IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHE 'C', NEW DELHI

Before Sh. Bhavnesh Saini, Judicial Member
And
Sh. N. S. Saini, Accountant Member

ITA No. 3650/Del/2015 : Asstt. Year : 2010-11

Dy. Commissioner of Income Tax, Circle-II, Faridabad	Vs	M/s NHPC Ltd., NHPC Complex, Sector-33, Faridabad
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACN0149C		

ITA No. 3738/Del/2015 : Asstt. Year : 2010-11

M/s NHPC Ltd., NHPC Complex, 4th Floor, Finance Div, Sector-33, Faridabad-121003	Vs	Asstt. Commissioner of Income Tax, Circle-II, Faridabad
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACN0149C		

Assessee by : Sh. Ved Jain, Adv. &
Sh. Himanshu Aggarwal, CA
Revenue by : Sh. Amit Katoch, Sr. DR

Date of Hearing : 06.05.2019		**Date of Pronouncement : 08.05.2019**

ORDER

Per N. S. Saini, Accountant Member:

These are Cross appeals filed by the Revenue and assessee against the order of Commissioner of Income Tax (Appeals), Faridabad dated 17.03.2013.

2. In ground nos. 1 & 2 of the appeal, the grievance of the Revenue is that the Commissioner of Income Tax (Appeals)

erred in deleting the addition of Rs.107,97,42,000/- made by the Assessing Officer on account of advance against depreciation.

3. The brief facts of the case are that the Assessing Officer from the perusal of profit and loss account of the assessee found that the assessee has reduced sales by Rs.107,97,42,000/- on the ground that the advance against depreciation included in the sales was not a revenue receipt. On a query by the Assessing Officer, it was submitted by the assessee that the company claimed advance against depreciation of Rs.107.97 crores is not taxable both in under normal income as well as income assessed u/s 115JB of the Income Tax Act. The assessee relied on the decision of Hon'ble Supreme Court in the case of assessee itself order dated 05.01.2010 wherein it was held that advance against depreciation is not taxable u/s 115JB of the Act. It was further submitted that advance against depreciation is being added back under normal provision in the assessment framed u/s 143(3) of the Act, however, assessee is contesting the same in appeal. The Commissioner of Income Tax (Appeals) has allowed the same in appeal for the assessment years 2007-08, 2008-09 and 2009-10 and enclosed copy of orders before the Assessing Officer.

4. The Assessing Officer did not accept the arguments of the assessee on the ground that the assessee was in appeal before the Hon'ble Supreme Court against the order of Authority for Advance Rulings in respect to allowability of advance depreciation under MAT which the Hon'ble Supreme Court has decided the issue in favour of the assessee. The decision of the

Hon'ble Supreme Court was not for the purpose of normal computation of income under the Income Tax Act. Therefore, he made addition ofRs.107,97,42,000/- to the income of the assessee.

5. On appeal, the Commissioner of Income Tax (Appeals) allowed the appeal of the assessee by observing as under:

> *"6.5 I have considered the submissions of learned counsel for the appellant an gone through the documents and evidences placed on record as well as the judicial rulings relied upon by the learned counsel and the AO. This issue relating to advance against depreciation came up for consideration before the Hon'ble Supreme Court against the order of the Authority for Advance Rulings in appellant's own case for AY 2001-02. After going into background of this issue, it is observed that in the year 1997, the Central Government devised a mechanism to help power generating companies to raise funds for meeting loan repayments in time and issued tariff fixation notification under section 43A of the Electricity (Supply) Act, 1948. This notification permitted power generating companies to collect an amount in advance in the years in which the normal depreciation (90% of the original cost of the plant spread equally over the useful life of plaint) otherwise allowed to be recovered was not sufficient to meet loan repayment schedule. The amount so collected was called as "advance against depreciation". Subsequently, the Central Electricity Regulatory Commission Act, 1999 was promulgated and the power to fix tariff was delegated to Central Electricity Regulatory Commission. The tariff as notified by the Central Electricity Regulatory Commission took into account and consisted of (i) Depreciation (ii) Advance against depreciation (iii) Interest on loans (iv) Interest on working capital (v) Operation and Maintenance expenses (vi) Return on Equity etc. On the issue of accounting treatment of advance against depreciation, the appellant sought clarification from the Expert Advisory Committee of Institute of Chartered Accountants of India, which*

confirmed that such an advance must be reduced from the sales owing to its nature as an advance and clarified that the same should be reflected in the balance sheet as a separate line-item appearing between 'Unsecured loans' and 'Current Liabilities and Provisions'. The Expert Committee further suggested that where revenue or a part thereof received/receivable during a particular period is to be adjusted in future, to that extent the revenue received/receivable is not considered as earned, but is treated as revenue received in advance. Therefore, the appellant has been consistently following the method of accounting in which the amount of extra tariff corresponding to the element of advance against depreciation and included in gross sales, is reduced from the sales and taken to the liability, side of balance sheet as 'advance against depreciation. The Hon'ble Supreme Court in the case of appellant for AY 2001-02 was concurred with the accounting treatment of this advance against depreciation and held as under:

> *3.4 "Section 115JB of the Income-tax Act, 1961 - Minimum alternate tax - assessment year 2001-02 - assessee was a Government Company - it was required to sell electricity to State Electricity Board(s) at tariff rates notified by CERC - Tariff consisted of depreciation, AAD, interest on loans, interest on working capital, operation and maintenance expenses and return on equity - on 26.5.1997 Government introduced a mechanism to generate additional cash flow by allowing generating companies to collect advance against future depreciation (AAD) by way of tariff charge in year in which normal depreciation fell short of original scheduled loan repayment installment - once loan stood repaid, advance so collected would get reduced from normal depreciation of later years, and such reduced depreciation would be included in tariff, in turn, lowering tariff - For relevant assessment year, assessee, while computing its book profit, deducted AAD component from total sale price and only balance amount net of AAD was taken into profit and loss account and book profit - AAR ruled that reduction*

of AAD from 'sales' was nothing but a reserve which was to be added back on basis of clause (b) of Explanation - I to section 115JB - Whether, on facts AAD was neither a reserve, nor was it carried through profit and loss account; rather it was timing difference and was income received in advance subject to adjustment in future and, therefore, clause (b) of Explanation - I to section 115JB was not applicable - Held, yes".

6.6 Though the above decision was in the context of the provisions of section 115JB of the Act, the Hon'ble Apex Court has held that the advance against depreciation is income received in advance subject to adjustment in future against depreciation. The appellant has reduced gross sales by the amount of advance against depreciation and the net sales are credited in the profit and loss account and book profit. Therefore, the amount of advance against depreciation, though resulting into correspondingly reduced sales in the Profit and Loss account, has not been permitted by the Hon'ble Apex Court to be added back under clause (b) of Explanation I to section 115JB. Hence, the same cannot be added under the regular provisions of the Act since the advance against depreciation has been held to be income received in advance. Secondly, Schedule XII-A to the balance sheet for the financial year 2004-05 onwards indicates recouping and the accounting treatment of advance against depreciation as well as method of accounting regularly employed by the appellant standard approved by the Hon'ble Apex Court. The Ld. CIT (Appeal) Faridabad vide order dated 29.4.2010 in appeal No. 137/2009-10 for AY 2007-08 has decided this issue in favour of appellant following his decision for earlier years and in the light of decision of Hon'ble Supreme Court in the case of appellant for AY 2001- 02. The Ld. CIT (Appeals) has elaborately discussed this issue in the order dated 5.4.2010 passed in appeal Nos. 177/03-04, 37/04-05 and 68/06-07 for the AY 2000- 01, 2001-02 end 2003-04, respectively, observing in para 5 of the order as under;

"Although the decision of the Ld. Apex Court has been given in respect of the adjustments to be made for the MAT purposes under clause (b) of Explanation 7 to Section 115JB, it is observed that the issue has been finally clinched by the Hon'ble Court, as to its nature and taxability, which would also be relevant for the computation of regular income as per the provisions of section 143(3) of the Income Tax Act, 1961. Since the AAD is a timing difference, it is not a reserve, it is not carried through P & L account and it is income received in advance subject to adjustment in future, it cannot be added/ disallowed also under the computation of normal income u/s 143(3) of the I. Tax Act, 1961. The above ratio of the Hon'ble Supreme Court, being equally inviolable and applicable in the regular assessments, the additions made by the AO in the order u/s 143(3) for these three years on account of AAD stand cancelled too."

6.7 The AO's contention that the decision of the Hon'ble Supreme Court is not for the purpose of normal computation of Income is not based on any rationality since the nature and character of advance against depreciation has been examined and held to be income received in advance subject to adjustment in future against the claim of depreciation. It has also been noted ITAT have decided the issue in favour of assessee in its order for AY 2000-01, AY 2001-02, AY 2002-03, AY 2003-04, AY 2004- OS, AY 2005-06 and AY 2007-08, the addition of Rs. 107,97,42,000/- made by the AO is deleted and Ground No. 4 of appeal is Allowed."

6. Both the parties agreed before us that the issue was covered in favour of the assessee by the order of the Hon'ble Punjab & Haryana High Court in the case of the assessee itself for assessment year 2006-07 reported in 408 ITR 237 (P&H).

7. We find that the Hon'ble Punjab & Haryana High Court was deciding the following question of law:

"1. Whether, on the facts and in circumstances of the case and in law, the Hon'ble ITAT was right in law in dismissing appeal of the Revenue observing that 'in view of categorical finding of the Supreme Court we hold that the CIT(A) was correct in holding that advance against depreciation cannot be added under the computation of the normal income', whereas the Hon'ble Supreme Court in its decision dated 05-01-2010 has held that the 'advance against depreciation' is 'income received in advance', thus making the said income subject to 'Charge under Chapter-II, as business income under Chapter-IV-D read with sub-clause (i) of sub- section 24 of section 2 of the Income Tax Act?"

2. Whether, on the facts and in circumstances of the case and in law, the Hon'ble ITAT was right in law in deleting the addition of Rs.47,88,00,000/- made by the Assessing Officer under section 143(3) (and not under section 115JB) on account of "Advance Against Depreciation" ignoring the provisions of section 2(24) read with section 28 of the Income Tax Act, 1961, which provides that "income" includes profits and gains and the profits and gains of any business or profession carried on by the assessee at any time during the previous year is taxable?"

8. The Hon'ble High Court in para 3 of the order held as under:

"3. It is agreed that question Nos.1, 2, 5, 6 and 7 are liable to be answered in favour of the respondent-assessee in view of our order and judgment dated 28.02.2018 in the assessee's case in ITA No.136 of 2015."

9. Therefore, the above grounds of appeal of the revenue are dismissed.

10. Ground No. 3 of the appeal of the Revenue is directed against the order of Commissioner of Income Tax (Appeals) in

deleting disallowance of prior period expenses of Rs.3,89,59,508/- made by the Assessing Officer.

11. The brief facts of the case are that the Assessing Officer disallowed the expenses of Rs.3,89,59,508/- on the ground that Section 37(1) of the Act excludes the prior period expenses while computing the taxable income of the assessee.

12. On appeal, the Commissioner of Income Tax (Appeals) deleted the disallowance by observing as under:

> *"7.4 I have gone through assessment order and assessee's reply reproduced by AO in the Assessment order. Assessee received advance from REC (Rural Electrification Corporation) for execution of contract work of RGGAVY. The unutilized/ surplus money was kept in short term bank deposits and earned interest of Rs. 3,89,59,508/- in AY 2010-11 and declared the same as income of the assessee. CAG objected to assessee's treatment of interest received and recommended to pass on interest to REC which assessee did during current year by net the interest income. It was contested by the assessee that interest income of Rs. 3,89,59,508/- which in fact belonged to REC wrongly considered during AY 2009 10. Such treatment by the assessee is not hit by provision of section 37(1) of I. Tax Act as corresponding income has already been wrongly accounted for by the assessee in AY 2009-10; the addition of Rs.3,89,59,508/- is hereby deleted, and Ground No. 5 of the appellant is Allowed."*

13. The ld. Departmental Representative relied on the order of the Assessing Officer.

14. On the other hand, the Authorized Representative relied on the order of Commissioner of Income Tax (Appeals).

15. After considering the rival submissions and perusing the orders of the lower authorities and materials available on record. We find that the ld. Departmental Representative simply relied on the order of the Assessing Officer. He could not point out any specific error in the order of the Commissioner of Income Tax (Appeals). In the circumstances, we find no good reason to interfere with the order of Commissioner of Income Tax (Appeals) which is hereby confirmed and the ground of appeal of the revenue is dismissed.

16. Ground No. 4 of the appeal of the revenue is directed against the order of Commissioner of Income Tax (Appeals) in deleting the addition of Rs.10 53,30,844/- made by the Assessing Officer on repair of capital assets by treating the expenses incurred as capital expenditure as it will give enduring benefit to the assessee.

17. The Assessing Officer observed that from the thorough analysis of bills submitted by the assessee, it is concluded that the expenses are capital in nature and needs to be capitalized.

18. On appeal, the Commissioner of Income Tax (Appeals) deleted the addition by observing as under:

> *"9.4 The appellant has contested that the project are quite old and require both type of maintenance viz; preventive and break-down during operation. It submitted that Hydro-Electric power projects are capital intensive and heavy equipment have been installed. Repair cost of such equipment is high and sud repairs need to be carried out by equipment supplier say by BHEL, L&T, Alstom etc., and only specified contractor/people are needed to handle such repairs. Keeping in view the repair expenses*

claimed and the capital cost of the projects and that repair expenses resulted no addition in capacity, the addition of Rs. 10,53,30,844/- is deleted and Ground No. 7 of the appeal is Allowed."

19. The ld. Departmental Representative relied on the order of the Assessing Officer.

20. On the other hand, the Authorized Representative supported the order of the Commissioner of Income Tax (Appeals).

21. After considering the rival submissions and perusing the orders of the lower authorities and materials available on record. We find that the ld. Departmental Representative simply relied on the order of the Assessing Officer. He could not point out any specific error in the order of the Commissioner of Income Tax (Appeals). In the circumstances, we find no good reason to interfere with the order of Commissioner of Income Tax (Appeals) which is hereby confirmed and the ground of appeal of the revenue is dismissed.

22. Ground Nos. 5 & 6 of the appeal are directed against the order of Commissioner of Income Tax (Appeals) in deleting addition of Rs.78,70,22,900/- made by the Assessing Officer by invoking provisions of Section 14A of the Act.

23. The brief facts of the case are that the Assessing Officer made the impugned addition applying the provisions of Rule 8D of the Income Tax Rules rejecting the assessee's claim that no expenditure has been incurred by the assessee to earn exempt income. The Assessing Officer observed that after having

considered the facts of the case, it would be reasonable to add back the expenditure relating to income to which Section 10 of the Act applies. Therefore, an amount of Rs.78,70,22,900/- was added to the book profit u/s 115JB of the Act for the purpose of MAT.

24. On appeal, the Commissioner of Income Tax (Appeals) vacated the disallowance by observing as under:

> *"5.3 I have considered submissions of learned counsel of the appellant and gone through the documents and assessment order. The appellant has challenged the addition of Rs.78,70,22,900/- made by invoking the provisions of section 14A of the Act while computing regular income of the assessee. There is no dispute to the fact that the appellant has declared dividend income of Rs. 25.02 crores which has been claimed exempt. The said dividend income has been earned from the investment in shares of the entities as under:*
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> | | |
> |---|---|
> | *1. NHDC* | *Rs.1002.42 crores* |
> | *2. Loktak Downstream Hydro Corpn. Ltd.* | *Rs.44.40 crores* |
> | *3. Power Trading Corporation* | *Rs.12.00 crores* |
> | *4. Indian Overseas Bank* | *Rs.0.36 croes* |
> | *5. National Power Exchange Ltd.* | *Rs.0.83 crores* |
> | *6. National High Power Testing Laboratory* | *Rs.88.00 crores* |
> | | *Rs.1060.89 crores* |
>
> *5.4 Perusal 6f the submissions made by the appellant show that the NHDC is a subsidiary company of the assessee in which investment has been made as 'per the sanction order of Govt. of India, Ministry of Power, vide DO No. 22/3/2000/28.3.2002 and order No. 34/1/2003/DO/NHPC dated 29.5.2003, out of budgetary support and equity capital invested by the Govt. to the extent of Rs. 772.42 crores. The balance investment of Rs. 312.42 crores has been made in the shares of subsidiary company out of funds raised from the issue of 'O' series bonds. The Investment in Loktak Downstream Hydro Corpn Ltd. of Rs. 44.40 crores, National High Power Testing*

Laboratory of Rs. 0.88 crores in the shares of PTC, Rs. 12.00 crores in the shares of Indian Overseas Bank and Rs. 36.00 lacs in the shares of National Power Exchange Rs. 83.00 lacs has been stated to be out of internal accruals. The necessary details and submissions in this regard were filed by the assessee but the AO did not consider the same. The AO therefore, applied Rule 8D and worked out the disallowance aggregating to Rs. 78.70 crores, under clause (i), (ii) and (iii) of Sub-Rule (2) of Rule 8D, respectively. The fact that the investment of Rs. 772.42 crores made by the appellant in the shares of subsidiary company NHDC was out of budgetary support and equity contribution by the Govt. of India has not been disputed by the AO. The admitted fact therefore, remains that the investment of Rs. 772.42 crores was directly from interest free funds contributed by the Govt. of India. If that being so, this amount cannot go into the working of 'disallowance of interest even if Rule 80 is applied. Clause (ii) of Sub-Rule (2) of Rule 8D provides for working of disallowable interest in a case where the assessee has incurred expenditure /by way of interest during the previous year which is not directly attributable to any particular income or receipt, thus, there" is no direct interest expenditure for the investment of Rs. 772.42 crores and also no direct interest expenditure pertaining to investment of Rs. 281.80 crores involved as such amount represent redumption proceeds of SEB Power Bonds/Loan Term Advances (Tax Free). The Hon'ble ITAT, Bench "F' Delhi in the case of Priya Exhibitors Pvt. Vs. ACIT (27 taxmann.com 88) has held that the disallowance under section 14A requires a clear finding of incurring of expenditure and in absence of same, no disallowance could be made. Similarly, the Hon'ble ITAT, Bench 'G' Delhi in the case of ACIT vs. SIL Investment Ltd. (26 taxmann.com 78) has held that where Assessing Officer did not bring any evidence on record to establish that any expenditure had been incurred by assessee for earning exempt income, it was wrong on part of Assessing Officer to proceed to compute disallowance of expenses under section 14A by merely applying rule 8D(2)(iii). The legal implications of sub-section (2) and (3) of

section 14A have been examined by the Hon'ble Delhi High Court in Maxcopp Investment Ltd. vs. CIT (347 ITR 272) and it has been held that the AO has to record cogent reasons to reject the claim of the assessee that no expenditure has been incurred by him for earning the exempt income.

5.5 It is however, observed from the assessment order that the AO has not assigned any reason while finding the submissions of the appellant as unsatisfactory. The identical issue was also involved in the case of appellant for A.Y. 2008-09 and as per the detailed discussion vide para 6.4 of order dated 2.1.2012 in appeal No. 276/2010-1 after considering the provisions of law and legal position emerging from relied upon judicial rulings, this issue has been decided in favour of the appellant by CIT(Appeals). Following the order of my predecessor in A.Y. 2009-10 which is squarely applicable this year also the addition of Rs.78,20,22,900/- made by the AO by invoking section 14A of the Act is directed to be deleted. The ground No. 3 of appeal is Allowed."

25. Before us, both the parties agreed the issue is covered in favour of the assessee and against the revenue by the decision of the Tribunal in the case of assessee itself for assessment year 2009-10 vide order dated 26.08.2015 passed in ITA No. 424/Del/2013 where it was held as under:

"17. We have heard both the parties and perused the records. We find that the assessee has earned exempt income to the tune of Rs.51,75,50,800/- and has suo motu disallowed Rs.13.78 crores under section 14A of the Act. We find that the AO has invoked Rule 8D without spelling out the reason for not being satisfied with the computation made by the assessee in respect to expenditure incurred for earning the exempt income. Without recording the objective satisfaction as required under sub-section (2) to section 14A that he is not satisfied with the correctness of the claim of the assessee in respect of expenditure in respect to exempt income, the AO cannot invoke Rule 8D to compute the disallowance

under the said Rule. The Hon'ble jurisdictional High Court in the case of CIT vs. Taikisha Engineering India Limited reported in 370 ITR 338 (Del.) has held as under :-

> *"Section 14A of the Act postulates and states that no deduction shall be allowed in respect of expenditure incurred by an assessee in relation to income which does not form part of the total income under the Act. Under sub Section (2) to Section 14A of the Act, the Assessing Officer is required to examine the accounts of the assessee and only when he is not satisfied with the correctness of the claim of the assessee in respect of expenditure in relation to exempt income, the Assessing Officer can determine the amount of expenditure which should be disallowed in accordance with such method as prescribed, i.e. Rule 8D of the Rules (quoted and elucidated below). Therefore, the Assessing Officer at the first instance must examine the disallowance made by the assessee or the claim of the assessee that no expenditure was incurred to earn the exempt income. If and only if the Assessing Officer is not satisfied on this count after making reference to the accounts, that he is entitled to adopt the method as prescribed i.e. Rule 8D of the Rules. Thus, Rule 8D is not attracted and applicable to all assessee who have exempt income and it is not compulsory and necessary that an assessee must voluntarily compute disallowance as per Rule 8D of the Rules. Where the disallowance or "nil" disallowance made by the assessee is found to be unsatisfactory on examination of accounts, the assessing officer is entitled and authorised to compute the deduction under Rule 8D of the Rules. This precondition and stipulation as noticed below is also mandated in sub Rule (1) to Rule 8D of the Rules."*

After going through the other cases also, relied upon by the ld. AR, we find that the AO has not recorded the satisfaction envisaged by the statute before invoking the computation provided for under Rule 8D, which 15 ITA No.424/Del./2013 vitiates the

impugned order. We also find that in assessee's own case for the previous year also, the Tribunal has deleted the addition made by the AO on this account. Therefore, we uphold the order of the CIT (A) on this issue. This ground of revenue's appeal is dismissed."

26. In view of the above, we dismiss this ground of appeal of the revenue.

27. Ground No. 7 of the appeal is directed against the order of Commissioner of Income Tax (Appeals) deleting the addition of Rs.51,74,19,109/- made by the Assessing Officer while computing book profit for MAT u/s 115JB of the Act.

28. The brief facts of the case are that the Assessing Officer made disallowance of provisions for gratuity, leave encashment, post retirement benefits, LTC, baggage allowance, MC on leave encashment while computing book profit u/s 115JB of the Act on the ground that they are not an ascertained liability and accordingly had made addition of Rs.51,74,19,109/- to the income of the assessee.

29. On appeal, the Commissioner of Income Tax (Appeals) deleted the disallowance by observing as under:

"10.3 I have pursued the assessment order, the submission of the appellant, orders of my predecessors, order of ITAT and order of Hon'ble High Court in the appellant's own case on these issues i.e. relating to adjustment and increase of the book profit computed under the Companies Act, by a sum of Rs. 51,74,19,109/- on account of the Provision for gratuity, leave encashment, post-retirement medical benefit, LTC, baggage allowed and Matching Contribution on leave encashment etc., for the purpose of computing tax liability u/s 115JB of the Act. As discussed in para 3 of the assessment order, the AO has added the above provisions for the

purpose of computing book profit u/s 115JB following the decision of Hon'ble Supreme Court in the case of Shree Sajjan Mills vs. CIT (156 ITR 585) after holding the said provisions to be only contingent and unascertained. In Shree Sajjan Mills case, the claim for deduction was set up on the ground that amount of gratuity payable to its employees!?was worked out actuarially, which was ascertained by virtue of actuarial valuation and .was deductible under section 37(1) of the Act.

10.4 The appellant has contended that the these provisions were created in accordance with accounting principles and standards; the valuation of liability was based on compilation of various details and by adopting actuarial valuation; the liabilities were 'ascertained' and the Profit & loss account was prepared in accordance part II and III of Schedule - VI of the Companies Act. Therefore, the book profit declared as per the Profit and Loss account should have not been disturbed in view of decision of Hon'ble Apex court in the case of Apollo Tyres Ltd. Vs. CIT (255 ITR 273). The reliance has also been placed on the decision of Hon'ble Supreme Court in the case of Bharat Earth Movers Limited vs. CIT (112 Taxman 61) and the decision of Hon'ble Mumbai High Court in the case of CIT vs. Echjay Forging Pvt. Ltd. (116 Taxman 322) in support of contention that when the liabilities were determined on the basis of actuarial calculations, the same represented ascertain liabilities. In this regard, the order of my predecessor dated 29.10.2012 for appeal No. 446/11-12 relevant to issue has been reproduced below:

> *"The identical issue was also involved in the case of appellant for A.Y. 2008-09 and as per the detailed discussion vide para 6.1 of my order dated 02.01.2012 in appeal No. 276/2010-11 after considering the provisions of law, legal position on this issue emanating from relied upon judicial rulings and the decision of Ld. CIT(Appeals) Faridabad vide order dated 29.04.2010 in appeal No. 137/2009-10 for A.Y. 2007-08, this issue was decided in favour of the appellant. Since the issue*

is already covered by the decision for earlier years, the AO is directed to compute the book profit without making any addition for aforesaid provisions. The addition of Rs.82,57,10,238/- made by the AO for the purpose of determining book profit u/s 115JB of the Act is deleted. The ground No. 2 of appeal is allowed."

10.5 The view of the CIT(A) has been upheld by the Hon'ble Delhi ITAT in the case of the appellant himself in ITA No. 2509, 2618 & 3681/Del/2008 for Asstt. Year 2005-06, vide order dated 30.09.2014.

10.6 In this regard it shall be pertinent to quote from the order of the Hon'ble ITAT's order vide ITA No. 1402/Del/2012 & 1956/Del/2009 for Asstt. Year 2008-09 & 2006-07 as below:

"7. After considering the rival submissions and perusing the relevant material on record, it is noticed that the Hon'ble Supreme Court in the aforenoted case of Bharat Earth Movers (supra) has held that the liability incurred by the assessee under the Leave Encashment Scheme determined on actuarial valuation is an ascertained liability and cannot be considered as a contingent liability. However, it is significant to note that the legislature has stepped in by inserting clause (f) to Section 43B mandating that any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee cannot be allowed as deduction unless this amount is paid by the assessee on or before the due date for furnishing the return of income u/s 139(1) of the Act. In view of this legislative amendment nullifying the ratio of the decision in the case of Bharat Earth Movers (supra), the amount of such provision can be claimed as deduction only on actual payment and not on the simple creation of provision. However, when we peruse the mandate of Explanation 1 to section 115JB, it becomes clear that clause (c) talks of making addition to book profit for 'the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or'. If we consider the judgment of the

Hon'ble Supreme Court holding such a provision as an ascertained liability and clause (f) of section 43B on one hand and clause (c) of Explanation 1 to section 115JB on the other, it becomes ITA No. 1402/D/2012,1956/Del/2009 & 1437/Del/2009 5 vivid that computation of income under the normal provisions debars deduction for the ascertained liability towards provision for leave encashment etc., unless the amount is actually paid before the due date. However, in the computation of book profit u/s 115JB, deduction is available for such provision of ascertained liability. The Id. DR has not drawn our attention towards any part of the provisions of section 115JB, which makes the provisions of section 43B(f) applicable to the computation of book profits. As the ground raised by the Revenue is only against the deletion of addition in the computation of book profit u/s 115JB, the impugned order needs to be upheld. It is however, made clear that if the income under the normal provisions of the Act turns out to be more than the book profit u/s 115JB and the total income is to be computed as per the normal provisions, then no deduction for such provision would be admissible unless the amount of such provision is paid before the due date u/s 139(1) of the Act."

10.7 Thus following the order of my predecessor and the Hon'ble ITAT (supra) and in view of the judicial rulings cited (supra) I hold that, the AO was not justified in law to make adjustment to book profit by adding the amount of various provisions aggregating to Rs. 26,84,24,189/-. The AO is therefore, directed to compute the book profit without making any adjustment of aforesaid provisions. However if the income under normal provisions of the Act turn out to be more than the book profit u/s 115JB and the total income is to be computed as per normal provisions, then no deduction for such provision would be admissible unless the amount of such provision is paid for before the due date u/s 139(1) of the Act. With these comments Ground No. 8 of appeal is allowed."

30. Both the parties agreed that the issue is covered in favour of the assessee by the decision of the Hon'ble Punjab & Haryana High Court in the case of the assessee itself reported in 408 ITR 237.

31. We find that the Hon'ble High Court was deciding the following question no. 5 which reads as under:

> *"5. Whether, on the facts and in circumstances of the case and in law, the Hon'ble ITAT was right in law in deleting disallowance of Rs.27,05,83,117/- made by the AO in computing book profit u/s 115 JB on a/c of provisions provision made for gratuity, leave encashment, post retirement medical benefits, LTC, Baggage allowance and Matching Contribution on Leave Encashment even when the assessee has failed to establish these provisions to be of ascertained in nature."*

32. The Hon'ble High Court held as under:

> *"3. It is agreed that question Nos.1, 2, 5, 6 and 7 are liable to be answered in favour of the respondent-assessee in view of our order and judgment dated 28.02.2018 in the assessee's case in ITA No.136 of 2015."*

33. Respectfully following the same, we dismiss the ground of appeal of the revenue.

34. Ground No. 8 of the appeal is that the Commissioner of Income Tax (Appeals) erred in deleting the addition of Rs.2,50,00,425/- made by the Assessing Officer while computing book profit for MAT u/s 115JB of the Act.

35. The brief facts of the case are that the Assessing Officer observed that the assessee has claimed an amount of Rs.4,85,86,995/- as per schedule 5 of the balance sheet as depreciation on land unclassified and leasehold land. He

observed that the assessee has claimed an amount of Rs.4,85,86,995/- in the balance sheet as depreciation on land unclassified and leasehold land. Out of the total depreciation on land of Rs.4,85,86,995/-, an amount of Rs.2,50,00,425/- has been debited to profit and loss account and balance amount of Rs.2,35,86,570/- has been added to the cost of capital work-in-progress. He observed that the depreciation on land is not allowable as per Companies Act and therefore, he made addition of Rs.2,50,00,425/- to the income of the assessee.

36. On appeal, the Commissioner of Income Tax (Appeals) deleted the disallowance by observing as under:

> *"11.4 I have carefully considered the submissions of the Ld. ARs', and perused the order of assessment and counter-comments alongwith the ITAT order and do not find any substance in the order of the AO. The Ld. ARs have sufficiently explained their position regarding amortization of land amounting to Rs. 6.12 crores during the FY 2003-04 relevant to the AY 2004-05.*
>
> *11.5 Since the contention of the appellant has been accepted by the Hon'ble ITAT in AY 2004-05, 2005-06 & 2007-08 and the issue, being a covered one, is being decided in favour of appellant, the addition of Rs.2,50,00,425 /- made by the AO to the book profit is directed to be deleted. Ground No. 9 of appeal is Allowed."*

37. Before us, both the parties agreed that the issue is covered in favour of the assessee and against the revenue by the decision of the Tribunal in the case of the assessee itself for assessment year 2009-10 vide order dated 26.08.2015 in ITA No. 424/Del/2013 wherein it was held as under:

"11. While allowing this issue in favour of the assessee, Ld. CIT (A) held as under:-

> *"6.1. The ground No. 3 of appeal has been taken against the disallowance of Rs.l,80,79,857/- on account of amortization of land (depreciation) while computing book profits u/s 115JB of the Act. While making the disallowance, the AO's contention has been that the depreciation on land is neither prescribed under the Income Tax Act nor in the Companies Act, 1956 and hence, the accounts of the company were not in accordance with the provision of part II and In of schedule VI of the Companies Act. The appellant, on the other hand, has contended that amortization of lease hold land has been made as per accounting standard 10 of ICAI and amortization of land unclassified as per Accounting S andard 6 of ICAI and in view of CAG, which has been done to meet the requirement of companies Act and amortization of land is permitted u/s 115JB. The identical issue was also involved in the case of appellant for A.Y.2008-09 and as per the detailed discussion vide para 6.2 of my order dated 02.01.2012 in appeal No.276/2010-11, this issue has been decided in favour of the appellant. Since the issue is already covered by the decision for earlier year, the addition of Rs.1,80,79,857 /- made by the AO for the purpose of computing book profit u/s 115JB of the Act is directed to be deleted. The ground No.3 of appeal is allowed."*

12. At the outset itself, the ld. AR for the assessee submitted that this issue is covered in favour of the assessee in assessee's own case in ITA No.2449/Del/2008 for Assessment Year 2004-05 order dated 30.09.2014 of the Tribunal and took our attention to page 6, para 7 of the order. He also submitted that the ITAT, relying on the aforesaid order dated 30.09.2014 (supra), has decided this issue in favour of the assessee in assessee's own case in assessment years 2007-08 and 2008-09.

13. We have heard rival submissions and perused the material on record. The Tribunal in the order for

assessment year 2002-03 (supra) has considered an identical issue and had decided the matter in favour of the assessee. The aforesaid order of the Tribunal was followed in subsequent assessment years 2005-06, 2007-08 and 2008-09. Since identical issue has been considered by the Tribunal and the issue raised before us is identical to the issue covered by the coordinate Bench of the Tribunal in assessee's own case for assessment year 2002-03 (supra) and other years, respectfully following the same, we confirm the order of the ld. CIT (A) on this issue."

38. Therefore, this ground of appeal of the revenue is dismissed.

39. Now we take up the assessee's appeal.

40. Ground No. 1 of the appeal of the assessee is general in nature and hence does not require any separate adjudication by us.

41. In ground no. 2 of the appeal of the assessee, the grievance of the assessee is that the Commissioner of Income Tax (Appeals) erred in confirming the order of the Assessing Officer disallowing deduction of Rs.4,46,54,883/- u/s 80IA of the Act.

42. The Assessing Officer has observed as under:

"11. From the perusal of computation of income, it is noticed that the assessee company had claimed deduction u/s 80-LA in case of three power station projects i.e. URI power station stage-I; Chamera power station stage-II and Rangit power station. Further, it is noted that the deduction taken from profits u/s 80-IA also includes other income which is Not allowed because as per section 80-IA of the Income Tax Act, 1961 an assessee shall be eligible for such deduction only from profit obtained from generation & distribution of power and Not from other

income. Accordingly, the AR was asked vide show cause dtd.04.02.2013 as to why the other income amounting to Rs. 12,47,34,246/- (4,67,54,558 + 5,99,90,812 + 1,79,88,876) be not excluded from the deduction claimed u/s 80-IA. The AR of the assessee replied on 18.02.2013 slating that,

"Regarding treatment of other income amounting to Rs. 12.47.34.246/- (4,67,54.558 + 5,99,90,812 + 1,79.88,876) in respect of above power stations.

Schedule 14 pertains to Other Income which contains the following items in case of Uri Power Station Stage-I, Chamera Power Station Stage-II & Rangit Power Station. Assessee has already filed project-wise Auditors certificates duly certifying eligible deduction u/s 80-IA of Income Tax Act.

Interest on Employees Advances, The amount recovered towards interest on loans granted to employees as per employment conditions and have been paid out of borrowed funds.

Late Payment Surcharge: This is basically in the nature of late payment made by State Electricity Boards and pertains to sale of electricity.

Profit on Sale of Assets: The amount has been reduced while calculating claim of 80-IA.

Liabilities/ provisions not required written back: This is basically in the nature of liabilities / provisions which are no longer required and have been written hack i.e. reversal of expenditure booked in earlier years.

Others Income: Includes rent/hire charges, other income, township recovery, lease recovery, electricity recovery, telephone recovery, staff car recovery, cable charges, guest house recovery etc and all these incomes are in relation to generating activity of the power station.

Foreign Currency Fluctuation Account: Based on actual payment of foreign currency, amounts become recoverable from beneficiaries (customers) and are credited to sales. On other hand, actual amount paid

is reduced from sale. In view of above, profit and loss account of the assessee company is not affected. To nullify this impact, a contra entry has been passed in accounts as per opinion given by Expert Advisory Committee of Institute of Chartered Accountants of India. The foreign currency fluctuation adjustment (debit) appeals in the schedule 15 'Gen, Admin and other expenses' and foreign currency fluctuation adjustment (credit) appears in schedule 14 other income.

In view of above, the above incomes are not liable to be excluded from the deductions claimed u/s 80-IA. As other income is directly /exclusively related to the concerned power stations, therefore, claim made are as per the applicable provisions."

The above reply of the AR has been taken on record and considered. I have also gone through the entire material available on the record and the case is also discussed with the AR of the assessee. After discussion, it is concluded that an assessee is eligible for such deduction u/s 80-IA is only from profit obtained from generation & distribution of power and Not from other income Further, the nature of each and every other income credited in profit & loss account is considered and thus, some incomes found to be correctly taken as they are inseparable from the business of the assessee. But the amount credited in 'others' is not acceptable and also the assessee had not provided its details and justification that why the income booked under the sub-category of 'others' be allowed. From the schedules of other income of all the three projects, the other income of Rs.4,46,54,883/- (2,17,83,145 + 1,17,59,699 + 1,11,12,039) is not eligible for such deduction u/s 80-IA.

Keeping in view the above facts, an amount of Rs.4,46,54,883/- is hereby disallowed and is added back to the total income of the assessee company under normal provisions of the Act."

43. On appeal, the Commissioner of Income Tax (Appeals) held as under:

"8.4 I have gone through the assessee's reply and AO remarks given in the assessment order for non considering miscellaneous income of Rs. 4,46,54,883/- for rebate u/s 80-IA in respect of Uri-I, Rangit and Chamber-ll Power station. The assessee's explanation regarding disallowance of Rs. 4,46,54,883/- is not acceptable as such income cannot be considered attributable to business activities of the project. In this regard, its pertinent to point out that the appellant has shown substantial income from Rent and it's evident that earning of Rent is not the Business activity of the appellant. Similarly the same logic holds true for the other means of income shown by the appellant. Thus I hold that the AO has rightly denied the rebate u/s 80IA under these heads. Therefore, addition of Rs. 4,46,54,883/- is upheld and Ground No. 6,of the appellant is Dismissed."

44. Before us, it was submitted by the Authorized Representative of the assessee that in the case of CIT Vs Cochin Refineries ltd. (1983) 43 CTR 103, it was held that hire charges and miscellaneous income earned in the course of business are eligible for deduction u/s 80IA of the Act. Therefore, the disallowance made should be deleted.

45. On the other hand, the ld. Departmental Representative supported the orders of the authorities below.

46. We find that the Assessing Officer made the impugned disallowance Rs.4,46,54,883/- holding that assessee is eligible for deduction u/s 80-IA only on profit earned from generation & distribution of power and not from other income. The details of such amounts are as follows:

S. No	Particulars	Uri-I Power Station (Amount in Rs.)	Chamera-II Power Station (Amount in Rs.)	Rangit (Amount in Rs.)	Total (Amount in Rs.)
1	RENT/HIRE CHARGES FROM CONTRACTORS	-	1,81,718	-	1,81,718
2	RENT/HIRE CHARGES-OTHERS	3,92,088	-	1,54,496	5,46,584
3	OTHER INCOME (BALANCES, EXPENSES, LIABILITIES NO LONGER REQUIRED WRITTEN BACK)	2,03,85,742	94,03,816	94,37,700	3,92,27,258
4	TOWNSHIP RECOVERIES	4,73,737	13,78,490	7,80,005	26,32,232
5	LEASE RECOVERY	75,102	1,40,005	-	2,15,107
6	ELECTRICITY RECOVERY	3,32,344	4,08,662	4,98,879	12,39,885
7	TELEPHONE RECOVERY		-	1,331	1,331
8	STAFF CAR RECOVERY	-		12,242	12,242
9	CABLE CHARGES	88,850	1,34,410	1 17,250	3,40,510
10	GUEST HOUSE RECOVERY	35,282	1,12,598	1,10,136	2,58,016
	Total	2,17,83,145	1,17,5 ,699	1,11,12,039	4,46,54,883

47. We find that the AAR in the case of National Fertilizers Limited 193 CTR 498(AAR) held that the expenses incurred to earn these other incomes should be excluded from the debit side of the profit and loss account for computing the deduction u/s 80-I of the Act. The relevant extract of the judgment is as below:

> *"(2)question No. 2 in AAR/532/2001 that the expenses of Rs.2,76,03,364 and Rs.12,12,74,426 (it is stated that the correct figure is Rs.11,02,56,561) allocated by marketing office and corporate office and interest expenditure of Rs.71,65,99,045 allocated by the corporate office and on question No. 2 in AAR/533/2001 that expenses of Rs.2,56,44,186 and of Rs.12,94,59,292 allocated by corporate office and marketing office and interest expenditure of Rs.8,49,30,952 allocated by corporate office should be excluded from the debit side of the profit and loss account of the industrial undertaking for the purpose of deduction under section 80-I of the Income-tax Act, 1961; the fact that the allocated interest income from corporate office Rs.5,22,94,939 and Rs.3,97,44,811 credited to profit and loss account of*

Vijaipur unit in the assessment years 1995-96 and 1996-97 is of no consequence as both interest income and interest expenditure are liable to be excluded for the purpose of deduction under section 80-I of the Act."

48. Further, the Hon'ble Delhi High Court in the case of Pr. CIT vs. Bharat Sanchar Nigam Limited reported in 388 ITR 371 explaining the meaning derived from while computing the deduction u/s 80-IA of the Act, has held as under:

"8. The question arose in the context of the Assessee being asked to explain why certain specific items categorized as 'other income' and 'extra-ordinary item' in the Profit and Loss Account in assessment year 2004-05 should not be excluded from the profit and gains of the Assessee. According to the Revenue, these items could not be considered as profits and gains 'derived from' the eligible business for the purpose of deduction under Section 80 I A. The said six items were:

(i) Extra Ordinary Items
(ii) Refund from Universal Service Fund
(iii) Interest from others
(iv) Liquidated Damages
(v) Excess provision written back
(vi) Others including sale of directories, publications, form, waster paper, etc.

9. The AO held that the six items of income could not be said to be derived from the business of the Assessee and added the income therefrom to the returned income of the Assessee. In the appeal by the Assessee, the Commissioner of Income Tax (Appeals) ["CIT (A)"] agreed with the AO that three of the above items, viz. Extraordinary Items, Refund from Universal Service Fund and Interest from Others, did not form part of the profit derived from eligible business. However, the Assessee"s plea regarding the other three items as being derived from the business was accepted by the CIT (A).

10. The Assessee filed appeals and the Revenue filed cross-appeals before the ITAT. The ITAT in the impugned orders concluded that with sub-section (2A) beginning with a non-obstante clause, the legislative intention of making available to an undertaking, providing telecommunication services, the benefit of deduction of 100% of the profits and gains "of the eligible business" was explicit. Indeed, the legislature appears to have made a conscious departure in adopting for sub-section (2A) a wording different from that appearing in sub section (1). Under Section 801A (1), what is available for deduction are profits and gains "derived by an undertaking or an enterprise from any business referred to in sub-section (4)" whereas in Section 80-IA (2A) what is available for deduction is "hundred percent of the profits and gains of the eligible business". The following conclusion reached by the ITAT in para 13.11 of the impugned order correctly encapsulates the legal position as far as the interpretation of Section 801A (2A) is concerned.

"13.11 Thus, we find that the legislature being alive to providing tax deductions to business enterprises and undertakings, it wanted to curtail the time line during which deduction can be claimed and also addressing the extent upto which it can be claimed has consciously carved out an exception to specified undertakings/enterprises whose needs and priorities differ has taken care to expand the time line for claiming deductions. It has consciously enabled those undertakings/enterprise 'who fall under sub-section (2A) to claim 100% deduction of profits and gains of eligible business for the first five years and upto 30% for the remaining five years in the ten consecutive assessment years out of the fifteen years starting from the time the enterprise started its operation. The legislature having ousted applicability of sub-section (1) and (2) in the opening sentence brought in for the purposes of time line sub-section (2) into play but made no efforts whatsoever to put the assessee under sub-section (2A) to meet the stringent requirements that the profits so contemplated were to be "derived from". The requirements of the first degree nexus of the

profits from the eligible business has not been brought into play."

11. As a result, the orders of both the AO and the CIT (A) to the extent they deny the Assessee, which in this case is in the business of providing telecommunication services, deduction in respect of the above items in terms of Section 80IA(2A) are unsustainable in law and have rightly been reversed by the IT AT."

49. Further, the Hon'ble Gujarat High Court in the case of Nirma Industries Ltd. Vs DCIT (2006) 283 ITR 402 has held as under:

"27. Insofar as question No. 2 is concerned, according to the Tribunal s. 80-I of the Act uses the phrase 'derived from' and hence the interest received by the assessee from its trade debtors cannot be taken into consideration for the purpose of computing profits derived from an industrial undertaking. The Tribunal has failed to appreciate that it is not the case of the AO that the interest income is not assessable under the head 'Profits and gains of business'. It is only while computing relief under s. 80-I of the Act that the Revenue changes its stand. When one reads the opening portion of s. 80-I of the Act it is clear that words used are: "gross total income of an assessee includes any profits and gains derived from an industrial undertaking". Once this is the position then, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to the prescribed percentage is to be allowed. That, in fact, the gross total income of the assessee included profits and gains from such business, and this is apparent on a plain glance at the computation in the assessment order. Both in relation to Vatva Unit and Mandali Unit the computation commences by taking profit as per statement of income filed along with return of income. Therefore, the same item of receipt cannot be treated differently: once while computing the gross total income, and secondly at the time of computing deduction under s. 80-I of the

Act. Therefore, on this limited count alone, the order of the Tribunal suffers from a basic fallacy resulting in an error in law and on facts. The Tribunal instead of recording findings on facts proceeded to discuss law. This litigation could have been avoided if the parties had invited attention to basic facts.

28. Neither the approach nor the reasons advanced by the Tribunal deserve acceptance. It is an incorrect proposition to state that interest paid by the debtors for late payment of the sale proceeds would not form part of the eligible income for the purpose of computing relief under s. 80-I of the Act. The reliance on the general meaning of the term interest as well as drawing distinction between the source of sale proceeds and the source of interest is erroneous in law in the case of CIT vs. Govinda Choudhury & Sons (supra) the apex Court was called upon to decide as to the nature of interest received by the assessee therein. In the case before the apex Court the assessee who was executing Government contracts found itself involved in disputes with the State Government with regard to the payments due under the contracts and upon reference to arbitrators, the award included the principal sum as well as the interest for delay in payment of the principal sum. The assessee claimed that the interest was of the same nature as other trading receipts, but it was held by the Tribunal that the same was 'Income from other sources'. The apex Court laid down:

> *"The assessee is a contractor. His business is to enter into contracts. In the course of the execution of these contracts, he has also to face disputes with the State Government and he has also to reckon with delays in payment of amounts that are due to him. If the amounts are not paid at the proper time and interest is awarded or paid for such delay, such interest is only an accretion to the assessee's receipts from the contracts. It is obviously attributable and incidental to the business carried on by him. It would not be correct, as the Tribunal has held, to say that this interest is totally de hors the contract business*

carried on by the assessee. It is well settled that interest can be assessed under the head 'Income from other sources' only if it cannot be brought within one or the other of the specific heads of charge. We find it difficult to comprehend how the interest receipts by the assessee can be treated as receipts which flow to him de hors the business which is carried on by him. In our view, the interest payable to him certainly partakes of the same character as the receipts for the payment of which he was otherwise entitled under the contract and which payment has been delayed as a result of certain disputes between the parties. It cannot be separated from the other amounts granted to the assessee under the awards and treated as 'Income from other sources'".

50. In view of the above quoted decisions, we are of the considered view that the disallowance made of Rs.4,46,54,883/- while computing the deduction allowable u/s 80-IA of the Act is not justified. Hence, we set aside the orders of the lower authorities and direct the Assessing Officer to re-compute the deduction allowable to the assessee u/s 80-IA of the Act without excluding Rs.4,46,54,883/-. Thus, this ground of appeal of the assessee is allowed.

51. Ground No 3 of the appeal of the assessee is directed against the order of Commissioner of Income Tax (Appeals) confirming addition of Rs.95,02,478/- made by the Assessing Officer on account of income tax on perquisite borne by the assessee in respect of accommodation provided to its employees while computing book profit u/s 115JB of the Act.

52. The brief facts of the case are that the Assessing Officer observed that the assessee has claimed deduction ofRs.95,02,478/- u/s 115JB of the Act being amount of tax

paid by the assessee in the capacity of employer towards non-monetary perquisite. The Assessing Officer observed that as per Clause (a) of Explanation (1) of Sub-section (2) of Section 115JB of the Act book profit is to be increased by the amount of income tax paid or payable and the provision therefore. He held that from this, it is clear that income tax paid or payable or provision thereof is to be added to compute the book profit u/s 115JB of the Act. Accordingly, he added Rs.95,02,478/- to the book profit computed u/s 115JB of the act.

53. On appeal, the Commissioner of Income Tax (Appeals) confirmed the action of the Assessing Office .

54. Before us, it was argued that perquisite on account of leased accommodation provided in NHPC residential colony was calculated u/s 17(2) of the Act and proportionately borne by assessee employer and employee. Housing accommodation provided by the employer is a non-monetary perquisite u/s 17(2) of the Act. It was submitted that according to Section 40(a)(v) of the Act any tax paid by the employer u/s 10(10CC) of the Act will not be allowed as deduction while computing the income under normal provisions of the Act. It was pointed out that it is pertinent to note that Section 115JB of the Act, tax paid on non-monetary perquisite was not covered under explanation (1) of sub-section (2)(a) of Section 115JB of the Act. Therefore, it does not affect the book profit and will not be added to calculate tax liability under MAT. Reliance was placed on the decision of Mumbai Bench of the Tribunal in the case of Rashtriya Chemicals & Fertilizers Ltd. Vs CIT (2018) 91 taxmann.com 104. Therefore, it was prayed that following the above decision, the addition made should be deleted.

55. The ld. Departmental Representative relied on the orders of the lower authorities.

56. We have heard the rival submissions and perused the orders of lower authorities and materials available on record. In the instant case, the assessee claimed deduction of income tax paid on income computed u/s 17(2) of the Act on accommodation provided to the employees of the company as the same was borne by the assessee. The Assessing Officer relying on Explanation (1) of Sub-section (2)(a) of Section 115JB of the Act held that income tax paid or payable or provision thereof is to be added to calculate the adjusted book profit u/s 115JB of the Act.

57. On appeal, the Commissioner of Income Tax (Appeals) confirmed the action of the Assessing Officer.

58. The assessee before us has placed reliance on the decision of Mumbai Bench of the Tribunal in the case of Rashtriya Chemicals & Fertilizers Ltd. Vs CIT (supra).

59. The ld. Departmental Representative supported the orders of the lower authorities.

60. We find that the Tribunal in the case of Rashtriya Chemicals & Fertilizers Ltd. Vs CIT (supra) has held as under:

> *"Para 8……We further find that taxes borne by the assessee on non-monetary perquisites provided to employees forms part of Employee Benefit cost and akin to Fringe Benefit Tax since they are certainly not below the line items since the same are expressively disallowed u/s 40(a)(v) and the same do not constitute Income Tax for the assessee in terms of Explanation-2. This view of ours is duly fortified by the judgment of Tribunal rendered in ITO v Vintage Distillers Ltd. [2010] 130 TTJ*

79 (Delhi) where the Tribunal has taken the view that the term 'tax' was much wider term than the term 'Income Tax' since the former, as per amended definition of 'tax' as provided in Section 2(43) included not only Income Tax but also Super Tax & Fringe Benefit Tax. Therefore, without there being any corresponding amendment in the definition of Income Tax as provided in Explanation-2 to Section 115JB, Fringe Benefit Tax was not required to be added back while arriving at Book Profits u/s. 115JB. Similar view has been expressed in another judgment of Tribunal titled as Reliance Industries Ltd. v. ACIT [IT Appeal No. 5769 (M) of 2013, dated 16-9-2015] where the Tribunal took a view that Wealth Tax' did not form part of Income Tax and therefore, could not be added back to arrive at Book Profits since the adjustment thereof was not envisaged by the statutory provisions. Therefore, we are of the opinion that the adjustment of impugned item as suggested by Ld. CIT was not legally tenable in law which leads us to inevitable conclusion that the omission to carry out the said adjustment did not result into any loss of revenue"

61. We find that the issue is squarely covered in favour of the assessee by the above quoted decision of the Tribunal. No contrary decision was cited before us by the ld. Departmental Representative during the course of hearing. We, therefore, respectfully following the above quoted decision of the Mumbai Bench of the Tribunal delete the addition of Rs.95,02,478/- and allow th s ground of appeal of the assessee.

62. Ground No. 4 of the appeal of the assessee is directed against the order of Commissioner of Income Tax (Appeals) in confirming the addition of Rs.69,11,134/- made by the Assessing Officer on account of wealth tax liability while computing the book profit u/s 115JB of the Act.

63. The Assessing Officer observed that the assessee has claimed deduction of Rs.69,11,134/- on account of wealth tax

liability while computing the book profit u/s 115JB of the Act. The Assessing Officer observed that deduction of wealth tax in computing book profit u/s 115JB of the Act is not acceptable and justified. Explanation 1 of Sub-section (2)(a) of Section 115JB of the Act provides that the net profit will be increased by income tax paid or payable and the provisions therefore and it also exclude wealth tax for addition which means it also exclude for deduction of wealth tax. Therefore, he added Rs.69,11,134/- on account of wealth tax deducted while arriving at the book profit u/s 115JB of the Act.

64. On appeal, the Commissioner of Income Tax (Appeals) confirmed the action of the Assessing Officer.

65. Before us, the Authorized Representative of the assessee argued and submitted that while calculating book profit u/s 115JB, the assessee claimed deduction of provision of wealth tax liability of Rs.69,11 134/-. It was submitted that u/s 115JB of the Act, wealth tax is not covered under Explanation 1 of Sub-section (2)(a) of Section 115JB of the Act. Thus, it does not affect the book profit and will not be added to calculate tax liability under MAT. For this reliance was placed on the decision of Hon'ble Bombay High Court in the case of CIT Vs Reliance Industries Ltd. (2019) 102 taxmann.com 142 and on the decision of Mumbai Bench of the Tribunal in the case of Rashtriya Chemicals & Fertilizers Ltd. Vs CIT (2018) 91 taxmann.com 104.

66. The ld. Departmental Representative relied on the orders of the lower authorities.

67. We find that the issue is no more *res integra.* The Hon'ble Bombay High Court in the case of CIT Vs Reliance Industries Ltd. (supra) has held as under:

> *"Para 4....In plain terms, clause (a) as noted above refers to amount of income tax paid or payable or the provision made therefor. The legislature has advisedly not included wealth tax in this clause. By no interpretative process, the wealth tax can be included in clause (a). The Revenue, further made a vague attempt to bring this item in clause (c) noted above. Clause (c) would include the amount set aside for provisions made for meeting liabilities other than ascertained liabilities. For applicability of this clause, therefore, fundamental facts would have to be brought on record which in the present case, the Revenue has not done. In fact, the entire thrust of the Revenue's argument at the outset appears to be on clause (a) which refers to the income tax which according to the Revenue would also include wealth tax. This question, therefore, is not required to be entertained"*

68. Respectfully following the above quoted decision of the Hon'ble Bombay High Court, we delete the addition of Rs.69,11,134/- and allow this ground of appeal of the assessee.

69. In the result, the appeal of the Revenue is dismissed and that of the assessee is allowed.

(Order pronounced in the Court on 8th day of May, 2019 at New Delhi)

Sd/-
(Bhavnesh Saini)
Judicial Member

Sd/-
(N. S. Saini)
Accountant Member

Dated: 08/05/2019
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR