INCOME TAX: When a particular receipt is exempt from tax under Income tax law, then same cannot be considered for purpose of computation of book profit under section 115JB of the Income-tax Act 1961

[2019] 112 taxmann.com 55 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'E'

Assistant Commissioner of Income-tax

v.

JSW Steel Ltd.

PAWAN SINGH, JUDICIAL MEMBER
AND G. MANJUNATHA, ACCOUNTANT MEMBER
IT APPEAL NO. 156 (BANG.) OF 2011
CO NO. 59 (MUM.) OF 2012
[ASSESSMENT YEAR: 2006-07]
NOVEMBER 29, 2019

Kanchun Kaushal and **Ms. Hirali Desai** *for the Appellant.* **Samatha Mullamudi** CIT (DR) *for the Respondent.*

ORDER

G. Manjunatha, Accountant Member - This appeal filed by the revenue and cross objection filed by the assessee is directed against order of the Ld. Commissioner of Income tax (Appeals)-1, Bangalore, dated 19/11/2010 for the AY 2006-07. Since, the facts are identical and issues are common, the appeal filed by the revenue and cross objection filed by the assessee is heard together and are disposed-off, by this consolidated order.

ITA.No.156/Bang/2011:-

2. The revenue has raised the following grounds of appeal

1. *The order of the learned CIT (Appeals), in so far as it is prejudicial to the interest of the revenue, is opposed to law, facts and circumstances of the case.*
2. *The learned CIT (Appeals) is not justified in directing the Assessing Officer to allow the depreciation of Rs 30,73,444 /- claimed on account of exchange loss incurred on cancellation of forward exchange contracts, without appreciating the reasons recorded by the Assessing Officer in the relevant assessment order.*
3. *The learned CIT (Appeals) has erred in not appreciating that the provisions of section 43A of the I.T Act, 1961 were not applicable as the losses arose from cancelled forward exchange contracts and not settled contracts, wherein payments relating to purchase of capital assets or payments towards loans taken for purchasing capital assets .were actually made.*
4. *The learned CIT (Appeals) was not justified in directing the Assessing Officer*

to allow depreciation of Rs.4,47,62,874/- in respect of foreign currency loss incurred on cancellation of forward exchange contracts on which depreciation was not allowed by the Assessing Officer respect of the assessment year 2005-06.

5. *The learned CIT (Appeals) was not justified in directing the Assessing Officer to allow depreciation of Rs. 6,81,21,607/- on the increased Written Down Value (WDV) of the assets, without appreciating the detailed reasons recorded in the relevant assessment order and the Assessing Officers analysis of the provisions of Explanation 2 and 3 below section 43(6) and the provisions of Section 72A of the I.T. Act, 1961.*
6. *The Ld. CIT(Appeals) was not justified in holding that the interest of Rs.40,68.488/-as business income and not under the head "Income from Other Sources", as held by the Assessing Officer.*
7. *The learned CIT (Appeals) has erred in not adjudicating on the issue involved in the appeal with reference to the facts and circumstances of the assessee's case and in following the Tribunal's order on the issue for the assessment year 1995-96 even though on further appeal, the Hon'ble Supreme Court had remanded the matter to the Hon'ble Karnataka High Court for fresh consideration.*
8. *The ld.CIT(Appeals) has erred in not taking into consideration the decision of [he Hon'ble Supreme Court in the case of M/s Tuticorin Alkali Chemicals & Fertilizers Ltd., Vs CIT reported in 227 ITR 172 while arriving at his findings.*
9. *The learned CIT (Appeals) was not justified in holing that the sales-tax incentives /concessions etc amounting to Rs.36,15.49,828/- as capital receipts, without appreciating the reasons recorded in the relevant assessment order by The Assessing Officer while treating The same as revenue receipts.*
10. *The learned CIT (Appeals) has erred in relying on the decisions in the cases of CIT v M/s Ponni sugars and Chemicals Ltd. S Others 30G ITR 392(SC) and DCIT vs. M/s Reliance' Industries Ltd., 68 ITD 273 (ITAT. Mumbai Bench) which are not applicable to the facts of the assessee's case.*
11. *The learned CIT(Appeals) has erred in holding that interest u/s 234B of the I.T.Act 1961 amounting to Rs,9,8494367/- attributable to the provision of Rs. 433,61,00,000/-for deferred ; which was inter-all a added to the net profit while commuting the book profit u/s 1l5JB of the act, 1961 on account of retrospective amendment of the provisions of section 115JB inserting clause (h) in Explanation 1 To Section 115JB of the I.T.Act,1961w.r.e.f 01. 4.2001.*
12. *The [earned CIT (Appeals) has failed to appreciate that interest u/s 234B is chargeable with reference to "assessed tax" as defined in Explanation 1 below section 234B{1) of the, I.T. Act, 1961 and the CIT (Appeals)'s finding that interest u/s. 234B is chargeable with reference to a pan of such "assessed tax" for the reasons mentioned in the appellate order, is clearly not in accordance with the relevant provisions of the I.T. Act, 1961.*
13. *The learned CIT (Appeals) has erred in not appreciating that his finding on the above mentioned issue is not in accordance with the ratio of the decisions of the Hon'ble Supreme Court in the cases of CIT vs. Central Provinces*

Manganese Ore Company Ltd reported in 160 ITR 961 and CIT v Anjum M.H. Ghaswala and others reported in 252 ITR 1.

14. *For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CJT(Appeals) may be reversed in so far as the above mentioned issues are concerned and that of the Assessing Officer be restored*

15. *The appellant craves leave to add, after, amend or withdraw all or any of the grounds that may be urged at the time of hearing of the appeal..*

3. The brief facts of the case are that the assessee is a public limited company which is engaged in the business of manufacturing and selling of pellets, hot/cold rolled coils/sheets, galvanized coils/sheets and plates and slag cement. The assessee has filed its return of income for AY 2006-07 on 30/11/2006, declaring the total income of Rs. 'Nil' under normal provision of Income Tax Act, 1961 and book profit of Rs. 960,77,05,749/- u/s 115JB of the I.T. Act, 1961. Subsequently, a revised return of income was filed on 31/03/2008, wherein the loss to be carried forward under the normal provision of the Act, was increased to be Rs. 10,45,47,550/- on account of disallowances of consumption of work rolls, additional depreciation on account of loss on forward contracts capitalized and additional deduction u/s 43B of the Act, on payment basis. The case was selected for scrutiny and the assessment has been completed u/s 143(3) of the I.T. Act, 1961 on 31/12/2008 and determined total income of Rs. 159,27,34,354/- under the normal provisions of the Act, and book profit of Rs. 1,297,87,51,517/- u/s 115JB of the I.T. Act, 1961. The assessee carried the matter in appeal before the first appellate authority. The Ld.CIT(A) for detailed reasons recorded in his appellate order, dated 19/11/2010 decided all issues in favour of the assessee . Aggrieved by the Ld.CIT(A) order, the revenue is in appeal before us and the assessee has filed cross objection on the issue, i.e where, the sales tax incentives is considered as capital receipt , the same should also not be considered while computing the book profits u/s 115JB of the I.T. Act, 1961.

4. Ground No.1 of revenue appeal is general in nature and does not require separate adjudication, and hence, the same is dismissed.

5. The first issue that came up for our consideration from ground No. 2 and 3 is disallowances of depreciation of Rs. 30,73,444/- on fixed assets due to increase in cost of assets on account of loss arising on cancellation of forward, foreign exchange contracts. The facts borne out from the records shows that during the previous year, the assessee had borrowed various foreign currency loans for the purpose of purchase of certain plant and machinery from outside India. For safeguarding its interest from foreign exchange fluctuations, the assessee has entered into forward contracts with authorized dealers for receiving foreign currency at the rates specified in contract, at future stipulated dates to enable repayment of installments of foreign currency loans. During the year under consideration, the said contacts were settled/cancelled resulting in a foreign exchange loss of Rs.2,04,89,627/-. In the original return of income, the assessee has omitted to adjust cost of the capital asset for loss on forward contract in terms of section 43A of the Act. But subsequently, the same was claimed in the revised return filed for the year under consideration. During the course of assessment proceedings, the Ld. AO rejected the claim of the assessee to adjust cost of asset on the ground that on cancellation of the forward contracts, no payments were actually made and the loss on cancellation of forward contract was not covered by section 43A of the Act, and accordingly, could not be added to the Written Down Value(WDV) of the assessee.

6. The Ld. DR submitted that the Ld.CIT(A) was erred in deleted additions made by the AO towards adjustment to cost of assets for loss arising on account of forward foreign exchange contracts without appreciating the fact that provision of section 43A of the I.T. Act, 1961 were not applicable as the losses arose from cancelled forward foreign exchange contracts are not settled and also payments relating to purchase of capital assets were actually not made.

7. The Ld. AR for the assessee, on the other hand submitted that this issue is covered in favour of the assessee by the decision of the ITAT, Bangalore bench in assessee's own case for AY 2005-06 in ITA No. 924/Bang/2009, where under identical set of facts the Tribunal held that loss arising on settlement/cancellation of forward foreign exchange contacts should be capitalized to the cost of fixed receipts.

8. We have heard both the parties and perused the material available on record along with case laws cited by the Ld. AR for the assessee. We find that the Tribunal in assessee's own case for AY 2005-06 in ITA No. 924/Bang/2009 had an occasion to consider an identical issue and by following the decision of Hon'ble Supreme Court in the case of *ACIT* v. *Elecon Engineering Co.Ltd*.322 ITR 20 held that since forward foreign exchange contracts were taken for acquiring capital assets, the profits/loss arising on settlement of such contracts had to be adjusted against the cost of the concerned capital asset in terms of section 43A of the Act, and depreciation was to be allowed on such adjusted value of the capital assets. The relevant findings of the Tribunal are as under:-

> *"6. We have considered the matter in detail. Section 4$A was inserted by Finance Act 1967 with, effect from 1st April, 1967. ft applies, as a result of change in the rats of exchange. There may be increase fir decreased in the liability of tin assesses in terms of Indian rupee. The east of assets procured in foreign exchange may increase or decrease. The crucial feature in law stated in sec. 43A till the amendment brought in bit Finance Act 2002 was that an assessee has to revalue the foreign exchange liability at the end of every previous year and provide for the increase or decrease as a result of foreign exchange fluctuation. These adjustments have to be made even in a case where payment was not actually made. The adjustments have to be made on the basis of the liability as on the last day of the previous year. This position of law continued till it was substituted by insertion of sec. 43A through Finance Act 2002 which brought a change with reference to the time of recognition of the liability for the purpose of adjusting the increase or decrease in the cost/ profit and loss account. For that purpose, the amendment made it dear that increase or decrease may be adjusted at the time of making payment. In other words, such adjustment can 6e mode only in the previous year in which the foreign account was settled by an assessee.*
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> *7. As far as the assessee's appeal is concerned, the amended law of section.43A applies. Now whether she assessee is entitled for claiming the loss on account of settlement of foreign exchange forward contract or not., has to be considered in light of the recent Judgment of the Hon'ble Supreme Court in the case of ACIT v ELKCON Engineering company Ltd.re reported m 322 ITR 20. The Hon'ble Court has considered the impact of sec.43A both before amendment and after amendment. The Court was intact examining the deductibility of Roll over premium in respect of foreign exchange forward contracts. The Court has held that whatever the foreign exchange loans were availed for securing capital assets, the decrease or increase would affect the capital asset. If the foreign exchange loan was acquired for working capital! or other revenue commitments, the fluctuation effect shall be adjusted in Revenue account. Till the amendment brought in by Finance Act 2002, this adjustment has to be made on yearly basis evaluating the position on the last day of the concerned previous year. Rut after the amendment, the adjustment shall be made on the actual payment or settlement of contracts and dues. This position has been made dear by the Hankie Court in the above case. The Hon'ble Court has further deliberated upon the capital nature and revenue nature of such adjustments arising out of foreign exchange fluctuation. Apart from the above general proposition of law, the Hon'ble Court further examined whether the Roll over premium in respect of foreign exchange forward contract is eligible for depreciation in the nature of expenditure to be added to the cost of the capital asset; of to be debited in the profit and loss account, if it is in [he Revenue account. If Roll over premium on forward contract by itself is held to be admissible as a deduction or adjustment. Then there is no doubt that the loss arises out of the*

forward contracts would be very much entitled for deduction or adjustment if it is is a loss.

8. We ore of the view that the issue raised by the assesses is squarely covered by the judgment of the. Hon'ble Supreme Court rendered in the case of ELHCON Engineering Ltd., 322 ITR 20.

9. In the present case, there is no dispute regarding the facts of the case as explained by She assessee that the foreign exchange contracts were made for the purpose of acquiring capital assets and, the forward contracts users settled during the previous year relevant to the assessment war under appeal. Therefore, the claim of the assessee to adjust for the lass of Rs. 397892211/- is legitimate.

10. As ***the settlement has resulted in loss to the above extent, the said amount needs to be added to the cost of the concerned capital assets. Depreciation shall be allowed on the enhanced value of the capital assets. This issue is decided in favour of the assessee."***

(emphasis supplied)

9. In this view of the matter and consistent with view taken by the coordinate bench in assessee own case for the earlier years, we are of the considered view that there is no error in the findings recorded by the ld.CIT(A), while deleting additions made towards disallowances of depreciation on fixed assets on account of adjusted cost of fixed assets towards loss arose on account of cancellation/settlement of forward foreign exchange contracts. Hence, we are inclined to uphold finding of the Ld.CIT(A) and reject ground taken by the revenue.

10. The next issue that came up for our consideration from ground No.4 of revenue appeal is disallowances of depreciation of Rs.4,47,62,874/- on loss arising on cancellation of forward foreign exchange contracts during the assessment year 2005-06. In this ground, the assessee seeking consequential depreciation for the current year on loss that arising on the forward foreign contracts settled/ cancellation in the previous year relevant assessment year 2005-06. We find that ITAT, Bangalore bench in assessee's own case held that such loss arising on forward foreign exchange contracts should be added to the cost of asset in terms of section 43A of the Act, and consequently, depreciation should be allowed on the same. Accordingly, the assessee is seeking consequential depreciation for the current year on such adjusted cost of assets as, which the Ld. AO has failed to grant. The Ld.CIT(A) after considering relevant facts has rightly directed the Ld. AO to allow consequential depreciation on fixed assets towards adjusted cost on account of loss arising on cancellation of forward foreign exchange contracts during the AY 2005-06. We do not find any error in findings of the Ld.CIT(A), and hence, we are inclined uphold findings of Ld.CIT(A) and reject ground taken by the revenue.

11. The next issue that came up for our consideration from ground No.5 of revenue appeal is allowances of depreciation of Rs. 6,81,21,607/- on increased WDV of assets transferred on amalgamation. The brief facts of the impugned dispute are that the assessee is in the business of steal manufacturing. In order to backward integrate its operations, the assessee had amalgamated with Euro Coke and Energy Private Limited (Euro Coke), Euro Ikon Iron and Steel Pvt.Ltd. (Euro Ikon) and JSW Power Private Limited (JPL) with effect from 1/04/2005. For the financial year 2004-05 to relevant AY 2005-06, these companies filed their return of income declaring loss of Rs.37,98,45,412/- (Euro coke) and Rs.42,35,06,813/- (Euro Ikon) after claiming depreciation. M/s JPL had not commenced business activities until AY 2005-06. The assessment of Euro Coke and Euro Energy was completed after allowing normal depreciation, however due to insufficient profits, the aforesaid depreciation could be absorbed in AY 2005-06 to the extent of Rs. 5,85,045/-, in case of Euro coke and of Rs. 13,12,05,089/- in case of Euro Ikon. For better understanding, the relevant details of actual depreciation and depreciation actually allowed during the AY 2005-06 is as follows.

5.4 The assessment of Euro Coke and Euro Energy was completed after allowing normal depreciation and computing the written down value of assets of both the companies as an 31 March 2005 as under:

Particulars	Euro Coke	Euro Ikon	Total
Actual Cost /WDV as on 31.03.2004	1,90,78,08,292	2,81,67,54,825	
Less: Normal Depreciation	(23,79,92,360)	(34,79,81,822)	
WDV as on 31.03.2005	1,66,98,12,932	2,46,87,73,003	4,13,85,935

5.5 However, due to insufficient profits, the aforesaid depreciation could be absorbed in AY 2005-06 only to the extent given below

Particulars	Reference	Euro Coke	Euro Ikon
Normal depreciation as per Return of Income	A	23,79,92,360	34,7981,822
Depreciation 'actually allowed" to the extent of available profits in AY 2005-06	B	5,85,045	13,12,05,089
Balance depreciation not allowed /Unabsorbed depreciation	C	23,74,07,315	21,67,76,733

12. In the return of income, filed by the assessee for the year of amalgamation i.e AY 2006-07, the assessee has computed WDV, in respect of the assets transferred by the amalgamating companies by reducing the amount of deprecation ("actually allowed") in AY 2005-06 in accordance with the provisions of Explanation (2) to section 43(6) of the Act,1961. However, the Ld. AO observed that closing WDV of the amalgamating company becomes the WDV in the hands of amalgamated company and accordingly determined the WDV of assets acquired on amalgamation after considering normal depreciation allowed on assets of two amalgamating companies and consequently, disallowed excess depreciation of Rs. 6,81,27,607/- (being 15% of the difference in WDV of Rs. 45,41,84,048/-).

13. The Ld. DR submitted that the Ld.CIT(A) was not justified in directing the AO to allow depreciation on the increased written down value of the assets, without appreciating the detailed reasons recorded in the relevant assessment order and the AO analysis of the provision of Explanation (2) and (3) to section 43(6) and the provision of section 72A of the I.T. Act, 1961.

14. The Ld. AR for the assessee, on the other hand strongly supporting order of the Ld.CIT(A) submitted that the Ld.CIT(A) has rightly appraised the facts in light of Explanation (2) and (3) to section 43C of the Act, to come to the conclusion that WDV of amalgamated companies shall be taken after allowing depreciation actually allowed without considering normal depreciation allowable on such assets. The Ld. AR, further submitted that the provisions relating to computation of WDV of assets transferred on amalgamation or specifically stated under the Explanation (2) to section 43(6) of the Act. Explanation 3 to section 43(6), which works under a deeming fiction, cannot be relied upon to import the meaning of the word 'actually allowed', since the assessee company is not being able to carry forward, the unabsorbed depreciation in terms of section 32(2) of the Act. Accordingly, Explanation (2) to section 43(6) has to be read independently and the words actually allowed have to be ascribed their natural meaning. The Ld. AR further submitted that assessee has computed the WDV of assets so transferred on amalgamation in accordance with the provisions of explanation (2) to section 43(6) of the Act. Accordingly, if the depreciation is not fully absorbed in the preceding year in the case of the amalgamating companies, then, the unabsorbed depreciation will be added to the WDV of the amalgamating companies. In this regard, he relied upon various judicial precedents including the decision of Hon'ble Bombay High Court in the case of *CIT* v. *Silical Metallurgic Ltd.* [2010] 324 ITR

29.

15. We have heard both the parties, perused the material available on record and gone through orders of the authorities below along with certain case laws cited by both the parties. The only dispute under consideration is whether, the written down value of the assets transferred on amalgamation was to be computed in the hands of the amalgamated company considering the unabsorbed depreciation, i.e depreciation not given effect to, in the assessment of the amalgamating companies. The provisions of Explanation (2) and (3) to section 43(6), which explains what, will be the WDV of assets in the hands of amalgamated company, in the cases of amalgamation. Similarly, section 32(2), which provides for carry forward of unabsorbed depreciation and section 72A, which provides for carry forward of business loss and unabsorbed depreciation in the hands of the amalgamated company in the cases of amalgamation. If you go through, Explanation (2) to section 43(6), it is very clear that the word used therein speaks about depreciation 'actually allowed' in relation to said preceding year in case of amalgamated company. Thus, in view of Explanation (2) to section 43(6) of the Act, the WDV in the hands of the assessee as on 01/4/2005 (appointed date) would be the WDV of block of assets as on 31/03/2004 as reduced by the depreciation 'actually allowed' during the said preceding year i.e FY 2004-05 in the hands of the amalgamating companies. Accordingly, the WDV of assets transferred on amalgamation in the hands of the amalgamating company has to be necessarily computed in terms of Explanation (2) to section 43(6) of the Act. As can be seen from the above, in terms of Explanation (2) to section 43(6), while computation the WDV on amalgamation, depreciation actually allowed has to be reduced.

However, the case of the AO is that Explanation (3) has to be read into Explanation (2) and accordingly, the WDV of assets transferred on amalgamation has to be computed after reducing the total depreciation in the hands of the amalgamated companies. Accordingly, it is necessary to read and comprehend as to why provision of section (3) to section 43(6) of the Act, cannot be applied in the facts of the present case. Explanation (3) to section 43(6) states that any depreciation, which is carry forward u/s 32(2) of the Act, shall be deemed to be depreciation actually allowed. As can be seen from the above, Explanation (2) and (3) to section 43(6) of the Act, both used the term depreciation actually allowed. However, as against Explanation (2), Explanation (3) to section 43(6) of the Act, operates as a deeming fiction, wherein depreciation which is carried forward u/s 32(2) of the Act, is deemed to have been actually allowed. In our considered view, Explanation (3) being a deeming fiction, operates only in a particular conditions and in order to remove an anomaly, which otherwise would have been created under the other provisions of the Act. It thus follows that while interpreting Explanation (3), one needs to be aware of the intention of the statute. These provisions along with their intent have been explained elaborately by the Hon'ble Bombay High Court, in the case of Hindustan Petroleum Corporation Limited (supra), where it was held that explanation (3) to section 43(6) of the Act, seeks to find certain anomalies which would have otherwise exists under the Act. The intention of explanation (3) is not a simply to nullify the provision of explanation (2) to section 43(6), as has been read by the Ld.AO. This is also evident from the fact that the Explanation (2) has been introduced from 01.4.1988, whereas Explanation (3) was always on statute, which clearly implies that Explanation (3), which is a legal/deeming fiction, was not introduced to nullify the impact of Explanation (2) of the Act. Accordingly, in terms of Explanation (3) to section 43(6), in the present case, unless the unabsorbed depreciation of the amalgamating companies is carried forward in the hands of the amalgamated company u/s 32(2) of the Act, Explanation (3) cannot be read into Explanation (2) to simply conclude that depreciation 'actually allowed' also includes unabsorbed depreciation.

16. The meaning of the term actually allowed is interpreted by the Hon'ble Supreme Court, in the case of *CIT* v. *Doom Dooma India Ltd.* [2009] 310 ITR 392 (SC), wherein it has been held that, the term 'depreciation actually allowed' means depreciation of which the assessee has received effective advantage or benefit and not merely, which is notionally allowed or which is allowable. Accordingly,

the words actually allowed under Explanation '(2) only mean depreciation, which has been given effect to, in the computation of income of the amalgamating companies and will not include unabsorbed depreciation. This legal proposition is supported decision of Hon'ble Bombay High Court, in the case of *CIT* v. *Silical Metallurgic Ltd.* [2000] 324 ITR 29 Mad HC). Where, the Hon'ble Court held that the statutory provision makes it clear that the WDV of the asset would be the actual cost of the assets of the assessee less depreciation allowed to the company. Any unabsorbed depreciation, which was not set off for carry forward could not be taken into account. A similar view was taken by the Bombay High Court in the case of *CIT* v. *Hindustan Petroleum Corporation Ltd.* (*supra*). Further, it is relevant to note that a Special Leave Petition filed against the aforesaid High Court decision has been dismissed by the Hon'ble Supreme Court on merits in SLP (C) No. 19054 of 2008(SC). A similar proposition has been laid down by the Hon'ble Madras High Court, in the case of *EID Parry India'*s v. *CIT* (ITA.No. 1311 & 1312/2005) (Mad HC).

17. In the present case, the Ld. AO has alleged that the unabsorbed depreciation of the amalgamating companies will be carried forward in the hands of the amalgamating companies in terms of section 72A of the Act. We find that in all above decisions of various high courts, we noted that the applicability of provision of section 72A had been considered and even after the courts held that deprecation actually allowed shall not include any unabsorbed depreciation. Therefore, we are of the considered view that the WDV in the hands of the amalgamated company was to be calculated without considering the unabsorbed depreciation of the amalgamating companies, for which set off was never allowed. The Ld.CIT(A) after considering relevant facts has rightly deleted additions made by the Ld.AO. Hence, we are inclined to uphold the findings of Ld.CIT(A) and reject ground taken by the revenue.

18. The next issue that came up for our consideration from ground No. 6 to 8 of revenue appeal is treatment of interest of Rs.40,68,488/- as business income instead of income from other sources. During the year under consideration, the assessee earns certain interest income on fixed deposits with banks. The fixed deposits were kept with banks in the normal course of business for extending guarantee to the Government authorities, in respect of disputed taxes, duties and letter of credits opened for import of capital goods, etc. The assessee has considered the interest income under the head income from business. The Ld. AO rejected the claim of the assessee and following the decision of the Hon'ble Supreme Court, in the case of *Tuticorin Alkali Chemicals & Fertilizers* v. *CIT* [1997] 227 ITR 172 (SC) held that the said interest income was taxable under the head 'Income from other sources. The Ld.AO acknowledged the fact that the said issue was covered in favour of the assessee by the decision of the Bangalore Tribunal for AY 1995-96. However, he chose not to follow the same, since the said decision of the Bangalore Tribunal was set aside by the Hon'ble Karnataka High Court.

19. The Ld. DR submitted that the Ld.CIT(A) was erred in following the Tribunal order on the issue for AY 1995-96, even though, on further appeal the Hon'ble Supreme Court had remanded the matter to the Hon'ble Karnataka High Court for fresh consideration. The Ld. DR, further submitted that the Ld.CIT(A) had erred in not taking into consideration, the decision of the Hon'ble Supreme Court, in the case of *Tuticorin Alkali Chemicals & Fertilizers Ltd*. v. *CIT* (*supra*), while arrive at his findings.

20. The Ld.AR for the assessee submitted that this issue is squarely covered in favour of the assessee by the decision of Hon'ble Karnataka High court, in assessee's own case for AY 1995-96. The Ld. AR, further submitted that although, the Hon'ble Karnataka High Court set aside the aforesaid order of the ITAT in first round of litigation, but on second round of litigation as per the directions of Hon'ble Supreme Court, allowed relief to the assessee and direct the Ld.AO to assess interest income under the head income from business. The Ld.CIT(A) after considering necessary facts has rightly directed the Ld.AO to consider interest income under the head income from business.

21. We have heard both the parties and perused the material available on record. Initially, the ITAT,

Bangalore Tribunal ruled in favour of the assessee by holding that interest income arising to the assessee was to be taxed under the head Business Income. The Department appealed against the said order of the Bangalore Tribunal before the Hon'ble Karnataka High Court, wherein the order of the Tribunal was set aside. Basis, the aforesaid decision of the Hon'ble Karnataka High court, the AO taxed the interest income under the head income from other sources. Thereafter, against the said order of the Hon'ble Karnataka High Court, the assessee preferred an appeal before the Hon'ble Supreme court, wherein the Hon'ble Supreme Court vide order dated 29th September, 2009 in SLP (Civil Appeal) No. 6555 of 2009 set aside the order of the Hon'ble Karnataka High Court and directed to answer the question of law, which was raised before it. In set aside proceedings, the Hon'ble High Court vide its order dated 17/08/2011 had decided the issue in favour of the assessee and held that interest income earned by the assessee from fixed deposit in the normal course of business was to be taxed as business income. The relevant findings of the court are as under:-

> *"23. Therefore, from the aforesaid judgment, ii is dear, that till the company commences its business and earns income, if they have kept their surplus funds in short deposits in order to earn interest that interest income is chargeable under section 56 of the Act, However, once the assesses commences business and earns income and in addition to the income so corned, the company also earns interest by way of such deposits, then the said income cannot be construed as income from other sources.*
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> ** ** **
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> *34. Therefore, in the facts of the case, wee are satisfied that the finding recorded by the Tribunal, is on a proper appreciation of the material on record keeping in mind the law on the point and is just and proper and does not call for any interference. Accordingly, the substantial questions of law are answered in favour of the assessee and against the revenue."*

22. The Hon'ble Karnataka High Court has also distinguished the case of *Tuticorin Alkali Chemicals & Fertilizers* (*supra*), in the following paragraphs:-

> *21. Reliance is placed by the revenue on this judgment of the Apex Court in the case of Tlticorin Alkali Chemicais & Fertilizers Ltd v. Commissioner of Income Tax reported in (1997) 227 ITR 172 (SC).*
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> *22. In the aforesaid judgment, Ike Supreme Court has made the position dear at para 4, which reads as*
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> *"4. The basic proposition that has to be borne in mind in this case is that it is possible for a company to have six different sources of income, each one of wh.ifh will be chargeable to income-tax 'Profits and gains of business or profession' is only vie of the head under which the company's income is liable to assessed to tax. If a company has not commenced business, there cannot be any question of assessment of its profits and gains of business. That does not mean that does not mean that until and unless the company commences its business^ its income from any other source will not be noted. If the company even before it commences business, invests the surplus, fund in its hand for purchase of land or house property and later sells it of profit, the gain made by the company will be assessable under the head Capital gains. Similarly, if a company purchases a rented house and gets rent, which rent will be assessable to tax under section 22 of the Act as income fro house property. Likewise, a company may have income from other sources. It ay buy shares and get dividends. Such dividends will be taxable under section 56. The company may also as in this case, keep the surplus fund in short term deposits in order to earn interest. Such interest will be chargeable under section 56.*
>
> *The company has chosen not to keep its surplus capital idel, but has decided to invest it fruitfully.*

The fruits of such investment will clearly be of revenue nature."

23. Therefore, from the aforesaid judgment, it is clear that till the company commences its business and earns income, if they have kept their surplus funds in short deposits in order to earn interest that income is chargeable under section 56 of the Act. However, once the assessee commences its business and earns income and in additions to the income so earned, the company also earns interest by way of such deposits, then the said income cannot be construed as income from other sources."

23. From the above decision, it is clear that the matter has been finally settled by the Hon'ble Karnataka High Court, in favor of the assessee and hence, we are of the considered view that there is no error in the findings of Ld.CIT(A) in treating interest income from fixed deposits under the head income from business and accordingly, we reject ground taken by the revenue.

24. The next issue that came up for our consideration from ground no 9 and 10 of revenue appeal is treatment of sales tax subsidy received of Rs. 36,15,49,828/-, as capital in nature instead of revenue in nature. The facts borne out from records show that in the year 1993, the Government of Karnataka proposed a new industrial policy, 1993 and package of Incentives and concessions for a period of five years. The assessee has filed copy of notification issued by the Government of Karnataka. As can be seen from the said notification, the new Industrial policy, 1993 and the package of incentives and concessions (1993-98) was introduced within the objective to attract new industrial investments and accelerate industrial development in the state, to promote the development of backward regions and generate employment opportunities for the local people. The scheme also aimed to generate additional employment opportunities for the local people of the state of Karnataka. In terms of the state policy in the year 1994, the assessee proposed to set up an integrated steel plant for manufacture of 1.25 million tons per annum (MTPA) of Hot Rolled (HR) Coils at village Toranagallu, Bellary Hospet, Karnataka with an initial investment of Rs. 3,200 crores. Accordingly, the assessee has made a application on 29th January, 1994, under the Industrial policy to the Government of Karnataka for grant of infrastructural assistance and incentives under the policy. In respect of the aforesaid application, the Government of Karnataka passed an order No. CI 29 SPI 94, Bangalore, dated 11/10/1994 granting exemption from payment of purchase-tax and entry- tax on all materials, plant and machinery and other production assets, acquired for the implement of the project for a period of 14 years. It also included exemption from payment of sales tax on sale of finished goods, by products and waste products. Consequential notification to this effect was passed by the Government of Karnataka, vide No. ED 165 CSL 94 (I), dated 14/02/1995, by which the tax payable under section 5 and 6C of the Karnataka Sales Tax act, 1957 was treated as exempt for a period of 14 years from the date of commercial production. Further, on introduction of VAT regime from 1st April, 2005, in the state of Karnataka, tax was charged on the purchases made from, for which input tax credit available. The assessee was also charged and collected tax on all its sales made to customers. The tax so collected (net of input tax credit) was deposited with the State Government. Accordingly, in order to nullify the effect of VAT vis-à-vis of VAT incentive Scheme of the State Government, the tax so charged and deposited on sales was refunded on a monthly basis as Sales Tax subsidy". A Notification to this effect was also passed by the Government of Karnataka, vide No. FD 56 CSL 2005(I), dated 18/04/2005, by which the tax payable under the Karnataka Sales Tax Act, 1957 was treated as exempt subject to certain conditions.

25. In the return of income filed for AY 2006-07, the assessee had claimed that since, sales tax subsidy was intrinsically related to set up of the plant in the backward area, the same was on capital account and hence, not taxable . During the course of assessment proceedings, the AO rejected the contention of the assessee and concluded that sales tax exemption was given by the State Government of Karnataka to help the assessee to use the funds for its day to day activities and hence, the Sales tax subsidy was revenue in nature and taxable in the hands of the assessee. On appeal before the first appellate authority,

the Ld.CIT(A) allowed relief to the assessee and held that sales tax subsidy received by the assessee was not given to facilitate the business operations of the assessee, but was given as an incentive for development of the backward areas as stated in the poly. Accordingly, by relied upon the decision of Hon'ble Bombay High Court in the case of Reliance Industries Ltd. (339 ITR 632) held that subsidy received by the assessee is in the nature of capital receipt and not liable for tax.

26. The Ld. DR submitted that the Ld.CIT(A) was not justified in holding that sales tax incentives/concessions etc. amounting to Rs. 36,15,49,828/- as capital receipts without appreciating the reasons recorded in the relevant assessment order by the Ld.AO. The Ld. DR, further submitted that the Ld.CIT(A) was erred in relied upon the decision of Hon'ble Supreme Court in the case of *CIT* v. *Ponni Sugars and Chemicals Ltd. and other* (306 ITR 392) and the decision of Hon'ble Bombay High Court in the case of *Reliance industrial Limited* v. *CIT* 33 ITR 632, without appreciating the fact that the Ld. AO has brought out clear facts to the effect that the subsidy was given for day to day maintenance of the assessee, which is in the nature of the revenue receipt, but not capital receipt. The Ld. DR, further referring to the decision of Hon'ble Supreme Court, in the case of M/s Sahney Steel & Pres Works Ltd.vs CIT(supra) submitted that the Hon'ble Court categorically held that when, payments are made after industries have been set up, then the said payments are not being made for the purpose of setting up of the industries, and the package of incentives were given to the industries to run more profitably for a period of 5 years from the date of commencement of production. In other words helping hand was being provided to the industries during the earlier days to enable them to come to a competitive level with other established industries. In this case, on perusal of scheme of incentives given by the State Government of Karnataka, it was very clear that the said incentives have been given after commencement of production for a period of 5 years for payment tax on sale of goods. Therefore, the facts of the present case are squarely covered by the decision of the M/s Sahney Steel & Pres Works Ltd. and accordingly, Ld.CIT(A) was totally erred in allowing the relief to the assessee.

27. The Ld. AR for the assessee, on the other hand strongly supporting order of the Ld.CIT(A) submitted that it is evident from the new Industrial policy, 1993 announced by the State Government of Karnataka that the incentives scheme was given to attract new industrial investments, in the state of Karnataka and to create additional employment opportunities with a direction for employment in under developed backward areas of Karnataka. In other words, the subsidy was granted to the assessee, since it is fulfilled the criteria specified in the scheme for grant of concession and incentives. The purpose of the concession /incentives was very clear, as per which the assistance was not given for general assistance to carry on its business as alleged by the Ld.AO. The Ld. AR, further submitted that there is a distinction between the subsidy given with the object of encouraging the industrial growth and setting up industries in backward areas and subsidy given with the object of assisting industries for a period after they are setup. The Ld. AR for the assessee referring to plethora of judicial precedents, including the decision of Hon'ble Supreme Court, in the case of Chaphalkar Brothers (CA Nos. 6513 & 6514 of 2012) submitted that the position of the Hon'ble Supreme Court on this issue is very categorical in the catena of the decisions, where it has been held that the mechanism, the source, the point in time, the form in which subsidy have been granted are irrelevant and what is relevant is, the purpose for which the subsidy is granted to decide, whether the subsidy is revenue or capital in nature. The Ld.AR, further submitted that if you go through the ratio laid down by the Hon'ble Supreme Court, in various cases it was very clear that the Hon'ble Supreme Court has considered ratio laid down by the court in the case of M/s. Sahney Steel and Press Works Ltd and again held that purpose is very relevant to decide the nature of subsidy, whether it is on account of capital account or revenue account, but form is irrelevant. The Ld. AR, further submitted that in all cases subsidy was received after the commencement of business and allowed in terms of sales tax exemption for a period of five years also and in those facts, the High Court's came to the conclusion that even though, the subsidy was given in terms of sales tax subsidy after commencement of production, but such subsidy was given to reimburse the cost incurred by the

assessee to set up industries. Therefore, he strongly submitted that it is only the purpose of the scheme that has to be seen to find out, whether the scheme is in fact capital revenue in nature. The Source of funds for the scheme and form of the scheme are irrelevant and point in time, when subsidy is received is also immaterial. Accordingly, he submitted that the case laws relied upon by the Ld. DR, in the case of M/s *Sahney Steel and Press Works* (*supra*) has no application to facts of the present case. The Ld.CIT(A) after considering relevant facts has rightly deleted additions made by the AO and his order should be upheld.

28. We have heard both the parties, perused the material available on record and gone through orders of the authorities below along with plethora of case laws cited by both parties. As we discussed in earlier year paragraph, the facts clearly indicates that in the year 1993 the Government of Karnataka proposed a new industrial policy, 1993 and package of incentives and concession with an objective to attract new industrial investments and to accelerate industrial development in the state to promote the development of backward regions and generate employment for the local people. It is also an admitted fact those in terms of the said policy, in the year 1994, the assessee proposed to set up a integrated steel plant for manufacturing of 1.25 million tons per annum (MTPA) of Hot rolled (HR) Coils at Village Torangallu, Bellary Hospet, Karnataka state with an initial investment of Rs. 3,200 crores. It is also not in dispute that the assessee has made an application under the industrial policy to the Government of Karnataka, for which the order has been passed by the Government of Karnataka granting exemption from payment of purchase tax and entry tax and also exemption from payment of sales tax on sale of finished goods.

29. In this factual back ground, if you examine the claim of the assessee that sales tax subsidy received from State government of Karnataka is capital or revenue in nature which is liable to tax, one has to understand the purpose for which said subsidy was given by the State Government. If you go through, the industrial policy, 1993 announced by the State Government and consequent notification issued there under, it is abundantly clear that the incentive scheme was granted within an objective to attract new industrial investments in the state of Karnataka and to accelerate industrial development in backward areas of Karnataka. In other words, the subsidy was granted to the assessee for setting up of a unit and to incentives was given to promote industry in a backward area of Karnataka and thereby generating employment in the state. Thus, the purpose of the concession/incentives was clearly not to provide general assistance to carry on its business as alleged by the Ld.AO. Further, there is a distinction between the subsidy given with the objective of encouraging the industrial growth and setting up industries in back ward areas and subsidy given with the object of assisting industries for a period after they are set up. Accordingly, if the purpose of the subsidy is to help its business/expanded its business, the subsidy must be treated as to have been given for capital purposes, whereas if it is given by way of assistance to the assessee in carrying of its trade/business, it has to be treated as a trading receipts. This controversy has been examined by the Hon'ble Supreme Court and also various high courts, in light of industrial policy of various state Governments and came to the conclusion that the mechanism, the source, point in time and the form in which subsidy has been granted are irrelevant and what is relevant is only the purpose for which the subsidy is granted to decide, whether the subsidy is revenue or capital in nature. The Hon'ble Supreme Court in the case of *Chaphalkar Brothers* (*supra*) had considered an identical issue, in the light of setting up a new multiplex theatre complex and held that if, the object of the scheme was to promote cinema houses by constructing multiplex theatres, then irrespective of the fact that the multiplexes have been constructed out of the own funds or borrowed funds, the receipt of subsidy would be on capital account. Further, the Hon'ble Supreme Court, while delivering the judgment has considered its earlier decision in the case of *Sahney Steel & Press Works Ltd.* v. *CIT*(*supra*) and held that even in Sahney Steel and press works Ltd(supra), the court has considered the purpose for which, the said subsidy was given and came to the conclusion that in the facts of those case, the subsidy was given for running of business after commencement of production and hence, opined that subsidy/incentive received is in the nature of revenue receipt.

30. A similar issue has been considered by the Hon'ble Gujarat High Court, in the case of Birla VXL Ltd. in ITA No.s 316 to 318 of 2013, where it was held that the purpose of the subsidy is relevant to decide the nature, whether it is on capital account or revenue account. The court further held that though, the benefit was computed in terms of sales tax liability in the hands of the recipient, the same was not meant to be given any benefit and day to day functioning of the business or for making the industry more profitable. The principle aim of the scheme was to cover the capital outlay already made by the assessee in undertaking special modernization of its existing industry. A similar view has been expressed by the Hon'ble Gujarat High court, in the case of *Munjal Auto industries* (*supra*). The Hon'ble Jammu & Kashmir High Court, in the case of Shri Balaji Alloys ITA No. 02/2010 had considered an identical issue and held that the purpose for which subsidy was given is very relevant to decide the nature of recipient, but not the manner in which such subsidy was quantified. The Hon'ble Gujarath High court in the case of *Shivshakti Flour Mills (P.) i*n ITA No 06/2014 had considered an identical issue and held that the purpose of the transfer subsidy was to encouraging investment and thereby stimulate industrial activity in difficult and far flung states in the North Eastern region for creating employment opportunities. Therefore, it is in the nature of capital receipt. The Hon'ble Bombay High Court, in the case of *Welspun Steel Ltd.* v. *CIT* (103 taxann.com 436) held that the scheme was envisaged to encourage investment, which would in turn provide fresh employment opportunity in the district, which has suffered due to devastating earthquake. The computation of subsidy may be on the basis of sales tax or excise duty. But, nevertheless, the purpose test would ensure that, the subsidy was capital in nature. The Hon'ble Kolkata High Court in the case of Shyam Steel Industries Ltd. (303 CTR 628) had expressed similar view and held that purpose test is most relevant to decide the nature of subsidy. The sum and substance of the ratio laid down by Hon'ble Supreme Court and various High Courts are that if the assistance/subsidy was given to enable to set up a new unit or to expand the existing unit in the backward area, the receipt of the subsidy was on capital account.

31. In this case, on perusal of facts, it is abundantly clear that the assessee has setup a new industry under the Industrial policy, 1993 of Government of Karnataka and package of incentives and concessions given by the state of Karnataka was to accelerate industrial development in the state of Karnataka. The said subsidy, although was qualify in terms of sales tax exemption on purchase of raw materials and plant and machinery and also, on sale of finished goods after commencement of production, but the purpose of the subsidy was to reimburse the cost of expenditure incurred for setting up the new industry. Therefore, we are of the considered view that when, the subsidy was given with an object to effect new industries in the backward area of the state in terms of sales tax exemption, then the said subsidy shall be treated as capitol receipt. The Ld. CIT(A) after considering relevant facts has rightly held that subsidy received by the assessee from state Government of Karnataka is for the purpose of setting up of a new industry and in the nature of capital receipt not charitable tax. We do not find any error in the findings of the Ld.CIT(A) and hence, we are inclined to uphold the findings of the Ld.CIT(A) and reject ground taken by the revenue.

32. The next issue that came up for our consideration from ground No. 11 to 13 of revenue appeal is levy of interest u/s 234B of the Act, of Rs.9,84,94,367/- on total income computed u/s 115JB of the I.T. Act, 1961 on account of retrospective amendment to section 115JB of the Act. The facts borne out from the records show that in the profit and loss account for the year ended 31/03/2006, the assessee had debited provision for deferred tax of Rs.433.61 crores/-. In the return of income filed for AY 2006-07, the aforesaid provision was not added back while computing Book profit u/s 115JB of the Act. However, subsequently Finance Act, 2008 made a retrospective amendment to Section 115JB of the Act, by inserting clause (h) in Explanation 1 to section 115JB of the Act, according to which book profits are required to be increased by an amount of deferred tax and provision thereof and the said amendment was made with retrospective effect from AY 2001-02. Accordingly, during the course of assessment proceedings, while computing book profits under section 115JB of the Act, the Ld. AO

added the provision for deferred tax liability and consequently, interest u/s 234B of the Act on account of the retrospective amendment to section 115JB of the Act, 1961. On appeal, the Ld.CIT(A) allowed relief to the assessee and deleted interest levied u/s 234B of the Act, on the ground that no liability can be fastened on the assessee on the basis of retrospective amendment to the Act.

33. The Ld. DR submitted that the Ld.CIT(A) has erred in holding that interest u/s 234B of the I.T. Act, 1961, attributable to the provision of Rs. 433.61 crores for deferred tax liability, which was *inter alia* added to the net profit, while computing book profit 115JB of the I.T. Act, 1961, on account of retrospective amendment to the provision of section 115JB of the Act by inserting clause(h) in Explanation 1 to section 115JB of the Act 1961 with retrospective effect from 01/04/2001. The Ld. DR, further, submitted that the findings of the Ld.CIT (A) are not in accordance with the ratio of the decision the Hon'ble Supreme Court in the case of *CIT* v. *Central provinces manganese ore co. Ltd.* 160 ITR 961 and *CIT* v. *Anjum Ghaswala and others*, (252 ITR 1).

34. The Ld. AR for the assessee, on the other hand, submitted that this issue is squarely covered in favour of the assessee by the decision of ITAT, Bangalore Tribunal, in assessee's own case for AY 2005-06 in ITA. No. 924/Bang/2009, wherein it was held that no interest can be levied u/s 234B of the Act, where the liability arises on account of retrospective amendment in the Act.

35. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that whether, interest us/ 234B can be charged on the basis of retrospective amendment to section 115JB of the Act 1961, on recomputed book profit is no longer is *res Integra.* The coordinate bench of ITAT Bangalore Tribunal in assessee's own case for AY 2005-06 in ITAT No. 924/Bang/2009 had considered an identical issue and held that no interest can be levied u/s 234 B of the Act, where liability arises on account of retrospective amendment in the Act. The relevant findings o the Tribunal are as under:-

> *16. We considered the issue in detail. It is a fact that clause(h) in Explanation 1 to sec. 115JB of the Act was inserted by Finance Act 2008. This new sub clause made it mandatory to add back the amount of deferred tax for the purpose of computing book profits u/s 115JB. It is also made clear that amendment is retrospective with effect from the assessment year 2001-02. If academically speaking, the said amendment which is retrospective w.e.f assessment year 2001-02 is applicable to the impugned assessment year 2005-06 as well.*
>
> *17. But as rightly contended by the appellant, by the tie the amendment was brought in the year 2008, the relevant previous year 2004-05 was already over and the appellant had not occasion to add back the deferred tax provision to compute the book profits u/s 115JB. By the time the retrospective amendment was made, the financial years 2004-05 to 2007-08 relevant to the AY 2005-06 to 2008-09 have already been over and the appellant could not have paid any advance tax retrospectively in respect of these years. The appellant cannot call back the bygone time. Even though a retrospective amendment is possible, a retrospective physical of advance tax is impossible. Therefore, we cannot over look the acclaimed principle. LEX NON COGIT AD IMPOSSIBILLA. The law dos not command to do which is impossible to do. The legal view prevailed at the time of previous year 2004-0 was that deferred tax liability is not to be added back while computing the book profits u/s 115JB.*
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> ** ** **
>
> *20. This position was considered by the Hon'ble Madras High Court in the case of CIT vs Revathy Equipment Ltd. 298 ITR 67. In that case, the appellant company o the assessment year 2001-02, being under the impression that the payment under the voluntary retirement scheme were allowable deduction had failed to pay the advance tax. The Assessing Officer levied interest u/s 234B and*

234C of the Income –tax act, 1961 and completed the assessment. On appeal the Ld.CIT(A) confirmed the levy of interest. On appeal by the Revenue the Hon'ble High Court held that the appellant had paid advance tax after deducting the payments made under the voluntary retirement scheme. In view of the decisions of the jurisdictional High Court, the appellant was allowed to deduct expenditure incurred towards voluntary retirement scheme. Since sec. 35DDA was introduced by the Finance Ac, 2001 w.e.f. April , 2001 and received assessment on 11.05.2001 the appellant couldn't have envisaged that it would become liable for payments of tax revenue against voluntary retirement payments, which were higher to deductible. The appellant could not have visualized that a new liability would be fattened on the appellant by a subsequent amendment. The Court held that in such circumstances, no liability existed for payment of advance tax much less the liability to pay interest.

21. We find that the judgment of the Jurisdictional High Court in the case of Jindal Thermal Power Company Ltd. vs. DCIT, 286 ITR 182 rendered in a writ petition on a fundamentally different legal issue, is not applicable to the present case. The judgment of the Hon'ble Madras High Court in the case of Revathy equipment Ltd. vs. DCIT 298 ITR 67 is directly applicable.

22. In a recent order, ITAT Delhi A' Bench has considered a similar situation. The Tribunal held in the case of Royal Jordanian Airlines vs. DDI (Intl. Taxation) 3 ITR (Trib.) 181 (Del) that where one appellant is under bonafide relief that income is not chargeable to tax, interest cannot be levied u/s 234B.Thsi proposition tremendously supports the case in hand. Not only bonafide belief, but even the statutory mandate to add back the deferred Tax provision to the book profits u/s 115JB was unknown during the period of the relevant previous years.

23. Therefore, we hold that the levy of interest u/s 234B on the incremental amount of tax computed u/s 115JB is not justified in the present case. Accordingly, the levy of said interest is deleted.

(emphasis supplied)

36. In the current year, as well the liability for interest under section 234B of the Act has arisen only on account of a retrospective amendment to the provision of section 115JB of the Act, 1961 with effect from AY 2001-02. Accordingly, the assessee would not have anticipated the retrospective amendment at the time of making the payments for advance tax, but to estimate the liability to pay advance tax on the basis of existing provisions. Therefore, we are of the consider view that there is no error in the findings recorded by the Ld.CIT(A), while deleting the interest liability u/s 234B of the Act. Hence, we are inclined to uphold the findings of Ld.CIT(A) and reject ground taken by the revenue.

37. In the result appeal filed by the revenue is dismissed.

Co.No. 59/Mum/2012:-

38. The assesse has raised the following grounds of cross objection.

GROUND I:

1. On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals) [ClT (A)'] erred in not giving direction to reduce sales tax subsidy by treating it as capital receipt, from the book profits computed u/s 115JB of the Income tax Act, 1961 (the Act[1]).

It is prayed that the learned CIT(A) be directed to reduce sales tax subsidy from the book profits computed u/s 115JBof the Act.

The Cross-Objector craves leave to add, to alter and/or amend all or any of the foregoing ground

of memorandum of cross objections.

39. At the time of hearing, the Ld. AR for the assessee submitted that there is a delay of 371 days in filing cross objection filed by the assessee, for which necessary petition for condonation of cross objection along with affidavit has been filed explaining the reasons for delay in filing cross objection. The Ld. AR, further submitted that during the AY, the Ld. AO made various additions, but the assessee was assessed to tax under the MAT provision of the Act. Against aforesaid additions, the assessee has preferred appeal before the Ld.CIT(A) and the Ld.CIT(A) has decided all the issues in favour of the assessee, including the issue of sales tax subsidy held to be capita in nature, however he do not give a corresponding reduction of MAT profits to the extent of sales tax subsidy, it being held to be capital in nature. Accordingly, the assessee has filed cross objection against the findings of the Ld.CIT(A) in not reducing the sales tax subsidy from book profits computed u/s 115JB. He, further submitted that a copy of the appeal filed by the department was served on the assessee 21/03/2011. However, the assessee did not file cross objection under the misconception of fact that the Ld.CIT(A)has decided all the issues in favour of the assessee. But, on the first date of hearing, when the matter came up for discussion with the assessee's consultants, it was realized that the Ld.CIT(A), while adjudicating, on the ground for sales tax incentive whether to be considered as revenue or capital receipt did not give consequential direction to reduce sales tax incentives from the book profits u/s 115JB of the Act. Accordingly, the assessee has filed cross objection challenging the findings of the Ld.CIT(A) on 25/04/2012 after a delay of 371 days. The said delay is unintentionally and on bonafide mistaken of facts and therefore, the same may be condoned and decide the issue on merits. In this regard, he relied upon the decision of Hon'ble Supreme Court, in the case of Collector, Land Acquisition *Anantnag and Anr.* v.. *Katiji and Ors,* (167 ITR 471).

40. The Ld. DR, on the other hand strongly opposing condonation petition filed by the assessee submitted that the reasons given for not filing appeal in time does not come under the purview of reasonable cause and hence, the condonation application filed by the assessee should be rejected.

41. We have heard both the parties and perused the material available on record along with case laws cited by the Ld. AR for the assessee. We find that there is a delay of 371 days in filing cross objection filed by the assessee, for which necessary petition along with affidavit has been filed for condonation of delay. According to the assessee, the delay in filing cross objection is under bonafied mistaken of facts. In the light of above averment, if you consider the legal position, we find that the statute provides for a right of appeal to the aggrieved persons against any order passed by an authority, but such right is not absolute, and it comes with a limitation. As per the present provision of Act, the assessee ought to have filed appeal or cross objection against order of the Ld.CIT(A) on or before 60 days from the date of receipt of impugned order. But, as per the provision of section 253 of the Income Tax Act, 1961, Tribunal has inherent powers to condone the delay, if the assessee makes out a case for condonation of delay with plausible reasons. The Hon'ble Supreme Court had also explained the position of law, in the case of *Collector of Land Acquisition Anantnag and Anr.* v.. *Katiji and Ors*(*supra*) and held that when, technical consideration and substantial justice are pitted against each other, the courts are expected to further the cause of substantial justice. The relevant findings of the Hon'ble Supreme Court are as under:-

"3. The Legislature has conferred the power to condone delay by enacting Section 5 of the Limitation Act of 1963 in order to enable the court to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the Legislature is adequately elastic to enable the courts to apply the (am in a meaningful manner which sub serves the ends of justice - that being the life-purpose of the existence of the institution of courts. It is common knowledge that this court has been making o justifiably liberal approach in mutters instituted in this court. But the message does not appear to have percolated down to all the other courts in the hierarchy

4. And such a liberal approach is adopted on principle as it is realized that:

1. *Ordinarily, a litigant does not stand to benefit by lodging an appeal fate.*
2. *Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.*
3. *"Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second"^ delay? The doctrine must be applied in a rational, common sense and pragmatic manner.*
4. *When substantial justice and technical considerations am pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have, vested right in injustice being done because of a non-deliberate delay.*
5. *There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.*
6. *It must be grasped that the judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."*

42. In this case, the assessee has given reasons for not filing appeal or cross objection within time allowed under the Act, as per which, it was under the bonafide belief that the Ld.CIT(A) had allowed relief, in respect of additions made by the AO and hence, no need to file any appeal or cross objection. But, when the matter came up for hearing in case of revenue appeal, it was noticed that the Ld.CIT(A) did not give consequential relief, in respect of book profit computed u/s 115JB of the I.T. Act, 1961 and therefore, the assessee has decided to file cross objection against order of the Ld.CIT(A). We find that the reasons given by the assessee for not filing cross objection within the time allowed under the Act is under a bonafide belief and mistaken of facts and comes within ambit of reasonable cause as provided under the Act. Therefore, considering the facts and circumstances of this case and also, by following the decision of Hon'ble Supreme Court, in the case of *Collector, land Acquisition* v. *M.S. Katiji* (*supra*), we condoned, the delay in filing cross objection filed by the assessee and proceed to dispose of the issue on merits.

43. The brief facts of the issue in question in cross objection filed by the assessee are that the assessee had received a sales tax subsidy of Rs. 36,15,49,828/- from the Government of Karnataka for setting up a new industrial unit in the backward area of the state. The refund of sales tax subsidy was routed through the profit and loss account and hence, the same was considered as part of the book profits u/s 115JB of the I.T. Act, 1961. Subsequently, the assessee realized that sales tax subsidy being capital receipt as held by the Ld.CIT(A), the same is not taxable under the MAT provisions and accordingly, the issue was raised before the Tribunal.

44. The ld. AR for the assessee, at the outset, submitted that the issue is squarely covered in favour of the assessee by the decision of ITAT Mumbai in assessee's own case for AY 2004-05 in ITA No. 923/Bang/2009, where it has been held that when a receipt is held to be capital in nature and not chargeable to tax under the normal provisions of the Act, the same cannot be taxed u/s. 115JB of the Act as well. In this regard, he relied upon the following case laws.

- *Shivalik Venture (P) Ltd. v. DCIT* [2015) 173 TTJ (Mum) 238

- *ACTT v. Shree Cement Ltd. (ITA Nos.614, 615 & 635/JP/2010) Following Shree Cement Ltd, vs. ACIT (2015) 152 ITD 561 (Jaipur)*
- *ACIT v. L. H, Sugar Factory Ltd. (ITA Nos. 417, 418, 418 & 339/ LKW/ 2013) (Lucknow ITAT)*
- *CIT v. Binani Industries Ltd.(ITA No.144/Kol/2013) (Kol ITAT)*
- *DCIT v. M/s. Garware Polyester Ltd. (ITA No. 5996/Mum/ 2013] (Mum ITAT)*
- *CIT v. Veekaylal Investment Co. (P) Ltd. (2001) 249 ITR 597 (Bom)*
- *Kopran Pharmaceutitals Ltd. v. DCIT (2009) 121 TTJ 77 (Mum)*
- *Hindustan Shipyard Ud. v. DCIT (2010) 130 TTJ 213 (Vizag)*
- *Duke Offshore Ltd. v. DCIT (2011) 45 SOT 399 (Mum)*
- *B& B Infotech Ltd. v. ITO (ITA No. 726/Bang/2014)*

45. The Ld. DR, on the other hand, strongly supporting order of the Ld.CIT(A) submitted that the book profit as referred u/s 115JB shall be computed irrespective of the fact that whether particular receipt is taxable under the income tax act or not. He, further, submitted that as per the ratio laid down by the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. Vs CIT (supra), once books of accounts of the assessee are audited and approved by the share holders in the annual general meeting, then the Ld. AO has limited scope to alter the book profit, unless otherwise as provided under Explanation (1) to section 115JB of the I.T. Act, 1961. The assessee case is squarely covered by the decision of Hon'ble Supreme Court in the case of *Apollo Tyres* v *CIT*(*supra*) and hence there is no question of deduction of sales tax subsidy, being capital receipt from book profit completed u/s 115JB of the I.T. Act, 1961.

46. We have heard both the parties, perused the material available on record and gone through orders of the authorities below along with case laws cited by both parties. The limited issue came up for our consideration from cross objection filed by the assessee is whether, sales tax subsidy being capital in nature shall be reduced from book profit computed u/s 115JB of the I.T. Act, 1961 or not. We find that the coordinate bench of ITAT, Mumbai Tribunal in assessee's own case for AY 2004-05 in ITA.No.923/Bang/2009, had considered an identical issue and held that where a receipt is held to be capital in nature not chargeable to tax under the normal provision of the Act, the same cannot be taxed u/s 115JB of the I.T. Act, 1961.

47. We further noted that Hon'ble Kolkata High Court, in the case of *Ankit Metal & Power Ltd.* In ITA no. 155 of 2018 had considered an identical issue and after considering the decision of Hon'ble Supreme Court in the case of *Apollo Tyres Ltd.* v. *CIT* (*supra*) held that when a receipt is not in the character of income as defined under section 2(24) of the I.T. Act, 1961, then it cannot form part of the book profit u/s 115JB of the I.T. Act, 1961. The Hon'ble High court, further observed that sales tax subsidy received by the assessee is capital receipt and does not come within definition of income under section 2(24) of the I.T. Act, 1961 and when, a receipt is not a in the nature of income, it cannot form part of book profit u/s 115JB of the I.T. Act, 1961. The Court, further observed that the facts of case before the Hon'ble Supreme Court in the case of *Apollo Tyres Limited* (*supra*) were altogether difference, where the income in question was taxable, but was exempt under a specific provision of the Act, and as such it was to be included as a part of book profit, but where the receipt is not in the nature of income at all, it cannot be included in book profit for the purpose of computation u/s 115JB of the I.T. Act, 1961.

48. We further noted that the ITAT special bench of Kolkata Tribunal, in the case *of Sutlej Cotton mills Ltd.* v. *ACIT* [1993] (45 ITD 22), held that a particular receipt, which is admittedly not an income cannot be brought to tax under the deeming provisions of section 115J of the Act, as it defies the basic intention behind introduction of provisions of section 115JB of the Act. The ITAT Jaipur bench, in case of *ACIT* v. *Shree Cement Ltd,* had considered an identical issue and held that incentives granted to the assessee is

capital receipt and hence, cannot be part of book profit computed u/s 115JB of the Act. Similarly, the ITAT Kolkata Bench, in the case of *Sipca India Pvt.Ltd*. v. *DCIT* 186 TTJ 289 had considered an identical issue and held that when, subsidy in question is not in the nature of income, it cannot be regarded as income even for the purpose of book profit u/s 115JB of the Act, though credited in the profit and loss account and have to be excluded for arriving at the book profit u/s 115JB of the Act.

49. Insofar as, case laws relied upon by the department , we find that all those case laws have been either considered by the Tribunal or High Court and came to conclusion that in those cases the capital receipt is in the nature of income, but by a specific provision, the same has been exempted and hence, the came to the conclusion that, once particular receipt is routed through profit and loss account, then it should be part of book profit and cannot be excluded, while arriving at book profit u/s 115JB of the Act 1961.

50. In this view of the matter and considering the ratio of case laws discussed hereinabove, we are of the considered view that when a particular receipt is exempt from tax under the Income tax law, then the same cannot be considered for the purpose of computation of book profit u/s 115JB of the I.T.Act 1961. Hence, we direct the Ld. AO to exclude sales tax subsidy received by the assessee amounting to Rs. 36,15,49,828/- from book profits computed u/s 115JB of the I.T. Act, 1961.

51. In the result, cross objection filed by the assessee is allowed.

52. As a result, the appeal filed by the revenue is dismissed and cross objection filed by the assessee is allowed.

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