

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA

Before: **Shri J. Sudhakar Reddy, Accountant Member and
Shri S.S. Viswanethra Ravi, Judicial Member**

I.T.A No.788/Kol/2018
(Assessment Year: 2012-13)

Tata Metaliks Ltd.
[PAN: AABCT1389B]

Appellant

Vs

DCIT, Circle-3(1), Kolkata

Respondent/Revenue

&

I.T.A No.1143/Kol/2018
(Assessment Year: 2012-13)

DCIT, Circle-3(1), Kolkata

Respondent/Revenue

Vs

Tata Metaliks Ltd.
[PAN: AABCT1389B]

Appellant

For the Appellant : Shri Ashish Agarwal &
Ms. Neha Jhunjhunwala, AR

For the Respondent/Revenue : Shri Radhey Shyam, CIT

Date of hearing : 19.08.2019

Date of pronouncement : 04.10.2019

ORDER

PER Shri S.S. Viswanethra Ravi, JM:

This appeal by the assessee against the common order dated 20.02.2018 passed by the Commissioner of Income Tax (Appeals)-1, Kolkata ['CIT(A)'] for Assessment Year 2012-13.

2. Since the facts relating to the issue raised by both the parties are identical and with the consent of both the parties, we proceed to

hear both the appeals together and pass a consolidated order for the sake of convenience.

3. We shall take up the appeal in ITA No.788/Kol/2018 by the assessee.

4. Ground No.1 raised by the assessee is in general and no adjudication is required.

5. Ground No.2(a) & 2(b) raised challenging the action of CIT(A) in confirming the addition made on account of leave encashment in the facts and circumstances of the case. We find the issue in hand is covered by the orders of this Tribunal from Assessment Years 2005-06 to 2011-12 in assessee's own case which are placed on record from Pages 259 to 310. The latest order being dated 05.07.19 in assessee's own case for Assessment Year 2009-10 is reproduced hereinbelow:

"4. The only issue is to be decided is as to whether the CIT(A) is justified in confirming the addition made by the Assessing Officer on account of leave encashment in the facts and circumstances of the case.

5. Heard both parties and perused the materials available on record. The Hon'ble Supreme Court in the case of Exide Industries Ltd. vs. Union of India granted stay against the decision of Hon'ble High Court of Calcutta in the case of Exide Industries Ltd. reported in 292 ITR 470(Cal) until further orders vide order dated 08.09.2008. Further, during the pendency of Civil appeal the Hon'ble Supreme Court was pleased to direct assessee therein to pay tax as if section 43B(f) is on the Statute Book though it would be entitled to make claim in the return vide order dated 08.05.2009. Keeping in view of the above orders of Hon'ble Supreme Court, on similar cases, this Tribunal is remanding the matter to the file of Assessing Officer to decide afresh after awaiting final order of Hon'ble Supreme Court in the case of Exide Industries Ltd. (supra). We find this Tribunal in assessee's own case remanded the similar issues from Assessment Years 2005-06 to 2011-12 which are placed on record at pages 229 to 230 and respectfully following the same, we deem it proper to remand the matter to the file of Assessing Officer for his fresh consideration taking into account final order of Hon'ble Supreme Court. Thus only ground raised by the assessee in this appeal is allowed for statistical purposes."

6. In view of the above, Ground No.2A & 2B raised by the assessee is allowed for statistical purposes.

7. Ground No.3 raised by the assessee challenging the action of CIT(A) in confirming the disallowance in computing the book profit u/s 115JB relating to Industrial Promotion Assistance and Sales Tax Incentive in the facts and circumstances of the case. We find the issue in hand is covered by the orders of this Tribunal in assessee's own case from Assessment Years 2010-11 to 2011-12 which are placed on record from Pages 279 to 305. The latest order being dated 12.09.2018 in assessee's own case for Assessment Year 2011-12 is reproduced hereinbelow:

"3. The assessee's second substantive ground challenges correctness of both the lower authorities' action in not allowing exclusion of sales tax incentive and state capital investment subsidy availed during the year amounting to ₹4,14,13,831/- and ₹18,20,000/-; respectively being capital in nature in computing book profits section 115JB of the Act. Both the parties are unanimous herein as well in pointing out that the above co-ordinate bench's decision has upheld the taxpayer's similar substantive grievance in preceding assessment year 2010-11 as under:-

"9. Next issue raised by assessee in ground No.3 is that Ld. CIT(A) erred in confirming the order of AO by sustaining the disallowance of sales tax incentive and state capital investment subsidy for ₹39,870,574/- and ₹59,75,000/- respectively while computing the book profit u/s 115JB of the Act.

10. During the year, assessee declared profit after taxes in its profit and loss account for ₹45,55,43,545/- only. The assessee while determining the book profit u/s.115JB of the Act has reduced following receipts:-

Sl.No	Particulars	Amount
1	Sales tax remission since capital in nature	3,98,70,574/-
2	State capital subsidy since capital in nature	59,75,000/-

The assessee claimed that the above receipts are not taxable in the hands of assessee under the normal provision of computation of income. Therefore, same are also eligible for deduction u/s 115JB of the Act. The assessee also submitted that sales tax remission and state capital subsidy was received by it under the West Bengal Incentive Scheme, 2000, which was given to it to achieve industrialization of backward areas as well as to generate employment opportunities. However, the AO observed that there is no provision under the Income Tax Act for allowing deduction on account of capital receipt under the provision of Sec. 115JB of the Act. Accordingly, AO disallowed the claim of assessee and added to the total amount of subsidy received by it while calculating the tax under Minimum Alternate Tax (MAT) provision.

11. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that incentive was received by it on account of sales tax remission of ₹3,98,70,574/- and state capital investment subsidy amounting to ₹59.75 lakh under the West Bengal Incentive Scheme, 2000. The specific purpose for giving incentive to assessee was to encourage the entrepreneurs to set up new industrialized units and expand the existing units in the backward areas in the state of West Bengal. However, assessee also submitted that the impugned capital receipts do not represent any element of income / profit and therefore neither chargeable to tax under the Income Tax Act nor includible in profit and loss account prepared under part 2nd and part 3rd of Schedule-VI to the

Companies Act, 1956 for the purpose of MAT. However, Ld. CIT(A) disregarded the contention of assessee and confirmed the order of AO by observing as under:-

"Decision:

The order of AO and the detailed submissions made by the appellant has been considered. The appellant has sought to exclude sales tax incentive of Rs.3,98,70,574/- and state capital investment subsidy of Rs.59,75,000/- received by then under West Bengal Incentive Scheme (WBIS), 2000 from computation of book profit under section 115JB of the Act.

The Assessing Officer has held that the appellant's claim for exclusion of incentives received does not fall under any of the exclusions provided in Explanation 1 to Section 115JB of the Act. Whereas, the appellant has claimed that sales tax and capital investment subsidies are capital receipt and do not have an element of income or profit and deserve to be excluded from computation of Book profit u/s 115JB. It is undisputed fact that the impugned sales tax incentive of Rs. 3,98,70,574/- and state capital investment subsidy of Rs. 59,75,000/- were admittedly disclosed by the appellant co and included in the net profit determined as per profit and loss account prepared as per Part II and Part III of Schedule VI to the Companies Act. In other words, it is not the case of the assessee that the capital receipts earned by the assessee was not included in the net profit determined as per profit and loss account of the assessee prepared under the Companies Act. As per the audited accounts of the assessee, the statutory auditors have reported that, that in their opinion, the profit and loss account and the balance sheet are in compliance with the accounting standards referred to in sub-section (3C) of section 211 of the Companies Act, and further reported that the balance sheet and profit and loss account, give the information required by the Companies Act, 1956 in the manner so required and give a true and fair view in conformity with the accounting principles generally accepted.

The appellant has contended that an item without any element of profit or income, when credited to the profit and loss account prepared under Part-2 & Part III of Schedule IV of the Companies Act, 1956, lays down that 'P& L should be made to closely disclose the "**working**" of the company. Since, in the present case, the subsidy has been credited to P& L a/c, in order to work out the real profit of the company u/s 115JB said amount needs to be deducted, following the decision of the Hon'ble Supreme Court in Apollo Tyres (2002) 255 ITR 273 (SC) rw Indo Rama Synthetics (I) Ltd vs CIT(2011) 330 ITR 363(SC). The appellant has also relied upon the judgment in the case of CIT vs Veekaylal Investments CO.(P) Ltd (2001) 249 ITR 597(BOM), although the copy of judgment in this case was not furnished. The reliance on the decision by the Hon'ble Mumbai High Court by the appellant is found to be misplaced, it was observed by the Hon'ble High Court that, "The important thing to be noted is that while calculating the total income under the Income Tax Act, the assessee is required to take into account income by way of capital gains under section 45 of the Income Tax Act. In the circumstances, one fails to understand as to how in computing the book profits under the Companies Act, the assessee Company cannot consider capital gains for the purposes of computing book profits under section 115J of the Act. Further, under clause (2) of Part II of Schedule VI to the Companies Act where a Company receives the amount on account of surrender of leasehold rights, the Company is bound to disclose in the profit and loss account the said amount as non-recurring transaction or a transaction of an exceptional nature Irrespective of its nature i.e. whether capital or revenue."

Hence, it is not a case of the assessee that the impugned capital receipts was not includible in the profit and loss account prepared in terms of Schedule VI to the Companies Act. Only in the computation of book profit under section 115JB of the Act, the assessee claimed exclusion of sales tax incentive and S.C.I subsidy as capital receipts. In the circumstances, when the appellant has itself included the impugned sales tax incentive and capital investment subsidy in the P&L, the same cannot be excluded under any of the Explanations under section 115JB. The proviso to section 115JB prescribes that the accounting policies, accounting standards and the method and rates of depreciation adopted for preparing the Book Profits under section 115JB shall be the same as adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting. Therefore, whatever accounting policy was adopted for the purpose of preparing the P&L laid before the company should be adopted for computing, 600k Profits under section 115JB. The sales tax incentive and Capital Investment Subsidy were included in computing the profits

presented before the shareholders and the A.O has held that the same should also be included in computing Book Profits under section 115JB.

It is well settled that the adjustments to the profit and loss account of the company can be carried out only in accordance with the provisions set out in the Explanation to section 115J. This is in view of the definition of 'book profit' as given in the Explanation to section 115JB, the net profit as shown in the profit and loss account, in the relevant previous year, can only be adjusted i.e., increased or reduced, as the case may be, by reference to heads referred in clauses (a) to (ha) and clauses (i) to (iv) of the Explanation to section 115JB. It is found from findings of fact on record that the assessee admittedly, had itself credited the amounts of S.T subsidy and state investment subsidy to the profit and loss account which was duly certified by the auditors, in view thereof the A.O correctly held that no adjustment could be made subsequently for computation of MAT profits by reducing the impugned receipts from the 'book profit' for the purpose of 115JB of the Act.

It is the case of the assessee that since these impugned receipts are in the nature of capital, receipts, it was contended that the same shall not be charged to tax and as such the same should be reduced from the net profit determined in the profit and loss account prepared by the assessee' while computing "**book profit**" within the meaning of section 15JB of the Act. The A.R of the appellant has contended that the provisions contained in sub-section (5) of section 115JB of the Act that since all other provisions of this Act shall also apply to every assessee, being a company, mentioned in section 115JB of the Act, the assessee is entitled to reduce these receipts as exempted under normal provisions of the Act. For this proposition the assessee relied on various judgments. The provisions of sections 115J, 115JA and 115JB of the Act are all deeming provisions. Section 115JB has overriding effect over all other provisions of the Act. Section 115JA and 115JB have also overriding effect over all other provisions of the Act to the extent of the matter provided in these sections. Sub-section (4) was inserted in section 115JA of the Act. A provision similar to sub-section (4) of section 115JA was not there in section 115J of the Act. Sub- section (4) of section 115JA reads as "**save as otherwise provided in this section, all other provisions of the Act shall apply**". It is, thus, clear that all other provisions of the Act shall apply but subject to the provisions otherwise provided in section 115JA of the Act. In other words, the provisions specifically provided in section 115JA shall have overriding effect over all other provisions of the Act. The provision for computing book profit by increasing or reducing the net profit as shown in the profit and loss account prepared in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act is specifically provided in section 115J or 115JA or 115JB itself as the case may be, and consequently all other provisions of the Act providing the manner of computation of total Income under the normal provisions of the Act cannot be applied while computing book profit under 'section '115J or 115JA or 115JB, as the case may be. We do not find any difference between section 115J or 115JA or 115JB in so far as method of computation of book profit as provided in the Explanation appended thereto is concerned.

The Tribunal in the case of Frigsales (India) Ltd. (2005) 4 SOT 376 (MUM) has not applied the ratio of the decision of the Supreme Court in the case of Apollo Tyres Ltd. v. CIT[2002] 255 ITR 273/122 Taxman 562. But the fact remains that the propositions laid down by the hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) have been reiterated and relied upon by the Supreme Court in the case of CIT v. HCL Comnet Systems & Services Ltd. [2008] 305 ITR 409/174 Taxman 118 which has been rendered in the context of section 115JA of the Act. As per sub-section (5) of section 115JB of the Act, which reads as "save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section". Having regard to expression "**save as otherwise provided in this section**" used in this sub-section (5) of section 115JB of the Act, we are of the considered opinion that the expression "**save as otherwise provided in this section 115JB**" clearly means that what is provided in section 115JB should be religiously followed and anything over and above the matter provided in section 115JB will be subject to other provisions of the Act. The provisions of section 115JB have an overriding effect upon other provisions of the Act as is evident from the section itself. Thus, the method of computation of book profit provided in the Explanation to section 115JB should be strictly followed while computing the book profit and the normal

provisions of computation of profit under any head of the Act shall not be applicable.

The A.R of the appellant has also relied upon the judgment of the Hon'ble Jaipur Tribunal in the case of ACIT Vs Shree Cement Ltd (2012-TIOL-02-ITAT- Jaipur) for its claim that the "Hon'ble Tribunal after discussing the issue at length has held that Sales Tax incentive needs to be excluded in computing Book Profit u/s 115JB since the same is in the nature of a capital receipt not liable for tax. However, it is observed that in the citation on para 52, relied upon by the appellant the ratio decidendi of the decision by the Jaipur Tribunal is not available in the judgement, as the Tribunal has followed its judgement for the preceding Assessment Year. It is well settled that it is only the ratio decidendi, which has a binding effect as an authority. Hence, I respectfully disagree with the said judgement cited by the appellant, .However, the issue is found to be clarified by the decision of the Hyderabad Special Bench of the Tribunal in the case of Rain commodities Ltd (2010) 41 DTR 449, which is applicable to the issue. It is found that the Special Bench of the Tribunal in the aforementioned decision has held as under(short notes):

"It is settled law that Assessing Officer has the power to alter the net profit. In the following two cases, the Assessing Officer can rewrite the P&L a/c i.e. to say that Assessing Officer should recalculate the net profit and then follow the adjustments of MAT as usual: (1) If it is discovered that P&L a/c is not drawn up in accordance with Parts II and III of Sch.VI to the Companies Act. However, the Assessing Officer cannot disturb the net profit as shown by the assessee where there are no such allegations, fraud or misrepresentation but only a difference of opinion as to whether a particular amount should be properly shown in the P&L a/c or in the balance sheet, (2) If accounting policies, Accounting Standards aren't adopted for preparing such accounts and method, rates of depreciation which have been incorrectly adopted for preparation of P&L a/c laid before the annual general meeting. Except for the above two cases, the AO has no power to alter the net profit shown by the companies for the purpose of computing the book profit. Thus, it is clear that under MAT, the Assessing Officer should take the net profit as computed by the assessee and then make the adjustments under sec. 115JB. The moot question that needs to be decided is whether Parts IT and II of Sch. VI to the Companies Act permit the exclusion of the capital gain from the P&L Account or not? In other words, can a P&L A/c drawn up without considering the capital gain said to be in accordance with the provisions of Parts II and II of Sch. VI to the Companies Act or not?" It was accordingly held that in the absence of any provision for exclusion of exempted capital gain in the computation of book profit under the provisions contained in Explanation to section 115JB of the Act, the assessee is not entitled to the exclusion thereof as claimed.

Thus, the argument that impugned capital receipts are to be reduced from the net profit shown in the profit and loss account prepared under the Companies Act for the purpose of computing book profit under section 115JB of the Act is not tenable. If such reduction is allowed from the net profit determined in the profit and loss account for the purpose of computing "**book profit**" under section 115JB of the Act, the same would certainly be against the above referred decisions laid down by the honourable Supreme Court in the case of Apollo Tyres Ltd. (supra) and HCL Comnet Systems & Services Ltd. (supra) wherein the powers of the Assessing Officer while computing the book profits for the purpose of section 115J or 115JA were limited as discussed above.

From the above, it is difficult to conclude that the Division Bench of Bombay High Court in this case has overruled the decision of another Division Bench without even a line of discussion. The decision of the Bombay High Court in the case of Veekaylal Investment Co. (P.) Ltd. 249 ITR 597, holding that the book profits have to be computed in accordance with Parts II and III of Schedule VI to the Companies Act. This is in conformity with the decision of the Apex Court in the case of Apollo Tyres Ltd. (supra). The Mumbai High Court in the case of Akshay Textiles Trading & Agencies (P.) Ltd. (supra) has held that there is no question of law in view of the decision of the Apex Court in the case of Apollo Tyres Ltd. (supra). From this it is not inferred that the decision of the Bombay High Court in the case of Veekaylal Investment Co. (P.) Ltd. (supra), is no longer good law. Therefore, this case does not help the assessee. Therefore, the A.O has rightly held that only permissible adjustments as provided for in Explanatoin-1 to sec. 115JB are to be made ,as held by the hon'ble Karnataka High Court in N.J.Jose &

Co. v. Asstt. CIT [2010] 321 ITR 132(KER) that no further deductions and allowances other than stipulated in Explanation 1 are available.

The Honourable Apex Court on the interpretation of provisions has held in the case of Vodafone International Holdings B.V. vs. Union of India reported in [2012] 17 taxmann.com 202 (Se) as follows:-

"71 We have to give effect to the language of the section when it is unambiguous and admits of no doubt regarding its interpretation, particularly when a legal fiction is embedded in that section. A legal fiction has a limited scope. A legal fiction cannot be expanded by giving purposive interpretation particularly if the result of such interpretation is to transform the concept of chargeability which is also there in Section 9(1) (i), particularly when one reads Section 9(1)(i) with Section 5(2) (b) of the Act. What is contended on behalf of the Revenue is that under Section 9(1) (i) it can "**look through**" the transfer of shares of a foreign company holding shares in an Indian company and treat the transfer of shares of the foreign company as equivalent to the transfer of the shares of the Indian company on the premise that Section 9(1)(i) covers direct and indirect transfers of capital assets" ...

The language of the section is unambiguous and there is no doubt regarding its interpretation particularly when there is specific mechanism provided in sec.115JB, which is a code in itself for computation of deemed income of MAT companies. The exclusion of the impugned capital receipts sought by the appellant is not tenable by giving purposive interpretation particularly since such interpretation is to transform the concept of Book profit for the purpose of section 115JB of the Act. On the contrary, the sections which impose the charge or levy, should be strictly construed and this position though was reiterated by the Apex Court in CIT v. Mahaliram Ramjidas [1940] 8 ITR 442; and subsequently by the Supreme Court in (PC) India United Mills Ltd. v. CEPT[1955] 27 ITR 20 in the case of India United Mills and thereafter the various other judgments, still prevails as the correct law.

The entire mechanism for the computation of book profit is clearly set out in sub-section (1) of section 115JB read with Explanation thereto. The starting point being the net profit as shown in the profit and loss account prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act but also the items, which are to-be increased as stipulated in clauses (a) to (h), and the items, which are to be reduced as specified in clauses (i) to (vii), find specific mention in the scheme of the section itself. Hence, the computation of book profit, and permissible adjustments are to be done strictly as per the Explanation-1 to section 115JB of the Act and therefore, no assistance from any other section of the Act can be taken for that purpose. The decisions of the Hon'ble Supreme Court in the cases of Apollo Tyres Ltd. (supra) and HCL Comnet Systems & Services Ltd. (supra) had clearly laid down a law that the Assessing Officer has only limited power of making increases and reductions to the net profit shown in the profit and loss account except as provided for in the Explanation to section 115J or 115JA of the Act. In view of the above discussions, it is clear that the Assessing Officer, while computing the book profit of a company under section 115J of the Act, has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act, and the Assessing Officer thereafter has the limited power of making increases and reductions as provided for in the Explanation to section 115JB of the Act. These receipts in question are not covered by any of the clauses (1) to (vii) of Explanation 1 to section 115JB of the Act and thus cannot be reduced from book profits u/s. 115JB of the Act. The finding by the A.O denying the exclusion of impugned sales tax incentive of Rs. 3,98,70,574/- and state capital investment subsidy of Rs. 59,75,000/- is confirmed. This ground of appeal is **dismissed**."

The assessee being aggrieved by this order of Ld. CIT(A) came in second appeal before us.

12. Ld. AR for the assessee submitted that the co-ordinate Bench of this Tribunal in the case of Sicpa India (P) Ltd. vs. DCIT (2017) 80 taxmann.com 87 (Kolkata-Trib) after considering the judgment of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT (20102) 255 ITR 273/122 taxman 562 has decided the issue in favour of assessee. The ld. AR in support of assessee's claim

also relied on the judgment of Hon'ble Supreme Court in the case of CIT vs.Chaphal Kar Brothers, Pune reported in 400 ITR 279 (SC). He requested the Bench to decide the issue on merit.

On the other hand, Ld. DR supported the order of Authorities Below.

13. We have heard the rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon. From the foregoing discussion, we note that subsidy was given by the Govt. of West Bengal for the purpose of enabling the entrepreneurs to establish new industry and also expand the existing industries. Under normal computation of income the subsidy given to promote the industries are not subject to tax, therefore, an item which is not taxable cannot be brought to tax under the provision of MAT. In holding so, we rely on the order of this co-ordinate Bench of this Tribunal in the case of Sicpa India (P) Ltd. (supra) wherein it was held as under:-

"22. We have heard the submission of the learned counsel for the Assessee. As far as the excluding the subsidies in question from computation of book profit u/s 115JB of the Act is concerned, the provisions of Sec.115JB of the Act have to be looked at. Section 115JB of the Act provides that notwithstanding anything contained in any other provision of the Act, where in the case of an Assessee, being a company, the income- tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April,2001, is less than seven and one half percent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of seven and one half ten per cent. The Assessee being a company the provisions of Sec.115JB of the Act were applicable. Every assessee, being a company, shall, for the purposes of section 115JB of the Act, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956). In so preparing its book of accounts including profit and loss account, the company shall adopt the same accounting policies, accounting stand and method and rates for calculating depreciation as is adopted while preparing its accounts that are laid before the company at its annual general meeting in accordance with provisions of Sec.210 of the Companies Act. Explanation below Sec.115JB of the Act provides that for the purposes of section 115JB of the Act, "**book profit**" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub- section (2), as increased by— certain items debited in the profit and loss account in arriving at the net profit and as reduced by- certain items that are credited in the profit and loss account. In other words, all that one has to do, while computing book profits is to take the profit as per profit and loss account prepared in accordance with Companies Act, 1956 and make additions or subtraction as is given in the explanation to Sec.115JB(2) of the Act.

23. We have already seen that the issue whether subsidies in question can be regarded as income at all is no longer res integra and has been concluded by the Hon'ble Jammu & Kashmir High Court in the case of Balaji Alloys (supra). In the aforesaid decision the Hon'ble J & K High Court on identical facts held that excise duty subsidy and interest subsidy were capital receipts not chargeable to tax. In view of the aforesaid decision of the Hon'ble High Court rendered on identical facts as that of the Assessee's case, there can be no doubt that subsidies in question does not have any character of income.

24. When a receipt is not in the character of income, can it form part of the book profits for the purpose of Sec.115JB of the Act, is the question that arises for consideration. The ITAT Kolkata Bench in the case of Dy. CIT v. Binani Industries Ltd. [2016] 178 TTJ 658 : had to deal with a case where the question was as to whether receipts on account of forfeiture of share warrants amounting to Rs. 12,65,75,000/-, being a capital receipt, would be liable for taxation u/s 115JB. The tribunal after referring to several decisions on the issue viz., the Hon'ble Apex Court in case of Indo Rama Synthetics (I) Ltd. v. CIT [2011] 330 ITR 336/9 taxmann.com 25, Apollo Tyres Ltd. v. CIT [2002] 255 ITR 273/122 Taxman 562 (SC), Special Bench ITAT in the case of Rain Commodities Ltd. v. Dy. CIT [2010] 40 SOT 265 (Hyd.) (SB), ITAT Luknow Bench in the case of ACIT v. L.H. Sugar Factory Ltd. and vice versa in ITA Nos. 417 , 418 & 339/LKW/2013 dated

9.2.2016 and decision of Mumbai ITAT in the case of Shivalik Venture (P.) Ltd. v. Dy. CIT [2015] 70 SOT 92/60 taxmann.com 314, came to the conclusions

(i)	the object of Minimum Alternate Tax (MAT) provisions incorporated in Sec.115JB of the Act was to bring out real profit of companies and the thrust was to find out real working results of company.
(ii)	Inclusion of receipt which are not in the nature of income in computation of book profits for MAT would defeat two fundamental principles, it would levy tax on receipt which was not in nature of income at all and secondly it would not result in arriving at real working results of company. Real working result could be arrived at only after excluding this receipt which had been credited to P&L a/c and not otherwise.
(iii)	There was a disclosure of the factum of forfeiture of share warrants amounting to Rs. 12,65,75,000/- by the Assessee in its notes on accounts vide Note No. 6 to Schedule 11 of Financial Statements for year ended 31.3.2009. Profit and loss account prepared in accordance with Part II and III of Schedule VI of Companies Act 1956, included notes on accounts thereon and accordingly in order to determine real profit of Assessee, adjustment need to be made to disclosures made in notes on accounts forming part of profit and loss account of Assessee. Profits arrived after such adjustment, should be considered for purpose of computation of book profits u/s 115JB of the Act and thereafter, AO had to make adjustments for additions/deletions contemplated in Explanation to section 115JB of the Act.

25. The Tribunal in the aforesaid decision made a reference to the decision of the Special Bench of the ITAT in the case of Rain Commodities (supra) which in turn was based on the ratio laid down in the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) as a case in which the income in question was taxable but was exempt under a specific provision of the Act and but for the exemption, the income would be chargeable to tax and such items of income should also be included as part of the book profits. But where a receipt is not in the nature of income at all it cannot be included in book profits though it is credited in the profit and loss account. The Bench followed the decision of the Lucknow Bench in the case of L.H. Sugar Factory Ltd. (supra), where receipts on account of carbon credits which were capital receipts not chargeable to tax and hence not in the nature of income were held not included in the book profits. The Bench also referred to the decision of the Mumbai Bench of the ITAT in the case of Shivalik Venture (P.) Ltd. (supra) which was a case where the question was whether profits arising on transfer of a capital asset by a company to its wholly owned subsidiary company which is not treated as income" u/s 2(24) of the Act and since it does not form part of the total income u/s.10 of the Act and therefore does not enter into computation provision at all under the normal provisions of the Act, the same should be considered for the purpose of computing book profit u/s 115JB of the Act. The Mumbai Bench held as follows:

'26. We shall now examine the scheme of the provisions of sec. 115JB of the Act. It is pertinent to note that the provisions of sec. 10 lists out various types of income, which do not form part of Total income. All those items of receipts shall otherwise fall under the definition of the term "**income**" as defined in sec. 2(24) of the Act, but they are not included in total income in view of the provisions of sec. 10 of the Act. Since they are considered as "incomes not included in total income" for some policy reasons, the legislature, in its wisdom, has decided not to subject them to tax u/s 115JB of the Act also, except otherwise specifically provided for. Clause (ii) of Explanation 1 to sec.115JB specifically provides that the amount of income to which any of the provisions of section 10 (other than the provisions contained in clause (38) thereof) is to be reduced from the Net profit, if they are credited to the Profit and Loss account. The logic of these provisions, in our view, is that an item of receipt which falls under the definition of "**income**", are excluded for the purpose of computing "Book Profit", since the said receipts are exempted u/s 10 of the Act while computing total income. Thus, it is seen that the legislature seeks to maintain parity between the computation of "**total income**" and "book profit", in respect of exempted category of income. If the said logic is extended further, an item of receipt which does not fall under the definition of "**income**" at all and hence falls outside the purview of the computation provisions of Income tax Act, cannot also be included in "**book profit**" u/s 115JB of the Act. Hence, we find merit in the submissions made by the assessee on this legal point.'

26. *The admitted factual and legal position in the present case is that subsidies in question is not in the nature of income. Therefore they cannot be regarded as income even for the purpose of book profits u/s.115JB of the Act though credited in the profit and loss account and have to be excluded for arriving at the book profits u/s.115JB of the Act. We hold accordingly and confirm the order of the CIT(A) in this regard. In light of the aforesaid discussion, we are of the view that the subsidies in question should be excluded for the purpose of determination of book profits u/s.115JB of the Act. We hold accordingly and dismiss Gr.No.2 raised by the Revenue."*

Similarly, we further find that Hon'ble Supreme Court in the case of Chaphas Kar Brother Pune (supra) has decided the issue in favour of assessee. The relevant extract is reproduced below:-

"27. *Since the subsidy scheme in the West Bengal case is similar to the scheme in the Maharashtra case being to encourage development of Multiplex Theatre Complexes which are capital intensive in nature, and since the subsidy scheme in that case is also similar to the Maharashtra cases, in that the amount of entertainment tax collected was to be retained by the new Multiplex Theatre Complexes for a period not exceeding four years, we are of the view that West Bengal cases must follow the judgment that has been just delivered in the Maharashtra case."*

The undisputed fact is that the incentive received by assessee is not in the nature of income earned during the course of business. Therefore, in our considered view, same cannot be regarded as "income" for the purpose of MAT u/s 115JB of the Act. Thus, the amount of incentive received by assessee should be excluded from the determination of book profit under the provision of Section 115JB of the Act. Thus, we reverse the order of Ld. CIT(A). and direct the AO to delete the same. This ground of assessee's appeal is allowed."

4. There is no distinction on facts or law pointed out at the Revenue's behest. We thus adopt judicial consistency in the impugned assessment year to accept assessee's instant latter substantive ground of its appeal ITA 1153/Kol/2017 is partly allowed therefore."

8. In view of the order of this Tribunal reproduced above, the order of CIT(A) is not justified and is set aside. Ground No.3 raised by the assessee is allowed.

9. Next, we shall take up ITA No.1143/Kol/2018 of Revenue.

10. We find this appeal was filed with the delay of six days and on hearing both the parties, we find the Revenue made out sufficient averment of cause for delay and the delay of six days are condoned.

11. Ground No.1 is relating to deletion of disallowance made on account of Industrial Promotion Assistance and Deferred Sales Tax Liability in the facts and circumstances of the case.

12. We find the issue in hand is covered by the orders of this Tribunal in assessee's own case. The latest order being dated 05.07.2018 for Assessment Year 2009-10 which is placed on record from Page 311 of Paper Book is reproduced hereinbelow:

"11. Ground No.2 is relating to deletion of disallowance made on account of capital investment subsidy and sales tax remission.

12. Heard both parties and perused the materials available on record. We find that the issue is covered in assessee's own case by the order of Coordinate Bench which is placed at 161 of Paper Book and for better understanding the same is reproduced hereinbelow:

"8. We have heard the arguments of both the sides and also perused the relevant material available on record. As agreed by the ld. representatives of both the sides, this issue involved in Grounds No. 3 & 4 of the revenue's appeal is squarely covered in favour of the assessee, inter alia, by the decision of the Coordinate Bench of this Tribunal in assessee's own case for A.Ys. 2003-04 and 2004-05 rendered vide its order dated 23.10.2009 (supra), wherein the similar amount of incentive received by the assessee-company under the same scheme of West Bengal Government has been held to be capital in nature not chargeable to tax. Respectfully following the said decision of the Tribunal, we uphold the impugned order of the ld. CIT(Appeals) giving relief to the assessee on this issue and dismiss Grounds No. 3 & 4 of the Revenue's appeal."

13. In view of the above discussion and further thereto, it is noted that this Tribunal in assessee's own case for Assessment Year 2010-11 held that subsidies given to promote industries are not subjected to tax vide order dated 27.04.18 at page 208 of paper book and the same has been followed in Assessment Year 2011-12 vide order dated 12.09.2018 at page 229 of paper book. It is noted that the CIT(A) placed reliance on the order of Kolkata Tribunal. Therefore, we find no infirmity in the order of CIT(A). Thus Ground No.2 raised by the Revenue is dismissed."

13. In view of the above, we find no infirmity in the order of CIT(A) and it is justified. Ground No.1 raised by the Revenue is dismissed. Ground No.2 is relating to deletion of disallowance made u/s 14A of the Act.

14. We find no dividend income earned by the assessee in the year under consideration when there is no dividend income earned the disallowance u/s 14A is not maintainable. It is noted that same issue arose in Assessment Year 2009-10 and this Tribunal by placing reliance in the case of Oil Industries Development Board of Hon'ble Supreme Court vide its order dated 16.02.2018 wherein the Hon'ble Supreme Court confirmed the ratio laid down by the Hon'ble High

Court of Delhi in the case of Cheminvest Ltd. that no disallowance is to be made when there is no dividend income earned. The relevant portion in assessee's own case for Assessment Year 2009-10 is reproduced hereinbelow:

"14. Ground No.3 is relating to deletion of disallowance made u/s 14A of the Act.

15. Heard both parties and perused the materials available on record. We find that the assessee earned no exempt income and the CIT(A) by placing reliance on the order dated 02.09.15 of Hon'ble Delhi High Court in the case of Cheminvest Ltd. in ITA No.749/2014 deleted the addition made by the Assessing Officer. The relevant portion of which is reproduced hereinbelow:

"Decision: It is admitted in the submissions that the assessee has not been earned any exempted dividend income during the year. The assessee has placed reliance on the order of Hon'ble Delhi High Court in the case of Cheminvest Ltd. (ITA No.749/2014 vide its order dated 02 September 2015). It is submitted that the Hon'ble Delhi High Court has categorically held that the expression 'does not form part of total income' as appearing in Section 14A of the Act envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year.

The Hon'ble Delhi High Court has held as under:

21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in Rajendra Prasad Moddy (supra) was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is 'for the purpose of making or earning such income'. Section 14A of the Act on the other hand contains the expression 'in relation to income which does not form part of the total income.' The decision in Rajendra Prasad Moody(supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act.

Respectfully following the above decision as no exempted dividend income has been earned by the assessee. I am of the opinion that no disallowance u/s 14A can be made in this case. Accordingly the addition made by the A.O of Rs.19,246,532/- is hereby deleted. The appeal of the assessee on this issue is allowed."

16. Further to the above, the Hon'ble Supreme Court in the case of Oil Industries Development Board vide order dated 16.02.2018 upheld the ratio laid down by the Hon'ble High Court of Delhi in the case of Cheminvest Limited (supra). For ready reference, the relevant portion of which is reproduced hereinbelow:

"The Revenue's appeal challenges an order of the Income Tax Appellate Tribunal (ITAT) which had set aside the disallowance of Rs.1,62,49,000/- under Section 14A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

The Assessing Officer (A.O) and later the CIT(A) made the disallowance by taking into account only the investment patterns of the assessee for the concerned assessment.

The ITAT relied upon the ruling of this Court in Cheminvest Limited vs. Commissioner of Income Tax-VI, (2015) 378 ITR 33 which ruled in the absence of any exempt

income, disallowance under Section 14A of the Act of any amount was not permissible. Since the decision in Cheminvest Limited (supra) was followed, there is no substantial question of law that requires consideration."

17. *In the light of above discussion, we find no infirmity in the order of CIT(A) and accordingly it is justified. Thus Ground No.3 raised by the Revenue is dismissed."*

15. In view of the order of Tribunal in assessee's own case reproduced hereinabove, we find no infirmity in the order of CIT(A) and it is justified. Ground No.2 raised by the Revenue is dismissed.

16. Ground No.3 raised challenging the action of CIT(A) in deleting the addition made by Assessing Officer on account of 14A u/s 115JB of the Act.

17. We find the issue on hand is covered by the order of this Tribunal in assessee's own case for Assessment Year 2007-08 which is placed at Page No.265 to 266 of Paper Book. The relevant portion of which is reproduced hereinbelow:

"24. In Ground no. 6 of its appeal for A.Y. 2007-08, the Revenue has challenged the action of the Id. CIT(Appeals) in directing the Assessing officer to delete the addition of Rs.6,43,924/- made to the book profit computed under section 115JB of the Act on account of disallowance of expenses incurred by the assessee in relation to the earning of exempt income under section 14A.

25. While computing the book profit under section 115JB for the year under consideration, i.e. A.Y. 2007-08, no disallowance on account of expenses incurred for earning of exempt income was made by the assessee. Relying on Explanation (1)(f) to section 115JB, the amount of disallowance as worked out by him under section 14A while computing the income of the assessee under the normal provisions was added by the Assessing Officer while computing the book profit of the assessee under section 115JB. Although the disallowance so made under section 14A amounting to Rs.6,43,924/- while computing the income of the assessee under the normal provisions of the Act was restricted by the Id. CIT(Appeals) to Rs.30,000/-, he held that the amount of disallowance so sustained, however, could not be added while computing the book profit of the assessee-Company under section 115JB as the disallowance so sustained at 1% of the exempt dividend income was on notional basis, which could not be termed as expenses actually incurred by the assessee in relation to the exempt dividend income. Reliance in this regard was placed by the Id. CIT(Appeals) on the decision of Delhi Bench of ITAT in the case of Goetze India Limited reported in 32 SOT 101, wherein it was held that the provisions of sub-section (2) and sub-section (3) of section 14A could not be imported into clause (f) of Explanation (1) to section 115JA.

26. We have heard the arguments of both the sides and also perused the relevant material available on record. As agreed by the Id. representatives of both the sides, this issue involved in Ground No. 6 of Revenue's appeal for AY 2007-08 is squarely covered, inter alia, by the decision of the Coordinate Bench of this Tribunal in the case of Goetze India Limited (supra), wherein the similar addition made to the book profit of the assessee-company computed under section 115JB on account of disallowance of expenses made under section 14A was held to be

unsustainable by the Tribunal holding that the provisions of section 14A could not be imported into Clause (f) of Explanation (1) to section 115JA. Respectfully following the said decision of the Coordinate Bench of this Tribunal in the case of Goetze India Limited, we uphold the impugned order of the Id. CIT(Appeals) giving relief to the assessee on this issue and dismiss Ground No. 6 of the Revenue's appeal."

13. In view of the order of this Tribunal reproduced hereinabove, we find no infirmity in the order of CIT(A) and it is justified. Ground No.3 raised by the Revenue is dismissed.

14. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 04.10.2019.

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Sd/-
[S.S. Viswanethra Ravi]
Judicial Member

Dated : 04.10.2019

Place : Kolkata

RS, Sr.PS

Copy of the order forwarded to:

1. Appellant – Tata Metaliks Ltd., Tata Centre, 10th Floor, 43, Chowringhee Road, Kolkata – 700071.
2. Respondent/Revenue– DCIT, Circle-3(1), Kolkata.
3. The CIT(A), Kolkata [sent through email]
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata [sent through emial]

//True Copy//

By order,
Assistant Registrar,
ITAT, Kolkata