INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SMT BEENA A. PILLAI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

Assessment Year	ITA No of AO	ITA NO of Assessee
2000-01	4410/Del/2003	NA
2001-02	3426/Del/2003	NA
2002-03	1308/Del/2006	1271/Del/2006
2003-04	NA	2815/Del/2008
2004-05	3242/Del/2008	3104/del/2008
2005-06	3920/Del/2009	3724/ Del/2009
2006-07	3314/Del/2010	3393/Del/2010
2007-08	2596/Del/2011	2479/Del/2011
2008-09	4975/del/2012	4793/Del/2012

The Addl. Commissioner of Income Tax & The Assistant Commissioner of Income Tax Range-I, Moradabad,	Vs.	Jubilant Life sciences Limited Formerly known as M/s. Jubilant Organosys Ltd, Plot No. 1A, Industrial Area, Sector-16A, Noida
(Appellant)		**(Respondent)**

Jubilant Life sciences Limited Formerly known as M/s. Jubilant Organosys Ltd, Plot No. 1A, Industrial Area, Sector-16A, Noida	Vs.	The Addl. Commissioner of Income Tax & The Assistant Commissioner of Income Tax Range-I, Moradabad,
(Appellant)		**(Respondent)**

Revenue by :	Shri J. K. Mishra, CIT DR Smt Naina Soin Kapil, Sr. DR
Assessee by:	Shri R.M. Gupta, Adv Ms. Shubhangi Arora, AR
Date of Hearing	28/01/2019
Date of pronouncement	12/03/2019

O R D E R

PER Bench

1. This is bunch of 15 appeals pertaining to one assessee for several assessment years involving some common grounds of appeal. Some of these appeals are filed before 16 years; they are being adjourned under one pretext or other. From the pendency of one appeal for assessment year 2000 – 01 in 2003, now it has become a pendency of 15 appeals of the same assessee over a period of 16 years. Each year appeals are being piled up in the pendency before us. It would be fruitless to find out who is responsible for non-disposal of these appeals for all these years, because the answer is that all stakeholders i.e. Assessee revenue and of course this tribunal is responsible for this state of affairs unquestionably. These matters were adjourned for more than 35 times in past. Therefore, with the consent of the parties, an attempt was made to dispose of all these appeals. At request of parties, we have heard them together and disposed of by this common order.

ITA No 4410/Del/2003

AY 2000-01

2. First, we take up ITA number 4410/del/2003 for assessment year 2000 – 01 filed by learned Assistant Commissioner of Income Tax, Range – 1, Moradabad (learned AO) against order of The Commissioner of Income Tax (Appeals), Bareilly dated 10/7/2003 wherein learned AO has raised following grounds of appeal.

"1. that LD CIT (A) has erred in law and on facts of case in directing AO not to enhance book profit by a sum of Rs. 10540000/- which represents depreciation on revalued assets for purpose of section 115J of Income Tax Act, 1961.

2. That ld CIT(A) has erred in law and on facts of case in not enhancing book profit by amount of depreciation on revalued assets in light of CBDT letter No. 385/96/88-IT(8) dated 31.01.89 as well as SLP reported in 212 ITR 61 pending on issue involved.

3. The ld CIT(A) has erred in law and on facts of case is directing Assessing Officer not to enhance book profit by Rs. 75230705/- for purpose of computation of book profit u/s 115JA as this amount is not actual profit derived from an industrial undertaking engaged in business of generation or generation and distribution or power.

4. That ld CIT (A) has failed to appreciate facts before allowing relief of Rs. 75230705/- that assessee had generated power for internal consumption of its existing units and it was not distributed for purpose of business.

5. That ld CIT (A) has erred in law not rejecting assessee's plea that an undertaking for generation of distribution of power is separate and independent unit while it is not fact and there is no separate viable unit. Assessee simply prepared income and expenditure account on proportionate basis

6. That ld CIT(A) has erred in law and on facts of case in accepting assessee's explanation that net profit shown in P/L a/c cannot be disturbed as per decision of Apex Court reported in 255 ITR 273 while facts of decision are distinguishable with facts of case.

7. That ld CIT(A) has failed to appreciate facts that assessee claimed deduction of Rs. 10540000/- on account of transfer of revelation reserve while computing book profit u/s 115JA which is not allowable as per explanation to section 115JA(2) since profit and loss was not credited by Rs. 10540000/-.

8. That ld CIT (A) has erred in law and on facts of case in deleting disallowance of Rs. 57052010/- made on a/c of interest on borrowed capital utilized in explanation and modification projects as per explanation 8 to section 43(1) of Act.

9. That ld CIT(A) has erred in law erred on facts of case in treating expenditure of Rs. 2600000/- incurred installation of Software System as revenue expenses while assessing office correctly treated it as capital in nature.

10. That ld CIT(A) has erred in law and on facts of case in allowing relief of Rs. 2600000/- while assessing officer has rightly addressed same and allowed depreciation accordingly which finds support from decision reported in 259 ITR 30 (Raj) wherein decision of Hon'ble Apex court reported in 166 ITR 66 was followed.

11. That ld CIT (A) has erred in law and on facts of case in directing AO to treat sum of Rs. 14389000/- and Rs. 34364/- as business income which was correctly assessed under head Income from other source.

12. That ld CIT (A) has erred in law and on facts of case in directing to treat service charges of Rs. 2163586/- as business income.

13. that ld CIT (A) has erred in law and on facts of case in deleting disallowance of expenses of Rs. 2098978/- incurred on books and journals, which was taken as capital expenses by Assessing Officer ass assessee admitted that books are tools for its business activities.

14. That ld CIT (A) has erred in law and on facts of case in treating expenses incurred in purchase of books as revenue expenses while Assessing Officer has rightly taken it capital in nature and treated it as a plant as per section 43(3) and reliance is placed on decisions reported in 132 ITR 401 (Guj) 129 ITR 73 and 206 ITR 30 (Cal)

15. That ld CIT(A) has erred in law on facts of case in allowing relief of Rs. 9131504/- out of Rs. 9829097/- disallowed on account payment of provident fund.

16. That ld CIT (A) has erred in law and on facts of case in deleting prior period expenses of Rs. 5862377/- while assessing officer has correctly disallowed it.

17. That ld CIT(A) has erred in law and on facts of case in directing Assessing Officer to allow deduction of Rs. 8184685/- u/s 35 of Act which as rightly been added by AO.

18. That ld order of ld CIT (A) being erroneous in law and on facts may be cancelled and order of ld Assessing Officer may be restored."

3. Brief facts shows that assessee is a company engaged in business of manufacturing and trading of polymers, specialty and fine chemicals, adhesives , fertilizers, animal nutrition products etc. Assessee filed its return of income on 30/11/2000 showing total loss of INR 150003727/. Assessee also offered book profit tax under section 115JA of act of INR 4674817/–. The return was revised on 30/3/2001 where there was no change in loss declared according to normal computation of income; however deemed income under section 115JA of income tax act was shown at Rs. Nil. Against this returned income, assessee was assessed under section 143 (3) of income tax act at loss of INR 57036945/– and book profit was assessed at INR 7836820 under section 115JA of income tax act. The learned assessing officer made several disallowances. Assessee challenged disallowances and additions before Commissioner of Income Tax (Appeals) that passed an order on 10/7/2003 deleting some disallowances. Against this order, learned AO aggrieved, has preferred this appeal.

4. The first ground of appeal of learned AO is that learned CIT – A has erred in law and on facts in case in directing learned AO not to enhance book profit by a sum of INR 10540000/- which represents depreciation on revalued assets for purpose of section 115JA of income tax act 1961. Second ground is also related to ground No 1, which shows that learned AO is aggrieved as learned CIT – A has not enhanced book profit, by amount of depreciation on revalued assets.

5. We have heard rival contentions on this issue. It was found that issue of revaluation reserve for purpose of section 115JA of act raised in these grounds of appeal is not arising out of order of learned assessing officer or learned CIT – A and thus this ground of appeal has wrongly been taken by learned assessing officer. On careful perusal of page number seven of assessment order it is apparent that learned assessing officer has himself accepted that revaluation reserve being credited to profit and loss account does not warrant any further adjustments. It is also noted that amount of INR 10548000 as mentioned in ground of appeal number 1 relates to amalgamation adjustment reserve that has been dealt with in ground

number 7 of appeal of learned assessing officer. The ld DR also did not show us how this ground is arising from order of lower authorities. Therefore, it is apparent that this ground has been taken under some misunderstanding or erroneously. In view of this ground number, 1 and 2 of appeal are dismissed.

6. The 3rd ground of appeal is with respect to order of learned CIT – A deleting addition of INR 75230705/– in book profit computation under section 115JA of income tax act as this amount is not actual profit derived from industrial undertaking engaged in business of generation of distribution of power. The 4th ground is also related to same where learned AO has contested that assessee had generated power for internal consumption of its existing unit and it was not distributed for purposes of business and therefore it is not eligible for deduction. Ground number 5 is also on same issue where AO is aggrieved that undertaking for generation of distribution of power is not a separate and independent unit as assessee has merely prepared separate income and expenditure account on proportionate basis. The learned AO vide ground number 6 is also aggrieved with fact that learned CIT – A has accepted assessee's explanation that net profit shown in profit and loss account cannot be disturbed as per decision of honourable Supreme Court reported in 255 ITR 273. Therefore, ground numbers 3 – 6 of this appeal are taken together.

7. The brief fact shows that assessee had setup a new power generation undertaking in financial year 1998-99. The assessee in that year had imported three Diesel Generator ('DG') sets and other ancillary machinery for generating power. The power generated from said undertaking was consumed captively by other units of assessee-company. While computing book profits under section 115JA of Act, assessee reduced amount of profit attributable to said power generating undertaking as per clause (iv) in Explanation to section 115JA(2) of Act. The assessee took a certificate from its auditors M/s K. N. Gutgutia & Co. regarding computation of profits of Rs. 7,52,30,705 from power generation unit. While computing revenues, number of units of electricity produced were multiplied with rate charged by State Electricity Board i.e. Rs 4.09/unit. The Ld. AO in impugned assessment order at page 3-6 denied deduction of Rs.

7,52,30,705 to book profits of assessee for purpose of determining deemed income under section 115JA of Income Tax Act, 1961 (' Act'). The allegations of Ld. AO are as under:

i. DG sets were imported for home consumption (Point i, page 6 of assessment order)
ii. No separate distinct independent unit for generation of power (point v, page 6 of assessment order)
iii. In absence of actual sales and generation of power of own use no business was carried on by assessee for generation and distribution of power. The profit shown is notional one (Point ii, iii, iv, vi, vii and viii page 6 of assessment order)

8. The learned CIT – A allowed claim of assessee and therefore revenue is aggrieved.

9. The learned departmental representative vehemently supported order of learned assessing officer stating that DG sets were imported for home consumption and there is No separate distinct independent unit for generation of power. He stated that in absence of actual sales and generation of power of own use no business was carried on by assessee for generation and distribution of power. The profit shown is notional one. He therefore submitted that claim of assessee is not allowable u/s 80 IA of act and therefore no book profit deduction can be granted.

10. The learned authorised representative stated that order of learned assessing officer is not sustainable and learned CIT – A has correctly deleted addition for following reasons.

(a) Re: DG sets were imported for home consumption:

The Ld. AO's allegation that if custom authorities have marked invoice of DG sets for home consumption, it means that goods are not used for purpose of business is not based on appreciation of Customs Act, 1962. As per section 45 thereof, imported goods may be cleared by Custom authorities in either of following manner:

- Home consumption or

- Warehoused; or
- Transshipped.

It manifests from above that home consumption means consumption of goods in Indian Territory. The Customs Act, 1962 is not concerned with whether goods are used for personal purpose or for purpose of business. This becomes clear in section 47 of Customs Act, 1962 where it is stated that Customs officer shall allow clearance of goods for home consumption upon payment of applicable import duty. Therefore, Ld. AO's allegation does not have any legally sustainable basis.

(b) Power generation unit is not a separate unit:

Clause (iv) in Explanation to section 115JA (2) of Act refers to word "industrial undertaking" and not separate unit. The word "industrial undertaking" is not defined in section 115JA of Act. It has however been defined in clause (b) in Explanation 1 to section 10(15) of Act as any undertaking which is engaged in business of generation or distribution of electricity or any other form of power.

Assuming that allegation of Ld. AO is with regard to DG sets not constituting an undertaking, assessee relies on definition of word "undertaking" as given in Explanation 1 to section 2(19AA) of Act since section 115JA of Act does not define word undertaking. As per section 2(19AA) of Act, "Undertaking" shall include any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity".

Thus, even a part of an undertaking is considered to be undertaking so long as it constitutes a business activity. It is submitted that substantial capital was invested in purchase of DG sets as is evident from bills of entry at pages 65 to 66 of Paper book. As per auditors certificate, assessee produced 6,37,30,270 units from use of DG

sets. (Page 75 of Paper book). The electricity generated by these DG sets is also capable of being sold in market, thereby establishing that it is a marketable product. The activity of producing electricity even when it is for captive use per se is eligible to be considered as a business as per serial no. c below.

The assessee submits that there is no requirement of having a separate undertaking as per reading of various provisions contained in section 115JA, section 10(15) and section 2(19AA) of Act. Nevertheless, industrial undertaking generating power had independent, separate existence since separate land was earmarked for establishing said undertaking, and undertaking was independent of other undertakings of assessee. The assessee's auditor had computed separate profit, which was attributable to power generation business. (Page 72 to 75 of Paper book).

(c) Re: Power not supplied to public i.e. it is for captive use:

The Ld. AO's allegation that merely because electricity produced is not sold in open market, profits thereof profits there from need not be reduced from book profits under section 115JA of Act is devoid of any merits. It is because no such condition is mentioned in clause (iv) of Explanation to section 115JA (2) of Act. The assessee places reliance on following judgments wherein under similar circumstances profits from captive power generation business have been allowed to be reduced from book profits:

- CIT vs. DCM Sriram Consolidated Ltd. [(2014) 368 ITR 720 (SC)]
- Tata Iron And Steel Co. Ltd vs. The State of Bihar [1958 AIR 452]

Consequently, this means that where assessee is producing something, is using produced product captively (for its own use) to produce an ultimate product and there is a transaction of sale of ultimate product and profit (if any derived from sale) embedded in

final realization will be taxed. In present case too, assessee's power generation unit is producing power for its own use in other units for producing ultimate product i.e. chemicals which are sold to customers& thus, profits from power generation (which are embedded in profits from chemical sale) should be disintegrated & reduced for purpose of 115JA of Act.

- CIT vs. ITC Ltd.[(2016) 268 CTR 400 (Del)] - Hon'ble Calcutta High Court- ITA 125 of 2007 - The power generating unit of assessee did not distribute power generated to outsider this fact does not disentitle this undertaking from taking benefit of u/s 115JA, it was held that " contention that assessee has not sold power generated by power undertaking to any outsider but has consumed 100% generated by its unit does not disentitle him u/s 115JA".

CIT vs. Orient Abrasive Ltd. [(2014) 271 CTR 626 (Del)] - Hon'ble Delhi High Court- In context of deduction under section 80-IA of Act, it was held that "profit and gain" from captive consumption of electricity supplied from generator set and which cannot be sold to any third person will qualify for deduction under Section 80-IA of Act. In arriving at this conclusion, Hon'ble Court relied on its judgment in CIT vs. DCM Sriram Consolidated Ltd., [2010] 322 ITR 486 (Delhi), which was later confirmed by Hon'ble Supreme Court in [(2014) 368 ITR 720].

11. We have carefully considered rival contention and perused orders of lower authorities. The facts stated above are undisputed. The first ground of rejection of claim of assessee is that diesel-generating sets are imported where invoices show that these were imported for home consumption. The learned assessing officer has noted that the marking show that goods are not used for purpose of business. There is a clear misunderstanding on part of learned AO in holding that when custom authorities have marked for home consumption means that they are not to be used for purpose of business. The only meaning of that particular Mark is that goods are to be used for consumption in Indian Territory. Therefore,

allegation of learned assessing officer that Gen sets imported for home consumption and therefore deduction under section 80 IA of income tax act is not allowable on it is devoid of any merit. Further, with respect to power generation unit not being a separate unit and further power is not supplied to public but it is for captive consumption and therefore no deduction under section 80 IA of income tax act is allowable is also now judicially settled by decision of honourable Delhi High Court in case of CIT vs. Orient Abrasives Ltd [271 CTR 626] wherein honourable Delhi High Court has held where substantial question of law before honourable High Court was Whether "profit and gain" from captive consumption of electricity supplied from generator set and which cannot be sold to any third person will qualify for deduction under Section 80-IA of Income Tax Act, 1961?. The honourable High Court answered same as under:-

> "11. A similar issue was raised before Delhi High Court in **CIT Vs. Orissa Cement Ltd.** [2002] 254 ITR 412 (Delhi), where deduction under Section 80-I was claimed on profits derived from captive consumption of limestone excavated from mines and thereafter used for manufacture of cement in plant of assessee. Revenue's submission that one cannot earn profit by indulging in business with oneself, was rejected to negate claim. Division Bench relying on Tata Iron and Steel Co. Ltd. & Ors. Vs. State of Bihar [1963] 48 ITR 123 (SC) and several decisions, rejected similar submission of revenue after quoting following paragraph from judgment in Tata Iron and Steel Co. Ltd. (supra):-
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> "That even in cases where profit resulting from an ultimate activity is brought to tax there could be an apportionment if there were an exemption in respect of profits resulting from distinct activities at earlier stages is illustrated by provisions of Indian Income Tax Act itself. Thus, in case of, say, a sugar mill, which grows its own cane, in absence of any exemption for income derived from agriculture, i.e., from production of cane, entire profit of mills from sale of sugar would have to be included in taxable profits under Section 10 of Income Tax Act. But Section 4(3)(vii) exempts agricultural income as defined in Section 2(1). The result, Therefore, is that there is a.

disintegration or dichotomy of 'incomes, profits or gains' of business and of agricultural income, so that there has to be an apportionment between two in order to determine taxable income of an assessed. It is on account of this situation that Section 59(2) of Income Tax Act provides for rules being made for prescribing manner in which and procedure by which incomes derived in part from agriculture and in part from business shall be arrived at."

It was observed that there could be erosion or deviation from principle that one cannot make profit by trading or doing business with oneself. It would be appropriate to also reproduce following observations of Supreme Court in Tata Iron and Steel Co. Ltd. (supra):-

"It could not be disputed that factually profit from mining operation and winning of mineral is imbedded in profit realised from sale of end product. A simple illustration would demonstrate this. Let us assume that cost of winning ore is Rs. 50/-a ton and market price of similar ore which would have to be used in absence of ore mined is Rs. 60/-per ton. There could not be any doubt that this difference of Rs. 10/-per ton of ore would be reflected in profit and loss resulting from sale of steel. It is needles to add that if in a given case mined product costs more than market price of commodity, there would be loss on mining operation notwithstanding that there is a profit realised from sale of end product -steel, but these are matters of calculation not relevant at present stage, for we are endeavouring to ascertain whether there could in law be a profit when mined ore is converted into steel in mills of mining-company. It thus factually profit from mine or from mining operation is imbedded in profit from sale of steel is there any principle of law which prevents effect being given to this factual position? The learned Attorney-General submitted that in such a situation "profit" is not a real or an actual profit but is one which is merely notional, and that when Act spoke of a "profit" it meant an actual, real and realised profit and not a merely notional "profit". We find ourselves unable to accept this submission. We start with premise that by sale of end product a real "profit" has been

realised. When analysed it is found that that profit is aggregate or resultant of profits from different lines of activity. If arithmetically that total represents resultant aggregation of different items of activity we fail to see how it could be said that profit from each item which results in that total is a notional and not an actual or real profit. In interests of clarity, we should add that principle would be same when sale of end product yields no profit, but results in a loss, only in such a case, relevant component, viz, disintegrated profit or loss resulting from mining operation would diminish loss if that were a profit, or add to loss if that were also a loss. No doubt, there was a further contention urged that you cannot dissect that final profit in order to ascertain its components, but it is quite a different one from that now under consideration and we shall deal with it in its proper place. But what we are now concerned to point out is that if it is capable of dismemberment or disintegration into its components, it would not be correct use of language to designate profit so apportioned and ascertained as attributable to each line of activity any less real than aggregate profit realised from all ventures. In way in which we have approached problem there could be no question involved of any departure from principle that a man cannot trade with himself. In fact, principle of dichotomy is

"4. After considering issue, statutory requirement as prescribed under section 80-IA(1) has been stated in paras 8 and 9 of abovesaid judgment which reads thus brought in by learned Attorney-General by first disintegrating business of appellant into two -first as a mine-owner winning ore and later by a Steel Manufacturing Co., consuming won ore and then posing question as to whether transfer of ore from mining section to manufacturing one could in law involve a sale of product so as to yield a "profit". It would be apparent that if one proceeded on basis of treating businesses as a single and integrated one, as learned Attorney-General desired us to do, as one unbroken chain from start of mining operation to sale of finished steel or steel products by company -no question of a person trading with himself would arise, but very different one as to whether there

could be a disintegration of profits of an integrated business, between component constituents which go to make it up. Undoubtedly, in order to ascertain profits from mine there would have to be a disintegration of gross profits which finally emerge from sale of finished steel or steel products. What we desire to point out is that this involves no disintegration of business affording scope for contention based upon principle that a person cannot trade with himself, but one far removed from it, viz., whether when a profit has been made as a conjoint result of different but integrated operations, profits so derived could be broken up so as to permit attribution of specific amounts of profit to each or any of several operations or activities."

12. Thereafter, Supreme Court in Tata Iron and Steel Co. Ltd. (supra) noticed and went into question whether there was anything in law which prohibits/bars ascertainment of profit and loss attributable to each line of activity, where sale of final end product has resulted in profit or loss for entire venture Contra argument raised on behalf of Revenue was rejected for reasons given in paragraph which has been quoted in decision of Delhi High Court in Orissa Cement Ltd. (supra). We have already noted statutory provisions of Section 80 IA of Act and bserved that statutory provisions in fact were to contrary and stipulate computation of an eligible undertaking's profit or loss, even when sales/transactions were made to a related party or to same assessee, but in such cases, profits have to be computed in manner stipulated in sub-sections (10) and (8) to Section 80-IA.

13. Madras High Court in Tamilnadu Petro Products Ltd. Vs. Assistant Commissioner of Income Tax, [2011] 338 ITR 643, had an occasion to deal with Section 80 IA in a case where assessee had a electricity generation unit, which was supplying electricity to same assessee and not to third parties, observing that profits from captive consumption would be eligible, Division Bench in paragraph 4 referred to an earlier decision of same Court dated 7th June, 2010 in Tax Case (Appeal) Nos.68 to 70 of 2010, CIT Vs. Jhiagarjar Mills Ltd. and quoted relevant portion and observed:-

"8. The contention that only whatever power generated from sale to an outsider or Electricity Board, and profit or gain derived by such sale alone can be taken as profits or gains derived by assessee as mentioned in section 80-IA(1) of Income-tax Act, has been rejected by Tribunal in order impugned. In our considered view, Tribunal was well justified in having rejected such a stand of appellant. Having referred to section 80-IA(1) of Income-tax Act, we are also convinced that what is all to be satisfied in order to be eligible for deduction as provided under sub-section (1) of section 80-IA, assessee should have set up an undertaking or an enterprise and from and out of such an undertaking or an enterprise set up, any profit or gain is derived, falling under sub -section covered by sub-section (4) of section 80-IA of Income-tax Act, such profit or gain derived by assessee can be deducted in its entirety for a period of 10 years starting from date of functioning of set up. The contention that profit or gain can be claimed by assessee only if such profit or gain is derived by sale of its product or power generated to an outsider cannot be manner in which provisions contained in section 80-IA(1) can be interpreted. The expression 'derived used in said section 80 -IA(1) in beginning as well as in last part of sub-section (4) makes it abundantly clear that such profit or gain could be obtained by one's own consumption of outcome of any such undertaking or business enterprise as referred to in sub-section (4) of section 80-IA. The dictionary meaning of expression 'derive' in New Oxford Dictionary of English states 'obtaining something from a specified source'. In section 80 -IA(1) also no restriction has been imposed as regards deriving of profit or gain in order to state that such profit or gain derived only through an outside source alone would make eligible for benefits provided in said section.

9. Therefore, there is no difficulty in holding that captive consumption of power generated by assessee from its own power plant would enable respondent/assessee to derive profits and gains by working out cost of such consumption of power inasmuch as assessee is able to save to that extent which would certainly be covered by section 80-

IA(1). When such will be outcome out of own consumption of power generated and gained by assessee by setting up its own power plant, we do not find any lack of merit in claim of respondent/assessee when it claimed by relying upon section 80-IA(1) of Income-tax Act by way of deduction of value of such units of power consumed by its own plant by way of profits and gains for relevant assessment years."

14. At this stage, it would be appropriate to also notice judgment of Delhi High Court in CIT Vs. DCM Sriram Consolidated Ltd., [2010] 322 ITR 486 (Delhi), wherein explanation clause (iv) to Section 115JA of Act had come up for interpretation. The clause provided for exclusion of profits derived by an industrial undertaking from business of generation or generation and distribution of power. Revenue had raised contention one cannot earn profit by indulging in business with oneself and thus captive consumption would not be covered by explanation clause (iv) to Section 115JA. Rejecting contention and relying upon decision in case of Tata Iron and Steel Co. Ltd. (supra), it was observed:-

"Based on ratio of Supreme Court in Tata Iron and Steel Ltd it is clear that in arriving at an amount that is to be deducted from book profits ' which is really to benefit of assessee as it reduces amount of tax which it is liable to pay under provisions of Section 115JA of Act, principle of apportionment of profits resting on disintegration of ultimate profits realized by assessee by sale of final product by assessee has to be applied. In applying that principle it is not necessary as was observed by Supreme Court to depart from principle no one could trade with himself ' even though it pointedly noticed that House of Lords in Sharkey v. Wernher has opined that there was neither a general proposition that no man could trade with himself and make in its true sense or meaning taxable profits by dealing with himself nor was it universally true, and that, there are situations in which a man could be said to make a profit out of consumption of his own goods. Since earlier decision of House of Lords had found favour with Supreme Court in Kikabhai Premchand (supra), Supreme Court in Tata Iron and Steel Ltd (supra) decided

case by applying principle of disintegration of ultimate profits realized on sale of final product."

15. In view of aforesaid discussion, it has to be held that finding of Tribunal that profits derived by respondent-assessee's power generation unit would be eligible for deduction as a separate undertaking under Section 80 IA, but has referred to decision in West Coast Paper Mills Ltd. vs. Asstt. Commissioner of Income Tax [2006] 286 ITR (AT) 252 (Mum.) is correct. The substantial questions of law mentioned above are accordingly answered in favour of respondent-assessee and against appellant Revenue.

16. At this stage, learned counsel for appellant Revenue has submitted that Tribunal has passed an order of remand on question of computation of profit and gain from business in terms of sub-section (8) to Section 80IA. Learned counsel for respondent-assessee submits that Assessing Officer is competent to decide said question as per law and hands and power of Assessing Officer have not been curtailed and present order does not give any specific or clear finding/direction. We take statement made by learned counsel respondent-assessee on said aspect on record. Both parties will be entitled to raise their contentions on computation of eligible profit/loss from eligible business."

12. In view of this, we do not find any infirmity in order of learned CIT – A in holding that above sum cannot be included in book profit for taxation. Accordingly, ground numbers 3 – 6 of appeal are dismissed.

13. Ground number 7 and 8 of appeal is against claim of deduction of INR 10540000/– because of transfer from revaluation reserve while computing book profit under section 115JA of act. The learned assessing officer while computing book profit under section 115JA of act has added above sum transferred to amalgamation reserve. The learned AO was of view that sum has been transferred out of profit and loss account though said sum was never debited to profit and loss account. The learned CIT – A allowed claim of assessee.

14. The learned departmental representative relied upon order of learned assessing officer and submitted that assessee has transferred above sum,

which was directly credited to amalgamation reserve instead of transferring it to profit and loss account. Therefore, claim of learned departmental representative is that learned assessing officer has made above adjustment, which is permissible according to law.

15. The learned authorised representative submitted that actually above sum represented difference between net asset received on amalgamation of company and consideration in form of equity shares issued to equity share holders of another company, therefore above difference in amount was directly credited to amalgamation reserve in terms of 'purchase method' of accounting prescribed under accounting standard 14 issued by Institute of chartered accountants of India. He submitted that above reserve has not been carried from profit and loss account. He therefore submitted that in view of this no addition is called for while computing book profit under section 115JA of income tax act.

16. We have carefully considered rival contentions and perused orders of lower authorities. During year in schedule B – reserve and surpluses of balance sheet of assessee, it has credited on amalgamation reserve of INR 10,540,000 during year. As per note number 14 of schedule M, assessee stated that during year AIL and ESCL has been amalgamated with assessee company on and from 22/10/1999 with retrospective effect from 01/02/1997 in terms of scheme of amalgamation sanctioned by honourable Bombay, Gujarat and Allahabad high courts vide their orders dated 11/06/1999, 28/1/1999 and 21/10/1999 respectively. Accordingly, entire business and undertaking of these two companies have been transferred to assessee company. The above amalgamation has been accounted for by assessee company in nature of 'purchase method' defined under accounting standard number 14 issued by Institute of chartered accountants of India which has resulted in transfer of assets and liabilities and issue of shares of consideration thereof. Accordingly total fixed assets at book value of Rs. 3300 lakhs and other assets of 563.02 lakhs was acquired along with liabilities which has resulted into excess of assets over liabilities transferred of INR 10,540,000 which was shown as amalgamation reserve account. The above sum was never transferred to profit and loss account and withdrawn there from. As per para number 16 of accounting

standard if amalgamation is 'amalgamation in nature of merger' identity of reserve is preserved and they appear in financial statement of transferee company in same form in which they appeared in financial statement of transferor company. Thus, for example, general reserve of transferor company becomes general reserve of transferee company, capital of transferor company becomes capital reserve of transferee company, and revaluation reserve of transferor company becomes revaluation reserve of transferee company. However if amalgamation is in nature of 'amalgamation in nature of purchase', then identity of reserve other than statutory reserve dealt with in paragraph 18 of Accounting standard (AS) is not reserve, amount of consideration is deducted from value of net assets of transferor company acquired by transferee company. If result of computation is negative, difference is debited to goodwill arising on amalgamation and dealt with in manner stated in paragraph number 19 – 20 of AS. If result of computation is positive, difference is credited to capital reserve. Therefore, accordingly assessee has credited such reserve to capital reserve account. According to explanation to section 115JA,(b) amount carried to any reserve by whatever name is required to be added to profit shown in profit and loss account. Here assessee has not carried to any reserve from sum cred ted in profit and loss account. The above sum has been credited in accordance with accounting standard issued by Inst of chartered accountants of India, which conforms to profit and loss prepared by assessee according to schedule VI of companies act. Therefore, we do not find any infirmity in order of learned CIT – A in directing learned assessing officer to not to increase book profit by amalgamation reserve credited by assessee directly to balance sheet of assessee company. Accordingly, ground number 6 and 7 of appeal of revenue is dismissed.

17. Ground number 8 of appeal is against order of learned CIT – A in deleting disallowance of INR 57051020/- made on account of interest on borrowed capital utilized in expansion and modification projects as per explanation 8 to section 43 (1) of income tax act 1961.

18. On hearing parties on this ground it was noted that issue is squarely covered in favour of assessee as per order of coordinate bench dated

22/2/2015 for assessment year 98-99 wherein on identical circumstances, in facts, order of learned CIT – A deleting above addition/disallowance was upheld. Further issue is also squarely covered in favour of assessee by decision of honourable Supreme Court in case of Deputy Commissioner Of Income Tax Vs Core Healthcare Limited 298 ITR 194, CIT vs. Arvind Polycot limited 299 ITR 12 and CIT vs. Sri Rama multi Tech Ltd 393 ITR 371. Therefore respectfully following decision of coordinate bench in case of assessee for earlier year which is on identical facts and circumstances, we confirm order of learned CIT – A and dismiss ground number 8 of appeal of revenue.

19. The ground number 9 and 10 of appeal is with respect to expenditure of INR 26,00,000/- incurred in installation of software system as revenue expenses while assessing officer has treated it as capital expenditure.

20. On hearing of parties it was noted that abov issue is squarely covered in favour of assessee by order of coordinate bench for assessment year 98 – 99 dated 22/2/2015 wherein under identical circumstances order of learned CIT – A was upheld holding that above expenditure on software system is revenue in nature.

21. The learned departmental representative vehemently relied upon decision of honourable Rajasthan High Court in 259 ITR 30 to support case of learned assessing officer.

22. The learned authorised representative relied upon CIT v. K. & Co.[2003] 181 CTR (Delhi) 378, Para 4, Amway India Enterprises vs. DCIT [(2008) 111 ITD 112 (Delhi) (SB)] affirmed by Delhi High Court in CIT vs. Amway India Enterprises [2012] 346 ITR 341 (Delhi), (Refer para 6) ,CIT vs. Asahi India Safety Glass Ltd.[(2012) 346 ITR 329 (Delhi)] (Refer para 9, 10), Sumitomo Corpn. India (P.) Ltd. v. Addl. CIT [2005] 1 SOT 91 (Delhi), Para 8, Bank of Punjab Ltd. v. Jt. CIT[2002] 122 Taxman 235 (Chd.) (Mag.) ,Alembic Chemical Works Co. Ltd. v. CIT[1989] 177 ITR 377 (SC), ,Arch Finance Ltd. vs. ACIT[(2007) 165 Taxman 188 (Delhi)(MAG.)], Business Information Processing Services vs. ACIT [(2000) 73 ITD 304(Jaipur)] and ITC Classic finance Ltd. vs. DCIT [(2000) 112 Taxman 155 Mag (Cal)] Glaxo Smithkline Consumer Healthcare Ltd. Vs. ACIT [(2007) 112 TTJ 94 (Chd)], Para 44.

23. Fact shows that assessee has incurred cost of enterprise resource planning software (ERP) as per bill number 34 dated 30/9/97 of INR 9,000,000/- . Vide bill number 30/9/97 cost of implementation of above software was incurred of INR 2,600,000/-. Above two items of expenditure has been incurred by assessee in assessment year 1998- 1999 wherein coordinate bench has given a finding that these are revenue expenditure and not capital expenditure. Further, in this year on 31/3/2000, assessee has incurred expenditure of INR 2,600,000/- being cost of implementation of above software. As in earlier year expenditure of INR 11,600,000 of same software of same nature of expenditure has been allowed to assessee as revenue expenditure by coordinate bench, we do not find any reason to deviate from same.

24. On careful consideration of decision of honourable Rajasthan High Court cited by learned departmental representative, cost of purchase of software was held to be capital in nature for following reasons:-

> "8. The fact on record is that payment of Rs. 1,38,360 was not made as consultancy fee to Hindustan Computers Ltd., in fact, payment was made for outright sale of 'computer software' which is used as technique in mining operations. The finding of Commissioner (Appeals) was that acquisition of software cannot be treated to be an asset of endurable nature. If programme is used in one mining to another mining operation, why it should not be treated as capital asset and expenditure on that, capital expenditure. Considering these facts and decision of their Lordships and later decision of Bombay High Court, in our view, acquisition of technical know-how is a capital expenditure; therefore, Assessing Officer has rightly treated expenditure on acquiring computer software as expenditure of capital nature and rightly allowed depreciation as per rules.
>
> 8. The fact on record is that payment of Rs. 1,38,360 was not made as consultancy fee to Hindustan Computers Ltd., in fact, payment was made for outright sale of 'computer software' which is used as technique in mining operations. The finding of Commissioner (Appeals) was that acquisition of software could

not be treated to be an asset of endurable nature. If programme is used in one mining to another mining operation, why it should not be treated as capital asset and expenditure on that, capital expenditure. Considering these facts and decision of their Lordships and later decision of Bombay High Court, in our view, acquisition of technical know-how is a capital expenditure; therefore, Assessing Officer has rightly treated expenditure on acquiring computer software as expenditure of capital nature and rightly allowed depreciation as per rules."

25. In present case, it is apparent that assessee has been granted license for a particular period of enterprise resource planning software. In view of this, there is no outright purchase in case of assessee. In view of this facts stated by assessee before us and facts before honourable Rajasthan High Court were all together distinguishable The learned departmental representative could not show us any reason to deviate from order of coordinate bench. Accordingly following decision of coordinate bench in assessee's own case in earlier years, we confirm order of learned CIT – A and dismiss ground number 9 and 10 of appeal.

26. The ground number 11 of appeal is against order of learned CIT Appeal directing AO to treat sum of INR 14389000/- of interest as business income, which was correctly assessed by learned assessing officer under head income from other sources. Ground number 12 of appeal is against direction of learned CIT appeal to treat service charges of INR 2163586 as business income. The learned assessing officer on perusal of schedule of balance sheet noted that assessee has received interest income of INR 14,280,000. Such interest is on interest on inter-corporate deposits, interest on margin money, interest on state bank of India Bonds, interest on state bank of India monthly income bonds, IFCI bonds, and fixed deposits with state bank of India and Corp bank, interest on security deposit, interest on income tax refunds interest on employee loans et cetera. The learned AO held that above interest income as shown by assessee as 'business income' is not 'business income' but is chargeable to tax under head 'income from other sources'. Several decisions were considered by learned assessing officer. The learned CIT – A held that as issue has been

already decided in favour of assessee for assessment year 98-99 where it is held to be considered as 'business income' and not 'income from other sources'.

27. The learned departmental representative vehemently stated that honourable Supreme Court of India has already decided above issue in case of liberty India and in 262 ITR 669 in favour of revenue. It was further stated that honourable Supreme Court with respect to deduction of these business income as income derived from industrial undertaking has already been considered in Liberty India vs. CIT 183 taxmann 349. It was therefore contested that though decision has been taken in earlier years in favour of assessee but it is not in consonance of law. It was further stated that interest income if it is held to be a business income then assessee has claimed deduction under section 80 IA on such interest income holding it to be income derived from industrial undert king, which is contrary to several judicial precedent. He also relied upon decision of jurisdictional High Court in CIT vs. Jyoti apparels 166 Taxman 343 as well as CIT vs. Marina creations 189 taxman 71 Therefore, he stated that above issue does not now cover in favour of assessee in view of jurisdictional High Court decision as well as decision of honourable Supreme Court. He therefore submitted that interest income cannot be held to be business income but it is income from other sources.

28. The learned authorised representative vehemently stated that coordinate bench in assessment year 1998-99 in assessee's own case wherein issue was adjudicated in favour of assessee (page 33 of order). However, in captioned assessment year even Ld. AO has assessed loss in assessment order passed by him. Accordingly, this issue becomes academic and department's grounds of appeal be rejected on this premise itself.

29. We have carefully considered rival contention and perused orders of lower authorities. The interest income earned by assessee is on bank interest as well as on interoperates deposits. The interest was also received on income tax refund. Looking to nature of interest income shown by assessee, we do not find any reason to sustain order of learned CIT appeal. In several decisions cited before us by learned departmental representative, it is apparent that earning of interest income is not

business of assessee, and also above income is also not inextricably linked with business of assessee but is altogether a different source of income which should be taxed under income from other sources only. In view of this with respect to interest income of INR 14289000/- , we hold that it is chargeable to tax as income from other sources and not as business income. Accordingly, ground number 11 of appeal of revenue is allowed.

30. Ground number 12 is with respect to service charges received by assessee of INR 2163586/- , both the parties submitted that the identical issue has been considered in the case of the assessee for assessment year 98 – 99 in assessee's own case. They also submitted that there is no change in the facts and circumstances of the case. In view of the above undisputed fact, we hold that it is business income as it is inextricably linked with business of assessee. Accordingly, ground number 12 of appeal of revenue is dismissed.

31. Ground number 13 of appeal is against deletion of disallowance of books and periodical expenses of INR 2098978/– which was claimed by assessee as revenue expenditure held by AO as capital expenditure, learned CIT – A allowed it is a revenue expenditure. Ground number 14 is also related to it. On hearing parties it was found that identical issue has been decided in case of assessee for assessment year 98 – 99 in assessee's own case wherein it has been held that expenditure incurred by assessee on purchase of books and journals cannot be held to be a capital expenditure. There is no change in facts and circumstances of case, nature of expenditure is also same, no contrary judicial precedent cited, therefore, following decision of coordinate bench, and hence, we dismiss ground number 13 and 14 of appeal of revenue.

32. Ground number 15 is on account of disallowance of contribution to provident fund of INR 9829097/– out of which learned CIT – A has granted relief of INR 9131504/–. The fact shows that salary for a calendar month is paid by 10th of succeeding months and due date for payment of provident fund contribution would therefore be 15th of month following. The assessee has stated that it has made all payments within due dates prescribed as per provident fund laws including grace period provided therein. The learned departmental representative did not controvert above

facts. On verification of dates mentioned in assessment order also, we also found that assessee has disposed of its liability within due date prescribed under provident fund laws as well as grace period. Accordingly, all provident fund dues have been deposited in time allowed, CIT (A) correctly deleted disallowance. Ground number 15 of appeal of revenue is dismissed.

33. Ground number 16 of appeal is with respect to addition of INR 5862377/– made by learned assessing officer on account of prior period expenses which was deleted by learned CIT – A. The fact shows that assessee during year had claimed prior period expenditure amounting to INR 5 862377/– and shown income of INR 9215260 as prior period income, on ground that it has been crystallized during assessment year under appeal. Learned AO disallowed prior period expenses as same were not incurred during year but in earlier years , but did not disturb prior period income offered by assessee during year. However, claim of assessee is that such expenditure has crystallized during year. However, learned AO did not accept argument of assessee The learned CIT – A allowed claim of assessee holding that it is not a prior period expenditure as it has been crystallized during year.

34. The learned departmental representative reiterated facts stated before learned CIT – A as well as before assessing officer and stated that merely because assessee has shown miscellaneous income pertaining to earlier years during year, it cannot be said that prior period expenditure should be also be allowed to assessee on same logic.

35. The learned authorised representative relied upon plethora of case law and stated that all these expenditure have been incurred during year as same has been crystallized during year, assessee has accepted them during year and therefore liability has accrued during year for payment of such expenditure. Therefore, they cannot be held to be prior period expenditure. Merely because in audit report it has been shown as a prior period expenditure, it cannot be disallowed. Reliance is placed on following decisions wherein it has been held that merely because an expense relates to a transaction of an earlier year it does not become a liability payable in earlier year, if it can be said that liability was determined and crystallized

in year in question on basis of maintaining accounts on mercantile basis.

- Hindustan Gum & Chemicals Ltd. vs. ITO [2008] 23 SOT 143 (Kolkata), (Refer Para 7.3)
- Saurashtra Cement and Chemical Industries Ltd. CIT[(1995) 213 ITR 523 (Guj)], Para 10
- CIT v. Shriram Piston & Rings Ltd.[(2008) 220 CTR 404 (Del.)], Para 7, 9, 17
- Toyo Engg India Ltd vs. JCIT [(2006) 100 TTJ 373(Mum.)] (Refer Para 15, 17)
- Essar Steel Ltd. v. DCIT: [(2005) 97 ITD 125 (Ahmd.) (TM)], Refer para 45)
- Goetze (India) Ltd. v. DCIT: [(2008) 115 ITD 119 (Del.], Para 22,
- CIT vs. Jagatjit Industries Ltd. [(2010) 194 Taxman 158 (Del), Para 16
- SMCC Construction India Ltd. vs. ACIT [(2014) 220 taxman 354 (Del), para 13
- Sutna Stone & Lime Co. Ltd. vs. CIT [(1991] 192 ITR 478 (Calcutta)], Para 5
- ITO v. InfratexEngg. Co. [(1990) 38 TTJ 551 (Del.), Para 9
- Ericsson India Pvt. Ltd. vs. Addl. CIT [ITA No. 760/Del/2006], para 16
- CIT vs. Excel Industries Ltd. [(2013) 358 ITR 295 (SC)],
- CIT vs. Vishnu Industrial Gases Pvt. Ltd. [ITR No. 229/1988 (Del)], Para 3,4

36. We have carefully considered rival contention and perused orders of lower authorities. The learned assessing officer has given a clear-cut finding that it was not found that these expenses were quantified during relevant previous year only. By deleting above disallowance also vide para number 1 of order, learned CIT appeal noted that it is clear that assessing officer has not allowed proper opportunity to explain same to assessee and learned AO has straight way referred notes of accounts as mentioned by auditor and concluded that disallowance is made without appreciating

proper facts. We do not agree with finding of learned CIT – A that disallowance cannot be sustained as assessee has also been taxed on miscellaneous income of earlier years charged to tax this year. The logic given by learned CIT appeal that assessing officer should have treated both these items of prior period income and expenses on same parity is devoid of any merit. It is also not acceptable that without examining facts of case that when these expenses have been crystallized, disallowance cannot be deleted. Before neither learned assessing officer nor before learned CIT appeals or before us has assessee shown that, this expenditure has been crystallized during year. Unless this is shown these expenditure cannot be allowed without verification. It is also fact that definition of prior period expenditure for companies act and definition of prior period expenditure for income tax act are different. Therefore it needs to be examined that how assessee has shown in its balance sheet prior period expenditure following companies act 1956 for preparing balance sheet according to schedule VI of companies act, and while filing return of income, it is contesting that same are not prior period expenditure. This dichotomy in argument of assessee is required to be rebutted by assessee himself before assessing officer. There has to be a categorical answer from assessee that disclosure made by it under companies act is erroneous and it is to be demonstrated by reliable evidences. Further, we also do not accept argument of assessee that auditors have certified prior period expenditure. This is devoid of any merit as balance sheet and notes on accounts according to companies act are prepared by assessee , auditor merely expresses an opinion on that. Therefore assessee itself has classified same is a prior period expenditure while preparing its balance sheet and now it is taking a different stand for purpose of computation of its income under income tax act. In view of this, whole issue is set aside back to file of learned assessing officer with a direction to assessee to show that above expenditure is not a prior period expenditure and has been crystallized during year only. If assessee demonstrates that, addition is required to be deleted. Accordingly, ground number 16 of appeal of learned AO is allowed with above direction.

37. The ground number 17 of appeal is against direction of learned CIT Appeal to learned assessing officer to delete disallowance of INR 8184685 under section 35 of income tax act. Facts shows that assessee is, inter alia, engaged in business of manufacturing chemical dyes etc. and carries on in-house research and development activities related to its business at facilities approved by Department of Science and Industrial Research, Government of India in Form 3CM under section 35(2AB) of Act for period from 14.9.1999 to 31.3.2002. During assessment year, assessee had incurred total expenditure of Rs.3,23,85,565 on such research and development (Rs.2,81,98,472 revenue expenditure + Rs.41,87,093 capital expenditure, other than land and building). Out of above total expenditure, expenditure amounting to Rs. 242.01 lakhs (Rs 202.03 lakhs revenue expenditure +Rs 39.98 lakhs capital expenditure) was considered for 125% weighted deduction under section 35(2AB) of Act as was certified by auditors (Pg 131 of Paper book). The assessee thus claimed weighted deduction amounting to Rs.3,02,51,250 on said amount. On balance amount revenue expenditure of Rs 7995472/- and capital expenditure other than land and building of Rs 189093, assessee has claimed deduction u/s 35 (1) (i) and 35 (2) (ia) respectively. Thus assessee has claimed total deduction amounting to INR 38435815 in respect of expenditure incurred on scientific research as under:-

Deduction under section 35(2AB) (125% of Rs 2,42,01,000)	Rs.3,02,51,250
Deduction under section 35(1)(i)	Rs. 79,95,472
Deduction under section 35(2)(ia)	Rs. 1,89,093
	Rs. 3,84,35,815

38. The Ld. AO while framing assessment held that assessee is only entitled for weighted deduction under section 35(2AB) of Act amounting to Rs. 3,02,51,250 and balance deduction amounting to Rs. 81,84,565 was disallowed alleging that assessee had claimed excess deduction and same was also not certified by tax auditors in their report. The Ld. AO ignored fact that Annexure 7 to tax audit report clearly stated total capital and revenue scientific research expenditure incurred by assessee

as Rs 281,98,473 and Rs 41,87,093 respectively. The CIT (A) allowed claim of assessee in respect of deduction claimed under sections 35(1)(i) and 35(2)(ia) observing that assessing officer has himself held that expenditure incurred u/s 35 was an allowable expenditure, but inadvertently same was not reduced from assessed income. The CIT (A), accordingly, directed assessing officer to rectify said mistake. The deduction on balance revenue/capital expenditure was claimed under sections 35(1)(i) and 35(2)(ia) as it was not in nature of expense qualifying for deduction under section 35(2AB).

39. The learned departmental representative relied upon order of learned assessing officer whereas learned authorised representative submitted that requirement for audit is only with respect to deduction under section 35 (2AB) of act. He further submitted that issue has been clearly disclosed in tax audit report.

40. On careful consideration of facts before us and order of lower authorities it is apparent that assessee is eligible for deduction of INR 8 184685 u/s 35 of income tax act. Even otherwise learned CIT – A has directed assessing officer to rectify mistake. Therefore, revenue cannot be said to be aggrieved by order of learned CIT – A if above mistake stated by assessee as well as by learned CIT appeal is correct. According to us, above mistake requires to be rectified by learned AO. Accordingly, ground number 17 of appeal of learned AO is dismissed.

41. Ground number 18 and 19 are general in nature, no arguments were advanced, and therefore they are dismissed.

42. Accordingly, ITA number 4410/del/2003 for assessment year 2000 – 01 filed by learned AO on 20/09/2003 is partly allowed for statistical purposes.

ITA NO 3426/Del/2004 A Y 2001-02 (By AO)

43. This appeal is filed by Learned Assistant Commissioner Of Income Tax Moradabad on 29/07/2004 for assessment year 2001 – 02 against order of learned CIT – A, Bareilly dated 6/5/2004.

44. Fact shows that return of income was filed by assessee on 30-10-2001 showing loss of INR 2016218760 in normal computation of income whereas book profit under section 115 JB was shown at INR 5 1182447/–.

The assessee was assessed under section 143 of income tax act by order dated 31/3/2004 wherein several additions/disallowances were made and total income of assessee was assessed at a loss of INR 85955505/- under normal computation and book profit was computed at INR 51182447/-. Assessee preferred appeal before learned CIT – A, who disposed of appeal of assessee vide order dated 6/5/2004 and therefore this appeal before us by learned AO against disallowances deleted by him.

45. The Revenue has raised following grounds of appeal in this appeal:-

1. That Ld CIT(A) has erred in law and on facts of case in deleting disallowance of Rs. 4,06,135/- which was made on account employees contribution and employers contribution respectively towards PF not paid within stipulated period.

2. That Ld. CIT(A) has erred in law and on facts of case in deleting disallowance of Rs. 25,48,000/- made on account of proportionate Interest on interest free advances given to sister concerns.

3. That Ld. CIT(A) has erred in law and on facts of case in reversing action of Assessing Officer who assessed interest income under head 'Income from Other Source

4. That Ld. CIT(A)has failed to consider his own order No. 77 dated 13-5-04 in case of M/s The Dhampur Sugar Mills Ltd., Dhaxnpur wherein action of Assessing Officer was upheld who assessed interest income under head 'Income from Other Sources.

5. That Ld. CIT (A) has erred in law and on facts of case in directing to allow deduction u/s 80HHC on interest Income while Kerala High Court did not allow such deduction in decisions reported in 243 ITR 192, 253 ITR 553 and 262 ITR 664 and SLP filed against these order was dismissed as reported in 263 ITR 3(St-l).

6. That Ld. CIT(A) has erred in law and on facts of case in directing to allow deduction u/s 80HHC, 80HH and 80I on interest income as interest income is neither derived from Export business nor from Industrial under taking as per ratio of Hon'ble Apex Court in decision reported in 262 ITR 278.

7. That Ld. CIT(A) has erred in law and on facts of case in directing A. O. to assess service charges as business income after following his order for A.Y. 98-99 & 00-01 which sure subjudice before Tribunal.

8. That Ld. CIT(A) has erred in law and on facts of case in deleting disallowance of Rs. 41,14,059/- incurred on books and journals which was treated as capital expenditure as assessee admitted that books are tools for its business activities.

9. That Ld. CIT(A) has erred in law and on facts of case in reversing action of Assessing Officer w ho correctly not allowed deduction of Rs. 5,04,71,311/- for interest paid on loans utilized in expansion and modernization of existing business as laid down in explanation 8 to section 43(1) of I. T. Act, 1961.

10. That Ld. CIT.(A) has erred in law and on facts of case in directing to allow prior period expenses of Rs. 1,65,02,794/- after following his order for A.Y. 2000-01 which is subjudice before Hon'ble Tribunal.

11. That Ld. CIT(A) has erred in law and on facts of case in allowing expenses of Rs. 89,02 332/- incurred in installation of Software System while Assessing Officer treated it as capital in nature.

12. That Ld. CIT(A) has erred in law and on facts of case in allowing relief of Rs. 89 02,332/- while Assessing Officer has rightly added same and al owed depreciation accordingly which finds support from decision reported in 259 ITR 30 (Raj) wherein decision of Hon'ble Apex Court reported in 166 ITR 66 was allowed.

13. That Ld. CIT. (A) has erred in law and on facts of case in allowing relief of Rs. 65 Lakhs, which was treated by Assessing Officer as capital in nature on a/c of consultancy fee paid.

14. That Ld. CIT(A) has erred in law and on facts of case in allowing expenses of Rs. 4,49,91,662/- being upfront fee for loans swap and Interest arbitrage expenses.

15. That order of Ld. CIT (A) being erroneous may be cancelled and order of A.O. may be restored."

46. The 1st ground of appeal was with respect to disallowance deleted of INR 406135/- on account of employees contribution and employers' contribution respectively towards provident fund allegedly not paid within stipulated period.

47. On hearing parties, it was found that this ground of appeal is Similar to ground of appeal no. 15 of departmental appeal for AY 2000-01 bearing ITA No. 4410/Del/2003 wherein we have confirmed order of learned CIT – A in deleting above disallowance. The fact shows that salary for a calendar month is paid by 10th of succeeding month. The due date for payment of PF contributions would, therefore, be 15th of month following. In that view of matter, payments which have been disallowed by AO have been made within due dates (including grace period) and therefore, disallowance under section 43B and/or section 2(24)(x) read with section 36(v)(a) of Act has rightly been deleted by CIT(A). In any case, payment of employers' and employees' contribution was made before due date of filing of return. In that view of matter, there should be no disallowance under section 43B of Act as held by Hon'ble Supreme Court in case of PCIT vs. Rajasthan State Beverages Corporation Ltd. [(2017) 84 taxmann.com 185(SC)], CIT vs. Alom Extrusions Ltd.: [(2009) 319 ITR 306], and by Hon'ble Delhi High Court in case of CIT v. AIMIL Ltd.: [(2010) 321 ITR 508 CIT vs. SPL Industries Ltd. [(2011) 9 taxmann.com 195 (Delhi)], CIT vs. P.M. Electronics Ltd. [(2009) 177 Taxman 1 (Del)]. Further on identical issue in case of assessee for earlier year we have deleted addition/disallowance for same reasons, hence, order of learned CIT – A is confirmed on this ground. Ground number 1 of appeal of AO is dismissed.

48. 2nd ground is on disallowance of Rs. 2548000/- on account of proportionate interest on interest free advances given to sister concerns. The assessee had following outstanding interest free advances given to its sister concerns:

M/s. Vam Leasing Ltd.	Rs. 2 lakhs (old balance)
M/s. Vam Investment Ltd.	Rs. 65 laths (old balance)
M/s. Vam Investment Ltd.	Rs.115 laths (during year)
Total	Rs 182 lakhs

49. The Ld. AO noted that assessee had paid interest of Rs 4,913.61 lakhs in captioned assessment year. He accordingly disallowed interest deduction of Rs. 25,48,000/- notionally imputing interest @ 14% (approximate cost of borrowing) on above interest free advances made to sister concerns. In doing so, Ld. AO stated if assessee had not made interest free advances to sister concerns, indebtedness of assessee could have been reduced to said extent and assessee would have saved outgo on account of interest expenditure. The Ld. CIT(A) deleted disallowance since assessee earned profit of Rs 12.93 lakhs and had accumulated reserves of Rs 14,152.50 lakhs , hence, was having enough interest free funds to advance to its sister concern. The Ld. CIT(A) thereafter noted that Ld. AO has not made a case that borrowing was not utilized for purpose of business. He thereafter noted that with respect to amount appearing as opening balance of advance, Ld. AO made no disallowance in earlier years, and hence was not entitled to take a different view in year under appeal. As far as amount of Rs. 115 lacs advanced during year under consideration, Ld. CIT (A) noted that assessee had mixed pool of funds and profits for year (Rs. 12.93 crores) far exceeded advances made. The Ld. CIT(A) accordingly held that interest free advances, in such a situation be presumed to have come out of profits in absence of any nexus between borrowed funds and interest free advances. Hence assessing officer is in appeal before us.

50. The learned departmental representative vehemently supported order of learned assessing officer whereas learned authorised representative relied upon order of learned CIT – A and submitted that reasons given by learned CIT – A are further supported by several judicial precedents where assessee has enough non-interest-bearing bearing surplus funds available with it, which exceeds amount of advances given without charging interest, then, no disallowance can be made.

51. We have carefully considered rival contention and found that decision taken by learned CIT A in deleting above disallowance where assessee has excess of non-interest-bearing funds in form of share capital and free reserve then amount advanced allegedly without charging interest, then presumption arises in favour of assessee that above advances been given

out of interest free funds and not interest-bearing funds, unless learned assessing officer prove contrary. Such view is also supported by plethora of judicial precedents. Where an assessee maintains a composite account where all receipts of business are banked and all outgoings are debited, interest free advances / non-business expenses should be presumed to have come out of profits, where profit for year exceeds interest free advances / non-business expenses. Such is also mandate of decision of honourable Supreme Court and several honourable high courts in Munjal Sales Corpn. vs. CIT [(2008) 298 ITR 298 (SC)](Para 17) , CIT v. Reliance Utilities and Power Ltd. [(2009) 313 ITR 340 (Bom.)](Para 10), CIT v. Tin Box Co. [(2003) 260 ITR 637 (Delhi)] (Para 9) , CIT v. South India Corporation (Agencies) Ltd. [209 CTR 233 (Mad)] (Para 18), CIT v. Prem Heavy Engg. Works (P.) Ltd [285 ITR 554/ 150 Taxman 90 (All.)] (Para 5). In view of this, we do not find any infirmity in order of learned CIT – A. Accordingly, ground number 2 is dismissed.

52. Ground number 3, 4, 5, 6 are with respect to charging of interest income as income from other sources and not as business income. The learned assessing officer has rejected contention of assessee that above income is business income and held that same is income from other sources, whereas learned CIT – A reversing order of learned AO, has held that same is business income. The above issue has already been decided in ground number 11 of appeal of learned assessing officer for assessment year 2000 2001, wherein we have held that interest income earned by assessee is chargeable to tax as 'income from other sources' and not as 'business income'. Therefore, for similar reason we also hold that interest income earned by assessee during year is not a business income but income from other sources. Similarly, it is also not even otherwise derived from industrial undertaking against which deduction has been claimed by assessee or likely to be allowed to assessee. Accordingly, ground numbers 3 – 6 are allowed.

53. Ground no 7 is with respect to services charges which according to assessee is business income, AO treated it as income from other sources, CIT –A upheld it as Business income, AO is in appeal before us. This issue has already been decided by us in appeal of learned assessing officer for

assessment year 2000 – 01 vide ground no 12 of that appeal, wherein we have held that service charges earned by assessee are business income as they are inextricably linked with business of assessee. Therefore, accordingly we dismiss ground number 7.

54. Ground number 8 of appeal is with respect to disallowance of books and journals expenditure amounting to Rs 4114059/– held by learned assessing officer as capital expenditure, claimed by assessee as revenue expenditure, learned CIT appeal deleting above disallowance. The identical issue has been decided by us in appeal of learned assessing officer for assessment year 2000 – 01 in ground number 13 of that appeal wherein we have confirmed action of learned CIT – A in holding that above expenditure is revenue in nature. Therefore, for similar reasons we dismiss ground number 8.

55. Ground number 9 is with respect to disallowance made by learned assessing officer of INR 50471311/– for interest paid on loans utilized in expansion and modernization of existing business which was deleted by learned CIT – A. Both parties agreed that this is identical to ground no 8 f for AY 2000-01 decided . the ld AR also stated that aforesaid issue is squarely covered in favour of assessee vide order dated 22.02.2015 passed by Hon'ble Tribunal in assessee's own case for assessment year 1998-99 bearing ITA No. 4307 & 4409/De1/2003, wherein Tribunal, under identical circumstances, has upheld order of CIT(A) deleting impugned addition/ disallowance. Prior to its decision, Coordinate bench noted fact that moneys were borrowed for modernization and productivity improvement of an existing business and also fact it is not case of Ld. AO that borrowed money was used for other than modernization and productivity improvement purposes. Coordinate bench relied upon decision of Hon'ble Supreme Court in case of DCIT vs. Core Health Care Limited [(2008] 298 ITR 194 (SC), (Para 11 and 13). In Para 11 of judgment, it was held that proviso inserted in section 36(1)(iii) of Act by Finance Act, 2003 would apply with effect from 1-4-2004. In para 13, it was held that section 36(1)(iii) of Act is a code by itself and hence it is attracted when assessee borrows capital for purpose of his business. It does not matter whether capital is borrowed in order to acquire a revenue asset or a capital asset since transaction of

borrowing is not same as transaction of investment into a revenue or capital asset. As in assessee's own case for assessment year 2000 – 01 vide ground no 8 of AO's appeal, following decision of coordinate bench in assessee's own case for assessment year 1998-99, we also allow claim of assessee and confirmed order of learned CIT – A. Accordingly, ground number 9 is dismissed.

56. The ground number 10 is with respect to prior period expenses of INR 16502794/– disallowed by learned assessing officer directed by learned CIT – A to allow same. Identical issue has been considered by us in appeal of AO for assessment year 2000 – 01 vide ground no. 13, wherein we have set aside issue of prior period expenses back to file of learned assessing officer with some direction to assessee. Further, with similar directions, we also set aside this ground of appeal to file of learned assessing officer. Accordingly, ground number 10 is allowed with above direction.

57. The ground number 11 of appeal is with respect to disallowance of software expenditure of INR 8902332/– claimed by assessee as revenue expenditure however learned assessing officer was of view that same is a capital expenditure which was reversed by learned CIT appeal holding it to be a revenue expenditure. The ground number 12 is also supporting same for similar reasons We have identically decided above issue in appeal of assessee for assessment year 2000 – 01 by this order vide ground no. 9 wherein we have held that software expenditure incurred by assessee are revenue expenditure in nature. We have also noted facts of honourable Rajasthan High Court cited by learned DR as well as in grounds of appeal and distinguished same with facts of case of assessee. Therefore, for similar reason we dismiss ground number 11 and 12 of appeal of AO.

58. Ground number 13 is with respect to deleting addition made by learned assessing officer with respect to INR 6,500,000 in treated by learned assessing officer as capital expenditure incurred by assessee of consultancy fees paid. During year, assessee paid Rs. 65 lakhs as consultancy fee to M/s. Shinning Strategic Identity (P) Ltd. Such expenses were incurred for services provided by said company to assessee in respect of developing its corporate and brand identity, therefore this has been claimed as revenue expenditure. The Ld. AO disallowed deduction for aforesaid amount on

ground that assessee has got benefit enduring in nature which is going to last for years to come and is thus expenditure of capital nature. The Ld. CIT(A) reversed order of AO.

59. Learned departmental representative vehemently stated that learned CIT – A has held that these expenditure are revenue in nature whereas these are brand building expenditure and brand is a capital expenditure on which depreciation is allowable. He therefore submitted that order of learned CIT – A is not sustainable.

60. The learned authorised representative stated that there is no error in order of learned CIT – A. He submitted that above expenditure are advertisement expenditure incurred by assessee for developing its corporate brand identity such as how to make representation. He further referred to copy of bills and vouchers in respect of consul ancy charges for corporate image makeover placed at paper book page number 271 – 276 of paper book. He also referred to copy of report prepared by consultant at page number 277 – 323 of paper book. He further stated that above expenditure incurred by assessee does not make it is a capital expenditure simply because these are for purpose of brand. Even otherwise, he stated that above expenditure is not for purpose of brand building of assessee but for standardization of presentation or letters and emails written by assessee. They are neither creating any enduring benefit to assessee but they are creating a standardization in organization and hence they are not capital expenditure but revenue expenditure. He also referred to plethora of case laws on this issue..

61. We have carefully considered rival contention and perused orders of lower authorities. We have also perused bills and vouchers in respect of consultancy charges for corporate image makeover at page number 271 – 276 of paper book. We have also perused copy of report placed in paper book. Above report shows that what kind of stationary assessee should use, what kind of corporate identity group should have, what kind of identity individual units should have, What are communication guidelines inter-unit as well as external and how signage should be placed. There are also several templates given for the same. On careful perusal of above documents, we are of view that above expenditure is not capital expenditure

but revenue expenditure as it helps assessee in maintaining its corporate image to outside world. The corporate image of assessee is created by product of assessee and these products are to be demonstrated to outside world in a proper manner by whole organization. Therefore, identity or image of assessee is not distorted to various stakeholders. In view of this, we do not find that these expenditure are creating any benefit of enduring nature to assessee. In fact, they are standard operating procedure of communicating with outside world. Accordingly we hold that these are revenue expenditure incurred by assessee which has been rightly allowed by learned CIT – A. Accordingly, ground number 13 is dismissed.

62. Ground number 14 is with respect to disallowance deleted of Rs. 44991662/– being upfront fees for loans swaps and interest arbitrage expenses.

63. Heard rival contentions. Facts shows that assessee incurred expenses of Rs. 4,49,91,662/- being upfront fees paid for swap of high interest bearing loans for low cost borrowings. The Ld AO allowed only 1/5th of entire expenditure i.e. Rs. 89,98,332/- as per provisions of section 35D of Act and disallowed Rs. 3,59,93,330/-. The Ld. CIT(A) allowed deduction for expenditure stating that payments were not made for activities as specified under section 35D but had been incurred to change over high cost loans to low cost loans. The expenditure on upfront fees for loan swap and interest arbitrage expenses is in nature of "interest" as defined in section 2(28A) of Act. Such interest has to be allowed on payment basis in terms of 43B(d) and (e) of Act. The definition of interest as per section 2(28A) of Act is very wide and it categorically covers 'upfront fees' by referring to phrase "any service fee or other charge in respect of moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized . Similar question came before Hon'ble Delhi High Court in case of CIT vs. Gujarat Guardian [(2009) 222 CTR 526 (Del)] wherein issue was also whether deduction towards interest be allowed in one lump sum as claimed by assessee or deferred over a period of time as sought to be done by revenue and Hon'ble Court held in Para 17 and 17.1 that in terms of section 43B(d) once it is ascertained that payment is in nature of 'interest' in terms of section 36(1)(iii) read with section 2(28A) of Act, and assessee fulfils

conditions provided in section 43B(d), that is, it is interest paid in respect of loans obtained from public institutions, it follows that, interest will have to be allowed as a deduction only in year of incurring /payment, notwithstanding fact that, liability to pay such sum was incurred in an earlier year based on method of accounting regularly employed by assessee. On identical facts of switching from high cost loans to low cost loans, Coordinate bench in case of DCIT vs. J.K. Paper Ltd. (ITA No.4027 & 4080/ Ahd/2008) held that upfront fees cannot be considered as capital in nature and it needs to be allowed as a revenue expenditure. Further Hon'ble Madras High Court in case of CIT vs. Meenakshi Mills Ltd. [(2007) 290 ITR 107] held that upfront fees paid by assessee to bank while availing loan cannot be construed as a capital expenditure and allowed same as revenue expenditure. In view of this, we do not find any infirmity in order of learned CIT – A in allowing claim of assessee as revenue expenditure. Accordingly, ground number 14 is dismissed.

64. Ground number 15 and 16 of appeal of revenue are general in nature, no arguments advanced, therefore there dismissed.

65. Accordingly appeal number 3426/del/2004 filed by learned assessing officer on 29/07/2004 for assessment year 2001 – 02 is partly allowed for statistical purposes

AY 2002-03

ITA No 1271/del/2006 (By Assessee)

&

ITA No ITA no 1308/del/2006 (By ld AO)

66. The assessee filed its return of income on 29/10/2002 declaring loss of INR 1084320 in normal computation of income and under section 115 JB it disclosed book profit of INR 15646013/–. Assessment order under section 143 (3) of income tax act 1961 was passed on 31/03/2005 by The Assistant Commissioner of Income Tax, Range – 1, Moradabad making several disallowances/ additions at Rs. nil. The book profit was computed under section 115JB of act at Rs. 27864409/–. The assessee challenged

same before learned Commissioner of Income Tax Appeals, Bareilly, who passed an order dated 2/2/2006 against which both parties are aggrieved and have preferred appeal before us.

67. The assessee has raised following grounds of appeal ITA No. 1271/Del/2006 for Assessment Year 2002-03:-

"1. That learned CIT-A had erred on facts and in law in not allowing reduction of profits eligible for deduction u/s 80HHC amounting to Rs. 1,13,81,193/- in computation of book-profits u/s 115JB of Act.

2. The ld CIT (A) erred on facts and in law in upholding disallowance of a sum of Rs. 1,89,277/- on account of Technical Know how fee u/s 35AB(i) of I.T. Act, 1961.

3. That learned. CIT-A had erred on facts and in law in upholding disallowance of club expenses of Rs. 48 751/-.

4. That learned. CIT-A had erred on facts and in law in upholding addition of a sum of Rs. 2,31,000/- being notional interest on refundable deposits made to clubs.

5. That learned CIT-A had erred on facts and in law in upholding disallowance of a sum of Rs. 5,16,339/- u/s 35D as claimed by appellant and allowed by AO in earlier years..

6. That learned CIT-A had erred in law in assessing long term capital gains of Rs. 10,84,316/- arising on relinquishment of rights in residential flats under head "income from other sources" at a sum of Rs 94,67,034/-.

6.1 That learned CIT-A had erred in law in assuming certain facts not borne out of records of company.

6.2 Without prejudice to above, learned CIT-A had erred in law in not holding that sum realized on relinquishment of right in flats is a capital receipt not exigible to tax under provisions of Income Tax Act, 1961.

7. That learned CIT-A had erred in law in upholding assessment of interest income of Rs. 4,11,52,280/- under head "Income from other sources" as against head of "Income from business or profession."

8. That learned CIT-A had erred in law & on facts in upholding that income from utilities of Rs. 43,98,949/- is assessable under head "Income from other sources" instead of "Income from business or profession" as claimed by appellant company."

68. The Revenue has raised following grounds of appeal ITA No. 1308/Del/2006 for Assessment Year 2002-03:-

"1. The Ld. CIT(A), Bareilly has erred in law and on facts of case in deleting disallowance on account of misc. expenditure amounting to Rs. 7,26,666/- out of expenditure incurred on journals, periodicals, books etc. treating same as revenue expenditure, which were treated as capital expenditure by AO.

2. The Ld. CIT(A),Bareilly has erred in law and on facts of case in not allowing depreciation from total income on capital expenditure holding Rs. 7,26,666/- as revenue expenditure.

3. The ld. CIT(A),Bareilly has erred in law and on facts of case in deleting disallowance of interest of Rs. 2,14,84,000/- claimed as revenue Expenditure while this amount was actually capitalized in books of account maintained by assessee.

4. The Ld. CIT(A),Bareilly has erred in law and on facts of ease in deleting disallowance of prior period expenses of Rs. 77,02,730/-, which, were debited by assessee in P&L Account. This has already been pointed out by auditors in Tax Audit Report. Considering mercantile system of accounting employed by assessee company, it is not allowable for year under consideration.

5. The Ld. CIT(A), Bareilly has erred in law and on facts of case in deleting addition made by A.O. amounting to Rs. 5,16,880/- being 10% of 16.51,68,887/- on account of claims received from insurance companies in respect of raw materials, stocks, finished goods, fixed assets, vehicles and from railways in absence of these details to plug pilferage loopholes.

6. That order of Ld CIT(A),Bareilly being erroneous may be cancelled and order of Assessing Officer lie restored."

69. 1st we take up appeal of assessee. The 1st ground of appeal is against order of learned CIT – A who did not allow deduction of profits eligible for deduction under section 80 HHC amounting to INR 1 1381193/– in computation of book profit under section 115 JB of income tax act.

70. After hearing parties on issue, fact shows that, during captioned assessment year, Appellant in its return (revised)claimed an amount of Rs. 1,13,81,193/- being eligible for deduction under 80HHC of Income-tax Act, 1961 for computing book profits under section 115JB of Act. However, said deduction under section 80HHC of Act was not claimed under normal provision of Act due to set off of brought forward business loss. While claiming deduction under 115JB of Act, Appellant disregarded trading loss amounting to Rs. 6,130 and calculated deduction of 90% of export incentives amounting to Rs. 9,74,06,810. The Appellant thereafter, pro-rated said amount based on adjusted export turnover to adjusted total turnover and further computed deduction at rate of 70% on pro-rated amount thereof in terms of section 80HHC(1B)(ii) of Act.

71. The ld AO recomputed the same relying on judgment of M/s IPCA Lab Ltd.- 266 ITR 521(SC), Rohan Dyes and Intermediates Ltd.- 192 CTR 47 (Bom) and Central Board of Direct Taxes ('CBDT') letter dated Sept 08, 2004 that third proviso to 80HHC(3) of Act refers to 'profits' only and therefore cannot be relied on in case of 'losses', as have occurred in present case. Hence, no deduction under section 80HHC can be claimed by Appellant. The Ld. AO on a without prejudice basis contended that an amount of Rs. 7,84,55,643 of total export incentives which relate to credit on account of Duty Entitlement Passbook ('DEPB') does not fall under purview of section 28 (iiia), (iiib) or (iiic) of Act to be considered for deduction under 80HHC of Act. He thereafter contended that excise duty paid by Appellant should be added to total turnover while computing deduction under 80HHC of Act relying on judgment of Chowringhee Sales Bureau (P.) Ltd. v. CIT [1973] 87 ITR 542 and he also added miscellaneous receipts in total turnover for computing deduction under 80HHC of Act.

72. On appeal, Ld. CIT(A) remanded back issue to Ld. AO to allow deduction under 80HHC of Act with reference to DEPB if permissible in light of retrospective insertion of fifth proviso to section 80HHC(3) of Act

(by Taxation Laws (Amendment) Act, 2005)exclusively dealing with a situation of loss.

73. Therefore, issue before us is how to calculate profit u/s 80 HHC while computing book profit. It is submission of Appellant that for purpose of 115JB of Act, deduction under section 80HHC of Act must be computed with reference to book profits and not business income computed under normal provisions of Act. This issue has been settled by Hon'ble Supreme Court by dismissal of Special Leave Petition ('SLP') in case of CIT vs. Futura Polyester Ltd. SLP (Civil) No(s).3189/2010 wherein judgment of Hon'ble Madras High Court [186 Taxman 51 (Madras)] in context of deduction under 80HHC for purpose of section 115JA of Act, was upheld. The Hon'ble High Court relying on CIT vs. Rajanikant Schnelder & Associates (P.) Ltd. [2008] 302 ITR 22 (Madras) held that only book profits need to be taken into account for computing deduction under 80HHC of Act for purpose of section 115JA of Act. Further, Hon'ble Supreme Court in case of CIT vs. Bhari Information Technology Systems (P.) Ltd. [2012] 340 ITR 593 (SC) upheld ruling of Special Bench Mumbai ITAT in case of DCIT & Ors. Vs. Syncome Formulations India Ltd.[2007] 13 SOT 414 (Mumbai) (SB) wherein in para 61 it was held that computation for deduction under section 80HHC needs to be worked out on basis of adjusted book profits for purpose of section 115JB of Act. The Hon'ble Supreme Court in case of Ajanta Pharma Ltd. vs. CIT 327 ITR 305 held that for purpose of section 115JB of Act that 100% export profits are 'eligible profits' for deduction and same cannot be reduced to 80% by relying on section 80HHC (1B) of Act. Considering aforesaid two propositions, Appellant has recomputed deduction under section 80HHC of Act for purpose of section 115JB of Act to be Rs. 55,184,948. From bare perusal of aforesaid computation and Profit & Loss Account of Appellant, it is patently apparent that there are no losses and therefore, Ld. AO's reliance on IPCA Lab (Supra) and Rohan Dyes (Supra) is clearly misplaced. Even otherwise, if Appellant incurred losses for export business, it is submitted deduction under 80HHC will be then have to be calculated with reference to clause (a) of fifth proviso to section 80HHC(3) of Act. Further with respect to nature of DEPB income alternative

contention of Ld. AO that DEPB does not fall under section 28 (iiia), (iiib), (iiic) of Act is also misplaced. The Hon'ble Supreme Court in case of Topman Exports vs. CIT (Civil Appeal No 1699 of 2012) after noting aforesaid characteristics of DEPB scheme in para 12 held that "DEPB is "cash assistance" receivable by a person against exports under scheme of Government of India and falls under clause (iiib) of Section 28 and is chargeable to income tax under head "Profits and Gains of Business or Profession" even before it is transferred by assessee." Further on aspect of Exclusion of Excise duty and Miscellaneous Receipts that excise duty and miscellaneous receipts are integral part of total turnover and therefore shall be included in export turnover. On this issue Hon'ble Supreme Court in case of CIT vs. Lakshmi Machine Works[2007] 290 ITR 667 (SC) wherein it was held that in such a situation the formulae for deduction will be unworkable. The aforesaid judgment was also approved in case of CIT vs. Catapharma (India) (P.) Ltd. [2007] 292 ITR 641 (SC). Further, Ld. AO held that miscellaneous receipts i e. sale of scraps should be added to total turnover. However, Appellant submitted that such miscellaneous receipts should not be added to total turnover. In context of Ld. AO's contention regarding miscellaneous receipts, Appellant relies on Hon'ble Supreme Court in case of CIT vs. Punjab Stainless Steel Industries [2014] 364 ITR 144 (SC) wherein in context of section 80HHC of Act, it was held that " sale proceeds of scrap cannot be included in the term 'turnover' for reason that respondent-unit is engaged primarily in manufacturing and selling of steel utensils and not scrap of steel." This view was also upheld in case of Jagraon Exports vs. CIT [2016] 284 CTR 209 (SC). Applying this analogy to facts of present case, miscellaneous receipts should not be added to total turnover. In view of above judicial precedent it is held that assessee is directed to submit computation of income under section 80 HHC which is required to be reduced from book profit to be computed under section 115JB of Income Tax Act before learned Assessing Officer. The learned AO after examination, in view of above judicial precedents, allow claim of assessee, if it is found in accordance with law. Accordingly, ground number 1 of appeal of assessee is allowed.

74. The assessee did not press ground number 2 and same is dismissed.

75. The 3rd ground of appeal is with respect to disallowance of club expenses of INR 48751/-. The fact shows that during year appellant has made certain payment to various clubs, which was disallowed by learned assessing officer holding that it is not for purpose of business of assessee. The learned CIT – A also upheld disallowance holding that assessee being a corporate body is not capable of utilizing club facilities itself.

76. On hearing parties, it was noticed that above issue is squarely covered in favour of assessee by order of coordinate bench for assessment year 2001 – 02 in case of assessee wherein it has been held that club expenses are in nature of business expenditure and therefore allowable to appellant relying on decision of honourable Bombay High Court and Gujarat High Court. The honourable Supreme Court has also held in CIT vs. United Glass manufacturing company limited civil appeal number 6449 of 2012 that club expenses are also PO of business expenditure. The honourable Delhi High Court has also taken similar view in 326 ITR 425 and 218 taxmann 69 in view of this ground number 3 of appeal of assessee is allowed.

77. The ground number 4 of appeal is against confirmation of disallowance of Rs. 231,000 being notional interest on refundable deposits made to club. The fact shows that assessee has made an interest free on refundable deposit of INR 1,800,000 with club. The learned assessing officer held that such deposit is not related to day-to-day business activities of appellant and therefore there is no business compulsion for this deposit in deposit appears to be made for personal use of directors of appellant company or their family entertainment. The learned assessing officer therefore computed interest at rate of 14% of deposit for 11 months. The learned CIT – A also confirmed above disallowance. Therefore, assessee is in appeal before us.

78. After hearing parties, it was noted that assessee has sufficient own noninterest bearing funds of Rs. 122 crores and therefore it cannot be held that such interest expenses can be disallowed. Even otherwise when we have held that club expenditure are expenditure incurred by assessee only an extra relief for purpose of business natural corollary will also states that deposit made by assessee with club is also for purposes of business.

Therefore we reverse finding of learned CIT – A and allow ground number 4 of appeal of assessee.

79. Ground number 5 of appeal is on issue of disallowance of INR 516339/- under section 35D of the act. Assessee has claimed deduction under section 35D of act amounting to INR 516339/- for share issue expenses incurred by amalgamating companies. The claim of assessee is that it has been allowed to assessee in previous assessment years and this being last year of said claim, it should be allowed in this year as well. The assessing officer as well as learned CIT – A disallowed deduction alleging that appellant could not furnish nature of expenditure.

80. The learned authorised representative submitted that deduction claimed represent specified expenditure i.e. issue expenditure incurred by amalgamating company such claim has been verified by statutory auditors and quantified by tax auditors. Therefore, on principle of consistency it should be allowed.

81. The learned departmental representative vehemently contested claim of assessee and submitted that according to provisions of section 35D of act no such deduction can be allowed to assessee and further assessee could not furnish nature of expenditure and its details and therefore disallowance made by lower authorities needs to be confirmed.

82. We have carefully considered rival contentions and find that assessee's claim is under section 35D of income tax act is not allowable. On careful analysis of provisions of section 35D of income tax act, it is apparent that such expenditure are allowed in case of commencement of business of assessee in connection with extension of his undertaking or in connection of setting up of a unit. There is no provision that expenses are allowable in case of amalgamation. Argument of assessee that in earlier years if same has been allowed it should be allowed in this year too, it needs to be rejected. To perpetuate an error is no heroism, to rectify it is the compulsion of judicial conscience. In result ground, number 5 of appeal of assessee is dismissed.

83. Ground number 6 of appeal is against treatment given to long-term capital gain of INR 1084316/- arising on relinquishment of rights in residential

flat as income from other sources of INR 9467034/-. The brief facts show that appellant had received a consideration of INR 16250000/– upon relinquishing its undivided interest in land and rights in proposed building in favour of another company namely M/s Rajshree Builder and Promoter's Private Limited (RBPPL) with respect to land situated in District Ghaziabad. On Jan 3, 1989, an agreement was entered into with one company to construct various apartments upon entering into a sale deed in lieu of advances to be given to it. Under clause 5 of this agreement, Appellant was given following rights:

(a) A say in fixation of official rates of apartments; and

(b) A rebate of 10% on apartment rate offered to third parties.

Further, in terms of clause 7 of this agreement, terms and conditions with respect to payment was also to be decided mutually between Appellant and RBPPL. Advance payment of Rs. 48,00,000 was made in AY 1991-92 and a further payment of Rs. 19 82,966/- was made in AY 1995-96 amounting to Rs. 67,83,000. On Jan 6, 1997, a second agreement was entered between Appellant and RBPPL for construction of 65 apartments for Appellant in a residential complex within 60 months from date of agreement. It was noted that till that dated Appellant had advanced Rs. 67.83 Lakhs to RBPPL under previous agreement and this sum in terms of clause 3 of agreement was to be adjusted against sale consideration of apartments. The consideration was also agreed between parties at Rs. 875 per square feet The agreement in clause 19 allowed Appellant an option to withdraw from this agreement and take back advance and interest (if any) due to it. As time period for constructing apartments in terms of agreement dated Jan 6, 1997 was to expire on Jan 6, 2002 with no visible certainty of completion of residential complex and there were revisions in construction plans which were not acceptable to Appellant, on May 24 2001, the Appellant relinquished its rights under the agreement dated Jan 6, 1997 vide a relinquishment deed for a consideration of Rs. 1,62,50,000. In furtherance of same, Appellant computed along term capital gain of Rs. 17,53,277 /- upon sale of aforesaid rights and claimed brought forward losses. Such long-term capital gain was Rs. 6,68,961. After adjustment, Appellant offered Long-term capital gain on Rs. 10,84,316/-. The Ld. AO

observed that rights relinquished vide relinquishment deed emanated from agreement entered on Jan 6, 1997 and that no rights were created from agreement dated Jan 3,1987. Further, advance was paid for proposed building and not for right in such proposed building concluding that transferred rights only arose in 1997 and indexation for purposes of computation of capital gain shall be done from AY 1997-98. Thereafter, Ld. AO contended that there is absence of correct bifurcation of cost of acquisition of rights. He noted Appellant's inability to provide cost of acquisition of rights in proposed building and treated 10% of advance given of Rs. 67,82,966 i.e. 6,78,296 on ad-hoc basis as cost of acquisition.

84. The Ld. CIT(A) observed that- Since in 1989, there was no land with RBPPL it could not have transferred any rights in any building to Appellant. The first agreement of 1989 appears to be an adventure in area of construction activity by Appellant. The agreement of 1989 was merely drawn up to safeguard money advanced by Appellant to RBPPL since it did not specify number of flats, size, cost etc. The genuineness of agreement dated Jan 6, 1997 has been doubted for following reasons:

- The Agreement as well as letter dated Jan 6, 1997 are signed by Mukesh Gupta on behalf of RBPPL.
- The letter mentions completion in 24 months while agreement mentions 60 months for completion of construction completion. Neither letter nor agreement refers to other document.

It was further held that even in year 1997, RBRPL did not own land free from encumbrances and thus, no right could be transferred by RBPPL. There is no explanation why relinquishment deed was entered into even when time limit under agreement was yet to expire. The Ld. CIT(A) also held that relinquishment deed in one paragraph mentions 65 apartments whereas in other mentioned 30 flats. He also doubted authenticity of agreement dated Jan 6, 1997 in absence of original agreement. After alleging as aforesaid pierced corporate veil and treated transaction as interest on money advanced then taxed same as Income from other sources.

85. The ld AR submitted that Appellant and RBPPL are unrelated companies having entirely different set of shareholders. Therefore, even if one pierces corporate veil of Appellant, transaction will still be a transaction of transfer of capital asset and thus liable to tax as capital gain. Without prejudice to aforesaid, Appellant vehemently rebuts CIT(A)'s allegation as follows:

(a) As mentioned above, Appellant by virtue of agreement dated Jan 3, 1989, Appellant received a right to have a say in fixation of official rates, a 10% rebate and right to negotiate payment terms.

(b) The allegation that first agreement of 1989 appears to be an adventure in area of construction activity by Appellant is merely an allegation which does not have any legs to stand. Further, this allegation is in contradiction to subsequent allegation of CIT(A) that agreement of 1989 was merely drawn up to safeguard money advanced by Appellant to RBPPL for reason that transaction could either be in nature of financing activity or a construction venture but it cannot be both[The Appellant however denies that aforesaid allegation of Ld. CIT(A)].

(c) The Ld, CIT (A)'s allegation that in absence of a specific number of flats, size, cost etc. transaction was a financing transaction is devoid of any merit for reason that RBPPL even in 1989 was engaged in business of real estate development and as rightly pointed out by CIT(A) could not have transferred rights in apartments prior to it acquiring same. RBPPL was allotted said land by Ghaziabad Development Authority ('GDA') on July 8, 1991. Accordingly, there was no firm plan on number of flats, cost, size etc. The Ld. CIT(A) ought to have appreciated that a construction plan and drawings need approval from GDA and therefore, an agreement regarding number of flats, size, cost etc. was not possible before any draft construction plan was prepared.

(d) The Ld. CIT(A) could not have doubted genuineness of agreement and letter dated Jan 6, 1997 for reason that while letter mentioned optimistic estimate of time needed for flat construction whereas

agreement provided for a legally binding time available to RBPPL for completion of flat construction. Therefore, both operate in different areas and do not contradict each other.

(e) The Ld. CIT(A) is patently wrong in stating that right in a land which is not free from encumbrances could not have been transferred by RBPPL. The clause 20 of agreement dated Jan 6, 1997 states that RBPPL "are fully empowered to carry out activities proposed in this agreement" and also "assures that same (sic land) shall vest in its (sic RBPPL) name soon". Therefore, RBPPL was well within its rights to enter into aforesaid agreement and more so Ld. CIT(A) is not right authority to question same.

(f) The Appellant in preamble of relinquishment deed on page 200 of Paper book that it is entered for (a) failure of RBPPL to even commence construction of flats and (b) change in construction plans by GDA were unacceptable to Appellant.

86. He further submitted that The Ld CIT(A)'s allegation that relinquishment deed in one paragraph mentions 65 apartments whereas in other mentioned 30 flats is devoid of any merit as it is an inadvertent typographical error since in entire agreement including preamble and clause 1 on page 199 and 201 of paper book respectively, and also in relinquishment deed 65 apartments are mentioned. Further, in mere absence of original agreement dated Jan 6, 1997 its authenticity cannot be challenged for reason that it is an old agreement executed much prior to Appellate proceedings before Ld. CIT(A).Therefore, allegation of Ld. CIT(A) that income shall be taxed as income from other sources is devoid of any merit.

87. While as per Appellant, cost of acquisition of rights transferred during captioned year was advances paid to RBPPL however, as per Ld. AO, cost of acquisition is indeterminate. Applying Hon'ble Supreme Court's judgment of CIT vs.B.C. Srinivasa Setty[1981] 128 ITR 294 (SC) capital gains cannot be taxed in case cost of acquisition is indeterminate.

88. Without prejudice to above, regarding Ld. AO's allegation that indexation benefits would be allowable from AY 1997-98, Appellant submits that at best Ld. AO could argue that rights mentioned above which Appellant

received in 1989 were transformed into undivided interest in land and rights in proposed building in 1997. If that be so, Ld. AO ought to have taxed capital gain in AY 1997-98 on transfer of rights received in year 1989 and treat consideration as cost of acquisition for undivided interest in land and rights in proposed building. Therefore, if he were to treat that Appellant acquired rights in 1997, he cannot tax entire capital gain made from 1989 to 2001 in captioned assessment year.

89. The learned departmental representative vehemently supported orders of lower authorities and submitted that it is clear transaction of advancing loan and there is no capital asset coming into existence which can result into short-term capital gain or long-term capital gain to assessee. He therefore submitted that income has been correctly taxed as income from other sources.

90. We have carefully considered the rival contentions and perused the orders of the lower authorities. During the previous year the appellant company received a sum of INR 1 6250000/– from Rajshree builder and promoter's Private Ltd. The genesis of the above receipt shows that on 3/1/1989 the assessee and the above company entered into an agreement where under the assessee obtained right to purchase of residential apartments proposed to be constructed by the above company on the land situated in Ghaziabad. Surprisingly in the terms of the said agreement there is no reference to the number of apartments that would be purchased by the assessee also the purchase price It was decided that it can be mutually agreed between the parties. The assessee made an advance payment of INR 4,800,000 in 90 – 91 and further INR 1,982,000 in 94-95. Therefore a total sum of INR 6 782966 was paid up to assessment year 95-96. Further it is stated that on 6/1/1997 that is after 8 years of entering into original agreement on 3/1/1989 and after 7 years of making the 1st payment of INR 4,800,000, the Rajshree builder informed the assessee about the delay and constructions of the apartment due to an encroachment on small piece of land and modification of site plan. It was further stated that the above company expects to complete the construction within 24 months. Therefore a 2nd agreement was also entered on 6/1/1997 and assessee agreed to purchase 65 apartments of 1145 ft² each in the residential complex to be

constructed by the above company. This agreement also fixed the price at INR 8 75 per square feet. Subsequently it is stated that there is a change in the plans of the above company which was not acceptable to the assessee. Therefore it is stated that INR 1 6250000 was agreed to be paid to the assessee which was to be adjusted against the original sum of INR 6 782966/– originally advanced by the appellant. Assessee computed the long-term capital gain on the above property taking the cost of acquisition of the right to obtain the conveyance of 65 apartments as capital asset whose full value of the consideration was INR 1 6250000 and the cost of acquisition was INR 6 782966/–. The learned AO accepted that there is a transfer of a capital asset however he reduced the sale consideration on ad hoc basis to the 10% of the amount advanced. The learned CIT – A held that the above sum is nothing but the compensation paid for using the money of the assessee. The learned CIT – A dealt with the whole issue and devoted more than 20 pages to consider the facts of the case. The page number 23 – 40 of the order of the learned CIT – A while dealing with ground number 9 of the appeal of the assessee are very relevant. After considering the same the learned CIT – A has held that the above income is nothing but an interest of compensation for the money used by the other company of the assessee for the relevant period. There is no justification available to us to upset the finding of the learned CIT appeal. It is correct that as on 3/1/1989 there were no identification of the area to be purchased by the assessee, number of flats to be obtained by the assessee, the rate at which the flats would be obtained, the time by which such flats would be available for occupation by the assessee. In absence of all these things the assessee paid a sum of INR 4,800,000 to the above company. Further it was not known whether the assessee company also identified the area on which the above lakhs were constructed. Therefore it is highly improbable that a person would agree to buy a property without all these factors being known to him. It is also apparent that assessee is usually earning very high sum as interest on intercorporate deposits. Further more on 6/1/1997 the area and the number of flats were quantified and identified. However, the assessee was paid the above sum of INR 16,300,000 and assessee did not agree with some of the terms and

conditions. There is no identification of all those terms and condition put by Rajshree builder is private limited which were not acceptable to the assessee. Further it is argued by the learned authorised representative that section 2 (14) of the act defines the capital asset which means property of any kind held by an assessee. The learned authorised representative vehemently stated that assessee has obtained right to obtain the conveyance deed of 65flats and therefore such is the right available to the assessee which is a capital right and on transfer of the same the assessee is difference of the consideration received is chargeable to tax under the head capital gains only. However we are not inclined to accept the above contention of the assessee because right to obtain the conveyance of 65 flats was not identified to any property and therefore when the original property does not exist, how does the right to obtain the possession of that property can be said to be a capital asset. Accordingly ground number 6 of the appeal is dismissed.

91. Ground number 7 of appeal is against order of learned CIT – A confirming action of learned assessing officer of taxing interest income of Rs. 41152280/- under income from other assesses against head income from business or profession as claimed by assessee. Both parties agreed that facts of this ground are identical to facts of ground no 11 in revenue's appeal discussed n ssessment year 2000 – 01. For assessment year 2000 – 01 we held that interest income earned by assessee is chargeable to tax under "income from other sources" and not "income from business." Therefore, for reasons given therein we also hold this year also that income of assessee from interest is chargeable to tax as income from other sources and not as income from business or profession. Accordingly, ground number 7 of appeal of assessee is dismissed.

92. Accordingly, ITA number 1271/del/2006 filed by assessee for assessment year 2002 – 03 is partly allowed.

93. Now we come to ITA number 1308/Del/2006 filed by learned assessing officer for assessment year 2002 – 03.

94. The 1st ground of appeal is with respect to disallowance of INR 726666/– out of expenditure incurred on books and periodicals treating same as

capital expenditure which was held by learned CIT – A as revenue expenditure. Both parties agreed that facts of this ground of appeal are identical to facts stated in department's appeal ground number 13 for assessment year 2000-01. After hearing parties, on perusal of facts for year, for same reasons has given in disposing of ground number 13 for assessment year 2000-01 in appeal of learned AO we also dismiss this ground of appeal. Ground number 2 of appeal is with respect to claim of depreciation thereon. Therefore consequently ground number 1 and 2 both are dismissed.

95. Ground number 3 of appeal is with respect to disallowance of interest of Rs. 21484000/- claimed by assessee as revenue expenditure, held by learned assessing officer as capital expenditure Both parties submitted that it is identical to ground number 8 in Department's appeal for assessment year 2000-01. On careful consideration of arguments of assessee and learned departmental representative, on perusal of facts for year, following order of coordinate bench in assessee's own case for 98 – 99, as held by us in ground number 8 of departmental appeal for assessment year 2000-01 for similar reasons we also dismiss ground number 3 of appeal of AO

96. Ground number 4 is with respect to disallowance of prior period expenses of Rs. 7702730/- debited by assessee in profit and loss account. Both parties submitted that it is identical to ground number 16 of departmental appeal for assessment year 2000 – 01. After hearing parties, on careful consideration of facts for year, and for reasons stated by us by disposing of ground number 16 of departmental appeal for assessment year 2000 – 01, we also set aside this ground of appeal back to file of learned assessing officer with similar directions. Accordingly, ground number 4 of appeal of learned assessing officer is allowed with above direction.

97. Ground number 5 of appeal is with respect to direction of learned CIT – A in deleting addition made by learned assessing officer of INR 5 16880/– being 10% of INR 5168800/– on account of claims received from insurance companies in respect of raw materials, stocks, finished goods, fixed assets, vehicles and from Railways in absence of these details to plug pilferage loopholes. The fact shows that during year appellant received a sum of

INR 51,68,887/– on account of insurance claim in respect of raw material, stock of finished goods, fixed assets etc. Same was credited to profit and loss account under head insurance and other claims as other income. The learned AO arbitrarily made an addition of 10 percent to bring any pilferage in amount of loss suffered by appellant. The learned CIT – A deleted same.

98. The learned departmental representative reiterated arguments of learned assessing officer. The learned authorised representative also submitted that above addition has been made by learned AO without any basis.

99. We have carefully considered rival contention and find that addition made by learned assessing officer is devoid of any merit. Insurance industry is a highly regulated industry wherein there are standard procedures for raising claims. Seldom, it happens that a person receives full amount of loss from insurance companies because issues of obsolete items, depreciation due to efflux of time etc. It is also known that insurance companies have surveyors whose primary work is to review claims made and assess losses. Surveyors in insurance industry are domain experts for particular area- be it fire, loss in transit or loss due to any other natural calamity. The Ld. AO does not have any mechanism to estimate it. Receipt of sums from insurance companies is sufficient proof of having incurred losses. Nevertheless, claims received from insurance companies because of raw materials, stocks, unfinished goods, fixed assets, vehicles and from railways was credited to P&L account and offered to tax by Appellant. When sum is offered to tax, Action of Ld. AO cannot doubt correctness of claim without any evidences. Ld. AO's addition is based on mere suspicion and surmises therefore have no legal or factual basis. Therefore, we upheld the order of the ld CIT A. Accordingly, ground number 5 of appeal is dismissed.

100. Accordingly, appeal of learned assessing officer in ITA number 1308/del/2006 for assessment year 2002 – 03 is partly allowed with above directions.

Ay 2003-04

By Assessee

101. The brief fact shows that assessee filed its return of income on 27/11/2003 declaring total income of Rs. nil as per normal computation but book profit was declared at INR 359527137 under provisions of section 115JB of income tax act 1961. Assessment under section 143 (3) of income tax act 1961 was passed on 31/3/2006 determining total income of assessee at Rs. at Rs. nil for normal computation but book profit under section 115JB of act were determined at INR 375550511/–. Therefore, assessee aggrieved with order of learned AO preferred an appeal before learned CIT – A who passed an order on 25/06/2008 partly allowing appeal of assessee. Therefore, assessee aggrieved with order has preferred an appeal before us.

102. The assessee has raised following grounds of appeal. ITA No. 2815/Del/2008 for Assessment Year 2003-04:-

> "1. That learned CIT(A) has erred on facts and in law in upholding interest income of Rs. 2,88 50,000/- as 'Income from other sources' instead of 'Income from business' as claimed by appellant.
>
> 2. That learned CIT(A) erred on facts and in law in upholding income from utilities of Rs. 21,92,000/- as 'Income from other sources' instead of 'income from business as claimed by appellant."

103. Coming to ground number 1 of appeal brief fact shows that assessee has earned interest income of Rs 28850000/– which was adjusted against expenditure incurred on interest payments made on account of bank term loan, deposits et cetera. On verification it was found that entire sum represents interest earned by Assessee Company on bonds, inter corporate deposits, income tax refunds, loan given to employees etc. Therefore, learned assessing officer treated same as income from other sources against claim of assessee that it is a business income. The above addition was challenged by assessee before learned CIT – A who also confirmed same.

104. The learned authorised representative stated that facts are same as ground of appeal no. 11 of Assessee appeal for AY 2000-01. He submitted that

aforesaid issue is squarely covered in favor of Appellant vide order dated Feb /22/ 2015 passed by ITAT in Appellant's own case for assessment year 1998-99 bearing ITA No. 4307 & 4409/De1/2003 (refer page 33 of ITAT order). However, in captioned assessment year due to NIL business profit, this issue becomes academic.

105. The learned departmental representative vehemently stated that above issue is not an academic but income earned by assessee does not have any Nexus with business of assessee and therefore it is rightly taxed as income from other sources. He reiterated submissions made for assessment year 2001 – 02.

106. We have carefully considered rival contentions and found that identical issue has been decided by us in departmental appeal vide ground no 11 for assessment year 2000-01 wherein it has been held that interest income earned by assessee is not business income but is chargeable to tax under the head " income from other sources" only. Accordingly, we also held for this year that above interest income earned by assessee is chargeable to tax under head "income from othe sources." Accordingly, ground number 1 of appeal of assessee is dismissed.

107. The second ground of appeal is with respect to taxing income of Rs. 2192000/– from utilities as income from other sources instead of income from business. After hearing both parties it was noted that identical issue has been decided in case of assessee for assessment year 2001 – 02 wherein it has been held that income from utilities is income from business of assessee as it is inextricably linked therewith. Accordingly, we called for this year too that income of Rs. 2192000/– from utilities is chargeable to tax as income from business and not income from other sources. Accordingly, ground number 2 of appeal of assessee is allowed.

108. Accordingly, ITA number 2815/del/2008 filed by assessee for assessment year 2003 – 04 is partly allowed.

AY 2004-05

ITA No 3104/del/2008 (By Assessee)

109. Assessee company filed its return of income on 31/del/2004 declaring income of INR 229839523/– as per normal computation of total income whereas under section 115 JB of income tax act total income was shown at INR 8 00530189/–. Assessment under section 143 (3) was passed on 27/12/2006 computing total income at INR 376910037/–. The assessee aggrieved with order of learned assessing officer preferred an appeal before learned CIT – A who passed an order on 24/7/2008 partly allowing appeal of assessee. Therefore, both parties are aggrieved and hence they are in appeal.

110. The assessee has raised following grounds of appeal in ITA No. 3104/Del/2008 for Assessment Year: 2004-05:-

"1. That learned CIT(A) erred on facts and in law in upholding disallowance of club expenses of Rs. 43,579/- by holding that same has not been incurred for purpose of business of Appellant Company.

2. That learned CIT(A) erred on facts and in law in upholding addition of a sum of Rs. 2,52 ,000/- being notional interest on refundable deposits made to clubs.

3. That learned CIT(A) erred on facts and in law in upholding interest income of Rs. 1,57,38,220/- as 'Income from other sources' instead of 'Income from business' as claimed by Appellant Company.

4. That learned CIT(A) erred on facts and in law in upholding income from utilities of Rs. 24,40,000/- as 'Income from other sources' instead of 'Income from business' as claimed by Appellant Company.

5. That learned CIT(A) erred on facts and in law in upholding income from processing charges of Rs. 20,61,378/- as 'Income from other sources' instead of 'Income from business' as claimed by Appellant Company.

6. That learned CIT(A) erred in not holding that interest income on refund is not a taxable real income as Appellate order based on which refund has been granted is subject to Appeal by Department.

7. That learned CIT (A) erred on facts and in law in holding that quantum of claim of deduction u/s 80HHC is to be restricted by a sum of Rs. 11,09,55,402/- being 90% of impugned export incentives from "Profits and Gains of Business."

111. Ground number 1 and 2 of appeal are with respect to disallowance confirmed of club expenses as well as national interest disallowed on refundable deposits made with club. Identical issues have been decided by us in assessee's appeal for assessment year 2001 – 02 wherein club expenditure has been allowed and disallowance on account of interest on refundable deposit made with club is deleted Therefore, for identical reasons we also allow ground number 1 and 2 of appeal.

112. Ground number 3 of appeal is with respect to taxing of interest income of INR 15738220/– as income from other sources instead of income from business as claimed by appellant. This issue is also decided in assessee's appeal for assessment year 2000 01 wherein it has been held that interest income earned by assessee is not inextricably linked with business of assessee but is interest income earned from fixed deposit receipts, inter corporate deposits, staff etc. , hence, same was held to be income from other sources. For similar reasons we also hold that interest income of INR 15738220/- earned by assessee is chargeable to tax as income from other sources. Accordingly, ground number 3 of appeal is dismissed.

113. Ground number 4 is with respect to treating income from utilities of Rs. 2440000/– as income from other sources instead of income from business.

114. Ground number 5 is with respect to treatment of processing charges of INR 2061378/– as income from other sources instead of income from business as claimed by appellant. This issue is decided in favour of assessee in appeal for assessment year 2001 – 02 wherein it has been held that service charges earned by assessee is inextricably linked with business of assessee and therefore it should be chargeable to tax has business income and not as income from other sources. Therefore following decision in assessee is a own case we also hold that processing charges received by

assessee of INR 2 061378/– is chargeable to tax as income from business and not as income from other sources. Accordingly ground number 5 is allowed

115. Ground number 6 of appeal with respect to interest income on income tax refund is not taxable as assessee does not press this ground and therefore it is dismissed.

116. Ground number 7 of appeal is with respect to order of learned CIT – A in holding that quantum of claim of deduction under section 80 HHC is to be restricted by a sum of Rs. 110955402/– being 90% of impugned export incentives from profits and gains of business.

117. The learned authorised representative on this ground submitted that there are lot of judicial developments after decision of learned CIT – A wherein it has been held that amendment brought out in by The finance act 2005 with effect from 01/04/1998 applies prospectively and therefore now assessee is entitled for deduction u/s 80 HHC of income tax act amounting to INR 29920309/–. The assessee has also submitted a revised computation of deduction allowable under section 80HHC of The act. It was submitted that above computation of deduction may be verified by learned assessing officer The learned departmental representative also agreed to above fact as issue has now been decided by honourable Supreme Court.

118. In view of above facts and after hearing parties it was noted that now issue is squarely covered in favour of assessee by decision of honourable Supreme Court in 277 CTR 460 wherein decision of honourable Gujarat High Court in Avani exports vs. CIT 348 ITR 391 was confirmed. In view of above facts, we direct assessee to file revised computation of deduction allowable to it before learned AO, who after verification allow claim of assessee, if found in accordance with law. Accordingly, ground number 7 of appeal of assessee is allowed.

119. Accordingly, appeal of assessee for assessment year 2004 – 05 in ITA number 3104/del/2008 is partly allowed.

120. The revenue has raised following grounds of appeal in ITA No. 3242/Del/2008 for Assessment Year 2004-05:-

"1. That Commissioner of Income-tax (Appeals), Bareilly has erred in law and circumstances in allowing relief of Rs. 37,49,191/- on account of out of books of periodicals.

2. The Commissioner of Income-tax (Appeals), Bareilly has erred in law and circumstances in allowing relief of Rs. 22,50,215/- out of prior period expenses.

3. The Commissioner of Income tax (Appeals), Bareilly has erred in law and circumstances in allowing benefit of deduction u/s 80IA of profits derived from business off generation of power. Departmental appeal on this issue is pending decision before ITAT in Assessment Year 2000-01.

121. The ground number 1 of appeal of revenue is with respect to holding that expenditure incurred by assessee on account of books and periodicals as revenue expenditure by learned CIT – A whereas learned assessing officer has held them to be of capital nature. Identical issue is decided in case of assessee for assessment year 2000-01 in ground no 13 wherein it has been held that books and periodical expenditure incurred by assessee are revenue in nature. Therefore, for similar reasons we also dismiss ground number 1 of appeal of learned AO and hold that that expenditure incurred on account of books and periodicals are revenue in nature.

122. Ground number 2 is with respect to disallowance of prior period expenses made by learned assessing officer which was allowed by learned CIT – A. The identical issue has been decided by us in appeal of revenue for assessment year 2000-01 in ground no 16 of AO wherein we have set aside whole issue back to file of learned assessing officer for verification whether expenditure crystallized during year or not. Therefore, for similar reasons we also set aside this ground number 2 of appeal of assessing officer to file of learned AO with similar direction. Accordingly, ground number 2 of appeal is allowed.

123. Ground number 3 is with respect to deduction u/s 80 IA allowed to assessee on profits derived from business of generation of power by learned CIT – A. Identical issue has been decided by us in appeal of assessee for assessment year 2000 – 01 wherein we have held that assessee is eligible for deduction under section 80 IA of income tax act on account of

profit derived from business of generation of power. Therefore, for similar reasons we also dismiss ground number 4 of appeal of learned AO. Accordingly, assessee is eligible for deduction under section 80 IA on profits on business of generation of power.

124. Accordingly, ITA number 3242/del/2008 for assessment year 2004 – 05 filed by learned deputy Commissioner of income tax, range 1, Moradabad on 22/10/2008 is partly allowed.

ITA No 3724/ Del/2009 (Assessee) & 3920/Del/09 (Departmental appeal)

A Y 2005-06

125. For assessment year 2005 – 06 assessee filed its return of income on 29/10/2005 declaring income of Rs. 551847983/– Subsequently return was revised on 4/2/2007 at income of INR 393262221/–. The assessment under section 143 (3) of act was passed on 30/12/2008 wherein total income of assessee was determined at INR 459144871/–. Aggrieved by order of learned assessing officer, assessee preferred an appeal before learned CIT – A, Bareilly, who passed an order on 2/7/2009 partly allowing appeal of assessee. Therefore, both parties are in appeal before us.

126. The assessee has raised following grounds of appeal in ITA No. 3724/Del/2009 for Assessment Year 2005-06:-

"1. That ld CIT(A) erred on facts and in law in upholding disallowance of club expenses of Rs. 2,34,352/- by holding that same not been incurred for purpose of business of appellant company.

2. That ld CIT(A) erred on facts and in law in upholding addition of a sum of Rs. 3,92,000/- being notional interest on refundable deposits made to clubs."

127. The ground number 1 and 2 of appeal is with respect to disallowance of club expenses of INR 234352/– and interest disallowance of INR 392,000 on refundable deposit placed with club. Identical issue has been decided in assessment year 2000-01 in assessee's own case wherein it has been held that club expenditure incurred by assessee are for purposes of business and therefore for same reason club refundable deposit is also for purposes

of business. Both disallowances were deleted. Therefore, for similar reason we allow ground number 1 and 2 of appeal of AO.

128. Accordingly, appeal of assessee in ITA number 3724/del/2009 for assessment year 2005 – 06 is allowed.

129. The revenue has filed appeal before us raising following grounds of appeal

i. Commissioner of income tax appeal, Bareilly has and in law and circumstances in allowing relief of INR 253301 5/– on account of out of books and periodical is. The departmental appeal on this issue is pending decision before ITAT in assessment year 2004 – 05.

ii. The Commissioner of income tax appeal, Bareilly has erred in law and circumstances in allowing relief of INR 143310/– national disallowance out of loss in transit, departmental appeal on this issue is pending decision before ITAT in assessment year 2004 – 05.

iii. The Commissioner of income tax appeal, Bareilly has erred in law and in circumstances in allowing relief of INR 3687419/– out of prior period expenses departmental appeal on this issue is pending before ITAT in assessment year 2004 – 05.

iv. The Commissioner of income tax appeal, Bareilly has erred in law and circumstances in allowing benefit of deduction u/s 80 IA on profits derived from business of generation of power. Departmental appeal on this issue is pending decision before ITAT in assessment year 2004 – 05.

130. Ground number 1 in appeal is with respect to disallowance of books and periodical expenditure which was held by learned assessing officer as capital expenditure by but allowed by learned CIT – A as revenue expenditure. Identical issue on similar facts has been decided in case of assessee for assessment year 2000-01 in appeal of AO vide ground no 13 wherein it has been held that books and periodical expenditure incurred by assessee are revenue in nature. Therefore, for similar reasons we dismiss ground number 1 of appeal.

131. Ground number 2 of appeal is with respect to national disallowance of INR 143310 out of loss in transit. The identical issue is decided in assessment year 2002 – 03 in ground number 5 of revenues appeal wherein we have deleted above addition made by learned assessing officer holding it to be

without any justification. For similar reasons we also dismiss ground number 2 of this appeal.

132. Ground number 3 of appeal is with respect to deletion of disallowance on account of INR 3687419/- of prior period expenses. Identical issue has been decided by us in revenues appeal for assessment year 2000-01 in ground number 16 wherein we have set aside whole issue back to file of learned assessing officer with a direction to assessee to justify before assessing officer that above expenditure has crystallized during year. In view of this for similar reasons, we also set aside this ground of appeal back to file of learned assessing officer with similar directions.

133. Ground number 4 of appeal is with respect to deduction allowable u/s 80 IA to assessee on profits derived from business of generation of power. We have decided identical issue in appeal of assessing officer for assessment year 2001 – 02 wherein we have held that assessee is eligible for deduction under section 80 IA on profits derived from business of generation of power. Therefore, for similar reasons we also dismiss ground number 4 of appeal and hold that assessee is eligible for deduction under section 80 IA on profits derived from business of generation of power.

134. Accordingly, ITA number 3920/del/2009 for assessment year 2005-06 filed on 18/11/2009 by learned Deputy Commissioner Of Income Tax, Circle – 1, Moradabad is partly allowed.

ITA No. 3314/Del/2010 &

ITA No. 3393/Del/2010

Assessment Year 2006-07

135. For assessment year 2006 – 07 assessee filed its return of income showing total income of INR 405801150/–. The assessment under section 143 (3) of act was passed on 24/12/2009 determining total income of assessee at INR 426513168/– wherein several disallowances/additions were made and certain claims of assessee were rejected as they were not made in original return of income but also same were not made in revised return. The assessee aggrieved with order of learned AO preferred an appeal before learned CIT – A, Bareilly who passed order dated 26/3/2010 partly allowing appeal of assessee. Therefore, both parties are in appeal before us.

136. The assessee has raised following grounds of appeal in ITA No. 3314/Del/2010 for Assessment Year 2006-07:-

1. That learned CIT(A) erred on facts and in law in upholding disallowance of club expenses of Rs. 1,91,676/- by holding that same has not been incurred for purpose of business of Appellant Company.

2. That learned CIT(A) erred on facts and in law in upholding addition of a sum of Rs. 2,31,000/- being notional interest on refundable deposits made to clubs.

3. That learned CIT(A) erred onfacts and in law in disallowing of expenditure u/s 14A of 48,62,528/- by holding that same is relatable to earning of exempt dividend income that does not form part of total income and are not entitled to be debited to P& L Account.

4. That learned CIT(A) erred on facts and in law in upholding disallowance of expenditure of Rs. 34,60,160/- by holding inter-alia that these expenses are not relatable to year under consideration and hence, not allowable in asstt. year 2006-07.

5. That learned CIT(A) erred onfacts and in law in upholding disallowance of Rs. 3,65,20,000/- on account of claim recoverable from Ranbaxy Laboratories Ltd. by holding that amounts receivable towards Breach of contract for setting up plant is not a Capital Receipt."

137. Ground number 1 of appeal is with respect to disallowance of club expenses of INR 1 91676 and ground number 2 is with respect to disallowance of interest expenditure of INR 231000/– on refundable deposits made with club. The parties confirmed that identical issue has been decided by lower authorities in assessee's own case for earlier years. It was also submitted that there is no change in facts and circumstances of case.

138. On careful consideration of orders of lower authorities and contentions of rival parties, it was found that identical issue has been decided in assessee's own case for assessment year 2002-03 vide ground no 3 & 4 of assessee's appeal . Therein it has been held that club expenditure incurred

by assessee is for purpose of business of assessee and therefore deposits made with club is also for purposes of business of assessee and therefore no interest disallowance can be made. Therefore, following decision in assessee's own case for earlier years we also direct learned assessing to delete disallowance involved in ground number 1 and 2 of appeal. Accordingly, ground number 1 and 2 of appeal of assessee is allowed.

139. Ground number 3 of appeal is with respect to disallowance of expenditure u/s 14 A of act of INR 4862528/– wherein learned assessing officer has held that such expenditure is relatable to earning of exempt income and does not form part of total income and are not entitled to be deduction. The simple issue involved in this appeal is disallowance u/s 14 A of income tax act. The fact shows that appellant in assessment year has earned dividend income amounting to INR 2 39648/– which was exempt u/s 10 (34) of act. The learned assessing officer made disallowance holding that there are certain expenses on account of interest etc. Which are directly attributable to exempt income. Accordingly he computed disallowance on account of interest of INR 3 232926/– and also made disallowance of 0.5% of average investment of INR 1629602/– on account of other expenditure. Therefore, total disallowance of INR 4862528/– was made. The above issue is contested by assessee before learned CIT – A which was dismissed. Therefore, assessee is in appeal before us.

140. The learned autho ised representative submitted that Ld. AO had no basis to disallow whole of interest expenditure under Section 14A of Act. The Ld. AO while proposing to disallow expenditure under section 14A of Act read with Rule 8D of Rules has no cogent reasons for rejecting expenditure of Rs. 48,62,528. The Appellant places reliance on decisions of Jurisdictional Hon'ble Punjab & Haryana High Court in case of CIT vs. Max India Ltd. (Income Tax Appeal No. 186 of 2013 (O&M)) wherein Hon'ble Court concurred with Hon'ble Bombay High Court judgment in CIT vs. Reliance Utilities and Power Ltd. 2009 (313) ITR (Bombay) and HDFC Bank Ltd. vs. DCIT 2016 (383) ITR 529 (Bombay) and held that:

> "*16..... We are in respectful agreement with these observations. There is no reason to restrict presumption to cases where funds from different sources are mixed in a common pool. The rational for*

presumption is that an assessee would utilize its funds prudently ensuring that it derives greatest financial advantage. If that be rational we see no reason for presumption to be restricted to cases where different funds are mixed in a common pool. It is, however, only a presumption."

17. …. We respectfully agree with these observations. While it is only a presumption, it is one which is in assessee's favour. The Department could have rebutted this presumption by calling for records from bank itself. It chose not do so at though assessee stated that it was not in possession of records. There was no application either before Tribunal or before us for an opportunity to lead further evidence in this regard.

20. In circumstances, question No.(i) is answered in favour of respondent-assessee.

The Appellant submits that it is imperative for Ld. AO to establish a direct or indirect nexus between expenditure alleged to have been incurred for earning exempt income in order to invoke section 14A of Act. He referred judicial precedents of C T., Mumbai vs. M/s. Walfort Share & Stock Brokers P. Ltd. [2010] 326 ITR 1 (SC). Thus, a vague assertion by Ld. AO that Appellant has not considered indirect expenses is not sufficient and cannot automatically trigger Rule 8D of Rules without satisfying provisions of section 14A(1) of Act. It is submitted before Hon'ble Bench that sub-section (2) of section 14A of Act provides that requirement of Assessing Officer embarking upon a determination of amount of expenditure incurred in relation to exempt income would be triggered only if Assessing Officer returns a finding that he is not satisfied with correctness of claim of assessee in respect of such expenditure. The same is not satisfied in present case. He further stated that the Appellant had sufficient own funds to extent of Rs. 824,45,60,000 for making any investments. This is evident from Page 154 of Paper book wherein Appellant has provided details of investments made and surplus fund of Appellant. Further, in Schedule F of Balance Sheet details of investment made by Appellant has been enumerated. This makes it abundantly clear that all dividend-earning investments were made out of owned funds. The

increase in investments during relevant assessment year was on account of foreign investments, income from which was already offered to tax. It is further submitted that it is an accepted position that if sufficient interest free funds are available with company then there is a presumption in favour of assessee that investments are made out of such interest free funds. The Appellant places reliance on decision rendered by Hon'ble Bombay High Court in case of CIT vs. Reliance Utilities & Power Ltd.[2009] 178 Taxman 135 (Bombay) to support above proposition, Hon'ble Bombay High Court had held as under:

> "*10. If there are funds available both, interest-free and overdraft and/or loans are taken, then a presumption would arise that investments would be out of interest-free fund generated or available with company, if interest-free funds are sufficient to meet investments. In instant case said presumption was established considering findings of fact, both by Commissioner (Appeals) and Tribunal.*"

Reliance is further placed on decision of Hon'ble Punjab and Haryana High Court in case of CIT v. Max India Ltd. [2016] 75 taxmann.com 268 (Punjab & Haryana), wherein Hon'ble High Court while accepting stance of Hon'ble Bombay High Court in Reliance Utilities [Supra] has held:

> "*16. … We are in respectful agreement with these observations There is no reason to restrict presumption to cases where funds from different sources are mixed in a common pool. The rational for presumption is that an assessee would utilize its funds prudently ensuring that it derives greatest financial advantage. If that be rational we see no reason for presumption to be restricted to cases where different funds are mixed in a common pool…*"

Further, Ld. CIT(A) also disallowed expenditure earned on dividend income by applying rule 8D of Income-tax Rules, 1962 ('IT rules')which is incorrect as rule 8D of IT rules is not applicable in instant case as same became effective from 24 March 2008. The CIT (A) placed reliance on judgments such as Cheminvest Ltd. vs. CIT [2009] 121 ITD 318 (Delhi)

which is highly misplaced since, overruled by Hon'ble Delhi High Court. It is also pertinent to note that in case of Godrej & Boyce Manufacturing Company Ltd. vs. DCIT [2017] 394 ITR 449 (SC) Hon'ble Supreme Court has held that rule 8D can only be applied prospectively. He further stated that the recording of the satisfaction on examination of the books of the assessee is a mandatory exercise, which should have been carried out by the assessing officer but has not been carried out and therefore on this score itself the disallowance cannot be made. Hence, action of AO is without any basis and cannot be explained with any cogent reason, accordingly it is submission of Appellant that disallowance made by AO is ought to be deleted.

141. Learned DR vehemently supported order of lower authorities and submitted that assessee has earned huge tax-free dividend income of INR 2339648/– and therefore there are certain expenditure which should have been incurred by assessee. He submitted that satisfaction has been recorded by AO.

142. We have carefully considered rival contention and found that during year assessee has earned exempt income of INR 2 339648/–. The learned AO Disallowed expenditure of interest of INR 3 232926/–. The claim of assessee is that assessee has sufficient own funds to extent of INR 8244560000/– for investment in exempt income generating investments. On careful examination of the disallowance made by the learned assessing officer it was found that the learned AO has not recorded the satisfaction on examination of the books of accounts of the assessee that assessee has incurred expenditure for earning of exempt income and the explanation given by the assessee is incorrect. Such is the mandate of the decision of the honourable Supreme Court in case of 402 ITR 640. In view of this, the disallowance made by the learned assessing officer cannot be sustained. Therefore orders of the lower authorities are set aside and the AO is directed to delete the disallowance u/s 14 A of the income tax act. Therefore, ground number 3 of the appeal of the assessee is allowed.

143. Ground number 4 of the appeal is against upholding the disallowance of expenditure of INR 3 460160/– by holding that these expenses are not relatable to the year under consideration and hence not allowable in the

assessment year 2006 – 07. In fact, this is disallowance of prior period expenses. The learned assessing officer did not entertain the claim of the assessee at the assessee has claimed the above deduction during the assessment proceedings and not claimed in the return of income filed or revised return. The AO relied upon the decision of the honourable Supreme Court in 284 ITR 232. Before the learned CIT – A above claim was raised wherein he noted that expenses were incurred during the previous year 2005 – 064 different locations and charged to profess and loss account and also the income was credited in the accounts as claimed by the assessee. However, these amounts were added in the computation of total income out of abundant precaution. The learned CIT – A also following the decision of the honourable Supreme Court dismissed the claim of the assessee stating that the claim of the assessee of raising the ground in appeal proceedings which was not claimed in the return of income cannot be entertained at this stage.

144. The learned authorised representative vehemently submitted that details of the expenditure are at pages 98-99 of the paper book. The expenses crystallized / became known for the first time during the relevant previous year on claims / bills being received. Even though such expenses pertained to earlier years, deduction for the same needs to be allowed in the year under appeal. The Appellant places reliance on CIT vs.Pruthvi Brokers & Shareholders [2012] 349 ITR 336 (Bombay)wherein the Hon'ble Bombay High Court held that an assessee is entitled to raise before appellate authorities additional grounds in terms of additional claims not made in return filed by it. The Hon'ble Bombay High Court in another case of CIT vs. Mukund Bhawan Trust , Pune (ITA No. 60 of 2015)dismissed revenue's appeal while upholding its own judgment in the aforesaid case. Further, reliance can also be placed on the following decisions wherein, it has been held that merely because an expense relates to a transaction of an earlier year it does not become a liability payable in the earlier year unless it can be said that the liability was determined and crystallized in the year in question on the basis of maintaining accounts on the mercantile basis.

- Hindustan Gum & Chemicals Ltd. vs. ITO [2008] 23 SOT 143 (Kolkata), (Refer Para 7.3)

- Saurashtra Cement and Chemical Industries Ltd. CIT [(1995) 213 ITR 523 (Guj)], Para 10
- CIT v. Shriram Piston & Rings Ltd.[(2008) 220 CTR 404 (Del.)], Para 7, 9, 17
- Toyo Engg India Ltd vs. JCIT [(2006) 100 TTJ 373 (Mum.)] (Refer Para 15, 17)
- Essar Steel Ltd. v. DCIT: [(2005) 97 ITD 125 (Ahmd.) (TM)], Refer para 45)
- Goetze (India) Ltd. v. DCIT: 112 TTJ 1 (Del.), Para 23,
- CIT vs Jagatjit Industries Ltd. [() 194 Taxman 158 (Del), Para 16
- SMCC Construction India Ltd. vs. ACIT [(2014) 220 taxman 354 (Del), para 13
- Sutna Stone & Lime Co. Ltd. vs. CIT [(1991] 192 ITR 478 (Calcutta)], Para 5
- ITO v. Infratex Engg. Co. [(1990) 38 TTJ 551 (Del.), Para 9
- Ericsson India Pvt. Ltd. vs. Addl. CIT [ITA No. 760/Del/2006], para 16
- CIT vs. Excel Industries Ltd. [(2013) 358 ITR 295 (SC)], Para 32,

  CIT vs Vishnu Industrial Gases Pvt. Ltd. [ITR No. 229/1988 (Del)], Para 3, 4

145. The learned departmental representative payment is supported the orders of the lower authorities and stated that when the assessee has not made any claim in original return and also not by filing the revised return both the lower authorities have correctly disallowed the claim of the assessee.

146. We have carefully considered the rival contention and find that the decision of the honourable Supreme Court is for the purposes of the learned assessing officer and not for the purposes of the appellate authorities. Therefore, the learned CIT – A should have entertained the claim of the assessee. The claim of the assessee is regarding the deduction of the prior period expenditure. This issue has been dealt in appeal of the learned assessing officer for assessment year 2000 – 01 vide ground number 16

wherein the whole issue has been set aside to the file of the learned assessing officer with a direction to the assessee to demonstrate before the assessing officer that the above expenditure has crystallized during the year and therefore they are allowable as deduction. Therefore, for similar reasons and with similar direction we set aside this ground of appeal to the file of the learned assessing officer. Accordingly, ground number 4 is allowed with above direction.

147. Ground number 5 is with respect to the disallowance upheld by the learned CIT – A of INR 3 6520000/– on account of claim recoverable from Ranbaxy laboratories Ltd by holding that the amounts receivable towards breach of contract for setting up of the plant is not a capital receipt. The brief fact shows that the assessee has received payment from Messer is Ranbaxy laboratories Ltd of INR 3 6520000/– which is credited to the profit and loss account but now during the assessment proceedings the assessee claimed before the learned AO that the said amount is in the nature of capital receipt and therefore should not have been charged to income tax. It was claimed that it is not chargeable to income tax. The assessee submitted that Assessee Company is engaged in drug discovery and chemistry services, custom research and manufacturing services for advance intermediates, fine chemicals, and active pharmaceuticals ingredients, regulatory services, development, licensing and supply of formulations and clinical research. On 25/10/2004, assessee entered into an agreement with Ranbaxy to setup a new manufacturing facility on exclusive basis for production of that company of specified product. The facility was to be constructed the newly which would include specified machineries, equipments and facilities. The manufacturing agreement was to expire on 30/4/2008 agreed to place order for minimum quantities of the specified products and pay the agreed price for the same. The assessee company in terms of manufacturing agreement set up the new manufacturing facility after making a capital investment of approximately 20,00,00,000. However, the Ranbaxy did not place orders for manufacturing of the minimum quantities and therefore assessee reached on a settlement agreement on 02/06/2006 with Ranbaxy according to which it was to receive INR 72173000 from that company. Part of the above sum INR 3 6520000/– was

credited to the profit and loss account on accrual basis and the balance sum was shown as receivable in the next year. The learned assessing officer disallowed the claim, as it was not there in the original return of income. The assessee preferred appeal before the learned CIT – A. The learned CIT appeal also following the decision of the honourable Supreme Court did not entertain the claim of the assessee; therefore, assessee is in appeal.

148. The Ld Authorised representative submitted that

i. Appellant engaged in the business of drug discovery, development and licensing & supply of formulations etc. entered into a manufacturing agreement with Ranbaxy Laboratories Ltd. ('Ranbaxy') dated 25 Oct 2004 to set up a manufacturing facility on an exclusive basis for Ranbaxy for production of specified products defined in the said Agreement (ASC-4 and DKT-3). Under the said agreement, Ranbaxy had to place order for minimum quantities (i.e.16 TPA for ASC-4 and 24 TPA for DKT-3 from 1 May 2005 to 30 April 2006) of the specified products as mentioned above and pay the price agreed in the agreement. In furtherance of the same, the Appellant set up a manufacturing plant making an investment of Rs.19,80,00,000. However, in respect of the terms of the agreement, Ranbaxy did not place an order for minimum quantities were not met my Ranbaxy which led to incurrence of losses by the Appellant on account of overheads, depreciation and interest on investment made in setting up the plant. After various negotiations, the parties then executed a termination and settlement contract dated 2 June 2006. The Termination and settlement contract entitled the Appellant to receive the following amounts from Ranbaxy:

1. Rs. 1,25,00,000 towards expenses incurred in maintaining the plant. (40% of amount spent by vendor till the date of termination subject to maximum of Rs. 6,40,00,000 in accordance with clause 16(iv)(a) of the manufacturing agreement)
2. Total Compensation of Rs. 5,96,73,000 (after subtracting the earned profits of Rs. 43,27,000 (ACS-4 Qty procured

by Ranbaxy x Rs. 4020 + DKT-3 Qty procured by Ranbaxy x Rs. 1320) from Rs. 6,40,00,000 in accordance with clause 16(iv)(b) of the manufacturing agreement)

ii. Hence, the amount of compensation to be received by the Appellant amounted to Rs. 7,21,73,000. The Appellant on an accrual basis treated the amount of Rs. 3,65,00,000 as a capital receipt to be recoverable from Ranbaxy in the current year and the rest of the amount was to be recovered in the subsequent year (Refer page 175 of the Paper book)

iii. The Ld. AO stated that the claim of the Appellant cannot be accepted in pursuance of the decision of Hasimara Industries Ltd. vs. CIT[1998] 230 ITR 927 (SC) wherein loss incurred on capital asset was termed as a capital loss. Further, the Ld. AO stated that Appellant could not claim the deduction unless the Appellant files revised return of income claiming such deduction. Hence, the claim of the Appellant is not admissible.

iv. The Ld. CIT(A) concurred with the findings of the Ld. AO and dismissed the ground of appeal stating that the assessee cannot raise a new ground of appeal which has not been raised in the return of income after relying on decision of Goetze (India) Ltd. vs. CIT (284 ITR 323).

v. The Appellant hereby submits that the case of Hasimara (Supra) is distinguished on the facts that if loss incurred on a capital asset is treated as a capital loss, if any profit or income is incurred on such capital asset, it can be termed as capital income and hence, the case supports the proposition of the Appellant rather than supporting the Ld. AO.

vi. It is pertinent to note that in the case of Goetze (India) Ltd. the Hon'ble Supreme Court went on to hold that the assessee was not allowed to raise a new claim before such assessing authority. However, it was made clear that the issue in this case was limited to the power of the assessing authority and did not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961.

vii. In the instant case, the Appellant did not raise a new claim but an additional claim before the tax authorities. Further, in light of the cases the appellate authorities have jurisdiction to adjudicate the issue of additional claim made by the Appellant.

viii. In the case of CIT vs.Pruthvi Brokers & Shareholders [2012] 349 ITR 336 (Bombay) wherein the Hon'ble Bombay High Court held that an assessee is entitled to raise before appellate authorities additional grounds in terms of additional claims not made in return filed by it.

ix. Reliance can also be placed on the judgment of the Hon'ble Supreme Court in the case of Kettlewell Bullen & Co. Ltd. vs. CIT[1964] 53 ITR 261 (SC), the Hon'ble Apex Court held that

> "*we have no doubt that what the assessee was paid was to compensate him for loss of a capital asset. It matters little whether the assessee did continue after the determination of its agency with the Fort William Co. Ltd. to conduct the remaining agencies. The transaction was not in the nature of a trading transaction, but was one in which the assessee parted with an asset of an enduring value. We are, therefore, unable to agree with the High Court that the amount received by the Appellant was in the nature of a revenue receipt*"

149. Learned departmental representative vehemently supported the order of the lower authorities and submitted that when there is no claim in the original return of income as well as assessee did not file any revised return making such claim, lower authorities have correctly not entertained the claim of the assessee following the decision of the honourable Supreme Court.

150. We have carefully considered the rival contentions and perused the orders of the lower authorities. The learned assessing officer has correctly not entertained the claim of the assessee as assessee neither filed the revised return nor made the claim in the original return of income. He followed the mandate of the honourable Supreme Court. However, such mandate did not apply to the first appellate authority. Therefore the learned CIT – A should have entertained claim of the assessee and examined the same on

the merits of the case. The learned CIT – A has not examined such claim. Therefore, in the interest of justice, the ground is set aside to the file of the learned CIT – A to examine the claim of the assessee and to adjudicate whether the above receipt is revenue receipt or capital receipt. Accordingly, ground number 5 of the appeal is allowed with above direction.

151. Accordingly, appeal of the assessee is partly allowed.

152. The revenue has raised following grounds of appeal in ITA No. 3393/Del/2010 for Assessment Year 2006-07:-

"1. The Commissioner of Income tax (Appeal), Bareilly has erred in law and circumstances in allowing relief of Rs. 40,13,830/- on account of out of books and periodicals. Departmental appeal on this issue is pending decision before ITAT in Assessment Year-2005-06 and earlier assessment years.

2. The Commissioner of Income tax (Appeal), Bareilly has erred in law and circumstances in allowing relief of Rs. 2,80,650/- national disallowance out of loss in transit. Departmental appeal on this issue is pending decision before ITAT in Assessment Year-2005-06 and earlier assessment years

3. The Commissioner of Income tax (Appeal), Bareilly has erred in law and circumstances in allowing benefit of deduction u/s 80 IA on profits derived from business off generation of power and deleting addition of Rs. 1,11,32,334/- made on this account. Departmental appeal on this issue is pending decision before ITAT in Assessment Year-2005-06 and earlier assessment years."

153. The ground number 1 of appeal of learned assessing officer is with respect to disallowance deleted by learned CIT – A of Rs. 4013830/– on account of books and periodicals. The learned assessing officer held that revenue expenditure claimed by assessee on account of books and periodicals is capital in nature. The learned CIT – A held that above expenditure is revenue in nature. Therefore, learned assessing officer aggrieved and preferred this appeal.

154. Parties confirmed that identical issue has been decided in case of assessee for assessment year 2000-01. There is no change in facts and

circumstances of case. In view of our decision for assessment year 2000-01 in assessee's own case by this order wherein we have allowed claim of assessee of books and periodicals expenditure holding it to be revenue expenditure confirming order of learned CIT – A, therefore, for similar reason we also hold for this year that INR 4013830 incurred by assessee on account of books and periodicals is revenue expenditure. Accordingly, ground number 1 of appeal is dismissed.

155. Ground number 2 of appeal is with respect to deletion of addition made by learned CIT – A of Rs. 280650/– as notional disallowance out of loss in transit with respect to insurance claim received by assessee. During year, assessee has received a sum of Rs. 2806502/– on account of insurance claim in respect of various losses incurred. The learned assessing officer made addition of 10% of such claim to total income of assessee. It was deleted by learned CIT – A and therefore learned AO is in appeal.

156. Both parties confirmed that identical issue has been decided in case of assessee for assessment year 2004 – 05 wherein identical addition was made by learned assessing officer was deleted by learned CIT – A. There is no change in facts and circumstances of case. In case of assessee for assessment year 2004 – 05 vide ground number 5 of appeal we have deleted identical addition made by learned assessing officer holding that it was purely made on basis of assumption and surmises without any evidence. For sim lar reasons we also dismiss this ground of appeal against deleting addition made by learned assessing officer of Rs. 280650/– and we confirm action of learned CIT – A. Ground number 2 is dismissed.

157. Ground number 3 is with respect to deduction allowable to assessee u/s 80 IA on profits derived from business of generation of power claimed by assessee of INR 11132334/–. The claim was allowed by learned CIT – A. The parties confirmed before us that identical issue has been decided in assessee's own case for assessment year 2001 – 02 wherein claim of assessee was also dealt with lower authorities in similar manner.

158. We have carefully considered rival contention and found that identical issue has been decided by us by this order for assessment year 2001 – 02 in ground number 4 of appeal of learned assessing officer wherein we have held that assessee is entitled for deduction u/s 80 IA of income tax act on

power generation unit installed by assessee. Therefore for similar reasons we dismiss ground number 3 of appeal of AO and direct him to grant deduction of INR 1 1132334/– under section 80 IA of income tax act being profits derived from business of generation of power.

159. Accordingly, ITA number 3393/del/2010 filed on 6/7/2010 by learned assessing officer for assessment year 2006 – 07 is dismissed.

ITA No. 2479/Del/2011 (Assessee)

&

ITA No. 2596/Del/2011 (by AO)

Assessment Year 2007-08:-

160. The assessee company filed its return of income on 12/10/2007 declaring total income of INR 4 05801154/– which was revised on 8/8/2008 declaring the same income the reason for revision of the written was to make an adjustment of deferred tax in competition of the book profit u/s 115JB of the act due to retrospective amendment. The assessment u/s 143 (3) was passed on 20/12/2010. The assessee preferred appeal against that order before the Commissioner of income tax (appeals), Bareilly. The CIT – A passed order on 8/3/2010 partly allowing the appeal of the assessee. Therefore, the learned assessing officer as well as the assessee was aggrieved by the order and both have filed appeal before us.

161. The assessee has raised following grounds of appeal in ITA No. 2479/Del/2011 for Assessment Year 2007-08:-

1. That learned CIT(A) erred on facts and in law in upholding disallowance of club expenses of Rs. 1,52,935/- by holding that same has not been incurred for purpose of business of Appellant Company.

2. That learned CIT(A) erred on facts and in law in disallowing of expenditure u/s 14A of 66,95,714/- by holding that same is relatable to earning of exempt dividend income that does not form part of total income and are not entitled to be debited to P& L Account.

3. That learned CIT(A) erred on facts and in law in upholding disallowance of expenditure of Rs. 24,73,697/- by holding inter-alia

that these expenses are not relatable to year under consideration and hence, not allowable in asstt. year 2007-08.

4. That learned CIT(A) erred on facts and in law in upholding disallowance of Rs. 3,56,53,000/- on account of claim recoverable from Ranbaxy Laboratories Ltd. by holding that amounts receivable towards Breach of contract for setting up plant is not a Capital Receipt."

162. Ground number 1 of appeal is with respect to disallowance of club expenses of INR 152935/- . The parties confirmed that lower authorities in assessee's own case have decided identical issue for earlier years. It was also submitted that there is no change in facts and circumstances of case.

163. On careful consideration of orders of lower authorities and contentions of rival parties, it was found that identical issue has been decided in assessee's own case for assessment year 2002-03 vide ground no 3 & 4 of assessee's appeal . Therein it has been held that club expenditure incurred by assessee is for purpose of business of assessee therefore no disallowance can be made. Therefore, following decision in assessee's own case for earlier years we also direct learned assessing to delete disallowance involved in ground number 1 of appeal. Accordingly, ground number 1 of appeal of assessee is allowed.

164. Second ground of appeal is against the disallowance of expenditure u/s 14A of INR 6695714/– holding that the same is relatable to earning of exempt dividend income that does not form part of total income and are not entitled to deduction. The learned assessing officer noted that assessee has shown income on account of dividend, which does not form part of total income, but there are certain expenses with regard to interest et cetera, which are directly attributable to the exempt income. Therefore he disallowed INR 6 695714 allocating interest to the exempt income with respect to the average investment and the average total assets of the assessee. He also disallowed 0.5% of average investment as other expenditure. The assessee preferred appeal before the learned CIT – A and submitted that assessee has earned dividend of Rs. 2656631/– which is exempt u/s 10 (34) of the act. It

raised several contentions however the learned CIT – A dismiss the appeal of the assessee on this ground.

165. The learned authorised representative challenged the disallowance on the count of the non-satisfaction by the learned assessing officer, more interest free own funds available then the amount of investment yielding exempt income.

166. The learned departmental representative supported the orders of the lower authorities.

167. We have carefully considered the rival contentions and find that vide para number 5 the learned assessing officer has made a disallowance u/s 14 A of the income tax act. However, on reading of the order of the learned assessing officer we did not find any satisfaction recorded by him that the assessee has incurred expenditure for earning exempt income on examination of the books of account. In absence of such satisfaction, the disallowance u/s 14A cannot be upheld. Honourable Supreme Court in 402 ITR 604 has held that satisfaction is mandatory before applying any apportionment ratio. In view of this second ground of appeal is allowed.

168. Third ground of the appeal is against the disallowance confirmed by the learned CIT of INR 2473697 holding that these expenses are not relatable to the year under consideration and hence not allowable in the assessment year 2007 – 08. This relates to disallowance of prior period expenses. The fact shows that the assessee did not make claim of deduction of the above expenditure pertaining to prior period in the return of income. Assessee also did not file any revised return to raise the claim before the AO. Accordingly, the AO denied entertaining the claim of the assessee in view of the decision of the honourable Supreme Court in 284 ITR 323. Before the learned Commissioner appeals assessee submitted that these expenses were incurred during the previous year 2005 – 064 different locations and charged to profit and loss account. However, the assessee added these expenses in the computation of total income out of abundant precaution. The learned CIT noted that above prior period expenditure are reflected in annexure 18 of the tax audit report. However, the appellant did not furnish required details in assessment proceedings to establish its claim that these

liabilities though pertaining to earlier were ascertained and crystallized during the year and therefore he confirmed the disallowance.

169. The learned authorised representative vehemently submitted that the details of the expenditure are at page 203 of the paper book. The expenses crystallized / became known for the first time during the relevant previous year on claims / bills being received. Even though such expenses pertained to earlier years, deduction for the same needs to be allowed in the year under appeal. Reliance is placed on the following decisions wherein, it has been held that merely because an expense relates to a transaction of an earlier year it does not become a liability payable in the earlier year unless it can be said that the liability was determined and crystallized in the year in question on the basis of maintaining accounts on the mercantile basis.

- Hindustan Gum & Chemicals Ltd. vs. ITO [2008] 23 SOT 143 (Kolkata), (Refer Para 7.3)
- Saurashtra Cement and Chemical Industries Ltd. CIT [(1995) 213 ITR 523 (Guj)], Para 10
- CIT v. Shriram Piston & Rings Ltd.[(2008) 220 CTR 404 (Del.)], Para 7, 9, 17
- Toyo Engg India Ltd vs JCIT [(2006) 100 TTJ 373 (Mum.)] (Refer Para 15, 17)
- Essar Steel Ltd v. DCIT: [(2005) 97 ITD 125 (Ahmd.) (TM)], Refer para 45)
- Goetze (India) Ltd. v. DCIT: 112 TTJ 1 (Del.), Para 23,
- CIT vs Jagatjit Industries Ltd. [() 194 Taxman 158 (Del), Para 16
- SMCC Construction India Ltd. vs. ACIT [(2014) 220 taxman 354 (Del), para 13
- Sutna Stone & Lime Co. Ltd. vs. CIT [(1991] 192 ITR 478 (Calcutta)], Para 5
- ITO v. InfratexEngg. Co. [(1990) 38 TTJ 551 (Del.), Para 9
- Ericsson India Pvt. Ltd. vs. Addl. CIT [ITA No. 760/Del/2006], para 16
- CIT vs. Excel Industries Ltd. [(2013) 358 ITR 295 (SC)], Para 32,

CIT vs. Vishnu Industrial Gases Pvt. Ltd. [ITR No. 229/1988 (Del)], Para 3, 4

170. The learned departmental representative vehemently supported the orders of the lower authorities and submitted that assessee itself during the course of filing of the return has made the above disallowance. Such disallowances were not rectified by offering the above adjustment in the revised return. In absence of any revised return, the learned assessing officer was bound by the verdict of the honourable Supreme Court. Therefore, the claim of the assessee was not entertained by the learned AO. Before the learned CIT – A the assessee did not file requisite details. He therefore submitted that the lower authorities have correctly disallowed the claim of the assessee.

171. On careful consideration of the rival contentions, it is noted that though learned assessing officer disallowed the claim of the assessee relying on the decision of the honourable Supreme Court correctly, the learned CIT – A has admitted the claim of the assessee but in absence of adequate details dismissed the same. The issue is the allowability of the prior period expenses. This issue is squarely covered by the decision in the case of the assessee itself for assessment year 2000 – 01 in appeal of the learned assessing officer wide ground number 16 wherein the whole issue is set aside back to the file of he learned assessing officer by directing the assessee to substantiate before the learned AO that these expenses have crystallized during the year and therefore they are allowable. For similar reasons, we set aside this ground of appeal also to the file of the AO accordingly with similar directions. Accordingly, ground number 3 is partly allowed.

172. Ground number 4 is against the upholding the disallowance of INR 3 5653000/– on account of claim recoverable from Ranbaxy laboratories by holding that the amounts receivable towards breach of contract for setting up the plant is not a capital receipt. The brief fact shows that assessee has credited the above amount in the profit and loss account but during the proceedings, it has been claimed that the said amount is of the nature of capital receipt. The learned assessing officer did not admit the claim of the assessee relying on the decision of the honourable Supreme Court in 284 ITR 323 stating that assessee cannot claim any deduction unless revised

return of income claiming such deduction is filed by it. He also followed the same line of decision as he took for assessment year 2006 – 07. The assessee contested the same before the learned CIT – A unsuccessfully. Therefore this ground.

173. The learned authorised representative submitted that identical ground number 5 is in the appeal of the assessee for assessment year 2006 – 07 and the facts have been narrated therein. He submitted that his arguments are also similar.

174. The learned departmental representative also agreed and stated that his arguments are also similar as made in that ground of appeal for assessment year 2006 – 07.

175. We have carefully considered the rival contentions and found that the facts are similar to the issue in ground number 5 of the appeal of the assessee for assessment year 2006 – 07. Therefore, for similar reasons and with similar directions we also set aside this ground of appeal to the file of the learned CIT – A to adjudicate whether amount received by assessee from Ranbaxy laboratories is capital are revenue receipt. Accordingly, ground number 5 of the appeal is allowed with above direction.

176. Accordingly, appeal of the assessee is partly allowed.

177. The revenue has raised following grounds of appeal in ITA No. 2596/Del/2011 for Assessment Year 2007-08:-

"1. The Commissioner of Income tax (Appeal), Bareilly has erred in law and circumstances in allowing relief of Rs. 23,21,594/- by deleting disallowance made out of expenses incurred on purchase of books and periodicals by treating same as revenue expenditure. Departmental appeal on this issue is pending decision before ITAT in Assessment Year- 2006-07 and earlier assessment years.

2. The Commissioner of Income tax (Appeal), Bareilly has erred in law and circumstances in allowing relief of Rs. 85,988/- which represented addition on account of notional income @ 10% of insurance claim i.e. Rs. 8,59,988/- in respect of loss in transit. Departmental appeal on this issue is pending decision before ITAT in Assessment Year-2006-07 and earlier assessment years.

3. The Commissioner of Income tax (Appeal), Bareilly has erred in law and circumstances in allowing benefit of deduction u/s 80IA on profits derived from business off generation of power. Departmental appeal on this issue is pending decision before ITAT in Assessment Year-2006- 07 and earlier assessment years."

178. The ground number 1 of appeal of learned assessing officer is with respect to disallowance deleted by learned CIT – A of Rs. 2321594/- on account of books and periodicals. The learned assessing officer held that revenue expenditure claimed by assessee on account of books and periodicals is capital in nature. The learned CIT – A held that above expenditure is revenue in nature. Therefore, learned assessing officer aggrieved and preferred this appeal.

179. Parties confirmed that identical issue has been decided in case of assessee for assessment year 2000-01. There is no change in facts and circumstances of case. In view of our decision for assessment year 2000-01 in assessee's own case by this order wherein we have allowed claim of assessee of books and periodicals expenditure holding it to be revenue expenditure confirming order of learned CIT – A, therefore, for similar reason we also hold for this year that INR 2321594/- incurred by assessee on account of books and periodicals is revenue expenditure. Accordingly, ground number 1 of appeal is dismissed.

180. Ground number 2 of appeal is with respect to deletion of addition made by learned CIT – A of Rs. 85988/- – as notional disallowance out of loss in transit with respect to insurance claim received by assessee. During year, assessee has received a sum of Rs. 859988/- on account of insurance claim in respect of various losses incurred. The learned assessing officer made addition of 10% of such claim to total income of assessee. It was deleted by learned CIT – A and therefore learned AO is in appeal.

181. Both parties confirmed that identical issue has been decided in case of assessee for assessment year 2004 – 05 wherein identical addition was made by learned assessing officer was deleted by learned CIT – A. There is no change in facts and circumstances of case. In case of assessee for assessment year 2004 – 05 vide ground number 5 of appeal we have

deleted identical addition made by learned assessing officer holding that it was purely made on basis of assumption and surmises without any evidence. For similar reasons we also dismiss this ground of appeal against deleting addition made by learned assessing officer of Rs. 85988/- and we confirm action of learned CIT – A. Ground number 2 is dismissed.

182. Ground number 3 is with respect to deduction allowable to assessee u/s 80 IA on profits derived from business of generation of power claimed by assessee. The claim was allowed by learned CIT – A. The parties confirmed before us that identical issue has been decided in assessee's own case for assessment year 2001 – 02 wherein claim of assessee was also dealt with lower authorities in similar manner.

183. We have carefully considered rival contention and found that identical issue has been decided by us by this order for assessment year 2001 – 02 in ground number 4 of appeal of learned asses ing officer wherein we have held that assessee is entitled for deduction u s 80 IA of income tax act on power generation unit installed by assessee. Therefore, for similar reasons we dismiss ground number 3 of appeal of AO and direct him to grant deduction under section 80 IA of income tax act being profits derived from business of generation of power. Assessee is directed to file the working of claim which will be verified by the ld AO and then if found in accordance with law may grant the same.

184. Accordingly, ITA number 2596/Del/2011 for Assessment Year 2007-08 filed by learned assessing officer is dismissed.

A Y 2008-09

ITA No. 4793/Del/2012 by Assessee

4975/Del/2012 By AO

185. Assessee company filed its return of income on 8/10/2008 declaring income of rupees 1103707139/–. Assessment u/s 143 (3) of the income tax act was passed on 15/11/2011 wherein certain disallowances were made and assess total income was determined at INR 1 412581351/–. The assessee preferred appeal before the learned CIT – A, Bareilly. He passed order on 30/5/2012 partly allowing the appeal of the assessee. Therefore, against the disallowances, sustained assessee is in appeal and against the disallowances, deleted revenue is in appeal.

186. The assessee has raised following grounds of appeal in ITA No. 4793/Del/2012 for Assessment Year 2008-09.

"1. That ld CIT(A) erred on facts and in law in upholding disallowance of club expenses of Rs. 1,60,264/- by holding that same has not been incurred for purpose of business of appellant company.

2. That ld CIT(A) erred on facts and in law in upholding disallowance of expenditure of Rs. 27,92,587/- by holding inter-alia that these expenses are not relatable to year 2008-09."

187. First ground of appeal is with respect to confirmation of disallowance of club expenses of INR 1 60264/– as held by the lower authorities that these expenses are not incurred for the purposes of the business. Both the parties submitted before us that identical issue has been covered in appeal for assessment year 2002 – 03 wherein while deciding ground number 3 and 4 of the above appeal the issue was decided. On careful analysis and verification of the details it was found that above issue has been considered by us in assessment year 2002 – 03 in appeal of the assessee wherein we have held that the club expenses incurred by the assessee are for the purposes of the business and therefore allowable. Accordingly, ground number 1 of the appeal is allowed.

188. Second ground of appeal is with respect to the disallowance of prior period expenditure of INR 2792587/–. The assessee did not claim the above expenditure in the original return of income and did not file any revised return to make such claim before the learned assessing officer. Therefore, following the decision of the honourable Supreme Court in 284 ITR 323 the lower authorities did not entertain the claim of the assessee.

189. We have considered identical issue in the case of the assessee for earlier years wherein we have held that the decision of the honourable Supreme Court in 284 ITR 323 does not apply to the appellate authorities but only to the assessing officer. Therefore the learned CIT – A should have entertained the claim of the assessee and examine date on the merits of the case. Further the issue of disallowance of the prior period expenses has been considered by us in assessment year 2000 – 01 in the appeal of the learned assessing officer wide ground number 16 wherein we have set aside the

whole issue back to the file of the learned assessing officer with a direction to assessee to demonstrate before the learned CIT (A) that above expenditure has crystallized during the year and therefore allowable for this year. Accordingly for similar reasons, with similar directions, we also set aside this ground of appeal to the file of the learned CIT – A. Accordingly, ground number 2 of the assessee's appeal is allowed with above direction.

190. Accordingly, ITA number 4793/del/2012 for assessment year 2008 – 09 is allowed.

191. The revenue has raised following grounds of appeal in ITA No. 4975/Del/2012 for Assessment Year 2008-09:-

"1. The Commissioner of Income-tax (Appeals), Bareilly has erred in law and facts in allowing relief of Rs. 59,07,539/- by deleting disallowance made out of expenses incurred on purchase of books and periodicals by treating sam as revenue expenditure Departmental appeals on this issue is pending decision before ITAT in Assessment Year 2007-08 and earlier years.

2. The Commissioner of Income tax (Appeals), Bariely has erred in law and on facts in allowing benefit of deduction u/s 80IA on profits derived from business of generation of power for captive consumption. Departmental appeal on this issue is pending decision on before ITAT in Assessment Year 2007-08 and earlier years."

192. The first ground of appeal is with respect to the disallowance of books and periodical expenditure of INR 5 907539/– by the learned assessing officer holding them as capital expenditure whereas the assessee has claimed it to be revenue expenditure. The learned CIT – A allowed the claim of the assessee. Both the parties agreed that identical issue has been considered in the appeal for assessment year 2000 – 01 in ground number 13 of the appeal. Their arguments, the facts of the case were also stated to be identical. Vide ground number 13 of appeal for assessment year 2000 – 01 we have held that the books and periodical expenditure are revenue in nature. For similar reasons we dismiss ground number 1 of the appeal.

193. Ground number 2 of the appeal is with respect to the disallowance of deduction u/s 80 IA of the act of INR 3 02747766/–. Both the parties explained that above issue has already been considered in the earlier

appeals of the AO, which are heard together. They also submitted that there is no change in the facts and circumstances of the case as well as in their arguments. In the case of the assessee, we have already allowed the claim of the assessee u/s 80 IA of the income tax act with respect to the generation of power. Therefore for the similar reasons and in absence of any change in the facts and circumstances of the case we also direct the learned AO to allow the claim of the assessee u/s 80 IA of INR 3 02747766/–. Accordingly, ground number 2 of the appeal is dismissed.

194. Accordingly, appeal of the learned assessing officer in ITA number 4975/del/2012 for assessment year 2008 – 09 is dismissed.

195. Accordingly, all the 15 appeals of the parties pertaining to the single assessee are disposed of.

Order pronounced in open court on 12/03/2019.

-Sd	-Sd/-
(BEENA A. PILLAI)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 12/03/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi