IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES, 'H' NEW DELHI

BEFORE SHRI PRAKASH CHAND YADAV, JUDICIAL MEMBER
AND
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER

Sl.No.	ITA No.	Filed by Assessee/Revenue	Assessment year	Authority passing the order

ITA Nos.158, 159, 4856 & 5358/Del/2010 & ITA No.2539/Del/2017
Assessment Years: 2002-03, 2003-04, 2004-05, 2006-07 & 2005-06 respectively

Gujarat Guardian Ltd. 4/7C, DDA Shopping Centre New Friends Colony New Delhi 110065 **PAN NO :AAACG1622K**	**Vs.**	DCIT Circle-12(1) New Delhi
APPELLANT		**RESPONDENT**

ITA Nos.4859/Del/2009, ITA Nos.157 & 4791/Del/2010
Assessment Years: 2002-03, 2003-04 & 2004-05 respectively

DCIT Circle-12(1) New Delhi	**Vs.**	Gujarat Guardian Ltd. 4/7C, DDA Shopping Centre New Friends Colony New Delhi 110065 **PAN NO :AAACG1622K**
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Ajay Vohra, Sr. A.R., Shri Neeraj Jain, A.R., Shri Ramit Katiyal, A.R. & Shri Kunal Pandey, A.R.
Respondent by	:	Shri Bhopal Singh, Sr. D.R.

Date of Hearing	:	06.05.2025
Date of Pronouncement	:	16.07.2025

O R D E R

PER PRAKASH CHAND YADAV, JUDICIAL MEMBER:

These appeals of assessee and revenue are arising from the orders of CIT(A)/DRP as per the details mentioned in the cause title of this order. Since the issue in all these appeals is common, these are clubbed together, heard together and disposed of by this common order for the sake of convenience and brevity. It is further clarified that in these appeals multiple issues are involved, similar in almost all years, so we are discussing the relevant facts at appropriate places where issues are mentioned.

2. First, we adjudicate ITA No.159/Bang/2010 (assessee's appeal) for the AY 2002-03 as follows:

3. Brief facts of the case which are relevant for adjudication of the Transfer pricing issue impugned in AY 2002-03 as ground number 1 are that the assessee filed its return of income with DCIT, Circle 12(1), New Delhi. Thereafter a reference was made by the AO to the ld. TPO to determine the 'arm's length price' u/s 92CA (3) of the Act in respect of 'international transactions' entered into by the assessee during the year under consideration. In response to notice u/s 92CA (2) of the Act, the AR of the assessee appeared from time to time. The documentation prescribed under Rule 10D of the Income Tax Rules was submitted before the ld. TPO. The assessee is an affiliated company of Modi Rubber Limited (MRL), Gujarat Alkalies and Chemicals Limited (GACL) and Guardian International Corporation (GI), USA and engaged in the business of manufacture and sale of float glass. The assessee has its own float glass plant near Ankleshwar. The company manufactures superior quality mirrors using automated curtain coating. During the year the assessee had a total turnover of Rs.307.08 crores with operating profit of Rs.65.38 crores, being 27% on sales.

3.1 The assessee during the relevant previous year entered into several international transactions including export of float glass to its associated enterprise. In the Transfer Pricing Documentation, the international transactions were benchmarked using Transactional Net Margin Method ("TNMM") method. By considering this method as Most appropriate method, the assessee has shown operating profit ratio of GGL at 27.26%, which as per assessee was higher than average of operating profit margin of 5 comparable companies at 6.77%, and hence it is contention of the assessee that the international transactions entered into by GGL are considered to be at arm's length.

3.2 The TPO, however, in the order passed under section 92CA(3) of the Act determined the arm's length price of international transactions of export of float glass, applying CUP method as against the TNMM applied by the assessee, holding that in the case of the assessee, same products have been sold to unrelated parties, and hence internal CUP would be the most suitable method for benchmarking the sale price to associated enterprise.

3.3 The TPO, for the purpose of computing the ALP, has applied CUP method as the most appropriate method, and has adopted following methodology for selection of the comparable uncontrolled transactions:

(i) The sales made to associated enterprises and independent parties were segregated on the basis of class of goods i.e. clear glass, bronze glass and grey glass.

(ii) Amongst the categories so classified further segregation was made on the basis of thickness of glass.

(iii) The sales made in respect of each category was then consolidated

on the basis of zone/continent.

(iv) Country wise monthly average prices realized in the same or preceding month from uncontrolled customers was adopted as the arm's length price for exports made in each country.

(v) In the absence of sales to unrelated parties in a specific country, monthly average price of export of same category of product in the same continent was used as the benchmark.

(vi) In cases where there was no sale of same category of products to unrelated parties in the same continent, the export of glass to unrelated parties of different category in terms of thickness was used as the benchmark.

3.4 The TPO accordingly computed an adjustment of Rs. 2,13,89,379 in respect of international transaction of export of goods. (reference in summary calculation of TP adjustment @ pg 3-8 of Convenience compilation – TP). After the receipt of TPO order, the AO passed the assessment order and framed the assessment.

4. Aggrieved with the order of AO, assessee filed an appeal before the ld. CIT(A), who vide its order dated 27.10.2009 partly allowed the appeal of the assessee.

4.1 The CIT(A), held that CUP method can only be applied in respect of such transactions only, where the products of similar nature have been sold to unrelated parties, within the same month and same country. Accordingly, the CIT(A) held that out of total international transactions of export of glass, CUP method could only be applied in respect of four transactions amounting to Rs 47,10,329/-. The CIT(A) accordingly, restricted the adjustment made by the TPO to Rs 6,94,469/-.

5. Aggrieved by the order of ld. CIT(A), the assessee and revenue both has come up in appeal before us. The main contention of the assessee is that CUP method could not be applied for determining the ALP of the international transactions of export of float glass to the customers in various countries and the assessee has rightly applied TNMM method for benchmarking the international transaction. The assessee has made following submissions:

(a) The TPO rejected TNMM holding that [Para 8 of TP order on Pg 13 of convenience compilation - TP], " The *assessee has exported the same glass to both AE & non AE and hence internal comparables are available. The TNMM does not provide an appropriate method since on an entity wide basis the assessee's aggregate net profit may be within industry range but chances of under invoicing cannot be ruled out because it is difficult to determine the income arising out of international transactions".*

(b) The premise of application of the CUP method by the TPO is incorrect due to differences in factors such as thickness of glass sold to the AEs and non-AEs, geographical differences, volume of products sold to AEs and Non-AEs and differences in the terms and conditions at which goods were sold by the assessee to AEs and Non-AEs. It would be appreciated that due to aforesaid factors benchmarking analysis of international transaction of sale of float glass undertaken by the assessee cannot be done by applying CUP method on a transactional basis. Accordingly, under the circumstances, a profit-based method i.e. TNMM can only be applied for the purpose of benchmarking analysis.

(c) The TNMM examines the net profit margin relative to an appropriate base (e.g. cost, sales, assets) that a taxpayer realizes from a controlled transaction (or transactions that are appropriate to

aggregate under the transfer pricing principles). TNMM determines an arm's length price for the transfer of tangible property by reference to an objective measure of profitability of an uncontrolled party, or comparable, that engages in similar transactions or operates under similar circumstances. The method compares the profitability of either the controlled party buyer or seller to the profitability of the comparable. The TNMM is statutory method prescribed under section 92C of the Act and under the Indian Transfer Pricing regulations all the methods stand on equal footing.

(d) The transaction of export of glass is closely linked with the overall operations of the assessee. It is submitted that the assessee was the first company to set up the float glass plant in India. Until that time float glass was not known in the Indian market and conventional sheet glass was used in all the applications. Being the first entrant, the company had to develop the market for float glass. Float glass plant is an example of continuous process industry and the furnace once fired cannot be shut. If the plant is to operate at less than the optimum capacity, there would be substantial fixed cost that would still have to be incurred. Soon after the commencement of production, the assessee realized that there was excess capacity of about 40-50% in the domestic market and the assessee could sell only 40% of its production in the Indian market leading to heavy losses and cash flow problems. It is pertinent to note that the glass industry in India has been facing situation of excess capacity for several years. In this scenario, it was imperative for the company to explore the export market for sale of its products.

(e) Further, the Letter of Intent (LOI) and the approval letter for foreign collaboration issued to the assessee by the Government of India, stipulated a condition that the company would export 25% of its production. Non-fulfilment of export obligation would have

attracted penal provisions. The assessee had to make sure that such an eventuality does not occur. Also, the assessee had imported part of the equipment's at concessional rate of duty of 15% under Export Promotion Capital Goods (EPCG) Scheme. In connection with these imports, the assessee had undertaken export obligation to be fulfilled over a period of 5 years. Accordingly, export of glass was essential for the survival of the assessee in the float glass industry. In view of the aforesaid, it is respectfully submitted that transaction of export of glass was closely and inextricably linked with the overall operations of the assessee and therefore, entity level TNMM has been correctly applied by the assessee for the purpose of benchmarking the international transaction of export of glass.

6. Ld. Counsel for the assessee in a nutshell has reiterated the submissions made before the lower authorities and also filed synopsis before the bench and has relied by so many authorities as found mentioned in the synopsis.

6.1 Ld. D.R. relied upon the orders of AO and TPO and also relied upon the synopsis filed by his predecessor DR with the bench.

Finding of the Bench:-

7. After considering rival submissions, we observe that the ld. CIT(A) in its order has mentioned that he is in agreement with the assessee's submission that CUP method requires high degree of comparability and the same can only be applied in such transactions, which can be compared having regard to the tangible/intangible/service sold and the surrounding circumstances in controlled transactions with uncontrolled transactions. We further observed that there are certain other factors for determining comparability of the uncontrolled and controlled transaction by

applying CUP method such as nature of product/service, quantity volume involved, market conditions, geographical market timing of the transaction and alternative commercial arrangements. The ld. CIT(A) referred to the judgement of Aztech Software, Special Bench, Delhi ITAT reported in 107 ITD 141 and called for such instances of the sale transactions(which fulfills all the conditions for CUP method), from the assessee in respect of sales made to AEs and non-AEs in the same country and in the same month were made by the assessee. Thereafter, the ld. CIT(A) found that only in 4 cases, the transactions can be bench marked by applying CUP method i.e. to the tune of Rs.6,94,649/- and ld. CIT(A) then came to the conclusion that the remaining transaction of Rs.15,68,90,190/- are not falling in the criteria for CUP method and hence the assessee correctly applied TNMM as the most appropriate method with respect to the remaining transaction of Rs.15.68 crores. Ld DR failed to point out any perversity in the order of the CIT(A). Therefore, considering the totality of the facts of the case and the judgements referred to by the ld. Counsel for the assessee as well as the CIT(A), we are of the view that there is no error in the order of ld. CIT(A) and hence we fortify the order of ld. CIT(A).

8. The next ground of appeal in AY 2002-03 in assessee's appeal is that the CIT(A) erred on facts and in law in confirming the action of the AO in computing deduction under section 80HHC of the Act by reducing an amount of Rs. 1,44,233 on account of sundry amounts written back, by erroneously applying Explanation (baa) to section 80HHC of the Act.

9. Facts as coming out from the order of ld. CIT(A) are that the assessing officer computed "profits of the business" for the purposes of computing the deduction under section 80HHC of the Act, as defined in Explanation (baa) to section 80HHC of the Act after

reducing 90% miscellaneous income of Rs.9,82,069 comprising of the following:

Description	Amount
Scrap sales	7,48,467
Cash discounts from the vendors	85,369
Sundry amounts written back	**1,44,233**
Interest on fixed deposits for Excise Department	5,585
Total	**9,82,069**

9.1 The CIT(A) held that scrap sale of Rs.7,48,467 and cash discount of Rs.85,369 are not in the nature of brokerage, commission, interest, rent, etc., or receipt of similar nature covered in Explanation (baa) to section 80HHC(1) of the Act. The CIT(A), however, did not accept the assessee's contention with respect to sundry amounts written back amounting to Rs.1,44,233.

9.2 Ld. A.R. submitted that the sundry amounts written back of Rs.1,44,233 being in the nature of operating income is part of profit of the business and is not in the nature of brokerage, commission, interest and rent, etc., covered in Explanation (baa) of section 80HHC(1) of the Act and is, therefore, not required to be excluded while computing profit of the business for the purpose of deduction under section 80HHC of the Act.

10. Ld. D.R. relied upon the orders of authorities below.

-:Finding of the Bench:-

11. The issue in dispute before us is whether the lower authorities are correct in reducing the amount of Rs.1,44,233/- from the ambit of section 80HHC of the Act. The main contention of the counsel for

the assessee is that the sundry amount returned back is inextricable linked with the profits derived by the undertaking and hence entitled for the deduction u/s 80HHC of the Act.

12. After considering the rival submissions, we are of the view that this amount of Rs.1,44,233/- is in the nature of income and hence linked with the amounts available for the deduction u/s 80HHC of the Act. It is settled position of law that profit derived from export business are entitled for deduction u/s 80HHC of the Act. The amount written back to the tune of Rs.1,44,233/- are the sundry amounts which has direct nexus with the business receipts of the assessee and therefore, entitled for the deduction u/s 80HHC of the Act. Therefore, we allow this ground of appeal of the assessee.

13. The next issue in the assessee's appeal is disallowance of Rs.4,47,917/-, being depreciation on indexed cost of asset on account of foreign exchange rate fluctuation. With respect to this issue, the AO has relied upon the amendment to section 43A of the Act to hold that assessment to the value of fixed asset will only be made at the time of actual payment. The disallowance of depreciation as aforesaid was affirmed by the ld. CIT(A) in view of the amendment.

14. Ld. Counsel for the assessee relied upon the judgement in the case Woodward Governor reported in 294 ITR 451 for the proposition that the amendment brought in section 43A of the Act is prospective and applicable w.e.f. 1.4.2003.

15. Ld. D.R. could not provide any adverse ruling holding otherwise against the assessee.

Finding of the Bench:

16. After considering the rival submissions, we are of the view that

the authorities have erred in relying upon the provisions of section 43A of the Act, which provisions are held to be prospective by the Hon'ble Delhi High Court in the case of Woodward Governor reported in 294 ITR 451, which decision has been further affirmed by the Hon'ble Supreme Court in the case of CIT Vs. Woordward Governor reported in 312 ITR 254 (SC). Therefore, we allow this ground of appeal of the assessee.

17. The next issue in the assessee's appeal is the disallowance of Rs.10,67,000/- being doubtful debts written off as irrecoverable by the assessee during the relevant assessment year. The case of the AO is that the assessee has made a mere provision of the doubtful debts and has failed to provide any documentary evidence to show that the assessee has actually written off these amounts. The ld. CIT(A) affirmed the order of AO on the ground that unless and until the debt become actually shown as bad, the assessee is not entitled for the deduction of the bad debt as per the provisions of section 36(1)(vii) of the Act.

18. Counsel for the assessee argued that the assessee has duly written off these debts, which are in the nature of trade debtors. The assessee has also filed the details of the parties to whom these debts pertain.

19. Ld. D.R. relied upon the orders of authorities below.

Finding of the Bench:

20. After considering the rival submissions we observe that Hon'ble Supreme Court in the case of TRF Ltd. Vs. CIT reported in 323 ITR 397 has held that it is not necessary for an assessee to establish that the debt, in fact, has become irrecoverable. The Hon'ble Apex Court further held that if the assessee writes off these

debts in its books of accounts as irrecoverable, then passing of these entries would be sufficient for allowing the claim of the assessee. We further observe that CBDT vide its Circular No.12/2016 dated 30.5.2016 has also ruled that the intention behind the amendment u/s 36(1)(vii) of the Act was to eliminate litigation on the issue of allowability of bad debts by doing away with the requirement for the assessee to establish that the debt, has in fact become irrecoverable. Considering the purport of the CBDT Circular and the judgement of Hon'ble Supreme Court, we allow this issue in favour of the assessee subject to the condition that the assessee will prove before AO with the help of audited financials that the assessee has actually written off these amounts in its books of accounts in the relevant year. With these observations, this issue is allowed for statistical purposes.

21. The next issue is the disallowance of Rs.2,08,470/- on account of purchase of software. It is pertinent to note here that the assessee has made an alternate claim of 60% depreciation on this purchase of software i.e. Nokia IP 110 Base System appliance.

22. Ld. Counsel for the assessee appearing on behalf of the assessee vehemently thrust upon the allowability of 60% depreciation on this appliance.

23. Ld. D.R. relied upon the orders of authorities below.

Finding of the Bench:

24. After considering rival submissions, we are of the view that without going into the controversy regarding the nature of these expenses, whether capital or revenue, we allow 60% depreciation on this appliance and decide accordingly.

25. The next issue is claim of assessee with respect to the sales tax incentives amounting to Rs.13,21,05,557/-. These incentives pertain to Gujarat Unit of the assessee company.

26. Before going into the merits of this ground, it is pertinent to note certain dates which goes to the root of the matter:

Date of filing Income Tax Return	30.10.2002
Date of intimation issued u/s 143(1) of the Act	27.02.2003
Date of issuance of notice u/s 148 of the Act	23.01.2004
Date of passing of order u/s 147 of the Act	30.03.2005
Date of Supreme Court order in the case of CIT vs. Ponni Sugars and Chemicals Ltd: 306 ITR 392	16.09.2008
Date of application filed before CIT(A) raising additional ground of appeal qua treatment of sales/ purchase tax subsidy as capital receipts	05.11.2008

26.1 Perusal of the above chart would show that the assessee has originally filed the return of income on 30.10.2002. This return of income filed by the assessee was processed and thereafter selected for scrutiny u/s 148 of the Act. Thereafter, relying upon the judgement of Hon'ble Supreme Court in the case of CIT Vs. Ponni Sugar reported in 306 ITR 392. The assessee has filed an additional ground before the ld. CIT(A) and claimed that the assessee is entitled for the sales tax incentives and the receipts of sales tax incentives are capital receipts not liable to be taxed under the Income Tax Act. The assessee further argued that these incentives were provided for making investment in the state of Gujarat. It is pertinent to observe that this claim was not made before the AO during the re-assessment

proceedings rather has been made for the first time before the ld. CIT(A) by way of additional ground.

27. The ld. CIT(A) relying upon the judgement of Goetz India Ltd. Vs. CIT reported in 284 ITR 323 dismissed the ground of the assessee by holding that assessee could have made this claim by filing revised return.

28. Counsel for the assessee appearing argued that the order of Goetz India Ltd. (supra) could not impinge upon the powers of Ld. CIT(A), therefore, the ld. CIT(A) erred in not admitting the claim of the assessee by way of additional ground.

29. Ld. D.R. relied upon the decision of Goetz India Ltd. (supra).

Finding of the Bench: -

30. After considering the rival submissions, we are of the view that the ld. CIT(A) is not correct in not adjudicating the additional ground vis-à-vis the claim of sales tax incentive. Therefore, we admit this ground and proceed to adjudicate. Decision of Goetz India Ltd. (supra) is not fettering the powers of appellate authorities for adjudicating new claim.

30.1 After admitting this ground, we have to decide whether an assessee can claim incentive or any other benefits, which he is entitled under the income tax law under proceedings of section 148 of the Act.

30.2 In this regard, ld. Counsel for the assessee relied upon the judgement of Hon'ble Karnataka High Court in the case of Karnataka State Co-operative Apex Banks reported in 283 taxman 98 (Karn.) for

the proposition that the assessee can claim a benefit in the proceedings of section 148 of the Act also. Ld. D.R. relied upon the judgement in the case of **Sun Engineering reported in 198 ITR 297 (SC)** for the proposition that assessee cannot claim a benefit under proceedings of section 148 of the Act.

30.3 After considering the rival submissions, we are of the view that the case of the assessee is squarely covered by the Hon'ble Supreme Court in the case of Sun Engineering (supra), wherein it was held as under:

"26. Although s. 147 is part of a taxing statute, it imposes no charge on the subject but deals merely with the machinery of assessment and in interpreting a provision of that kind, the rule is that that construction should be preferred which makes the machinery workable. Since the proceedings under s. 147 of the Act are for the benefit of the Revenue and not an assessee and are aimed at garnering the "escaped income" of an assessee, the same cannot be allowed to be converted as "revisional" or "review" proceedings at the instances of the assessee, thereby making the machinery unworkable.

***27.** As a result of the aforesaid discussion, we find that, in proceedings under s. 147 of the Act, the ITO may bring to charge items of income which had escaped assessment other than or in additional to that item or times which have led to the issuance of the notice under s. 148 and where reassessment is made under s. 147 in respect of income which has escaped tax, the ITO's jurisdiction is confined to only such income which has escaped tax or has been under assessed and does not extend to revising, reopening or reconsidering the whole assessment or permitting the assessee the re-agitate questions which had been decided in the original assessment proceedings. It is only the underassessment which is set aside and not the entire assessment when reassessment proceedings are initiated. The ITO cannot make an order of reassessment inconsistent with the original order of assessment in respect of matters which are not the subject matter of proceedings under s. 147. An assessee cannot resist validly initiated reassessment proceedings under this section merely by showing that other income which had been assessed originally was at too high a figure except in cases under s. 152(2)."*

30.4 Respectfully following the above judgement, we are of the firm belief that assessee is not entitled to claim the benefits of sale tax incentive in proceedings u/s 148 of the Act particularly in view of the facts that the assessment was not reopened on any of the issue

related to the taxability of these incentives. Further, the case law relied upon by the counsel for the assessee in case of Karnataka State Co-operative Apex Banks, the facts of that case are different in as much as in that case the assessee has claimed the benefit in the return of income filed in response to the notice issued u/s 148 of the Act. However, in the present case, the assessee has not claimed this benefit while filing the return of income in response to section 148 of the Act, therefore, that case has no application in the facts of the present case. Further, we do not find any force in the argument of the assessee that it is a case of assessment and not reassessment. In our view intimation passed u/s 143(1) of the Act are also equivalent to the order of assessment for certain provisions for example, powers u/s 263 of the Act can be initiated against the intimation passed by the assessing officer, as it stood at relevant times. Recently, coordinate bench of the Delhi ITAT in the case of Jindal Photo in ITA No.5251/Del/2015 dated 21.5.2025 while deciding the admissibility of a fresh claim under similar set of facts after referring to the judgement in the case of Goetz India Ltd. (supra) and the provisions of section 139(1) of the Act and 139(5) of the Act has observed as under: -

*18 With regard to admissibility of claim, the ld AR submitted that the reliance placed by AO/CIT(A) on decision of **Goetz** (supra) is highly misplaced since SC judgment was in context of **power of AO** to entertain a fresh claim made otherwise than by revised return. The Supreme Court, however, made it clear that the decision in **Goetze India Limited** (supra) was restricted to the power of Assessing Authority to entertain a claim for deduction otherwise than by a revised return and the same, did not impinge on the power of the Tribunal u/s 254 of the Act to permit a new claim……..*

19. That apart, the ld. counsel for the assessee submitted, that the purpose of assessment is to compute the correct taxable income of the assessee as per the provisions of the Act and even if the deduction was not claimed in the return of income by the assessee, which was clearly allowable in law to the assessee, the assessing officer was duty bound to consider and allow such claim suo-motu, while framing the assessment and relied on the Circular No. 14 (XL-35) dated 11.04.1955 issued by the Board of Revenue under the Income-Tax

Act, 1922. The ld AR relied on the following decisions, where Courts have held that the AO is duty bound to grant benefits and reliefs during assessment, even if not claimed in ROI.

*20.The ld. counsel for the assessee relied upon the decision of the Hon'ble Supreme Court in the case of **CIT vs. Mahindra Mills:** 243 ITR 56, which approved the aforesaid Circular……..*

52. With respect to the admissibility of the claim of non-taxability of sales tax subsidy for assessment years 2008-09 to 2011-12, in the 2nd category of cases, we find that for the above three years, on the date of search 14.11.2011, the assessment was pending and therefore they were considered as abated assessment years. The undisputed fact is the assessee, in these three assessment years, had declared the sales tax subsidy as income in the original returns filed u/s 139(1). Though time was available for filing revised return, the assessee, for these three years, did not file any revised return to claim the sales tax subsidy as non-taxable. Subsequent to the search under section 132 on 14.11.2011, the assessee was issued notices under section 153A in response to which the assessee filed returns declaring the sales tax subsidy as its income. It was only during the assessment proceedings under section 153A that the assessee claimed the sales tax subsidy as non-taxable by way of revised computation of income. In such asituation we are called upon to decide whether the assessee can make a fresh claim other than by way of filing Revised return u/s 139(5) and whether an additional claim/deduction be made in the proceedings under section 153A.

*53. We find that in **NTPC**the Hon'ble Apex Court has held that the assessee can make a claim for the **first time** before the Tribunal with a caveat that the claim should purely be a question of law arising from the facts which are already on record in the assessment proceedings. Further, there must be a bonafide and good reasons as to why the claim could not have been raised earlier by the assessee. Further, in the **NTPC** case, the Hon'ble Court, observed that the Revenue gave no objection to the assessee to setup the fresh claim for the first time before the Tribunal. In the instant case, we find that the claim is firstly made before the AO who rejected the claim. The claim was further put before the CIT(A) but in vain. The claim was made in the ITAT in the normal course of appeal proceedings and therefore was not either fresh claim nor was for the first time before the ITAT. Furthermore, the allowability of claim of sales tax subsidy being capital in nature was not automatic and was in serious dispute with the Revenue. In view of this crucial factor, the decision of **NTPC** and **Jute Corporation** and **Wipro Finance Ltd** regarding plenary powers of ITAT u/s 254, do not apply. We are of the considered view that as the claim for exclusion of the sales tax subsidy was made for the first time before the AO, therefore, the decision of the Hon'ble Supreme Court in the case of **Goetze India Ltd** squarely apply. The assessee*

agitated this issue before the CIT(A) in regular appeal which was adjudicated by him and rejected, hence the issue was before ITAT in normal course. In view of the above, the assessee cannot be allowed a claim without revising the return u/s 139(5) within the due date and mandatory time limits.

*54. In this context, the decision in the case of **Wipro Ltd** is of great relevance. Though it was in the context of specific statutory timeline for withdrawal of claim as mandated under section10B(8), it laid down the importance of fulfillment of statutory conditions namely filing of return under section 139(1) for claiming exemption/deductions. This proposition was further strengthened by the Hon'ble Supreme Court in the later decision in the case of **Shriram Investment** in Civil appeal no 6274 of 2013 dated 04.10.2024 where it upheld the decision of Madras High Court that after the revised return was barred by time there was no provision to consider the claim made by the assessee. The hon'ble Supreme Court also noted that the case of **NTPC** was one where the Department gave no objection for enabling the assessee to setup a fresh claim which makes the instant case distinguishable on facts as in the instant case, the Revenue has raised objection to the claim at every stage, be it the AO, CIT(A) or the Departmental Representative before the ITAT. We are of the opinion that when there is no provision in the Act where the assessee can claim expenses/deduction outside the Return filed u/s 153A, the same has to be rejected. Our conclusions are duly supported by the decision of the Hon'ble Supreme Court in the case of **Commissioner of Customs (Imports), Mumbai Vs. Dilip Kumar and Company**(AIR 2018 Supreme Court 3606) that the provisions for exemption/deduction has to strictly construed and any perceived ambiguity would necessarily accrue to the benefit of the Revenue.*

30.5 In view of the above judgement of Hon'ble Apex Court in the case of Sun Engineering cited (supra), the decision of coordinate bench in the case of Jindal Photo (supra), we are of the view that assessee is not entitled for this claim in proceedings u/s 148 of the Act. So far as the issue on merits is concerned, whether the assessee is entitled to sales tax incentive or not, we will deal with this issue in appeal of assessee for AY 2005-06, which findings would be applicable in this year also.

31. Last ground of the assessee are as under:

8. That on the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in not directing the assessing officer to compute book profit under section 115JB of the Act after reducing from the profit as per profit and loss account deduction under section 80HHC of the Act computed on the basis of profit as per books of accounts instead of reducing deduction under that section computed as per provisions of the Act.

8.1 That on the facts and circumstances of the case and in law, the assessing officer ought to have allowed 100% deduction under section 80HHC of the Act in respect of export profits while computing 'book profits' in terms of clause (iv) of Explanation 1 to section 115JB of the Act, and not restricting the same to the extent specified in sub-section (1B) of the section 80HHC of the Act.

32. Facts relevant to this are that for the relevant assessment year, the assessee had filed its return of income declaring Nil income under normal provisions of the Act and Rs.34,37,36,599/- under section 115JB of the Act. Accordingly, the assessee paid tax on the deemed income in accordance with provisions of section 115JB of the Act. In the return of income, the assessee inadvertently made reduction under clause (iv) of Explanation 1 to section 115JB to the extent of the limits specified in sub-section (1B) of section 80HHC of the Act viz. 70% of export profits, under misconception of law, without appreciating that such limits are not applicable for computing book profits under that section. Accordingly, book profits of Rs.34,37,36,599 were returned under section 115JB of the Act by reducing export profits of Rs. 9,31,67,949 restricted to 70% of the eligible profits, in terms of sub-section (1B) of section 80HHC **as against** 100% export profits of Rs. 13,30,97,070 being eligible for deduction sub-section (3)/(3A) of section 80HHC of the Act.

33. The ld. A.R. for the assessee submitted that this issue stands covered by the decision of the Hon'ble Supreme Court in the case of **Ajanta Pharma Ltd vs. CIT: 327 ITR 305,** wherein the Court has held that provisions of section 115JB of the Act is a self-contained code and consequently 'book profit' under that section has to be

computed on the basis of net profit as shown in the audited financial statements, subject to various upward and downward adjustments as required to be made in terms of various clauses given in Explanation 1 to that section. Their Lordship further held that even though in terms of sub-section (1B) of section 80HHC, for the purpose of computing income under the normal provisions of the Act, deduction of export profits is restricted to the extent specified therein, the said restriction is, however, not applicable for the purpose of computing 'book profits'.

33.1 He placed reliance, in this regard, on the following decisions:

- CIT v. Flex Foods Ltd.: 360 ITR 359 (Del)
- CIT v. Sri Vishnu Shankar Mils Ltd.: 198 Taxman 236 (Mad)
- CIT v. G.T.N. Textiles Limited: 248 ITR 372 (Ker)
- CIT v. C. P. S. Textiles (P.) Ltd.: 340 ITR 590 (Mad)
- CIT v. K.G. Denim Ltd.: 180 Taxman 590 (Mad)
- CIT v. Hindustan Aeronautics Ltd.: 203 Taxman 449 (Kar)
- Syncome Formulation (I) Ltd.: 108 TTJ 105 (Mum) (SB)
- JT. CIT v. Kanco Enterprises Ltd.: 156 ITD 926 (Kol)
- Kothari Products Ltd. v. DCIT: ITA Nos. 210, 306, 348 & 408/LKW/2012 (Lucknow)
- The Indian Smelting and Refining Company Ltd. v. ACIT: ITA Nos. 2942 and 2941/Mum/2012 (Mum)
- Wheels India Ltd., Chennai v. Assessee: ITA No.1430/Mds/2010 (Chen)
- N.W. Export Limited v ITO: ITA No. 3123/Mum/2010 (Mum)
- Addl. CIT v Weizmann Ltd and Weizmann Ltd.: IT.A No.4603 & 4161/Mum/2008 (Mum)
- DCIT vs. Govind Rubber (P) Ltd: 89 ITD 457 (Mum-Tri)
- Garware Polyester Ltd vs ACIT:143 ITD 87 (Mum-Tri)
- M/s Bonfiglioli Transmissions Pvt. Ltd. v ACIT: ITA No.457Mds/2007 (Chen)
- ACIT vs Varinder Agro Chemicals Ltd: 161 Taxman 134 (Chd)(Mag)

33.2 In addition to the above, Mr Vohra ld Sr Counsel further submitted that the book profits under section 115JB of the Act should be computed with reference to adjusted book profits and not the taxable profits computed under the normal provisions of the Act.

34. Ld. D.R. relied on the orders of the authorities below.

Finding of the Bench: -

35. After considering the rival submissions we observe that Special Bench of the Tribunal in the case of ACIT vs. Ashima Syntex Ltd: 117 ITD 1 (ALT) (SB), following the decision of other Special Bench of the Tribunal at Bombay in the case of DCIT v. Synchrome Formulations (I) Ltd: (supra), has held that deduction under section 80HHC of the Act is to be computed with reference to the profit as per books of accounts and not as per provisions of 115JB of the Act. The aforesaid decision in the case of Syncome Formulations (supra) too, has been upheld by the Hon'ble Supreme Court in the case of CIT vs. Bhari Information Tech. Sys. Pvt. Ltd: 340 ITR 593. Respectfully following the decision of Special Bench we hold that section 115JB is a self-contained code and hence only those adjustments which are specified thereunder are to be given effect. Therefore, we are of the firm view that the AO ought to have allowed 100% deduction of 80HHC instead of 70%. We direct accordingly and set aside the order of the CIT(A) and AO.

ITA 4859/Del/2009 (AY 2002-03) (Revenue Appeal):

Now we adjudicate cross appeal of revenue in ITA No.4859/Del/2009 for the AY 2002-03 as follows:

36. This appeal is filed by the revenue against the order of ld. CIT(A) for assessment year 2002-03. Revenue has raised 3 grounds of appeal. Brief facts of the case relevant for ground number 2 are not repeated here for the sake of brevity. So far as ground No.1 is concerned, this ground is general in nature and hence does not require any specific adjudication.

Finding of the Bench: -

37. With respect to ground no.2, the grievance of the revenue is that the ld. CIT(A) has erred in holding the application of TNMM method with respect to the international transactions of sales of Rs.15.68 Crores. With respect to this ground, we observe that this issue has already been decided by us, in assessee's appeal in ITA No.158/Del/2010 for the AY 2002-03, wherein we have affirmed the view of the CIT(A). Therefore, this ground of appeal raised by the revenue stands dismissed.

38. Ground No.3 of the revenue's appeal is related to the deletion of Rs.27.29,861/- on account of software purchase. Brief facts of the case, which are relevant for this issue are that the assessee has purchased software for an amount of Rs.29,38,331/-. The AO treated these expenses as capital in nature on the ground that these expenses were providing benefits of enduring nature to the assessee and hence the same are capital in nature. The ld. CIT(A) in its order partly sustained the disallowance by observing that out of the total expenses of Rs.29.38 lakhs, an amount of Rs.27,29,861/- is pertaining to such expenses, which are revenue in nature and balance of the amount has been disallowed by the ld. CIT(A) treating the same as capital in nature.

Finding of the Bench: -

38.1 At the outset, it is observed that this issue is squarely covered by the decision of ITAT Delhi in assessee's own case in ITA No.3214 & 3215/Del/2013 vide order dated 22.8.2014 for the AYs 2007-08 & 2008-09, wherein the coordinate bench of this Tribunal in paras 43 & 44 has discussed this issue and after referring to the judgement of Hon'ble Delhi High Court in the case of Asahi India Safety Glass Ltd.

reported in 346 ITR 329 and CIT Vs. Amway India reported in 346 ITR 341 has held that the expenses incurred by the assessee on account of software license purchase and development of other miscellaneous software and maintenance of web sites are revenue in nature. Respectfully following the verdict of the coordinate bench, we dismiss the appeal of the revenue and sustain the order of ld. CIT(A).

ITA No.159/Del/2010 (AY 2003-04) (Assessee's Appeal):

39. The present appeal of the assessee is arising from the order of ld. CIT(A) dated 11.11.2009 and relates to assessment year 2003-04. In this appeal, the assessee has raised total 5 grounds of appeal.

40. Ground Nos.1 & 2 are further divided into sub-grounds.

40.1. In ground Nos.1 to 1.4, the assessee has challenged the addition of Rs.1,52,392/- on account of adjustments made by the TPO in respect of international transactions entered into by the assessee.

41. Facts relatable to ground Nos.1 & 1.4 are that in this case the assessee has entered into an international transaction with respect to the sale of glass to its AE. After receiving the TPO report, the AO has made an addition of Rs.2,27,46,932/-. The assessee challenged this addition before the ld. CIT(A) and contended that the TPO has wrongly applied CUP method and erred in making the addition of Rs.2,27,46,932/-. The ld. CIT(A) relying upon the orders of assessment year 2002-03 has sustained the addition of Rs.1,52,392/- on the ground that out of the total transactions of Rs.2.27 crores, transaction of Rs.34,38,839/- are to be test checked by applying CUP method. Both revenue and assessee has come up

in appeal against this finding of the ld. CIT(A).

Finding of the Bench: -

42. We have already upheld the order of ld. CIT(A) while deciding the appeal of assessment year 2002-03 in IT No.158/Del/2010 in that order we have observed that the ld. CIT(A) is correct in law in holding that part of the transactions are to be determined having regard to the applicability of CUP method. Therefore, the findings given in that order would mutatis mutandis apply here also.

43. In ground Nos.2 & 2.1, the assessee has challenged the addition of Rs.68,59,982/- disallowed by the AO on account of writing off of the bad debts.

44. Ld. CIT(A) while deciding this issue has relied upon the reasoning come up in assessment year 2002-03 affirmed the order of AO.

Finding of the Bench: -

44.1 While deciding the appeal for assessment year 2002-03 in ITA number 158/Del/2010, we have already observed that in case the assessee has actually written off these advances then no disallowance can be made by the AO. With the same direction, we restore this issue to the file of AO.

45. In ground No.3, the assessee has challenged the addition of prior period depreciation of Rs.2,55,61,332/-, while computing the book profit u/s 115JB of the Act, claimed by assessee on account of change in method of accounting of Tin-In-Tinbath.

46. Brief facts pertaining to this issue are as under:

46.1 During the relevant previous year, the appellant changed its method of accounting of "Tin used in Tinbath", by classifying it as plant and machinery, which was earlier accounted as inventory in the books of account. Consequently, the value of 'Tin used in Tin-bath' amounting to Rs.5,40,74,511 was converted into fixed asset and depreciation was charged on the same. The facts in this regard are explained as under:

46.2 The float glass manufacturing process consists of:

(a) receiving raw materials (silica sand, soda ash, limestone, dolomite etc.), mixing them in the Batch House and conveying the same to furnace;
(b) melting of raw materials in the Furnace using natural gas as fuel;
(c) glass ribbon formation in Tin Bath;
(d) controlled cooling of glass in Annealing Lehr; and
(e) computer controlled automatic cutting.

46.3 In Tin Bath section, molten glass from the furnace would flow by gravity where a continuous ribbon would be formed by controlling glass temperature with time. Tin Bath section is filled with about 200 MT of molten tin. The glass ribbon is pulled through the bath on a layer of molten tin, the temperature of which is controlled electrically. In this section the molten glass floats across the surface of the molten tin, which then absorbs sufficient heat from the glass to enable it to begin forming cohesive and continuous sheet or 'ribbon' of glass. The glass produced through this process is called "Float Glass".

46.4 Although, the molten glass "floats" across the tin bath, some amount of tin sticks to the glass. Molten tin is also highly reactive

metal that combines with oxygen, sulfur, iron and glass in the tin bath. As a result of these combinations and reactions, tin oxide and tin sulfide impurities continuously form on surface of the molten tin.

46.5 These impurities are continuously required to be removed. In addition, other quantity losses occur due evaporation, migration and contamination of molten tin. Thus, Tin in Tin-Bath undergoes continuous and inexorable volumetric and purity losses as a result of tin oxide and tin sulfide formation, tin evaporation, iron contamination and tin absorption in to glass being manufactured. The amount of tin lost in the process is regularly replenished to maintain the required level of Tin in Tin-Bath section of the plant.

46.6 The appellant company, as per industry practice, hitherto treated the original quantity of tin as part of the inventory and subsequent additions of tin to replace the quantity lost in the manufacturing process had been charged to expense account.

46.7 *Based on technical re-evaluation, the appellant was advised that the treatment of Tin in Tin-Bath as inventory was not proper. The volume of tin, installed in the Tin-Bath section of the plant is continuously subject to exhaustion, and wear & tear. On account of physical changes and purity losses, even with the replacement of quantity lost in the process, the Tin in Tin-bath would not retain its original characteristics and would undergo continuous deterioration. Accordingly, Tin in Tin-bath was reclassified to be treated as depreciable asset.* It also does not confirm to the definition of inventory as per Accounting Standard-2 'Valuation of Inventories' which is given below:

> *"3.1 Inventories are assets:*
> *(a) held for sale in the ordinary course of business;*
> *(b) in the process of production for such sale; or*
> *(c) in the form of materials or supplies to be consumed in the production*

process or in the rendering of services."

46.8 Molten tin, it is respectfully submitted, is neither a trading asset held for sale nor it is an asset used in the process of sale of float glass and is also not used as consumable in the production process.

46.9 In view thereof, Tin in Tin-bath does not qualify to be inventory as per AS-2. Instead, it satisfies the definition of 'Fixed Asset' as per Accounting Standard-10 given as under:

> *"6.l Fixed asset is an asset held with the intention of being used for the purpose of producing or providing goods or services and is not held for sale in the normal course of business."*

46.10 The Company was also advised by legal consultants that the float glass plants are treating Tin in Tin-Bath as depreciable asset. Therefore, Tin in Tin-bath was retrospectively reclassified as depreciable asset. Accordingly, *the appellant during the relevant previous year, charged in the books of accounts depreciation on 'Tin used in Tin-bath' for the earlier years amounting to Rs.2,55,61,332.*

46.11 The AO made disallowance of Rs.5,40,74,511 being the amount of Tin used in Tinbath treating the same as fixed asset instead of closing stock. It is pertinent to mention here that prior to this assessment year, the assessee was treating this item of Tin as part of inventory. However, in the impugned year, the assessee changed the accounting method and transferred this inventory to the block of fixed assets. The AO could not accept the method of the assessee and treated the same as part of closing stock and made an addition of Rs.5,40,74,511/-. The AO also reversed the entry of Rs.2,55,61,332/- being depreciation on the asset. This addition has

been deleted by the ld. CIT(A), however, the ld. CIT(A) while computing the book profit of the assessee has added the amount of depreciation in the book provided u/s 115JB of the Act.

47. Feeling aggrieved with the action of ld. CIT(A), the assessee has come up in appeal and argued that ld. CIT(A) has erred in adding the prior period depreciation of Rs.2,55,61,332/- in the book profits of the assessee ignoring the purport of accounting standard 6 issued by the ICAI, which accounting standard provides that the audited accounts of an assessee cannot be altered with for the purpose of computation of book profit u/s 115JB of the Act.

48. Counsel for the assessee also relied upon the provisions of Companies Act as well as judgement of Hon'ble Supreme Court in the case of Apollo Tyres reported in 255 ITR 273.

49. Ld. D.R. relied upon the orders of authorities below.

Finding of the Bench

50. After considering rival submissions, we observe that section 115JB of the Act is a complete code in itself. This section itself provides the upward and downward adjustment, while computing the book profit. The explanation appended to section 115JB of the Act clearly provides that the AO cannot go beyond the adjustments as provided in the explanation u/s 115JB of the Act. We observe that Hon'ble Supreme Court in Appollo Tyres(Supra) while dealing with the provisions of section 115J of the Act, which are pari materia to section 115JB of the Act has observed that the AO has limited power of making adjustments as provided in explanation to section 115J of the Act. Hon'ble Supreme Court further held that the AO does not have jurisdiction to go behind the net profit shown in the profit &

loss account except to the extent as provided in explanation to section 115J of the Act. Further, the assessee relied upon various judgements as mentioned in the synopsis filed by the assessee. Considering the totality of facts and circumstances of the case, we observe that the AO has passed a very cryptic order while deciding this issue, therefore, in the interest of justice, we restore this issue to the file of AO for examining afresh in the light of judgement of Hon'ble Supreme Court in the case of Apollo Tyres (supra) and the other judgements relied upon by the assessee in its synopsis. Ld. AO will grant meaningful opportunity to the assessee to decide before taking a view on this issue.

51. In ground No.4, the assessee has challenged the action of ld. CIT(A) with respect to claim of assessee on sales tax incentives amounting to Rs.13,47,84,407/- and also incentives pertaining to purchase of goods amounting to Rs.6,75,66,563/-.

Finding of the Bench

52. At the outset, we observe that the ld. CIT(A) has dismissed this ground solely relying upon the judgement in the case of Goetz India Ltd. reported in 284 ITR 323.

53. So far as the action of the ld. CIT(A) in not entertaining the claim of the assessee by way of additional ground, and reliance upon the Goetz India Ltd. (supra), we have already decided that the judgement in the cases of Goetz India Ltd. (supra) does not impinge upon the powers of ld. CIT(A), therefore, we hold that the ld. CIT(A) has erred in discarding the claim of the assessee, sitting as an appellate authority. So far as the issue whether the assessee is entitled to sales tax incentive is concerned, we will deal with this issue in appeal of assessee for AY 2005-06, which findings would be

applicable in this year also.

54. In ground No.5, the assessee has challenged the action of ld. AO in restricting the deduction of section 80HHC to 70% while computing the book profit.

Finding of the Bench

55. We have already adjudicated this issue in ITA No.158/Del/2010 of assessee's appeal for AY 2002-03 and those findings would apply mutatis mutandis here also. With these observations, this ITA No.159/Del/2010 for the AY 2003-04 is decided and the appeal of the assessee is partly allowed.

ITA No.157/Del/2010 (AY 2003-04) (Revenue Appeal):

Now we adjudicate cross appeal of revenue in ITA No.157/Del/2010 for the AY 2003-04 as follows:

56. In this revenue's appeal, the revenue has basically challenged 3 issues. First is regarding the partial relief given by the assessee with respect to international transaction entered into by the assessee. The second issue pertaining to deletion of disallowance on account of royalty claimed by assessee as prior period expenses. The third issue is regarding the allowance of depreciation with respect to the Tin used in Tinbath equipments.

57. Ld. D.R. relied upon the orders of authorities below and ld. A.R. relied upon the order of ld. CIT(A).

Finding of the Bench

58. After considering the rival submissions, we observe that so far as the TP issue is concerned, we have already decided this issue in ITA No.158/Del/2010 for the AY 2002-03 in assessee's appeal and the findings given therein would mutatis mutandis apply here also.

59. Now coming to the second issue of prior period expenses, the relevant facts are that during the year under consideration, the assessee has paid royalty of Rs.10,17,21,989/- and cess of Rs.50,86,101/- pertaining to FYs 1995-96 & 1996-97. In simple words, the assessee has debited these expenses in AYs 1995-96 & 1996-97 by making a provision, however claimed these expenses in impugned year as the same were crystalised in this year only. It is the contention of the assessee that the amount was not paid by the assessee in earlier year on account of the conditions imposed by IDBI bank, who has granted loan to the assessee stating that the assessee will not make the payment of royalty to its parent company till the time the assessee discharges its liability of principal and interest borrowed from financial institutions. Subsequently, the IDBI bank vide its letter dated 20.9.1999 allowed the assessee to make the payment of royalty and hence the assessee started paying the royalty in instalment from financial year 2001-02 onwards. The AO disallowed this payment on the ground that these are prior period expenses.

60. The ld. CIT(A) deleted the addition after examining the accounts of the assessee and all the other details.

Finding of the Bench

61. After considering the rival submissions, we are of the view that this issue requires fresh consideration at the end of AO. The AO will examine this issue afresh in the light of judgements as well as facts

submitted before us. In case the assessee is able to demonstrate with the documentary evidences that these expenses were actually crystalized in this year, then the AO is duty bound to allow these expenses. With these observations, we restore this issue to the file of AO.

62. So far as the issue of deletion of Tin used in Tinbath, we have also decided this issue in assessee's appeal in ITA No.159/Del/2010 for the AY 2003-04 and has restored the matter to the AO. Our findings given in that order would mutatis mutandis apply here also.

ITA No.4856/Del/2010 (AY 2004-05) Assessee's appeal:

63. Ground No.1 is related to the addition made u/s 14A under Rule 8D of the I.T. Rules.

64. On this issue, our findings given in ITA No.5358/Del/2010 would apply mutatis mutandis here also.

65. So far as ground No.2 related to the disallowance of 90% of sundry creditors written off from the income in computing the deduction u/s 80HHC of the Act is concerned, we observe that similar issue has been decided by us in ITA No.158/Del/2010 for the AY 2002-03 vide ground no.2. Our findings given in that order would apply mutatis mutandis here also.

66. Now coming to ground Nos.3 & 4 related to the claim of assessee vis-à-vis subsidy of sales tax treating the same as capital receipt is concerned, we have dealt with this issue at length in ITA No.2539/Del/2017 vide ground Nos.7 to 11. Our findings given therein would apply mutatis mutandis here also.

ITA No.4791/Del/2010 (AY 2004-05) (Revenue's appeal):

Now we adjudicate ITA No.4791/Del/2010 for the AY 2004-05 in respect of revenue's appeal as follows:

67. The revenue has raised three issues as follows:

a) TP issue
b) Expenditure related to software incurred by assessee and claimed by assessee as revenue
c) Royalty paid and disallowed by the AO treating the same as prior period expenses.

68. We have already decided these issues in ITA No.158/Del/2010. Our findings given therein would apply mutatis mutandis here also.

ITA No.2539/Del/2017 (AY 2005-06) Assessee's appeal:

69. Present appeal of the assessee is arising from the order of ld. CIT(A) dated 21.2.2017 and relates to assessment year 2005-06. In this appeal, the assessee has raised six grounds of appeal, which grounds were further sub-divided into sub-grounds. We will decide these grounds in below paragraphs. First of all, we will deal with the ground of sales tax incentive amounting to Rs.16.91 crores and purchase of goods subsidy amounting to Rs.6.46 crores as challenged by the assessee in ground No.4 and its sub-grounds.

70. Brief facts of the case related to the claim of sales tax incentive are being discussed herewith as these facts were not discussed by us in the previous paragraphs relatable to the adjudication of issues for assessment years 2002-03, 2003-04 & 2004-05. Since we have not dealt with this issue on merit in those years so we think it appropriate to discuss the facts relatable to this issue in this portion of the order.

The assessee had set up the plant in the backward area at Village Kondh (Taluka Valia), District Bharuch, Gujarat. As per the Sales-tax Incentive Scheme applicable to a *"Pioneer Unit" in a backward area of the State of Gujarat, the appellant was given incentive by way of complete exemption from payment of sales tax on sale of goods (Sales-tax subsidy)* and in respect of purchase of raw materials, processing materials, consumable stores or packing materials, etc. a concessional rate of tax @ 0.25% (Purchase-tax incentive) was fixed. Based on the Gujarat Government Resolutions, it may be noted that the objective of the State Government was to accelerate industrialization in the backward regions in the State of Gujarat. With this objective, the Government offered certain incentives to new units to be set up in the backward regions.

71. It is the claim of the assessee that sale tax exemption was linked to eligible fixed capital investment as defined under the relevant scheme of Gujarat government. *It is also an admitted fact that the assessee has received first professional eligibility certificate on 1.3.1993 after the commencement of the production* and the assessee has received final eligibility certificate 16.12.2016 by the state government, exempting the assessee from the sale tax, as applicable in the state of Gujarat. It is pertinent to note that the state government has notified that the eligible unit can avail the sale tax incentive offered in the form of sales tax exemption or sales tax deferment. In the case at hand, the assessee has availed most of the sales tax incentive by way of sales tax exemption and not deferment. In view of these facts, it is the claim of the assessee that the amount of sales tax incentive earned by the assessee are capital receipts and cannot be taxed. This claim was first made before the ld. AO by way of a letter dated 4.12.2008 in which the assessee contended that assessee is entitled to treat Rs.16.91 crores as sales tax subsidy and Rs.6.46 crores as purchase tax subsidy being capital. The assessee

has placed reliance upon the judgement of Reliance Industries (Special Bench) decision reported in 88 ITD 273 and also on the judgement of Ponni Sugars reported in 306 ITR 392. However, the ld. AO discarded the claim of the assessee on the ground that the assessee has neither made this claim either in the original return nor in the revised return. Therefore, in view of the judgement of Hon'ble Supreme Court in the case of Goetze India Ltd. Vs. CIT reported in 284 ITR 323, the assessee cannot claim a relief without filing the return of income under the provisions of section 139(1) or 139(5) of the Act. The ld. AO further dealt with the issue on merits and relied upon the judgement in the case of Sahney Steel Vs. CIT reported in 228 ITR 253(SC), and concluded that the sales tax incentives are revenue receipts and hence the same are liable to be taxed under the Income tax act. Thereafter, the AO has also referred to the other judgements and dismissed the contention of the assessee. It is pertinent to note here that the ld. AO after referring to the judgement in the case of Ponni Sugars (supra), wherein held that subsidy can be capital only if the assessee is entitled to utilize the subsidy either for expansion of the unit or towards the acquisition of certain new capital assets, held that if the assessee does not utilize the subsidy for expansion then the subsidy is liable to be treated as revenue receipts.

72. Aggrieved with the order of AO, assessee filed appeal before the ld. CIT(A) who also affirmed the view of the AO after distinguishing all the case laws relied upon by the assessee. The findings of the ld. CIT(A) are there in its order at page 12 para 10 and the final discussion in para 10.1 at page 13, which are reproduced below:

10. The next GOA no 6 -6.1 raised by appellant states that AO erred in not holding that sales tax subsidy amounting to Rs.16.91 crores on sale of goods (sales-tax subsidy) and Rs.6.46 crores on purchase of goods (purchase tax subsidy), received under the Special Incentive for Pioneer Unit - 1986, Scheme of the State of Gujarat are capital receipt not liable to taxation -

The AO has stated that *"The assessee in its reply dt. 04/12/2008 while giving details which were called for in an earlier hearing appears to have made a new claim for the first time in the assessment proceedings. The assessee claims that assessee is entitled to treat Rs. 16.91 crores as sales tax subsidy and Rs. 6.46 crores as purchase tax subsidy being capital receipt not liable to tax. This claim has been made by the assessee on the basis of special bench decision in the case of Reliance Industry Ltd. 88 ITO 273 and on the decision of Supreme Court in the case of CIT Vs. Ponni Sugars & Chemical Ltd.* ***I have considered the assessee's claim and find it not maintainable because of following reasons:***

- ***the claim was not made in the original return and neither the assessee filed any revised return u/s 139(5) of the Income Tax Act. In the case of Goetze India Goetze (India) Ltd. v. Commissioner of Income- tax, 284 ITR 323 wherein the Hon'ble Supreme Court held It is possible for an assessee to claim relief, which he had omitted to claim in the return of income by filing a revised return, if it is in time. Where he had failed to file such revised return in time, he cannot circumvent the requirement by merely filing a letter asking for relief. Therefore the assessee's claim is not maintainable on the technical basis itself.***

• Coming to the merits, the nature of subsidy as to whether it is capital or revenue has been vexed question with various decisions of different courts and Tribunals some holding it revenue others as capital. The nature of subsidy as to whether it is capital or revenue will depend upon the purpose, intent and nature of scheme and benefit received under it by the recipient.

The Hon'ble Supreme Court in the case of Sahney Steel and Press Works Ltd. Vs CIT [228 ITR 02S3(SC)] after analyzing various decisions on the subject have held the subsidy given by Andhra Pradesh Government as revenue in nature. Tp arrive at this decision, the Hon'ble Supreme Court considered following distinctive features and laid down these tests.

i) Whether the subsidy is given only after setting up and commencement of production or before - in case it is given only after commencement of production it will be revenue in nature.

ii) Whether the subsidy incorporates any stipulation for use of money like it is to enable assessee to acquire new plant and machinery for their expansion of its manufacturing activity in capital area. Then the subsidy will be capital in nature.

iii) Whether subsidy is as an aid to setting of industry or it is an aid to run industry profitably by giving it competitive edge. In case of later it is revenue.

The Hon'ble apex court thereby held as under:-

" the subsidies have not been granted for production of or bringing into existence any new asset. The subsidies were granted year after year only after setting up of the new industry and commencement of production. Such a subsidy could only be treated as assistance given for the purpose of carrying on of the business of the assessee applying the test of Vscount Simon in the case of Ostime [1946} 14 ITR (Suppi) 45 (HL),' it must be held that these subsidies are of revenue character and will have to be taxed accordingly.

The decision therefore accepts as a matter of rule that incentives given after setting up and commencement of production will be revenue only.

To the claim that subsidy are for backward area development and it object is for promoting industries then it will be capital receipt. The answer is available in the above judgment of Hon'ble Supreme Court itself. The Hon'ble Supreme Court specifically overruled the decision of M.P.High Court in case of CIT Vs Dusad Industries 162 ITR 784 stating as:-

"The Madhya Pradesh High Court in the case of CIT V. Dusad Industries [1986] 162 ITR 784, dealt with a case where the 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 a 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 date 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." [emphasis added]

Therefore, the argument of subsidy being granted for setting of industry in backward area and therefore capital fails, if no subsidy is given until the time production was actually commenced.
The above decision would leave no doubt that if an incentive is granted only after commencement of production by the industry then it will be of revenue nature.
Incidentally, the Hon'ble Court also had dealt with decision of Ratna Sagar Mills (Alld) and Chitra Kalpa (AP) quoted and cited by the assessee and these are on a different set of facts.
The assessee had placed reliance on the recent decision of Supreme Court in the case of CIT Vs Ponni Sugar and Chemicals Ltd. [306 ITR 392]. The perusal of decision reveals that the Hon'ble Court had reiterated the 'purpose test' i.e. what is purpose for which subsidy is given. The Hon'ble court noted the main eligibility condition of scheme as:-

> *"the main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute if the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the 'existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant."* [emphasis added]

The Hon'ble court further noted that how the payment received or subsidy amount is to be utilized by the recipient is also relevant factor by stating:-

> *"One more aspect needs to be mentioned. In Sahney Steel and Press Works Ltd. this court found that the assessee was free to use the money in its business entirely as it liked. It was not obliged to spend the money for a particular purpose. In the case of Seaham Harbour Dock Co. assessee was obliged to spend the money for extension of its docks. This aspect is very important. In the present case also, receipt of the subsidy was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans under taken by the assessee for setting up new units/expansion of existing business.*

Therefore, this latest decision of Hon'ble Supreme Court while approving the ratio of its earlier decision in the case of Sahney Steel and Press Works Ltd. (supra) have clearly indicated that subsidy can be capital if it has obligation on the part of recipient to utilize it either to expand its capital structure or towards acquisition of the same or repayment of its capital liability only. If there is no such stipulation and assessee is free to use the money in its business entirely as it liked it will be revenue in nature.
Applying the tests laid down in the two leading decisions of Hon'ble Supreme Court as discussed above following facts emerge in this case also:
i) The sales tax incentive given to the assessee is only after commencement of production and that too within specified date.
ii) The assessee is under no stipulation to apply the amount of incentive towards repayment of capital cost [as was case in Ponni Sugar & Chemicals Ltd.] and is free to utilize it.
iii) The nature of assistance was for the purpose of trade. It was given to the assessee for supplementing the profits.
iv) In effect sales tax incentive reduced the cost resultantly profits of the assessee got enhanced and its goods by virtue of sales tax exemption got competitive advantage which was on revenue account.
Therefore, the sales tax incentive received by the assessee clearly is on revenue account and not capital receipt as claimed by the assessee. In view of the above the assessee's claim is rejected, however no addition is made on this.(emphasis supplied)

10.1 The appellant has given voluminous submission on only one aspect of the matter ie whether the sales tax subsidy amounting to Rs.16.91 crores on sale of goods (sales-tax subsidy) and Rs.6.46 crores on purchase of goods (purchase tax subsidy), received under the Special Incentive for Pioneer Unit - 1986, Scheme of the State of Gujarat is capital in nature as being claimed by ppellant or otherwise (ie revenue). Catena of decisions have been quoted / submissions made which has been carefully examined..

10.2 But the appellant has failed to appreciate that before proceeding to agitate the findings of the AO to hold that such subsidy is Revenue in nature the A O has categorically invoked Goetzes case of SC of 281ITR to hold that appellant could not have made such claim during course of assessment proceedings and the plea of the appellant before AO failed on this technical premise *per se* . This aspect of the technical aspect of the matter having not been challenged by the appellant in either GOA no 6, or GOA no 6.1 before this office , this GOAs (ie 6&6.1) raised by appellant becomes academic in nature and are dismissed as such thereby confirming the order of AO relying on 281ITR Goetzes case rw 228ITR 253(SC) of Swahney Mills case , 33taxmann.com470(AP) in case of CIT Vs Rassi cements, 24taxmann.com267(Mumbai) in case of Mahindra &Mahindra Vs DCIT (para7 to 7.3) (157Taxmann1(SC)).Held accordingly .

73. Aggrieved with the order of ld. CIT(A), the assessee has come up in appeal before us. Ld. Counsel for the assessee vehemently argued that the ld. CIT(A) has erred in not adjudicating this issue on merits, rather simply relying upon the judgement in the case of Goetz India Ltd. (supra). Besides this, ld. Counsel for the assessee also relied upon the synopsis filed with the bench and the main thrust of the counsel is that the sales tax incentives were linked with the deployment of the capital by the assessee and hence as per the jurisprudence of purposive interpretation, the assessee is entitled for the relief. In simple words, the main contention of the assessee is that taxability of subsidy by whatever name called is to be determined by the purpose for which the subsidy is granted and not the form/mode/manner in which the subsidy is received.

74. Ld. D.R. relied upon the orders of authorities below.

Finding of the Bench

75. After considering the rival submissions, we deem it necessary to reproduce certain important clause of the impugned Gujarat Scheme which has been considered by the AO also. From the synopsis filed by the assessee, **it is an admitted position of fact that the assessee has duly charged the sales tax amount from its customer as part of sale price of the goods**. However, the assessee did not deposit this with state government. Certain relevant clauses of the scheme are reproduced hereunder:

GOVERNMENT OF GUJARAT

INDUSTRIES, MINES AND ENERGY DEPARTMENT

No. INC/1086/705 (3)/I

Sachivalaya, Gandhinagar, Dated the 7th May, 1986.

RESOLUTION

1. With a view to accelerate industrialisation of backward regions in the State, Government of Gujarat is pleased to introduce the following scheme :

2. *Title.*—This scheme shall be known as "Special incentives for pioneer units—1986."

3. *Operative period.*—This scheme shall come into operation with effect from 1st April, 1986 and shall remain in force for a period of 5 years upto 31st March, 1991.

4. *Applicability of the Scheme.*—This scheme will be applicable in the areas mentioned in Annexure 'A' to this Resolution.

5. *Definitions.*—(a) "New Industrial Unit" means an industrial unit which commences commercial production after 1st April, 1986.

(b) "Previous Scheme" means special incentives for pioneer units announced vide GR No. INC-1580–1766-PPD, dated 27th August, 1980 as amended and clarified by various Resolutions/ circulars from time to time.

(c) "Eligible fixed capital investment" means investment in—

—land : the actual price paid for the land to the extent needed but excluding land development charges,

—new building

—new plant and machinery and imported second hand machinery and installation expenditure capitalised for plant and machinery,

—capitalised interest during construction not exceeding 5% of the total fixed capital investment,

—technical know-how fees or drawing fees paid in lump sum to foreign collaborators or foreign suppliers as approved by Government of India or paid to laboratories recognised by the State Government or Central Government.

(i) Working capital (whether raised through Banks or otherwise and including working capital margin), goodwill fees, engineering fees, commissioning fees, commissioning expenses, royalties capitalised or otherwise, pre-operative expenses, expenditure on trucks, cars, vans, trailers, tractors and transport vehicles and catalysts will not be considered as eligible fixed capital investment for the purpose of this Scheme. Plant and machinery used or installed anywhere in India and shifted, purchased, leased, hired, licensed or transferred in any manner will not be considered as fixed capital investment eligible for the pioneer benefits.

(ii) Only those assets which are acquired and paid for during the operative period of the scheme will be eligible for the pioneer benefits.

(d) "Resources based industry" means the industries based on local mineral resources. Units requiring consumption of local mineral resources to the extent of atleast 50% of the value of raw materials or in total quantity of raw materials consumed would fall under the definition of resources based industry.

Mineral resources means those resources for which permit of licences is required under any mineral Rules or Act.

Such resources based industries will be eligible for sales tax incentives under this scheme at half the scale otherwise applicable in the eligible area where such an industrial unit is set up.

(e) "Eligible Area" means areas mentioned in Annexure-A to this Resolution. Areas not included in Annexure 'A' will not be covered under this scheme.

(f) "Banned Area" means the areas covered under (1) the Urban Development Authorities of Ahmedabad, Baroda, Surat, Rajkot, Jamnagar and Bhavnagar, and (2) Municipal limits of Nadiad, Porbandar, Navasari, Junagadh and Bharuch.

Explanation : "Banned Areas" will include such areas as are covered under the urban development limit/municipal limit as on the date of application for registration for pioneer benefits.

(g) "Ineligible Industries" means the industries listed in Annexure 'B' to this Resolution. The industry listed in Annexure 'B' will not be eligible for Pioneer benefits.

6. *Eligibility Criteria :* A new industrial unit fulfilling the following criteria will be considered for the grant of status of a pioneer unit.

(i) The unit have shall fixed capital investment atleast of Rs. 3 crores (Rupees three crores).

(ii) The unit shall employ atleast 100 workers on a permanent basis.

(iii) Only one unit per village in the eligible area will be given pioneer status.

(iv) A new industrial unit will not be eligible for the grant of pioneer status if it is set up in a taluka where 10 or more units having such investment have already been set up prior to the date of the registration for pioneer status.

Units involving fixed capital investment of Rs. 3 crores and above, already set up before the operative period of the scheme will also be counted for the maximum number of 10 units per taluka and one unit per village.

(v) Those units which have been granted final registration under the previous scheme or have availed of the pioneer benefits under previous scheme will not be eligible for the special incentive under this scheme.

(vi) Those units which have already commenced production before 1st April, 1986 will also not be eligible for the incentive under this scheme.

(vii) Pioneer benefit will not be available for expansion or diversification.

(viii) Existing units undertaking expansion or diversification will also not be eligible for the pioneer status for their expansion/diversification.

(ix) Modernisation, renovation, rehabilitation or rationalisation of industrial units will not be eligible for pioneer benfit under the scheme. Similarly, replacement of plant and machinery or other assets or change of product mix will not be eligible.

Revival of a sick or closed unit whether under a scheme of liquidation or any other law or agreement, settlement, merger, take over or any manner will not be eligible for pioneer benefits.

(x) Ineligible industries listed in Annexure 'B' will not be eligible for Pioneer Status.

7. Eligible areas and categorisation of areas for this Scheme :

As per Annexure 'A'

8. *Types and Quantum of Benefits.*—Those units which fulfil the criteria of pioneer status and have been granted registration by the Industries Commissioner will be eligible for the following benefits :

1. *Subsidy.*—Such unit will be allowed subsidy at a rate, which together with central subsidy (if available), shall not exceed Rs. 25 lakhs. This sub-sidy will be granted subject to conditions and procedures mentioned in GR No. INC-1086-705(1)I dated 5th May 1986.

Unit claiming subsidy under this scheme will not be eligible for any subsidy under any other scheme.

Sanction and disbursement of State and Central Subsidy will be done in accordance with the criteria and stipulations under the respective schemes.

2. *Sales Tax Incentives :* A pioneer unit set up in the eligible area may choose one of the following incentives ;

(1) Sales Tax Exemption,

OR

(2) Sales Tax Deferment.

Pioneer units claiming the incentives under this scheme will not be eligible for Sales Tax incentives under any other Scheme. The quantum of Sales tax incentive is as follows.

(1) - *Sales Tax Exemption*

Category of area	*Quantum*	*Time-limit*
1	2	3
A	90% of the fixed capital investment.	For a period of 14 years from the date of commencement of commercial production.
B	70% of the fixed Capital investment or/ Rs. 2.5 crores whichever is less.	For a period of 12 years from the date of commencement of commercial production.
	(2) *Sales Tax Deferment*	
A	90% of the fixed capital investment.	For a period of 14 years from the date of commencement of commercial production.
B	65% of the fixed capital investment or/ Rs. 2.00 crores whichever is less.	For a period of 12 years from the date of commencement of commercial production.

Note.—(1) If a unit reaches admissible amount stated in Col. 2 above before the expiry of the time limit mentioned in col. 3 above, it will not be eligible for incentives thereafter.

(2) In respect of sales tax deferment, the amount so deferred will be recovered in six equal annual instalments after the expiry of the time limit mentioned above. No interest will be charged on the amount so allowed to be deferred.

9. Procedure for claiming pioneer status, its registration etc., will be laid down separately.

This issues with the concurrence of Finance Department on this Department's file of even number dated 17th April, 1986.

By order and in the name of the Governor of Gujarat,

RAJIV TAKRU,
Deputy Secretary to the Government of Gujarat,
Industries, Mines and Energy Department.

(Typed version):

Quote:

Clause 6 Eligibility Criteria:

A New industrial unit fulfilling the following criteria will be considered for the grant of the status of pioneer unit.

i. *The unit have shall fixed capital investment atleast of Rs.3 Crores (Rupees three crores.)*
ii. *The unit shall employ atleast 100 workers on a permanent basis.*
iii. *Only one unit per village in the eligible areas will be given pioneer status.*

……
……

As per Annexure 'A'

Clause (8) Types of quantum of Benefits:-
Those units which fulfill the criteria of pioneer status and have been granted registration by the Industries Commissioner will be eligible for the following benefits:

1. *Subsidy – Such unit will be allowed subsidy at a rate, which together with Central subsidy (if available), shall not exceed Rs.25 lakhs. This subsidy will be granted subject to conditions and procedures mentioned in GR No.INC-1086-708(1) dated 5th May, 1988.*

   Unit claiming subsidy under this scheme will not be eligible for any subsidy not in other scheme.

   Sanction and disbursement of the State and Central subsidy will be done in accordance with criteria and stipulations under the respective scheme.

2. *Sales tax incentives:-*

   A pioneer unit set up in the eligible area may chose one of the following incentives:

   i. *Sales tax exemption,*
      OR
   ii. *Sales Tax deferment.*

   Pioneer units claiming the incentive under the scheme will not be eligible for sales tax incentive……

(1) Sales Tax Exemption

Category of area	*Quantum*	*Time limit*
1	*2*	*3*
A	*90% of the fixed capital investment*	***For a period of 14 years from the date of commencement of commercial production***
B	*70% of the fixed capital investment or/Rs.2.5 crores whichever is less*	*For a period of 12 years from the date of* ***commencement of commercial production***
(2) Sales Tax Deferment		
A	*90% of the fixed capital investment*	*For a period of 14 years from the date of commencement of commercial production*
B	*65% of the fixed capital investment or/Rs.2.00 crores whichever is less*	*For a period of 12 years from the date of commencement of commercial production.*

Note – (1) If a unit reaches admissible amount stated in Col.2 above before the expiry of the time limit mentioned in co. 3 above, it will not be eligible for incentives thereafter.

(2) In respect of sales tax deferment, the amount so deferred will be recovered in six equal annual instalments after the expiry of the time limit mentioned above. No interest will be charged on the amount so allowed to be deferred.

9. Procedure for claiming pioneer status, its registration etc., will be laid down separately.

This issues with the concurrence of Finance department on this Department's file of even number dated 17th April, 1986.

By order and in the name of the Governor of Gujarat

RAJIV TAKRU
Deputy Secretary to the Government of Gujarat
Industries, Mines and Energy Department"

76. For deciding the issue in hand, we would like to refer to clause (6) of the scheme, which says that a new industrial unit fulfilling the following criteria will be considered for the grant of status of pioneer unit and would be entitled for the incentive. Further, clause (8) of this scheme lays down provision with respect to the types and quantum of benefits. This clause says that those units which fulfill

the criteria of pioneer status have been granted registration by the Industry commissioner will be eligible for the following benefits:

1. **Subsidy**: Such unit will be allowed subsidy at the rate which together with Central subsidy shall not exceed Rs.25 lakhs. In simple words, such unit have been granted Rs.25 lakhs as lumpsum amount on account of subsidy.
2. Thereafter the second benefit is termed as sales tax incentives. It is described in this clause that a pioneer unit set up in the eligible area may chose one of the following incentives:
    a) Sales tax exemption or
    b) Sales tax deferment.

77. As we have already noted in para 65 above, that the assessee has opted for sales tax exemption and not deferment. Now the manner of quantification has been described in clause (8) itself which says that an assessee is entitled for sales tax incentives up to the limit of 90% value of the fixed capital investment. **It is pertinent to note here that this benefit(Sales Tax incentives) has been further subjected to a condition that it is available to the pioneer unit only after the commencement of commercial production**. In other words, this scheme says that the assessee who falls in the definition of pioneer unit, can claim sales tax incentive benefits up to the value of 90% of the total capital payable for 14 years. **This 14 years' period would have to be reckoned from the date of commercial production and not from the date of establishment/ setting up of such unit**. Further the term subsidy is used in clause 8(1) and incentive is used in clause 8(2). Both these terms are exclusive and carries different meanings, as discussed by us in below para(s).

78. Now we discuss the case laws as relied upon by both the parties.

79. First of all we will discuss the case law of CIT Vs. Ponni Sugars & Chemicals Ltd. reported in 306 ITR 392 on which both the parties i.e. AO and the assessee are relying. Perusal of this decision would say that Hon'ble Supreme Court has observed a peculiar fact i.e. in that case, the "incentives" given were to be utilized for repayment of the loans taken by the assessee to set up the new unit, which is not the case here, therefore, the reliance of the assessee on Ponni Sugars (supra) is of no relevance. **It is an admitted position of fact that the assessee has already claimed this amount as income in its profit & loss account and has not utilized this amount for repayment of loan or for acquisition of some assets**. Therefore, in our view, the AO is correct in relying upon the judgement of Ponni Sugars (supra) and decide the issue against the assessee. The relevant observations of their lordship in the case of Ponni Sugar as reproduced hereunder: -

"the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. ***The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units****. On this aspect there is no dispute.* ***If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account****. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy"*

80. Similarly, in the case of Sahani Steel reported in 228 ITR 253 also, the Hon'ble Supreme Court has decided the issue against the assessee and observed that subsidy can be capital if it is obligation on the part of recipient to utilize it either to expand its capital structure or towards the acquisition of the same or repayment of capital liability and if the assessee is free to use the money in its

business, then certainly such subsidy would be revenue in nature.

81. Now we will discuss the term "subsidy" as well as "incentive". In our view, the term "subsidy" is different from the term "incentive" and this distinction has been beautifully discussed by the Hon'ble ITAT in the case of Bajaj Auto Vs. DCIT reported in 90 ITD 153(Mum.). In that case the coordinate bench of the ITAT after distinguishing the case of Reliance Industries (special bench) has first held that there is a distinction between the term "subsidy" and "incentive" and then the Hon'ble ITAT in para 43 has held that since the **sales tax incentives were given with a condition of commencement of production, the same were to be treated as revenue receipts**. In that case also, the admitted fact is that the assessee has not deposited sales tax amount with the State Government rather credited that amount in its profit & loss account. In that case also, the incentives were also given conditional upon the commencement of production. For the sake of convenience, we would like to reproduce the relevant paragraphs of the coordinate bench, distinguishing the term "subsidy" from "incentive" as follows:

> ***"35.*** *The Tribunal, while making comparison of the Andhra Pradesh Scheme under Government Order MS No. 455 dated 3rd May 1971, with Maharashtra Scheme sanctioned by the Government of Maharashtra vide Resolution No. IDL-7079/(2043)-IND-8 dated 5th January, 1980, laid stress on the form, not on the substance of the Scheme. The quantum of incentive or the period of eligibility is not a determining factor to decide whether the incentive given is of the nature of subsidy. True purport of the Scheme should be spelt out. What is subsidy? That is discussed by the Hon'ble Calcutta High Court in the case of Sarda Plywood Industries Ltd. v. CIT [1999] 238 ITR 354, 368. The relevant portion is reproduced here as under :-*
>
> > *"In Kesoram Industries' case [1991] 191 ITR 518(Cal.), the meaning of the word "subsidy" had been considered in great detail which is to the following effect; (page 529)*
> > *Webster's New World Dictionary, 1962: 'a grant of money, specifically (a) ..... (b) a government grant to a private enterprise considered of benefit to the public.'*

Shorter Oxford English Dictionary. 'Help, aid, assistance .... Financial aid furnished by a State or a public corporation in furtherance of an undertaking or the upkeep of a thing .....'

Chambers' Twentieth Century Dictionary, revised edition: 'assistance, aid in money .... a grant of public money in aid of some enterprise, industry, etc., or to keep down the price of a commodity.....'

The Reader's Digest Great Encyclopedic Dictionary, vol. II (M.Z.): '2. Financial aid given by government towards expenses of an undertaking or institution held to be of public utility, money paid by government to producers of a commodity so that it can be sold to consumers at a low price.....'

In addition, our attention has been drawn to the definition given in 'Words and Phrases, permanent edition, vol. 40,' where subsidy is described as follows :

'A subsidy is a grant of funds or property from a government, as of the state or municipal corporation to a private person or company to assist the establishment or support of an enterprise deemed advantageous to the public; a subvention.'

Reference is made to 60 Corpus Juris, Corpus Juris Secundum, vol. 83, page 760, gives the following under the heading of subsidy:

'Something, usually money, donated or given or appropriated by the Government through its power agencies, a grant of funds or property from a Government, as of the State or a municipal corporation, to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public; a subvention.

Pecuniary premiums offered by the Government to persons enlisting in the public service, or engaging in particular industries, or performing specified services for the public benefit are treated in Bounties'.

A subsidy, therefore, can be granted, inter alia, for the manufacturer to sell his commodity to consumers at a lower price."

36. *It is stipulated in the scheme that the eligibility certificate under Part I of 1983 will be issued by the implementing agency after commencement of commercial production. Since the eligibility to avail the benefit of sales tax exemption arise subsequent upon commercial production, as such it cannot be said that the benefit was granted in the capital field. It was only an incentive.* ***Incentive is different from subsidy. In Random House Encyclopedia Dictionary, the word "incentive" is defined as something that incite to action. In the Concise Oxford Dictionary the word "incentive" is defined as tending to incite, incitement (to action, to do, to doing), payment or concession to stimulate greater output by workers. We have considered the various clauses of the Scheme. In our opinion, exemption from sales tax was only a concession. It cannot be equated with subsidy****."*

82. Thereafter, we would also like to reproduce the relevant observation of the coordinate bench in the case of Baja Auto(Supra) deciding the nature of receipt:

> ***"41.*** *The decision of the Apex Court rendered in the case of CIT v. P.J. Chemicals Ltd. [1994] 210 ITR 8305, 841 ruled that where the Government subsidy is an incentive not for the specific purpose of meeting a portion of the cost of the assets though quantified as or geared to a percentage of such cost, it does not partake of the character of a payment intended either directly or indirectly to meet the actual cost. The question posed before the Apex Court was whether subsidy reduces the actual cost or not. The facts of the present case are different. As such, the ratio of this decision is not applicable.*
>
> ***42.*** *The Apex Court in the case of Sahney Steel & Press Works Ltd. (supra) has held that if payments in the nature of subsidy from public funds are made to the assessee to assist him in carrying on his trade or business, they are trade receipts. The character of the subsidy in the hands of the recipient - whether revenue or capital - will have to be determined, having regard to the purpose for which the subsidy is given. The source of the fund is quite immaterial. However, if the purpose is to help the assessee to set up its business or complete a project the monies must be treated as having been received for capital purposes. But if monies are given to the assessee for assisting him in carrying out the business operations and the money is given only after and conditional upon commencement of project, such subsidies must be treated as assistance for the purpose of the trade.*
>
> ***43.*** *In the present case the incentives were given conditional upon commencement of production. There is no dispute on this point. The sales tax exemption was given to the assessee for assisting him in carrying out the business operations. It was not given for the purpose of setting up businesss or to complete a project. This decision applies on all fours to the facts of the present case. The Tribunal was not correct in the case of Reliance Industries Ltd. (supra) to give a different interpretation to the decision in Sahney Steel & Press Works Ltd.'s case (supra) and applying the ratio of P.J. Chemicals Ltd.'s case (supra), in which the facts were totally different."*

83. In yet another case, recently Hon'ble Delhi High Court in the case of Bhushan Steels reported in 398 ITR 216 has held that the sales tax incentives received by the assessee after the setting up of the unit and commencement of production would always be revenue in nature. Hon'ble High Court further observed that the assessee

was entitled to retain 100% of the amount collected from the customers towards sales tax. Hon'ble jurisdictional High Court after relying upon the judgement of Sahani Steel and Ponni Sugar (supra) observed that the object of providing subsidy by way of permission to not deposit the amounts collected which meant that the customer or service user had to pay sales tax but at the same time the Collector i.e. assessee could retain the amount so collected undoubtedly to achieve that large goal of industrial utilization. The achievement of a quantitative limit would mean that the incentives would not be available if the assessee would not be able reach the targeted sales. Hon'ble High Court in para 25 & 26 has held that since the incentives/subsidy were given after the setting up of the unit and the assessee was free to utilize the funds in any manner, the sales tax receipts are revenue receipts. The relevant observation of the Hon'ble High Court are reproduced as under:

> *"25. In the present case, the provisions of the original scheme (i.e. the original policy of 1990) and its subsidy scheme are relevant; they have quite correctly been relied upon by the revenue. Paras 6 (A) and 6(B) of that scheme specifically provided for capital subsidy to set up prestige units; the amounts indicated (Rupees fifteen lakhs) were to be towards capital expenditure. Now, if that was the scheme under which the assessees set-up their units, undoubtedly it contained specific provisions that enabled capital subsidies. Whether the assessees were entitled to it, or not, is not relevant. The assessees are now concerned with the sales tax amounts they were permitted to retain, under the amended scheme (dated 27.07.1991) which allowed the facility of such retention, after the unit (established and which could possibly claim benefit under the first scheme) was already set up. This subsidy scheme had no strings attached. It merely stated that the collection could be retained to the extent of 100% of capital expenditure. Whilst it might be tempting to read the linkage with capital expenditure as not only applying to the limit, but also implying an underlying intention that the capital expenditure would thereby be recouped, the absence of any such condition should restrain the court from so concluding.*
>
> *26. How a state frames its policy to achieve its objectives and attain larger developmental goals depends upon the experience, vision and genius of its representatives. Therefore, to say that the indication of the limit of subsidy as the capital expended, means that it replenished the capital expenditure and therefore, the subsidy is capital, would not be justified. The specific provision for capital subsidy in the main scheme*

and the lack of such a subsidy in the supplementary scheme (of 1991) meant that the recipient, i.e. the assessee had the flexibility of using it for any purpose. Unlike in Ponni Sugars (supra), the absence of any condition towards capital utilization meant that the policy makers envisioned greater profitability as an incentive for investors to expand units, for rapid industrialization of the state, ensuring greater employment. Clearly, the subsidy was revenue in nature."

84. When we examined the facts of the present case in the light of the law as propounded by the Apex Court and other courts we are of the view that the amount of incentives received by the assessee are revenue receipts. Therefore, respectfully following the above decision of Bombay Tribunal in the case of Bajaj Auto and of Delhi High Court in Bhushan Steels (supra), we hold that the amount of sales tax incentives received by the assessee are revenue in nature and liable to be taxed as revenue receipts.

ITA No.2539/Del/2017 (AY 2005-06) (Assessee's appeal):

Now we discuss the other grounds in ITA Number 2539 and adjudicate the same as follows:-

85. In ground No.1, the assessee has challenged the addition of Rs.3,22,112/- which amount has been added by the AO u/s 41(1) of the Act on the ground that the assessee has failed to establish that these sundry creditors, which are appearing in the books of the assessee from last more than 3 years are still alive. The main reason of the disallowance as observed by the AO is that the assessee could not produce any confirmation to indicate that these liabilities were enforceable by the creditors and hence it is a case of cessation of liability.

86. The ld. CIT(A) has also affirmed this addition on the ground that the assessee could not be able to furnish the relevant documentary evidences and has not seriously contested this issue in the appellate proceedings. The ld. CIT(A) observed that the assessee

vide its letter dated 4.5.2016 has categorically stated that there is no correspondence for writing back these static creditors available with the assessee.

-: Finding of the Bench:-

87. Before us also, the assessee has not contested this issue. However, we restore this issue to the file of AO to examine as to whether the assessee has written back these balances in assessment years 2009-10 & 2010-11, if yes, then corresponding benefit should be given to the assessee.

88. In ground No.2, the assessee has challenged the action of the ld. CIT(A) in reducing the rate of depreciation from 40% to 10% and 15% with respect to internal road, erection and commissioning of wind turbine converter and laying of electric power cables.

89. Brief facts of the case with respect to this issue are that the assessee has installed 13 wind mills. Out of the total addition to wind mills (Rs.40.25 crores), proportionate amount has been capitalized under the head "plant and machinery" i.e. Rs.39.38 crores and the remaining amount has been shown under the head factory building. In this backdrop the assessee has claimed depreciation @ 40% being 50% of the rate of 80% as the assets were installed in the later half year with respect to the wind mills capitalized as plant and machinery. The ld. AO was of the view that the assessee is entitled for depreciation on electric wiring @ 12.5% and the ld. CIT(A) has further reduced this rate of depreciation to the tune of 10% for road and 55% for electric fitting.

90. Ld. Counsel for the assessee before us has argued that the issue involved in this case is squarely covered by the Hon'ble

Rajasthan High Court in the case of CIT Vs. K.K. Enterprises reported in 227 Taxman 181.

91. Ld. D.R. relied upon the orders of authorities below.

-: Finding of the Bench:-

92. After considering the rival submissions, we are of the view that the lower authorities have erred in restricting the claim of depreciation @ 10%. A reference can be made to the judgement of Hon'ble Rajasthan High Court in the case of CIT Vs. K.K. Enterprises reported in 227 Taxman 181, wherein the Hon'ble High Court has held that "Civil structure, electric fitting and equipments are part and parcel of wind mill and accordingly entitled for higher rate of depreciation." Respectfully following this judgement, we direct the AO to grant depreciation @ 40%

93. In ground No.3, the assessee has challenged the disallowance of Rs.39,44,541/- being amount paid to 3 entities namely Bharat Marketing Pvt. Ltd. for the purpose of market survey, MMB Sales Pvt Ltd. for the purpose of marketing a public relation and third one is S.R. Batliboy & Company for market survey. The assessee has paid amount of Rs.22,92,541/- to M/s. Bharat Market Pvt. Ltd., amount of Rs.10,80,000/- to M/s. MMB Sales Pvt. Ltd. and Rs.5,72,000/- to M/s. S.R. Batliboy & Company. During the course of assessment proceedings, the AO disallowed these expenses on the ground that the assessee failed to provide any evidence with respect to the nature of these expenses. Meaning thereby, the assessee has produced the relevant bills and other information, however, could not be able to substantiate the nature of expenses incurred by the assessee for the purpose of its business. Before ld. CIT(A) the assessee has explained the nature of these expenses up to some extent. However, the ld.

CIT(A) affirmed the view of the AO and disallowed these expenses.

94. Counsel for the assessee before us reiterated the submissions made before the lower authorities and also argued that similar expenses were allowed in previous and subsequent years.

95. Ld. D.R. relied upon the orders of authorities below.

-: Finding of the Bench:-

96. After considering the rival submissions, we observe that principle of res judicata are not applicable to tax proceedings and each assessment year is a separate unit, and has to be decided in accordance with the facts relevant for that year. Therefore, for this assessment year, the burden is on assessee to prove with cogent evidence, the nature of these expenses. Mere filing of the bills and communication via e-mails are not enough to prove the rendering of services. Perusal of the ld. CIT(A)'s order para 9.5 would show that the assessee in its reply dated 18.4.2016 and 3.5.2016 had categorically stated that expenses related to MMB Sales were incurred for fixing appointment with Senior government officials vis-à-vis pending matters. Similarly, for the expenses related to M/s. Bharat Market Pvt. Ltd, it is stated by the assessee that the market reports are 10 year old and hence could not be available since the records are not available with the assessee. It is settled position of law that burden is on assessee to prove that genuineness and nature of the expenses incurred by an assessee on account of commercial expediency. In the present case, admittedly amount of Rs.10,80,000/- has been paid for fixing appointment with government officials which fact will prove that these expenses are not for the purpose of business. Therefore, the same are not allowable. Similarly, the assessee failed to provide any cogent evidence with

respect to the expenses related to M/s. Bharat Market Pvt. Ltd. Mere submission of that the records are 10-year-old and hence could not be traceable is not a valid ground for running out from the responsibility of producing evidence. Therefore, amount of Rs.22,92,541/- is also disallowed. We would like to refer to the judgement of Bombay High Court in the case of Umakant Vs DCIT reported in 46 taxmann.com 338 wherein it has been held that ***" It is a primary onus and which was to be discharged and which has been held as not discharged by providing the requisite details. These are not matters which were to the knowledge of the Assessing Officer and the assessee was called upon to clarify them. It was a matter solely to the knowledge of the appellant. It was personal to him. It was the assertion of the appellant and which was being probed, however, in greater details. It was a clear case where the onus which was resting on the assessee in law, has not been discharged by producing the details with regard to the matters which are to the personal knowledge only of the assessee***". Similarly, the Kerala High Court in the case of CIT Vs. Modus Mediacare reported in 76 taxmann.com 309 has held that "even if it is true that in previous years similar claims were allowed by the AO, in so far as the assessment in question is concerned since the assessee has miserably failed to substantiate the claim, we feel that first appellate authority ought not to have inferred with the assessment order." There are so many other judgements also including of Delhi High Court in the case of Meera Kulkarni Vs. CIT reported in 2011-TIOL-859-High Court-Delhi, wherein the Hon'ble High Court has also laid down that "burden is on assessee to prove the nature of the expenses

97. So far as the expenses incurred with S.R. Batliboy & Company, we allow the expenses because the assessee is able to establish the nature of these expenses. Therefore, this ground of the assessee is

partly allowed.

98. In ground No.5, the assessee has challenged the disallowances of commission payment made to Gujarat Guardian International, USA. By invoking the provisions of section 40(a)(i) of the Act in respect of this issue the AO observed that the assessee has made payments without deducting the TDS and hence the payments of commission are not allowable to the assessee. The AO was of the view that the export commission paid by the assessee is in the nature of FTS and hence the assessee ought to have deducted TDS before making these payments.

99. Ld. CIT(A) observed that the assessee has made payments of commission to its AE, which is situated at Cayman Island. After making these observations, the ld. CIT(A) affirmed the view of the AO relying upon the certain judgements.

100. Before us, ld. Counsel for the assessee has reiterated the submissions made before the lower authorities.

101. Ld. D.R. relied upon the orders of authorities below.

-: Finding of the Bench:-

102. After considering the rival submissions we observe that the AO has made this disallowance on the ground that the payments made by the assessee were in the nature of FTS. We further observe that even if we relied upon the definition as provided in explanation to clause (vii) of sub-section (1) of section 9, which describes the words managerial, technical or consultancy in the nature of FTS. They have not been specifically explained by the legislature. These words are interpreted by various courts and have been interpreted in a manner

that managerial services mean a service essential involving control, direction or administration of the business of the recipient (CIT Vs. Bharathi Cellular Ltd. 319 ITR 139). Similarly, consultancy has also been interpreted to mean something akin to advisory services provided by the non-resident pursuant to the deliberation between two parties (GVK Industries Vs. ITO 371 ITR 453). In the same manner in the case of (CIT Vs. Kotak Securities 383 ITR 1) Hon'ble Supreme Court has defined what is the meaning of technical services and has held that technical services can only be provided through human intervention. All these decisions as well as the agreements entered into between the assessee and its associated enterprises have not at all been considered by lower authorities. Therefore, in the interest of justice, we restore this issue to the file of AO for examining afresh in the light of above judgements as well as after analyzing the agreements entered into between the assessee and its AE with respect to the payment of commission.

103. In ground no.6, the assessee has challenged the adjustment made by the TPO with respect to the transactions entered into by the assessee with ITS AEs.

104. We have already decided this issue in ITA No.158/Del/2010 and the findings given therein would mutatis mutandis apply here also.

ITA 5358/Del/2010 (AY 2006-07) (Assessee's appeal) (DRP route):-

Now we adjudicate assessee's appeal in ITA No.5358/Del/2010 for the AY 2006-07 as follows:

105. Present appeal of the assessee is arising from the order f ld. AO dated 27.9.2010 and it relates to assessment year 2006-07.

106. Brief facts of the case are that the assessee has filed its return of income declaring substantial income of Rs.114.11 crores on 15.12.2006. The return of income filed by the assessee was processed u/s 143(1) of the Act on 30.3.2008. Thereafter, the assessee filed one revised return reflecting lesser income of Rs.113.14 crores. The revised return so filed by the assessee was processed on 30.3.2009 and thereafter the case of the assessee was picked up for scrutiny. Since international transactions were involved in this case, a reference was made to the ld. TPO. After receiving the TPO order, the AO passed draft assessment order on 24.11.2009 and against which the assessee filed objections before the ld. DRP. The ld. DRP vide its order dated 25.8.2010 after making certain modifications affirmed the draft order. Thereafter, the AO passed the impugned order.

107. Aggrieved with the order of assessment, assessee come up in appeal before us.

108. The assessee has raised 7 grounds of appeal which are further sub-divided into sub grounds.

109. Ground no.1 to 2.8 are related to addition of Rs.59,81,515/- to the income of the assessee on account of adjustments made by the

TPO.

110. With respect to this issue, we have already given our findings in ITA No.158/Del/2010 in assessee's appeal and the same findings give by us would apply mutatis mutandis here also.

111. In ground No.3, the assessee has challenged the disallowance of Rs.105,94,398/- u/s 14A read with Rule 8D of the I.T. Rules.

112. Brief facts with respect to this ground are that the assessee has invested certain surplus funds in debt mutual funds. On these funds, the assessee has earned dividend income of Rs.5,60,34,333/. The AO invoking the provisions of section 14A of the Act made an addition of Rs.1,05,94,393/- on the ground that these expenses are relatable to the exempt income and hence not allowable as per the provisions of section 14A read with Rule 8D. The ld. DRP upheld the findings of the AO.

113. Before us, ld. Counsel for the assessee vehemently argued that the assessee has a zero debt company and has not borrowed any loans or debt for making these investments and hence it cannot be presumed that certain direct or indirect expenses attributable to tax free income deserves any disallowance.

114. The next argument of the assessee is that these are incomes earned from the mutual funds which are credited to the assessee after deducting management charges and hence no further disallowance is required to be made. It is the submission of the ld. Counsel for the assessee that no effort or time etc. has been made by the employees of the assessee with respect to the earning of these dividend income. In a nut shell, the counsel for the assessee argued that neither any direct nor any indirect expenses were incurred.

115. Ld. D.R. relied upon the orders of the authorities below.

-: Finding of the Bench:-

116. We find force in the argument of ld. Counsel for the assessee that the income received from the investments made in mutual funds is already subject to the management charges and hence no further disallowance is required to be made. We also observe that assessee is a zero-debt company and has not paid any interests with respect to any debt and hence disallowance under section 14A of the Act is not warranted in these facts. We further observe that the AO has wrongly invoked the provisions of rule 8D. Further the assessee is a debt free company, which fact has not been refuted by the DR therefore, it cannot be presumed that any indirect expenses such as interest on capital would have been incurred by the assessee while making investments in Mutual funds. A reference can be made to the judgement of Hon'ble Supreme Court in the case of CIT Vs. Gujarat Stat Fertilizers reported in 409 ITR 378. In this judgement, it is held that where sufficient interest free funds are available for making investments, no disallowance can be made u/s 14A of the Act. Before parting, we would further like to observe that provisions of Rule 8D are prospective as held by Hon'ble Supreme Court in the case of CIT Vs. S.R. Technology reported in 401 ITR 445(SC). Therefore, we allow this ground of appeal of the assessee.

117. Ground No.4 of the assessee's appeal is related to the addition of Rs.1,29,275/- on account of cessation of liability.

118. The ld. AO observed that these creditors remain static in the books of assessee for more than 3 years. Observing this, the AO added these amounts as income of the assessee on account of

cessation of liability.

119. Ld. DRP affirmed the order of AO.

120. Aggrieved with the order of ld. DRP, assessee has come up in appeal before us and reiterated the submissions made before the lower authorities.

121. Ld. D.R. relied upon the orders of the authorities below.

-: Finding of the Bench:-

122. It is trite position of law that until the credit balances are appearing in the books of the assessee, provisions of section 41(1) of the Act cannot be invoked. These provisions are invoked only in the year when these credits are being written off by the assessee. Therefore, we allow this ground of appeal of the assessee holding that the same are taxable in the year when the assessee has writen off these credits.

123. In ground No.5, the assessee has challenged the disallowance of expenses amounting to Rs.2,04,13,749/- incurred by assessee on glow sign boards and expenses of Rs 1,60,76,902 pertaining to expenditure incurred on hoardings. The AO took the view that these expenses are capital in nature and the ld. DRP confirmed the view of the AO.

124. Before us, ld. Counsel for the assessee at the out set pointed out that similar expenses have been allowed by the coordinate bench in assessee's own case in ITA No.3214/Del/2013 for assessment year 2007-08. Relevant portion of the observations of the ITAT has been quoted by the ld. A.R. in the synopsis filed before us.

-: Finding of the Bench:-

125. Perusal of these findings of the coordinate bench would prove beyond doubt that the coordinate bench was please to hold the nature of these expenses as revenue. Therefore, respectfully following the verdict of coordinate bench, we allow this ground of appeal of the assessee.

126. Ground No.6 and its sub-grounds are related to the addition of sales tax subsidy/incentive. This issue we have already dealt with at length in ITA No.4856/Del/2010 for AY 2004-05 for the reasonings mentioned therein, we dismiss this ground of appeal of the assessee.

127. In ground No.7, and its sub grounds the assessee has challenged the disallowance of certain expenses to the tune of Rs.1,02,56,677/-.

128. The assessee has incurred expenses of Rs 1,43,02,855/- under various heads such as a**) Horticulture expenses b) Wind power expenses c) Software purchase expenses etc... The AO, after treating some of the expenses as capital and allowing deprecation on them made an addition of Rs 1,02,56,677/-**

129. Facts relatable to these expenses are like that during the year assessee incurred an amount of Rs.18,39,516/- on horticulture expenses of its industry. The industry of the assessee is located in a remote area having dusty environment and in order to build a ground landscaping and pollution free environment, the assessee has incurred these expenses. However, the AO took a view that these expenses provided benefits of enduring nature and hence the same are capital in nature. The ld. DRP affirmed the view of the AO.

130. Before us, ld. Counsel for the assessee at the outset pointed out that in assessee's own case in ITA No.3686/Del/2013 for AY 2008-09, the coordinate bench of the Tribunal has already allowed the expenses related to horticulture.

131. Ld DR relied on the orders of the authorities below.

-: Finding of the Bench:-

132- After considering the rival submissions and perusing the order of the coordinate Bench in assessee's own case in the ITA number 3686/D/2013, we allow this ground of the assessee.

133. Next disallowance by the AO is wind power expenses. It is the claim of the assessee that for the operation and maintenance of wind mills, the assessee has incurred these expenses. The AO treated these expenses as capital in nature. The ld. DRP confirmed the order of AO.

134. The ld. A.R. reiterated the submissions made before the AO and ld. D.R. relied upon the orders of the authorities below.

-: Finding of the Bench:-

135. After considering rival submissions, we are of the view that the purpose of justice would be served if we allow 40% depreciation on these expenses. It is ordered accordingly.

136. The next disallowance is of the expenses incurred by assessee towards purchase of printer cartridge, computer peripherals like CD, etc. The AO treated these expenses as capital in nature. The ld. DRP

confirmed the order of AO.

137. Before us, ld. A.R. of the assessee argued that depreciation @ 60% may kindly be allowed on these expenses.

138. The ld. D.R. relied upon the orders of the authorities below.

-: Finding of the Bench:-

139. After considering rival submissions, we observe that in assessee' own case for AY 2007-08 in ITA No.3214/Del/2013, the coordinate bench restored this issue to the file of AO with a direction that AO shall examine the details/financials of the assessee about the claim and adjudicate the issue afresh. It is ordered accordingly. We also restore this issue to the file of AO.

140. Next disallowance if of software purchase expenses. The assessee has incurred Rs.12,77,565/- towards the purchase of software license. The AO treated these expenses as capital in nature and allowed the depreciation @ 60% and disallowed the balance expenses.

141. Before us, ld. Counsel for the assessee pointed out that expenses related to software purchase are revenue in nature.

-: Finding of the Bench:-

142. We have already decided this issue while deciding the appeal of the assessee in AY 2002-03 in ITA No.158/Del/2010. Our findings given in that year would apply mutatis mutandis here also.

143. Next expenses as related to the disallowance of security guard

payments made by the assessee with respect to the staff quarters located in the industry of the assessee.

144. The AO disallowed these expenses by observing that they are not incurred for the purpose of business. Ld. DRP confirmed the order of AO.

145. Before us, ld. Counsel for the assessee reiterated the submissions made before us.

146. Ld. D.R. relied upon the orders of the authorities below.

-: Finding of the Bench:-

147. After considering the rival submissions, we observe that the impugned expenses were subject to FBT and therefore, we are of the considered opinion that no disallowance can be made with respect to these expenses.

148. It is further worthy to note that in assessee's own case for AY 2007-08 in ITA No.3214/Del/2013, the coordinate bench has already decided this issue in favour of the assessee. Therefore, we allow these expenses.

149. In ground Nos.7.10 & 7.11 the assessee has challenged the action of the AO with respect to the disallowance of payments made by assessee towards charity and claimed deduction u/s 80G of the Act.

150. the ld. AO disallowed the claim of the assessee u/s 80G of the Act by observing that assessee could not file any evidence in support of the claim u/s 80G of the Act. The ld. DRP confirmed the view of

the AO.

151. Ld. A.R. reiterated the submissions made before the lower authorities. So far as the addition of Rs.4 lakhs out of the amount of Rs.14 lakhs, it is observed that the assessee has incurred only Rs.10,44,518/- as actual amount and inadvertently mentioned the figure of Rs.14,44,580/-. With respect to the addition of Rs.4.5 lakhs, the assessee is contending that claim u/s 80G of the Act has been duly certified by the auditors and the evidence of claim u/s 80G of the Act was obtained subsequent to the framing of assessment.

152. Ld. D.R. relied upon the orders of the authorities below.

-: Finding of the Bench:-

153. After considering the rival submissions, we are of the view that both these issues require fresh consideration at the end of AO. Therefore, we restore this issue of Rs.4 lakhs and Rs.4.5 lakhs to the file of AO for examining afresh in accordance with law.

154. Last ground is related to the addition of Rs.15,390/- for which the AO observed that assessee has not furnished any evidence before him. The ld. DRP also affirmed the view of the AO.

155. Before us, ld. A.R. submitted that this ground is similar to the ground No.4 of AY 2002-03 in assessee's appeal in ITA No.158/Del/2010.

156. Ld. D.R. relied on the orders of the authorities below.

157. After considering rival submissions, we are of the view that findings given by us with respect to ground No.4 in ITA

No.158/Del/2010 would apply mutatis mutandis here also.

158. In the combined result, the all the appeals filed by the assessee in ITA Nos.158, 159, 4856 & 5358/Del/2010 & ITA No.2539/Del/2017 are partly allowed and all the appeals filed by the revenue in ITA Nos.4859/Del/2009, ITA Nos.157 & 4791/Del/2010 are dismissed.

Order pronounced in the open court on 16th July, 2025

Sd/-	**Sd/-**
(Brajesh Kumar Singh)	**(Prakash Chand Yadav)**
Accountant Member	**Judicial Member**

Delhi,
Dated 16th July, 2025.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, New Delhi
5 Guard file

By order

Asst. Registrar,
ITAT, New Delhi.