

**IN THE INCOME TAX APPELLATE TRIBUNAL “H”
BENCH, MUMBAI**

**BEFORE HON’BLE SH. G. S. PANNU, VP &
HON’BLE SH. SANDEEP GOSAIN, JM**

आयकरअपीलसं./ I.T.A. No. 4535/Mum/2013
(निर्धारणवर्ष / Assessment Year: 2010-11)

ITO- 9 (2) (2), R. No. 225, AayakarBhavan, M. K Road, Mumbai-400 020	बनाम/ Vs.	Kitec Industries (Ind) Ltd. C-18/11, JeevanBima Nagar, Borivali(west) Mumbai-400 103
स्थायीलेखासं ./जीआइआरसं ./PAN No. AABCK1840L		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Ashish Kumar, DR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri Hitesh M. Shah, AR

सुनवाईकीतारीख/ Date of Hearing	:	05.10.2018
घोषणाकीतारीख / Date of Pronouncement	:	31.10.2018

आदेश / ORDER

Per Sandeep Gosain, Judicial Member:

The present Appeal filed by the revenue is against the order of Ld. CIT (Appeal) – 20, Mumbai dated 14.03.13 for AY 2010-11 on the grounds mentioned herein below:-

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the disallowance of additional remuneration to Rs. 13,92,665/- as against Rs.62,08,265/- made by the A.O treating the same to be excessive and unreasonable within the meaning of provisions of section 40A(2)(a) r.w.s 40A(2)(b) of the J. Act 1961.

2 On the facts and in the circumstances of the case and in law, theLd. CIT(A) erred in deleting the disallowance of Rs.5,99,7571- made u/s 40a(1)(A) of the Act, for failure to deduct tax at source u/s 195 of the Act.

3. On the facts and in the circumstances of the case and. in law, theLd. CIT(A) erred in deleting the addition made amounting to Rs.92,66.374/- representing suppressed production and corresponding sales made outside books despite a specific finding that the assessee could not explain production loss to the extent of 8,48% with any supporting evidences.

4..On the facts and in the circumstances of the case and in law, theLd. CIT(A) erred in deleting the addition made amounting to Rs.3,48,69,755/- representing suppressed Gross Profits despite a specific finding that there is substantial and unexplained fall in G.P. as compared to

preceding years. And also ignoring the fact that the assessee could not explain the production costs to sales prices etc as elaborated in the assessment order.

5. . On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance made amounting to Rs.20,99,976/- representing interest expense on ECB being capital expenditure u/s 37(1) of the Act.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition/adjustment made to book profits for the purpose of section 115JB of the Act amounting to Rs.1,28,92,244/- representing Foreign Exchange gain on borrowed funds holding the said gains to be a capital receipt.

7. The appellant prays the order of the CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.

8. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary

2. The brief facts of the case are that the assessee filed its return of income for the year under consideration declaring total income at Rs. NIL on 14.10.10. Later on, the case was selected for scrutiny and after serving statutory notices and seeking reply of the assessee, assessment order u/s. 143(3) of the I.T. Act, 1961 was passed by the AO thereby making additions under different heads on 25.12.12.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties, partly allowed the appeal of the assessee.

Now before us, the revenue has preferred the present appeal by raising the above grounds.

Ground No. 1

3. This ground raised by the revenue relates to challenging the order of Ld. CIT(A) in restricting the disallowance of additional remuneration to Rs. 13,92,665/- as against Rs. 62,08,265/- made by the A.O treating the same to be excessive and unreasonable within the meaning of provisions of section 40A(2)(a) r.w.s 40A(2)(b) of the I.T. Act 1961.

4. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 4.1 to 4.3 of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 4.3 of its order and the same is reproduced below:-

4.3 I have considered the finding of the Assessing Officer and rival submission of the appellant, carefully. I have also gone through the documents on record. I find that additional remuneration has been provided as per terms of resolution passed in 14 Annual General Meeting of members of the company. This meeting was held on 27.09.2008, accordingly additional remuneration was also there in FY 2008-09 to the extent of Rs. 63,721/-. Thus, if there is additional remuneration, which is in consistence with the policy of the company and accounting treatment followed in

previous years This fact is very much visible in 14th Annual report of FY 20070 Page No.3 of the Company's Annual Report. Ld. Assessing Officer has mentioned the reply of the appellant but has ignored this aspect while coming to the conclusion that no supporting evidence has been furnished in respect of claim of increase of remuneration. Further it is wrong on the part of the Assessing Officer saying that sales and profit; have been fallen whereas fact is altogether different.. During the year gross turnover of the company has been increased by 6.53% i.e. fruit Rs. 17,79,57,950/-toRs. 18,95,87,009/-. Further, in subsequent year i.e. FY 2010-11 there is increase of turnover to Rs.23,14,97,442/- revaling growth nearby 22%. Thus., the finding of the Assessing Officer is factually incorrect. During the year operating profit before depreciation and MD remuneration is of Rs.2,96,57,828/ Thus, it is also wrong on the partof the Assessing Officer to say that there is no profit in the company. As regard, query of the Assessing Officer as to what prompted such huge increase in Director's remuneration as there was no increase in the business or profit of the company, it is pertinent to mention that resolution passd in Annual General Meeting reveals We decision of the Members of Company about the responsibility and rule of Managing Director with reference to reservation of

interest of the company. Such remuneration has been increased with reference to terms of appointment and remuneration and also with reference to various responsibilities borne by the Managing Director iii day to clay discharge of his duty, therefore, same cannot be challenged without contrary evidence in possession. The point No.6 of explanatory statement of Annual Report reveals "comparative remuneration profile with respect to industry, size of company, profile of the position arid person (in case of expatriates the relevant details would be w.r. t. the country of his origin)- The remuneration proposed is justified in comparison to the other organizations of the similar type in the industry, where the annual t of managing personnel thin the range of Rs. 80 lacs to Rs. 125 lacs perannum." This justification is given in the notice for Annual General Meeting has 'been approved hence it cannot be presumed that there is no proper reason for increase of remuneration. Further, it is pertinent to mention that whatever decision has been taken by the appellatant for increase of remuneration same has also been approved by government of India, Ministry of Corporate Affairs subsequently. it is also relevant to mention that, as per Section 3 10 of Company Act, there is a provision of law that if remuneration is increased by the Company it is not void unless disapproved by the Government. Here in this case

remuneration has been fixed as per the resolution which was still valid upto the end of the accounting year because there was no disapproval by the Government and furthermore such increase in remediation has been approved by the Central Government subsequently, therefore no fault can be found out in such claim of increased remuneration. It is however, relevant to mention that during the year appellant has claimed more remuneration of .13,92,665/- being short provision of FY 2008-09 and same has also been included in provision of remuneration in this year. Thus, there is increase of expenditure to this extent in this year. Therefore, to the extent of Rs.13,92,665/-, such expenditure is not found allowable, in view of the above discussion appellant deserves allowance of 48,15,600/- out of total claim of additional remuneration 62.08,265/-. Assessing Officer is therefore directed to allow the genuine expenditure of Rs. 48,15,600/-

After having gone through the aforementioned order, we find that Ld. CIT(A) had rightly appreciated the facts of the present case and rightly concluded that the additional remuneration had been provided as per terms of resolution passed

in 14 Annual General Meeting of members of the company. We have also perused the records and find that in the meeting held on 27.09.2008, additional remuneration was there in FY 2008-09, therefore if there is additional remuneration, which is in consistence with the policy of the company and the same is in accordance with 14th Annual Report for AY 2007-08 of the company's annual report. We have also noted that during the year, the gross turnover of the company has been increased by 6.53% and further in subsequent years, there is increase of turnover of approximate 22%. Therefore, we are of the view that considering all those facts, Ld. CIT(A) had rightly allowed this ground of appeal in favour of the assessee. Even otherwise, such remuneration has been increased with reference to terms of appointment and remuneration and also with reference to various responsibilities borne by the Managing Director in day to day discharge of his duty. Since the decision taken by the assessee for increase of remuneration of the directors has also been approved by the Govt. of India, Ministry of Corporate Affairs and in this case, resolution which was passed for the increase, was valid up

to the end of the accounting year because there was no disapproval by the Govt. of India.

No new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings so recorded by the Ld.CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, this ground raised by the revenue stands **dismissed**.

Ground No. 2

5. This ground raised by the revenue relates to challenging the order of Ld. CIT(A) in deleting the disallowance of Rs.5,99,7571- made u/s 40a(1)(A) of the Act, for failure to deduct tax at source u/s 195 of the Act.

6. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment

cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 5.1 to 5.3 of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 5.3 of its order and the same is reproduced below:-

5.3 I have considered rival submission of the appellant and finding of the Assessing Officer, carefully. It is very evident from the record that Ld. Assessing Officer has disallowed this expenditure for the sake of disallowance without Properly appreciating the facts of the case. it is wrong on the part of the Assessing Officer to presume that appellant had not submitted any evidence in respect of necessity of expenditure whereas in Para 4.4 Assessing Officer himself has written that appellant has remitted the professional charges and Same has been reflected in Form No.15CA and 15CB which is certified by the auditor. It is not understood as to why Ld. Assessing Officer has not given due credit to these evidences. Further, it is wrong on the part of the Assessing Officer

to presume that there is no proper explanation regarding professional fees given for certification to the U.S. based company whereas it is very evident from record that an amount of Rs. 3,80,438/- was given to M/s. IAPMO Research and Testing Ind. USA for testing and certification of product developed and manufactured by the company for international market. An amount of Rs. 1,38,591/- was paid to M/s. AMG Exports Ltd. for development of export market in Latin America. Similarly, an amount of Rs. 9,01,08/- was paid to World Plumping Council as a membership fees and Rs. 71,548/- was paid to M/s. Jagwar Corporation for shareholding certification for trademark registration. It is evident that Ld. Assessing Officer has not analyzed and properly appreciated all these facts and has reached to the conclusion baselessly. Obviously, it is wrong on the part of the Assessing Officer to presume that such professional fees are liable for TDS u/s. 19. It is very evident that services were rendered by the recipient outside India, hence such income in the hands of recipient was neither accrued in India nor was received in India hence was not liable for any TDS. Form No. 15CA, duly available with the record of the Assessing Officer or with NSDL shows all the details of remittances and recipient banks. Ld. A.R. has clarified that there is no permanent establishment of recipient in India hence there is no question of making any TDS.

Further, I find force in the arguments of the Ld.A.R. that no query was raised by the AO regarding genuineness of remittance. Therefore, in view of all these factual aspect discussion, I reach to the conclusion that Ld. Assessing Officer has wrongly disallowed such genuine professional fees u/s.40(a)(1a). Therefore, Assessing Officer is directed to delete the disallowance of expenditure of Rs.5,99,71 57/-.

After having gone through the aforementioned order as well as considering the facts of the present case, we find that Ld. CIT(A) after appreciating the facts of the present case had rightly concluded that AO had disallowed the expenditure without properly appreciating the facts of the present case, whereas the AO himself in his order had clearly mentioned that the assessee had remitted the professional charges and the same were reflected in Form No.15CA and 15CB which were certified by the auditor. Even otherwise, from the records, it is clear that amount of Rs. 3,80,438/- was given to M/s. IAPMO Research and Testing Ind. USA for testing and certification of product develop and manufactured by the company for international market. From the record, we further notice that AO has not

analyzed and properly appreciated all these facts and had reach to the conclusion on presumption. It is a settled law that presumption howsoever strong may be, but cannot take place of proof. From the records, it is evident that services were rendered by the recipient outside India, hence such income in the hands of recipient was neither accrued in India nor was received in India hence was not liable for any TDS.

No new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, this ground raised by the revenue stands **dismissed**.

Ground No. 3

7. This ground raised by the revenue relates to challenging the order of Ld. CIT(A) in deleting the addition made amounting to Rs.92,66.374/- representing suppressed production and

corresponding sales made outside books despite a specific finding that the assessee could not explain production loss to the extent of 8.48% with any supporting evidences.

8. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 6.1 to 6.3 of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 6.3 of its order and the same is reproduced below:-

6.3 I have considered the finding of the Assessing Officer and rival submission of the appellant, carefully. It is evident from the record and audited balance sheet that assessee has consume 563075 kg. raw materials and, produce 2.34 million mtr. (if converted into kg. at maximum wall thickness comes to 450520 kg.) of composite pipe with maximum wall thickness and

produced PVC and PE pipe of 24915 kg. and produced 'B' class pipe 61r735 kg. and claim distribution loss due to cutting sizes and sealing loss and handling loss @ 2.5% which conies to 14077 kg. and Loss in the production process is 11,828 kg. which works out to be 2.10% only. Assessing Officer has erred in converting 2.3 million mtr pipe at the standard rate to arrive at the weight of consumption of raw material at 417441 kg. He failed to consider the facts relating to day to day manufacturing process and also submissions of the appellant that while producing the pipe of standard thickness, actual thickness is to be kept always high due to the various reasons. For example fluctuation in power supply, quality o raw material and ingredients properties. It is tendency of machine operator to run the pipe of high thickness range to avoid rejection. Hence, actual weight of pipe with maximum wall thickness will always be higher as compare to standard weight. Further, the Assessing Officer has riot brought anything on the record to establish that the assessee has produce / sold the goods outside the books. It is also pertinent to mention that assessee has produced excise records before the Assessing Officer for his examination and Ld. Assessing Officer has not been able to point out any substantial defect in the accounts or production register, therefore, merely on the basis of unsupported calculation, no such conclusion can' be

drawn. Further, the sales and purchases are verified by the Assessing Officer by issuing notices u/s. 133(6) and no discrepancies have ever been found. Ld. A.R. has rightly submitted that appellant's books of accounts are duly audited and accepted by the Assessing Officer and as such there is no reason for such addition. To make this point more clear it is pertinent to mention that Ld. Assessing Officer has confine to principal item of raw material and finished products showing yield of 74.14% (wrongly mentioned by the Assessing Officer 74.15%) ignoring the fact that there is B' class pipe production to the extent of 61,735 kg. which is not included in Annexure--6 in the Tax Audit Report. While giving reply to the Assessing Officer, appellant has explained that because of wall thickness which is not always as per the standard, there can be variation in production. During the course of assessment proceeding itself appellant has clarified that as against standard loss of .7.98%, in reality there is a actual loss of @2.10 % in the production process. The factual aspect is to be reviewed. Appellant has shown consumption of 563075 kg of raw material and has produced 2.34 million mtr (converted to 450520 k: at maximum wall thickness) composite pipes, Further, there is a production of 24,016 kg. PVC pipe, 899 kg. of HDPE Pipe and 61,735 '3' class composite pipe. Thus, there is net loss of 25,905 kg. which is 4.60 of*

total consumption. Therefore, in reality there is actual yield of 95,40%. It is very apparent that Ld. Assessing Officer has not analyzed these factual aspects relevant to the issue under consideration. Therefore, the addition so made by the Assessing Officer is found based on vague arguments and without proper analysis and investigation of accounts. Furthermore, there is no independent evidence in the possession of the Assessing, Officer to discard the book result. It is worthwhile to further mention that Ld. Assessing Officer has not rejected the veracity of the books of account and has merely theoretically estimated unaccounted production and unaccounted sales which is not justifiable. Thus, addition so made of T. 92,66,374/- is deleted.

After having gone through the aforementioned order as well as considering the facts of the present case, we find that Ld. CIT(A) after appreciating the facts of the present case had rightly deleted the additions as it was evident from the records and audited balance sheet that assessee has consumed raw materials and, produce 2.34 million mtr. of composite pipe with required thickness as are full explained in the order of Ld. CIT(A) in para

no. 6.3 of its order. The AO had failed to consider the facts relating to day to day manufacturing process, therefore could not appreciate that while producing the pipe of standard thickness, actual thickness is to be kept always high due to the various reasons. Ld. CIT(A) has discussed in detail the entire issue and the shortcomings in the orders passed by AO. Although, the assessee had produced excise records before the AO, but the AO has not been pointed out any substantial defect in the accounts or production register, therefore, merely on the basis of unsupported calculation. The AO had verified the sales and purchases by issuing required notices u/s. 133(6), but no discrepancies have ever been found.

We also find that the AO had not analyzed the factual aspects which are contained in order of Ld. CIT(A) and hence in this way, the additions made by the AO were found without appreciating /investigating factual facts. The AO could not brought anything on record any independent material to discard the book result and thus had not rejected veracity of the books of account, but on the contrary had theoretically estimated

unaccounted production and unaccounted sales, which is not permissible under law.

No new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, this ground raised by the revenue stands **dismissed**.

Ground No. 4

9. This ground raised by the revenue relates to challenging the order of Ld. CIT(A) in deleting the addition made amounting to Rs.3,48,69,755/- representing suppressed Gross Profits despite a specific finding that there is substantial and unexplained fall in G.P. as compared to preceding years.

10. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 7.1 to 7.3 of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 7.3 of its order and the same is reproduced below:-

7.3 I have circumspected the entire spectrum of the facts and circumstances of the case, finding of the Assessing Officer and rival submission of the appellant, carefully. I find Ld. Assessing Officer has made the addition on flimsy ground without material or evidence in hand. It is very apparent from the reasoning of the Assessing Officer that instead of referring any reliable evidence for hit; estimation of OP / NP, he has only disbelieved the written submission of the appellant without pointing out any instance of suppression of selling price. When appellant has submitted that price of raw material was

on higher side because of increase in prices but sale price was not increased due to internal and external competition, it was the duty of the Assessing Officer to verify the sales price as compared to the market price and thereafter was to reach to the such conclusion if anything was found adverse against the appellant. Lth Assessing Officer has not done so and has jumped to the conclusion on conjecture. If manufacturing activity has been increased it does not mean that margin of profit should also be increased. Assessing Officer has apparently failed to substantiate his reasoning as to how margin of profit was increased and inspite of increase of margin appellant had shown less profit. The law of burden of proof suggests that burden lies on the person who makes allegations or contend otherwise. Here, Assessing officer has failed to discharge his onus by proving that there was a higher margin of profit than shown by the appellant. Therefore, such baseless additions cannot be sustained. Further, it is wrong on the part of the Assessing Officer to say that appellant has not submitted any evidence in support of claim of increase in raw material cost. When appellant has submitted books of account and evidences of purchase of raw material, it is not understood as to what more evidence Assessing Officer wants to have in his possession. The argument that if raw material casts increases the

corresponding sales prices are bound to increase, is baseless presumption. There may be compelling situation for not increasing selling price because appellant has to safeguard the interest of business and does continuance of manufacturing and selling of goods In the market. There is no fundamental rule that if cost of material increases, correspondingly selling price was required to be increased. Ld. Assessing Officer has wrongly argued that selling price has to be increased. It is the appellant who has to decide the selling price and not the Assessing Officer. Further, it is wrong on the part of the Assessing Officer to presume that appellant has not produced any evidence of increase in man power and corresponding cost. When books of accounts has been produced and details are appearing in the record there cannot be any baseless presumption that there is no increase in the man power or corresponding cost. It is very evident from the assessment order that Assessing Officer has not properly verified the books of accounts otherwise he would not have mentioned such factually incorrect statement. It can be seer, from the accounts that in this year there is increase of depreciation from Rs.1,42,37,747/- of AY 2008-09 to Rs.2,04,83,191F. Similarly, other wages and salary has increased from Rs.89,75,338I- of AY 2008-09 to Rs.1,01,61,103/- of AY 2009-10. Last year total cost of material was ofRs.

4,95,92,097/- whereas in this year it is of Rs.5,52,74,825/-. Similar, is the fact in respect of operation and other expenses and marketing expenses. Further, I find baselessness in the arguments of the Ld. Assessing Officer that because in increase in depreciation profit cannot be reduced. It can be seen from the annual report and profit and loss account that before interest, depreciation and taxes profit in this year is Rs.2,66,78,258/- whereas in immediately preceding year it was of Rs.2,63,84,560/-. Thus, profit is based on increase or decrease in depreciation or other factors like cost of material, operating expenses, marketing expenses. It is relevant to mention that in preceding year marketing expenses was of Rs.1,17,89,210/- whereas in this year it has increased to Rs.1,62,57,906/-. Therefore, the arguments of the Ld. Assessing Officer is found to be very vague and baseless. Further, I find no substance in the reasoning of the Assessing Officer that if production capacity is increased, there is bound to be good profit. Profit depends upon various factors and not exclusively dependent upon increase of plant and machinery. Volume may be increased but that does not mean that margin of profit should also be increased. Further, I find factually incorrect statement of Assessing Officer that during the year there is no increase in turnover whereas it can be seen from the

profit and loss account that as compare to turnover of .10,60,98,955/- of AY 2009-10, it has increased to Rs 1,09,279/- in AY 2010-11. It is wrong on the part of the Assessing Officer to expect from the appellant to submit details of competitors and comparables in the Industry. If Assessing Officer wanted to have the details, he could have made enquiry to that extent and extracted information on his own but, instead of doing basic work of scrutiny and investigation he has merely expected some information from the appellant. Further, in Paragraph 6.5 of the assessment order, Ld. Assessing Officer has wrongly estimated net profit @17.94% of AY 2008-09 ignoring the fact of the AY 2009-10 admitted by him in this year where net profit has been shown @0.36%. While doing so, he has forgotten the element of depreciation and other cost as pointed out earlier. It can be seen from the records that in AY 2008-09 there was Interest income of Rs.1,66,76,247/- whereas in this year it is only of Rs.82,61,800/-. In AY 2008-09 depreciation. of .96,82,042/- whereas In this year it has increased substantially to Rs. 12,04,83,191/-. Similarly, other wages and salary was of Rs.36,66,055/- in AY 2008-09 whereas in this year it is of Rs.1,01,81,103/-. Apparently, Ld. Assessing Officer has ignored such vital facts of accounts and due to that he has entangled himself in wrong presumption. Therefore, after

reviewing the reasoning of the Assessing Officer, I reach to the conclusion that Ld. Assessing Officer has made such huge additions. of T .3,48,69,'55/- without any corroboration material evidence in possession and without pointing out substantial defects in the books of account duly audited by the authorized Auditor. Appellant also gets support from various judicial pronouncement vide CIT vs. Shrinati Poonarn Raid - 326 17W 23 (Delhi), Saurashtra Ball Pen (P.) Ltd vs. DC17 - 24 SOT 556 ('MwriL al), CIT vs. Rithilkanth Dave - 281 ITR 6 ('All.), Madnani Construction Corp. (P) Ltd. v. CIT 296 17W 45 ('Gau.), Ashok Re factors Pvt. Ltd. CIT 279 JTR 457 (Cal) and International Forcst company vs. CIT 101 JTR 721 (1&K). Thus, in view of the above discussion and narration of various facts, the addition so made of Rs.3,48,6,755/- is directed to be deleted from the assessment.

After having gone through the aforementioned order as well as considering the facts of the present case, we find that AO had made the addition without material or evidence and by disbelieving the written submission of the assessee without pointing out any instance of suppression of selling price. The assessee had submitted books of accounts and evidences of

purchases of raw material, but still the AO wanted more evidence in support of claim of increase in raw-material cost. The assessee had disclosed /placed on record all the material which was in his possession to support his contentions, but the AO rejected the contentions of assessee by merely holding that prices of raw material was on higher side because increase in prices then the sale price should also have been increased. The said finding of the AO is only presumption, whereas it was categorically stated by the assessee that the sale price was not increased due to internal and external competition. Thus in this situation, it was the duty of the AO to verify the sales price as compared to the market price and thereafter to reach any conclusion, in case anything was found adverse against the assessee. But the AO instead of doing such exercise had reached to the conclusion on conjecture, which is not permissible under law. The AO had not properly verified the books of accounts as it can be seen from the accounts that in the year under consideration, there was an increase of depreciation for AY 2008-09. Similarly, other wages and salary have also increased from that for AY 2008-09 to AY 2009-10. From the facts, we observed from the annual report and

profit and loss account that before interest, depreciation and taxes profit in this year was Rs.2,66,78,258/- whereas in immediately preceding year it was Rs.2,63,84,560/-. Thus in this way, profit is based on increase or decrease in depreciation or other factors like cost of material, operating expenses, marketing expenses. From the records, we also notice that in preceding year, marketing expenses were less than the year under consideration, therefore we are also of the view that the profit depends upon various factors and not exclusively dependent upon increase of plant and machinery. Volume may be increased but that does not mean that margin of profit should also been increased. We have meticulously analyzed the orders passed by Ld. CIT(A) which are in consonance with that of the facts and material placed on record.

No new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT(A). Hence, we are of the considered view that the findings

so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, this ground raised by the revenue stands **dismissed.**

Ground No. 5

11. This ground raised by the revenue relates to challenging the order of Ld. CIT(A) indeleting the disallowance made amounting to Rs.20,99.976/- representing interest expense on ECB being capital expenditure u/s 37(1) of the Act.

12. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 8.1 to 8.3 of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 8.3 of its order and the same is reproduced below:-

8.3 I have considered the finding of the Assessing Officer and rival submission of the appellant, carefully. I find that Ld. Assessing Officer has not properly analyzed the fact of the case and has made disallowance of Rs.20,99,776/- without any basis, T.ie fact of the case is that in FY 2007-09 appellant has obtained USD 3 million HC equivalent to Rs.11,99,10,000/- inclusive of exchange rate fluctuation. Out of which Rs.3,00,22,396/- was utilized on capital assets. Further, in FY 2008-09, an amount of Rs.7,16,71,146/- was utilized. The balance amount of Rs.3,84,12,500/- was kept in FUR on which interest income has been earned and has been duly reflected in profit and loss account as income. It is evident from the record that assets worth of .10,16,93,542/- has been purchased and put to use in earlier year which is also continuing in this year whereas the interest element corresponding to unutilized borrowed funds not utilized for purchase of assets has been utilized for earning of interest income, hence the corresponding expenditure relating to interest on borrowed fund, not utilized later on is also a revenue expenditure. To make this Point more clear it is to be reiterated that unutilized fund has yielded income to the appellant and same has been duly reflected in profit and loss account Therefore, the

corresponding interest expenditure is to be allowed Even if such income is regarded as income from other sources, the corresponding interest expenditure has to be allowed. In view of this, find no merit in the reasoning of the Assessing Officer. Further, it is found from the record that Ld. Assessing Officer has wrongly mentioned 'CWIP' at Rs. 16,49,18,808/- whereas the actual CWIP in this year is of Rs. 30,00,274/-. Apparently there is factual mistake led Assessing Officer to wrong conclusion. In view of the above discussion, I find that Assessing Officer has wrongly disallowed genuine interest expenditure, hence, Assessing Officer is directed to delete all amount of Rs. 20,99,776/- from the assessment.

After having gone through the aforementioned order as well as considering the facts of the present case, we find as per the facts of the case is that in FY 2007-08 assessee had obtained USD 3 million ECB equivalent to Rs.11,99,10,000/- inclusive of exchange rate fluctuation, out of which Rs.3,00,22,396/- was utilized on capital assets. Further, in FY 2008-09, an amount of Rs.7,16,71,146/- was utilized and in this way, the balance amount of Rs.3,84,12,500/- was kept in FDR on which interest

income was earned and which was duly reflected in profit and loss account as income. From the records, we also find that the unutilized fund has yielded income to the assessee and same has been duly reflected in profit and loss account. Therefore, the corresponding interest expenditure is also to be allowed. Ld. CIT(A) after appreciating the factual position had pointed out the mistake committed by the assessee as are evident from its order.

No new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, this ground raised by the revenue stands **dismissed**.

Ground No. 6

13. This ground raised by the revenue relates to challenging the order of Ld. CIT(A) indeleting the disallowance made

amounting to Rs.20,99.976/- representing interest expense on ECB being capital expenditure u/s 37(1) of the Act.

14. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by both the parties as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 10.1 to 10.3 of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 10.3 of its order and the same is reproduced below:-

10.3 I have considered the facts of the case, contentions of the A.O. and rival submissions of the Assessee. I find that Ld. AO has wrongly presumed that an amount of Rs.1,28,92,244/- is related to revenue account, whereas facts on record show that this foreign exchange fluctuation gain is related to capital account. To make this point more clear, it is pertinent to mention that the Appellant had taken a foreign

currency loan of USD 3,000000 equivalent to INR Rs.11,99,10,000/and which is Z,13,54,20,000/- as on 31.03.20 10 being converted value of foreign loan Out of this foreign exchange loan Appellant has utilized Rs.10,16,93,542/- for the purpose of acquisition of assets capitalized inthe books of account. The balance amount of Rs.3,12,84,500/- waskept in fixed deposit for further utilization for acquisition of assets. On this PDR appellant has received interest income and has shown us income from other sources. It can be seen from the Schedule 12 to the profit and loss account that this year appellant has received interest income of .82,61,800/-. Further, exchange rate difference being gain of .13,94,400/- has been shown in profit and loss account as income from other sources. Thus, it is not the case of notshowing foreign exchange fluctuation gain in profit and loss account. As regards, .1,28,92,244/-, it is found from the record that same has been deducted from the cost of fixed assets and thereby depreciation has been reduced. This fact can be verified from note No.9 of Schedule-19B forming part of account. Ld. Assessing Officer has made adjustment without analyzing the actual accounts and has reach to the conclusion ex-parte without issuing prober show-cause notice to the appellantrelating to such issue. It appears that merely on the basis of computation of income wherein foreign exchange gain

has been shown income of the year, he has reach to the conclusion that such foreign exchange gain is revenue in nature. It is found from the record that appellant has given this treatment because of GSR notification 225 (E) dated 31.03.2009 and has accordingly shown it foreign exchange gain while computing. taxable income of the year, but that itself is not giving right to Assessing Officer to modify the book profit without considering the impact of foreign exchange gain related to capital employed for acquisition of capital assets. Assessing Officer can very well verify such facts from Schedule-5 of balance sheet anc. notes to account already there on his record.

At this juncture, it is important to understand the scope of section 115JB, which lays down condition that the accounts of Assessee are to be prepared in accordance with the provisions of part 11 and III of Schedule VI of the Companies Act, 1956. Under the Companies Act, 1956, section 211 provides form and content of Balance Sheet and Profit and Loss Account, which in turn vide sub-section (1) and (2) provide for making the Balance Sheet and Profit and Loss Account in compliance with the requirements of Part I, 11 and III of Schedule VI of the said Act. Sub-section (3A) to this section, provides for that every Balance Sheet and Profit and Loss Account of the Company shall comply with the Accounting Standards which inter-alia have

been defined under sub-section (30) of the said section 211. As per section 211 (3C) the expression Accounting Standards means the Standards of Accounting recommended by ICAI and prescribed by Central Government in consultation with National Advisory Committee. The Ministry of Corporate Affairs, in exercise of power conferred u/s. 642(1)(a) read with section 21A and section 211(3C) of the Companies Act, 1956, brouhta notification GSR no. 225(E) or. 31st March 2009 i.e. the Central Government, in consultation with National Advisory Committee on Accounting' Standards, amended the(Accounting Standards) Rules, 2006. In which, the annexure wider the heading B. ACCOUNTING STANDARDS", in the sub-heading Accounting Standard (AS) 11, relating to "The Effect of Changes in Foreign Exchange Rates", wherein a paragraph no. Ji was inserted for the accounting periods commencing on or after 7th December 2006 and ending on or before 31st March 2011, so as to the exchange difference arising on reporting of the long term foreign currency items at rate different from those at which they were initially recorded during the period, or reported in previous financial statement, in so far as they relate to the acquisition of depreciable capital assets, can be added to or deducted from the cost of

assets and shall be depreciated over the balance life of the assets.

Based on the above notification, I am of the considered opinion that the treatment given by the Appellant in relation to the foreign exchange gain, amounting to Rs.1,28,92,244/- is in accordance with Accounting Standard AS 11 relating to "the Effects of Changes in Foreign Exchange Rates", which has been prescribed by the Central Government in consultation with National Advisory Committee on Accounting Standards under the powers conferred under section 211 and is therefore in accordance with Part 11 and 111 of Schedule VI of the Companies Act, 1956. In my considered opinion and also as per the ratio of judgment by the Hon'ble Supreme Court in case of Apollo Tyre Ltd v CIT (2002) 255 ITR 273, the Profit and Loss Account cannot be disturbed unless and until it is not made in accordance with Part. II and III of Schedule VI of the Companies Act, 1956. Whereas as per the finding given above the Profit and Loss Account drawn by the Company is in accordance with Part II and 111 of Schedule VI of the Companies Act, 1956, and hence adjustments made by AO of Rs.1,28,92,244/- under the Book Profits computed under section 15JB is not sustainable, Therefore, in view of above finding and discussion. Assessing Officer

is directed to delete the addition so made by way of adjustment u/s.115JB of the I.T. Act.

After having gone through the aforementioned order as well as considering the facts of the present case, we find that Ld. CIT(A) had rightly appreciated the facts of the present case and concluded that the treatment given by the Assessee in relation to the foreign exchange gain is in accordance with Accounting Standard AS 11 relating to "the Effects of Changes in Foreign Exchange Rates", which has been prescribed by the Central Government in consultation with National Advisory Committee on Accounting Standards under the powers conferred under section 211 and is therefore in accordance with Part II and III of Schedule VI of the Companies Act, 1956. Ld. CIT(A) had also relied upon the judgment of Hon'ble Supreme Court in case of **Apollo Tyre Ltd v CIT (2002) 255 ITR 273**, wherein it was held that the Profit and Loss Account cannot be disturbed unless and until it is not made in accordance with Part. II and III of Schedule VI of the Companies Act, 1956.

No new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, this ground raised by the revenue stands **dismissed**.

Ground No. 7 & 8

15. These grounds raised by the revenue are general in nature, thus requires no specific adjudication.

16. In the net result, the appeal filed by the revenue stands **dismissed**.

Order pronounced in the open court on 31st Oct, 2018

Sd/-
(G. S. Pannu)
Vice President

Sd/-
(Sandeep Gosain)
Judicial Member

मुंबई Mumbai;दिनांक Dated : 31.10.2018
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार

(Dy./Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai