

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI YOGESH KUMAR US, JUDICIAL MEMBER**

**ITA No.9513/Del./2019
(ASSESSMENT YEAR : 2007-08)**

**ITA No.9514/Del./2019
(ASSESSMENT YEAR : 2008-09)**

**ITA No.9515/Del./2019
(ASSESSMENT YEAR : 2009-10)**

**ITA No.9516/Del./2019
(ASSESSMENT YEAR : 2010-11)**

ACIT, Central Circle,
Moradabad.

vs. Genus Electrotech Limited,
308, Dev Arc Mall,
Opposite Big Bazar, SG Highway,
Ahmedabad – 380 015 (Gujarat).
(PAN : AABCG9645H)

**ITA No.2418/Ahd./2017
(ASSESSMENT YEAR : 2007-08)**

Genus Electrotech Limited,
308, Dev Arc Mall,
Opposite Big Bazar, SG Highway,
Ahmedabad – 380 015 (Gujarat).
(PAN : AABCG9645H)

vs. DCIT, Circle 2(1)(1),
Ahmedabad.

**ITA No.1136/Ahd./2012
(ASSESSMENT YEAR : 2007-08)**

Genus Electrotech Limited,
308, Dev Arc Mall,
Opposite Big Bazar, SG Highway,
Ahmedabad – 380 015 (Gujarat).
(PAN : AABCG9645H)

vs. CIT, Ahmedabad II,
Ahmedabad.

ITA No.9513 to 9516/Del./2019
 ITA No.2418/Ahd./2017
 ITA No.1136/Ahd./2012
 ITA No.1830/Ahd./2015

ITA No.1830/Ahd./2015
(ASSESSMENT YEAR : 2007-08)

DCIT, Circle 2(1)(1),
 Ahmedabad.

vs. Genus Electrotech Limited,
 308, Dev Arc Mall,
 Opposite Big Bazar, SG Highway,
 Ahmedabad – 380 015 (Gujarat).
(PAN : AABCG9645H)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Mayank Patawari, CA
 REVENUE BY : Md. Gayasuddin Ansari, Senior DR
 Shri J.K. Mishra, CIT DR

Date of Hearing : 21.07.2022
 Date of Order : .07.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

ITA NOS.9513, 9514, 9515 & 9516/DEL/2019

These are all appeals by the Revenue against the respective orders of the ld. CIT (Appeals).

2. The grounds of appeal are common except for change in figures.

For the sake of reference, we are referring to ITA No.9513/Del/2019 and the grounds of appeal taken by the Revenue read as under :-

“1. On facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting the additions on account of Sales Tax Subsidy of Rs.12,74,46,480/-, Excise Duty incentive of Rs.7,90,94,513/- and Debenture redemption Reserve of Rs.4,50,00,000/- made for the purpose of income computation u/s 115JB following the decision of Hon'ble ITAT in the case of

the assessee for A.Yr. 2006-07 when the decision of Hon'ble IT AT has been challenged and is under the consideration of Hon'ble High Court.

2. On facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting the additions on account of Sales Tax Subsidy of Rs.12,74,46,480/- and Excise Duty incentive of RS.7,90,94,513/- made for the purpose of income computation u/s 115JB in circumstances when these receipts have been received after commencement of production and are of revenue character and therefore have to be taxed accordingly as observed by Hon'ble Supreme Court in the case of Sahney Steel and Press Works Ltd. Vs CIT [228 ITR 253 (SC)], CIT Vs Bhushan Steel & Strips 3981TR 216 (Delhi) and CIT Vs Raasi Cements 351 ITR 169 (AP).

3. On facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting the additions on account of Sales Tax Subsidy of Rs.12,74,46,480/- and Excise Duty incentive of Rs.7,90,94,513/- made for the purpose of income computation u/s 115JB in the circumstances when these receipts are of revenue character when examined from the angle of purpose test as observed by Hon'ble Supreme Court in the case of CIT Vs. Ponni Sugars & Chemicals Ltd. [306 ITR 392 (SC)].

4. On facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting the addition of Rs.4,50,00,000/- on account of Debenture redemption Reserve in circumstances when the said amount is an appropriation towards reserve and therefore the same is to be added to the income of the assessee for computation of income for the purposes of Section 115J B as per provisions of I.T. Act.”

3. Brief facts of the case are that the assessee company filed its return of income for AY 2007-08 declaring loss of Rs.18,80,00,836/-. The income was assessed under section 143 (3) of the Income-tax Act, 1961 (for short ‘the Act’) at Rs.5,54,93,353/-. The ld. CIT (A) passed order on

28.10.2013. The order u/s 250 of the Act was passed on 10.12.2013 and the effect was given and income was revised to loss of Rs.18,80,00,836/-. The order u/s 154 of the Act was passed by the AO on 22.03.2016 calculating the book profit of Rs.9,28,81,324/-. In the order u/s 154, AO noted that assessee had shown net profit of Rs.10,71,44,263/- but had not shown any tax liability u/s 115JB of the Act and no tax was received under MAT. AO further noted that assessee had adjusted against profit, Debt Redemption Reserve of Rs.4,50,00,000/-. The income was assessed u/s 143(3) of the Act on 29.12.2009 for Rs.5,54,93,353/- after disallowing sales tax subsidy income credited as income in P&L account being capital receipts and treating the same as revenue receipts and central excise rebate refund. That further in the assessment year, claim of adjustment of Rs.4,50,00,000/- on account of Debt Redemption Reserve was disallowed provisionally while computing book profit. Finally, the AO held as under:-

“ After taking necessary approval, a notice u/s 154 was issued on the assessee specifying the mistake that is proposed to be rectified. The assessee submitted its reply, in which it relied on the observation of Ld CIT(A) with respect to an order of AY 2012-13. The reply of the assessee was considered and not found tenable.

The scrutiny of the records revealed as per profit and loss account the profit before tax (PBT) of the assessee company was Rs. 10,71,44,263 /-. It was observed the adjustment relating

to sales tax incentive subsidy income and excise rebate refund does not fall in any category of adjustment provided u/s 115t~.of the Act. Thus the book profit was required to be taken at Rs. 9,28,81,324/-, while assessing income u/s 115JB of the Act in the assessment order, which was not done.

The figure is arrived as :-

Particulars	Amount
Balance of profit carried to B/S	4,74,66,697
Add: Debt Redemption Fund	4,50,00,000
Add: Fringe Benefit Tax	4,14,627
Book Profit	9,28,81,324

At the time of giving appeal effect the tax was should have been levied on the book profit of Rs.9,28,81,324/- u/s 115JB of the Act.”

4. Against the above order, assessee appealed before the Id. CIT (A).

Ld. CIT(A) summarized the facts as under :-

“I have examined the facts and circumstances of the case, I have considered the finding of the AO in the assessment order and submission filed by the appellant made during appellate proceedings. The AO has noted that the appellant company filed its return of income for A.Y. 2007-08 on 24/07/2007 declaring loss of Rs. 18,80,00,836/-. The assessee had not shown any tax liability u/ s 115JB of the Act and not tax was offered under MAT. It had not offered any tax under MAT after adjusting the sales tax incentive subsidy income of Rs.12,74,46,480/- and Debt Redemption Reserve of Rs.4,50,00,000/-, from the Net Profit of Rs.9,28,81,324/-. The AO took the book profit of Rs.9,28,81,324/- while computing income u/s 115JB. According order u/s 154 of the Act was passed and tax was calculated on MAT on Book Profit.”

5. Ld. CIT (A) thereafter noted that ITAT, Ahmedabad in assessee’s own case for AY 2006-07 vide order dated 11.05.2016, on identical facts,

has decided in favour of the assessee and Id. CIT (A) quoted the relevant finding of the ITAT as under :-

“The relevant material facts, as culled out from material on record, are like this. The assessee before us is a company engaged in the business of manufacturing of CTVs, PCBs, and Washing Machines etc. During the course of the scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has claimed an amount of Rs. 4,36,57,867/- as capital subsidy received by way of sales tax benefit under the scheme of the Gujarat Government, and Rs. 3,21,35,417/- as excise duty benefit under the scheme of the Government of India. As the Assessing Officer noted, these amounts being notional, assessee had claimed the same in computation of income % In response to the questions put by the Assessing Officer, during the course of the assessment proceedings, it was explained by the assessee that the assessee was granted sales tax benefit for setting up the unit in the district of Kutch, and this benefit was in the sense that nether the assessee has paid any sales tax on purchases nor charged any sales tax to its customers. The claim of the assessee was that there is a notional subsidy element in built in the revenue received and that is really the subsidy received by it in respect of sales tax. As for the Central Excise Subsidy granted by the Government of India, the assessee was to charge full excise duty on sales invoices, adjusted the CENVAT credit available to it on purchase, and was required to pay the balance through the PLA. Subsequently, the amount actually paid, through PLA, was refunded to the subsidy. The assessee disclosed these refunds in the profit and loss account as capital receipts. The Assessing Officer noted the facts, as set out above, as also the assessee reliance on several judicial precedents, including Special Bench decision of this Tribunal in the case of DCIT Vs Reliance Industries Ltd [(2004) 88 ITD 273 (SBI)], decision dated 29th August 2008 in the case of sister concern by the name of Genus Overseas Limited, Jaipur, Ratna Sugar Mills Co Ltd Vs CIT (33 ITR 644), CIT Vs Chitra Kalp (2771TR 540) and CIT vs. Ponni Sugar & Chemicals Ltd (306 ITR 392). He then noted that weather a subsidy is capital receipt of revenue receipt is a vexed question and it has no easy

answer. He further expressed the view that whether a subsidy is to be treated as capital receipt or revenue receipt will depend upon the purpose intent and nature of scheme and benefit received under it by the recipient % he then referred to the decision of Hon'ble supreme court in the case of Sahney Steel and press works Ltd Vs CIT (228 ITR 253). He then concluded that there is no doubt that if an incentive is granted after the commencement of production by the industry, then it will be of revenue nature% Referring to Ponni Sugar & Chemicals decision (Supra) by Hon'ble Supreme Court, the Assessing Officer Opined that Subsidy can be capital if it has obligation on the part of the recipient to utilize it wither to expand its capital structure or towards acquisition of the same or repayment of its capital liability only%. He inferred that, if there is no such stipulation and the assessee is free to use the money in its business entirely as he likes it, it will be of revenue nature%. The Assessing Officer noted that the sales tax benefit in given to the assessee only after commencement of production, that the assessee is under no stipulation to apply the incentive amount towards repayment of capital asset- unlike in the case of Ponni Sugar, that the nature of assistance was for trade and that in effect sales tax subsidy reduced the cost and increased the profits of the assessee, and that, for all these reasons, the sales tax subsidy is required to be treated as revenue in nature. As regard central Excise Duty refund, the Assessing Officer noted that the rebate / refund is available on the for the period which is reckoned from the date of commencement of commercial production, that there is no stipulation on how to use the refunds so receive, and that, in view of this factual position and earlier discussions on legal position, this subsidy is also required to be treated as a revenue receipt. It was in this backdrop that the additions of Rs.4,36,57,867 in respect of sales tax subsidy and Rs.3,21,35,417 for excise duty subsidy were made to the income returned by the assessee. Aggrieved, assessee carried the matter in appeal before the CIT (A). Learned CIT (A) line of reasoning was as follows:

“On merits of the issue, I have carefully considered the submission of the learned counsel and also considered

the findings of the Assessing Officer. The subsidy/sales tax incentive was available to the appellant for establishing the industries unit in the Kutch district of Gujarat. The incentive scheme was formulated vide resolution Ni INC-10200-903-1 dated 09.11.2001 of industries of mines department government of Gujarat. In the preamble itself it was stated that 'The economic activities in the district of Kutch came to a standstill on account of the devastating earthquake in the state on 28th January 2001; New employment opportunities could be created. If new investment takes place, the government is committed to attracting industries in the district to make the industrial and economic environment live. Government of India has announced excise duty exemption for new industries to promote large scale investment in the district along with which the state Government has also decided to announce the scheme of sales tax incentives. Since the scheme is aimed at making the economic environment of Kutch district live, it has been decided to confine the same only to Kutch district. The appellant company is availing the benefit of scheme by not paying sales tax on purchases, while on sales, company is collecting sales tax on sales made and the same is carried under the head direct income under the profit and loss account of the company. It is evident from the preamble of the scheme that the incentives were given to entrepreneurs to attract the large-scale investment to generate new employment and for making the economic environment of Kutch district live. Thus, neither the incentives were given for meeting the cost of the investment nor were given for assisting the appellant in carrying out the business operations. Thus, neither the incentives were given for assisting the appellant in carrying out the business operations. Thus, the subsidy in the form of exemption from the liability to pay sales tax is on capital account and not on revenue account.

The facts of the appellant's case are similar. It is evident from the scheme itself that the sales tax subsidy/incentives were

not given to the appellant for assisting it is carrying out the business operations. The objects of the subsidy were to encourage large scale investment by attracting entrepreneurs for setting up of industries in the notified area of Kutch district where the economic activities came to a standstill on account of the devastating earthquake in the state on 26th January, 2001. The scheme was formulated and the incentives were given to entrepreneurs to attract the large-scale investment to generate new employment and for making the economic environment of Kutch district of Gujarat before the specified date as per the scheme of incentive. The limit of the incentive was fixed. The appellant's case is covered by the decision of Hon'ble special bench of Mumbai tribunal in the case of DCIT vs. Reliance industries Ltd. 88 ITO 273 (Mum. (SB) as realised on by the learned counsel. The Hon'ble special bench of Mumbai tribunal head relied on the decision of the Hon'ble madras High Court in the case of Ponni Sugars & Chemicals Ltd. 260 ITR 605 (MAD). This decision was later on affirmed by the Hon'ble Supreme Court in the case of CIT vs. Ponni Sugars & Chemicals Ltd. 306 ITR 392 (SC) by holding that the character of the receipt in the hands of the appellant has to be determined with respect to the purpose for which the subsidy is given. In other works, in such cases one has to apply 'Purpose test'. The point of time when the subsidy is paid is not relevant. The source is immaterial and the form of subsidy is also immaterial. It is evident from the incentive scheme itself that the purpose of the scheme was to attract the large scheme investment to generate new employment and for talking the economic environment of Kutch district live. In view of the above judicial decision and considering the facts of the case and also relying on the decision of the jurisdictional bench of ITAT in the case of ACIT Vs. Birla VXL Ltd. (ITA/247-249/Rajkot/2011), I am of the considered opinion that the sales tax incentives of Rs.43657867/- and Excise duty incentive of Rs.32135417/- received by the appellant were in the nature of capital receipts and thus were not chargeable to tax. The AO is directed to delete the above additions. The grounds of appeal are accordingly allowed.

We find that so far as the Special Bench decision of this Tribunal in the case of Reliance Industries (Supra) is concerned, it still holds the field. All that has happened, as a result of Hon'ble Supreme Court's decision dated 9th September 2011, is that Hon'ble Bombay High Court has now admitted the question "whether, on the facts and circumstances of the cases, the Hon'ble Tribunal was right in holding that sales tax exemption was a capital receipt %and will, in due course though, adjudicate on this legal issue. To that extent, Hon'ble Bombay High Court's order dated is" April 2009, to the extent of declining to admit this question, Stands reversed. However, the decision of the Special Bench still holds good as the same has not, and at least not yet, even been examined by Hon'ble Bombay High Court. Mere admission of appeal against a decision, as is elementary, does not affect the binding nature of a judicial precedent. The Special Bench decision, in the case of Reliance Industries Ltd (Supra), was not reversed by Hon'ble Supreme Court, but was directed to be examined, on merits, by Hon'ble Bombay High Court. That is quite different from disapproving the special bench decision, but it appears that the coordinate bench was led to believe, and there could not have been any other reason for ignoring the special bench decision, that this Special Bench decision is reversed. That is patently incorrect, and when we pointed it out to the learned Commissioner (DR), he did not have much to say except to rely upon the coordinate bench decision which seems to have followed that approach. The coordinate bench, in the case of Jindal Steel (Supra), did indeed travel much beyond its limited mandate in ignoring a binding judicial precedent simply because appeal against that special bench decision is now pending before Hon'ble Bombay High Court. When posed with a special bench decision and a division bench directly on the issue, though touching different chords, we have no difficulty in recognizing our limitations. The wisdom of a division bench, even if superior- as strenuously argued by the learned Commissioner, has to make way for the higher wisdom of a larger bench. It is this faith of judicial hierarchical system that is the strength of our functioning, and we must follow the same. We, therefore, regret our inability to follow the division bench in the case of Jindal Power, no matter how deeply we respect

and admire the work of all our colleagues, and we would rather be guided by the special bench decision which is exactly what another division bench, on the same set of facts as before us, did in the case of Ajanta Manufacturing Ltd (Supra). As for learned Commissioner (DR) suggestion that we should follow the jurisdictional High Court decision in the case off Colourman Dyechem (Supra), we find that Their Lordship, in this case, were dealing with an entirely different type of subsidy which was clearly dealing with an expansion situation. However, we would rather refrain from making any further detailed observation on this issue, as we are alive to the fact that Hon'ble jurisdictional High Court, in Tax Appeal No 358 of 2012, has admitted appeal against the decision of this Tribunal in Ajanta case (Supra) and all these issues will now came up for consideration of their Lordships. The fact that appeal is admitted does not, as we have stated earlier as well, done not affect the binding nature of the judicial precedents. There is no dispute before us the schemes under which the sales tax and excise duty are given to this assess are the same as in the case of Ajanta Manufacturing Ltd (Supra). All the material facts being the same, there is no reason to take any other view of the matter than the view so taken by the Coordinate Bench. We must, therefore, uphold the conclusions arrived at by the Commissioner (Appeals), which are in consonance with the Special Bench decision in the case of Reliance Industries (Supra) and coordinate bench decision in the case of Ajanta Manufacturing Ltd (Supra), and decline to interfere in the matter.

During the course of the scrutiny assessment proceedings, the adjustment for debt redemption fund, at Rs. 2.50 crores, was declined with a short observation that debt redemption fund of Rs. 2.50 crores is an appropriation for purpose of creating a reserve and is a below the line adjustment, it does not fall in my category of the adjustment provided under section 115 JB % Learned CIT(A) confirmed the same on the same basis and rejected assessee's stand that it is covered by the Hon'ble Bombay High Court's judgment in the case of CIT vs. Raymonds Ltd [21 taxman.com 80]. It was held that the purpose of debt redemption reserves creation of a reserve and is

not a permissible adjustment. The assessee is aggrieved and is in appeal before us.

Having heard the rival contentions and having perused the material on record, we find that the issue is indeed covered by the decision of Hon'ble Bombay High Court, in the case of CIT Vs Raymond's Ltd [(2012) 71 DTR 265 (Born)] wherein Their lordships have inter alia observed as follow:

Re question (a): Section 115JA of the Income Tax Act 1981 provides in subsection (2) that every assessee being a company shall for the purpose of the section prepare its profit and loss account for the relevant previous year in accordance with the provisions of parts II and III of Schedule VI to the Companies Act 1956. The explanation to the section provides that for the purpose of the section, 'book profit' means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-Section (2) as increased inter alia by (b) the amounts carried to any reserves by whatever name called". Part III of Schedule VI to the Companies Act 1958 provides inter alia in Clause 7(1) (b) that "that expression "reserve" shall not include any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets or retained by way of providing for any known liability."

The nature of a Debenture Redemption Reserve (DRR) has been considered by the judgment of the Supreme Court in Notional Rayon Corporation Ltd. Vs. Commissioner of Income Tax {(1997) 2271TR 764}. The Supreme Court after adverting to the provision of Clause 7 of Part III Schedule VI of the Companies Act, 1956 held that "the basic principle is that an amount set apart to meet a known liability cannot be regarded as reserve". Where a company issues debenture, the liability to repay arises the moment the money is borrowed. By issuing debentures a company takes a loan against the security of its assets. Though the loan may not be repayable in the year of account, the obligation to repay is a present obligation. Hence any money set apart in the accounts of the company to redeem

the debenture has to be treated as monies set apart to meet a known liability. Consequently, debentures have to be shown in the balance sheet of a company as a liability. Being monies set apart to meet a known liability, a Debenture Redemption Reserve cannot be regarded as a reserve for the purpose of Schedule VI to the Companies Act, 1956. In National Rayon Corporation, the Supreme Court followed its earlier decision in Vazir Sulton Tabacco Co. Ltd. Vs. CIT {(1981) 132 ITR 559}, in holding that since the concept of a provision is well known in commercial accountancy and is used in the Companies Act, 1956, while dealing with the preparation of balance sheets and profit and loss accounts the meaning of that concept would have to be gathered from the meaning attached in the Companies Act itself. The following observations of the Supreme Court are of significance:

“The debentures were nothing but secured loans. Merely because the debentures were not redeemable during the accounting period the liability to redeem the debentures did not cease to exist. It was redeemable or repayable at a future date. But it was a known liability. In the form of balance sheet prescribed by the Act in schedule VI, the secured loans have to be shown under the heading “liabilities”. Secured loans include (1) debentures, (2) loans and advances from banks, (3) loans and advances from subsidiaries, and (4) other loans and advances. The secured loans might not be immediately repayable, but the liability to repay these loans is an existing liability and has to be shown in the company's balance sheet for the relevant year of account as a liability. Amounts set apart to pay these loans cannot be “reserve”. The interpretation clause of the balance sheet in Schedule VI of the Companies Act specifically lays down that reserves shall not include any amount written off or retained by way of providing for a known liability.”

The mere fact that a Debenture Redemption Reserve is labelled as a reserve will not render it as a reserve in the true sense or meaning of that concept. An amount which is retained by way of providing for a known liability is not a reserve.

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Consequently, the Tribunal was correct in holding that the amount which was set apart as a Debenture Redemption Reserve is not a reserve within the meaning of Explanation (b) to Section 115JA of the Income Tax Act, 1961.

On merits, we find that this issue is squarely covered, in favour of the assessee, by coordinate bench decision in the case of ACIT Vs Shree Cements Ltd (ITA No 614, 615 and 635/jpr/2010; order dated 9th September 2011), and no judicial precedent to the contrary has been brought to our notice. There were no specific arguments of the revenue on this issue. We, therefore, uphold this plea of the assessee as well, and direct the Assessing Officer to grant the relief accordingly.”

6. Ld. CIT (A) further noted that on identical facts for AY 2012-13 on the issue of addition of Rs.2,83,98,056/- in the book profit u/s 115JB of the Act regarding Sale Tax Incentive, following has been held :-

“7.3 I have carefully considered the facts of the case, the assessment order and the written submission of the appellant It is noted that the similar issue has been decided by me in the case of the appellant for the A. y. 2009-10 in appeal no.CIT(A)-2/DC/T Circle-4/406/13-14 dated 12/12/2014. For the sake of clarity the findings given by me in para 7.3 are reproduced as under-

“It is noted that the issue regarding treatment of sales tax subsidy has been decided by me in favour of the appellant and the AO has been directed to treat the same as capital receipt. Since, the subsidy has been treated as capital receipt, there is no question of adding the same to the regular income as well as the income under section 115JB of the Act for computation of book profit.

The ground of appeal is accordingly allowed.:

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As the facts are similar, following the finding given by me in earlier assessment year, the addition made by the AO of Rs.2,83,98,056/- in the book profit u/s 115JB on account of Sales Tax Incentive is directed to be deleted.”

7. Finally, the Id. CIT (A) concluded as under :-

“11. Considering the above decision of Hon'ble ITAT in appellant's own case, I find that sales tax incentives subsidy of Rs.12,74,46,480/- and Excise duty incentive of Rs.79094513/- received by the appellant were in the nature of capital receipts and thus not chargeable to tax as regular income as well as income u/ s 115JB of the Act, for computation of book profit. Further, it is noted that a Debenture Redemption Reserve labeled as a reserve will not render it as a reserve in the true sense or meaning of that concept. An amount which is returned by way of providing for a known liability is not a reserve. Consequently, the amount which was set apart as a Debenture Redemption Reserve is not a reserve within the meaning of Explanation (b) of Section 115JA of the Act.

12. In view of the above discussion, I find that the addition of made by the AO on account of sales Tax incentive subsidy of Rs.12,74,46,480/ - , Excise duty incentive of Rs.79094513/ - and Debenture Redemption Reserve of Rs.4,50,00,000/- to the Book Profit under section 115JB of the Act is held to be unjustified. The AO is directed to grant relief to the appellant.”

8. Against the above order, Revenue is in appeal before us. We have heard both the parties and perused the records.

9. We note that Revenue does not dispute that the issue is covered in favour of the assessee in assessee's own case for AY 2006-07, however it

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has been claimed that the decision of ITAT is under challenged before the Hon'ble High Court. In our considered opinion, this cannot be a reason to stand depart from the decision of coordinate Bench. Hence, following the aforesaid decision of ITAT in assessee's own case, we uphold the order of ld. CIT(A).

10. For other assessments years i.e. ITA Nos.9514, 9515 & 9516/Del/2019 for AYs 2008-09, 2009-10 & 2010-11 respectively, except for the change in figures, the grounds raised in other matters are identical. The orders of authorities below are also on similar lines, hence our above order applies *mutatis mutandis* to all these appeals. Hence the Revenue's appeals stand dismissed.

11. In the result, all the four appeals filed by the Revenue are dismissed.

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12. All the aforesaid three appeals relate to the same assessee i.e. Genus Electrotech Ltd. also for the AY 2007-08.

13. ITA No.1136/Del/2012 is the appeal filed by the assessee against the order of ld. CIT wherein following grounds have been raised :-

“1. On the facts and circumstances of the case, the Ld. CIT erred in passing order u/s 263 thereby set aside the assessment order dated 29.12.2009 passed by assessing officer.

2. On the facts and circumstances of the case, the Ld. CIT erred in directing the AO to make enquiry as to whether sales tax incentive amounting to Rs.12.74 crore had been capitalized in the books of accounts for the purpose of depreciation or not, completely disregarding the fact that the sales tax incentive had been credited in profit & loss account had never been capitalized in books of accounts. Thus the said direction by commissioner is wrong and unjustified.

3. On the facts and circumstances of the case, the Ld. CIT erred in invoking section 263 for adjustment of the unabsorbed business loss & depreciation of Rs.4.11 crore from business income completely ignoring the fact that the same error was not prejudicial to the interest of the revenue rather the error was prejudicial to interest of assessee for which appellant has filed petition u/s 154. Therefore basic conditions for invocation of power u/s 263 had not been fulfilled.”

14. Consequent to the aforesaid 263 order, AO passed the order which traveled to ld. CIT (A). Ld. CIT (A) decided the issue in favour of the assessee against which Revenue has filed appeal i.e. ITA No.1830/Ahd/2015. The ground raised in this regard is as under :-

“The ld. CIT (A) has erred in law and on facts in deleting the disallowance of Rs.1,91,17,002/- made by the AO on account of depreciation.”

15. AO while giving effect to ld. CIT (A)'s order dated 25.03.2015 has passed an order. The assessee was not satisfied. Assessee appealed

before the Id. CIT (A). Ld. CIT(A) passed the order against which assessee has preferred appeal before us in ITA No.2418/Ahd/2017. The grounds raised in this regard read as under:-

“1. On the facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming action of AO in not allowing Sales Tax Incentive of Rs.12,74,46,680/- and Excise Duty Refund of Rs.7,90,94,513/- from the computation of book profit under MAT (u/s 115JB).

2. On the facts and circumstances of the case and in law, CIT(A) erred in not adjudicating the fact that AO has gone beyond the direction while giving appeal effect to the order of CIT(A) dated 25.03.2015.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in adjudicating on the facts which were not the subject matter of appeal before CIT(A).

4. On the facts and circumstances of the case and in law, the Ld.CIT was erred in ignoring the fact that AO after considering Return of Income of assessee, chose not to add back amount of sales tax subsidy and excise subsidy in computation of book profit under section 115JB in assessment u/s 143(3).”

16. First we note that in ITA No.2418/Ahd/2017, assessee has raised a ground which is identical to the one raised by the Revenue in ITA No.9513/Del/2019 for AY 2007-08 dealt with by us herein above. On the same reasoning, we set aside the order of Id. CIT (A) and decided the issue in favour of the assessee. Hence, ITA No.2418/Ahd./2017 is decided in favour of the assessee.

17. In ITA No.1136/Ahd./2012, assessee has appealed against the order passed u/s 263 of the Act. When the AO gave effect to this order the assessee filed appeal before the Id. CIT. Ld. CIT in ITA No.1830/Ahd./2015 has dealt with the issue as under :-

“I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The appellant has set up a manufacturing plant in Kutch area of the state of Gujarat. As per the schemes of the government, the appellant was getting sales tax incentive/subsidy. The appellant treated the subsidy as capital receipt for A. Y. 2007 - 08. The AO held that the proportionate depreciation at the rate of 15% of the subsidy of Rs.12.74 crores should also be disallowed as the cost of the asset acquired by the appellant has been met directly or indirectly by this Central or state government or any authority in the form of subsidy. The AO accordingly made a disallowance of Rs. 1.91 crores on account of depreciation.

The appellant on the other hand has submitted that the subsidy was not given towards any capital asset, but it was given as incentive scheme for creating new employment opportunities in the area. It was to recruit minimum 85% of .he total post from the local area and minimum 60% of the managerial and supervisory posts also from the local area. The unit will have to invest the amount equivalent to 50% of the sales tax incentive availed in the new project in the state within a period of 10 years from the commencement of commercial production. It has, therefore, been submitted by the appellant that the subsidy was not given to meet the fixed cost of investment and, therefore, the provisions of section 43(1) were not applicable. The appellant has also placed reliance on the judgment of honourable Supreme Court in the case of P J Chemicals 210 ITR 830. It has also relied on the judgment of Gujarat High Court in the case of Ellora Times in ITA number 245 of 2010.

On a careful consideration of entire facts of the case, it is noted that the incentive was not given to meet the fixed costs of investment. The terms and conditions of the incentive scheme clearly laid down that the objective of the scheme was for creating new employment opportunities through new industries. There is no condition in the scheme, a copy of which has also been given by the appellant that the subsidy provided by it in the form of sales tax would be for meeting out the cost of assets. The provisions of explanation 10 to section 43(1) states that where a portion of cost of an asset acquired by the appellant/assessee has been met directly or indirectly by Central Government or a State Government, in the form of subsidy or reimbursement than so much of the cost should not be included in the cost of fixed assets. The scheme, under which the appellant is getting benefit, is clear that the subsidy is not meant for any particular asset? and, therefore, these provisions of explanation 10 would not be applicable in the case of the appellant.

The appellant has rightly placed reliance on the judgment of honourable Supreme Court In the Case of P J Chemicals (supra), in which it has been held that if the subsidy is not given for a specific purpose of meeting a portion of the cost of asset, it does not partake the character of payment intended either directly or indirectly to meet the 'actual cost'. Further honourable Gujarat High Court in the case of Ellora Times (supra) has also held, on similar facts as in the present case, that the sales tax incentive was granted by the state government during the year and was not for acquisition of the Wind Mills (the machineries purchased by the appellant in that case) but for the development of wind farm by way of alternative source of energy. The similar decision has been given by the honourable ITAT Rajkot bench in the case of Ajanta Manufacturing Ltd (supra). In that case, the industry was set up in the similar scheme as that of the appellant and the sales tax/excise incentives were held to be capital receipt. In another case which is also been relied by the appellant and decided by honourable High Court of Delhi in the case of Indo Rama Synthetics India Ltd (supra), it was held that the subsidy receipt for encouraging investment in backward area, even if computed with reference

to cost of investment in fixed assets, will not be reduced from the cost of assets by applying the provisions of section 43. The honourable High Court approved the decision of ITAT Hyderabad bench, in which it was held that the payment of subsidy was not related to the actual acquisition of assets.

In the present case there is no link of the subsidy received with the cost of purchase of assets. The appellant has been getting the subsidy with reference to the sales made by it and the sales tax benefit is given. The appellant has purchased the machinery and nowhere subsidy is linked to those cost of acquisition. Therefore, in my considered opinion the cost of acquisition of the assets on which the appellant has claimed depreciation is not to be reduced on account of subsidy received by the appellant. The disallowance made by the AO is, therefore, directed to be deleted.”

18. Against this order, Revenue is in appeal before us. We note that the crux of the issue involved is that the sales-tax subsidy which has been treated as capital receipt on the direction of Id. CIT u/s 263 has been attributable to be relatable to the assets acquired and accordingly, depreciation against the so-called capital subsidy purchased as such has been denied. The Id. CITA's order in this regard is quite appropriate as he has held that subsidy is given with reference to sales made and sale-tax benefit is given. Subsidy nowhere linked to cost of acquisition of the assets, hence there is no reason to make any deduction from the depreciation claimed. We find that the above reasoning is quite in consonance with the order of ITAT in this regard on the basis of which we have disposed off ITA Nos.9513, 9514, 9515 & 9516/Del/2019 as

ITA No.9513 to 9516/Del./2019
ITA No.2418/Ahd./2017
ITA No.1136/Ahd./2012
ITA No.1830/Ahd./2015

above. In the said decision, ITAT had categorically held that the same was a capital receipt and it had upheld the order of Id. CIT (A) and no view was expressed that the same is linked to capital assets acquisition, hence question of deduction in depreciation does not arise.

19. In view of our aforesaid discussion, we set aside the Revenue's appeal (ITA No.1830/Ahd./2015) and allow the assessee's appeal (ITA No.1136/Del/2012 in this regard.

Order pronounced in the open court on this 4th day of August, 2022.

Sd/-
(YOGESH KUMAR US)
JUDICIAL MEMBER

sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Dated the 4th day of Aug., 2022
TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.