IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI

BEFORE SHRI MAHAVIR SINGH (VICE PRESIDENT) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 2439/MUM/2011
Assessment Year: 2003-04

Tata Chemicals Limited, Bombay House, Fort, Mumbai-400 001.	Vs.	Deputy Commissioner of Income Tax-2(3), Aayakar Bhavan, M.K. Road, Mumbai-400020.
PAN No. AAACT 4059 M **Appellant**		**Respondent**

ITA No. 2734/MUM/2011
Assessment Year: 2003-04

DCIT-2(3), Room No. 555, Aayakar Bhavan, Mumbai.	Vs.	M/s Tata Chemicals Ltd., Bombay House, 24 Homi Mody Street, Fort, Mumbai-400 001
Appellant		**PAN No. AAACT 4059 M** **Respondent**

Assessee by	:	Mr. Nitesh Joshi, AR
Revenue by	:	Ms. Anupama Shukla, CIT-DR
Date of Hearing	:	25/11/2020
Date of pronouncement	:	19/02/2021

ORDER

PER N.K. PRADHAN, A.M.

The captioned cross appeals- one by the assessee and other by the Revenue – are directed against the order of the Commissioner of Income Tax (Appeals)-6, Mumbai [in short CIT(A)] and arise out of the assessment completed u/s 143(3) of the Income Tax Act 1961 (the 'Act'). As common

issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience.

ITA No. 2439/MUM/2011
(Assessee's Appeal)

2. The original return of income was filed on 28.11.2003 declaring income at Rs.254,78,10,992/- u/s 115JB and Rs.274,17,21,703/- under the normal provisions of the Act. A revised return along with the revised tax audit report and consolidated accounts (incorporating the working results of Hind Lever Chemicals Ltd. for the financial year (FY) 31.03.2003, assessment year (AY) 2003-04 which was merged with the assessee-company) was filed on 30.03.2005 disclosing total income of Rs.79,60,48,750/- under normal provisions and Rs.107,21,06,283/- under the provisions of MAT (section 115JB).

3. <u>The 1st ground of appeal</u>

> The Ld. CIT(A) erred upholding the disallowance of provision for bad and doubtful debts for computing the book profit u/s 115JB.

Before us, the Ld. counsel for the assessee submits that they have filed an additional ground of appeal before the Tribunal stating :

> "That the amount of Rs.2,94,39,561/- written off in the appellant's accounts ought to be allowed as a deduction for bad and doubtful debts under section 36(1)(vii) of the Act."

As the additional ground raised herein does not require investigation of additional facts and as it goes to the root of the matter, we admit it for adjudication by following the decision of the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd. v. CIT* 229 ITR 383 (SC).

In the computation of income u/s 115JB, the Assessing Officer (AO) has made an addition of provision for bad and doubtful debts of Rs.2,94,39,561/-.

In appeal, the Ld. CIT(A) *vide* order dated 21.01.2011 held that "in view of the amendment in the provisions of the relevant section, the AR did not press this ground. Hence, this ground is dismissed".

4. Before us, the Ld. counsel for the assessee submits that during the year under reference an amount of Rs.2,94,39,561/- was provided in the books as "provision for bad and doubtful debts". In the return of income, while computing income u/s 115JB, the said amount was not added back to the profit. It was mentioned by way of a Note in the return of income that "provision for doubtful debts and advances is not added back while computing the book profits in view of the Bombay High Court's decision in CIT v. Echjay Forgings Pvt. Ltd. reported in 251 ITR 15".

The Ld. counsel relies on the decision in *CIT v. Yokogawa India Ltd.* (2012) 17 taxmann.com 15 (Karn.) stating that while computing book profits, provision made for bad and doubtful debts cannot be added back in accordance with Explanation (c) to section 115JB(1) as same is not an ascertain liability.

Referring to the decision in *Echjay Forgings (P.) Ltd*. (supra), it is stated that where the assessee had made provision for doubtful debts to meet ascertained liability, such provisions would have to be excluded from net profit for working out book profits u/s 115J of the Act.

Referring to the decision in *Vijaya Bank v. CIT* (2010) 190 Taxman 257 (SC), it is stated that where assessee-Bank had written off bad debt in

its books by way of debit to profit and loss account, simultaneously reducing corresponding amount from loans and advances to debtors depicted on asset side in balance sheet at close of year, the assessee was entitled to deduction u/s 36(1)(vii) and for that purpose, it was not necessary for it to close individual account of each of its debtors in its books.

Referring to the decision in *CIT v. Syndicate Bank* (2019) 101 taxmann.com 171 (Karn) it is held that where AO while computing book profit u/s 115JA, added back provision for 'Non-performing Assets' covered under policy with Deposit Insurance and Credit Guarantee Corporation, matter was to be remanded back to the CIT(A) with a direction to look into records and to record a finding as to whether bad and doubtful debts were reduced from loan and advances of debtors from asset side of balance sheet and thereafter, recompute income u/s 115JA.

Referring to the decision in *CIT v. Vodafone Esser Gujarat Ltd.* (2017) 397 ITR 55 (Guj.) [FB], it is stated that "that prior to the insertion of clause (i) of Explanation 1 to section 115JB , the then existing clause (c) did not cover a case where the assessee made a provision for bad or doubtful debt. With the insertion of clause (i) of Explanation 1 with retrospective effect, any amount or amounts set aside for provision of diminution in the value of the asset made by the assessee, would be added back for compensation of book profit under section 115JA . However, if that was not a mere provision made by the assessee by merely debiting the profit and loss account and crediting the provision for bad and doubtful debt, but by simultaneously obliterating such provision from its accounts by reducing the corresponding amount from the loans and advances on the assets side of the balance-sheet and consequently, at the end of the year showing the

loans and advances on the assets side of the balance-sheet as net of the provision for bad debt, it amounted to a write off and such an actual write off was not hit by clause (i) of Explanation 1 to section 115JB."

5. On the other hand, the Ld. Departmental Representative (DR) supports the order passed by the Ld. CIT(A).

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In *Vijaya Bank* (supra), relied on by the Ld. counsel, in the relevant assessment years 1993-94 and 1994-95, the AO disallowed the amount which the assessee-bank had reduced from loans and advances or debtors on the ground that the impugned bad debts had not been written off in an appropriate manner as required under the accounting principles. According to him, write off of each and every individual account under the head 'loans and advances' or debtors was a condition precedent for claiming deduction u/s 36(1)(vii). On appeal, the Commissioner (Appeals) held that it was not necessary for the purpose of writing off of bad debts to pass corresponding entries in the individual account of each and every debtor; and that it would be sufficient if the debit entries were made in the profit and loss account and corresponding credit was made in the 'bad debt reserve account'. On the Revenue's appeal, the Tribunal affirmed the view taken by the Commissioner (Appeals) on the grounds that (i) the assessee had rightly made a provision for bad and doubtful debts by debiting the amount of bad debt to the profit and loss account so as to reduce the profits of the year, (ii) the provision account so created was debited and simultaneously, the amount of loans and advances or debtors stood reduced and, consequently, the provision account stood obliterated and (iii) loans and advances or the

sundry debtors of the assessee as at the end of the year lying in the balance sheet were shown as net of 'provision for doubtful debt' created by way of debit to the profit and loss account of the year.

That view of the Tribunal was not accepted by the High Court which held that in view of the insertion of the Explanation to section 36(1)(vii) *vide* the Finance Act, 2001 w.e.f. 01.04.1989, merely creation of a provision did not amount to actual write off of bad debts.

On appeal by the assessee, the Hon'ble Supreme Court held that where assessee-bank had written off impugned bad debt in its books by way of a debit to the profit and loss account, simultaneously reducing corresponding amount from loans and advances to debtors depicted on asset side in balance sheet at close of year, assessee was entitled to deduction u/s 36(1)(vii) and for that purpose, it was not necessary for it to close individual account of each of its debtors in its books.

6.1 In *Syndicate Bank, Manguluru* (supra), relied on by the Ld. counsel, the assessee filed its return declaring certain income u/s 115JA. The assessee claimed certain amount as provision for 'non-performing assets' covered under policy with Deposit Insurance and Credit Guarantee Corporation. The AO recomputed the income u/s 115JA and added back said amount of provision to assessee's income. The Tribunal, however, directed the AO to allow provision as deduction while computing book profit u/s 115JA. In view of the order passed by the Hon'ble Supreme Court in *Vijaya Bank* (supra), the Hon'ble Karnataka High Court remanded back the matter to the Commissioner (Appeals) with a direction to look into records and give a finding as to whether bad and doubtful debts were reduced from loan and

advances of debtors from asset side of balance sheet and thereafter, re-compute income u/s 115JA of the Act. The Hon'ble High Court thus held :

> "4. The same fell for consideration before this Court in the case of *CIT* v. *YOKOGAWA INDIA LTD.* [2012] 204 Taxman 305 (Kar.). Therein, the judgment of the Apex Court in the case of *Vijaya Bank* v. CIT [2010] 190 Taxman 257/323 ITR 166 was considered, wherein the Apex Court considered the Explanation with regard to Item (c) of the *Explanation* of Section 115JA of the Act. It was held that a mere debit to the profit and loss account would constitute a bad and doubtful debt, but it would not constitute actual write off and that was the very reason why the explanation stood inserted. That prior to the Finance Act, 2001, the assessee would take the benefit of a deduction under Section 36(1)(vii) of the Act by merely debiting the impugned bad debt to the profit and loss account and, therefore, the explanation was added on to state that a mere reduction of profits by debiting the amount to the profit and loss account *per se,* would not constitute an actual write off. However, it was clarified that, besides debiting the profit and loss account and creating a provision for bad and doubtful debt, the assessee correspondingly/simultaneously obliterated the said provision from its accounts by reducing the corresponding amount from loans and advances/debtors on the assets side of the balance sheet. Consequent to the explanation, the assessees are now required, not only to debit the profit and loss account but, simultaneously also reduce the loans and advances from the assets side. Therefore, it was held that, if the bad debt or doubtful debt is reduced from the loans and advances of the debtors from the assets side of the balance sheet, the *Explanation* to Section 115JA or JB is not at all attracted."

6.2 Having regard to the facts of the case, we are of the considered view that the decision in *Syndicate Bank* (supra) relied on by the Ld. counsel is applicable to the instant case, wherein the Hon'ble Karnataka High Court by following the judgment of the Hon'ble Supreme Court in *Vijaya Bank* (supra) has held that where the AO while computing book profit u/s 115JA, added back provision for 'Non-performing Assets', matter was to be

remanded back with a direction to look into records and to record a finding as to whether bad and doubtful debts were reduced from loan and advances of debtors from asset side of balance sheet and thereafter, re-compute income u/s 115JA.

Accordingly, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to re-compute income u/s 115JB by following the above ratio laid down in *Vijaya Bank* (supra) and *Syndicate Bank* (supra) after giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant accounts/documents before the AO. Thus the 1st ground of appeal along with the additional ground is allowed for statistical purposes.

7. <u>The 2nd ground of appeal</u>

> The Ld. CIT(A) erred in upholding the disallowance of Rs.3,73,88,538/- paid to Tata Sons Limited towards the subscription paid for The Brand Equity and Business Promotion(BEPB) Agreement.

7.1 During the course of assessment proceedings, the assessee submitted before the AO vide letter dated 10.10.2005 stating that the Company has entered into an agreement dated 01.01.1999 titled "Tata Brand Equity & Business Promotion Agreement" *vide* which it had to pay 0.25% of its annual profits to M/s Tata Sons Ltd. as premium for using the TATA logo. Explaining that the said payment is made annually on a recurring basis, the assessee explained before the AO that the same be allowable as a revenue expense.

However, the AO was not convinced with the above explanation of the assessee on the ground that (i) the Company is a well known Tata group Company since 1939 having its own reputation as a house hold name

; the assessee had its own well-established logo which also discloses the Tata linkage of the company, (ii) the payment for premium is being made under a mandatory direction from the holding company and is for non-business consideration and (iii) the agreement as referred is nothing but an arrangement to share profits with the holding company at a pre-determined rate and any payment in perseverance to the said agreement is not allowable as an expense relating to the business of the Company.

Accordingly, the AO had a disallowance of the above claim of Rs.3,73,88,538/-.

8. In appeal, the Ld. CIT(A) affirmed the disallowance of Rs.3,73,88,538/- with the following reasons :

> "I have considered the facts of the issue and the submissions made by the AR. There is merit in AO's finding that the company is well known as a Tata Group Company since 1939 having its own reputation as a household name. Further, the AO is right in noting that the appellant had its own well established logo which clearly indicated the linkage of the appellant with the Tata Groups. Hence, the company did not need to make any payments for utilizing the Tata logo to promote its sales or to further get identified with the Tata Group. Hence, the finding of the AO that the said payment was being made under a mandatory direction from the holding company and was not for business consideration is perfectly in order. Thus, the same cannot be allowed as a deduction. Hence, the order of the AO disallowing the said payment is confirmed. Alternatively, even if the decision of the DRP is followed, still the said expenditure cannot be allowed as a revenue expenditure."

9. Before us, the Ld. counsel submits that in the wake of new competitive environment and radical transformation of the business scene created by liberalization and globalization of trade and industry, it was felt that all Tata Companies should come under one umbrella and hence an

agreement titled "TATA Brand Equity & Business Promotion Agreement" was signed on 01.01.1999 and the assessee-company subscribed to the 'Brand Equity Scheme' by paying premium @ 0.25% per annum. The said agreement was entered into between Tata Sons and Tata Chemicals (the assessee-company) to pool their resources and make a co-operative effort to promote a unified common Tata Brand which, collectively would match the Brand Equity of well known international brand names. Explaining the above, the Ld. counsel submits that the ITAT 'H' Bench, Mumbai in assessee's own case for AY 2002-03 (ITA No. 3383/Mum/2015) on similar facts has dismissed the appeal filed by the Revenue.

On the other hand, the Ld. DR relies on the order passed by the Ld. CIT(A).

10. We have heard the rival submissions and perused the relevant materials on record. Similar issue arose before the Tribunal in assessee's own case for AY 2002-03 in ITA No. 3383/Mum/2015, wherein it is noted that the same issue has been decided in favour of the assessee in its own case for AY 2000-01 (ITA No. 5446/M/2014, dated 21.06.2017) and AY 2001-02 (ITA No. 6366/M/2014, dated 15.09.2017) by the Tribunal. Also in the case of its subsidiary company i.e. Rallis (India) Ltd., the same issue has been decided in favour of the assessee by the Tribunal in ITA No. 5257/M/2008 vide order dated 30.08.2001. Therefore, the Tribunal in AY 2002-03 affirmed the order of the Ld. CIT(A) deleting the addition made by the AO.

Facts being identical, we follow the above order of the Co-ordinate Bench in assessee's own case and delete the addition of Rs.3,73,88,538/- made by the AO. Thus the 2nd ground of appeal is allowed.

11. The 3rd ground of appeal

The Ld. CIT(A) erred in confirming the disallowance u/s 80M/section 14A with a direction to rework the same in respect of indirect expenses.

The assessee has filed an additional ground stating that "the AO erred in adding back a sum of Rs.7,45,00,000/- towards allocation of interest expenses towards dividend income, under the head business income".

During the year under consideration, the assessee received dividend and income from units of mutual funds amounting to Rs.12,73,84,631/-. Out of the same, it claimed an amount of Rs.12,00,21,432/- (being dividend received from domestic companies) as deduction u/s 80M of the Act, without allocating any expense towards earning such income. During the course of assessment proceedings, the assessee explained before the AO that the main business is manufacturing and sale of chemicals, cement, detergent and urea. The surplus funds are invested in shares and other securities and at no stage borrowed funds diverted for investment in shares. There are surplus reserves with the company to explain the source of its investments and shares and borrowings are made for specific purposes only.

However, the AO was not convinced with the above reply of the assessee on the ground that the common pool of funds is source to all outgoings including investments, advances, fixed assets and other current assets and is destination of all incoming funds from loans and advances, capital and retained earnings in the nature of reserves. The AO restricted the net deduction u/s 80M with the following reasons :

"Having said so, since it is not possible to identify the source of each outgoing from the common pool of funds including both own funds as well as borrowed

funds, what is more important is to determine the tangible cost of capital employed i.e. the actual interest expenses with respect to total capital employed. It is noted from the balance sheet, as on 31-3-2003 that total funds employed in the business including own capital, borrowed funds and reserves are Rs.3602.61 Crores. The interest paid during FY 2002-03 (pertaining to TCL) is Rs.98.25 crores (gross). Hence the average interest cost to entire capital employed is 2.73%. While computing the average cost of funds employed, assessee's contention regarding investment out of internal resources has also been taken care of. The total investment in quoted and unquoted equity shares of domestic companies (excluding investments received on account of merger of Hind Lever Chemicals Limited), dividend income from which is claimed as deduction u/s 80M is Rs.272.72 crores as per schedule F to the balance sheet.

As the average interest cost of capital employed is 2.73% the interest cost allocable to the above investments comes to Rs.7.45/- crores.

Accordingly an amount of Rs.7.45 crores is attributed as interest expense towards the investment in shares of domestic companies, income from which is claimed as deduction u/s 80M of the I. T. Act. Therefore, net deduction u/s 80M of the Income Tax Act (after allocation of interest expenses) would be Rs.4,55,21,432/-(Rs.12,00,21,432/- *minus* Rs.7,45,00,000/-)."

12. In appeal, the Ld. CIT(A) by following the order of the Hon'ble Bombay High Court in the case of *Godrej & Boyce Mfg Co. Ltd. v. DCIT* (ITA No. 626/10 and WP No. 785/10) held that :

"Since, it has been held in this case that rule 8D is only prospectively applicable, the same cannot be applied in the year under consideration. However, in that case, it has also been held by the Jurisdictional High Court that the disallowance u/s. 14A has to be made by the AO on a 'reasonable' basis. Hence, the action of the AO in allocating expenses towards earning of exempt income (relating to deduction u/s. 80M) and making of disallowance u/s. 14A is confirmed albeit he would re-work out such allocation /disallowance u/s 14A on a reasonable basis keeping in view the findings given by the Hon'ble Bombay High Court in the case

of Godrej & Boyce Mfg. Co. Ltd vs. DCIT (ITA No.626/10 and W.P. No.785/10); without resorting to the provisions of rule 8D as held by the Jurisdictional High Court in the above stated case. Hence, this ground is partly allowed with the above said directions to the AO."

13. Before us, the Ld. counsel submits that the surplus funds for past several years were deployed systematically for expansion of business and investments in units of mutual funds and shares of various reputed companies. Such income earned on investments during the year was as under:

Dividend from shares of domestic cos	120,021,432
Others	7,363,199
Total	127,384,631

It is explained that for earning income from investments, the company has not incurred any expenses and this can be verified from the following facts :

i. Company has huge own funds aggregating to Rs.2786.35 crores. Against this, borrowings both for capital expenditure and for Working Capital is just Rs.816.26 crores.
ii. The Gross Block is of Rs.2,834.90 crores, much more than borrowed capital, whereas the Investment portfolio is just Rs.569.02 crores.
iii. Borrowings including that for Working capital have come down from Rs.1,060.56 to Rs.816.26 crores.
iv. There is an all round reduction in the loans i.e. secured loans or terms loans and short term loans in comparison to previous year.
v. Investments have marginally increased from Rs.555.68 crores to Rs.569.02 crores.
vi. The entire fresh investments are financed out of the own funds of the company and not out of borrowings.

Finally, the Ld. counsel submits that on identical facts in AY 1992-93 (and followed in AY 1993-94 and AY 1994-95) the Tribunal has decided the issue in favour of the assessee and held that there is no scope for allocation

of interest expenses towards investment income and Department's reference to High Court on the above issue and SLP to Supreme Court has been rejected.

On the other hand, the Ld. DR relies on the order of the Ld. CIT(A).

14. We have heard the rival submissions and perused the relevant materials on record. There is no dispute that in the instant case, the assessee-company has not incurred any expenses for earning dividend income. Surplus funds time to time are invested in shares, securities, units etc. of reputed company. In the impugned assessment year, there is merit in the contentions of the Ld. counsel that for earning income from investments, the assessee-company has not incurred any expenses as evident from facts mentioned at para 13 hereinabove, which is reflected in the audited accounts. In fact the 'Reserve & Surplus' as at 31st March 2003 is Rs. 1,455.16 crores, whereas the 'Investment' is Rs. 569.02 crores, as evident from the audited accounts for the year under consideration. Further, on identical facts, the Tribunal for AYs 1992-93, 1993-94 and 1994-95 has decided the issue in favour of the assessee. Facts being identical, we follow the above orders of the Co-ordinate Bench and allow the 3rd ground of appeal. Consequently, the related additional ground becomes academic in nature.

15. <u>The 4th ground of appeal</u>

The Ld. CIT(A) erred in holding that 90 % of the following Miscellaneous Income:

a.	Interest on ICDs and Sundry Advances	Rs.7,97,21,078/-
b.	Town Income	Rs.1,08,97,055/-
c.	Miscellaneous Income	Rs.3,58,50,343/-

should be excluded from the profits of the business for computing deduction u/s 80HHC.

The Ld. counsel submits that the above ground of appeal is not pressed because of smallness. However, it is submitted by him that this should not be quoted as a precedent for other years.

Having heard the above contentions and examined the materials available on record, we dismiss the above ground of appeal as not pressed. As this ground of appeal is not pressed because of smallness in amount, we make it abundantly clear that the above finding is limited to the impugned assessment year only and the same should not be quoted as a precedent for other years.

16. <u>The 5th ground of appeal</u>

The Ld. CIT(A) erred in upholding the disallowance of deduction u/s 80(IB) of Rs.25,31,96,667/-, in respect of the fertilizer unit of Haldia:

a. without going through the detailed submissions made,
b. holding that the Sales Tax Incentive Scheme does not have a direct nexus with the activities of the industrial unit;
c. holding that the Fertilizer Subsidy provided by the government as price concession was not income from the industrial undertaking and therefore not eligible for deduction u/s 80 (IB).

The assessee has also filed and additional ground which reads as under :

"That the Sales Tax Incentive money of Rs.3,30,61,201/- being the amount retained by the company in accordance with section 41 of the West Bengal Sales Tax Act, 1944 (read with The West Bengal Incentive Scheme, 1999), was a capital receipt not chargeable to tax under the Income Tax Act."

As the above additional ground does not require investigation of additional facts and as it goes to the root of the matter, we admit it for adjudication by following the decision of the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd*. (supra).

The AO noted that for the impugned assessment year, Hind Lever Chemicals Ltd. (HLCL) (since amalgamated with the assessee) filed its return of income on 28.11.2003, claiming a refund of Rs.2.87 crores. In the return of income, section 80IB claim of Rs.7.59 crores was made in respect of its 3 new industrial undertakings located in category "B" industrially backward district i.e. Midnapore, West Bengal. The return of income was processed u/s 143(1) and the refund arising on intimation was adjusted against the outstanding demand of HLCL for AY 1997-98. While processing the return of income u/s 143(1), TDS and advance tax payments of HLCL were not considered. The effective date of amalgamation was June 01, 2004 and the appointed date of amalgamation was April 01, 2002 i.e. HLCL amalgamated with the assessee w.e.f. April, 2002. After amalgamation, the assessee filed a revised return of income for the financial year 2002-03 relevant to the impugned assessment year, incorporating the working results of HLCL. In the revised return of income, section 80IB claimed was not made but the disclosure was made that the same will be claimed at the time of assessment. Accordingly, during the course of assessment proceedings for the impugned assessment year, *vide* letter dated 30.11.2005, section 80IB claim of Rs.7,59,59,000/- (same as that claimed in original return of HLCL) @ 30% of the profits (this being the 4th year of claim) in respect of erstwhile HLCL was made. The audit report in Form No. 10CCB along with audited accounts of the new industrial undertakings duly certified by the chartered accountant were also filed. Before the revised

return of income was filed by the assessee-company, notice u/s 148 dated 31.03.2005 was issued by the AO of the erstwhile HLCL.

The AO having gone through the assessment records of AY 2002-03 of HLCL (earlier assessment year) noted that sales tax remission and price concession (subsidy) forming part of section 80IB claimed were rejected by the AO in that year. Observing that during year under consideration, both the items i.e. sales tax remission of Rs.3.31 crores and price concession (subsidy) of Rs.105.40 crores have been included in the computation of claim u/s 80IB of the Act, the AO disallowed the above sums by following the order of his predecessor for the earlier assessment year.

17. In appeal, the Ld. CIT(A) held that sales tax remission/subsidy has been received on account of the scheme of the Government for setting up the industrial unit in the 'backward district'; this finding is supported by the fact that the old unit was not in receipt of any such incentive; it is not the industrial unit from which this benefit was derived by the appellant but the Government scheme allowing such benefit depending upon the location of industry. Therefore, he held that there is merit in the finding of the AO that the remission/reimbursement is not 'derived from the business of' the industrial undertaking. The Ld. CIT(A) in agreement with the AO relied on the decision of the Hon'ble Supreme Court in *Andaman Timber Chemicals Inds* (244ITR 204) and *CIT v. Sterling Foods* (237 ITR 579). Stating that the impugned sales tax incentives has its genesis in the scheme of the Government, being located in a 'backward area' and not in the profits derived from the industrial undertaking *per se*, he upheld the action of the AO in disallowing deduction u/s 80IB in respect of sales tax incentive.

In respect of fertilizer subsidy, the Ld. CIT(A) agreed with the findings of the AO that the selling price of the fertilizer in AY 2002-03 was much less than the MRP and that in case of DAP, while the MRP fixed by the Government was Rs.9,350/- per metric ton, the selling price of the assessee was only Rs.8,458/- per metric ton; the assessee was not able to sell the product at MRP fixed by the Government; also as noted by the AO as against pre-1994 when the price concessions were computed separately for individual units, now said concessions were being given uniformly to all the units in respect of similar variety of fertilizer and this also reflected that the concession by the Government was merely an aid to the assessee.

Further dismissing the contentions of the assessee that the fertilizer concessions being related to the sale of fertilizer products flew directly from the operations of the industrial undertaking, the Ld. CIT(A) observed that the concessions being received from the Government is a 'step removed' from the principal activity of the assessee-company namely- production and sale of fertilizer; it was not the industrial undertaking which yielded the subject income by way of sales tax concession but the scheme of the Government which made it possible for the assessee to receive those amounts and the existence of such a scheme was not an essential part of the industrial undertaking.

Further dismissing the contentions of the assessee that the terms 'profits and gains derived from any business' is wide enough to cover profits having indirect nexus with the industrial undertaking, the Ld. CIT(A) observed that the income from fertilizer concession is clearly relatable only to the Government scheme and not to the industrial undertaking *per se;* the contentions that the incentive provisions should be

construed liberally would not mean that the incentives be allowed in respect of ineligible units.

Referring to the order of the AO, wherein the case of M/s Hind Lever Chemicals Ltd. (AY 2002-03) is brought out to show how the assessee is not eligible for section 80IB deduction in respect of fertilizer concession/subsidy, the Ld. CIT(A) affirmed the order of the AO disallowing the claim of the assessee of deduction u/s 80IB of the Act.

18. Before us, the Ld. counsel reiterating the statement of facts filed before the Ld. CIT(A), submits that for the year under consideration, HLCL (since amalgamated with the assessee-company) filed its return of income on 28.11.2003 at Chandigarh before Addl. CIT, claiming a refund of Rs.2.87 crores. In the said return, section 80IB claim of Rs.7.59 crores was made in respect of its 3 new industrial undertakings located in category "B" industrially backward district i.e. in Midnapore, West Bengal. It is stated that the effective date of amalgamation was 01.06.2004 and the appointed date of amalgamation was 01.04.2002 i.e. HLCL amalgamated with the assessee-company w.e.f. 01.04.2002. It is stated that the order of the Hon'ble Bombay and Punjab & Haryana High Court sanctioning the scheme of amalgamation were filed before the AO. After the amalgamation, the assessee-company filed its revised return of income for the year under reference incorporating the working results of HLCL. In the revised return of income, section 80IB claim was not made but a disclosure was made that the same will be claimed at the time of assessment. It is stated by the Ld. counsel that during the course of assessment proceedings, *vide* letter dated 30.11.2005, section 80IB claim of Rs.7,59,59,000/- (same as that claimed in original return of HLCL) @ 30% of the profits (this being the 4th year of claim) in respect of erstwhile HLCL was made. It is explained that the audit

report in Form No. 10CCB along with audited accounts of the new industrial undertakings, duly certified by Chartered Accountant were also filed at the time of assessment.

Regarding the disallowance made by the AO of Sales Tax remission of Rs.3.31 crores and price concession (subsidy) of Rs.105.40 crores, included in the computation of section 80IB claim, the Ld. counsel submits that the sales tax collected is a part of trading receipt as held by the Hon'ble Supreme Court in the case of *Sinclair Murray & Co. Pvt. Ltd. v. CIT* 97 ITR 615 (SC) and cannot be excluded from the income of the unit. Further, it is submitted that the fertilizer concession received by the assessee is nothing but part of the sale proceeds, which cannot be excluded while working out profit u/s 80IB of the Act.

19. On the other hand, the Ld. DR submits that the sales tax remission/subsidy has been received on account of the Scheme of the Government for setting up the industrial unit in 'backward district', hence, it is not the industrial unit from which this benefit was derived by the assessee but the Government's Scheme allowing such benefit, depending upon the location of the industry. Thus it is stated that the Ld. CIT(A) has rightly confirmed the order of the AO.

Regarding the fertilizer subsidy, the Ld. DR submits that the concession by the Government was merely an aid to the assessee and there is no merit in the contentions of the assessee that fertilizer concessions being related to the sale of fertilizer products, flew directly from the operations of the industrial undertaking. Referring to the order of the Ld. CIT(A), the Ld. DR submits that it was not the industrial undertaking which yielded the subject income by way of sales tax concession but the scheme of

the Government which made it possible for the assessee to receive those amounts and the existence of such scheme was not an essential part of the industrial undertaking. Referring to the order of the AO that in the case of M/s Hind Lever Chemicals Ltd. (AY 2002-03) as to how the assessee was not eligible for section 80IB deduction in respect of fertilizer concession/subsidy, the Ld. DR submits that the order of the Ld. CIT(A) in respect of the above ground of appeal be affirmed.

20. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

As mentioned earlier, it is the contentions of the Ld. counsel that for the year under reference, HLCL (since amalgamated with the assessee) filed its return of income on 28.11.2003 claiming a refund of Rs.2.87 crores ; in the said return of income, section 80IB claim of Rs.7.59 crores was made in respect of its 3 new industrial undertakings located in category "B" industrially backward district i.e. in Midnapore, West Bengal; the effective date of amalgamation was 01.06.2004 and the appointed date of amalgamation was 01.04.2002 i.e. HLCL amalgamated with the assessee-company w.e.f. 01.04.2002 ; after the amalgamation, the assessee-company filed its revised return of income for the year under consideration incorporating the working results of HLCL. Also it is the contentions of the assessee that during the course of assessment proceedings, *vide* letter dated 30.11.2005, section 80IB claim of Rs.7,59,59,000/- (same as that claim in original return of HLCL) @ 30% of the profits (this being the 4th year of claim) in respect of erstwhile HLCL was made.

Regarding fertilizer price concession from the Government of Rs.105.40 crores, it is the contentions of the assessee that to support

industries, certain portion of price is reimbursed by Central Government in the name of fertilizer concession ; while selling the fertilizer, the assessee-company recovers part cost from farmers and part cost through Government by way of concession; the subsidy is related to the business activity of the assessee as the subsidy claim arises only upon sale of the fertilizer to the farmers ; the subsidy is nothing but a difference between cost of sales and MRP indicated by the Government; it is the subsidy amount which alone permits the manufacturer, like the present assessee to recover is uncovered cost of production including distribution cost and minimal margin allowed; it is only pursuant to the sale of fertilizer to the farmers would the assessee be eligible to receive subsidy; the fertilizer concession received by the assessee is nothing but part of sales proceeds, which cannot be excluded while working out profit u/s 80IB of the Act;

In respect of sales tax remission of Rs.3.31 crores, it is the contentions of the assessee that it sold its products at notified prices and charged sales tax in the invoices ; in the books of accounts, sales tax collected was shown as sales tax incentive and not deposited the Government as per the Industrial Development Policy of the State; sales tax remission/subsidy is arising only on account of sales from fertilizers to the farmers, which clearly indicates that the sales tax remission has direct nexus with the activities of the industrial undertaking

Having examined the materials available on record, we find that the AO has not examined in proper perspective the above contentions of the assessee. As the above contentions have a direct bearing on the above ground of appeal, we set aside the order of the Ld. CIT(A) on the above issue and restore the matter to the file of the AO to pass an order afresh on

the above 5th ground along with the additional ground raised for the first time before us, after giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the AO. As the matter has been restored to the file of the AO, we are not adverting to the case-laws relied on by the Ld. counsel. Thus the 5th ground of appeal along with the additional ground is allowed for statistical purposes.

21. In the result, the appeal filed by the assessee is partly allowed.

ITA No. 2734/MUM/2011
(Revenue's Appeal)

22. The grounds of appeal filed by the Revenue read as under :

1. The order of CIT(A) is opposed to law and facts of the case.
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance made u/s 40A(9), ignoring the fact that these expenses were not incurred wholly for business.
3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.3,54,774/- being share issue and preliminary expenses, ignoring the fact that these expenses are capital in nature.
4. For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the AO restored.

23. Central Board of Direct Taxes (CBDT) *vide* Circular No. 17/2019 dated 08.08.2019 has amended Circular No. 3/2018 dated 11.07.2018 for further enhancement of monetary limit for filing of appeals by the Revenue before the ITAT, High Courts and SLPs/Appeals before Supreme Court as measures for reducing litigation.

24. CBDT *vide* Circular No. 3/2018 dated 11.07.2018 has specified that appeals shall not be filed before the Income Tax Appellate Tribunal (ITAT) in cases where the tax effect does not exceed the monetary limit of Rs.20,00,000/-. For this purchase, 'tax effect' means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of issues against which appeal is intended to be filed. Further, 'tax effect' shall be taxes including applicable surcharge and cess. However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty order, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

At para 13 of the said Circular, it has been mentioned that:

> "13. This Circular will apply to SLPs/appeals/cross objection/references to be filed henceforth in SC/HCs/Tribunal and it shall also apply retrospectively to pending SLPs/appeals/cross objections/references. Pending appeals below the specified tax limits in para 3 above may be withdrawn/not pressed."

25. As a step towards further management of litigation, CBDT *vide* Circular No. 17/2019 has fixed the monetary limit for filing of appeals before ITAT at Rs.50,00,000/-.

26. In the instant case, the disallowance made by the AO u/s 40A(9) is Rs.84,50,252/-. Further, the AO has made an addition of share issue and preliminary expenses of Rs.6,74,584/-. In the grounds of appeal filed by the Revenue against the order of the Ld. CIT(A), the above two amounts are

agitated. The total quantum involved is Rs.91,24,836/-. The tax rate (including surcharge @ 5%) comes to 36.750%. Consequently, the tax effect is Rs.33,53,377/-. The consequential tax effect is less than Rs.50,00,000/-. Therefore, the Ld. counsel for the assessee submits that the appeal filed by the Revenue be dismissed.

27. Before us, the Ld. Departmental Representative (DR) fairly agrees that the tax effect herein is below the monetary limit of Rs.50,00,000/- fixed by the above Circular for filing of appeals before the ITAT.

28. In view of the CBDT Circular No. 17/2019, this appeal involving tax effect of less than Rs.50,00,000/- is dismissed as withdrawn.

29. To sum up, the appeal filed by the assessee is partly allowed, whereas the appeal filed by the Revenue is dismissed as withdrawn.

Order pronounced in the open Court on 19/02/2021.

Sd/-	Sd/-
(MAHAVIR SINGH)	(N.K. PRADHAN)
VICE PRESIDENT	ACCOUNTANT MEMBER

Mumbai;
Dated: 19/02/2021
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai