आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
(समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य **एवं** डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
[Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. Nos. 114-115/Kol/2016
Assessment Years: 2008-09 & 2009-10

Deputy Commissioner of Income-tax, Circle-4(1), Kolkata	Vs.	M/s. Mcleod Russel India Ltd. (PAN: AAACE6918J)
Appellant		Respondent

Date of Hearing	06.03.2019
Date of Pronouncement	03.05.2019
For the Appellant	Shri A. K Singh, CIT, DR
For the Respondent	Shri D. S. Damle, AR

ORDER

Per Shri A.T.Varkey, JM

These appeals filed by the Revenue are against the orders of the Ld. CIT(A) dated 11th September 2015 for the Assessment Years 2008-09 & 2009-10. Since the issues involved in these appeals are common, these appeals were heard together and are being disposed by this common order.

2. We first take up the appeal filed by the Revenue in ITA No. 114/Kol/2016 for AY 2008-09. Ground No. 1 raised by the Revenue relates to disallowance of provision for retirement benefits on the ground that such provision is not permissible for not complying with Section 43B of the Act. Briefly stated the facts of the case are that the appellant company sets aside provision in it's annual accounts for payment of post retirement benefits to employees employed at its various tea estates, being medical reimbursements, leave encashment, staff pension & foreign pension, in conformity with the Accounting Standard – 15 ('AS-15') prescribed by the Institute of Chartered Accountants of India ('ICAI'). In the relevant year the said AS-15 was revised by the ICAI and the methodology to measure the

employer's obligation towards long term retirement benefits was amended with a view to ensure a more realistic and correct ascertainment of the liability. In terms of the Revised AS-15, every reporting corporate entity was required to re-measure its past as well as present obligations and restate such liability in it's books, based on the revised methodology. The additional liability of Rs.11,04,14,367/- arising as a consequence of re-statement of the past obligations was provided by way of transitional provision in the assesee's books of account which was charged to Reserve account. The liability of Rs.1,65,51,581/- based on revised AS-15 pertaining to the relevant financial year was charged off to the Profit & Loss Account. Provision for retirement benefits based on application of Revised AS-15 was claimed by way of deduction in the computation of income. In the assessment order passed u/s 143(3), the AO disallowed the deduction in respect of provision for retirement benefits holding that there was no provision in the Income-tax Act, 1961 which specifically permitted its deduction. He further held that such provision was made based on actuarial valuation reports, which in turn are based on assumptions and therefore the provision so created was contingent in nature. Aggrieved by the order of the AO; an appeal was preferred by the Ld. CIT(A) who deleted the disallowance by observing as under:

4.2. I have considered the A/R s submissions and perused the observations & findings of the AO in the impugned order. I have also gone through the relevant Accounting Standard and Guidance Notes issued by the ICAI in respect of provision for employees' retirement benefits. From the material placed before me I find that the assessee had consistently been making provision for retirement benefits for Employees in its annual accounts in conformity with AS-15. In all the past assessments of the appellant, the AOs consistently allowed the deduction for provision for post retirement benefits debited in accounts in consonance with AS-15. I further note that prior to AY 2005-06 tea business of the appellant belonged to Eveready Industries India Limited. The appellant company succeeded to the tea business of Eveready Industries India Limited on account of the scheme of demerger approved by Calcutta High Court. Eveready Industries India Limited in its books made provision for post retirement benefits to Employees in conformity with AS-15. In income-tax assessments of the said company also the deduction was allowed by the AOs in all regular assessments except for AY 1997-98. The ITAT, Kolkata in its appellate order for AY 1997-98 in ITA No. 959/Kol/2002 however allowed the assessee's claim for provision for post retirement benefits to Employees taking the view that the said provision was made in respect of a liability which accrued during the relevant year in relation to services performed by the employees although payable in future at unspecified date. The Tribunal further found that the provision for post retirement benefits was ascertained on the basis of actuarial valuation certificate obtained by the assessee. Such provision was made in conformity with AS-15 prescribed by the ICAI. The ITAT accordingly held that the deduction was allowable in computing the business income of the assessee. Following the ITAT decision for AY 1997-98, no disallowances were made in the case of Eveready Industries India Limited or the appellant till AY 2007-08 even though in the accounts of the relevant years the provision for Employee Retirement benefits was debited and deduction therefor was claimed.

4.3 From these facts it therefore appeared that in the past assessments the AOs in principle accepted that the deduction for provision for post retirement benefits was permissible in arriving at the taxable income of the assessee since the relevant liability was incurred during the relevant years in which the employees performed their services. While assessing total income in the past years the AOs also accepted that the provision was to be allowed in accordance with the method prescribed in AS-15 issued by I CAI even though no specific provision of the I. T. Act dealt with such claim. Yet in the past assessments deduction for such provision was allowable because retirement benefits were payable to employees in terms of contract of employment with the employees.

4.4 In the impugned order the AO disallowed the assessee's claim on one of the fact that the assessee did not debit Rs.11,00,14,367/- to its Profit & Loss Account. The assessee did not spell out the enabling provision of the Act under which the action was permissible in respect of a liability which was admittedly not charged during the relevant but which was to be paid at a future unspecified date. In other words in AO's opinion such liability was a contingent. The reasons adduced by the AO justifying the disallowance are apparently inconsistent with the Departmental stand in the earlier years and also contrary to the provisions of the Act. The AO's decision is also contrary to the judicial precedents available on the subject. As noted in the foregoing the appellant and it predecessor in business in the past years had made provision in its books for the post retirement employees' benefits in accordance with AS-15. In all the past assessments except for AY 1997-98 the de uction therefor was allowed. The disallowance made in AY 1997-98 was disapproved by the CIT(A) & ITAT. In the assessment orders of the past years, deduction for retirement benefits as debited in the accounts in accordance with AS- 15 was always allowed. On the basis of the principle of judicial consistency therefore the AO could not depart from the admitted position when there was n change in the factual matrix except for the fact that the ICAI had recommended revision in the method for ascertaining the liability.
4.5 The Supreme Court in the case of Radhasoami Satsang vs. CIT (193 ITR 321) has held as follows:
"where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and the parties ha allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."
The principle of consistency has also been applied by the jurisdictional Calcutta High Court in the case of Russell Properties P L d v . Addl CIT (109 ITR 229). I therefore find that if the provision for retirement benefits of employees made in accordance with AS-15 was considered as an allowable deduction in the past assessments, then apparently there was no reason for the AO to depart from the said position and take entire y a contrary view in AY 2008-09 so as to disallow the current year's liability of Rs.1,65 51,581/-

4.6. In the impugned order the AO justified the disallowance also on the ground that the appellant did not specify any specific provision of the I.T. Act under which deduction was permissible. In my considered opinion this reason is inappropriate. It is not disputed by the AO that in terms of the contract of employment, the assessee had assured certain benefits to employees which were payable either during the period of employment or at the time of retirement or during the post retirement period. The retirement benefits were payable by the assessee to Its employees only at the time of or after the employees retired from the active service. But in either case these benefits could not have been claimed by the employees while they were. in active service. However the fact remained that the retirement benefits were promised to be paid by the assessee employer in consideration for the services rendered or performed during their time when employees were in active service. It was apparent that the contract of employment envisaged payment of remuneration to employees which was partly payable during the period when they were in active of service and partly during the period when the employment came to an end. However both the components of the remuneration were payable in consideration of the services to be performed by the employees from year to year during the period when services were actually rendered. In the circumstances by applying the principle of matching of cost and benefit it was necessary for the appellant to make fair estimate of its liability to pay for the employees' retirement benefits though payable in future but for the period during which the services

were actually performed by the employees. The liability on account of post retirement benefits represented contractual liabilities payable to employees according to their terms of employment. In the impugned order the Assessing Officer has allowed the deduction for emoluments paid to employees during the relevant year on being satisfied that the expenditure was incurred or laid out wholly for business purposes. In terms of the same contract of employment, the employees of the appellant were also entitled for the retirement benefits assured under the same contract of employment. The only difference was that such benefits were receivable by the employees in future upon retirement. However there being no material difference in the character of payment in the benefit receivable by the employees the AO could not disallow the provision for retirement benefits when the deduction was fully allowed in respect of remuneration paid to employees under the same contract of employment.

4.7. In order to disclose true & fair amount of Income earned, It was therefore mandatory for the assessee to determine its liability; which accrued during the impugned year. In respect of services performed by the employees during that period but which would be payable at future unspecified date The AS-15 methodology by which the assessee was required to make fair estimate of such future liability which accrued with reference to services performed employees during the relevant reporting period. AS-15 contained the Rules as the methodology to be followed by the enterprises in ascertaining the quantum of the liability for employee retirement benefits to be discharged in future. For ascertaining such liability, AS-15 mandated that the enterprise should obtain a report from the actuary estimating the liability. The actuarial valuation of a liability or expenditure is always based on assumptions which are statistically proven. The Supreme Court in the case of Bharat Earth Movers Limited Vs CIT (245 ITR 248) accepted that the liability for eave encashment though payable at future unspecified date yet the provision therefor made on scientific basis was allowable as deduction in computing the profits. The relevant observations of the Supreme Court were as follows:

"The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the-liability-may-have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied, the liability is not a contingent one. The liability is in praesenti though it will be discharged at i future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain.

Applying the principles laid down in Metal Box Co. of India Ltd. v. Their Workmen [1969] 73 ITR 53 (SC) and Calcutta Co. Ltd v. CIT [1959J 37 ITR 1 (Se), it must be held that the provision made by the assessee-company for meeting the liability incurred by it under the leave encashment scheme proportionate with the entitlement earned by employees of the company, inclusive of the officers and the staff, subject to the ceiling on accumulation as applicable on the relevant date, would be allowable as deduction out of the gross receipts for the accounting year during which the provision was made for the liability. The liability was not a contingent liability. The High Court was not right in taking a view to the contrary. "

4.8 In this judgment the Supreme Court had relied on its earlier judgment in the case of Metal Box Company of India l.td vs Their Workmen (73 ITR 53). From these judgments it is evident that the Supreme Court in principle accepted that liability of a company payable at future unspecified date In relation to employee benefits can be allowed in the years in which the employees render the relevant services. The Supreme Court however observed that the liability can be allowed as a deduction if it can be estimated by following a method which has scientific basis. In the appellant's case such liability was ascertained by obtaining report from an actuary. In various judgments the Courts have accepted in principle that obtaining actuarial valuation report is the scientific way of ascertaining the quantum of an expenditure or liability. Moreover AS-15 issued by ICAI and which was mandatory u/s 209 of the Companies Act 1956 makes it compulsory that the reporting enterprise should obtain actuarial valuation of the post retirement employee benefit liability and based thereon provision should be made in the accounts. On these facts I agree with the AR's submissions that in arriving at the amount of business income which was to be assessed on the basis of generally accepted principle and method of accounting, the assessee was entitled to claim deduction for retirement benefits payable to employees.

4.9 The Supreme Court in the case of UP State Industrial Development Corporation (225 ITR 703) has observed as follows:

"The accounting practice followed by the assessee in the instant case was in consonance with general principles of accountancy governing underwriting accounts. It is a well-accepted proposition that for the purposes of ascertaining profits and gains the ordinary principles of commercial accounting should be applied, so long as they do not conflict with any express provision of the relevant statute. The Tribunal, after referring to authoritative books on accountancy, had found that the assessee was maintaining the accounts correctly in accordance with the principles of accountancy applicable to underwriting accounts and keeping in view the said principles the underwriting commission on the shares which were not subscribed by the public and were purchased by the assessee could not be treated as profit earned by the assessee in the transaction and the said commission could only be treated as reducing the price of the shares purchased by the assessee. The Tribunal had also stated that there was no contrary provision in the Act. The revenue had not shown that the accountancy practice followed by the assessee was repugnant to any provision of the Act. In the circumstances, it must be held that the Tribunal and the High Court had not committed any error in taking the view that the underwriting commission earned by the assessee in respect of the shares which were riot subscribed by the public and were purchased by the assessee, would not be treated as a part of its taxable income."

From the above observations it is apparent that only where there is a conflict between the Accounting Standards or standard accounting principles with the provisions of IT Act then the provisions of the I. T. Act prevail with regard to assessment of total income. However, when there is no such conflict between the IT and the commercial principles of accounting then the income of the assessee is necessarily assessable with reference to accepted principle of accounting and the accounting standards recommended by ICAI which have been made mandatory under Section 209 of the Companies Act, 1956. From the impugned order it is n ted that the sum of Rs.2,65,65,948/- disallowed inter alia included provision for leave encashment which is subject to application of Section 43B(f) of the Act. I find that in assessment order the AO has separately dealt with provision for leave encashment included in the said sum of Rs 12,65,65,948/- and made separate disallowance by invoking Section 43B(f) of the Act. The said disallowance is dealt with in Ground No. 12 of the present appeal. Save & except the item of leave encashment, there was no other employee benefit payable to retired employees' which was prohibited by any specific provision of the Act. Even the liability for leave encashment provided in terms of AS-15 was disallowed separately by the AO and therefore the AO could not have disallowed the same item again while dealing with the issue of provision as per AS-15. From the AR's submis ions it appeared that the liability as provided in the accounts pertained to the period when the employees were in employment and benefit of their services had been availed by the appellant for carrying on its business. Applying the ratio laid down by the Supreme Court in the case of Bharat Earth Movers Limited Vs CIT (Supra) the assessee's own case in AY 1997-98 in ITA NO.959/KoI/2002, I am therefore of the opinion that the assessee was entitled to claim deduction for provision for post retirement employees' benefits computed on the basis of actuarial valuation in terms of Sec 37 of the Act since such expenditure was incurred or laid out wholly for the assessee's business purposes and the benefits were payable to employees according to their contracts of employment with the appellant.

4.10. In the impugned order the AO justified the disallowance also on the ground that the deduction claimed inter alia included the liability of the earlier years amounting to Rs.11,00,14,367/- and which was not debited to the P&L A/c but was debited to the General Reserve brought forward from the earlier years In this regard I find that the ICAI revised AS-15 and prescribed new methodology for determining the liability which the enterprise was required to provide in its books. The revised method prescribed was mandatory. Based on the revised methodology the enterprises were required to re-compute their existing liabilities. The ICAI was aware that revision of the existing liabilities would result in either increase or decrease in the quantum of the provision made in the accounts till the revision was made effective. The ICAI therefore recommended that where as a result of the revision enterprise was required to make additional provision in its books then the additional liability could

either be set off against the General Reserves or additional liability could be written off to the P&L A/c in five annual equal instalments. In the appellant's case it followed the first option and debited Rs.11,00,14,367/- being additional liability for the period upto 31.03.2007 to its General Reserve.

4.11 In my opinion however the manner in which the assessee accounted the additional liability in its books was not material in deciding whether the assessee was eligible to claim deduction for Rs.11,00,14,367/- which represented additional liability provided in the accounts based on the revision in AS-15 and which pertained to period prior to 01.04.2007. The provision for post retirement employee' benefits for the period upto 31.03.2007 were always allowed as business expenditure in the past assessments. AS-15 only prescribed the methodology on the basis of which the liability for such expenditure was quantified in the books. In the earlier assessments, the deduction was allowed by the AOs on being satisfied that the expense was permissible as revenue deduction and for which liability accrued in the respective years. In the circumstances if the revised AS-15 was in force in the earlier years then the deduction for the expense quantified on the basis of the said methodology would have been allowed in the respective years. The material change, if any, which occurred during the previous year relevant to AY 2008-09 was revision in the methodology prescribed by ICAI for estimating the liability in accordance with revised AS-15. As a result of the revision in AS-15, the assessee was mandatorily required to recomputed or rework the quantum of its existing provision because the revision prescribed in AS-15 was retroactive in operation. Because of the retroactive revision not only the current years liability but entire liability of the company accruing upto the date of revision becoming effective was required to be quantified and provided in the accounts. As a consequence the assessee's liability to pay such expenditure went up by Rs.11,00,14,367/-.

4.12 Additional liability of Rs.11,00,14,367/- however got crystallised as a consequence of the revision of AS-15 made by ICAI and which came in force w.e.f. 01.04 2007. The crystallization of the liability pertained to an item of expenditure which was in nature. I therefore find that the liability of Rs.11,00,14,367/- crystallised during FY 2007-08. The revision in the quantum of liability did not bring about any change in the basis character or nature of the expenditure which was always considered in the past assessments to be revenue in the earlier year' assessments the deduction for the same expense was allowed by the AOs following pre-amended AS-15 and therefore there was no reason for AO to adopt contrary view with regard to allowability of the additional expenditure which accrued as a result of revision in AS-15. The revision in AS-15 having become effective during the relevant previous year, the deduction was permissible in the relevant year of the revision , therefore hold that the assessee was entitled to claim deduction both for Rs.11,00,14,367/- and Rs.1,65,51,581/- which represented the assessee's liability to pay post retirement employees benefits based on revised AS-15. The AO is accordingly directed to re-compute the income after allowing the deduction for Rs.12,65,65,948/-. Ground Nos.1 to 6 are therefore allowed."

Being aggrieved, Revenue is now in appeal before us against the foregoing finding of the Ld. CIT(A).

3. We have carefully perused the material on record. The Ld. DR appearing on behalf of the Revenue contended that although the provision for employee retirement benefits was provided on scientific basis but it could be allowed in computation of business income only on actual payment basis as statutorily provided in Section 43B of the Act. Per contra, the Ld. AR of the appellant supported the order of the Ld. CIT(A). He submitted that the provision for retirement benefits which the AO disallowed inter alia included the following :

Particulars	Amount (in Rs.)
Staff Pension	Rs.7,34,67,165/-
Medical Reimbursement	Rs.2,95,13,970/-
Leave Encashment	Rs.74,20,744/-
Foreign Pension	Rs.2,73,41,641/-

4. It was contended that out of the above four provisions, only provision for leave encashment was subjected to the rigors of Section 43B(f) of the Act.The remaining three provisions for post retirement benefits i.e. medical reimbursement, staff pension & foreign pension were allowable on accrual basis. As regards provision for leave encashment, the Ld. AR invited our attention to the AO's order wherein he had separately disallowed the provision for leave encashment which was separately confirmed by the Ld. CIT(A) in Para 4.9 of his appellate order. He therefore submitted that the AO could not have again disallowed the provision for leave encashment while dealing with it from the angle of AS-15 (Revised). With regard to the deductibility of remaining three provisions on mercantile basis, he fully supported the order of the Ld. CIT(A).He relied on the decisions of the Hon'ble Supreme Court in the case of Bharat Earth Movers Ltd Vs CIT (245 ITR 428) &Rotork Control (I) Ltd (189 Taxman 422); Vishakapatnam Bench of this Tribunal in the case of RashtriyaIspath Nigam Ltd (ITA No.13/Vizag/2013) dated 22.11.2017 and the decision of coordinate Bench of this Tribunal in the case of Eveready Industries India Ltd for AY 1997-98 in ITA No. 959/Kol/2002which has since been upheld by the Hon'ble Calcutta High Court.

5. We have carefully considered the submissions of the rival parties. From the material on record it is noted that the provision for employees' post retirement benefits was regularly provided inthe appellant's annual financial accounts in conformity with mandatory AS-15. The said AS-15 was consistently followed in the past assessments and the AO allowed the deduction from the profits of the business in respect of such provisions on accrual basis. In none of the past income-tax assessments the Revenue disputed the allowability of the

provision for retirement benefits claimed on accrual basis and provided in conformity with AS-15. We note that dispute regarding the allowability of provision for employee retirement benefits was raised by the AO only once in AY 1997-98. This Tribunal vide its order in ITA No. 959/Kol/2002 however held that the provision for employee's retirement benefit ascertained by following AS-15 was an allowable deduction u/s 37 of the Act. The order of this Tribunalwas affirmed by the Hon'ble Calcutta High Court in its judgment reported in 258 Taxman 313 wherein the following observation was made :

> *"10. As far as question no. (v) is concerned, Mr. Agarwal very strenuously argued that the provisions for Rs. 82, 64, 000/- was a benefit conferred on the employees on superannuation or was a retirement benefit.*
>
> *11. Analysing the question, we find that this issue does not appear from the question raised. The issue which is raised is whether the provision regarding Rs. 82, 64, 000/- was in the nature of a contingent liability and thus not allowable. Neither was the issue raised in the way Mr. Agarwal has sought to raise it now, before the Tribunal. Learned counsel tried to submit that on application of Section 40A (7) and Section 36 (1) (iv) of the said Act, these provisions being one for benefit of employees on superannuation ought to be approved by the appropriate authority and in the absence of that the deduction was not admissible. We find on examination of the order of the Tribunal that its decision was based on Bharat Earth Movers v. CIT [2000] 112 Taxman 61/245 ITR 428 where the Supreme Court held that the liability was not a contingent liability. In that case, the Supreme Court was concerned with beneficiary schemes for encashment of leave of the assessee company Bharat Earth Movers. In this case a scheme for medical benefit post retirement was involved. The tribunal treated the liability as accrued and to be discharged in the future, based on the above Supreme Court decision. In our opinion, this finding of the tribunal is based on standard accounting principles and consequential application of the law laid down by the Supreme Court in Bharat Earth Movers (supra). We find no infirmity in the reasoning or conclusion reached by the Tribunal."*

6. We therefore find that the issueof allowability of provision for employee retirement benefits stands squarely covered in favour of the assessee by the judgment of the Hon'ble Calcutta High Court (supra).

7. It is also noted that in all income-tax assessmentscompleted upto AY 2007-08 the AO himselfallowed deduction in respect of provision for retirement benefits on accrual

basis and claimed on the basis formulated in AS-15. The Ld. AR also drew our attention to the fact that in the income-tax assessment orders passed u/s 143(3) for AYs 2010-11 and onwards the AO once again allowedthe assessee's claim of deduction for provision for post retirement employee benefits u/s 37 of the Act on accrual basis. We therefore find force in the submissions of the Ld. AR that on the principle of judicial consistency the AO was not permitted to depart from the accepted position,which permeated in earlier years as well as subsequent years, without pointing out any change in the factual matrix or provisions of law in the relevant AY 2008-09. In this regard we may gainfully refer to the judgment of the Hon'ble Supreme Court in the case of RadhasoamiSatsang (193 ITR 321)wherein it was held as under:

> *"where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and the parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."*

8. Now we proceed to deal with the Ld DR's contention regarding the applicability of provision of Section 43B to such provision for employee's retirement benefits. For this we first need to examine the provisions of Section 43B of the Act which is as under:

> *"Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—*
>
> *(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or*
>
> *(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or*
>
> *(c) any sum referred to in clause (ii) of sub-section (1) of section 36, or*
>
> *(d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing, or*

(e) any sum payable by the assessee as interest on any loan or advances from a scheduled bank or a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank in accordance with the terms and conditions of the agreement governing such loan or advances, or

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee."

9. From the above, it is noted that only the provision for employee's benefits being in the nature of gratuity, superannuation, provident fund& leave encashment are subject to Section 43B(b) & (f) of the Act and therefore allowable only on actual payment basis. We are therefore unable to agree with the contention of the Ld. DR that all the provisions for employee's post retirement benefits payable to employees are subject to application of Section 43B of the Act. In our considered opinion since the employee's benefits in form of medical reimbursements, foreign pension and staf pension do not find mention in any of the specific clauses of Section 43B of the Act, the same is held to be allowable u/s 37 on mercantile basis.

10. With regard to provision for leave encashment,we agree with the contention of the Ld. DR to the effect that such provision is allowable only on actual payment basis. However from the facts on record it is noted that the appellant had already added back the provision for leave encashment in the computation of income for AY 2008-09 under Section 43B(f) of the Act. The Ld. AR also drew our attention to the fact that even the AO had taken specific note of theseparate disallowance made in the computation of income in his assessment order and that the AO had separately made addition in respect of provision for leave encashment on the ground of being not admissible in terms of Section 43B(f) of the Act. We further note that this separate disallowance made u/s 43B(f) was confirmed by the Ld. CIT(A) against which no appeal has been preferred by the assessee. We therefore find merit in the Ld. AR's submissions that when the provision for leave encashment had been separately added back u/s 43B(f) while assessing the taxable income, the AO could not have again disallowed the said provision in light of AS-15 (Revised) and that the impugned addition amounted to double disallowance. For the reasons set out in the foregoing therefore we find no infirmity in the order of the Ld. CIT(A) deleting the disallowance of provision for leave encashment

made by the AO in light of AS-15 since it had already been added back separately u/s 43B(f) of the Act.

11. For the reasons set out above we do not find any infirmity in the reasoning and conclusions of the Ld. CIT(A) deleting the disallowance of provision for employees' retirement benefits. This ground of the Revenue is therefore dismissed.

12. Ground No. 2 of the appeal is against the Ld. CIT(A)'s action directing the AO to allow marked-to-market loss of Rs.65.56 lacs arisen on realignment of open foreign exchange derivative contracts as on the year-end. The brief facts of this issue are that the AO observed that the assessee had booked mark to market ('MTM') loss on unsettled forward contracts amounting to Rs.65.56 lacs which was created by corresponding debit to profit and loss account and the same was claimed as deduction in the return of income by the assessee. According to AO the loss accounted by the assessee was only notional and contingent. Placing reliance on the Instruction No. 3/2010 dated 23.3.2010, the AO disallowed the claim of MTM loss on unsettled derivative contracts. On appeal the Ld. CIT(A) deleted the disallowance made by the AO by observing as under:

10.2 I have considered the submissions of the AR. I have also perused the Instruction No. 3 of 2010 issued by CBDT with reference to which the AO disallowed the loss of Rs. 65.56 lacs. I have also examined the documents with reference to which the assessee accounted MTM loss in its books. From the impugned order I find that the AO's order is cryptic The AO did not discuss the background facts leading to MTM loss which the appellant accounted in it books. The MTM loss of Rs. 65.56 lacs had two components comprising of Rs.26.01 lacs and Rs.39.55 lacs. Loss of Rs.26.01 lacs pertained to forex derivative transactions which the appellant entered into under interest swap arrangement with ICICI Bank Remaining loss of Rs.39.55 lacs was incurred on account of unsettled outstanding forward contracts which the appellant executed into in relation to its export sales. The main component of the loss thus pertained to open outstanding forward contracts pertaining to appellant's export receivables.

10.3 From the audited accounts of the appellant, I find that during the relevant year the assessee's exports were Rs.145.15 crores which proved that assessee carried on international trade on substantial scale. In the circumstances the assessee was exposed to the risk of exchange rate fluctuations and therefore it was in the appellant's business interest that assessee hedged its exchange rate flutctuation risks by entering into forward contracts. In terms of AS-11 issued by the ICAI, values of outstanding open contracts as on 31.03.2008 were rested at the prevailing exchange rates. Any gain or loss incurred on restatement of the outstanding position was accounted in its books. The underlying transactions in relation to which the assessee executed forward were its export sales i.e. to say, revenue item. In the circumstances any gain or loss incurred on restatement of open forward contracts and where underlying security was the export receivables, represented revenue gain or revenue loss. The assessee followed accounting method of restating the unsettled open contracts on the last date of the previous year consistently and the gain or loss incurred was accounted in the books in conformity with AS-11. I therefore find that the loss which the assessee incurred was a definitive loss and it accrued on the last date of the previous year i.e. 31.03.2008. The loss

was quantified with reference to exchange rate prevailing on 31.03.2008 and therefore such loss accrued in AY 2008-09.

10.4 The issue as to whether exchange fluctuation loss accounted by an assessee with reference to exchange rate prevailing on the date of balance sheet is a notional or contingent loss or ascertained loss was considered and decided by the Hon'ble Apex Court in the case of CIT Vs Woodward Governor India Pvt. Ltd. (312 ITR 254). In this judgment the Supreme Court essentially considered the question whether the loss arising from restatement of an expenditure or liability pursuant to exchange fluctuation in respect of unpaid trade receivable or trade payable was allowable in computing business income of an assessee. In the case before the Supreme Court it was the Revenue's argument that such loss was notional or hypothetical loss which could not be allowed to be deducted in computing the business income of the assessee. It was the Department's argument that such loss can be allowed as a deduction only when the loss was actually incurred on excess payment and not otherwise. The Supreme Court however negated the Revenue's contention and held that the loss accounted by an assessee with reference to exchange rate prevailing at the end of the pervious was a real and definitive loss and the same was admissible as a deduction in arriving at taxable income if the assessee had recognize such loss by debiting it to its P&L A/c in terms of mercantile system of accounting which the assessee constantly followed. In its judgment the Supreme Court discussed in detail the accounting method prescribed in AS-11 issued by the ICAI and held that such method of accounting if followed consistently by an assessee was supreme even for computation purposes and the Department was precluded from making the disallowance unless the Revenue proved that the accounting system followed by the assessee was incorrect. The Apex Court particularly held that loss recognized and accounted by an assessee on account of restatement of foreign exchange denominated liabilities was allowed as revenue deduction if the underlying for such transactions were revenue items such as trade receivables, trade payables or working capital. This view was reiterated by the same Court in its later decision in the case of CIT Vs. Oil & Natural Gas Corpn. Limited Vs CIT (322 ITR 180).

10.5 The A/R's reliance on the decisions of the ITAT Delhi in the case of Bechtel India PVT. Ltd. Vs. Addl. CIT (32 Taxmann.com 123) and ITAT, Mumbai Special Bench in the case of DCIT v. Bank of Bahrain and Kuwait (41 SOT 290) also found to be relevant. In arriving at the finding that MTM losses were definitive and not notional or contingent, the ITAT Benches had taken into account not only the decisions of the Apex Court referred above but also the CBDT nstruction No. 3 of 2010 on which the AO placed reliance in the impugned order. Even after considering Instruction No. 3 of 2010, the ITAT Benches did not agree with the Department's view that MTM loss accounted by the assessee in their books as per AS-11 was notional. On the contrary the ITAT Benches held that the Apex Court in its judgments in the cases of CIT Vs. Woodward Governor India Pvt. Ltd (supra) CIT Vs. & Oil and Natural Gas Corpn. Limited (supra) had accorded judicial recognition to AS-11 and held that the loss on restatement of outstanding foreign exchange transactions were ascertained losses and could not considered to be notional or contingent one. In view of the binding judicial precedents therefore I have no hesitation in holding that loss of Rs.39.55 lacs accounted by the appellant in its books of account on restatement of outstanding forward contracts where underlying was exports receivable, was allowable in computing assessee's business income.

10.6 The second component of MTM loss of Rs.26.01 lacs pertained to re0statement of unsettled derivative contracts booked under interest rate swap arrangement which the appellant entered with ICICI Bank. The assessee had obtained loan of Rs.40 crores from banks & institutions for its business purposes. Interest payable thereon was being claimed as business expenditure. The loans were obtained in Indian currency carrying interest @ 11.25%. Since interest rates globally were much lower, to reduce its servicing cost the assessee entered into interest rate swap arrangement with ICICI Bank with regard to loan of Rs.40 crores. Under this arrangement ICICI agreed to pay net interest @ 2% on Rs.40 crores by treating the loan amount being notionally swapped with deposit in Swiss Francs denomination. However under this arrangement the appellant incurred the risk of depreciation of Indian currency against Swiss Francs. From the AR's explanation it was apparent that the purpose of entering into interest swap arrangement was to reduce effective cost of borrowing the dominant purpose for which the interest swap arrangement was entered into was not to obtain additional loan but to reduce effective cost of existing borrowing. In view of these facts therefore any loss or gain which arose from the interest rate swap arrangement was in the revenue field

since the underlying transaction for such an arrangement was interest payable which was a revenue item. Applying the principle laid down by Supreme Court in the cases of CIT Vs Woodward Governor India Pvt. Ltd. (supra) & Oil & Natural Gas Corpn. Limited Vs CIT (supra), such MTM loss of Rs.26.01 lacs incurred and accounted in the appellant's books therefore constituted Revenue loss.

10.7 From the A/R's submissions it further appeared that the assessee's method of restatement of outstanding open foreign currency contracts was consistently followed in the subsequent years as well. The interest rate swap transactions were ultimately settled in the assessment year 2010-11. In the books for AY 2010-11 when the outstanding interest swap derivatives were ultimately settled the assessee accounted profit of Rs.97.39 lacs. Such profit was accounted after taking into account the opening provision for MTM loss from currency interest rate swaps amounting to Rs.788.77 lacs. The provision for MTM loss was made in the accounts for the AY 2008-09 & 2009-10 respectively. After taking into account loss of Rs.788.77 lacs accounted in the earlier years the assessee reported net gain of Rs. 97039 lacs in AY-2010-11 form interest rate swap transaction. From the assessment order for AY 2010-11, I find that even though loss of Rs. 788.77 lacs arising from restatement of interest rate swap derivatives was disallowed in AY 2008-09 and 2009-10, no deduction therefore was allowed in AY 2010-11 being the year in which the derivative transaction was ultimately settled. The gain of Rs. 97.39 lacs accounted as income in the books of that was however assessed as income of AY 2010-11. I therefore find that the year in which the derivati es transactions was ultimately settled, the AO did allow the deduction for the loss accounted in the book of prior years but the income reported in the relevant year was assessed without demure. I, therefore find that while making assessment the AO did not even follow the CBDT Instructions No. 3 of 2010 in its true letter and spirit.

10.8 From the instruction No. 3 of 2010, it is apparent that the Board did not lay down a proposition that losses incurred from foreign exchange derivatives should be disallowed in all circumstances. The only proposition put forth in this instruction is that MTM loss which is considered by the Board to be notional or contingent should not be allowed from year to year but be allowed only in the year in which derivative contract is ultimately settled. Applying the letter and spirit of instruction No. 3 of 2010, the AO should have therefore, allowed the deduction for loss of Rs. 691.38 lacs in AY 2010-11. However from the assessment order of AY 2010-11, I find that the AO did not allow deduction for such loss even though in the year under consideration MTM loss was disallowed I therefore find from the AR's submissions that the AO did not follow CBDT's Instruction No. 3 of 2010 and therefore, the AO's reliance on the said instruction was inappropriate because the AO himself never faithfully acted in accord with the said instruction.

10.9 For the reasons set out in the foregoing therefore I have no hesitation in holding that the disallowance of Rs. 65.56 lacs made by the AO in the impugned order solely relying on Instruction No. 3 of 2010 was legally & factually inappropriate. Further since the loss was incurred by the appellant in relation to underlying transactions which were in the revenue field, the loss incurred on restatement of outstanding foreign exchange contracts or open derivative contract positions was in the revenue field and hence allowable. As per the ratio laid down by Supreme Court in the case of CIT vs Woodward Governor India Pvt. Ltd. (supra) & Oil & Natural Gas Corpn. Limited vs CIT (supra), MTM loss was not a contingent or notional loss but the same was real loss which was allowable in the year in which the loss was accounted in the appellant's books. The AO is therefore directed to delete the disallowance of Rs. 65.56 lacs. Ground Nos. 15 & 16 are therefore allowed."

Being aggrieved by the order of the Ld. CIT(A), the Revenue is now in appeal before us.

13. We have heard the rival submissions and perused the material on record. It is noted that the assessee is engaged in the business of production and marketing of tea and substantial revenue is derived from exports. The total export turnover during the year was

Rs. 145.15crores. In order to hedge its exchange risk, the assessee entered into foreign exchange forward contracts with banks for its export bills. Apart from foreign exchange forward contracts;the assessee had also entered into an interest swap derivative with ICICI Bank with a view to reduce effective interest cost on the borrowings. The assessee had originally borrowed loan of Rs.40 crores in Indian rupees carrying interest rate of 11.25%. Since the interest rates globally were lower, the assessee under a derivative contract entered into with ICICI Bank swapped the loan amount notionally in Swiss Francs and thereby the assessee was entitled to received interest of 2% on such converted amount of loan in foreign currency i.e. Swiss Francs. Effectively therefore the assessee was able to reduce the interest rate to 9.25% payable on their borrowings. However as a consequence of this interest swap derivative the assessee incurred the risk of depreciation of Indian currency against Swiss Francs. Due to adverse fluctuation in exchange rate, upon re-alignment of the foreign exchange forward contracts & interest rate derivative, the assessee incurred MTM losses at the close of the financial year. In terms of the mandatory Accounting Standards prescribed by ICAI for accounting for such derivative contracts and following the doctrine ofprudence, the assessee was mandatorily required to provide for such losses in respect of all outstanding derivative contracts at the balance sheet date by marking them to market. Accordingly with reference to the open derivative contracts outstanding as on 31.3.2008, the assessee determined the loss of Rs. 65.56 lacs with reference to the exchange rate prevailing at the end of the year i.e. 31.3.2008. The said loss was provided in the assessee's accounts for 31.3.2008 and such provision was reversed in the next year and the assessee accounted for the actual profit / loss upon settlement of the forward contract. The Ld. DR supported the order of the AO. He heavily relied on the Instruction No. 3/2010 dated 23.3.2010 wherein it has been mentioned that mark to market loss where sale or settlement has actually not taken place, the said loss would be notional and contingent in nature and cannot be allowed as deduction. Accordingly he prayed that the order of the AO on this issue be restored.

14. Per contra the Ld AR argued that the assessee had derived export turnover of Rs. 145.15crores. As such the assessee was highly exposed to the risks arising from exchange rate fluctuations. With a view to hedge against exchange fluctuation risks in relation to its

international trading operations, the assessee had entered into foreign exchange denominated forward contracts with bank. He therefore submitted that underlyings of the foreign exchange forward contracts entered into by the assessee were export orders/bills and therefore any gain/loss which accrued or arose on account of re-alignment of foreign exchange forward contracts at the year was in the nature of revenue gain/loss incurred in the ordinary course of assessee's business. The Ld. AR placed reliance on the following decisions in support of his arguments :-

- CIT vs D Chetan& Co (75 taxmann.com 300) (Bom HC)
- Bechtel India (P) Ltd VsAddl CIT (33 taxmann.com 213) (ITAT Delhi)
- Reliance Industries Ltd Vs CIT (40 taxmann.com 431) (ITAT Mumbai)

15. In respect of the interest rate derivatives, the Ld AR submitted that the underlying of this derivative contract was the loan commitments. The interest paid on the borrowings was allowed by the AO as deduction from the business profits. He therefore contended that the interest rate derivative which was entered into in the ordinary course of business with a view to reduce the effective cost of borrowings, the MTM loss incurred on such derivative as on 31.03.2008 was real, crystallized and on revenue account. The Ld. AR also invited our attention to the fact that when the interest rate derivative was ultimately settled in FY 2009-10 relevant to AY 2010-11andnet gain of Rs.97.39 lacs determined at the time of actual settlement was offered to tax in that year; such gain was computed after taking into consideration the re-aligned position of the interest rate swap for AYs 2008-09 & 2009-10. It was submitted that had the MTM losses of Rs.26.03 lacs and Rs.762.75 lacs not been recognized in AYs 2008-09 & 2009-10, then instead of gain of Rs.97.39 lacs there would have been a loss of Rs.691.36 lacs and consequently the taxable profit of AY 2010-11 would have been a lower by that amount. The Ld. AR submitted that the fact that AO who framed the income-tax assessment for AY 2010-11 did not dispute the exchange gain of Rs.97.39 lacs and the same amount was assessed as the appellant's income with reference to the re-aligned position of the interest rate derivative, showed that the Revenue adopted selective approach to treat the gain derived from derivative contract to be true & real but

losses to be notional & contingent. The Ld. AR therefore submitted that the Ld. CIT(A) was justified in treating the MTM loss incurred on derivative contracts to be real & therefore allowable as deduction from business profits. He also argued that the reliance placed by the Ld. DR on the CBDT Instruction No. 3/2010 dated 23.3.2010 was misplaced in as much as it talks about losses arising to an assessee on account of trading in forex derivatives. Admittedly in the facts of the present case the assessee had not carried out trading in forexderivatives and thereforehe contended that the said Instruction No. 3/2010 had no application. The Ld. AR thus pleaded that the order of Ld. CIT(A) be upheld.

16. After giving thoughtful consideration to the facts of the case and the material placed before us, we find do not find any force in the case which the Ld DR tried to make out by referring to the Board Instruction No. 3/2010 dated 23.3 2010. From perusal of the said Instruction, we find that this Instruction was issued in respect of loss on account of trading in foreign exchange derivatives. In the present case however the assessee had entered into derivative contracts in order to hedge its exchange risk in respect of export proceeds receivable by it in foreign exchange or with a view to reduce it's effective cost of servicing the borrowings raised in the ordinary ourse of it's tea business. The forward contracts entered into by the assessee were not by way of trading per se in foreign exchange derivatives. In our considered view therefore Instruction No. 3/2010 had no relevancein the facts of the instant case.

17. It is noted that the ICAI relying on the principle of prudence has recommended that the entities and enterprises who follow mercantile system of accounting should evaluate derivatives contract on the basis of exchange rate prevailing on the Balance Sheet date and on restatement of outstanding derivative or forward contracts the enterprise should account for income or loss arising from restatement of outstanding foreign currency derivative contracts. The assessee has consistently followed the said method recommended by ICAI in the past as well as in the subsequent years and accordingly the income or loss arising from restatement of outstanding foreign exchange derivative contracts were offered as income or claimed as loss in the earlier years as the case may be.

18. The facts on record demonstrate that the foreign exchange forward contracts were entered into by the assessee with reference to underlying which were export bills in the ordinary course of its business. In our considered view therefore any gain or loss arising on restatement ofsuch foreign exchange forward contracts alsoarose in the ordinary course of assessee's business. Similarly we note that the intent & purpose of the interest rate derivative was to reduce effective interest cost in respect of loan of Rs.40 crores borrowed in the ordinary course of business. Interest paid on such loan has been allowed as revenue deduction by the AO. Accordingly any gain or loss arising from such interest rate derivative was also in the revenue field since the underlying was the interest payable on the loan. Now theissue as to whether the loss arising on account of restatement of foreign currency denominated trade payables or receivables arising from exchange rate variation is real or contingent has been dealt with by the Hon'ble Apex Court in in the case of Woodward Governor of India Ltd vs, CIT(312 ITR 254) and CIT Vs. ONGC Ltd (322 ITR 180). In both these judgments the Hon'blethe Supreme Court categorically held that the loss debited in the P & L account by an assessee on account of restatement of foreign currency denominated trade payables or receivables pursuant to exchange rate variation at the year-end is defined or ascertained loss and not contingent loss and hence allowable as deduction from the business profits.Applying the ratio laid down in these judgments to the facts of the present case, in our cons dered view since the underlyings of thederivative contracts entered into by the assessee were export bills& loan commitments, the gain/loss arising its restatement as on 31 ^{t} March was real in nature and in the revenue field.

19. We also find that the decision relied upon by the Ld AR in the case of CIT Vs D Chetan& Co (supra) is squarely applicable to the facts involved in the present case. In the decided case the question raised before the Hon'bleBombay High Court and the decision rendered thereon is as under:-

> *"The Revenue has urged the following question of law for our consideration:-*
>
> *"Whether on the facts and in the circumstances of th case and in law, the Tribunal was justified in deleting the addition of 'Mark to Market' Loss of Rs.78,10,000/- made by the Assessing Officer on account of disallowance of loss on foreign exchange forward*

contract loss and not appreciating the fact that the said loss was a notional loss and hence cannot be allowed?"

7. The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently. come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature-of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safe guard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard-l l is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative butonly disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in S. vinodkumar Diamonds (P) Ltd. (supra) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in S. Vinodkumar (supra) are identical/similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in S. Vinodkumar Diamonds (P.) Ltd. (supra), the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in CITv. BadridasGauridu (P.) Ltd. [2003] 261 ITR 256/[2004] 134 Taxman 376 (Mum.) was not brought to the notice of the Tribunal when it rendered its decision in S. Vinodkumar Diamonds (P.) Ltd. (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity.

8. In the above view, the question of law, as formulated by the Revenue, does not give rise to any substantial of law. Thus, not entertained."

20. We further find that the co-ordinate bench of this Tribunal in the case of Bechtel India Pvt Ltd Vs Addl. CIT (supra) had decided an identical issue in favour of the assessee after considering the Instruction No. 3/2010 wherein it was held as follows :-

"8. Coming to the corporate additions i.e. disallowance of loss, it clearly emerges from the record that the assessee in respect of foreign exchange realization follows mercantile system of accounting and not cash system of accounting. The loss has been incurred for hedging of foreign currency fluctuation involved in sales invoices on the basis of forward contracts, which is a business decision to safeguard its interest. The loss has been incurred on the basis of scientific method in the ordinary course of business. The loss being based on a scientific method, on the basis of contractual liability with banks and on mercantile system has to be allowed to the assessee following Hon'ble Supreme Court judgment in the case of Woodward Governor India (P) Ltd. (supra). Our view is further fortified by the fact that DRP in its own order in subsequent year has itself held that the issue about the loss on mercantile system is pending dispute in AY 2008-09. Therefore, the allowability of the loss on actual payment in AY 2009-10 has been made subject to the allowability of the loss for AY 2008-09. This stand of the DRP its lf negates the observations of assessing officer that it is a notional loss and establishes that it is a business loss incurred by the assessee on mercantile system which method is consistently followed by the assessee. Under these circumstances, we are inclined to allow the foreign exchange fluctuation loss to assessee in this year. This ground of the assessee is allowed."

21. In respect of the interest rate derivative, we additionallynote that when such contract was finally settled in AY 2010-11 the assessee had accounted for a profit of Rs.97.39 lacs after taking into re-aligned position of the derivative contract i.e. after accounting for the MTM losses of earlier years. In the income tax assessment order passed u/s 143(3) for AY 2010-11 which was much later than passing of the impugned order for AY 2008-09, the AO assessed such profit of Rs.97.39 lacs without allowing the deduction for the MTM losses disallowed in the earlier AYs 2008-09 & 2009-10. We therefore note that the Revenue authorities did not faithfully follow the proposition incorporated in the CBDT Instruction of 2010 in the subsequent year but adopted a selective criteria by assessing the profit arising in

AY 2010-11 (computed based on the re-aligned position) without allowing for the deduction of MTM losses which was disallowed in the prior years.

22. In view of the facts as discussed above and respectfully following the judgment of the Hon'ble Supreme Court in the case of Woodward Governor of India Ltd (supra) and Bombay High Court in the case of D Chetan& Co. (supra), we do not find any infirmity in the order of the Ld.CIT(A) in this regard. Hence this ground raised by the revenue is dismissed.

23. Ground No. 3 raised by the Revenue is against the Ld. CIT(A)'s order directing the AO to consider interest income under the head 'Business' without appreciating the fact that interest income earned by the assessee from FDs and financial institutions had no nexus with the assessee's business of growing & manufacturing tea. At the outset the Ld. AR of the assessee pointed out that this very issue has been adjudicatedin its favour by the 'B' Bench of this Tribunal in their order in ITA No. 116 & 117/Kol/2016 for AYs 2010-11 & 2011-12 dated 01.02.2019. The Ld. AR submi ted that in the aforesaid decision the Tribunal had followed the judgment rendered by he jurisdictional Hon'ble Calcutta High Court in assessee's own case in ITAT No. 92 of 2013 dated 19.06.2018 for the AY 2007-08 wherein the Hon'ble High Court had held that the interest from FDs and financial institutions was assessable under the head 'Business' and the benefit of Rule 8 was granted to the assessee. The relevant findings of the said decision is as follows:

> *"..At the outset the Ld. AR of the assessee pointed out that this very issue was adjudicated in assessee'sfavour by the jurisdictional Hon'ble Calcutta High Court in assessee's own case in its judgment rendered in ITAT No. 92 of 2013 dated 19.06.2018 for the AY 2007-08. The Ld. AR submitted that in AY 2007-08 also the assessee had earned interest from FDs and financial institutions which was assessed by the AO under the head 'Other Sources' and benefit of Rule 8 was denied to the assessee. On appeal the Ld. CIT(A) upheld the assessee's contention by observing as follows:*
>
> > *"14. I have carefully considered the submissions of the A/R and have perused the decision of the Jurisdictional High Court in the case of Eveready Industries (I) Ltd for the A.Y. 1991-92 & 1992-93. In the audited accounts for the year ended 31st March 2007 appellant had debited gross interest of Rs.43,44,53,000lacs and separately credited Rs.1,64,65,000, out of which Rs.4,74,687 being exempt interest,*

i.e. Rs.1,59,90,313/- being gross interest received on loans and deposits. The net interest expenditure was therefore Rs.41,79,88,000/-. According to A.O. Rule-8 was not applicable to the interest received as it did not have any element of agricultural income. By the same logic, the entire interest debited in the Profit & Loss A/c also did not have element of expenditure incurred wholly & exclusively in relation to business of growing and manufacture of tea. In any business; fund position undergoes change on day- to-day& from moment to moment. Interest is a charge for use of funds. Interest income is a charge received for use of assessee's business funds by other persons. Similarly interest expenditure is a charge paid by the assessee for use of funds belonging to others. To determine the effective cost of borrowings; it is therefore necessary to set off the interest received against interest paid and only the net interest can be considered to be business expenditure for tax purposes. In the present case after setting off interest received against interest paid there was net interest expenditure of Rs.41,79 88,000/-. which was incurred in connection with business of growing and manufacture of tea to which Rule - 8 was applicable. I do not find substance in the AO's hypothesis that gross interest paid represented expenditure of tea business to which Rule - 8 was applicable whereas gross interest received represented non agricultural income to which Rule - 8 was not applicable. Having regard to the nature of business and composite nature of funds deployed, the only correct method was to set off interest received against interest paid. This proposition is accepted by the Jurisdictional Calcutta High Court in the case of Eveready Industries (I) Ltd in 1TA Nos 123 of 2000 dated 22.12.2009. In that case also the assessee engaged in business of growing and manufacture of tea had derived interest income which was assessed subject to application of Rule-8. In the regular income tax assessments, the AO did not assess interest income separately but considered the interest to be part of the composite business of growing and manufacture of tea & thereby assessed only 40% of such income under central income tax assessment. The C I T in his order u/s 263 directed to AO to assess gross interest received as fully chargeable to tax under Central Income Tax. The Order of the CIT u/s 263 was upheld by the Tribunal. On further appeal, the Calcutta High Court however held that the interest income was rightly treated by the AO to be part of assessee's business of growing and manufacture of tea subject to Rule - 8 and therefore only 40% of interest income could be brought to Central Income Tax.

15. The decision of the Calcutta High Court squarely answers the question raised in Ground No. 6 of the present appeal. In appellant's case also after netting of interest received against interest paid there is net expenditure of Rs.41,79,88,000/- which could only be considered to be expenditure incurred in connection with assessee's business of growing and manufacture of tea. The AO could not treat interest paid

and interest received of different footings. I therefore direct AO to consider interest receipt of Rs.1,59,90,313/- as part of assessee's income of growing and manufacture of tea and therefore in computing book profits only 40% of such interest could be brought to tax for the purposes of Sec. 115 JB of the Act. The AO shall accordingly re-compute the book Profits."

7. On further appeal the coordinate Bench of this Tribunal reversed the Ld. CIT(A)'s order and restored the AO's order assessing interest income wholly to Central Income-tax without giving benefit of Rule 8. Being aggrieved the assessee carried the matter before the Hon'ble Calcutta High Court wherein the following the question was raised:

"Whether the interest income derived from temporary investment of surplus borrowed funds for the business of growing and manufacturing of tea, would fall within the scope of Rule 8 of the Income Tax Rules, 1962?

8. In its judgment the Hon'ble Calcutta High Court found merit in the assessee's case and set aside the decision of this Tribunal and restored the order of the Ld. CIT(A) holding that the interest income was liable to be set off against the interest expense and only the net interest expenditure was liable to be considered for assessing income from composite business to which Rule 8 was applicable. The Ld. AR also brought to our attention the decision of the coordinate Bench of this Tribunal in the case of Eveready Industries India Ltd for the AY 1997-98 in ITA No. 959/Kol/2002 wherein also the identical view was expressed by the Tribunal. The Tribunal held that since assessee paid interest on loans and also derived interest on deposits, the interest received had to be netted off against interest payment and only the net interest expenditure could be considered in computing the composite income of growing & manufacture of tea. Against this order of the Tribunal, an appeal u/s 260A was filed by the Revenue before the Hon'ble Calcutta High Court raising the following question of law :

(iv) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in holding interest of Rs. 22, 07, 47, 000/- received as "Profits and Gains of Business" instead of "Income from other Sources", contrary to law, on the basis of its order for earlier years against which appeals under Section 260A of the Income Tax Act, 1961 have been admitted by the Hon'bleCourt ?

9. In its judgment dated 09.08.2018 in ITA No. 789 of 2004, the Hon'ble Calcutta High Court dismissed the appeal of the Revenue inter alia including the question raised above. The Ld. DR was unable to controvert the submissions of the Ld.

AR as also the findings of the Ld. CIT(A) which are in consonance with the view taken by the Hon'ble Calcutta High Court in assessee's own case for AY 2007-08. Respectfully following the judgement of the Hon'ble Calcutta High Court rendered in assessee's own case, we therefore see no reason to take any contrary view. Accordingly Ground No. 2 raised by the Revenue is rejected."

24. The Ld. DR fairly stated that the issue now stands covered in the favour of the assessee by the said judgment of the Hon'ble High Court. Respectfully following the judgment of the Hon'ble Calcutta High Court and this Tribunal rendered in assessee's own case, we see no reason to interfere with the order of the Ld. CIT(A). Accordingly Ground No. 3 raised by the Revenue is rejected.

25. In the result, appeal of the Revenue in ITA No. 114/Kol/2016 is dismissed.

26. Now we proceed to deal with the Revenue s appeal in ITA No. 115/Kol/2016 for AY2009-10. Ground No. 1of the appeal relate to the disallowance of provision for retirement benefits of Rs.55,58,000/-.After considering the rival submissions, it is observed that the issue involved in this ground is identical to Ground No.1 of departmental appeal in A.Y. 2008-09. The reasons for making the disallowance in the year under consideration are same as discussed in the assessment order for AY 2008-09. The order of the Ld. CIT(A) was also passed on identical lines on which the relief was allowed in the appellate order for AY 2008-09. Following our conclusions drawn in A.Y. 2008-09, we therefore dismiss Ground No. 1 raised by the Revenue and uphold the order of Ld. CIT(A).

27. Ground No. 2 is against the order of Ld. CIT(A) directing the AO to assess interest income under the head 'Business' and grant the benefit of Rule 8. After considering the rival submissions and the orders of the authorities below, it is observed that the issue involved in this ground is similar to the Ground No. 3 of department appeal in A.Y. 2008-09. Following our conclusion in A.Y. 2008-09, we uphold the order of Ld. CIT(A) and dismiss this ground of the revenue.

28. Ground No. 3 is against the order of Ld. CIT(A) deleting the disallowance of Rs.941.52 lacs made by the AO on account of MTM losses incurred on open derivative contracts. After considering the rival submissions and the orders of the authorities below, it

is observed that the issue involved in this ground is similar to the Ground No. 2 of department appeal in A.Y. 2008-09. Following our conclusion in A.Y. 2008-09, we uphold the order of Ld. CIT(A) and dismiss this ground of the Revenue.

29. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open court on 3rd May, 2019.

Sd/- Sd/-

(Dr. A. L. Saini) (A. T. Varkey)
Accountant Member Judicial Member

Dated: 3rd May, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1 Appellant – DCIT, Circle-4(1), Kolkata

2 Respondent – M/s. Mcleod Russel India Ltd., 4, Mangoe Lane, Kolkata-700 001.

3 CIT(A)-2, Kolkata. (sent through e-mail)

4 CIT , Kolkata

5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy, By order,

Assistant Registrar