IN THE INCOME TAX APPELLATE TRIBUNAL, "A" BENCH, KOLKATA

Before : **Shri N.V.Vasudevan, Judicial Member, and**
Shri M. Balaganesh, Accountant Member

ITA No. 144/Kol/2013 A.Y 2009-10

D.C.I.T, C.C-XXVIII, Kolkata Vs. M/s. Binani Industries Ltd
PAN: AABCB0979C
(Appellant) (Respondent)

For the Appellant/Department: Shri Rajat Subhra Biswas, CIT, ld.DR
For the Respondent/Assessee: S/ Shri K.V. Beswal, FCA
Vijay Mehta, ld.ARs

Date of Hearing: 15-02-2016

Date of Pronouncement: 02-03-2016

ORDER

SHRI M.BALAGANESH, AM :

This appeal of the revenue arises out of the order of the Learned CIT(A), Central-1, Kolkata in Appeal No. 158/CC-XXVIII/CIT(A)C-I/11-12 dated 26th November, 2012 for the Asst Year 2009-10 passed against the order of assessment framed by the Learned AO u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. The first issue to be decided in this appeal is as to whether an addition u/s 14A of the Act in the sum of Rs. 4,69,87,450/- could be made in the facts and circumstances of the case.

2.1. The brief facts of this issue is that the assessee filed its original return of income on 30.9.2009 disclosing total income at Rs Nil under normal provisions of the Act and declaring book profits u/s 115JB of the Act at Rs. 21,24,72,340/-. Later the assessee filed revised return of income on 31.3.2011 disclosing total income at Rs. Nil under normal provisions of the act and declaring book profits u/s 115JB of the Act at Rs. 33,90,47,340/-. In the said revised computation of book profits u/s 115JB of the Act, an extraordinary item of receipt to the tune of Rs. 12,65,75,000/- representing forfeiture of share warrants was included by the assessee. The assessee also sought to disallow a sum of Rs. 1,37,12,550/- towards section 14A voluntarily under the normal provisions of the Act in the revised return filed by it on 31.3.2011. Admittedly, this revised return was filed within the prescribed time limit u/s 139(5) of the Act. Before the Learned AO, the submissions of the assessee were as under:-

a) That only the third limb of Rule 8D(ii) would be applicable viz. 0.5% of average value of investments for the purpose of disallowance u/s 14A of the Act and accordingly worked out the disallowance at Rs. 1,37,12,550/- and disallowed the same under the normal provisions of the Act in the revised return filed.

b) That since the investments were made by the assessee since 1997-98 onwards out of own funds in the form of share capital , free reserves and internal accruals , the second limb of Rule 8D(ii) would not come into operation for the purpose of making disallowance u/s 14A of the Act.

c) That no disallowance u/s 14A of the Act was made by the revenue prior to Asst Year 2009-10 on the subject mentioned investments.

d) That the major investments in question are the investments made by the assessee in its subsidiary companies like Binani Cement Ltd (BCL) ; Goa Glass Fibre Ltd (GGFL) and Binani Zinc Ltd (BZL) .

e) That out of total dividend received of Rs. 34.13 crores, Rs. 32.95 crores represents dividend received from its subsidiary company viz. Binani Cement Ltd .

f) That at one point of time, all these units viz BCL , GGFL and BZL were part of the composite business of the assessee company and after approval of the appropriate authorities in the respective years, these units were hived off to the subsidiary companies namely Binani Cement Ltd , Goa Glass Fibre Ltd and Binani Zinc Ltd in the year 1997 , 1998 and 2003 respectively.

g) That the status of paid up capital, free reserves and internal accruals during Asst Year 2002-03 were as under :-

	Rs. In lakhs	
Internal Generation	24708.68	
Public issue for cements & glass fibre division	23000.00	
Interest free loans as on 31.3.2002	1873.28	
	--------------	49581.96

Investments as on 31.3.2002 were as under:-

Binani Cement Ltd	40000.83	
Goa Glass Fibre Ltd	7417.74	
BT Composites Ltd	928.85	
Binani Lead Ltd	590.01	
Bank of India – Equity	3.60	
RBW Minerals Industries Ltd	49.84	
Udaipur Urban Co-op Bank – Equity	0.05	
	--------------	48990.92

The Learned AO, however, simply resorted to make disallowance u/s 14A of the Act by applying the second limb and third limb of Rule 8D(ii) of IT Rules by rejecting all the contentions of the assessee without adducing any cogent reasons. On first appeal, apart from the aforesaid facts , the assessee stated that the interest expenditure amounting to Rs. 7.02 crores was not attributable to the acquisition of shares which were acquired due to the hive off of the companies as stated supra. In this regard, it relied on the unreported **decision of the Hon'ble Bombay High Court in the case of CIT vs Raheja Corporation Pvt Ltd and the decision of the Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd reported in 313 ITR 340 (Bom)** for the proposition that the Learned AO having failed to establish that borrowed funds were utilized for the purpose of acquiring the shares and in view of availability of own funds with the assessee, no expenditure ought to have been disallowed u/s 14A of the Act read with Rule 8D of IT Rules. The Learned CIT(A) duly appreciated all the contentions of the assessee and deleted the disallowance made u/s 14A of the Act both under normal provisions of the act as well as for the computation of book profits u/s 115JB of the Act. Aggrieved, the revenue is in appeal before us on the following ground:-

> *(i) That the Ld. CIT(A) has erred in Law as well as in facts and circumstances of the case in deleting the disallowance of Rs. 4,69,87,450/- made u/s 14A of the Income-tax Act, 1961 read with Rule 8D(2)(ii) of the Income-tax Rules, 1962,*

2.2. The Learned DR vehemently supported the order of the Learned AO.

2.3. We have heard the rival submissions and perused the materials available on record. We find that the entire investments were made long back by the assessee. We hold that the assessee was having sufficient own funds to make those investments in the earlier years. We hold that the Learned AO had not brought on record any nexus between the borrowed funds and the investment in shares of various companies. We find that the following case laws relied upon by the Learned CIT(A) in his order are well placed and are squarely applicable to the facts of the instant case :-

- ***<u>CIT vs Reliance Utilities & Power Ltd (313 ITR 340) (Bom)</u>***

Interest on borrowed capital – investments by assessee – finding that investments were from interest free funds available with assessee - borrowed capital used for purposes of business – interest deductible under Income Tax Act, s. 36(1)(iii).

* ***G.D.Metsteel Pvt Ltd vs ACIT reported in 142 TTJ 641 (Mum ITAT)***

Held that the investments are made by the assessee's own funds and have been made in the earlier years, no disallowance u/s 14A is required to be made. The Head Note reads as under:-

> *" Business expenditure – Disallowance under section 14A – Apportionment of expenditure – When investments are made from own funds, merely because the assessee had to subsequently borrow the funds for business use, it cannot be said that the borrowed funds have been used for the purposes of investments."*

2.4. We also hold that the investments made in subsidiary companies are to be treated as strategic investments and hence the disallowance u/s 14A of the Act would not operate at all as the investment made thereon is not with an intention to earn any exempt income in the form of dividend but only for obtaining controlling interest in the said companies and to further the business interests of the assessee in the said company. Reliance in this regard is placed on the **decision of the co-ordinate bench of Delhi Tribunal in the case of *Interglobe Enterprises Ltd vs DCIT reported in (2014) 40 CCH 0022 DelTrib in ITA No. 1362 & 1032 /Del/ 2013 , ITA No. 1580/Del/2013 dated 4.4.2014 for Asst Years 2008-09 & 2009-10,*** wherein it was held that :

> *"7. We have heard the rival submissions of both the parties and have gone through the material available on record. First, we take up the appeal for assessment year 2008-09. In this year, the assessee had three type of investments one relating to investment in subsidiary companies the amount of which is Rs.101.74 crores. The second category relates to long term unquoted shares the amount of which is Rs.31.53 crores. The third category is of equity shares the value of which is Rs.14.88 lakhs and the last category is investment in units of mutual funds amounting to Rs.10.15 crores. These facts and figures are verifiable from paper book page 204A. As regards the first category of shares in the form of investment into subsidiary companies we find that investment into this category of shares had increased from Rs.78.17 lakhs to Rs.101.74 crores which is due to increase in investment in*

preference shares and other equity shares. During this period, the interest bearing funds had decreased from Rs.1.49 crores to Rs.87,30 lakhs as is apparent from paper book page 203 and further most of the interest bearing loans are for vehicle loans as mentioned in paper book page 203. During this year under consideration, the assessee has earned a cash profit of Rs.11 crores. The cash flow statement at paper book page 200 reflects cash from operating activities including cash profits of Rs.49.28 crores. The assessee has also raised an amount of Rs.50.80 crores by issue of fresh preference shares as is apparent from paper book page 200. In view of the above facts and figures it is apparent that assessee had utilized interest free funds for making fresh investments and that too into its subsidiaries which is not for the purpose of earning exempt income and which are for strategic purposes only.

8. In view of the above facts, we hold that no disallowance of interest is required to be made under rule 8D(i) & 8D (ii) as no direct or indirect interest expenditure has incurred for making investments.

9. As regards disallowance under Rule 8D(iii) we find that assessee had invested in four debt oriented schemes of DSP Merile Lynch, reliance Liquid Plus, Reliance Monthly Interval Mutual Funds and SBI Liquid Plus Funds. We find that these are not really investments and these are in fact parking of surplus funds in a more tax efficient manner. However, since these gives rise to exempt income in the form of dividend section 14A read with Rule 8D is applicable as held by Hon'ble Delhi High Court in the case of Maxopp Investments. The Hon'ble Delhi High Court had held as under:-

"24. We do not agree with the submission of the learned counsel appearing on behalf of the assessees that a narrow meaning ought to be ascribed to the expression "in relation to" appearing in section 14A of the said act. The context does not suggest that a narrow meaning ought to be given to the said expression. It is pertinent to note that the provision was inserted by virtue of the Finance Act, 2001 with retrospective effect from 01/04/1962. In other words, it was the intention of Parliament that it should appear in the statute book, from its inception, that expenditure incurred in connection with income which does not form part of total income ought not to be allowed as a deduction. The factum of making the said provision retrospective makes it clear that Parliament wanted that it should be understood by all that from the very beginning, such expenditure was not allowable as a deduction. Of course, by introducing the proviso it made it clear that there was no intention to reopen finalized assessments prior to the assessment year beginning on 01/04/2001. Furthermore, as observed by the Supreme Court in Walfort (supra), the basic principle of taxation is to

tax the net income, i.e., gross income minus the expenditure and on the same analogy the exemption is also in respect of net income. In other words, where the gross income would not form part of total income, it's associated or related expenditure would also not be permitted to be debited against other taxable income.

25. We are of the view that the expression "in relation to" appearing in Section 14 A of the said act cannot be ascribed a narrow or constricted meaning. If we were to accept the submission made on behalf of the assessees then sub-section (1) would have to be read as follows:-

"For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee with the main object of earning income which does not form part of the total income under this Act."

That is certainly not the purport of the said provision. The expression "in relation to" does not have any embedded object. It simply means "in connection with" or "pertaining to". If the expenditure in question has a relation or connection with or pertains to exempt income, it cannot be allowed as a deduction even if it otherwise qualifies under the other provisions of the said Act. In Walfort (supra), the Supreme Court made it very clear that the permissible deductions enumerated in sections 15 to 59 are now to be allowed only with reference to income which is brought under one of the heads of income and is chargeable to tax. The Supreme Court further clarified that if an income like dividend income is not part of the total income, the expenditure/deduction related to such income, though of the nature specified in sections 15 to 59, cannot be allowed against other income which is includable in the total income for the purpose of chargeability to tax.

Similarly the Hon'ble Bombay high Court in the case of Godrej & Boyce Manufacturing Co. Ltd. observed as under:-

"In order to determine the quantum of the disallowance there must be a proximate relationship between the expenditure and the income which does not form part of total income. Once such a proximate relationship exists the disallowance has to be affected., All expenditure incurred in the earning of income which does not form part of total income has to be disallowance subject to compliance with the test adopted by Supreme Court in Walfort and it would not be permissible to restrict the provision of section 14A by an artificial method of interpretation."

However, we find that the calculation of disallowance under Rule 8D(iii) made by the Assessing Officer and upheld by Ld CIT(A) is not correct In view of the fact that Assessing Officer had included the value of total investments for calculation of disallowance whereas in our opinion the value of those investments should have been included which were made for the purpose of earning exempt income. The assessee had made significant investments in the shares of subsidiary companies which are definitely not for the purpose of earning exempt income. The Hon'ble Tribunal in I.T.A. No.3349/Del/2011 in the case of Promain Ltd., after relying upon a Kolkatta judgment of Tribunal in I.T.A. No.1331 has held that strategic investment has to be excluded for the purpose of arriving at disallowance under Rule 8D(iii). The Tribunal had relied upon the findings of Kolkatta Tribunal in the case of Rei Agro Ltd. v. DCIT in I.T.A. No./1331/Del/2011 dated 29.7.2011. The relevant portion of Tribunal findings as contained in the Kolkatta Tribunal are reproduced below:-

"(iii) Further in Rule 8D(2)(ii), the words used in numerator B are "the average value of the investment, income from which does not form or shall not form part of the total income as appearing in the balance sheet as on the first day and in the last day of the previous year". The Assessing Officer was wrong in taking into consideration the investment of Rs.103 crores made during the year which has not earned any dividend or exempt income. It is only the average of the value of the investment from which the income has been earned which is not falling within the part of the total income that is to be considered. Thus,. It is not the total investment at all beginning of the year and at the end of the year, which is to be considered but it is the average of the value of investments which has given rise to the income which does not form part of the total income which is to be considered. The term "average of the value of investment" is used to take care of cases where there is the issue of dividend striping.

iv) Under Rule 8D(2)(iii), what is disallowable is an amount equal to ½ percentage of the average value of investment the income from which does not or shall not form part of the total income/. Thus, under sub clause (iii), what is disallowed is ½ percentage of the numerator B in Rule 8D(2)Iii). This has to be calculated on the same lines as mentioned earlier in respect of Numerator B in the Rule 8D(2)(ii). Thus, not all investments become the subject matter of consideration when computing disallowance u/s 14A read with Rule 8D. The disallowance u/s 14A read with Rule 8D is to be in relation to the income which does not form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income. (A.Y.) (I.T.A. No.1331/Kol/2011 dated 29.7.2011."

Following the above judicial precedents, we held that value of strategic investments should be excluded for the purpose of disallowance under Rule 8D)iii) facts, we direct the Assessing Officer to calculate the disallowance under Rule8D(iii) by excluding the value of strategic investments in the calculation of disallowance. As regards disallowance under Rule 8D(i) and 8D(ii) we have already held that no disallowance is warranted".

2.5. We hold that the Learned AO without appreciating the various contentions raised by the assessee had mechanically applied the provisions of Rule 8D(2)(ii) of the IT Rules without recording his satisfaction in terms of Rule 8D(1) of IT Rules as to why the disallowance made voluntarily by the assessee u/s 14A of the Act is incorrect. It is not in dispute that the assessee had voluntarily disallowed a sum of Rs. 1,37,12,550/- u/s 14A of the Act towards 0.5% of average value of investments applying the third limb of Rule 8D(2) of the IT Rules. The language of Rule 8D(1) is very clear in this regard. We place reliance on the following decisions in this regard:-

(a) Decision of the co-ordinate bench of Mumbai Tribunal in the case of *Fali S Nariman vs Addl. CIT reported in (2015) 56 taxmann.com 155 (Mumbai – Trib) dated 30.1.2015,* wherein it was held that :

"4. We have heard the parties and perused the material on record. We are wholly unimpressed with the assessee's argument supporting his working of the expenditure relatable to income not forming part of total income under the Act on the ground that 'mind' is his principal asset. So be it; every economic activity, particularly in today's extremely competitive environment, entails some degree of cerebral activity. There is, however, no corresponding expenditure, or claim in its respect, while the issue at hand is the apportionment of such expenditure. Income, which may or may not arise on incurring expenditure, and again with no certainty as to its quantum, cannot by itself form the basis of either incurring or allocation of expenditure.

So however, we consider the Revenue's reading of r.8D as equally misplaced. The estimate per r. 8D(2) is only qua expenditure relatable to tax exempt income/s. The expenditure claimed stands debited in the assessee's accounts, which could be inquired into as to their purpose. For all we know, the assessee may be managing his investments in instruments *yielding tax exempt incomes, which are at a healthy sum of Rs. 21.71 cr. i.e on an average for the year, on his own, or could also be assisted by personnel, who stand remunerated. No inquiry in this regard stands made, while the assessee has maintained proper accounts, duly audited and, further, bases his claim of having incurred a lower expenditure than that per the statutory prescription of r. 8D, thereon. The expenditure observed as relatable to the income not forming part of the total income by the Revenue are : salary (Rs. 3.54 lacs); printing and stationery (Rs. 0.11 lacs); and bank charges (Rs. 0.10 lacs), without specifying the relationship, so that the same is inferably casual. Even the claim of depreciation (Rs. 7.26 lacs) we observe as principally on law books.*

The ingredients of s. 14A(2) r/w r.8D(1) are clearly not satisfied in the instant case. We accordingly find no infirmity in the assessee's claim of disallowance u/s 14A(1) at Rs. 1,00,000/- . We decide accordingly. ""

(b) Decision of the co-ordinate bench of Kolkata Tribunal in the case of *REI Agro Ltd , Kolkata vs DCIT in ITA No. 1331 / Kol / 2011 dated 19.6.2013 reported in (2013) 35 taxmann.com 404 (Kolkata-Trib.)* wherein it was held that :

"6. We have considered the rival submissions. A perusal of the provisions of section 14A, more specifically sub-section (2), shows that if the AO is not satisfied with the correctness of the claim of the assessee, then the AO shall determine the amount of expenditure incurred in relation to such income, which does not form part of total income under the Act. For this the method is prescribed in rule 8D. The provision of section 14A, sub-section (3) specifies the provision of 14A(2) would also apply where the assessee makes a claim that there is no expenditure incurred. This is because if the assessee does not make a disallowance under section 14A in its computation of total income, when filing the return, then if subsection (3) was not available, the AO might not be able to make a disallowance under section 14A. Thus, where the assessee makes a claim that only a particular amount is to be disallowed under section 14A or where the assessee does not make a disallowance under section 14A, if the AO proposes to invoke the section 14A, he is to record a satisfaction on that issue. This satisfaction cannot be a plain satisfaction or a simple note. It is to be done with regard to accounts of the assessee. In the present case, there is no satisfaction by the AO and consequently, in view of the decision of the Coordinate bench of this Tribunal in the case of Balarampur Chini

Mills Ltd. referred to supra, no disallowance under section 14A can be made.

7. Now coming to the merits of the issue. A perusal of the provision of section 14A(1) clearly shows the wordings, "in relation to the income which does not form part of the total income under this Act". In the present case, this income, which does not form part of the total income under the Act, is the dividend income of Rs.1,32,638/-. Therefore, if any disallowance is to be made in respect of expenditure incurred, it should be in relation to this dividend income of Rs.1,32,638/-. If an assessee has invested in shares, which could get dividend or there is investment which generates dividend income or exempt income as also investment which does not generate exempt income, it is only such investments in respect of which the dividend income or exempted income has been earned which can be considered when computing the disallowance under section 14A read with rule 8D. A perusal of the provisions of rule 8D also talks of satisfaction in sub-rule (1). Rule 8D(2) has three sub-parts. The first sub-part i.e. (i) deals with the amount of expenditure directly relating to the income which does not form part of the total income. That issue is not in dispute here and therefore, we do not go into it in this case. In second sub-part i.e.(ii), it is a computation provided in respect of expenditure incurred by the assessee by way of interest during the previous year which is not directly attributable to any particular income or receipt. This clearly means that if there is any interest expenditure, which is directly relatable to any particular income or receipt, such interest expenditure is not to be considered under rule 8D(2)(ii). In the assessee's case here the interest has been paid by the assessee on the loans taken from the banks for its business purpose. There is no allegation from the banks nor the AO that the loan funds have been diverted for making the investment in shares or for non-business purposes. Further rule 8D(2)(ii) clearly is worded in the negative with the words "not directly attributable". Thus for bringing any interest expenditure, claimed by the assessee, under the ambit of rule 8D(2)(ii) it will have to be shown by the AO that the said interest is not directly attributable to any particular income or receipt. Why we say here that it is to be shown by the AO is on account of the words in Rule 8D(1) being "where the Assessing Officer, …… is not satisfied with.

(a) ……..

(b) ……..

in relation to income……., he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).

In the assessee's case, admittedly, the assessee has substantial capital. The increase in the capital itself is to an extent of Rs.4 crores and in respect of reserves and surplus, the increase is Rs.112 crores. The loans taken during the year admittedly are for the letters of credit and the assessee is bound to provide the bank stock statement and other details to show the utilization of the loans. No bank would permit the loan given for one purpose to be used for making any investment in shares. The ld. CIT(A), it is noticed that after considering these facts that the assessee had not used any of its borrowings for purchasing the shares, has deleted the disallowance. On this ground itself, the deletion as made by the ld. CIT(A) is liable to be confirmed and we do so".

(c) Decision of Hon'ble Delhi High Court in the case of *<u>Joint Investments (P) Ltd vs CIT reported in 372 ITR 694 (Delhi),</u>* wherein it was held that :

"9. In the present case, the AO has not firstly disclosed why the appellant/assessee's claim for attributing `2,97,440/- as a disallowance under Section 14A had to be rejected. Taikisha says that the jurisdiction to proceed further and determine amounts is derived after examination of the accounts and rejection if any of the assessee's claim or explanation. The second aspect is there appears to have been no scrutiny of the accounts by the AO - an aspect which is completely unnoticed by the CIT (A) and the ITAT. The third, and in the opinion of this court, important anomaly which we cannot be unmindful is that whereas the entire tax exempt income is `48,90,000/-, the disallowance ultimately directed works out to nearly 110% of that sum, i.e., `52,56,197/-. By no stretch of imagination can Section 14A or Rule 8D be interpreted so as to mean that the entire tax exempt income is to be disallowed. The window for disallowance is indicated in Section 14A, and is only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case".

In view of the aforesaid facts and circumstances and respectfully following the various judicial precedents relied upon hereinabove, we hold that the addition u/s 14A of the Act deleted by the Learned CITA does not require any interference. Accordingly, the ground no.1 raised by the revenue is dismissed.

3. The second issue to be decided in this appeal is as to whether the assessee is entitled for reduction of Rs. 2,18,09,000/- being the lower of unabsorbed depreciation or business loss as per books of accounts from the computation of book profits u/s 115JB of the Act in the facts of the case.

3.1. The Learned AO held that there was no loss available for reduction from the book profits u/s 115JB of the Act and hence the sum of Rs. 2,18,0,9000/- reduced by the assessee was not considered for reduction by the Learned AO. On first appeal, the said reduction was granted by the Learned CITA by relying on certain case laws. Aggrieved, the revenue is in appeal before us on the following ground:-

> *(ii) That the Ld. CIT(A) has erred in Law as well as in facts and circumstances of the case in directing to reduce the Book Profit u/s 115JB by an amount of Rs.2,18,09,000/- when the admissible amount, i.e., lower of 'unabsorbed depreciation' or 'business loss' was actually 'NIL',*

3.2. The Learned DR vehemently supported the order of the Learned AO. In response to this, the Learned AR argued that the finding given by the Learned AO that the loss as per books of accounts once reduced from book profits in earlier years would not be available for reduction in the subsequent years. He stated that the losses would continue to remain in the books of accounts till it is wiped out by profits derived by the assessee. Accordingly, he argued that the assessee company is very much entitled for reduction of least of the cash loss or depreciation loss as per books of accounts from book profits for computation u/s 115JB of the Act.

3.3. We have heard the rival submissions and perused the materials available on record. We are in agreement with the arguments of the Learned AR that the losses (both cash loss and depreciation loss) would continue to remain in the books of accounts till it is wiped off by earning profits by the assessee company and accordingly the same would be available for reduction from book profits u/s 115JB of the Act. We hold that the least of the cash loss or depreciation loss once adjusted / reduced from book profits in earlier assessment years, do not vanish out of the books until it is wiped out by profits in subsequent years. Till such time, the losses would only continue to remain in the books. We hold that for the purpose of computation of book profits u/s 115JB of the Act, every year the situation of least of cash loss and depreciation loss needs to be worked out and reviewed and accordingly the understanding of the Learned AO that such loss once adjusted in earlier year is no longer available for set off is misconceived. Hence we do not find any infirmity in the order of the Learned CIT(A) in this regard. The Ground No.2 raised by the revenue is dismissed.

4. The last issue to be decided in this appeal is as to whether, the forfeiture of share warrants amounting to Rs. 12,65,75,000/-, being a capital receipt, would be liable for taxation u/s 115JB of the Act just because it has been credited in the profit and loss account as an extraordinary item, in the facts and circumstances of the case.

4.1. The brief facts of this issue are that the assessee filed its original return of income on 30.9.2009 disclosing total income at Rs Nil under normal provisions of the Act and declaring book profits u/s 115JB of the Act at Rs. 21,24,72,340/-. Later the assessee filed revised return of income on 31.3.2011 disclosing total income at Rs. Nil under normal provisions of the act and declaring book profits u/s 115JB of the Act at Rs. 33,90,47,340/-. In the said revised computation of book profits u/s 115JB of the Act, an extraordinary item of receipt to the tune of Rs. 12,65,75,000/- representing forfeiture of share warrants was included by the assessee. Later the assessee vide letter dated 27.12.2011 at assessment stage stated that the said extraordinary receipt of Rs. 12,65,75,000/- was erroneously included in the computation of book profits reported in the revised return and pleaded for exclusion of the same on the ground that it is capital receipt. However, the Learned AO considered the book profits at Rs. 33,90,47,340/- as per the revised return of the assessee and proceeded with the assessment by relying on the **decision of the Hon'ble Apex Court in the case of Apollo Tyres Ltd reported in 255 ITR 273 (SC) and also the provisions of section 115JB** which stated that the profit and loss account (a) shall be made out so as clearly to disclose the result of the working of the company during the period covered by the account and (b) shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature. Before the Learned CIT(A), the assessee pleaded that the Learned AO had not disputed the fact that the accounts have been prepared in accordance with the provisions of Companies Act, 1956 and the provisions of Companies Act mandates the subject mentioned receipt of forfeiture of share warrants amounting to Rs. 12,65,75,000/- to be routed through profit and loss account as an extraordinary item. It was further argued before the Learned CIT(A) by the assessee that the Learned AO had rightly not taxed the said receipt of Rs. 12,65,75,000/- as income under the normal provisions of the Act despite the fact that the same is credited in the profit and loss account of the assessee. It was further pleaded before the Learned CIT(A) that the said receipt was not taxed by the Learned AO under normal provisions of the Act on the reason that it is only a capital receipt and further on the reasoning that what is not taxable as per law cannot be taxed by the Learned AO just because the same is offered erroneously by the assessee. The Learned CIT(A) appreciated the contentions of the assessee in this regard and directed the Learned AO to start the book profits computation as per original return of income filed by the assessee. Aggrieved, the revenue is in appeal before us on the following ground :-

> *(iii) That the Ld. CIT(A) has erred in Law as well as in the facts and circumstances of the case in directing to treat the net profit at Rs.21 ,24,72,340/- for the purpose of computation of Book Profit instead of Rs.33,90,47,340/- offered by the assessee in its revised return of income;*

4.2. We have heard the rival submissions and perused the materials available on record including the detailed paper book containing the audited financial statements together with notes on accounts thereon for the year ended 31.3.2009, copy of return acknowledgements (both original and revised returns), among others. At the outset, we find from Note No. 6 to Schedule 11 of the Financial Statements for the year ended 31.3.2009, the assessee had stated as below:-

> *6. As per Resolution passed by the members at the Extra Ordinary General Meeting held on 15th February, 2008, the Company had allotted 50,00,000 warrants on 18th March , 2008 to M/s K.B.Vyapar Pvt ltd ., a Promoter Group Company, convertible into equal number of Equity Shares within 18 months at a price of Rs. 253.15 per share as per SEBI guidelines. The Company had received 10% as upfront deposit amounting to Rs. 1265.75 lakhs which was shown as 'Share Capital Suspense' (Refer Schedule 1A).*
>
> *Vide letter dated 28th January, 2009, M/s K.B.Vyapar Private Limited had expressed its unwillingness to acquire the Equity Shares against which it had deposited Rs. 1265.75 lakhs as upfront deposit and had requested the Company to treat the said convertible warrants as cancelled in accordance with the SEBI (DIP) Guidelines, 2000.*
>
> *Accordingly, the forfeited warrants were cancelled and the amount of upfront deposit of Rs. 1265.75 lakhs has been forfeited and credited to Profit and Loss Account as an extraordinary income.*

4.3. It is not in dispute before us that the subject mentioned receipt of Rs. 12,65,75,000/- representing forfeiture of share warrants is only a capital receipt by its nature not chargeable to tax. However, the same has been duly credited in the profit and loss account as an extraordinary item and the said profits after such extraordinary items has been approved by the shareholders in the annual general meeting of the assessee company.

4.3.1. The Learned AR submitted before us that the basic intention behind introduction of the provisions of section 115J of the Act has been explained by the

Hon'ble Kerala High Court . The constitutional validity of the provisions of section 115J of the Act was tested by the ***Hon'ble Kerala High Court in the case of Karimtharuvi Tea Estates Ltd and Another vs DCIT and Others reported in 247 ITR 22 (Ker)*** **,** wherein it was held that :-

> *The object of the insertion of section 115J of the Income Tax Act, 1961, was to ensure levy of minimum tax on what are known as "prosperous zero tax companies". Under the scheme of the section, where the total income of companies as computed under the provisions of the Income Tax Act, in respect of the previous year relevant to the assessment year is less than 30 percent of their book profits, the total icnome of such companies chargeable to income tax for the relevant previous year is treated as income equal to 30 percent of such book profits and is taxed accordingly. It also provides for certain adjustments by way of adding amounts and granting deductions for computing the chargeable income under section 115J(1) . Sub-section (2) provides that determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years will have to be made unaffected by the provisions in sub-section(1) of section 115J. The very object of the provisions of section 115J is to tax such companies which are making huge profits and also declaring substantial dividends, but are managing their affairs in such a way as to avoid payment of income tax, as a result of various tax concessions and incentives and for that purpose, the taxable income is determined under sub-section (1) of section 115J. An assessee is enabled to claim carry forward and set off of losses , unabsorbed allowance in view of the specific provisions of the Income Tax Act enabling an assessee to claim them. But because of this provision a company will have to pay tax on at least 30 percent of its book profit. Therefore, what is taxed is not fictional or hypothetical income. Under law, thought it is permissible to bring to tax hypothetical income, what is really done under section 115J is not exactly bringing to tax hypothetical income. What is really done is to limit or restrict or curtail deduction, carry forward and set off of losses, unabsorbed depreciation, unabsorbed allowance, etc., etc. Ordinarily, these deductions are permissible in view of the provisions introduced in the statute by Parliament and Parliament is equally competent to take away or restrict or limit such allowances for a definite purpose.*
>
> *Various concessions and allowances are given as per various provisions enabling the companies to arrange their tax affairs in such a way as to become "zero tax " companies and the Legislature by this section*

<u>restricted or curtailed or limited such concessions to the extent as provided in section 115J so that they can pay some tax</u>. This is not unreasonable so as to make it violative of Article 14 or 19 of the Constitution of India. What is done by the Legislature is to limit the allowances and nothing else.

The Learned AR submitted that the above principle would apply with equal force for companies falling under the ambit of provisions of section 115JA / 115JB of the Act as the case may be.

4.3.2. It was further contended by him that the Rule of Purposive Construction to be followed. He pointed out that the facts in the instant case was that the assessee issued share warrants for which payments were received by it in several phases. The applicant refused to pay the instalments as agreed upon and accordingly the assessee company chose to forfeit the amounts already paid by him. The assessee had credited the same in its profit and loss account as an extraordinary item and derived the current year profits under the Companies Act. The assessee sought to reduce the same from the computation of book profits u/s 115JB of the Act as the same is not the real profit of the assessee. According to him, what is to be seen is that whether the forfeiture of share warrants amounting to Rs. 12,65,75,000/- would enter the stream of income definition which is an inclusive definition u/s 2(24) of the Act. According to him when it is not disputed that forfeiture of share warrants is a capital receipt and cannot be subjected to tax and there is no provision to tax the same under the provisions of the Act, it would be just and fair to hold that what is not income as per the definition of the word income in the Act cannot be brought to tax under any other provision of the Act. In this regard, he drew our attention from the decision of co-ordinate bench of ***<u>Delhi Tribunal in the case of Vasundhara LPG (P) Ltd vs ITO reported in (2005) 146 Taxman 23 (Delhi) (Mag.) dated 8.4.2004</u>*** wherein it was held that :

It is an elementary principle of interpretation of statutes that statute should be given what has come to be known as purposive construction , i.e., the Court should identify the mischief which existed before passing of the *statute and then proceeded to interpret the statute so as to suppress the mischief and advance the remedy. There is no doubting the view that subtle inventions and devices resorted to by any person for continuance of the mischief should be suppressed. However, the proposition cannot be extended beyond the intended purpose and object of the law makers and cause hardship, serious inconvenience, injustice and absurdity*.

Reference was also made to the decision of the ***Hon'ble Calcutta High Court in the case of SAIL DSP VR Employees Association 1998 vs Union of India and Others reported in 262 ITR 638 (Cal)***, wherein the **Hon'ble Calcutta High Court after placing reliance on the two *apex court decisions in (1988) 170 ITR 137 (SC) and (1981) 131 ITR 597 (SC)*** had held that :-

If a plain literal interpretation of statutory provision produces a manifestly absurd and unjust result, which the Legislature could not have intended, the court is supposed to modify the language used by the Legislature, even to do some violence to it so as to achieve the obvious intention of the Legislature and produce a rational construction. An expression used in the statute is not always to be interpreted literally or grammatically. Sometimes it has to be interpreted having regard to the context in which the expression is used and having regard to the object and purpose for which the same is enacted.

According to him therefore the intention of section 115J and the memorandum explaining the provisions of the Act and giving purposive construction to the same, it could be safely concluded that the Legislature never intended to bring to tax such receipt which otherwise is not taxable under the provisions of the Act. It only intended to bring to tax zero tax companies pay some tax due to availing of various concessions and incentives which are provided in the statute. Hence the Rule of Purposive Construction should be given to the intention behind introduction of provisions of section 115J / 115JA / 115JB of the Act so that it doesn't gets defeated.

4.4. It was submitted that the subject mentioned receipt comprising of forfeiture of share warrants amounting to Rs. 12,65,75,000/- is not chargeable to tax as it is undisputably a capital receipt, the same would not be liable to be taxed u/s 115JB of the Act merely because it is credited in the profit and loss account by the assessee. In this regard, he pointed out the two different nature of receipts that might arise to an assessee. According to him there is a basic dichotomy between receipts which are not taxable at all and receipts which are taxable but subject to exemption / deduction on fulfilling certain conditions. The receipt stated in the former case would never enter the stream of taxation even under the book profits u/s 115J / 115JA / 115JB of the Act going by the intention of the said provisions. However, the receipt stated in the latter case would definitely be liable to be taxed u/s 115JB of the Act as per the intention of the said provision. According to him, applying this principle, it could be safely concluded that the subject mentioned receipt of forfeiture of share warrants , which is admittedly not income, would fall in the former category and accordingly not liable to be taxed u/s 115JB of the Act. He also made reference to the provisions of section 115JB (5) of the Act which is reproduced herein below:-

115JB(5) – Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee , being a company, mentioned in this section.

Applying the aforesaid provision to the facts of the instant case, according to him, it could be safely concluded that when the forfeiture of share warrants is not taxable under any other provisions of this Act, then the same would not be taxable under book profits u/s 115JB of the Act.

4.4.1. The Learned AR also referred to the decision of the ***Special Bench of Calcutta Tribunal in the case of Sutlej Cotton Mills Ltd vs ACIT reported in (1993) 45 ITD 22 (Cal) (SB) dated 26.10.1992*** wherein it was held that a particular receipt which is admittedly not an income cannot be brought to tax under the deeming provisions of section 115J of the Act as it defies the basic intention behind introduction of provisions of section 115J of the Act. Further it was held that the Rule of Purposive Construction should be invoked to decide the applicability of MAT provisions.

4.5. He then ade a reference to the decision of the ***Special Bench of Hyderabad Tribunal in the case of Rain Commodities Ltd vs DCIT reported in (2010) 131 TTJ (Hyd)(SB) 514 dated 2.7.2010*** , wherein it was held the capital gain which is exempt u/s 47(iv) of the Act which is credited to the profit and loss account of the assessee cannot be reduced for computation of book profits u/s 115JB of the Act as it is not covered by any of the clauses (i) to (vii) of the Explanation to Section 115JB of the Act. Accordingly it held that MAT is applicable for receipt of capital gains eventhough the same is exempt u/s 47(iv) of the Act. It was submitted by him that the decision of Rain Commodities Ltd has to be understood in the proper perspective. It was submitted by him that the Rain Commodities (supra) did not say that the receipt (a non-taxable receipt such as capital receipt) which is per se not taxable under the Act would enter the stream of taxation u/s 115JB of the Act. It only said that the capital gains derived by the assessee were subjected to exemption u/s 47(iv) of the Act which would be liable for taxation u/s 115JB of the Act and more so it is credited in the profit and loss account of the assessee. It was submitted that here the Rule of Harmonious Construction would also come into play. First of all, the receipt should per se be taxable under the Act. It does not matter if the same is eligible for deduction / exemption under any other provisions such as section 47(iv) of the Act. In such a scenario, the capital gains which is exempt would be liable for MAT. This goes in consonance with the true intention behind introduction of provisions of section 115J of the Act as enumerated supra. According to him, therefore, this decision does not in any way even remotely contemplate to bring to tax any receipt which is not chargeable at all to tax under the provisions of the Act. Hence a thin line of difference needs to be drawn between a receipt which is not taxable from its inception and that which is not taxable pursuant to claim of deduction / exemption. As stated earlier, the former case would be outside the ambit of book profits tax u/s 115JB of the Act while the latter would definitely be taxed under MAT. Hence according to him the decision of Rain Commodities (supra) does not stand in the way of assessee seeking to keep the subject mentioned receipt of forfeiture of share warrants outside the ambit of book profits tax u/s 115JB of the Act.

4.6. We have given a very careful consideration to th rival submissions. We find the following decisions in support of our proposition that a capital receipt which is not chargeable to tax under any provisions of the Act would not be liable for book profits tax u/s 115JB of the Act which was rendered after considering the decisions of Hyderabad Special Bench in Rain Commodities (supra) and the decision of Hon'ble Apex Court in Apollo Tyres (supra) :-

(a) Decision of Lucknow Tribunal in the case of ACIT vs L.H.Sugar Factory Ltd and vice versa in ITA Nos. 417 , 418 & 339/LKW/2013 dated 9.2.2016**,** wherein it was held that :-

> *49. We have considered the rival submissions. We find that this aspect has been already decided by us as to whether receipt on account of transfer of carbon credit is a capital receipt not liable to tax or not. Now, in the light of this factual position, we examine the applicability of this Tribunal's order rendered in the case of ACIT vs M/s Shree Cement Ltd for Assessment Year 2004-05 to 2006-07. The relevant paras of this Tribunal's order are para 13 to 13.11 of this Tribunal's order and the same are reproduced herein below for the sake of ready reference :-*
>
>> *"13. We have heard the rival submissions and considered them carefully. We have also perused the orders of authorities below as well as other material on which our attention has been drawn. We have taken into consideration the ratio decidendi of all the decisions relied upon by the rival parties.*

13.1. At the outset, the issue in hand is covered in favour of the assessee in its own case for A.Y. 2003-04 vide order dated 23-12-2009 in ITA No. 942/Jp/08. The above decision of Tribunal has been appealed before the Hon'ble Jurisdictional Rajasthan High Court and Hon'ble Jurisdictional High Court vide order dated 01-10-2010 has admitted only one ground which is reproduced below:

> *"Whether on the facts & circumstances of the case, the Tribunal was justified in holding that the Sales Tax Subsidy received by the Assessee of Rs. 18,48,85,506 in the form of Sales Tax Exemption was a capital receipt & not a revenue receipt, ignoring the basic purpose for which the same was given which itself provides that the subsidy was given to the Assessee to enhance the production, employment & sales in the state of Rajasthan, which are all post operational actvities."*

From the abvoem it could be clearly seen that Hon'ble High Court admitted only the ground as to whether the impugned subsidy was a capital receipt or a revenue receipt. Hon'ble High Court has not admitted the ground of the Revenue against relief granted by Tribunal under section 115JB of the Act on above capital receipt. Therefore, respectfully following the decision of Jurisdictional High Court and the Tribunal in Assessee's own case for AY 2003-04 we see no reasons to take any other view on the matter different from the conclusions arrived at by this bench in favour of the Assessee, as far as exclusion from book profit under section 115JB is concerned, that now stands affirmed by the Hon'ble Rajasthan High Court and we are in respectful agreement with the same.

13.2. Our above view also finds support from the decision of Hon'ble Apex Court in the case of Padmaraje R. Kadambande vs CIT (1992) 195 ITR 877 (SC) , wherein it has been held by the Apex Court that Capital Receipts are not income within the definition of section 2(24)of the Act and hence are not at all chargeable under the I.T.Act. A receipt which is neither 'Profit' nor 'Income' and which does not have any element thereof embedded therein, cannot be part of 'Profit' as per Profit & Loss Account prepared in terms of Part II of Schedule VI to Companies Act.

13.3. As far as the decisions relied upon by the Ld D/R are concerned, we are unable to follow the same in the present case, as *the facts of the said decisions are clearly different from the facts in the present case. It is a settled principle of law as laid down by the Hon'ble Apex Court in the case of Padmasundra Rao (Decd) vs State of Tamil Nadu (2002) 255 ITR 147 (SC) that Courts should not place reliance on the decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed.*

13.4. From perusal of the decisions of Rain Commodities (supra) and Growth Avenues (supra) , we notice that both the decision dealt with the issue of taxability of capital gains in computing Book Profit u/s 115JB of the Act. These capital gains were otherwise income u/s 2(24) of the Act and exclusion was claimed in computing Book Profit u/s 115JB on the ground that the said capital gains was exempt either u/s 47(iv) or u/s 54EC of the Act, which the Tribunal did not agree. In the present case, however, we are dealing not with capital gains but with pure capital receipt, which does not even have any 'income' , 'profits or, gains' embedded therein. The impugned incentive granted to the Assessee is pure and simple capital receipt, in terms of our decision on ground no. 1 at Para 10 hereinabove, which in turn is supported by the principles laid down by the Apex Court, various high courts & Special Bench of the Tribunal. That being the case, it does not have any income or profit element embedded in it, since the incentive was granted to encourage industrial growth of industrially non developed area. No one can make profit out of the subsidy or incentive granted to it. Hence, it is not chargeable to tax under the Income Tax Act as held by the Apex Court in the case of Padmaraje (supra) and in the light of our fact finding as above, clearly not includible in P&L account prepared under Part II & Part III of Schedule VI to the Companies Act.

13.5. The genesis of Sec 115J, thereafter section 115JA and now section 115JB was to ensure that the assessee , while making profit from operations, should not enjoy tax free status due to various deductions available under the Income Tax Act. There was never any intention of the legislature to tax what is not income at all. In a recent decision, the Hon'ble Apex Court in the case of Indo Rama Synthetics (I) Ltd vs CIT (2011) 330 ITR 363 (SC) has held that the object of MAT provisions is to bring out the real profit of the companies. The thrust is to find out the real working results of the company. Inclusion of receipt in the computation of MAT would defeat two fundamental principles, it would levy tax on receipt which is not in the nature of income at all and secondly it would not result *in arriving at real working results of the company. The real working result can be arrived at only after excluding this receipt which has been credited to P&L a/c and not otherwise.*

13.6. For better understanding of the issue, let us also extract down relevant provision of sec. 115JB as under .

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

13.7. On consideration of the above, it is apparent that for the purpose of computing book profit u/s 115JB Profit and Loss a/c shall be prepared as per part II and III of Schedule VI to the Companies Act. Part II of Schedule VI prescribes the requirements as to Profit and Loss A/c. Clause 2(a) of Part II clearly spells that the profit and loss a/c shall be so made out as clearly to disclose the result of the working of the company during the period covered by the accounts. Hence, in our view, P&L Accounts do not reflect the true result of the working of the company for the year, it cannot be said to be as per Schedule VI, Part II & III of the Companies Act and it would necessitate corrective adjustment in that situation so as to comply with Schedule VI , Part II & III.

13.8. With the above discussions, the only issue left to be considered is whether exclusion of the above capital receipt is in line with the principles as laid down by Hon'ble Apex Court in the case of Apollo Tyres (supra). In the case of Apollo Tyres (supra), the question before the Apex Court was whether an AO can, while assessing a company for income tax u/s 115J of the IT Act, question the correctness of the P&L a/c prepared in accordance with requirements of Part II and III of Sch. VI to the Companies Act. From the question as framed before the Apex Court it is clear that the issue before the Hon'ble Court was with regard to power of the AO to recast audited accounts prepared in accordance with Part II and Part III of Sch.VI to the Companies Act. Therefore, for applicability of the decision of the Apex Court the prerequisite is that the accounts are prepared in accordance with Part II and Part III to Sch.VI of the Companies Act. If however the P&L accounts are not in accordance with Part II and III of Sch. VI to the

Companies Act, the said decision cannot be applied and in that situation it does not prohibit the needful adjustment.

13.9. Our view as above is supported by the decision of the Special Bench in the case of Rain Commodities (supra), which incidentally has been relied upon by DR. On examination of the said order, we find that at Para 17 (last sub-para) & Para 18, after considering the decision of Supreme Court in Apollo Tyres Ltd (supra), Special Bench have held that if Profit & Loss account is not in accordance with Part II & III of Schedule VI to the Companies Act, it is permissible to alter the net profit so as to make it in accordance with Part II & III of Schedule VI, which is the starting point for computation of 'Book Profit' in terms of section 115JB. We have concluded in Para 13.4 above, that inclusion of sales tax subsidy in the Profit and Loss is not in accordance with Schedule VI, Part II & III. Hence it implies that needful adjustment to exclude the same is not only permissible, but is mandatory so as to make the Profit & Loss Account compliant , with the basic requirement of Section 115JB.

13.10. Our view per Para 13.8 above is also supported by, the decision of Mumbai Tribunal in the case of Bombay Diamond (supra) & that of Bangalore Tribunal in the case of Syndicate Bank (supra) [both analysed in Para 12.1 above], where also Tribunal, after considering the decision of Supreme Court in the case of Apollo Tyres (supra) and explaining the same, have permitted adjustment to the Profit as per P&L Account, so as to comply with Schedule VI , Part II & Part III of the Companies Act, which is a prerequisite for section 115JB.

13.11. In the light of the aforesaid, the additional Ground filed by the Department is rejected and we hold that capital receipt in the form of Sales Tax incentive needs to be excluded from profit as per P&L Account for the year in computing Book Profit u/s 115JB of the Act. This Ground of the Department is thus dismissed."

50. From the above paras, we find that the Tribunal has duly considered the judgement of the Hon'ble Apex Court rendered in the case of Apollo Tyres Ltd (Supra) and thereafter, it was noted by the Tribunal in this case that as per the decision of Special Bench of the Tribunal rendered in the case of Rain Commodities Ltd vs DCIT, 41 DTR 449, if profit and loss account is not in accordance with Part II & Part III of Schedule VI to the Companies Act, 1956 because it is prerequisite for Section 115JB of the

Act. The Tribunal in this case also considered two another Tribunal's orders rendered in the case of DCIT vs Bombay Diamond Company Ltd (33 DTR 59) and Syndicate Bank vs ACIT , 7 SOT 51 Bangalore, where it was held by the Tribunal after considering the decision of Hon'ble Apex Court rendered in the case of Apollo Tyres Ltd (Supra), and after explaining the same that adjustment of profit and loss account is possible to make it compliant with Schedule VI Part II and Part III of the Companies Act, 1956 which is prerequisite of Section 115JB of the Act. On this basis, the Tribunal in the case of Shree Cement Ltd (Supra0 decided this issue in favour of the assessee and it was held that capital receipt in the form of sales tax subsidy needs to be excluded from profit as per P&L account for the purpose of computing book profit u/s 115JB of the Act. By respectfully following these Tribunal's orders, we hold that in the present case also, the receipt on account of transfer of carbon credit which is held to be a capital receipt needs to be excluded from profit as per P&L account for the present year while computing the book profit u/s 115JB of the Act. This issue is decided in favour of the assessee and accordingly Ground Nos. 1 to 5 are allowed. The assessee gets relief of Rs. 27,70,880/- and consequent interest being 10% of the amount received by the assessee on sale of carbon credit of Rs. 2,77,08,800/-.

(b) Decision of Mumbai Tribunal in the case of Shivalik Venture (P) Ltd vs DCIT reported in (2015) 173 TTJ (Mumbai) 238 dated 19.8.2015 **,** wherein it was held that :

23. *We shall now examine the second contention urged by the assessee, viz., since the profit arising on transfer of a capital asset by a company to its wholly owned subsidiary company is not treated as income" u/s 2(24) of the Act and since it does not enter into computation provision at all under the normal provisions of the Act, the same should not be considered for the purpose of computing book profit u/s 115JB of the Act.*

26. *We shall now examine the scheme of the provisions of sec. 115JB of the Act. It is pertinent to note that the provisions of sec. 10 lists out various types of income, which do not form part of Total income. All those items of receipts shall otherwise fall under the definition of the term "income" as defined in sec. 2(24) of the Act, but they are not included in total income in view of the provisions of sec. 10 of the Act. Since they are considered as "incomes not included in total income" for some policy reasons, the legislature, in its wisdom, has decided not to subject them to tax u/s 115JB* *of the Act also, except otherwise specifically provided for. Clause (ii) of Explanation 1 to sec.115JB specifically provides that the amount of income to which any of the provisions of section 10 (other than the provisions contained in clause (38) thereof) is to be reduced from the Net profit, if they are credited to the Profit and Loss account. The logic of these provisions, in our view, is that an item of receipt which falls under the definition of "income", are excluded for the purpose of computing "Book Profit", since the said receipts are exempted u/s 10 of the Act while computing total income. Thus, it is seen that the legislature seeks to maintain parity between the computation of "total income" and "book profit", in respect of exempted category of income. If the said logic is extended further, an item of receipt which does not fall under the definition of "income" at all and hence falls outside the purview of the computation provisions of Income tax Act, cannot also be included in "book profit" u/s 115JB of the Act. Hence, we find merit in the submissions made by the assessee on this legal point.*

27. *A careful perusal of the decision rendered by the Special bench in the case of Rain Commodities Ltd. (supra) would show that the above said legal contentions were not considered by the Special bench. We notice that the Special bench considered the following decisions:—*

(a) ***Malayala Manorama Co. Ltd v.CIT*** ***[2008] 300 ITR 251/169 Taxman 471 (SC)***

(b) ***N.J. Jose & Co. (P) Ltd v. ACIT*** ***[2010] 321 ITR 132/[2008] 174 Taxman 141 (Ker.)***

(c) ***CIT v. Veekaylal Investment Co.(P) Ltd*** ***[2001] 249 ITR 597/116 Taxman 104 (Bom.)***

In all these cases, the Courts were dealing with the issue of inclusion of Capital gains in the computation of "Book Profits", but such capital gains were otherwise chargeable to capital gain tax u/s 45 of the Act under the normal provisions of the Act. However, here is the case that the profits and gains arising on transfer of capital is not falling under the definition of "transfer" and hence under the definition of "Capital gains chargeable u/s 45" and consequently, the same does not fall within the purview of the definition of "income" given u/s 2(24) of the Act. Further, we notice that the Special bench did not have occasion to consider the argument urged before us that the profits and gains arising on transfer of a capital asset by a holding company to its wholly owned Indian Company does not fall under the definition of "income" at all u/s 2(24) of the Act and hence the same does not enter into the computation provisions of the Act at all. We are impressed by the arguments advanced in this regard and we have also extensively dealt with the relevant provisions and also about the scheme of the provisions of sec. 115JB of the Act. We are of the view that the said contentions distinguish the decision rendered by the Special Bench in the case of Rain Commodities Ltd. (supra). On merits also, we have earlier *seen that the assessee herein has attached a note in the notes forming part of accounts and in the case before the Special bench, no such notes has been inserted, which fact was specifically noted by the Special bench. Hence on this factual aspect also, the decision rendered by the Special bench is distinguishable.*

28. *In view of the foregoing discussions, we find merit in the contentions of the assessee that the profit arising on transfer of capital asset to its wholly owned Indian subsidiary company is liable to be excluded from the Net profit., i.e., the Net profit disclosed in the Profit and Loss account should be reduced by the amount of profit arising on transfer of capital asset and the amount so arrived at shall be taken as "Net profit as shown in the profit and loss account" for the purpose of computation of book profit under Explanation 1 to sec. 115JB of the Act. Alternatively, since the said profit does not fall under the definition of "income" at all and since it does not enter into the computation provisions at all, there is no question of including the same in the Book Profit as per the scheme of the provisions of sec. 115JB of the Act. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to exclude the above said profit from the computation of "Book Profit" for the reasons discussed above.*

In the instant case, the assessee also has duly disclosed the fact of forfeiture of share warrants amounting to Rs. 12,65,75,000/- in its notes on accounts vide Note No. 6 to Schedule 11 of Financial Statements for the year ended 31.3.2009. Hence respectfully following the aforesaid decision of the Mumbai Tribunal, the profit and loss account prepared in accordance with Part II and III of Schedule VI of Companies Act 1956, includes notes on accounts thereon and accordingly in order to determine the real profit of the assessee as laid down by the ***Hon'ble Apex Court in the case of Indo Rama Synthetics (I) Ltd vs CIT reported in (2011) 330 ITR 363 (SC)***, adjustment need to be made to the disclosures made in the notes on accounts forming part of the profit and loss account of the assessee and the profits arrived after such adjustment , should be considered for the purpose of computation of book profits u/s 115JB of the Act and thereafter, the Learned AO has to make adjustments for additions / deletions contemplated in Explanation to section 115JB of the Act.

5. In view of the aforesaid facts and respectfully following the various judicial precedents relied upon hereinabove, we find no infirmity in the order passed by the Learned CIT(A) in this regard and accordingly, the Ground No. 3 raised by the revenue is dismissed.

6. In the result, the appeal of the revenue is dismissed.

Order pronounced on 02-03-2016

Sd/- Sd/-
(N.V.Vasudevan, Judicial Member) (M. Balaganesh, Accountant Member)

Date 02/03 /2016

Copy of the order forwarded t

1. The Appellant: The DCIT, CC-XXVIII, 110 Shanti Pally, Aaykar Poorva, Em-Bye Pass, 4th Fl., Kol-107.
2 The Respondent-M/s. Binani Industries Ltd 37/2 Chinar Park, New Town, Rajarhat Main Road, P.O Hatiara, Kol-157.

3 /The CIT, 4.The CIT(A)

5. DR, Kolkata Bench
6. Guard file.

True Copy, By order, Asstt Registrar