

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'G' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&**

SHRI M.BALAGANESH, ACCOUNTANT MEMBER

**ITA No.1892/Mum/2019
(Assessment Year :2015-16)**

M/s. Serveall Construction Pvt. Ltd. Dewan Tower, Navghar, Vasai Road Vasai (W) Thane- 401 202	Vs.	Dy. Commissioner of Income Tax Central Circle 5(4) Room No.1927, 19 th Floor Air India Building Nariman Point Mumbai – 400 021
PAN/GIR No.AADCS4763Q		
(Appellant)	..	(Respondent)

Assessee by	None
Revenue by	Shri H.K. Lal
Date of Hearing	03/01/2023
Date of Pronouncement	06/01/2023

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No.1892/Mum/2019 for A.Y.2015-16 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-53, Mumbai in appeal No.CIT(A)-53/DCCC-5(4)/IT-421/2017-18 dated 28/01/2019 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act)

dated 08/12/2017 by the Id. Dy. Commissioner of Income Tax Central Circle 5(4), Mumbai (hereinafter referred to as Id. AO).

2. At the outset, we find that this case could not be heard due to continuous adjournment sought from the side of the assessee on the ground that the promoter of the assessee company is under judicial custody. Obviously, the assessee company being a private limited company would be having other Directors also to take care of the affairs of the company and more so, the issues to be resolved before the regulatory authorities. In view of the continuous non-cooperation from the side of the assessee, we deem it fit to dispose of this appeal by hearing the Id. DR and based on the materials available on record.

3. The assessee has raised the following grounds of appeal:-

“Following grounds of appeal are without prejudice to each other:

1) The Learned CIT (A) has erred in law & on facts in upholding the Learned AC's action of making addition of Rs. 15,38,414/- u/s 14A rwr 8D of the Income Tax Act, 1961

2) The Learned CIT (A) has erred in law & on facts in upholding the Learned AC's action of adding of Rs. 15,38,414/-in computing Income from Business & Profession u/s 115JB of the IT Act, 1961 being disallowance made u/s 14A r. w. Rule 8D of the IT Act

3) The Learned CIT (A) has erred in law & on facts in upholding the Learned AOs action of adding debenture redemption reserve to the tune of Rs.36,00,00,000/-while computing book profit under section 115JB of the IT Act

4) The Learned CIT (A) has erred in law & on facts in upholding the Learned AO's action of disallowing Rs.10,05,28,048/- being interest expenses u/s 43B of the IT Act and reducing the same from Work-In-Progress as on 31-03-2015.

5) *The Learned CIT (A) has erred in law & on facts in upholding the Learned AO's action of imposing interest under Section 234B & 234C of the Income Tax Act 1961*

6) *The Appellant craves leave to add to and/ or amend and/ or delete and/ or modify and/ or alter the aforesaid grounds of appeal as and when the occasion demands*

7) *All the aforesaid grounds of appeal are independent, in the alternative and without prejudice to one another.”*

4. The ground Nos. 1 & 2 raised by the assessee are challenging the disallowance made u/s.14A of the Act under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act.

4.1. We have heard Id. DR and perused the materials available on record. It is not in dispute that the assessee had not earned any exempt income. The Id. AO by applying the computation mechanism provided under Rule 8D (2) of the Income Tax Rules made disallowance of Rs.15,38,414/- both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act. In fact the Id. AO had arrived at the disallowance of Rs.75,62,760/- but restricted the same to the total expenses claimed in the profit and loss account by the assessee in the sum of Rs.15,38,414/-. The issue to be decided herein is whether the disallowance u/s.14A of the Act would at all come into operation in the absence of any exempt income. This issue is no longer *res integra* in view of the decision of the Hon'ble Supreme Court in the case of Maxopp Investments reported in 402 ITR 640 wherein it was held that disallowance u/s.14A of the Act could not be made in the absence of any exempt income. We find that the provisions of Section 14A of the Act had been amended by the Finance Act 2022 w.e.f. 01/04/2022 by way of insertion of an Explanation which reads as under:-

“[Explanation-For the removal of doubts, it is hereby clarified that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income”]

4.2. This explanation has been held to be operative prospectively from A.Y.2022-23 onwards as per the Explanatory Memorandum to the Finance Act as well as the decision of the Hon'ble Delhi High Court in the case of PCIT Central vs. Era Infrastructure India Ltd. reported in 288 Taxman 384 (Del). In view of the aforesaid judicial precedents, the ground Nos. 1 & 2 raised by the assessee are hereby allowed.

5. The ground No.3 raised by the assessee is challenging the addition of debenture redemption reserve to the tune of Rs.36 Crores while computing book profits u/s.115JB of the Act.

5.1. We have heard Id. DR and perused the materials available on record. We find that in the return of income, the assessee has shown book profit u/s.115JB of the Act at Rs.Nil after deducting Debenture Redemption Reserve of Rs.36 Crores from the net profit as per profit and loss account of Rs.35.81 Crores. In the opinion of the assessee, the said Debenture Redemption Reserve of Rs.36 Crores represent provision made for ascertained liability and not reserve as it is not in the nature of charge against profit but merely appropriation of profit and hence, deductible while computing book profit u/s.115JB of the Act. We find that the Id. CIT(A) had addressed this issue by observing as under:-

6.11 I have considered the facts and submissions carefully. First the facts are noted. The Profit and loss statement of the appellant as seen from the published audited accounts is as follows

Total Revenue	35,92,96,997
Total Expenses	15,38,414/-
Profit before tax	35,77,58,583

Current Tax	0
Deferred tax charge	(3 88,461)
Profit for the year	35,81,47,044

The balance sheet shows the following

Share Capital	10,00,000
Reserves and surplus	36,54,41,299/-

The **notes to financial statements** shows the following

Debenture Redemption Reserve	
Opening Balance	0

Add Transferred from statement

of Profit and Loss	36,00,00,000/-
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Less: Transferred to general reserve 0

Closing balance	36,00,00,000
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Surplus in the Statement of Profit and Loss

Opening balance	73.29,019
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Add short provision for tax of earlier years

5829

Add: Net profit for the current year **35,81,47,044**

Less Transferred to Debenture

Redemption Reserve	36,00,00,000
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Less: Adj depreciation 40,593

Closing balance	54,41,299/-
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6.12 The **first point** that emerges for consideration is what is the "net profit as per Profit and Loss Account since section 115JB Explanation 1 defines "book profit" to mean "the net profit as shown in the profit and loss account". It is to this figure only that prescribed adjustments and no other

are permissible. It is clear from the details culled out from the audited accounts mentioned above that the net profit is Rs. 10,32,27,700. To this the provisions for tax has to be added. The items listed for deduction does not include "transfer to debenture reserves".

6.13. The appellant in its computation of income has considered the net profit as Rs. 10,32,,82,464/- (which is profit before tax) from which it has reduced Debenture Redemption Reserve of Rs 10,30,00,000/- This is not as per the literal reading of section 115JB.

*6.14. The **second point** is that there is another aspect of the issue. The reserve for redemption of debentures is in the nature of capital payment. This cannot be considered as charge for determination of profits in any recognized method of accounts. This aspect was considered by the Hon'ble ITAT Bangalore Bench as reported in [2010] 3 ITR (T) 151 (Bangalore) in the case of D.R. Ranka Charitable Trust & Director of Income-tax Exemptions). The relevant portion is reproduced below.*

"28. The next issue raised by the Revenue in its appeal is that the Commissioner of Income-tax (Appeals) is not justified in directing the Assessing Officer to recompute the book profits under section 115JB by deleting debenture redemption reserve of Rs 25 crores from the net profit.

29. In the account for the previous year relevant to the assessment year under appeal, the assessee-company had transferred a sum of Rs. 25 crores to debenture redemption reserve (DRR). While computing book profits for the purposes of section 115JB, the Assessing Officer held that this amount cannot be reduced from the book profits and accordingly he treated the said amount of Rs 25 crores as part of the taxable book profits. The contention of the assessee was that DRR was not in fact a reserve as contemplated in section 115JB for the reason that the amount was set aside by the assessee-company to meet an ascertained liability. The assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of National Rayon Corporation Ltd. v. CIT (1997) 227 ITR 764

30. The Commissioner of Income tax (Appeals) in the light of the above judgment and the explanation offered by the assessee held that the amount set apart by the assessee-company in fact is al provision and not a reserve. The Commissioner of Income tax (Appeals) found that the Hon'ble Supreme Court in the case of National Rayon Corporation Ltd. v. CIT 1997) 227 ITR 764 was in fact examining a very similar case where the amount was set apart for redemption of debenture just like the assessee. The court has held therein that the amount set apart to meet known liability cannot be regarded as reserve. Therefore, the Commissioner of Income-tax (Appeals)

excluded Rs. 25 crores from the computation of book profits under section 115JB

31. It is the case of the Revenue that the amount set apart to redeeming debentures is to be treated as a reserve. Accordingly the same is covered by clauses (b) and (c) of the Explanation to section 1150 and as such, the said amount is to be added to the net profit for computing book profit for the purpose of section 115JB of the Act.

32. The assessee has relied on the following decision to support its argument

(1) National Rayon Corporation Ltd. v. CIT (1997) 227 ITR Z04

(2) CIT. National Rayon Corporation 119861 160 ITR 716 (Bom)

(3) CIT v. Tube Investments of India Ltd. [1999] 153 CTR (Mad) 432.

33. We considered this issue very carefully. As per clause (c) of Explanation 1 to section 115JB, the amount or amounts set aside to the provision made for meeting liabilities other than ascertained liabilities are to be added to increase the book profits worked out by the assessee. Literally reading, it means provision made for meeting ascertained liabilities need not be added back to the book profits under section 115JB. It is on the basis of the above specific exclusion that the assessee-company has relied on various judgments to argue that the debenture redemption reserve is a provision made by the assessee-company to meet liabilities, i.e, redemption of debentures ascertained

34. From page 6 of the assessment order, it is clear that the assessee has computed the book profits on the basis of the profits transferred to the balance-sheet of the assessee-company, where the profit was reduced by debenture redemption reserve before transferring the profits to the balance-sheet. It means that the assessee has worked out the book profits for the purpose of section 115JB after deducting the amount set apart under debenture redemption reserve.

35. Now, while considering the expression "ascertained liabilities" we have to be very cautious. Ascertained liabilities may be of two types; one in capital nature and the other in revenue nature. The liability arising on capital accents cannot be charged to the profit and loss account to work out the net profit even under the provision of the Companies Act, 1956. Even under the Companies Act such deduction to not made from the net profits but as an appropriation of the profits. It will be therefore, usually such adjustments and transfers made in

the appropriation portion of the profit and loss account. If the provision made for ascertained liability is towards expenses and other revenue items, the same would be charged to the profit and loss count

36. Now coming to the specific context of section 115JB, even if the provision is made for ascertained liability the same cannot be deducted in computing the book profits the ascertained liabilities are in the nature of capital liabilities Even in the case of provision for ascertained liabilities, the deduction can be claimed only in respect of liabilities assumed for revenue expenditure. The fundamental distinction between capital and revenue in the context of computing the profits of an assessee, cannot be overlooked only for the reason that the expression used in the Explanation to section 115JB is the provision made for meeting ascertained liabilities in this context, it is necessary to find that the provision made for ascertained liabilities is provision relating to revenue expenditure.

37. In the present case, the debenture redemption reserve, even though in the nature of provision for ascertained liabilities, is in the capital account. When the debentures were issued and monies were collected by the assessee, the proceeds were not treated as income of the assessee-company. They were treated as loans, which always come in the category of capital liability. When the same capital loan is returned it would be a capital expenditure. So also the provision made for such repayment of debentures loan is capital in nature and not deductible in working out the net profits. Therefore, in the present case, even if the DRR set apart by the assessee company is the provision for ascertained liabilities, it cannot be deducted in computing book profits. This position is supported by clause (b) of Explanation I to section 115JB.

38. Therefore, in the facts and circumstances of the case, we find that the Commissioner of Income-tax (Appeals) has erred in allowing the assessee to deduct Rs. 25 crores from computation of book profits under section 115JB. We reverse the order of the Commissioner Income-tax (Appeals) on this point and restore the order of the Assessing Officer to add back the amount of Ra. 25 crores to the book profits of the assessee company

39. The issue accordingly decided in favour of the Revenue

6.15 The Hon'ble High Court of Delhi in the case of SREI INFRASTRUCTURE FINANCE LTD. ITA 371 & 372/2012 dated 13.2.2015 have considered this issue of computation of book profits u/s 115JB. It has considered the Supreme Court decisions in the case of National Rayon Corporation and Vazir Sultan Tobacco Company Ltd. and also noted the

distinction between charge on profits and appropriation of profits. The extracts from this judgement is reproduced below.

3. As noticed by this Court in Commissioner of Income Tax (Central) Vs. Goetze (India) Limited (2014) 361 ITR 505 (Del), Sub-section (1) to Section 115JB of the Act begins with a non obstante expression, which gives an overriding effect to the said section. Sub-section (2) states that every assessee being a company shall prepare a Profit and Loss account for the previous year in accordance with the of Part II and III of Schedule VI of the Act, 1956 Explanation to the said section in the first part refers to increase in book profit by amounts specified in sub paragraphs (a) to (g). Explanation in the second part states that the book profit shall be reduced under clause (i) to (iii). Thus, the book profits of the previous years preferred in accordance with the provisions of Part II and III of Schedule VI of the Companies Act, have to be decreased or increased as per the express mandate of the

Explanation Section 115.1B (2) of the Act

4. In the present case, we are concerned with clause(b) to Explanation 1 which states that book profit prepared in accordance with Part II and III of Schedule VI of the Companies Act, 1956 will be increased by the amount carried to any reserve by whatever name called, other than a reserve specified under Section 334C of the Act. The legislature in express, lucid and categorical terms has stipulated that the book profit shall be increased by the amounts carried to any reserve. The word "any", it is obvious, refers to all kinds of reserves and encompasses all types and categories without exception. The legislature did not stop and has thereafter used the expression "reserve by whatever name called". There could not have been more clarity and articulateness in the language of clause (b) to Explanation (1). The intention is unambiguous, i.e. book profit would include all amounts carried to any reserve by whatever name called, except the reserve specified under Section 33AC of the Act. The nature and type of reserve or its character would not affect operation of clause (b) to Explanation (1) Only reserves specified in Section 33AC of the Act have to be excluded. Guidance Note on revised Schedule VI to the Companies Act, 1956 by the Institute of Chartered Accountants of India would indicate that reserves and surplus are generally classified as; (a) capital reserve, (b) capital redemption reserve; (c) securities premium reserve; (d) debenture redemption reserve; and, (e) revaluation reserve or other reserves. In addition, there can be share options outstanding account and surplus, the balance in the statement of profit and loss disclosing allocations and appropriations such as dividend, bonus shares and transferred to/from reserves, etc.

5. *In view of the aforesaid legal position and language of clause (b) to Explanation (1) to Section 115JB of the Act, the appellant-assessee had adopted a different line of argument relying upon the decision of the Supreme Court in the case of National Rayon Corporation (supra) and Vazir Sultan Tobacco Company Ltd. (supra) and argued that the amounts "appropriated" under Section 45-IC of the Reserve Bank of India Act, 1934 are not a reserve. We record and express our inability to agree with the said contention for the reasons set out below.*

6. *In Vazir Sultan Tobacco Company Ltd. (supra), the Supreme Court was concerned with the Companies (Profits) Surtax Act, 1964 and it was observed that the terms "provision" and "reserve" were not defined in the said Act, but are well-known terms in commercial accountancy and are used in the Companies Act with reference to preparation of balance sheets and Profit and Loss account. It was held that if a sum of money had not been set apart for certain purpose, it would not be a "provision" but it did not follow that it would be a "reserve" Referring to Part I and II of the Schedule VI, it was observed that the expression "provision" has been defined positively and meant 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 of which, the amount cannot be determined with substantial accuracy However, the expression "reserve" has been defined in a negative manner, and would exclude, i.e, not include, any amount written off retained by way of providing for depreciation, renewal or diminution in value of assets, or retained by way of providing for any known liability Therefore, an amount retained in excess of the amount retained for any known liability was not necessarily a reserve. A provision, it was held, is a charge against profits and therefore to be taken into account against gross receipts in the Profit and Loss account. The "reserve", on the other hand, is appropriation of profits, the assets by which it is represented being retained to form a part of the capital employed in business. Whether an amount was a "reserve or "provision", it was observed, must be determined with reference to the nature and character of sum retained and substance of the matter The balance-sheet contains separate heads for reserve and surplus" and "current liabilities and provisions"*

7. *The aforesaid position still holds good when we refer to the Guidance Note issued by the Institute of Chartered Accountants of India on revised Schedule VI to the Companies Act, 1956 (December, 2011 Edition) in which it has been observed*

8.1.2.1. Reserve

The Guidance Note on Terms Used in Financial Statements defines the term 'Reserve' as the portion of earnings, receipts or other surplus of an enterprise (whether capital or revenue) appropriated by the

management for a general or a specific purpose other than a provision for depreciation or diminution in the value of assets or for a known liability Reserves" should be distinguished from 'provisions. For this purpose, reference may be made to the definition of the expression provision in AS-29 Provisions, Contingent Liabilities and Contingent Assets.

As per AS-29, a provision is a liability which can be measured only by using a substantial degree of estimation A liability is a present obligation of the enterprise arising from past events, the settlement of which is expected to result in an outflow from the enterprise of resources embodying economic benefits Present obligation' "an obligation is a present obligation based on the evidence available, its existence at the Balance Sheet date is considered probable, i.e, more likely than not

8. Thereafter, the Guidance Note under different headings describes capital reserve, capital redemption reserve, securities premium reserve, debenture redemption reserve, revaluation reserve, share options outstanding account and other reserves.

9. Similarly, in the Guidance Note on the Terms Used in Financial Statements GN(A) 5 issued in 1983, the terms as under "reserve" and "provision were explained

"14.04 Reserve

The portion of earnings, receipts or other surplus of any enterprise (whether capital or revenue) appropriated by the management for a general or a specific purpose other than a provision for depreciation or diminution in the value of assets or for a known liability. The reserves are primarily of two types capital reserves and revenue reserves.

13.14 Provision

An amount written off or retained by way of providing for depreciation or diminution in value of assets or retained by way of providing for any known liability the amount of which cannot be determined with substantial accuracy."

20. In the case of National Rayon Corporation (supra), the assessee company had issued secured redeemable mortgage debentures against the security of land, building and machinery and a floating charge on the undertaking. The High Court held that this was merely a "provision" to enable it to redeem debentures when they became due for redemption. The aggregate amount of the debentures was higher than the amount of Debenture Redemption Reserve. The High Court on the aforesaid reasoning held that the amount set aside to meet the future liability, which was certain to come into existence was a "provision and not a reserve" The Supreme Court, therefore, disagreed with the said reasoning observing that the High Court itself

had come to the conclusion that the Debenture Redemption Reserve was less than the company's liability on this account. Further, the liability had arisen the moment money was borrowed, which would be repayable. The obligation or liability to repay would not cease just because the fact that the date of repayment was deferred by an agreement, as the obligation was an ascertained liability. Therefore, the money set apart for redemption of debentures must be treated as money set apart to meet a known liability and the amount should be shown as a liability. In these circumstances, it was held that the amount set apart was not a "reserve". Reference was made to Batliboi's Advanced Accountancy with to nature of sinking funds and it was held that redemption of debenture would not be a reserve, it was shown as "reserve" in the balance sheet. An amount shown as a reserve is in the nature of allocation of profits and not a charge against them. The Debenture Redemption Reserve, it was held, was in the nature of charge against profits and not appropriation of profits.

21 We do not see how this decision can help and assist the appellant assessee.

29. During the course of argument it was ascertained and accepted on behalf of appellant assessee that the reserve under Section 45-IC of the Reserve Bank of India Act, 1934 and debt redemption reserve were below the line allocations, after computing the financial profit and were not treated and regarded as expenditure/liability for the for the purpose of the profit and loss account in the accounts. The amount treated as reserve created under Section 45-IC of the Reserve Bank of India Act, 1934 was not regarded as diversion of income at source by the statutory auditors.

Indeed, the reserve created under Section 45-IC of the Reserve Bank of India Act, 1934 can neither be diversion of income at source nor constitute an expenditure or liability. Reserve under Section 45-IC of the Reserve Bank of India Act, 1934 of not less than 20% of net profit every year can only be computed after net profit is calculated and computed.. Reserve, so created is not a liability known or ascertained, even estimated. Section 45 IC ensures that a Non Banking Finance Company does not appropriate entire net profit as disclosed in the Profit and Loss account but this percentage is either ploughed back into business or is represented by a portion of the asset. No separate bank account is required to be maintained. It is an added measure of protection created by the statute, to prevent defaults by the Non Banking Financial Companies. Section 45-IC of the Reserve Bank of India Act, 1934 also permits appropriation but in restricted or controlled manner by a Non Banking Financial Company

30. Accounts in case of a company are prepared as a going concern assuming that the business will continue in the foreseeable future. To ascertain the net profit of each year, not only the current liabilities and the contingencies but future contingencies should also be considered. Thus, Chapter VI of the Companies Act in Part II and III. provides for Provision and Reserves which relate to future payments, future needs and contingencies for which a part of the current earning is set aside.

31. The underlying purposes of financial accounts may not necessarily be the same as those of taxing accounts which are maintained and computed in accordance with the provisions of the taxing statute, Le the Income Tax Act, 1961 Notwithstanding clear commonalities such as matching of income with expenses, in the case of financial accounts there is greater emphasis on ensuring that the profits are not overstated, in contrast in the tax accounts the emphasis is on ensuring that the profits are not understated.

32. As noticed above, provision and reserves' are different accounting terms. A created meet a known liability is a charge against the profit. Hence, it is debited to the Profit and Loss account and reduces the profit. Provisions should be created, even if there is insufficient profit. Provision in not, therefore, invested. On the other hand, reserve is only appropriation of profit and, therefore, it is not debited to the Profit and Loss account. The purpose of reserve is to strengthen the financial position and to meet unforeseen liabilities which may arise in future. The reserves are created out of adequate profits. However, once reserve in created. It reduces divisible profit. This is the amount of profit which is for use in business when difficulty arises. Reserves can be invested. The said investments can be even outside the business and in such cases the reserve is called the reserve fund. Reserves are shown on the liability side of the balance sheet and are generally treated as belonging to the proprietor just as capital. It is a sum owned by the business to the proprietor. Reserves themselves are not assets but represent a portion of the assets which the proprietor is free to utilize for business as one likes, i.e the assets equalling the reserves that are not required to pay liabilities. Generally reserves are created at the discretion of the management as a matter of prudence, but in certain cases a can direct creation of special reserves. For the purpose of Section 115JB of the Act, statutory reserves are treated alike and in a similar manner as other reserves.

33 Reserves are normally treated as a part of equity which is defined as residual, ie assets less liabilities, but as recorded above sometimes reserves are required to be created by statute in order to give the entity and its creditors an added measure of protection from the effect of losses.

34. To reiterate, a reserve a below the line of allocation of profits. The amount mentioned in the reserve does not get reflected in the Profit and Loss account. Further, the amount mentioned in the reserve is not to be kept in a designated bank account but would get reflected in the form of assets under the heading "assets" etc.

34. In view of the aforesaid reasoning, the two substantial questions of law mentioned in paragraph 7 above have to be answered against the appellant-assessee and in favour of the respondent Revenue. To this extent, the appeal is dismissed. As the substantial question of law relating to rate of depreciation has been answered in favour of the appellant-assessee, we are not inclined to impose costs

6.16. This aspect of the matter was noted by the Hon'ble ITAT Mumbai in the case of JSW Energy Ltd. vs ACIT Circle 11(5) reported in 2013] 34 taxmann.com/ 152 (Mumbai Trib) as below but in view of the jurisdictional High Court decision in the case of CIT v Raymond Ltd. [2012] 209 Taxman 65/21 taxmann.com 60 (Bom) was decided in favour of the assessee.

4. The issue arising per ground nos 2 & 3 relates to whether the amount set aside out of the profits as Debenture Redemption Reserve (DRR) by the assessee-company, is to be considered as a reserve Le, an appropriation of profits, or as a provision, for meeting a liability and, therefore, deductible in the computation of book profit u/s. 115JB of the Act. The same has been argued before us from the assessee's side as covered by the decision by the Hon'ble jurisdictional High Court in the case of CIT vs. Raymond Ltd. (2012) 209 Taxman 65/21 tazmann.com 60 (Bom.), confirming the tribunal's view. The Revenue, though unable to rebut this claim, Le, of the said issue as being the same as adjudicated by the Hon'ble court, would yet contest the assessee's said ground on merits, relying on the orders by the authorities below.

5. We have given our careful consideration to the matter, pursuing the impugned orders by the assessing and the first appellate authority, as well as by the Hon'ble jurisdictional high court, which to binding on us. Debenture is a loan liability, ie, borrowed capital of the entity raising funds through the issue of debentures. The said liability is classified as a secured loan in the balance-sheet prepared under Part of Schedule VI to the Companies Act, 1956 (companies act hereinafter). The interest accrued on the same would be at revenue expenditure of the enterprises, whether the said capital is. utilized as working capital or for acquisition of any fixed asset, or for even discharge of any loan or liability undertaken earlier inasmuch as there is thereby a substitution of the source of financing of the business purpose for which the said liability was assumed, therewith.

The said interest would stand to be debited to the profit and loss account (P & L A/c) or the operating statement of the enterprises for the relevant period, as well as deductible u/s.36(1)(i) in the computation of the income for the relevant assessment year u/s.28 of the Act. The only exception would be where the capital asset being acquired thereby is under construction or otherwise in the process of being initialized, so that it is not put to use. The interest, under such circumstances, would stand to be capitalized as a part of the cost of acquisition of the relevant asset in the assessee's accounts. It would also, likewise, form part of the actual cost of the said asset in terms of section 43 read with Explanation 8 thereto, and not allowable w/s.36(1)(ii) in the computation of business income. The accounting treatment of both the loan liability as well as of the interest thereon, Le, as prescribed by the applicable accounting standards as well as the principles of commercial accounting, is in complete harmony and agreement with the corresponding provisions of the Act.

As the debenture funds form part of the capital structure of the enterprise, the relevant provisions of the companies act provide that its profits are to that extent, and over the period of its currency, set aside for the purpose. This ensures, simultaneously, two things. Firstly, that the debentures are redeemed out of the profits of the enterprise and, two, that the profits are capitalized to that extent. This, thus, is also a measure of prudence, which is a fundamental accounting assumption, so that even if not mandated by the provisions of the companies act, is so by the accounting norms. Here I would also be not out of the place to state that the Companies Acceptance of Deposit Rules, 1975, as prescribed u/a.34A of the companies act, also provide, similarly, for a set aside, over a period of time i.e, the tenure of the public deposits, of the profits of the depositor company, investing a part thereof in liquid government securities each year This ensures that the of the redemption are met in a timely manner (set of the fund so created), and there are no defaults by the depositor-companies, as where the company invests its profits on expansion or in business of otherwise dissipates them, as by way of dividends, so that the liquid funds are not available for discharge of the loan liability at the relevant time, Le, the time of redemption, but at hand through the sale/realization of the liquid securities. This can thus also be considered as a measure to protect investor's confidence as well as to promote investment climate and corporate discipline. The set aside of profits is, therefore, only a sinking fund to fund (meet) a capital liability (out of the profits), the rationale of which stands discussed hereinabove. In the case of National Rayon Corporation, Lad CIT (1997) 227 ITR 764/93 Taxman 754 (SC), also relied upon by the assessee, sinking funds, which fall under the heading Reserve and Surplus (in the balance-sheet as per Schedule VI stood specifically

excluded w/r. 1 of second schedule to the Companies (Profits) Surtax Act, 1964 in the computation of capital

The set aside of profits, though for meeting a liability, is of one on capital account, so that neither the assumption thereof (the liability)) nor its liquidation (discharge) would impact the operating statement of the enterprises, Le, the company's P & L A/c prepared to be prepared under Parts II and III of Schedule VI to the companies act. The adjustments to the book profit u/s 115JB are, again, also consistent with the preparation of the P&L A/c under the companies act. The set side of the profits is not to meet a trading liability or a liability on revenue account, so as to form part of or get incorporated therein, Le, the P&L a/c. In fact, no set aside for meeting a trading liability would be required in actual practice, as such a liability would itself be charged to the operating statement, reducing the profit to that extent. That is, even if not actually discharged out of the profits as where the same stand locked up in an asset/s, the profits have been deemed to have been absorbed to that extent, so as to become the source of its discharge.

In our humble view, therefore, the Revenue is not incorrect in stating that the said set aside of the profits is only an appropriation of profits, and would not amount to a provision, so as to qualify for deduction in the computation of the profit of the assessee company. The issue, in fact, is not if it is a provision (against an ascertained liability) or a 'reserve per se, but whether it could be considered as deductible in computing the profit of the enterprise. On the contrary, as afore stated, the said accounting treatment, i.e., the set aside of profit, ensures capitalization of the profits, so that the debenture funds forming part of the capital structure, the same (capital) is not depleted on the redemption of the liability representing the said source of funds. In short, the liability. for the discharge of which the profits are being set aside, is in the capital field, so that neither the liability (on its assumption) nor the profit set aside (for its discharge) could be considered as a charge against the profits. This is precisely the reason that the same is not either claimed or allowed as deduction in the computation of income under the regular provisions of the Act.

So, however, the decision by the Hon'ble jurisdictional high court in the case of Raymond Ltd. (supra), as aforesaid, is squarely on the point, and binding on us. In fact, even in its absence, our view, being ostensibly not in consistence with that expressed by the co-ordinate bench of the tribunal, our purview in the present proceedings would only have been to refer this matter for consideration by a large bench of the tribunal. There is, under the circumstances, no question of taking any different view in the matter. Accordingly, respectfully following the said decision by the Hon'ble high court, we allow the

assessee's appeal on its grounds, so that the adjustment made by it in the computation of book profit u/s. 115JB gets validated. The assessee succeeds on its relevant grounds.

6.17 The third point that arises for consideration is that there was no DRR created last year and the creation this year is obviously out of motive to avoid taxes since gains have arisen on sale of shares. No basis or working has been provided by the appellant based on which DRR of as high as Rs 36 crores is created.

6.18. Now let us look at the decision in the case of Raymond Led. In the case of Raymond Ltd., the Hon'ble Bombay High Court held as follows

1. This appeal by the Revenue against the order of the Income Tax Appellate Tribunal dated 13 February 2009 relates to AY 1997-98. Two questions of law have been framed by the Revenue which are as follows:

(a) Whether on the facts and in the circumstances of the case and in law, the ITAT was right in deleting the adjustment made by the AO relating to Redemption of Debentures Reserve amounting to Rs 18.80 Crores

(b) Whether on the facts and in the circumstances and in law, the ITAT was right in deleting the disallowance in respect of capital expenditure incurred in respect of Steel Division at Nashik as revenue expenditure?

2. Re question (a): Section 115JA of the Income Tax Act, 1961 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 the Companies Act, 1956. The explanation to the Section provides that for the purpose of the section, "book 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. 1956 provides inter alia in Clause 7(1)(b) that, the 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

3. The nature of a Debenture Redemption Reserve [DRR] has been considered by the judgment of the Supreme Court in National Rayon Corporation Ltd. Vs. Commissioner of Income Tax (1997) 227 ITR 764. The Supreme Court after adverting to the provisions of Clause 7

of Part II to 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 u company issues debentures, 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 Sultan Tobacco Co. Ltd. Vs. CIT [1982] 132 ITR 59, in holding that since the concept of reserve and 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."

4. The mere fact that a Debenture Redemption Reserve is labeled 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, 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 The Act, 1961, No substantial question of law would, therefore, arise"

6.19. A perusal of the decision of the Hon'ble High Court in the case of Raymond Ltd. shows that the aspects of i) the book profit being defined as net profit as per profit and loss account and that the debenture redemption reserve is in the field of capital and not a charge on profits and is an appropriation of profits were not raised and hence not considered and discussed. Further, another distinction in fact in the present case in that there is no increase in debenture redemption reserve and the net effect in that profits as per profit and loss statement only adds to general reserves. The net profit as per profit and loss account is reflected in the audited accounts of the appellant at Rs 226.33 crores which is after reducing provisions for taxes which have to added back Thus, the decision in the case of Raymond Ltd. is distinguishable on facts.

6.20 Now the argument that the assessing officer or the assessee cannot tinker with the accounts prepared under the Companies Act other than the adjustments provided in Explanation to section 115JB for which case laws are cited by appellant does not advance the case of the appellant in as much as it is the appellant who has claimed to make adjustments which are found to be not legally and on accounting principles tenable The appellant has also referred to the decision of the Hon'ble ITAT in the case of Repute Properties P Ltd but copy of the same was not filed and in also not found in journals and CDs showing reported decisions After making efforts and locating the order, it is found that there is merely a mention but there is no discussion of the decision Hon'ble Delhi High Court in case of Seri Infrastructure Finance Ltd, v/s ACIT (2015) taxman. Com 254 (Delhi). Further the issues raised in the preceding paragraphs here were not considered In that decision in the case of Repute Properties P. Ltd. the Bombay High Court decision in the case of Raymonds Ltd. has been merely followed. The reasons why the decision in the case of Raymonds Ltd. is not applicable here has already been discussed earlier and distinguished

6.21 The appellant has towards the fag end of the appellate proceedings referred to the decision of the Hon'ble ITAT on this issue in the case of HDIL dated 10.1.2019 for AY 2009-10 and 2010-11. A perusal of the same shows that they were in respect of the orders u/s 263 passed by Ld. Pr CIT (Central)-3 Mumbai. The Hon' ble ITAT has held that the Pr CIT (Central) 3 Mumbai did not have jurisdiction to pass an order u/s 263. It was held that the order u/s 263 has been passed in respect of the re- assessment order passed by the assessing officer. The re-assessment was in respect of financial transactions entered into by HDIL with Bhoomi Group etc. The issue of DRR was not a subject matter of the re- assessment order. Hence the time limit will commence from date or original assessment order and holding thus, it was concluded that order u/s 263 was time barred. The Pr CIT has sought to revise an issue which was allowed in the original assessment proceedings and which was not subject matter of re-assessment proceedings. Hence the time limit has to be reckoned from the date of

passing the original assessment order. Further it was held that the fact that the issue of DRR had reached higher courts show that the issue is debatable and whatever may be the reasoning given by the Pr CIT, it cannot be denied that he has taken a different view and this is therefore this is not a case where an assessment order can be termed as erroneous and prejudicial to the interests of revenue. The context and ratio of that case is different and not applicable to the facts before me

6.22 In the light of the facts and discussion above, the decision of the assessing officer is upheld. Hence, this ground of appeal no. 3 is dismissed.

5.2. No contrary material has been brought on record by the assessee before us to controvert the aforesaid observations of the Id. CIT(A) who had taken a decision after considering the various judicial precedents. Hence, we do not find any infirmity in the order of the Id. CIT(A) dismissing the ground of the assessee. Accordingly, the ground No.3 raised by the assessee is dismissed.

6. The ground No.4 raised by the assessee is challenging the disallowance of Rs.10,05,28,048/- being interest expenses u/s.43B of the Act and reducing the same from 'work in progress' as on 31/03/2015.

6.1. We have heard Id. DR and perused the materials available on record. The assessee had capitalised the finance cost of Rs.10,05,28,048/- to the 'work-in-progress' as on 31/03/2015. This interest is paid on loan availed from Punjab and Maharashtra Co-operative Bank Ltd. (PMC Bank Ltd.) but the same had not been paid by the assessee. Accordingly, the Id. AO invoked the provisions of Section 43B of the Act and disallowed the same. We find that the Id. CIT(A) had observed in this regard as under:-

7.4. I have considered the facts and submissions carefully. The admitted fact is that the interest claimed is not paid till due date of filing of return

and section 43B applies. The appellant is following mercantile basis of accounting The interest expenses claimed pertaining to borrowings from financial institutions are covered u/s 438 which begins with a non-obstante clause. If interest claimed is unpaid, the same is disallowable u/s 43B If such expenditure is capitalized as WIP such portion of interest will have to be reduced from closing WIP The distinction between interest accrued but not due and interest accrued and due is not germane to application u/s 438. What has to be seen is the expenditure claimed during the year. Further this will also apply to interest claimed during the year but capitalized on WIP The ground of appeal no 4 is dismissed.

6.2. No contrary material has been brought on record by the assessee before us to controvert the aforesaid observations of the Id. CIT(A). Hence, we do not find any infirmity in the order of the Id. CIT(A) in this regard. Accordingly, the ground No.4 raised by the assessee is hereby dismissed.

7. The ground No.5 raised by the assessee is challenging the levy of interest u/s.234B and 234C of the Act. This is consequential in nature and interest is leviable thereof. Hence, dismissed.

8. The ground No.6 & 7 are general in nature and does not require any specific adjudication.

9. In the result, appeal of the assessee is partly allowed.

Order pronounced on 06/01/2023 by way of proper mentioning in the notice board.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 06/01/2023
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai