IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 7133/MUM/2014
Assessment Year: 2009-10

Mangalore Refinery & Petrochemicals Ltd. 15th Floor, Maker Tower, Ewing, Cuffe Parade, Mumbai-400005.	Vs.	Addl. CIT-3(2), Mumbai
PAN No. AAACM5132A		**Respondent**
Appellant		

ITA No. 7241/MUM/2014
Assessment Year: 2009-10

DCIT-3(2) Room No. 674, 6th Floor, AayakarBhavan, M. K. Road, Mumbai-400020.	Vs.	Mangalore Refinery & Petrochemicals Ltd. 15th Floor, Maker Tower, Ewing, Cuffe Parade, Mumbai-400005. **PAN No. AAACM5132A**
Appellant		**Respondent**

Assessee by : Mr. J.D.J. Mistri, Senior Advocate
& Mr. Madhur Agrawal, Advocate
Revenue by : Mr.Samuel Darse, CIT(DR)

Date of Hearing : 12/06/2018
Date of pronouncement: 07/09/2018

ORDER

PER N.K. PRADHAN, AM

The captioned cross appeals- one by the assessee and other by the Revenue – are directed against the order of the Commissioner of Income

Tax (Appeals)-4, Mumbai [in short 'CIT(A)'] and arise out of the assessment completed u/s 143(3) of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience.

The assessee-company filed its revised return of income for the assessment year (AY) 2009-10 on 29.03.2011 declaring total income of Rs.1565,34,24,281/- under normal provisions of the Act. The nature of business of the assessee is refining of crude oil, selling of petroleum products, captive generation and distribution of power.

ITA No. 7133/MUM/2014
Assessment Year: 2009-10

2. <u>The 1st ground of appeal</u>

1. On the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeals)-4, Mumbai ["CIT (A)"] erred in confirming the action of the Assessing Officer ["the AO"] with respect to the disallowance of freight charges u/s 40(a)(i) of the Act amounting to Rs.80,19,59,658/- paid to foreign shipping companies.
2. He failed to appreciate and ought to have held that since payments were made to foreign shipping companies outside India for import of crude, such income is not chargeable to tax in India u/s. 44B (2) of the Act and hence no tax is required to be deducted u/s. 195 of the Act and consequently no disallowance u/s 40(a)(i) of the Act be made,
3. Without prejudice, the CIT(A) erred in directing the AO to verify the Double Tax Avoidance Agreement (DTAA) and necessary details in respect of payments made to foreign shipping companies; being resident

of country with whom India has DTAA, when the DTAA itself was submitted to the CIT(A).

4. Without Prejudice, CIT(A) erred in confirming disallowance u/s. 40(a)(i) of the Act despite there being no amount outstanding as on the Balance Sheet date as payable to foreign shipping companies.

3. Briefly stated, the facts of the case are that the assessee has debited in its P&L account, an amount of Rs.80,19,59,658/- as freight charges paid to foreign shipping companies. During the course of assessment proceedings, the AO noticed that the assessee had not made TDS on such freight payments. The AO referred to section 44B of the Act and observed that foreign shipping companies are subject to tax in India @ 7.5% of the freight payments made by Indian companies for carriage of passengers, livestock, mail or goods shipped in any port in India. By referring to the decision in *G.E. India Technology Cen. (P.) Ltd.* 193 TAXMAN 234 (SC), the AO held that in the instant case section 195 of the Act is applicable and disallowance u/s 40(a)(i) is required to be made in case of default to make TDS. As the assessee had not made TDS, the AO disallowed the above sum of Rs.80,19,59,658/- u/s 40(a)(i) of the Act.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) followed the order of his predecessor for AYs 2007-08 and 2008-09, rejected the claim of the assessee except the amounts paid by it to shipping companies belonging to Cyprus, Malta, Qatar and United Arab Republic. The Ld. CIT(A) thus held :

> "The disallowance on account of payment to companies registered in these countries was allowed and reduced from the disallowance because DTAA between India and these countries provided that the profit derived by an enterprise registered or having its headquarters in the contracting state from the operation of ships shall be taxable only in that state i.e. where the company is registered. The appellant has claimed that payments made to companies registered in Singapore and UAE are of the similar nature in the year under consideration also, therefore, A.O. is directed to examine that the payments made and claimed by the appellant pertaining to the companies located in Singapore and UAE are located in Singapore and UAE and that relevant DTAAs provide that the profit derived by the enterprises registered or having its headquarter in the contracting state from the operation of ships shall be taxable only in that state i.e. where the company is registered and after verification if the claim is found correct then reduce the disallowance to that extent. The appellant is directed to furnish the necessary details before the A.O. with regard to the companies located in Singapore and UAE, DTAAs of the respective countries and other supporting documents. The facts of the case are similar to the facts in A.Ys. 06-07, 07-08 and 08-09 and therefore, respectfully following the decisions of Id. CIT(A) for those assessment years, the ground of appeal no. 1 is partly allowed as discussed above."

5. Before us, the Ld. counsel of the assessee submits that there is no dispute on the facts that payment is made to foreign shipping companies for import of crude from a port outside India and since such freight is not received or deemed to be received by foreign shipping companies or their agents in India, the said freight is not chargeable to tax in India u/s 44B(2)(ii) of the Act.

The Ld. counsel submits that the above issue has been decided by the Tribunal in assessee's own case for AY 2006-07 (ITA No.

1240/M/2010), AY 2007-08 (ITA No. 3588/M/2013) and AY 2008-09 (ITA No. 4448/M/2013).

Reference is also made to the decision in *ACIT v. Avon Organics Ltd.* 55 SOT 260 (Hyd.).

6. On the other hand, the Ld. DR specifically refers to para 5.2.3 of the order dated 24.09.2014 passed by the Ld. CIT(A) and submits that the same may be confirmed.

7. We have heard the rival submission and perused the relevant materials on record. We find that the same issue arose before the Tribunal in assessee's own case for AYs 2006-07, 2007-08 and 2008-09. The issue has been decided in favour of the assessee. We refer here to para 6 (page 3-8) of the order dated 17.05.2017 passed by the ITAT 'A' Mumbai for AY 2006-07 (ITA No. 1240/Mum/2010); para 2 (page 1-3) of the order dated 11.09.2017 by the ITAT 'L' Bench Mumbai for AY 2007-08 (ITA No. 3435/Mum/2015) ; para 7 (page 8-24) of the order dated 08.06.2018 by the ITAT 'L' Bench for AY 2008-09 (ITA No. 4448/Mum/2013).

Facts being identical, we follow the above orders of the Co-ordinate Bench and allow the 1st ground of appeal.

8. <u>The 2nd ground of appeal</u>

> On the facts and circumstances of the case and in law, the CIT (A) erred in confirming the action of the AO of assessing the interest on bank deposits, interest on inter-corporate deposits, miscellaneous interest and interest on contractor's advance received by the Appellant, of Rs.27,09,64,429/-,

Rs.62,26,22,179/-, Rs.4,40,34,267/- and Rs.1,32,251/-respectively, under the head as "Income from Other Sources" instead of Business Income as returned by the Appellant.

9. During the course of assessment proceedings, the AO noticed that the assessee had earned interest income of Rs.1,05,30,83,833/- in the FY 2008-09 relevant to the AY 2009-10 and offered the same to tax under the head “Income from business or profession”. The AO came to a finding that the assessee has been carrying out the business of refining of crude oil and selling of petroleum products. Earning of interest was nowhere held as the objective of the business carried on by the assessee. With the above reasons, the AO brought to tax the interest income of Rs.1,05,30,83,883/- under the head “Income from other sources”.

10. In appeal, the Ld. CIT(A) followed the order of his predecessor for the AYs 2007-08 and 2008-09 and partly allowed the appeal.

11. Before us, the Ld. counsel submits that the issue regarding taxability of interest on bank deposits has been decided in favour of the assessee by the Tribunal in assessee’s own case for the AY 1999-2000. It is stated that the nature of taxability of ‘interest on inter-corporate deposits’ has been decided in favour of the assessee in assessee’s own case for the AYs 2005-06, 2006-07, 2007-08 and 2008-09. Further reliance is placed by him on the decision in *CIT v. Green Infra Ltd*. 392 ITR 7 (Bom).

The Ld. counsel further submits that the 'interest on contractor's advance' and 'miscellaneous interest' be held as business income considering the nature of interest receipts.

12. On the other hand, the Ld. DR submits that the Ld. CIT(A) has rightly followed the order of his predecessor for the AYs 2007-08 and 2008-09 and partly allowed the appeal filed by the assessee.

13. We have heard the rival submissions and perused the relevant materials on record. The same issue has been decided by the Tribunal in favour of the assessee in different assessment years. We refer here to para 23-25 (page 14-17) of the order of the ITAT 'H' Bench (ITA No. 76/M/2003) for the AY 1999-2000; para 3 (page 3-4) of the order of the ITAT 'A' Bench (ITA No. 7341/M/2008 & CO No. 104/M/2009) for AY 2005-06; para 8 (page 14-15) of the order of the ITAT 'A' Bench (ITA No. 1240/M/2010) for AY 2006-07; para 3 (page 3-6) of the order of the ITAT 'L' Bench (ITA No. 3588/M/2013) for AY 2007-08 and para 11 (page 24-32) of the order of the ITAT 'L' Bench, Mumbai (ITA No. 4448/M/2013 & 4436/M/2013).

Facts being identical, we follow the above orders of the Co-ordinate Bench and allow the 2nd ground of appeal.

14. <u>The 3rd ground of appeal</u>

> On the facts and circumstances of the case and in law, the CIT(A) erred in not admitting the additional ground and also adjudicating the same in relation to deduction of provision for advances doubtful of recovery amounting to Rs.17,81,19,711/- under normal provisions of the Act.

15. We find that the Ld. CIT(A) has dismissed the ground of appeal relating to claim for allowing provision for doubtful debts and advances under normal provisions of the Act on the reason that the said grounds raised are not purely legal grounds, but involve verification of facts.

16. Before us, the Ld. counsel of the assessee submits that the Ld. CIT(A) erred in not admitting the additional ground of appeal. Reliance is placed by him on the decision in *NTPC Ltd. v. CIT* 229 ITR 383 (SC), *CIT v. Pruthvi Brokers & Shareholders* 23 taxmann.com 23 (Bom), *CIT v. St. Mary's Malankara Seminary* 19 taxmann.com 175 (Kar.), *Pradeep Kumar Harlalka v. ACIT* 14 taxmann.com 42 (Mum).

The Ld. counsel further submits that when the provision is written off from the books of accounts, it is to be allowed as deduction u/s 36(1)(vii) of the Act. Reference is placed by him on the order of the Tribunal in assessee's own case for the AY 2007-08 (ITA No. 3588/M/2013), AY 2008-09 (ITA No. 4448/M/2013 & 4436/M/2013). Also reliance is placed by him on the decision in *Vijaya Bank Ltd. v. CIT* 190 Taxman 257 (SC), *CIT v. Tainwala Chemicals & Plastics India Ltd.* 34 taxmann.com 159 (Bom), *Tainwala Chemicals & Plastics India Ltd. v. ACIT* 47 SOT 169 (Mum), *ACIT v. LML Ltd.* 72 taxmann.com 207 (Mum), *KEC International Ltd. v. DCIT* 33 taxmann.com 243 (Mum).

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

17. We have heard the rival submissions and perused the relevant materials on record. In the case of *NTPC Ltd.* (supra), the assessee-

company had deposited its funds which were not immediately required, on short term deposits with banks. Interest received on such deposits was offered by the assessee for tax assessment and the assessment was completed on that basis. Before the CIT(A), a number of grounds were taken by the assessee challenging the assessment. However, the inclusion of interest amount was neither challenged by the assessee nor not considered by the CIT(A). The inclusion of the aforesaid amount was not challenged in the grounds of appeal as originally filed before the Tribunal. However, the assessee challenged the same in a forwarding letter. The Tribunal declined to entertain the additional grounds. On a reference, the Hon'ble Supreme Court held that "where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings, we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee."

In the instant case the additional ground filed by the assessee is related to the proposition that when the provision is written off from the books of accounts, it is to be allowed as deduction u/s 36(1)(vii) of the Act. We further find that the Tribunal in the assessee's own case has decided the above issue for AYs 2007-08 and 2008-09. Therefore, we admit the above additional ground of appeal.

However, we are of the considered view that the above issues need to be examined by the AO. Therefore, we set aside the order of the Ld. CIT(A) on the above issue and remit the matter to the file of the AO

to pass a fresh order after giving opportunity of being heard to the assessee. We direct the assessee to file the relevant accounts/documents/evidence before the AO.

Thus the 3rd ground of appeal is allowed for statistical purposes.

18. The 4th ground of appeal

> On the facts and circumstances of the case and in law, CIT(A) erred in confirming the action of the AO in disallowing a sum of Rs.9,03,79,391/- u/s 14A of the Income Tax Act being the disallowance u/s 14A of the Act r.w. Rule 8D.

19. During the course of assessment proceedings, the AO observed that the assessee had shown investment of Rs.6,15,61,43,083/- as on 31.03.2009 and Rs.6,17,85,74,948/- as on 01.04.2008 in equity shares and UTI Mutual Funds. In response to a query raised by the AO to explain as to why the expenditure incurred for earning the exempt income should not be disallowed u/s 14A of the Act, the assessee filed a reply dated 09.10.2012, which has been extracted at page 14-18 of the assessment order dated 31.12.2012 passed by the AO. The AO was not convinced with the said reply filed by the assessee and made a disallowance of Rs.9,03,79,391/- u/s 14A r.w. Rule 8D.

20. In appeal the Ld. CIT(A) agreed with the computation made by the AO and dismissed the appeal filed by the assessee.

21. Before us, the Ld. counsel submits that Rule 8D is not automatic and he relies on the decision *in Godrej & Boyce Manufacturing Company Ltd. v. DCIT* (2017) (81 taxmann.com 111) (SC), *Maxopp Investment Ltd.*

(203 Taxmann 364) (Del HC), *CIT v. I.P Support Services India Private Limited* (378 ITR 240) (Del HC), *CIT v. REI Agro Ltd.* (ITA No. 161 of 2013) (Cal. HC) and *Graviss Hospitality Ltd. v. DCIT* (67 SOT 184) (Mum).

It is further submitted that the assessee has sufficient own funds/net worth as compared to the investments made as can be seen from the audited financial statements and accordingly, no disallowance u/s 14A is warranted. Reliance is placed by him on the decision in *CIT v. Reliance Utilities & Power Ltd.* (313 ITR 340) (Bom.), *CIT v. HDFC Bank Ltd.* (366 ITR 505) (Bom), *HDFC Bank Ltd. v. DCIT* (383 ITR 529) (Bom) and *CIT v. Micro labs Limited* (ITA No. 471 of 2015) (Kar).

Finally, the Ld. counsel submits that the AO has to examine the computation made by the assessee and only if, on an objective satisfaction recorded by the AO with regard to the correctness of the workings, the AO can proceed to apply provisions of Rule 8D(2)(iii) of the Income Tax Rules 1962. Reliance is placed by him on the decision in *M/s Raptakos Brett & Co. Limited v. ACIT* (ITA No. 7490/Mum/2013) (Mum), *M/s Raptakos Brett & Co. Limited v. ACIT* (ITA No. 578/Mum/2015) (Mum), *M/s Aditya Birla Finance Limited v. ACIT* (ITA No. 5732/Mum/2011) (Mum) and *Britannia Industries Ltd. v. DCIT* (ITA No. 390/Kol/2013) (Kolkata Trib).

22. On the other hand, the Ld. DR relies on the order of the Ld. CIT(A) and submits that the AO has correctly computed the disallowance of Rs.9,03,79,391/- u/s 14A r.w. Rule 8D of the Income Tax Rules.

23. We have heard the rival submissions and perused the relevant materials on record. At para 9.1 of the assessment order dated 31.12.2012, the AO has mentioned that on the basis of accounts of the assessee, he was not satisfied with the correctness of its claim in respect of expenditure in relation to income which does not form part of the total income under the Act. In response to a query raised by the AO to explain as to why expenditure incurred for earning the exempt income should not be disallowed u/s 14A, the assessee filed a reply which has been extracted by the AO at page 14-18 of the said assessment order. Having examined the contentions of the assessee, the AO made the above disallowance u/s 14A r.w. Rule 8D. Thus the AO has recorded reasons before proceeding to make the above disallowance.

In the instant case, we refer now to the balance sheet of the assessee as at 21.03.2009. It is found that the share capital is at Rs.17,618.31 Million, reserve and surplus at Rs.29,675.68 Million. The investments stand at Rs.6428.93 Million. Thus the assessee had sufficient own funds/net worth as compared to the investments. Therefore, following the decision in HDFC Bank Ltd. (supra) we delete the disallowance of Rs.59,542,595/- made by the AO under Rule 8D(2)(ii).

Now we deal with the disallowance of Rs.30,836,795/- made under Rule 8D(2)(iii) by the AO. We are of the considered view that the recent decision in *Godrej & Boyce Manufacturing Company Ltd. v. DCIT* (2017) 81 taxmann.com 111 (SC) and *Maxopp Investment Ltd. v. CIT*

(2018) 91 taxmann.com 154 (SC) have relevance to instant case and these are to be examined.

In *Asst. Collector of Central Excise v. Dunlop India Ltd*. (1985) 154 ITR 172 (SC), it is held:

> "It is needles to add that in India under article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India and under article 144 all authorities civil and judicial, in the territory of India shall act in aid of the Supreme Court."

In the instant case neither the AO nor the Ld. CIT(A) had the benefit of the above two decisions of the Hon'ble Supreme Court on the date of passing the assessment/appellate order. Also the assessee was not having the benefit of the above two decisions while submitting its case before the above two authorities.

In view of the above position of law, which is relevant to the instant case, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to recompute the disallowance u/s 14A r.w. Rule 8D(2)(iii) by following the above decisions of the Hon'ble Supreme Court. We direct the assessee to file the relevant documents/evidence before the AO. Needless to say the AO would give reasonable opportunity of being heard to the assessee before finalizing the order.

Thus the 4th ground of appeal is allowed for statistical purposes.

24. 5th ground of appeal

1. On the facts and circumstances of the case and in law, the CIT(A) erred in not admitting the additional ground and also adjudicating the same in relating to deduction of provision for non-moving inventory amounting to Rs.92,00,000/- under normal provisions of the Act.
2. The CIT(A) further erred in holding that the issue is decided by his Ld. Predecessor in AY 2008-09 in as much as there was no such ground in AY 2008-09.

25. The assessee raised the above issue in the shape of additional ground of appeal before the Ld. CIT(A). We find that the Ld. CIT(A) followed the order of his predecessor for the AY 2008-09 and dismissed the additional ground as it was neither made in the return of income nor during the assessment proceedings.

26. Before us, the Ld. counsel of the assessee submits that in the case of *CIT v. Hotline Teletube & Components Ltd.* (2008) 175 Taxman 286 (Del), it has been held that provision made by the assessee for diminution in value of stock available with it on account of stock having become obsolete and old could be allowed as business loss. Also reliance is placed on the order of the Tribunal in *Atlas Copco (India) Ltd. v. DCIT* (ITA No. 448/PN/2010) (Pune)

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

27. We have heard the rival submissions and perused the relevant materials on record. In order to verify the claim of deduction of

provision of non-moving inventory under normal provisions of the Act, we are of the considered view, that the matter be examined by the AO. Therefore, we set aside the order of the Ld. CIT(A) on the above issue and remit the matter to the file of the AO to make a fresh order after giving an opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the AO. Thus the 5th ground of appeal is allowed for statistical purposes.

28. <u>The 6th ground of appeal</u>

> On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO in respect of addition on account of provision for mark to market loss amounting to Rs.22,63,79,918/- under normal provisions of the Act on the alleged ground that the same is notional in nature.

29. The assessee raised the above issue for the first time before the Ld. CIT(A). We find that the Ld. CIT(A) relying on the decision in *CIT v. Oriental Motors Car P. Ltd.* (1980) 124 ITR 74 and the Instruction No. 17/2008 dated 26.11.2008 issued by CBDT disallowed the claim of loss of Rs.22,63,79,918/- made by the assessee on account of provision of mark to market losses.

30. Before us, the Ld. counsel of the assessee relies on the decision in *CIT v. Woodward Governor India (P.) Ltd*. (312 ITR 254) (SC), *PCIT v. M/s Bhargovi* (ITA No. 1022 of 2015) (Bom), *CIT v. D. Chetan & Co.* (390 ITR 36) (Bom), *DCIT v. Bank of Bahrain & Kuwait* (41 SOT 290) (Mum) (SB).

On the other hand, the Ld. DR relies on the order passed by the Ld. CIT(A).

31. We have heard the rival submissions and perused the relevant materials on record. We are of the considered view that the decisions cited by the Ld. counsel need to be examined by the AO on the basis of relevant facts. Therefore, we set aside the order of the Ld. CIT(A) on the above issue and remit the matter to the file of the AO to make a fresh order after giving an opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the AO. Thus the 6th ground of appeal is allowed for statistical purposes.

32. The 7th ground of appeal

> On the facts On the facts and circumstances of the case and in law, the CIT (A) erred in confirming the action of the AO in respect to addition on account of provision for advances doubtful of recovery amounting to Rs.17,81,19,711/- while calculating book profit u/s. 115JB of the Act by applying clause (c) to explanation to section 115JB of the Act.

33. The assessee raised the above issue for the first time before the Ld. CIT(A), who has followed the order of his predecessor for AY 2008-09 and dismissed the appeal filed by the assessee.

34. Before us, the Ld. counsel of the assessee relies on the decision in *Vijay Bank v. CIT* (190 taxman 257) (SC), *CIT v. Tainwala Chemicals & Plastics India Ltd.* (34 taxmann.com 159) (Bom), *Tainwala Chemicals & Plastics India Ltd. v. ACIT* (47 SOT 169) (Mum), *CIT v. Vodafone Essar Gujarat Ltd.* (73 taxmann.com 225) (Guj), *CIT v. Yokogawa India Ltd*. (17

taxmann.com 225) (Guj), *CIT v. Kirloskar Systems Ltd*. (40 taxmann.com 15) (Kar), *CIT v. Syndicate Bank Syndicate House* (54 taxmann.com 292) (Kar).

Reliance is also placed by him on the decision of the Tribunal in assessee's own case for AY 2007-08 (ITA No. 3588/M/2013) and AY 2008-09 (ITA No. 4448/M/2013 & 4436/M/2013).

On the other hand, the Ld. DR relies on the order passed by the Ld. CIT(A).

35. We have heard the rival submissions and perused the relevant materials on record. We find that similar issue arose before the ITAT in assessee's own case for AYs 2007-08 and 2008-09. In AY 2007-08 (ITA No. 3588/M/2013) the Tribunal held at para 4.3 that the assessee had debited the provision for doubtful debts to the profit and loss account and credited the corresponding provisions in the balance sheet and therefore, following the decision in *Tainwala Chemicals & Plastics India Ltd.* (supra) decided the issue in favour of the assessee. The above order has been followed subsequently by the Tribunal in AY 2008-09.

Facts being identical, we follow the above orders of the Co-ordinate Bench and allow the 7th ground of appeal.

36. <u>8th ground of appeal</u>

> 1. On the facts and circumstances of the case and in law, the CIT (A) erred in confirming the addition made by the AO on account of provision for custom duty while calculating Book Profit u/s 115JB of the Act.

2. He failed to appreciate and ought to have held that the provision for custom duty is an ascertained liability and therefore it is not required to be added to Book Profit under clause (c) of Explanation 1 to section 115JB of the Income Tax Act.
3. He further failed to appreciate and ought to have held that the provision for custom duty is not diminution in the value of asset and therefore it is not required to be added to Book Profit under clause (i) of Explanation 1 to section 115JB of the Act.
4. He further erred in not adjudicating the without prejudice claim that the reversal of such provision which was disallowed in A.Y. 2008-09 amounting to Rs. 592,48,26,511/-should now be reduced from the Book Profit.

37. During the course of assessment proceedings, the AO came to a finding that the provision for custom duty of Rs.187,60,68,592/- is in the nature of contingent and unascertained liability. Therefore, the AO made an addition of above sum while arriving at the book profit u/s 115JB of the Act.

38. In appeal, the Ld. CIT(A) agreed with the reasons given by the AO and dismissed the appeal filed by the assessee.

39. Before us, the Ld. counsel of the assessee relies on the decision in *Metal Box Company of India Ltd. v. Their Workmen* (73 ITR 53) (SC), *Bharat Earth Moves v. CIT* (245 ITR 428) (SC), *CIT v. Nagri Mills Co. Ltd.* (33 ITR 681) (Bom).

Also reliance is placed by him on the order of the Tribunal in assessee's own case for AY 2004-05.

On the other hand, the Ld. DR relies on the order of the Ld. CIT(A).

40. We have heard the rival submissions and perused the relevant materials on record. Similar issue arose before ITAT 'F' Bench Mumbai in assessee's own case for AY 2004-05 in ITA No. 6835/Mum/2008. The Tribunal has discussed the issue at para 27-39 of its order dated 23.11.2016. At para 39, the Tribunal by following the judgment of the Hon'ble Bombay High Court in *Nagri Mills Co. Ltd*. (supra) has allowed the appeal filed by the assessee.

Facts being identical, we follow the above order of the Co-ordinate Bench and allow the 8th ground of appeal.

41. The 9th ground of appeal

> On the facts and circumstances of the case and in law, the CIT (A) erred in confirming the action of the AO in respect to addition on account of provision for non-moving inventory amounting to Rs. 92,00,000/- while calculating book profit u/s. 115JB of the Act by applying clause (i) to explanation to section 115JB of the Act.

The 10th ground of appeal

> On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO in respect to addition on account of provision for mark to market loss amounting to Rs.22,63,79,918/- while calculating book profit u/s 115JB of the Act by applying clause (i) explanation to section 115JB of the Act.

We have set aside the above grounds of appeal arising out of computation of income under normal provisions of the Act to the AO.

The points of determination would be whether the amount or amounts set aside to provisions made for meeting liabilities other than ascertained liabilities. Accordingly, we set aside the above two grounds of appeal pertaining to computation of book profits to the file of the AO for making a fresh order as per the provisions of section 115JB of the Act. Thus the 9th and 10th grounds of appeal are allowed for statistical purposes.

42. <u>The 11th ground of appeal</u>

> On the facts and circumstances of the case and in law, CIT(A) erred in confirming the action of the AO in respect addition made u/s 14A while computing book profits u/s 115JB of the Act.

43. The AO has made a disallowance of Rs.9,03,79,391/- u/s 14A r.w. Rule 8D while computing the book profit u/s 115JB of the Act. In appeal, the Ld. CIT(A) has confirmed the above disallowance.

44. Before us, the Ld. counsel of the assessee submits that the issue has been decided by the Special Bench of the Tribunal in *ACIT v. Vireet Investments (P.) Ltd*. (2017) 165 ITD 27 (Delhi-Trib) (SB).

On the other hand, the Ld. DR relies on the order of the Ld. CIT(A).

45. We find that in *Vireet Investment (P.) Ltd*. (supra), the Special Bench of the Tribunal has held that computation under clause (f) of Explanation 1 to section 115JB (2) is to be made without resorting to computation as contemplated u/s 14A r.w. Rule 8D.

Facts being identical, we follow the above decision of the Special Bench of the Tribunal and allow the 11th ground of appeal.

46. The 12th ground of appeal relates to levy of interest u/s 234B, 234C and 234D. The levy of interest is mandatory, though consequential. We order accordingly.

47. In the result, the appeal filed by the assessee is partly allowed.

ITA No. 7241/MUM/2014
Assessment Year: 2009-10

48. Now we deal with the appeal filed by the revenue.

1st ground of appeal

Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in treating the interest of Rs.3,45,42,266/- received from the New Mangalore Port Trust as business income instead of income from other sources as held by the Assessing Officer.

49. Before us, the Ld. DR relies on the order of the AO.

On the other hand, the Ld. counsel of the assessee submits that the above issue has been decided in favour of the assessee by the order of the Tribunal in assessee's own case for AYs 1999-00, 2001-02, 2005-06, 2006-07, 2007-08 and 2008-09. Also it is stated that the same issue has been decided in favour of the assessee by the order of the Bombay High Court in assessee's own case for AYs 1999-00 and 2001-02.

50. We have heard the rival submissions and perused the relevant materials on record. For quick reference, we may refer to one decision

here. We may refer here to the order of the ITAT "B" Bench Mumbai in assessee's own case for AY 2001-02 in ITA No. 1463/M/2008. At para 4 of order dated 08.05.2009, the Tribunal has held as under:

> "4. We have perused the records and considered the matter carefully. The dispute raised is regarding treatment of interest income received on advances given during the pre-operative period of the second phase of the project. There is no dispute that advances to contractors as well as to NMPT had been given during the pre-operative period and in the course of setting up of the project. We find that the same issue has already been considered by the Tribunal in assessee's own case in A.Y 2000-01 (supra), in which the Tribunal following the judgment of Hon'ble Supreme Court in the case of Bokaro Steel Ltd., (236 ITR 315) held that interest on advances to contractors has to adjusted against the cost of the project. However, in so far as the advance to NMPT was concerned the Tribunal observed that the assesses was not the owner of the Jetty to be developed by NMPT for which advances had been given by the assesses and therefore, the interest received on such advances could not be adjusted against the cost of the construction of the refinery. However, the Tribunal further observed that that since the advances had been given during the course of carrying on of business, the interest income from advances to NMPT would be income from business and not income from other sources. The facts this year are identical. Therefore, respectfully following the decision of the Tribunal in A.Y.2000-01 (supra) we hold that interest from the advances to contractors will be set off against the cost of the project and will not be treated as income from other sources, whereas the interest income from advances given to NMPT would be treated as income from business."

Facts being identical, we follow the above decision of the Co-ordinate Bench and uphold the order of the Ld. CIT(A). Thus the 1st ground of appeal is dismissed.

51. <u>The 2nd ground of appeal</u>

> Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in treating the interest of Rs.51,082/-, Rs.27,90,611/-, Rs.1,90,94,600/- and Rs.10,28,86,465/- being interest and recovery of discount charges, interest on housing loan, interest on oil bonds and interest – miscellaneous respectively as business income instead of income from other sources as held by the Assessing Officer.

52. The above ground of appeal relates to the addition of Rs.1,90,94,600/- (interest on Oil bonds); Rs.51,082/- (interest and recovery of discount charges); Rs.27,90,611/- (interest on housing loans) and Rs.10,28,86,465/- (miscellaneous interest).

53. Before us, the Ld. DR relies on the order of the AO.

54. On the other hand, the Ld. counsel submits that the issue in respect of interest Oil Bonds has been decided in favour of the assessee by the Tribunal in assessee's own case in AY 1999-00 (ITA No. 76/M/2003), AY 2001-02 (ITA No. 1463/Mum/2008), AY 2006-07 (ITA No. 1240/M/2010), AY 2007-08 (ITA No. 3588/M/2013), AY 2008-09 (ITA No. 4448/M/2013 and 4436/M/2013). Also it is stated that the above issue has been decided in favour of the assessee by the Bombay High Court in AY 1999-00 [ITA (L) No. 601 of 2004], and AY 2001-02 (ITA No. 2470 of 2013).

Also it is submitted that the issue regarding interest and recovery of discount charges and interest on housing loan, has been decided in favour of the assessee by the Tribunal in assessee's own case in AY 2004-05 (ITA No. 6835/M/2008), AY 2005-06 (ITA No. 7341/M/2008 & C.O. No. 104/M/2009), AY 2006-07 (ITA No. 1240/M/2010), AY 2007-08 (ITA No. 3588/M/2013), AY 2008-09 (ITA No. 4448/M/2013 and 4436/M/2013).

Finally, the Ld. counsel submits that the interest on B G Sales of Rs.5,88,52,198/- is identical or similar to interest and discount charges which has been allowed in assessee's own case for AY 2005-06.

55. We have heard the rival submissions and perused the relevant materials on record.

We find that the above issue regarding interest on Oil Bonds has been decided in favour of the assessee by the Tribunal in assessee's own case in AY 1999-00 (para 3-21, page 2-14 of the order); AY 2006-07 (para 3, page 2 of the order); AY 2007-08 (para 8, page 8-9 of the order) and AY 2008-09 (para 35, page 48 of the order). Also the order of the Tribunal in assessee's own case for AY 2001-02 has been upheld by the Hon'ble Bombay High Court (ITA No. 2470 of 2013).

Facts being identical, we follow the above decisions and uphold the order of the Ld. CIT(A).

55.1 We also find that the issue regarding interest and discount charges and interest on housing loan has been decided in favour of the

assessee by the order of the Tribunal in assessee's own case in AY 2004-05 (para 10-11, page 7-9 of the order); AY 2005-06 (para 3, page 3-4 of the order); AY 2006-07 (para 3, page 2 of the order); AY 2007-08 (para 8, page 8-9 of the order) and AY 2008-09 (para 35, page 48 of the order).

Facts being identical, we follow the above decisions and uphold the order of the Ld. CIT(A).

55.2 Then we come to the treatment of miscellaneous interest of Rs.10,28,86,465/-. We find that the that the Ld. CIT(A) has decided the issue by following the order of his predecessor for the AY 2007-08 which is as under:

"Interest on miscellaneous sources was also examined in the case of the assessee for AY 2007-08 and the facts of the case are same, therefore, following the decision for AY 2007-08, interest from BG Sales on bank guarantee of Rs.3,90,59,690/-, which is received from buyers on sales is held taxable as business income, whereas, remaining other interest under the head-miscellaneous have been rightly taxed under the head interest from other sources by the AO."

We find that the interest on BG Sales is identical to interest and discount charges which arose before the ITAT 'A' Bench Mumbai in assessee's own case for AY 2005-06 (ITA No. 7341/Mum/2008). We also find that the Tribunal has dismissed the appeal of the revenue filed against the order of the Ld. CIT(A) by holding that interest and discount charges be assessable as income from business.

Facts being identical, we follow the above decision of the Co-ordinate Bench and uphold the order of the Ld. CIT(A). Thus the 2nd ground of appeal is dismissed.

56. The 3rd ground of appeal

> Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in allowing higher depreciation to the extent of Rs.13,09,37,839/- without appreciating the facts that the same was restricted by the AO consequent to allowance of depreciation for AY 2001-02.

57. During the course of assessment proceedings, the AO brought to the notice of the assessee that though depreciation was not claimed in AY 2001-02, the same was allowed in the assessment order. Therefore, the AO asked the assessee to furnish the revised statement for depreciation, taking into consideration depreciation allowed in that year. Then the AO asked the assessee to explain as to why excess depreciation of Rs.13,09,37,839/- should not be disallowed. In response to it, the assessee filed a reply which has been extracted by the AO at para 7.1 of the assessment order dated 31.12.2012. The AO was not convinced with the said reply and made a disallowance of the excess claim of depreciation of Rs.13,09,37,839/-.

In appeal, the Ld. CIT(A) followed the order of his predecessor for AY 2008-09 and allowed the appeal filed by the assessee.

58. Before us, the Ld. DR supports the order passed by the AO.

On the other hand, the Ld. counsel of the assessee submits that the above issue has been decided in favour of the assessee by the order of

the Tribunal in assessee's own case for AY 2004-05 (ITA No. 6835/Mum/2008), AY 2006-07 (ITA No. 1240/M/2010), AY 2007-08 (ITA No. 3588/M/2013), AY 2008-09 (ITA No. 4448/M/2013 and 4436/M/2013). Also reliance is placed on the decision in *CIT v. Mahindra Mills Ltd*. (243 ITR 56) (SC).

59. We have heard the rival submissions and perused the relevant materials on record. It would be relevant to refer here to the order of the ITAT 'F' Bench Mumbai in assessee's own case for AY 2004-05 (ITA No. 6835/Mum/2008). The Tribunal *vide* order dated 23.11.2016 (para 17-19) held:

> "17. Insofar as Ground of appeal no. 4 is concerned, the same relates to the direction of CIT(A) contained in para 6 of his order whereby he has directed the Assessing Officer to allow depreciation based on the opening WDV of assets, calculated without reducing the depreciation thrust upon the appellant in Assessment Year 2001-02.
>
> 18. In this context, the relevant facts are that in the course of assessment proceedings, the Assessing Officer recalculated the depreciation allowable to assessee by reworking the WDV of assets. In the earlier Assessment Years of 2000-01 and 2001-02, assessee had not claimed depreciation but the same were allowed in the assessment order. As a consequence, the Assessing Officer reworked the WDV of the assets and scaled down the allowance of depreciation in the instant year. The CIT(A) noted that the earlier order of Assessing Officer for Assessment Year 2001-02 was reversed as depreciation could not be thrust upon the assessee and based on such precedent, he set-aside the action of Assessing Officer of reworking the WDV in the instant assessment year. Against such a decision of CIT(A), Revenue is in appeal before us.

> 19. At the time of hearing, it has been pointed out that the order of Assessing Officer for Assessment Year 2001-02 wherein assessee was allowed depreciation in spite of the fact that it was not claimed in the return of income, has since been reversed by the CIT(A) and even the appeal of Revenue against such an order has been dismissed by the Tribunal for want of requisite permission from COD. It is sought to be emphasised that the order of the CIT(A) for Assessment Year 2001-02 on this point has since become final. The aforesaid factual matrix has not been disputed by the ld. DR and in this view of the matter, we find no reason to find fault with the directions of CIT(A) that the adjustment of WDV done by Assessing Officer in order to recalculate the depreciation is untenable. As a consequence, the order of CIT(A) on this aspect is upheld and Revenue fails."

59.1 Facts being identical, we uphold the order of the Ld. CIT(A) and dismiss the 3rd ground of appeal.

60. In the result the appeal filed by the revenue is dismissed.

61. To sum up, the appeal filed by the assessee is partly allowed, whereas the appeal filed by the revenue is dismissed.

Order pronounced in the open Court 07/09/2018.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 07/09/2018
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai