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 Nos. 652 & 1424/MUM/2020
Assessment Years: 2014-15 & 2015-16

DCIT, Circle-1, Thane Room No. 22, B-Wing 6th floor, Ashar IT Park, Wagle Industrial Estate, Thane (W)-400604.	***Vs.***	M/s Everest Industries Limited. G-1, A-32, Genesis Mohan Coop. Industries, Mathura Road, New Delhi-110044. **PAN No. AAACE 7550 N**
Appellant		**Respondent**

ITA Nos. 719 & 720/MUM/2020
Assessment Years: 2015-16 & 2016-17

Everest Industries Limited, D-206, Sector-63, Noida-201301 Uttar Pradesh. **PAN No. AAACE 7550 N**	***Vs.***	Dy. CIT, Circle-1 Ashar I.T Park, 6th floor, B-Wing, 16-Z, Wagle Industrial Estate, Thane (W)-400604.
Appellant		**Respondent**

Assessee by	**:**	Mr. Yogesh Thar/ Mr. Chaitanya Joshi/ Mr. Ansh Ajmera
Revenue by	**:**	Mr. Biswanath Das, CIT-DR/ Ms. Richa Gulati,
Date of Hearing	**:**	13/06/2023
Date of pronouncement	**:**	30/06/2023

ORDER

PER OM PRAKASH KANT, AM

These appeals by the Revenue and assessee are directed against separate orders dated 22.10.2019 and 04.12.2019 passed by the Ld. Commissioner of Income-tax (Appeals), Nashik/Commissioner of Income-tax (Appeals), Thane [in short 'the Ld. CIT(A)'] for assessment year 2014-15 and 2016-17 respectively. As common grounds of appeals have been raised in these appeals , therefore these appeals were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. First of all, we take up the appeal of the Revenue in ITA No. 652/Mum/2020 for assessment year 2014-15. 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. 4,63,30,950/- 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 id. 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 adiudication.

(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. 49,00,05,693/-*** *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 (li) 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. 49,00,05,693/- 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. 49,00,05,693/- 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 the facts and in the circumstances of the case and in law, in directing the AO to allow the ***balance additional depreciation in A.Y. 2014-15*** *on account of asset put to use for less than 180 days in A.Y. 2013-14, when no such provision was available in the I.T. Act, 1961 for A.Y. 2014-15.*

4. Whether the CIT (A) erred on the facts and in the circumstances of the case 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 u/s 115JB*** *of the Act, without appreciating 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 InfrastructureFinance Ltd.

(i) Whether the CIT(A)erred in his interpretation that ***Pre-operative expenditure of Rs. 4,33,50,999/-*** *was revenue in nature?*

(ii)Whether on the facts and in the circumstances of the case, the order of the Tribunal holding this to be revenue would not lead to a double deduction since the expenditure was shown as work in progress in theblock of assets that would subsequently be eligible for depreciation?

3. Briefly stated, facts of the case are that the assessee, a public limited company, was during the year under consideration engaged in the business of manufacturing of 'asbestos cement sheets' and 'accessories and 'pre-engineered' building products. For the year under consideration, the assessee filed return of income on 27.02.2014 declaring total loss of Rs.58,70,89,863/- under the normal provisions of the Income-tax Act, 1961 (in short 'the Act') whereas book loss of Rs.40,32,90,378/- was shown as per the provisions of section 115JB of the Act. The assessee further revised its return of income on 30.03.2016 declaring total loss of Rs.57,35,23,520/- under the normal provisions and book loss at Rs.40,71,78,204/-. The return of income filed by the assessee was selected for scrutiny and the statutory notices under the Act were

issued and complied with. In the assessment order passed u/s 143(3) of the Act dated 30.12.2016, the Assessing Officer made additions to the income under the normal provisions of the Act as well as book profit/loss u/s 115JB of the Act. Aggrieved, the assessee filed appeal before the Ld. CIT(A) wherein got part relief in the impugned order dated 22.10.2019. Aggrieved with the relief allowed to the assessee, the Revenue is in appeal. The appeal of the assessee for the impugned assessment year has already been adjudicated by the Tribunal vide order dated 31.01.2023.

4. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record.

4.1 The ground No. 1 of the appeal of the Revenue relates to deletion of disallowance of the claim of exclusion of sales tax incentives being capital receipts amounting to Rs.4,63,30,950/-. This amount consists of sales tax incentives of Rs.2,66,04,629/- and pre-payment of deferred sales tax incentives of Rs.1,97,26,321/-.

4.2 The Ld. Assessing Officer noted that the sales tax incentives of Rs.2,66,04,629/- has been filed under "the Orissa Industrial Policy, 2007". It was contended by the assessee that objective of the policy was to incur additional investment for setting up / expansion and modernization of industry in backward area and same was linked with the fixed capital investment. The assessee relied on the

decision of the Hon'ble Supreme Court in the case of **Sahney Steel & Press Works Ltd.'s (1997) 228 ITR 253 (SC)** and submitted that subsidy or the incentives received in the hand of the recipient have to be determined having regard to the purpose for which the subsidy was given.

4.3 In respect of sales tax incentives of Rs.1,97,26,321/- for 'Lakhmapur' Unit, the assessee submitted that same had been quantified on the basis of net present value (NPV) of deferred sales tax liability granted under the new package scheme incentives of 1993. It was submitted that payment of net present value(NPV) of the future liability cannot be classified as remission or cessation of the liability so as to attract the provisions of section 41(1) of the Act and same cannot be treated as income for the purpose of the computation of the total income.

4.4 The Assessing Officer noted that identical claim of the assessee has been rejected by the Assessing Officer in earlier years though the Tribunal has deleted the addition but to keep the matter alive before the Hon'ble High Court, the Assessing Officer made addition of sales tax incentives amount of Rs.4,63,30,950/-. On further appeal, the Ld. CIT(A) in his detailed finding deleted the addition observing as under:

> *"5. I have duly considered the submissions of the appellant company. The brief facts of the case are that the appellant company is engaged in the business of manufacturing and sale of asbestos & cement roofing sheets, accessories and*

pre-engineered building products. It provides a range of products including roofing products, paneling and partitioning. The appellant company has its units at Kymore, Kolkata, Lakhmapur, Podanur, Bhagwanpur and Baleshwar. In respect of Lakhmapur unit, the Certificate of Entitlement dated 01.10.2013 provided that said unit was liable to pay the entire amount of sales tax liability in equal annual instalments not exceeding five such instalments on expiry of 10 year as computed from the date prescribed for furnishing the last return for the period covered in respect of each of the order of assessment passed. As against this, provisions of section 94(2) of the Maharashtra Value Added Tax Act, 2002 stated that the appellant company at its own option could prematurely pay in place of the amount of tax deferred by it, an amount equal to the net present value of the deferred tax. Considering the above facts, the Lakhmapur unit had the option to defer the payment of VAT & CST collected from customers during the relevant year aggregating to Rs.2,71,38,148/- to the Sales Tax Department after 10 years. However the unit opted to pre-pay the above tax at Net Present Value basis in terms of section 94(2) of the MVAT Act, 2002 read with rule 84D of MVAT Rules 2005 and paid an amount of Rs.74,11,826/- against the aforesaid tax liability. Thus by opting for NPV basis, the Lakhmapur unit had realised a profit of Rs. 1,97,26,321/- (i.e.Rs.2,71,38,148/- less Rs.74,11,826/-) and the same had been credited to profit & loss account as 'other receipts'. Further Sales Tax returns filed during the year along with the summary of returns evidencing deferment of VAT & CST of Rs.2,71,38,148/- were also submitted. It was claimed that the difference of Rs.1,97,26,321/- was a capital receipt not liable to tax. 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-5 as to why the Sales Tax Incentive under 1993 Scheme was a capital receipt not liable to tax. There is no change in the facts & circumstances in the current year in respect of Lakhmapur unit as compared to those in AY 2010-11.The undersigned had also compared the terms and conditions of 1979 and 1993Scheme of the State Government and both the Schemes were found to be*

similar. While rendering the decision on this issue, the undersigned had also placed reliance on the decision of Supreme Court in the case of CIT Vs. Ponni Sugars & Chemicals Ltd. (306IT 392), Shree Cement Ltd. Vs. Addl. CIT (031 IT. Trib.513), CIT Vs. Rasoi Ltd.(335 IT 438), DCIT Vs. Reliance Industries Ltd. (88 ITD 273 (Mumbai SB), CIT Vs.Kirloskar Oil Engines Ltd. (364 IT 88). John Deere India (P.) Ltd. Vs. ITO (82 taxmann.com 201), CIT Vs. Birla VXL Ltd. (32 taxmann.com 330), CIT Vs. Udupi Builders Pvt. Ltd. (319 IT 440) and CIT Vs. Balarampur Chini Mills Ltd. (238 ITR445). The Package Scheme of Incentives, 1993 was introduced with a view to revise the1988 Scheme to rationalize the scope of incentives, various scales and mode of release of incentives to intensify and accelerate the process of dispersal of industries from the developed areas and for development of the underdeveloped regions of the State, particularly those farther away from the Bombay-Thane-Pune belt. The quantum of incentive benefit was to be determined with reference to the gross fixed capital investment of the eligible unit during the period of eligibility. The quantum of incentive benefit was variable and said quantum of deferral benefit was directly related to the cumulative gross fixed capital investment made by the eligible unit. As and when further fresh capital investment was made, the quantum of Sales Tax Incentive was further increased during the period of eligibility. The period of entitlement of benefit could be curtailed if the gross fixed investment fell short of sales tax liability. For earning eligibility for the incentive benefit, the Industrial unit was supposed to take some initial and final steps and it could apply for incentive benefit after having taken possession of the land and having made an application of DGTD for registration. Such application was to be processed by the implementing agency i.e. SICOM without wailing for the completion of the setting up of the Industrial unit and the provisional eligibility certificate was issued to the industrial unit on acquisition of at least 10% of the total fixed assets envisaged in the project and incurrence of expenditure to the extent of 25% of the capital cost of project. In the aforesaid facts, the exemption availed of by the appellant's eligible units under the said notification, was a capital receipt not liable to tax. Though the sales tax incentive could have been realised only upon the commencement of

production yet the fixed capital investments entitled the assessee company to the sales tax incentive. The Maharashtra Government instead of giving outright subsidy for setting up of industry in the backward regions had permitted the industrial unit to realize said subsidy by way of sales tax collection which were either exempted or deferred at the option of the industrial unit. The main purpose of the resolution was to modernize industries which ordinarily would come at a considerable cost, particularly when such industries were located in under-developed areas. It was for this purpose that the said scheme was framed giving benefit of the Sales Tax Waiver/Deferment, at the option of the industry concerned. The entitlement of industrial unit to claim eligibility for the Sales Tax incentive arose even while the industry was in the process of being set up. The scheme was oriented towards and subservient to investment in fixed capital assets. The object of the subsidy was to encourage the setting up of industries in the backward area.Para 5.1(Il) of said 1993 Scheme gave the details of quantum of sales tax incentive which was to be calculated as percentage of fixed capital investment depending on the category of area in which the eligible unit was being set up. The Sales Tax incentive was envisaged only as an alternative to the cash disbursement and by its very nature was to be available only after production commenced. Thus in effect, the subsidy in the form of Sales Tax incentive was not given to the appellant company for assisting it in carrying out the business operations. It was therefore held that Sales Tax Incentive availed by the appellant company under the Package Scheme of Incentives, 1993 was on capital account.

5.1 The appellant company had also set up a manufacturing facility at Somnathpur in Orissa in FY 2012-13 and this unit started commercial production w.e.f. 17.05.2013.This unit had applied to District Industries Centre (DIC) for grant of Thrust Sector Status under Orissa Industrial Policy Resolution 2007. As per Para 18.4 (ji) of the Policy, New Industrial units of Thrust sector were eligible for reimbursement of 75% of VAT paid for a period of 10 years from the date of starting commercial production limited to 200% of fixed capital investment provided that the

VAT reimbursement shall be applicable only to the net tax paid after adjustment of input tax credit against the output tax liability. In view of the above facts, this unit was eligible for incentive for a period of 10 years from the date of commencement of commercial production i.e. 17.05.2013. Accordingly it had applied to DIC for grant of approval as Thrust Sector Unit. The General Manager, DIC had forwarded the copy of the said applicationDirectorate mclustries, Orissa. The office of the Director of Industries, Odisha had issued the certificate of Thrust sector on 05.11.2015. On the basis of the aforesaid certificate, the appellant company had credited Sales Tax Incentive of Rs.2,66,04,629/-to profit & loss account during the relevant year under the head 'other receipts'. The objectives of the Scheme (para 2 of the Orissa Industrial Policy) provided, including inter alia, as under:

(a) To transform Orissa into a vibrant industrialized state,

(b) To promote Orissa as a major manufacturing hub,

(c) To maximize employment generation opportunities both direct and indirect,

(d) To make concerted efforts for balanced regional development.

Further the objective for thrust sector Unit (applicable to Somnathpur unit), as stated in para 4.4 of the Scheme, was to facilitate directed investment into sectors that offered huge employment opportunities, maximize value addition and had a multiplier effect in terms of ancillary and downstream linkages. Further as per para-19 of the Scheme, the Thrust Sector meant new industrial Units in the specified categories which commenced fixed capital investment on or after the effective date and fulfilled certain criteria as specified therein. As regards Ancillary & Down Stream sector, the minimum capital investment had been prescribed at Rs. 10 crores and direct employment generation of 100 persons. Further Down Stream industry, as per para-2, meant an industrial undertaking which was engaged or proposed to be engaged in value addition of the intermediate or final produce or waste product of one or more industrial undertakings. The Somnathpur unit of the

appellant company was eligible for the incentive under the OIP as it had fulfilled the following conditions:

(a) It had invested amount of Rs.51.61 crores (As per application filed before

DIC) as against minimum required capital investment of Rs. 10 crore.

(b) It had provided direct employment of 104 personnel (more than required minimum of 100).

(c) It was using fly ash as waste of industrial produce. The copy of report on process study & determination of percentage of fly ash, was also submitted.

The very object of the incentive scheme was to promote industrial development in the backward regions of the State of Orissa and to generate employment opportunity in that state. The entrepreneur setting up industries in the most backward areas of Orissa were entitled to the Sales Tax benefit. The terms and conditions of New Package Scheme of Incentives, 1993 for Maharashtra State and Industrial Policy Resolution, 2007 for Orissa State were also compared by the undersigned and both the Schemes were found to be similar as per following details:

Particulars	***New Package Scheme of Incentives, 1993***	***Industrial Policy Resolution, 2007***
Government Resolution No.	*1088/(6603)/IND-8*	*3391-XIV-HI-52/2007/I*
Intention of Government	*The aim was to intensify and accelerate the process of dispersal of industries from the developed areas and for developmentoftheunderdeveloped regions of the state particularly those farther away from the Bombay-Thane-Pune belt. (Page-1, Opening para of Preamble)*	*Orissa Industrial Policy Resolution-2007 aims at reinforcing & further expanding the existing policy framework for industrial promotion and investment facilitation, including creation of enabling environment and maximizing the triple objectives of value addition, employment generationandrevenueaugmentation. (Page-1, Para-1.1 and Page-5-Para-4)*
Time Frame for filing application for different incentives	*An eligible unit can apply for incentive after it has taken all the initial effective steps. The application shall be submitted to implementing agency at least 3*	*An industrial unit, which considers itself eligible for any incentives, shall apply in accordance with the operational guidelines and the same shall be considered and disposed of*

	months prior to expected date of commencement of commercial production.The eligibility certificate shall be obtained within 6 months from the date of commercial production.(Page-10, Para-4.1)	*on merit by the competent authority. The claim has to be made within 6 months of its starting commercial production. The claim has to be made within 6 months of starting commercial production.(Page-17,General Provisions-14.10 and 14.11)*
	The incentive under the 1993 scheme will be admissible to anew unit /pioneer unit/prestigious unit and will be in the nature of Sales Tax Incentives by way of exemption/deferral/interest free unsecured loan (page 11-12, para 5.1(1)	*The incentive under the 2007 scheme will be admissible to new industrial units of MSME status, in prioritysector, in thrust sector and existing industrial units which take up expansion, modernization, and diversification and will be in the nature of reimbursement of net VAT paid. (Page-16, Para-14 & 18)*
Steps taken to claim exemption	*Shifting of the Industrial undertaking from Mulund to Lakhmapur*	*Applied to District Industries Centre(DIC) for grant of Thrust SectorStatus under Orissa Industrial PolicyResolution, 2007.*
Mode of Exemption	*The incentives is based on the percentage of fixed capital investment. (page-12, para 5.1-(II)*	*Reimbursement of 75% of VAT paid for a period of ten years from the date of starting commercial production limited to 200% of fixed capital investment provided that the VAT reimbursement shall be applicable only to the new tax paid after adiustment of input tax credit against the output tax liability. (Page-23, Para-18.4(iii)*
Quantum	*The quantum depends on the area in which unit is located (page-12 para 5.1(II)*	*The quantum of exemption depends on the nature of the eligible unit.(Page-21,Para-18.4-differentexemptions for different units)*
Period of exemption	*The period of eligibility shall be computed from the date specified in theEligibilityCertificate in respect of EligibleUnit and will be determined whether the unit is pioneer or non-pioneer.Theperiod ofentitlement is also directly connected to the percentage of Fixed Capital Investment. (page -8 para 3.11, page 11)*	*The exemption can be claimed as per the time limit specified in the Industries Department Resolution dated 2nd March, 2007. (Page-21, Para-18.4(iii)*

In order to treat the incentive as capital in nature, it is to be seen whether the industrial unit was eligible to receive the incentive prior to the date of commencement of production.

This is true in the case of appellant company.Further the Sales Tax incentive was envisaged as an alternative to cash disbursement and obviously was available only after commencement of production. In other words, if the industrial unit was eligible for incentive at the stage of being set up, then even though the same was available after the commencement of production, still the incentive would be regarded as a capital receipt. Though the sales tax incentive could have been realised only upon the commencement of production yet the fixed capital investments entitled the assessee to the sales tax incentive.The Orissa Government instead of giving outright subsidy for setting up of industry in the backward regions had permitted the industrial unit to realize said subsidy by way of Sales Tax collection which were either exempted or deferred at the option of the industrial unit. In the case of CIT Vs. Birla VXL Ltd. (32 taxmann.com 330), the assessee had received incentives under the scheme framed by the Government of Gujarat under resolution dated 2nd January 1991 in the form of Sales Tax Waiver/Deferment scheme. The main purpose of the scheme was to accelerate the industrial development and to disperse industries to under-developed areas as well as to provide additional employment. The Hon'ble Gujarat High Court held that it could be straightaway seen that the benefit, though computed in terms of the Sales Tax liability in the hands of the recipient, the same was not mean to give any benefit on day-to-day functioning of the business or for making the industry more profitable. The principle aim of the scheme was to cover the capital outlay already made by the assessee in undertaking special modernization of its existing industry. From the provisions of the said scheme, it clearly emerged that the subsidy though computed in terms of Sales Tax deferment or waiver, in essence it was meant for capital outlay expended by the assessee for set up of the unit in case of a new industrial unit and for expansion and diversification of an existing unit. As noted, such subsidy was available only to a new industrial unit. The Hon'ble Gujarat High Court further held that it was undoubtedly true that such subsidy was computed in terms of Sales Tax deferment and necessarily therefore, would accrue to an a mindustry only once the commercial production commenced. However this by itself would not be

either a sole or concluding factor. In the result, the appeals of the Revenue were dismissed. Considering the above facts, the Sales Tax Incentive of Rs.2,66,04,629/- availed in respect of Somnathpur unit is held to be a capital receipt not liable to tax. The question that if a subsidy was on capital account then whether it had to be reduced from the cost of assets for allowing depreciation or not, was also decided in the favour of the appellant company by placing reliance on the decision in the case of Sasisri Extraction Ltd. Vs. ACIT (307 IT AT. 127), Rohit Exhaust Systems Pvt. Ltd. Vs. ACIT in ITA No. 1880/PN/2013 dated 31.03.2015 (Pune ITAT) and Inventaa Chemical Ltd. Vs. ACIT (42 SOT 249), wherein it was held that the payment of subsidy was not related to the actual acquisition of assets and subsidy was granted on capital investment on land, building and machinery, therefore it could not be reduced from the value of asset (WDV). Accordingly I direct the AO to delete the addition of Rs.4,63,30,950/- made by him. This ground of appeal is accordingly allowed."

5. We have noted that, **firstly**, regarding sales tax incentives of Rs.2,66,04,629/- in relation to Orissa Industrial Policy, 2007, the Tribunal in earlier assessment years has allowed in favour of the assessee. The Ld. Counsel referred to the decision of the ITAT in ITA No. 653/Mum/2020 for assessment year 2013-14 and ITA No. 654/M/2020 for assessment year 2012-13. Further the Tribunal in ITA No. 655/Mum/2020 for assessment year 2011-12 has followed the finding in assessment year 2010-11 and deleted the addition. The Tribunal in assessment year 2010-11 has adjudicated the issue 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 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."

5.1 Since the facts and the issue in dispute involved before us is identical to the facts and dispute in assessment year 2010-11, therefore, following the same,we uphold the finding of ld CIT(A) on the issue on dispute and the addition of Rs.2,66,04,629/- is liable to be deleted.

5.2 **Secondly**, as far as prepayment of deferred sales tax incentives of Rs.1,97,26,321/-, related to Lakhmapur Unit is concerned, before us, the Ld. Counsel of the assessee relied on the decision of the **Mumbai Bench of the Tribunal in the case of Ambuja Cement Ltd. v. ACIT (2022) in ITA Nos. 2968/Mum/2015 and 1665/Mum/2019 and 3307/Mum/2015 and 2428/Mum/2019**. The relevant finding of the decision is reproduced as under:

> *"23. A plain reading of the above ground of appeal clearly shows that, even going by the stand of the Assessing Officer, the issue is covered in favour of the assessee, by Hon'ble jurisdictional High Court judgment in the case of CIT Vs Sulzer India Ltd [(2014) 369 ITR 717 (Bom)] but yet the appeal has been filed because the revenue has challenged the correctness of the said judgment. That very approach is simply erroneous because it is only elementary in law that the mere pendency of the appeal, against a binding judicial precedent, in a higher judicial forum does not dilute, curtail or otherwise narrow down its binding nature. As long as the binding judicial precedent holds good in law, as it does unless it is upturned or reversed by a higher judicial forum, it binds the lower judicial forums. That apart, even otherwise, the view taken by the Hon'ble Bombay High Court in Sulzer's case (supra) now stands approved and confirmed by the Hon'ble Supreme Court in the case of CIT Vs Balakrishna Industries Limited [(2017) 88 taxmann.com 273 (SC)] wherein Their Lordships have, inter-alia, observed as follows:*
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> *.....The main judgment is dated 05.12.2014 which was rendered in a batch of appeals with the leading case known as 'The CIT v. Sulzer India Ltd. [2015] 54 taxmann.com 161/229 Taxman 264/[2014] 369 ITR 717 (Bom.). It is this judgment which has been followed in other cases. Therefore, for the sake of convenience,*

we shall refer to the facts as noted in Sulzer India Ltd.'s case (supra).

4. The Assessee M/s. Sulzer India Ltd. filed return of income for the assessment year 2003-04 on 27th November, 2013, declaring total income at Rs. 10,59,76,986/-, claiming deduction under section 80HHC of the I.T. Act in the sum of Rs. 82,48,864/-.

5. During the assessment proceedings, the Assessing Officer observed that the Assessee had credited amount of Rs. 4,14,87,985/- to the capital reserve contending that the said amount was a remission of loan liability. The Assessee stated that under the Industrial Backward Area Scheme of the Government of Maharashtra, it was entitled to defer the Sales Tax liability for a period of 7 years under the Deferral Scheme of 1983 and for a period of 6 years under the Deferral Scheme of 1988. In response to a Notification issued by the Government of Maharashtra regarding premature repayment of deferral Sales Tax at Net Present Value (NPV), the Assessee made a repayment of Rs. 3,37,13,393/- against the total liability of Rs.7,52,01,378/-. The Assessee remitted the balance amount of Rs. 4,14,87,985/- and credited the said amount to its capital reserve account. The Assessing Officer asked the Assessee to show cause as to why the said amount should not be taxed in the hands of the Assessee as a revenue receipt. Relying on Circulars of the Central Board of Direct Taxes being Nos. 496 and 674, the Assessee claimed that the deferral Sales Tax under the Deferral Scheme was required to be treated as actually paid for the purposes of section 43B of the I.T. Act. Further, the conversion of Sales Tax liability into loans would be taken as discharge of the liability of Sales Tax and, therefore, the deferral amount was in the form of a loan and not a trading receipt. On this basis, the Assessee contended that the remission of a loan cannot be treated as a revenue receipt and taxed as its income. The Assessing Officer rejected this claim and by holding that the Board's Circular is in the context of section 43B of the Income Tax Act and therefore not relevant for the present issue.

6. Against the aforesaid Assessment Order passed by the Assessing Officer, M/s. Sulzer India Ltd. (hereinafter referred to as 'assessee') preferred the appeal before the Commissioner of Income Tax (Appeals) who dismissed the same by sustaining the assessment. This was challenged by the assessee before the Tribunal. In view of the difference of opinion of the two coordinate Benches on this issue, a special Bench was constituted. The special Bench decided the case in favour of the assessee and allowed the appeal. As mentioned above, it is this judgment, which has been upheld by the High Court as well and in these circumstances, the Revenue is in appeal before us.

7. A glimpse of the facts taken note of, shows that the assessee herein had collected the sales tax in the sum of Rs. 7,52,01,378/-. As per the Scheme floated by the Government of Maharashtra, for those assessees who set up their industries in the backward area, the sales tax liability was deferred for a period of 7 years and, thereafter, it can be paid over a period of 7 years under the Deferral Scheme of 1983 and over a period of 6 years under the Deferral Scheme of 1988. However, under the Scheme of 1988, the Government of Maharashtra promoted premature or payment of deferral sales tax at Net Present Value (NPV).

8. In the meantime, section 38 of the Sales Tax Act was amended which provides that where the NPV of deferred tax as may be prescribed was paid, the deferred tax was deemed to have been paid. Taking advantage of this Scheme, the assessee made repayment of Rs. 3,37,13,393/- against the total liability of Rs. 7,52,01,378/-. In this manner, the assessee could save a sum of Rs. 4,14,87,985/-. The issue is as to whether this amount, which the assessee could save, is to be treated as 'income' by applying the provisions of Section 41 of the Act. The Assessing Officer treated it as the revenue receipt and thereby income. Contention of the assessee is that it is a capital receipt, which is accepted by the High Court.

9. In a very detailed and exhaustive judgment rendered by the High Court, it has discussed the view taken by the Assessing Officer, which was confirmed by the

Commissioner of Income Tax (Appeals). Thereafter, the High Court noted in detail the manner in which the Tribunal has dealt with the issue. A perusal of the judgment would show that the High Court took into consideration the provisions of Section 41 of the Act and the conditions which are required to be satisfied for bringing a particular receipt as "income" within the ambit thereof and found that those conditions are not satisfied in the present case. The High Court also repelled the contention of the Revenue that the assessee obtained the benefit of reduction of sales tax liability under Section 43B of the Act as per the CBDT Circular No. 496 dated 25th September, 1987. The relevant portion of the discussion in this behalf reads as under:

"It is not possible to agree with Mr. Gupta. Because, premature payment of Sales Tax already collected but its remittance to the Government, as Mr. Gupta envisages, is not covered by this provision else the subsections and particularly section 43B(1) would have been worded accordingly. Therefore Section 43B has no application. Insofar as applicability of section 41(1)(a), there also the applicability is to be considered in the light of the liability. It is a loss, expenditure or trading liability. In this case, the scheme under which the Sales Tax liability was deferred enables the Assessee to remit the Sales Tax collected from the customers or consumers to the Government not immediately but as agreed after 7 to 12 years. If the amount is not to be immediately paid to the Government upon collection but can be remitted later on in terms of the Scheme, then, we are of the opinion that the exercise undertaken by the Government of Maharashtra in terms of the amendment made to the Bombay Sales Tax Act and noted above, may relieve the Assessee of his obligation, but that is not by way of obtaining remission. The worth of the amount which has to be remitted after 7 to 12 years has been determined prematurely. That has been done by find out its NPV. If that is the value of the

money that the State Government would be entitled to receive after the end of 7 to 12 years, then, we do not see how ingredients of sub section (1) of section 41 can be said to be fulfilled. The obligation to remit to the Government the Sales Tax amount already recovered and collected from the customers is in no way wiped out or diluted. The obligation remains. All that has happened is an option is given to the Assessee to approach the SICOM and request it to consider the application of the Assessee of premature payment and discharge of the liability by finding out its NPV. If that was a permissible exercise and in terms of the settled law, then, we do not see how the Assessee can be said to have been benefited and as claimed by the Revenue. The argument of Mr. Gupta is not that the Assessee having paid Rs. 3.37 crores has obtained for himself anything in terms of section 41(1), but the Assessee is deemed to have received the sum of Rs. 4.14 crores, which is the difference between the original amount to be remitted with the payment made. Mr. Gupta terms this as deemed payment and by the State to the Assessee. We are unable to agree with him. The Tribunal has found that the first requirement of section 41(1) is that the allowance or deduction is made in respect of the loss, expenditure or a trading liability incurred by the Assessee and the other requirement is the Assessee has subsequently obtained any amount in respect of such loss and expenditure or obtained a benefit in respect of such trading liability by way of a remission or cessation thereof. As rightly noted by the Tribunal, the Sales Tax collected by the Assessee during the relevant year amounting to Rs. 7,52,01,378/- was treated by the State Government as loan liability payable after 12 years in 6 annual/equal installments. Subsequently and pursuant to the amendment made to the 4th proviso to section 38 of the Bombay Sales Tax Act, 1959, the Assessee accepted the offer of SICOM, the implementing agency of the State Government, paid an amount of Rs. 3,37,13,393/- to SICOM, which, according to the Assessee, represented the NPV of the future sum as determined and prescribed by the SICOM. In other words, what the Assessee was required to pay after 12 years in 6 equal installments

was paid by the Assessee prematurely in terms of the NPV of the same. That the State may have received a higher sum after the period of 12 years and in installments. However, the statutory arrangement and vide section 38, 4th proviso does not amount to remission or cessation of the Assessee's liability assuming the same to be a trading one. Rather that obtains a payment to the State prematurely and in terms of the correct value of the debt due to it. There is no evidence to show that there has been any remission or cessation of the liability by the State Government. We agree with the Tribunal that one of the requirement of section 41(1)(a) has not been fulfilled in the facts of the present case."

10. After hearing the counsel for the parties at length, we are of the view that the aforesaid approach of the High Court is without any blemish, inasmuch as all the requirements of Section 41(1) of the Act could not be fulfilled in this case.

24. In view of these discusssions, as also bearing in mind the entirety of the case, we approve the conclusions arrived at by the learned CIT(A), and decline to interfere in the matter."

5.3 Since the issue in dispute involved in the year under consideration being identical, respectfully following the finding of the Tribunal (supra), we uphold the finding of ld CIT(A) on the issue of the pre-payment of deferred sales tax incentives of Rs.1,97,26,321/-. In the result, the ground Nos. 1(i) to (iv) of the appeal are accordingly dismissed.

6. The ground No. 2 of the appeal of the Revenue relates to deletion of addition of excise duty exemption of Rs.49,00,05,693/-. According to the assessee this was a capital receipt in nature whereas according to the Revenue this was a revenue receipt.

Further the Ld. CIT(A) also held that this amount of subsidy was not liable for reduction from the cost of the asset under the provisions of Explanation 10 to section 43(1) of the Act.

7. Briefly stated, facts qua the issue in dispute that a unit of the assessee was located in the state of Uttarakhand, whichcommenced production of Cement products and pre-engineering building unis (PEB) in previous year relevant to assessment year 2009-10. This unit/undertaking was entitled for central excise incentive in terms of Notification No. 50/2003 dated 10/06/2003 of Central Excise Govt of India (supra) as it was situated in specified backward area. Under the notification, the unit was totally exempt from payment of the duty. The assessee in return of income filed excluded the Excise duty exemption/incentive of Rs. 49,00,05,693/- in computing the total income on the reasoning that incentive had been granted for setting up of manufacturing unit in backward area and thus it was a capital receipt in view of purposive test held by the hon'ble supreme court in the case of **CIT Vs Ponni Sugars and Chemicals Ltd (2008) 306 ITR 392(SC)**. According to the Assessing Officer, since the unit was exempt from excise duty, the assessee was not authorised to collect excise duty from customers at all. As no duty was collected from customers, the question of subsequent refund of any part to the same to the assessee did not arise and therefore, according to the Assessing Officer ratio the decision of the Hon'ble Supreme Court in the case of CIT Vs Ponni Sugars and Chemicals

Ltd (supra) was not applicable and accordingly, he rejected the claim of the assessee of the excise duty incentive as capital receipt. On further appeal, the Ld. CIT(A) deleted the addition observing as under:

> *"13. I have duly considered the submissions of the appellant. On perusal of the assessment order, it is seen that the AO noticed that the appellant had claimed Excise Duty Exemption of Rs.49,00.05.693/- in its computation of total income. It was claimed that the appellant had set up its industrial units in a notified backward area i.e. Village Lakeshwari, Pargana-Bhagwanpur, Roorkee, Uttaranchal and in terms of Excise Notification No.50/2003-CE dated 10.06.2003, it had been granted Excise Duty Exemption. Following the ratio of Hon'ble Supreme Court in the case of CIT Vs. Ponni Sugars & Chemicals Ltd. (306 ITR 392), the amount in question had been claimed as capital receipts. However the AO held that the Excise Duty Incentive of Rs.49,00,05,693/- was a revenue receipt and could not be treated as capital receipt.The AO was of the opinion that the assessee company was not authorized to collect the Excise Duty from its customers. In that case, the question of payment of Excise Duty to the government and its subsequent refund, did not arise. Therefore the reliance placed by the assessee company on the decision of Ponni Sugars & Chemical Ltd. was totally misplaced. Further even if the Excise Duty Incentive was to be treated as capital receipt then the amount paid over and above the Cenat Credit would be considered as capital receipt. Further while completing the set-aside assessment for AY 2009-10 on 28.12.2018 U/s 143(3) r.w.s. 254, the AO held that the Excise Duty Incentive was recurring in nature and same had been given as production incentive.The AO held that the subsidy in question had been granted for running the business more efficiently and profitably. 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-13 as to why the Excise Duty Exemption was a capital*

receipt not liable to tax. There is no change in the facts & circumstances in the current year as compared to those in AY 2010-11. The undersigned had also examined Tar the terms and conditions of the Excise Incentive under the Central Excise NotificationNo.50/2003-CE dated 10.06.2003. In para-1 of said notification, the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act 1985 (5 of1986) other than the goods specified in Annexure-1 appended thereto, cleared from a unit located in the notified area, were exempted from the whole of the duty of Excise or additional duty of Excise, leviable thereon under any of said Acts. In para-3 of said notification, it had been categorically mentioned that the exemption contained in this notification shall apply to any of said units for a period not exceeding 10 years from the date of publication of said notification in the Official Gazette or from the date of commencement of commercial production whichever was later. The appellant's units were located in Village Lakeshwari, Pargana-Bhagwanpur, Tehsil-Rookee which was a notified industrial area as per para-5C of said notification. The appellant was manufacturing CBS Roofing Sheets, Rapicon Panels, Flat Boards, Pre-fabricated Building Materials etc. and these items were not mentioned in the Annexure-1 of said notification. These facts were evident from Office Memorandum dated 07.01.2003 of the Ministry of Commerce & Industry. On perusal of the above memorandum, it was seen that incentive in the form of Excise Duty exemption had been given with an objective to achieve industrialization in the backward areas of Uttaranchal, generate employment opportunities and utilization of local resources. During the assessment year under consideration, the Cement and PEB units of the appellant company had availed Excise Duty Incentives due to commencement of commercial production in the notified backward area of State of Uttaranchal. The appellant company vide letter dated 15.06.2007 addressed to the Asst. Commissioner of Central Excise, Dehradun had exercised its option to avail exemption under Notification No.50/2003-CE dated 10.06.2003 for Corrugated Roofing Products, Flat Board, Rapicon Panels, Prefabricated Building and Housing Material to be manufactured and cleared from its unit at Village-Lakeshwari, Pargana-Bhagwanpura, Tehsil-Roorkee. It was seen that the appellant company had been given

subsidy @15% of their investment in plant & machinery subject to a ceiling of Rs.30 lakhs from the State Government of Uttaranchal. The other benefit available to the appellant company for setting up its unit at Lakeshwari, a notified backward area was exemption from payment of Excise Duty. The appellant company had collected Excise Duty from the customers as it was fro embedded in the dealers' price. Instead of first making payment of Excise Duty to the government and then getting refund, the appellant company had retained such amount with it. In case if the Excise Duty Exemption of Rs.49,00,05,693/- was treated as revenue receipt then the whole purpose of setting up of unit in backward area would be defeated. It is clear that no entrepreneur would set up industry in a backward area if it was being compensated with a meager subsidy of Rs.30 lakhs only.As against this figure, the appellant company had made investment of Rs.6.66 crores in land during the FY 2006-07, investment of Rs.75.88 crore in building/plant and machinery during the FY 2008-09 and Rs. 10.90 crores in building/plant and machinery during the FY 2014-15. The total investment of the appellant company till date stood at Rs.111.08 crores. While granting subsidies for capital investment, the Uttaranchal Government did not disburse any amount by way of cash subsidy but allowed industrial undertaking to collect usual charge on account of Excise Duty and retain it as capital subsidy instead of depositing the Excise Duty collected. The purpose of the scheme was not to support carrying on business in a more profitable manner but for promotion/setting up the production unit in a backward area. Collection of Excise Duty was simply a measurement of the subsidy to be allowed. Since the incentives were given for bringing about addition to necessary infrastructure in processing/developing the backward area, it was accordingly in the nature of capital receipt not liable to tax. Reliance was placed on the decision of the Hon'ble Apex Court in the case of CIT Vs. Ponni Sugars & Chemicals Ltd. (306 IT 392). This scheme was intended to accelerate industrial development in the State of Uttaranchal and Excise Duty incentive was given for setting up industries in a notified backward area. The intention was not to increase the viability of the eligible units or assist these in their business operations. Reliance was also placed on the decision of Hon'ble Supreme Court in the case of CIT Vs.

Chaphalkar Brothers (88 taxmann.com 178).Reliance was placed on the decision of Hon'ble Jammu & Kashmir High Court in the case of Shree Balaji Alloys Vs. CIT (333 IT 335). The Hon'ble Supreme Court also dismissed the appeal filed by the Revenue challenging the decision so rendered by Hon'ble Jammu & Kashmir High Court in the case of Shree Balaji Alloys vide Civil Appeal No. 10061of 2011 dated 19.4.2016. The "Excise Incentive schemes" framed for Jammu & Kashmir Government and Uttaranchal Government were found to be similar.since theof both the schemes were identical in nature and hence decision rendered by Hon'ble Jammu & Kashmir High Court in the case of Shree Balaji Alloys (supra) and affirmed by Hon'ble Supreme Court was squarely applicable to the present case. The Hon'ble Mumbai High Court had also considered an identical issue in the case of CIT Vs. Harinagar Sugar Mills Ltd. in ITA No. 1132 of 2014 dated 04.01.2017 and held that the excise duty reimbursement received by the assessee was a capital receipt and not chargeable to tax. It was therefore held by the undersigned that Excise Duty Exemption availed by the appellant company was on capital account. The question that if a subsidy was on capital account then whether it had to be reduced from the cost of assets for allowing depreciation or not, also stood covered in the favour of the appellant company as elaborately discussed by the undersigned in para-5 of the appellate order for AY 2010-11. I accordingly hold that the Excise Duty Incentive of Rs.49,00,05,693/- is a capital receipt not liable to be taxed. The finding of the AO that even if the Excise Duty Exemption availed by the assessee company was a capital receipt then the appellant company would be entitled to claim only the amount over and above the Cenvat Credit, suffers from a serious error without appreciating the fact that the appellant company had not availed any Cenvat Credit during the year or in the earlier years. As per Notification No.50/2003-CE dated 10.06.2003, the appellant company was fully exempted from the Excise Duty and it had not opted for Cenvat Credit Scheme as per letter dated 15.06.2007 addressed to the Asst.Commissioner of Central Excise, Dehradun for exercising its option to avail exemption under Notification No.50/2003-CE dated 10.06.2003. The addition of Rs.49,00,05,693/-made by the AO cannot be sustained and

same is directed to be deleted. This ground of appeal is accordingly allowed."

8. Before us, the Ld. Counsel of the assessee relied on the decision of the Tribunal in the case of the assessee for assessment year 2013-14, 2012-13, 2011-12 and 2010-11. The relevant finding of the Tribunal in assessment year 2010-11 in ITA No. 7791/Mum/2019 along with ITA No. 554/Mum/2020 is reproduced 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 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."

9. Since, the issue in dispute in the year under consideration is identical to the issue decided by the Tribunal (supra) therefore, being a binding precedent, we do not find any illegality or perversity in the finding of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground Nos. 2(i) to (iv) of the appeal are accordingly decided against the Revenue.

10. The ground No. 3 of the appeal relates to additional depreciation/spillover additional depreciation in assessment year 2014-15 on account of asset put to use for less than 180 days in assessment year 2013-14. The facts reproduced by the Ld. CIT(A) in respect of issue in dispute are extracted as under:

"6. In the third ground of appeal, the appellant has challenged the action of the A0 in not allowing the additional depreciation of Rs. 1,50,09,131/- U/s 32(1)(ia) of the Act.Before me, the counsel of the appellant has argued that in the instant assessment year, the assessee company in the revised return of income filed on 30.03.2016 had claimed additional depreciation of Rs.4,53,24,583/- comprising of Rs.3,03,15,452/- pertaining to FY 2013-14 relevant to AY 2014-15 and the balance amount of Rs. 1,50,09,131/- pertained to the arrears of additional depreciation computed @10% on eligible plant & machinery put to use for less than 180 days in FY 2012-13 relevant to AY 2013-14.Further the assessee company vide letter dated 14.12.2016 had modified its claim of additional depreciation by capitalising an amount of Rs.3,26,43,000/- to the block of plant and machinery and accordingly recomputed additional depreciation of Rs.5,09,44,602/-. Out of total amount of

Rs.5,09,44,602/-, Rs.3,59,35,471/- pertained to the additional depreciation in respect of eligible plant and machinery acquired and installed in FY 2013-14 relevant to AY 2014-15 and balance amount of Rs.1,50,09,131/- pertained to balance 10% additional depreciation in respect of eligible plant and machinery acquired and installed in FY 2012-13 relevant to AY 2013-14which was put to use for less than 180 days in that year. It was argued that 2nd provisosection 32(1)(iia) restricts deduction to 50% of the total depreciation only in the previous year in which the asset was acquired. It did not debar the assessee company to claim balance additional depreciation in the subsequent year. Therefore the additional depreciation being a statutory benefit was claimed in second year to the extent of balance 10% which was not claimed in earlier year since the assets were put to use for less than 180 days in the previous year. However the Assessing Officer disallowed the claim of the assessee company on the ground that additional depreciation Us 32 was allowable only in the year in which new plant and machinery was acquired and put to use. It was argued that in terms of provisions of section 32()(ia) of the Act, the assessee company was entitled to benefit of additional depreciation @20% on new plant and machinery acquired and installed after the 31" day of March, 2005. Further second proviso to section 32(1)(il) provided that where the assets had been acquired and put to use for less than 180 days, deduction Us 32(1)(ia) should be restricted to fifty percent of the amount of depreciation calculated on such assets. Relevant provisions of second proviso to section 32(1)() were enumerated as under:-

"Provided further that where an asset referred to in clause (i) or clause (ii) or clause (ia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty percent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) or clause (jia), as the case may be".

From the above, it could be seen that the said proviso restricted deduction under section 32(1)(iia) to 50% of the

total depreciation only in the previous year in which such asset was acquired. It did not debar an assessee to claim balance additional depreciation in the subsequent year. Therefore the additional depreciation being a statutory benefit could be claimed in second year also to the extent of balance 10% which was not claimed in the earlier year since the assets were put to use for less than g tart. 39 days in the previous year. Reliance was placed on the judgement of the Apex Court in the case of Bajaj Tempo Ltd. Vs. CIT (196 IT 188) wherein it was held that provision in a taxing statute granting incentives for promoting growth and development should be construed liberally and since a provision for promoting economic growth had to be interpreted liberally, the restriction on it too, had to be construed so as to advance the objective of the provision and not to frustrate it.Reliance was placed on the decisions in the case of ACIT Vs. SIL Investment Ltd. (73DIR 233), Apollo Tyres Ltd Vs. ACIT in ITA No.616/Coch/2011 dated 20.12.2013, M/s Ashwani Industries in ITA No. 140/Ahd/2013, M/s Well Known Polysters Ltd. In ITA No. 7015/Mum/2012, Rashtriya Chemicals & Fertilizers Ltd. Vs. CIT in ITA No. 5160/Mum/2014, Century Enka Limited Vs. DCIT in ITA No.560/Kol/2010 and Birla Corporation Ltd. Vs. DCIT in ITA No.683/Kol/2011. The Finance Act 2015 had inserted 3rd proviso to section 32(1)(ji) which provided allowance for the balance 50% of additional depreciation which had not been allowed in the year of acquisition, in the immediately succeeding previous year. The 3rd proviso to section 32(1)(ii) inserted by Finance Act, 2015 stipulated the allowability of balance additional depreciation of 10% in the subsequent year on new plant and machinery used for a period of less than 180 days in the preceding year. The said amendment had been made in order to remove the discrepancy in the matter of allowing additional depreciation. The amendment made by Finance Act 2015 fortified the view expressed in aforesaid decisions and was applicable for earlier years also. This amendment was curative in nature and retrospective as it was made to remove the unintended hardship which was against legislative intent. It was held by the Hon'ble Madras High Court in the case of CIT Vs.T.P. Textiles (P) Ltd. (394 IT 483) that balance 10% additional depreciation was allowable as deducted in the immediately succeeding year as amendment being clarificatory in nature

was to be applied retrospectively. Similar views had been taken by the Hon'ble Mumbai Tribunal in the case of MACG Pampac Machines Pvt. Ltd. Vs. Pr.CIT in ITA No.3565/Mum/2017 on relying on the decision in the case of T.P. Textiles (supra). In view of above facts, it was requested to allow additional depreciation of Rs.1,50,09,131/- to the assessee company."

11. Before the Ld. CIT(A), the assessee relied on the decision of the Hon'ble Karnataka High Court in the case of **CIT v. M/s Rittal India Pvt. Ltd. (ITA No. 268/2014 dtd. 24.11.2015 and other decisions**. Further, the Ld. CIT(A) following the decision of the Tribunal in the case of MITC Rolling Pvt. Ltd. (supra) allowed the claim of assessee of additional depreciation in subsequent year if the entire additional depreciation was not allowed in the first year of the installation. The relevant finding of the Ld. CIT(A) is reproduced as under:

"7. I have duly considered the submissions of the appellant. On perusal of the assessment order, it is seen that the AO was of the opinion that the additional depreciation could be claimed only in the year in which the new plant & machinery was purchased even if it was put to use for less than 180 days. The AO held thatbalance 10% additional depreciation could not be claimed in the immediate succeeding year. On careful consideration of the facts and circumstances of the present case, I am inclined to accept the arguments of the appellant. The second proviso to section 32()(li) provides that where the assets have been acquired and put to use for less than180 days, the deduction Us 32()(a) should be restricted to fifty percent of the amount of depreciation calculated on such assets. However it does not bar the assessee to claim additional depreciation in the immediate succeeding year. The 3r proviso to section 32(1)(i) inserted by Finance Act, 2015 stipulates the allowability of balance additional depreciation of 10% in the subsequent year on new plant and machinery used for a period of less than 180 days in the

preceding year. The said amendment has been introduced in order to remove the discrepancy prevailing in the matter of allowing additional depreciation in the subsequent year. Moreover this issue is well settled in the favour of the assessee by the decisions of various Tribunals and High Courts. The Hon'ble Karnataka High Court in the case of CIT Vs. Rittal India Pvt. Ltd. (380 IT 423) upheld the decision of the Tribunal allowing the claim of balance 10% additional depreciation in the immediate succeeding year and dismissed the departmental appeal. The Hon'ble High Court allowed the deduction of the balance 10% of additional depreciation and held that the proviso to clause (¡i) of the section32(1) makes it clear that only 50% of the 20% would be allowable, if the new plant and machinery so acquired was put to use for less than 180 days in a financial year.However it nowhere restricts that the balance 10% would not be allowed to be claimed by the assessee in the next assessment year. It was further held that additional depreciation allowed under section 32(1)(a) of the Act was a one-time benefit to encourage industrialization and the provisions related to it, had to be construed reasonably, liberally and purposively, to make the provision meaningful while granting additional allowance. Reliance is also placed on the decision of Hon'ble Delhi Tribunal in the case of DCIT Vs. Cosmo Films Ltd. (13 IT Trib. 340) wherein it was held that clause 32(1)(ia) was inserted to provide incentives for fresh investment in industrial sector. The second proviso to section 32(1)(a) restricts the allowances only to 50% where the assets had been acquired and put to use for a period less than 180 days in the year of acquisition. However this restriction was only on the basis of period of use. There was no restriction that balance of one time incentive in the form of additional sum of depreciation shall not be available in the subsequent year. It was further held that this additional benefit was to give impetus to industrialization and the basic intention and purpose of these provisions could be reasonably and liberally interpreted in view of Bajaj Tempo Vs. CIT (196 IT 188) (SC) and the assessee deserved to get the benefit in full when there was no restriction in the statute to deny the benefit of balance of 50% when the new plant and machinery were acquired and used for less than 180 days. It was held that the assessee had earned the benefit as soon as he had purchased the new plant and machinery

in full but it was restricted to 50% in that particular year on account of period of usage. Such restrictions could not divest the statutory right. It was held that extra depreciation allowable U/s 32(1)Gia) was an extra incentive which had been earned and calculated in the year of acquisition but was restricted for that year to 50% on account of usage. This type of earned incentive must be made available in the subsequent year. The Hon'ble Mumbai Tribunal in the case of ***MITC Rolling Pvt. Lid. Vs. ACIT in ITA No. 2789/Mum/ 2012,*** *relying on the decision in case of Cosmo Films Ltd. (supra) held that the assessee was entitled to additional depreciation in the subsequent year if the entire depreciation was not allowed in the first year of installation.Respectfullyfollowing the above decisions and considering the facts of the present case, the addition of Rs. 1,50,09,131/- made by the A cannot be sustained and same is directed to be deleted. This ground of appeal is accordingly allowed."*

12. Since, the Ld. CIT(A) has followed binding precedents of the Tribunal and Hon'ble High Court, therefore, we do not find any error or illegality in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground No. 3 of the appeal of the Revenue is accordingly dismissed.

13. The ground No. 4 of the appeal of the Revenue relates to foreign exchange fluctuation loss of Rs. 1,43,79,800/- for reinstatement of the loan. The facts qua the issue in dispute are that the assessee company had taken External Commercial Borrowing (ECB) loan of US Dollars 12 million for the purpose of business (capital and revenue expenditure) in AY 2007-08. During the year under consideration, the assessee reinstated the said loan in books of account applying prevailing exchange rate of US Dollars and shown loss due to foreign exchange fluctuation amounting to

Rs.1,43,79,800/-, which was capitalised to the fixed assets following a notification issued by the Ministry of Corporate affairs, Govt of India, but claimed as revenue/ business loss for the purpose of computation of Income-tax. This claim of the business loss as revenue expenditure was disallowed by the Assessing Officer and directed to capitalize and eligible for depreciation. The Ld. CIT(A) however, allowed the claim of the assessee observing as under:

> *"11. I have duly considered the submissions of the appellant. In the present case, the appellant company has suffered foreign exchange fluctuation loss on reinstatement of ECB loans which were availed in AY 2008-09. The loss has been worked out on the basis of exchange rates prevailing on the balance sheet date. This issue was decided 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-11 to hold that the foreign exchange fluctuation loss was allowable. The issue under consideration is covered in the favour of the appellant company by the order of Hon'ble Mumbai ITAT in its own case for AY 2008-09 vide order dated 15.09.2017 in ITA No.1972 & 1886/Mum/2013 and for AY 2009-10 vide order dated 31.01.2018 in ITA No.3804 &3849/Mum/2015. While adjudicating the issue under consideration, the Hon'ble ITAT held that the appellant company was consistently booking loss or gains on FOREX on the basis of Forex rates as on the last day of the relevant financial year. It was further noticed by the Hon'ble ITAT that in the AY 2011-12, the AO had taxed foreign exchange fluctuation gain and if gains for a particular transaction were to be taxed, the losses arising out of same could not be denied to the assessee. The undersigned had also placed reliance on the decision rendered by the Hon'ble Supreme Court in the case of CIT Vs. Woodward Governor India (P.) Ltd. (312 ITR254), wherein it was held that the valuation is a part of accounting system*

and 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 allowable Us 37(1) of the Act. Further the appellant company has recognized loss arising on account of foreign-exchange fluctuation as per Accounting Standard-11. As a result, said loss is an amate accrued and subsisting liability and not a contingent or hypothetical liability. During the year under reference, the appellant company had capitalized loss of Rs. 1,43,79,800/- to the fixed assets on the basis of Notification F No. 17/33/2008/CL-V dated 31.03.2009. However this loss has to be allowed as a business loss considering the judicial precedent in the case of appellant company. It is a well settled law that accounting entries are not sine-qua-non in determining the taxability of an item of income or deductibility of expenditure as held by the Hon'ble Supreme Court in the case of Kedarnath Jute Manufacturing Co. (82 IT 363). Further the provisions of section 43A are also not applicable in the present case as the loans were borrowed to acquire the assets from outside India. The increase or decrease in the liability on account of foreign exchange fluctuation after the acquisition of assets, will arise at the time of making payment. In the case of CIT Vs. Tata Iron & Steel Co. Ltd. (231 ITR285), it was held by the Hon'ble Supreme Court that increase of rupee liability due to devaluation of foreign currency could not be considered as an addition to the cost of fixed assets. It was further held that cost of an asset and cost of raising money for purchase of the asset are two different and independent transactions. The price of the asset cannot change by any event subsequent to the acquisition of asset. The mode of payment or its manner in respect of loan has nothing to do with the cost of the asset.Further in the present case, the foreign exchange fluctuation loss has arisen after the asset has been put to use. Therefore the same is allowable as a deduction of interest Us 36(1)(in) of the Act. In view of above facts, I direct the AO to delete the addition of Rs.1,43,79,800/- made by him. This ground of appeal is accordingly allowed."

14. Before us, the Ld. Departmental Representative (DR) submitted that identical issue has been restored by the ITAT in ITA

No. 715/Mum/2020 and ITA No. 1423/Mum/2020 for AY 2008-09 to the file of the Assessing Officer observing as under:

> *"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."

15. As far as issue in dispute raised in this ground, the facts and circumstances of the instant case being identical to the facts of the case decided by the Tribunal (supra) , therefore, following the same,

the ground of appeal of the Revenue is allowed for statistical purposes.

16. The ground No. 5 of the appeal relates to the issue of allowability of sales tax incentives and excise duty exemption while computing book profit u/s 115JB of the Act. Before us, the Ld. Counsel of the assessee submitted that identical issue has been decided by the Tribunal in ITA No. 1423/Mum/2020 and ITA No. 715/Mum/2020 for assessment year 2008-09 observing as under:

> *"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.*

51. We find that a coordinate bench of this Tribunal, in JSW Ltd's case (supra), has inter alia,observed as follows:

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 ofincome 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."

17. Since the issue in dispute involved before us is identical to issue decided by the Tribunal(supra), therefore, following the same, the ground No. 5 of the Revenue is dismissed.

18. The ground No. 6 relates to deduction of education cess. The finding of the Ld. CIT(A) on the issue in dispute 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 115JB of the Act (for MAT purpose), Explanation 2 to section 115IB(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 115IB 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)(in) 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 such profits or gains. Therefore education cess was not covered by section 40(a)(ji) 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)(ii), 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 CBDT 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 Jaipuria Samla Amalgamated Collieries (82IT 580) held that section 10(4) of the Income Tax Act, 1922 (pari materia to section 40(a) (ji) 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)(i) of the Act. In view of above facts, I direct the AO to delete the addition of Rs. 1,88,093/- made by him. This ground of appeal is accordingly allowed."

19. In view of Explanation-3 inserted by way of Finance Act 2022 w.e.f. 1/4/2005 to section 40(a)(ii) the Act, the education cess being part of the tax amount, therefore same is not deductible

expenditure. The Ld. Counsel of the assessee also did not object to disallowance of the education cess as deduction, accordingly, the ground of the appeal of the Revenue is allowed.

20. The ground Nos. 7.1 and 7.2 of the appeal relate to pre-operative expenditure of Rs.4,33,50,999/-, which was claimed by the assessee as revenue in nature. The relevant finding of the Ld. CIT(A) on the issue in dispute is reproduced as under:

> *"9. I have duly considered the submissions of the appellant. During the year under reference, the appellant company had incurred expenditure in respect of salaries and wages, contributions to provident & other funds, staff welfare expenses, consumption of stores and spare parts, cost of materials consumed, power and fuel, repairs & maintenance expenses, rent, rates & taxes, insurance, travelling expenses, advertisement & sales promotion expenses, miscellaneous expenses etc. on the new projects namely Somnathpur Works (SW) at Balasore, Orissa and Narmada Works (NW) at Dahej before commencement of commercial production. It was also an undisputed fact that both these new ventures were managed from common funds and there was unity of control leading to an interconnection, interdependence and interlacing among the various ventures such that it could be said that both these projects were only anexpenses were required to be capitalized post-completion of said projects. In the books of accounts, the aforesaid expenses had been reduced as pre-operative expenses from the respective schedule of expenditures and transferred to capital work-in-progress and pre-operative expenditure schedule (Note No.2.33 of notes forming partof financial stat ents) in the Annual Report. However said expenditure was revenuein nature and therefore in the computation of income, it was claimed as a revenue expenditure considering the judicial decisions of various High Courts as well as Tribunal. It was consistently held in various decisions that pre-operative expenditure incurred on expansion of the existing business of an assessee was allowable as a revenue expenditure U/s 37(1) of the Act.*

On careful consideration of facts & circumstances of the present case, I am inclined to agree with the arguments of the appellant. ***The fact that the appellant company had capitalized the pre-operative expenditure to the cost of fixed assets, is not determinative of the factor whether same is allowable or not.*** *Where the assessee had set up new business unit or expanded the existing unit, then pre-operative expenses on revenue account incurred by way of salaries & wages, PF and ESI contribution, staff welfare expenses, repairs & maintenance expenses, travelling expenses and other administrative expenses are allowable Us 37 of the Act. In the present case, it is an undisputed fact that the impugned expenditure was revenue in nature and incurred wholly and exclusively for setting up new units or expansion of existing units.* ***These expenses have not brought into existence any capital asset or enduring benefit to the appellant company.*** *None of the expenses involve construction of structure or renovation, extension Or improvement of the asset. The expenses incurred during the year are purely revenue in nature and cannot be permitted to be deferred under the relevant provisions of the Act. The issue under consideration is covered in the favour of the assessee by the decision of Hon'ble Mumbai High Court in the case of Reliance Supply Chain Solutions Ltd. in ITA No.892 of 2014 dated 05.07.2017. Under similar circumstances, the Hon'ble Mumbai High Court held that when assessee had incurred expenditure for expansion of its existing business, expenditure incurred in the nature of revenue expenditure could not be disallowed. It was further held that it was not relevant as to how the assessee showed a particular income or expenditure in the books of account.In the cited case, both the Commissioner (Appeals) and the Tribunal had specifically, on appreciation of factual matrix, arrived at a conclusion that the expenditures were directly identifiable with the operations and maintenance of the existing stocks i.e. with regard to the payment of salary, travelling and conveyance allowance, telephone expenses, professional fees paid, audit fee and other miscellaneous expenses. In viewthe specific finding of fact arrived at by the Commissioner (Appeals) and theTribunal, the Hon'ble High Court held the expenditure to be revenue expenditure.This issue is also covered in the favour of the assessee by the decision of Hon'ble Mumbai High Court in the case of CIT Vs. Evergrowth Telecom Ltd. (29 taxmann.com*

273) wherein the Hon'ble jurisdictional High Court, while considering the issue of expenditure incurred after setting up of business and before commencement of business held that the said expenditure was allowable as a deduction U/ 37(1) of the Income Tax Act. In the case of Olive Bar & Kitchen (P.) Ltd.Vs. DCIT (102 taxmann.com 98), the assessee was engaged in the business of running restaurants and related activities. During the year under reference, the assessee had expanded its existing business by opening three more restaurants at different places and treated pre-operative expenses incurred under the head, 'pre-operative expenses' like salaries and wages, travelling expenses, restaurant rent, repairs and maintenance and like other general administrative expenses which were incurred wholly and exclusively in connection with business under the head 'capital work-in-progress' in its books of account. But when it came to computation of total income, the expenses in the nature of revenue were treated as revenue expenditure and claimed as such. The Assessing Officer disallowed the pre-operative expenses capitalized in the books of account but claimed as revenue expenditure in computation of the total income. The Assessing Officer disallowed pre-operative expenses on the ground that a particular expense cannot have two treatments i.e. one in the books of account and the other in computation of total income. According to the Assessing Officer, pre-operative expenses can be deducted as per the provisions of section 35D(1)(ji) to the extent as indicated therein. On the contrary, the assessee company contended that it was in the business of running restaurants and it had commenced its business during the year under consideration. Though the commercial operations had not taken place in respect of three new restaurants, yet the commencement of the business activities was not in doubt. It was further contended that all expenditures incurred in connection with setting up of new units which were in the nature of capital expenditure, had been debited to capital work-in-progress. The revenue expenditure incurred in connection with a particular unit had been treated as capital work in progress in its books of account. But when it came to the computation of total income, revenue expenditure claimed as deduction under section 37(1) of the Act because the assessee hadcommenced business activities. On appeal, the Commissioner (Appeals) held that although pre-operative expenses were capitalized in books

under the head 'work-in-progress' but the fact remained that the said expenditure claimed in the statement of total income as revenue expenditure under section 37(1), was purely revenue expenditure which was incurred wholly and exclusively in connection with expansion of the existing restaurant business. The management, the control and the funds utilized were common. Therefore the same could not be treated as pre-operative expenses under the provisions of section 35D so as to amortize it over a period of years. On further appeal, the Hon'ble Mumbai Tribunal held that It was not relevant as to how the assessee showed a particular income or expenditure in the books of account. Separate computation of income and expenditure would be justified only when several distinct business were carried on and not when the separate business activities were carried out by same person and one set of account was maintained for all set of activities. It was not in dispute that the assessee had maintained one set of books of account for its business activity even though it had separate units in different places. Further it was also not in doubt that pre-operative expenses claimed in statement of total income were in the nature of revenue expenses. Therefore when the assessee had commenced its business activity in the relevant previous year and also incurred certain expenses which were revenue in nature, there was no reason for the AO to treat said expenditure as capital expenditure merely for the reason that the assessee had given different treatment for such expenditure in its books of account and statement of total income. It was held that the AO had erred in disallowing deduction claimed towards pre-operative expenses in the computation of total income Us 37(1) of the Income-tax Act even though said expenditure had been treated as capital expenditure in books of account. The Hon'ble Madras High Court in the case of CIT Vs. Shakti Sugars Ltd. (339 IT 400), while considering the issue of deductibility of pre-operative expenses also held that expenditure on setting up of new unit by way of expansion of existing business was a revenue expenditure. The Hon'ble Delhi High Court in the case of Jay Engineering Works Ltd. Vs. CIT (311 IT 405) held that the assessee's claim of preoperative expenditure which included testing charges, salary & perquisites, motor car repairs, travelling expenses, miscellaneous expenses & consultancy fees was allowable as revenue expenditure U/S 370) of the

Income TaxAct. The High Court held that the new project undertaken by the assessee was only an extension of the existing business and therefore the expenditure incurred on the new project constituted revenue expenditure. In the cited case, the assessee was in the business of fans and sewing machines and expenses incurred on fuel injection equipment (new project) was considered as revenue expenses as the same was controlled and managed from common funds and two different ventures were also having an interconnection, interdependence and interlacing. Thereafter the SLP filed by the Department against the above decision had been dismissed by Hon'ble Supreme Court vide its order dated 28.07.2008. The Hon'ble Supreme Court in the case of Taparia Tools Ltd. (372 IT 605) held that the fact that a different treatment was given in the books of account by an assessee could not be a factor which would bar the assessee from claiming the entire expenditure as a deduction. It was further held that once a return had been filed in a particular manner, the AO was bound to carry out the assessment applying the provisions of the Act and not to go beyond the return. There is no estoppel against the statute and the Act enables and entitles the assessee to claim the entire expenditure in the manner it can be claimed under the law. Respectfully following the above decisions and facts of the present case, I direct the AO to delete the addition of Rs.4,33,50,999/- made by him. This ground of appeal is accordingly allowed."

21. Before us the Ld Counsel of the assessee contended that those expenses are revenue in nature, being salary, wages, staff welfare expenses before commencement of commercial production and therefore same should be allowed to the assessee. The Ld. Counsel of the assessee submitted that those expenses being related to the business of the assessee, therefore same are eligible for allowance once the commercial production has been started.

22. The Ld. Departmental Representative (DR) on the other hand, submitted that it needs to be ascertained whether those expenses

claimed were related to the setting up of the unit or for day-to-day expenses for running of business. According to him expenses had been charged in books of account to capital work in progress, then same should be part of fixed asset and eligible for depreciation only and not allowableas revenue expenditure, therefore the issue needs to be sent back to the file of the Ld. Assessing Officer for verification.

23. Before us, the Ld. Counsel of the assessee submitted that issue being old and therefore bills and vouchers of the relevant expenses may not be readily traceable. We find that issue in dispute before us is whether the entry of particular expenses in books of account should determine the character of expenses as capital or revenue or the character should be determined as per provisions of the Act. In the facts and circumstances of the case, Ld CIT(A) has followed binding precedent on the issue in dispute after analyzing facts of the case, which have not been disputed by the Ld DR also, therefore, we don't find any error in the order of ld. CIT(A) on issue in dispute. The ground of appeal of the Revenue is accordingly dismissed.

24. Now we take up the appeal of the Revenue in ITA No. 1424/Mum/2020 for assessment year 2015-16. 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. 6,06,77,4301- 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.

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. 55,57,89,360/- 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. 55,57,89,360/- 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. 55,57,89,360/- 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 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.

4. (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, Excise Duty Exemption and profits on sale of assets, while computing the book profits u/s 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 and profits on sale of assets, while computing the book profits u/s 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)

25. The issue in dispute involved in ground Nos. 1 and 2 of the appeal of the Revenue are covered by our finding while adjudicating ground No. 1 and 2 of the appeal of the Revenue for assessment year 2014-15 and therefore, to have consistency in our decision, following our finding in assessment year 2014-15, the ground No. 1 and 2 of the appeal of the Revenue are accordingly dismissed.

26. The issue of ground No. 3 is related to deduction of claim of the education cess. The identical ground of the Revenue has been allowed by us in assessment year 2014-15, therefore, following the same, the ground No. 3 of the appeal of the Revenue for the year under consideration is also allowed.

27. The ground No. 4 of the appeal of the Revenue relates to claim of sales tax incentives and excise duty exemption and profit on sale of fixed asset while computing book profit u/s 115JB of the Act.

27.1 The Ld. CIT(A) has allowed the claim of exclusion of sales tax incentives and excise duty exemption while computing book profit u/s 115JB of the Act observing as under:

> *"11.1. While adjudicating ground no.3 on sales tax incentive and ground no.4 on excise duty exemption, it has been held that they are capital in nature and hence, is exempt. While computing book profit u/s 115JB, the sales tax incentive and excise duty exemption should thus be excluded while computing book profits us 115JB. The CIT (A) (3), Nasik in his Order dated 16.10.2019 has also held the same view when he has adjudicated that "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 and loss account prepared under Para-ll and Para-Ill of Schedule-VI of the Companies Act. The Hon'ble Supreme Court has held in the case of Indo Rama Synthetics (1) Ltd. Vs.CIT (330 IT 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 (TR 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 PartlI and Part II of Schedule-VI Of the CompaniesAct. In the case of ACIT Vs. Shree Cement Ltd. (2012-TIOL-02-ITAT-Jaipur was held that Sales Tax Incentive was required to be excluded while computing the books profits uls 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 he capital gain on sale of depreciable asset was exempt us 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 Jewellary (India) Ltd. (21 SOT 79). It was held by the Hon'ble Mumbai ITAT in the case of Shivalik Venture (P.) Ltd. Vs. DCIT (60 taxmann.com 314) that an item of receipt which does not fall under the definition of income at all, will be outside the purview of computation provisions of the Act and hence it cannot be included in the 'book profits' us 115JB of the Act." This Ground is thus allowed."

27.2 The claim of exclusion of profit on sale of fixed assets amounting to Rs.1,56,439/- while computing book profit, has been allowed by the Ld. CIT(A) observing as under:

"12.1 It is seen that this issue has been adjudicated in favour of the Appellant byCIT(A)-3, Nashik for A.Y. 2011-12.

The Appellant has, during the year, received profit sale of fixed assets of Rs. 1,56,439/- which has been added by the AO while computing the book profits u/s 115JB. The capital receipts which do not have any element of income or profit are not chargeable to tax under the Income Tax Act nor can they be included in the P&L Account, prepared under Part-ll and Part-IlI of Schedule-VI of the Companies Act. From the submissions of the Appellant, It is seen that the profit on sale of fixed assets has not been included in the P&L Account prepared under the Companies Act. The Hon'ble Supreme Court, in the case of Indo Rama Synthetics(1) Ltd vs CIT (330 ITR 363), has held that the object of MAT Provisions is to bring out the real profits of the

company. This has also been followed by the Hon'ble ITAT Mumbai in the case of Hitkari Fibers Ltd. VS JCIT (90 ITD 654). The Hon'ble Apex Court in the case of Apollo Tyres (255 IT 273) held that the AO has no powers to rework the book profits, if the same has been computed in accordance with Part-ll and Part-Ill of Schedule-VI of the Companies Act. That the capital gain on sale of depreciable assets which were exempt us 50 could not be taxed as income under the provisions of Section 115JA has been held by Hon'ble Mumbai Tribunal in the case of ITO vs Frigsales (India) Ltd (4 SOT 376). This has also been held in the case of ITO vs Suraj Jewellery (India) Ltd. (21 SOT 79) by the Hon'ble Mumbai ITAT. In the case of Shivalik Venture Pvt. Ltd. vs DCIT (60 taxmann.com 314), the Hon'ble Mumbai ITAT has held that an item of receipt which does not fall under the purview of income at all, outside the purview ofcomputation provisions of the Act, cannot be included in the book profits us

Considering the judicial pronouncements on the issue and the decision of theCIT(A)-3, Nashik, the profit on sale of fixed assets of Rs. 1,56,439/- added to the book profit u/s 115JB is deleted."

28. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record.

28.1 Before us, the Ld. Counsel submitted that Tribunal in ITA No. 7792/Mum/2019 along with ITA No. 655/Mum/2020 for assessment year 2011-12 has allowed the claim of the assessee u/s 115JB of the Act ,observing as under:

"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 nothave 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 ScheduleVI 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."

28.2 The issue in dispute before us being identical to the issue decided by the Tribunal (supra) therefore, respectfully following the same the, ground No. 4 of the appeal of the Revenue is accordingly dismissed.

29. Now we take up the appeal of the assessee for assessment year 2015-16. The relevant 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 the reassessment proceedings u/s 147/148 without appreciating the fact that the same has been done in utter disregard of the express provisions of the Act.

(b) That on the facts and in the circumstances of the case, the Ld.CIT(Appeals) erred in not holding that the order u/s 143(3) r.w.s 147 dated 04-12-2019 passed by AO is unjustified, erroneous and needs to be summarily cancelled.

2. That on the facts and in the circumstances of the case and without prejudice to ground no. 1,Ld. CIT(Appeals)was not justified & grossly erred in confirming disallowance in respect of provision for leave encashment debited to Profit & Loss Accountamounting to Rs. 87,38,136/- in computing total incomeunder the normal provisions of the Act.

3. That on the facts and in the circumstances of the caseand without prejudice to ground no. 1, the Ld. CIT(Appeals) was not justified & grossly erred in confirming the action of the A.O. ofadding back provision for doubtful debts amounting to Rs. 1,72,61,202/- in computing book profit u/s 115]B of the Act.

4. That on the facts and in the circumstances of the case, the Ld.CIT(Appeals) was not justified &rather grossly erred in not allowing claim for exclusion of write back of Provision for bad and doubtful debts amounting to Rs. 20,21,975/-, inspite of the fact that the appellant has already offered the same while computing book profit u/s 115]B in AY 2012-13.

30. The ground Nos. 1(a) and (b) of the appeal of the assessee relate to validity of the reassessment proceedings u/s 147 of the Act. The brief facts qua the issue in dispute are that second revised return of income filed by the assessee on 31/3/2017 declaring loss of Rs. Rs.21,82,30,460/- under normal provisions of the Act and

book loss u/s 115JB at Rs. (-) 13,35,80, 146/-, was processed u/s 143(1) of the Act on 30.10.2017. Subsequently, the assessee filed revised computation of income on 28/03/2018 reducing total loss under normal provisions fromRs.21,82,30,460/- to Rs.21,15,23,775/-. The details of same reproduced in assessment order are extracted as under:

> *"2. Thereafter, the assessee has filed revised computation of income be filing letter dated 28.03.2018 wherein the assessee has reduced the claim of depreciation at Rs. 67.06.682 - In the last - revised return filed on 31.03.2017, the assessee has claimed total depreciation of Rs.30,99,15,538 as against which, in the revised computation submitted on 28.03.2018 the assessee has claimed total depreciation of Rs.30,32,08.856/-. Thus, the claim of depreciation was reduced by Rs. 67.06.682 which has resulted into decrease in loss claimed in return of income filed on 31.03.2017 The total loss claimed in the revised return filed on 31.03.2017 was Rs. 21.82.30.458- as against which in the resist computation submitted on 28.03.2018, the assessee has claimed total loss of Rs. 21.15.23.775/- Further in the revised computation of income submitted on 28.03.2018. the assessee has made additional: disallowance w/s 41(1) at Rs. 5.96.47,741/- as per the tax audit report and further claimed deduction account of liabilities written back and credited to Profit and Loss account of Rs. 6.01.289 9 against the claim of Rs. 4,81,238/- made in last revised return filed on 31.03.2017. The above slam deduction and allowances made by the assessee in the revised computation of income submittedon 28.03.2018 are not accepted as the same are made after the processing of return of income and also after the expiry of one year from the end of the relevant assessment year and therefore these revised clan are not allowable as per the provisions of sections 139(5)."*

30.1Thereafter notice u/s 148 of the Act was issued on 30.01.2019 on the ground that in assessments of earlier and subsequent years

certain additions/ disallowances for Sales tax Incentive, excise duty exemption etc., were made rejecting the claims of the assessee, therefore, same need to be made in the year under consideration. The reassessment proceedings were completed on 07.03.2019. Before the Ld. CIT(A) the assessee submitted that the reassessment proceedings were mere change of opinion. The Ld. CIT(A) rejected the contention of the assessee observing as under:

> *"6.2 In this case, the return was processed and intimation us 143(1) of the Act was issued on 30.10.2017. Notice us 148 of the Act was issued on 30.01.2019 The appellant has stated that the reassessment proceedings initiated are mere change of opinion and thus notice needs to be quashed. No scrutiny proceedings u/s 143(3) of the Act was conducted for the instant Assessment Year, hence the question of "change of opinion " as alleged by the Appellant does not arise as no opinion was" formed" by the AO. It is however seen that the reasons for reopening the case was to examine the issue of sales tax incentive, excise exemption, education cess, provision of leave encashment, profit on sale of fixed assets and provision for doubtful debts on the basis of disallowances made in the earlier years ie. for AY. 2012-13, 2013-14, 2014-15 and 2016-17. Under these circumstance, the AO had reason to believe that income had escaped assessment Hence, this ground of appeal is dismissed and reopening is upheld."*

31. Before us, the Ld. Counsel of the assessee submitted that there was no tangible material to reopen the assessment and the assessment has been reopened merely on the basis of the assessment orders for earlier and subsequent years. He submitted that the information in respect of grounds for which assessment has been reopened were already available with the Assessing Officer and therefore, he was not justified in reopening the assessment. In

support of contention, the Ld. Counsel of the assessee relied on the decision of the Hon'ble Delhi High Court in the case of **CIT v. Orient Craft Ltd. (2013) 354 ITR 536 (Del)** and decision of the Tribunal in the case of **Navajbai Ratan Tata Trust v. ACIT 196 ITD 18932.**

32.The Ld. DR on the other hand, submitted that the assessment orders for earlier and subsequent years could be said to be a tangible material to form the reasons to believe that income escaped assessment. In support of contention, he relied on the decision of the Hon'ble High Court of Bombay in **Rabo India Finance Ltd. v. DCIT 225 Taxman 92 (Bombay).**

33. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the validity of the reassessment has been challenged by the assessee on the ground the Assessing Officer has not relied on any new or fresh material and reopening being on the basis of the records already available before him and therefore, the Assessing Officer is not justified in reopening. The Ld. AR referred to para 15 of the decision of the Hon'ble Delhi High Court in the case of **CIT v. Orient Craft Ltd.(supra),** which is reproduced for ready reference as under:

> *"15. In the present case the reasons disclose that the Assessing Officer reached the belief that there was escapement of income "on going through the return of income filed by the assessee after he accepted the return under Section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and*

an abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in Kelvinator of India Lid. (supra). The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words "reason to believe" vis-à-vis an intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the assessing officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147."

33.1 Further, the Ld. Counsel of the assessee has relied on the decision of the Bombay Bench Tribunal in the case of Navajbai Ratan Tata Trust v. ACIT(supra). The relevant para of the decision relied upon of the assessee is reproduced as under:

11. We have considered the rival submissions and perused the material available on record. In the present case, return filed by the assessee was processed vide intimation issued under section 143(1) of the Act and same was not selected for scrutiny and thus, no order under section 143(3) of the Act was passed. The Assessing Officer, pursuant to notice issued under section 148 of the Act, initiated reassessment proceedings.Copy of reasons recorded for reopening the assessment was subsequently provided to the assessee. From the perusal of the reasons recorded for reopening the assessment, as reproduced above, it is evident that the impugned reassessment proceedings has been initiated after perusal of the return and other annexures filed by the assessee along with the return. This fact has also been admitted by the Assessing Officer vide its order dated 2-12-2014 rejecting assessee's objections against impugned reassessment proceedings for the year under consideration. From the perusal of the reasons recorded for reopening the assessment, it is also evident that no new or tangible material was available with the Assessing Officer for initiating the impugned reassessment proceedings. With this factual background, it is relevant to note that under the provisions of section 147 of the Act, the Assessing Officer

can initiate reassessment proceedings only if he has reason to believe that any income chargeable to tax has escaped assessment. The courts have interpreted that the term'reason to believe' doesn't mean subjective belief of the Assessing Officer and the same should be based on some material which has come to the knowledge of the Assessing Officer before initiating proceedings under section 147 of the Act. While rejecting the objections raised by the assessee against initiation of reassessment proceedings, the Assessing Officer vide order dated 2-12-2014 held that since the return was not selected for scrutiny, therefore, no details were called and thus no opinion was formed on any of the aspect on which the reassessment has been initiated in the present case. Though, it is true that, in the present case, as the return of income filed by the assessee was processed under section 143(1) of the Act and thus no scrutiny assessment was carried out, therefore, the impugned reassessment proceedings cannot be questioned on the ground of'change of opinion' by the Assessing Officer. However, non-selection of the case for scrutiny does not in any manner belittle/ reduce the significance and meaning of the term 'reason to believe, which is of paramount importance for initiating proceedings under section 147 of the Act and, as been held in various decisions, reason to believe that income has escaped assessment should be based on some new or tangible material.Such a requirement also rules out the possibility of initiation of reassessment proceedings only on the basis of suspicion without any material being available with the Assessing Officer."

33.2. On the contrary in the decision relied upon the Ld. DR in the case of **Rabo India Finance Ltd. v. DCIT (supra**), the Hon'ble High Court has held that assessment can be reopened on the basis of the assessment orders of the earlier or subsequent years. The relevant finding of the Hon'ble High Court is reproduced as under:

9. In the present case, the order of the Transfer Pricing Officer dated 14 February 2008 under Section 92CA(3) contained only the following reasoning:

"Considering the facts and circumstances of the case, and the assessee's submissions and documents furnished, the value of the international transactions with the associated enterprises, with regards to the Arm's length price is not being disturbed."

Similarly, the order of the Assessing Officer under Section 143(3) for Assessment Year 2006-07 contains absolutely no evaluation or consideration whatsoever in respect of the issues on the basis of which the assessment has been sought to be reopened. During the course of the assessment proceedings for Assessment Year 2007-08, an order of assessment came to be passed on 24 November 2010. During the course of the order of assessment, the Assessing Officer on the basis of material in his possession came to the conclusion that the assessee had failed to demonstrate the nature of the services or support received, the necessity of the said services, that the payments were made for commercial reasons of business exigency, as a result of which the expenses were inadmissible under Section 37(1). At this stage, the Court is not concerned with the correctness of that determination, since the only issue is as to whether the material which emerged during the course of the assessment proceedings for Assessment Year 2007-08 and the order of assessment could furnish tangible material on the basis of which the assessment for Assessment Year 2006-07 could be reopened.Having regard to the law as expounded by the Supreme Court in the several judgments which we have noted earlier, we have come to the conclusion that the assessment for Assessment Year 2006-07 could legitimately be reopened on the basis of the material which came before the Assessing Officer during the course of the assessment proceedings for Assessment Year 2007-08."

34. In view of the above discussion, it is relevant to reproduce reasons recorded by the Assessing Officer in the case of the assessee, as under:

"Reasons for reopening of the assessment in the case of M/s Everest Industries Ltd. for A.Y 2015:16 u/s 147 of the Act

The assessee Company is engaged in the business of manufacturing of Asbestos Cement Sheets and accessories and Pre-Engineering Buitding products. The assessee company has filed its original return of income for A Y2015-16 on 23.11.2015 declaring total loss of Rs 12,31,11,7947Subsequently, the assessee company has revised its return of income for AY.2015-16 on 25.11.2016 and on 31.03.2017 and finally declaring total loss ofRs. 21,82,30,459/

2. On perusal of case record it is noticed that the assessients in this casewere completed for A.Y. 2012-13. A.Y 2013-14, A.Y. 2014-15 and AY. 206-17 wherein additions on account of leave encashment, additonal aspreciation, excise duty exemption, education cess, sales tax incentives, provision for doubtful debts, profit on sale of fixed assets, etc were made after disallowing the claims of the assessee on this issues, as discussed in detail in the respective assessment orders. The aesessment for A.Y. 2015-16 was not made ufs 143(3) as the case of the assessee was not selected for scrutiny under CASS (Computer Aided Scrutiny Selection. On verification of the returns of income (Original as well as Revised) for AY. 2015-16 and the information available on record, it is seen that, for this year, the assessee has made variousclaims of deductions from the business profit on account of leave encashment, additional depreciation, excise duty exemption, education cess, sales tax incentives, provision for doubtful debts, profit on sale of fixed assets, etc while working out the taxable income as per normal provisions of Income-tax and as per the provisions of Sec. 115JB under MA'. The details of such claims made by the assessee for A.Y. 2015-16 are as under.

Sr. No.	**Description**	**Amount**
1.	Excise exemption claimed as capital receipt	55,57,89,360
2.	Sales Tax incentives claimed as capital receipt	6,06,77,430
3.	Claim of Education Cess	39,81,425
4.	Provision of leave encashment	1,53,73,154
5.	Profit on sale of Fixed Assets	1,56,439

6.	Provision for doubtful debts	1,72,61,202
	Total	**65,32,39,010**

3. Considering the fact that the above claims were disallowed in the assessments completed for A.Y, 2012-13, 2013-14, 2014-15 and 2016-17 for the detailed reasons discussed in the respective assessment orders for each claim, the above mentioned claims of deductions and allowances for A.Y. 2015-16 are also required to be disallowed. The assessee's appeals are pending for these years before the Appellate Authorities. However, the details of decisious. on these issues for earlier years are discussed as under

As regards, the assessee's claim of Excise Exemption as Capital Receipts, the Department has treated the same as Revenue Receipts. For AY. 2009-10, the Hon'ble IFAT, Mumbai has set-aside this issue and restore the same to the file of Assessing Officer for fresh adjudication after giving specific directions.The order u/s 254 r w.s, 143(3) was passed for A.Y. 2009-10 on 28.12.2018 and the claim of assessce on this issue has been disallowed.

As regards, the assessee's claim of Sales Tax Incentive as Capital Receipts, the Department has treated the same as Revenue Receipts. For A.Y 2004-05, A.Y, 2005 06, A.Y. 2008 00 and AY. 2009-10, the Hon'ble ITAT.Mumbai has set-aside this issue and restore the same to file of the Assessing Omicer for fresh adjudication after giving specific direction. The order 0/s 254 r.w. 143(3) were passed for these years on 28.09.2018 and 28.12.2019 and the claim of the assesse on this issue has been disallowed.

As regards, the assesse's claim of deduction on account of Education Cess, the Hon ble ITAT has confirmed the addition made on this issae for AY.2009-10.

As regards, the assessee's claim of deduction on account o leave encashment on provision basis. the Departnient has allowed and restricted assessee's claim on payment basis and the balance amount was disallowed.The Hon/ble ITAT has confirmed this issue for A.Y. 2007-08 and A.Y. 2009-10.

From the above discussion, it is established that, it is a clear case of escapement of income which is chargeable to tax and the assessee has understated it's income and has claimed excessive loss, deductions, allowances, etc in the return of income.

4; Considering the above facts and circumstances, I have reason to believe that income chargeable to tax to the extent of Rs. 65,32,39,010/- has escaped assessment for AY 2015-16 within the meaning of provisions of section 147 of the Income Tax Act, 1961.

5. In this case a return of income was filed for the year under consideration and regular assessment u/s 143(3) was not made. Therefore, this case is covered as per Clause (b) of Explanation 2 to Section 147 of the Income Tax Act, which reads as under :

"Explanation 2 - for the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment,namely

(a) ----------

(b) Where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;"

6. It is evident from the above discussion that in this case, for A.Y. 2015-16, the issues under consideration were never examined during the course of processing of return of income: It is important to highlight here that facts relevant on the above issues may be embedded in annual report, audited P & L A/c, balance sheet and books of account in such a manner that it would require due diligence by the A0 to extract these information.

7. In this case less than four vears have elapsed from the end of assessment year under consideration i.e. A.Y. 2015-16. Hence sanction to issue notice us 148 has been requested from Additional Commissioner of Income Tax as per the provisions of section 151(2) of the Act."

35. On perusal of the above reasons recorded, we find that the Assessing Officer has invoked the information received by way of assessment year 2014-15 as well as assessment year 2016-17. In those assessment orders certain additions were made and some of the additions were already upheld by the Tribunal and considering the finding in those assessment orders as information, the Assessing Officer has reopened the assessment for the year under consideration which was not subjected to scrutiny earlier. In our opinion as held by the Hon'ble Bombay High Court in the case **Rabo India Finance Ltd. v. DCIT (supra**), the finding or the material which emerged during the course of assessment proceedings for earlier or subsequent assessment years, was in the nature of the tangible material and assessment could be reopened on that basis. The facts of the instant case bring identical, we reject the contention of the assessee challenging the validity of the reassessment and accordingly,we uphold the finding of the Ld. CIT(A) on the issue in dispute. The ground No. 1 of the appeal of the assessee is accordingly dismissed.

36. The ground No. 2 of the appeal of the assessee relates to the disallowance of claim provision of leave encashment amounting to Rs.67,38,136/-. Before us, the Ld. Counsel of the assessee submitted that in view of the provisions of u/s 43B of the Act, the claim is allowed on paid basis and therefore the ground of appeal

was not pressed. Accordingly, the ground of appeal of the assessee is dismissed.

37. The ground No. 3 of the appeal of the assessee relates to disallowance of provision of doubtful debts amounting to Rs.1,72,61,202/- while computing book profit u/s 115JB of the Act. Before the Ld. CIT(A) the assessee relied on the decision of the Hon'ble Supreme Court in the case of **Vijaya Bank v. CIT (2010) 322 ITR 166 (SC)** to support that once the amount of provision has been reduced from the debtors in balance sheet, it amounts to written off of bad debts and therefore it was not an unascertained liability and hence not disallowable for the purpose of section 115JB of the Act. However, the Ld. CIT(A) following the finding of the third Member in the case of **M/s Southern Power Distribution Company of AP Ltd. v. DCIT (2018) 170 ITD 1(TM) (Hyd.) (Trib.)**rejected the contention of the assessee observing as under:

> *13.1 Clause 'c' to Explanation 1 of Section 115JB of the I.T. Act, 1961 is as under:*
>
> *"The amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities or;"*
>
> *An analysis of the said provision shows that 'book profit' means the profit as shown in the profit and loss account of the relevant assessment year prepared under the Companies Act and the same has to be reduced by the amount set aside to provisions made for meeting liabilities other than ascertained liabilities.*
>
> *As per the decision of the Hon'ble Supreme Court in the case of Apollo Tyres the Assessing Officer has no power to tinker with the profit/loss declared for Company Law*

purposes and the 'book profit' shown therein has to be taken as the base for making adjustment u/s 115JB.

As per Clause 'c' to Explanation 1 of Section 115JB addition to the book profit can be made only when the provision made for liabilities is not an ascertained liabilities. The AO has added the gross provision for doubtful debts of Rs. 1,72,61,202/-. A perusal of the relevant extract of the Annual Report for F.Y.

2014-15 filed as Annexure-70 in Page No. 948 of the written submission of the Appellant shows that under the head 'other expenses' the following expenses are reflected:

p-Provisions for doubtful trade and other receivables (net) 172.61 (Rs. In lakhs)

Hence it is seen that the provision for doubtful debts of Rs. 172.61 lakhshave been created which is an unascertained liability. Sub-clause 'c' empowers AO to increase the book profit only to the extent of unascertained liabilities which in the case of the Appellant as per its Audited Financial Statement is Provisions for doubtful trade and other receivables (net) 172.61 (Rs. In lakhs). Following the decision of the third member, Hon'ble Vice President, Hyderabad in the case of M/s Sadan Power Distributin Co. of Andra Pradesh Ltd. vs DCIT. I uphold the addition of Rs. 172.61 Lakhs made by the AO. This Ground of Appeal is Dismissed."

38. Before us, the assessee submitteda chart containing working out of closing balance of debtors in the balance sheet amounting to Rs.2,07,00,044/-, a detailed break up of which is provided as under:

Particulars	Amount	Remarks	Ground No.
Opening as on 01 April 2014	59,09,801		
Provision created during the year	1,72,61,202	During the previous year relevant to instant assessment year i.e. AY 2015-16, theassessee has created provision for doubtful debts of Rs. 1,72,61,202/- and the same is debited to Profit and Loss	Ground No. 3 AY 2015-16

		Account. The assessee has not added back provision for doubtful debts debited to P/L A/c while computing of Book Profit u/s 115JB on the contention that since the aforesaid provision had been netted off with debtors in the Balance Sheet, the same represents actual write off and hence clause (i) in Explanation 1 to Sec. 115JB shall not be attracted.	
Written off against the debtors during the year of AY 2012-13	20,21,975	The assessee has added provision for doubtful debts under MAT provisions. In view of the aforesaid facts, the assessee shall be entitled for claim write back of provision for doubtful debts amounting to Rs. 20,21,975/-, pertaining to AY 2012-13 as it has already added the provision for doubtful debt created in AY. 2012-13 while computing Book Profit u/s 115JB else the same will result in double disallowance.	Ground No. 4 AY 2015-16
Written off against the debtors during the year of AY 2014-15	4,48,984	The assessee has not added provision for doubtful debts under MAT provisions which has been accepted in order u/s 143(3). Out of the amount of provision created in AY 2014-15 38,87,826, only 4,48,984 have been written off in current AY.	
Closing balance as on 31 March, 2015	2,07,00,044		

38.1 Before us, the LD. Counsel of the assessee relied on the decision of the Hon'ble Supreme Court in the case of Vijaya Bank Ltd. v. CIT (supra). The Ld. Counsel further referred to the decision of the Mumbai Tribunal in the case of **Tainwala Chemicals & Plastics India Ltd. v. ACIT (2011) (47 SOT 169)**and decision of the Kolkata Tribunal in the case of **DCIT v. SSPL Properties Management Pvt. Ltd. ITA No. 2074/Kol/2019** and submitted that clause (c) as well as clause (i) of explanation to section 115JB (2) of the Act are not applicable over the provisions for doubtful debt if same is reduced from the debtors account. The Ld. Counsel

further submitted that Hon'ble Bombay High Court in the case of CIT v. Tainwala Chemicals & Plastic India Ltd. (2013) 215 Taxman 153 has upheld the finding of the Tribunal.

39. On the other hand, the Ld. DR submitted that as far as decision of the Vijaya Bank Ltd. (supra) is concerned same was in respect of section 36(1)(viia) of the Act and was not related for the purpose of section 115JB of the Act for determining whether the provision for bad &doubtful debt is an unascertained liability or provision for diminution in the value of asset.

40. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In the case of Vijay Bank Ltd (supra), the assessee made a provision for bad and doubtful debts by debiting the P & L A/c and crediting the Provision for Bad debts A/c. Thereafter, the provision account was debited and the loans and advances a/c were credited. The AO denied the claim for bad debts u/s 36(1)(vii) on the ground that the individual account of the debtors had not been written off. The CIT (A) and Tribunal allowed the assessee's claim though the Hon'ble High Court reversed it.On further appeal by the assessee, the Hon'ble supreme court reversed the Hon'ble High Court and held *that pursuant to the Explanation inserted w.r.e.f. 1.4.1989 a mere provision for bad debt is not entitled to deduction u/s 36(1)(vii) of the Act*. However, in the facts of the case Hon'ble supreme Court held *that reducing the amount of debtors from the balance sheet*

amounted to write off and the assessee was entitled for deduction under section 36(1)(vii) of the Act. The relevant finding of the Hon'ble Supreme court is reproduced as under:

> *"However, as stated by the Tribunal, in the present case, besides debiting the Profit and Loss Account and creating a provision for bad and doubtful debt, the assessee-Bank had correspondingly/ simultaneously obliterated the said provision from it's accounts by reducing the corresponding amount from Loans and Advances/ debtors on the asset side of the Balance Sheet and, consequently, at the end of the year, the figure in the loans and advances or the debtors on the asset side of the Balance Sheet was shown as net of the provision "for impugned bad debt". In the judgement of the Gujarat High Court in the case of Vithaldas H. Dhanjibhai Bardanwala [supra], a mere debit to the Profit and Loss Account was sufficient to constitute actual write off whereas, after the Explanation, the assessee(s) is now required not only to debit the Profit and Loss Account but simultaneously also reduce loans and advances or the debtors from the asset side of the Balance Sheet to the extent of the corresponding amount so that, at the end of the year, the amount of loans and advances/ debtors is shown as net of provisions for impugned bad debt. This aspect is lost sight of by the High Court in it's impugned judgement. In the circumstances, we hold, on the first question, that the assessee was entitled to the benefit of deduction under Section 36(1)(vii) of 1961 Act as there was an actual write off by the assessee in it's Books, as indicated above."*

40.1 The Tribunal in the case of Tainwala Chemicals and Plastics India Ltd (supra) on the issue of addition for provision of bad and doubtful debt held as under:

> *"41. We have considered the rival submissions carefully. We find that a controversy was going whether provision for doubtful debt was against any ascertained liability or a diminution of asset and whether same could be added back to the profits under section 115JB. The controversy was settled by the Hon'ble Supreme Court in the case of in the case of CIT v. HCL Comnet Systems & Services Lid. (2008] 305 ITR 409 / 174 Taxman 118 by holding that provision for doubtful debt is a provision against diminution of the asset and, therefore, same could not be added back to the book profits. However, Parliament inserted clause (i) to section 115JB by which even the provision of diminution in the assets was also required to be added to the book profits. Therefore, it was a mere case of provision for doubtful debt, then it is required to be added back to the book profits. However, while deciding the assessee's appeal the issue regarding claim for bad debt also came up for consideration before the Tribunal and by following the decision of the Hon'ble Supreme Court in the case of Vijaya Bank (supra) we have already held that the claim for bad debt is allowable. Once such claim is allowable as such, then there is no question of adding back the same to the book profits. In view of this discussion, we confirm the order of the Id. CIT(A)."*

40.2 Thus, the Tribunal upheld the deletion of provision of bad and doubtful debt u/s 15JB of the Act mainly for the reason that under regular provisions of the Act said entry has been held as actual write off. The relevant finding of the Tribunal in relation to claim of said provision as actual write off u/s 36(1)(vii) is reproduced as under:

> *32. We have considered the rival submissions carefully. The first objection of the Ld.DR is that originally the provision for doubtful debt was claimed against Katayan Construction & Developers Ltd.*

before the AO, whereas before the CIT(A) this provisions was shown to be against Tainwala Holdings Pvt. Ltd. We find that the ld. CIT(A) has reproduced ground No.6 in para-7 which reads as under:

" Ground 6 - Bad Debts Written off The AO erred in disallowing the provision made for doubtful recovery of loan given to Tainwala Holdings Private Limited on the alleged ground that the said loan given to this company are not declared as income in earlier years so this amount cannot be allowed as deduction u/s.36(1)(vii) of the Act.

In this regard it is respectfully submitted that loan given to Tainwala Holdings Private Limited out of the surplus funds of the appellant, which were already offered to tax in the earlier years. Therefore, the contention of the AO that the loan given to company is not declared as income, is not correct.

Further, it is to be noted that the provision is made after considering weak financial position of the Tainwala Holdings Private Limited. This is clearly loss of fund of the appellant and therefore, allowable as deduction u/s.36(1)(vii) of the Act.

The appellant humbly prays that the proper and appropriate relief be allowed in the appeal to meet the ends of justice as being aggrieved by the assessment made, the appellant is constrained to file this appeal."

33. From the above it is clear that provision for doubtful debt seems to be only against Tainwala Holdings Pvt. Ltd. However since a doubt has been raised, therefore, we remit the matter back to the file of the AO for verification of the name against whom the provision for doubtful debt has been claimed. The second objection that since assessee is not a NBFC, therefore, it cannot be said that assessee company was engaged in the business of granting loans. It was pointed out by the Ld.counsel of the assessee

that whenever assessee company has surplus funds they were lent as inter corporate deposits and this fact becomes clear from page-17 of the paper book wherein interest has been accounted for. This fact can be further verified from assessment order for A.Y 1995-96, copy of which has been filed at pages 53 to 57 of the paper book wherein interest from loans amounting to Rs.33,00,238/- has been assessed as business income. Similarly, in A.Y 1996-97 from the assessment order, copy of which is placed at pages 75 to 78 of the paper book wherein while dealing with the issue of deduction u/s.80IA against interest income it has been clearly mentioned that assessee has earned interest income of Rs.30,68,014/- and it has been observed that no deduction u/s.80IA was available. But it clearly shows that assessee's interest income has been clearly assessed as business income. Thus, it is clear that whenever assessee has earned income from giving money to inter corporate deposits same has been offered as business income and has been assessed also as business income. The Ld.DR in the written submissions had also relied on the decision of the Bombay Bench of the Tribunal in the case of M/s. Maini Shipping Pvt. Ltd. in I.T.A.Nos.2687/M/08 and 2718/M/07 and 3531/M/07. In that case it was clearly found that interest has been charged only from two parties and, therefore, lending of money could not be considered as business of the assessee. Whereas in the case before us, interest has been charged from all the parties. Moreover, in the case of M/s.Maini Shipping Pvt. Ltd.I.T.A.No.2687/M/07 [supra] it was also observed that there was no discussion regarding charging of interest income as business income and section 143[3] order was available only for one year, whereas in the case before us section 143[3] orders are available for A.Yrs.1995-96 and 1996-97 and also there is discussion regarding interest income while adjudicating the issue for deduction u/s.80IA. Thus, those decisions are clearly distinguishable and we hold that once assessee has lent the surplus money and offered the interest income as business income,

then the activity of lending the money has to be treated as business activity. In any case, if this claim cannot be allowed as bad debt, same has to be allowed as business loss because money was lent during the course of business for earning income. This view is further supported by the decision of the Special Bench of the Tribunal in the case of Dy. CIT vs. Shri Shreyas S.Morakhia I.T.A.No.3374/Mum/2004 dated 16th July, 2010. In this case vide para-32 it was held as under [210 ITR 1] in which it was held as under:

"32. Keeping in view all the facts of the case and the legal position emanating from the various judicial pronouncements as discussed above, we are of the view that the amount receivable by the assessee, who is a share broker, from his clients against the transactions of purchase of shares on their behalf constitutes debt which is a trading debt. The brokerage/commission income arising from such transactions very much forms part of the said debt and when the amount of such brokerage/commission has been taken into account in computation of income of the assessee of the relevant previous year or any earlier year, it satisfies the condition stipulated in section 36(2)(i) and the assessee is entitled to deduction u/s.36(1)(vii) by way of bad debts after having written of the said debts from his books of account as irrecoverable. We, therefore, answer the question referred to this Special Bench in the affirmative that is in favour of the assessee."

34. The third objection is that the amount was really not reduced from the debtor on the assets side of the balance-sheet and in this regard the Ld.DR had filed a copy of the Annual Report. However, we find that the portion of the report which has been filed by the Ld.DR is a copy of the Schedule-O which consists of "Significant Accounting Policies and Notes Forming Part of the Account for the year ended 31st March, 2004", therefore, it is not the part of the balance sheet as such. Under Companies Act every company is required to file certain statistical information, e.g.,

production capacity, quantitative details of stock etc. Similarly, in the case of loans extended to the companies within the same group, every company has to disclose the amount outstanding at the end of the year, maximum amount outstanding during the year, number of shares held in such companies and maximum numbers of shares held in such companies, so this part of the schedule basically deals with the statistical information in compliance with the requirement of the Companies Act. Whereas actual schedule of loans and advances is schedule I wherein the loan amount has been shown after reducing the provision for doubtful debts.

35. The Hon'ble Bombay High Court in the case of CIT vs. General Insurance Corporation Ltd. [254 ITR 204] wherein one of the issue was that if a debt has been written off then what would be the procedure for writing off of the debt. The Hon'ble court analysed the concept of writing off and made the following observations at page 209 of the report which read as under:

"In the case of Jwala Prasad Tiwari [1953] 24 ITR 537, the Bombay High Court had held that the expression "writing off" is a technical term used by the auditors. That, there are two methods of dealing with a debt which has been written off in the books of account, viz., by giving corresponding credit to the debtor's account or by giving corresponding credit to the bad and doubtful debts account. The first method is only employed where it is desired to close the account of the debtor. The second method is employed where there are some chances of recovery. That, when we talk of "writing off", we are not concerned with the credit to be given to an account. That, "writing off" means raising a debit entry. This can only be to the debit of the profit and loss account. That, this is the only debit which can be raised as a result of writing off a bad debt. To the same effect is the judgment of the Gujarat High Court in the case of Sarangpur Cotton Mfg. Co. Ltd. [1983] 143 ITR 166. In the case of Vithaldas H. Dhanjibhai Bardanwala

v. CIT [1981] 130 ITR 95, the Division Bench of the Gujarat High Court has held that under section 36 of the Act, before any claim for allowance for a bad debt is held established by the Assessing Officer, it must appear that the concerned bad debt was written off as irrecoverable in the account books of the assessee. This requirement is a condition for the grant of claim for bad debt allowance. To that extent, there is a departure from the earlier Act. However, so far as the exact requirement of the writing off is concerned, the language used in the Indian Income-tax Act, 1922 and the 1961 Act is identical. If the debit entries posted by the assessee indicate that bad debt has been written off as irrecoverable in the accounts of the assessee, then the statutory condition stands fully complied with. That, if the assessee has posted entries in the profit and loss account and the corresponding entries are posted in the bad debt reserve account, it would be sufficient compliance with the provisions of the statutory requirement for writing off as irrecoverable the concerned debt in the books of the assessee. These judgments squarely apply to the facts of our case. In the present matter, the assessee has posted entries in the profit and loss account and has made corresponding entries in the bad debt reserve account. There- fore, there is compliance with section 36(1)(vii). It may be noted that prior to April 1, 1989, this statutory requirement existed under section 36(2)(i). That entry has been shifted and brought to section 36(1)(vii). Therefore, to the extent of the exact requirement of writing off of the concerned debt as irrecoverable, the law remains the same even after April 1, 1989. Hence, there is compliance with section 36(1)(vii). Rule 5(a) of the First Schedule, inter alia, lays down that where any expenditure or allowance is debited to the profit and loss account by way of reserve which is not admissible under the provisions of section 36(1), then the amount shall be added back in computing the profits of the business. However, in the present case, as stated hereinabove, there is full compliance with section 36(1)(vii). The manner of writing off is as per the statutory requirement. The Department has

not raised the relevant factual dispute as to whether the debt has not become irrecoverable.

Recently, the Hon'ble Supreme Court has dealt with this matter in the case of Vijaya Bank vs. CIT [322 ITR 166]. In that case it was observed as under:

"Though a mere debit to the profit and loss account would constitute a provision for a bad and doubtful debt, yet that would not constitute actual write off. But where besides debiting the profit and loss account and creating a provision for bad and doubtful debt, the assessee has correspondingly/simultaneously obliterated the said provision from its accounts by reducing the corresponding amount from loans and advances/debtors on the assets side of the balance-sheet, and, consequently at the end of the year, the figure in the loans and advances or the debtors on the assets side of the balance-sheet is shown as net of the provision for "impugned bad debt", the assessee will be entitled to the benefit of deduction under section 36(1)(vii), as there is an actual write off by the assessee in his books. Disallowance cannot be made on an apprehension that if the assessee failed to close each and every individual account of its debtor, it may result in the assessee claiming deduction twice over.

Held, on the facts, that the assessee was entitled to the deduction claimed because : (i) the head office accounts of the assessee clearly indicated that on repayment in subsequent years the amounts were duly offered for tax ; (ii) that under accountancy practice the accounts of the rural branches had to tally with the accounts of the head office, and if the amount repaid in subsequent years is not credited to the profit and loss account of the head office and if the repaid amount in subsequent years is not credited to the profit and loss account of the head office, which was what mattered ultimately, then there would be a mismatch between the rural branch accounts and the head office accounts ; (iii) in any

event under section 41(4), where deduction had been allowed in respect of a bad debt or a part thereof under section 36(1)(vii) then if the amount subsequently recovered on any such debt is greater than the difference between the debt and the amount so allowed, the excess is deemed to be profits and gains of business, and accordingly chargeable to tax as the income of the previous year in which it is recovered ; and the Income-tax Officer is sufficiently empowered to tax such subsequent repayments under section 41(4)."

Thus, from the above it is clear that once a provision of doubtful debt has been debited in the profit & loss account and the corresponding provision has been credited or reduced from the debtor's account on the assets side of the balance-sheet, then this would amount to writing off. In the case before us, the assessee company has debited the provision of doubtful debt to the profit & loss account and correspondingly has reduced the assets by reducing the amount of unsecured loans outstanding and thus would amount to writing off of the loan. Accordingly, assessee would become entitled to the claim of bad debt. One more objection was raised that the debtor company has stated in its Annual Report that they were regular in making repayments, therefore, such write off cannot be treated as bona fide write off. However, it was clearly pointed out before us that this observation was also made by the debtor company whereas the fact remains that no payments were received in 2000-01 and, in fact, assessee had stopped charging interest after A.Y 1997-98 because the financial position of the debtor company had become bad. When assessee company had not received any amount for the last three years and even no interest charged, then if assessee company after ascertaining the amount as irrecoverable has written off the balance amount, then it cannot be said that the same is not bona fide. Therefore, we find no force in this objection. The Ld.DR had also mentioned that in penalty proceedings assessee has taken a plea that this amount was not claimed as bad debt

but was only a provision for doubtful debt. As pointed out by the Ld.counsel of the assessee first of all it is settled that assessment proceedings are totally separate and independent from penalty proceedings and in any case the representation regarding penalty was made on 26-12-2006 whereas the decision of the Hon'ble Supreme Court in the case of Vijaya Bank vs. CIT [supra] was rendered on 15th April, 2010 which means at that point of time there was a doubt whether the provision for doubtful debt could also be considered as claim for bad debts because actual writing off of the debt was not there and this position got settled only in 2010 by the Hon'ble Supreme Court.

36. The issue regarding writing off of part of the debt came up for consideration before the Hon'ble Delhi High Court in the case of CIT vs. Realest Builders And Services Ltd. [308 ITR 246]. In that case the facts involved were as under:

"For the assessment year 2001-02, the Assessing Officer disallowed the deduction claimed by the assessee in respect of bad debts written off. The debtor company suffered a heavy loss due to a fire which broke out in its factory. The board of directors of the assessee company took a business decision and passed a resolution on March, 2001, to write off the debts to the extent they were not recoverable. A compromise deed was also executed on 14th May, 2001, with the assessee company. The Commissioner (Appeals) deleted the additions made by the Assessing Officer and recorded the findings (i) that the assessee was in the business of money lending there is no question of the principal amount written off to be treated as capital in nature and

(ii) that the assessee had written off the amount in the books of account during the relevant previous year, the compromise for write off was only a formality. The Tribunal upheld the order of the Commissioner (Appeals) that the bad debts written off in the books of account of the assessee had to be

allowed as deduction under section 36(1)(vii) of the Income-tax Act, 1961."

On the above facts, it was held as under:

"Held, dismissing the appeal, that the assessee did not have to establish the bad debt and he has to merely indicate that the bad debt was written off in its books in the year in question. The plea that the assessee was not in the business of money-lending could nto be raised in appeal, particularly, when the Commissioner (Appeals) had given a clear finding to the contrary. There was no infirmity in the order of the Tribunal."

Thus, it is clear that even when a part of the debt is written off, same can be allowed as claim for bad debt. In view of this detailed discussion, we set aside the order of the ld. CIT(A) and directed the AO to allow the claim for bad debt."

40.3 Before the Hon'ble Bombay high Court, the Revenue raised following question of law raising this issue:

"(k) Whether, on the facts and circumstances of the case, the Tribunal was justified in upholding the decision of the CIT (A), in deleting the addition on account of provision for doubtful debts to the book profit under Section 115JB of the Act without appreciating that the disallowance / addition on account of diminution in the value of assets is mandatory in view of Explanation (I) to Section 115JB of the Act ?"

40.4 The Hon'ble High Court also in view of holding the reducing of debtors account from the balance sheet by amount of provision for bad and doubtful debt as actual write off under regular provisions, dismissed the question raised by the revenue.

40.5 In the case of DCIT Vs SSPL Property Management p Ltd (ITA No.2074/Kol/2019) also the issue of provision of bad and doubtful debt u/s 115JB has been decided relying on the decision in the case of Vijay Bank Ltd (supra), which we have observed above as related to section 36(1)(vii) of the Act, whereas in the case issue before us is whether the provision for bad and doubtful debt is an unascertained liability and/ or provision for diminution in value of asset.

40.6 However in in the instant case before us there is no factual finding whether the claim for deduction of said provision for doubtful debt as actually written off u/s 36(1)(vii) was raised by the assessee before the lower authorities, and thus the ratio of the decisions relied upon by the assessee are distinguishable on facts.

40.7 As far as facts of the assessee are concerned, in the profit and loss account the assessee has debited the sum under reference as provision for bad and doubtful debt. The provisions of section 115JB refers to the adjustment if any to be made to the **profit declared in books ofaccount as per the profit and loss account**. The relevant Explanation-I to section 115JB(2) of the Act is reproduced as under:

> *"Explanation 1.—For the purposes of this section, "book profit" means the* ***profit as shown in the statement of profit and loss*** *for the relevant previous year prepared under sub-section (2), as increased by—*

(a) the amount of income-tax paid or payable, and the provision therefor; or

(b) the amounts carried to any reserves, by whatever name called, other than a reserve specified under section 33AC*; or*

(c) ***the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities;*** *or*

(d) the amount by way of provision for losses of subsidiary companies; or

(e) the amount or amounts of dividends paid or proposed ; or

(f) the amount or amounts of expenditure relatable to any income to which section 10 *(other than the provisions contained in clause (38) thereof) or* section 11 *or* section 12 *apply; or*

(fa) the amount or amounts of expenditure relatable to income, being share of the assessee in the income of an association of persons or body of individuals, on which no income-tax is payable in accordance with the provisions of section 86*; or*

(fb) the amount or amounts of expenditure relatable to income accruing or arising to an assessee, being a foreign company, from,—

(A) the capital gains arising on transactions in securities; or

(B) the interest, royalty or fees for technical services chargeable to tax at the rate or rates specified in Chapter XII,

if the income-tax payable thereon in accordance with the provisions of this Act, other than the provisions of this Chapter, is at a rate less than the rate specified in sub-section (1); or

(fc) the amount representing notional loss on transfer of a capital asset, being share of a special purpose vehicle, to a business trust in exchange of units allotted by the trust referred to in clause (xvii) of section 47 *or the amount representing notional loss resulting from any change in carrying amount of said units or the amount of loss on transfer of units referred to in clause (xvii) of* section 47*; or*

(fd) the amount or amounts of expenditure relatable to income by way of royalty in respect of patent chargeable to tax under section 115BBF*; or*

(g) the amount of depreciation,

(h) the amount of deferred tax and the provision therefor,

(i) the amount or amounts set aside as provision for diminution in the value of any asset,

(j) the amount standing in revaluation reserve relating to revalued asset on the retirement or disposal of such asset,

(k) the amount of gain on transfer of units referred to in clause (xvii) of section 47 *computed by taking into account the cost of the shares exchanged with units referred to in the said clause or the carrying amount of the shares at the time of exchange where such shares are carried at a value other than the cost through statement of profit and loss, as the case may be;"*

40.8 In our opinion what is relevant for the purpose of section 115JB of the Act is book profit prepared in accordance with the provisions of the Company Act, 2013 as mentioned in section 115JB(2) as increased by the items mentioned in Explanation (a) to(k). How the entries have been made in Balance sheet, may be

relevant for deciding the issue under section 36(1)(vii) of the Act and if there is finding on that issue that provision for bad and doubtful debt is no longer an unascertained liability, then no addition could be made under section 115JB of the Act. But unless there is such a finding under regular provisions of section 36(1)(vii) of the Act, the provision for doubtful debt being also in the nature of diminution in value of asset, it also attractsexplanation (i) of the section 115JB of the Act. Therefore, under the facts and circumstances, we uphold the finding of ld CIT(A) on the issue in dispute. The ground of the appeal of the assessee is accordingly dismissed.

41. The ground No. 4 of the appeal of the assessee relates to issue of non-allowing of claim of exclusion of write back of doubtful debt amounting to Rs. 20,21,975/- u/s 115JB of the Act even without considering that assessee had already offered the same while computing book profit u/s 115JB of the Act for AY 2012-13. Before us, the Ld. Counsel of the assessee submitted that in the assessment year 2012-13, the assessee has already added the provision for doubtful debt created in very same assessment year, while computing the book profit u/s 115JB, therefore in the year under consideration when the same provision for doubtful debt has been written back, the assessee is entitled for making claim of the same under the provisions of section 115JB of the Act.

42. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In our opinion, for the purpose of section 115JB of the Act no amount can be reduced or added from the book profit otherwise under the items listed in Explanation-I to section 115JB(2) of the Act. Though, the assessee might be entitled for written back of the provisions for the purpose of computing income under regular provisions of the Act, but is not entitled for benefit u/s 115JB of the Act in view of express provisions of the Act. Accordingly, this ground of appeal of the assessee is dismissed.

43. Now we take up the appeal of the assessee for assessment year 2016-17 having ITA No. 720/Mum/2020. The grounds of appeal of the assesses are 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 toRs. 98,34,309/-in computing total income under the normal provisions of the Act.*
>
> *2(a) That on the facts and in the circumstances of the case, the Ld.CIT(Appeals) was not justified &rather grossly erred inconfirming the action of the A.O. ofadding backprovision for doubtful debts amounting to Rs. 3,24,52,000/-in computing book profit u/s 115JB of the Act.*
>
> *2(b) That on the facts and in the circumstances of the case and without prejudice to ground no. 2(a) taken here-in-above, the Ld. CIT (Appeals) was not justified & rather grossly erred in not allowing claim of adiustment of Provision for doubtful debt against debtors amounting to Rs.*

89,08,462/- out of provision for doubtful debt created during the instant year while computing book profit us115JB of the Act.

2(c) That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified & rather grossly erred in not allowing claim of adiustment of Provision for doubtful debt against debtors amounting to Rs. 1,72,61,202/- which were created in AY 2015-16 inspite of the fact that the claim of aforesaid provision in the vear of its creation has been disallowed by Ld. CIT (Appeals)while computing book profit us 115JB.

44. Before us, the Ld. Counsel of the assessee has not pressed ground No. 1 of the appeal of the assessee, which relates to disallowance of leave encashment, therefore, same is dismissed as infructuous.

45 The ground No. 2(a) of the appeal of the assessee is related non-exclusion of provision of bad and doubtful debts under section 115JB, which being identical to the ground No. 3 raised in assessment year 2015-16 and therefore, same is decided mutatis mutandis. Regarding ground 2b and 2c of the appeal, Ld. Counsel of the assessee provided detail of the working doubtful debts as under:

Particulars	Amount	Remarks	Ground No.
Opening as on 01 April 2015	2,07,00,044		
Provision created during the year	3,24,52,000	i) During the previous year relevant to instant assessment year i.e. AY 2016-17, the assessee has created provision for doubtful debts of Rs. 3,26,47,692/- ¡ii) Rs. 1,95,692/- has been written back to doubtful debt expense a/c and net amount of Rs. 3,24,52,000/- has been debited in P & La/c.	Ground No. 2(a) AY 2016-17
Provision Written off against the debtors	34,38,842	The assessee has not added provision for doubtful debts under MAT provisions	Ground No. 4 AY 2015-16

during the year of AY 2014-15		which has been accepted in order w/s 143(3). Hence, write back not allowable in this AY.	
Provision Written off against the debtors during the year of AY 2015-16	1,72,61,202	The assessee has not added provision for doubtful debts under MAT provisions which has been added in order u/s 143(3). The addition of provision for doubtful debts created during AY 2015-16 has been upheld by Ld. CIT(Appeals) vide order dated 04-12-2019 [Refer Page 50-58 at page 57 of PB J. In case this addition is not deleted by your goodself, then the assessee is entitled to write back of aforesaid provision of Rs. 1,72,61,202/- else the same will result in double disallowance.	Ground No. 2(b) AY 2016-17
Provision written off against the debtors during the year of AY 2016-17	89,08,462	The assessee has not added provision for doubtful debts under MAT provisions which Ground N has been added in order u/s 143(3). Similarly, in case addition of provision for doubtful debts created during AY 2016-17 and upheld by Ld. CIT(Appeals) is not deleted by your goodself, then the assessee is entitled to write back of aforesaid provision of Rs. 89,08,462/- else the same will result in double disallowance.	Ground No. 2(c) AY 2016-17
Closing balance as on 31 March, 2015	2,07,00,044		

46. We find that identical issue has been dismissed by us in assessment year 2015-16 and therefore, this ground of the appeal is also dismissed.

47. In the result, appeals of the Revenue as well appeals of the assessee are allowed partly.

Order pronounced in the open Court on 30/06/2023.

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

Mumbai;

Dated: 30/06/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai