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

BEFORE SHRI B.R. BASKARAN, AM AND SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ I.T.A. No. 2524/Mum/2005

(**निर्धारण वर्ष /** Assessment Year: 1998-99)

Gujarat Ambuja Cements Limited 122, Maker Chambers III, Nariman Point, Mumbai-400 021.	**बनाम**/ Vs.	The Deputy Commissioner of Income Tax, Range 3(1), Aayakar Bhawan, M.K. Road, Mumbai-400 020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAAPJ 8040P		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Soumen Adak
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri P.R. Ghosh

आयकर अपील सं./ I.T.A. No. 2654/Mum/2005

(**निर्धारण वर्ष /** Assessment Year: 1998-99)

The Deputy Commissioner of Income Tax, Range 3(1), Aayakar Bhawan, M.K. Road, Mumbai-400 020.	**बनाम**/ Vs.	Gujarat Ambuja Cements Limited 122, Maker Chambers III, Nariman Point, Mumbai-400 021.
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अपीलार्थी की ओर से / **Appellant by**	:	Shri Soumen Adak
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri P.R. Ghosh

सुनवाई की तारीख / **Date of Hearing**	:	30/11/2015
घोषणा की तारीख / **Date of Pronouncement**	:	05/08/2016

आदेश / O R D E R

Per Sandeep Gosain, J. M.:

These cross appeals are filed by the assessee and revenue for AY 1998-1999 against order of ld. CIT(A)-XXVII dated 10.01.2005.

First of all, we take up ITA No.2524/Mum/2005 (A.Y.1998-89) for disposal.

ITA No.2524/Mum/2005 (A.Y.1998-89): In this appeal, the Grounds raised by the assessee are as under :

"1(a) That on the facts and in the circumstances of the case, the Learned Commissioner of Income Tax(Appeals) [here-in-after referred to as Ld. CIT(Appeals)] was not justified in confirming the disallowance of expenditure incurred for Pooja function expenses amounting to Rs. 29,87,781/.

l(b) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in not holding that the expenditure was incurred wholly and exclusively for the purpose of business.

2(a) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified in confirming the disallowance of Consultancy Charges amounting to Rs. 8,40,000/- by holding that the said expenditure is capital in nature.

2(b) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) failed to appreciate the fact that the expenditure on account of consultancy charges amounting to Rs. 8,40,000/- is of revenue nature in view of the decision of IT AT in the appellant's own case on an identical issue.

2(c) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in holding that the nature of expense is distinct from expenditure incurred in earlier years inspite of the fact that there is no material change in the nature of expenses.

2(d) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) failed to appreciate the fact that by incurring the said expenditure no new assets or advantage of enduring nature was brought into existence.

2(e) That on the facts and in the circumstances of the case and without prejudice to Ground No. 2(a), 2(b), 2(c) and 2(d) taken here-in-above, having held that the impugned expenditure is capital in nature, the Ld. CIT(Appeals) erred in not allowing depreciation on the same.

3(a) That on the facts and in the circumstances of the case, the Ld .. CIT(Appeals) was not justified in confirming the disallowance of charges for service amounting to Rs. 1,51,048/- by holding that the said expenditure is capital in nature.

3(b) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) failed to appreciate the fact that the expenditure on account of charges for services amounting to Rs. 1,51,048/- is of revenue nature in view of the decision of ITA T in the appellant's own case on an identical issue.

3(c) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) . erred in holding that the nature of expense is distinct from expenditure incurred in earlier years inspite of the fact that there is no material change in the nature of expenses.

3(d) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) failed to appreciate the fact that by incurring the said expenditure no new assets or advantage of enduring nature was brought into existence.

3(e) That on the facts and in the circumstances of the case, without prejudice to Ground No. 3(a), 3(b), 3(c) and 3(d) taken here in above, having held that the impugned expenditure is capital in nature, the Ld. CIT(Appeals) erred in not allowing depreciation on the same.

4(a) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified in confirming the disallowance of the expenses on account of non-compete fees paid to Mr. D. K. Modi of Rs. 50,00,0001- as business expenditure.

4(b) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) failed to appreciate that by incurring the expenditure being non-compete fees paid to Mr. D.K. Modi of Rs. 50,00,0001- the appellant did not derive any benefit of enduring nature.

5(a) That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified in confirming the denial of claim for exclusion of interest u/s 244A received during the year amounting to Rs. 28,71,804/-.

5(b) That on the facts and in the circumstances of the case and without prejudice to ground no. 5(a) taken hereinabove, the Ld. CIT(Appeals) failed to take cognizance of the fact that the said amount of Rs. 28,71,804/- only represented interest income of a contingent nature at the stage of provisional assessment or otherwise, the accrual of which could be said to take place only in further pending proceedings and hence as such, was completely outside the purview of taxability as per the provisions of the Income-tax Act, 1961.

6(a) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified in confirming disallowance of the proportionate amount of Premium paid on Leasehold Land of Rs. 21,07,945/- written off during the year as revenue expenditure by treating the same as capital expenditure.

6(b) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) failed to appreciate the fact that the Premium paid on Leasehold Land, essentially bears the character of rent paid in advance which does not entail acquisition of any asset.

7(a) That on the facts and in the circumstances of the case, having disallowed premium on leasehold land in respect of Unit Gaj-1 in computing taxable income, the Ld. CIT(Appeals) has grossly erred in confirming deduction of the same in computing profits of Unit Gaj-1 and in the process, there was corresponding erroneous and unjust reduction in the quantum of deduction u/s 80-IA on Unit Gaj-l.

7(b) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) has grossly erred in directing the A.O. to verify the claim that the expenditure on powerline is in respect of Unit Gaj-2 and should not be excluded from the profit of Unit Gaj-I, instead of outright deciding the issue.

8(a) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified in confirming the decision of the A.O. in assessing Interest Income of Rs. 18,28,39,247/-, Income from Bill Discounting of Rs. 18,42,4011- and Truck Hire Charges of Rs. 2,18,10,1581- as income under the head "Income from Other Sources".

8(b) That on the facts and in the circumstances of the case, and without prejudice to ground no. 8(a) taken here-in-above, having held that the said income were to be

assessed under the head "Income from Other Sources", the Ld. CIT(Appeals) ought to have allowed the expenditure incurred to earn the aforesaid income.

8(c) That on the facts and in the circumstances of the case, and without prejudice to ground no. 8(a) taken here-in-above, having held that Truck Hire Charges are assessable under the head "Income from Other Sources", the Ld. CIT(Appeals) ought to have allowed depreciation on trucks.

9(a) That on the facts and circumstances of the case, the Ld. CIT(Appeals) was not justified in confirming the decision of the A.O. of not allowing deduction of profits derived by the Himachal Unit (an industrial undertaking located in an industrially backward state or district) in computing the book profits, as per clause (v) to the explanation below the second proviso to section 115JA.

9(b) That on the facts and circumstances of the case, the Ld. CIT(Appeals) was not justified in holding that the profits to be excluded under clause (v) of the explanation below section 115JA (2) shall be the profits as computed under section 80-IA of the Income Tax Act, and not the amount of book profits of the specified new unit which forms part of the book profits of the company as a whole.

9(c) That on the facts and circumstances of the case, without prejudice to Ground No. 9(a) and 9(b) taken here in above, having held, by following the decision taken by his predecessor in A. Y. 1997-98 that the profit computed u/s 80IA is to be reduced in computing Book Profit, the Ld. CIT(Appeals) erred in not directing the A.O. to exclude brought forward losses, while computing book profits for the year as was held by his predecessor in the same order.

10(a) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified in granting exclusion of export profit as computed under the provisions of the Act in computing the book profit for the purpose of section 115JA of the Act instead of allowing deduction for export profits as per profit computed under the provisions of Companies Act.

10(b) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified in not directing to compute deduction u/s 80HHC based on profit of the business as per the accounts prepared under the Companies Act in computing the book profit for the purpose of section 115JA of the Act.

11 That on the facts and circumstances of the case, the Ld. CIT(Appeals) was not justified in confirming the non-exclusion of Capital Profit on sale of investment

amounting to Rs. 4,97,27,379/- (Net) from the net profit in computing Book Profit as per provision of section 115JA of the Act.

12 *That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in not holding that imposition of interest u/s 234C is erroneous and bad in law.*

13 *That on the facts and in the circumstances of the case, on disposal of this appeal, material adjustments would be required in computing total income, interest and tax and necessary direction may be given to the A.O. on this front.*

14 *That the appellant craves leave to add, amend, modify, rescind, supplement, or alter any of the grounds stated here in above, either before or at the time of hearing of this appeal."*

The assessee vide letter dated 14.04.2009 has also taken additional grounds which is as under:

1. *"That on the facts and in the circumstances of the case, the claim for deduction u/s 80IA amounting to Rs.3,38,07,839/-, in respect of power generating unit, made by the appellant in the computation of total income under the provisions of the Act other than sec.115JA for the assessment year under consideration be treated as withdrawn."*

Since the assessee has submitted that the additional grounds raised in view of amendment in Finance Act, 1999 and as per amended provisions of section 80IA, the assessee has the option of claiming deduction for a period of ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking begins to generate power in respect of the units set up on or after 01.04.1993.

We have considered the submissions raised by the assessee and additional ground being raised by assessee is purely of legal nature and can be decided from the facts which are already in record therefore, we allow the assessee take the additional ground.

2. The Brief facts of the case are that the return of income by the assessee was filed on 26.11.1998 declaring an income of Rs.13,35,74,640/- u/s 115JAof the Act. Thereafter a revised return of income was filed on 31.03.2000 declaring income of Rs.8,25,05,680/- u/s 115 JA of the Act. The return was processed u/s 143(1) of the Act and the case was selected for scrutiny by issuing notice u/s 143(2) of the Act. After considering the reply submitted by the assessee, the AO passed the order of assessment thereby making disallowances and consequently making several additions under different heads vide order dated 15/03/2001.

Aggrieved by the order of AO, assessee preferred appeal before the CIT(A) and the CIT(A) after considering the case partly allowed the appeal of assessee vide its order dated 10.01.2005.

Aggrieved by the decision of the CIT (A), the assessee filed the present appeal before us on the grounds mentioned here in above.

Ground No. 1(a) & 1(b):

3. This ground relates to disallowance of expenditure incurred for Pooja/function expenses amounting to Rs.29,87,781/-.

3.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. As per ld. AR , the afore mentioned expenditure has been incurred for performing daily Pooja in plants, celebration of republic day, independence day, etc. The same was claimed as business expenditure but the ld. AO while passing order of assessment has held that the expenses are of non business nature and disallowed the same. The ld. AR submitted that the disallowance made by the AO was only on the basis that in the earlier years i.e. 1998-99 the similar expenditure were disallowed. It was further argued by ld. AR that this ground is covered by the order of Hon'ble ITAT Mumbai Bench in assessee's own case in AY 1988-99, 1989-90, 1996-97, 1997-98. In this regard our attention was drawn to the afore mentioned decisions and we found that in ITA No.3733/Mum/96, at page no. 2 para no.6 which is attached in paper book page no.110 the same ground has already been decided by Hon'ble ITAT in favour of assessee which is reproduced below:

"*The fifth ground is regarding disallowance of pooja expenses of Rs.61,984/-. According to the assessee, the issue is covered in its favour by the decision of the Tribunal in assessee's own case, in ITA No.2690/M/93 vide its order dated 20.12.02 for assessment year 89-90. We find that this issue is covered in favour of the assessee by the above decision of the Tribunal. In the assessment year 89-90, the Tribunal allowed the temple inauguration expenses except disallowance of Rs.3.00 lac out of lavish traveling expenses of Rs.3.8 lacs on travelling and food. The present year expenditure seems to be normal day to day expenses on pooja for running the temple in the vicinity of the plant. Accordingly, after considering the rival submissions, facts of the issue as stated above, and Tribunal's decision referred above, this ground is allowed in favour of the assessee. The addition so sustained by CIT(A) is deleted.*"

3.2 In view of the afore mentioned decision of Hon'ble ITAT in fvaour of assessee, while adhere to the principles of judicial consistency and while respectfully following the decision of co-ordinate Bench we allow the issue in favour of assessee and additions mad by AO and sustain by CIT(A) are deleted.

Ground No.2 & 3(a) to 3(e)

4. These grounds relates to disallowance of Consultancy Charges for services of Rs.1,51,048/-.

4.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Ld. AR submitted that the assessee has appointed Mr. S.K.

Sekhsaria for advice in civil construction pertaining to factory buildings and has appointed Mr. L.M. Hirani for advice in construction and regular maintenance of colony. Towards this assessee has incurred consultancy and service charges. Ld. AR submitted that the AO while following the order of earlier years had disallowed the expenditure by treating the same as capital nature. It was further argued by ld. AR that CIT(A) has sustained the said disallowance erroneously. It was also argued by ld. AR that similar ground was allowed by Hon'ble ITAT in assessee's own case for AY 1995-96, 1996-97, 1997-98. In this respect our attention was drawn to page no. 5 &7 and para 8-11 in supplementary paper book at page no. 53-55.

8. The fourth ground raised by the assessee is as follows:

> *"4(a) That on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the disallowance of Consultancy charges amounting to Rs. 5,40, 000/ - by holding that the said expenditure is capital in nature.*
>
> *4(b) That on the facts and in the circumstances if the case, the Ld. CIT(A) failed to appreciate the fact that the expenditure on account of consultancy charges amounting to Rs,5,40,OOO/- is of revenue in nature in view a/the decision of ITAT in the appellant's own case on an identical issue*
>
> *4((c) That on the facts and in the circumstances of the case, the Ld. CIT(A) failed to appreciate the fact that by incurring the said expenditure, 110 new assets or advantage of enduring nature was brought into existence."*

This issue is covered in favour of the assessee in assessee's own case in ITA No.2292/M/94 for A.Y. 1990-91 in which it has been held as under:

"As regards consultancy fees, ld. Counsel drew our attention to the finding by the AO that the construction of building, staff quarters etc. had already been completed. On the basis of that finding, the AO had allowed depreciation. The ld. Counsel pointed out that since construction had already been completed, the impugned consultancy fees were for the proper maintenance of the property and hence admissible as revenue deduction.

We have considered the rival submissions. In the light of the facts and findings as stated above, the legal provisions and the judicial pronouncements on the subject, we are inclined to uphold the order of CIT(A) on this ground. The CIT(A) has rightly held that the impugned expenditure is not directly related to creation of new capital assets and is in the nature of revenue expenditure. In this view, of the matter, the depreciation allowed by AO on Rs.1,51,995/- is required to be withdrawn. The ground of appeal fails.

Respectfully following the above decision, this ground of the appeal is allowed.

10. Ground No. 5 raised by the aseessee reads as follows:

> *"5(a) That on the facts and in the circumstances of the case, the ld. CIT(A) was not justified in confirming the disallowance of charges for service amounting to Rs.1,17,939/- by holding that the said expenditure is capital in nature.*
>
> *5(b) That on the facts and in the circumstances of the case, the ld. CIT(A) failed to appreciate the fact that the expenditure on account of charges for service amounting to Rs.1,17,939/- is of revenue in nature in view of the decision of ITAT in the appellant's own case on an identical issue.*
>
> *5(c) That on the facts and in the circumstances of the case, the ld. CIT(A) failed to appreciate the fact that by incurring the said*

expenditure no new assets or advantage of enduring nature was brought into existence."

11. This issue is covered by the decision in assessee's own case in ITA No.4032/M/99 for the A.Y. 1994-95 in which it has been held as under:

" Ground No.3 of the appeal reads as under:

On the facts and in the circumstances of the case and in law the ld. CIT(A) has erred in holding that the payment of Rs.97,512/- made to Shri Hirani as Revenue expenditures."

After hearing both the parties and on perusal of the paragraphs 9 and 10 of the order passed in ITA No.4189/B/96 for the A.Y. 1992093, as the circumstances and nature of that case are similar to that of previous year and hence service charges to the extent of Rs.97,512/- is in the nature of revenue expenditure and hence this ground of revenue's appeal is dismissed."

4.2 In view of the afore mentioned decision of Hon'ble ITAT in favour of assessee, while adhere to the principles of judicial consistency and while respectfully following the decision of co-ordinate Bench we allow the issue in favour of assessee and additions mad by AO and sustain by CIT(A) are deleted.

Ground No.4(a) & 4(b):

5. This ground relates to disallowances of expenses on account of non-complete fees as business expenditure amounting to Rs.50,00,000/-

5.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the

revenue authorities. Ld. AR representing the assessee submitted that the assessee has entered into an agreement with Mr. D.K. Modi for :

(i) Transfer of control and management in Modi Cements Ltd.

(ii) Resigning as Managing Director

(iii) Getting his nominees resign from the board and

(iv) For not carrying on the business of manufacturing or marketing of cement for 5 years within radius of 250 km of the existing plant.

5.2 Ld. AR argued that the AO has held that the payment was not made to ward off competition but to acquire management control. The same results in deriving enduring benefits and hence the expenditure was considered by the AO is capital in nature. Ld. AR further argued that the CIT(A) has also erroneously upheld the order of AO. Ld. DR representing the revenue relied upon the orders passed by lower authorities.

6. After considering the facts of the case we noticed that controversy in question relates to making payment on account of non-compete fees and considering the same to the business expenditure. Under the similar facts the Hon'ble Madras High Court in case of Carborandum vs. JCIT in ITA No.244 of 2006 as held that the "payment of non compete fees for fruitful exercise of

business is a commercial decision and hence should be treated as a revenue expenditure". Further in the case of CIT vs. Eicher Ltd. (2008) 302 ITR 249 (Del) it has been held "payment of non compete fees has not resulted in acquisition of capital asset. But merely eliminated competition for a while and restrictive covenant was neither permanent nor ephemeral. Hence, the advantage was not of an enduring nature."

6.1 In addition to the above we also found that similar grounds were also considered in the following case "JCIT Vs. Synergy Credit Corporation Ltd." (2006) 9 SOT 75 (Mum) and in the case of "ACIT Vs. Clariant Chemicals (I) Ltd. (ITA No.7428/Mum/2011). After considering afore mentioned judgements we found that the similar points have already been considered by Hon'ble High Court as well as co-ordinate bench of ITAT.

6.2 In view of the afore mentioned decision of Hon'ble ITAT in favour of assessee, while adhere to the principles of judicial consistency and while respectfully following the decision of co-ordinate Bench we allow the issue in favour of assessee and additions mad by AO and sustain by CIT(A) are deleted. We allow this ground.

Ground No.5(a)& 5(b):

7. This ground relates to non-exclusion of Interest u/s 244A received during the year amounting to Rs.28,71,804/-.

7.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Ld. AR representing the assessee submitted that in intimation u/s 143(1)(a) for A.Y. 1996-97, interest u/s 244A was granted at Rs. 28,06,140/- in the return of income, the said amount was excluded from the computation of total income since the assessment was in progress and the said interest was not attained finality. Therefore, ld.CIT(A) upheld the order of the AO.

7.2 We have considered the order of CIT(A) and the CIT(A) has discussed the facts and has relied upon the decision in the case of Saffron Trading Co. (P) Ltd. vs. ACIT (2003) 84 ITD 70 (Mum).

7.3 In our view CIT(A) has rightly upheld the orders passed by AO wherein it has been categorically mentioned that the interest received on the revenue issued by the department is taxable in the year of receipt an in the present case the assessee has received the interest income during the previous year relevant to assessment year 1998-99 and even of taxable of interest cannot be postponed in the

dies of finality of the proceedings. It was rightly held by AO as well as CIT(A) that interest received on the refund u/s 244(A) is treated as income received during the year and taxed accordingly. Hence, we see no reasons to interfere or deviate from the findings recorded and orders passed by the CIT(A) and hence this ground of appeal raised by assessee stands dismissed and the orders passed by CIT(A) are upheld. Therefore, we dismiss the appeal of the assessee.

Ground No.6(a)&6(b):

8. This ground relates to disallowance of proportionate amount of premium on leasehold land amounting to Rs.21,07,945/-.

8.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. We have noticed that the assessee has acquired various lands on lease and had paid lease premium in advance for acquiring such land on lease. AO held that the expenditure incurred on leasehold right in the land has resulted in advantage having enduring benefit. Therefore, the same was treated as Capital Expenditure. After considering the case we are also of the considered view that the premium paid for acquiring leasehold rights as capital expenditure and in this respect this view is verified by the decision of the Special Bench of Hon'ble

Mumbai ITAT in the case of JCIT Vs. Mukund Ltd. (2007) 106 ITD 231 (Mum) (SB).

Therefore, considering the afore mentioned facts, this ground raised by assessee is dismissed.

Ground No.7(a)&7(b)

9. This ground is not pressed and therefore the same is dismissed as not pressed.

Ground No.8(a) to 8(c):

10. This ground relates to assessing interest income, income from Bill Discounting & Truck Hire Charges under the head "Income from Other Sources".

10.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Ld. AR submitted that the assessee had treated interest income, income from bills discounting and truck hire charges as "income from business" in the computation of total income chargeable to tax but the AO has held that the said income shall be taxed under the head "income from other sources". Ld. AR further argued that CIT(A) has also erroneously upheld the order passed by AO. Ld. AR argued that the Hon'ble ITAT Mumbai Bench in assesse's own case for A.Y. 1995-

96, 1996-97, 1997-98 as set aside the issue to the file of the AO for fresh decision and to verify the nexus between the earnings. Our attention was drawn to operative para of ITA No.942/Mum/2004 for A.Y. 1995-96 at page no.8-9 of the said order passed by ITAT which is now annexed in supplementary paper book of page no. 56-57.

10.2 Therefore the issue with regard to truck hire charges are set aside to the file of the AO for fresh decision and the issue of interest income and bill discounting are also set aside to the file of the AO to verify the nexus between the earnings from money deployed our of unutilized funds and interest on borrowed funds. Further the AO is also directed to reduce the actual expenditure incurred and tax only the net income under the head of 'Income from Other Sources'.

Ground No.9(a) to 9(c):

11. This ground relates to non allowance of exclusion of the profits of Himachal unit as per the books in computing the Book Profit u/s 115JA amounting to Rs.58,57,93,526/-

11.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Ld. AR representing the assessee has claimed exclusion of profit computed as per books of Himachal Pradesh Unit located in backward area in computing Book Profit u/s 115JA in terms of clause (v) of the Explanation to

Sec.115JA but the AO held that assessee can claim exclusion only of the profit computed u/s 80IA for computing total income under the normal provisions. Ld. AR submitted that CIT(A) has erroneously upheld the order of AO whereas the similar ground has already been decided by ITAT in assessee's own case for A.Y. 1997-98 in ITA No.1859/Mum/2004 in this respect our attention was drawn to page no. 7-8 at para 2.6 to 2.6.1 of page no.24-25 of supplementary paper book.

> *"2.6 The seventh dispute is regarding not allowing the exclusion of profit from the Himachal Unit computed as per books while computing the book profit as per clause (v) to Explanation to section 115JA(2). The income from Himachal unit was exempt under section 80IA. The AO held that income as computed under the provisions of the Act and as reduced by brought forward losses was only to be deducted. CIT(A) upheld the view of the AO that the income computed under the provisions of Act has to be deducted but he directed not to deduct the brought forward losses.*
>
> *2.6.1 After hearing both the parties we find that this issue is covered in favour of the assessee by the decision of the Tribunal in case of Tushako Pump Ltd. (2SOT 556) in which it has been held that for the purpose of computing book profit under section 115JA, the profit of industrial undertaking eligible for deduction under section 80IA must be computed as per the books of accounts and not as per the provision of the Act. Respectfully following the said decision we held that the profit of the Himachal unit computed as per the books and after making adjustments as permissible under section 115JA will only be excluded while computing the book profit."*

Ground No.10(a)&10(b)

12. This ground relates to non allowance of exclusion of deduction u/s 80HHC computed on profit of the business as per the accounts prepared under the Cos. Act in computing Book Profit u/s 115JA amounting to Rs.11,11,94,842/-.

12.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Ld. AR representing the assessee submitted that in computing book profit u/s 115JA, the assessee has claimed exclusion of deduction u/s 80HHC by considering the profit as per books of accounts but the ld. AO while following the decision of Royal Cushion Vinyl Products Ltd. vs. DCIT (1993) 47 ITD 111 (Bom). Ld. AR further argued that CIT(A) has also erroneously upheld the order passed by AO. Ld. AR argued that the Hon'ble ITAT Mumbai Bench in assesse's own case for A.Y. 1997-98 in ITA No.1859/Mum/04 in this respect our attention was drawn to page no. 7-8 at para 2.6 to 2.6.1 of supplementary paper book page no. 24-25.

Therefore, considering afore mentioned facts, this ground raised by assessee is allowed.

Ground No.11

13. This ground relates to non-exclusion of profit on sale of investment in computing Book Profit u/s 115JA amounting to Rs.4,97,27,379/-.

13.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Ld. AR representing the assessee submitted that during the year, the assessee has claimed exclusion of profit (net of loss) on sale of investments in computing Book Profit u/s 115JA ld. AR further submitted AO while relying on the decision of CIT vs. Veekaylal Investments Co. (P) Ltd. (2001) 249 ITR 597 (Bomb). Ld. AR further argued that CIT(A) has also erroneously upheld the order passed by AO. Ld. AR argued that the issue is covered by the decision of the Hon'ble Delhi Tribunal in the case of ACIT vs. Northern India Theaters (P) Ltd. (1996) 133 CTR 326 (Del) wherein it has been held that profit derived on sale of fixed assets yield only capital gains and they do not partake the character of business profits and the same should not be shown as business profits in a properly prepared Profit and Loss Account as per provisions of Par II & III of Schedule VI of Companies Act.

13.2 On the other hand, ld. DR relied upon the orders passed by revenue authorities. After considering the rival contentions we are of the considered view that the CIT(A) has discussed this ground in detail and the operative para is reproduced below:

"16.2 During the course of appellate proceedings, the appellant submitted that the book profit on sale of investments and assets of Rs. 4,97,27,379/- (net) was excluded, under the contention that it was the profit derived on realization of capital asset and therefore would not be an item of income earned during the regular course of business. Section 115JA(2) specifically provides that every assessee, being a company, shall for the purposes of this section prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II & III of Schedule VI to the Companies Act, 1956 (1 of 1956). Therefore, the profit realised from sale of investments did not form part of the book profit as required to be shown in the profit and loss account under the provisions of Parts II & III of Schedule VI to the Companies Act, 1956. Reliance was placed among others on the decisions of Asst. CIT -vs- Northern India Theaters (P) Ltd. (1996) 133 CTR 326 (Del), Sutlej Cotton Mills Ltd. -vs- Asst. CIT (1993) 45 ITD 22 (Cal.)(SB), Oswal Agro Mills Ltd. -vs.- Dy. CIT (1994) 51 ITD 447 (Del), CIT -vs.- India Discount Company Ltd. [1970] 75 ITR 191(SC), CIT -vs.- Mis Shoorji Vallabhdas & Co. (1962) 46 ITR 144 (SC) and Sutlej Cotton Mills Ltd. -vs.- CIT (1979} 116 ITR 1 (SC). As regards the decision relied upon by the A.O., the appellant submitted that the said decision was in relation to an investment company, which has no application in the case of the appellant.

16.3 I have perused the submission made by the appellant and the relevant provisions of the Act. Provision of Sec.115JA specifies the items to be added back and to be deducted. In the said section there is no provision of deduction of capital profit in computing book profit. Thus,

following the provisions of the act, the ground is decided against the appellant."

13.3 After considering the afore mentioned detailed order we are of the view that the CIT(A) has passed judicial orders there is no reason to interfere or deviate into the order passed by the CIT(A) and upheld by the AO. Therefore, this issue is decided against the assessee.

Ground No.12

14. This ground relates to imposition of interest u/s 234C amounting to Rs.64,854/-

14.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Ld. AR representing the assessee submitted that as per the ld. AR the assessee is not liable to file the return of income for the assessment year under consideration, and assessee is not liable to pay interest u/s 234C. It is argued by ld. AR that the AO impose interest without assigning any reason. Ld. AR further argued that CIT(A) has also erroneously upheld the order passed by AO. Ld. AR relied upon the decision of Bombay Gymkhana Ltd vs. ITO (2008) 115 TTJ 639 (Mum) wherein it has been held that interest u/s 234C needs to the levied as per returned income.

14.2 On the other hand, ld. DR relied upon the orders passed by the lower authorities. After perusal of all the facts of the case laws we are of the considering view that the interest is u/s 234C to be levied as interest income therefore we direct the AO to recalculate the interest as per the return income. This ground of appeal is allowed in terms of above direction.

Ground No. 13&14

15. Both grounds are general in nature and needs no separate adjudication in view of the above decision.

Additional Ground No.1

16. This ground relates to withdrawal of claim of deduction u/s 80-IA in respect of unit engaged in the business of generation of power under the normal computation amounting to Rs.3,38,07,839/-.

16.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. It was argued by ld. AR for the assessee that as per section 80IA(2) as amended vide Finance Act,1999, the assessee has an option to claim deduction u/s 80-IA on generation of power for any 10 consecutive assessment years out of 15 assessment years beginning from the year in which the undertaking begins to

generate power. Ld. AR also relied upon the judgement in the case of ACIT vs. Vodafone Essar Gujarat Ltd. (2010) 131 TTJ 544 (Ahm) wherein it has been held that the assessee having fulfilled all the conditions as specified in the provisions of sec.80-IA it cannot be denied the benefit of the option claiming deduction for 10 assessment years out of 15 assessment years as granted by the amended provisions applicable w.e.f. 01.04.2000 even if the undertaking has commenced operations prior to amendment.

16.2 On the other hand ld. DR relied upon the orders passed by the revenue authorities.

16.3 After considering the rival submissions and appreciating the cited judgements we are other considered view that the assessee could not be denied the benefit of amended provision once it fulfill the conditions stipulated in the relevant provision and therefore in view of section 80IA (2) the assesse is entitled to view the option of claiming deduction u/s 80IA on generation of power for assessment year 1999-2000 onwards. However the issue on merits needs to be considered by the AO, accordingly we set aside this issue to the file of the AO.

16.4 With this direction this additional ground is treated as allowed.

In the net result, the appeal filed by the assessee is partly allowed.

ITA No. 2654/Mum/2005

1. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of community welfare expenses of Rs.146,39,374/-."*
2. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance on account of Temple expenses of Rs.5,89,535/-."*
3. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of mines prospecting charges of Rs.15,79,162/-."*
4. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of foreign exchange loss of Rs.157,16,034/-.*
5. *"The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."*

Ground No.1

17. This ground relates to deletion of disallowance of Community Welfare Expenses amounting to Rs.1,46,39,374/-.

17.1 We have heard the counsels for both the parties and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Ld. AR submitted that the Community welfare expenses have been incurred for maintenance of school, temple, ashram, village houses for the benefits of the employees and local residents residing nearby the factories for smooth functioning

of factories. The same is being claimed as business expenditure. It was further submitted by ld AR that the AO disallowed the expenditure while following the orders of earlier years. It was further argued that CIT(A) has also rightly deleted the addition. Ld. AR submitted that this ground is already been decided by Hon'ble ITAT in favour of assessee in assessee's own case for different years in this respect our attention is drawn on the decision of ITA No. 3733/Mum/96 for assessment year 1988-89 at page no. 3 para number 7 of paper book page no. 47 which is reproduced here under:

> *"The sixth ground is regarding disallowance of Rs.93,220/- being village welfare expenses. This expenditure relates to expenditure towards general village welfare in the vicinity of the plant. We find that this issue also covered by the decision of ITAT in ITA No. 2690/Mum/93 vide its order dated 20.12.2002 in assessee's own case for assessment year 89-90. Accordingly following above order, this ground is decided in favour of the assessee. The appeal of the assessee succeeds on this issue."*

17.2 This ground of appeal is dismissed.

Ground No.2

18. This ground relates to deletion of disallowance of Temple expenses amounting to Rs.5,89,535/-.

18.1 We have heard the counsels for both the parties and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Ld. AR submitted that temple expenses comprises of daily pooja

expenses, temple function expenses, etc performed in the temple situate inside the factory premises. The same has been incurred for the general welfare of employees and to boost up their morale in order to run the business more efficiently and economically. Hence the same has been claimed as business expenditure. Ld. AR further submitted that the AO has disallowed the expenditure following the orders of earlier years. It was further argued that CIT(A) has rightly deleted the addition. Ld. AR submitted that the said ground has already been decided in favour of assessee in assessee's own case by Hon'ble ITAT and our attention was drawn to ITA No. 2690/Mum/1993 for assessment year 1989-90 para 6 page no. 14-17 of paper book page no.57-60.

> *"6. The fifth ground pertains by CIT(A)'s action in confirming the disallowance in respect of temple inauguration expenses of Rs.8,33,943/-.*
>
> *6.1 It was submitted by the ld. Counsel of the assessee that the company had constructed a temple called Radhakrishna Temple near the factory. It was stated that in the year of account the said temple was inaugurated and puja functions had taken place for 10 days. It was pointed out that the temple was constructed at a cost of Rs.71.91 lakhs and its inauguration expenditure was incurred for the welfare of the employees and it included expenses like purchase of puja materials, dakshina/fees paid to pundits and other expenses like distribution of Prasad to all the employees, expenditure of flowers etc. in this regard the ld. Counsel adverted our attention to details of Temple Inauguration Expenses given at page 110 of the paper book. These details are reproduced as under-*

	Amount (Rs.)
Mandap Decoration etc	*1,33,210*
Prasad Distribution	*82,067*
Electricity Charges	*12,826*
Pooja materials	*55,210*
Travelling & Transportation	*3,79,499*
Labour Charges	*38,762*
Miscellaneous Expenses	*30,933*
Food Expenses	*1,01,436*
	8,33,943

6.2 It was furthers submitted by the ld. Counsel that the aforesaid expenses were incurred for the purpose of the temple located at factory complex just outside the factory. It was stated that the said expenditure was incurred to meet the emotional and religious needs of the employees and hence, the expenditure was incurred fort the welfare and recreation of the employees of the assessee and like any other expenditure incurred for the employees, it is also directly related to the business of the assessee. Reliance was placed by the ld. Counsel on the following decisions.

i) Commercial Ahmedabad Mills Co. Ltd. vs. CIT (1993) 204 ITR 505 (Guj)

ii) Allas Cycle Industries Ltd. vs. CIT (1982) 134 ITR 458 (P&H)

iii) Allas Cycle Industries vs. CIT 181 ITR 18 (P&H)

iv) Kedarnath Jute Mfg. Co. Ltd. vs. CIT 82 ITR 363 (SC)

v) Sutlej Cotton Mills Ltd. vs. CIT 116 ITR 1 (SC) &

vi) Cehemosyn (P) Ltd. vs. 2nd ITO (1992) 42 ITD 1(Bom)(SB)

6.3 on the other hand, the ld. DR has argued that since the assessee has suffered huge losses during this period, there was no necessity for incurring so much of the expenditure. She also argued that the said expenditure is not related to the business of the assessee and hence it is disallowable. She also

referred to decision of Bombay High Court in the case of Kolhapur Sugar Mills Ltd (119 ITR 387) which is relied upon by CIT(A).

6.4 we have heard the rival submissions in the light of material placed before us. The CIT(A) in confirming the decision of the AO relied on the decision of the Bombay High Court in the case of Kolhapur Sugar Mills Ltd. (supra) and also N. Sirur and Co. Pvt. Ltd. vs. CIT (1977) 109 ITR 432 (Bom), wherein the Bombay High Court relied on the decision of Calcutta High Court in the case of Andrew Yule & Co. Ltd. vs. CIT (1963) 49 ITR 57(Cal.)

6.5 the ld. Counsel of the assessee has replied that the decision of Kolhapur Sugar Mills Ltd. (supra) is not relevant in the present context. In the said case the expenditure was incurred for food and entertainment of labourers working in the assessee's own sugar factory. In the case of Andrew Yule & Co. (supra) the Hon'ble Calcutta High Court has held that to arrive at the conclusion that the expenditure was dictated solely by business consideration, one has to consider nature of the business, the way it is conducted and any likelihood of the business being adversely affected or its interest being promoted by the refusal or the incurring of the expenditure as the case may be. The ld. Counsel of the assessee submitted that the said decision squarely and favourably applies to the assessee's case. It was pointed out in the instant case the assessee was carrying on the business of manufacturing cement in a remote area, where no facilities for social and other recreation of the workers are available. It was stated that the impugned expenditure was incurred for boosting up the morale of the employees of the purpose of the assessee's business.

6.6 In this context, we would like to refer to the decision of Punjab & Haryana High "Court in the case of Atlas Cycle Industries (supra) wherein it was held that

"No curb can be placed on the discretion of the assessee to provide the type of recreation which, according to it, would best advance the interest of its business. If the recreation provided, even if it is in the nature of a religions activity, has a direct nexus with the welfare of a class of workers engaged by the assessee, it was wholly immaterial if the recreation provided is

directly or indirectly connected with the religious tenets of a section of the society."

6.7 We are in respectful agreement with the aforesaid decision, as well as most of other decisions relied upon by the ld. Counsel of the assessee, including the decision of the Bombay Tribunal in the case of Chemosyn P. Ltd. (supra). However, we find that some of the decisions referred by the ld. counsel are irrelevant for … the judgment of Supreme Court in the case of Sutlej Cotton Mills Ltd's case (supra) pertains to loss due to exchange fluctuation and hence is distinguishable on facts. In principle we hold that the genuine and reasonable temple inauguration expenditure is necessarily for the welfare of the employees and hence for the purpose of business of the assessee. However, from the details of the expenses given by the assessee we find that apart from expenditure of Rs.82,067/- incurred on "Prasad distribution, the assessee incurred food expenses of RS.1,01,436/-. These were not expenses on food or beverages provided by the assessee to its employees in office, factory or other place of work. Therefore, in view of Explanation 2 to sec.37(2A) (as existing at the relevant time). Food expenses are clearly in the nature of entertainment and hence are inadmissible as business expenses. In holding this view we are fortified by the decision of Hon'ble Bombay High Court in the case of India Plastics Ltd.240 ITR 528. But the expenditure incurred on "prasad" distribution is, in our opinion, allowable as business expenditure keeping in view the fact that it was since qua non in temple inauguration function. We further find that assessee has incurred huge expenses of Rs.3,79,499/- on travelling and transportation in connection with temple inauguration. The details of such expense are not available on records. But during the course of hearing it was stated by the ld. Counsel that these expenses included expenses for air tickets of pundits and other guests and employees who were invited to attend the tempele inauguration function. We are of the opinion that such lavish expenditure on air tickets etc. was not dictated by considerations o commercial or business expediency particularly when the assessee was suffering huge losses. The judgement of Hon'ble Bombay High Court in Kolhapur Sugar Mills Ltd's case does fortify our view. But we are of the view that some reasonable expenses on travelling and transportation have to be allowed as pundits and some employees for the function were called

for from outside stations. In our view it will meet the ends of justice if disallowance of Rs.3,00,000/- is made out of travelling and transportation expenses. Thus, the total disallowance under this head is restricted to Rs.4,01,436/-(i.e. 1,01,436+3,00,000) which will result in a relief of Rs.4,32,507/- to the assessee. The assessee, therefore, partly succeeds on this issue."

18.3 We dismiss this ground of appeal.

Ground No.3

19. This ground relates to deletion of disallowance of Mines Prospecting expenses amounting to Rs.15,79,162/-.

19.1 We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities.

19.2 Ld. AR submitted that mines prospecting expenses has been incurred for identifying deposits of limestone at various mining locations. The same has been claimed as revenue expenditure u/s 37(1). Ld AR futher submitted that the AO has wrongly held that the expenditure incurred is capital in nature. It was further arugued that the CIT(A) has rightly deleted the addition. Ld. AR submitted that this issue is already been decided in assessee's own case for assessement year 1988-89 in ITA No. 3733/Mum/1996 para 17 of paper book page no.48.

"17 Ground no.8 relates to disallowance of miscellaneous expenditure as under:-

i) Quarry development expenses of Rs.25,69,139/
ii) Market research and development expenses of rs.8,18,712/- and
iii) Advertisement for corporate image of Rs.8,53,980/-

According to learned counsel, these items are covered by following decisions:

a) ITA No.2690/M/93 vide its order dated 20.12.2002 for assessment year 1989-90
b) ITA No.2419/M/94 vide its order dated 4.8.2003 for assessment year 90-91
c) Empire Jute co. Ltd. vs. CIT (1980) 124 ITR 1(SC)
d) CIT vs. Ananda Bazar Patnika (P) Ltd. 91990) 184 ITR 542 (cal)
e) CIT vs. Berger Paints (India) Ltd. (No.s2) (2002) 254 ITR 503 (cal)

Vide para 17.3 of its order dated 20.12.2002, the Tribunal for the assessment year 89-90 in ITA No.2690/M/93 held as under:-

"17.3 We have considered the rival submissions in the light of material placed before us. It is a fact that assessee's business had started during the preceding year and it had already started extracting limestone form the mines. The impugned expenses are to be incurred on year to year basis and cannot be said to be incurred prior to commencement of business. Since the business had already commenced, the same will not be cover by the provisions of section 35(1). Further the said expenditure was incurred for extracting raw material and not for acquiring any asset of enduring benefit or advantage. In this context, we rely on the decision of apex court in the case of Empire Co. Ltd. (supra) wherein it was held that if the advantage consists merely in facilitating the assessee's trading operation, the expenditure would be on revenue account. Respectfully, following the said decision and other decisions relied upon by the ld. Counsel; we hold that the said expenditure can in no way be treated as capital in nature. We, therefore, confirm the order of CIT(A) who has held that the impugned expenditure is revenue expenditure allowable u/s

37(1). The assessing officer has not discussed the issue at all. The appeal of the revenue fails on this issue as well."

In view of the above, quarry development expenses are treated as revenue expenditure and are allowed. The assessee succeeds on this ground.

Other two expenses viz market research and development expenses of Rs.8,18,712/- and advertisement of corporate image of Rs.85,39,801/- the assessee has placed reliance on three decisions (supra). The assessing officer have treated them as capital expenditure and so confirmed by the CIT(A) vide para 15 and 15.1 of his order. Since the business of the assessee has commenced during this year, the expenditure on quarry development expenses, will be treated as revenue expenditure, following the

19.3 Therefore, we dismiss this ground of appeal.

Ground No.4

20. This ground relates to deletion of disallowances of Foreign Exchange Loss amounting to Rs.1,57,16,034/-.

20.1 We have heard the counsels for both the parties and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Ld. DR appearing on behalf of revenue supported the order passed by AO and submitted that foreign exchange fluctuation loss is notional or anticipated loss computed on the basis of prevailing exchange rate as on 31.03.1998 therefore the AO has rightly disallowed the same. On the other hand ld. AR appearing on behalf of

assessee submitted that foreign exchange fluctuation loss has been incurred for various types of revenue expenditure as well as for loan in foreign currency taken for day to day functioning of the business. The same is being accounted as per AS-11 issued by ICAI. Ld. AR also submitted that this issue is squarely covered in favour of assessee by the decision of CIT vs. Woodward Governor India Pvt. Ltd. (2009) 312 ITR 254 (SC) where is has been held that loss suffered by the assessee on account of the exchange difference as on the date on the balance sheet is an item of expenditure u/s 37(1) of the Act.

20.2 We have considered the rival submissions since the issue is squarely covered in favour of assessee by different judicial pronouncements as mentioned above and the CIT9A) has also passed order while following the decision of Oil and Natural Gas Corpn. Ltd. vs. CIT (2010) 322 ITR 180 (SC) and DCIT vs. Bank of Bahrain & Kuwait (2010) 41 SOT 290 (Mum) (SB).

20.3 Order passed by CIT(A) are judicious and well reasoned therefore we see no reason to interfere or deviate hence we upheld the orders of CIT(A) and dismissed this ground of appeal.

20.4 Since the assessee has submitted that the additional grounds raised in view of amendment in Finance Act, 1999 and as per amended provisions of section 80IA, the assessee has the option of claiming deduction for a period of ten consecutive

assessment years out of fifteen years beginning from the year in which the undertaking begins to generate power in respect of the units set up on or after 01.04.1993.

22. In the net result, appeal filed by the revenue is dismissed.

Order pronounced in the open court on 5th August, 2016

Sd/-	Sd/-
(B.R. Baskaran)	(Sandeep Gosain)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 05.08.2016
Ps. Ashwini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**