IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.A. No.5124/DEL/2011
Assessment Year: 2008-09

Montage Enterprises Pvt. Ltd., C-53, Shashi Garden, Near Pocket-V, Gurudwara, Mayur Vihar, Phase-I, New Delhi.	v.	DCIT, Central Circle-18, New Delhi.
TAN/PAN: AACCM8173H		
(Appellant)		(Respondent)

ITA No.92/DEL/2012
Assessment Year: 2008-09

ACIT, Central Circle-18, New Delhi.	v.	Montage Enterprises Pvt. Ltd., C-53, Shashi Garden, Near Pocket-V, Gurudwara, Mayur Vihar, Phase-I, New Delhi.
TAN/PAN: AACCM8173H		
(Appellant)		(Respondent)

ITA No.144/Del/2013
Assessment Year : 2009-10

Montage Enterprises Pvt. Ltd., C-53, Shashi Garden, Near Pocket-V, Gurudwara, Mayur Vihar, Phase-I, New Delhi.	v.	ACIT, Central Circle-18, New Delhi.
TAN/PAN: AACCM8173H		
(Appellant)		(Respondent)

ITA No.475/Del/2013
Assessment Year : 2009-10

DCIT, Central Circle-18, New Delhi.	v.	Montage Enterprises Pvt. Ltd., C-53, Shashi Garden, Near Pocket-V, Gurudwara, Mayur Vihar, Phase-I, New Delhi.
TAN/PAN: AACCM8173H		
(Appellant)		(Respondent)

ITA No.4426/Del/2013
Assessment Year : 2010-11

Montage Enterprises Pvt. Ltd., C-53, Shashi Garden, Near Pocket-V, Gurudwara, Mayur Vihar, Phase-I, New Delhi.	v.	ACIT, Central Circle-18, New Delhi.
TAN/PAN: AACCM8173H		
(Appellant)		(Respondent)

ITA No.4906/Del/2013
Assessment Year : 2010-11

DCIT, Central Circle-18, New Delhi.	v.	Montage Enterprises Pvt. Ltd., C-53, Shashi Garden, Near Pocket-V, Gurudwara, Mayur Vihar, Phase-I, New Delhi.
TAN/PAN: AACCM8173H		
(Appellant)		(Respondent)

Appellant by:	Shri Atiq Ahmed, Sr.D.R.		
Respondent by:	Shri Ashwani Kr. Aditya Kr., FCA & Shri Rahul Chaurasia, CA		
Date of hearing:	01	05	2018
Date of pronouncement:	29	06	2018

O R D E R

PER AMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid appeals have been filed by the assessee as well as by the Revenue against separate impugned orders dated:-07.10.2011 for the Assessment Year 2008-09; 26.11.2012 for the Assessment Year 2009-10; 10.06.2013 for the Assessment Year 2010-11, passed by ld. CIT (Appeals)-III, New Delhi for the quantum of assessment passed u/s.143(3). Since, the issues involved in all the appeals are common arising out of identical set of facts, therefore, same were heard together and are being disposed of by way of this consolidated order.

2. We will first take up the Cross Appeals for the Assessment Year 2008-09 and the finding given therein on those issues would apply *mutatis mutandis* in the appeal for the Assessment Years 2009-10 & 2010-11 also. In the assessee's appeal, the following grounds have been raised:-

> *1. On the facts and in the circumstances of the case, the lower authority has erred in holding that the Royalty Payment of Rs.6,00,00,000/- (Rupees Six Crores Only) crores pertains to Jammu Unit.*
>
> *2. On the facts and in the circumstances of the case, the lower authority has erred in holding that the assessee is not entitled to the exclusion of refund of Excise duty (Self Cenvat Credit) amounting to Rs. 1,31,01,284/-, being Capital in nature, in the determination of total income u/s 115JB of the Income Tax Act, 1961."*

Whereas in the Revenue's appeal, following grounds have been raised:-

> *"1. On the faces and in the circumstances of the case, the C1T(A) has erred in law and on facts in deleting the disallowance of claim for deduction of Rs. 1,31,01,284/- u/s 80-IB on account of Self Cenvat Credit availment.*
>
> *2. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in holding the Excise duty refund is a capital receipt in nature and not liable to tax.*
>
> *3.The order of the learned CIT(A) is erroneous and is not tenable on facts and in law.*
>
> *4. The order of the Ld. CIT (A) is erroneous and is not tenable on facts and in law. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal."*

3. Facts in brief are that assessee-company is engaged in the business of manufacturing and trading of flexible packaging material in roll and pouch form. During the year under consideration, the total sales and job work receipts were at Rs.247.02 crore. The assessee was having three units; one at Malanpur; second at Jammu; and third at NOIDA. At Malanpur unit, the assessee company has acquired the usage of the existing production unit of M/s. Flex Industries Ltd. by paying licence fee of Rs.9,60,00,000/-. The Assessing Officer from the perusal of profit & loss account noted that income and expense details of the Corporate unit shows loss of Rs.11,52,42,759/- on account of various expenses which

includes license fee, royalty and factory rent of Rs.6,18,00,312/-. The Assessing Officer noted that in the Assessment Year 2006-07, passed u/s.153A r.w.s. 143(3) on 31.12.2007, it was held that license fee/royalty paid to one Shri Ashok Chaturvedi was held to be expenditure of only Jammu unit on the ground that improved sachet/pouches were produced only at Jammu Unit and there was no rationale for shifting the expenses of Rs.6 crore relating to production of Jammu unit to the Corporate unit, because there was no production in the Corporate unit. It was noted that assessee did not manufacture the kind of pouch for which royalty payment agreement has been made to Shri Ashok Chaturvedi in any other unit except at Jammu and very production and existence of this unit depends upon the technology received in lieu of the payment of royalty to Shri Ashok Chaturvedi. Accordingly, it was held that amount of royalty paid and debited to the Corporate Unit was held to be considered as actual expenditure incurred at Jammu unit. Accordingly, the claim of the assessee for allocation of these expenses were also disallowed. Assessing Officer reduced the deduction claimed u/s.80IB of Rs.6 crores on the profits of Jammu Unit.

4. Before the ld. CIT (A), brief and background with regard to payment of such license fee/royalty was stated as under by the assessee:-

"License fees paid is for acquiring technical know-how for

manufacturing of improved sachet pouches with the additional gusset either on one or both sides of Sachet Pouch with a scoring line in the form of laser cut is not exclusively for Jammu Unit but for the company as a whole with a right to produce such product anywhere in India or abroad.

- *That, the sum of Rs.6.00 crores had been treated by Ld. AO as an expenditure of Jammu unit instead of Company as a whole and allocable on all the units of the assessee. The basis of doing so as mentioned by the Ld. AO is the reason taken in the Asst. Year 2006-07 stating that the expenditure relates to Jammu Unit.*

- *It was further submitted that in the Assessment Year 2005-06, the appellant entered into an agreement with Mr. Ashok Chaturvedi (hereinafter referred to as AC) for acquiring technical know-how for the manufacture of "improved Sachet Pouches with additional gusset either on one or both the sides of the Sachet Pouch with a scoring line in the form of a laser cut". A copy of such agreement is placed at Page No. 44 to 48 of the Paper Book.*

- *That, under the terms of the agreement, such technical know-how can be used for the manufacture of improved Sachet Pouches in all parts of India including the plant located at Jammu. This is clear from paragraph 2.1 of the said agreement. Under paragraph 2.2 of the said agreement, the appellant is also entitled to sub-license such know-how and technology to other parties in India or abroad.*

- *As per appellant the licence is not exclusively for Jammu Unit. The agreement between the licensor and the Assessee is dated 14.07.2004 and in the first page of the agreement, the Regd. Office of Montage Enterprises Pvt. Ltd. is mentioned. Hence it is not entered by Jammu Unit but by the Company as a whole as right to commercially use this licence is not confined to Jammu Unit alone but to all the Units of appellant in any part of this country.*

➢ *That, the agreement has to be read in totality and not in isolation. It is a well known legal position of law, substance over legal form. Hence the entire agreement has to be read to understand the true nature of transaction.*

➢ *That, this view of the assessee that it pertains to the entire company and not exclusively for Jammu Unit is further strengthened with the following evidences:-*

1. *The copies of the bills of licence fee paid is attached at Page No. 31 to 43 shows the address of Corporate Office of the assessee.*

2. *From the perusal of the Bill, it can be observed that Service Tax @12% + Cess has been charged by the licensor and paid by the assessee whereas in the State of Jammu & Kashmir, Service Tax is not applicable.*

Hence if it was exclusively for Jammu Unit, the appellant need not have to pay the Service Tax.

The Notification of Service Tax about the Non-applicability in the state of Jammu & Kashmir is attached at Page No.50- 51of the Paper Book.

3. All cheques paid has been issued from the bank of corporate division for which the Bank Account is debited in corporate division and not at Jammu Unit.

As per appellant, in view of such factual position, the conclusion of Ld AO on the basis of technicality involved in assessment year 2005-06 is highly unjustified and is therefore requested to delete it from Jammu unit and give due directions to treat it expenses of corporate/ head office to be allocated to all unit of the appellant."

5. Ld. CIT (A) following the reasoning given by the ld. CIT (A) in the Assessment Year 2006-07, decided the issue against

the assessee.

6. Before us, learned counsel submitted that this issue now stands covered in favour of the assessee. On the other hand, learned DR strongly relied upon the order of the ld. CIT (A).

7. On perusal of material on record and findings given in the impugned order, we find that this precise issue whether the royalty expenses pertain to Jammu unit or not has been dealt by the Tribunal in assessee's own case for the Assessment Year 2006-07. The relevant finding on this issue reads as under:-

> "*4.2 The Ld. AR submitted that the Ld. CIT (A) has allowed the netting of the amount to be considered while determining the deduction under section 80 IB in respect of the Jammu unit. The Ld.AR placed is reliance on the decision of Hon'ble Bombay High Court in the case of Zandu Pharmaceuticals Works Ltd. Vs. CIT reported in 259 CTR 253.*
>
> *5. The revenue in its appeal has raised that the netting of royalty income as directed by the Ld. CIT (A) is not proper.*
>
> *As both these grounds of assessee as well as revenue are interlinked with each other, they are disposed of together for the sake of convenience.*
>
> *5.1. There is no dispute that the assessee is entitled to the benefit of the provisions of section 80 IB of the act which provides that, where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, there shall be allowed, in computing the total income of the assessee, a deduction from such profits and gains, an amount specified therein. Further*

while computing the profits and gains of the concerned undertaking, only expenses relating thereto can be deducted. In other words the expenses must be incurred, for and on behalf of the concerned undertaking. The expenses attributable to any other unit or the head office expenses which have no relevance to the industrial undertaking, cannot be deducted in respect of the said undertaking while computing the profits and gains of the undertaking.

5.2. It is not the case of the revenue that the technical know-how obtained by the assessee by way of licence has benefited assessee, in any manner whatsoever. It is also not the case of the revenue that the assessee has manufactured the sachet with the assistance of Jammu unit. However it is important to note that the assessee had obtained the licence of the technical know-how of manufacturing the sachet for Jammu unit, as the assessee had installed the plant and machinery for utilization of that technical know-how at Jammu unit. However due to some unforeseen reasons the assessee could not use the technical know-how neither at Jammu unit nor at any other units. As submitted by the Ld.AR, the assessee has commercially exploited the same and has earned Rs. 1.96 crores for the year under consideration, by subletting the technical know-how to an outside party.

5.3. Hon'ble Bombay High Court in the case of Zandhu Pharmaceuticals Works Ltd vs. CIT reported in 259 CTR 253 observed as under:

> *"In CIT vs. Sterling Foods, reported in 237 ITR 579, the Hon'ble Supreme Court had considered a similar issue under section 80 ITIIC of the act: whether, on the facts and in circumstances of the case, the tribunal was justified in law in holding that the received from the sale of import entitlements could not be included in the income of the assessee for the purpose of computing the relief under section 80 HHC of the IT Act, 1961?*
>
> *12 The question is to be charged regardless of this, and the*

question is whether the intervention of the raw NAPTHA would justify the finding that the said products are not derived from refining of crude petroleum. The refining of crude petroleum produces various products at different stages. Row naphta is one such stage the further refining, or cracking of raw naphta results in the said products. The source of the said products is crude petroleum the said products must therefore be held to have been derived from crude petroleum.

13. We do not think that the source of the import entitlements can be said to be the industrial undertaking of the assessee. The source of the import entitlements can, in circumstances, only be said to be the export promotion scheme of the Central government parent that the export entitlements become available. There must be, for the application of the words derived from, a direct nexus between the profits and gains and the industrial undertaking. In the instant case the nexus is not direct but only incidental. The industrial undertaking exports processed seafood. By reason of such export, the export promotion scheme applies.

Thereunder, the assessee is entitled to import entitlements, which it can sell. This sale consideration therefrom can not in our view be held it to constitute a profit and gains derived from the assessee's industrial undertaking. "

5.3.1 The Hon'ble Bombay High Court in view of the ratio laid down by the Hon'ble Supreme Court in the case of Sterling foods (supra), observed as under:

*"The Supreme Court held that there must be for the application of the words *derived from" a direct nexus between the profits and gains and an industrial undertaking. Sections 80 I and 80-IB also use the expression "derived from". If there must be a direct nexus between the profits and gains and an industrial undertaking, it*

must follow equally that there must be a direct nexus between an industrial undertaking and that the expenses which are sought to be apportioned/ attributable to it. Expenses which do not relate to an industrial undertaking/ unit under consideration and they relate to other units or to the head office of the assessee, cannot be taken into consideration while computing deduction under the said provisions.

5.3.2 Hon'ble Bombay High Court while deciding the decision in the case of Zandu Pharmaceuticals Works Ltd (supra) had relied upon the decision of Madras High Court in the case of Bush Boak Allen (India) limited versus ACIT reported in 273 ITR 152.

5.4. In our considered opinion on the present facts of assessee's case stands squarely covered by the ratio laid down by Hon'ble Bombay High Court in the case of Zandu Pharmaceuticals Works Ltd (supra). The assessee has paid certain royalty towards the technical know-how obtained by it and it had received certain license fee in respect of the same technical know-how as it was passed out to an outside party. The assessee could not exploit the technical know¬how for manufacture of goods at Jammu unit and therefore the assessee had shown the sums under corporate division. Respectfully following the decision of Hon'ble Bombay High Court in the case of Zandu Pharmaceuticals Works Ltd (supra), we hold that the sums of rupees for Rs.4.25 crores and Rs.1.96 crores has to be shown under corporate division and the excess along with other corporate expenses has been rightly been allocated to the 3 manufacturing units by the assessee."

8. Since, the entire basis for adverse inference by the Assessing Officer as well as of ld. CIT (A) is upon the assessment order and first appellate order given in the

Assessment Year 2006-07, which the Tribunal has reversed by holding that assessee has rightly shown the payment of licence fee/royalty under the corporate unit; therefore, respectfully, following the precedence of the earlier year, we also give the same direction that the licence fee, royalty payment of Rs.6 crore has rightly been shown under the Corporate Division and accordingly, the finding of the ld. CIT(A) is reversed.

9. Coming to the issue of exclusion of refund of Excise duty (Self Cenvat Credit) amounting to Rs.1,31,01,284/- being capital in nature, and therefore, same should also be not part of Section 115JB. First of all, we find that the Revenue has also raised the similar issue in ground no.1 and 2, that is, *firstly*, disallowance of claim for deduction at Rs.1,31,01,284/- on account of 'Self Cenvat Credit Availment' u/s.80IB; and *secondly*, challenging the finding that Excise refund is a capital receipt in nature and not liable to tax.

10. The facts in brief qua this issue are that Assessing Officer noted that in the P&L account of the Jammu Unit, assessee has credited an amount of Rs.1,31,01,284 on account of Self Cenvat Credit to Jammu unit. The assessee has received refund of Excise duty by the Excise Department. The Government of India, Ministry of Commerce & Industry, and Department of Industrial Policy & Promotion vide its Office Memo dated 14th June 2002 has formulated a special package of incentives for the development of industries in the

State of J&K. Such Office Memorandum states that the special package for the State of J&K is on the same lines which were earlier formulated by the Government of India for the North Eastern States, notified vide OM No. EA/1/2/96-IPD dated 24th December 1997. With a view to accelerate industrial development in the State of J&K, the package of incentives was introduced and made applicable to the industrial undertakings specifying certain conditions and put up in the State of J&K. One of the incentives made was 100% excise duty exemption for a period of ten years from the date of commencement of commercial production by the industrial undertakings. Such Office Memo dated 14th June 2002 at the concluding paragraph states as under:-

> *"The Ministry of Finance, Department of Revenue is requested to amend Act/Rules/Notification etc. and issue necessary instructions for giving effect to these decisions."*

Accordingly, under the Excise Duty Act, excise duty Notification No. 56/2002 dated 14th November 2002 was issued. As per such notification, the assessee in respect of such J&K units, upon clearance of goods, shall pay/deposit excise duty. By seventh of the following month, a claim will be made on the Excise Department for the excise duty paid from the first day to the last day of the prior month. The Excise Department, upon verification of such claim, refunds the excise duty paid by the undertaking. It was submitted that such a refund is a capital receipt not subject to tax.

11. Ld. CIT (A) following the appellate order for the Assessment Year 2007-08 in assessee's own case held it to be allowable in favour of the assessee. In Assessment Year 2007-08, the ld. CIT(A) has followed the decision of Hon'ble High Court in the case of ***CIT vs. Dharam Pal Pream Prakash Ltd., reported in 317 ITR 353 (Del.),*** wherein the Hon'ble High Court had clearly distinguished the nature of income by way of DEPB/ Refund/ Cenvat Credit/ Duty Draw Back and Assessing Officer was directed to consider the excise duty refund as profit derived from the business of the Industrial Undertaking while computing the eligible deduction u/s.80IB of the Income of the assessee's Jammu unit. Alternatively, it was also claimed that Excise Duty refund is a capital subsidy in view of the decision of Hon'ble Jammu & Kashmir High Court in the case of ***Shree Balaji Alloys*** **v. CIT [*2011*] *239 CTR* (*J&K*) *70*** wherein it was held that Excise duty refund as granted by the State of Jammu and Kashmir is a capital subsidy.

12. Before us, ld. counsel for the assessee submitted that first of all, the Jammu unit falls within the jurisdiction of Hon'ble High Court of Jammu & Kashmir and if the excise refund has been treated as capital receipt, then the same has to be followed as such. He further pointed out that this decision of Hon'ble Jammu & Kashmir High Court has been affirmed by the Hon'ble Supreme Court vide order dated 19th April, 2016, wherein Hon'ble Apex Court following the ratio of

CIT vs. Ponni Sugars & Chemicals Ltd., reported in (2008) 9 SCC 337 has confirmed the order of the High Court and dismissed the Revenue's appeal. Thus, in view of such binding precedence the refund amount has to be treated as capital receipt.

13. On the other hand, learned DR relied upon the order of the Assessing Officer.

14. After considering the relevant finding given in the impugned orders as well as the judgment relied upon before us, we find that Assessing Officer has held that the excise refund on account of Self Cenvat Credit Availment is not eligible for deduction u/s.80IB and for this he has relied upon the various decisions of Hon'ble Supreme Court on the point that such excise refund cannot be held as business receipt derived from the eligible undertaking. Hence he denied the assessee's claim for deduction u/s.80IB. Before the ld. CIT (A), assessee besides relying upon the decision of Hon'ble Delhi High Court in the case of Dharampal Prem Chand, wherein distinction has been made between the treatment given to the excise duty and the duty draw back in the DEPB in the context of which various judgments have been rendered which has been cited by the Assessing Officer. The Hon'ble Delhi High Court has held that Excise duty refund is a profit derived from the industrial undertaking while computing the eligible deduction u/s.80IB.

15. However, the alternative plea of the assessee that it is a capital receipt, hence, the same cannot be treated as revenue receipt chargeable to tax has again being found favour by the ld. CIT(A) in view of the decision of Hon'ble Jammu & Kashmir High Court in the case of Shree Balaji Alloys (supra).

16. We find that in the case of Balaji Alloys the Hon'ble J&K High Court, on same Govt. Notification has held that excise refund receipt in pursuance of new Industrial policy of the government is a capital receipt. Once that is so, then the entire receipt itself cannot be treated as part of taxable receipt and the entire question of allowing and disallowing the deduction u/s.80IB becomes purely academic. This judgment of Hon'ble Jammu & Kashmir High Court has also been approved and affirmed by the Hon'ble Supreme Court in the case of CIT vs. Shree Balaji Alloys in the civil appeal 10666 of 2013 and other appeals vide judgment and order dated 19th April, 2016 following Ponni Sugar and Chemicals Ltd (supra). Thus, when the excise duty refund has been treated as capital subsidy not part of taxable receipts, then entire controversy sets at rest and accordingly, the finding of the ld. CIT (A) that excise refund is a capital in nature stands confirmed. In view of this finding grounds no.1 and 2 as raised by the Revenue are dismissed.

17. Now coming to the issue, whether such capital receipt in the form of excise duty refund should be treated as part income while computing book profit u/s.115JB. Ld. CIT(A)

has held assessee is not entitled to the exclusion of the said amount following the judgment of ITAT Hyderabad in the case of ***Rain Commodities Ltd. Vs. DCIT*, [2014] 149 ITD 732 (Hyd.).**

18. Before us the learned counsel has strongly relied upon the decision of ITAT Mumbai Bench in the case of JSW Steel vs. ACIT, ITA Nos. 923 & 930/Bang/2009, wherein all the decisions on this issue has been discussed and analysed and on similar capital receipt, ITAT Mumbai Bench in the case has held that such capital receipt cannot be part of book profit. Thus, he submitted that once a receipt itself is not taxable within the provision of the Act, then same cannot be held to be includable while computing the book profit u/s.115JB.

19. On the other hand, learned Department Representative submitted that once the assessee has itself credited to the P&L account then it cannot be claimed that it should be removed while computing the book profit u/s. 115JB. He thus strongly relied upon the order of the ld. CIT (A).

20. After considering the rival submissions and perusal of the judgment relied upon by the learned counsel, we find that from the stage of the ld. CIT(A) it has been held that excise duty refund of Rs.1,31,01,284/- is a capital receipt not chargeable to tax under the provision of the Act. Such a receipt being a capital in nature stands upheld from the stage

of the Hon'ble Supreme Court also. Once receipt itself has been treated as capital in nature it cannot be brought to tax, then same cannot be held to be includable in the book profit. This issue whether an amount to which is not a taxable receipt at all whether can be part of the book profit or not has been discussed threadbare by the ITAT Mumbai Bench in the case of ***JSW Steel Ltd. and Anr. Vs. ACIT, Reported in (2017) 49 CCIT 97***. In that case, the issue was the waiver of land for acquisition a capital asset which is held to be capital account is whether includable in computing of book profit of the company for the purpose of levy of MAP u/s.115JB or not even when such an amount was included through P&L account. The relevant observations and finding of the Tribunal reads as under:-

> *15. Now whether the surplus arising on account of waiver of the principal amount of loan is required to be credited to the profit & loss account in terms of provisions of Part II & III of VIth Schedule of the Companies Act needs to be seen. The starting point for computation of book profit under section 115JB is the 'net profit' as per the profit & loss account prepared in accordance with the provisions of the Companies Act. The primary purpose of preparing profit & loss account under the Companies Act is to find out the result of the working of the company during the period covered by the profit & loss account which has been enshrined in Part II of the Companies Act. The relevant portion of Part II reads as under:-*
>
> *Xxxxxxxxxx*
>
> *As can be seen, clause (iv) clearly excludes the cases of remission of liability, because it is nothing but gains realised from discharge of an obligation at less than carrying amount, which herein this case is gain*

on account of waiver of part of obligation to repay the loan. Further, Accounting Standard - 5 also states that, extra-ordinary items should be disclosed separately in the profit and loss account. The objective of AS-5 is to prescribe the classification and disclosure requirements. The relevant text of the standard 5 reads as under:

> *"8. Extraordinary items should be disclosed in the statement of profit and loss as a part of net profit or loss for the period. The nature and the amount of each extra- ordinary item should be separately disclosed in the statement of profit and loss in a manner that its impact on current profit or loss can be perceived."*

A con-joint reading of the above accounting standards suggests that, there are two types of compulsions while preparing annual accounts, one are accounting compulsions and second are disclosure compulsions. The accounting compulsion comes into play since there is a double entry system of accounting, for instance, when a loan amount is waived, a debit goes to the liability account and a credit has to go to any of the liability/ reserve account, which in the present case has been taken to the Profit and Loss account. The disclosure compulsions merely require the assessee to disclose the material items in the Profit & Loss account. A mere disclosure of an extraordinary item in the profit & loss account statement does not mean that the said item represents the 'working result' of the company, when the accounting standard, especially AS-9 clearly provides that remission of a liability is not to be recognized as revenue, then it has to be reckoned that it cannot be treated as revenue for the purpose of either net profit or consequently book profit. The primary purpose of preparing the Profit &Loss account in Part II of the Companies Act is to find out the result of the company, during the period covered by the profit & loss account and the exceptional nature items are required to be disclosed separately so as to assess the correct impact on the profit & loss account of the company. What is

required Under clause (3) of Part II of Schedule VI of the Companies Act, is that, a profit & loss account should set out various items relating to the income and expenditure of the company arranged under the most convenient heads and then it provides to list out the various information which needs to be disclosed in the profit & loss account. The profit & loss account contains income and expenditure of a company in respect of the period covered by the account and therefore, there cannot be any question for including a capital surplus in that account which cannot be reckoned as income. Clause (3)(xii)(b) of Part II of schedule also shows that what is to be included in the profit & loss account is in respect of transactions of an account, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount. This clearly indicates that only those items can be regarded as part of the profit & loss account which is in respect of similar type of transaction and not which are exceptional in nature. Waiver of a loan certainly cannot be reckoned as transaction of a kind usually taken but it is an item of exceptional and non-recurring nature. A capital surplus on account of waiver of loan in no way can be recorded as operational profit or profit which is to be included in the profit & loss account. There can be absolutely no question for accounting in the Profit and Loss Account something which cannot be regarded as income, profit or gain. This view is further reiterated by the interpretation clause 7 appearing in Part III of Schedule VI of the Companies Act which reads as under:-

> *"7(1) For the purpose of Parts I and II of this Schedule, unless the context otherwise requires._*
>
> *(a .....)*
>
> *(b .....)*
>
> *(c) the expression "capital reserve" shall not include any amount regarded as free for distribution through the profit and loss account;*

and the expression "revenue reserve" shall mean any reserve other than a capita! reserve; "

A capital surplus thus, in respect of waiver of loan amount cannot be regarded as being amount available for distribution through the profit & loss account. This follows from the very definition of expression 'capital reserve' that it must be accounted directly to the credit of the capital reserve account instead of being credited to the profit & loss account so as to ensure that it is not left for being distributed through the profit & loss account.

16. From our above analysis and discussion of the various provisions of the Companies Act as well as Accounting Standards it can be ostensibly deduced that an item of 'capital surplus' can "ever be a part of profit & loss account albeit it is a part of a capital reserve as the waiver of a loan taken for acquisition of a capital asset is a capital receipt falling within the category of cap :a surplus which is non-recurring and exceptional item which to be disclosed as per the requirement of the Companies Act. Further it is quite pertinent to note that, clause (ii) of Explanation -1 of section 115JB is also an indicator of the intention of the legislature and also the scheme of the section that the incomes which are treated as exempt under the Income Tax Act are to be excluded from the profit & loss account. The said clause excludes;

Xxxxxxxx

17. From the above discussion we are of the opinion that surplus resulting in the books of the assessee company consequent upon waiver of loan amount is not required to be credited to the profit & loss account for the year in which waiver is granted and in any case it cannot be reckoned as working result of the company during the period covered by the account, so as to be treated as part of book profit of the company for that year under the Companies Act.

18. Before us the Ld. CIT D.R. has strongly contended that the when the assessee itself has shown the waiver of loan as part of the book profit therefore, it is precluded from claiming the deduction from the book profit, because once it has been shown and declared as part of book profit then neither the Assessing Officer nor the assessee can tinker with such a result and any adjustment if at all can only be made as provided in Explanation-1 to sub section (2) of section 115JB. First of all, from the perusal of the Profit &Loss account for the year ending 31.03.2004 it is seen that assessee had shown profit before exceptional item at Rs.571.84 crores. Thereafter, it has disclosed exceptional item of Rs.390.76 crores which is on account of waiver of dues. However, while computing the book profit and tax payable under section 115JB the assessee included the said amount for calculating the tax under MAT. Along with the said computation, the assessee has given the following note which reads as under:

> *"The Company has credited an amount of Rs. 390,76,03,999 as an exception al item in its Prof it and Loss account. This includes write-back of certain principal amounts and certain interest dues, as a part of a restructuring package with its tenders Out of these amounts, the Company has not considered the write-back of principal amounts (amounting to Rs 228,46,76,328) as a taxable income since the same is in the nature of capital receipt in the hands of the Company. Further, these amounts do not represent the revers al of any amount allowed as a deduction in any earlier year. Hence the provisions, of section 41(1) do not apply in respect of this write-back.*
>
> As *regards the write-back of the balance amount relating to waiver of interest dues, the Company has offered for tax those amounts which had been claimed as a deduction in earlier years on provision basis amounting to Rs. 76,27,96,973 (refer clause A(l) of*

Annexure 8 of TAR). The balance amount of Rs. 86,01,30,698 had not been allowed as a deduction in earlier years due to the provisions of Section 43B of the Act and consequently, the write-back of this amount is not considered as a taxable income in this year Accordingly, the loss computed has been increased to the extent of the provision written-back.

In connection with the above contentions, the Company relies on the following decisions:-

- *Tirunelveli Motor Bus Service Co. P Ltd. v. CIT 78 ITR 55(SC)*
- *CIT V. Chetan Chemicals (P) Ltd. 188 CTR572(Guj*
- *Mahindra & Mahindra Ltd v CIT 261 ITR 501 (Bom)*
- *CIT v. Usha Ranjan Bhadra 126 ITR 44 (Gauhati)"*

Then again in note no.10.1 (the relevant portion of which has already been incorporated above) the assessee specifically gave a caveat that this amount on account of waiver of loan is not includable in the 'book profit' and same has been included only out of abundant precaution as the assessee company reserves the right to exclude such sum and contest during the course of assessment proceedings. Thus, at the very initial stage itself the assessee had disclosed all the particulars and had also given a detailed note as to why the said amount will not form part of the 'book profit'. Once that is so, then such notes qualifying the computation of book profit has to be read into it, that is, notes accompanying computation of income cannot be segregated or completely ignored. It is not the case of the assessee that an adjustment should be done while arriving at the book profit as provided in Explanation-1,albeit its claim is that correct amount of net profit as per the profit & loss account should be taken as 'book profit' which is the starting point of computation under section 115JB. As discussed in detail in our earlier part of the order that, a receipt which could never enter the stream of taxation either under the normal provisions of the Act or under the MAT provisions under section

115JB, then the said receipt neither constitutes profit nor revenue nor income nor any kind of gain which needs to be included in the net profit. It is a equally a trite proposition of law that an income cannot be taxed by an acquiescence or consent of the assessee but as per the mandate of the statutory provision and if assessee shows that a particular income is not taxable then he can always demonstrate and satisfy to the authorities that a particular income was not taxable in his hand and it was returned under an erroneous impression of law. There cannot be imposition of tax without the authority of law. One has to look what is envisaged under the Act to be taxed and there is no room for intendment or tax authorities can capitalize on acquiescence by assessee sans any authority by law. The court and taxing authorities have bounden duty to decide as to whether a particular category of assessee is to pay a particular tax or not. Even if we agree that Assessing Officer could not have entertained such a fresh claim but in view of the decision of Hon'ble Supreme Court in the case of Goetz India Ltd. vs. CIT (supra) as heavily relied upon by the Ld. CIT D.R., however, it does not impinge upon the powers of the appellate authorities including Ld. CIT (A) and Tribunal. This has been clarified by the Hon'ble Supreme Court itself in the concluding part of the said judgment. There is no such bar or statutory restrain on the appellate authorities to permit/entertain such additional claims which has been raised by the assessee before them. This proposition is strongly supported by the decision of Hon'ble Jurisdictional High Court in the case of CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd., (2012) 349 ITR 336 (Bom.). It is also equally a salutary principle of tax laws that entries in the books of account or in the profit & loss account is not a determinative factor for taxing the income because income can be taxed only by the express provisions of law. We have already discussed in detail in our earlier part of the order that waiver of a loan is a capital receipt which is part of the capital reserve and cannot be reckoned as working result of the company and therefore, it

does not form part of the net profit as per the profit & loss account. Thus, such a capital receipt cannot be taxed as 'book profit' as envisaged in terms of section 115JB.

19. As regard the decision of the Hon'ble Apex Court in the case of Apollo Tyres (supra), as relied upon the Ld. CIT D.R., we do not find that this judgment in any way envisages that a receipt which is not taxable as book profit nor reckoned as part of net profit as per profit & loss account should be taxed under u/s 115JB, just because it has been credited to profit & loss account which too has been qualified by a note giving a caveat for non-inclusion in the book profit. Assessing officer or taxing authorities can tinker with the net profit as shown by the assessee if the accounts are not prepared as per Part II & III of Schedule VI of the Companies Act which is a condition precedent for determination of net profit in terms of section 115JB(2). What the Hon'ble Apex court laid down that when assessee company prepares its profit & loss account as per the Companies Act and the accounts is placed before the company in its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956, AO cannot tinker with such accounts except for provided under Explanation 1. This judgment in no way impinge upon the requirement to comply with the statutory requirement of preparing the accounts in accordance with the accounting standards adopted for preparing the profit & loss account and in accordance with the Part II & III of Schedule VI of the Companies Act. Only when accounts are drawn as provided in section 115JB, then the proposition laid down by the Hon'ble Apex Court will apply. In our humble opinion the Judgment and law as envisaged by the Hon'ble Apex Court will not apply here because, as we have held above that waiver amount is a capital reserve which cannot be included in the net profit as shown in the profit & loss account for the relevant previous year and consequently cannot be taxed as book profit."

Thus, following the aforesaid decision of the Tribunal, we hold amount of Rs.1,31,01,284/- being capital in nature, cannot be part of book profit.

20. In the result, the appeal of the assessee is allowed whereas the appeal of the Revenue is dismissed.

21. In the appeal for the Assessment Year 2009-10 following grounds have been raised by the assessee:-

1. On the facts and in the circumstances of the case, the lower authority has erred in holding that the Royalty Payment of Rs.6,00,00,000/- (Rupees Six Crores Only) crores pertains to Jammu Unit.

2. On the facts and in the circumstances of the case, the lower authority has erred in disallowing of Rs.35,78,530/- u/s 14A read with Rule 8D. It is contended that Section 14A is not applicable in the case of the appellant.

3. On the facts and in the circumstances of the case, the lower authority has erred in not appreciating the difference between a "simple investment" to earn income from dividend and a "Business Investment" made with a commercial motive of acquiring controlling interest.

4. On the facts and in the circumstances of the case, the lower authority has erred in applying Section 14A read with Rule 8D, without establishing the requisite nexus between the expenses incurred and dividend income earned.

5. On the facts and in the circumstances of the case, the lower authority has erred in holding the refund of Excise duty (Self Cenvat Credit) amounting to Rs.2,46,79,790/-, is not a capital receipt.

6. On the facts and in the circumstances of the case, the lower authority has erred in holding that the assessee is not entitled to the

exclusion of refund of Excise duty (Self Cenvat Credit) amounting to Rs.2,46,79,790/-, being Capital in nature, in the determination of total income u/s 115JB of the Income Tax Act, 1961."

22. Since, the issue involved in grounds no.1, 5 and 6 in assessee's appeal and grounds no.1 and 2 in the Revenue's appeal were exactly the same as were involved in Assessment Year 2008-09, therefore, finding given therein will apply *mutatis mutandis* in this year also. Accordingly, grounds no.1, 5 and 6 of the assessee are allowed whereas the Revenue's grounds are dismissed.

23. Coming to the issue of disallowance u/s.14A r.w. Rule 8D of Rs.35,78,530/-, the brief facts are that assessee has received a sum of Rs.1,47,52,936/- as dividend which was claimed as exempt. In response to the show cause notice, the assessee submitted that these were old investments and all the investments were made out by own funds and all borrowed money were used for the purpose of business. However, the Assessing Officer without examining the books of account and the nature of expenditure debited in the books of account as well as identifying any expenditure which can be said to be attributable for earning of exempt income, has mechanically applied Rule 8D and computed the disallowance of Rs.2,51,81,751/- which consisted of disallowance of interest of Rs.2,16,03,221/- under Rule 8D2(ii) and investment of Rs35,78,530/- on account of indirect expenditure under Rule 8D2(iii).

24. Ld. CIT (A) has directed the assessee to give, *firstly*, the reconciliation of the bank details and the dates on which the investments were made; secondly, whether on those dates the balance as per overdraft was there or not; and *lastly*, to verify whether own fund have been used for the investment. After going through these details, he found that investments have been made from assessee's own funds, because when the investments were made there were huge credit balance as per bank statements and no overdraft facility were availed. Accordingly with this finding, he held that no disallowance of interest should be made. However for certain verification, he has given to the Assessing Officer as per the direction given at pages 21 and 22 of the order. However with regard to the calculation of administrative cost @0.5% under Rule 8D (2)(iii), he upheld the action of the Assessing Officer.

25. Before us, the learned counsel submitted that, first of all there was only one dividend cheque received during the year and all investments were made in the earlier years. This aspect was clearly stated before the Assessing Officer that no expenditure has been incurred for the purpose of earning the dividend income. In so far as the disallowance of interest is concern, he submitted that there is a categorical finding by the CIT(A) which is also borne out from the record that no borrowed funds have been diverted for the purpose of investment and hence no disallowance can be made on account of interest.

26. On the other hand, learned DR strongly relied upon the

order of the Assessing Officer and ld. CIT (A) and submitted that, once the assessee has a dividend income which is claimed as exempt then expenditure needs to be attributable.

27. After considering the aforesaid submissions and on perusal of the relevant finding given in the impugned orders as well as material referred to before us, we find that in so far as disallowance of interest expenditure is concern, the same has rightly been deleted by the ld. CIT (A) after due verification of the records that none of the investments have been made out of borrowed funds and has been made by assessee's own fund. In view of such a clear cut finding, no disallowance of interest can be made. With regard to other disallowance on account of administrative cost, we find that assessee has given a categorical explanation that no expenditure can be said to be attributable especially when all the investments were made in much earlier years and there is only one dividend cheque received during the year. Once assessee has produced all the relevant books of account, explained the nature of expenses debited and has explained that none of the expenditure can be said to be attributable to earning of exempt income, then onus shifts upon the Assessing Officer to examine the books of account and nature of expenditure debited and after recording his 'satisfaction' as per the mandatory requirement given in Section 14A(2) and (3) r.w.s. Rule 8D(1), then only he can proceed to make disallowance under Rule 8D, This has been clearly stated by the Hon'ble Delhi High Court in the case of ***HT Media Ltd.***

vs. Pr.CIT, reported in (2017) 399 ITR 576 (Del.) and Hon'ble Apex Court in the case of ***Godrej & Boyce Manufacturing Co. Ltd. vs. Dy.CIT & Anr., reported in (2017) 394 ITR 449 (SC).*** Thus, in the absence of any recording of mandatory satisfaction as per Section 14A (2) r.w.s. Rule 8D (1) Assessing Officer cannot mechanically apply Rule 8D for the purpose of disallowance. Accordingly, disallowance made u/s.14 by Assessing Officer is hereby deleted.

28. In the result, the appeal of the assessee is allowed and the Revenue's appeal is dismissed.

29. In the appeal for the Assessment Year 2010-11 following grounds have been raised by the assessee:-

1. On the facts and in the circumstances of the case, the lower authority has erred in holding that the Royalty Payment of Rs.6,00,00,000/- (Rupees Six Crores Only) crores pertains to Jammu Unit.

2. On confirming the facts and in the circumstances of the case, the lower authority has erred in disallowing to the extent of Rs.29,77,571 u/s 14A read with Rule 8D. It is contended that Section 14A is not applicable in the case of the appellant.

3. On the facts and in the circumstances of the case, the lower authority has erred in not appreciating the difference between a "simple investment" to earn income from dividend and a "Business Investment" made with a commercial motive of acquiring controlling interest.

4. On the facts and in the circumstances of the case, the lower authority has erred in applying Section 14A read with Rule 8D,

without establishing the requisite nexus between the expenses incurred and dividend income earned.

5. On the facts and in the circumstances of the case, the lower authority has erred in holding that the refund of Excise duty (Self Cenvat Credit) amounting to Rs. 1,37,67,330/-, is not a capital receipt.

6. On the facts and in the circumstances of the case, the lower authority has erred in holding that the assessee is not entitled to the exclusion of refund of Excise duty (Self Cenvat Credit) amounting to Rs. 1,37,67,330/-, being Capital in nature, in the determination of total income u/s 115JB of the Income Tax Act, 1961."

In revenue's appeal identical grounds have been taken in the earlier years as discussed above.

30. Since all the issues raised in both the appeals are identical to the appeals raised in Assessment Year 2008-09 and 2009-10 arising out of identical set of facts, therefore, in view of our finding given in the earlier years, we hold that grounds no.1 to 6 as raised by the assessee are allowed whereas Revenue's appeal is dismissed.

31. To sum up, all the three appeals of the assessee are allowed whereas all three appeals of the Revenue are dismissed.

Order pronounced in the open Court on 29th June, 2018.

Sd/-	Sd/-
[PRASHANT MAHARISHI]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED: 29th June, 2018