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

BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER

AND

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NOs. 1994 & 1995/MUM/2023
(A.Ys. 2003-04 & 2004-05)

ACIT – 1(1)(1) 579-A, Aayakar Bhavan M.K. Road, Mumbai - 400020	*V.*	Hindustan Petroleum Corporation Limited 17-Petroleum House J. Tata Road, Churchgate Mumbai - 400020 **PAN: AAACH1118B**
(Appellant)		**(Respondent)**

CO NOs. 109 & 110/MUM/2023
[ARISING OUT OF ITA NOs. 1994 & 1995/MUM/2023
(A.Ys. 2003-04 & 2004-05)]

Hindustan Petroleum Corporation Limited 17-Petroleum House J. Tata Road, Churchgate Mumbai - 400020 **PAN: AAACH1118B**	*V.*	ACIT – 1(1)(1) 579-A, Aayakar Bhavan M.K. Road, Mumbai - 400020
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri P.J. Pardiwala & Ms. Aarti Sathe**
Department Represented by	**:**	**Shri Biswanath Das**
Date of Conclusion of Hearing	**:**	**15.01.2024**
Date of Pronouncement	**:**	**07.02.2024**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. These appeals and cross objections are filed by revenue and assessee respectively, against different orders passed by Learned Commissioner of Income-Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] dated 30.03.2023 for the A.Ys. 2003-04 and 2004-05.

CO NOs. 109 & 110/MUM/2023

2. At the time of hearing, Ld. DR submitted that the cross objections filed by the assessee is not maintainable due to the fact that Ld. CIT(A) has not given any finding on the jurisdictional issue. Therefore, cross objections will not survive.

3. On the other hand, Ld.AR of the assessee submitted that Ld.CIT(A) has decided the issue on merit and he prayed that the Cross Objections may be kept open.

4. Considered the submissions of both the parties, since Ld. CIT(A) has dealt with the issue on merit we are not inclined to go into the

jurisdictional issue raised by the assessee in the cross objections. Accordingly, we keep the ground raised by the assessee in Cross objections open.

5. In the result, cross objections filed by the assessee are dismissed as indicated above.

ITA No. 1994/MUM/2023 (A.Y. 2003-04)
ITA No. 1995/MUM/2023 (A.Y. 2004-05)

6. Now, we proceed to dispose off the appeals filed by the revenue. Since the issues raised in both these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal in ITA.No. 1994/MUM/2013 for Assessment Year 2003-04 as a lead appeal.

7. Revenue has raised following grounds in its appeal: -

> *"1. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in deleting the disallowance of deduction u/s. 80IA of the Act, 1961 of Rs.9,72,33,000/-?"*
>
> *2. "Whether on the facts and circumstance of the case and in law, the Ld.CIT(A) was right in deleting the disallowance of deduction u/s. 80IB of the I.T. Act, 1961 amounting to Rs.578,46,06,000/-"*
>
> *3. "Whether on the facts and circumstance of the case and in law, the Ld.CIT(A) erred in deleting the disallowance of*

construction expenses under the head sundry expenses and other charges amounting to Rs.5,10,13,674/-?"

4. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the AO be restored.

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

8. Brief facts relating to the issue raised by the revenue in Ground No.1 are, in the assessment proceedings the Assessing Officer observed that assessee has claimed deduction under section 80IA on the profit of Generation of electricity to the extent of ₹.972.33 Lakhs in the A.Y.2003-04. The scrutiny of the Profit and Loss account of Generation of electricity shows that the generation of electricity was in loss to the extent of ₹.2533.10 lakhs but to show a profit the assessee added a notional income of ₹.3505.43 lakhs being the saving in Low Sulphur Heavy Stock (in short "LSHS") and due to use of steam generated as by-product in generation of electricity. The Generation plant used only HSD and Naphtha for generation of electricity hence there was no ground to show that the saving in terms of use of LSHS. He observed that the generation of electricity resulted in loss to the assessee there was no profit and the assessee is not entitled to any deduction under section 80IA of the Act.

9. On enquiry, assessee has submitted before Assessing Officer justifying the claim made by the assessee and the Assessing Officer has summarized the submissions of the assessee as under: -

> *"7.1 The Assessee during the course of regular assessment proceedings has given a detailed note on the operation of the captive power plant which co-generated power and steam. The Assessee submits that the captive power plant of Visakh refinery is based on co-generation of power and steam leading to more energy efficient use of fuel as compared to conventional power plants. The captive power plant includes two gas turbo generators and two heat recovery steam generators. Steam is generated in the heat recovery steam generators by using hot exhaust gases from gas turbo generators Each heat recovery steam generator has a capacity of generating 27 T/hr steam. Whenever the gas turbo generator is in operation it is ensured that the corresponding heat recovery steam generator is also put on line to avoid any energy wastage. All the steam generated from the heat recovery steam generator is utilized for refinery operations. Hence, the captive power plant is not only to generate electricity but also based on co-generation of power and steam and steam generation is unavoidable. Thus, steam generation in the captive power plant is a newly established industrial undertaking which is accepted as a separate unit by itself.*
>
> *7.2 The Assessee has two options available to take income arising from steam generation by either taking the price in the open market of the product if it is saleable or actually sold in the market or consider savings in the cost of alternative uses made of steam. The different alternative uses of steam in the refinery process rule out the possibility of sale of steam in the open market. Hence, income arising from steam generation was calculated considering the savings in LSHS due to steam generated in gas turbo generators. The Assessee provided a working calculation to show that the standard LSHS requirement for production of 1 Ton of steam is 80.09 kg LSHS per MT of steam which would have been generated in the boiler using more LSHS. Since, consumption of LSHS to that extent as fuel would have increased the cost of fuel / raw material in the refinery operations and since generation of steam in the co-generation of power and steam in the captive power plant has resulted in savings they are rightly considered as income in the profit and loss account of the captive power plant at Visakh refinery.*

7.3 The Assessee has furnished a working of receipts in respect of the plant for generation of electricity and steam (saving in LSHS) along with computation of the value considered in the profit and loss account The Assessee had also submitted a chart computing the savings in LSHS due to generation of steam in the gas turbo generators which amounted to Rs. 35,05,42,781. The same is tabulated hereunder: -

Computation of savings in LSHS due to generation of steam in Gas Turbo Generators			
Steam Generated	(A)	5,26,691	MTS
LSHS required per metritonne of steam	(B)	0.08009	Kgs
Quantity of LSHS saved (A)*(B)		42,183	MTS
Realisable Value of LSHS per MT	Rs.	9913.05	
Margin included in above	Rs.	1602.94	
Cost of LSHS	Rs.	8310.11	
Savings in LSHS due to Steam generation in Gas Turbo Generators		35,05,42,781	

7.4 Further, the Assessee submitted that generation of electricity has not resulted in any loss and saving in LSHS by way of generation of steam has been taken into consideration during the assessment proceedings. Thus, after going through a detailed scrutiny and review of the details Assessing officer had accepted the savings in LSHS on account of generation of steam which was shown on the credit side of the profit and loss account.

7.5 The Assessee submits that the deduction has been allowed even in earlier years and attention is invited to the assessment order dated 15 December 1992 where the deduction was allowed in AY 1990-91. Further, a reference was made to the order passed under section 154 of the Act dated 6 April 1999 where in AY 1996-97 the claim towards LPG Bottling Plant had been disallowed by the AO but the claim for deduction for captive power plant of the Mumbai refinery had been consciously allowed by the AO. Thus, the claim has been allowed on merits not only for Visakh refinery but also for Mumbai refinery that too not only through the assessment order but also by a rectification order under section 154 to the Assessee.

7.6 Hence, the Assessee submitted that the AO has allowed the deduction under section 80- IA of the Act for captive power plant unit after a detailed scrutiny r application of mind to the facts of the case. The reason for rejecting the claim of deduction based on

no documentary evidence furnished with the objections by the Assessee has no basis and cannot be sustained. The AO while disposing off the objections has not considered the factual details before him and incorrectly held that the generation plant used only HSD and Naphtha for generation of electricity and there was no ground to show savings in terms of use of LSHS. The Assessee submits that the deduction ought to be granted to it and the same has been correctly allowed during the original assessment proceedings. The reasons for reopening the assessment on this ground are unsustainable and even on merits ought to be allowed to the Assessee.

7.7 The Assessee relies on the Bombay High Court in its own case for AY 2002-03 in Hindustan Petroleum Corporation Limited v. DM (2010) 328 ITR 534 where a deduction under section 80-IA on the generation of electricity by a captive power plant amounting to Rs. 86.37 lakhs had been allowed which was computed on the basis of savings in low sulphur heavy stock (LSHS) due to use of steam generated as a byproduct in the generation of electricity which was quantified at Rs. 29.95 crores. The AO sought to reopen the assessment to disallow the deduction under section 80-IA of the Act and the Court quashed the reopening proceedings observing that the Assessee had fully disclosed the material facts and similar claim of deduction under section 80-IA has been consistently made and allowed to the Assessee since 1990-91."

10. After considering the submissions of the assessee, Assessing Officer found not acceptable and he observed in his order that after due verification of the records submitted by the assessee and also aware of the fact that in the earlier assessment years the issue under consideration was already verified and the steam from power plant results in saving of LSHS which is otherwise consumed to generate steam for refinery. He rejected the claim of the assessee by observing as under: -

"8.1 As regards the issue having been already examined, this fact has been discussed in detail while disposing of the objections to reopening of the case in speaking order dated 07.02.2022 and hence does not require repetition here. Coming to the factual aspect, it is admitted fact that no actual revenue has been generated from use of the steam generated in power plant. The value of steam has been calculated on the basis of the cost of LSHS that would have been consumed had the steam generated in power plant was not available. The valuation of the steam is a pure guess work undertaken to fictitiously enhance the revenue generated from power plant. A plain reading of section 80IA make it abundantly clear that in order to avail deduction there has to be actual income. The deduction u/s 80IA is not intended for notional income.

8.2 In its submission dated 15.02.2022 and during the course of VC the assessee has reiterated the arguments made in earlier reply dated 13.01.2022. Moreover, the assessee has requested to follow the principle of judicial discipline to state that the first Appellate Authority or the Assessing Officer are bound by the orders of Tribunal. Even where the assessee or the department has pursued the matter in reference proceedings, it does not act as a kind of stay of operation of the order of the Tribunal.

The principle of judicial discipline is to be followed keeping in view the rule of consistency to keep the matter alive till the issue attains finality by the High Court or Supreme Court. In case no addition/ disallowance are made in subsequent assessments on a particular issue and that issue is decided in favour of the revenue at higher forums, the department would not get second innings to play in subsequent assessments. Moreover, the existence of different facts and legal provisions in subsequent years on the same issue are other restrictions which have to be considered while following the orders of Tribunal in subsequent assessments.

8.3 The assessee has also relied upon the assessment order dated 15.12.1992 wherein the deduction was allowed in AY 1990-91, and order u/s 154 dated 06.04.1999 for the AY 1996-97 wherein deduction u's 80IA was allowed by the AO.

The orders being relied upon by the assessee pertain to Mumbai refinery which dates back to quite earlier period than the year under consideration. In the year under consideration the deduction in respect of Visakh refinery is under question. The facts of the case of the year under consideration are not identical to the facts of the years involved in the orders referred by the assessee.

> *8.4 The fact and legal position being so the claim of deduction u/s 80IA amounting to Rs. 972.33 lakhs in respect of captive power plant tis hereby disallowed and added back to the income of the assessee."*

11. Aggrieved, assessee preferred appeal before the Ld. CIT(A) and filed detailed submissions before him, relying on the decisions in favour of assessee in particular decision of the Hon'ble Bombay High Court in the assessee's own case for the A.Y. 2002-03 in Hindustan Petroleum Corporation Ltd. *v.* DCIT [(2010) 328 ITR 534 (Bombay)] wherein the Hon'ble Bombay High Court has relied on the similar facts on record and allowed the claim of the assessee. By relying on the detailed submissions of the assessee, Ld. CIT(A) allowed the claim of the assessee by reproducing the decision of the Hon'ble Bombay High Court in assessee's own case.

12. Aggrieved, revenue is in appeal before us filing the present appeal. At the time of hearing, Ld. DR brought to our notice findings of the Assessing Officer from Page No. 3 to 7 of the assessment order and brought to our notice the detailed findings of the Assessing Officer. Ld.DR also brought to our notice findings of the Ld. CIT(A) from Page No. 32 to 43 of the Appellate Order and submitted that Ld. CIT(A) has not dealt with the issue in detail as per the detailed findings of the

Hon'ble Bombay High Court and allowed the claim of the assessee merely relying on the findings of the Hon'ble Bombay High Court. He submitted that in order to appreciate the issue under consideration the issue may be remitted back the file of the Ld. CIT(A) for fresh adjudication.

13. On the other hand, Ld. AR brought to our notice Page No. 48 and 49 of the Paper Book which is the Tax Audit Report submitted on the basis of audit under section 80IA of the Act. Ld. AR brought to our notice the above said audit report and he explained the workings stated in the above audit report. He explained that the revenue from power generation is ₹.6023.93 lakhs and also assessee has saved in LSHS. This is nothing but diversion of steam energy in the refinery to the extent of ₹.3,505.43 lakhs and expenditure incurred by the assessee for generation of HSD / Naptha and other direct expenditures of ₹.662.20 lakhs and indirect expenditure of ₹.680.86 lakhs and declared a net profit for financial year 2002-03 of ₹. 972.33 lakhs.

14. Further, he brought to our notice Page No. 234 of the Paper Book which is the order in assessee's own case in which Hon'ble Bombay High Court has decided exactly similar issue under consideration and allowed

the claim of the assessee in A.Y. 2002-03. By referring to the above order he submitted that electricity generated by the assessee are nothing but utilization for captive power consumption and the by-product coming out of the electricity division which is LSHS (Steam) are also utilized within the company for captive purpose, by relying on the above decision he prayed that the issue under consideration is covered in favour of assessee.

15. Considered the rival submissions and material placed on record, we observe that assessee has a captive power plant which co-generates power and steam. The captive power plant of Visakh refinery is based on co-generation of power and steam leading to more energy efficient use of fuel as compared to conventional power plants. It is also brought to our notice the captive power plant includes two gas turbo generators and two heat recovery steam generators. The Steam is generated in the heat recovery steam generators by using hot exhaust gases from gas turbo generators. Each heat recovery steam generator has a capacity of generating 27 Tons per hour steam. It is brought to our notice that the captive power plant is not only to generate electricity but also based on co-generation of power and steam. In this operation steam generation is unavoidable. The steam generation in the captive power plant is a

newly established industrial undertaking which is accepted as a separate unit by itself.

16. The Assessee utilized the electricity generated by it for the captivate purpose and the steam generated by the same plant was also utilized for captive consumption in the generation of electricity as well as in refinery. Therefore, the expenditure incurred by the assessee in this particular captive power plant to the extent of material consumption of ₹.7213.97 lakhs and direct and indirect expenditure including material consumption of ₹.8557.03 lakhs. From the above expenditure assessee was able to generate power to the value of ₹.6023.93 lakhs and value of steam [LSHS] to the extent of ₹.3505.43 over and above utilized for power generation, which were transferred to refinery which is recognized in the books as saving in LSHS. Therefore, the claim of the assessee to the extent of additional steam generated by the assessee in this plant are transferred to the refinery. Therefore, the assessee has to adjust the transfer value of steam to the refinery otherwise are to be adjusted in the value of material consumption, by doing so the net result will be the net profit in this operation. Therefore, the same can be presented as under: -

		(₹. Lakhs)	(₹. Lakhs)
01.	**Income**		
a)	Generation		6,023.93
b)	Recovered From APSEB		-
			6,023.93
02.	**Expenditure**		
a)	HSD / Naptha / Int.Product consumed Duties Applicable To Products	7213.97	
b)	Direct Charges	662.20	
c)	Indirect Charges	680.86	
	Sub Total	8,556.03	
(Less)	Saving in LSHS	3,505.43	
			5,051.60
Profit /Loss For 2002-03			**972.33**

17. The facts brought to us which is similar to the facts in the A.Y.2002-03 in which the Hon'ble Bombay High Court has considered the same issue and decided the issue in favour of assessee, the relevant findings of the Hon'ble Bombay High Court are reproduced below: -

> *"12. The material which has been placed on the record would support the contention of the assessee that there was a full and true disclosure of all material facts relating to the claim of the assessee for a deduction under s. 80-IA in respect of the profits made by the CPP at Vizag. In computing those profits, the assessee disclosed the two components which form a constituent element of the income of the unit. The assessee furnished a break-up of the value which it placed on the generation of electricity and on the steam which had been generated as a by-product. There was a disclosure that the basis for valuing the generation of electricity was the rate prescribed by the Andhra Pradesh State Electricity Board and that the basis for the valuation of the steam generated was the saving in LSHS which would otherwise be the raw material*

for the generation of the steam. Whether the assessee was correct or otherwise in adopting a particular method for valuation does not fall for determination in these proceedings since the question to which the Court has to address itself is as to whether there was a full and true disclosure by the assessee. The assessee disclosed that it claimed a deduction under s. 80-IA. The computation of profits was disclosed. The break-up was explained. The assessee disclosed that its revenues were determined by taking two components viz. (i) the revenues relating to the generation of electricity and (ii) the saving on the cost of LSHS that was utilized in valuing the steam generation. In these circumstances, the Revenue is not correct in its submission that there was a failure on the part of the assessee to fully and truly disclose all the material facts necessary for the assessment. As a matter of fact we must also note that the submission which has been urged on behalf of the Revenue is that the issue was not considered by the AO when the order of assessment was passed. The question before the Court, however, is whether that in itself would justify the inference that a full and true disclosure was not made. Such an inference cannot be drawn since the record before the Court would show that as a matter of fact there was a full and true disclosure. Besides this, the attention of the Court has also been drawn to the circumstance that a similar claim of deduction under s. 80-IA has been consistently made and allowed in the case of the assessee since 1990-91. The record before the Court inter alia contains an application for rectification made by the assessee on 31st March, 1999 in respect of a deduction inter alia under s. 80-IA on the CPP units of the Mumbai and Vizag refineries, the P&L a/c for the Vizag refinery for 1995-96 which contains a similar computation of income including the saving in LSHS and an order dt. 6th April, 1999 passed under s. 154 by the Jt. CIT, Special Range-56, Mumbai. For all these reasons we are of the view that the first issue on which the assessment is sought to be reopened, the Revenue has failed to establish a case for the reopening of the assessment beyond four years."

18. Respectfully following the above decision, we are inclined to allow the claim of the assessee for the current assessment year also. Accordingly, Ground No. 1 raised by the revenue is dismissed.

19. Coming to the Ground No. 2, the relevant facts are, during the course of assessment proceedings, Assessing Officer observed that assessee has claimed deduction under section 80IB of ₹.57846.06 lakh pertaining to Visakh Refinery Expansion Project II [in short "VREP-II"] at Visakh refinery, Andhra Pradesh and assessee had included the marketing margin of ₹.10158.56 lakhs in its claim of deduction under section 80IB of the Act.

20. Assessing Officer observed that as per the provisions of the Income Tax Act, deduction under section 80IB is applicable to the profit of the industrial undertaking only and no other income can be brought and added to it. The Marketing margin is not attributable to the activities of the industrial undertaking (VREP-II). He observed that Marketing margin is the profit derived by the marketing division of the assessee on the products manufactured by the refinery unit and transferred to the marketing division of the assessee at a fixed price. As the marketing division is not an industrial undertaking under the definition of Section 80IB and is involved only in trading activities, the profit earned by marketing division is only a trading profit and not a profit derived out of manufacturing activities. Therefore, the deduction u/s 80IB on marketing margin is not allowable.

21. On enquiry with the assessee, assessee has submitted detailed submissions vide letter dated 13.01.2022, the same is summarized by the Assessing Officer in his order as under: -

> *"10.1 The Assessee during the course of regular assessment proceedings has provided details in respect of Visakh Refinery Expansion Phase II [VREP-II) where deduction 80- IB of the Act has been claimed. The Assessee provided factual details pertaining to the VREP-II unit being commissioned in AY 2000-01 and commercial production started from AY 2001- 02 and the expansion resulted in increased capacity from 4.5 MMTPA to 7.5 MMTPA The expanded unit consists of independent units with a separate quid catalyst cracking unit and a crude distillation unit. The Assessee enclosed a technical write up regarding various units contained in the expansion unit along with a flow diagram. Further, the assessee also submitted approvals received from Ministry of Petroleum and Natural gas accepting the refinery unit as an independent unit for the purpose of fixing a separate refinery transfer price for the expanded unit.*
>
> *10.2 The Assessee submits that the eligibility of the expansion unit for deduction under section 80-I was considered by the AO for AY 1990-91 when the first phase of expansion had eligible profits for deduction under the relevant section. The Assessee submits that the assessment order for AY 1990-91 accepted the claim of deduction under section 80-1 of the Act. The deduction under section 80-I including marketing margin was adjudicated by the CIT(A) for AY 1990-91 and the CIT(A) vide its order dated 15 September 1993 held that profits made by the expanded unit should also include marketing profits for computation of eligible profits of Visakh refinery expansion unit and Mumbai refinery expansion unit. The order of the CIT(A) has been submitted by the assessee during the course of the regular assessment. The CIT(A) order has been accepted by the department and no appear has been filed. The issue of inclusion of marketing profit for computing the eligible profits for deduction under section 801 therefore reached finality. Based on the Supreme Court decision of Berger Paints (266 1TR 99) where the department has not challenged the correctness of the law and has accepted it, there can be no cause to justify departure from the laid down principle.*
>
> *10.3 The Assessee also submits that the Mumbai tribunal order in its own case for AY 1984-85 held that marketing division is an*

integral part of the total manufacturing activity undertaken by the company. The Tribunal also held that the business of the company is one single integrated and indivisible business of manufacturing and marketing of petroleum products. Thus, during the course of original assessment proceedings detailed submissions were made regarding inclusion of marketing profits for the purpose of computing the eligible profits for deduction under section 80-IB of the Act.

10.4 The Assessee submits that the Bombay High Court in its own case for AY 1989-90 vide order dated 24 July 2006 has allowed the claim of deduction from AY 1989-90 in case of VREP-1 and Mumbai refinery expansion unit. Since, the Bombay High Court decision is on the same issue there in no question of disallowing the marketing margin from the profits of the VREP-11 unit and the AO has rightly been allowing the claim right from AY 1989-90 to AY 2005-06, Hence, the Assessee submits that there is no reason to believe that income escaped assessment and reconsideration of the same issue on the same set of facts will therefore mean only a change of opinion and there is no reason to believe that income has escaped assessment.

10.5 The Assessee has relied on the Bombay High Court in its own case for AY 2002-03 in Hindustan Petroleum Corporation Limited v. DCIT (2010) 328 ITR 534 where a deduction under section 80-IB was made in respect of the VREP-11 project. The assessee had provided details during the course of assessment and clarified that Ministry of Petroleum and Natural Gas had granted approval to treat additional capacity of the expanded project at par with that if new refineries for the purpose of payment of import parity price and the assessee disclosed all the relevant details for deduction under section 80-IB of the Act.

Therefore, based on the above submissions and by placing reliance on the aforesaid decisions, the deduction under section 80-IB of the Act ought to be granted to the Assessee."

22. After considering the detailed submissions of the assesse, the Assessing Officer rejected the same and observed as under: -

"11.1 The assessee has heavily relied on the judgment of Mumbai High Court in assessee's own case for the A.Y. 2002-03 (328 ITR 534), in that case the issue under consideration was validity of the notice issued u/s 148 after expiry of four years. The Hon'ble High

Court had quashed the reopening proceedings while observing that there was no failure on the part of assessee to disclose material facts during original proceedings and hence after expiry of four years the reopening was not justified. It is reiterated that the Hon'ble High Court has not given any finding on merits of any issue involved in that case. The other judgements relied upon by the assessee have different facts and hence not applicable to the case of assessee.

11.2 In the case of India leather Corporation P. Ltd Vs CIT (SC) 227 ITR 552, the Hon'ble Supreme Court has held :

> *The phrase "derived from " is different from "attributable to"- It is no doubt true that the words 'attributable to have a wider meaning than the words 'derived from'- But at the same time it cannot be ignored that normally the word 'attributable' implies that for a result to be attributable to anything' it must be wholly, or in material part, caused by that thing- In order that income can be said to be attributable to manufacture or processing of goods, the earning of the income must be directly connected with manufacture or processing of goods. It is also necessary that material part of the said income should have been earned by that activity.*

11.3 Further, in the case of Liberty India Vs CIT (SC) 317 ITR 2318 the Hon'ble Apex Court has held as under:

> *"By using the expression 'derived from Parliament intended to covers sources not beyond that first degree- DEPB / Duty drawback are incentive which flow from the schemes framed by Central Govt, or Customs Act and hence they belong to the category of ancillary profits of such undertakings- Not derived from the industrial undertaking- Further, they cannot be reduced from the cost of purchase of manufacture of goods and they should be treated as separate items of revenue or income and accounted accordingly."*

11.4. The decision of the Apex Court in the case of Cambay Electrical Supply Co. Ltd. (113 ITR 84) highlights the distinction between the two expressions. According to the Hon'ble Apex Court, the expression 'attributable to as a much wider import than the expression 'derived from' thereby intending to cover receipts from sources other than the actual conduct of the business of the industrial undertaking. In other words, it can be understood to mean that there can be receipts which are incidental to the actual conduct of the business of industrial undertaking yet the same may

not fall within the expression of 'derived from' so as to be eligible for the benefits envisaged under Section 80-IA of the Act.

11.5. In view of the above fact and legal position, it is concluded that the Marketing margin doesn't fall under the purview of "derived from". The Marketing margin at best falls under the category of "attributable to" and not "derived from" manufacturing or production activities. Such profits do not come within first degree source from the eligible business. The nexus between the Marketing margin and the industrial undertaking is not direct but only incidental Accordingly, it is held that assessee's income to the extent of Rs. 10158.56 lakh on account of Marketing margin is not eligible for deduction u/s 80 IB of the IT and hence disallowed."

23. Aggrieved with the above order assessee preferred an appeal before Ld. CIT(A) and filed detailed submissions before him. After considering the detailed submissions of the assessee, Ld. CIT(A) by relying on the decision of the Coordinate Bench of Mumbai in assessee's own case in ITA No. 5537/MUM/2011 dated 06.03.2022 allowed claim of the assessee.

24. Aggrieved revenue is in appeal before us, at the time of hearing, Ld. DR brought to our notice detailed findings of the Assessing Officer from Page No. 7 of the assessment order and reiterated the fact that Marketing margin declared by the assessee in its claim of deduction under section 80IB is not a margin generated by the industrial undertaking Visakh Refinery Expansion Project – II unit. He also brought to our notice Page No. 49 to 54 of the First Appellate Order

wherein Ld. CIT(A) has allowed the claim of the assessee merely relying on the decision of the ITAT, Mumbai bench in assessee's own case. He submitted that Ld. CIT(A) has not appreciated the facts on record and merely following the decision in assessee's own case passed earlier, allowed the claim of the assessee. Therefore, this issue may also be remitted back to file of the Ld. CIT(A).

25. On the other hand, Ld. AR brought to our notice Page No. 294 of the Paper Book to highlight that Visakh Refinery Expansion Project – II is an expanded unit and as per the definition of section 80IB this particular unit is covered by the provisions of section 80IB of the Act and further, he brought to our notice Page No. 305 of the Paper Book which is the decision of the Hon'ble Bombay High Court in assessee's own case wherein Hon'ble High Court upheld the findings of the Tribunal. Further, he brought to our notice Page No. 96 to 105 of the Paper Book which is the assessment order for the A.Y. 1990-1991 wherein the Assessing Officer itself has allowed claim of the assessee by considering the marketing profit included by the assessee in the computation of eligible profit. Further, he brought to our notice Page No. 265 of the Paper Book which is the order of the Coordinate Bench of this Tribunal in assessee's own case for the A.Y. 2003-04 to 2005-06 wherein similar

claim of the assessee was allowed. Further, he brought to our notice decision of the CIT *v.* Indian Aluminium Co. Ltd. [108 ITR 367] wherein similar claim was allowed.

26. Considered the rival submissions and material placed on record, we observe that the issue raised by the Assessing Officer in claim of the deduction under section 80IB of the Act is the inclusion of marketing margin of ₹.10158.56 lakhs. The Assessing Officer disputed the fact that the margin derived by the marketing division is nothing but the notional profit derived by the market division which is nothing but the administration operation. Therefore, the unrelated margin to the eligible unit under consideration is not eligible to be claimed under section 80IB of the Act. However, we observe that this issue under consideration is not a new issue raised during the current assessment year. This is an issue raised in the earlier year also. The Coordinate Bench in A.Y.2005-06 in ITA No.1187/MUM/2009 dated 23.11.2016, wherein the revenue has raised similar issue in its appeal before the ITAT and the Coordinate Bench has dealt with the issue and allowed the claim of the assessee with the following observations: -

> *"52. We have considered the rival contention of the parties and perused the order of authorities below. We have noticed that the*

AO not disputed the market price of cost of processing VGO in all refinery units. However the same was considered to be below the crude oil price and was not accepted by AO. The AO further observed that assessee is required to include at least cost of processing crude oil to VGO in computing the price of inter-unit transfer. The AO further concluded that the assessee was required to submit average processing cost in CDU and the same works out to be Rs. 36.24/MT. The AO accordingly took Rs. 14400.79/mt as the transfer price of MT VGO. And inter-unit transfer was calculated at Rs. 1204.19 crore reducing the net profit of the VERP II of Rs 664,51,07,775/-. The ld CIT(A) while considering this ground of appeal concluded as under:

> *"10.6 I have carefully considered the submission of ld AR and gone through the facts brought before me. As I filed, the AO has mentioned the market price in his order and has not disputed the same. Since the market price is lower than the value adopted by the appellant there is no reduction of cost resulting in inflation of the profit of the eligible unit and thereby a claim of deduction under section 80I. In fact by adopting the value which is substantially higher than the market price, the appellant has increased its cost, reduced the profits of eligible unit and thereby has claimed a lesser reduction under section 80 IA then what could have been calculated if market price of the product was adopted. In such a scenario there was no region for the AO to disturb the calculation made by the appellant. He has increased the value only marginally from 14.365 p.m. to 14.479 p.m. own estimate basis which cannot be accepted under the circumstances. 10.7. Taking into consideration the entirety of the facts and circumstances of the appellant's case and the relevant provision of the Income Tax Act, I find no reason to support the action of AO. Accordingly he is directed to accept the appellant's claim of profit from the VERP II for the purpose of deduction under section 80 IB. This ground of appeal is allowed.*

53. We have seen that the ld Commissioner (Appeals) granted the relief after considering the entire fact related with the claim of assessee. We do not find any reason to differ with the finding of learned Commissioner (Appeals). Thus this ground of appeal is dismissed."

27. Respectfully following the above decision, we are inclined to allow the claim raised by the assessee. Accordingly, Ground No. 2 raised by the revenue is dismissed.

28. Coming to Ground No. 3, relevant facts of the case are, Assessing Officer observed that one of the ground for reopening of the case is that the assessee has claimed an amount of ₹.131.06 crores towards sundry expenses and other charges in the profit and loss account. The break-up of this amount shows that an amount of ₹.5,66,81,860/- has been included therein towards "construction expenses" under Marketing Division. This expenditure is in addition to the repairs and maintenance charges of ₹.43.28 crores pertaining to Marketing Division. The above said expenditure of ₹.5,66,81,860/- is of capital nature and hence not allowable as deduction while computing the income from business.

29. In reply, assessee vide letter dated 13.01.2022 submitted as under: -

> *"That the head shown as expenses construction' is actually 'M & R - Expensed Construction. As er the assessee expenses guidelines, these expenses are incurred for modification, relocating realignment and reinstallation of tanks, pumps, dispensing units, electrical systems etc. to maintain operation at current levels and are charged to 'expensed construction'. Any expenditure incurred for modification which results in increasing capacity / efficiency are*

capitalized in the books of accounts. The assessee also furnished a detailed break up of location wise expenses amounting to Rs.5,66,81,860/-. The assessee submitted that the expenses are pure maintenance and repair activities that are charged to this account and hence are purely revenue in nature and allowable under section 37(1) of the Act and the same cannot be capital in nature."

The assessee has also relied on CIT Vs. Madras Auto Services P. ltd (1998)233 ITR 468 (SC) and other cases to support its case that the impugned expenditure are revenue in nature.

30. After considering the submissions of the assessee, Assessing Officer rejected the submissions of the assessee by observing as under:-

"14. I have considered the submission made by the assessee. I have also gone through the relevant provisions and judicial pronouncements on the subject. The decisions being relied upon by the assessee have the facts, different from assessee's facts and hence not applicable here. Revenue expenditures are short-term business expenses usually used immediately or within one year. They include all the expenses that are required to meet the current operational costs of the business, making them essentially the same as operating expenses. Tracking revenue expenditure allows a business to link earned revenue with the business operations expenses incurred during the same accounting year. Capital expenditures are funds that a company uses to acquire, improve, or maintain physical assets (land, property, equipment software) or intangible assets (patents or licenses). Capital expenditure is generally used to improve the company's capacity or efficiency.

14.1 As regard legal position on the subject, in the case of Arvind Mills Ltd Vs CIT 197 ITR 422 (SC) it has beds held that Capital expenditure would not become revenue expenditure simply by reasons that it was incurred in connection with business activities which ultimately resulted in efficiently carrying on day-to-day business. In the case of Devidas Vithaldas & Co. Vs CIT 84 ITR 277 (SC) it has been held that the expression 'enduring benefit' and rights of permanent nature are only descriptive and not definite

and are relative in meaning not synonymous with 'perpetual' or 'everlasting'. In the case of K.T.M.T.M. Abdul Kayoom Vs. CIT (SC) 44 ITR 689 it has been held that to decide whether an expenditure is capital or revenue in nature what is decisive is the nature of the business. the nature of the expenditure, the nature of the right acquired and their relation, inter se.

14.2 In its submission dated 15.02.2022 and during the course of VC the assessee has reiterated the arguments made in earlier reply dated 13.01.2022 which have been duly dealt in the preceding para and hence not repeated.

14.3 In the impugned case, the expenditure has been incurred for modification, relocating realignment and reinstallation of tanks, pumps, dispensing units, electrical systems etc.. Any expenditure incurred for modification which results in increasing capacity/ efficiency are capitalized in the books of accounts. The assessee has derived benefit of enduring nature by incurring such expenditure. In view of such fact legal provision, the impugned expenditure of Rs. 5,66,81,860/- are considered to be capital in nature and hence disallowed while computing assessee's income from business. This means an addition of Rs. 5,10,13,678/- [Rs. 56681860 - Rs. 5668186/- (depreciation @ 10%)] to the total income of assessee.

(Addition Rs. Rs. 5,10,13,678/-)"

31. Aggrieved assessee prefered an appeal before Ld. CIT(A) and filed detailed submissions. After considering the detailed submissions, Ld.CIT(A) allowed the claim of the assessee with the following observations: -

"7.3.5 It is seen from that assessment order that the Ld. AO has not brought any cogent evidence against the claim of the appellant regarding the expenses being of revenue in nature. The appellant being a respectable PSU, there remains no reason for not relying upon the version presented by them. It is held that the ground take by the appellant that expenses are pure maintenance and repair

activities that are charged to P & L account and hence are purely revenue in nature and allowable under section 37(1) of the Act. Therefore, Ground No. 3 taken by the appellant is allowed."

32. Aggrieved, revenue is in appeal before us and at the time of hearing, Ld. DR brought to our notice findings of the Assessing Officer from Page No. 13 of the assessment order and he also brought to our notice findings of the Ld. CIT(A) from Page No. 56 to 67 of the order and he brought to our notice Page No. 64 to 66 of the order in which assessee has submitted a detailed break-up of the expenses which assessee has spent location wise during the year. He submitted that Ld.CIT(A) has merely accepted the above break-up and allowed the claim of the assessee without proper verification. He submitted that the issue may be remitted back to the file of the Assessing Officer for proper verification.

33. On the other hand, Ld.AR of the assessee brought to our notice Page No. 59 to 64 of the Appellate order and he submitted that all these expenditures are incurred by the assessee in the various retail outlets situated across the country. This is not a fresh construction expenditure rather these are all repair expenses carried by the assessee in the

various locations. Therefore, it cannot be termed as a capital in nature. He supported the findings of the Ld. CIT(A).

34. Considered the rival submissions and material placed on record, we observe from the record which is submitted before Assessing Officer and Ld. CIT(A) that assessee has submitted a detailed break-up of the various construction expenditures carried in the various retail outlets across country. The assessee has given a detailed break-up before the authorities for claiming of the above said expenditures, these expenditures are incurred by the assessee in the outlets which is spread across the country and such construction expenses are repairs of the outlets therefore these are revenue in nature and which is nothing but the running expenditure to be carried on by the assessee to upkeep the various outlets in the various locations in the country. Therefore, we hold that the above expenditure claimed by the assessee is allowable expenditure. By incurring these expenditures there is no creation of new assets. Accordingly, we are inclined to accept the findings of the Ld.CIT(A). Accordingly, ground raised by the revenue is dismissed.

35. In the result, appeal filed by the revenue is dismissed.

ITA No. 1995/MUM/2023 (A.Y. 2004-05)

36. Coming to the appeal relating to A.Y. 2004-05, since facts in this case are mutatis mutandis, therefore the decision taken in A.Y. 2003-04 are applicable to this assessment year also. Accordingly, this appeal is dismissed.

37. In the result, appeal filed by the revenue is dismissed.

38. To sum-up, appeals filed by the revenue are dismissed and cross objections filed by the assessee are dismissed.

Order pronounced in the open court on 07th February, 2024.

Sd/-	Sd/-
(ABY T VARKEY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 07.02.2024
Giridhar, Sr.PS

Copy of the Order forwarded to:
1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum