IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

I.T.A No. 686/Kol/2014
Assessment Year : 2010-11

Birla Corporation Ltd. Kolkata [PAN : AABCB 2075 J] (Appellant)	-vs.-	D.C.I.T., Circle-6, Kolkata (Respondent)

I.T.A No. 1101/Kol/2014
Assessment Year : 2010-11

D.C.I.T., Circle-6, Kolkata [PAN : AABCB 2075 J] (Appellant)	-vs-	Birla Corporation Ltd. Kolkata (Respondent)

For the Assessee	:	Shri J.P.Khaitan, Sr.Advocate & Shri Sanjay Bhaumik, AR
For the Department	:	Shri G.Mallikarjuna, CIT(DR)

Date of Hearing : 06.09.2017.
Date of Pronouncement : 13.09.2017.

ORDER

Per N.V.Vasudevan, JM

ITA No.686/Kol/2014 is an appeal by the Assessee while ITA NO.1101/Kol/2014 is an appeal by the revenue. Both these appeals are directed against the order dated 25.02.2014 of C.I.T.(A)-VI, Kolkata relating to A.Y.2010-11.

ITA No.1101/Kol/2014 (Revenue's appeal):

2. There is a delay of about 8 days in filing the appeal by the revenue. The same has been explained by the AO in an affidavit filed before us as owing to administrative reasons. The reasons given in the affidavit, in our view, are sufficient and reasonable

cause for the delay in filing the appeal by the revenue. The delay in filing the appeal by the revenue is accordingly condoned.

3. Ground No.1 raised by the revenue in this appeal reads as follows :-

> *1. "That on the facts and in circumstances of the case, the CIT(A) erred in law as well as on facts in holding that disallowance of deduction u/s 80IA of Rs.1,11,89,18,801/- computed by the Assessing Officer due to difference in rate of power was not correct, ignoring the fact that there was huge difference in rate on which power was purchased by the cement units with that of power purchased by the Rajasthan & MP state electricity regulatory authority" .*

This ground can be conveniently decided together with grounds no. 2 to 6 raised by the assessee in its appeal. These grounds read as follows :-

> *"2. That on the facts and circumstances of the case, the Ld.CIT(Appeals) erred in not holding that the appellant company is entitled to claim ofRs.1,11,89,18,801/- made during the year uls.80IA of I.T. Act, 1961.*
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> *3. That on the facts and circumstances of the case, the Ld.CIT(Appeals) erred in not holding that the basis of sale price considered by the TPP for sale of power to the cement units of the appellant company is correct and accordingly directing the learned AO to accept the same.*
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> *4. That on the facts and circumstances of the case, the sale price determined by the Ld.CIT(A) excluding Electricity duty and Cess charges does not represent the market value of electricity at which it could be sold to any consumer and, therefore, the same has no relevance for the purpose of Section 80IA.*
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> *5. That on the facts & circumstances of the case, the Ld.CIT(Appeals) erred in not holding Interest Income derived by the TPP being eligible for deduction uls.80IA of I.T. Act.*
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> *6. That on the facts and circumstances of the case, the Ld.CIT(Appeals) further erred in arriving at the sale price on weighted average basis for units consumed by cement plants annually instead of rate considered by TPP on monthly average basis."*

4. The Assessee is a company. It is engaged in the business of manufacture of cement and jute goods. During the previous year relevant to A.Y.2010-11 the assessee also derived income from generation of power. During the previous year relevant to A.Y.2006-07 the assessee set up a Thermal Power Plant (TPP) at Satna (Madhya Pradesh) and Chanderia (Rajasthan). Under Section 80IA of the Income Tax Act, 1961 (Act), the assessee was entitled to claim deduction on the profits derived from the manufacture of an article or thing, which also includes generation of power. The Assessment year 2010-11 was the third year in which the benefit of deduction was claimed by the assessee. The assessee had claimed deduction u/s80IA of the Act a sum of Rs.1,11,89,18,801/-. The power generated by the Thermal Power Plant of the assessee was consumed by the assessee in its cement manufacturing units at Satna and Chanderia (Rajasthan). Besides the above, power was also sold to Power Grid and India Energy Exchange.

5. The dispute between the revenue and the assessee is with regard to the price that has to be adopted for the power generated by it in TPP and consumed by the Assessee's cement manufacturing units. The assessee adopted the actual price at which the consumption unit purchased power from the grid for each month by adopting the price paid to the grid by the consuming units in the previous month, which was a sum of Rs.6.82 Rs. Per unit. The AO was of the view that tariff for sale of Electricity from Captive Power Plants as determined by orders of Rajasthan Electricity Regulatory Commission and M.P. Electricity Regulatory Commission during the financial year 2009-10 should be considered as sale price. In his show cause notice dated 5.3.2013 (copy of which is at page 194 of the paper book), the AO proposed to adopt the rates adopted by the Rajasthan Electricity Regulatory Commission, Jaipur, for power purchase by Distribution Licensee which was determined at Rs.2.44 Ps. Per unit. In the case of power generation by the Madhya Pradesh Unit of the Assessee, the AO proposed to adopt the rate of Rs.1.39 Ps., which was the rate fixed for purchase of

power by M.P.Vidyut Vitran Companies in an order dated 3.3.2010 passed by M.P.Electricity Regulatory Commission.

6. The Assessee submitted before the AO, as follows:-

i) Provisions of Section 80lA (8) and the Explanation to the sub-section provide for adoption of the market values "for the purpose of computation of profits and gains of the eligible business where its goods or services are transferred to any other business carried on by the assessee. The explanation defines "Market Value" to mean the price that would ordinarily be fetched in the open market.

ii) The price at which State Electricity Boards sell electricity to consumers is representative of the price that electricity would ordinarily fetch in the open market and that is the price which has been adopted by the Assessee for the electricity generated by the eligible business transferred to its other business for the purpose of computation of the profits and gains of the eligible business in terms of section 80lA (8).

iii) During the relevant previous year the Captive Plant of the Assessee at Chanderia sold power to Rajasthan Power Procurement Centre, a Govt. of Rajasthan undertaking at a firm rate of Rs 6.82 per unit but for calculation of transfer price u/s 80lA, the Assessee had taken the previous month's average grid rate at which it had purchased power from grid which is lower than its sale rate. The Assessee also submitted that the figures proposed by the AO are picked up from the different orders of the Regulatory Authority for fixation of power tariff and do not represent the open market value of electricity at all. The Assessee pointed out that the AO had relied on an order dated August 31, 2009 wherein the Authority determined the tariff for compulsory sale of surplus power generated by captive Power Plants to Electricity Distribution Companies in accordance with statutory parameters and norms. The Assessee pointed out that the AO had also taken figures taken from another order dated March 3 , 2010 which represented the purchase cost in respect of transfer of electricity by Power Generating Stations to Electricity Distribution Companies. It was further submitted that the

purchase price determined in accordance with statutory parameters and norms for the purchase of electricity by the Electricity Distribution Companies does not represent the open market value of electricity. The Electricity Distribution Companies do not and will never sell electricity to any consumer at these rates and the same have no relevance for the purpose of section 80lA(8). There can be no question of adopting such purchase cost for determining the profits and gains of the eligible business for the purpose of the deduction under section 80lA.

7. The AO however computed the basis of sale price as proposed in a show cause notice dated 05.03.2013. Consequently, the profits derived by the power generating units became negative and the Assessee was not allowed deduction u/s.80IA of the Act.

8. Another dispute between the Assessee and the Revenue in the matter of allowing deduction u/s.80IA of the Act was as to whether interest income of Rs.6,96,85,282/- earned on fixed deposits by the Satna Unit and Rs.7,18,61,971/- earned on fixed deposits by the Chanderia Unit should also be considered as part of the profits derived from the industrial undertaking for the purpose of allowing deduction u/s.80IA of the Act. The AO held that fixed deposits were made out of surplus funds in bank for short period cannot be considered as "derived" from the industrial undertaking as it has not direct nexus with the industrial undertaking. In coming to the above conclusion the AO relied on the decision of the Hon'ble Supreme Court in the case of Liberty India Vs. CIT (2009) 183 Taxman 349 (SC) wherein it was held that the word "derived from" connotes a direct nexus between the profits and gains of the industrial undertaking and a mere commercial connection in the source does not amount to income derived from the industrial undertaking.

9. On appeal by the assesee the CIT(A) noticed that identical dispute had arisen for consideration in assessee's own case in A.Y.2009-10 and CIT(A) following the order of

CIT(A) in A.Y.2009-10 directed the AO to adopt weighted average basis of annual consumption. The following were the relevant observations of CIT(A) :

> "5.2. It is seen that this is also a recurring issue in the appellant's case. In the immediately preceding year i.e. AY 2009-10, the issue came up before my ld. Predecessor. While deciding appeal no.245/CIT(A)-VI/Circle-6/2011-12, my ld. Predecessor vide his order dated 07.12.2012, my Id. predecessor had dealt with this issue as under:-
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> > *"In view of the above judgments as discussed supra in my appellate order of assessment year 2008-09 and respectfully following the decision of the Hon'ble ITATs including jurisdictional ITAT, Kolkata decision; the appellant is allowed to charge unit price at the rate being charged by State Electricity Boards i.e. Rajasthan and Madhya Pradesh. The appellant was asked to give a calculation of the total units consumed by the cements units taken from SEB(s) and reduced there-from the incentive(s) received due to optimal utilisation of the demand and supply quantities and also to reduce the electricity duty, CESS, taxes etc., if any. The appellant has given the said calculation as given in Annexure-"A". The appellant has not been given electricity duties and cess charges for calculation of per unit charges because these are the charges paid to the State Govt and are not kept by him. The rates have been taken on weighted average basis of both the units in M.P and Rajasthan for the units consumed annually together in one state and the net amount paid by the appellant to the State Electricity Board after deducting taxes, CESS and electricity duty, if any. "*
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> Thus, he allowed deduction on the basis of calculation of total units consumed by the cement units taken from SEBs and after reducing therefrom the incentive received due to optimum utilisation of demand and supply quantities and also electricity duty, cess, taxes etc., if any. The appellant accordingly submitted a working based on calculated average basis which was found to be fair and reasonable by my ld. predecessor. Similar view had been taken in AY 2008-09 as well. The factual and legal position in the year under consideration is practically identical. I have, therefore, no reason to differ from the view taken by my ld. predecessor. The appellant has, during the appellate proceedings submitted a working of deduction u/s 80lA of the Act based on methodology approved in the appellate orders in the earlier years. The said working is enclosed as annexure 'A' to this order. The assessing officer shall verify the figures mentioned therein. The assessing officer will verify the quantity of the units consumed and the figures of the bills from the original documents while giving the appeal effect. In case, there

is any variation in the figures as given by the appellant, he will modify it accordingly after giving detailed reasoning for the same. The appellant gets part relief on this point."

10. On the issue of non-consideration of interest income for the purpose of allowing deduction 80lA of the Act, the Assessee submitted before the CIT(A) the interest was earned on temporarily surplus business funds of the thermal power plants deposited with banks and forms part of the profits of the business of the thermal power plants eligible for deduction under section 80IA of the Act.

11. The CIT(A) found that identical issue was considered and decided against the Assessee in AY 2009-10. The CIT(A) following the said order rejected the claim of the Assessee. The following were the relevant observations of the CIT(A).

"6.2. This issue was also involved in the earlier assessment years. While deciding appeal no. 245/CIT(A)-VI/Circle-6/2011-12, my ld. predecessor, vide his order dated 07.12.2012, my ld. predecessor had dealt with this issue and confirmed the action of the assessing officer in excluding interest income for purpose of deduction u/s 80-IA of the Income Tax Act, 1961, by stating as under:-

"The interest income was not "derived from" Industrial activity and therefore, it does not qualify for deduction under section 80lA of the Act. The interest income was not in the nature of business income and it had to be treated as "income from other sources" and, therefore, it does not qualify for deduction under section 80lA of the Act. As per above discussion and relying on the various decisions of the Hon'ble appellate authorities it is held the interest income shown in unit Satna of Rs.2,63,86,592/- and unit Chanderia of Rs.1,83,34,999/- respectively is taxable income and not eligible for deduction u/s 80IA. This ground of appeal is rejected.

I am in agreement with the view of my ld. Predecessor. Following the reasoning given in the appellate orders of the earlier years, this ground is rejected."

12. Aggrieved by the order of CIT(A) in approving the basis of determining the profits of the TPP units for the purpose of allowing deduction u/s.80IA of the Act, the revenue has raised Gr.No.1 before the Tribunal. Aggrieved by the order of the CIT(A) in

excluding electricity duty, cess, taxes etc., in the price to be adopted for determining profits derived from the business of the industrial undertaking and not including interest income as part of the income derived from the industrial undertaking, the Assessee has raised Gr.No.2 to 6 before the Tribunal.

13. At the time of hearing the parties agreed that identical issue has already been decided in assesee's own case and in this regard filed a copy of the order of ITAT for A.Y.2008-09 and 2009-10 in ITA No.971/Kol/2012, 942/Kol/2013, 298/Kol/2013 and 329/Kol/2013 dated 25.8.2017. We have already seen that while deciding the issue of deduction u/s.80IA of the Act, the CIT(A) in the impugned order had followed the order of the CIT(A) in Assessee's own case on an identical issue in AY 09-10. The order of the CIT(A) for AY 09-10 was based on a decision of the Hon'ble ITAT Kolkata Bench in the case of ITC Ltd., for AY 2002-03. When the appeal of the Revenue in Assessee's case for AY 09-10 was heard by the Tribunal, the revenue pointed out before the Tribunal that the very basis of allowing relief to the Assessee was the decision of the Tribunal in the case of ITC Ltd., and that the Hon'ble Calcutta High Court had reversed the order of the Tribunal in the case of ITC Ltd., reported in CIT v ITC Ltd., (2016) 236 Taxman 612 (Cal). In ITC's case (supra) it was held by the Hon'ble Calcutta High Court, that the quantum of benefit u/s 80IA of the Act was to be worked out with reference to the market rate at which electricity could have been sold to the distribution licensee by a generating company and that benefit cannot be claimed on the basis of rate chargeable by the distribution licensee from the consumer. The Assessee however pointed out to the Tribunal that the view taken by the Hon'ble Calcutta High Court in the case of ITC Ltd. (supra) was taken on the basis of the the provisions of Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948 that were in force upto the year 2003. It was pointed out before the Tribunal that The Electricity Act, 2003 (hereinafter referred to as "the 2003 Act") repealed the erstwhile legislation and the new legislation came into force on June 10, 2003. The 2003 Act was applicable

and in force during the previous years relevant to the Asst Years 2009-10. It was also pointed out before the Tribunal as per the provisions of the 2003 Act and the regulations made in terms thereof by the States of Madhya Pradesh and Rajasthan, it was open to an assessee having a captive power plant to sell electricity even to a consumer at a mutually agreed rate. In other words, under the provisions of the 2003 Act and the regulations made there under it is not the position that a captive power plant can sell electricity only to a distribution company or a company which is engaged in both generation and distribution. The Tribunal after making reference to the various provisions of the Electricity Act 2003 and the determination of Tariff under the new legislation in the state of Rajasthan and Madhya Pradesh, as claimed by the Assessee before the AO, came to the following conclusions:-

> "5.6. We have heard the rival submissions and perused the materials available on record including the paper book and the relevant provisions of the Electricity Act, 2003 as detailed supra. We find that the main thrust of order of ld CITA was by placing reliance on the decision of this tribunal in the case of ITC Ltd, which was modified by the Hon'ble Jurisdictional High Court. The ld AR fairly brought to our attention the decision of Hon'ble Jurisdictional High Court in the case of ITC Ltd before us and had duly distinguished the same as not applicable to the facts of the instant case , as admittedly, the Asst Year before Hon'ble Calcutta High Court in ITC Ltd was Asst Year 2002-03. The said decision in ITC Ltd for Asst Year 2002-03 was rendered by taking into account the relevant provisions of Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948. These Acts were repealed and a new Electricity Act 2003 was introduced with effect from 10.6.2003. Hence for the Asst Years 2008-09 and 2009-10 (i.e the years under appeal before us) , the assessee would be governed by the provisions of Electricity Act, 2003.
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> 5.6.1. We have already seen that the ITC's case in Hon'ble Calcutta High Court, proceeded on the basis that the open market for the captive power plant was only a distribution company or a company engaged both in generation and distribution and that the rate at which electricity could be sold by the captive power plant was the one fixed by the tariff regulatory commission. However, such position has undergone sea change inasmuch as during the relevant previous years it was open to the assessee to sell even to a consumer and the price for sale to a distribution company or to a consumer that could be mutually agreed upon notwithstanding the tariff fixed by the State Regulatory Commission. We find that during the previous

year relevant to the Asst Year 2009-10, the assessee in fact sold electricity at rates higher than that charged from it by the State Electricity Board. The assessee nevertheless made the computation for the purpose of section 80IA of the Act with reference to the price charged from it by the State Electricity Board. In such circumstances, we hold that, when it was permissible for the assessee to sell electricity to consumers and distribution licensees at rates higher than that paid by it to the State Electricity Board, the price charged by the State Electricity Board would be a very good indication of the market value of electricity and the assessee did not commit any error in adopting such price for working out the amount eligible for deduction u/s 80IA of the Act.

14. After coming to the conclusion that the decision of the Hon'ble Calcutta High Court in the case of ITC Ltd., (supra) would not be applicable to the case of the Assessee, the Tribunal thereafter went into the question as to what would be appropriate rate to the adopted as sale price by the TPP unit of the Assessee to its Cement manufacturing units. The Tribunal thereafter referred to the decision of the Hon'ble Supreme Court in the case of Thiru Arooran Sugars Ltd. v CIT, (1997) 227 ITR 432 (SC), as to the meaning of the word "Market Price" wherein in the context of market price of sugarcane which was also a commodity whose price was subject to control by the Government held that the price at which a manufacturer buys sugarcane must be taken to be the market price. The Hon'ble Supreme held that if the price is controlled by the Sugarcane Control Order, the controlled price will be taken as the market price, because it is at this price that a willing buyer and a willing seller are expected to transact business. The Tribunal agreed with the submission of the Assessee that as held in the aforesaid judgment of the Hon'ble Supreme Court, the price paid by an assessee for purchase of raw material represents the market price of such raw material produced by the assessee. The said judgment was held not to apply in ITC's case because the Hon'ble Court was of the view that electricity could not be sold to the consumer because of specific prohibition in the erstwhile Electricity Act and as such the price to the consumer could not be taken into account. We find that that is not the position in the instant case. The Tribunal also held that the method adopted by the assessee viz. to take

the average rate charged by the State Electricity Board for the previous month is quite appropriate and reasonable for determining the market value for the month of supply. The tribunal held that the annual weighted average adopted by the ld CITA would result in variations occurring during the year at different times being made applicable uniformly for the whole year and therefore the assessee's method is more appropriate as it factors in variations as and when they take place.

15. On the issue whether electricity duty and cess has to be excluded from the price while determining profits derived from the business, the Tribunal held that they are also to be considered as part of the price. The following were the relevant observations of the Tribunal.

> "<u>5.6.5. Exclusion of Electricity Duty and Cess as directed by ld CITA</u>
> Now coming to the decision of the ld CITA to exclude electricity duty and cess, we find that the same has been addressed by the Hon'ble Gujarat High court in the case of CIT vs Shah Alloys Ltd in Tax Appeal No. 2092 of 2010 dated 22.11.2011, which approved the view taken by the Ahmedabad Tribunal in ITA Nos.844, 2072 and 2073/Ahd/2006 dated 8.1.2010, that the price charged by the Electricity Board inclusive of the amount of Electricity Duty represented the market value even though the assessee was not required to charge electricity duty.
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> 5.6.6. In view of our aforesaid findings, we direct the ld AO to accordingly modify the earlier years profits also which were modified by him, in the same lines as directed for Asst Years 2008-09 and 2009-10 herein. Accordingly, the grounds raised by the assessee in this regard deserve to be allowed and that of the revenue deserve to be dismissed."

16. The aforesaid decision of the tribunal would apply to the present AY also. Respectfully following the order of the Tribunal we allow grounds 2 to 4 & 6 raised by the assessee in its appeal and dismiss ground no.1 raised by the revenue in its appeal.

17. As far as ground no.5 of the assessee's appeal is concerned the interest income derived by Thermal Power Plant cannot be held as income derived from eligible

business for the purpose of allowing deduction u/s 80IA of the Act. No specific arguments were advanced on this issue and this issue was not considered in the decision cited before us. This issue is accordingly decided against the assessee and ground no.5 raised by the assessee is dismissed.

18. Ground no.2 raised by the revenue reads as follows :-

> *2. "That on the facts and in circumstances of the case, the CIT(A) erred in holding that amount of compensation of Rs.23, 71,340/- paid for infringement of mining right was revenue in nature, ignoring the fact that infringed mining right transferred in lieu of compensation had got benefit of enduring nature, hence capital in nature".*

19. We have already seen that the Assessee is also in the business of manufacturing of cement. Limestone is the main raw material for manufacture of cement. The Assessee obtained mining lease from the State Government for quarrying limestone. It had to pay royalty to the State Government in terms of the mining lease. The terms of the mining lease also provided that over and above the royalty payable to the State Government, the Assessee is also required to pay compensation as determined by the local authority/court to the persons whose rights are infringed because of the mining activity. The Assessee claimed the compensation so paid was a revenue expenditure and allowable as a deduction while computing income from business. It was the plea of the Assessee that by incurring these expenses, no interest in land and that compensation has to be paid in order to obtain the raw material for the assessee's business, thereby facilitating the carrying on of its business. The AO however found that in earlier years such claims were disallowed treating it as capital in nature as a part of acquisition of the leasing right over and above the fees paid to Govt. The AO accordingly did not accept the claim of the assessee and disallowed the claim of the Assessee for deduction and added the sum of Rs. 23,71,340/- to the total income of the Assessee.

20. Aggrieved by the order of the AO, the Assessee preferred appeal before the CIT(A). Before CIT(A), the Assessee contended that identical disallowance was made in the assessment year 2006-07 and in first appeal, the CIT(A) by order dated July 9, 2010 deleted the addition made by the AO. Against the said order, the revenue preferred further appeal before the Hon 'ble Tribunal, being ITA No. 1936 (Kol) of 2010. The said appeal has since been rejected by the Hon'ble Tribunal by order dated July 29,2011 (Page 71 to 87 the Paper Book - paragraphs 10-15 at page-77 to 84). The said decision was rendered after considering the judgment of the Hon'ble Supreme Court in Enterprising Enterprises v Deputy Commissioner, (2007) 293 ITR 437 (SC). The said order of the Hon 'ble Tribunal has been followed in first appeal for the assessment years 2007-08 (page 3, para 4), 2008-09 (page 55, para 4) and 2009- 10 (page 110, para 5). It was submitted that in this year also, the compensation amount of Rs.23,71,3401- should be held to be revenue in nature and an admissible deduction.

21. The CIT(A) deleted the addition made by the AO by following the order of the Tribunal in ITA No. 1936/Kol of 2010. Aggrieved by the order of the CIT(A), the revenue has raised Gr.No.2 before the Tribunal.

22. At the time of hearing it was brought to our notice that identical issue was considered by the Tribunal in assesee's own case for A.Y.2008-09 and 2009-10 in ITA Nos. 971/Kol/2012 & 298/Kol/.2013 and this tribunal on an identical issue held as follows :-

> *"2.2. We have heard the rival submissions. We find that the issue under dispute is squarely covered by the decision of this tribunal in assessee's own case for the Asst Year 2006-07 wherein it was held that :-*
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> > *"We have heard the parties and perused the material placed on record. The Ld. Counsel for the assessee has elaborated the facts of the case making reference of several decisions of Tribunal and Hon'ble Supreme Court and High Courts. After careful consideration of the same and evidences filed on record and in the paper book, we find that the assessee is required to pay compensation as determined by the local*

authority/ court to the persons whose rights are infringed because of the mining activity. We also observe that Ld. CIT(A) has properly analyzed the facts of the present case and distinguished the facts decided by the Hon'ble Apex Court in the case of Enterprising Enterprises vs. DCIT (supra) and then only had come to a conclusion that the compensation was paid for the damaged caused on the infringement of right of the land owner. He has also analyzed that the payments are progressively distributed as they work, as they proceed year by year, going on with their work and the payments are in the nature of incidental expenditure to conduct the mine and the business operations. He, therefore, held that the payment of compensation to persons whose rights are infringed by the mining activity is revenue in nature. We, therefore, find no infirmity in the order of the Ld. CIT(A) on this issue and confirmed the same. Ground no. 1 of the Revenue's appeal is thus dismissed.".

The facts in the years under dispute is also analogous to that in earlier years and hence respectfully following the order of this tribunal supra, we don't find any infirmity in the order of the ld CITA in this regard. Accordingly the grounds raised by the revenue in this regard are dismissed."

23. Following the aforesaid decision we uphold the order of CIT(A) and dismiss ground no.2 raised by the revenue.

24. Ground No.3 raised by the revenue reads as follows :-

"3. "That on the facts and in the circumstances the case, the CIT(A) erred in law as well as on facts in holding that subsidy received of Rs.13,59,12,890/- for Industrial promotion assistance from State Govt. was capital in nature, ignoring the fact that the said subsidy was not used for the purpose of acquisition of capital assets".

25. This ground can be conveniently decided with ground no.7 raised by the assessee which reads as follows :-

"7. That on the facts and circumstances of the case, the Learned CIT(Appeals) though holding that Industrial Promotion Assistances ofRs.13,59,12,890/- allowed by State Government is in the nature of capital receipt but erred in directing the Assessing Officer (AO) to reduce the same from the cost of Fixed Assets for the purpose of computing depreciation by applying the Explanation 10 ofSecA3(1) of the I.T.Act. "

26. During the previous year relevant to AY 2010-11, the Assessee received Industrial Promotion Allowance provided to one of its unit Durgapur Hi-tech, Durgapur under West Bengal Investment Scheme, 2000 to the tune of Rs.13,59,12,890/-. It was the claim of the Assessee that the 2000 Scheme was formulated by the West Bengal state Government for the promotion of industry in the state. It was applicable in respect of units to be set up and also to expansion projects of existing units having investment in fixed assets. Industrial projects in the large and medium sectors were eligible for the incentives under the scheme provided such projects were covered by a detailed feasibility report/project report and the project had been approved and sanctioned by the financial institutions/banks. It was the claim of the Assessee that its Durgapur Hi-tech unit fell under Group B and it was an expansion project which qualified as a Mega Project and it was eligible for the incentives under the 2000 Scheme. The amount of IPA to which the assessee was entitled was quantified at 75% of the sales tax paid in the preceding year and the amount of assistance was to be adjusted against the sales tax liability of the year of claim. It was the claim of the Assessee that the Incentive Scheme 2000 Scheme the registration and eligibility certificates granted to the assessee would clear show that the object of the assistance under the 2000 Scheme was to enable the assessee to expand its existing unit. The assistance granted under the 2000 Scheme was in effect an alternative cash disbursement to meet the capital cost of the assets and was a capital receipt and cannot be subjected to tax.

27. The claim of the Assessee was rejected by the AO and he held that the receipt under IPA was a revenue receipt chargeable to tax. On appeal by the assessee the CIT(A) found that same issue was also involved in the assessment for earlier years. In the order for immediately preceding year i.e. AY 2009-10, his Id. predecessor has held as under:-

I have carefully considered the observations of the Assessing Officer in the assessment order and submissions of the appellant. Respectfully, following the judgment of the Hon'ble Jurisdictional High Court in the case of CIT vs. Rasoi Ltd. (supra), this ground of appeal is partly allowed and Industrial promotion assistance received by the appellant is considered as capital subsidy. It is held that the claim of Industrial Promotion Assistance (IPA) of the appellant is capital in nature.

The Assessing Officer is further directed that since, he has treated Industrial Promotion Assistance (IPA) as revenue subsidy and whole of it has been added as income. However, following the judgment of the Hon'ble Jurisdictional High Court in the case of CIT vs. Rasoi Ltd. (supra), this ground of appeal has been partly allowed and IPA has been considered as capital subsidy, the issue of depreciation is to be considered accordingly as per Explanation 10 to Section 43 w.e.f. 01-04-1999 provides that "actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority and further provides that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee."

The Hon'ble jurisdictional High Court has not considered the amendment carried out as per explanation 10 to subsection 5 of section 43 in the case of CIT vs. Rasoi Ltd. (supra) regarding the depreciation on the capital assets since the matter involved was assessment year 1995-96 and the amendment in the explanation 10 was brought into force w. e. f 1.4. 1999. Therefore, in view of the above decision and following my own order of Asst. year 2008-09, the Assessing Officer is directed to re-compute the depreciation on all capital assets in which the capital subsidies have been received by the appellant after taking into consideration explanation 10 to section 43 as held in assessment year 2008-09. This ground of appeal is partly allowed. "

The CIT(A) agreed with the view of his predecessor. The CIT(A) held that the IPA was a capital receipt not chargeable as it was a capital receipt. He however directed the AO to re-compute depreciation on all capital assets in which the capital subsidies have been received by the Assessee in accordance with Explanation 10 to section 43.

28. Aggrieved by the order of CIT(A) in holding that the subsidy in question is a capital receipt not chargeable to tax, the revenue has raised ground no.3 before the Tribunal. Aggrieved by the order of CIT(A) holding that the amount of subsidy should be reduced from the actual cost of the assets acquired out of the subsidies received for the purpose of allowing depreciation, the assessee has raised ground no.7 before the Tribunal.

29. At the time of hearing it was agreed by both the parties that identical issue was considered by this Tribunal in assessee's ow case in A.Y.2008-09 and 2009-10 in ITA Nos. 971/Kol/2012 and ITA No.942/Kol/2013, 298/Kol/2013 and 329/Kol/2013 and this tribunal in its order dated 25.8.2017, on the aforesaid issue held as follows :-

> *"4.3. We have heard the rival submissions and perused the materials available on record including the paper book containing the entire West Bengal Incentive Scheme 2000 and eligibility certificate issued by the competent authority approving the expansion of existing unit thereby approving the fact of assessee falling under the category of 'Mega Unit' under the said scheme. We find that Subsidy could be reduced from the cost only if it is found that the cost for acquiring the asset was directly or indirectly met out of the subsidy. In order to apply the proviso, it is necessary to show that the subsidy had been directly or indirectly used to acquire the asset though it may not be possible to exactly quantify the amount directly or indirectly used for acquiring the asset. For the purpose of applying the proviso, also it has to be found that the asset was acquired by directly or indirectly using the subsidy. It is apparent from the provisions of the 2000 Scheme and the certificate of registration and eligibility certificate that the assistance was to be made available after the commencement of commercial production without any financial cap and was to be adjusted against the sales tax liability of the year of claim. The industrial promotion assistance was clearly not used directly or indirectly to acquire the assets nor any part of the cost of the assets was met directly or indirectly from the industrial promotion assistance. We find that the issue under dispute is squarely covered by the decision of this tribunal in assessee's own case for Asst Year 2007-08 in ITA No. 683 & 581 /Kol/2011 dated 8.12.2014 wherein the grounds raised by the assessee as well as by the revenue were as under:-*

Assessee Ground No. 1

That on the facts and circumstances of the case, the learned CIT(Appeals) though holding that sales-tax incentive of Rs 1238000 allowed by the State Govt. is the nature of capital receipt but erred in directing the Assessing Officer (AO) for reducing the same from the cost of Fixed Assets for the purpose of computing depreciation by applying the Explanation 10 to Sec. 43(1) of I.T.Act.

Revenue Ground No. 2

That Ld.CIT(A)-VI Kolkata has erred in law as well as on facts by deleting the addition made by the AO on account of Sales Tax Subsidy received by the assessee as revenue income of Rs 12,38,000/-.

The decision rendered thereon by this tribunal is as under:-

7. We have heard rival contentions on this issue and gone through the facts and circumstances of the case. We find that the facts are discussed in detail and which are undisputed. It is admitted that the assessee's issue of Sales Tax Incentive is capital in nature for the reason that the very scheme under which the expansion of the unit and subsidy under Rajasthan Sales Tax Scheme, 1998 was received explains the purpose of the scheme as incurring capital expenditure for installation of plant and machinery and for eligible for fixed capital investment. Even the issue of assessee is covered in its favour by Tribunal's decision in assessee's own case all along from A Ys 2002-03 to 2006-07. It is not brought to our notice by the Revenue that the matter has been decided by Hon'ble Calcutta High Court, despite a query from the Bench, In such circumstances, and taking a consistent view, we hold that the CIT(A) has rightly treated the sales tax subsidy receipt as 'capital in nature' .

8. In respect to the issue of application of Explanation-10 to Sec.43(1) of the Act we find from the facts of the case that the Rajasthan Govt. has framed a incentive scheme i.e., R.S.T/C.S.T. Exemptions Scheme 1998 for encouragement of setting up of industrial project or expansion of existing industrial projects. It is also a fact that the maximum limit of the subsidy was restricted with reference to the value of fixed capital investment in land, building, plant & machinery but no part of the subsidiary was specifically intended to subsidize the cost of the any fixed assets, therefore, it cannot be said that subsidy was to meet a portion of cost of asset. According to us, assessee has rightly not reduced the amount of subsidy received from the actual cost/WDV of the fixed assets while claiming depreciation. It is also a fact that revenue during scrutiny assessments of the assessee for AY s 2002-03 to 2006-07 added the subsidy amount as revenue receipt but Tribunal has considered the receipt as 'capital', accepting the contention of the assessee. Even Hon'ble Supreme Court in the case of PJ. Chemicals. Ltd. (supra) has considered this issue and held that where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost, which is the basis for determining the subsidy, being only a measure adopted under the scheme to quantify the

financial aid, is not a payment, directly or indirectly, to meet any portion of the actual cost. Therefore, the said amount of subsidy cannot be deducted from the actual cost under sec. 43(1) for the purpose allowing depreciation. It is further held that if Government subsidy is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as a percentage of such cost, it does not partake the character of payment intended either directly or indirectly to meet the "actual cost". By implication, the above judgment also provides that if the subsidy is intended for meeting a portion of the cost of the assets, then such subsidy should be deducted from the actual cost, for the purpose of computing depreciation. As per Hon'ble Supreme Court, law is that if the subsidy is asset-specific, such subsidy goes to reduce the actual cost. If the subsidy is to encourage setting up of the industry, it does not go to reduce the actual cost, even though the amount of subsidy was quantified on the basis of the percentage of the total investment made by the assessee. The law is already settled on the subject. Now, the only wavering is with reference to Explanation 10 provided under sec.43(l) of the Act. The said Explanation provides that where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee. It is further, provided thereunder, that where such subsidy or grant or reimbursement of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee. In order to invoke Explanation 10, it is necessary to show that the subsidy was directly or indirectly used for acquiring an asset. This is again a question of fact. The relatable subsidy to such asset can be reduced from the cost only if it is found that the cost for acquiring that asset was directly or indirectly met out of the subsidy. Likewise in the proviso, it is necessary to show that the subsidy has been directly or indirectly used to acquire an asset but it is not possible to exactly quantify the amount directly or indirectly used for acquiring the asset. Here also, a finding of fact is necessary that an asset was acquired by directly or indirectly using the subsidy. The above Explanation and the proviso thereto do not dilute the finding of the Hon'ble Supreme Court in the case of P. J. Chemicals Ltd.(supra) that asset-wise subsidy alone can be reduced from the actual cost. The above Explanation and the proviso therein to explain the law. They are not bringing any new law different from the law considered by Hon'ble Supreme Court in the above cases.

9. In view of the above facts and circumstances of the case and legal position explained by Hon'ble Supreme Court in the case of P.J. Chemicals Ltd. (supra), we are of the vie that subsidy receipt should not be reduced from the actual cost of fixed assets for computing depreciation under the provisions of the Act. Accordingly, this issue of revenue's appeal is dismissed and that of the assessee is allowed".

Respectfully following the aforesaid decision of this tribunal supra , we hold that the IPA received by the assessee would have to be construed as a Capital Receipt and the same need not be reduced from the cost of assets in terms of Explanation 10 to Section 43(1) of the Act. Accordingly, the grounds raised by the revenue are dismissed and grounds raised by the assessee are allowed.

30. Respectfully following the aforesaid decision we hold that the subsidy in question is a capital receipt and not chargeable to tax. Ground no.3 raised by the revenue is dismissed. We also hold that capital receipt need not be reduced from the cost of the assets and under Explanation 10 to section 43(1) of the Act. We accordingly allow ground no.7 raised by the assesse in its appeal.

31. Ground No.4 raised by the revenue reads as follows :-

4. "That on the facts and in circumstances of the case, the CIT(A) erred in law as well as on facts in holding that for computing disallowance u/s 14A read with Rule 8D, only investments from which exempt income was received should be considered and restricted the disallowance u/s14A to Rs.l 07.61 lacs instead of Rs.4.17 Cr, ignoring the fact that investments are made in anticipation to earn dividend income and as per provisions of Rule 8D total investments has to be considered to arrive at the quantum of disallowance".

32. This can be conveniently taken up together with ground nos. 12 and 13 raised by the assessee in its appeal. These grounds read as follows :-

12. That on the facts and circumstances of the case, the Learned CIT (Appeals) erred in not. deleting the excess disallowance of Rs.4,17,64,978/- treated by Learned DCIT as expenses attributable to earning dividend income for the year and did not hold that expenses of Rs.5,84,022/- only have been incurred to earn the said income.

13. That without prejudice to ground no.12 above, the ld. CIT(Appeals), erred in confirming the disallowance to the extent of Rs.107.61 lacs for earning exempt income i.e. dividend income. The Learned CIT(Appeals) further erred in computing the expenses in a mechanical manner by applying the provision of Rule 8D, which is at a n excessive figure.

33. The Assessee had earned exempt income of Rs.21, 15,47,865/-. As per the provisions of Sec.14A of the Act, any expenditure in earning income which does not form part of the total income under the Act cannot be allowed as a deduction while computing total income. Rule 8D of the Income Tax Rules, 1962 (Rules) prescribes the mode in which the disallowance of expenses has to be made in terms of Sec.14A of the Act. The Assessee had offered disallowance of a sum of Rs.5,84,022/- u/s 14A of the Act. The assessing officer was not satisfied with the claim of the Assessee and he invoked Rule 8D according and worked out the disallowance at Rs.4,23,49,000/-. He accordingly made disallowance of Rs.4,17,62,918/- over and above disallowance offered by the Assessee.

34. Aggrieved by the aforesaid addition the Assessee preferred appeal before CIT(A). Before CIT(A), the Assessee submitted that the assessee was in the business of manufacturing cement, jute goods, vinoleum, auto trim parts, etc. From time to time, the assessee makes investments out of its own funds in shares of companies and units of mutual funds. The assessee does not borrow any funds for making such investments. The mutual fund investments of the assessee are not in equity oriented funds as defined in the explanation to section 10(38) of the Act and disposal/redemption thereof attracts capital gains tax. Substantial part of the mutual fund investments of the assessee are in growth schemes which do not provide for payment of any dividend during the currency of the scheme. Only some of the mutual fund schemes in which the assessee invests provide for payment of dividend. Such dividend is usually reinvested in the respective schemes without being actually received by the assessee. The assessee receives dividend warrants only in respect of some of its investments in mutual funds and in respect of the shares held by it in companies. The only activity in relation to such dividend income is deposit of the warrants received in the bank account. The Assessee also submitted that during the relevant previous year, there was no change in the share investments of the assessee. In respect of its share investments, the assessee received 6

dividend warrants for an aggregate sum of Rs. 86, 82,091/- which were deposited in the assessee's bank account for the purpose of encashment. The rest of the dividend income of Rs.20, 28,65, 775/- was from investment in schemes of mutual funds providing for declaration of dividend. Out of the said amount, the sum of, Rs.18,31,31,836/- was reinvested in units without physically receiving the warrants. Only 3 warrants for an aggregate sum of Rs.1,97,33,939/- were physically received and had to be deposited in the bank. Break-up as on March 31, 2010 of the assessee's investments which provided for payment of dividend and those which did not so provide was tabulated thus:-

	As at 31.3.09 (Rs. in lakh)	As at 31.3.10 (Rs. in lakh)	Average (Rs. in lakh)	Percentage
1.Investments in mutual fund schemes and other assets including shares which provided for payment of dividend	14026.08	29016.41	21521.25	25.34%
2.Investments in growth schemes of mutual funds and other assets which did not provide for payment of dividend	41567.75	85237.04	63402.39	74.66%

A copy of a statement containing break-up of the assessee's investments was also filed before the CIT(A).

35. The assessee determined the sum Rs. 5, 84,022/- as expenditure incurred in connection with its investments, offered the said amount for disallowance under section 14A in its return and submitted a detailed statement in course of the assessment proceedings in respect of such expenditure. In the said statement, the assessee included

2% of the remuneration paid to Shri P. K. Chand (Chief Financial Officer) and 15% of the remuneration of Shri R.C. Jha, Manager (Finance & Accounts), who were required to spend only a part of their time in managing/maintenance of the assessee's investment portfolio and the entire remuneration of Shri M K. Sharma, Asst. Manager (Accounts). The assessee also included in the said statement the other expenses incurred by it for managing/maintenance of its investment portfolio such as bank charges, telephone charges, stationery and printing charges and conveyance and other expenses. The aggregate expenditure as per the said statement for management/maintenance of the assessee's investment portfolio was Rs.5,84,022/-, which included appropriate proportion of the emoluments of the employees involved in such management/maintenance. A statement and also another statement listing the job profile of the assessee's Chief Financial Officer and Manager (Finance & Accounts) were filed before the CIT(A).

36. It was submitted that the AO in his order arbitrarily rejected the assessee's figure of expenditure. The disallowance under section 14A of the Act was worked out by Assessing Officer by invoking rule 8D at 0.5% of the assessee's average investment of Rs.846.97 crores amounting to Rs. 4,23,49,000/-. It was submitted that almost the entire expenditure incurred by the assessee is in connection with its business of manufacturing diverse goods. Only the surplus business funds of the assessee are invested by it in safe and liquid investments, which activity is looked after by the aforesaid three officers of the assessee to the extent specified in the assessee's statement of expenditure. The assessee's share investments are practically non-moving with only some small additions taking place, if at all. The expenditure of Rs.5,84,022/- incurred in connection with management/maintenance of the assessee's investment portfolio has been correctly tabulated by it in the statement submitted to the Assessing Officer. The said statement includes not only the concerned employees' remuneration but also other office expenses. No other infrastructure of the assessee was utilised in connection with the

management/maintenance of its investment portfolio. The Assessing Officer wrongly did not accept the assessee's statement of expenditure and worked out the disallowance under section 14A by invoking rule 8D at 0.5% of the assessee's average investment of Rs.846.97 crores amounting to Rs. 4,23,49,000/-. In the facts of the assessee's case, the quantum of investment or the amount of investment income are not at all determinative of the quantum of expenditure incurred by the assessee in connection therewith.

37. It was argued that under section 14A (2) of the Act, Assessing Officer is empowered to determine the amount of expenditure incurred in relation to exempt income in accordance with the method prescribed by rule 8D only if the Assessing Officer is not satisfied with the correctness of the assessee's claim of expenditure. Rule 8D also so provides. It was submitted that in the instant case, there is no material to doubt the correctness of the assessee's claim of expenditure incurred in connection with management/maintenance of its investment portfolio. The observations of the Assessing Officer for not accepting the assessee's computation are most vague and general in nature. It was submitted that the Assessing Officer should not have rejected the assessee's computation on the basis of such vague and general observations without citing any material in support thereof.

38. Without prejudice to the aforesaid contention, it was contended that the formula in rule 8D viz. 0.5% of the average investment could have at best been applied by the Assessing Officer in respect of investments which provided for payment of exempt dividend income, averaging Rs.21521.25 lakh. There was no question of making any disallowance of 0.5% in respect of investments which did not provide for payment of any dividend and disposal/redemption of such investments was liable to tax. The amount of disallowance under rule 8D could have at best been 0.5% of Rs.21521.25 lakh i.e. Rs.107.61Iakh and not Rs.423.49 lakh as computed by the Assessing Officer. It

was made clear that the said contention of the assessee was strictly without prejudice to its contention that the formula in rule 8D cannot be applied in its case at all.

39. It was pointed out that for the assessment year 2009-10 the Commissioner (Appeals), by his order dated December 7, 2012, accepted the above alternative plea of the Assessee and disallowed 0.05% of Rs.12444.14 lakh that is Rs. 62.22 lakh, being the average of the investments which provided for payment of exempt dividend income.

40. The CIT(A) found that the issue of disallowance of expenses u/s 14A of the Act was also a recurring issue in the Assessee's case. He found that in the AY 2009-10 his predecessor had considered various contentions made by the Assessee Vide his order dated 07.12.2012 and he rejected the claim that disallowance offered by the Assessee was reasonable and upheld the action of the assessing officer in invoking Rule 8D of the Rules. He however, accepted the alternate plea of the Assessee that only investment which provided for payment of exempt dividend income should be considered for purpose of Rule 8D. Since the material facts in the year under consideration remained the same, the CIT(A) was of the view that there was no reason to differ from the view taken by his Id. predecessor. Following the reasoning given in the said order, while the disallowance made in accordance of Rule 8D was, in principle, confirmed, the assessing officer was directed to exclude the amount of investment which did not provide for any exempt income. The CIT(A) directed the AO to verify the claim of the Assessee that after such exclusion, the average investment to be considered for disallowance under Rule 8D would be reduced to Rs. 21521.25 lakhs and the disallowance should be worked out to Rs.107.61 lakhs.

41. Aggrieved by the order of CIT(A) in holding that while computing the average value of investment only investments which yield exempt income should be considered, the revenue has raised ground no.4 before the Tribunal. Aggrieved by the order of

CIT(A) in not accepting the Assessee's claim of disallowance u/s.14A of the Act as made in the return of income and also not excluding strategic investments (investments in subsidiaries for retaining controlling interest in the group etc.) while working the averge value of investments while applying the formula under Rule 8D(2)(iiii) the assessee has raised grounds no. 12 and 13 before the Tribunal.

42. At the time of hearing both the parties agreed that identical issue was considered and decided by the tribunal in assessee's own case in ITA No.971/Kol/2012, 942/Kol/2013, 298 & 329/Kol/2013 for A.Y.2008-08 and 2009-10 in its order dated 25.8.2017 and this Tribunal on the identical issue held as follows :-

> *"3.3. We have heard the rival submissions and perused the materials available on record. The ld DR vehemently relied on the order of the ld AO. The ld AR prayed that the disallowance made by the assessee voluntarily at Rs 4,00,096/- which was later revised to Rs 4,43,903/- based on the devotion of certain executives of the organization for managing the investment portfolio and other indirect expenses connected thereon , should be accepted and the ld AO had not given any proper finding as to why the said disallowance was not proper. He simply resorted to computation mechanism provided in Rule 8D of the Rules and made disallowance thereon under the third limb of Rule 8D(2)(iii). Alternatively he prayed that 0.5% of dividend bearing investments alone be considered (i.e investments from where dividends were actually received by the assessee alone excluding the dividends that were reinvested) and also prayed for exclusion of investments made in subsidiaries as they are apparently strategic investments. We find that the ld AO had given a finding in the assessment order as to why the workings of disallowance u/s 14A of the Act need to be rejected . Hence it cannot be said that the ld AO had mechanically applied Rule 8D(2) of the Rules for making disallowance u/s 14A of the Act. It was argued by the ld AR that 69.07% of the assessee's investments (including in non-equity oriented mutual funds growth schemes) did not provide for payment of any dividend. Upon redemption / disposal of such investments, the assessee would be liable to capital gains tax and income from such investments is not exempt under the provisions of the Act. He argued that even in respect of the assessee's investments in other schemes of mutual funds providing for payment of dividend, the assessee is liable for capital gains tax upon disposal / redemption of the units since such schemes are also not equity oriented. We find that the ld AR also made an alternative argument that only dividend bearing investments should be reckoned for disallowance under Rule 8D(2)(iii) of the Rules and that strategic investments should be excluded. We find lot of force in the alternative argument of*

the ld AR that only dividend bearing investments are to be considered for making disallowance u/s 14A of the Act. In this regard, the reliance placed by the ld AR on the decision of this tribunal in the case of REI Agro Ltd reported in 144 ITD 141 (Kol) is very well founded wherein it was held that :-

> ***8.1*** *Thus, not all investments become the subject-matter of consideration when computing disallowance under section 14A read with rule 8D. The disallowance under section 14A read with rule 8D is to be in relation to the income which does not form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income. Under the circumstances, the computation of the disallowance under section 14A read with rule 8D(2)(iii), which is issue in the assessee's appeal, is restored to the file of the AO for recomputation in line with the direction given above. No disallowance under section 14A read with rule 8D(2)(i) and (ii) can be made in this case.*

We also find lot of force in the argument of the ld AR that the investments made in subsidiaries would fall under the category of strategic investments as they are admittedly made only for the purpose of obtaining controlling interest in the said companies and not for the purpose of earning dividend income which is exempt. Hence they would stand differently from other regular investments. Reliance in this regard is placed on the decision of this tribunal in the case of Dy CIT vs Selvel Advertising (P) Ltd reported in (2015) 58 taxmann.com 196 (Kol Trib). We also find that the reliance placed in this regard by the ld AR on the decision of the Hon'ble Delhi High Court in the case of CIT vs Oriental Structural Engineers Pvt Ltd in ITA 605/2012 dated 15.1.2013 wherein it was held that :-

> *It was the contention of the revenue that Rule 8D of the Income Tax Rules, 1962 had not been applied properly in respect of the assessment year 2008-09. This aspect has been considered by the Tribunal in detail and it has observed as under:-*
>
> > *6.3. We have carefully considered the submissions and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has given a finding that only interest of Rs 2,96,731/- was paid on funds utilized for making investments on which exempted income was receivable. Further, Ld. Commissioner of Income Tax (Appeals) has observed that in respect of investment of Rs 6,07,75,000/- made in subsidiary companies as per documents produced before him, they are attributable to commercial expediency , because as per submission made by the assessee, it had to form Special Purpose Vehicle (SPV) in order to obtain contracts from the NHAI and the SPVs so formed engaged the assessee company as contract to execute the works awarded to them (i.e SPVs) by the NHAI. In its profit and loss account for the year, the assessee has shown the turnover from execution of these contracts and therefore no expense and interest attributable to the investments made by the appellant in the PSVs can be*

disallowed u/s 14A r.w. Rule 8D because it cannot be termed as expense / interest incurred for earning exempted income. Under the circumstances, Ld. Commissioner of Income Tax (Appeals) is correct in holding that disallowance of a further sum of Rs 40,556/- calculated @ 2% of the dividend earned is sufficient. Under the circumstances, we do not find any infirmity in the order of the Ld.Commissioner of Income Tax (Appeals), hence we uphold the same.

On going through the above observations we are of the view that this is merely a question of fact and does not involve any question of law much less a substantial question of law, as the Tribunal held that the expenses which have been claimed by the assessee were not towards the exempted income. The disallowance, therefore, was rightly limited to a sum of Rs 40,556/-. The question of interpreting Rule 8-D is not in dispute and the only dispute is with regard to facts which have been settled by the Tribunal.

In view of the aforesaid findings and respectfully following the judicial precedents relied upon, we deem it fit and appropriate to remand this issue to the file of the ld AO with the direction to consider all investments (excluding investments in subsidiary companies) which yielded dividend income to the assessee for computing disallowance u/s 14A of the Act r.w. Rule 8D of the Rules . Accordingly the grounds raised in this regard are partly allowed for statistical purposes. "

43. Respectfully following the aforesaid decision we partially uphold the order of CIT(A) and dismiss ground no.4 raised by the revenue and partly allow ground nos. 12 and 13 raised by the assessee and direct the AO to consider all investments (excluding investments in subsidiary companies) which yielded dividend income to the assessee for computing disallowance u/s 14A of the Act r.w. Rule 8D(2)(iii) of the Rules.

44. In the result the appeal by the revenue is dismissed.

ITA No.686/Kol/2014 Assessee's appeal :

45. Grounds No. 2 to 6, 7, 12 & 13 have already been decided while deciding the connected grounds of appeal of the Revenue. The remaining grounds of appeal of the Assessee will be taken up for adjudication in the following paragraphs.

46. Ground No.1 raised by the assessee in its appeal reads as follows :-

> *"1. That on the facts and circumstances of the case, the Learned CIT(Appeals) erred in not directing the AO to allow balance 50% initial depreciation to the extent of Rs.13,83,17,412/- u/s 32(1)(ii) on Plant & Machinery put to use for a period of less than 180 days during the financial yer 2008-09 relevant to Asst. Year 2009-10."*

47. During the financial year 2008-09 (Asst.Year 2009-10). the assessee had purchased & installed new plan & machinery for its manufacturing business. Some of such plant & machinery were put to use for a period of less than 180 days during the said financial year and in respect of such plant & machinery the assessee claimed only 50% of Additional Depreciation u/s.32(1) (iia) in view of the second proviso to section 32(1) of the IT Act. Now during the year under reference, the assessee claimed further depreciation (balance 10%) on those Plant & Machinery on the plea that it is entitled to get the balance depreciation this year also. In support of its claim, the assessee submitted that, clause (iia) of section 32(1) of the Act, as it presently stands after substitution by the Finance Act, 2005 w.e.f. the Asst.Year. 2006-07, provides for allowance of further depreciation equal to 20% of the actual cost of new plant and machinery acquired and installed after March 31, 2005 by an assessee engaged in the business of manufacture or production of any article or thing. Such initial depreciation is to be allowed as a deduction under clause (ii). The second proviso to section 32(1) restricts the allowance of depreciation to 50% if the plant and machinery acquired during the previous year is put to use for a period of less than 180 days in that previous year. The said second proviso specifically makes a reference to an asset referred to in clause (iia). It is because of the said proviso that the assessee claimed only 50% initial depreciation during the assessment year 2009-10. The conditions for allowance of initial depreciation are acquisition, installation and use of the plant and machinery in the manufacturing business and once the conditions are fulfilled, the entire allowance is admissible. The right of the Assessee to such initial depreciation in full should not get affected because of the number of days for which the plant and machinery is used in the

year of acquisition and installation. Initial depreciation is not the same as normal depreciation allowed under section 32(1) (ii) as it is granted as an incentive to encourage industry. Because of the second proviso to section 32(1), the amount of allowance of initial depreciation may get restricted in the first year but the balance amount has to be allowed in the second year. Unlike the first proviso contained in clause (iia) introduced in 2002, the substituted clause (iia) does not specify the year of allowance of initial depreciation. Therefore there is no prohibition on allowing initial depreciation in two years. Further clause (iia) is in the nature of incentive or exemption provision and the courts have taken the view that an exemption provision has to be strictly construed for the purpose of finding out whether an assessee is entitled to the exemption and once eligibility is established the exemption provision will be liberally construed in its application to the assessee.

48. The AO however did not accept the contention of the Assessee. He held that no where in the Act it has been provided that balance 50% of further depreciation can be claimed in the subsequent year if the assessee had claimed initial of 50% depreciation in the year of purchased because of used for less than 180 days in terms of proviso to sec 32(1). Accordingly the claim for further depreciation to the extent of Rs. 13,83,17.412/- pertaining to additions made during assessment year 2009-10 and used for period of less than 180 days was not accepted by the AO. The AO also observed that in the assessment for assessment year 2009-10 also, the department has not accepted the above claim of balance additional depreciation.

49. The Assessee during the course of the assessment proceedings, also submitted before the AO that since the department has not accepted the claim of the assessee on identical claim for additional depreciation during assessment year 2009-10, the claim of depreciation on those assets on which additional depreciation was to be computed as per written down value of the assets as per department's records. The claim of the

assessee was accepted and the depreciation was allowed according to the revised computation of depreciation entitlement as filed by the Assessee.

50. Before CIT(A) the Assessee reiterated submissions made before the AO and further submitted identical claim was rejected on first appeal in the assessee's case for the assessment year 2009-10 by order dated December 7, 2012 , for the assessment year 2008-09 by order dated March 29, 2012 and for 2007-08 by order dated February 28, 2011. The assessee relied on the decision of the Hon'ble Delhi Bench of the Hon 'ble Tribunal in Deputy Commissioner of Income Tax v. Cosmo Films Ltd., (2012) 24 taxmann.com 189, wherein similar claim for additional depreciation spread over for two years was allowed by the Tribunal.

51. The CIT(A) however preferred to follow his predecessor's order for AY 2009-10 and held that the provision of section 32(1) specifically restricts that the depreciation will be provided at half the rate if the assets is used for less than 180 days in the year. Therefore, the same was rightly disallowed by the Assessing Officer. He also held that depreciation u/s 32(1)(iia) of the Income-tax Act, 1961 is available to the Assessee as per provision depending from the period for which it is used. There was no vested right to the Assessee to claim the depreciation u/s 32(1)(iia) in the year in which the machinery was not installed. The CIT(A) also held that the decision of Delhi Bench of Hon'ble tribunal in the case of Cosmo Films Ltd. (supra) cited by the Assessee was contrary to the clear and un-ambiguous provisions of the Act. Therefore, with due respect to the Hon'ble tribunal, he chose to follow the order of his predecessor and upheld the order of the AO refusing the claim for additional depreciation.

52. Aggrieved by the order of CIT(A) the assesse has raised ground no.1 before the Tribunal. At the time of hearing both the parties agreed that identical issue came up for consideration in assessee's own case in ITA No.971/Kol/2012, 942/Kol/2013, 298

& 329/Kol/2013 for A.Y.2008-08 and 2009-10 order dated 25.8.2017. This Tribunal on the identical issue held as follows :-

"7.2. We have heard the rival submissions and perused the materials available on record. We find that the issue under dispute is squarely covered in favour of the assessee by the decision of this tribunal in the case of Hindustan Gum & Chemicals Ltd vs DCIT in ITA Nos. 462 & 752/Kol/2014 for Asst Year 2008-09 vide order dated 8.3.2017 wherein it was held that :-

6.3. We have heard the rival submissions. We find that the issue under dispute is squarely covered by the decision of the co-ordinate bench of this tribunal supra wherein it was held as under :-

"4. Ground no. 1 relating 10 depreciation on plant and machinery which were put to use less than 180 days during the said financial year. During the previous assessment year (2006- 07) the assessee claimed 50% of depreciation and it was allowed. Now for the year under consideration, the assessee claimed further 10% depreciation to the extent of &.20, 97, 495/- under second proviso to Sec. 32(1)(iia) of the Act. The AD denied the same on the ground that the Act does not have option where assessee can claim remaining depreciation in subsequent year. The CIT(A) confirmed the order of the AD. however, directed the AD to recalculate the amount of depreciation on writ/en down value (WDV).

5. . The Ld AR before us submits that the case in hand is squarely covered by the decision of the Hon 'ble Karnataka High Court in the case of CIT & Anr Vs. Rittal India Pvt. Lid reported in (2016) 380 ITR 423 (Karn).

6. The Ld. Sr. DR relied on the orders of the authorities ' below.

7. Heard both the parties and perused the relevant material on record. In this regard, we may refer to the decision of the Hon 'ble High Court of Karnataka in the case of CIT and another vs Rittal India Private Ltd (supra). The facts of the case therein are that the assessee being an existing industrial undertaking had acquired and installed new plant and machinery in the F. Y 2006-07 and claimed 50% of additional 20% depreciation i.e, 10% additional depreciation under section 32(1)(iia) of the Act in the corresponding assessment year 2007-08 for the reason that the new machinery was acquired after 01-10-2006. The relevant portions at page no 's at 9 and 10 of which is reproduced herein below for below for better understanding:-

"The language used in clause (iia) of the said section clearly provides that "a further sum equal to 20 per cent. of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii)". The word "shall" used in the said clause is very significant. The benefit which is to be granted is 20 per cent. additional depreciation. By virtue of the proviso referred to above. only 10 per

cent. can be claimed in one year, if plant and machinery is put to use for less than 180 days in the said financial year. This would necessarily mean that the balance 10 per cent. additional deduction can be availed of in the subsequent assessment year, otherwise the very purpose of insertion of clause (iia) would be defeated because it provides for 20 per cent. deduction which shall be allowed.

It has been consistently held by this court, as well as the apex court, that the beneficial legislation, as in the present case, should be given liberal interpretation so as to benefit the assessee. In this case, the intention of the legislation is absolutely clear, that the assessee shall be allowed certain additional benefit, which was restricted by the proviso to only half of the same being granted in one assessment year, if certain condition was not fulfilled. But, that, in our considered view, would not restrain the assessee from claiming the balance of the benefit in the subsequent assessment year. The Tribunal, in our view, has rightly held, that additional depreciation allowed under section 32(1)(iia) of the Act is a one-time benefit to encourage industrialisation. and the provisions related it have to be construed reasonably, liberally and purposively to make the provision meaningful while granting the additional allowance. We are in full agreement with such observations made by the Tribunal. "

8. Heard both parties and perused the relevant material on record. By reading of Clause (iia) to sub-section (1) of section 32 provides for allowance of initial depreciation equal to 20% of the actual cost of new plant and machinery acquired and installed after March 31, 2005 with effect from the assessment year 2006-07 to those who engaged in the business of manufacture or production of any article or thing. Therefore, the assessee is entitled to claim 20% of depreciation equal to the actual cost of plant and machinery, but, where as the 2nd proviso to section 32(1) of the Act restrains the authority to allow depreciation to 50% of such 20% if the subjected plant and machinery acquired during the previous year and is put 10 use for a period of less than 180 days in that previous year. According to AO in his order at page no-4 referred that the assessee put to use new plant and machinery for less than 1BO days and confirmed by the CIT-A in para-8 of impugned order and it is a requirement under 2nd proviso to section 32(1) which lifts the restriction on AO allow the further depreciation of 10% of which remained unclaimed out of20% as referred in Clause (iia) to sub-section (1) of section 32 of the Act. The facts of the present are similar to the decision supra relied on by the assessee. Therefore, we are of the view that the law laid down by the Hon 'ble High Court of Karnataka in the case of CIT and another vs Rittal India Private Lid supra is applicable to the present case, thus we hold that the assessee is entitled to claim remaining 50% depreciation of such 20% which is equal to the actual cost of new plant and machinery, accordingly ground no-I raised by the assessee is allowed. "

Respectfully following the same, we dismiss Ground No. 2 raised by the revenue".

> *Respectfully following the said decision supra, we hold that the assessee is entitled for remaining portion of additional depreciation in the asst years 2008-09 and 2009-10 and accordingly the grounds raised by the assessee in this regard are allowed."*

53. Respectfully following the decision of the Tribunal the assessee is entitled to additional depreciation (remaining portion). Thus ground no.1 raised by the assessee is allowed.

54. Ground No.8 raised by the assessee reads as follows :-

> *"8. That on the facts and circumstances of the case, the Ld. CIT(Appeals) erred in not holding that provision for leave encashment of Rs.1 ,61,10,394/- is neither a statutory liability nor contingent liability and therefore not to be considered for the purpose of computing disallowance u/s.43B(f) of the I.T..Act, 1961."*

55. The AO disallowed the claim of the Assessee for deduction while computing income from business of a sum of Rs.1,61,1 0,394/- being provision for leave encashment u/s 43B(f) of the Income Tax Act, 1961. Clause (f) to sec 43B provides that any sum payable by an employer in lieu of leave at the credit of his employee shall be allowed only on actual payment and not on mere provision. This clause was inserted by the Finance Act, 2001, w.e.f 1/4/2002, i.e., A.Y. 2002-03.

56. In the case of Exide Industries Ltd v. UOI (2007) 292 ITR 470 (Cal), the Hon'ble Calcutta High Court held that the provision for leave encashment cannot been disallowed under sec 43B(f) of the Act. The Calcutta High Court after referring to the decision of Bharat Earth Movers v. CIT (2000) 245 ITR 428 (SC) held that amendment to sec 43B(f) was not constitutionally valid. The Calcutta High Court held the provision to be arbitrary and vulnerable, because there was no disclosure of reasons for the amendment. The High Court ruled that, while the Legislature was free to make such amendments, reasons therefor should be inferable and such reasons should be consistent with the provisions of the Constitution and the laws of the land. When legitimate business expenditure is

denied without reason, when reason was available for other disallowances under sec 43B, clause (f) of sec 43B is arbitrary and unconscionable as the amendment is to nullify the Supreme Court decision in the case of Bharat Earth Movers v. CIT (supra).The Calcutta High Court further held that leave encashment is neither a statutory liability nor a contingent liability and it is a provision to be made for the entitlement of an employee achieved in a particular financial year. Testing clause (f) with the objects sought to be achieved by the introduction of sec 43B, it was held that the same could not have any nexus with the object sought to be achieved by the original enactment. Sec 43B was originally inserted to plug evasion of statutory liabilities and the introduction of clause (f) was found to be inconsistent with the said object. The Judges held that the amendment brought in could not have nullified the dictum laid down in Bharat Earth Movers case (supra).

57. The Department filed SLP against the decision of the Hon'ble Calcutta High Court and while admitting the same, the Hon'ble Supreme Court vide its judgment dated 08.09.2008 stayed the judgment of the Hon'ble Calcutta High Court until further orders. By another Interim Order passed by the Hon'ble Supreme Court on 08.05.2009, which is as follows:

> "Pending hearing and final disposal of the Civil Appeal, Department is restrained from recovering penalty and interest which has accrued till date. It is made clear that as far as the outstanding interest demand as of date is concerned, it would be open to the Department to recover the amount in case Civil Appeal of the Department is allowed.
>
> We further make it clear that the assessee would during the pendency of this Civil Appeal, pay tax as if section 43B(f) is on the Statute Book but at the same time it would be entitled to make a claim in its returns".

58. The assessing officer added back the provision for leave encashment u/s 43B(f) of I.T.Act, 1961.

59. On appeal by the Assessee, the CIT(A) upheld the order of the AO. Aggrieved by the order of the CIT(A), the Assessee has raised Gr.No.8 before the Tribunal.

60. At the time of hearing both the parties agreed that identical issue was considered by this Tribunal in assessee's own case in ITA No.971/Kol/2012, 942/Kol/2013, 298 & 329/Kol/2013 for A.Y.2008-08 and 2009-10 dated 25.8.2017. This Tribunal on the identical issue held it could be inferred that the Hon'ble Supreme Court had not stayed the judgment of the Calcutta High Court during Leave proceedings. But the Hon'ble Supreme Court had only passed an interim order on the impugned issue. Hence the Tribunal thought it fit and appropriate , in the interest of justice and fair play, to remand this issue to the file of the ld AO to pass orders based on the outcome of the main appeal on merits by the Hon'ble Supreme Court as stated supra.

61. Respectfully following the decision of the Tribunl we set aside the order of CIT(A) and remand the issue to the AO to pass order based on the outcome in the proceedings pending before the Hon'ble Supreme Court in the case of Exide Indusries Ltd. (supra). Thus ground no.8 raised by the assessee is allowed for statistical purposes.

62. Ground No.9 raised by the assessee reads as follows :-

> *"9. That on the facts and circumstances of the case, the Ld. CIT(Appeals) erred in holding that provision for sick leave liability of Rs.10,35,870/- is notional and contingent liability and therefore covered by the provisions of section 43B(f) of the I.T.Act, 1961 ."*

63. Ground no. 12 relates to addition of Rs.10,35,870/- in respect of provision for sick leave. The assessing officer observed that the Assessee had made the provision of Rs..1 0,35,870/- towards sick leave and claimed that the same should be allowed as deduction

while computing income from business. The Assessee claimed that provision had been made as per guidelines given in Accounting Standard AS-15. The assessing officer, however, made disallowance by invoking the provision of section 438(f) of the 1.T.Act, 1961.

64. Before CIT(A), the Assessee submitted that liability on account of provision for sick leave liability of Rs.10,35,870/- was wrongly rejected the claim of the assessee without citing any reason and without considering the submissions of the assessee. In respect of provision for sick leave liability, the Institute of Chartered Accountants of India has issued Accounting Standard (AS) 15 (Revised 2005). In accordance with the said standard, the assessee provided a sum of Rs.10,35,870/- in its profit and loss account for the previous year relevant to the assessment year 2010-11. The said amount was determined by actuarial method to assess the liability including for death-service and incapacity benefits on year wise basis taking into account the following assumptions, which are consistent with the requirements of AS15 (Revised 2005) such as :

(a) Discount rate per annum;
(b) Rate of increase in salary;
(c) Rate of return of plan assets;
(d) Expected average remaining working lives of employees.

This has been done to meet the statutory guidelines issued by the Institute which every company has to follow while preparing its accounts. On retirement or once an employee leaves his job, corresponding amount is reversed and re-credited in the profit and loss account. It was contended that the said amount of Rs.10,35,870/- does not fall within the ambit of section 43B(f) of the Act as said liability was neither a statutory nor a contingent liability and the same should have been allowed as business expenditure.

65. The CIT(A) noted that clause (f) of section 43B read thus:-

"any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee, "

He held that the provision under consideration was for payment liable to be made to the employees in respect of un-availed sick leave at the credit of the employees, Therefore, it fell within the ambit of clause (f) of section 43B of the Act, irrespective of the methodology adopted to assess the liability. The CIT(A) also found that the provision was made in respect of liability accruing on likely benefits of un-availed sick leave at credit of employees. He found that there was no actual financial outflow. The liability was reversed at the time of retirement or quitting of job by the employee, He therefore concluded that the liability was notional and not representing any certain financial liability. He also observed that the liability has been worked out in accordance with Accounting Standard AS-15 but the purpose of Accounting Standard is to encourage prudent accounting by providing for various liabilities. These include, apart from present liabilities, also liabilities such as deferred tax liability etc. This is in line with the conservative approach to recognition of income and expenditure for purpose of accounting. However, that does not determine the allowability of any such provision for the purpose of income tax assessment. The latter is to be decided strictly as per provisions of I.T.Act, 1961. It is well settled that in the assessment for income tax purpose, allowance can be made only in respect of actual liability and not the contingent or notional one. The provision for un-availed sick leave as discussed above does not relate to any actual liability but was a provision for notional and contingent liability. The same is also covered by the provisions of sec ion 438 (f) of the I.T.Act. The addition of RS.10,35.870/- was accordingly confirmed.

66. Aggrieved by the order of CIT(A) the assessee has raised ground no.9 before the Tribunal. The ld. Counsel for the assessee reiterated the submissions as were made before CIT(A) and also filed before us a chart showing as to how the provision for sick leave liability was computed by the assessee and as to how in a case where there was

excess provision made it was being written back in the books of account as AS-15 of ICAI, on the basis of which the liability in question is claimed as deduction was also filed before us.

67. We have considered his submissions and are of the view that this liability is purely notional and cannot be allowed as deduction. It is an admitted position that there is no out flow on this account in any assessment year and the liability is notional and is based purely on entries in the books of account on the basis of notional figures. This may be relevant for the purpose of showing the true and fair view of the state of affairs of the assessee as is required for reporting to share holders and other public authorities. When it comes to computing total income under the Act, such notional liability cannot be allowed as deduction. We concur with the view of CIT(A) in this regard. We are of the view that application of the provision of section 43B(f) of the Act would not be relevant because the liability in question is not otherwise allowable under the Act and Sec.43B of the Act will come into operation only when a expenditure is otherwise allowable under the Act. With this observation we dismiss ground no.9 raised by the assessee.

68. Ground Nos. 10 and 11 raised by the assesee read as follows :-

> *"10. . That on the facts and circumstances of the case, the Learned CIT (Appeals) erred in not holding that interest subsidy of Rs.l,1l,42,419/- received from State Government is a capital receipt and to be excluded from total income.*
>
> *11. That without prejudice to ground no.10 above, the Learned CIT(A) further erred in not holding that the interest subsidy received by one of the Thermal Power Plants (TPP) at Chanderia forms part of income of that unit and should be considered for the purpose of computing deduction u/s.80IA of the Income Tax Act."*

69. The AO observed that during the relevant previous year, one of the units of assessee named Chanderia Cement Works at Rajasthan received Interest subsidy of Rs.1,11,42,419/- based on Investment Promotion Policy of Rajasthan Government

which is applicable to all new investment and investment made by the existing units and enterprises for modernization /expansion / diversification subject to the condition that such unit shall commence commercial production / operation owing to such investment during the operative period of the scheme i.e 1.7.2003 to 31.3.2008. As per the scheme a unit shall be eligible for subsidy under the scheme from the date of payment of sales tax and the amount of subsidy shall be subject to a maximum of 50% of the additional amount of Rajasthan Sales Tax & CST and VAT payable or deposited by the unit over and above the highest tax payable or deposited whichever is higher, in any of the three immediately preceding years. Subject to above clause interest subsidy shall be 5% on maximum side.

70. The said subsidy was considered by the assessee as capital receipt. The ld AO was of the view that the said subsidy was in the form of relaxation of tax and was more for encouragement to entrepreneurs to establish / expand industrial unit in the state of Rajasthan rather than towards acquisition of specific capital assets in that industrial unit. The intention was with the object of supplementing trade receipt and profits of the assessee rather than to assist the assessee in acquiring a capital asset and accordingly the said subsidy is incidental to the carrying on the business of the assessee. Based on these observations, he treated the interest subsidy as a revenue receipt.

71. Before CIT(A), the assessee reiterated the submissions made before the ld AO and also tried to distinguish the earlier order of the ld CITA on the very same issue in the earlier year wherein it was held that the subsidy was revenue receipt and taxable. The ld CIT(A) upheld the order of the AO by relying on the order of his predecessor in AY 2009-10 on an identical issue, wherein it was held as follows:-

> *"16. The whole of the subsidy has been given in respect of setting up of a captive power plant which is not in the nature of expansion. This scheme has been termed as a scheme of interest subsidy. Under this scheme an assessee becomes eligible only if it borrows funds from banks/financial institutions etc. for investing in the new industry/expansion/modernization allowed under this scheme. The subsidy amount is*

calculated @ 5% of the funds borrowed for use in the projects as per this scheme. The subsidy is given only till the assessee pays interest on the borrowed funds. If no interest is payable then the subsidy will not be allowed to the assessee. There is a limit to which subsidy can be claimed which is decided on the basis of the Sales Tax paid in three earlier years. All these features of this scheme show that the subsidy is not given for meeting a part of the capital expenditure incurred by the assessee but for meeting a part of the interest which will be payable on the loan taken for investing in the capital assets. The subsidy granted is revenue receipts which has been granted after setting up of the new industries and after commencement of production. In Sahney Steel & Press Works Ltd. vs. CIT (1997) 228 ITR 253/94 Taxman 368, the Hon'ble Supreme Court stated that the concept of a subsidy (generally) is a "helping hand" provided to industries in their early days to enable them to come to competitive level with other established industries. Subsequently, in Paragraph 31 the Supreme Court, while dealing with subsidies granted after setting up of a new industries and after commencement of production, described such subsidies as "an assistance given for the purpose of carrying on the business of the assessee.

17. The benefit in payment of interest on borrowed capital has been received in the course of carrying on the business and during the continuation of business. The calculation is not directly related to the investment on Pro rata basis but a scale has been formed to grant the incentive. The reimbursement is after the establishment of industry and start of production therefrom by the appellant. The subsidy was not intended to be contribution towards capital outlay of the industry or directly related to it. The receipt of the incentives from the State Government was incidental to carrying on the business of the assessee and not the primary source of capital investment. This subsidy was to be received year after year by reimbursement from payment of additional sales tax subject to maximum 50% of additional sales tax paid by the industry. The significant fact that under the scheme framed by the Government, no subsidy was given until the time production had actually commenced. Mere setting up of the industry did not qualify an industrialist for getting any subsidy. The subsidy was given as help not for the setting up of the industry which was already there but as assistance only after the industry commenced production and that too minimum three years prior to it.

19. The interest subsidy was @ 5% of capital as interest out of interest paid by the industry on the money borrowed for this purpose. The appellate courts have held that the sales tax subsidy is a revenue receipt and this is also indirectly exemption out of sales tax in the form of interest being paid by the industry and reimbursement of the same by the State out of the sales tax. Therefore, in view of the above discussion and following the reasoning an decision of my predecessor in the case of the appellant in the assessment year 2007-08, it is held that the reimbursement of interest out of sales tax payable is not a capital receipt in nature as it does not meet the capital expenditure of the assessee and is a profit earned year after year by the appellant. The Hon'ble High Court of Gauhati in the case of CIT vs. Meghalaya Steels Ltd. reported in (2011) 12 Taxman.com 451(Gau) has held impliedly in para 14 that the subsidies i.e. interest subsidy and transport subsidy are revenue receipts and have granted after setting off of

the new industries and commencement of the production. This grounds of appeal is rejected".

72. The ld CITA also held that the alternate plea taken by the assessee that in case the said interest subsidy is treated as revenue receipt, the same would go to increase the deduction u/s 80IA of the Act to the assessee thereby becoming revenue neutral. This alternate plea was rejected by the ld CIT(A) on the ground that the said interest subsidy was not derived from the industrial undertaking and hence not eligible for deduction u/s 80IA of the Act. Aggrieved, the assessee is in appeal before us.

73. At time of hearing, it was agreed by the parties before us that identical issue arose for consideration in Assessee's own case for AY 2009-10 and in that year, the Hon'ble Tribunal in ITA No. 942/Kol/2013 and ITA No.329/Kol/2013 by its order dated 25.8.2017, held that the interest subsidy in question received under the very same scheme as in the present year, was a capital receipt not chargeable to Tax. The following were the relevant

> "6.2 We have heard the rival submissions and perused the materials available on record. The ld AR drew our attention to page 77 of Supplementary Paper Book Volume III to the order dated 7.6.2007 passed by the Commercial Taxes Officer, Special Circle Bhilwara, Government of Rajasthan , sanctioning a sum of Rs 15,91,813/- towards Interest Subsidy to the assessee. The said order also clearly mentioned that the said interest subsidy of Rs 15,91,813/- would not be paid to the assessee in cash and instead the same would get adjusted with the sales tax liability payable by the assessee. Based on this, the ld AR argued that the interest subsidy also takes the character of sales tax subsidy and hence to be treated as capital receipt. We find that this issue was subject matter of adjudication in assessee's own case for the Asst Year 2007-08 in ITA No. 686 & 581/Kol/2011 dated 8.12.2014 wherein it was held that the said interest subsidy would have to be treated as a capital receipt but with a direction to reduce the same from the cost of assets as per Explanation 10 to section 43(1) of the Act. Later this order was modified by this tribunal in ITA No. 683/Kol/2011 (assessee appeal) dated 9.7.2015 for Asst Year 2007-08 , wherein the issue as to whether the said interest subsidy is to be reduced from the cost of assets as per Explanation 10 to section 43(1) of the Act was restored back to the file of the ld

CITA for fresh adjudication. We find that with regard to treatment of Industrial Promotion Assistance (IPA) as capital receipt or revenue receipt supra in Para 4 above , we have already held it to be a capital receipt and the same need not be reduced from the cost of assets as per Explanation 10 to Section 43(1) of the Act. We find that the subsidy amount was adjusted against the sales tax liability and was not used directly or indirectly to acquire the assets and hence the cost of assets cannot be reduced by the amount of subsidy . We also find that the Hon'ble Jammu and Kashmir High Court in the case of Shree Balaji Alloys vs. CIT, (2011) 333 ITR 335 (J&K) at page 346 held interest subsidy to be a capital receipt. On further appeal by the revenue, the Hon'ble Supreme Court by an order dated 19.4.2016 in Civil Appeal No.10061 of 2011 held that the interest subsidy was a capital receipt in view of its decision in Ponni Sugars (supra) and further held that even if it was treated as a revenue receipt, then the assessee was entitled to deduction under section 80IB/80IC as profits derived from eligible business according to its judgment in CIT v Meghalaya Steels Ltd., (2016) 383 ITR 217 (SC). Hence respectfully following the said decision of the Hon'ble Supreme Court in Balaji Alloys supra, we hold that the interest subsidy is to be treated only as a capital receipt and accordingly the grounds raised by the assessee in this regard are allowed."

74. Respectfully following the decision of the Tribunal in Assessee's own case, we hold that the interest subsidy in question is a capital receipt not chargeable to tax. Thus ground nos. 10 and 11 raised by the assessee are allowed.

75. In the result the appeal by the assesee is partly allowed.

76. In the result, appeal by the revenue is dismissed, while the appeal by the Assessee is partly allowed.

Order pronounced in the Court on 13.09.2017.

Sd/-	Sd/-
[Waseem Ahmed]	[N.V.Vasudevan]
Accountant Member	Judicial Member

Dated : 13.09.2017.
[RG PS]

Copy of the order forwarded to:

1. Birla Corporation Ltd., Birla Building, 4th Floor, 9/1, R.N.Mukerjee Road, Kolkata-700001.
2. D. C.I.T., Circle-6, Kolkata.
3. C.I.T.(A)-VI, Kolkata 4. C.I.T.-II, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head Of Office/ D.D.O., ITAT Kolkata Benches