आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री गिरीश अग्रवाल, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Shri Girish Agrawal, Accountant Member

I.T.A. No.1964/Kol/2019
Assessment Year: 2015-16

DCIT, Circle-6(1), Kolkata…….....…..……....Appellant

vs.

M/s Birla Corporation Ltd…….....….....…..…..... Respondent
Birla Building, 9/1, R.N. Mukherjee Road,
Kolkata – 700001.
[PAN: AABCB2075J]

C.O. 39/Kol/2019
(A/o I.T.A. No.1964/Kol/2019)
Assessment Year: 2015-16

M/s Birla Corporation Ltd…….....….....…..…..... Cross-Objector
Birla Building, 9/1, R.N. Mukherjee Road,
Kolkata – 700001.
[PAN: AABCB2075J]

Vs

DCIT, Circle-6(1), Kolkata…….....…..……....Respondent

Appearances by:
Shri Abhijit Kundu, CIT-DR, Advocate, appeared on behalf of the department.
Shri J. P. Khaitan, Sr. Counsel, appeared on behalf of the assessee.

Date of concluding the hearing : October 18, 2023
Date of pronouncing the order : January 16, 2024

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal by the revenue and the corresponding cross objections by the assessee have been preferred against the order dated 30.05.2019 of the Commissioner of Income Tax (Appeals)-22, Kolkata [hereinafter referred to as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act'). First, we take up revenue's appeal ITA No.1964/Kol/2019.

2. **ITA No.1964/Kol/2019 :**

The revenue in this appeal has taken the following grounds of appeal:

1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the adjustment made by the AO/TPO amounting to Rs. 124,76,75,528/- for transaction in respect of transfer of power/electricity.

2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) had failed to appreciate the analysis undertaken by the TPO while concluding the said transaction were not at the arm's length.

3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) had failed to appreciate that, even if we consider the electricity board rate i.e. rate at which assessee purchases power from the distributors, for transfer pricing purpose, adequate adjustment has to be made for the costs which the distributors incurs towards transmission of power and other additional costs for arriving at arm's length price.

4. That on the facts and circumstances of the case and in law, the Ld. CIT(A) had erred in deleting the downward adjustment made by the TPO/AO pertaining to the exaggerated profit of captive power generating unit by claiming higher rate than the cost price or market price as determined in tariff order of electricity board for independent power generating units.

5. Whether on the facts and circumstances of the case as well as in Law, the Ld. CIT(A) erred in holding that deduction u/s 80IA of the IT Act will be allowed as claimed by the assessee.

6. Whether on the facts and circumstances of the case as well as in Law, the Ld. CIT(A) has erred by allowing the claim of balance additional depreciation of Rs. 12,19,30,258/-.

7. Whether on the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in holding that compensation paid of Rs.69,61,595/- to obtain raw materials is Revenue Expenditure not Capital expenditure.

8. Whether on the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in holding that the amount received by the assessee of Rs.31,86,63,403/- as Industrial Promotion Assistance from the State Govt. is capital in nature as against revenue receipt as treated in the assessment order.

9. Whether on the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in holding that the amount received by the assessee of Rs.12,83,76,610/- as Interest Subsidy from the State Govt.

is capital in nature as against revenue receipt as treated in the assessment order.

10. Whether on the facts and circumstances of the case as well as in law, Ld. CIT(A) has erred in deleting the addition made by A.O. u/s 14A under Rule 8D without appreciating the CBDT Circular No. 05/2014.

11. Whether on the facts and circumstances of the case as well as in law, Ld. CIT(A) has erred by giving direction to exclude the subsidy from the book profit assessable u/s.115JB, without appreciating that no adjustment is allowed for computation of book profit other than prescribed under explanation 1 to section 115JB(2).

12. Whether on the facts and circumstances of the case as well as in law, Ld. CIT(A) has erred in giving direction to the AO to exclude the subsidy aggregating to Rs.31,86,63,403/- from the book profit assessable u/s.115JB of the Act without considering that the accounts of the assessee company were prepared in accordance with the provisions of Companies Act and these incentives were credited to Profit & Loss Account, and no adjustment is allowed for computation of Book Profit u/s.115JB other than prescribed under explanation 1 to section 115JB(2).

13. Whether on the facts and circumstances of the case as well as in law, Ld. CIT(A) has erred in deleting upward adjustment made to Book Profit for disallowance computed u/s. 14A read with rule 8D.

14. That the appellant craves for leave to add, delete and modify any of the grounds of appeal before or at the time of hearing."

3. **Ground Nos.1 to 5** - A perusal of the above reproduced grounds No. 1 to 5 of the appeal would reveal that the sole issue raised by the revenue through these grounds is relating to the action of the CIT(A) in deleting the addition of Rs.124,76,75,528/- made by the Assessing Officer on account of transfer pricing adjustment in respect of the price of the power transferred by the section 80IA eligible captive power plant of the assessee to the non-eligible manufacturing units of the assessee and thereby, reducing the claim of deduction claimed by the assessee u/s 80IA of the Income Tax Act.

3.1 Both the ld. representatives have submitted that the Ground No.1 to 5 are covered in favour of the assessee by various decisions of the Tribunal in the own cases of the assessee in relation to earlier

assessment years. The ld. counsel for the assessee, in this respect, has submitted that earlier the issue was decided vide common order of the Tribunal dated 25.08.2017 passed in the own cases of the assessee in ITA No.971/Kol/2012 and Others. Thereafter, the issue has been consistently decided in favour of the assessee. The ld. counsel, in this respect, has further placed reliance on the order of the Tribunal dated 07.02.2023 passed in ITA Nos.2142 & 2143/Kol/2018 in relation to Assessment Years 2013-14 & 2014-15, wherein, the identical ground raised by the department has been dismissed by the Tribunal, relying upon the earlier decision of the Tribunal in the own case of the assessee. The relevant part of the order of the Tribunal dated 07.02.2023 (supra) is reproduced as under:

> *"9.3. Before us, ld. Counsel for the assessee vehemently argued referring to the written submissions filed before the lower authorities as well as the finding of ld. CIT(A) and also referred to the decision of this Tribunal in assessee's own case for AY 2011-12 & 2012-13 wherein this Tribunal confirmed the view taken by ld. CIT(A) and dismissed the Revenue's ground observing as follows:*
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> > *"11. We have heard rival contentions and perused the records placed before us. The second common ground raised in the Department's appeal relates to the assessee's claim for deduction under section 80IA in respect of the thermal power plants set up by it at Satna, M.P. and Chanderia, Rajasthan. The electricity generated by the two power plants was transferred to the assessee's cement manufacturing units. Further, electricity was also sold to independent third parties during the year under reference. Having regard to the provisions of sub-section (8) of section 80IA of the Act, the electricity transferred from the power plants to the cement manufacturing units was valued by the assessee with reference to the amount charged by the concerned State Electricity Board in its bills raised upon the assessee. The assessee took into consideration the average rate charged by the State Electricity Board for the previous month even though the rates at which electricity was sold by the assessee to third parties were higher than the rate charged by the State Electricity Board.*

11.1. Ld. AO, however, reworked the profits of the power plants for the assessment year under reference by substituting the value of electricity adopted by the assessee with much lower figures. Such lower figures were taken by the ld. AO from orders passed by the concerned State Electricity Regulatory Commission. For the State of Rajasthan, the ld. AO referred to an order dated November 16, 2010 passed by the Regulatory Commission of that State determining the annual fixed charges and energy charge in accordance with the statutory parameters and norms in respect of power generated by Rajasthan Rajya Vidyut Utpadan Nigam at its different generating stations and supplied to electricity distribution companies. The tariff was separately determined for each generating station based on different elements of cost incurred at each such station. For the State of Madhya Pradesh, the ld. AO referred to an order dated March 3, 2010 passed by the Regulatory Commission of that State determining, in accordance with the statutory parameters and norms, the fixed charges and energy charges for each generating station of the Madhya Pradesh Power Generating Company Limited which it could charge in respect of electricity supplied to electricity distribution companies. The working made by the ld. AO on such basis resulted in losses for both the power plants. As such, the ld. AO held that no deduction was available to the assessee under section 80IA. On appeal, the ld. CIT(A) accepted the assessee's working and granted relief to it following the order dated August 25, 2017 of this Hon'ble Tribunal in the assessee's own case for the assessment years 2008-09 and 2009-10.

11.2. It is submitted by ld. Counsel for the assessee that the question in controversy is covered by the said order dated August 25, 2017 of this Hon'ble Tribunal in the assessee's own case for the assessment years 2008-09 and 2009-10 (Page 125 at pages 133 - 136 of Paper Book). In the said order, this Hon'ble Tribunal took note of the decision of the Hon'ble Calcutta High Court in CIT v. ITC Limited (2016) 236 Taxmann 612 (Calcutta) for the assessment year 2002-03 when the provisions of Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948 were in force. It was noted that because of the provisions of the said legislation it was held by the Hon'ble High Court that a captive power plant could sell electricity only to a generating and distribution company or to a distribution company and such sale could only be made at the tariff determined by the State Regulatory Commission. It was on such basis that the Hon'ble High Court held that electricity generated and captively consumed could only be valued with reference to the price charged by a generating company to a distribution company or a generating and distribution company and that the price charged from the consumer by the

distribution company was not relevant. This Hon'ble Tribunal considered the provisions of the Electricity Act, 2003, which came into force on June 10, 2003, repealed the previous legislation, and was in force during the previous years relevant to the assessment years 2008-09 and 2009-10. The sea change in the law brought about by the Electricity Act, 2003 was considered along with the regulations made by the Regulatory Commissions in the two States. It was noted that by reason of the 2003 legislation and regulations made thereunder, it was open to the assessee to sell electricity even to consumers and such sale could take place at mutually agreed rates notwithstanding the tariff fixed by the State Regulatory Commission. This Hon'ble Tribunal took note of the fact that in one of the years before it, the assessee in fact sold electricity at rates higher than that charged from it by the State Electricity Board. This Hon'ble Tribunal held that when it was permissible for the assessee to sell electricity to consumers at rates higher than that paid to the State Electricity Board, the prices charged by the State Electricity Board were a very good indication of the market value of electricity. This Hon'ble Tribunal thus concluded that the assessee did not commit any error in adopting such prices for working out the amount eligible for deduction under section 80IA of the Act.

11.3. The Hon'ble Tribunal by an order dated September 13, 2017 for the assessment year 2010-11 (Page 153, at Pp 159-162 of the Paper Book, paragraph 3 at paragraphs 13-16) followed the said decision for the assessment years 2008-09 and 2009-10 on this issue.

11.4. It is further submitted that against the said decision of the Hon'ble Tribunal dated August 25, 2017 for the assessment years 2008-09 and 2009-10 the department preferred appeal before the Hon'ble Calcutta High Court under section 260A of the Act, being ITA No. 125/2019 (Question (iii)-Page 11 at page 25 of the Compilation of Case Laws). The Hon'ble High Court, by an order dated September 12, 2019 (Page 9-10 of the Compilation of Case Laws) was pleased not to admit the appeal on this issue. The department also preferred appeal against the decision of the Hon'ble Tribunal dated September 13, 2017 for the assessment year 2010-11 before the Hon'ble Calcutta High Court under section 260A of the Act, being ITA No. 124/2019 (Memorandum of appeal at Page 31-35 of the Compilation of Case Laws). A supplementary affidavit was filed in the said appeal reformulating the questions (page 36 at pages 42 – 44 of the Compilation of Case Laws). It would appear from the order of admission dated March 11, 2020 (page 29 of the Compilation of Case Laws) that the question admitted with reference to section 80IA is only in relation to sale of electricity by the

assessee to Indian Energy Exchange and Rajasthan Power Procurement Centre. We find that this Tribunal in assessee's own case for AY 2010-11 dealt with this issue and decided in assessee's favour observing as follows:

"13. At the time of hearing the parties agreed that identical issue has already been decided in assessee's own case and in this regard filed a copy of the order of ITAT for A.Y.2008-09 and 2009-10 in ITA No.971/Kol/2012, 942/Kol/2013, 298/Kol/2013 and 329/Kol/2013 dated 25.8.2017. We have already seen that while deciding the issue of deduction u/s.80IA of the Act, the CIT(A) in the impugned order had followed the order of the CIT(A) in Assessee's own case on an identical issue in AY 09-10. The order of the CIT(A) for AY 09-10 was based on a decision of the Hon'ble ITAT Kolkata Bench in the case of ITC Ltd., for AY 2002-03. When the appeal of the Revenue in Assessee's case for AY 09-10 was heard by the Tribunal, the revenue pointed out before the Tribunal that the very basis of allowing relief to the Assessee was the decision of the Tribunal in the case of ITC Ltd., and that the Hon'ble Calcutta High Court had reversed the order of the Tribunal in the case of ITC Ltd., reported in CIT v ITC Ltd., (2016) 236 Taxman 612 (Cal). In ITC's case (supra) it was held by the Hon'ble Calcutta High Court, that the quantum of benefit u/s 80IA of the Act was to be worked out with reference to the market rate at which electricity could have been sold to the distribution licensee by a generating company and that benefit cannot be claimed on the basis of rate chargeable by the distribution licensee from the consumer. The Assessee however pointed out to the Tribunal that the view taken by the Hon'ble Calcutta High Court in the case of ITC Ltd. (supra) was taken on the basis of the provisions of Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948 that were in force up to the year 2003. It was pointed out before the Tribunal that The Electricity Act, 2003 (hereinafter referred to as "the 2003 Act") repealed the erstwhile legislation and the new legislation came into force on June 10, 2003. The 2003 Act was applicable and in force during the previous years relevant to the Asst Years 2009-10. It was also pointed out before the Tribunal as per the provisions of the 2003 Act and the regulations made in terms thereof by the States of Madhya Pradesh and Rajasthan, it was open to an assessee having a captive power plant to sell electricity even to a consumer at a mutually agreed rate. In other words, under the provisions of the 2003 Act and the regulations made there under it is not the position that a captive power plant can sell electricity only to a distribution company or a company which is engaged in both generation and distribution. The Tribunal after making reference to the various provisions of the Electricity Act 2003 and the determination of Tariff under the new legislation

in the state of Rajasthan and Madhya Pradesh, as claimed by the Assessee before the AO, came to the following conclusions:

"5.6. We have heard the rival submissions and perused the materials available on record including the paper book and the relevant provisions of the Electricity Act, 2003 as detailed supra. We find that the main thrust of order of Id CITA was by placing reliance on the decision of this tribunal in the case of ITC Ltd, which was modified by the Hon'ble Jurisdictional High Court. The Id AR fairly brought to our attention the decision of Hon'ble Jurisdictional High Court in the case of ITC Ltd before us and had duly distinguished the same as not applicable to the facts of the instant case, as admittedly, the Asst Year before Hon'ble Calcutta High Court in ITC Ltd was Asst Year 2002-03. The said decision in ITC Ltd for Asst Year 2002-03 was rendered by taking into account the relevant provisions of Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948. These Acts were repealed and a new Electricity Act 2003 was introduced with effect from 10.6.2003. Hence for the Asst Years 2008-09 and 2009-10 (i.e. the years under appeal before us), the assessee would be governed by the provisions of Electricity Act, 2003.

5.6.1. We have already seen that the ITC's case in Hon'ble Calcutta High Court, proceeded on the basis that the open market for the captive power plant was only a distribution company or a company engaged both in generation and distribution and that the rate at which electricity could be sold by the captive power plant was the one fixed by the tariff regulatory commission. However, such position has undergone sea change inasmuch as during the relevant previous years it was open to the assessee to sell even to a consumer and the price for sale to a distribution company or to a consumer that could be mutually agreed upon notwithstanding the tariff fixed by the State Regulatory Commission. We find that during the previous year relevant to the Asst Year 2009-10, the assessee in fact sold electricity at rates higher than that charged from it by the State Electricity Board. The assessee nevertheless made the computation for the purpose of section 80IA of the Act with reference to the price charged from it by the State Electricity Board. In such circumstances, we hold that, when it was permissible for the assessee to sell electricity to consumers and distribution licensees at rates higher than that paid by it to the State Electricity Board, the price charged by the State Electricity Board would be a very good indication of the market value of electricity and the assessee did not commit any error in adopting such price for working out the amount eligible for deduction u/s 80IA of the Act."

14. After coming to the conclusion that the decision of the Hon'ble Calcutta High Court in the case of ITC Ltd. (supra) would not be applicable to the case of the Assessee, the Tribunal thereafter went into the question as to what would be appropriate rate to the adopted as sale price by the TPP unit of the Assessee to its Cement manufacturing units. The Tribunal thereafter referred to the decision of the Hon'ble Supreme Court in the case of Thiru Arooran Sugars Ltd. v CIT, (1997) 227 ITR 432 (SC), as to the meaning of the word "Market Price" wherein in the context of market price of sugarcane which was also a commodity whose price was subject to control by the Government held that the price at which a manufacturer buys sugarcane must be taken to be the market price. The Hon'ble Supreme held that if the price is controlled by the Sugarcane Control Order, the controlled price will be taken as the market price, because it is at this price that a willing buyer and a willing seller are expected to transact business. The Tribunal agreed with the submission of the Assessee that as held in the aforesaid judgment of the Hon'ble Supreme Court, the price paid by an assessee for purchase of raw material represents the market price of such raw material produced by the assessee. The said judgment was held not to apply in ITC's case because the Hon'ble Court was of the view that electricity could not be sold to the consumer because of specific prohibition in the erstwhile Electricity Act and as such the price to the consumer could not be taken into account. We find that that is not the position in the instant case. The Tribunal also held that the method adopted by the assessee viz. to take the average rate charged by the State Electricity Board for the previous month is quite appropriate and reasonable for determining the market value for the month of supply. The tribunal held that the annual weighted average adopted by the Id CITA would result in variations occurring during the year at different times being made applicable uniformly for the whole year and therefore the assessee's method is more appropriate as it factors in variations as and when they take place.

15. On the issue whether electricity duty and cess has to be excluded from the price while determining profits derived from the business, the Tribunal held that they are also to be considered as part of the price. The following were the relevant observations of the Tribunal:

"5.6.5. Exclusion of Electricity Duty and Cess as directed bv Id CITA Now coming to the decision of the Id CITA to exclude electricity duty and cess, we find that the same has been addressed by the Hon'ble Gujarat High court in the case of CIT vs Shah Alloys Ltd in Tax Appeal No. 2092 of 2010 dated 22.11.2011, which approved the view taken by the Ahmedabad

Tribunal in ITA Nos.844, 2072 and 2073/Ahd/2006 dated 8.1.2010, that the price charged by the Electricity Board inclusive of the amount of Electricity Duty represented the market value even though the assessee was not required to charge electricity duty.

5.6.6. In view of our aforesaid findings, we direct the Id AO to accordingly modify the earlier years profits also which were modified by him, in the same lines as directed for Asst Years 2008-09 and 2009-10 herein. Accordingly, the grounds raised by the assessee in this regard deserve to be allowed and that of the revenue deserve to be dismissed."

16. The aforesaid decision of the tribunal would apply to the present AY also. Respectfully following the order of the Tribunal we allow grounds 2 to 4 & 6 raised by the assessee in its appeal and dismiss ground no. l raised by the revenue in its appeal."

11.5. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2010-11 and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 2 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed."

9.4. We, further, observe that ld. CIT(A) after considering the facts of the case for the year under appeal as well as the decision of this Tribunal in assessee's own case for the preceding years deleted the addition towards transfer pricing adjustment of Rs. 107,46,72,729/- observing as follows:

"<u>08. FINDINGS & DECISION</u>:

1. I have carefully considered the action of the Ld. TPO as also equally carefully perused the submissions made by the Ld. A.Rs, and the documents available in the Paper Book filed by the appellant. The claim of the appellant for deduction u/s 80IA in respect of profits of captive power plants ('CPPs') has been subject matter of dispute in the past as well. In the AYs 2008-09 & 2009-10, the matter with regard to determination of tariff rate for the purpose of computing profits of the CPPs travelled upto the Hon'ble ITAT, Kolkata, which vide its order dated 25.08.2017 in ITA No.971/Kol/2012 accepted the proposition put forth by the assessee that the profits of the eligible undertaking should be computed by adopting power tariff equal to monthly average landed cost of the power supplied to the other undertakings by the State Electricity Boards. The material difference during the year under consideration is that in the

years decided by the Hon'ble ITAT, Kolkata. the adjustments were carried out by the Ld. AO in terms of Section 80IA(8) of the Act and there was no transfer pricing regulations in force. However the appeal relates to AY 2013-14 when the transfer pricing provisions contained in Chapter X of the Act became applicable to specified domestic transactions and therefore not only the assessee is required to demonstrate that the profits are arrived at by adopting fair value of the goods & services provided to related parties but it is also incumbent to prove that the price charged to the related parties was on arm's length. In this regard, the provisions of Chapter X that the arm's length price for the goods or services should be determined on the basis of methods prescribed in Section 92C of the Act. In the circumstances therefore apart from the fact that the power tariff should be shown to be fair value, it must also be demonstrated that the price adopted for determination of profits of the eligible undertaking, the assessee had adopted power tariff which could be said to be arrived at on arm's length principle.

2. From the orders of the lower authorities as also from the contentions of the appellant, it is noted that both the parties have in principle accepted and agreed that the most appropriate method for determination of ALP of power tariff is CUP Method. In the Ld. TPO's opinion the power tariff orders issued the relevant SECs was the most relevant indicator of the arm's length price for power supplied by CPPs. Apart from relying on the orders of the regulatory authorities determining the tariff, the Ld. TPO also took into account the judgment of the Hon'ble Calcutta High Court in ITC Limited reported in (2015) 64 Taxman.com 214wherein the Hon'ble Court had held that the CPPs were not permitted to sell power to anyone else but to power distribution companies and that too at the controlled rates notified by the regulatory authorities. The Ld. TPO also took into consideration the fact that during the relevant year the appellant itself had sold 3,32,891 units generated by CPP in Rajasthan on IEX where per unit price realized was Rs.4.95. Keeping in view these facts and documents the Ld. AO concluded that the rates adopted by the appellant at Rs.6.76/6.85 per unit & Rs.6.79/Rs.6.84 per unit for the CPPs at Rajasthan & Madhya Pradesh was excessive and did neither represent fair market value nor the ALP of the power supplied by CPP. On the contrary he adopted Rs.4.13 per unit8i Rs.2.45 per unit as the ALP for the power generated by Units located in the States of Rajasthan & Madhya Pradesh respectively.

3. Per contra, the Ld. AR of the appellant has made detailed submissions rebutting the Ld. TPO's conclusion, which have extensively been extracted in the earlier paragraphs. From the

foregoing the question to be decided is that for application of CUP Method what should-be the most appropriate data and the price to-be adopted. It is well understood that CUP Method can be applied where AEs buy or sell similar goods or services in comparable transactions with unrelated enterprises or when unrelated enterprises buy or sell similar goods or services, as is being done between the AEs. The CUP Method, can be broadly classified into two categories i.e. Internal CUP Method & External CUP Method. Under the Internal CUP Method, the transaction between the AEs involving buy or sell of goods 8i services are comparable to the transacted conducted by any of the AEs with unrelated parties for buy or sell of similar goods or services under similar conditions. However when such internal data is not available, then one may apply external CUP which involves comparison of prices paid/ charged between two unrelated third parties in uncontrolled conditions with the transaction conducted between the AEs.

4. In the facts of the present case, the transaction in question involves supply of power by the eligible units at Rajasthan & Madhya Pradesh to the non-eligible cement units of the appellant in the same States. From the facts on record, it is noted that the eligible unit at Madhya Pradesh supplied power only to the AE i.e. the non-eligible unit and it did not have any transaction with any unrelated enterprises. In the circumstances the unit at Madhya Pradesh cannot be considered as the tested party for the purposes of application of CUP. On the contrary, it is noted that the non-eligible unit i.e. cement unit was sourcing power both from the AE i.e. the eligible undertaking as well as unrelated enterprises i.e. the SEB. In the circumstances it Is noted that reliable internal CUP data was available with the appellant to benchmark the ALP of the power generated & supplied by the eligible undertaking to the non-eligible unit. Similarly in the case of CPP at Rajasthan, it is noted that the eligible unit had supplied power to the AE as well as unrelated enterprises i.e. lEX/Grid. It is however noted that the power which the eligible undertaking supplied to non-AEs did not even constitute 0.11% of the total power generated by the CPP during the relevant year. In the circumstances therefore the rate at which the transaction was conducted by the eligible unit with non-AEs cannot be considered to be reliable data because the facts indicate that such sale was more in nature of reducing effective cost of generation by selling the excess power generated rather than incurring the generation loss. On the contrary however, in the case of CPP at Rajasthan also it is noted that the cement manufacturing undertaking to which the eligible unit supplied power, had procured substantial quantity of power throughout the year from unrelated enterprise i.e. SEB and therefore the tariff at

which the said AE, i.e. non-eligible unit purchased power from SEB represented reliable internal CUP. I therefore find that even after introduction of domestic transfer pricing provisions to specified domestic transactions and becoming applicable to the appellant, the ratio laid down by the Hon'ble ITAT, Kolkata in the appellant's own case for AYs 2008-09 & 2009-10 remains equally valid.

5. For the reasons set out in the foregoing therefore I hold that the methodology and benchmarking performed by the appellant (also judicially approved by higher judicial forums in its own case) was justified. Accordingly the Ld. AO/TPO is directed to delete the transfer pricing adjustment and further direct the Ld. AO/TPO to grant the deduction u/s 80IA based on the transfer price of Rs.6.76/6.85 per unit & Rs.6.79/Rs.6.84 per unit in respect of CPPs at Rajasthan 8i Madhya Pradesh respectively. While computing the deduction permissible, the Ld. AO/TPO shall give an opportunity of hearing to the appellant and will re-compute the deduction in terms of the directions above. Ground Nos. 2 to 5 are therefore allowed."

9.5. As relied by ld. Counsel for the assessee, we observe that similar issue came up before this Tribunal in the case of DCIT vs. M/s. Dhunseri Ventures Ltd. in ITA No. 1989/KOL/2019 order dated 29.08.2022 regarding the transfer pricing adjustment in relation to specified domestic transactions of transfer of power for captive consumption by eligible units to non-eligible units. This Tribunal after considering the catena of judgments held as follows:

"9.5. We have heard rival submissions and perused the material as placed before us carefully including the impugned order and case laws relied upon by the assessee and the revenue. The undisputed facts in brief are that the assessee has two CPPs or eligible units generating electricity which was consumed captively by other non-eligible units i.e. PET Resin Manufacturing Units hereinafter referred to as Non Eligible Units), for carrying out the manufacturing. Noteworthy that non eligible units have also consumed power by purchasing the same from SEB. We observe that the assessee determined the ALP of specified domestic transactions at rate ranging from Rs. 7.66 per unit to Rs. 7.87 per unit which was the Average Annual Landed Cost (AALC) at which the non-eligible unit procured power from SEB. Thus , the assessee followed internal CUP for bench marking the specified domestic transactions of transfer of power from CPPs to non eligible unit at average landed cost at which the non eligible units procured electricity from the SEB by taking non eligible units as the tested party in the TP Study Report and accordingly ALP of the power captively consumed has been benchmarked at ALC of

power purchased by the tested party from SEB. The assessee also duly reported these transactions in the audited report in Form 3CEB. Accordingly to the TPO the average rate of Rs. 3.47 per unit calculated on the basis of sale data of power by independent CPPs/IPPs as determined by various tariff orders would be the ALP of the domestic specified transactions. Accordingly the TPO recommended adjustment to the tune of Rs. 6,75,22,00,000/- and the AO passed the draft assessment accordingly. According to the assessee the internal CUP has to be used for the determination of ALP at which the non-eligible units/manufacturing units procured the power from unrelated party i.e. SEB. Now the issue before us whether the CUP method can be applied to bench mark specified domestic transactions of transferring power by CPPs to non eligible units. We have also perused the provisions as contained in Rule 10B of the Income Tax Rules which provide as to where the CUP can be and has to be applied. We observe from the said rule 10B that we have to see the price at which the property, goods or service has been acquired under similar market conditions. It is also settled that choice of tested party is of lesser significance for the purpose of application of CUP method but instead key factor in application of CUP is product comparability and similar market conditions. Further the CUP method can be classified into two categories i.e. internal CUP method and external CUP method. Under internal CUP method the transactions between the AE's involving buying or selling of goods and services are comparable to the transactions entered into by the AE's with the unrelated parties for buying and selling similar goods and service under similar circumstances. However when such internal data was not available then one may apply external CUP which involves comparison of price paid/charged between the two unrelated parties in uncontrolled condition for transactions entered into between the AE's. In the instant case as noted elsewhere hereinabove that the CPPs bench marked the transactions with non eligible units at a rate at which power is supplied by the SEB to the non eligible units and therefore is the prevailing rate at which the power has been supplied by the SEB to other parties/factories located in the same geographical areas/location. It is also undisputed that both CPPs as well as SEB supplied/sold power during the year and thus there is no timing difference as well. Thus we are in agreement with the conclusion of Ld. CIT(A) that transactions of purchase of power by the non eligible units from SEB fulfil the internal CUP parameters vis product comparability and similar market conditions and thus the ALC paid by the non eligible units to the SEB represented the internal comparable ALP.

9.6. According to Ld. CIT(A), the excess surplus power sold in the open market at a price which was lower than the price at

which the manufacturing units procured electricity from the SEB cannot the arm's length price of the power. Thus, the Ld. CIT(A) reversed the order of TPO/AO by directing that the price at which the SEB sold power in the open market under uncontrolled conditions is reliable internal CUP and accordingly came to the conclusion that ALC notified by the SEB is a fair, reliable and reasonable basis to bench mark the power procured by non-eligible unit from the eligible unit. The Ld. CIT(A) while allowing the appeal of the assessee has relied on the series of decisions namely PCIT vs. Gujarat Alkalies & Chemicals Ltd. (supra), CIT vs. Godawari Power & Ispat Ltd. (supra) and Reliance Infrastructure Ltd. in ITA No. 2180 of 2011 (Bombay-High Court) and the decision of Coordinate Bench of Kolkata in the case of DCIT vs. Birla Corporation Ltd. in ITA No. 971/Kol/2012 for AY 2008-09. We note that in all the above decisions, the AALC at which the power is purchased by the non-eligible unit of the assessee was considered to be the fair market value / transfer price of power supplied by the eligible unit to the non-eligible unit. Before us, the Ld. A.R also argued that non-eligible units has to be held as a tested party and AALC at which the power was purchased by the tested party from SEB/ third party is the most appropriate ALP to bench mark the transfer of power supplied by eligible unit to non-eligible unit. The said view of the assessee is squarely covered by the two decisions of Hon'ble Benches namely Star Paper Mills Ltd. vs. DCIT (supra) and DCIT vs. Balrampur Chini Mills Ltd. (supra). Having considered the ratio laid down, we are of the view that there is no infirmity in the order of Ld. CIT(A) which is a very reasoned and speaking order passed after following the decision of various Hon'ble High Courts and decision of Co-ordinate Benches of the Tribunal. We have also noted the arguments advanced by the Id DR that average rate of Rs. 3.47 per unit as calculated on the basis of sale data of power by independent CPPs /IPPs as determined by various tariff orders should be taken as ALP however can not overlook the fact that the said transactions did not take place under similar market conditions and that price cannot be taken as ALP under CUP method. The power supplied by the CPPs to non eligible units was business to consumer (commonly known As B2C) meaning thereby the rate at which the ultimate consumers can purchase the power for their consumption is relevant. In the instant case before us, the B2C market comprises the sale of power by SEB and other distribution companies to different categories of consumers. Thus the power sold by other CPPs/IPPs to unrelated parties was in altogether different market conditions which is business to business commonly known as B2B model and the said rate represented the rate at which the distribution companies purchased power from

generation companies. Further no consumer can buy the power in the open market at a rate generation companies sell power to distribution companies. Thus we do not find any force in the contentions of the Id DR that rate at which the power was sold to unrelated parties by the CPP is the ALP. We also note that decision of the Calcutta High court in the case of CIT Vs ITC 236 Taxman 612 which was relied by the TPO/AO and the functional dissimilarity between CPPs and SEB have been considered by the coordinate bench of the tribunal in the case of Star Paper Mills Ltd Vs DCIT in ITA No. 127/Kol/2021. Therefore, we are inclined to uphold the order of Ld. CIT(A) by holding that the ALC at which the power is procured by non-eligible units from SEB is the most appropriate ALP to bench mark the specified domestic transactions and accordingly the order passed by Ld. CIT(A) is upheld by dismissing the revenue's appeal on this issue. The grounds of appeal pertaining to this issue are dismissed."

9.6. Thus, respectfully following the consistent view taken by this Tribunal and since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2011-12 & 2012-13 and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 2 for AY 2013-14 & 2014-15 regarding transfer pricing adjustment made for deduction u/s 80IA of the Act raised by the Revenue are dismissed."

4. Both the ld. representatives have submitted that the issue is squarely covered in favour of the assessee by the above decision of the Tribunal in the own case of the assessee for earlier assessment years. Therefore, respectfully following the same, for the sake of consistency, this issue is decided in favour of the assessee and against the revenue. Ground Nos.1 to 5 of Revenue's appeal are hereby dismissed.

5. Ground No.6 – Vide Ground No.6, the revenue has assailed the order of the CIT(A) in allowing the claim of balance additional depreciation of Rs.12,19,30,258/-.

6. The brief facts relating to the issue are that the assessee purchased and installed new plant and machinery in the preceding year but put to use the same for a period less than 180 days in that year. In

view of the 2nd Proviso to section 32(1) of the Act, for the assessment year 2014-15, the assessee claimed only 50% initial depreciation and the remaining 50% was claimed in the assessment year, in question, i.e. A.Y 2015-16. The Assessing Officer disallowed the claim on the ground that initial depreciation is available only in the year of purchase and cannot be claimed in the subsequent year. The Commissioner of Income Tax (Appeals) allowed the claim of the assessee by following the decision of the Tribunal in assessee's own case for the assessment year 2007-08.

7. Both the ld. representatives of the parties have submitted that the issue is squarely covered in favour of the assessee by earlier decisions of the Tribunal in the own case of the assessee. The ld. counsel, in this respect has placed reliance on the order of the Tribunal dated 07.02.2023 passed in ITA Nos.2142&2143/Kol/2018 in relation to Assessment Years 2013-14 & 2014-15, wherein, the identical ground raised by the department has been dismissed by the Tribunal relying upon the earlier decision of the Tribunal in the own case of the assessee. The relevant part of the order of the Tribunal dated 07.02.2023 (supra) is reproduced as under:

> ***"Revenue's common Ground no. 1 for AY 2013-14 & 2014-15 relating to the claim of additional depreciation u/s 32(1)(iia):***
>
> *8. We have heard rival contentions and perused the records placed before us. We find that this Tribunal in assessee's own case for AY 2011-12 & 2012-13 dealt with this issue and decided in assessee's favour observing as follows:*
>
> > *"10. We have heard rival contentions and perused the records placed before us. The first common ground raised in the Department's appeal relates to the assessee's claim for 50% initial depreciation u/s 32(1)(iia) of the Act amounting to Rs.14,93,45,096/- in respect of new plant and machinery purchased and installed in the preceding year but put to use for a period of less than 180 days in that year. In view of the second proviso to section 32(1) of the Act, for the assessment year 2010-11, the assessee claimed only 50% initial*

depreciation and the remaining 50% was claimed in the assessment year 2011-12. Ld. AO disallowed the claim on the ground that initial depreciation is available only in the year of purchase and cannot be claimed in the subsequent year. The ld. CIT(A) allowed the claim of the assessee by following the decision of this Hon'ble Tribunal in assessee's own case for the assessment year 2007-08.

"10.1. It is submitted that the identical claim of the assessee for the assessment year 2007-08 was allowed by the Hon'ble Tribunal by an order dated December 8, 2014 (page 83 at Pp 86-88 of Paper Book-paragraphs 10 at 15-18). The Hon'ble Tribunal also allowed the said claim for the assessment years 2008-09 and 2009-10 by a consolidated order dated August 25, 2017 (Page 140 at Pp 142-144 of Paper Book-paragraphs 7 at 7.2) and for the assessment year 2010-11 by an order dated September 13, 2017 (Page 180 at Pp 182-185 of Paper Book-paragraphs 46 at 52-53). The orders of this Hon'ble Tribunal for the assessment years 2008-09, 2009-10 and 2010-11 were passed after taking into consideration the judgment of the Hon'ble Karnataka High Court in CIT v. Rittal India (P) Limited, (2016) 380 ITR 423 (Karn). Subsequently, the Hon'ble Madras High Court in CIT vs. Shri T.P. Textiles (P.) Ltd., [2017] 394 ITR 483 (Mad) [Page 1 at Pp 4-8 of Compilation of Case Laws] has agreed with the Hon'ble Karnataka High Court. The issue is thus covered in favour of the assessee. We find that this Tribunal in assessee's own case for AY 2010-11 dealt with this issue and decided in assessee's favour observing as follows:

"52. Aggrieved by the order of CIT(A) the assessee has raised ground no. l before the Tribunal. At the time of hearing both the parties agreed that identical issue came up for consideration in assessee's own case in ITA No.971/Kol/2012, 942/Kol/2013, 298 & 329/Kol/2013 for A.Y.2008-08 and 2009-10 order dated 25.8.2017. This Tribunal on the identical issue held as follows:

"7.2. We have heard the rival submissions and perused the materials available on record. We find that the issue under dispute is squarely covered in favour of the assessee by the decision of this tribunal in the case of Hindustan Gum & Chemicals Ltd vs DCIT in ITA Nos. 462 & 752/Kol/2014 for Asst Year 2008-09 vide order dated 8.3.2017 wherein it was held that:

6.3. We have heard the rival submissions. We find that the issue under dispute is squarely covered by the decision of the co-ordinate bench of this tribunal supra wherein it was held as under"

"4. Ground no. 1 relating 10 depreciation on plant and machinery which were put to use less than 180 days during the said financial year. During the previous assessment year (2006- 07) the assessee claimed 50% of depreciation and it was allowed. Now for the year under consideration, the assessee claimed further 10% depreciation to the extent of &. 20, 97, 495/- under second proviso to Sec. 32(l)(iia) of the Act. The AD denied the same on the ground that the Act does not have option where assessee can claim remaining depreciation in subsequent year. The CIT(A) confirmed the order of the AD. however, directed the AD to recalculate the amount of depreciation on written down value (WDV).

5. The Ld. AR before us submits that the case in hand is squarely covered by the decision of the Hon'ble Karnataka High Court in the case of CIT & Anr Vs. Rittal India Pvt. Lid reported in (2016) 380ITR 423 (Karn).

6. The Ld. Sr. DR relied on the orders of the authorities below.

7. Heard both the parties and perused the relevant material on record. In this regard, we may refer to the decision of the Hon'ble High Court of Karnataka in the case of CIT and another vs. Rittal India Private Ltd (supra). The facts of the case therein are that the assessee being an existing industrial undertaking had acquired and installed new plant and machinery in the F. Y 2006-07 and claimed 50% of additional 20% depreciation i.e, 10% additional depreciation under section 32(l)(iia) of the Act in the corresponding assessment year 2007-OS for the reason that the new machinery was acquired after 01-10-2006. The relevant portions at page no 's at 9 and 10 of which is reproduced herein below for below for better understanding:

"The language used in clause (iia) of the said section clearly provides that "a further sum equal to 20 per cent, of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii)". The word "shall" used in the said clause is very significant. The benefit which is to be granted is 20 per cent, additional depreciation. By virtue of the proviso referred to above, only 10 per cent, can be claimed in one year, if plant and machinery is put to use for less than 180 days in the said financial year. This would necessarily mean that the balance 10 per cent, additional deduction can be availed of in the subsequent assessment year, otherwise the very purpose of insertion of clause (iia) would be defeated because it provides for 20 per cent, deduction which shall be allowed.

It has been consistently held by this court, as well as the apex court, that the beneficial legislation, as in the present case, should be given liberal interpretation so as to benefit the

assessee. In this case, the intention of the legislation is absolutely clear, that the assessee shall be allowed certain additional benefit, which was restricted by the proviso to only half of the same being granted in one assessment year, if certain condition was not fulfilled. But, that, in our considered view, would not restrain the assessee from claiming the balance of the benefit in the subsequent assessment year. The Tribunal, in our view, has rightly held, that additional depreciation allowed under section 32(1)(iia) of the Act is a one-time benefit to encourage industrialisation, and the provisions related it have to be construed reasonably, liberally and purposively to make the provision meaningful while granting the additional allowance. We are in full agreement with such observations made by the Tribunal."

8. Heard both parties and perused the relevant material on record. By reading of Clause (iia) to sub-section (1) of section 32 provides for allowance of initial depreciation equal to 20% of the actual cost of new plant and machinery acquired and installed after March 31, 2005 with effect from the assessment year 2006-07 to those who engaged in the business of manufacture or production of any article or thing. Therefore, the assessee is entitled to claim 20% of depreciation equal to the actual cost of plant and machinery, but, whereas the 2nd proviso to section 32(1) of the Act restrains the authority to allow depreciation to 50% of such 20% if the subjected plant and machinery acquired during the previous year and is put 10 use for a period of less than 180 days in that previous year. According to AO in his order at page no-4 referred that the assessee put to use new plant and machinery for less than 1B0 days and confirmed by the CIT-A in para-8 of impugned order and it is a requirement under 2nd proviso to section 32(1) which lifts the restriction on AO allow the further depreciation of 10% of which remained unclaimed out of 20% as referred in Clause (iia) to sub-section (1) of section 32 of the Act. The facts of the present are similar to the decision supra relied on by the assessee. Therefore, we are of the view that the law laid down by the Hon'ble High Court of Karnataka in the case of CIT and another vs. Rittal India Private Lid supra is applicable to the present case, thus we hold that the assessee is entitled to claim remaining 50% depreciation of such 20% which is equal to the actual cost of new plant and machinery, accordingly ground no-I raised by the assessee is allowed."

Respectfully following the same, we dismiss Ground No. 2 raised by the revenue".

Respectfully following the said decision supra, we hold that the assessee is entitled for remaining portion of additional

> *depreciation in the asst years 2008-09 and 2009-10 and accordingly the grounds raised by the assessee in this regard are allowed."*
>
> *53. Respectfully following the decision of the Tribunal the assessee is entitled to additional depreciation (remaining portion). Thus ground no. 1 raised by the assessee is allowed."*
>
> *10.2. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. for AY 2010-11 referred above and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 1 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed."*
>
> *8.1. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. for AY 2011-12 & 2012-13 referred above and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 1 for AY 2013-14 & 2014-15 regarding claim of additional depreciation raised by the Revenue are dismissed.*

8. Both the ld. representatives have submitted that the issue is squarely covered in favour of the assessee by the above decision of the Tribunal in the own case of the assessee for earlier assessment years. Therefore, respectfully following the same, for the sake of consistency, this issue is decided in favour of the assessee and against the revenue. Ground No.6 of Revenue's appeal is hereby dismissed.

9. **Ground No.7** – Vide Ground No.7, the revenue has agitated the action of the CIT(A) in setting aside the disallowance made by the Assessing Officer relating to the assessee's claim for deduction of Rs.69,61,595/- on proportionate basis of the compensation paid in connection with the mining activity for obtaining limestone, used as raw material for manufacturing of cement. The ld. counsel referring to the above issue has submitted that for obtaining limestone, which is the main raw material for manufacture of cement, the assessee is required

to pay rent/royalty to the State Government in terms of the mining lease. Such rent/royalty paid to the State Government is debited to the profit and loss account. In terms of the mining lease and requirement of the relevant State Land Revenue law, in addition to the rent/royalty, the assessee is also required to pay compensation as determined by the local authority/court to the persons whose rights are infringed because of the mining activity. No interest in land is acquired by payment of such compensation. Compensation has to be paid in order to obtain the raw material for the assessee's business, thereby, facilitating the carrying on of its business. The assessee has been following the practice of claiming the amount of compensation proportionately over the period of the mining lease in order to avoid any distortion due to claim of the entire amount of compensation in the year of payment.

9.1. The Assessing Officer, however, disallowed the claim of the said expenditure by observing that the same was capital expenditure in nature. The ld. CIT(A), however, decided this issue in favour of the assessee following the orders of the Tribunal in assessee's own case for A.Y 2006-07 to 2010-11. The ld. counsel for the assessee has submitted that this issue has been consistently decided in favour of the assessee by the Coordinate Benches of the Tribunal in the earlier assessment years. He, in this respect, has relied upon the latest decision of the Tribunal 07.02.2023 passed in ITA Nos.2142&2143/Kol/2018 in relation to Assessment Years 2013-14 & 2014-15, wherein, the identical ground raised by the department has been dismissed by the Tribunal relying upon the earlier decision of the Tribunal in the own case of the assessee. The relevant part of the order of the Tribunal dated 07.02.2023 (supra) is reproduced as under:

> ***"Revenue's common Ground no. 3 for AY 2013-14 & 2014-15 relating to the claim of compensation paid for obtaining limestone connected to mining activity:***

10. We have heard rival contentions and perused the records placed before us. We find that this Tribunal in assessee's own case for AY 2011-12 & 2012-13 dealt with this issue and decided in assessee's favour observing as follows:

> *"12. We have heard rival contentions and perused the records placed before us. The third common ground in the Department's appeal relates to disallowance of the assessee's claim for deduction of Rs.35,79,586/- on proportionate basis of the compensation paid in connection with the mining activity for obtaining limestone used as raw material for manufacture of cement. Compensation of Rs.17,92,420/- relates to the assessee's Satna Cement Works and the balance amount of Rs.17,87,166/- relates to its Birla Cement Works.*
>
> *12.1. For obtaining limestone, which is the main raw material for manufacture of cement, the assessee is required to pay rent/royalty to the State Government in terms of the mining lease. Such rent/royalty paid to the State Government is debited to the profit and loss account. In terms of the mining lease and requirement of the relevant State Land Revenue law, in addition to the rent/royalty, the assessee is also required to pay compensation as determined by the local authority/court to the persons whose rights are infringed because of the mining activity. No interest in land is acquired by payment of such compensation. Compensation has to be paid in order to obtain the raw material for the assessee's business, thereby facilitating the carrying on of its business. The assessee has been following the practice of claiming the amount of compensation proportionately over the period of the mining lease in order to avoid any distortion due to claim of the entire amount of compensation in the year of payment. The ld. AO, however, sought to treat such compensation as capital expenditure. The ld. CIT(A) granted relief to the assessee following the orders of this Hon'ble Tribunal in the assessee's case for the assessment years 2006-07 to 2010-11.*
>
> *12.2. The identical disallowance was made in the assessment year 2006-07. Relief was granted to the assessee on first appeal by order dated July 9, 2010 against which the revenue preferred further appeal before this Hon'ble Tribunal, being ITA No. 1936 (Kol) of 2010. The said appeal was rejected by the Hon'ble Tribunal by order dated July 29, 2011 (Page 66 at Page 73 of the Paper Book - paragraphs 10 at 15). This Hon'ble Tribunal also rejected the Department's appeal for the assessment years 2007-08 (Pages 97-98 of the Paper Book, paragraphs 33 at 34) and assessment years 2008-09 and 2009-10 (Page 106 at Pp 107-108 of the Paper Book, paragraphs 2 at 2.2), by following its order for the assessment*

year 2006-07. The Hon'ble Tribunal dismissed the Department's appeal for the assessment year 2010-11 (Page 163 at Pp 164-165 of the Paper Book-paragraphs 18 at 22-23) by following its order for the assessment years 2008-09 and 2009-10.

12.3. The Department preferred appeals before the Hon'ble Calcutta High Court against the orders of this Hon'ble Tribunal for the assessment years 2007-08 [ITAT 80/2015 and GA 1714/2015 – Page 47 at 52 – Question 2(c) of the Compilation of Case Laws] and for the assessment year 2010-11 [ITA 124/2019-Supplementary Affidavit affirmed by the Department – Page 36 at Page 43 – Question 14(c) of the Compilation of Case Laws]. The Hon'ble High Court, by orders dated September 26, 2019 (Pages 45-46 of the Compilation of Case Laws) and March 11, 2020 (Page 29 at Page 30 of the Compilation of the Case Laws) respectively, was pleased not to admit the said appeals filed by the department on this issue for the assessment years 2007-08 and 2010-11. Further, this issue was not raised by the department before the Hon'ble Calcutta High Court in ITA No. 125/2019 preferred for the assessment years 2008-09 and 2009-10 (Page 11 at Pp 23-25 of the Compilation of Case Laws). We find that this Tribunal in assessee's own case for AY 2010-11 dealt with this issue and decided in assessee's favour observing as follows:

"19. We have already seen that the Assessee is also in the business of manufacturing of cement. Limestone is the main raw material for manufacture of cement. The Assessee obtained mining lease from the State Government for quarrying limestone. It had to pay royalty to the State Government in terms of the mining lease. The terms of the mining lease also provided that over and above the royalty payable to the State Government, the Assessee is also required to pay compensation as determined by the local authority/court to the persons whose rights are infringed because of the mining activity. The Assessee claimed the compensation so paid was a revenue expenditure and allowable as a deduction while computing income from business. It was the plea of the Assessee that by incurring these expenses, no interest in land and that compensation has to be paid in order to obtain the raw material for the assessee's business, thereby facilitating the carrying on of its business. The AO however found that in earlier years such claims were disallowed treating it as capital in nature as a part of acquisition of the leasing right over and above the fees paid to Govt. The AO accordingly did not accept the claim of the assessee and disallowed the claim of the Assessee for deduction and added the sum of Rs. 23,71,340/- to the total income of the Assessee.

20. Aggrieved by the order of the AO, the Assessee preferred appeal before the CIT(A). Before CIT(A), the Assessee contended that identical disallowance was made in the assessment year 2006-07 and in first appeal, the CIT(A) by order dated July 9, 2010 deleted the addition made by the AO. Against the said order, the revenue preferred further appeal before the Hon'ble Tribunal, being ITA No. 1936 (Kol) of 2010. The said appeal has since been rejected by the Hon'ble Tribunal by order dated July 29,2011 (Page 71 to 87 the Paper Book - paragraphs 10-15 at page-77 to 84). The said decision was rendered after considering the judgment of the Hon'ble Supreme Court in Enterprising Enterprises v Deputy Commissioner, (2007) 293 ITR 437 (SC). The said order of the Hon'ble Tribunal has been followed in first appeal for the assessment years 2007-08 (page 3, para 4), 2008-09 (page 55, para 4) and 2009- 10 (page 110, para 5). It was submitted that in this year also, the compensation amount of Rs.23,71,3401- should be held to be revenue in nature and an admissible deduction.

21. The CIT(A) deleted the addition made by the AO by following the order of the Tribunal in ITA No. 1936/Kol of 2010. Aggrieved by the order of the CIT(A), the revenue has raised Gr.No.2 before the Tribunal.

22. At the time of hearing, it was brought to our notice that identical issue was considered by the Tribunal in assessee's own case for A.Y.2008-09 and 2009-10 in ITA Nos. 971/Kol/2012 & 298/Kol/.2013 and this tribunal on an identical issue held as follows:

"2.2. We have heard the rival submissions. We find that the issue under dispute is squarely covered by the decision of this tribunal in assessee's own case for the Asst Year 2006-07 wherein it was held that

"We have heard the parties and perused the material placed on record. The I A. Counsel for the assessee has elaborated the facts of the case making reference of several decisions of Tribunal and Hon'ble Supreme Court and High Courts. After careful consideration of the same and evidences filed on record and in the paper book, we find that the assessee is required to pay compensation as determined by the local authority/ court to the persons whose rights are infringed because of the mining activity. We also observe that Ld. CIT(A) has properly analysed the facts of the present case and distinguished the facts decided by the Hon'ble Apex Court in the case of Enterprising Enterprises vs. DCIT (supra) and then only had come to a conclusion that the compensation was paid for the damaged caused on the infringement of right of the land owner. He has

also analysed that the payments are progressively distributed as they work, as they proceed year by year, going on with their work and the payments are in the nature of incidental expenditure to conduct the mine and the business operations. He, therefore, held that the payment of compensation to persons whose rights are infringed by the mining activity is revenue in nature. We, therefore, find no infirmity in the order of the Ld. CIT(A) on this issue and confirmed the same. Ground no. 1 of the Revenue's appeal is thus dismissed.".

The facts in the years under dispute is also analogous to that in earlier years and hence respectfully following the order of this tribunal supra, we don't find any infirmity in the order of the Ld. CITA in this regard. Accordingly, the grounds raised by the revenue in this regard are dismissed.

23. Following the aforesaid decision, we uphold the order of CIT(A) and dismiss ground no.2 raised by the revenue."

12.4. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2010-11 and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 3 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed."

10.1. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding AYs 2011-12 & AY 2012-13 except the change of figures and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 3 for AY 2013-14 & 2014-15 raised by the Revenue are dismissed.

10. Both the ld. representatives have submitted that the issue is squarely covered in favour of the assessee by the above decision of the Tribunal in the own case of the assessee for earlier assessment years. Therefore, respectfully following the same for the sake of consistency, this issue is decided in favour of the assessee and against the revenue. Ground No.7 of Revenue's appeal is hereby dismissed.

11. **Ground No.8** – Vide Ground No.8, the revenue has assailed the decision of the CIT(A) in holding that the amount received by the assessee of Rs.31,86,63,403/- as industrial promotion assistance from

the State Govt. is capital in nature as against the observation of the Assessing Officer that the same was a revenue receipt liable to taxation. The ld. counsel, in this respect, has submitted that the assessee undertook expansion of its cement unit in Durgapur, West Bengal at a cost of about Rs.100 crore and increased the manufacturing capacity from 0.6 million tonnes per annum to 1.6 million tonnes per annum. The expansion was practically a new unit. Commercial production post-expansion commenced in December, 2005. The said expansion undertaken by the assessee qualified as a Mega Project under the 2000 Scheme(Incentive scheme) because of the extent of investment. In terms of the said Incentive Scheme, the assessee was entitled to industrial promotion assistance which was quantified at 75% of the sales tax paid in the preceding year. The amount of assistance was to be adjusted against the sales tax liability of the year in which the assistance was claimed. Such industrial promotion assistance was available to the assessee for ten years. The assessee's contention was that the object for which the assistance was granted under the provisions of the 2000 Scheme was to enable the setting up of a new unit or expansion of an existing unit and that the assistance was on capital account. Measurement of the amount of assistance with reference to the sales tax paid and payment of the assistance by way of adjustment against the sales tax liability merely related to the form or mechanism through which the assistance was granted and did not determine the character of the subsidy. The amount of sales tax paid was only the measure for determining the quantum of assistance. Further, the time of payment of the assistance was also of no relevance. The Assessing Officer, however, took the view that the assistance was in the form of relaxation of tax and supplemented the assessee's trade receipts and profits and was a revenue receipt. He sought to rely upon the decision of the hon'ble Supreme Court in the case of "Sahney Steel & Press Works Ltd. v. CIT",

(1997) 228 ITR 253 (SC). On appeal, the Commissioner of Income Tax (Appeals) accepted the assessee's claim following the decisions of the Tribunal in the assessee's own case for the assessment years 2008-09 and 2009-10.

12. The ld. DR in this respect, however, has made the following submissions:

> *The assessee-company set up a factory in the State of Andhra Pradesh, which went into production in the year 1973. For the assessment year 1974-75, the assessee obtained refund of sales tax to extent of Rs. 14,565 in terms of & notification issued by the State Government. According to the said notification, certain facilities and incentives were to be given to all the new industrial undertakings which commenced production on or after 1-1-1969 with investment capital not exceeding Rs. 5 crores. The incentives were to be allowed for a period of five years from the date of commencement of production. The incentives were not available unless and until production had commenced. The Assessing Officer included the said amount in the assessable income of the assessee and that was affirmed by the Commissioner (Appeals). On further appeal, the Tribunal deleted the additions holding that the refund was a development subsidy in the nature of a capital receipt. On reference, the High Court set aside the order of the Tribunal.*
>
> *On further appeal by assessee Hon'ble SC held while distinguishing the decision of Hon'ble M.P. High Court on identical facts-*
>
> > *"34.The Madhya Pradesh High Court in the case of CIT v. Dusad Industries 162 ITR 734, dealt with a case where Government had framed a scheme for granting sales tax subsidies to industries set up in backward areas. The High Court was of the view that the object of the scheme was not to supplement the profits made by industries. In that view of the matter, the High Court held that the subsidies given under the said scheme by the Government to newly set up industries were capital receipts in the hands of the industries and could not be taxed as revenue receipts. In that case, 75 per cent of the sales tax paid in a year for a period of five years from the day of starting of production was to be given back by the Government to the industry concerned. The High Court was of the view that obviously the subsidy was given by way of an incentive for capital investment and not by way of addition to the profits of the assessee as was clear from the facts and circumstances of the case. The Madhya Pradesh High Court, however, failed to notice the significant fact that under the scheme framed by the Government, no subsidy was given until the time production was actually commenced. Mere setting up of the industry did not qualify*

> *an industrialist for getting any subsidy. The subsidy was given as help not for the setting up of the industry which was already there but as an assistance after the industry commenced production. The view taken by the Madhya Pradesh High Court is erroneous."*
>
> *In the instant case also, the grant of subsidy was subject to commencement of commercial production. As per the scheme commercial production in the new unit was required to commence on or after 01.01.2000. Further, in the Registration Certificate dated 29.04.2015 it was stipulated that the assessee would be eligible for Industrial Promotion Assistance only after the total investment crossed the limit of Rs.25 Cr and on starting commercial production. Therefore, the AO was justified in treating the subsidy as revenue in nature and adding back the same to the total income of the assessee. The inclusion of the amount of Rs.31.86 Cr. u/s 115JB is consequential.*

13. The ld. AR, however, has submitted that the issue is squarely covered in favour of the assessee by the earlier decisions of the Tribunal in the own case of the assessee. He has submitted that earlier, the issue was raised in the own case of the assessee for A.Y 2008-09 and 2009-10 and the issue was decided by the Coordinate Bench of the Tribunal by consolidated order dated 25.08.2017. He has further submitted that the issue has been consistently decided by the Coordinate Benches of the Tribunal in favour of the assessee. He, in this respect, has relied upon the latest decision of the Tribunal 07.02.2023 passed in ITA Nos.2142 & 2143/Kol/2018 in relation to Assessment Years 2013-14 & 2014-15, wherein, the identical ground raised by the department has been dismissed by the Tribunal, relying upon the earlier decision of the Tribunal in the own case of the assessee. The relevant part of the order of the Tribunal dated 07.02.2023 (supra) is reproduced as under:

> ***"Revenue's common Ground no. 4 for AY 2013-14 & 2014-15 regarding the issue of treating of industrial promotion assistance from the State Government as capital receipt:***
>
> *11. We have heard rival contentions and perused the records placed before us. We find that this Tribunal in assessee's own case for AY 2011-12 & 2012-13 has dealt with this issue and decided in assessee's favour observing as follows:*

"13. We have heard rival contentions and perused the records placed before us. The fourth common ground of the Department's appeal relates to the assessee's claim that industrial promotion assistance of Rs.16,94,84,638/- received from the West Bengal State Government is a capital receipt and cannot be subjected to tax. The said amount was received by the assessee in terms of the West Bengal Incentive Scheme, 2000 (hereinafter referred to as "the 2000 Scheme") for expansion undertaken at the assessee's Durgapur Cement Works involving an investment of about Rs.100 crore.

13.1. The material facts are that the assessee undertook expansion at its cement unit in Durgapur, West Bengal at a cost of about Rs.100 crore and increased the manufacturing capacity from 0.6 million tonnes per annum to 1.6 million tonnes per annum. The expansion was practically a new unit. Commercial production post-expansion commenced in December, 2005. The said expansion undertaken by the assessee qualified as a Mega Project under the 2000 Scheme because of the extent of investment. In terms of the 2000 Scheme, the assessee was entitled to industrial promotion assistance which was quantified at 75% of the sales tax paid in the preceding year. The amount of assistance was to be adjusted against the sales tax liability of the year in which the assistance was claimed. Such industrial promotion assistance was available to the assessee for ten years. The assessee's contention was that the object for which the assistance was granted under the provisions of the 2000 Scheme was to enable the setting up of a new unit or expansion of an existing unit and that the assistance was on capital account. Measurement of the amount of assistance with reference to the sales tax paid and payment of the assistance by way of adjustment against the sales tax liability merely related to the form or mechanism through which the assistance was granted and did not determine the character of the subsidy. The amount of sales tax paid was only the measure for determining the quantum of assistance. Further, the time of payment of the assistance was also of no relevance.

13.2. The ld. AO, however, took the view that the assistance was in the form of relaxation of tax and supplemented the assessee's trade receipts and profits and was a revenue receipt. On appeal, the ld. CIT(A) accepted the assessee's claim following the decisions of the Hon'ble Tribunal in the assessee's own case for the assessment years 2008-09 to 2010-11.

13.3. It is submitted that the identical question fell for consideration in the assessee's own case for the assessment years 2008-09 and 2009-10 and was decided in assessee's

favour by this Hon'ble Tribunal by a consolidated order dated August 25, 2017 (Page 115 at Pp 122-125 of Paper Book-paragraphs 4 at 4.3) and for the assessment year 2010-11 by an order dated September 13, 2017 (Page 165 at Pp 168-171 of Paper Book-paragraphs 25 at 29-30). The Department had preferred appeal against the said order dated August 25, 2017 passed by this Hon'ble Tribunal for the assessment years 2008-09 and 2009-10 before the Hon'ble Calcutta High Court under section 260A of the Act being ITA No. 125/2019, GA No. 3548/2018 (Page 11 at Pp 23-24 – Question 10(i) of the Compilation of Case Laws). The Hon'ble High Court by an order dated September 12, 2019 was pleased not to admit the said question (Page 9-10 of the Compilation of Case Laws).

13.4. The identical question involving the 2000 Scheme came up for consideration recently before the Hon'ble Calcutta High Court in PCIT vs. Budge Budge Refineries Limited, (2022) 139 taxmann.com 124 (Calcutta) and the revenue's appeal against the order of the Hon'ble Tribunal was dismissed. We find that this Tribunal in assessee's own case for AY 2010-11 dealt with this issue and decided in assessee's favour observing as follows:

"29. At the time of hearing, it was agreed by both the parties that identical issue was considered by this Tribunal in assessee's own case in A.Y.2008-09 and 2009-10 in ITA Nos. 971/Kol/2012 and ITA No.942/Kol/2013, 298/Kol/2013 and 329/Kol/2013 and this tribunal in its order dated 25.8.2017, on the aforesaid issue held as follows:

"4.3. We have heard the rival submissions and perused the materials available on record including the paper book containing the entire West Bengal Incentive Scheme 2000 and eligibility certificate issued by the competent authority approving the expansion of existing unit thereby approving the fact of assessee falling under the category of 'Mega Unit' under the said scheme. We find that Subsidy could be reduced from the cost only if it is found that the cost for acquiring the asset was directly or indirectly met out of the subsidy. In order to apply the proviso, it is necessary to show that the subsidy had been directly or indirectly used to acquire the asset though it may not be possible to exactly quantify the amount directly or indirectly used for acquiring the asset. For the purpose of applying the proviso, also it has to be found that the asset was acquired by directly or indirectly using the subsidy. It is apparent from the provisions of the 2000 Scheme and the certificate of registration and eligibility certificate that the assistance was to be made available after the commencement of commercial production without any financial cap and was to

be adjusted against the sales tax liability of the year of claim. The industrial promotion assistance was clearly not used directly or indirectly to acquire the assets nor any part of the cost of the assets was met directly or indirectly from the industrial promotion assistance. We find that the issue under dispute is squarely covered by the decision of this tribunal in assessee's own case for Asst Year 2007-08 in ITA No. 683 & 581 /Kol/2011 dated 8.12.2014 wherein the grounds raised by the assessee as well as by the revenue were as under:

Assessee Ground No. 1

That on the facts and circumstances of the case, the learned CIT(Appeals) though holding that sales-tax incentive of Rs. 1238000 allowed by the State Govt, is the nature of capital receipt but erred in directing the Assessing Officer (AO) for reducing the same from the cost of Fixed Assets for the purpose of computing depreciation by applying the Explanation 10 to Sec. 43(1) of I.T.Act.

Revenue Ground No. 2

That Ld.CIT(A)-VI Kolkata has erred in law as well as on facts by deleting the addition made by the AO on account of Sales Tax Subsidy received by the assessee as revenue income of Rs 12,38,000/-.

The decision rendered thereon by this tribunal is as under:

7. We have heard rival contentions on this issue and gone through the facts and circumstances of the case. We find that the facts are discussed in detail and which are undisputed. It is admitted that the assessee's issue of Sales Tax Incentive is capital in nature for the reason that the very scheme under which the expansion of the unit and subsidy under Rajasthan Sales Tax Scheme, 1998 was received explains the purpose of the scheme as incurring capital expenditure for installation of plant and machinery and for eligible for fixed capital investment. Even the issue of assessee is covered in its favour by Tribunal's decision in assessee's own case all along from AYs 2002-03 to 2006-07. It is not brought to our notice by the Revenue that the matter has been decided by Hon'ble Calcutta High Court, despite a query from the Bench. In such circumstances, and taking a consistent view, we hold that the CIT(A) has rightly treated the sales tax subsidy receipt as 'capital in nature'.

8. In respect to the issue of application of Explanation-10 to Sec.43(1) of the Act we find from the facts of the case that the Rajasthan Govt, has framed a incentive scheme i. e.,

R.S.T/C.S.T. Exemptions Scheme 1998 for encouragement of setting up of industrial project or expansion of existing industrial projects. It is also a fact that the maximum limit of the subsidy was restricted with reference to the value of fixed capital investment in land, building, plant & machinery but no part of the subsidiary was specifically intended to subsidize the cost of the any fixed assets, therefore, it cannot be said that subsidy was to meet a portion of cost of asset. According to us, assessee has rightly not reduced the amount of subsidy received from the actual cost/WDV of the fixed assets while claiming depreciation. It is also a fact that revenue during scrutiny assessments of the assessee for AY s 2002-03 to 2006-07 added the subsidy amount as revenue receipt but Tribunal has considered the receipt as 'capital', accepting the contention of the assessee. Even Hon'ble Supreme Court in the case of PJ. Chemicals. Ltd. (supra) has considered this issue and held that where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost, which is the basis for determining the subsidy, being only a measure adopted under the scheme to quantify the financial aid, is not a payment, directly or indirectly, to meet any portion of the actual cost. Therefore, the said amount of subsidy cannot be deducted from the actual cost under sec. 43(1) for the purpose allowing depreciation. It is further held that if Government subsidy is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as a percentage of such cost, it does not partake the character of payment intended either directly or indirectly to meet the "actual cost". By implication, the above judgment also provides that if the subsidy is intended for meeting a portion of the cost of the assets, then such subsidy should be deducted from the actual cost, for the purpose of computing depreciation. As per Hon'ble Supreme Court, law is that if the subsidy is asset-specific, such subsidy goes to reduce the actual cost. If the subsidy is to encourage setting up of the industry, it does not go to reduce the actual cost, even though the amount of subsidy was quantified on the basis of the percentage of the total investment made by the assessee. The law is already settled on the subject. Now, the only wavering is with reference to Explanation 10 provided under sec.43(l) of the Act. The said Explanation provides that where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement

shall not be included in the actual cost of the asset to the assessee. It is further, provided thereunder, that where such subsidy or grant or reimbursement of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee. In order to invoke Explanation 10, it is necessary to show that the subsidy was directly or indirectly used for acquiring an asset. This is again a question of fact. The relatable subsidy to such asset can be reduced from the cost only if it is found that the cost for acquiring that asset was directly or indirectly met out of the subsidy. Likewise in the proviso, it is necessary to show that the subsidy has been directly or indirectly used to acquire an asset but it is not possible to exactly quantify the amount directly or indirectly used for acquiring the asset. Here also, a finding of fact is necessary that an asset was acquired by directly or indirectly using the subsidy. The above Explanation and the proviso thereto do not dilute the finding of the Hon'ble Supreme Court in the case of P. J. Chemicals Ltd.(supra) that asset-wise subsidy alone can be reduced from the actual cost. The above Explanation and the proviso therein to explain the law. They are not bringing any new law different from the law considered by Hon'ble Supreme Court in the above cases.

9. In view of the above facts and circumstances of the case and legal position explained by Hon'ble Supreme Court in the case of P.J. Chemicals Ltd. (supra), we are of the vie that subsidy receipt should not be reduced from the actual cost of fixed assets for computing depreciation under the provisions of the Act. Accordingly, this issue of revenue's appeal is dismissed and that of the assessee is allowed".

Respectfully following the aforesaid decision of this tribunal supra, we hold that the IPA received by the assessee would have to be construed as a Capital Receipt and the same need not be reduced from the cost of assets in terms of Explanation 10 to Section 43(1) of the Act. Accordingly, the grounds raised by the revenue are dismissed and grounds raised by the assessee are allowed.

30. Respectfully following the aforesaid decision, we hold that the subsidy in question is a capital receipt and not chargeable to tax. Ground no.3 raised by the revenue is dismissed. We also hold that capital receipt need not be reduced from the cost of the assets and under Explanation 10 to section 43(1) of the Act.

We accordingly allow ground no.7 raised by the assessee in its appeal."

13.5. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2010-11and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 4 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed."

11.1. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding AYs 2011-12 & AY 2012-13 except for the change in figure and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 4 for AY 2013-14 & 2014-15 raised by the Revenue are dismissed."

14. So far as the reliance of the ld. DR on the decision of the Hon'ble Supreme Court in "Sahney Steel & Press Works Ltd. v. CIT" (supra) is concerned, it is to be noted that the said decision has subsequently been considered by the Hon'ble Supreme Court in the case of 'CIT-I Vs. M/s Chaphalkar Brothers, Pune and Others' in Civil Appeal Nos. 6513-6514 of 2012 order dated 7.12.2017. The Hon'ble Supreme Court while deliberating on the earlier decisions of the Supreme Court in the cases of 'Sahney Steel & Press Works Ltd. Hyderabad Vs. CIT, A.P.-1, Hyderabad Vs. 1997 (7) SCC 765, 'CIT, Madras Vs. Pooni Sugars and Chemicals Limited' 2009 (9) SCC 337 and further of the Hon'ble J&K High Court in the case of 'Shri Balaji Alloys Vs. CIT' (2011) 333 ITR 335, has held that to gather any of the aforesaid receipts as to the same are capital or Revenue in nature, 'purpose test' is to be applied. If the purpose is for the setting up of new industry, then the receipts are to be considered as capital in nature. However, if the receipts are in the nature of facilitation/helping hand of the trade, the same is construed Revenue in nature. What is Important, is the object for which the subsidy/incentive is granted. That the object is carried out in a particular manner is irrelevant. Once the object of the subsidy was to

industrialize the State and to generate employment in the State, the fact that a subsidy took a particular form and that it was granted only after commencing of production, would not make any difference. The Hon'ble Supreme Court made reference to the decision of the Hon'ble J&K High Court in the case of 'Shri Balaji Alloys v CIT' (supra), wherein, the Hon'ble High Court, while considering the scheme of refund of excise duty and interest subsidy, has held that the scheme was capital in nature despite the fact that the incentives were not available until and unless the commercial production has started and justified the fact that these incentives were not given to the assessee expressly for the purpose of capital assets. The relevant part of the decision of the Hon'ble Supreme Court in the case of 'CIT Vs. M/s Chaphalkar Brothers, Pune' reported in [2017] 88 taxmann.com 178 (SC) is reproduced as under:-

> *"Finally, it was found that, applying the test of purpose, the Court was satisfied that the payment received by the assessee under the scheme was not in the nature of a helping hand to the trade but was capital in nature.*
>
> *What is important from the ratio of this judgment is the fact that Sahney Steel was followed and the test laid down was the "purpose test". It was specifically held that the point of time at which the subsidy is paid is not relevant; the source of the subsidy is immaterial; the form of subsidy is equally immaterial.*
>
> *Applying the aforesaid test contained in both Sahney Steel as well as Ponni Sugar, we are of the view that the object, as stated in the statement of objects and reasons, of the amendment ordinance was that since the average occupancy in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past, the concept of a Complete Family Entertainment Centre, more popularly known as Multiplex Theatre Complex, has emerged. These complexes offer various entertainment facilities for the entire family as a whole. It was noticed that these complexes are highly capital intensive and their gestation period is quite long and therefore, they need Government support in the form of incentives qua entertainment duty. It was also added that government with a view to commemorate the birth centenary of late Shri V. Shantaram decided to grant concession in entertainment duty to Multiplex*

Theatre Complexes to promote construction of new cinema houses in the State. The aforesaid object is clear and unequivocal. The object of the grant of the subsidy was in order that persons come forward to construct Multiplex Theatre Complexes, the idea being that exemption from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centers. This being the case, it is difficult to accept Mr. Narasimha's argument that it is only the immediate object and not the larger object which must be kept in mind in that the subsidy scheme kicks in only post construction, that is when cinema tickets are actually sold. We hasten to add that the object of the scheme is only one -there is no larger or immediate object. That the object is carried out in a particular manner is irrelevant, as has been held in both Ponni Sugar and Sahney Steel.

Mr. Ganesh, learned Senior Counsel, also sought to rely upon a judgment of the Jammu and Kashmir High Court in Shri Balaji Alloys vs. C.I.T. (2011) 333 I.T.R. 335. While considering the scheme of refund of excise duty and interest subsidy in that case, it was held that the scheme was capital in nature, despite the fact that the incentives were not available unless and until commercial production has started, and that the incentives in the form of excise duty or interest subsidy were not given to the assessee expressly for the purpose of purchasing capital assets or for the purpose of purchasing machinery.

After setting out both the Supreme Court judgments referred to hereinabove, the High Court found that the concessions were issued in order to achieve the twin objects of acceleration of industrial development in the State of Jammu and Kashmir and generation of employment in the said State. Thus considered, it was obvious that the incentives would have to be held capital and not revenue. Mr. Ganesh, learned Senior Counsel, pointed out that by an order dated 19.04.2016, this Court stated that the issue raised in those appeals was covered, inter alia, by the judgment in Ponni Sugars, and the appeals were, therefore, dismissed.

We have no hesitation in holding that the finding of the Jammu and Kashmir High Court on the facts of the incentive subsidy contained in that case is absolutely correct. In that once the object of the subsidy was to industrialize the State and to generate employment in the State, the fact that the subsidy took a particular form and the fact that it was granted only after commencement of production would make no difference."

15. We may further add here that the decision of the Hon'ble Jammu & Kashmir High Court in the case of 'CIT Vs. Shri Balaji Alloys & Ors'

(supra) has been upheld by the Hon'ble Supreme Court reported in (2016) 95 CCH 0249 SCC / (2016) 138 DTR 0036 (SC)

16. In view of the above referred two decisions, this issue is decided in favour of the assessee and against the revenue. This Ground of the revenue's appeal is hereby dismissed.

17. **Ground No.9** –Vide this Ground of Appeal, the revenue has agitated the action of the CIT(A) in holding that the amount received by the assessee as interests subsidy from the state government was capital in nature as against the revenue receipt treated by the Assessing Officer.

18. The ld. counsel for the assessee, in this respect, has submitted that the nature of the interest subsidy was same i.e. Capita Receipt as noted above in respect of investment incentives given by the Govt. and that even subsequently, the said interest subsidy was renamed as 'Capital Investment Subsidy' under the amended Rajasthan Investment Promotion Scheme, 2003 in respect of expansion undertaken at the assessee's Chanderia Cement Works. The ld. counsel has submitted that the issue is identical as raised vide Ground no.8 of the revenue's appeal. He, in this respect, has relied upon the latest decision of the Tribunal 07.02.2023 passed in ITA Nos.2142&2143/Kol/2018 in relation to Assessment Years 2013-14 & 2014-15, wherein, the identical ground raised by the department has been dismissed by the Tribunal, relying upon the earlier decision of the Tribunal in the own case of the assessee. The relevant part of the order of the Tribunal dated 07.02.2023 (supra) is reproduced as under:

> ***"Revenue's common Ground no. 5 for AY 2013-14 & 2014-15 relating to the claim of interest subsidy from the State Government as a capital receipt:***

12. We have heard rival contentions and perused the records placed before us. We find that this Tribunal in assessee's own case for AY 2011-12 & 2012-13 dealt with this issue and decided in assessee's favour observing as follows:

> *"14. We have heard rival contentions and perused the records placed before us. The fifth common ground in the Department's appeal relates to the assessee's claim that interest subsidy, since renamed "Capital Investment Subsidy", of Rs. 3,04,22,210/- received under the amended Rajasthan Investment Promotion Scheme, 2003 (hereinafter referred to as "the 2003 Scheme") in respect of expansion undertaken at the assessee's Chanderia Cement Works should be treated as a capital receipt. The ld. AO held that the subsidy was incidental to carrying on of the business of the assessee and treated the same as revenue receipt. On appeal, the ld. CIT(A) held it to be a capital receipt by following this Hon'ble Tribunal's decision in assessee's own case for the assessment year 2008-09 and 2009-10.*
>
> *14.1. It is submitted that this question is concluded in the assessee's favour by the decision of the Hon'ble Tribunal in assessee's own case for the assessment year 2007-08 in ITA as 683 and 581/Kol/2011 decided on December 8, 2014 (page 77 at pages 88 – 94 of the Paper Book). After considering the provisions of the 2003 Scheme, the Hon'ble Tribunal held that the assistance granted under the scheme was to enable the setting up of a new unit or expansion of an existing unit and was a capital receipt. The said decision was rendered after taking into consideration the judgment of the Hon'ble Supreme Court in CIT v. Ponni Sugar and Chemicals Limited, (2008) 306 ITR 392 (SC). The said decision for the assessment year 2007-08 was followed in the assessee's own case for the assessment years 2008-09 and 2009-2010 decided by a consolidated order dated August 25, 2017 (Page 137 at pages 139-140 of the Paper Book – paragraphs 6 at 6.2). In the order dated August 25, 2017, the Hon'ble Tribunal also considered the judgment of the Hon'ble Jammu & Kashmir High Court in Shree Balaji Alloys v. CIT, (2011) 333 ITR 335 (J & K) and the judgment of the Hon'ble Supreme Court on appeal therefrom reported as CIT v. Shree Balaji Alloys, (2017) 80 taxmann.com 239 (SC) as also the judgment of the Hon'ble Supreme Court in CIT v. Meghalaya Steels Limited, (2016) 383 ITR 217 (SC).The order dated August 25, 2017 for the assessment years 2008-09 and 2009-10 was followed by the Hon'ble Tribunal for the assessment year 2010-11 decided by an order dated September 13, 2017 (Page 190 at pages 193-194 of the Paper Book – paragraphs 68 at 73-74). A still later decision in the assessee's favour is that of the Hon'ble Calcutta High Court in PCIT v. Ankit Metal and Power Limited,*

(2019) 416 ITR 591 (Cal) (Page 76 at Pp 84,86-87 of the Compilation of Case Laws). It is submitted that this ground is covered in favour of the assessee. We find that this Tribunal in assessee's own case for AY 2010-11 dealt with this issue and decided in assessee's favour observing as follows:

"73. At time of hearing, it was agreed by the parties before us that identical issue arose for consideration in Assessee's own case for AY 2009-10 and in that year, the Hon'ble Tribunal in ITA No. 942/Kol/2013 and ITA No.329/Kol/2013 by its order dated 25.8.2017, held that the interest subsidy in question received under the very same scheme as in the present year, was a capital receipt not chargeable to Tax. The following were the relevant:

"6.2 We have heard the rival submissions and perused the materials available on record. The ld. AR drew our attention to page 77 of Supplementary Paper Book Volume III to the order dated 7.6.2007 passed by the Commercial Taxes Officer, Special Circle Bhilwara, Government of Rajasthan, sanctioning a sum of Rs 15,91,813/- towards Interest Subsidy to the assessee. The said order also clearly mentioned that the said interest subsidy of Rs 15,91,813/- would not be paid to the assessee in cash and instead the same would get adjusted with the sales tax liability payable by the assessee. Based on this, the ld. AR argued that the interest subsidy also takes the character of sales tax subsidy and hence to be treated as capital receipt. We find that this issue was subject matter of adjudication in assessee's own case for the Asst Year 2007-08 in ITA No. 686 & 581/Kol/2011 dated 8.12.2014 wherein it was held that the said interest subsidy would have to be treated as a capital receipt but with a direction to reduce the same from the cost of assets as per Explanation 10 to section 43(1) of the Act. Later this order was modified by this tribunal in ITA No. 683/Kol/2011 (assessee appeal) dated 9.7.2015 for Asst Year 2007-08, wherein the issue as to whether the said interest subsidy is to be reduced from the cost of assets as per Explanation 10 to section 43f 11 of the Act was restored back to the file of the ld. CITA for fresh adjudication. We find that with regard to treatment of Industrial Promotion Assistance (IPA) as capital receipt or revenue receipt supra in Para 4 above, we have already held it to be a capital receipt and the same need not be reduced from the cost of assets as per Explanation 10 to Section 43(1) of the Act. We find that the subsidy amount was adjusted against the sales tax liability and was not used directly or indirectly to acquire the assets and hence the cost of assets cannot be reduced by the amount of subsidy. We also find that the Hon'ble Jammu and Kashmir High Court in the case of Shree Balaji Alloys vs. CIT, (2011) 333 ITR 335 (J&K) at

page 346 held interest subsidy to be a capital receipt. On further appeal by the revenue, the Hon'ble Supreme Court by an order dated 19.4.2016 in Civil Appeal No.10061 of 2011 held that the interest subsidy was a capital receipt in view of its decision in Ponni Sugars (supra) and further held that even if it was treated as a revenue receipt, then the assessee was entitled to deduction under section 80IB/80IC as profits derived from eligible business according to its judgment in CIT v Meghalaya Steels Ltd., (2016) 383 ITR 217 (SC). Hence respectfully following the said decision of the Hon'ble Supreme Court in Balaji Alloys supra, we hold that the interest subsidy is to be treated only as a capital receipt and accordingly the grounds raised by the assessee in this regard are allowed."

74. Respectfully following the decision of the Tribunal in Assessee's own case, we hold that the interest subsidy in question is a capital receipt not chargeable to tax. Thus, ground nos. 10 and 11 raised by the assessee are allowed."

14.2. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2010-11and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 5 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed."

12.1. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding AYs 2011-12 & 2012-13 and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 5 for AY 2013-14 & 2014-15 raised by the Revenue are dismissed."

19. Both the ld. representatives have submitted that the issue is squarely covered in favour of the assessee by the above decision of the Tribunal in the own case of the assessee for earlier assessment years. Therefore, respectfully following the same for the sake of consistency, this issue is decided in favour of the assessee and against the revenue. Ground No.9 of Revenue's appeal is hereby dismissed.

20. Ground No.10 – Vide Ground No.10, the revenue has agitated against the action of the CIT(A) in deleting the addition made by the Assessing Officer u/s 14A of the Income Tax Act read with Rule 8D of

the Income Tax Rules, in respect of proportional disallowance of expenditure incurred for earning of tax-exempt income. It is to be pointed out here that the assessee has also raised this issue in its cross-objections has also assailed the order of the CIT(A) on the ground that Rule 8D cannot be invoked unless the Assessing Officer finds any defect or infirmity in the suo moto calculation made by the assessee in respect of proportionate disallowance of expenditure incurred for earning of tax-exempt income.

20.1. The ld. counsel for the assessee has submitted that the assessee was in receipt of exempt income of Rs.3,86,49,083/- by way of dividend on its investment in shares and units of mutual funds. The assessee offered a disallowance of Rs.9,77,888/- as expenditure incurred in relation to the exempt income. The disallowance offered by the assessee comprised salary and other employee related costs on proportionate basis as also establishment expenses. The Assessing Officer, however, invoked rule 8D and worked out the disallowance @0.5% of the average of the opening and closing values of investment amounting to Rs.6,62,97,455/-. After deducting the disallowance of Rs.9,77,888/- made by the assessee, the Assessing Officer further disallowed Rs.6,53,19,567/-.

20.2. On appeal, the Commissioner of Income Tax (Appeals) following the decisions of the Tribunal in the assessee's own case for the assessment years 2008-09 to 2010-11 directed the Assessing Officer to consider only those investments which yielded dividend income but excluding investments in subsidiary companies, for computing the disallowance under section 14A read with rule 8D(2)(iii).

21. Before us, the ld. DR has made the following submissions:

> *"1. On this issue reliance is placed on Maxopp Investment Ltd. v. CIT, New Delhi [2018] 91 taxmann.com 154 (SC), wherein Hon'ble Supreme*

Court held inter alia in para 35 that "The aforesaid reasoning would be applicable in cases where shares are held as investment in the investee company, may be for the purpose of having controlling interest therein. On that reasoning, appeals of Maxopp Investment Limited as well as similar cases where shares were purchased by the assessees to have controlling interest in the investee companies have to fail and are, therefore, dismissed.

I may be mentioned that in Maxopp Investment Ltd. [2011] 15 taxmann.com 390 (Delhi) [affirmed by SC as above] the Hon'ble High Court inter alia held in Para 31 of the judgement as under:

If one examines sub-rule (2) of Rule 8D, we find that the method for determining the expenditure in relation to exempt income has three components. The first component being the amount of expenditure directly relating to income which does not form part of the total income. The second component being computed on the basis of the formula given therein in a case where the assessee incurs expenditure by way of interest which is not directly attributable to any particular income or receipt. The formula essentially apportions the amount of expenditure by way of interest [other than the amount of interest included in clause (i)] incurred during the previous year in the ratio of the average value of investment, income from which does not or shall not form part of the total income, to the average of the total assets of the assessee. The third component is an artificial figure - one half percent of the average value of the investment, income from which does not or shall not form part of the total income, as appearing in the balance sheets of the assessee, on the first day and the last day of the previous year. It is the aggregate of these three components which would constitute the expenditure in relation to exempt income and it is this amount of expenditure which would be disallowed under Section 14A of the said Act. It is, therefore, clear that in terms of the said Rule, the amount of expenditure in relation to exempt income has two aspects - (a) direct and (b) indirect. The direct expenditure is straightaway taken into account by virtue of clause (i) of sub-rule (2) of Rule 8D. The indirect expenditure, where it is by way of interest, is computed through the principle of apportionment, as indicated above. And, in cases where the indirect expenditure is not by way of interest, a rule of thumb figure of one half percent of the average value of the investment, income from which does not or shall not form part of the total income, is taken.

The Hon'ble Court, thus made it clear that in cases where the applicability of Section 14A, which is based on the theory of apportionment of expenditure between taxable and non-taxable income, read with Rule 8D is triggered, a rule of thumb amount would have to be calculated at the prescribed percentage of the investment, income from which does not or shall not form a part of the total income, to arrive at the quantum of disallowance.

> *Therefore, a it is clear from a conjoint reading of the two judgements quoted above that the Ld.CIT(A) was not justified in directing the AO to compute the disallowance u/r 8D(2)(iii) by considering only the dividend bearing investments and by excluding the strategic investments. This decision deserves to be reversed and the lower authorities may, therefore, be directed accordingly."*

22. The ld. counsel for the assessee, however, has submitted that the assessee had made investments out of its own funds in shares of companies and mutual funds. That the mutual fund investments of the assessee were not in equity-oriented funds and hence, the proceeds at maturity/redemption of the same were not exempt from taxation but would attract capital gains tax. That substantial amount was invested in mutual fund investments for which there was no provision of providing any dividend. That, some of the mutual fund schemes, however, have yielded dividend income, however, the said dividend was reinvested by the assessee without being actually receiving the same. He has further submitted that the assessee has made calculation of the suo moto disallowance of expenditure after consulting the accounts and after consideration of the aforesaid facts, but the Assessing Officer has not recorded any dissatisfaction regarding the suo moto disallowance of expenditure made by the assessee u/s 14A after consulting the accounts of the assessee. He, therefore, has submitted that the Assessing Officer was not justified in applying Rule 8D of Income Tax Rules without pointing out any defect or infirmity in the correctness of the assessee's claim of expenditure. He, in this respect, has relied upon the decision of the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. vs. CIT reported in (2018) 402 ITR 640(SC).

23. We have considered the rival submissions and gone through the record. Both the parties have fairly admitted that the issue has already been dealt with by the Tribunal in the assessee's own case for earlier assessment year. This issue was also racked up in assessee's own case

in the latest decision of the Tribunal 07.02.2023 passed in ITA Nos.2142&2143/Kol/2018 in relation to Assessment Years 2013-14 & 2014-15, wherein, the identical ground raised by the department has been dismissed by the Tribunal relying upon the earlier decision of the Tribunal in the own case of the assessee. The relevant part of the order of the Tribunal dated 07.02.2023 (supra) is reproduced as under:

> ***"Revenue's common Ground no. 6 for AY 2013-14 & 2014-15 relating to the disallowance u/s 14A of the Act read with Rule 8D of the Rules and assessee's additional ground stating that ld. AO should have accepted the disallowance offered by the assessee u/s 14A of the Act and he erred in invoking and applying Rule 8D:***
>
> *13. We have heard rival contentions and perused the records placed before us. We find that this Tribunal in assessee's own case for AY 2011-12 & 2012-13 dealt with this issue of disallowance u/s 14A of the Act and decided in assessee's favour observing as follows:*
>
> > *"15. We have heard rival contentions and perused the records placed before us. The sixth common ground of the department's appeal relates to disallowance under section 14A read with rule 8D. The assessee has filed an additional ground in its appeal in respect of the disallowance under the said provisions. As such, both the said grounds can be conveniently taken up together.*
> >
> > *15.1. The assessee was in receipt of exempt income of Rs.12,84,34,263/- by way of dividend on its investment in shares and units of mutual funds. The assessee offered a disallowance of Rs. 6,40,792/- as expenditure incurred in relation to the exempt income. The disallowance offered by the assessee comprised salary and other employee related costs on proportionate basis as also establishment expenses. The ld. AO invoked rule 8D and worked out the disallowance at the rate of 0.5% of the average of the opening and closing values of investment amounting to Rs. 5,77,72,000/-. After deducting the disallowance of Rs. 6,40,792/- made by the assessee, the ld. AO disallowed Rs.5,71,31,208/-. On appeal, the ld. CIT(A) following the decisions of the Hon'ble Tribunal in the assessee's own case for the assessment years 2008-09 to 2010-11 directed the ld. AO to consider all investments (excluding investments in subsidiary companies) which yielded dividend income for computing the disallowance under section 14A read with rule 8D(2)(iii).*
> >
> > *15.2. Before us, ld. Counsel for the assessee stated that the material facts are that the assessee is in the business of*

manufacturing cement, jute goods, vinoleum, auto trim parts, etc. From time to time, the assessee makes investments out of its own funds in shares of companies and units of mutual funds. The assessee does not borrow any funds for making such investments. The mutual fund investments of the assessee are not in equity-oriented funds as defined in the explanation to section 10(38) of the Act and disposal/redemption thereof attracts capital gains tax. Substantial part of the mutual fund investments of the assessee are in growth schemes which do not provide for payment of any dividend during the currency of the scheme. Only some of the mutual fund schemes in which the assessee invests provide for payment of dividend. Such dividend is usually reinvested in the respective schemes without being actually received by the assessee. The assessee receives dividend warrants only in respect of some of its investments in mutual funds and in respect of the shares held by it in companies. The only activity in relation to such dividend income is deposit of the warrants received in the bank account.

15.3. Further it is submitted that during the relevant previous year, there was no change in the share investments of the assessee. In respect of its share investments, the assessee received 7 dividend warrants for an aggregate sum of Rs. 1,17,21,334 /- which were deposited in the assessee's bank account for the purpose of encashment. The rest of the dividend income of Rs. 11,67,12,929/- was from investment in schemes of mutual funds providing for declaration of dividend. Out of the said amount, a sum of Rs.10,29,03,619/- was reinvested in units without physically receiving the warrants. Only 11 warrants for an aggregate sum of Rs. 1,38,09,310/- were physically received and had to be deposited in the bank. Break-up as on March 31, 2011 and March 31, 2010 of the assessee's investments which yielded dividend during the year and those which did not yield or were incapable of yielding dividend is tabulated under:

(Rs. in lakh)

Particulars	*As at 31.3.11*	*As at 31.3.10*	*Average*	*Percentage*
1.Investments in mutual fund schemes and shares which yielded dividend	*20,676.51*	*27,630.32*	*24,513.42*	*20.90 %*
2.Investments in shares which did not	*1,385.67*	*1,385.49*	*1,385.58*	*1.20%*

yield any dividend				
3. Investments in growth schemes of mutual funds and other investments which were incapable of yielding any dividend	*94,858.73*	*85,149.41*	*90,004.07*	*77.90%*
	116,920.91	*114,165.22*	*115,543.07*	*100.00%*

15.4. It would be seen from the above that 77.90% of the assessee's investments (including in non-equity oriented mutual fund growth schemes) did not provide for payment of any dividend. Upon redemption/disposal of all such investments, the assessee would be liable for capital gains tax. The income from such investments is not exempt under the provisions of the Act. Even in respect of the assessee's investments in other schemes of mutual funds providing for payment of dividend, the assessee is liable for capital gains tax upon disposal/redemption of the units since such schemes are also not equity oriented. Similarly, in respect of the assessee's investments in unquoted equity shares of companies, it will have to pay capital gains tax upon disposal thereof. It is only the dividend received by the assessee in respect of the dividend schemes of the mutual funds which is not taxable in the assessee's hands because of payment of dividend distribution tax by the mutual funds.

15.5. Further ld. Counsel for the assessee submitted that in course of the assessment proceedings, the assessee submitted a detailed statement in respect of the expenditure of Rs. 6,40,792/- offered by it for disallowance as incurred in relation to the exempt dividend income. In the said statement, the assessee included appropriate proportion of the emoluments of the employees involved in management/maintenance of the assessee's investment portfolio. The assessee included 2% of the remuneration paid to Shri P. K. Chand (Chief Financial Officer) and 15% of the remuneration of Shri R.C. Jha, Manager (Finance & Accounts), who were engaged in multiple activities and were required to spend only a part of their time in managing/maintenance of the assessee's investment portfolio, and the entire remuneration of Shri M. K. Sharma, Asst. Manager (Accounts). The assessee also included in the said statement the other expenses incurred by it for

managing/maintenance of its investment portfolio such as bank charges, telephone charges, stationery and printing charges and conveyance and other expenses.

15.6. It is also submitted by the assessee that almost the entire expenditure incurred by the assessee is in connection with its business of manufacturing diversified goods. Only the surplus business funds of the assessee are invested by it in safe and liquid investments, which activity is looked after by the aforesaid three officers of the assessee to the extent specified in the assessee's statement of expenditure. The assessee's share investments are non-moving. The expenditure of Rs. 6,40,792/- incurred in connection with management/maintenance of the assessee's investment portfolio was correctly tabulated by it in the statement submitted to ld. AO. The said statement includes not only the concerned employees' remuneration but also other office expenses. No other infrastructure of the assessee was utilised in connection with the management/maintenance of its investment portfolio. In the facts of the assessee's case, the quantum of investment or the amount of investment income are not at all determinative of the quantum of expenditure incurred by the assessee in connection therewith. Further, Section 14A(2) of the Act enables ld. AO to determine the amount of expenditure incurred in relation to exempt income in accordance with the method prescribed by rule 8D only if the ld. AO is not satisfied with the correctness of the assessee's claim of expenditure. Rule 8D also so provides.

15.7. It is submitted that in the instant case, there was no material to doubt the correctness of the assessee's claim of expenditure incurred in connection with management/maintenance of its investment portfolio. This is apparent from the findings of the ld. AO in paragraphs 11.2 and 11.3 at page 15 of the assessment order:

"11.2 Carefully considering the above submission, contention of the assessee is partly accepted. Disallowance u/s. 14A is worked out by invoking Rule 8D of the IT Rules since it is applicable for current assessment. The amount of disallowance is worked out as follows:

Opening value of investment	*: 114165.22 lacs*
Closing value of investment	*: 116920.91 lacs*
Average value	*: 115543.07 lacs*
0.5% of the above	*: 577.72 lacs*

11.3 In view of above Rs.5.71,31,208/- [Rs. 5,77,72,000 less Rs.6,40,792] is further disallowed u/s. 14A and added back to total income."

It is submitted that ld. AO did not dispute the correctness of the assessee's computation of the expenditure to be disallowed. The only reason given by ld. AO for making the disallowance was that rule 8D was applicable for the assessment year. It is submitted even rule 8D stipulates that ld. AO can resort to sub-rule (2) only where ld. AO, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of expenditure made by the assessee. It is submitted that in the instant case, ld. AO did not express any dis-satisfaction with the assessee's claim of expenditure and was not entitled to invoke section 14A(2) or rule 8D(2)(iii). In Maxopp Investment Ltd. vs. CIT, [2018] 402 ITR 640 (SC) [Page 110 at Pages 134, 136-137 of the Compilation of Case Laws], the Hon'ble Supreme Court was pleased to hold as follows:

"……Keeping this objective behind Section14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act. This is so held in Walfort Share & Stock Brokers (P.) Ltd., relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom.

"The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A.

** ** **

The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14A."

35. The Delhi High Court, therefore, correctly observed that prior to introduction of Section 14A of the Act, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-taxable income, the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. It is to find a cure to the aforesaid problem that the Legislature has not only inserted Section 14A by the Finance (Amendment) Act, 2001 but also made it retrospective, i.e., 1962 when the Income Tax Act itself came into force. The aforesaid intent was expressed loudly and

clearly in the Memorandum explaining the provisions of the Finance Bill, 2001…."

"Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, the nature of the loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the Assessing Officer."

[emphasis added]

15.8. Ld. Counsel for the assessee further submitted that in Kesoram Industries Ltd. vs. PCIT [2022] 441 ITR 648 (Cal), the Hon'ble Calcutta High Court was pleased to hold as follows:

"6. Two important issues have been pointed out in the aforementioned decision. Firstly that the provisions of section 14A has to be interpreted, particularly, the words that "in relation to the income" that does not form part of total income. Therefore, it was held that the principle of apportionment of expenses comes into play as that is the principle which is incorporated in section 14A of the Act. With regard to as to how the power under section 14A(2) read with rule 8D of the Rules could be invoked it was pointed out that the assessing officer needs to record satisfaction that having regard to the kind of the assessee suo motu disallowance under section 14A was not correct and it will be in those cases where the assessee in his return has himself apportioned but the assessing officer was not accepting the said apportionment. In any event, the assessing officer will have to record its satisfaction to the said effect."

[emphasis added]

15.9. It is further submitted that even in a case where ld. AO is not satisfied with the correctness of the assessee's apportionment, it is not mandatory for ld. AO to invoke the method of calculation in rule 8D and he is free to make the disallowance on any reasonable basis. It would not therefore be correct to say that once ld. AO rejects the mode of computation of disallowance under section 14A of the Act as made by the assessee, he has no other option but to resort to rule 8D of the Rules. Reference in this behalf is invited to an

unreported judgment dated July 19, 2018 of the Hon'ble Calcutta High Court in the case of PCIT vs. Britania Industries Ltd. [ITAT No.45/2017, GA No.420/2017], where the following view taken by this Hon'ble Tribunal was approved:

"...Even in a case where the AO rejects the claim of the assessee that no expenses were incurred to earn the exempt income, it is not mandatory for him to invoke the method of calculation prescribed by Rule 8D(2) of the Rules and is free to make the disallowance on any reasonable basis. By applying the Rule 8D of the Rules blindly sometimes absurd disallowances would result. In our view, therefore while examining the claim of the assessee regarding expenditure incurred in earning the exempt income including a claim that no expenses were incurred, the AO is bound to take note of such absurdities and refrain from invoking the method of disallowance of expenses as prescribed by Rule 8D(2) of the Rules. It is for this reason that the satisfaction of the AO regarding expenses incurred for earning exempt income is to be objective satisfaction. In other words, it is only when no reasonable and proper parameters for making disallowance can be arrived at, that resort to Rule 8D(2) can be had by the AO. Rule 8D(2) will thus be a last resort when it becomes impossible to arrive at a just conclusion on the amount of expenses that has to be disallowed as attributable or incurred in earning exempt income. It cannot therefore be said that once the AO rejects the mode of computation of disallowance u/s.14A of the Act as made by the Assessee, he has no other option but to resort to Rule 8D of the Rules".

[emphasis added]

15.10. Ld. Counsel for the assessee that in the instant case, ld. AO not having expressed any dis-satisfaction with the assessee's claim of expenditure incurred in relation to exempt income, he was not entitled to invoke section 14A(2) or rule 8D(2)(iii). Where an assessee is engaged in multiple income-earning activities and the same set of employees and infrastructure are used for all the activities, some taxable and some exempt, the common expenses incurred in respect of such employees and infrastructure have to be necessarily apportioned between the taxable and exempt activities. As held by the Hon'ble Supreme Court in CIT v. Walfort Share and Stock Brokers P. Ltd., (2010) 326 ITR 1(SC) and in Maxopp's case (supra), the principle of apportionment of expenses comes into play as that is the principle which is incorporated in section 14A of the Act. The assessee adopted a reasonable basis for such apportionment. The ld. AO did not find anything to dispute the assessee's computation except for saying that it is not as

per rule 8D. In such circumstances, the disallowance offered by the assessee under section 14A of Rs. 6,40,792/- has to be accepted and no further disallowance can be made under the said provision.

15.11. Ld. Counsel for the assessee took an alternate plea submitting that assuming for the sake of argument that section 14A(2)/rule 8D(2)(iii) can be invoked, the finding of the ld. CIT(A) to the extent he held that only the investments which yielded dividend income should be considered for disallowance under section 14A read with rule 8D(2)(iii) cannot be faulted. Of course, in view of the judgment of the Hon'ble Supreme Court in Maxopp's case (supra), investments in subsidiary companies would have to be considered if they yielded dividend income. To this extent finding of the ld. CIT(A) is contrary to law. It is necessary to add that the amendments made to section 14A by the Finance Act, 2022 have no relevance in the instant case. The said amendments will apply only where it is undisputed that expenditure has been incurred but the assessee does not want it disallowed on the ground that no exempt income was earned. That is not the controversy in the instant case. In the instant case, the dispute is whether any expenditure over and above the sum of Rs.6,40,792/- was actually incurred by the assessee. In any event, the said amendments are effective only from AY 2022-23 and have no application for the earlier years as held by the Hon'ble Delhi High Court in PCIT v. Era Infrastructure (India) Ltd, (2022) 141 taxmann.com 289 (Del).

15.12. Though the ld. Counsel for the assessee has pleaded that in lack of proper satisfaction recorded by ld. AO questioning the correctness of the claim of disallowance suo moto made by the assessee, the alleged disallowance is uncalled for and had also made an alternate plea that if the main plea is not accepted and at least the alternate plea that the disallowance under Rule 8D(3) of the I.T. Rules may be restricted only to the extent of 0.5% of the average investments yielding dividend income, we find that for the preceding AY 2010-11 also same issue under identical facts was there before this Tribunal and after considering the ratios laid down by the Hon'ble Court's directions are given to ld. AO to consider only those investments which yielded dividend income for concluding the disallowance u/s 14A of the Act r.w. Rule 8D(3) of the I.T. Rules. Relevant finding of this Tribunal is reproduced below:

"42 At the time of hearing both the parties agreed that identical issue was considered and decided by the tribunal in assessee's own case in ITA No.971/Kol/2012, 942/Kol/2013, 298 & 329/Kol/2013 for A. Y.2008-08 and 2009-10 in its order

dated 25.8.2017 and this Tribunal on the identical issue held as follows:

"3.3. We have heard the rival submissions and perused the materials available on record. The Id DR vehemently relied on the order of the Id AO. The ld. AR prayed that the disallowance made by the assessee voluntarily at Rs 4,00,096/- which was later revised to Rs 4,43,903/- based on the devotion of certain executives of the organization for managing the investment portfolio and other indirect expenses connected thereon, should be accepted and the ld. AO had not given any proper finding as to why the said disallowance was not proper. He simply resorted to computation mechanism provided in Rule 8D of the Rules and made disallowance thereon under the third limb of Rule 8D(2)(iii). Alternatively he prayed that 0.5% of dividend bearing investments alone be considered (The investments from where dividends were actually received by the assessee alone excluding the dividends that were reinvested) and also prayed for exclusion of investments made in subsidiaries as they are apparently strategic investments. We find that the ld. AO had given a finding in the assessment order as to why the workings of disallowance u/s 14A of the Act need to be rejected. Hence it cannot be said that the ld. AO had mechanically applied Rule 8D(2) of the Rules for making disallowance u/s 14A of the Act. It was argued by the Id AR that 69.07% of the assessee's investments (including in non-equity oriented mutual funds growth schemes) did not provide for payment of any dividend Upon redemption/disposal of such investments, the assessee would be liable to capital gains tax and income from such investments is not exempt under the provisions of the Act. He argued that even in respect of the assessee's investments in other schemes of mutual funds providing for payment of dividend, the assessee is liable for capital gains tax upon disposal/redemption of the units since such schemes are also not equity oriented. We find that the ld. A R also made an alternative argument that only dividend bearing investments should be reckoned for disallowance under Rule 8D(2)(iii) of the Rules and that strategic investments should be excluded We find lot of force in the alternative argument of the Id AR that only dividend bearing investments are to be considered for making disallowance u/s 14 A of the Act. In this regard, the reliance placed by the Id A R on the decision of this tribunal in the case of REI Agro Ltd. reported in 144 ITD 141 (Kol) is very well founded wherein it was held that:

8.1 Thus, not all investments become the subject-matter of consideration when computing disallowance under section 14A read with Rule 8D. The disallowance under section 14A read with rule 8D is to be in relation to the income which does not

form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income. Under the circumstances, the computation of the disallowance under section 14A read with rule 8D(2Riii), which is issue in the assessee's appeal, is restored to the file of the AO for recomputation in line with the direction given above. No disallowance under section 14A read with rule 8D(2)(i) and (ii) can be made in this case.

We also find lot of force in the argument of the ld. AR that the investments made in subsidiaries would fall under the category of strategic investments as they are admittedly made only for the purpose of obtaining controlling interest in the said companies and not for the purpose of earning dividend income which is exempt. Hence they would stand differently from other regular investments. Reliance in this regard is placed on the decision of this tribunal in the case of Dy CIT vs Selvel Advertising (P) Ltd reported in (2015) 58 taxmann.com 196 (Kol Trib). We also find that the reliance placed in this regard by the Id A R on the decision of the Hon'ble Delhi High Court in the case of CIT vs Oriental Structural Engineers Pvt Ltd in ITA 605/2012 dated 15.1.2013 wherein it was held that

It was the contention of the revenue that Rule 8D of the Income Tax Rules. 1962 had not been applied properly in respect of the assessment year 2008-09. This aspect has been considered by the Tribunal in detail and it has observed as under:

It was the contention of the revenue that Rule 8D of the Income Tax Rules. 1962 had not been applied properly in respect of the assessment year 2008-09. This aspect has been considered by the Tribunal in detail and it has observed as under:

6.3. We have carefully considered the submissions and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has given a finding that only interest of Rs 2,96,731/- was paid on funds utilized for making investments on which exempted income was receivable. Further. Ld. Commissioner of Income Tax (Appeals) has observed that in respect of investment of Rs 6,07,75.000/- made in subsidiary companies as per documents produced before him, they are attributable to commercial expediency, because as per submission made by the assessee, it had to form Special Purpose Vehicle (SPV) in order to obtain contracts from the NHAI and the SPVs so formed engaged the assessee company as contract to execute the works awarded to them (i.e. SPVs) by the NHAI. In its profit and loss account for the year, the assessee has shown the turnover from execution of these

contracts and therefore no expense and interest attributable to the investments made by the appellant in the PSVs can be disallowed u/s 14A r.w. Rule 8D because it cannot be termed as expense/interest incurred for earning exempted income. Under the circumstances, Ld. Commissioner of Income Tax (Appeals) is correct in holding that disallowance of a further sum of Rs 40,556/- calculated @ 2% of the dividend earned is sufficient. Under the circumstances, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals), hence we uphold the same.

On going through the above observations we are of the view that this is merely a question of fact and does not involve any question of law much less a substantial question of law, as the Tribunal held that the expenses which have been claimed by the assessee were not towards the exempted income. The disallowance, therefore, was rightly limited to a sum of Rs 40,556/-. The question of interpreting Rule 8D is not in dispute and the only dispute is with regard to facts which have been settled by the Tribunal.

In view of the aforesaid findings and respectfully following the judicial precedents relied upon, we deem it fit and appropriate to remand this issue to the file of the Id AO with the direction to consider all investments (excluding investments in subsidiary companies) which yielded dividend income to the assessee for computing disallowance u/s 14A of the Act r.w. Rule 8D of the Rules. Accordingly the grounds raised in this regard are partly allowed for statistical purposes."

43. Respectfully following the aforesaid decision we partially uphold the order of CIT(A) and dismiss ground no.4 raised by the revenue and partly allow ground nos. 12 and 13 raised by the assessee and direct the AO to consider all investments (excluding investments in subsidiary companies) which yielded dividend income to the assessee for computing disallowance u/s 14A of the Act r.w. Rule 8D(2)(iii) of the Rules."

15.13. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2010-11 and assessee fail to prove that there is change of facts in the years under appeal vis-à-vis preceding AY 2010-11 and also Revenue being unable to controvert by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 6 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed."

13.1. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding AYs 2011-

12 & 2012-13 and assessee fail to prove that there is any change of facts in the years under appeal vis-à-vis preceding AY 2011-12 & 2012-13 and also Revenue being unable to controvert by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 6 for AY 2013-14 & 2014-15 raised by the Revenue and the additional ground raised by the assessee for both the years under appeal are dismissed.

24. It has to be noted that the Hon'ble Supreme Court as pointed out by the ld. DR in the case of Maxopp Investment Ltd. (supra) has held that the exempt income earned by the assessee from the strategic investments made in the sister concern/subsidiaries are also subjected to disallowance u/s 14A of the Act. In view of this, the impugned order of the CIT(A) is modified and it is directed that the Assessing Officer would recompute the disallowance u/s 14A r.w.r 8D(2)(iii) by considering all investments including investments in subsidiary companies which yielded dividend income. This Ground of the revenue's appeal is partly allowed, whereas, the cross-objection of the assessee on this issue is hereby dismissed.

25. **Ground Nos.11 & 12** – The revenue vide Ground Nos.11 and 12 has assailed the order of the CIT(A) contending that the CIT(A) has erred to exclude the subsidy from the books profits assessable u/s 115JB of the Act.

26. The ld. counsel for the assessee, in this respect, has submitted that the issue is squarely covered by the decision of the Tribunal in the assessee's own case in the latest decision of the Tribunal 07.02.2023 passed in ITA Nos.2142&2143/Kol/2018 in relation to Assessment Years 2013-14 & 2014-15, wherein, the identical ground raised by the department has been dismissed by the Tribunal relying upon the earlier decision of the Tribunal in the own case of the assessee. The relevant part of the order of the Tribunal dated 07.02.2023 (supra) is reproduced as under:

Revenue's Ground no. 7 for AY 2013-14 and ground nos. 7 & 8 for 2014-15 relating to the issue that whether subsidy/incentives being capital receipts needs to be excluded from the book profit u/s 115JB of the Act:

14. We have heard rival contentions and perused the records placed before us. We find that this Tribunal in assessee's own case for AY 2011-12 & 2012-13 dealt with this issue and decided in assessee's favour observing as follows:

> *"16. The seventh common ground of the Department's appeal is against the decision of the ld. CIT(A) directing the ld. AO to exclude the subsidy/incentive from book profit under section 115JB of the Act. The ld. AO rejected the assessee's claim to exclude the following incentives in computing Book Profit u/s 115JB of the Act:*
>
> | *Particulars* | *Amount (in Rs.)* |
> |---|---|
> | *Interest Subsidy received from Govt. of Rajasthan under Rajasthan Investment Promotion Scheme, 2003* | *Rs. 3,04,22,210* |
> | *Incentive from Govt. of West Bengal in the form of Industrial Promotion Allowance* | *Rs. 16,94,84,638* |
> | *Total* | *Rs. 19,99,06,848* |
>
> *The ld. AO held that the accounts were prepared in accordance with the provisions of Companies Act and these incentives were credited to Profit & Loss Account. Besides, the claim was not made through IT Return or Revised IT return and therefore fresh claim raised during the course of assessment proceedings was not accepted in view of decision of Hon'ble Supreme Court in case of Goetze (India) Ltd, [2006] 284 ITR 323 (SC). On appeal, the ld. CIT(A) granted relief to the assessee relying upon various decisions including the decision of the Hon'ble Tribunal in DCIT v. South Asian Petrochem in ITA Nos. 1222 to 1241/Kol/2014 decided on May 3, 2017.*
>
> *16.1. We observe that it is settled law that subsidy granted for the purpose/object of encouraging setting up of new industrial units or expansion of existing industrial units is a capital receipt. It has already been held by this Hon'ble Tribunal in the assessee's own case for the earlier years that interest subsidy received under the 2003 Scheme and industrial promotion assistance received under the 2000 Scheme are capital receipts. Submissions have been made hereinbefore in support of the assessee's contention that the same view should be taken in this year. Subsidy was included in the definition of income in section 2(24) of the Act for the first time by insertion*

of sub-clause (xviii) by the Finance Act, 2015 with effect from April 1, 2016 i.e. assessment year 2016-17. In paragraph 5.3 of Circular No. 19 dated November 27, 2015 containing explanatory notes to the provisions of the Finance Act, 2015, it is stated that the said amendment takes effect from April 1, 2016 and would accordingly apply to assessment year 2016-17 and subsequent assessment years [(2015) 379 ITR (St.) 19 at 35, 36]. The assessment year involved herein is 2011-12 before the amendment of section 2(24). Having regard to the decisions holding the field, subsidy received on capital account was not income within the meaning of the Act at least till the assessment year 2015-16. It is submitted by ld. Counsel for the assessee that since the said subsidies are not income within the meaning of section 2(24) of the Act, the same cannot also form part of the total income or be subjected to tax under section 115JB of the Act. The subject matter of taxation under the Act is "income". The charging section 4 of the Act provides for levy of tax in respect of "total income". "Total income" is defined in section 2(45) of the Act to mean "the total amount of income referred to in section 5, computed in the manner laid down in this Act". The material portion of section 5 reads as under:

"5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which –"

(emphasis added)

The "total income" consists of all items of "income" as defined in clause (24) of section 2 of the Act.

16.2. What can be taxed u/s 115JB of the Act is the "total income" which is income as defined in section 2(24) of the Act chargeable under section 4 and computed in the manner laid down in section 115JB. What is not "income" within the meaning of section 2(24) is outside the purview of the Act; cannot form subject matter of the charge of tax under section 4; cannot form part of "total income" and cannot be subjected to tax either under the normal computation provisions or under section 115JB of the Act. The absence of provision in section 115JB of the Act for exclusion of such capital receipt credited to the profit and loss account cannot result in its taxation.

16.3. It is submitted by ld. Counsel for the assessee that this issue is now squarely covered in favour of the assessee by the judgment of the Hon'ble Calcutta High Court in PCIT vs. Ankit Metal & Power Ltd., [2019] 416 ITR 591 (Cal) [Page 76 of the Compilation of Case Laws]. The said decision also deals with the aspect relating to claim made otherwise than by filing a

return/revised return. Particular reference is invited to Paragraphs 30-33 of the judgment [Pages 87-88 of the Compilation of the Case Laws], which are extracted hereinbelow:

"Now the second issue which requires adjudication is as to whether the aforesaid incentive subsidies received by the assessee from the Government of West Bengal under the schemes in question are to be included for the purpose of computation of book profit u/s 115JB of the Income Tax Act, 1961 as contended by the revenue by relying on the decision in the case of Appollo Tyres Ltd. (supra).

In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy' is a 'capital receipt' and does not fall within the definition of 'Income' under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. In the case of Appollo Tyres Ltd. (supra) the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under Section 115JB of the Income Tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under Section 115 JB of the Income Tax Act, 1961.

The third issue involve in the instant appeal which requires adjudication is whether the action of Tribunal entertaining / allowing the claim which was made by the assessee before the Assessing Officer by filing a revised computation instead of filing a revised return since the time to file the revised return was lapsed, for claiming to treat the incentive subsidies in question as capital receipts instead of revenue receipts as claimed in original return. The Assessing Officer had denied this claim. Revenue has attacked the order of the tribunal by relying on the decision in the case of Goetze (India) Ltd. (supra).

This case does not help the revenue/appellant. In this case Supreme Court has made it clear that its decision was restricted to the power of the Assessing authority to entertain a claim for deduction otherwise than by a revised return, and did not impinge on the power of the Appellate Tribunal under Section 254 of the Income Tax Act, 1961. The Hon'ble Supreme Court in the said decision held as follows:

> *".....In the circumstances of the case, we dismiss the Civil Appeal. However, we make it clear that the issue in this case is limited to the power of the Assessing Authority and does not impinge on the power of the Income Tax Appellate Tribunal under Section 254 of the Income Tax Act, 1961."*
>
> *This judgment was followed by our Court in the case of Britannia Industries Ltd. (supra) holding that Tribunal has the power to entertain the claim of deduction not claimed before the Assessing Officer by filing revised return. Respectfully following the aforesaid decision as well as the view already taken by us in this case that the aforesaid subsidies are capital receipt and not an 'income' and not liable to Tax Tribunal in exercise of its power under Section 254 of the Income Tax Act justified this claim though no revised return under Section 139 (5) of the Act was filed before the Assessing Officer. We answer both the question Nos. 1 and 2 in negative and in favour of assessee."*
>
> *(emphasis added)*
>
> *16.4. Since the issue stands squarely covered by the Hon'ble Jurisdictional High Court in the case of Ankit Metal and Power Limited (supra), we fail to find any infirmity in the finding of ld. CIT(A) holding that the subsidy/incentive received by the assessee which have been held to be capital receipts are to be excluded from the book profit u/s 115JB of the Act. Thus, common ground no. 7 raised by the Revenue for AY 2011-12 & AY 2012-13 are dismissed."*

14.1. Since the issue stands squarely covered by the Hon'ble Jurisdictional High Court in the case of Ankit Metal and Power Limited (supra), we fail to find any infirmity in the finding of ld. CIT(A) holding that the subsidy/incentive received by the assessee which have been held to be capital receipts are to be excluded from the book profit u/s 115JB of the Act. Thus, common ground no. 7 for AY 2013-14 and 7 & 8 for 2014-15 raised by the Revenue are dismissed."

27. Both the ld. representatives have submitted that the issue is squarely covered in favour of the assessee by the above decision of the Tribunal in the own case of the assessee for earlier assessment years. Therefore, respectfully following the same, for the sake of consistency, this issue is decided in favour of the assessee and against the revenue. Ground Nos.11 & 12 of Revenue's appeal are hereby dismissed.

28. **Ground No.13** – Vide Ground No.13, the revenue has agitated the action of the CIT(A) in deleting the upward adjustment made to book

profit on account of disallowance of expenditure computed u/s 14A of the Act r.w.r. 8D of the Income Tax Rules.

29. The ld. counsel for the assessee, in this respect, has relied upon the decision of the Tribunal in the assessee's own case dated 07.02.2023 passed in ITA Nos.2142 & 2143/Kol/2018 in relation to Assessment Years 2013-14 & 2014-15, wherein, the identical ground raised by the department has been dismissed by the Tribunal relying upon the earlier decision of the Tribunal in the own case of the assessee. The relevant part of the order of the Tribunal dated 07.02.2023 (supra) is reproduced as under:

> ***"Revenue's common Ground no. 9 for AY 2013-14 & 2014-15 relating to the upward adjustment made to book profit for disallowance computed u/s 14A r.w. Rule 8D of the Rules:***
>
> *16. We have heard rival contentions and perused the records placed before us. We find that this Tribunal in assessee's own case for AY 2011-12 & 2012-13 dealt with this issue and decided in assessee's favour observing as follows:*
>
> > *"17. The eighth common ground of the Department's appeal is against the deletion of upward adjustment made to book profit on account of the disallowance computed under section 14A read with rule 8D. The assessee had disallowed a sum of Rs. 6,40,792/- in the computation of its book profit in terms of clause (f) of Explanation 1 to section 115JB of the Act on account of expenditure relatable to exempt dividend income. Whilst working out the disallowance under section 14A of the Act read with rule 8D of the Rules under the normal computation provisions, ld. CIT(A) made a further disallowance of Rs. 5,71,31,208/-. The same disallowance of Rs. 5,71,31,208/- was made in the computation of book profit under section 115JB of the Act. On appeal, ld. CIT(A) held that the provisions of section 14A and rule 8D cannot be applied in the computation of book profit under section 115JB of the Act. He placed reliance on the judgment of the Hon'ble Calcutta High Court in CIT v. Jayshree Tea and Industries Limited in ITAT 47 of 2014 and G.A. 1501 of 2014 decided on November 19, 2014.*
> >
> > *17.1. It is submitted that this question is decided in favour of the assessee by the judgment of the Hon'ble Calcutta High*

Court in Jayshree Tea's case (supra) (page 152 of the Compilation of Case Laws). Question No. 2 in Jayshree Tea's case is relevant in this behalf. The material extracts from the said judgment are as below:

QUESTION 2 in Jayshree Tea's case

"2. Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in upholding the order of CIT (Appeals) that disallowance under Section 14A of the I.T. Act, 1961, amounting to Rs.2,20,15,787/- is not to be considered for book profit for calculation of book profit under Section 115JB of the I.T. Act, 1961?"

DECISION OF THE HON'BLE COURT

"We admit the question no.2 for adjudication in this appeal. By consent of the parties, the appeal is treated as ready for hearing and taken up as such.

We find computation of the amount of expenditure relatable to exempted income of the assessee must be made since the assessee has not claimed such expenditure to be Nil. Such computation must be made by applying clause (f) of Explanation 1 under section 115JB of the Act. We remand the matter for such computation to be made by the learned Tribunal.

We accept the submission of Mr. Khaitan, learned Senior Advocate that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act."

(emphasis added)

17.2. The same view was taken by the Hon'ble Karnataka High Court in CIT v. Gokal Das Images Private Limited, (2020) 429 ITR 526 (Karn) – paragraph 10 at page 533 of the Reports (Page 156 at page 163 of the Compilation of the Case Laws). Relevant portion of the decision of the Karnataka High Court in Gokaldas Images' case (supra) is extracted hereinbelow:

"10. The Commissioner of Income-tax (Appeals) has held that as per section 115JB of the Act, the assessee being a company is liable to tax on book profits in accordance with the aforesaid provision and there is no exemption granted to the non-dividend company in this regard. However, the tribunal by placing reliance on decision of the Supreme Court in Apollo Tyres v. CIT [2002] 122 Taxman 562/255 ITR 273 has held that Assessing Officer while determining book profits under section 115JB of the Act cannot tamper with the profits as per profit and loss

> *account prepared in accordance with the Companies Act except in the manner provided in Explanation 1 to section 115JB of the Act. Thus, it has been held that the additions made by the Assessing Officer while determining the book profits under section 115JB of the Act cannot be sustained. Any disallowance computed under section 14A of the Act pertain to computation of income under normal provisions of the Act and cannot be read into the provisions of section 115JB of the Act pertaining to computation of book profits by levy of Minimum Alternate Tax (MAT) and there is no express provision in clause (f) of Explanation 1 to section 115JB of the Act to that extent. For the aforementioned reasons, the third substantial question of law is answered against the revenue and in favour of the assessee."*
>
> *(emphasis added)*
>
> *17.3. Respectfully following the judgments/decisions referred herein above, we fail to find any infirmity in the finding of ld. CIT(A) in deleting upward adjustment made to book profit for disallowance computed u/s 14A r.w. Rule 8D of the Rules. Thus, common ground no. 8 raised by the Revenue for AY 2011-12 & AY 2012-13 are dismissed."*

16.1. Respectfully following the judgments/decisions referred herein above, we fail to find any infirmity in the finding of ld. CIT(A) in deleting upward adjustment made to book profit for disallowance computed u/s 14A r.w. Rule 8D of the Rules. Thus, common ground no. 9 raised by the Revenue for AY 2013-14 & 2014-15 are dismissed."

30. However, the ld. DR, in this respect, has made the following submissions:

> *"2. As regards the issue of inclusion of the disallowance u/s 14A for the purpose of computation of book profit u/s115JB, reliance is placed on the decision of Hon'ble ITAT, Kolkata bench in A.C.I.T. Vs M/s. Ridhi Portfolio (P) Ltd, vide order dated 16.02.2018 in IT (SS) Nos. 106 to 109/Kol/2016. It was held as under:*
>
> *In the case of CIT vs Jayshree Tea Industries Ltd. (ITAT No. 47 of 2014 dated 19.11.20 14), Hon'ble Kolkata High Court has also expressed a similar view by holding that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act. Hon'ble Kolkata High Court has further held that the computation of the amount of expenditure relatable to exempt income of the assessee must be made independently by applying clause (f) of Explanation (1) under section 115JB of the Act where the assessee has not claimed such expenditure to be nil. Respectfully following the said decision of the Hon'ble Jurisdictional High*

Court in the case of Jayshree Tea Industries Ltd. (supra), we set aside the impugned orders of the Ld. CIT(A) on this issue and restore the matter to the file of the A.O. for computing the amount of expenditure relatable to the exempted income of the assessee independently for all the four years under consideration by applying clause (f) of Explanation (1) under section 115JB of the Act without resorting to section 14A or Rule 8D." (Emphasis provided)

31. We have considered the rival submissions and gone through the record. The ld. DR has placed reliance on Explanation 1 Clause (f) to section 115JB of the Act, which reads as under:

"Explanation [1] – For the purposes of this section, "book profit" means the [profit] as shown in the [statement of profit and loss] for the relevant previous year prepared under sub-section (2), as increased by –

(f) the amount or amount of expenditure relatable to income to which [section 10 (other than the provisions contained in clause (3) thereof) or [***] section 11 or section 12 apply; or]"*

32. The ld. counsel for the assessee, in this respect, has submitted that the provisions of section 115JB are complete code in itself and therefore, the Assessing Officer cannot tinker with the book profits. However, we do not find force in the aforesaid contention of the ld. counsel for the assessee in this respect. It is to be pointed out that as per Explanation 1(f), the book profit means the profit shown in the statement of profit and loss account as increased by the amount of expenditure relatable to the exempt income. The said amount of expenditure has already been ordered to be determined as per our observations made above while adjudicating the issue relating to the disallowance u/s 14A vide Ground No.10 of the revenue's appeal. It has to be further noted that section 115JB in itself does not prescribe any procedure to calculate the expenditure relatable to exempt income earned by the assessee. The said provision has been separately and specifically placed in the Act u/s 14A of the Act. Therefore, the book profits of the assessee are liable to be increased by the expenditure as calculated u/s 14A of the Act as provided under Explanation 1 to

Clause (f) of section 115JB of the Act. In view of this, it is directed that the book profits will be increased u/s 115JB of the Act by the disallowance calculated as per our directions given while adjudicating Ground No.10 of the revenue's appeal. This ground of the revenue's appeal is hereby allowed.

33. **C.O No.39/Kol/2019 -** Now, coming to cross-objections filed by the assessee.

34. Cross Objections No. 1 & 2 – These grounds of cross-objection have already been dealt by us while adjudicating Ground No.10 of the revenue's appeal. These grounds are accordingly decided as per our findings given in respect of Ground No.10 of the revenue's appeal.

35. **Additional Cross-Objection** – The assessee vide additional cross-objection has claimed deduction of leave encashment actually paid. The ld. counsel for the assessee, in this respect, has relied decision of the Tribunal in the assessee's own case dated 07.02.2023 passed in ITA Nos.2142 & 2143/Kol/2018 in relation to Assessment Years 2013-14 & 2014-15, wherein, the identical issue has been adjudicated and the matter has been restored to the file of the assessing officer with the direction to allow the claim of leave encashment actually paid by the assessee during the relevant assessment year. The relevant part of the order of the Tribunal dated 07.02.2023 (supra) is reproduced as under:

> *"21. Ground no. 2 & 3 for AY 2013-14 and ground no. 1 & 2 for AY 2014-15 raised by the assessee relates to deduction of provision made for leave encashment and the allowability of the deduction u/s 43B(f) of the Act for the amount actually paid.*
>
> *21.1. The assessee had claimed deduction on account of provision made for leave encashment relying upon the decision of the Hon'ble Calcutta High Court in Exide Industries Limited v. Union of India, (2007) 292 ITR 470 (Cal) whereby clause (f) of Section 43B of the Act was held unconstitutional. Ld. AO disallowed the claim by observing that the matter is sub judice before the Hon'ble Supreme Court. On appeal, ld. CIT(A) directed ld. AO to allow deduction in respect of the provision only if*

the Hon'ble Supreme Court upheld the decision of the Hon'ble Calcutta High Court by rectifying the assessment once the judgment was rendered by the Hon'ble Supreme Court. The assessee's ground of appeal was dismissed subject to the said observation.

21.2. The Hon'ble Supreme Court in Union of India v. Exide Industries Limited, (2020) 425 ITR 1 (SC) upheld clause (f) of Section 43B of the Act as constitutionally valid (pages 220 – 249 of the Compilation of Case Laws). Therefore, in view of the judgment of the Hon'ble Supreme Court, deduction in respect of leave encashment is available only in the year of actual payment. It is then submitted by ld. Counsel for the assessee that ld. AO may be directed to allow deduction in respect of the amount actually paid on account of leave encashment during the previous year relevant to the AY 2013-14 & 2014-15.

21.3. We also find that this issue came for adjudication before this Tribunal in assessee's own case for AY 2011-12 & 2012-13 and the following was held by this Tribunal:

> *"22.3. We also find that this issue came for adjudication before this Tribunal in assessee's own case for AY 2010-11 and the following was held by this Tribunal:*
>
> *"67. We have considered his submissions and are of the view that this liability is purely notional and cannot be allowed as deduction. It is an admitted position that there is no out flow on this account in any assessment year and the liability is notional and is based purely on entries in the books of account on the basis of notional figures. This may be relevant for the purpose of showing the true and fair view of the state of affairs of the assessee as is required for reporting to shareholders and other public authorities. When it comes to computing total income under the Act, such notional liability cannot be allowed as deduction. We concur with the view of CIT(A) in this regard. We are of the view that application of the provision of section 43B(f) of the Act would not be relevant because the liability in question is not otherwise allowable under the Act and Sec.43B of the Act will come into operation only when a expenditure is otherwise allowable under the Act. With this observation we dismiss ground no.9 raised by the assessee."*
>
> *22.4. We, therefore, respectfully following the finding of the Tribunal applying the ratios laid down by Hon'ble Supreme Court of India in the case of Exide Industries Limited (supra) are of the considered view that the issue needs to be remitted back to the file of ld. AO who shall allow the claim of leave encashment actually paid by the assessee during the AY 2011-12 & AY 2012-13."*

21.4. We, therefore, respectfully following the finding of the Tribunal applying the ratios laid down by Hon'ble Supreme Court of India in the case of Exide Industries Limited (supra) are of the considered view that the issue needs to be remitted back to the file of ld. AO who shall allow the claim of leave encashment actually paid by the assessee during the AY 2013-14 & 2014-15."

36. Respectfully, following the decision of the Tribunal, this issue is restored to the file of the Assessing Officer with a direction to allow the claim of leave encashment actually paid by the assessee during the previous year relevant to A.Y 2015-16. The cross-objections of the assessee are partly allowed.

37. In the result, the appeal of the revenue as well as cross-objection of the assessee are partly allowed.

Kolkata, the 16th January, 2024.

Sd/-	Sd/-
[गिरीश अग्रवाल /Girish Agrawal]	**[संजय गर्ग /Sanjay Garg]**
लेखा सदस्य/**Accountant Member**	न्यायिक सदस्य/**Judicial Member**

Dated: 16.01.2024.
RS

Copy of the order forwarded to:
1. DCIT, Circle-6(1), Kolkata
2. M/s Birla Corporation Ltd
3.CIT (A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches