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

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.7792/M/2019
Assessment Year: 2011-12

M/s. Everest Industries Ltd., D-206, Sector-63, Noida-201301 Uttar Pradesh **PAN: AAACE7550N**	Vs.	Dy. Commissioner of Income Tax, Circle-1, Ashar I.T. Park, 6th Floor, B-Wing, 16-Z, Wagle Industrial Estate, Thane (W) – 400 604
(Appellant)		(Respondent)

ITA No.655/M/2020
Assessment Year: 2011-12

Dy. Commissioner of Income Tax, Circle-1, Thane Room No.22, B-Wing, 6th Floor, Ashar I.T. Park, Wagle Industrial Estate, Thane (W) – 400 604	Vs.	M/s. Everest Industries Ltd., D-206, Sector-63, Noida-201301 Uttar Pradesh **PAN: AAACE7550N**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Yogesh Thar, A.R. &
Shri Chaitanya Joshi, A.R.

Revenue by : Shri Sanjeev Kashyap, D.R.

Date of Hearing : 15 . 12 . 2022
Date of Pronouncement : 20 . 01 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

At the very outset, the Ld. A.R. for the M/s. Everest Industries Ltd. (hereinafter referred to as the assessee) stated at bar that he does not press the appeal bearing ITA No.7792/M/2019 filed by the assessee. In view of the matter, appeal filed by the assessee is dismissed having not been pressed.

2. Appellant DCIT, Circle-1, Thane (hereinafter referred to as the Revenue) by filing aforesaid appeal sought to set aside the impugned order dated 21.10.2019 passed by the Ld. CIT(A) on the grounds inter-alia that:

> *"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.7,01,07,115/- 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.*
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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.*
>
> *(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. 25,39,40,496/- 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 (1) above, whether the CTT (A) erred on facts and in the circumstances of the case and in law in holding that the excise duty of Rs. 25,39,40,496/- 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. 25,39,40,496/- 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 I.T .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 re-instatement 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.

4. Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in allowing weighted deduction for AY 2011-12 when the Agreement between the assessee company and the prescribed authority, as required under subsection 3 of Section 35(2AB) was for the period 01.04.2011 to 31.03.2012 and not for the AY under appeal.

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 and profits on sale of assets,

while computing the book profits u/s 11538 of the Act, without appreciating that they have not been specifically excluded in Explanation 1 to section 1153B 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 and profits on sale of assets, while computing the book profits u/s 11538 of the Act despite the fact that no adjustment other than the ones mentioned in Sec.1153B is permissible as held by the Supreme Court in the case of Apollo Tyres Ltd.(255 ITR 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.

7. The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal."

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee is a limited company, into the business of manufacturing of asbestos cement sheets and accessories and pre-engineering building products. During the year under consideration the assessee company has claimed receipts from its core business and other income from sale of scrap, excess provisions written back, interest from banks and others, miscellaneous income etc. The assessee filed its original return of income for the year under consideration declaring total income at Rs.Nil under the normal provisions of Income Tax Act, 1961 (for short 'the Act') and book profit at Rs.53,24,13,045/- under section 115JB of the Act. The return filed by the assessee was processed under section 143(1) of the Act. Thereafter, the

assessee filed revised return of income on 31.03.2013 declaring total income at Rs.Nil under the normal provisions and book profit at Rs.13,90,35,231/- which was subjected to scrutiny. Notices under section 143(2) and 142(1) along with questionnaire were served upon the assessee and in response there to the assessee appeared through its chartered accountant, furnished details and also discussed the case. The Assessing Officer (AO) after examining the contentions raised by the assessee disallowed deduction claimed by the assessee to the tune of Rs.7,01,07,115/- on account of sales tax incentives availed under the new package scheme of incentive 1993. The AO also made disallowance of Rs.25,39,40,496/- on account of excise duty incentive claimed by the assessee. The AO also disallowed inter-alia education cess of Rs.44,18,315/- claimed by the assessee; foreign exchange fluctuation loss of Rs.34,13,340/- amortised in the books of account; weighted deductions claimed by the assessee under section 35(2AB) on in-house R&D to the tune of Rs.1,51,87,471/-; provision of leave encashment and also disallowed additional depreciation in second and subsequent years. The AO also added back in the computation of book profit under section 115JB of the Act an amount of Rs.39,33,77,814/- claimed by the assessee on account of sales tax incentives and excise duty incentive (Rs.7,01,07,115/- + Rs.25,39,40,496/- respectively). The AO also added back profit on sale of fixed assets in computing the book profit under section 115JB of the Act and thereby framed the assessment under section 143(3) of the Act.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the appeal filed by the

assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue has come up before the Tribunal by way of filing the present appeal.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

Ground No.1(i) to 1(iv)

6. The appellant/Revenue has challenged the deletion of an amount of Rs.7,01,07,115/- being disallowance of claim of sales tax incentives by the Ld. CIT(A) vide impugned order. However, at the very outset it is brought to the notice of the Bench that this ground is already covered in favour of the assessee having been already decided by the Tribunal in assessee's own case of earlier years ITA No.7791/M/2019 & ors. for A.Y. 2010-11 order dated 29.07.2022 available at page 1 to 35 of the case law paper book.

7. We have perused the findings returned by the co-ordinate Bench of the Tribunal on this very issue wherein issue has been decided in favour of the assessee by returning following findings:

> *"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 DCIT vs., Reliance Industries Ltd., [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 vs., Kamlakshi Finance Corporation Ltd., [1991] 55 ELT 433 (SC) 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, therefore, 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."

8. When the issue in question has already been decided in favour of the assessee even in earlier years A.Y. 2003-04 as well as this issue has also been decided by the Special Bench of the Tribunal in case of DCIT vs. Reliance Industries Ltd. (2004) 88 ITD 273 (Mum.) wherein it is held that sales tax subsidy received under the package scheme incentives 1997 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 as such a capital asset.

9. The Ld. D.R. for the Revenue has failed to bring on record any distinguishable facts qua the year under assessment vis-à-vis earlier years i.e. A.Y. 2010-11. We find no illegality or perversity in the impugned findings. Hence, grounds No.1(i) to1(iv) raised by the Revenue have been determined against it.

Ground No.2(i) to 2(v)

10. The appellant/Revenue has challenged the findings returned by the Ld. CIT(A) that excise duty of Rs.25,39,40,496/- collected

by the assessee was capital in nature by way of filing present appeal. Again it is brought to the notice of the Bench that this issue has also been decided in favour of the assessee in its own case for A.Y. 2010-11 (supra).

11. We have perused the findings returned by the co-ordinate Bench of the Tribunal in assessee's own case which are on identical issue having no change in the facts of the year under consideration, by returning following findings:

> *"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 07-01-2003 [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 Balaii Alloys vs.- CIT (2011) 51 DTR 217 (J&K) 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 -vs.- CIT (supra) had relied on the principles laid down by the Hon'ble Apex Court in the case of Sahnev Steel & Press Works - vs. - CIT (1997) 228 ITR 253 (SO & CIT - vs. - Ponni Sugars & Chemicals Ltd. (2008) 306 ITR 392 (SC) 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 Balaii 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(v) of the Revenue."*

12. So when the issue has already been decided in favour of the assessee by examining the objective of grant of excise duty incentive vide memorandum dated 07.01.2003 issued by Ministry

of Garments & Industry, decision rendered by Hon'ble Jammu & Kashmir High Court in case of Shree Balaji Alloys vs. CIT (supra) which has been affirmed by the Hon'ble Supreme Court and decision rendered by Hon'ble Supreme Court in case of Ponni Sugars & Chemicals Ltd. (2008) 306 ITR 392 (SC), holding that excise duty refund granted with the object of social problem of unemployment in the state by accelerating the industrial development was a capital receipt, we find no illegality or perversity in the impugned findings returned by the Ld. CIT(A) holding receipt of excise duty by the assessee as capital in nature. So ground No.2(i) to 2(v) are determined against the Revenue.

Ground No.3

13. The Ld. CIT(A) allowed the foreign exchange fluctuation loss on reinstatement of loan, otherwise disallowed by the AO on the ground that the assessee company has capitalized it in the books of account, by returning following findings:

> *"20. I have duly considered the submissions of the appellant. It is noticed by the undersigned that in the AY 2009-10, there was foreign exchange fluctuation loss capitalized in books which arose on account of re-instatement of ECB loan and in the AY 2011-12, there was foreign exchange fluctuation gain de-capitalized in books which also arose on account of reinstatement of the said ECR loan. In AY 2009-10, the AO had disallowed the claim of foreign exchange fluctuation loss on the ground that appellant company had capitalized it in the books of account. On the contrary, in AY 2011-12, the AO has added back foreign exchange fluctuation gain to taxable income ignoring the fact that the appellant company had de-capitalized the same in books of account, similar to the treatment accorded in AY 2009-10. The above chain of events showed that the AO had taken two different views in two different years for the same matter which was not permissible. Similar was the case for the claim of foreign exchange fluctuation loss amortized in books of account. Following the stand take by the Department in order U/S 143(3) for AY 2009-10 wherein foreign exchange fluctuation loss amortized in books was allowed, the appellant company had claimed foreign exchange fluctuation loss amortized in books during instant year amounting to Rs.34,13,340/- in the revised return. The facts and circumstances in AY 2009-10 and AY*

2011-12 were same and there was no material change for both the years. It showed that the AO had taken a view in AY 2011-12 which was contrary to the view taken by his predecessor in AY 2009-10 for the same matter which was not permissible. Further in the assessment order U/s 143(3) for AY 2010-11, the AO had taken the same stand as was taken in the AY 2009-10. It is relevant to note here that in the original return for AY 2010-11, the appellant company had offered to tax foreign exchange fluctuation gain de-capitalized in books and foreign exchange fluctuation loss amortized in books with a disclosure in notes forming part of the return, similar to disclosure made in AY 2011-12, that in the event foreign exchange fluctuation loss for earlier year was not allowed then foreign exchange fluctuation gain should be treated as withdrawn. Subsequently, in the revised return the appellant company withdrew the aforesaid additions since claim of foreign exchange fluctuation loss was not allowed in order U/S 143(3) for AY 2009-10. 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 in para-11 to hold that the appellant company should be allowed foreign exchange fluctuation loss since the department had taxed the foreign exchange fluctuation gain in the subsequent years. The Hon'ble ITAT had also allowed the appeal of the appellant company for AY 2009-10 vide its order dated 31.01.2018 in ITA No.3804 & 3849/Mum/2015 on this issue. On the same parity, the foreign exchange fluctuation gain de-capitalized in the books amounting to Rs.10,28,500/- is held to be taxable and the addition made to that extent is sustained. However the addition of Rs.34,13,340/- made by the AO on account of foreign exchange fluctuation loss amortized in books is deleted since his predecessor had already disallowed the whole amount while completing the assessment for AY 2009-10 and same has attained finality. These grounds of appeal are accordingly partly allowed."

14. Perusal of the impugned findings returned by the Ld. CIT(A) goes to prove that the Ld. CIT(A) by following the order passed under section 143(3) for A.Y. 2009-10 in which year foreign exchange fluctuation loss amortised in the books was allowed. For the year under consideration the assessee company has claimed the foreign exchange fluctuation loss to the tune of Rs.34,13,340/- in the revised return. When the Revenue has itself allowed the claim of the assessee of foreign exchange fluctuation loss amortised in the books in A.Y. 2009-10 and 2011-12 no extraneous reasons have been brought on record by the Ld. D.R. for the Revenue as to why

it should not be allowed for the year under consideration. Moreover, for earlier two years Revenue has accepted the decision of AO allowing the foreign exchange fluctuation loss amortised in the books. So we find no illegality or perversity in the impugned findings returned by the Ld. CIT(A), hence ground No.3 raised by the Revenue is hereby dismissed.

Ground No.4

15. The assessee has claimed weighted deduction of Rs.15,87,471/- on R&D expenses under section 35(2AB) of the Act, which has been disallowed by the AO on failure of the assessee to bring on record certificate issued by the prescribed authority [Secretary of Department of Scientific and Industrial Research, Government of India(DSIR)].

16. However, the Ld. CIT(A) allowed the same by thrashing the facts in the light of the order passed by the co-ordinate Bench of the Tribunal in case of Zeus Numerix Private Ltd. vs. ITO in ITA No.3464/M/2012 dated 21.04.2015 by returning following findings:

> *"16. I have duly considered the submissions of the appellant. The brief facts of the case are that the appellant company is having its in-house research facility at Lakhmapur, Taluka Dindori, Nashik, Maharashtra. During the relevant year, the appellant company had incurred total expenditure exclusively for R & D Unit amounting to Rs 75.93,736/ on account of revenue and capital expenditure. The appellant company had claimed weighted deduction @200% U/s 35(2AB) amounting to Rs.1,51.87.471/ The DSIR had initially accorded its approval for recognition to the research facility in the year 1977 till 31.03.1984. The said approval had been subsequently renewed by the DSIR from time to time Further the DSIR vide letter F. No.2(100)/2008/RD/459 dated 28.05.2008, had accorded its approval for renewal of recognition to the said facility till 31.03.2011. The said approval had subsequently been renewed till 31.03.2014. The main purpose of research & development (R & D) activities carried out by the appellant company was to improve the quality of its products, development of new products & processes to meet the requirements of growing house building needs, for optimum utilization of raw*

materials, process stability, reduction of cost of existing products/processes, technical support to the existing line of business, explore the possibility of utilization of cheaper raw materials, energy conservation, pollution control etc. The resultant benefit derived by the appellant company viz. cost reduction, import substitution, new products launched in both domestic & International markets was evident from the Director's Report as on 31.03.2011. The AO noticed that section 35(2AB) provided that certificate was to be obtained from the prescribed authority and the prescribed authority was the Secretary, Department of Science and Industrial Research. Further the assessee company had submitted the certificate which was issued by Scientist-G and not the Secretary, DSIK. The AO noticed that at serial no. 9 of said certificate issued by Scientist-G, it was mentioned that the recognition was not for any tax exemption. quantum of tax concession etc. Therefore he held that the assessee company had not fulfilled the conditions as mentioned in section 35(2AB) of the Act. On the other hand, it was argued by the appellant company that the DSIR vide letter dated 28.05.2008 had accorded its approval for renewal of recognition to the said Unit till 31.03.2011 being relevant for AY 2011-12. The said approval has subsequently been renewed till 31.03.2014. Further in terms of Rule 6(4) of the Income Tax Rules, the appellant company had filed its application in Form 3CK before the DSIR for grant of approval U/s 3512AB) vide its letter dated 23.09.2011 which was filed on 28.09.2011. However the DSIR vide letter dated 04.07.2012 had granted its approval in Form ICM in terms of Rule 6(5A) for the period from 01.04.2011 to 31.03.2012. In view of the above, it was argued that the appellant company was also entitled to weighted deduction U/s 35(2AB) for the relevant year. On careful consideration of facts and circumstances of the present case, I am inclined to agree with the arguments of the appellant. The grievance of the AO that requisite certificate had been signed by Scientist-G and not the Secretary, DSIR, does not appear to be correct. This issue had been addressed by the Hon'ble Mumbai ITAT in the case of ACTT Vs. Ferment Biotech Ltd. (64 SOT 246) wherein it was held that the DSIR had authorized one of its Nodal Officers to issue order of approval on or behalf of the Secretary for the purpose of section 35(2AB) of the Act. Therefore where the certificate in Form 3CM was signed by Scientist-G then it had to be taken as approval by the DSIR itself. Similar view was taken by the Hon'ble Mumbai ITAT in the case of Zeus. Numerix Private Ltd. Vs. ITO in ITA No.3464/Mum/2012 dated 21.04.2015 wherein it was held that weighted deduction U/s 35(2AB) could not be denied merely because Scientist-G had signed the letter granting the renewal of recognition or letter of approval. The AO held that the appellant company had failed to furnish Forms 3CK, 3CL & 3CM for the assessment year under reference. However the issue under consideration is covered in the favour of the assessee by the decision of Honourable Pune ITAT in the case of Minilec India (P) Ltd. Vs. ACTT in ITA No.690/PUN/2015 dated 09.04.2018 wherein it was held that If recognition to facility given by prescribed authority which is mandate of section 35(2AH) is maintained, the assessee has to be accorded

deduction under section 35(2AB). It was further held that non-receipt of Form No. 3CM is at best a procedural lapse and is not fatal for denial of claim of deduction under section 35(2AB) of the Act, it was further held that prescribed authority till 01.04.2016 has no authority to look into the nature and quantum of expenditure incurred by an assessee except in the first year to see investment in land and building and after recognition of the facility and approval by DSIR the Assessing Officer has to allow the claim of the assessee after verifying the same. It was further held that under the amended provisions of section 35(2AB) by Finance Act. 2015 w.c.f. 01.04.2016. besides maintaining separate accounts of the R&D facility, copy of audited accounts have to be submitted to the prescribed authority. However this will not apply to the earlier assessment years prior to 01.04.2016. Further the issue under consideration is also covered in the favour of assessee by the decision of Hon'ble Mumbai ITAT in the case of ACIT Vs. Meco Instruments (P) Ltd. (7 taxmann.com 24), CIT Vs. Claris Lifesciences Ltd. (326 ITR 251) and CIT Vs. Sadan Vikas (India) Ltd. (335 ITR 117). The Hon'ble Pune ITAT in the case of Nath Bio Genes (India) Ltd. VS. ACIT in ITA No.367/PN/2012 dated 27.01.2014 held that the AO had merely disallowed the deduction U/s 35(2AB) on the ground that the recognition obtained by the assessee was not in prescribed Form No.3CM as specified in Rule 6(18) of the Income Tax Rules, 1962. The Hon'ble ITAT held that it was not in dispute that the assessee had applied to the competent authority for getting the approval/recognition and only after the verification of all the details, the prescribed authority had issued the approval letter. It was held that the fact that approval was not in prescribed Form No.3CM was not a serious discrepancy which shall result in disallowance of deduction U/s 35(2AB). Further the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. (397 ITK 728) had analyzed the provisions of section 35(2A8) of the Act and also applying the ratio laid down by the Hon'ble High Court of Delhi in the case of Sandan Vikas (India) Ltd. (335 ITR 117) & the Hon'ble High Court of Gujarat in Claris Lifesciences Ltd. (326 FTR 251) held that for availing the benefit under section 35(ZAR) of the Act, what was relevant was not the date of recognition or cutoff date mentioned in the certificate of DSIR or even the date of approval, but the existence of recognition. It was further held that if R&D centre was not recognized, it was not entitled to deduction; but if it was recognized, it was entitled to the benefit. It was further observed that the Hon'ble Gujarat High Court in the case of Claris Lifesciences Ltd. (supra) rightly observed that the date of approval of R&D centre, not being part of provision, extending benefit only from the date of recognition "amounted to reading more in the law which was not expressly provided". Considering the facts of the present case, the addition of Rs.151,87,471/- made by the AO cannot be sustained and same is directed to be deleted. The ninth ground of appeal is accordingly allowed. The tenth and eleventh grounds of appeal pertaining to deduction U/S 35(1)(1) and 35(1)(iv) have become redundant as the appellant company has been allowed deduction U/s

35(2AB). These are therefore not being adjudicated by the undersigned."

17. As discussed by the Ld. CIT(A) identical issue was decided by the co-ordinate Bench of the Tribunal in case of Zeus Numerix Private Ltd. (supra) in favour of the assessee by holding that "it was never the case of the Revenue that the assessee was not carrying out scientific research. When the assessee has been carrying out the research and development as is evident from the approval accorded vide letter (supra) discussion in the preceding paras the same cannot be disallowed on hyper technical ground.

18. It is brought to the notice of the Bench that vide letter dated 28.05.2008 issued by DSIR available at page 370 of the paper book approval has been renewed to the assessee for in-house R&D unit(s) of assessee firm at Gat No.152, Lakhmapur, Taluka Dindori, Nashik upto 31.03.2011. Furthermore, as per letter dated 04.07.2012 available at page 376 of the paper book renewal of recognition to the in-house R&D unit(s) of the assessee have been accorded upto 31.03.2018. Similarly vide letter dated 04.07.2012 R&D facilities in in-house research and development have been accorded to the assessee w.e.f. April 2011 to 31st March 2012 for the purpose of section 35(2AB). The assessee has also brought on record letter dated 18.04.2011 issued by DSIR to the assessee company according renewal of recognition to the in-house R&D unit(s) of its firm at Gat No.152, Lakhmapur, Taluka Dindori, Nashik has been upto 31.03.2014 in view of the application moved by the assessee for renewal of recognition beyond 31.03.2011, which goes to prove that assessee had approval for the year under consideration.

19. The Ld. CIT(A) has also discussed the law laid down by the Hon'ble Delhi High Court in case of Sandan Vikas (India) Ltd. (335 ITR 117) and the Hon'ble Gujarat High Court in case of Claris Lifesciences Ltd. (326 ITR 251) on the issue in question where it is held by the Hon'ble High Courts that for the purpose of section 35(2AB) existence of recognition is relevant and not the date of recognition or not of date mentioned in the certificate of DSIR or even the date of approval. In the instant case it is undisputed fact that R&D centre to be run by the assessee company has been recognized. When it is so the Ld. CIT(A) has rightly allowed the benefit of deduction claimed by the assessee under section 35(2AB) of the Act. So finding no illegality or perversity in the impugned order passed by the Ld. CIT(A) ground No.4 is determined against the Revenue.

Grounds No.5(i) & 5(ii)

20. The AO disallowed the exclusion of sales tax incentives, excise duty exemption and exclusion of profits on sale of assets of Rs.7,01,07,115/-, Rs.25,39,40,496/- and Rs.6,93,30,203/- respectively while computing the book profit under section 115JB of the Act. However, the Ld. CIT(A) has allowed the same by following his earlier years order by returning following findings:

> *"23. In the seventeenth, eighteenth and nineteenth ground of appeal, the appellant has challenged the action of the AO in not allowing exclusion of Sales Tax Incentive amounting to Rs.7,01,07,115/-, Excise Duty Exemption of Rs.25,39,40,496/- and profits on the sale of fixed assets amounting to Rs.6,93,30,203/- while computing book profits U/s 115JB of the Act. Since the undersigned has held in the preceding paragraphs that Sales Tax Incentive of Rs.7,01,07,115/- and Excise Duty Exemption of Rs.25,39,40,496/- were capital receipts and not liable to tax, therefore the AO is directed to exclude the above amounts while computing book profits U/S 115JB. Similarly the AO is directed to exclude profits of Rs.6,93,30,203/- on sale of fixed assets while computing book profits U/s 115JB. The capital receipts which do not*

have any element of income or profit embedded therein are neither chargeable to tax under the Income Tax Act nor can be included in the profit & loss account prepared under Part-II and Part-III of Schedule-VI of the Companies Act. The Hon'ble Supreme Court has held in the case of Indo Rama Synthetics (I) Ltd. Vs. CIT (330 ITR 363) that object of MAT provisions is to bring out the real profits of the company. The similar view was taken by the Hon'ble Mumbai ITAT in the case of Hitkari Fibres Ltd. Vs. JCIT (90 ITD 654). If the capital receipts are included in the computation of MAT, the object of introduction of section 115JA/115JB would be defeated. The above exclusion is also permissible in view of decision of Hon'ble Apex Court in the case of Apollo Tyres (255 ITR 273) wherein it was held that the AO has no powers to rework the book profits if the same have been computed in accordance with Part-Il and Part- III of Schedule VI of the Companies Act. In the case of ACIT Vs. Shree Cement Ltd. (2012 TIOL-02-ITAT Jaipur), it was held that Sales Tax Incentive was required to be excluded while computing the book profits U/s 115JB since the same was in the nature of capital receipt. Similarly the Hon'ble Mumbai Tribunal in the case of ITO Vs. Frigsales (India) Ltd. (4 SOT 376) held that the capital gain on sale of depreciable asset which was exempt U/S 50, could not be taxed as income under the provision of section 115JA. Similar view was taken by the Hon'ble Mumbai ITAT in the case of ITO Vs. Suraj Jewellery (India) Ltd. (21 SOT 79). These grounds of appeal are accordingly allowed."

21. The Ld. CIT(A) has also passed the order following the decision rendered by co-ordinate Bench of the Tribunal in case of ACIT Vs. Shree Cement Ltd. (2012 TIOL-02-ITAT Jaipur) wherein it is held that sales tax incentive and excise duty exemption are required to be excluded while computing the book profit under section 115JB of the Act as the same was in the nature of capital receipt. Moreover, object of the MAT provisions is to bring out the real profit of the company. Hon'ble Supreme Court in case of Indo Rama Synthetics (I) Ltd. vs. CIT 330 ITR 363 also held that object of MAT provisions is to bring out the real profits of the company. So in case we include the capital receipts in computation of MAT the very purpose of section 115JA and 115JB would be defeated.

22. We are of the considered view that when a receipt is not in the nature of income it is not to be formed part of the taxable profit and as such sales tax incentive and excise duty exemption and profit on sale of fixed assets are not chargeable to tax, hence rightly ordered to be excluded from computing the book profit under section 115JB of the Act by the Ld. CIT(A). So we find no illegality or perversity in the impugned order passed by the Ld. CIT(A). Hence, grounds No.5(1) & 5(ii) are determined against the Revenue.

Ground No.6

23. Revenue by raising this ground challenged the deletion of addition of Rs.44,18,315/- made by the AO by way of disallowing education cess on income tax and dividend distribution tax. However, in view of the amendment made vide Finance Act, 2022 with retrospective effect from 01.04.2005 to section 40(a)(ii) of the Act, for the purpose of section 40, the term 'Tax' shall include and shall be deemed to have always included any sur-charge or cess by whatever name called, on such tax. So in view of the matter, we are of the considered view that education cess on income tax and dividend distribution tax is integral part of income tax under the Income Tax Act payable by the assessee covered by provision of section 40(a)(ii) of the Act.

24. Even the Ld. A.R. for the assessee has fairly conceded that as per amendment vide Finance Act, 2022 disallowance made by the Ld. CIT(A) on account of education cess on income tax and dividend distribution tax is not sustainable in the eyes of law. So the deletion of education cess on income tax and dividend

distribution tax made by the Ld. CIT(A) is not sustainable in the eyes of law and disallowance made by the AO to the tune of Rs.44,18,315/- is ordered to be restored. Hence, ground No.6 raised by the Revenue is allowed.

25. In view of what has been discussed above, appeal filed by the assessee is dismissed having been withdrawn. However, appeal filed by the Revenue is partly allowed.

Order pronounced in the open court on 20.01.2023.

Sd/-	**Sd/-**
(S. RIFAUR RAHMAN)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 20.01.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.