IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA

BEFORE SHRI S. S. GODARA, JM & Dr. A. L. SAINI, AM

I.T.A Nos. 147&109 & C.O Nos.35 & 36/Kol/2018

(निर्धारण वर्ष / Assessment Years: 2010-11 & 2011-12)

DCIT, Circle-1(1), Kolkata	**Vs.**	**M/s. Mcnally Bharat Engineering Ltd.** M/s Mcnally Bharat Engineering Co. Company Limited, 4, Mangoe Lane, Kolkata – 700001.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AABCM9443R**		
(Appellant)	**..**	**(Respondent/Cross-Objector)**

Appellant by : Dr. P. K. Srihari, CIT(DR)

Respondent by : Shri Chetan Mehta, FCA, Ashish Jain, FCA & Alpesh Gupta, ACA

सुनवाईकीतारीख/ **Date of Hearing : 04/11/2019**

घोषणाकीतारीख/**Date of Pronouncement : 22/11/2019**

आदेश / O R D E R

Per Shri S. S. Godara:

These two Revenue's appeals and assessee's cross-appeals thereby for Assessment Year 2010-11 & 2011-12 arise against the Commissioner of Income Tax (Appeals) – 22, Kolkata's separate orders; both dated 30.10.2017 passed in case nos.219/CIT(A)-22/10-11/14-15/Kol and No.15/CIT(A)-22/11-12/15-16/Kol; respectively involving proceedings u/s 144C(3)/143(3) of the Income Tax Act, 1961 (in short 'the Act'); respectively.

Heard both the parties. Case files/records perused.

2. It emerges during the course of hearing that some of the issues raised in the instant lis are identical/interconnected. All these four cases are therefore taken up for adjudication together for the sake of convenience and brevity.

3. We find at the outset that the Revenue's former appeal ITA No.147/KOl/2018 suffers from 12 days' delay in filing stated to be attributable to various formalities at the departmental itself. The assessee is fair enough in not disputing all these solemn averments. We therefore condone the impugned delay of 12 days in filing of the Revenue's appeal. Its former appeal ITA No.147/Kol/2018 is taken up for adjudication on merits.

4. The Revenue's identical first substantive grievance in both of its appeals challenges correctness of the CIT(A)'s action deleting arm's length price adjustment relating to corporate guarantee involving overseas associated enterprise of Rs.3,52,20,173/- and 6,55,73,898/- @3.75% of the amount of guarantee itself; respectively. Suffice to say, it transpires at the outset that the CIT(A) has followed various judicial precedents i.e Tega Industries Ltd. vs. DCIT (ITA 1912/Kol/2012 dated 21.09.16) & Bharti Airtel Ltd. vs. Addl. CIT (2014 64 SOT 50 (URO) that a corporate guarantee does not amount to an international transaction u/s 92B of the Act. Learned coordinate bench(s) have also taken into consideration section 92B Explanation by the Finance Act 2012 w.e.f. 01.04.02. We therefore decline Revenue's arguments in support of its first substantive ground raised in both the instant appeals.

5. Next comes Revenue's second identical substantive ground seeking to revive u/s 115JB book profit adjustment regarding retention money amounts of Rs.89,58,21,021/- and 63,78,79,456/-; assessment tears' wise, respectively made in the course of assessment and deleted in the lower appellate proceedings. Both the learned representatives are fair enough that the same is a recurring issue in assessee's case and this tribunal's coordinate bench's order dated 01.03.2017 in in assessment year 2006-07 to 2008-09 decided as under:

> *"28. Ground No.5 raised by the revenue reads as follows :- "5. That on the facts and in the circumstances of the case Ld. CIT (Appeals) has erred in directing to exclude retention money of Rs. 28,87,72,022/- in computing total income under normal provision as well as in computing Book Profit u/s. 115JB." 29. We have already seen that the assessee filed its return of income disclosing the total income as 'Nil 'under the normal provisions of the Act besides declaring book profits under the provision of section 115JB of the Act. In the proceedings before CIT(A) the assessee filed an additional ground of appeal where in the assessee claimed that a sum of Rs.28,87,72,022/- was retention money*

over which the assessee has no rights and therefore the sum in question cannot be considered as income both under the normal provision of the Act as well as while computing the book profit u/s 115JB of the Act.The break up of the retention money over which the assessee does not have a title and therefore cannot be regarded as income is given at page 49 of the assessee's paper book and the same is given as Annexure-2 to this order. As we have already seen that the assessee executes turnkey contracts. Under the terms of contract a certain percentage of the value of the contract is retained by the persons for whom the assessee executes the contract. This is referred to as retention money and will be given to the assessee only on successful trial run of the final acceptance by the customer. According to the assessee therefore this is an air of suspense over the right of the assessee to the money which it had received unless and until successful trial run and final settlement is obtained. It was the plea of the Assessee that till such time the receipt in question cannot be regarded as income even though the assessee follows mercantile system of accounting. The assessee placed reliance on the decision of the Hon'ble Calcutta High Court in the case of CIT vs Simplex Concrete Piles (India)P.Ltd. 179 ITR 8 (Cal) and several other high courts in support of its claim that the sum in question cannot be regarded as income under the normal provisions of the Act.

30. With regard to the claim of the assessee that the said sum cannot also be regarded as part of the book profits u/s 115JB of the Act. The assessee relied on the following decisions :-

(i) Bangalore ITAT in the case of Syndicate Bank -vs.- ACIT (2006) 7 SOT 51 (Bang) where it has been held that the entry by way of crediting the profit and loss account in respect of zero coupon bond is of notional credit and not in respect of interest accruing during the year. Hence, even though the same has been credited to profit and loss account, it needs to be excluded while computing the book profit as per Section 115JA. If notional income has been credited to P&L account and the said income has not accrued during the year, the same cannot be considered as "to disclose the result of working of the company during the financial year as provided under Part-I and Part- II of Schedule VI to the Companies Act, 1956."
(ii) Hon'ble Mumbai Tribunal in the case of Hitkari Fibres Ltd. -vs.- JCIT (2004) 90 ITD 654 (Mum) after referring to the case of Bangalore Tribunal, wherein it was held that MAT has to be levied on the real book profits which have been earned by the companies during the relevant assessment years and not on artificial income which has not accrued to the companies but has been credited to the profit and loss account.
(iii) Hon'ble Mumbai Tribunal in the case of ITO -vs.- Frigsales (India) Ltd. (2005) 4 SOT 376 (Mum) wherein it was held that a receipt which is not in the nature of income cannot be taxed as income under section 115JA. When the accounts are prepared in accordance with Part-Il and Part-Ill of Sch. VI of the Companies Act while making adjustments as per the provisions of s.115JA to compute book profits, the amounts which are not taxable or exempt are excluded, because such amounts do not really reflect a receipt in the nature of income and, therefore, such amounts cannot form part of the profit reflecting real working results. While rendering the above decisions, the Hon'ble Tribunal has referred to the decision of Apex Court in the case of Apollo Tyres -vs.- CIT (2002) 255 ITR 273 (SC) and held that the above decision does not debar the assessee to make the above adjustment in computing Book Profit u/s 115JA/JB.

31. The CIT(A) agreed with the contentions put forth by the assessee. On the admission of the additional ground, the CIT(A) was of the view that the facts to decide the additional ground were already available on record and therefore there should not be any hindrance in entertaining the additional ground. The CIT(A) placed reliance on the decision of the Hon'ble Supreme Court in the case of Jute Corporation of India 187 ITR 688 (SC) and the decision in the case of NTPC Ltd. 229 ITR 383(SC) to come to the conclusion that when facts to decide an additional ground of appeal are available on record and when it was only a question of applying the law to those facts for correctly deciding the liability to tax of an assessee in accordance with law, the additional grounds of appeal should be permitted to be raised.

32. As far as the question whether retention money can be regarded as income under the normal provisions of the Act is concerned, the CIT(A) was of the view that even in the mercantile system of accounting, income cannot be said to have resulted even though the entry might have been made in the books of accounts. In this regard the ITA No.100/Kol/2011& C.O.No.13/Kol/2011 532&217,533&218/Kol/2012 M/s. Mcnally Bharat Engg.Co.Ltd A.Yr.2006-07 CIT(A) placed reliance on the decision of the Hon'ble Supreme Court in the case of Shoorji Vallabhdas and Co. 46 ITR 144 (SC).

33. With regard to including the retention money in computing the book profits the CIT(A) held as follows :-

"11.9 Whether the above amount needs to be excluded in computing Book Profit u/s 115JB or not, the above issue is only academic as once it is upheld that the income has not accrued to the assessee, the

same cannot be brought to tax under the special provisions of Section 115JB of the Act. In a plethora of decisions it has been held that MAT cannot be levied on notional income which has not accrued to the assessee. It can be levied only on real book profits which have been earned by the company. If the notional income has been credited to P&L account and the said income has not accrued during the year, the same cannot be considered as "to disclose the result of working of the company during the financial year as provided under Part-I and Part-II of Schedule VI to the Companies Act, 1956." The above principle has been upheld by Hon'ble Bangalore Tribunal in the case of Syndicate Bank (supra) & Hon'ble Mumbai Tribunal in the case of Hitkari Fibres Ltd. (supra) & Frigsales (I) Ltd. (supra). It may be noted that in rendering the above decisions, the Hon'ble Tribunal has referred to the decision of Apex Court in the case of Apollo Tyres vs CIT (2002) 255 ITR 273 (SC) and held that the above decision does not debar the assessee to make the above adjustment in computing Book Profit u/s 115JA/JB.

11.10 On careful consideration of the facts and circumstances of the case and the decisions of the Courts referred to above including the decision of jurisdictional Calcutta High Court, the above ground is decided in favour of the appellant and the A.O. is directed to exclude retention money in computing total income amounting to Rs.28,87,72,022/- both under the provisions of the Act other than Section 115JB as well as in computing Book Profit u/s 115JB of the Act. "

34. Aggrieved by the order of CIT(A) the revenue has raised ground no.5 before the Tribunal.

35. We have heard the submissions of the ld. DR, who submitted that the CIT(A) ought not to have admitted the additional ground for adjudication. In our view this is not the grievance projected by the revenue in the grounds of appeal. Apart from the above we ITA No.100/Kol/2011& C.O.No.13/Kol/2011 532&217,533&218/Kol/2012 M/s. Mcnally Bharat Engg.Co.Ltd A.Yr.2006-07 are of the view that the legal question arising out of facts already available on record can be entertained by CIT(A) in the form of an additional ground. We therefore reject the arguments of the ld. DR.

36. The ld. DR submitted that the assessee was following the mercantile system of accounting and therefore had to account for all receipts on accrual basis and cannot seek to exclude the retention money on the ground that the assessee's is titled over the retention money remains in suspense till the conclusion of all the terms of contract to the satisfaction of the customer. With regard to the excluding the aforesaid receipts from the book profits u/s 115JB of the Act it was submitted by him that the provision of explanation to section 115JB of the Act clearly lays down what are the sums to be excluded and included to the profit as per profit and loss account prepared in accordance with the provisions of the Companies Act, 1956 and the retention money is one of the sums that had to be excluded from the book profits as laid down in Explanatin-1 to section 115JB(2) of the Act.

37. The ld. Counsel for the assessee while reiterating the plea of the assessee as put forth before CIT(A) further placed reliance on the decisions of the Hon'ble ITAT, Kolkata Bench in the case of DCIT vs Binani Industries Ltd. In ITA NO.144/Kol/2012 for A.Y.2009-10 order dated 02.03.2016 wherein the entire case laws on the issue has been discussed. The Tribunal finally concluded in the aforesaid decision that if the receipt is not in the nature of income then it cannot be considered as income for the purpose of book profit u/s 115JB of the Act. On the other hand if a receipt is considered as income but is exempt by virtue of any specific provision of the Act, then the same would be treated s part of the book profit u/s 115JB of the Act. Thus the ld. Counsel for the assessee submitted that since the retention money in question was not in the nature of income at all it should not be included as part of the book profit u/s 115JB of the Act.

38. We have given a very careful consideration to the rival submissions. As far as the question with regard to excluding the retention money while computing the total income under the normal provisions of the Act is concerned, it is not disputed by the revenue that the sum in question is in the nature of retention money. In such circumstances we are of the view that the retention money cannot be regarded as income of the assessee. The issue is no longer res integra and has been concluded by the Hon'ble Calcutta High Court in case of CIT Vs. Simplex Concrete (Piles) India Pvt. Ltd. [179 ITR 8]. In the aforesaid decision the Hon'ble Calcutta High Court on identical facts held that having regard to the terms and conditions of the contract, it could not be held that either 10 per cent. or 5 per cent., as the case may be, being retention money, became legally due to the assessee on the completion of the work. Only after the assessee fulfilled the obligations under the contract, the retention money would be released and the assessee would acquire the right to receive such retention money. Therefore, on the date when the bills were submitted, having regard to the nature of the contract, no enforceable liability accrued or arose and, accordingly, it could not be said that the assessee had any right to receive the entire amount on the completion of the work or on the submission of bills. The assessee had no right to claim any part of the retention money till the verification of satisfactory execution of the contract. Therefore, the Tribunal was right in holding that the retention money in respect of the jobs completed by the assessee during the relevant previous year should not be taken into account in computing the profits

of the assessee for the assessment year in question. In view of the aforesaid decision of the Hon'ble Calcutta High Court rendered on identical facts as that of the Assessee's case, we are of the view that there is no merit in one part of Gr.No.5 raised by the Revenue viz., that retention money has to be considered as income for computing total income under the normal provisions of the Act and accordingly the same is dismissed.

39. As far as the excluding the retention money 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 as applicable for AY 2006-07 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. It is also not in dispute that the income tax payable on the total income as computed under the Act in respect of the previous year relevant to AY 2006-07 was less than Seven and one half percent of its book profits and therefore book profit should be deemed to be the total income of the Assessee and tax payable by the Assessee on such total income shall be seven and one half percent of such total income. Every assessee, being a company, shall, for the purposes of this section, 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 ITA No.100/Kol/2011& C.O.No.13/Kol/2011 532&217,533&218/Kol/2012 M/s. Mcnally Bharat Engg.Co.Ltd A.Yr.2006-07 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.

40. We have already seen that the issue whether retention money in the case of contracts executed on a turkey basis can be regarded as income at all is no longer res integra and has been concluded by the Hon'ble Calcutta High Court in case of CIT Vs. Simplex Concrete (Piles) India Pvt. Ltd. [179 ITR 8]. In the aforesaid decision the Hon'ble Calcutta High Court on identical facts held that having regard to the terms and conditions of the contract, it could not be held that either 10 per cent. or 5 per cent., as the case may be, being retention money, became legally due to the assessee on the completion of the work. Only after the assessee fulfilled the obligations under the contract, the retention money would be released and the assessee would acquire the right to receive such retention money. Therefore, on the date when the bills were submitted, having regard to the nature of the contract, no enforceable liability accrued or arose and, accordingly, it could not be said that the assessee had any right to receive the entire amount on the completion of the work or on the submission of bills. The assessee had no right to claim any part of the retention money till the verification of satisfactory execution of the contract. Therefore, the Tribunal was right in holding that the retention money in respect of the jobs completed by the assessee during the relevant previous year should not be taken into account in computing the profits of the assessee for the assessment year in question. 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 retention money does not have any character of income.

41. 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 Binani Industries Ltd. ITA No.144/Kol/2013 order dated 2.3.2016 reported in (2016) 178 TTJ 0658 (Kol) : (2016) 137 DTR 0185 (Kol)(Trib) 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 vs CIT 330 ITR 336 (SC), Apollo Tyres Ltd. 255 ITR 273 (SC), Special Bench ITAT in the case of Rain Commodities Ltd. Vs. DCIT (2010) 131 TTJ (Hyd)(SB) 514, ITAT Luknow Bench in the case of ACIT vs. 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. Vs. DCIT (2015) 173 TTJ (Mumbai) 238 dated 19.8.2015, 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 ITA No.100/Kol/2011& C.O.No.13/Kol/2011 532&217,533&218/Kol/2012 M/s. Mcnally Bharat Engg.Co.Ltd A.Yr.2006-07 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.

42. 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 Pvt. 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."

43. The admitted factual and legal position in the present case is that retention money is not in the nature of income till such time the contractual obligations are fully performed to the satisfaction of the customer by the Assessee. Therefore the retention money 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 there is no merit in the other part of ground no.5 with regard to excluding retention money from the book profits for the purpose of Sec.115JB of the Act, and consequently the same is dismissed."

6. We adopt judicial consistency in absence of any distinction in facts and law to affirm the CIT(A)'s order under challenge in both the assessment years. The Revenue's second substantive ground in its former appeal ITA No.147/Kol/2018 fails accordingly.

7. We now deal with Revenue's third substantive ground in latter appeal seeking to revive section 14A r.w.r. 8D disallowance of Rs.3,13,29,549/- in relation to the exempt income in nature of dividends amounting to Rs.1,27,08,716/. The Revenue's former case is that the impugned disallowance also deserves to be added for book profits computation u/s 115JB of the Act. The CIT(A) detailed discussion on the instant issue as under:

> *"25. Ground No. 8. relates to disallowance of deemed expenses u/s 14A r.w.r. 8D amounting to Rs. 3,13,29,549/- under normal provisions and u/s 115JB of the Act.*
>
> *The impugned issue has been dealt by Ld. AO as under:*
>
> *"6. Disallowance u/s 14A*
>
> *On perusal of the balance sheet and its schedules furnished by the assessee, it was observed that the assessee is holding the investments which are capable of generating exempt income. The assessee also claimed expenses of interest payment in its statement of profit & loss in the relevant financial year.*
>
> *As the assessee did not maintain any separate books of accounts for accounting for expenses incurred in relation to income not includible in its total income, the amount of expenses actually incurred cannot be ascertained from the assessee' s books of accounts and details produced/ furnished satisfactorily , Accordingly , the provisions of section 14A read with rule BD of the Act are invoked in the case of the assessee.*
>
> *As per the provisions of Circular(No 05 / 2014 dated 11 .02 .201 4 issued by the CBDT and in the light of Commissioner of Income Tax-III , Kolkata vs . RKBK Fiscal Services (P) Ltd. (358 ITR 288) of Calcutta HC, it is clear that the legislative intent is to allow only that expenditure which is relatable to earning of income and therefore follows that the expenses which are relatable to earning of exempt income have to be considered for disallowance, irrespective of the fact whether any such income has been earned during the financial or not and the onus is on the assessee to give one to one correlation between the funds available and funds deployed with reference to the payment of interest claimed as expenses in the Profit & Loss Account.*
>
> *The detailed calculation/working of the disallowance u/s 14A r.w.r 8D of the Act is as under:*

Sl. No.	*Particulars*	*Amount (Rs.)*	*Amount (Rs.)*
i.	*Expenses directly relatable to exempt income*		*41,219*
ii.	*Expenses by way of interest which is not directly relatable to any particular income (AXB/C)*		
	Where A = amount of expenditure by way of interest = 29,22,84,000	*29,22,84,000*	
	B = average value of investment, income from which does or shall not form part of total income	*1,45,83,65,000*	

	=(1,45,83,65,000+1,45,83,65,000)/2 *C = average of total assets* *=(19,58,84,06,000+15,87,72,44,000)/2*	*17,73,28,25,000*	
Iii	*Amount equal to one-half per cent of the average value of investment, income from which does not or shall not form part of the total income*		*72,91,525*
Iv	*Total amount to be disallowed*		*3,13,70,768*
	Less: Amount already disallowed		*41,219*
	Total		*3,13,29,549*

Therefore , the above mentioned figure amounting to Rs. 3,13,79,249/- added back to the income of the assessee "

26. During the course of the appeal/ the appellant/Ld, ARs for the appellant company furnished submissions, reproduced as under:

(a) Dividend income of Rs. 1,27,08,716/- has been earned from investments in subsidiary and group companies, details of which are as follows:-

Investment in	*Acquired in A.Y.*	*As on 31.03.2011*
Mcnally Sayaji Engineering Co. Ltd.	*2009-10 & 2010-11*	*14,557*
Eveready Industries India Ltd.	*2003-04*	*2*
McLeod Russel India Ltd.	*2005-06*	*2*

(b) The appellant has been receiving dividend income from the aforesaid investments year on year directly into its bank account without incurring any extra cost or effort. Further, no part of borrowed funds of the appellant were acquired and/or utilized for the acquisition of the investments. Actual expenditure of Rs. 41,219/- incurred w.r.t. such investments being proportionate salary of its executives and miscellaneous charges has already been offered to tax in the return of income.

(c) Investment made in shares in the earlier years (FY 2002-03, 2004-05 & 2008-09 & 2009-10), continued substantially in the year under consideration and there has been no fresh investment in shares during the year. Majority of the investments were acquired by way of corporate restructuring exercise and the balance were acquired out of the appellants own funds. Hence disallowance u/s 14A is not called for. The said view finds support from decision in the case of ***Hindustan Motors Limited -vs.- DCIT in ITA No. 171/Kol/2012 dtd. 20-11-2015****. Further, in earlier years, the department has accepted that investment has not been made from borrowed funds and there is no disallowance u/s 14A in those Years.*

(d) Sec. 14A seeks to disallow only the expenditure incurred in relation to earning exempt income. Therefore, any expenditure which has not been incurred in relation to earning exempt income shall not be disallowed under this section. Refer decision of Hon'ble Jurisdictional Tribunal in Candlewood Holdings Pvt. Ltd. -vs.- DCIT (ITA No. 1572/Kol/ 2011 dated 13.04.2012).

Submissions without Prejudice

(e) ***Disallowance as per Rule 8D(2)(i)***

As per Rule 8D(2)(i) the amount of expenditure directly relating to the income which does not form part of the total income is required to be added, Appellant has already offered to tax an amount of Rs.41,219/- and without controverting the workings of disallowance u/s 14A done by assessee and without recording his satisfaction with cogent reasons as to why the figure is incorrect, directly embarking on invoking Rule 8D(2) is wrong. Held in:-

- CIT -vs.- Ashish Jhunihunwala in G,A,No. 2990 of 2013

- All Bank Finance Ltd -vs.- JCIT in ITA No. 465/Kol/2013 A.Y. 2009-10 dtd. 13.01.2016

(f) ***Disallowance as per Rute 8D(2)(ii)***

As per Rule BD(2)(ii) interest which is not directly attributable to any particular income is required to be added.

The total own fund held by the company as on 31.03.2011 is Rs. 266.31 Crs which are much higher than the investment held on 31.03.2011 which is 156.18 Crs. If appellant has sufficient owned funds, investments would not be considered to be made out of borrowed funds, Refer:

- ***CIT vs – Reliance Utilities & Power Ltd. (2009) ITR 340 (Bom)***
- ***The Laxmi Salt Co. Ltd. – vs – ITO in ITA No. 2434/Kol/2013 dtd. 23.09.2016***
- ***Raniquani Co-operative Bank Ltd. - vs – DCIT in IT Appeal No.s 1983 & 1984/Kol/2014 dtd. 02.09.2016.***
- ***Damodar Valley Corporation – vs – ACIT (2016) 180 TTJ 82 (Kol-Trib)***
- ***CIT - vs – UTI Bank Ltd. in Tax Appeal No. 118 of 2013 dtd. 22.03.2013 (Guj-HC)***

(g) ***Disallowance as per Rule 8D(2)(iii)***

As per Rule 8D(2)(iii) an artificial figure, i.e. one-half per cent of the average investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee on the first day and the last day of the previous year is to be added.

*(i)****While computing disallowance u/s 14A as per Rule 8D, investment made for strategic purpose needs to be excluded***

Strategic investment made for acquiring controlling rights and not for the purpose of earning exempt dividend income is required to be excluded while computing disallowance u/s 14 r.w.r 8D. Refer decision of Hon'ble Jurisdictional Tribunal in:

- ***DCIT vs – Selvel Advertising Pvt. Ltd. (2015) 37 ITR 611 (Kol. Trib.)***
- ***Integrated Coal Mining Ltd. – vs – DCIT (ITA No. 1146/Kol/2012 dtd. 30.11.2016***
- ***DCIT - vs – M/s. Binani Industries Ltd. in ITA No. 144/Kol/2013 dtd. 02.03.2016.***

Similar view held in following cases:

- ***Triune Projects Pvt. Ltd. vs – DCIT (ITA No. 3917/Del/2011 dated 10.02.2016***
- ***Interglobe Enterprise Ltd. – vs – DCIT (2014) 40 CCH 22 (Del)***
- ***EIH Associated Hotels Ltd. - vs – DCIT in ITA No. 1503/Mds/2012 dtd. 17.07.2013).***

*(ii)****While computing disallowance u/s 14A as per Rule 8D, investment in which no dividend has been earned needs to be excluded.***

The above view finds support from the following decisions:-

- ***Cheminvest Ltd. vs –CIT (2015) 378 ITR 33 (Del).***
- ***All Bank Finance Ltd -vs.- JCIT in ITA No. 465/Kol/2013 A.Y. 2009-10 dtd. 13.01.2016***

*(iii)****If the AO does not agree with the claim of the assessee having regard to the books of accounts of the assessee, then it is not mandatory for him to resort to Rule 8D to quantify the disallowance u/s 14A of the Act.***

The above view finds support from the decision in the case of ***Allahabad Bank – vs – ACIT in ITA No. 1199/Kol/2012 dtd. 01.06.2016***

(iv) Disallowance u/s 14A r.w.r. 8D cannot exceed exempt income

The above view is supported by decisions in the case of :-

- ***Joint Investments Pvt. Ltd. vs – CIT (2015) 372 ITR 694 (Delhi)***
- ***DCIT – vs – M/s. Neerai Consultants in ITA No. 316/Kol/2014 dtd. 22.09.2016 &***
- ***Crawford Plantation Pvt. Ltd. – vs – ITO in ITA No. 1538/Kol/2016 dtd. 30.11.2016***

(h) CBDT Circulars are binding on department and not on assessee

The AO in his order u/s 143(3) has placed reliance on CBDT Circular No. 05/2015 dtd. 11.02.2014 wherein CBDT has provided clarification with regard to cases for disallowance u/s 14A where corresponding exempt income has not been earned during the year. However in the year consideration, dividend income amounting to Rs. 1,27,08,716/- has been earned with regard to which disallowance amounting to Rs. 41,219/- has duly been made. Hence reliance of the said Circular is totally misplaced. Further, it is a settled law that circulars issued by CBDT are binding on department and not on assessee.

(i) ***Disallowance u/s 14A in computing Book Profit u/s 115JB***

27. DECISION:

1. The findings of the Ld. AO, the written submission and case laws /judicial precedents cited by the Ld. ARs have been duly considered. The appellant has produced details of acquisition of investments from which dividends has been earned during the year under consideration. On careful perusal of the same it is evident that investment made in shares in the earlier years (FY 2002-03,2004-05 & 2008-09 & 2009-10), continued in the year under consideration. It is also evident that the majority of investments have been acquired by the appellant by way of corporate restructuring exercises undertaken in various years" Hence in my considered view of the situation, the question of utilisation of debt funds does not arise. The appellant was also having sufficient own funds in the concerned years to make the investments,

2. The Ld. A.O. has placed reliance on the decision of CIT -vs.- RKBK Fiscal Services Ltd reported in 358 ITR 288 Cal wherein it is stated that onus is on the assessee to give one-to-one correlation between the funds available and funds deployed with reference to the interest claimed in profit and Loss A/c. The appellant-company in the present case has also shown one to one linkage wherever possible about the borrowed funds and the end use which has dominantly been for working capital purposes and not for investment activities. Hence no part of the borrowed funds can be said to have been used for acquiring such investments.

3. In the case of Damodar Valley Corporation vs. ACIT reported in 2016 180 TTJ 82 Kol it has been held by the Hon'ble ITAT that the assessee has got sufficient own funds to make investments and the Ld. AO had not brought any nexus between the borrowed funds vis-a-vis the investments made by the assessee, and that without doing the same, the Ld AO cannot directly presume that the investments were made out of borrowed funds. In the present case also, the appellants share capital and reserves for the year under consideration is Rs. 266.31 Crs and the investments is Rs, 156.18 Crs. In this emergent scenario, as long as investments are less than the interest free funds, presumption is required to be taken that the investments are from interest free funds.

4. The appellant has suo-motto offered to tax an amount of Rs. 41,219/- with regard to the dividend earned, the expenses constitutes salaries of the employees dedicated to the investment activity and miscellaneous expenses incurred. The Ld. AO examining the claim of the appellant regarding expenditure incurred in earning the exempt income, has not been able to show how the disallowance made by the appellant suffers from error. The books of accounts, Balance Sheet, Profit& Loss account etc. were duly produced before the Ld. A.O. during the course of assessment proceedings. The A.O. has neither attempted to identify actual expenditure incurred from the said books of accounts nor asked the appellant to furnish any separate books of accounts for earning such income, Hence, without going into the facts of the case, such mechanical application of Rule 8D is wrong. The case of the appellant finds support from the decision in the case of CIT vs, Ashish Jhunjhunwala in G.A.No, 2990 of 2013 dtd 08-01-2014 as cited by the appellant wherein it was held that the Ld. AO has not considered the claim of the assessee and straight away embarked upon computing disallowance under Rule 8D of the Rules on presuming the average value of investment at ½% of the total value. Accordingly, disallowance as made by Ld. A.O. was deleted.

5. The A.O. while determining the profit under the provisions of MAT has also added the same amount of disallowance made u/s, 14A r.w.s 8D. The decision in the case of Integrated Coal Mining Ltd vs. DCIT in I.T.A No. 1146/Kol/2012 dated 30-11-2015 as cited by the appellant supports the appellant's contention that disallowance u/s 14A r.w.r 8D cannot be imported to Sec. 115JB as the same only mandates adding back of actual expenditure incurred for earning exempt income which the appellant has already done by disallowing Rs,41,219/- while computing its Book profits under MAT. in the said case, it was held that the disallowance made u/s 14A of the Act read with Rule 8D is only an artificial disallowance and obviously the same is not debited in the profit & loss account and the same cannot be imported into clause (f) of Explanation,(to Section 115JB of the Act.

> *6. In view of the aforesaid, the A.O. is directed to delete the disallowance u/s r.w.r 8D both under normal provisions and under Sec. 115JB and restrict the same to the amount already disallowed by the appellant.*

8. Learned Authorized Representative submits that the CIT(A) has rightly deleted the impugned section 14A as well as its book profits adjustment in the above extracted lower appellate findings. The Revenue's case on the other hand is that the Assessing Officer's has rightly disallowed proportionate interest and administrative expenses under Rule 8D(2)(ii) to (iii) involving corresponding figures of Rs.2,40,37,724/- & Rs.72,91,525/-; respectively. We proceed to notice that there is no dispute about the assessee's direct expenses. Coming to proportionate disallowance interest, it has already come on record in assessee's interest free funds is Rs.266.31 crores as against investment of Rs.156.18 crores. The CIT(A) has quoted a catena of case laws (supra) that the necessary presumption in such a case is that of deployment of interest free funds in exempt income yielding investments. We thus affirm the above lower appellate discussion qua this second limb of impugned proportionate interest disallowance as well. Lastly comes the third head of administrative expenditure disallowance. The assessee's case as per its argument extracted hereinabove is that it had made impugned investment as a strategic move only. Hon'ble apex court's decision in Maxopp Investment Ltd. vs. CIT (2018) 402 ITR 640 (SC) holds that the purpose of making exempt income yielding investments is no more a guiding factor, we therefore decline the assessee's foregoing argument. The fact also remains that this tribunal's coordinate bench's decision in REI Agro Ltd. vs. DCIT 144 ITD 141 (Kol) holds that only exempt income yielding investment have to be considered for computing the impugned disallowance. The same has nowhere been considered in either of the lower proceedings. This tribunal's yet another decision in Maruti Traders & Investors vs. ACIT ITA No.846/Kol/17 & No.637/Kol/18 dated 28.11.18 holds that since administrative expenditure is an indirect head, the same has to be disallowed on pro rata basis i.e exempt income vis-a-vis total income. We therefore accept this last limb of section 14A r.w. Rule 8D disallowance in

Revenue's favour for statistical purposes and direct the Assessing Officer to compute impugned administrative expenditure disallowance in terms of foregoing case law in consequential proceedings.

9. The Revenue's further contention that the impugned section 14A r.w. Rule 8D disallowance deserves to be added for book profit adjustment is declined in view of ACIT v. Vireet Investments Pvt. Ltd. (2017) 82 taxmann.com 415 (Del)(Trib)(SB). We therefore partly accept the Revenue's instant last issue and restore it back to the Assessing Officer for a fresh computation in above terms. The Revenue's latter appeal ITA No.109/Kol/2018 is allowed for statistical purposes in above terms.

10. Now comes the assessee's C.O Nos.35 & 36/Kol/2018 assessment years wise respectively. Its identical substantive grounds on both cross-objections are of provision(s) for leave encashment disallowance of Rs.1,99,25,293/- & Rs.3,02,25,926/-; respectively u/s 43B(f) of the Act. Both the learned lower authorities have treated the same as a contingent liability being a mere provision only. It transpires during the course of hearing the hon'ble jurisdictional high court's decision in the case of Exide Industries Ltd. vs. UOI [2007] 292 ITR 470 (Cal) had quashed the very statutory provision itself as ultra vires. Hon'ble apex court stated thereof in SLP Civil No.22889/2008 stated to be pending till date. We therefore direct the Assessing Officer to keep this issue in abeyance for a fresh decision in view of their lordships' final call in the above stated lis.

11. Lastly comes the assessee's latter grievance in both of the cross-objections that seeking to delete education cess disallowance of Rs.52,86,700/- and disallowed Rs.70,64,118/-; respectively. This issue is also no more res integra. Hon'ble Rajasthan high court's judgment in D.B. ITA No.52/2018 dated 31/07/2018 M/s Chambal Fertilisers & Chemicals Ltd. vs. JCIT considers the CBDT's old circular at 18.05.67 to conclude the statutory expenses "tax" u/s

40(a)(ii) does not include cess. We go by the very reasoning to decide this latter issue in assessee's favour. Both of its C.Os 35&36/Kol/2018 are partly allowed.

12. To sum up, the Revenue's appeal ITA No.147/Kol/2018 is disallowed and latter ITA No.109/Kol/2018 is partly allowed for statistical purposes. The assessee's CO Nos.35 & 36/Kol/2018 are partly accepted in above terms. A copy of this order be placed in the respective case files.

Order is pronounced in the open court on 22.11.2019.

Sd/-	**Sd/-**
(A. L. Saini)	**(S. S. Godara)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

कोलकाता /Kolkata;
दिनांक/ Date:22/11/2019
RS

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

1. The Appellant - DCIT, Circle-1(1), Kolkata
2. The Respondent- M/s. Mcnally Bharat Engineering Ltd.
3. आयकरआयुक्त(अपील) / The CIT(A), Kolkata [sent through email]
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT, Kolkata [sent through email]
6. गार्डफाईल / Guard file.

सत्यापितप्रति

True Copy

By Order

Assistant Registrar,
I.T.A.T, Kolkata Benches,
Kolkata.