

Dcit Cen Cir 40, Mumbai vs Saf Yeast Co. P. Ltd, Mumbai on 24 November, 2017

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI N.K. PRADHAN, AM

ITA No. 1634/Mum/2014

(A.Y. 2005-06)

ITA No. 1635/Mum/2014

(A.Y. 2006-07)

ITA No. 1636/Mum/2014

(A.Y. 2007-08)

ITA No. 1637/Mum/2014

(A.Y. 2008-09)

Saf Yeast Company Private
Limited, 419, Swastik

Deputy Commissioner of
Income Tax, Central Circle -

Vs.

Chambers, Chembur,
Mumbai-400 071

40, Mumbai

Appellant

..

Respondent

PAN No. AADCS9080J

ITA No. 1777/Mum/2014

(A.Y. 2005-06)

ITA No. 1778/Mum/2014

(A.Y. 2006-07)

ITA No. 1779/Mum/2014

(A.Y. 2007-08)

ITA No. 1780/Mum/2014

(A.Y. 2008-09)

Deputy Commissioner of
Income Tax, Central Circle -

Saf Yeast Company Private
Limited, 419, Swastik

Vs.

40, Mumbai

Chambers, Chembur,
Mumbai-400 071

Appellant

..

Respondent

Assessee by

:

J.P. Bairagra, AR

Revenue by

:

B.C.S. Naik, CIT-DR

Date of hearing: 08-11-2017 Date of pronouncement : 24-11-2017

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ITA Nos. 1634-1637&1777 -1780/ Mum/2016
Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09)

ORDER

PER MAHAVIR SINGH, JM:

These cross appeals are arising out of the common order of Commissioner of Income Tax-38, Mumbai, ['CIT(A)] in appeal No. CIT(A)- 38/IT-84,85 & 86,119/2009-10 & 2010-11 vide order dated

31-12-2013. The assessments were farmed by Deputy Commissioner of Income Tax, CC-40, Mumbai, ('DCIT') for the AYs 2005-06, 2006-07, 2007-08 & 2008-09 vide orders dated 20-03-2015, 27-11-2008, 29-10-2010 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The first common issue in these appeals of assessee and revenue is that whether the CIT(A) erred in restricting the deduction u/s 80IA of the Act for generation of steam power and generation of cooling power and the revenue also raised the identical issue that the CIT(A) erred in deleting the disallowance of deduction u/s 80IA of the Act without considering the facts, that generation of steam is not a form of power eligible for deduction, no separate undertaking was set up for production of Instant Dry Yeast, and it is manufactured in an undertaking which already existed prior to 1st October, 1994, which amounts to that the undertaking is established by splitting of the old existing business for the purposes of section 80IA of the Act. For this, the assessee raised the following grounds: -

"1. The CIT(A) erred in restricting the deduction u/s 80IA for generation of steam power.

2. The CIT(A) erred in restricting the deduction u/s 80IA for generation of cooling power."

The revenue raised the following grounds: -

"1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance made u/s 80IA, without appreciating ITA Nos. 1634-1637 & 1777-1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) the fact that generation of steam is not a form of power eligible for deduction u/s 80IA of the I.T. Act.

2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance made u/s 80IB of the Act, without appreciating the fact that not separate undertaking was set up for production of Instant Dry Yeast, which is in violation of the provision of section 80IB of the Act.

3. On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance made u/s 80IB of the Act, without appreciating the fact that, even if it is taken that Instant Dry Yeast is a totally new product from the beginning, it is manufactured in an undertaking which already existed prior to 1st October, 1994, which amounts to that the undertaking is established by splitting of the old existing business, within the meaning of provisions of section 80IB of the Act."

3. Brief background and facts are that the assessee manufactures Baker's Yeast at its factories situated at Sandila and Chiplun. The main raw material is sugar cane molasses and other raw materials are urea, phosphoric acid, caustic soda, soda ash, vitamins, antifoaming agent, emulsifier,

magnesium sulphate, water etc. Bakers Yeast manufactured by the assessee is sold in three forms (a) Fresh Yeast, (b) Active Dry Yeast and (c) Instant Dry Yeast. Fresh yeast is highly perishable and needs to be stored under continuous refrigeration. Fresh yeast is transported in refrigerated trucks. Instant Dry yeast can be stored at room temperature and is mainly used by bakers in areas that are not easily accessible by road and where refrigerated storage facilities are not available. Temperature is very important for production and survival of the yeast. During the process of production the assessee ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) requires both heat and cooling power. For this purpose, the assessee also generates Steam Power from Biogas Boilers and Cooling Power from Cooling Towers set up at its power generation undertakings at Sandila and Chiplun. Assessee claimed commencement of production of Steam Power, Cooling Power from Cooling Tower and Cooling power from Ammonia Absorption Refrigeration plant at Sandila as on 31.01.2000, 22.03.1997 and 28.02.2002 respectively. Similarly, commencement of production was claimed of Steam Power and Cooling Power from Cooling Towers as on 01.03.2001 and 02.08.2002 respectively.

4. The assessee claimed the deduction u/s 80IA of the Act cooling power and steam power for Sandila for the first year in AY 2003-04. The AO disallowed the deduction vide assessment order u/s 143(3) r.w.s. 147 of the Act dated 30.01.2006. The assessee filed appeal before CIT(A), who allowed deduction for both power generation undertakings at Sandila and Chiplun but he restricted the quantum as under: -

a) For generation of cooling power he restricted the claim of rate of conversion of 1 Tonne of refrigeration equal to 3.52KW of electric power to 1.02 KW of electric power.

b) For generation of steam power he directed an ad- hoc reduction of 25% of the notion receipts from the sale of steam power.

Aggrieved, assessee as well as department filed appeal before Tribunal and Tribunal decided the issue on jurisdiction and quashed the reassessment. It means the merits were not tested.

5. Similarly for AY 2004-05, the AO framed the assessment u/s 143(3) of the Act vide order dated 27.12.2006, despite the fact that search and seizure action u/s 132 of the Act was conducted on the assessee on 30.11.2006. AO u/s 143(3) of the Act passed assessment ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) order and inter alia disallowed deduction u/s 80IA of the Act. The assessee preferred appeal before CIT(A), who reduced the quantum of deduction. Aggrieved, assessee preferred appeal before Tribunal. The Tribunal vide order dated 03.10.2012 held that the assessment for AY 2004-05 had abated on the date of search by virtue of second proviso to section 153 A of the Act and assessment completed u/s 143(3) of the Act during the pendency of assessment u/s 153A of the Act is nullity and without jurisdiction. Accordingly, even for AY 2004-05 was not tested on merits.

6. Now, the assessments for AYs 2005-06 and 2006-07 were framed u/s 143(3) r.w.s. 153A of the Act and for AYs 2007-08 and 2008-09 were framed u/s 143(3) of the Act. The AO inter alia disallowed

the claim of deduction u/s 80IA of the Act of power generation undertakings by following the assessment order of AY 2003-04. Aggrieved, assessee preferred appeal before CIT(A), who restricted the claim of deduction u/s 80IA of the Act as under: -

ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) Aggrieved, assessee and revenue preferred these cross appeals for these four assessment years.

7. We find that the AO was of the view that there is no generation of power in the case of the assessee and moreover, the word power is not defined in the Act. The meaning in common parlance should be taken which would mean electricity. According to the AO, steam power and cooling power is not power as per Section 80IA(4)(iv) of the Act. Water that is cooled through the cooling tower is supplied to the assessee's manufacturing process. In any industry, various forms of energy like electrical energy, heat energy, mechanical energy etc are used or generated. If the argument of the assessee is to be accepted almost every undertaking should be entitled for deduction u/s 80IA of the Act and that too with reference to each stage of their production process where some form of energy is generated. For instance when a machine runs on electricity it can claim that mechanical energy is generated which is used in the business. The word power is used in sub-section (2) of section 80IA of the Act and it is not defined therein. In such a case, the condition in sub-clause (IV) would become meaningless. Sub-section 4(iv)(b) of Section 80IA of the Act allows deduction to undertakings that start transmission or distribution by laying a net work of new transmission or distribution lines. This reference is electric power and cannot apply to steam power, refrigeration power or any other form of power. If the assessee's argument is accepted, these provisions would also encourage cutting down of trees as burning of wood produces heat energy and assessee could claim the deduction on the ground that he is engaged in the generation of power. Such cannot be the intention of the legislature.

8. The CIT(A) allowed the claim of the assessee by observing that Sub-section 4 (iv) of section 80 IA of the Act provides that an undertaking for generation of power is eligible for deduction and for this he followed the order of AY 2003-04. According to CIT(A) the term 'Power' has not been defined to mean electrical power to the exclusion of other forms of ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) power and the term has to be understood in its natural meaning. Regarding the AO's observation that at each stage of production some form of energy is produced, the assessee argued that the AO has completely misdirected himself. The legislature has clearly provided a benefit of a deduction u/s 80IA of the Act for generation of any form of power generated by an undertaking. At each stage of production there is no undertaking that is generating power. This is where the AO has gone wrong. Further the CIT(A) also referred to the relevant observation's of the AO's in Remand Report dated 24.12.2012 which reads as under: -

"In the additional evidence the assessee has relied upon the judicial interpretation of the term power apart from various textbook definitions of the terms power and energy. The terms power has been interpreted in following cases;

Sial SBEC Bioenergy Ltd. ITA No.5461/Del/2003 decided on 26.3.2004.

West Coast	Paper	Mills	Ltd.	ITA	No.
5403/Bom/1999	&	382/Mum/2001		decided	on
21.6.2005.					

West Coast Paper Mills Ltd. ITA No.3187/Mum/2003 decided on 3.4.2006 wherein it is held as under:-

One aspect which emerges from the above judicial interpretation is that understanding the definition of power and concept of generation of power is inextricably link with concept of energy. Power means energy in any form available for application to work. Judicially it has been held that steam is a form of power. Energy can only be transformed from one from to another. Energy can neither be created nor can it be destroyed. The assessee it appears in light of the above judicial pronouncement trying to ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Privat e Limited (A.Y. 05-06 to 08-09) justify that they are producing power." (emphasis supplied)

9. Inspite of noticing several judicial pronouncements on the subject, the AO still concludes the assessee is not producing power, because, according to the AO, power can only mean electricity for the purpose of claiming deduction u/s 80-IA of the Act. The AO has not even stated why the aforesaid decisions are incorrect. Therefore, the profits from generation of steam power and cooling power are eligible for deduction u/s 80-IA of the Act.

10. Furthermore, the assessee submitted various Patents, Chapters from textbooks, and technical articles to CIT(A) by a letter dated 8 th February 2012 (Copy enclosed at Page Nos 733 to 738 of assessee Paper Book). The CIT(A) called for a remand report from the AO. The AO submitted a remand report No. DCIT CC-40/Remand Report 2012-13 dated 24.12.2012 wherein he has not disputed or controverted technical information and evidences filed by the assessee. The CIT(A) also considered that 'Power' is the rate of transfer of or conversion of energy for doing work or in other words, energy converted in a unit of time. The physical equation for power is, work divided by time. Since work is equal to force multiplied by distance, the equation of 'power' would be force multiplied by distance divided by time or force multiplied by velocity. Any form of energy can be converted to produce power for doing work. There are various forms of energy such as, electrical energy, wind energy, tidal energy, steam etc. In fact a Ministry has been formed to develop alternative sources of energy, which are referred to as Non-conventional Energy Sources. This department of the Government encourages development of sources of energy other than conventional sources such as, electricity, fuel or nuclear power by a system of incentives. 'Power' in clause (iv) of sub-section 4 of section, 80-IA of the Act, therefore, cannot be restricted only to electrical power in the absence of any specific exclusion. Accordingly, he was of the view that deduction has been given ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Privat e Limited (A.Y. 05-06 to 08-09) to encourage generation of power which would augment the total power generation or save consumption of electric power and so long as these forms of power are generated and used for doing

work in the production process, the activity would be an eligible business.

11. At the outset learned Counsel for the assessee took us through the provision of section 80IA of the Act and the relevant reads as under:

Sub-section 1 of Section 80-IA reads as follows:

"(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years."

Sub-section 4 refers to the categories of business which an undertaking must carry on to be entitled to the deduction referred to above. Clause

(iv) (a) of Sub-section 4 is relevant and reads as under: -

"(iv) an [undertaking] which, -

Is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, [2006];"

12. He explained that an undertaking which generates 'power' or generates and distributes 'power' is entitled to claim deductions of the ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) profits and gains derived by it from such generation or generation and distribution of power. For A.Y. 2003-04 and 2004-05 it was held by the CIT(A) that Cooling Power and Steam Power generated by the assessee are eligible for deduction u/s 80IA of the Act. These orders also followed by CIT(A) for AY 2005-06 to AY 2008-09. He specifically argued that the term Power is not defined in the Act, however, u/s 32A of the Act an Investment Allowance was allowed in respect of the plant and machinery newly installed after 1.4.1976, if the same is used for the purposes of business of generation or distribution of electricity or any other form of power. As far as, Section 32A(2) clause b(i) is concerned, the wording of said provision is as under:

"(2) The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following, namely

(a) a new ship or new aircraft acquired after the 31st day of.....;

(b) any new machinery or plant installed after the 31st day of March, 1976,--

(i) for the purposes of business of generation or distribution of electricity or any other form of power ; or

(ii) in a small-scale industrial undertaking for the purposes of business of manufacture or production of any article or thing ; or

(iii) in any other industrial undertaking for the purposes of

13. In view of the above provision, he argued that the Parliament has recognised electricity to be one of the forms of power. This interpretation is supported by judgments in the cases of SIAL SBEC Bioenergy Ltd vs DCIT 83 TTJ 866 (Del) and further in West Coast Paper Mills Ltd vs ACIT (2014) 33 ITR (AT) 560 (Mumbai). Even Hon'ble Madras High Court in the case of Tanfac Industries Ltd (Tax Case (A) No 1773 of 2008 and ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) Tamilnadu Petro Products Ltd 238 CTR 454, which was upheld by Hon'ble Supreme Court (2010) 319 (ST) 8 that even the steam power is treated as one of the forms of power. So far as Section 80IA(4)(iv) of the Act is concerned, the term used is power and it is not restricted to electricity. He further explained that the Rules of Interpretation of Statutes by using principles of internal aid, the provisions of Section 32A can be used to explain the term power as used in Section 80IA(4)(iv) of the Act. Therefore, it is clear that the term power used in Section 80IA(4)(iv) of the Act is not only restricted to generation of electricity but for generation of any form of power. For the use of internal aid, the assessee also relied on the order of ITAT in the case of Vandana Properties vs ACIT (2010) 128 TTJ 89 (Mumbai).

14. The term Power has been the subject of judicial interpretation by the ITAT in the case of SIAL SBEC Bioenergy Ltd. vs. DCIT (2004) 83 TTJ 866(Del) has held that 'steam' is a form of 'power' as contemplated in Section 80-IA of the Act. This order is upheld by Hon'ble Bombay High Court reported in (2013) 353 ITR 36. In the case of SIAL SEBC Bioenergy case the assessee earned money from supply of power to SBEC Sugar Ltd and after whatever power was consumed by SBEC Sugar Ltd., the surplus power remaining was supplied to the U.P. State Electricity Board. Apart from the receipts generated through the supply of power, the assessee also received some amount on account of supply of steam to SBEC Ltd. Assessee claimed deduction under Section 80-IA of the Act for these receipts the reason being that they pertain to the supply of power as according to that assessee steam so supplied is a form of power and the same falls within the parameters of Section 80-IA of the Act. On these receipts also the assessee claimed 100% deduction. This steam gives thermal energy which is used in the sugar plant at various stages to heat sugar cane juices for evaporation of water in juices to produce final sugar. According to the assessee, the evaporation of water in juices takes place by way of transfer of thermal heat energy from low ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) pressure exhaust steam to the juices. The ITAT noticing that the term has not been defined, relied on the dictionary meaning of the word Power. Power, it was held, has been defined to mean "mechanical or electrical energy or any form of energy or force available for application to work (as that of gravitation, running water, wind, steam, electricity)." The ITAT held that both steam and electricity were capable of doing the same work, and that the assessee had chosen to use thermal energy instead of electrical energy. It was held that since, in the facts of the said case, steam had actually produced results by doing work,

it came within the meaning of the word 'power' as used in Section 80-IA of the Act. At Para 25 of the order, the Tribunal observed as follows:

"We must here itself say and as admitted by the Departmental Representative that energy is capacity to do work. In this case, the steam definitely produces thermal energy, which evaporates water from cane juices to produce sugar. Therefore, steam produced/extracted from turbine has a capacity of producing thermal energy which evaporates water from sugarcane juices to produce sugar, and 'can definitely be qualified as power', and therefore, definitely be eligible for the benefit available under s. 80-IA(iv)." (emphasis supplied) At Para 29 of the order, the Tribunal observed as follows:

"When we apply the principles of interpretation of statutes to the present case, we find that the word 'power' has to be given a meaning which is in common parlance and in common parlance the word 'power' shall mean the energy only. The energy can be of any form, be it mechanical, be it electrical, be it wind or be it thermal. The steam produced by the assessee on the principle of ITA Nos. 1634-1637&1777 -1780/Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) interpretation of statute shall only be termed as power and shall qualify for the benefits available under s. 80-IA(iv)." (emphasis supplied)

15. The aforesaid pronouncement by the Delhi Bench of the ITAT on the issue of the meaning of the word 'power' was followed by Jaipur Bench of Hon'ble ITAT in the case of DCIT vs. Maharaja Shree Umaid Mills Ltd. (2009) 120 TTJ (JP) 711, wherein it was held that just like electricity steam is also a form of power. In this case, the assessee had a system of waste heat recovery for generation of steam of required pressure which could also be made available for operating the textile unit of the assessee. The steam so generated through the attachment of power generation unit, was by using the residual heat being exhausted by the engine while producing electric power. Such steam is thus generated as a bye-product of plant for generation of electricity. In the above case the textile unit would have itself had to generate steam for its use if the same was not available to it from the power generation unit, as was being done there before. It was held by the ITAT in Para 5 that whether scientifically or in general parlance the terms 'Production of Steam' and 'Generation of Steam' or for that matter 'Production of Electricity' and 'Generation of Electricity' are synonymous. The AO in that case (just as in the assessee's case) held that the intention of the legislature under Section 80IA(4)(iv)(b) of the Act is to allow a deduction for generation of electricity only as transmission and distribution as referred to sub-clause

(b) are for electricity only. The Tribunal held that sub-clauses (a), (b), (c) of Section 80IA(4)(iv) provide for the benefit of a deduction in three different sets of undertakings being; first which generate or generate and distribute power, second which starts transmission or distribution lines and third which undertake substantial

renovation and modernization of existing transmission or distribution lines. Thus it was held that while referring to one sub-clause an inference cannot be drawn from another sub-clause and that there three types of undertakings refer to in sub-

ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) clauses (a),(b),(c) are different and independent of each other. It was also held that terms 'Power' and 'Energy' are synonymous and they can be in several forms, steam, mechanical, electrical, wind etc. Accordingly, in the present case also it was claimed that if the legislature only wanted to confer the benefit of deduction under Section 80IA of the Act only for generation of electricity, it would have been specifically mentioned by using the term 'Electrical Power' instead of the connotation as 'Power' which is omnibus. Similarly, the Mumbai Bench of ITAT in the case of DCW Ltd vs ACIT (37 SOT 322) relied on the decision of Hon'ble Madras High Court in the case of Tanfac Industries Ltd (Supra) and held in Para 18.9 that steam produced by the assessee is eligible unit and income from sale of steam is the income derived from industrial undertaking, therefore, deduction under section 80-IA is allowable. The Hon'ble Madras High Court in the case of CIT vs TANFAC Industries Ltd in Tax Case No. 1773 of 2008 held that steam sold to its sister concern is eligible for deduction u/s 80IA of the Act. This judgement was upheld by Hon'ble Supreme Court (2010) 319 ITR (St) 8.

16. The learned Counsel also referred to a book of Advanced Physics written by author Keith Gibbs, Cambridge University Press has described the meaning of Power under the chapter Energy and Power. A copy of the Chapter on Energy and Power is at Pages No. 84 to 89 of assessee Paper Book No III, the relevant is being reproduced below a part of the chapter on Energy and Power:

"The rate at which work is done, or the rate at which energy is converted from one form to another form to another is Power. Energy is never created or destroyed but only changes from one form to another. Energy is available from number of sources such as:

Coal , Oil, Gas, ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) Other forms:, Wind, Waves, Hydro Electricity, Heat, Geothermal, Solar Energy, Biochemical Energy, Tides, Nuclear Fission and Fusion, Wood, Energy exists in the following forms:

Mechanical (Potential & kinetic), Chemical ,Heat, Light ,Nuclear, Magnetic, Electrical
Almost everything that happens in the world is a result of a change of energy from one form to another".

17. Similarly, he referred to school Physics book: A textbook of Physics by Anita Prasad for Eighth Standard Students, wherein the word Power (energy) has been described in detail and its conversion from one form to another form. Power and energy are almost synonymous. The assessee reproduces below the relevant portion of the chapter on Sources of Energy (Forms of Energy, Energy Resources, Wind Energy) from the popular textbook of Physics prescribed for 8th Standard students.

"Energy is the ability of a body to do work. Energy can be transformed from one form to another. There is energy in the Wind that blows and in the water that flows. There is energy in the fuel that we burn and in the food that we eat. Most of the energy can be harnessed for doing useful work.

Heat Energy (power): When water is boiled, the water changes to steam. The steam used to do work such as turn turbines and railways engines.

i) Light Energy (power): Green plants in the presence of sunlight make food. Light is used to start chemical reactions within the leaves of the plant. Chemical reactions take place when light falls on photographic plates. Light causes chemical changes, hence it is a form of energy.

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ii) Chemical Energy (power): Foods made by plants store energy in the form of chemicals.

Humans and animals use the food to release energy, some of which is stored in our muscles. This muscular energy is used for doing work. A piece of coal, a log of wood or a drum of oil also contains stored chemical energy. When ignited these produce energy in the form of heat and often light.

iii) Sound Energy (power): If you place your fingertips against your throat when you speak you can feel the vibrations or movement produced by the sound. The vibrations occur due to energy of the sound. Hence, sound is a form of energy.

iv) Electrical Energy (power): When you switch on the radio or music system, electric current passes into it and produces sound. The set also gets heated up. Electricity can produce heat, light and sound energy. Hence it is a form of energy.

v) Magnetic Energy (power): Energy is stored in permanent magnets because a magnet can move a piece of iron-thus doing work on it.

vi) Nuclear Energy (power): The heat and light of the Sun is produced when hydrogen atoms join together to form helium. The atoms store energy in their nucleus. The nuclear energy released when atoms split up is used in power stations to generate electricity. Nuclear energy is also when an atom bomb explodes.

vii) Potential Energy and Kinetic Energy (power):

Potential energy is the energy possessed by a body due to its position or change in shape. Kinetic energy is the energy possessed by a body on account of its motion. Both potential energy and ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast

Company Private Limited (A.Y. 05-06 to 08-09) kinetic energy are forms of Mechanical Energy (power).

viii) Alternative Sources of Energy (power): India has today among the worlds largest programmes for renewable energy. The spectrum of Renewable and non-conventional energy covers Solar Energy (power), Wind Energy (power), Biomass (power), Tidal (Ocean) Energy (power) and Geothermal Energy (power).

ix) Wind Energy (power): The flow of air is called wind. Wind possesses kinetic energy by virtue of its motion. The kinetic energy of the moving air (wind) is called wind energy."

18. Similarly, the learned Counsel explained GENERATION OF COOLING POWER FROM COOLING TOWER in the case of assessee. In the case of assessee, the UNDERTAKING concerned is generating "Cooling Power". The power generated by the Cooling Tower is known as Refrigeration Power or Cooling Power. Cooling or Refrigeration Power, as the name suggests, is used in reducing the temperature of an object, whether solid, liquid or gaseous. The assessee generates Cooling Power at its undertakings at Sandila and Chiplun. The temperature of the water is reduced by passing air through the apparatus, i.e. the 'Cooling Tower' in sufficient volumes, at a temperature cooler than that of the incoming hot water such that the particles of water are enveloped by the air and there is a transfer of heat from the water to the air. The air then exits the chamber at a temperature higher than its temperature at the point of entry and the water exits the apparatus at a temperature lower than its original temperature. In other words, air (which is 1/1000th the density of water) acts as the refrigerant to cool the temperature of water.

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19. The transformation of thermal energy into cooling power is a technology known and applied for decades. In a Cooling Tower, enthalpy potential difference is used to generate Cooling Power. In the process, each particle of water is surrounded by a thin film of air and the enthalpy difference between the film and the surrounding air provides the driving force for the cooling process which generates the Cooling Power. Cooling Power or Refrigeration Power is measured in Tonnes of Refrigeration (TR). Power is a measure of the Work done divided by the Time taken to do the Work. Thus, when a 'Joule' is the unit of Work, and an 'Hour' is the unit of Time, the unit of Power is Joule/Hour or Watt.

Power = Work/Time = Joule/Hour = Watt One TR is equal to 11376 KiloJoules/hour, which is equal to 3025 Kilocalories/hour, which is equal to 3.516 Kilo Watts of Power. (Assessee Paper Book No III (Sr No 10 to 14) at Sr No 14A after page 763) ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09)

20. The Ld Counsel explained the facts of the present case that Cooling Power generated at the assessee's Cooling Power generation undertakings is put to captive use in the manufacture of yeast.

The assessee claimed that it is entitled to claim deduction under Section 80- IA of the Act, in respect of profits/gains derived from the generation of the Cooling Power. The assessee filed details of generation of power for the A.Y. 2005-06, 2006-07, 2007-08 & 2008-09 at its Cooling Power generation undertaking at Chiplun including its value and also of Cooling Power at its Cooling Power generation undertaking at Sandila. It was explained that Production of Cooling Power began at the Cooling Power generation undertaking at Chiplun on 2.8.2002 and at its Cooling Power generation undertaking at Sandila on 22.3.1997.

21. The assessee also relied on an International Patent Number Wo2004094928 on Cooling Power titled Absorption Chiller For The Production Of Cooling Power from Low Temperature Hot Water (Copy enclosed at Page No 96 to 137 of the Continuation No 2 of Paper Book No III) granted under International Application Number PCT/GR2004/000025 bearing International Patent Classification F35B17/08. This Patent is valid in 96 countries of the world including India. This confirms the existence, generation and utilization of Cooling Power. The relevant portion of this patent is as under:

"The transformation of thermal energy into cooling power is a technology known and applied for decades, especially with the combustion of propane and other fuel or with the use of steam, in adsorption chillers, where the working medium was ammonia or lithium bromide etc. However there exists many applications where it is desirable for the production of cooling power, but the available heat source is water with low temperature for example 50 C till 90 C from rejected heat from cooling of internal ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) combustion engines or district heating or solar collectors."

22. This patent supports the assessee's submission that cooling tower generates cooling power/refrigeration power. Hence, the cooling power generated in a cooling tower is entitled for deduction under 80IA of the Act. The assessee also relied on Patent No: PL838609/ Wo9908055 on Method of Generating Refrigeration Power which describes the method of production of cooling power. The relevant part of this patent is as under:

"The invention relates to a method of producing cooling power for one or more buildings by means of hot district heating water and an absorption aggregate obtaining energy from the district heating network."

23. The assessee has exercised the option and for the first time claimed deduction under Section 80-IA for Generation of Cooling Power at its Cooling Power generation undertaking at Sandila for AY 2003-04 and for later AYs which was well within 15 years from 22.3.1997. Similarly, the assessee has exercised the option and for the first time claimed deduction under Section 80-IA of the Act for Generation of Cooling Power at its Cooling Power generation undertaking at Chiplun for AY 2004-05 and for later AYs which was well within 15 years from 2.8.2002. It was explained that the assessee's Cooling Power generation undertakings at Chiplun and Sandila are independent. They have separate plant and machinery. Separate labour is used for running the assessee's Cooling Power generation undertakings. The cooling power generation undertakings are independent and

distinct from the assessee's yeast manufacturing factory. The cooling power generation undertakings are independent and distinct from the assessee's yeast manufacturing factory. In this regard the assessee relied on Factory Inspector's certificate dated 08.11.2006.

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24. The learned Counsel also explained the Generation of Steam Power from Biogas by stating that the effluent (thick black liquid) generated in the process of manufacturing yeast is collected in lagoons where there is no oxygen and it is pumped into Anaerobic biogas digesters. The assessee produces biogas in a methane digester where complex microbial mixtures are required to produce methane gas from the effluent. The numbers and type of bacteria in the anaerobic digester depend upon the composition of the effluent and the operating conditions of the digester. Methane gas is produced by a chemical reaction from the effluent by a process of anaerobic digestion which is used as a raw material to fuel specialized boilers in order to produce steam which again is a form of Power. In the boiler water is added and the boiler is heated through biogas to produce Steam Power. The Steam Power generated is sold to yeast manufacturing unit where it is captively consumed. The biogas so produced contains hydrogen sulphide which is removed by passing it through a scrubber in a sulphur removal plant which includes a reactor. Biogas is then transported through pipe lines to boilers where biogas is fired in the boiler to produce steam power. Steam power is then sold and transported through insulated pipelines to the yeast factory. The generation of steam power at the assessee's Steam Power generation undertaking at Sandila began on 31.01. 2000 and the generation of steam power at the assessee's Steam Power generation undertaking at Chiplun began on 01.03.2001.

25. The assessee has separate plant and machinery for its Steam Power generation undertakings which are distinct and separate from the yeast manufacturing factories. The labour used at the steam power generation undertakings is also separate. In this regard the assessee relied on Factory Inspector's certificate dated 08.11.2006. Accordingly the assessee claimed deduction u/s 80IA of the Act for the profits derived from aforesaid undertaking engaged in generation of steam power. The initial year of claim for the assessee's Steam Power generation ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) undertaking at Sandila was AY 2003-04 and the initial year of claim for the assessee's Steam Power generation undertaking at Chiplun was AY 2004-05. He also relied on Government of India, Ministry of Non- Conventional Energy Sources, vide Notification No: F No: 2/1/2005-UICA dated 25.07.2005 encouraged entrepreneurs by providing financial assistance to set up plant for energy/power generation from industrial and commercial waste and effluent. One of the objects of this notification is that production of biogas (source of renewable energy) from industrial waste and also power generation from biogas. By this notification, Government of India has clarified that biogas is a source of power and hence the contention of AO is totally wrong and without any scientific basis. Biogas is indeed a source of power. Therefore, the assessee is producing steam power from biogas and has rightly claimed deduction u/s 80IA of the Act. A copy of Government of India's Notification F.No.2/2/2005-UICA dated 25th July, 2005 is enclosed at Pages No 138 to 142 of the Continuation No 2 of assessee Paper Book No III. The biogas so produced contains hydrogen sulphide which is

removed by passing it through a scrubber in a sulphur removal plant which includes a reactor and then transported through pipe lines to the boiler plant where biogas is fired in boilers to produce steam power. Steam power is then sold and transported through insulated pipelines to the yeast factory where it is captively consumed. For the AYs 2005-06, 2006-07, 2007-08 & 2008-09, Steam Power generation undertaking at Chiplun and Sandila produced steam power valued, the details of which are given by the assessee and can be verified by the AO. The production of steam power at assessee's Steam Power generation undertaking at Sandila began on 31.01. 2000 and at Chiplun began on 01.03. 2001.

26. The assessee relied on Patent No: JP2005152851 on Power Generation method using Biogas and Biogas Power Generation system, (Copy enclosed at Page No 143 to 157 of the Continuation No 2 of Paper Book No III), wherein the biogas generating system and method of power ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) generation using biogas has been described. This patent is very much relevant and supports the assessee's contention that biogas is a source of power which is used for the generation of steam power. The assessee relied on United States America Patent No. 5423247 on Environmental Steam Energy Storage. A part of the invention is reproduced below:

"This invention relates to an environmental Steam Energy storage method and device which is able to transfer heat originating in heated water in a container for use for many purposes e.g. to transfer such heat to food products in the water or to beverages dissolved in the water, in an efficient manner and at atmospheric pressure. This invention also relates to such a method and device which is able to transfer heat originating in an empty container directly to a water containing food products, in a highly efficient manner and at atmospheric pressure. The present invention further relates to methods and devices to provide an environmental steam energy storage zone to transfer hot steam either firstly, into a heated container containing water or food, including dried vegetables or beverages dissolved in water; or, secondly, into a heated container containing vegetables or animal products, which contain molecular water therein." (Copy enclosed at Page No 158 to 169 of the Continuation No 2 of Paper Book No III)

27. The learned Counsel relied on the order of Delhi Bench of the ITAT in the case of SIAL SBEC Bio Energy Ltd. vs. DCIT (2004) 83 TTJ 866 on the issue of meaning the word power and that steam is a form of energy. He also relied on the case of West Coast Paper Mills Ltd 100 TTJ 833 for the proposition that deduction under Section 80-IA of the Act ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) can be given for generation of steam power which is used for captive consumption. Further, the Mumbai Bench of the ITAT in the case of West Coast Paper Mills Ltd. vs. Jt. CIT (2006) 100 TTJ 833 held that the deduction provided in Section 80-IA are available to an assessee who generates power and consumes the power itself. The only condition that needs to be satisfied for the provisions of Section 80-IA of the Act to be attracted is that the undertaking must generate power. In that case the assessee generated power using two Diesel Generator Sets and it was held that the assessing authority was bound to grant a deduction to the assessee on the profits attributable to the generation of power from the two Diesel

Generator Sets. Relying on judgements of the Apex Court and the Bombay High Court, as well as looking to the intention of the legislature (as construed from the memorandum explain the provisions of the Finance Bill, 1993) to encourage and incentive the generation of power, the ITAT has held that generation of power for captive consumption makes the assessee entitled to claim a deduction under Section 80-IA of the Act. The Hon'ble Madras High Court in case of Tamilnadu Petro Products Ltd. vs. ACIT (2011) 238 CTR 454 held that:

"5. The Division Bench also relied upon the decision of the Hon'ble Supreme Court in CIT v. Tanfac Industries Ltd., S.L.P. (C) No. 18537 of 2009 reported in [2009] 319 ITR (St.) 8 wherein, while applying Section 80IA of the Income-tax Act, the Hon'ble Supreme Court took a view that the value of steam used for captive consumption by the assessee was entitled to be deducted under Section 80 IA of the Act. On behalf of the Revenue, reliance was placed upon the circular of the Central Board of Direct Taxes dated October 3, 2001, and contended that the assessee was not entitled for the deduction. After making a detailed reference to the contents of ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) the said circular, the Division Bench has stated as under in paragraph 13 of the judgment:

"13. A perusal of the above said circular would clearly show that it is also in favour of the assessee. The said circular is very specific that in a case of captive power unit the provision of law is also the same as in the case of the undertaking which generates and distributes the power to any other concern. Further, it is a well-established principle of law that a circular can only be made in consonance with the provisions of the enactment and the same cannot be derogatory to the purport sought to be achieved. Hence, we are of the opinion that the circular relied upon by the learned counsel for the Revenue is in fact in favour of the assessee and, therefore, the said contention also cannot be accepted.

6. Mr. K. Subramanian, learned standing counsel for the respondent, would, however, contend that the expression "derived from" should be given restricted meaning in which event the claim of the appellant cannot be countenanced. According to the learned standing counsel, since the business of the appellant is manufacture of petro products and generation of electricity is not its business, it cannot be held that whatever profit earned, even notional profit, by virtue of captive consumption, cannot be construed as profit earned from and out of the income derived from the business undertaking."

7. In our considered opinion, the said contention can have no application to the case on hand. In as much as we dealt with the issue in the light of S.80IA and in particular sub-section (4) of the said section which ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) provides for the benefit even in respect of electricity generation plant established by the assessee and the income derived from such enterprise of the assessee, it will have to be held that the assessee fully complied with the requirements prescribed under S. 80-IA in order

to avail of the benefits provided therein. Therefore, the contention based on the interpretation of the expression "derived from" can have no application to the case where the provisions of S. 80-IA get attracted." (emphasis supplied)

28. A similar view was taken by the Hon'ble Madras High Court in case of CIT vs. TANFAC Industries Ltd in Tax Case (A) No.1773 of 2008 regarding the eligibility to claim a deduction u/s 80IA of the Act for the sale of steam to its sister concern. This judgment was upheld by the Hon'ble Supreme Court (2010) 319 ITR (St) 8. The Hon'ble Madras High Court in the Tax case (Appeal) Nos. 68 to 70 of 2010 of CIT vs. Thiagarajar Mills Ltd. it was held that:

"9. Therefore, there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the respondent/assessee to derived profit and gains by working out the cost of such consumption of power in as much as the assessee is able to save to that extent which would certainly be covered by Section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting of its own power plant, we do not find any lack of merit in the claim of the respondent/Assessee when it claimed by relying upon Section 80-IA(1) of the Income Tax Act by way of deduction of the value of such units of power consumed by its own plant by way of profits and gains for the relevant assessment years.

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10. Hence the contention of the learned counsel for the Revenue has no legal basis. It is a well settled principal of law that court while interpreting the provision will have to see the object of the enactment and its provisions. Hence, we are of the opinion that the interpretation sought to be made by the Revenue would be fact frustrate the vary purpose for which for which the benefit is provided in the said provision and therefore the same cannot be countenanced.

11. In this context, we find that a decision of the Hon'ble the Supreme Court in CIT v. TANFAC INDUSTRIES LTD. S.L.P. (C) No.18537 OF 2009 reported in 319 ITR (Statutes),8, fully support the stand of the assessee. That was also a case where while applying Section 80-IA of the Income Tax Act, the Hon'ble the Supreme Court took the view that the value of steam used for captive consumption by the assessee was entitled to be deducted under Section 80-IA of the Act.

12. The learned counsel for the Revenue has also submitted that as per the Circular of the Central Board of Direct Taxes dated 03.10.2001 the assessee is not entitled to the deductions. In order to appreciate the above said contention, the relevant portions of the said Circular is extracted here under:-

"2. I am directed to say that the Board examined the above matter and are of the view that if an undertaking, which is set up in any part of India for the generation or generation and distribution of power, begins to generate power at any time during the period beginning on the 1st day of April, 1993 ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) and ending on the 31st day of March, 2006, will be eligible for the benefit of deduction u/s 80-IA. In case of a captive power unit, the provisions of law is also the same.

13. There may be a case where a captive power plant is set up by an undertaking which is different from the undertaking making use of the power generated. As long as the two undertakings are distinct and separate and there is an element of commercial profit and gains by the power generating undertaking from the Industrial user, the provisions of the Act with reference to the benefit of deduction under Section 80-IA to such said undertaking, would be available, within the framework of law and subject to the following:-

i) The tax holiday provisions under Section 80-IA came into effect from the date such an undertaking begins to generate power. In a captive power plant, the date of generation may require determination by the Assessing Officer with reference to initial date on which such captive power plant starts generation.

ii) Where a captive power plant is merely hived off as a separate entity and not sold to a third party, owing to the close connection between the power generating undertaking and its industrial user undertaking, the transactions would require examination at the level of Assessing Officer to ensure that they are at arms' length and that the provisions sub-section (8) of Section 80-IA are not attracted adversely.

iii) Any grant of deduction under Section 80-IA of the Income Tax Act, 1961 should not be taken to ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) legitimate something not permissible under the provisions of the Electricity Supply Act and related laws of various states and union.

iv) Where an undertaking generating captive power for the exclusive use of another industrial undertaking claims the benefit of deduction under Section 80-IA, the industrial user undertaking will not be eligible for claiming similar deduction in respect of the aforesaid power generating plant.

Further, the user undertaking should also not debit the expenditure incurred by the captive power generating undertaking in its own profit and loss a/c."

13. A perusal of the above said Circular would clearly show that it is also in favour of the assessee. The said Circular is very specific that in a case of Captive power unit the provision of law is also the same as in the case of the undertaking which generates and distribute the power to any other

concern. Further, it is a well established principle of law that a Circular can only be made in consonance with the provisions of the enactment and the same cannot be derogatory to the purport sought to be achieved. Hence we are of the opinion that the Circular relied upon by the learned counsel for the Revenue is in fact in favour the assessee and therefore the said contention also cannot be accepted." (emphasis supplied) In the case of Prabhu Spinning Mills Pvt. Ltd. vs. DCIT (2012) 31 CCH 277 the ITAT held that:

"18. In so far as the second issue regarding captive consumption is concerned, it is, admittedly, covered ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) by the decision of the Hon'ble Madras High Court rendered in the case of CIT vs Thiagarajar Mills Ltd in Tax Case (Appeal) Nos. 68 to 70 of 2010, in favour of the assessee. Paragraphs 8 to 11 of the decision are reproduced herein below: The contention that only whatever power generated from the sale to an outsider or the Electricity Board and the profit or gain derived by such sale alone can be taken as profit or gains derived by the assessee as mentioned in Section 80-IA(1) of the Income-tax Act, has been rejected by the Tribunal in the order impugned. In our considered view, the Tribunal was well justified in having rejected such a stand of the tax Act, we are also convinced that what are all to be satisfied in order to be eligible for the deduction as provided under sub-section (1) of section 80-IA the assessee should have set up and an undertaking or an enterprise and from and out of such an undertaking or an enterprise set up, any profit or gain is derived, falling under sub-section covered by sub-section(4) of section 80-IA of the Income-tax Act such profit or gain derived by the assessee can be deducted in its entirety for a period of 10 years starting from the date of functioning of the set up. The contention that profit or gain can be claimed by the assessee only if such profit or gain is derived by the sale of its product or power generated to an outsider cannot be the manner in which the provisions contained in section 80-IA⁹¹ can be interpreted. The expression 'derived' used in the said section 80-IA in the beginning as well as in the last part of sub-section(4) makes it abundantly clear that such profit or gain could be obtained by one's own consumption of the outcome of any such ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) undertaking or business enterprise as referred to in sub-section(4) of section 80-IA. The dictionary meaning of the expression 'derive' in the New Oxford Dictionary of English states "obtaining something from a specified source." In section 80- IA(1) also no restriction has been imposed as regards the deriving of profit or gain in order to state that such profit or gain derived only through an outside source alone would make eligible for the benefits provided in the said section.

19. Therefore, there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the respondent/ assessee to drive profit and gains by working out the cost of such consumption of power inasmuch as the assessee is able to save to that extent which would certainly be covered by section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting up its own power plant,

we do not find any lack of merit in the claim of the respondent/ assessee when it claimed by relying upon section 80-IA(1) of the Income-tax Act by way of deduction of the value of such units of power consumed by its own plant by way of profit and gains for the relevant assessment years."

West Coast Paper Mills Ltd. vs ACIT [2014] 33 ITR (T) 560 (Mumbai - Trib.) - wherein ITAT, Mumbai held as under:

"The assessee's claim under section 80-IA, with regard to unit No. 6 is that it has installed a power unit in the form of chemical recovery boiler for the generation of steam. This steam is used firstly, to ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) rotate the turbine which generates electrical power for the assessee which is used in the paper manufacturing process and secondly, for drying of the pulp. For the first use, the steam so generated by the chemical recovery boiler has a high temperature and pressure which is then transferred through the inlet to run the turbines. This transforms to electrical energy which is supplied to paper division for running of the machines. The second use of steam is independently using it for evaporating the moisture from the paper product or for drying pulp by the assessee. On these facts, whether it can be held that the said undertaking on a standalone basis has been set-up for generation of power or not within the meaning of section 80-IA(4)(iv). The relevant clause (iv)(a) of section 80-IA(4), reads as under :

"(a) is set up in any part of India for the generation and distribution of power if it begins to generate power at any time during the period beginning on the first day of April 1993 and ending on 31st day of March 2006."

21. Thus, the statute contemplates "generation of power" or "generation and distribution of power". The moot question before us is, whether the steam generated by the assessee, which rotates the turbine for running of machines used for its manufacturing process and also steam alone, is a form of power or not. The case of the learned Commissioner (Appeals) is that the meaning of power as contemplated in the statute is generation of electricity alone, whereas the case of learned counsel before us is that the power is a form of energy which can be electrical, mechanical, thermal or any other form of energy. The Income-tax Act, ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) 1961, does not define the word "power". The New Oxford Dictionary of English defines the word "power" as "energy" that is produced by mechanical, electrical or other means which is used for operating device. Otherwise also, generation of steam is a kind of energy which can be converted into mechanical or electrical energy from which power is generated. To say that the generation of power is only restricted to generation of electricity alone, is too narrow a view. The term "power" encompasses a whole range of energy generated in various forms to run machines, devices, etc."

29. The Mumbai Bench of the Tribunal relying on the decisions in the case of SIAL SBEC Bioenergy Ltd. vs. DCIT (2004) 83 TTJ (Del) 866 held that generation/ production of steam is also a form of

power and the unit of the assessee which is an undertaking set-up for generation of steam for its manufacturing process (i.e. for captive consumption) can be said to be for generation of power.

30. Cooling Power Produced by Ammonia Absorption Refrigeration Plant (AARP). The assessee claimed that the production of Cooling Power from Ammonia Absorption Refrigeration Plant at the assessee's undertaking at Sandila began on 28.02.2002. The assessee produced 3,37,631 Tonnes of Refrigeration of Cooling Power from AARP valued at Rs.53,04,183 at its undertaking at Sandila. The cooling power generation from Ammonia Absorption Refrigeration Plant at the assessee's undertaking at Sandila is a standalone unit and it is in no way connected with the yeast manufacturing factory. This power generation undertaking has separate plant and machinery and it uses separate labour. Even the AO has not negated any of the contentions of the assessee regarding the claim of deduction on this activity u/s 80IA of the Act. Even this is supported by learned Counsel by relying on Patent No. WO 2004094928 issued by World Intellectual Property Organization on Absorption Chiller ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) for Production of Cooling Power from Low Temperature Hot Water wherein the invention relating to production of cooling power from low temperature hot water has been patented. (Copy of the Patent is at Pages No 259 to 264 of the assessee Paper Book No III, Sr. No 10 to 14 after Page 763). This Patent is valid in 96 countries of world including India. The relevant portion of the Patent is as under:

"The transformation of thermal energy into cooling power is a technology known and applied for decades, especially with the combustion of propane and other fuel or with the use of steam, in adsorption chillers, where the working medium was ammonia or lithium bromide etc. However there exists many applications where it is desirable for the production of cooling power, but the available heat source is water with low temperature for example 50 C till 90 C from rejected heat from cooling of internal combustion engines or district heating or solar collectors."

This patent supports the assessee's claim that ammonia absorption plant (AARP) generates cooling power/refrigeration power.

31. For disallowance of the deduction for Cooling Power produced by AARP, the AO has not mentioned any reasons for this power generation activity under section 80 IA of the Act. Hon'ble Madras High Court in the case of CIT vs Geo Industries & Insecticide (I) Pvt. Ltd. (1998) 234 ITR 541 held that when an assessee makes a claim for consideration of an item for deduction during the course of assessment proceedings, it is the duty of the ITO to examine the claim on the merits of the claim. It is the duty of the ITO to determine the correct taxable income and nothing precludes the assessee from making the claim and nothing prevents the ITO from examining the claim on merits of the matter. The CIT(A) allowed the claim of deduction under Section 80IA of the Act for Cooling Power generated from AARP undertaking and further he has discussed the quantum of this claim wherein he held that the per unit cost of Rs 15.71 should ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) be restricted to average power cost during the year in Sandila unit of Rs.5.32 and therefore reduced the claim from Rs.23,31,945 to a loss of Rs.10,44,728. He therefore held that since net result is negative figure or a

loss no deduction would be available to the assessee.

32. The AO also of the view that no "undertakings" was set up and for this he relied on decision of Hon'ble Madras High Court in the case of Madras Machine Tools Manufacturers Ltd vs CIT (1975) 98 ITR 119 for the meaning of the word undertaking. He further held that no separate undertaking was set up by the assessee for generation of power as:

(a) Name in Form 10CCB was Saf Yeast Company Pvt Ltd which is the name of assessee company and it is engaged in production of yeast

(b) Address mentioned is the same as that of assessee for producing yeast.

(c) No separate permission obtained from Central Government or State Government or local authority for carrying on the eligible business as stated in Rule 18BBB.

(d) No mention about business of power generation in Form 3CD and Schedule N of statutory report of auditor.

(e) No separate segmental reporting for power generation business as per AS 17.

(f) No books of accounts maintained for power generation undertaking

(g) No purchase or sales in name of undertaking. H0 does not even have a contra entry against power plant.

(h) Power generation is not the main business of the assessee.

(i) No claim for depreciation at special rates for assets claimed by assessee as allowed under

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Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) section 32(1)(i) for undertaking engaged in generation and distribution of power.

The CIT(A) replied each of the objection of the AO as under: -

(a) There is no need or statutory obligation to have a different name for the power generation undertaking. The address has to be the same as it is situated in the same premises as the yeast producing factory.

(b) In IAC vs Dalmiya Cement 37 ITD 335, the Tribunal held that the manufacture of clinkers by a new plant which is used as raw material for production of cement was a separate industrial unit although both cement and clinker units were located at same place.

(c) As long as unit and activity is independent and identifiable it can be treated as separate industrial unit. CIT(A) relied on Hon'ble Bombay High Court's judgement in Commissioner of Wealth Tax vs. P. Devashayam 236 ITR 885, Kharwar (J.B.) & Sons 163 ITR 394 and Nazeer Cashew Industries 166 ITR 804.

(d) In the assessee's case, the three elements of systematic activity, employment of labour and equipment and production of goods are present and therefore the enterprise could be termed as an undertaking or an industrial undertaking.

(e) There is no fetter against using of power generated for self consumption - Mumbai ITAT in case of West Coast Paper Mills 100 TTJ 833.

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(f) Sub-section 7 of s. 80IA simply says that accounts of eligible undertaking should be audited which has been done for the assessee's power generation undertakings. The audit report is required to be furnished and the assessee has complied with the same. No specific condition for maintaining separate books. CIT(A) relied on judgements of ITAT, Mumbai Bench in IAC vs Fulford India Ltd 34 TTJ 285 and ITAT Delhi Bench in Hindustan Computers Ltd 38 TTJ 222.

(g) On the issue of whether the receipts from the supply of steam would be eligible for benefit under section 80IA. CIT(A) relied on order of ITAT in the case of SIAL SBEC Bio Energy Ltd.

33. In the provisions of Section 80IA(4)(iv) of the Act, there is no requirement that assessee should have an independent undertaking for the generation of power alone. More over in this case, the issue before Hon'ble Madras High Court was in the context of whether that assessee was engaged in the manufacture of lathes, grinders and other heavy machinery and that there was no manufacturing or production of articles or things before 31.5.1958 and hence whether a benefit would be available under Section 84 of the Act. It was held that the benefit of erstwhile Section 84 of the Act could be claimed as from the material available on record and it was established by the assessee that actual production started after 01.04.1958. The said decision relied on by the AO is inapplicable.

34. The assessee submitted Factory Inspector's Certificate in respect of Cooling Power and Steam Power undertakings at Sandila and of Cooling Power generation and Steam Power generation undertakings at Chiplun and that these power generation undertakings are separate and distinct from the yeast manufacturing unit. The power produced in these ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) power generation undertakings are used for captive consumption in the yeast manufacturing unit. The assessee has separate plant and machinery for its Steam Power generation undertaking and Cooling Power generation undertakings which is distinct and separate from the yeast manufacturing unit. In this regard the assessee relied on Factory Inspector's certificates dated 08.11.2006, a copy of which is enclosed. Further this fact has also been appreciated by the AO who in the last few paras of the

remand report stated as under:

"The Assessee has submitted the copy of factory inspector's certificate in respect of cooling power plant and biogas power plant. The certificate reveals that the cooling power plant and biogas power plant is separate from Fresh Baker Yeast and Instant Dry Yeast."

The assessee submitted separate and duly audited Profit and Loss accounts giving the revenues and expenses from such power generation undertakings at Sandila and Chiplun and also furnished Balance Sheets which give details of assets and liabilities of each power generation undertaking. These details are available at pages no 195 to 473 of the assessee Paper book No I. It has been held that if new a industrial unit is established as a part of an existing industrial establishment and if the newly established unit is itself an integrated independent unit in which new plant and machinery is put up and that by these is capable of production of goods independently, the said unit could be classified as newly established undertaking.

35. The assessee has separate plant and machinery, separate labour for each of its power generation undertakings. In the assessee's case, the three elements of systematic activity, employment of labour and equipment and production of goods are present and, therefore, the Cooling Power and Steam Power generation undertakings have been setup for generation of power. The CIT(A) has correctly held so in the ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) assessee's case. Hon'ble Supreme Court in the case of Textile Machinery Corpn. Ltd. vs. CIT [1977] 107 ITR 195 held that in order to be entitled to the benefit under Section 15C of the Act, the following facts have to be established by the assessee, subject always to time-schedule in the Section:

1. Investment of substantial fresh capital in the industrial undertaking set up,
2. Employment of requisite labour therein,
3. Manufacture or production of articles in the said undertaking,
4. Earning of profits clearly attributable to the said new undertaking, and
5. Above all, a separate and distinct identity of the industrial unit set up.

36. Similarly, Hon'ble Gujarat High Court in the case of Gujarat Alkalies & Chemicals Ltd vs CIT (350 ITR 94) while relying on the judgement of Textile Machinery Corpn. Ltd. vs. CIT [1977] 107 ITR 195 further held that so far as the fifth test is concerned i.e. a separate and distinct identity, only because to a certain extent the new undertaking is dependent on the existing unit, will not deprive the new undertaking the status of a separate and distinct identity. It all depends on the nature of the technology and the mechanism of production. In CIT vs. Chanda Diesels 216 ITR 639 (BOM), Hon'ble Bombay High Court examined the meaning of 'Industrial Undertaking' in the context of a claim of section 80HH of the Act and held that if a new industrial unit is established as a part of an

existing industrial establishment and if the newly established unit is itself an integrated independent unit in which new plant and machinery is put up and that by these is capable of production of goods independently, the said unit could be classified as a newly established industrial undertaking for the purpose of deduction under Section 80HH. Hon'ble Madras High Court in another case CWT vs P. Devasahayam 236 ITR 885, interpreted an industrial undertaking as an ITA Nos. 1634-1637&1777-1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) undertaking engaged in the business of generation or distribution of electricity or any other form of power.

37. The AO has taken an objection that the power generation unit is a part of a larger undertaking and assessee's power generation undertakings are not independent unit with a distinct name, address or product and that in various documents filed before various Government authorities, the name and address of the factory is that of "Saf Yeast Co.Pvt. Ltd." and the product manufactured is stated to be yeast. There is no need nor is there any statutory obligation to have a different name and the address obviously has to be the same as the assessee's power generation undertakings are situated in the same premises as the yeast producing factory. The Mumbai Bench of ITAT in the case of West Coast Paper Mills, 100 TTJ 833 observed that Section 80IA of the Act does not speak of the consumption of power and there is no fetter against using the power generated for self consumption. The Bench was of the view that the assessee was eligible for deduction for power generated by the two DG sets, which was used for captive consumption. In taking this view, the Tribunal relied on the decision of the Supreme Court in Textile Machinery Corporation Ltd. vs. CIT regarding exemption under section 15C of the 1922 Act and the Bombay High Court decision in CIT vs Sahney Steel & Press Works (1989) 177 ITR 354.

38. Regarding AO's contention that no separate permission was obtained from Central /State Government/Local Authority for carrying on eligible business, it was argued that as per the provisions of Section 80IA of the Act, there is a mandatory requirement for obtaining approval of Central Government/ Statutory Authority only for those undertakings which fall under clause (i) of Section 80IA(4) of the Act i.e. any enterprise carrying on the business of developing, operating and/or maintaining any infrastructure facility. The assessee claimed deduction of eligible business being generation of power which falls under clause (iv) of Section 80IA(4) of the Act for which there is no requirement in this section ITA Nos. 1634-1637&1777-1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) for power generation undertakings to obtain any permission from Central Government. Further though sub-clause (4) of Rule 18BBB of the Income Tax Rules, 1962 prescribes submission of copy of the agreement, approval or permission, as the case may be, to carry on the activity signed by the Central Government or the State Government or the local authority for carrying on the eligible business, this rule mandates that certificate has to be furnished only where permission should be necessary. The assessee argued that there is no specific approval required for carrying on business of generation of steam power and cooling power and hence it is incorrect for the AO to contend that it did not obtain the requisite permissions. In fact the AO not been able to state what permission was necessary because in fact no such permission was required for undertakings generating steam power and cooling power. The assessee relied on a judgement of Hon'ble Allahabad High Court in the case of CIT vs Hanuman Rice Mills (275 ITR 79), wherein it was held that "Following the decision in CIT v. Sultan and Sons Rice Mill [2005] 272 ITR 181 (All.), it was to be held in the instant case that the Tribunal was legally correct in allowing the assessee's

claim under sections 80J and 80HH. These provisions do not require that the industrial undertaking should be registered under the Factories Act, 1948 to qualify for the deductions under the said provisions."

39. The assessee's contention that the AO erred in taking the recourse to accounting standards (AS) for segment reporting. There is no requirement in the entire Section of 80-IA of the Act for reporting of a separate segment in the Accounts. Accounting Standards are prescribed under the Companies Act. Income tax authorities cannot derive adverse inference merely since the assessee took a view that segment reporting is only required for the manufacture of yeast. Further, the Cooling Power and Steam Power generated by the assessee are captive consumption and hence no separate segment disclosure is required. Further as per the provisions of the Act, for granting a deduction u/s 80IA of the Act only a ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) separate P/ L account and B/S is to be prepared and report from a Chartered Accountant as per Form No 10CCB is also required to be filed and same have been duly filed. The assessee relied on the judgement of the Hon'ble Supreme Court in the case of CIT vs Bongaigaon Refinery and Petrochemical Ltd (349 ITR 352). In this case the AO while framing assessment, under Section 143(3) allowed deduction u/s 80HH and 80I of the Act after examining and being satisfied with the unit-wise profit & loss statement filed by that Assessee. The CIT u/s 263 passed an order holding that the assessee was statutorily obliged to maintain Segregated Accounts for each of the three units unit-wise for claiming deduction under Sections 80HH and 80I of the Act, whereas the assessee had maintained Consolidated Accounts. Against the order of CIT, the matter came by way of appeal to the ITAT, which came to the conclusion that there was no statutory requirement under Section 80HH(5) / 80I(7) of the Act to maintain unit-wise accounts. However, the Tribunal observed that, to put an end to litigation, Bongaigaon Refinery and Petrochemicals Ltd should submit unit-wise audited accounts and claim deduction under Sections 80HH and 80I of the Act. Against the said decision that assessee appealed to the High Court which set aside the order of the Tribunal. An appeal was filed by the department before the Supreme Court. The Supreme Court held that neither Section 80HH nor Section 80I of the Act statutorily obliged the assessee to maintain its accounts unit-wise and that it was open to maintain its accounts in a consolidated form and that unit-wise net profits could be prepared by the Auditors from the Consolidated Books of Accounts and on that basis compute deduction under Section 80HH / 80I of the Act. The judgement squarely applies to the assessee's case.

40. The AO has also sought to deny the deduction u/s 80IA of the Act by stating that there is no mention about business of power generation in Form 3CD and Schedule N of statutory report of the auditor. The assessee stated that Section 80IA of the Act only mandates that a ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) separate report in Form 10CCB is to be furnished by each undertaking or enterprise of the assessee claiming deduction under Section 80-IA of the Act and the same shall be accompanied by a P/L Account and Balance Sheet of the undertaking or enterprise as if the undertaking or the enterprise were a distinct entity. The assessee has duly submitted the report in prescribed form along with separate a Profit and Loss Statement for each power generation undertaking which are at page no 195 to 473 of assessee's Paper book. The AO cannot deny deduction merely on the ground that the business of power generation namely cooling power generation undertakings and steam power

generation undertakings were not mentioned in Form 3CD audit report. Further, that there is no requirement mentioned in Section 80IA of the Act to the effect that the business of power generation should be mentioned in the Form 3CD audit report nor is there any rule under the Act to that effect.

41. The AO also disallowed on the ground that no claim for depreciation at special rates for assets claimed by assessee as allowed under Section 32(1)(i) of the Act for undertaking engaged in generation and distribution of power. The AO noted that the assessee has charged depreciation as per the rates in Appendix 1 on the written down value of various assets, whereas according to him, the assessee should have adopted the rates of depreciation in Appendix 1A both for the rate of depreciation and the method i.e. straight-line method of depreciation. But the facts are that the assessee has adopted the rates of depreciation mentioned in Appendix-1 and charged depreciation on the basis of Written Down Value Method and not under Appendix-1A and SLM method. The assessee has for the first time claimed deduction under Section 80-IA of the Act for the AY 2003-04 at its power generation undertakings at Sandila and computed the W.D.V. in respect of the assets of the eligible undertaking by adopting Appendix-1. The Act and the Rules thereunder have not prescribed any specific format in which the assessee should state the option that is adopted for the purpose of ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) charging depreciation while computing the eligible profits under Section 80IA. In the absence of any such specific form of exercising option, the method adopted by the assessee for charging depreciation while computing the eligible profits is justified. The reliance placed by the assessee on the case of Jindal Steel and Power Ltd vs. ACIT (2007) 106 TTJ 943, wherein it was held that:

"As per second proviso to rule 5(1A), the assessee may instead of the depreciation specified in Appendix 1A on his option be allowed depreciation under sub-rule (1) r/w Appendix I, i.e. on WDV basis if such option was exercised by the assessee before the due date for furnishing the return of income under s. 139(1). It is seen that no particular format or procedure has been laid down in second proviso in relation to disclosure of exercise of option by an assessee."

42. Further, the assessee explained that the AO relied on a decision of P & H High Court in the case of CIT vs Suraj Theatre (274 ITR 558) to support his erroneous contention that captive generation of the electricity is not eligible for investment allowance u/s 32A of the Act. The assessee, in that case was engaged in the business of exhibition of motion pictures and a generator was installed for running a cinema hall and issue before High Court was whether a theatre is an industrial undertaking and whether a generator installed in a theatre is for the purpose of business of generation of electricity or any other form of power. As far as Section 32A(2) of the Act clause b(i) is concerned, the wording of said provision is as under:

"(2) The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following, namely :--

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(c) a new ship or new aircraft acquired after the 31st day of.....;

(d) any new machinery or plant installed after the 31st day of March, 1976,--

(iv) for the purposes of business of generation or distribution of electricity or any other form of power ;

or

(v) in a small-scale industrial undertaking for the purposes of business of manufacture or production of any article or thing ; or

(vi) in any other industrial undertaking for the purposes of

[Provided that nothing contained in clauses (a) and

(b) shall apply in relation to,--"

43. In view of the above, it was explained that it is clear from the said provision that generation of the electricity or any other form of power, it should be for the purpose of doing the business and there is no concept for using the power for captive generation. Another distinguishing feature is that so far as the plant and machinery installed in a theatre is concerned, the mandatory condition as per Section 32A of the Act is that it should be an industrial undertaking. The High Court answered both the issues by holding that theatre is not an industrial undertaking and hence generator installed in the theatre cannot be considered for the purpose of Section 32A of the Act and even otherwise also the generator are not used for the purpose of carrying on business of generation of electricity. Further, assessee relied on order of ITAT in ACIT vs Apollo Tyres Ltd (2013) 33 Taxmann.com 575 (Cochin), wherein it was held that D.G. set power generation units set up for generating power for captive consumption constituted an "undertaking" in terms of sub-section (4)(iv) ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) of Section 80IA of the Act. The relevant portion of the judgement as under:

"27. We shall now take up the appeal numbered as I. T. A. 378/Coch/09. The only issue urged in this appeal by the Revenue is whether the learned Commissioner of Income-tax (Appeals) is justified in holding that the DG power generation units I and II installed by the assessee-company for captive power consumption constituted an "undertaking" in terms of sub-section (4)(iv) of section 80-IA of the Act.

28. The Assessing Officer rejected the claim of deduction under section 80-IA of the Act by holding that the DG power generation units I and II cannot be termed as an "undertaking" for the purpose of section 80-IA of the Act. The learned Commissioner

of Income-tax (Appeals) allowed the claim by following his own order in the immediately preceding year. During the course of hearing, the learned authorised representative brought to our notice that the Tribunal has considered this issue in the assessee's own case in the assessment year 2002- 03 in I. T. A. Nos. 429/Coch/2006 and 377/Coch/2009 and decided the same in favour of the assessee.

29. We notice that the Tribunal has considered an identical issue in the assessee's own case in its order referred supra in paragraphs 89 to 93 and has held that the assessee-company is entitled to deduction under section 80-IA of the Act in respect of the new DG power generation units. Since the decision rendered by the learned Commissioner of ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) Income-tax (Appeals) is in accordance with the decision of the Tribunal, we do not find any reason to interfere with the same."

44. Insofar as the findings of the AO that the Cooling Power and Steam Power undertakings are part of the yeast manufacturing activity of the assessee is incorrect. In the case of Sirpur Paper Mills Ltd.(supra), a similar objection was raised by the Revenue as in that case the steam generated was used in the paper making process. Ground No 6 of the Revenue's Appeal in the Sirpur Paper Mills case was that the steam is directly used in the paper making process and hence the steam producing facility cannot be treated as a separate or independent undertaking. It was held by the Hon'ble Hyderabad Bench of the Tribunal that, "Ultimately the determinative factor would be whether the undertaking is producing a different article or thing or not whether for sale to outsiders or for captive consumption. The steam generated by the two units may be useful in the paper manufacturing process. But even then the question to be asked is whether it is a product which is capable of being sold to outsiders. The answer to this question has to be in the affirmative. The assessee itself may not have sold it to any outsider but the same is capable of being sold to any State Electricity Board or for that matter to any electricity generating unit. In fact, we see no reason why the same cannot be sold to anyone, though the assessee itself may have sold it to an outsider. It has used the entire steam generated either in the papermaking process or has transferred it to the turbine unit to generate electricity. If electricity used for captive consumption can be eligible for ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) deduction, we see no reasons as to why steam which is also a form of power cannot be eligible for such deduction. Thus there is absolutely no force in the contention of the Revenue merely on the basis of its own appreciation about the maintenance of books of account that no separate undertaking exists. The aforesaid discussion rules out objection No 5 as well as Objection No 6 raised by the Revenue."

From the above facts and discussion, it is clear that the very scheme of 80-IA of the Act as also referred and discussed in a catena of judgments was to encourage captive generation of power. There is no bar in the Section on an assessee to produce power at his power division and sell it to its his own manufacturing unit i.e. captive consumption.

45. Further the AO was of the view that the undertaking was formed by transfer of plant and machinery previously used for other business to a power business. But according to CIT(A),

although, the equipment has been installed from FY 1996-97 onwards till FY 2002-03, the assessee had not claimed deduction u/s 80IA of the Act and the deduction has been claimed in current year AY 2003-04 treating the year of commencement as AY 1997-98 and current year as one of the ten years for which deduction is available. It cannot, therefore, be said that old machinery used for any other business earlier has been used to form the new undertaking. A new cooling tower was installed in FY 1996-97 at the assessee's Cooling Power generation undertaking at Sandila for Rs.11,66,810. The percentage of new assets in this undertaking is 96% which is much more than the statutorily prescribed limit of 80%. This undertaking commenced production on 22.3.1997. A new cooling tower was installed in FY 2002-03 at the assessee's Cooling Power generation undertaking at Chiplun for Rs.9,77,640. The percentage of new assets in this undertaking is 97.11% which is much more than the statutorily ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) prescribed limit of 80%. This undertaking commenced production on 2.8.2002. A perusal of Section 80IA of the Act would show that deduction can be claimed for any 10 consecutive years out of 15 years commencing in the AY in which the power generation activity begins. In this regard the assessee relied on Hon'ble Delhi High Court the case of Praveen Soni vs CIT (2011) 241 CTR 542. Cooling Power generation undertaking at Sandila commenced in AY 1997-98 and assessee exercised its option and claimed deduction u/s 80IA of the Act from AY 2003-04 onwards. Similarly, the Cooling Power generation undertaking at Chiplun commenced in AY 2003-04 and the assessee exercised its option and claimed deduction u/s 80IA from AY 2004-05 onwards. At the assessee's Steam Power generation undertaking at Sandila was set up in FY 1999-2000 at a cost of Rs.84 Lacs and commencement of production of steam power was 31.01.2000 with percentage of new assets at 98.38% and therefore was well above the 80% statutory limit. Similarly, the assessee's Steam Power generation undertaking at Chiplun was set up in FY 2000-01 at a cost of Rs. 59.25 Lacs and commencement of production of steam power was 01.03.2001. The percentage of new assets was 96.39% and therefore was well above the 80% statutory limit.

46. The next objection of the AO was that unlike electric power, refrigeration power and steam power cannot be transmitted or traded and assessee had not been able to show any instance of trading in the above two forms of energy. Even if cooling power by way of chilled water is transported it will be transported in the form of water and not energy and hence what is traded is water not power. The assessee explained that the eligible business is defined in sub-section (4). As per sub section (4)(iv)(a) the following business is eligible for deduction u/s 80IA of the Act:

"an undertaking which is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2017."

47. The assessee claimed that it generates Cooling Power and Steam Power which are captively consumed. Further, instead of doing the same work by employing electrical power has chosen to generate and sell cooling power and steam power for captive consumption for the production of yeast. Hon'ble Gujarat High Court in CIT vs. Ahmedabad Mfg. & Calico Printing Co. Ltd. [1986] 162 ITR 760, held that the assessee would be entitled for deduction under section 80-I of the Act

irrespective of the fact whether the product is sold in the open market or is used for consumption in its other plant or units; such product should be taken at market price for the purpose of allowing deduction under section 80-I. The assessee also relied the decision of Jaipur ITAT in the case of Maharaja Shree Umaid Mills Ltd. 120 TTJ 711 (Jaipur) wherein it was held as under:-

"There is little room for any doubt that scientifically in general parlance, 'production of steam', and 'generation of steam' or for that matter, 'production of electricity' and 'generation of electricity', shall have the same meaning whichever of the two be the item under consideration. In this regard, the assessee had also referred to the definition of word 'generate' under section 2(29) of the Electricity Act, 2003 as per which 'generate' means to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supplier to be so given. The Assessing Officer had tried to point out the intention of the Legislature by referring to section 80-IA(4)(iv)(b) to infer that its intention is to provide benefit to the generation of electricity only, since in the sub-clause (b) transmission and distribution lines are mentioned which could be of electricity only. However, the submission of the assessee in this regard was ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) appropriate that sub-clauses (a), (b) and (c) of section 80-IA(4)(iv) provide for deduction in the cases of three types of undertakings, viz., the first which is engaged in generation or generation and distribution of power; the second, which starts transmission or distribution lines; and the third, which undertakes substantial renovation and modernization of the existing network of transmission or distribution lines. All these three clauses deal with the three different categories of the undertakings. These three types of undertakings referred to in the said sub-clauses (a), (b) and (c) are different and independent of each other. Thus, while dealing with one sub-clause, inference need not and cannot be drawn from the other sub-clause. On a perusal of those provisions, the plea of the assessee was correct that its case fell in sub-clause

(a) itself and the legislative intent inferred by the Assessing Officer with reference to sub-clause (b) was superfluous, just like there are transmission or distribution lines for electricity there are transmission and distribution lines for steam too. Therefore, there was no basis whatsoever for drawing distinction between the two or a room for any confusion between the two propositions. 'Power' and 'energy' are synonymous, which can be in several types and forms, be it heat, which is steam or mechanical or electrical, wind or be it thermal. If the intent of the Legislature remains to restore the application of the benefit of deduction under section 80-IA to generation of electricity only, it would have been specifically so worded by using the connotation 'electrical power' only rather than the connotation 'power' omnibus. Thus, there is no doubt that like ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) electricity, steam is also a form of power. In the aforesaid circumstances, the decision arrived at by the Commissioner (Appeals) that the assessee was in the business of generation of power and that the steam so generated by the industrial undertaking and receipt from the business of industrial

undertaking was within the meaning of section 80-IA was correct.

In the result, the revenue's appeal was to be dismissed."

48. In view of the above, it was explained that Section 80IA(8) of the Act provides that in case of captive consumption, the market value of the goods and services should be adopted for the purpose of calculation. The computation of the profit of the eligible unit was done taking the market value of the product. For this assessee relied on ITAT, Chennai Bench in the case of Sri Velayudhaswamy Spinning Mills Pvt Ltd vs. DCIT [12 ITR(T) 353] wherein it is held that :

Whether expression 'market value' used in section 80-IA(8) means value determined by market forces - Held, yes - Whether, in instant case, market forces would come into picture only when assessee bought power from State Electricity Board like any other consumer - Held, yes - Whether since price paid by assessee was Rs. 3.50 per unit, it had to be taken into account while computing amount of eligible profit available for deduction under section 80-IA - Held, Yes"

49. The assessee relied on following decisions wherein it was held that Captive consumption power generated is eligible for deduction u/s 80-IA ;

i) CIT vs. TANFAC Industries Limited Tax Case No.1773 of 2008 wherein it was held by Hon'ble ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) Madras High Court that Steam generated and consumed captively would be eligible for deduction u/s 80IA. This judgment was upheld by the Hon'ble Supreme Court as reported in (2010) 319 ITR (St) 8.

ii) In the case of West Coast Paper Mills Ltd. vs. ACIT (2014) 52 Taxmann.com 268 the ITAT held that:

"As the Assessing Officer put it if the assessee has not realized any revenue by selling the power to outsiders, can the assessee be held to be entitled for deduction under section 80IA of the Act? the Assessing Officer was of the view that it is only an inter-division transfer and there was no revenue realized by it and consequently there was no derivation of profit or income in the business of industrial undertaking. The questions raised by the Assessing Officer have all been answered by the Supreme Court in the case of Orient Paper Mills Ltd., 176 ITR 110 SC ITAT allowed deduction u/s 80IA for power generated and consumed captively.

III) CIT vs. Thiagarajar Mills Ltd. Tax Case (Appeal) Nos. 68 to 70 of 2010 Madras High Court held:

"9. Therefore, there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the respondent/assessee to derive profit and gains by working out the cost of such

consumption of power in as much as the assessee is able to save to that extent which would certainly be covered by Section ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting of its own power plant, we do not find any lack of merit in the claim of the respondent/Assessee when it claimed by relying upon Section 80-IA(1) of the Income Tax Act by way of deduction of the value of such units of power consumed by its own plant by way of profits and gains for the relevant assessment years.

12. The learned counsel for the Revenue has also submitted that as per the Circular of the Central Board of Direct Taxes dated 03.10.2001 the assessee is not entitled to the deductions. In order to appreciate the above said contention, the relevant portions of the said Circular is extracted here under:-

"2. I am directed to say that the Board examined the above matter and are of the view that if an undertaking, which is set up in any part of India for the generation or generation and distribution of power, begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2006, will be eligible for the benefit of deduction u/s 80-IA. In case of a captive power unit, the provisions of law is also the same.

3. There may be a case where a captive power plant is set up by an undertaking which is different from the undertaking making use of the power generated. As long as the two undertakings are distinct and separate and there is an element of commercial profit and gains by the power generating undertaking from the Industrial user, the provisions ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) of the Act with reference to the benefit of deduction under Section 80-IA to such said undertaking, would be available, within the framework of law and subject to the following:-

i) The tax holiday provisions under Section 80-IA came into effect from the date such an undertaking begins to generate power. In a captive power plant, the date of generation may require determination by the Assessing Officer with reference to initial date on which such captive power plant starts generation.

ii) Where a captive power plant is merely hived off as a separate entity and not sold to a third party, owing to the close connection between the power generating undertaking and its industrial user undertaking, the transactions would require examination at the level of Assessing Officer to ensure that they are at arms' length and that the provisions sub-section (8) of Section 80-IA are not attracted adversely.

iii) Any grant of deduction under Section 80-IA of the Income Tax Act, 1961 should not be taken to legitimate something not permissible under the provisions of the

Electricity Supply Act and related laws of various states and union.

Where an undertaking generating captive power for the exclusive use of another industrial undertaking claims the benefit of deduction under Section 80-IA, the industrial user undertaking will not be eligible for claiming similar deduction in respect of the aforesaid power generating plant. Further, the user undertaking should also not debit the expenditure ITA Nos. 1634-1637&1777-1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) incurred by the captive power generating undertaking in its own profit and loss a/c."

A perusal of the above said Circular would clearly show that it is also in favour of the assessee. The said Circular is very specific that in a case of Captive power unit the provision of law is also the same as in the case of the undertaking which generates and distribute the power to any other concern. Further, it is a well established principle of law that a Circular can only be made in consonance with the provisions of the enactment and the same cannot be derogatory to the purport sought to be achieved. Hence we are of the opinion that the Circular relied upon by the learned counsel for the Revenue is in fact in favour the assessee and therefore the said contention also cannot be accepted."

In case of DCW Ltd. vs. ACIT (2010) 132 TTJ (Mumbai) 442 - it was held that:

"Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings - Assessment year 2003-04 - Assessee claimed deduction under section 80-IA from its captive power plant unit - Assessing Officer allowed assessee's claim - On appeal, Commissioner (Appeals) reduced amount of deduction for following reasons: firstly, assessee had taken into account electricity tax levied by State Government while working out market price of electricity for purpose of section 80-IA(8), secondly, certain amount of indirect expenses was to be allocated to C.P.P. unit for calculating eligible profit under section 80-IA and, thirdly, income from sale of ITA Nos. 1634-1637&1777-1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) sludge and sale of steam was not eligible for deduction under section 80-IA - Whether price charged by assessee while transferring manufactured electricity from C.P.P. unit to its other unit including electricity tax levied by State Electricity Board was price ordinarily prevailing in open market, and, therefore, Commissioner (Appeals) was not justified in disallowing assessee's claim on said ground - Held, yes - Whether as regards second ground, incomes and expenditures which were not directly relatable to industrial unit had to be ignored and, therefore, Commissioner (Appeals) was not justified in allocating indirect expenses not directly relatable to industrial unit of assessee for purpose of computation of its income for deduction under section 80-IA - Held, yes - Whether as regards third ground, sale of sludge did not amount to income derived from industrial undertaking and, therefore, it was not eligible for deduction under section 80-IA - Held, yes - Whether, however, in view of fact that steam produced by assessee from eligible unit was a by- product and income from sale of steam was income derived from industrial undertaking, it was eligible for deduction under section 80-IA - Held, Yes"

In the case of Prabhu Spinning Mills Pvt. Ltd. vs. DCIT reported in (2012) 31 CCH 277 the ITAT held that: "18. In so far as the second issue regarding captive consumption is concerned, it is, admittedly, covered by the decision of the Hon'ble Madras High Court rendered in the case of CIT vs Thiagarajar Mills Ltd in Tax Case (Appeal) Nos. 68 to 70 of ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) 2010, in favour of the assessee. Paragraphs 8 to 11 of the decision are reproduced herein below: The contention that only whatever power generated from the sale to an outsider or the Electricity Board and the profit or gain derived by such sale alone can be taken as profit or gains derived by the assessee as mentioned in Section 80-IA(1) of the Income-tax Act, has been rejected by the Tribunal in the order impugned. In our considered view, the Tribunal was well justified in having rejected such a stand of the tax Act, we are also convinced that what are all to be satisfied in order to be eligible for the deduction as provided under sub-section (1) of section 80-IA the assessee should have set up and an undertaking or an enterprise and from and out of such an undertaking or an enterprise set up, any profit or gain is derived, falling under sub-section covered by sub-section(4) of section 80-IA of the Income-tax Act such profit or gain derived by the assessee can be deducted in its entirety for a period of 10 years starting from the date of functioning of the set up. The contention that profit or gain can be claimed by the assessee only if such profit or gain is derived by the sale of its product or power generated to an outsider cannot be the manner in which the provisions contained in section 80-IA(1) can be interpreted. The expression 'derived' used in the said section 80-IA in the beginning as well as in the last part of sub-section(4) makes it abundantly clear that such profit or gain could be obtained by one's own consumption of the outcome of any such undertaking or business enterprise as referred to in sub-section(4) of section 80-IA. The dictionary meaning of the expression 'derive' in the New ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) Oxford Dictionary of English states "obtaining something from a specified source." In section 80-IA(1) also no restriction has been imposed as regards the deriving of profit or gain in order to state that such profit or gain derived only through an outside source alone would make eligible for the benefits provided in the said section.

19. Therefore, there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the respondent/ assessee to drive profit and gains by working out the cost of such consumption of power inasmuch as the assessee is able to save to that extent which would certainly be covered by section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting up its own power plant, we do not find any lack of merit in the claim of the respondent/ assessee when it claimed by relying upon section 80-IA(1) of the Income-tax Act by way of deduction of the value of such units of power consumed by its own plant by way of profit and gains for the relevant assessment years."

50. The next issue in the appeals of assessee is as regards to the quantum of deduction claimed by assessee and restricted by the CIT(A). The assessee explained that it has submitted certificates from a Chartered Accountant in Form 10CCB as required under sub-section 7 of 80IA for Cooling Power generation and Steam Power generation undertakings at Chiplun and Sandila respectively along with the return of income. It was claimed that copies of Form 10CCB for AY 2005-06 to AY 2008-09 along with Profit and Loss and Balance sheet of each eligible ITA Nos. 1634-1637&1777 -1780/

Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) undertaking is enclosed as part of assessee Paper book No I at Pages no 195 to 473 as follows:

AY Cooling Power Steam Power Cooling Power Ammonia Steam Power Absorption
Chiplun Chiaplun Sandila Sandila Recovery Plant Sandila (Refrigeration power)
2005-06 Pg 195 to 201 Pg 202 to 208 Pg 209 to 215 Pg 216 to 222 Pg 223 to 229
2006-07 Pg 288 to 294 Pg 295 to 301 Pg 302 to 308 Pg 309 to 315 Pg 316 to 322
2007-08 Pg 376 to 382 Pg 390 to 396 Pg 383 to 389 - Pg 397 to 403 2008-09 Pg 446
to 451 Pg 459 to 466 Pg 452 to 458 - Pg 467 to 473

51. The assessee explained the brief facts relating to Deduction Claimed For Generation of Cooling Power that the cost of generating cooling power has been arrived at based on actual cost records maintained and duly audited. Further for office and administrative expenses, these are based on the salary of one administrative staff each for its Cooling power generation undertakings at Chiaplun and Sandila. The cost of each undertaking is recorded location wise in the audited financial statement enclosed along with Form 10CCB as above. As regards the quantum of units produced, the Cooling Power is measured in Tonnes of Refrigeration (TR). Based on the actual Cooling Power Generation the assessee records the Tonnes of refrigeration in the logbook which was not disputed either by the AO or the CIT(A).

52. In view of the above it was explained that as per Section 80IA(8) of the Act, where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes 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 ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services 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 or services as on that date. Since Cooling Power which is generated by the assessee at its undertakings Chiaplun and Sandila is captively consumed by the yeast manufacturing factories and is not sold to any outsider, the assessee in order to arrive at the market value of such goods taken the electricity rate of Maharashtra State Electricity Board and U.P. State Electricity Board as a base and has assigned the notional value of sales. The notional sales value which was lower than rate of electricity as per electricity bill when converted from TR to kw of electricity as shown as under: -

Power is a measure of the Work done divided by the Time taken to do the Work. Thus, when a 'Joule' is the unit of Work, and an 'Hour' is the unit of Time, the unit of Power is Joule/ Hour or Watt.

Power = Work/Time = Joule/Hour = Watt One Ton of Refrigeration (TR) is equal to 11376 Kilo Joules/hour, which is equal to 3025 Kilocalories/hour, which is equal to 3.516 Kilo Watts of Power.

This is a standard rate of conversion of TR to Kw and the same can also be observed from the various research sites as submitted in Annexure 3 Refrigeration Tonnes to kilowatts (kW) conversion calculator from RapidTables.com, where it clearly show that 1 Refrigeration Tonne = 3.5168525 kW (rounded off to 3.52 kW). The Appellant has ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) enclosed RapidTables.com at Page Nos 349 to 352 of Continuation No. 2 of Paper Book No. III which evidences the fact that 1 Tonne of Refrigeration [1TR] = 3.517 kilowatts (kW) of electric power.

53. Thereafter, the assessee applied the rate of Rs.8.17, Rs.8.17, Rs.8.17, Rs. 8.99 respectively per TR for the A.Y. 2005-06, 2006-07, 2007-08, 2008-09 which was lower than rate of electricity as per electricity bill for the Cooling Power generation undertaking at Sandila and the rate of Rs.4.92, Rs.8.17, Rs.8.17, Rs. 8.99 respectively per TR for the A.Y. 2005-06, 2006-07, 2007-08, 2008-09 which was also lower than rate of electricity as per electricity bill for the Cooling Power generation undertaking at Chiplun. The same are as under:-

Cooling Power Generation Undertaking at Sandila AY Price Per Rate per TR at Rate per TR Unit of Kw conversion rate of 1 adopted by the as per U.P. TR = 3.517 Kw Appellant in the Electricity computation of Board deduction Section 80IA in the return 2005-06 Rs.3.61 3.61X 3.517=Rs.12.69 Rs.8.17 2006-07 Rs.3.62 3.62X3.517=Rs.12.73 Rs.8.93 2007-08 Rs.3.92 3.92X3.517=Rs.13.78 Rs.8.17 2008-09 Rs.3.76 3.76X3.517=Rs.13.22 Rs.8.99 Cooling Power Generation Undertaking at Chiplun AY Price Per Rate per TR at Rate per TR Unit of Kw conversion rate of 1 adopted by the as per TR = 3.517 Kw Appellant in the Maharashtra computation of State deduction Section Electricity 80IA in the return Board ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) 2005-06 Rs.3.61 3.61X3.517=Rs.12.69 Rs.8.17 2006-07 Rs.3.62 3.62X3.517=Rs.12.73 Rs.8.17 2007-08 Rs.4.49 4.49X3.517=Rs.15.79 Rs.8.17 2008-09 Rs.4.52 4.52X3.517=Rs.15.89 Rs.8.99

54. Thereafter, the assessee arrived at the net profit of the Cooling Power generation undertakings after deducting from sales price as above, the expenses directly incurred and the common expenses on a pro-rata basis and claimed the deduction for each undertaking as follows:

AY Cooling Power Cooling Power Ammonia Absorption Recovery Plant Chiplun Sandila Sandila (Refrigeration power) 2005-06 Rs.2,03,91,161 Rs.9,46,24,471 Rs.18,17,877 2006-07 Rs.4,43,61,550 Rs.9,39,65,151 Rs.16,47,348 2007-08 Rs.3,84,19,573 Rs.9,74,90,930 -

2008-09 Rs.4,54,17,690 Rs.12,42,10,859 -

The assessee claimed that valuation per TR done by them is less than the State Electricity Board prices. Therefore, the deduction claimed by assessee u/s 80-IA of the Act for generation of cooling power be allowed. But the AO did not allow the

claim for deduction under Section 80IA of the Act and he has in Paras 7.25 to 7.29 of assessment order for AY 2005-06 held without prejudice, that if at any appellate stage the assessee is entitled to deduction u/s 80IA of the Act, deduction should be computed by adopting the net profit rate of consolidated business. The AO did not accept the computation prepared by the assessee on the basis of notional sale and by allocating certain expenses from the accounts and held that profit from production of such energy should be ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) computed at best at net profit rate of consolidated business (including manufacture of yeast) which was 2.75%, 14.97%, 23.13%, 26.41% in AY 2005-06, 2006-07, 2007-08, 2008-09 respectively. Aggrieved, assessee preferred appeal before CIT(A).

55. The CIT(A) in appeal accepted the claim of the assessee and allowed the deduction u/s 80IA for Cooling Power generation undertaking at Sandila. However CIT(A) reduced the quantum of deduction on the ground that in his opinion the rate of conversion of 1 Tonne of Refrigeration equal to 3.52 kW of electricity as adopted by the assessee is much on the higher side and instead the rate of 1 Tonne of Refrigeration equal to 1.02 kW of electricity being rate applicable for modern chilling plant as per an article by one Henry Manczyk, which has been relied by CIT(A). The CIT(A) followed AY 2003-04 and held the conversion value of 1 Tonne of Refrigeration (TR) at 3.52 kW of electric power is on the higher side which has ultimately resulted in higher figure of profit. He referred to an article "Refrigeration Chiller Performance Analysis at Various loads" by Henry Manczyk, Director of Facilities Management, Lau Chester, NY dated April 2003, wherein he stated as per this analysis a modern chilling plant could produce 1 tonne of refrigeration for an average of 1.02 KW of electrical energy. The CIT(A) by adopting 1.02 KW as the rate of conversion rate instead of 3.52 kW adopted by the assessee, converted the tonnage of refrigeration power to electric power in kilowatts (KW) and thereafter applied a rate of Rs 4.63 per KW (being the state Electricity Board's price of electricity at the relevant time) and he computed the profit of the undertaking to which he added the expenses as claimed by the assessee and arrived at the sales value of the undertaking. He held the profit so computed of Rs 2,80,04,904 as being eligible for deduction under Section 80IA instead of deduction claimed by assessee of Rs 3,85,17,595/- for AY 2003-04.

56. The assessee before CIT(A) argued that the data used as above, applies in case where air is not a refrigerant. However in the present ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) case, the refrigerant is air. Conversion Calculator from Rapid Tables.com is applicable, where it clearly show that 1 Tonne of Refrigeration [TR] = 3.5168525 kW (rounded off to 3.52 kW). This is Standard formula for converting 1 TR to KW. Therefore the comparison and reliance on the data in the said article by CIT(A) is totally misplaced. Further the conversion rate of 1 Refrigeration Tonne = 3.5168525 kW is a standard conversion of refrigeration tonnes and is universally recognized as such. This is also evident from report obtained by the assessee from M/s Engineering Services. copy enclosed at Page Nos 73 to 79 of the Continuation No 2 of Paper Book No III. The mathematical derivation of the formula for converting 1 Tonne of Refrigeration i.e. 1 TR = 3.5168525 KW is at Page No 79 of the Continuation No 2 of Paper Book No III. Further copies of websites wherein the conversion formula 1 Refrigeration Tonne = 3.5168525 kW is affirmed is enclosed as Annexure 3 to the note filed during the course of hearing

before us. Further, assessee contended that reliance placed by CIT(A) on the article "Refrigeration Chiller Performance Analysis at Various loads" by Henry Manczyk is not available in public domain and hence it cannot be relied on. Further as can be observed from the table below at the conversion rate as per standard rate of 1 TR = 3.516 Kw the rate per TR as arrived at by the assessee is lower than the price at which the State Electricity Boards have sold electricity:

Cooling Power Generation Undertakings At Sandila AY Price Per Rate per TR at Rate per TR adopted by Unit of Kw conversion rate of the Appellant in the as per UP 1 TR = 3.517 Kw computation of Electricity deduction under Section Board 80IA in the return 2005-06 Rs.3.61 3.61X3.517=12.69 Rs.8.17 2006-07 Rs.3.62 3.62X3.517=12.73 Rs.8.93 2007-08 Rs.3.92 3.92X3.517=13.78 Rs.8.17 ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) 2008-09 Rs.3.76 3.76X3.517=13.22 Rs.8.99 Cooling Power Generation Undertakings At Chiplun AY Price Per Rate per TR at Rate per TR adopted by Unit of Kw conversion rate of the Appellant in the as per 1 TR = 3.517 Kw computation of Maharashtra deduction under Section State 80IA in the return Electricity Board 2005-06 Rs.3.61 3.61X3.517=12.69 Rs.8.17 2006-07 Rs.3.62 3.62X3.517=12.73 Rs.8.17 2007-08 Rs.4.49 4.49X3.517=15.79 Rs.8.17 2008-09 Rs.4.52 4.52X3.517=15.89 Rs.8.99

57. The assessee also placed reliance on the order in the case of Sirpur Paper Mills Ltd. ITA Nos. 425/Hyd/01, 547/Hyd/06, 545/Hyd/06, 963/Hyd/06 vide order dated 18.05.2007, wherein it was held that each unit of steam should be valued at the same price at which the Andhra Pradesh State Electricity Board sold electricity and that the State Electricity Board rates are the true representative of the market rate.

58. The next Deduction claimed for Cooling Power Produced from Ammonia Absorption Recovery Plant (AARP) undertaking at Sandila for the first time in AY 2004-05 and thereafter for AY 2005-06 and AY 2006-

07. CIT(A) in Para 32 of appellate order for AY 2004-05 allowed the claim of deduction of the assessee under Section 80IA of the Act for Cooling Power generated from AARP undertaking. Further in Para 33 he has discussed the quantum of this claim wherein he held that per unit cost of Rs.15.71 should be restricted to average power cost during the year in Sandila Unit of Rs.5.32. Therefore, CIT(A) reduced the claim from Rs.23,31,945 to a loss of Rs. 10,44,728. He held that since net result is negative figure or a loss no deduction would be available.

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59. The assessee before us claimed that for the AARP unit the CIT(A) has considered the conversion rate of 1 TR = 1.02kw by relying on article "Refrigeration Chiller Performance Analysis at Various loads" by Henry Manczyk. The assessee claimed that as the rate claimed of Rs.15.71 is higher than the price at which the U.P. State Electricity Boards have sold electricity which is based on conversion

rate of 1TR = 3.517 Kw which comes to Rs.12.69 and Rs.12.73 per Tonne of Refrigeration respectively for AY 2005-06 and AY 2006-07 respectively. Hence, the claim be restricted per TR based on Electricity Board's rate which comes to Rs Rs.12.69 and Rs.12.73 per Tonne of Refrigeration at the conversion rate of 1 Tonne of refrigeration - 3.516 Kw for AY 2005-06 and AY 2006-07 respectively being lower than the price claimed by the assessee of Rs 15.71 per TR.

60. The next claim of deduction is for generation of Steam Power and for this it was claimed that the cost of generating steam power has been arrived at based on actual cost records maintained and which were duly audited. For office and administrative expenses, the assessee allocated this based on the salary of one administrative staff at each of its steam power generation undertakings at Sandila and Chiplun. The cost of each undertaking is recorded in the location wise in the audited financial statement enclosed along with Form 10CCB. As regards the quantum of units produced, that is based on the meter recording the assessee records the Kilograms of steam generated in the logbook, disputed neither by the AO nor the CIT(A). As per Section 80IA(8) of the Act, where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes 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 or services as on the date of the ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) 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 or services as on that date. Since Steam which is generated at Chiplun and Sandila by the assessee at its Steam Power generation undertakings is captively consumed by the yeast manufacturing factories, the assessee in order to arrive at the market value of such goods taken the electricity rates of Maharashtra State Electricity Board and U.P. State Electricity Board as a base and has assigned the notional value of sales as under. For a few years the notional sales value was lower than price of electricity from state electricity boards as shown below. Further 1 Kg of steam is equivalent to 1 KW of electric power and computed as under:-

Steam Power Generation Undertaking At Sandila AY Price Per Unit of Rate per Unit Kw as per UP adopted by the Electricity Board Appellant in the computation of deduction under Section 80IA in the return 2005-06 Rs.3.61 Rs.2.11 2006-07 Rs.3.62 Rs.2.11 2007-08 Rs.3.92 Rs.5.71 2008-09 Rs.3.76 Rs.5.71 Steam Power Generation Undertaking At Chiplun Unit AY Price Per Unit of Rate per Unit adopted Kw as per by the Appellant in Maharashtra the computation of State Electricity deduction under Board Section 80IA in the return ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) 2005-06 Rs.3.61 Rs.0.82 2006-07 Rs.3.62 Rs.1.08 2007-08 Rs.4.49 Rs.4.34 2008-09 Rs.4.52 Rs.5.71

61. Thereafter, the assessee arrived at the net profit of the steam power generation undertakings after deducting from sales price as above the expenses directly incurred and the common expenses on a pro-rata basis and claimed the deduction for each undertaking as follows:

AY	Steam Power Chiplun	Steam Power Sandila
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2005-06	14,58,745	1,15,90,174
2006-07	47,21,189	1,55,35,607
2007-08	33,54,683	3,57,59,313
2008-09	67,90,153	77,70,175

62. But the AO did not accept the computation prepared on the basis of notional sale and by allocating certain expenses from accounts and held that:

(i) The computation prepared by the Appellant on the basis of notional sale and by allocating certain expenses from considered accounts, some by process of identification as relating to the undertakings and some on an estimate basis. No scientific basis has been provided for these estimates.

(ii) Profit from production of such energy should be computed at best at net profit rate of

consolidated business (including manufacture of yeast) was 2.75%, 14.97%, 23.13%, 26.41% in AY 2005-06, 2006-07, 2007-08, 2008-09.

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63. The CIT(A) followed AY 2003-04 in respect of profits from eligible business being generation of steam power adopting cost of producing steam by conventional boiler. He further held that the assessee has adopted new method of producing steam by using biogas and thereby achieved significant savings by way of cost and that the cost of steam by using a conventional boiler would not seem justified. Thereafter, he held that there is no data furnished either by AO or assessee for the price of steam produced by alternate methods. CIT(A) held that the notional receipts from steam in the profit and loss account should be reduced by 25% to make it appropriate and in AY 2003-04 the CIT(A) computed the deduction under Section 80IA for the steam power generating undertaking at Sandila as follows:

Sales receipt - Rs 87,67,180 Less 25% = Rs 65,75,385 Expenses - Rs 29,64,619 Profit - Rs 36,10,766 Deduction u/s 80 IA - Rs 36,10,766/-

Aggrieved, assessee preferred appeal before Tribunal.

64. The assessee claimed that they have valued each unit (kg) of steam power produced at their undertaking at Sandila at Rs.2.21, Rs.2.11, Rs.5.71, Rs.5.71 for the AYs 2005-06, 2006-07, 2007-08, 2008-09 respectively and valued each unit (kg) of Steam Power produced at their undertaking at Chiplun Rs.0.82, Rs.1.08, Rs.4.34, Rs.5.71 for the AYs 2005-06, 2006-07, 2007-08, 2008-09 respectively. It was argued that a similar objection was taken in the case of Sirpur Paper Mills Ltd. ITA Nos. 425/Hyd/01, 547/Hyd/06, 545/Hyd/06, 963/Hyd/06 vide order dated 18.05.2007 in

which case that assessee was also generating steam which was captively consumed in its paper manufacturing factory. Tribunal's Hyderabad Bench in Para Nos 20 to 26 which is on Page 244 to 247 of the Paper book held that the true representative of the market price can only be the price of A.P. State Electricity Board (APSEB) because they are the major producers of electricity in the country and also since the assessee itself purchases electricity from APSEB. In view ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) of the above, the assessee argued that that at the most the claim of the assessee can be restricted to the rates at which the State Electricity Board sold electricity to the assessee but the arbitrary reduction of 25% of the sales revenue without pointing out any discrepancy or defect in audited profit & loss account and without stating why the electricity rate as per State Electricity Board cannot be considered is not appropriate and that too when for a few years the assessee has adopted a price less than the State Electricity Board prices.

65. The reliance placed by assessee on the order of ITAT, Chennai Bench in the case of Sri Velayudhaswamy Spinning Mills (P.) Ltd vs DCIT [12 ITR(AT) 353] held that -

"Section 80-IA of	the	Income-tax	Act,	1961	-
Deductions - Profits and gains			from infrastructure		
undertakings	-	Assessment	year	2007-08	-

Assessee was a textile manufacturing company - It was having an independent windmill undertaking eligible for deduction under section 80-IA -

Electricity generated by windmill was collected by State Electricity Board from generation point of assessee and later on it was released to assessee whenever required - State Electricity Board took over electricity generated by assessee at rate of Rs. 2.70 per unit - On other hand, State Electricity Board charged a rate of Rs. 3.50 per unit when power was supplied to industrial units including assessee -

Assessee-company claimed deduction under section 80-IA adopting market rate of energy produced at rate of Rs. 3.50 per unit - Assessing Officer took a view that assessee had delivered power to State Electricity Board at rate of Rs.

2.70 per unit, therefore, same should be taken as market price generated by assessee - To that extent ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) quantum of eligible profit of assessee had come down - Whether expression 'market value' used in section 80-IA(8) means value determined by market forces - Held, yes - Whether, in instant case, market forces would come into picture only when assessee bought power from State Electricity Board like any other consumer - Held, yes - Whether since price paid by assessee was Rs. 3.50 per unit, it had to be taken into account while computing amount of eligible profit available for deduction under section 80-IA - Held, yes [In favour of assessee]."

Further, Hon'ble Supreme Court in the case of Thiru Arooran Sugars Ltd vs. CIT (227 ITR 432) held:

"Section 2(1A) of the Income-tax Act, 1961, read with rule 7(2) of the Income-tax Rules, 1962 - Agricultural income - Assessment years 1962-63 to 1967-68 - Whether formula contained in clause (b) of rule 7(2) will apply only in cases where agricultural produce is not ordinarily sold in market in its raw state or after any process applied to it to make it marketable - Held, yes - Whether in order to apply rule 7(2)(a), existence of an open market where buyers and sellers come together to do business is an essential pre-requisite - Held, no - Whether where there is no such open market an estimate of market price will have to be done on a hypothetical basis - Held, yes - Assessee-sugar manufacturer cultivated sugarcane and also purchased sugarcane from other individual cultivators presumably from door steps of cultivators

-Whether, on facts clause (a) to Rule 7(2) applied and price paid by assessee to cultivators should be ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) taken as market price and non-agricultural income had to be arrived at accordingly - Held, yes"

66. Further, assessee also relied on the following judicial decisions wherein it was held that each unit of power should be valued at the same price at which the State Electricity Board sold electricity:

(i) West Coast Paper Mills Ltd. vs. ACIT 33 ITR (T) 560 (Mumbai - Trib.).

Section 80-IA of the Income-tax Act, 1961 -

Deductions - Profits and gains from infrastructure undertakings (Eligible activity/Steam generation) - Assessment year 2005-06 - Whether generation of steam is also a form of power and assessee would be eligible to claim deduction under section 80-IA with regard to its unit set up for generation of steam for its manufacturing process - Held, yes [Para 23] [In favour of assessee] Section 80-IA of the Income-tax Act, 1961 -

Deductions - Profits and gains from infrastructure undertakings (Computation of deduction) -

Assessment years 2002-03 to 2005-06 - Whether transfer of price as contemplated in section 80-IA(8) has to be seen having regard to arm's length condition, i.e., what would be price under uncontrolled transactions in open market - Held, yes

- Whether while computing deduction under section 80-IA market value of supply of electricity by power unit of assessee to paper division of assessee had to be taken at same price at which paper unit had to purchase electricity directly from State Electricity Board - Held, yes - Whether if taxes and duties were part of price at which power/electricity was supplied by State Electricity Board to paper division, then ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) same price was indicator of market value which was fetchable in open market and there was no reason to exclude element of tax and duty from market price of electricity - Held, yes [Para 32] [In favour of assessee]

(ii) Judgement of Hon'ble High Court of Chhattisgarh in the case of CIT vs. Godawari Power & Ispat Ltd (223 Taxman 234) wherein it was held that:

Where assessee had established a Captive Power Plant in State of Chhattisgarh to supply electricity to its steel division, for the purpose of Section 80-IA deduction market value of power supplied by assessee to steel division should be computed considering rate of power charged by Chhattisgarh State Electricity Board for supply of electricity to industrial consumers

(iii) Judgement of Hon'ble Madras High Court in the case of CIT vs Cethar Ltd (228 Taxman 139), wherein it is held as under:-

"In Thiagarajar Mills Ltd. T.C. (A) Nos. 68 to 70 of 2013, dated 7-6-2010, this Court, held that there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the assessee to derive profits and gains by working out the cost of such consumption of power inasmuch as the assessee is able to save to that extent which would certainly be covered by section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting up its own power plant, there is no lack of merit in the ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) claim of the assessee when it claimed by relying upon section 80-IA(1) by way of deduction of the value of such units of power consumed by its own plant by way of profits and gains for the relevant assessment years. [Para 4]"

67. We have heard rival contentions and gone through facts and circumstances of the case. We find that in the assessment orders the AO has stated that the assessee has reported net profit rates for the Assessment Years 2005-06, 2006-07, 2007-08, 2008-09 respectively for manufacturing of yeast @2.75%, 14.97%, 23.13%, 26.41% and that this should be the basis for calculating profits of power generation undertakings. The net profit rates of the assessee's yeast manufacturing business includes the manufacture and sale of yeast and inter-alia, has all expenses such as excise duty, labour, other direct expenses such as cost of raw materials etc. included in it. There is no basis for including all these expenses and the sales revenue on sale of yeast for working out the net profit ratio for power generation undertakings are distinctly different from yeast manufacturing factories. The scheme of Section 80- IA of the Act itself provides for working out the profit on power generation undertaking as a separate industrial undertaking as a stand-alone business dehors any other business. Therefore, there is absolutely no logic in applying the Net Profit rate of the assessee's yeast manufacturing business to the business of generating cooling power and steam power. We have gone through the provision of Section 80IA(5) of the Act, which reads as under:-

"(5) 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 that sub-section for the assessment year immediately ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) 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."

68. Perusal of the above provision shows that for purposes of calculating the deduction under Section 80-IA of the Act, the profits of the eligible business must be worked out as it were the only source of an assessee's income. Therefore, the the AO by applying the net profit percentage of the assessee's yeast manufacturing business for arriving at profits u/s 80-IA in respect of Cooling Power and Steam Power generation undertakings is contrary to Section 80IA(5) of the Act and is therefore baseless and deserves to be set aside. When the assessee has submitted the audited statements duly supported by various records of the power generation undertakings, the same should be taken as correct, subject of course to the verification of the facts. None of these facts have been disputed by the AO.

69. In view of the above discussion and facts of the case, case laws cited of courts, we finally held as under: -

(i) That the assessee has generated steam power from bio-gas,

(ii) Generation of cooling power from cooling towers and

(ii) Cooling Power from Ammonia Absorption Refrigeration Plant These are entitled for deduction under section 80IA of the Act at their plants at Sandila and Chiplun for the AY 2005-06 to 2008-09. We agree with the findings of CIT(A) on the above reasoning recorded. Even, the assessee's power unit is established as part of existing industrial ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) establishment and the newly established unit itself is an integrated independent unit in which new plant and machinery is put up and that why these is capable of production are classified as newly established undertaking in the given facts and circumstances of the case.

70. In regard to quantum of deduction, the assessee has to take the electricity rate of Maharashtra State Electricity Board and U.P. State Electricity Board as a base for computing the rates. The notional sale value is to be converted from TR to KW, the conversion of the Tons of Refrigeration to Kilowatts being the unit of measurement for electric power, it should be taken at 1 Refrigeration Tonne =3.5168525 KW (rounded off to 3.51 KW). However the details can be verified by the AO at the time of giving effect to this order. Accordingly, this inter-connected issue for claim of deduction under section 80IA of the Act is allowed in favour of assessee. This issue of assessee's appeals is allowed and that of the Revenue's is dismissed.

71. The next common issue in these appeals of assessee is as regards to disallowance of distribution expenses. It is noticed that the issue is common in all the years of the assessee's appeals and the facts are exactly identical. The ground raised by assessee in ITA No. 1634/Mum/2014 for AY 2005-06 i.e. Ground No.3 reads as under: -

"3. The CIT(A) erred in confirming the disallowance of distribution expenses amounting to 25,05,196/- on an ad-hoc basis ignoring the fact that these expenses are incurred wholly and exclusively for the purpose of business. Further, this disallowance is bad in law and must be quashed because no incriminating material was found during the search."

72. At the outset, the learned Counsel for the assessee stated that the quantum of expenditure incurred by assessee is very high and going by ITA Nos. 1634-1637&1777 -1780/ Mum/2016 Saf Yeast Company Private Limited (A.Y. 05-06 to 08-09) the disallowance restricted by the AO and confirmed by CIT(A) is very small amount and due to smallness of amount, the assessee is not interested in prosecuting this issue for all the years. However, the learned Counsel stated that this should not be taken as precedent for any other year and this concession cannot be used against assessee in any other proceedings. On this the learned CIT DR has not objected.

73. As the learned counsel conceded the position, as recorded above, we dismiss this common issue of assessee's appeal.

74. In the result, the appeals of Revenue are dismissed and the appeals of assessee are partly allowed.

Order pronounced in the open court on 24-11-2017.

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 24-11-2017
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

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

BY ORDER,

Assistant Registrar
ITAT, MUMBAI