आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 759/JP/2018
निर्धारण वर्ष/Assessment Year :2014-15

Assistant Commissioner of Income Tax, Circle-2, Jaipur.	बनाम Vs.	M/s Om Metal Infraproject Ltd., Om Tower, M.I. Road, Church Road, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAACO 8245 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/ Revenue by : Shri Varinder Mehta (CIT-DR)
निर्धारिती की ओर से/ Assessee by : Shri B.V. Maheshwari (CA)

सुनवाई की तारीख/ Date of Hearing : 08/08/2018
उदघोषणा की तारीख/ Date of Pronouncement : 23/08/2018

आदेश/ ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the revenue is directed against the order dated 28/03/2018 of ld. CIT(A)-I, Jaipur for the A.Y. 2014-15. The revenue has raised following grounds of appeal:

"1. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was justified in deleting the addition on account of employees contribution to ESI & PF without appreciating the fact the issue is pending before the Hon'ble Apex Court in CIT V/s M/s SBBJ in SLP (c) No. 16249/2014?

(ii) Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was justified in deleting the disallowance of Rs. 44,02,000/- u/s 14A r.w.r 8D of the I.T. Act when the assessee has

not suo moto made disallowance u/s 14A and therefore the case is distinguishable from the case of M/s Maxopp Investment Ltd. V/s CIT (SC)?

(iii) Whether on the facts and circumstances of the case and in law the Ld. CT(A) was justified in deleting the adjustment of Rs. 19,19,91,664/- made u/s 115JB with regard to the income of the JV?

(iv) Whether on the facts and circumstances of the case and in law the Ld. CIT (A) was justified in holding that clause (iic) inserted in Explanation 1 to sec. 115JB by Finance Act, 2015 is remedial and curative in nature whereas in the Act this clause is applicable from 01.04.2016 i.e. for A.Y. 2016-17?

The appellant craves the right to amend alter or add to any of the grounds of appeal given above."

2. Ground No. 1 of the appeal is regarding the disallowance made on account of Employees' Contribution towards ESI and PF as the payment was not made within the prescribed time limit as per the respective Acts, which was deleted by the ld. CIT(A).

3. We have heard the ld CIT-DR as well as the ld AR of the assessee and considered the relevant material on record. At the outset we note that this issue is covered by the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs SBBJ (2014) 363 ITR 70. We further note that an identical issue was considered and decided by this Tribunal in assessee's own case for the A.Y. 2009-10, 2010-11 and 2012-13. The

Hon'ble Jurisdictional High Court vide order dated 22/9/2017 has considered this issue in para 4.2 as under:

> "*4.2 The issue No. 2, the same is now covered by the decision of this Court in CIT Vs State Bank of Bikaner & Jaipur (2014) 363 ITR 70 against which SLP is preferred therefore, in view of the earlier decision taken by this Court, the issue is answered in favour of the assessee subject to SLP pending before the Supreme Court."*

Accordingly in view of the earlier decision of this Tribunal as well as the decision of Hon'ble High Court in assessee's own case, we do not find any error or illegality in the order of the ld. CIT(A) qua this issue. Hence, this ground of revenue's appeal stands dismissed.

4. Ground No. 2 of the appeals is with regard to disallowance made U/s 14A of the Income Tax Act, 1961 (in short the Act) read with Rule 8D of the Income Tax Rules, 1962 (in short the Rules), which was deleted by the ld. CIT(A). During the course of assessment proceedings, the Assessing Officer noted that the assessee has made investment of Rs. 44.02 crores in shares and income from same is exempt. Accordingly, the Assessing Officer proposed to make disallowance U/s 14A of the Act read with Rule 8D of the Rules. The Assessing Officer has computed the disallowance as per amended Rules 8D and equivalent to 1% of average investment amounting to Rs. 44.02 lacs.

5. The assessee challenged the action of the Assessing Officer before the ld. CIT(A) and submitted that the investment was an old investment in the sister concern of the assessee and no fresh investment was made in the year under consideration. Further the assessee has not used any borrowed fund for the purpose of investment in question and therefore, when there is no expenditure incurred by the assessee, no disallowance is called for U/s 14A of the Act. The assessee has also pleaded that there is no dividend income either accrued or received by the assessee, hence no disallowance is called for U/s 14A of the Act. The ld. CIT(A) after considering the fact that as per the assessee's balance sheet as on 31/3/2014, the assessee was having interest free fund of Rs. 513.45 crores, which was much more than the investment. Accordingly, following the various decisions on the point, the ld. CIT(A) has deleted the disallowance made by the Assessing Officer.

6. Before us, the ld DR has submitted that the predominant purpose of investment is not relevant for the purpose of disallowance U/s 14A of the Act as held by the Hon'ble Supreme Court in the case of M/s Maxopp Investment Ltd. V/s CIT 402 ITR 640. The ld DR has submitted that the Assessing Officer has computed disallowance as per clause (ii) of Rule 8D, which provides disallowance equivalent to 1% of the average investment.

7. On the other hand, the ld AR of the assessee has submitted that the assessee's own interest free fund comprising of share capital and reserve and surplus was Rs. 513.45 crores as on 31/3/2014 whereas no fresh investment was made by the assessee during the year under consideration for which the provisions of Section 14A of the Act can be applied. The total investment is in the subsidiary/sister concerns of the assessee and therefore, in absence of dividend accrued or received by the assessee, no disallowance can be made U/s 14A of the Act. The ld AR has relied upon the decision of Hon'ble Gujarat High Court in the case of CIT Vs Gujarat State Fertilizers & Chemicals Ltd. (2013) 217 Taxman 343 (Guj) as well as the decision of Hon'ble Bombay High Court in the case of Godrej & Boycee Manufacturing Co. Ltd. Vs. CIT 328 ITR 81, which has been upheld by the Hon'ble Supreme Court. Thus, the ld AR has submitted that it is settled proposition of law that there cannot be any disallowance U/s 14A of the Act when the assessee is having interest free sufficient funds and no expenditure has been incurred by the assessee in respect of the investment in question.

8. We have heard the rival submissions as well as the relevant material on record. We note that the Assessing Officer has given details of investment which was considered as exempt for the purpose of

disallowance U/s 14A of the Act. The Assessing Officer has given the details as opening investment and closing investment of some figure of Rs. 44.02 crores. Thus, it is admitted fact that there was no fresh investment during the year under consideration falling in the category of exempt investment. It is also not in dispute that the assessee has neither received any dividend nor any dividend accrued or due on the investment in question which is in the sister concerns of the assessee. Thus, when no dividend was received by the assessee during the year under consideration and also no fresh investment was made during the year then no expenditure has been incurred by the assessee during the year under consideration except the interest expenditure if any for the purpose of investment. Since the investment in the sister concerns are old one, therefore, an identical issue was considered and decided by this Tribunal in assessee's own case for the earlier assessment years including the A.Y. 2012-13 which was challenged by the revenue before the Hon'ble Jurisdictional High Court. The Hon'ble High Court vide order dated 22/8/2017 in DBIT No. 202 & 204/2017 has considered and decided this issue in para 4.3 and 4.4 as under:

> "4.3. The issue No.3 is regarding 14A. Now the issue is governed by the decision of Supreme Court the case of Godrej & Boyce Manufacturing

Company Limited vs. Deputy Commissioner of Income Tax, Mumbai & Anr. reported in 394 ITR 449 wherein it has been held as under:-

> "36. Section 14A as originally enacted by the Finance Act of 2001 with effect from 1.4.1962 is in the same form and language as currently appearing in Sub-section (1) of Section 14A of the Act. Sections 14A (2) and (3) of the Act were introduced by the Finance Act of 2006 with effect from 1.4.2007. The finding of the Bombay High Court in the impugned order that Subsections (2) and (3) of Section 14A is retrospective has been challenged by the Revenue in another appeal which is presently pending before this Court. The said question, therefore, need not and cannot be gone into. Nevertheless, irrespective of the aforesaid question, what cannot be denied is that the requirement for attracting the provisions of Section 14A(1) of the Act is proof of the fact that the expenditure sought to be disallowed/deducted had actually been incurred in earning the dividend income. Insofar as the Appellant-Assessee is concerned, the issues stand concluded in its favour in respect of the Assessment Years 1998-1999, 1999-2000 and 2001-2002. Earlier to the introduction of Subsections (2) and (3) of Section 14A of the Act, such a determination was required to be made by the Assessing Officer in his best judgment. In all the aforesaid assessment years referred to above it was held that the Revenue had failed to establish any nexus between the expenditure disallowed and the earning of the dividend income in question. In the appeals arising out of the assessments made for some of the assessment years the aforesaid question was specifically looked into from the standpoint of the requirements of the provisions of Subsections (2) and (3) of Section 14A of the Act which had by then been brought into force. It is on such consideration that findings have been recorded that the expenditure in question bore no relation to the earning of the dividend income and hence the Assessee was entitled to the benefit of full exemption claimed on account of dividend income.
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> 37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Subsections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the Assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a

satisfaction in the Assessing Officer that having regard to the accounts of the Assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the Assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable.

38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-2003, to hold that the claims of the Assessee that no expenditure was incurred to earn the dividend income cannot be accepted and why the orders of the Tribunal for the earlier Assessment Years were not acceptable to the Assessing Officer, particularly, in the absence of any new fact or change of circumstances. Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received. That any part of the borrowings of the Assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (Rs. 270.51 crores as on 1.4.2001 and Rs. 280.64 crores as on 31.3.2002) remains unproved by any material whatsoever. While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. In this regard we may remind ourselves of what has been observed by this Court in Radhasoami Satsang v. Commissioner of Income Tax (1992) 193 ITR (SC) 321 [At Page 329].

We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

4.4. In that view of the matter, the issue is required to be answered in favour of the assessee and against the department."

Accordingly, when the disallowance made by the Assessing Officer in the earlier year has been deleted by this Tribunal and the decision of this Tribunal has been confirmed by the Hon'ble Jurisdictional High Court then in absence of any fresh investment or dividend received by the assessee during the year under consideration, the issue is covered by the decision of this Tribunal as well as the decision of Hon'ble Jurisdictional High Court in assessee's own case. Hence, we do not find any error or illegality in the order of the ld. CIT(A) qua this issue and this ground of revenue's appeal sands dismissed.

9. Grounds No. 3 and 4 of the appeal are regarding the addition made by the Assessing Officer on account of adjustment made in the book profit computed U/s 115JB of the Act in respect of share of the assessee in the income of the joint venture. The Assessing Officer noted that the assessee deducted a sum of Rs. 37,60,20,402/- as share of profit from OMIL & JSC (JV) from the profits of the assessee as per Schedule VI of the I.T. Act. The Assessing Officer was of the view that the said share in the profit of joint venture is not deductible as per the provisions of Section 115JB of the Act. The Assessing Officer noted that as per explanation to Section 115JB, only income which is exempt as per the provisions of Section 10 of the Act and credited to the P&L account, shall

be reduced while computing the book profit. Though the amendment has been brought to the provisions of Section 115JB under clause (iic) of explanation (1), however, the said amendment is inserted by the Finance Act, 2015 w.e.f. 01/4/2016 and therefore, the same is not applicable for the year under consideration. The Assessing Officer accordingly, made an addition of the said amount of Rs. 19.19 crores.

10. The assessee challenged the action of the Assessing Officer before the ld. CIT(A) and submitted that the amendment brought in the provisions of Section 115JB by inserting Clause (iic) to explanation (1) is remedial in nature and shall have retrospective effect. The assessee relied upon the decision of Mumbai Benches of the Tribunal in the case of M/s Goldgerh Finance Pvt. Ltd. Vs ACIT, 78 taxmann.com 123. The ld. CIT(A) deleted the addition made by the Assessing Officer in the book profit by following the decision of Mumbai Benches of the Tribunal.

11. Before us, the ld CIT-DR has submitted that when the amendment was specifically inserted w.e.f. 1/4/2016 then the same shall not have a retrospective effect or application which is not the intention of the legislature. He has relied upon the order of the Assessing Officer and submitted that the Assessing Officer has relied upon the decision of Hyderabad Benches of the Tribunal. Hence, the ld CIT-DR has contended

that when the share in the income of the joint venture is not exempt as per the provisions of Section 10 of the Act then as per existing provisions of Section 115JB of the Act, the same amount of income being share in the joint venture cannot be excluded for the purpose of computing of book profit and MAT liability of the assessee.

12. On the other hand, the ld AR of the assessee has submitted as under:-

> This is matter relating to tax payable U/s 115JB : that is called Minimum Alternative Tax on Book Profit of the Company. For the purpose of book profit, the Company has to prepare its Profit & Loss A/c as per Schedule VI of the Companies Act, 1956 and if the taxable income is less than 10% of its book profit shall be deemed the total income of assessee and tax payable by the assessee on such income shall be amount of Income Tax @ 18%. In relation to the AY 2014 -15, the Company received share of profit from a joint venture firm/ JV called OMIL-JSC-JV and in the case of that entity which is separately assessed, the entire amount made taxable @ maximum marginal rate and company got share of profit was received after duly taxed in the said JV that the share of profit which is received by OMIL and affected full tax, was not included in the calculation of book profit of the Company nor made a part of Profit & Loss Account since it was not distributed by the JV.
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> That from the above amendment in Sec. 115JB it is clarified that the Share of AOP which is subjected to tax U/s 86 at maximum marginal rate, shall be excluded from the total income of the Assessee for MAT U/s 115JB. It gives strength to the view that once the tax has been paid at the maximum

marginal rate, then on such income there will be no other tax (i.e. double tax), thus this amendment has clarified the provisions of 115JB. We also draw your kind attention on the object of taxability of income in India U/s 14(1) of Act 22 and U/s 86 of Act, 1961, it is specifically mentioned that for any income wherever it is found, tax is to be collected at the earliest possible stage. But the tax is not levied again on one passage of the money in the form of one sort of income. Thus, when a group of persons is taxed as the income of the group or otherwise, it would be double taxation. A member of family, firm or association is not liable to tax again in respect of share received by him out of the income of the assessable unit to which he belongs to. That is the provision made by this clause and Sec. 86 are to prevent the state from taxation twice over (CIT Vs. Bhagwati 15 TTR 409. 414; CIT Vs. Guan Manjuri 13 ITR 55, 63; Vedathanni Vs. CIT 1 ITR 70: Kanhaiyalal Vs. CIT 9 ITR 70). As such when any income has already been subject to full rate of tax, then it cannot be taxed twice and, therefore, the share of profit from the JV was received after paying tax at maximum marginal rate, therefore, it was not considered in income even for MAT calculation also. In this case we submit that no income can be taxed twice as referred above and, therefore, there cannot be of any application of Sec. 115JB in the case of share of profits received from the JV firm.

We also submit that as per provisions of Sec. 86, the share of a member of an association of persons or body of individuals in the income of the association, Income tax shall not be payable by the assessee in respect of his share in the income of the association or body computed in the manner provided in Sec. 67A. Sec. 67A, which is reproduced here, states that if the share of the AOP members is determinate then the income is not taxed in the hands of the APO, then it will be taxed in the hands of AOP members on their share in accordance with the heads of income.

He has relied upon the decision of Hon'ble Supreme Court in the case of CIT Vs. Vatika Township P. Ltd. (2014) 367 ITR 466 (SC) as well as the decision of Mumbai benches of the Tribunal in the case of M/s Goldgerg Finance Pvt. Ltd. Vs ACIT (supra).

13. We have heard the rival submissions as well as the relevant material on record. The Assessing Officer has rejected the contention of the assessee that the share of profit from AOP/Joint Venture shall be excluded for the computation of book profit U/s 115JB of the Act. The relevant finding of the Assessing Officer are as under:

> *I have carefully considered the submission of the assessee and find the same not acceptable in view of the following reasons:*
>
> *1) In the instant case the share of profit from the joint venture company represent the share of profit from AOP. As per section 10(2 A), only the share of profits from a firm governed by the partnership Act is excluded from computation of total income. In computing the book profit also the share of profits from the firm would have excluded in view of explanation (ii) to sec. 115JB. But the share of profits from AOP which may be exempt from taxation in the hands of the members by the virtue of section 86, cannot be excluded while the computing the book profits of the members of AOP, under any of the explanation under sec. 115JB of the Act.*
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> *2) Here, it is pertinent to mention that the AOP and Partnership Firm are very much distinguishable in nature.*

3) *Further, the ITAT Bench, Hyderabad in the case of ACIT Circle Hyderabad V/s Seenaiah & Co. Projects Ltd Hyderabad has held that the adjustments have to be made only on the basis of explanation contained under section 115JB of the Act and the explanations of the provisions are clear that no such adjustment as made by the assessee i.e. reduction of profit from JV is allowable under eyes of law.*

4) *Moreover, clause (iic) has been inserted in Explanation 1 below sub-section (2) of section 115JB by the finance Act 2015 w.e.f. 01.04.2016 (i.e. A.Y. 2016- 17). It is apparent that the amendment (to exclude share of the assessee in the income of an AOP on which no income tax is payable in accordance with the provision of section 86) has not been made applicable retrospectively. Hence* Rs. 37,60,20,402/- *as per profit from OMIL & JSC (JV) shall not be deductible in accordance with as per Part II & III of schedule VI and accordingly be added to the Book Profit.*

14. The assessee challenged the action of the Assessing Officer before the ld. CIT(A) and relied upon the decision of Mumbai Benches of the Tribunal in the case of M/s Goldgerg Finance Pvt. Ltd. Vs ACIT (supra). The ld. CIT(A) has decided the issue by holding as under:

(iv) I have duly considered the submissions of the appellant, assessment order and the material placed on record. The issue is relating to computation of book profit u/s 115JB of the Act viz a viz profit and loss account prepared by the appellant as per the provisions of Companies Act and the applicability of clause (iic) to Explanation 1 to section 115JB of the Act, which has been inserted by the Finance Act, 2015 w.e.f. 01.04.2016. In the assessment order, it has held by the AO that the said clause was applicable w.e.f. 2016- 17 i.e. it was not applicable to the year

under consideration and it was not made applicable retrospectively. It would be appropriate to reproduce clause (iic) to Explanation 1 to section 115JB as under:

> (iic) the amount of income, being the share of the assessee in the income of an association of persons or body of individuals, on which no income-tax is payable in accordance with the provisions of section 86, if any such amount is credited to the profit and loss account; or

(v) It may be mentioned that the issue under consideration has been considered by the Hon'ble ITAT, Mumbai in the case of Goldgerg Finance (P.) Ltd. Vs ACIT [2017] 78 taxmann.com 123 (Mumbai - Trib.)

> ……..
> ……..

(vi) It may be mentioned that in a number of judicial pronouncements, the case of Apollo Tyres Ltd. v. CIT [2002] 255 ITR 273/122 Taxman 562 (SC), has been distinguished. In these judgements, it has been observed that the object of Minimum Alternate Tax (MAT) provisions incorporated in Sec.ll5JB of the Act was to bring out real profit of companies and the thrust was to find out real working results of company. It was further observed that inclusion of receipt which are not in the nature of income in computation of book profits for MAT would defeat two fundamental principles, it would levy tax on receipt which was not in nature of income at all and secondly it would not result in arriving at real working results of company. Real working result could be arrived at only after excluding this receipt which had been credited to P&L a/c and not otherwise. The reliance is placed on the cases of JSW Steel Ltd. Vs ACIT [2017] 82 taxmann.com 210 (Mumbai - Trib.); Sicpa India (P.) Ltd. Vs DCIT [2017] 80 taxmann.com 87 (Kolkata - Trib.), Dy. CIT v. Binani Industries Ltd. [2016] 178 TTJ 658 and Hon’ble ITAT, Jaipur in the case of ACIT Vs Shree Cement Ltd. in ITA No. 614, 615 & 635/JP/2010 for AY 2004-05, 05-06 & 06-07.

(vii) In view of the above discussion and looking to the totality of facts and circumstances of the case, it is held that the Assessing Officer was not justifiedin not excluding profit of share of the appellant from its AOP while computing book profit u/s 115JB of the Act and thus, the AO is hereby directed to exclude the same while computing book profit u/s 115JB of the Act. "

Thus, it is clear that the ld. CIT(A) has given a finding on the issue by following the decisions of this Tribunal. We further note that the provisions of Section 86 of the Act contemplates that no income tax shall be payable by the assessee in respect of his share in the income of association of persons or body of individuals and such share in the association or body is computed in the manner provided U/s 67A of the Act. Though, the share of profit in the association of persons or body of individuals as envisaged U/s 86 as well as Section 67A of the Act is not liable to income tax, however, the same shall be included in the total income of the assessee for the purpose of determining the average marginal rate of tax in terms of Section 66 of the Act. The second proviso to Section 86 set out the exception in the case where no income tax is chargeable on the total income of the association of persons or body of individuals then the share of a member shall be chargeable to tax as part of his total income and the benefit of Section 86 shall not be available to the member of association or body.

15. For ready reference, we reproduce the provisions of Section 66, 67A and 86 of the Act as under:

"Section 66. In computing the total income of an assessee, there shall be included all income on which no income-tax is payable under Chapter VII [38][* * *].

Section 67A. (1) In computing the total income of an assessee who is a member of an association of persons or a body of individuals wherein the shares of the members are determinate and known [other than a company or a cooperative society or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any law corresponding to that Act in force in any part of India], whether the net result of the computation of the total income of such association or body is a profit or a loss, his share (whether a net profit or net loss) shall be computed as follows, namely :—

(*a*) any interest, salary, bonus, commission or remuneration by whatever name called, paid to any member in respect of the previous year shall be deducted from the total income of the association or body and the balance ascertained and apportioned among the members in the proportions in which they are entitled to share in the income of the association or body ;

(*b*) where the amount apportioned to a member under clause (*a*) is a profit, any interest, salary, bonus, commission or remuneration aforesaid paid to the member by the association or body in respect of the previous year shall be added to that amount, and the result shall be treated as the member's share in the income of the association or body ;

(*c*) where the amount apportioned to a member under clause (*a*) is a loss, any interest, salary, bonus, commission or remuneration aforesaid paid to the member by the association or body in respect of the previous year shall be adjusted against that amount, and the result shall be treated as the member's share in the income of the association or body.

(2) The share of a member in the income or loss of the association or body, as computed under sub-section (1), shall, for the purposes of assessment, be apportioned under the various heads of income in the same manner in which the income or loss of the association or body has been determined under each head of income.

(3) Any interest paid by a member on capital borrowed by him for the purposes of investment in the association or body shall, in computing his share chargeable under the head "Profits and gains of business or profession" in respect of his share in the income of the association or body, be deducted from his share.

Explanation.—In this section, "paid" has the same meaning as is assigned to it in clause (*2*) of section 43.]

Section 86. Where the assessee is a member of an association of persons or body of individuals (other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any law corresponding to that Act in force in any part of India), income-tax shall not be payable by the assessee in respect of his share in the income of the association or body computed in the manner provided in section 67A :

Provided that,—

(*a*) where the association or body is chargeable to tax on its total income at the maximum marginal rate or any higher rate under any of the provisions of this Act, the share of a member computed as aforesaid shall not be included in his total income;

(*b*) in any other case, the share of a member computed as aforesaid shall form part of his total income :

Provided further that where no income-tax is chargeable on the total income of the association or body, the share of a member computed as aforesaid shall be chargeable to tax as part of his total income and nothing contained in this section shall apply to the case.]

The co-joint reading of Section 66, 67A and 86 of the Act reveals that the Income tax shall be payable by the assessee in respect of his share in the income of association of persons or body or individuals computed in the manner provided in Section 67A subject to the condition that the total income of such association or body or person is not exempt from income tax. However, such share of member shall be included while computing the total income for the purpose of average marginal tax. The share of a partner in the total income of the firm is exempt as per provisions of Section 10(2A) of the Act and consequently is excluded from the total income of the partner and therefore, the said share shall be excluded while computing the book profit U/s 115JB of the Act as envisaged in clause (ii) of explanation (1) to the said Section. So far as second proviso to Section 86 of the Act is concerned, it refers to the association of

persons or body of individuals whose total income is exempt from income tax and therefore, in our view, the reference in second proviso to Section 86 is made to the association of persons or body of individuals whose total income is exempt U/s 10 of the Act and not otherwise. Once the share in the joint venture which is treated as share in the association of persons is not hit by the second proviso to Section 86 then the same is akin the share from the partnership firm. Thus to bring it to the parity of share in partnership firm, the amendment in Section 115JB of the Act vide Finance Act, 2015 was brought by inserting clause (iic) w.e.f. 1/4/2016. Therefore, the purpose and intention to bring the amendment is to remove the mischief or hardship of the assessee on MAT in respect of the income being share in the association of persons or body of individuals which is otherwise not subject to income tax in accordance with the provisions of Section 86 of the Act. The Mumbai Benches of the Tribunal in the case of M/s Goldgerg Finance Pvt. Ltd. Vs ACIT (supra) while dealing with this issue has held in para 10 and 11 as under:

10. We have heard the rival contentions and perused the relevant findings given in the impugned order. The addition of share income of AOP in the book profit has been made on the ground that the assessee itself has credited the share income from AOP in the P&L account and consequently the book profit has to be computed on the basis of amount shown in the P&L account. On a perusal of *Explanation* to Section 115JB specifically the second part dealing with exclusion/reduction from the book profit it can be seen that clause (ii) permits certain deduction from book profit with regard to the amount of income to which the provisions of sections 10, 11 or 12 applies if such amount has been credited to the P&L account. The said clause reads as under:—

> "the amount of income to which any of the provisions of section 10 [other than the provisions contained in clause (38) thereof] or section 11 or section 12 apply, if any such amount is credited to the profit and loss account; or"

Section 10 includes section 10(2A) also which provides for exemption of share income of partner from the partnership firm. Thus, if share income of partner is credited to the profit & loss account, then, *Explanation 1* to sec 115JB envisages its exclusion or deduction from book profit. However, there was no such enabling provision for the share income from the AOP which can be excluded from the computation of book profit. In order to extend this benefit and to provide remedial measures in the case of AOP also, a new clause has been inserted by the Finance Act, 2015 w.e.f. 1.4.2016, which reads as under:

> "(*iic*) the amount of income, being the share of the assessee in the income of an association of persons or body of individuals, on which no income tax is payable in accordance with the provisions of section 86 if any, such amount is credited to the profit and loss account; or"

The rationale behind this section has been explained in the Explanatory notes to the Finance Act, 2015 in the following manner:—

> "Rationalising the provisions of section 115JB
>
> The existing provisions contained in section 115JB of the Act provide that in the case of a company, if the tax payable on the total income as computed under the Act in respect of any previous year relevant to the assessment year commencing on or after 1st day of April, 2012, is less than eighteen and one-half percent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable for the relevant previous year shall be eighteen and one-half percent of book profit. This tax is termed as minimum alternate tax (MAT). *Explanation* below sub-section (2) of section 115JB provides that the expression "book profit" means net profit as shown in the profit and loss account prepared in accordance with the provisions of the Companies Act, or in accordance with the provisions of the Act governing a company as increased or reduced by certain adjustments, as specified in the section.
>
> *Section 86 of the Act provides that no income-tax is payable on the share of a member of an AOP, in the income of the AOP in certain circumstances. However, under the present provisions, a company which is a member of an AOP is liable to MAT on such share also since such income is not excluded from the book profit while computing the MAT liability of the member. In the case of a partner of a firm, the share in the profits of the firm is exempt in the hands of the partner as per section 10(2A) of the Act and no MAT is payable by the partner on such profits.*
>
> *In view of the above, it is proposed to amend the section 115JB so as to provide that the share of a member of an AOP, in the income of the AOP, on which no income-tax is payable in accordance with the provisions of section 86 of the Act, should be excluded while computing the MAT liability of the member under section 115JB of the Act. The expenditures, if any, debited to the profit loss account, corresponding*

to such income (which is being proposed to be excluded from the MAT liability) are also proposed to be added back to the book profit for the purpose of computation of MAT." [Emphasis added is ours]

This has been further explained and clarified by the CBDT Circular in the similar manner. From the reading of above clarification it is ostensible that, the background and intention behind for such an insertion of clause was that, in case of a partner of a firm, the share in the profit of the firm which is exempt in the hands of the partner in terms of section 10(2A), there were no liability to pay MAT by the partner on such profit. However, this benefit was lacking in the case of share of a member of an AOP where in certain circumstances was not taxable in hands of member in terms of section 86 were not excluded from the book profit while computing the MAT liability of the member. It was felt by the legislature that the share of member of an AOP on which no income tax is payable in accordance with the provisions of section 86 should be excluded while computing the MAT liability of the member u/s 115JB. It was further provided that expenditure if any debited to the P&L account corresponding to such income which is to be excluded from the MAT liability shall be added back to the book profit for the purpose of computation of MAT. The intention of the legislature which can be gauged by the Explanatory notes to the amending Act, was to provide similar remedy which was applicable to the partners whose share income from the profit of the firm was not liable for MAT. If a provision has been brought to extend the benefit to certain class of assessees which was earlier applicable to other class of assessees on a similar circumstances and is remedial in nature, then, the same has to be reckoned as retrospective. It is quite a trite proposition that explanatory Act which is curative in nature or any remedial statute is brought in the statute either to remedy unintended consequence or to provide benefit which is applicable to particular class of assessee and is extended to other class of assessee, then, on reasonable interpretation it should be declared as retrospective in operation. In our opinion, if an amendment in law has been brought by the legislature in the statute which is curative in nature, to avoid unintended consequence and to provide similar benefit to other class of assessee, then, it has to be treated as retrospective in nature even though it has not been stated specifically by the amending Act. This proposition find strong support from the judgments of the Hon'ble Supreme Court in the case of *Allied Motors (P.) Ltd.* (*supra*) and in the case of *Alom Extrusions Ltd.* (*supra*). The Hon'ble Apex Court while interpreting the proviso to section 43B brought in the statute with a particular date was treated as curative and was held to be applicable retrospectively. The relevant observation of the Hon'ble Supreme Court in the case of *Alom Extrusions Ltd*. following the ratio of in the case of *Allied Motors (P.) Ltd*. (*supra*) reads as under:—

"Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by the Parliament only w.e.f. 1st April, 2004, would become curative in nature, hence, it would apply retrospectively w.e.f. 1st April, 1988 (i.e. the date on which the related legal provision was introduced). Secondly, it may be noted that, in the case of *Allied Motors (P.) Ltd.* v. *CIT* [1997] 139 CTR (SC) 364: [1997] 224 ITR 677 (SC), the scheme of s. 43B of the Act came to be examined. In that case, the question which arose for determination was, whether sales-tax collected by the assessee and paid after the

end of the relevant previous year but within the time allowed under the relevant sales-tax law should be disallowed under s. 43B of the Act while computing the business income of the previous year? That was a case which related to asst yr. 1984-85. The relevant accounting period ended on 30th June, 1983. The ITO disallowed the deduction claimed by the assessee which was on account of sales-tax collected by the assessee for the last quarter of the relevant accounting year. The deduction was disallowed under s. 43B which, as stated above, was inserted w.e.f. 1st April, 1984. It is also relevant to note that the first proviso which came into force w.e.f. 1st April, 1988 was not on the statute book when the assessments were made in the case of *Allied Motors (P.) Ltd.* (*supra*). However, the assessee contended that even though the first proviso came to be inserted w.e.f. 1st April, 1988, it was entitled to the benefit of that proviso because it operated retrospectively from 1st April, 1984, when s. 43B stood inserted. This is how the question of retrospectivity arose in *Allied Motors (P.) Ltd.* (*supra*). This Court, in *Allied Motors (P.) Ltd.* (*supra*) held that when a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give the section a reasonable interpretation, it could be read retrospective in operation, particularly to give effect to the section as a whole. Accordingly, this Court in *Allied Motors (P.) Ltd.* (*supra*), held that the first proviso was curative in nature, hence, retrospective in operation w.e.f. 1st April, 1988. It is important to note once again that, by Finance Act, 2003 not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgment in *Allied Motors (P.) Ltd.* (*supra*) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003, will operate retrospectively w.e.f. 1st April, 1988 (when the first proviso stood inserted). Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, to the above extent, operated prospectively. Take an example in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March (end of accounting year) but before filing of the Returns under the IT Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under s. 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under s. 43B of the Act. In our view, therefore, Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988 when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate w.e.f. 1st April, 2004. However, the

matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003."

11. Thus, we are of the opinion that the clause (iic) inserted in *Explanation 1* to section 115JB by the Finance Act, 2015 is remedial and curative in nature as it was brought in the statute to provide similar benefit to the member of the AOP which was earlier applicable to the partner of the firm, therefore, it is to be reckoned as retrospective. This proposition can be viewed from another angle that, the amending Act had sought to bring parity between similar kind of situation faced by two class of assessees, where in one case, statute envisaged that if the income of the assessee is not taxable, that is, in case of partner the share income from the partnership firm, then it cannot be taxed as book profit under MAT liability. Similarly, in second case also, that is, in case of member of an AOP where no income-tax is payable on the share of a member of an AOP in certain situations in terms of section 86, should also not be brought to tax under MAT liability. The legislature by this amendment has thus removed this imparity between two classes of assessees so that mischief or prejudice caused to other class of assessees should be removed. The mischief which has been sought to be remedied is that the share income of the member of the AOP which was not taxable in terms of section 86 was getting taxed under MAT while computing the book profit. This was also never the purpose of section 115JB to tax any income or receipts which is otherwise not taxable under the Act. If the intention of legislature was always that income which is not taxable under the normal provisions of the Act should not be brought to tax under MAT also, then it has to be interpreted that such a benefit has to be given to all and where the income is otherwise not taxable under the Act cannot be brought to be taxed under MAT. Therefore, any remedy brought by an amendment to remove the disparity and curb the mischief has to be reckoned as curative in nature and hence, is to be held retrospectively. Accordingly, this issue is allowed in favour of the assessee.

Thus, it was held that the amendment was brought to remove the hardship and bring the parity of the income being share in the association of persons or body of individuals, which is otherwise not liable to tax as per the provisions of Section 86 of the Act, the same shall have retrospective application. In absence of any contrary precedent brought to our notice and to maintain the rule of consistency, we follow the decision of Mumbai Benches of the Tribunal in the case of M/s Goldgerg Finance Pvt. Ltd. Vs ACIT (supra). Accordingly, we do not find any error

or illegality in the order of the ld. CIT(A) qua this issue. Hence, this ground of revenue's appeal stands dismissed.

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

Order pronounced in the open court on 23/08/2018.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(विजय पाल राव)
(VIKRAM SINGH YADAV)	(VIJAY PAL RAO)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 23rd August, 2018
*Ranjan
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- The ACIT, Circle-2, Jaipur.
2. प्रत्यर्थी/ The Respondent- M/s Om Metal Infraproject Ltd., Jaipur.
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त(अपील)/The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 759/JP/2018)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar