

Joint Cit Vs. Cipla Ltd.

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SooperKanoon Citation : sooperkanoon.com/73805

Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Feb-14-2005

Reported in : (2005)2SOT617(Mum.)

Appellant : Joint Cit

Respondent : Cipla Ltd.

Judgement :

As all the above appeals are inter-related, so we are disposing them of by this common consolidated order for the sake of convenience.

I.T.A. No. 2062/M/1999 is an appeal by revenue for assessment year 1995-96 and is directed against the order of Commissioner (Appeals), Mumbai dated 25-1-1999.

I.T.A. Nos. 3057 & 3036/Mun-i./2000 are cross-appeals by assessee and revenue respectively for assessment year 1996-97 and are directed against the order of Commissioner (Appeals), Mumbai dated 16-3-2000.

I.T.A. Nos. 4731 & 4619/Mum./2000 are cross-appeals by assessee and revenue respectively for assessment year 1997-98 and are directed against the order of Commissioner (Appeals), Mumbai dated 19-7-2000.

The grounds taken by revenue and assessee are reproduced below for the sake of convenience.

(i) the learned Commissioner (Appeals) has erred in holding that unabsorbed depreciation of Rs. 3,66,60,505 for Kurkumbh Unit for assessment year 1994-95 which has been set off against other income of the assessee for the assessment year 1994-95 can't be carried forward and reduced while computing deduction under section 80-IA of the Income Tax Act for assessment year 1995-96.

(ii) The learned Commissioner (Appeals) erred in holding that Global Profit method adopted by the assessing officer in determining the actual income of Kurkumbh Unit eligible for deduction under section 80-IA is erroneous and thereby directing the assessing officer to allow deduction under section 80-IA amounting to Rs. 5,70,67,970.

(iii) The learned Commissioner (Appeals) has erred in holding that as per section 80-IA(9) Kurkumbh Unit has to be treated as a separate business from the business of manufacturing taking place in other units of assessee.

(iv) The learned Commissioner (Appeals) has erred in directing the assessing officer to adopt assessee's computation for allowing deduction under section 80-IA and also holding that the rates applied by the assessee for transfer in and out of the Kurkumbh Unit are keeping with the market price in terms of section 80-IA(9) and are in order.

(v) The learned Commissioner (Appeals) erred in holding the purchase and lease back transactions of boilers with M/s. TEWL as bona fide and setting aside the issue to the file of assessing officer for estimating the value of the boilers for the purpose of claim of depreciation.

(vi) The learned Commissioner (Appeals) has erred in deleting Rs. 57,82,509 by holding that repairs to Machinery, building etc. are of revenue nature and fall within the purview of section 37.

(vii) The learned Commissioner (Appeals) has erred in deleting the addition of Rs. 77,10,345 made by the assessing officer on account of unutilized Modvat credit.

(viii) The learned Commissioner (Appeals) erred in deleting Rs. 42,69,617 being disallowance made by assessing officer on account of gift articles having no logo/

name of the company.

(ix) The learned Commissioner (Appeals) has erred in deleting Rs. 4,06,760 being disallowance made by the assessing officer on account of expenditure incurred on dry fruits etc.

(x) The learned Commissioner (Appeals) has erred in deleting the disallowance of Rs. 3.5 lakhs which was made by the assessing officer under rule 6D.I. (i) On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) has erred in holding that the assessee is entitled for deduction under section 80-IA in respect of Kurkumbh and Patalganga Units on profits of Rs. 10,37,23,216 and Rs. 5,97,44,407 respectively instead of Rs. 2,84,03,869 and Rs. 53,91,883 respectively allowed by the assessing officer by invoking the proviso to section 80-IA(9) of the Act.

(ii) Without prejudice to the above and on the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in relying on the Cost Auditor's report called during appeal proceedings, which was never produced before the assessing officer during assessment proceedings nor even at the stage of remand report and thus the assessing officer was precluded from making his submissions on the said Cost Auditor's report.

II. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in holding that the transaction of sale and lease back between M/s. TEWI and the assessee is a straight transaction and the transaction is at arms length and is a bona fide finance lease without appreciating that Commissioner (Appeals) himself has given a finding that the value of the assets is highly jacked up merely to provide higher depreciation to the assessee and also that no income from lease rental from the leased assets had been accounted for in the year under consideration and date of commencement of the lease is doubtful.

III. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) has erred in deleting an addition of Rs. 48,01,865 made by the assessing officer on account of unutilized Modvat credit.

IV. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in deleting the disallowance of Rs. 2,24,383 and Rs. 2,87,718 respectively made by the assessing officer on account of expenditure incurred on gift articles and dry fruits under rule 6B of the Income Tax Rules.

V. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) has erred in deleting a disallowance of Rs. 73,366 which was made by the assessing officer under rule 6D.1(i). On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) has erred in holding that the assessee is entitled for deduction under section 80-IA in respect of Kurkumbh and Patalganga Units on profits of Rs. 31,50,44,462 and Rs. 5,01,78,295 respectively instead of Rs. 26,59,82,964 and Rs. 3,59,65,954 respectively allowed by the assessing officer by invoking the proviso to section 80-IA(9) of the Act.

Without prejudice to the above and on the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in relying on the Cost Auditor's report called during appeal proceedings, which was never produced before the assessing officer during assessment proceedings and thus the assessing officer was precluded from making his submissions on the said Cost Auditor's report.

2. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) has erred in deleting an addition of Rs. 3,19,40,657 made by the assessing officer on account of unutilized Modvat credit.

3. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in deleting the disallowance of Rs. 3,50,000 made by the assessing officer under rule 6D on account of incidental expenses on tour.

4. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in deleting the disallowance of Rs. 2,65,677 on dry fruits boxes and sweets to staff on festival and Rs. 92,896 on account of gifts which were made by the assessing officer under rule 6B of the I.T. Rules.

1. The Commissioner (Appeals) erred in confirming the decision of the DCIT, Spl. Range23, Mumbai of treating the interest of Rs. 5,30,70,859 on right issue proceeds as income of assessment year 1996-97 as against the contention of the appellant that the same is taxable in assessment year 1997-98.

2. The Commissioner (Appeals)-XV, Mumbai erred in quantifying the profits of the eligible undertaking for purpose of section 80-IA deduction at Rs. 16,34,67,623 as against Rs. 23,23,82,706 claimed by the appellant and sustainable as per order of the Commissioner (Appeals) for the assessment year 1995-96. Without prejudice to the generality the Commissioner (Appeals) further erred in: (a) Adopting the rates of captive transfers on the basis of or derived from the realizations from exports, which, as per the appellant, do not represent market prices in the context of insignificant volume of the transactions and, in not accepting the appellants contentions that in such cases the transfer prices should be based on or derived from the representative market price being the cost of actual purchases or the prevailing procurement prices.

(b) Not directing the valuation of the opening stock at the rates adopted by him for valuation of transfers in the year under consideration.

(c) Not considering as part of eligible profit, interest and misc.

receipts and miscellaneous' earning on technology transfer included in other income.

(a) Rs. 11,93,012 being 25% of the foreign travel expenses of Dr. Y.K.Hamied, Chairman and Managing Director of the company following the order of the Commissioner (Appeals) for earlier year.

(b) Rs. 4,25,256 being 10% of foreign travel expenses of all persons other than Dr. Y.K. Hamied.

4. The Commissioner (Appeals) erred in confirming the disallowance of Rs. 4,39,073 being expenditure on food etc. incurred on staff debited to staff welfare expenses by treating the same as entertainment expenses.

The Commissioner (Appeals) erred in confirming the decision of the DCI of disallowance 10% of canteen expenses amounting to Rs. 6,95,712.

6. The Commissioner (Appeals) has erred in confirming the stand of DCI of taking the total turnover of the appellants, at Rs. 3,75,69,70,445 as against Rs. 3,61,11,78,063 taken by them for the purpose of working out the deduction under section 80HHC by including sales tax as part of total turnover.

The Commissioner (Appeals) erred in confirming the additional disallowance of Rs. 73,366 made by DCI, being the expenditure incurred on travelling calculated on the basis of each trip instead of accepting the figure of disallowance submitted by the appellant at Rs. 4,96,676 being the disallowance calculated on the basis of all the trips taken together by an employee in the year of account.

8. The Commissioner (Appeals) erred in following the order of his predecessor for assessment year 1995-96 in restoring to the DCI the issue of depreciation claim on two boilers purchased by the appellants from M/s. Triveni Engg. Works Ltd. and subsequently leased back to them.

9. The Commissioner (Appeals) erred in confirming the addition of Rs. 25,00,000 being freight element to be included on closing stock of finished goods lying at depots.

1. The Commissioner (Appeals)-XV, Mumbai erred in quantifying the profits of the eligible undertaking for purpose of section 80-IA deduction at Rs. 36,52,22,757 as against Rs. 50,35,66,605 claimed by the appellant and sustainable as per order of the Commissioner (Appeals) for the assessment year 1995-96. Without prejudice to the generality the Commissioner (Appeals) further erred in: (a) Adopting the rates of captive transfers on the basis of or derived from the realizations from exports, which, as per the appellant, do not represent market prices in the context of insignificant volume of the transactions and, in not accepting the appellants contentions that in such cases the transfer prices should be based on or derived from the representative market price being the cost of actual purchases or the prevailing procurement prices.

(b) Not directing the valuation of the opening stock at the rates adopted by him for valuation of transfers in the year under consideration.

(c) Not considering as part of eligible profit, interest and misc.

receipts included in other income.

(d) Taking the global profit percentage, in respect of goods where selling price of Cipla was not available, at 20.3196 instead of 25.4896.

(a) Rs. 8,35,516 being 25% of the foreign travel expenses of Dr. Y.K.Hamied, Chairman and Managing Director of the Company following the order of the Commissioner (Appeals) for earlier year.

(b) Rs. 3,83,699 being 10% of foreign travel expenses of all persons other than Dr. Y.K. Hamied.

3. The Commissioner (Appeals) erred in confirming the decision of the JCIT, Spl. Range23, Mumbai of treating Rs. 9,87,763 being expenditure on food etcincurred on staff debited to staff welfare expenses, as entertainment expenses.

4. The Commissioner (Appeals) erred in confirming the decision of the JCIT of treating 10% of canteen expenses amounting to Rs. 6,53,23 2 as entertainment expenses.

5. The Commissioner (Appeals) has erred in confirming the stand of JCIT of taking the total turnover of the appellants, at Rs. 4,78,46,06,928 as against Rs. 4,51,88,60,159 taken by them for the purpose of working out the deduction under section 80HHC by including sales tax as part of total turnover.

6. The Commissioner (Appeals) erred in confirming the additional disallowance of Rs. 1,02,339 made by DCI, being the expenditure incurred on travelling calculated on the basis of each trip instead of accepting the figure of disallowance submitted by the appellant at Rs. 6,27,769 being the disallowance calculated on the basis of all the trips taken, together by an employee in the year of account.

7. The Commissioner (Appeals) erred in confirming the addition of Rs. 30,00,000 being freight element to be included on closing stock of finished goods lying at depots.

6. In the course of the proceedings, the assessee has filed in each of the years, an additional aspect to be added to ground No. 2 in assessment year 1996-97 and to ground No. 1 in assessment year 1997-98, which was not specifically mentioned in the said main grounds; and the same are as under: "d. holding as per page 40, para 4.27 of the appellate order, that actual sale price wherever available will represent market price." 'e. holding, following the appellate order for assessment year 1996-97, that actual sale price where available will represent market price." Considering the facts of the case, we admit the same and we will dispose of the same on merits since the same is only by way of elaboration of main ground of appeal and it does not require any investigation into the facts, which are not already on record.

7. In the department's appeal before us under consideration following are the issues contained in various grounds of appeal in various years, as detailed in tabulation, which arise for our consideration First we may take up above-mentioned issue No. 2 in department's appeals, as the arguments also have been made before us in respect of this issue first for the sake of convenience. This issue is contained in ground Nos. V and II in assessment years 1995-96 and 1996-97 respectively. The learned Departmental Representative has submitted that this issue pertains to the matter of Lease and buy back transaction wherein the assessee had purchased two boilers from M/s.

Triveni Engineering Works Ltd. (TEWL) and subsequently leased back to them. He has contended that the learned Commissioner (Appeals) had restored the issue to assessing officer, who has framed the consequent fresh assessment repeating the same addition /disallowance and the assessee is already in appeal in the 2nd ground, so this issue has now been rendered academic. The learned Authorised Representative of assessee agreed that this has now become infructuous in this appeal as the assessee is already in appeal in 2nd round on this issue. As such, considering the contentions and the facts of the case, we find this issue to have

become academic and in turn, infructuous. We, therefore, dismiss this issue accordingly for the reason of the same having become academic and in the turn infructuous.

Issue No. 1 pertains to deduction under section 80-IA. This issue is contained in concised ground Nos. I to IV in assessment year 1995-96 in respect of Kurkumbh unit only, ground No. 1 in assessment years 1996-97 and 1997-98 in revenue's appeals in respect of Kurkumbh and Patalganga II units; and the same issue is contained in ground No. II in assessment year 1996-97 and ground No. 1 in assessment year 1997-98 in assessee's appeals. In assessment year 1995-96 the learned Commissioner (Appeals) accepted assessee's claim, so the revenue is in appeal whereas in assessment years 1996-97 and 1997-98 the learned Commissioner (Appeals) accepted assessee's claim in part only so both the department as well as assessee are in appeal on this issue in assessment years 1996-97 and 1997-98. So we take up these grounds together for our consideration. The learned Departmental Representative has contended that this comprises two aspects - (a) Whether unabsorbed loss of assessment years 1994-95 in specified unit can be set off before allowing deduction under section 80-IA for assessment year 1995-96.

(b) Whether purchase and sale of goods by Kurkumbh unit was on market value As regards the issue of set off of Rs. 3,66,60,505 being the depreciation allowed in respect of Kurkumbh (hereinafter referred to as the KK) Unit in assessment year 1994-95 by way of reducing the same from the eligible profit of Kurkumbh, the learned Departmental Representative has referred to para 2 on page 2 of assessing officer's order and contended that the assessee is a pharmaceutical manufacturing company engaged in the manufacture of bulk chemicals, pharmaceutical formulations etc. He has contended that the assessee has its manufacturing units at five places namely Bombay Central, Bangalore, Vikhroli, Patalganga and Kurkumbh. He has contended that this first aspect (set off of depreciation) in assessment year 1995-96 is related to Kurkumbh only. He has contended that in assessment year 1994-95 there was loss in Kurkumbh unit and unabsorbed depreciation of Rs. 3,66,60,505 was set off against other income of Kurkumbh Unit in assessment year 1994-95, and so at the end of assessment

year 1994-95 in I.T. proceedings there is no unabsorbed loss relating to Kurkumbh Unit carried forward in assessment year 1995-96. He has contended that in assessment year 1995-96 the assessing officer applied the provisions of section 80-IA(7) and accordingly held the eligible business is the only source of income of assessee during the previous year related to assessment year 1995-96. He has contended that the Kurkumbh Unit had already started in assessment year 1994-95 and the year under appeal being assessment year 1995-96 was 2nd year of Kurkumbh Unit. He has contended that the assessing officer took the stand that the earlier years' depreciation /unabsorbed loss which was set off against other income of assessee in assessment year 1994-95 was to be set off against income of Kurkumbh unit in assessment year 1995-96 and accordingly the assessing officer reduced the eligible profit of this unit by the amount of unabsorbed depreciation. He has contended that as per assessee, the initial assessment year was assessment year 1995-96 inasmuch as assessment year 1994-95 was the trial period and for this the assessee relied on the provision of section 80-IA(12(c)). He has contended that sub-section (12(c)) of section 80-IA defines initial assessment year being related to previous year in which the industrial undertaking "begins to manufacture or produce" articles or thing; and that the assessee having started production in the previous year related to assessment year 1994-95 the initial assessment year of assessee was assessment year 1994-95 and in turn, the year under appeal being assessment year 1995-96 was the second year of production of Kurkumbh unit. He has contended that accordingly the provision of section 80-IA(7) will be applicable to assessment year 1995-96. He has contended that the learned Commissioner (Appeals) has treated assessment year 1995-96 as initial assessment year of assessee in respect of Kurkumbh unit. He has contended that the assessing officer allowed deduction under section 80-IA in assessment year 1995-96 as profit was there but in assessment year 1994-95 only loss was there so there was no question of allowing deduction under section 80-IA in assessment year 1994-95. He has contended that in assessment year 1994-95 Kurkumbh unit having had started, the assessee had claimed depreciation in assessment year 1994-95 which was allowed. He has referred to page 17 PB and contended that this is letter by assessee written to department wherein the assessee has mentioned the factum of trial production at Sr. No. 4, and these

details were given for claiming depreciation in assessment year 1994-95. He has contended that thus it is clear from record that in assessment year 1994-95 the production was there and so the initial assessment year is 1994-95.

He has contended that the production had started in the previous year 1993-94 related to assessment year 1994-95. He has contended that the learned Commissioner (Appeals) is holding that the manufacture of article or things means the end/final product and not the intermediary product, and also that the production should be on commercial basis and not on trial basis. He has contended that in the present case, as per the fact-situation, there is commercial production in assessment year 1994-95. He has contended that there was huge investment of Rs. 10 crores and a depreciation of Rs. 3.66 crores was claimed, excise duty was also paid as is reflected from the details given in assessee's letter placed on page 17PB. The learned Departmental Representative has contended that if intermediary product is marketable then that may also be the end-product for this section and so assessment year 1994-95 is initial assessment year for Kurkumbh unit and assessment year 1995-96 is its 2nd year of production. For this proposition he relied on the decision of Hon'ble Supreme Court in the case of CIT v. Cellulose Products of India Ltd. (1991) 192 ITR 1551.

As against the above, the learned Authorised Representative of assessee has contended that there is no finding of carrying forward in assessment year 1994-95; and it is only after finding of C/F that in subsequent year there can be set off. Referring to pages 1 to 12 PB, containing assessment order for assessment year 1994-95, he has contended that in this order there is no finding that there is unabsorbed depreciation of assessment year 1994-95 and is allowed to be carried forward, There should be finding in the preceding year 1994-95 which is not there and so there cannot be set off in assessment year 1995-96. He has cited Sri Rajarathinam Transports (P.) Ltd. v. CIT (1993) 199 ITR 203 (Mad.) in support of above contention.

He has contended that 80-IA(7) will apply to 2nd year following initial assessment year. He has contended that the question as to which year is initial assessment year no more arises for determination by the Tribunal inasmuch as the assessing

officer himself has given finding of fact that assessment year 1995-96 is the initial assessment year. In this regard, he has referred to para No. 2 on page 2 and para 2nd on page 5 of assessing officer. He has contended that the contention of learned Departmental Representative that in assessment year 1994-95 there was commercial production and not trial production and referring to assessee's letter dated 10-10-1996 (pages 17 and 18 PB) and that the Tribunal being, final fact-finding authority so it can go into this aspect de novo should not be accepted. He has contended that on page 17 PB at Sr. No. 4 Kurkumbh unit's trial production is mentioned but in this narration there is not a single item showing payment of excise duty. He has contended that in assessment year 1994-95 there is receipt of raw material but no manufacture of goods, so it is a trial of production, production was tried but it failed. He has contended that the documentation referred to by learned CIT-Departmental Representative, as mentioned at Sr. No. 4 on page 17 PB was confined to the availment of Modvat on materials received by Kurkumbh unit and that there is no excise documentation evidencing production and sale of any output/product from the raw materials received by Kurkumbh unit. He has also drawn our attention to the fact of copies of work orders of trial batches, as mentioned at Sr. No. 4(d) on page 17 PB, submitted during assessment proceedings for assessment year 1994-95 and accordingly contended that there was no output at all as a result of trial operation in assessment year 1994-95 and so the question of there being production as such in that year cannot arise. He contended that in the situation it cannot be said that the initial assessment year is assessment year 1994-95. He has contended that payment of excise duty, sale invoices etc. would have shown production, which are not there on page 17 PB. Citing CIT v. Hindustan Antibiotics Ltd. (1974) 93 ITR 548 (Bom.), he has contended that the year of trial run is not the first/initial assessment year for section 80-IA. Referring to the learned Departmental Representative's citation in CIT v. Cellulose Products of India Ltd. (1991) 192 ITR 155 (SC) he has contended that it will be commercial production only when intermediary product is marketable whereas in assessee's case there is no such finding, but the finding is that it is a trial production.

In rejoinder, the learned Departmental Representative has contended that for the department to apply section 80-IA(7) it is not necessary that there should be

finding of unabsorbed depreciation and carrying forward of the same. He has contended that in the instant case in assessment year 1994-95 the unabsorbed depreciation was set off against other income so there was no question of C/F finding in assessment year 1994-95.

We have considered the rival contentions, relevant material on record as also the cited decisions. In CIT v. Cellulose Products of India Ltd. (1991) 192 ITR 155 (SC) the assessee was engaged in the business of manufacture of chemical products namely Carboxy Methyl Cellulose (CMC), cellulose pulp and other chemical products. The assessee was granted licence for manufacture of sodium carboxy methyl. The respondent installed plant in which was manufactured cellulose pulp, which, in its turn, was to be used as a raw material for manufacture of carboxy methyl cellulose. The production of cellulose pulp was started from 18-3-1961 while production of carboxy methyl cellulose was started from 15-6-1961 "The Income Tax Officer took the view that since the respondent had started production of cellulose pulp from 18-3-1961, it had begun to manufacture or produce finished articles or goods in the year ending on 31-3-1961, and consequently, the assessment year 1961-62 was the first year in which the assessee was entitled to relief under section 84. According to him, the relief contemplated by section 84 being available only for five years, namely, the assessment year 1961-62 and the four assessment years immediately succeeding as contemplated by sub-section (7) of section 84 of the Act, the respondent was not entitled to the relief claimed in the assessment year 1966-67 which fell beyond the aforesaid period. This finding of the Income Tax Officer was affirmed in appeal by the Appellate Assistant Commissioner. The matter was taken up by the respondent in further appeal before the Income Tax Appellate Tribunal.

The respondent's contention that the production of cellulose pulp during the month of March 1961, was a trial production was repelled by the Tribunal and a categorical finding was recorded by it that cellulose pulp manufactured by the respondent during the month of March 1961, was a finished product which was a marketable commodity. On this view, the Tribunal held that the respondent having begun production or manufacture of a finished product which was capable of being sold in the market in the year of account relevant to the assessment year 1961-62,

the last year in which the respondent was entitled to get relief under section 84 of the Act was the assessment year 1965-66 and the claim made by it for the said relief in the assessment year in question, namely, 1966-67, was not maintainable." This finding of Tribunal was upheld by the Hon'ble Supreme Court. Thus, on facts the case relied on by learned Departmental Representative is distinguishable.

For the sake of convenience and ready reference we may reproduce below the relevant provisions of section 80-IA: "(7) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under sub-section (5) for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

(a) 'hilly area' means any area located at a height of one thousand metres or more above the sea level; ' (b) 'industrial undertaking' shall have the meaning assigned to it in the Explanation to section 33B; (c) 'initial assessment year' means the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things, or to operate its cold storage plant or plants or the ship is first brought into use or the business of the hotel starts functioning." From the perusal of record, we find that in assessment year 1994-95 there was trial production only and not the commercial production of any article or thing; neither was there any commercial production of the end/ finished product for marketing or to be sold by assessee, nor was there any such production of an intermediary article or product which itself was a marketable product. The assessing officer himself has accepted this fact that there is no denying the fact that commercial operations started during assessment year 1995-96 and for the purpose of deduction under section 80-IA assessment year 1995-96 is the first year of claim. As such, considering all the facts and circumstances of the case, we find that the commercial production having been started by assessee in assessment year 1995-96, the 'initial assessment year' or first year for the purpose

of deduction under section 80-IA was assessment year 1995-96 and not assessment year 1994-95. Accordingly, the deeming provision of section 80-IA(7) for treating the eligible industrial undertaking as the only source of income of assessee for computation of deduction under section 80-IA(5) is applicable to assessment year 1996-97 and subsequent years, being succeeding to the "initial assessment year" which is assessment year 1995-96. In that view of the matter, the depreciation of Rs. 3.66 crores, allowed in respect of Kurkumbh unit for assessment year 1994-95 could well be set off against income/profit of assessee from other units in that year (assessment year 1994-95) as the aforesaid deeming provision of section 80-IA(7) was not applicable in assessment year 1994-95; and so the same was rightly set off in assessment year 1994-95 and in turn, the said notional unabsorbed depreciation amount of Rs. 3.66 crores, could not be carried forward in assessment year 1995-96 so as to deduct the same from the eligible profit of Kurkumbh unit in assessment year 1995-96 for the purpose of computing deduction under section 80-IA. As such, considering all the facts and circumstances of the case as also the legal position, we find no fault with the impugned order of learned Commissioner (Appeals) in directing the assessing officer not to reduce the amount of Rs. 3.66 crores as unabsorbed depreciation from the eligible profits of Kurkumbh unit while computing deduction under section 80-IA for assessment year 1995-96. We, therefore, decline to interfere with the same on this count. While deciding this issue, we have considered the following decisions: Now we take up the second aspect of issue No. 1 raised by revenue in assessment year 1995-96 being against the finding of learned Commissioner (Appeals) holding the Global Profit method adopted by assessing officer in determining actual income of Kurkumbh unit eligible for deduction under section 80-IA to be erroneous and that the computation of profits derived from the industrial undertaking at Kurkumbh, as worked out by the assessee and claimed at an amount of Rs. 5,70,67,970 was correct and proper. The third concised ground is against the finding of the Commissioner (Appeals) that the Kurkumbh undertaking has to be treated as a separate business from the business of manufacturing taking place in other units of the assessee. And the fourth ground of appeal raised is against the direction of the Commissioner (Appeals) to the assessing officer to adopt assessee's computation for allowing deduction under

section 80-IA and also holding that the rates applied by the assessee for transfer in and out of Kurkumbh unit are in keeping with the market price in terms of section 80-IA(9) and are in order. In substance, this ground of appeal is-common with the revenue's ground of appeal No. 1 in each of assessment years 1996-97 and 1997-98. We, therefore, deal with the issue of computation of profits derived by the industrial undertakings for all 3 years in a consolidated manner.

The facts, relevant to the issue, under our consideration, as ascertainable from the material on record including the fact-sheet, synopsis, write up etc. furnished by the parties before us as also the contentions made by the two rival representatives, may for convenience, be stated as under: (i) The assessee, engaged in the business of bulk drugs and formulations, has undertaking at Bombay Central, Vikhroli, Bangalore, Patalganga I and II, and Kurkumbh.

(ii) Patalganga II and Kurkumbh undertakings are eligible for relief under section 80-IA in the year under appeal.

(iii) The initial year of Patalganga II undertaking is assessment year 1992-93 whereas in respect of Kurkumbh undertaking, the initial year as concluded by us above, is the year under appeal, being assessment year 1995-96.

(iv) In respect of Patalganga undertaking, the assessee claimed eligible derived profits in the amount of Rs. 4.45 crores. The assessing officer has not questioned the correctness of these profits.

However, in respect of Kurkumbh undertaking, the assessee claimed eligible derived profits at Rs. 9 crores as against which the assessing officer has computed the profits in the amount of Rs. 3.30 crores. The above diminution in the amount of profit made by the assessing officer has been on the ground that the transfer pricing policy adopted by the assessee in terms of section 80-IA(9) of the Act is not wholly appropriate.

(v) The profit & loss account of Kurkumbh undertaking as juxtaposed with the profit & loss account of the other undertakings is at page 33 of the Paper book.

(vi) The direct sales of Kurkumbh undertaking are of Rs. 42.23 crores whereas the direct sales of other undertakings are of Rs. 253.59 crores, aggregating in all to Rs. 295.82 crores for the Company as a whole.

(vii) Out of total inter-unit transfers of goods and materials of Rs. 36.36 crores, the goods issued by Kurkumbh undertaking have been valued by the assessee at Rs. 5.32 crores and the goods received in Kurkumbh are valued at Rs. 4.04 crores.

(viii) The assessing officer has accepted the transfer pricing policy adopted in respect of Patalganga undertaking and has accordingly not disturbed the computation of the assessee in respect thereof.

(ix) However, in respect of Kurkumbh undertaking the assessing officer has not accepted the value of issues of Rs. 5.32 crores. Instead, he has adopted a value of Rs. 2.34 crores. He has also not accepted the valuation of receipts of Rs. 4.04 crores. Instead, he has adopted such value at Rs. 6.76 crores. The assessing officer has thus come to the conclusion that the issues by Kurkumbh undertaking are overvalued by Rs. 2.98 crores and the values of receipts are understated by Rs. 2.72 crores.

(x) Annexure 'A' to the order of Commissioner (Appeals) contains cases where the assessing officer has alleged undervaluation of receipts. The aggregate amount of under-valuation as per the said Annexure 'A' is of Rs. 2.62 crores (Rs. 2.72 crores stated by assessing officer incorrectly due to an arithmetical calculation error in respect of the transfer at Sr. No. 1 in Annexure 'A') Annexure 'B' to the order of the Commissioner (Appeals) contains cases of receipts by Kurkumbh where the value of receipts would have decreased if assessing officer were to have adopted the same transfer pricing policy which he has adopted in Annexure 'A' for increasing the value of receipts.

Annexure 'C' to the order of the Commissioner (Appeals) contains the working of under-valuation of issues by Kurkumbh as alleged by the assessing officer.

Annexure 'D' to the order of the Commissioner (Appeals) contains those cases where value of issues would have increased if the assessing officer were to have

adopted the same transfer pricing policy, which has been adopted by him for the valuation of issues in Annexure 'C' for decreasing the value of issues.

(xi) The assessee company manufactures formulations from bulk drugs.

These bulk drugs are manufactured by the company itself or are purchased. Some manufactured bulk drugs are sold in the same form, without making formulations. The sale of formulations constitutes 91% of the total sales of the company.

(xii) The bulk drugs and the drug intermediates are transferred from one unit to another as and when so required. The inter-unit transfers cover the units eligible for relief under section 80-IA as also the other Units which are not so eligible.

The learned Departmental Representative has contended that the inter-unit transfer has to be valued on the market rate. Referring to proviso to sub-section (8) of section 80-IA, he has contended that the assessing officer may compute profits on reasonable basis if the assessing officer is of the opinion that there are exceptional difficulties in computing the eligible profit in the manner specified in sub-section (8) to section 80-IA. He has contended that the assessing officer found that there was overstatement of profits of Kurkumbh unit for assessment year 1995-96. He has contended that in respect of Kurkumbh unit the assessee has understated the value of transfers in and has overstated the value of goods transferred out, in the matter of inter-unit transfers in and out, which has resulted in overstatement of profits of Kurkumbh unit, which is eligible for benefit under section 80-IA though all units being of assessee, the overall effect may be nil to assessee.

Referring to page 8 para 3(a) the learned Departmental Representative has contended that the overall net profit of assessee company in its all the units from entire business, called the global profits, was of Rs. 17.70 crores on a turnover of Rs. 295 crores which is 6% n.p. on sales whereas the net profit of Kurkumbh unit is declared at Rs. 9 crores as per Income Tax Act on sales of Rs. 47.55 crores, which is 19% n.p. on sales and that is the reason, why assessing officer has doubted the assessee's transfer pricing strategy. He has contended that the assessing officer has elaborately dealt with the matter on pages 8 to 22 of

assessment order.

Referring to pages 11 and 12 of assessment order, the learned Departmental Representative has contended that as per cost audit report in the cases of sales of intermediate bulk drug as per Proforma C, there has not been any positive margin on any of the products which have been sold from Kurkumbh. He has contended that there is negative margin in Bulk Drug. He has contended that as per cost audit report the net actual profit of Kurkumbh unit is of Rs. 1.74 crores (Rs. 1.39 crores on domestic sales of formulations + Rs. 35 lakhs on exports formulation) then how the assessee company has declared a net profit of Rs. 9 crores as per its computation for deduction under section 80-IA for Kurkumbh unit. He has contended that the basis for this given by assessee is mentioned on pages 13 and 14 of assessment order. He has contended that the pricing mechanism adopted by assessee for purchases and sales of intermediate/ bulk drug from and to Kurkumbh unit vis-a-vis the other units shows that for certain items the assessee has taken domestic price while for other items the assessee has taken export price; and there is difference between local/domestic price and the export price. He has contended that on pages 14 and 15 of assessment order, the assessing officer has given chart showing the rate adopted for determining the margin in cost audit and the rate adopted in determining net profit for deduction under section 80-IA in respect of transfers in (receipt) and transfers out (issue) of Kurkumbh unit. He has contended that on pages 17 and 18 of assessment order the assessing officer has given the chart mentioning the difference between rate as per section 80-IA calculation on the one hand, an average sale rate/cost of production on the other. He has contended that the assessing officer has discussed the assessee's price mechanism, that is how the price is determined by assessee on pages 18 and 19 of assessment order. He has contended that the assessing officer has calculated the under valuation of purchases by Rs. 2.71 crores and over valuation of sales by Rs. 2.98 crores, thus total difference of Rs. 5.70 crores and so the assessing officer has rejected the assessee's claim for deduction under section 80-IA in respect of Rs. 5.70 crores.

He has contended that the assessing officer has also applied the judgment of Hon'ble Supreme Court in the case of CIT v. British Paints India Ltd. (1991) 188

ITR 441 (SC).

The learned Departmental Representative further submitted that the learned Commissioner (Appeals) has relied on assessee's submission discussing the issue on pages 13 to 40 of his appellate order. The learned Commissioner (Appeals) says that the assessing officer has not pointed out any exceptional difficulty in computing the reasonable rate for intra-unit transfer. The learned Commissioner (Appeals) has also accepted the assessee's contention that whatever pricing policy the assessee is following in other units, has also been followed in Kurkumbh unit. He has contended that when global profit rate is 6% and the assessee is declaring profit rate of Kurkumbh unit at 19%, this fact itself supports the assessing officer's conclusion in not accepting the assessee's transfer pricing policy and accordingly the assessing officer is justified to estimate the reasonable rate and profit. For the above reasons and reasons given by the assessing officer, the learned Departmental Representative fully relied on the order of assessing officer.

In his written submission, fact-sheet and synopsis (Explanatory chart), the learned Authorised Representative of assessee has contended that for the purpose of computing profits under section 80-IA the internal transfers are valued at market price under sub-section (9) of the said section. He has contended that as per assessing officer, only the cost audit rate should be adopted for the internal transfers and that the market price can be attributed to the internally transferred bulk drugs only if the same are actually sold by the company.

"(a) For internal transfers, assessing officer has valued the bulk drugs at cost of production (without any mark-up towards profit percentage) where the drugs are not actually sold by the company - Annexure 'A' to the order of Commissioner (Appeals).

(b) For the drug intermediates, the concept of derived market price is ignored Annexure 'C' to the order of Commissioner (Appeals).

(c) The concept of representation or most appropriate market price is ignored - Annexure 'A' to the order of Commissioner (Appeals).

(d) The assessing officer has applied this method only selectively i.e., where his method results into diminution of the profits derived under section 80-IA. Conversely if the adoption of the very same method is not applied in such cases. Please refer Annexures 'B' & 'D' to the order of Commissioner (Appeals).

(e) The assessing officer has not re-allocated the expenses in the ratio of the revised turnover of the undertakings based on his method.

(1) Closing stock of transfers-in was not revalued as per the revised rates." The learned Authorised Representative of assessee has contended that the Tribunal is to consider and adjudicate upon the question as to whether the assessee has computed the profits of Kurkumbh unit correctly or not. The learned Authorised Representative of assessee has contended that the assessing officer has observed that the assessee has not computed the profits of Kurkumbh unit correctly. He has contended that the assessee has claimed profits of Kurkumbh unit at Rs. 9 crores whereas the assessing officer says that it is of Rs. 3.30 crores and that the assessee has overstated its profits of Kurkumbh unit by Rs. 5.70 crores. He has contended that the assessee purchases raw material and sells manufactured bulk drug as also formulations. He has contended that the formulation sale is 95% of the entire sales and that the bulk drug sale is 5% of entire sales. He has contended that various units of assessee transfer bulk intermediate to Kurkumbh unit or bulk drug to Kurkumbh unit. He has contended that from the basic raw material, assessee makes bulk intermediate and then from bulk intermediate assessee makes formulations, which are end-products. He has contended that Kurkumbh unit also similarly transfers to other units bulk intermediate as also bulk drug.

He has contended that similar fact-situation of PG-II is there. He has contended that the assessee is maintaining inter-unit transfer in and out. He has contended that in respect of PG-II also the assessee is following the same method of accounting in transfer in and out and that this has been followed consistently. He has contended that the assessing officer has accepted this method that is transfer pricing policy in respect of PG-II and the fact of this transfer pricing policy regarding PG-II has been explained to assessing officer during assessment

proceedings for assessment year 1994-95 as mentioned at Sr.

No. 5 in assessee's letter dated 10-10-1996 to assessing officer (pages 17, 18 PB). He has contended that the assessee has been following this method since the beginning of PG-II in the year 1983 and it was accepted in assessment year 1985-86 and continued to be accepted upto assessment year 1994-95 and it was for the first time in assessment year 1995-96 that the assessing officer has not accepted this method for Kurkumbh unit, though for PG-II the assessing officer has accepted this method in assessment year 1995-96 also. He has contended that the assessee has adopted the very same policy has been adopted for all the transfers including Patalganga and Kurkumbh in the year under consideration, namely, assessment year 1995-96. He has contended that the transfer pricing policy adopted for all the inter-unit transfers, including the transfers in and out of Kurkumbh undertaking, is common.

The learned Authorised Representative of assessee has contended that the assessing officer has observed in para 3a on page 8 of assessment order that the ratio of taxable income to the turnover of the company, as a whole, is 6% whereas in respect of Kurkumbh undertaking, the same works out at 19% and so he felt that the pricing strategy of the products received or issued by Kurkumbh which engineered such a net profit of the new undertaking, is disproportionate. He has contended that these observations of assessing officer are based on overall macro analysis but the assessing officer Failed to consider a number of relevant aspects like taking taxable returned income of assessee-company after considering depreciation on leased assets in respect of leasing activity without adding back the depreciation on leased assets for appropriate comparison; not considering the proportion of other expenses (other than pricing of materials transferred in and out of Kurkumbh unit) the correctness of which he did not doubt in relative terms; not considering the variation in the product mix while observing that on sale of bulk drugs loss suffered is Rs. 9.01 crores as against profit on formulations and other activities of Rs. 39.58 crores, the net profit being of Rs. 30.57 crores (Page II of assessment order), though ratio of bulk drugs sales to total sales of Kurkumbh unit is lower at 5% as compared to similar ratio of 9% in respect of other units. He has contended that the prima facie conclusion drawn by assessing officer in

suggesting that the pricing strategy adopted by the assessee for transfer of goods in and out by Kurkumbh undertaking had engineered disproportionate profits was not proper for the reason that the said conclusion was influenced by irrelevant considerations and non-consideration of some relevant aspects of the matter.

The learned Authorised Representative of the assessee has contended that on page 12 of his assessment order the assessing officer has observed that as per the cost audit report, the book profit earned on the sale of formulations and export of bulk drugs of Kurkumbh undertaking is only Rs. 1.74 crores vis-a-vis the profits of Rs. 9 crores derived for the purpose of claiming deduction under section 80-IA. He has contended that the assessing officer has accepted that the profits, as per costing records cannot be adopted for the purpose of computing derived profits under section 80-IA for the reason that profits as per cost records are not derived as per section 80-IA(9); and that as against assessee's working out of derived profits at Rs. 9 crores the assessing officer himself has computed such eligible profits at Rs. 3.3 crores (after his adjustments on account of transfer pricing policy) as against costing profits of Rs. 1.74 crores. He has contended that the assessing officer failed to take into account that the profits as per costing records are computed without considering Modvat credit.

He has contended that assessing officer has observed on page 14 of assessment order that in respect of Kurkumbh unit transfer price adopted in the case of receipts for the purpose of section 80-IA is less than the cost determined as per costing records and vice versa those cases of issues where transfer pricing adopted is higher than the cost as per costing records. He has contended that firstly the transfer pricing in terms of section 80-IA(9) prescribes the statutory Supersession over the costs as per the costing records; and secondly that the assessing officer failed to consider the other side where the costs as per costing records are lower than the transfer price adopted in the case of receipts of Kurkumbh unit (Annexur B) and vice versa and those cases where transfer prices are less than costs in the case of issues of Kurkumbh unit (Annexure 'D').

The learned Authorised Representative of assessec has contended that on page 16 of assessment order the assessing officer has illustrated six instances where

the average sale price realization are more than the transfer price adopted by the assessee in case of receipts at Kurkumbh.

The assessing officer has concluded that in such cases, the market related prices have been given a go-by. He has contended that out of six instances, 3 instances of transfers were of such nature, where the Kurkumbh undertaking had transferred these goods to the other undertaking and therefore, if at all, the profits had come to be understated rather than being overstated. In another instance, the fact of alleged defective transfer pricing was a nominal sum of Rs. 34,164.

He has contended that the learned Commissioner (Appeals) has considered all these and he relies on learned Commissioner (Appeals)'s order in this regard.

He has contended that on page 16 of assessment order, the assessing officer observed that in respect of Intermediates transferred out of Kurkumbh, the same were not sold by the assessee and therefore there was no market available for determining the market related rates. In this regard he has contended that as per section 80-IA(9) read with Explanation thereto what is relevant is not actual sale by the assessee, but the assumption of a hypothetical market and a hypothetical price. Reliance was placed on the decision of the Bombay High Court in the case of CWT v. Purshottam N. Amersey (1969) 71 ITR 180 (Bom). He has contended that section 80-IA(9) requires the computation of the profits on commercial accounting principles as if the undertaking is the only source of income. Reliance was placed on the decision of the Supreme Court in the case of Tata Iron & Steel Co.

Ltd. v. State of Bihar (1963) 48 ITR 123 (SC), for the proposition that though the profits are made or received at the ultimate point of sale of the final output but the profits are earned or derived in a distributive sense which are required to be telescoped in all the activities of the enterprise which finally culminate into the receipt of profits at the last stage. He has contended that the assessee has adopted the well known commercial accounting principle of Profits split method by deriving the transfer price from the sale price of the final bulk drug which is produced out of the Intermediates transferred from Kurkumbh. For the method of working he has referred to Annexure 'C' to the order of Commissioner (Appeals).

He has contended that the assessing officer has observed on page 16 of assessment order that the cost of production of Intermediates received in Kurkumbh where there are no sales effected by the company are required to be determined on the basis of cost of production of those Intermediates in the other undertakings. In this regard, referring to Annexure 'A' to Commissioner (Appeals)'s order, he has contended that this contains the cases where assessing officer has applied this principle. He has contended that out of 11 items mentioned in the list, only three items mentioned at Sr. Nos. 3, 9 & 11 are intermediates and the remaining items are finished bulk drugs. The valuation in these cases has been adopted at statutorily regulated controlled prices.

Reliance is placed on the decision of Allahabad High Court in the case of Vijay Kumar Kedia v. CED (1976) 104 ITR 302 (All). In respect of items 3 and 9, the method of transfer pricing adopted is identical with that adopted in the case of transfers out as per Annexure 'C' to the order of Commissioner (Appeals). It has been contended that the assessing officer has applied the principles propounded by him only in a selective manner where the cost of inputs were increased by the assessing officer and the prices of issues out were reduced by the assessing officer without considering the fact that by the application of very same principles in certain cases the cost of inputs will diminish (Annexure 'B' to the order of Commissioner (Appeals)) and the prices of issues will increase (Annexure 'D' to the order of Commissioner (Appeals)).

The assessing officer has further observed on page 16 of assessment order that in such cases where sales have been registered of the Intermediates received by Kurkumbh, the average sale price will be the market driven rate. He has contended that the learned Commissioner (Appeals) has accepted the submission of assessee that where there is an evidence of more than one market price, the price to be adopted should be the one which bears the more appropriate degree of comparability, this basic principle stands incorporated in the transfer pricing regulations.

On page 16 of assessment order the assessing officer has further observed that the Kurkumbh undertaking has received formulations and has issued formulations

to the other undertakings. He has contended that this is an undisputed fact that Kurkumbh undertaking has neither received nor transferred out any formulations. He has also contended that the assessing officer has observed on page 17 of assessment order that in such cases the costs as per the cost records have been ignored.

As per assessing officer, when there is no market for the company, the cost as per the cost records are to be considered as transfer prices.

He has contended that the assessing officer's observation that the market price is to be determined based solely on the fact as to whether there exists any market for the company's sales is unsustainable because section 80-IA(9) does not contain any such limitation and moreover, his observation is contrary to the basic legal principles that the profits of the undertaking have to be derived on commercial principles so as to impute appropriate profits to the activities of the undertaking on stand-alone basis.

He has contended that the assessing officer has observed on page 18 of assessment order as under: (a) When it comes to receipts at Kurkumbh, the yardstick is domestic quotation. When it comes to issues, the yardstick is export rate.

(b) When it comes to receipt at Kurkumbh, the yardstick is domestic market price, when it comes to issues, the yardstick is export rate of final bulk drug on the basis of yields.

(c) When it comes to receipt at Kurkumbh, the yardstick is domestic market price of third party quotations (like Hira Pharma's quotation for Alprazolan at Rs. 16,000 even though the assessee has itself sold Alprazolan at Rs. 55,319 per kg. during the year.

In this regard, he has contended that the observations of assessing officer are contrary to the facts on records and has referred to para II(4) of statement filed before Commissioner (Appeals), which has been considered by learned Commissioner (Appeals) on pages 25 and 26 of his appellate order.

He has contended that on page 19 of assessment order the assessing officer has mentioned that if the issues are based on the rate of final bulk drugs on the basis of yields, the receipt should also have been based on the rate of formulations on the basis of yield. He has contended that the price of formulations is not taken into consideration at all both in cases of receipts and issues, He has contended that the inappropriateness of adoption of formulation pricing has been considered by the learned Commissioner (Appeals) by referring to the submissions made before him on page 38, Para 40 of the Appellate order.

He has contended that on pages 19 and 20 of assessment order the assessing officer has mentioned that the principles contained in section 80-IA(9) can be applied only if the goods transferred by the undertaking are held for the purpose of business of the undertaking and conversely, the goods received by the undertaking should be held for the purpose of business by the other undertakings. He has contended that this observation of assessing officer is unsustainable for the reason that if these observations of assessing officer were to be accepted then such a qualifying undertaking will not be able to derive any profits at all under section 80-IA. Citing in the case of Textile Machinery Corpn. Ltd. v. CIT (1977) 107 ITR 195 (SC) he has contended that a qualifying undertaking could be solely a feeder unit for other undertakings.

He has contended that on page 21 of assessment order, the assessing officer has observed that acceptance of the accounting policy in the earlier years cannot stop the revenue from questioning the correctness of the policy in the year under consideration. Reliance has been placed on the decision of the Supreme Court in the case of CIT v. British Paints India Ltd. (1991) 188 ITR 44 (SC). He has referred to the assessee's submission made before assessing officer during proceedings for assessment year 1994-95 as placed on pages 17 and 18 PB wherein the assessee has informed the assessing officer about the method of accounting employed right from assessment year 1985-86 for deriving the profits of the qualifying undertaking No. 1 at Patalganga. Generally, the same method is employed for deriving the profits of Kurkumbh undertaking, The assessing officer has employed his theory for re-computation of profits only of Kurkumbh undertaking without disturbing the profits of Patalganga undertaking. Citing in the

case of Radhasoami Satsang v. CIT (1992) 193 ITR 321 (SC), he has relied on the following observation made therein "Where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

He has supported the order of learned Commissioner (Appeals)".

We have considered the rival contentions, relevant material on record as also the cited decisions. From the perusal of the record we find that the assessee has been following the same method of intra-unit transfer in respect of all other units of assessee which the assessee has been following in respect of KK unit.

For the sake of convenience/ ready reference we may reproduce below the provisions of sub-section (9) of section 80-IA : "(9) Where any goods held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods held for the purpose of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods as on the date: Provided that where, in opinion of the assessing officer, the computation of the profits and gains of the eligible business in the manner here in before specified presents exceptional difficulties, the assessing officer may compute such profits and gains on such reasonable basis as he may deem fit.

Explanation.-In this sub-section, 'market value', in relation to any goods, means the price that such goods would ordinarily fetch on sale in the open market." In our opinion sub-section (9) of section 80-IA is to be read alongwith sub-section (7). A conjoint reading of both of these clauses leaves no room for doubt that the qualifying undertaking is to be treated as if it is the only source of income of the assessee. That is to say, the transaction of the qualifying undertaking with the

other undertakings of the assessee are required to be translated into commercial terms while computing profit of the qualifying undertaking, at par with the transactions with the third parties from whom the goods may be actually purchased or to whom the goods may be actually so learned A commercial value has to be assigned to all the transactions of such qualifying undertaking where such transactions are with the other business or undertakings of the assessee. The derivation of the profits of the qualifying undertaking has to be worked out on commercial principle on stand-alone basis, these principles, have been laid down by the Hon'ble Supreme Court in the case of Tata Iron & Steel Co. Ltd. v. State of Bihar (1963) 48 ITR 123 (SC). Though these principles have been explained with reference to different fact situation but the ratio does apply in the situation in hand as well. The following observations in the said judgment deserve reproduction :- "It could not be disputed that factually the profit from the mining operation and the writing of the mineral is imbedded in the profit realized from the sale of the end product. We start with the premise that by the sale of the end product a real "profit" has been realized.

When analyzed it is found that profit is the aggregate or resultant of the profits from different lines of activity." As such, considering the facts of the case as also the legal position as emanating from the aforesaid judgment of the Hon'ble Apex Court of India, we are of the considered view that whatever principle the assessee may have adopted in the cost audit records for value of captive or internal transfers, such transfers, will have to be assigned a commercial value in terms of sub-section (9) of section 80-IA. Considering the rival contentions, we are of the view that if the transferred goods do not have any comparable market price, it will be wrong to value such transfers at their cost without assigning any commercial value of such transfers. If such transfers are used in producing the final output will have to be telescoped for assigning a commercial value of the transfers. Only then it will be possible to derive profits of the undertaking on commercial principles. In our view, the proviso to section 80-IA(9) which requires the assessing officer to compute the profits of the undertaking on a reasonable basis where the assessment of actual and comparable market prices presents exceptional difficulties contains this principle itself in that the transactions of the undertaking have to be assigned a commercial value based on the economic concept of value

addition. In other words if direct evidence of market price is available then assigned market prices to the transfers will result in the depiction of the profits of the undertaking on commercial prices. The same results will be achieved if an appropriate commercial value is assigned to the transactions of the undertaking where the direct and comparable market price is not available but the commercial value is derived by the process of extrapolation of the prices of the final saleable output. We find substance in proposition canvassed before us on behalf of the assessee that one has to assume a hypothetical market and a hypothetical price in the context of section 80-IA(9) and that statutory regulatory control prices can also be applied as representative market prices.

On careful consideration of various facts brought on record and argument raised before us, we hold that assessing officer has failed to establish that the assessee has in respect of KK unit understated 'transfers in', and overstated the 'transfers out' and has in turn, inflated eligible profits of KK unit. The assessee applied the rates for transfer in and transfer out of KK unit to be in keeping with the market price whereas the rates adopted by assessing officer, based on cost of production are not in accordance with the provisions of section 80-IA(9). We agree with the view has been held by the learned Commissioner (Appeals) that is the more appropriate market price will be the domestic price of the same goods actually purchased by the assessee in preference to the selling price of a very small quantity by the other undertaking of the assessee. It is necessary to bear in mind that sub-section (9) of section 80-IA does not at all mandate the market price has to be necessarily the selling price of goods actually sold by the assessee. On the other hand, the requirement is that the goods should be valued as per the market price. If the actual selling price realized in a given factual situation is demonstrated by the assessee as not the appropriate market price then such a selling price can be discarded in favour of more appropriate and representative market price. Considering all the facts and circumstances of the case together with the legal position and the elaborated discussion made by the learned Commissioner (Appeals) and together with the contentions of the rival representatives we are of the considered view that the findings/ conclusions drawn by learned Commissioner (Appeals) are justified.

As regards the alternative contention of the learned CIT-Departmental Representative that if the claim of assessee in respect of deduction under section 80-IA is allowed then atleast income from other sources should be excluded from eligible profit for the purpose of computing deduction under section 80-IA. We have considered/ examined the above submission of learned CIT-Departmental Representative and we find that the complete details are not readily available. Whatever details are available, from the same we find that the major component of OS income is duty drawback and we are holding the same as trading receipt in one finding being drawn ahead, so the remaining components of the OS income should be examined by assessing officer to find out nexus between the said OS income and the industrial undertaking of assessee. If the assessing officer findings that there is no direct nexus between the said income and the Industrial Undertaking of assessee, he may exclude the same from the eligible profit to be considered for deduction under section 80-IA. In assessment years 1996-97 and 1997-98, the learned CIT-Departmental Representative has raised his contention regarding the admission of additional evidence by the Commissioner (Appeals) in the form of cost auditor's report. He has contended that this record was never produced before assessing officer during the assessment proceedings nor even at the stage of remand report and thus the assessing officer was precluded from making his submission on the said report and thus the action of the Commissioner (Appeals) in relying upon the said evidence was in contravention of rule 46A of the Income-tax Rules and therefore, the matter regarding computation of deduction under section 80-IA be set aside and sent back to the Commissioner (Appeals) for read judication for compliance with rule 46A. As against the above, the learned Authorised Representative of the assessee has contended that the said report of the cost auditor was not in the nature of additional evidence requiring compliance of rule 46A. He has further contended that the learned Commissioner (Appeals) had exercised his powers correctly in terms of section 250 of the Income Tax Act and there was no contravention of the provisions of rule 46A at all and he has referred to the discussions made by learned Commissioner (Appeals) in various sub-paras of para 4 (paras 4.7, 4.14, 4.29 to 4.32) of his appellate order. He has also contended that the assessing officer himself had emphasized only on the determination of the conceptual correctness of the working submitted by the

assessee in the course of remand proceedings. The learned Authorised Representative submitted that the assessing officer had requested that these issues be adjudicated upon by the learned Commissioner (Appeals) on merits of the case. Therefore, there is no contravention of rule 46A on the part of Commissioner (Appeals).

We will now deal with the assessee's ground of appeal No. 2 in assessment year 1996-97 and No. 1 in assessment year 1997-98 dealing with the computation of profits under section 80-IA. The learned Authorised Representative of assessee has contended that the facts in assessment years 1996-97 and 1997-98 were really common with assessment year 1995-96 and that whatever be the decision of the Tribunal in the revenue's Appeal for assessment year 1995-96 will have to be applied consistently for these two years as well. In particular, the learned Authorised Representative objected to the assessing officer's finding that the evidence obtained by the assessee in the course of the assessment proceedings in support of the market price of goods was too complex to admit of reasonable verification. Objecting to the observations of the assessing officer in the assessment order that the assessee had failed to produce any evidence in support of higher profitability of the undertakings at Kurkumbh and Patalganga, the learned Authorised Representative of assessee has contended that the working available with the assessing officer was eloquent enough to lead the assessing officer to the conclusion that the application of the Global Profit Percentage would result in gross understatement of the profits derived by these undertakings. He has contended that the issue has been dealt with by learned Commissioner (Appeals) elaborately. He has contended that what the learned Commissioner (Appeals) has done is to adopt the working of the assessing officer for assessment year 1995-96 itself by not disturbing the profits derived on external sales. It has been contended that the learned Commissioner (Appeals) has rightly focused his attention to the valuation of captive transfers which alone are covered by the provisions of section 80-IA(9) including the proviso thereto. It has been contended that the application of section 80-IA(9) could not distort the profits, which are actually earned by the undertaking on direct sales in respect of which there was no dispute whatever. It has been contended that the revenue should not have any grievance whatsoever against the conceptual mechanism adopted by Commissioner (Appeals) which

ultimately found reflection in the report submitted by Cost Auditor.

The learned CIT (Departmental Representative) supported the order of the assessing officer. It was emphasized by the learned CIT (Departmental Representative) that the circumstances brought out by the assessing officer in the assessment order were more than sufficient to justify the invocation of the proviso to section 80-IA(9). The assessing officer's action in applying the Global Profit Percentage was the logical culmination of his action in the correct invocation of the proviso to section 80-IA(9).

The learned CIT-Departmental Representative has also contended that the learned Commissioner (Appeals) has accepted the assessee's contention that duty drawback received on exports, which is major component of Income from other sources should be treated as part of the profits derived from the undertaking. It has been contended that the decision of the Commissioner (Appeals) was directly in conflict with the decision of the Supreme Court in the case of CIT v. Sterling Foods (1999) 237 ITR 579 (SC) as also the decision of the Supreme Court in the case of Pandian Chemicals Ltd. v. CIT As against this, the learned Authorised Representative of assessee has submitted that duty drawback is a trading receipt. In support of this submission, he relied upon the decision of the Delhi Bench of Tribunal in the case of Dy. CIT v. Metro Tyres Ltd. (2001) 79 ITD 557 (Del). He has particularly referred to the following observations in para 8 of the Tribunal's order "The perusal of section 75(1) clearly shows that the duty drawback is given by way of incentive to boost the export of goods manufactured in India. If any imported goods on which custom duty has been levied, has been used in the manufacture of any goods of any class or description and such manufactured goods have been exported out of India, the custom duty paid on imported goods is given back to the manufacturer by way of rebate. This duty drawback is given only to manufacturers making export as is apparent from sub-section (2) of section 75. In other words, it is nothing but reimbursement of duty already paid. Whenever such duty paid, it directly affects the profits of industrial undertaking inasmuch as it is debited to Manufacture & Profit and Loss Account.

Such payment of custom duty increases the cost of manufacturing but when the same is received back as drawback, it nullifies the affect of aforesaid increase in the cost of manufacturing. Therefore, in our opinion, the duty drawback is inextricably linked with the production cost of the goods manufactured by assessee. Accordingly, it is held that duty drawback is the trading receipt of the industrial undertaking having direct nexus with the activity of such industrial undertaking and accordingly, the same forms part of the income derived from such industrial undertaking." We have considered the rival contentions as also the relevant material on record.

In our view, proviso to section 80-IA(9) is not an exception to the main provisions of section 80-IA. Ordinarily, the principles of statutory interpretation advocate that the proviso carves out an exception to the main provision of the law. However, we are of the considered view that the proviso to section 80-IA(9) does not admit such an interpretation; and the proviso to section 80-IA(9) is an integral part of the main section itself. The main part of section 80-IA(9) requires that the captive transfers should be assigned a commercial value so as to depict the profits of the undertaking on commercial principles as if the undertaking is the solitary source of income of the assessee. For this purpose, market price of the transferred goods is required to be ascertained. In case such ascertainment presents exceptional difficulties, the assessing officer is empowered to compute the profits on such reasonable basis as he may deem fit. It is clear that the proviso does not empower the assessing officer at all to negate the concept of derivation of the profit of the undertaking on commercial principle by assigning commercial values to the transaction of the undertaking. The objective of the main section 80-IA and the proviso thereto is identical namely to derive the profits of the undertaking on commercial principles as if the undertaking is only source of the income. Considering the ratio of *Tata Iron & Steel Co. Ltd. v. State of Bihar* (1963) 48 ITR 123 (SC) wherein it has been held that the profits of each activity of an enterprise is required to be ascertained in a distributive sense, we are of the view that the proviso to section 80-IA(9) does not militate against the primary objective of section 80-IA(9) which is to derive the profits of the undertaking on commercial principles by adoption of alternative approaches. Accordingly, we uphold the finding of learned Commissioner (Appeals) that the proviso to section 80-IA(9)

cannot be invoked in a manner which will disturb the profits of the undertaking derived from the external sales in respect of which there is no dispute at all. From the perusal of learned Commissioner (Appeals)'s impugned order it is clear that whatever alternative method is applied there is enough evidence on the record to signify that the profits of both the undertakings on the external sales have a higher rating compared to the Global Profit earned by the assessee. As such, we are of the view that the adoption of the formula of global profit by assessing officer is not sustainable in view of clear findings of learned Commissioner (Appeals) based on evidence on record; and that the manner in which learned Commissioner (Appeals) has adopted transfer pricing policy is in line with the intent and purpose of section 80-IA(9). The approach of learned Commissioner (Appeals) in averaging the sales price and application of such average to the total transfers during the year should understandably be acceptable. If the market price on each day of transfer is not ascertainable then the principle of averaging will meet the test of the proviso to section 80-IA(9) also. Besides, in the case of wide fluctuations between two extremes, the adoption of the weighted average formula will avoid any distortion in the depiction of reasonable profits. The principle of averaging will result in a reasonable depiction of a representative market price, which can be applied to the totality of transfers during the year. We, therefore, find no fault with the decision of Commissioner (Appeals) on the issue to the extent not disputed by the assessee.

Coming to the issue of duty drawback, we respectfully follow the decision of the Delhi Bench of Tribunal in the case of Dy. CIT v. Metro Tyres Ltd. (2001) 79 ITD 557 (Del). The decision of the Supreme Court in the case of Pandian Chemicals Ltd. (supra) is not applicable since in that case it was held that interest earned on Electricity Deposits can not be considered to be part of the profits derived from the undertaking. On the other hand, in the assessee's case, the question is whether the receipt of duty drawback has the effect of reducing the expenditure incurred which is debited to the profit and loss account and the Delhi Tribunal has considered this very aspect. Though the receipt of duty drawback is treated as deemed income under section 28, what the Tribunal has held is that this receipt, in substance, has the effect of reducing the corresponding expenditure debited to the profit and loss account.

In assessment year 1995-96, we have upheld the learned Commissioner (Appeals)'s impugned appellate order wherein the learned Commissioner (Appeals) had directed the assessing officer to allow deduction under section 80-IA in accordance with the computation submitted by assessee-appellant. However, in assessment years 1996-97 and 1997-98 the learned Commissioner (Appeals) has not accepted the assessee's claim in total but partly only while quantifying the profits of eligible undertaking for the purpose of deduction under section 80-IA. In our considered opinion the fact-situation basically being identical, we need justifiably follow our decision rendered above on similar issue in assessment year 1995-96 and apply the same principle /rationale in assessment years 1996-97 and 1997-98 as well. Since the method of computation of eligible profit for the purpose of deduction under section 80-IA is the same in all the three years in respect of Kurkumbh and Patalganga II, the eligible units, as also the ineligible/other units; and learned Commissioner (Appeals) has accepted the method of computation of eligible profit in assessment year 1995-96 and which we have upheld, we do not find any valid reason for Commissioner (Appeals) to differ in subsequent years 1996-97 and 1997-98. Therefore, the order of Commissioner (Appeals) is modified in the manner that we direct the assessing officer to allow deduction under section 80-IA in accordance with the computation submitted by assessee except with regard to ground No. 2(c) in assessment year 1996-97 and ground Nos. 1 (c) and 1 (a) in assessment year 1997-98, which were not pressed and subject to verification of OS income as directed by us above.

Thus ground No. 1 in revenue's appeal for assessment years 1996-97 and 1997-98 comprised in issue No. 1 tabulated above, together with ground Nos. II and 1 in assessee's appeals for assessment years 1996-97 and 1997-98 respectively, comprised in issue No. 2 in assessee's appeals, tabulated above stand disposed of by this decision.

Now we proceed to dispose of the remaining issues/grounds in revenue's appeals.

Issue No. 3 pertains to deletion of disallowance of expenditure made by assessing officer treating the same as capital expenditure; and this issue is contained in Ground No. VI in assessment year 1995-96. Citing *Ballmal Naval Kishore v. CIT*

(1997) 224 ITR 414 (SC) the learned Departmental Representative has relied on assessing officer's order whereas the learned Authorised Representative of assessee has supported the learned Commissioner (Appeals)'s order.

We have considered the rival contentions as also the relevant material on record. In Ballimal Naval Kishore (supra), the Hon'ble Supreme Court has held as under: ". . . the expression 'Current Repairs' means expenditure on buildings, machinery, plant or furniture which is not for the purpose of renewal or restoration but which is only for the purpose of preserving or maintaining an already existing asset and which does not bring a new asset into existence or does not give to the assessee a new or difference advantage." From the perusal of record we find that the expenditure on repairs is comprised of the following three items- The learned Commissioner (Appeals) has observed in para 52 of his impugned appellate order that all these three items of repairs expenses have been booked by assessee under the head "Current Repairs". The assessing officer treated the expenses for preserving and maintaining the existing assets as current repairs but the expenses for renewal /restoration of machinery, furniture, fittings etc. to be not falling within current repairs and accordingly, treating the same to be rendering the assets as to be of more durable character disallowed the same holding the same to be of capital nature. The learned Commissioner (Appeals) has noted that similar expenses have been allowed by the department in earlier years as revenue expenditure. The learned Commissioner (Appeals) however, considered the fact-situation together with the legal position held the expenses to be falling within the ambit of section 37 of Income Tax Act and accordingly deleted the addition of Rs. 57,82,509. Considering the facts and circumstances of the case as also the legal position, we find no fault with the impugned order of learned Commissioner (Appeals) and so we decline to interfere with the same.

Issue No. 4 pertains to deletion of addition of unutilized Modvat credit in closing stock. This issue is contained in ground No. VII in assessment year 1995-96, III in assessment year 1996-97 and II in assessment year 1997-98. The learned Departmental Representative has contended that the issue of Modvat credit is covered in favour of assessee by the judgment of Hon'ble Supreme Court, no doubt, but appropriate directions be given to the assessing officer to give effect in

opening balance also together with the closing stock and not in closing stock alone. The learned Authorised Representative of assessee expressed no objection to the issuance of directions to assessing officer as suggested by learned Departmental Representative.

We have considered the rival contentions. The issue is covered in favour of assessee by the judgment of Hon'ble Supreme Court in the case of CIT v. Indo Nippon Chemicals Co. Ltd. (2003) 261 ITR 275 (SC). As such, we find no infirmity in the impugned order of learned Commissioner (Appeals) on this count. We, A therefore, uphold the impugned order of learned Commissioner (Appeals) on this count subject to the direction to assessing officer that he should give effect of unutilized Modvat credit in opening balance together with the closing stock. We order accordingly.

Issue No. 5 pertains to deletion of addition made by assessing officer on account of entertainment expenses. This issue has the following two parts Issue No. 5 (1) i.e., Gift articles not bearing logo is contained in ground No. VIII in assessment year 1995-96, IV(a) in assessment year 1996-97 and IV(b) in assessment year 1997-98. Issue No. 5 (ii) i.e., Expenses on Dry fruits is contained in Ground No. 1X in assessment year 1995-96, IV(b) in assessment year 1996-97 and IV(a) in assessment year 1997-98. The learned Departmental Representative has relied on the orders of assessing officer in respect of disallowance of both these entertainment expenses comprised in Issue No. 5(1) and 5(ii).

The learned Authorised Representative of assessee has relied on the impugned orders of learned Commissioner (Appeals) as also on Tribunal's common order dated 30-7-2003 rendered in assessee's case in ITA Nos.

6957/Mum./1996 and 6629/M/1997 for assessment years 1993-94 and 1994-95 respectively and has furnished a copy of the same.

We have considered the rival contentions as also the relevant material on record. In the aforesaid common order of the Tribunal for assessment years 1993-94 and 1994-95 ITAT, Mumbai has, vide para 8 of its order, followed the judgment of Hon'ble Bombay High Court in the case of CIT v. Allana Sons (P) Ltd. (1995) 216

ITR 690 (Bom) as also Tribunal's order in assessee's own case for assessment year 1992-93 deleted the addition holding that there being no logo the issue was covered in favour of assessee by the aforesaid

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. As such, considering the facts and circumstances of the case and respectfully following the above mentioned

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, we find no fault with the impugned order of learned Commissioner (Appeals) in deleting the addition made by assessing officer in respect of gift articles which do not bear any logo and in turn, have no advertisement value. As regards the issue No. 5(ii), being in respect of expenses on dry fruits, the same is covered in favour of assessee by Tribunal's order in assessee's own case for assessment year 1994-95 rendered on 24-7-2003 in ITA No.6342/Mum./1997 by 'F' Bench of ITAT, Mumbai, copy of which is placed on record before us. In the cited order the Tribunal has followed earlier order dated 16-4-2003 of Tribunal rendered in assessee's own case for assessment year 1993-94 in ITA No. 6208 /Mum./1996 and treating the issue covered thereby deleted the addition that was made by assessing officer on account of expenditure on dry fruit boxes and sweets. As such, respectfully, following the aforesaid order of the Tribunal, we find the issue covered thereby in favour of assessee and in turn, we find no fault with the impugned order of learned Commissioner (Appeals) on the count of deletion of expenses contained in Issue No. 5(i) and (ii). We, therefore, decline to interfere with the same.

Issue No. 6 pertains to disallowance of expenses u/r 6D. This issue is contained in ground No. X in assessment year 1995-96, Ground No. V for assessment year 1996-97 and III in assessment year 1997-98. The learned Departmental Representative has relied on the order of assessing officer while the learned

Authorised Representative of assessee has relied on the order of Commissioner (Appeals), contending that the issue is covered in favour of assessee by 'F' Bench of Tribunal vide order dated 24-7-2003 in assessee's own case for assessment year 1994-95 rendered, in, ITA No. 6342/M/97.

We have considered the rival contentions as also the relevant material on record including the cited decision. In the aforesaid order dated 24-7-2003 the Tribunal has followed earlier order dated 16-4-2003 of Tribunal in assessee's own case for assessment year 1993-94 rendered in ITA No. 6208/Mum/1996 and accordingly deleted similar addition made by assessing officer u/r 6D incurred during travel. As such, we find the issue covered in favour of assessee and so respectfully following the aforesaid order of the Tribunal, we uphold the impugned order of learned Commissioner (Appeals) on this count. We order accordingly.

In the result, revenue's appeal Nos. 2062/Mum./99 for assessment year 1995-96, 3036/M/2000 for assessment year 1996-97 and 4619/M/2000 for assessment year 1997-98 are dismissed.

Now we will take up the assessee's appeals being ITA No. 3057 /Mum./ 2000 for assessment year 1996-97 and ITA No. 4731/Mum./2000 for assessment year 1997-98, in respect of the remaining issues/grounds.

The matters involved in various grounds of the above two appeals of assessee may be summarized in the issues as tabulated below: Food Exp. on staff of Rs. 4,39,073 for assessment year 1996-97 & Rs. 9,87,763 for assessment year 1997-98 Issue No. 1 pertains to taxability of interest on right issue proceeds as income in assessment year 1996-97 as against the plea of assessee to treat this interest income as taxable in assessment year 1997-98. The learned Authorised Representative of assessee has contended that the dispute involved in this issue is as to whether the interest income is taxable in assessment year 1996-97 or in assessment year 1997-98. He has contended that as per assessee this interest-income is taxable in 1997-98 whereas the department's case is to tax it in assessment year 1996-97. He has contended that the fact-situation is that in assessment year 1996-97 the assessee made offer for right shares. He has contended that one of the conditions thereof was that shares will be listed in

Bombay Stock Exchange and until the shares are so listed the share money will be deposited in the bank accounts and the assessee company will not have right/access to that money at all. He has contended that the shares were listed in Bombay Stock Exchange in next year i.e., in assessment year 1997-98. He has contended that accordingly the assessee's plea is that the interest on this money (share money) deposits from this bank became assessee's money in next year (assessment year 1997-98) only and so as per assessee the said interest is taxable in assessment year 1997-98. He has cited CIT v. Henkel SPIC India Ltd. (2004) 266 ITR 490 (Mad.)... and contended that until the Stock Exchange permits the assessee to list the shares in that Stock Exchange, interest is to remain in that bank Account and the interest will be available and accrue to assessee only after listing. He has contended that in the present case listing of assessee's right share is in assessment year 1997-98 and so the interest accrued to assessee in assessment year 1997-98 only and so the same is not taxable in assessment year 1996-97.

As against the above, the learned Departmental Representative has contended that section 73(2A) of Companies Act does not lay down any condition for payment of interest while making repayment of principal money to the shareholder. He has contended that if Stock Exchange does not give permission for listing then the principal amount alone will be refunded and the liability for interest does not arise to the assessee.

He has referred to the provisions of section 73(3) & (3A) of Companies Act read with section 73(2) of the Companies Act contending that these provisions provide for depositing of share application money in separate bank account and these provisions also provide that on refusal of permission by Stock Exchange, principal amount of share money alone is to be refunded to the share applicant immediately without any interest thereon. He has contended that the question is as to who is the claimant of that bank interest for this period He has relied on AS-9 which deals with as to when the income should be recognized; when there is no uncertainty regarding measurability/collectability, then income is to be recognized, that is the income is accrued. He has cited Smt. Rama Bai v. CIT (1990) 181 ITR 400 (SC)... in his support, contending that in the case of Land Acquisition the Hon'ble

Supreme Court held that interest accrues year-to-year. He has accordingly contended that in this case therefore the interest accrues in assessment year 1996-97 and so the same is taxable in assessment year 1996-97. He has contended that all the companies are following the same procedure and there is no reason for postponement of taxability of income.

We have considered the rival contentions, the relevant material on record including the write up of the learned Departmental Representative as also the cited decisions. In *Smt. Rama Bai v. CIT* (1990) 181 ITR 400 (SC) it was held that the interest on enhanced compensation for land compulsorily acquired awarded by the court accrued not on the date of the order of the court granting enhanced compensation but accrued from the date when possession of land was taken and it accrued from year-to-year. However, this case is quite distinguishable from the case under our consideration on facts. On the contrary *CIT v. Henkel SPIC (India) Ltd.* (2004) 266 ITR 490 (Mad.), is directly on the issue and on identical facts, that is on the issue of accrual of interest on share application money deposited in the bank during the period between receipt of share application money and finalisation of allotment of shares or the listing of shares in the Stock Exchange. In that view of the matter, considering all the facts and circumstances of the case and respectfully following the decision of *CIT v. Henkel SPIC (India) Ltd.* (2004) 266 ITR 490 (Mad.), we hold this interest on right issue proceeds to be income assessable in assessment year 1997-98 and not in assessment year 1996-97. We direct the assessing officer accordingly.

Issue No. 2 in assessee's appeals for assessment years 1996-97 and 1997-98 contained in Ground Nos. II and I respectively pertains to section 80-IA, which has already been dealt with and decided by us above while dealing with similar issue being Issue No. 1 in revenue's appeals.

Issue No. 3 pertains to disallowance of Foreign Travel Expenses. This issue is contained in Ground No. 3(a) regarding Chairman and Managing Director of assessee and 3(b) regarding all other persons in assessment year 1996-97; and in ground No. 2(a) regarding Chairman and Managing Director of assessee and 2(b) regarding all other persons. The learned Authorised Representative of assessee

has contended that this issue is covered partly in favour of assessee and partly against assessee by Tribunal's order dated 31-10-2003 in assessee's own case for assessment year 1995-96 rendered in ITA No. 2157 /Mum./ 1999, copy of which has been furnished on record. The learned Departmental Representative has relied on the orders of authorities below.

We have considered the rival contentions, relevant material on record as also the cited decisions. From the perusal of record we find that in assessment year 1995-96 the Tribunal has discussed /decided this issue vide para Nos. 4 and 5 of its order whereby the Tribunal has followed the earlier orders of the Tribunal in assessee's own case for assessment years 1993-94 and 1994-95 and reduced the disallowance of foreign travel expenses in the case of Chairman and Managing Director from 25% to 10% and in the case of all other persons from 10% to 5%.

The facts being identical, we follow the aforesaid order of the Tribunal for assessment year 1995-96 and hold and direct the assessing officer accordingly for both the assessment years 1996-97 and 1997-98.

Issue No. 4 pertains to disallowance of entertainment expenses and comprises (i) Food expenses on staff, as contained in ground Nos. IV and III in assessment years 1996-97 and 1997-98 respectively and (ii) Canteen Expenses, as contained in Ground Nos. V and IV in assessment years 1996-97 and 1997-98 respectively. The learned Authorised Representative of assessee has contended that this issue is covered partly in favour of assessee and partly against assessee by Tribunal's order for assessment year 1995-96 rendered in ITA No. 2157/Mum./ 1999.

The learned Departmental Representative has supported the orders of authorities below.

We have considered the rival contentions, relevant material on record as also the cited decisions. From the perusal of record we find that in assessment year 1995-96 the Tribunal following the earlier orders of Tribunals for assessment years 1993-94 and 1994-95 has disallowed a sum of Rs. 2,00,000 out of 3.94 lakhs which is roughly about more than 50% and in assessment year 1994-95 the disallowance of Rs. 6 lakhs was sustained out of an expenditure of Rs. 13.88

lakhs. The figures in the remark column of assessee's chart regarding issues/matters in assessee's appeals contains incorrect figures in this regard. A perusal of Commissioner (Appeals)'s impugned appellate order in assessment year 1996-97 reveals that vide para 11 on page 49 of his order, he has observed as under: "(1) Expenditure on staff on food and refreshment during late sitting Rs. 4,39,073 (2) 10% of Canteen expenses Rs. 6,95,712 In the order the aforesaid expenses have been treated as entertainment expenses and accordingly 50% thereof amounting to Rs. 8,23,443 has been disallowed. This issue is also covered by the Commissioner (Appeals) order for assessment year 1995-96. On the same basis the disallowances (1) and (2) are confirmed

As such considering all the facts and circumstances of the case, we find no fault with the impugned order of learned Commissioner (Appeals) on this count as the disallowance has been confirmed only to extent of 50% of expenditure on food etc.

As regards the disallowance of 10% of canteen expenses, the Tribunal has in assessment year 1995-96 in ITA No. 2157/Mum./ 1999 vide paras 8 and 9 of its order reduced the disallowance out of canteen expenses from 10% to 2.5% of the canteen expenses. The facts being identical, we follow the aforesaid order of the Tribunal and hold and direct accordingly.

Issue No. 5 disputes the disallowance u/r 6D per trip. It has been the common submission of both the rival representatives that the issue is covered against assessee vide Tribunal's order for assessment year 1995-96. In assessment year 1995-96 the Tribunal has vide para 12 of its aforesaid order rejected the assessee's ground by following the judgment of Hon'ble Jurisdictional High Court in the case of CIT v. Aorow India Ltd. (1998) 229 ITR 325 (Bom.). As such, respectfully following the aforesaid judicial decisions, we uphold the impugned order of learned Commissioner (Appeals).

Issue No. 6 pertains to inclusion of sales-tax in total turnover for the purpose of deduction under section 80HHC. This issue is covered in favour of assessee by the judgment of Hon'ble Jurisdictional High Court in the case of CIT v. Sudarshan Chemicals Industries Ltd. (2000) 245 ITR 769 (Bom.). Accordingly, this issue is decided in favour of assessee.

Issue No. 7 pertains to Lease & Buy back and is contained in ground No.8 in assessment year 1996-97. From the perusal of impugned order of Commissioner (Appeals) we find that the learned Commissioner (Appeals) has simply restored the issue to assessing officer for deciding afresh.

Inasmuch as the assessee has opportunity to contest the issue before assessing officer, so we find no genuine grievance to assessee against the impugned order of learned Commissioner (Appeals) on this count and so we decline to interfere with the same.

Issue No. 8 pertains to inclusion of freight outward in closing stock and is contained in ground No. 9 in assessment year 1996-97 and ground No. 7 in assessment year 1997-98. This issue is covered in favour of assessee by the decision of the Tribunal in assessee's own case for assessment year 1995-96 in ITA No. 2157/M/99 (copy placed on record) and so we decide this issue accordingly, that is in favour of assessee.

In the result, assessee's appeals being ITA Nos. 3057 & 4731/Mum./ 2000 are allowed in part as indicated above.

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