IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI

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

ITA No. 715/MUM/2020
Assessment Year: 2008-09
&
ITA No. 718/MUM/2020
Assessment Year: 2009-10
&
ITA No. 7793/MUM/2019
Assessment Year: 2012-13
&
ITA No. 7794/MUM/2019
Assessment Year: 2013-14

Everest Industries Limited, D-206, Sector-63, Noida- 201301, Uttar Pradesh **PAN No. AAACE 7550 N** **Appellant**	**Vs.**	DCIT, Circle-1, Ashar I.T. Park, 6th floor, B- Wing, 16-Z, Wagle Industrial Estate, Thane(W)- 400 604. **Respondent**

ITA No. 1423/MUM/2020
Assessment Year: 2008-09
&
ITA No. 1418/MUM/2020
Assessment Year: 2009-10
&
ITA No. 654/MUM/2020
Assessment Year: 2012-13
&
ITA No. 653/MUM/2020
Assessment Year: 2013-14

DCIT, Circle-1, Room No. 22, B-Wing 6th floor, Ashar IT Park, Wagle Industrial Estate, Thane (W)-400 604.	**Vs.**	M/s Industrial Industries Limited, G-1, A-32, Genesis Mohan Coop. Industries, Mathura Road, New Delhi-110044. **PAN No. AAACE 7550 N**
Appellant		**Respondent**

Assessee by	:	Mr. Yogesh Thar/ Mr. Chaitanya Joshi/Ansh Ajmera
Revenue by	:	Smt. Nilu Jaggi, CIT-DR
Date of Hearing	:	24/01/2023
Date of pronouncement	:	31/01/2023

ORDER

PER OM PRAKASH KANT, AM

These cross appeals by the assessee and Revenue for assessment year 2008-09; 2009-10; 2012-13 and 2013-14 are directed against separate orders passed by the learned Commissioner of Income-tax(Appeals)-1, Mumbai [in short 'the Ld. CIT(A)']. As common issue-in-dispute are involved in these appeals, therefore, same were hard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. Firstly, we take up the cross appeals for assessment year 2008-09. The grounds raised by the Revenue are reproduced as under:

1. *Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in directing the A to exclude Sales Tax incentive, while computing the book profits /s 115JB of the Act, without appreciating that they have not been specifically excluded in Explanation 1 to section 115JB of the Act.*
2. *2. Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in directing the AO to exclude Sales Tax incentive, while computing the book profits /s 115B of the Act despite the fact that no adjustment other than the ones mentioned in Sec.115JB is permissible as held by the Supreme Court in the case of Apollo Tyres Ltd. (255 IT 273)*

2.1 The grounds raised by the assessee are reproduced as under:

1(a). That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) (here-in-after referred to as 'Ld. CIT(Appeals)' was not justified & grossly erred in confirming the action of the A.O. in initiating reassessment proceedings us 147/148 without appreciating the fact that the same has been done in utter disregard of the express provisions of the Act.

1(b). That on the facts and in the circumstances of the case, the Ld.CIT (Appeals) was not justified and rather grossly erred in not quashing the reassessment proceedings initiated beyond four years from the end of the relevant assessment year without appreciating the fact that there was no failure on the part of the appellant to disclose truly and fully all material facts necessary for completion of assessment.

1(c). That on the facts and in the circumstances of the case, the Ld.CIT (Appeals) was not justified and rather grossly erred in notnot quashing the reassessment proceedings without appreciating the fact that there was fresh application of mind on the part of AO to the same set of facts as available with him at the time of assessment and leading to mere change of opinion.

2. That the appellant craves leave to add, to amend, modify, rescind, supplement or alter any of the Grounds stated here-in-above, either before or at the time of hearing of this appeal.

3. Briefly stated facts of the case are that the assessee filed return of income for the assessment year under consideration on 30/09/2009 declaring total loss of ₹36,28,84,497/-under the regular provisions of the Income-tax Act, 1961 (in short 'the Act'), whereas declared book profit of ₹7,68,23,521/- for the purpose of section 115JB of the Act. The said return of income was revised on 31/03/2010 declaring loss at Rs.37,97,34,102/-under the normal provisions of the Act and book profit at ₹ 2, 88 ,27, 166/-. Subsequently, the case of the assessee was selected for scrutiny and after consideration of the submission of the assessee and examination of the details, the Assessing Officer passed the assessment order under section 143(3) of the Act on 23/12/2010 determining business loss at ₹19,97,80,218/- and long-term capital gain of ₹7,13,98,483/- under the regular provisions of the Act, however book profit was accepted as returned by the assessee in revised return of income at rupees ₹2,88,27,166/-. On further appeal, the Ld. First appellate authority, allowed the claim of 'sales tax incentive' as capital receipt under the normal provisions of the Act including set off of business loss against long-term capital gains, which resulted into loss under normal provisions of the Act at ₹18,21,26,459/- whereas book profit remained unchanged at ₹2,88,27,166/-.

3.1 Subsequently, reassessment proceedings were initiated under section 147 of the Act by way of the issue of notice under section 148 of the Act dated 27/01/2014. In the reassessment order passed under section 143(3) read with section 147 of the Act on 24/03/2015, the Assessing Officer determined total loss at ₹18,21,26,459 /- under the normal provisions of the Act and also denied exclusion of sales tax incentive claimed by the assessee in for the purpose of book profit and recomputed book profit at ₹8,25,71,890/- under the provisions of section 115 JB of the Act.

4. On further appeal, the Ld. CIT(A) upheld the validity of reassessment, however, allowed the relief on merit of the addition. Aggrieved, both the revenue and assessee are before the Income-tax Appellate Tribunal (in short 'the Tribunal') raising grounds as reproduced above.

5. The grounds raised by the Revenue relates to finding of Ld. CIT(A) for excluding the 'sales tax incentive' amount while computing the book profit under section 115 JB of the Act.

6. The briefly stated facts qua the issue in dispute are that case of the assessee was reopened on one of the ground of sales-tax exemption/incentive was wrongly reduced for the purpose of book profit under section 115JB of the Act by the Assessing Officer accepting it as a capital receipt. In the reassessment completed, the Assessing Officer observed that for the purpose of section115JB(2),

every assessee being a company shall prepare its profit and loss account for the relevant previous year in accordance with the provisions of Part II and III of Schedule VI to the Companies Act 1956. The first provisio to section 115JB of the Act, further provides that while preparing the annual accounts including the profit and loss account, the accounting policies, the accounting standard and method and rates adopted for calculating the depreciation shall be the same as adopted by the company for the purpose of preparing such accounts including the profit and loss account and laid before the company at its annual general body meeting, to which permissible adjustment are to be made as mentioned in 'Explanation-1' to section 115JB of the Act. According to the Assessing Officer, the item of capital receipt is not covered in the 'Explanation-1' to section 115 JB of the Act. Thus, the assessee can reduce the amount for the purpose of computation of the book profit as mentioned in 'Explanation-1' of section 115JB of the Act only and cannot reduce any other amount, even the capital receipt for the purpose of computing book profit under section 115 JB of the Act. The Ld. Assessing Officer referred to the decision of the Hon'ble Bombay High Court in the case of **CIT Vs Veekay Lal Investment Co. Ltd 249 ITR 597 (Bom)**; Hon'ble Kerala High Court in the case of **NJ Jose and company Vs ACIT, 174 Taxman 141 (Kerala)** ; decision of the Tribunal in the case of **Growth Avenue Securities 126 ITD 179 (Delhi-Trib)**; decision of the

Tribunal in the case of DCIT Vs Bombay Diamond Co. 32(1) ITCL 456 (Mum-ITAT) ; decision of the Special bench of Tribunal, Hyderabad in the case of **Rain Commodities Vs DCIT 4 ITR (Trib.) 551 (Hyd-Trib-SB)** and decision of ITAT in the case of Sumer Builder 50 SOT 198 (Mumbai -Trib). He accordingly rejected the claim of the assessee of reducing the amount of sales-tax incentive for the purpose of computation of the book profit.

7. On further appeal, the Ld. CIT(A) adjudicated the appeal on 03/12/2019, wherein allowed part relief to the assessee.

8. Before us, the Ld. Departmental Representative relied on the order of the Assessing Officer and submitted that provisions of law do not permit for excluding the sales incentive for the purpose of book profit from the profit computed as Part II and III of Schedule VI of Companies Act, 1956. The Ld. counsel of the assessee, on the other hand, submitted that identical issue in the case of **PCIT Vs Ankit Metal & Power Ltd (2019) 416 ITR 591** has been decided in favour of the assessee by Hon'ble Calcutta High Court. He also relied on the decision of the Coordinate bench of the Bombay Tribunal in the case of **Ambuja Cement Limited Vs Add CIT (LTU) in ITA No. 5883/Mum/2012** and **Prism Cement Ltd Vs DCIT in ITA No. 804 and 805/Mum/2018**.

9. We have heard rival submission of the party on the issue in dispute and perused the relevant material on record. However, on

perusal of the order of the Ld. CIT(A), we find that Ld. CIT(A) had adjudicated on the issue that sales-tax incentive received by the assessee under the Aegis of New Packages Scheme, 1993 was capital in nature. The issue of reduction of the same from the profit and loss account for the purpose of computation of the book profit has not been adjudicated by the Ld. CIT(A). But this being purely a legal issue and all facts having been reproduced by the Assessing Officer, we proceeded to adjudicate in view of no objection of both the parties.

9.1 The Hon'ble Calcutta High Court in the case of **Ankit Metal & Power Ltd (supra),** has adjudicated the issue as under:

> *"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 AppolloTyres Lid. (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."*

9.2 Further, the coordinate bench of the Tribunal in the case of Ambuja cements Ltd (supra) after considering the decision of the

Hon'ble Bombay High Court in the case of Harinagar Sugar Mills ltd (supra) and decision of the Hon'ble Calcutta High Court in the case of Ankit Metals and power Ltd (supra), held as under:

> *"50. Ld. representatives fairly agree that the above issues are now covered, in favour of the assessee, by Hon'ble Calcutta High Court's judgment in the case of PCIT Vs Ankit metal & Power Lid 120197 416 ITR 591 (Call. by Hon 'ble jurisdictional High Court's judgment in the case of CIT Vs Harinagar Sugar Mills Lid [ITA No 1132 of 2014, dated 4* January 2017] and by a coordinate bench decision in the case of ACIT Vs JSW Steel Limited [(2019) 112 taxmann.com 55 (Mum)]. Learned Departmental Representative, however, relied upon the stand of the authorities below.*
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> *51. We find that a coordinate bench of this Tribunal, in JSW Ltd's case (supra), has inter alia, observed as follows:*
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> > *47. We further noted that Hon'ble Kolkata High Court, in the case of Pr. CIT v. Ankit Metal & Power Lid. |20191 109 taxmann.com 93/266 Taxman 237 Ltd. had considered an identical issue and after considering the decision of Hon'ble Supreme Court in the case of Apollo Tyres Lid. (supra) held that when a receipt is not in the character of income as defined under section 2(24) of the IT. Act, 1961, then it cannot form part of the book profit us 115JB of the IT. Act, 1961. The Hon'ble High court, further observed that sales tax subsidy received by the assessee is capital receipt and does not come within definition of income under section 2(24) of the IT. Act, 1961 and when, a receipt is not a in the nature of income, it cannot form part of book profit us 115JB of the IT. Act, 1961. The Court, further observed that the facts of case before the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) were altogether difference, where the income in question was taxable, but was exempt under a specific provision of the Act, and as such it was to be included as a part of book profit, but where the receipt is not in the nature of income at all, it cannot be included in book profit for the purpose of computation u/s 115JB of the I.T. Act, 1961.*

48. We further noted that the ITAT special bench of Kolkata Tribunal, in the care of Sutlej Cotton mills Lad, v. Asset. CITIES 3EnS I ID 22 kaan, SEy, held that d particular receipt, which is admittedly not an income cannot be brought to tax under the deeming provisions of section 115J of the Act, as it defies the basic intention behind introduction of provisions of section 115JB of the Act. The ITAT Jaipur bench, in case of Shree Cement Led. (supra) had considered an identical issue and held that incentives granted to the assessee is capital receipt and hence, cannot he part of book profit computed us 11SJB or the Acr. Similarly. the ITAT Kolkata Bench, in the case of Sipea India (P) Lid. v. De. CIT I2017 80 taxmann.com 87 (Trib.) had considered an identical issue and held that when, subsidy in question is not in the nature of income, it cannot be regarded as income even for the purpose of book profit u/s 115JB of the Act, though credited in the profit and loss account and have to be excluded for arriving at the book profit us 115JB of the Act.

49. Insofar as, case laws relied upon by the department, we find that all those case laws have been either considered by the Tribunal or Hich Court and came to conclusion that in those cases the capital receipt is in the nature of income, but by a specific provision, the same has been exempted and hence, the came to the conclusion that, once particular receipt is routed through profit and loss account, then it should be part of book profit and cannot be excluded, while arriving at book profit u/s 115JB of the Act 1961.

50. In this view of the matter and considering the ratio of case laws discussed hereinabove, we are of the considered view that when a particular receipt is exempt from tax under the Income tax law, them the same cannot be considered for the purpose of computation of book profit w/s 115JB of the IT.Act 1961. Hence, we direct the Ld. AO to exclude sales tax subsidy received by the assessee amounting to Rs. 36,15,49,828/- from book profits computed w/s 115JB of the IT. Act, 1961.

52. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the same, we uphold the plea of the assessee and direct the Assessing Officer to exclude the sales tax incentive subsidy for computing book profit under section 115 JB of the Act. The assessee gets the relief accordingly."

9.3 The issue in the decisions cited by the Assessing officer is of capital income under the capital gain, which is liable for tax but the capital receipt in the case of the assessee has been held as not as part of income at all and not liable for tax in the decision in the case Ankit Metal and Powers ltd. (supra) , which has been followed in the case of Ambuja Cement Limited (supra). The issue in dispute being squarely covered by the decision of the coordinate bench of the Tribunal (supra), the grounds raised by the Revenue are accordingly dismissed.

10. As far as grounds raised by the assessee are concerned, which relates to challenging validity of the reassessment, we find that issue on merit has been decided in favour of the assessee and therefore adjudicating the issue on the validity of the reassessment has been rendered merely academic. Therefore, we are not adjudicating the grounds raised by the assessee and same are left open to the assessee to challenge in case the decision on merit is reversed by the higher appellate authorities. The grounds of the appeal of the assessee are accordingly dismissed as infructuous.

11. Now we take up the cross appeals for assessment year 2009-10. The grounds raised by the assessee reproduced as under:

> *1. That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) (here-in-after referred to as 'Ld. CIT(Appeals) was not justified &rather grossly erred in confirming disallowance in respect of foreign exchange fluctuation loss on reinstatement of CB loan as capital in nature amounting to Rs.13,41,01,121/- in computing total income under the normal provisions of the Act.*

11.1 The grounds raised by the Revenue reproduced as under:

> *1. (i) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in deleting an amount of Rs. 5,83,36,300/- being disallowance of claim of sales tax incentive.*
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> *(ii) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in holding that Sales Tax was embedded in the Sales prices charged by the assessee and the same was in the nature of capital receipt. The Ld. CIT(A) ignored the fact that the assessee was legally required to collect Sales Tax on the Sales made, yet it had worked out the notional Sales Tax so collected and had claimed the same as capital receipts.*
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> *(iii) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in relying on the decision of ITAT, Mumbai and the decision of Bombay High Court (ITA No. 1299 of 2008) in the case of Reliance Industries Limited, even though subsequent to the Departmental appeal against the Order of High Court, the issue has been remitted back to the Bombay High Court to decide afresh and the same is still pending for adjudication.*
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> *2. (i) Whether the CIT (A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 14,52,06,708/- stated to be collected by the assessee was capital in nature without any evidence placed*

on record to establish that the said amount was actually collected on account of excise duty.

(ii) Without prejudice to the ground at (i) above, whether the CIT (A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 14,52,06,708/- collected by the assessee was not revenue in nature despite the fact that the same was collected by the assessee on goods which were exempted from levy of any duty as per the Central Excise Department's Notification No. 50/2002-CE dated 10.06.2003

(iii) Whether the CIT (A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 14,52,06,708/- collected by the assessee was capital in nature by comparing the scheme of exemption under which the claim was made by the assessee by such other schemes wherein the mode of incentive was in the nature of refund/reimbursement or subsidy.

3. (i) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in directing the AO to exclude Sales Tax incentive and Excise Duty Exemption while computing the book profits us 115JB of the Act, without appreciating that they have not been specifically excluded in Explanation 1 to section 115]B of the Act.

(ii) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in directing the AO to exclude Sales Tax incentive and Excise Duty Exemption, while computing the book profits us 115JB of the Act despite the fact that no adjustment other than the ones mentioned in Sec.115JB is permissible as held by the Supreme Court in the case of Apollo Tyres Ltd. (255ITR 273)

12. The sole ground of the appeal of the assessee relates to disallowance in respect of foreign-exchange fluctuations loss on the reinstatement of External Commercial Borrowing (ECB) loan amounting to ₹13,41,01,121/- holding it as capital in nature

13. The brief facts qua the issue in dispute that on this issue the assessee is before us in second round of proceedings. In first round, the Assessing Officer observed that during the year under consideration, the assessee availed a loan of US dollar 12 million, as external commercial borrowing (ECB) which was reinstated in the balance sheet at the end of the year on the basis of the exchange rate of US dollar prevailing on the year, which resulted in a loss of ₹13,41,01,121/-.

13.1 In the books of accounts, the assessee capitalised the loss to the extent of ₹12,35.43 lakhs in accordance with accounting standard 11 as modified by the notification of Ministry of corporate affairs and balance amount of ₹105.57 lakhs was transferred to "Foreign Currency Monetary Item Translation Difference Account (FCMITDA)"following the notification issued by the Ministry of Corporate Affairs, and was proposed to be amortised over a period of three years. During the year under consideration, the assessee₹amortised Rs. 34.13 lakhs.

13.2 For the purpose of income tax, the assessee claimed entire loss of ₹13,41.01 lakhs as deduction treating it as business loss. The Tribunal while its order dated 20/01/2018 in ITA No. 3804 and 3849/Mum/2015 , after analyzing the decision of Hon'ble Supreme Court in the case of Sutlej Cotton Ltd Vs CIT (1979) 116 ITR 1, and other decisions including decision of Pune Bench of Tribunal in the

case Cooper Corporation Ltd (2016) 159 ITD 165 Pune, restored the matter back to the Assessing Officer for deciding afresh. The relevant finding of the Tribunal (supra) is reproduced as under:

> *"49. We have heard rival contentions and perused the record. We notice that the Ld CIT(A) has confirmed the disallowance by taking the view that the foreign exchange valuation loss is a notional loss and not actual business loss. The view so taken by Ld CIT(A) is apparently not in accordance with the decision rendered by Hon'ble Supreme Court in the case of Woodward Governor India P Ltd (2009)(312 ITR 254)(SC), wherein the Hon'ble Supreme Court has expressed the view that the valuation is a part of accounting system and that the loss suffered by the assessee on account of exchange difference (on revenue account) as on the date of balance sheet is an item of expenditure u/s 37(1) of the Act.*
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> *50. It is also pertinent to extract below the observations made by the Hon'ble Supreme Court in this regard in the above cited case:-*
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> *"In the case of Sutlej Cotton Mills Ltd. v. CIT reported in 116 ITR 1 this Court has observed as under:*
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> *"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature."*
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> *(emphasis supplied)*

21. In conclusion, we may state that in order to find out if an expenditure is deductible the following have to be taken into account (i) whether the system of accounting followed by the assessee is mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received; (ii) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide; (iii) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it; (iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards; (vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation."

The Hon'ble Supreme Court has made a distinction between the circulating capital/ trading asset and Fixed capital/capital asset. While the loss arising on revaluation of foreign currency held in the former category is a trading loss and the loss arising on revaluation of foreign currency held in later category is a capital loss.

51. The Hon'ble Bombay High Court had an occasion to examine an identical issue in the case of CIT Vs. V.S. Dempo and Co. P Ltd (206 ITR 291) and the Hon'ble Bombay High Court has laid down following principles:-

"15. The propositions that emerge from the above discussions may be summed up as follows :

(i) A loss arising in the process of conversion of foreign currency which is part of the trading asset of the assessee is a trading loss as any other loss.

(ii) In determining the true nature and character of the loss, the cause which occasions the loss is immaterial; what is material is whether the loss has occurred in the course of carrying on the business or is incidental to it.

(iii) If there is loss in a trading asset, it would be a trading loss, whatever be its cause because it would be a loss in the course of carrying on the business,

(iv) Loss in respect of circulating capital is revenue loss whereas loss in respect of fixed capital is not.

(v) Loss resulting from depreciation of the foreign currency which is utilised or intended to be utilised in business and is part of the circulating capital, would be a trading loss, but depreciation of fixed capital on account of alteration in exchange rate would be a capital loss.

(vi) For determining whether devaluation loss is revenue loss or capital loss what is relevant is the utilisation of the amount at the time of devaluation and not the object for which the loan had been obtained. Even if the foreign currency was intended or had originally been utilised for acquisition of fixed asset, if at the time of devaluation it had changed its character and had assumed the new character of stock-in-trade or circulating capital, the loss that occurred on account of devaluation shall be a revenue loss and not a capital loss.

(vii) The way in which the entries are made by an assessee in the books of account is not determinative of the question whether the assessee has earned any profit or suffered any loss. What is necessary to be considered is the true nature of the transaction and whether in fact it has resulted in profit or loss to the assessee."

52. The Hon'ble Supreme Court has also observed in the case of Woodward Governor India P Ltd (supra) that the profits and

gains of the previous year are required to be computed in accordance with the relevant accounting standard (paragraph 16). Hence the Hon'ble Supreme Court analysed various clauses of AS-11 and finally upheld the view taken by the assessee, in the case before Hon'ble Supreme Court, that the foreign exchange fluctuation arising on valuation as on the date of balance sheet is required to be adjusted to the value of assets u/s 43A of the Act.

53. The Ld D.R took the support of sec. 43A of the Act and accordingly supported the action of the AO in adjusting the foreign exchange loss to the value of assets. However, a perusal of the provisions of sec. 43A would show that the said section shall have application only in a case where any asset is acquired in any previous year from a country outside India for the purposes of his business or profession. If the assets were acquired in India, in our view, the provisions of sec. 43A shall not have application.

54. In the instant case, it is not clear as to whether the foreign currency loan availed by the assessee was used to acquire any asset from a country outside India. Hence to decide about the applicability or otherwise of provisions of sec. 43A, the details of purchase of assets are required. However, we notice that the assessee has taken a plea before Ld CIT(A) that it has not used the foreign currency loan for acquiring assets from a country outside India. However this submission of the assessee has not been examined by the tax authorities. Upon verification, if it is found to be correct, then the provisions of sec. 43A shall not be applicable to the assessee.

55. We have noticed earlier that the Hon'ble Supreme Court has held that the profits and gains are required to be computed in accordance with the relevant accounting standard. We have also noticed that the loss arising on valuation of foreign exchange can either be on revenue account or on capital account, depending upon the fact of the case, i.e., whether the

loan has been used as circulating capital or as fixed capital. The Hon'ble Bombay High Court has held in the case of V.S.Dempo& Co. P Ltd (supra) that for determining whether devaluation loss is revenue loss or capital loss what is relevant is the utilisation of the amount at the time of devaluation and not the object for which the loan had been obtained, i.e., if the foreign currency loan was obtained to hold it a fixed capital and later on it was converted into circulating capital, then the valuation loss shall be considered as on revenue account. These principles, in our view, would govern the nature of treatment to be accorded to the loss arising on account of restatement of foreign currency loans.

56. In the instant case, the nature of foreign currency loan availed by the assessee; whether it was held as fixed capital or circulating capital etc., have not been examined or brought on record. The assessee has simply taken the plea that the foreign currency loan has been used for the purpose of business and hence the loss arising its revaluation is allowable. In our view, it may be difficult to accept the said proposition of the assessee without examining the nature of loan and its utilisation.

57. Further we notice that the assessee has capitalised a sum of Rs.1235.43 lakhs by following paragraph 46 of the Accounting Standard-11 inserted by the Ministry of Corporate Affairs under the Companies (Accounting Standards) Rules, 2006. The accounting standards, as we have seen earlier, are relevant to determine the profits and gains of business. Hence, this aspect would also require consideration.

58. The Ld A.R took support from the decision rendered by Hon'ble Pune bench in the case of Cooper Corporation (P) Ltd (2016)(69 taxmann.com 244) to support the claim of loss. However, following observations made by the Pune bench of Tribunal would show that the facts prevailing there is different:-

"10.9 We find that the decision in the case of Sutlej Cotton Mills Ltd. (supra) relied upon by the Ld. Departmental Representative is of no assistance to the Revenue. The Hon'ble Supreme Court therein stated the principle of law that where any profit or loss arises to an assessee on account of depreciation in foreign currency held by him on conversion from another currency, such profit and loss would ordinary be trading loss if the foreign currency held by the assessee on revenue account as trading asset or as a part of circulating capital embargo in business. However, if the foreign currency is held as a capital asset, the loss should be capital in nature. The aforesaid principle of law is required to be applied to the facts of case to determine whether the foreign currency is held by the assessee on revenue account or as a part of circulating capital. In the present case, fluctuation loss inflicted upon the assessee bears no nexus or relation to the acquisition to the assets. The action of the assessee is tied up to its underlying objective i.e. saving in interest costs, hedging its revenue receipts etc. which are undoubtedly on revenue account. Thus, the loss generated in impugned action bears the character of revenue expenditure."

It can be noticed that the decision in the above said case has been rendered by Pune bench of Tribunal on the basis of facts prevailing in that case. Hence, we are of the view that the assessee cannot take support from the said decision.

58. Thus, we notice that the facts relating to the foreign currency loan of USD 12 million availed by the assessee have to be examined in the light of principles discussed in the preceding paragraphs in order to arrive at a fair and just conclusion of the matter. We notice that neither the assessee nor the tax authorities have brought relevant facts on record. In the absence of the same, it will not be possible for us to apply the legal principles discussed above. Under these set of facts, we are of the view that this issue requires fresh examination at the end of the assessing officer. Accordingly we restore this issue to the file of the assessing officer with the direction to examine the

same afresh by duly analysing the nature of loan, manner of its utilisation, the present position of loan etc., in the light of legal principles discussed above. After affording adequate opportunity of being heard to the assessee, the AO may take appropriate decision in accordance with the law.

13.3 The Assessing Officer examined the nature of the loan and concluded that loan had been sanctioned and utilised for purchase/acquisition of plant and machinery therefore relying on the decision of the Hon'ble Supreme Court in the case of Sutlej Cotton Ltd (supra); Hon'ble Bombay High Court in the case of CIT Vs Dempo and Co. Pvt. Ltd (supra) and Hon'ble Supreme Court in the case of Woodword Governer India Private Limited(supra), he treated the loss as capital expenditure and allowed the depreciation accordingly.

14. The Ld. CIT(A) following judicial precedents, upheld the disallowance observing as under:

"8.2 It is seen that the Appellant has suffered Foreign Exchange Fluctuation Loss arising out of CB borrowing for assets acquired in India. The Appellant has claimed it as a "Revenue loss relying on various decisions, the AO has treated it as "capital loss". If the proceeds of the CBs were utilized to acquire any capital assets from outside India, Section 43CA of the I.T. Act, 1961 would be applicable However, in the case of the Appellant this is not so. Under the circumstances, judicial pronouncements need to be examined. There are certain judicial pronouncements analogous to the issue under consideration, wherein such deductions has been denied holding to be "capital" in nature. In Shell Company of China Ltd [22 ITR 1(A)], it was held that "gains arising on deposits (in foreign currency) are capital receipts as the deposits were in essence loan/capital & not trading receipts".

Further in Sutlej Cotton Mills Ltd., (1979) 116 IT 1 (SC)] it was held by Supreme Court that, "the law may, therefore, now be taken to be well settled that where the profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into anothercurrecny, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading assetor as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature."

Also in Tata Locomotive & Engineering Co. Ltd. [TELCO - (1966) 60 IT 405 (SC)] a similar view was again reiterated.

The aforesaid decisions were later consistently followed by some High Courts in Bestobell (India) Ltd. Union Carbide India, Oil India Limited], Bharat General and Textile Industries Limited I. Groz-BeckertSaboo Ltd. Sandoz (India) Electric Lamp Manufacturers (India) Limited and V. S. Dempo& Co. (P) Ltd. in the context of CB holding that if the foreign exchange fluctuation loss arises on restatement of ECBs utilized for acquiring capital asset indigenously in India, then such loss will be capital in nature.

Considering the facts brought on record and the judicial pronouncements on the issue the foreign exchange loss of Rs. 13,41,01, 121/- is held to be capital in nature. However, the AO is directed to give appropriate adjustment in depreciation on such fixed assets. Ground partly allowed."

15. Before us, the Ld. counsel of the assessee referred to decision of the Hon'ble Supreme Court in the case of **CIT Vs UP State Industrial Development Corporation reported in (1997) 92 Taxman 45 (SC)** wherein it is held that for the purpose of ascertaining profit and gains, the ordinary principle of commercial accounting should be applied, so long as they don't conflict with the express provision of the relevant statute.

15.1 The Ld. counsel for the assessee referred to accounting standard (AS)-11 (Revised 2003) and submitted that as per normal accounting standard the foreign-exchange gain or loss on loans in foreign currency is required to be recorded as income or loss in books of accounts. Regarding recognition of the exchange difference, the Ld. counsel referred to clause 13 of the AS-11, which is reproduced as under:

> *"13. Exchange differences arising on the settlement of monetary items or on reporting an enterprise's monetary items at rates different from those at which they were initially recorded during the period, or reported in previous financial statements, should be recognised as income or as expenses in the period in which they arise, with the exception of exchange differences dealt with in accordance with paragraph 15.*
>
> *" It may be noted that the Institute has issued in 2003 an Announcement titled"Treatment of exchange differences under Accounting Standard (AS) 11 (revised2003), The Effects of Changes in Foreign Exchange Rates vis-a-vis Schedule VI to the Companies Act, 1956. As per the Announcement, the requirement with regard to treatment of exchange differences contained in AS 11 (revised 2003), is different from Schedule VI to the Companies Act, 1956, since AS 11 (revised 2003) does not require the adjustment of exchange differences in the carrying amount of the fixed assets, in the situations envisaged in Schedule VI. It has been clarified that pending the amendment, if any, to Schedule VI to the Companies Act, 1956, in respect of the matter, a company adopting the treatment described in Schedule VI will still be considered to be complying with AS 11 (revised 2003) for the purposes of section 211 of the Act. Accordingly, the auditor of the company should not assert non-compliance with AS 11 (2003) under section 227(3)(d) of the Act in such a case and should not qualify his report in this regard on the true and fair view of the*

state of the company's affairs and profit or loss of the company under section 227(2) of the Act. (published in "The Chartered Accountant', November, 2003, pp. 497.) The full text of the Announcement has been reproduced in the section titled "Announcements of the Council regarding status of various documents issued by the Institute of Chartered Accountants of India' appearing at the beginning of this Compendium."

15.2 The Ld. counsel further referred to revisedaccounting standards, which superseded the accounting standard AS-11 and came into effect in respect of accounting periods commencing on or after 01/04/2004. The learned counsel particularly referred to para 46 of said revised accounting standards and submitted that in respect of accounting periods commencing on or after 07/12/2006 and ending on or before 31/03/2011, at the option of the enterprise, exchange difference arising and reporting of long-term foreign currency monetary items at rates different from those at which they were initially recorded during the period, or reported in previous financial statements, insofar as they relate to the acquisition of an depreciable capital asset, can be added to or deduced from the cost of the asset and shall be depreciated over the balance life of the asset and in other cases can be accumulated in a "Foreign Currency Monetary Item Translation Difference Account (FCMITDA)in the enterprise's financial statement and amortised over the balance life of such long-term asset/liability but not beyond 31/03/2011. The Ld. counsel further referred to Institute of Chartered Accountants of India website to support that said

modification in the accounting standard was done by the Corporate Affairs ministry in March 2009 to ease accounting treatment on foreign exchange difference to help the companies to tie over the global financial crisis in 2008-09 and therefore the India Inc was given an option to refrain from complying with the AS 11, which stipulated that exchange difference on foreign currency borrowing should be recognised only in the profit and loss account.

15.3 The Ld. counsel, submitted that following above transitory changes in the accounting standard, the assessee capitalised the foreign exchange difference loss in respect of the depreciable assets as capital expenditure, but these modification in the accounting standard were transitory and not falls under normal accounting principle. Therefore, for the purpose of income tax, the assessee claimed the said foreign exchange loss as revenue expenditure as per the normal accounting standard As-11.

15.4 The Ld. counsel of the assessee further relied on the decision of theCoordinate bench of the Tribunal in the case of Hyundai **Motor India Ltd v. DCIT, LTU, Chennai in ITA No. 853/Chny/2014 and563/Chny/2015 for assessment year 2009-10 and 2010-11** to support that once the asset is put to use the foreign exchange difference for subsequent period is to be treated as revenue expenditure in view of analogous treatment to interest under section 36(1)(iii) of the Act.The Tribunal (supra) relied on the

decision of coordinate bench in the case of **Cooper Corporation Private Limited Vs DCIT (2016) 159 165 (Pune)**.

15.5 The Ld. counsel also relied on the decision dated 16/03/2018 of the Tribunal Cochin Bench in the case of **MFAR Hotels and Resorts Ltd reported in (2019) 105 taxmann.com 335**, wherein it is held that the Assessing Officer should bifurcate foreign-exchange fluctuation in respect of foreign currency loan used for assets acquired outside India and indigenous assets and apply provisions of section 43A orAS-11 (2003) accordingly.

15.6 The Ld. counsel also referred to the decision of the Mumbai bench of the Tribunal dated 19/06/2020 in the case of **Mahindra and Mahindra Ltd (2020) 117 taxmann.com 518 (Mumbai-Trib)** in support of the claim that foreign exchange loss should be allowed as revenue expenditure.

16. On the contrary, the Ld.DR relied on the order of the Ld. CIT(A) and submitted thatin the case of the assessee, the forex gain/loss is arising from a fixed capital, in view of the decision of the Hon'ble Supreme Court in the case of Sutlej Cotton Mils Limited (supra), same would be capital in nature, and thus decision of the Tribunal cited by the learned counsel of the assessee need not to be acted upon keeping in view the judicial hierarchy. The ld.DR further submitted that complete details of application of foreign currency loan for purchase of assets were not provided before the Assessing

Officer even in the second round of assessment proceeding. She referred to the finding of the Assessing Officer in para 5.2 of the assessment order wherethe AO has mentioned that the assessee had provided bills of ₹ 34.11 crores and not provided bills of balance purchase for rupees 18.26 crores, out of the total loan amount of ₹ 48.37 crores. Thus according to the learnedDR , whether the assets to the extent of Rs. 18.26 crore are indigenous or foreign assets is not clear and therefore without prejudice she submitted that if at all, the assessee is allowed the claim then revenue expenditure should be restricted to the amount of ₹30.11 crore only.

17. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute before us is determination of character of foreign-exchange fluctuation loss/gain in respect of the foreign loans, which according to the assessee have been utilised for purchase of assets from domestic market. The revenue has also disputed the application of quantum of loan utilised for purchase of domestic assets in view of incomplete details filed by the assessee before the Assessing Officer.

17.1 As far as any gain or loss due to foreign exchange fluctuation in respect of the foreign loan for purchase of capital asset from overseas market is concerned, the section 43A of the Act which is

effective from 01/04/1967, deals with the issue and any such gain or loss are to be adjusted to the written down value (WDV) of the Asset as per the provisions of the section 43A of the Act.

17.2 The question before us, is however in relation to gain or loss due to foreign exchange fluctuation arising from the loans utilised for purchase of domestic assets. With effect from 01/04/2017, the legislation has introduced section 43AA of the Act, which deals with the taxation of forex fluctuation. The said section prescribe that subject to the provisions of section 43A, any gain loss arising on account of any change in foreign exchange rates shall be treated as income or loss, as the case may be and such gain or loss shall be computed in accordance with Income Computation and Disclosure Standard (ICDS) notified under section 145(2) of the Act. The section 43AA is applicable in respect of all forex transactions including those relating to monetary, non-monetary, transactions of financial statement of foreign operations, forward exchange contract etc. thus, barring the situation of purchase of capital asset overseas, in all of the situations, the gain arising from foreign-exchange transactions is to be dealt in accordance with section 43AA read with relevant ICDS. The section 145(2) of the Act has notified 10 ICDS with effecting from assessment year 2017-18. The ICDS-06, deals with effect of foreign-exchange rates. The said ICDS has provided different treatment for foreign exchange fluctuation arising from monetary items and nonmonetary items. The para 2(k)

of the ICDS-06 defines 'monetary items' as money held in assets to be received on liabilities to be paid in fixed or determinable amounts of money. Thus, the cash receivables and payables are monetary items. In the instant case before us the foreign-exchange fluctuation is relating to payables and therefore it is one of the monetary item. The para 5(i) of the ICDS-06 prescribe that in respect of monetary items, exchange difference arising on the settlement thereof or on conversion thereof at the last day of the previous year shall be recognised as income or expense in that previous year. Para 6 of the ICDS-06 notwithstanding anything contained in para 5, recognition of the exchange difference shall be subject to the provision of section 43A of the Act. In view of the above provisions of the Act, it is evident that except for the circumstances as described in section 43A, after 01/04/2017, the gain or loss arising from foreign-exchange fluctuation on monitory items has to be treated as income or loss in terms of ICDS-06 read with section 43AA of the Act.

17.1 But, the assessment year involved before us is for the period of era of pre-43AA of the Act. Therefore, we have to examine the position of law emerging from the judicial precedentsdealing with the issue of gain or loss from foreign-exchange fluctuation in respect of the monetary items.

17.2 We find that in the case of **Tata Locomotive and engineering Co Ltd (1966) 60 ITR 405 (SC),**the assessee was in the business of manufacturing locomotive boilers and locomotive. The assessee was also acting as a selling agent for locomotives of a USA company namely 'Baldwin'. The assessee earned commission of UDS 36,123/- for sale of their products in India and requested the said company to deposit this amount with its agent namely 'Tata Inc, New York'. The assessee intimated this deposit to the Exchange Control Regulator of India (i.e. RBI) that said amount will be used for purchase of capital goods from USA and not for any other purposes. The commission income earned was though offered to tax in India in respective assessment years, but subsequently due to the devaluation of the Indian rupee, the assessee found purchase of capital goods from USA as more expensive and also noted that Government of India had put some sanctions on purchase of goods from the USA. The assessee then with the permission of Exchange Control Regulator, brought the said amounts back into India. According to the revenue, gain on account of foreign exchange fluctuation on the commission income retained in the USA was revenue in nature and subjected to tax, since it is a profit incidental to the business. The assessee however contended that since the amounts were retained outside India for the purpose of procurement of capital goods, any gain arising on foreign exchange fluctuation account pertained to fixed capital and accordingly not

subjected to tax. The Hon'ble Supreme Court held that in the case with the permission of RBI, the assessee retained such amount for the purpose of capital goods, the same would obtain the nature of capital even though the said capital goods were not ultimately purchased. The gain arising due to foreign action fluctuation was held as capital in nature and no tax was to be paid.

17.3 In the case of **Sutlej cotton mills limited Vs CIT (1979) 116 ITR 1 (SC),** the assessee was engaged in the business of manufacturing and sales of cotton fabrics. The cotton mill of the assessee located in West Pakistan (i.e. present Bangladesh) earned profit for the period ended 31st March, 1954, which was taxed on accrual basis and included in the profit of the Indian company. At the time of offering profit for tax in India the exchange rate between Pakistan and India was at 100 Pakistan rupees being equal to 144 Indian rupees. Subsequently, when the assessee company applied for repatriation of said amount of the profit lying in west Pakistan branch, the exchange rate changed to 100 Pakistan rupees being equal to hundred Indian rupee. The Indian company accordingly claimed loss of amount due to foreign action fluctuation under section 10(1) of Income-tax Act, 1922. The Assessing Officer did not allow such deduction which arose due to foreign-exchange fluctuation holding that such loss was due to state action and not relating to the business of the assessee. The Hon'ble Supreme Court held that any devaluation of foreign-exchange on account of trading

asset would be trading loss and on account of the capital asset would be capital loss. The Hon'ble Supreme Court laid down the test that in order to decide whether a foreign-exchange fluctuation gain or loss is taxable or allowable, the important question that need to be addressed is whether the gain or loss arising from fixed capital of circulating capital. If the gain or losses arising from fixed capital, the same wouldbe capital in nature and not allowed as loss or taxed and if same is arising from circulating capital than it shall be accordingly allowed as deduction or taxed.Relevant finding of the Hon'ble Supreme Court has already been reproduced above in the order of the Tribunal (supra) in first round of proceedings in the case of the assessee.

17.4 In the case of **Tata iron and steel Co Ltd (1998) 22 ITR 285**, the Hon'ble Supreme Court held that the actual cost of asset depend upon the amount paid by the assessee to acquire the asset. The amount may have been borrowed by the assessee, but it will not alter the cost of the asset even if the assessee did not repay the loan. According to the Hon'ble Supreme Court the cost of the asset and the cost of raising money for purchase of the asset are two different and independent transactions. The Hon'ble Supreme Court held that more of repayment of loan has nothing to do with the actual cost of the asset. The Hon'ble Supreme Court held that all the matters other than matters falling under section 43A, the actual cost cannot be altered based on a subsequently event of foreign

action fluctuation. The relevant part of the decision of the Hon'ble Supreme Court is reproduced as under:

> *"4. Coming to the questions raised, we find it difficult to follow how the manner of repayment of loan can affect the cost of the assets acquired by the assessee. What is the actual cost must depend on the amount paid by the assessee to acquire the asset. The amount may have been borrowed by the assessee. But even if the assessee did not repay the loan it will not alter the cost of the asset. If the borrower defaults in repayment of a part of the loan, cost of the asset will not change. What has to be borne in mind is that cost of an asset and cost of raising money for purchase of the asset are two different and independent transactions. Even if an asset is purchased with no repayable subsidy received from the Government, the cost of the asset will be the price paid by the assessee for acquiring the asset. In the instant case, the allegation is that at the time of repayment of loan, there was a fluctuation in the rate of foreign exchange as a result of which, the assessee had to repay a much lesser amount than he would have otherwise paid. In our judgment, this is not a factor which can alter the cost incurred by the assessee for purchase of the asset. The assessee may have raised the funds to purchase the asset by borrowing but what the assessee has paid for it, is the price of the asset. That price cannot change by any event subsequent to the acquisition of the asset. In our judgment the manner or mode of repayment of the loan has nothing to do with the cost of an asset acquired by the assessee for the purpose of his business. We hold that the questions were rightly answered by the High Court. The appeals are dismissed. There will be no order as to costs."*

17.5 In the case of Cooper Corporation (P) Ltd. (supra), the Pune bench of Tribunal, observed that the assessee initially taken loan in Indian currency and later unconverted them to foreign currency in order to save interest. The Tribunal also observed that the assessee acquired capital assets in India from the term loan and those assets

had already been put to use. The Tribunal held that loss from fluctuation of foreign currency loans so converted is post facto subsequent to the capital asset having been put to use. The Tribunal held that, whether the losses are in revenue or capital account has to be tested in the light of generally accepted accounting principles, pronouncement and guidelines etc. The Tribunal further observed that there is no provision or explanation in the Act which deals with any gain or loss on foreign currency loan acquired for purchase of indigenous assets which directs for addition or reduction in the cost of the asset. Accordingly, the Tribunal held that nothing can be added or reduced to the actual cost of the asset except the situation envisaged in section 43A of the Act because of its non-obstinate clause. The Tribunal followed the finding of Hon'ble Supreme Court in the case of Tata iron and steel Co Ltd (supra).

17.6 In the case of **Hyundai motor India Ltd (supra)**, the Tribunal followed the finding in the case of Cooper Corporation (supra).

17.7 In the case of **MFAR Hotels & Resorts Ltd (supra)**the Tribunal held that section 43A is only relating to foreign-exchange rate fluctuation in respect of the assets acquired from a country outside India by using foreign currency loan, which is not applicable to the indigenous assets acquired out of foreign currency loan. Hence the Assessing Officer was directed to bifurcate the

foreign-exchange fluctuation in respect of the foreign currency loan used for assets acquired outside India and the indigenous assets and apply the provision of section 43A or AS-11 (2003) respectively. Regarding the application of AS-11 (2003), the Tribunal observed as under:

> *"6.8 In view of the revision made in AS-11 in 2003, it can be said that treatment of foreign exchange loss arising out of foreign currency fluctuations in respect of fixed assets acquired through loan in foreign currency shall required to be given in profit and loss account. Said exchange loss should be allowed as revenue expenditure in view of amended AS-11 (2003). It may be noted that Apex Court had followed treatment of exchange loss or gain as per AS-11 (1994). In view of revision made in AS-11, now treatment shall be as per revised AS-11 (2003). Exchange gain or loss on foreign currency fluctuations in respect of foreign currency loan acquired for acquisition of fixed asset should be allowed as revenue expenditure.However, in the Preamble of AS-11 (Revised 2003), it was stated that the Revised Standard supersedes AS-11(1994) except that in respect of accounting for transactions in foreign currencies entered into by the reporting enterprise before the date of AS-11 (2004) comes into effect, AS-11 (1994) will continue to be applicable."*

17.8 In the case of Mahindra and Mahindra Ltd (supra),the Tribunal observed that up to assessment year 2008-09, the assessee capitalised foreign exchange fluctuation difference in the books of accounts, to the extent foreign currency loans were utilised for acquisition of the fixed assets in India, as part of cost of fixed assets/CWIP. To the extent foreign currency loans were utilised for acquiring other monetary items (i.e.basically investment in foreign companies) the difference in exchange was debited to an account

called “Foreign Currency Monetary Items Translation Difference Account (FCMITDA). From assessment year 2009-10, in view of notification amending accounting standard 11 dealing with accounting treatment for effects of changes in foreign exchange rates, the assessee charged the amount of difference in exchange to (i) fixed assets (ii) capital work in progress and (iii) carried forward certain amount in the FCMITDA account to be written off to the profit and loss account and later years over the life of the corresponding foreign currency loans. According to the assessee, there was no specific provision in the Act dealing with adjustment based on foreign action fluctuation for assets acquired locally in India, the assessee claimed the difference in exchange of ₹63,02,52,539/- to the fixed assets/capital work in progress and ₹56,34,75,052/-carried forward in the FCMITDA as deductible revenue expenditure. The Assessing Officer disallowed the action of claiming fluctuation loss as notional or contingent and also held it to be capital in nature. The Ld. DR submitted that issue was decided against the assessee by the order of the Tribunal for assessment year 2009-10 in assessee’s own case. The Ld.Authorised Representative of the assessee on the other hand stated that decision of the Tribunal in assessment year 2009-10 covers the claim of ₹63,02,52,539/-being exchange loss relatable to the fixed assets/capital work in progress, for which at least depreciation should be granted to the assessee in any case and

requested for allowing loss debited to FCMITDA as revenue expenditure and direction for depreciation on loss to be adjusted to the cost of the capital assets. The Tribunal in the case held as under:

> *"12.12 We have gone through the order of the Tribunal for A.Y. 2009-10 and we find force in the argument advanced by the Id. AR in this regard. We find that this Tribunal had held that the exchange loss need to be adiusted to the cost of fixed assets/cost of capital work-in-progress. Hence, we hold that assessee is entitled for depreciation on such capital portion of the exchange fluctuation loss.*
>
> *12.13 The another related issue involved in this regard is what is the period for which such loss should be capitalised. In this regard, the ld. AR argued that under the Income-tax Act, any item that is added to the fixed asset need to be capitalised till the asset is put to use. This is supported by Explanation 8 to section 43(1) and proviso to section 36(1)iii) of the Act. Any cost incurred beyond that period should be charged off as revenue expenditure. Accordingly, he argued that irrespective of the accounting treatment given by the assessee in the books, the exchange loss could be added to the cost of fixed assets only till such time, the assets were not put to use. Thereafter, such exchange loss should be allowed as revenue expenditure. We find that this line of argument was not taken up by the assessee for A.Y. 2009-10 while addressing this issue before the Tribunal for A.Y. 2009-10. Accordingly, there was no occasion for this Tribunal to adjudicate this aspect of the issue.The Id AR submitted that this exchange loss that is debited to FCMITDA is not related to acquire fixed assets and hence, the same should be allowed as revenue expenditure. The Id. AR further stated that, in any event, the process of capitalisation of such exchange loss should end with the commencement of overseas investments utilizing foreign currency loans. Exchange loss for the period after acquisition of investments and therefore, be allowed as revenue expenditure according to the Id. AR. We find that the decision taken by this Tribunal in A.Y. 2009-10*

may not be fully applicable to the facts of the instant case and we hold that the said decision would hold good with some modifications as suggested below based on factual developments that had happened later:-

(a) Foreign currency loans utilised for acquiring fixed assets and overseas investments is to be capitalised and correspondingly depreciation need to be granted to the assessee. In this, the exchange loss pertaining to the period till the asset was put to use should alone be capitalised and thereafter, the same should be allowed as revenue expenditure.

(b) Foreign exchange loss attributable to other monetary items debited to FCMITA as per AS 11 ofICAI should be allowed as revenue expenditure.

Accordingly, the concise ground No. 10 raised by the assessee is disposed off in the aforesaid manner."

17.9 In back ground of above precedents available, we find that there are two sets of decisions. One set of decisions are of Hon'ble Supreme Courts and Hon'ble High Court. The Another set is decisions of Tribunal, where mainly the decision in the case of Cooper Corporation (supra) has been followed.

17.9.1 In the instant case, The Tribunal in the first round of proceeding, restored the matter back to the Assessing Officer and directed to decide the issue in the lights of principles laid down in the case of Sutlaj Cotton Mills Ltd (supra) and other decisions. We find the decision on the issue-in dispute in the case Sutlej Cotton Mills Ltd (supra) and Tata Iron and Steel Ltd (supra) are contradictory. The Tribunal in the case of MFAR Hotels and Resorts Ltd (supra)b has also made similar observations. In such a

situation of conflict in two decisions coordinate bench of Hon'ble Supreme Court, it is difficult for a subordinate authority to decide, which decision should be followed. However, Hon'ble supreme Court in the case**Hyder Consulting (UK) Ltd. v. State of Orissa (2015) 2 SCC 189**and **Indian Oil Corporation Limited v. Municipal Corporation and Another (1995) 4 SCC 96**, held *that the earliest decision on a point of law would continue to be a good law, especially when the latter especially when the latter decisions have not considered the earlier judgment – because had they considered, they could not have differed from the earlier decision, and it would have to be referred to a full bench.*

18. We find that Hon'ble Supreme Court in the case of Tata Iron and steel Ltd (supra) has not discussed the earlier decision in the case of Sutlej Cotton Mills Ltd (supra), therefore, with due respect,we are bound to follow the decision of Hon'ble Supreme Court in the case of Sutlej Cotton Mills Ltd (supra). We also note that Tribunal in the case of Cooper Corporation (supra) distinguished the decision of the Hon'ble Supreme Court in the case of the" Sutlej cotton mills limited (supra) observing that in the case fluctuation loss inflicted upon the assessee bears no nexus of relation to the acquisition of the asset, and the action of the assessee was for saving in interest cost i.e. hedging its revenue receipts and therefore the foreign action fluctuation loss was on

revenue account. The relevant funding of the Tribunal is reproduced as under:

> *"10.9 We find that the decision in the case of Sutlej Cotton Mills Ltd. (supra) relied upon by the Ld. Departmental Representative is of no assistance to the Revenue. The Hon'ble Supreme Court therein stated the principle of law that where any profit or loss arises to an assessee on account of depreciation in foreign currency held by him on conversion from another currency, such profit and loss would ordinary be trading loss if the foreign currency held by the assessee on revenue account as trading asset or as a part of circulating capital embargo in business. However, if the foreign currency is held as a capital asset, the loss should be capital in nature. The aforesaid principle of law is required to be applied to the facts of case to determine whether the foreign currency is held by the assessee on revenue account or as a part of circulating capital. In the present case, fluctuation loss inflicted upon the assessee bears no nexus or relation to the acquisition to the assets. The action of the assessee is tied up to its underlying objective i.e. saving in interest costs, hedging its revenue receipts etc. which are undoubtedly on revenue account. Thus, the loss generated in impugned action bears the character of revenue expenditure. Similarly, decision of the Apex Court in the case of Tata Iron and Steel co. (supra) also weighs in favour of the assessee.We also note that reliance placed by the CIT(A) on Elecon Engineering Co.Ltd. (supra) is misplaced. The decision concerns applicability of S. 43A in the facts of that case and thus clearly distinguishable."*

18.1 Thus, in our opinion, the decisions of Tribunal relied upon by the Ld Counsel of assessee, where ratio of Copper Corporation (supra) has been followed, are of no assistance. The Cooper corporation (supra) was also distinguished by the Tribunal in first round of proceedings. As far as other decisions, where the issue of

Forex gain or loss has been decided on the basis of accounting principles, is considered, first of all, the assessee itself has followed the accounting principles in operation during the relevant period and treated the forex loss as item of capital expenditure except small amount transferred to FCMITDA, which has been further written off in the books of account. The claim of the assessee that those accounting standard were issued for transitory period and not normally following accounting principles and therefore, forex loss should be allowed following accounting standard in existence in prior period, is devoid of any merit. In exactly identical circumstances in the case of Mahindra & Mahindra Ltd. (supra), the assessee accepted the loss as capital expenditure. Further, we are of the view that when the Hon'ble Supreme Court has already laid down the law on a particular issue then , the plea of the assessee that for the purpose of ascertaining profits and gains the ordinary principles of commercial accounting should be applied , so long as they do not conflict with any express provision of the relevant statute [relying on the decision of the Hon'ble supreme Court in the CIT vs UP State Industrial Development Corporation (supra)] is also of no assistance, accordingly, we reject said contention of the ld. Counsel of the assessee.

18.2 When we examine the facts of the instant case in the light of the above decisions, we find that assessee has made the accounting entries in respect of foreign-exchange fluctuation difference to the

fixed assets following the Ministry of corporate affairs notification for modification of accounting standard As-11 and treated the forex loss as capital expenditure. In the ratio of the Hon'ble Supreme Court in the case of Sutlej Cotton Mills Ltd (supra) , as reproduced above, if the loan is utilised for fixed capital, the forex gain or loss , will be capital in nature. We also note that the Hon'ble Bombay High Court in the case of CIT Vs V S Dempo and Co. Pvt Ltd (1994) 206 ITR 291(Bom), relying on the decision of Hon'ble Supreme Court in the case Sutlej Cotton Mills Ltd (supra) ; the decision of Calcutta High Court in the case of Oil India Co. Ltd Vs CIT (1982) 137 ITR 156 ; decision of Hon'ble Supreme Court in the case of CIT vs Tata Locomotive and Engineering Co. Ltd (supra) . The ratio of the decision in the case of CIT Vs V S Dempo and Co. Pvt Ltd (supra) has been discussed by the Tribunal in first round of proceedings.

18.3 In the case before the Assessing Officer in second of proceedings, the assessee has provided details of bills and vouchers in support of purchase of assets of ₹ 30.11 crores out of the loan of ₹ 48.37 corrodes and no details of the balance Rs. 18.26 crores have been submitted. This is second round of proceeding before us. The assessee was required to provide all details before the assessing officer in second round of proceedings still incomplete detils have been filed. The ld Counsel of the assessee intimated that complete were provided and still all details are available with the assessee.

Therefore , in facts and circumstances of the case and the interest of substantial justice, we feel it appropriate to restore this issue back to the file of the Assessing Officer with the direction to the assessee for providing evidence in support as to what amount of the foreign loan (ECB) has been utilised for assets indigenously and what amount of loan has been utilised for acquiring assets from outside India , and then the Assessing Officer is directed to decide the issue following the finding of Hon'ble Supreme Court in the case of Sutlej Cotton Mills Ltd (supra), which has been further followed in the case of V S Dempo and Co Ltd (supra), in respect of assets purchased indigenously and as per the provisions of section 43A in respect of assets purchased from outside India. The ground of the appeal of the assessee, is allowed for statistical purposes.

19. As far as ground No. 1 and 2 of the appeal of the Revenue are concerned, the Ld. counsel of the assessee, at the outset submitted that issue in dispute are covered in favour of the assessee by the order of the Tribunal for assessment year 2010-11, which is reported in (2022) 141 taxmann.com 176(Mumbai-Trib.). The Ld. DR also could not controvert the statement of Ld. counsel of the assessee.

20. As far as ground No. 1 of the appeal concerning sales tax incentive as capital receipt is concerned, we find the Tribunal (supra) has mentioned in para 9.1 that grounds of the appeal No.

1(i) to 1(iv) of the Revenue relates to sales tax incentive under new packages scheme of incentives. The Tribunal(supra) after hearing both the parties on the taxability of sales tax incentive held the same as capital receipt observing as under:

> *"12. We have heard the submissions of both the parties and perused the material available on record. We find that the present issue is fully covered in assessee's own case in ITA.No. 814/Mum/2007 for the A.Y. 2003-04 wherein the Tribunal allowed relief in respect of the matter in issue. Further, the Special Bench of the Tribunal in the case of Dy. CIT v. Reliance Industries Lid. (2004] 88 ITD 273 (Mum) held that sales tax subsidy received under the Package Scheme of Incentives, 1979 is for the purpose of industrial development of the backward districts as well as generation of employment, thus, establishing a direct nexus with the investment in fixed capital assets and hence, a capital receipt. Against this Special Bench order of the Tribunal, the Department filed an appeal before the Hon'ble High Court of Bombay which is pending for adjudication. In this connection, it is relevant to state that the Hon'ble Supreme Court in the case of Union of India v., Kamlakshi Finance Corpn. Lid., 1992 taxmann.com 16 has held that ' mere fact that the order of the appellate authority is not "acceptable" to the Department and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. We find that since the order of the Special Bench of the Tribunal is still holds the field and in absence of any contrary decision brought to our notice by the Ld. D.R, and the order of the Ld. CIT(A) in deleting the addition made by the A.O, is in accordance with law, we find no reason to interfere with the order of the Ld, CIT(A) on this issue and, therefore, we hold that the amount of incentive is not a revenue receipt, but, it is a capital receipt and; therofore, we direct the A.O. to delete the addition. The Revenue fails in its grounds of appeal Nos. 1(i) to 1(iv) and, therefore, the grounds on this issue are dismissed."*

21. As far as ground of the appeal concerning excise duty incentive as capital receipt is concerned, the Tribunal(supra) in para 16, has held the same as capital receipt observing as under:

"16. We have heard the rival submissions of both the parties and perused the material available on record. We find that the objective of grant of Excise Duty Incentive as envisaged in Office Memorandum dated 7-01-2003 [Refer Page No. 245-262 of FBI issued by Ministry of Commerce & Industry is industrialization of backward area of Uttaranchal for generation of employment and utilization of local resources. Hence, the incentive received by assessee is on capital account. The Ld. CIT(A) also treated the sum as capital receipt by taking strength from the Judgment of Hon'ble Jammu & Kashmir High Court in the case of Shree Balaji Alloys (supra) which has been affirmed by Hon'ble Apex Court vide Civil appeal No. 10061 of 2011 dated 19-04-2016. Further the Hon'ble Jammu and Kashmeer High Court while rendering its Judgment in the case of Shree Balaji Alloys (supra) had relied on the principles laid down by the Hon'ble Apex Court in the case of Sahney Steel & Press Works v. CIT (1997) 94 Taxman 368/228 ITR 253 &Ponni Sugars & Chemicals Ltd. (supra) and after analyzing the Office Memorandum dated 14-06-2002 behind the grant of Incentive has held that Excise Duty refund granted with the object of creating avenues for Perpetual Employment, to eradicate the social problem of unemployment in the State by accelerated industrial development was a capital receipt. Further, the Departmental Appeal filed against the said High Court decision of Shree Balaji Alloys (supra) has also been dismissed by the Hon'ble Apex Court. So, this issue has attained finality. Since we find no infirmity in the order of the Ld. CIT(A) and the Ld. D.R. failed to put forth any contrary decision, we confirm the order of the Ld. CIT(A) on this issue and dismiss the grounds of appeal no. 2(i) to 2(w) of the Revenue."

21.1 The issue in dispute involved in the year under consideration being identical to the issues decided by the Tribunal(supra), therefore respectfully following the same, the ground No. 1 and 2 of the appeal of the Revenue are dismissed.

22. The ground No.3 of the appeal of the Revenue relates to excluding sales tax incentive and excise duty exemption while computing the book profit under section 115 JB of the Act.

23. We find that identical issue has been decided by us in the case of the assessee for assessment year 2008-09, therefore following our finding in assessment year 2008-09, the ground of the appeal of the revenue is dismissed.

24. Now, we take up the cross appeals for assessment year 2012-13. The grounds raised by the assessee are reproduced as under:

> *1. That on the facts and in the circumstances of the case, the Ld.Commissioner of Income Tax (Appeals) (here-in-after referred to as'Ld. CIT(Appeals)' was not justified & grossly erred in confirming disallowance in respect of provision for leave encashment debited to Profit & Loss Account amounting to Rs. 45,22,238/-in computing total income under the normal provisions of the Act.*
>
> *2. That on the facts and in the circumstances of the case, the Ld.CIT (Appeals) was not justified &grossly erred in confirming the action of the A.O. in not allowing additional depreciation u/s32(1) (iia) amounting to Rs. 7,26,59,325/- in respect of new Plant & Machinery acquired and installed after 31-03-2005 but before 01-04-2011.*

24.1 The grounds raised by the revenue are reproduced as under:

> *1. (i) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in deleting an amount of Rs. 2,34,15,232/- being disallowance of claim of sales tax incentive.*
>
> *(ii) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in holding that Sales*

Tax was embedded in the Sales prices charged by the assessee and the same was in the nature of capital receipt. The Ld. CIT(A) ignored the fact that the assessee was legally required to collect Sales Tax on the Sales made, yet it had worked out the notional Sales Tax so collected and had claimed the same as capital receipts.

(iii) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in relying on the decision of ITAT, Mumbai and the decision of Bombay High Court (ITA No. 1299 of 2008 in the case of Reliance Industries Limited, even though subsequent to the Departmental appeal against the Order of High Court, the issue has been remitted back to the Bombay High Court to decide afresh and the same is still pending for adjudication.

(iv) Without prejudice to the above grounds, whether the CIT (A) erred on facts and in law, directing the AO that the Sales Tax Incentive is not required to be deducted from the cost of assets, if the same is treated as capital receipts by the A.O. ignoring the provisions of explanation 10 to section 43(1) of the Act?

2. (i) Whether the CIT (A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 35,13,87,884/- stated to be collected by the assessee was capital in nature without any evidence placed on record to establish that the said amount was actually collected on account of excise duty.

(ii) Without prejudice to the ground at () above, whether the CIT (A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 35,13,87,884/- collected by the assessee was not revenue in nature despite the fact that the same was collected by the assessee on goods which were exempted from levy of any duty as per the Central Excise Department's Notification No. 50/2002-CE dated 10.06.2003

(iii) Whether the CIT (A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 35,13,87,884/- collected by the

assessee was capital in nature by comparing the scheme of exemption under which the claim was made by the assessee by such other schemes wherein the mode of incentive was in the nature of refund/reimbursement or subsidy.

(iv) Without prejudice to the above, whether the CIT (A) erred on facts and in law, directing the AO that the Excise duty exemption is not required to be deducted from the cost of assets, if the same is treated as capital receipts by the A.O. ignoring the provisions of explanation 10 to section 43(1) of the Act?

(v) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in not appreciating the fact that the provision to explanation 10 section 43(1) of the IT .Act, was intended to cover any subsidy or grant or reimbursement directly or indirectly met by the Central or State Government or any authority established under any law and the asesseee's claim of excise duty exemption is covered in indirect subsidy?

3. Whether the CIT (A) erred on facts and in law in allowing the foreign exchange fluctuation loss on reinstatement of loan without verifying whether the underlying transaction was on capital or revenue account and without verifying whether the underlying transaction was in US dollar and Japanese Yen.

5. (i) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in directing the AO to exclude Sales Tax incentive and Excise Duty Exemption, while computing the book profits us 115JB of the Act, withoutappreciating that they have not been specifically excluded in Explanation 1 to section 115JB of the Act .

(ii) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in directing the AO to exclude Sales Tax incentive and Excise Duty Exemption, while computing the book profits us 115JB of the Act despite the fact that no adjustment other than the ones mentioned in Sec.115JB is permissible as held by the

Supreme Court in the case of Apollo Tyres Ltd. (255 IT 273)

6. (i) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in not following precedent in the decision of hon'ble ITAT vide order dated 31.01.2018 in assessee's own case for A.Y. 2009-10 wherein hon'ble ITAT rejected the grounds raised by the assessee in respect of Education Cess.

(ii) Whether the CIT (A) erred On the facts and in the circumstances of the case and in law, to appreciate that fact that the education cess has been levied under Finance Act as an item to increase income tax and it has been held to be part of"income tax" by Hon'ble Calcutta High Court in the case of Srei Infrastructure Finance Ltd.

25. As far as grounds of the appeal of the assessee is concerned, the learned counsel of the assessee did not press the grounds raised and accordingly same are dismissed as infructuous.

26. As far as ground No. 1 and 2 of the appeal of the Revenue are concerned, same are identical to ground No. one and two raised by the revenue for assessment year 2009-10 and therefore following our finding in assessment year 2009-10, the ground 1 and 2 of the appeal of the Revenue for year under consideration are dismissed.

27. The ground No.3 of the appeal of the Revenue is related to foreign exchange fluctuation loss on the reinstatement of loan. We find that identical issue has been adjudicated by us in the appeal of the assessee for assessment year 2009-10, therefore following our finding in assessment year 2009-10, the ground of the appeal of the revenue accordingly allowed for statistical purposes.

28. We find that assessee has also raised an additional ground stating that in case the foreign exchange loss is not allowed to the assessee as revenue expenditure, then depreciation in respect of the said foreign exchange expenditure, should be allowed. In principle, we agree with the contention of the assessee, but we have already restored this issue of foreign exchange loss to the file of the learned Assessing Officer, this additional ground of the assessee is also allowed for statistical purpose to be decided by the Assessing Officer, accordingly.

29. The ground No. 5 raised in the appeal of the Revenue relates to exclusion of sales tax incentive and excise duty exemption for the purpose of computation of book profit under section 115JB of the Act. The identical issue has been adjudicated by us in the case of the assessee for assessment year 2008-09, therefore following our finding in assessment year 2008-09, this ground of the appeal of theRevenueis accordingly dismissed.

30. The ground No. 6 of the appeal of the Revenue relates to deduction in respect of education cess.

31. The relevant finding of the Ld. CIT(A) allowing the education cess to the assessee is reproduced as under :

> *"15. I have duly considered the submissions of the appellant. The issue under consideration is covered in the favour of the appellant company by the appellate order dated 16.10.2019 in appeal No. NSK/CIT(A)-3/139/2017-18 for AY 2010-11*

wherein elaborate discussion was made by the undersigned in para-15 as to why the education cess was an allowable expenditure. Under Section 40(a)(ji) of the Income Tax Act, any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of or otherwise on the basis of, any such profits or gains, is not allowable as deduction. As per aforesaid provision, any tax levied on profits or gains of any business or profession in computing the gross total income of a taxpayer, is not an allowable expenditure. While computing Book Profit under section 1151B of the Act (for MAT purpose), Explanation 2 to section 115]B(2) specifically states that for adding income tax paid/payable, income tax shall include inter alia, education cess and Secondary & Higher education cess, if any, as levied by the Central Act. Section 40(a)(ji) states only tax whereas section 115JB states that for computing book profit, tax includes cess as levied by the Central Act. Hence it could be seen that where the legislature intended to disallow cess, it had provided specifically for the same. However in case of computation under regular provisions, the same had not been mentioned in section 40(a)(ji) of the Act. Further education cess was levied on the amount of income-tax, it was not levied on the profits or gains of any business or profession.Also it was not assessed at a proportion of or otherwise on the basis of any suchprofits or gains. Therefore education cess was not covered by section 40(a)(il) of the Act. Under the old income Tax Act, section 10(4) of the Income-tax Act, 1922 stated that any sum paid on account of any cess, rate or tax levied on the profits or gains of any business, profession or vocation or assessed at a proportion of or otherwise on the basis of any such profits or gains was not an allowable expense. Thus the Legislators specifically added the word "cess" in aforesaid provision of old law whereas same was missing in the present law. The "cess" was not in the nature of a"tax". While proceeds from collection of tax were used by the Government for general purposes and running of the state of affairs of the country, cess proceeds were collected and utilized separately with a specific purpose. As in the case of education cess, the proceeds were not credited to Consolidated Fund but to a non-lapsable Fund for elementary education i.e. "Prarambhik Shiksha Kosh" and used only for that purpose. Reliance was also placed on the decision of Hon'ble Rajasthan High Court in case of Chambal Fertilisers

and Chemicals Limited Vs. JCIT in ITA No. 52/2018, wherein it was held that education cess was not a tax, therefore the same was not required to be disallowed under section 40(a)(i), in computing profits and gains from business as part of total income of the taxpayer. The Hon'ble High Court further held that education cess cannot be treated at par with tax and hence it is an allowable expenditure. It was the only available decision of a High Court on the issue and was binding on the appellate authorities. While deciding the issue, the High Court specifically referred to the CDT Circular issued in the year 1967. It also held that CBDT Circulars are binding on the Department. The issue under consideration is also covered in the favour of the assessee by the decision of Hon'ble Pune ITAT rendered in the case of Atlas Copco (India) Pvt. Ltd. Vs. DCIT in ITA No.732 & 736/Pun/2011 for AY 2005-06. Reliance was also placed on the decision of the Hon'ble Apex Court in the case of JaipuriaSamla Amalgamated Collieries (82 IT 580) held that section 10(4) of the Income Tax Act, 1922 (parimateria to section 40(a)(ii) of the Income Tax Act,1961) provides only for disallowance of rates and taxes levied on profits or gains of any business or profession computed in accordance with the provisions of section 10 of Income Tax Act, 1922. Since 'education cess' was not levied on profits or gains of any business or profession, the same did not fall within the purview of section 40(a)(ii) of the Act. In view of the above facts, I direct the AO to delete the addition of ₹66,31,870/- made by him. This ground of appeal is accordingly allowed."

32. We find that legislature has brought an amendment to the provisions of section 40(a)(ii) treating the education cess as part of the income tax retrospectively w.e.f 1/4/2005, and therefore said deduction is not allowable. The said amendment is reproduced as under :

"(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.

[Explanation 1. For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.]

[Explanation 2. For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A.]

[Explanation 3. For the removal of doubts, it is hereby clarified that for the purposes of this sub-clause, the term "tax" shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax;]"

32.1 Further, we find Hon'ble Supreme Court in the case of JOINT COMMISSIONER OF INCOME TAX vs M/S. CHAMBAL FERTILISERS & CHEMICALS LIMITED (2022) TAXSCAN (SC) 212, in view of the amendment vide the Finance Act, 2022 with retrospective effect from 01.04.2005 to Section 40(a) (ii) of Act, has allowed the appeal of the Revenue. Therefore, respectfully following the Supreme Court (supra), the finding of the Ld. CIT(A) on the issue in dispute are accordingly set aside. The ground No. 6 of the appeal of the revenue is accordingly allowed.

33. Now, we take up cross appeals for assessment year 2013-14. The grounds raised by the assessee are reproduced as under:

1. That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) (here-in-after referred to as 'Ld. CIT (Appeals)' was not justified & grossly erred in confirming disallowance in respect of provision for leave encashment debited to Profit & Loss Account amounting

to Rs. 1,02,01,402/-in computing total income under the normal provisions of the Act.

2. That on the facts and in the circumstances of the case, the Ld.CIT(Appeals) was not justified & grossly erred in confirming the action of the A.O. in not allowing additional depreciation u/s 32(1) (ia) amounting to Rs. 6,08,94,395/- in respect of Plant & Machinery acquired and installed after 31-03-2005 but before 01-04-2012.

33.1 The assessee also raised additional ground, which is reproduced as under:

"1. Additional Ground No. 1:

1.1 In case Ground No. 2 of Department's appeal is decided against the Assessee and the foreign exchange loss on reinstatement of foreign currency loan is held to be disallowable, in that event, the Appellant Assessee be allowed to claim depreciation on the same for the year under consideration as also the depreciation on the adjusted opening written down value of the related block of assets and that the Id. AO be directed accordingly."

33.2 The grounds raised by theRevenue are reproduced as under:

1. (i) Whether the CIT (A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 46,09,77,123/- stated to be collected by the assessee was capital in nature without any evidence placed on record to establish that the said amount was actually collected on account ofexcise duty.

(ii) Without prejudice to the ground at (i) above, whether the CIT (A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 46,09,77,123/- collected by the assessee was not revenue in nature despite the fact that the same was collected by the assessee on goods which were exempted from levy of any duty as per the Central Excise Department's Notification No. 50/2002-CE dated 10.06.2003

(iii) Whether the CIT (A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 46,09,77,123/- collected by the assessee was capital in nature by comparing the scheme of exemption under which the claim was made by the assessee by such other schemes wherein the mode of incentive was in the nature of refund/reimbursement or subsidy.

(iv) Without prejudice to the above, whether the CIT (A) erred on facts and in law, directing the AO that the Excise duty exemption is not required to be deducted from the cost of assets, if the same is treated as capital receipts by the A.O. ignoring the provisions of explanation 10 to section 43(1) of the Act?

(v) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in not appreciating the fact that the provision to explanation 10 section 43(1) of the IT .Act, was intended to cover any subsidy or grant or reimbursement directly or indirectly met by the Central or State Government orany authority established under any law and the asesseee's claim of excise du exemption is covered in indirect subsidy?

2. Whether the CIT (A) erred on facts and in law in allowing the foreign exchang fluctuation loss on reinstatement of loan without verifying whether the underlyir transaction was on capital or revenue account and without verifying whether tr underlying transaction was in US dollar and Japanese Yen.

3. (i) Whether the CIT (A) erred on the facts and in the circumstances of the case al in law, in directing the AO to exclude Excise Duty Exemption, while computing ti book profits u/s 115JB of the Act, without appreciating that they have not be specifically excluded in Explanation 1 to section 115JB of the Act.

(ii) Whether the CIT (A) erred on the facts and in the circumstances of the ca and in law, in directing the AO to exclude Excise Duty Exemption, while computi the book profits us 115JB of the Act despite the fact that no adjustment other th the ones mentioned in Sec.115JB is permissible as held by the Supreme Court the case of Apollo Tyres Ltd. (255 IT 273)

4. (i) Whether the CIT (A) erred on the facts and in the circumstances of the c and in law, in not following precedent in the decision of hon'ble ITAT vide or dated 31.01.2018 in assessee's own case for A.Y. 2009-10 wherein hon'ble IT rejected the grounds raised by the assessee in respect of Education Cess.

(i) Whether the CIT (A) erred On the facts and in the circumstances of the c and in law, to appreciate that fact that the education cess has been levied un Finance Act as an item to increase income tax and it has been held to be par"income tax" by Hon'ble Calcutta High Court in the case of Srei Infrastructure Finance Ltd.

34. We find that the grounds and original ground raised by the assessee in the year under consideration are identical to grounds raised in assessment year 2012-13. The grounds raised have not been pressed by the assessee, therefore same are dismissed as infructuous. The identical additional ground raised in AY 2012-13, has been allowed for statistical purpose, therefore following the same, the additional ground for the year under consideration is allowed for statistical purpose.

35. The ground No. 1 of the appeal of the revenue relates to excise duty exemption as capital receipt. The identical ground of the revenue has been dismissed in assessment year 2009-10. Accordingly, following our finding in assessment year 2009-10, the ground of the appeal of Revenue is dismissed.

36. The ground no.2 of the appeal of the Revenue relates to foreign exchange fluctuation loss on the reinstatement of the loan. The identical ground raised by the revenue in assessment year 2012-13,

has been allowed for statistical purposes, accordingly following our finding in assessment year 2012-13, the ground No. two of the appeal of the assessee for year under consideration is allowed for statistical purposes.

37. The ground No. 3 of the appeal of the Revenue relates to exclusion of excise duty exemption for the purpose of computation of book profit under section 115 JB of the Act. The identical ground of the revenue has been dismissed in assessment year 2012-13, therefore following our finding in assessment year 2012-13, this ground of the appeal of the revenue is accordingly dismissed.

38. The ground No. 4 of the,the Revenue relates to deduction of education cess, which we have already allowed in the case of the assessee for assessment year 2012-13, therefore following our finding in assessment year 2012 and 13, this ground of the appeal of the revenue is allowed.

37. In the result, the assessee and Revenue are educated as under:

AY	**ITA No.**	**Revenue /assessee**	**Result**
2008-09	715/M/2020	Assessee	Dismissed
2008-09	1423/M/2020	Revenue	Dismissed
2009-10	718/M/2020	Assessee	Allowedfor statistical purpose
2009-10	1418/M/2020	Revenue	Dismissed.

2012-13	7793/M/2019	Assessee	Allowed purpose	partly	for	statistical	
2012-13	654/M/2020	Revenue	Allowed purpose	partly	for	statistical	
2013-14	7794/M/2019	Assessee	Allowed purpose	partly	for	statistical	
2013-14	653/M/2020	Revenue	Allowed purpose	partly	for	statistical	

Order pronounced in the open Court/under Rule 34(4) of the ITAT Rules, 1963 on 31/01/2023.

Sd/-	**Sd/-**
(ABY T VARKEY)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 31/01/2023
Dragon Legal/Rahul Sharma, Sr. P.S.

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.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai