



4. *The CIT-(A) erred in confirming the AO's decision of levying interest u/s 234D of the Act.*

3. Brief facts of the case are that the Assessing Officer has passed order u/s 143(3) on 21/12/2010 by making disallowance under section 14 A read with rule 8D. Subsequently, the Assessing Officer has noticed from the accounts filed during the course of assessment proceedings u/s 143(3) that the assessee has taken the profits on sale of assets and investments directly to the balance sheet under "Reserves & Surplus" without routing it through the P&L account. The Assessing Officer was of the opinion that the profits on sale of assets and investments by not taking into P&L account has reduced the book profit to the extent of Rs. 1,29,97,997/- for the purpose of section 115 JB. As a result the tax liability under 115 JB was reduced. The Assessing Officer has also made an observation that the book profits under section 115 JB were not worked out by the assessee as per the provisions of Part-II and Part-III of Schedule-VI of Companies Act, 1956. Since it is a mistake apparent from records, the Assessing Officer has resorted to rectify the mistake by invoking the provisions u/s 154 of the Act.

4. Before the learned CIT(A) it was submitted that the issue as to whether the profits from sale of assets and investments should be routed through P&L account or can be taken directly to balance-sheet, is a debatable one therefore, it cannot be rectified under section 154 of the Act. In support of this claim assessee relied on the decisions, including the decision of the Honorable High Court in the case of Forever Diamonds Private Limited and the decision of the Supreme Court in the case of Apollo Tyres Ltd, 255 ITR 273.

5. Considering the above learned CIT(A) has held under:

*"I have carefully considered the submissions of the learned AR in the light of the facts of the case. As seen from the facts of the case the book profits under section 115 JB had to be worked out as per the provisions of Part-II and Part-III of Schedule-VI of Companies*

*Act, 1956. The AO has elaborately discussed how the appellant has failed to adhere to the laid down procedure under the above provisions while working out book profits for the purpose of 115 JB. Since it is the laid down procedure to be followed while working out the profits and when the appellant fails to follow such procedure which the AO notices in due course, in my considered opinion, the AO can rectify the mistake under section 154 of the Act treating it as a mistake apparent from records. I am fully convinced that not bringing the profits out of sale of assets and investments into the P&L account is definitely a mistake apparent from record. I also hold that there is no ambiguity and also there is no possibility of two opinions as to whether such profits should be brought to P&L account or not. The applicability of the decision given by the Honorable Supreme Court in the case of Apollo Tyres Ltd (supra) relied on by the appellant is on a different context and not relevant to the present issue on hand. The ratio of the decision of the Honorable Supreme Court is on the possibilities of disturbing the book profit arrived at as per the provisions of Part-II and Part-III of Schedule-VI of Companies Act, 1956. In view of this I confirm the action of the AO in invoking the section 154 of the Act"*

Aggrieved, the assessee is in appeal before us.

5. We have heard both the counsel and perused the records. Learned counsel of the assessee submitted that issue on merits is covered in favour of the assessee by Tribunal's decision in assessee's own case on similar issue. He submitted that in the said order the Tribunal has duly followed Hon'ble Jurisdictional High Court decision on the same issue. He further submitted that when the issue is covered in favour of the assessee up on merit itself there cannot be any justification of invocation of section 154 of the IT Act.

6. Per Contra learned Departmental Representative submitted that the accounts prepared by the assessee are not in accordance with Schedule VI of the Companies Act. He submitted that assessee while preparing the accounts has not followed the basic principles of accountancy. He submitted that when an asset is sold the sale proceeds are debited to cash /bank and the

corresponding credit is given to the written down value of the asset and the difference being credited to profit on sale of asset/ debited to loss on sale of asset as the case may be. He further submitted that the profit on sale of asset after being brought into the books in the profit and loss account can thereafter be appropriated to the reserve account. Hence, he submitted that the assessee by directly crediting the profits to the reserve account has grossly violated the accounting principles and the corresponding accounting standards. He submitted that the Companies Act provides that account of the company has to be prepared following the Accounting Standards. Hence, he submitted that the accounts prepared by the assessee are not in accordance with Schedule VI of the Companies Act. Hence, he submitted that the action of the authorities below should be upheld.

7. We have considered the submissions and perused the records. We find that on the issue of Ld CIT-A's direction to the Assessing Officer to increase the book profit by the amount of capital gain not exempt, which was not credited to profit and loss account but was directly credited to capital reserves, this Tribunal in assessee's own case for assessment year 2006 -07 in ITA No. 6291/Mum/2010, vide order dated 4/8/2017, has decided the issue in favour of assessee by noting as under

*"11. We have heard the rival submissions perused the orders of the authorities below and the decisions relied upon. We find that issue has been elaborately considered by the Coordinate Bench of this Tribunal in case of Forever Diamonds Private Limited v. DCIT in ITA No. 5720/Mum/2011 dated 23.01.2013 wherein the Coordinate Bench taking note of various decisions of the Jurisdictional High Court including the decision in the case of CIT v. Akshay Textile Trading (supra) wherein it was held that capital gains not shown in the profit and loss account under the company account cannot be added while computing the book profits."*

Upon careful consideration, we find that the submissions of the learned Departmental Representative cannot be summarily dismissed. However, we note that similar issue has been decided upon merits in favour of the assessee . Furthermore when the issue on merits is claimed to be covered in favour of the assessee, there cannot be any occasion for the Assessing Officer making a rectification in his order under section 154 of the IT Act for rectifying mistakes apparent from record. Furthermore we note that the above decision of the ITAT was based upon a decision of Hon'ble Jurisdictional High Court on similar issue. Hence, when there are decisions on merits in favour of the assessee, it cannot be said that there was a mistake apparent from record in the order of the Assessing Officer which was in accordance with those decisions. Hence, admittedly the issue becomes debatable and in such situation the rectification of mistake under section 154 of the IT Act is not sustainable.

8. Accordingly in the background of aforesaid discussions and precedent, we said aside the orders of authorities below and decide the issue in favour of assessee.

9. In the result this appeal by the assessee stands allowed

Order pronounced in the open court on this day of 13<sup>th</sup> March, 2018.

**Sd/-**  
**(Ram Lal Negi)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Shamim Yahya)**  
**ACCOUNTANT MEMBER**

Mumbai, Dated 13<sup>th</sup> March, 2018.  
SA

**Copy of the Order forwarded to :**

1. The Appellant.
2. The Respondent.
3. The CIT(A),
4. The CIT
5. The DR, 'D' Bench

BY ORDER

//True Copy//

(Assistant Registrar)  
Income Tax Appellate Tribunal, Mumbai