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

BEFORE SHRI J. SUDHAKAR REDDY, AM & SHRI S. S. GODARA, JM

आयकर अपीलसं./I.T.A Nos.742&743/Kol/2019

(निर्धारण वर्ष / Assessment Years: 2013-14 & 2014-15)

Krishi Rasayan Exports(P) Ltd. 29, Lala Lajpath Rai Sarani (Elgin Road), Kolkata – 700020.	**Vs.**	**PCIT-4, Kolkata**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AACCK4124G**		
(Appellant)	**..**	**(Respondent)**

Appellant by : Shri S.D. Verma, Advocate
Respondent by : Smt. Ranu Biswas, Addl. CIT

सुनवाईकीतारीख/ **Date of Hearing** **: 21/02/2020**
घोषणाकीतारीख/**Date of Pronouncement** **: 28/02/2020**

आदेश / O R D E R

Per Shri S. S. Godara:

These two assessee's appeals for assessment years 2013-14 and 2014-15 arise against the Principal Commissioner of Income Tax -4, Kolkata's separate orders; both dated 12.03.2019 passed in proceedings u/s 263 of the Income Tax Act, 1961 (in short 'the Act').

Heard both the parties. Case files as well as assessee's detailed paper books running into 348 and 369 pages; assessment year wise; respectively stand perused.

2. It transpires at the outset that the identical factual backdrop in both these cases is very much identical. The Assessing Officer had framed his regular assessments on 20&21/12/2016; assessment year wise, respectively in assessee's case. This taxpayer is a company engaged in manufacturing and trading of insecticides, pesticides and agro chemicals disallowing/adding various heads. The

PCIT thereafter sought to treat the said regular assessments as erroneous ones causing prejudice to interest of the Revenue on the ground that the assessee's audited balance sheets as on 31.03.13 and 31.03.14 revealed that it had received excise duty and interest subsidy refunds of Rs.7,72,07,898 and Rs.2,20,95,177/- in former and Rs.10,75,14,429/- and Rs.1,47,47,173/- in latter assessment year; respectively. And that the same had been directly taken to reserves and surplus as excise refund interest subsidy reserves. The PCIT was of the opinion that section 115JB made it clear in such circumstances that these figures of reserves "by whatever name shall form part of the Profit & Loss account for the purpose of computing book profits. The PCIT issued show-cause notice(s) to this effect on 08.02.19.

3. The assessee appeared and filed its written reply(ies) in both these assessment years. This followed the PCIT's yet another show-cause notice that the above twin heads of excise duty refunds and interest subsidy hereinabove amounted to revenue receipts as per hon'ble apex court's decision in (2016) 383 ITR 217(SC) CIT vs. Meghalaya Steels Ltd. The assessee's identical reply(ies) to this effect also disputed the PCIT's foregoing reasoning. It was submitted that the impugned issue(s) of excise refund and interest subsidy had been already held as capital receipt not chargeable to tax under normal provisions as well as book profits as per the tribunal's coordinate bench's decision in its own cases for assessment year 2010-11 to 2012-13. The PCIT has declined the same by reiterating the reasons in his show-cause notice read with section 263 Explanation 2(c) inserted by the Finance Act 2015 w.e.f. 01.06.2015 to conclude that the Assessing Officer's regular assessments in question had been completed without making adequate enquiry(ies) and therefore, the same are erroneous causing prejudice to interest of the Revenue.

This leaves the assessee aggrieved.

4. We have given our thoughtful consideration to rival pleadings against and in support of PCIT's assumption of impugned revision jurisdiction. There can hardly be any dispute about the settled legal proposition in view of hon'ble apex

court's landmark decisions in M/s Malabar Industries Co. vs. CIT [2000] 243 ITR 83 (SC), CIT vs. Max India Limited: 268 ITR 128 (P&H) & CIT v Kwality Steel Suppliers Complex: 395 ITR I (SC) that for the CIT or the PCIT; the case may be, can assumed his revision jurisdiction in case the assessment in question both erroneous as well as causing prejudice to interest of the Revenue; simultaneously. And also that each and every loss of revenue does not attract the revision proceedings in case the Assessing Officer has adopted one of the two plausible views. We keep in mind this settled legal proposition and proceed to deal with the identical facts in these two appeals.

5. We have sufficiently indicated that the PCIT has adopted twin reasoning of the impugned excise duty refund and interest subsidy to be included in computation of section 115JB book profits since forming part of the corresponding reserves and further observes that the same are in the nature of revenue receipt as well going by hon'ble apex court's decision in CIT vs Meghalaya Steel Ltd. (supra). We notice in this factual backdrop that the very issue is no more res integra since this tribunal's coordinate bench's order in assessee's and Revenue's case itself i.e. ITA No.883&1018/Kol/2014 for assessment year 2010-11 decided on 08.03.2017 has accepted the assessee's case as under:

> *"9. We have considered the issue carefully and in the light of the decision of the Hon'ble Jammu & Kashmir High Court in the case of Balaji Alloys (supra). In the case of Balaji Alloys (supra), the Hon'ble Jammu & Kashmir High Court has set out of the objects of the scheme under which the excise duty exemption subsidy and interest subsidy were received by the Assessee in the present case in the following words:*
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> > *"Before coming to the issues, which need determination, regard needs to be had to the salient features of the New Industrial Policy, amendment introduced thereto and the statutory Central excise notifications issued in this respect governing the refund of excise duty and interest subsidy, as incentives to the industrial units, pursuant to the New Industrial Policy.*
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> > *The statement and objects, which had lead to the New Industrial Policy and other concessions for the State of Jammu & Kashmir floated vide Office Memorandum of 14th June, 2002 and the salient features thereof, may, in a nutshell, be stated thus :*
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> > *Considering the request of the Government of Jammu & Kashmir for a special package for development of the industries in the State on the lines for the North East Industrial Policy notified by the Central Government vide Ministry of Industry's OM No. EA/1/2/96-IPD dt. 24th Dec., 1997, discussions were held by the Central Government on strategy and action plan for development of industries and generation*

of employment in the State of Jammu & Kashmir with various related Ministries on the issues, inter alia of infrastructure development, financial concessions and easy market access, pursuant whereto, the Government of India, Ministry of Commerce and Industry (Department of Industrial Policy and Promotion), issued its Office Memorandum dt. 14th June, 2002 whereby it was provided that keeping in view the fact that the State of Jammu & Kashmir had lagged behind in industrial development, there was need for structured interventionist strategies to accelerate the industrial development of the State boosting investors' confidence.

The new initiatives, in terms of the memorandum were aimed at providing requisite incentives as well as enabling environment for industrial development, improving availability of capital and increase in market access so as to give a fillip to private investment in the State.

These fiscal incentives were to be provided to the new industrial units and substantial expansion of existing units.

The new industrial units and existing industrial units on their substantial expansion, as defined, set up in growth center, industrial infrastructure development centers and other locations like industrial estates, parks, export processing zones, commercial estates, etc., as notified by the Central Government, were entitled to 100 per cent excise duty exemption for a period of 10 years from the date of commencement of commercial production.

All new industries in the notified locations were eligible for capital investment subsidy @ 15 per cent of their investment in plant and machinery, subject to a ceiling of Rs. 30 lakhs whereas the existing units were entitled to subsidy on substantial expansion, as defined. Besides these and other concessions, interest subsidy of 3 per cent on the working capital and insurance premium to the extent of 100 per cent on capital investment too was permissible to the new and existing units on their substantial expansion for a period of 10 years.

6. Office Memorandum dt. 14th June, 2002 referred to hereinabove was later amended vide notification of 28th Nov., 2003 issued by the Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion. It reads thus :

> *"No. 1(11)/2002-NER--In pursuance of the announcement by the Prime Minister on 19th April, 2003 at Srinagar for creation of one lakh employment and self-employment opportunities in Jammu & Kashmir, the Government of India had set up a Task Force under Cabinet Secretary. The recommendations of Task Force were submitted to the Cabinet. To achieve this object of employment generation, the Cabinet has inter alia, approved following definition of the term 'substantial expansion' for the purpose of incentives/subsidies notified as per OM No. 1(13)/2000-NER dt. 14th June, 2002.*
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> *2. The Central Government, therefore, hereby makes amendment in the Central Interest Subsidy Scheme, 2002 notified in the notification of the Government of India in the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion No. 1(11)/2002-NER dt. 22nd Oct., 2002. The definition of the term 'substantial expansion' appearing under para 5(d) of the scheme may be substituted by the following :*
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> *'Concessions for substantial expansion should extend to include all new investments by entrepreneurs, which leads to substantial additional employment*

creation by an existing entrepreneur without insisting on major expansion. However, credit under the industrial policy package should not be merely for paying off old debts or for equipment already in place'."

7. To implement the New Industrial Policy referred to hereinabove, requisite notifications for exemption on excise duty were issued under s. 5A of the Central Excise Act, 1944 prescribing therein the procedure required to be followed by the industrial units before claiming incentives.

8. Para No. 3, appearing in the two notifications i.e. Central Excise Notification Nos. 56 of 2002 and 57 of 2002 dt. 14th Nov., 2002, which may be relevant to understand the issue raised in the case, needs to be noticed. It reads thus :

"..... 3. The exemption contained in this notification shall apply only to the following kind of units namely :

(a) New industrial units which have commenced their commercial production on or after the 14th day of June, 2002.

(b) Industrial units existing before the 14th day of June, 2002, but which have :

(i) undertaken substantial expansion by way of increase in installed capacity by not less than twenty-five per cent on or after the 14th day of June, 2002; or

(ii) made new investments on or after the 14th day of June, 2002, and such new investment is directly attributable to the generation of additional regular employment of not less than twenty-five per cent over and above the base employment limit, subject to the conditions that :

(1) the unit shall not reduce regular employment after claiming exemption, and once such employment is reduced below one hundred and twenty-five per cent of the base employment limit, such industrial unit shall be debarred from claiming the exemption contained in this notification in future. However, the exemption availed by such industrial unit, prior to such reduction, shall not be recoverable from such industrial unit.

(2) The manufacturer shall produce a certificate, from general manager of the concerned District Industries Centre to the jurisdictional Dy. CCE or the Asstt. CCE, as the case may be, to the effect that the unit has created such additional regular employment.

Explanation--For the purposes of this notification :

(a) 'base employment limit' means maximum number of regular employees employed at any point of time by the concerned industrial unit, during last five years;

(b) 'regular employment' shall not include employment provided by the industrial unit to daily wagers or casual employees;

(c) 'new investment' shall not include investments which are used for paying off old debts or making payments for the plant or machinery installed prior to the 14th day of June, 2002, or paying salaries to the employees.

[Above cl. (b) has been substituted vide NTF No. 11/2004- CE, dt. 29th Jan., 2004]. Old :

(b) Industrial units existing before the 14th day of June, 2002, but which have undertaken substantial expansion by way of increase in installed capacity by not less than twenty five per cent on or after 14th day of June, 2002.]

4. The exemption contained in this notification shall apply to any of the said units for a period not exceeding ten years from the date of publication of this notification in the Official Gazette or from the date of commencement of commercial production whichever is later."

10. The Hon'ble Jammu & Kashmir High Court had to deal with the issue whether excise refund and interest subsidy availed of by an assessees under the very same scheme under which the Assessee in the present appeal received excise duty refund and interest subsidy, as to whether the same was capital receipt not chargeable to tax and not revenue receipt which is chargeable to tax. The Hon'ble High Court after referring to the decisions of the Hon'ble Supreme Court in the case of Sahney Steel & Press Works Ltd. Etc. vs. CIT (1997) 142 CTR (SC) 261 : (1997) 228 ITR 253 (SC) and CIT vs. Ponni Sugars & Chemicals Ltd. & Ors. (2008) 219 CTR (SC) 105 : (2008) 13 DTR (SC) 1 : (2008) 306 ITR 392 (SC), held as follows:

"15. After going through the two judgments, we find the ratio in Sahney Steel case (supra) and approval thereof in Ponni Sugars & Chemicals Ltd. (supra), to have been spelt out, in the following para of the judgment delivered by the Hon'ble Supreme Court of India in Ponni Sugars & Chemicals Ltd. case (supra). It reads thus :

"The importance of the judgment of this Court in Sahney Steel case (supra) lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy. That test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form or the mechanism through which the subsidy is given are irrelevant."

16. Perusal of the judgments in Sahney Steel (supra) and Ponni Sugars (supra), therefore, reveals that the apex Court had applied the above quoted dictum to determine the purpose, which the two schemes had intended to achieve by the incentive subsidies, permissible under the schemes in question in those cases.

It was, therefore, in the context of respective subsidy incentive schemes in the two cases, that the subsidy in Sahney Steel (supra) was held to be revenue receipt whereas the subsidy in Ponni Sugars & Chemicals Ltd. (supra) was held as capital receipt.

17. We are supported in taking this view by the observations made by the Hon'ble Supreme Court of India in a later decision reported as Mepco Industries Ltd. vs. CIT & Anr. (2009) 227 CTR (SC) 313 : (2009) 31 DTR (SC) 305 : 2009 (7) SCC 564, where the above dictum was reiterated as follows :

".....Sahney Steel & Press Works Ltd. Etc. (supra) was a case which dealt with production subsidy, Ponni Sugars & Chemicals Ltd. (supra) dealt with subsidy linked to loan repayment whereas the present case deals with a subsidy for setting up an industry in the backward area. Therefore, in each case, one has to examine the nature of the subsidy. The judgment of this Court in Sahney Steel & Press Works Ltd. Etc. (supra) was on its own facts; so also, the judgment of this Court in Ponni Sugars & Chemicals Ltd. (supra). The nature of the subsidies in each of the three cases is separate and distinct. There is no straightjacket principle of distinguishing a capital receipt from a revenue receipt.

It depends upon the circumstances of each case. As stated above, in Sahney Steel & Press Works Ltd. Etc. (supra), this Court has observed that the production incentive scheme is different from the scheme giving subsidy for setting up industries in backward areas."

18. Now coming to the findings of the Tribunal on the issue, we find that the Tribunal has referred to various paras appearing in the two judgments to support its view that the receipts in the hands of the assessees were production incentives and thus revenue receipt and not capital receipt. This, however, appears to have been done without appreciating that the observations made in those paras were in the context of the schemes as such, which the apex Court was considering to find the intent and purpose of the incentives under those schemes, and not the law laid down as such.

19. The Tribunal has relied upon five factors to hold the incentives in question as production incentives but without dealing with that part of the scheme, whereby unemployment in the State had been intended to be eradicated creating atmosphere for accelerated industrial development to provide employment opportunities to deal with the social problem of unemployment.

This in our view was a lopsided interpretation of the New Industrial Policy and concessions formulated by the Central Government for the State of Jammu & Kashmir vide Office Memorandum of 14th June, 2002.

20. Therefore, in view of the clear legal position adumbrated by the Hon'ble Supreme Court of India on the issue in question, that to determine the nature and intent of the incentives as to whether those were revenue receipts or capital receipts, the purpose underlying the incentives was the determinative test, there may not be any necessity of referring to the judgments of other High Courts of the country referred to by the appellants' learned counsel, some of which had been considered by Hon'ble Supreme Court of India in the above-referred cases.

21. Thus, finding that the New Industrial Policy and other concessions for the State of Jammu & Kashmir have not been correctly appreciated by the Tribunal, we proceed to examine the true intent and purpose underlying the Policy and concessions contemplated by the Office Memorandum of 14th June, 2002 and the statutory notifications issued in this behalf.

22. Perusal of the Office Memorandum dt. 14th June, 2002 indicating New Industrial Policy and other concessions for the State of Jammu & Kashmir, makes it explicit that the concessions were issued to achieve twin objects viz.

(i) Acceleration of industrial development in the State of Jammu & Kashmir, which had been found lagging behind in such development and (ii) Generation of employment in the State of Jammu & Kashmir.

Amendment introduced to the Office Memorandum vide notification of 28th Nov., 2003 of the Government of India, Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) eloquently demonstrates the Central Government's intention in extending the incentives. The Government's objective, as conveyed by Hon'ble the Prime Minister at Srinagar on 19th April, 2003, was, for creation of one lac employment and self-employment opportunities in Jammu & Kashmir State.

23. To achieve the purpose and objective referred to hereinabove, it was, inter alia, provided in the Central excise notifications that the exemptions contained in the notifications would be available only on production of certificate from general manager of the concerned District Industry Centre to the jurisdictional Dy. CCE or the Asstt. CCE, as the case may be, to the effect that the unit had created required additional regular employment, which would not, however, include employment provided by the industrial units to daily wagers or casual employees engaged in the units.

24. A close reading of the Office Memorandum and the amendment introduced thereto with para No. 3 appearing in the Central Excise Notification Nos. 56 and 57 of 11th Nov., 2002, thus, makes it amply clear that the acceleration of development of industries in the State was contemplated with the object of generation of employment in the State of Jammu & Kashmir and the generation of employment, so contemplated, was not only casual or temporary, but was on the other hand, of permanent nature.

25. Considered thus, the paramount consideration of the Central Government in providing the incentives to the new industrial units and substantial expansion of the existing units, was the generation of employment through acceleration of industrial development, to deal with the social problem of unemployment in the State, additionally creating opportunities for self-employment, hence a purpose in public interest.

26. In this view of the matter, the incentives provided to the industrial units, in terms of the New Industrial Policy, for accelerated industrial development in the State, for creation of such industrial atmosphere and environment, which would provide additional permanent source of employment to the unemployed in the State of Jammu & Kashmir were in fact, in the nature of creation of new assets of industrial atmosphere and environment, having the potential of employment generation to achieve a social object. Such incentives, designed to achieve public purpose, cannot, by any stretch of reasoning, be construed as production or operational incentives for the benefit of assessees alone.

27. Thus, looking to the purpose of eradication of the social problem of unemployment in the State by acceleration of the industrial development and removing backwardness of the area that lagged behind in industrial development, which is certainly a purpose in the public interest, the incentives provided by the Office Memorandum and statutory notifications issued in this behalf, to the appellant-assessees cannot be construed as mere production and trade incentives, as held by the Tribunal.

28. Making of additional provision in the scheme that incentives would become available to the industrial units, entitled thereto, from the date of commencement of the commercial production, and that these were not required for creation of new assets cannot be viewed in isolation to treat the incentives as production incentives, as held by the Tribunal, for the measure so taken, appears to have been intended to ensure that the incentives were made available only to the bona fide industrial units so that larger public interest of dealing with unemployment in the State, as intended, in terms of the Office Memorandum was achieved.

29. The other factors, which had weighed with the Tribunal in determining the incentives as production incentives may not be decisive to determine the character of the incentive subsidies, when it is found, as demonstrated in the Office Memorandum, amendment introduced thereto and the statutory notification too that the incentives were provided with the object of creating avenues for perpetual employment, to eradicate the social problem of unemployment in the State by accelerated industrial development.

30. For all what has been said above, the finding of the Tribunal on the first issue that the excise duty refund, interest subsidy and insurance subsidy were production incentives, hence revenue receipt cannot be sustained, being against the law laid down by Hon'ble Supreme Court of India in Sahney Steel (supra) and Ponni Sugars case (supra).

31. The finding of the Tribunal that the incentives were revenue receipt is, accordingly, set aside holding the incentives to be capital receipt in the hands of the assessees."

11. The conclusion of the Hon'ble High Court is that the Excise refund and interest subsidy received in pursuance of New Industrial Policy of the Government have to be considered in the light of the Office Memorandum dt. 14th June, 2002, and the said Office Memorandum makes it explicit that the concessions were given to achieve twin objects viz., acceleration of industrial development in the State of Jammu & Kashmir and generation of employment in that State. The Hon'ble High Court further held that a close reading of the Office Memorandum and the amendments introduced thereto with para 3 of Central Excise Notification Nos. 56 and 57, dt. 11th Nov., 2002, makes it amply clear that the generation of employment so contemplated was not casual or temporary but of permanent nature and the paramount consideration of the Central Government in providing the incentives to new industrial units and substantial expansion of the existing units was generation of employment through acceleration of industrial development in public interest. Such incentives, designed to achieve a public purpose, cannot be construed as production or operational incentives for the benefit of assessees alone. It was further held that making of additional provision in the scheme that the incentives would be available to the eligible industrial units from the date of commencement of commercial production and that these are not to be allowed for creation of new assets cannot be viewed in isolation to treat the incentives as production incentives. Such provisions are intended to ensure that the incentives are made available only to the bona fide industrial units so that the larger public interest of eradicating unemployment is achieved. The Court finally concluded that the incentives received by way of excise duty refund and interest subsidy are capital receipts in the hands of the assessee and therefore not chargeable to tax.

12. The ratio laid down in the aforesaid decision is squarely applicable to the very same subsidy received under the very same scheme of State of Jammu & Kashmir by the Assessee in the present case. We therefore find no grounds to interfere with the conclusions of the CIT(A). The grievance of the revenue in ground No.2 regarding the revised return of income is not valid and has rightly held by the CIT(A) the said revised return of income was valid u/s.139(5) of the Act and was acted upon by the AO. In these circumstances, we find no merit in Ground No.2 raised by the revenue.

13. In the result, the appeal by the revenue is dismissed.

ITA No. 883/Kol/2014 (Assessee's appeal)

14. Ground No.1 raised by the Assessee reads as follows:

"1. That the Learned Commissioner of Income Tax (Appeals) -XII, Kolkata was not justified in upholding the action of the Learned Additional CIT Range-12, in denying deduction while computation of Books Profits under section 115JB for Interest Subsidy of Rs.1,88,90,893/- & Customs Duty Refund Rs.3,00,15,964/-

[Which were claimed by the Appellant Company & upheld by CIT(A)-XII, as Capital Receipts not chargeable to Income Tax under Normal Provisions of the Act] just because these receipts were credited to the Profit & Loss Account by the Appellant Company."

15. The issue that arises for consideration on the basis of the grievance projected by the Assessee in the aforesaid ground of appeal is as to whether the interest subsidy and excise duty refund which were held by the CIT(A) to be capital receipts not chargeable to tax can still be considered as part of the book profits u/s.115JB of the Act, even though these sums have been credited in the profit and loss account and treated as income and even though the exclusion of these sums for the purpose of computing book profit u/s.115JB has not been specifically provided under explanation below Sec.115JB (2) of the Act.

16. In rejecting the claim of the Assessee in this regard, the CIT(A) held that these sums have been credited in the profit and loss account and treated as income and exclusion of these incomes (sums) for the purpose of computing book profit u/s.115JB has not been specifically provided under explanation below Sec.115JB (2) of the Act.

17. 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.

18. 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.

19. 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 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.

20. 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.*
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> *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."*
>
> *21. 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 allow Gr.No.1 raised by the Assessee."*

5. Case file further suggests that this tribunal's yet another coordinate bench's decision has followed the above-extracted reasoning in assessee's case itself in assessment years 2011-12 and 2012-13 as well. Learned departmental representative re-emphasized that both the impugned excise duty and interest subsidy receipts have to be invariably treated as revenue in nature as per hon'ble apex court's judgment. We find no reason to accept the Revenue's instant last argument as well since we are dealing with assessee's eligible unit(s) in Jammu & Kashmir and learned coordinate bench had dealt with the very scheme than that for providing an impetus to industries in north-eastern region forming subject matter of CIT vs. Meghalaya Steel Ltd. (supra). We wish to reiterate here that the hon'ble

Jammu & Kashmir high court's judgment in Shri Balaji Alloys (supra) stands affirmed in (2017) 80 taxmann.com 229(SC) wherein their lordships have taken note of "Meghalaya Steels (supra)". We thus conclude that since the learned coordinate bench(es) had already accepted the assessee's case drawing distinction between the two subsidy schemes, the impugned receipts have therefore rightly held as capital and not revenue in the regular assessment in issue.

6. Coming to latter issue of section 115JB book profit computation of the corresponding excise duty refund and interest subsidy reserves (supra), we note that this tribunal's coordinate benches take note of (2016) 178 TTJ 658 Binani Industries Ltd vs. CIT, Indo Rama Syntehetics (I) Ltd. 330 ITR 336(SC), Apollo Tyres Ltd. 255 ITR 273(SC) that when a receipt is not even a revenue item, the same also does not form part of book profits u/s 115JB of the Act. Hon'ble jurisdictional high court in PCIT vs. Ankit Metal & Power Ltd. ITA 155/2018 dated 09/07/2019 also reiterate the very proposition. We follow the very reasoning herein as well mutatis mutandis and conclude that the PCIT's twin orders under challenge in these assessment years have erred in law and on facts in assuming revision jurisdiction since the Assessing Officer had rightly not included the excise duty refund and interest subsidy as a revenue item in normal computation and corresponding reserves for book profits u/s 115JB of the Act. Learned PCIT's revision direction under challenge are reversed and the impugned both regular assessments in these two assessment years are restored as a necessary corollary.

7. These two assessee's appeals are allowed.

Order is pronounced in the open court on 28.02.2020.

Sd/-	**Sd/-**
(J. Sudhakar Reddy)	**(S. S. Godara)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

कोलकाता /Kolkata;
दिनांक/ Date: 28/02/2020
RS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. The Appellant - Krishi Rasayan Exports(P) Ltd.
2. The Respondent- PCIT-4, Kolkata
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.