IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F': NEW DELHI

BEFORE,
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI SUDHIR PAREEK, JUDICIAL MEMBER

ITA No.1617/Del/2023
(ASSESSMENT YEAR 2018-19)

Pragati Power Corporation Ltd. Himadri Rajghat Power House, Office Complex Rajghat New Delhi-110002 PAN:AACCP 8035F	Vs.	Asst. CIT Circle-20(1) New Delhi
(Appellant)		**(Respondent)**

Assessee by	Shri Ajay Vohra, Sr. Adv., Shri S. Krishnan, Adv. & Shri Shaurya Jain, CA
Respondent by	Ms. Nimisha Singh, CIT-DR

Date of Hearing	20/05/2024
Date of Pronouncement	14/08/2024

O R D E R

PER S.RIFAUR RAHMAN, AM:

1. This appeal has been filed by the Assessee against the order of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) Delhi ["Ld. CIT(A)", for short], dated 29/03/2023 for Assessment Year 2018-19.

2. The Ld. CIT(A) has sustained the following additions made by the Assessing Officer, the same are given below:

Sl.	***Particulars***	***Amount(Rs.)***
1.	*Addition on account of non-recognition of late payment surcharge (LPSC)*	*6 79 65 74 000/-*
2.	*Disallowance of proportionate interest u/s 36(1)(iii) of the Act*	*17 66 79 721/-*
3.	*Disallowance of foreign exchange loss u/s 43A of the Act*	*7 98 24 636/-*
4.	*Disallowance of proportionate depreciation u/s 32 of the Act*	*17 67 88 271/-*
5.	*Disallowance of proportionate depreciation u/s 32 of the Act*	*2 36 12 51 643/-*
	Total	*9,59,11,18,274/-*

3. Against the order of Ld. CIT(A), the assessee has filed concise grounds of appeal:-

"01. That the Ld. CIT(A) has erred in confirming the additions of Rs.959,11,18,274/-made by Assessment Unit (AU) under normal provisions and additions of Rs.682,70,31,234/- made by AU to the book profit u/s 115JB of the Act without assigning any reasons and without applying his mind, merely relying upon the reasoning given by the AU.

02. That the Ld. CIT(A) has erred in not exercising the powers conferred upon him u/s 46A of the Income Tax Rules, 1962 by not admitting the additional evidence produced by the assessee when the same were necessary to render substantial justice to the assessee.

03. That the Ld. CIT(A) has erred in law and on facts in confirming the addition of Rs.679,65,74,000/- made by AU, being late payment surcharge on over dues, on the ground that the assessee was following mercantile system of accounting when the assessee had not recognised the same as revenue in accordance with ICDs-IV issued by CBDT u/s 145(2) of the Income Tax Act r/w AS-9 and IND AS-115 as there was no certainty of realizing such amount.

04. That the Ld. CIT(A) and the AU have erred in law and on facts in making the addition of Rs.679,65,74,000/- to the book profit being late payment surcharge on overdues, u/s 115JB of the Act ignoring the material fact that the assessee had maintained the books of accounts as per Schedule-3 of the Companies Act r/w AS-9 and IND AS-115.

05. That the Ld. CIT(A) and AU have erred in law and on facts in disallowing the interest of Rs.17,66,79,121/-invoking the provisions of section 36(1)(iii) of the Act, applying average cost of debts to the amount of capital works-in-progress (CWIP), addition to fixed assets and capital advance, ignoring the material fact that borrowed amounts were not utilised by the assessee for acquiring capital asset and that the interest free owned funds (equity and reserves) were sufficient to meet out such expenditure.

06. That the Ld. CIT(A) and AU have erred in law and on facts in disallowing deduction u/s 80IA(4) of the Act on unwinding interest of Rs.7,98,24,639/- claimed by the assessee on retention liability project in the Profit & Loss A/c but had reverted back while computing eligible profit for deduction as the same was not allowable as expenditure under the Income Tax Act.

07. That the Ld. CIT(A) has erred in confirming the order of AU making addition of Rs.17,67,88,271/- being foreign exchange loss incurred by the assessee on payment of foreign exchange to BHEL as per contract for acquisition of capital asset from abroad treating the same as capital expenditure ignoring the provisions of section 37 as well as section 43AA of the Income Tax Act r/w ICDs-VI issued u/s 145(2) of the Act.

08. That the Ld. CIT(A) and AU have erred in disallowing the depreciation of Rs.233,07,94,409/- by applying the depreciation rate applicable for SLM method of depreciation to the opening WDV of the asset when the same was to be applied to the actual cost of assets.

09. That the Ld. CIT(A) and AU have erred in law and on facts in disallowing the depreciation of Rs.3,04,57,234/- to the income of assessee under normal provisions and to the book profit u/s 115JB of the Act by disallowing 50% of the depreciation in respect of assets which were acquired by the assessee and put to use on the same date i.e. 0n 31.03.2019 ignoring the material fact that the assessee itself had claimed only 50% of the deprecation.

10. That the appellant seeks leave to add, amend, alter, abandon or substitute any of the above grounds during the hearing of the appeal."

4. We shall deal with the above issues ground wise. Ground No.1 is general in nature, the same are not adjudicated.

5. The basic facts are, the Pragati Power Corporation Ltd. (Assessee) is a Government of Delhi undertaking, engaged in generation of electricity. The Assessee is having two gas based electricity generation plants, one at Bawana known as PPS-III and another at IP Estate known as PPS-I, Plant at Bawana i.e., PPS-III plant is eligible for deduction u/s 80IA(4) of the Income Tax Act.

6. The electricity generated by the assessee is supplied to distribution utilities of Delhi i.e. DISCOMS and two other distribution utilities outside Delhi. The income of the assessee is generated from the electricity tariff received from the aforesaid DISCOMS against the electricity supplied to them. The said tariff is determined by Delhi Electricity Regulatory Commission (DERC) in terms of statutory tariff regulations applicable for the electricity supplied within Delhi. However, in respect of the power plant from which electricity is supplied by the company outside Delhi, the tariff is determined by Central Electricity Regulatory Commission (CERC) in terms of tariff regulations applicable for the electricity supplied outside Delhi. The Assessee is used to raise monthly bills of electricity supplied by it to the DISCOMS, which are payable within a period of 45/60 days from the date of issuance of bills. If the payment is not received by the assessee within the specified period then as per the terms of agreement, assessee is entitled for the late payment surcharge (LPSC) at the rates notified under statutory tariff regulations from time to time. During the relevant period the rate of LPSC was 1.5% per month i.e. 18% per annum on the outstanding amount of bills.

7. For the year under consideration, assessee filed the return of income declaring income at Rs.119.10 Cr. under the normal provisions and book profit at Rs.336.99 Cr. under MAT provisions as per section 115JB of the Act.

8. While completing the assessment, the Assessing Officer completed the assessment u/s 143(3) of the Act at Rs.1078.21 Cr.

after making additions of Rs.959.11 Cr to the income of assessee under normal provisions. Assessing Officer also made additions of Rs.6,82,70,31,234/- to the book profit u/s 115JB of the Act.

9. Aggrieved by this order, assessee filed an appeal before CIT(A), however, he sustained all the additions made by the Assessing Officer.

10. With regard to ground No.2 raised by the assessee, it is interconnected with Ground No.3, hence adjudicated together. As stated above in the facts, the issue raised by the assessee relating to non acceptance of additional evidence by the Ld CIT(A) and issue relating to LPSC. At the time of hearing, with regard to ground No.2, the Ld. AR submitted that Ld CIT(A) has sustained the additions without assigning any reasons of his own, ignoring the submissions made by the assessee as well as evidences/documents filed by the assessee. Further submitted that during the proceedings, assessee has filed certain additional evidences, which were not allowed by the CIT(A) to be admitted. The said evidences are as under:-

i) Copy of Power Purchase Agreements (PPAs) entered into by the assessee with BRPL/BYPL (DISCOMS in short).
ii) Relevant excerpts from DERC regulations to show that in case of delayed payment or non-payment, a late payment surcharge at the rate of 1.5% is leviable.
iii) Comments of C&AG of India on the report of statutory auditor for the year under consideration.
iv) Equity sanction order-dated 29.11.2011 issued by GNCTD.
v) relevant part of contract entered into by the assessee with BHEL.

a). Further Ld AR submitted that the relevant excerpts of DERC regulations filed by the assessee in fact, is not the additional evidence. Assessee had already argued before the Assessing Officer that the invoices were issued as per DERC regulations, therefore, in

order to show that the tariff was charged as per DERC regulations, the copy of regulations were filed by the assessee. There was no reason for CIT(A) not to admit the same particularly when the same was not the self-serving document.

b). Similarly, Power Purchase Agreements were filed to show that the electricity was sold to DISCOMS as per the agreement, but it was the DISCOMS who failed to make the payment. Moreover, comments of C&AG of India on the audit report of statutory auditor were filed to show that the same was accepted by C&AG and no qualification was made.

c). Equity sanction order was produced by the assessee before CIT(A) to establish that the entire Bamnauli Project was funded out of equity infusion by GNCTD. It was throughout the stand of the assessee that the said project was funded out of equity infusion by GNCTD and therefore, it was not in fact an additional document. Similar were the contract with BHEL and loan agreement with Power Finance Corporation for Bawana Plant.

d). These documents were necessary to render substantial justice to the parties. Rather admission of additional evidence would have enabled the CIT(A) to dispose the appeal in a fair and efficient manner. In CIT vs Virgin Securities & Credits (P) Ltd. (2011) 332 ITR 396 (Del), Delhi High Court have held that Rule 46A permits the CIT(A), to admit additional evidence if he finds that the same is crucial for disposal of the appeal.

e). Though Rule 46A of the Income Tax Rules restrict the right of the assessee to produce additional evidence, however, it does not debar the first appellate authority from calling for additional evidence nor does it debar the Assessing Officer from producing further evidence in support of the evidence made by him. The

power of the First Appellate Authority conferred by section 250 is not affected or disturbed by Rule 46A refer Smt Mohinder Kaur vs Central Government (1976) 104 ITR 120 (ALL)). Infact, Rule 46A (4) specifically lays down that its provisions shall not affect the power of the First Appellate Authority to call for the production of any document or the examination by him of any witness in order to enable him to dispose off the appeal before him or for any other substantial cause. It means that Ld. CIT(A) was well within his powers to accept the additional evidence produced by the assessee.

11. On the other hand, Ld DR supported the findings of Ld CIT(A) in rejecting the additional evidences and submitted that the assessee has not followed the due process of law in this regard.

12. Considered the rival submissions and material placed on record, we observed that the Ld CIT(A) has rejected the evidences submitted before him without granting proper opportunity to the assessee as well as analyzing the evidences submitted before him. In our considered view, the evidences submitted by the assessee goes to the root of the matter and Ld CIT(A) could have dealt with the issue on merits instead of rejecting on the face of it. Since the issue raised by the assessee and the additional evidences have direct correlation. Hence these are required to be admitted to adjudicate the issue on merit. Accordingly, the ground no 2 raised by the assessee is allowed.

13. With regard to ground Nos.3 & 4, the relevant facts are, Assessee is engaged in the generation of electricity which is being sold to various distribution utilities (i.e., BRPL, BYPL, etc.) who are in turn distributing the same to the ultimate customers. Under the Electricity Act 2003, PPAs were entered into by the assessee with DISCOMS to regulate the terms and conditions in respect of sale of power. In terms of the said PPAs, late payment surcharge (LPSC) as per DERC regulations is leviable in order to settle the power purchase bills within the stipulated time frame.

13.1. As per Regulation 64 of DERC (Terms & Conditions for Determination of Tariff) Regulations 2012 "in case, payment of any bill for charges payable under these regulations are delayed by a beneficiary beyond a period of 60 days from the date of dealing, a late payment surcharge @ 1.25% per month shall be levied by the generating company". Similarly, Regulation 137 of DERC (Terms & Conditions for Determination of Tariff) Regulations 2017, had enhanced the said LPSC from 1.25% to 1.5% per month if the bill is paid beyond a period of 60 days from the date of billing. Thus, LPSC is nothing but a monetary charge in the form of compensatory interest levied on delayed payment.

13.2. In the present case, the DISCOMS were continuous to default from 2010-2014 onwards in payment of both, the principal amount of power purchase dues as well as the interest component in the form of LPSC. Up to FY 2022-23, an aggregate sum of 9277.24 Cr. (approx.) could not be realized from DISCOMS on account of LPSC.

13.3. The assessee has filed a recovery suit before the Court of Law which is pending before the Hon'ble Supreme Court. In the said suit, DISCOMS have disputed the payment of principal sum as well as LPSC before the Supreme Court. In WP. (C) No. 104/2014, Hon'ble Supreme Court, vide order-dated 26.03.2014, has directed the DISCOMS to pay current payments to the generating and transmission companies w.e.f 01.03.2014 which will relate to the billing period from 01.01.2014. Still DISCOMS were not making payment, hence contempt petition was filed. Vide order-dated 12.05.2016 in I.A. No. 01 of 2015 in Contempt Petition (C) No.83/2015 in W.P. (C) No. 104 of 2014, Hon'ble Supreme Court had directed the DISCOMS to pay 70% of the current principal dues. Thus, recovery of LPSC, during the year, remained uncertain.

13.4. As per the accounting policy adopted and disclosed by the assessee, amount of monthly bills raised by the assessee for sale of power to the DISCOMS are accounted for as income however, LPSC

was recognized as income only when the same is actually received following IND- AS-115, AS-9, & ICDs-IV, ICAI guidance note & Section 5 r/w section 145 of the Income Tax Act though the DISCOMS were depositing TDS to the credit of company against LPSC which was offered by the assessee as income, from the records, they were not releasing the amount towards LPSC on which TDS had been deposited. Necessary disclosure to this effect had been incorporated in Note-27 of the audited financial statements of the assessee.

13.5. During the assessment proceeding, Assessing Officer directed the assessee vide notice-dated 21.12.2020, dated 22.02.2021 and notice-dated 05.04.2021 to show-cause as to why the amount of 679,65,74,000/- be not recognized as revenue as the assessee was following mercantile method of accounting system.

13.6. In response, Vide letter dated 04.02.2021, 26.02.2021 and 08.04.2021, assessee submitted that the amount of LPSC recoverable from DISCOMS had not been accounted as revenue due to continuous default in payment by DISCOMS and underlying uncertainty in its ultimate collection. Assessee relied upon clause 9.2 of AS-9 and clause 4 of ICDs-4 notified u/s 145(2) of the Act where it is stated that "revenue shall be recognised when there is reasonable certainty of its ultimate collection". However, Assessing Officer rejected the submissions made by the assessee and made the addition of Rs.6,79,65,74,000/- to the income of assessee stating that since the assessee has followed mercantile system of accounting, any receipts accrued in the nature of revenue must be recognized as revenue, whether it is collected or not during the year.

13.7. Against this addition, assessee filed an appeal before CIT(A), relying upon various case laws, however CIT(A) sustained the additions.

14. At the time of hearing, Ld AR submitted as under:

A. **Mercantile system of accounting does not warrant taxation of hypothetical income and therefore revenue recognition must be postponed when there is uncertainty of realization due to disputes and defaults by the other party.**

a) As per the provisions of section 5, income can be said to have accrued as well as arisen only when there is no improbability of realization.

Section 5 prescribes the scope of total income. It encompasses within its fold 03 forms accrual, arisen and receipt as basis for taxing income. In so far as "receiving of income" is concerned, there is no difficulty, however the terms "accrues" and "arises" are two distinct terms. In strict terms, the term accrual means growth/accumulation/increase/addition, however the same can be said to have "arisen" only when it acquires a tangible shape so as to be receivable. There can be situations where income might have been accrued but the same cannot be said to have arisen until the recipient gets a vested right for the same.

B) Tax cannot be levied on hypothetical income

i) It is a well settled law that tax cannot be levied on hypothetical income. Income tax is a levy on income, Liability to tax is attracted on accrual of income or on its receipt but the substance of the matter is the income. If income does not result at all there cannot be a tax, even though in book keeping, an entry is made about a hypothetical income which does not materialize.

ii) In the case of Godhara Electricity Co. Ltd. vs CIT (1997) 225 ITR 746 (SC), Supreme Court relied upon the following cases:-

CIT vs Shoorji Ballabhdas & Co. (1962) 46 ITR 144 (SC)

CIT vs Birla Gwalior (P) Ltd. (1973) 89 ITR 266 (SC)
Morvi Industies Ltd. vs CIT (1971) 82 ITR 835 (SC)
Poona Electric Supply Company Ltd. vs CIT(1965) 57 ITR 521 (SC)
Kashiparekh (H.M.) & Co. Ltd. vs CIT (1960) 39 ITR 706 (Bom)
State Bank of Travencore vs CIT(1986) 158 ITR 102 (Ker)

Supreme Court held in this case that the question, whether there was real accrual of income to the assessee Co. in respect of the enhanced charges for supply of electricity, has to be considered by taking the probability or improbability of realisation in a realistic manner. Tribunal had rightly held that the claim at the increased rate made by the assessee Co., on the basis of which necessary entries were made, represented only hypothetical income and the impugned amount as brought under tax by the ITO did not represent the income which had really accrued to the assessee during the relevant previous year.

iii) Assessee is also relying upon the following cases:

CIT Kota vs M/s Chambal Fertilizers & Chemicals Ltd. Gadepan Kota ITA No.866 of 2008 decided on (Raj)
CIT vs Annamalai Finance Ltd. (2009) 319 ITR 196 (Mad)
CIT Chennal vs Shriram Investments Ltd. (2015) 378 ITR 533 (Mad)
CIT vs Vasisth Chay Vyapar Ltd. (2019) 410 ITR 244 (SC)

iv) Delhi bench of ITAT in the case of Brahmaputra Capital & Financial Services Ltd. vs ITO (2009) 119 ITD 266 have held that there was uncertainty regarding ultimate collection of interest hence assessee was justified in not showing the notional interest income which did not actually materialized during the year under consideration.

v) Delhi High Court in CIT vs Metropolitan Financier (P) Ltd. (1981) 5 Taxman 216 have held that in the instant case,

assessee Co. found that it was not recovering even the principal amount, let alone the overdue interest on the higher purchase agreements. So, it chose to keep the impugned interest in suspense account. Hence, the Tribunal was found to be justified in holding that the impugned sum was not liable to income tax.

vi) Mumbai Bench of ITAT in Bectel International Inc. vs DCIT (2016) 71 Taxmann.com 62 have held that the assessee was rightly following AS-9. It cannot be said that income has accrued merely on the ground that the assessee had been following mercantile system. It has to be considered whether there has been real income to the assessee taking into consideration the commercial and business realities of the case. No real income can be said to have accrued during the pendency of suit/disputes.

C) Section 5, ICDS-4 notified u/s 145, IND-AS 115, IND-AS 18, EAC opinion, framework from financial reporting, AS-9 and guidance note on accrual basis of accounting, also pre-empt the significance of realisation certainty.

i) Section 5 of the Act lays down the necessary foundation for income recognition under which probability of realization is one of the three tests laid down by the Apex Court in the case of Parashuram Pottery WorksLtd. vs ITO (1977) 106 ITR 01 (SC), in order to determine whether an income has accrued to the assessee or not.

ii) Principles of section 5 has further been canvassed in section 145 of the Act which prescribes the methods of accounting. It provides that the income under the head "Profit & Gains of Business or Profession" or "Income From Other Sources" shall be computed in accordance with the mercantile or cash system of accounting regularly employed by the assessee and shall be subject to the

income computation and disclosure standards (ICDS) notified by the government.

iii) Under ICDS-4 notified u/s 145 of the Act, "realization certainty" is the necessary predicament for recognition of revenue.

iv) Clause 4 of ICDs-4 (revenue recognition) notified u/s 145(2) provides that "revenue shall be recognized when there is reasonable certainty of the ultimate collection".

v) Clause 9.2 of AS-9 states that where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim, e.g. for escalation of price, export incentives, interest etc, revenue recognition is postponed to the extent of uncertainty involved. In such cases, it may be appropriate to recognize revenue only when it is reasonably certain that the ultimate collection will be made. When there is no uncertainty as to ultimate collection, revenue is recognised at the time of sale or rendering of service even though payments are made by installment.

vi) Para 9.5 of AS-9 states that "when recognition of revenue is postponed due to the effect of uncertainties, it is considered as revenue of the period in which it is properly recognized.

vii) The theory of "realization uncertainty envisaged in section 5 and 145 of the Act also finds place in the financial reporting framework applicable to the assessee Co.

viii) Financial statement of the assessee Co. has been drawn-up in accordance with Indian Accounting Standards (IND-AS) notified u/s 129 of the Companies Act 2013.

ix) IND-AS-115 deals with "revenue from contracts with customers". Para-9 of IND AS-115 specifies 5 pre-requisites

that is to be satisfied in toto in order to account for a contract with customer. One such pre- requisite is the probability of realisation of consideration which in turn depends upon the customer's ability and intention to pay.

x) Prior to the enforcement of IND AS-115, IND AS-18 dealing with revenue recognition also held that revenue shall be recognized only when it is certain that future economic benefits in relation to a transaction will flow to the entity. In some cases, this may not be probable until the consideration is received or until an uncertainty is removed.

xi) Even the Expert Advisory Committee (EAC) of ICAI has upheld the above view in volume-XXXVIII of the Compendium of Opinions stating that "to the extent and till the time such uncertainty of collection exists, revenue recognition should be postponed. The revenue needs to be recognised only when it is probable that the economic benefits associated with the transaction will flow to the entity.

xii) Para 1.17 of "Comprehensive Framework for Financial Reporting (Revised March 2018) issued by International Accounting Standards Board deals with the concept of financial performance reflected by accrual accounting. In simple words, what is accruing and when it is accruing is based on facts and circumstances of that particular transaction i.e. actual occurrence of economic resources and claims is relevant. That is to say the substance of the transaction is vital then the legal form.

xiii) Para 2.12 specifies that financial reports must faithfully represent the "substance" of the economic phenomena that it purports to represent.

iv) Financial information is considered to be faithfully represented when its depiction exhibits 03 characteristics, "completeness, neutral & free fromerrors"

xv) It is noteworthy that the above opinion is reiterated in para 10 of AS-9 "revenue recognition" which states that if at the time of raising of any claim for revenue from sales or service transactions, it is un-reasonable to expect ultimate collection, revenue recognition should be postponed"
xvi) Guidance note on accrual basis of accounting issued by ICAI vindicates the above view as under: -

"4.5 Recognition of revenue requires that revenue is measurable and that at the time of sale or the rendering of service or the use of resources of the enterprise by others, it would not be unreasonable to expect ultimate collection.
xvii) Thus, from all the corners a financial reporting framework applicable to the assessee Co., it emanates that in case probability of realization of a receipt is uncertain at the time of raising of claims, then revenue recognition on account of it shall be postponed until such uncertainty is resolved.

D) When matter is *sub-judice*, no revenue can be recognized.

i) It is a settled principle that where a suit has been filed, the right to get the amount for the period after the institution of the suit would depend not on the agreement between the parties but on the discretion of the Court.

ii) In CIT vs Bengal Jute Mills Company Ltd. (No.1) (1987) 165 ITR361 (Cal), Calcutta High Court have held that whether there is accrual of interest should be judged from a realistic point of view.

iii) In CIT vs Raigharh Jute Mills Ld. (1981) 132 ITR 702 (Cal), Debtor has stopped paying interest and had also denied its liability in the suit filed by the assessee. Hence, assessee stopped charging interest as there was no chance of recovery. Calcutta High Court held that no interest income could be assessed in the hands of assessee.

iv) In CIT vs Uttar Pradesh Financial Corporation (1992) 194 ITR 282 (ALL), assessee, a financial corporation, did not credit interest to Profit & Loss A/c but to suspense account. It filed suit for recovery of loan and the suit was pending. It was held that interest did not accrue during the pendency of suit.

In the present case also, principal amount was due from DISCOMS and the assessee company had filed the suit to recover the amount. Hence, it cannot be said that LPSC had accrued to the assessee as income when the principal amount itself was outstanding.

E) The system of accounting qua LPSC has been regularly followed by the assessee as well as accepted by the Assessing Officer in the preceding years, hence any change in stand would be against the principal of consistency

i) Assessee was regularly following this system of accounting since FY 2014-15 relevant to AY 2015-16. This system was accepted by the Department in AY 2015-16, 2016-17 & 2017-18. Even in AY 2019-20, Department has not objected to this system of accounting. Hence the rule of consistency demands that in this very year also, this system was to be accepted by the Assessing Officer and CIT(A).

ii) In Radhasoami Satsang vs CIT (1992) 193 ITR 321 (SC). Supreme Court did not think it appropriate to allow the reconsideration of an issue for a subsequent assessment year, if the same fundamental aspects permeates in different assessment years. Hon'ble Supreme Court held that "strictly speaking, res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact, one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. Assessee is also relying upon the following case:-

Parashuram Pottery Works Ltd. vs. ITO (1977) 106 ITR 01 (SC) Pr. CIT vs Quest Investment Advisors Ltd. (2018) 409 ITR 545 (Bom)

Bharat Sanchar Nigam Ltd. vs UOI (2006) 282 ITR 273 (SC)

CIT vs Excel Industries Ltd. (2013) 358 ITR 295 (SC)

CIT vs Realest Builders & Services (2008) 307 ITR 202 (SC)

DCIT Circle-33 vs India housing (2020) 113 Taxmann.com 535 (ITAT-Kolkata)

Bodal Chemicals Ltd. vs Addl CIT (2019) 112 Taxmann.com 217 (ITAT-Ahmedabad)

Travencore Textiles P. Ltd. vs ITO (ITA No.3193/Chny/2018) (ITAT-Chennai)

AVTEC Limited vs DCIT (2015) 370 ITR 611 (Del)

F) Even if the statutory auditors have made some observation in the accounts in respect of LPSC not shown as income, the said observation has not been accepted by the CAG of India as well as the tax auditor.

i) Rather they have accepted the system of accounting followed by the assessee company.

ii) ii) In so far as observation by the statutory auditor is concerned, it is stated that assessee Co. is a government Co. u/s 2(45) of the Companies Act, more than 50% of the share capital is held by government of NCT of Delhi. As per the provisions of section 143(6) and (7) of the Companies Act, C&AG can conduct a supplementary as well as test audit of the accounts of government company after the receipt of report of statutory auditor and raise comments upon the same. In the present case, C&AG of India have not pointed out any specific anomaly in the accounting treatment adopted by the assessee Co., in respect of LPSC recoverable from DISCOMS. Further, the audited books of accounts have been duly accepted by the management of the assessee Co. as well as by the tax auditors.

iii) Even if some bills / invoices would have raised by the assessee Co. on DISCOMS in respect of LPSC recoverable from them, the same would have tantamounted to bestowing a "claim" upon them.

iv) In CIT vs Ashok Bhai Chiman Bhai (1956) 56 ITR 42 (SC), it has been observed that mere raising a claim does not by itself create any legally enforceable right to receive any income.

v) Thus, there is a difference between the terms "claim" and "revenue recognition". To convert a piece of claim into recognition of revenue, it is fundamental that there is no probability of uncertainty of realization at the time of raising such claim.

G) Books of accounts have already been accepted by the Assessing Officer. Even if the Revenue by way of recoverable LPSC is not recognized and the bad debts are not claimed separately by the assessee, it cannot be prejudiced by differences in such accounting treatment.

i) Under section 145(3), the prime requirement to accept a different accounting method than that adopted by the assessee is to express the dissatisfaction as to the completeness or correctness of the books of accounts of the assessee and reject the same after giving an opportunity of being heard.

iii) In the present case, no deformity or irregularity has been pointed out by the Assessing Officer in the books of accounts, however, Assessing Officer has simply changed the method of accounting qua LPSC without any shred of evidence. It is a settled law that method of accounting followed by the assessee cannot be jettisoned/discarded without rejecting books of accounts or pointing out any defect in the method of accounting or any finding that true and fair profits cannot be deduced therefrom. The assessee is relying upon the following cases:-

PCIT vs Panchsheel Colonizers Pvt. Ltd. (2019) 111 Taxmann.com 459 (Raj)

Investment Ltd. vs CIT (1970) 77 ITR 533 (SC)

CIT vs McMillan & Company (1958) 33 ITR 182 (SC)

CIT vs Manish Buildwell (P) Ltd. (2011) 63 DTR 369 (Del), Manu/De/4468/2011

iii) In the assessment orders, the Assessing Officer has number of times stated that assessee Co had to recognize recoverable LPSC as income and could have claim deduction for the same as "bad debts" separately u/s36(1)(viia) of the Act.

iv) It is submitted that it would have ended in the same result but it is a well recognized principle that no income can be subjected to tax if its realisation is uncertain. Further by recording the said transaction as bad debts, it would have amounted to unilaterally waiving off its right to recover the said amount from the DISCOMS when the outcome of contempt petitions filed by the Delhi Power Utilities have not been concluded and that the DISCOMS have also not waived off their liabilities. It would haveresulted into huge financial implications.

v) In any case, the treatment on account of bad debts u/s 36(1)(viia) is also based on the accounting treatment and the same would have yielded into same results. Hon'ble Supreme Court in the case of CIT vs Sarkar Builders (2015) 375 ITR 392 (SC) have held that the assessee should not be prejudiced by differences in accounting treatment adopted by him.

H) When all the accounting principles laid down under the Income Tax Act and the accounting standards have been duly followed by the assessee and that the impugned issue is revenue neutral in nature, then a hypothetical income cannot be subjected to tax.

i) The issue involved in the present case is revenue neutral. The rate of tax in the present assessment year as well as in the subsequent assessment year is same, therefore, the dispute raised by the revenue is entirely academic or at best may have a minor tax effect.

ii) Assessee is also relying upon the judgement of Supreme Court in the case of CIT vs Glaxo Smithkline Asia (P) Ltd. (2010) 236 CTR 1 (SC) wherein Supreme Court did not interfere in the matter as the entire exercise was a revenue neutral exercise.

I) When principal amount itself is overdue, recovery of LPSC is uncertain

As analyzed in detail above, in the instant case, collection of LPSC is clouded in uncertainty and accordingly, the same is recognised as income at the time of receipt by the assessee. Certainty of ultimate collection arises only when the same is received by the assessee from its customers. Infact, accrual of the impugned income cannot be said to have been happened during the year even for the reasons that LPSC is in the nature of penalty, in case of failure by the DISCOMS to pay its dues within the period as specified by DERC. When the principal amount of bills towards sale of electricity itself is due then there is no basis for making out a case that LPSC payable by the customers would be collectible with certainty.

J) the other CPSUs such as NTPC, PGCIL & NHPC are alsorecording LPSC on cash basis because of level of uncertainty involved in its realization.

It is stated that if there is no income, no tax can be levied even though, in book keeping, an entry is made about a hypothetical income which does not materialize. Moreover, assessee Co. itself offers LPSC to tax when the uncertainty regarding its collection is resolved. Since the impugned issue is revenue neutral, no addition is sustainable on this count.

K) Without prejudice, deduction u/s 80IA of the Act shall be enhanced by an equivalent amount.

i Without prejudice to the aforesaid submission and in the alternative, in case your honour are still not inclined to accept the aforesaid prayer of the assessee then it is most humbly requested that the alleged income from LPSC amounting to Rs.679,65,64,000/- shall be allowed as deduction u/s 80IA of the Act.

ii. Since the assessee Co. is engaged in the business of generation and sale of power, it is eligible for deduction u/s 80IA of the Act. The business model of the assessee Co. is not in dispute; it is also not the case of the Assessing Officer that LPSC

has not been derived from the business of generation and sale of power. Hence, the action of Assessing Officer in inflating the income of the assessee Co. without enhancing corresponding deduction u/s 80IA of the Act is in sheer violation of the requirement of law.

iii. Income of an assessee can be enhanced either by way of making an addition to the returned income or by making a disallowance in respect of any component of expense. In both the scenarios "profit and gains" derived by the assessee under the Income Tax Act gets inflated, and the same become eligible for enhanced deduction under Chapter-VIA of the Act.

iv) IV Mumbai Bench of ITAT in the case of ITO vs Anthelio Business Technologies (P) Ltd. (2017) 78 Taxmann.com 203, relying upon the Circular No.37/2016 issued by CBDT held that deduction under Chapter- VIA is admissible on the profits enhanced by the Assessing Officer by making disallowance of certain expenditure and accordingly in this case, it is held that the deduction u/s 10B is allowable on certain disallowances such as pertaining to section 32, 40(a)(ia), 40A(3), 43B etc, made by the Assessing Officer while computing profits and gains of business activity.

v. Bombay High Court in CIT vs Gem Plus Jewellery India Ltd. (2011) 330 ITR 175 held that the disallowance u/s 40(a)(i) is a statutory disallowance and thus enhanced profit due to disallowance shall be considered for deduction u/s 10B of the Act. Assessee is also relying upon following cases:-

CIT vs M Pact Technology Services (P) Ltd. (ITA No.228 (Kar) of 2013 dated 11.07.2017)

Pr. CIT vs BMC Software India (P) Ltd (2019) 109 Taxmann.com 277

ITO vs Sahasra Electronics Pvt. Ltd. (2010-TIOL-89-ITAT-Del)

In view of above judicial precedence, it is submitted that in case addition on account of LPSC is sustained, then corresponding deduction of the same u/s 80IA of the Act is also to be allowed in the interest of justice.

b. <u>Case Laws</u>

Issue relating to LPSC is no more res integra and has already been settled by the Supreme Court in following cases:-

i. Pr. CIT Hissar vs M/s Dakshin Haryana Bijli Vittaran Nigam Ltd. SLP(C) No.18187 of 2015 decided on 17.07.2019, Manu/SCOR/20434/2019.

In this case, Hon'ble Apex Court has dismissed the SLP filed by the revenue against the judgement of Punjab & Haryana High Court in thecase of Pr. CIT Hissar vs M/s Dakshin Haryana Bijli Vittaran Nigam Ltd., ITA No. 209 of 2014 decided on 01.10.2014.

In this judgement Hon'ble Punjab & Haryana High Court has upheld the order passed by Tribunal that when the realisation of surcharge is uncertain due to continuous defaults by the corresponding parties and the assessee has followed its accounting treatment consistently, then tax on such surcharge can be levied only when it is actually received by the assessee.

ii. Gauhati Bench of ITAT in the case of **M/s North Eastern Electric Power Corporation Ltd. vs Pr. CIT Meghalaya, ITA No.45/Gau/2019 decided on 12.12.2022 (ITAT-Gau)** dealt with an identical issue and held that change of system of accounting i.e. the LPS on cash basis from the earlier system of accrual basis is revenue neutral because the quantum of LPSC is not a dispute; only the year of taxability is in dispute. Moreover, this treatment has been consistently followed by the

assessee and accepted by the Department, the view taken by the Assessing Officer is permissible in law and therefore, action u/s 263 does not lie.

iii. In **CIT vs Karnataka Power Transmission Corporation Ltd. (2020) 122 Taxmann.com 99 (Kar**) there was uncertainty with regard to recovery / collection of outstanding amount, hence assessee for the assessment year in question decided not to recognize revenue of Rs.52.89 Cr for wheeling charges. Hon'ble High Court held that the income did not accrue to the assessee but was a hypothetical income which could not have been subjected to tax and in view of AS-9, assessee has rightly decided not to recognize the revenue of Rs.52.89 Cr for wheeling charges for the relevant assessment year.

iv Similar observations are made by Delhi Bench of ITAT in the case of ACIT vs Uttaranchal Jal Vidyut Nigam Ltd. (2022) 138 Taxmann.com 448.

It is submitted that in the present case, the method of accounting followed by the assessee was completely in conformity with the provisions of section 5 r/w section 145 of the Act. If the books of accounts are maintained on the basis of mercantile system of accounting except in respect of those items which involve high level of uncertainty and is recorded by the assessee as and when it is received then in that case it cannot be said that assessee had deviated from the provisions of section 145 of the Act. Hence, no addition could have been made by the Assessing Officer.

vi) Disallowance of addition of 679,65,74,000/- to the book profit u/s 115JBof the Act

a. Since addition is liable to be deleted under normal provision, the same is also liable to be deleted under MAT provisions as well because Assessing Officer cannot tinker with the books of accounts, impugned adjustment does not fall within the ambit of Explanation 1 to section 115JB(2) of the Act.

i. Assessing Officer has made the impugned addition of 679,65,74,000/- to the book profit u/s 115JB of the Act, also contending that the statutory auditors of the assessee Co. has certified the accounts subject to a "qualification to this effect reflected in the notes to accounts and hence the Assessing Officer is duty bound to make adjustment on account of such qualifications.

ii In reference to above, it is relevant to submit that though the qualification has been made by the statutory auditor, Hon'ble C&AG has not given any adverse comment in respect of the same as the assessee Co being a government company is subjected to C&AG audit u/s 143(6) & (7) of the Companies Act.

iii Further audited accounts have been drawn-up by the assessee Co. in compliance to the requirement of IND AS-115, IND AS-18, framework for financial reporting, AS-9 and guidance note on accrual basis of accounting, according to which revenue recognition shall be postponed in case an uncertainty underpins the probability of realisation at the time of raising the claim. Moreover, as per the accounting policy adopted by the assessee, revenue on account of LPSC was used to be recognised when there is certainty in collection of the same.

iv. Qualification made by the statutory auditor is his view on the subject but it cannot supersede the statutory provisions and also the judicial pronouncement on the subject. It is pertinent to note that the statutory auditor has nowhere reported that the financial statements of the assessee Co. are not drawn-up in compliance with the requirements of section 128 of the Companies Act. Moreover, the audited accounts of the assessee Co. have been duly admitted by its management, by its tax-auditor and also by C&AG without raising any qualification in this regard.

v. Reliance placed by the Assessing Officer on the judgement of Supreme Court in the case of Apollo Tyre is misplaced. Rather it supports the case of the assessee. The Assessing Officer is duty bound to rely upon the authenticity of books of accounts prepared by the assessee under the Companies Act. It is a trite law that only those adjustments can be made to the net profit of the assessee, which are permissible under Explanation 1 to section 115JB of the Act. The book profit of the assessee Co. cannot be tinkered with any particular item which is not encompassed within the said Explanation. vi. As stated by the Supreme Court in the case Apollo Tyres Ltd. vs CIT (2002) 255 ITR 273 (SC) Assessing Officer has no power to tinker with the computation of book profit made by the assessee, once the accounts of the company are made in accordance with the provisions of Companies Act. The Assessing Officer does not have the jurisdiction to go behind the net profit shown in the Profit & Loss A/c except to the extent provided in the Explanation to section 115J.

vii. This case was relied upon by the Supreme Court again in the case of Malyalam Manorama vs CIT (2008) 300 ITR 251 (SC) holding that the Assessing Officer while computing

income u/s 115J, has only the power of examining whether the books of accounts have been certified by the authorities under the 1956 Act as having been properly maintained in accordance with the 1956 Act. The Assessing Officer, thereafter, has the limited power of making increases and reductions as provided for in the Explanation to the said section.

viii. The judgment Supreme Court in the case of Apollo Tyres Ltd. is relied upon by various High Courts in the following cases:-

i. CIT vs J K Synthetics Ltd. (2016) 73 Taxmann.com 278 (All)
ii. CIT vs Kovai Maruthi Paper & Board (P) Ltd. (2007) 294 ITR 57 (Mad)

b. Since the addition on account of notional income towards "surcharge on delayed payments" has not been specifically envisaged in any of the limbs laid down under Explanation 1 to section 115JB of the Act and therefore, the impugned adjustment to the book profit of the assessee Co. is unsustainable in law and therefore, liable to be deleted in the interest of justice.

15. Further, Ld AR submitted that the assessee has satisfied all the ingredients laid down under the Income Tax Act as well as companies Act i.e.,

a) the impugned issue of LPSC is no more res integra and has already been settled by the Apex Court in the case of Dakshin Haryana Bijli Vitran Nigam Company Ltd..

b) as per the jurisprudence pronounced u/s 5 as well as section 145 of the Act, revenue recognition shall be postponed,

in case there is a probability of any "uncertainty in realisation" in respect of any income. Tax cannot be levied on hypothetical income. It is the real income which is subjected to tax,

c) The method of accounting adopted by the assessee for LPSC is in compliance to ICDs-IV notified by the government, IND AS-115, IND AS-18, EAC Opinion, AS-9, framework for financial reporting and guidance note on accrual basis of accounting. The accounting policy of the assessee Co, has been drawn-up in consonance with such accounting policy and accounting standards.

d) Mercantile system of accounting as well as accounting for LPSC has been consistently followed by the assessee as accepted by the Ld. Assessing Officer in preceding years and in subsequent year.

e) Even if the assessee has not recorded bad debts separately, as stated by the Assessing Officer, in its books of accounts, the assessee cannot be prejudiced of any differences in accounting treatment. In any case, it would result in the same income at the end. Moreover, claiming LPSC as bad debts would amount to waiving of right by the assessee for recovery.
f) Even if statutory auditors has raised any qualification, the same has not been carried over by the C&AG of India, the management of the assessee Co. as well as the tax auditors. The adjustment made by the Ld. Assessing Officer to the book profit does not fall under any of the limbs envisaged in Explanation 1 to section 115JB of the Act.

Thus, as seen from any angle the impugned addition made by the Assessing Officer under normal provisions of the Act as well as u/s 115JB of the Act is injudicious and unwarranted and therefore, is liable to be deleted in the interest of justice.

16. On the other hand, the Ld. DR submitted that assessee followed mercantile system and the assessee has recorded its income on the concept of accrual in this regard. He brought to our notice page 33 of PB wherein assessee itself recognizes above said Revenues and he brought to our notice page 43 of the PB relating to "notes to financial statement" wherein it was declared that this has resulted in non recognition of Revenue of Rs.67965.74 lacs (31.03.2017 Rs.52792.41 lacs) with corresponding impact on receivables. It clearly shows that assessee has to recognize the above said Revenue and must have declared the same as part of the receivables as well as financial results. In case of non reorganization of such Revenue assessee has the option of creating provision for bad debts. With regard to Ld. AR submissions, he objected vehemently to the detailed submissions made by the Ld. AR and relied on the findings of the lower authorities.

17. Considered the rival submissions and material placed on record. We observed that the assessee is in the business of generation of electricity and distributes the same through intermediaries like BRPL, BYPL etc to the ultimate customers. Based on the PPAs entered with DISCOMS, the assessee is eligible to claim sale prices of the electricity and late payment surcharge (LPSC) of existing rate of 1.5% per month in case the sale considerations are settled beyond the agreed period of settlement. This is nothing but monetary compensation for the delayed payments. The question raised before us is, whether the above LPSC is an income under mercantile system of accounting when the question of realization is uncertain.

18. We observed from the record that the assessee has disclosed all the aspects of this transaction in the notes forming part of accounts to the financial statements prepared under the Companies Act. We observe from the record that DISCOMS were continuously

defaulting payment of principal amount of power purchase dues and the LPSC upto FY 2022-23. All the data relating to outstanding amount relating to power purchase dues and LPSC are disclosed in the notes to accounts. It is brought to our notice that the assessee taken up the issue of recovery before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide order dated 26.03.3014 has directed DISCOMS to pay the power purchase dues. Accordingly they have settled the power purchase dues. It is also brought to our notice that the DISCOMS have credited TDS towards LPSC dues and never settled the LPSC to the assessee until now. Based on the above facts on record, in the current assessment year, the assessee chose to disclose the above aspects in its notes forming part of accounts and declared the power purchase income alone and declared in its notes no 27 that the LPSC will be included in the taxable income as and when it recovers from the DISCOMS.

19. After considering the above facts and aspect on record, the AO rejected the same and proceeded to make the addition the LPSC relating to the current AY as income of the assessee with the observation that the assessee follows mercantile system of accounting and the same is chargeable to tax whether it is received or receivable. After considering the facts on record, we are of the view that no doubt in the mercantile system of accounting, the accrued portion of the income has to be declared as income however, it is also relevant and important that the certainty of recovery is relevant and important aspect before declaring and recognizing the same as income chargeable to tax. The AO has acknowledged the fact that the assessee has not recovered any LPSC in the past and still he proceeded to make the addition on the basis of method of accounting followed by the assessee. The assessee being a company has to follow the various accounting standards prescribed to prepare/submit its financial statements. Therefore, the duty imposed on the assessee to prepare its financial

statements adopting applicable accounting standard to declare true and fair statement of its affairs.

20. Based on the facts on record, we observe that the assessee has not recovered any LPSC in the past and as per the accounting standard and norms, the assessee has to declare its income not only based on accrual system, also supported by the concept of certainty of recovery. In the similar facts on record, the Hon'ble Supreme Court held in the case of Godhara Electricity Co. Ltd. (supra) that there was real accrual of income to the assessee Co. in respect of the enhanced charges for supply of electricity, has to be considered by taking the probability or improbability of realisation in a realistic manner. It observed that the Tribunal had rightly held that the claim at the increased rate made by the assessee Co., on the basis of which necessary entries were made, represented only hypothetical income and the impugned amount as brought under tax by the ITO did not represent the income which had really accrued to the assessee during the relevant previous year. From the above, it is clear that the mere accrual does not make the income chargeable to tax but also supported by the concept of certainty of recovery. Therefore, we are inclined to allow the grounds raised by the assessee both in addition made under normal provision of income tax and also under MAT provisions.

21. Further, we observe that the assessee has submitted various propositions before us, since we have already allowed the grounds raised by the assessee on the basis of concept of certainty of realization based on the Accounting Standards, the other propositions raised by the assessee are not adjudicated at this stage. In the result, the grounds raised in ground 3 and 4 are allowed.

22. With regard to Ground No.5, the relevant facts are, during the course of assessment proceedings, Assessing Officer, vide notice

dated 21.12.2020, query no 15(ii)) directed the assessee to explain as to whether any interest on borrowed capital pertaining to additions to fixed asset, Capital WIP and capital advances has been capitalized during the year and if not, then to show-cause as to why such interest be not disallowed u/s 36(1)(iii) of the Act.

22.1. In response to this notice, assessee vide reply-dated 04.02.2021 submitted that no funds had been borrowed for the purposes of additions to fixed assets, CWIP and capital advances. It was also clarified that even the borrowing made for working capital requirement had also not been utilized for the purpose of acquisition of aforesaid assets. The said additions were made out of equity funds and reserve funds of the assessee which were far in excess of the additions made.

22.2. Further, vide notice-dated 17.03.2021, Assessing Officer directed the assessee to explain as to why interest in respect of loan availed from Govt of NCT of Delhi (GNCTD) in the nature of project loan be not disallowed.

22.3. In response, Vide reply-dated 05.04.2021 assessee furnished details with respect to projects undertaken by it, stating that it had undertook two projects for development of power plants namely Bawana Project and Bamnauli Project.

-With regard to Bawana Project, it was submitted that it is commissioned in the FY 2013-14 and therefore, interest till that date was capitalized in the cost of the project in preceding years. Expenditure incurred subsequent to commissioning of project in FY 2013-14 was made out of internal accruals, hence, there is no scope for any disallowance of interest.

-With regard to Bamnauli Project, it was submitted that it was entirely funded out of equity capital provided by GNCTD and

therefore, question of disallowance of any interest does not arise as there was no interest.

22.4. However, AO rejected the explanation submitted by the assessee and Assessing Officer issued a show-cause notice / draft assessment order-dated 05.04.2021 observing that "in clause 13f(7) (Pg-62) of the Tax Audit Report dealing with ICDs-IX borrowing cost, the tax auditor has reported that amount of borrowing cost capitalized during the year is "Nil" when the borrowed funds are outstanding in the books of assessee companies. The additions made to fixed assets and CWIP are out of such borrowed funds and hence, proportionate interest expenditure is to be capitalized.

22.5. The proportionate disallowance worked out by the Assessing Officer is as under: -

Particulars	**Amount(Rs.)**
Own Funds (A)	4664,19,66,767
Borrowed Funds (B)	2288,89,38,169
Total funds (C=A+B)	6953,09,04,936
Total interest paid by the company Funds (D)	298,76,97,000
Average cost of Debt **(E=D/C*100)**	**4.29%**
CWIP (F)	144,97,64,267
Capital advance (H)	75,10,991
Total Investment **(I=F+G+H)**	**411,84,08,409**
Proportionate interest disallowance (**J=E*I)**	17,66,79,721

22.6. Thus, Assessing Officer had calculated the proportionate interest by applying average cost of debt to the total investment being CWIP, additions to fixed asset and capital advance.

22.7. In response, vide reply-dated 08.04.2021 (Pg-225, para-6), assessee objected to the addition worked out on the basis of average cost of debt @ 4.29%.

22.8. However, Assessing Officer rejected the same and proceeded to make addition of Rs.17,66,79,721/- to the income of assessee observing that the borrowed funds are outstanding in the books of the assessee and the assessee has invested in an asset which has not been put to use and therefore, interest expenditure relatable to the amount invested has to be capitalized and cannot be allowed as revenue expenditure. The same was also sustained by the Ld CIT(A).

23. At the time of hearing, Ld AR submitted as under:

a) Assessee Co. has undertaken in-house development of two power plants projects namely PPS-II at Bamnauli and PPS-III at Bawana. As per usual practice, the completed portion of the project is being transferred to "fixed assets" and the remaining portion is reflected in "Capital Work In Progress" (CWIP) outstanding at the end of the year.

b) Moreover, assessee Co. had also incurred certain expenditure on direct acquisition of fixed asset from outside vendors, in regular course of its business which have also been added to the fixed asset.

c) In so far as CWIP is concerned, the following amount of expenditure had been incurred by the assessee on CWIP standing at the end of the year as under:-

CWIP balance as on 31.03.2018	Amount (Rs.)(in lakh)	Remarks
Bamnauli project for development of PPS-II power plant	10,923.38	Refer Note 3 of audited financials (Pg 32 of PB)
Bawana project for development of PPS III power plant Gross Less: completed portion capitalized and transferred to fixed asset (6955.59)	10529.84	
Net Balance outstanding as on 31.03.2018	3574.24	Refer Note 3 of audited financials (Pg 32 of PB)
	14497.62	

d) In so far as addition to fixed assets are concerned, the assets worth Rs.26.611.33 lakh had been added to the fixed assets during the year, the details of which are as under:-

Additions to fixed assets during FY 2017-18	Amount (Rs.)(in lakh)	Remarks
Completed portion of Bawana project transferred from CWIP	6955.59	Refer Note 3 of audited financials (Pg 32 of PB)
Other assets which are ready to use and have been directly purchased from outside vendors	19655.74	
Total	26611.33	Date-wise details given in TAR (Pg 75-80 of PB) Also refer Note 3 of audited financial (Pg 31 of PB)
	14497.62	

e) Assessing Officer has observed that part of CWIP and additions to fixed asset during the year had been financed borrowed funds and therefore interest cost proportionate to the same is liable to be disallowed under provision to section 36(1)(iii) r/s Explanation 8 to section 43(1) of the Act. However, Assessing Officer has not established the nexus between the borrowed funds and CWIP/fixed assets. Assessing Officer has not brought on record any material to show that additions to CWIP/fixed assets are out of borrowed funds of the assessee instead of its equity funds, despite interest free owned funds were surpassing the borrowed funds.

f) Source of funding in respect of CWIP

1. Bamnauli Project (PPS-II)

i) The entire project had been funded out of equity infusion by GNCTD. Even the statutory auditor in the audited financial statement had noted that the amount of Rs.10,923.38 lakh relating to Bamnauli Project is outstanding at the end of the year.

ii) During the assessment proceeding it was categorically stated that the project was funded out of equity infused by GNCTD. In order to further corroborate the above facts, assessee Co. had submitted a copy of equity sanction order-dated 29.11.2011 issued by GNCTD before CIT(A), however the same was not admitted and considered by the CIT(A) stating the same as additional evidence not produced before Assessing Officer. As per the sanctioned order, a total equity contribution of 400 Cr was sanctioned by GNCTD specifically for Bamnauli Project.

iii) It was the consistent stand of the assessee that the Bamnauli Project was funded by GNCTD and therefore, the

sanction letter was not to be treated by the CIT(A) as additional evidence and was to be considered in order to render substantial justice to the assessee.

iv) In any case it is clear from the sanction order that no borrowed funds were utilized by the assessee Co. for the said project

II. Bawana Project (PPS-III)

i) As stated earlier, Bawana Project had already been commissioned in FY 2013-14. Interest up to such period had duly been capitalized by the assessee and subsequent capital expenditure was incurred out of internal accruals.

ii) Upto 31.03.2014, a total sum of 4,31,831 lakh had been incurred on the said project out of following sources: -

i) Equity from GNCTD,

ii) Loan from PFC,

iii) Loan from GNCTD

iv) From internal accruals

Proportionate interest cost of Rs.44,028 lakh in respect of loan availed from PFC and GNCTD had already been capitalized to the cost of such project and the same had not been doubted even by the Assessing Officer.

iii) Interest on capital expenditure subsequent to FY 2013-14 was not required to be capitalized even in view of provisions of section 36(1)(iii) of the Act. In any case, subsequent capital expenditure was out of internal accruals and therefore, no interest was payable.

g) Assessing Officer has applied average cost of debt to the investment in CWIP which is absolutely baseless and arbitrary in nature.

h) Commissioning of project amounts to "first put to use". Hence, even if subsequent capital expenditure is considered to be made out of borrowed funds, same cannot be disallowed u/s 36(1) (iii) of the Act.

Section 36(1) (iii) reads as under:-

"(iii) the amount of interest paid in respect of capital borrowed for the purposes of the business or profession:

Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset (whether capitalized in the books of accounts or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.

i) Accordingly, to claim deduction under this provision (i) funds should have been borrowed by the assessee, (ii) funds should be borrowed for the purposes of business and (c) interest should have been paid on such funds. Once all these conditions are satisfied, interest is allowable as deduction u/s 36(1)(i) of the Act. However, proviso carves out an exception. In the case where borrowed funds are ublised for acquisition of an asset then interest incurred till the date on which such asset is first put to use shall not be allowable as revenue expenditure.

j) In the present case, assessee Co. had capitalized the interest till the date on which Bawana Project was first put to use. Thereafter, main provision of section 35(1)() was applicable. It is also pertinent to state that it is immaterial

whether subsequent capital expenditure is debited to CWIP or fixed assets in the books of accounts.

It is not disputed by the Assessing Officer that the assessee had generated electricity since FY 2013-14.

k) Hon'ble Supreme Court in the case of Kedarnath Jute Mfg Co Ltd. vs CIT (1971) 82 ITR 363 that existence or absence of entries in the books of accounts cannot be decisive or conclusive for a particular deduction if otherwise it is allowable as per existing law.

Hon'ble Supreme Court in the case of DCIT vs Core Health Care Ltd. (2008) 298 ITR 194 (SC) have held that the legislature has made no distinction in section 36(1)(ii) between "capital borrowed for a revenue purpose" and "capital bomowed fora capital purpose Once the capital is borrowed for business purposes, interest is alllowable as deduction. Similar view is taken in the following cases:

JCIT vs Bell Ceramics Ltd. (2015) 56 Taxmann.com 353 (Guj)
CIT vs Ishwar Bhuwan Hotels Ltd. 215 CTR 14 (SC)
ACIT vs Arvind Polycot Ltd. (2008) 299 ITR 12 (SC)
Pr. CIT vs Jay Chemicals Industries Ltd. (2020) 422 ITR 449 (Guj)

m) Hence, in view of above, it is stated that the question of capitalizing the interest

i) in respect of Bawana Project does not arise due to following reasons:-
ii) 1) Project had been commissioned in FY 2013-14

iii) Proportionate interest cost up to 31.03.2014 had already been capitalized by the assessee Co.

iv) subsequent capital expenditure had been incurred out of internal accruals

v) even if such capital expenditure is considered to be made out of borrowed funds, then also interest cannot be disallowed as "commissioning of project in generation of electricity signifies "put to use of asset. There is nothing in section 36(1)(iii) of the Act to disallow interest expenditure after such put to use.

n) Source of funding in respect of Addition to Fixed Assets

i) Addition of Rs.26,611.33 lakh was made to fixed asset which includes Rs.6,966.69 lakh pertaining to completed portion of Bawana Project transferred from CWIP

ii) Assessee Co. had purchased other assets amounting to Rs.19,655.74 lakh directly from outside vendors. These assets were put to use on the same date on which they were acquired or transferred. Even the Ld. Assessing Officer has not pointed out any item which had not been used on the date on which, it was acquired.

iii) During the assessment proceeding itself, assessee had pointed out that the expenditure had been incurred out of internal accruals. The cash flow statement was also produced before the Assessing Officer, which is as under:-

Sl. No.	Cash inflows/outflows during FY 2017-18 (relevant to AY 2018-19)	(Rs. in Lakh)
1.	Cash generated from operation	63 035
2.	Add: Cash generated from investment activities (comprising of interest income, sale of capital assets and also redemption of FDs)	5 465
3.	Total cash generated from (1 & 2 above)	68 490

4.	Less: Cash outflow from financing activity (comprising of fresh loans + interest repayment)	26 442
5.	Balance cash available for capital expenditure including capital WIP (3-4)	42 048
6.	Less: Cash outflow out of above on capital expenditure including capital WIP	22 070
7.	Net increase inc ash surplus	19 978

iv) During the proceeding, assessee had also explained that the borrowed amount had not been utilised for the purchase of aforesaid fixed asset. In this regard, assessee had also produced loan sanction letter as additional evidence under Rule 46A of the Income Tax Act. However, Assessing Officer did not admit the same. Even where capital expenditure is presumed to be incurred out of a mixed pool of funds, disallowance of interest u/s 36(1)(iii) is unwarranted if owned funds are sufficient to meet out such expenditure

v) It was submitted during the assessment proceeding that paid-up equity capital and free reserves of the assessee Co. as on 31.03.2018 amounting to 4,66,420 lakh was far in excess of the additions to fixed assets/CWIP made during the year. Hence even if it is presumed that investment in fixed assets / CWIP was made out of mixed pool of funds then also it is a settled proposition of law that no disallowance u/s 36(1)(iii) of the Act can be made where interest free owned funds are sufficient to make such investment. Hon'ble Apex Court in the case of CIT vs Reliance Industries Ltd. (2019) 410 ITR 466 (SC) have held that in view of finding recorded by the Tribunal that interest free funds available to the assessee were sufficient to meet its investment. It is to be presumed that the investments were made from the interest free funds available with the assessee.

vi) Bombay High Court in the case of **CIT vs Reliance Utilities and Power Ltd. (2009) 313 ITR 340** have held that if there is interest free funds availableto an assessee, sufficient to meet its investments and at the same time assessee had raised a loan, it can be presumed that the investments were made from the interest free funds available.

vii) Various Benches of ITAT have taken a similar view, some of the cases are

Tata Sky Ltd. vs ACIT (2020) 119 Taxmann.com 424 (Mum-ITAT)

ITO vs Anunay Fab (P) Ltd. (2021) 133 Taxmann.com 412 (Ahd-ITAT)

Bhagwati Gases Ltd. vs DCIT (2019) 105 Taxmann.com 183 (Kol-ITAT)

Coffeeday Global Ltd. vs Addl CIT (2021) 130 Taxmann.com 277 (Kar-ITAT)

ITO vs SEL Manufacturing Company Ltd. (2017) 88 Taxmann.com 822 (Chd-ITAT)

viii) Allahabad High Court in the case of CIT vs Motor Sales Ltd. (2008) 304 ITR 123 (ALL) following ratio of the judgement of Hon'ble Supreme Court in the case of M/s S.A. Builders Ltd. vs CIT (288 ITR 01) (SC) and in the case of Munjal Sales Corpn (2008) 298 ITR 298 (SC) dismissed the appeal of the Revenue in the light of finding of CIT(A) that assessee had paid-up capital/reserves/surplus of □6.10 crore on which no interest was being paid and therefore, interest free advances made by it were covered. Assessee had not diverted any borrowed funds on which interest was paid for non-commercial purposes and therefore, there was no question of disallowance of interest out of interest paid by the assessee. Thus, if interest free advances are less than paid-up, share

capital/ reserve / surplus of the assessee, no disallowance of interest could be made.

ix) Hon'ble Supreme Court in the case of South Indian Bank Ltd. vs. CIT(2021) 438 ITR 01 have categorically held as under:

> "In a situation where the assessee had mixed fund (made-up partly of interest free funds and partly of interest-bearing funds) and payment is made out of that mixed fund, the investment must be considered to have been made out of the interest free funds. To put-it in another way, in respect of payment made out of mixed fund, it is the assessee who has such right of appropriation and also the right to assert from what part of the fund a particular investment is made, and it may not be permissible for the revenue to make an estimation of a proportionate figure".

x) Even Delhi High Court in the case of CIT vs. Modi Rubber Ltd. (2017)378 ITR 128 (Del) has taken a similar view.

o) <u>Rebuttal to case law relied upon by the Assessing Officer</u>

i) While making the addition, Ld. Assessing Officer has relied upon the judgement of Punjab & Haryana High Court in the case of M/s Abhishek Industries (286 ITR 01) to support his assertion that owned and borrowed funds belong to a common pool of resources and are not colored differently.

It is submitted that the said judgement has been overruled by the Hon'ble Apex Court in the case of Munjal Sales Corporation vs CIT (2008) 298 ITR 298 (SC) relying upon the settled position that where owned funds are sufficient to make onward investments, it shall be presumed that such

investments have been made out of owned funds only and hence, no disallowance can be made u/s 36(1)(iii) of the Act.

ii) Ld. Assessing Officer has also relied upon the order of Chandigarh Bench of ITAT in the case of M/s Torque Pharmaceuticals Pvt. Ltd. vs Addl. CIT (Manu/IG/0052/2011), to work out the impugned addition by adopting the methodology for computing average cost of debt enshrined therein. It is submitted that facts of this case are different from the present case. In the said case, assessee had diverted its funds to its other unit and claimed deduction in respect of interest, which is not the scenario in the present case.

p) Without prejudice to above, if the proportionate interest is disallowed then depreciation is to be allowed on the said amount.

i) The Ld. Assessing Officer had disallowed proportionate interest of Rs.17,66,79,721/-, invoking the provisions of proviso to section 36(1)(iii) r/w Explanation 8 to section 43(1) of the Act.

In the assessment proceeding, it was categorically stated that no borrowed funds had been utilised for investment in fixed assets /CWIP. Without prejudice to the above, in case, the said position is not accepted, then necessary direction be given to the Ld. Assessing Officer to allow depreciation on the amount of 17,66,79,721/- in current as well as subsequent years, which has stated to be capitalized under Explanation 8 to section 43(1) of the Act.

ii) In view of the forgoing discussion, it is submitted that any dispute with regard to treatment of interest expenditure is ultimately academic as the same is revenue neutral over the years.

24. In summary, Ld AR submitted as under:

1. In so far as CWIP is concerned, the Bamnauli Project (PPS-II) had been specifically financed from equity infusion by GNCT.

2. Remaining part of CWIP (Bawana Project-PPS-III) had already been commissioned in FY 2013-14, proportionate interest paid on borrowing up to that date had been duly capitalized by the assessee; subsequent capital expenditure had been incurred out of internal accruals; even if it is presumed that this subsequent capital expenditure is incurred out of borrowed funds then proviso to section 36(1)() is not applicable as commissioning of the project and generation of electricity indicates that assets had already been put to use"

3. Additions to fixed asset including the assets purchased directly from outside vendors had been made out of internal accruals/equity funds only. It is evident from TAR that all the assets had been put to use on the same date as that of acquisition. No discrepancy has been pointed out by the Assessing Officer as to any particular item.

4. Assessing Officer has not been able to point-out any nexus between the borrowed funds and the investments in CWIP / fixed assets. Hence, even if it is presumed that such investment is made out of a mixed pool of funds then also it is a trite law that addition u/s 36(1)(iii) is not warranted, where equity funds are sufficient to make such investment.

5. Without prejudice, even if it is presumed that the said interest cannot be allowed as revenue expenditure but to be capitalized as per the provisions of Explanation 8 to section 43(1) of the Act then the depreciation u/s 32 has to be allowed on the said figure.

25. On the other hand, Ld DR relied on the findings of lower authorities.

26. Considered the rival submissions and material placed on record. We observed that the AO noticed from the record that the assessee shown outstanding loan in the Balance Sheet and not capitalized any interest amount on the fixed assets purchased during the year and outstanding Capital WIP. He rejected the explanations offered by the assessee and proceeded to make the disallowance of interest claimed by the assessee by adopting the average cost of capital to the assessee and proportionately disallowed to the value of capitalization of fixed assets and outstanding CWIP. We observed that the AO merely observed from the balance sheet the outstanding amounts of borrowed funds and closing CWIP and proceeded to disallow the interest. On careful analysis of the facts on record, we observed that the capitalization of interest is directly linked to the specific funds utilized for the purpose of making investment for the creation of fixed assets. In the given case, we observed that the assessee has proceeded to make investments in the three categories, viz., a). direct purchase of fixed assets, b). In house development of project I (Bamnauli project) and c). In house development of project II (Bawana Project). As per the information submitted before us clearly shows that the Bawana Project was already commissioned in FY 2013-14 and to the extent of interest for the period was already capitalized. In this project there was direct utilization of equity funds, loan from PFC and GNCTD. The interest was already determined and capitalized at the time of commissioning of the project itself. Therefore, there is no requirement to make further capitalization in this project.

The next project is Bamnauli Project, it was submitted that this project was fully financed out of equity introduced by GNCTD and no borrowed funds were utilized during this AY. The relevant evidence was submitted before CIT(A) and he has rejected the same.

For the sake of justice, we observe that none of the tax authorities have verified this aspect and for the sake of clarity, we direct the AO to verify the claim of the assessee and allow the same as per law.

The next issue is direct purchase of assets, once it is put to use, or deferred there is no concept of further capitalization. Therefore, we do not see any reason to sustain the addition made by the AO. Therefore, we direct AO to only verify the Project Bamnauli and allow the claim of the assessee as per law after providing proper opportunity of being heard to the assessee. In the result, ground raised by the assessee is partly allowed as per above directions.

26. With regard to ground No.6, the relevant facts are, during the assessment proceeding, Assessing Officer vide notice-dated 21.12.2020 issued u/s 142(1) of the Act directed the assessee to furnish the working of deduction claimed u/s 80IA(4)(iv) of the Act and also to explain whether other income earned by it had been reduced while working out the said deduction. In response, Vide reply-dated 04.02.2021 (Pg-116), assessee submitted that PPS-III project at Bawana is eligible for deduction u/s 80IA(iv) of the Act. Assessee also furnished copy of computation of deduction stating that other income being in the nature of interest on FDR and Mutual Funds had been duly reduced while working out said deduction u/s 80IA(iv) of the Act.

26.1. Further, Assessing Officer issued a show-cause notice-dated 05.04.2021 to show-cause that in the computation of deduction, income had been increased by 27,98,24,639/- being unwinding of interest on vendor liabilities (IND-AS Adjustment), AO observed that the said amount has not been reduced while computing the amount of deduction. Hence, why the said amount be not disallowed.

26.2. In response, Vide reply dated 09.04.2021, assessee submitted that the said amount pertains to an IND-AS adjustment on account

of unwinding of interest on vendor liabilities which is a notional loss charged as finance cost in the books of accounts and hence added back for the purpose of deduction u/s 80IA(4)(iv) of the Act as the same is not allowable as revenue expenditure.

26.3. However, the Assessing Officer rejected the explanation furnished by the assessee and proceeded to make the addition. While making addition, he relied upon the judgement of Supreme Court in the case of CIT vs Sterling Foods (237 ITR 579) (SC) and Pandyan Chemicals Ltd. vs CIT (262 ITR 278) (SC) stating that the said amount is not the income derived from industrial undertaking and therefore, was to be reduced from the profit for the purposes of computing deduction u/s 80IA(4)(iv) of the Act.

26.4. Aggrieved, filed an appeal before Ld CIT(A) and Ld.CIT(A) sustained the addition made by the assessing officer.

27. At the time of hearing, Ld AR submitted as under:

a) It is to be stated that the financial statement had been drawn-up by the assessee company in accordance with the Indian Accounting Standards (IND-AS), notified under the Companies (Indian Accounting Standards) Rules 2015.

b) IND-AS 109 prescribes the accounting treatment for recording liabilities towards various vendors, according to which, any financial liability towards a vendor shall be initially recorded at its fair value, which shall represent the discounted value of sum payable to the vendor. Such sum shall be subsequently unwound over the years by applying market interest rate until the liability is fully settled.

c) For instance, a sum of 121 is payable to the vendor at the end of two years, suppose market interest rate is 10%. As per

the provisions of IND-AS 109, the present value of Rs.121/- is to be computed by discounting Rs.121/- over two years at the market interest rate of 10%. In the present example, such present value shall be worked out to be Rs.100/-. Therefore, the liability towards the vendor shall be initially recorded at Rs.100/- at the end of first year, such liability shall be increased by applying market interest rate of 10% to the sum of Rs.100/-. Therefore, Rs.10/- shall be charged to finance cost alongwith a corresponding increase in the amount of liability. At the end of second year, the liability would be further increased by applying market interest rate of 10% to the revised sum of Rs.110/-. Hence, Rs.11/- shall be charged to finance cost alongwith a corresponding increase in the amount of liability and the revised liability would stand at Rs.121/- which is the sum actually payable to the vendor.

d) Thus even though no finance cost is actually payable to the vendor, the same is notionally charged to the Profit & Loss A/c on account of the provisions of IND-AS 109. Such notional finance cost is referred to as "unwinding of interest on vendor liabilities" in the books of accounts of the assessee. During the year under consideration, assessee Co. had debited a sum of Rs.7,98,24,639/- towards such notional unwinding cost under IND-AS 109 to the Profit & Loss A/c under the head "finance cost". However, the same was added back in the computation of income as such finance cost was notional and therefore, was not allowable as deduction.

e) Profit Gains derived by an industrial undertaking is eligible for deduction u/s 80IA(4) of the Act.

i) As per the provisions of section 80IA, where the gross total income of an assessee include any profit and gains derived by an undertaking from any business referred to in sub-section (4), there shall, in accordance with and subject to the

provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to 100% of the profit and gains derived from such business for 10 consecutive assessment years

ii) From a careful reading of the above provision, it is discernible that where gross total income of an assessee includes any profit and gains derived from eligible business then a deduction equivalent to 100% of the profit and gains derived from such eligible business shall be allowable as deduction u/s 80IA of Act.

Since no separate code or method specifying the manner in which profit and gains derived from eligible business shall be computed, the provisions of the Act are to be applied in the usual manner while working out such deduction.

iii) Para 4(ii) of the ICDS-I states that

(ii) "marked to market loss or an expected loss shall not be recognised unless the recognition of such loss is in accordance with the provisions of any other Income Computation And Disclosure Standard."

iv) There is no specific ICDS wherein notional finance cost due to unwinding of vendor liability is allowed as deduction. Moreover, even section 36(1)(iii) provides deduction only in respect of actual interest incurred and not notional interest due to unwinding of vendor liabilities.

v) In view of above, it is stated that an amount which has already been debited as finance cost to the Profit & Loss A/c in the books of account but which is not allowable under the Income Tax Act shall be added back to the book profit for the purposes of computing taxable income as well as computing profit/gains derived from eligible business. The computation furnished by the assessee Co. itself reflects that the assessee

had added this amount back to its income in the Computation of Income as well as in the computation of deduction u/s 80IA(4) (iv) of the Act. Thus IND-AS adjustment disallowable under the Income Tax Act is added back in the computation of gross total income under normal provisions.

vi) Assessing Officer has duly admitted the disallowance of Rs.7,98,24,639/- made by the assessee while computing gross total income under normal provisions of the Act. The fact that such adjustment was attributable to the specified business of the assessee is also not disputed by the Assessing Officer, hence by no stretch of imagination can such amount be disallowed solely u/s 80IA(4)(iv) of the Act

vii) By adding the amount back under the normal provisions in the gross total income, the said amount was also to be added back while computing deduction u/s 80IA of the Act and the same has to be deducted from the gross total income. The overall effect is revenue neutral ie the impact of IND-AS adjustment gets nullified from the computation of net taxable income.

viii) In case, such amount is added back at the time of computing gross total income and not so allowed while computing deduction u/s 80IA of the Act then the overall effect would be that a loss debited in the books of accounts would not merely be disallowed / nullified but would instead be converted into an income subject to tax under the Act. This may lead to double taxation of income which is against the principles of natural justice and is against the intention of law

ix) The Assessing Officer has failed to consider that by adding back the amount while computing the amount of eligible deduction, the assessee had infact added back the notional loss debited as finance cost in the books of accounts. Hence,

there cannot be any question to further reduce the same as the same would being the entire position back to square one.

x) That the amount of Rs.798,24,639/- is a notional loss which is not allowable under the Income Tax Act and therefore, added back to the income. Hence, there cannot be any question of income not being derived from industrial undertaking. The Assessing Officer has completely failed to understand the facts and circumstances of the present case in true letter and spirit and has framed the assessment on his own whims and fancies, which is not sustainable in law.

xi) Case Laws

i) Hon'ble Supreme Court in the case of Bajaj Tempo Ltd. vs CIT (1992) 196 ITR 188 (SC) have held that a provision in the taxing statute granting incentives for promoting growth and development should be construed liberally. Moreover, Hon'ble Supreme Court in the case of Kedarnath Jute Manufacturing Company Ltd. vs CIT (1971) 82 ITR 363 (SC) have held that existence or absence of entries in the books of accounts are not decisive / conclusive of a particular deduction if otherwise allowable as per existing law.

ii) In the present case, assessee had claimed Rs. 7,98,24,639/- being unwinding of interest on retention liability project (IND-AS adjustment) as deduction which was reverted back in the computation of income while computing deduction u/s 80IA(4) (iv) of the Act as the same was notional loss and therefore, was not allowable as deduction. Assessing Officer and consequently the CIT(A) had ignored the expenditure part and held that the said amount is not the profit derived from industrial undertaking and therefore, deduction u/s 80IA is not allowable on this amount. By not allowing deduction of

Rs.7,98,24,639/- u/s 80IA of the Act, the Assessing Officer has made an attempt to tax a hypothetical income which is not sustainable in law.

If seen from another angle, Assessing Officer in the present case, has reduced the same amount of Rs.7,98,24,639/- from the income side. It would mean that the notional loss on account of unwinding of interest on vendor liabilities has been allowed to the assessee which is a notional loss. This is in gross violation of the legal position.

g) **Case law relied upon by the Assessing Officer is not applicable to the present case, rather it supports the case of the assessee.**

i) The Ld. Assessing Officer has relied upon the judgement of Supreme Court in the case of CIT vs Sterling Foods (237 ITR 579)(SC) and Pandyan Chemicals Ltd. vs CIT (262 ITR 278) (SC) for the proposition that the words "Profit & Gains as derived by" are narrower than "Profit attributable or arising from the business of an assessee or an undertaking"

ii) It is submitted that the assessee had not claimed that the amount is income derived from industrial undertaking, rather it had added the amount of 7,98,24,639/- back to its income which was a notional loss claimed as deduction though not allowable under the Income Tax Act. Thus the proposition sought to be advanced by the Assessing Officer was not relatable to the case of assessee.

iii) If the judgements relied upon by the Assessing Officer are applied to the issue under consideration, then the position emerges that the amount of 27,98,24,639/-,

being a notional item is an expenditure attributable to the business of the assessee though not derived from the said eligible business. The same was not allowable as expenditure and therefore, was required to be added back while computing the deduction.

h) In a nutshell, it is submitted that if the said amount is disallowed while computing the deduction then it would mean that Assessing Officer wants to allow IND-AS adjustment in computing taxable profit which is not the purpose of legislature.

28. Further, Ld. AR summarized submissions as under:

a) Notional Loss on account of "unwinding of interest on vendor liabilities" is not an allowable expenditure under the Income Tax Act. If the same is debited to the Profit & Loss A/c then is liable to be added back in the computation of gross total income as well as deduction u/s 80IA.

b) Assessee has maintained separate books of accounts for the eligible unit. In the statement of income, assessee has added back this amount while computing gross total income as well as computing deduction u/s 80IA of the Act. Hence the impugned disallowance is liable to be summarily deleted.

c) Without Prejudice if your honour are still not inclined to accept the aforesaid prayer of the assessee then it implies that even notional losses are allowed as deduction. In that scenario it is requested to allow credit for the sum already disallowed by the assessee in computation of gross total income against the impugned disallowance. Both the circumstances would yield the same amount of net taxable income under the Act and hence are completely revenue neutral.

29. On the other hand, Ld DR submitted the relevant facts on record and objected to the detailed submissions of Ld AR. He relied on the findings of lower authorities.

30. Considered the rival submissions and material placed on record, we observed that a sum of Rs.7,98,24,639/ has been added by the Assessee in its computation of taxable income as the said amount is not allowable under the provisions of Income Tax Act, 1961 being the amount of notional interest accounted for in the accounts of the company during the Financial Year 2017-18 on the liability to be discharged by the Assessee to its contractors in future by adopting IND AS with effect from the financial year 2015-16. The Assessee was required to maintain its accounts on the basis of IND AS 109 (Indian Accounting Standards). As per the said accounting standards, the company was required to account for its liabilities on fair value considering the Present Value basis of the said liabilities. As per the concept of Fair Value/Present Value basis for liabilities, the price payable by the company against the goods and services received by it at present will comprise of the basic (core cost) of the said goods and services and the interest cost which the seller/ service provider shall bear in receiving the price of the goods/ services in future. Therefore, as per the IND AS 109, the amount of liabilities of the company shall be bifurcated in core(basic) and finance cost of the goods and services during end of each financial year until the discharge of the same to the contractors/ vendors in the core/ basic cost and finance/ interest cost.

30.1. For instance, the liability towards the vendor shall be initially recorded at Rs.100/- at the end of first year, such liability shall be increased by applying market interest rate of 10% (say) to the sum of Rs. 100/-. Therefore, Rs. 10/- shall be charged to finance cost alongwith a corresponding increase in the amount of liability. At the end of second year, the liability would be further increased by

applying market interest rate of 10% to the revised sum of Rs.110/. Accordingly, Rs. 11/- shall be charged to finance cost alongwith a corresponding increase in the amount of liability and the revised liability would stand at Rs. 121/- which is the sum actually payable to the vendor.

30.2. Thus, it is actually recognition of present value of future liability in the books of account by notionally debiting the profit and loss, even though no finance cost is actually payable to the vendor/ contractor, the same is notionally charged to the Profit & Loss A/c for each financial year until the year in which the said liability is discharged/ paid off. Such notional finance cost is referred to as "unwinding of interest on vendor liabilities" in the books of accounts of the assessee. During the year under consideration, assessee had debited a sum of Rs.7,98,24,639/- towards such notional unwinding cost under IND-AS 109 to the Profit & Loss A/c under the head "finance cost".

30.3. Therefore, the company on the implementation of IND-AS from the Financial Year 2015-16, recognized the Retention Money payable to the contractors/ Vendors on its fair value by dissecting the amount of notional interest from the amount of the Retention Money. The said amount of notional interest was cancelled (Unwound) for each financial year to arrive and show the fair value of the Retention Money for such financial year. As on 31/03/2018 all retention liability was considered as current liability and therefore shown as Other Financial Liabilities (Note No.23) under current liabilities after unwinding of balance amount of Rs.7,98,24,639/-. That means the liability to the extent of Rs.7,98,24,639/- was increased in the liability side and notional financial loss was claimed in the books as finance cost. In our view, it is only an accounting adjustment and it has no impact as the computation of taxable income.

30.4. We observed that in the statement of computation of gross taxable income as well as determining the deduction u/s 80IA, the assessee had added back the above said finance cost (unwinding of interest cost) as the above said finance cost was notional and therefore, was not allowable as deduction under the provisions of Income Tax Act, 1961.

30.5. We observed that the deduction u/s 80IA is allowable to the assessee on the basis of eligible unit. In the present case, the assessee has two eligible units eligible to claim deduction u/s 80IA, therefore the computed income under the Act is towards the income generated for the purpose of eligible business u/s 80IA. After careful consideration, we are of the view that the assessee has rightly determined the eligible profit from the eligible business by adopting the declared profit as per Profit and Loss Account statement and added back the notional finance cost, which is otherwise not allowable expenditure under the Income Tax Act. Even otherwise, the assessee determines the eligible profit of the eligible unit separately, by considering the revenue from eligible units and relevant costs of eligible units, without considering the notional loss adopted in the books of account, the relevant eligible profit would be the same. Therefore, the disallowance of deduction claimed u/s 80IA of the Act by the assessing officer is not proper. Accordingly, the ground raised by the assessee is allowed.

31. With regard to ground No.7 the relevant facts are, during the assessment proceeding, Assessing Officer vide notice dated 17.03.2021 issued u/s 142(1) of the Act observed that the net loss on account of foreign exchange transaction and translation amounting to Rs.17,67,88,271/- is on account of capital assets acquired by the assessee from abroad and therefore, not liable as revenue expenditure u/s 37(1) r/w section 43A of the Act.

31.1 In response, vide reply-dated 05.04.2021, assessee submitted that assessee had entered into a contract with BHEL on turnkey basis for in-house development of a power plant at Bawana (PPS-III). During the course of execution of contract, BHEL had imported certain Plant & Machinery from abroad on account of which certain part of consideration was payable by the assessee in foreign currency. In this regard, assessee had also produced relevant excerpts of the contract with BHEL. The AO rejected the same and proceeded to make impugned disallowance vide show-cause notice-dated 05.04.2021.

31.2 In response, vide reply-dated 08.04.2021, assessee reiterated the same submissions. However, the Assessing Officer made the impugned addition of Rs.17,67,88,271/- to the income of assessee invoking the provisions of section 43A of the Act contending that the assessee had imported machinery from abroad and had made payment to BHEL in foreign currency. While making this addition, Assessing Officer relied upon the judgement of Supreme Court in the case of Sutlej Cotton Mills Ltd. vs CIT (1979) 116 ITR 01.

32. At the time of hearing, Ld AR submitted as under:

a) Section 43A of the Act has no application where domestic/indigenous assets are constructed or loans availed are in Indian currency.

i) Section 43A reads as under:-

43A Special provisions consequential to changes in rate of exchange of currency (1) Notwithstanding anything contained in any other provision of this Act, where an assessee has acquired any asset from a country outside India for the purposes of his business or profession and, in consequence of a change in the rate of exchange at any time after the acquisition of such asset, there is an increase or reduction in

the liability of the assessee as expressed in Indian currency for making payment towards the whole or a part of the cost of the asset or for repayment of the whole or a part of the moneys borrowed by him from any person, directly or indirectly, in any foreign currency specifically for the purpose of acquiring the asset (being in either case the liability existing immediately before the date on which the change in the rate of exchange takes effect), the amount by which the liability aforesaid is so increased or reduced during the previous year shall be added to, or, as the case may be, deducted from, the actual cost of the asset as defined in clause (1) of section 43 or the amount of expenditure of a capital nature referred to in clause (iv) of sub-section (1) of section 35 or in section 35A or in clause (ix) of sub-section (1) of section 36 or, in the case of a capital asset (not being a capital asset referred to in section 50), the cost of acquisition thereof for the purposes of section 48, and the amount arrived at after such addition or deduction shall be taken to be the actual cost of the asset or the amount of expenditure of a capital nature or, as the case may be, the cost of acquisition of the capital asset as aforesaid.

Explanation-1.-In this sub-section, unless the context otherwise requires,

(a) "Rate of Exchange" means the rate of exchange determined or recognized by the Central Government for the conversion of Indian currency into foreign currency or foreign currency into Indian currency
(b) "Foreign Currency" and "Indian Currency" have the meanings respectively assigned to them in section 2 of the Foreign Exchange Regulation Act, 1947 (7 of 1947).

Explanation 2.-Where the whole or any part of the liability aforesaid is met, not by the assessee, but, directly or indirectly, by any other person or authority, the liability so

met shall not be taken into account for the purposes of this sub-section. Explanation-3. Where the assessee has entered into a contract with an authorized dealer as defined in section 2 of the Foreign Exchange Regulation Act, 1947 (7 of 1947) for providing him with a specified sum in a foreign currency on or after a stipulated future date at the rate of exchange specified in the contract to enable him to meet the whole or any part of the liability aforesaid, the amount, if any, to be added to, or deducted from, the actual coat of the asset or the amount of expenditure of a capital nature or, as the case may be, the cost of acquisition of the capital asset under this sub-section shall, in respect of so much of the sun specified in the contract as is available for discharging the liability aforesaid, be computed with reference to the rate of exchange specified therein.

(2) The provisions of sub-section (1) shall not be taken into account in computing the actual cost of an asset for the purpose of the deduction on account of development rebate under section 33.'.

ii) From perusal of section, it is crystal clear that the said provision is applicable only when all the following conditions are satisfied:-

a) the asset had been acquired by the assessee,
b) such asset is acquired from the country outside India,
c) such asset is acquired either on a) deferred credit term from the foreign supplier or b) loans availed in foreign currency.

iii) As per the facts of the case, for in-house development of the power plant at Bawana, assessee had entered into a contract with BHEL on turnkey basis. The said work encompassed civil, structural and architectural design and construction, engineering, manufacturing, inspection, testing, packing,

forwarding, dispatch, transportation, port handling, clearance, insurance, loading and unloading, handling and storage etc.

iv) During the course of execution of contract, BHEL was required to import certain Plant & Machinery/ equipment from abroad on account of which certain part of the consideration was payable by the assessee to BHEL in foreign currency

v) Without pointing out any infirmity, Assessing Officer blindly made the addition. Hence, before the CIT(A), produced relevant part of excerpts of the contract as additional evidence under Rule 46A of the Income Tax Rules However, CIT(A) rejected to admit the same. Since the said evidence was relevant to consider the issue and to render the substantial justice to the assessee, the CIT(A) should have admitted the same.

vi) Since under the terms of contract, assessee had paid part of consideration in foreign currency, it would not mean that assessee had imported the assets from abroad. It is submitted that the power plant is located in India and the asset was imported from abroad by BHEL and not the assessee. Thus the condition prescribed in section 43A are not satisfied. If the provisions of section 43A are to be enforced then the same can be applied against the contractor only and not against the assessee company.

vii) Assessee is relying upon the following judicial precedence in which it is held that section 43A is not applicable in the case of Indigenous / domestic asset even if payment is made to the supplier in foreign currency.

viii) Hon'ble Supreme Court in the case of CIT vs. Tata Iron & Steel Company Ltd. (1998) 231 ITR 285 (SC) held that cost of an asset and cost of raising money for purchase of asset are two different and independent transactions. Thus, events subsequent to acquisition of assets cannot change the price paid for it.

ix) Hon'ble Supreme Court in the case of CIT vs Woodward Governor India (P) Ltd. (2009) 312 ITR 254 (SC) have held that loss suffered by the assessee on account of foreign exchange difference as on the date of Balance Sheet is an item of expenditure u/s 37(1) of the Act.

x) Assessee is also relying upon following judgements:-

Cooper cooperation (P) Ltd. vs DCIT (2016) 159 ITD 165 (ITAT-Pune)

DCIT vs Maddi Lakshmaiah & Co. Ltd. (2017) 166 ITD 69 (Vizag) (ITAT-Vishakhapatnam)

Baby Memorial Hospital Ltd. vs ACIT Circle-1(1), Kozhikode (2019) 111 Taxmann.com 189 (ITAT-Cochin)

MFAR Hotels & Resorts Ltd. vs ACIT, Circle-1(1), Kochi (2019) 105 taxmann.com 335 (ITAT-Cochin)

ACIT Circle-5(1) vs KEI Industries Ltd. (2020) 12 TMI 1190 (ITAT-Del)

Hueco Electronics (1) Pvt. Ltd. vs DCIT Circle-11 2020 (2) TMI 419 (ITAT-Pune)

Neuman & Esser Compressor Application Centre Pvt. Ltd. vs DCIT Circle-10, 2019 (6) TMI 1434 (ITAT-Pune)

xi) In view of above judicial pronouncement, it is stated that the provisions of section 43A are not applicable.

xii) It is further submitted that from perusal of the contract, it manifests that payment to the contractor was required to be made on achievement of certain milestones and in any case till the successful commissioning/guarantee test of the asset. The present case is not the case where assets had been acquired on deferred credit terms from the supplier. Further,

development of power plant at Bawana was funded out of loan from Power Finance Corporation Ltd. (PFC). The said loan agreement was produced by the assessee before CIT(A) as additional evidence under Rule 46A of the Income Tax Rules however CIT(A) did not allow to admit such evidence. Perusal of contract reflects that the said loan had been availed in Indian currency i.e. rupees and not in foreign currency. Thus, all the three conditions required for applying section 43A are not satisfied and therefore, impugned addition is unwarranted.

b) Foreign exchange loss is allowable u/s 43AA of the Act as well as ICDs

i) as per the provisions of section 43AA of the Act, any foreign exchange gain/loss which is not covered by the provisions of section 43A is allowable as income/expense in accordance with ICDs notified u/s 145(2) of the Act.

ii) Section 43AA lays down as under:-

> "43AA (1) Subject to the provisions of section 43A, any gain or loss ansing on account of any change in foreign exchange rates shall be treated as income or loss, as the case may be, and such gain or loss shall be computed in accordance with the income computation and disclosure standards notified under sub-section (2) of section 145
>
> (2) For the purposes of sub-section (1), gain or loss arising on account of the effects of change in foreign exchange rates shall be in respect of all foreign currency transactions, including those relating to-
>
> a) monetary items and non-monetary items,
> b) translation of financial statements of foreign operations;
> c) forward exchange contracts:
> d) foreign currency translation reserves.

Para-5 of ICDS-VI dealing with "effects of changes in foreign exchange rates, notified by CBDT vide Notification dated 29.09.2016 provides that foreign exchange gain/loss on monetary as well as non-monetary items shall be considered as income/expense in the relevant previous year. The only exception to the said treatment as provided in para 6 of the ICDs is section 43A of the Act. Section 43A is not applicable to the instant case as discussed above. Para 5 & 6 of para 5 lays down as under.-

> "5(i) In respect of monetary items, exchange differences arising on the settlement thereof or on conversion thereof at last day of the previous year shall be recognised as income or as expense in that previous year.
>
> (ii)In respect of non-monetary items, exchange differences arising on conversion thereof at the last day of the previous year shall not be recognised as income or as expense in that previous year,

Notwithstanding anything contained in paragraph 3, 4 and 6, initial recognition, conversion and recognition of exchange difference shall be subject to provisions of section 43A of the Act or Rule 115 of Income Tax Rules, 1962, as the case may be."

iv) On conjoint reading of section 43A and section 43AA r/w ICDs-VI it is evident that any foreign currency loss in respect of sum payable to the Indian contractor for construction of an asset located in India is allowable as revenue expenditure.

v) It is relevant to note that assessee Co. is maintaining its books of accounts as per mercantile system of accounting. Even as per Indian accounting standards, such foreign currency loss is required to be charged to P/L account and is not required to be capitalised under IND-AS 21 dealing with "effects of changing in foreign exchange rates". Such

accounting treatment has been duly certified by statutory auditors of the company and no infirmity / discrepancy in the books of accounts has been pointed out by the Assessing Officer in this regard.

vi) Moreover, sight cannot be lost of section 43(1) of the Act which defines the term "actual cost of an asset and the same is circumscribed by 13 Explanations dealing with various specific situations. None of such Explanations provide that foreign exchange fluctuation loss in respect of assets constructed in India is required to be added to the cost of asset.

vii) It is submitted that **unrealized foreign exchange losses are allowable as revenue expenditure even u/s 37(1) of the Act. Hon'ble Supreme Court in the case of Oil & Natural Gas Corporation Ltd. vs CIT (2010) 189 Taxmann 292 held that loss suffered by the assessee, maintaining accounts regularly on mercantile system and following accounting standards prescribed by ICAI, on account of fluctuation in rate of foreign exchange is an item of expenditure u/s 37(1), notwithstanding that liability has not been discharged in the year in which fluctuation in rate of foreign exchange occurred. Thus from all the facets, the impugned addition is injudicious and liable to be deleted.**

c) Case Law relied upon by the Assessing Officer

1) The Assessing Officer has relied upon the judgement of Supreme Court in the case of Sutlej Cotton Mills Ltd. vs CIT (1979) 116 ITR 01. It is submitted that the ratio of the said judgement is not applicable to the present case as the facts of the present case are different. In the case of Satlej Cotton, assessee was carrying on business in West Pakistan and was being taxed on Pakistan profit in India calculating the income

based on the then prevailing foreign exchange rate. During the subsequent assessment years, assessee remitted certain amounts from Pakistan to India and claimed that with the devaluation of Pakistani rupee, it had suffered losses in the said remittances. Hon'ble Supreme Court held that where any profit/loss arises on account of conversion of foreign currency into another currency, the determination of nature of such profit/loss as revenue or capital would depend upon the fact that whether such foreign currency is held by the assessee on revenue account as a trading asset or as a capital / fixed asset.

ii) Issue in the present case is in connection with losses arising out of fluctuation in foreign exchange rate in respect of sum payable to an Indian contractor for construction of a power plant located in India. It is not the case as to whether assessee had kept the foreign currency as capital asset or revenue asset. Hence, the reliance on the judgement in the case of Satlej Cotton is misplaced.

d) Without prejudice, if the foreign exchange fluctuation loss is treated as capital in nature then depreciation should have been allowed by the Assessing Office

i) Without prejudice to above, if ultimately, Hon'ble Tribunal is not inclined to allow this foreign exchange loss is treated as revenue expenditure then the same shall be added to the actual cost of asset u/s 43(1) of the Act and depreciation is to be allowed thereon.

ii) In the assessment order, the Assessing Officer has disallowed the foreign exchange fluctuation loss claimed by the assessee, treating the same as capital in nature by erroneously invoking provisions of section 43A of the Act.

Hence, if the same is not treated as revenue expenditure then the depreciation is to be allowed thereon.

33. Further, he submitted as under:

Accordingly, it is concluded that the foreign exchange loss incurred by the assessee is to be allowed as revenue expenditure on the following grounds:-

a) section 43A is not applicable as:

- the asset constructed by the assessee (i.e. power plant) is located in India and not imported from abroad.
-the components required for the construction of the said asset have been imported by the contractor (i.e. BHEL) and not by the assessee,
- the asset constructed is not on deferred payment terms and the loan availed to finance the same is also in Indian currency.

b) Once section 43A is not applicable, foreign currency loss on monetary as well as non-monetary assets is allowable u/s 43AA r/w ICDS-VI.

c) Assessee follows mercantile system of accounting, books of accounts have not been rejected by the Assessing Officer and the accounting treatment adopted by the assessee is also in consonance with IND-AS 21. Moreover, none of the explanations in section 43(1) require capitalization of unrealized foreign exchange loss and the same is otherwise allowable u/s 37 of the Act as well.

d) Without prejudice and in the alternative, depreciation is allowable on the amount of forex loss capitalized u/s 43A of the Act, which has not been granted either in the present year or the subsequent assessment years.

34. On the other hand, Ld DR submitted the relevant facts on record and objected to the detailed submissions of Ld AR. He relied on the findings of lower authorities.

35. Considered the rival submissions and material placed on record. We observed from the record that for in-house development of the power plant at Bawana, assessee had entered into a contracts with BHEL on turnkey basis in May 2008, where the consideration was payable in three different currencies which converts in equivalent INR at that time at Rs.3499.99 crores, currency wise break-up is given in table below:

S. No	Contract	Currency	Contract Price Amount
1	Plant and Equipment including mandatory spares to be supplied from abroad	USD	11,87,10,857/-
2	Supply of Domestically manufactured Plant and Equipment including mandatory spares	EURO INR	14,17,53,800/- 1418,97,70,172/-
3	All Services	INR	Rs.308,70,06,418/-
4	Civil Structural & Architectural Design 85 Construction work	INR	Rs.473,02,32,9947-

In addition to the above, any taxes except customs were also to be reimbursed to contractor.

35.1. It is brought to our notice that every Contract, for Terms of Payment, referring Terms and Procedure of Payment-Appendix-1 placed at Page 94 to 106. As per the Schedules referred in the Terms and Procedure of Payment above contracted price were not required to be paid in lump-sum, rather it was submitted before us that the payment is to be released on the basis of different mile stones e.g. Advance Payment, payment of dispatch of material, Payment on receipt, Payment on completion of facility and Payment on successful completion of guarantee test.

35.2 We notice from the payment procedures agreed with BHEL, refer page 105 of the paper book, it states as under:

2. Currency of payment

2.1 The contract price shall be paid in the currency or currencies in which the various price components have been stated in the bid and as incorporated in the contract.

35.3. From the above terms agreed with BHEL, the liability to settle the contract amount in the foreign currencies remained with the assessee even after the completion or commissioning of the plant. We observe from the record that there were contracts having contract price in foreign currency i.e. in USD and EURO.

35.4. Accordingly, Assessee has recorded the 100% liability against the material received or services certified by the project manager. Out of this accounted liability, some amount already paid as advance payment or payment against dispatch and balance payable afterwards in the books on the date of commissioning of the project. It was submitted before us that the Assessee has held 5% towards liquidated damages till the final closure of the contract. Upto FY 2017-18 almost 90% payment against the contract on foreign currency was paid and balance shown as liability.

35.5. We observe that, as per the IND AS-21 on the Effects of Changes Foreign Exchange Rates, the assessee has to report, at the end of each reporting period, foreign currency monetary items shall be translated using the closing rate. The same standard provides that the exchange differences arising on the settlement of monetary items or on translating monetary items at rates different from those at which they were translated on initial recognition during the period or in previous financial statements shall be recognized in profit or loss in the period in which they arise.

35.6. At the time of hearing, the bench directed the assessee to submit the relevant claim made during the year, the assessee has submitted the relevant Calculation of foreign exchange Gain/loss for AY 2018-19 (FY 2017-18) as under:

Details of Foreign Exchange Gain/Loss incurred during FY 2017-18 for BHEL

							Amount in Rs.
Name of the Party	Nature of Transaction	Amount in Foreign Currency O/s as on 31.03.2018	Currency	Rate as on 01.0*2017	Rate as on 31.03.2018	(Gain) / Loss	Foreign Exchnage (Gain) / Loss
BHEL	Advance	148,358.62	EURO	79.20	68.11	(11.09)	(1,645,297.10)
BHEL	Advance	368,825.00	USD	65.73	65.63	(0.10)	(36,882.50)
BHEL	Liability	16,459,210.76	EURO	70.50	81.05	10.55	173,644,673.52
BHEL	Liability	12,688,819.61	USD	65.73	65.63	(0.10)	(1,268,881.96)
Net Foreign Exchange Loss booked related to BHEL during FY 2017-18							170,693,611.96
	Other Gain/ Losses during the year						6,094,659.04
							176,788,271.00

From the above, the assessee has reinstated the forex liability in the Balance Sheet and the excess liability was claimed as forex loss. In the subsequent AY, the relevant settlement will be made and in case the settlement made are lesser than the liability created above, the same will be declared as income during the next AY. The method of accounting is continues process and the liability in the foreign currencies has to be recognized at the end of each year. Therefore, the foreign currency liability relating to the above project remained with the assessee till the relevant liability is settled. Considering the agreement with BHEL on payment procedure agreed with them, the claim made by the assessee during the year under consideration is proper. Accordingly, the ground raised by the assessee is allowed.

36. With regard to ground No.8 & 9, the relevant facts are, during the year, assessee has claimed an amount of Rs.293,34,46,596/- towards depreciation on fixed assets in its books of accounts, which was computed in accordance with IND-AS 16 applicable to the assessee and the same was duly admitted by the statutory auditors. Since no component of the said depreciation pertained to revaluation, the assessee had also claimed the same amount in the computation of book profit u/s 115JB of the Act. However, in the computation of income, assessee had claimed depreciation of Rs.398,46,51,672/-. During the assessment proceeding. Assessing Officer vide notices dated 21.12.2020, 22.02.2021 and 17.03.2021 directed the assessee to furnish depreciation chart, details in respect of addition to Plant & Machinery, justification for put to use and claiming depreciation thereon along with copy of sample bills in respect thereto.

36.1 Assessee vide reply-dated 04.02.202, 26.02.2021 and 08.04.2021 submitted that it, being a power generating company, had claimed depreciation as per section 32(1) r/w Rule 5(la) and Appendix-IA of the Act. It was further submitted that during the year, total additions to fixed assets were made at 266.11 crores, date-wise details of which had been duly submitted in the tax audit report.

36.2 Amount of additions to fixed assets and depreciation thereon was claimed by the assessee in consonance with IND-AS 16 applicable to the assessee company. However, the Assessing Officer, vide show-cause notice-dated 05.04.2021 and 08.04.2021 worked out the depreciation at Rs.162,34,00,032/- as against Rs.398,46,51,672/- claimed by the assessee and accordingly, required the assessee as to why difference of Rs.236,12,51,643/- be not disallowed and added back to the returned income.

Out of the sum of 236,12,51,643/-

-a sum of Rs.3,04,57,234/- had been proposed to be disallowed on account of 50% of the depreciation in respect of assets amounting to Rs.79,21,25,723/- which had been purchased by the assessee on 31.03.2018 and whose depreciation rate was 7.69%.

-balance Rs.233,07,94,409/- (i.e. Rs.236,12,51,643-Rs.3,04,57,234/-) had been proposed to be disallowed by applying SLM rate to the opening WDV of the assets, details of which had been tabulated in the show-cause notice.

36.3 In response, Vide reply dated 08.04.2021, assessee submitted that the calculation was made on the opening WDV by applying SLM rate which is incorrect. Assessee furnished copy of clause-18 of Form 3CD in support of depreciation claimed. However, AO rejected the submissions/calculation/ explanation made by the assessee, AO disallowed the depreciation of Rs.236,12,51,643/- as per normal provisions and made addition of Rs.3,04,57,234/- to the book profit u/s 115JB of the Act by observing that the assessee had not submitted working of depreciation.

36.4 Aggrieved, the assessee preferred an appeal before CIT(A) and Ld CIT(A) has sustained the additions by observing that the assessee had failed to submit the working/details of depreciation claimed.

37. Aggrieved, the assessee in appeal before us and at the time of hearing, Ld AR submitted as under:

A**. Disallowance of Rs. 3,04,57,234/- on account of 50% of the depreciation in respect of assets acquired on 31.03.2018**

a) This addition was made by the Assessing Officer on the ground that the assets amounting to 79,21,25,723/- had been capitalized on 31.03.2018 and therefore, depreciation was to be computed at 50% of 7.69%.
b) In fact, assessee had itself claimed half depreciation in respect of assets put to use for less than 180 days during the previous year. The said position was evident from the working of depreciation submitted by the assessee during the assessment proceeding, however, Assessing Officer had ignored the same.

Assessing Officer had deliberately ignored the same in order to make addition. Even CIT(A) has also not applied his mind to the computation furnished by the assessee.

B. **Disallowance of 233,07,94,409/- (236,12,51,643-Rs.3,04,57,234) on account of depreciation computed by applying SLM rate to opening WDV of assets vis-à-vis their "actual cost"**

a) Since the assessee company is engaged in the business of generation and sale of power to various DISCOMS in the state of Delhi, it was claiming depreciation as per straight line method (SLM) as per the provisions of section 32(1)(i) r/w Rule 5(IA) of the Income Tax Rules. As per this annexure, depreciation rate was to be allowed to the actual cost of the asset.

b) Section 32(1)(i) states that in the case of assets of an undertaking engaged in generation or generation and distribution of power, depreciation is to be claimed at such percentage on the actual cost thereof to the assessee as may be prescribed.

c) Rule 5(IA) states that the allowance under clause (i) of sub-section (1) of section 32 of the Act in respect of depreciation of

assets acquired on or after 15 day of April 1997 shall be calculated at the percentage specified in the 2nd column of the table in Appendix-IA of these rules on the actual cost thereof to the assessee as are used for the purposes of the business of the assessee at any time during the previous year.

d) Since the assessee was engaged solely in the business of generation and distribution of power, depreciation was claimed as per Appendix-IA.

e) It is not the case of Assessing Officer that the assessee was not engaged in the business of generation and distribution of power or the rates applied by the assessee were different from the rate specified in Appendix-1A.

f) The Assessing Officer and the CIT(A) had ignored the computation filed by the assessee and disallowed part of depreciation by wrongly computing the same applying SLM rate to the opening WDV

g) As per 2nd proviso to Rule 5(1A) of the Income Tax Rules, an option can be exercised by the assessee to compute depreciation in accordance with Appendix-1 instead of Appendix-1A and the same has to be opted on or before the due date of filing of return u/s 139(1) of the Act. It is needless to say that such an option is available to the assessee only and not to the Assessing Officer Assessee had not opted for the said alternative and instead had continued with SLM method provided as per Appendix-1A and therefore, Assessing Officer and the CIT(A) were duty bound to accept the same.

h) This method was continuously followed by the assessee in the preceding as well as subsequent years. In any case, approach of the Assessing Officer in calculating depreciation by applying SLM rate to opening WDV is wrong since the same was in complete violation of the provisions of the Act.

Hence, the addition made by the Assessing Officer is to be deleted in the interest of justice

C. Disallowance of Rs.3,04,57,234/- under MAT Provisions

a) Apart from the addition under normal provisions, Assessing Officer has also made addition of Rs.3,04,57,234/- to the book profit by disallowing 50% depreciation in respect of assets amounting to 79,21,25,723/- capitalized on 31.03.2018 under MAT provisions.

b) As per the provisions of section 115JB of the Act where the tax payable by the assessee under normal provisions is less than 18.5% of the "book profits" then the assessee is liable to pay 18.5% of the book profit as tax.

The term "book profit" is defined in Explanation 1 to section 115JB of the Act to mean the net profit as shown in the Profit & Loss A/c as increased by and decreased by certain items provided therein.

c) As per sub-section (2) to section 115JB, the Profit & Loss A/c of the assessee shall be prepared as per Schedule-III to the Companies Act 2013.

d) As per Explanation 1 to section 115JB (2), amount of depreciation is to be added to the book profit as per clause (g) if it was debited to the Profit & Loss A/c and the amount of depreciation (excluding the depreciation on account of revaluation of assets) is to be reduced from the Profit & Loss A/c as per clause (iia) while computing book profit. Since there was no depreciation claimed by the assessee on account of revaluation of asset and therefore, same depreciation was claimed by the assessee in the Profit & Loss A/c as per normal provisions as well as under MAT provisions.

e) As stated by the Supreme Court in the case Apollo Tyres Ltd. vs. CIT (2002) 255 ITR 273 (SC) Assessing Officer has no power to tinker with the computation of book profit made by the assessee, once the accounts of the company are made in accordance with the provisions of Companies Act. The Assessing Officer does not have the jurisdiction to go behind the net profit shown in the Profit & Loss A/c except to the extent provided in the Explanation to section 115J.

f) This case was relied upon by the Supreme Court again in the case of Malyalam Manorama vs CIT (2008) 300 ITR 251 (SC) holding that the Assessing Officer while computing income u/s 115J, has only the power of examining whether the books of accounts have been certified by the authorities under the 1956 Act as having been properly maintained in accordance with the 1956 Act. The Assessing Officer, thereafter, has the limited power of making increases and reductions as provided for in the Explanation to the said section.

g) The judgement of Supreme Court in the case of Apollo Tyres Ltd. is relied upon by various High Courts in the following cases:-

CIT vs J K Synthetics Ltd. (2016) 73 Taxmann.com 278 (All) CIT vs Kovai Maruthi Paper & Board (P) Ltd. (2007) 294 ITR 57 (Mad)

h) It is not the case of Assessing Officer that depreciation in respect of assets capitalized on 31.03.2018 amounting to Rs.79,21,25,723/- has not been correctly computed in accordance with Companies Act. Even statutory auditors have duly admitted the same and no qualification has been made to that effect in the audit report. It is also not the case of Assessing Officer that depreciation of

Rs.3,04,57,234/- is attributable to any alleged revaluation.

Hence, the action of Assessing Officer in making the adjustment of 3,04,57,234/- to the book profit is in gross violation of the provisions of section 115JB of the Act and therefore, it deserves to be deleted in the interest of justice.

38. Finally, he submitted that in view of forgoing discussion, it is requested that the addition/disallowance made by the Assessing Officer as confirmed by CIT(A) in respect of proportionate depreciation under the normal provisions as well as under MAT provisions are untenable owing to the following:-

a) Depreciation in respect of assets amounting to 79,21,25,723/- capitalised on 31.03.2018 had been claimed by the assessee itself at 50%, since the said assets had been put to use for less than 180 days.
Ignoring the calculation made by the assessee and disallowing 50% depreciation would amounted to "Nil" depreciation on these assets in the hands of assessee.

b) Balance disallowance of 233,07,94,409/- made under normal provisions is on account of applying SLM rate to opening WDV of assets. As per the provisions of section 32(1)(i) r/w Rule 5(1A), assessee company is solely engaged in the generation and distribution of power, and therefore, rate specified in Appendix-1A was to be applied, according to which, rate prescribed therein was to be applied to the "actual cost" of assets and not to their "opening WDV.

c) The sole allegation of the Assessing Officer as confirmed by CIT(A) is that the assessee company had failed to provide working of depreciation which is factually incorrect.

d) Under the MAT provision, Assessing Officer is under an obligation to accept the authenticity of books of accounts prepared under the Companies Act and can make only those adjustments to the net profit which are permissible under Explanation 1 to section 115JB of the Act. Thus book profit of the assessee cannot be tinkered with any particular item which is not envisaged within the said Explanation.

e) It is not the case of the assessee that any part of depreciation is attributable to any revaluation of asset.

39. Further he submitted that the order passed by CIT(A) is perverse in law and on facts. In this regard, assessee has taken the following ground:

15. That the Ld. CIT(A) and AO has erred in law and on facts in disallowing the depreciation of Rs.3,04,57,234/- and adding back to the book profit u/s 115JB of the Act alleging the same to be excessively claimed despite the fact that book profit had been arrived at as per the provisions of the Companies Act and had been audited by the statutory auditor.

a) The order passed by the Ld. CIT(A) is perverse in law and on facts as he ignored the detailed written submissions running into 200 pages filed by the assessee enclosing relevant documents and relying upon the irrelevant considerations.

b) First, CIT(A) committed the error by not admitting the additional evidence filed by the assessee. In fact, those were not the additional evidence as such the same were already brought into the notice of Assessing Officer in the pleading. In any case, CIT(A) had to admit the same to render the substantial justice to the assessee. CIT(A) has not given his

own reasons while deciding the issue and had merely confirmed the order of Assessing Officer stating that Assessing Officer had passed a reasoned order and thus the entire purpose of filing the appeal is frustrated. The CIT(A) had to apply his own mind, appreciate the evidence independently and thereafter had to arrive at a decision. Even for rejecting the submissions of the assessee, CIT(A) had to give his own reasons. By not doing the same, the CIT(A) has committed the error and had rendered the order perverse. Hence, it is liable to be quashed.

40. On the other hand, Ld DR relied on the orders of lower authorities.

41. Considered the rival submissions and material placed on record. We observed that AO has noticed from the statement of depreciation claimed by the assessee that an amount of Rs. 79,21,25,723/- was purchased/added to the fixed assets on 31/03/2018, put to use on 31/03/2018. It failed to submit the relevant information to prove the assets were put to use on 31/03/2018. Accordingly, he has disallowed the depreciation to the extent of Rs.304,57,234/-. Since the Assessee has not submitted the relevant working, he proceeded to recalculate the depreciation and the same is reproduced in the order at page 44 of assessment order. After considering the detailed submissions and material available on record. We observed that the method adopted by the AO is not as per accepted method. It is fact on record that the assessee falls under the Electricity generation and distribution category, the applicable rates as per section 32(1)(i) read with rule 5(IA) (Appendix 1A) and the assessee has followed the same. It is also brought to our notice that the relevant depreciation schedule was submitted before AO, which is part of audit report submitted as per Form 3CD. The AO has initiated the verification of additions to assets made at the fag end of the year and not satisfied with the

certificate of put to use on 31/03/2018, he has determined the relevant depreciation and failed to verify the relevant depreciation allowable for other assets already put to use by adopting wrong methods. It was submitted before us that the assessee itself has claimed 50% of the depreciation for those assets which were added to the fixed assets after 01.10.2017. Since the assessee has already submitted the relevant depreciation schedule in the audit report, we are inclined to remit this issue back to the file of AO to verify the relevant depreciation schedule and also verify the relevant documents submitted to claim that the assets were already put to use on or before 31/03/2018. The assessee had already adopted the relevant method of claiming the depreciation as per the rates in Appendix 1A, AO has to verify the same afresh as per law after giving proper opportunity of being heard to the assessee. Accordingly the grounds raised by the assessee on the issue of depreciation u/s 32(1) as well as allowable depreciation in the computing the book profit u/s 115JB of the Act are remitted back to AO to verify the same and allow them as per law. It is needless to say that assessee may be given proper opportunity of being heard. Accordingly, the ground raised by the assessee is allowed for statistical purpose.

19. In the result, the appeal filed by the assessee is partly allowed as indicated above.

Order pronounced on 14th August, 2024.

Sd/-	Sd/-
(SUDHIR PAREEK)	**(S.RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 14/08/2024
Pk/sps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI