Acit, Cc-Xx, Kolkata, Kolkata vs Paharpur Cooling Towers Limited, ... on 15 March, 2017

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA
[Before Shri M. Balaganesh, AM & Shri S. S. Viswanethra Ravi, JM]

I.T.A Nos.1370 to 1374/Kol/2010
Assessment Years: 2001-02 to 2005-06

Assistant Commissioner of Income-tax, Central Circle-XX, Kolkata. (Appellant)	Vs. Paharpur Cooling Towers Ltd. (PAN: AABCP8017C) (Respondent)

Date of hearing: 07.03.2017
Date of pronouncement: 15.03.2017

For the Appellant: Shri Sallong Yaden, Addl. CIT
For the Respondent: Shri Navin Verma & Nitin Agarwal, ARs

ORDER

Per Shri M. Balaganesh, AM:

All these appeals by revenue are arising out of separate orders of CIT(A)-XXXII, Kolkata vide Appeal Nos. 34/CIT(A)-XXXII/08-09/CIR-10/2001-02, 59/ CIT(A)- XXXII/08-09/CIR-10/2002-03, 58/ CIT(A)-XXXII/08-09/CIR-10/2003-04, 57/ CIT(A)- XXXII/08-09/CIR-10/2004-05 and 60/ CIT(A)-XXXII/08-09/CIR-10/2005-06 dated 29.01.2010, 29.01.2010, 22.01.2010, 22.01.2010 and 22.01.2010 respectively. Assessments were framed by Addl. CIT, Range-10, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Years 2001-02 to 2005-06 vide his separate orders dated 18.03.2004, 21.03.2005, 30.12.2005, 19.12.2006 and 18.12.2007 respectively. Since some of the issues are common and all the appeals have been heard together, we dispose of all the appeals by this consolidated order for the sake of convenience.

2. DISALLOWANCE OF AMORTISATION OF LEASE PREMIUM Ground No. 1 in ITA No. 1370/Kol/2010 for Asst Year 2001-02 Ground No. 1 in ITA No. 1371/Kol/2010 for Asst Year 2002-03 Ground No. 1 in ITA No. 1372/Kol/2010 for Asst Year 2003-04 The facts of Asst Year 2001-02 are considered and the issue under dispute is adjudicated for Asst Year 2001-02 and the decision rendered thereon would apply with equal force for other assessment years also except with variance in figures.

Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 2.1. The brief facts of this issue is that the assessee claimed in its computation of income a sum of Rs. 1,10,131/- being lease amount paid for leasehold land taken for 99 years. The assessee had capitalized the total payment made towards leasehold land as capital expenditure in its books. For income tax purposes, it claimed the same as expenditure on the basis of amortization. Accordingly, the assessee claimed the amortization charge alone as a deduction in the computation of total income eventhough the same is not debited to profit and loss account for the year. The ld AO treated the same as capital expenditure for the purposes of

income tax and disallowed the same in the assessment. This according to the ld AO resulted in double disallowance as admittedly the ld AO started the computation of income from 'Net Profit as per Profit and Loss Account' and from that figure added this sum of Rs. 1,10,131/- in the assessment. The ld CITA observed as under :-

> "From perusal of the order of the A.O., it is seen that the A.O. has disallowed lease premium amortization twice in as much as that in the computation of income the A.O. added the said amount to the income of the assessee and since the above amortization was not debited to the profit and loss account , thus, such an action has resulted in disallowance of the said amount of Rs 1,10,131/- twice. Hence, the addition made on this account is deleted."

2.2. Aggrieved, the revenue is in appeal before us on the following ground:-

> "1. On the facts and circumstances of the case the Ld.CIT(A)-XXXII, Kolkata has erred in law and in facts while treating that the lease premium amortization was disallowed twice, but actually there was no such double disallowance."

2.3. The ld DR vehemently relied on the order of the ld AO. In response to this, the ld AR vehemently relied on the order of the ld CITA and pointed out as to how there was double disallowance.

2.4. We have heard the rival submissions. We find that the ld CITA had rightly deleted the disallowance made twice by the ld AO as admittedly the amortization of leasehold premium was not debited to profit and loss account by the assessee and the ld AO had started the computation of total income from the 'Net profit as per profit and loss account' and not from the returned income. The ld AO if he is not convinced with the deduction claim of Rs. 1,10,131/- made by the assessee, he should have simply ignored the same while starting the computation of total income from "Net Profit as per Profit and loss Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 Account'. Hence the action of the ld AO in adding the said sum in the assessment would only result in double disallowance which has been rightly deleted by the ld CITA. Hence the grounds raised in this regard by the revenue are dismissed for various assessment years.

3. ADDITION TOWARDS TREATMENT OF SUBSIDY RECEIVED FROM GOVERNMENT OF GUJARAT Ground No. 2 in ITA No. 1370/Kol/2010 for Asst Year 2001-02 The brief facts of this issue is that the assessee received Rs 15 lakhs as Central State Subsidy from the Gujarat Government under 'State's Capital Investment Subsidy Scheme' which was credited to Reserves and Surplus Account in the books of accounts of the assessee. The said subsidy was granted to small and tiny industries under the Gujarat State Government's 'Incentive Policy Scheme 1995-2000'. In the return of income, the assessee treated the same as capital receipt and not considered as part of the total income chargeable to tax. The ld AO treated the said subsidy as revenue subsidy on the following grounds:-

a) Even if the term 'Capital Investment Subsidy' is appearing in the incentive policy, it does not indicate that there was an overriding obligation upon the assessee to utilize the fund for fixed capital.

b) The Unit at Nani Chirai was already in operation at the time of signing of the agreement with the Government or at the time of disbursement of subsidy.

c) The assessee failed to substantiate the purpose for utilizing the fund in the fixed assets or in expansion of the unit.

d) Further the subsidy provided was treated as a helping hand provided by the government which would enable the assessee to continue production.

3.1. The ld CITA stated that the capital investment subsidy was provided for investment in the backward areas to create employment opportunities to sustain long term growth and following the decision of the Hon'ble Supreme Court in the case of CIT vs Ponni Sugar & Chemicals Ltd reported in (2008) 306 ITR 392 (SC) deleted the said addition and treated the said subsidy as a capital receipt. Aggrieved, the revenue is in appeal before us on the following ground:-

Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 "2. On the facts and circumstances of the case the Ld.CIT(A)-XXXII, Kolkata has erred in law and in facts while treating the subsidy amounting to Rs.15 lakhs received from the Govt.

of Gujarat as capital subsidy where the A.0 rightly treated the same as operational subsidy."

3.2. The ld DR vehemently relied on the order of the ld AO. In response to this, the ld AR argued that the subsidy was granted for setting up of a plant in backward area. He stated that the subsidy was not granted for conducting the operational activities of the unit and hence the same was treated as capital in nature. He heavily relied on the decision of the Hon'ble Apex Court in the case of CIT vs Ponni Sugar & Chemicals Ltd reported in (2008) 306 ITR 392 (SC) and Hon'ble Calcutta High Court in the case of CIT vs Rasoi Limited reported in (2011) 335 ITR 438 (Cal) . He also placed reliance on the decision of the co-ordinate bench of Ahmedabad Tribunal in the case of ITO vs Symphony Comfort Systems Ltd reported in (2006) 101 TTJ 224 (Ahm) .

3.3. We have heard the rival submissions and perused the materials available on record including the subsidy scheme and the agreement entered into by the assessee with the Government which are enclosed in the paper book of the assessee. We find that the said subsidy was given for setting up of the unit in backward area by the assessee. We find that the Hon'ble Apex Court in the case of Ponni Sugars supra had held that it is the purpose of the incentive which decides its nature and not the modality or the source thereof. The reckoning of subsidy may be based on investment in capital made by the assessee but the purpose of subsidy was for setting up of the plant in back ward area. We find that reliance on the decision of the co-ordinate bench of Ahmedabad Tribunal in the case of ITO vs Symphony Comfort Systems Ltd reported in (2006) 101 TTJ 224 (Ahm) wherein it has been held that the Capital Investment subsidy received from Gujarat Government was capital in nature as

the subsidy was given for establishing the industry and not for carrying on of the business. In view of the aforesaid facts and purpose of the subsidy and respectfully following the judicial precedents relied upon hereinabove, we do not find any infirmity in the order of the ld CITA in this regard. Hence the ground raised by the revenue is dismissed.

4. ADDITION TOWARDS TREATMENT OF SHARE BADLA INCOME Ground No. 3 in ITA No. 1370/Kol/2010 for Asst Year 2001-02 Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 The brief facts of this issue is that the income from badla transaction aggregating to Rs. 15,42,966/- was treated as 'speculative profit' by the assessee and was set off with the brought forward speculation loss of earlier assessment years in the return of income. The assessee stated that the share badla income represents income earned on purchase and sale of shares without taking delivery thereof. It was further submitted that the assessee is basically an investor who decides to invest certain amounts in share badla transaction and accordingly deposited the amount with the share broker. The said share broker on behalf of investor invested the said amount in shares of different companies. The said investments are either squared off during the trading period itself or carried forward to the next settlement, in either case, without taking delivery thereof. The profit / loss resulting fom such transaction is considered as income from share badla transaction. As the investments do not result in physical delivery of shares u/s 43(5) of the Act , the profits arising on such transactions has to be considered as arising from speculative transactions. The stand of the assessee was not found acceptable by the ld AO. According to him, the profit from badla transactions on account of difference in rates of current settlement or next settlement was liable to be taxed in the hands of the assessee as the 'income from other sources' instead of 'speculative income' and accordingly the same was brought to tax by him in the hands of the assessee without allowing its claim for set off against the speculation loss of earlier years. On appeal, the ld CITA allowed the claim of the assessee to treat the share badla income as speculative income by relying on the order of his predecessor in assessee's own case for Asst Year 1994-95 in pursuance of which the similar claim of the assessee was accepted by the ld AO himself.

4.1. The ld DR vehemently relied on the order of the ld AO. In response to this, the ld AR argued that the issue is covered in favour of the assessee by the order of this tribunal in assessee's own case for the Asst Year 2000-01 in ITA No. 1369/Kol/2010 dated 2.3.2016.

4.2. We have heard the rival submissions. We find that the issue under dispute is covered by the order of this tribunal in assessee's own case for Asst Year 2000-01 supra wherein it was held as below:-

> Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 "11. We have heard the arguments of both the sides and also perused the relevant material available on record. Although the Id. D.R. has relied on the order of the Assessing Officer in support of the revenue's case on this issue, it is observed that the Id. CIT(Appeals) in assessee's own case for A.Y. 1994-95 had directed the Assessing Officer to verify the similar claim of the assessee for treating the income from badla transactions as speculative profit and to adjust the same against speculation loss vide its order dated 15.12.1997 and while giving effect to the said order of the Id. CIT(Appeals), the

> Assessing Officer vide its order dated 05.02.1998 treated the badla transactions income as speculation profit and adjusted the same against speculation loss. As pointed out by the Id. Counsel for the assessee, the order of the Id. CIT(Appeals) dated 15.12.1997 for A.Y. 1994-95 on this issue has been accepted by the Department and no appeal has been filed against the same before the Tribunal. Keeping in view all these facts of the case including especially the fact that the Assessing Officer himself has treated the similar badla transactions profit as speculation profit in assessee's own case for A.Y. 1994-95, we find no justifiable reason to interfere with the impugned order of the Id. CIT(Appeals) directing the Assessing Officer to treat the share badla income as speculative income and to adjust the same against the speculation loss. The impugned order of the Id. CIT(Appeals) on this issue is, therefore, upheld and Ground No. 3 of the Revenue's appeal is dismissed."

Respectfully following the same we do not find any infirmity in the order of the ld CITA in this regard and accordingly dismiss the ground raised by the revenue.

5. DEDUCTION UNDER SECTION 80HHC OF THE ACT Ground Nos. 4, 5 & 7 in ITA No. 1370/Kol/2010 for Asst Year 2001-02 Ground Nos. 5 & 6 in ITA No. 1371/Kol/2010 for Asst Year 2002-03 Ground Nos. 4, 5 & 6 in ITA No. 1372/Kol/2010 for Asst Year 2003-04 Ground Nos. 4, 5 & 6 in ITA No. 1373/Kol/2010 for Asst Year 2004-05 The facts of Asst Year 2001-02 are considered and the issue under dispute is adjudicated for Asst Year 2001-02 and the decision rendered thereon would apply with equal force for other assessment years also except with variance in figures.

The brief facts of this issue is that the assessee claimed deduction u/s 80HHC of the Act to the tune of Rs. 13.11 lacs. The ld AO recomputed the deduction u/s 80HHC of the Act at Rs. 10.57 lacs by making the following adjustments / modifications:-

> a) Exclusion of 90% of gross design and erection charges amounting to Rs. 216.82 lacs (being 90% of Rs 240.91 lacs) on the reasoning that it is a separate service provided by the assessee and does not have any direct nexus with the core business of the assessee and will fall wihin the nature of charges occurring in clause (baa) of explanation below sub-section (4B) of section 80HHC of the Act.

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b) Inclusion of 'other income' amounting to Rs. 767.98 lacs in the computation of total turnover, on the reasoning that the turnover defined in section 80HHC of the Act does not authorize such exclusions.

c) The ld AO recomputed the deduction u/s 80HHC of the Act at Rs. 10,57,436/- on the basis of returned profits and gains from business of Rs. 13,98,24,236/- instead of assessed business income of Rs. 14,21,38,162/- vide order u/s 143(3) of the Act dated 18.3.2004. Non-consideration of revised profits and gains from business (i.e. assessed business income) had reduced the claim of deduction u/s 80HHC of the Act.

5.1. The ld CIT(A) granted relief to the assessee by observing as under:-

> "13. Ground No. 5(a) is directed against exclusion of 90% of erection and design charges of Rs.2,40,91,000/- from 'profits of the business' for the computation of deduction u/s. 80HHC of the I. T. Act. At the outset, it is observed that the said issue has been decided in favour of the appellant by Hon'ble Tribunal in assessee's own case for the AY 1994-95 in ITA No.2586/Kol/2005 dated 15.05.2006 and for the Ay 1996-97 ITA No. 813/Cal/2000 dated 29.08.2003. On appeal by the Department for the AY 1994-95, the Hon'ble Calcutta High Court vide order dated 06.07.2007 dismissed the appeal. Hence, respectfully following the orders of Hon'ble High Court and ITAT, the AO is directed to consider the income from design and erection charges as profits derived out of the business of the assessee for the purpose of computation of deduction u/s. 80HHC of the Act. This ground is, accordingly, allowed."

5.2. Aggrieved, the revenue is in appeal before us on the following grounds :-

> "4. On the facts and circumstances of the case the Ld.CIT(A)-XXXII, Kolkata has erred in law and in facts while directing the A.O to consider the 90% of income from design and erection charges as profits derived out of business of the assessee for the purpose of computation of deduction u/s.80HHC.
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> 5. On the facts and circumstances of the case the Ld.CIT(A)-XXXII, Kolkata has erred in law and in facts while directing the A.O to exclude the other income of Rs.767.98 Lakhs to the total turnover in computation of deduction u/s. 80HHC.
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> 7. On the facts and circumstances of the case the Ld. CIT(A)-XXXII, Kolkata has erred in law and in facts while directing the AO to consider the assessed business income to continue the deduction u/s. 80HHC where the AO has rightly excluded a part of other income while calculating the said deduction."

5.3. We have heard the rival submissions. We find that the ld CITA had rightly granted relief to the assessee by following the orders of tribunal and Hon'ble High Court in assessee's own case on the impugned issue. Hence we do not find any infirmity in the said order of the ld CITA. With regard to the ground raised on the claim of deduction u/s 80HHC of the Act on the assessed business income, we hold that as per Explanation (baa) Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 to section 80HHC of the Act, profits of the business means profits and gains from business and that profit should be the latest profit as computed under any stage of proceedings and as per the latest order. Accordingly, the grounds raised by the revenue for various assessment years in this regard are dismissed.

6. DISALLOWANCE OF PRIOR PERIOD EXPENSES Ground No. 6 in ITA No. 1370/Kol/2010 for Asst Year 2001-02 Ground No. 7 in ITA No. 1371/Kol/2010 for Asst Year 2002-03 Ground No. 2 in ITA No. 1372/Kol/2010 for Asst Year 2003-04 Ground No. 2 in ITA No. 1373/Kol/2010 for Asst

Year 2004-05 Ground No. 2 in ITA No. 1374/Kol/2010 for Asst Year 2005-06 The facts of Asst Year 2001-02 are considered and the issue under dispute is adjudicated for Asst Year 2001-02 and the decision rendered thereon would apply with equal force for other assessment years also except with variance in figures.

The brief facts of this issue is that the ld AO observed that the assessee had reflected a sum of Rs. 2,03,795/- in its Tax Audit Report vide Annexure XV as prior period expenses. The assessee when asked for the explanation on the same replied that prior period expenses represents expenditure incurred in respect of liabilities though pertaining to earlier years but crystallized in the instant year itself. The ld AO disallowed the same as not incurred for the year under appeal for want of evidence. The ld CITA allowed prior period expenses to the year to which it pertains, relying on the decision of his predecessor for the Asst Years 1997-98 and 1998-99. Aggrieved, the revenue is in appeal before us on the following ground:-

> "6. On the facts and circumstances of the case the Ld.CIT(A)-XXXII, Kolkata has erred in law and in facts while directing the A.O to allow prior period expenditure amounting to Rs.2,03,795/- to the year to which it pertain, where there is no such claim (debit) in that year."

6.1. The ld DR vehemently relied on the order of the ld AO. In response to this, the ld AR argued relied on the order of this tribunal in assessee's own case for the Asst Year 1998- 99 in ITA No. 2492/Kol/2003 dated 22.12.2006 wherein the tribunal had dismissed the Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 appeal of the revenue and held that prior period expenses should be allowed in the year to which it pertains. He also placed reliance on the following decisions in support of his arguments :-

> a) Delhi Tribunal in the case of Sony India (P) Ltd vs DCIT reported in (2008) 118 TTJ 865 (Del Trib)
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> b) Hon'ble Delhi High Court in the case of CIT vs Jagatjit Industries Ltd reported in (2011) 339 ITR 382 (Del) 6.2. We have heard the rival submissions and we find that the ld CITA had deleted the same based on his predecessor's order for the Asst Year 1998-99 which has been further upheld by this tribunal. Hence we do not find any infirmity in the order of the ld CITA in this regard. Accordingly, the grounds raised by the revenue for various assessment years are dismissed.
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> 7. DISALLOWANCE OF EMPLOYEES CONTRIBUTION TO PF AND ESI Ground No. 2 in ITA No. 1371/Kol/2010 for Asst Year 2002-03 Ground No. 7 in ITA No. 1372/Kol/2010 for Asst Year 2003-04 Ground No. 7 in ITA No. 1373/Kol/2010 for Asst Year 2004-05 Ground No. 4 in ITA No. 1374/Kol/2010 for Asst Year 2005-06 The facts of Asst Year 2002-03 are considered and the issue under dispute is adjudicated for Asst Year 2002-03 and the decision rendered thereon would apply with equal force for other assessment years also except with variance in figures.

The brief facts of this issue is that the assessee had remitted the employees contribution to PF and ESI beyond the due dates prescribed under the respective acts with minor delays. The assessee did not make any disallowance in this regard in the return of income. The ld AO made the same by invoking the provisions of section 36(1)(va) read with section 2(24)(x) of the Act. The ld CITA deleted the disallowance on the ground that the same had been duly remitted by the assessee before the due date of filing the return of income u/s 139(1) of the Act. Aggrieved, the revenue is in appeal before us on the following ground:-

> "2. On the facts and circumstances of the case the Ld. CIT(A)-XXXII, Kolkata has erred in law and in facts while allowing relief to the assessee on late payment of employee's Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 contribution to PF and ESI by wrongly applying the provisions of Sec.43B of the I. T. Act, 1961."

7.1. We have heard the rival submissions and we find that the issue under dispute is covered by the decision of the Hon'ble Jurisdictional High Court in favour of the assessee in the case of ACIT vs Vijay Shree Ltd in ITAT No. 245 of 2011 dated 6.9.2011 wherein the Hon'ble Calcutta High Court by placing reliance on the decision of the Hon'ble Apex Court in the case of CIT vs Alom Extrusion Ltd reported in (2009) 309 ITR 306 (SC) held that the amendment to second proviso to section 43B of the Act is curative in nature and hence to be applied retrospectively and such being the position, the deletion of the amount paid by the employees contribution beyond due date was deductible by ivokign the aforesaid amended provisions of section 43B of the Act. We also find that the PF and ESI dues were remitted before the end of the previous year, the same is allowable as deduction in the light of decision of the Hon'ble Jurisdictional High Court in the case of CIT vs Coal India Ltd in ITA 12 of 2015 dated 12.8.2015 wherein it was held as under:-

> "It is submitted by Mr. Khaitan, learned senior advocate, appearing on behalf of the respondent that whether employees contribution to provident fund would call for deduction under section 43B(b) of the Income Tax Act, 1961 came up for consideration in CIT Circle I Kolkata vs Vijay Shree Ltd ; 224 Taxman 12 (Cal) wherein court held that the amount paid for employees contribution beyond due date was deductible by invoking the amended provisions of section 43B of the Income Tax Act, 1961 and thus, the issues stand covered in favour of the assessee. It is to be noted that the jurisdictional court while passing the judgement in CIT vs Vijay Shree (supra) had followed the judgement in CIT vs Alom Extrusions Ltd : 319 ITR 306 (SC) wherein it was held that amendment to the second proviso to section 43B of the act as introduced by Finance Act, 2003 was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988. Mr.Khaitan submits save and except the judgement in CIT vs Gujarat State Road Transport Corporation : 223 Taxman 398 (Guj) wherein a different view has been taken, all other High Courts have taken a view similar to the judgment passed by the Calcutta High Court.
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> Since we find that the issues stand covered by the judgment of the jurisdictional court in CIT vs Vijay Shree (supra) , the question no. 1 is answered in the negative, in favour of the respondent and against the appellant. The question no. 2 is answered in

the affirmative, against the appellant and in favour of the respondent.

Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 The appeal is dismissed."

Respectfully following the aforesaid decisions, we dismiss the grounds raised by the revenue for various assessment years in this regard.

8. DISALLOWANCE OF DEDUCTION U/S 80IA OF THE ACT IN RESPECT OF SALE OF SCRAP Ground No. 3 in ITA No. 1371/Kol/2010 for Asst Year 2002-03 The brief facts of this issue is that the assessee claimed deduction u/s 80IA of the Act for Rs. 93,34,945/- which included income from sale of scrap amounting to Rs. 11,80,623/- in respect of industrial undertaking at its Bhasa unit. The ld AO reduced the deduction u/s 80IA of the Act to the extent of income from sale of scrap as the same was not regarded as income derived from the industrial undertaking relying on the decision of the Hon'ble Madras High Court in the case of Pandian Chemicals Ltd vs CIT reported in (2004) 270 ITR 448 (Mad) . The ld CITA directed the ld AO to consider the income from sale of scrap being eligible for deduction u/s 80IA of the Act on the contention that the case law relied upon by the ld AO differs from the facts of the present case as the said case law relates to interest on deposits, whereas in the present case, the 'other income' relates to income from sale of scrap. Aggrieved, the revenue is in appeal before us on the following ground:-

"3. On the facts and circumstances of the case the Ld. CIT(A)-XXXII, Kolkata has erred in law and in facts while directing the AO to allow the deduction u/s. 80IA by considering the income from sale of scrap amounting to Rs.11,80,623/- as income eligible for deduction u/s. 80IA."

8.1. The ld DR argued that the decision of the Hon'ble Madras High Court reported in 233 ITR 497 (Mad) in the case of Pandian Chemicals Ltd was approved by the Hon'ble Supreme Court in 262 ITR 278 (SC). He further argued that the issue is squarely covered in favour of the revenue in Pandian Chemicals Ltd case reported in 270 ITR 448 (Mad). He stated that the assessee had not furnished any details to prove as to how the scrap was generated and how it was treated in the books and accordingly prayed for set aside of this issue to the file of the ld AO. In response to this, the ld AR argued that the assessee had Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 furnished complete details of the scrap before the ld AO which are also enclosed in Pages 10 to 12 of the paper book and hence the argument of the ld DR in this regard is factually incorrect. He argued that the issue before the Hon'ble Madras High Court and Hon'ble Apex Court was taxability of interest earned on electricity deposits whether to be taxed as business income or income from other sources and consequent deduction u/s 80HH of the Act as income derived from industrial undertaking. He argued that the reliance placed by the ld AR on the subsequent decision of Pandian Chemicals Ltd reported in 270 ITR 448(Mad) is also factually distinguishable as in that case, it was held that the scrap as not being a necessary by-product in the process of manufacture and accordingly the income from sale of scrap could not be construed as income derived from industrial undertaking for the purposes of section 80HH of the Act. But in the instant case, the generation of scrap is integral part of manufacturing process of the assessee and is inevitable as rightly pointed out by the ld CITA. The scrap consists of raw materials which are used in the manufacturing of cooling towers and had

become obsolete due to normal wear and tear and passage of time. Such scrap items are a necessary by-product in the process of manufacture and have a direct nexus with the manufacturing activity and hence deduction u/s 80IA of the Act is eligible for the same. He placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of Reckitt Benckiser (India) Ltd vs Addl CIT reported in (2015) 231 Taxman 585 (Cal) in support of his argument.

8.2. We have heard the rival submissions. We find that the assessee is in the business of manufacturing of cooling towers. The ld CITA observed that there cannot be any denial that in such a business, generation of scrap is inevitable. The scrap consists of raw materials which are used in the manufacturing of cooling towers and had become obsolete due to normal wear and tear and passage of time. Such scrap items are a necessary by- product in the process of manufacture and have a direct nexus with the manufacturing activity and hence deduction u/s 80IA of the Act is eligible for the same. These facts have not been controverted by the revenue before us. We find that this issue is also addressed in favour of the assessee by the decision of the Hon'ble Jurisdictional High Court in the case of Reckitt Benckiser (India) Ltd vs Addl CIT reported in (2015) 231 Taxman 585 (Cal), wherein it was held that scrap materials come within the manufacturing process of the industrial undertaking and accordingly the profits and gains from the sale of scrap Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 materials is eligible for deduction in an amount equal to 20% u/s 80HH of the Act as they are profits derived from industrial undertaking. Therefore, we hold that scrap is an integral by-product or inevitable result of the manufacturing process of the assessee and accordingly income derived from sale of scrap would be business income and hence to be construed as income derived from industrial undertaking eligible for deduction u/s 80IA of the Act. The ld CITA also observed that the said deduction in respect of income from sale of scrap was granted to the assessee in the preceding nine assessment years under scrutiny assessments and the year under appeal is the 10th and last year of eligibility.

8.3. In view of our aforesaid findings and respectfully following the decision of the Hon'ble Jurisdictional High Court in 231 Taxman 585 (Cal) supra , we do not find any infirmity in the order of the ld CITA in this regard. Accordingly , the ground raised by the revenue in this regard is dismissed.

9. ADDITION TOWARDS EXCISE DUTY ON CLOSING STOCK OF FINISHED GOODS Ground No. 4 in ITA No. 1371/Kol/2010 for Asst Year 2002-03 Ground No. 3 in ITA No. 1372/Kol/2010 for Asst Year 2003-04 Ground No. 3 in ITA No. 1373/Kol/2010 for Asst Year 2004-05 Ground No. 3 in ITA No. 1374/Kol/2010 for Asst Year 2005-06 The facts of Asst Year 2002-03 are considered and the issue under dispute is adjudicated for Asst Year 2002-03 and the decision rendered thereon would apply with equal force for other assessment years also except with variance in figures.

The brief facts of this issue is that the assessee valued its closing stock of finished goods under exclusive method of accounting as per consistent practice followed in the past and accordingly the excise duty element on closing stock was not included while valuing the same. The ld AO added the element of excise duty in the valuation of closing stock by applying the provisions of section 145A of the Act. The ld CITA held that excise duty should not form part of closing stock as no excise duty liability was incurred, since the goods did not leave the premises of the assessee. The entire amount

of excise duty Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 included in closing stock was duly paid before the due date of filing the return of income and hence in any case, the same is allowable as deduction u /s 43B of the Act. Accordingly, he deleted the addition made thereon. Aggrieved, the revenue is in appeal before us on the following ground:-

> "4. On the facts and circumstances of the case the Ld. CIT(A)-XXXII, Kolkata has erred in law and in facts while deleting the addition made by the AO of Rs.54,70,000/- being the element of excise duty in the valuation of closing stock of the finished goods."

9.1. The ld DR argued that as per the provisions of section 145A of the Act, the excise duty element is to be included in the valuation of closing stock and hence there is nothing wrong in the action of the ld AO in framing the said addition. In response to this , the ld AR placed reliance on the decision of the Hon'ble Bombay High Court in the case of CIT vs Loknete Balasaheb Desai S.S.K. Ltd reported in (2011) 339 ITR 288 (Bom) wherein it was held that excise duty liability crystallizes on the date of clearance of excisable goods and not on the date of manufacture and therefore excise duty liability was not incurred by the assessee in respect of unsold sugar lying in stock and could not be included in the value of closing stock of sugar. He also placed on record a reconciliation statement showing that the profit before tax remains neutral both under Inclusive as well as Exclusive Method of Accounting and hence there cannot be any addition that could be made u/s 145A of the Act in the facts and circumstances of the case. He stated that in any case, the assessee had duly remitted the excise duty on closing stock of finished goods before the due date of filing the return of income u/s 139(1) of the Act at the time of clearance of goods , in support of which , he placed reliance on the excise duty remittance statement forming part of the paper book and hence, the same is allowable as deduction u/s 43B of the Act.

9.2. We have heard the rival submissions. At the outset, we find that though the excise duty is payable at the time of manufacture of goods, the same is collected only at the time of clearance of goods from the factory under the Excise Act. We find that the assessee has filed a reconciliation of inclusive and exclusive method and its effect on profit u/s 145A of the Act for the year ended 31.3.2002 which is reproduced hereunder:-

> Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 From the aforesaid table, we find that the profit before tax does not undergo any change due to exclusion or inclusion of excise duty on closing stock of finished goods. We find that in any case, the ld CITA had pointed out that the assessee had duly remitted the said excise duty before the due date of filing the return of income u/s 139(1) of the Act and hence the same would be allowable as deduction u/s 43B of the Act. In view of our aforesaid findings, we do not find any infirmity in the order of the ld CITA in this regard and accordingly the grounds raised by the revenue in this regard for various assessment years are dismissed.

10. CHARGING OF INTEREST U/S 234D OF THE ACT Ground No. 8 in ITA No. 1371/Kol/2010 for Asst Year 2002-03 This issue is with regard to charging of interest u/s 234D of the Act by the ld AO . The assessee submitted that the interest u/s 234D of the Act is applicable only from Asst Year 2004-05 and onwards as the same was introduced only with effect from 1.6.2003 and assessee placed reliance on the decision of the Special Bench of Delhi Tribunal in the case of ITO vs Ekta Promoters P Ltd reported in (2008) 113 ITD 719 (Delhi) (SB) wherein it was held that the provisions of section 234D of the Act are substantive and so they cannot be applied retrospectively. The ld CITA relied on the said decision and directed the ld AO not to charge any interest u/s 234D of the Act. Aggrieved, the revenue is in appeal before us on the following ground:-

> "8. On the facts and circumstances of the case the Ld. CIT()-XXXII, Kolkata has erred in law and in facts while directing the AO to delete the interest charged u/s. 234D by wrongly applying the provisions of the sec. 234D."

10.1. The ld DR stated that the Explanation 2 to section 234D(2) of the Act introduced in the statute by Finance Act 2012 provides that provisions of section 234D of the Act would also be applicable for the assessment year commencing before 1.6.2003 , if the proceedings for such assessment year is completed on or after 1.6.2003 and accordingly interest u/s 234D of the Act has been rightly levied by the ld AO. In response to this, the ld AR fairly agreed for the same.

10.2. We have heard the rival submissions. We find that the law has been subsequently amended by insertion of Explanation clarifying the intention of the legislature with regard Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 to charging of interest u/s 234D of the Act and accordingly, the ground raised by the revenue in this regard is allowed.

11. ADDITION TOWARDS REFUND OF SALES TAX FROM THE STATE GOVERNMENT Ground No. 1 in ITA No. 1373/Kol/2010 for Asst Year 2004-05 The brief facts of this issue is that in terms of notification dated 26.12.1985, the assessee for its unit located at Sahidabad, Ghaziabad District, situated in Uttar Pradesh was eligible for exemption from sales tax under the Uttar Pradesh Sales Tax Act, 1948 on turnover of sales of such goods as produced in the said undertaking for a period of five years beginning from 10.4.1985 to 9.4.1990. However, the said exemption period was further extended for one year upto 9.4.1991 vide notification dated 24.6.1992. On being aware of the extended period of exemption, the assessee refunded the sales tax collected earlier to the customers by issuing credit notes. It paid Rs. 1,24,02,870/- as sales tax instead of the actual liability of Rs. 34,89,259/- to the revenue department. The sales tax department vide order dated 2.5.2003 granted the refund of excess sales tax paid of Rs. 87,80,432/- in Asst Year 2004-05. In the return of income for the year under consideration, the assessee reduced the amount of sales tax refund from the computation of income considering it as a capital receipt. The ld AO contented that the same is a revenue receipt and further held that in the order dated 2.5.2003, there was nothing to show that the U.P. Government will grant capital incentive for those industrial undertaking who would set up a new industrial undertaking under the exemption scheme. Accordingly he added the same to the total income of the assessee for the Asst Year 2005-06. The ld CITA deleted the said addition by going into the purpose of the scheme and by placing reliance on certain decisions. Aggrieved, the revenue is in appeal before us on the following ground:-

"1. On the facts and circumstances of the case the Ld. CIT(A)-XXXII, Kolkata has erred in law and in facts while accepting that the refund of sales tax from the state government amounting to Rs.87,61,400/- to be capital receipt as claimed by the assessee where the AO rightly treated the same as revenue in nature."

11.1. The ld DR vehemently relied on the order of the ld AO. The ld AR argued that the sales tax exemption granted to the assessee is on account of capital investment made by Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 the assessee and hence subsidy linked with said capital investment is nothing but capital receipt. The subsidy granted vide notification date 26.12.1985 in the form of exemption from payment of sales tax is for the purpose of promotion and development of industries in the State of Uttar Pradesh. He placed reliance on the decision of the Delhi Tribunal in the case of Bhushan Steel Strips Ltd vs DCIT reported in (2003) 91 TTJ 108 (Del -Trib) wherein sales tax refund received under the same scheme was held as capital receipt and not chargeable to tax. He also placed reliance on the decision of the Hon'ble Apex Court in the case of CIT s Ponni Sugars & Chemicals Ltd reported in (2008) 306 ITR 392 (SC) wherein it has been held that it is the purpose of the incentive which decides its nature and not the modality or the source thereof.

11.2. We have heard the rival submissions and perused the materials available on record. We find that the ld CITA had deleted the addition by observing as under :-

"I have gone through the submission of the appellant and the order of the AO. The appellant has submitted that during the previous year relevant to Assessment Year 1991-92 the appellant was liable to pay sales tax amounting to Rs.34,89,259/-. However, the appellant had paid Rs.1,24,02,870/- as sales tax to Revenue Department. The excess payment was made because the appellant inadvertently omitted to consider the benefit of the Sales Tax exemption under the U.P. Sales Tax Incentive Scheme in relation to HDPE Woven Sack Unit. For the Income Tax purpose as the exemption/subsidy received by the appellant was related to the capital invested by the company in the new undertaking, the appellant has considered the same as capital in nature. A perusal of the said notification of the U .P. Governments shows that the exemption from payment of sales-tax was dependent upon the quantum of capital investment made in the qualifying industrial unit, and for Tehsil Dadri of Ghaziabad district such exemption was available for six year if the capital investment was exceeding three lakh rupees.

The nature and the question of taxability of Sales Tax exemption/subsidy under the said scheme of the U .P. Government came for consideration of the Hen'ble Delhi Tribunal in the case of Bhushan Steel Strips Ltd. vs DCIT (supra). In that case, the assessee was running the business of manufacture of cold rolled/galvanised steel strips and sheets, etc. in its two units located at Sahibabad (Distt. Ghaziabad-UP). The Hon'ble Tribunal examined and analyzed the provisions of the said scheme and observed that the said scheme was launched for "promoting the development of industries in the State in general and. in certain districts and part of districts in particular" and that the purpose behind such notification was the development of

industries in the State, in other words the incentive was given to the assessee to establish industrial unit in the specified areas. The Hon'ble Tribunal further observed as follows:

"It will not be out of place to mention that the amount of sales-tax collected exceeding the computed amount, the assessee was liable to pay such excess sales-tax collected in this collection, we feel it expedient to consider the decision of the Hon'ble Supreme Court in the case of Sawhney Steels and Press Works Ltd. vs CIT (1997) 228 ITR 253 (SC). The Hon'ble Supreme Court in this case decided that if the moneys are given to the assesses for assisting them in carrying out their business Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 operations and the money was given only after and conditional upon commencement of the production, such subsidy must be treated as assistance for the purpose of trade. But insofar as the case before us is concerned, the subsidy is granted to the appellant-company by the State Government not for the purposes of carrying on its business in a more profitable manner but merely in consideration of setting up the production units in backward areas. The purpose of the State Government 111 granting subsidy is clear from the preamble portion of the two notifications under which the appellant company became entitled to exemption in respect of sales-tax amount."

With the above observations and also referring to the decisions of the Hon'ble Kolkata Bench of Tribunal in the cases of Rasoi Ltd. (ITA No.1080ICaI/2000) and Pharrna lmpex Laboratory (P) Ltd. (ITA No. 476ICaI12000), Hon'ble Delhi Bench of Tribunal herd that since the subsidy granted was especially for the purpose of promotion and development of the industries in the backward areas of the State, the amount received by the assessee was capital receipt and not liable to tax upto the limits computed in accordance with the notification of the State Government.

Since the amount refunded by the Sales Tax Authorities was only the sales-tax exempted under the said notification of the U.P. Government, following the decision of the Delhi Tribunal in the case of Bhushan Steel Strips Ltd. vs DCIT (supra), such refund of sales tax is held to be capital receipt as claimed by the appellant. Accordingly, the appellant succeeds and gets relief of Rs. 87,61,400/-. This ground is, thus, allowed."

We find that the subsidy granted under the very same incentive scheme had been duly considered by the co-ordinate bench of Delhi Tribunal in the case of Bhushan Steel Strips Ltd supra wherein the sales tax refund was granted for the purpose of promotion and development of industries in the State of Uttar Pradesh. We find that the Hon'ble Apex Court in the case of Ponni Sugars supra had held that it is the purpose of the incentive which decides its nature and not the modality or the source thereof. The reckoning of subsidy may be based on investment in capital made by the assessee but the purpose of subsidy was for setting up of the plant in back ward area. In view of the aforesaid facts and purpose of the subsidy and respectfully following the judicial precedents relied upon hereinabove, we do not find any infirmity in the order of the ld CITA in this regard. Hence the ground raised by the revenue is dismissed.

12. ADDITION TOWARDS PROFIT EARNED ON ACCOUNT OF FUTURE & OPTIONS Ground No. 1 in ITA No. 1374/Kol/2010 for Asst Year 2005-06 The brief facts of this issue is that the assessee showed an amount of Rs. 56,45,341/- as profit earned on account of futures & options in respect of foreign exchange transaction as Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 speculation profit and adjusted the same from brought forward speculation losses of Asst Year 1997-98. The assessee was asked to explain as to why the same should not be treated as business profit. The assessee repaid that they were carrying out various transactions in foreign exchange derivatives through authorized dealer. It was explained that the authorized dealer on behalf of assessee executes such transaction in varied foreign currency derivatives and such transactions are squared up or settled on maturity without any physical delivery of foreign currency. The ld AO concluded that as the transaction did not result in physical delivery of foreign currency therefore the provisions of section 43(5) of the Act would be applicable for the same as according to him , the assessee was engaged in the business of jobbing or arbitrage in foreign exchange derivatives which falls under the proviso (c) to section 43(5) of the Act. Accordingly the earning on account of futures and options in respect of foreign exchange transaction was treated as business income and added back to the total income of the assessee. The ld CITA granted relief to the assessee holding that since the transactions in foreign currency derivatives have been done through authorized dealers on behalf of the assessee and not by assessee himself and the assessee is not a member of forward market or of a stock exchange, clause (c) of proviso to section 43(5) of the Act is not attracted. Aggrieved, the revenue is in appeal before us on the following ground:-

> "1. On the facts and circumstances of the case the Ld. CIT(A)-XXXII, Kolkata has erred in law and in facts while directing the AO to treat the profit earned on account of future option in respect of foreign exchange transaction as speculative transaction and to adjust it from brought forward speculative business loss where as the AO rightly treated the said transaction within the ambit of clause (c) to the proviso to Sec. 43(5) of the Income Tax Act."

12.1. The ld DR placed reliance on para 13 of the ld CITA 's order for Asst Year 2003-04 and stated that the assessee itself had considered the gains arising on foreign exchange transactions in that year as business income and there is no good reason for shifting the same to speculation income in the year under appeal. In response thereto, the ld AR stated that in Asst Year 2003-04, the gains arising on account of foreign exchange fluctuation was in the regular course of export activities of the assessee wherein the exchange gain obviously had to be treated only as business income which was accepted by the assessee and that has got absolutely no relevance for the gains arising on account of future options Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 in respect of foreign exchange derivatives transactions in the year under appeal. He stated that the proviso to clause (c) to section 43(5) pre supposes entering into a contract by a member of forward market or a stock exchange. In the instant case, the assessee admittedly is not a member of forward market or of a stock exchange and hence the proviso to clause (c) to section 43(5) of the Act has been wrongly invoked by the ld AO. He argued that the proviso to clause (d) of section 43(5) of the Act has been inserted whereby an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts Regulation Act, 1956 carried out in a recognized stock exchange shall not be deemed to be a speculative transaction , was applicable only from Asst Year

2006-07 and onwards and not earlier. He placed reliance on the Special Bench decision of this tribunal in the case of Shree Capital Services Ltd vs ACIT reported in (2009) 121 ITD 498 (Kol) (SB).

12.2. We have heard the rival submissions and perused the materials available on record. We find that the ld CITA had granted relief to the assessee by observing as under :-

> "I have gone through the submission made by the appellant and perused the assessment order. The contention of the AO that the transaction carried out by the appellant falls within the ambit of clause © to proviso to section 43(5) is not tenable since the transactions in foreign currency derivatives is done through authorized dealers on behalf of the appellant and not by the appellant himself and the appellant is not a member of a forward market or of a stock exchange. Therefore, the profit earned on account of future option in respect of foreign exchange transaction has rightly been treated as Speculation Income by the assessee for the year under consideration.
>
> The provisions of section 43(5)(d) which provides that trading in derivatives carried out through recognized stock exchange even by a non-member of such exchange shall not be treated as speculative transaction were brought by Finance Act, 2005 which have been held to be prospective in nature and applicable from AY 2006-07 as held in the case of Shree Capital Services Ltd. (supra). Hence, the AO is directed to treat the gain arising from foreign currency transaction as speculative transaction and to adjust it from brought forward speculative business. In the result, this ground is allowed."

We find that the assessee is not a member of forward market or of a stock exchange and the provisions of clause (c) of proviso to section 43(5) of the Act pre-supposes the entering of contract by such member. Hence we hold that the assessee does not fall under the ambit of proviso to section 43(5) of the Act. Accordingly, the profit derived by the assessee from the subject mentioned transaction is to be treated as speculation profit and set off of brought forward speculation losses of Asst Year 1997-98 is to be granted to the Paharpur Cooling towers Ltd. AYs 2001-02-2005-06 assessee. Hence, we do not find any infirmity in the order of the ld CITA in this regard. Accordingly, the ground raised by the revenue is dismissed.

13. In the result, Order is pronounced in the open court on 15.03.2017 Sd/- Sd/-

(S. S. Viswanethra Ravi) (M. Balaganesh)
Judicial Member Accountant Member

Dated : 15th March, 2017

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT - ACIT, C.C-XX, Kolkata.

2 Respondent - Paharpur Cooling Towers Ltd., 8/1/B, Diamond Harbour Road, Kolkata-27.
3. The CIT(A), Kolkata
4. CIT, Kolkata.
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.