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

BEFORE SHRI R.C.SHARMA, AM
&
SHRI PAWAN SINGH, JM

ITA No.6821/Mum/2004
(Assessment Year 1998-99)
ITA No.4900/Mum/2006
(Assessment Year 1999-00)
ITA No.4901/Mum/2006
(Assessment Year 2000-01)
ITA No.4902/Mum/2006
(Assessment Year 2001-02)
ITA No.6305/Mum/2005
(Assessment Year 2002-03)
ITA No.2801/Mum/2007
(Assessment Year 2003-04)
ITA No.445/Mum/2009
(Assessment Year 2004-05)
ITA No.446/Mum/2009
(Assessment Year 2005-06)
ITA No.6734/Mum/2011
(Assessment Year 2006-07)
ITA No.6735/Mum/2011
(Assessment Year 2007-08)
ITA No.6737/Mum/2011
(Assessment Year 2008-09)
ITA No.6190/Mum/2012
(Assessment Year 2009-10)
ITA No.370/Mum/2015
(Assessment Year 2010-11)

M/s. Parle Products Pvt. Ltd., North Level Crossing Vile Parle (E) Mumbai - 400057	Vs.	ACIT CEN CIR-25 / DCIT CEN CIR-24, / CIR 25 Aayakar Bhavan Mumbai-400020
PAN/GIR No.AAACP0486A		
Appellant)	..	**Respondent**)

ITA No.6964/Mum/2004
(Assessment Year 1998-99)
ITA No.5362/Mum/2006
(Assessment Year 1999-00)
ITA No.5363/Mum/2006
(Assessment Year 2000-01)

ITA No.5364/Mum/2006
(**Assessment Year 2001-02**)
ITA No.6529/Mum/2005
(**Assessment Year 2002-03**)
ITA No.3891/Mum/2007
(**Assessment Year 2003-04**)
ITA No.1156/Mum/2009
(**Assessment Year 2004-05**)
ITA No.1157/Mum/2009
(**Assessment Year 2005-06**)
ITA No.6715/Mum/2011
(**Assessment Year 2006-07**)
ITA No.6714/Mum/2011
(**Assessment Year 2007-08**)
ITA No.6713/Mum/2011
(**Assessment Year 2008-09**)
ITA No.5946/Mum/2012
(**Assessment Year 2009-10**)
ITA No.397/Mum/2015
(**Assessment Year 2010-11**)

ACIT CEN CIR-25 / DCIT CEN CIR-24, / CIR 25 Aayakar Bhavan Mumbai-400020	Vs.	M/s. Parle Products Pvt. Ltd., North Level Crossing Vile Parle (E) Mumbai - 400057
PAN/GIR No.		**AAACP0486A**
Appellant)	..	**Respondent**)

Assessee by	Shri Nitesh Joshi
Revenue by	Dr. Rajeev Harit and Ms. Aarju Garodia
Date of Hearing	**10/01/2018**
Date of Pronouncement	**22/01/2018**

आदेश / O R D E R

***PER BENCH*:**

These are the cross appeals filed by the assessee and revenue against the order of CIT(A)-V, Mumbai for the A.Y.1998-99 to 2010-11 in the matter of order passed u/s.143(3) of the IT Act.

2. Most of the grounds taken by assessee and revenue are common in all the years under consideration, therefore all the appeals were heard together and are being decided by this consolidated order.

3. Ground taken by the assessee in A.Y.1998-99 reads as under:-

> *The appellant objects to the order dated 12 July 2004 passed by the Commissioner of Income-tax (Appeals) Central Circle -V, Mumbai ["Commissioner (Appeals)"] for the aforesaid assessment year on the following among other grounds:*
>
> *1 The learned Commissioner (Appeals) erred in confirming the action of Assessing Officer in rejecting the book results of the appellant. He erred in holding that the books of accounts cannot be said to be complete.*
> *He erred in observing in para 3,.4 of his order that the assessing officer has not specifically invoked the provisions of section 145 of the Act but the manner in which the appellant's income has been estimated is indicative of the same.*
> *He further erred in observing in para 3,4 of his order that in this context, as pointed out earlier, the Id. A.O. has brought out that the books of accounts of the appellant are not complete in as much as these do not enable the determination of the profits of the classes of products manufactured by the appellant.*
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> *2 The learned Commissioner (Appeals) erred in confirming an addition of Rs. 2,35,74,949 out of an addition of Rs. 9,76,18,200 made by the assessing officer on account of alleged suppressed production resulting into suppressed sales of biscuits. He erred in comparing the yield derived by the appellant's factory in Mumbai with that of its Contract Manufacturing units.*
>
> *3 The learned Commissioner (Appeals) erred in confirming an addition of Rs. 26,46,754 out of an addition of Rs. 63,01,795 on made by the assessing officer on account of alleged suppressed production resulting into suppressed sales of biscuits. He erred in comparing the yield derived by the appellant's factory in Mumbai with that of its Contract Manufacturing units.*
>
> *4 The learned Commissioner (Appeals) erred in confirming the action of the assessing officer in disallowing expenditure of Rs. 13,06,342 on the grounds that the expenses pertain to the earlier years.*

5 The learned Commissioner (Appeals) erred in confirming the action of assessing officer in disallowing long-term capital loss of Rs. 41,200 on redemption of preference shares.

6. The learned Commissioner (Appeals) erred in confirming the disallowance of Publicity general expenses Rs. 1,76,023.

7 The learned Commissioner (Appeals) erred in not directing the assessing officer to allow deduction of Rs. 14,82,636 being provision made for leave encashment. He erred in observing in para 13.3 of his order that as the claim for deduction has been made by way of note to the Return of Income the assessing officer could not have varied downward the returned income of the appellant.

8 Each one of the above grounds of appeal is without prejudice to the other.

9 The appellant reserves the right to amend, alter or add to the above grounds of appeal.

3. Grounds taken by Revenue in the A.Y.1998-99 reads as under:-

I. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in :

a. Deleting the addition of Rs.7,40,71,044/- on account of suppression / sales Of biscuits.

b Deleting the addition of Rs.36,55,041/- on account of suppression / sales of Confectionery.

c. Directing to allow depreciation on plant and machinery of Rs.18,61,835/-wrongly relying on the CIT(A)'s order for A.Y. 1996-97, where in fact the CIT(A) had rejected the assessee's claim of depreciation on such Machinery.

d. Allowing relief of Rs.8,52,050/- on account of foreign travel expenses.

II. The Appellant craves to leave toad, to amend and/or to alter any of the grounds of appeal, if need be.

III. The appellant, therefore, prays that on the grounds stated as above, the order of the CIT(A) - C-V, Mumbai may p^ set aside and that of the Assessing Officer restored.

4. Facts in brief are that the assessee is engaged in the business of manufacturing biscuits and confectioneries of different varieties. It also gets some of the items manufactured on contract basis from various Contract, Manufacturing, Units (CMUs) located all over the country. Ten of the CMUs were manufacturing biscuits and 5 of the CMUs were manufacturing confectioneries. The technical knowhow as well as the raw material for the CMUs is provided by the assessee and the manufacturing in the CMU is conducted under the direct supervision of employees of the assessee. From the details filed, the Ld. A.O. observed that the yield for this manufacture was 82.677% in assessee's own unit whereas the average yield in the CMUs was 91.277%. After considering the explanations given by the assessee, the Ld. A.O. noted that while most of the CMUs were manufacturing biscuits identifiable by the trade name 'Parle-G', the assessee's own manufacturing unit produced both Parle-G biscuits and other biscuits. No separate registers was being maintained in the assessee's manufacturing unit which could lead to the determination of the yield in the manufacture of Parle-G biscuits and other biscuits separately. He also noted that some of the CMUs were also manufacturing biscuits other than Parle-G and their yield was almost the same as those of the other CMUs exclusively producing Parle-G. Therefore, in the opinion of the Ld. A.O., the assessee's books of accounts were not reliable. Similarly, there was a difference in yield in the confectionery manufactured by the assessee in its own unit and the

manufacturing results of the CMUs. Accordingly, AO rejected the book results and made addition on account of suppression of production.

6. By the impugned order CIT(A) allowed part relief to the assessee after having the observation as under:-

> *"There are no changes in the basic facts and contentions of the case the year under consideration as compared to the earlier A.Y. 1996-97. The assessee has reiterated the same submissions as were made in the earlier A.Y.1996-97 to the A.O. and during appellate proceedings. The assessee has prepared a statement showing "Without prejudice" the computation of the amount to be disallowed on the same basis as determined by the CIT(A) for the A.Y. 1996-97. In this statement part A gives the disallowance made by the A.O. and part B gives the disallowance on the basis made by the CIT(A) for the A.Y. 1996-97. The yield of CMUs in the production of biscuits (primarily Parle-G brand) was 91.28% whereas the yield of Parle-G biscuits in assessee's own manufacturing units has been determined at 87.61% i.e. a difference of 3.67%. It is clarified that for the purpose of working out the consumption of raw material the yield of Parle-G production in the assessee's unit, the input/output on the basis of batch has been adopted by applying a standard input/output batch size, as had been done for A.Y. 1996-97 and formed the basis of the decision of my learned predecessor. Therefore, the consumption is an assumed figure and may not be the actual consumption. The suppressed production has been worked out by applying shortfall of 3.67% to the consumption of raw materials for Parle-G biscuits in assessee's own unit. The value of suppressed production is worked out at 2,35,74,949/- On this basis the addition made by the A.O. of Rs 9,76,45,993/- is reduced to Rs 2,35,74,949/- and assessee is entitled to relief of Rs 7,40,71,044/-."*

7. Against above order, both assessee and revenue are in further appeal before us.

8. We have heard rival contentions. Assessee has raised ground with regard to reduction of books of accounts, addition on account of alleged separate suppressed production resulting in suppressed sales of biscuits.

The AO has dealt with these issues the order at para 2 & 3, the CIT(A) has dealt with the issues at para 3 to 5.

9. At the outset, learned AR placed on record the order of the Tribunal in assessee's own case for the A.Y.1996-97 wherein exactly similar issue was decided by the Tribunal in assessee's favour. The precise observation of the Tribunal was as under:-

> *45. Ground no.8 raised by the Revenue corresponding to ground no.5 raised by the assessee are on the issue of addition made with regard to suppressed production resulting in suppressed sales of biscuits.*
> *46. Brief facts are, during the assessment proceedings, the Assessing Officer while examining tax audit report of the assessee found that as per quantitative details of consumption in production mentioned therein, percentage of yield works out to 92.55%. He, therefore, called upon the assessee to furnish quantitative details of raw material consumed in the manufacture of biscuit and confectionary separately; percentage of yield in respect of biscuits and confectionery; percentage of shortage / wastage in the process of manufacturing biscuits and confectionery separately; monthly statement of item-wise purchases of raw materials; monthly statements of item-wise consumption of raw materials and packing materials in the process of manufacturing biscuits and confectionery separately; monthly yield of final products item-wise; monthly statement of sales item wise and so on. After verifying the details submitted by the assessee, he found that overall percentage of yield both in respect of biscuit and confectionary comes to 84.50%. Whereas, as per the audit report, the yield* ***works*** *out to 92.55%. Further, the Assessing Officer observed, in the statement of quantitative details submitted before him, the assessee has shown 1059 MTs of coco vita oil as against 1860 MTs reported by the auditor. Further, though, the assessee in the statement furnished before the Assessing Officer has claimed consumption of "other materials" at 3335 MTs. It was not mentioned in the tax audit report. Further, the assessee has revised the figures of consumption of Mumbai unit from 36690 MTs to 38490 MTs. To further verify the percentage of yield the Assessing Officer sought information from the contract manufacturing units. From the information obtained from contract manufacturing units, he found that consumption of other materials were shown at nil. He also found variation in the consumption of material as recorded in the books of the assessee for contract manufacturing units. He also observed, all the raw materials are provided by the assessee to the contract manufacturing units. He*

further observed, as per revised statement filed during the assessment proceedings, the yield for Mumbai Unit worked out to 82.67% for Biscuit and 85.99% for confectionary. Whereas, the corresponding figure for contract manufacturing unit were 91.65% and 100.24% respectively. When the Assessing Officer called upon the assessee to explain the difference in consumption, the assessee submitted that the difference in consumption of coco vita oil was on account of clerical mistake and the actual consumption was 1860 MTs. Thus, on the basis of difference found in the percentage of yield as per tax audit report and the statements filed by the assessee as well as the information obtained from the contract manufacturing units regarding percentage of yield, the Assessing Officer called upon the assessee to submit further details and also the standard formula applicable for consumption and production. In response, the assessee submitted, itemwise details of consumption and production cannot be filed as it was manufacturing various items and the details submitted before the Assessing Officer were as per books of account. The assessee also submitted, quantity of itemwise ingredients for various items of confectionary was taken as a whole and no separate records were available. To explain reason for difference in percentage of yield between its manufacturing unit at Mumbai and the contract manufacturing units assessee submitted, its unit at Mumbai was manufacturing various items of biscuits and confectionary for many years while the contract manufacturing unit have started recently and were mainly manufacturing Parle-G biscuit. The assessee, though, admitted that there is a standard formula but the theoretical form is not scientific and practical for working out consumption and production. Further, the assessee submitted, the standard formula cannot be applied due to various other factors as enumerated before the Assessing Officer. The assessee also advanced various other reasons for difference in percentage of yield between its Mumbai unit and contract manufacturing units. The Assessing Officer, however, did not accept the contention of the assessee on various grounds as summarized in Para-19.5 of the first appellate order. Further, the Assessing Officer comparing the production and sales at Mumbai unit with that of contract manufacturing units found that the sales at Mumbai unit was much less than the quantity available for sale, while for contract manufacturing units the quantity sold was more than the quantity available for sale. The Assessing Officer observed, as per standard formula, the yield should work out to 92.59%. He observed, the contract manufacturing units were showing average yield of 91.65% whereas, the Mumbai unit was showing yield of 82.69%. Thus, the Assessing Officer inferred that the assessee did not maintain records for consumption, production and sales of Mumbai Unit in a proper manner or the details were withheld purposely. Thus, on the aforesaid reasoning, the Assessing Officer taking into consideration the difference in percentage of yield shown by the

contract manufacturing units and the assessee concluded that such difference of 8.96% was suppressed production resulting in suppressed sales. Taking into consideration consumption of raw material of Mumbai unit at 37498 MTs, he worked out the suppressed production at 3359.820 MTs and by adopting Rs.36,025, as average sale price, the Assessing Officer worked out the suppressed production of biscuits resulting in suppressed sales at Rs.12,10,44,000 and added it to the income of the assessee. Being aggrieved of such addition, assessee preferred appeal before the first appellate authority.

47. *In the course of hearing of appeal before the learned Commissioner (Appeals), assessee contesting the addition made by the Assessing Officer submitted that the Assessing Officer did not appreciate the facts properly. It was submitted, the difference in coco vita oil was on account of typographical error. It was submitted, the quantity of other raw material though specifically not mentioned in the printed account but the value was shown. Reiterating the stand taken before the Assessing Officer, it was submitted that contract manufacturing units were manufacturing less number of brands as compared to Mumbai unit. It was submitted, the standard formula of manufacturing cannot be applied due to various factors including wastage in the manufacturing process. In this context, the assessee submitted the different variety of biscuits and confectionary manufactured by contract manufacturing units. The assessee furnishing a statement of reconciliation of sales submitted that the Assessing Officer did not consider the sales from depots and the outstandings available at different units and depots. In this context, the assessee specifically pointed out all discrepancies in figures taken by the Assessing Officer. The assessee also furnished copies of excise record to substantiate the production as recorded in the books of account. It was submitted, since, the assessment year 1992-93 the percentage of yield shown by the assessee was about 83% and in assessment year 1995-96, it was shown at 81.65%. In this context, the assessee submitted the working of yield for Mumbai unit for ParleG biscuit after considering wastage and operational loss of 350 MTs, heating loss of 1978 MTs, moisture of 405 MTs and excess weight of packaging in 642 MTs are worked out at 88.24%. It was submitted, in respect of contract manufacturing units also the percentage of yield varied between 87.85% to 100.35%. Thus, it was submitted, there is no suppression of production therefore, addition made should be deleted.*

48. After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) upheld the rejection of books of account accepting the reasoning of the Assessing Officer, As far as the quantum of yield is concerned,

after examining the material on record he observed that the yield of Mumbai unit is less than the yield of contract manufacturing units. However, he accepted assessee's contention that in the manufacturing process, standard formula cannot be applied strongly though it may be a guiding factor for appreciating the result. From the material on record, he found that the yield of contract manufacturing units vary between 87.85% to 100.35%. Therefore, adopting average yield of 91.65% for all contract manufacturing unit will give a distorted picture. Referring to the percentage of yield of few contract manufacturing units, the learned Commissioner (Appeals) held that the percentage of yield of contract manufacturing unit can be taken at 91%. The learned Commissioner (Appeals) observed, as per the bifurcation of consumption of raw material for confectionary and biscuit, the assessee has worked out yield of 84%, whereas, after taking into account various aspects like heating, moistures and other factors, assessee has reconciled the yield for biscuits at 88.4%. The learned Commissioner (Appeals) also accepted assessee's plea that mixtures if rejected results in heavy loss and the work force at Mumbai unit is not as disciplined as at contract manufacturing units. He also accepted assessee's contention that while packing the biscuits extra weight of 5% to 10% is given. Thus, taking into consideration these aspects the learned Commissioner (Appeals) held that the percentage of yield of biscuit of the Mumbai unit can be fixed at 88% which leaves a gap of 2% which is unexplained. The learned Commissioner (Appeals) observed, taking into account consumption of raw materials at 37,498 MTs, the production @ 2% shall work out to 750 MTs which valued at Rs.36,205 per MT will work out to Rs.2,71,53,750. Therefore, he sustained the addition to the extent of Rs. 3 crore while deleting the balance addition of Rs.9,10,44,000.

49. Learned Departmental Representative extensively referring to the observations of the Assessing Officer in the assessment order submitted that the assessee was supplying all the raw materials to the contract manufacturing units. He submitted, as per the tax audit report yield of the Mumbai unit of the assessee worked out to 92.55%. Whereas, as per the statements filed before the Assessing Officer by the assessee, percentage of yield worked out to 84.50%. He submitted, in the reconciliation statement also, discrepancy was found which was again revised by the assessee. He submitted, as per the reconciliation statement, the discrepancy was found in consumption of vanaspati, sugar, maida, coco vita oil. He submitted, as per the information obtained from contract manufacturing units, percentage of average yield was found to be 91%. He submitted, before the Assessing Officer assessee could not prove that it was manufacturing a large variety of biscuits compared to contract manufacturing units. He submitted, the Assessing Officer has worked out the yield by applying a standard formula which was accepted by

the Tribunal in assessee's own case. Learned Departmental Representative submitted, in the course of assessment proceedings, the assessee was given full opportunity to reconcile the differences and prove the fact that percentage of yield is as per the standard formula. He submitted, the learned Commissioner (Appeals) without properly appreciating the reasoning of the Assessing Officer has deleted major part of the addition without proper reasoning and in a non-speaking manner. He submitted, even additional evidence produced before the learned Commissioner (Appeals) were not forwarded to the Assessing Officer for examination. Finally, the learned Departmental Representative submitted, once the Assessing Officer has rejected the books of account and made estimation on a scientific basis and to the best of his judgment, the learned Commissioner (Appeals) cannot interfere with the same. In support of such contention, he relied upon the decision of the Hon'ble Supreme Court in Commissioner of Sales Tax v/s H.M. Esufali H.M. Yusuf All Abdul AM, [1973] 90 ITR 271 (SC).

50. Learned Authorised Representative submitted, no defect was found in the books of account. He submitted, if there was any discrepancy, it was in the statement submitted before the Assessing Officer, that too, due to bonafide mistake. He submitted, in the tax audit report, there is no mention of percentage of yield. He submitted, as per Form no.3CD, prescribed under Income-tax Rules, 1962, in case of manufacturing concern, full quantitative details of principal items of raw material and finished products are to be given. He submitted, in Annexure to the tax audit report, the auditor has furnished the quantitative details of principal items of raw materials and finished products. In this context, he drew our attention to Annexure-V to the tax audit report at Page-211 of the paper book. He submitted, when the Assessing Officer called for details of "Others", the assessee furnished statement of consumption of raw materials wherein coco vita oil was wrongly shown at 1056 MTs which was subsequently corrected in the revised statement. He submitted, the raw materials shown as "Others" since was not a principal item was not shown in the tax audit report. Learned Authorised Representative submitted, if at all there is any mistake / discrepancy it is in the statement furnished and not in the audit report or books of account. He submitted, books of account can be rejected if conditions of section 145(3) of the Act are fulfilled. Learned Authorised Representative submitted, only if the conditions of sub-section 3 of section 145 are satisfied, the Assessing Officer can make a best judgment assessment. He submitted, the Assessing Officer has not pointed out a single instance of sales outside the books. The purchases made by the assessee have not been doubted. The production of biscuit and confectionary are fully supported by and as per Central Excise records. He submitted, all excise registers were

produced before the Assessing Officer and nothing adverse was found. Reiterating the stand taken before the Departmental Authorities, learned Authorised Representative submitted/ the reason for low yield is due to the factors explained before the Departmental Authorities. He submitted, because of labour problem ultimately assessee had to close down its factory at Mumbai. He submitted, it is not possible to maintain itemwise stocks considering the variety of products manufactured by the assessee qua the contract manufacturing units which primarily manufacture ParleG. He submitted, when the consumption of raw material and production of biscuit and confectionary are regulated by the Central Excise law and the assessee is maintaining Central Excise records which were verified by the Central Excise authorities and have not been found to be defective the Assessing Officer cannot question on the consumption and manufacture recorded in the books of account. In this context, he relied upon the decision of the Hon'ble Motipur Sugar Factory (P.) Ltd. v/s CIT [1974] 95 ITR 401. Strongly opposing the contention of the Learned Departmental Representative regarding applicability of standard formula, the learned Authorised Representative submitted, such formula cannot be applied as the Tribunal in assessee's own case has held against applicability of such formula. Learned Authorised Representative submitted, compared to the yield for earlier years, the percentage of yield shown in the impugned assessment year is more. Therefore, the inference drawn by the Departmental Authorities regarding suppression of sales is baseless and unfounded. He submitted, even the contract manufacturing units have not shown any standard yield as their yield varies from 87% to 100%. That being the case, on the basis of yield shown by the contract manufacturing units, the books of account of the assessee should not have been rejected and no addition should be made.

51. We have heard rival contentions and perused the material available on record. On a perusal of the order of the Departmental Authorities as well as factual aspect of the issue, it is very much clear that the issue in dispute is purely a factual one and has to be decided after considering the facts brought on record. As could be seen, the Assessing Officer inferred suppression of sales by the assessee primarily taking into account the percentage of yield of biscuits of the assessee compared to the percentage of yield of the contract manufacturing units. The allegation of the Assessing Officer is, as per the tax audit report the percentage of yield works out to 92.55%, whereas, as per the statement and revised statement showing consumption of different raw material and manufacture furnished by the assessee, the yield works out to 84%. He has also referred to the information obtained from contract manufacturing units to conclude that the average yield of contract manufacturing units work out to

91.55%. In this context, the Assessing Officer has also referred to the standard formula applicable and the physical enquiry conducted by him at the factory premises/ wherein, it was found that the manufacturing of products at Mumbai unit is through sophisticated machinery. In the course of assessment proceedings, the assessee has explained comparative lesser yield qua contract manufacturing units due to the following reasons:-

i) Variety of biscuits manufactured at Mumbai unit compared to few variety of biscuits manufactured in contract manufacturing units;
ii) In case of contract manufacturing units, due to similar size of production and type of machinery used biscuit fall on the belt and tray which are manually picked up and sorted and identified for re-use or waste. Whereas, in case of Mumbai unit production being faster it is difficult to have such control and also costs for employing labour to pick and sort out biscuit fallen on the belt and tray is much higher;
iii) Due to different products lines at Mumbai unit, the average give away is much higher as compared to contract manufacturing units;
iv) Mumbai unit has a much higher production capacity as compared to contract manufacturing units and due to sheer volume wastages are higher in Mumbai unit;
v) Since, the contract manufacturing units are receiving processing charges which in turn is directly proportionate to production they exercise a better control over the labour, machine and the processing methods;
vi) Mumbai unit has a trade union and employees being of permanent nature there is always labour problem. Whereas, contract manufacturing units have small work force, hence, were able to supervise efficiently;
vii) The assessee being the mother unit effort is put on new formulas and research and development;
viii) Part of biscuit produced are consumed by the employees, therefore, cannot be reflected in the accounts; and
ix) Waste before production takes place on account of wheat flour remaining in jute bags, grinding loss sweepage, etc., compared to the loss suffered by contract manufacturing units.

52. Notably, the learned Commissioner (Appeals) has found some of the reasons shown for lesser yield at Mumbai unit acceptable. As far as the discrepancies pointed out by the Assessing Officer with reference to the audited accounts and the statements of consumption of raw material filed before him, it is noticed that in the audited accounts while furnishing the quantitative details of principal items of raw materials and finished products, there is no mention of the percentage of yield. Therefore, allegation of the Assessing Officer

that as per the audit report, the assessee has shown yield of 92.55% is factually incorrect. This is evident from Annexure-5 of the audit report copy of which is at Page-211 of the paper book. As far as the discrepancies pointed out in the original statement of consumption of raw materials and the revised statement furnished during the assessment proceedings, it is a fact that the quantity of coco vita oil has been shown at 1059 MTs instead of 1860 MTs shown in the audit report. However, in the revised statement, the quantity of coco vita oil has been shown at the correct figure of 1859 MTs. Therefore, the assessee's explanation that the figure of 1059 MTs shown in the original statement was due to a mistake is believable. As far as the allegation of the Assessing Officer that the raw material "others" were not shown in the audit report, we are of the view that non-mentioning of the said item in the Annexure to the audit report may be for the reason that as per Form no.3CD, only primary raw materials are required to be shown. Therefore, non-mentioning of raw material "others" in the Annexure to the audit report cannot be considered to be very serious lapse so as to infer suppression of sales and unreliability of books of account. It is a matter of record that the goods produced by the assessee are excisable goods and subject to scrutiny and regulatory measures of Central Excise authorities. It is also a fact on record that the assessee has maintained all Central Excise registers with regard to consumption of raw materials, production of biscuits and confectionary which have been verified by the Central Excise authorities periodically and the authenticity of the entries made in the said registers have not been questioned by them. It is also a fact on record that the Central Excise registers were produced before the Assessing Officer as well as the learned Commissioner (Appeals).

53. There is no allegation by the Departmental Authorities that the consumption of raw materials and production of finished products as recorded in the Excise registers were doubted by the Central Excise authorities. It is also a fact on record that the Assessing Officer has not doubted the purchases made by the assessee. It is also a fact that the assessee has maintained all books of account as required under the Income-tax Act, 1961, Companies Act, 1965 and Central Excise norms. Further, the accounts maintained by the assessee were subject to statutory audit. No specific defect or discrepancy in the books of account maintained by the assessee has been pointed out by the Assessing Officer. The alleged difference in yield was worked out on the basis of the statement and revised statement of quantitative details of consumption of raw materials and production filed by the assessee in the course of assessment proceedings as well as the information obtained from contract manufacturing units. Further, the Assessing Officer has worked out the yield by applying the standard formula as mentioned by him in the assessment order. It is relevant to observe, in

the impugned assessment year, the dispute is with regard to the manufacture of finished products in assessee's own unit at Mumbai. In the preceding assessment year, while dealing with similar addition made by the Assessing Officer, the Tribunal in assessee's own case in ITA no.5320/Mum./2006 and other dated 31st August 2010, held that no addition by applying the standard formula can be made. Facts are no different in the impugned assessment year as well. The Assessing Officer has not found a single instance of sale made by the assessee outside the books. At least, no adverse material to indicate out of book sales has been brought on record by the Assessing Officer. In these circumstances, making addition on estimate basis by rejecting the books of account in the absence of any adverse material brought on record cannot stand legal scrutiny. It is also a fact on record that as per the information obtained from the contract manufacturing units, the yield varies between 87% to 100%. Therefore, average yield cannot be standardized to a particular percentage. Moreover, the yield of Mumbai unit for preceding assessment years has been shown by the assessee as under:-

A.Y.	*Percentage*
1992-93	*83.11%*
1993-94	*83.32%*
1994-95	*82.27%*
1995-96	*81.65%*

54. Thus, compared to the yield of Mumbai unit in the preceding assessment years as noted above, the assessee has shown a higher yield for the Mumbai unit in the impugned assessment year. Therefore, on over all consideration of facts and circumstances of the case, we are of the considered opinion that rejection of books of account and addition made on estimate basis alleging suppression of sale is not in accordance with law. Therefore, even a part of addition made by the Assessing Officer cannot be sustained. Accordingly, we delete the addition made by the Assessing Officer fully. Ground no.8 of the Department is dismissed and grounds no. 4&5 raised by the assessee are allowed.

10. We have gone through the orders of the authorities below as well as the order of Tribunal, and found that facts and circumstances during the year under consideration are same, respectfully following the order of the

Tribunal in assessee's own case, grounds raised by the assessee are allowed whereas grounds raised by revenue are dismissed.

11. Learned DR fairly agreed that issue is covered by the order of the Tribunal in A.Y.1996-97 and the facts and circumstances during the year under consideration are same.

12. In the A.Y.1998-99, assessee has also challenged disallowance of prior period expenses of Rs.13,06,342/-.

13. We have considered rival contentions and found that expenditure bills have been verified and approved during the present year. Hence the expenditure cannot be regarded as prior period. For this purpose, reliance is placed on the decision of Saurashtra Cements and Chemical Industries Ltd. (213 ITR 523). Accordingly, expenditure are required to be allowed.

14. As a precaution, we direct the AO to verify if the assessee has not claimed double deduction in respect of these expenditure in any earlier years. We direct accordingly.

15. Next grievance of assessee relates to disallowance of long term capital loss of redemption of preference shares of Rs.41,200/-. The AO has dealt with the issue at para 8 and the CIT(A) has dealt with the issue at para 10. We found that this issue is decided by the Hon'ble ITAT in case of assessee's subsidiary company - Parle Biscuits Pvt. Ltd. [PBPL] for assessment year 1998-99 (ITA NO.5540/Mum/2006) wherein the ITAT has decided the issue in favour of PBPL. The Hon'ble Bombay High Court has also dismissed the department appeal against the aforesaid order of the ITAT (ITA No. 418 of 2012).

16. Precise observation of the Tribunal in the case of Parle Biscuits Pvt. Ltd., is as under:-

> *32. Ground No. 3 in assessee appeal pertain to the disallowance of long term capital loss of Rs.35,58,718/- on account of redemption of preference shares.*
>
> *33. The facts in brief are that assessee claimed capital loss of Rs.35,58,718/- on account of redemption of preference shares. The total consideration received by assessee on redemption of preference shares has two categories. The preference shares are of SFR Ltd. and Himachal Futuristics Communications Ltd. Both these preference shares were allotted to the assessee company in the month of July 1995 at a face value of Rs.1,000/- and were redeemed in July 1997 at a value of Rs.1,000/-, i.e. same value. In the notes attached to the statement of Income assessee stated that redemption of preference shares amounts to transfer within the meaning of section 2(47) relying on the decision of the Hon'ble Supreme Court in the case of Anarkali Sarabhai vs. CIT 224 ITR 422. Assessee claimed indexation benefit on cost of acquisition of Rs.2 crores thereby arriving at the cost of acquisition at Rs.2,35,58,718/-. The resultant difference was claimed as capital loss on redemption of preference shares. The A.O. did not agree with the above and stated that the receipt of money on redemption has to be treated as dividend within the meaning of section 2(22)(d) relying on the judgment of the Hon'ble Supreme Court in the case of CIT vs. G. Narasimham & Others 236 ITR 327. He held that since the amount was to be covered within the provisions of section 2(22)(d) the question of claiming capital loss does not arise and since redemption has taken place after 30.06.1997 the dividend was not taxable as such. Therefore long term capital loss pertaining to redemption of preference shares at Rs35,58,718/- was disallowed. Assessee contested the same before the CIT(A). The CIT(A) vide para 9.2 considered that similar issue had come up in A.Y. 1998-99 before the CIT(A) in the case of assessee's holding company Parle Products Pvt. Ltd. in which the issue was decided against the assessee. Following the same, on identical facts the ground was rejected. There is no discussion about the issues contested by assessee in the order of CIT(A)..*
>
> *34. The learned counsel for the assessee placed on record the order of the CIT(A) in the case of Parle Products Pvt. Ltd. for A.Y. 1998-99 wherein the loss in that year was only Rs.41,200/- but most of the discussion of the CIT(A) pertain to sale of 12% preferential shares which are sold through a broker in the market for which loss of Rs.25,54,923/- was claimed but disallowed. He referred to the finding of the CIT(A) in para 10.5 and submitted that this issue was not*

discussed by the CIT(A) on contentions but rejected only on the reason that the nature of preference shares are not on record. It was f further submitted that the appeal of A.Y. 1998-99 in Parle Product Pvt. Ltd. on this issue was still pending but the issue can be decided on merits as there is no discussion on the contentions raised by the assessee. The learned counsel submitted that: -

(a) Redemption of preference shares of Indian Lead Ltd. is covered by exception (i) to section 2(22) since preference shares are non participating. This exception states that a distribution made under clause (d) of section 2(22) in respect of share issued for full cash consideration where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets, will not be included as dividend. The Preference shares are not entitled to participate in surplus income / assets unless they are "Participating preference shares". The shares issued by these companies are not Participating Preference shares. Reference in this connection may be made to schedule 5 page 14 of annual accounts (page 16 of compilation) where the shares are described as "12.5% Redeemable Cumulative Preference shares". If the shares were participating preference shares are word "Participating" would have been specifically mentioned and the shares would have been described as such in the schedule just as the shares have been specifically described as "Cumulative" and "Redeemable" in the present case. Hence as the shares are not participating preference shares the exception (i) to section 2(22)(d) will apply and the amount will not be taxable as deemed dividend u/s 2(22)(d) but as capital gains under section 45.

(b) that Sec. 2(22)(d) refers to any distribution to the shareholders by a company on the reduction of its capital....
Sec 80(3) of the Companies Act, 1956 provides that redemption of Preference shares under the section shall not be taken as reducing the amount of its share capital. Accordingly section 2(22)(d) which deals with <u>reduction</u> of capital does not apply to <u>redemption</u> of Preference shares <u>since redemption of such shares is not a reduction of capital</u> in view of specific provisions of section 80(3) of the Companies Act.

(c) Reliance is also placed on the decisions of the Supreme Court in the case of
(i) Anarkali Sarabhai (224 ITR 422)
(ii) Kartikeya Sarabhai (229 ITR 163)"

35. The learned D.R., however, submitted that redemption of preference shares does not yield to capital loss and assessee claimed only indexation loss as capital loss. It was further submitted that A.O. treated the amount as deemed dividend, therefore, the question of allowing the loss does not arise.

36. In reply the learned counsel submitted that if the entire amount is treated as deemed dividend then the whole of consideration received consequent to redemption would got exempted as dividend and was not taxable and since assessee has redeemed the shares the loss would go up by same amount, if the contentions of Revenue that it is deemed dividend are to be accepted. He relied on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Surat Cotton Spinning and Weaving Mills Pvt. Ltd. 202 ITR 932. It was submitted that assessee was claiming only capital loss consequent to redemption which should be allowed.

37. We have considered the issue. As far as redeeming preference shares are concerned, the Hon'ble Supreme Court in the case of Anarkali Sarabhai vs. CIT 224 ITR 422 has examined the provisions of section 77 of the Companies Act, section 80 of that Act and also definition of transfer under section 2(47) of IT ACT and has held that the difference between the sum received by the assessee on redemption of shares and the sum earlier paid by for purchasing them was taxable as capital gain. The decision of the Hon'ble Supreme Court is as under: -

"When a preference share is redeemed by a company, what the shareholder does in effect is to sell the hare to the company. The company redeems its preference shares only by paying the preference shareholders the value of the shares and taking back the preference shares. In effect, the company buys back the preference shares from the shareholders. If redemption of preference shares did not amount to sate, it would not have been necessary, in section 77 of the Companies Act, 1956, to specifically provide that the restriction imposed upon a company in respect of buying its own shares will not apply to redemption of shares issued under section 80 of that Act. The redemption of preference shares by a company, therefore, is a sale and squarely comes within the phrase "sale, exchange or relinquishment" of an asset in section 2(47)(i) of the Income-tax Act, 1961.

The definition of "transfer" in section 2(47) of the Income-tax Act, 1961, is not an exhaustive definition. Sub-clause (i) of clause (47) of section 2 speaks of "sale, exchange or relinquishment of the asset" and implies parting with any capital asset for gain which will be taxable under section 45 of the Act. When preference shares are redeemed by the company, the shareholder has to abandon or surrender the shares, in order to get the amount of money in lieu thereof. There is, therefore, also a relinquishment which brings the transaction within the meaning of section 2(47)(i) of the Income-tax Act.

The appellant had purchased preference shares in a company at less than their face value and held them as capital assets. The company redeemed them at their face value:
Held accordingly, that the difference between the sum received by the appellant on redemption of the shares and the sum earlier paid by her for purchasing them, was taxable as capital gains."

38. Similar issue was also considered by Hon'ble Supreme Court in the case of Kartikeya Sarabhai vs. CIT 228 ITR 163 where there is reduction in face value of shares, the definition of transfer were discussed and held as under: -

"Section 2(47) of the Income-tax Act, 1961, defines "transfer" in relation to a capital asset. It is an inclusive definition which, inter alia, provides that relinquishment of an asset or extinguishment of any right there in amounts to a transfer of a capital asset. It is not necessary for a capital gain to arise, that there must be a sale of a capital asset. Sale is only one of the modes of transfer envisaged by section 2(47) of the Act, Relinquishment of the asset or extinguishment of any right in it, which may not amount to a sale, can also be considered as a transfer and any profit or gain which arises from the transfer of a capital assist is liable to be taxed under section 45. A company, under section 100{l)(c) of the Companies Act, 1956, has a right to reduce the share capital and one of the modes which can be adopted is to reduce the face value of the preference shares. Section 87{2)(c) of the Companies Act, inter alia, provides that "where the holder of any preference share has a right to vote on any resolution in accordance with the provisions of this sub-section, his voting right on a poll, as the holder of such shares, shall, subject to the provisions of section 89 and sub-section (2) of section 92, be in the same proportion as the capital paid up in respect of the preference share bears to the total paid-up equity capital of the company". Hence, when as a result of the reducing of the face value of the share, the share capital is reduced, the right of the preference shareholder to the dividend on his share capital and the right to share I the distribution of the net assets upon liquidation is extinguished proportionately to the extent of reduction in the capital. Such reduction of the right in the capital asset would clearly amount to a transfer within the meaning of that expression in section 2(47) of the Income-tax Act, 1961.

39. Consequently, the redeeming of preference shares has to be considered as a transfer under the meaning of section 2(47). Therefore computation of capital) loss has to be considered on this transaction. Assessee has worked the cost of acquisition as per the provisions of section 48 and since shares was held for more than one year and being a long term capital asset, indexed cost of acquisition has been claimed as against the sale consideration received. On the

facts of the case, assessee purchased preference shares at a cost of Rs.2 crores and the same was redeemed at face value and assessee received only Rs.2 crores. However, by virtue of mode of computation prescribed under section 48 of the I.T. Act assessee's sale consideration being Rs.2 crores and indexed cost of acquisition being Rs.2,35,58,718/- being the deduction allowable under section 48, the net loss of Rs.35,58,718/- has been computed. This amount is an allowable long term capital loss.

40. The A.O., however, examined the issue of section 2(22){d). Provisions of section of section 2(22)(d) are as under: -

'2(22).....

(d) any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not;"

41. As can be seen by the above provision, there should be a reduction of

its capital and distribution to the shareholders out of the accumulated profits. Section 80(3) of the Companies Act states that the redemption of preference shares under this section by a company shall not be taken as reducing the amount of its authorised share capital. By virtue of section 80(3) redemption of preference shares cannot be considered as reduction of authorised share capital, therefore, treating them as deemed dividend does not arise, as the provisions of section 2(22){d) can only be invoked only when there is distribution of accumulated profits by way of reduction of share capital. On the facts of the case, assessee has purchased the preferential shares at a cost of Rs.2 crores and they were redeemed at the same price of Rs.2 crores. Therefore the question of invoking deemed dividend provision on this transaction does not arise, eventhough the redemption of shares are to be made out of the profits of the company by virtue of section 80(1) of the Companies Act. However, since it cannot be treated as reduction of authorised share capital by virtue of section 80(3) of the Companies Act, the amount received by assessee on redemption of preference shares cannot be treated as deemed dividend. The A.O. relied on the principles established by the Hon'ble Supreme Court in the case of CIT vs. G. Narasimham & Others 236 ITR 327. In fact this case supports the above opinion also eventhough it was given in a different context. The facts of that case were that assessee was a shareholder in a private company. Assessee held 70 shares in the company with face value of Rs.1,000/- each. During the accounting period relevant to A.Y. 1963-64 the company passed a resolution to reduce its capital and the procedure prescribed under the Companies Act was undergone. After obtaining the orders from the Court reduction was given effect and on 26.05.1962. Subsequently the face value of shares

in the company was reduced from Rs.1,000/- to Rs.210/-. There was a pro-rata distribution of some properties of the company and payment of money to the shareholders including the assessee. In the Income Tax proceedings connected with the property/amounts so received by the assessee on reduction of share capital in the said company, the Tribunal was required to consider whether any capital gains accrued to the assessee. The Tribunal held that no capital gain accrued to the assessee. The Hon'ble High Court held that a sum of Rs.64.517/- must be taken to have come out of the accumulated profits and treated as dividend for all purpose and on appeal the Hon'ble Supreme Court confirmed the decision of the Hon'ble Madras High Court and held that: -

"(ii) that the assessee in the present case had been paid not merely cash but had also been given a property for the reduction in the value of his shares from Rs.1,000 to Rs.210. Out of the total amounts so received including the value of the property so received, the portion attributable to accumulated profits had to be deleted. Only the balance amount could be treated as a capital receipt. Thereafter looking to the cost of acquisition of that portion of the share which had been diminished, capital gains would have to be determined. The Tribunal, while computing capital gains, would have to decide how this property should be valued for the purpose of deciding what the assessee had received on reduction in the value of his shares, and whether any capital gains had accrued to the assessee or not. This question was not required to be considered but the Tribunal because the Tribunal came to the conclusion that there being no transfer of any capital asset, the question of capital gains did not arise. But the question would now have to be considered and decided by the Tribunal when the matter went back before it for the determination of capital gains."

42. It was further held that thus the amount distributed by a company on reduction of its share capital has two components, i.e. distribution attributable to accumulated profits and distribution attributable to capital (except capitalised profits). To the extent of accumulated profits whether such accumulated profits are capitalised or not, the return to the shareholder on reduction of share capital is a return of such accumulated profits. This part of it is taxable as dividend. The balance may be subject to tax as capital gain, if they accrue.

43. Adopting the same principles here, since there is no reduction of share capital in the given case, consequent to section 80(3) of the Companies Act which states that redemption of preference shares under this section shall not be taken as reducing the amount of its authorised share capital, that part of the amount received by assessee as face value, even though paid out of accumulated profit, does not

fall within the definition of deemed dividend, therefore, cannot be treated as deemed dividend. So the amount received on redemption of preference share has to be considered as consideration received on transfer in working out the capital gain, which assessee did.

44. Even for the purpose of argument, it is considered as deemed dividend, assessee would be eligible for a higher loss as the sale consideration received would become Nil, after considering that the amount received on redemption as deemed dividend it gets exempted, as accepted by the A.O., under section 10(34). Similar issue was considered by the Hon'ble Bombay High Court in the case of CIT vs. Surat Cotton Spinning and Weaving Mills Pvt. Ltd. 202 ITR 932 where the A.O. treated the sum received on redemption of preference shares as dividend under section 2(22) and also treated the same as consideration received while working out the capital gains. The Hon'ble Bombay High Court examined the issue and held as under: -

"Section 2(22) deals with various types of cases and creates a fiction by which certain receipts or parts thereof are treated as dividend for the purpose of levy of income-tax. A deeming provision is intended to enlarge the meaning of a particular word which includes matters which otherwise may or may not fall within the provision. It should be, therefore, be extended to the consequences and incidents which shall invariably follow. In other words, the consequences and incidents flowing from a legal fiction should also be deemed to be real. The very same income or the very same receipt cannot be assessed twice under two different heads of income. "Dividend", which is income from other sources and "Capital gains" are two different heads under which the income falls to be charged. That being so, once a particular receipt has been treated as dividend, it cannot be treated as income under any other head. The duty of the Income-tax Officer is to find out the appropriate head under which the receipt in question can be assessed. Once he assesses a particular receipt under a particular head of income, that amount is no more available to him for assessment under another head. The Revenue cannot approbate and reprobate. It cannot be permitted to treat a part or the whole of the consideration as dividend and to assess The same as such and also t say that this will not have the effect of reducing the amount of consideration for the purpose of computation of capital gain.

Redemption of preference shares amounts to "transfer" within the meaning of section 2(47). Section 45 will apply to such a transfer and the capital gain or loss will have to be computed. From a bare reading of section 2(22) and sections 45 and 48, it is clear that for the purpose of finding out the profits or gains arising from the transfer of a capital asset, it is necessary to know the cost of

acquisition of the asset and the full value of the consideration for which the transfer is made. It is the difference between the two which is termed as profits and gains arising from t he transfer subject, however, to specific provisions, if any, contained in any other section of the Act. Section 48 deals with the mode of computation of capital gains. It says that capital gain has to be computed by deducting from the full value of the consideration receive d or accruing as a result of the transfer of the capital assets, the cost of acquisition and the cost of improvement thereof and other expenses mentioned therein. In view of the provisions of section 46(1), the Legislature was required to make a specific provision in sub-section (2) to make the shareholder who receives any asset on liquidation of a company liable to capital gains. As in such a case, under section 2(22)(c) of the Act, a part of the receipt may be held to be dividend, with a view to avoid any ambiguity. The Legislature thought it fit to make it clear that the consideration for the purpose of computation of capital gains shall be amount received by the assessee as reduced by the amount assessed as dividend under section 2(22)(c). This provision makes the position abundantly clear that in a case where a part of the consideration has been assessed as dividend it is only the balance amount left with the assessee which can be said to be a consideration for the transfer and capital gain has to be computed under section 48 of the Act taking such balance amount only as the consideration for transfer."

45. In view of the above principle laid down, assessee would become eligible for capital loss of Rs. 2,35,58,718/-, if the issue of deemed dividend as was done by the A.O., were to be accepted.

46. We are of the opinion that the redemption of preference shares at face value without any premium or discount does not result in any amount to be considered as deemed dividend and assessee's claim of loss by way of computation prescribed by the Act is correct. The loss of Rs.35,58,718/- is consequently allowable as long term capital loss. Therefore the A.O. is directed to allow the same as claimed. Assessee's ground on this is allowed .

47. Assessee appeal is partly allowed whereas Revenue appeal is dismissed.

17. We have considered rival contentions and carefully gone through the orders of the authorities below as well as order of Tribunal for the A.Y. 1996-97 as reproduced above and find that the facts and circumstances during the year under consideration are same, we do not find any merit for the

disallowance of Rs.41,200/- on account of long term capital loss of redemption of preference shares.

18. Learned DR also fairly conceded that issue is covered by the order of the Tribunal in case of subsidiary company and which has also been confirmed by the Hon'ble Bombay High Court.

19. The AO has also disallowed sum of Rs.1,76,023/- on account of advances written off.

20. We have considered rival contentions and found that AO has dealt with the issue at para 9 of his order whereas CIT(A) has dealt with the issue at para 11 of his appellate order. It appears that disallowance has been upheld considering this claim as for bad debts and not fulfilling the conditions of section 36(2) of the Act. However, since this was an advance given in the course of business and neither services rendered nor advance returned back, the claim is required to be allowed as a business loss. In the interest of justice, we restore the matter back to AO and we direct the AO to verify the facts and decide afresh. We direct accordingly.

21. Assessee is also aggrieved for not granting deduction for provision for leave encashment of Rs.14,82,636/-. We have considered rival contentions and found that issue is squarely covered by the decision of the Supreme Court in case of Bharat Earth Movers 245 ITR 428. Respectfully following the same, we direct the AO to delete the disallowances as claimed by assessee on account of provision for leave encashment. We direct accordingly.

22. Now coming to the appeal of the Revenue in ITA No.6964/Mum/2004 for the A.Y.1998-99 on account of deletion of alleged suppressed production resulting in suppressed sales. We have already dealt with the

issue while dealing with assessee's ground for the part disallowance upheld by CIT(A). The issue is covered by the order of the Tribunal as reproduced above for the A.Y.1996-97. Respectfully following the same, we dismiss this ground of the Revenue's appeal.

23. Next grievance of revenue relates to deleting disallowance of depreciation on plant and machinery amounting to Rs.18,61,835/-.

24. Rival contentions have been heard and record perused.

25. From the record we found that disallowance of depreciation on two items of machinery viz. Super Roll and Verso flow toffee and confectionery wrapping machines. The Ld. A.O. has disallowed depreciation on the ground that the machines were never received by the assessee and therefore the question of their being put into use does not arise. The depreciation for the year disallowed was Rs 18,61,835/-.

26. From the record, we found that this issue had first come up in the A.Y. 1996-97 in which disallowance was made for the first time on these machines. The CIT(A) in the appellate order for A.Y. 1996-97 has mentioned that the assessee has adduced evidence to prove that the machines were imported and documentary evidence in support of purchase of the machines and their commissioning and inclusion in the fixed assets have been produced before Ld. A.O. or before himself. Therefore receipt of the machinery by the assessee has been established and accepted by the CIT(A) in the order for A.Y. 1996-97. The addition was however confirmed by the CIT(A) on the ground that no evidence has been adduced to show how production results changed which could prove

that the machines were used. The assessee submitted that the machines imported are wrapping machines. Their function is to wrap/pack the chocolates & confectionery and by themselves do not produce any chocolates/confectionery. Hence, there has not been any change in the production results on account of the wrapping machines and no increased production is attributable to the wrapping machines.

27. By the impugned order, CIT(A) deleted the disallowance by following the order of his predecessor in the A.Y.1996-97. We found that issue has been decided by the Tribunal in assessee's favour in the A.Y.1996-97. The precise observation of the Tribunal was as under:-

> *61. In ground no.3, the assessee has challenged the disallowance of depreciation of Rs. 14,18,541 on certain plant and machinery.*
>
> *62. Brief facts are, during the assessment proceedings, the Assessing Officer for verifying the claim of depreciation on plant and machinery called for necessary details. He found that the assessee had shown addition to the plant and machinery for an amount of Rs.1,13,48,325 on which depreciation of Rs. 14,18,541 was claimed. From the details submitted, he found that the particular machine was actually imported by Parle Biscuits Ltd., a subsidiary of assessee in January 1991, since, it wanted to go into manufacturing of chocolate and other permitted items. However, as Parle Biscuits Ltd., could not finalise the idea of manufacturing of chocolate the machine was not used and lying idle until they were sold to Parle Products Ltd. on 26th February 1996. To verify the authenticity of assessee's claim, the Assessing Officer made a physical enquiry by visiting the factory premises of the assessee on 15th March 1999. In the course of physical enquiry, when the assessee was called upon to produce the documentary evidence in respect of installation of machinery in the factory premises and its use, as alleged by the Assessing Officer/ no documentary evidence was produced to substantiate the claim that such machineries were directly brought into the factory premises from the Dock in January 1991. He further observed, the assessee could not substantiate its claim that machinery was transferred to one of the contract manufacturing units through documentary evidence. In respect of another machinery viz. Verso Flour Machine, the assessee could not furnish documentary evidence to demonstrate installation and use of machinery. Therefore, he*

disallowed assessee's claim of depreciation for an amount of Rs. 14,18,541.

63. The learned Commissioner (Appeals) also confirmed the disallowance in appeal proceedings by accepting the reasoning of the Assessing Officer.

64. Learned Authorised Representative submitted that the machine on which the assessee has claimed depreciation is a packaging machine and has no relationship with production. He submitted, detail use of machine was submitted before the Departmental Authorities. He submitted, not only the machine was installed in the relevant financial year but it was also used in the impugned year. In this context, he drew our attention to the commissioning certificate issued by the Chief Engineer, a copy of which is at Page-602 of the paper book. He submitted, in the subsequent assessment year, the first appellate authority has allowed assessee's claim of depreciation on this particular machine.

65. Learned Departmental Representative relying upon the observations of the Assessing Officer and the learned Commissioner (Appeals) submitted that onus is on the assessee to prove the use of machinery. Since the assessee failed to prove such facts, deprecation was rightly disallowed.

66. We have heard rival contentions and perused the material available on record. As could be seen from the impugned order of the learned Commissioner (Appeals), he has accepted that the assessee has produced evidence to prove that the machines were purchased through import and it was commissioned and form part of the fixed assets in the impugned assessment year. The only reason on which the learned Commissioner (Appeals) has rejected assessee's claim of depreciation is, the assessee was unable to prove that the machinery was used in production. As could be seen from the materials placed before us, which were also before the Departmental Authorities, the machine in question is used for cutting and wrapping confectionary toffees and were delivered at ready to use condition. Thus, it is evident that the machine has no role to play in the production activity. Therefore, when the learned Commissioner (Appeals) has accepted the fact that the machine was purchased and commissioned and formed part of the fixed asset in the relevant financial year, there is no reason to disallow assessee's claim of depreciation. Moreover, the fact that in the subsequent assessment year, assessee's claim of depreciation on such machinery has been allowed has not been controverted by the learned Departmental Representative. Therefore, we delete the disallowance made by the Assessing Officer and confirmed by the learned Commissioner (Appeals). This ground is allowed.

67. Grounds no.4 and 5 having already been disposed-off while deciding ground no.8 of Department's appeal in ITA no.4023/Mum./ 2002, vide Para-51 to 54, no separate adjudication is required at this stage.

68. Grounds no.6 and 7 have already been disposed off while deciding grounds no.9 and 10 of Department's appeal in ITA no.4023/ Mum./2002. Hence, no separate adjudication is required in respect of these grounds now.

69. In ground no.8, assessee has challenged levy of interest under section 234B of the Act. Both the parties admitted before us that this ground is consequential in nature. Accordingly, we direct the Assessing Officer to give consequential effect while re-computing the income of the assessee keeping in view our findings given above and in accordance with the provisions of law.

28. As the facts and circumstances during the year under consideration are same, respectfully following the order of Tribunal in assessee's own case for the A.Y.1996-97, we do not find any infirmity in the order of CIT(A) for deleting the addition made on account of disallowance of depreciation on plant and machinery.

29. Next grievance of Revenue relates to deleting disallowance on account of foreign travel expenses of Rs.8,52,050/-. The AO has dealt with the issue at para 5 whereas CIT(A) has dealt with the issue at para 7 of its appellate order.

30. We have considered rival contentions and found that the Ld. A.O. has disallowed 25% of total foreign travelling expenses of Rs 34,08,197/- on the basis that similar disallowance has been made in the earlier years which has been confirmed by the CIT(A) and the reasons for disallowance during the year also remained the same as in the earlier years.

31. By the impugned order, CIT(A) allowed assessee's claim by following order of the Tribunal in the A.Y.1984-85 to 1986-87.

32. It was brought to our notice by learned DR that issue with regard to disallowance of foreign travel expenses have been decided by the Tribunal in assessee's own case for the A.Y.1996-97 against the assessee after following the order of the Tribunal for A.Y.1995-96.

33. It was submitted by learned AR that in the assessment year 1995-96, the ITAT has observed that the directors of the assessee had visited foreign countries in connection with Company's business as per the Board resolutions and no correspondence/ evidences were submitted to substantiate the foreign tours.

34. As per learned AR the facts in the current year is different and therefore the above observations based on which the decision was taken will not apply in the current year.

35. As per learned AR during the year under consideration, the assessee has incurred foreign travel expenditure for directors as well as executives of the assessee. The assessee has also submitted the following documents as evidences/ proofs:

i. Copies of passports and visas issued to the directors and executives of the assessee for travelling abroad for the purpose of business.

ii. Copy of the extract of resolutions passed by the Board of Directors of the assessee with respect to foreign travel";

36. Our attention was also invited to the Copy of correspondences with the foreign parties:

1. Letter from APV Baker to Mr. Ajay Chauhan with respect to the visit to Hard candy cooking and depositing plant in Tourcoing near Lille, France.

2. Letter from Kohli and Kohli to Mr. Vijay Chauhan and Mr. Ajay Chauhan with respect to Food extrusion seminar in France

3. Meeting with Strategic Food International Co.LLC in Dubai by Mr. Vijay Chauhan and Mr. Ajay Chauhan.

37. Learned AR also highlighted the visit report with respect to the travel made by Mr. Raj Chouhan and Executives to Switzerland.

38. We have considered rival contentions and carefully gone through the orders of the authorities below and found that during the year under consideration, assessee has incurred foreign travel expenses for visit of Directors as well as Executives to Switzerland. As per the noting on passport, the travel was for the purpose of business. The correspondence with the foreign parties also indicate that travel was for business purpose. Considering the totality of facts and circumstances of the case, we restore the matter back to the file of the AO for deciding afresh after considering the documents highlighted by learned AR during the course of hearing before us. We direct accordingly.

39. In the result, appeal of assessee and Revenue are allowed in part in terms indicated hereinabove.

40. Grounds taken by assessee and revenue in the A.Y.1999-2000 to 2010-11 are same. Accordingly, we direct the AO to follow our decision as per the reasoning given hereinabove in the A.Y.1998-99. We direct accordingly.

41. In the A.Y.2008-09 to A.Y. 2010-11, the assessee is also aggrieved for the disallowance made u/s.14A.

42. In the A.Y.2008-09, the AO has disallowed Rs.1,76,023/- u/s.14A r.w.r.8D. The AO has dealt with the issue at para 10 of his order whereas CIT(A) has dealt with the issue at para 10 of its appellate order.

43. At the outset learned AR submitted that issue has been decided by the Tribunal in the case of subsidiary company of the assessee namely Parle Biscuits Pvt. Ltd., for the A.Y.2008-09 to 2011-12 wherein it has been held that considering the balance sheet of the assessee, the disallowance of Rs.1,00,000/- would meet the end of the justice.

44. Learned AR also drawn our attention to the balance sheet for the year under consideration and contended that similar investments are held by the assessee company. Considering the totality of facts and circumstances of the case, we restore the issue back to the file of the AO for deciding afresh after considering the assessee's balance sheet for the year ending on 31/03/2008.

45. We also direct the AO to consider only those investments wherein exempt income is received during the year. For this purpose reliance is placed on the following decisions:

- *Delhi High Court in case of Cheminvest Ltd. (378 ITR 33) (2015).*
- *ITAT Delhi Special Bench in case of Vireet Investment (P.) Ltd. (165 ITD 27).*

46. Strategic investments are not to be considered. Reliance is placed on the decision of Bombay High Court in the case of Reliance Capital Asset Management Ltd (ITA No. 487 of 2015).

47. In the A.Y.2009-10, AO has made disallowance of Rs.11,20,490/- u/s.14A r.w.Rule 8D. Learned AR has contended that issue has been decided by the Tribunal. In the case of its subsidiary Parle Biscuits Private Limited for assessment years 2008-09 to 2011-12 wherein it has been held that considering the balance sheet of the assessee, the disallowance of Rs.1,00,000 would meet the ends of justice.

48. Following the reasoning given in the A.Y.2008-09, we restore this issue back to the file of the AO for deciding in terms of direction given hereinabove.

49. We also direct AO to consider only those investments wherein exempt income is received during the year. Furthermore, strategic investments are not to be considered while computing disallowance under Rule 8D (2)(iii). We direct accordingly.

50. In the A.Y.2011-12, AO has made disallowance of Rs.62,16,326/- u/s.14A r.w.R. 8D.

51. With regard to the disallowance of the interest, learned AR drawn our attention to the share capital and reserves and surplus, which is more than the investment yielding exempt income. Keeping in view the decision of Bombay High Court in the case of HDFC Bank Ltd., 383 ITR 529, we do not find any merit for the disallowance of interest in so far as share capital reserves and surplus of the company was much more than the investment.

52. With regard to the disallowance of administrative expenses under Rule 8D(2)(iii), following the reasoning given in the A.Y.2008-09, we restore the mater back to the file of AO for deciding afresh.

53. In the result, all the appeals of the assessee and revenue are allowed in part in terms indicated hereinabove.

Order pronounced in the open court on this 22/01/2018

Sd/-	**Sd/-**
(PAWAN SINGH)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 22/01/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai