IN THE INCOME TAX APPELLATE TRIBUNAL, RAJKOT BENCH, RAJKOT
BEFORE DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER
AND
SHRI DINESH MOHAN SINHA, JUDICIAL MEMBER

आयकर अपील सं./**ITA No. 83/RJT/ 2025**

(निर्धारण वर्ष/**Assessment Year: (2017-18)**

Seabird Marine Services Pvt. Ltd. Office No. 309 & 310, Centroid Luxuria, Nr. Crystal Mall, Khodiyar Colony, Aerodrome Road, Jamnagar – 361006	Vs.	Assistant Commissioner of Income-tax, Circle–1, Jamnagar, Aayakar Bhawan, Nr. Subhash Bridge, Jamnagar –Rajkot Highway, Jamnagar
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AACCS 9869 C**		
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

Appellant by : Shri S. N. Soparkar, Ld. AR
Respondent by : Shri Sanjay Punglia, Ld. CIT-DR

Date of Hearing : 30/04/2025
Date of Pronouncement : 30/05/2025

आदेश / **O R D E R**

Per DR. A. L. SAINI, AM:

Captioned appeal filed by the assessee, pertaining to Assessment Year 2017-18, is directed against the order passed by the National Faceless Appeal Centre (NFAC), Dehi/ Commissioner of Income Tax (Appeal) [in short 'Ld. CIT(A)'], dated 02.01.2025, which in turn arises out of an assessment order passed by the Assessing Officer, under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), vide order dated 31.12.2019.

2. Grounds of appeal raised by the assessee are as follows:

"All the below mentioned grounds of appeal are independent and without prejudices to each other.

1. The Hon. CIT (A) erred in law as well as on facts in confirming the Assessment order dated 31/12/2019 u/s 143(3) of the Income tax Act (the Act] passed by the Assistant commissioner of Income tax. Circle -1 Jamnagar [the Ld. assessing officer] determining the total income of assessee as per normal computation of income at Rs 50,17,35,726/- against returned income of Rs. 49,85,50,620/- and determining the Book profit u/s 115JB of the Act at Rs. 45,58,90,530/-against Returned Book loss of Rs.28,40,37,610/-.

2. Grounds of Appeal in relation to computation of book profit u/s 115JB

Hon. CIT(A) erred in law as well as in facts in

(i). confirming addition made by assessing officer of Rs. 73.99 crores to the book profits under Clause (1) of Explanation 1 to Section 115JB (2) of the Income Tax Act. 1961.

(ii). failed to appreciate that the amount written off is not a provision for diminution in the value of any asset as contemplated under Clause (i) of Explanation 1 to Section 115JB(2), but an actual write-off, which is not covered by the scope of adjustments permitted under the said Explanation.

*(iii). upholding assessing officer's treatment of '**the actual write off**' made in the books of account as 'provision' as per Clause (i) of Explanation 1 to Section 115JB (2) of the Income Tax Act, 1961.*

(iv). confirming action of Ld. assessing officer in non-consideration of the fact that there is no asset in existence in order to make addition under Clause (i) of Explanation 1 to Section 115JB (2) of the Income Tax Act, 1961. The write-off represents a complete extinguishment of the investment, which is not subject to addition as per the said Explanation.

(v). not considering the judgement given by the Hon'ble Supreme Court in the case of Apollo Tyres Limited wherein it was held that the assessing officer has limited power of making increases and reductions as provided for in the Explanation to Section 115JB, and does not have the jurisdiction to go behind the net profit shown in the profit and loss account.

*(vi). hon CIT(A) has erred in law as well as on facts by ignoring the requirement of compliance with Schedule III of the Companies Act 2013 and resultantly requirement of compliance with Ind AS (**the Indian Accounting Standards Rules, 2015**) for computing book profit u/s 115JB.*

(vii). drawing adverse inference u/s 114 of the Indian Evidence Act 1872 by considering failure on part of assessee by not showing reduction in value of shares in the company where assessee has made investment.

(viii). not following orders of Hon'ble high courts in respect of capital reduction of investee companies which has resulted in write off of investment in the books of assessee.

(ix). not considering decisions of Supreme Court, jurisdictional High Court, other High Court, and Tribunals which was relied upon by the assessee during assessee proceedings.

(x). considering the capital reduction of its own and capital reduction of investee companies which are carried out as part of family arrangement, as a scheme of planning to avoid taxes.

(xi). considering the capital reduction of its own and capital reduction of investee companies as a scheme of planning to avoid taxes even though assessee has not claimed any capital loss under the normal provision of income tax.

(xii). considering the capital reduction of its own and capital reduction of investee companies as a scheme of planning to avoid taxes even though claim of loss in MAT computation is on account of Ind AS implementation and CBDT circular which issued after the end of the previous year.

3. Grounds of Appeal in relation direction given to assessing officer

Hon. CIT(A) erred in law as well as in facts in

(i). proposing enhancement of assessment in the form of direction given to assessing officer for the matter which has not been considered by assessing officer in assessment order.

(ii). proposing enhancement of assessment in the form of direction given to assessing officer without issuing a show cause notice to assessee as required u/s 251(2) of the Act.

(iii). linking two different transactions i.e., the capital reduction of assessee- company and capital reduction of its investee companies.

(iv). considering capital reduction of assessee- company, as deemed dividend u/s 2(22)(d) of the Act, despite the fact that capital reduction is carried out for NIL consideration.

(v). considering transaction of capital reduction of assessee- company, as buy back to be covered u/s 115QA, despite the fact that capital reduction is carried out for NIL consideration.

4. Grounds of Appeal in relation to computation of deduction u/s 80-1A

Hon CIT(A) has erred in law as well as in facts in

(i). confirming addition made by assessing officer by considering Rent Income of Rs. 30,84,582/-as Income from house Property instead of business income and considering the same as not eligible for computing deduction u/s 801A though the Rent Income has direct nexus with the 80IA eligible business activity of the assessee, being income derived from the business and further issue is covered in favour of assessee by the decision of Rajkot bench in assessee's case for earlier years and not following it.

(ii). stating that revenue is not accepting the definition of CFS when the issues is decided by the Honourable Supreme court in case of Container Corporation of India Limited [2018] 93 taxmann.com 31 (SC). Thus, not accepting decision of honourable Supreme court and Honourable ITAT on this issue.

5. Grounds of Appeal in relation to assessee proceedings by not adjudicating grounds of appeal and also violation of principles of natural justice in not granting an opportunity of hearing

(i). Hon. CIT(A) has erred in law by not adjudicating legal grounds raised in respect of computation of book profit u/s 115JB of the Act.

(ii). Hon. CIT(A) has erred in law by passing order without granting opportunity of personal hearing by video conference to assessee.

Appellant craves leave to add, amend or withdraw any ground of appeal."

3. Ground No.1 raised by the assessee is general in nature, therefore does not require any adjudication.

4. Ground No.2 raised by the assessee is in relation to addition made by the Assessing Officer, while computing book profit of the assessee, u/s 115JB of the Act, and Ld. CIT(A) erred in confirming the addition made by assessing officer of Rs. 73.99 crores to the book profits under Clause (i) of Explanation 1 to Section 115JB (2) of the Income Tax Act. 1961.

5. The relevant material facts, as culled out from the material on record, qua ground No.2, are as follows. The assessee, before us is a private limited company and engaged in owning and operating container freight services, (CFS) at Navi Mumbai, Kandla, Hajiira, Mundra, and Bhiwandi and warehousing services. The assessee filed its original return of income on 28.10.2017, declaring total income at Rs.50,37,06,700/-. Subsequently, the assessee filed its revised return of income on 19.03.2019, declaring total income at Rs.49,85,50,620/-. The assessee`s case was selected for complete scrutiny under CASS. Therefore, notice under section 143(2) of the Act, was issued and served upon the assessee. Subsequently, notice under section 142(1) of the Act was issued along with detailed questionnaire, on 15.01.2019. The authorised representative of the assessee, in response to these

notices, submitted written submissions and relevant documentary evidences, before the assessing officer, through ITBA. During the course of assessment proceedings, the assessing officer noticed that a sum of Rs.73.99 Crores, (Rs.7399.28 lakhs,) has been debited to the profit & Loss Account, being "Exceptional Items". On a further perusal, the assessing officer observed that the said amount of Rs.73.99 Crores, appears to be, on account of investments, written off, in the following companies:

Company name	Nature	Amount (Rs. in lakhs)
Polestar Maritime Limited	Equity shares	200.00
Polestar Maritime Limited	Preference shares	1913.51
Seabridge Reality Pvt. Ltd.	Preference shares	3589.92
Triton Maritime Pvt. Ltd.	Preference shares	1685.85
Total		7399.28

The Assessing Officer noticed that in the calculation of taxable income, such amount of exceptional items has been added back, while calculating income under the regular provisions of the Act. However, such amount is not added back in computation of the tax payable under the provisions of section 115JB of the Act. As per Clause (i) of Explanation 1 to sub-section 2 of Section 115JB, the 'book profit' shall further be increased by the amount or amounts set aside, as provisions for diminution in the value of any asset. However, as stated above, such adjustment to the book profit has not been made, while working it, as per the provisions of section 115JB of the Act. As per the facts of the case, such reduction in investment in share tantamount to diminution in the value of assets and accordingly required to be added back, while working the 'Book profit' under the provisions of section 115JB of the Act. Accordingly, the 'Book profit' is required to be altered to that extent. The assessee was, therefore, requested to explain, as to why such sum of Rs. 7399.28 lakhs, should not be added back while working the 'Book profit' under the provisions of section 115JB of the Act.

6. Therefore, during the assessment proceedings, the Assessing Officer has issued notice to the assessee to explain the written off amount, to the tune of Rs.7399.28 lakhs.

7. In this regard, assessee had submitted written submission with documentary evidence, before the Assessing Officer, which are reproduced by the assessing officer on page no.9 to 20 of the assessment order. The assessee submitted in its reply before the assessing officer that "write off" of Rs.7399.28 lacs, is on account of capital reduction of investment in equity shares and preference shares in the group companies. This capital reduction is carried out u/s 100 to 104 of the Companies Act, 1956. The assessee submitted that the capital reduction is duly approved by the Hon'ble Bombay High Court. The assessee submitted before the assessing officer that when the balances of the assets at the end of the year are reflected at a reduced value, then amount of such reduction shall be treated as 'actual write off' and not 'provision'. Hence, once the amount of diminution in the value of investments is written off against the asset, there can be no use of any amount having been **set-aside** for diminution in the value of assets. As per the provisions of the Companies Act, 1956 and according to order of the High Court, capital reduction has resulted in extinguishment and cancellation of shares. Extinguishment of any rights in assets amounts to transfer u/s 2(47) of the Income Tax Act,1961. Hence, capital reduction amounts to transfer of asset. Hence, an actual write off on account of capital reduction is in the context of the fact that at the end of the year there is no asset in respect of which loss on capital reduction is debited. Hence, in absence of any asset no amount can be considered to set aside for diminution in value of asset. Based on these facts, the assessee submitted before the assessing officer that the fundamental premise of existence of asset to treat the amount under clause (i) of

Explanation 1 of Section 115JB(2) is lacking, and hence no addition should be made in the hands of the assessee.

8. However, the Assessing Officer rejected the above contention of assessee and observed that assessee has done these transactions under a larger scheme of planning to avoid taxes. Therefore, assessing officer did not accept the plea of the assessee that such reduction in value of investment cannot be added back, while computing the book profit under section 115JB of the Act. That is, assessing officer held that such reduction in value of investment is a part of clause (i) of Explanation 1 of Section 115JB(2) of the Act, and it should be added while computing the book profit under section 115JB of the Act. Accordingly, the book profit, as per the provisions of section 115JB of the Act, was worked out by the assessing officer to the tune of Rs.7399.28 Lakhs and added as per clause (i) of Explanation 1 of Section 115JB(2) of the Act.

9. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Ld. CIT(A), who has confirmed the action of the assessing officer. The ld CIT(A) observed that assessee has not explained that how the demerger affected the quantum of the taxable income and profit u/s 115JB. Further, the assessee tried to take the shelter of the order of the High Court. The transaction has taken place with reference to reorganisation, demerger, amalgamation etc. are to be dealt in accordance with the, provisions of the Income Tax and provisions of the Companies Act has no bearing in calculation of taxable income. The reorganisation resulted into a taxable event which has to be dealt in with accordance to the Income Tax Act which assessee has failed to do so. Further also, the assessee has not submitted vital evidences to determine actual losses if any. In other words, the loses has not been crystalised by the assessee in the books of account with reference to value of shares on the date of reorganisation. The assessee has shown purchase of shares of group companies at various rates for which no valuation report is there. Under these circumstances, it appeared that

the assessing officer has rightly added the amount of Rs.73.99 Cr invoking the provisions of clause (i) of Explanatin1 of sec. 115JB(2) as actual loss is not determinable. The actual capital loss/capital gain should have been shown irrespective of treatment in book of account. Therefore, ld CIT(A), based on these facts, confirmed the addition made by the assessing officer.

10. Shri S. N. Soparkar, Ld. Senior Counsel for the assessee, pleaded on behalf of assessee that there was reduction in the capital and the assesssee has "written off" the investments in respects of Polestar Maritime Ltd. (equity shares), Polestar Maritime limited (preferred shares), Seabridge Reality Pvt. Ltd. (preferred shares), and Triton Maritime Pvt. Ltd. (preferred shares) and because of this "write off", the assessee did not get any amount from the Investor, and the assessee- company under consideration also did not claim this "write off" as an expense in the profit and loss account, hence, there is no tax evasion on the part of the assessee. However, this action of "write off" does not fall in clause (i) of Explanation 1 of section 115JB(2) of the Act, therefore, the assessing officer should not make any adjustment for the purpose of calculation of MAT liability under section 115 JB of the Act. That is, the Ld. Senior Counsel for the assessee submitted that there was no inflow of on-money on account of capital reduction, and this capital reduction was done by the assessee company as per the order of the Hon`ble Bombay High Court, and hence the Ld. Senior Counsel for the assessee took us through paper book page-18, which is the order passed by Hon'ble Bombay High Court in respect of assessee, in relation to capital reduction, wherein the Hon'ble Bombay High Court in Company Scheme Petition No. 917 of 2016 , vide order dated 22.12.2016, has observed as follows:

> *"3) Learned Counsel for the Petitioner submits that Article 8 of the Articles of Association of the Petitioner Company empowers the Petitioner Company to rude its Share Capital, inter alia, from time to time in any manner for the time being authorised by law AND the Petitioner Company having passed Special Resolution with unanimous consent at its Extraordinary General Meeting held on 11th November, 2016 being Exhibit F to the Company Scheme Petition, approving the reduction of the issued, subscribed and paid-up share capital of the Company from Rs.40,31,36,240/- (Rup[es*

Forty Crores Thirty One Lakhs Thirty Six Thousand Two Hundred and Forty Only) divided into 34,63,624 (Thirty Four Lakh Sixty Three Thousand Six Hundred and Twenty Four)) equity hares of Rs.10/- (Rupees Ten only) each and 36,85,000 (Thirty Six Lakhs and Eighty Five Thousand) 6% Non-Cumulative, Non-Convertible, Redeemable fully paid up preference shares of Rs.100/- each to Rs.2,76,36,240/- (Rupees Two Crores Seventy Six Lakhs Thirty Six Thousand Two Hundred and Forty only) divided into 27,63,624 (Twenty Seven Lakh Sixty Three Thousand Six Hundred and Twenty Four) equity shares of Rs.10/- (Rupees Ten) each be reduced which reduction shall be effect by way of ()a) selective extinguishment and cancellation of (i) 4,00,000 (Four Lakh) fully paid up equity shares of Rs.10/ (Rupees Ten) each held by Seabird Marine Services Private Limited and having an aggregate paid up value of Rs.40,00,000/- (Rupees Forty Lakhs only); (ii) 3,00,000 (Three Lakh) fully paid up equity shares of Rs.10/- each (Rupees Ten) held by Orchid Shipping Private Limited and having an aggregate paid up value of Rs.30,00,000 (Rupees Thirty Lakhs Only) and (iii) 36,85,000 (Thirty Six Lakh Eighty Five Thousand) 6% Non-Cumulative, Non-Convertible, Redeemable fully paid up preference shares of Rs.100/- (Rupees Hundred) each held by Seabird Marine Services Privat Limited and having an aggregate paid up value of Rs.36,85,00,000/- (Rupees Thirty Six Crores Eight Five Lakhs); ("Proposed Capital Reduction"); and (b) NIL consideration being payable by the Company to Seabird Marine Services Private Limited and Orchid Shipping Private Limited in lieu of the aforesaid selective extinguishment and cancellation of the fully paid up equity shares and preference shares respectively held by them as mentioned hereinabove AND in view of the averment made in paragraph 17 of the Company Scheme Petition inter alia stating that there is one (1) Secured Creditor of the Petitioner Company and fifty one (51) Unsecured Creditors AND in view of the averments made in paragraphs 18 and 20 of the Company Scheme Petition wherein it is further inter alia sated that the proposed capital reduction does not affect or prejudice the interests of its creditors and does not involve the diminution of liability in respect of unpaid equity and preference share capital or payment to any equity and preference shareholder of any paid up equity and preference capital AND in view of the above, the provisions of and the procedure prescribed under Section 101(2) of the Companies Act, 1956 was not applicable and the same was dispensed with along with publication of the notice of hearing of the Petition in the Maharashtra Government Gazette and newspapers and the formality of words "And Reduced" while describing the capital structure of Petitioner Company while confirming the proposed reduction of equity and preference capital was also dispensed with vide order dated 15th December, 2016 passed in Company Summons for Direction No.1034 of 2016."

11. The Ld. Senior Counsel for the assessee, also took us through to the schedule No.37 to notes to "accounts" of the assessee-company, which are reproduced below:

"37. Investments written off:

During the year under review, in order to streamline the shareholding for better and more efficient management of the company and as a part of reorganisation and to simplify holding structure, the following Companies in which the Company has made investments, have carried out capital reduction duly approved by the High Cut Bombay. Pursuant to the order, the Company has written off the investments in its books of

account and same is reflected in the accounts as an adjustment against the brought forward balance of profit & loss a/c.

Company name	*Nature*	*Amt. (Rs in lakhs)*
Polestar Maritime Ltd.	*Equity shares*	*200.00*
Polestar Maritime Ltd.	*Preference shares*	*1,913.51*
Seabridge Reality Pvt Ltd.	*Preference shares*	*3,589.92*
Triton Maritime Pvt. Ltd.	*Preference shares*	*1,695.85*
Total		*7,399.28*

12. Therefore, Ld. Senior Counsel submitted that in respect of four companies mentioned above, the assessee-company went into capital reduction and investment has been "written off" in the books of account hence it does not fall in clause (i) of Explanation 1 of section 115JB(2) of the Act, as it relates to "amount written off," where the asset would not exist in the balance sheet. After such "amount written off," the Assessing Officer cannot make adjustment on this account for the purpose of calculation of book profit under section 115 JB of the Act. Then after, Ld. Senior Counsel took us through the ledger account of Polestar Maritime Ltd-equity share, on page-14 of the paper book, where investment was "written off" by the Company. On page number 21 of the paper book, the investment of Seabridge Realty Private Limited, 6% preference share, were "written off" by the Company. On page-15 of the paper book, the account of the Polestar Maritime Ltd.- 6% NCNCP was "written off" and on page-27 of the paper book there is ledger account of Triton Maritime Pvt. Ltd-pref. shares, wherein investments were "written off" by passing general entry by assessee-company in the books of account. This way assessee-company identified the actual loss, and loss has been crystalised, in the books of the assessee-company.

13. The Ld. Senior Counsel for the assessee also took us through the profit and loss account (vide page No.34 of paper book), which is audited and approved by the Board of Directors and Annual General Meeting, wherein loss was shown to the tune of Rs.(-)2,421.71 lakhs, which is the profit shown by the assessee-company after making all the adjustments on account of capital reduction and the

same loss was taken, as a base to compute the Minimum Alternate Tax (MAT)/ book profit u/s 115JB of the Act. The Ld. Senior Counsel also took us through the audit report of the Chartered Accountant, (vide page-74 of the paper book) wherein ld. Counsel has explained that audit report has not expressed any negative comment on the assessee, that is, the audit report was not qualified by the chartered accountants of the assessee-company. Thereafter, Ld. Senior Counsel also submitted that on account of capital reduction, the assessee-company has not received any amount from the holders, therefore the same should not be taken into consideration for the calculation of book profit u/s 115JB of the Act. To prove the above stand, the Ld. Senior Counsel for the assessee relied on the following judgments: (i) Kartikeya vs. Sarabhai vs. CIT [1977] 94 Taxman164 (SC) (ii) CIT vs. Narasiman (1999) 236 ITR 327 (SC) (iii) PCIT vs. Juptiter Capital (P.) Ltd. [1981] 170 taxmann.com 305 (SC) (iv) Vazir Sultan Tobacoo Co. Ltd. [1981] 7 Taxman 28 (SC) (v) Southern Technologies Ltd. vs. JCIT 320 ITR 577 (SC) (vi) Vijaya Bank vs. CIT 323 ITR 166 (SC) (vii) PCIT vs. Torrent (P.) Ltd. [2019] 108 taxmann.com 375 (Guj) (viii) CIT vs. Vodafone Esar Gujarat Pvt. Ltd. [2017] 85 taxmann.com 32 (Guj) (ix) CIT vs. Binani Cement Ltd. [2016] 67 taxmann.com 281 (Cal) (x) Jubilant Energy (P) Lt. vs. DCIT (3927/Del/2016 (Delhi – Trib.) (xi) Khan Bahadur Ahmed Alluddin & Co. vs. CIT [1966] 62 ITR 490 (AP) (xii) CIT vs. Veekaylal Investment Co.(P.) Ltd. (249 ITR 597 (Bom) (xiii) ACIT vs. Reliance Welfare Association (ITA No.5976/Mum/2012) (Trib- Mumbai) (xiv) Zyma Laboratories Ltd. vs. ACIT [2006] 7 SOT 164 (Mumbai Trib.) (xv) Apollo Tyres Ltd. vs. CIT [2002] 122 taxmann.om 562 (SC) (xvi) Azadi Bachao Andolan vs. UOI [132 Taxman 373] (SC) and (xvii) Banyan & Berry vs. CIT [1996] 222 ITR 831 (Guj).

14. On the other hand, Ld. CIT-DR for the Revenue supported the order of lower authorities. The Ld. CIT-DR took us through the provisions of Section 115JB of the Act, wherein he has especially drawn our attention to clause-(i) of

Explanation 1 of sub section (1) of Section 115JB of the Act, which reads as follows:

> *"115JB(1): Notwithstanding anything contained in any other provision of this payable on the total income as compute under this Act in respect of any previous relevant to the assessment year commencing on or before after 1st day of April (2012) is less than [eighteen and one half per cent] of its book profit [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee of such total income shall be the amount of income tax as [eighteen and one half per cent]*
>
> *[Provided…*
>
> (i) *"Amount or amounts set aside as provisions for diminution in the value of any asset"*

Therefore, the Ld. CIT-DR submitted that the provision itself, says that the amount which is **set-aside** as provision of diminution in the value of asset should be considered for the purpose of computing book profit and the amount should be increased to that extent, and hence, the case law relied on by Ld. Senior Counsel for the assessee should not applicable when especially, there is a provision in bare Act, itself.

15. In rejoinder, Ld. Senior Counsel for the assessee submitted that the clause-(i) of Explanation 1 of sub-section (1) of 115JB of the Act, states about the amount, as provisions of **diminution** in the value of any asset. However, in assessee`s case under consideration, there is no diminution in the value of any asset. The reduction in capital without paying any amount, does not fall in the definition of **diminution**. The diminution in the value of asset means when let say, any asset held by the company is value at Rs.100/- and at the time of making balance-sheet, the Fair Markt Value the said asset, is only Rs.20/-, then it would be said that Rs.80/- has to be **set aside on a provision for diminution in the value of the asset**, which is not the case here in the assessee`s case under consideration. The concept of **"reduction in capital"** is different then **diminution** in the value of the asset**.** The ld. Counsel further stated that on account of reduction of capital, there is a loss, which assessee-company could

have claimed in its profit and loss account. However, the assessee-company has not claimed any loss on account of reduction of capital in the profit and loss account. Therefore, assessee's case is on better footing and the addition so made by the Assessing Officer should be deleted.

16. We have given our thoughtful consideration to rival contention. We have perused case file as well as paper books furnished by assessee with the able assistance of Shri S. N. Soparkar, (Senior advocate), representing the assessee and Shri Sanjay Punglia, Learned CIT(DR), representing the Revenue. We find that one key issue arises for our apt adjudication in the instant *lis,* which is, whether the "written off" amount made by the assessee in his books of accounts, on account of capital reduction, does fall in clause (i) of Explanation 1 of section 115JB(2) of the Act, for the purpose of computing book profit. First of all, we should examine the provisions of the bare Act of clause (i) of Explanation 1 of section 115JB(2) of the Act, therefore, for the sake of clarity and also being pertinent, we reproduce the provisions of section 115JB of the Act (to the extent relevant for our analysis) as follows:

> ***"[Special provision for payment of tax by certain companies.***
>
> ***115JB.*** *(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, [2012], is less than [eighteen and one-half per cent] of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent]:*
>
> ***[Provided*** *that for the previous year relevant to the assessment year commencing on or after the 1st day of April, 2020, the provisions of this sub-section shall have effect as if for the words "eighteen and one-half per cent" occurring at both the places, the words "fifteen per cent" had been substituted.]*
>
> *(2) Every assessee,—*
>
> *(a) being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its statement of profit and loss for the relevant*

previous year in accordance with the provisions of Schedule III to the Companies Act, 2013 (18 of 2013); or

(b) being a company, to which the second proviso to sub-section (1) of section 129 of the Companies Act, 2013 (18 of 2013) is applicable, shall, for the purposes of this section, prepare its statement of profit and loss for the relevant previous year in accordance with the provisions of the Act governing such company:

***Provided** that while preparing the annual accounts including statement of profit and loss],—*

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including [statement of profit and loss];

(iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including [statement of profit and loss] and laid before the company at its annual general meeting in accordance with the provisions of [section 129] of the Companies Act, 2013 (18 of 2013)]:

***Provided further** that where the company has adopted or adopts the financial year under the [Companies Act, 2013 (18 of 2013)], which is different from the previous year under this Act,—*

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including [statement of profit and loss];

(iii) the method and rates adopted for calculating the depreciation,

shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including [statement of profit and loss] for such financial year or part of such financial year falling within the relevant previous year.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) the amount of depreciation,

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

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

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

17. Having gone through the above Clause (i) of Explanation 1 to Section 115JB(2) of the Act, we note that as per clause (i) of Explanation 1 of Section 115JB(2) of the Act, the following adjustment is made, in computing the book profit:

"the amount or amounts set aside as provision for diminution in the value of any asset"

18. Therefore, as per clause (i), above, the amount, **set-aside, as provision for diminution,** in the value of any asset is required to be added back while computing book profits. However, **written off amount,** in the books of account is not a **diminution** in the value of any asset. Therefore, the major difference between the terminology of "**written off amount",** and "**diminution",** is that in case of "**written off amount",** the asset does not exist in the books of accounts, whereas, in case of "**diminution",** the asset exists in the books of accounts. Therefore, in order to make addition of any amount under clause (i) of Explanation 1 to Section 115JB(2) of the Act, the following three conditions must be fulfilled:

(i)There should be amount or amounts set aside;

(ii).Such amount should be set aside as provision for diminution in the value of an asset; and

(iii)The asset must exist after **diminution** in the value.

We note that **"written-off amount"** implies that the value of asset or asset itself ceases to exist in the books of account, whereas in case of **diminution,** asset must exist after **diminution** in the value. We note that in assessee`s case, under consideration, it is "**written off amount",** ('Written-off' means 'to eliminate an item from the books of accounts) where the asset does not exist in the books of account, therefore, in case of **written off amount",** the clause (i) of Explanation 1 to Section 115JB(2) of the Act, does not apply. There should be "amount set aside" to bring it under application of clause (i) of Explanation 1 to Section 115JB(2) of the Act. Hence, the amount **"set-aside"** needs to be construed as an amount appropriated from the earning to meet loss / liability in future. However, on account of capital reduction, there remains no assets and hence, there cannot

be any amount in respect of these asset (which are not existing), as there is no future of the investment after capital reduction. There can never be any presumption at any stretch of imagination that any amount can be **"set aside"** for an asset which is not in existence. Therefore, based on the above bare provisions of the Act, the addition made by the assessing officer to the tune of Rs.7399.28 Lakhs does not have any leg to stand, therefore, it should be deleted.

19. We note that **capital reduction** is extinguishment and cancellation of investment and it amounts to transfer u/s 2(47) of the Income Tax Act. Therefore, it is actual **write off** and hence cannot be added back to the Book Profit. Thus, it is undisputed fact that it is an actual write off of investment on account of capital reduction which is different from provision for diminution in value of asset. For this we, place reliance on the following judgements of Hon'ble jurisdictional High Court of Gujarat and Supreme Court:

(1). Hon'ble Gujarat High Court in the case of PCIT v/s Torrent (P.) Ltd.

> *"wherein vide Para 21 it was held that in terms of the accounting standards, in view of the decline in the value of the provisions created in the current year (as shown at page 57 of the paper book) the carrying amount of such investments has been reduced and in case of provisions where there was a rise in the value, the provisions are written back and the net amount of provision has been debited to the profit and loss account. Thus, insofar as the provision for diminution of value of investment to the extent of Rs. 13.85 crores are concerned, the same has actually been written off from the asset side of the balance sheet and, therefore, is in the nature of a write off. Under the circumstances, the amount of Rs. 13.85 crore is not of the nomenclature of provision for diminution of value of investment. It is actual write off, cannot be added to the book profit under section 115JB(2)(i) of the Act."*

(2). **Hon'ble Gujarat High Court in case of CIT v Vodafone Essar Gujarat Pvt Ltd**

> *"(5) wherein at para 23 it was held that with insertion of clause (i) to the Explanation with retrospective effect, any amount or amounts set aside for provision for diminution in the value of the asset made by the assessee, would be added back for computation of book profit under section 115JB. However, if this was not a mere provision made by the assessee by merely debiting the Profit and Loss Account and crediting the provision for bad and doubtful debt, but by simultaneously obliterating such provision from its accounts by reducing the corresponding amount from the loans and advances on the*

asset side of the balance sheet and consequently, at the end of the year showing the loans and advances on the asset side of the balance sheet as net of the provision for bad debt, it would amount to a write off and such actual write off would not be hit by clause (i) of the Explanation to section 115JB".

(3). The Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT, reported in 122 taxman 562 (SC)

*"**3.** Brief facts necessary for the disposal of first of the above questions are as follows :*

The assessee-company while determining its net profit for the relevant accounting year has provided for arrears of depreciation in its profit and loss account which according to the revenue is not in accordance with Parts II and III of Schedule VI to the Companies Act, 1956 ('the Act'). Hence, the Assessing Officer while considering the case of the assessee- company under section 115J of the Income-tax Act, 1961, recomputed the said profit and loss account of the company so as to exclude the provisions made for arrears of depreciation. The said action of the Assessing Officer in questioning the correctness of the accounts maintained by the company was challenged by the company before the Tribunal which, among other things, held that the Assessing Officer has no authority to reopen the accounts of a company which are certified by the auditors of the company as having been maintained in accordance with the provisions of the Companies Act and which accounts have been accepted in the general meeting of the company as well as by the Registrar of Companies. This view of the Tribunal was not accepted by the High Court which held that the Assessing Officer has the authority to examine whether the accounts of the company have been maintained in accordance with the requirement of sub-section (1A) of section 115J and in that process if he finds that the accounts of the company are not in accordance with the provisions of the Companies Act, he could make the necessary changes before proceeding to assess the company for tax under the Explanation to section 115J.

The relevant part of section 115J reads as follows :

"115J. Special provisions relating to certain companies.—(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee being a company (other than a company engaged in the business of generation or distribution of electricity), the total income, as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1988 but before the 1st day of April, 1991 (hereafter in this section referred to as the relevant previous year), is less than thirty per cent of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent of such book profit.

(1A) Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956).

Explanation.—For the purposes of this section, 'book profit' means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (1A), as increased by—

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

(b) the amounts carried to any reserves other than the reserves specified in section 80HHD or sub-section (1) of section 33AC, by whatever name called; or

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

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

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

(f) the amount or amounts of expenditure relatable to any income to which any of the provisions of Chapter III applies; or

(g) the amount withdrawn from the reserve account under section 80HHD, where it has been utilised for any purpose other than those referred to in sub-section (4) of that section; or

(h) the amount credited to the reserve account under section 80HHD, to the extent that amount has not been utilised within the period specified in sub-section (4) of that section;

(ha) the amount deemed to be the profits under sub-section (3) of section 33AC;

if any amount referred to in clauses (a) to (f) is debited or, as the case may be, the amount referred to in clauses (g) and (h) is not credited to the profit and loss account, and as reduced by,—

(i) the amount withdrawn from reserves (other than the reserves specified in section 80HHD) or provisions, if any such amount is credited to the profit and loss account :

Provided that, where this section is applicable to an assessee in any previous year (including the relevant previous year), the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1988, shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation; or

(ii) the amount of income to which any of the provisions of Chapter III applies, if any such amount is credited to the profit and loss account; or

(iii) the amounts as arrived at after increasing the net profit by the amounts referred to in clauses (a) to (f) and reducing the net profit by the amounts referred to in clauses (i) and (ii) attributable to the business, the profits from which are eligible for deduction under section 80HHC or section 80HHD; so, however, that such amounts are computed in the manner specified in sub-section (3) or sub-section (3A) of section 80HHC or sub-section (3) of section 80HHD, as the case may be; or

(iv) the amount of the loss or the amount of depreciation which would be required to be set off against the profit of the relevant previous year as if the provisions of clause (b) of the first proviso to sub-section (1) of section 205 of the Companies Act, 1956 (1 of 1956), are applicable.

(2) Nothing contained in sub-section (1) shall affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of sub-section (2) of section 32 or sub-section (3) of section 32A or clause (ii) of sub-section (1) of section 72 or section 73 or section 74 or sub-section (3) of section 74A or sub-section (3) of section 80J."

***4.** For deciding this issue, it is necessary for us to examine the object of introducing section 115J which can be easily deduced from the Budget Speech of the then Finance Minister of India made in the Parliament while introducing the said section which is as follows :*

"It is only fair and proper that the prosperous should pay at least some tax. The phenomenon of so-called 'zero-tax' highly profitable companies deserves attention. In 1983, a new section 80VVA was inserted in the Act so that all profitable companies pay some tax. This does not seem to have helped and is being withdrawn. I now propose to introduce a provision whereby

every company will have to pay a 'minimum corporate tax' on the profits declared by it in its own accounts. Under this new provision, a company will pay tax on at least 30 per cent of its book profit. In other words, a domestic widely held company will pay tax of at least 15 per cent of its book profit. This measure will yield a revenue gain of approximately Rs. 75 crores."

5. *The above Speech shows that the income-tax authorities were unable to bring certain companies within the net of income-tax because these companies were adjusting their accounts in such a manner as to attract no tax or very little tax. It is with a view to bring such of these companies within the tax net that section 115J was introduced in the Income-tax Act with a deeming provision which makes the company liable to pay tax on at least 30 per cent of its book profits as shown in its own accounts. For the said purpose, section 115J makes the income reflected in the companies' books of account as the deemed income for the purpose of assessing the tax. If we examine the said provision in the above background, we notice that the use of the words 'in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act' was made for the limited purpose of empowering the assessing authority to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company, an Assessing Officer under the Income-tax Act has to accept the authenticity of the accounts with reference to the provisions of the Companies Act which obligates the company to maintain its account in a manner provided by the Companies Act and the same to be scrutinised and certified by statutory auditors and will have to be approved by the company in its General Meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and satisfy that the accounts of the company are maintained in accordance with the requirements of the Companies Act. In spite of all these procedures contemplated under the provisions of the Companies Act, we find it difficult to accept the argument of the revenue that it is still open to the Assessing Officer to rescrutinise the accounts and satisfy himself that these accounts have been maintained in accordance with the provisions of the Companies Act. In our opinion, reliance placed by the revenue on sub-section (1A) of section 115J in support of the above contention is misplaced. Sub-section (1A) of section 115J does not empower the Assessing Officer to embark upon a fresh inquiry in regard to the entries made in the books of account of the company. The said sub-section, as a matter of fact, mandates the company to maintain its account in accordance with the requirements of the Companies Act which mandate, according to us, is bodily lifted from the Companies Act into the Income-tax Act for the limited purpose of making the said account so maintained as a basis for computing the company's income for levy of income- tax. Beyond that, we do not think that the said sub-section empowers the authority under the Income-tax Act to probe into the accounts accepted by the authorities under the Companies Act. If the statute mandates that income prepared in accordance with the Companies Act shall be deemed income for the purpose of section 115J, then it should be that income which is acceptable to the authorities under the Companies Act. There cannot be two incomes one for the purpose of Companies Act and another for the purpose of the Income-tax Act both maintained under the same Act. If the Legislature intended the Assessing Officer to reassess the company's income, then it would have stated in section 115J that 'income of the company as accepted by the Assessing Officer'. In the absence of the same and on the language of section 115J, it will have to held that view taken by the Tribunal is correct and the High Court has erred in reversing the said view of the Tribunal.*

Therefore, we are of the opinion that the Assessing Officer while computing the income under section 115J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increase and reductions as provided for in the Explanation to the said section. To put it differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to section 115J.

6. *The second question framed by us hereinabove arises for our conside-ration in the following*

factual background. The assessee-company in its books of account had shown certain sums of money representing as 'dividend' from units of the UTI and had included the said sums in the computation of its profit as an income from 'eligible business'. It also claims that out of such income from 'eligible business', it had purchased certain new machineries for its factory because of which it claimed a deduction of 20 per cent of the said income as provided in section 32AB of the Income-tax Act. This claim of the company has been allowed by the Tribunal and confirmed by the High Court. The argument of the revenue in this regard is that the income received by the assessee-company from its investment in the UTI has been declared by the company itself as an 'income from other sources' which head of income is different from income from 'Profits and gains of business or profession' and under section 32AB, income from business alone is entitled for the benefit of that section. The assessee contends that its income from sale and purchase of units of the UTI is part of its regular business and that it has held these units as stock-in-trade and has been doing the business of buying and selling the same. The assessee also contends that its income from this business of investment in the units of the UTI and its business of manufacture and sale of tyres are pooled together in a common account of funds which is managed by one common management. It is also the submission of the assessee that these two businesses, namely, the business of buying and selling units of the UTI and the manufacture and sale of tyres, are so intertwined and interlaced that the same cannot be separated and treated independently, therefore, this income from the UTI being part of its business income, it is entitled to claim the benefit of section 32AB.

A perusal of section 32AB, as it stood at the relevant time, shows that if an assessee has a total income including the income chargeable to tax under the head 'Profits and gains of business or profession' and if the income from such business is derived from an 'eligible business' and if the assessee has out of such income utilised any amount during the previous year for purchase of new plant or machinery, then it is entitled to a set-off of a sum equal to 20 per cent of the profit of such eligible business as computed in the accounts of the assessee which accounts have been audited in accordance with sub-section (5) of section 32AB.

***7.** The dispute in the present case is in regard to the question whether the assessee's investment in the UTI is business, and if so, is it a business which qualifies to be an 'eligible business' under section 32AB? In regard to the first aspect, we must note that the Tribunal as a question of fact based on material on record has come to the conclusion that the investment in the UTI by the assessee-company is in the course of its business and its businesses of manufacture and sale of tyres and sale and purchase of units of the UTI are common in nature and both the businesses are intertwined and interlaced. This finding is accepted by the High Court also. We also find that this business of the assessee-company of buying and selling of units is a business as contemplated under section 32AB. The question then is: is it an eligible business under the said section? The term 'eligible business' is defined under sub-section (2) of section 32AB. As per that definition, all businesses of an assessee-company will be an eligible business unless it falls under the type of business enumerated in sub-clauses (a) and (b) of section 32AB(2). It is nobody's case that this business of the assessee-company is one of those businesses which falls under business enumerated in clauses (a) and (b) of sub-section (2) of section 32AB. Therefore, there is no doubt that the business of the assessee-company is an eligible business. The fact that it is shown under a different head of income would not deprive the company of its benefit under section 32AB so long as it is held that the investment in the units of the UTI by the assessee-company is in the course of its 'eligible business'. Therefore, in our opinion, the dividend income earned by the assessee-company from its investment in the UTI should be included in computing the profits of 'eligible business' under section 32AB.*

***8.** The last point for our consideration is: whether buying and selling of units by the assessee-company can be treated as a speculative business? For this purpose, the revenue argues that the units purchased by the assessee-company from the UTI are shares, therefore, as per Explanation to section 73 of the Act, the said business of purchasing and selling of shares will*

have to be treated as a business of speculation. The revenue in support of this argument, relies on section 32(3) of the UTI Act which reads as follows :

"(3) Subject to the foregoing sub-sections, for the purposes of the Income-tax Act, 1961,—

(a) any distribution of income received by a unitholder from the Trust shall be deemed to be his income by way of dividends; and

(b) the Trust shall be deemed to be a company."

***9.** Relying on the above provision of the UTI Act, the revenue contends that if the UTI is a company and income from its units is dividend, then ipso facto the units will have to be shares, therefore, the business of purchase and sale of units conducted by the assessee-company will have to be deemed to be a business in shares which business, according to the revenue, attracts Explanation to section 73. On this basis, it is contended that the business of purchase and sale of units by the assessee-company amounts to a business of speculation. Both the Tribunal and the High Court have considered this argument as also the effect of section 32(3) of the UTI Act and have come to the conclusion that the provision of the said Act is limited for the purpose of assessment of dividend income under the Act, and for deduction of tax at source. They have held that the legal fiction created by section 32(3) of the UTI Act cannot be carried any further. We have examined the provisions of the UTI Act and we are of the opinion that even though the said section creates a fiction to make the UTI as a deemed company and distribution of income received by the unitholder as a deemed dividend, by virtue of these deemed provisions, it cannot be said that it also makes the unit of the UTI a deemed share. In our opinion, a deeming provision of this nature, as found in section 32(3), should be applied for the purpose for which the said deeming provision is specifically enacted, which in the present case is confined only to deeming the UTI as a company and deeming the income from the units as a dividend. If as a matter of fact, the Legislature had contemplated making the unit as also a deemed share, then it would have stated so. In the absence of any such specific deeming in regard to the units as shares, it would be erroneous to extend the provisions of section 32(3) of the UTI Act to the units of UTI for the purpose of holding that the unit is a share. For these reasons, we are in agreement with the finding of the High Court on this point also.*

***10.** For the reasons stated above, we allow C.A. No. 6100 of 1998 preferred by the assessee to the extent of our finding in the first point formulated by us but without costs.*

***11.** Based on our finding in regard to point Nos. 2 and 3 formulated by us hereinabove, C.A. Nos. 2518-19 of 1999 are dismissed with costs."*

20. We also find that at the assessment stage, the assessee submitted before the assessing officer that the write off of Rs.7399.28 lacs, is on account of capital reduction of investment in equity shares and preference shares in the group companies. This capital reduction is carried out u/s 100 to 104 of the Companies Act, 1956. This is duly approved by the Board of directors of the assessee/ investor company; approved by Shareholders of the investee companies; and approved by Hon'ble Bombay High Court. The assessee submitted the Copy of order of Bombay High Court, copy of petition for capital reduction and working of actual write off / loss on capital reduction has been submitted during the course

of assessment proceedings. Under section 101 of the Companies Act, 1956, the company may reduce its share capital by **extinguishing** any of its shares subject to approval of members and High Court. In this case, both the shareholders, as well as, the High Court have duly approved the capital reduction of shares in all three companies. Further, the same is also registered by the Registrar of Companies and issued certificate in respect thereof. Copy of certificate was submitted by the assessee during the assessment proceedings. Hence, capital reduction has resulted in **extinguishment and cancellation** of investment in the group company. It amounts to transfer u/s 2(47) of the Income Tax Act. On approval of Capital Reduction by the Hon'ble Bombay High Court (supra), shares of the assessee -company gets cancelled, and rights attached with the shares – dividend, redemption, share in liquidation of company (in case of equity share), voting rights, etc. are extinguished. The name of assessee in the members register is also struck off, on approval of capital reduction by Hon'ble High Court. Therefore, respectfully following the binding precedent of the jurisdictional Hon`ble High Court of Gujarat, in the case of **Torrent (P.) Ltd(supra) and in the case of Vodafone Essar Gujarat Pvt Ltd (supra), Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra)** we allow ground No.2 raised by the assessee.

21. In the result, ground No.2 raised by the assessee is allowed.

22. Ground No.3 relates to enhancement of assessment made by the Ld. CIT(A) without giving show -cause notice to the assessee.

23. The relevant material facts have already been narrated by us in above paras of this order, therefore we do not reiterate the facts of the assessee`s case again for the sake of brevity.

24. Shri S. N. Soparkar, Ld. Senior, Counsel for the assessee stated that during appellate proceedings, the Ld. CIT(A), after confirming the addition under clause (i) of Explanation 1 to Section 115JB(2) of the Act, also noticed that net consideration in transfer of these shares cannot be considered zero for the purpose of Income Tax Act, but for the purpose of Income Tax Act, each transfer is a taxable event. Therefore, the provisions of section 2(22)(d) of the Act, "deemed dividend" is applicable to the assessee. However, the Ld. CIT(A) noted that the assessee has compensated these companies, by purchasing their shares. Therefore provision of section 115QA of the Act, is directly applicable, as there is reduction of share capital, by way of buy- back and of course consideration has been paid indirectly in the form of investment in shares. Therefore, Ld. CIT(A) has given the direction to the Assessing Officer to proceed against the assessee, in terms of provisions of section 2(22)(d) of the Act and Section 115QA in respect of capital reduction of Rs.2.71 crores. The learned Counsel submitted that such enhancement order passed by the ld. CIT(A) is without any notice to the assessee. Therefore, such enhancement in the assessment order, is without giving an opportunity of being heard to the assessee and without giving any notice to the assessee for enhancement. Hence, such addition should not be made in the hands of the assessee.

25. On the other hand, Ld. CIT-DR for the Revenue submitted that during appellate proceedings, there was an issue before the Ld. CIT(A) pertaining to clause (i) of Explanation 1 to Section 115JB(2) of the Act, for calculation of book profit u/s 115JB of the Act. Therefore, the direction of enhancement, which is given by the Ld. CIT(A), is very much connected with the adjudication of the issue in relation to book profit u/s 115JB of the Act, hence there was no requirement to issue the separate notice for enhancement of assessment.

26. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We

do not agree with learned DR for the revenue, to the effect that it is not necessary to issue the separate notice for enhancement. We note that sub-section 2 of section 251 of the Income Tax Act, clearly states that if the ld CIT(A) wants to enhance the assessment, a separate show-cause notice and of hearing should be given to the assessee. The provisions of section 251 of the Act, is reproduced below:

> ***"SECTION 251:****Powers of the [Joint Commissioner (Appeals) or the "[Commissioner (Appeals)].*
>
> *251. (1) In disposing of an appeal, the [Commissioner (Appeals)] shall have the following powers-*
>
> *(a) in an appeal against an order of assessment, he may confirm, reduce enhance or annul the assessment.*
>
> *Provided that where such appeal is against an order of assessment made under section 144, he may set aside the assessment and refer the case back to the Assessing Officer for making a fresh assessment;*
>
> *(aa) in an appeal against the order of assessment in respect of which the (proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;]*
>
> *(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;*
>
> *(c) in any other case, he may pass such orders in the appeal as he thinks fit.*
>
> *[(1A) In disposing of an appeal, the Joint Commissioner (Appeals) shall have the following powers-*
>
> *(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;*
>
> *(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;*
>
> *(c) in any other case, he may pass such orders in the appeal as he thinks fit.]*
>
> ***(2) The [Joint Commissioner (Appeals) or the] [Commissioner (Appeals)] [as the case may be,] shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.***
>
> *Explanation. In disposing of an appeal, the [Joint Commissioner (Appeals) or the] [Commissioner (Appeals)], may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such*

matter was not raised before the [Joint Commissioner (Appeals) or the] [Commissioner (Appeals)] [as the case may be] by the appellant."

27. From the above provisions of section 251(2) of the Act, it is vivid that Commissioner (Appeals), shall not enhance an assessment, unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.Therefore, we find that direction given by the Ld. CIT(A) to the Assessing Officer for enhancement of assessment, without issuing show cause notice to the assessee u/s 251(2) of the Act to treat deemed dividend u/s 2(22)(d) of the Act, in the hands of the assessee, is bad in law and therefore not sustainable in the eye of law.

28. We note that Ld. CIT(A) has directed the Assessing Officer to make a further addition on account of deemed dividend u/s 2(22)(d) of the Act and u/s 115QA of the Act, such direction is tantamount to enhancement of assessment. Therefore, before making any enhancement of the assessment, it is the duty of the Ld. CIT(A) to give a notice to the assessee to that effect and after getting reply from the assessee, the Ld. CIT(A) may enhance the assessment, if any, and for that we rely on the following judgments: (i) CIT vs. Rai Bahadur Hardutroy Motilal Chamaria [1967] 66 ITR 443 (SC) (ii) CIT vs. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC). We also that capital reduction is carried out for NIL consideration, therefore, considering capital reduction of assessee- company, there should not be deemed dividend u/s 2(22)(d) of the Act. That is, no deemed dividend arises on losses/crystalised losses. Moreover, the said transaction is also not covered u/s 115QA of the Act as the capital reduction is carried out for NIL consideration. Considering these facts and circumstances, we allow ground No.2 raised by the assessee.

29. Now we shall take ground No.4 raised by the assessee, which relates to deduction under section 80-IA of the Act.

30. Brief facts *qua* the issue are that on perusal of the return of income as well as submissions made by the assessee, it was noticed by the assessing officer that the assessee has claimed a deduction u/s 80-IA of the Act, amounting to Rs.14,22,65,580/-. On perusal of the working of such deduction, it was noticed by the assessing officer that the assessee has claimed such deduction in respect of CFS maintained and operated at Mundra and while calculating such deduction, the assessee has included a sum of Rs.30,84,582/-, being rental income. The assessing officer noted that as per the provisions of section 80IA of the Act, only profits and gains derived by an undertaking or an enterprise from any business referred to in section 80IA(4) are eligible for deduction u/s 80-IA of the Act. The assessee was therefore requested to explain as to why such sum of Rs. 30,84,582/- should not be excluded while working the profit eligible for deduction u/s. 80IA of the Act and why such deduction should not be restricted accordingly.

31. The assessee, in response, to the above notice, vide letter dated 20.12.2019 has furnished following written submissions before the assessing officer:

> *"B.* ***Exclusion of rental income from deductions u/s 80-IA – Rs.30.84 lacs***
>
> *1. During the year under consideration, the assessee has earned rent income of Rs. 30.84 lacs from providing office space to various user's agencies like Custom House Agents, Shipping Agent etc. and State Bank of India.*
>
> *2. The Container Freight Station (CFS) facility of the Company is approved by the Ministry of Commerce on certain terms & conditions in respect of minimum level of facilities required at CFS. The terms and conditions as well as the minimum level of facilities required and prescribed for setting up of CFS, as set out in the permission letter (copy attached herewith), are reproduced hereunder:*
>
> > *1. ……..*
> >
> > ***2. Office building for ICD, Customs office and a separate block for user agencies equipped with basic facilities.***
> >
> > *……..*
> >
> > ***(j) Accommodation for bank.***
> >
> > *……..*
>
> *Condition at Serial No. (b) requires separate block for user agencies equipped with basic facilities. Similarly, Serial No. (j) provides for accommodation for bank. In*

compliance with such conditions, the Company has created office spaces for the user agencies and bank on which it earns rental income.

3.The rental income is derived from the eligible business of Industrial Undertaking i.e. Container Freight Station. As the income is derived from the activities necessary for carrying out the business, it can be said to have been directly related to the business of the assessee and first-degree source of income. Hence, there is direct nexus between business of the assessee and rental income earned by the assessee and therefore assessee company submits that rental income earned is income from the business of eligible industrial undertaking.

4. CBDT vide ***Circular No. 16/2017 dated 25.04.2017*** *has clarified and put to rest the controversy on 'house property' versus 'business income' classification for income from letting out of premises /developed-space along with other facilities in an industrial park or SEZ. CBDT stated that lease rentals would be charged as 'business income'. Board has clarified that in the case of an undertaking which develops, develops and operates or maintains and operates an industrial park/SEZ notified in accordance with the scheme framed and notified by the government, the income from letting out of premises/developed space along with other facilities in an industrial park/SEZ is to be charged to tax under the head 'profits and gains of business'. Copy of circular is attached herewith for your reference.*

5.Industrial parks and SEZ's are considered as infrastructure facility under section 80IA(4) and similarly assessee-company has been granted deduction u/s 80IA as an eligible business. Hence, applying the same ratio as stated in the circular in case of an infrastructure facility, the rental income earned by assessee may also be granted benefit u/s 80IA.

6. Further, this issue has been decided by Hon'ble ITAT Rajkot in assessee's own case for A.Y. 2006-2007, 2007-08 and 2008-09 and CIT(A) for AY 2013-14, 2012-13. 2011-12, 2010-11, 2009-10 where in appeal of the assessee is allowed holding that rental income of the CFS is a part of the income derived from the eligible business and therefore eligible for deduction u/s. 80IA of the Income Tax Act, 1961.

7.We further submit that if there being no change either in facts or in law, as compared to the earlier and subsequent years, the position accepted/ determined needs to be followed even on the principle of consistency. Reliance in this regard is placed on the following decisions:

- *CIT vs. Excel Industries Ltd.: 358 ITR 295 (SC)*
- *Radhasoami Satsang v. CIT: 193 ITR 321 (SC)*
- *DIT (E) v. Apparel Export Promotion Council: 244 ITR 734 (Del)*
- *CIT v. Neo Polypack (P) Ltd: 245 ITR 492 (Del.)*
- *CIT v. Dalmia Promoters Developers (P) Ltd: 281 ITR 346 (Del.)*
- *DIT v. Escorts Cardiac Diseases Hospital: 300 ITR 75 (Del.)*
- *CIT v. P. KhrishnaWarrier: 208 ITR 823 (Ker)*
- *CIT v Harishchandra Gupta 132 ITR 799 (Ori)*
- *CIT v. SewaBharti Haryana Pradesh: 325 ITR 599 (P&H)*
- *CIT v. Rajasthan Breweries Limited.: ITA 889/2009 (Del) – SLP dismissed.*

Hence, based on above we submit deduction u/s 80-IA should not be restricted by amount of rental income."

32. However, the assessing officer, rejected the above contentions of the assessee- company and observed that as per the provisions of section 80IA(1) of the Act, deduction is available on the profits and gains derived by an undertaking or an enterprise from an eligible business as referred to in the provisions of section 80IA(4) of the Act. Therefore, income from rent cannot qualify for deduction u/s. 80IA of the Act. Therefore, the claim of the assessee for deduction u/s. 80IA of the Act was reduced to the extent of rental income of Rs. 30,84,582/-.

33. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before Ld. CIT(A), who has confirmed the addition made by the Assessing Officer. The ld. CIT(A) noticed that assessee company had earned rent income of Rs.30.84 lacs from providing office space to various use's agencies like Custom House Agents, Shipping Agent etc. and Sate Bank of India. The ld. CIT(A) noted that the CBDT never accepted the definition of the CFS given by Ministry of Commerce and issued clarification vide letter dated FN 178422010-ITA-I dated 06.01.2011 that CFS are not inland ports and not eligible for 80IA(4)(i) of the Act. The assessee relied on Circular 16/2017 of CBDT dated 24-04-2017. This circular relates to rental income arising from the infrastructure facility not form auxiliary activity. This circular does not cover rental income from bank etc. In view of the above, the ld CIT(A) confirmed the disallowance of the deduction u/s 80IA of Rs.30,84,582/-.

34. Aggrieved by the order of Ld. CIT(A), assessee is in further appeal before us.

35. The Ld. Senior Counsel for the assessee, at the outset submitted that Ld. CIT(A) ought not to have confirmed the addition made by the Assessing Officer of Rs.30,84,582/-, as it is business income and eligible for computation of deduction u/s 80IA of the Act. Such rent income has direct nexus with the Section

80IA and eligible business activity of the assessee, being income derived from the business. Further the said issue is covered in favour of the assessee by the decision of the Co-ordinate Bench of ITAT, in assessee's own case. Since the issue under consideration is covered by assessee's own case, therefore addition made by the Assessing Officer should be deleted.

36. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

37. We have heard both the parties and perused the materials available on record. We note that during the year under consideration, the assessee- company had earned rent income of Rs.30.84 lacs from providing office space to various user's agencies like Custom House Agents, Shipping Agent etc. and Stat Bank of India. Since these user's agencies were covered under the permission letter granted by the Ministry of Commerce vide Sr. No.(b) & (c), the rental income earned from the CFS (Container Freight Station) was considered as income earned from the business of eligible industrial undertaking and hence, deduction u/s 80IA of the Income Tax Act, 1961 was claimed. Further, this claim u/s 80IA is also supported by circular no.76/2017 dated 25.04.2017 issued by CBDT. Further, this issue has also been decided by Hon'ble ITAT Rajkot in assessee's own case for A.Y 2006-2007, 2007-08 and 2008-09 and CIT(A) for AY 2013-14, 2012-13, 2011-12, 2010-11, 2009-10 where in appeal of the assessee is allowed holding that rental income of the CFS is a part of the income derived from the eligible business and therefore eligible for deduction u/s 80IA of the Income Tax Act, 1961.We note that there being no change either in facts or in law, as compared to the earlier and subsequent years, the position accepted/determined needs to be followed even on the principle of consistency. We note that issue under consideration is also covered by the following judgements:

1. A.S. Shipping Agencies (P.) Ltd. *v.* Assistant Commissioner of Income-tax [2011] 15 taxmann.com 247 (Chennai)

> *"Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings - Assessment years 2003-04 to 2005-06 - Assessee company derived income as a steamer agent for shipping companies besides running a container freight station (CFS) -Whether income from letting of bonded warehouse being part of infrastructure in business of running of CFS, would be eligible for deduction under section 80-IA - Held, yes [In favour of assessee]*

2. VITP (P.) Ltd. *v.* Additional Commissioner of Income-tax, Range-3, Hyderabad [2012] 25 taxmann.com 178 (Hyd.)

> *"Rent received from letting out a portion of administrative building space to maintenance-contractor of industrial park is eligible for deduction under section 80-IA(4)(iii)."*

3. Commissioner of Income Tax, Delhi-1 *v.* Container Corporation of India Ltd., [2018] 93 taxmann.com 31 (SC)

> *"Inland Container Depots are Inland Ports, subject to provisions of section 80-IAand deduction can be claimed for income earned out of these Depots".*

4. Commissioner of Income Tax, Chennai *v.* Tidel Park Ltd., [2021] 125 taxmann.com 218 (Madras)

> *"Lease rent income received by assessee from letting out of built-up space of industrial park was assessable under head 'income from business'"*

5. Menzies Aviation Bobba (Bangalore) (P.) Ltd. *v.* Assistant Commissioner of Income-tax [2023] 152 taxmann.com 435 (Bangalore - Trib.)

> *"Where assessee entered into an agreement with Bangalore International Airport Ltd. to provide cargo service and further it entered into license agreement for using of space in cargo terminal operated by it with cargo handling agents, airlines, banks, etc., rental income derived by assessee from cargo agents, airlines, etc. being an internal part of cargo business was eligible for deduction under section 80-IA"*

38. Therefore, we find that this issue is squarely covered in favour of the assessee in assessee's own case as well as it is also covered by other judgments of Hon'ble High Courts in favour of the assessee, as noted above. Therefore, respectfully following the binding precedents, we allow this ground of assessee.

39. In the result, ground No.4 raised by the assessee is allowed.

40. Ground No.5 raised by the assessee, is repetition of earlier grounds, hence does not require adjudication.

41. In the combined result, appeal filed by the assessee is allowed.

Order is pronounced on 30/05/2025 in the open court.

Sd/-	**Sd/-**
(DINESH MOHAN SINHA)	**(DR.ARJUNLALSAINI)**
न्यायिक सदस्य/**JUDICIAL MEMBER**	लेखा सदस्य/**ACCOUNTANT MEMBER**

राजकोट /Rajkot

दिनांक/ Date: 30/05/2025 ***TRUE COPY***

DKP Outsourcing Sr.P.S

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

- अपीलार्थी/ The Appellant
- प्रत्यर्थी/ The Respondent
- आयकर आयुक्त/ CIT
- आयकर आयुक्त(अपील)/ The CIT(A)
- विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, राजकोट/ DR, ITAT, RAJKOT
- गार्डफाईल/ Guard File

By order/आदेशसे,

सहायक पंजीकार
आयकर अपीलीय अधिकरण ,राजकोट