

आयकर अपीलीय अधिकरण
कोलकाता 'बी' पीठ, कोलकाता में
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA**

श्री राजपाल यादव, उपाध्यक्ष (कोलकाता क्षेत्र)
एवं
डॉ. मनीष बोरड, लेखा सदस्य
के समक्ष

Before
**SRI RAJPAL YADAV, VICE PRESIDENT
&
DR. MANISH BORAD, ACCOUNTANT MEMBER**

**I.T.A. Nos.: 494 & 495/Kol/2020
Assessment Years: 2011-12 & 2012-13**

***Birla Corporation Limited.....Appellant
[PAN: AABCB 2075 J]***

Vs.

DCIT, Circle-6(1), Kolkata.....Respondent

**I.T.A. Nos.: 2111 & 2112/Kol/2018
Assessment Years: 2011-12 & 2012-13**

DCIT, Circle-6(1), Kolkata.....Appellant

Vs.

***Birla Corporation Limited.....Respondent
[PAN: AABCB 2075 J]***

Appearances by:

Sh. J.P. Khaitan, Sr. Adv., &

Sh. Sanjay Bhaumik, Adv., appeared on behalf of the Assessee.

Sh. Sudipta Guha, CIT, (D/R), appeared on behalf of the Revenue.

Date of concluding the hearing : August 3rd, 2022

Date of pronouncing the order : October 31st, 2022

आदेश
ORDER

Per Manish Borad, Accountant Member:

The captioned cross appeals pertaining to the Assessment Years (in short “AY”) 2011-12 & 2012-13 are directed against separate orders passed u/s 250 of the Income Tax Act, 1961 (in short the “Act”) by Id. Commissioner of Income-tax (Appeals)-6, Kolkata [in short Id. “CIT(A)”] dated 02.07.2018 which are arising out of the assessment orders framed u/s 143(3) of the Act.

2. Registry has informed that assessee’s appeals are time barred by 741 days. Condonation application has been filed by the assessee. After perusing the same, we find that the reason stated by the assessee for the said delay is for making claim of deduction of education cess in view of the judgment of Hon'ble Bombay High Court in the case of *Sesa Goa Ltd.* dated 28.02.2020. Though notice in respect of the Department’s appeal was received by the assessee on 14.02.2018, at that point of time assessee did not intend to file any cross appeal. But, due to later development arising out of the said judgment, assessee after taking advice from its consultant decided to file the cross appeals. Some part of delay is also on account of COVID-19 restrictions arising out of the outbreak of COVID-19. We therefore, find merit in the condonation application filed by the assessee and in the larger interest of justice

condone the delay and admit the assessee's appeal for adjudication.

3. The assessee has raised the following grounds of appeal:

Assessment Year 2011-12:

"1. For that education cess included in the liability for income tax is an allowable deduction under section 37(1) of the Income Tax Act, 1961 (in short "the Act") and is not hit by section 40(a)(ii) of the Act.

2. For that the Commissioner of Income Tax (Appeals) erred in not directing the Assessing Officer to allow the deduction of actual payment made during the previous year relevant to the assessment year 2011-12 on account of leave liability, if the Hon'ble Supreme Court, in the case of CIT vs. Exide Industries Ltd., allow the appeal filed by the Department in their favour and deduction of provision made for Leave Liability is withdrawn, while remanding the matter to the Assessing Officer with a direction to await the decision of the Hon'ble Supreme Court in the case of Exide Industries Ltd. (supra) and decide the issue accordingly.

3. For that further and in any event, a direction may be given to the Assessing Officer to allow the deduction of actual payment made during the previous year relevant to the assessment year 2011-12 on account of leave liability under the provisions of section 43B(f) of the Act in the remand proceedings."

Assessment Year 2012-13:

"1. For that education cess included in the liability for income tax is an allowable deduction under section 37(1) of the Income Tax Act, 1961 (in short "the Act") and is not hit by section 40(a)(ii) of the Act.

2. For that the Commissioner of Income Tax (Appeals) erred in not directing the Assessing Officer to allow the deduction of actual payment made during the previous year relevant to the assessment year 2012-13 on account of leave liability, if the Hon'ble Supreme Court, in the case of CIT vs. Exide Industries Ltd., allow the appeal filed by the Department in their favour and deduction of provision made for Leave Liability is withdrawn, while remanding the matter to the Assessing Officer with a direction to await the decision of the

Hon'ble Supreme Court in the case of Exide Industries Ltd. (supra) and decide the issue accordingly.

3. For that further and in any event, a direction may be given to the Assessing Officer to allow the deduction of actual payment made during the previous year relevant to the assessment year 2012-13 on account of leave liability under the provisions of section 43B(f) of the Act in the remand proceedings.”

3.1. The Revenue is in appeal before this Tribunal raising the following grounds:

Assessment Year 2011-12:

“1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred by allowing the claim of balance additional depreciation of Rs.1,43,97,535/-.

2. Whether on the facts and in the circumstances of the case, the Ld. CIT (A) has erred in holding that deduction u/s 80IA of the IT Act will be allowed as claimed by the assessee of Rs.95,02,42,853/-.

3. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that compensation paid Rs.35,79,586/- to obtain raw materials is Revenue Expenditure not Capital expenditure.

4. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the amount received by the assessee of Rs.16,94,84,638/- as Industrial Promotion Assistance from the State Govt, is capital in nature as against revenue receipt as treated in the assessment order.

5. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the amount received by the assessee for Rs.3,04,22,210/- as Interest Subsidy from the State Govt, is capital in nature as against revenue receipt as treated in the assessment order.

6. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition made by A.O u/s 14A under Rule 8D without appreciating the CBDT Circular NO-5/2014.

7. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the impugned capital receipt is neither

taxable under normal provisions of the Act nor under the MAT provision without considering that the accounts of the assessee company were prepared in accordance with the provisions of Companies Act and these incentives were credited to Profit & Loss Account, and this claim was not made through IT Return of Revised IT Return.

8. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law by deleting upward adjustment made to Book Profit for disallowance computed u/s. 14A read with rule 8D.

9. That the appellant craves for leave to add, delete and modify any of the grounds of appeal before or at the time of hearing.”

Assessment Year 2012-13:

“1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred by allowing the claim of balance additional depreciation of Rs.19,62,84,508/-.

2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that deduction u/s 80IA of the IT Act will be allowed as claimed by the assessee of Rs.109,92,96,346/-.

3. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that compensation paid Rs.30,64,547/- to obtain raw materials is Revenue Expenditure not Capital expenditure.

4. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the amount received by the assessee of Rs.21,53,28,688/- as Industrial Promotion Assistance from the State Govt, is capital in nature as against revenue receipt as treated in the assessment order.

5. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the amount received by the assessee for Rs.1,46,56,285/- as Interest Subsidy from the State Govt, is capital in nature as against revenue receipt as treated in the assessment order.

6. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition made by A.O u/s 14A under Rule 8D without appreciating the CBDT Circular No-5/2014.

7. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the impugned capital receipt is neither

taxable under normal provisions of the Act nor under the MAT provision without considering that the accounts of the assessee company were prepared in accordance with the provisions of Companies Act and these incentives were credited to Profit & Loss Account, and this claim was not made through IT Return of Revised IT Return.

8. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law by deleting upward adjustment made to Book Profit for disallowance computed u/s. 14A read with rule 8D.

9. That the appellant craves for leave to add, delete and modify any of the grounds of appeal before or at the time of hearing.”

4. In the cross appeals for AY 2011-12 & AY 2012-13 most of the issues raised by the Revenue are common, therefore, as agreed by both the parties, the same are taken up together and are being disposed off by this common order for the sake of convenience and brevity.

5. For the purpose of adjudication of the issues, we will take the facts for AY 2011-12. Brief facts of the case are that the assessee is a limited company engaged in manufacturing of cement, generation and selling of power, jute goods, auto trim parts, iron and steel castings. Return of income for AY 2011-12 was filed on 30.09.2011 declaring loss of Rs. 1,95,29,34,610/-. This return was further, revised on 22.05.2012. Case selected for scrutiny through CASS followed by serving of valid notices u/s 143(2) & 142(1) of the Act. Various details called for were filed by the assessee and ld. AO after considering the submissions of the assessee assessed the income at Rs. 3,17,91,06,973/- making various additions/disallowances. Book profit assessed at Rs. 4,27,46,49,075/-.

6. Aggrieved, the assessee preferred appeal before ld. CIT(A) and partly succeeded.

7. Aggrieved, now both assessee and Revenue are in appeal before this Tribunal.

8. The main appeals are of the Revenue. Therefore, issues raised by the Revenue are decided first. At the outset, ld. Counsel for the assessee submitted that most of the issues raised by the Revenue are squarely covered in favour of the assessee by the decision of this Tribunal in assessee's own case for preceding years and copy of the decisions are placed on record.

9. Ld. D/R failed to controvert this fact that most of the issues have already been dealt in the past by this Tribunal.

Revenue's common Ground no. 1 for AY 2011-12 & 2012-13 relating to the claim of additional depreciation of Rs. 1,43,97,535/- u/s 32(1)(iia):

10. We have heard rival contentions and perused the records placed before us. The first common ground raised in the Department's appeal relates to the assessee's claim for 50% initial depreciation u/s 32(1)(iia) of the Act amounting to Rs.1,43,97,535/- in respect of new plant and machinery purchased and installed in the preceding year but put to use for a period of less than 180 days in that year. In view of the second proviso to section 32(1) of the Act, for the assessment year 2010-11, the assessee claimed only 50% initial depreciation and the remaining 50% was claimed in the assessment year 2011-12. Ld.

AO disallowed the claim on the ground that initial depreciation is available only in the year of purchase and cannot be claimed in the subsequent year. The ld. CIT(A) allowed the claim of the assessee by following the decision of this Hon'ble Tribunal in assessee's own case for the assessment year 2007-08.

10.1. It is submitted that the identical claim of the assessee for the assessment year 2007-08 was allowed by the Hon'ble Tribunal by an order dated December 8, 2014 (page 83 at Pp 86-88 of Paper Book-paragraphs 10 at 15-18). The Hon'ble Tribunal also allowed the said claim for the assessment years 2008-09 and 2009-10 by a consolidated order dated August 25, 2017 (Page 140 at Pp 142-144 of Paper Book-paragraphs 7 at 7.2) and for the assessment year 2010-11 by an order dated September 13, 2017 (Page 180 at Pp 182-185 of Paper Book-paragraphs 46 at 52-53). The orders of this Hon'ble Tribunal for the assessment years 2008-09, 2009-10 and 2010-11 were passed after taking into consideration the judgment of the Hon'ble Karnataka High Court in *CIT v. Rittal India (P) Limited*, (2016) 380 ITR 423 (Karn). Subsequently, the Hon'ble Madras High Court in *CIT vs. Shri T.P. Textiles (P.) Ltd.*, [2017] 394 ITR 483 (Mad) [Page 1 at Pp 4-8 of Compilation of Case Laws] has agreed with the Hon'ble Karnataka High Court. The issue is thus covered in favour of the assessee. We find that this Tribunal in assessee's own case for AY 2010-11 dealt with this issue and decided in assessee's favour observing as follows:

"52. Aggrieved by the order of CIT(A) the assessee has raised ground no. 1 before the Tribunal. At the time of hearing both the parties agreed that identical issue came up for consideration in assessee's own case in ITA No.971/Kol/2012, 942/Kol/2013, 298 & 329/Kol/2013 for

A.Y.2008-08 and 2009-10 order dated 25.8.2017. This Tribunal on the identical issue held as follows:

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

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

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

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

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

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

"The language used in clause (iia) of the said section clearly provides that "a further sum equal to 20 per cent, of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii)". The word "shall" used in the said clause is very significant. The benefit which is to be granted is 20 per cent, additional depreciation. By virtue of the proviso referred to above, only 10 per cent, can be claimed in one year, if plant and machinery is put to use for less than 180 days in the said financial year. This would necessarily mean that the balance 10 per cent, additional deduction can be availed of in the subsequent assessment year, otherwise the very purpose of insertion of clause (iia) would be defeated because it provides for 20 per cent, deduction which shall be allowed.

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

8. Heard both parties and perused the relevant material on record. By reading of Clause (iia) to sub-section (1) of section 32 provides for allowance of initial depreciation equal to 20% of the actual cost of new plant and machinery acquired and installed after March 31, 2005 with effect from the assessment year 2006-07 to those who engaged in the business of manufacture or production of any article or thing. Therefore, the assessee is entitled to claim 20% of depreciation equal to the actual cost of plant and machinery, but, whereas the 2nd proviso to section 32(1) of the Act restrains the authority to allow depreciation to 50% of such 20% if the subjected plant and machinery acquired during the previous year and is put 10 use for a period of less than 180 days in that previous year. According to AO in his order at page no-4 referred that the assessee put to use new plant and machinery

for less than 180 days and confirmed by the CIT-A in para-8 of impugned order and it is a requirement under 2nd proviso to section 32(1) which lifts the restriction on AO allow the further depreciation of 10% of which remained unclaimed out of 20% as referred in Clause (iia) to sub-section (1) of section 32 of the Act. The facts of the present are similar to the decision supra relied on by the assessee. Therefore, we are of the view that the law laid down by the Hon'ble High Court of Karnataka in the case of CIT and another vs. Rittal India Private Ltd supra is applicable to the present case, thus we hold that the assessee is entitled to claim remaining 50% depreciation of such 20% which is equal to the actual cost of new plant and machinery, accordingly ground no-1 raised by the assessee is allowed."

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

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

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

10.2. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. for AY 2010-11 referred above and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of Id. CIT(A). Thus, common ground no. 1 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed.

Revenue's common Ground no. 2 for AY 2011-12 & 2012-13 relating to the deduction u/s 80IA of the Act in respect of thermal power plants for generating electricity:

11. We have heard rival contentions and perused the records placed before us. The second common ground raised in the Department's appeal relates to the assessee's claim for deduction under section 80IA in respect of the thermal power plants set up by it at Satna, M.P. and Chanderia, Rajasthan. The electricity generated by the two power plants was transferred to the assessee's cement manufacturing units. Further, electricity was also sold to independent third parties during the year under reference. Having regard to the provisions of sub-section (8) of section 80IA of the Act, the electricity transferred from the power plants to the cement manufacturing units was valued by the assessee with reference to the amount charged by the concerned State Electricity Board in its bills raised upon the assessee. The assessee took into consideration the average rate charged by the State Electricity Board for the previous month even though the rates at which electricity was sold by the assessee to third parties were higher than the rate charged by the State Electricity Board.

11.1.Ld. AO, however, reworked the profits of the power plants for the assessment year under reference by substituting the value of electricity adopted by the assessee with much lower figures. Such lower figures were taken by the ld. AO from orders passed by the concerned State Electricity Regulatory Commission. For the State of Rajasthan, the ld. AO referred to an order dated November 16, 2010 passed by the Regulatory Commission of that State determining the annual fixed charges and energy charge in accordance with the statutory parameters and norms in respect of power generated by Rajasthan Rajya Vidyut Utpadan Nigam at its

different generating stations and supplied to electricity distribution companies. The tariff was separately determined for each generating station based on different elements of cost incurred at each such station. For the State of Madhya Pradesh, the ld. AO referred to an order dated March 3, 2010 passed by the Regulatory Commission of that State determining, in accordance with the statutory parameters and norms, the fixed charges and energy charges for each generating station of the Madhya Pradesh Power Generating Company Limited which it could charge in respect of electricity supplied to electricity distribution companies. The working made by the ld. AO on such basis resulted in losses for both the power plants. As such, the ld. AO held that no deduction was available to the assessee under section 80IA. On appeal, the ld. CIT(A) accepted the assessee's working and granted relief to it following the order dated August 25, 2017 of this Hon'ble Tribunal in the assessee's own case for the assessment years 2008-09 and 2009-10.

11.2. It is submitted by ld. Counsel for the assessee that the question in controversy is covered by the said order dated August 25, 2017 of this Hon'ble Tribunal in the assessee's own case for the assessment years 2008-09 and 2009-10 (Page 125 at pages 133 - 136 of Paper Book). In the said order, this Hon'ble Tribunal took note of the decision of the Hon'ble Calcutta High Court in *CIT v. ITC Limited (2016) 236 Taxmann 612 (Calcutta)* for the assessment year 2002-03 when the provisions of Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948 were in force. It was noted that because of the provisions of the said legislation it was

held by the Hon'ble High Court that a captive power plant could sell electricity only to a generating and distribution company or to a distribution company and such sale could only be made at the tariff determined by the State Regulatory Commission. It was on such basis that the Hon'ble High Court held that electricity generated and captively consumed could only be valued with reference to the price charged by a generating company to a distribution company or a generating and distribution company and that the price charged from the consumer by the distribution company was not relevant. This Hon'ble Tribunal considered the provisions of the Electricity Act, 2003, which came into force on June 10, 2003, repealed the previous legislation, and was in force during the previous years relevant to the assessment years 2008-09 and 2009-10. The sea change in the law brought about by the Electricity Act, 2003 was considered along with the regulations made by the Regulatory Commissions in the two States. It was noted that by reason of the 2003 legislation and regulations made thereunder, it was open to the assessee to sell electricity even to consumers and such sale could take place at mutually agreed rates notwithstanding the tariff fixed by the State Regulatory Commission. This Hon'ble Tribunal took note of the fact that in one of the years before it, the assessee in fact sold electricity at rates higher than that charged from it by the State Electricity Board. This Hon'ble Tribunal held that when it was permissible for the assessee to sell electricity to consumers at rates higher than that paid to the State Electricity Board, the prices charged by the State Electricity Board were a very good indication of the market

value of electricity. This Hon'ble Tribunal thus concluded that the assessee did not commit any error in adopting such prices for working out the amount eligible for deduction under section 80IA of the Act.

11.3. The Hon'ble Tribunal by an order dated September 13, 2017 for the assessment year 2010-11 (Page 153, at Pp 159-162 of the Paper Book, paragraph 3 at paragraphs 13-16) followed the said decision for the assessment years 2008-09 and 2009-10 on this issue.

11.4. It is further submitted that against the said decision of the Hon'ble Tribunal dated August 25, 2017 for the assessment years 2008-09 and 2009-10 the department preferred appeal before the Hon'ble Calcutta High Court under section 260A of the Act, being ITA No. 125/2019 (Question (iii)-Page 11 at page 25 of the Compilation of Case Laws). The Hon'ble High Court, by an order dated September 12, 2019 (Page 9-10 of the Compilation of Case Laws) was pleased not to admit the appeal on this issue. The department also preferred appeal against the decision of the Hon'ble Tribunal dated September 13, 2017 for the assessment year 2010-11 before the Hon'ble Calcutta High Court under section 260A of the Act, being ITA No. 124/2019 (Memorandum of appeal at Page 31-35 of the Compilation of Case Laws). A supplementary affidavit was filed in the said appeal reformulating the questions (page 36 at pages 42 – 44 of the Compilation of Case Laws). It would appear from the order of admission dated March 11, 2020 (page 29 of the Compilation of Case Laws) that the question admitted with reference to section 80IA is only in relation to sale

of electricity by the assessee to Indian Energy Exchange and Rajasthan Power Procurement Centre. We find that this Tribunal in assessee's own case for AY 2010-11 dealt with this issue and decided in assessee's favour observing as follows:

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

Act and the regulations made there under it is not the position that a captive power plant can sell electricity only to a distribution company or a company which is engaged in both generation and distribution. The Tribunal after making reference to the various provisions of the Electricity Act 2003 and the determination of Tariff under the new legislation in the state of Rajasthan and Madhya Pradesh, as claimed by the Assessee before the AO, came to the following conclusions:

“5.6. We have heard the rival submissions and perused the materials available on record including the paper book and the relevant provisions of the Electricity Act, 2003 as detailed supra. We find that the main thrust of order of Id CITA was by placing reliance on the decision of this tribunal in the case of ITC Ltd, which was modified by the Hon’ble Jurisdictional High Court. The Id AR fairly brought to our attention the decision of Hon’ble Jurisdictional High Court in the case of ITC Ltd before us and had duly distinguished the same as not applicable to the facts of the instant case, as admittedly, the Asst Year before Hon’ble Calcutta High Court in ITC Ltd was Asst Year 2002-03. The said decision in ITC Ltd for Asst Year 2002-03 was rendered by taking into account the relevant provisions of Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948. These Acts were repealed and a new Electricity Act 2003 was introduced with effect from 10.6.2003. Hence for the Asst Years 2008-09 and 2009-10 (i.e. the years under appeal before us), the assessee would be governed by the provisions of Electricity Act, 2003.

5.6.1. We have already seen that the ITC’s case in Hon’ble Calcutta High Court, proceeded on the basis that the open market for the captive power plant was only a distribution company or a company engaged both in generation and distribution and that the rate at which electricity could be sold by the captive power plant was the one fixed by the tariff regulatory commission. However, such position has undergone sea change inasmuch as during the relevant previous years it was open to the assessee to sell even to a consumer and the price for sale to a distribution company or to a consumer that could be mutually agreed upon notwithstanding the tariff fixed by the State Regulatory Commission. We find that during the previous year relevant to the Asst Year 2009-10, the assessee in fact sold electricity at rates higher than that charged from it by the State Electricity Board. The assessee nevertheless made the computation for the purpose of section 80IA of the Act with reference to the price charged from it by the State Electricity Board. In such circumstances, we hold that, when

it was permissible for the assessee to sell electricity to consumers and distribution licensees at rates higher than that paid by it to the State Electricity Board, the price charged by the State Electricity Board would be a very good indication of the market value of electricity and the assessee did not commit any error in adopting such price for working out the amount eligible for deduction u/s 80IA of the Act.”

14. After coming to the conclusion that the decision of the Hon’ble Calcutta High Court in the case of ITC Ltd. (supra) would not be applicable to the case of the Assessee, the Tribunal thereafter went into the question as to what would be appropriate rate to the adopted as sale price by the TPP unit of the Assessee to its Cement manufacturing units. The Tribunal thereafter referred to the decision of the Hon’ble Supreme Court in the case of Thiru Arooran Sugars Ltd. v CIT, (1997) 227 ITR 432 (SC), as to the meaning of the word “Market Price” wherein in the context of market price of sugarcane which was also a commodity whose price was subject to control by the Government held that the price at which a manufacturer buys sugarcane must be taken to be the market price. The Hon’ble Supreme held that if the price is controlled by the Sugarcane Control Order, the controlled price will be taken as the market price, because it is at this price that a willing buyer and a willing seller are expected to transact business. The Tribunal agreed with the submission of the Assessee that as held in the aforesaid judgment of the Hon’ble Supreme Court, the price paid by an assessee for purchase of raw material represents the market price of such raw material produced by the assessee. The said judgment was held not to apply in ITC’s case because the Hon’ble Court was of the view that electricity could not be sold to the consumer because of specific prohibition in the erstwhile Electricity Act and as such the price to the consumer could not be taken into account. We find that that is not the position in the instant case. The Tribunal also held that the method adopted by the assessee viz. to take the average rate charged by the State Electricity Board for the previous month is quite appropriate and reasonable for determining the market value for the month of supply. The tribunal held that the annual weighted average adopted by the Id CITA would result in variations occurring during the year at different times being made applicable uniformly for the whole year and therefore the assessee’s method is more appropriate as it factors in variations as and when they take place.

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

“5.6.5. Exclusion of Electricity Duty and Cess as directed by Id CITA
Now coming to the decision of the Id CITA to exclude electricity duty and cess, we find that the same has been addressed by the Hon’ble Gujarat High court in the case of CIT vs Shah Alloys Ltd in Tax Appeal No. 2092 of 2010 dated 22.11.2011, which approved the view taken by the Ahmedabad Tribunal in ITA Nos.844, 2072 and 2073/Ahd/2006 dated 8.1.2010, that the price charged by the Electricity Board inclusive of the amount of Electricity Duty represented the market value even though the assessee was not required to charge electricity duty.

5.6.6. In view of our aforesaid findings, we direct the Id AO to accordingly modify the earlier years profits also which were modified by him, in the same lines as directed for Asst Years 2008-09 and 2009-10 herein. Accordingly, the grounds raised by the assessee in this regard deserve to be allowed and that of the revenue deserve to be dismissed.”

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

11.5. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee’s own case for preceding assessment year i.e. AY 2010-11 and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of Id. CIT(A). Thus, common ground no. 2 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed.

Revenue’s common Ground no. 3 for AY 2011-12 & 2012-13 relating to the claim of compensation paid for obtaining limestone connected to mining activity:

12. We have heard rival contentions and perused the records placed before us. The third common ground in the Department's appeal relates to disallowance of the assessee's claim for deduction of Rs.35,79,586/- on proportionate basis of the compensation paid in connection with the mining activity for obtaining limestone used as raw material for manufacture of cement. Compensation of Rs.17,92,420/- relates to the assessee's Satna Cement Works and the balance amount of Rs.17,87,166/- relates to its Birla Cement Works.

12.1. For obtaining limestone, which is the main raw material for manufacture of cement, the assessee is required to pay rent/royalty to the State Government in terms of the mining lease. Such rent/royalty paid to the State Government is debited to the profit and loss account. In terms of the mining lease and requirement of the relevant State Land Revenue law, in addition to the rent/royalty, the assessee is also required to pay compensation as determined by the local authority/court to the persons whose rights are infringed because of the mining activity. No interest in land is acquired by payment of such compensation. Compensation has to be paid in order to obtain the raw material for the assessee's business, thereby facilitating the carrying on of its business. The assessee has been following the practice of claiming the amount of compensation proportionately over the period of the mining lease in order to avoid any distortion due to claim of the entire amount of compensation in the year of payment. The ld. AO, however, sought to treat such compensation as capital expenditure. The ld. CIT(A) granted relief to the assessee following the orders of this

Hon'ble Tribunal in the assessee's case for the assessment years 2006-07 to 2010-11.

12.2. The identical disallowance was made in the assessment year 2006-07. Relief was granted to the assessee on first appeal by order dated July 9, 2010 against which the revenue preferred further appeal before this Hon'ble Tribunal, being ITA No. 1936 (Kol) of 2010. The said appeal was rejected by the Hon'ble Tribunal by order dated July 29, 2011 (Page 66 at Page 73 of the Paper Book - paragraphs 10 at 15). This Hon'ble Tribunal also rejected the Department's appeal for the assessment years 2007-08 (Pages 97-98 of the Paper Book, paragraphs 33 at 34) and assessment years 2008-09 and 2009-10 (Page 106 at Pp 107-108 of the Paper Book, paragraphs 2 at 2.2), by following its order for the assessment year 2006-07. The Hon'ble Tribunal dismissed the Department's appeal for the assessment year 2010-11 (Page 163 at Pp 164-165 of the Paper Book-paragraphs 18 at 22-23) by following its order for the assessment years 2008-09 and 2009-10.

12.3. The Department preferred appeals before the Hon'ble Calcutta High Court against the orders of this Hon'ble Tribunal for the assessment years 2007-08 [ITAT 80/2015 and GA 1714/2015 – Page 47 at 52 – Question 2(c) of the Compilation of Case Laws] and for the assessment year 2010-11 [ITA 124/2019-Supplementary Affidavit affirmed by the Department – Page 36 at Page 43 – Question 14(c) of the Compilation of Case Laws]. The Hon'ble High Court, by orders dated September 26, 2019 (Pages 45-46 of the Compilation of Case Laws) and March 11, 2020 (Page 29 at Page 30 of the Compilation of the Case Laws) respectively,

was pleased not to admit the said appeals filed by the department on this issue for the assessment years 2007-08 and 2010-11. Further, this issue was not raised by the department before the Hon'ble Calcutta High Court in ITA No. 125/2019 preferred for the assessment years 2008-09 and 2009-10 (Page 11 at Pp 23-25 of the Compilation of Case Laws). We find that this Tribunal in assessee's own case for AY 2010-11 dealt with this issue and decided in assessee's favour observing as follows:

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

20. Aggrieved by the order of the AO, the Assessee preferred appeal before the CIT(A). Before CIT(A), the Assessee contended that identical disallowance was made in the assessment year 2006-07 and in first appeal, the CIT(A) by order dated July 9, 2010 deleted the addition made by the AO. Against the said order, the revenue preferred further appeal before the Hon'ble Tribunal, being ITA No. 1936 (Kol) of 2010. The said appeal has since been rejected by the Hon'ble Tribunal by

order dated July 29,2011 (Page 71 to 87 the Paper Book - paragraphs 10-15 at page-77 to 84). The said decision was rendered after considering the judgment of the Hon'ble Supreme Court in *Enterprising Enterprises v Deputy Commissioner*, (2007) 293 ITR 437 (SC). The said order of the Hon'ble Tribunal has been followed in first appeal for the assessment years 2007-08 (page 3, para 4), 2008-09 (page 55, para 4) and 2009- 10 (page 110, para 5). It was submitted that in this year also, the compensation amount of Rs.23,71,3401- should be held to be revenue in nature and an admissible deduction.

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

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

“2.2. We have heard the rival submissions. We find that the issue under dispute is squarely covered by the decision of this tribunal in assessee's own case for the Asst Year 2006-07 wherein it was held that

“We have heard the parties and perused the material placed on record. The I A. Counsel for the assessee has elaborated the facts of the case making reference of several decisions of Tribunal and Hon'ble Supreme Court and High Courts. After careful consideration of the same and evidences filed on record and in the paper book, we find that the assessee is required to pay compensation as determined by the local authority/ court to the persons whose rights are infringed because of the mining activity. We also observe that Ld. CIT(A) has properly analysed the facts of the present case and distinguished the facts decided by the Hon'ble Apex Court in the case of *Enterprising Enterprises vs. DCIT* (supra) and then only had come to a conclusion that the compensation was paid for the damaged caused on the infringement of right of the land owner. He has also analysed that the payments are progressively distributed as they work, as they proceed year by year, going on with their work and the payments are in the nature of incidental expenditure to conduct the mine and the business operations. He, therefore, held that the payment of compensation to

persons whose rights are infringed by the mining activity is revenue in nature. We, therefore, find no infirmity in the order of the Ld. CIT(A) on this issue and confirmed the same. Ground no. 1 of the Revenue's appeal is thus dismissed."

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

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

12.4. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2010-11 and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of ld. CIT(A). Thus, common ground no. 3 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed.

Revenue's common Ground no. 4 for AY 2011-12 & 2012-13 relating to the treating of industrial promotion assistance from the State Government as capital receipt:

13. We have heard rival contentions and perused the records placed before us. The fourth common ground of the Department's appeal relates to the assessee's claim that industrial promotion assistance of Rs.16,94,84,638/- received from the West Bengal State Government is a capital receipt and cannot be subjected to tax. The said amount was received by the assessee in terms of the West Bengal Incentive Scheme, 2000 (hereinafter referred to as "the 2000 Scheme") for expansion undertaken at the assessee's

Durgapur Cement Works involving an investment of about Rs.100 crore.

13.1. The material facts are that the assessee undertook expansion at its cement unit in Durgapur, West Bengal at a cost of about Rs.100 crore and increased the manufacturing capacity from 0.6 million tonnes per annum to 1.6 million tonnes per annum. The expansion was practically a new unit. Commercial production post-expansion commenced in December, 2005. The said expansion undertaken by the assessee qualified as a Mega Project under the 2000 Scheme because of the extent of investment. In terms of the 2000 Scheme, the assessee was entitled to industrial promotion assistance which was quantified at 75% of the sales tax paid in the preceding year. The amount of assistance was to be adjusted against the sales tax liability of the year in which the assistance was claimed. Such industrial promotion assistance was available to the assessee for ten years. The assessee's contention was that the object for which the assistance was granted under the provisions of the 2000 Scheme was to enable the setting up of a new unit or expansion of an existing unit and that the assistance was on capital account. Measurement of the amount of assistance with reference to the sales tax paid and payment of the assistance by way of adjustment against the sales tax liability merely related to the form or mechanism through which the assistance was granted and did not determine the character of the subsidy. The amount of sales tax paid was only the measure for determining the quantum of assistance. Further, the time of payment of the assistance was also of no relevance.

13.2. The ld. AO, however, took the view that the assistance was in the form of relaxation of tax and supplemented the assessee's trade receipts and profits and was a revenue receipt. On appeal, the ld. CIT(A) accepted the assessee's claim following the decisions of the Hon'ble Tribunal in the assessee's own case for the assessment years 2008-09 to 2010-11.

13.3. It is submitted that the identical question fell for consideration in the assessee's own case for the assessment years 2008-09 and 2009-10 and was decided in assessee's favour by this Hon'ble Tribunal by a consolidated order dated August 25, 2017 (Page 115 at Pp 122-125 of Paper Book-paragraphs 4 at 4.3) and for the assessment year 2010-11 by an order dated September 13, 2017 (Page 165 at Pp 168-171 of Paper Book-paragraphs 25 at 29-30). The Department had preferred appeal against the said order dated August 25, 2017 passed by this Hon'ble Tribunal for the assessment years 2008-09 and 2009-10 before the Hon'ble Calcutta High Court under section 260A of the Act being ITA No. 125/2019, GA No. 3548/2018 (Page 11 at Pp 23-24 – Question 10(i) of the Compilation of Case Laws). The Hon'ble High Court by an order dated September 12, 2019 was pleased not to admit the said question (Page 9-10 of the Compilation of Case Laws).

13.4. The identical question involving the 2000 Scheme came up for consideration recently before the Hon'ble Calcutta High Court in *PCIT vs. Budge Budge Refineries Limited*, (2022) 139 *taxmann.com* 124 (Calcutta) and the revenue's appeal against the order of the Hon'ble Tribunal was dismissed. We find that this

Tribunal in assessee's own case for AY 2010-11 dealt with this issue and decided in assessee's favour observing as follows:

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

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

Assessee Ground No. 1

That on the facts and circumstances of the case, the learned CIT(Appeals) though holding that sales-tax incentive of Rs. 1238000 allowed by the State Govt, is the nature of capital receipt but erred in

directing the Assessing Officer (AO) for reducing the same from the cost of Fixed Assets for the purpose of computing depreciation by applying the Explanation 10 to Sec. 43(1) of I.T.Act.

Revenue Ground No. 2

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

The decision rendered thereon by this tribunal is as under:

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

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

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

acquiring that asset was directly or indirectly met out of the subsidy. Likewise in the proviso, it is necessary to show that the subsidy has been directly or indirectly used to acquire an asset but it is not possible to exactly quantify the amount directly or indirectly used for acquiring the asset. Here also, a finding of fact is necessary that an asset was acquired by directly or indirectly using the subsidy. The above Explanation and the proviso thereto do not dilute the finding of the Hon'ble Supreme Court in the case of P. J. Chemicals Ltd.(supra) that asset-wise subsidy alone can be reduced from the actual cost. The above Explanation and the proviso therein to explain the law. They are not bringing any new law different from the law considered by Hon'ble Supreme Court in the above cases.

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

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

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

13.5. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2010-11 and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of Id. CIT(A).

Thus, common ground no. 4 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed.

Revenue's common Ground no. 5 for AY 2011-12 & 2012-13 relating to the claim of interest subsidy from the State Government as a capital receipt:

14. We have heard rival contentions and perused the records placed before us. The fifth common ground in the Department's appeal relates to the assessee's claim that interest subsidy, since renamed "Capital Investment Subsidy", of Rs. 3,04,22,210/- received under the amended Rajasthan Investment Promotion Scheme, 2003 (hereinafter referred to as "the 2003 Scheme") in respect of expansion undertaken at the assessee's Chanderia Cement Works should be treated as a capital receipt. The ld. AO held that the subsidy was incidental to carrying on of the business of the assessee and treated the same as revenue receipt. On appeal, the ld. CIT(A) held it to be a capital receipt by following this Hon'ble Tribunal's decision in assessee's own case for the assessment year 2008-09 and 2009-10.

14.1. It is submitted that this question is concluded in the assessee's favour by the decision of the Hon'ble Tribunal in assessee's own case for the assessment year 2007-08 in ITA as 683 and 581/Kol/2011 decided on December 8, 2014 (page 77 at pages 88 – 94 of the Paper Book). After considering the provisions of the 2003 Scheme, the Hon'ble Tribunal held that the assistance granted under the scheme was to enable the setting up of a new unit or expansion of an existing unit and was a capital receipt. The

said decision was rendered after taking into consideration the judgment of the Hon'ble Supreme Court in *CIT v. Ponni Sugar and Chemicals Limited*, (2008) 306 ITR 392 (SC). The said decision for the assessment year 2007-08 was followed in the assessee's own case for the assessment years 2008-09 and 2009-2010 decided by a consolidated order dated August 25, 2017 (Page 137 at pages 139-140 of the Paper Book – paragraphs 6 at 6.2). In the order dated August 25, 2017, the Hon'ble Tribunal also considered the judgment of the Hon'ble Jammu & Kashmir High Court in *Shree Balaji Alloys v. CIT*, (2011) 333 ITR 335 (J & K) and the judgment of the Hon'ble Supreme Court on appeal therefrom reported as *CIT v. Shree Balaji Alloys*, (2017) 80 taxmann.com 239 (SC) as also the judgment of the Hon'ble Supreme Court in *CIT v. Meghalaya Steels Limited*, (2016) 383 ITR 217 (SC). The order dated August 25, 2017 for the assessment years 2008-09 and 2009-10 was followed by the Hon'ble Tribunal for the assessment year 2010-11 decided by an order dated September 13, 2017 (Page 190 at pages 193-194 of the Paper Book – paragraphs 68 at 73-74). A still later decision in the assessee's favour is that of the Hon'ble Calcutta High Court in *PCIT v. Ankit Metal and Power Limited*, (2019) 416 ITR 591 (Cal) (Page 76 at Pp 84,86-87 of the Compilation of Case Laws). It is submitted that this ground is covered in favour of the assessee. We find that this Tribunal in assessee's own case for AY 2010-11 dealt with this issue and decided in assessee's favour observing as follows:

“73. At time of hearing, it was agreed by the parties before us that identical issue arose for consideration in Assessee's own case for AY 2009-10 and in that year, the Hon'ble Tribunal in ITA No.

942/Kol/2013 and ITA No.329/Kol/2013 by its order dated 25.8.2017, held that the interest subsidy in question received under the very same scheme as in the present year, was a capital receipt not chargeable to Tax. The following were the relevant:

“6.2 We have heard the rival submissions and perused the materials available on record. The ld. AR drew our attention to page 77 of Supplementary Paper Book Volume III to the order dated 7.6.2007 passed by the Commercial Taxes Officer, Special Circle Bhilwara, Government of Rajasthan, sanctioning a sum of Rs 15,91,813/- towards Interest Subsidy to the assessee. The said order also clearly mentioned that the said interest subsidy of Rs 15,91,813/- would not be paid to the assessee in cash and instead the same would get adjusted with the sales tax liability payable by the assessee. Based on this, the ld. AR argued that the interest subsidy also takes the character of sales tax subsidy and hence to be treated as capital receipt. We find that this issue was subject matter of adjudication in assessee's own case for the Asst Year 2007-08 in ITA No. 686 & 581/Kol/2011 dated 8.12.2014 wherein it was held that the said interest subsidy would have to be treated as a capital receipt but with a direction to reduce the same from the cost of assets as per Explanation 10 to section 43(1) of the Act. Later this order was modified by this tribunal in ITA No. 683/Kol/2011 (assessee appeal) dated 9.7.2015 for Asst Year 2007-08, wherein the issue as to whether the said interest subsidy is to be reduced from the cost of assets as per Explanation 10 to section 43f 11 of the Act was restored back to the file of the ld. CITA for fresh adjudication. We find that with regard to treatment of Industrial Promotion Assistance (IPA) as capital receipt or revenue receipt supra in Para 4 above, we have already held it to be a capital receipt and the same need not be reduced from the cost of assets as per Explanation 10 to Section 43(1) of the Act. We find that the subsidy amount was adjusted against the sales tax liability and was not used directly or indirectly to acquire the assets and hence the cost of assets cannot be reduced by the amount of subsidy. We also find that the Hon'ble Jammu and Kashmir High Court in the case of Shree Balaji Alloys vs. CIT, (2011) 333 ITR 335 (J&K) at page 346 held interest subsidy to be a capital receipt. On further appeal by the revenue, the Hon'ble Supreme Court by an order dated 19.4.2016 in Civil Appeal No.10061 of 2011 held that the interest subsidy was a capital receipt in view of its decision in Ponni Sugars (supra) and further held that even if it was treated as a revenue receipt, then the assessee was entitled to deduction under

section 80IB/80IC as profits derived from eligible business according to its judgment in CIT v Meghalaya Steels Ltd., (2016) 383 ITR 217 (SC). Hence respectfully following the said decision of the Hon'ble Supreme Court in Balaji Alloys supra, we hold that the interest subsidy is to be treated only as a capital receipt and accordingly the grounds raised by the assessee in this regard are allowed."

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

14.2. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2010-11 and Revenue being unable to controvert this fact by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of Id. CIT(A). Thus, common ground no. 5 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed.

Revenue's common Ground no. 6 for AY 2011-12 & 2012-13 relating to the disallowance u/s 14A of the Act read with Rule 8D of the Rules:

15. We have heard rival contentions and perused the records placed before us. The sixth common ground of the department's appeal relates to disallowance under section 14A read with rule 8D. The assessee has filed an additional ground in its appeal in respect of the disallowance under the said provisions. As such, both the said grounds can be conveniently taken up together.

15.1. The assessee was in receipt of exempt income of Rs.12,84,34,263/- by way of dividend on its investment in shares and units of mutual funds. The assessee offered a disallowance of

Rs. 6,40,792/- as expenditure incurred in relation to the exempt income. The disallowance offered by the assessee comprised salary and other employee related costs on proportionate basis as also establishment expenses. The ld. AO invoked rule 8D and worked out the disallowance at the rate of 0.5% of the average of the opening and closing values of investment amounting to Rs. 5,77,72,000/-. After deducting the disallowance of Rs. 6,40,792/- made by the assessee, the ld. AO disallowed Rs.5,71,31,208/-. On appeal, the ld. CIT(A) following the decisions of the Hon'ble Tribunal in the assessee's own case for the assessment years 2008-09 to 2010-11 directed the ld. AO to consider all investments (excluding investments in subsidiary companies) which yielded dividend income for computing the disallowance under section 14A read with rule 8D(2)(iii).

15.2. Before us, ld. Counsel for the assessee stated that the material facts are that the assessee is in the business of manufacturing cement, jute goods, vinoleum, auto trim parts, etc. From time to time, the assessee makes investments out of its own funds in shares of companies and units of mutual funds. The assessee does not borrow any funds for making such investments. The mutual fund investments of the assessee are not in equity-oriented funds as defined in the explanation to section 10(38) of the Act and disposal/redemption thereof attracts capital gains tax. Substantial part of the mutual fund investments of the assessee are in growth schemes which do not provide for payment of any dividend during the currency of the scheme. Only some of the mutual fund schemes in which the assessee invests provide for

payment of dividend. Such dividend is usually reinvested in the respective schemes without being actually received by the assessee. The assessee receives dividend warrants only in respect of some of its investments in mutual funds and in respect of the shares held by it in companies. The only activity in relation to such dividend income is deposit of the warrants received in the bank account.

15.3. Further it is submitted that during the relevant previous year, there was no change in the share investments of the assessee. In respect of its share investments, the assessee received 7 dividend warrants for an aggregate sum of Rs. 1,17,21,334 /- which were deposited in the assessee's bank account for the purpose of encashment. The rest of the dividend income of Rs. 11,67,12,929/- was from investment in schemes of mutual funds providing for declaration of dividend. Out of the said amount, a sum of Rs.10,29,03,619/- was reinvested in units without physically receiving the warrants. Only 11 warrants for an aggregate sum of Rs. 1,38,09,310/- were physically received and had to be deposited in the bank. Break-up as on March 31, 2011 and March 31, 2010 of the assessee's investments which yielded dividend during the year and those which did not yield or were incapable of yielding dividend is tabulated under:

(Rs. in lakh)

Particulars	As at 31.3.11	As at 31.3.10	Average	Percentage
1. Investments in mutual fund schemes and	20,676.51	27,630.32	24,513.42	20.90 %

shares which yielded dividend				
2. Investments in shares which did not yield any dividend	1,385.67	1,385.49	1,385.58	1.20%
3. Investments in growth schemes of mutual funds and other investments which were incapable of yielding any dividend	94,858.73	85,149.41	90,004.07	77.90%
	116,920.91	114,165.22	115,543.07	100.00%

15.4. It would be seen from the above that 77.90% of the assessee's investments (including in non-equity oriented mutual fund growth schemes) did not provide for payment of any dividend. Upon redemption/disposal of all such investments, the assessee would be liable for capital gains tax. The income from such investments is not exempt under the provisions of the Act. Even in respect of the assessee's investments in other schemes of mutual funds providing for payment of dividend, the assessee is liable for capital gains tax upon disposal/redemption of the units since such schemes are also not equity oriented. Similarly, in respect of the assessee's investments in unquoted equity shares of companies, it will have to pay capital gains tax upon disposal thereof. It is only the dividend received by the assessee in respect of the dividend schemes of the mutual funds which is not taxable in the assessee's hands because of payment of dividend distribution tax by the mutual funds.

15.5. Further Id. Counsel for the assessee submitted that in course of the assessment proceedings, the assessee submitted a detailed

statement in respect of the expenditure of Rs. 6,40,792/- offered by it for disallowance as incurred in relation to the exempt dividend income. In the said statement, the assessee included appropriate proportion of the emoluments of the employees involved in management/maintenance of the assessee's investment portfolio. The assessee included 2% of the remuneration paid to Shri P. K. Chand (Chief Financial Officer) and 15% of the remuneration of Shri R.C. Jha, Manager (Finance & Accounts), who were engaged in multiple activities and were required to spend only a part of their time in managing/maintenance of the assessee's investment portfolio, and the entire remuneration of Shri M. K. Sharma, Asst. Manager (Accounts). The assessee also included in the said statement the other expenses incurred by it for managing/maintenance of its investment portfolio such as bank charges, telephone charges, stationery and printing charges and conveyance and other expenses.

15.6. It is also submitted by the assessee that almost the entire expenditure incurred by the assessee is in connection with its business of manufacturing diversified goods. Only the surplus business funds of the assessee are invested by it in safe and liquid investments, which activity is looked after by the aforesaid three officers of the assessee to the extent specified in the assessee's statement of expenditure. The assessee's share investments are non-moving. The expenditure of Rs. 6,40,792/- incurred in connection with management/maintenance of the assessee's investment portfolio was correctly tabulated by it in the statement submitted to Id. AO. The said statement includes not only the

concerned employees' remuneration but also other office expenses. No other infrastructure of the assessee was utilised in connection with the management/maintenance of its investment portfolio. In the facts of the assessee's case, the quantum of investment or the amount of investment income are not at all determinative of the quantum of expenditure incurred by the assessee in connection therewith. Further, Section 14A(2) of the Act enables Id. AO to determine the amount of expenditure incurred in relation to exempt income in accordance with the method prescribed by rule 8D only if the Id. AO is not satisfied with the correctness of the assessee's claim of expenditure. Rule 8D also so provides.

15.7. It is submitted that in the instant case, there was no material to doubt the correctness of the assessee's claim of expenditure incurred in connection with management/maintenance of its investment portfolio. This is apparent from the findings of the Id. AO in paragraphs 11.2 and 11.3 at page 15 of the assessment order:

"11.2 Carefully considering the above submission, contention of the assessee is partly accepted. Disallowance u/s. 14A is worked out by invoking Rule 8D of the IT Rules since it is applicable for current assessment. The amount of disallowance is worked out as follows:

<i>Opening value of investment</i>	<i>: 114165.22 lacs</i>
<i>Closing value of investment</i>	<i>: 116920.91 lacs</i>
<i>Average value</i>	<i>: 115543.07 lacs</i>
<i>0.5% of the above</i>	<i>: 577.72 lacs</i>

11.3 In view of above Rs.5.71,31,208/- [Rs. 5,77,72,000 less Rs.6,40,792] is further disallowed u/s. 14A and added back to total income."

It is submitted that ld. AO did not dispute the correctness of the assessee's computation of the expenditure to be disallowed. The only reason given by ld. AO for making the disallowance was that rule 8D was applicable for the assessment year. It is submitted even rule 8D stipulates that ld. AO can resort to sub-rule (2) only where ld. AO, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of expenditure made by the assessee. It is submitted that in the instant case, ld. AO did not express any dis-satisfaction with the assessee's claim of expenditure and was not entitled to invoke section 14A(2) or rule 8D(2)(iii). In *Maxopp Investment Ltd. vs. CIT*, [2018] 402 ITR 640 (SC) [Page 110 at Pages 134, 136-137 of the Compilation of Case Laws], the Hon'ble Supreme Court was pleased to hold as follows:

".....Keeping this objective behind Section 14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act. This is so held in Walfort Share & Stock Brokers (P.) Ltd., relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom.

"The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A.

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The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14A."

35. The Delhi High Court, therefore, correctly observed that prior to introduction of Section 14A of the Act, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-taxable income, the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. It is to find a cure to the aforesaid problem that the Legislature has not only inserted Section 14A by the Finance (Amendment) Act, 2001 but also made it retrospective, i.e., 1962 when the Income Tax Act itself came into force. The aforesaid intent was expressed loudly and clearly in the Memorandum explaining the provisions of the Finance Bill, 2001....”

“Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, the nature of the loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the Assessing Officer.”

[emphasis added]

15.8. Ld. Counsel for the assessee further submitted that in *Kesoram Industries Ltd. vs. PCIT* [2022] 441 ITR 648 (Cal), the Hon’ble Calcutta High Court was pleased to hold as follows:

“6. Two important issues have been pointed out in the aforementioned decision. Firstly that the provisions of section 14A has to be interpreted, particularly, the words that "in relation to the income" that does not form part of total income. Therefore, it was held that the principle of apportionment of expenses comes into play as that is the principle which is incorporated in section 14A of the Act. With regard to as to how the power under section 14A(2) read with rule 8D of the Rules could be invoked it was pointed out that the assessing officer needs to record satisfaction that having regard to the kind of the

assessee suo motu disallowance under section 14A was not correct and it will be in those cases where the assessee in his return has himself apportioned but the assessing officer was not accepting the said apportionment. In any event, the assessing officer will have to record its satisfaction to the said effect.”

[emphasis added]

15.9. It is further submitted that even in a case where ld. AO is not satisfied with the correctness of the assessee's apportionment, it is not mandatory for ld. AO to invoke the method of calculation in rule 8D and he is free to make the disallowance on any reasonable basis. It would not therefore be correct to say that once ld. AO rejects the mode of computation of disallowance under section 14A of the Act as made by the assessee, he has no other option but to resort to rule 8D of the Rules. Reference in this behalf is invited to an unreported judgment dated July 19, 2018 of the Hon'ble Calcutta High Court in the case of *PCIT vs. Britannia Industries Ltd.* [ITAT No.45/2017, GA No.420/2017], where the following view taken by this Hon'ble Tribunal was approved:

“...Even in a case where the AO rejects the claim of the assessee that no expenses were incurred to earn the exempt income, it is not mandatory for him to invoke the method of calculation prescribed by Rule 8D(2) of the Rules and is free to make the disallowance on any reasonable basis. By applying the Rule 8D of the Rules blindly sometimes absurd disallowances would result. In our view, therefore while examining the claim of the assessee regarding expenditure incurred in earning the exempt income including a claim that no expenses were incurred, the AO is bound to take note of such absurdities and refrain from invoking the method of disallowance of expenses as prescribed by Rule 8D(2) of the Rules. It is for this reason that the satisfaction of the AO regarding expenses incurred for earning exempt income is to be objective satisfaction. In other words, it is only when no reasonable and proper parameters for making disallowance can be arrived at, that resort to Rule 8D(2) can be had by the AO. Rule 8D(2) will thus be a last resort when it becomes

impossible to arrive at a just conclusion on the amount of expenses that has to be disallowed as attributable or incurred in earning exempt income. It cannot therefore be said that once the AO rejects the mode of computation of disallowance u/s. 14A of the Act as made by the Assessee, he has no other option but to resort to Rule 8D of the Rules”.

[emphasis added]

15.10. Ld. Counsel for the assessee that in the instant case, ld. AO not having expressed any dis-satisfaction with the assessee's claim of expenditure incurred in relation to exempt income, he was not entitled to invoke section 14A(2) or rule 8D(2)(iii). Where an assessee is engaged in multiple income-earning activities and the same set of employees and infrastructure are used for all the activities, some taxable and some exempt, the common expenses incurred in respect of such employees and infrastructure have to be necessarily apportioned between the taxable and exempt activities. As held by the Hon'ble Supreme Court in *CIT v. Walfort Share and Stock Brokers P. Ltd.*, (2010) 326 ITR 1(SC) and in *Maxopp's case (supra)*, the principle of apportionment of expenses comes into play as that is the principle which is incorporated in section 14A of the Act. The assessee adopted a reasonable basis for such apportionment. The ld. AO did not find anything to dispute the assessee's computation except for saying that it is not as per rule 8D. In such circumstances, the disallowance offered by the assessee under section 14A of Rs. 6,40,792/- has to be accepted and no further disallowance can be made under the said provision.

15.11. Ld. Counsel for the assessee took an alternate plea submitting that assuming for the sake of argument that section

14A(2)/rule 8D(2)(iii) can be invoked, the finding of the ld. CIT(A) to the extent he held that only the investments which yielded dividend income should be considered for disallowance under section 14A read with rule 8D(2)(iii) cannot be faulted. Of course, in view of the judgment of the Hon'ble Supreme Court in *Maxopp's case (supra)*, investments in subsidiary companies would have to be considered if they yielded dividend income. To this extent finding of the ld. CIT(A) is contrary to law. It is necessary to add that the amendments made to section 14A by the Finance Act, 2022 have no relevance in the instant case. The said amendments will apply only where it is undisputed that expenditure has been incurred but the assessee does not want it disallowed on the ground that no exempt income was earned. That is not the controversy in the instant case. In the instant case, the dispute is whether any expenditure over and above the sum of Rs.6,40,792/- was actually incurred by the assessee. In any event, the said amendments are effective only from AY 2022-23 and have no application for the earlier years as held by the Hon'ble Delhi High Court in *PCIT v. Era Infrastructure (India) Ltd, (2022) 141 taxmann.com 289 (Del)*.

15.12. Though the ld. Counsel for the assessee has pleaded that in lack of proper satisfaction recorded by ld. AO questioning the correctness of the claim of disallowance *suo moto* made by the assessee, the alleged disallowance is uncalled for and had also made an alternate plea that if the main plea is not accepted and at least the alternate plea that the disallowance under Rule 8D(3) of the I.T. Rules may be restricted only to the extent of 0.5% of the

average investments yielding dividend income, we find that for the preceding AY 2010-11 also same issue under identical facts was there before this Tribunal and after considering the ratios laid down by the Hon'ble Court's directions are given to ld. AO to consider only those investments which yielded dividend income for concluding the disallowance u/s 14A of the Act r.w. Rule 8D(3) of the I.T. Rules. Relevant finding of this Tribunal is reproduced below:

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

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

assessee would be liable to capital gains tax and income from such investments is not exempt under the provisions of the Act. He argued that even in respect of the assessee's investments in other schemes of mutual funds providing for payment of dividend, the assessee is liable for capital gains tax upon disposal/redemption of the units since such schemes are also not equity oriented. We find that the Id. A R also made an alternative argument that only dividend bearing investments should be reckoned for disallowance under Rule 8D(2)(iii) of the Rules and that strategic investments should be excluded. We find lot of force in the alternative argument of the Id AR that only dividend bearing investments are to be considered for making disallowance u/s 14 A of the Act. In this regard, the reliance placed by the Id A R on the decision of this tribunal in the case of REI Agro Ltd. reported in 144 ITD 141 (Kol) is very well founded wherein it was held that:

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

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

It was the contention of the revenue that Rule 8D of the Income Tax Rules, 1962 had not been applied properly in respect of the assessment year 2008-09. This aspect has been considered by the Tribunal in detail and it has observed as under:

It was the contention of the revenue that Rule 8D of the Income Tax Rules, 1962 had not been applied properly in respect of the assessment year 2008-09. This aspect has been considered by the Tribunal in detail and it has observed as under:

6.3. We have carefully considered the submissions and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has given a finding that only interest of Rs 2,96,731/- was paid on funds utilized for making investments on which exempted income was receivable. Further, Ld. Commissioner of Income Tax (Appeals) has observed that in respect of investment of Rs 6,07,75,000/- made in subsidiary companies as per documents produced before him, they are attributable to commercial expediency, because as per submission made by the assessee, it had to form Special Purpose Vehicle (SPV) in order to obtain contracts from the NHAI and the SPVs so formed engaged the assessee company as contract to execute the works awarded to them (i.e. SPVs) by the NHAI. In its profit and loss account for the year, the assessee has shown the turnover from execution of these contracts and therefore no expense and interest attributable to the investments made by the appellant in the PSVs can be disallowed u/s 14A r.w. Rule 8D because it cannot be termed as expense/interest incurred for earning exempted income. Under the circumstances, Ld. Commissioner of Income Tax (Appeals) is correct in holding that disallowance of a further sum of Rs 40,556/- calculated @ 2% of the dividend earned is sufficient. Under the circumstances, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals), hence we uphold the same.

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

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

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

15.13. Since the issues raised before us are squarely covered by the decision of this Tribunal in assessee's own case for preceding assessment year i.e. AY 2010-11 and assessee fail to prove that there is change of facts in the years under appeal vis-à-vis preceding AY 2010-11 and also Revenue being unable to controvert by placing any other binding precedence in its favour, we fail to find any infirmity in the finding of Id. CIT(A). Thus, common ground no. 6 for AY 2011-12 & AY 2012-13 raised by the Revenue is dismissed.

Revenue's common Ground no. 7 for AY 2011-12 & 2012-13 relating to the issue that whether subsidy/incentives need to be excluded from the book profit u/s 115JB of the Act:

16. The seventh common ground of the Department's appeal is against the decision of the Id. CIT(A) directing the Id. AO to exclude the subsidy/incentive from book profit under section 115JB of the Act. The Id. AO rejected the assessee's claim to exclude the following incentives in computing Book Profit u/s 115JB of the Act:

Particulars	Amount (in Rs.)
Interest Subsidy received from Govt. of Rajasthan under Rajasthan Investment Promotion Scheme, 2003	Rs. 3,04,22,210
Incentive from Govt. of West Bengal in the form of Industrial Promotion Allowance	Rs. 16,94,84,638
Total	Rs. 19,99,06,848

The ld. AO held that the accounts were prepared in accordance with the provisions of Companies Act and these incentives were credited to Profit & Loss Account. Besides, the claim was not made through IT Return or Revised IT return and therefore fresh claim raised during the course of assessment proceedings was not accepted in view of decision of Hon'ble Supreme Court in case of *Goetze (India) Ltd*, [2006] 284 ITR 323 (SC). On appeal, the ld. CIT(A) granted relief to the assessee relying upon various decisions including the decision of the Hon'ble Tribunal in *DCIT v. South Asian Petrochem* in ITA Nos. 1222 to 1241/Kol/2014 decided on May 3, 2017.

16.1. We observe that it is settled law that subsidy granted for the purpose/object of encouraging setting up of new industrial units or expansion of existing industrial units is a capital receipt. It has already been held by this Hon'ble Tribunal in the assessee's own case for the earlier years that interest subsidy received under the 2003 Scheme and industrial promotion assistance received under the 2000 Scheme are capital receipts. Submissions have been made hereinbefore in support of the assessee's contention that the same view should be taken in this year. Subsidy was included in

the definition of income in section 2(24) of the Act for the first time by insertion of sub-clause (xviii) by the Finance Act, 2015 with effect from April 1, 2016 i.e. assessment year 2016-17. In paragraph 5.3 of Circular No. 19 dated November 27, 2015 containing explanatory notes to the provisions of the Finance Act, 2015, it is stated that the said amendment takes effect from April 1, 2016 and would accordingly apply to assessment year 2016-17 and subsequent assessment years [(2015) 379 ITR (St.) 19 at 35, 36]. The assessment year involved herein is 2011-12 before the amendment of section 2(24). Having regard to the decisions holding the field, subsidy received on capital account was not income within the meaning of the Act at least till the assessment year 2015-16. It is submitted by ld. Counsel for the assessee that since the said subsidies are not income within the meaning of section 2(24) of the Act, the same cannot also form part of the total income or be subjected to tax under section 115JB of the Act. The subject matter of taxation under the Act is “income”. The charging section 4 of the Act provides for levy of tax in respect of “total income”. “Total income” is defined in section 2(45) of the Act to mean “the total amount of income referred to in section 5, computed in the manner laid down in this Act”. The material portion of section 5 reads as under:

“5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which –”

(emphasis added)

The “total income” consists of all items of “income” as defined in clause (24) of section 2 of the Act.

16.2. What can be taxed u/s 115JB of the Act is the “total income” which is income as defined in section 2(24) of the Act chargeable under section 4 and computed in the manner laid down in section 115JB. What is not “income” within the meaning of section 2(24) is outside the purview of the Act; cannot form subject matter of the charge of tax under section 4; cannot form part of “total income” and cannot be subjected to tax either under the normal computation provisions or under section 115JB of the Act. The absence of provision in section 115JB of the Act for exclusion of such capital receipt credited to the profit and loss account cannot result in its taxation.

16.3. It is submitted by Id. Counsel for the assessee that this issue is now squarely covered in favour of the assessee by the judgment of the Hon’ble Calcutta High Court in *PCIT vs. Ankit Metal & Power Ltd.*, [2019] 416 ITR 591 (Cal) [Page 76 of the Compilation of Case Laws]. The said decision also deals with the aspect relating to claim made otherwise than by filing a return/revised return. Particular reference is invited to Paragraphs 30-33 of the judgment [Pages 87-88 of the Compilation of the Case Laws], which are extracted hereinbelow:

“Now the second issue which requires adjudication is as to whether the aforesaid incentive subsidies received by the assessee from the Government of West Bengal under the schemes in question are to be included for the purpose of computation of book profit u/s 115JB of the Income Tax Act, 1961 as contended by the revenue by relying on the decision in the case of Appollo Tyres Ltd. (supra).

In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy' is a 'capital receipt' and does not fall within the definition of 'Income'

under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. In the case of Appollo Tyres Ltd. (supra) the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under Section 115JB of the Income Tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under Section 115 JB of the Income Tax Act, 1961.

The third issue involve in the instant appeal which requires adjudication is whether the action of Tribunal entertaining / allowing the claim which was made by the assessee before the Assessing Officer by filing a revised computation instead of filing a revised return since the time to file the revised return was lapsed, for claiming to treat the incentive subsidies in question as capital receipts instead of revenue receipts as claimed in original return. The Assessing Officer had denied this claim. Revenue has attacked the order of the tribunal by relying on the decision in the case of Goetze (India) Ltd. (supra).

This case does not help the revenue/appellant. In this case Supreme Court has made it clear that its decision was restricted to the power of the Assessing authority to entertain a claim for deduction otherwise than by a revised return, and did not impinge on the power of the Appellate Tribunal under Section 254 of the Income Tax Act, 1961. The Hon'ble Supreme Court in the said decision held as follows:

".....In the circumstances of the case, we dismiss the Civil Appeal. However, we make it clear that the issue in this case is limited to the power of the Assessing Authority and does not impinge on the power of the Income Tax Appellate Tribunal under Section 254 of the Income Tax Act, 1961."

This judgment was followed by our Court in the case of Britannia Industries Ltd. (supra) holding that Tribunal has the power to entertain the claim of deduction not claimed before the Assessing Officer by filing revised return. Respectfully following the aforesaid decision as well as the view already taken by us in this case that the aforesaid subsidies are capital receipt and not an 'income' and not liable to Tax Tribunal in exercise of its power under Section 254 of the

Income Tax Act justified this claim though no revised return under Section 139 (5) of the Act was filed before the Assessing Officer. We answer both the question Nos. 1 and 2 in negative and in favour of assessee.”

(emphasis added)

16.4. Since the issue stands squarely covered by the Hon'ble Jurisdictional High Court in the case of *Ankit Metal and Power Limited (supra)*, we fail to find any infirmity in the finding of Id. CIT(A) holding that the subsidy/incentive received by the assessee which have been held to be capital receipts are to be excluded from the book profit u/s 115JB of the Act. Thus, common ground no. 7 raised by the Revenue for AY 2011-12 & AY 2012-13 are dismissed.

Revenue's common Ground no. 8 for AY 2011-12 & 2012-13 relating to the upward adjustment made to book profit for disallowance computed u/s 14A r.w. Rule 8D of the Rules:

17. The eighth common ground of the Department's appeal is against the deletion of upward adjustment made to book profit on account of the disallowance computed under section 14A read with rule 8D. The assessee had disallowed a sum of Rs. 6,40,792/- in the computation of its book profit in terms of clause (f) of Explanation 1 to section 115JB of the Act on account of expenditure relatable to exempt dividend income. Whilst working out the disallowance under section 14A of the Act read with rule 8D of the Rules under the normal computation provisions, Id. CIT(A) made a further disallowance of Rs. 5,71,31,208/-. The same disallowance of Rs. 5,71,31,208/- was made in the computation of book profit under section 115JB of the Act. On appeal, Id. CIT(A) held that the provisions of section 14A and rule 8D cannot be

applied in the computation of book profit under section 115JB of the Act. He placed reliance on the judgment of the Hon'ble Calcutta High Court in *CIT v. Jayshree Tea and Industries Limited* in ITAT 47 of 2014 and G.A. 1501 of 2014 decided on November 19, 2014.

17.1. It is submitted that this question is decided in favour of the assessee by the judgment of the Hon'ble Calcutta High Court in *Jayshree Tea's case (supra)* (page 152 of the Compilation of Case Laws). Question No. 2 in *Jayshree Tea's case* is relevant in this behalf. The material extracts from the said judgment are as below:

QUESTION 2 in Jayshree Tea's case

"2. Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in upholding the order of CIT (Appeals) that disallowance under Section 14A of the I.T. Act, 1961, amounting to Rs.2,20,15,787/- is not to be considered for book profit for calculation of book profit under Section 115JB of the I.T. Act, 1961?"

DECISION OF THE HON'BLE COURT

"We admit the question no.2 for adjudication in this appeal. By consent of the parties, the appeal is treated as ready for hearing and taken up as such.

We find computation of the amount of expenditure relatable to exempted income of the assessee must be made since the assessee has not claimed such expenditure to be Nil. Such computation must be made by applying clause (f) of Explanation 1 under section 115JB of the Act. We remand the matter for such computation to be made by the learned Tribunal.

We accept the submission of Mr. Khaitan, learned Senior Advocate that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act."

(emphasis added)

17.2. The same view was taken by the Hon'ble Karnataka High Court in *CIT v. Gokal Das Images Private Limited*, (2020) 429 ITR 526 (Karn) – paragraph 10 at page 533 of the Reports (Page 156 at page 163 of the Compilation of the Case Laws). Relevant portion of the decision of the Karnataka High Court in *Gokaldas Images' case* (*supra*) is extracted hereinbelow:

*“10. The Commissioner of Income-tax (Appeals) has held that as per section 115JB of the Act, the assessee being a company is liable to tax on book profits in accordance with the aforesaid provision and there is no exemption granted to the non-dividend company in this regard. However, the tribunal by placing reliance on decision of the Supreme Court in *Apollo Tyres v. CIT* [2002] 122 Taxman 562/255 ITR 273 has held that Assessing Officer while determining book profits under section 115JB of the Act cannot tamper with the profits as per profit and loss account prepared in accordance with the Companies Act except in the manner provided in Explanation 1 to section 115JB of the Act. Thus, it has been held that the additions made by the Assessing Officer while determining the book profits under section 115JB of the Act cannot be sustained. Any disallowance computed under section 14A of the Act pertain to computation of income under normal provisions of the Act and cannot be read into the provisions of section 115JB of the Act pertaining to computation of book profits by levy of Minimum Alternate Tax (MAT) and there is no express provision in clause (f) of Explanation 1 to section 115JB of the Act to that extent. For the aforementioned reasons, the third substantial question of law is answered against the revenue and in favour of the assessee.”*

(emphasis added)

17.3. Respectfully following the judgments/decisions referred herein above, we fail to find any infirmity in the finding of ld. CIT(A) in deleting upward adjustment made to book profit for disallowance computed u/s 14A r.w. Rule 8D of the Rules. Thus, common ground no. 8 raised by the Revenue for AY 2011-12 & AY 2012-13 are dismissed.

18. The common Ground no. 9 raised by the Revenue is general in nature which needs not adjudication.

19. Thus, both the appeals filed by the Revenue for AY 2011-12 & AY 2012-13 are dismissed.

20. Now, we take the assessee's appeal in ITA No. 494/Kol/2020 for AY 2011-12 & ITA No. 495/Kol/2020 for AY 2012-13.

21. The first common ground relates to education cess being claimed as an expenditure u/s 37(1) of the Act. We fail to find any merit in this ground raised by the assessee, since the claim of deduction in the nature of education cess has been decided against the assessee by this Tribunal in the case of *M/s. Kanoria Chemicals & Industries Ltd. vs. ACIT in ITA No. 2184/Kol/2018* dated 26.10.2021 and also in light of the retrospective amendment made by the Finance Act, 2022 inserting Explanation 3 to Section 40 of the Act as per which education cess cannot be claimed as expenditure. Therefore, common ground no. 1 raised by the assessee for AY 2011-12 & AY 2012-13 are dismissed.

22. The 2nd & 3rd common grounds raised by the assessee relate to deduction of provision made for leave encashment and the allowability of the deduction u/s 43B(f) of the Act.

22.1. The assessee had claimed deduction on account of provision made for leave encashment relying upon the decision of the Hon'ble Calcutta High Court in *Exide Industries Limited v. Union of India*, (2007) 292 ITR 470 (Cal) whereby clause (f) of Section 43B of the Act was held unconstitutional. Ld. AO disallowed the claim by

observing that the matter was sub judice before the Hon'ble Supreme Court. On appeal, ld. CIT(A) directed ld. AO to allow deduction in respect of the provision only if the Hon'ble Supreme Court upheld the decision of the Hon'ble Calcutta High Court by rectifying the assessment once the judgment was rendered by the Hon'ble Supreme Court. The assessee's ground of appeal was dismissed subject to the said observation.

22.2. The Hon'ble Supreme Court in *Union of India v. Exide Industries Limited*, (2020) 425 ITR 1 (SC) upheld clause (f) of Section 43B of the Act as constitutionally valid (pages 220 – 249 of the Compilation of Case Laws). Therefore, in view of the judgment of the Hon'ble Supreme Court, deduction in respect of leave encashment is available only in the year of actual payment. It is then submitted by ld. Counsel for the assessee that ld. AO may be directed to allow deduction in respect of the amount actually paid on account of leave encashment during the previous year relevant to the AY 2011-12 & AY 2012-13.

22.3. We also find that this issue came for adjudication before this Tribunal in assessee's own case for AY 2010-11 and the following was held by this Tribunal:

"67. We have considered his submissions and are of the view that this liability is purely notional and cannot be allowed as deduction. It is an admitted position that there is no out flow on this account in any assessment year and the liability is notional and is based purely on entries in the books of account on the basis of notional figures. This may be relevant for the purpose of showing the true and fair view of the state of affairs of the assessee as is required for reporting to shareholders and other public authorities. When it comes to computing total income under the Act, such notional liability cannot

be allowed as deduction. We concur with the view of CIT(A) in this regard. We are of the view that application of the provision of section 43B(f) of the Act would not be relevant because the liability in question is not otherwise allowable under the Act and Sec.43B of the Act will come into operation only when a expenditure is otherwise allowable under the Act. With this observation we dismiss ground no.9 raised by the assessee.”

22.4. We, therefore, respectfully following the finding of the Tribunal applying the ratios laid down by Hon'ble Supreme Court of India in the case of *Exide Industries Limited (supra)* are of the considered view that the issue needs to be remitted back to the file of Id. AO who shall allow the claim of leave encashment actually paid by the assessee during the AY 2011-12 & AY 2012-13.

23. In the result, appeals filed by the Revenue for AYs 2011-12 & 2012-13 are dismissed and cross appeals filed by the assessee for both AYs 2011-12 & 2012-13 are partly allowed for statistical purposes.

Kolkata, the 31st October, 2022.

Sd/-
[Rajpal Yadav]
Vice President

Sd/-
[Manish Borad]
Accountant Member

Dated: 31.10.2022

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Birla Corporation Limited, Birla Building, 4th Floor, 9/1
R.N. Mukherjee Road, Kolkata-700 001.**
- 2. DCIT, Circle-6(1), Kolkata.**
3. CIT(A)-6, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata