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आयकर अपीलीय अधिकरण "जी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

श्री मनोज कुमारअग्रवाल, लेखा सदस्य **एवं**
श्रीमती मधुमिता राय,न्यायिक सदस्य के समक्ष।
BEFORE SHRI MANOJ KUMAR AGGARWAL, AM
AND MS. MADHUMITA ROY, JM

आयकरअपील सं./ I.T.A. No. 2709/Mum/2019
(**निर्धारण वर्ष /** Assessment Year: 2013-14)
&
आयकरअपील सं./ I.T.A. No. 4696/Mum/2019
(**निर्धारण वर्ष /** Assessment Year: 2013-14)
&
आयकरअपील सं./ I.T.A. No. 2710/Mum/2019
(**निर्धारण वर्ष /** Assessment Year: 2014-15)
&
आयकरअपील सं./ I.T.A. No.4697/Mum/2019
(**निर्धारण वर्ष /** Assessment Year: 2014-15)

M/s. Windsor Machines Ltd. 102/103, Devmilan CHS Next to Tip Top Plaza LBS Road, Thane-(W)-400 604.	**बनाम**/ Vs.	**DCIT-Circle-3** Room No.2, "B" Wing, 6th Floor Ashar I.T. Park, Road No.16Z Wagle Estate, Thane (W)-400 604.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAACD-4302-P**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	S/Shri Pradip N. Kapasi & Shri Akhilesh Pevekar – Ld. ARs
Revenue by	:	Shri Vinay Sinha – Ld. CIT-DR

सुनवाई की तारीख/ **Date of Hearing**	:	07/01/2020
घोषणाकीतारीख / **Date of Pronouncement**	:	28/05/2020

आदेश / O R D E R

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Manoj Kumar Aggarwal (Accountant Member): -

1.1 Aforesaid appeals by assessee for Assessment Years [in short referred to as 'AY'] 2013-14 and 2014-15 contest separate orders of learned first appellate authority. There are two appeals for each of the assessment years in view of the fact the order of learned first appellate authority was rectified u/s 154 of the Act which gave rise to two separate appeals by assessee for each of assessment year. Since, common issues were involved, the appeals were consolidated and are now being disposed-off by way of this consolidated order for the sake of convenience and brevity.

1.2 The revenue, vide letter dated 25/11/2019 submitted that the assessee did not upload Form No. 29B (Report u/s 115JB for computing the book-profits) for AYs 2013-14 & 2014-15. The same is also not available in the respective assessment folders. The Ld. Authorized Representative for Assessee (AR), during the course of hearing, submitted copies of Form No.29B for AYs 2012-13 & 2014-15. Both the forms are dated 01/01/2020. No form has been submitted for AY 2013-14. Form No. 29B is the report u/s 115JB for computing the Book Profits of the company. In the said report, the Book Profits for both the years have been reflected as Nil. Upon perusal of report submitted by the revenue, it could be observed that Form No.29B has been filed by the assessee only for AYs 2017-18 & 2018-19. The assessee's computation of income for AYs 2013-14 & 2014-15 would also reveal that no computations have been made by the assessee u/s 115JB. The perusal of assessment order for AY 2012-13 dated 18/03/2015, as placed on record, would reveal that no computations have been made by Ld.

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AO u/s 115JB. In the above background, we take up appeals for AY 2013-14 simultaneously.

ITA No. 2709/Mum/2019, AY 2013-14

2.1 Aggrieved by the order of Ld. Commissioner of Income Tax (Appeals)-2, Thane dated 05/03/2019, the assessee is under appeal with following grounds of appeal: -

> **I. Exemption from MAT**
>
> 1. The Ld. CIT(A) erred in law and on facts in upholding the action of ld. AO of computing Book Profit u/s. 115JB at Rs. 10,76,27,367 liable to MAT and in denying exemption from payment of MAT u/s. 115JB as directed by the Board of Industrial and Financial Reconstruction (BIFR) and altogether ignoring the provisions of law including the overriding provisions of SICA, 1985 under which your appellant during the period of rehabilitation was entitled to exemption from liability to MAT.
> 2. Your appellant submits that relief claimed from provisions of MAT was as per the order passed by the BIFR dt. 21.09.2010 and provisions of the Income Tax Act, 1961 including the overriding provisions of SICA, 1985 and the appellant was not liable to MAT. The Ld. AO and/ or DIT(R) had mislead or misapplied the order of BIFR.
> 3. Your appellant prays that the addition of Rs. 10,76,27,367 made to total income computed u/s. 115JB be deleted and the appellant be held to be not liable to MAT u/s. 115/B of the Act.
>
> **II. Non adjudication of claims by CIT(A)**
>
> 1. The ld. CIT(A), without prejudice to Ground No. 1, erred in law and on facts by failing to adjudicate the claims by the appellant for adjustment of Book Profit on account of (i) amount credited to Profit & Loss A/c vide the Restructuring Account and (ii) reduction of the Book Profit by the amount representing the lower of the Unabsorbed Depreciation or Business Loss as per clause (iii) of Explanation to S. 115JB(2) of the Act.
> 2. Your appellant submits that the Book Profit should be calculated as per provisions of S.115JB and the amount credited to Profit & Loss A/c vide the Restructuring Account and also the amount representing lower of the Unabsorbed Depreciation or Business Loss, should be excluded and/or reduced therefrom.
> 3. Your appellant prays that the claims of reduction in the Book Profit be allowed and amount of MAT liability be reduced.

Ground No. II would become infructuous in view of the fact that the claims not adjudicated in the appellate order has subsequently been dealt with by Ld. CIT(A) u/s 154, against which the assessee has preferred separate appeal which is the subject matter of ITA No. 4696/Mum/2019.

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2.2 Briefly stated, the assessee was assessed for year under consideration u/s 143(3) on 18/03/2016. The assessee is stated to be engaged in the business of plastic processing machines. It was declared as a sick company under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). The Hon'ble BIFR sanctioned the rehabilitation scheme for assessee on 21/09/2010 with directions for implementation for revival of the assessee. The copy of the same has been placed on record. The cut-off date has been taken as 31/03/2009. The Scheme envisages various reliefs and concessions from various agencies as a part of rehabilitation Scheme. As per the Scheme, the rehabilitation period was from 01/04/2009 to 31/03/2017. The Clause 11.4 of the Scheme envisages certain tax concessions for the assessee and the same reads as under: -

> **11.4 CBDT**
> To consider to exempt / grant relief to the company from the provisions of Section 41, 72, 43-B and 115JB of the Income Tax Act for a period of eight years from the cut-off date except for the prosecution and criminal proceedings.

As evident, the CBDT has been directed to consider granting of relief to the assessee u/s 41, 72, 43B and 115JB of the Act for a period of 8 years from the cut-off date. The concluding part of the scheme notes that as per projected profitability, the net worth of the company becomes positive in the seventh year of rehabilitation and the entire losses would be wiped out in the eighth year of rehabilitation i.e. FY 2016-17.

2.3 Fortunately, the assessee's net worth has turned positive on 31/03/2011. Accordingly, the assessee received a letter dated 21/11/2012 from Hon'ble Directorate of Income Tax (Recovery) [DIT(Recovery)]

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mentioning the said fact. The said letter was addressed to BIFR. The copy of the letter has been placed in the paper-book. In the said letter, it was stated that BIFR has discharged the company from the purview of SICA vide order dated 16/08/2011 on the ground that the revival of the company has substantially been implemented and the net worth has turned positive and has issued direction that unimplemented provisions of the sanctioned scheme, if any, would be implemented by the concerned agencies. However, appellate authority, vide order dated 02/02/2012 directed that monitoring will be done by BIFR itself u/s 18(12) of the Act. In the aforesaid letter of DIT(Recovery), the decision of CBDT on the proposed relief was conveyed to BIFR. Regarding relief u/s 115JB, it was stated that the said relief would be available only till net worth becomes positive. Since the assessee was discharged by SICA on 16/08/2011 and its net worth turned positive by virtue of implementation of revival scheme, the assessee would be precluded from relief u/s 115JB in view of Explanation 1(vii) to Section 115JB (2) and therefore, no relief would be available to the assessee from AY 2011-12 onwards from applicability of provisions of Sec.115JB.

2.4 Aggrieved by aforesaid directions, the assessee, vide letter dated 14/12/2012, preyed DIT(Recovery) that in terms of BIFR Scheme, the DIT ought to have granted relief u/s 115JB for a period of 8 years. Alternatively, the assessee also pointed out the factual error in the letter of DIT(Recovery) since net worth turned positive as on 31/03/2011, the relief should have been allowed up-to AY 2011-12 in terms of Explanation 1(vii) to Section 115JB(2). Therefore, a prayer was made to make necessary modifications in the order. In fact, the assessee sought relief till the end of rehabilitation

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period i.e. up-to AY 2017-18 based on certain precedents of similar BIFR cases, wherein such MAT exemption was allowed by the BIFR for the rehabilitation period. However, it appears that the said application has remained to be dealt-with by DIT(Recovery).

2.5. In the above factual background, during assessment proceedings, it was noted by Ld. AO that while computing income under normal provisions, the assessee claimed deduction of various items pertaining to AY 2011-12 aggregating to Rs.19.71 Crores. The same are tabulated in para-3 of quantum assessment order. The assessee explained that it had claimed relief from taxation by praying that the provisions of Sec. 28 / Sec. 41 should not be applied to AY 2011-12 which was principally accepted by BIFR. However, DIT(Recovery), while passing the order did not specifically grant the relief under Sec.28 as well as under Sec.41. No relief was granted in this respect for AY 2011-12. The assessee filed necessary application before DIT(Recovery) in this regard but the same remained to be dealt with by DIT(Recovery) till date. Since the date of filing the revised return for AY 2011-12 expired on 31/03/2013, the assessee thought it appropriate to claim the deduction of these items while filing return for AY 2013-14 which was to be filed subsequently, Accordingly, the assessee claimed deduction of the aforesaid items while computing income for AY 2013-14 while agitating the same before appellate authorities for AY 2011-12.

2.6 After considering assessee's submissions, Ld. AO opined that these items pertained to AY 2011-12 and there was no specific order of relief under Sec. 28 / Sec. 41. Therefore, the deduction of the same could not be allowed to the assessee. The assessee, while agreeing for the addition,

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pleaded that the provisions of Sec. 115JB should not be made applicable.

2.7 Consequently, the deduction of these items was not allowed and the income was computed at Rs.950.77 Lacs. The aforesaid income was after another disallowance u/s 40(a)(ia) for Rs.38.69 Lacs for want of TDS. Against the income so computed, the benefit of brought forward business losses and depreciation was granted to the assessee which reduced the total income to *Nil.*

2.8 The assessee agitated the applicability of the provisions of Sec. 115JB. However, Ld. AO referring to letter of DIT(Recovery) as discussed in preceding para-2.3, opined that the assessee would be entitled for relief u/s 115JB only up-to AY 2011-12. Since the assessee's application before appropriate authorities was pending and in the absence of specific order or direction from appropriate authorities, no such exemption could be granted to the assessee. Therefore, Ld. AO computed Book Profits u/s 115JB at Rs.1076.27 Lacs which was nothing but Profit shown by the assessee in the financial statements (after excluding exempt dividend income).

3.1 Aggrieved, the assessee agitated the stand of Ld. AO before learned first appellate authority vide impugned order dated 05/03/2019. The assessee, in its submissions, *inter-alia,* reiterated that the rehabilitation period was from 01/04/2009 to 31/03/2017 and as per the order of BIFR, the relief was available from the provisions of Sec.41, 72, 43-B and 115JB for a period of 8 years from the cut-off date. The attention was drawn to the provisions of Sec.19(1) of SICA to submit that BIFR was empowered to grant the relief from taxation for any such period as it deems fit, which need not be restricted to the year in which the company's net worth turns positive

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as per Sec. 115JB(2) Expl.-1(vii). In other words, the power of BIFR would extend beyond the aforesaid provisions of Sec. 115JB(2) Expl.-1(vii). The benefit provided under those provisions of Sec. 115JB was available to all sick companies without the order of BIFR. Reliance was placed on the decision of Hon'ble Bombay High Court in the vase of **Ballarpur Industries Ltd. 398 ITR 145** and also on other decisions, which have already been mentioned in the impugned order. A plea was also raised that non-grant of relief would adversely affect the cash flow position of the company.

3.2 In the alternative, the assessee also submitted that amount credited to Profit & Loss Account in respect of waiver of loans as per the orders of BIFR, would even otherwise have no character of income and therefore, beyond the scope of levy of Income Tax. Therefore, the same should be excluded for the purpose of computations u/s 115 JB.

3.3 Another alternative ground was that accumulated debit balance in Profit & Loss account was adjusted from time to time against the credit balance in Capital Reserve and Share Premium account vide *restructuring account*. The said set-off should not prejudice or affect assessee's claim for set-off of book-losses or depreciation, which ever is less, as per the books of accounts.

3.4 The Ld. CIT(A) noted the directions given in BIFR order dated 21/09/2010 which read as under: -

> To consider to exempt / grant relief to the company from the provisions of Section 41, 72, 43B and 115JB of the Income Tax Act for a period of eight years from the cut-off date except for the prosecution and criminal proceedings"

The contents of letter of DIT (Recovery) dated 21/11/2012 were noted in

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para 5.2 of the impugned order. It was also noted that consequent to the letter of DIT (Recovery), the assessee filed a letter for reconsideration of the afore said order.

3.5 After due consideration of submissions and material on record, Ld. CIT(A) upheld the action of Ld.AO by observing as under: -

> 5.4 Now it is seen that the DIT(R) vide its letter F No. 2/DIT (R)/BIFR/2010-1172663 dated 21.11.2012 recorded the fact that the appellant company's net worth has turned positive as on 31.03.2011. The DIT (R) further recorded that in view of the provisions of Expln 1 (vii) to section 115JB, relief is available to the company from applicability of the provisions of Section till the AYr in which the net worth becomes positive, and as such the relief from Sec 115JB should be available to the appellant company till 2011 -12. The AO, held that based on the application before the BIFR which is pending as on date and in the absence of a specific order or a direction from the BIFR, no relief from exemption of the applicability of Section 115JB of the Act can be allowed to the assessee and the provisions of Sec 115JB of the Act are applicable in the case of assessee with effect from A Y 2012-13.
>
> 5.5 The appellant during the course of appellate proceedings has stated that the AO has mistakenly applied the provisions of Sec 115JB (2)(vii). The appellant has also stated that Section 19(1) of SICA empowers BIFR to confer and grant companies under it the benefit from relief of payment of Income Tax. The appellant has cited cases of jurisdictional High Courts in the case of Ballarpur Industries Ltd 398 ITR 145 and the decision of the Rajasthan High Court in the case of Rajasthan Explosive and Chemicals, 396 ITR 736 and also quoted that in both these decisions, the courts have upheld the unfettered power of BIFR. The appellant has further stated that the AO was wrong in applying the aforementioned provision in isolation of provisions of SICA 1985 which he proceeds to state defeats the mandate of BIFR. In short the appellant has stated that applying of provisions of Section 115JB (2) (vii) defeats mandate of BIFR as the appellant is covered under SICA as well as BIFR.
>
> 5.6 At this point it is necessary to recapitulate the appellant's application in BIFR and the results thereof. The appellant had approached the BIFR and the BIFR vide its order dated 21/09/2010 vide Para 11.4 stated as under:
>
> > "To consider to exempt / grant relief to the company from the provisions of Section 41, 72, 43B and 115JB of the Income Tax Act for a period of eight years from the cut-off date except for the prosecution and criminal proceedings"
>
> 5.7 From the above it is noted that the BIFR vide its order had directed CBDT To CONSIDER to exempt grant of relief to the appellant from the provisions of a number of sections including 115JB for the period of 8 years from cut off date, which is 01.04.2009 to 31.03.2017. The BIFR has not given any directions to the CBDT regarding the exemptions / reliefs to be granted to the Appellant. The DIT (Recovery) considered the order of the BIFR and relief u/s 115JB of the Act was allowed for up to 2010-11 only and no relief u/s 115JB was allowed to the company from AYr 2011-12 onwards. The AO has followed the decision of the DIT (Recovery). The appellant had also approached

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> the DIT(Recovery) for reconsideration of its decision and as per the information gathered from the AR of the appellant, during the course of appellate proceedings the same has not been disposed off / no communication has been received by the appellant in this regard.
> 5.8 In view of the decision of the DIT (Recovery) in pursuance of the order dated 21.09.2010 of the BIFR in the case of the appellant wherein exemption from MAT is available up to AYr 2010-11, the action of the AO in applying the provisions of MAT as in Section 115JB(2)(vii) in the instant case is confirmed.

It is evident that Ld. CIT(A), going by the decision of DIT (Recovery) confirmed the stand of Ld.AO in applying the provisions of Sec.115 JB. Aggrieved, the assessee is in further appeal before us.

ITA No. 4696/Mum/2019, AY 2013-14

4.1 This appeal arises out of appellate order passed u/s 154 on 22/05/2019. The said order was passed sine it was pointed out that the without prejudice claim made by the assessee requesting for reduction of Book Profits u/s 115JB was not adjudicated in the original appellate order. In the alternative grounds, it was submitted that the assessee was not liable to pay MAT even without the benefit of sub-clause (vii). Further, the amount credited to Profit & Loss Account in respect of waiver of loans as per the order of BIFR, even otherwise would have no character of income and therefore, beyond the scope of levy of Income Tax. Lastly, debit balance in Profit & Loss account was adjusted from time to time against the credit balance in Capital Reserve and Share Premium account vide *restructuring account.* The said set-off should not prejudice or affect assessee's claim for set-off of book-losses or depreciation, which-ever is less, as per the books of accounts. This amount was stated to be Rs.3942.55 Lacs.

4.2 However, Ld. CIT(A), in the light of statutory provisions of Sec.115JB(2)(a) opined that the starting point for computation would be

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net profit as shown in the profit & loss account prepared in accordance with the provisions of Part-II and III of Schedule VI to the Companies Act. The cited case law of Mumbai Tribunal in **Shivalik Venture Pvt Ltd. (ITA No.2008/Mum/2012 dated 19/08/2015),** as relied upon by assessee, was distinguished. Rather, reliance was placed on the decision of Hon'ble Supreme Court rendered in **Apollo Tyres Ltd. V/s CIT (122 Taxman 562)** and finally the submissions were rejected. It is quite discernible that the assessee's specific plea regarding adjustment of accumulated Profit & Loss Account through*restructuring account* were not dealt with.

4.3 Aggrieved, the assessee is under appeal with following grounds of appeal: -

> I **Reduction of Book Profit by lower of Unabsorbed Depreciation or Business loss, whichever is less without setting off of amounts written back as per order of B1FR**
> 1. The Id. CIT(A) erred in law and on facts by rejecting the claim of the appellant for reduction of Book Profit on account of the recomputed/ revised amounts representing the lower of the Unabsorbed Depreciation or Business Loss as per clause (iii) of Explanation to s.115JB(2) of the Act to be arrived at by ignoring the credits on account of write backs due to relief given by BIFR.
> 2. Your appellant submits that the company was granted certain reliefs by BIFR in repayment of its liabilities which amount of relief was credited to Profit & Loss A/c and as a consequence this balance in unabsorbed losses and depreciation accounts were reduced artificially without there being real profits and Your appellant submits that the Book Profit should be calculated as per provisions of S.115JB and the amount representing lower of the Unabsorbed Depreciation or Business Loss, duly adjusted by amount written back should be excluded and/or reduced therefrom.
> 3. Your appellant prays that the claims of reduction in the Book Profit be allowed and amount of MAT liability be reduced.
>
> II **Reduction of 'Book Profits' by amounts credited on account of Capital Reserve and Share Premium account to Profit & Loss A/c vide the Restructuring account.**
> 1. The Id. C1T(A) erred in law and on facts by rejecting the claim of the appellant for adjustments to be made in Book Profits on account of credits in Profit and Loss Account relating to the Capital Reserve and Share Premium Accounts.
> 2. Your appellant submits that the Book Profit should be reduced by the amounts of credit balance of Capital Reserve and Share Premium Accounts credited/ adjusted against the Profit & Loss Account.
> 3. Your appellant prays that the claims of reduction in the Book Profit be allowed and amount of MAT liability be reduced.

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III. **Failure to rectify the Appellate Order u/s. 154**

1. In the alternative, without prejudice, the ld. CIT(A) erred in law and on facts in rejecting the application u/s. 154 and as a consequence erred in not rectifying the appellate order dt. 05.03.2019 which contained mistakes that were apparent on the face of records in as much as the grounds and issues in appeal had remained to be adjudicated in passing the said order.
2. Your appellant submits that the said order of the CIT(A) dt. 05.03.2019 suffered from apparent mistakes that were required to be rectified in as much as Ground No. 1 and additional ground filed on 27.02.2019 requesting reduction of amounts credited to Profit and Loss Account as per BIFR's order from 'Book Profit' by the lower of Unabsorbed Depreciation and Business Loss as per s. 115JB(2) which ground/ plea were not adjudicated by the said order dt. 22.05.2019.
3. Your appellant prays that the said appellate order be rectified u/s. 154 in pursuance of the application dt. 22.04.2019 seeking the rectification of order.

Our adjudication

5.1 We have carefully heard the rival submissions and perused relevant material on record including documents placed in the paper-book. The case laws cited during the course of hearing has been deliberated upon. The written submissions have duly been considered. Our adjudication to the subject matter of present appeals would be as given in succeeding paragraphs.

Applicability of Sec.115JB(2), Expl.1(vii) vis-à-vis BIFR orders

5.2 Upon perusal of factual matrix as enumerated by us in preceding paragraphs, it is undisputed position that the assessee's net worth has turned positive as on 31/03/2011. It is settled legal position that the manner of computation as provided in Sec.115JB would be complete code in itself and the computations were to be made strictly in the manner as provided therein. Explanation-1 (vii) envisages reduction of profit of sick

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industrial company for the assessment year commencing on and from the assessment year relevant to the previous year in which the said company has become a sick industrial company u/s 17(1) of Sick Industrial Companies (Special Provisions) Act, 1985 and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses. Going by these provisions, the assessee is ineligible to claim the deduction of profit earned during the year while making computations u/s 115JB.

5.3 So far as the arguments that the provisions of SICA would prevail over other statute is concerned, we find that as noted in para 2.3 above, the assessee's net worth had turned positive on 31/03/2011. As per the letter dated 21/11/2012 of Hon'ble Directorate of Income Tax (Recovery) to BIFR, it is evident that BIFR had discharged the company from the purview of SICA vide order dated 16/08/2011 on the ground that the revival of the company had substantially been implemented and the net worth had turned positive. It had issued directions that unimplemented provisions of the sanctioned scheme, if any, would be implemented by the concerned agencies. In the aforesaid letter of DIT(Recovery), the decision of CBDT on the proposed relief was conveyed to BIFR. Regarding relief u/s 115JB, it was stated that the said relief would be available only till net worth becomes positive. Since the assessee was discharged by SICA on 16/08/2011 and its net worth turned positive by virtue of implementation of revival scheme, the assessee would be precluded from relief u/s 115JB in view of Explanation 1(vii) to Section 115JB (2) and therefore, no relief would be available from AY 2011-12 onwards. Therefore, the matter of

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applicability of Sec.115JB was delved into by CBDT and it was proposed to restrict the relief u/s 115JB as per the provisions contained therein. This being the case, the plea as raised by Ld. AR could not be accepted since the assessee's claim was specifically examined by appropriate authorities and it was decided not to extend the benefit of provisions of Sec. 115JB after assessee's net worth turned positive. Therefore, no relief could be granted to the assessee on this point. The case law of Hon'ble Madras High Court in **CIT V/s Tube Investments of India Ltd. (341 ITR 199)** is factually distinguishable since the assessee's net worth had not turned positive in that case and the relief as proposed by BIFR was not specifically rejected by the CBDT. Further, that case deal with deduction u/s 43B to an entity which has taken over a sick company. Therefore, the said case law, in our opinion, is not applicable to the facts of present case. Consequently, ITA No.2709/Mum/2019 stands dismissed.

Reduction in Book Profits u/s 115JB

6.1 The plea raised by Ld. AR are two folds viz. (i) Amount credited to Profit & Loss Account on account of waiver of loan would not partake the character of income and hence should not form part of Book Profits u/s 115JB; (ii) Adjustment in accumulated debit balance of Profit & Loss Account through *Restructuring Account* was to be disregarded for the purpose of computation of brought forward losses in terms of Explanation-1 (iii) to S. 115JB (2). As noted by us in para 4.2, the appellate order does not specifically deal with these issues rather Ld. CIT(A) has placed reliance on the decision of Hon'ble Apex Court in **Apollo Tyres Ltd. V/s CIT (supra)** to support the stand of Ld. AO.

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6.2 In support of stated submissions, Ld. AR has relied upon various binding judicial precedents, the copies of which has been placed on record. After going through the same, we find certain substance in the same. Further, as per the express provisions of Explanation-1(iii) to S.115JB (2), the assessee would be entitled for deduction of amount of loss brought forward or unabsorbed depreciation whichever is less as per books of account. It is also evident that the assessee has claimed lower of depreciation and book loss while computing Book Profits u/s 115JB for AY 2012-13 which has not been disturbed by Ld. AO in the assessment order for AY 2012-13. Therefore, we find certain strength in these arguments.

6.3 We find that the issue of aforesaid adjustments has not been delved upon either by Ld. AO or by Ld. CIT(A). Therefore, on the facts and circumstances, we deem it fit to remit the matter back to the file of Ld.CIT(A) to specifically adjudicate the issues raised under the appeal by way of a speaking order and bring on record correct factual matrix, in this respect. Needless to add that reasonable opportunity of hearing shall be granted to the assessee, who, in turn, is directed to substantiate his claim. The appeal stands allowed for statistical purposes.

<u>Appeals for AY 2014-15</u>

7. Facts are *pari-materia* the same in AY 2014-15 wherein an assessment has been framed u/s 143(3) on 30/12/2016 on similar lines. The Book Profits has been determined at Rs.26.45 Crores. The stand of Ld. AO, upon confirmation by Ld. CIT(A) in similar manner, is under challenge before us. The assessee is before us with similar grounds of appeal in both the appeals. Facts and circumstances being the same as in AY 2013-14, our

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adjudication in AY 2013-14 shall *mutatis-mutandis* apply to both these appeals also. Consequently, ITA No.2710/Mum/2019 stands dismissed whereas ITA No.4697/Mum/2019 stand allowed for statistical purposes.

Reasons for delay in pronouncement of order

8.1 Before parting, we would like to enumerate the circumstances which have led to delay in pronouncement of this order. The hearing of the matter was concluded on 07/01/2020 and in terms of Rule 34(5) of Income Tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of Rule 34(5), every endeavor was to be made to pronounce the order within 60 days after conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the bench could fix a future date of pronouncement of the order which shall not ordinarily be a day beyond a further period of 30 days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the order. This period could be extended by the bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not***ordinarily*** exceed a period of 30 days.

8.2 The record would show that a draft of the present order was prepared and sent through postal authorities vide receipt no. EM045083040IN dated 20/03/2020 for approval of Hon’ble Judicial Member at Ahmedabad. The package containing the draft orders was delivered at destination on 23/03/2020. It is quite evident that the order was well drafted before the expiry of 90 days and sent for approval of the other member immediately. However, unfortunately, on 24/03/2020, a

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nationwide lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic covid-19 in the country. The lockdown was extended from time to time which crippled the functioning of most the government departments including Income Tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the draft order could not reach Hon'ble Judicial Member for approval despite lapse of considerable period of time. The situation created by pandemic covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of aforesaid rule governing the pronouncement of the order. The draft order was subsequently been received at the first available opportunity and approved by the bench and accordingly, the same is being pronounced now.

8.3 Faced with similar facts and circumstances, the co-ordinate bench of this Tribunal comprising-off of Hon'ble President and Hon'ble Vice President, in its recent decision titled as **DCIT V/s JSW Limited (ITA Nos. 6264 & 6103/Mum/2018)** order dated 14/05/2020 held as under: -

> 7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:
> (5) The pronouncement may be in any of the following manners: —
> (a) The Bench may pronounce the order immediately upon the conclusion of the hearing.
> (b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.
> (c) In a case where no date of pronouncement is given by the Bench, every endeavour

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shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that **"We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile** (emphasis, by underlining, supplied by us now), **all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment".** In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.

9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **"In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown".** Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, **"It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly"**, and

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also observed that **"arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020".** It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. **force majeure** clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term **'force majeure'** has been defined in Black's Law Dictionary, as **'an event or effect that can be neither anticipated nor controlled'** When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)],** Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed **"while calculating the time for disposal of matters made timebound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly".** The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

Driving strength from the ratio of aforesaid decision, we exclude the period

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of lockdown while computing the limitation provided under Rule 34(5) and proceed with pronouncement of the order.

Conclusion

9. ITA Nos. 2709-10/Mum/2019 stand dismissed whereas ITA Nos. 4696-97/Mum/2019 stand allowed for statistical purposes. This order is pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details of the same on the notice board.

Sd/- Sd/-

(Madhumita Roy)
न्यायिक सदस्य **/ Judicial Member**

(Manoj Kumar Aggarwal)
लेखा सदस्य **/ Accountant Member**

मुंबई Mumbai; दिनांकDated : 28/05/2020
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT – concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई **/ ITAT, Mumbai**