

**In the Income-Tax Appellate Tribunal,  
Delhi Bench 'F', New Delhi**

**Before: Shri Amit Shukla, Judicial Member And  
Shri L.P. Sahu, Accountant Member**

**ITA No. 170/Del/2019  
Assessment Year: 2015-16**

Priapus Developers P. Ltd., Plot No. 103-A, 1st Floor, Mahipalpur Extension, New Delhi. PAN- AAFCP 2747R <b>(Appellant)</b>	<b>vs.</b>	ACIT, Circle 20(1), New Delhi  <b>(Respondent)</b>
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<b>Appellant by</b>	Sh. S.K. Tulsian, Advocate
<b>Respondent by</b>	Sh. J.K. Mishra, CIT/DR

<b>Date of Hearing</b>	9.02.2019
<b>Date of Pronouncement</b>	12.03.2019

**ORDER**

**Per Amit Shukla, JM:**

Aforesaid appeal has been filed by the assessee against the impugned order dated 05.12.2018, passed by the Ld. CIT(Appeals)-7, New Delhi for the quantum of assessment passed u/s. 143(3) for the assessment year 2015-16.

2. The grounds of appeal as raised by the assessee in the memo of appeal read as under:-

1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in passing and upholding the Assessment Order u/s 143(3)/ Rectification order u/s 154 of the Act wherein the Income under the normal provisions was assessed at Rs.4,43,46,101/- as against the Returned Income of Rs.3,28,09,280/-, and the Book profit U/s 115JB of the Act for MAT purposes was determined at Rs.65,47,56,587/- as against the declared Book profit u/s 115JB of the Act at Rs.2,75,39,440/-.

2. That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in making the addition of Rs.61,56,80,326/- to the Book profit u/s 115JB of the Act holding the same to be the amount standing in the Revaluation Reserve relating to the stock sold by the Appellant.

2(a). That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in treating the Capital Reserve as a Revaluation Reserve.

2(b). That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in not appreciating the Amalgamation Scheme duly approved by the Hon'ble High Court which clearly laid out the modus operandi of the said Amalgamation.

2(c). That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in applying the provisions of the Clause (j) of Explanation 1 to section 115JB of the Act to the Capital Reserve created by the Appellant Company pursuant to the Scheme of Amalgamation

3. That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in placing reliance on the decision of the Hon'ble ITAT, Ahmadabad in the case of Infibeam Incorporation Ltd. vs I TO. Ward 4(3), Ahmedabad in ITA No. 3391/Ahd/2015 for the A.Y. 2011-12

*which is on completely different facts from the case of the Appellant.*

*4. That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in applying the provisions of section 49(2) of the Act to the case of the Appellant.*

*5. That, without prejudice to the above, on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in applying the proviso to the section 10(38) of the Act r.w. Clause (ii) to the Explanation to section 115JB of the Act to the case of the appellant.*

*5(a). That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in placing reliance on the decision of the Bangalore Bench of the ITAT in the Case Of Karnataka State Industrial Infrastructure Developers Co. Ltd. Vs DCIT (2016) 76 taxmann.com 360 (bang - ITAT) which is which is on completely different facts from the case of the Appellant.*

*5(b). That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law in interpreting section 10(38) of the Act r.w.s 115JB of the Act.*

*6. That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in alleging that the Appellant has violated the AS-13 relating to the "Accounting for Investments"*

*7. That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in placing reliance on the case of M/s Summer Builders Pvt. Ltd. Vs DOT Central Circle -36, Mumbai (ITA Nos. 2512, 13 & 14/Mum/2009) which is completely on different facts from the case of the Appellant.*

8. *That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in law and in facts in making disallowance of Rs.1,15,36,821/- u/s 14A of the Act even though no expenditure was incurred to make such investment or earn dividend.*

9. *That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in disallowance of Rs. 1,15,36,821/- made u/s 14A of the Act to the profit for purposes of section 115JB of the Act.*

10. *That, as the order of Ld. CIT(A) suffers from illegality and is devoid of any merit, the same should be quashed and your appellant be given such relief(s) as prayed for.*

11. *That the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/ or rescind any or all of the above grounds.”*

3. The core issue involved in this case relates to addition of Rs.61,56,80,326/- on account of adjustment made in the book profit u/s 115JB made by the Assessing Officer, which has been confirmed by the Ld. CIT(A).

4. The facts, in brief, qua the adjustment made in the book profit are that, the assessee company is engaged in the business of development of infrastructure and realestate. For the relevant assessment year, the assessee had filed its return of income by way of e-filing on 06.07.2017, declaring income of Rs.3,28,09,280/- under the normal provisions of the Act; and book profit u/s. 115JB was declared at Rs.2,75,39,440/-. During the relevant financial year 2014-15, two wholly subsidiaries of the assessee company, i.e.,

M/s. Priapus Real Estate Pvt. Ltd. (PREPL) and M/s. Priapus Properties Pvt. Ltd. (PPPL), were amalgamated with their holding company, i.e., M/s. Priapus Development Pvt. Ltd. (assessee). The merger scheme was approved by the Hon'ble Delhi High Court u/s 391 to 394 of the Companies Act, 1956 read with Rules 67 to 87 of the Companies' Act, vide judgment and order dated 06.10.2016, The appointed date was treated as 15.11.2014. As per the Scheme of Amalgamation placed before the Hon'ble High Court, the accounting principles and 'purchase method' as prescribed in 'AS-14 was adopted. Under the scheme of amalgamation, the shares of M/s. India Bulls Housing Finance Ltd. (IHFL) held by the amalgamating companies were transferred to the assessee company. As per the said Scheme, such shares were revalued at the time of amalgamation at the rate of Rs. 456.47 per share; and the difference arising between the book value shown in the books of amalgamating companies and the fair value of Rs.456.47 per share was to form part of the capital reserves of the assessee company for long term capital investment projects or other future expenditure. Thus, consequent to the order of Hon'ble High Court, the value of IHFL shares acquired by the assessee company, in the books were shown @ Rs.456.47 per share. Further, in terms of section 47(vi) of the Income Tax Act, such transfer of capital asset was not recorded as transfer which can be subject to capital gain tax. Subsequently, during the assessment year 2015-16, the assessee company sold 2,02,053 shares of IHFL at recognized Stock Exchange at a loss of

Rs.52,59,843/, on which STT was paid. It was stated by the assessee that it had prepared its balance sheet and Profit & Loss Account in accordance with the provisions of Companies' Act and the same were duly audited and approved by the Statutory Auditors and also accepted/adopted by members in the AGM as well filed and disclosed before the ROC. Thus, the loss arising out of sale of shares was disclosed in the financial statement as per the requirement under the Companies Act. However, while filing the return, the assessee has suo motto disallowed the loss of Rs.52,59,843/- for the purpose of computing its profit from business and profession. Accordingly, it was submitted that since net result in the profit and loss account drawn in accordance with the provisions of the Companies Act had resulted into loss and therefore, the assessee was not liable for MAT liability u/s. 115JB.

5. The learned Assessing Officer required the assessee to furnish the details about the nature of capital reserves and also asked the assessee as to why the amount credited to the capital reserves for 20,42,053 shares sold by the assessee should not be considered for the purpose of calculation of book profit u/s. 115JB and adjustment be made in the book profit. In response, the assessee submitted detailed reply, which has been incorporated in the assessment order. The working of the capital reserve in the books of account and in the financial statement shown by the assessee in terms of the scheme of amalgamation was disclosed in the following manner:-

Particulars	Priapus Properties Pvt Ltd.	Priapus Real Estate Pvt Ltd.	Priapus Developers Pvt Ltd.	Total
On revaluation of shares	232,19,92,283	85,84,92,000		318,04,84,283
On revaluation of Land	3,27,760	3,27,760	3,27,760	9,83,280
On Purchase consideration	62,80,58,323	14,95,05,680		77,75,64,003

It was further submitted that, neither the books of account nor audited statement of accounts have been disqualified by the auditors nor ROC has taken any objection and therefore, the book profit shown by the assessee cannot be tinkered with. It was further stated that, as per Scheme of Amalgamation, assessee had no option but to take the differential value of shares to capital reserves. In support, strong reliance was placed on the decision of ITAT Mumbai Bench in the case of United Estate Pvt. Ltd. The Assessing Officer then asked the assessee, why no adjustment should be made in the book profit with respect to valuation of shares, which is nothing but revaluation of reserve. The assessee in response had relied upon AS-14 and submitted that in case of 'purchase method' the assets and liabilities are to be recorded at fair market value at the time of amalgamation and as per the scheme of amalgamation 'purchase method' was adopted. The ld. Assessing Officer observed that reserve created on account of revaluation of shares was not credited to the profit & loss account and therefore, he was of the

opinion that the same has to be considered for determination of book profit. The assessee, however, squarely relied upon the Amalgamation Scheme and the order of Hon'ble High Court on account of treatment given in the books of account. The detail submissions of the assessee in this regard are incorporated on page 4 to 6 of the assessment order. The ld. Assessing Officer held that in terms of *clause (v) to Explanation 1* of section 115JB, such revaluation of shares has to be taken into account while computing the book profit. Finally, ld. Assessing Officer made the addition of Rs.61,04,10,483/- in the hands of the assessee mainly on following grounds: –

- Firstly, the reserve created out of revaluation of shares held by M/s. PREPL and PPPL in their books of accounts, which has been credited in the balance sheet as capital reserves is nothing but revaluation of shares created out of excess of revaluation of assets and therefore, the contention of the assessee that it is not revaluation of reserves does not have any merit;
- Secondly, the Hon'ble High Court has merely approved the Amalgamation but has not comment upon accounting treatment given in pursuance to the amalgamation of the companies. Hon'ble High court has not discussed at all the merits of accounting treatment in its order;
- Thirdly, he rejected various case laws relied by the assessee that capital reserve created out of amalgamation

schemecannot be added to the book profit on the ground that what is proposed is not addition of entire capital reserve but that of the amount which is present in the reserve created on revaluation of assets while those assets were disposed of during the year.

- Lastly, reserve created due to revaluation of assets does not route through profit accounts directly, which is not correct and therefore, in terms of clause (v) of Explanation 1 makes it clear that for the purpose of book profit, such revaluation of reserve relating to revalued assets has to be increased.

6. Finally, the addition was made by the Assessing Officer in the following manner: -

- In consequence of amalgamation of M/s. PPPL and M/s PREPL with the assessee company, the shares of IHFL held by the two companies were revalued on market price as on the date of amalgamation. A reserve was created out of such revaluation and Rs.318,04,84,283/- were credited to the balance sheet directly and the same was not routed through profit and loss account.*
- Of the 1,06,39,926/- shares which were received by the assessee company in consequence to amalgamation, assessee company has sold 20,42,053/- shares during the year. However, of the shares which were sold during the year, the consequent amount which was credited to*

*the reserve was not reduced from the value of reserve and routed through profit and loss account.*

- iii. Assessee in its profit and loss account has claimed loss on sale of these shares of IHFL amounting to Rs.52,69,843/- however, corresponding effect of the same was not given to the revaluation reserve.*

*8.6. In view of the above facts, it can be stated that the provisions of clause (i) of explanation 1 to section 115JB squarely applies to the case of the assessee. Quantum of adjustment needs to be worked out in this regard which is as follows:*

<i>Particulars</i>	<i>No. of shares</i>	<i>Value share price on 14.11.2014</i>	<i>Revalued share value</i>	<i>Original Price</i>	<i>Total</i>
<i>PPPL</i>	<i>70,39,926</i>	<i>456.47</i>	<i>3213515021.22</i>	<i>891522739</i>	<i>232,19,92,282</i>
<i>PREPL</i>	<i>36,00,000</i>	<i>456.47</i>	<i>1643292000</i>	<i>78,48,00,000</i>	<i>85,84,92,000</i>
<i>Total</i>					<i>318,04,84,282</i>

*8.7. On the date of amalgamation, assessee company thus received, total of Rs.1,06,39,926/- shares from M/s. PPPL and M/s. PREPL. Further, for 10639926 shares of IHFL, Rs.318,04,84,282/- was taken to the reserve in consequence of the revaluation of the shares. Thus, for every single share of IHFL that was revalued at the time of amalgamation, Rs.298.92 were credited to the reserve. Now assessee company during the year under consideration has disposed 20,42,053 shares of*

*IHFL. Further, for these shares sold, assessee has debited in its statement of profit and loss account a sum of Rs.52,69,843/- towards loss on sale of shares. The working of calculation of the amount as per clause (i) of explanation 1 to section 115JB of the IT Act, 1961 is as follows:*

*No. of shares sold by the assessee :20,42,053*

*Amount credited to the reserve for each share :298.92*

*Total amount in the reserve for the disposed shares:  
61,04,10,482.76*

*Less: Amount credited to Profit & loss account on*

*Sale of shares : 52,69,843/-*

*Total adjustment to be made to the book profit*

*u/s. 115JB :61,56,80,325.76*

*In view of the above discussion, adjustment to the book profit is being made into clause (j) of explanation 1 of section 115JB of the IT Act, 1961 is being made by Rs.61,56,80,325.76.”*

7. The ld. CIT(A) too has confirmed the said addition after detailed reasoning and also strongly relied upon the judgment of ITAT Ahmedabad Bench in the case of Infibeam Incorporation Ltd. vs. ITO in ITA No. 3391/Ahd/2015. The sum and substance of his reasoning for rejecting the assessee's contention and upholding the action of the Assessing Officer can be summarized in the following manner:-

a. Amalgamation has been used by the assessee as a tool for tax evasion. The assessee cannot take shelter behind judiciary and prohibit the revenue from examining the evasion. He held that the power of amalgamation is the administrative power of the Hon'ble High Court. The power has been granted by the Companies Act to ensure that the interest of the creditors and share-holders are protected. The amalgamation order of the judiciary is therefore not in the nature of judicial order of the High Court.

b. Sub-section 5 of section 115JB provides that "save as other-wise provided in this section or other provisions of this Act shall apply to every assessee, being assessee company mentioned in this section". Thus, clearly *provisio* to section 10(38) of the Act is also applicable while calculating book profit of the company. The provisions of section 115 JB are status specific. If the LTCG on sale of STT paid share transactions accrue to any company, in that case though as per the normal provisions of the Act, the tax liability is NIL owing to the provisions of section 10(38), but the company has to pay MAT on gain. The law does not exempt any company from not paying tax under MAT on LTCG u/s 10(38).The situation like amalgamation and demerger has not found a place in exceptions to section 115JB. Thus, MAT liability cannot be extinguished for a company under any scheme of amalgamation.

c. Income by way of LTCG of a company has to be taken into account in computing the book profit and tax payable u/s 115JB. The word "income by way of capital gain" as used in section 10(38) of IT Act, 1961 is of quite significance. Such income can only be computed in accordance with the provisions of section 48 of the Act. This aspect has been considered by the Bangalore Bench of ITAT in the case of Karnataka State Industrial Developers Co. Ltd., vs DCIT' (2016) 76Taxmann.com 360 where it has been held that amount of profit eligible u/s 10(38) should alone be considered for the purpose of tax liability u/s 115JB of the Act.

d. As per AS-13 for accounting for investments, investments are to be carried at cost and not fair market value. However, the appellant company by its own admission is carrying the investments at fair market value. Further AS-13 also clarifies that difference between carrying amount and disposal proceeds net of expenses, has to be recognised in the P/L A/c. Thus, the assessee has not even followed the accounting treatment required to be followed as per AS-13. If the assessee had correctly followed the accounting treatment as per AS-13, then difference of sale proceeds of investment and cost thereof (and not fair market value) would have been recognised in the Profit & Loss A/c. Further, the afore-said treatment of stating the investment at Fair Market Value is contrary to assessee

company's own accounting policy stated in its financial statements.

e. While computing "book profit" and capital gain u/s 10(38), the assessee is adopting different "costs of acquisition". The claim of assessee appears to be that cost of acquisition in terms of provisions of section 49(3) (i.e., cost to the previous owner) is applicable only for the purpose of "computation of capital gain". If we go by this logic, the exemption from definition of the word "transfer" as provided in sub-section (vi) of section 47 will also apply only in respect of computation of "book profit". As per this argument, the entire appreciation recorded in the books of accounts post amalgamation, would become taxable for the purpose of computation of "book profit" u/s 115JB.

f. Clause (j) of explanation 1 to section 115JB, states that "the amount standing in revaluation reserve relating to revalued asset on the retirement or disposal of such asset" needs to be added to "book profit". The adoption of fair market value of the Investments is nothing but revaluation. Merely, the credit of increase in value to "capital reserve" would not alter the true character and substance of the event. Revaluation is not confined to only "land & building" but can be in respect of any asset and investment in shares is one of them. In this regard, reliance was placed on the decision of

Hon'ble ITAT, Mumbai Bench in the case of M/s Sumer Builders Pvt Ltd., vs DCIT Central Circle-36, Mumbai.

g. AS-13 mandates that profit from sale of investments were required to be credited to the revenue account. Further, section 115JB mandates that annual accounts must be prepared in accordance with the Accounting Standards which have been followed for preparing accounts which were laid before company for annual general meeting.

8. Before us, the ld. counsel for the assessee after narrating the entire facts and background of the case, first of all drew our attention to the Scheme of Amalgamation appearing in the paper book from pages 27 to 66 and especially drew our attention to clause 9 to clause 9.4, where it has been clearly stipulated that the transferee company shall account for amalgamation of transferor company in its books of account as per "purchase method" specified in Accounting Standard 14. It was clearly provided that all the assets and liabilities of the transferor company which is transferred and visited in the transferee company pursuant to the Scheme shall be recorded at their respective fair values. Lastly and most importantly, it was provided that any excess arising on transfer of assets and liabilities of transferor companies would be considered to be the part of capital reserve of the transferee company and such capital reserve shall not be for any purpose considered to be a reserve created by transferee company and any deficit shall be

considered to form part of the goodwill. Thereafter, he drew our attention to the order of the Hon'ble High Court, which has approved and sanctioned the said Scheme of Amalgamation vide judgment and order dated 18.02.2016, copy of which has been placed in the paper book from pages 21 to 26. He also pointed out that during the pendency of Amalgamation Scheme, Ministry of Corporate Affairs had issued notice to all the stake holders including the Income Tax Department and it was specifically stated that the Regional Director shall invite specific comments from Income-tax Department within 15 days of receipt of notice before filing its response to the court and in case no response is received from IT department, then the same may be presumed that the Income-tax Department has no objection to the action proposed u/s. 391 – 394 of the Companies Act. Thereafter, notice was also sent from the Hon'ble High Court of Delhi to the Assessing Officer and therein it was specifically required that any observation or comment in this regard should be sent to the Regional Director, Northern Region, Ministry of Corporate Affairs. The notices sent by Hon'ble High Court are appearing at page 103 to 105 of the paper book. He submitted that, once there was a clear cut Scheme which has been approved by Hon'ble High Court, it has statutory force and binding upon all. Ld. Counsel also relied upon a catena of judgments wherein scope of High Court order in regard to amalgamation has been explained and that the High Court judgment has to be given full effect to. The key judgments relied upon by him, first of all was on

the decision of Hon'ble Gujarat High court in the case of **Wood Ploymer Ltd., reported in 109 ITR 177**; and the judgment of **Hon'ble Supreme Court in the case of J.K. (Bombay) Pvt. Ltd. vs. New Kesar-e-Hind Spinning and Weaving Co.** reported in **1971 AIR 1041**. Ld. Counsel thus submitted that, once the Hon'ble High Court after due diligence and conducting detailed enquiry before sanctioning the Scheme and after examining the entire public interest has passed the order, then same has to be accepted and if any Scheme is formulated for the purpose of tax evasion, then same could not have been sanctioned by the High Court under the Companies Act. Once, Hon'ble Delhi High Court has accorded sanction to the Amalgamation Scheme, it implies that same has been done after considering the scheme with tax evasion point for Income-tax purpose. He also relied on the decision of ITAT, Kolkata Bench in the case of **ITO vs. Purbanchal Power Co. Ltd. in ITA No. 201/Kol/2010**, wherein it has been held that as a matter of public policy, once the Scheme of Amalgamation is approved by Hon'ble High Court, no authority should be allowed to tinker with the Scheme. He has also relied upon various other judgments filed before us, which are by and large upholding the same proposition

9 Ld. Counsel further submitted that entire addition made by the Assessing Officer has been made on flawed premise that the reserve has been created on revaluation of shares which is not correct, because the reserve has not been created on revaluation of assets *albeit* here in this case, the shares belonging to

amalgamating companies which on amalgamation has entered into books of assessee company at fair market value as sanctioned by Hon'ble High Court. Hence, there is no revaluation of assets. Once, there is no revaluation of any asset, then there is no question of making any addition to the book profit u/s. 115JB under *clause (j)* to *Explanation*. Apart from that, the profit and loss account of the assessee has been prepared strictly in compliance with part-I and part-II of the Companies Act, 2013, corresponding to Part II & III of the Schedule of Companies Act, 1956 and also Accounting Standard issued by ICAI has been strictly followed. Relying upon the decision of Hon'ble Supreme Court in **Appollo Tyres Ltd vs. CIT reported in 255 ITR 273**, he submitted that once the accounts have been prepared in accordance with Companies Act, which have been scrutinized and certified by Statutory Auditors and approved by Company's AGM, the Assessing Officer is bound by the same.

10. Ld. Counsel also distinguished the judgment of ITAT Ahmedabad Bench in the case of Infibeam (supra) as relied upon by the ld. CIT(A) and pointed out that same do not apply factually and legally in the case of assessee for the following reasons:

- In the case of Infibeam the assessee had revalued its assets and created a revaluation reserve whereas in the case of the appellant there is no revaluation of assets as brought out in earlier paragraphs. Revaluation of assets can only occur if the

assets existing in balance sheet are revised which is not true in the case of the appellant assessee.

- In the case of Infibeam the auditors had clearly qualified the accounts by stating that AS-11 was not properly followed. This is brought out at para 5.11 of the judgment which states that “in the instant case, the auditors have clearly qualified the report on such accounts, stating that upward revaluation of investment in subsidiary company is not in line with the AS 13 issued by the ICAI. Thus, it cannot be said that when the Accounting Standard required to be complied with by the appellant company is not complied, then the profit as shown in the profit and loss account is not in accordance with the Companies’ Act, whereas in the case of the appellant the auditors have expressed their satisfaction regarding the compliance of provisions of Companies Act and accounting standards.
- In fact, the case of Infibeam brings out what the appellant has been trying to say all along. In this regard, attention was sought to para 5.13 of the judgment of Infibeam, wherein it is clearly held that, “regarding judgment of the Supreme Court in the case of Apollo Tyres Ltd vs CIT 255 ITR 273, was on different facts as in the said case, the profit and loss account was prepared in accordance with the requirements of the Companies Act, 1956 read with Accounting Standards and there was no question of issuance of bonus shares....”. Hence

the members have distinguished the judgment of Apollo stating that in the case of Apollo Tyres the accounts were in line with the requirements of the Companies Act and Accounting Standards, whereas in the case of Infibeam as stated by the auditors accounts were not in keeping with the requirements of Companies Act and Accounting Standards. In the case of the appellant the auditors have expressed their satisfaction regarding accounts having been prepared in keeping with the requirements of the Companies Act and Accounting Standards having been followed the case clearly is different from Infibeam and hence the reliance placed on the said judgment of Infibeam by the department is clearly illegal.

11. Ld. Counsel, further highlighted the discrepancies in the order of the Assessing Officer in his written submissions in the following manner:

*“Out of 1,06,39,926/- shares of Indiabulls Housing Finance Ltd., received by the appellant on amalgamation with M/s PREPL & M/s PPPL, 20,42,053/- shares were sold by the appellant company at a recognised stock exchange on which securities transaction tax was paid. These shares were sold @ Rs.453.88 per share resulting in a short term capital loss of Rs.52,69,843/- [difference between value at which shares acquired on amalgamation being Rs.456.47 and sale value of Rs.453.88 per share]. This loss was included in its profit and loss account prepared and accepted by the auditors and shareholders.*

8.11 Further long-term capital gain of Rs.70.90 crores was claimed exempt u/s 10(38) of the Act. The same was computed by deducting from the sales proceeds of Rs.92.68 crores cost to the previous owner being Rs.21.79 crores.

8.12 It is the case of the department that :-

a. such income from long term capital gain should be taken into consideration while computing book profit u/s 115JB. In this regard, reliance has been placed on the decision of the Hon'ble Bangalore Bench of the ITAT in the case of Karnataka State Industrial Infrastructure Developers Co. Ltd., vs DCIT 76 taxmann.com 360.

b. AS-13 demands that investments be carried at their cost. However, the appellant has carried the same at fair market value. Further AS-13 requires that difference between cost and sale value net of expenses should be recognised in the profit and loss account. The appellant assessee has thus failed to follow AS-13

c. Appellant assessee has taken different costs for the purpose of "book profit" and Long term Capital Gain.

d. Appellant assessee has failed to apply clause (j) of explanation (1) to section 115JB.

8.13 The above findings of the lower authorities are illegal as brought out in the following discussion:-

8.14 Attention is sought to para 1 and 3.1 of the AS-13 reproduced here-under for your ready reference:-

Para 1- This standard deals with accounting for investments in the financial statements of enterprises and related disclosure issues. Inage 91 of paper book |

*Para 3.1 Investments are assets held by an enterprise for earning income by way of dividends, interest and rentals, for capital.*

*8.15 AS-13 deals with investments. Further investments are defined in AS-13 as “assets held by an enterprise..”. In the case of the appellant assessee shares of IHFL were acquired by the appellant company on amalgamation with M/s PREPL & M/s PPPL at fair market value as per the order of the Hon’ble Delhi High Court under section 391 to 394 of the Companies Act, 1956. Further, since the shares have been acquired under the “purchase method” duly prescribed in AS-14 the assets were recorded at their fair market value, the same being its cost of acquisition. The historical cost to the previous owners has no bearing to the accounts of the appellant company as the assets were not acquired at historical cost. Hence AS-13 has no application in the case of the appellant as far as the shares of IHFL are concerned as the same are not revalued but only recorded at their cost of acquisition.*

*8.16 Further the amalgamation was sanctioned by the Hon’ble High Court in a scheme duly accepted by it post calling for objections if any from the Income Tax department. The said scheme clearly mandated that assets of the transferor company were to be recorded by the transferee company at fair market value. This fact was known to the department and its opinion was also sought before the scheme was sanctioned. Post the sanction of the scheme the appellant assessee having acquired the assets of the amalgamating company at fair market value was bound by the order to record the acquisition value of the amalgamated assets. Hence the same were recorded in its balance sheet at the acquisition value.*

*8.17 As regards capital gain computed u/s 10(38) and application of section 49(1) of the Income Tax Act, 1961 for*

*computing capital gain it needs to be noted that the same applies to normal computation of capital gain. In case of computation of book profit by applying clause (ii) to Explanation of section 115JB where sale of investments is included in the books prepared and profit/loss from such sale included in the profit and loss account, then the said exemption u/s 10(38) of the Act cannot be included.*

*8.18 In this case the difference between cost of acquisition of the amalgamated assets and the sale consideration resulted in loss and the same was duly recorded in the profit and loss account. The CIT(A)'s argument that in computation of book profit capital gain should be computed by taking historical cost of assets is completely flawed.”*

12. Before us, the ld. DR strongly referred to various observations made by the Assessing Officer and submitted that here in this case on the date of Amalgamation, the shares were valued at FMV and not on cost and once, the shares were amalgamated it became part of reserve of assessee, therefore, such revaluation amounts to revaluation of reserves. Here, the nature remains the same, because post amalgamation, there was revaluation of shares and such shares were sold, therefore, it is clearly hit by clause (j) of Explanation to section 115JB. He further referred to various observation of Ld. CIT (A) and submitted that the High Court Order cannot be interpreted to mean that the matter cannot be examined under the provisions of Income Tax Act. Here what is required to be seen is that whether adjustment in book profit can be made u/s 115JB or not. He thus strongly relied upon the order of Ld. CIT (A).

13. We have heard the rival submissions and also perused the relevant findings given in the impugned order as well as material referred to before us at the time of hearing. The sole issue involved in this case is, whether the addition of Rs.61,56,80,326/- can be made in the book profit u/s. 115 JB on account of shares sold by the assessee, which was held as 'capital reserve', which the Assessing Officer and CIT(A) have treated on account of amount standing in revalued reserve relating to revaluation of assets in terms of clause (j) of Explanation 1 of section 115JB. As discussed in the foregoing paragraphs, two subsidiary companies of the assessee, PREPL and PPPL were amalgamated with the assessee company being holding company, vide judgment and order dated 18.02.2016 of Hon'ble Delhi High court, wherein the Hon'ble Court has sanctioned the scheme of Amalgamation. First of all it would be quite pertinent to note the relevant clauses of Scheme of Amalgamation which are important for the purpose of adjudication of present controversy. The relevant clauses dealing with accounting standard and purchase method adopted for valuing the assets and liabilities at a fair market value and how any excess on such transfer of assets and liabilities has to be treated as part of the capital reserve, reads as under:-

*9.1. On the scheme becoming effective and with effect from the appointed date, Transferee company shall account for amalgamation of Transferor Company No. 1 and transferor Company No. 2 in its books of accounts as per the **"purchase***

**Method” specified under the Accounting Standard 14 – “Accounting for Amalgamation”.**

9.2 All the assets and liabilities of Transferor Company No. 1 and Transferor Company No. 2 shall be transferred to and vested in Transferee Company pursuant to this Scheme and shall be recorded at their respective fair values.

9.3. **Any excess arising on transfer of assets and liabilities of Transferor Company No. 1 and transferor company No. 2 after giving effect to clause 9.4 below would be considered to form part of the “Capital Reserve” of Transferee Company.** Such Capital Reserve shall be a reserve which arises pursuant to this Scheme and shall not be, for any purpose, be considered to be a reserve created by Transferee Company. Any deficit shall be considered to form part of Goodwill.”

14. Aforesaid scheme thus clearly provides that, *firstly*, the ‘purchase method’ as prescribed in AS-14 was adopted stating that the transferee company shall account for amalgamation of transferor companies in its books of account; *secondly*, all assets and liabilities of the transferor companies shall be transferred and would be recorded in the respective fair values; and *lastly*, any excess arising on transfer of assets and liabilities of the transferor companies would be considered to form part of the “capital reserves” of the transferee company and such capital reserve shall not be for any purpose be considered to be a reserve created by the transferee company. Ergo, if there is an excess on account of valuation on purchase method determining the fair market value

was to form part of the capital reserve and no other mandate was given to the transferee company. The shares of IHFL was held by the amalgamating companies which has been transferred to the assessee company and thus, it was akin to acquisition of an asset which as per the mandate of Amalgamation Scheme has to be treated as part of the capital reserve. Now, this scheme has been duly approved by Hon'ble Delhi High Court vide judgment and order dated 18.02.2016. In the conclusion of the said order, Hon'ble Court has specifically observed that any person interested shall be at liberty to apply to the court in the above matter for any directions that may be necessary. The said order of Hon'ble High Court sanctioning the entire Amalgamation Scheme had become final. It is further seen that vide General Circular No. 1 of 2014 issued by Ministry of Corporate Affairs to all Regional Directions and Registrars of Companies and all stake holders and notices were issued to all the concerned parties including the Income Tax Department, the same read as under :

*"To,  
All Regional Directors,  
All Registrar of Companies,  
All Stakeholders.*

*Subject: Report u/s 394A of the Companies Act, 1956- Taking accounts of comments/inputs from Income Tax Department and other sectoral Regulators while filing reports by RDs.*

*Sir,*

*Section 394A of the Companies Act, 1956 requires service of a notice on the Central Government wherever cases involving arrangement/compromise (under Section 391) or reconstruction /*

amalgamation (under Section 394) come up before the Court of competent jurisdiction. As the powers of the Central Government have been delegated to the Regional Directors (RDs) who also filed representations on behalf of the Government wherever necessary.

2. It is to be noted that the said provisions is in addition to the requirement of the report to be received respectively from the Registrar of Companies and the Official Liquidator under the first and second provisos to Section 394(1). A joint reading of Sections 394 and 394A makes it clear that the duties to be performed by the Registrar and Official Liquidator under Section 394 and of the Regional Director concerned acting on behalf of the Central Government under Section 394A are quite different.

**3. An instance has recently come to light wherein a Regional Director did not project the objections of the Income Tax Department in a case under Section 394. The matter has been examined and it is decided that while responding to notices on behalf of the Central Government under Section 394A, the Regional Director concerned shall invite specific comments from Income Tax Department within 15 days of receipt of notice before filing his response to the Court. If no response from the Income Tax Department is forthcoming, it may be presumed that the Income Tax Department has no objection to the action proposed under Section 391 or 394 as the case may be. The Regional Directors must also see if in a particular case feedback from any other sectoral Regulator is to be obtained and if it appears necessary for him to obtain such feedback, it will also be dealt with in a like manner.**

4. It is also emphasized that it is not for the Regional Director to decide correctness or otherwise of the objections/views of the Income tax Department or other Regulators. While ordinarily such views should be projected by the Regional Director in his representation, if there are compelling reasons for doubting the correctness of such views, the Regional Director must make a reference to this Ministry for taking up the matter with the Ministry concerned before filing the representation under Section 394A.

5. This Circular is effective from the date of issue.”

15. Thereafter, Hon'ble High Court had also issued notices to the Income Tax Department through Assessing Officer which was received in the office of the Assessing Officer on 18.05.2015. The Assessing Officer/ Department nowhere had objected to said Scheme at any point of time, neither in pursuance of circular issued by Ministry of Corporate Affairs nor when the notice was issued by the High Court. Thus, Scheme of Amalgamation sanctioned by Hon'ble High court had become final. Such an order has a binding effect upon all. Hon'ble Supreme Court in the case of J.K. (Bombay) Pvt. Ltd. (supra) held that once the scheme has been sanctioned by the Court that does not operate as mere agreement between the parties, but it becomes binding on the company, their creditors and the share holders and other statutory force. The relevant observation of the Hon'ble Apex Court reads as under:

*“The principle is that a scheme sanctioned by the court does not operate as a mere agreement between the parties. **It becomes binding on the company, the creditors and the shareholders and has statutory force,** and therefore, the joint-debtor could not invoke the principle of accord and satisfaction. By virtue of the provisions of sec. 391 of the Act, a scheme is statutorily binding even on creditors, and shareholders who dissented from or opposed to its being sanctioned. **It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the shareholders and the creditors acquiesce in such alteration.....”***

From the aforesaid ratio it is quite ostensible that, once the amalgamation scheme has been approved and sanctioned by the Court, it has a statutory force and is binding on the company and all the stake holders. Similar view has been echoed by the Hon'ble Gujrat High Court in the case of Wood Polymer Ltd. (supra), wherein Hon'ble Court has observed and held as under:-

*"The expression "public interest" is to be found in the second proviso and in the context of a company which, if, scheme of amalgamation is sanctioned, is likely to lose its identity by getting merged with the transferee-company. It is to be dissolved without winding up. In winding up the manner in which affairs of a company are conducted can be probed in depth; but a scheme of amalgamation which provides for merger of the transferor-company with the transferee-company, would destroy any opportunity for examination of the affairs of the transferor-company. The second proviso would provide the last opportunity to peep into the affairs of the transferor company before it gets virtually extinct. The court is, therefore, charged with a duty before it finally confirms burial-cum-cremation of the transferor-company, to peep into its affairs to ascertain whether they have been carried on not only in a manner not prejudicial to its members but in even public interest. The expression "public interest" must take its colour and content from the context in which it is used. The context in which the expression "public interest" is used should permit the court to bring out why the transferor-company came into existence, for what purpose it was set up, who were its promoter, who were controlling it, what object was sought to be achieved through creation of the transferor-company and why it is now being dissolved by merging it with another company. All these aspects will have to be examined in the context of the satisfaction of the*

*court whether its affairs have not been carried on in a manner prejudicial to public interest. That is the colour and content of the expression "public interest" as used in section 394(1), second proviso and the facts of this case will have to be examined keeping in view the colour and content of the expression "public interest".*

*The scheme of amalgamation must have some purpose or object to achieve. It was repeatedly inquired what purpose or object was to be achieved by a scheme of amalgamation offered for court's sanction. It was said that the property belonging to the transferor-company will be available to the transferee-company. Now, the property belonging to the transferor-company is situated in Calcutta. The transferor-company is having its factory at Billimora. The transferor-company appears to have not done any business except acquiring capital asset from its parent company of which it was a subsidiary company and got it revalued so that by the process of revaluation, the equity shareholders of the transferor-company can get large number of shares of the transferee company by the exchange ratio prescribed in the scheme of amalgamation. No apparent understandable purpose or object behind the scheme is discernible. The purpose and the only purpose appears to be to acquire capital asset of the DOC Pvt. Ltd. through the intermediary of the transferor-company which was created for that very purpose to meet the requirement of law, and in the process to defeat tax liability that would otherwise arise. If such be the scheme of amalgamation and if such is the use made of the transferor-company by those controlling it, it can never be said that the affairs of the transferor-company sought to be amalgamated, created for the sole purpose of facilitating transfer of capital asset, through its medium, have not been carried on in a manner prejudicial to public interest. Public*

*interest looms large in this background, and the machinery of judicial process is sought to be utilized for defeating public interest and the court would not lend its assistance to defeat public interest, namely, tax provision.”*

Thus, when amalgamation scheme has been approved by the Court, it is not open for the Assessing Officer and CIT (A) to hold that amalgamation has been used by the assessee company as a tool for tax evasion. The amalgamation order passed by the High Court is a judicial order and has statutory force and in case, the department had any objection, then same should have been given before the Hon'ble High Court for which sufficient time was allowed. Now, the department cannot clamour that such an amalgamation have been used by the assessee as a tool for tax evasion or as colourable device.

16. Here in this case, by transferring the excess fair market value of the assets/shares to capital reserve could not be treated as a tax evasion practice. The difference between the fair market value of assets and liabilities taken over as per the book values, which has resulted in 'capital reserve', was recorded in the books in the following manner:-

Particulars	Priapus Properties Pvt Ltd.	Priapus Real Estate Pvt Ltd.	Priapus Developers Pvt Ltd.	Total
On revaluation of shares	232,19,92,283	85,84,92,000		318,04,84,283
On revaluation of Land	3,27,760	3,27,760	3,27,760	9,83,280
On Purchase consideration	62,80,58,323	14,95,05,680		77,75,64,003

As per said scheme itself, such capital reserve was prohibited for any purpose by the transferee company. Thus, such a creation of capital reserve cannot be questioned by the Assessing Officer or CIT(A) or perceive it as any kind of tax evasion practice. Here in this case, the assets transferred to the assessee company from transferor companies pursuant to Scheme of Amalgamation, included 1,06,39,926 shares of India bull Housing Finance Ltd. in the following manner:-

M/s. Priapus Properties Pvt Ltd. held 70,39,926 shares (acquired by them at Rs.89,15,22,739/-);

M/s. Priapus Real Estates Pvt. Ltd. held 36,00,000 shares (acquired by them at Rs.78,48,00,000/-).

The fair market value of the said shares on the date of amalgamation was Rs. 456.47 per share which aggregated to Rs.485,68,07,021/-. Post Amalgamation, the assessee company had sold 20,42,053 shares of IHFL out of 1,06,39,926 shares acquired on amalgamation, which was sold for consideration of Rs.453.88 per share resulting into a short term capital loss of Rs.52,69,843/-. Said loss has been included in the profit and loss account. The ld. AO has alleged that this reserve which has been created is on account of revaluation of assets and since during the relevant previous year such revalued assets has been disposed of and such amount which is standing as reserve was not credited in the profit and loss account.

17. Such a premise of the Assessing Officer cannot be approved for the reason that;

- *Firstly*, this reserve has not been created on revaluation of asset *albeit* same has been acquired through amalgamation and the shares have been valued as per the purchase method for a certain price.
- *Secondly*, it is not revaluation of any asset held by the assessee, because no such reserve has been created by the assessee on revaluation of shares. Revaluation of assets takes place only when the assessee decides to revalue the asset existing in the balance sheet.
- *Lastly*, in this case all the assets belonged to amalgamating companies, that is, the shares of IHFL originally belonged to PREPL and PPPL and appeared in their balance sheet; and these assets entered in the books of assessee by virtue of amalgamation valued on fair market value as mandated by the order of Hon'ble High Court. Thus, it would be wrong to say that there was any kind of revaluation of assets.

Therefore, there could not be any question of invoking clause (j) of *Explanation* to section 115JB for calculation of book profit u/s. 115JB. Here in this case, nowhere it has been disputed that the profit and loss account has not been prepared in compliance of requirement of Part-I and Part-II of the Companies Act, 2013 and as per accounting standard. The profit and loss account has been approved by the Statutory Auditors and also laid before the

Members in the AGM, which is sacrosanct for computing the book profit u/s. 115JB. Thus, once the accounts have been prepared in accordance with the Companies Act duly certified by statutory auditors and approved by Company AGM, then same cannot be disturbed as held by Hon'ble Supreme Court in the case of Apollo Tyres (supra). Here the Assessing Officer cannot tinker with such profit and loss account or treat the part of capital reserve by holding that it should have been routed through regular profit and loss account. The reasoning given by the Id. CIT (A) too cannot be upheld for the same reason.

18. As regards the capital gain computed u/s. 10(38), and application of 49(1) for computing the capital gain, the same would be relevant while computing the normal computation of capital gain in the computation of book profit where the sale of investment is included in the books prepared and profit and loss is included in the profit and loss account. It is only in such situation the said exemption u/s. 10(38) cannot be included. Here in this case, the difference between the cost of acquisition of the amalgamated assets and sale consideration has resulted in loss and the same has been duly recorded in the profit and loss account; and thus the contention of the Id. CIT (A) that in computation of book profit capital gain should be computed by taking historical cost of assets is not correct. It is clear from plain reading of clause (ii) of *Explanation* to section 115JB, which reads as under:-

*(ii). The amount of income to which any of the provisions of [section 10 (other than the provisions contained in clause (38) thereof)] or section 11 or section 12 apply, if any such amount is credited to the profit and loss account;*

The *proviso* to section 10(38) resorted by the Id. CIT (A) cannot be read independently as the same has to read alongwith clause (ii) of section 115JB. Such a finding of the Id. CIT (A) to uphold the addition in our opinion is not correct.

19. Thus, we hold that in this case the provisions of clause (j) of *Explanation 1* to section 115JB would not be applicable at all as, there is no disposal of asset from the amount standing in revaluation reserve relating to revalued asset as per the reasoning given above; and accordingly, the addition made by the AO and sustained by the Id. CIT (A) is directed to be deleted.

20 The other issue involved is with regard to addition made u/s. 14A of Rs.1,58,96,544/-. The brief facts are that the assessee company has earned dividend income of Rs.7,73,92,423/- on shares and Rs. 92,345/- on mutual funds. The dividend was earned from shares of IHFL, which was acquired by the assessee company on amalgamation. Hence, it was stated that it has not incurred any expenditure. Further, no loan fund was utilized for making any investment. However, the assessee had suo moto calculated the disallowance at Rs.7,74,848/-. The Assessing Officer without examining the books of account, nature of expenditure debited, has

proceeded to apply Rule 8D mechanically and calculated disallowance of Rs.1,58,96,544/- which is mostly on account of indirect expenditure calculated u/s. 8D(2)(ii) which has been confirmed by the Id. CIT(A) also following the Special Bench decision of ITAT in the case of Daga Capital Management (P) Ltd. 26 SOT 603 (Mum).

21. After considering the rival submissions and on perusal of the relevant findings given in the impugned orders, we find that the Assessing Officer while making the addition has not examined the veracity of claim made by the assessee nor has he examined the books of account which is a statutory mandate provided in sub-section (2) of section 14A. Here in this case, the major exempt income has come from shares of IHFL which has been acquired by the assessee by way of amalgamation. Hence, it cannot be said that the assessee could have incurred any kind of indirect expenses for earning of dividend income. It is trite and well settled law by Hon'ble Delhi High court and Now by the Hon'ble Apex Court in **Maxopp Investment** reported in **402 ITR 640 (SC)**, that if the Assessing Officer has not recorded his satisfaction to disbelieve the disallowance made by assessee, he cannot resort to the provisions of Rule 8D. Relevant observations of Hon'ble Supreme Court read as under:

- *In the first instance, it needs to be recognised that as per section 14A(1), deduction of that expenditure is not to be allowed which has been incurred by the assessee in relation to*

*income which does not form part of the total income under this Act. Axiomatically, it is that expenditure alone which has been incurred in relation to the income which is includible in total income that has to be disallowed. If an expenditure incurred has no causal connection with the exempted income, then such an expenditure would obviously be treated as not related to the income that is exempted from tax, and such expenditure would be allowed as business expenditure. To put it differently, such expenditure would then be considered as incurred in respect of other income which is to be treated as part of the total income.*

- *if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind section 14A in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in section 14A.[Para 34]*
- *having regard to the language of section 14A(2), read with Rule 8D of the Rules, it is also made clear that before applying the theory of apportionment, the Assessing Officer needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the Assessing Officer was not accepting the said apportionment. In that eventuality, it will have to record satisfaction to this effect. Further while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making investment in shares is to be examined by the Assessing Officer.”*

22. Thus, in absence of any satisfaction being recorded by the Assessing Officer, no disallowance could have been made. Accordingly, disallowance made by the AO and confirmed by the ld. CIT (A) is directed to be deleted.

23. Since we have already deleted the addition made u/s. 14A, hence we do not deemed fit to decide, whether such disallowance should be made while computing the book profit u/s. 115JB which otherwise is covered by the decision of ITAT Delhi Bench in the case of ACIT vs. Vireet Investment Pvt. Ltd. in ITA No. 502/Del/2012.

24. In the result, the appeal of the assessee is allowed.

**Order pronounced in the open court on 12<sup>th</sup> March, 2019.**

Sd/-

**(L.P. Sahu)**  
**Accountant Member**

Sd/-

**(Amit Shukla)**  
**Judicial member**

Dated: 12<sup>th</sup> March, 2019.

*\*aks\**

*Copy of order forwarded to:*

(1) <i>The appellant</i>	(2) <i>The respondent</i>
(3) <i>Commissioner</i>	(4) <i>CIT(A)</i>
(5) <i>Departmental Representative</i>	(6) <i>Guard File</i>

*By order*

*Assistant Registrar  
Income Tax Appellate Tribunal  
Delhi Benches, New Delhi*