

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI ABY T VARKEY (JUDICIAL MEMBER)
AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**

**ITA No. 4484/MUM/2019 - A.Y 2014-15
ITA No. 4485/MUM/2019 - A.Y 2015-16**

Asst. Commissioner of
Income-tax 2(1)(1), Mumbai,
Room No.561, 5th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400 020

Appellant

Vs.

M/s Bombay Dyeing &
Manufacturing Co. Ltd
Neville House, JN Herdia
Marg, Ballard Estate,
Mumbai-400 001
PAN No. AA ACT 2328 K
Respondent

**ITA No. 4291/MUM/2019 - A.Y 2014-15
ITA No. 4293/MUM/2019 - A.Y 2015-16**

M/s Bombay Dyeing &
Manufacturing Co. Ltd
Neville House, JN Herdia
Marg, Ballard Estate,
Mumbai-400 001

PAN No. AA ACT 2328 K
Appellant

Vs

Dy. Commissioner of Income-
tax 2(1), Mumbai, Room
No.561, 5th Floor, Aayakar
Bhavan, M.K. Road, Mumbai-
400 020

Respondent

Revenue by : Shri Ashok Kumar Kardam,
CIT-DR

Assessee by : Shri Yogesh Thar / Chaitanya
Joshi / Karan Jain

Date of Hearing : 29/12/2022
Date of pronouncement : 24/01/2023



ORDER

PER OM PRAKASH KANT, AM

These cross appeals by the assessee and Revenue are directed against two separate orders, both dated 09th April, 2019 passed by the Commissioner of Income-tax (Appeals)-4, Mumbai [in short, 'the Ld. CIT(A)] for Assessment Years 2014-15 and 2015-16, respectively.

2. As common grounds are involved in these cross appeals, the same were heard together and disposed off by way of this consolidated order for convenience and to avoid repletion of facts.

3. First we take cross appeals for A.Y. 2014-15:

3.1 The grounds raised by the assessee are reproduced as under:-

"GROUND NO. 1: ADDITION OF INCREMENTAL LONG TERM CAPITAL GAINS OF RS. 3630,53,2577- ON CONVERSION OF LAND, BEING CAPITAL ASSET, INTO STOCK-IN-TRADE BY CONSIDERING COST INFLATION INDEX CCIT) OF THE YEAR OF CONVERSION INSTEAD OF CII OF YEAR OF SALE OF FLATS;

On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO in taxing the incremental long term capital gains on account of conversion of land being capital asset into stock in trade by considering the CII of the year of conversion instead of CII of the year of actual sale of flats by the Appellant.

The Appellant prays that the impugned addition of incremental long term capital gains of Rs. 36,30,53,2577- be deleted.

ROUND NO. 2 - ADDITION OF RS. 27.97,9357- TO BOOK PROFITS U/S. 115JB IN RESPECT OF EXPENDITURE INCURRED IN RELATION TO EXEMPT INCOME

U/S. 14A RWR 8D: *On the facts and the circumstances of the case and in law, CIT (Appeal) has erred by not*

holding that addition to book profit under section 115JB of the Act cannot be made with reference to provisions of section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 ("the Rules").



GROUND NO. 3 - SHORT CREDIT OF TDS; Rs. 1,44,21,975/-:

1. *On the facts and the circumstances of the case and in law, the CIT'(Appeal) erred in not adjudicating the ground of short credit of TDS amounting to Rs. 1,44,21,975/-.*
2. *Without prejudice to above, the Appellant prays that the AQ.be directed to grant the credit of TDS of Rs. 1,44^1,975/- as per law."*

3.2 The grounds raised by the Revenue are reproduced as under:-

1. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the receipt of Rs.26,07,02,254/- as subsidy from the Government of Maharashtra under 'The Package Scheme, of Incentive ('PSI') 2007' as 'capital receipt' where as there is no obligation cast on the assessee as to applying the subsidy for any particular purpose?"*
2. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that no disallowance can be made if there is no exempt income while CBDT circular no. 5/2014 dtd 11.02.2014 clearly specified that even if no exempt income is earned on the investments for the purpose of calculation of disallowance u/s 14A r.w.r. 8D, these are to be included?"*
3. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the whole of Capital Gains on conversion of land to stock in trades cannot be brought to tax in the year in which only part sale of stock in trade is effected without appreciating the fact that the time of chargeability of income tax for capital gain arising from conversion of capital asset to stock in trade should be the point when the stock in trade is sold or otherwise transferred?"*
4. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in excluding the sales tax subsidy for computing book profit u/s 15JB of the IT Act, when the same is not provided for in section 115JB of the Act and is therefore in contravention to the law laid down by HonTDle Supreme Court in the case of Apollo Tyres Ltd. vs CIT(255 ITR 273)?"*

4. Briefly stated, facts of the case are that the assessee during the year under consideration was engaged in the business of manufacturing and trading of textile polyester staple fiber and was also engaged in development of real estate. For the year under consideration, the assessee filed its return of income electronically



on 29/11/2014 declaring total income at Nil under the normal provisions of the Income-tax Act, 1961 (in short, 'the Act') and book profit of ₹44,41,08,237/- under section 115JB of the Act. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Act were issued and complied with. In the assessment completed under section 143(3) of the Act, the Assessing Officer made certain additions / disallowances and assessed total income under normal provisions of the Act at ₹354,42,01,379/- and computed book profit of ₹40,69,06,175/-. As the income determined under section 115JB was of the Act was less than the income computed under the normal provisions of the Act, the Assessing Officer took the total income at ₹354,42,01,379/-. On appeal, the Ld.CIT(A) allowed part relief. Aggrieved, both the assessee and the Income-tax Department are in appeals before the ITAT, raising the grounds as reproduced above.

5. The Ground No.1 of the appeal of the assessee relates to computation of long term capital gain on sale of land which was converted from 'capital asset' into 'stock in trade'. The Ground No.3 of the appeal of the Revenue is also connected with ground No.1 of the appeal of the assessee.

5.1 The brief facts qua the issue in dispute are that the assessee in the process of real estate development of its land parcel, which



were appearing in its books of accounts as Capital asset , converted one such capital asset into stock-in-trade of real esate business in year earlier to present assessment year. The section 45(2) of the Act prescribes for offer of capital gain tax on such conversion in the year of sale of stock in trade. The two issues are involved in this transaction. **Firstly**, the point of time when the capital gain was to be declared for income-tax Act purpose, (i.e the issue which has been raised in the Ground No. 3 of the appeal of the Revenue) . The assessee was following percentage completion method for declaring business profit from such real estate project. The assessee accordingly also offered long term capital gain on conversion of ‘capital asset’ into ‘stock in trade’ amounting to ₹206,09,36,801/- in the year under consideration based on ‘percentage completion method’. Whereas, according to the Revenue the capital gain should have declared in the year of sale of stock in trade as per provisions of section 45(2) of the Act. The **second** issue is regarding computation of quantum of long-term capital gain, which has been agitated by the assessee in ground no. 1 of its appeal. While working out the long-term capital gain, the assessee took the fair market value (FMV) of the capital asset as on the date of conversion of capital asset into stock in trade. However, while reducing the indexed cost of the acquisition of the capital asset, the indexation was applied upto the year in which the stock-in-trade was sold or transferred as against the claim of Revenue that indexation of cost



of acquisition should be allowed up to the year in which the capital stock was converted into stock-in-trade. The contentions of the assessee on both the issues i.e. offer of capital gain as per the percentage completion method and indexed cost of acquisition of the capital asset in the year of the sale of stock-in-trade, were rejected by the Assessing Officer observing as under:-

The claim of the assessee cannot be accepted because capital gain accrues in the financial year in which the capital asset is converted into stock in trade. However the timing of the taxation of the capital gain is differed to the point of sale. Thus whenever the sale of flat occurs during the relevant assessment year the long term capital gain corresponding to the area sold will have to be offered for tax in the very same assessment year. Accordingly the contention of the assessee that the long term capital gain are to be taxed based on percentage of completion method cannot be accepted and the differential long term capital gain as worked out below is required to be brought to tax.

			FMV@ 1981(cost)	Index	Indexed cost	Conversion Price	LTCG	%com pletio n	Capital gain already offered
FY	Desc rip	Area sold	@Rs.92/sq.f t.	facto r	cost	Price			
2013- 14	One ICC	169,178	15,64,376	939	146,149,491	2,188,772,167	2,042,622.677	43.26 %	883638569.9
(As per ROI	Two ICC	198.799	18,289,508	939	171,738,480	2,610,218,660	2,438,480.180		
		367,977.00	33,853,884		317,887,971	4,798,990,828	4,481,102,857		2,060,936.801
2013- 14	One ICC- Scal 143, 038	143,038	13,159,496	785	103,302.044	2,585,123,073	2,481,821,029		
(As per new worki ng)	Two ICC- Scal	49,337	4,539,004	711	32,373,318	677,189,263	644,916.945		
	Two ICC- Scal	143,220	13,176,782	785	103,437,739	1,965,888.396	1,862,450.658		



	One ICC	15,684	1,442,928	785	11,326,985	2,83,46,636	272,129,651		
	Two ICC	3,516	323,472	785	2,539,255	48,259,875	46,720		
					Total of 2013-14				5,307,038,903
					Capital gain offered in ROI				2,060,938,801
					Differential Capital Gain				3,245,102,102

As it is apparent that from the above details that LTCG of Rs. **206,09,36,801/-** was offered by the assessee applying percentage completion method and taking indexation till the year of sale. But as per the provisions of the Income Tax Act, 1961 both the claims of the assessee are not allowable. Single flat is the one unit for the purpose of 'transfer' within the definition of Capital Gain Working. Percentage completion method can't be applied because it doesn't follow the 'unit concept of the transfer. When one single flat is sold it can't be presumed that only part of the same has been transferred. The concept of transfer recognizes the ownership transfer and not the concept of part completion. Part completion is applicable for the income under Income "from Business and Profession" in form of Percentage Completion Method where it has been recognized under accounting standards and Income Tax Act also. For example if a person converts his investment in land into stock in trade and manages to construct 10 flats out of it. Afterwards he offers 50% under percentage completion method. In this situation his offer is acceptable for the income offered under the head Income from Business and Profession' but for the purpose of Long Term Capital Gain it will not work. It is important for Long Term Capital Gain that how many flats were sold and not how much construction is fixed. The Capital Gain will be worked out on the basis of unit wise sale of the flats. Accordingly, both the claim of the assessee, i.e., Long Term Capital Gain as per the working under percentage completion method and indexation till the year of sale are hereby rejected. So as per the provisions of the Income Tax Act, 1961 the Long Term Capital Gain works out at Rs. **530,70,38,903/~** after removing the wrong claim of indexation and rejecting percentage completion method for the working of LTCG. Since the assessee has already offered Rs. **206,09,36,801/-** under the head LTCG, the amount of **Rs.3,246,102,102/-**, being differential amount in the capital gain offered, is added to the income of the assessee. **Penalty proceedings u/s 271(l)(c) of the Act is initiated separately."**

5.2 On appeal, the Ld.CIT(A) on the first issue of taxing entire capital gain on account of conversion of capital asset being land



into stock in trade in the year in which it was converted into stock in trade by the Assessing officer and not as per percentage completion method, followed the finding of the ITAT for the A.Y. 2012-13 and directed to tax the capital gain following the percentage completion method.

5.3 On the second issue of applying cost of indexation on the cost of acquisition, the assessee referred to the decision of the Hon'ble Karnataka High Court in the case of **CIT vs Rudra Industrial Corporation 244 CTR 304 (Kar)** and submitted that for indexation for the cost of asset, the capital gain index for the year of the sale should be applied. The Ld.CIT(A), however, in view of the clear provisions of section 45(2) of the Act for indexed cost of the acquisition in the year in which asset was converted, rejected the request of the assessee following CIT vs Rudra Industrial Corporation (supra). The relevant finding of the Ld.CIT(A) is reproduced as under:-

"8.6 From perusal of Para 9 of the judgement of Hon'bie Karnataka High Court, it is evident that facts of the Appellant are different from the facts decided by the Hon'bie Karnataka High Court in the case of CIT V/s Rudra Industrial Commercial Corporation. In the case considered by Hon'bie Court, although the immovable property owned by the assessee was converted into stock-in-trade in the year 1987-88 and the assessee entered into an agreement dated 16.03.1988 with M/s Unitech Ltd, but, in the year 1988-89, when the agreement was entered into, the Revenue did not treat it as a transfer. Rather the Revenue, called upon the assessee to pay taxes in subsequent year. The claim for capital gain was made by assessee only when the assessee executed registered sale deed in favour of the purchaser of the flats in the F.Yr. 1992-93. The facts of the Appellant are different. The AO has taxed the capital gain in the year in which assets were converted to stock-in-trade, therefore, the case, cited by the Appellant is not applicable in its case. The Hon'bie Delhi High Court in the case of Arun Shoonglu Trust v/s CIT (supra) has observed that benefit of index of



cost of inflation is given to ensure that tax payer pays the capital gain tax on the real or actual gain and not on the increase in the capital value of the property due to inflation, The principle determined by the Hon'ble Court has been duly considered by the Ld. A.O while granting indexation cost in the year in which asset was converted into stock-in-trade. On the other hand, Sec 45(2) very clearly defines that profit or gain arising from the transfer is to be taxed in the year in which asset is converted into stock-in-trade. For proper appreciation of facts, Sec 45(2) is reproduced as under:-

"Notwithstanding anything contained in sub-section (1), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income-tax, as his income of the previous year in which such stock-in-trade is sold otherwise transferred by him and, for the purposes of Sec 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset]"

8.7 *From perusal of the Section, it is evident that transfer taken place in the year in which asset is converted into stock-in-trade and law is very clear about indexation cost is to be applied for the year in which transfer has taken place. In view of the above discussion, the ground raised by the Appellant on this regard is, dismissed."*

6. Before us, the assessee has filed a paper book containing pages 1 to 249 and also a supplementary paper book containing pages 250 to 256.

7. We have heard rival submissions of the parties on the issues in dispute and perused the relevant materials on record. In ground 3, the Revenue has challenged the finding of the Ld.CIT(A) for applying percentage completion method instead of taxing capital gains under section 45(2). We find that the Ld.CIT(A) has followed the binding precedent on the issue in dispute in the case of assessee itself. The relevant finding of the ITAT in A.Y. 2012-13 is as under:-

"54. In accordance with the aforesaid policies, in the year in which the company converts Fixed Assets being Land to Stock-in-trade the unrealized appreciation



i.e. the difference between the market value of land on the date of conversion into stock in trade and the cost of the said land in books of the company is credited to revaluation reserve. Based on Percentage Completion Method of accounting, the appropriate amount is released from Revaluation Reserve to statement of Profit & loss in proportion of revenue recognized. In other words, the revenue comprising of Capital Gains and Business Profits is accounted on the same basis each year, as contemplated in the provisions^ the act. Accordingly, each year income from Real Estate Activity is offered to Tax under the head Long Term Capital Gains (pertaining to gains on conversion of Fixed Assets to Stock in Trade) & Business income (pertaining to revenue accruing thereafter).

55. Our attention was drawn towards-the provision of section 2(47)(iv) of the income Tax Act, 1961 ("the Act")

"transfer, in relation to a capital asset, Includes, -

.....

.....

"(iv) In a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment".

Hence, under section 45 of the Act, profits & gains arising from such transfer (conversion to stock in trade) is chargeable to tax in the year of transfer. However as per non obstante provision contained in sub section (2) of section 45, the capital gains shall be chargeable to income tax as income of the previous year in which such stock in trade is sold or otherwise transferred by him. Since the sale of Stock in Trade would actually happen when the flats are completed and ownership transferred, a strict interpretation of section 45(2) would suggest that the capital gains rising on conversion of stock in trade would be chargeable to tax when; -(project is completed. However, it would be inconsistent to say that the business profits arising from real estate activity would be chargeable to tax on percentage completion method each year during the construction activity and the capital gains portion of there is chargeable to tax in a different year i.e. when the project is completed. A reading down of. section 45(2) of the Act would therefore mean that the capital gains on conversions should be charged to tax in the same year in which the corresponding business income is offered to tax, on the same basis i.e. percentage completion method which the company is following. Further, the assessee has made disclosure by way of a note at serial no. 31 in Notes to Financial Statement in relation to the Revaluation Reserve and amount released from the revaluation reserve on credited to profit and loss account and which is read as under:



"31. The Company has during the year ended March 31, 2012 converted a part of the freehold land under real estate development from Fixed Assets to Stock in trade at market value and the difference between the market value and cost amounting to Rs. 764.30 crores (2010-11 Rs. 853.96 crores) has been credited to Revaluation Reserve. An amount of Rs. 165.27 crores (2010-11 Rs. 70.57 crores) has been ' released from revaluation reserve to Statement of Profit and Loss in proportion of revenue recognized on the area sold in accordance with the accounting Policy."

56. We find from records that lower authorities proceeded on total misreading of the relevant provision of the Act and have brought to tax the whole of the capital gain on the conversion of the land (fixed asset) to stock intrade in the year in which only part sale of stock in trade iseffected and assessee has offered theproportionate capital gain in the year under consideration. We, in view of the above facts and circumstances, direct the AO to verify the sale of stock in trade effected and offered the proportionate capital gains in the relevant years and the same should be taxed accordingly. This issue of assessee's appeal is set aside for verification purpose only with the above directions."

8. Respectfully following the finding of the Tribunal (supra), the ground No. 3 of appeal of the Revenue is accordingly dismissed.

9. In respect of ground No.1 of the assessee, the Ld.Counsel of the assessee has relied on the decision of the Hon'ble Karnataka High Court in the case of CIT vs Rudra Industrial Corporation supra) which has been further followed by the Tribunal in the case of Hoogly Flour Mills Co Ltd vs DCIT; Shrenco Ltd. The question of law raised before the Hon'ble Karnataka High Court on the issue is reproduced as under, for ready reference:

"(i) Whether, the appellate authorities are correct in adopting for the purpose of computation of income from capital gains, the cost of inflation index for the financial year 1992-93 instead of index for the financial year 1987-88 in view of the provisions, of s. 48 r/w s. 45(2) of the Act ?

(ii) Whether the AO had correctly worked out the capital gains of the property on the cost of land sold by the assessee as per the index relevant to financial year 1998-99 as



this asset had been converted into stock-in-trade on 16th March, 1988 which was not considered by the appellate authorities in the proper perspective and consequently recorded a perverse finding ?

10. In respect of above question of law raised, after considering the submission of the parties, the Hon'ble High Court held as under:-

"9. The material on record discloses that the appellant a partnership firm, which owned immovable property, converted the same into stock-in-trade in the year 1987-88. They entered into an agreement dt. 16th March, 1988 with M/s Unitech Ltd. under which the said company was expected to develop the property, construct flats and give to the assessee their share in the constructed building. The assessee is assessed to income-tax regularly. In the year 1988-89 when this agreement was entered into, the Revenue did not treat it as a transfer and called upon the assessee to pay tax. However, the claim for capital gains is made only when the assessee executed registered sale deeds in favour of the purchaser of the flats in the financial year 1992-93. At that stage, for the purpose of calculating capital gains instead of taking the cost inflation index, they took the index as prevailing in 1988, the date on which the immovable property was converted into stock-in-trade and consequently entered into contract for development of the property. In this regard, the question that arises for consideration is, which is the relevant date to be taken into consideration for the purpose of assessing the capital gains.

10. Sec. 45(2) which is relevant reads as under :

"45. Capital gains.—(1)

(2) Notwithstanding anything contained in sub-s. (1) the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of s. 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset."

11. Explanation (iii) to s. 48 defines indexed cost of acquisition which means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later.

12. A harmonious interpretation of these two provisions makes it clear as to how the capital gains is to be taken into consideration. First we have to find out what is the fair market value of the asset on the date of conversion, then to find out what is the market value of the property on the date of transfer, So, in order to compute the capital gains payable, it is the market value on the date of transfer that is relevant and in arriving at that market value the index cost of acquisition as prescribed on the date of transfer is to be taken into consideration and not the date of conversion}In the instant case, the index



cost of acquisition was 223 on the date of transfer in the year ending 1993 and the-index cost of acquisition on the date of conversion is 161. Therefore, the AO committed a serious error in taking 161 as the index. The appellate authorities have rightly interfered with the said assessment and have taken 223 as correct index cost of acquisition. Therefore, when the impugned order passed by the appellate authorities is in accordance with the aforesaid statutory provisions, the said substantial questions of law have to be answered in favour of the assessee and against the Revenue.”

11. We find that Hon'ble High Court has directed to adopt both, **firstly**, the market value of the capital asset as on the date of the transfer of stock-in-trade and **secondly**, for indexed cost of acquisition also on the date of sale or transfer of the stock in trade. But before us, the assessee is seeking only application of part of the ratio of the decision for indexation of the cost of acquisition only and not for the purpose of sale consideration of the capital asset. In our opinion, the assessee cannot choose part of the decision which is in its favour ignoring the other part of the decision of the Hon'ble High Court. Though the provisions of section 45(2) prescribe for taking fair market value of the asset as on the date of such conversion for the purpose of full value of the consideration received or acquiring as a result of transfer of the capital asset and also cost of acquisition to be indexed till the date of such conversion, however, in view of the decision of the Hon'ble Karnataka High Court in the case of CIT vs Rudra Industrial Corporation (supra), we feel it appropriate to restore this issue to the file of the Ld.AO for computing the long term capital gain on conversion of capital asset into stock in trade in accordance with



law. The ground No.1 of the appeal of the assessee is accordingly allowed for statistical purpose.

12. In ground No.2, the assessee has challenged addition of ₹27,97,935/- under section 14A read with rule 8D of Income-tax Rules, 1962 to the book profit under section 115JB in respect of expenditure incurred in relation to exempt income.

13. Before us, the Ld.Counsel of the assessee submitted that this issue was raised before the Ld.CIT(A) by way of an additional ground. However, the same has not been adjudicated by the Ld.CIT(A). He further submitted that identical issue has been adjudicated in the assessee's own case for A.Y. 2012-13 wherein Tribunal has followed the decision of the Special Bench in the case of Vireet Investments (P) Ltd (2017) 58 ITR (AT) 313 (Delhi – Trib)(SB). The relevant finding of the Tribunal is reproduced as under:-

“57. The next issue in this appeal of assessee is against the order of DRP confirming the action of the AO / TPO making addition of disallowance under section 14A of the Act r.w.r 8D of the Rules, while computing book profit under section 115JB of the Act. For this assessee has raised following grounds: -

*GROUND NO: 9: ADDITION OF RS. 2,73,960/-
BEING AMOUNT DISALLOWED U/S 14A OF
THE ACT WHILE COMPUTING BOOK
PROFITS U/S.115JBOF THEACT*

•On the facts and in the circumstances of the case and in law the I A. AO, pursuant to the directions of the I.d. DRP. erred in adding the disallowance made



u/s NA to the book profits on the alleged ground that expenditure pertains to earning exempt income.

58. At the outset, the learned Counsel for the assessee stated that this issue is covered in favour of assessee and against Revenue by the decision of Special Bench of this Tribunal in the case of ACIT vs. Vireet Investments (P.) Ltd. [2017] 58 ITR (AT) 313 (Delhi - Trib.) (SB) wherein the Tribunal has clearly held that no disallowance under section 14A of the Act r.w.r 8D of the Rules can be made while computing book profit under section 115JB of the Act. The learned CIT Departmental Representative could not controvert the above proposition. Accordingly, we are of the view that this issue is covered by the special bench decision of this Tribunal in the case of Vireet Investments (P.) Ltd. (supra), respectfully following the same, we delete the disallowance and allow this issue of assessee's appeal."

14. Respectfully following the finding of the Tribunal, we restore this issue to the file of the Assessing Officer with the direction to follow the finding of the Tribunal in earlier and in accordance of law. The ground No.2 of the appeal of the assessee is accordingly allowed for statistical purpose.

15. The Ground No.3 of the appeal of the assessee relates to short credit of TDS amounting to ₹1,44,21,975/- allowed to the assessee. This ground was also raised by the assessee before the Ld.CIT(A) by way of an additional ground and sought that TDS credit of ₹1,44,21,975/- be allowed on the basis of form 26AS. However, this ground has also not been adjudicated by the Ld.CIT(A). As this claim of TDS is a matter of verification, therefore, we feel it appropriate to restore this issue to the file of the Assessing Officer



for deciding in accordance to law . The ground No.3 is allowed for statistical purpose.

16. In ground No.1, the Revenue has challenged deletion of income added on account of subsidy under Package Scheme of Incentives (PSI), 2007 as capital receipt not chargeable to tax amounting to ₹26,07,02,254/-.

17. Before us, the Ld. Counsel of the assessee submitted that issue in dispute is squarely covered by the order of the co-ordinate bench of the Tribunal in assessee's own case for A.Y. 2012-13 (ITA No.1716/Mum/2017). The relevant finding of the Tribunal is reproduced as under:-

"28. We have gone through facts and circumstances of the case and noted the facts that the State Government of Maharashtra with a view to encourage the dispersal of industries to the less developed areas of the State of Maharashtra announced "The Package Scheme of Incentives, 2007" w.e.f. 01.04.2007. The PSI was applicable based on the level of Fixed Capital Investment or Employment Generation. Assessee Company is eligible for getting subsidy on account of investment made in new plant commenced at Patalganga and Ranjangaon. Further, in the context of subsidy, the question as to whether it is of 'revenue' or 'capital'¹ in nature will have to be determined, having regard to the purpose for which the subsidy is given. If it is given by way of assistance in carrying on the business, it has to be treated as a 'trading'¹ receipt. The source of the fund is immaterial. If the purpose was to help in setting up a business or complete a project, it must be treated as having been received for 'capital' purpose. But if it is given only after and conditional upon commencement of production, such subsidies must be treated as assistance for the purpose of trade.-This-view has been taken by the Hon'ble Supreme Court in case of Sahney Steel and Press Works Ltd. (*supra*). Similarly, Delhi Tribunal in -case of L G Electronics India Pvt Ltd. v. Addl. CIT in ITA No. 1404/Del/2007 for AY 2002-03 vide order dated 26-02-2010, has held the sales tax subsidy availed by the assessee as revenue receipt since it was not linked with setting up of industry, rather linked with the production. Reliance was also placed on the decision of the Special Bench



of Mumbai Tribunal Reliance Industries Limited (*supra*), wherein the Tribunal has, after considering the decision of the Supreme Court in *Sahney Steels (supra)*, held that if a subsidy is received for development of industries in backward areas, it constitutes 'capital' receipt regardless of the fact that it has been received only after the commencement of production, as it is the 'purpose' of the scheme which is of fundamental importance in determining the nature of the subsidy as 'revenue'¹ or 'capital'¹. This decision of the Special Bench has been upheld by Hon'ble Bombay High Court in *CIT v. Reliance Industries Limited [2011] 339 ITR 632 (Bom.)*.

29. Further, the Hon'ble Supreme Court has held in *Ponni Sugars and Chemicals Ltd. (supra)*, after considering the decision in *Sahney Steel (supra)* held that the character of the receipt of a subsidy in the hands of the assessee under a scheme has to be determined with respect to the 'purpose' for which the subsidy is granted and that if the purpose of a subsidy is to enable the assessee to run the business more profitably then the receipt is on 'revenue' account but if the object of the assistance under the subsidy scheme is to enable the assessee to set up a new unit (or to expand the existing unit then the receipt would be on 'capital' account. Further, it was held that the point of time at which the subsidy is >aid is not relevant, the source is irrelevant and the form of subsidy is irrelevant. Attention is also invited to a recent decision of the Hon'ble Jammu & Kashmir High Court in *Shri Balaji Alloys vs. CIT (2011) 333 ITR 385 (J&K)*, wherein, considering *Ponni Sugar (supra)* and *Sahney Steel (supra)* it is held that the excise duty refund, interest subsidy and insurance subsidy received under a State Scheme are of 'capita!' in nature. In arriving at its decision, the High Court noted that the foregoing incentives were given to achieve dual objectives, viz. acceleration of industrial development and generation of employment in the State and that such incentives designed to achieve a public purpose, could not- be construed as production or operational incentives for the benefit of the assessee alone. Similarly, the Hon'ble Calcutta High Court in *CIT v. Rasoi Limited (201.1) 335 ITR 438 (Cal)*, following the ratio of Supreme Court in *Ponni Sugar (supra)* has held the subsidy received from Government of West Bengal under scheme of industrial promotion for expansion of its capacities, modernization and improving its marketing capabilities would be 'capital' receipt.

30. Further, the Central Board of Direct Taxes ('CBDT) has issued Circular No. 142 dated 01-08-1974 wherein it has clarified that where the subsidy is primarily given for helping the growth of industries and not for supplementing their profits, such subsidy can be regarded as 'capital' receipt in the hands of the recipient. Further, it has been time and again held by various Courts that Circulars issued by CBDT are binding on Revenue and it is not open to the Revenue even to raise a contention contrary to the binding circular. Therefore, it is the purpose' under the Scheme



which is relevant to decide whether the incentives are 'capital' or 'revenue'¹ receipt and other factors like the point of time when incentive is received, the form, etc are irrelevant considerations. For the same reasons, nomenclature given to any incentive/component of an incentive will not be decisive for determining the 'revenue'¹ or 'capital' nature of such benefits. Thus, considering that the purpose of PSI is to enable the Company to set up a new unit or to expand an existing unit to encourage industrial development in the State, the subsidy / incentives received is on capital account in the present case of the assessee and hence, not chargeable to tax. Accordingly, this issue of the assessee's appeal is allowed. "

18. Respectfully following the earlier order of the Tribunal (supra), the finding of the Ld. CIT(A) on the issue in dispute in deleting addition on account of subsidy under Package Scheme of Incentives (PSI), 2007 is upheld. Ground No.1 of the appeal of the Revenue is accordingly dismissed.

19. Ground No.2 of the Revenue's appeal relates to addition of ₹27,97,935/- under section 14A read with rule 8D in respect of the expenditure incurred in relation to exempt income.

20. Brief facts qua the issue in dispute are that during the year under consideration, assessee has not earned any exempt income; however, the Assessing Officer, applying Rule 8D of the Income-tax Rules, 1962 read with section 14A of the Act made disallowance of ₹27,97,935/-. The Ld. CITA) following the finding of the Tribunal for A.Y. 2012-13 wherein decision of Hon'ble Delhi High Court in the case of **Cheminvest Ltd vs CIT in ITA No.749 of 2014** has been followed, deleted the addition.



21. In view of above facts and circumstances, we do not find any error in the order of the Ld.CIT(A) in following binding precedence on the issue in dispute. Ground No.2 of the Revenue is accordingly dismissed.

22. Ground No.4 of the appeal of the Revenue relates to exclusion of subsidy received under Package Scheme of Incentives (PSI), 2007 while computing book profit under section 115JB of the Act.

23. This ground was raised by the assessee before the Ld.CIT(A) by way of additional ground and it was claimed that issue was covered in favour of the assessee by way of the co-ordinate bench of the Tribunal decision in the case of **Alok Industries (ITA No.1017/Mum/2017)**. The assessee further relied on the decision of the co-ordinate bench of the Tribunal in the case of **Deege Orchards Pvt. Ltd (ITA No.4613/Mum/2016)**. The assessee further relied on the decision of the Tribunal and Hon'ble Rajasthan High Court in the case of Shree Cement Ltd (supra). In view of the above decisions, the Ld.CIT(A) allowed the additional ground of the assessee observing as under:-

*"11.5 The facts of the Appellant are similar to the facts considered by Hon'ble Tribunals and Hon'ble Rajasthan High Court as discussed in the foregoing paras. Therefore, respectfully following judgement of Hon'ble Tribunal in Alok Industries Ltd (supra), Degee Orchards Pvt Ltd (supra), Shree Cement Ltd (supra) and CIT v Shree Cement Ltd (supra), appeal of the assessee on this ground is **allowed.**"*



24. Before us, the Ld. Counsel of the assessee relied on the decision of Hon'ble Calcutta High Court in the case of **PCIT vs Ankit Metal & Power Ltd (416 ITR 591)(Cal)** wherein it is held that interest and power subsidy would have to be excluded while computing book profit under section 115JB of the Act. The relevant finding of the Hon'ble High Court is reproduced as under:-

“26. Now the second issue which requires adjudication is as to whether the aforesaid incentive subsidies received by the assessee from the Government of West Bengal under the schemes in question are to be included for the purpose of computation of book profit under Section 115 JB of the Income Tax Act, 1961 as contended by the revenue by relying on the decision in the case of Appollo Tyres Ltd. (supra).

27. In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy' is a 'capital receipt' and does not fall within the definition of 'Income' under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. In the case of Appollo Tyres Ltd. (supra) the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under Section 115JB of the Income Tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under Section 115 JB of the Income Tax Act, 1961.”

25. Respectfully following the finding of the Hon'ble Calcutta High Court, the finding of the Ld.CIT(A) on the issue in dispute is upheld. The ground of appeal of the Revenue is accordingly dismissed.

26. Now we take up the cross appeal for A.Y. 2015-16. The ground raised by the assessee are reproduced as under:

1. *On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in not adjudicating the*



ground of short credit of TDS amounting to ₹5,12,579/-.

- 2. Without prejudice to the above, the appellants, prays that the AO be directed to grant the credit of TDS of Rs.5,12,579/- as per law.*

26.1 The grounds raised by the Revenue are reproduced as under:

- 1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the receipt of Rs. 15,66,26,347 / - as subsidy from the Government of Maharashtra under The Package Scheme of Incentive (PSI) 2007' as 'capital receipt' where as there is no obligation cast on the assessee as to applying the subsidy for any particular purpose?"*
- 2. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that no disallowance can be made if there is no exempt income while CBDT circular no. 5/2014 dtd 11.02.2014 clearly specified that even if no exempt income is earned on the investments for the purpose of calculation of disallowance u/s 14A r.w.r. 8D, these are to be included?"*
- 3. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing relief to the assessee relying on the decision of Hon'ble Special Bench of ITAT Delhi in the case of Vireet Investment (P) Ltd., without appreciating the facts that the issue has*



not reached to its finality as the Hon'ble Delhi High Court in its decision in the case of Goetz India Ltd., reported in 361 IT 505 held that while computing Book Profit disallowance u/s 14A is required to be made. However, in its later judgment the Hon'ble Delhi High Court in the case of Bhushan Steel Ltd. (ITA No. 593 & 594/2015) has taken a contrary view".

4. *Whether on the facts and in the circumstances of the case and in law, the Id. CIT erred in deleting the addition of Rs. 112,67,62,506/- on account of revaluation reserve created for revaluation of land being fixed assets converted into stock in trades, in violation of provisions of section 115JB of the Income Tax Act, 1961?"*
5. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in excluding the sales tax subsidy for computing book profit u/s 115JB of the IT Act, when the same is not provided for in section 115JB of the Act and is therefore in contravention to the law laid down by Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs CIT(255 ITR 273)?"*

27. In ground 1 assessee has raised the issue of short credit of TDS. The identical ground for A.Y. 2014-15 has been restored back to the file of the Ld.AO for allowing credit as per the provisions of



the Act. Accordingly, this ground in the year under consideration is also restored to the file of the A.O.

28. As far as grounds 1, 2, 3 & 5 of the appeal of the Revenue are concerned, same are covered by our decision in the case of the assessee for A.Y. 2014-15 and therefore, same are decided mutatis mutandis.

29. In ground 4 of the appeal, the Revenue has challenged the deletion of addition of ₹112,67,62,506/- towards revaluation reserve on account of conversion of the amount being 'fixed asst' into stock in trade. The Ld. CIT(A) following the finding of the Tribunal in A.Y. 2012-13 has deleted the addition observing as under:-

“10, Ground Mo, 5 : Vide this ground, Appellant has agitated against addition to Book Profit u/s 115JB towards alleged creation of revaluation reserve by debiting P & L Account for an amount of ₹ 112,67,62,5067-. Appellant stated that similar addition was made in assessee's own case in A.Yr 2012-13. During the year A.Yr 2012-13 assessee filed an appeal against the assessment order passed u/s 143(3) r.w.s. 144 C(13) before Hon'ble ITAT. The Hon'bie ITAT had decided the appeal of the assessee for A.Yr 2012-13. Relevant para of Hon'ble ITAT order is reproduced as under:

"41. After hearing rival contentions, we find that facts that the Assessee in its business of real estate, had during the year under consideration converted certain portion of land lying in the fixed asset into stock-in trade. Such conversion was done at the market value of the land. Consequently, certain Revaluation Reserve got created in its books, being the excess of the market value of the Land over the carrying costs in the books of account. In computing the "book profits" for the purposes of section 115JB of the Act, the AO has added the entire amount of Revaluation Reserve created during the year to its audited profits applying the provisions of Clause (b) of Explanation I to section 115JB(2) of the Act. Before us assessee explained that in its segmental P&L account, the Assessee has disclosed results of the following segments:

- a. Textile Division*
- b. Polyester Division*



c. Real Estate Division

In respect of the Real Estate Segment, as at the beginning of the relevant year- the assessee carried opening stock of certain work-in-progress relating to two residential projects under construction, namely, ICC-1 Project and ICC-2 Project The Opening W1P of the two Projects was as follows:

- (a) For ICC-1 Project: Rs.384,34,95,000/-*
- (b) For 1CC-2 Project: Rs.398,54,27,000/-*

During the year under consideration, for the purpose of these two projects, the assessee converted further pieces of land, hitherto held by it as fixed assets, into Stock-in-trade. For this purpose, consistent with the requirement of the provision of section 45(2) of the Act, the assessee got the market value of the land determined by approved valuer as per valuation report dated 10.03.2011. This report is filed by assessee in its Paper Book before us. The entries for conversion were passed in the books of account at such market value. Thus, for these two transactions.viz. (i) revaluation of fixed asset; and (ii) its conversion into stock-in-trade, assessee has passed one consolidated accounting entry as under: -

<i>For ICC Project 1:</i>				
<i>Account Code</i>	<i>Grouped as</i>	<i>Entry</i>	<i>Debit</i>	<i>Credit</i>
<i>13270</i>	<i>Current Assets, Loans and Advances</i>	<i>Stock-in trade A/c</i>	<i>377,85,47,25 0</i>	
<i>11105</i>	<i>Fixed Assets</i>	<i>To Land A/c.</i>		<i>4,03,630</i>
<i>11521, 11525, 11510</i>	<i>Capital work in Progress (under Fixed Assets)</i>	<i>To capitalized Costs A/c.</i>		<i>1,88,04,439</i>
<i>22210</i>	<i>Reserve & Surplus</i>	<i>To Revaluation Reserve</i>		<i>375,95,30,18 2</i>
<i>For ICC Project 2:</i>				



Account Code	Grouped as	Entry	Debit	Credit
13270	Current Assets, Loans and Advances	Stock-in trade A/c	390,32,79,00 0	
11105	Fixed Assets	To Land A/c.		4,16,954
11521, 11525, 11510	Capital work in Progress (under Fixed Assets)	To capitalized Costs A/c.		1,94,25,403
22210	Reserve s & Surplus	To Revaluation Reserve		388,34,36,64 3

It is evident from the Account Codes and the relevant Groupings mentioned in the above entries that the credit to the Revaluation Reserve account has been created with a corresponding debit to the 'Current Assets, Loans and Advances.' It is evident that this is not a case where the Revaluation Reserve is created out of profits for the year. Having recorded the stock-in-trade at its fair value at the time of conversion, the entire value of such stock in trade becomes the cost for the real estate division. Consequently, this entire cost amounting to Rs. 768.18 Crs (i.e. Rs. 377.85 Crs + 390.33 Crs) is recorded as 'Land cost on conversion off free hold land from fixed assets to stock in trade' under the head 'Construction Expenses' as an item of debit to P&L account. Needless to say, to the extent the land is lying in 'Stock-in-Trade' of construction business, it is once again recognised as part of closing inventory by crediting the P&L account and debiting Asset Account. From this it is clear that this debit of Rs. 768.18 Crs. to the Profit and Loss Account reflects the cost of the Stock-in-Trade to the real estate business and that it does not reflect any amount carried to reserves.

42. During the year, the Assessee incurred certain further expenses towards these two projects which were debited directly to the P&L account and in computing the profits of the real estate segment, these have been duly considered separately. It was claimed by the assessee before us that the Revenues from the said construction business is recognized on the basis of 'percentage completion method'. See note 31 on page 1 & 2 of the Annual Accounts as part of the notes on Significant Accounting Policies. Accordingly, the Assessee has recognized revenue of Rs.258,62,49,100/- in respect of 1CC-1 Project and revenue



of Rs. 260,78,49,630/-for ICC-2 Project, aggregating to Rs. 519,40,98 730/-, Working of the Real Estate Projects based on the percentage completion method. Having recognized the revenues as above, the portion of the Revaluation

Reserve which relates to the sale recognized as per percentage completion method needs to be released to the P&L account. Thus, to that extent, the proportionate part of the 'Revaluation Reserve' is withdrawn and credited to the Profit and Loss Account (Amount Rs. 165.27 Crs.).

Entries passed for release from Revaluation Reserve

(a) For 1CC-1 Project

Revaluation Reserve.....Dr. 81,69,56,453
To Profit and Loss Account... Cr. 81,69,56,453

(b) For 1CC-2 Project:

Revaluation Reserve..... Dr. 83,57,27,418
To Profit and Loss Account.. Cr. 83,57,127,418

This is given by the assessee in its paper book at page 82 note no. 31 to 32, the audited accounts explaining this Position.

43. Having recognized the revenues as above, the assessee claimed that it is now left with Closing stock-in-trade and its valuation. As the revalued amount of land is included in the cost of the project, to the extent of the revenues from the project are not yet recognize the revalued amount is carried forward as part of work-in-progress by crediting the P&L account and carrying forward the dosing WIP to the Balance Sheet. This is reflected in the following accounting treatment:

(a) For ICC-1 Project:

Stock-in-trade (Balance Sheet).. .Dr. 582,43,61,125
To Profit and Loss A/c.....Cr, 582,43,61,125

(b) For ICC-2 Project:

Stock-in-trade (Balance Sheet).. .Dr. 605,67,27,668
To Profit and Loss A/c..... Cr. 605,67,27,668

From the above, we find that Revaluation Reserve was created on transfer of land from Fixed Asset to Stock-in-trade. Thus, Revaluation Reserve was not created by debiting the P&L account as assumed by the AO. The amount of Revaluation Reserve embedded in the value of the stock-in-trade transferred to the P&L account (Debit side) is, at the end of the year, based on the matching principles, either recognized as revenue corresponding to the revenues recognized based on percentage completion method (Credit side or reflected as part of the Closing work-in-progress (debit side) carried forward to Balance Sheet. The profits of the assessee as shown in its P&L account duly considers the profits based on Percentage Completion Method on the portions sold during the year and hence there is no warrant for again adding the revaluation. Reserve to such declared profits. The addition, made by the AO leads to not merely double accounting of the book profits actually earned by the assessee but also leads to accounting for profits not yet earned by the assessee in respect of the portion of the project not yet completed and not yet sold and which is carried forward as part of closing work-in-progress. '

44. We have gone through the provision of Clause (b) of Explanation to section 115JB(2) of the Act, which applies only in case of Appropriation of profits. Clause (b) of Explanation I to section 115JB(2) requires the book profits to be increased by "the amounts carried to any reserves by whatever name called. The underlined words imply a transfer of the relevant amounts, from the Profit and Loss Account to the Reserve Account. Indeed, this is duly supported by not only the dictionary meaning of the word 'carry' as we shall shortly see, but, also by the use of the words 'if any amount' referred to in clauses (a)(i) debited to the profit and loss account in the text of Explanation 1 itself. The word 'earn' has several shades of meaning as would be evident from the extracts from the Webster's dictionary and the Oxford dictionary. However, in the context in which the words 'earned to' are used, in clause (c) of Explanation 1, it appears that the following shades of meaning are relevant in the present context; viz.:-



In Merriam Webster's Collegiate Dictionary:

'6: to transfer from one place (as a column) to another (—, a number in adding)'

'4: a quantity that is transferred in addition from one number place to the adjacent one of higher place value'.

In the Oxford English Reference Dictionary:

(in reckoning) transfer (a figure) to a column of a higher value'

It is apparent from the plain reading of the phrase 'amounts carried to' in clause (b) of Explanation 1 read with the above referred shades of meanings of the word 'carry' that the amounts contemplated to be created in computing the book profits are the amounts that are transferred from the Profit and Loss Account to the Reserves Account. As claimed by id Counsel Sh. Thar in the present case, there is no transfer of amounts from the Profit and Loss Account to the Reserves Account. Indeed, the reserves in the present case are created by way of revaluation of land which means that the reserves do not reflect the above, it is evident that the AO has misread the provisions of the law and misdirected himself in making the addition to the book profits in this behalf.

45. We have gone through the case law relied on by the Counsel for assessee of the Hon'ble Supreme Court in the case of National Hydroelectric Power Corporation v 'CIT (320 ITR 374)(SC). In this case, the question before the Hon'ble Supreme Court was as to whether advance against depreciation (AAD) could be regarded as amount carried to reserves within the meaning of clause (b) of Explanation 1 to section 115JB or not. In this context, the Supreme Court has explained the true interpretation of clause (b) on page 376, 377 in the following words:

"...9. We quote herein below Explanation I to section 115JB of the 1961 Act which reads as under:
"Explanation I. For the purposes of this section, 'book profit' means the net profit as shown in the profit and loss account for the relevant previous year prepared under subsection (2), as increased by,)* (a)***** -• (b) the

amounts carried to any reserves, by whatever name called, other than a reserve specified under section 33A C; or if any, amount referred to in clauses (a) to (ii) is debited to the profit and loss account, and as reduced by.."

10. We find merit in this civil appeal. On reading explanation L quoted above, it is clear that to make an addition under clause (b) two conditions must be jointly satisfied:

- (a) There must be a debit of the amount to the profit and loss account.
- (b) The amount so debited must be carried to the reserve.

Since the amount of AAD is reduced from sales, there is no debit in the profit and loss account. The amount did not enter the stream of income for the purposes of determination of net profit at all, hence clause (b) of Explanation I 'was not applicable. Further, "reserve" as contemplated by clause (b) of the Explanation I to section 115JB of the 1961 Act is required to be carried through the profit and loss account. At this stage it may be stated that there are broadly, two types of reserves, viz., those that are routed through profit and loss account and those which are not carried via profit and loss account, for example, a Capital Reserve such as Share Premium Account. AAD is not a reserve. It is not appropriation of profits...."

The term 'Appropriation of profits' is explained in the Guidance Note on Terms used in Financial -Statements' issued by the Institute of Chartered Accountants of India in the following words:

"An account sometimes included as a separate section of-the- profit and loss statement showing application of profits towards dividends, reserves etc."



It is evident on the given facts that the revaluation reserve is not created by 'Application of profits'. Indeed, the debit to the Profit and Loss Account indicates the cost of land to the real estate division and not 'Application of profits'.

46. Therefore, we are of the view that in the light of the decision of Supreme Court in *National Hydroelectric Power Corporation Ltd. (supra)*, the addition made by invoking the provisions of clause (b) of the Explanation-1 to section 115JB(2) cannot be sustained.

47. The assessee claimed that disclosure under section 217 of the Companies Act 1956 is made and as per Clause (b) of section 217(1) of the Companies Act, 1956, requires disclosure in the report by the Board of directors in respect of the amounts which the company proposes to carry to any reserves. The text of said section is set out as annexure-5. The disclosures pursuant to section 217 are given in the Directors' Report starting from page 32 of the audited accounts. It is apparent from para 1 of the Directors Report that various appropriations out of profits are disclosed and one such appropriation is that of profits "transferred to General Reserve".. The assessee claimed that the Revaluation Reserve is not considered as 'appropriation for the purposes of disclosures in the Directors Report pursuant to section 217 of the companies act 1956 and the said Directors Report is duly filed with the Registrar of Companies and no objections have been raised whatsoever of date which indicates that the provisions of section 217 have been duly complied with. Indeed, the phrase 'amounts carried to reserves' as understood under the Act in the context of section 115JB cannot be different from its interpretation under the Companies Act. In view of the above, the application of clause (b) of the Explanation I to section 115JB (2) is evidently inappropriate.

48. Disclosures requirement under Revised Schedule VI to the Companies Act 1956 in terms of para 6 (B)(i)(h) of the general instructions for preparation of Balance Sheet under Revised Schedule VI to the Companies Act, 1956, the appropriations by of transfer to / from reserves needs to be disclosed under the caption 'Reserves and Surplus'. Annexure -6 sets out a copy of the relevant portions of the format of Revised Schedule VI. Ld Counsel explained that in compliance with the above requirements, the amounts transferred to General Reserve have been disclosed at page 69 of the audited annual accounts under the caption 'Appropriations' and the list of 'Appropriations' so disclosed does not include any amount transferred to 'Revaluation Reserve'. The accounts have been duly audited by the statutory auditors of the company, approved by the shareholders of the company and filed with the Registrar of Companies. None of the three authorities have alleged that the accounts are not in accordance with the Revised Schedule and hence, this conclusively proves that Revaluation Reserve is not created out of the profits of the company. These reserves are not in the nature of appropriation of profit and therefore, the question of adding the same to the book profits by invoking clause (b) of Explanation f (I) to section 115JB (2) does not arise.

49. We are of the view that the action of the AO is contrary to the scheme of the provisions of MAT - clause (1) of the Explanation I to section 115J8 (2) of the Act. Clause (j) of the Explanation 1 requires that the book profits shown in the profit and loss account for a given year should be increased by - 'the amount standing in revaluation reserve relating to revalued asset on the retirement or disposal of such asset 'The said clause was introduced by Finance Act, 2012. The Memorandum explaining the provisions of Finance Bill, 201.2 has explained the rationale in the following words.

"It is noted that in certain cases, the amount landing in the revaluation reserve is taken directly to the general reserve on disposal of revalued asset. Thus, the gain attributable



to revaluation of the asset is not subject to MAT liability. It is, therefore, proposed to amend section 115JB to provide that the book profit of the purpose of section 115JB shall be increased in the amount standing in the revaluation reserve relating to the revalued asset which has been retired or

disposed, the same is not credited to the profit and Loss account" Relevant Extracts from the Explanatory memorandum to the Finance Bill, 2012 are set out at Annexure 7."

Para II of the relevant portion of Explanatory Memorandum clearly indicates that the amount standing to the Revaluation Reserve should be treated as part of taxable Book Profits only in the year in which the relevant asset is retired or disposed. In view of the above, we are of the view that valuation of inventory is essentially a part of the process of determining the trading results and that valuation of inventories does not give rise to any profits [see an early decision of the Hon'ble Supreme Court in the case of Chainrup Sampatram V. CIT (24 FIR 481). The Hon'ble Supreme Court has explained at Page 485, the purpose of crediting the value of unsold stock in the Profit and Loss Account in the following words:

"The true purpose of crediting the value of, unsold stock is to balance the cost of those goods entered on the other side of the account at the time of their purchase, so that the cancelling out of the entries relating to the same stock from both sides of the account would leave only the transactions on which there have been actual sales in the course of the year showing the profit or loss actually realised on the year's trading."

In any case, this is not a case of revaluation of stocks. The Indian Accounting Standards (AS-2) does not permit upward revaluation of stock-in-trade. This is, a case of transfer of Fixed Asset to Stock-in-trade at a revalued amount. Indeed, in the year of creation of Revaluation Reserve, there is no commercial profit earned by the Assesses Company by virtue of revaluation. The entire purpose of introduction of MAT was that certain companies were declaring significant book profits, paying dividends to its shareholders but not paying any tax because of various tax shields like investment allowance, depreciation etc. Accordingly, we delete the addition made by AO of the entire amount of revaluation reserve created during the year to its audited profit applying the provisions of section clause (b) of explanation (1) to section 115JB (2) of the Act. However, the AO will verify whether the assessee has released a sum of Rs. 165,26,83,871/- from revaluation reserve and credited to the profit and loss account, in that case this is not to be added as income under section 115JB of the Act This issue of assessee's appeal is partly allowed..."

10.1 Neither there is any factual change nor any legal change during the year under consideration, therefore, respectfully following the judgement of Hon'ble ITAT in Appellant's own case for A.Yr.,2012-13, appeal of the assessee on this ground is allowed."

30. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Since the Ld. CIT(A) has followed binding precedent on the issue in dispute, we



do not find any error in the order of the Ld.CIT(A) and accordingly, we uphold the same. Ground No.4 of the appeal of the Revenue is accordingly dismissed.

31. In the result, appeals of the assessee are partly allowed and appeals of the Revenue are dismissed.

Order pronounced under Rule 34(4) of the ITAT Rules, 1963 on 24/01/2023.

**Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;
Dated: 24/01/2023
Pavanan, Sr. P.S (on contract)

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,
(Sr. Private Secretary)
ITAT, Mumbai