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

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 6589/MUM/2013
(Assessment Year: 2004-05)

Larsen & Toubro Limited Taxation Department, L&T House, N. M. Marg, Ballard Estate, Mumbai-400001 [PAN: AAACL0140P]	.....	**Appellant**
	Vs	
The Deputy Commissioner of Income Tax, Range 2(2), Mumbai, Aayakar Bhavan, M.K. Marg, Mumbai - 400020	.....	**Respondent**

Appearance

For the Appellant/Assessee	:	Shri J. D. Mistry, Sr. Advocate Shri Madhur Agrawal Shri Fenil Bhatt
For the Respondent/Department	:	Dr. Yogesh Kamat Shri A.K. Ambastha

Date

Conclusion of hearing	:	15.09.2023
Pronouncement of order	:	11.12.2023

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 12/08/2013, passed by the Ld. Commissioner of Income Tax (Appeals)-15, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2004-05, whereby the Ld. CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order, dated 05/12/2006, passed under Section 143(3) of the Income Tax

Act, 1961 (hereinafter referred to as 'the Act').

2. The Appellant has raised the following grounds of appeal:

"*1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) [CIT(A)] erred in confirming the disallowance of Rs. 2,94,88,620/- being commission paid to certain parties during the previous year.*

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming disallowance of Rs.54,16,82,032/- on account of increase in value of construction work-in-progress. The CIT(A) erred in not directing the Assessing Officer to grant deduction of Rs. 52,95,37,421/- [Rs.54,16,82,032/- less Rs.1,07,12,19,453/-] being difference between closing and opening construction work-in-progress allowable based on the stand of Assessing Officer in earlier years.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming disallowance on account of provision for foreseeable loss of Rs.9,79,40,038/-.

4. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming disallowance made u/s 40A(9) for contribution to Utmal Employees Welfare Fund of Rs. 1,50,000/-.

5. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming partial disallowance of depreciation, by reducing opening WDV of various block of assets relating to transfer of manufacturing unit at Bangalore.

6. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming disallowance of interest and other expenses under section 14A of the Act. While doing so, the CIT(A) has followed the methodology prescribed under Rule 8D of Income-tax Rules in spite of agreeing to the stand of appellant that the said rule is not applicable for the assessment year under consideration.

7. On the facts and in the circumstances of the case and in law,

the learned CIT(A) erred in confirming the addition of Rs. 4,25,44,104/- made on account of gain on extinguishment of sales tax deferred loan liability by treating it as revenue receipt.

8. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming addition of Rs. 4,11,67,000/- by way of adjustment to the arms' length price of the international transaction entered in to by the appellant with its associated enterprises by invoking the provisions of section 92CA(3) of the Act.*

9. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the computation of deduction under section 80HHC on the following basis:*

    a. *90% gross interest (as against net interest) was reduced from the profits of business.*

    b. *90% of Miscellaneous Income was reduced from the profits of business.*

    c. *Profits in respect of projects eligible for deduction u/s. 80HHB was reduced while computing profits and gains of business.*

10. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the computation of deduction under section 80HHE on the following basis:*

    a. *90% gross interest (as against net interest) was reduced from the profits of business*

    b. *90% of Miscellaneous Income was reduced from the profits of business.*

    c. *Profits in respect of projects eligible for deduction u/s. 80HHB was reduced while computing profits and gains of business.*

11. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the disallowance under section 14A for the purpose of computing book profit u/s 115JB of the Act. In doing so, he erred in applying Rule 8D of Income-*

tax Rules,

12. The appellant company craves leave to add to, to amend, to alter or modify any or all the aforesaid grounds of appeal."

2.1. The Appellant has also raised the following Additional Ground of appeal vide letter, dated 14/11/2018:

1. "On the facts and in the circumstances of the case and in law, the Ld. Assessing Officer (AO) ought to have computed the deduction u/s 80HHC of the Act in determining the Book Profit u/s 115JA on the basis of "profit as per the profit and loss account" instead of "profits of business and profession computed under the normal provisions of the Act while determining tax liability u/s 115JA of the Act.

2. On the facts and in the circumstances of the case and in law, the Ld. Assessing Officer (AO) ought to have computed the deduction u/s 80HHE of the Act in determining the Book Profit u/s 115JA on the basis of "profit as per the profit and loss account" instead of "profits of business and profession computed under the normal provisions of the Act" while determining tax liability u/s 115JA of the Act."

3. The relevant facts in brief are that the Appellant filed original return of income on 29/10/2004 declaring total income of INR 7,33,46,,49,210/-. The case of the Appellant was selected for scrutiny and notice under Section 143(2) of the Act was issued to the Appellant on 10/01/2005. Thereafter, the Appellant filed revised return on 31/03/2005 declaring income of INR 7,31,58,39,669/- under normal provisions of the Act.

4. During the assessment proceedings, the Assessing Officer noted that the Assessee had entered into international transactions with Associated Enterprises (AEs) and therefore, made a reference to the Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP) under Section 92CA(1) of the Act. The TPO, vide order, dated

30/11/2006, passed under Section 92CA(3) of the Act proposed transfer pricing adjustment of INR 4,77,67,000/-.

5. The Assessing Officer completed the assessment under Section 143(3) of the Act vide Assessment Order, dated 05/12/2006, at income of INR 7,50,57,02,452/- under normal provisions of the Act after making, inter alia, the following additions/disallowances:

(i) Disallowance of Commission paid INR 2,94,88,620/- made to certain parties

(ii) Disallowance of provision for foreseeable losses of INR 9,79,40,038/-

(iii) Disallowance of INR 1,50,000/- under Section 40A(9) of the Act

(iv) Disallowance of INR 4,11,94,218/- relating to depreciation – sale of Bangalore Works

(v) Disallowance of INR 3,18,00,000/- under Section 14A of the Act

(vi) Addition of INR 4,25,44,104/- on account of extinguishment of debt being sales tax deferred loan liability

(vii) Transfer pricing addition of INR 4,11,67,000/-

(viii) Disallowance of deduction under Section 80HHC of the Act to the extent of INR 1,82,45,413/- [INR 3,94,71,017/- Less INR 2,12,25,604/-]

(ix) Disallowance of deduction under Section 80HHE of the Act to the extent of INR 9,92,729/- [INR 39,28,234/- Less INR 29,30,505/-]

Further, the Assessing Officer made, inter alia, the following adjustments to the 'Book Profits' computed for the purpose of Section 115JB of the Act:

(i) Increased Book Profits by disallowance of INR 3,18,00,000/- under Section 14A of the Act

(ii) Reduced Book Profits by INR 2,12,25,604/- and INR 29,30,505/- being profits eligible for deduction under Section 80HHC and 80HHE of the Act, respectively

6. Being aggrieved, the Appellant preferred appeal before the CIT(A) vide, order dated 12/08/2013, the CIT(A) partly allowed the aforesaid appeal. However, the CIT(A) did not grant any relief in relation to the additions/disallowances specified in paragraph 5 above.

7. Being aggrieved, the Appellant is now in appeal before the Tribunal on the above issues on the grounds reproduced in paragraph 2 above which are taken up hereinafter in seriatim.

Ground No. 1

8. Ground No. 1 pertains to disallowance of commission expenses of INR 2,94,88,620/- paid to different parties by the Appellant.

9. During the relevant previous year, the Appellant paid commission of INR 2,94,88,620/- to various parties in respect of contracts received from Government Departments and Public Sector Undertakings. According to the Appellant, the commission was paid for various services rendered by these parties, like liaision with the customers, providing feedback on tenders, collection of cheques, 'C' forms etc., and was, therefore, allowable deduction under Section 37 the Act being expenditure incurred wholly and exclusively for the purpose of business of the Appellant. However, the Assessing Officer was not convinced. The Assessing Officer held that adequate evidence was not furnished by the Appellant to prove the services rendered by the recipients of commission. According to the Assessing Officer, the

award of contracts by Government Departments and Public Sector Undertakings were governed by well defined rules/procedures, and no extraneous influence was possible. Therefore, the Assessing Officer concluded that the commission payments could not be said to have been made for procuring the orders and disallowed the commission amounting to INR 2,94,88,620/- paid to various parties.

10. Before the CIT(A), the Appellant reiterated the submissions made before the Assessing Officer and submitted that the commission was paid not only for procurement of orders but also for giving logistic support like coordinating offered between customers, keeping Appellant oppressed of the developments in relation to the bids submitted, providing feedback on tax, follow up and collection of charge, statutory firms etc. from customers, all of such ultimately helped the Appellant in formulating different strategies for procurement of contracts and other business purposes. However, the Ld. CIT(A) declined to grant any relief and confirmed the disallowance made by the Assessing Officer by relying upon the decision of Co-ordinate Bench of the Tribunal in the case of the Appellant for the Assessment Years 1990-91 to 1995-96.

11. Being aggrieved, the Appellant is now in appeal before us on this issue.

12. We have considered the rival submissions and perused the material on record. We find that the identical issue stands decided against the Appellant by the Tribunal in Appellant's own case pertaining to Assessment Years 1990-1991 to 2002-03, inter alia, on the ground that the Appellant had failed to explain the nature of services and substantiate the claim for deduction for commission expenses. The relevant extract of decision of the Tribunal of the Appellant for the

Assessment Year 1994-95 (ITA No. 4265/Mum/1998, dated 30/09/2009 reads as under:

> *"55. Ground No. 9 raised by the assessee in its appeal is as under:*
>
> > *9. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in upholding the disallowance of Rs 71,63,687 being the expenditure towards payment of commission to certain parties.*
>
> *56. This ground is directed against the disallowance of expenditure incurred towards payment of commission to certain parties. From the perusal of records, we find that similar issue raised by the assessee company in its appeal in ITA No.987/Mum/1998 relating to Assessment Year 1990-91, wherein the Tribunal after deliberated upon the issue a length and following the decisions of the Tribunal in assessee's own case relating to Years 1988-89 held that ……The assessee company should explain without any shadow of doubt, the nature of such services. In the present case, no such explanations or details have come from the side of the assessee company. Without knowing the exact nature of the services rendered by those parties, it is not possible for us to decide whether the commission payable by the assessee company was a legitimate expenditure permitted by law, and therefore, to be allowed. If such detail: are not coming, such payments made in respect of contracts awarded by Public Sector Companies we have to be held as expenses were incurred against public policy, and therefore, not entitled to be deducted in the light o the proviso to Sect 37 of the IT Act. This position is confirmed by the order o the Tribunal in assessee's own case for the Assessment Year 1989-90. Accordingly, we reject the contention of the assessee and confirm the disallowance made by the CIT (A). Respectfully following the decision of the co-ordinate bench in assessee's own case, we confirm the orders of the authorities below and dismiss the ground of appeal raised by the assessee."*

13. During the course of hearing both the sides agreed that there is no

change in the facts and circumstances during the Assessment Year 2004-05 as compared to the preceding Assessment Years (i.e., Assessment Years 1990-1991 to 2002-03). Therefore, consistent with the view taken by the Coordinate Bench of the Tribunal in the case of the Appellant for the earlier assessment years, we confirmed the order passed by the CIT(A) and dismiss Ground No. 1 raised by the Appellant.

Ground No. 2

14. Ground No. 2 pertains to the value of Construction Work-In-Progress adopted by the Assessing Officer.

15. During the assessment proceedings, the Assessing Officer noted that while valuing the Work-in-Progress of construction jobs as on 31/03/2004, the Appellant had scaled down the valuation by INR 54,16,82,032/- from the value of work certified by the customers. In response to a query raised by the Assessing Officer in this regard the Assessing Officer submitted that the aforesaid scaling down was done as per the provisions of Accounting Standard 7 – 'Construction Contracts' issued by the Institute of Chartered Accountants of India (ICAI). The percentages used in scaling down the Work-in-progress are based on technical experience and behavior of contracts obtained over a long period of time. This method of valuation of Work-in Progress has been consistently followed by the Appellant from year to year. The sum total of profits accounted on the contract in various years over the tenure of the contract is equal to the actual profit on the contract and hence, there is no understatement of profits and consequent no loss of revenue. The scaling down is part and parcel of the process of valuation of Work-in-Progress. It was further submitted by the Appellant that in case similar adjustment made to the closing stock of construction Work-in-Progress of the immediately

preceding year amounting to INR 1,07,12,19,453/-, which became the opening stock of the year under reference, is taken into account, the net result of the adjustment would be as under:

Particulars	*Amount (INR)*
Provision made in valuation of closing construction work-in-progress	*54,16,82,032*
Provision made in valuation of opening construction work-in-progress	*1,07,12,19,453*
Difference between closing & opening Constructions Work-in-Progress	*(52,95,37,421)*

16. In support of the above contentions the Appellant filed before the Assessing Officer 'Notes on Account for Construction Contract' (placed at page 78 & 79 of the paper-book) and 'Accounting Policy Regarding Construction/Project Activity' (placed at page 80 to 82 of the paper-book).

17. The Assessing Officer, however, did not accept the above contentions of the Appellant holding that method of valuation followed by the Appellant in respect of construction jobs was not correct and concluded that the valuation of closing Construction Work-In-Progress as on 31/03/2004 was incorrectly reduced the Appellant by INR 54,16,82,032/-. The Assessing Officer also noted that similar increase in the value of Construction Work-In-Progress was also made by the Assessing Officer for the earlier Assessment Years and computed the difference in valuation of the adjusted closing and opening constructions Work-in-Progress of at (INR 52,95,37,421). However, the Assessing Officer ignored the above difference observing as under:

> *"9.6 The assessee has further submitted that the addition on account of provision for expenses in respect of construction jobs has been deleted by the Commissioner of Income-tax (Appeals) in the*

earlier year as also by the Income-tax Appellate Tribunal in A.Y. 1988-89 and A.Y. 1989-90. Considering the relief allowed by the Appellate Authorities, the deduction without prejudice to the assessee's contention amounting to Rs. 52,95,37,421/- as determined above is ignored for the purpose of assessed income computed herewith since any such allowance now will need to be withdrawn at a later date."

18. Being aggrieved, the Appellant carried the issue in appeal before CIT(A) who disposed off the ground raised by the Appellant in this regard holding as under:-

"7.4 I have considered the facts of the case, submission of the appellant as against the findings/observations of the AO in his order u/s 143(3) of the I.T. Act. The contentions and submission of the appellant are being discussed and decided here in under:

The A.O. during the assessment proceedings noted that the assessee has made provision for expenses in respect of construction jobs. However, it is noted that the this issue is academic in nature since in para 9, after discussion, the AO has not made any addition on this issue. This ground of appeal is accordingly dismissed."

19. The Appellant is now in appeal before us.

20. We have considered the rival submissions and perused the material on record.

21. We have gone through Notes on Accounting for Construction Contracts which read as under:

"1.1 <u>This note deals with Accounting for Construction Contracts covering revenue recognition methods and job costing</u>.

1.2 The unique feature of Construction Contract Accounting is that the date of securing the contract and the date of completion of the contract activity fall into different accounting periods. Construction Contract accounting essentially deals with quantifying the results of long-term events and allocating those results into relatively short-term accounting periods. In other words, the principal problem in

construction contract accounting is the allocation of revenues and related costs to accounting periods over the duration of the contract.

2.0 Revenue recognition

2.1 Two principal methods followed for recognizing the revenue are:
a) The completed contract method
b) The percentage completion method

2.2 Under the completed contract method, revenue is recognized only when a substantial portion of the contract is completed. Costs and progress payments received are accumulated and carried to the accounting period in which the contract is completed and the profits/loss recognized in that year.

2.3 Under the percentage completion method, revenue is recognized pro rata to the stage of completion is reached. Against the revenue, costs incurred in reaching the given stage are matched leading to the profits for the period in question. The merit of percentage completion method is that revenue is reflected in the year in which the activity is undertaken.

2.4 A number of methods are used to measure the stage of completion of the job which is in turn the basis for determining the revenue to be recognized in the financial statements e.g., (i) proportion of costs incurred to date to the estimated total costs of the contract or (ii) proportion of value work done to the total contract value.

2.5 The employment of percentage completion method is subject to the risk of errors in making estimates. For this reason, no profit is recognized until the outcome of the contract can be reliably estimated.

2.6.1 Considering the uncertainties and peculiarities of the contract activity, an appropriate allowance is usually made for future unforeseen losses on either a specific or a percentage basis. This is achieved either by applying a suitable scaling down formula to the profit figure so calculated and a recognizing in the financial statements the reduced profit figure or by reducing the "work certified figure" by a percentage.

2.6.2 A detailed list of factors (peculiarities of and uncertainties in Contract Industry), which could affect the final outcome of a contract

is enclosed on Annexure 4.1.1. These factors warrant the allowance for contingencies.

2.6.3 The principle of scaling down the amount of profit to be recognized in a given year (that is, the principle of conservative recognition of profit) is recognized in many authoritative text books on Cost Accountancy. We enclose Xerox of an extract (dealing with recognition of profit on uncompleted contracts) from "Wheldon's Cost Accounting & Costing Methods", (Annexure 4.1.2) wherein the following scaling down factor is shown:

$$2/3 \times \frac{\text{Work certified}}{\text{Contract Value}}$$

The book goes on to add that individual firms may have their own methods of calculation.

2.7 Under the percentage completion method, the amount of advances and progress payments received from the customer do not represent the stage of completion of the job or the revenue that can be considered as earned. Such amounts are determined to be payable more to suit the cash flow requirements of the contractor."

22. We have also perused the Accounting Policy regarding Construction/Project Activity followed by the Appellant which reads as under:

"L&T Accounting Policy Re: Construction/Project Activity

1.0 Revenue recognition:

L&T has been consistently following the percentage completion method of construction accounting with the following salient features:

(a) Revenue is recognized on the basis of stage of completion. Jobs are valued at cost or at estimated realizable value depending on the stage of completion.

(b) Stage of completion is measured by the proportion of the value of work certified to total contract value.

(c) Claims made in respect of escalations are accounted only on being admitted by the customers.

(d) Revenue is recognized on the basis of value of work certified by the customer. Advances / Progress payments received against "running bills" are not considered as revenue.

(e) Retentions are accounted as Sales and shown as receivables.

2.0 Job (WIP Valuation):

2.1 Job valuation is the key element of the construction contract accounting. The difference between the work-in-progress figures as on the opening & closing days of the accounting period is accounted as Sales. The aggregate value of all jobs which are in progress (as per 2.2 and 2.3 below) at the end of the accounting period constitutes the Work-in-progress.

2.2 Jobs which are less than 50% complete are valued at cost (vide valuation policy disclosed in the covering letter to the Return of Income - Para 27).

2.3 Other jobs are valued at estimated realizable value which is calculated as follows:

Value of Work Certified	*xxx*
Add:	
a) Cost of work done but not billed	*xxx*
b) Materials at site	*xxx*
Less:	
a) Allowance for Contingencies	*xxx*
	xxx

2.4 a) Work certified which is the basis for computing the estimated realizable value-refers to the amount for which the progress bills of the contractor are "passed" or "certified for payment". The job is entrusted to project staff of the customer. Invariably, in the case of large jobs, the customers engages specialist project consultants (Chartered Architects / Engineers etc.,) who possess technical skills to measure/certify the job progress.

b) The work certified is in most cases less than the amount billed. The main reasons are: (1) Quality of work not upto the expectation of the customer to be rectified by re-work or additional work (2) Part of the work billed being held as "not ready for certification" to be considered along with certification of next progress bill.

c) As the job progresses, the value of work certified keeps increasing and when the job is actually complete, the work certified figure will equal the contract value.

2.5 Cost of work done but not billed is added to job value so that such cost gets carried to next accounting period, thereby ensuring that such cost does not understate the profit for the period in question.

2.5.1 Materials at site represent materials issued (and cost debited) to the job but not consumed as on the date of job valuation. Such cost is added to job value for the same reason as 2.5.1 above.

2.6.1 "Allowance for contingencies" represents an allowance for unforeseen losses please refer to Para 2.6.1 of Note on Construction Contract Accounting vide Annexure 1. The unique feature of contract accounting is that the job execution is spread over different accounting periods. Adverse developments in a subsequent year can change the ultimate outcome of the contract. That is, in a contract executed over a period 4 years, there could be profits as per the percentage completion method for year 1 and year 2, but finally, the contract may show a loss due to unforeseen cost escalations, delays etc., in subsequent years.

The year in which the job is complete, allowance for contingencies made in respect of that job is automatically released increasing the income side (revenue) and influencing the profit figure of that year.

This method of job valuation differs from the job completion method wherein profits form part of Profit & Loss Account in the year of job completion as both the expenses and revenue are postponed to that year.

It can be observed from the valuation policy followed by the company that as an ongoing business, there will be many jobs just taken up for construction and other hand, many jobs will be completed. The cycle will continue every year without having any material impact on the reported profits.

2.6.2 The amount of Contingencies allowance is quantified by applying following pre-determined percentages to "work certified" figure depending on the type of project and the stage of completion:

Job Type	*For 51-90% Completion*	*For 91-99% Completion*	*Defect Liability Period*
Civil/Infrastructure	*3 %*	*1.5 %*	*1 %*
Mechanical	*5 %*	*2 %*	*-*
Electrical	*5 %*	*2 %*	*-*

Note: DLP refers to Defect liability period i.e. Warranty period.

2.6.3 No allowance for contingencies is made in respect of jobs which are less than 50% complete, since as per our accounting policy, such jobs are valued at cost and no profit is recognized on the same. Also, it is to be noted that the percentage of "contingency allowance" is naturally and logically lower as the job progresses and the uncertainties reduce. On completion of Defect Liability Period, no provision is retained, thereby recognizing the total profit actually earned on the job

3.0 Financial Accounting entries:

3.1 The scheme of accounting entries in financial accounts - is shown on Annexure 4.2.1.

3.2 It may be noted that there is no accounting entry for contingency allowance; it does not represent a provision in the accounting sense.

3.3 The peculiar feature of the contract accounting is that each year, Sales is recorded in P&L account by creating a Work-in-progress A/Cs (at Cost or ERV) and not by debit to Customer's A/C. Customer's A/C is debited for the total value of contract only on the completion of the job."

23. It was the contention of the Appellant that the above revenue recognition and accounting policy has been followed by the Appellant consistently. We note that in paragraph 9.6 of the Assessment Order,

the Assessing Officer had referred to upon the decision of the Tribunal in the case of the Appellant for the Assessment Years 1988-89 and 1989-90 and decided not to make any additions in view of the relief granted by the Tribunal. In appeal, CIT(A) declined to interfere with the above order passed by the Assessing Officer observing that the issue was academic as no addition was made by the Assessing Officer. In our view, the CIT(A) was right in dismissing the issue as being academic in nature since no addition was made by the Assessing Officer on account of adopting higher value of the Construction Work-In-Progress. We do not find any infirmity in the order passed by the CIT(A). Accordingly, Ground No. 2 raised by the Appellant in the present appeal is dismissed.

Ground No. 3

24. Ground No. 3 is directed against the order of CIT(A) confirming the disallowance of provision for foreseeable loss of INR 9,79,40,038/-.

25. During the relevant previous year, the Appellant had created a provision for foreseeable losses of INR 9,79,40,038/- in respect of construction jobs. According to the Appellant, the aforesaid provision was made in accordance with the provisions of the revised mandatory Accounting Standard - 7 on Construction Contracts issued by the Institute of Chartered Accountants of India (ICAI) with effect from 01/04/2003. However, the Assessing Officer was not convinced. According to the Assessing Officer, the aforesaid provision was created for a loss which may or may not occur at a future day. Therefore, the Assessing Officer disallowed the deduction for provision for foreseeable losses of INR 9,79,40,038/- holding the same to be contingent in nature.

26. In appeal, it was contended on behalf of the Appellant that the provision has been created in accordance with the revised Accounting Standard – 7 on Construction Contracts issued by ICAI with effect from 01/04/2003 the aforesaid Accounting Standard provided that in cases were probability of the total cost exceeding the total contract revenue is higher, the expected loss from the concerned construction-work is required to be recognized as an expense immediately in the year on which the contract is signed notwithstanding the fact whether or not such construction-work has commenced or not. The Appellant has been following this accounting policy consistently. Therefore, the provision for foreseeable loss on construction-work should be allowed as deduction from the income. However, the CIT(A) confirmed the disallowance of deduction for provision for foreseeable losses of INR 9,79,40,038/- made by the Assessing Officer holding that the provision did not crystalise during the relevant previous year. The amount has been merely set aside in anticipation of liability which may accrue on a future day on happening of an uncertain event. Given that the liability cannot ascertained with accuracy, the Appellant was not entitled to deduction for provision for foreseeable losses of INR 9,79,40,038/-.

27. Being aggrieved, the Appellant carried the issue in appeal before us.

28. During the course of hearing the Ld. Sr. Counsel appearing for the Appellant submitted that the provision for foreseeable losses is an allowable deduction. As per AS-7, the Appellant was under obligation to recognize the amount of foreseeable loss as an expense immediately in the relevant assessment year. In this regard, reliance was placed on the judicial precedents which have been taken into consideration. In the case of Mazgaon Dock Ltd. Vs. Joint Commissioner of Income, Spl. Range, Mumbai : [2009] 29 SOT 356

(Mumbai), deduction for foreseeable losses was allowed by the Tribunal holding as under:

> *"9. We have considered the rival submissions and perused the record of the case. The short dispute is whether the anticipated loss on the valuation of fixed price contract, in view of the mandatory requirements of AS-7, is to be allowed in the year in which the contract has been entered into or it is to be spread over a period of contract, as was done by the assessee in earlier years. As far as the change in the method of valuation of work-in-progress is concerned, it cannot be disputed that in view of mandatory requirements of AS-7, it was a bona fide change in the method of valuation of work-in-progress, particularly in view of the qualification made in this regard by statutory auditors as well as by Comptroller & Auditor General of India. Therefore, at the very outset, we may observe that the observation of Ld. CIT(A) that the assessee had booked bogus loss is not correct. As far as the basis of estimation is concerned the same was done on technical estimation basis and, therefore, merely because there were some variations in the figures furnished by the assessee at different stages, it cannot be said that the estimated loss was not allowable. It is not disputed that the department in earlier years has allowed the loss on estimated basis having regard to the expenditure actually incurred in various years. Therefore, in principle, it is not disputed that the estimated loss under the present and circumstances is an allowable deduction. However, merely because the change in method of accounting is bona fide, it would not lead to the inference that the income is also deducible properly under the Income-tax Act. This aspect is very evident from 1st proviso to section 145 as it stood prior to amendment 1995 with effect from 1-4-1997 which reads as under:—*
>
> > *"Method of accounting-(1) Income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall be computed in accordance with the method of accounting regularly employed by the assessee :*
> >
> > ***Provided** that in any case where the accounts are correct and complete to the satisfaction of the Assessing Officer but the method employed is such that, in the opinion of the Assessing Officer, the income cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Assessing Officer may determine."*

Therefore, it is to be examined whether income is properly deducible or not. In our opinion, it cannot be disputed that from the method adopted by the assessee, assessee's income cannot be deduced properly in the year in which the loss has been anticipated. As a matter of fact this aspect is not disputed by the Assessing Officer also. He seems to have swayed more by the revenue loss than by the correct principle to be applied. The matching principle of accounting is not of much significance in the present context because if the loss has been properly estimated in the year in which the contract has been entered into then it has to be allowed in that very year and cannot be spread over the period of contract. The matching principle is of relevance where income and expenditure, both are to be considered together. However, in the present case, the effect of valuation of WIP will automatically affect the profits of subsequent years accordingly. We, accordingly, do not find any reason for not accepting in principle the assessee's claim as being allowable. However, in view of discrepancies pointed out by Ld. CIT(A) for correct estimation of loss, we restore the matter to the file of the Assessing Officer to examine the correctness of amount claimed. This ground is, accordingly, treated as allowed for statistical purposes." (Emphasis Supplied)

29. Similarly, in the case of Jacobs Engineering India Pvt. Ltd. Vs. Assistant Commissioner of Income Tax : [2011] 14 taxmann.com 186 (Mumbai)[26-05-2009] cited on behalf of the Appellant, it was held as under:

"11. Having regard to the above legal and factual discussions, and following the decision of the ITAT in the case of Mazagon Dock Ltd. (supra) and Metal Box Co. of India Ltd. (supra) and decision of the Hon'ble Delhi High Court in the case of Woodward Governor India (P.) Ltd. (supra) the contention of the assessee regarding allowability of foreseeable loss is accepted in principle. However, the issue is restored to the file of A.O., for the purpose of quantification and calculation of the said loss in terms of Accounting Standard - 7, as the same has not been done. The A.O. is, further, directed to afford reasonable and proper opportunity to the assessee for the purpose of calculation and quantification of the said foreseeable losses. It is, further, made clear that the similar ground has been raised by the assessee for the A.Y. 2003-04, vide ground No.2. As the issue is identical expect the assessment year and the amount of foreseeable losses at Rs. 5,83,038/-, the findings given in respect of A.Y. 2002-03

is also applicable for the A.Y. 2003-04. Therefore, ground No.1 of A.Y. 2002-03, and Ground No.2 of A.Y. 2003-04 of the assessee are allowed." (Emphasis Supplied)

30. On perusal of above, it was clear that while in principle the Tribunal had accepted the contention of the Assessee in the above cases that deduction for foreseeable losses estimated on a reasonable basis could be allowed as deduction. However, in both the cases, the issue is remanded back to the file of Assessing Officer for computation and quantification. In the case of Mazgaon Dock Ltd. (supra) though the Tribunal noted that estimation was done on technical basis, in view of the discrepancies pointed out by the First Appellant Authority for correct estimation of loss, the issue was restored to the file of Assessing Officer for examining correctness of the claim. Whereas in the case of Jacobs Engineering India Pvt. Ltd (supra) the Tribunal noted that quantification and calculation of foreseeable losses in terms of AS-7 had not been done by the Assessing Officer.

31. During the course of hearing, the Appellant was also asked to clarify the basis of quantification/computation of the foreseeable losses. In response, it was contended on behalf of the Appellant that the Assessing Officer had never doubted the basis of computation of Foreseeable Loss and therefore, the Tribunal was not required to examine this issue at all. Referring to the table at page 88 of the paper-book – '*Working of foreseeable losses for some jobs on sample basis*', the Ld. Senior Counsel submitted that the figure of Foreseeable Loss was the balancing figure. Since the Assessing Officer has accepted the actual expenditure incurred in the project and the percentage of completion, it can be inferred that the Assessing Officer has accepted the computation of foreseeable loss. In case the Tribunal was to accept the contention that the deduction was foreseeable loss was be allowed to the Appellant, Tribunal had

no option but to allow deduction for foreseeable loss claimed by the Appellant. Since the issue of quantification of the foreseeable loss was not before the Tribunal, the Tribunal had no power to call for information or records pertaining to the foreseeable loss. However, when it was pointed out by the Bench that what was furnished by the Appellant to the Assessing Officer and CIT(A) was only computation of foreseeable loss for 4 out of 30 projects involved, a computation was filed on behalf of the Appellant for all the 30 projects in respect of which deduction was claimed for foreseeable losses. The aforesaid computation was in the same format as the computation of foreseeable loss (placed at page 88 of the paper-book) pertaining to 4 projects containing following coloums:

Column A : Contract Value as per JCR
Column B : Estimated Cost as per JCR
Column C : Estimated Margin on completion as per JCR [C = A – B]
Column D : Margin % as per JCR [D = C/A]
Column E : Cost
Column F : Cost Completion Percentage [F=E/B]
Column G : Invoice amount
Column H : Invoice Completion Percentage [H= G/A]
Column I : Percentage of Completion [F or H, whichever is lower]
Column J : Margin Considered [J=I x C]
Column K : Foreseeable Loss [K= C – J]

32. The computation made reference to JCR (short for Job Cost Report). Therefore, the Appellant was asked to file documents in support of the computation above. In the aforesaid background an affidavit came to be filed by the Appellant the relevant extract of which reads as under:

> *" I …… do hereby state that I am currently working in the capacity of Joint General Manager, Finance & Accounts with Larsen & Toubro Limited. I do hereby solemnly Affirm that I am aware of the facts pertaining to the appeal proceedings specifically in respect of the claim for "foreseeable loss" by the Company for Assessment Year 2004-05 and on the basis of the same I state as under:-*

a. *The Assessment proceedings for Assessment Year 2004-05 took place between the Year 2005 and 2006.*

b. *During the course of the Assessment Proceedings vide letter dated 17th November 2006, the methodology adopted for computing the foreseeable loss was explained to the Assessing Officer along with the relevant extract of Accounting Standard -7 ('AS-7') issued by The Institute of Chartered Accountants of India.*

c. *In the Audited Accounts for the year under consideration, the amount of foreseeable loss is specifically referred to in "Schedule O' under the head 'Sales, administration and other expenses' and 'Schedule Q' contains a note dealing with foreseeable loss.*

d. *The Provision for foreseeable loss is claimed on the basis of and in accordance with AS-7. The Assessing Officer disallowed the loss by holding that it is merely a provision, and the Assessing officer did not dispute the basis of computation of foreseeable loss.*

e. *In the course of the proceedings before the learned CIT(A), detailed submissions were filed on the allowability of Provision for foreseeable loss with project wise (including name of client) breakup of the Provision for foreseeable loss (submissions dated 10.04.2013 and 02.08.2013) together with sample workings explaining the quantification of Provision for foreseeable loss.*

f. *The learned CIT(A) has while passing the order incorrectly remarked that the details was not given with reference to the parties. The CIT(A) also incorrectly referred actuarial quantification wherein no Actuary is involved in quantification. The CIT(A) has also in the order remarked that no supporting evidence has been provided. The CIT(A) has eventually confirmed the addition on the basis that Provision for foreseeable loss was not an ascertained liability and, therefore, the deduction of the same cannot be allowed during the year under consideration.*

g. *With respect to the job cost reports providing the project wise details of the estimated cost, I say that in the year 2006-07 the Company has migrated from its then existing system of*

maintaining the record to a more integrated inhouse ERP system of Enterprise Information Portal. I say that considering that projects under consideration were already completed by 2009, presently, we are unable to retrieve any electronic records with respect to the concerned job cost reports for the purpose of detailing.

h. *The physical records of the Company are maintained in a record room situated at Main Depot Kancheepuram, Tamil Nadu which was affected by cyclone and floods in 2015, wherein significant records of the Company were destroyed. The said job cost reports also seem to have been damaged in the said floods/cyclone. Due to this the Company is currently unable to produce the Job Cost Reports for the Assessment Year under consideration. The Company is continuing its efforts to retrieve and extract the relevant information, nevertheless.*

i. *The Company had undertaken 690 projects (approx.) during the Assessment Year 2004-05. Of this, the Company has provided for loss in about 30 projects. The foreseeable loss claimed is insignificant vis a vis the overall cost of the operating projects and is not material. Further, only, the foreseeable loss of the project is disallowed. The loss, to the extent of actual expenditure of the project has been allowed by the Assessing Officer. In doing so, the Assessing Officer has accepted the estimated cost of the project as per the job cost report. I say that the computation of foreseeable loss is also based on the same estimated cost of the project as per the job cost report which has been accepted by the Assessing Officer.*

j. *I further say that the issue of foreseeable loss is only a timing difference as by the end of the project, only the actual profit / loss of the project is offered to tax/claimed as loss by the Company.*

I hereby state that whatever is stated hereinabove is true to the best of my knowledge."

33. On perusal of the above affidavit it is not clear whether the statements given by the officer are as per personal knowledge or knowledge as per record. Be that as it may, we find that the stand taken by the Appellant is that the Appellant is not in a position to

produce presently/currently the documents to substantiate the computation of the foreseeable loss. As per the paragraph e. of the above affidavit, only 'sample workings explaining the quantification of Provision for foreseeable loss' were filed before the CIT(A). As noted herein above, the sample working pertained to 4 out of 30 projects. It has been stated in paragraph g. that the Appellant migrated to inhouse ERP System for maintaining records. The projects under consideration were completed by year 2009, the Appellant is enable to presently retrieve any electronic records with respect to the concerned Job Cost Reports (JCR) for the purpose of providing details. Even the Job Cost Reports maintained in physical form in record room situated at Tamil Nadu were damaged in flood/cyclone in the year 2015 and for the same reason the Appellant is currently unable to produce the JCRs. However, the Appellant is continuing to make efforts to retrieve/extract Job Cost Reports.

34. On the other hand, we note that in paragraph f of the above affidavit it has been stated that the CIT(A) has incorrectly remark that details were not given with reference to parties. In support of the aforesaid the Appellant has only placed before us 'job-wise details of provision for foreseeable losses' [placed at Page 87 of the paper-book] which gives the names of 30 projects and the amount of foreseeable loss claimed by the Appellant in respect of the same. At page 88 of the paper-book, the Appellant has placed 'working of foreseeable losses for some jobs on sample basis' giving computation of foreseeable losses in respect of 4 projects. The Appellant had not filed working of foreseeable losses in respect of balance 26 projects and therefore, to this extent the CIT(A) was correct in observing that the details were not given with reference to parties.

35. In paragraph d. and paragraph i. of the affidavit it has been stated that the Assessing Officer did not dispute the basis of computation of foreseeable losses. Further, the loss, to the extent of actual expenditure of the project has been allowed by the Assessing Officer and in doing so the Assessing Officer has accepted estimated cost of the project as per the Job Cost Reports and therefore, by necessary implication the Assessing Officer has also accepted the computation of foreseeable losses as the same are based upon estimated cost of the project as per the Job Cost Reports. We do not find any merit in the aforesaid assertions. Admittedly, the Job Cost Reports were never filed before the Assessing Officer or the CIT(A). In our view, the question of drawing any inference does not arise in view of the fact that the Assessing Officer rejected the claim of foreseeable losses made by the Appellant and therefore, as a matter of fact the occasion to examine the computation/working of the same did not arise.

36. Further, in our view it cannot be said that the Assessing Officer had accepted the computation of foreseeable losses. We note that as per paragraph 2.1 L&T's Accounting Policy Re: Construction/Project Activity (for short 'Accounting Policy') dealing with Job (WIP Valuation), the difference between the work-in-progress figures as on the opening and the closing days of the accounting period was accounted as sales. The valuation of Work-in Progress is based upon cost in case of jobs which were less than 50% complete whereas in the case of the balance jobs (competed 50% or more) the valuation of work-in-progress were valued at Estimated Realizable Value (ERV). While arriving at ERV the Appellant reduced the 'Allowance for Contingency' from value of Work Certified. As per paragraph 2.6.2 of the Accounting Policy, the allowance for contingencies was quantified

by applying pre-determined percentages to work certified which were dependent upon type of the project and the stage of completion. No allowance for contingencies was made for jobs less than 50% complete as the same were valued as cost. As per paragraph 3.3 of the Accounting Policy, the sales were recorded in Profit & Loss Account by creating a Work-in-Progress and not by debiting customers account. Further, as per paragraph 3.2 of the Accounting Policy, no accounting entry was passed for Allowance for Contingency. Thus, the Allowance for Contingencies is taken into account while valuing the Work-in-Progress and is not debited to Profit & Loss Account. On the other hand, the Provision for Foreseeable Losses is debited to the Profit & Loss Account. We note that in the reply filed by the Appellant on 10/04/2013 and 02/08/2013 filed by the Appellant before the CIT(A), inter alia, containing submissions/contentions of the Appellant on foreseeable loss it has been stated as under:

> *"During the year under reference an amount of Rs.9,79,40,038/- has been provided towards foreseeable loss in relation to construction jobs and has been accordingly charged to P&L Account. A job-wise detail of aforesaid provision along with working of provision for few projects on sample basis is attached herewith at Annexure 1. The said provision has been made in accordance with the provisions of the revised mandatory Accounting Standard 7 ["AS-7"] for construction contracts issued by the Institute of Chartered Accountants of India ["ICAI"] w.e.f. 1 April, 2003.*
>
> *The appellant reproduce the relevant extract of AS-7 below:*
>
> > *"Recognition of Expected Losses*
> >
> > *35. When it is probable that total contract costs will exceed total contract revenue, the expected loss should be recognized as an expense immediately."*
>
> *As will be seen from the AS-7, when it is probable that total contract*

costs will exceed total contract revenue, the expected loss is required to be recognized as an expense immediately, i.e. in the period in which the contract is signed or a legal or constructive obligation has been assumed. Further, the amount of such loss is determined irrespective of whether or not work has commenced on the contract; the stage of completion of contract; or amount of profits expected to arise on other contracts.

In determining the said loss of Rs.9,79,40,038/- in respect of our various construction jobs, we have considered the costs attributable to such jobs in accordance with the provisions of the revised AS-7. The said provision has been made by us in accordance with the mandatory requirement of the Accounting Standard issued by the ICAI and followed consistently. You will thus appreciate that the practice followed by the assessee is consistent with para 6(c) of AS-I notified u/s 145(2).”

37. We note that the Assessing Officer has not made any addition on account of difference of valuation of Work-in-Progress and therefore, it can be said that the Assessing Officer has accepted the computation of Allowance for Contingencies. This is in line with the decision of the Tribunal in the case of Mazgaon Dock Ltd. (supra) relied upon by the Appellant. However, in our view, it cannot be said that the computation/working of foreseeable business losses has been accepted by the Assessing Officer. In absence of any material on record supporting the computation/working of the foreseeable loss, we cannot direct the Assessing Officer to allow deduction for foreseeable losses in the present case. Even though in principle we may agree with the contention that deduction for foreseeable losses can be allowed in certain cases, the basis and the reasonableness of the estimate of foreseeable losses would require examination/verification of the underlying documents, at least on a test check basis. In the present case, the aforesaid documents are presently not available with the Appellant. Further, in our view, the Assessing Officer would also be required to take into consideration

the impact of the Allowance for Contingencies taken into account by valuing the Work-in-Progress. On perusal of material placed before us, it is clear that in support of the claim for foreseeable loss that Appellant had filed the project wise break-up showing unforeseeable loss for 30 projects and had provided computation of 4 out of the aforesaid 30 projects on sample basis. The Assessing Officer rejected the claim for provision for foreseeable losses and therefore, in our view, the occasion for examining the quantification or computation of foreseeable loss did not arise during the assessment proceedings. Therefore, we reject the contention of the Appellant that the computation of foreseeable loss was accepted by the Assessing Officer. We also reject the contention of the Appellant that the Tribunal was exceeding its jurisdiction while calling for the details of the computation of foreseeable loss or the supporting documents related thereto, as the issue of allowability of foreseeable losses claimed by the Appellant had to be taken to its logical conclusion. As regards, contention of the Appellant that the quantum of foreseeable loss claimed by the Appellant was not material as out of around 690 projects the provision for foreseeable losses was created in 30 projects only and therefore, the deduction should be allowed is concerned, we are of the view, that a claim otherwise not allowable as per the provisions of the Act cannot be allowed merely on the ground of non-materiality of the quantum involved. However, having concluded as aforesaid, we find some merit in the alternative contention of the Appellant. It was submitted that since the Appellant is following project completion method and the projects have been completed, the entire Revenue from the project would have been offered to tax and therefore, in absence of any impact on revenue the settled position should not be disturbed. However, even this contention that claim of foreseeable losses made by the Appellant

merely resulted in timing difference as by the end of the project entire/actual profits of the project were offered to tax cannot be accepted in absence of any material on record supporting the same. Accordingly, we direct the Appellant to file relevant documents/details before the Assessing Officer to show that all the 30 projects have been completed and entire revenues from the 30 projects under consideration have been offered to tax leading to no leakage of revenue pertaining to the projects on overall basis. We direct the Assessing Officer to verify the details/documents submitted by the Assessing Officer and if satisfied, restrict the disallowance on account of unforeseeable losses pertaining to (a) the projects (mentioned in the list of 30 projects) which have not been completed till date, and (b) the projects which have been completed but entire Revenue has not been offered to tax till date. In terms of the aforesaid, Ground No. 3 raised by the Appellant is partly allowed.

Ground No. 4

38. Ground No. 4 pertains disallowance of INR 1,50,000/- made under Section 40A(9) of the Act.

39. During the year, the Appellant paid INR 1,50,000/- to Utmal Employees Welfare Fund to provide for recreational activities for employees at Kansbahal Works, formerly known as 'Utkal Machinery Limited'. The aforesaid payment was made in pursuance of a settlement under Section 18 of the Industrial Disputes Act, 1947. The contention of the Appellant was that the payment falls under the exception provided under Section 40A(9) of the Act as the same was 'made under the law for the time being in force'. However, the Assessing Officer rejected the aforesaid contention of the Appellant and made the disallowance invoking provision of Section 40A(9) of the Act.

40. In appeal, the CIT(A) confirmed the disallowance by following the decision of his predecessor in the case of the Appellant for the Assessment Year 2003-04. Therefore, the Appellant is before us in appeal.

41. We have heard the rival submissions and perused the material on record. We find that the identical disallowance made by the Assessing Officer was deleted by the Tribunal in the case of the Appellant in appeals for Assessment Year 1994-95 to 1997-98, 1999-2000 to 2002-03. The relevant extract of the decision of the Tribunal in the case of the Appellant for the Assessment Year 1999-2000 [ITA No. 6257/Mum/2011, dated 28/03/2018] read as under:

"5. The 4th ground of appeal

On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the additions made u/s 40A(9) of the Act in respect of contribution to Marine Navy Officers Welfare Fund (Rs.1,82,665/-) and Utmal Employees Welfare Fund (Rs.1,00,000/-).

5.1 During the year under consideration, the assessee had incurred an expenditure of Rs.2,82,665/- comprising of Rs.1,82,665/- as contribution to Marine Navy Officers Welfare Fund and Rs.1,00,000/- as contribution to Utmal Employees Welfare Fund. The AO followed the assessment order for earlier year and disallowed the above expenditure on the ground that these are covered by section 40A(9) of the Act.

5.2 In appeal, the Ld. CIT(A) following the order of his predecessor-in office for the AY 1997-98 held that the said contributions cannot be said to have been made to any statutory fund nor covered u/s 36(1)(iv)/(v). Moreover, the assessee has itself admitted the disallowance in terms of section 40A(9). On the above reasons, the Ld. CIT(A) upheld the addition of Rs.2,82,665/- made by the AO.

5.3 Before us, the Ld. counsels of the assessee rely on the order of the Tribunal in its own case for the AY 1994-95 to AY 1997-98 and submit that the issue has been decided in favour of the assessee by the above decisions.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

5.4 We have heard the rival submissions and perused the relevant materials on record. The ITAT 'J' Bench Mumbai in assessee's own case for the AY 1997-98 (ITA No. 2891/Mum/2001) held :

> *"Ground No. 4 relates to the disallowance of Rs.6,32,725/- on account of contribution to Marine Officers Welfare Fund. This issue has been discussed by the Assessing Officer at para 18 page 9 of this order and the same has been considered by the CIT(A) at para 13 page 5 of his order, wherein the CIT(A) has directed the Assessing Officer to allow deduction of Rs.1,00,000/- . Similar disallowance was considered by the Tribunal in ITA No. 2200/Mum/2000 at para 12 and 13 of its order at page 5&6, wherein the Tribunal has followed its own decision in ITA No. 3943/Mum/98. Facts and circumstances being identical, respectfully following the decision of the Tribunal in the assessee's own case for earlier years, we direct the Assessing Officer to delete the addition of Rs.6,32,725/-. Ground no. 4 is accordingly allowed."*

5.5 Facts being identical, we follow the above decision of the Coordinate Bench and delete the disallowance of Rs.2,82,665/- made by the AO. Thus the 4th ground of appeal is allowed."

42. Therefore, respectfully following the above decisions of the Coordinate Bench of the Tribunal in the case of the Appellant for the preceding assessment years, we delete the addition of INR 1,50,000/- made under Section 40A(9) of the Act. Accordingly, Ground No. 4 raised by the Appellant is allowed.

Ground No. 5

43. Ground No. 5 pertains to addition made by the Assessing Officer by reducing the claim of depreciation made by the Appellant by INR 4,11,94,218/-.

44. The facts relevant for adjudication of the issue for consideration are that during Assessment Year 1998-99, the Appellant had sold its

construction equipments manufacturing undertaking at Bangalore (hereinafter referred to as 'the Undertaking') to its associate concern M/s L & T Komatsu Ltd. as going concern for a lumpsum consideration. However, the Assessing Officer, in Assessment Year 1998-99, disregarded the transaction as slump sale transaction and hypothetically allocated the values to individual assets and credited the same to the respective blocks of assets. This resulted in reduction of the closing WDV of the block of assets carried to Assessment Year 1999-2000 till Assessment Year 2004-05. During the year under reference, the Assessing Officer recomputed the depreciation claim of the Appellant on such reduced WDV carried from Assessment Year 2003-04 resulting in reduction in the depreciation claim by INR 4,11,94,218/-.

45. The CIT(A) confirmed the order passed by the Assessing Officer resulting in reduction depreciation claim by INR 4,11,94,218/- by following the order passed by the CIT(A) in appeal for the Assessment Year 1998-99 and 2003-04.

46. Being aggrieved, the Appellant is now in appeal before us on this issue.

47. During the course of hearing, both the sides agreed that vide common order, dated 27/07/2016, passed in the cross-appeals for the Assessment Year 1998-99 (ITA No. 442/Mum/2010 and 4599/Mum/2013), the Tribunal has held that the sale of the Undertaking was a transaction of slump sale and not a case of itemized sale as held by the Assessing Officer. Therefore, the very basis on which the WDV and depreciation was re-computed by the Assessing Officer does not survive. Taking note of the aforesaid facts, the Tribunal had decided identical issue in favour of the

Appellant and directed the Assessing Officer to accept depreciation as calculated by the Appellant and thereby deleted the addition made on account of reduction of depreciation claimed by the Assessing Officer vide common order dated 11/04/2022, passed in a batch of appeals including the appeal preferred by the Appellant for the Assessment Year 2001-02 (ITA No. 6908/Mum/2012) and 2002-03 (ITA No. 2117/Mum/2013). Respectfully following the aforesaid decision of the Tribunal, we overturn the decision of the Assessing Officer and the CIT(A) directing the Assessing Officer to accept the depreciation as computed by the Appellant. Thus, delete the addition of INR 4,11,94,218/- made by the Assessing Officer on account of reduction of depreciation claim made by the Appellant. Accordingly, Ground No. 5 raised by the Appellant is allowed.

Ground No. 6

48. Ground No. 6 raised by the Appellant is directed against the order of CIT(A) confirming the disallowance of interest and other expenses made by the Assessing Officer under section 14A of the Act.

49. The relevant facts in brief are that in the return of income the Appellant had claimed exemption in respect of dividend and interest income from equity shares/Units of mutual funds and tax free bonds. During the assessment proceedings, the Appellant submitted that the investments from which exempt income was earned by the Appellant during the relevant previous year were made out of Appellant's own funds and not out of any borrowed funds. The Assessing officer was not convinced with the aforesaid submission and invoked provisions of Section 14A of the Act to disallow INR 3,18,00,000/- holding the same to be interest expenditure incurred by the Appellant in respect of interest bearing funds utilized by the Appellant for making investment yielding exempt income. While computing the aforesaid

disallowance, the Assessing Officer applied the average cost of total capital employed to the total amount of investments generating exempt income.

50. Being aggrieved, the Appellant carried the issue in appeal before the CIT(A). During the appellate proceedings, the CIT(A) asked the Appellant to show cause why disallowance under Section 14A of the Act should not be computed by applying provisions contained in Rule 8D of the Income Tax Rules, 1962. In response the Appellant submitted that the provisions contained in Rule 8D were not applicable to the Assessment Year 2004-05. While the CIT(A) accepted the aforesaid contention of the Appellant, however, the CIT(A) proceeded to conclude that as per the judgment of the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. Dy. CIT : [2010] 328 ITR 81 a proportionate disallowance (computed on a reasonable basis) could be made by invoking provisions contained in Section 14A of the Act. Thus, the CIT(A) computed the disallowance at INR 12.24 Crores by taking 0.5% of average value of investment as a reasonable basis of determining the quantum of disallowance to be made under Section 14A of the Act.

51. Being aggrieved by the above order passed by the CIT(A), the Appellant is now in appeal before us.

52. The contentions advanced on behalf of the Appellant can be summarized as under:

(a) The CIT(A) has enhanced the disallowance under Section 14A of the Act without issuing enhancement notice under Section 251 of the Act.

(b) While the provisions contained in Rule 8D were held by the CIT(A) to be not applicable for the Assessment Year 2004-05, the CIT(A) has, in effect, applied the same for making disallowance towards interest and other expenses under Section 14A of the Act

(c) In the case of the Appellant for the Assessment Year 1999-2000 [ITA No. 6257/Mum/2011, order dated 28/03/2018] this identical issue has been decided in favour of the Appellant and the disallowance made by the Assessing Officer under Section 14A of the Act has been deleted by the Tribunal by accepting the contention of the Appellant that the investments have not been made out of borrowed funds by placing reliance on the judgment of the Hon'ble Bombay High Court in the case of HDFC Bank Ltd. v. DCIT [2016] 67 taxmann.com 42 (Bom).

53. Per Contra, the Learned Departmental Representative placed reliance on the order passed by the CIT(A) and submitted that this was not a case of enhancement without issuance of notice. The Appellant was clearly asked to show cause why higher disallowance should not be made.

54. We have heard the rival submission and perused the material on record. It emerges that the Appellant had claimed exemption in respect of income earned from investment in equity shares, mutual funds and tax free bonds during the relevant previous year. The Assessing Officer noticed that the Appellant had borrowed fund of INR 1,324.35 Crores out of which INR 921.27 Crores were borrowed for specific projects while INR 142.32 Crores were borrowed for general corporate purpose. Further, the Appellant had incurred

interest expenditure of INR 27.60 Crores in respect of funds borrowed for general corporate purpose. The Assessing Officer was of the view that the interest bearing funds for general corporate purpose were utilized for making investment yielding exempt income during the relevant previous year. Therefore, the Assessing Officer made a disallowance of INR 3.18 Crore. The CIT(A) enhanced the disallowance to INR 12.24 Crores. While arriving at the enhanced amount of disallowance the CIT(A) has borrowed the computation mechanism prescribed in Rule 8D of the Rules as a reasonable basis even though the aforesaid Rule 8D did not apply to the Assessment Year 2004-05. On perusal of paragraph 13.2 of the order impugned, we note that the CIT(A) has recorded that (a) Total Owned Funds of the Appellant were INR 2,775.04 Crores, (b) General Purpose Borrowed Funds available with the Appellant were INR 142.32 Crores (c) Total Common Pool Funds were INR 2917.36 Crores (INR 2,775.04 Crores + INR 142.32 Crores) and (d) Total Investments made by the Appellant were INR 335.73 Crores. Thus, it is admitted position that the own funds of the Appellant were much more than the investments. Therefore, as per the judgment of the Hon'ble Bombay High Court in the case of In HDFC Bank Ltd. v. DCIT:383 ITR 529 no disallowance can be made under Section 14A of the Act (by applying the provisions contained in Rule 8D of the Income Tax Rules). Therefore, the basis on which the CIT(A) has computed the disallowance cannot be regarded as reasonable. Further, while making the disallowance the Assessing Officer has observed that the burden was on the Appellant to show that the investment were made from own funds. The reasoning given by the CIT(A) is contrary to the judgment of the Hon'ble Supreme Court in the case of South Indian Bank Ltd. Vs Commissioner of Income Tax: [2021] 438 ITR 1 (SC) given the facts of the present case noted hereinabove, it would be

presumed that investments were made out of own funds and therefore, proportionate disallowance of interest expenses under Section 14A of the Act was not warranted on the ground that separate accounts were not maintained by Appellant for investments and other expenditure incurred for earning tax-free income. Accordingly, we delete the addition/disallowance made by the Assessing Officer and the CIT(A). Disallowance of INR 12.24 Crores made under Section 14A of the Act is deleted. Ground No. 6 raised by the Appellant is allowed.

Ground No. 7

55. Ground No. 7 raised by the Appellant is directed against the order of CIT(A) confirming the assessment order to the extent it holds that extinguishment of sales tax deferred loan liability results in a taxable revenue receipt in the hands of the Appellant.

56. During the year under reference, the Appellant assigned/repaid certain liabilities in respect of sales tax deferred loan availed under the sales tax laws. These liabilities were payable at a future date. The difference (INR 4,25,44,104/-) between the actual liability and the net present value of the said liability on the date of transfer was accounted for and included in Schedule 'L' under the heads "Gains on extinguishment of debt'. The Appellant treated said gains as Capital receipt while the Assessing Officer and the CIT(A) held it to be taxable revenue receipt. Therefore, the Appellant carried the issue in appeal before the Tribunal.

57. During the course of hearing, both the sides are agreed that identical issue stand decided in the case of the Appellant in cross-appeals pertaining to Assessment Year 2000-01, 2001-02 and 2002-03.

58. We have perused the above decision of the Tribunal. The relevant extract of the common order, dated 11/04/2022, of the Coordinate Bench of the Tribunal in the case of the Appellant for the Assessment Years 2001-02 and 2002-03 [ITA No. 6908 & 6878/Mum/2012, 2117 & 2284/Mum/2013] capturing the factual background and the issue under consideration reads as under:

> *"27. Ground 7 pertains to treatment of extinguishment of sales-tax deferred loan liability as revenue receipt (Rs.50,17,98,460/-).*
>
> *28. This ground also covered by the decision of the co-ordinate bench for assessment year 2000-01. The co-ordinate bench, after deliberating upon the issue in detail has come to the following conclusions:-*
>
> > *"37. After hearing both the parties and perusing the material available on record, the undisputed facts coming out are that the sales tax was collected by the assessee from the customers under Sales Tax deferral Incentive Scheme. As per the said scheme the payment of said sale tax was to be deferred for specified number of years subject to the fulfillment of certain special conditions as specified in the scheme. Such deferment of sale tax was to be treated as loan to the assessee by sales tax department to be paid after a specified number of years. During the year the assessee deferred the sales tax amounting to Rs. 71. crores which the assessee has assigned to another company at a net present value of Rs. 19.73 crores. In other words, the assessee has paid an amount of Rs. 19.73 crores in assignment in consideration for taking over the said obligation for repaying for Rs. 71.34 crores on future date to another company. The differential amount of Rs.51.61 Crores was credited to the P&L account, however while computing the income the assessee, the same was reduced in the computation of income by treating the same as capital receipt not chargeable to tax. According to the A.O., the said liability has ceased to exist in the books of the assessee as the same was taken over by another entity. In coming to this conclusion, the A.O relied on the decision of CIT vs. Sunderam Iyengar & Sons Ltd. (supra). wherein the assessee used to receive deposits in the course of*

its trading transaction on sale of Coca Cola in glass bottles of, etc. which are refundable on return of the said bottles. wherein the order of the Supreme Court has held that liability needs to be treated as income of the assessee u/s 41(1) of the Act. The ld. CIT(A) in the appellate proceeding affirmed the order of AO by holding that the said takeover of deferred sales tax liability to be paid in future is taxable u/s 28(iv) of the Act, by relying on the decision of CIT(A) Vs. Sundaram Iyangar & Sons Ltd., (supra) and also the decision of the Jurisdiction High Court in the case of Solid Container Ltd., Vs. DCIT (supra). In this case, we note that the A.O made addition u/s 41(1) of the Act, while in the appellate proceeding, ld. CIT(A) upheld the said addition u/s 28(iv) of the Act and not u/s 41(1) of the Act. The arguments of the Ld. counsel before us are that the said assignment of sales tax liability by the assessee is neither income u/s 41(1) of the Act nor benefit or perqs 28(iv) of the Act. In defense of his arguments the Ld. CIT(A) relied on the decision of Cable Corporation of India Ltd., Vs. DCIT(supra). In the present case, we find that provisions of Sec. 41(1) of the Act are not applicable as the necessary conditions as envisaged in the said section are not fulfilled namely the assessee has (i) not obtained any amount in respect of loss or expenditure; (ii) nor any benefit in respect of trading liability by way of remission or cessation. The first 36 condition of obtaining an amount is obviously not applicable as the assessee has paid an amount for discharge of a future liability while the issue as to the applicability of the second condition of obtaining a 'benefit' is now settled by the decision of the Apex Court in the case of CIT vs. Balkrishna Industries Ltd. 88 taxmann.com 273 (SC) wherein the Supreme Court has affirmed the decision of the Hon'ble Bombay High Court in the case of CIT vs. Sulzer India Ltd., 369 ITR 717(Bom) holding that when an assessee discharges the present value of future obligation, it would not be a case of any 'benefit' accruing to the assessee, as the assessee has discharged the full liability at the present value. Therefore, as there is no 'benefit' obtained by or accruing to the assessee, the question of applicability of section 41(1) of the Act does not arise. In both the Supreme Court and the High Court decisions were concerned with pre-payment of sales tax liability at net present value to the Sales tax Department, but the same principle would equally be applicable to the present case of assignment of the sales-tax deferred loan liability at the net

present value. We find merits in the case of the assessee that the provisions of section 41(1) of the Act are not applicable, as there is no remission or cessation of 37 the liability. The remission or cessation of liability contemplates a discharge or partial discharge of a liability coupled with no obligation to discharge the balance liability and thus, it would not cover the facts of the present case, where the Appellant has assigned its obligation, although at the present value. The liability has been discharged by the Appellant by making an immediate payment at the present value and therefore it cannot be said that there is a remission or cessation of the liability. Further there is no remission or cessation of the liability for the reason that the assignment of the liability is to a third party whereas qua the Sales-Tax Department the assessee continues to be liable to pay the said amount and thus as for as the Sales-Tax Department is concerned, there is no remission or cessation of a liability. The case of the assessee finds support from the decision of the Apex Court in CIT vs. S.I. Group India Ltd., (Supra) wherein the Apex Court held that when the Sales-tax Department has not accepted the pre-payment, it cannot be a case of cessation or remission of a liability. In the present case also, the assignment has not been accepted by the Sales-tax Department and, therefore, there is no question of cessation or remission of the liability. Besides the 38 deemed loan from the Sales-tax Department is not a loss or expenditure or a trading liability and, therefore, the provision of section 41(1) of the Act is not applicable. The sales-tax originally collected by the assessee was an expenditure which has been allowed to the assessee by treating it as a deemed loan. Once the said amount has been treated as a loan, it loses its characteristic of sale-tax liability. Such deemed loan is not a loss or expenditure or a trading liability and, hence, does not come within the ambit of section 41(1) of the Act. 38. Similarly the difference of Rs. 51.61 Crores arising out of assignment of sales tax liability of Rs.71.34 Crores to be paid in future date at its present value of Rs. 19.73 Crores has not resulted in any benefit or perquisites and thus not covered by the provisions of section 28(iv) of the Act as section 28(iv) proposes to tax 'benefit' or 'perquisite' arising from business of the assessee. In the present case the pre-payment of a deferred sales-tax loan liability at the net present value, does not result in any 'benefit' to the assessee. Besides the case of the assessee is squarely covered by the decision of the coordinate bench in

Cable Corporation of India Ltd. 39 vs. Deputy Commissioner of Incometax(supra) wherein on identical facts, the Tribunal has concluded that the assignment of such liability, at the net present value, cannot be charged to tax either under section 41(1) of the Act or under section 28(iv) of the Act. The provisions of section 28(iv) of the Act are not applicable to the facts of the present case as monetary benefit is not covered by the said section. Section 28(iv) of the Act uses the phrase - 'whether convertible into money or not', which would mean that cash benefits are not covered by the said section. This issue is covered in favour of the assessee by the decision of the Apex Court in the case of CIT vs. Mahindra & Mahindra Ltd.93 taxmann.com 32(SC) wherein the Apex Court has held that waiver of loan is a monetary benefit and, hence, it does not come within the ambit of section 28(iv) of the Act. Therefore, the amount of Rs.51,60,87,976/- is to be regarded as capital receipt which is not chargeable to tax. 39. We have also perused the decision relied upon by the revenue to support the orders of the authorities below but find that the same are distinguishable on facts or reversed or not a good law 40 in view of the subsequent decisions. In the case of CIT vs. Sunderam Iyengar & Sons Ltd. (supra), the assessee used to receive deposits in the course of its trading transaction on sale of Coca Cola in glass bottles of, etc. which are refundable on return of the said bottles. During the relevant year, such deposits outstanding for a number of years were transferred by the assessee to the Profit & Loss Account as no longer payable to the said customers. On these facts, the Apex Court held that the amount was received by the assessee in the course of trading transaction and the same is chargeable to tax as trading receipts when the said amount becomes the assessee's own money. The Apex Court further held that because of the trading transaction, the assessee has become richer to the extent of the amount transferred to Profit & Loss Account and, hence, the amount so transferred is to be treated as income of the assessee. In the present facts are distinguishable and, therefore, the decision of the Apex Court is not applicable as the Supreme Court was neither concerned with section 28(iv) or section 41(1) of the Act, but with the issue of whether the amount received by an assessee in the course of a trading transaction, should be treated as income of the assessee or not. In the present case, the 41 allegation of the Assessing Officer and the Commissioner of Incometax

(Appeals) is that the provision of section 41(1) or section 28(iv) of the Act is applicable which issue is not there before the Hon'ble Supreme Court. Further, the Supreme Court has held that the amount is treated as income of the assessee as the assessee had become richer by the amount which is transferred to the Profit & Loss Account. In the present case, the assessee has discharged its complete obligation by paying the net present value of the obligation and, therefore, there is no question of the assessee either becoming richer or poorer on such transaction. The Apex Court in the cases of Balkrishna Industries Ltd. (supra) and Mahindra & Mahindra Ltd. (supra) has specifically dealt with the provisions of section 41(1) and section 28(iv) of the Act and, therefore, the said decisions are applicable to the case of the Appellant. So far as the decision in Solid Containers Ltd. v DCIT (supra) is concerned, the counsel of the assessee submitted that the finding in this decision by the Bombay High Court is contrary to the decision of the Apex Court in Mahindra & Mahindra Ltd. (supra) and, therefore, the said decision is no longer good law. The finding by the High Court that the provision of section 28(iv) of the 42 Act is applicable to a waiver of loan is contrary to the decision of Mahindra & Mahindra Ltd. (supra) wherein the Apex Court has held that waiver of loan being a monetary benefit is not covered under section 28(iv) of the Act. Even for applicability of section 41(1) of the Act, the Apex Court has held that waiver of loan amounts to cessation of a liability other than a trading liability, for which no deduction has been claimed in earlier years and, therefore, does not come within the ambit of section 41(1) of the Act. Thus the decision of the Bombay High Court in Solid Containers Ltd.(supra) which had taken a contrary view, is no longer good law. Further the decision of Solid Containers Ltd.(supra) is further not applicable to the present case as in the present case, the Appellant has discharged the full liability at net present value which cannot be said to be a case of either waiver or cessation of the liability, which was the fact before the High Court. The decision in the case of CIT vs. Ramaniyam Homes Pvt. Ltd.,(supra) relied upon by the ld DR has been reversed by the Apex Court by the common judgment dated 24th April 2018 in Mahindra & Mahindra Ltd.(supra).Therefore, the reliance on the decision of the Madras High Court by the Revenue is wholly misplaced and completely 43 unjustified. The facts in the case of CIT vs. Aries Advertising Pvt. Ltd.(supra) are altogether different vis a vis

the facts in the present case as in the case before the High Court, there was actual write off credit balance (trading liabilities) and, accordingly, the High Court held that the assessee therein had received a benefit in respect of a trading liability which came within the ambit of section 41(1) of the Act whereas in the present case, there is no question of any benefit being received by the Appellant as the appellant has discharged the net present value of a future liability not can the present case be said to be of remission or cession of the liability. Therefore, this decision is clearly inapplicable to the facts of the present case. In the case of CIT vs. ICC India Pvt. Ltd. (supra), the Hon'ble High Court has held that share application amount was a capital receipt and was never received towards trading purpose and, therefore, the question of applicability of section 41(1) does not arise. The High Court has, therefore, dismissed the appeal of the Revenue. Although the High Court has noted that if the loan was received for trading purposes, the provision of section 41(1) of the Act may be applicable; however, as the fact in the present case was not a case of receipt of loan towards 44 the trading purposes, the High Court has not considered whether other conditions of section 41(1) are fulfilled or not. In the case of Indian Seamless Steels & Alloys Ltd. vs. ITO (supra). The Tribunal in paragraph 16 of the order has noted that the assessee therein has transferred its deferral sales-tax loan to third party for a consideration which is higher than the amount payable to the Sales-tax Deptt. The Tribunal has further noted that the assessee therein has sold its 'sales-tax incentive' and what it has received is not sales-tax benefit but sale consideration on transfer of its entitlement and such sale consideration is a benefit directly arising from business and is, therefore, revenue receipt. In the present case of the Appellant, the Appellant has, in fact, paid a consideration to the other Company for taking over its obligation, which amount is lesser than the amount payable to the Sales-tax Department. The facts in this case are different is further clear from the reliance by the Tribunal on decision of Sun & Sand Hotels Pvt. Ltd. vs. DCIT (ITA No.7125/MUM/2007) wherein also it was a case of transfer of sales-tax entitlement for a consideration which was held as revenue receipt. Therefore, the Appellant submits that the said decision is clearly inapplicable on the facts of the present case. Even otherwise, the Appellant submits that the decision of the Tribunal being contrary to the decisions in

Balkrishna Industries Ltd. (supra) and Mahindra & Mahindra Ltd. (supra), is not applicable to the Appellant. In view of these facts and decisions as discussed above we are inclined to set aside the order of CIT(A) on this issue by holding that Rs. 51.61 Crores is a capital in nature. The AO is directed accordingly. The ground of the assessee is allowed."

29. The facts and circumstances are stated to be identical. Therefore, consistent with the earlier orders of the co-ordinate bench of this Tribunal, we allow the ground raised by the assessee."

59. Respectfully following the above decision of the Tribunal in the case of the Appellant, we delete the addition of INR 4,25,44,104/- made by the Assessing Officer on account of extinguishment of debt being sales tax deferred loan liability. Thus, Ground No. 7 raised by the Appellant is allowed.

Ground No. 8

60. Ground No. 8 raised by the Appellant is directed against the order of CIT(A) confirming the transfer pricing adjustment of INR 4,11,67,000/-.

61. During the assessment proceedings a reference was made to the Transfer Pricing Officer (TPO) under Section 92CA(1) of the Act for the computation of arm's length price in relation to international transactions entered by the Appellant with its Associated Enterprises (AEs).

62. The TPO noted that during the relevant previous year the Appellant has reported a international transaction being payment of INR 20,58,35,000/- by the Appellant to its AE in Sri Lanka [i.e., Larsen & Toubro Ceylinco (Pvt) Ltd.] which was claimed by the Appellant to be reimbursement of costs. The TPO noted that the Appellant held 80% equity Larsen & Toubro Ceylinco (Pvt) Ltd. [for short 'L&T Ceylinco']

while the balance 20% equity shares were held by Ceylinco Insurance Co Ltd. Sri Lanka.

63. In response to query raised by the TPO regarding the payment of INR 20,58,35,000/- by the Appellant to L&T Ceylinco, the Appellant explained that the aforesaid reimbursements were the amounts incurred by L&T Ceylinco by way of cost overrun expenses pertaining to the execution of power project in Sri Lanka. Since the Appellant held 80% of the equity share capital but reimbursed 100% of the aforesaid overrun expenses, the TPO was of the view that the cost sharing arrangement was not equitable. Accordingly, the Appellant was required to explain the following vide office letter dated 27/11/2006:

"Sub Information to be furnished in connection with the proceedings under Section 92CA) of the IT Act, 1961-reg.-A.Y.2004-05.

All details be provided as per serial number of this letter.

1. *Specify the percentage of equity walling you have in your Srilanka AE in the FY 2003-04.*

2. *Specify the percentage of holding of others in this entity*

3. *Specify the quantum of loss borne by you for this entity*

4. *What is the basis of bearing these losses?*

5. *Since in a third party situation you would bear the profits and losses in proportion to your equity holding losses as have occurred should also have been borne in this ratio In case, this is not the situation and if it is found that you have borne losses in a proportion more than your equity holding, then why should adjustments not be made on account of losses relating to Srilanka AE borne by you?*

You may treat this as an opportunity of being heard, as per Proviso to Section 920 (3) of the IT Act 1961. You may avail of this opportunity of hearing your case now fixed for hearing on

29.11.2006 at 3.30 pm Should you require more time, specify the same."

64. In response, the Appellant filed reply letter dated 28/11/2006. The relevant portions of the aforesaid reply letter read as under:

"M/s AEs Kelantissa (Pvt) Ltd, a company incorporated under the laws of Srilanka awarded the supply contract to the company and the onshore work comprising of installation, erection and commissioning of the plant was awarded to AE A separate Umbrella Agreement (Guarantee and Co-ordination Agreement) dated 15.6.2000 was further entered into between the client (AEs Kelantissa P Ltd, Srilanka), the company and its AE wherein the overall responsibility for the total execution/performance of the contract awarded by the client was fixed on the company Reference in this connection is invited to para 1.1-1.4 of the Umbrella enclosed at pages 34 to 26 forming part of the Documentation.

Since the AE faced a cost overrun on the onshore work of the project and was unable to meet the milestones within the budgeted resources, the company had to reimburse the expenditure amounting to Rs 2,058.35 lacs during the year under reference It is worthwhile here to note that the said reimbursement was subject to the decision of working group committee (comprising of EXIM Bank RBI ECGC SCGB Credit Lyonnacs and the company as its members) and the final approval of the Reserve Bank of India.

The copies of all the relevant correspondence in this regard, including the minutes of the working group meeting, approval of RBI statement showing comparison of estimated and actual cost of project and the audited statement of cost overrun incurred on the project are enclosed as part of our documentation submitted to your goodself's office earlier.

The AE was formed with the main objective to undertake the business of cement. As mentioned earlier. AE is a subsidiary the company with only minority equity stake of a local Srilankan Company, namely Ceylinco Insurance Co Ltd.

The contract for procurement and construction of mega power project in Srilanka was actually intended to be awarded by AEs Kelantissa to the company on lumpsum turnkey basis However, for certain reasons

an understanding was reached with the client to Split the total contract into two parts viz Supply Contract and service contract. As aforesaid supply portion was executed by the company and for the service portion to he performed onshore, comprising of installation erection and commissioning, it was decided by the company to be subsidiary company (AE) in Srilanka to execute the said job.

in view of the above arrangement, an Umbrella Agreement was entered into by the client with the company and its AE whereby the singular liability for the satisfactory completion of the entire contract including the ervice component was fixed on the company as on overall EPC contractor. It is worthwhile here to note that the minority shareholder in the AE was not interested in diversifying into construction and accordingly in the execution of the power project in Srilanka. An agreement was therefore reached with Ms Ceylinco Insurance Co Ltd that the execution of the AESK power project would be the sole responsibility of the company and that any contractual obligation liabilities arising out of the contract will be made good by the company The copy of the communication in this regard vide letter dated 17.2.2003 is enclosed.

In view of the above, the question of sharing the expenditure by way of cost overrun between the company and the minority shareholders in the AE did not arise"

65. The TPO was not convinced by the above reply furnished by the Appellant and therefore, proceeded to hold that while there was no doubt that the payments were made to L&T Ceylinco after obtaining necessary approvals from the Reserve Bank of India (RBI) and other authorities to comply with the procedural requirements of remitting money outside India, the same could not be regarded as an approval for transfer pricing purposes. No unrelated party would have agreed to bear 100% of the project cost overrun expenses. Since the Appellant was holding 80% equity shares in L&T Ceylinco, the Appellant should have shared the project cost overrun to the extent of its equity holding only. This would have been in conformity with the CUP Method prescribed as per the provisions of the Act. Accordingly, the TPO determined the ALP of the transaction between

the Appellant and L&T Ceylinco at 80% of the total cost overrun expenses remitted by the Appellant [i.e., INR 16,46,68,000 being 80% of INR 20,58,35,000/-]. Thus, the TPO proposed transfer pricing adjustment of INR 4,11,67,000/- (i.e., INR 20,58,35,000 less INR 16,46,68,000) vide order dated 30/11/2006, passed under Section 92CA(3) of the Act. The aforesaid transfer pricing adjustment was incorporated by the Assessing Officer in the Assessment Order, dated 05/12/2006, passed under Section 143(3) of the Act.

66. Being aggrieved, the Appellant carried the issue in appeal before the CIT(A). Before the CIT(A), the Appellant made detailed submissions which have been summarized in paragraph 15.3 of the order passed by CIT(A) which read as under:

> *"15.3 The submission of the appellant are summarized as under:*
>
> *Appellant submitted that during the financial year 2003-04, the appellant company held 80% of the equity shares of Larsen & Toubro Ceylinco (Pvt.) Ltd. Srilanka ["AE"], a subsidiary of the appellant company. Balance 20% of the equity shares in AE was held by Ceylinco Insurance Company Limited, Srilanka.*
>
> *Appellant contended that during the assessment year under consideration, the appellant company has reimbursed expenditure amounting to Rs.2058.35 lacs incurred by the AE, being cost overrun on execution of power project in Srilanka. While passing the assessment order u/s 92CA(3), the Transfer Pricing Officer has disallowed 20% of the cost overrun i.e. Rs. 411.67 Lacs and restricted the cost overrun to 80% considering appellant's shareholding in AE. In this regard, we wish to submit as follows:*
>
> *Appellant further contended M/s. AES Kelantissa (Pvt.) Ltd. ("the client"] was a company incorporated under the laws of Srilanka. The contract for procurement and construction of mega power project in Srilanka was actually intended to be awarded by the client to the appellant company on lumpsum turnkey basis. However, at the time of entering into contract, the total contract was split into two parts viz. Supply Contract and Service contract. The supply portion was given to*

the appellant company and for the service portion to be performed onshore comprising of installation, erection and commissioning, the contract was given to the AE in Srilanka.

Appellant submitted that as per the Guarantee and co-ordination Agreement dated 15.6.2000 entered into between the client (AES Kelantissa Pvt. Ltd., Srilanka)/ the appellant company and the AE, the overall responsibility for the total execution / performance of the contract was fixed on the appellant company. Drawing attention to para 1.1 to para 1.4 of the Guarantee and co-ordination agreement it was submitted that as per the Agreement the singular liability for the satisfactory completion of the entire contract including the service component, was fixed on the company as on overall EPC contractor.

Further it was stated that the minority shareholder in the AE was not interested in diversifying into construction and accordingly in the execution of the power project in Srilanka. An understanding was therefore reached with M/s. Ceylinco Insurance Co. Ltd. that the execution of the AESK power project would be the sole responsibility of the appellant company and any contractual obligation liabilities arising out of the contract will be made good by the appellant company. Copy of communication in this regard vide letter dated 17th February, 2003 is enclosed at ***Annexure 6.2.***

Appellant submitted that during the execution of project, the AE faced cost overrun on the onshore work of the project and was unable to meet the milestones within the budgeted resources. Accordingly, the appellant company has reimbursed the cost overrun of Rs.2,058.35 lacs [USD 4.5 Mn.]. The said reimbursement was subject to the decision of Working Group Committee (comprising of EXIM Bank, RBI, ECGC, 8CGB, Credit Lyonnacs and the appellant Company as its members) and the final approval of the Reserve Bank of India. The copies of the relevant correspondence in this regard viz. statement showing comparison of estimated and actual cost of project, the minutes of the Working Group Meeting, approval of RBI and the bank advice for remittance were enclosed as ***Annexure 6.3.***

In view of the above, it was requested to direct the assessing officer to delete the adjustment made to the reimbursement of cost overrun to the AE.

With respect to the excess adjustment of Rs. 66 lacs by the Assessing Officer, it was submitted that the said adjustment was already

rectified vide order u/s 154 dt. 04.04.2007. Copy of the rectification order is enclosed as ***Annexure 6.4.***

Further it was submitted that they erroneously mentioned Transfer Pricing Adjustment amount as Rs. 2058.35 Lacs in Annexure 1 to letter no. TAX/5094/L&T/2005-CIT(A) dt. 02.12.2009 instead of correct disallowance amount of Rs. 411.67 Lacs.

The copies of contract with client and the relevant Schedule 2 indicating the contract value were submitted."

67. However, the above submissions did not find favour with the CIT(A) who agreed with TPO/Assessing Officer and vide order, dated 12/08/2013, inter alia, held that as per CUP method the Appellant should have shared the project cost overrun expenses to the extent of equity shared in the L&T Ceylinco. The CIT(A) also rejected the contention of the Appellant that the reimbursement of the project cost overrun expenses was a business decision taken on account of commercial expediency and therefore, the reimbursement of 100% of project cost overrun expenses should be accepted as being on arm's length.

68. Being aggrieved, the Appellant has preferred appeal before the Tribunal seeking deletion of transfer pricing adjustment of INR 4,11,67,000/-.

69. We have heard the rival submissions and perused the material on record. The admitted factual position is that the Appellant held 80% equity shares in L&T Ceylinco, a Sri Lankan Company while the balance 20% of the equity share were held by the Ceylinco Insurance Company Ltd., Sri Lanka. It is the contention of the Appellant that initially a contract for procurement and construction of mega power project in Sri Lanka was to be awarded by M/s AES Kelantissa (Pvt.) Ltd. (for short 'the Client') to the Appellant. However, the said

contract was split in the two parts viz. supply contract and service contract. The supply contract was awarded to the Appellant while the service contract comprising of installation, erection and commissioning services was awarded to L&T Ceylinco. However, as per the Guarantee and Coordination Agreement, dated 15/06/2000, entered amongst the client, L&T Ceylinco (i.e. AEs) and the Appellant the overall responsibility for execution/performance was fixed on the Appellant. It is the contention of the Appellant that as per the understanding between M/s Ceylinco Insurance Company Ltd. (the minority shareholder holding 20% share in L&T Ceylinco), and the Appellant, execution of the power project was the sole responsibility of the Appellant. During the execution of the project, L&T Ceylinco was enabled to meet the milestone within the budgeted resources incurring project cost overrun expenses of INR 2,058.35 Lacs. It was the aforesaid project cost overrun expenses which were reimbursed by the Appellant. The case of the Appellant is that the Appellant was under contractual obligation to make the aforesaid remittances to L&T Ceylinco.

70. We have perused the Guarantee and Coordination Agreement, dated 15/06/2000. Even if we accept the contention that the Appellant was responsible for the execution of power project as a whole, it cannot be said that the Appellant was under obligation to bear 100% of the project cost overrun expenses. It is the contention of the Appellant that the decision to pick up 100% of the project overrun cost was taken by the Appellant on account of commercial expediency. In our view, though it can be said that the Appellant was required to provide funds to L&T Ceylinco to meet the project cost overrun expenses, the decision to opt for not providing funds by way of loan or capital but to directly reimburse the project cost overrun expenses

was an option exercised by the Appellant. We agree with the contention of the Appellant that, as held by the Hon'ble Bombay High Court in the case of CIT-LTU Vs. SI Group India Ltd. : [2019] 265 Taxmann 204 (Bombay), the TPO cannot replace the Appellant in the decision making process and question the business decision made by the Appellant. However, at the same time, the Appellant cannot avoid applicability of transfer pricing provisions triggered on account of the aforesaid business decision by simply pleading that the aforesaid business decision was taken on account of commercial expediency.

71. As regards the contention of the Appellant that the remittances were made to L&T Ceylinco after obtaining necessary approvals from RBI and therefore, the remittances should be considered as being on arm's length is concerned, we find that the Mumbai Bench of the Tribunal has, in the case of Sara Lee TTK Ltd. Vs. DCIT Range - 10(2), Mumbai, [ITA No. 376/Mum/2012, dated 24/08/2016] cited by the Ld. Departmental Representative, held as under:

> *"12. We have considered the rival submissions and perused the relevant finding given in the impugned orders. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by ld. AR and DR during the course of hearing before us, in the context of factual matrix of the case. From the record we found that the assessee did not bench mark the royalty payment separately. On enquiry by TPO, it has relied on RBI approval given in 1995 and also on the fact that the assessee earned a gross profit of 41.6%. TPO applied Press Note 9(2000 series) and restricted it to 1% on the plea that the payment was for use of trademark without transfer of technology. The assessee has not separately benchmarked the Royalty transaction at the time submission of Form 3CEB or at the time of preparation of Transfer Pricing Report. It is settled proposition of law that it is the onus of the assessee to prove that the transactions were taken at arm's length. Royalty is a separate international transaction, for this purpose, reliance can be placed on the decision of Punjab & Haryana High Court*

in the case of Knorr-Bremse India (P) Ltd., ITA No.182 of 2013. The RBI approval/FIPB approval is not determinative of ALP cannot be considered to be a valid CUP. Automatic route under which FIPB approvals or RBI approvals are granted have been devised for the "ease of doing business". These approvals emanate from other legislation or policy and are not in relation to determination of Arm's Length Price. The purpose of the RBI approval/FIPB approval is entirely different and cannot be equated with the arm's length principle. The approvals of rates given by the DIPP and the RBI are for different purposes, like for promotion of industries, management of foreign exchange etc. and it varies in accordance with the business practices prevalent at different times which are clear from the RBI approvals themselves. Going by the relevant TP provisions as enshrined under the Act and relevant Rules, it is mandatory that the appellant has to independently benchmark its international transaction with independent comparables so as to arrive at arm's length price, which has not been made in this case. The comparability analysis is the substratum of determining the ALP, which has not been done by assessee at any stage. At the very same time we found that the revenue authorities have not properly appreciated the relevant clauses of the trademark licence agreement, precisely the clauses which were highlighted by ld. AR during the course of hearing before us. Therefore, in the interest of justice and fair play, this case should be restored back to the file of AO, ho shall require the assessee to bench mark its international transaction of 'royalty' with independent comparables following suitable methods prescribed under the Act and on its compliance, the AO after giving adequate opportunity to the assessee shall decide this issue in accordance with the TP regulations."

72. To the same effect is the decision of Delhi Bench of the Tribunal in the case of Assistant Commissioner of Income Tax Circle 4(1) Vs. Johnson Matthey India Pvt. Ltd.: [2013] 36 taxmann.com 356 (Delhi - Trib.) where identical contention of the assessee to accept the rate of royalty specified for remittances under automatic route by RBI as being arms length rate of royalty was rejected by the Tribunal.

73. We concur with the above decisions of the Tribunal, wherein it has been explained that the approvals given by RBI emanate from other

legislation or policy and are not in relation to determination of Arm's Length Price.

74. As regards, the judgment of Hon'ble Bombay High Court in the case of CIT-10 Vs. SGS India Pvt. Ltd. Income Tax Appeal No. 1807 of 2013, dated 18/11/2015, on which reliance was placed on behalf of the Appellant, is concerned, we find that the same had no application in the facts and circumstances of the present case. In that case the issue before the Hon'ble Bombay High Court pertained to benchmarking of royalty payments for use of trademark by Indian wholly owned subsidiary to its Swiss holding/parent company. In that case the Revenue was in appeal before the Hon'ble Bombay High Court against the order of the Tribunal whereby the Tribunal had accepted the contention of the assessee that 3% of the revenue generated should be considered as reasonable royalty for use of trademark provided by the parent company. Before the Hon'ble Bombay High Court it was initially contended by the Revenue that the royalty rate should be less than 3% by placing reliance on Clause III of Press Note 9 (2000 Series), dated 08/09/2000. However, subsequently, the Revenue agreed that the assessee in that case was covered by Clause IV of Press Note 9 (2000 Series), dated 08/09/2000. Therefore, while dismissing the appeal preferred by the Revenue the Hon'ble Bombay High Court held as under:

> *"9. It is an undisputed position before us that the respondent assessee is a wholly owned subsidiary of its parent company which is registered in Switzerland. The respondent pays to its parent company Royalty for use of its Trademark/brand name. Therefore, admittedly the present case is covered by Clause IV and not Clause III of the Press Note 9(2000 series). The aforesaid clause IV of the Press Note 9 (2000 series) allows payment of Royalty upto 8% on export sales by wholly owned subsidiaries to its offshore parent companies.*

10.On the last occasion that is on 23 September 2015 Mr. xxx, learned Counsel for the Revenue sought time to take instructions on whether Clause IV as reproduced hereinabove is applicable in the case of respondent-assessee. Today Mr. xxx, on instructions, states that the respondent-assessee is covered by clause IV of the Press Note 9 (2000 series) dated 8 September 2000. Therefore, the bench marking of the Royalty paid at 3% by the respondent to arrive at the ALP is much below the Royalty for trade mark / brand name which is allowed to be paid by wholly owned subsidiary to its offshore parent company.

11. In view of the above, the grievance of the Revenue that the Tribunal ought to have lowered the bench marking on application of Clause III of the Press Note 9 (2000 series) dated 8 September 2000 does not survive. Accordingly, question as proposed does not give rise to any substantial question of law. Thus not entertained.

12. The appeal is dismissed. No order as to costs."

75. It would be pertinent to note that in the above case as per the transfer pricing study conducted by the Assessee the arm's length rate of royalty determined by the assessee was 10% whereas the assessee had paid royalty @ 3% which was much lower than the prescribed rate specified in Clause IV of Press Note 9 (2000 Series) as well as the aforesaid rate of 10%. There is no such general threshold rate prescribed by RBI for project cost overrun expenses. In our view, the reliance placed by the Appellant on the aforesaid judgment of Hon'ble Bombay High Court is misplaced in view of the fact that the approval granted by the RBI and other authority to the Appellant for making the remittance of project cost overrun expenses was not based upon a threshold rate accepted or determined by RBI/such authority which could have been regarded as an independently determined price for benchmarking the remittances. In any case going by the relevant transfer provisions contained in the Act and rules made thereunder, the Appellant is required to independently benchmark its international transaction to arrive at arm's length price. We note that the Appellant has claimed that the

remittance was purely in the nature of reimbursement of cost and therefore, the same should be considered as at arm's length as per Cost Plus Method. However, in effect, the Appellant had remitted 100% of the project cost overrun expenses which can be considered as Appellant's share of project cost overrun expenses of 80% along with markup of 20%. On the other hand, TPO was also required to determine the arm's length price by following one of the method prescribed. Accordingly, we remand this issue back to the file of the TPO/Assessing Officer for determination of ALP of the transaction of reimbursement of project cost overrun expenses by the Appellant to L&T Ceylinco and recompute transfer pricing adjustment, if any. In terms of the aforesaid, Ground No. 8 raised by the Appellant is allowed for statistical purposes.

76. Before parting with this issue we would also deal with another contention raised on behalf of the Appellant. During the course of hearing, it was contended on behalf of the Appellant that the transfer pricing provisions contained in the Act were not applicable to the international transaction under consideration for the reason that the transfer pricing provisions as applicable for the Assessment Year 2004-05 were inserted by the Finance Act, 2001 with effect from 01/04/2002, whereas the relevant being (a) The Installation, Erection and Commissioning Contract entered into between the Client, and L&T Ceylinco, (b) Supply Contract between the Client and Larsen and Toubro Limited and (c) Guarantee and Coordination Agreement between the Client, Larsen and Toubro Limited and L&T Ceylinco, were executed on 15/06/2000 (i.e. prior to 01/04/2002). In support reliance was placed upon the decision of Visakhapatnam Bench of the Tribunal in the case of M. Siva Parvathi & Ors. Vs. Income Tax Officer: [2011] 7 ITR(T) 468 (Visakhapatnam).

76.1. Per contra, the Ld. Departmental Representative submitted that no such contention had been raised by the Appellant before the Assessing Officer or the CIT(A) and therefore, the Appellant cannot be permitted to raise the same for the first time during the course of hearing. Further, the Appellant had reported the reimbursement of project cost overrun expenses as international transaction undertaken during the relevant previous year and therefore, the Appellant cannot now be heard to contend that the transfer pricing provisions were not applicable to the aforesaid transaction. Further, even as per the provisions contained in Section 92 of the Act, as applicable on 15/06/2000, the Assessing Officer could have made identical transfer pricing adjustment.

76.2. On perusal of the provisions contained in 'Chapter X – Special Provisions relating to Avoidance of Tax' we find that no exception has been carved out in relation to International Transactions pertaining to or arising out of contracts/agreements/arrangements which were executed/existing prior to 01/04/2002. Further, on a combined reading of the provisions contained in Section 92 to 92F of the Act, as applicable at the relevant time, we are of the considered view that the expression 'International Transactions' as defined in Section 92B of the Act cannot be restricted to the transaction of executing the contract/agreement between the Associated Enterprises and must be understood to mean/include transactions undertaken by the Associated Enterprises in discharge of their corresponding obligations under such contract/agreement during the relevant previous year. On perusal of agreements placed at page 153 to 380 of the paper-book, we find that the parties thereto were to discharge their corresponding obligations during the periods spanning over

subsequent financial years and that the same were in the nature of executor contracts (as opposed to executed contracts). The Appellant had reported the transaction of reimbursement of expenses as an international transaction during the relevant previous year. During the assessment proceedings as well as appellate proceedings before CIT(A), the Appellant has accepted the transaction of reimbursement of project cost overrun expenses as an international transaction and had contended that the submitted that the same was undertaken at arm' s length price as per the Cost Plus Method adopted by the Appellant. The contention that the transfer pricing provisions are not applicable to the transaction of reimbursement of cost overrun expenses has been raised for the first time before the Tribunal. On perusal of the record we find that no application for admission of additional ground/claim has been preferred by the Appellant. Be that as it may, we proceed to adjudicate the contention raised by the Appellant by treating the same as submission supporting the Ground No. 8. The decision of the Tribunal in the case of M. Siva Parvathi & Ors. (supra) cited on behalf of the Appellant, we have also perused the same and are of the view that it does not advance the case of the Appellant. In that case the issue before the Tribunal was regarding the applicability of provisions of Section 50C of the Act inserted by the Finance Act, 2002 with effect from 01/04/2003. In that case, the Tribunal noted that the parties had entered into the agreement for sale of property and discharge their corresponding obligations prior to the introduction of the Section 50C of the Act. Only the registration of the sale deed took place after the insertion of Section 50C of the Act. The assessee in that case was able to justify the delay in registration of the sale deed by establishing that the delay was caused on account of dispute between the parties. Keeping in view, the objection of introduction Section 50C of the Act - which

was to prevent under valuation of the real value of the property in sale deeds to avoid payment of tax/duty which was to be paid to the Government, the Tribunal concluded that the amended provisions contained in Section 50C of the Act were not applicable to the transaction of sale of property. The relevant extract of the decision of the Tribunal reads as under:

> *"8.10 The periods of the impugned transaction have fallen in the transition phase of law, i.e., the sale agreement was entered before the introduction of s. 50C and the registration was completed after the introduction of said section. As pointed out by Hon'ble apex Court in the case of A (supra), the assesses have only fulfilled the contractual obligation imposed upon them by virtue of the sale agreement. The ratio of the decisions in the cases of Nirmal Textiles (supra) and Laxman Singh (supra) is that the character of the transaction vis-a-vis IT Act should be determined on the basis of the law that prevailed on the date the transaction was initially entered into. However actual computation of income and income-tax would be made as per the law existing on the 1st April of the relevant assessment year. If we look at the impugned transactions from the point of view of this legal proposition, we notice that the provisions of s. 50C cannot be applied to the sale agreement as the said section was not available in the statute book at that time. Even otherwise, as stated earlier, there is no suppression of actual consideration. Consequently, since the final registration of the sale is only in fulfilment of the contractual obligation, the logical conclusion is that the provisions which do not apply at the time of entering into the transaction initially would not also at the time the transaction is completed. In view of the above, we are unable to agree with the arguments of learned Authorised Representative that the computation provisions fail in the facts and circumstances of the case. In our opinion, the final argument of the learned Authorised Representative that the FMV cannot be substituted in the absence of charging section is not relevant under the peculiar facts and circumstances of the case."*

76.3. From the above, it is clear that the Tribunal was of the view that there was no suppression of the actual consideration and the final registration of the sale was only culmination of contractual obligation of a transaction already fulfilled by the parties as per the agreement

already executed. In the above context, the Tribunal had concluded that the provisions of Section 50C of the Act introduced after the transaction was undertaken by the assessee in that case would not be applicable even though the sale deed was registered after the introduction of Section 50C of the Act. Reliance was placed on behalf of the Appellant on paragraph 8.1 of the aforesaid order (reproduced herein below) to contend that law that existed at the time of entering into transaction were prevail over this amendment subsequently made.

> *"8.1 The next legal issue that was pressed into service by the learned Authorised Representative was that if there is a change of law between the dates when the transaction was entered into and the transaction was actually completed, then the subsequent amendment will not change the character of the transaction and consequently the law that existed at the time of entering into the transaction will prevail over the amendments subsequently made. The case law relied upon by learned Authorised Representative are discussed in brief.*
>
> *(a) CIT v. Nirmal Textiles (supra). In this case the assessee was following Samvat year as his accounting year, which ends on the Diwali day of every year. During the period between 26th Dec, 1973 and 25th March, 1974, he sold certain plots and the said transaction was assessable in the asst. yr. 1975-76. On the date of transfer, the IT Act provided for treatment of immovable property, which was held for less than 24 months, as short-term capital asset. Subsequently, consequent to an amendment made the Finance Act, 1973 w.e.f. 1st April, 1974, the period of holding upto which the capital asset would remain as short-term capital asset was extended to 60 months instead of 24 months. The plots were held by the assessee therein for more than 24 months but less than 60 months. While the assessee claimed the gain on sale of plots as long-term, the AO treated the same as short-term. The Hon'ble Gujarat High Court held that the question whether the said transfer is of long-term capital asset or short-term capital asset will have to be determined as on the date of taxable event i.e., the date of transfer as per the law existing on the date.*
>
> *(b) CIT v. Laxman Singh (supra). In this case the assessee sold certain jewellery between 29th March, 1972 to 31st March, 1972. On those dates, the definition of 'capital asset', for the purpose of assessing the capital gain, did not include jewellery. However, w.e.f.*

1st April, 1973 jewellery articles were included in the definition of capital asset. The Hon'ble Rajasthan High Court held that no capital gain occurs as a result of sale of jewellery which was sold before 1st April, 1973, for the reason that whatever substantive rights that had occurred to the assessee prior to 1st April, 1973 could not be taken away."

76.4. On perusal of paragraph 8.1 above, we find that the same contained the submission advanced on behalf of the assessee and not the ratio laid down by the Tribunal. Further, in paragraph 8.10 the Tribunal has concluded that character of the transaction for the provisions of the Act should be determined on the basis of law prevailing on the date on which the transaction was initially entered into. However, the actual computation of income and income tax would be made as per the law prevailing on 1st April of the relevant Assessment year. In the case before us, there is no dispute as to the nature/character of the international transaction. Further, the Assessing Officer has applied the transfer pricing provisions as applicable on 01/04/2004, which only affect the computation of income. Further, we note that even the provisions contained in Section 92 of the Act as on the date of the execution of the agreements under consideration provided for determination of arm's length price in case of International Transaction between Associated Enterprises with respect to arrangement for allocation or apportionment of cost or expenses. In view of the aforesaid, we reject the contention of the Appellant that the transfer pricing provision would not apply to the International Transaction reported by the Appellant during the relevant previous year for the reason the same arise out of a contract executed prior to the introduction of transfer pricing provisions.

Ground No. 9 & 10

77. Ground No. 9 & 10 pertains to computation of deduction under section 80HHC & 80HHE of the Act, respectively. The Assessing

Officer recomputed the quantum of deduction allowable under Section 80HHC/80HHE of the Act, inter alia, by (a) Reducing 90% of gross interest (as against net interest) from the profits of business, (b) Reducing 90% of the Miscellaneous Income of from the profits of business, and (c) by reducing the profits in respect of projects eligible for deduction under Section 80HHB while computing the profits of business. In appeal preferred by the Appellant on the aforesaid three issues, the CIT(A) upheld the order passed by the Assessing Officer. Being aggrieved, the Appellant has carried the issues in appeal before the Tribunal.

78. During the Course of hearing both the sides agreed that the above issues are recurring in nature and stand decided by the Tribunal in the case of the Appellant for the preceding assessment years.

79. On perusal of the common order, dated 29/10/2020, passed by the Tribunal disposing off the cross appeals (ITA No. 3076/Mum/2012 & 3573/Mum/2012) filed in the case of the Appellant for the Assessment Year 2000-2001, the Tribunal has allowed the overturned the decision of the Assessing Officer and CIT(A) and held that net profits were to be reduced while computing profits of the business for the computation of deduction under Section 80HHC of the Act. Whereas, the other two issues were remanded back to the file of the Assessing Officer for adjudication as per directions in the earlier years. The aforesaid decision of the Tribunal was again followed by the Tribunal in the case of the Appellant for the Assessment Year 2000-2001 (ITA No. 6908/Mum/2012) and 2001-02 (ITA No. 2117/Mum/2013) decided by common order, dated 11/04/2022. Nothing has been placed before us to persuade us to take a view different from the view taken by the Tribunal in the immediately preceding assessment years. Accordingly, in conformity

with the aforesaid order of the Tribunal passed in the case of the Appellant for the Assessment Years 2000-2001, 2001-02 and 2002-03, we allow Ground No. 9(a) & 10(a) raised by the Appellant and direct the Assessing Officer to reduce net profits from profits of the business for the purpose of computing deduction under Section 80HHC/80HHE of the Act. Whereas, issues raised in Ground No. 9(b) & 10(b) *[relating to reduction of profit of business by 90% of the Miscellaneous income]*; and 9(c) & 10(c) [*relating to exclusion of profits of projects eligible for deduction under Section 80HHB of the Act from the profits of the business]* are concerned, we remit the aforesaid issues back to the file of the Assessing Officer for fresh adjudication in terms of the order passed by the Tribunal in the above said preceding assessment years. Accordingly, Ground No. 9(b), 9(c), 10(b) and 10(c) are allowed for statistical purposes.

Ground No. 11

80. Ground No. 11 raised by the Appellant is directed against the order of the CIT(A) confirming the disallowance under Section 14A of the Act for the purpose of computing book profit under Section 115JB of the Act.

81. While computing the book profit under Section 115JB of the Act, the Assessing Officer made an addition of INR 3,18,00,000/-, being the interest calculated notionally and attributed to the earning of exempt income by invoking the provisions of Section 14A of the Act. The CIT(A) confirmed the order passed by the Assessing Officer. Therefore, the Appellant carried the issue in appeal before us. While deciding Ground No. 6 above, we have deleted the addition made under Section 14A of the Act for the purpose of computing income under the normal provisions of the Act. Therefore, the addition made while computing books profits under Section 115JB of the Act does

not survive. Accordingly, addition of INR 2,00,201/- made by the Assessing Officer while computing the 'Book Profits' under Section 115JB of the Act is deleted. Assessing Officer directed to compute the amount of disallowance under Section 14A of the Act to be added to the Book Profits in terms of Section 115JB of the Act read with Explanation 1(f) thereto as per the decision of the Special Bench of the Tribunal in the case of Assistant Commissioner of Income Tax, Circle 17(1), Delhi vs. Vireet Investments Ltd.: [2017] 58 ITR(T) 313 (Delhi-Trib.) (SB) on the basis of audited financial statements of the Appellant. In terms of the aforesaid, Ground No. 11 raised by the Appellant are allowed for statistical purposes.

Additional Ground 1 & 2

82. By way of the Additional Grounds No.1 and 2 raised by the Appellant vide letter, dated 14/11/2018, the Appellant has claimed that while determining book profits under Section 115JB of the Act the Assessing Officer should have reduced deduction under Section 80HHC and 80HHE of the Act as computed on the basis of profits as per Profit & Loss Account as against profits of business and profession computed under the normal provisions of the Act. Both the sides agreed that identical additional ground raised by the Appellant in appeal pertaining to preceding assessment years were admitted by the Tribunal. On perusal of the additional ground we find that the additional ground raised by the Appellant is a legal ground which can be adjudicated after taking into consideration material on record without inquiring into new facts. Thus, therefore, consistent with the view taken by the Tribunal in the preceding assessment years, the additional grounds raised by the Appellant are admitted in view of the judgment of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. Vs. CIT: 229 ITR 383. However, in

view of the submission of the Learned Departmental Representative that the Assessing Officer was never granted opportunity to examine the claim/computation of the Appellant, and that the adjudication of the ground would require verification of records and computation of deduction under Section 80HHC/80HHE of the Act in case the contention of the Appellant is accepted, we remit the issues raised in Additional Ground No. 1 and 2 to the file of the Assessing Officer for adjudication keeping in view the judgment of the Hon'ble Supreme Court in the case of Ajanta Pharma Vs. CIT: 327 ITR 305.

83. In result, the present appeal preferred by the Appellant is partly allowed.

Order pronounced on 11.12.2023.

Sd/-	***Sd/-***
(Prashant Maharishi)	**(Rahul Chaudhary)**
Accountant Member	**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 11.12.2023
Alindra ,PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai