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

BEFORE SHRI C. N. PRASAD, JM & SHRI S. RIFAUR RAHMAN, AM

आयकरअपीलसं./ **I.T.A. No. 804 & 805/Mum/2018**
(निर्धारणवर्ष / Assessment Year: 2012-13 & 2011-12)

Prism Cement Ltd. Rahejas, V. P. Road, Main Avenu, Santacruz (west), Mumbai-400 054	**बनाम**/ Vs.	DCIT Cen Cir – 6(1), R. No. 1905, 19th floor, Air India Bldg, Nariman Point, Mumbai-400 021
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAACP6224A		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकरअपीलसं./ **I T.A No. 871 & 872/Mum/2018**
(निर्धारणवर्ष / Assessment Year: 2012-13 & 2011-12)

DCIT Cen Cir – 6(1), R. No. 1905, 19th floor, Air India Bldg, Nariman Point, Mumbai-400 021	**बनाम**/ Vs.	Prism Cement Ltd. Rahejas, V. P. Road, Main Avenu, Santacruz (west), Mumbai-400 054
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Vijay Mehta, AR
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri V. Sreekar, DR

सुनवाईकीतारीख/ **Date of Hearing**	:	25.11.2020
घोषणाकीतारीख / **Date of Pronouncement**	:	04.01.2021

आदेश / O R D E R

PER S. RIFAUR RAHMAN (ACCOUNTANTMEMBER):

The present four appeals have been filed by the assessee and revenue against the order of Commissioner of Income Tax (Appeals)-54, Mumbai in short 'Ld. CIT(A)', dated 30.11.2017 for AY 2011-12 and 2012-13 respectively.

2. Since the issues raised in all the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed of by this consolidated order.

3. Firstly we are taking the appeal for Assessment Year 2011-12 filed by a sessee and revenue. Since the issues in both the appeals are common, therefore we prefer to deal with these issues ground wise.

4. The brief facts of the case are, assessee filed its return of income on 29.09.11 declaring total loss of Rs. 1,36,67,03,673/- as per profit and loss (return of income) and Rs. 1,25,85,18,744/- u/s 115JB of the Act. The return of income was processed u/s 143(1) of the Act and thereafter, the case was selected for

scrutiny and notices u/s 143(2) and 142(1) were issued and served upon the assessee. In response, AR of the assessee attended and filed the relevant information as called for.

5. AO passed the assessment order by making disallowance u/s 14A, 40A(9) of the Act, disallowance in respect of depreciation and bogus purchases.

6. Aggrieved with the above order, assessee preferred the appeal before Ld. CIT(A) and Ld. CIT(A) after considering the submission of assessee, partly allowed the appeal of the assessee. During appellate proceedings, vide letter dated 02.11.17, assessee raised 4 additional grounds of appeal and since the additional grounds raised by the assessee are legal in nature, therefore Ld. CIT(A) admitted the additional grounds and adjudicated the same.

7. Aggrieved with the above order, both assessee and revenue preferred the appeal before us by raising the respective grounds of appeal. Since many grounds of appeal raised by assessee and revenue, therefore we shall deal the issues ground wise.

Ground No. 1(a) to 1(d) raised by assessee and Ground No. 1 to 3 raised by revenue in respect of disallowance u/s 14A r.w.r. 8D.

8. It is brought to our notice by Ld. AR that assessee is pressing only ground no. 1(c). The other grounds raised by the assessee are **dismissed** as not pressed.

9. The brief facts relating to disallowance u/s 14A are, during the assessment proceedings, AO observed that assessee has received dividend of Rs. 12,62,95,486/- and assessee has added back an amount of Rs. 29,87,943/ stating that the same is added as per the provision of section 14A of the Act. When the assessee was asked to explain as to why the expenditure incurred in relation to exempt income should not be computed by applying the provision of section 14A r.w.r 8D of the Act. In response, assessee submitted that there are no major expenses incurred for the purpose of earning dividend income.

10. After considering the explanation of the assessee, AO rejected the explanation of the assessee and invoked rule 8D. AO by relying on the decision of ITAT, Spl. Bench in the case of M/s Daga Capital Management Pvt. Ltd, determined the disallowance

under rule 8D(2)(ii) at Rs. 10,56,83,273 and under rule 8D(2)(iii) at Rs. 95,26,000/- totaling Rs. 11,52,09,273/- and AO reduced the amount of Rs. 29,87,943/- which was already disallowed by the assessee and disallowed net amount of Rs. 11,22,21,330/-.

11. Aggrieved with the above, assessee preferred the appeal before Ld. CIT(A) and before him, assessee raised 3 contentions on the issue of 14A disallowance. The first one was, AO failed to record any dissatisfaction with regard to suo moto disallowance of expenses made by the assessee. Second, the AO was not justified in considering the entire interest expenses for the purpose of calculation under rule 8D and Third, the disallowance under rule 8D works out to more than 100% of the amount of dividend received.

12. For the first issue, assessee submitted before Ld. CIT(A) that he has not incurred any specific expenditure directly attributable to making investments and earning dividend income there from. As a matter of cautious, assessee suo moto added an amount of Rs. 29,87,943/- based on time spent by certain employees in connection with the investment activities. Assessee

also submitted that AO determined disallowance under rule 8D to the extent of Rs. 11,52,09,273/- and also added back the amount suo moto disallowance made by the assessee while determining the book profit u/s 115JB. Assessee further submitted that AO considered the whole interest expenditure incurred by the assessee and AO cannot charge the whole interest expenditure. Since assessee has incurred interest expenditure on specific term loan, other interest, processing fees and bank charges. Assessee further pointed out that AO has not recorded his dissatisfaction in respect of claim made by the assessee with regard to suo moto expenditure and relied on the various case laws. Assessee further submitted that investment yielding exempt income have been made ou of its own funds and gave a chart in support of its claim for 3 years and relied on various case laws in this regard. Assessee further argued that 14A disallowance cannot be added while computing the book profit u/s 115JB and lastly, submitted that the disallowance u/s 14A cannot be more than exempt income earned by the assessee.

13. After considering the submission of the assessee, Ld. CIT(A) however agreed that AO has not recorded any dissatisfaction and observed that ITAT Mumbai Bench in assessee's own case for Assessment Year 2008-09 & 2009-10, held that in the absence of recording necessary satisfaction, it was wrong on the part of the AO to determine the disallowance u/s 14A by applying rule 8D. Further, Ld. CIT(A) analyzed the other contentions of the assessee and came to the conclusion as below:-

> *6.5 It is also the contention of the learned counsel that the investments of the appellant were made out of own funds comprising of share capital, reserves and surplus and other accruals over the years. No part of the investments were made out of the borrowed funds and the appellant had sufficient own funds. To substantiate this, the assessee had provided the following details of the fund availability and investments made:*

Financial year	*Share Capital (A)*	*Reserves & Surplus (B)*	*Total (A+B)*	*Total Investment (closing balance)*
2010-11	*503.36*	*704.47*	*1,207.83*	*354.31*
2009-10	*503.36*	*666.14*	*1169.5*	*326.67*
2008-09	*298.25*	*363.4*	*661.65*	*203.81*

6.6 It is seen from the above table and the financials of the assessee that the assessee had sufficient own funds to cover all the investments made by it. Moreover, the Hon'ble ITAT in the assessee's own case for AY 2008-09 held that the assessee had own funds to cover all the investments and no disallowance from interest is warranted. The relevant portion of the ITAT order is reproduced here under

"5.4 We have carefully considered the rival submissions. In our considered opinion, the action of the AO of disallowing interest expenditure under section 14A of the Act by applying Rule 8D(2)(ii) of the Rules is wholly misplaced. The factual matrix clearly brings out that the interest expenditure debited in the P & L A/c. has no nexus with the investments which have yielded exempt income. A copy of the balance sheet of the assessee-company, which is placed in the paper book at pages 1 to 55, clearly points out that there are no borrowed funds either at the close of the earlier year or during the year under consideration. At the time of hearing, the Ld. Representative for the assessee also asserted that 'other interest' 'Bank Charges' debited in the P & L A/c. are not in relation to the investments. Bank charges have been incurred with respect to export related transactions and

'Other Interest' is on deposits from customers, suppliers, etc. Be that as it may, it is quite evident that the Share Capital and Reserve & Surplus available with the assessee company at the beginning of the year as well as at the close of the year under consideration are enough to cover the investments in question and, therefore, following the ratio of the judgment of the Hon'ble Bombay High Court in the case of CIT vs. Reliance Utilities and Power Ltd., 313 ITR 340(Bom), it gives rise to a presumption that such investments have come out of interest free-funds. The said proposition is equally applicable in the context of section 14A of the Act, as held by Hon 'ble Bombay High Court in the case in the case of CIT vs. HDFC Bank Ltd., 366 ITR 505(Bom) and in the case of HDFC Bank Ltd. vs. DCIT, 383 ITR 529 (Born). Therefore, in the above background, we have no hesitation to delete the disallowance of interest made by the AO under section 14A of the Act."

6.7 It could be seen from the table above that the assessee had own funds to cover all the investments made. Respectfully following the hon'ble ITAT's decision in the appellant's own case for AY 2008-09 and that of the Bombay High Court in the case of CIT vs. Reliance Utilities and Power Ltd 313 ITR 340 (BOM) and the case of CIT vs. HDFC bank Ltd 366 ITR 505 (BOM) it is held

that the assessee had sufficient own funds by way of share capital and reserves and surplus to make investments and it is presumed that the borrowed funds have not been utilised for making the investments and therefore no disallowance of interest under rule 8D 2(11) can be made. The disallowance made by the AO under this clause which is to the tune of Rs.10,56,83,273/- is DELETED.

6.8 The appellant has further taken the plea that the dividend earned by the appellant also includes strategic investments in joint ventures, subsidiaries and associates. According to the learned counsel while computing the disallowance, the strategic investments have to be excluded as they are made in larger business interest, on account of commercial expediency. However the Special Bench of ITAT Mumbai in the case of Daga Capital Management (P) Ltd 117 ITD 169 (Mum) (SB) 2009 held that the disallowance can be made even if the investments made for strategic purpose. This contention of the appellant is rejected.

6.9 The next contention of the appellant is that the disallowance u/s.14A cannot exceed the exempt income. The learned counsel for the appellant made the following submissions on this issue:

3.2.26 It is submitted that Sec. I 15JB is a complete code in itself and overrides all provisions of the Act. Further, tax liability u/s 1 15JB is to be worked out only on the basis of adjusted book profit and not on the basis of income computed under the normal provisions of the Act.

3.2.27 Sec. 14A of the Act is contained in Chapter IV of the Act and begins with the phrase "for the purpose of computing the total income under this Chapter". It is submitted that income under the normal provisions of the Act is computed under the five heads specified in Sec. 14. Provisions relating to computation of income under different heads are contained in Sec. 14 to 59, forming part of Chapter IV of the Act. In other words, the said Chapter provides for computation of income of an assessee under the normal provisions of the Act. As a necessary corollary, provisions of Sec. 14A cannot be extended to any Chapter, other than Chapter IV of the Act.

Sec. 1 15JB finds place under Chapter XII-B of the Act. Therefore, provisions of Sec. 14A contained in Chapter IV cannot be imported and incorporated in Sec. 115JB especially considering the fact that clause (f) of Explanation 1 to Sec. 1 I5JB [in respect

of increasing the book profit by the amount of expenditure relatable to income to which Sec. 10 (excluding clause 38) or Sec. 11 or 12 apply] contains no reference to disallowance u/s 14A of the Act.

3.2.28 It is submitted that based on the matching principle of accountancy, only expenses debited to the Profit & Loss account that had direct and proximate nexus with the exempt income credited to the Profit & Loss account should be added back while computing book profit under MAT provisions.

3.2.29 In this regard the appellant places reliance on the decision in the case of Pr. CIT -vs.-Bhushan Steel Ltd. (ITA No.593/2015, order dt.29-09-2015)(refer Annexure-12) wherein the Hon'ble Delhi High Court has upheld decision of the Hon'ble ITAT in holding that disallowance u/s 14A r.w. Rule 80 cannot be added while computing book profits u/s 1 J5JB as Explanation to that section does not specifically mentions Sec. 14A. The Review Petition filed by Revenue against this decision was dismissed by Delhi High Court vide order dt. 03-03-2017.

3.2.30 The Special Bench of the Hon'ble Delhi ITAT in the case of ACIT -vs.-Vireet Investment (P.) Ltd.

(20177 82 taxmann.com 415 (order dt. 16-06-2017)(referAnnexure-13)following decision in the case of Bhushan Steel (supra) held that the computation under clause (f) of Explanation 1 to Sec. 115JB(2) is to be made without resorting to the computation as contemplated u/s 14A read with Rule 80.

3.2.31 The Hon'ble Mumbai ITAT in the case of DOT -vs.- Reliance Natural Resources Ltd. [2017] (85 taxmann.com 128)(Mum)(referAnnexure-14) following the decision in the case Vireet Investment (P.) Ltd. (supra) has held that disallowance u/s. 14A to compute the book profits was not justified in view of specific Explanation to Sec. 115JB of the Act.

In view of the discussion in the preceding paras and judicial pronouncements, it is submitted that disallowance u/s 14A r.w. Rule 8D should not be added to the book profit computed u/s 1 I5JB of the Act.

6.10 In this case, the appellant had earned dividend income to that extent of Rs.12,62,95,486/- whereas the disallowance made by the AO is Rs.11,52,09,273/- which is many times more than the exempt income. The

honourable ITAT Mumbai in the case of M/S Daga global chemicals Private Ltd vs. ACIT ITA number 5592/MA OM/2012 held that the disallowance made u/s.14A cannot exceed the exempt income. Similar view has been held by the hon'ble ITAT Mumbai in the cases of Maharashtra Agro industries development Corp Ltd vs. ACIT ITA number 6566/MA OM/2013 and silver X cable co Private Ltd vs. DCIT (ITA number 8581/M/2011). Respectfully following the judgements of the jurisdictional ITAT, the AO is directed to restrict the disallowance u/s.14A read with rule 8D 2 (iii) to the exempt income earned which is Rs. 12,62,95,486/-.

6.12 The appellant has also taken the argument that the disallowance u/s.14A read with rule 8D cannot be added while computing book profits u/s.115 JB. The special bench of he honourable ITAT, Delhi in the case of a CIT vs. Vireet Investment (P) Ltd (2017) 82 Taxmann.com 415 while following the decision in the case of Bushan steel of Delhi High Court held that the computation under clause (F) of explanation 1 to section 115 JB (2) is to be made without resorting to the computation as contemplated u/s.14 A read with rule 8 D. Accordingly, the assessing officer is directed not to make this addition while computing the book profit u/s.115 JB of the IT Act. This ground of appeal is partly allowed."

14. Aggrieved with the above, assessee is in appeal before us.

15. Before us, Ld. AR brought to our notice findings of AO and Ld. CIT(A) and submitted that it is fact on record that Ld. AO has not recorded any satisfaction before rejecting the suo moto disallowance made by the assessee in its return of income while determining the exempt income u/s 14A. He submitted that Ld. CIT(A) has admitted the above facts in his order in para 6.1 and 6.3 and Ld. CIT(A) has taken note the decision of the Coordinate Bench of ITAT in assesee's own case for Assessment Year 2008-09 & 2009-10. After considering the fact that this year also, AO has not recorded any satisfaction, however Ld. CIT(A) proceeded to adjudicate the other alternate plea raised by the assessee in the grounds of appeal and come to the conclusion that satisfaction is not recorded u/s 14A, still proceeded to sustaining the addition u/s 14A. He submitted that Ld. CIT(A) gave clear finding that there is no satisfaction and Ld. CIT(A) cannot proceed with the other alternate plea raised by the assessee.

16. Ld. AR further submitted that in this case, Ld. CIT(A) accepted the fact that assessee had its own funds to cover all the investment made and further relied on the decision of Coordinate Bench of ITAT in assessee's own case for Assessment Year 2008-09 and considered the plea of the assessee and deleted the additions made by the AO to the extent of Rs. 10 56,83,273/- under rule 8D(2)(ii). Ld. CIT(A) proceeded to analyze the disallowance made under rule 8D(2)(ii) and under rule 8D(2)(iii). In fact, AO has actually disallowed Rs. 95,26,000/- under rule 8D(2)(iii) only, but Ld. CIT(A) after analyzing the alternate pleas made by the assessee came to the wrong conclusion and gave the direction to AO by relying on the decision of Coordinate Bench of ITAT in the case of M/s Gaga Global Chemicals Pvt. Ltd. (supra), Maharashtra Agro Industries Development Corp. Ltd. Vrs. ACIT (supra) and Silver X Cable Co. Pvt. Ltd. Vrs. DCIT (supra) to restrict the disallowance u/s 14A r.w.r. 8D2(iii) to the exempt income earned at Rs. 12,62,95,486/-. Ld. AR strongly objected to the findings of Ld. CIT(A) which is not consistent and submitted that the disallowance made by the AO may be

deleted by considering the fact that there is no satisfaction recorded by the AO and further Ld. CIT(A) has also noted this fact in his order.

17. On the other hand, Ld. DR brought to our notice page 2 and para no. 4 of the assessment order and submitted that AO has observed the said expenditure and wrote the letter asking the assessee to substantiate the expenditure disallowed by them and enquired why the disallowance u/s 14A r.w.r. 8D should not be made in its case. By writing the above said letter itself, AO has displayed his dissatisfaction and he supported the findings of Ld. CIT(A) in this regard

18. Considered the rival submission and material placed on record We observed that assessee has earned exempt income of Rs. 12,62,95,486/- and made a suo moto disallowance of Rs. 29,87,943/-. After careful consideration of the assessment order passed by the AO and the order passed by Ld. CIT(A), it is fact on record that AO has not recorded any satisfaction before rejecting the suo moto disallowance made by the assessee and Ld. CIT(A) also clearly accepted this fact that no satisfaction was

recorded. We notice from the record that no satisfaction was recorded even in the earlier Assessment Year 2008-09 and 2009-10 and based on the above facts on record, Coordinate Bench of ITAT has deleted the disallowance made u/s 14A with the following observations:-

> *"5.5 In so far disallowance of Rs.75 71,222 - out of administrative expenses is concerned, the plea of the assessee is based on the requirements of section 14A(2) of the Act. The plea is that the method prescribed in Rule 80 of the rules cannot be straightway invoked to compute the disallowance under section 14A of the Act unless the Assessing Officer has recorded his satisfaction with regard to correctness or otherwise of the assessee's claim in this regard. On this aspect, the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. (supra) has upheld the proposition that section 14A(2) of the Act does not empower the Assessing Officer to apply the method prescribed in Rule 80 of the Rules irrespective of the nature of claim made by the assessee. According to the Hon'ble Bombay High Court, the Assessing Officer has to first consider the correctness or otherwise of the claim of the assessee, having regard to the accounts of the assessee. In fact, as per Hon'ble Bombay High Court,*

such satisfaction contemplated in section 14A(2) has to be "objectively arrived at" by 'the Assessing Officer, on the basis of the accounts of the assessee and the relevant facts and circumstances. In this background, what is required to be examined in the present case is as to whether the Assessing Officer has recorded a satisfaction about incorrectness of assessee's claim that the amount of Rs.70,276/- was an expenditure relatable to the earning of the impugned exempt income, before proceeding to apply Rule 8D of the Rules. Having perused the entire discussion in para 5 of the assessment order, the satisfaction contemplated under section 14A(2) of the Act is not discernible. In fact, the Assessing Officer has proceeded to apply Rule 8D of the Rules in an automatic manner without recording a satisfaction that the claim of the assessee was incorrect, having regard to the accounts of the assessee and the relevant facts and circumstances of the case. In fact, the following para in the judgment of Hon'ble Bombay High Court brings out that recording of the satisfaction contemplated under section 14A(2) of the Act is a safeguard provided by the Parliament, and thus the same is required to be adhered to:-

> *"Parliament has provided an adequate safeguard to the invocation of the power to determine the expenditure incurred in relation to the earning of*

non-taxable income by adoption of the prescribed method. The invocation of the power is made conditional on the objective satisfaction of the Assessing Officer in regard to the correctness of the claim of the assessee, having regard to the accounts of the assessee. When a statute postulates the satisfaction of the Assessing Officer. "Courts will no readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated" (M. A. Rasheed v. State of Kerala [1974] AIR1974 SC 22491). A decision by the AO has to be arrived at in good faithe on relevant considerations. The Assessing Officer must furnish to the assessee a reasonable opportunity to show cause on the correctness of the claim made by him. In the event that the AO is not satisfied with the correctness of the claim made by the assessee, he must record reasons for his conclusion. These safeguards which are implicit in the requirements of fairness and Fair procedure under article 14 must be observed by the AO when he arrives at his satisfaction under sub-section (2) section 14A. As we shall note shortly hereafter, sub-rule(1) of rule 8D has also incorporated the essential requirements of

sub-section (2) of section 14A before the AO proceeds to apply the method.

In the absence of the recording of the necessary satisfaction, in our view, it was wrong on the part of the AO to determine the disallowance u/s. 14A by applying Rule 8D(2)(iii) of the Rules.

19. Therefore, respectfully following the decision of Coordinate Bench of ITAT which is applicable *mutatis mutandis* in the present case, we are inclined to accept the submission of Ld. AR and delete the addition made u/s 14A by observing that there is no satisfaction recorded by the AO as per the findings of Ld. CIT(A).

20. However, we notice that Ld. CIT(A) after accepting that no satisfaction was recorded by the AO further proceeded to analyse the alternate pleas of the assessee and deleted the additions under rule 8D(2)(ii) and while analyzing the disallowance under rule 8D(2)(iii), he gave a direction that the disallowance may be restricted to the exempt income earned by assessee. We find that the whole exercise of the Ld. CIT(A) is unwarranted and gave a conflicting decision with regard to Rule

8D(2)(iii). We notice from the record that AO has actually made a disallowance of Rs. 95,26,000/- only by calculating 0.5% of the average value of the investment. Once Ld. CIT(A) has deleted the disallowance under rule 8D(2)(ii), then there is no scope to restrict the disallowance to the exempt income earned by the assessee.

21. Therefore, in our considered view, since there is no satisfaction recorded by the AO and by respectfully following the decision of Coordinate Bench of ITAT, we are inclined to direct the AO to delete the addition made u/s 14A r.w.r. 8D. Accordingly, ground no 1(c) is **allowed** and other grounds raised by the assessee are **dismissed** as well as the ground no. 1, 2 & 3 raised by the revenue are **dismissed**.

Ground No. 4 raised by revenue in respect of disallowance u/s 40A(9) for reimbursement of school expenses.

22. The brief facts relating to this ground are, during the assessment proceedings, AO observed that in tax audit report para 17(J), the auditors have mentioned that the company has reimbursed expenses of Rs. 97,20,786/- to an institution for

running of school, situated at Mankahari Village, Satna. The company contends that this is not in the nature of contribution which is disallowable u/s 40A(9). When the assessee was asked to furnish the details with justification of the above said expenditures of running school, assessee submitted that the company had reimbursed to Prism Cement Ltd Education Trust towards running the school. Further assessee submitted that it is engaged in the business of manufacture of cement and clinker and their factory is located in Satna and the institution which provides education facilities. It is their business necessity to develop the locality near to their factory premises and also to provide various facility to their staff and people located in that area. It is also submitted that the main object of the Institution is to set up educational institutions for providing education, vocational training, development of curricular activities and other activities relating to human resources amongst the children of the employees and also to the children of surrounding community. It also submitted that as there is a business necessity to set up educational institutions for providing educational and other

curricular activities to the children of employees and surrounding community, the expenditure incurred is for the purpose of carrying on the business activities of the company and is wholly and exclusively for the purpose of business.

23. After considering the submission of the assessee, AO rejected the submissions made by assessee and observed that the expenses reimbursed by the assessee are relating to educational institution, which is a separate tax entity and the business of the assessee is not relating to carrying out business of the school. Therefore, the provisions of section 40A(9) of the Act are clearly attracted in this case He further observed that assessee has not submitted any details to prove that the institution is exclusively used by the employees' children and relied on the decision of the Allahabad High Court in the case of Simbholi Sugar Mills Vs CIT reported at 45 ITR 125, wherein the Hon'ble Court has disallowed the expenditure reimbursed by the assessee.

24. Aggrieved with the above order, assessee preferred the appeal before Ld. CIT(A) and Ld. CIT(A) after considering the submission of assessee observed that the issue under

consideration has already been decided by the Hon'ble ITAT in assessee's own case for Assessment Year 2003-04 to 2009-10. Hon'ble ITAT has consistently upheld the allowability of reimbursement of expenses for running the school. Accordingly, Ld. CIT(A) by following the decision of Coordinate Bench of ITAT in assessee's own case, directed the AO to allow the expenses claimed by the Assessee.

25. Aggrieved with the above, r venue is in appeal before us.

26. After considering the submission of both Ld. Counsels on this issue, we notice that the Coordinate Bench of ITAT in assessee's own case for Assessment Year 2003-04 to 2009-10 has already allowed the reimbursement of expenses to the educational institution. Therefore, respectfully following the decision of Coordinate Bench of ITAT which is applicable *mutatis mutandis* in the present case, we are inclined to **dismiss** the ground raised by the revenue.

Ground No. 5 raised by revenue in respect of claim of depreciation.

27. The brief facts relating to this ground are, during the assessment proceedings, AO observed that assessee had not claimed any depreciation as per Income Tax Act, on its assets for the previous year relevant to Assessment Year 2000-2001 and 2001-2002. He further observed that if such effect of allowing the eligible depreciation in those years are considered, then as against the depreciation claim of Rs. 3 61,03,53,497/-, the assessee will only be eligible for depreciation of Rs. 3,58,02,02,566/-. He further observed that the claim of depreciation is a charge on the profits for determining the income of a particular year and since explanation 5 to section 32 has clarified that irrespective of the claim made such deduction has to be allowed for computing the total income, the eligible depreciation should be calculated after allowing for such reduction in WDV on account of depreciation allowable for Assessment Year 2000 - 2001 and 2001 - 2002. In response, assessee has submitted that the amendment for compulsorily claiming depreciation in the computation of income is effective from Assessment Year 2002 - 2003. The assessee had also

submitted that since depreciation was not claimed for Assessment Year 2000 - 2001 and 2001 - 2002 and consequently not being allowed in the assessment, the same cannot be reduced in arriving at WDV of fixed assets for calculation of depreciation in future years. However, AO rejected the contention of the assessee and proceeded to make disallowance.

28. Aggrieved with the above order, assessee preferred the appeal before Ld. CIT(A) and Ld CIT(A) after considering the submission of assessee observed that the issue under consideration has already been decided by the Coordinate Bench of ITAT in assessee's own case for Assessment Year 2005-06 and 2009-10 Accordingly, Ld. CIT(A) by following the said decision of Coordinate Bench of ITAT in assessee's own case, **allowed** the ground of appeal raised by the assessee.

29. Aggrieved with the above, revenue is in appeal before us.

30. After considering the submission of both Ld. Counsels on this issue, we notice that the Coordinate Bench of ITAT in assessee's own case for Assessment Year 2005-05 to 2007-08

has already decided this issue in favour of the assessee. For the sake of clarity, relevant portion of the said decision is reproduced below:-

5.2.1 "As the outset, it is respectfully submitted that the aforesaid issue is squarely covered in favour of the appellant by the decision of the Hon'ble ITAT in the appellant's own case for AY 2005-06 to AY 2009-10 wherein the Hon'ble ITAT has accepted the appellant's contention of not claiming depreciation for AY 2000-01 and 2001-02 and allowed depreciation as claimed by the appellant in its return of income. Further, the Hon'ble CIT(A) in the appellant's own case for AY 2010-11, has allowed depreciation as claimed by the appellant in return of income.

The relevant extract of the decision of the Hon'ble Mumbai ITAT in appellant's own case for AY 2005-06 to AY 2007-08 is reproduced below:

"8.2. ... We note that the assessee did not claim depreciation while computing business profit for Assessment year 2000-01 and 2001-02, which position had become final as the Id. Assessing Officer did not allow depreciation in those years. However, the Explanation-5 to section 32 of the Act was inserted by the Finance Act w.e.f. 01/04/2002 (i.e. from

Assessment year 2002-03) from which year the assessee had started claiming depreciation. Considering the totality of facts, we are in agreement with the finding of the id. Commissioner of Income Tax (Appeal) that it is not open for the Assessing Officer to assume the allowance of depreciation for earlier years, when such depreciation was not actually allowed in those years, because, the situation could have been different, if he would have reopened the assessment of those earlier years. Without amending the assessments of those years, the assumed written down value could not be considered to work out the depreciation of the current year. The Hon'ble Madras High Court in CIT vs Sree Senhavalti Textiles (P) Ltd. (2003) 253 ITR 77 (Mad.), Hon'ble Kerala High Court in CIT vs Kerala Electric Lamp Works Ltd (2003) 261 ITR 721 (Ker.), the Hon'ble J ft K. High Court in CIT vs Agya Wanti 248 ITR 641 (J & K). It is noted that the Department has relied upon the decision in K. K Doshi (245 ITR 849)(Bom.), which has been reversed by Hon'ble Apex Court in (2008) 297 ITR 38(SC), wherein, the main point was that as to whether the amendment to section 80HHC of the Income Tax Act, 1961, brought about by the Finance (No. 2) Act, 1991, w.e.f. 1st April, 1992, is prospective in nature or is retrospective. This Court in the case of P.R. Prabhakar vs. CIT (2006) 204 CTR (SC) 27 : (2006) 284 ITR 548 (SC), relying upon Circular No. 621, dt. 19th Dec., 1991 [(1992) 101 CTR (St) 1] issued by the

CBDT, has held that the amendment in question is prospective in nature and the same is binding on the Revenue. In view of Circular No. 621, dt. 19th Dec., 1991 issued by the CBDT and the aforesaid judgment of this Court, the appeals were accepted and the orders passed by the Hon'ble High Court of Bombay were set aside leaving the parties to bear their own costs, thus, we affirm the stand of the Ld. Commissioner of Income Tax (Appeal) and dismiss the impugned ground, raised by the Revenue."

In view of the above, it is respectfully submitted that the appellant's claim for depreciation amounting to Rs.3,61,03,53,497/- should not be disturbed.."

31. Therefore, respectfully following the decision of Coordinate Bench of ITAT which is applicable *mutatis mutandis* in the present case, we are inclined to **dismiss** the ground raised by the revenue.

32. Ground No. 6 raised by revenue is general in nature, therefore, no needs for adjudication.

Ground No. 2(a) & 2(b) raised by assessee in respect of VAT subsidy.

33. The brief facts relating to this ground are, assessee vide letter dated 12.11.17 raised the additional ground with a plea to

consider the additional ground being legal in nature. Since the claim is made for the first time during appellate proceedings, Ld. CIT(A) with reference to Jurisdictional High Court decision in the case of CIT vrs. Pruthvi Brokers and Shareholders (349 ITR 336 – Bom) considered the additional grounds raised by the assessee and this claim of the assessee submitted first time before him, therefore Ld. CIT(A) accepted and adjudicated the same.

34. Ld. CIT(A) observed that assessee is making this claim first time during the appellate proceedings and this was not in the return of income or had not claimed during the assessment proceedings, assessee had shown it as income in its return of income.

35. Before him, Ld. AR submitted that assessee manufactures cement in its 2 manufacturing units i.e. Unit I & II, Satna, Madhya Pradesh. The Government of Madhya Pradesh, vide "Madhya Pradesh Industrial Investment Promotion Assistance Scheme-2004" read with Madhya Pradesh Industrial Policy, 2004 (Scheme) had introduced sales tax exemption scheme for units in Madhya Pradesh. It was submitted that assessee commenced its

commercial production in respect of Unit-II, Satna, Madhya Pradesh on 01-01-2011 and filed a copy of confirmation from Ministry of Commerce and Industry. As per the Scheme, industries having Fixed Capital Investment ('FCI') of more than Rs. 10 crores are given industrial investment promotion assistance equivalent to 75% of the amount of commercial tax and central sales tax restricted to the amount of FCI. The value of FCI in Unit-II was Rs. 808.89 crores. During FY relevant to that AY under consideration, MP Trade & Investment Facilitation Corporation Ltd. sanctioned subsidy of Rs. 6.87 crores and a copy was enclosed. Ld. AR brought to the notice Ld. CIT(A) key objectives of the schemes, which are given below:-

(a) To accelerate the pace of industrialization and make Madhya Pradesh industrially a leading state.

(b) To maximize employment prospects.

(c) To attract foreign direct investment by developing world-class infrastructure.

(d) To create congenial environment for the development of small, medium and large industries.

(e) To ensure balanced regional development by generating employment.

(f) To chalk out special packages for removing industrial sickness.

(g) To integrate the different employment oriented schemes in order to provide employment opportunities on a sustainable basis,

(h) To rationalize commercial tax rates to make the state's industries competitive vis-a-vis industries in other states,

(i) To provide direction to industrialization, keeping in view the available local resources and the existing industrial base.

(j) To ensure private sector participation in the state's industrialization,

(k) To financially strengthen the undertakings of Department of Industries, enabling them to play a pivotal role in the promotion of industries.

36. With reference to the above objectives of the Scheme, it was submitted that the key objective of granting sales tax exemption is to accelerate industrialization and maximize

employment prospects in Madhya Pradesh and creation of infrastructure is the basic requirement for setting any industrial unit. It is the responsibility of the State to provide such infrastructure and the subsidy given in the form of government contribution to the industrial units to subsidize the portion of their capital investment which they have incurred for setting up /improving said infrastructure. It was submitted with reference to CBDT Circular No. 142 dated 01.08.1974 that where the subsidy is primarily given for helping the growth of the industries and not for supplementing their profits, such subsidy shall be regarded as capital receipt in the hands of the recipient. He submitted a copy of the above said circular before Ld. CIT(A) and in this regard, Ld. AR relied on following case laws before him:-

i) CIT vs. Ponni Sugars and Chemicals Ltd. (2008) 306 ITR 392(SC)

ii) CIT vrs. M/s Harinagar Sugar Mills Lt. (ITO No. 1132 of 2014 – Bom HC)

iii) CIT vrs. Shree Cement Ltd. (IT No. 204/2010 dated 22.08.2017 – Rajsthan HC)

iv) Shree Balaji Alloys vrs. CIT (ITA No. 2,4& 5 of 2010 – J & K High Court)

v) CIT vrs. Birla VXL Ltd. (2013) 215 taxman 117 (Guj)

vi) CIT vrs. Kirloskar Oil Engines Ltd. (ITA No. 2646 of 2011 – Bom HC)

vii) Shiv Shakti Flour Mills Pvt. Ltd. vrs. CIT (ITA No. 6/2014 – Guj HC)

viii) CIT vrs. Dusad Industries (1986) 162 ITR 784 – MP HC.

37. After considering the submission of the assessee, Ld. CIT(A) rejected the contention of the assessee by relying on decision of Hon'ble Supreme Court in the case of Sahney Steel and Press works Ltd. 228 ITR 253 (SC), CIT vrs. Chhindwara fuels 245 ITR 9 (Kol HC) and CIT vrs. Shiv Shakti Flour Mills

Pvt. Ltd. – ITAT Guwahati Bench. With reference to the above cases, Ld. CIT(A) observed that subsidy given by the government is after the commencement of the business and to promote the business and not to set up the business. The creation of the infrastructure is of the State Govt. and assessee cannot take advantage of such objectives of the State Govt. He further observed that sales tax subsidy received by the assessee from the Govt. of Madhya Pradesh is after setting up of the new industry and the subsidy received by the assessee is revenue nature and it is liable to tax. Accordingly, he dismissed the grounds raised by the assessee.

38. Aggrieved with the above assessee is in appeal before us raising this ground of appeal.

39. Before us, Ld. AR brought to our notice the industrial scheme of Madhya Pradesh which was also extracted by Ld. CIT(A) at page no. 31 of its order. He brought to our notice sanction order received by the assessee from MP trade and Investment Facilitation Corp. Ltd, which is placed on record at page no. 130 of the paper book and submitted that this sanction

order was received by the assessee as Industrial Investment Promotion Assistance under the MP Industrial Investment Promotion Scheme 2004. He further brought to our notice that this new industrial promotion policy is effective for the industries commencing commercial production on or after 01.04.2004 and submitted that this scheme is promoted by the MP Govt. in order to increase the rate of economic development in the State and in order to improve the infrastructure and power and due to sharp decline in capital in the State. The Industrial Promotion Policy is to aim to address the issue for providing, developing quality infrastructure, reviving the industries and providing maximum support and facilities to the industries. He also brought to our notice the objectives of the Industrial Promotion Policy and the frame work of granting industrial investment promotions assistance under this scheme. He submitted, as per the scheme, there were two types of assistance to the industries in the range of 1 to 10 crores and above 10 crores. Since the unit of the assessee and its capital investment falls under 2nd category i.e. more than 10 crores, eligible to claim equivalent to 75% of the

amount of commercial tax and central tax deposited by them. He submitted that the scheme and objective of the industrial policy is important and how the assistance granted to the assessee may differ scheme to scheme, in some of the scheme assistance is granted based on the actual investment or may be assistance is granted after the commencement of the business. He further submitted that the assistance received by the assessee even though falls under the assistance received by the assessee after the commencement of the unit, but what is relevant is the scheme and objective of the industrial policy which is actually to assist the unit against the investment made by the assessee in assisting the industrial growth in the State. In this regard, he relied in the case of Universal Cables vrs. DCIT 57 taxman 95 (Kol-Trib) and brought to our notice para 10 of the said order and submitted that in this decision, the similar facts were considered and also it is the concession received under MP Industrial Investment Promotion Scheme 2004. He further relied in the similar case law which are as under:-

i) Parle Agro Pvt. Ltd. v. ACIT (ITA No. 6209/Mum/2013) dated 30.11.2015

ii) CIT v. Ponni Sugars & Chemicals Ltd [306 ITR 392 (SQ]

iii) Shree Balaji Alloys v. CIT [333 ITR 335 (J&K)] upheld by Hon'ble Supreme Court (287 CTR 459)

iv) CIT v. Chaphalkar Brothers [400 ITR 279 (SQ]

v) PCIT v. Shyam Steel Industries [303 CTR 628 (Cal)]

40. On the other hand, Ld. DR submitted that Ld. CIT(A) has considered the facts and issue raised by the assessee before him and Ld. CIT(A) rejected the contentions of the assessee by giving reasoning and relying on relevant case law. He supported the findings of Ld. CIT(A) that all the subsidy are having revenue character and he relied in the case of Sahney Steel and press works 228 ITR 253 (SC). He further submitted that Ld. CIT(A) has decided the issue based on the facts on record but primarily,

the documents and facts were not verified by any authority and for that purpose, he prayed that the issue may be remitted back to the AO for further verification and AO may be given proper opportunity to verify the issue whether it is capital or revenue.

41. After considering the submission of both Ld. Counsels on this issue, we notice that the Coordinate Bench of ITAT in the case Parle Agro Pvt. Ltd. vrs. ACIT (ITA No. 6209/Mum/2013) has already decided this issue in detail. For the sake of clarity, relevant portion of the said decision is reproduced below:-

> *19. We have heard rival contentions and gone through the finding given in the impugned orders. The subsidy given by the MP Government in pursuance of "Madhya Pradesh Udyog Nivesh Samvardhan Yogna" was for setting-up of an industrial unit in the backward area of state of Madhya Pradesh and subsidy offered was in the form of refund of VAT / CST paid. The said subsidy was purely for investment in the setting-up of industrial unit. The Ld. CIT(A) and the AO have treated it as a „revenue receipt" on the ground that subsidy has been granted to promote industries in the state and in the form of a refund of commercial taxes paid. Since the subsidy was for augment of profit and hence it has to*

be treated as revenue receipt. While adjudicating such kind of cases, what is to be seen is the purpose for which subsidy is given and not the form or manner in which subsidy is given. The Hon'ble Supreme Court in the case of Ponni Sugar Mills (supra) has laid down a very important proposition that the test of character of the receipts in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. Hence, the "purpose test" has to be applied. The point of time at which subsidy is paid is not relevant, neither the source nor the form of subsidy is material. In that case the Hon'ble Supreme Court held that if the subsidy has been given for setting up of new units or substantial expansion of the existing unit, then same is to be treated as capital account. If the object of the subsidy scheme is to enable the assessee to run the business more profitably then the receipts is on revenue account. Hence in this case if we see the "Preface" of the "Madhya Pradesh Udyog Nivesh Samvardhan Yogna" of Industrial Promotion Policy of 2004 of the Madhya Pradesh Government, it provides that the subsidy would be given for setting up of a new industrial units at various places for employment generation and to accelerate the pace of industrialization in Madhya Pradesh. From the reading of the entire scheme, it is absolutely clear that

the subsidy provided is not for assisting the assessee for augmenting the profit or help in running of the business, albeit it is for setting up of new industrial unit, for promotion of employment, growth, infrastructure in the backward areas of Madhya Pradesh. Thus, such a subsidy though given in the form of refund of VAT or CST is on capital account. Accordingly, we hold that the subsidy received by the assessee cannot be taxed as revenue, as it is on capital account, hence capital receipt. Accordingly, ground no. 4 is allowed.

42. Further we notice that Ld. DR submitted that this issue may be remitted back to the AO for factual verification and documents and AO may be given opportunity to verify the claim of the assessee. We notice that this issue was analyzed and adjudicated by Ld. CIT(A) after verifying the relevant documents submitted by the assessee before him and moreover, the proceedings before Ld. CIT(A) is only extension of assessment, it is otherwise known as extended assessment proceedings, therefore Ld. CIT(A) has applied his mind and came to the conclusion with his own reasoning and rejected the submission

/contention of the assessee. Therefore, there is no necessity to remit this issue back to the AO for further verification.

43. Therefore, respectfully following the decision of Coordinate Bench of ITAT which is applicable *mutatis mutandis* in the present case, we are inclined to **allow** the ground nos. 2(a) and 2(b) raised by the assessee.

Ground No. 3(a) & 3(b) raised by assessee in respect of Sales Tax exemption.

44. This issue is relating to Sales Tax exemption scheme by the Maharashtra Govt. Since this issue is made for the first time during appellate proceedings, Ld. CIT(A) with reference to Jurisdictional High Court decision, considered the additional grounds raised by the assessee and this claim of the assessee submitted first time before him, therefore Ld. CIT(A) has accepted the additional grounds and adjudicated the same.

45. The brief facts relating to this ground are, the HRJ division of the assessee is the manufacturing units at various locations. One of the said manufacturing units of HRJ division is at Penn, district Raigad, Maharashtra. Due to its location, the

assessee has enjoyed sales tax incentive from the government of Maharashtra in the form of sales tax exemption under the package scheme of incentives, 1993. The above said incentive is declared with an objective of dispersal of industries outside Mumbai, Thane and Pune belt and attract the industries to underdeveloped and developing areas of Maharashtra. The above said incentive is available to new units as well as units undertaking expansion. Under the above said scheme, assessee also received incentive from the Maharashtra State Govt.

46. Ld. CIT(A) observed that for the reasons discussed while adjudicating the issue of VAT subsidy received from Madhya state government and the entry tax exemption received from the Madhya Pradesh state government the sales tax exemption received from the Maharashtra state government is also treated as revenue receipts liable to be taxed. He further observed that the objective and nature of receipts are identical and it will not be out of place to mention here that the assessee itself treated these incomes as revenue both while filing the returns and during the

assessment proceedings. Accordingly, Ld. CIT(A) **dismissed** this ground raised by the assessee.

47. Aggrieved with the above assessee is in appeal before us raising this ground of appeal.

48. Before us, Ld. AR submitted that sales tax scheme declared by the Maharashtra Govt. based on the Industries and Labour Scheme of 1993, copy of the scheme is placed at paper book and brought to our notice the scheme of exemption granted by the Maharashtra Govt. He submitted that the Coordinate Bench of ITAT has decided the similar issue in the case of ACIT v. Mihir Packaging (ITA No.5629/Mum/2011) dated 21.09.2012 and in the case of John Deere India Pvt. Ltd v. ITO (ITA No. 828/Pun/2014) dated 17.05.2017, wherein it was held that the subsidy received by the assessee is a capital receipt. He further relied the similar case law which are as under:-

i) CIT v. Ponni Sugars & Chemicals Ltd [306 ITR 392 (SQ]

ii) Shree Balaji Alloys v. CIT [333 ITR 335 (J&K)] upheld by Hon'ble Supreme Court (287 CTR 459)

iii) CIT v. Chaphalkar Brothers [400 ITR 279 (SQ]

iv) PCIT v. Shyam Steel Industries [303 CTR 628 (Cal)]

49. On the other hand, Ld. DR submitted that Ld. CIT(A) has considered the facts and issue raised by the assessee before him and Ld. CIT(A) rejected the contentions of the assessee by giving reasons and relevant case law He supported the findings of Ld. CIT(A) that all the subsidy are having revenue character and he relied in the case of Sahney Steel and press works 228 ITR 253 (SC). He further submitted that Ld. CIT(A) has decided the issue based on the facts on record but primarily, the documents and facts were not verified by any authority and for that purpose, he prayed that the issue may be remitted back to the AO for further verification and AO may be given proper opportunity to verify the issue whether it is capital or revenue.

50. Considered the rival submission of both Ld. Counsels on this issue and material placed on record, we notice that Coordinate Bench of ITAT in the case ACIT v. Mihir Packaging (ITA No.5629/Mum/2011) and in the case of John Deere India Pvt. Ltd v. ITO (ITA No. 828/Pun/2014) has already decided this issue in detail. For the sake of clarity, relevant portion of the decision of Mihir Pacakging case is reproduced below:-

> *14. We have carefully considered the rival contentions, perused the findings given by the authorities below and the material available on record. It is an undisputed fact that the assessee has established a small scale industries undertaking in a duly notified backward area in the District of Thane, which has been categorized as "D+" locality i.e., remote backward area for the purpose of new Package Scheme of Incentive, 1993. The preamble of the said scheme, reads as under:-*
>
> > *"In order to achieve dispersal of industries outside the Bombay-ThanePune belt and to attract them to, the underdeveloped and developing areas of the State, Government has been giving a*

Package of Incentives to New/Expansion Units set up in the developing region of the State since 1964 under a Scheme popularly known as the Package Scheme of Incentives.

The Package Scheme of Incentives, introduced in 1964, was amended from time to time. The last amended Scheme, commonly known as the 1988 Scheme was operative from 1st October 1988 to 30th September, 1993.

The question of revising the 1988 Scheme to rationalise the scope of incentives, various scales and mode of release of incentives to intensify and accelerate the process of dispersal of industries from the developed areas and for development of the under- developed regions of the State, particularly those farther away from the Bombay-ThanePune belt, had been under consideration of the Government. In the light of the experience gained in implementation of the earlier Schemes,, particularly the 1988 Scheme, and in the changed circumstance of the liberalised industrial policy of the Government of India, and with a view to achieving the objectives outlined above, the Government has decided to revise the 1988 Scheme and bring into force a New Scheme, viz.,

the Package Scheme of Incentives, 1993 (hereinafter referred to as "the 1993 Scheme")."

15. Under the said scheme, one of the eligible unit in terms of clause 1.1 were the industries falling within the purview of small scale industries board and the implementing agency for the purpose of the scheme in case of small scale industries unit was "District Industries Centre" under which eligible certificate has to be procured after fulfilling certain conditions. Clause 5 provided various nature of incentive, which should be given and one of them included "Special Capital Incentive for SSI Unit". The said scheme also provides the effective steps comprising of initial effective steps and final effective steps which were to be undertaken before being eligible for the grant of subs dy. Finally, in terms of clause 5.2, special capital incentive for SSI unit, was admissible as a grant after completion of all initial and final effective steps and will be computed on the basis of fixed capital investment actually made by the eligible SSI unit. The maximum ceiling for "D+" category has been put at ` 20,00,000.

16. The assessee had fulfilled the eligible criteria and also complied with the effective steps to be taken and thereafter, it has received the subsidy under special

capital incentive for SSI unit based on its capital investment, which finally worked out to ` 20,00,000. Thus, from the preamble and also various other terms, it is seen that the purpose of the subsidy was to set-up a new unit in the notified backward areas particularly those between Bombay, Thane, Pune, belt for the development of the remote area. The said scheme provide special capital incentive for SSI unit and, therefore, the subsidy received under the scheme is clearly on account of capital only This has been also mentioned in the eligible certificate dated 29th June 2000, issued by the District Industrial Centre, implementing agency for the SSI unit. The Hon'ble Supreme Court in Ponni Sugars and Chemicals Ltd. (supra), after relying upon the judgment in Sahani Steels and Press Works Ltd. (supra), held that character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which subsidy is given. The "Propose Test" has to be applied while determining whether the subsidiary is in account of revenue account or capital subsidy. The relevant observation given in Ponni Sugars and Chemicals Ltd., by Their Lordships are reproduced herein below:-

"14. In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this Court in the case of Sahney Steel & Press Works Ltd. (supra). In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10 per cent of the. capital investment calculated on the basis of the quantum of investment in capital and, therefore, receipt of such subsidy was on capital account and not on revenue account. It was also urged in that case that subsidy granted on the basis of. refund of sales tax on raw materials, machinery and finished goods were also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. The contention of the assessee in that case was dismissed by the Tribunal and, therefore, the assessee had come to this Court by way of a special leave petition. It was held by this Court on the facts of that case and on the basis of the analyses of the Scheme therein that the subsidy given was on revenue account because it was given by way of assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital

asset. It was not to meet part of the cost. It was not granted for production of or bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Consequently, the contentions raised on behalf of the assessee on the facts of that case stood rejected and it was held that the subsidy received by Sahney Steel could not be regarded as anything but a revenue receipt. Accordingly, the matter was decided against the assessee. The importance of the judgment of this Court in Sahney Steel & Press Work s Ltd. „scase (supra) lies in the fact that it has discussed arid analysed the entire case law and. it has laid down the basic test to be applied in judging the character of a subsidy. That test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is

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

17. Applying the above ratio and the test laid down by the Hon'ble Supreme Court, we find that the subsidy received by the assessee under the new package scheme incentive of 1993, was solely for the purpose of setting up of SSI unit in the backward area for which it has received special capital incentive computed on the basis of fixed capital investment actually made by the assessee and, therefore, the same is capital in nature

and hence, not taxable. Thus, the finding and conclusion given by the Commissioner (Appeals) is upheld and, accordingly, ground no.1, raised by the Revenue is dismissed.

51. Further we notice that Ld. DR submitted that this issue may be remitted back to the AO for factual verification and documents and AO may be given opportunity to verify the claim of the assessee. We notice that this issue was analyzed and adjudicated by Ld. CIT(A) after verifying the relevant documents submitted by the assessee before him and moreover, the proceedings before Ld. CIT(A) is only extension of assessment, it is otherwise known as extended assessment proceedings, therefore Ld CIT(A) has applied his mind and came to the conclusion with his own reasoning and rejected the submission /contention of the assessee. Therefore, there is no necessity to remit this issue back to the AO for further verification.

52. Therefore, respectfully following the decision of Coordinate Bench of ITAT which is applicable *mutatis mutandis* in the present case, we are inclined to **allow** the ground nos. 3(a) and 3(b) raised by the assessee.

Ground No. 4(a) & 4(b) raised by assessee in respect of Entry Tax Exemption.

53. Since this issue is made for the first time during appellate proceedings, therefore Ld. CIT(A) considered the additional grounds raised by the assessee and this claim of the assessee submitted first time before him, accordingly Ld. CIT(A) accepted and adjudicated the same.

54. The brief facts relating to this ground are, the assessee has received entry tax exemption from the Madhya Pradesh government. As per the Scheme, the incentive has been availed to achieve increasing employment to qualify the residence of the state of Madhya Pradesh and to accelerate the pace of industrialization and the same is capital in nature, hence is liable to be excluded in computing total income. Ld. CIT(A) observed that in the preceding paragraphs while deciding the issue of sales tax subsidy received by the assessee from the Madhya Pradesh state government, by applying the same ratio, the entry tax exemption is held to be revenue in nature and is liable to tax. Accordingly, he **dismissed** this ground raised by the assessee.

55. Aggrieved with the above assessee is in appeal before us raising this ground of appeal.

56. Before us, Ld. AR brought to our notice the Scheme of Madhya Pradesh Govt. at page 78 and 98 of the paper book. He further brought to our notice at page no. 99 of the Scheme as per which, the new industrial units will be exempted from the payment of entry tax for a period of 5 years from the date of first purchase of raw material. The scheme was similar to the Sales Tax Exemption Scheme and the industries were given incentives not only based on exemption in Sales Tax. Further, incentives were given based on entry tax on purchase of raw material. This is also given for promotion of new industries of MP State and in order to bring new industries and capital to the State and this assistance is only against the capital investment made by the respective industries. He brought to our notice page 209 and 210 of the paper book as per which, assessee was awarded a certificate of eligibility for exemption of entry tax and he relied the same case laws relied for the VAT subsidy. For that purpose, by relying on the case CIT vrs. Ponni Sugars & Chemicals Ltd

(supra), he submitted that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which subsidy is given, therefore one has to apply the purpose test and the point of time at which the subsidy is paid is not relevant and the source is immaterial. He further brought to our notice page 399 of the decision of Ponni Sugars & Chemicals Ltd (supra) that according to the department the price and costs are essential items that are basic to profit making process and any price relating to mechanism would normally be presumed to be revenue in nature. In other words, according to the department, since incentives were given through price and duty differential, the character of the impugned incentive in this case was revenue and not capital in nature. According to the assessee, what was relevant to decide the character of the incentive is the purpose to test and not the mechanism of payment. The Hon'ble Supreme Court has upheld the purpose test and observed that such payment received by the assessee under the scheme was not in the course of trade, but was of capital in nature. He submitted that the Scheme under consideration is similar to the Sales Tax

Scheme and this incentive should also be treated as capital not revenue.

57. On the other hand, Ld. DR submitted that Ld. CIT(A) has considered the facts and issue raised by the assessee before him and Ld. CIT(A) rejected the contentions of the assessee by giving reasons and relevant case laws. He supported the findings of Ld. CIT(A) that all the subsidy are having revenue character and he relied in the case of Sahney Steel and press works 228 ITR 253 (SC). He further submitted that Ld. CIT(A) has decided the issue based on the facts on record but primarily, the documents and facts were not verified by any authority and for that purpose, he prayed that the issue may be remitted back to the AO for further verification and AO may be given proper opportunity to verify the issue whether it is capital or revenue.

58. Considered the rival submissions of both Ld. Counsels on this issue and material placed on record, we notice that assessee was awarded a certificate of eligibility for exemption of entry tax considering the fact that assessee has made investments in the Units established in the State of Madhya Pradesh and the

Industrial Development Scheme clearly states that the incentive awarded only because, the assessee has made the investments and also the Scheme of incentive clearly based on the range of the investment made by the respective industries. As held in the various decisions, it is not relevant what mechanism was adopted by the State Govt. to award the incentive, but for what purpose this incentive were awarded whether these were awarded to benefit the units to function profitably or in order to bring capital inside the State in order to improve the industrial development in the State. As per the scheme, it is clear that incentives were awarded only because of new industrial units were commenced after 2004. Therefore, we are in agreement with Ld. AR by following the various case laws as mentioned below:-

i) Universal Cables vrs. DCIT 57 taxman 95 (Kol-Trib)

ii) Parle Agro Pvt. Ltd. v. ACIT (ITA No. 6209/Mum/2013) dated 30.11.2015

iii) CIT v. Ponni Sugars & Chemicals Ltd [306 ITR 392 (SQ]

iv) Shree Balaji Alloys v. CIT [333 ITR 335 (J&K)] upheld by Hon'ble Supreme Court (287 CTR 459)

v) CIT v. Chaphalkar Brothers [400 ITR 279 (SC]

vi) PCIT v. Shyam Steel Industries [303 CTR 628 (Cal)]

59. Therefore, respectfully following the aforesaid decisions of various Courts which are applicable *mutatis mutandis* in the present case, we are inclined to **allow** the ground nos. 4(a) and 4(b) raised by the assessee.

Ground No. 5 raised by assessee in respect of Sale of Carbon Credit.

60. This issue is made for the first time during appellate proceedings, Ld. CIT(A) with reference to Jurisdictional High Court decision, considered the additional grounds raised by the assessee and this claim of the assessee submitted first time before him, therefore Ld. CIT(A) accepted and adjudicated the same.

61. The brief facts relating to this ground are, assessee earned the income from sale of carbon credit and assessee has

undertaken a clean development mechanism project by utilisation of waste gases emitted from gas-based power generating system for spray drying and vertical drying application at HRJ unit in Dewas, Madhya Pradesh. The project for utilisation of waste gases generated has been registered under UNFCC as COM project. Accordingly, assessee received carbon emission reductions (CERs) for utilisation of waste gases. Therefore, assessee sold the above CERs and credited to the profit and loss account. As the Carbon Credit are being in the nature of an entitlement received to improve the atmosphere and environment reducing carbon, heat and gas emissions, it is arising out of environmental concerns and not as part of the business of the assessee. Further, the assessee treated the above receipt as capital receipt with the submission that if the absence of any element or profit or gain, income from sale of carbon credit should be treated as capital receipt and should be excluded in computing the total income both under the normal provisions of the Act as well as in computing book profit under section 115 JB of the Act.

62. Ld. CIT(A) observed that the United Nation's (UN) Kyoto protocol commits to certain development countries to reduce their GHG (green house gases) emissions and for this, they will be given carbon credits. He further observed that a reduction in emission entitles the entity to credit in the form of a Certified Emission Reduction (CER) certificate. The above said CER is tradeable and its holder can transfer it to an entity which needs carbon credits to overcome an unfavourable position on carbon credits and as per Article 6 of the Kyoto Protocol provides for achieving these reduction norms, the parties may "acquire from any such other party emission reduction units resulting from projects aimed in reducing and throw anthroprogenic emissions by sources or enhancing anthroprogenic removals by sinking of green gas house in any sector of the economy" provided, inter alia, "in such project as the approval of the parties involved" and "in such project provides a reduction in emission by sources, or of enhancing by removal of sinks, ie. additional to any that would otherwise occur". Ld. CIT(A) confirmed that these CERs are tradeable and the entities trade in and facilitate transfer of these

credits from one entity to another entity. In affect, CERs generated by entities in developing countries get converted into cash and entities in the developing country was their guilt for generating harmful gas by doling out names to those who save emission of harmful gases. Before Ld. CIT(A), assessee relied on the judgement of ITAT Hyderabad in the case of My Home Power Ltd. vrs. CIT [365 ITR 82 (AP)] which was subsequently confirmed by the Hon'ble Andhra Pradesh High Court. Assessee further submitted before Ld. CIT(A) that the same issue was dealt and decided by Hon'ble Karnataka High Court in the case of CIT vs. Subhash Kabini Power Corporation Ltd. [69 Taxmann.com 399 (Karnataka)] in favour of the assessee. However, Ld. CIT(A) relied on the decision of Coordinate Bench of ITAT Ahmedabad in the case of DCIT vs Kalpataru Power Transmission Ltd. [ITA No. 538/AHD/2013] and distinguished the case relied by assessee i.e. My Home Power Ltd. vrs. CIT (supra) and decided this issue in favour of the revenue. Accordingly, by following the decision in the case of DCIT vs

Kalpataru Power Transmission Ltd that present case is similar to the facts of the above case, **dismissed** the ground of assessee.

63. Aggrieved with the above assessee is in appeal before us raising this ground of appeal.

64. Before us, Ld. AR brought to our notice the facts of the case and submitted that the sale of carbon credit to be treated as capital in nature and not to be considered in computing the income under normal provision as well as MAT provisions. For that proposition, he relied in the case of Dodson Lindblom Hydro Power Ltd. Bom HC [ITA No.1820 of 2016 dated 27-02-2019] and Dy. CIT v Dodson Lindblom Hydro Power Ltd (ITA No. 6704/Mum/2016 dated 12.06.2018).

65. On the other hand, Ld. DR supported the findings and decision of Ld. CIT(A).

66. Considered the rival submission of both Ld. Counsels on this issue and material placed on record, we notice that assessee has sold the CERs and received the revenue and the same were credited in the profit and loss account and offered to tax. Before

Ld. CIT(A), assessee first time claimed that these sale of carbon credit is capital in nature, accordingly raised additional grounds.

67. After considering the submission of the assessee, we find that this carbon credit should be treated as capital in nature. We notice that Ld. CIT(A) by relying on the case DCIT vs Kalpataru Power Transmission Ltd (supra), decided this issue against the assessee. We further notice that this issue was already considered by Hon'ble AP High Court and Karnataka High Court in favour of the assessee. Our attention was also drawn by Ld. AR to the case of Dodson Lindblom Hydro Power Ltd. Bom HC and Dy. CIT v Dodson Lindblom Hydro Power Ltd, which are similar to the facts of the present case, wherein the Hon'ble Jurisdictional High Court held that the sale of carbon credit is to be considered as capital receipt, therefore not liable to tax. The same reasoning was followed by Hon'ble Allahabad and Rajasthan High Court. Therefore, considering the consistent view of the different High Courts in the country, we see no reason to take a different stand since the different High Courts has decided this issue in favour of the assessee. Respectfully following the aforesaid decisions of

various High Courts which are applicable *mutatis mutandis* in the present case, we are inclined to **allow** the ground no. 5 raised by the assessee.

Ground No. 6 & 7 raised by assessee in respect of exclusion of VAT subsidy, sales tax exemption, entry tax exemption and income from sale of carbon credit while computing income u/s 115JB of the Act.

68. The brief facts relating to this ground are, Ld. CIT(A) has treated the above said exemption and subsidy as revenue in nature and accordingly, treated as part of the book profit.

69. Aggrieved with the above assessee is in appeal before us raising these grounds of appeal.

70. Before us, Ld. AR brought to our notice the decision in the case of PCIT vrs. Ankit Metal & Power Ltd. (2019) 109 taxmann.com 93 (Calcutta), wherein Hon'ble High Court addressed the issue whether the incentive subsidies received by the assessee from the Govt. of West Bengal under the schemes in question are to be included for the purpose of computation of book profit u/s 115JB of the Act. Hon'ble High Court has held that relevant Assessment Year 2010-11, the incentives 'Interest

Subsidy' and 'Power Subsidy' is a capital subsides and does not fall within the definition of income under section 2(24) of the Act and when a receipt is not in the character of income, it cannot form part of the book profit u/s 115JB of the Act. He further submitted that Hon'ble High Court has distinguished the decision in the case of Appollo Tyres Ltd. (supra) and also relied on the decision in the case of Ramgad Minerals vrs. ACIT (ITA No. 1270 & 1271/Bang/2019) and DCIT vrs. Binani Industries Ltd. (2016) 178 TTJ 0658 (Kol-Trib)

71. On the other hand, Ld DR supported the findings of Ld. CIT(A).

72. Considered the rival submission of both Ld. Counsels on these grounds and material placed on record, we notice that since we have already decided that the subsidies are in the nature of capital receipt and also by following the decision of Hon'ble Kolkata High Court decision in the case of PCIT vrs. Ankit Metal & Power (supra), we direct the AO not to consider these receipts in calculating the book profit as decided by Hon'ble Kolkata High Court that these incentives /receipts are capital

receipt and does not fall within the definition of income under section 2(24) of the Act and also receipts are not in the character of income. Therefore, it cannot form part of the book profit u/s 115JB of the Act. Accordingly Ground no. 6 & 7 raised by assessee are **allowed.**

Additional Ground raised by assessee during this appellate authority.

73. During this appellate proceedings, assessee filed an additional ground of appeal with plea that assessee while filing the income tax return for this Assessment Year, assessee has not claimed deduction of education cess as allowable expenditure. Assessee has come across the decision in the case of Chambal Fertilizers and Chemicals Ltd. vrs. JCIT (ITA No. 52/2018) – (Raj. HC), wherein the Hon'ble Rajasthan High Court has held that 'cess' is not part of tax and based on the said decision, assessee is seeking to claim Educational Cess paid.

74. Similarly, assessee has debited an amount towards Debenture Redemption Reserve should be excluded in the computation of book profit u/s 115JB of the Act as it is a

provision made towards a known liability. In this regard, assessee relied on the decisions of Hon'ble Apex Court in the case of National Rayon Corporation Ltd. Vrs. CIT (1997) 227 ITR 764 (SC), wherein it was held that '*the basic principle is that an amount set part to meet a known liability cannot be regarded as reserve.*' Similarly, he relied on the decision of Hon'ble Bombay High Court in the case of CIT vrs. Raymond Ltd. (2012) 209 taxmann 65 (Bom), wherein it was held that Debenture Redemption Reserve is not a reserve within the meaning of Explanation (b) to section 115JA of the Act.

75. Considered the submission of assessee on this additional ground and since this issue is legal in nature and Ld. DR has not objected on this issue and also considering that all the information is already available on record, we accept the additional grounds raised by the assessee and remitting this issue back to the file of AO to verify the admissibility of claim raised by the assessee and to decide the issue as per law after giving proper opportunity of being heard to the assessee. Accordingly,

the additional grounds raised by the assessee are **allowed for statistical purposes**.

76. Resultantly, the appeal filed by the revenue for Assessment Year 2011-12 is **dismissed** and appeal filed by the assessee for Assessment Year 2011-12 is **partly allowed for statistical purposes.**

ITA No. 804/Mum/2018 filed by assessee and ITA No. 872/Mum/2018 for Assessment Year 2012-13.

77. With regard to appeal filed by the assessee for Assessment Year 2012-13, we notice that the grounds raised by the assessee for Assessment Year 2011-12 are exactly similar to the present appeal filed by the assessee for Assessment Year i.e. 2012-13, which are applicable mutatis mutandi. Therefore, the grounds raised by the assessee in this Assessment Year are also **partly allowed for statistical purposes**.

78. With regard to appeal filed by the revenue for Assessment Year 2012-13, we notice that the Grounds Nos. 1 to 6 raised by the revenue for Assessment Year 2011-12 are exactly similar to the present appeal filed by the revenue for Assessment Year i.e.

2012-13, which are applicable mutatis mutandi. Therefore, these grounds raised by the assessee in this Assessment Year are also **dismissed** for parity of reasons.

Ground no. 7 raised by the revenue in respect of Mine Development expenses & Lease expenditure.

79. The brief facts relating to this ground are, during the course of assessment proceedings, AO observed that in the computation of income, assessee has reduced expenses on account of Mines, development expenses. It is also seen that vide Note 3 to statement-II being depreciation calculation as per Income Tax Act, it was stated that, "Expenditure incurred on Mines Development is capitalized as fixed asset in the financial books of account. AO further observed that the company is proposing to claim expenditure incurred during the year as Revenue expenditure in its income tax return & hence the same is not considered as "Addition to Fixed Asset" for reporting under clause-14. When the assessee was asked to substantiate the said claim, assessee vide letter dated 16.12.14 submitted as below:

"(a) During the previous year relevant to assessment year 2012-13, the company has incurred a sum of Rs. 24,90,46,960/- as Mines Development Expenses. In its books of account the company has treated the same as capital expenditure to be depreciated over a period of five years. However, while computing the total income, the company has claimed the entire amount ofRs. 24,90,46,960/- as revenue expenditure

(b) The company submits that the aforesaid expenses were incurred for removal of overburden etc in respect of new mines. The company submits that in order to reach the mineral, it becomes necessary to remove the overburden of the earth. Removal of overburden in the case of existing pits is a continuous process and is to be carried out simultaneously from year to year.

(c) The company submits that the process of removal of overburden does not result in any enduring benefit as the process had to be repeated immediately and such expenditure is a part of its normal business process. The company had therefore, written off the amount during the previous year."

80. After considering the submission of the assessee, AO observed that the similar issue was involved in the assessment

year 2001-02 & 2002-03 in both the assessment years and Ld. CIT(A) & ITAT has allowed appeal in favour of assessee. But AO observed that the department has filed appeal u/s 260 in the Bombay High Court and in order to keep the issue alive, he made the addition.

81. Aggrieved with the above, assessee preferred the appeal before Ld. CIT(A) and before him, made the following submissions, which are as under:-

> *7.2.1 It is submitted that in order to reach the minerals, it becomes essential to remove the overburden of the earth. Removal of overburden in the case of existing pits is a continuous process and is to be carried out simultaneously from year to year.*
>
> *7.2.2 Further it is submitted that the process of removal of overburden does not result in any enduring benefit as the process had to be repeated immediately and such expenditure is a part of its normal business process.*
>
> *7.2.3 The aforesaid issue is squarely covered in favor of the appellant by the decision of the Hon'ble Mumbai ITAT in the appellant's own case for the AY 2000-01,*

2002-03, 2005-06, 2006-07 and 2007-08. The relevant extract of the observation made by the Tribunal in the appellant's own case for AY 2005-06 is mentioned as under-

> *"we find that the issue for Assessment year 2000-01 and 2002-03, the Tribunal has dismissed the appeal of the Revenue, therefore, in view of the decision from Hon'ble jurisdictional High Court in CIT vs Paul Brothers and Western Outdoor Interactive Pvt. Ltd. (Bom)(Supra), we allow this ground of the assessee as in the absence of any contrary facts. The Department is not expected to a different view."*

7.2.4 The appellant also places reliance on the following decisions:-

a) In the case of CIT -vs.- Amalgamated Jambad Syndicate Pvt. Ltd. ((1979) 117 ITR 6981 (Cal.)the Hon'ble Calcutta High Court dealt with the allowability of expenditure incurred on removal of overburden. It was observed that the overburden resting on the surface of a particular area, if removed, could enable the company only to reach the coal under that and not any further. If any further surface had to be exposed, further overburden had to be removed. The

expenditure is not made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business but is incurred for running the business with a view to produce profits and therefore, it is revenue expenditure.

b) In the case of CIT-vs.- Katras Jharia Coal Co. Ltd.[(1979) 118 ITR 6](CaL), the Hon'ble Calcutta High Court held that the expenses incurred in removing the overburden for reaching the coal seam did not result in any enduring benefit as the process had to be repeated immediately, the expenditure was, therefore, allowable as revenue expenditure.

c) In the case of United Commercial Bank -vs.- CIT [(1999) 240 ITR 3551 (SO, the Hon'ble Supreme Court held that whether an assessee is entitled to a particular deduction or not will depend on the provisions of law and not on the existence or absence of entries in the books of account. It was further held that preparation of balance sheet/accounts in accordance with the statutory provisions would not disentitle an assessee in submitting the income-tax return on the real taxable income.

d) In the case of Northern Coalfields Ltd -vs.- ACIT [20151 59 taxmann.com 394(order dated 05-05-2015)

the Hon'ble Jabalpur ITAT held that overburden removal was carried out in the process of extraction of coal and the extraction of coal was not possible without doing so. Hence overburden removal expenses were required to be treated as revenue expenses.

e) In the case of ACIT -vs.- Jindal Power Ltd. [20161 70 taxmann.com 389(order dated 23-06-2016) the Hon'ble Raipur ITAT relying on the decision of Northern Coalfields Ltd (supra) held that the overburden removal is a continuous process and extraction of coal is not possible without removal of overburden. Even if the coal extraction is on, there is removal of overburden from between the coal seams. It is not a onetime process. Thus removal of overburden cannot be treated as a capital expenditure.

f) In the case of Neyveli Lignite Corporation Ltd, -vs.- Asst. CIT (2009) 309 ITR 136(Order dated 17-04-2008),the Hon'ble Chennai Tribunal held that overburden expenditure is a revenue expenditure. The removal of overburden and the pumping out water from the mine is a part of the work of mining and it is not in the nature of preliminary or preparatory work. The expenditure incurred did not bring into existence any asset of enduring benefit but it was an expenditure incurred for the purpose of acquiring a raw material

required for the assessee's business. From the commercial point of view, it was part of the company's working expenses and it was an expenditure laid out as part of the process of profit earning. It is not an expenditure which was going to be spent once and for all, but was an expenditure which was going to recur every year.

7.2.5 In view of the above, it is submitted that the removal of overburden to excavate the coal does not result in creation of an asset but it is an on-going process to be considered as a revenue expenditure.

82. After considering the submission of the assessee, Ld. CIT(A) observed that this issue is covered in assessee's favour by the order of Coordinate Bench of ITAT Mumbai for the preceding years.

83. Aggrieved with the above, revenue is in appeal before us on this ground of appeal.

84. Considered the rival submissions and material placed on record, we notice that the Coordinate Bench of ITAT in assessee's own case for Assessment Year 2001-02 and 2002-03 has already decided this issue in favour of the assessee.

Therefore, respectfully following the aforesaid decisions of Coordinate Bench of ITAT in assessee's own case, which are applicable *mutatis mutandis* in the present case, we are inclined to **dismiss** the ground no. 7 raised by the revenue.

85. In the net result, the appeal filed by the assessee is **partly allowed** as indicated above and appeal filed by the revenue stands **dismissed.**

Order pronounced in the open court on 04.01.2021.

Sd/-	*Sd/-*
(C. N. Prasad)	(S. Rifaur Rahman)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member

मुंबई Mumba ;दिनांकDated : 04.01.2021
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**