IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD ñDò BENCH

Before: Shri Amarjit Singh, Accountant Member
And Ms. Madhumita Roy, Judicial Member

ITA Nos. 2693/Ahd/2014 ,
305/Ahd/2015 & CO Nos. 01 & 41/Ahd/2015
Assessment Year 2010-11 & 2011-12

The DCIT(OSD)-1, Circle-4, Ahmedabad & DCIT, Cir. 2(1)(2), Ahmedabad (Appellant/Respondent)	Vs	Jay Chemical Industries Ltd. Jay House, Panchvati Circle, Ambawadi, Ellis bride, Ahmedabad-380006 PAN: AAACJ7625J (Respondent/Cross Objector)

Revenue by: **Shri Vinod Talwani, Sr. D.R.**
Assessee by: **Shri Nimish Viawala, A.R.**

Date of hearing : 18-03-2019
Date of pronouncement : 26-03-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

These two appeals filed by revenue and two cross objections filed by assessee A.Y. 2010-11 & 2011-12, arise from order of the CIT(A)-VIII, Ahmedabad, in proceedings under section 143(3) of the Income Tax Act, 1961; in short ñthe Actò.

2. The brief fact of the case is that return of income declaring loss of Rs. 59,28,500/- was filed on 15th October, 2010. Subsequently, the case was selected under scrutiny by issuing of notice u/s. 143(2) of the act on 25th August, 2011. Remaining facts of the case are discussed while adjudicating the respective grounds of appeals of the revenue and of cross objection of the assessee as under:-

1st ground of appeal (disallowance u/s. 40(a)(ia) of the act in respect of commission expenses)

3. During the course of assessment, the assessing officer noticed that assessee has claimed commission payment of Rs. 3,47,81,265/- to various non-residents on export sales made during the year under consideration. After verification of the detail filed, the assessing officer observed that assessee has not deducted tax on such commission payment made to non-residents, therefore, the assessee was asked to explain why no TDS was made as per provisions of section 195 of the act on such commission payment. The assessee explained that the non-resident agents to whom the commission was paid have rendered services outside India. The assessee has further submitted that as per provision of section 5 and section 9 of the income tax act, no part of commission income was received or deemed to be received in India. It was further submitted that section 195 has to read with the provision of section 4, 5 and 9 of the act and if the payment made to non-resident is not at all chargeable to tax in India then no deduction of tax at source is required to be made on such payments. The assessee has also placed reliance on the decision of Hon'ble Supreme Court in the case of GE India Technology Centre Pvt. Ltd. vs. CIT (2010) 327 ITR 456 (SC) and

CIT vs. Toshoku Ltd. 125 ITR 525 (SC). The assessing officer has not agreed with the submission of the assessee. He was of the view that in the case of the assessee, the income accruing or arising directly or indirectly through or from any source of income in India shall be deemed to accrue or arise in India as per section 9(1)(i) of the act. The assessing officer has stated that commission payment has been made for utilization of their services for procuring order from the overseas companies. The assessing officer was of the view that no doubt the agents must have rendered services abroad and have solicited orders therefrom, but the rights to receive the commission arise in India when the order is executed by the assessee in India and therefore the income accrued is sourced in India. Therefore, he was of the view that income arising in India and is taxable under the act in view of the specific provision of section 5(2)(b) r.w.s. 9(1)(ii) of the act. The assessing officer has opined that the assesse was under obligation to deduct tax at source as envisaged u/s. 195 of the act from the payments made to non-residents towards services rendered by them. Therefore an amount of Rs. 3,47,81,265/- on which TDS has not been deducted was disallowed and added to the total income of the assessee u/s. 40(a)(ia) of the act.

4. Aggrieved assessee has filed appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee stating that commission paid to non-resident agent was not liable to tax under the provision of the act when the services were rendered outside India, payments were made outside and there was no permanent establishment or business connection in India. During the course of appellate proceedings before us, ld. departmental representative has supported the order of assessing officer. On the other

hand, the ld. counsel has submitted paper book containing detail of information and various submissions on this issue made before the assessing officer and ld. CIT(A) during the course of assessment proceedings and appellate proceedings. He has also submitted a paper book containing number of judicial pronouncements delivered by the Co-ordinate Benches of the ITAT Ahmedabad after placing reliance on the decision of Hon'ble Supreme Court in the case of GE India Technology Centre (Pvt.) Ltd. Vs. CIT (2010) 327 ITR 456/193 taxman 234/7 taxman/com 18 that for application of section 195, it is sine quo non that the payment to non-resident must have an element of income liable to be taxed under the income tax act, 1961.

5. We have heard the rival contention and perused the material on record carefully. The assessing officer has disallowed the commission paid to foreign agents by holding that the income arising on account of commission paid to overseas agents was deemed to accrue or arise in India and was accordingly taxable under the provision of section 5(2)(b) r.w.s. 9(1)(i) of the act and the assessee has failed to make compliance with the provisions of section 195(2) of the act. With the assistance of ld. representatives, we have gone through the material on record. In this case, the non-residents agents have rendered their services outside India. All the agents have overseas offices and they were not having any permanent establishment in India. As per explanation below section 9(2) state that income of non-resident shall be deemed to accrue or arise in India under clause (v) or (vi) or (vii) of sub-section (1) included in the total income of the non-resident whether or not the non-resident has a residence or place of business or business connection

in India or the non-resident has rendered services in India. It is clear from the provision that income of the nature of interest or royalty or fees for technical services shall be deemed to accrue or arise in India in the case of non-resident. Therefore, after considering the decision of Hon'ble Supreme court in the case of GE India Pvt. Ltd supra, we consider that provision of section 9(1)(i) are not applicable to the case of the assessee. Regarding applicability of section 195 of the act, we observe that once the income is not taxable, there is no liability of deduction of tax, therefore, it was not applicable for the assessee to deduct tax, therefore, there was no violation of provision of section 195 of the act. After considering the above facts, we observe that in the case of the assessee, the commission paid to non-resident agent was not liable to tax under the provisions of act when the services were rendered outside India, payments were made outside India and there was no permanent establishment or business connection in India. These undisputed facts has not been disproved by the revenue, therefore, we do not find any infirmity in the decision of the ld. CIT(A). Accordingly, this ground of appeal of the revenue is dismissed.

2nd ground of appeal (disallowance u/s. 14A of Rs. 5,95,111/-)

6. During the assessment, the assessing officer noticed that assessee company was having investment of Rs. 1,02,25,000/- in shares of Jay Infra Trade Pvt. Ltd. one of its sister concern. The assessing officer observed that prime motive of assessee company for making investment in the sister concern was to earn dividend which was not includible in the taxable income of the assessee. Therefore, the assessing officer has applied

provision of section 14A and computed disallowance of Rs. 5,95,111/- and added to the total income of the assessee.

7. Aggrieved assessee has filed appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee placing reliance on the decision on the decision of Hon'ble Gujarat High Court in the case of Corrtech Energy Pvt. Ltd. supra wherein the Hon'ble High Court has held that if no exemption has been claimed, there was no question of disallowance u/s. 14A.

8. We have heard the rival contention on this issue. It is undisputed fact that assessee has not earned and claimed any exempt income during the year under consideration, therefore, we consider that ld. CIT(A) has rightly deleted the disallowance after following the decision of Jurisdictional High Court of Gujarat in the case of Corrtech Energy Pvt. Ltd. 45 taxman.com 116 (Guj). Therefore, we do not find any merit in this ground of appeal of the revenue and the same is dismissed.

C.O. No. 01/Ahd/2015 filed by assessee

9. At the time of hearing, ld. counsel of the assessee has not pressed this cross objection, so, the same is dismissed as not pressed.

ITA N. 305/Ahd/2015 filed by revenue

1st and 2nd grounds of appeal of disallowance of commission payment u/s.40(a)(ia) of the act

10. The assessing officer has disallowed the commission paid to foreign agent by holding that the income arising on account commission payable to overseas agents was deemed to accrue or arise in India and was accordingly taxable under the provisions of section 5(2)(b) r.w.s. 9(1)(i) of the income tax act and the assessee has failed to make compliance with provision of sedition 195(2) of the act. The assessing officer has made disallowance of Rs. 24785500/- u/s. 40(a)(ia) of the act. The ld. CIT(A) has deleted the impugned addition stating that similar issue has been decided in the case of the assessee for assessment year 2010-11.

11. We have heard the rival contentions. With the assistance of ld. representatives, we have gone through the material on record and it is noticed that identical issue on similar facts for the assessment year 2010-11 in the case of the assessee vide ITA No. 2693/Ahd/2014 has been adjudicated in favour of the assessee as supra in this order. On careful consideration of the entire fact of the case, we consider that similar issue and identical facts has been involved in this ground of appeal, therefore, following the finding as supra for assessment year 2010-11 in this order, we do not find any infirmity in the decision of ld. CIT(A), therefore, this ground of the revenue is dismissed.

Ground no. 3 (disallowance of interest amounting to Rs. 17,85,407/- u/s. 36(1)(iii)

12. During the course of assessment, the assessing officer noticed from the balance sheet for the year ended on 31st March, 2011 that fixed assets of the assessee company were increased from 157.63 crores to Rs. 178.55/- crores and capital work in progress has also increased from 4.51 crores to Rs. 26.70 crores. He has also noticed that assessee had debited interest expenses of Rs. 10.24 crores in the P & L a/c account during the year under consideration. Therefore, the assesse was show caused to explain why the interest on borrowed fund utilized for CWIP should not be capitalized as per provisions of section 36(1)(iii) of the act. The assessee explained that it has already capitalized the interest of Rs. 32,64,147/- on borrowing used to acquire the capital asset up to the time the capital assets were put to use. The assessing officer has not accepted the explanation of the assessee. The assessing officer was of the view that interest free funds of Rs. 10.82 cores were only available with the assessee during the year under consideration against which the assessee had acquired fixed assets of Rs. 20.92 crores and CWIP of Rs. 21.56 crores during the year. The assessing officer has reported the above facts in his order as under:-

Type of Fund	*As on 31.03.2011*	*As on 31.03.2010*	*Available during the year*
Share Capital & Reserves	*101.19*	*90.37*	*10.82*
Loans Obtained	*190.17*	*141.57*	*48.60*
Assets	*As on 31.03.2011*	*As on 31.03.2010*	*Acquired during the year*
Fixed Assets	*178.55*	*157.63*	*20.92*
CWIP	*26.07*	*4.51*	*21.56*

The assessee has objected to the observations of the assessing officer and made the following submissions:-

> *"The assessee, vide its letters dated 30.01.2014 further submitted as under:*
> *"We are giving the figures of Share Capital and Free Reserves, Investment infixed Assets, creditors for Capital Goods. It will be seen that assessee has sufficient funds to finance the CWIP as at 31/03/2010.*
> *No Loan was availed during FY 31/03/2010. The figure fo term loan as at 31/03/2009 & 31/03/2010 may be reused. The increase infixed assets (actually put to use during FY 31/03/2010 may also be considered. It will be seen that all earlier loan are utilized in that year itself.*
> *The opening CWIP has been considered while calculating the capitalization of interest of current year.*
> *The amount affixed assests put to use & capital work in progress month wise has been considered at pro rata interest has been capitalized.*
> *Interest on the term loan disbursed during the current year has been considered as that loan gone into financing of the new assests.*
>
> *We avail the reimbursement other actually incurring the expenditure.*
> *In A. Y. 04-05 & 05-06 there was dispute about interest free fund available with the assessee. After considering the relevant year cash accrual the Hon 'ble I.T.A.T. held that the assessee had sufficient interest free funds. Considering from that angle the total cash accruals during FY 09-10 are Rs. 20 crores this funds are available for financing the purchase of assests.*
> *We have already capitalized Rs. 32 lacs out of 62 lacs of interest paid.*
> *The proviso to Sec 36(iii) requires that interest must relate to the specific borrowings made for investment in Plant & machinery.*
> *In view of this, there has to be link of the borrowing & investment. The disallowance cannot be made on presumption.*
> *The working capital loans are borrowed for investment in current assets. In facts current assets are quite higher.*
> *Now coming to the main aspect, if the assessee has got interest free fund in excess of investment unless the borrowed funds are linked it cannot be said that borrowed funds are used for a specific purpose.*
> *In the assessee's own case for A.Y. 2005-06, the AO disallowed interest on the ground that borrowings are diverted for investment etc. The hon'ble I.T.A.T. on facts held that the sufficient interest free funds are available with the assessee and therefore no disallowance can be done. The Hon'ble Gujarat High Court has approved the view of I.T.A.T. The relevant decisions are enclosed.*
> *In other independent decisions also same view is taken.*
> *The interest on other loans have been allowed in earlier years.*
> *(sec H. C. decision enclosed) "*

The assessing officer has not accepted the explanation of the assesse and computed the disallowance as under:-

Month	*Loan taken*	*Cumulative sum of Loan*	*Loan Applied for CWIP*	*Interest Total Loan*	*Interest on Application of actual Fund*

Aug-2010	*5,00,00,000*	*5,00,00,000*	*5,00,00,000*	*3,32,877*	*3,32,877*
Sep-2010		*5,00,00,000*	*5,00,00,000*	*3,69,863*	*3,69,863*
Oct2010		*5,00,00,000*	*5,00,00,000*	*3,82,192*	*3,82,192*
Nov-2010		*5,00,00,000*	*5,00,00,000*	*3,69,863*	*3,69,863*
Dec-2010	*6,25,00,000*	*11,25,00,000*	*11,25,00,000*	*4,39,990*	*4,39,990*
Jan-2011	*5,60,72,123*	*16,85,72,123*	*2,20,08,231*	*^10,06,366*	*8,74,978*
Feb-2011	*7,58,03,210*	*24,43,75,333*	*8,02,71,855*	*13,02,711*	*8,74,799*
Mar-2011	*10,91,21,292*	*35,34,96,625*	*11,55,31,501*	*20,87,111*	*14,04,991*
Total Interest to be capitalized					*50,49,554*
Less: Already capitalized by the assessee					*32,64,147*
Net Interest on borrowed fund to be capitalized					*17,85,407*

Consequently the assessing officer has disallowed amount of Rs. 17,85,407/- u/s. 36(1)(iii) of the act.

13. Aggrieved assessee has filed appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee. Relevant part of ld. CIT(A) is reproduced as under:-

> ***"3.3 Decision:***
> *I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The AO noted that there was an increase in value of fixed assets as well as capital work in progress. The appellant had debited interest expenses in the P&L account and accordingly the interest cost was to be capitalised as per the provisions of section 36(i)(iii). The appellant had itself capitalized the interest cost of Rs. 32,64,147/- out of the borrowings used to acquire a capital asset up to the time of capital assets were put to use. The AO did not accept the submission of the appellant and the working given by it and worked out total interest to be capitalised at Rs. 50,49,554/- and after setting off the interest already capitalised by the appellant further disallowance of Rs. 17,85,407/- was made. The appellant on the other hand has submitted that it has already given a detailed working of the calculation of capitalisation of interest. The appellant was purchasing the raw material and fabricating the machines through Labour contactors. The machines were being put to use in stages. The term loan was sanctioned in the middle of the year and by that time many purchases for the machineries were made either appellant by utilising its own funds. The appellant has contended that the presumption of the AO that total loan received was applied for CWIP was not correct. It has been submitted that the*

correct approach was to bifurcate the same between assets put to use and the capital work in progress.
On a careful consideration of entire facts of the case, it is noted that the appellant had given detailed working of interest capitalisation for the year. It had given details of the opening capital work in progress and the monthly accretion therein month-wise during the year. Further it has also given details of capitalisation, Cumulative expenses, Cumulative capitalisation and percentage of C WIP to CAPEX. It is noted that the first instalment of loan was received by the appellant in the month of August 2010 and it has bifurcated the interest by taking into account the percentage of CWIP to CAPEX. For example the percentage of capital work in progress to CAPEX was 69% in the month of August, the interest cost has been proportionately distributed in that ratio. It has been similarly done for other months as well. It is an accepted fact that the appellant has not borrowed money for specifically for the assets and therefore, as per the guidelines issued by the ICAI, a copy of which has also been given by the appellant, the allocation of interest shall have to be made by taking into account by applying a capitalisation rate to the expenditure on that asset. The guidelines specifies that the capitalisation rate should be the weighted average of the borrowing cost applicable to the borrowing of the enterprise that is the outstanding during the period. The method of the AO by capitalising the total loan borrowed for CWIP as long as the Cumulative borrowings are less than the CWIP is not correct as there is no specific borrowing for a particular asset and the appellant has also invested its own money before purchase of assets which was subsequently financed. The method adopted by the appellant is as per the guidelines issued by the ICAI and has also been certified by the chartered accountant in the Audit Report. In view of these facts, I am inclined to accept the submission and calculation given by the appellant. The disallowance made by the AO is therefore, directed to be deleted.
The ground of appeal is accordingly, ***allowed."***

14. We have heard the rival contention and perused the material on record carefully. The assessee has given the working of interest capitalized to the amount of Rs. 32,64,147/- after taking into consideration the capital expenditure incurred for capital asset and the quantum of work in progress from time to time. The assessing officer has disallowed the interest on all the term loans availed after August, 2010 without considering as to what part of the term loan was applied for the new asset which was already put to use. The assessing officer has not disproved the detailed working of the calculation of capitalization of interest given by the assessee. The term loan was sanctioned in the middle of the year and by that time many purchases for machineries were made by the asssessee by utilizing its own funds. We observe that the presumption of the assessing officer that the total term loan received was applied towards CWIP was not based on relevant supportive

evidences. Considering the above facts and the detailed findings of the ld. CIT(A) , we do not find any merit in the ground of the appeal of the revenue. Therefore, this ground of appeal of the Revenue is dismissed.

Ground No. 4 (Disallowance u/s. 80IA)

15. During the course of assessment proceedings, the assessing officer noticed that assessee has claimed deduction of Rs. 32,51,080/- u/s. 80IA (iv) of the act for the first time on account of operation of captive power plant. The assessee has shown income from sale of power of Rs. 1,23,10,500/- and sale of vapour of Rs. 6,59,77,170/-. The assessing officer has asked the assessee to explain why the deduction u/s. 80IA(iv) should not be disallowed since the same is claimed on vapour income of Rs. 6,59,77,170/- and vapour does not fall within the meaning of power. The assessee explained that steam is also a form of power and deduction is also available u/s. 80IA(iv). It has also placed reliance on the decision of CIT(A) for assessment year 2007-08 on the similar issue. The assessing officer has not agreed with the assessee and stated that steam was not generation of power and was not profit derived from the industrial undertaking because the deduction u/s. 80IA(iv) was meant for the generation and distribution of power. The assessing officer has referred the decision of ITAT Ahmedabad in the case of M/s N.R. Agricultural industrial Ltd. vs. DCIT dated 26th July, 2013 wherein it is held that steam is not power and not eligible for deduction u/s. 80IA(iv) of the act. The assessing officer has also referred the decision of Hon'ble Supreme Court in the case of Pandian Chemical Ltd. vs. CIT (2003) 262 ITR 278 wherein it is held that such business profit that has direct

nexus to the essential business activity can qualify for deduction. The assessing officer has further referred the decision of the Supreme Court in the case of Cambay Electronic Supply Industrial Company Ltd. vs. CIT (1978) 1133 ITR 84 wherein it is held that expression ñattributableò was used when the legislature intended to cover the receipt from sources other than the actual conduct of the business. The assessing officer has also stated that in this case the sale of steam would have been liable as deduction u/s. 80IA(iv) if the legislature has used the word profit ñattributable toò instead to ñderived fromò the industrial undertaking. The assessing officer has stated that the Apex Court in the case of CIT vs. Sterling Foods (1999) 237 ITR 579 has held that only such business profit that have direct nexus to the essential business activity of the assessee can qualify for deduction. Consequently, the assessing officer has disallowed the deduction of Rs. 32,51,080/- u/s. 80IA(iv) of the act and added to the total income of the assessee. The assessing officer has also stated that the assessee has applied the sale rate levied by GEB on its consumers. The assessing officer observed that assesee had not to cover subsidy cost, distribution cost and the various losses therefore sale rate of GEB per unit for generation of power should not be adopted. Therefore, deduction u/s. 80IA(4) was restricted to Rs. 1,81,646/-

16. Aggrieved assessee has filed appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee. The relevant part of the decision of the ld. CIT(A) is reproduced as under:-

> ***"4.3 Decision:***
> *I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The appellant had claimed deduction under section 80 I-A for the first time on account of operation of captive power plant. It had shown income from sale of power at Rs. 1.23*

crores and sale of steam at Rs. 6.59 crores. It was held by the AO that the sale of steam/vapour was not entitled for deduction under section 80 I-A and the deduction of Rs, 32,51,0807- was disallowed on this account. Further the AO also noted that the appellant had sold power at the rate of Rs. 6.25 per unit i.e., at the rate at which the appellant was purchasing the power from GEB. The AO adopted the sale price per unit at Rs. 2.5 per unit as the appellant did not incur the cost of distribution, transmission and other subsidies. Accordingly, the deduction was reduced by the AO to Rs.l,81,646/-.

The appellant on the other hand has submitted that the deduction under section 801-A for sale of steam has been allowed in earlier assessment years for 2004 - 05 and 2005 - 06. It has also been submitted by the appellant that the decision of honourable ITAT in the N.R. Agrawal Paper Mills case was not applicable in the appellant's case as in its case the steam was a byproduct. It also placed reliance on the judgement of honourable High Court of Madras in the case of Tanfac Industries fsupraj. However, the appellant also submitted a calculation for the cost of production of steam utilised for generation of electricity and the steam which was utilised by the appellant for other purposes. The appellant furnished all the details related to the boiler, the value of the steam used by the turbine for generation of electricity and the heat value of the steam which was used by the appellant, for manufacturing of chemicals. The submission given by the appellant was forwarded to the AO vide this office letter dated 15/09/2014. The AO submitted comments on the calculation given by the appellant vide office letter dated 15/10/2014. The comments given by the AO were also given to the appellant and it has also submitted its rejoinder. The relevant extracts of the AO's report as well as the rejoinder submitted by the appellant have been reproduced in the preceding pages.

On a careful consideration of the entire facts related to the issue and also considering the additional evidences submitted by the appellant it is noted that the following issues are to be decided here:-

1. Whether the rate of sale of electricity should be taken at Rs.6.25 per unit or at 2.5 per unit as taken by the AO?

2. Whether the appellant is entitled deduction under section 80 IA on sale of steam to the chemical plant?

3. What would be the allocation of expenditure between the eligible and non-eligible units?

4. Whether the depreciation on the eligible unit is to be allowed after considering the carry forward depreciation or only current year's depreciation?

The above issues are decided here under: -

1. The appellant had claimed the deduction by calculating the rate of sale of power to the non-eligible unit at Rs. 6.25 per unit. The rate\ was adopted by the appellant as it was the rate at which the GEB was supplying the power to the appellant. The AO has taken the rate at Rs. 2.5 per unit as she was of the opinion that the appellant is not incurring the expenses on distribution, transmission and the subsidy cost etc. On careful consideration of all the facts if is noted that the issue is decided by majority of Courts and Tribunals in favour of the appellant. It has been held that the rate of sale of electricity is to be taken at the rate at which the appellant is buying from the Electricity Co. The honourable ITAT Ahmedabad In the case of Gujarat State Fertilisers and Chemicals Limited in ITA No. 477/AHD/2010, has held that the saving fo the assessee company on account of power expenses to the extent of power produced in cogeneration plant is equal to the power supply rate of GEB. Accordingly it was held that the rate should be taken at which the consumer is purchasing from the Electricity Board or outside market. The decision of honourable ITAT is logical. In the present case the appellant has also adopted the average rate at which it is buying the power from GEB. Therefore, respectfully following the judgement of honourable ITAT Ahmedabad, the disallowance made by the AO is directed to be deleted on this issue.

2. The appellant has also claimed deduction under section 80 I-A on account of sale of steam to the chemical plant. "The steam was generated by the power plant in the boiler and part of it was also utilised for the chemical processes of the non-eligible unit. The AO has held that the appellant was not entitled to the deduction on account of sale of steam to the power plant. It has been held by her that steam does not fall within the meaning of "power". In this reference she has made reliance on the judgement of honourable ITAT Ahmedabad in the case of N R Agrawal

Industries Ltd Vs DCIT dated 26/07/2013. The appellant on the other hand has submitted that the value of steam should be considered for arriving the profit as the scheme is being generated for generation of electricity and after utilising the same for electricity generation the balance steam is[1] used for the chemical process. Therefore, it is a byproduct and therefore, the deduction was admissible.

On a careful consideration of the facts related to the issue, it is noted that the appellant is generating steam at high-pressure and temperature and the steam is being fed into turbine and the steam which is coming out from turbine is utilised for the chemical process. The details on record to show that the turbine utilised by the appellant for generation of the power is a back pressure turbine. In back pressure turbine the intake is of high-pressure steam which is used for generation of power and the exhaust steam is also at certain pressure so that it can utilised for some other purpose. The design of the turbine is done in such a manner so that all energy of the steam is not utilised by the turbine for generation of power but certain part of it is released in the exhaust steam also. Therefore, the design of the turbine used by the appellant is in such a manner that the exhaust steam is at a certain pressure so that it can be utilised for some other work. Accordingly, this steam cannot be considered as a byproduct but it is intentionally being produced or generated for a specific purpose. Further the intention of the legislature was to provide deduction for generation of electricity and not for generation of steam. The intention is clearly evident from the perusal of the speech of the honourable Finance Minister while introducing the provisions for deduction in the budget. The use of word 'power' is intended for 'electricity' as the other relevant sections clearly mentioned the word 'electricity'. The honourable Bench of ITAT Ahmedabad while deciding the issue in N.R Agrawal Industries Private Limited has discussed these aspects in detail and accordingly relying on the judgement it is held that the appellant is not entitled for deduction under section 80 I-A on sale of such steam to its chemical plant. Accordingly the decision of the AO in this regard is upheld.

3. For the purpose of calculating the quantum of deduction and
allocation of expenditure incurred for production of steam the appellant had given certain information - related to the heat value of steam (Enthalpy). The details given by the appellant were also forwarded to the AO and she has also given her comments on the same. In order to arrive at a logical conclusion it would be useful to understand the process involved. The appellant has installed a boiler which generates high-pressure steam at a very high temperature. The steam is first fed in the turbine where part of the heat energy of the steam is utilised in generating the electricity and the balance energy available in the steam coming out from the turbine is utilised in the chemical process. The appellant is incurring expenses such as coal consumption, boiler running, depreciation of boiler and other machinery and the building in which the whole generation plant is housed. The expenditure for the steam which is utilised in generation of power and the balance steam which is utilised by the chemical plant can be determined by distributing the same in proportion to the heat value (Enthalpy) of the inlet steam and the outlet steam of the turbine. As per the details available on record the heat value of the inlet steam at 65 .5 KG/cm^2 is 793 kcal per KG whereas the heat value of the output steam at 3.5 KG/cm^2 is 653.7 kcal per KG. The quantity of input and output steam remains the same and only the calorific value or the heat value goes down as part of the energy is utilised for generation of power. Accordingly, the expenses can be apportioned in the ratio of enthalpy of the inlet and output steam. The same is worked out as under: -

Total enthalpy of the steam coming out of the boiler	*793 kcal per KG*
The enthalpy of the steam coming out of the turbine	*653 kcal per KG*

The enthalpy utilised by the turbine for generation of electricity	*139 kcal per KG*	
Percentage of energy utilised in the generation of electricity	*17.66%*	
Total expenses for generation .of steam to be allocated on a percentage basis	*Boiler expenses*	*1800000*
	Boiler maint.	*1 728903*
	Coal expenses	*38733894*
	Depreciation other than turbine	*10522945*
	Total expenses	*52785832*
Expenses for steam utilised for	*17.66% of 52785832*	
generation of electricity	***= 9321977***	

In addition to above expenses for generation of steam, the expenses of head office of the appellant company which looks after the management or the affairs of-the Company and also the power plant are also to be disallowed on proportionate basis. It is also noted that the appellant has taken loan from financial institutions for installing the power plant. The appellant is also paying huge amount of interest on the loan. Proportionate allocation of the interest expenditure should also be done and added to the cost of generation of steam. Since the details related to the expenses of head office as well as interest expenditures are not available before me, the AO is directed to work out the proportionate allocation of these expenses by obtaining suitable details from the AO. The details of following expenses are readily available from record: -

Expenses for generation of steam	*9321977*
Depreciation on turbine	*1289189*
Electricity duty	*787872*

The AO is also directed to verify the above figures. Accordingly the AO is directed to rework the deduction under section 80 I-A claimed by the appellant as indicated in the preceding discussion.

4. The last issue which is to be decided is the claim of the appellant regarding depreciation of the power plant. It has been claimed by the appellant that since the plant had a trial run in earlier year the depreciation was claimed by it in A.Y 2010 - 11. The appellant had already claimed this depreciation in the earlier year however, while preparing the profit and loss account and the figures of depreciation therein the total depreciation was claimed without giving effect to the depreciation already claimed in earlier year. During the course of appellate proceedings, it was claimed by the appellant that the depreciation which has already been allowed in earlier year should not be taken into account for calculating the deduction as it was the first year of claim of

deduction and this year should be taken as initially for the purpose of provisions of section 80 I-A. The claim of the appellant was also forwarded to the AO and she has objected to the claim relying on the judgement of ITAT Ahmedabad in the case of Goldmine Shares and Finance 113 ITD 209. The appellant on the other hand has placed reliance on various subsequent judgements of ITAT Ahmedabad in which the similar claim has been allowed. The reliance has been placed by the appellant on the Judgements of Honourable ITAT Ahmedabad in the cases of Jivraj Tea and Industries Ltd 42 taxman.com 461, Sadbhav Engineering Ltd 45 taxman.com 333 and Anil H Lad 45 taxman.com 98.

On a careful consideration of entire facts of the case of it is noted that issue is squarely covered in favour of the appellant by the decision of honourable ITAT Ahmedabad in many cases some of which are also relied by the appellant. Since the appellant has claimed the deduction under section 80 I-A for generation of electricity for the first time, the current assessment year is to be taken as initial assessment year. The depreciation and other losses, if any, pertaining to the same unit for earlier years should not be adjusted from the claim of the present year. The judgement relied by the AO has been overruled by the Ahmedabad bench itself by following the judgement of Madras High Court in the case of Velayudhaswamy Spinning Mills Pvt Ltd 340 ITR 477. The claim of the appellant is accordingly allowed. It would be useful to mention here that in while calculating the allowable deduction in the preceding paragraphs the depreciation claim of the current year only has been taken into account. However, the A.O is directed to determine the correct figures of depreciation while giving effect to this order.

The ground of appeal is accordingly allowed."

17. During the course of appellate proceedings before us, ld. counsel has placed reliance on the decision on West Coast Paper Mills Pvt. Ltd. vs. CIT (2014) 52 taxman.com 268 (Mum-Trib) dated 30th May, 2014. He has further contended that in the case of M/s. NR Agrawal Industries Vs. DCIT, the issue as to steam is power or not is not decided but set aside to the file assessing officer. On the other hand, ld. departmental representative has supported the order of assessing officer.

18. We have heard the rival contention and perused the material on record carefully. With the assistance of Ld. representatives, we have gone through the decision of West Coast Paper Mills Pvt. Ltd. vs. CIT (2014) 52 taxman.com 268 (Mum-Trib). The relevant part of the decision from para 20 to 23 is reproduced as under:-

"20. We have heard the rival contentions, perused the findings of the authorities below as well as the material available on record. The assessee's claim under section 80-IA, with regard to unit No. 6 is that it has installed a power unit in the form of chemical recovery boiler for the generation of steam. This steam is used firstly, to rotate the turbine which generates electrical power for the

assessee which is used in the paper manufacturing process and secondly, for drying of the pulp. For the first use, the steam so generated by the chemical recovery boiler has a high temperature and pressure which is then transferred through the inlet to run the turbines. This transforms to electrical energy which is supplied to paper division for running of the machines. The second use of steam is independently using it for evaporating the moisture from the paper product or for drying pulp by the assessee. On these facts, whether it can be held that the said undertaking on a stand alone basis has been set-up for generation of power or not within the meaning of section 80-IA(4)(iv). The relevant clause (iv)(a) of section 80-IA(4), reads as under :

"(a) is set up in any part of India for the generation and distribution of power if it begins to generate power at any time during the period beginning on the first day of April 1993 and ending on 31st day of March 2006."

21. *Thus, the statute contemplates "generation of power" or "generation and distribution of power". The moot question before us is, whether the steam generated by the assessee, which rotates the turbine for running of machines used for its manufacturing process and also steam alone, is a form of power or not. The case of the learned Commissioner (Appeals) is that the meaning of power as contemplated in the statute is generation of electricity alone, whereas the case of learned counsel before us is that the power is a form of energy which can be electrical, mechanical, thermal or any other form of energy. The Income-tax Act, 1961, does not define the word "power". The New Oxford Dictionary of English defines the word "power" as "energy" that is produced by mechanical, electrical or other means which is used for operating device. Otherwise also, generation of steam is a kind of energy which can be converted into mechanical or electrical energy from which power is generated. To say that the generation of power is only restricted to generation of electricity alone, is too narrow a view. The term "power" encompasses a whole range of energy generated in various forms to run machines, devices, etc. This precise issue had also come up for consideration before the Tribunal in several cases cited supra. The Tribunal in Sial SBEC Bioenergy Ltd.'s case (supra), while deciding the issue whether generation of steam amounts to generation of power or not for the purpose of deduction under section 80-LA, has referred to a catena of decisions and also the dictionary meaning on the meaning and term of "power" and thereafter, observed and concluded as under :*

> *"The word 'power' used in section 80-IA(4)(iv) has not been defined in the statute, then the common parlance meaning as per the dictionary is normally taken into account. The word 'power' has to be given a meaning which is in common parlance and in common parlance the word 'power' shall mean the energy only. The energy can be of any form, be it mechanical, be it electrical, be it wind or be it thermal. The steam produced by the assessee on the principle of interpretation of statute shall only be termed as power and shall qualify for the benefits available under section 80-IA(4)(iv).*
>
> *The assessee is into the business of generation of power. The generation of power takes place when bagasse is burnt in a boiler and heat generated is used to heat up the water in the boiler and generates steam. The steam so generated is at high temperature and pressure. This steam is then transferred into an inlet of steam turbine through pipes. The energy available in steam is used to rotate the turbine, the turbine then rotates the alternator which generates electrical energy. The steam after being used to rotate turbine is drawn from the turbine outlet and then finally used. In this background, the steam so generated is generated by the industrial undertaking and the receipt would be the receipt from the business of the industrial undertaking within the meaning of section 80-IA which would qualify for this benefit. The assessee, therefore, succeeds on this account also. The observations of the authorities below that it is only the electrical form of energy which qualifies for deduction under section 80-IA, with reference to the provisions of the Electricity Act, was not correct."*

22. Similarly, in the decision of Maharaja Shri Umaid Mills Ltd.'s case (supra), the Tribunal held that like electricity, steam is also a form of power which is eligible for relief under section 80-IA(4). The relevant observation and the conclusion drawn by the Tribunal is reproduced below :

> *"5. Considering the above submissions, we find substance in the arguments of the learned authorised representative that like electricity, steam is also a form of power as per the*

dictionary meaning reproduced by the learned Commissioner of Income-tax (Appeals) at pp. 5 and 5 (sic) of the first appellate order. We also concur with the view of the learned authorised representative that there is little room for any doubt that scientifically or in general parlance, 'production of steam' ***'generation*** *of steam[1]: or for that matter, 'production of electricity' and 'generation of electricity', shall* ***have*** *the same meaning whichever of the two be the item under consideration. In this regard the learned authorised representative has also referred to the definition of word 'generate' under section 2(29) of the Electricity Act, 2003 as per which 'generate' means to produce electricity from a generating station for the purpose of giving supply to its any premises or enabling a supplier to be so given. The Assessing Officer has tried to point out the intention of the Legislatures by referring to section 80-IA(4)(iv)(b) to infer that intention is to provide benefit to the generation of electricity only, since in the sub-clause (b) transmission and distribution lines are mentioned which can be of electricity only. Submission of the learned authorised representative in this regard to which we also agree remained that sub-clauses (a), (b) and (c) of section 80-IA(4)(iv) provide for deduction in the cases of three types of undertaking, viz. the one which is engaged in generation or generation and distribution of power ; second, which start transmission or distribution lines ; and the third, which undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines. All these three clauses deal with the three different categories of the undertaking. These three types of undertakings referred to in the said sub-clauses (a), (b) and (c) are different and independent of each other. Thus while dealing (with) one sub-clause, inference need not and cannot be drawn from the other subclause. On perusal of these provisions, we agree with the plea of the learned authorised representative that case of the assessee falls in sub-clause (a) itself and the legislative intent inferred by the Assessing Officer with reference to sub-clause (b) is superfluous, just like there is transmission or distribution lines for electricity there are transmission and distribution lines for steam too. Therefore, there is no basis whatsoever for drawing distinction between the two or a room for any confusion between the two propositions. The 'power' and 'energy' are synonymous, which can be in several types and forms, be it heat, which is steam or mechanical or electrical, wind or be it thermal. We also agree with this plea of the learned authorised representative that if the intent of the Legislature remained to restore the application of the benefit of deduction under section 80-IA to generation of electricity only, it would have been specifically so worded by using the connotation 'electrical power' only rather than the connotation 'power' omnibus. As per Chambers Twentieth Century Dictionary, steampower ; is a spell of travel by steam power; energy, force, spirit for, using, worked by steam ; to rise or pass off in steam or vapour, or smell; to become dimmed with condensed vapour (often with up); to move by means of steam. As per the Cambridge International Dictionary of English, the steam is the hot gas that is produced when water boils ; steam can be used to provide power, steam turbines of a steam engine/locomotive of the age of steam. Thus there is no doubt, like electricity, steam is also a form of power. The arguments advanced on behalf of the assessee also find support from the decision of the Delhi Bench of the Tribunal in the case ofSial SBEC Bioenergy Ltd. v. Dy. CIT [2004] 83 TTJ (Del) 866 on an identical issue wherein dealing with the matter in detail, it has been held that the word 'power' has to be given a meaning which is in common parlance and in common parlance the word 'power' shall mean the energy only. The energy can be of any form, be it mechanical, be it electrical, be it wind or be it thermal. The steam produced by the assessee on the principle of interpretation of statute shall only be termed as power and shall qualify for the benefits available under section 80-IA(4)(iv), held the Tribunal. Under these circumstances, we fully concur with the decision on the issue arrived at by the learned Commissioner of Income-tax (Appeals) that the assessee is in the business of generation of power and that the steam so generated by the industrial undertaking and receipt from the business of industrial undertaking is within*

the meaning of section 80-IA which would qualify for this benefit. The first appellate order is thus upheld. The ground is thus rejected."

23. From the aforesaid decisions, it can be inferred that the generation/ production of steam is also a form of power and the unit 6 which is an undertaking set-up for generation of steam for its manufacturing process can be said to be for generation of power. The basis on which the learned Commissioner (Appeals) has tried to distinguish the decision of Sial SBEC Bioenergy Ltd.'s case (supra) is very superficial. What needs to be seen is, whether generation of steam can be said to be generation of power I or not, then, the finding and the conclusion drawn by the Tribunal in the aforesaid decision after referring I to the catena of decisions and various other provisions clearly clinches the point. Now coming to the other I observation of the learned Commissioner (Appeals) that the assessee has not undertaken the generation of I power in this year also, we find that the same is incorrect on facts because the assessee has already filed a I certificate from the Karnataka State Boiler Inspection Department that the assessee has generated steam I during the period from May 3, 2001 to May 6, 2002 which mostly falls in this year only and the rate of quantity generated has also been mentioned. This generation of steam has been evaluated at a realisable market value by the assessee in its books of account and the assessee has also debited expenditure incurred for the generation of power. Thus, on these facts itself, it cannot be held that the assessee has not undertaken the generation of power in this year. The section provides that the assessee must begin to generate power during the period defined under the statute and the impugned assessment year definitely falls within that period. Lastly, in so far as the observation and the conclusion of the Assessing Officer, which are based on similar reasons as given for units-1 to 5, the same is also not sustainable as the Tribunal has already decided the issue on these reasoning in favour of the assessee. Thus, we set aside the impugned order passed by the learned Commissioner (Appeals) on this score and hold that the assessee is eligible to claim deduction under section 80-IA with regard to unit-6 also as a standalone power generating undertaking. Ground No. 5 raised by the assessee is thus treated as allowed."

Respectfully following the decision of the Co-ordinate Bench of ITAT Mumbai supra on identical issue and facts and after considering the detailed findings of the ld. CIT(A) , we do not find any error in the decision of ld. CIT(A), therefore, this ground of appeal of revenue is dismissed.

Ground no. 4 (Disallowance of Rs. 19,09,800/ u/s. 14A)

19. During the course of assessment proceedings, the assessing officer noticed that assessee company has made investment in shares of its own subsidiary company. The assessing officer has further stated that assessee has not eaned any exempt income u/s. 10 on the investment but possibility of earning such tax free income cannot be ruled out. Accordingly he has

computed disallowance u/s. 14A r.w. Rule 8D to the amount of Rs. 19,09,800/- and added to the total income of the assessee.

20. Aggrieved assessee has filed appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee by following the decision of Hon'ble Jurisdictional High Court in the case of Corrtech Energy Pvt. Ltd. 45 taxman.com 116 wherein it is held that no disallowance can be made if no exemption from the income has been claimed. Respectfully following the decision of Jurisdiction High Court as cited above, we do not find any infirmity in the decision ld. CIT(A), therefore, this ground of appeal of the revenue is dismissed.

C.O. No. 41/Ahd/2015 filed by assessee

21. At the time of hearing, ld. counsel of the assessee has not pressed this cross objection, so, the same is dismissed as not pressed.

22. In the result, the appeal ITA 2693/Ahd/2014, ITA 305/Ahd/2015, cross objection 01/Ahd/2015 & 41/Ahd/2015 all are dismissed.

Order pronounced in the open court on 26-03-2019

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(AMARJIT SINGH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad : Dated 26/03/2019

आदेश क□□ति□लिप अ□ेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद