

i) *Disallowing provision for doubtful debts and advances (written back) 18,243,319 (cr.)*
 ii) *Disallowing provision for Reversal of provision for diminution in value of investment(writtenback) 10,442,237 (cr.)*
 Consequently computing the Book Profit at Rs. 32,20,96,314/-.

c) *Not determining the amount of MAT credit available to the assessee company for the assessment year to be adjusted against future normal tax liability.*

2) *Whether under the facts and circumstances of the case and in law the learned CIT(A) was justified in confirming the action of the AO in considering the Foreign Exchange Fluctuation- Capital Nature (Credit) Rs. 43,82,892/-, chargeable to tax as Business Income.*

3) *Whether in view of the facts and under the circumstances of the case, the CIT(A) was justified in law in upholding the action of AO in charging of interest of Rs. 29,16,943/- u/s 234B of the Act; on the amount of tax on book profit of Rs. 32,20,96,314/- recomputed on the basis of retrospective amendment in sec. 115JB of the Act inserted by Finance Act (No.2), 2009.*

4) *The appellant craves to be allowed to add any fresh/additional grounds of appeal and/or withdraw any of the grounds of appeal either before or at the time of hearing of appeal.”*

3. The assessee being a Listed Company engaged in the business of Software Development and IT Enabled Services, being a 100% EOU and eligible for Exemption u/s 10A of the Act. Income-tax return was filed at book profit of Rs. 26,84,71,987/- which was to be taxed under the provision of Section 115JB of the Act. Subsequently, pursuant to the retrospective amendment by Finance Act (No.2), 2009, the book profit was recomputed at Rs.29,34,10,758/-, due additional tax paid and rectified statement of income was duly filed with the department on 13.04.2010. The Assessing Officer completed the assessment at the book profit under the deemed provision at Rs.32,20,96,314/- and under the normal provision at Rs.4,92,50,570/- after allowing deduction u/s 10A of the Act.

4. Being aggrieved by the assessment order the assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

5. As regards Ground No. 1 relating to disallowance of Rs. 10,39,36,080/- in computing deduction u/s 10A, the Ld. AR submitted that expenditure on Telecommunication/ISP of Rs.2,76,28,106/- were not incurred to deliver computer software outside India. Out of Rs.2,76,28,106/- expenditure of Rs.2,02,92,476/- was on local lease line. Expenditure on lease line outside India was Rs.90,43,495/-. Further, the export invoices were only for the value of software / ITE supervision. Export proceeds being FOB value of software developed, therefore, no deduction from export proceeds was called for. The Ld. AR relied upon the Circular No.564 dated 5.7.1990 [(1990) 184 ITR (St) 137]. As regards, traveling expenses in foreign currency of Rs.7,63,07,974/-, the Ld. AR submitted that the same were not incurred to provide technical services outside India. Onsite software development was rendered by deputing assessee's employees. Offshore services were rendered at assessee's business premises in India. Relying upon Circular No.694 dated 23.11.1994 [(1995) 211 (St) 26], the Ld. AR submitted that expenditure incurred for development of software at clients' sites is not required to be excluded from the export turnover. The Ld. AR submitted that though the Assessing Officer had not given any reason for restricting the deduction u/s 10A, however, the CIT(A) attributed certain reasons to him and upheld the deduction allowed by him. As per rectified order dated 19.01.2012 passed under Section 154 of the Act, the Assessing Officer allowed these claims. Further the Ld. AR while referring to section 10A(4) submitted that the said section provides formula for computing deduction, CIT(A) observed that though "export turnover - the numerator", in the formula has been defined in section 10A, however, "total turnover - the denominator" has not been defined. The Ld. AR submitted that since export turnover specifically excludes freight, telecomm and insurance, therefore, different meaning cannot be assigned to total turnover. The Ld. AR relied upon the decision in case of CIT v. Lakshmi Machine Works [2007] 290 ITR 667 (SC). The Ld. AR submitted that neither the Assessing Officer nor CIT(A) has given any adverse finding on the submissions made. There is no finding that ISP charges were for delivery of computer software and the travelling expenses were for providing technical

services outside India. The Ld. AR submitted that the issue is no more res-integra and is covered by the decision of the Hon'ble Supreme Court in case of CIT v. HCL Technologies Ltd. (2018) 404 ITR 719 (SC). The Assessing Officer on estimate basis had excluded 60% of software development charges from export turnover as expenditure on technical services outside India. Though the CIT(A) observed that the Assessing Officer has not brought any evidence that assessee was providing technical services outside India, still 10% of software development charges were treated as incurred on technical services outside India. The Assessee's appeal was allowed by Tribunal. The Hon'ble Supreme Court upholding the order of the Hon'ble High Court observed that the Assessing Officer could not bring any evidence to show that assessee was engaged in providing technical services independent of software development for which expenditure was incurred outside India in foreign currency and that even after delivery of software, there would be requirement of technical personal to visit the client to make the software fully functional. The Ld. AR also relied upon the decision of Patni Telecom (P) Ltd. v. ITO [2009] 308 ITR (AT) 414. The Ld. AR further submitted that except for AY 2008-09 and 2009-10, neither in earlier years nor in later years, similar disallowance was made by the Assessing Officer. In fact, page 9 of order of CIT(A) for AY 2009-10, records that for AY 2003-04 to 2007-08, deduction was allowed. The Ld. AR further submitted that no Second appeal for AY 2010-11 & 2011-12 has been filed by the Revenue. The Ld. AR further submitted that by the original return filed on 24.09.2008, deduction of Rs. 22,56,55,798/- was claimed u/s 10A of the Act. By revised return filed on 22.09.2009, deduction u/s 10A of Rs. 25,61,48,875/- was claimed. Deduction u/s 10A was claimed in respect of four undertaking. Against the claim of deduction of Rs. 25,61,48,875/-, the Assessing Officer allowed deduction of Rs.23,95,42,286/- (difference of Rs. 1,66,06,589) as under:

- * Profit of the business was taken at Rs. 23,22,45,490/-
- * Export turnover and total turnover was reduced by Rs. 3,08,53,780/- and Rs. 7,80,68,057/- on account of telecommunication expenses and travel expenses.

* Though deduction of Rs. 23,95,42,286/- was allowed in the respect of four undertakings having profit, however, by mistake only the figures pertaining to Noida IT were noted.

6. The Ld. DR relied upon the Assessment Order and the order of the CIT(A).

7. We have heard both the parties and perused all the relevant material available on record. From the submissions of the working of deduction under Section 10A, the Ld. AR admitted that there is mistake in figures pertaining to one undertaking. The Ld. AR submitted that by revised return filed on 22.09.2009, deduction u/s 10A of Rs. 25,61,48,875/- was claimed. Deduction u/s 10A was claimed in respect of four undertaking. Against the claim of deduction of Rs. 25,61,48,875/-, the Assessing Officer allowed deduction of Rs.23,95,42,286/- (difference of Rs. 1,66,06,589) as under:

* Profit of the business was taken at Rs. 23,22,45,490/-

* Export turnover and total turnover was reduced by Rs. 3,08,53,780/- and Rs. 7,80,68,057/- on account of telecommunication expenses and travel expenses.

* Though deduction of Rs. 23,95,42,286/- was allowed in the respect of four undertakings having profit, however, by mistake only the figures pertaining to Noida IT were noted.

Thus, these aspects needs to be verified and should be put before the Assessing Officer for fresh adjudication. It will be appropriate to remand back this issue to the file of the Assessing Officer. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus, Ground No. 1(a) is partly allowed for statistical purpose.

8. As regards Ground Nos. 1(b) and 1(c) relating to adjustment of Rs. 1,04,42,237/- and Rs. 1,82,43,319 u/s. 115JB towards provision for diminution in value of investment and doubtful debts as well as advances written back. The Ld. AR submitted that in AY 2007-08, following provisions were debited to P&L A/c:

- diminution in value of investment of Rs. 1,04,42,237/-
- doubtful debts of Rs. 5,08,06,788/-
- doubtful advances of Rs. 3,39,47,774/-

In the computation for AY 2007-08, provisions for Rs. 1,04,42,237/, Rs.5,08,06,788/- and Rs.3,39,47,774/- were added back to the income. By Finance (No.2) Act, 2009, section 115JB was amended w.r.e.f. 1.4.2001 and thereby, net profit was to be increased by the provision for diminution in value of any asset. The Ld. AR pointed out that assessment for AY 2007-08 was made at the total income of Rs.5,65,96,889/- on which tax of Rs. 1,67,09,898/- was payable. Net profit as per P&L A/c for AY 2007-08 was Rs. 13,87,67,663 & book profit post amendment by the Finance (No.2) Act, 2009 was Rs. 11,75,52,668/-, on which tax of Rs. 1,31,89,409 was payable. In AY 2008-09, provision for Rs. 1,04,42,237/- was reversed and was credited to P&L A/c I page 108 r/w 134 Note 11(a). Similarly, out of provision of Rs.5,08,06,788/- and Rs.3,39,47,774/-, a sum of Rs. 1,82,43,319/- was reversed and was credited to P&L A/c as other income. Since in AY 2007-08, provisions for Rs. 1,04,42,237/- and Rs. 1,82,43,319/- created by debiting P&L A/c and was taken into account for MAT purposes, though book profit was less than income under the normal provisions. Therefore, on reversal of provisions in AY 2008-09 were not required to be added to net profit as provided by clause (i) of Explanation 1 to Section 115JB(2). The Assessing Officer declined to exclude provisions for Rs. 1,04,42,237/- and Rs. 1,82,43,319/- in computing book profit for AY 2008-09 for the reason that the said provisions were not added while computing the book profit for AY 2007-08. Proviso to clause (i) of Explanation 1 to section 115JB(2) provides that amount withdrawn from the provision shall be reduced from net profit provided the book profit for the year in which the provision was created was increased. This condition was met because book profit for AY 2007-08 was increased by provisions for Rs. 1,04,42,237/-, Rs.5,08,06,788/- and Rs.3,39,47,774/-. The CIT(A) by following Indo Rama Synthetics India Ltd. v. CIT12011/ 330 ITR 363 (SC) upheld the adjustment holding that in the year in which provisions were created, the same were not added back for the purposes of MAT

computation in the return originally filed. Only by the revised computation, provisions were added back. Therefore, book profit for AY 2007-08 has not been increased by the provision of Rs. 1,04,42,237/- & Rs. 1,82,43,319/-. The Ld. AR submitted that the reason that revised computation was filed subsequently is of no significance. Return for AY 2007-08 was filed on 30.10.2007 i.e. much before the amendment by Finance (No.2) Act, 2009 (It was notified on 19.8.2009). Impossibility of compliance due to subsequent retrospective amendment could not be the basis for adverse finding. Assessment for AY 2007-08 was made u/s 143(3) vide order dated 16.12.2010 i.e. after the revised computation of income u/s 115JB was filed for AY 2008-09. Since it is not in dispute that tax liability for AY 2007-08 under normal computational provision was more than the tax liability u/s 115JB, therefore, it can be said that provisions for Rs. 1,04,42,237/- and Rs. 1,82,43,319/- were added back to compute book profit for AY 2007-08. Reliance is placed on Kochi Refineries Ltd. v. DCIT (2010) 4 ITR (Trib) 95 (Mum). In the context of prima facie adjustments, the Courts have consistently held that adjustments cannot be made on the basis of retrospective amendment. In Modern Fibotex India Ltd. v. Dy. CIT (1995) 212 ITR 496 (Call, return for AY 1989-90 was filed on 29.12.1989, showing CCS as non taxable. Subsequently in 1990, section 28 was amended w.e.f. 1.4.1967 and CCS was made liable to tax. Adjustment made based on retrospective amendment was held to be unjustified. Similar view was taken in CIT v. Hindustan Electrographite Ltd. (1998) 229 ITR 16 (MP), it has been affirmed in 243 ITR 48 (SC). Just as adjustment u/s 143(l)(i) based on retrospective amendment cannot be made, similarly adjustment under proviso to clause (i) of Explanation 1 to section 115JB(2) could not have been made when return for AY 2007-08 was filed because in both the cases, circumstances were beyond the control of the assessee. Had the assessment for AY 2007- OS been made under MAT, condition of proviso to clause (i) of Explanation 1 to section 115JB(2) would have met & revival of provisions of Rs. 1,04,42,237/- & Rs. 1,82,43,319/- would have been allowed deduction in computing book profit for AY 2008-09. In case of Indo Rama Synthetics (supra), the assessee had revalued its fixed assets during

the previous year ending on 31.3.2000 (Assessment Year 2000-01). The reserve was created by debiting the "fixed assets account". Thus, the profit & loss account and the book profit for the year ended 31.3.2000 remained untouched by the amount of revaluation reserve. In the accounting year ended on 31.3.2001 (assessment year 2001-02), the assessee withdrew an amount from the reserve which was credited to the profit and loss account. On these facts, it was held that the proviso to clause (i) of section 115JB was applicable because the book profit of the year ended 31.3.2000 had not been increased by the amount of the reserve created in that year. It was in this background that the Hon'ble Supreme Court decided the issue against the assessee holding that unless the adjustment has the effect of increasing the net profit as shown in the P&L A/c, the assessee cannot be allowed reduction of net profit under clause (i) to the Explanation to section 115JB(2). Since in the present case, net profit for the year ended on 31.3.2007 was increased by the amount of provision of Rs. 1,04,42,237/- 8s Rs. 1,82,43,319/- therefore, CIT(A) was not justified in upholding the adjustment. Merely because for AY 2007-08, total income under regular provisions was more than the book profit u/s 115JB, it cannot be said that book profit for AY 2007-08 was not increased by the amount of provisions. Upholding the order of CIT(A) would lead to absurdity. Had total income for AY 2007-08 been assessed u/s 115JB, then book profit of Rs. 11,75,52,668/- been the total income and tax would have been Rs. 1,31,89,409/-, whereas, tax of Rs. 1,67,09,898/- was paid under normal computational provisions

9. The Ld. DR relied upon the Assessment Order and the order of the CIT(A).

10. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that in the present case, net profit for the year ended on 31.3.2007 was increased by the amount of provision of Rs. 1,04,42,237/- and Rs. 1,82,43,319/- therefore, CIT(A) was not justified in upholding the adjustment. Merely because for AY 2007-08,

total income under regular provisions was more than the book profit u/s 115JB, it cannot be said that book profit for AY 2007-08 was not increased by the amount of provisions. The CIT(A) was not correct in holding that the book profits of the earlier years have not been increased by the said reserves or provisions therefore as per provision Section 115JB the addition sustains. In fact, the net profit for the year ended on 31.3.2007 was increased by the amount of provision. Thus, Ground Nos. 1(b) and 1(c) are allowed.

11. As regards ground no. 2 relating to exclusion of exchange fluctuation of Rs. 43,82,892/- in computing deduction u/s 10A. The Ld. AR submitted that addition of Rs. 43,82,892/- on account of exchange fluctuation gain was made without any discussion. Details of the gain of Rs. 43,82,892/- were filed by the assessee. In first appeal, the CIT(A) examining the issue from the point of view of exclusion of fluctuation gain for the purposes of deduction u/s 10A directed the Assessing Officer to disallow deduction u/s 10A on gain on external commercial borrowing or reinstatement of any capital asset. The assessee raised additional ground before the Tribunal to the effect that exchange gain of Rs. 43,82,892/- was a capital receipt, but the same is not pressed at this juncture. The Ld. AR pointed out that out of gain of Rs. 43,82,892/-, gain of Rs. 32,29,114/- [1,13,262 + 39,08, 276 minus 5,91,524 & 2,00,900] was on account of payment to shareholders and gain of Rs. 11,53,778/- [11,53,778 - 3,69,974 + 3,69,974] was on account of advance to subsidiaries (principal account). All the transactions relate to "foreign operations" i.e. investment in subsidiaries. Since the gain relate to capital field being investment in subsidiaries, therefore, such gain was capital in nature. The Ld. AR further submitted that in ITA No. 4247/Del/2011 for AY 2007-08, this aspect was not taken into account.

12. The Ld. DR relied upon the Assessment Order and the order of the CIT(A).

13. We have heard both the parties and perused all the relevant material available on record. The submission of the Ld. AR that out of gain of Rs. 43,82,892/-, gain of Rs. 32,29,114/- [1,13,262 + 39,08, 276 minus 5,91,524 & 2,00,900] was on account of payment to shareholders and gain of Rs. 11,53,778/- [11,53,778 – 3,69,974 + 3,69,974] was on account of advance to subsidiaries (principal account). All the transactions relate to “foreign operations” i.e. investment in subsidiaries. Since the gain relate to capital field being investment in subsidiaries, therefore, such gain was capital in nature. These submissions were not taken into account by the Assessing Officer as well as by the CIT(A). Therefore, it will be appropriate to remand back this issue to the file of the Assessing Officer. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus, Ground No. 2 is partly allowed for statistical purpose.

14. As regards ground no. 3 relating to charging of interest of Rs. 29,16,943/- u/s 234B of tax computed u/s 115JB. The Ld. AR submitted that pursuant to amendment of section 115JB by the Finance (No.2) Act 2009 with retrospective effect of 1.4.2001, the assessee filed revised computation of book profit and thereby, provision for bad debts of Rs. 1,68,37,339/- and provisions for doubtful advances of Rs. 3,67,86,988/- was added to the book profit. It led to shortfall in advance tax. The legal position is settled that in such cases, interest u/s 234B cannot be charged. The Ld. AR relied upon the following decisions:

- (i) Emami Ltd. v. CIT [2011] 337 ITR 470 (Cal)
- (ii) CIT vs. Jupiter Bio Science Ltd. [2013] 352 ITR 113 (Karn)
- (iii) CIT v. National Dairy Development Board (2017) 397 ITR 543 (Guj)
- (iv) CIT v. Glenmark Pharmaceuticals Ltd. (2017) 398 ITR 439 (Bom)
- (v) Pr. CIT v. NHPC Ltd. (2017) 399 ITR 275 (P&H)
- (vi) CIT vs. Kirloskar Systems Ltd. [2014] 220 Taxman 1 (Karn).

15. The Ld. DR relied upon the Assessment Order and the order of the CIT(A).

16. We have heard both the parties and perused all the relevant material available on record. From the perusal of the record it can be seen that as the amendment of section 115JB by the Finance (No.2) Act 2009 operates with retrospective effect from 1.4.2001, the assessee filed revised computation of book profit and thereby, provision for bad debts of Rs. 1,68,37,339/- and provisions for doubtful advances of Rs. 3,67,86,988/- was added to the book profit which led to shortfall in advance tax. Thus, on such interest u/s 234B cannot be charged as held in various decisions. The legal position is settled that in such cases, interest u/s 234B cannot be charged. Therefore, Ground No. 3 is allowed.

17. In result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the Open Court on 30th October, 2019.

Sd/-

**(N. K. BILLAIYA)
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 30/10/2019
BR

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	19 .09.2019
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Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	