IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

Shri Pramod Kumar, Vice President
Shri Rahul Chaudhary, Judicial Member

ITA No. 5259/MUM/2007
(Assessment Year: 2004-05)

Assistant Commissioner of Income Tax,
Range-(1)(1), Mumbai,
Room No. 579, Aayakar Bhavan, ... Appellant
Mumbai – 400020

Vs

M/s Associated Cement Co. Ltd.,
Cement House, 121,
M.K. Road, Mumbai - 400020 ..... Respondent
[PAN: AAACT1507C]

ITA No. 4895/MUM/2007
(ASSESSMENT YEAR: 2004-05)

ACC Limited,
(Formerly known as The Associated
Cement Companies Ltd.),
Cement House, 121,
M.K. Road, Mumbai ..... Appellant
[PAN: AAACT1507C]

Vs

The Deputy Commissioner of Income Tax,
Range – 1(1), Mumbai ..... Respondent

Appearances

For the Appellant/Department	:	Shri K.K. Mishra
For the Respondent/Assessee	:	Shri Yogesh Thar, Shri Chaitanya Joshi & Shri Hardik Nirmal
Date of conclusion of hearing	:	02.03.2022
Date of pronouncement of order	:	27.05.2022

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. These are cross appeals pertaining to the Assessment Year 2004-05 arising from order, dated 18.05.2007, passed by the Ld. Commissioner of Income Tax (Appeals)-1, Mumbai [hereinafter referred to as 'CIT(A)'], whereby appeal filed by the Assessee

against the Assessment Order, dated 26.12.2006, passed under section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] was partly allowed.

2. The Assessee is a public limited company engaged, inter alia, in the business of manufacture and sale of cement. The Appellant filed return of income for the Assessment Year 2004-05 on 01.11.2004 offering to tax the Book Profits as per provisions of Section 115JB of the Act which was processed under Section 143(1) of the Act. Thereafter, the Assessee filed a revised return on 31.03.2006 declaring total income of INR 169,16,298/- under the normal provisions of the Act and Book Profit of INR 1,50,76,67,103/- as per the provisions of Section 115JB of the Act.

3. The case of the Assessee was selected for scrutiny and notice under Section 143(2) and 142(1) of the Act were issued. In response to the same, the Assessee filed various replies/submissions, and furnished information and documents. The Assessing Officer (Assessing Officer) completed the assessment under Section 143(3) of the Act vide order, dated 26.12.2006, after making additions/disallowances under normal provisions of the Act and also making adjustments to the book profits. The Assessing Officer determined total Income under normal provisions of the Act at INR 63,60,985/- and computed book profits under Section 115JB of the Act at INR 3,05,82,73,260/-. Since the assessed income tax payable on income as computed under the normal provisions of the Act was less than 7.5% of the Book Profits computed under the provisions of Section 115JB of the Act, INR 23,51,04,758/- (being 7.5% of the Book Profits plus 2.5% surcharge) was deemed to be the tax payable.

4. Being aggrieved, the Assessee filed appeal before CIT(A). The CIT(A) granted relief to the Assessee by partly allowing the appeal.

5. Now, the Assessee as well as the Revenue are before us in cross-appeals being aggrieved by the decision of the CIT(A) on various issues. The Revenue has raised 22 grounds of appeal. The Revenue has also raised 3 additional grounds of appeal, vide letter dated 28.01.2008, and 1 additional ground of appeal, vide letter dated 13.04.2010. The Assessee has raised 7 grounds of appeal and 1 additional grounds of appeal, vide letter dated 17.10.2019. We have heard both sides on admitting the additional grounds, we are of the view that the additional grounds raised by the Revenue as well as the Assessee are legal grounds which do not require examination of any facts not already on record. Accordingly, in view of the judgment of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT:229 ITR 383, the additional grounds raised by the Revenue as well as the Assessee are admitted.

6. The Ld. Authorised Representative of the Assessee appearing before us stated under instructions that the Assessee would only be pressing Ground No. 6 pertaining to setting off of unabsorbed depreciation for the relevant previous year, whereas all the other grounds raised by the Assessee can be disposed of as being not pressed. He further submitted that the additional ground raised by the Assessee is consequential and would become infructuous depending upon the decision on additional grounds raisedby the Revenue in its appeal vide letter dated 28.01.2008.

7. The various grounds/additional grounds raised in the present cross-appeals requiring adjudication are taken up hereinunder. To

avoid repetition of facts and for the sake of convenience, the grounds having common facts and/or legal issues are taken up together.

Departmental Appeal: ITA No. 5259/MUM/2007

8. **Ground No. 1:** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in directing the A.O. to delete the disallowance made on account of Club Entrance/Subscription fees of INR 17,45,829/-.

8.1. The relevant facts are that during the previous year the Appellant incurred expenditure of INR 17,45,829/-, consisting of club entrance fee of INR 15,00,000/- and subscription fee of INR 2,45,829/- which were disallowed by the Assessing Officer on the ground that the same were capital in nature since the same provided enduring benefit to the Assessee.

8.2. In appeal, the CIT(A) deleted the addition holding the expenditure to be business expenditure of revenue nature incurred for smooth running of business of the Assessee by relying upon the decision of Hon'ble Bombay High Court in the case of Otis Elevator Co (I) Ltd. vs. CIT (1992) 195 ITR 682 (Bom) and American Express International Banking Corporation vs. CIT (2002) 258 ITR 601 (Bom). The CIT(A) also noted that similar issue has been decided by the Tribunal in the favour of the Assessee in the Assessee's own case for Assessment Year 1987-1988 to 1991-1992.

8.3. We have heard the rival contentions and perused the material on record. We note that the Tribunal has decided identical issue in the favour of the Assessee in Assessee's own case in ITA No. 647/Mum/1997 (AY 1991-92), ITA No. 2361/Mum/1995 (AY 1990-91), ITA No. 288/Mum/1993 (AY 1989-90), ITA No. 968/Mum/1992

(AY 1988-89), and ITA No. 43/Mum/1991 (AY 1987-88) by following the decision of the Hon'ble Bombay High Court in the case of Otis Elevator Co (I) Ltd. v. CIT (supra), and American International Banking Corporation v. CIT (supra). The relevant extract of the order of the Tribunal in ITA No. 43/Mum/1991 pertaining to AY 1987-88, followed in subsequent years, reads as under:

> *"8. Ground no. 2 relates to disallowance of payments to clubs. The Assessing Officer made disallowance of Rs. 8,125/- representing payments made by the assessee to clubs. On appeal, it was contended that reimbursement of club fees to employees is an expenditure incurred by the assessee wholly and exclusively for the purpose of business and the expenditure is allowable as deduction u/s 37 of the Act. Reliance was placed on the decision reported in 13 ITD 550. The contention of the assessee was not acceptable to the CIT(A) who confirmed the disallowance observing that no attempt has been made to bifurcate the expenses between those relating to business of the assessee and those involving personal benefit to the employees.*
>
> *We observe that the issue is covered in favour of the assessee by the decision of the jurisdictional High Court in Otis Elevator Co (I) Ltd. 195 ITR 682 (Bom) wherein their Lordships held that payment of club fees made to promote business interest is an allowable expenditure. Following the decision supra this ground is decided in favour of the assessee." (Emphasis Supplied)*

8.4. Respectfully following the decision of the Hon'ble Bombay High Court and of the Tribunal in Assessee's own cases specified herein above, we decide this issue in favour of the Assessee. Accordingly, order of CIT(A) to delete the addition of INR 17,45,829/-, consisting

of expenditure incurred on club entrance fee of INR 15,00,000/- and subscription fee of INR 2,45,829/-, is confirmed. Ground No. 1 of the Departmental Appeal is dismissed.

9. **Ground No. 2:** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made on account of the amount received on surrender of transferable Development Right of Rs.6,60,67,542/-.

9.1. The facts relevant to issue for consideration are that the Assessee owned 1,11,093 Sq. Meters of non-agricultural freehold land in village Naupada, District Thane. Assessee surrendered four separate portions of land aggregating to 8,632.68 Sq. Meters for widening and development of roads to Thane Municipal Corporation (TMC). The details of the land handed over are as under:

CTS No.	Area in Sq. Meters	Purpose of surrender
1	1,500.00	Setback of LBS Marg
2.	4,443.00	18 m wide DP Road
3.	1,725.00	15 m wide DP Road (service road)
4.	964.68	Set back area of Mental Hospital Road
Total	8,632.68	

9.2. Thus, out of the 1,11,093 Sq. Meters, the Assessee had surrendered land aggregating to 8,632.68 Sq. Meters, and in lieu thereof, the Assessee got Transferable Development Rights (TDRs) which were sold to Kalapataru Properties (Thane) Pvt. Ltd. for consideration of INR 6,60,61,542/- during the relevant previous year.

9.3. In the original return of income the Assessee offered to tax capital gains arising from sale of TDRs while in the revised return the Assessee did not offer the same to tax. This was noticed by the Assessing Officer in the assessment proceedings which lead to issuance of show-cause notice to the Assessee in this regard. In

reply to the show-cause notice, the Assessee submitted that the capital gains arising from transfer of TDR's cannot be computed as no cost can be attributed to the acquisition of TDR's by placing reliance on the decision of the Tribunal in the case of Jethalal D. Mehta vs. DCIT: (2005) 2 SOT 422 (Mum.) and the judgment of Hon'ble Supreme Court in the case of CIT vs. B.C. Srinivasa Shetty: (1981) 128 ITR 294 (SC). The Assessing Officer was of the view that the cost of acquisition of TDRs could be taken as cost of acquisition of land surrendered. Accordingly, the Assessee was directed to furnish details of cost of acquisition of land surrendered. In response, without prejudice to the submission that no cost can be attributed to the acquisition of TDRs, the Assessee submitted that since the land surrendered was acquired before 1981, in terms of Section 55 of the Act the fair market value of land surrendered as on 01.04.1981 should be adopted as cost of acquisition. The Assessee submitted valuation report to support the valuation of INR 1,71,44,502/- as the fair market value as on 01.04.1981 by adopting the rate of INR 1,986/- per Sq. Meters. The Assessing Officer rejected the primary argument of the Assessee that no cost can be attributed to the acquisition of the TDR's and in principle accepted contention of the Assessee that the fair market value of land surrendered as on 01.04.1981 can be adopted as cost of acquisition of TDRs. However, the Assessing Officer rejected the valuation report submitted by the Assessee and adopted rate of INR 260/- Sq. Mtrs. on the basis of valuation report submitted by another assessee, i.e., M/s Colour Chem Ltd. who had sold a piece of land situated at old Mumbai Agra Road, Thane.

9.4. Being aggrieved the Assessee carried this issue in appeal before the CIT(A) who found merit in the primary argument of the Assessee and held that the cost of acquisition of TDRs could not be determined by

relying upon the decision of the Tribunal in the case of Jethalal D Mehta (supra). Thus, CIT(A) deleted the addition made by the AO.

9.5. Before us, the Revenue is in appeal on this issue. We have heard the Ld. Authorized Representative and the Ld. Departmental Representative on this issue who have reiterated their submission made before the lower authorities. Having examined the decision of the Tribunal in the case of Jethalal D Mehta (supra), we are of the view that the same cannot be applied to the facts of the present case in view of the following observations made by the Hon'ble Tribunal in paragraph 5 of the aforesaid decision:

> *"5. We may mention that as far ..... The CIT(A)'s observations that this right cannot be said to be without any cost of acquisition because the TDRs have been received on surrender of reserved plot to the Government is ex facie incorrect inasmuch as what we are really concerned with is the right to receive the TDR on the plot owned by the assessee, and not with the right to receive the TDR from the Government. The person getting TDRs from the Government has to surrender the reserved plot but the person on whose plot such TDRs can be used, as is the case we are in seisin of, does not do anything more than owning the 'receiving plot'." (Emphasis Supplied)*

9.6. In the case before us issue pertains to determination of the cost of acquisition of TDRs obtained by the Assessee in lieu of surrender of land. The cost of acquisition of TDRs is identifiable and can be determined, as opted by the Assessee, by taking fair market value of land surrendered as on 01.04.1981 as per Section 55 of the Act. Accordingly, we overturn the order of the CIT(A) to this extent and hold that the AO was legally justified in rejecting the contention of the Assessee that no cost can be attributed to the acquisition of the TDRs. We hold that the AO was also justified in holding that the cost of acquisition of to the TDRs was same as the cost of acquisition of

land surrendered which could be determined by taking the fair market value of land surrendered as on 01.04.1981 in terms of provisions of Section 55 of the Act.

9.7. However, we are of considered view that the AO fell into error in adopting cost of INR 260 per Sq Mtrs as the basis for determining cost of acquisition of TDRs in view of the following. The determination of fair market value of land surrendered as on 01.04.1981 required estimation of price of such land. We have perused the valuation report, dated 08.07.2006 submitted by the Assessee wherein to arrive at the estimate/approximation of the fair market value as on 01.04.1981, the valuer adopted two methods. The valuer determined the value by Investment Reversion Method and also by Rent Capitalization Method, and thereafter, taking value of INR 1,986.57 per Sq. Mtrs. determined by Investment Reversion Method, being lower of the value determined by the aforesaid two methods, arrived at fair market value of INR 2,29,81,000/- In Part 2 of the valuation report, the valuer has specifically stated the despite making efforts to ascertain the rates prevailing in 1981 through reputed estate agents, local architects etc. in an around Thane, authentic rates (as prevailing in 1981) could not be determined. After discussing background of the real estate market and the conditions prevailing between 1976 and 1981, the valuer has expressed his concern that determination of the fair market value by relying on documents pertaining to instance of sale for a period prior to 1981 may lead to erroneous results since the sale transactions of properties were, at the relevant time, registered at a much lower value. We note that the Assessing Officer simply rejected the valuation report filed by the Assessee observing as under:

> *"7.3 The contentions raised by the assessee.....*
>
> *Therefore, the cost of land is in fact the cost of TDR in the hands of the assessee. The cost of land surrendered*

*is to the tune of Rs. 29,071 as per details furnished by the assessee. Therefore, the cost of acquisition of TDR is taken at Rs. 29,071. Now, the assessee has furnished a copy of regd. Valuer Report dated 08.07.2006 regarding value of the said land as on 01.04.81 which can be taken under Section 55(2)(b)(i). The regd. Valuer has reported value of land as on 01.04.81 to the tune of Rs. 1986.57 per sq.mt. Perusal of the said report revealed that the valuation done by regd. valuer is purely on basis of estimation. No instance of sale of land in the vicinity of the said area during the period has been quoted in the report. Rather, the report has been based on hypothetical methods. In other case namely M/S Colour Chem Ltd., that assessee has sold a piece of land at Thane and a report form regd. Valuer has been furnished regarding valuation as on 01.04.81. In that case, the regd. Valuer has reported the value of land as on 01.04.81 to the tune of Rs. 260 per sq.mt. The land in present case is situated at rear side of ACC Ltd. and near to Mental Hospital, Thane. The piece of land in case of M/S Colour Chem Ltd. is situated at old Mumbai Agra Road, Thane. The value of land in a relatively small city can not vary from Rs. 260 to 1986.57 per sq.mt. when both the lands are similarly located. Since the assessee has not furnished any evidence in support of valuation as mentioned in regd. Valuer report, the value is taken at Rs. 260 per sq.mt. as in the cost of land in question as on 01.04.81 comes out to be Rs. 22,44,495 (8632.68*260)……"*(Emphasis Supplied)

9.8. On perusal of the above, it can be seen that the Assessing Officer has at first rejected the valuation report submitted by the Assessee on the ground that it does not refer to any sale instances. Thereafter, the Assessing Officer has taken value determined by another valuer in a valuation report submitted by another assessee, namely M/s M/s Colour Chem Ltd. without confronting the Assessee with the said valuation report. We note that the valuation report relied upon by the Assessing Officer is not a report of departmental valuation officer and therefore, does not stand on a better footing

than the valuation report submitted by the Assessee. Further, no effort has been made by the Assessing Officer to bring on record any instance of sale. We also note that while adopting value of INR 260 Sq Mtrs, the Assessing Officer has not taken into consideration any of the factors relevant for arriving at the value of land such as location, locality, size of the land etc. To the contrary, even after noting that the land of the Assessee and the land of M/s Colour Chem Ltd. are not in same locality, the Assessing Officer has gone ahead and adopted the value of land as stated in valuation report of M/s Colour Chem Ltd. by observing that "*The value of land in a relatively small city cannot vary from Rs. 260 to 1986.57 per sq.mt. when, both the lands are similarly located".* In our view, the finding returned by the Assessing Officer has no basis either on facts or in law, and is based upon surmise. The value of INR 260 Sq Mtrs adopted by the Assessing Officer cannot be considered as the value of comparable sale instance denoting fair market value of land under consideration.

9.9. In the valuation report submitted by the Assessee, the valuer had highlighted the fact that comparable sale instances were not available and that adopting value as per sale instance may not yield correct result on account of underreporting of sale consideration in the documents during the relevant period. In this regard, it would be pertinent to refer to the observations made by the Hon'ble Supreme Court in the case of K.P. Varghese vs. ITO (1981) 131 ITR 597 (SC) while interpreting provisions of Section 55(2) of the Act:

> *"This rule being a rule of construction has been repeatably applied in India in interpreting statutory provisions. It would, therefore, be legitimate in interpreting sub-section (2) to consider what was the mischief and defect for which section 52 as it then stood did not provide and which was sought to be remedied by the enactment of sub-section (2) or in other*

words, what was the object and purpose of enacting that sub-section. Now in this connection the speech made by the Finance Minister while moving the amendment introducing subsection (2) is extremely relevant, as it throws considerable light on the object and purpose of the enactment of sub-section (2). The Finance Minister explained the reason for introducing sub-section (2) in the following words:

> *"Today, particularly every transaction of the sale of property is for a much lower figure than what is actually received. The deed of registration mentions a particular amount; the actual money that passes is considerably more. It is to deal with these classes of sales that this amendment has been drafted. It does not aim at perfectly bonafide transactions ... but essentially relates to the day-to-day occurrences that are happening before our eyes in regard to the transfer of property. I think, this is one of the key sections that should help us to defeat the free play of unaccounted money and cheating of the Government." (Emphasis Supplied)*

9.10. Thus, the opinion expressed by the valuer in the valuation report submitted by the Assessee has its basis in the practical difficulties faced while valuing the capital assets acquired before 1981 on the basis of instances of sale. This was also recognized by the legislature. In order to remove the genuine difficulties in computing the capital gains in respect of transfer immovable property including property acquired before 01.04.1981 due to non-availability of relevant information for computation of fair market value of such asset as on 01.04.1981, Section 55 of the Act was amended by the Finance Act, 2017 shifting the base year from 1981 to 2001 with effect from Assessment Year 2018-19. In our view, the Assessing Officer erred in simply rejecting the valuation report without point out any flaw in the methods adopted by the valuer to estimate the fair market value and/or bringing on record any material to support that value of INR 260 per Sq Mrts adopted by the Assessing Officer represents the fair estimation of market value.

9.11. In view of the above, we hold that the Assessing Officer was not justified in rejecting the valuation report submitted by the Assessee. Accordingly, we direct the Assessing Officer to determine the capital gains tax liability of the Assessee by taking the value of INR 2,29,81,000/- Per Sq. Mtrs determined by the valuer in the valuation report dated 08.07.2006 submitted by the Assessee as the cost of acquisition of TDRs. Accordingly, Ground No. 2 is partly allowed.

10. **Ground No. 3 and Additional Ground No. 1 to 3 (letter dated 28.01.2008):**

Ground No. 3: On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that the sales tax subsidy is not taxable in computing the total income under normal provisions of I.T. Act of Rs.1,20,07,95, 709/-.

Additional Ground No. 1: On the facts and in the circumstances of the case and in view of the Supreme Court decision in the case of Goetz India, the Ld. CIT(A) erred in giving such a direction to the Assessing Officer, the effect of which has reduced the Total Income to less than the Returned Income.

Additional Ground No. 2: On the facts and in the circumstances of the case and in view of the decision of the Apex Court in the case of M/s Apollo Tyres Ltd. Vs. CIT [2002] [255 ITR 273] [SC], the Ld. CIT(A) erred in directing to deduct exempted sales tax for computation of Book Profit u/s 115JB of the Act.

Additional Ground No. 3: On the facts and in the circumstances of the case the Ld. CIT(A) ought not to have granted the relief on the basis of the decision in the case of Reliance Industries Ltd. as the facts of the appellant case is different from that of the facts of the case relied on by the Ld. CIT(A) as the case of Reliance Industries

relates to State of Maharashtra, whereas in the assessee's case the schemes relating to other states are different where the income is Revenue in nature.

10.1. Ground No.3 & Additional Ground No. 3: The relevant facts are that during the year relevant to assessment year the Assessee availed incentive/ sales tax subsidy of INR 95,12,68,516/- . However, in the Revised Return, by an inadvertent error, amount of incentive was quantified at INR 162,13,06,137/- which error was sought to be rectified by filing a letter, dated 23.08.2006, during the assessment proceedings wherein the incentive/sales tax subsidy was quantified at INR 95,12,68,521/-. The Assessing Officer treated the aforesaid incentive/sales tax subsidy of INR 95,12,68,516/- as revenue receipt and rejected the contention of the Assessee that the incentive/sales tax subsidy was a capital in nature and was, therefore, not liable to tax.

10.2. Being aggrieved, the Assessee carried this issue in appeal before the CIT(A), who decided the issue in favour of the Assessee holding as under:

> *" 14.9 I have carefully considered the submissions made by the appellant. In my view, sales tax subsidy availed by various units of the appellant constitutes capital receipt in the hands of the appellant. Accordingly, respectfully following the decision in the case of Reliance Industries Ltd. (supra) and Frigsales (India) Ltd. (supra) as well as my own orders for A.Y. 2001-02 in appeal no. CIT(A)-1/IT/87/2004-05, for A.Y. 2002-03, in appeal no. CIT(A)-1/IT/07/05-06 and A.AY. 2003-04 in appeal no. CIT(A)-1/IT/67/06-07 disallowance made by the A.O. is deleted. Hence, these grounds of appeal are allowed."*

10.3. The Revenue is now in appeal before us challenging the order of the CIT(A) holding sales tax subsidy to be capital in nature.

10.4. It is the contention of the Assessee that the issue stands covered in favour of the Assessee by the order of the Tribunal passed in Assessee's own case for earlier years. During the Assessment Year 1996-97, the Assessee had claimed that the incentive in the form of sales tax exemption under the Himachal Pradesh Incentive Scheme was capital in nature. The claim of the Assessee was accepted by the Tribunal vide order, dated 27.06.2007, passed in ITA No. 3783/Mum/2000. This was followed in the case of the Assessee for the Assessment Year 1997-98 in ITA No. 6289/Mum/2003 wherein it was held by the Tribunal as under:

> *"33. Vide additional ground No. 7, assessee is aggrieved that Sales Tax Incentive/Subsidy of Rs. 36688970/- availed during the relevant year treated by it as capital receipt was not so considered in assessment.*
>
> *34. It was pointed out by the Learned A.R. that identical ground was allowed by this Tribunal in assessee's own case for A.Y. 96-97 referred supra. We find from para 21 of this order that Sales Tax exemption availed was held to be capital receipt. Following this decision, we direct that the Sales Tax incentive/subsidy relating to the impugned previous year also, be treated only as capital receipt. Assessee succeeds in its additional ground No. 7"*

10.5. The aforesaid decision of the Tribunal for the Assessment Year 1997-98 has been relied upon in the subsequent years. We note that for the Assessment Year 2002-03, the Tribunal has remanded the issue to the file of Assessing Officer with the directions for fresh adjudication after examining the incentive schemes whereas for the immediately succeeding Assessment Year 2003-04, the issue has been decided in favour of the Assessee by the Tribunal. For the Assessment Year before us, the CIT(A) has, in paragraph 14.9 of the impugned order, merely concluded that sales tax subsidy received

by the Assessee is revenue in nature without examining the provisions of the incentive schemes as was the case in the Assessment Year 2002-03. While deciding this issue in appeal for the Assessment year 2002-03, the Tribunal after noting these facts, held as under:

"*10. Ground No. 9 is about subsidy received from Government of West Bengal of Rs. 12,10,000/-. The Assessing Officer found that the assessee had received Capital Investment Subsidy from the Government of West Bengal for setting up manufacturing Unit under the West Bengal Incentive Scheme, 1993. He held that the amount received by the assessee was not allocable towards any capital asset and was in the nature of incentive which was a taxable receipt."*

10.1 ....

10.2 ....

10.3. We have heard the rival submissions and perused the material before us. We find that the disputed amount was received by the assessee under a particular scheme i.e. West Bengal Incentive 1993. We find that the FAA had relied upon various case laws and decided the issue without examining the whole scheme. On a query by the Bench, the AR informed that the matter of Reliance Industries Ltd. was sent back by the Hon'ble Supreme Court to the Hon'ble High Court to decide afresh after considering the provisions of scheme. In our opinion, any scheme in itself cannot be treated revenue or capital in nature – to arrive at a definite conclusion one has to consider scheme in entirety. We feel that the issue needs further investigation, therefore, in the interest of justice, the issue is restored back to the file of Assessing Officer who would decided the matter after affording a reasonable opportunity of hearing to the assessee and after analyzing the scheme. Ground No. 9 is decided in favour of the Assessing Officer, in part.

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"20. Next ground of appeal about Sales Tax Subsidy in computation of book profit u/s 115JB as well as in computing total income under normal provisions of the Act and the amount involved is Rs. 84,73,17,391/-. During the assessment proceedings, the Assessing Officer found that the following units of the assessee had received various incentives:

Sl No.	*Unit*	*State Incentive Policy*	*Amount (Rs.)*
1	*Tikaria*	*Uttar Pradesh*	*15,29,63,561*
2	*Sindri*	*Bihar/Jharkhand*	*11,04,03,555*
3	*Kymore*	*Madhya Pradesh*	*1,66,33,472*
4	*Gagal*	*Himachal Pradesh*	*9,04,81,224*
5	*Chanda*	*Maharashtra*	*15,13,55,476*
6	*Wadi*	*Karnataka*	*32,54,80,103*
		Total	*84,73,17,391*

The Assessing Officer held that the amounts received by it had to be taxed as revenue receipts. Accordingly, he added Rs. 84.73 Crores to the income of the assessee under the normal provisions and the MAT provisions. In the appellate proceedings, the FAA held that the sale tax subsidy being capital in nature cannot be the part of the total income under either of the provisions."

20.1 ....

20.2. We have heard the rival submissions. As far as addition under the MAT provisions is concerned we are of the opinion that in view of the judgment of Apollo Tyres (supra) the Assessing Officer is not authorised to disturb the book result. Therefore, we confirmed the order of the FAA to that extent.

But, the issue of addition of various subsidies/incentives, we are of the opinion that same needs further verification. While deciding ground no. 9, we have held that the Assessing Officer should analyse the scheme and then only adjudicate it. Following the same, we are restoring back the matter to the file of the Assessing Officer for fresh adjudication, who would decide the issue after affording a reasonable opportunity of

hearing to the assessee. Ground no. 19 is decided in favour of the Assessing Officer, in part."

10.6. We note that in the assessment year before us the Assessee has received incentive in the form of sales tax subsidy from various state government aggregating to Rs. 95,12,68,516/- as detailed below:

Location of Unit	Amount
Tikaria, Uttar Pradesh	29,92,39,613/-
Wadi, Karnataka	37,86,70,711
Sindri, Bihar	11,21,18,,388
Chandrapur, Maharashtra	1,61,2,39,388
Total	95,12,68,521

10.7. We find that Assessing Officer has, in paragraph 9.3 of the Assessment Order, examined the provisions of different schemes and returned a finding that the scheme under which incentive have been claimed by the Assessee are similar to the scheme in the case of Sahney Steel and Press Works Ltd.(supra) and therefore, the incentive/sales tax subsidy is to be regarded as revenue in nature. The CIT(A) has, on the other hand, concluded that the incentive/sales tax subsidy capital in nature without examining the scheme. The Ld. Authorised Representative of the Assessee has also relied upon the various judicial precedents. We are of the view that the applicability or otherwise of the same would have to be determined keeping in view the facts of the case. The judicial precedents cannot be applied without considering the provisions of the incentive scheme. The Revenue has also raised 3 additional ground, vide letter dated 28.01.2008. In Additional Ground No. 3 Revenue has assailed the decision of the CIT(A) on the ground that the facts of the present case are different from the facts of the case relied upon by the Ld. CIT(A). In case of Reliance Industries, relied upon by CIT(A), the scheme pertained to state of Maharashtra whereas in the present case the schemes relating to other states

which are different. We find merit in the aforesaid additional ground raised by the Revenue. Judicial precedents rendered in the context of an assessee enjoying incentives under scheme offered by one state cannot be applied in case of another assessee availing benefit of scheme of another state unless the purpose and provisions of scheme are similar which can be determined on examination of the schemes. In identical facts and circumstances, the Tribunal has, for the Assessment Year 2002-03, held that the CIT(A) fell in error in adjudicating the issue without first examining/analyzing the nature of incentive scheme which pertain to different states and has set aside the issue to the file of Assessing Officer. We are agreement with the aforesaid decision of the Tribunal. Accordingly, we set aside the issue to the file of CIT(A) for fresh adjudication after calling remand report from the Assessing Officer and giving reasonable opportunity of being heard to the Assessee. With the aforesaid directions, Ground No.3 as well as Additional Ground No. 3 raised by the Revenue letter dated 28.01.2008 stands disposed.

10.8. Additional Ground No. 2: The Additional Ground No.2 pertains to inclusion/exclusion of Sales Tax Subsidy while computing book profit under Section 115JB of the Act. In paragraph 10.7 above, we have remanded the issue to the file of CIT(A) for determination of the nature of Sales Tax Subsidy being capital or revenue in nature for the purpose of computing income under the normal provision of the Act. The determination of this issue would be relevant for adjudication of Additional Ground No. 2. Accordingly, this issue is also remanded to the file of CIT(A) for adjudication in light of conclusion to be derived by the CIT(A) as to the nature of Sales Tax Subsidy.

(Additional Ground No. 1 raised by the Assessee is similar to Additional Ground No.2 raised by the Revenue, and therefore, the same has not been pressed by the Assessee)

10.9. **Additional Ground No. 1**: Since Ground No. 3, Additional Ground No. 2 and Additional Ground No. 3 raised by the Revenue have been remanded to the file of CIT(A), Additional Ground No.1 raised by the Revenue is disposed off as being infructuous. However, before parting we would like to observe that judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT: 284 ITR 323 does not curtain the power of appellate authorities to entertain and accept a claim of assessee even if the same is not made by way of a revised return.

11. **Ground No. 4**: On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition in respect of expenditure on Jukehi Raod at Kymore of INR. 2,23,00,000/- *[stated as INR 39,00,000/- in the grounds of appeal]*

11.1. During the relevant previous year, the Assessee incurred expenditure of INR.2,23,00,000/- on construction of Jukehi Road at Kymore, Madhya Pradesh and claimed deduction for the same in the return of income. During the assessment proceedings, the Assessee was asked to explain why the aforesaid expenditure should not be capitalized. In response to the same, the Assessee submitted that the Assessee has cement plant at Kymore, Madhya Pradesh which received raw material from Mines near Jukehi located around 9 to 12 kilometer away. Since, the Kymore-Jukehi Road was in completely damage condition, the Assessee was not able to receive the raw material in time and was also facing difficulties in transporting cement to plant/factory. After having discussion with the Govt. of Madhya Pradesh, the Assessee entered into a contract to construct the road from plant/factory to mines. Out of total expenditure of INR 8,86,00,000/- incurred on constructing the road only INR 5,97,00,000/- was reimbursed. Out of the balance of INR

2,66,00,000/-, INR 2,23,00,000/- were debited to the Profit & Loss Account pertaining to the relevant previous year. Since, the road did not belong to the Assessee, the aforesaid expenditure was not capitalized by the Assessee. It was contended by the Assessee that the aforesaid expenditure has been incurred for smooth running of the business and therefore, should be allowed as revenue expenditure. Rejecting the contentions raised by the Assessee and following the assessment order for the immediately preceding Assessment Year 2003-04, the Assessing Officer disallowed deduction for INR 2,23,00,000/- claimed by the Assessee by treating the aforesaid expenditure as capital in nature. The Assessing Officer, however, allowed depreciation of INR.11,15,000/- computed at the rate of 5% of INR 2,23,00,000/.

11.2. In appeal, the CIT(A) held that the expenditure of INR 2,23,00,000/- incurred on construction of Jukehi-Kymore Road was revenue in nature. The road belonged to the Government of Madhya Pradesh, and therefore, it could not be said that the aforesaid expenditure resulted in creation of any asset of enduring nature for the Assessee. Thus, the CIT(A) deleted the addition of INR 2,23,00,000/- following the decision of Hon'ble Supreme Court in the case of the Assessee, i.e., CIT vs. Associated Cement Companies Ltd. (1988) 172 ITR 275 (SC), and withdrew the depreciation at the rate of 5% allowed by the Assessing Officer.

11.3. Revenue is in appeal challenging the decision of CIT(A) to delete the addition of INR.2,23,00,000/-.

11.4. The Ld. Departmental Representative relied upon the assessment order. The Authorised Representative of the Assessee reiterated the submissions made before the lower authorities and relied upon the decision of the Tribunal in Assessee's own case for the Assessment

Year 2003-04 wherein the tribunal had granted relief to the Assessee.

11.5. We have considered the rival contentions and perused the material on record. We note that for the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the common order, dated 13.03.2019, of the Tribunal passed in ITA No. 4242&4988/MU/2007 for the Assessment Year 2003-04 reads as under:

"24. Under this issue the revenue has challenged the deletion of addition in respect of expenditure on Jukehi Road at Kymore in computing total income under normal provision of the Act in sum of Rs.39,00,000/-. The assessee constructed the road at Jukehi upon the land belonging to the Government of Madhya Pradesh. The assessee claimed the expenses in sum of Rs.39,00,000/-. The CIT(A) has allowed the claim of the assessee on the basis of the decision of Hon'ble Supreme Court in the assessee's own case for the A.Y. 1994-95 to A.Y. 1998-99. The following finding has been given by CIT(A):

> *"18.3 I have considered the submissions made by the ARs of the appellant. In my view the impugned expenditure did not result in creation of any asset of enduring nature to the appellant since the ownership vests with the Government of Madhya Pradesh. Therefore, respectfully following the decision of Hon'ble Apex Court in the case of Associated Cement Companies Ltd. (supra) and the orders of my predecessor from A.Y. 1994-95 to AY 1998-99 as well as my own order for A.Y. 2001-02, the addition made by Assessing Officer is deleted and Assessing Officer is directed to withdraw depreciation allowed @ 5% in the assessment order. Hence this ground of appeal is allowed."*

25. On appraisal of the above mentioned finding, we find that the CIT(A) has allowed the claim of the assessee on the basis of his own decision for the A.Y. 1994-95 to 1998-99. At the time of argument, the Ld. Representative of the assessee has argued that the issue has been covered in favour of the

assessee in the assessee's own case reported in CIT Vs. Associated Cement Companies Ltd. (1988) 172 ITR 257 (SC). The facts are not distinguishable at this stage also. Since the matter of controversy has duly been covered and decided in favour of the assessee in the assessee's own case and L.H. Sugar Factory and oil Mills (P) Ltd. V CIT (1980) 125 ITR 293 (SC), therefore, in the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."

11.6. In the present case as a result of the expenditure incurred by the Assessee, there has neither been any addition to the capital asset, nor has there been any change the capital structure. Accordingly, applying the principles laid down by the Hon'ble Supreme Court in the CIT Vs. Associated Cement Companies Ltd. (1988) 172 ITR 257 (SC), and respectfully following the decision of the co-ordinate bench of the Tribunal in the case of the Assessee for the Assessment Year 2003-04, we confirm the order of CIT(A) of setting aside the disallowance of INR 2,23,00,000/- made by the Assessing Officer. Accordingly, Ground No. 4 raised by the Revenue is dismissed.

12. **Ground No. 5:** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made on account of expenditure of Dry Fly Ash Handing System at Madukkarai of INR.4,57,00,000/-

12.1. During the relevant previous year, the Assessee incurred expenditure of INR.4,57,00,000/- on construction of Dry Ash Handing System at construction at Mettur Thermal Power Station at Madukkarai (hereinafter referred to as 'MTPS') and claimed deduction for the same in the return of income. During the assessment proceedings, the Assessee was asked to explain why the aforesaid expenditure should not be capitalized. In response to

the same, the Assessee submitted that the Assessee obtains fly ash, raw material for manufacturing cement, from MTPS at Madukkarai owned by Tamil Nadu Electricity Board (TNEB). The use of wet fly ash was resulting in production losses and therefore the Assessee entered into a Memorandum of Understanding (MoU) with TNEB for installing Dry Fly Ash Handling System at MTPS at Madukkarai. According to the aforesaid MoU, Assessee had no rights over the Dry Fly Ash Handling System as it was agreed that the same would be property of TNEB. Since, the expenditure of INR 4,57,00,000/- was incurred for smooth operation of business the same was claimed as revenue expenditure by the Assessee. Not being convinced, the Assessing Officer rejected the submissions of the Assessee. The Assessing Officer, noting that the Assessee was authorised to operate the Dry Fly Ash Handling System and that MTPS could not dispose of the same on its own, disallowed a deduction treating the expenditure of INR 4,57,00,000/- as capital in nature and allowed only depreciation of INR 4,57,00,000/- by applying the rate of 10% as applicable to a civil structure.

12.2. In appeal, the CIT(A) held that the expenditure of INR 4,57,00,00/- incurred on construction of MTPS was revenue in nature as claimed by the Assessee. After examining Clause 2 and Clause 6 of MoU between the Assessee and TNBE, the CIT(A) concluded that the Assessee did not have absolute rights and did not become the owner of the Dry Fly Ash Handling System by incurring such expenditure. Since, the expenditure incurred by the Assessee did not result in creating any assets of enduring nature, the CIT(A) deleted the addition of INR 4,57,00,000/- and withdrew the depreciation at the rate of 10% allowed by the Assessing Officer.

12.3. Revenue is in appeal, challenging the decision of CIT(A) of deletion of INR.4,57,00,000/-. While the Departmental Representative relied

upon the assessment order, the Authorised Representative of the Assessee reiterated the submissions made before the lower authorities and relied upon the judgment of Hon'ble Supreme Court in the case of CIT vs. Associated Cement Companies Ltd. (1988) 172 ITR 275 (SC) and CIT v. Madras Auto Services (P) Ltd. : (1988) 233 ITR 468 (SC).

12.4. We have heard the rival contentions and perused the record. We do not find any infirmity in the order passed by the CIT(A) on this issue. On perusal of orders passed by lower authorities it is clear that admittedly the Assessee is not the owner of the Dry Flash Ash Handling System. The expenditure did not result in creation of any asset of enduring nature and was incurred for smooth running of the business. Accordingly, applying the principles laid down by the Hon'ble Supreme Court in the CIT Vs. Associated Cement Companies Ltd. (supra), and CIT v. Madras Auto Services (P) Ltd. (supra), we confirm the order of CIT(A) of allowing deduction for INR 4,57,00,000/- holding the same to be revenue in nature. Accordingly, Ground No. 5 raised by the Revenue is dismissed.

13. **Ground No. 6**: On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made in respect of provision for Director's Retirement Benefit at Rs.1,88,97,500/-.

13.1. During the relevant previous year, the Assessee made 'Provision for Director's Retirement Benefit' to the tune of INR 1,88,97,500/- on the basis of actuarial valuation report. However, in the computation of total income filed along with the original as well as revised return, the Assessee had added back the aforesaid amount and thus, did not claimed deduction for the same. During the assessment proceedings, vide letter dated 14.12.2006, the Assessee made a

fresh claim for deduction for INR 1,88,97,500/-. The Assessing Officer, relying upon the decision of the Hon'ble Supreme Court in the case of Goetz (India) Ltd. vs. CIT : (2006) 284 ITR 323 (SC), rejected the claim of the Assessee, the Assessing Officer also observed that provision for Director's Retirement Benefit was a provision for unascertained liability not supported by any evidence and therefore, deduction for the same was, in any case, not allowable.

13.2. In appeal, the CIT(A) deleted the addition made by the Assessing Officer holding the provision for Director's Retirement Benefit to be a provision for ascertained liability determined on the basis of actuarial valuation after taking into consideration Paragraph 2(E)(ii) of Schedule O : Notes to Accounts, and placing reliance upon the judgment of the Hon'ble Supreme Court in the case of Bharat Earth Movers vs. CIT : (2000) 245 ITR 428 (SC).

13.3. Revenue is in appeal, challenging the decision of CIT(A) of deletion of INR.1,88,97,500/-. We have heard the rival contentions and perused the record. While the Departmental Representative relied upon the assessment order, the Authorised Representative of the Assessee reiterated the submissions made before the lower authorities and relied upon the decision of the Tribunal in Assessee's own case for the Assessment Year 1990-91, 2002-03 and 2003-04 wherein the Tribunal had, on identical issue, granted relief to the Assessee.

13.4. We note that the in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the common order, dated 13.03.2019, passed in ITA No. 4242&4988/MU/2007 for the Assessment Year 2003-04 reads as under:

"59. On appraisal of the above said finding ,we find that CIT(A) has decided the issue on the basis of the decision of the case titled as Bharat Earth Movers and Echjay Forgings P. Ltd. (supra). Furthermore, we noticed that the issue has been squarely covered by assessee's own case in ITA. No.4987/M/2007.The relevant finding has been given in para no. 19 which is hereby reproduced as under.:

> *"19.Deletion of addition in respect of provision for Director's Retirement Benefit in computing income under normal provisions of the Act of Rs.2,84,53,850/ is the subject matter of the next ground. During the assessment proceedings, the Assessing Officer found that the assessee had created provision for director's retirement benefit on the basis of actuarial valuation and it was added in computing total income. Subsequently, exclusion was claimed before the FAA. As the similar addition was deleted in MAT computation, so, he allowed the claim made by the assessee.*
>
> *19.1. Before us, the DR argued that the FAA allowed the claim that was not before the Assessing Officer. The DR contended that provision made for Director's Retirement Benefit was made on the basis of actuarial valuation, that it represented a liability in praesenti that was to be discharged at future date. He referred to the case of Bharat Earth Movers (245 ITR 428). He also stated that similar claim was allowed by the Tribunal while deciding the appeal for the AY.1990-91.*
>
> *19.2.We find that the issue of a certain business liability was deliberated upon and adjudicated by the Hon'ble Apex Court in the case of Bharat Earth Movers and it was held that if a business liability had definitely arisen in the accounting year and was capable of being estimated with reasonable certainty, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. Following the principle laid down by the Apex court in the above case and the decision of the Tribunal delivered for the AY.1990-91, we decide ground no.18 against the Assessing Officer."*

60. In view of the said finding, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Since, the issue has duly been covered by assessee's own case for the A.Y. 2002-03 in ITA. No. 4987/M/2007, therefore, in the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."

13.5. Applying the principles laid down by the Hon'ble Supreme Court in Bharat Earth Movers vs. CIT : (2000) 245 ITR 428 (SC), and respectfully following the decisions of the co-ordinate bench of the Tribunal in the case of the Assessee for the Assessment Year 1990-91 (ITA No. 2361/Mum/1995), 2002-03 (ITA No. 3787/Mum/2007 & others), and 2003-04 (ITA No. 4988/Mum/2007), we confirm the order of CIT(A) of allowing deduction for INR 1,88,97,500/- holding the same to be a liability in praesenti to be discharged at future, capable of being estimated with reasonable certainty. Accordingly, Ground No 6 raised by the Revenue is dismissed.

14. **Ground No. 7 to 13:** While computing Book Profits under Section 115JB of the Act, the Assessing Officer increased the Book Profits by the following provisions created by the Assessee during the relevant previous year debited to the Profit and Loss Account.

Ground No.	Provision For	Amount (INR)
7	Bad and doubtful debts	6,53,53,040
8	Wealth tax	70,00,000
9	Normal and additional gratuity	5,86,82,751
10	Leave Encashment	3,26,00,238
11	Director's Retirement	1,88.97,500
12	Contingencies	2,60,43,844
13	Technical fees, interest and	2,07,95,361

royalty

Before taking up the specific grounds raised by the assessee, it would be relevant to consider the legal prepositions laid down by the Hon'ble Supreme Court and the Hon'ble Bombay High Court. In the case of Apollo Tyres Ltd. Versus CIT:255 ITR 73, the Hon'ble Supreme Court has, while examining the provisions of section 115J (pari materia to section 115 JB), held as under:

"5. The above Speech ..... In spite of all these procedures contemplated under the provisions of the Companies Act, we find it difficult to accept the argument of the revenue that it is still open to the Assessing Officer to rescrutinise the accounts and satisfy himself that these accounts have been maintained in accordance with the provisions of the Companies Act. In our opinion, reliance placed by the revenue on sub-section (1A) of section 115J in support of the above contention is misplaced. Sub-section (1A) of section 115J does not empower the Assessing Officer to embark upon a fresh inquiry in regard to the entries made in the books of account of the company. The said sub-section, as a matter of fact, mandates the company to maintain its account in accordance with the requirements of the Companies Act which mandate, according to us, is bodily lifted from the Companies Act into the Income-tax Act for the limited purpose of making the said account so maintained as a basis for computing the company's income for levy of income-tax. Beyond that, we do not think that the said sub-section empowers the authority under the Income-tax Act to probe into the accounts accepted by the authorities under the Companies Act. If the statute mandates that income prepared in accordance with the Companies Act shall be deemed income for the purpose of section 115J, then it should be that income which is acceptable to the authorities under the Companies Act. There cannot be two incomes one for the purpose of Companies Act and another for the purpose of the Income-tax Act both maintained under the same Act. If the Legislature intended the Assessing Officer to reassess the company's

income, then it would have stated in section 115J that 'income of the company as accepted by the Assessing Officer'. In the absence of the same and on the language of section 115J, it will have to held that view taken by the Tribunal is correct and the High Court has erred in reversing the said view of the Tribunal.

Therefore, we are of the opinion that the Assessing Officer while computing the income under section 115J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increase and reductions as provided for in the Explanation to the said section. To put it differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to section 115J." (Emphasis Supplied)

Following the above judgment, in the case of CIT versus Adbhut Trading Co. (P) Ltd: 338 ITR 94 (Bombay) the Hon'ble Bombay High Court has held as under:

"1. In the present case, ...Once the accounts including the profit and loss account are certified by the authorities under the Companies Act it is not open to the Assessing Officer to contend that the profit and loss account has not been prepared in accordance with the provisions of the Companies Act, 1956."

In the case of Bharat Earth Movers Vs. CIT: 245 ITR 428, the Hon'ble Supreme Court has, while examining the nature of ascertained and contingent liability, held as under:

"4. The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of

the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied, the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain."

In view of the above judicial pronouncements, we proceed to adjudicate the grounds of appeal as under.

14.1. Ground No. 7 : On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made in respect of provision for bad and doubtful debts at Rs.6,53,53,040/- in computation of 'book profit u/s 115JB of the Act.

14.1.1. During the assessment proceedings, the Assessing Officer noticed that Provision For Bad and Doubtful Debts amounting to INR 6,53,53,040/- has not been added back while computing Book Profits under Section 115JB of the Act. In response to the query raised by the Assessing Officer, the Assessee, vide letter dated 22.11.2006, submitted that Provision for Bad and Doubtful Debts is nothing but a provision for diminution in the value of asset and cannot be construed as a provision for liability. Disregarding the aforesaid submissions, the Assessing Officer added back the Provision For Bad and Doubtful Debts amounting to INR 6,53,53,040/- holding that the Assessee has failed to establish that the Provision For Bad and Doubtful Debts was for an ascertained liability.

14.1.2. In appeal, CIT(A) granted relief to the Assessee and deleted the addition to Book Profits on account of Provision for Bad and Doubtful Debts by placing reliance on the decision of the Special Bench of the Tribunal in the case of CIT vs. Usha Martin Industries

Ltd. (2007) 288 (18) ITR 63 (Kol) (SB) and judgment of Hon'ble Bombay High Court in the case of CIT Vs. Echjay Forgings P. Ltd. (2001) 251 ITR 15 (Bom). The relevant findings of the CIT(A) are as under:

> *"22.3 I find considerable merit in the submission made by the appellant, since provision for bad and doubtful debt is diminution in the value of assets and not liability. Further, in my view addition made in computing total income under normal provisions of the Act is not relevant for the purpose of book profit computation u/s 115JB. Therefore, respectfully following the decision of Special Bench of Kolkata tribunal in the case of Usha Martin Industries Ltd. (supra), the decision of Mumbai High Court in the case of Echjay Forgings (P) Ltd. (Supra), as well as my own orders in A.Y. 2002-03 & 2003-04 in appeal no. CIT(A)-I/IT/07/05-06 and CIT(A)-I/IT/67/06-07 respectively, stated here-in-above, the addition made by the A.O. in computing book profit u/s 115JB is deleted and this ground of appeal is allowed."*

14.1.3. During the pendency of the appeal before the Tribunal, clause (i) to Explanation 1 to Section 115JB(2) by the Finance Act, 2009, with retrospective effect from 01.04.2001 which reads as under:

> *"(i) the amount or amounts set aside as provision for diminution in the value of any asset."*

14.1.4. We note that Hon'ble Gujarat High Court while examining the above provision in the case of CIT v. Vodafone Essar Gujarat Ltd. : (Tax Appeal No. 749 of 2012, reported in 397 ITR 55) has held as under:

> *"24. By way of culmination of above judicial pronouncements and statutory provisions, the situation that arises is that prior to the introduction of clause (i) to the explanation to section 115JB, as held by the Supreme Court in case of HCL Comnet Systems & Services Ltd. (supra), the then existing clause (c) did not cover a case where the assessee made a provision for bad or doubtful debt. With insertion of clause (i) to the explanation with retrospective effect, any amount*

or amounts set aside for provision for diminution in the value of the asset made by the assessee, would be added back for computation of book profit under section 115JB of the Act. However, if this was not a mere provision made by the assessee by merely debiting the Profit and Loss Account and crediting the provision for bad and doubtful debt, but by simultaneously obliterating such provision from its accounts by reducing the corresponding amount from the loans and advances on the asset side of the balance sheet and consequently, at the end of the year showing the loans and advances on the asset aside of the balance sheet as net of the provision for bad debt, it would amount to a write off and such actual write off would not be hit by clause (i) of the explanation to section 115JB. The judgment in case of Deepak Nitrite Ltd. (supra) fell in the former category whereas from the brief discussion available in the judgment it appears that case of Indian Petrochemicals Corpn. Ltd. (supra), fell in the later category.

14.1.5. In view of the above, we remand this issue to the file of Assessing Officer for fresh determination, keeping in view, the provisions of clause (i) to Explanation 1 to Section 115JB(2) inserted by the Finance Act, 2009, with retrospective effect from 01.04.2001, and the principles enunciated by the Hon'ble Gujarat High Court in the case of CIT v. Vodafone Essar Gujarat Ltd (Supra). In view of the aforesaid directions, Ground No. 7 stands disposed off.

14.2. **Ground No. 8:** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition in respect of provision for Wealth-Tax at Rs.70,00,000/- in computation of Book Profit u/s 115JB of the Act.

14.2.1. During the assessment proceedings, the Assessing Officer noticed that Provision For Wealth-Tax amounting to INR 70,00,000/- has not been added back while computing Book Profits under Section 115JB of the Act. In response to the query raised by the Assessing Officer in this behalf, the Assessee, vide letter dated 22.11.2006, submitted that provision for Wealth-Tax does not fall within the

ambit of clause (a) or any other clauses to Explanation 1 to Section 115JB(2) of the Act. Wealth-Tax chargeable under Wealth-Tax Act, 1957 cannot be held to be Income-tax and therefore is not required to be added back to the Book Profits. However, the Assessing Officer following the Assessment Order for the Assessment Year 2003-04, added back the Provision Wealth-Tax amounting to INR 70,00,000/-.

14.2.2. In appeal, CIT(A) granted relief to the Assessee and deleted the addition to Book Profits on account of provision for Wealth-Tax by placing reliance on the decision of the Special Bench of the Tribunal in the case of CIT vs. Usha Martin Industries Ltd. : (2007) 288 (18) ITR 63 (Kol) (SB), judgment of Hon'ble Bombay High Court in the case of CIT Vs. Echjay Forgings P. Ltd. : (2001) 251 ITR 15 (Bom) and the orders passed by CIT(A) for the Assessment Year 1998-99 and 2003-04.

14.2.3. Revenue is in appeal, challenging the relief granted by CIT(A). We have heard the rival contentions and perused the record. While the Departmental Representative relied upon the assessment order, the Authorised Representative of the Assessee reiterated the submissions made before the lower authorities and relied upon the decision of the Tribunal in Assessee's own case for the Assessment Year 2002-03 and 2003-04 wherein the Tribunal had granted relief to the Assessee.

14.2.4. We note that the Hon'ble Bombay High Court has, in the case of CIT vs. Echjay Forgings (P) Ltd. (2001) 251 ITR 15 has held as under:

> *"4. The short point which arises for consideration in this appeal is, whether the Assessing Officer was right in disallowing the*

claims for deduction in respect of the five items and ordering addition thereof to the net profit for the purposes of section 115J.

5. The addition of the five items to the net profit is, accordingly, discussed hereinbelow:
(I) Addition of wealth-tax paid by the assessee to the net profit

6. Mr. Desai, the learned senior counsel for the department, fairly concedes that the net profit, as shown in the profit and loss account, will not be increased by the amount of wealth-tax paid because under clause (a) of the Explanation to section 115J(1A), what is contemplated is the amount of income-tax paid. Under the said clause, payment of wealth-tax is not contemplated. Therefore, the net profit shall not be increased by the amount of wealth-tax paid by the assessee." (Emphasis Supplied)

14.2.5. In the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the common order, dated 13.03.2019, passed in ITA No. 4242&4988/MUM/2007 for the Assessment Year 2003-04 reads as under:

"44. Issue no. 15 is in connection with the deletion of addition in respect of provision of Wealth Tax in computing book profit u/s 115JB of the Act in sum of Rs.80,00,000/-. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -

"37.3 I have considered the submissions made on behalf of the appellant. Respectfully following the decision of the Hon'ble Bombay High Court in the case of Echjyay Forgings Ltd. (supra) and the Hon'ble Special Bench of Kolkata Tribunal in the case of Usha Martin Industries Ltd. (supra) as well as my own order in appeal no. CIT(A)-I/IT/232/04-05 for AY 1998-99 stated herein above, the addition made by the Assessing Officer is deleted and this ground of appeal is allowed."

> *45. On appraisal of the said finding, we noticed that the claim of the assessee has been allowed in view of the decision of Bombay High Court in the case of CIT Vs. Echjay Forgings (P) Ltd. (2001) 251 ITR 15 (Bom) and JCIT Vs. Usha Martin Industries Ltd. (2007) 104 ITD 249 (Kolkata Tribunal) SB. We also noticed that the matter of controversy has been adjudicated by CIT(A) for the A.Y. 1998-99 also and against the said decision, the revenue is not in appeal. It is reiterated that the adjustment can only be made in view of Section 115JB of the Act which has been specified in Explanation to Section 115JB of the Act. In view of the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue." (Emphasis Supplied)*

14.2.6. In view of the above, we confirm the order of CIT(A) and hold that provision for Wealth-Tax of INR 70,00,000/- is not required to be added back while computing Book Profits under Section 115JB of the Act. Accordingly, Ground No 8 raised by the Revenue is dismissed.

14.3. **Ground No. 9 :** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the assessee's claim of provision for normal & additional gratuity amounting to INR 5,86,82,751/- in computation of book profit u/s 115JB of the I T Act.

14.3.1. During the relevant previous year, the appellant has debited INR 5,86,82,751/- in respect of provision for normal amounting to INR 5,00,00,000/- and provision for additional gratuity amounting to INR 86,82,751/-. According to the Assessee, the provision was created on the basis of actuarial valuation report and therefore, was not added back while computing Book Profit under Section

115JB of the Act. During the course of assessment proceedings, vide letter dated 22.11.2006, the Assessee submitted that the aforesaid provision is not in the nature of a provision for unascertained liability and, therefore, the same should not be added in computing Book Profit. However, disregarding the submissions of the Assessee, the Assessing Officer added back the Provision for Normal Gratuity of INR 5,00,00,000/- & Additional Gratuity amounting to INR 86,82,751/- holding that the Assessee has failed to establish that the aforesaid provision was for an ascertained liability.

14.3.2. In appeal, CIT(A) granted relief to the Assessee and deleted the addition to Book Profits on account of Provision for Normal & Additional Gratuity amounting to INR 5,86,82,751/- by placing reliance on the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Echjay Forgings P. Ltd. : (2001) 251 ITR 15 (Bom) and the orders passed by Tribunal in the case of the Assessee for the Assessment Year 1990-91.

14.3.3. Revenue is in appeal, challenging the decision of CIT(A) of deletion of INR 5,86,82,751/-. We have heard the rival contentions and perused the record. While the Departmental Representative relied upon the assessment order, the Authorised Representative of the Assessee reiterated the submissions made before the lower authorities and relied upon the decision of the Tribunal in Assessee's own case for the Assessment Year 1990-91, 2002-03 and 2003-04 wherein the tribunal had granted relief to the Assessee.

14.3.4. We note that in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the common order, dated 13.03.2019, passed by the Tribunal in ITA No.

4242&4988/MUM/2007 for the Assessment Year 2003-04 reads as under:

> *"46. Under this issue the revenue has challenged the allowance of claim of provision for additional gratuity in computing book profit u/s 115JB of the Act amounting to Rs.1,21,90,817/-. The proposition is the same which has been discussed above while deciding the issue no. 15. The finding of the CIT(A) in this regard is hereby reproduced as under.: -*
>
> > *"38.2 I have considered the submission made on behalf of the appellant. Respectfully following the order of Hon'ble Tribunal for the A.Y. 1990-91 as well as my own orders for AY 1998-99 in appeal no. CIT(A)-I/IT/232/04-05 the addition made by the Assessing Officer is deleted and the ground stands allowed in favour of the appellant."*
>
> *47. On appraisal of the said finding, we noticed that this issue has been covered by decision of Hon'ble ITAT in the assesee's own case for the A.Y. 1990-91 in ITA. No.2361/M/1995 & in the A.Y. 2002-03 in ITA. No.4987/M/2007. There is nothing on record to which it can be assumed that the order has been varied or changed in appellate proceeding. Since this issue has been duly adjudicated in favour of the assessee by above mentioned decision of the Hon'ble ITAT, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."*

14.3.5. Respectfully following the decision of the co-ordinate Bench of the Tribunal in the case of the Assessee for the Assessment Year 1990-91 (ITA No. 2361/Mum/1995), Assessment Year 2002-03 (ITA No. 4987/Mum/2007 & others) and Assessment Year 2003-04 (ITA No.

4242/Mum/2007), we confirm the order of CIT(A), and hold that provision for Normal/Additional Gratuity of INR 5,86,82,751/- is in the nature of provision for an ascertained liability and is, therefore, not required to be added back while computing Book Profits in terms of Clause (c) of Explanation 1 to Section 115JB(2) of the Act. Accordingly, Ground No. 9 raised by the Revenue is dismissed.

14.4. **Ground No. 10:** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the assessee's claim of provision for Leave Encashment amounting to INR 3,26,00,238/- in computation of book profit u/s 115JB of the I T Act.

14.4.1. During the relevant previous year, the Assessee has debited to the Profit & Loss Account INR 3,26,00,238/- in respect of provision for Leave Encashment. During the assessment proceedings vide letter dated 22.11.2006, the Assessee submitted that the aforesaid provision was not a provision for unascertained liability and was created on the basis of actuarial valuation report and therefore, was not required to be added back while computing Book Profit under Section 115JB of the Act. Disregarding the submissions of the Assessee, the Assessing Officer added back the Provision for Leave Encashment of INR 3,26,00,238/- holding that the Assessee has failed to establish that the aforesaid provision was for ascertained liability.

14.4.2. In appeal, CIT(A) granted relief to the Assessee and deleted the addition made by Assessing Officer while computing Book Profits under Section 115JB of the Act, on account of Provision for Leave Encashment of INR 3,26,00,238/-, by placing reliance on the judgment of Hon’ble Supreme Court in the case of Bharat Earth Movers (245 ITR 528) (SC), and the judgment of the Hon’ble Bombay

High Court in the case of CIT v. Echjay Forgins (P) Ltd. (2001) 251 ITR 15. Revenue is in appeal, challenging the aforesaid decision of CIT(A).

14.4.3. The Departmental Representative appearing before us relied upon the Assessment Order, whereas the Authorised Representative of the Assessee reiterated the submissions made before the lower authorities and relied upon the order passed by CIT(A) on this issue.

14.4.4. We have considered the rival contentions and perused the material on record. We note that the CIT(A) has granted relief to the Assessee by following the judgment of the Hon'ble Supreme Court in the case of Bharat Earth Movers (245 ITR 528), and the Hon'ble Bombay High Court in the case of CIT v. Echjay Forgins (P) Ltd. (2001) 251 ITR 15. We do not find any infirmity in the order passed by the CIT(A) to the extent it holds that provision for Leave Encashment of INR 3,26,00,238/- is in the nature of provision for ascertained liability created on the basis of actuarial valuation and is, therefore, not required to be added back while computing Book Profits in terms of Clause (c) of Explanation 1 to Section 115JB(2) of the Act. Accordingly, order of CIT(A) on this issue is confirmed and Ground No. 10 raised by the Revenue is dismissed.

14.5. **Ground No. 11:** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made in respect of provision for Director's Retirement Benefit at Rs.1,88,97,500/- in computation of book profit u/s 115JB of the Act.

14.5.1. During the relevant previous year the Assessee made 'Provision for Director's Retirement Benefit' to the tune of INR 1,88,97,500/- on the basis of actuarial valuation report. In the computation of Book Profits under Section 115JB of the Act filed along with the original

and the revised return, the said amount was added back to the Book Profits by the Assessee. However, during the course of assessment proceedings, vide letter dated 14.12.2006, the Assessee submitted that the aforesaid provision is not in the nature of a provision for unascertained liability and, therefore, the same should not be added back while computing Book Profit under Section 115JB of the Act. However, disregarding the submissions of the Assessee, the Assessing Officer added back the Provision for Director's Retirement Benefit of INR 1,88,97,500/- while computing Book Profits under Section 115JB of the Act holding that the Assessee has failed to establish that the aforesaid provision was for an ascertained liability.

14.5.2. In appeal, CIT(A) granted relief to the Assessee and deleted the addition made to the Book Profits by the Assessing Officer on account of Provision for Director's Retirement Benefit amounting to INR Rs.1,88,97,500/- relying upon the judgment of Hon’ble Bombay High Court in the case of CIT Vs. Echjay Forgings P. Ltd. : (2001) 251 ITR 15 (Bom) and the orders passed by Tribunal in the case of the Assessee for the Assessment Year 1990-91, 2002-03 and 2003-04.

14.5.3. Revenue is in appeal, challenging the decision of CIT(A) of deletion of INR1,88,97,500/-. While dismissing Ground No. 6 above, we have concluded that Provision for Director's Retirement Benefit is not a provision for unascertained liability. We note that the CIT(A) has granted relief to the Assessee by following the judgment of the Hon’ble Supreme Court in the case of Bharat Earth Movers (245 ITR 528). Further, in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the order, dated 13.03.2019, passed by the Tribunal in the case of the Assessee for the

Assessment Year 2003-04 (ITA No. 4242 & 4988/MUM/2007 reads as under:

32. Under this issue the revenue has challenged the deletion of addition in respect of provision for Director's Retirement Benefit in computing Book Profit U/s 115JB of the Act amounting to Rs.46,27,200/-. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.:

> *"26.5 On consideration of the submission made by the ARs of the appellant, I find that provision for director's retirement benefit cannot be considered as unascertained liability since the same has been calculated on the basis of actuarial valuation and is squarely covered by the decision of Hon'ble Apex Court in the case of Bharat Earth Movers (supra). Therefore, provision for director's retirement is an allowable deduction in computing profits and gains of business or profession. Further, in my view additions made in computing book profit u/s 115JB on the ground that the same has been added back in the computing total income under normal provisions of the Act is not tenable. Thus, respectfully following the decision of Mumbai High Court in the case of Echjay forgings Ltd. (Supra) and the decision of Hon'ble Tribunal in the appellant own case for AY 1990-91 as well as my own orders for AY 1998-99 and for AY 2002-03 as discussed herein above the addition made by the Assessing Officer is deleted and this ground of appeal is allowed."*

33. Since the case of the assessee has duly been covered by the assessee's own case for the A.Y. 2002-03 in ITA. No. 4987/M/2007, for the A.Y. 1990-91 in ITA. No. 2361/M/1995, therefore, in the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue.

14.5.4. In view of the above, we do not find any infirmity in the order passed by the CIT(A), and respectfully, following the decision of the co-ordinate bench of the Tribunal in the case of the Assessee for the Assessment Year 2003-04 (ITA No. 4988/Mum/2007), we confirm the order of CIT(A) on this issue. Accordingly, Ground No. 11 raised by the Revenue is dismissed.

14.6. Ground No. 12 : On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition on account of Provision for Contingencies of Rs.2,30,00,000/- in computation of book profit u/s 115JB of the Act.

14.6.1. In the computation of income filed along with original return the Assessee had added back Provision for Contingencies while computing book profit under Section 115JB of the Act of INR 2,30,00,000/-. However, in the computation of income filed along with the revised return the Assessee did not add back the aforesaid Provision for Contingencies. During the assessment proceedings, the Assessee claimed that the aforesaid provision was made against the diminution in the value of the investment in ACC Rio Tinto Exploration Limited, ACC Nihon Castings Ltd., and The Iran and India Cement Engineering Consultants Co. PJS. This becomes clear on perusal of note fact is evident from Note 12(a to

d) at page no. 87 & 88 of Annual Report for the year ended 31st March 2004. The Assessee contended that as per Clause (c) to Explanation to Section 115JB only provision for unascertained liability is required to be added to the Net Profit. The aforesaid provision created by the Assessee is not covered by Explanation (c) to Sec. 115JB.

14.6.2. In appeal, the CIT(A) granted relief to the Assessee holdting that Provision for Contingencies is not required to be added back while computing Book Profit under Section 115JB of the Act. Revenue is in appeal, challenging the aforesaid decision of CIT(A).

14.6.3. We have heard the rival contentions and perused the record. While the Departmental Representative relied upon the decision of the Tribunal in Assessee's own case for the Assessment Year 2003-04, the Authorised Representative of the Assessee reiterated the submissions made before the lower authorities before fairly conceding that the identical issue has been remanded to the to the file of the Assessing Officer by the Tribunal in Assessee's own case for the immediately preceding Assessment Year 2003-04.

14.6.4. During the pendency of the appeal before the Tribunal, clause (i) to Explanation 1 to Section 115JB(2) by the Finance Act, 2009, with retrospective effect from 01.04.2001 which provides that the amount set aside as provision for diminution in the value of any asset is required to be added back while computing Book Profits under Section 115JB of the Act. During the assessment proceedings, the Assessee had claimed that the Provision for Contingencies was made against the diminution in the value of the investment. In the immediately preceding Assessment Year 2003-04, while deciding the identical issue, the Tribunal in

Assessee's own case in ITA No. 4242/MUM/2007 and ITA No. 4988/MUM/2007 held as under:

> *"53. Under this issue the revenue has challenged the allowance of the claim in connection with the provision for contingencies in computation of book profit u/s 115JB of the Act in sum of Rs.3,75,00,000/-. While arguing the case the Ld. Representative of the assessee has admitted that this fact that this issue has been covered against the assessee due to insertion of clause (i) to Explanation 1 to Section 115JB vide Finance No. 2 Act, 2009 w..e.f 01.04.2001 and also in accordance with law settled in the assessee's own case in ITA. No.4241/M/2007 dated 29.07.2015. Accordingly, we set aside the finding of the CIT(A) on this issue and restored the issue before the Assessing Officer to decide the issue afresh by giving an opportunity of being heard to the Assessee in accordance with law. Accordingly, we decide this issue in favour of the revenue against the assessee." (Emphasis Supplied)*

14.6.5. Respectfully following the aforesaid decision of the Tribunal, we remand the issue back to the file of the Assessing Officer for fresh adjudication keeping in view the provisions of Clause (i) to Explanation 1 to Section 115JB(2) of the Act and after giving Assessee an opportunity of being heard. The order of CIT(A) on this issue is set aside with the aforesaid directions. Ground No. 12 raised by the Revenue is allowed.

14.7. **Ground No. 13 :** On the facts and in the **circumstances** of the case and in law, the learned CIT(A) erred in deleting the addition on account of provision for technical fees, interest and royalty of

Rs.2,07,95,361/- in computation of book profit u/s 115JB of the I T Act.

14.7.1. During the relevant previous year, the appellant has debited to the Profit & Loss account the Provision for Technical Fees, Royalty and Interest amounting to INR 2,07,95,361/-. In the computation of total income as per normal provisions of the Act, the said amount was offered to tax in view of provisions of Section 40(a) of the Act on account of failure to deduct tax at source. However, the aforesaid provisions was not added back while computing Book Profits under Section 115JB of the Act. In response to the query raised by the Assessing Officer during the assessment proceedings, the Assessee, vide letter dated 22.11.2006, submitted that the aforesaid provision was not made for unascertained liability, and therefore should not added back while computing Book Profit under Section 115JB of the Act. The Assessee relied upon the judgment of Hon'ble Supreme Court in the case of Bharat Earth Movers (245 ITR 528) and the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Echjay Forgings P. Ltd. : (2001) 251 ITR 15 (Bom). However, the Assessing Officer, not being satisfied with the submissions of the Assessee, added back the aforesaid provision for while computing Book Profits under Section 115JB of the Act holding that the Assessee has failed to establish that the same was for an ascertained liability.

14.7.2. In appeal before CIT(A) the Assessee contended that the aforesaid provisions was not made for unascertained liability. The Profit & Loss account of the Assessee has been prepared in accordance with Part II and III of Schedule VI to the Companies Act, 1956 and in compliance with the applicable Accounting Standard on mercantile basis. Assessee further submitted that in view of the

judgment of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. v. CIT : (2002) 255 ITR 273 (SC), the Provision for Technical Fees, Royalty and Interest should not be added back while computing Book Profits under Section 115JB of the Act. The submissions of the Assessee found favour with the CIT(A) who deleted the addition holding as under:

" 30.3. I have considered the submission made on behalf of the appellant and find that the treatment in the accounts, in respect of provision for technical services, interest and royalty, is in accordance with mercantile system of accounting practice followed by the appellant as per which, at the end of the year they have to provide for liability accrued. Thus, the same cannot be considered as unascertained liability and cannot be added back under clause (c) of Explanation to Section 115JB(2). Hence, this ground of appeal is allowed."

14.7.3. The Revenue is in appeal against the above relief granted by CIT(A). The Ld. Departmental Representative relied upon the Assessment Order, while the Authorised Representative of the Assessee reiterated the submissions made before the lower authorities. We have heard the rival contentions and perused the record. We note that the relief granted by the CIT(A) is in line with the judgment of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra), wherein the Hon'ble Supreme Court has, while examining provisions Section 115J of the Act (pari materia to Section 115JB), has held as under:

"Therefore, we are of the opinion that the Assessing Officer while computing the income under section 115J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been

properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increase and reductions as provided for in the Explanation to the said section. To put it differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to section 115J."

14.7.4. In the present case the books of accounts have been accepted by the Assessing Officer and therefore, the Assessing Officer only has limited power to increase/decrease of book profits in terms of Explanation to Section 115JB of the Act. Provision for Technical Fees, Royalty and Interest is not a provision made for unascertained liability and does not fall within the ambit of any of the clauses of Explanation to Section 115JB of the Act.

14.7.5. In view of the above, we do not find any infirmity in the order passed by CIT(A) on this issue. The order of CIT(A) holding that the Provision for Technical Fees, Royalty and Interest amounting to INR 2,07,95,361/- is not required to be added back while computing Book Profit under Section 115JB of the Act is confirmed. Accordingly, Ground No. 13 raised by the Revenue is dismissed.

15. **Ground No. 14:** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made in respect of revenue generated from trial run production at Rs.86,55,040/- in computation of book profit u/s 115JB of the I T Act.

15.1. During the relevant previous year, the Assessee had reduced the revenue generated from trial run production of captive power

plant at Madukkarai amounting to INR 86,55,040/- from the expenditure incurred during the trial production and capitalized the net expenditure as cost of asset in the Books of Account. In response to the query raised during the assessment proceedings, the Assessee filed detailed submission vide letter, dated 22.11.2006. However, not being satisfied with the Explanation/submission of the Assessee, the Assessing Officer added the revenue generated from trial run production amounting to INR 86,55,040/- to the Book Profit computed under Section 115JB of the Act.

15.2. In appeal, the CIT(A) deleted the addition made in respect of Revenue generated from trial run production of INR.86,55,040/- in computation of book profit u/s 115JB of the Act. Revenue is in appeal, challenging the aforesaid decision of CIT(A).

15.3. We have considered the rival contentions and perused the material on record. We note that the in the immediately preceding Assessment Year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the order, dated 13.03.2019, passed by the Tribunal in the case of the Assessee for the Assessment Year 2003-04 (ITA No. 4242 & 4988/MUM/2007 reads as under:

"40. Under this issue the revenue has challenged the deletion of addition made in respect of revenue generated from trial run production in computing of book profit u/s 115JB of the Act in sum of Rs.15,71,82,196/-. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -

"31.5 I have considered the submission made on behalf of the appellant and find that the treatment in the accounts, in respect of revenue generated during construction

period, is in accordance with the Guidance note on "Expenditure incurred during the construction period" which is issued by the Institute of Chartered Accountant of India, which is an authoritative body in the matter of laying down the accounting standard. That being so addition made by the Assessing Officer on the ground that the same has been added back in computing income under normal provisions of the Act and the said amount should have been credited in the profit and loss account is neither justified nor tenable in view of the decision of Apex Court in the case of CIT v Bipin Chandra Magan Lal (1961 41 ITR 290 SC) wherein it has been held that there is a distinguishable relationship between the assessable income and the profits of business concern in a commercial sense. Hence, this ground of appeal is allowed."

41. On appraisal of the above said finding, we noticed that the CIT(A) has decided the matter of controversy on the basis of decision in the case of CIT Vs. Bipin Chandra Magan Lal (1961) 41 ITR 290 (SC). Moreover, we also noticed that this issue has been covered in favour of the assessee in the assessee's own case for the A.Y. 2002-03 in ITA. No.7987/M/2007. By honoring the order passed by the Hon'ble ITAT in the assessee's own case (supra), we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."

15.4. In view of the above, we do not see any infirmity in the order passed by the CIT(A) on this issue. Respectfully following the abovesaid decision of the Tribunal in the case of the Assessee for the Assessment Year 2003-04, we confirm the order of CIT(A) on this issue Accordingly, Ground No. 14 raised by the Revenue is dismissed.

16. **Ground No. 15** : On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made in respect Expenses on VRS pertaining to earlier years of INR 21,24,43,994/- in computation of book profit u/s 115JB of the IT Act.

16.1. As per the accounting policy consistently followed by the Assessee, expenditure incurred on account of Voluntary Retirement Scheme (VRS) was amortized over a period of 5 years till Assessment Year 2003-04 in the books of account. However, from the Assessment Year 2004-05, compensation payable under the VRS has been charged to the profit & loss account in the books of accounts. Whereas, while computing taxable income under normal provisions of the Act, the VRS expenditure was being claimed on payment basis till Assessment Year 2000-01. From 2001-02, claim for VRS expenditure has been made in terms of provisions of Section 35DDA of the Act. Accordingly, while computing income under normal provisions of the Act for the assessment years prior to Assessment Year 2001-02, the amount amortized in Profit & Loss Account was added back in the computation of income as the deduction was claimed on payment basis. Whereas Assessment Years 2001-02 onwards the claim was made under Section 35DDA of the Act. During the relevant previous year, the Assessee had debited to profit & loss account INR 21,24,43,994/- as VRS expenditure pertaining to earlier years. The Assessing Officer added back the VRS expenditure of INR 21,24,43,994/- debited to the Profit and Loss Account pertaining to earlier years while computing Book Profit under Section 115JB of the Act on the ground that the same has been added back in the computation of income under the normal provisions of the Act.

16.2. During the assessment proceedings, the Assessee had, vide letter dated 08.12.2006, submitted that Books of accounts of the Assessee have been accepted as having been prepared in accordance with Part II and III of Schedule VI to Companies Act. Since there is no clause in Explanation to Section 115JB of the Act which provides that the aforesaid VRS expenditure is to be added back. Accordingly, the book profits of the Assessee cannot be increased by the amount of VRS expenditure debited to Profit & Loss account. However, Assessing Officer rejected the same and made the addition. However, In appeal, the CIT(A) granted relief to the Assessee holding as under:-

> *"32.4 I have considered the submissions made by A.R. of the Appellant I find that the amount of expenditure incurred on account of VRS, the amount debited to the profit and loss account in different years and the amount of deduction allowed in the normal computation in the said years are fully reconcilable as could be seen from the details given in Annexure A to this order. In my view additions made in computing total income under normal provisions of the Act has nothing to do with computation of book profits under section 115JB, which is a self-contained code and it is subject to only those adjustments which are specified in the Explanation to section 115JB(2). Further, VRS expenditure amortised in the profit and loss account cannot be said to be answered an ascertained liability and is also not covered under the provisions of Explanation to Section 115JB(2). Hence, respectfully following the principles laid down by the Hon'ble Apex Court in the case of Apollo tyres Ltd (supra) as well as other decisions cited hereinabove, the*

addition made by the Assessing Officer is deleted and this ground of appeal is allowed."

16.3. Revenue is in appeal, challenging the above relief granted by the CIT(A). While the Departmental Representative relied upon the Assessment Order, the Authorised Representative of the Assessee relied upon the decision of the Tribunal in Assessee's own case for the Assessment Year 2003-04.

16.4. We have considered the rival contentions and perused the material on record. The CIT(A) has allowed the claim of the Assessee applying the principles laid down by the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT (supra), The accounts of the Assessee have been prepared in accordance with Parts II and III of Schedule VI to the Companies Act and the same has been duly certified by the statutory auditors, and therefore, in absence of any specific clause in Section 115JB(2) of the Act providing for increase of Book Profits by the amount of VRS expenses, no further adjustment is called for on this account. In the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee wherein the Tribunal has, vide common order, dated 13.03.2019, passed in ITA No. 4242/MUM/2007 & ITA No. 4988/MUM/2007 has held as under:

"34. Under this issue the revenue has challenged the deletion of addition made in respect of VRS expenditure pertaining to earlier years in computing Book Profit u/s 115JB of the Act in sum of Rs.18,69,64,996/-. The relevant finding has been given in CIT(A) in para no. 27.4. On appraisal of the above said finding, we are of the view that the CIT(A) has allowed the claim of the assessee on the basis of decision of the case titled

*as **Apollo Tyres Ltd. CIT (2002) 255 ITR 273 (SC).** We also noticed that the issue has already been covered in favour of the assessee in the assessee's own case for the A.Y. 2002-03 in ITA. No.4987/M/2007. The facts are not distinguishable at this stage also. Taking into account all the facts and circumstances of the case, we are of the view that the CIT(A) has allowed the claim of the assessee rightly, hence, the finding of the CIT(A) is not liable to be disturbed at this stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."*

16.5. In view of the above, Ground No. 15 raised by the Revenue is dismissed.

17. **Ground No. 16:** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition in respect of capital expenditure debited to P & L account of INR 14,16,56,815/- in computation of book profit u/s 115JB of the Act.

17.1. During the relevant previous year, the Assessee had debited INR 14,16,56,815/- to the Profit & loss account being capital expenditure. The Assessing Officer added back the aforesaid capital expenditure to Book Profits for the reason that the same has been added back while computing profits under normal provisions of the Act.

17.2. In response to the query raised during the course of assessment proceedings, the Assessee, vide letter dated 08.12.2006, submitted that the aforesaid capital expenditure has been debited to Profit & Loss Account as per accepted accounting practice which is in line with the applicable accounting standards. Since the accounts has been prepared m accordance with Parts II and III of Schedule VI to the Companies Act and the same has been duly

certified by the statutory auditors, no further adjustment is called for on this account in view of the decision of Apex Court in the case of Apollo Tyres -vs.- CIT (2002) 255 ITR 273 (SC). However, disregarding the submission of the Assessee, the Assessing Officer added back INR 14,16,56,815/- while computing book profits under Section 115JB of the Act.

17.3. In appeal, the CIT(A) granted relief to the Assessee accepting the contention of the Assessee and following the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) as well as the order passed by the CIT(A) in the case of the Assessee for the Assessment Year 1998-99, 2002-03 and 2003-04. Revenue is in appeal, challenging the aforesaid decision of CIT(A).

17.4. We have heard the rival contentions and perused the record. We note that the in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the order, dated 13.03.2019, passed by the Tribunal in the case of the Assessee for the Assessment Year 2003-04 (ITA No. 4242 & 4988/MUM/2007 reads as under:

> *"35. Under this issue the revenue has challenged the deletion of the addition made in respect of Capital expenditure debited to P&L Account in computing book profit u/s 115JB of the Act in sum of Rs.15,02,74,405/-. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -*
>
> > *"28.2 I have considered the submission made on behalf of the appellant. In my view additions made in computing total income under normal provisions of the Act has nothing to do with computation of book profit u/s 115JB and respectfully following the decisions of Hon'ble Apex Court in the case of Apollo Tyres Ltd.*

(supra), Max Well Dyes & Chemicals P. Ltd. (supra) as well as my own order for AY 1998-99 and 2002-03 in appeal no CIT(A)-I/IT/232/4-5 and CIT(A)-I/IT/7/5-6 respectively discussed herein above and for the reasons stated therein the addition made by the Assessing Officer is deleted. Hence the ground of appeal is allowed."

36. On appraisal of the above said finding, we noticed that the CIT(A) has allowed the claim of the assessee on the basis of the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. Vs. CIT (2002) 255 ITR 273 (SC). Moreover, we also noticed that the issue has been decided in favour of the assessee by the Hon'ble ITAT in the assessee's own case for the A.Y.2002-03 in ITA. No.4987/M/2007. No distinguishable material has been placed on record. Since the issue has been decided in favour of the assessee in the assessee's own case for the A.Y. 2002-03 (supra), therefore , we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."

17.5. Applying the principles laid down by the Hon'ble Supreme Court in the Apollo Tyres Ltd. (supra) and respectfully following the decisions of the co-ordinate bench of the Tribunal in the case of the Assessee for the Assessment Year 2002-03 (ITA No. 4987Mum/2007 & others) and Assessment Year 2003-04 (ITA No. 4988/Mum/2007), we confirm the order of CIT(A) holding that capital expenditure of INR 14,16,56,815/- debited to Profit & Loss Account is not required to be added back while computing book profits under Section 115JB of the Act. Accordingly, Ground No. 16 raised by the Revenue is dismissed.

18. **Ground No. 17:** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition in respect of deferred revenue expenditures of earlier years amounting to Rs.3,23,69,815/-.

18.1. During the relevant previous year, the Assessee had debited INR 3,23,69,815/- to the Profit & loss account being deferred revenue expenditure. The Assessing Officer added back the aforesaid deferred revenue expenditure to Book Profits for the reason that the same has been added back while computing profits under normal provisions of the Act.

18.2. In response to the query raised during the course of assessment proceedings the Assessee, vide letter dated 08.12.2006, submitted that the aforesaid deferred revenue expenditure has been debited to Profit & Loss Account as per accepted accounting practice and applicable accounting standards. The accounts has been prepared in accordance with Parts II and III of Schedule VI to the Companies Act and the same has been duly certified by the statutory auditors. In view of the decision of Apex Court in the case of Apollo Tyres -vs.- CIT (2002) 255 ITR 273 (SC) no adjustment is called for on this account. However, disregarding the submission of the Assessee, the Assessing Officer added back INR 3,23,69,815/- while computing book profits under Section 115JB of the Act.

18.3. In appeal, the CIT(A) granted relief to the Assessee accepting the contention of the Assessee and following the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra). Revenue is in appeal, challenging the aforesaid decision of CIT(A).

18.4. We have heard the rival contentions and perused the record. We note that the in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the order, dated 13.03.2019, passed by the Tribunal in the case of the Assessee for the Assessment Year 2003-04 (ITA No. 4242 & 4988/MUM/2007 reads as under:

"38. Under this issue the revenue has challenged the deletion in respect of deferred revenue expenditure of earlier years in computing book profit u/s 115JB of the Act in sum of Rs.2,16,46,865/-. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.:

> *"30.3 I have considered the submission made by the ARs of the appellant. In my view additions made in computing total income under normal provisions of the Act has nothing to do with computation of book profit u/s 115JB which is a self-contained code and it is subject to only those adjustments which are specified in the Explanation to section 115JB(2). Hence, respectfully following the principles laid down by the Hon'ble Apex Court in the case of Apollo Tyres Ltd. (supra) as well as other decisions cited here-in-above, the addition made by the Assessing Officer is deleted and this ground of appeal is allowed."*

39. On appraisal of the above said finding, we noticed that the CIT(A) has allowed the claim of the assessee on the basis of the decision of Apex Court in the case of Apollo Tyres Ltd. Vs. CIT (2002) 255 ITR 273 (SC). It is specifically held that the computation of income under the normal provision of the Act has nothing to do with computation of book profit u/s 115JB of the Act in which specifically adjustment has been given in Explanation to Section 115JB(2) of the Act. No doubt, the addition which nowhere fall within the provision of Section

115JB of the Act and Explanation (2) of the Act is not required to be added to the income of Assessee, therefore, in the said circumstances, the same is not required to be added while computing the book profit u/s 115JB of the Act. Since the matter of controversy has been adjudicated by the CIT(A) judiciously and correctly, therefore, the finding of the CIT(A) is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue."

18.5. Applying the principles laid down by the Hon'ble Supreme Court in the Apollo Tyres Ltd. (supra) and respectfully following the decisions of the co-ordinate bench of the Tribunal in the case of the Assessee for Assessment Year 2003-04 (ITA No. 4988/Mum/2007), we confirm the order of CIT(A) holding that deferred revenue expenditure INR 3,23,69,815/- debited to Profit & Loss Account is not required to be added back while computing book profits under Section 115JB of the Act. Accordingly, Ground No. 17 raised by the Revenue is dismissed.

19. **Ground No. 18 :** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made in respect of profit on sale of fixed assets of Rs.10,98,70,597/- in computation of book profit u/s 115JB of the Act.

19.1. During the relevant previous year the Assessee had credited to the Profit & Loss Account net profits on sale of fixed assets amounting to INR 10,98,70,597/-. In the original return of income, while computing book profit under Section 115JB of the Act, the Assessee omitted to exclude aforesaid profit on sale of fixed assets. However, in the revised return, while computing book profits under Section 115JB of the Act the same were excluded.

In response to query raised during the course of assessment proceedings, the Assessee, vide letter dated 16.11.2006, filed detailed submission substantiating the claim. However, the Assessing Officer rejected the claim of the Assessee by placing reliance on the judgment of Hon'ble Bombay High Court in the case of CIT vs. Veekay Lal Investments Co. Pvt. Ltd. : 249 ITR 597 (Bom)

19.2. Being aggrieved, the Assessee filed before CIT(A) on this issue. The CIT(A) granted relief to the Assessee by following orders of CIT(A) in the case of the Assessee for the Assessment Year 2001-02, 2002-3 and 2003-04.

19.3. Revenue is in appeal before us challenging the relief granted by CIT(A). The Ld. Departmental Representative appearing before us submitted that the issue is covered in favour of the Revenue by the order of the Tribunal in Assessee's own case for the earlier years. The Ld. Authorised Representative of the Assessee fairly conceded that the issue was decided against the Assessee in Assessee's own case for the Assessment Year 1998-99 to 2001-02 and Assessment Year 2003-04.

19.4. We note that in the immediately preceding Assessment Year 2003-04, the Tribunal has decided this issue in favour of the Revenue, vide common order 13.03.2019 passed in ITA No. 4242/MUM/2007 and ITA No. 4988/MUM/2007, holding as under:

> *"52. Under this issue the revenue has challenged the deletion of the addition of profit on sale of fixed assets in computation of book profit u/s 115JB of the Act in sum of Rs.5,19,20,846/-. At the time of argument, the Ld. Representative of the assessee has disclosed this fact that this issue has been decided against the assessee in the*

assessee's own case for the A.Y.2002-03 in ITA. No.4241/M/2007 dated 29.07.2015. Since this issue has been decided against the Assessee in the assessee's own case (supra), therefore, the finding of the CIT(A) on this issue is hereby ordered to be set aside and we allow the claim of the revenue for the addition of said amount while computing the book profit u/s 115JB of the Act. Accordingly, this issue is decided in favour of the revenue against the assessee."

19.5. Respectfully following the decision of the co-ordinate Bench of the Tribunal in Assessee's own case, we set aside the order of CIT(A) and restore the order of the Assessing Officer on this issue. Accordingly, Ground No. 18 raised by the Revenue is allowed.

20. Ground No. 19 : On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made on account of expenditure on Jukehi Road, at Kymore of INR 2,23,00,000/- and Dry Fly Ash Handing System at Madukkarai of INR 4,75,00,000/- in computation of book profit u/s 115JB of the Act.

20.1. The Assessing Officer had added back the expenditure of INR 2,23,00,000/- on Jukehi Road, at Kymore and INR 4,75,00,000/- on Dry Fly Ash Handing System at Madukkarai expenditure while computing Book Profit under Section 115JB of the Act on the ground that the same were capital in nature. While disposing of Ground No. 4 and 5, we have confirmed the order of CIT(A) holding that the aforesaid expenditure are not capital in nature and therefore, deduction for the same is allowed while computing income under normal provisions of the Act. The very basis on which the Assessing Officer had added the aforesaid expenditure of INR 2,23,00,000/- and INR 4,75,00,000/- while computing book

profits under Section 115JB of the Act does not hold good. In view of the aforesaid, we confirm the order passed by CIT(A) on this issue. The Ground No. 19 raised by the Revenue is dismissed.

21. **Ground No. 20 :** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition made on account of the amount withdrawn from share premium account of INR 9,66,64,158/- in computation of book profit u/s 115JB of the IT Act.

21.1. During the relevant previous year, the Assessee had incurred expenses on issue of Share, Foreign Currency Convertible Bonds and debenture amounting to INR 9,66,64,158/- which were debited to Profit and Loss Account. Simultaneously, an equivalent amount was transferred from share premium account to the Profit and Loss Account in accordance with Sec. 78(2) of the Companies Act, 1956. In the computation of income, the Assessee had reduced the net profit by INR 9,66,64,158/- on account of the said amount having been transferred from Share Premium Account. The Assessing Officer added back the aforesaid amount while computing book profit under Section 115JB of the Act.

21.2. In appeal, the CIT(A) granted relief to the Assessee holding as under:

> *"38.3 I have considered the submissions made on behalf of the appellant. In my view write back of share premium account is an allowable deduction in view of clause (i) of Explanation to Section 115JB(2). Therefore, respectfully following the decision of the Hon'ble ITAT for A.Y. 1990-91 as well as the order of my predecessor for AY 1997-98 and A.Y. 1998-99 as well as my own order for A.Y. 2003-04, the*

addition made by the A.O. of Rs. 9,66,64,158/- is deleted. Hence, this ground of appeal is allowed."

21.3. Now, the Revenue is in appeal before us against the above finding of the CIT(A) on this issue. We note that CIT(A) has granted relief to the Assessee following decision of the Tribunal in the case of the Assessee in Assessment Year 1990-91 and 1998-99. Further, in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Assessee. The relevant extract of the order, dated 13.03.2019, passed by the Tribunal in the case of the Assessee for the Assessment Year 2003-04 (ITA No. 4242 & 4988/MUM/2007 reads as under:

"50. Under this issue the revenue has challenged the deletion of addition made in respect of amount withdrawn from share premium account in computation of book profit u/s 115JB of the Act. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record.: -

> *"40.3 I have considered the submissions made on behalf of the appellant. In my view write back of share premium account is an allowable deduction in view of clause (i) of Explanation to Section 115JB(2). Therefore, respectfully following the decision of the Hon'ble ITAT for A.Y. 1990-91 as well as the orders of my predecessor for A.Y. 1997-98 and A.Y. 1998-99 the addition made by the Assessing Officer of Rs.76,63,200/- is deleted. Hence this ground of appeal is allowed."*

51. On appraisal of the above said finding, we noticed that the claim of the Revenue is in connection with the deletion of addition made in respect of amount withdrawn from share premium account in computation of book profit u/s 115JB of the Act. The claim was allowed in view of the decision of Hon'ble ITAT Mumbai in the assessee's own case for the A.Y.1990-91 in

ITA. No.2361/M/1995. Further the matter has been adjudicated by Hon'ble ITAT in the assessee's own case for the A.Y. 1998-99 in ITA. No.6320/M/2003. Since the case of the assessee has squarely covered by decision of the Hon'ble ITAT in the assessee's own case, therefore, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue." (Emphasis Supplied)

21.4. In view of the above, we do not find any infirmity in the order passed by CIT(A). Accordingly, we confirm the order of CIT(A) holding that amount of INR 9,66,64,158/-, transferred from Share Premium Account to the profit & loss account was correctly reduced from Book Profits by the Assessee while computing book profit as per the provisions of Clause (i) of Explanation to Section 115JB(2) of the Act. Accordingly, Ground No. 20 raised by the Revenue is dismissed.

22. **Ground No. 21 :** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the interest levied of INR70,87,210/- u/s 234D of the I T Act.

22.1. The Assessing Officer imposed interest under Section 234D of INR 70,87,210/- on refund granted vide intimation under Section 143(1) of the Act which was deleted by the CIT(A). Revenue is now in appeal. Ground No. 21 relating to levy of interest under section 234D of the Act is disposed off as being consequential.

23. **Ground No. 22 :** On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the assessee's claim of additional gratuity amounting to Rs. 86,82,751/-.

23.1. During the relevant previous year, the appellant had made provision for additional gratuity of INR 86,82,751/-. While dismissing Ground No. 9 raised by the Revenue, we have, in paragraph 14.3.5 above, concluded that the provision for additional gratuity is a provision for ascertained liability. Further, the CIT(A) has granted relief to the Assessee by following decision of the Tribunal in the case of the Assessee for the Assessment Year 1990-91 (ITA No. 2361/Mum/95). In view of the aforesaid, we are not inclined to interfere the order of CIT(A) on this issue. Accordingly, Ground No. 22 raised by the Revenue is dismissed.

24. **Additional Ground No. 1** (letter dated 13.04.2010): On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs. 18.60 crores made by Assessing Officer u/s 14A of the I.T. Act, 1961.

24.1. During the relevant previous year the Assessee had earned Dividend Income of Rs. 37,59,59,110/-. The same was credited to the Profit and Loss Account. In the computation of total income the same was claimed exempt u/s 10(34)/10(35) of the Act. During the course of hearing, the Assessee was asked to state whether any direct or indirect expenditure has been incurred for earning the above income. In response to the same, the Assessee vide letter dated 16.11.2006, submitted that no expenditure has been incurred for the purpose of earning dividend income. Hence, no disallowance is called for on this account. Disregarding the submissions made by the Assessee, in the order u/s 143(3), the Assessing Officer disallowed the proportionate interest expenditure of INR 18,60,00,000/- as expenditure incurred for earning dividend income. For the purpose of computing the aforesaid disallowance, the Assessing Officer computed

investment out of borrowed fund by applying the ratio of borrowed funds and total funds to total investment. Taking average rate of interest @10% and applying the same to investment out of borrowed funds (computed as aforesaid), the Assessing Officer arrived at an amount of INR 18,60,00,000/- to be disallowed under Section 14A of the Act.

24.2. Being aggrieved, the Assessee carried this issue in appeal before CIT(A). The CIT(A) granted relief to the Assessee and deleted the addition holding as under:

> *"6.5 I have considered the submission made on behalf of the appellant. On consideration of the facts as stated here-in-above, I find that the investment in shares of Bargarh Cement Ltd. has been made out of business expediency and therefore interest on borrowed funds utilized for acquiring the shares is an allowalbe deduction u/s 36(1)(iii). I also find that revenue has also not disputed deductibility of the said interest expenditure u/s 36(1)(iii)/37(1) of the Act. Further dividend received during the year were out of investment made in the earlier assessment years out of own funds. Thus, question assuming that dividend received from investment has been made from borrowed funds does not arise. Therefore, respectfully following the decision of the Tribunal in the case Maruti Udyog Ltd. (supra) and orders of my predecessor for A.Y. 1999-00 and A.Y. 2000-01 as well as my own orders for A.Y. 2001-02 to A.Y. 2003-04, the addition made by the A.O. is deleted and both the grounds of appeal are allowed."*

24.3. Revenue is in appeal, challenging the decision of CIT(A) deleting the disallowance of INR 18,60,00,000/-. While the Departmental Representative relied upon the Assessment Order, the Authorised

Representative of the Assessee reiterated the submissions made before the lower authorities.

24.4. We have considered the rival contentions and perused the material on record. We note that the CIT(A) has, while granted relief to the Assessee has, after taking into account details of investments, own funds and borrowed funds furnished by the Assessee, returned a factual finding that the dividend income received during the year pertained to investments made by the Assessee in the earlier years out of its own funds and therefore the question of assuming that the such dividend income pertained to investments made from borrowed funds does not arise. In the appellate proceedings before us, nothing has been placed before us to establish that the aforesaid finding returned by CIT(A) is incorrect/perverse. Accordingly, we confirmed the order of CIT(A) on this issue.

Assessee's Appeal : ITA No. 4895/MUM/2007

25. The Assessee has raised the following grounds of appeal:

Ground No.1: That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred in confirming the addition of Deferred Tax Liability of Rs. 37,53,00,000/- in computing Book Profit u/s 115JB.

Ground No.2.: That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred in confirming the addition of dividend distribution tax of Rs. 9,08,00,000/- in computing Book Profit u/s 115]B.

Ground No. 3: That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred in confirming the addition of corporate tax paid at Saudi Arabia amounting to Rs. 2,12,09,809/- in computing Book Profit u/s 115JB.

Ground No. 4. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred in confirming the short allowance of depreciation.

Ground No.5. That on the facts and in the circumstances of the case, dividend accrued and crystallised during the year of Rs. 42,73,24,860/- be allowed as deduction in computing total income under the normal provisions of the Act.

Ground No. 6: That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred in confirming setting off of unabsorbed depreciation of the current previous year with short term capital gain of the current previous year instead of allowing deduction under chapter VIA against short term capital gain.

Ground No. 7.: That on the facts and in the circumstances of the case and on favourable disposal of Ground No. 6 taken herein above, tax payable under the normal provisions of the Act would come to Nil and hence provisions of section 115JB would not apply.

Additional Ground No.1: On the facts and the circumstances of the case and in law, if sales tax subsidy of Rs. 120,07,95,709/- is held to be a capital receipt not chargeable to tax under the normal provisions of the Act, then the same be held as a capital receipt not includible while computing book profits u/s 115JB of the Act.

25.1. **Ground No. 1,2,3,4,5, 7 and Additional Ground No. 1**: In view of statement made by the Authorized Representative of the Assessee under instructions, Ground No. 1 to 5 and 7, as well as Additional Ground No. 1 are disposed off as being not pressed.

25.2. **Ground No. 6** : At the outset, the Ld. Departmental Representative pointed out that this issue stands decided in favour of the Revenue. Ld. Authorised Representative submitted that though this issue has been decided against the Assessee in appeal for the Assessment Year 2003-04, the appeal filed by the Assessee is pending before the Hon'ble High Court.

25.2.1. We note that the in the immediately preceding assessment year (AY 2003-04), identical issue has been decided in favour of the Revenue. The relevant extract of the order, dated 13.03.2019, passed by the Tribunal in the case of the Assessee for the Assessment Year 2003-04 (ITA No. 4242&4988/MUM/2007) reads as under:

> *"12. Under this issue the assessee has challenged the confirmation of setting off of unabsorbed depreciation of the current previous year with long term capital gain of the current previous year instead of setting it off with long term capital loss brought forward from earlier years. The assessee wanted to set off in future but the Assessing Officer declined the claim of the assessee on account of this fact that the claim is against provision of income tax. The CIT(A) has also declined the claim of the assessee on the basis of this fact that Section 71 deals with inter head adjustment and have precedence over section 74 of the Act. Nothing seems to contrary to the law. No law in support of the claim of assessee has been produced before us, therefore, taking into account, all the facts and circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage."*

25.2.2. In view of the above, the order passed by CIT(A) on this issue is confirmed. Ground No. 6 raised by the Assessee is dismissed.

26. In view of the above, appeal of the Revenue is partly allowed while the appeal of the Assessee is dismissed.

Order pronounced on 27.05.2022.

Sd/-	*Sd/-*
(Pramod Kumar)	(Rahul Chaudhary)
Vice President	Judicial Member

मुंबई Mumbai; दिनांक Dated : 27.05.2022

Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

27. While expressing my considered agreement with my learned brother, I may add, particularly with respect to his thought-provoking observations in paragraphs 9.7 to 9.10, that the suppression of sale consideration in real estate transactions in the olden days, such as in 1981, was so common that the sale instances could seldom be conclusive, or even reasonable standalone evidence, to suggest the market value of the real estate in that era. As learned brother has aptly quoted from Hon'ble Supreme Court's judgment in the case of K P Verghese *(supra),* which in turn has quoted from the Finance Minister's speech, that was a time "**when particularly every transaction of sale of property is for a much lower figure than what is actually received**" and when "**the deed of registration mentioned a particular amount; the actual money which passes hands is much more**". The reduction in use of unaccounted monies in the reals estate sector, particularly in a large metropolitan city like Mumbai and even its suburbs, has been, even if slow, a steady process, and today, due to conscious deincentivization of such practices by the law and as also by the emerging overall economic realities, is, if at all, rather drastically reduced if not altogether eliminated.

28. On a practical note, thus, while examining the valuation of an asset as of 1st April 1981, one has to bear in mind the fact that the prices stated in the sale instances of real estate being on the lower side than the actual market price was quite common in the eighties as well, and, therefore, such sale instances, as standalone and conclusive evidence of the market valuation, could not be put to the disadvantage of the assessee- unless, of course, there is no reasonable evidence, in support of the valuation claimed by the assessee, placed on record at all by the assessee, or unless it is corroborated by some other indicators supporting that valuation.

29. Coming to the specific facts of the case before us, as learned brother rightly takes note of, the valuation report submitted by the assessee has been simply brushed aside by observing that it lacks any comparable sale instances having been given in support of the valuation. The learned Assessing Officer has been dismissive of the method of valuation adopted by the Valuer for this short reason alone, but then such an approach, given the limitation of the relevance of the comparable sale instances at the relevant point of time, was wholly unwarranted and justified. It was open to the Assessing Officer to deal with the approach adopted by the Valuer on merits, and take a call on that, but then just because it did not have the support of comparable sale instances, such a valuation could not have been rejected straight away. What was even more inappropriate that is the Assessing Officer picked up sale price stated in a transaction of sale of land, which was admittedly not even comparable, and proceeded to note that since this sale transaction at Rs 260.00 per square meter, the market price of a nearby land could not have been as high as Rs 1,986.57 per square meter- as has been claimed by the assessee. When the matter travelled in appeal before the learned CIT(A), he deleted the addition in entirety by relying upon a coordinate bench decision in the case of Jethalal D Mehta *(supra)*, but, as learned counsel for the assessee fairly conceded, that decision was not applicable on the facts of this case, and that is how the computation of capital gain has become relevant before us. Learned CIT(A) thus had no occasion to deal with the valuation aspect, as on 1st April 1981, at all. The valuation report submitted by the assessee has not been faulted, for legally sustainable reasons, by the authorities below. Yet, the Assessing Officer simply brushed it aside and proceeded to adopt the valuation on the basis of the sale instance of land in a different locality. Such an approach cannot meet any judicial approval, and since it is a very old matter, inasmuch as relevant financial period was almost two decades back, there is no point in remitting the matter back for fresh valuation exercise either.

30. It is in this backdrop that I am in most considered agreement with my learned brother, on this point, as indeed all the other points so comprehensively dealt with in the proposed draft order.

31. With these observations, I agree with my learned brother.

Sd/-
Pramod Kumar
Vice President