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

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**
**AND**
**MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)**

**ITA No. 202/MUM/2004**
**Assessment Year: 1998-99**
**&**
**ITA No. 114/MUM/2004**
**Assessment Year: 1999-2000**
**&**
**ITA No. 4413/MUM/2004**
**Assessment Year: 2000-01**
**&**
**ITA No. 3867/MUM/2008**
**Assessment Year: 2001-02**
**&**
**ITA No. 4743/MUM/2007**
**Assessment Year: 2002-03**
**&**
**ITA No. 4744/MUM/2007**
**Assessment Year: 2003-04**
**&**
**ITA No. 4745/MUM/2007**
**Assessment Year: 2004-05**
**&**
**ITA No. 2452/MUM/2011**
**Assessment Year: 2005-06**

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| Nuclear Power Corporation of India Ltd., Vikram Sarabhai Bhavan, Central Avenue, Anushakti Nagar, Mumbai-400094. **PAN NO. AAACN 3154 F** | ***Vs.*** | ACIT, Range-3(2), Aayakar Bhavan, M.K. Road, Mumbai-400021. |
| **Appellant** | | **Respondent** |

## ITA No. 3553/MUM/2011
## Assessment Year: 2006-07

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| Nuclear Power Corporation of India Ltd., 8th floor, South Wing, Vikram Sarabhai Bhavan, Central Avenue, Anushakti Nagar, Mumbai-400094. **PAN NO. AAACN 3154 F** **Appellant** | ***Vs.*** | DCIT, Large Tax Payer Unit, 28th floor, Centre 1, World Trade Centre, Mumbai-400005. **Respondent** |

## ITA No. 4603/MUM/2007
## Assessment Year: 2004-05
## &
## ITA No. 625/MUM/2009
## Assessment Year: 2005-06

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| DCIT, 3(2), Room No. 608, 6th floor, Aayakar Bhavan, M.K. Road, Mumbai-400020. **PAN NO.** **Appellant** | ***Vs.*** | M/s Nuclear Power Corporation of India Ltd., Centre-I, World Trade Centre, 16th floor, Cuffe Parade, Mumbai-400005. **AAACN 3154 F** **Respondent** |

## ITA No. 3501/MUM/2011
## Assessment Year: 2006-07

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| DCIT-LTU, 28th floor, Centre-1, World Trade Centre, Cuffe Parade, Mumbai-400005. **PAN NO.** **Appellant** | ***Vs.*** | M/s Nuclear Power Corporation of India Ltd., Centre-I, World Trade Centre, 16th floor, Cuffe Parade, Mumbai-400005. **AAACN 3154 F** **Respondent** |

**Assessee by** : Mr. K. Gopal, Advocate
**Revenue by** : Mr. Ashok Kumar Kardam, CIT-DR

Date of last Hearing : 27/10/2023
Date of pronouncement : 29/11/2023

**ORDER**

**PER Bench**

These appeals by the assessee and Revenue are directed against separate orders passed by the Ld. First Appellate Authority i.e. "the Commissioner of Income-tax (Appeals)" [in short the ld CIT(A)]. As identical issusses arising from same set of facts are involved in these appeals, therefore, same were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

**AY 1998-99**

2. First of all, we take up the appeal of the assessee for assessment year 1998-99 in ITA No. 202/Mum/2004. The grounds raised by the assessee are reproduced as under:

1. *The learned Commissioner Appeals erred in confirming as income of the appellant an amount of Rs.4,263.63 lacs, being Renovation & Modernisation levy collected by the appellant.*
2. *Without prejudice to Ground 1 above, the learned Commissioner (Appeals) erred in holding that the amount collected towards Renovation & Modernisation levy was not in the nature of a capital receipt exempt from tax.*
3. *The learned Commissioner (Appeals erred in confirming as income of the appellant an amount of*

*Rs.2,558.18 lacs, being Research & Development levy collected by the appellant.*

4. *Without prejudice to Ground 3 above, the learned Commissioner (Appeals) erred in holding that a portion of the amount collected towards Research & Development levy was not in the nature of a capital receipt exempt from tax.*
5. *The learned Commissioner (Appeals) erred in confirming as income of the appellant an amount of Rs.1,705.55 lacs, being Decommissioning Levy collected by the appellant.*
6. *The learned Commissioner (Appeals) erred in confirming as income of the appellant an amount of Rs. 1,836.71 lacs, being interest credited to Decommissioning Fund.*
7. *The learned Commissioner (Appeals) erred in confirming the action of the Additional Commissioner in taxing as income the following amounts which had been reduced by the appellant from the expenditure incurred during construction:*

| | | |
|---|---|---|
| *1* | *Interest income (other than on surplus funds)* | *Rs. 276.71 lacs* |
| *2* | *Consultancy receipts* | *Rs. 87.70 lacs* |
| *3* | *Other income* | *Rs.1216.96 lacs* |
| | ***Total*** | ***Rs.1581.37 lacs*** |

8. *The learned Commissioner (Appeals) erred in confirming the action of the Additional Commissioner of disallowing an amount of Rs.7 lacs as prior period expenditure. The appellant submits that as the expenditure had crystallized during the previous year relevant to the assessment year 1998-99, the said expenditure was fully allowable as a deduction.*
9. *Without prejudice to Ground No. 8 above, the learned Commissioner (Appeals) erred in not allowing deduction in respect of the expenditure treated as prior period in the years to which the same related to.*
10. *The learned Commissioner (Appeals) erred in confirming the action of the Additional Commissioner of disallowing an amount of Rs.53.47 lacs under section 43B.*

*The learned Commissioner (Appeals) ought to have appreciated that the amounts were paid by the appellant during the previous year and therefore were not to be disallowed.*

11. *11. The learned Commissioner (Appeals) erred in holding that the provisions of section 115JA apply to the appellant.*

12. *12. The learned Commissioner (Appeals) erred in confirming the action of the Additional Commissioner in holding that the other income of the appellant was not derived from the business of generation of power.*

13. *13. The learned Commissioner (Appeals) erred in confirming the action of the Additional Commissioner in including the following amounts as being part of book profits under section 115JA:*

| Sr. No. | Particulars | Amount in Rs. lacs |
|---|---|---|
| a) | Delayed payment charges | 3,592.03 |
| b) | Interest on staff loan | 135.46 |
| c) | Other interest | 111.36 |
| d) | Provision no longer required | 126.08 |
| e) | Miscellaneous receipts | 446.31 |
| f) | Interest income on deposits with banks | 7,031.62 |
| | **Total** | **114,42.86** |

*The learned Commissioner (Appeals) ought to have appreciated that the above incomes were inextricably linked to the business of generation of power and were therefore derived from the business of generation of power. On this basis, the above amounts were to be excluded from book profits in accordance with Explanation (iv) to section 115JA(2).*

14. *14. The learned Commissioner (Appeals) erred in not allowing deduction for expenditure incurred by the appellant in earning the income of Rs. 114,42.86 lacs, in computing the book profits of the appellant.*

15. *The learned Commissioner (Appeals) erred in confirming the action of the Additional Commissioner that the appellant had utilised the share capital received during the year for earning the interest income. The learned Commissioner (Appeals) erred in*

*not appreciating the facts presented during the course of the appeal proceedings.*

16. *Without prejudice to Grounds 11 to 15 above, the learned Commissioner (Appeals) erred in confirming the action of the Additional Commissioner in making adjustments to the Profit and Loss account prepared by the appellant.*

17. *The learned Commissioner (Appeals) ought to have appreciated that no adjustments can be made to the Profit and Loss Account, other than those specified in the Explanation to section 115JA(2).*

18. *The learned Commissioner (Appeals) erred confirming the action of the Additional Commissioner in raising a demand for interest under section 234B of Rs. 8,46,25,483 vide the notice of demand dated March 8, 2001 under section 156.*

19. *The learned Commissioner (Appeals) erred in confirming the levy of interest under section 234B of Rs.8,46,25,483. The appellant denies liability to such interest.*

20. *Each one of the above grounds of appeal is without prejudice to the other.*

3. Briefly stated facts of the case are that the assessee is a Central Government Public Sector Undertaking, engaged in the business of generation of electricity though various nuclear power plants situated in India including “Tarapur Atomic Power Station” (TAPS); “Rajasthan Atomic Power Station” (RAPS); “Narora Atomic Power Station”( NAPS) , “Kakrapar Atomic Power Station”(KAPS) etc. The company is governed by the provisions of the Atomic Energy Act, 1962. The assessee company took over the nuclear power stations from the Atomic Energy department and further developed and sold/distributed electricity generated to its customers, the tariff of which, however was determined by the Government of India. For

the year under consideration, the assessee filed return of income on 01.12.1997 declaring income of Rs.171.41 crores, before set off of brought forward losses, but after setting of brought forward losses, nil income was declared. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the assessment order passed by the Assessing Officer on 08.03.2001 u/s 143(3) of the Act, various additions were made to the returned income. On further appeal, the Ld. CIT(A) allowed part relief vide impugned order dated 22.10.2003. Aggrieved, the assessee filed appeal before the ITAT (in short the 'Tribunal') by way of raising grounds as reproduced above.

4. The assessee also filed an additional ground on 23/07/2018 for the first time vide letter dated 18/07/2018, where in jurisdiction of the Assessing Officer in passing impugned assessment order has been challenged. Again, the assessee filed a copy of said additional ground on 17.11.2022, and 14.06.2023. The said additional ground filed is reproduced as under:

> 1. *The ground of appeal is independent and without prejudice to other grounds of appeal filed earlier, pending disposal.*
> 2. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) without having legal and valid jurisdiction under the Act to pass the assessment order. The Additional Commissioner of Income Tax lacked*

*jurisdiction to pass the assessment order under section 143(3) dated 8th March 2001 and to exercise the powers of performing the functions of an Assessing Officer.*

3. ***The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) where the assessment proceedings were initiated by the Joint Commissioner of Income Tax****. Such order passed is bad in law, in the absence of an order transferring, jurisdiction under section 127 to the Additional Commissioner of Income Tax.*
4. *Your appellants crave leave to add, alter, amend, vary, omit or substitute the aforesaid ground of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal as they may be advised*

5. The Ld. Counsel for the assessee made oral arguments praying admission of additional ground and also filed written submissions. The relevant part of written submissions is reproduced as under:

> ***a.*** *That, in the additional ground, the Appellant has urged that the Additional Commissioner of Income-tax had no jurisdiction to act as its Assessing Officer and hence, the assessment order passed by him is without jurisdiction. This was because, in compliance with section 2(7A) read with section 120(4)(b) of the Act, no authority had been given by the CBDT to either the Director General or Chief Commissioner or Commissioner nor by any of the said authorities in favour of the Addl. Commissioner of Income-tax. Further, though the assessment proceedings were initiated and carried on by the Jt. Commissioner of Income-tax, there was no transfer of jurisdiction from him to the Addl. Commissioner of Income-tax as required by section 127 of the Act. The Appellant submits that both the aforesaid grounds dealing with jurisdiction goes to the root of*

*the matter. It is well settled by now that such ground could be raised at any stage of the proceedings. In this regard, your attention is invited to:*

*CIT vs. Mohd. Ayyub & Sons Agency 197 IT 637 (All) (Pg No. 1 of Case law Paper book)*

*CIT vs. Jolly Fantasy World Ltd. 377 ITR 530 (Guj.) (Pg No. 2 to 10 of Case law Paper book)*

*Inventors Industrial Corpn. Ltd. vs. CIT 194 IT 548 (Bom)(Pg No. 11 to 15 of Case law Paper book)*

*Before the Bombay High Court, in the case referred to above, the assessee had challenged the validity of reassessment proceedings in second round of proceedings which was objected by the Revenue (see the Revenue's submissions at page 3 of the printed report). Relying upon its earlier judgment in he case of CWT vs. N. A. Narielwala 126 IT 344 and the Punjab & Haryana High Court in Vijay Kumar Jain vs. CIT 99 IT 349 the court held that "a ground by which the jurisdiction of the Income-tax Officer to make assessment is challenged can be allowed to be taken in an appeal before the Tribunal even though such a ground was not taken before the Income-tax Officer or the Appellate Assistant Commissioner. The facts in that case were that for the assessment year 1961-62, the Wealth-tax Officer, acting under section 19A, had assessed the wealth ofthe deceased in the hands of the executor. On appeal, the Appellate Assistant Commissioner confirmed the assessment order. On appeal to the Tribunal, a new ground was taken for the first time that section 19A was introduced in the Wealth-tax Act with effect from April 1, 1965, and the assessment was, therefore, without jurisdiction. The Tribunal entertained the ground and our court upheld the order of the Tribunal. In Ugar Sugar Works Ltd. v. CIT [1983] 141 IT 326, ouT court was*

*faced with a similar problem. In this case, the question of the Tribunal's jurisdiction was considered at length. It was held that the Tribunal's jurisdiction under section 254 was restricted to passing of orders on the subject-matter of the appeal though within the four corners of the subject-matter of appeal. However, within the four corners of that jurisdiction, the Tribunal was clothed with almost the same powers as those of the Appellate Assistant Commissioner except that of enhancement. The judgment in CWT v. Narielwalla (N.A.) (1980] 126 ITR 344 (Bom) was noticed and not adversely commented upon. It was distinguished observing that (headnote) :*

*"The question as to the initial jurisdiction in making an order would stand on a different footing, as in such cases the question of Jurisdiction of the Income-tax Officer would always be present as a part of the subject-matter of the appeal at all stages of the appeal, either before the Appellate Assistant Commissioner or the Tribunal, as, such jurisdictlon is always presumed to be existing in an authority before the passing of the order."*
*(emphasis supplied).*

*In CIT v. Belapur Sugar and Allied Industries Ltd. [1983] 141 IT 404, our court followed the decision in CWT v. Narielwalla (IN.A.) [1980] 126 ITR 344 (Bom) and held (headnote) :*
*".. that the earlier notices issued under section 148 of the Income-tax Act, 1961, that is, the three notices issued on March 31, 1965, March 31, 1965, and December 10, 1965, respectively, were invalid, because by that time the determination under section 163 of the said Act had not properly taken place. Since these notices were invalid, the reassessment done in pursuance thereof was also invalid."*

*Thus, so far as our court is concerned, it can be taken to be settled law that a point which goes to the jurisdiction of the assessment can be allowed to be taken in an appeal before the Tribunal even though it was not taken before the Income-tax Officer or the Appellate Assistant Commissioner.*
*We find that the Supreme Court also, in the case of R.J. Singh Ahluwalia v. State of Delhi, AIR 1971 SC 1552, at p. 1553, held in the context of new ground raised before it for the first time:*

*"This ground of challenge had, of course, not been raised in either of the two courts below but since it went to the root of the case, being a jurisdictional point, we considered it just and proper to allow it to be raised."*

*Again, in the case of G.M. Contractor v. Gujarat Electricity Board, AIR 1972 SC 792 at p. 793 the Supreme Court held as under :*
*"It is stated that this ground goes to the very root of the matter but was not raised before the High Court. The appellants objected to this fresh ground being allowed to be taken up, but we consider that as this ground goes to the very root of the matter, it should be allowed after the appellants are compensated by costs."*

*The Gujarat High Court has, of course, taken the very view in its two decisions in CIT v. Nanalal Tribhovandas [1975) 100 ITR 734 and P. V. Doshi v. CIT |1978] 113 ITR 22. Indirectly, the Allahabad High Court in CIT v. Hari Raj Swarup and Sons (1982] 138 ITR 462, has also taken the same view.*

*We, therefore, hold that a ground by which the jurisdiction to make assessment itself is challenged can be urged before any authority for the first time."*
*Additional ground raising legal issue can be raised when the facts are available on record:*

***b.*** *The Appellant next relies upon the judgements of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. vs. CIT 229 ITR 383 (Pg No. 16 to 18 of Caselaw Paper book), Jute Corporation of India Ltd. vs CIT 187 IT 688 (Pg No. 19 to 24 of Caselaw Paper book) and CIT vs. S. Nelliappan 66 IT 722 (Pg No. 25 to 27 of Caselaw Paper book) and Special Bench order of the Tribunal in the case of All Cargo Global Logistic Ltd Vs DCIT (21 Taxmann 429) (Pg No. 28 to 47 of Caselaw Paper book) to urge that an appellant can raise an additional ground raising legal issues when the necessary facts are on record. Issue relating to exercise of jurisdiction by the Addl. Commissioner of Income-tax raises a legal issue.* ***The facts as necessary for disposal as these grounds would include the relevant notices issued by the Assessing Officer in the course of assessment proceedings as well as the notifications/ directions issued by the CBDT or the Director General or Chief Commissioner or Commissioner. The notices under section 143(2) and 142(1) of the Act have been issued by the Assessing Officer and there can be no doubt that they formed part of the record. The notifications or directions issued by the respective authorities, if any, should also be a part of the record, as otherwise, the Addl. CIT could not have exercised the jurisdiction as the Assessing Officer of the Appellant.*** *In the course of hearing before the Tribunal, the Ld. DR explained that the designation of the Addl. Commissioner of Income-tax shows that he was a part of the special range'. According to him, an Officer of the special range is directed to pass an assessment order in a particular case. He does not exercise general jurisdiction over assessee's located in a particular region or assessee's or cases forming a class. Based thereon, it is essential that the authority, if any, granted in favour of the Addl. Commissioner of Income-tax, in the present case, should be a part of the assessment record. The record of which the*

*relevant facts should form part of should be the assessment record or the appellate record. It does not mean only the facts as placed by either party before the Tribunal. If a view is taken that it only means facts available only before the Tribunal, then, it would be extremely simple for a party to not to produce the relevant records and thereby frustrate the additional ground.* ***The Appellant submits that, since the additional ground raises a legal issue for which the necessary facts forms part of the assessment record, the same may be admitted.***

***Additional ground relates to issue which could not have been raised before the A.O or the CIT(A).***

***c.*** *According to the judgement of the Full Bench of Bombay High Court in Ahmedabad Electricity Co. Ltd. vs. CIT 199 IT 351 (Pg No. 48 to 58 of Caselaw Paper book) and the Division Bench in Ultratech Cement Ltd. vs. ACIT 408 IT 500 (Pg No. 59 to 68 of Caselaw Paper book), an additional ground could also be permitted to be raised in a case where, evidence is to be examined which is not on record, if the party seeking to raise the additional ground satisfies that for good and sufficient reasons, the ground could not be raised before the lower authority. In the present case, the Appellant came to know of the issue concerning the jurisdiction of the AO, when it came across order dated 27.11.2017 passed by the Tribunal in the case of Tata Sons Ltd. Prior thereto, it was not aware of this issue. In its case, the assessment order was passed on 28.03.2001 and the appellate order by the CIT(A) on 22.10.2003. Since it was not aware of these issues before, there is good and sufficient cause for not raising the same before the AO and the CIT(A), Hence, it was fully justified in raising the same before the Tribunal.*

***No limitation for raising of additional ground.***

***d.*** *The other issue as raised by the Revenue in written submissions dated 14.06.2019 filed by them before the Tribunal as well as in the course of hearing is that raising of an additional ground at this stage suffers from laches and ought not to be admitted. The Appellant submits that as per Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 ("the Appellate Tribunal Rules"), an appellant can with the leave of the Tribunal urge or be heard in support of any ground not set forth in the memorandum of appeal. The only limitation on exercise of such powers by the Tribunal is that the party who may be affected by its decision should have sufficient opportunity of being heard on that ground. This is the only limitation on exercise of powers to admit additional ground by the Tribunal. There is no time limit prescribed either in the Act or the Rules or the Appellate Tribunal Rules within which an additional ground could be raised.*
*In these circumstances, an appellant should be allowed to raise an additional ground before the commencement of the hearing of the appeal, which test has been fulfilled in the present case. In this regard, reliance is placed on:*
*National News Print and Paper Mills Ltd. vs. CIT 223 ITR 688 (MP) (Pg No. 69 to 70 of Caselaw Paper book);*
*Shilpa Associates vs. ITO (2004) 135 Taxman 277 (Raj (Pg No. 71 to 73 of Caselaw Paper book)*

***e.*** *The judgment in the case of Dr. V. S. Chauhan vs. DIT (Investigation) 336 ITR 533 (All) (Pg No. 74 to 85 of Caselaw Paper book) and Kishore Jagjivandas Tanna vs JDIT (2018) 1998 Taxman.com 235 (Bom) (Pg No. 86 to 90 of Caselaw Paper book)as relied upon by the Ld. DR in support of his claims that the additional ground suffer from laches, the Appellant submits that they were concerned with writ petitions*

*before the High Courts. That writ jurisdiction of a High Court is discretionary. Even though a party may be entitled to a particular relief, the writ court may refuse to exercise its jurisdiction for various reasons not necessarily dealing with the merits. Both the aforesaid cases are where the Court refused to exercise its writ jurisdiction as the writ petitions were delayed. In this regard, your attention is invited to para 8 of the judgment of the Bombay High Court, wherein it is held " In the light of the aforesaid discussion, no writ petition could have been brought by relying on the communication from the Revenue. We are unable to agree with the petitioner for the simple reason that this Court is not obliged to entertain belated and stale claims. The writ jurisdiction is not meant to confer benefit or enable litigants who sleep over their rights to derive an advantage for themselves. The writ jurisdiction is equitable and discretionary and if people like the petitioner, who is a businessman and prudent enough to know as to how monies, allegedly retained illegally, have to be recovered promptly and expeditiously. He does nothing despite a favourable order from this Court for more than a decade. Such a litigant does not deserve any relief in our discretionary and equitable jurisdiction. The jurisdiction is extraordinary as well. It is not meant to get over the bar prescribed in the Limitation Act, 1963 for bringing a suit either. This indirect and oblique way of seeking a discretionary relief has to be discouraged. The writ petition is, therefore, dismissed on the ground of maintainability and delay and laches."*

*As stated above, in the present case, there is no requirement under the Act or the Rules or the Appellate Tribunal Rules for the time within which an additional ground could be raised. In these circumstances, the Appellant submits that the said additional ground need not be dismissed as delayed.*

***f.*** *Assuming without admitting that it was incumbent on the Appellant to file the additional ground within a reasonable time, it submits that it came across the issue raised in the additional ground through the Tribunal order dated 27.11.2017 in the case of Tata Sons Ltd. (193 & 3475/ Mum/ 2006) (Pg No. 91 to 141 of Caselaw Paper book) dated 27.11.2017 which came to its notice while preparing for the present appeal. After obtaining advise on the same from the Chartered Accountants and the Counsel who have been briefed to appear in the mater, it was decided that the additional ground should be filed.*

*The said ground has been filed on 23.07.2018. The said issue could not have been raised by the Appellant either before the AO or the CIT(A) as it was not aware of the same at those stages. It has come to know of this issue only when the appeal was pending before the Tribunal. The Appellant therefore submits that the delay, if any, in filing the additional ground is on account of sufficient cause and may be condoned.*

***g.*** *Similar additional grounds as raised by the Appellant have been admitted by the Tribunal in the following cases:*

i. *Tata Sons Ltd. vs. ACIT (AY 2001-02)(2016) (162 ITD 450) (MUM - TRI)(see para 3.11 to 3.16 on Pg No. 151 to 152 of Caselaw Paper*
ii. *Tata Communication Ltd. vs. ACIT (AY 2002-03) in ITA No.7071/Mum/2005 and 1108/Mum/2008 vide its order dated 30.06.2017)(see para 4 and 6 on Pg No. 165 to 167 of Caselaw Paper Tata Sons Ltd. vs. ACIT (AY 2002-03) in ITA Nos. 193 and 3745 /Mum/2006 vide its order dated 27.11.2017 )(see para 12 to 17 on Pg No. 108 to 119 of Caselaw Paper book) ;*
iv. *Tata Sons Ltd. vs. ACIT (AY 2004-05) in ITA No.2639/Mum/2009 vide its order dated*

*11.03.2009 )(see para 2 on Pg No. 211 to 212 of Caselaw Paper book)*

v. *Tata Sons Ltd vs. ACIT (AY 2005-06 (ITA No 5090 / Mum/2012) dated 16.08.2019 (see para 4 on Pg No. 281 of Caselaw Paper book).*

vi. *Tata Communication Ltd vs. ACIT (AY 2003-04 and AY 2004-05 ITA No.3972/ Mum/2007) ) dated 16.08.2019 (see para 3 to 3.3 on Pg No. 241 to 246 of Caselaw Paper book) .*

*In all the aforesaid cases both the aforesaid issues were raised as additional ground before the Tribunal. Further in each of these cases, the delay, in raising of the additional ground was in excess of ten years. The Tribunal has held that the additional ground raises legal issue for which necessary facts are expected to be available in the assessment records. The Tribunal has also held that the said issues go to the root of the matter. Since, similar position is existing in the present case, the Appellant submits that the additional grounds may be admitted and adjudicated by the Tribunal in accordance with law."*

6. On the contrary, the Ld. Departmental Representative (DR) opposed admission of the additional ground. The relevant submission of the Revenue filed by the Ld. DR is reproduced as under:

*"3. In this respect, the undersigned would like to bring to your kind notice of the decision of the Hon'ble ITAT, 'L' Bench, Mumbai in the case of* ***M/s Stock Traders Pvt Ltd in ITA No. 4493/Mum/2003 and ITA No. 4737/Mum/2003*** *wherein under similar circumstances, the similar additional grounds raised by the assessee therein was dismissed by the Hon'ble Bench after holding that when there is no information in possession of the assessee that the internal procedure of the department regarding the transfer and posting of officers has not been complied with and the assessee in the said case after a lapse of 15 years was making a wild guess and hence did not accept the assessee's request that the assessment deserve to be quashed in as much as*

*the assessing officer did not have authority of law. In this respect, the Hon'ble ITAT has made detailed discussion in Para 17 onwards of the above referred order. It is also brought to your kind notice that while dismissing the similar additional ground in the above referred case, the Hon'ble Tribunal has considered the assessee's plea and also their reliance on the decision of the Hon'ble Bombay ITAT in the case of M/s Tata Sons Limited vs. ACIT (76 taxmann.com 126). Since the finding of the Horible Tribunal in the above referred case is directly applicable in the present case. So you are requested to go through the same and if deemed fit may kindly be brought to the notice of the Hon'ble Bench."*

6.1 The Ld. DR further referred to a written submission filed (undated) by his predecessor opposing the admission of the additional ground, relevant part of which is reproduced as under:

*The assessee has made an application in the above mentioned case requesting for admission of additional grounds of appeal in this case. The assessee has stated that since the additional grounds raised is purely a question of law and is dependent upon the facts which are already on record, the same may be admitted and adjudicated. The said additional grounds of appeal challenge the jurisdiction of the Additional Commissioner of Income Tax to issue notice u/s. 143(2) and also to pass the subsequent assessment Order U/s 143(3). In stating so, the assessee is of the view that the Addl. CIT has not established that he possesses valid jurisdiction conferred on him in terms of Section 120(4)(b) of the I.T. Act and hence in the absence of such an order, the assessment order passed by him is bad in law. The assesse has also challenged the validity of assessment proceedings, since in its view, the notice u/s. 143(2) has been issued by the ACIT who is a lower authority. The Assessee has heavily relied on various orders of ITAT passed in the case of TATA Sons Limited, TATA Communications Limited, TATA power Limited and others. At the outset, it is submitted that the additional grounds of appeal are not admissible. Some of the reasons are as under:*

> *2.1. The assessment in this case was completed on 08.03.2001 and the appeal before ITAT was preferred by the assessee in 2004, and this ground of the assessment being bad in law has been taken first before this Hon'ble Bench in 2018. Thus, for period of almost 14 years the assessee has blissfully chosen to ignore this aspect and has raked up this issue only now. This unexplained delay has not been backed or supported by any affidavit or*

*reasons and mechanical reliance has been placed on different case laws.*

*2.2 The decisions of coordinate Bench of ITAT in the case of Tata Sons Ltd Tata Communications Ltd etc dated on and near 31.10.2016, on which the assessee is heavily relying, has already been considered and not followed by another Bench of ITAT in ITA No: 4493/Mum/2003 dated 11.07.2018. A copy of this order is attached. (PB-III)*

*2.3 The claim of the assessee of challenging the jurisdiction after almost 14 years is therefore barred by the laches, being in the nature of unreasonable delay in asserting the claim which has prejudiced the party against whom relief is sought.*

*2.4 This ground of appeal challenging the jurisdiction of the Addl CIT to pass orders U/s 143(3) was not taken before the CIT(A) and is not admissible as a matter of right. If such additional grounds, which are likely to change the complexion of the case, are permitted to be taken before higher judicial forums then that would defeat the very scheme of appellate forums conceived by the legislature. The ITAT is supposed to decide only issues which were the subject matter of first appeal, especially when the fresh ground of appeal is going to challenge the complexion of entire appeal, otherwise the entire judicial hierarchy below would become infructuous, in this case the forum of CIT(A).*

*2.5 The issue of jurisdiction being raised now is a mixed question of fact and law and not a pure question of law as is being claimed by the assesse. The issue raised by the assessee would require examination of assessment records and is likely to vary with each case.*

*2.6 The Department has filed a judicial paper book citing various case laws in which the fact, as enumerated above, has been the ratio decidendi. (Legal Submissions against Additional Grounds taken by "a" filed on 14.06.2019 followed by Legal PB dated 20.08.19 showing that even on merits the ground is not maintainable)*

*3.1 On merits also, the grounds proposed to be raised by the Assessee are not admissible. The provisions of Section 120(1), 120(2) and 120(4) of the Income Tax Act are reproduced as under:*

*"Section 120.*

*(1) Income-tax authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, as the case may be, assigned to such authorities by or under this Act in accordance with such directions as the Board may issue for the exercise of the powers and performance of the functions by all or any of those authorities.*

*Explanation.—For the removal of doubts, it is hereby declared that any income-tax authority, being an authority higher in rank, may, if so directed by the Board, exercise the powers and perform the functions of the income-tax authority lower in rank and any such direction issued by the Board shall be deemed to be a direction issued under sub-section (1).*

*(2) The directions of the Board under sub-section (1) may authorise any other income-tax authority to issue orders in writing for the exercise of the powers and performance of the functions by all or any of the other income-tax authorities who are subordinate to it.*

*(3) .....*

*(4) Without prejudice to the provisions of sub-sections (1) and (2), the Board may, by general or special order, and subject to such conditions, restrictions or limitations as may be specified therein, —*

*(a) authorise any Principal Director General or Director General or Principal Director or Director to perform such functions of any other income-tax authority as may be assigned to him by the Board;*

*(b) empower the Principal Director General or Director General or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner to issue orders in writing that the powers and functions conferred on, or as the case may be, assigned to, the Assessing Officer by or under this Act in respect of any specified area or persons or classes of persons or incomes or classes of income or cases or classes of cases, shall be exercised or performed by an Additional Commissioner or an Additional Director or a Joint Commissioner or a Joint Director, and, where any order is made under this clause, references in any other provision of this Act, or in any rule made thereunder to the Assessing Officer shall be deemed to be references to such Additional Commissioner or Additional Director or Joint Commissioner or Joint Director*

*by whom the powers and functions are to be exercised or performed under such order, and any provision of this Act requiring approval or sanction of the Joint Commissioner shall not apply."*

*3.2 Subsequent to the Cadre restructuring of the Income Tax Department in 2001, Addl CIT's/JCIT's were empowered to pass orders U/s 143(3). The assessee has challenged this practice in this appeal in its additional ground of appeal. In this connection, it is to be noted that the Board had issued various Notifications and the Commissioner of Income Tax had issued subsequent notifications empowering the Addl CIT/JCIT to exercise all powers and functions of the Assessing Officers, in respect of territorial areas or persons or classes of income or cases or classes of cases. The various notifications are attached as an enclosure and are also summarized herein which would leave no doubt that the additional ground being raised by the assessee is infructuous ab initio.*

*(i) In exercise of its powers U/s 120(1) and 120(2) the Board issued Notification in S.O 732(E) dated 31.07.2001 authorizing the Commissioners of Income Tax to pass jurisdiction orders assigning jurisdiction to the authorities below. (Page 14 of PB-I)*

*(ii) The Commissioners of Income Tax, CIT-Ill, Mumbai in the instant case, in view of the delegated powers vide above Notification, passed order in F.No: MC-lII/JURIS/2001-02 dated 01.08.2001 assigning jurisdictions to AddIC'sIT (Addl CIT, Range 3(3) Mumbai)/JC'sIT to exercise the powers and perform all the functions under the Income Tax Act except the functions relating to deduction and collection of tax at source. (Page 08 of PB-II)*

*(iii) The Board issued another Notification No. 267 /2001 dated 17.09.2001, in exercise of powers U/s 120(4)(b) directing that the JC'sIT who have been assigned jurisdictions by the respective C'sIT in subsequent to Notification No 732(E) dated 31.07.2001 shall exercise the powers and functions of the Assessing Officers in respect of jurisdiction assigned to them by the respective C'sIT. (Page 13 of PB-I)*

*3.3 Upon plain reading of the above-mentioned Notifications that have been attached as an enclosure, it is crystal clear that the legal requirements as envisaged u/s. 120(1), 120(2) and 120(4)(b) of the I.T. Act. were satisfied and jurisdiction was conferred on the Addl./Jt. CIT to exercise all powers and perform all functions of the Assessing Officer in respect of cases or classes of cases specified. All these Notifications are public documents and widely available. It appears that the assessee has omitted to take note of the said Notifications and therefore as stated above, it is*

*reiterated that the additional ground of appeal being raised is infructuous ab initio and does not merit admittance."*

6.2. Thus, the ld DR has opposed the admission of additional ground mainly for the reasons that, ***firstly***, additional ground has been filed with inordinate delay of more than 14 years and that too without any affidavit explaining the delay, ***secondly,*** the additional ground raised being mixed question of law and facts and require examination and investigation of fresh facts, which are not available on record of the Tribunal as well as record of Assessing officer.

6.3. We have heard rival submission of the parties and perused the relevant material on record. As regards the issue of admissibility of the additional ground, it is undisputed that this appeal has been filed by the assessee in the year 2004 and the additional ground has been raised before the Tribunal for the first time in year 2018 i.e. after a lapse of almost of 14 years. In the additional ground, the assessee seeks to challenge validity of the jurisdiction of Additional Commissioner of Income-tax in passing the assessment order in the capacity of Assessing Officer. The assessee is contending that the Additional Commissioner of Income-tax, who has passed the assessment order, was not having authority of law for passing the said assessment order. The Revenue is contending that during the course of the assessment proceedings or in subsequent appellate proceedings, the assessee has never objected jurisdiction of the Assessing Officer. The Ld DR submitted that jurisdiction of the

case has been transferred from time to time with the Assessing officer as per the prevalent circular/notification issued by the Central Board of Direct Taxes (CBDT) and consequent orders passed by the lower authorities and it is difficult to trace all those orders including administrative orders of their transfer and posting after such a long time. Whereas according to the assessee those orders passed are part of the records of the assessment, therefore, in view of the various decisions cited, the assessee is eligible for challenging the validity of the jurisdiction of the Assessing Officer at any stage of the appellate proceedings.

6.4 As far as admission of additional ground during appellate proceedings is concerned, the Hon'ble Supreme Court in the case of **NTPC Ltd. 229 ITR 383(SC)** has laid down as under what circumstances, an additional ground could be admitted before the Tribunal. The judgment of Hon'ble Supreme Court (supra) has been followed by the Tribunal in various decisions including the decisions relied upon by the parties before us. The relevant finding of the Hon'ble Supreme Court (supra) is reproduced as under:

> *7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand P. Ltd. and C.IT. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised.* ***But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the***

> ***assessment proceedings*** *we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.*

6.5 Thus, according to the Hon'ble Supreme Court for admitting any additional ground, **firstly**, the question of law should be involved in the additional ground raised and **secondly**, the said question of law should arise from the facts which are on record in the assessment proceedings. If investigation or examination of the fresh facts is required for admitting an additional ground, then same may not be admitted by the Tribunal. In the case of **ACIT Vs Stock Traders p Ltd (supra),** also identical additional ground had been raised by the assessee after lapse of substantial period but the Tribunal admitted the additional ground in identical circumstances. For ready reference, said additional ground raised by concerned assessee and the submission of said assessee are reproduced as under:

> *12. The assessee has also filed additional grounds. The same reads as under:*
>
> > *On the facts and in the circumstances of the case and in law, it is submitted that the Addl. CIT did not have valid authority to perform and exercise the powers and functions of an Assessing Officer, as per the provisions of section 2(7)(a) read with section 120(4)(b) of the Act, and therefore, the above mentioned assessment order, which has been passed without authority of law, may be treated as bad in law, and be quashed.*
>
> *13. For admission of additional ground, the assessee has made the following submissions:*
>
> > *For the captioned AY, an order under section 143(3) of the Income-tax Act, 1961 ('Act), was passed by the*

*Additional Commissioner of Income-tax, Special Range 31. Mumbai (Addl. CIT Mumbai on 22 March 2001. We wish to humbly submit that the Addl. CIT Mumbai did not have valid authority to perform and exercise the powers and functions of an Assessing Officer, as per the provisions of section 2(7A) read with section 120(4)(b) of the Act and therefore, the above-mentioned assessment order, which has been passed without authority of law, shall be treated as bad in law, and be quashed.*

*In this regard, we wish to place reliance on the decision of the Hon'ble Mumbai Bench of the Income Tax Appellate Tribunal (Mumbai ITAT) in the case of Tata Sons Ltd v ACIT [2016] 76taxmann.com 126 (Mumbai - Trib.), wherein the Hon'ble Mumbai ITAT held as under:*

*.. It is well settled law thatjurisdictional conditions required to be fulfilled by the Assessing Officer must be performed strictly in the manner as have been prescribed and if it has not been done in the manner as prescribed under the aw, then it becomes nullity in the eyes of law. Supreme Court in the case of CIT v. Anjum M.H. Ghaswala. [2001] 252 ITR 1/119 Taxman 352 ofaseeygettictf it is a normal rule of construction that when a statue vests certain powers in an authority to be exercised in a particular manner, then that authority is bound to exercise it only in the manner provided in the statute only.*

*It is clear that impugned assessment order has been passed without authority of law inasmuch as revenue has not been able to demonstrate that the Additional Commissioner of Income tax who had passed the assessment order had valid authority to perform and exercise the powers: and functions of an Assessing Officer of the assessee and to pass the impugned assessment Otder. Under these circumstances, the same is held as nullity and, therefore, the impugned assessment order is quashed having been passed without authority of taw."*

*We would also want to refer to the following observation of the Honble Mumbai ITAT which is relevant for the Appellant's case::*

*"No order can be sustained in the eyes of law if its author does not have requisite sanction of the law. If an order does not possess requisite strength in the eyes of law and void ab initio, then it will remain so*

*even if there is acquiescence or participation by the assessee in the proceedings carried out. by the AO to frame the assessment order. It is well settled law that consent of the assessee cannot confer jurisdiction to an assessing officer who lacked jurisdiction under the law."*

*A similar view was taken by the Hon'ble Mumbai ITAT in the case of Tata Communication Ltd. (ITANo. 6981/Mum/2005) and Tata Sons Limited (ITA Nos. 193 & 3745/Murn/2006).*

*Given that the aforesaid decisions were recently pronounced, based on the facts of our case, we hereby attempt to file the enclosed additional ground of appeal in the captioned Appeal with a request that this ground may please be adjudicated by the Hon'ble Bench.*

*The additional ground raised herein go to the very root of the matter and deal with the very jurisdiction and authority of the Assessing Officer to pass the assessment order. Therefore, this ground can be admitted in the interest of substantial justice and especially when the same is raised in a bonafide manner without indulging in delaying tactics.*

*Further, the Appellant wishes to place reliance on the following decisions wherein it has been held that the additional ground of appeal can be raised if the facts are on record:*

- *Jute Corporation Of India Limited 187 ITR 688 (SC)*
- *National Thermal Power Co. Limited Vs. CIT 229 ITR 383 (SC)*
- *Ahmedabad Electricity Co. Limited 199 ITR 351 (Bom) (FB)*
- *Pruthvi Brokers & Shareholders Pvt Ltd (349 ITR 336) (Bom)*
- *Ramco Cements Ltd (373 ITR 146) (Mad)*
- *Mahindra & Mahindra Ltd (30 SOT374) (Mum SB)*

*In view of the above, we request Your Honours to kindly admit our additional ground of appeal and oblige by adjudicating the same on merits.*

*14. Upon careful consideration on the touch stone of the above said case law, the additional grounds filed by the assessee are admitted."*

6.6 We note that in the instant case before us also facts and circumstances are identical, hence, the additional ground raised is admitted for adjudication

7. Regarding merit of additional ground, the assessee submitted that the notice under section 143(2) of the Act dated 15/12/1998 for initiating scrutiny proceedings was issued by the Assessing officer having designation of **Joint Commissioner of Income-tax**, whereas the assessment order has been passed on 08/03/2001 by the Assessing officer having designation of **Additional Commissioner of Income-tax**. According to the assessee, the Additional Commissioner of Income-tax was not authorised to act as an Assessing Officer and therefore the assessment order passed being without authority of law, is void ab-initio. The ld. counsel filed a chart of events in chronological order, relevant part of which is reproduced as under:

| Sr. No. | | |
|---|---|---|
| 1. | 30.11.1998 | The Appellant filed its return of income for assessment year 1998-99 declaring NIL income. The designation of the Assessing Officer as mentioned in the said return of income was Joint Commissioner of Income tax |
| 2. | **15.12.1998** | The Appellant's return of income for assessment year 1998-99 was selected for scrutiny by issue of notice under section 143(2) of the Act by the Jt. Commissioner of Income-tax (see page 1 of paper book-I). |
| 3. | 16.08.2000 | The Jt. Commissioner of Income-tax issued notice under section 143(2) and 142(1) of the Act directing the Appellant |

| | | |
|---|---|---|
| | | to produce certain information in connection with the assessment for the assessment year 1998-99(see pages 2 to 4 of paper book-II). |
| 4. | **08.03.2001** | The Addl. Commissioner of Income-tax passed the assessment order under section 143(3) of the Act determining its total income as per the regular provisions of the Act at Rs. Nil after allowing set off of brought forward losses and book profits under section 115JA of the Act of Rs.132,59, 12,000. |
| 5. | 22.10.2003 | The CIT(A) disposed of the Appellant's appeal against the assessment order for assessment year 1998-99 partly allowing the same. |
| 6. | 12.01.2004 | Aggrieved by the appellate order of the CIT(A), the Appellant filed an appeal before the Tribunal. |
| 7. | 23.07.2018 | The Appellant has filed additional grounds before the Tribunal including an application for admission of the same. |
| 8. | 24.07.2018<br>30.08.2018<br>26.10.2018 | The Appellant filed three letters with the Assessing Officer requesting for information in connection with the additional grounds of appeal. |
| 9. | 08.02.2019 | The Appellant made its RTI application seeking information with respect to jurisdiction of the Additional Commissioner of Income-tax to pass the assessment order. |
| 10. | 11.04.2019 | The Appellant filed appeal against non-response of RTI application dated 08.02.2019. |

7.1 For assailing the assessment order passed by the Additional Commissioner of Income-tax, before us, the Ld. Counsel for the assessee **firstly**, referred to section 2(7A) of the Act , which has been amended by the Finance Act, 2007 with retrospective effect from 01.06.1994 and the Addl. CIT has been defined to be an Assessing Officer under section 2(7A) r.w.s. 120(4)(b) of the Act to exercise or perform all or any of the powers or functions conferred on or assigned to an Assessing Officer under the Act. The Ld. Counsel submitted that as per section 120(4)(b) of the Act, the

CBDT has to issue an order authorising the Director General of Income-tax (DGIT) or Chief Commissioner of Income-tax (CCIT) or Commissioner of Income-tax (CIT) to issue an order in the writing that the powers and functions confirmed on or assigned to the Assessing Officer under this Act shall be exercised or performed by the Addl. Commissioner of Income-tax. The Ld. Counsel submitted that in the case of the assessee, there was neither any order from the CBDT to the concerned DGIT/CCIT/CIT nor order has been issued from the said authority to assign jurisdiction to the Additional Commissioner of Income-tax for exercising jurisdiction as an Assessing Officer and in absence thereof, the assessment order passed by the Additional Commissioner of Income-tax is illegal and bad in law. The Ld. Counsel submitted that the assessee has time and again vide letter dated 24.07.2018, 30.08.2018 and 26.10.2018 requested the Assessing Officer for providing details of jurisdiction orders passed by CBDT and subordinate authorities and also filed an application on 08.02.2019 under the Right to Information Act, 2005 (RTI). However, same was not responded and the assessee preferred appeal under the RTI Act before the Pr. Chief Commissioner of Income-tax. The Ld counsel submitted that despite efforts made on the part of the assessee, no information in respect of jurisdiction acquired by the Addl. CIT has been provided to the assessee ,therefore it is presumed that no such authorization/transfer of jurisdiction exist in favour of the Addl.

Commissioner of Income-tax. In view thereof, it might be held that the assessment order has been passed by him without any valid jurisdiction. The Ld. Counsel has raised the validity of jurisdiction, ***secondly,*** on the ground that no order u/s 127 of the Act has been passed by the Commissioner of Income-tax for transfer of jurisdiction of case from Joint Commissioner of Income-tax to the Addl. Commissioner of Income-tax. In support thereof, the Ld. Counsel relied on following decisions:

i. **Tata Sons Ltd. vs. ACIT (AY 2001-02) (2016) (162 ITD 450) (AY 2001 - 02) (MUM - TRI) (see para 3.24 to 3.40 on Pg No. 155 to 160c of Caselaw Paper book);**
ii. **Tata Communication Ltd. vs. ACIT (AY 2002-03) in ITA No.7071/Mum/2005 and 1108/Mum/2008 by its order dated 30.06.2017 (see para 13 to 18 on Pg No. 177 to 207 of Caselaw Paper book);**
iii. **Tata Sons Ltd. vs. ACIT (AY 2002-03) in ITA Nos. 193 and 3745 /Mum/2006 vide its order dated 27.11.2017 (see para 18 on Pg No. 119 to 139 of Caselaw Paper book)**
iv. **iv. Tata Sons Ltd. vs. ACIT (AY 2004-05) in ITA No. 2639/Mum/2009 vide its order dated 11.03.2019 (see para 2-3 & 5.1 on Pg No. 211 to 212 & 235 respectively of Caselaw Paper book)**
v. **Tata Communication Ltd vs. ACIT (AY 2003-04 and AY 2004-05) (ITA No.3972/Mum/2007) | dated 16.08.2019 (see para 6 and 6.1 on Pg No. 253 to 276 of Caselaw Paper book)**
vi. **Tata Sons Ltd vs. ACIT (AY 2005-06)(ITA No 5090/Mum/2012) dated 16.08.2019 (see para 7 on Pg No. 282 to 295 of Caselaw Paper book)**

7.2 The Ld. Counsel for the assessee further relied on the decision of the Co-ordinate Bench of the Tribunal in ITA No.

1975/Mum/2014 and ITA No. 1771/Mum/2015 for assessment year 2010-11 in the case of **M/s Vertiv Energy Pvt. Ltd**., wherein the Tribunal has further relied on the Co-ordinate Bench of the Tribunal in the case of Tata Sons Ltd. (supra).

7.3 In view of the above submissions, the learned counsel for the assessee submitted that the Additional Commissioner of Income-tax had no authority to act as an Assessing Officer for the assessee and pass the impugned assessment order.

7.4 The learned departmental representative (DR) **firstly**, referred to provision of section 124(3) of the Act which *inter-alia* prescribe that no person shall be entitled to call in question the jurisdiction of an Assessing Officer beyond the prescribed time limit of 30 days of issue of notice u/s 143(2) of the Act and the final authority on such issue of jurisdiction shall be of the Director-general of Income-tax or Chief Commissioner of Income-tax or Commissioner of Income-tax. He submitted that the assessee did not raise this issue of validity of jurisdiction of the Additional CIT within the prescribed time period before the Assessing Officer and therefore it should not be allowed to raise the issue at any later stage. The ld DR relied on the decision of Hon'ble Supreme Court in the case of **DCIT(exemption) vs Kalinga Institute of Industrial Technology reported in (2023) 151 taxmann.com 434 (SC)**.

7.5 ***Secondly***, the Ld. DR submitted that in the case, no change of jurisdiction is involved. The Ld. DR submitted that the assessment in the case is of the era of pre restructuring in the Income-tax Department i.e. prior to 1/08/2001. He submitted that prior to restructuring in the year 2001, the 'Charge' of the Commissioner of Income-tax was comprised of units namely 'Ranges' and 'Special Ranges'. Until, 23/12/1998, the officers heading the 'Ranges' and 'Special Ranges', were designated as **Deputy commissioner of Income-tax (DCIT)**. During relevant time, the jurisdiction over taxpayers below a threshold returned income ( say Rs. 25 lakhs) under the charge of a Commissioner of Income-tax, was assigned to 'Range' ( which was called as regular Range), whereas cases having returned income above that threshold value were assigned to 'Special Ranges'. The 'Range' was further used to be comprised of units namely 'Circles' and 'Wards'. The 'Circles were headed by officers of the rank of the **Asst Commissioner of Income-tax (ACIT)**, whereas wards were being headed by the officer in the rank of **Income-tax Officer (ITO).** The jurisdiction of the 'Range' having pecuniary limit of returned income, say from ₹ 2 lakh to 25 lakhs was assigned to the Asst Commissioner of income-tax (ACIT), whereas the cases of the 'Range', below the pecuniary limit of say ₹ 2 lakhs were divided amongst the 'Wards'. In this structure, the regular 'Range officer' was not acting as Assessing Officer and only

the 'Special Range' DCIT was acting as an Assessing Officer, along with ACIT and ITO.

7.7 The Ld. DR referred to Circler No. 772 dated 23.12.1998 issued by the CBDT, wherein the post of Dy. Commissioner of Income-tax (DCIT) was re-designated as Joint Commissioner of Income-tax (JCIT) with effect from 1st day of October, 1998. Thus in the case of the assessee, the first notice issued under section 143(2) on 15/12/1998 is having designation of Joint Commissioner of Income-tax, special range-32, Mumbai. The assessee has not disputed the jurisdiction of Joint Commissioner of Income-tax, special range-32, Mumbai at any point of time even in assessment years prior to assessment year 98-99. The same Joint Commissioner of Income-tax issued further notices under section 143(2) and 142(1) of the Act to the assessee in the year under consideration. The jurisdiction of the Assessing Officer in issuing those notices has also not been disputed by the assessee.

7.8 The learned departmental representative further submitted that, a section 2(28C) of the Act has been inserted by way of Finance, 1998 w.e.f. 01.10.1998 which defined that "Joint Commissioner" means a person appointed to be 'Joint Commissioner of Income-tax' or 'Addl. Commissioner of Income-tax' u/s 117(1) of the Act. The Ld. DR submitted that in the case of assessee, initial notices u/s 143(2) and 142(1) were issued by the

Officer namely sh R K Goyal, who was acting as Joint Commissioner of Income-tax, Special Range 32, Mumbai. He further submitted that somewhere between 16/08/2000 and 8/3/2001, Sh 'R.K. Goyal' must have been promoted to non-functional grade and was elevated to the Additional Commissioner of Income-tax post and accordingly his designation got changed to Additional Commissioner of Income-tax, Special Range 32, Mumbai. So there was no '*dejure*' Change in status and therefore, officer issuing 143(2) notice and passing the assessment order are one and the same.

7.9 The Ld. DR further relied on decision of the Hon'ble Allahabad High Court in the case of **Arun Kumar Maheshwari v. ITO [2006] 285 ITR 179 (Allahabad)** wherein the Hon'ble Court has considered the section 2(28C) of the Act where the term 'Joint Commissioner of Income-tax' has been defined to include 'Addl Commissioner of Income-tax'. Thus, according to the Ld. DR, the assessee has not challenged the jurisdiction of the Joint Commissioner of Income-tax of Special Range 32 and as per section 2(28C) of the Joint Commissioner of Income-tax include the Addl Commissioner of Income-tax also and since in the case same officer has been promoted to the post of Additional Commissioner of Income-tax and thus, there was no change of jurisdiction.

7.10. ***Thirdly*** , the learned department representative further submitted that the decisions cited by the assessee in the case of Tata Sons Ltd.(supra) and Tata Communication Ltd. (supra) relates to the era of the post re-structuring in the Department wherein 'Special Range' had been abolished and the cases of special ranges were redistributed among respective 'ranges' working under concerned Commissioner of Income-tax, further to be distributed among Assistant/ Deputy Commissioner of Income-tax ( unit namely 'Circle') and ITO ( Unit namely 'ward'), depending on the pecuniary limit of return of income filed. The Joint Commissioner of Income-tax /Additional Commissioner of Income-tax, who were heading the ranges, were given concurrent jurisdiction of Assessing Officer over all the cases under their Ranges, however, certain cases were assigned to them for completing scrutiny proceedings by them. In the case of Tata Sons Ltd.(supra) and Tata Communication Ltd. (supra), the matter under challenge was jurisdiction acquired by the Joint/ Additional Commissioner of Income-tax, Range for passing the assessment order under the capacity of concurrent jurisdiction. The Ld DR submitted that according to the assessee this transfer should have been by way of order u/s 127 of the Act by the Commissioner of Income-tax, whereas, according to the Revenue, the relevant Range officer i.e. JCIT/Addl. CIT was already having concurrent jurisdiction over the cases and assignment of the cases by the CIT to him/her was a formal procedure for transparency in

distribution of the work. The Ld DR submitted that the issue in dispute involved in the case cited by the assessee is different and therefore ratio of those cases cannot be applied over the facts of the instant assessment year.

7.11 The ld DR referred to CBDT notification No. 228/2001 dated 31/07/2001 and notification No. 267/2001 dated 17/09/2001 cited in the decision of Tata Sons Ltd (supra), which have been issued under section 120(4)(b) of the Act and submitted that same pertain to distribution of jurisdiction in post-restructuring era and thus, not related to the question of jurisdiction raised in the year under consideration.

7.12 In rejoinder, the learned counsel referred to the notification No. 228/2001 dated 31/07/2001 and notification No. 267/2001 dated 17/09/2001 relied upon by the learned departmental representative and submitted that contention of the learned DR that said notifications would satisfy the requirement of section 120(4)(b) of the Act is not correct. He submitted that a mere perusal of the said notifications shows that same were not concerned with the Additional Commissioner of income-tax and dealt only with the subject relating to Joint Commissioner of income-tax. He further submitted that said notification has been considered by the Tribunal in its lead order in the case of Tata Sons Ltd reported in (2016) 76 Taxman.com 126 (supra). The learned counsel submitted

that Revenue has not brought on record any order or notification issued by the Commissioner of income-tax authorising the Additional Commissioner of Income-tax for acting as an Assessing Officer.

7.13 The learned counsel for the assessee, on the argument of ld DR of not raising the issue of jurisdiction before the AO within the period of 30 days of issue of notice u/s 143(2) of the Act, responded that section 124 of the Act deals with a completely distinct scenario. According to him under the section 124 of the Act, an Assessing Officer who has been vested with jurisdiction of any area, shall exercise such jurisdiction within the limits of such area in respect of a specified categories of person and it is only when a question arises with respect to which Assessing Officer would exercise jurisdiction of a particular area, the section 124 would apply in those circumstances. He submitted that in the present case the issue involved is that the Additional Commissioner of income-tax had no inherent jurisdiction or authority to act as an Assessing Officer. He submitted that this issue has already been considered by the Tribunal in the case of Tata sons ltd (supra).

8. We have heard rival submission of the parties on the issue in dispute raised in additional ground and perused the relevant material on record. The Ld. DR has pointed out that notice u/s 143(2) dated 15/12/1998 for the assessment year under

consideration has been issued by the Joint Commissioner of income-tax, Special Range 32, Mumbai. The said jurisdiction has not been disputed by the assessee. The assessee is disputing only the assessment order passed by Additional Commissioner of Income-tax, Special Range 32. According to the assessee, for assignment of jurisdiction to the Additional CIT,range -32, Mumbai, the CBDT should have issued a notification and in compliance thereof Chief Commissioner of Income-tax or Director General of Income-tax or Commissioner of Income-tax should have passed order for assigning jurisdiction to the Addl. CIT. In our opinion, the contentions of the Ld. Counsel of the assessee are without understanding the structure of the Department. Prior to restructuring of the Department, the cases having returned income more than particular returned income , which according to the ld DR was of Rs 25 lakhs, under particular charge of Commissioner of Income-tax used to be assigned to the Special Range(s). The case of the assessee was continued to be assessed under the Unit Special Range-32. The said Unit was earlier being headed by the officer having designated as DCIT Special Range , but in view of change of designation by way Circular No. 772 dated 23/12/1998, i.e. cited by the ld DR, the post of 'Deputy Commissioner of Income-tax' was re-designated as 'Joint Commissioner of Income-tax' and consequently the Special Range-32, Mumbai was re-designated from Deputy Commissioner of Income-tax , special Range -32 to

Joint Commissioner of Income-tax, special Range-32 and under the said authority , notices u/s 143(2) and 142(1) of the Act have been issued by the Joint Commissioner of Income-tax Special Range-32 as an Assessing Officer. Till that point of time, the assessee was not having any objection regarding the authority of the Assessing officer.

8.1 By way of Finance Act, 1998 w.e.f. 01.10.1998 by way of section 2(28C) the Joint Commissioner of Income-tax has been defined to be a person appointed to be a Joint Commissioner of Income-tax or Additional Commissioner of Income-tax under sub-section (1) of section 117 of the Act. The Ld. DR has pointed out before us that the same officer was working as Joint Commissioner of Income-tax and on his promotion by way of non-functional selection grade, he was elevated to the post of Additional Commissioner of Income-tax and therefore the Assessing Officer became the Additional Commissioner of Income-tax, Special Range 32. Since, as per the provisions of section 2(28C) of the Act, the Joint Commissioner of Income-tax means a person appointed to be as Joint Commissioner of Income-tax or Additional Commissioner of Income-tax, therefore, he continued on the same post heading the Special Range-32 as the Assessing Officer and there was no change in the jurisdiction of the Assessing Officer in the case of the assessee. Further, regarding the submission of Ld. Counsel for the assessee that no order u/s 127

of the Act has been issued for transfer of jurisdiction from Joint Commissioner of Income-tax to the Additional Commissioner of Income-tax, we are of opinion that in view of the above discussion, there was no requirement of issue of order u/s 127 of the Act by the Commissioner of Income-tax as no transfer of the case from one jurisdiction to another jurisdiction was involved and the case remained in the same jurisdiction. The decision in the cases of Tata Sons Ltd (supra) and Tata Communications Ltd (supra) relate to the period of post restructuring in the Income-tax department i.e. 1/08/2001 , wherein cases were transferred to the Range Officer for completing assessment, and the assessment order passed by the Additional CIT range have been held as without authority of law. The other arguments whether there was no compliance by the assessee of section 124(3) of the Act i.e. not raising the issue of jurisdiction before the AO within the period of 30 days of issue of notice u/s 143(2) of the Act, are rendered merely academic; hence we are not commenting on the same.

8.2 In view of the above discussion, we reject the contention of the Ld. Counsel for the assessee. Further, In the case of **stock Traders p ltd (supra)** , in absence of no cogent basis for challenging the authority of Additional Commissioner of Income-tax Act in passing the assessment order, the additional ground raised by the assessee has been dismissed by the Tribunal observing as under:

*"20. In this case, the only reason for the assessee's allegation that the above provisions are not complied with is that the notice u/s. 143(2) was issued by the ACIT. However, the assessment order has been passed by the Addl. CIT. We note that the assessment order was passed on 22.03.2001 since then the assessee has got no information whatsoever and it has never ever had reason to challenge the jurisdiction of the Assessing Officer in this case. However, suddenly on 13.04.2018, the assessee has filed an additional ground that the Assessing Officer in this case did not have any jurisdiction. We note that there is no information in the possession of the assessee that the internal procedure of the department regarding the transfer and posting of officers has not been complied with. The assessee in this case after a lapse of 15 years is making a wild guess. In our considered opinion, there is no cogent reason to accede to this request of the Id. Counsel of the assessee. The laws referred by the Id. Counsel of the assessee were rendered on the facts of those cases where the bench upon the facts has gone into the specifics and particulars of that case. In the present case, we have already held the assessee's assertion after 15 years has no cogent basis whatsoever. Hence, we are unable to accept the assessee's request that the assessment deserves to be quashed insamuch as the Assessing Officer did not have the authority of law. Hence, the additional ground raised by the assessee stands dismissed."*

8.3 Before us also, the Ld. CIT DR has submitted that though the notices issued under section 143(2) of the Act are available on the assessment record but the relevant notifications authorising the Additional Commissioner of Income tax as Assessing Officer or the order of elevation of the Joint Commissioner to the post of Additional Commissioner of Income-tax are not available on assessment record because same were part of administrative procedure and therefore were not placed on the assessment record. He submitted that despite making thorough search of all record of the relevant authorities, those notifications / promotion orders could not be traced after a lapse of substantial period of more than

14 years. We find that in the case of **Stock Traders P Ltd (supra),** the assessee had placed reliance on the decision of the Tribunal in the case of Tata Sons Ltd (supra) and Tata communication limited (supra) but the Tribunal after considering the submission of the parties, rejected the additional ground challenging the authority of the Additional Commissioner of income-tax , in passing the assessment order. Thus, respectfully following the finding of the Tribunal in the case of Stock Traders P Ltd (supra), we dismiss the additional ground raised by the assessee.

9. The ground Nos. 1 and 2 of the appeal relate to taxability of **renovation and modernization levy** of Rs. 4263.63 lakhs collected by the assessee from customers. The Ld. Counsel for the assessee submitted that while raising invoices from customers, the renovation and modernization levy collected is in accordance with the notification issued by the Department of Atomic Energy Commission to cover equity portion of the Government for expenditure on renovation and modernization. He submitted that renovation and modernization fund was only for the meeting of capital expenditure and was to be a capital reserve and not distributable as dividend. The Ld. Counsel accordingly submitted that levy calculated is not the income of the assessee being on account of 'diversion' of title at source. Alternatively, it was

submitted that levy collected being in the nature of a Capital receipt, it was not taxable in for the purpose of income-tax.

9.1 On the other hand, the Ld. DR submitted that issue in dispute is decided against the assessee by the Tribunal in assessee's own case for assessment year 1997-98 in ITA No. 4071/Mum/2001 dated 05.04.2007 and further appeal filed by the assessee is pending before the Hon'ble High Court.

9.2. In the rejoinder, the Ld Counsel submitted that identical issue of levy of de-commissioning levy has been decided by the Tribunal in ITA No. 843/mum/2003 for AY 1992-93 in favour of the assessee , which has been further upheld by the Hon'ble Bombay High Court vide ITA No. 1002 of 2016.

9.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the issue in dispute is squarely covered by the decision of the Co-ordinate Bench of Tribunal in the case of the assessee in ITA No. 4071/Mum/2001 for assessment year 1997-98. The relevant part of the decision is reproduced as under:

> *"14. We have heard the parties and considered their rival submissions including the authorities referred to by them. Following facts emerge on perusal of each Notification:*
>
> *A. Facts emerging on perusal of the first Notification:*

*(1) Both the levies authorized by the Government were to be included in the tariff fixed by the assessee from its customersand were therefore collected as part of the overall tariff.*

*(2) The assessee was not required to part with the levies so collected in favour of the Government. In fact, the levies, after their collection, were to be retained by the assessee.*

*(3) Both the levies were intended to generate financial resources to enable the assessee to use and apply them for meeting its expenditure on notified activities.*

*(4) None of the levies collected by the assessee was intended to be passed over or was actually passed over to the Government. Both the levies were collected and retained by the assessee. What the Notification provided was the manner in which the levies would be used by the assessee.*

*B. Facts emerging on perusal of the second Notification:*

*(1) Under the second Notification, both the levies authorized by the Government were to be recovered in the tariff fixed by the assessee from its customers. In the earlier Notification, what was provided was that they would be included in the tariff.*

*(2) In the second Notification also, the assessee was not required to part with the levies so collected in favour of the Government. In fact, the levies, after their collection, were to be retained by the assessee.*

*(3) The second Notification did not alter the fact that both the levies were intended to generate financial resources to enable the assessee to use and apply them for meeting its expenditure.*

*(4) Second Notification also did not alter the position that none of the levies collected by the assessee would be passed over or was actually passed over to the Government. Both the levies were collected and retained by*

*the assessee for its use. What the second Notification provided was the manner in which the levies would be used by the assessee for its own purposes.*

*(5) Second Notification specifically provided that both the levies would not form part of the tariff or sales income in the hands of the assessee. In other words, a distinction was created between the tariff forming part of sales income and the levies, which were declared to be not forming part of the tariff or sales income of the assessee. The fact however remains that the levies were required to be collected along with tariff though under a separate head. Notwithstanding the stipulation in the second Notification that the levies would not form part of sales income of the assessee, the assessee was to retain the levies collected and use the same for the purposes of meeting its own capital and revenue expenditure on notified activities.*

*15. On the factual matrix of the case, the assessee has all along been claiming that the income by way of levies stood diverted at source by an overriding title in favour of the Government and hence was not taxable. The assessing officer and the learned first appellate authority have however rejected the aforesaid submission. Both of them have held that it is a case of application of income and not of diversion of income at source. It is the correctness of the aforesaid finding, which is the subject-matter of the present appeal. Sometimes, a portion of the income arising out of the corpus held by the assessee is consumed at the source itself for the purpose of meeting some recurring or non-recurring expenditure arising out of an obligation imposed on the assessee by contract or by statute or by the law of the land. In such cases, a question arises whether such portion of the income so consumed or expended is to be treated as income assessable to tax in the hands of the assessee. The answer is that if the income before it reaches the hands of the assessee is diverted away by superior title so that the assessee, when he receives the income, has to pass it on to a third party, the portion passed on, or is liable to be passed on, is not the income of the assessee but of the person to whom it is passed on or is liable to be passed on.*

*In cases of diversion of income, it is the existence of superior title which not only deprives the assessee of his title to the income but also requires him to part with the same in favour of a A third party as the assessee in receipt of the income would be receiving it both on behalf of himself and the third party by virtue of the overriding title and not exclusively for himself. In cases of diversion of income, the income does not accrue to the assessee at all; it, in fact, accrues to the third party in that the destination of income is not towards the assessee in whose hands the money is placed but towards a third party in whose favour and for whose benefit the title is created. Resultantly, the assessee, after the income stands diverted at source by a superior title to a third party, would no longer be concerned with that income.*

*16. In Sitaldas Tirathdas' case (supra), a part of income from property paid as maintenance allowance to the dependants under a decree of the court, without the maintenance allowance being charged upon the property yielding income, was held to be a case of application of income. In Sijua (Jharriah) Electric Supply Co. Ltd.'s case (supra) the Hon'ble High Court has considered the judgment in Sitaldas Tirathdas' case (supra) and held as under :*

*The concept of real income or diversion of income by an overriding title was explained by Hidayatullah, J. in the case of Sitaldas Tirathdas (supra) at pages 374-375 :*

*In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the D decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Whereby the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first*

*kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable.*

*If this test is applied, it will be seen that there has been no diversion of income by an overriding title at all. The amount appropriated to the contingencies reserve was collected by the assessee as its revenue from sale of electricity. The amount remained at the disposal of the assessee and for the benefit of the assessee. It could be used only for a few specified purposes but the purposes for which the fund could be used were all business purposes of the assessee-company. Payment of compensation to workers, replacement of plant and machinery or other expenditure envisaged in para V, which we have set out earlier, are all normal business expenditure of a company. This is not a case of diversion of income before it reaches the assessee, but only a case of setting apart of a portion of the assessee's income under compulsion of law for the use and benefit of the assessee although the mode and the objects of the expenditure are statutorily restricted.*

*17. In Vibhuti Glass Works 'case (supra) referred to by the learned Commissioner (Appeals)in his order, the assessee was under a financial crisis. In a package offinancial assistance, the Industrial Finance Corporation agreed to grantloan of Rs. 20 lakhs to the assessee provided the State Government guaranteed the repayment and also allowed the Industrial Finance Corporation to have first charge under the mortgage deeds. The State Government agreed to do so provided the assessee transferred its business to the State Government to manage and run the same. Under the Agreement, the State Government was entitled to 50 per cent of the profits. The assessee contended that the profits earned from the glass factory was not assessable in its hands but in the hands of the Government which was running and managing the said*

*business. It was alternatively contended that only 50 per cent of the profits could be assessed in the hands of the assessee. Rejecting both the aforesaid submissions, the Hon'ble Supreme Court has held that income earned from that business accrued to the assessee directly which was merely applied by the State Government to discharge the obligations of the assessee.*

*18. On perusal of catena of decisions on the subject, it transpires that, inorder to constitute diversion of income at source by overriding title following facts must be established:*

*(i) There must be income arising out of the corpus held by the assessee;*

*(ii) A portion of the income so generated must be charged to the source itself by an overriding title in favour of a third party or, in other words, the obligation must attach to the source of income in that the income itself should not accrue to the receiver and not to the receiver of the income to apply it in a particular manner;*

*(iii) The income so charged must be passed on or is required to be passed or, in other words, is required to be diverted in favour of a third party before it reaches the assessee; and*

*(iv) The assessee, after the income stands diverted at source by a superior title, is no longer concerned with that income or, in other words, the assessee must be completely divested of any kind of dominion over the income.*

*19. Applying the aforesaid tests to the facts of the case before us, it is seen that the assessee was entitled to collect and recover the levies from its customers during the course of its business. The income by way of levies thus accrued to the assessee in its own right. The levies so collected were not only retained by the assessee but were also available to it for use and application for meeting its own expenses. The Notifications issued by the Government simply enabled the assessee to raise the resources for meeting its own*

*expenses. They gave the authority to the assessee to collect the levies, which it had no authority to collect in the absence of the A aforesaid Notifications. The levies were neither required to be diverted at source nor were actually diverted at source in favour of any third party. Second Notification issued by the Government simply regulated the application and utilization of funds. The fact that the reserve was created in terms of the Notification issued by the department of Atomic Energy is not really of any consequence. If an assessee sets apart a sum of money every year to a reserve, it cannot be said that the sum so set apart has been diverted at source by an overriding title. Similarly, if a sum is set apart under compulsion of a Notification issued by the Government, diversion of income at source by an overriding title does not take place. Both the levies collected and the reserve created belonged to the assessee-com-pany; the assessee-company had title to the fund, dominion over the fund and also the use of the fund. In these circumstances, it cannot be said that there has been any diversion of income at source by an overriding title from the assessee-company or that the amount that has been appropriated to the fund does not form part of the real income of the assessee. On the facts of the case, we are in agreement with the well-reasoned order of the learned Commissioner (Appeals) that it is a case of application of income and not of diversion of income at source. We therefore endorse his order.*

*20. We have also considered the submission of the assessee that the assessing officer has himself accepted that there was diversion of title atpage 6 of the assessment order. We find that the assessing officer has made the aforesaid observation in the context of decommissioning charges and not in the context of the impugned levies.*

*21. The alternative plea of the assessee that the impugned levies are in the nature of capital receipts has been dealt with by the learned Commissioner (Appeals) in Para15 of his order. In order to constitute capital receipt, the receipt should be traceable to loss of capital. The assessee has not collected the levies against loss of capital. They were*

*included and collected along with the tariff in the ordinary course of business. Once they have been so collected, their ultimate destination or application will not change their character from being business receipts to capital receipts. In our view, the Commissioner (Appeals) has correctly held that the impugned receipts were not capital receipts. We endorse his order.*

*22. We have considered all the submissions made including the judicial authorities referred to by the parties though we have not individually commented upon them as the decision in the present case has turned essentially on facts.*

*23. In view of the foregoing, Ground Nos. 1 to 4 taken by the assessee are dismissed."*

9.4 Since the issue of de-commissioning levy being different from the present levy of Renovation and modernization, which is covered against the assessee, thus, to maintain judicial discipline, we are not following the precedent in the case of de-commissioning levy and prefer to follow the finding of the Tribunal (supra) on issue of renovation and modernization levy only.

9.5 We also note that the assessee in assessment years i.e. 2004-05, 2005-06 and 2006-07 has admitted the collection of different levies as its income and claimed deduction on the same for the purpose of section 80IA of the Act. Once the assessee itself has admitted the receipt as income in subsequent years, we do not find any justification on the part of the assessee in contesting those receipts as not taxable.

9.6 In view of aforesaid discussion, the ground Nos. 1 and 2 of the appeal of the assessee are accordingly dismissed.

10. The ground Nos. 3 and 4 of the appeal relate to amount of Rs.2558.18 lakhs being **Research & Development levy** collected by the assessee. The issue of research and development levy has been discussed by the Assessing Officer along with the renovation and modernization levy and added the same as income of the assessee. The Ld. CIT(A) on the other hand, following the finding of his predecessor in assessment year 1997-98 upheld the order of the Ld. Assessing Officer.

10.1 Before us, the Ld. Counsel of the assessee fairly agreed that the issue in dispute is covered against the assessee by the Co-ordinate Bench of the Tribunal in ITA No. 4071/Mum/2001. The relevant part of the said decision has already been reproduced above while adjudicating ground Nos. 1 & 2 of the appeal. We also note the assessee in assessment years i.e. 2004-05, 2005-06 and 2006-07 has admitted the collection of different levies as its income and claimed deduction on the same for the purpose of section 80IA of the Act. Once, the assessee itself has admitted the receipt as income in subsequent years, we do not find any justification on the part of the assessee in contesting those receipt as not taxable

10.2 The issue in dispute in the year under consideration being identical to the issue in dispute raised in assessment year 1997-98, therefore, respectfully following finding of the Tribunal(supra), the ground Nos. 3 &4 of appeal of the assessee are accordingly dismissed.

11. The ground No. 5 of the appeal relates to income of the assessee of Rs.1705.55 lakhs being **De-commissioning levy** collected by the assessee. The ground No. 6 relates to treating the interest of Rs. 1836.71 lakhs credited to de-commissioning fund. The Assessing Officer has noted that the term 'De-commissioning' used within conventional industry means action taken to take the plant or machinery out of operation after the end of its economic life. The nuclear plants contain radioactive inventory causing radiation hazards, so a comprehensive rules were framed for decommissioning of plants involving technical guideline and provision of finance. The assessee submitted before the AO that in view of notification issued by Government of India, Department of Atomic Energy dated 22.12.1988, the assessee charged a decommissioning levy of Rs. 1.25 paise per kilowatt-hour(KWH) of electricity sold and credited the said amount of the De-commissioning charges to a fund known as 'De-commissioning fund', which was to be maintained by the assessee. The interest accrued on said fund was also credited to the reserve and not

invested outside. It was contended by the assessee that in view of maintenance of separate fund for decommissioning levy , said receipt has been diverted from the assessee. It was submitted by the assessee that the assessee collected De-commissioning charge of Rs.1.25 per Kilowatt of electricity sold from the nuclear station in the country, which was subsequently increased to Rs. 2.00 per KWH w.e.f. 15.10.1997. Though in the assessment year 1997-98 the Ld. AO accepted the contention of the assessee of the diversion of title in receipt , however for the year under consideration, the Ld. AO observed that issuing notification by the Government for utilisation of decommissioning charges for specific purpose and creating a reserve, was in the nature of appropriation of the funds out of the profit and was not a diversion of title, therefore, it does not mean that such income would be exempt from income tax. He further observed that the assessee had credited notional interest of 12% to the fund and thereafter on use of the funds; the assessee had charged interest expenditure to profit and loss account. The Ld. AO accordingly reversed finding on the issue in dispute in earlier year and held that such notional interest expenditure cannot be allowed under the provisions of the Act. For reversal of his finding, the Ld. AO relied on the decision of the Hon'ble Supreme Court in the case of **Distributors Baroda ltd reported in 155 ITR 120**, wherein it is held that *to perpetuate an error is no heroism*.

11.1Before the Ld. CIT(A) the assessee claimed that the collections had been made at the instance of Central Government and the amount collected had never reached the assessee by overriding title and same had been credited to the decommissioning fund. The contention of the assessee has been summarised by the Ld. CIT(A) as under:

> *"i) The responsibility of decommissioning a nuclear power facility rests with the Government.*
>
> *ii) The decommissioning levy is collected on behalf of the Government of India, thus the levy belongs to the Government of India*
>
> *iii) The notification states that the collection of the levy would not constitute revision of tariff. It is clear from the above that the levy collected does not form part of the tariff and profits of the Nuclear Power Station.*
>
> *Iv) The levy is required to be transferred to a separate fund irrespective of the fact whether the Nuclear Power Station has made a profit or not. Thus, this is a case of diversion by overriding title and not a case of appropriation of profits."*
>
> *v) The levy is not available for the Nuclear Power Stations for the recoupment of any losses.*
>
> *vi) The levy is to be utilised by the Government of India for the purposes of carrying out decommissioning activities, which activity is the responsibility of the Government of India.*

11.2 The Ld. CIT(A) however rejected the contention of the assessee observing as under:

> *"7.7. The above argument of the Ld. A.R. in my considered opinion is misconceived and fallacious. It is equally misconceived for the appellant to assert that the collection has even before reaching the hands of the appellant has been credited to the decommissioning fund. The fact is that it is the appellant who has collected the amount from the consumers/customers and none else. Therefore, the amount so collected by the appellant as an additional levy has reached the hands of the appellant in the same manner and from the same*

*consumers as the other charges. To say that the collection has been made on behalf of the Central Govt. is again quite misconceived in as much as the collections has not gone to the coffers of the government but has remained with the appellant under its effective custody. It is not the appellant's case that the collections in question have been appropriated by the Government in favour of some other party divesting the appellant of the use of the funds for all times to come. The collections no doubt have been made for specific purpose of the appellant's own business and no one else's. The case law cited by the appellant in fact supports the stand of the AO rather than that of the appellant. The appellant has relied upon the judgment in the case of CIT VS. Tolly Junge Club Ltd. 107 ITR (SC). In this case the Club by a resolution decided to collect a surcharge together with admission fee from every race goer. The surcharge was earmarked for local charities. The Supreme Court held that the surcharge did not form part of the price for admission but for the specific purpose of charity. On these facts the Supreme Court held that it was a case of over-riding title. The Apex Court held that the collection in that case fell in a category in which "the income never reaches the assessee who, even if were to collect it, does so, not as a part of his income but for and on behalf of the person to whom it is payable." Thus in Tolly Gonge case the amount collected was not to remain with the Club but was to be disbursed in favour of outsiders who were the recipients of the charity collected. The collection was not used by the Club and had to be passed on in favour of third parties. The facts in the Tolly Gonge case are poles aparts from the basic facts in the appellant's case. In the appellant's case the collections made are not at all meant to be passed on in favour of any one else. No third party is involved claiming the ownership of the funds collected but the same are in the effective possession of the appellant only to be used for some specific business purposes. The appellant has deliberated at length by way of a technical jargon as to how the funds are to be used but the basic fact remains that the decommissioning fund is to be exclusively used for appellant's own power station/plants which are the appellant's main source of power generation and sale thereof. These power plants need to be subjected to certain process as per the appellant's own version which include "closing down the facility and a minimum removal of the actual material coupled with continuing maintenance and surveillance, to a complete removal of residual radioactivity in excess of levels acceptable for unrestricted use of the facility and its cite". These activities, it has to be appreciated are quite normal activities having regard to the nature of the appellant's business of power generation. What the appellant describes as decommissioning is basically an essential requirement of taking care of the normal life of a power plant with reference to its normal wear and tear and attendant hazards. The collection of charges from customers in the course of the conduct of business to create adequate funds to take care of the wear and tear of the power plants at the instance of the Government is quite understandable having regard to the attendant hazards of maintaining the power plants. Which of the business but such*

*regulation does nor a given business having regard to thes The government can always regulate the conduct of a given business having regard to the which the appellant has made in course of sale of electricity to the customers are not collections of revenue nature. There is no diversion of such collections at source in favour of anyone else. The charges have been collected by the appellant and have remained with the appellant in the form of a fund and have to be used only for the purposes of the appellant's business. No third party is involved. The funds are not to be parted with in favour of any third party. Diversion by over-riding title takes place only and exclusively in a situation where the income never reaches an assessee and it is passed on to a third party. In the instant case of the appellant the collections have been made by the appellant from the customers in the course of conduct of its business, the collections are with the appellant and the fund created out of these collections is also squarely for the purposes of appellant's business. It is, therefore, farfetched and misconceived on the part of the assessee trying to import the concept of over-riding title.*

*7.8 In the conspectus of what is discussed above, I am of the considered view that the AO has rightly subjected the revenue receipts by way of decommissioning charges to tax by including the same in the computation of income of the appellant. I am in full agreement with the reasons recorded, case law applied and conclusions reached by the AO in the body of the impugned order of assessment apart from the reasons recorded and view taken on identical issues by my Ld. Predecessor in the appellate order for AY. 1997-98 as mentioned above. As such, this ground of appeal is rejected and action of the AO in bringing to tax the income relating to the decommissioning charges is confirmed."*

11.3 Regarding the issue of interest expenditure claimed by the assessee corresponding to the amount credited to decommissioning fund of ₹ 1836.57 lakhs, the CIT(A) followed his finding in assessment year 1992-93 and confirmed the disallowance of interest expenditure for utilisation of the funds out of decommissioning fund.

11.4 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the

Ld. Counsel of the assessee relied on the decision of the Co-ordinate Bench of the Tribunal in the case of the assessee in ITA No. 843/Mum/2003 for assessment year 1992-93 which has been further upheld by the Hon'ble Bombay High Court in ITA No. 1002 of 2016. The relevant part of the decision of the Tribunal (supra) is reproduced as under:

> *"11. Ground No. 12 relates to the deduction of interest credited to decommissioning reserve. Brief facts in this regard are that the assessee collects decommissioning charges from its customers at Rs.1.25 paisa or 2 paisa per kwh. As per clause 12 of the office of the memorandum dated 4.09.1987, the decommissioning of a nuclear power station after its useful life includes decontamination, dismantling and removal of radio active material, radio-active material, waste, components and structure and it is the responsibility of the company. This decommission reserve of nuclear power station includes the expenditure relating to decontamination, dismantling and removal of radio-active material,waste, components and structure. With a view to meet the decommissioning expenditure as and when the plant is decommissioned, the Department of Atomic Energy issued a notice dated 22.12.1988 and 4.11.1991 directing the assessee to charge such decommissioning levy from its customers. Vide another notification dated 20.2.1997 a clarification was issued stating that the decommissioning charges so levied at on the assumption that the funds collected will carry an interest of 12% per annum. Therefore, assessee credited interest @ 12% on the decommissioning fund kept with the assessee. For the year under consideration assessee credited an amount of Rs. 331.73 lakhs towards interest on the decommissioning reserve of Rs. 917.08 lakhs. Assessee claimed the same as a deduction stating that the funds so collected by the assessee from the customers were used for the purpose of business. Justifying the same saying that the assessee borrows funds for the business purposes but for the decommissioning fund, the assessee would have had to borrow more and pay interest on them. However, the claim of the assessee was denied by the Assessing Officer and the CIT (A) on the ground that the said interest was claimed on a notional basis. Before us, Ld Counsel for the assesse argued in favour of the said claim of the assessee and clarifed that the funds so received is undisputedly not taxable income of the assessee and there Is no dispute on this. This Issue is only about the adopting of interest relating to the said funds. The assessee has charged the interest on the sald funds keeping in tune with the notification Issued by the Department of Atomic Energy. Otherwise, he relied on the written submissions made in para 27 of the sald written*

*note (supra). On the other hand, Ld DR relied on the order of the Assessing Officer and the CIT(A). On hearing both the partles and on perusal of the notifications referred above which are ssued by the Department of Atomic Energy, we find the amount of Rs.917.08 lakhs was collected by the assessee form its customers towards decommissioning funds which is almed at for use as and when the power plant is decommissioned/ dismantled at the expiry of Its life. Thus, undisputedly the funds do not belong to the assessee accordingly, the same Is found reflected in the balance sheet. Now the issue about the levy of Interest on the said funds which does not belong to the assessee, it was used for the purpose of the business of the assessee. Levy of interest on the sald fund was done at the instance of the Department of Atomic Energy. Considering the said notification, the charge of interest cannot be called notional interest as there Is a charge on the assessee to do so. Therefore, we are of the opinion that the deduction of claim of Interest of Rs 331.73 lakhs is rightly claimed by the assessee. Accordingly, we reverse the orders of the Assessing Officer and the CIT (A) on this issue. Thus, ground no.12 is allowed."*

11.5 The Hon'ble High Court upheld the finding of the Tribunal observing as under:

*"5. Having heard the learned counsel for the parties and having perused the documents on record, we are in agreement with the view of the Tribunal. As noted, the assessee was under directives of the Government of India to collect and create decommissioning reserves which would be utilized for decommissioning of the plant at the end of its useful life. In the meantime, the amount so collected from the customers would be in the possession of the assessee and would be utilized for the purpose of its business. The Government of India, therefore, required the assessee to account for the interest which was also specified at 12% per annum on said funds. The interest expenditure was claimed by the assessee by way of deduction. This interest expenditure was clearly business expenditure. The situation is akin to the assessee borrowing from the market, utilizing such borrowed funds for the purpose of business and paying interest to the creditors. No question of law arises. The Income Tax Appeal is dismissed."*

11.6 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record . We find that Hon'ble High Court and the Tribunal has given finding on the issue of claim of interest expenditure for utilisation of the funds out of the

decommissioning fund on the ground that said interest was credited to the decommissioning fund and when said fund has been utilized for the purpose of the business of the assessee, interest in respect of use of fund was eligible for deduction. The Hon'ble High Court has observed that the situation is akin to the assessee borrowing fund from the market and utilising such borrowed funds for the purpose of the business and paying interest to the creditors. Thus, as far as the issue of disallowance of interest expenditure of ₹ 1836.71 lakhs is concerned, the issue is squarely covered in favour of the assessee and therefore the finding of the Ld. CIT(A) to that extent is set aside and matter is restored to the Assessing Officer for following the decision of the Hon'ble Bombay High Court (supra) and verify whether interest income credited has already been taxed, then claim of interest expenditure has to be allowed to the assessee. But as far as the issue of receipt collected by way of decommissioning charges and credited separately to decommissioning fund is identical to collection of the levy of renovation and modernisation fund, which we have upheld following the decision of the Tribunal in earlier years in preceding Para, and therefore to have consistency in our view, we uphold the addition treating the receipt of decommissioning charges as income in the hands of the assessee. We also note that the assessee in assessment years i.e. 2004-05, 2005-06 and 2006-07 has admitted the collection of different levies as its income and claimed reduction

on the same for the purpose of section 80IA of the Act. Once the assessee itself has admitted the receipt as income in subsequent years, we do not find any justification on the part of the assessee in contesting those receipts as not taxable. The ground No. 5 of the appeal of the assessee is accordingly dismissed, whereas the ground No. 6(six) of the appeal of the assessee is allowed for statistical purpose.

12. The ground No. 7 of the appeal relates to considering the interest income (Rs.276.71 lakhs), consultancy receipt (Rs.87.70 lakhs) and other income (Rs.1216.96 lakh) under the head "income from other sources" rather than adjusting the same against the "expenditure incurred on construction of plants" during the year under consideration.

12.1 Before the Assessing Officer, it was submitted that above receipts were having direct nexus with the activity of construction of plants and does not constitute independent sources of the income therefore, should be reduced from the construction expenses which were capitalized. It was further submitted that identical treatment of account has been followed by the assessee in past years , which same had not been disturbed by the AO and thus, in view of the 'rule of consultancy' said income should be adjusted against the construction expenditure, instead of taxing separately under the head 'income from other sources'. Before the Ld. CIT(A), the

assessee explained that income under the respective head was having nexus with the construction activity. The detailed submission of the assessee before the Ld. CIT(A) is reproduced as under:

> *"At the outset, we would like to provide your honor with the factual background about the nature of income that has been reduced from the construction expenses.*
>
> *a) Interest (others)*
>
> *This amount represents interest received by the appellant from the employees, contractors etc. on loans / mobilization advances granted for the purposes of the project. The expenditure in respect of such interest is included as expenditure in Schedule 6A.*
>
> *b) Consultancy receipts*
>
> *The appellant for each project designates certain individuals (engineers, etc.). These individuals are expected to devote their entire time towards the project completion activities. The remuneration and other expenses incurred for these identified individuals is not debited to the Profit and Loss Account but is included in the Schedule 6A. The construction of the Nuclear Power Station and its related activities take considerable amount of time and the engineers and the staff are not completely occupied at these times. In order to ensure that the staff are engaged in productive activities, the appellant near its locations obtain certain consultancy assignments. These assignments are taken up in order to ensure that the staff is gainfully engaged and the consultancy receipts result in the reduction of the total expenditure incurred during construction period.*
>
> *The appellant submits that in view of the fact that the entire expenditure of the engineers and staff has been included in Schedule 6A, the receipts are to be reduced from the same Schedule.*

*Without prejudice to the above, the appellant submits that the income after reducing the expenditure incurred for earning the same is negligible.*

*c) Other income*

*The other income mainly constitutes the following items:*

*i. Receipts from sale of tender forms*
*ii. Interest from contractors on advances given*
*iii. Interest received from staff engaged in the project on certain loans given.*
*iv. Deposits of contractors forfeited*
*v. Sale of scrap in respect of material used in the project*
*vi. Penal interest*
*vii. Rent from staff / contractors*
*viii. Recoveries from staff for the transport provided*
*ix. Miscellaneous receipts*

*The location wise break-up of income is provided hereunder:*

| Sr. No. | Location | Amount in Rs. Lacs | Details at page nos. |
|---|---|---|---|
| a) | Corporate office | 1045.96 | 122 |
| b) | RAPS | 58.81 | 123 |
| c) | Kaiga | 128.23 | 124 |
| d) | Engg. Division | 136.81 | 125 - 126 |
| e) | RAPP 3 & 4 | 203.22 | 127 |
| f) | TAPP 3 & 4 | 8.34 | 128 |
| | Total | 1,581.37 | |

*A summary is enclosed at page 129 of the compilation.*

*It is submitted that the relevant expenditure in respect of items mentioned at (a), (b) and (c) above has not been claimed as a deduction in computing the total income and has been treated as capital expenditure.*

*It is further submitted that the total expenditure incurred exceeds the income in Schedule 6A.*

*On the basis of the above background, the appellant makes the following submissions:*

*The appellant invites attention to the Guidance Note on Treatment of Expenditure during Construction period issued by the Institute of Chartered Accountants of India (ICAI).*

*The Guidance Note states that the expenses incurred during the construction period which are directly relatable to the acquisition or construction of the assets are to be accumulated and appropriated to the cost of such assets when the project is commissioned. In the instant case, the issue for consideration is not in respect of the expenditure earned during construction period but in respect of income earned during construction period*

*Para 17.11 of the Guidance Note deals with the treatment of income earned during the construction or pre-production period. Para 17.11 reads:*

*"17.11 During the construction period a project may earn income from miscellaneous sources - for example share transfer fees, interest income, income from hire of equipment or assets and income from sale of products manufactured during the period of test runs and experimental productions. It is recommended that such income should be set off against the related items of expenditure so that only net amount of the expenditure is capitalized or treated as deferred revenue expenditure as the case may be. In either case consideration may have to be given to the question of providing for the income tax liability on such income."*

*It can be observed from the above, the ICAI has recommended, income which is earned during the construction period can be set off against the expenditure incurred during the same period which would result in only the net amount of expenditure being capitalised or treated as deferred revenue expenditure.*

*It is submitted that the income referred to above at (a) and (b) have therefore been correctly reduced from the expenditure during construction period rather than treating this as income liable to tax."*

12.2 The Ld. CIT(A) however following his predecessor in assessment year 1992-93, rejected the contention of the assessee and upheld the finding of the Assessing Officer. Before us, the Ld. Counsel for the assessee referred to paperbook pages 210 and 211. for showing detail of income of Rs. 1581.378 lakhs, which has been reduced from expenditure incurred on construction. For ready reference, said detail is reproduced as under:

| Sr. No. | Unit | Interest Income | Consultancy Receipts | Other Income | Total |
|---|---|---|---|---|---|
| 1. | Corporate Office | 170.92 | -- | 875.03 | 1045.95 |
| 2. | RAPS | 12.49 | --- | 46.31 | 58.8 |
| 3. | Kaiga | 4.95 | --- | 123.28 | 128.23 |
| 4. | Engineering Division | --- | 87.7 | | 136.82 |
| 5. | RAPP 3&4 | 85.93 | | 117.29 | 203.22 |
| 6. | TAPP 3&4 | 2.42 | | 5.93 | 8.35 |
| | Grand Total | 276.71 | 87.7 | 1167.84 | 1581.37 |

12.3 Further on page 211, in the details of corporate office, a sum of ₹ 8,75,02,500/- has been stated to be received as premium on bonds. It was submitted that expenses incurred for earning the said receipt had already been reduced from those receipts. A detail of income earned and corresponding expenditure for engineering division has been explained on page 214 to 215 of the paperbook.

12.4 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. During the course of hearing, the learned counsel for the assessee was asked to justify as how the interest received from employees for mobilization

advances was connected to the construction of project. Similarly, he was asked to justify as how the consultancy receipts were connected with the construction of plants. Similarly, regarding other receipts under the head 'other income' reported as premium received on bonds, the ld Counsel was asked to justify as how same was connected with the construction expenditure. However, the Ld. Counsel for the assessee failed to file any documentary evidence in support of claim that those incomes were having nexus with the construction of the plants and therefore the plea of the assessee is accordingly rejected. We do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same.

13. The ground No. 8 of the appeal of the assessee relates to disallowance of prior period expenses.

13.1 Before us, the Ld. Counsel for the assessee submitted that in the financial statement for the year end, total prior period expenses debited was of Rs.278.118 lakhs and after set off of prior period income of Rs.1155.72 lakhs, the net prior period expenses are of Rs.1626.54 lakhs. Though the Ld. Counsel submitted that during the course of the assessment proceedings, the details of prior period expenses were submitted from time to time, however, the Assessing Officer has recorded on page 30 of the impugned assessment order that no such detail of legal expenses amounting to Rs.7 lakhs was submitted and therefore, accordingly, he added the same. Before

the ld CIT(A), the Ld. Counsel of the assessee submitted that said expenditure crystallized during the year under consideration, however, no evidence in support of same was filed before the Ld. CIT(A), therefore , he following the finding of his predecessor on the issue in dispute, upheld the disallowance. Before us the learned counsel for the assessee submitted that total turnover of the assessee was around Rs. 1447.72 crores, whereas the total prior period expenses are only ₹ 11.55 crores, which is approximately 0.80%, which being normal and a small percentage, considering the size of organization and the locations, it should be allowed to the assessee.

13.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, also no such detail of the legal expenses amounting to Rs.7 lakhs has been filed and therefore, we do not have any option other than to uphold the disallowance made by the Assessing Officer.

14. In ground No. 9, the assessee has prayed that deduction in respect of expenditure treated as prior period should have been allowed.

14.1.In our opinion, the Assessing Officer has made only disallowance in respect of legal expenses of Rs.7 lakhs and he has not disturbed either prior period income or prior expenses except

said disallowance of Rs. 7.00 lakhs for legal expenses, which we have already upheld and therefore the ground No. 9 of the appeal of the assessee is also dismissed.

15. The ground No. 10 of the appeal relates to disallowance of employee state insurance (ESI) and provident fund (PF) amounting to Rs.53.47 lakhs u/s 43B of the Act. Before the Assessing Officer, the assessee filed an annexure of the detail of ESI and PF amounting to Rs.53.47 lakhs which has been disallowed by the Assessing Officer as same was paid after the due date under the relevant Acts. Since, the issue in dispute of payment of employees contribution to ESI/PF after the due date under the relevant Act has been finally settled by the Hon'ble Supreme Court in the case of **Checkmate Services Pvt. Ltd. CIVIL APPEAL NO. 2833 OF 2016** and therefore employee's contribution ESI/PF paid after due date under the relevant is not allowable. Before us, the Ld. Counsel for the assessee claimed that said amount of disallowance of Rs.53.47 lakhs include employee's as well as employer's contribution, however no such breakup of the amount has been given before us, ,therefore, we remit this matter back to the Assessing Officer for verification and if this amount of Rs.53.47 lakhs include any employer's contribution to ESI/PF, then the same may be allowed subject to provisions of section 43B of the Act i.e. paid before the due date of filing of the return of income and employee's

contribution should be considered as per the decision of Hon'ble Supreme Court in Checkmate services P Ltd (supra). The ground No. 10 of the appeal of the assessee is accordingly allowed partly for statistical purposes.

16. In Ground No. 11, the assessee has challenged that provisions of section 115JA of the Act are not applicable over the assessee who is an entity incorporated by the Government of India. The Ld. Counsel referred to the decision of the Hon'ble Kerala High Court in the case of **Kerela State Electricity Board Vs DCIT reported in 329 ITR page 91**, which has been further upheld by the Hon'ble Supreme Court as reported in **447 ITR 193(SC).** The relevant finding of the Hon'ble Kerala High Court is reproduced as under:

> *11. Before we examine the first question a brief survey of the history of Section 115JB is necessary. Chapter XII-B was inserted by the Finance Act of 1987 in the Income Tax Act. Section 115J was introduced for the first time by the said Chapter. The relevant portion of the said Section reads as follows:*
>
> > *"S.115J. Special provisions relating to certain companies.- (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee being a company (other than a company engaged in the business of generation or distribution of electricity), the total income, as computed connected cases. under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1988 but before the 1st day of April, 1991 (hereafter in this section referred to as the relevant previous year), is less than thirty per cent of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent of such book profit.*

*(1A) Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956)*

*Explanation.- For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (1A), as increased by -*

*if any amount referred to in clauses (a) to (f) is debited or, as the case may be, the amount referred to in clauses (g) and (h) is not credited to the profit and loss account, and as reduced by,*

*It can be seen from clause (1) that the provision creates a legal fiction regarding the total income chargeable to tax. Such a fiction is applicable only to those assessees which (a) are Companies except the Companies engaged in the business of either generation or distribution of electricity, (b) that such a fiction is made applicable to the Companies only with reference to the previous year relevant to the assessment year commencing after 1st April, 1988 and ending with the 1st April, 1991, (c) connected cases. the "total income" of the Company as computed under the Act is less than thirty per cent of its "book profit". The fiction being that the total income for the purpose of assessment shall be deemed to be 30% of the book profit. In other words, the Section prescribes 30% of the book profits of those Companies falling within the purview of the Section shall be treated as the total income of the Company for the purpose of income tax, irrespective of the fact that according to the accounts of the Company the "total income" is less than thirty per cent of the book profit. The expression "book profit" itself is explained in the Section as meaning, the net profit as shown in the profit and loss account for the relevant previous year prepared as per the prescription under sub-section (1A) and either increased or decreased by various amounts specified in the various subsequent sub-clauses appended to the Explanation, the details of which are not necessary for the purpose of this case. However, the operation of Section 115J came to an end with 1991-92 assessment year onwards.*

*12. Subsequently, Section 115JA came to be inserted in the Income Tax Act by Finance Act 2 of 1996, with effect from 1.4.1997. The scheme of Section 115JA is*

*almost similar to the scheme of Section 115J. Two major points of difference are that the new Section is applicable with reference to the previous year relevant to the assessment year commencing from 1st April, 1997 and ending with 1st April, 2001. Secondly, the express exclusion of the Companies engaged in the business of either generation or distribution of electricity is absent under Section connected cases. 115JA. The third and most important change is that two provisos are added to sub-section (2) stipulating that -*

*"Provided that while preparing profit and loss account, the depreciation shall be calculated on the same method and rates which have been adopted for calculating the depreciation for the purpose of preparing the profit and loss account laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956):*

*Provided further that where a company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under the Act, the method and rates for calculation or depreciation shall correspond to the method and rates which have been adopted for calculating the depreciation for such financial year or part of such financial year falling within the relevant previous year".*

*The further details of Section 115JA may not be necessary for the present purpose.*

*13. Then came to Section 115JB, which was inserted in the Income Tax Act by Finance Act of 2000 with effect from 1.4.2001. The relevant portion as it stands today reads as follows:-*

*"115JB. Special provision for payment of tax by certain companies.- (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2007 is less than ten per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of ten per cent.*

*(2) Every assessee, being a company shall for the purposes of this section, prepare its profit and loss*

*account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956):*

*Provided that while preparing the annual accounts including profit and loss account,-*

*(i) the accounting policies;*

*(ii) the accounting standards followed for preparing such accounts including profit and loss account;*

*(iii) the method and rates adopted for calculating the depreciation shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956):*

*Provided further that where the company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under this Act,-*

*(i) the accounting policies;*

*(ii) the accounting standards adopted for preparing such accounts including profit and loss account;*

*(iii) the method and rates adopted for calculating the depreciation, shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year failing within the relevant previous year".*

*The scheme of the Section 115JB is similar to Section 115J and Section 115JA. The difference in so far as it is relevant for the present purpose between Section 115JB and its fore-runners (Sections 115J and 115 JA) is as follows:*

*All the 3 Sections (Ss.115J, 115JA and 115JB) create legal fictions regarding the 'total income' (a defined expression under Section 2(45)of the Act) of the Companies. While the earlier two sections mandate the department to make the assessment on a fictitious amount of 'total income' where the actual amount of total income computed in accordance with the I.T Act is less than 30% of the book profits of the Company, Section 115JB mandates the department to*

*resort to the fiction in those cases where the tax payable on the basis of the 'total income' computed in accordance with the I.T.Act is less than a specified percentage (7=% for the years in issue) of the book profit. Further, Sections 115JA and 115JB also stipulate a definite manner of preparing the annual accounts including the profit and loss accounts. More specifically, Section 115JB stipulates that the accounting policies, accounting standards, etc. shall be uniform both for the purpose of income tax as well as for the information statutorily required to be placed, before the annual general meeting conducted, in accordance with Section 210 of the Companies Act, 1956.*

*14. It may be mentioned here that under Section 166 of the Companies Act every Company is mandated to hold a general meeting in each year. Section 210 mandates that every year the Board of Directors of the Company in the general meeting shall lay before the Company a balance sheet as at the end of the relevant period and also a profit and loss account for the period. Parts II and III of Schedule VI to the Companies Act specify the method and manner of maintaining the profit and loss account.*

*15. However, the appellant though is by definition a Company under the Income Tax Act and deemed to be a Company for the purpose of Income Tax Act, (by virtue of the declaration under Section 80 of the Electricity Supply Act) it is not a Company for the purpose of Companies Act. Therefore, the appellant is not obliged to either to convene an annual general meeting or place its profit and loss account in such general meeting. As a matter of fact, a general meeting contemplated under Section 166 of the Companies Act is not possible in the case of the appellant as there are no share holders for the appellant Board. On the other hand, under Section 69 of the Electricity Supply Act, the appellant is obliged to keep proper accounts, including the profit and loss account, and prepare an annual statement of accounts, balance sheet, etc. in such form as may be prescribed by the Central Government and notified in the official gazette. The prescription of the rules in this regard is required to be made in consultation with the Comptroller and Auditor-General of India and also the State Governments. Such accounts of the appellant are required to be audited by the Comptroller and Auditor-General of India or such other person duly authorised by the Comptroller and Auditor-General of India. The accounts so prepared along with the audit report is required to be laid annually before the State Legislature and also to be published in the prescribed manner and*

*copies of such publication shall be made available for sale at a reasonable price, obviously for the benefit of the general public who wish to scrutinise the accounts.*

*16. Thus, it can be seen that coming to the maintenance of the accounts, the appellant though is deemed to be a "Company" - both by virtue of operation of Section 80 of the Income Tax Act for the purpose of Income Tax Act and by virtue of the definition of the expression "Company" under the Income Tax Act (which is already examined earlier) the appellant is required to keep and maintain its accounts in a manner specified by the Central Government, but not in the manner specified in the Companies Act. Therefore, the question is whether the legal fiction contemplated under Section 115JB can be pressed into service while making the assessment of income tax payable by the appellant.*

*17. It must be remembered that Section 115JB creates a legal fiction regarding the total income of the assessees which are Companies. The book profit of the Company is deemed to be total income of the assessee in the circumstances specified in the said Section, which are already noticed earlier. The expression "book profit" for the purpose of the said Section is explained in the Section itself to mean the net profit as increased or decreased by the various amounts shown in the various sub-clauses of the Section. The "net profit" itself must be the net profit as shown in the profit and loss account of the Company. Sub-section (2) mandates that the profit and loss account of the Company is required to be prepared in the manner specified therein. Though in view of the requirement under Section 69 of the Electricity Supply Act the appellant is required to maintain accounts in a different form than the one contemplated under Section 115JB(2), the prescription under Section 69 is only regarding the general duty of the appellant for the purpose of Electricity Supply Act. Nothing in theory prevents the Parliament from obligating the appellant to prepare another profit and loss account as prescribed under Section 115JB(2) for the purpose of the Income Tax Act. The question is whether such an obligation is created under Section 115JB (2) in so far as the appellant is concerned. In examining the said question, the legislative history and the mischief sought to be cured by the Legislature in making the special deeming provision, in our opinion, would be relevant.*

*18. Coming to the legislative history of Section 115JB and its fore-runners - Sections 115J and 115JA - we have already noticed that they*

*provided for the determination of the total income of the Companies by a fictitious process. However, at the earliest point of time when such a fictitious process is invented, i.e. when Section 115J was introduced, the Section expressly excluded from its operation bodies like the appellant. Coming to Section 115JA, though such express exclusion is absent, the Central Board of Direct Taxes issued a Circular - No.762 dated 18th February 1998 - (which is binding on the Department, see K.P. Varghese v. I.T.O. [(1981) 131 ITR 597(SC)]* and Ranadey Micronutrients v. Collector of Central Excise [1996 (97) ELT 19 (SC)] excluding the bodies like the appellant from the operation of the said Section. Though under the normal rules of interpretation of statutes the omission of a clause which existed in the statute at some point of time by a subsequent amendment would indicate that the legislature intended not. These two circulars of the CBDT are, as we shall presently point out, binding on the tax department in administering or executing the provision enacted in sub-s.(2), but quite apart from their binding character, they are clearly in the nature of contemporanea expositio furnishing legitimate aid in the construction of sub-s. (2). The rule of construction by reference to contemporanea expositio is a well-established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. This rule has been succinctly and felicitously expressed in Crawford on Statutory Construction, 1940 Edn., where it is stated in paragraph 219 that "administrative construction (i.e., contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although non-controlling, is nevertheless entitled to considerable weight, it is highly persuasive". to give the benefit of such clause any more to those who were getting the benefit of such exclusion clause, in our opinion, it is not an absolute rule. The other attendant circumstances, the context, the history and the mischief sought to be remedied by the amendment are all required to be examined before reaching at definite conclusion.*

*19. The Circular No.762 not only is binding on the respondents, but also explains the purpose in introducing Section 115JA. The relevant portion reads as follows:-*

*"46.1 In recent times, the number of zero-tax companies and companies paying marginal tax has grown. Studies*

*have shown that in spite of the fact that companies have earned substantial book profits and have paid handsome dividends, no tax has been paid by them to the exchequer.*

*46.2 The Finance Act has inserted a new section 115JA of the Income-tax Act, so as to levy a minimum tax on companies who are having book profits and paying dividends but are not paying any taxes. The scheme envisages the payment of a minimum tax by deeming 30 per cent of the book profits computed under the Companies Act, as taxable income, in a case where the total income as computed under the provisions of the Income-tax Act, is less than 30 per cent of the book profit. Where the total income as computed under the normal provisions of the Income-tax Act, is more than 30 per cent of the book profit, tax shall be charged on the same.*

*46.3 The effective minimum alternate tax, at the existing rates of taxation works out to 12 percent of the book profits.*

*46.4 Income arising from free trade zone (FTZ), export oriented undertakings (EOUs), charitable activities, investment by a venture capital company and other exempted incomes (section 10) are excluded from the purview of the alternate tax.*

*46.5 Since the alternate tax is applicable only where the normal total income computed is less than 30 per cent of the book profits, so long as the enterprises (other than FTZ units and EOUs) earning income from export profits do not have their component of export income higher than 70 per cent of the book profits, the provisions of section 115JA will not be attracted. In other words, the MAT will apply only to such cases where export profits forming part of book profits of an assessee exceed 7- per cent of the total profits.*

*46.6 Companies engaged in the business of generation and distribution of power and those enterprises engaged in developing, maintaining and operating infrastructure facilities under sub-section (4A) of section 80--IA are exempted from the levy of MAT, so that the incentive given to infrastructure development is not affected". It can be seen from the above that the legislature took note of the fact that a number of Companies paying marginal tax and also zero-tax has grown. Such Companies earned substantial book profits and paid handsome dividends to the share holders without paying any tax to the*

*exchequer. Such a result was achieved by such Companies by taking advantage of the then existing legal position which permitted the adoption of dual accounting policies and practices, one for the purpose of computation of income tax and another for the purpose of determining the book profits for the purpose of payment of dividends. Therefore, the amendment was made to plug the loophole in the law. However, the CBDT understood that Companies engaged in the business of generation and distribution of electricity and Enterprises engaged in developing, maintaining and operating infrastructure facilities, as a matter of policy, are not brought within the purview of the amendment (Section 115JA) for the reason that such a policy would promote the infrastructural development of the country. Such an understanding of the CBDT is binding on the department.*

*20. If that is the background in which Section 115JA is introduced into the Income Tax Act, Section 115JB, which is substantially similar to Section 115JA, in our opinion, cannot have a different purpose and need not be interpreted in a manner different from the understanding of the CBDT of Section 115JA.*

*21. Another submission made by the learned counsel for the appellant is that in view of the judgment of the Supreme Court in C.I.T. v. B.C.Srinivasa Setty [(1981) 128 ITR 294 (SC)] and CIT v. Eli Lilly and Co. (India) P.Ltd. [(2009) 312 ITR 225 (SC)], where the computation provision could not be applied in a particular case, it is indicative of the fact that the charging Section also would not apply. It was held in B.S.Srinivasa Setty's case (supra) as follows:-*

*"Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by s.45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s.45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the I.T.Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and*

*the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision. That pertains to the fundamental integrality of the statutory scheme provided for each head".*

*In Eli Lilly and Co. (India) P.Ltd. case (supra) also, the apex Court has held as follows:-*

*"On the question as to whether there is any inter-linking of the charging provisions and the machinery provisions under the 1961 Act, we may, at the very outset, point out that in the case of CIT v. B.C.Srinivasa Setty reported in [1981] 128 ITR 294 this court has held that the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section".*

*22. Another reason is that the appellant or bodies similar to the appellant, which are totally owned by the Government - either State or Central - have no share holders. Profit, if at all, made by the appellant would be for the benefit of entire body politic of the State of Kerala. In the final analysis, all taxation is meant for the welfare of the people in a Constitutional Republic. Therefore the enquiry as to the mischief sought to be remedied by the amendment becomes irrelevant. Therefore, we are of the opinion that the fiction fixed under Section 115JB cannot be pressed into service against the appellant while making the assessment of the tax payable under the Income Tax Act.*

16.1 The Hon'ble supreme in Civil No. 151,152, 154 and 13571 of 2015 upheld the decision of Hon'ble Kerala High Court observing as under:

> *2. The judgment under appeal was rendered by the Division Bench of the Kerala High Court in Kerala State Electricity Board v. Dy. CIT [20101 8 taxmann.com 118/[2011]196 Taxman 1/[2010] 329 ITR 91.*
>
> *3. We have gone through the circumstances on record and considered the rival submissions. In our view, no interference is called for. We, therefore, dismiss this appeal.*

16.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Hon'ble Kerala High Court(supra) observed that the assessee is a company wholly owned by the Government; therefore, it was not obliged to either to convene an annual general meeting or place its profit and loss account in such general body meetings. The Hon'ble Kerala High Court has ***firstly***, held that the assessee was required to maintain its books of accounts in a manner specified by the Central Government, but not in the manner specified in the Companies Act, 1956, which is the requirement of provisions of section 115JA of the Act, thus section 115JA should not be applicable over government companies. ***Secondly***, referred to the CBDT Circular (supra) and observed that Companies engaged in business of electricity generation were stated to be exempted from the provision of section 115JA of the Act and such an understanding was binding on the Income-tax authorities. Further, held that assessee or body similar, who are totally owned by the Government, have no shareholders,

thus profit would be for the benefit of the public at large and taxation being meant for the welfare of the people, the mischief sought to be remedied by way of amendment (i.e. introduction of section 115JA/115JB becomes irrelevant, therefore, the fiction of section 115JB( in our case section 115JA) cannot be pressed into service against the assessee.

16.3 The assessee before us being a company wholly owned by the Government of India, therefore, in view of the decision of the **Hon'ble Kerala High Court (supra)**, as upheld by the Hon'ble Supreme Court, we hold that the assessee is not liable to be taxed under the provisions of section 115JA of the Act. Accordingly, the ground of appeal of the assessee is allowed.

17. The ground Nos. 12 to 16 have been raised as an alternative plea to ground No. 11, since we have already allowed relief to the assessee on ground No. 11 , therefore, the ground Nos. 12 to 16 of the appeal are rendered academic and therefore dismissed as infructuous.

18. The ground Nos. 17 and 18 of the appeal of the assessee are consequential in nature and therefore same are not required to be adjudicated upon and same dismissed as infructuous.

**AY 1999-2000**

19. Now, we take up the appeal of the assessee for AY 1999-2000. The grounds raised by the assessee are reproduced as under:

1. *The learned Commissioner (Appeals) erred in confirming as income of the appellant an amount of Rs. 1,986.21 lacs, being Decommissioning Levy collected by the appellant.*
2. *The learned Commissioner (Appeals) erred in confirming as income of the appellant an amount of Rs.2,278.46 lacs, being interest credited to Decommissioning Fund.*
3. *The learned Commissioner Appeals erred in confirming as income of the appellant an amount of Rs.4,965.52 lacs, being Renovation & Modernisation levy collected by the appellant.*
4. *The learned Commissioner (Appeals) erred in confirming as income of the appellant an amount of Rs.322.09 lacs, being interest credited to Renovation and Modernisation fund.*
5. *Without prejudice to Grounds 3 and 4 above, the learned Commissioner (Appeals) erred in holding that the amount collected towards Renovation & Modernisation levy was not in the nature of a capital receipt exempt from tax.*
6. *The learned Commissioner (Appeals) erred in confirming as income of the appellant an amount of Rs.2,979.31 lacs, being Research & Development levy collected by the appellant.*
7. *The learned Commissioner (Appeals) erred in confirming as income of the appellant an amount of Rs.206.57 lacs, being interest credited to Research and Development fund.*
8. *Without prejudice to Grounds 6 and 7 above, the learned Commissioner (Appeals) erred in holding that a portion of the amount collected towards Research & Development levy was not in the nature of a capital receipt exempt from tax.*

9. 9. *The learned Commissioner (Appeals) erred in confirming the action of the Assistant Commissioner of taxing as income the following amounts which had been reduced by the appellant from the expenditure incurred during construction:*

| ***Sr. No.*** | ***Particulars*** | ***Amount*** |
|---|---|---|
| *1.* | *Consultancy receipts* | *103.52* |
| *2.* | *Other Income (including interest income - other than on surplus funds)* | *598.89* |
| | ***Total*** | ***702.41*** |

10. *Without prejudice to Ground 9 above, the learned Commissioner (Appeals) erred in not clearly directing the Assistant Commissioner to re-compute the depreciation allowable to the appellant pursuant to the exclusion of the income reduced from expenditure during construction. The learned Commissioner (Appeals) ought to have clearly directed the Assistant Commissioner to recompute the depreciation for the assessment year 1999-2000 and subsequent assessment years.*
11. *11. The learned Commissioner (Appeals) erred in confirming the action of the Assistant Commissioner of disallowing an amount of Rs.87.74 lacs under section 43B claimed by the appellant in the course of the assessment proceedings.*
*The learned Commissioner (Appeals) ought to have appreciated that the amounts were paid by the appellant during the previous year and therefore were not to be disallowed.*
12. *The learned Commissioner (Appeals) erred in holding that the provisions of section 115JA apply to the appellant.*
13. *The learned Commissioner (Appeals) erred in confirming the action of the Assistant Commissioner in holding that the other income of the appellant was not derived from the business of generation of power.*
14. *The learned Commissioner (Appeals) erred in confirming the action of the Assistant Commissioner*

*in including the following amounts as being part of book profits under section 115JA:*

| ***Sr. No.*** | ***Particulars*** | ***Amount*** |
|---|---|---|
| *a)* | *Interest income on deposits with banks* | *10,077.98* |
| *b)* | *Interest income from Inter Corporate Deposits* | *267.46* |
| *c)* | *Interest on staff loan* | *225.12* |
| *d)* | *Interest Others* | *222.63* |
| *e)* | *Delayed payment charges* | *9,312.97* |
| *f)* | *Miscellaneous receipts* | *694.82* |
| | ***Total*** | ***20,800.98*** |

*The learned Commissioner (Appeals) ought to have appreciated that the above incomes were inextricably linked to the business of generation of power and were therefore derived from the business of generation of power. On this basis, the above amounts were to be excluded from book profits in accordance with Explanation (iv) to section 115JA (2).*

15. *The learned Commissioner (Appeals) erred in not allowing deduction for expenditure incurred by the appellant in earning the income of Rs. 20,800.98 lacs, in computing the book profits of the appellant.*

16. *The learned Commissioner (Appeals) erred in holding that there is no difference in facts for the assessment year in appeal vis-à-vis the assessment year 1998-1999 as regards the source of funds from which the amounts were placed in bank fixed deposits. The Commissioner (Appeals) erred in not verifying the facts for the assessment year under appeal.*

17. *Without prejudice to Grounds 12 to 16 above, the learned Commissioner (Appeals) erred in confirming the action of the Assistant Commissioner in making adjustments to the Profit and Loss account prepared by the appellant. The learned Commissioner (Appeals) ought to have appreciated that no adjustments can be made to the Profit and Loss Account, other than those specified in the Explanation to section 115JA(2).*

*18. 18. Each one of the above grounds of appeal is without prejudice to the other.*

20. The additional grounds filed by the assessee on 18.07.2018, are reproduced as under:

1. *The ground of appeal is independent and without prejudice to other grounds of appeal filed earlier, pending disposal.*
2. *The learned Assistant Commissioner of Income Tax erred in passing assessment order under section 143(3) dated 11th March 2002 where the assessment proceedings were initiated by the Deputy Commissioner of Income Tax. Such order passed is bad in law, in the absence of an order transferring, jurisdiction under section 127 to the Assistant Commissioner of Income Tax.*
3. *Your appellants crave leave to add, alter, amend, vary, omit or substitute the aforesaid ground of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal as they may be advised*

20.1 The identical additional grounds raised by the assessee have been admitted in appeal for AY 1998-99, but after detailed discussion and following finding of the Tribunal in the case **Stock Traders P Ltd (supra),** same have been dismissed. Accordingly, following our finding in AY 1998-99, the additional grounds of the appeal for year under consideration are accordingly dismissed.

21. Now, we take up the regular grounds of appeal of the assessee. The ground Nos. 1 and 2 of the appeal relate to **receipt of de-commissioning levy** by the assessee and the **interest credited on**

**the de-commissioning fund** respectively. The issues in dispute being identical to ground Nos. 5 and 6 raised in assessment year 1998-99, therefore, following our finding in ITA No. 202/Mum/2004 for assessment year 1998-99, the ground No. 1 is dismissed, whereas the ground No. 2 is allowed for statistical purposes,.

22. The ground Nos. 3 and 4 of the appeal of the assessee relate to amount of **receipt of Rs. 4965.52 lakhs by way of renovation and modernization levy** and **interest of Rs. 322.09 lakhs credited to the renovation and modernization fund** respectively. In ground no. 5, the assessee has prayed for treating the **receipt of Rs. 4965.52 lakhs by way of renovation and modernization levy** as capital receipt. The issues in dispute raised in above grounds have already been adjudicated by us in the appeal for assessment year 1998-99 ,therefore, following our finding in ground the appeal for assessment year 1998-99, the issues in dispute are decided mutatis mutandis.

23. The ground Nos. 6 to 8 of the appeal of the assessee relate to amount of Rs. 2979.31 lakhs collected by way of **research and development levy**, **interest** of Rs. 206.57 lakhs credited to research and development fund and research and development levy being in the nature of **capital receipt**. The identical grounds have been decided by us while adjudicating ground Nos. 3 and 4 of the appeal of the assessee for assessment year 1998-99 ,therefore,

respectfully following the same, the ground Nos. 6 to 8 of the appeal of the assessee are decided mutatis mutandis.

24. The ground No. 9 of the appeal of the assessee relates to assessing of 'consultancy receipt' and 'other income' including interest income amounting to Rs.702.41 lakhs under the head 'income from other sources'. The identical issue has been decided by us while adjudicating ground no. 7 of the appeal of the assessee for assessment year 1998-99. Therefore, following our finding in assessment year 1998-99 the ground no. 8 is adjudicated mutatis mutandis.

25. The ground No. 10 of the appeal has been raised without prejudice to ground No.9 of the appeal and relates to claim of depreciation allowance consequent to treatment of income incurred during construction of the projects. As far as depreciation on cost of project eligible for depreciation in the year under consideration, the ld CIT(A) has already directed the Assessing Officer as under:

> *"12.1. With reference to this ground of appeal, the Ld. A.R. inter-alia submitted as under:*
>
> *"The learned Additional Commissioner erred in disallowing an amount of Rs.7 lacs as prior period expenditure. The appellant submits that as the expenditure had crystallized during the previous year relevant to the assessment year 1998-99, the said expenditure was fully allowable as a deduction.*
>
> *The appellant in the return of income at Note 4 had submitted as under:*
>
> *"The prior period expenses (other than depreciation) as per Schedule 13 to the audited Annual Accounts are Rs.2782.25 lacs prior to netting off of*

*prior period income of Rs.1155.11 lacs. The liability in respect of such prior period expenses have arisen during the current year. Secondly, accordingly to the method of accounting followed by the assessee the cut-off date for accounting liabilities for the year is 30th June. Thereafter the expenditure is accounted for in the subsequent year. The said prior year's adjustments arise on this account from year to year and hence is an allowable expenditure for the Assessment Year 1998-99."*

*The details of the prior period adjustments were provided in the Annual Report at Schedule 13. The net amount of Rs.2,583.13 lacs was claimed as a deduction by the appellant.*

*The learned Additional Commissioner vide letter dated August 16, 2000 requested the appellant to submit details of the prior period expenses and also requested the appellant to make submissions as to why disallowances should not be made in respect of the said expenditure. The appellant submitted the information requested vide letters dated November 27, 2000, December 12, 2000 and January 12, 2001. The information was furnished in respect of each item of expenditure and explanations were also provided in that respect. However, information in respect of legal expenses aggregating to Rs.7 lakhs was not received by the appellant and the same could not be furnished during the course of the assessment proceedings.*

*The learned Additional Commissioner in the assessment order held that the legal expenses incurred are not deductible in the absence of details.*

*The appellant submits that the learned Additional Commissioner ought to have appreciated that producing evidence in respect of every item of expenditure is not possible for an organisation of the size of the appellant.*

*The appellant further submits that the expenditure had crystallized during the previous year relevant to the assessment year 1998-99 and therefore ought to have been allowed by the Additional Commissioner.*

*The appellant submits considering the size of the organisation and the fact that obtaining information from various stations located at remote places there are at times instances where there is a delay in accounting of various expenditure. Such delays in accounting should not result in the appellant being denied a deduction for expenditure which has been otherwise allowable*

*In view of the above, the appellant submits that the learned Additional Commissioner may be directed to allow deduction for the legal expenses aggregating to Rs.7 lacs. Alternatively, the appellant submits that the learned Additional Commissioner may be directed to allow deduction for the expenditure after verifying the details that may be produced at the time of giving effect to the appellate order."*

25.1 Since the ground no. 9 of the appeal has already been dismissed, therefore, the consequent claim of depreciation allowance in subsequent assessment years, if not allowed by the Assessing Officer, then it is a matter of rectification, for which the assessee should have sought proper remedy before the relevant income-tax authority. However, in the interest of justice, we restore the matter to the file of the Assessing officer for examination and consider the request of the assessee in accordance with law. The ground is accordingly allowed for statistical purpose.

26. The Ground No. 11 relates to disallowance of Rs 87.74 lakhs towards contribution to provident fund and claimed by the assessee as allowable under the provisions of section 43B of the Act as paid before due date of filing of return of income. We find that in view of the decision of Hon'ble Supreme Court in the case of **Checkmate services p ltd CIVIL APPEAL NO. 2833 OF 2016 ,** the employee's contribution to provident fund paid after due date under relevant act is not allowable. In the case , before us ,it has not been made clear by way of evidences that the payment relates either to employee's contribution or to employer's contribution , therefore, in the interest of justice, we restore this matter to the Assessing Officer for verification and decide in accordance with law. The ground No. 11 of the appeal is allowed for statistical purpose.

27. In ground No. 12, the assessee has challenged that provisions of section 115JA are not applicable in the case of the assessee. The identical ground has been adjudicated by us in assessment year 1998-99 and therefore following our finding in assessment year 1998-99, the ground No. 12 of the appeal is adjudicated mutatis mutandis.

28. The ground Nos. 13 to 16 have been raised by the assessee alternatively to ground No. 12 of the appeal. Since ground No. 12 has been already adjudicated in favour of the assessee, therefore, these grounds are rendered academic only. Accordingly, same are dismissed as infructuous.

29. In ground No. 17 of the appeal, the assessee has raised the issue of adjustments to book profit u/s 115JA of the Act. Since, we have already held that section 115JA is not applicable over the assessee; therefore, this issue is merely academic hence dismissed as infructuous.

**AY 2000-01**

30. Now we take up the appeal of the assessee for assessment year 2000-01. The grounds raised by the assessee in form No. 36 filed on 05/05/2004 are reproduced as under:

> *"The appellant company objects to the appellate order dated 15 March 2004 passed by the Commissioner of Income-tax (Appeals)- III, Mumbai [*

*CIT (A)] under section 250 of the Income Tax Act, 1961 ('the Act) on the following grounds:*

***Decommissioning charges***

1. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 2,198.10 lacs, being Decommissioning Levy collected by the appellant.*
2. *The learned CIT (A) erred in confirming as income of the appellant an amount of Rs.2,802.93 lacs, being interest credited to Decommissioning Fund.*

***Renovation & Modernisation levy***

3. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 5,495.24 lacs, being Renovation & Modernisation levy collected by the appellant.*
4. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 1,398.90 lacs, being interest credited to Renovation and Modernisation fund.*
5. *Without prejudice to Grounds 3 and 4 above, the learned CIT(A) erred in holding that the amount collected towards Renovation & Modernisation levy was not in the nature of a capital receipt and accordingly taxable.*

***Research & Development levy***

6. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs.3,297.14 lacs, being Research & Development levy collected by the appellant.*
7. *The learned CIT (A) erred in confirming as income of the appellant an amount of Rs.885.08 lacs, being interest credited to Research and Development fund.*
8. *Without prejudice to Grounds 6 and 7 above, the learned CIT(A) erred in holding that a portion of the amount collected towards Research & Development levy was not in the nature of a capital receipt and accordingly taxable.*

***Income arising from / during construction activities***

9. *The learned CIT(A) erred in confirming the action of the Assistant Commissioner of taxing as income the following amounts which had been reduced by the appellant from the expenditure incurred during construction:*

| ***Sr. No.*** | ***Particulars*** | ***Amount (Rs. in Lacs)*** |
|---|---|---|
| | *Staff loan* | *59.80* |
| | *Interest on others* | *440.83* |
| | *Consultancy receipts* | *64.49* |

| | | |
|---|---|---|
| | *Other Income (including interest income – other than on surplus funds)* | *1,998.59* |
| | ***Total*** | ***2,563.71*** |

***Disallowance for provision made for obsolete stock***

10. *The learned CIT (A) erred in confirming the action of the Assistant Commissioner of disallowing the provision made for loss and obsolete stock of Rs. 36.22 lacs*

***Taxability under section 115JA of the Act***

11. *11. The leamed CIT(A) erred in holding that the provisions of section 115JA apply to the appellant.*
12. *The learned CIT(A) erred in confirming the action of the Assistant Commissioner in holding that the other income of the appellant was not derived from the business of generation of power.*
13. *13. The learned CIT(A) erred in confirming the action of the Assistant Commissioner in including the following amounts as being part of book profits under section 115JA:*

| **Sr. No.** | **Particulars** | **Amount (Rs. In Lacs)** |
|---|---|---|
| a. | Interest income on deposits with banks | 10.870.92 |
| b. | Interest income from Inter Corporate Deposits | 184.75 |
| c. | Interest on staff loan | 364.37 |
| d. | Interest Others | 445.17 |
| e. | Gain on sale of fixed assets | 10.96 |
| f. | Miscellaneous receipts | 560.24 |
| g. | Income on R & M funds and R & D funds credited to the respective funds | 841.79 |
| | **Total** | **13,278.20** |

*The learned CIT (A) ought to have appreciated that the above incomes were inextricably linked to the business of generation of power and were therefore derived from the business of generation of power. On this basis, the above amounts were to be excluded from book profits in accordance with Explanation (iv) to section 115JA(2).*

14. *The learned CIT(A) erred in not allowing deduction for expenditure incurred by the appellant in earning the income of Rs. 13,278.20 lacs, in computing the book profits of the appellant.*
15. *15. The learned CIT(A) erred in holding that there is no difference in facts for the assessment year in appeal vis-à-vis the assessment years 1998-1999 and 1999-2000 as regards the source of funds from which the amounts were placed in bank fixed deposits. The learned CIT(A) erred in not verifying the facts for the assessment year under appeal.*

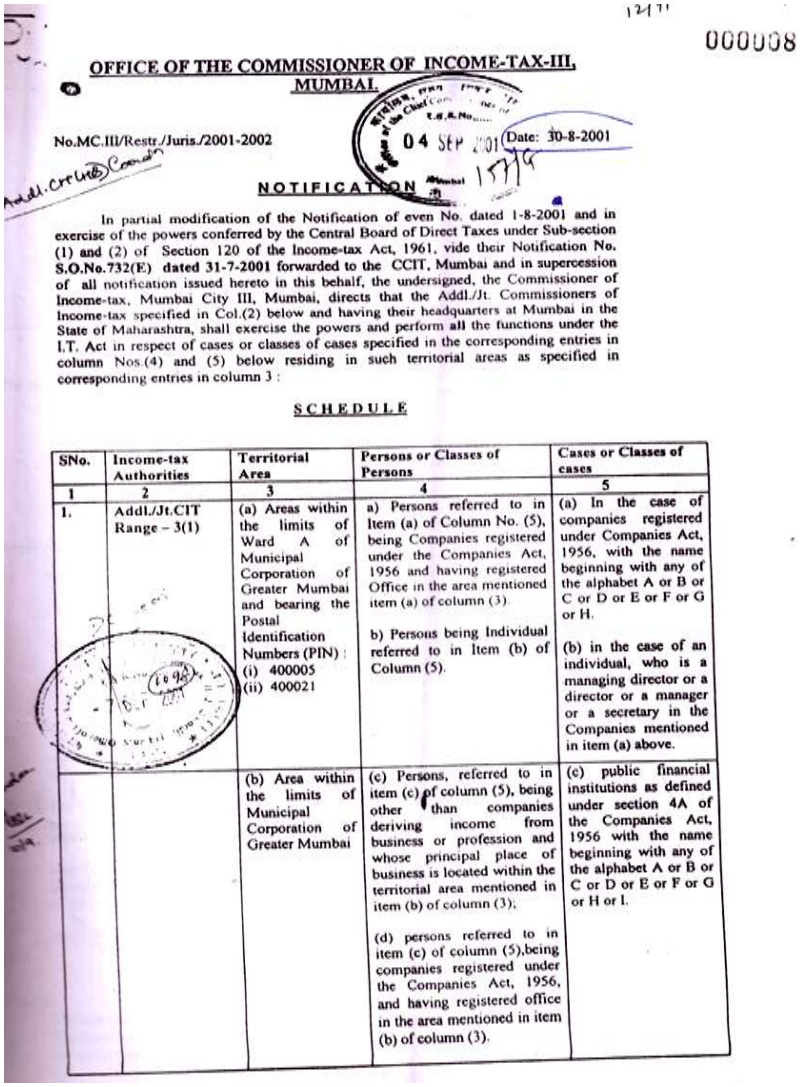
*16. Without prejudice to Grounds 11 to 15 above, the learned CIT(A) erred in confirming the action of the Assistant Commissioner in making adjustments to the Profit and Loss account prepared by the appellant. The learned CIT(A) ought to have appreciated that no adjustments can be made to the Profit and Loss Account, other than those specified in the Explanation to section 115JA(2).*

31. Further, the assessee filed additional ground on 18/07/2018, which are reproduced as under:

1. *The ground of appeal is independent and without prejudice to other grounds of appeal filed earlier, pending disposal.*
2. *The learned Assistant Commissioner of Income Tax erred in passing assessment order under section 143(3) dated 26th February 2003 where the assessment proceedings were initiated by the Deputy Commissioner of Income Tax. Such order passed is bad in law, in the absence of an order transferring, jurisdiction under section 127 to the Assistant Commissioner of Income Tax.*
3. *Your appellants crave leave to add, alter, amend, vary, omit or substitute the aforesaid ground of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal as they may be advised*

31.1 Before us, the Ld Counsel for the assessee relied upon his submission for AY 1998-99. The ld DR submitted that in the additional ground raised for the year under consideration, the assessee has challenged that notice under section 143(2) of the Act was issued by the Deputy Commissioner of income-tax, whereas the assessment order has been passed by the Asst Commissioner of income-tax. He referred to his submission in the appeal for assessment year 98-99 that post restructuring in the Income tax department, the special ranges were abolished and all cases assessed under those special ranges were transferred to the jurisdiction of normal ranges. Accordingly, the case of the assessee was transferred to Range 3(2), Mumbai, under the charge of the

same Commissioner i.e. Commissioner of income-tax-III, Mumbai. The scanned copy of notification issued by the Commissioner of income-tax-III, Mumbai, distributing the case i.e Company having alphabet N, under the range 3(2), filed by the ld DR is extracted as under:



000008

**OFFICE OF THE COMMISSIONER OF INCOME-TAX-III, MUMBAI**

No.MC.III/Restr./Juris./2001-2002 Date: 30-8-2001

**NOTIFICATION**

In partial modification of the Notification of even No. dated 1-8-2001 and in exercise of the powers conferred by the Central Board of Direct Taxes under Sub-section (1) and (2) of Section 120 of the Income-tax Act, 1961, vide their Notification No. S.O.No.732(E) dated 31-7-2001 forwarded to the CCIT, Mumbai and in supercession of all notification issued hereto in this behalf, the undersigned, the Commissioner of Income-tax, Mumbai City III, Mumbai, directs that the Addl./Jt. Commissioners of Income-tax specified in Col.(2) below and having their headquarters at Mumbai in the State of Maharashtra, shall exercise the powers and perform all the functions under the I.T. Act in respect of cases or classes of cases specified in the corresponding entries in column Nos.(4) and (5) below residing in such territorial areas as specified in corresponding entries in column 3 :

**SCHEDULE**

| SNo. | Income-tax Authorities | Territorial Area | Persons or Classes of Persons | Cases or Classes of cases |
|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 |
| 1. | Addl./Jt.CIT Range – 3(1) | (a) Areas within the limits of Ward A of Municipal Corporation of Greater Mumbai and bearing the Postal Identification Numbers (PIN) : (i) 400005 (ii) 400021 | a) Persons referred to in Item (a) of Column No. (5), being Companies registered under the Companies Act, 1956 and having registered Office in the area mentioned item (a) of column (3).<br><br>b) Persons being Individual referred to in Item (b) of Column (5). | (a) In the case of companies registered under Companies Act, 1956, with the name beginning with any of the alphabet A or B or C or D or E or F or G or H.<br><br>(b) in the case of an individual, who is a managing director or a director or a manager or a secretary in the Companies mentioned in item (a) above. |
| | | (b) Area within the limits of Municipal Corporation of Greater Mumbai | (c) Persons, referred to in item (c) of column (5), being other than companies deriving income from business or profession and whose principal place of business is located within the territorial area mentioned in item (b) of column (3);<br><br>(d) persons referred to in item (c) of column (5),being companies registered under the Companies Act, 1956, and having registered office in the area mentioned in item (b) of column (3). | (c) public financial institutions as defined under section 4A of the Companies Act, 1956 with the name beginning with any of the alphabet A or B or C or D or E or F or G or H or I. |

| | | | | |
|---|---|---|---|---|
| 2. | Addl./Jt.CIT Range – 3(2) | (a) Areas within the limits of Ward AD of Municipal Corporation of Greater Mumbai and bearing the Postal Identification Numbers (PIN) : (i) 400005 (ii) 400021 | a) Persons referred to in Item (a) of Column No. (5), being Companies registered under the Companies Act, 1956 and having registered Office in the area mentioned item (a) of column (3).<br><br>b) Persons being Individual referred to in Item (b) of Column (5). | (a) In the case of companies registered under Companies Act, 1956, with the name beginning with any of the alphabet I or J or K or L or M or N or O or P.<br><br>(b) in the case of an individual, who is a managing director or a director or a manager or a secretary in the Companies mentioned in item (a) above. |
| | | (b) Area within the limits of Municipal Corporation of Greater Mumbai | (c) Persons, referred to in item (c) of column (5), being other than companies deriving income from business or profession and whose principal place of business is located within the territorial area mentioned in item (b) of column (3);<br><br>(d) persons referred to in item (c) of column (5),being companies registered under the Companies Act, 1956, and having registered office in the area mentioned in item (b) of column (3). | (c) public financial institutions as defined under section 4A of the Companies Act, 1956 with the name beginning with any of the alphabet J or K or L or M or N or O or P. |
| 3. | Addl./Jt.CIT Range – 3(3) | (a) Areas within the limits of Ward A of Municipal Corporation of Greater Mumbai and bearing the Postal Identification Numbers (PIN) : (i) 400005 (ii) 400021 | a) Persons referred to in Item (a) of Column No. (5), being Companies registered under the Companies Act, 1956 and having registered Office in the area mentioned item (a) of column (3).<br><br>b) Persons being Individual referred to in Item (b) of Column (5). | (a) In the case of companies registered under Companies Act, 1956, with the name beginning with any of the alphabet Q o R or S or T or U or V or W or X or Y or Z.<br><br>(b) in the case of an individual, who is a managing director or a director or a manager or a secretary in the Companies mentioned in item (a) above. |

| | | | |
|---|---|---|---|
| | (b) Area within the limits of Municipal Corporation of Greater Mumbai | (c) Persons, referred to in item (c) of column (5), being other than companies deriving income from business or profession and whose principal place of business is located within the territorial area mentioned in item (b) of column (3);<br><br>(d) persons referred to in item (c) of column (5),being companies registered under the Companies Act, 1956, and having registered office in the area mentioned in item (b) of column (3). | (c) public financial institutions as defined under section 4A of the Companies Act, 1956 with the name beginning with any of the alphabet Q o R or S or T or U or V or W or X or Y or Z. |

The above notification shall take effect from 01-08-2001.

Sd/=
( SUDHAKAR MISHRA )
Commissioner of Income-tax
Mumbai City III, Mumbai.

31.2 In view of returned income of the assessee for the year under consideration being more than threshold limit prescribed, the case was transferred to unit i.e. circle 3(2) , Mumbai [ falling under Range 3(2), Mumbai] which was headed by the officer in the rank of Assistant/ Deputy Commissioner of Income-tax . At the time of the issue of notice under section 143(2), the unit was headed by the officer in the rank of the Deputy Commissioner of Income-tax but subsequently, he might have been transferred and in his place officer in the rank of Asst Commissioner of income-tax, must have been posted, and therefore assessment order has been passed by the officer in the rank of Asst Commissioner of income-tax. Therefore there is no change in the jurisdiction of the assessee,

because it remained with the same unit i.e. circle-3(2) or Range-3(2) at the time of initiation of assessment proceeding as well as at the time of completion of the assessment proceeding.

31.2 We have heard rival submission of the parties on the issue of jurisdiction in passing the assessment order challenged by the assessee. The identical additional grounds raised by the assessee have been admitted in appeal for AY 1998-99, but after detailed discussion and following finding of the Tribunal in the case **Stock Traders P Ltd (supra),** same have been dismissed. Accordingly, following our finding in AY 1998-99, the additional grounds of the appeal for year under consideration are accordingly dismissed.

32. Now we take up the regular ground raised by the assessee. The ground No. one and two of the appeal of the assessee, relate to receipts of ₹ 2,198.10 lakhs by way of decommissioning levy and interest of rupees 2802.93 credited to decommissioning levy fund respectively. The issues in dispute being identical to ground Nos. 5 and 6 raised in assessment year 1998-99, therefore, following our finding in ITA No. 202/Mum/2004 for assessment year 1998-99, the issues are decided mutatis mutandis.

33. The ground Nos. 3 and 4 of the appeal of the assessee relate to amount of **receipt of Rs. 5495.24 lakhs by way of renovation and modernization levy** and **interest of Rs. 1398.90 lakhs**

**credited to the renovation and modernization fund** respectively. In ground no. 5 , the assessee has prayed for treating the **receipt of Rs. 5495.24 lakhs by way of renovation and modernization levy** as capital receipt. The issues in dispute raised in above grounds have already been adjudicated by us in the appeal for assessment year 1998-99 ,therefore, following our finding in appeal for assessment year 1998-99, the issues in dispute are decided mutatis mutandis.

34. The ground Nos. 6 to 8 of the appeal of the assessee relate to amount of Rs. 3297.14 lakhs collected by way of **research and development levy** , **interest** of Rs. 885.08 lakhs credited to research and development fund and research and development levy being in the nature of **capital receipt** respectively. The identical grounds have been decided by us while adjudicating ground Nos. 3 and 4 of the appeal of the assessee for assessment year 1998-99 ,therefore, respectfully following the same the ground Nos. 6 to 8 of the appeal of the assessee are decided mutatis mutandis.

35. The ground No. 9 of the appeal of the assessee relates to assessing of 'consultancy receipt' and 'other income' including interest income amounting to Rs.2563.71 lakhs as income from other sources. The identical issue has been decided by us while adjudicating ground no. 7 of the appeal of the assessee for assessment year 1998-99. Therefore, following our finding in

assessment year 1998-99 the ground no. 8 of the appeal is adjudicated mutatis mutandis.

36. The ground No. 10 of the appeal relates to disallowance of provision for the loss/obsolete stock of ₹ 36,22, 537/-. The assessee submitted unit -wise breakup of provision of loss/obsolete stock, which is reproduced as under:

| Unit | Rs. |
|---|---|
| TAPS | 7,82,025 |
| MApS | 25,69,758 |
| KAPS | 2,70,754 |
| **Total** | **36,22,527** |

36.1 Regarding the unit KAPS, the assessee submitted that amount of ₹2,70,754/- represented actual loss due to fire in the godown. The Assessing Officer accordingly allowed the said claim of the loss, but regarding the other provisions for slow-moving stock no details were provided by the assessee as how same became obsolete. Therefore he disallowed the balance amount of ₹ 33.52 lakhs while computing the assessed income. The Ld. CIT(A) upheld the disallowance observing as under:

> *"15.2. I have considered the foregoing submissions. The case law cited by the learned A.R. is not applicable to the facts of the appellant's case. I am in agreement with the AO that slow moving spares do not amount to mean that the same have become useless. In my considered opinion there is no plausible justification for the appellant to seek to book a loss by resorting to the revaluation of stock of spare parts which are meant for the appellant's own internal use. The disallowance is. Therefore, confirmed."*

36.2 Before us the learned counsel of the assessee submitted that provision was made on the basis of a committee set up to ascertain value of slow-moving stock/obsolete stock. It was submitted that said provision was being made consistently and has not been challenged in the past. The learned counsel for the assessee relied on following decisions in support of its claim:

a. ***CIT v Hotline Teletube & Components Ltd. (175 Taxman 286)Delhi HC)***
b. ***CIT v Hughes Communications India Ltd. (215 Taxman 136)Delhi HC)***
c. ***CIT v Becton Dickinson (India (P.) Ltd. (214 Taxman 636)(Delhi HC)***

36.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. If a wrong claim has been allowed in the earlier year same cannot be ground for allowing in the year under consideration also. The Hon'ble Supreme Court in the case of **Distributor (baroda) Private Limited 1985 AIR 1585, 1985 SCR Supl. (1) 778** held that there is no heroism in continuing the error and it should be corrected when pointed out. Though the learned counsel of the assessee has relied on various decisions cited, but the factual information of the list of such stock and how same became obsolete was not submitted before the lower authorities. Before us also no such evidences have been submitted to establish that relevant stock became obsolete. Unless properly identified the obsolete stock or a scientific way of making provision for such an obsolete stock is produced with

documentary evidence, the claim of the assessee cannot be allowed. Therefore, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute, and accordingly, we uphold the same. The ground No. 10 of the appeal of the assessee is dismissed.

37. The ground No. 11 of the appeal of the assessee relates to applicability of section 115JA or the case of the assessee. The identical ground has been adjudicated by us in assessment year 1998-99 and therefore following our finding in assessment year 1998-99, the ground No. 11 of the appeal is allowed in favour of assessee.

38. The ground Nos. 12 to 15 have been raised by the assessee alternatively to ground No. 11 of the appeal. Since ground No. 11 has been already adjudicated in favour of the assessee, therefore, these grounds are rendered academic only. Accordingly, same are dismissed as infructuous.

39. In ground No. 16 of the appeal, the assessee has raised the issue of adjustments to book profit u/s 115JA of the Act. Since, we have already held that section 115JA is not applicable over the assessee, therefore, this issue is merely academic hence dismissed as infructuous.

## AY 2001-02

40. Now we take up the appeal of the assessee for assessment year 2001-02. The grounds raised by the assessee in form No. 36 dated 02/06/2008 are reproduced as under:

> *The appellant company objects to the appellate order dated 30 March 2007 passed by the Commissioner of Income-lax (Appeals)-III, Mumbai [ CIT (A)'| under section 250 of the Income Tax Act, 1961 ('the Act) on the following grounds:*
>
> ***Decommissioning Levy***
>
> 1. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 2,955. 19 lacs, being Decommissioning Levy collected by the appellant.*
> 2. *The learned CIT (A) erred in confirming as income of the appellant an amount of Rs.3,292.31 lacs, being interest credited to Decommissioning Fund.*
>
> ***Renovation & Modernisation Levy***
>
> 3. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 7,387.98 lacs, being Renovation & Modernisation levy collected by the appellant.*
> 4. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs.2,269.66 lacs, being interest credited to Renovation and Modernisation fund.*
> 5. *Without prejudice to Grounds 3 and 4 above, the learned CIT(A) erred in holding that the amount collected towards Renovation & Modernisation levy was not in the nature of a capital receipt and accordingly taxable.*
>
> ***Research & Development Levy***
>
> 6. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 4,432.79 lacs, being Research & Development levy collected by the appellant.*
> 7. *The learned CIT (A) erred in confirming as income of the appellant an amount of Rs. 1,336.46 lacs, being interest credited to Research and Development fund.*

8. *Without prejudice to Grounds 6 and 7 above, the learned CIT(A) erred in holding that a portion of the amount collected towards Research & Development levy was not in the nature of a capital receipt and accordingly taxable.*

***Income arising from /during Construction Period***

9. *The learned CIT(A) erred in confirming the action of the Assessing Officer in taxing as income, the following amounts which had been reduced by the appellant company from the expenditure incurred during construction period:*

| ***Sr. No.*** | ***Particulars*** | ***Amount (Rs. in Lacs)*** |
|---|---|---|
| *1.* | *Interest on Staff loan* | *47.06* |
| *2.* | *Interest on others* | *591.59* |
| *3.* | *Consultancy receipts* | *97.48* |
| *4.* | *Infirm Power* | *1,759.28* |
| *5.* | *Other Income* | *269.69* |
| | ***Total*** | ***2,764.70*** |

10. 10. *Without prejudice to Ground No. 9 above, the learned CIT(A) erred in not directing to allow deduction for expenditure incurred in respect of the income of Rs. 2.764.70 lakhs brought to tax.*

***Prior Period Expenses***

11. *The Learned CIT(A) erred in confirming the disallowance of prior period expenses to the extent of Rs. 421.04 lakhs*
12. *Without prejudice to the above. the learned CIT(A) / Assessing Officer may be directed to disallow only the net prior period expenditure after setting off prior period expenditure against prior period income.*
13. *Without prejudice to Ground Nos. 11 & 12 above. the learned CIT(A)/Assessing Officer may be directed to allow deduction of the prior period expenses in respective financial years.*

***Extra ordinary item written off***

14. *The learned CIT(A) erred in confirming the disallowance of extra ordinary item written off Rs. 1,038.88 lakhs.*

***Provision made for Loss and Obsolete Stock***

15. *The learned CIT(A) erred in confirming the disallowance in respect of the provision made for loss and obsolete stock of Rs. 64.08 lakhs.*

***Taxability under section 1153B of the Income Tax Act***

16. *16. The learned CIT(A) erred in confirming the increase of the net profit by the following amounts, while computing the book profit of the appellant under Section 115JB of the Income Tax Act, 1961*

| Sr. No. | Particulars | Amount (Rs. In Lacs) |
|---|---|---|
| a. | Decommissioning levy | 2,955.19 |
| b. | Interest credited to Decommissioning Fund | 3,292.31 |
| c. | Renovation & Modernisation levy | 7,387.98 |
| d. | Interest credited to Renovation & Modernisation Fund | 2,269.66 |
| e. | Research & Development levy | 4,432.79 |
| f. | Interest credited to Research & Development Fund | 1,336.46 |
| | **Total** | **21,674.39** |

17. *17. The learned CIT(A) erred in confirming that the amounts credited to the Decommissioning fund, Renovation & Modernisation fund and Research & Development fund are the amount transferred to 'reserves as specified in clause (b) of Explanation to Section 115JB*
18. *18. The learned CIT(A) erred in not confirming that that the amounts credited to the respective funds above are diverted at source and do not form part of the turnover of the appellant company. The learned CIT(A) erred in not appreciating that the said amounts do not form part of the profit and loss account, prepared in accordance with the provisions of Parts II and Ill of Schedule VI to the Companies Act, 1956 and therefore the same could not be included in the book profit computed under Section 115JB*
19. *19. Without prejudice to Ground 16 above, the learned CIT(A) erred in confirming the action of the Additional Commissioner in making adjustments to the Profit and Loss account prepared by the appellant. The learned Commissioner (Appeals) ought to have appreciated that no adiustments can be made to the Profit and Loss Account, other than those specified in the Explanation to section 115JB(2).*

***Interest under section 234B***

20. *The learned CIT(A) erred confirming the interest charged by the Additional Commissioner under section 234B at Rs. 1078.08 lakhs*

41. Further, vide letter dated 18/07/2018, the assessee filed additional ground, which are reproduced as under:

1. *The ground of appeal is independent and without prejudice to other grounds of appeal filed earlier, pending disposal.*
2. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) without having legal and valid jurisdiction under the Act to pass the assessment order. The Additional Commissioner of Income Tax lacked jurisdiction to pass the assessment order under section 143(3) dated 17th February 2004 and to exercise the powers of performing the functions of an Assessing Officer.*
3. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) where the assessment proceedings were initiated by the Asst. Commissioner of Income Tax. Such order passed is bad in law, in the absence of an order transferring, jurisdiction under section 127 to the Additional Commissioner of Income Tax.*

41.1 We have heard rival submission of the parties on the issue of jurisdiction in passing the assessment order challenged by the assessee. The identical additional grounds raised by the assessee have been admitted in appeal for AY 1998-99, but after detailed discussion and following finding of the Tribunal in the case **Stock Traders P Ltd (supra),** same have been dismissed. Accordingly, following our finding in AY 1998-99, the additional grounds of the appeal for year under consideration are accordingly dismissed.

42. Now we take up the regular grounds of appeal of the assessee. The ground Nos. 1 and 2 of the appeal relate to **receipt of de-**

**commissioning levy** by the assessee and the **interest credited on the de-commissioning fund** respectively. The issues in dispute being identical to ground Nos. 5 and 6 raised in assessment year 1998-99, therefore, following our finding in ITA No. 202/Mum/2004 for assessment year 1998-99, the issues are decided mutatis mutandis.

43. The ground Nos. 3 to 9 of the appeal for year under consideration are identical to ground raised in assessment year 2000-01, accordingly following our finding in assessment year 2000-01, the ground Nos. 3 to 9 of the year under consideration are decided mutatis mutandis.

44. As far as ground No. 10 of the appeal against not allowing the deduction for expenditure incurred in respect of income of ₹ 2, 764.70 lakhs, which has held to be income assessable under the head “income from other sources”. While adjudicating round No. 9, we have already upheld the finding of the lower authorities that said income is liable to be assessed under head “the income from other sources”. We are of opinion that under the provisions for assessment of the income under the head ‘income from other sources’, the assessee is eligible for expenses incurred for earning such income. Accordingly, we restore this ground to the file of the Assessing Officer for verification of the claim of the assessee and decide in accordance with law. The ground No. 10 of the appeal of the assessee is accordingly allowed for statistical purposes.

45. The ground Nos. 11 to 13 of the appeal relate to disallowance of prior period expenses. The Assessing Officer disallowed the claim of prior period expenses of ₹ 542.02 lakhs observing as under:

> *"1. Even though the accounting of liability is fixed as 30th June, every year, return is filed almost after six months from this date. The final Balance sheet is signed almost after 3 months from this date. The assessee is having sufficient time to claim its expenses in return of Income.*
>
> *2. As it is three months time i.e. 30th June is sufficient to account for an outstanding expense, but in event of something left out it can be claimed directly in the Return of Income which is filed around December every year.*
>
> *3. From the break up of these expenses filed, the major expenses related to salaries and bonuses, repairs, maintenance etc. It is difficult to believe that unpaid salaries and bonuses could not be calculated and provided for in the book. Similarly, repairs and maintenance are on going expenses and are paid regularly to contractors. It is difficult to imagine that a period of 3 months from the year end was not sufficient for assessee to obtain bills from contractors and account them.*
>
> *4. Under mercantile system of accounting, which is recognised as proper system of accounting by both institute of Chartered Accountants of India and Income tax, all expenses related to that year should only be debited to P&L account and claim in respect of only those expenses is allowable. Any expenses that pertains to the period other than for which assessment is under processing is to be disallowed. Though the assessee is following the Mercantile System of Accounting yet the above expenses were not accounted for as per the above principle.*

*Hence contentions raised by the assessee is rejected and amount of Rs.542.02 lakhs claimed during this year which pertains to last year is disallowed."*

45.1 On further appeal, the Ld. CIT(A) partly allowed relief to the assessee, wherever the assessee was able to justify crystallisation of the expenses in the year under consideration. The relevant finding of the Ld. CIT(A) is reproduced as under:

*"9.1 Before me, the Ld. A.R. of the appellant reiterated the submissions made before the A0 during the assessment proceedings. He also filed a copy of letter dated 10th February 2004 filed before the 10 during assessment proceedings giving the details of various expenses claimed as prior period expenses. The reasons for claiming these expenses in the year under consideration have also been given in the said letter. According to the appellant, as against the total expenditure of Rs.1,93.709.11 lacs debited in the P & L Alc, the amount of Rs. 542.02 lacs claimed on account of prior period expenses does not constitute even 0.3% of the total expenditure. In such a big organisation, it is not possible to account for each and very expenditure relating to the relevant year. Delayed receipt of some bills can never be avoided. Since the expenditure claimed by the appellant on account of prior period expenses is quite minuscule, it should have been allowed by the AO as deduction in the current year. It Prada Bi was firther stated that the cut-off date for accounting liabilities for the year is 30th June. Any liability crystallizing after 30th June is accounted for in the succeeding year. According to the appellant, the liability in respect of prior period expenses claimed by the appellant at Rs.542.02 lakhs arose in the current year and, accordingly, these expenses are allowable while computing income of the appellant for the year under consideration. It was further contended that the prior period expenses also include bonus of 82.82 lakhs*

*which is allowable w/s 43B on payment basis irrespective of the financial year to which the expenditure pertains. The appellant also placed reliance on the decision in the case of Saurashtra Cement & Chemical Industries Ltd. 213 ITR 523 (Guj) and Nathmal Tolaram 88 IT 234 (Gauhati). In these cases, it has been held that the deduction in respect of the expenditure is to be allowed in the year in which the liability in respect of the expenditure was determined and crystalised.*

*9.2 I have carefully considered the submissions made by the appellant. The AO has merely rejected the claim of the appellant seeking deduction of Rs. 542.02 lakhs in respect of prior period expenses on the ground that these expenses pertained to carlier years. Although the appellant had filed detailed submissions and paper book running into more than 100 pages vide its letter dated 10th Feb. 2004 but the AO has not even summarily discussed the contentions made by the appellant in the said letter. Simply from the fact that an expenditure relates to the transaction of an earlier year does not make it a liability for the earlier year unless it can be established that the liability was determined and crystallized in that year. When an assessee follows mercantile system of accounting, every liability claimed by it has to be examined as to whether such liability had crystallized and quantified during the year in which it was claimed as deduction. The liability though pertaining to the transaction in an earlier year might have been determined and crystallized in later year. In that case, it has to be allowed as a deduction in the relevant later year. It cannot be disallowed merely on the ground that it related to a transaction of the earlier year. In the case of Saurashtra Cement & Chemical Industries Ltd. Vs. CIT 213 ITR 523 (Guj), it has been held as under :-*

> *"Merely because an expense relates to a transaction of an earlier year it does not becom a liability payable in the earlier year unless it can be*

*said that the liability was defermined and crystallized in the year in question on the basis of maintaining accounts on the mercantile basis. In each case where the accounts are maintained on mercantile basis it wowskaswe be found in respect of any claim, whether such liability was crystallized and quantified Felusing the previous year so as to be required to be adjusted in the books of accounts of that previous year. If any liability, though relating to the earlier year, depends upon making a demand and its acceptance by the assessee and such liability has been actually claimed and paid in the later previous years cannot be disallowed as deduction merely on the basis the accounts are maintained on mercantile basis and that it related to a transaction of the previous year. The true profit and gain of a previous year are required to be computed for the purpose of determining tax liability. The basis of taxing income is accrual of income as well as actual receipt. If for want of necessary material crystallising the expenditure is not in existence in respect of which such income or expenses relate, the mercantile system does not call for the adjustment in the books of accounts on estimate basis. It is actually known income or expenses, right to receive or liability to pay which has come to be crystallised, is to be taken into account under mercantile system of maintaining books of accounts. As estimated income or liability, which is yet to be crystallised, can only be adjusted as contingency item but not as an accrued income or liability of that year.*

*9.2.1 The nature of various prior period expenses claimed by the appellant as deduction for the year under consideration are as under:*

| Units | Particualrs. | | Amount (Rs.) |
|---|---|---|---|
| TAPS | Commission arrears | | 8.08 lakhs |
| RAPS | (a) Repairs & Maintenance exp. | 45.56 lakhs | |
| | (b) Miscellaneous exp. | 84.58 lakhs | 130.14 lakhs |
| MAPS | (a) Re payment of electricity charges recovered from employees | 6.44 lakhs | |
| | (b) Repairs & maintenance exp. | 17.40 lakhs | |
| | (c) Adjustment entry for materials received | 2.09 lakhs | 25.93 lakhs |
| KAPS | (a) Payment of trade tax | 14.02 lakhs | |
| | (b) Repairs & maintenance | 23.37 lakhs | |
| | (c) Bonus | 82.82 lakhs | |
| | (d) Leave salary & pension contribution | 17.69 lakhs | |
| | (e) Miscellaneous expenses | 51.79 lakhs | 189.69 lakhs |
| NAPS | Details not given | | 186.66 lakhs |
| Corporate Office | Repairs & maintenance | | 1.51 lakhs |
| | | | 542.01 lakhs |

*Based on the above discussion, the issue regarding the allowability of various prior period expenses claimed by the appellant is discussed hereunder :-*

*9.2.1(a) TAPS - Rs. 8.08 lakhs.*

*Neither before the AO nor before me, the appellant has filed any evidence to show that the liability in respect of these expenses has crystallized during the year under consideration. Although the appellant was specifically asked to file evidence during the hearing of appeal but no evidence has been filed so far. In the absence of any evidence the claim of the appellant that these expenses had crystallized during the year under consideration cannot be accepted. Accordingly, the disallowance of Rs. 8.08 lakhs made by the AO is upheld.*

*9.2.1(6) RAPS - Rs. 130.14 lakhs.*

*Neither before the AO nor before me, the appellant has filed any evidence to show that the liability in respect of these expenses has crystallized during the year under consideration. Although the appellant was specifically asked*

*to file evidence during the hearing of appeal but no evidence has been filed so far. In the absence of any evidence the claim of the appellant that these expenses had crystallized during the year under consideration cannot be accepted. Accordingly, the disallowance of Rs. 130.14 lakhs made by the AO is upheld.*

*9.2.1(c) MAPS - Rs. 25.93 lakhs.*

*(i) Repayment of electricity charges recovered from the employees - Rs.6.44 lakhs.*

*It was submitted that the appellant company had recovered the clectricity charges from the employees during the period from November 1998 to February 2000. The amount recovered was offered to tax as income in the A.Y. 1999-2000 and 2000-01. However, during the previous year relevant to A. Y. 2001-02, the appellant company decided to return the electricity charges thus recovered to the employees. Accordingly, an amount of Rs. 6.04 lakh was paid back to the employees. The appellant also filed copy of bank payment voucher and other details in respect of the repayment. These documents appear at page 78 & 79 of the letter dated 10.2.2004 filed by the appellant before the AO during the assessment proceedings. Since the amount recovered from the employees in the earlier years has been refunded by the appellant to the employees in the year under consideration, the appellant is entitled to deduction in respect of amount of Rs. 6.44 lakh. Accordingly, the appellant is tled to deduction of Rs. 6.44 lakh on this account.*

*(ii) Repairs and Maintenance expenses - Rs. 17.40 lakhs.*

*It has been submitted that the appellant had got the machinery repaired from M/s. Bharat Heavy Electricals Ltd. in the earlier years. The bill for Rs. 17,39,943/- in respect of the same was received from BHEL during the current year because of which the deduction was claimed in this year. Along with the letter dated 10.2.2004 filed before the AO, the appellant had also filed copies of invoices of BHEL in respect of these expenses. I have perused the documents filed by the appellant to contend that the liability in respect of these*

*expenses crystallized in the current year since the bills were received in the current year. The copies of the bills filed by the appellant are quite illegible and unclear. However, whatever can be deciphered from the bills, it is seen that the bills were raised in the month of February and March 2000 i.e. much before the previous year for the current assessment year commenced. No evidence has been filed by the appellant to show that these bills were received during the previous year relevant to A. Y. 2001-02. In view of these facts and circumstances of the case, it cannot be accepted that the liability of these expenses had crystallized in the year under consideration. Accordingly, the addition of Rs. 17.40 lakh made by the AO in this regard is upheld.*

*(iii) Reconcilation adjustment entry for material received in earlier years - Rs. 2.09 lakhs.*

*Neither before the AO nor before me, the appellant has explained the nature of this entry not to speak of filing any evidence to prove that the liability in respect of this amount had crystallized in this year. Therefore, the contention of the appellant in respect of this amount cannot be accepted. Accordingly, the addition of Rs. 2.09 lakh made by the A0 on this count is upheld.*

*9.2.1(d) KAPS - Rs. 189.69 lakhs.*

*(I) Trade tax - Rs. 14.02 lakhs.*

*It was submitted that the appellant company had received crane hire charges from M/s. Oswal Chemical and Fertilizer Ltd. in the A.Y. 1994-95 and 1997-98. The same was offered to tax in the respective assessment years. The Trade Tax Officer, Sahajahanpur, UP had raised a demand of Rs. 14.02 lakhs on the crane hire charges received by the appellant. The demand was disputed by the appellant. However, in the previous year relevant to A.Y. 2001-02, the appellant decided to make the payment of Trade Tax. As the liability of Trade Tax was accrued during the current year, it was submitted that the same should be allowed as deduction in this year.*

*I have considered the contention of the appellant. The payment made by the appellant is eovered by sec. 43B of IT. Act. In respect of any tax, deduction is allowable only on actual payment. Since payment of Trade tax amounting Rs. 14.01,755/- has been made by the appellant on 14.7.2000, the appellant is entitled to deduction in respect of the same w/s 43B in the assessment year 2001-02. Accordingly, addition of Rs. 14.02 lakh made by the AO is deleted.*

*(ii) Repairs & Maintenance - Rs. 23.37 lakhs.*

*It was submitted by the appellant that the appellant had paid advances to various state government agencies for Civil work. The amount paid was debited to the advance account. The civil work was completed in the earlier years. However, the company did not receive any bills from the Government agencies after the completion of the work. The company during the relevant A.Y. 2001-02, on the basis of certification from the Civil Engineer, transferred the amount from advances to the expense account. A copy of the letter dated May 19, 2001 of the Civil Engineer, Nuclear Power Corporation was enclosed at pages 102 of the compilation filed before the AO during asstt. proccodings. It was submitted that as the status of work completed was finalised in the A.Y. 2001-02, the expenses must be allowed as deduction.*

*I have considered the contention of the appellant. On the basis of reply of the appellant it cannot be said that the liability in respect of the expenses of Rs. 23.37 lakhs crystallized during the previous year relevant to the A.Y. 2001-02. Since the expenses had crystallized prior to 1.4.2000, these expenses cannot be allowed as deduction for AY. 2001-02. Accordingly, the addition of Rs. 23.37 lakh made by the AO in this regard is upheld.*

*(iii) Bonus - Rs. 82.82 lakhs.*

*It was stated that the appellant made payment of Capacity Factor Award Bonus for the period 1998-99 and 1999-2000 amounting Rs. 82,82,130/- in the month of June 2000. It was contended that the said deduction is allowable w/s 43B on payment basis.*

*I have considered the contention of the appellant. The appellant has paid the bonus of Rs. 82.82 lakh pertaining to the F.Y. 1998-99 and 1999-2000 in the previous year relevant to A. Y. 2001-02. Evidence in this regard was filed by the appellant at page no. 103 of the paper set out or peak filed before the AD. As per section 43B (6) of the 1. T.Act, the deduction in respect of the bonus is to be allowed in the year of payment. Accordingly, the appellant is eligible for deduction in respect of the amount of Rs. 82.82 lakh in year under consideration. Therefore, the addition of Rs.82.82 lakh made by the AO is deleted.*

*(iv) Leave Salary and Pension Contribution - Rs. 17.69 lakhs.*

*According to the appellant, the appellant company had made contribution of Rs. 17,68,552/- to the Pay & Accounts Officer, Department of Atomic Energy on account of leave salary and pension fund of the employees in the previous year relevant to the A.Y. 2001-02. A copy of the cheque dated 18.4.2000 for Rs. 3,32,69,624/- which inter alia includes the payment of Rs. 17,68,552/- and a copy of the letter dated 18.4.2000 addressed to the Pay & Accounts Officer, Department of Atomic Energy, Mumbai remitting therewith the said amount was filed in support of the claim. All these documents appear at page no. 104 and 105 of the paper book filed before the AO. It was contended that the said amount requires to be allowed as deduction since the liability to pay the amount crystallized during the previous year relevant to the A.Y. 2001-02.*

*I have considered the contention of the appellant. It is seen that the payment of Rs. 17,68,552/- is covered by Clause (b) and Clause (D of sec. 43B. Accordingly, the same is allowable in the A.Y. 2001-02 on payment basis. Therefore, the addition of Rs. 17.69 lakh made by the AO on this count is deleted.*

*9.2.1(e) Miscellaneous Expenses - Rs. 51.79 lakhs,*

*Neither before the AO nor before me, the appellant has filed any evidence to show that the liability in respect of these expenses has crystallized during the year under consideration. Although the appellant was specifically asked*

*to file evidence during the hearing of appeal but no evidence has been filed so far. In the absence of any evidence the claim of the appellant that these expenses had crystallized during the year under consideration cannot be accepted. Accordingly, the disallowance of Rs. 51.79 lakhs made by the AO is upheld.*

*9.2.1(f) Corporate Office - Rs. 1.51 lakhs.*

*Neither before the AO nor before me, the appellant has filed any evidence to show that the liability in respect of these expenses has crystallized during the year under consideration. Although the appellant was specifically asked to file evidence during the hearing of appeal but no evidence has been filed so far. In the absence of any evidence the awes claim of the appellant that these expenses had crystallized during the year under consideration cannot be accepted. Accordingly, the disallowance of Rs. 1.51 lakhs made by the AO is upheld.*

*On the basis of the above discussion, the relief allowed to the appellant in respect of the ground of appeal at S. No. 12 is worked out as under:*

| Para No. of the order | Amount of relief |
|---|---|
| 9.2.1(c) | 6.44 lakh |
| 9.2.1(d)(i) | 14.02 lakh |
| 9.2.1(d)(iii) | 82.82 lakh |
| 9.2.1(d)(iv) | 17.69 lakh |
| | 120.97 lakh |

*Accordingly, the ground of appeal at S. No. 12 is partly allowed."*

45.2 We have heard rival submission of the party on the issue in dispute and peruse the relevant material on record. The Ld. CIT(A) has given detailed bifurcations of the such expenses claimed by the assessee. In case of TAPS and RAPS , the assessee failed to file any

evidence to show that expenses crystallised during the year under consideration and therefore the Ld. CIT(A) has upheld the disallowance of ₹ 8.08 lakhs and ₹ 130.14 lakhs respectively. Out of the expenses related to MAPS, the learned CIT(A), deleted the repayment of electricity charges recovered from the employees, but upheld the disallowance of repair and maintenance expenses and reconciliation adjustment entry for material received in earlier years due to to lack of documentary evidence to support crystallisation of expenses in the year under consideration. Similarly in respect of KAPS, the Ld. CIT(A) has deleted the addition for trade tax and bonus, whereas in respect of repair and maintenance and leave salary and pension contribution, the assessee failed to justify crystallisation of expenses in the year under consideration. Similarly the Ld. CIT(A) has disallowed the miscellaneous expenses and corporate office expenses due to lack of evidence supporting crystallisation of expenses in the year under consideration. In our opinion, the finding of the Ld. CIT(A) on the issue in dispute is justified and we do not find any error in the same, accordingly we uphold the same. Further, in ground No. 10, the assessee has claimed for setting off of prior period expenditure against prior period Income. In our opinion, when the items of the prior period income are different than the nature of the expenditure, same cannot be allowed to be set off against the prior period income, which has been declared by the assessee on accrual basis. As far as

claim of the assessee for allowing the said prior period Expenses in respective financial years, we are of the opinion that it is open for the assessee to avail remedy provided under statutory provisions of the Act for claim of such expenses in relevant financial /assessment years. The ground Nos. 11 to 13 of the appeal are accordingly dismissed.

46. The ground No.14 of the appeal relates to disallowance of extraordinary items written off amounting to ₹ 1,038.88 lakhs. The Ld. CIT(A) has referred to the finding of the Assessing Officer and after considering submission of the assessee upheld the disallowance of the observing as under:

> *"10. The ground of appeal at Sr.No.13 is against the action of the AO in disallowing expenses of Rs. 1038.88 lakhs debited by the appellant under the head "extra ordinary item written off. As per the assessment order, the appellant had incured this expenditure on the delamination of the IC dome. It was explained by the appellant before the AO that this amount represented the expenditure on inner lining of Dome constructed in a nuclear power plant. Since this expenditure was not of recurring nature, the AO treated the expenditure of Rs. 1038.88 lacs in the nature of capital expenditure thereby making addition of Rs. 1038.88 lacs to the income of the appellant.*
>
> *10.1 Before me, it was submitted that the amount of Rs. 1038.88 lacs was incurred on the construction of the dome of a power plant which had collapsed during construction period. It was submitted that the said expenditure is allowable as revenue expenditure.*
>
> *10.2 I have considered the contention of the appellant. The nature of the expenditure of Rs. 1038.88 lacs as explained by the appellant before me is at variance with the nature of the said expenditure given before the AO. Further, except stating that the expenditure was incurred on the construction of a dome which had collapsed, no further explanation or corroborative evidence has been filed by the appellant. In the statement of facts also, not even a single word has*

*been written about the nature of this expenditure or as to why the said expenditure was revenue expenditure. As per section 30(a) (ii) of the IT.Act, only an amount incurred on www. account of current repairs to the premises can be allowed as a deduction. The amount incurred on the construction of a dome cannot be considered to be in the nature of current repairs. Therefore, the expenditure of Rs. 1038.88 lacs incurred by the appellant on the construction of dome cannot be allowed as deduction. Accordingly, the action of the AO in this regard is upheld.*

*Therefore, the ground of appeal at Sr. No. 13 is rejected."*

46.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that Ld. CIT(A) has observed that no explanation or documentary evidence in respect of the claim of the expenditure was filed before the lower authorities. The Ld. CIT(A) has also observed that any amount incurred on account of current repairs to the premises can be allowed as revenue expenditure whereas the amount incurred has been claimed by the assessee for construction of a capital asset. In our opinion, the finding of the Ld. CIT(A) on the issue in dispute is well reasoned, and therefore we uphold the same. The ground No. 14 of the appeal of the assessee is accordingly dismissed.

47. The ground No. 15 of appeal relates to disallowance of provision for loss /obsolete stock. The Ld. CIT(A) upheld the disallowance observing as under:

*"11.2 I have considered the contention of the appellant. The AO has made the disallowance mainly because of the reason that the appellant had not filed the item wise details of obsolete stock claimed by the appellant at Rs. 64.08 lacs. Even before me, no such details have been filed. No evidence has been filed before me to show that*

*these items of stock had really become useless. Had it been so, the appellant would have disposed off these items at lower de in the succeeding years. No evidence has been filed by the appellant to show that any of these items has been disposed of below cost in the succeeding years. In absence of any documentary evidence, the claim made by the appellant in respect of the obsolete stock at Rs. 64.08 lacs appears to be adhoc and arbitrary. It is pertinent to note that, in the case of the appellant for the A.Y. 2000-01, similar disallowance made by the AO has been upheld by the CIT(A) vide his order dated 15th March 2004. In view of these facts and circumstances of the case, the claim made by the appellant cannot be accepted. Accordingly, the addition of Rs.64.08 lacs made by the AO is upheld.*

*Therefore, the ground of appeal at Sr. No. 14 is rejected."*

47.1 We have heard rival submission of the parties and perused the relevant material on record. We note that neither itemised detail of obsolete stock was filed nor any evidence was filed to show that any of those items had been disposed off being below cost in succeeding years. In absence of any documentary evidence filed by the assessee before the lower authorities, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly uphold the same. The ground No. 15 of the appeal of the assessee is accordingly dismissed.

48. As far ground Nos. 16 to 19 of the appeal are concerned, we have already held that provisions of section 115 JB of the Act are not applicable in the case of the assessee and therefore the consequent adjustment to book profit invoking section 115 JB of the Act made by the Assessing Officer and upheld by the Ld. CIT(A), also cannot be sustained. The ground Nos. 16 to 19 of the appeal of the assessee are accordingly allowed.

49. The ground No. 20 of the appeal being consequential, and ground Nos. 21 and 22 being general in nature same are dismissed as infructuous.

## AY 2002-03

50. Now we take up the appeal of the assessee for assessment year 2002-03. The relevant grounds raised by the assessee in form No. 36 filed on 20/08/2007 are reproduced as under:

> *The appellant company objects to the appellate order dated 30 March 2007 passed by the Commissioner of Income-tax (Appeals)- III, Mumbai [ CIT (A) '] under section 250 of the Income Tax Act, 1961 ('the Act) on the following grounds:*
>
> ***Decommissioning Levy***
>
> 1. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 3,449.33 lacs, being Decommissioning Levy collected by the appellant.*
> 2. *The learned CIT (A) erred in confirming as income of the appellant an amount of Rs.3,652.06 lacs, being interest credited to Decommissioning Fund.*
>
> ***Renovation & Modernisation Levy***
>
> 3. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 8,623.31 lacs, being Renovation & Modernisation levy collected by the appellant.*
> 4. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs.2,999.27 lacs, being interest credited to Renovation and Modernisation fund.*
> 5. *Without prejudice to Grounds 3 and 4 above, the learned CIT(A) erred in holding that the amount collected towards Renovation & Modernisation levy was not in the nature of a capital receipt and accordingly taxable.*
>
> ***Research & Development Levy***

6. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs.5,173.99 lacs, being Research & Development levy collected by the appellant.*
7. *The learned CIT (A) erred in confirming as income of the appellant an amount of Rs. 1,752.77 lacs, being interest credited to Research and Development fund.*
8. *Without prejudice to Grounds 6 and 7 above, the learned CIT(A) erred in holding that a portion of the amount collected towards Research & Development levy was not in the nature of a capital receipt and accordingly taxable.*

***Deduction under Section 801A***

9. *The learned CIT(A) erred in confirming the exclusion of the amount of interest income of Rs. 48.34 lakhs and miscellaneous income of Rs. 23.93 lakhs from the "Profit of the business" eligible for deduction under Section 80 lA of the Income Tax Act, 1961.*
10. *10. Without prejudice to Ground No. 9, the learned CIT(A) erred in confirming the exclusion of the gross interest income from the "Profits of the business" eligible for deduction under Section 80 IA of the Income Tax Act, 1961 instead of the net interest income. The learned CIT(A) erred in not netting off the interest income against the interest expenditure.*

***Income arising from /during Construction Period***

11. *11. The learned CIT(A) erred in confirming the action of the Assessing Officer in taxing as income, the following amounts which had been reduced by the appellant company from the expenditure incurred during construction period:*

| ***Sr. No.*** | ***Particulars*** | ***Amount (Rs. In lacs)*** |
|---|---|---|
| *1.* | *Interest on Loan* | *266.76* |
| *2.* | *Other Income* | *69.26* |
| | ***Total*** | ***336.02*** |

12. *12. Without prejudice to Ground No. 11 above, the learned CIT(A) erred in not directing to allow deduction for expenditure incurred in respect of the income of Rs. 336.02 lakhs brought to tax.*
13. *13. Without prejudice to Ground 11 and 12 above, the learned CIT(A) erred in not directing the Assessing officer to re-compute the depreciation allowable to the appellant company pursuant to the exclusion of the income reduced from expenditure during construction.*

***Prior Period Expenses***

14. 14. *The learned CIT(A) erred in confirming the disallowance of prior period expenses to the extent of Rs. 1,188.41 lakhs*
15. 15. *Without prejudice to the above, the learned CIT(A) / Assessing Officer may be directed to disallow only the net prior period expenditure after setting off prior period expenditure against prior period income.*
16. 16. *Without prejudice to Ground Nos. 14 & 15 above, the learned CIT(A)/Assessing Officer may be directed to allow deduction of the prior period expenses in respective financial years.*

***Expenditure on Research & Development***

17. 17. *The learned CIT(A) erred in confirming the disallowance of expenditure on Research & Development levy of Rs. 82.50 lakhs.*

***Provision made for Loss and Obsolete Stock***

18. 18. *The learned CIT(A) erred in confirming the disallowance in respect of provision made for loss and obsolete stock of Rs. 64.08 lakhs.*

***Taxability under section 115JB of the Income Tax Act***

19. 19. *The learned CIT(A) erred in confirming the increase of the net profit by the following amounts, while computing the book profit of the appellant under Section 115JB of the Income Tax Act, 1961.*

| ***Sr. No.*** | ***Particulars*** | ***Amount (Rs. in lacs)*** |
|---|---|---|
| | *Decommissioning levy* | *3,449.33* |
| | *Interest credited to Decommissioning Fund* | *3,652.06* |
| | *Renovation & Modernisation levy* | *8,623.31* |
| | *Interest credited to Renovation & Modernisation Fund* | *2,999.27* |
| | *Research & Development levy* | *5,173.99* |
| | *Interest credited to Research & Development Fund* | *1,752.77* |
| | ***Total*** | ***25,650.73*** |

51. The assessee has also filed additional ground on 18/07/2018, which are reproduced as under:

1. *The ground of appeal is independent and without prejudice to other grounds of appeal filed earlier, pending disposal.*

2. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) without having legal and valid jurisdiction under the Act to pass the assessment order. The Additional Commissioner of Income Tax lacked jurisdiction to pass the assessment order under section 143(3) dated 28th December 2004 and to exercise the powers of performing the functions of an Assessing Officer.*
3. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) where the assessment proceedings were initiated by the Asst. Commissioner of Income Tax. Such order passed is bad in law, in the absence of an order transferring, jurisdiction under section 127 to the Additional Commissioner of Income Tax.*

51.1 We have heard rival submission of the parties on the issue of jurisdiction in passing the assessment order challenged by the assessee. The identical additional grounds raised by the assessee have been admitted in appeal for AY 1998-99, but after detailed discussion and following finding of the Tribunal in the case **Stock Traders P Ltd (supra),** same have been dismissed. Accordingly, following our finding in AY 1998-99, the additional grounds of the appeal for year under consideration are accordingly dismissed.

52. Now we take of the regular grounds of the appeal. The ground No. 1 to 8 of the appeal for the year under consideration are identical to ground No. 1 to 8 raised in assessment year 2001-02, therefore following our finding in assessment year 2001-02, the ground No. 1 to 8 of the appeal are decided mutasis mutandis.

53. The ground No. 9 (nine) of the appeal relates to denial of deduction under section 80IA of the Act in respect of the interest income of ₹ 48.34 lakhs and miscellaneous income of ₹ 23.93 lakhs.

53.1 The facts in brief qua the issue in dispute are that the assessee in the computation of the total income claimed deduction under section 80 IA in respect of profit derived from Kakrapar atomic Power Station (KAPS). The profit of the KAPS included interest income of ₹ 48.34 lakhs. Before the Ld. CIT(A), the assessee claimed that interest income was earned on loans given to the staff working at KAPS, and the staff being integral part of the unit, any income earned from such a staff had a nexus with the business operation of KAPS and accordingly chargeable under the head business income and forms part of the profit of KAPS. The assessee relied on the decision of **CIT Vs The Madras Motors Ltd 257 ITR 60( Mad)** and other decisions. The assessee also claimed deduction under section 80IA of the Act on the miscellaneous income of ₹ 52.22 lakhs. However the Ld. CIT(A) rejected the contention of the assessee observing as under:

> *6.3.1 The eligibility of deduction us 80-IA in respect of various items of income shown by the appellant is examined in view of the above discussion. The appellant has claimed deduction u/s 80 IA on interest received from the staff loans. There is no direct nexus of the interest income with the appellant's industrial undertaking. The nexus between the income and the industrial undertaking is incidental. Therefore, the appellant is not entitled to deduction u/s 80 IA on the said income. Even in the case of Madras Motors Ltd. (supra) relied upon the appellant,*

*the Court did not allow deduction u/s 80 HH (similar to 80-IA) on the interest received on bank deposits which were kept with the bank in connection with opening of letter of credit since the connection of the said interest income with the industrial undertaking was held to be only incidental. The Court allowed deduction u/s 80 IA only in respect of interest received on belated payments from the customers which were directly relatable to the business of the industrial undertaking. The other decisions relied upon by the appellant have been rendered prior to the decision of Hon'ble Supreme Court in the case of Pandian Chemicals Ltd.*

*6.3.2 6.3.2 As regards the miscellaneous income of Rs. 52.22 lacs the said income consists of the following items.*

| | |
|---|---|
| *Sale of scrap* | *Rs. 18,20,024/-* |
| *Sale of tender forms* | *Rs. 3,25,450/-* |
| *Charges - Contractors* | *Rs. 1,58,159/-* |
| *Refund of LD charges* | *Rs. 36,750/-* |
| *Reimbursement of DAE Sports meet* | *Rs. 8,51,462/-* |
| *Security deposit* | *Rs. 1,47,965/-* |
| *Rental from staff* | *Rs. 13,59,399/-* |
| *Rental - Contractors* | *Rs. 2,95,849/-* |
| *Charges - demonstration* | *Rs. 1,46,890/-* |
| *Others* | *Rs. 1,80,380/-* |
| | *Rs.52,22,328/-* |

*As regards the sale of scrap is concerned, the same has direct nexus with the industrial undertaking. The same is eligible for deduction u/s 80IA in view of the decision in the case of Fenner (India) Ltd. VS. CIT 241 ITR 803 and Nirma Inds Ltd. Vs. ACIT 95 ITD 199 (Ahd) (SB). Further, the appellant is also entitled to deduction us 80IA in respect of the Charges recovered from the Contractors at Rs.1,58,159/- and the reimbursement of DAE Sports meet at Rs. 8,51,462/- because the expenses incurred by the appellant on these items earlier had gone to reduce the profits for the purpose of deduction u/s 80IA. On recovery of these charges, the eligible profits for section 80A would increase to this extent. The other receipts shown by the appellant under the head miscellaneous income have no direct nexus with the industrial undertaking. The nexus of those receipts with the industrial undertaking is indirect and incidental. Accordingly, those receipts are not eligible for deduction u/s 80IA."*

53.2 Before us the learned counsel for the assessee referred to paperbook page 178 and relied on the submission made before the lower authorities and submitted that interest income being derived from the undertaking, is eligible for deduction under section 80IA of the Act. Regarding miscellaneous income also learned counsel for the assessee submitted that same is eligible for deduction under section 80IA of the act.

53.4 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute is regarding claim of deduction on interest income earned from giving loans to staff working at undertaking namely KAPS, under section 80IA of the Act. In our opinion, the activity of providing loans or advances to the employees working at the eligible unit, is not part of the business activity of the undertaking. It might be a welfare activity on the part of the assessee but interest earned on such loans and advances to a staff cannot be any income derived from the operation of the power plant. In our opinion finding of the Ld. CIT(A) on the issue in dispute is well reasoned and we do not find any error in the same, accordingly we uphold the finding of the Ld. CIT(A) on the issue in dispute.

53.5 Regarding the deduction in respect of the miscellaneous income, no details have been submitted by the assessee before the lower authorities, therefore Ld. CIT(A) is justified in rejecting the

claim of deduction under section 80IA in respect of miscellaneous income. The ground No. nine of the appeal of the assessee is accordingly dismissed.

54. In ground No. 10, the assessee has prayed for exclusion of net interest income from the profit of the business for the purpose of section 80IA of the Act instead of gross interest income excluded by the lower authorities.

54.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The interest income earned from loans and advances to the staff has been excluded by the lower authorities for the purpose of deduction under section 80IA of the Act. In this ground, the assessee is claiming that interest expenditure should be adjusted against the interest income earned. The assessee has not given the details of the interest expenditure incurred in respect of the borrowing. If the borrowings were made for the purpose of extending loans and advances to the staff, then same could be netted off against the gross interest income, but in absence of any such nexus of the interest expenditure with the interest income earned, claim of netting off cannot be allowed. The ground No. 10 of the appeal of the assessee is accordingly dismissed.

55. The ground No. 11 of the appeal is in respect of treating the income from interest on the staff loan and other income as assessable under the head 'income from other sources', rather than set off claimed by the assessee against the expenditure incurred during construction period. The identical issue has been decided by us while adjudicating ground no. 7 of the appeal of the assessee for assessment year 1998-99. Therefore, following our finding in assessment year 1998-99 the ground no. 8 is adjudicated mutatis mutandis.

56. The ground No. 12 of the appeal relates to claim of deduction for expenditure incurred in respect of income of Rs. 336.02 lakhs, which has been assessed under the head income from other sources. The identical issue has been decided by us, while adjudicating ground No. 10 of the appeal for assessment year 2001-02 , and issue has been restored to the file of the learned Assessing Officer for verification and to be decided in accordance with law . However in the instant case no such details are filed before the Ld. CIT(A) and therefore the Ld. CIT(A) rejected the claim of the assessee. The relevant finding of the Ld. CIT(A) is reproduced as under :

> *"10. The ground of appeal at Sr. No. 13 has been taken without prejudice to ground no. 11 this ground it has been contended that the expenditure incurred in respect of the income of 336.02 lacs should be deducted from the said amount and only the net income should be brought to tax. However, neither in the ground of appeal nor in the*

*statement of facts or during the course of hearing of appeal, the appellant specified the expenses which have been incurred to earn the income of Rs. 336.02 lacs. In absence of any details or documentary evidence to prove that any expenditure has been incurred for earning the income of Rs.336.02 lacs, the claim made by the appellant cannot be accepted.*

*Accordingly, the 13th ground is rejected."*

56.1 We find that Ld. CIT(A) has only referred to the ground of appeal and statement of the facts but did not provide any opportunity to furnish such details. Therefore in the interest of the justice and to provide one more opportunity to the assessee, claim for deduction of expenditure against the income under the head income from other sources is restored to the file of the Assessing Officer for verification and deciding in accordance with law. The ground of the appeal of the assessee is allowed for statistical purposes.

57. The ground Nos. 14 to 16 of the appeal relate to disallowance of prior period expenses to the extent of ₹ 1181.41 lakhs. We heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Ld. CIT(A) after proper verification of the prior period Expenses, given the relief of ₹ 33.98 lakhs out of the disallowance made by the Assessing Officer. The Ld. CIT(A) has analysed all the expenses under the prior period Expenses and consider the expenses on the basis whether the same were crystallised in the year under consideration or not. Wherever the assessee failed to file any evidence in support of crystallisation

of the expenses in the year under consideration, he upheld the disallowance. Before us no documentary evidence supporting crystallisation of those expenses in the year under consideration has been filed. Therefore, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly we uphold the finding of the Ld. CIT(A). The ground No. 14 of the appeal is accordingly dismissed.

58. The ground No. 15 relates to setting off the prior period Expenditure against the prior period Income. The ground No. 16 relates to prayer for allowing deduction of prior period expenses in respective financial years. Identical ground Nos. 12 and 13 raised in assessment year 2001-02 have been rejected by us, therefore following our finding, the ground Nos. 15 and 16 of the appeal are also dismissed.

59. The ground no. 17 relates to disallowance of expenditure of ₹ 82.50 lakhs out of research and development levy fund.

59.1Brief facts qua the issue in dispute are that the assessee claimed contribution of ₹ 82.5 lakhs towards setting up of fuelling machine test facility at Bhaba Atomic Research Centre (BARC). The assessee claimed that since payment has been made out of research and development levy fund, and such levies have been treated by the Assessing Officer as revenue receipts , therefore the expenditure

incurred out of such R &D fund should be allowed as revenue expenditure. The Ld. CIT(A) has rejected the claim of expenditure as being in the nature of the capital expenditure. The relevant finding of the Ld. CIT(A) is reproduced as under:

> *"17.2 I have considered the contention of the appellant. In this case, the appellant has made contribution of Rs. 82.50 lacs towards the setting up of Fueling Machine Test facility to Bhabha Atomic Research Centre. The total cost of the project is 150.30 lacs. The amount of Rs. 82.50 lacs has been provided in respect of capital project which has to be treated as capital expenditure. Such expenditure is not allowable as deduction u/s 37 of the I.T.Act. The appellant has not made any argument or filed any evidence to claim that the said expenditure is allowable under any other provisions of the I.T.Act. Accordingly, the appellant is not entitled to the deduction of Rs. 82.50 lacs. Therefore, the action of the AO in this regard is upheld.*
>
> *Therefore, the ground of appeal at Sr. No. 21 is rejected."*

59.2 We have heard rival submission of the parties on the issue in dispute in the light of the material available on record. The fact that expenditure was incurred for capital asset, which was installed at BARC, has not been disputed by the assessee. Evidently said expenditure is in the nature of the capital expenditure and not allowable as revenue expenditure under section 37 of the Act. Accordingly, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and we uphold the same. The ground No. 17 of the appeal of the assessee is accordingly dismissed.

60. The ground No. 18 of the appeal relates to provision made for loss and obsolete stock amounting to be 64.08 lakhs. This ground

of appeal was not pressed before us and therefore same is dismissed as infructuous.

61. As far ground No. 19 of the appeal is concerned, we have already held that provisions of section 115 JB of the act are not applicable in the case of the assessee and therefore the consequent adjustment to book profit invoking section 115 JB of the Act made by the Assessing Officer and upheld by the Ld. CIT(A), also cannot be sustained. The ground No. 19 of the appeal of the assessee is accordingly allowed.

62. The ground Nos. 20 and 21 are being general in nature, same are dismissed as infructuous.

**AY 2003-04**

63. Now we take of the appeal of the assessee for assessment year 2003-04. The grounds raised vide form No. 36 dated 28/06/2007, are reproduced as under:

> *"The appellant company objects to the appellate order dated 30 March 2007 passed by the Commissioner of Income-tax (Appeals)- III, Mumbai ['CIT (A)'] under section 250 of the Income Tax Act, 1961 (the Act) on the following grounds:*
>
> ***Decommissioning Levy***
>
> 1. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 3,470.39 lacs, being Decommissioning Levy collected by the appellant.*
> 2. *The learned CIT (A) erred in confirming as income of the appellant an amount of Rs.3,615.08 lacs, being interest credited to Decommissioning Fund.*

***Renovation & Modernisation Levy***

3. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 8,675.97 lacs, being Renovation & Modernisation levy collected by the appellant.*
4. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs.3,417.72 lacs, being interest credited to Renovation and Modernisation fund.*
5. *Without prejudice to Grounds 3 and 4 above, the learned CIT(A) erred in holding that the amount collected towards Renovation & Modernisation levy was not in the nature of a capital receipt and accordingly taxable.*

***Research & Development Levy***

6. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs.5,205.58 lacs, being Research & Development levy collected by the appellant*
7. *The learned CIT (A) erred in confirming as income of the appellant an amount of Rs.2036.22 lacs, being interest credited to Research and Development fund.*
8. *Without prejudice to Grounds 6 and 7 above, the learned CIT(A) erred in holding that a portion of the amount collected towards Research & Development levy was not in the nature of a capital receipt and accordingly taxable.*

***Deduction under section 80-IA***

9. *The learned CIT(A) erred in confirming the exclusion of an amount of interest income of Rs. 128.65 lakhs and miscellaneous income to the extent of Rs.477.45 lakhs from the "Profit of the business" eligible for deduction under*

***Section 80 IA of the Income Tax Act. 1961.***

10. *Without prejudice to Ground No. 9, the learned CIT(A) erred in confirming the exclusion of the gross interest income from the "Profits of the business" eligible for deduction under Section 80 IA of the Income Tax Act, 1961 instead of the net interest income. The learned CIT(A) erred in not netting off the interest income against the interest expenditure.*

11. *The learned CIT(A) erred in confirming that the Research & Development expenditure was relatable to the units that were eligible for the deduction under section 80-IA of the Income Tax Act, 1961 and consequently apportioning Research and Development expenditure of Rs. 747.48 lakhs to the "Profit of the business" eligible for deduction under Section 80 IA of the Income Tax Act, 1961.*

***Income reduced from expenditure incurred during construction Period***

12. *The learned CIT(A) erred in confirming the action of the assessing officer in taxing as income the following amounts which had been reduced by the appellant company from the expenditure incurred during construction period:*

| ***Sr. No.*** | ***Particulars*** | ***Amount*** |
|---|---|---|
| *1.* | *Interest on Staff Loan* | *910.54* |
| *2.* | *Interest on others* | *67.75* |
| *3.* | *Other Income* | *176.12* |
| ***Total*** | | ***1154.41*** |

13. *Without prejudice to Ground No. 12 above, the learned CIT(A) ought to be directed to allow deduction for expenditure incurred in respect of the income of Rs. 1,154.41 lakhs brought to tax.*

14. *Without prejudice to Grounds 12 and 13 above, the learned CIT(A) may be directed to re-compute the depreciation allowable to the appellant company pursuant to the exclusion of the income reduced from expenditure during construction.*

15. *Without prejudice to the appeals) preferred by the appellant in the earlier assessment years, the learned CIT(A) erred in not re-computing the depreciation allowance, as due to the appellant company pursuant to the exclusion of income reduced from expenditure during construction in the earlier assessment years.*

***Prior Period expenses***

16. *The learned CIT(A) erred in confirming the disallowance of prior period expenses to the extent of Rs. 552.41 lakhs.*

17. *Without prejudice to the above. the learned CIT(A) / Assessing Officer may be directed to disallow only the net prior period expenditure after setting off prior period expenditure against prior period income.*

18. *Without prejudice to Ground Nos. 16 & 17 above, the learned CIT(A)/Assessing Officer may be directed to allow deduction of the prior period expenses in respective financial years.*

***Provision made for Obsolete Stock***

19. *The learned CIT(A) erred in confirming the disallowance in respect of the provision made for loss and obsolete stock of Rs. 10.34 lakhs.*

***Computation of book profits under section 115JB***

20. *The learned CIT(A) erred confirming the action of the assessing officer in increasing the net profit by the following amounts, while computing the book profit of the appellant under Section 115JB of the Income Tax Act, 1961*

| ***Sr. No.*** | ***Particulars*** | ***Amount in lakhs*** |
|---|---|---|
| *1.* | *Decommissioning Reserve* | *3,470.39* |
| *2.* | *Renovation & Modernization Reserve* | *8,675.97* |
| *3.* | *Research & Development Reserve* | *5,205.58* |
| *4.* | *Interest on above reserves* | *9,069.02* |
| ***Total*** | | ***26,420.96*** |

21. *The learned CIT(A) erred in denying the claim for deduction of Renovation & Modernisation expenditure claimed by the appellant vide Note No. 7 of the notes to the return of income, which reads as under -*

*"During the previous year the asssessee has incurred expenditure on renovation and modernization of its power station at Kalpakkam. The expenditure has been funded from internal accruals and from the Renovation & Modernisation Fund. The company*

*believes that the expenditure incurred towards Renovation and Modernisation could be classified as being revenue in nature as the expenditure has been incurred for an existing asset. In the accounts this expenditure has not been debited to the Profit & Loss account and accordingly no deduction has been claimed in computing the total income of the previous year. The company submits that deduction for this expenditure ought to be allowed in computing the total income of the company. The return of income has been filed without prejudice to this claim.*

*Without prejudice to the above it is submitted that it is held that the expenditure is capital in nature, depreciation on the amounts incurred ought to be allowed".*

*22. The learned CIT(A) erred in denying the claim for deduction made by the assessee vide No. Note 8 of the notes to the return of income, which reads as under -*

*During the previous year an amount of Rs. 14.63 lakhs has been incurred from the Research & Development Fund.*

*It is submitted that as the expenditure has not been debited to the Profit & Loss Account, no deduction has been claimed. in the computation of income. The company submits that the amount of Rs.14.63 lakhs expended is deductible in computing the total income of the company in view of the provisions contained in sections 35 / 37 of the Income-tax Act, 1961. The return of income has been filed without prejudice to this claim"*

64. The assessee also raised additional ground by letter dated 18/07/2018, which is reproduced as under:

1. *The ground of appeal is independent and without prejudice to other grounds of appeal filed earlier, pending disposal.*
2. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) without having legal and valid jurisdiction under the Act to pass the assessment order. The Additional Commissioner of Income Tax lacked jurisdiction to pass the assessment order under*

*section 143(3) dated 14th February 2005 and to exercise the powers of performing the functions of an Assessing Officer.*

3. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) where the assessment proceedings were initiated by the Asst. Commissioner of Income Tax. Such order passed is bad in law, in the absence of an order transferring, jurisdiction under section 127 to the Additional Commissioner of Income Tax.*

64.1 We have heard rival submission of the parties on the issue of jurisdiction in passing the assessment order challenged by the assessee. The identical additional grounds raised by the assessee have been admitted in appeal for AY 1998-99, but after detailed discussion and following finding of the Tribunal in the case **Stock Traders P Ltd (supra),** same have been dismissed. Accordingly, following our finding in AY 1998-99, the additional grounds of the appeal for year under consideration are accordingly admitted and dismissed.

65. Now we take up regular grounds for adjudication.

66. The ground Nos. 1 to 10 of the year under consideration are identical to ground Nos. 1 to 10 of the appeal for assessment year 2002-03, and therefore following our finding, the ground Nos. 1 to 10 of the appeal for the year under consideration are decided mutasis mutandis.

67. The ground No. 11 of the appeal relates to apportionment of research and development expenditure to the units which were eligible for deduction under section 80IA of the Act. The Ld. CIT(A)

upheld the apportionment of research and development expenditure observing as under:

> *"8.2 I have carefully considered the submissions made by the appellant. The appellant is engaged in the business of generation of electricity through various units located at different places. The head office looks after the research and development work relating to all the units at Central level. Various units of the appellant are benefited from the research and development work carried out by the corporate office. During the assessment proceedings, the appellant could not deny that no part of the research and development expenditure related to the units eligible for deduction us 80IA. In the case of DCIT Vs. Eastern Medikit Ltd (2006) 100 TTJ 383 (Del), it has been held that deduction us 80IA of the IT.Act has to be computed for each unit independently taking into consideration the profit of each unit only. It was further held that the head office expenditure has to be allocated to all the units unless there are valid reasons to exclude a particular unit. In the instant case, all the units have benefited from the research and development work carried on by the head office, there is no reason for not allocating the R & D expenses to all the units including those eligible for deduction us 80IA. In view of this discussion, the action of the AO in apportioning a sum of Rs 747.48 lacs out of the total R & D expenditure of Rs. 13.75 crores is upheld. Accordingly, the addition of Rs. 747.48 lacs made by the AO on this account is confirmed.*
>
> *Therefore, the ground of appeal at Sr. No. 11 is rejected."*

67.1 We have heard rival submission of the parties and perused the relevant metal on record. The Ld. CIT(A) has observed that research and development expenses have been incurred by the office. Before us the assessee has not provided details of specific R&D activity carried out by the head office and whether same was not related to the electricity production activity of the plant eligible for deduction under section 80IA of the Act. In absence of any such information, the action of the lower authorities in allocating the said R & D

expenditure towards the profit from the undertaking eligible for deduction under section 80IA is justified and we do not find any error in the order of the Ld. CIT(A) in upholding the allocation of the R&D expenditure to the eligible units. The ground No. 11 of the appeal of the assessee is accordingly dismissed.

68. The ground Nos. 12 to 15 of the appeal of the assessee relates to rejection of reducing certain incomes from the expenditure incurred during construction period. The identical rounds raised in assessment year 2001-02 have been decided by us, therefore relevant ground No. 12 to 15 of the present appeal are also decided mutatis mutandis.

69. The ground Nos.16 to 18 of the appeal relate to prior period expenses of ₹ 552.41 lakhs. The identical grounds have been adjudicated by us in the appeal for assessment year 2001-02 and 2002-03. Following our finding on those assessment years, the ground No. 16 to 18 of the appeal are decided mutatis mutandis.

70. Ground of 19 of the appeal relates to provision made for obsolete stock. This ground of the appeal was not pressed before us and therefore same is dismissed as infructuous.

71. As far ground No. 20 of the appeal is concerned, we have already held that provisions of section 115 JB of the act are not applicable in the case of the assessee and therefore the consequent adjustment to book profit invoking section 115 JB of the Act made

by the Assessing Officer and upheld by the Ld. CIT(A), also cannot be sustained. The ground No. 20 of the appeal of the assessee is accordingly allowed.

72. The ground No. 21 of the appeal relates to denial of claim of deduction for renovation and modernisation expenditure.

72.1 Brief facts qua the issue in dispute are that the assessee claimed that said expenditure was not debited to the profit and loss account and accordingly no deduction was claimed while computing total income of the previous year, but same has been claim separately . The Ld. CIT(A) rejected the claim observing as under:

> *"17.1 I have carefully considered the submissions of the appellant. I have also perused the note no. 7 given in the return of income. Not to speak of giving the details of expenditure incurred from the Renovation and Modernisation Fund, even the amount spent from the said fund has not been specified by the appellant before me or before the AO. In absence of any details or other information the claim of the appellant cannot be accepted.*
>
> *Accordingly, the ground of appeal at Sr.no. 29 is rejected."*

72.2 We have heard rival submission of the parties and perused the relevant material on record. In absence of any details of the expenditure filed, the Ld. CIT(A)is justified in rejecting the claim of the assessee. No such details have been filed before us also. Accordingly, we uphold the finding of the Ld. CIT(A) on the issue in dispute and dismiss the ground of the appeal of the assessee.

73. The ground No. 22 of the appeal relates to denial of the claim for deduction of expenditure incurred out of research and

development fund. It was claimed by the assessee that said expenditure had not been debited to the profit and loss account and therefore no deduction had been claimed in the computation of the income. The Ld. CIT(A) rejected the claim observing as under:

> *"18.1 I have considered the contention of the appellant. Before me, the appellant has furnished the details of R & D expenses incurred out of the Research and Development Fund. As per the details filed by the appellant, it has incurred an expenditure of Rs. 14,63,152/- on the leveling of R & D site. As per the resolution passed by the Board of the appellant company, there is proposal to construct building for R & D at cost of Rs. 2.63 lacs. The amount of Rs. 14,63,152/- has also been incurred in connection with the construction of the building which is capital in nature. Such types of expenses are not allowable w/s 37 of the I.T.Act. The appellant has not made any argument or filed any evidence to claim that the said expenditures is allowable under any other provisions of the I.T.Act. In view of these facts and circumstances of the case, it is held that the appellant is not entitled to deduction of Rs. 14,63,152/- being amount spent out of the Research & Development Fund.*
>
> *Accordingly, the ground of appeal at Sr.No. 30 is rejected."*

73.1 We have perused the finding of the Ld. CIT(A) and heard rival submission of the parties. The assessee has not disputed that the expenditure has been incurred in relation with construction of the building for research and development. The expenses and construction of the building for the purpose of research and development is in the nature of the capital expenditure. Before us the learned counsel has not submitted any evidence to support that said expenditure was in the nature of revenue expenditure. In the facts and circumstances of the case, we do not find any error in the finding of the Ld. CIT(A) on the issue in dispute and we accordingly

uphold the same. The ground No. 22 of the appeal of the assessee is accordingly dismissed.

74. The ground No. 23 and 24 of the appeal being general in nature, same dismissed as infructuous.

**AY 2004-05**

75. Now we take up the appeal of the assessee for assessment year 2004-05. The ground raised by the assessee wide for No. 36 dated 28/06/2007, reproduced as under:

> *"The appellant company objects to the appellate order dated 30 March 2007 passed by the Commissioner of Income-tax (Appeals)-III, Mumbai [*CIT (A) under section 250 of the Income Tax Act. 1961 ('the Act) on the following grounds:*
>
> ***Decommissioning Levy***
>
> 1. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 3,052.70 lacs, being Decommissioning Levy collected by the appellant.*
> 2. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs.4103.80 lacs, being interest credited to Decommissioning Fund*
>
> ***Renovation & Modernisation Levy***
>
> 3. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs. 5361.98 lacs, being Renovation & Modernisation levy collected by the appellant.*
> 4. *The learned CIT(A) erred in confirming as income of the appellant an amount of Rs.3,624.04. lacs, being interest credited to Renovation and Modernisation fund.*
> 5. *Without prejudice to Grounds 3 and 4 above, the learned CIT(A) erred in holding that the amount collected towards Renovation & Modernisation levy was not in the nature of a capital receipt and accordingly taxable.*

***Research & Development Levy***

6. *The leamed CIT(A) erred in confirming as income of the appellant an amount of Rs.3,217.19 lacs, being Research & Development levy collected by the appellant.*
7. *The learned CIT (A) erred in confirming as income of the appellant an amount of Rs. 1877.47 lacs, being interest credited to Research and Development fund.*
8. *Without prejudice to Grounds 6 and 7 above, the learned CIT(A) erred in holding that a portion of the amount collected towards Research & Development levy was not in the nature of a capital receipt and accordingly taxable*

***Deduction under section 80-IA***

9. *The learned CIT(A) erred in confirming the exclusion of an amount of interest income of Rs. 281.63 lakhs and other income to the extent of Rs.658.85 lakhs from the "Profit of the business" eligible for deduction under Section 80 IA of the Income Tax Act, 1961*
10. *Without prejudice to Ground No. 9, the learned CIT(A) erred in confirming the exclusion of the gross interest income and other income from the "Profits of the business" eligible for deduction under Section 80 IA of the Income Tax Act 1961 instead of the net income. The learned CIT(A) erred in not netting off the interest income and other income against the interest and other expenditure.*

***Income reduced from expenditure incurred during Construction Period***

11. *The learned CIT(A) erred in confirming the action of the assessing officer in taxing as income, the following amounts which had been reduced by the appellant company from the expenditure incurred during construction period:*

| ***Sr. No.*** | ***Particulars*** | ***Amount (Rs. In Lakhs)*** |
|---|---|---|
| *1.* | *Interest on Staff Loan* | *215 46* |
| *2.* | *Penal Interest recovered from employees* | *0.87* |
| *3.* | *Sale of Power* | *44.54* |
| *4.* | *Other income* | *766.01* |
| | *Total* | *1,007.74* |

12. *Without prejudice to Ground No. 11 above, the learned CIT(A) ought to be directed to allow deduction for expenditure incurred in respect of the income of Rs. 1,007.74 lakhs brought to tax.*
13. *Without prejudice to Grounds 11 and 12 above, the learned CIT(A) may be directed to re-compute the depreciation allowable to the appellant company pursuant to the exclusion of the income reduced from expenditure during construction. The learned CIT(A) may be accordingly directed to re-compute the depreciation for the assessment year 2004-05 and subsequent assessment year.*
14. *14. Without prejudice to the appeals) preferred by the appellant in the earlier assessment years, the learned CIT(A) erred in not re-computing the depreciation allowance, as due to the appellant company pursuant to the exclusion of income reduced from expenditure during construction in the earlier assessment years.*

***Disallowance under Section 14A***

15. *15. The learned CIT(A) erred in confirming the disallowance of administrative expenses of Rs. 3,191.03 lakhs under Section 14A of the Act.*
16. *Without prejudice to Ground No. 15 above. the learned CIT(A) be directed to reduce the amount of administrative expenses disallowed under Section 14A of the Act.*

***Prior period Expenses***

17. *The learned CIT(A) erred in confirming the disallowance of prior period expenses of Rs. 1,028.89 lakhs.*
18. *Without prejudice to the above, the learned CIT(A) / Assessing Officer may be directed to disallow only the net prior period expenditure after setting off prior period expenditure against prior period income.*
19. *Without prejudice to Ground No. 17 & 18 above, the learned CIT(A)/Assessing Officer may be directed to allow deduction of the prior period expenses in respective financial years.*

***Provision made for Obsolete Stock***

20. *The learned CIT(A) erred in confirming the disallowance of the provision made for obsolete stock of Rs. 20.66 lakhs.*

***Computation of book profits under section 115JB***

*21. The learned CIT(A) erred in confirming the action of the assessing officer in increasing the net profit by the following amounts, while computing the book profit of the appellant under Section 115JB of the Income Tax Act; 1961.*

| Sr. No. | Particulars | Amount (Rs. In Lakhs) |
|---|---|---|
| 1. | Decommissioning Reserve | 3,052.70 |
| 2. | Renovation & Modernization Reserve | 5,361.98 |
| 3. | Research & Development Reserve | 3,217.19 |
| 4. | Interest on above reserves | 9,605.31 |
| | **Total** | **21,237.18** |

***Renovation and Modernisation Expenditure***

*22. 28. The learned CIT(A) erred in confirming the action of the assessing officer in disallowing the claim of the appellant company to allow the Renovation and Modernisation expenditure incurred in Kalpakkam unit as revenue expenses.*

75. Before us, the assessee vide letter dated 18/07/2018, has raised additional ground, which are identical to additional ground raised in assessment year 2002-03 and 2003-04. We have already admitted additional grounds in those assessment years and after considering submission of the parties, those additional grounds have been dismissed. Following our finding in assessment year 2002-03 and 2003-04, the additional grounds raised in the year under consideration are also dismissed.

76. Now we take up the regular ground of the appeal for adjudication.

77. The ground Nos. 1 and 2 of the appeal relate to **receipt of de-commissioning levy** by the assessee and the **interest credited on the de-commissioning fund** respectively. The issues in dispute

being identical to ground Nos. 5 and 6 raised in assessment year 1998-99, therefore, following our finding in ITA No. 202/Mum/2004 for assessment year 1998-99, the issues are decided mutatis mutandis.

78. The ground Nos. 3 and 4 of the appeal of the assessee relate to amount of **receipt of Rs. 5361.98 lakhs by way of renovation and modernization levy** and **interest of Rs. 3624.04 lakhs credited to the renovation and modernization fund** respectively. In ground no. 5 , the assessee has prayed for treating the **receipt of Rs. 5361.98 lakhs by way of renovation and modernization levy** as capital receipt. The issues in dispute raised in above grounds have already been adjudicated by us in the appeal for assessment year 1998-99 ,therefore, following our finding in appeal for assessment year 1998-99, the issues in dispute are decided mutatis mutandis.

79. The ground Nos. 6 to 8 of the appeal of the assessee relate to amount of Rs. 3297.14 lakhs collected by way of **research and development levy** , **interest** of Rs. 1877.47 lakhs credited to research and development fund and research and development levy being in the nature of **capital receipt** respectively. The identical grounds have been decided by us while adjudicating ground Nos. 3 and 4 of the appeal of the assessee for assessment year 1998-99

,therefore, respectfully following the same the ground Nos. 6 to 8 of the appeal of the assessee are decided mutatis mutandis.

80. The ground Nos. 9 in 10 of the appeal relate to disallowance of deduction under section 80IA in respect of the interest income earned from loans and advances to staff working at unit eligible for deduction under section 80 of the Act. The identical ground nos. 9 and 10 , raised in assessment year 2002-03, have been dismissed. Following our finding in assessment year 2002-03, the ground Nos. 9 in 10 of the appeal under consideration are also dismissed accordingly.

81. The ground Nos. 11 to 14 of the appeal relate to disallowance of reduction of certain income(s) from expenditure incurred during construction. Identical grounds have been raised in assessment year 2002-03 and 2003-04, therefore following our finding in assessment year 2002-03 and 2003-04, ground No. 10 to 14 of the appeal are decided mutatis mutandis.

82. The ground Nos. 14 and 15 of the appeal relate to disallowance under section 14A of the Act.

82.1 The brief facts, the issue in dispute that the assessee shown tax-free exempted income from investments, however no disallowance for earning such exempted income was shown by the assessee. Before the Assessing Officer assessee submitted that

company has made investment of ₹ 2,63,198 lakhs in bonds as per the recommendation of the 'Ahluwalia committee' of Government of India. It was submitted that those Bonds were compulsorily allotted by the different Electricity Board for converting existing debt as investment. It was explained that investment in Bond was from internal funds i.e. debt and not from borrowed funds and therefore no disallowance of interest could be made under the provisions of section 14A of the Act. The Assessing Officer accepted the contention regarding the interest disallowance, however he pointed out that assessee has not made any disallowance towards administrative expenses incurred for earning exempted income. The Assessing Officer made disallowance of proportionate administrative expenses, computed as under:

> *"9.4 The expenses on the earning of tax-free incomes have to be estimated. A fair basis of the estimate would be apportionment of the administrative expenses on the ratio of tax-free income to the turnover of the assessee.*
> *Total turnover as per P &L account 597177.96 lakhs*
> *Income from Tax-free bonds 55,759.58 lakhs*
> *Administrative expenses as per P &L account*
> *Rs. 2,11,959.79 lakhs*
> *Less: expenses relatable only to industrial activity:*
>
> | | | *Rs. In lakhs* |
> |---|---|---|
> | *1.* | *Fuel charges* | *54,179.32* |
> | *2.* | *Heavy water charges* | *35,871.30* |
> | *3.* | *Auxillary consumption of power* | *47,095.98* |
> | *4.* | *Stores and spares* | *1,766.52* |
> | *5.* | *Repairs to Plant &machinery* | *7,104.01* |
> | *6.* | *Rebates and discount* | *31767.17* |
> | | *Total* | *1,77,784.30* |
>
> *Allocable expenses 2,11,959.79 - 1,77,784.3*

*= 34,175.49 lakhs*

*Expenses on tax-free interest:*
*= 34,175.49 X 55,759.58*
*597177.96*
**= *Rs. 31,91,02,695***

*In view of the above, the provision made by Rs.31,91,02,695 is disallowed in computing the total income of the assessee. Para 9.4 of the Assessing Officer"*

82.2 On further appeal, the Ld. CIT(A) upheld the disallowance observing as under:

*"11.2 I have carefully considered the submissions of the appellant. As per section 14A of the I.T.Act, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under I.T.Act. Therefore, while computing income of assessee, all the expenses relating to exempt income have to be disallowed. In the case of DCIT Vs. S.G. Investment & Industries Ltd 89 ITD 14 (Cal.), it has been held that, in section 14A, the expression "expenditure incurred by the assessee in relation to income which does not form part of total income" should be given a wide meaning and it cannot be construed in a narrow or restricted manner. If such a wider meaning is given, the said expression would encompass not only the direct or proximate expenditure incurred for the purpose of making or earning exempt income but would include all other expenses attributable or in relation to exempt income. In other words, it would signify or imply both direct and indirect relationship between the expenditure and the exempt income. Further, in the case of Southern Petro Chemical Industries Vs. DCIT (2005) 3 SOT 157 (Chennai), it has been held that investment decisions are very strategic decisions in which top management is involved and, therefore, proportionate management expenses are required to be deducted while computing the dividend income for the purpose of section 10(33). Similar decision has been given in the case of ACIT Vs. Premier Consolidated Capital Trust (1) Ltd. (2004) 4 SOT 793 (Mumbai) ; JCIT Vs. Holland Equipment Co. B.V (2005) 3 SOT 810 (Mumbai) ; Rhythm Exports Pvt.Ltd. Vs. ITO 97 TTJ 493 (Mumbai) and ACIT Vs. Dakshesh S. Shah 90 ITD 519 (Mumbai). In the case of Rhythm Exports Pvt.Ltd. (supra), it has been held that it is the duty of the assessee to allocate the expenditure to exempt income w/s 14A but*

*in case the assessee fails to allocate the same, the AO has no option but to disallow the same on proportionate basis. The decision of Hon. Bombay High Court in the case of General Insurance Corporation of India supra) and other decisions relied upon by the appellant are not applicable since the same was rendered in respect of section 80M and before the introduction of section 14A in IT.Act. In view of this discussion, the action of the AO in ==disallowing expenditure of Rs. Rs. 31,91,02,695/- /s 14A of the I.T.Act is upheld. (Addition confirmed Rs. 31,91,02,695/-).*

*Therefore, grounds of appeal at Sr.no. 15 and 16 are rejected."*

82.3 Before us the learned counsel for the assessee referred to paperbook page 190 and submitted that as far as exempted income is concerned, the assessee received cheques from state electricity boards toward interest, which were deposited in bank account and no other administrative cost was incurred by the assessee for earning the exempted income.

82.4 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Prior to assessment year 2008-09, rule 8D of Income-tax Rules, 1962 ( in short the rules) was not in operation and it was discretion of the Assessing Officer to disallow expenses corresponding to earning of exempted on a reasonable basis. In the case, the Assessing Officer has disallowed the administrative expenses in proportion to the ratio of exempted income to the total turnover of the assessee. But as per the submission of the assessee, assessee is receiving tax-free interest income on bonds invested in state electricity board, and no efforts except depositing the cheques of the interest were deposited

in the bank. In such circumstances, we are of the opinion that disallowance proportional to the receipt of interest is too excessive. At maximum, some percentage of administrative expenses on salary, office establishment expenses etc would be sufficient to cover expenses corresponding to earning of exempted income. Accordingly, we set aside the finding of the Ld. CIT(A) on the issue in dispute and restore the matter to the file of the Assessing Officer for making disallowance on some reasonable basis . The assessee is directed to provide details of expenses including office establishment expenses related to employees engaged in work related to earning of exempted income so that Assessing Officer after verification of the same may be in position to decide the quantum of disallowance on reasonable basis. The ground Nos. 15 and 16 of the appeal of assessee are accordingly allowed for statistical purposes.

83. The ground Nos. 17 to 19 of the appeal relate to disallowance of prior period expenses. Identical grounds have been raised by the assessee in assessment year 2002-03 and 2003-04, therefore following our finding in assessment year 2002-03 and 2003-04, the ground No. 17 to 19 of the appeal are adjudicated mutatis mutandis.

84. The ground No. 20 of the appeal relates to disallowance of provision made for obsolete stock of ₹ 20.66 lakhs. The learned

counsel of the assessee submitted that this ground was not pressed by the assessee and therefore accordingly it is dismissed as infructuous.

85. The ground no. 21 of the appeal, relate to increase in net profit while computing book profit under section 115 JB of the Act. Since we have held that provisions of section 115JB of the act are not applicable in the case of the being a government company, therefore consequently action of the Assessing Officer for increasing the profit for the purpose of section 115 JB of the act is not sustainable in the foreground of the appeal of the assessee are accordingly allowed.

86. The ground No. 22(sic) of the appeal relates to disallowance of the claim of the assessee for considering renovation and modernisation expenditure incurred in 'Kalpakkam' unit as revenue expenditure. This expenditure was not debited to the profit and loss account and therefore no deduction for the same was claimed in the return of income filed, however by way of a note to the return of income the assessee made this claim. The Ld. CIT(A) however rejected this claim observing as under:

> *"18.1 I have carefully considered the submissions of the appellant. I have also perused the note no. 6 given in the return of income. Not to speak of giving the details of expenditure incurred from the Renovation and Modernisation Fund, even the amount spent from the said fund has not been specified by the appellant before me or before the AO. In absence of any details or other information the claim of the appellant cannot be accepted. Accordingly, the ground of appeal at Sr.no.32 is rejected."*

86.1 We have heard rival submission of the parties on the issue in dispute and perused the material available on record. We find that before us also no details of expenditure claimed to have incurred or innovation and modernisation have been filed for determination whether the same were in the nature of the revenue expenditure or capital expenditure. In such circumstances, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute in rejecting the claim of the assessee. The ground No. 22( sic) of the appeal of the assessee is accordingly dismissed.

87. The ground Nos. 23 and 24 (wrongly mentioned as to ground No. 29 and 30) being general in nature are dismissed as infructuous.

88. Now we take up the appeal of the Revenue for assessment year 2004-05. The grounds raised by the Revenue are reproduced as under:

1. *"On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in allowing deduction on interest received by assessee company on over due payments from its customer us 80lA on sale of electricity to the extent of R.32474.94 lakhs without appreciating that the said income cannot be said to have derived from the business of sale of electricity.*
2. *"On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in deleting the provisions for doubtful debts to the extent of Rs.74.33 lakhs made by the A.O while working out book profit u/s 115JB".*
3. *"The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."*

89. In the ground no.1, the Revenue has challenged finding of the Ld. CIT(A) of allowing deduction under section 80IA in respect of the interest received by the assessee company on overdue payments from its customers. The Assessing Officer noted that delayed payment charges were in the nature of interest and same emanated from the debit balance lying with the debtors, which are not a profit of the industrial unit directly. The Assessing Officer held that the delayed payment charges though attributable to the business of the assessee, but are not derived from the business of the assessee undertaking. The Ld. CIT(A) following the judicial precedents on the issue in dispute deleted the addition. The relevant finding of the Ld. CIT(A) is reproduced as under:

> *As regard the delayed payment charges amounting Rs. 32433.04, it is seen that the appellant supplies power to various electricity boards. In case the payment is not made by the boards in time, the appellant charges interest at certain rate from them on delayed payments. In this way interest of Rs. 32433.04 was recovered by the appellant during the year from the trade debtors. In the case of Nirma Industries Ltd. Vs. DCIT 283 IT 402(Guj), Mayank Electro Ltd. Vs. I.T.O. 71 TTJ 612(Ahd), JCIT Vs. Sidheshwari Paper Udyog Ltd. 94 ITD 187(Del), it has been held that deduction w/s 80 IA is allowable on interest receved from trade debtors for late payment of sales consideration. Respectfully following these decisions, the AO is directed to allow deduction w/s 80IA to the appellant in respect of the amount of Rs. 32433.04 lakh.*
>
> *Further, the appellant is also entitled to deduction w/s 80IA in respect of the write back of provision no longer required. These provisions were created on account of certain expenses debited to the profit and loss account. These expenses had earlier gone to reduce the profits for the purpose of deduction w/s 80IA. On write back of the provision in respect of these expenses, the eligible profits for section 80A would increase to this extent. Accordingly, the AO is*

*directed to allow deduction u/s 80IA to the appellant in respect of the amount of Rs.41.90 lakhs.*

*The other receipts shown by the appellant under the head miscellaneous income have no direct nexus with the industrial undertaking. The nexus of those receipts with the industrial undertaking is indirect and incidental. Accordingly, those receipts are not eligible for deduction us 80IA."*

89.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that Hon'ble Gujarat High Court in the case of Nirma industries Ltd(283 ITR 402 ), observed that when an assessee enters into a contract for sale of its products it could either stipulate (a) that interest at the specified rate which would be charged on the unpaid sale price and added to the outstanding till the time of realization, or (b) that in case of delay the payment for sale of products worth Rs. 100 to carry the sale price of Rs. 102 for first month's delay, Rs. 104 for second month's delay , Rs. 106 for third month's delay and so on. If the contention of revenue is accepted merely because the assessee has described the additional sale proceeds as interest in case of contract as per illustration, (a) above, such payment would not be profits derived from industrial undertaking, but in case of illustration (b) above, if the payment is described as sale price it would be profits derived from the industrial undertaking. This can never be, because in sum and substance these are only two modes of realizing sale consideration, the object being to realize sale proceeds at the earliest and without delay. Purchaser pays higher

sale price if it delays payment of sale proceeds. In other words, this is a converse situation to offering of cash discount. Thus, in principle, in reality, the transaction remains the same and there is no distinction as to the source. It is incorrect to state that the source for interest is the outstanding sale proceeds. Thus, according to the Gujarat High Court, when interest is paid on delayed payment, it can be treated as higher sale price which is converse situation to offering of cash discount because the transaction remains the same and there is no distinction as to the source. Looking from this angle, the interest becomes part of the hire sale price and is clearly derived from the sales made and is not divorced there from. It is, thus, the direct result of the sale of goods and the income is derived from the Business of industrial undertaking.

89.2 We find that the Ld. CIT(A) has followed decision of the Hon'ble Gujarat High Court on the issue in dispute. Before us, the learned DR has not brought on record any contrary decision of the jurisdiction High Court and therefore we do not find any error in the order of the Ld. CIT(A) on the issue in dispute in following the finding of the Hon'ble Gujarat High Court (supra). The ground No. one of the appeal of the Revenue is accordingly dismissed.

90. The ground No. 2 (two) of the appeal relate to deletion by the Ld. CIT(A) of the provision for doubtful debts amounting to ₹ 74.33

lakhs while working out book profit under section 115JB of the Act. The Ld. CIT(A) deleted the provision for doubtful that in advances added by the Assessing Officer to the net profit while computing book profit under section 115JB of the Act relying on judicial precedents mentioned in impugned order.

90.1 Before us learned counsel of the assessee relied on the decision of the Tribunal in ITA no. 4463/Del/2009. Further we find that in earlier assessment years we have already held that provisions of section 115 JB of the act are not applicable in the case of the assessee and therefore the consequent adjustment to the book profit is also not applicable in the case of the assessee. Accordingly the ground No.2 of the appeal raised by the revenue is dismissed.

**AY 2005-06**

91. Now, we take up the appeal of the assessee for assessment year 2005-06. The grounds raised by the assessee vide form No. 36 dated 28/03/2011 are reproduced as under:

> *The appellant company objects to the order dated 18 November 2008 passed by the Commissioner of Income-Tax (Appeals)-III, Mumbai [ CIT(A)] under section 250 of the Income Tax Act, 1961 ("the Act") on the following among other grounds:*
>
> ***Decommissioning Levy***

1. *The learned CIT(A) erred in confirming as income of the appellant, an amount of Rs. 2,956.60 lakhs being Decommissioning Levy collected by the appellant company.*

***Interest on Decommissioning Fund***

2. *The learned CIT(A) erred in confirming as income of the appellant, an amount of Rs. 3,739.48 lakhs being interest credited to the Decommissioning Fund.*

***Interest on Renovation & Modernisation Fund***

3. *The learned CIT(A) erred in confirming as income of the appellant, an amount of Rs. 3,386.77 lakhs being interest credited to the Renovation and Modernisation Fund.*

***Research & Development Levy***

4. *The learned CIT(A) erred in confirming as income of the appellant, an amount of Rs. 49.07 lakhs being Research & Development Levy collected by the appellant company.*

***Interest on Research & Development Fund***

5. *5. The learned CIT(A) erred in confirming as income of the appellant, an amount of Rs. 1,676.53 lakhs being interest credited to the Research and Development Fund.*

***Research & Development Levy - portion represents capital receipt***

6. *Without prejudice to Ground Nos. 4 & 5 above, the learned CIT(A) erred in holding that the amount collected towards Renovation & Modernisation Levy was not in the nature of a capital receipt and accordingly taxable.*

***Deduction under section 80-IA***

7. *7. The learned CIT(A) erred in confirming the exclusion of an amount of interest income of Rs. 91.74 lakhs and Miscellaneous Income to the extent of Rs.398.21 lakhs from the "Profit of the business" eligible for deduction under Section 80IA of the Act.*
8. *8. Without prejudice to Ground No. 7, the learned CIT(A) erred in confirming the exclusion of the gross interest income and miscellaneous income from the "Profits of the business" eligible*

*for deduction under Section 80 IA of the Act instead of the net income. The learned CIT(A) erred in not netting off the interest income and miscellaneous income against the interest and other expenditure.*

***Income reduced from expenditure incurred during construction***

9. *9. The learned CIT(A) erred in confirming the action of the Assessing Officer in taxing as income, the following amounts which had been reduced by the appellant company from the expenditure incurred during construction period:*

| ***Sr. No.*** | ***Particulars*** | ***Amount (Rs. In Lakhs)*** |
|---|---|---|
| *1.* | *Interest on Staff Loan* | *91.29* |
| *2.* | *Penal Interest recovered from employees* | *5.77* |
| *3.* | *Sale of Power* | *49.29* |
| *4.* | *Other income* | *1,672.00* |
| | *Total* | *1,818.35* |

10. *10. Without prejudice to Ground No. 9 above, the learned CIT(A) erred in not directing Additional Commissioner of Income-tax ('Addl. CIT*) to allow a deduction for expenditure incurred in respect of the income of Rs. 1.818.35 lakhs brought to tax.*
11. *11. Without prejudice to Grounds Nos. 9 & 10 above, the learned CIT(A) erred in not directing the Addl. CIT to re-compute the depreciation allowable to the appellant company pursuant to the exclusion of the income reduced from expenditure during construction period.*
12. *12. Without prejudice to the appeals) preferred by the appellant in the earlier assessment years, the learned CIT(A) erred in not re-computing the depreciation allowance, as due to the appellant company pursuant to the exclusion of income reduced from expenditure during construction period in earlier assessment years.*

***Prior period expenses***

13. *13. The learned CIT(A) erred in confirming the disallowance of prior period expenses of Rs. 1,991.02 lakhs.*
14. *14. Without prejudice to the above, the learned CIT(A) / Assessing Officer may be directed to disallow only the net prior period expenditure, if any, after setting off prior period expenditure against prior period income.*

*15.15. Without prejudice to Ground Nos. 13 & 14 above, the learned CIT(A) may be directed to allow deduction of the prior period expenses in the respective assessment years.*

***Provision made for Obsolete Stock***

*16.16. The learned CIT(A) erred in confirming the disallowance of the provision, for obsolete stock of Rs. 45.92 lakhs.*

92. The assessee also raised additional grounds by letter dated 18/07/2018, which are reproduced as under:

1. *The ground of appeal is independent and without prejudice to other grounds of appeal filed earlier, pending disposal.*
2. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) without having legal and valid jurisdiction under the Act to pass the assessment order. The Additional Commissioner of Income Tax lacked jurisdiction to pass the assessment order under section 143(3) dated 25th January 2007 and to exercise the powers of performing the functions of an Assessing Officer.*
3. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) where the assessment proceedings were initiated by the Asst. Commissioner of Income Tax. Such order passed is bad in law, in the absence of an order transferring, jurisdiction under section 127 to the Additional Commissioner of Income Tax.*

92.1 The identical additional grounds have been admitted by us in assessment year 2002-03 to AY 2004-05. Therefore following our finding in those assessment years, the additional ground raised in the year under consideration is also admitted. After considering submission of the parties, the facts and circumstances of the year under consideration being identical to assessment year 2002-03 to 2004-05, therefore following our finding in those assessment years,

the additional grounds for the year under consideration are also dismissed.

93. As far as regular grounds raised by the assessee are concerned, same are covered by the grounds raised by the assessee in the earlier years and therefore same are decided mutatis mutandis.

94. Now we take up the appeal of the Revenue for assessment year 2005-06. The grounds raised by the Revenue reproduced as under:

1. *"On facts and in the circumstance of the case and in law the Ld CIT(A) erred in holding that the receipt amounting to Rs. 2555.06 lakhs from delayed payment charges, amount of Rs.60.82 lakhs as provision no longer required, charges of Rs. 1, 11, 124/- from contractor and amount of Rs.7,76,029/- from sale of scrap shall be entitled to deduction u/s 80lA without appreciating that same are not derived from manufacturing activity of the assessee".*
2. *"On facts and in the circumstance of the case and in law the Ld CIT(A) erred in deleting amount of Rs. 2017.19 lakhs being addition made by the A.O. us 14A of the I.T.Act without applying the decision in the case of M/s.Daga Capital Management P Ltd. (ITA No. 8057/Mum/2003)."*
3. *"The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."*

95. In ground No. 1(one) revenue has challenged finding of the Ld. CIT(A) in allowing deduction under section 80IA of the Act on interest on delayed payments amounting to Rs.60.82 lakhs, provision no longer required amounting to ₹ 1, 11, 124 and scrap sales amounting to ₹ 7, 76, 029/-.

95.1 The learned Assessing Officer noted that delayed payment charges emanated from the debit balance lying with the debtors and therefore same is not profit of the industrial unit directly and it could be considered as profit attributable to the business of the assessee but not derived from the business of the assessee. Similarly regarding the provision no longer required, the Assessing Officer held that same are not part of the income of the year under consideration. Similarly the claim of scrap sales for deduction was also disallowed. The Ld. CIT(A) allowed the deduction under section 80 IA in respect of those receipts observing as under:

*"2. Ground No.9 is against excluding from the profits of the business eligible for deduction u/s. 80IA the following amounts:*

| | | |
|---|---|---|
| 1. | Interest income | Rs. 91.74 lakhs |
| 2. | Delayed payment charges | Rs. 2555.06 lakhs |
| 3. | Miscellaneous Income | Rs. 407.08 lakhs |
| 4. | Provision no longer required | Rs. 60.82 lakhs. |

*2.1 This issue has been discussed in detail by my predecessor Appellate Commissioner in appellant's appeal for Assessment Year 2004-05. In that appeal, Appellate Commissioner has gone into the details of variety of decisions on the issue under consideration and has held that appellant is not entitled to deduction us. 80IA in respect of interest income. As far as delayed payment charges and provision no longer required are concerned. The decision of my predecessor is in favour of appellant. There is no change in the facts as far as interest, delayed payment charges and provision no longer required are concerned. Therefore, Assessing Officer is directed to allow deduction u/s. 80IA in respect of delayed payment charges and in respect of provision no longer required. The decision of Assessing Officer in respect of interest is upheld. As far as miscellaneous income is concerned, it is noticed that majority of these incomes, details of which have been filed in the appellate proceedings cannot be said to be derived from appellant's business activity. However, two of these incomes, charges from contractors at*

*Rs, 1, 11,124/- and sale of scrap at Rs.7,76,029/- are directly having nexus with the manufacturing activity of appellant. Therefore, Assessing Officer is directed to grant deduction in respect of these two items. The claim of deduction in respect of balance miscellaneous income is rejected."*

95.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Ld. CIT(A) has followed finding of his predecessor as far as delayed payment charges and provision no longer required in view of no change of the facts as compared to the immediately preceding assessment year. As well as issue of the deduction on delayed payment charges, we have decided issue in favour of the assessee in assessment year 2004-05. As far as provision no longer required, we are of the opinion that same are in respect of the business operation of the assessee and since the said income crystallized in the year under consideration, the Ld. CIT(A) is justified in considering the same for deduction under section 80IA in the year under consideration. Regarding charges from contractors amounting to ₹ 1,11,124/- and sale of a scrap amounting to Rs. 7,76,029/-, the Ld. CIT(A) held that same are directly having nexus with the manufacturing activity of the assessee. The learned DR failed to rebut such finding of the Ld. CIT(A). In view of our discussion, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground No.1 of the appeal of the Revenue is accordingly dismissed.

96. The ground No. 2 (two) of the appeal relate to the disallowance of ₹ 2017.19 lakhs made by the Assessing Officer under section 14A of the Act. The assessee claimed that tax-free interest income was earned from debts converted by the state Electricity Board as bonds therefore no borrowed funds had been utilised for yielding taxable income. The Assessing Officer admitted the claim of the assessee regarding interest expenditure, however according to him certain administrative expenses must have been incurred by the assessee for earning exempted income but same were not disallowed. Accordingly, the Assessing Officer made disallowance of proportionate administrative expenses of ₹ 2 017.19 lakhs. The Ld. CIT(A) however deleted the same observing as under:

> *"I have perused the facts of the case. I have also analyzed Schedule 7 Note No. 12 forming part of the accounts. It is a fact that investment on which tax free fence Tries, Income has been earned by appellant had to be compulsorily acquired by the appellant on the basis of recommendation of Ahluwalia Committee of Govt. of India. is, therefore, an investment where appellant does not have to devote any attention or time with regard to either its maintenance or with. regard to change of the investment pattern or with regard to earning income from these funds. To my mind, this is a case where appellant is not spending anything either for maintaining the investments Or, for earning tax free income thereon. Therefore, it is held that investments under consideration are outside the scope of Sectior! 14A. The disallowance made by Assessing Officer is therefore deleted."*

96.1 We have heard rival submission of the parties on the issue in dispute and perused relevant material on record. We find that identical issue of the disallowance under section 14A in respect of

the administrative expenses has been restored by us to the file of the Assessing Officer in assessment year 2004-05 in case of appeal of assessee, and therefore following our finding in assessment year 2004-05, the issue of disallowance of administrative expenses for earning exempted income is restored back to the file of the Assessing Officer. The ground No.2 two of the appeal of the Revenue is accordingly allowed for statistical purposes.

**AY 2006-07**

97. Now, we take up the appeal of the assessee for assessment year 2006-07. The grounds raised by the assessee vide form No. 36 dated 03/05/2011 are reproduced as under:

> *The appellant company objects to the order dated 28 February 2011 passed by the Commissioner of Income-Tax (Appeals), Large Tax Payer Unit, Mumbai [*CIT(A)] under section 250 of the Income Tax Act, 1961 ('the Act') on the following among other grounds:*
>
> ***Decommissioning Levy***
>
> 1. *The learned CIT(A) erred in confirming as income of the appellant, an amount of Rs. 3,021.02 lakhs being Decommissioning Levy collected by the appellant company.*
>
> ***Interest on Decommissioning Fund***
>
> 2. *The learned CIT(A) erred in confirming as income of the appellant, an amount of Rs. 3.594.39 lakhs being interest credited to the Decommissioning Fund.*
>
> ***Interest on Renovation & Modernisation Fund***
>
> 3. *The learned CIT(A) erred in confirming as income of the appellant, an amount of Rs. 3,269.47 lakhs being interest credited to the Renovation and Modernisation Fund.*

***Interest on Research & Development Fund***

4. *The learned CIT(A) erred in confirming as income of the appellant, an amount of Rs. 1,934.30 lakhs being interest credited to the Research and Development Fund.*

***DISALLOWANCE UNDER SECTION 14A***

5. *5. The learned CIT(A) erred in confirming the disallowance of expenses under Section 14A of the Act of Rs.4.073.58 lakhs.*
6. *6. The learned CIT(A) erred in ignoring the fact that the appellant company had not incurred any expenditure for earning the tax free interest income and accordingly, the disallowance under Section 14A is not warranted.*
7. *7. The learned CIT(A) erred in directing the Assessing Officer to determine the expenditure incurred for earning exempt income based on the criteria which is same as Rule 8D, although Rule 8D is not applicable for assessment year 2006-07.*
8. *8. The learned CIT(A) erred in not considering the submissions made by the appellant company in its correct perspective.*
9. *9. The learned CIT(A) erred in not considering the submissions of the appellant company to allow the expenditure of Rs. 2,062.97 lakhs, disallowed by the appellant in the return of income under Section 14A of the Act, following the assessment order passed in the appellant company's own case for the assessment year 2004-05.*
10. *10. The appellant company therefore prays that the disallowance under section 14A of the Act be deleted.*
11. *11. Without prejudice to the above, the disallowance of expenses under section 14A of the Act is on a higher side and must be reduced considering the facts of the appellant company.*

***Income reduced from expenditure incurred during construction***

12. *12. The learned CIT(A) erred in confirming the action of the Assessing Officer in taxing as income, the following amounts which had been reduced by the appellant company from the expenditure incurred during construction period:*

| ***Sr. No.*** | ***Particulars*** | ***Amount (Rs. In Lakhs)*** |
|---|---|---|
| *1.* | *Interest on Staff Loan* | *98.76* |
| *2.* | *Penal Interest recovered from employees* | *76.50* |
| *3.* | *Sale of Power* | *1,321.31* |
| *4.* | *Other income* | *1,185.53* |

| | | |
|---|---|---|
| | ***Total*** | ***2,682.10*** |

13. *13. Without prejudice to Ground No. 12 above, the learned CIT(A) erred in not considering the submissions of the appellant company to allow a deduction for expenditure incurred in respect of the income of Rs. 2,682.10 lakhs brought to tax.*
14. *14. Without prejudice to Grounds Nos. 12 & 13 above, the learned CIT(A) erred in not directing the Assessing Officer to re-compute the depreciation allowable to the appellant company pursuant to the exclusion of the income reduced from expenditure during construction period.*
15. *15. Without prejudice to the appeals) preferred by the appellant company in the earlier assessment years, the learned CIT(A) erred in not re-computing the depreciation allowance, as due to the appellant company pursuant to the exclusion of income reduced from expenditure during construction period in earlier assessment years.*

***Prior period expenses***

16. *16. The learned CIT(A) erred in confirming the disallowance of prior period expenses of Rs. 354.04 lakhs*
17. *17. The learned CIT(A) erred in not considering the submissions made by the appellant company in correct perspective.*
18. *18. The appellant company prays that the prior period expenses should be allowed as deduction.*
19. *Without prejudice to the above, the learned CIT(A) / Assessing Officer may be directed to disallow only the net prior period expenditure, if any, after setting off prior period expenditure against prior period income.*
20. *Without prejudice to above grounds, the learned CIT(A) erred in not accepting the submission of the appellant company to allow deduction of the prior period expenses in the respective assessment years, to which it pertains.*

***Provision made for Obsolete Stock***

21. *21. The learned CIT(A) erred in confirming the disallowance of the provision made for obsolete stock of Rs. 300.95 lakhs.*

***Addition of consultancy charges***

22. *22. The learned CIT(A) erred in not adjudicating on the issue relating to addition of the consultancy income of Rs. 36.17 lakhs.*

23. 23. *The appellant company requests that the learned CIT(A) be directed to decide the issue relating to consultancy income.*

***Deduction under section 80-IA***

24. 24. *The learned CIT(A) erred in confirming the exclusion of following income from the "Profit of the business" eligible for deduction under Section 80 IA of the Act.*

| ***Sr. No.*** | ***Particulars*** | ***Amount (Rs. In Lakhs)*** |
|---|---|---|
| *1.* | *Interest Income* | *121.82* |
| *2.* | *Miscellaneous income* | *387.49* |
| | ***Total*** | ***509.31*** |

25. 25. *The learned CIT(A) erred in not considering the submissions made by the appellant company in correct perspective.*
26. *The appellant company prays that the above income should be included in the 'profit of business' while computing deduction under section 80 IA of the Act.*
27. 27. *Without prejudice to Ground Nos. 24 to 26, the learned CIT(A) erred in confirming the exclusion of interest income on gross basis and miscellaneous income from the "Profits of the business" eligible for deduction under Section 80IA of the Act instead of the net income.*
28. 28. *The learned CIT(A) erred in rejected the claim of the appellant company for netting off the interest income and miscellaneous income against the interest and other expenditure.*

***Depreciation***

29. 29. *The learned CIT(A) erred in not deciding on merits, the issue relating to the classification of assets under the head Plant & Machinery for determining the rate at which depreciation is eligible to the appellant company.*
30. 30. *The learned CIT(A) erred in directing the Assessing Officer to verify the supplementary tax audit report and based on the said verification, decide on the claim made the appellant company.*

***Computation of book profits under section 115JB***

31. 31. *The learned CIT(A) erred in confirming the action of the Assessing Officer in increasing the net profit of the appellant company by the following amounts, while computing the book profit under Section 115JB of the Income Tax Act, 1961.*

| Sr. No. | Particulars | Amount (Rs. In Lakhs) |
|---|---|---|
| 1. | Decommissioning Reserve | 3,021.02 |
| 2. | Interest on decommissioning Reserve | 3,594.39 |
| 3. | Interest on Renovation & Modernization Reserve | 3,269.47 |
| 4. | Interest on Research & Development Reserve | 1,934.30 |
| **5.** | Disallowance under section 14A of the Act | 4.073.58 |
| | **Total** | **15,892.76** |

98. The assessee has filed additional ground vide it's letter dated 18/07/2018, which are reproduced as under:

> 1. *The ground of appeal is independent and without prejudice to other grounds of appeal filed earlier, pending disposal.*
> 2. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) without having legal and valid jurisdiction under the Act to pass the assessment order. The Additional Commissioner of Income Tax lacked jurisdiction to pass the assessment order under section 143(3) dated 31st December 2008 and to exercise the powers of performing the functions of an Assessing Officer.*
> 3. *The learned Additional Commissioner of Income Tax erred in passing assessment order under section 143(3) where the assessment proceedings were initiated by the Dy. Commissioner of Income Tax. Such order passed is bad in law, in the absence of an order transferring, jurisdiction under section 127 to the Additional Commissioner of Income Tax.*

98.1 We have already admitted identical additional grounds raised in earlier assessment years, therefore following our finding in earlier assessment years, the additional grounds raised in the year under consideration are admitted for adjudication. The identical additional ground raised by the assessee had been dismissed by us in assessment years 2002-03 to 2004-05, therefore following our finding in those assessment years, additional ground raised in the year under consideration are also dismissed.

99. The regular ground Nos. 1(one) and 2(two) of the appeal relate to amount collected from customers against decommissioning levy as income of the assessee and interest credited to the decommissioning levy fund respectively. The issues in dispute being identical to ground Nos. 5 and 6 raised in assessment year 1998-99, therefore, following our finding in ITA No. 202/Mum/2004 for assessment year 1998-99, the issues are decided mutatis mutandis.

100. The ground No. 3(three) of the appeal relates to interest credited to renovation and modernisation fund. The ground No. 4(four) of the appeal relates to interest credited to the research and development fund. The issue in dispute involved in these grounds is covered by our finding in appeal for assessment year 98-99, therefore following our finding in assessment year 98-99, the ground No. 3( three) and 4 (four) of the appeal of the assessee are accordingly dismissed.

101. The Ground Nos. 5 to 11 of the appeal of the assessee relate to disallowance amounting to ₹ 4,073.58 lakhs under section 14A of the Act.

101.1 The brief facts qua the issue in dispute are that the assessee earned tax free interest amounting to Rs. 22905.68 lakhs on tax-free bonds. The assessee made proportionate disallowance of administrative expenses amounting to ₹ 2062.9 7 lakhs. But the

Assessing Officer invoked Rule 8D of Rules and computed disallowance of interest expenditure amounting to rupees to Rs. 2544. 42 lakhs [under rule 8D(2)(ii) of rules] and disallowance of administrative expenses amounting to rupees to ₹ 1529.16 lakhs [ under rule 8D(2)(iii) @ 0.5 % of average investment] totaling to Rs. 4073.58 and after subtracting the *su-moto* disallowance by the assessee, made net disallowance under section 14A amounting to ₹ 2010.61 lakhs. The relevant computation of disallowance by the AO is reproduced as under:

*3.5 The working of disallowance u/s. 14A read with Rule 8D is as follows:*

| ***Sr. No.*** | ***Particulars*** | ***Amount (Rs. In Lakhs)*** |
|---|---|---|
| *a.* | Opening Balance of Investment | 302291.45 |
| *b.* | Closing Balance of investment | 309372.05 |
| *c.* | Average Investment (a+b) /2 | 305831.75 |
| *d.* | Total interest debited to P&L A c. | 23549.00 |
| ***e.*** | Total Asset as per Balance sheet<br>i) Opening Balance<br>*ii)* Closing Balance | 2723628.55<br>2937416.49 |
| ***f.*** | Average total assets i.e. [e (i) and e(ii)]/2 | 2830522.52 |
| ***g.*** | Disallowance under Rule 8D(ii) i.e. dx c/f | 2544.42 |
| ***h.*** | Disallowance under rule 8D(ii) = 0.5% of the average investment | 1529.16 |
| ***i.*** | Total disallowance under Rule 8D r.w.s 14A ie. g + h | *4073.58* |

101.2 The Ld. CIT(A) upheld the action of the Assessing Officer of invoking rule 8D of the rules, but regarding the claim of interest expenditure out of head office expenses reduced while claiming

deduction under section 80IA of the Act, the Ld. CIT(A) directed the Assessing Officer to verify the claim of the assessee so as to avoid double disallowance.

101.3 We have heard rival submission of the parties and perused the relevant material on record. We find that in AY 2004-05 and 2005-06, the Assessing Officer has accepted the claim of the assessee that no interest expenditure has been incurred for making investment in tax-free bonds, therefore the Assessing Officer in assessment year 2004-05 and 2005-06 made disallowance under section 14A of the Act only in respect of the administrative expenses in proportion to the exempted income to the total turnover of the assessee. In the year under consideration the assessee has accepted the method of disallowance of administrative expenses adopted by the Assessing Officer in assessment year 2004-05 and accordingly made *su-moto* disallowance of ₹ 2,062.97 lakhs out of the administrative expenses as incurred for earning the exempted interest income. But in the year under consideration, the Assessing Officer has rejected the *su-moto* disallowance made by the assessee and invoked Rule 8D of Income-tax , rules 1962 , which was introduced by the CBDT wide notification dated 04/03/2008. According to the Assessing Officer said rule was having retrospective application. But we find that **Hon'ble Supreme Court in the case of CIT Vs Essar Technologies Ltd ( Civil Appeal No.**

**2165 of 2012)** held that *Rule 8D is applicable only from assessment year 2008-09 onward and can't be applied for prior assessment years.* Therefore the computation of disallowance made under section 14A of the Act following Rule 8D for the AY under consideration is rejected.

101.4 The fact that no interest has been incurred for investment in the bonds bearing tax-free interest income has been accepted by the Assessing Officer in assessment year 2004-05 and 2005-06, therefore no disallowance for interest can be made under section 14A of the Act in the year under consideration following the Rule of consistency. As far as disallowance for administrative expenses, the assessee itself has made suo-moto disallowance following the method of disallowance adopted by the Assessing Officer in assessment year 2004-05. Therefore the disallowance made by the Assessing Officer following the rule 8D is rejected. The finding of the Ld. CIT(A) on the issue in dispute are set aside . We find that identical issue of the disallowance under section 14A in respect of the administrative expenses has been restored by us to the file of the Assessing Officer in assessment year 2004-05, and therefore following our finding in assessment year 2004-05, the issue of disallowance of administrative expenses for earning exempted income is restored back to the file of the Assessing

Officer. The grounds of the appeal of the assessee from Nos. 5 to 11 are accordingly allowed for statistical purposes.

102. The ground Nos. 12 to 15 of the appeal relates to certain incomes reduced from the expenditure incurred during the construction period and this claim of the assessee has been rejected by the Ld. CIT(A). We note that identical grounds have been adjudicated by us in appeal for earlier assessment years from 2002-03 to 2005-06, and therefore following our finding, the ground Nos. 12 to 15 of the appeal decided *mutasis mutandis*.

103. The ground Nos. 16 to 20 of the appeal relate to disallowance of prior period Expenses. We note that identical grounds have been adjudicated by us in appeal for earlier assessment years from 2002-03 to 2005-06, and therefore following our finding, the ground Nos. 16 to 20 of the appeal are decided *mutasis mutandis*.

104. The ground No. 21 of the appeal relates to disallowance of provision for obsolete stock. The said ground was not pressed by the assessee and therefore same is dismissed as infructuous.

105. The ground No. 22 of the appeal relates to addition for consultancy income of ₹ 36.17 lakhs.The Assessing Officer observed from the tax audit report that consultancy service charges of ₹ 36.17 lakhs were shown as receivable but was not credited in the profit and loss account. The assessee explained that the bill toward

consultancy service amounting to ₹ 36.17 lakhs was raised but same were forwarded for quality assurance inspection or test report and therefore same was not recognised as income during the relevant assessment year. The Assessing Officer rejected the contention of the assessee on the ground that the assessee was following mercantile system of the accounting and therefore assessee ought to have offered this amount for tax purposes. Before the Ld. CIT(A) , the assessee challenged this addition while computing book profit under section 115 JB of the Act. However, we find that Ld. CIT(A) has allowed his ground in favour of the assessee observing as under:

> *"Ground 60*
>
> *Addition of consultancy service charges*
>
> *I have perused the nature of the consultancy service charges and understand that the case pertain to the revenue recognition principles being followed by the appellant company from year to year.*
>
> *As per the revenue recognition policies of the appellant company, it recognises the income only after the approval is received from the Quality Assurance department. This principle cannot be challenged saying that the books of accounts are maintained using mercantile system. Accordingly, the above addition cannot be said to be permissible for computing book profits under section 115JB of the Act.*
>
> *Accordingly, the above ground no. 60 is allowed. (relief allowed for 115JB Rs. 36.17 lakh)"*

105.1 Accordingly this ground, being infructuous, same is dismissed.

106. The ground nos. 24 to 28 of the appeal relate to interest income and miscellaneous income. The identical grounds have been decided by us in earlier assessment years 2002-03 to 2005-06, therefore following our finding in those assessment years, the grounds no. 24 to 28 of the appeal are decided *mutasis mutandis*.

107. The ground No. 29 of the appeal relates to claim of the assessee for depreciation on a reactor building at higher rate being classified as plant and machinery. In the tax audit report, a note was given that addition to plant and machinery includes amount of ₹ 534,37,04, 104/-relating to building constructed in Tarapor Atomic Power Plant (TAPP) unit No. 3 (three) and 4(four), which is a composite part of plant and machinery and therefore classified under 'plant and machinery' of block of asset. the Assessing Officer relied on the decision of **Hon'ble Supreme Court in the case of CIT Vs M/s Anand theatre in SLP (Civil) Nos.4373-74 of 1999,** *wherein it is held that a building cannot be treated as plant and machinery even if it is especially constructed in accordance with the requirements of the assessee's business.* The Assessing Officer also referred to the definition of the "plant" provided in section 43(3) of the Act. He specifically referred to amendment inserted by the Finance Act 2003, with effect from assessment year 2004-05 which makes it clear that plant does not include building. The Assessing Officer also referred to section 43B of the Act, specifying as plant

does not include 'tea bushes' or the 'livestock' or 'building' or 'furniture and fittings'. In view of the above discussion, the Assessing Officer restricted the depreciation on the building at the rate of the 10% allowable for factory buildings, observing as under:

> *"7.5. In the light of aforesaid discussion I have no hesitation whatsoever inferring that the addition is to building by virtue of ruling of the Hon'ble Apex Court and also by virtue of statutory provisions in the form of Section 43(3). The impugned assets falls within the class of bldg i.e. factory bldg and does not fall within the class of plant and machinery. Accordingly the assessee is granted depreciation at the rate applicable to the factory bldg i.e. 10%. Since the assessee has not provided any data or material when the addition on this account is made to class of plant and machinery therefore it is taken of having put into use for a period less than 182 days.Consequently assessee has been granted depreciation @5%. It is not ascertainable form the material on record that at what rate i.e. 15% or 80% or 100% assessee has claimed depreciation on account of this addition. However, to avoid unwarranted disallowance on this account, as a matter of abundant precaution it is assumed that the assessee has claim depreciation on the impugned assets at the rate of 15%. Accordingly, excess claim of depreciation at the rate of 10% (i.e.15% -5% = 10%) stands disallowed. The disallowance on this account works out to Rs. 53,43,70,410/-."*

107.1 Before us the learned counsel for the assessee submitted that Ld. CIT(A) has not decided this issue of the classification of the asset under plant and machinery.

107.2 We have heard rival submission of the parties on the issue in dispute and perused relevant material on record. The Ld. CIT(A) has referred to the submission of the assessee on the issue in dispute, which are reproduced as under:

*"The learned Addl. Commissioner erred in not considering the submissions made by the appellant company in its correct perspective.*

*The appellant is a Public Sector Enterprise wholly owned by Government of India, engaged in the business of generation of electricity. In the process of generating nuclear power, the appellant company requires Reactor building, Service Building, Pump house building & Turbine building.*

*As per Note No. 5 of Annexure VI of the Tax Audit Report "Additions to Plant & Machinery includes an amount of Rs. 53,437 lacs relating to Building constructed in TAPP # units 3 & 4, which in view of the appellant company are composite part of Plant & Machinery and therefore should be classifled under 'Plant & Machinery' block of asset".*

*In this connection, it was submitted by the appellant company that*

> *"The building taken as plant & machinery are not the simple building but the reactor building. It is the structure at requisite pressure to sustain the chain reaction for power generation. Hence, it has been clubbed under plant & machinery. In view of above, the same has been classified under the head 'Plant & Machinery block of asset and depreciation in respect of the same should be allowed as a deduction."*

*The AO has relled on the decision of the Hon'ble Supreme Court in the case of Anand Theatre and the definition of the "Plant" provided in section 43(3) of the Act and rejected the contention of the appellant and further stated as under:*

> *"Accordingly, the assessee is granted depreciation at the rate applicable to factory building l.e. 10%. Since the assessee has not provided any data or material when the addition on this account Is made to class of plant and machinery therefore it is taken of having put into use for a period less than 182 davs. Consequently assessee has been granted depreciation @5%. It Is not ascertainable from the material on record that at what rate i.e. @15% or*

*80% or 100% appellant has claimed deprecation on account of this addition. However, to avoid unwarranted disallowance on this account, as a matter of abundant precaution it is assumed that appellant has claimed depreciation on the impugned assets at the rate of 15%. Accordingly, excess claim of depreciation at the rate of 10% (l.e. 15% -5%) =10%) stand disallowed)"*

*In this connection, the appellant company submitted that as per the Concise Oxford dictionary the word "Reactor is defined as under:*

*"an apparatus or structure in which a controlled nuclear chain reaction releases energy"*

*Further, the word "building" is defined as under:*

*"1. a permanent fixed structure forming an enclosure and providing protection from the elements (e.g. a house, school, factory, or stable).*

*2. the constructing of such structures.*

***Turbine Building***

*The Turbine Building is an enclosed metal and girder structure that houses:*

*(1) Turbine, generator and the support lubrication and cooling systems,*

*(2) Condensate-feedwater systems supply water to the steam generators*

*(3) Circulating water to and from condenser,*

*(4) Electrical switchgear rooms that supply electrical power to plant components,*

*(5} Demineralised water system that supplies clean water for cooling plant components, and*

*(6) Control Room outside the building are the transformers that either supply power to the plant for start-up or that supply power to the grid for distribution*

*In view of the above, the appellant company submitted that as such nomenclature does not affect the nature of the assets. The essence of classification of assets should be based on the use of the assets. One type of assets may be considered as the 'Bullding' for an entity whereas the same assets can be considered as 'Plant' for another entity.*

*The appellant submitted that for determining the nature of an asset one needs to examine on the basis of functional test. In CIT v Navodaya (2004) 271 IT 173(Ker), the Hon'ble High court found exception for a film studio, because it could be modified to suit different settings necessary for production of films, so that the functional test cannot be disregarded. Bulldings as ordinarily understood are buildings according to particular specifications, while plant is understood in a more flexible sense as necessary for business. While a building, which merely houses the business, cannot be treated as plant, where such building is used as a tool of the trade with which the business itself is carried on. it can count as a plant.*

*In the instant case, reactor building, turbine bullding, service building and pump house building are classified as 'Plant'.*

*On a perusal of the above note, it is observed that these structures are designed to support the power generation. For example, Reactor building is a structure at requisite pressure to sustain the chain reaction for power generation*

*Turbine building, on the other hand, designed to control the effect of oil and gas fire that can occur from the TMOT and the Generator Hydrogen Cooling system.*

*Service building is designed for safety against unacceptable exposure to radio activity during handling and storage of spent fuel.*

*Pump house building is a Condenser circulating water pump house, which has been provided for each individual unit. The*

*level of the pump house and pumping head of CW pumps have been optimised on the bass of varying water levels, in the forebay, CW Pump House and the Main Condenser. CCW Pump House has open wet walls and facility for providing stop logs etc. Condenser circulating water is pumped through the main condenser and discharge from condenser is led through separate discharge channel to the outfall structure for suitable discharge of warm water into the sea.*

***EFFECT OF AMENDMENT IN ACT***

*The appellant company submitted that the definition of Plant has been amended by Finance Act, 2003 with effect from 1-4-2004. Effect of which would be that all buildings, where business is carried on, could not be treated as plant. However, functional test was understood to mean that buildings specially designed for special use, as in the case of hospitals, hotels and auditoriums, were treated as plant entitling higher depreciation to such buildings.*

*In the instant case, the functions of the asset are akin to a power generating plant. Also the asset cannot be used as a building for multi-purpose utilities. The asset Is in the existence with a limited purpose of generating electricity. The asset may have nomenclature of a building but serves the commercial function of a plant.*

*The appellant also submitted that in the earlier year and subsequent assessment years, the nuclear reactors were treated as machinery by the assessing officer and no disallowance was made by the AO in respect of the same.*

*In view of the above discussion, I hold that the asset is in the nature of plant.*

***CAPITALIZATION OF TAPS-4***

*The AO had held that the appellant had not provided any data or material when the addition on ascount of factory building is made to class of plant and machinery. Therefore it was taken of having put into use for a period less than 182 days.*

*Consequently the appellant company was granted deprecation @ 5% (50% of 10% ie. rate of deprecation applicable to building).*

*In this regard, the appellant submitted that the date of commercial operation of TAPS -4 was 12.9.2005 and hence the assets are put into use from this date and therefore are put into use for more than 180 days. In this connection, a letter dated 12 September 2005 written by the appellant company to Western Regional Electricity Board was submitted during the course of appellate proceedings.*

*In view of above, since the asset was put into use for more than 180 day, depreciation on the same should be allowed at the rate 15% instead of 5% as allowed by AO in the assessment order.*

*I have perused the facts and contentions provided by the appellant company. I have also perused the letter dated 12 September 2005 written by the appellant company to Western Regional Electricity Board. Perusing the aforesald letter, it can be concluded that the plant was operational as on 12 September 2005.*

*In view of the above case, the A is directed to allow the depreciation for the entire year."*

107.3 We agree with the contention of the learned counsel of the assessee that Ld. CIT(A) has not given a specific finding on the issue of classification of the building under the category of plant and machinery by the assessee. But as far as facts related to the issue in dispute as whether the building which is part of the reactor could be termed as 'plant and machinery', available on record, therefore, both parties argued before us to decide the issue on merit. In our opinion, the ld. Assessing Officer has followed the ratio of the Hon'ble Supreme Court in the case of **M/s Anand theatre**

**(supra),** and referred to the relevant provisions of the Act, we do not find any error on the part of the Assessing Officer in restricting the depreciation at the rate of the 10% of written down value of the building under reference. No other decision contrary to the decision cited by the Assessing Officer has been brought to our knowledge; therefore, we uphold the finding of the Assessing Officer. The ground No. 29 of the appeal of the assessee is accordingly dismissed.

108. In ground No. 30, the assessee is aggrieved with the direction given by the Ld. CIT(A) for verification of the supplementary tax audit report in respect of the claim of the additional depreciation.

108.1 The brief facts qua the issue in dispute that in the original return of income for the assessment year under consideration the assessee claimed depreciation under section 32 amounting to ₹ 74,750.81 lakhs, however in the revised return of income it claimed depreciation at ₹ 159,643.98 lakhs. The reason for difference was explained as misclassification of the asset and arithmetical error while computing the written down value. Before the Ld. CIT(A) the assessee filed 'engineer's certificate' for valuation of plant and machinery eligible for depreciation at the rate of the 80% and 100 % ( hundred percentile). It was submitted by the assessee that the above errors were identified during the tax audit for assessment year 2008-09. A copy of the relevant annexure to tax

audit report for assessment year 2008-09 was also submitted during the course of the appeal before ld CIT(A). It was further submitted that assessee obtained supplementary tax audit report from the tax auditor in which revised claim of the depreciation was certified by the auditor and reason for the claim of additional depreciation were stated. In view of the additional supplementary tax audit report, the Ld. CIT(A) directed the Assessing Officer to verify and allow the ground of the appeal. In our opinion, there is no error in the finding of the Ld. CIT(A) on the issue in dispute and accordingly we uphold the same. The ground No. 30 of the appeal of the assessee is accordingly dismissed.

109. The ground no. 31 of the appeal relates to increase in net profit for the purpose of computation of book profit u/s 115JB of the Act.

110. The ground nos. 31 & 32 being general in nature, are dismissed as infructuous.

111. Now, we take up the appeal of the Revenue for the assessment year 2006-07. The grounds raised by the Revenue are reproduced as under:

> 1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing A.O not to reduce of expenses from business profits for the purpose of 80-IA deduction.*

2. *The appellant prays that the order of the Id. CIT(A) on the above ground be set aside and that of the Assessing Officer restored*
3. *3 The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary.*

111.1 The brief facts qua the issue in dispute that consolidated administrative and other expenses debited to profit and loss account of head office had not been distributed proportionately to the units eligible for deduction under section 80 IA of the act and thus the deduction under section 80 IA has been inflated. The Assessing Officer rejected the contention of the assessee that identifiable expenses have been allocated to the respective unit and balance expenses have been allocated in the ratio aggregate of annual net sales of electrical energy and a new capital outlay. The Assessing Officer computed the ratio of administrative and other expenses amounting to ₹ 54092.94 lakhs to the total sale of energy amounting to ₹ 356706.27 lakhs , which was worked out to 15.16%. Applying the said ratio of 15.16%, the Assessing Officer worked out administrative and other expenses of Rajasthan unit three and four to ₹ 12 444.55 lakhs and after reducing the administrative and other expenses debited to said units amounting to ₹ 887.51 lakhs, he identified expenses of ₹ 11 557.04 lakhs as the amount by which deduction under section 80 IA of the act was inflated by the assessee , accordingly he made disallowance for the amount of ₹ 11 557.04 lakhs . on further appeal, the Ld. CIT(A) deleted the disallowance after accepting the allocation of identifiable

head office expenses to the respective unit and allocation of unidentifiable expenses on the basis of ratio of aggregate of annual net sale of electrical energy and annual capital outlay . The relevant finding of Ld. CIT(A) qua the issue in dispute is reproduced as under:

> ***"ALLOCATION OF PROPORTIONATE ADMINISTRATIVE EXPENSES TO THE UNITS CLAIMING DEDUCTION UNDER SECTION 80lA OF THE ACT***
>
> *The appellant company submitted that the A while passing the assessment order, has apportioned proportionate administrative and other expenses debited to Profit & Loss account to units claiming deduction under section 80lA of the Act of Rs. 11,557.04 lakhs stating that administrative expenses debited to the aforesaid units is not proportionate to and on much lower side as compared to the administrative & other expenses shown in Profit & loss account.*
>
> *In this connection, the appellant company submitted that each unit of NPCIL is a profit center. All the expenses relating to each unit is captured at the respective unit and no unrelated expenditure is debited to any site/ unit. The identifiable Head office expenses are transferred to the respective locations.*
>
> *Unidentifiable head office expenses are allocated to Power stations and projects in the ratio of aggregate of annual net sale of electrical energy & annual capital outlay. Hence, the administrative and other expenses shown in the consolidated Profit & Loss Account is a consolidation of the expenses of all units including that of 80lA units and therefore, there is no unrelated/common expenditure for apportionment to the units eligible for deduction under Section 801A.*
>
> *It was submitted that all the identifiable & unidentifiable expenses are apportioned to the units claiming deduction under section 80lA as mentioned above, no disallowance*

*should be made in respect of administrative & other expenses.*

*On the basis of above, it was submitted that in the computation of deduction under section 80-IA, the actual administration and other expenses incurred and debited to the Profit & Loss Account ought to be considered. It was submitted by the appellant that the balance expenditure debited in shit kin dhe consolidated Profit & Loss Account do not have any bearing to the units claiming deduction under section 80-IA of the Act. Accordingly, no portion of the said expenditure ought to be deducted in the computation of deduction under section 80-IA of the Act.*

*I have considered the submissions of the Ld. Counsel and in view of the details brought on record - the same is allowed and AO is directed to give relief accordingly. This ground of appeal is allowed."*

111.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that Ld. CIT(A) considered the submission of the assessee that each unit of the assessee is a profit centre and all the expenses relating to the unit are captured at the respective unit and only unidentifiable head office expenses are allocated to power stations and projects in the ratio of annual net sale of electrical energy and annual capacity outlay. In our opinion, the assessee has allocated head office expenses not identified to particular unit on the basis of a reasonable allocation key. Accordingly the Ld. CIT(A) has held that no portion of said administrative expenses ought to be directed in the computation of the deduction under section 80IA of the Act. In our opinion, there is nowhere in the order of the Ld. CIT(A) on the issue in dispute and accordingly we uphold the same. The

ground No. one of the appeal of the revenue is accordingly dismissed.

113. The ground Nos. 2 (two) and 3 (three) of the appeal of the Revenue are general in nature and therefore same are dismissed as infructuous.

114. In the result, the appeals are allowed /dismissed as indicated in below table:

| S. No. | ITA No. | AY | Assessee/ Revenue | Result |
|---|---|---|---|---|
| 1 | 202/Mum/2004 | 98-99 | Assessee | Allowed partly for statistical purpose |
| 2 | 114/Mum/2004 | 99-2000 | Assessee | Allowed partly for statistical purpose |
| 3 | 4413/Mum/2004 | 2000-01 | Assessee | Allowed partly for statistical purpose |
| 4 | 3867/Mum/2008 | 2001-02 | Assessee | Allowed partly for statistical purpose |
| 5 | 4743/Mum/2007 | 2002-03 | Assessee | Allowed partly for statistical purpose |
| 6 | 4744/Mum/2007 | 2003-04 | Assessee | Allowed partly for statistical purpose |
| 7 | 4745/Mum/2007 | 2004-05 | Assessee | Allowed partly for statistical purpose |
| 8 | 4603/Mum/2007 | 2004-05 | Revenue | Dismissed. |
| 9 | 2452/Mum/2011 | 2005-06 | Assessee | Allowed partly for statistical purpose |
| 10 | 625/Mum/2009 | 2005-06 | Revenue | Allowed partly for statistical purpose |
| 11 | 3553/Mum/2011 | 2006-07 | Assessee | Allowed partly for statistical purpose |

| | | | | |
|---|---|---|---|---|
| 12 | 3501/Mum/2011 | 2006-07 | Revenue | Allowed partly for statistical purpose |

**Order pronounced in the open Court on 29/11/2023.**

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(KAVITHA RAJAGOPAL)** | **(OM PRAKASH KANT)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai;
Dated: 29/11/2023
Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
**ITAT, Mumbai**