IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "J", MUMBAI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER

ITA No.923/Bang/2009
Assessment Year: 2004-05

M/s. JSW Steel Limited, (formerly known as Jindal Vijaynagar Steel Limited) Jindal Mansion, 5A, Dr. G. Deshmukh Marg, Mumbai – 400 026 **PAN: AACJ4323N**	Vs.	Assistant Commissioner of Income Tax, Circle 11(5), Bangalore
(Appellant)		(Respondent)

ITA No.930/Bang/2009
Assessment Year: 2004-05

Assistant Commissioner of Income Tax, Circle-11(5), No.14/3, 5th Floor, Nrupathunga Road, Bangalore-560001	Vs.	M/s. JSW Steel Limited, (formerly known as Jindal Vijaynagar Steel Limited) Jindal Mansion, 5A, Dr. G. Deshmukh Marg, Mumbai – 400 026 **PAN: AAACJ4323N**
(Appellant)		(Respondent)

Present for:

Assessee by: S/Shri Kanchan Kaushal & Hirali Desai, A.R

. Revenue by: Shri Alok Johri, CIT D.R.

Date of Hearing : 21.10.2016
Date of Pronouncement : 13.01.2017

O R D E R

Per: Amit Shukla, Judicial Member:

The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against impugned order dated 09.07.2009, passed by Ld.CIT (Appeals)-1, Bangalore for the quantum of assessment passed under section 143(3) for the assessment year 2004-05.

2. We will first take up assessee's appeal, being ITA No.923/Bang/2009, wherein the assessee has raised following grounds:

> "*1. On the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) ['CIT (A)'] has legally erred in confirming the action of the learned Assessing Officer ('AO') in not reducing the Net profit by an amount of Rs. 390,76,03,999 being waiver of dues while computing the Book Profits under Section 115JB of the Income Tax Act, 1961 ('the Act').*
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> *It is prayed that the learned AO be directed to reduce the Net profit by an amount of Rs390,76,03,999 being waiver of dues while computing the Book Profits under 'Section 115JB of the Act.*
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> *2. **Without prejudice to Ground 1 above**, the learned CIT(A) erred in rejecting the contention of the Appellant that under no circumstances the amount of Rs.228,46,76,328 being the principal portion of the waived loan while computing the Book Profits under Section 115JB of the Act.*
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> *3. On the facts and in the circumstances of the case, the learned CIT(A) has legally erred in directing the learned AO to levy interest under Section 234B and 234C of the Act.*
>
> *It is prayed that the learned AO be directed to delete the interest under Section 234B and 234C of the Act."*

3. Besides this, the assessee vide petition dated, 06.04.10 has filed additional grounds wherein the amount challenged of Rs.390.76 crores has been substituted withRs.314.48 crores. The additional grounds raised by the assessee read as under:

> *"4. Without prejudice to Ground 1 above, the Ld. Commissioner of Income Tax (Appeal) ["the CIT (A)] has erred on facts and in law in not reducing waiver of the principal amount of loan and waiver of interest payable to UTI (which such interest was not claimed as an expenditure at all) in aggregate amounting to Rs.314.48 crores, from the net profit, while computing Book Profit u/s 115JB of the Act.*

5. On the facts, in law and in the particular circumstances of the present case, keeping in view the amendment to section 115JB regarding adjustment of deferred tax asset/liability brought about by the Finance Act, 2009, the learned CIT(A) ought to have allowed the appellant the set off of loss for the previous year of Rs. 438.63 crores instead of Rs 172.36 crores, while computing Book Profit u/s 115JB of the Act, otherwise, the computation mechanism of Book Profit for MAT in the current year leads to double taxation as upheld by the Calcutta High Court in Balrampur Chini Mills Ltd. and Jaipur Tribunal in the case of Maharaja Shree Umaid Mills Ltd.

6. On the facts and in the circumstances of the case, the learned AO has legally erred in not granting full and complete interest as contemplated under Section 244A of the Act.
It is prayed that the learned AO be directed to grant proper interest under Section 244A of the Act."

4. The facts in brief qua the issue raised in the aforesaid grounds are that, assessee is a public limited company engaged in the business of manufacturing of hot rolled steel sheets and steel plates. For the assessment year 2004-05 assessee had filed its original return of income u/s 139(1) on 30.10.04, declaring loss of (-)Rs.262,53,15,582/-. Later on the said return was revised on 17.02.05 whereby "nil" income was declared under the normal provision of the Act and the tax liability under MAT provision of section115JB was shown at Rs.22,33,03,139/- on a book profit of Rs.297,73,75,188/-. In the course of the assessment proceedings, the Assessing Officer noted that assessee company had shown extraordinary item of income amounting to Rs.390,76,03,999/- on account of waiver of loan, which was obtained by the assessee in the earlier years. The breakup of this waiver amount was as under:-

Particulars	Amount (Rs.)
Waiver of principal loans	228,46,76,328
Waiver of interest payable to UTI	86,01,30,698
Waiver of interest, guarantee & commitment fees	76,27,96,973
Total	**390,76,03,999**

In the computation of income assessee added back only the amount of Rs.76,27,96,981/- on the ground that it was claimed as deduction in the earlier years. Regarding waiver of principal loan amount and interest payable to UTI, it was submitted that it was not claimed as allowance or deduction in the earlier years. Therefore, it does not constitute income under section 41(1) of the Act. However, the Assessing Officer vide his order dated 29.12.06 passed u/s 143(3) determined the income under the normal provisions of the Act at Rs.152,58,98,970/- and book profit was computed at Rs.529,36,24,104/- under section 115JB after disallowing the following expenses/deductions claimed by the assessee in the normal computation of income and also making other adjustments while computing the book profits:

- Addition of Rs.109,41,00,000/-, being the amount of depreciation attributable to the capital assets purchased out of loans taken from financial institutions but subsequently waived, liable to be taxed u/s. 41(1) of the Act.
- Non reduction of Rs.314,48,07,026/-, being waiver of loans, while determining Net Profit for the purpose of computing book profits u/s. 115JB.

5. The background of the waiver of the loan is that, assessee had availed 'rupee term loans' and 'foreign currency loans' from various Indian and foreign financial institutions and banks for

setting up of integrated steel plants. The foreign lenders had sanctioned foreign currency loans of about Rs.1000 crores as buyer's credit for purchase of various equipment, plant and machinery etc. The assessee had utilized the above loans to pay the purchase price of the imported plant and machinery for setting up of the Steel plants. The loans were repayable over various maturity dates up to 2010. After setting up the steel plants, the assessee had incurred huge loss due to economic recession in general and steel industry in particular and was under severe financial crisis. Hence, the assessee was unable to meet its financial commitments in respect of the above loans. Accordingly, the assessee entered into a financial restructuring package, i.e., 'Corporate Debt Restructuring Package' (CDR) in respect of loans taken from various Indian and foreign financial institutions. After negotiations with the foreign lenders, the assessee entered into agreements to settle the dues, pursuant to which the principal and interest payable were reworked and part of the principal and interest amounts aggregating toRs.390,76,03,999/-were waived. Accordingly, the entire sum of Rs. 390,76,03,999/- was credited to the Profit and Loss account as an exceptional item on account of waiver of the principal and interest payable thereon with a specific note in 'Notes to Account' that the exceptional item represents waiver of dues on settlement with certain lenders and since the principal amount of the borrowing of Rs.228.46 crores was utilized to pay the purchase price of the imported plant and machinery for setting up the steel plants, therefore, it amounts to capital surplus and not trading ability. Assessee thus contended that, since the waiver of principal amount of borrowing was utilized on capital account, therefore, it is a capital receipt not taxable while computing the income of the assessee. As regards the interest payable to UTI amounting to Rs.86,01,30,698/-, it was contended that the same was never claimed as deduction in the earlier years due to provision of section 43B and hence the amount waived has not been offered to tax as per section 41(1). However a vital fact to be noted in the present case is that, the assessee while computing the book profit under section 115JB in the revised computation of income has included the amount of Rs.314.14 crores (i.e. Rs.228.46 + Rs.86.01) which represented the exceptional items of receipts on account of waiver of loan and same was not taken to 'capital reserve' or excluded by the assessee from the net profit as per profit & loss account. Instead, in the computation of income the assessee by way of a note gave a caveat that the amount of Rs.314.14 crores which represents capital receipt is not in the nature of profit and gains of business and therefore, is not includable in the book profit under section 115JB. This note has given in the para 10.1 of the revised computation which reads as under:

> *"The company submits that the above item is not in the nature of profits and gains of business and accordingly, is not includible within the Book Profits under Section 115JB. In any event, the principal amount waived and written back cannot be considered as income and the same should not be included in the Book Profit. While the Company has, out of abundant caution, included the above item in the computation of Book Profits to the extent of Rs.3,907,603,999, the Company reserves its right to exclude such sum from Book Profits during the course of assessment/ appellant proceedings.*
>
> *For this purpose, the assessee relies on the following decisions of the Income-tax Appellate Tribunal.*
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> - *Sutlej Cotton Mills Ltd. V ACIT (1993) 45 ITD 22 (Cal) (SB)*
> - *Sipani Automobiles Ltd. V DCIT (1993) 46 ITD 280 (Bang)*
> - *NCL Industries Ltd. V JCIT (2004) 88 ITD 150 (Hyd)"*

Even while filing the Auditor's report in form no. 29B in accordance with section 115JB(4) along with return of income, the assessee company again mentioned that exceptional item representing waiver of loan was capital receipt and hence could not be considered to be part of book profits for the purpose of section 115JB. The Assessing Officer, however, while computing the book profit in the assessment order considered the figure as given in the profit & loss account and did not agree to reduce the aforesaid waiver of dues as stated by the assessee in the 'notes' as well as in the accountant's report that it should not be included in the profit & loss account.

6. The assessee's submissions in the first appellate proceedings have been summarized by the Ld. CIT(A) in the following manner:-

> "The AO had erred in including the aforesaid dues waived while computing the Book Profits u/s 115JB of the Act, in view of the following:
>
> i) Firstly, the principal amount waived and written back being an 'exceptional item' cannot be considered as income for the purposes of determining "Book Profits" u/s 11 5JB.
>
> ii) Secondly, the principal amount waived and written back would be chargeable to tax only by the provisions of Section 41(1) by deeming it to be the income of the previous year;
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> iii) Thirdly, if the conditions prescribed in Section 41(1) are not satisfied, such deeming would not apply and the waiver of dues would not be chargeable to tax; and
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> iv) Lastly, in support of the above contention, the appellant placed reliance on the following judicial

precedents in the cases of:

(a) NCL Industries Ltd. Vs JCIT - 88 ITD 150 (ITAT, Hyderabad Bench).

(b) Sutlej Cotton Mills Ltd. Vs ACIT - 45 ITD 22 (Kol) (SB).

To sum up, as the principal amount waived and written back would not satisfy the conditions prescribed in Section 41(1), the same would not be deemed as income chargeable to tax. Even otherwise, assuming without admitting, that such waiver of dues are chargeable to tax due to deeming provisions of Section 41(1), it was submitted that such deemed income cannot be included for the purposes of computing Book Profits u/s 115JB of the Act as held by the ITAT, Hyderabad Bench in the case of NCL Industries (supra)."

7. The Ld. CIT(A) rejected the assessee's contention on the ground that assessee is required to prepare its profit & loss account in accordance with Part II & III of VIth Schedule of the Companies Act,1956 and the book profit so arrived is to be taken at the basis for MAT calculation subject to certain specific adjustments of amount/data prescribed in the *Explanation-1* thereto. The assessee in its computation of book profit once has adopted the said amount as the part of the book profit then the same has to be accepted as such. He rejected the assessee's contention that notes given in the statement of accounts that it is not includable within book profit cannot be considered. He distinguished the judgments relied upon by the assessee and finally he upheld the action of the Assessing Officer for including the waived amount for the purpose of arriving the book profit.

8. Before us, the Ld. Counsel for the assessee, Mr. Kanchan Kaushal submitted that the amount of waiver of loans needs to be reduced from the net profit for the purpose of computing the book profit u/s 115JB to the extent of Rs.314.14 crores on the

ground that *firstly,* the exclusion of capital receipt though credited to the profit & loss account is in accordance with Part II & III of VIth Schedule of the Companies Act, 1956 as only the 'working results' of the company is required to be considered for the purpose of computing the book profit under the provisions of section 115JB; and *secondly,* the waiver of loan is a 'capital receipt' because it was taken for the purchase of capital assets and hence it does not fall within the definition of income under the provisions of the Income Tax Act, therefore it is neither a profit nor revenue nor income nor gain which can be said to be chargeable to tax under the Income Tax Act. Once the particular receipt is not recognized as income at all under the charging provisions of Sections 4 & 5, there is no question of taxing the same under any other provisions of the Act. For the first proposition, after referring to the provisions of section 115JB read with *Explanation-1,* he submitted that the book profit has been defined as net profit shown in the profit & loss account and such a profit & loss account is to be prepared in accordance with the provisions of Part II & III of 6th Schedule of the Companies Act. The surplus arising on waiver of loan is though required to be credited to the profit & loss account as provided under section 211(2) of the Companies Act, however he pointed out that section 211(3A) as well as sub section (2) of section 115JB envisages that such profit & loss account is to be prepared in accordance with the accounting standards. After referring to theAS-5 and AS-9, he submitted that such waiver of a loan amounts to gain resulting from discharge of an obligation which is not considered as revenue, therefore, such a waiver of loan amount cannot be treated as revenue as per accounting standards. Mere disclosure of an extraordinary item in the profit & loss account does not mean that the item represents the 'working result' of the company. He submitted that even the Part II of VIth Schedule provides that Profit &Loss account shall be so made which clearly discloses the result of the working of the company during the period covered by the account and shall disclose every material after including the credits or receipts and debits or expenses in respect of non-recurring transaction or transaction of exceptional nature. The waiver of loan can no way be reckoned as working result of the company for the period. He referred to the decision of Hon'ble Supreme Court in the case of **Indo Rama Synthetics (I) Ltd. vs. CIT, (2011) 330 ITR 363 (SC)** wherein it has been held that object of the MAT provision is to bring out the 'real profits' of the companies and the main thrust is to find out the working result of the company. The real working result of a company can be arrived only after excluding the capital receipt and not otherwise. On the issue that assessee itself has included the waiver of amount in its profit & loss account, Mr. Kaushal submitted that the said working has to be read with the caveat given in notes to the account which has to be read along with the balance sheet of the profit & loss account. The assessee has very categorically stated that the waiver amount is not includable in the working of the book profit and it has been shown out of abundant precaution to avoid any amount of interest or penalty. In support of his contention, he relied upon the decision of Hon'ble Delhi High Court in the case of **Sain Processing & Weaving Mills (P) Ltd (2010) 325 ITR 565 (Del).** In the case before the Hon'ble Delhi High Court, the assessee did not charge depreciation to the Profit & Loss account, but disclosed the same in the Notes forming part of accounts. However, while computing book profit u/s 115J of the Act, it claimed the amount of depreciation as deduction from the net profit disclosed in the profit and loss account. The relevant observation of the Hon'ble High Court in respect of the said controversy was as under:

> *"The answer to this poser is found in sub-section (6) of section 211 of the Companies Act, which provides that except where the context otherwise requires any reference to a balance sheet or profit and loss account shall include the notes thereon or documents annexed thereto, giving information required to be given and/or allowed to be given in the form of notes or documents by the Companies Act. As already noted it is obligatory under clause 3of Part II to Schedule VI to the Companies Act to give information with regard to depreciation, which has not been provided for along with the quantum of arrears. According to us, once this information is disclosed in the notes to the accounts it would clearly fall within the ambit of the Explanation to section 115 J of the Act which defines "book profit" to mean "net profit as shown in the profit and loss account for the relevant assessment year.*
>
> *To our minds, as long as the depreciation which is not charged to the profit and loss account but is otherwise disclosed in the notes of the accounts, it would come within the ambit of the expression "shown" in the profit and loss account, as notes to accounts form part of the profit and loss account by virtue of subsection (6) of section 211 of the Companies Act, 1956. This is quite evident if the provisions of sub-section (6) of section 211 of the Companies Act, are read in conjunction with sub section (1A) as well as the Explanation to section 115Jof the Act". (emphasis added)*

9. On the second proposition that the receipt which is not chargeable to tax under section 4 cannot be brought to tax under section 115JB, Mr. Kaushal submitted that the first and foremost condition for taxing an income is that such a receipt should be first held as an income under the charging sections and if it is not an income then same cannot be brought to tax under the MAT provision also. The waiver/remission of a loan taken for the purchase of a capital asset is a capital receipt which is not chargeable to tax and therefore, waiver of a loan being a capital receipt cannot be indirectly brought to tax under section 115JB as it would defeat the entire purpose of the legislative intend

behind introducing the provisions of MAT in section 115J/115JA/115JB. He also relied upon the decision of Hon'ble Kerala High Court in the case of **Karimtharuvi Tea Estates Ltd. and Another vs. DCIR and Others (247 ITR 22),** wherein the Hon'ble Kerala High Court after examining the object of section 115JB observed and held as under:

> *"The object of insertion of section 115J of the Income Tax Act, 1961, was to ensure levy of minimum tax on what are known as 'prosperous zero-tax companies'. Under the scheme of the section, where the total income of companies as computed under the provisions of the Act, in respect of the previous year relevant to the assessment year, is less than 30 per cent of their book profits, the total income of such companies chargeable to income-tax for the relevant previous year is treated as income equal to 30 per cent of such book profits and is taxed accordingly. It also provides for certain adjustments by way of adding amounts and granting deductions for computing the chargeable income under section 115J (1). Sub-section (2) provides that determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years will have to be made unaffected by the provisions in sub-section (1) of section 115J. The very object of the provisions of section 115J is to tax such companies which are making huge profits and also declaring substantial dividends but are managing their affairs in such a way as to avoid payment of income-tax, as a result of various tax concessions and incentives and for that purpose, the taxable income is determined under sub-section (1) of section 115 J. An assessee is enabled to claim carry-forward and set-off of losses, unabsorbed allowance, in view of the specific provisions of the Act enabling an assessee to claim. But because of this provision a company will have to pay tax on at least 30 per cent of its book profits. Therefore, what is taxed is not fictional or hypothetical income. Under the law though it is permissible to bring to tax hypothetical income, what is really done under section115 J is not exactly bringing to tax hypothetical income. What is really done is to limit or restrict or curtail deduction, carry-forward and set-off of losses, unabsorbed depreciation, unabsorbed allowance, etc. Ordinarily these deductions are permissible in view of the provisions introduced in the statute by the Parliament*

and the Parliament is equally competent to take away or restrict or limit such allowances for a definite purpose."

Thus, he submitted that the legislature never intended to bring tax in such events which otherwise are not taxable at all under the provisions of the Act and such a provision cannot be so interpreted so as to tax any capital receipt. He also strongly referred and relied upon the decision of a special bench in the case of **Sutlej Cotton Mills vs. ACIT (Spl. Bench), (1993) 45 ITD 22,** wherein it was held that particular receipt which is admittedly not an income cannot be brought to tax under the deeming provision of section 115J as it defies the basic intention behind introduction of provision of section 115J. By way of illustration, he pointed out that clause (f) of *Explanation-1* and clause (2) itself shows that any income to which provision of section 10, 10A, 10B or section 11 applies, then it requires exclusion of such income from the book profit which has so credited to the profit & loss account likewise if a capital receipt which is not taxable under the Act is credited to the profit & loss account it does not *ipso facto* reached to a conclusion that it is to be treated as part of book profit. He also relied upon following case laws wherein on similar issues; the matter was decided in favour of the assessee by the various Tribunals:-

i. *Shivalik Venture (P) Ltd. vs. DCIT (2015) 173 TTJ (Mum) 238.*
ii. *ACIT vs. Shree Cement Ltd. (ITA Nos.614, 615 & 635/JP/2010).*
iii. *ACIT vs. L.H. Sugar Factory Ltd. and vice versa in ITA Nos.417, 418& 339/LKW/2013 dated 9 February 2016.*
iv. *DCIT vs. Binani Industries Ltd. in ITA No.144/Kol/2013 dated 15 February 2016.*
v. *DCIT vs. M/s. Garware Polyester Ltd. (ITA No.5996/Mum/2013*).

10. On the other hand, the Ld. CIT D.R. submitted that once the assessee itself has credited the waiver amount to the profit & loss account, then neither the Assessing Officer nor the assessee can tinker with such profit & loss account. In support of it, he strongly relied upon the decision of Hon'ble Supreme Court in the case of **Apollo Tires Ltd. vs. ACIT, reported in 255 ITR 273**. The assessee is required to prepare its Profit &Loss account as per part II & III of VIth Schedule of the Companies Act and here in this case assessee did prepared its Profit &Loss account as per the requirement of the Companies Act and therefore, said Profit &Loss account cannot be disturbed while computing the book profit under section 115JB which are the non obstante provisions and code by itself. Once the assessee itself has offered the amount as income under section 115JB which has been accepted by the Assessing Officer as such then how the assessee can claim that the same should be reduced from the book profit. The notes appended to the profit & loss account cannot be read into because ultimately the results shown by the assessee are to be reckoned and considered for the profit & loss account disclosed in the books. In all the judgments relied upon by the Ld. Counsel, the assessee had made a claim for deduction from the book profit in the computation of book profit itself and not when assessee himself has shown as a part of Profit & Loss Account and offered it as a book profit. Therefore, on facts all these judgments relied upon by the assessee are not applicable at all. The assessee herein the present case has made a claim before the Assessing Officer by way of simple note which cannot be accepted in view of the decision of Hon'ble Supreme Court in the case of **Goetz (India) Ltd. vs. CIT (2006) 284 ITR 323,** which clearly envisages that a claim can only be made through revised income of return. On merits, he submitted that the issue

is covered in favour of the department in view of the following decisions:

i) *CIT vs. Veekaylal Investment Co. (P) Ltd. (2001) 249 ITR 597 (Bom)*

ii) *Kopran Pharmaceuticals Ltd. vs. DCIT (2009) 121 TTJ 77(Mum)*

iii) *Hindustan Shipyard Ltd. vs. DCIT (2010) 130 TTJ 213 (Vizag)*

iv) *Duke Offshore Ltd. vs. DCIT (2011) 45 SOT 399 (Mum)*

v) *B & B Infotech Ltd. vs. ITO (ITA No.726/Bang/2014)*

His strong contention was that once the amount of waiver of loan is part of profit & loss account duly credited to the P&L account and also clarified by the auditor, then neither the Assessing Officer nor the assessee can tinker with such profit & loss account while computing the book profit.

11. We have heard the rival submissions of both the representatives, perused the relevant material referred to before us and the relevant findings given in the impugned order. The main issue involved here in this appeal is, whether the amount of Rs.314,48,07,026/- being waiver of loan amount can be reduced while determining the net profit for the purpose of computing the 'book profits' under section 115JB. The waiver of the loan amount has arisen on account of the fact that assessee had availed rupee term loan and foreign currency loan from various institutions in India and foreign financial institutions for setting up of integrated steel plants. It is an undisputed fact that loan taken and utilized was for the purchase of plant and machinery for setting up of steel plant, i.e., for acquisition of capital assets. The assessee due to heavy losses and its inability to meet its

financial commitment, entered into a 'corporate debt restructuring package' in respect of the loan taken from various Indian and foreign financial institutions. After negotiations the principal and interest amount which was waived by the institutions were calculated at Rs.390,76,03,999/- which consists of following amounts:-

Particulars	Amount (Rs.)
Waiver of principal loans	228,46,76,328
Waiver of interest payable to UTI	86,01,30,698
Waiver of interest, guarantee &commitment fees	76,27,96,973
Total	**390,76,03,999**

Out of the said amount it is an admitted fact that sum of Rs.76,27,96,973/- has been added back by the assessee in its computation of income and has been offered to tax as it was claimed in the earlier years. The balance amount aggregating to Rs. 314.4 crores which was though in the nature of exceptional item representing the waiver of loan amount as aforesaid was not excluded by the assessee from the net profit as per the profit & loss account while computing the book profit, instead assessee made a caveat by way of notes in the computation itself that the said amount represents capital receipt, hence was not in the nature of profit and gains of business and accordingly, was not includable in the book profit under section 115JB. In the notes to the computation of income which has been reproduced above, the assessee categorically mentioned that such capital receipt is not in the nature of income and hence it is not includable in the book profit, but same has been included only out of abundant portion in order to avoid any interest and penalty exposure.

12. Before we dwell upon the controversy involved, it needs to be first determined, whether the amount of waiver of loan is taxable under the normal provisions of the Income Tax Act, 1961 or not. It is axiomatic that under the Income Tax Act only those receipts which are in the nature of income can alone be subject to tax and such a nature of income should fall within the charging section as provided under the Act. All the receipts by an assessee would not necessarily be deemed to be income of the assessee for the purpose of income tax and the question whether the particular receipt is income or not will depend upon the nature of the receipt as well as the scope and effect of the relevant taxing provision. The Hon'ble Supreme Court in the case of Parimisetti Seetharamamma vs. CIT (57 ITR 532) has observed as under:

> *"By sections 3 and 4, the Indian Income-tax Act, 1922, imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision. Where, however, a receipt is of the nature of income, the burden of proving that it is not taxable because it falls within an exemption provided by the Act, lies upon the assessee.*
>
> *Where the case of the assessee is that a receipt did not fall within the taxing provision, the source of the receipt is disclosed by the assessee and there is no dispute about the truth of that disclosure, the income-tax authorities are not entitled to raise an inference that the receipt is assessable to income-tax on the ground that the assessee has failed to lead all the evidence in support of his contention that it is not within the taxing provision."*

Generally the waiver of remission of a liability cannot be regarded as income in the hands of the assessee unless it is a trading liability and if the waiver of a loan is on capital account then certainly it cannot be reckoned as income or revenue, which is clearly evident from the relevant provisions of section 41(1) which reads as under:

> *"(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,-*
>
> *(a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income- tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not;..........."*

From the plain reading of above section it is quite ostensible that before this section can be invoked it is *sine-qua-non* that assessee should establish that first of all an allowance or deduction has been granted during the course of assessment for any year in respect of, (i) loss; (ii) expenditure; or (iii)trading liability, which is incurred by the assessee; and subsequently during any previous year the assessee obtains, whether in cash or in any other manner, whatsoever; (i) any amount in respect of such loss or expenditure, or (ii) some benefit in respect of such trading liability by way of remission or cessation of such liability. Thus, a remission or cessation of liability which can be deemed to be as an income must be a trading liability for which an allowance or deduction has been made in the assessment for an earlier year. A Companies liability on account of the principal amount of loan borrowed by it on a capital account, i.e., for acquisition of a capital asset cannot be reckoned as a nature of trading liability as envisaged in section 41(1), therefore, its remission cannot be deemed as income under the said provision. When a remission of a particular liability cannot even be deemed as income pursuant to a provision which has been enacted specifically for the purpose of treating it as a deeming income, then how can it be treated as income for the purpose any other provisions of the Act, unless specially provided to be taxed under any provision. Here, in this case admittedly the pre-requisite condition for invoking the provision of section 41(1) has not been satisfied/fulfilled at all for the reason that the pre-component of the borrowing for acquisition of capital asset has neither been allowed as allowance nor as deduction in the earlier years and being for the purpose of acquisition of a capital asset any waiver thereof will not constitute income under section 41(1).

13. The aforesaid proposition is also well supported by Hon'ble Bombay High Court in the case of **Mahindra & Mahindra vs. CIT, reported in 261 ITR 501.** Similarly, in a later judgment Hon'ble Court in the case of **CIT vs. Softworks Computers Pvt. Ltd., reported in 354 ITR 16,** after considering the said judgment and also the judgment of **Solid containers Ltd., reported in 308 ITR 417,** observed and held as under:-

> *"7. We find that the decision of this court in the matter of Solid Containers Ltd. (supra) has also considered the earlier decision in the matter of Mahindra and Mahindra Ltd. (supra) and distinguished the same by holding that in that case the loan was given for purchase of capital assets unlike in the case of Solid Containers Ltd. (supra) where waiver was of a loan taken for trading activity and thus considered to be of a revenue nature. In the present case, the amount which was advanced as a loan to the respondent-assessee was for the purposes of relocating its office premises. The loan taken was utilized for the purposes of acquiring a office at Godrej Soap Complex, Vikroli, Mumbai. Therefore, the loan in the present fact was taken for acquisition of capital asset and not for the*

> *purposes of trading activity as in the case of Solid Containers Ltd. (supra). The present case is, therefore, covered in favour of the respondent-assessee by the decision of this court in the matter of Mahindra and Mahindra Ltd. (supra).”*

Thus, waiver of loan taken for acquisition of a capital asset and on capital account cannot be taxed u/s 41(1), as it is neither on revenue account nor a remission of a trading liability so as to attract tax in the year of remission.

14. Now we come to the core issue, whether the amount of waiver amount would at all form part of the ‘book profit’ of the company for the purpose of levy of MAT under section 115JB. Relevant portion of section 115JB as it stood at the relevant period reads as under:

> *“**115JB.**(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one-half per cent of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of seven and one-half per cent].*
>
> *(2) Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956) :*
>
> ***Provided** that while preparing the annual accounts including profit and loss account,—*
>
> *(i) the accounting policies;*
>
> *(ii) the accounting standards adopted for preparing such accounts including profit and loss account;*
>
> *(iii) the method and rates adopted for calculating the depreciation,*

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956) :

Provided further *that where the company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under this Act,—*

(i)the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

(iii) the method and rates adopted for calculating the depreciation,

shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year falling within the relevant previous year.

Explanation.*—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2),* ***as increased by—***

(a) ------

to

(f) --------

if any amount referred to in clauses (a) to (f) is debited to the profit and loss account, and ***as reduced by—***

(i) -------

to

(viii) --------.

From the reading of the above provision it can be seen that;

- *Firstly,* it is a *non-obstante* provision which provides that if the income tax payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year is less than 7½% of its 'book profit', then such 'book profit' shall be deemed to be the total income of the assessee and assessee shall pay tax on the book profit at the rate of 7½%.;

- *Secondly,* the assessee company is required to prepare its profit & loss account in accordance with the provision of Part II & III of VI[th] Schedule of the Companies Act, 1956 and while preparing the annual accounts including profit & loss account, accounting policies, accounting standards shall be the same which has been adopted for the purpose of annual general meeting in accordance with provision of section 210 of the Companies Act and;
- *Lastly,* book profit has been defined to mean 'net profit' as shown in the Profit &Loss account for a particular year prepared under sub section (2) of this section, as increased by the items in clause (a) to (f) (if these items are debited to the P & L Account)and is to be reduced by the items mentioned in clause (i) to (viii) as listed in the *Explanation-1*.

The purpose and legislative intent behind introduction of provisions of section 115J/115JA/115JB was to take care of the phenomenon of prosperous zero tax companies which had continued but were paying no income tax even though they had profits and were declaring dividends. It was therefore, sought that minimum corporate tax should be paid by these prosperous companies and accordingly, MAT was introduced. The Hon'ble Kerala High Court in case of Karimtharuvi Tea Estate Ltd. and another vs. DCIT (supra) as reproduced above explains the main purpose and intent behind these sections. It was never the intention of the legislature that any receipts which is not taxable *per se* within the income tax provision or not reckoned as part of net profit as per the profit & loss account as per Companies Act can be brought to tax as a book profit. This has been held so by Spl. Bench in case of Sutlej Cotton Mills Ltd. vs. ACIT (supra) and by **Cochin Bench of ITAT in the case of ACIT vs. Nilgiri Tea Estate Ltd., reported in (2014) 65 SOT 14,** wherein the

Tribunal held that, an item of income which does not come within the purview of the Income Tax cannot be subjected to tax under any other provision of the Act.

15. Now whether the surplus arising on account of waiver of the principal amount of loan is required to be credited to the profit & loss account in terms of provisions of Part II & III of VIth Schedule of the Companies Act needs to be seen. The starting point for computation of book profit under section 115JB is the 'net profit' as per the profit & loss account prepared in accordance with the provisions of the Companies Act. The primary purpose of preparing profit & loss account under the Companies Act is to find out the result of the working of the company during the period covered by the profit & loss account which has been enshrined in **Part II of the Companies Act**. The relevant portion of Part II reads as under:-

> *"1. The provisions of this Part shall apply to the income and expenditure account referred to in sub-section (2) of section 210 of the Act, in like manner as they apply to a profit and loss account, but subject to the modification of references as specified in that sub-section.*
>
> *2. The profit and loss account—*
>
> *(a) shall be so made out as clearly to disclose the result of the working of the company during the period covered by the account, and*
> *(b) shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature.*
>
> *3. The profit and loss account shall set out the various items relating to the income and expenditure of the company arranged under the most convenient heads; and in particular, shall disclose the following information in*

respect of the period covered by the account-

> *………………. ……………….*
>
> *(xii)*
>
> *(a) ……….*
>
> *(b) Profits or losses in respect of transactions of a kind, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount."*

Further, section 211(2) of the Companies Act provides for the form and contents of profit & loss account in the following manner:

> *"(2) Every profit and loss account of a company shall give a true and fair view of the profit and loss account of the company for the financial year and shall, subject as aforesaid, comply with the requirements of Part II to Schedule VI, so far as they are applicable thereto:"*
>
> Further, sub-section (3A) provides that,
>
> *"Every profit and loss account and balance sheet of the company shall comply with the accounting standards".*

From the harmonious reading of the above provisions of the Companies Act, it can be gathered that *firstly,* the Profit & Loss account must disclose the result of the working of the company during the period covered by the account; *secondly,* it should disclose every material feature including credits or receipts and debits or expenses in respect of non-recurring transaction or transaction of an exceptional nature; *thirdly,* the profit and loss account should set out the various items relating to the income and expenditure of the company arranged under the most convenient heads and disclose all such information as set out therein*; fourthly,* profits or losses in respect of transactions of a kind, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, should also be disclosed; and *lastly,* profit & loss account should give the fair view of the working result and accounting standards should be complied with. A clear cut distinction has been made for disclosing the true working result of the company and a disclosure of non-transaction or transaction of an exceptional nature. One has to keep in mind that the aforesaid provisions mainly requires a broad disclosure of the exceptional items or non-recurring transactions referred to therein and if for some reason or the other they have been accounted for in the profit & loss account then those provisions do not require that those items must necessarily be accounted as a part of the profit & loss account. Separate disclosure is intended to ensure that the reader of the profit & loss account gets a fair and clear picture of the result of the working of the company during the period covered by the profit & loss account. The aforesaid provision cannot be so read so as to require that every non-recurring transaction or transaction of an exceptional nature to be debited/credited to the Profit & Loss account. Accounting Standard-5 prescribes the classification and disclosure requirements of certain items in the statement of profit & loss account, whereas the Accounting Standard-9 gives the illustration of revenue recognition. AS-5 defines Profit or Loss for the period in the following manner:

> *"All items of income and expense which are **recognised in a period** shall be included in the determination of the net profit or loss for the period unless an Accounting Standard requires or permits otherwise."*

Thus, what is contemplated is that, all items of income and expenses which are recognised in a period alone are reckoned as net profit or loss. The recognition criteria of revenue by a company in the profit & loss account is however determined as per Accounting Standard-9. Clause 3 of AS-9 gives illustration of the items which are specifically not to be included within the definition of 'Revenue', the same reads as under:-

> *"3. Examples of items not included within the definition of revenue for the purposes of this Statement are:*
>
> *(i) Realised gains from the disposal of, and unrealised gains resulting from the holding of, non-current assets e.g. appreciation in the value affixed assets;*
>
> *(ii) Unrealised holding gains resulting from the change in value of current assets, and the natural increases in herds and agricultural and forest products;*
>
> *(iii) Realised or unrealized gains resulting from changes in foreign exchange rates and adjustments arising on the translation of foreign currency financial statements;*
>
> ***(iv) Realised gains resulting from the discharge of an obligation at less than its carrying amount;***
>
> *(v) Unrealised gains resulting from the restatement of the carrying amount of an obligation."*

As can be seen, clause *(iv)* clearly excludes the cases of remission of liability, because it is nothing but gains realised from discharge of an obligation at less than carrying amount, which herein this case is gain on account of waiver of part of obligation to repay the loan. Further, Accounting Standard - 5 also states that, extra-ordinary items should be disclosed separately in the profit and loss account. The objective of AS-5 is to prescribe the classification and disclosure requirements. The relevant text of the standard 5 reads as under:

> *"8. Extraordinary items should be disclosed in the statement of profit and loss as a part of net profit or loss for the period. The nature and the amount of each extra-ordinary item should be separately disclosed in the statement of profit and loss in a manner that its impact on current profit or loss can be perceived."*

A con-joint reading of the above accounting standards suggests that, there are two types of compulsions while preparing annual accounts, one are accounting compulsions and second are disclosure compulsions. The accounting compulsion comes into play since there is a double entry system of accounting, for instance, when a loan amount is waived, a debit goes to the liability account and a credit has to go to any of the liability/ reserve account, which in the present case has been taken to the Profit and Loss account. The disclosure compulsions merely require the assessee to disclose the material items in the Profit & Loss account. A mere disclosure of an extraordinary item in the profit & loss account statement does not mean that the said item represents the 'working result' of the company, when the accounting standard, especially AS-9 clearly provides that remission of a liability is not to be recognized as revenue, then it has to be reckoned that it cannot be treated as revenue for the purpose of either net profit or consequently book profit. The primary purpose of preparing the Profit &Loss account in Part II of the Companies Act is to find out the result of the company, during the period covered by the profit & loss account and the exceptional nature items are required to be disclosed separately so as to assess the correct impact on the profit & loss account of the company. What is required under clause (3) of Part II of Schedule VI of the Companies Act, is that, a profit & loss account should set out various items relating to the income and expenditure of the company arranged under the most convenient heads and then it provides to list out the various information which needs to be disclosed in the profit & loss account. The profit & loss account contains income and expenditure of a company in respect of the period covered by the account and therefore, there cannot be any question for including a capital surplus in that account which cannot be reckoned as income. Clause (3)(xii)(b) of Part II of schedule also shows that what is to be included in the profit & loss account is in respect of transactions of an account, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount. This clearly indicates that only those items can be regarded as part of the profit & loss account which is in respect of similar type of transaction and not which are exceptional in nature. Waiver of a loan certainly cannot be reckoned as transaction of a kind usually taken but it is an item of exceptional and non-recurring nature. A capital surplus on account of waiver of loan in no way can be recorded as operational profit or profit which is to be included in the profit & loss account. There can be absolutely no question for accounting in the Profit and Loss Account something which cannot be regarded as income, profit or gain. This view is further reiterated by the interpretation clause 7 appearing in Part III of Schedule VI of the Companies Act which reads as under:

> *"7(1) For the purpose of Parts I and II of this Schedule, unless the context otherwise requires._*
>
> *(a) …………………………*
> *(b) …………………………*
> *(c) the expression "capital reserve" shall not include any amount regarded as free for distribution through the profit and loss account; and the expression "revenue reserve" shall mean any reserve other than a capital reserve; " ………"*

A capital surplus thus, in respect of waiver of loan amount cannot be regarded as being amount available for distribution through the profit & loss account. This follows from the very definition of expression 'capital reserve' that it must be accounted directly to the credit of the capital reserve account instead of being credited to the profit & loss account so as to ensure that it is not left for being distributed through the profit & loss account.

16. From our above analysis and discussion of the various provisions of the Companies Act as well as Accounting Standards it can be ostensibly deduced that an item of 'capital surplus' can never be a part of profit & loss account albeit it is a part of a capital reserve as the waiver of a loan taken for acquisition of a capital asset is a capital receipt falling within the category of capital surplus which is non-recurring and exceptional item which to be disclosed as per the requirement of the Companies Act. Further it is quite pertinent to note that, clause *(ii)* of *Explanation -1* of section 115JB is also an indicator of the intention of the legislature and also the scheme of the section that the incomes which are treated as exempt under the Income Tax Act are to be excluded from the profit & loss account. The said clause excludes;

> *(ii) the amount of income to which any of the provision 0f section 10 or section 11 or section 12 apply, if any such amount is credited to the profit and loss account;*

When the said clause requires exclusion from the book profit all that amount of income which are exempt and are not in the nature of income, if any such amount is credited to the profit & loss account, then on same logic it would be inconceivable that this provision intends that 'book profit' should include something which is in the nature of a capital surplus on account of waiver of a loan. Even if a company has credited the amount of remission to its profit & loss account, then such a profit &loss account needs to be adjusted with the amount of remission so as to arrive at the net profit as per the profit & loss account prepared in accordance with provisions of Part II & III of VIth

Schedule of the Companies Act and this is what has been envisaged in the operating lines of *Explanation-1* to section 115JB, that, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year. Net profit as per profit and loss account can never meant to include capital reserve or capital receipts. The object of enacting of section 115J, 115JA & 115JB was never to fasten any tax liability in respect of something which is not an income at all or even if it was income but is not taxable under the normal provisions of the Act. The provisions of section 115JB cannot be so interpreted so as to require accounting of what in substance is capital in nature to the credit of the profit & loss account and get indirectly taxed under book profit. The Special Bench of ITAT, Kolkata in the case of Sutlej Cotton Mills Ltd. V ACIT (supra) observed and held as under:

> "*The pattern of the income-tax Act is that certain receipts are not to be taken as income at all while, in respect of certain receipts, there is an exemption from tax on fulfilling certain conditions and, in respect of certain other incomes, certain concessions or deductions are given. There is a basic dichotomy between receipts which are not taxable at all and receipts which are taxable but subject to exemption on fulfilling certain conditions. In the case of capital gains, it is a receipt which is not taxable at all but for a deeming provision. Even the deeming provision is subject to exclusion in respect of certain receipts which fulfill certain conditions such as reinvestment. Section 115J has recognized this and has provided in Explanation, clause (f), item (ii), that the amounts falling under Chapter III are to be excluded. When an amount which forms part of the book profit itself cannot be taxed under section 115J when it does not have the income character, it has to be accepted that, when what is routed through the profit and loss account and carried to re-.serve is of a capital nature and does not have an income character, it cannot be added back to the book profits merely because of the enabling provision in the Explanation to section 115J for the purpose of imposing a tax thereon. Apart from the fact that capital gains is deemed*

to be income under section 45, it has to be kept in mind that even section 115J deems 30 per cent of the book profit to be total income chargeable to tax. The legislative history shows that the tax under section 115J was with reference to the business profit as it was in replacement of section 80VVA which sought to reduce the deductions available in computing the income from business. When section 80VVA was introduced in 1983-84, the intention was to restrict the various tax incentives and concessions available in computing the income from business to 70 per cent thereof. Significantly, the deduction under section 80T in respect of capital gains was not one of the items of concession or tax rebate which was to be restricted under that section. This shows that exemption of capital gains was not intended to be restricted. Subsequently also when that section was replaced by section 115J, the object was to introduce the provision whereby every company will have to pay a minimum corporate tax on the profits declared by it in its own accounts. These profits can only be those which are assessable as income under the Act. It is now well-settled that, in the interpretation of statutes, one has to adopt such a construction as will promote the general legislative purpose underlying the provision. In the present case, as can be seen from the Finance Minister's speech and the Memorandum explaining the provisions, the intention was to make the company pay tax on income which would otherwise be reduced by reason of certain deductions available under the Act. Even the adjustments specified in section 115J refer only to appropriation from the profits of the business. The mandate given by section accordance with the provisions of Part-II and Part -III of the Sixth Schedule to the Companies Act" and the "net profit as shown in the profit and loss account". These two expressions convey an idea of an implied mandate given to the Assessing Officer to verify and satisfy himself that the net profit was as shown in the profit and loss account and the profit and loss account was prepared in accordance with Part II and Part Ill of the Sixth Schedule to the Income-tax Act. A reference to the requirements of the Companies Act shows that it is concerned with the result of the working of the company. Consequently, it cannot be directly concerned with changes in the capital structure. In particular, the profit and loss account is concerned with items of income and expenditure and, therefore, any profit derived by realization of a capital asset would not be an item of income. In a case where the profit and loss account *was prepared in accordance with the provisions of Part II and Part Ill of Sixth Schedule to the Companies Act, the Assessing Officer will have no power to disturb the book profit except as stated in section 115J. The Assessing Officer is bound to proceed with the computation only on the basis of the book profit as shown in the profit and loss account unless it is discovered that the profit and loss account is not drawn up in accordance with the provisions of the Companies Act. As far as fixed assets and investments are concerned, the valuation of such assets is not a necessary part of the process of determining the trading result since they do not form part of the stock-in-trade. Any revaluation of fixed assets or investments does not indicate the accrual of any profit because profit or loss will arise only on sale or disposal and not on revaluation and such unrealized profit on revaluation cannot be brought to tax. However, it is well recognized that, in case of unrealized appreciation of fixed assets, they are written up on revaluation on the assets side of the balance-sheet to give a true and fair view of the company's affairs on a particular date, i.e. balance sheet date and the net surplus is shown as a capital reserve. This is not a regular annual feature but an exercise undertaken at appropriate junctions in the career of a company. In contrast, in the case of stock-in-trade, if the assessee had been following the method of valuing at cost and changes to the method of valuation at market value, such a valuation has to be made thereafter every year at market value on the valuation date. But, in the case of fixed assets, if the investments have been shown at cost for some years and the value is written up or written down on revaluation at market rate on a particular date, there is no change in the method of accounting so as to require the company to again revalue the investments at market rate on subsequent annual valuation dates. What will be shown in the subsequent years will be only the revised book value. The method of accounting is an essential and integral process to ascertain the income or loss after the end of the previous year within the meaning of section 145 and it does not apply to revaluation of fixed assets or investments. The proceeds by way of sale of an investment not being income, they are not liable to tax under section 115J unless there is a clear intendment. It is well recognized that there cannot be a charge by implication. The non obstante clause with which this section begins could only mean that the other sections which impose tax on book profit alone are to be ignored and* *not that the section which deems a capital receipt as income should be taken as part of the book profit for the purpose of the section, more so when section 45 declares that it cannot be taken as income if section 54E is attracted. Hence a capital gain which is not chargeable even as deemed income because of section 54E, cannot be brought to tax as part of the book profit under the Explanation to section 11 5J..........................."*

17. From the above discussion we are of the opinion that surplus resulting in the books of the assessee company consequent upon waiver of loan amount is not required to be credited to the profit & loss account for the year in which waiver is granted and in any case it cannot be reckoned as working result of the company during the period covered by the account, so as to be treated as part of book profit of the company for that year under the Companies Act.

18. Before us the Ld. CIT D.R. has strongly contended that the when the assessee itself has shown the waiver of loan as part of the book profit therefore, it is precluded from claiming the deduction from the book profit, because once it has been shown and declared as part of book profit then neither the Assessing Officer nor the assessee can tinker with such a result and any adjustment if at all can only be made as provided in *Explanation-1* to sub section (2) of section 115JB. First of all, from the perusal of the Profit &Loss account for the year ending 31.03.2004 it is seen that assessee had shown profit before exceptional item at Rs.571.84 crores. Thereafter, it has disclosed exceptional item of Rs.390.76 crores which is on account of waiver of dues. However, while computing the book profit and tax payable under section 115JB the assessee included the said amount for calculating the tax under MAT. Along with the said computation, the assessee has given the following note which

reads as under:

> *"The Company has credited an amount of Rs. 390,76,03,999 as an exceptional item in its Profit and Loss account. This includes write-back of certain principal amounts and certain interest dues, as a part of a restructuring package with its lenders Out of these amounts, the Company has not considered the write-back of principal amounts (amounting to Rs 228,46,76,328) as a taxable income since the same is in the nature of capital receipt in the hands of the Company. Further, these amounts do not represent the reversal of any amount allowed as a deduction in any earlier year. Hence the provisions, of section 41(1) do not apply in respect of this write-back.*
>
> *As regards the write-back of the balance amount relating to waiver of interest dues, the Company has offered for tax those amounts which had been claimed as a deduction in earlier years on provision basis amounting to Rs. 76,27,96,973 (refer clause A(1) of Annexure 8 of TAR). The balance amount of Rs. 86,01,30,698 had not been allowed as a deduction in earlier years due to the provisions of Section 43B of the Act and consequently, the write-back of this amount is not considered as a taxable income in this year Accordingly, the loss computed has been increased to the extent of the provision written-back.*
>
> *In connection with the above contentions, the Company relies on the following decisions -*
>
> - *Tirunelveli Motor Bus Service Co. P Ltd. v. CIT 78 ITR 55(SC)*
> - *CIT V. Chetan Chemicals (P) Ltd. 188 CTR572(Guj*
> - *Mahindra & Mahindra Ltd v CIT 261 ITR 501(Bom)*
> - *CIT v. Usha Ranjan Bhadra 126 ITR 44 (Gauhati)"*

Then again in note no.10.1 (the relevant portion of which has already been incorporated above) the assessee specifically gave a caveat that this amount on account of waiver of loan is not includable in the 'book profit' and same has been included only out of abundant precaution as the assessee company reserves the right to exclude such sum and contest during the course of assessment proceedings. Thus, at the very initial stage itself the assessee had disclosed all the particulars and had also given a detailed note as to why the said amount will not form part of the 'book profit'. Once that is so, then such notes qualifying the computation of book profit has to be read into it, that is, notes accompanying computation of income cannot be segregated or completely ignored. It is not the case of the assessee that an adjustment should be done while arriving at the book profit as provided in *Explanation-1,*albeit its claim is that correct amount of net profit as per the profit & loss account should be taken as 'book profit' which is the starting point of computation under section 115JB. As discussed in detail in our earlier part of the order that, a receipt which could never enter the stream of taxation either under the normal provisions of the Act or under the MAT provisions under section 115JB, then the said receipt neither constitutes profit nor revenue nor income nor any kind of gain which needs to be included in the net profit. It is a equally a trite proposition of law that an income cannot be taxed by an acquiescence or consent of the assessee but as per the mandate of the statutory provision and if assessee shows that a particular income is not taxable then he can always demonstrate and satisfy to the authorities that a particular income was not taxable in his hand and it was returned under an erroneous impression of law. There cannot be imposition of tax without the authority of law. One has to look what is envisaged under the Act to be taxed and there is no room for intendment or tax authorities can capitalize on acquiescence by assessee sans any authority by law. The court and taxing authorities have bounden duty to decide as to whether a particular category of assessee is to pay a particular tax or not. Even if we agree that Assessing Officer could not have entertained such a fresh claim but in view of the decision of Hon'ble Supreme Court in the case of Goetz India Ltd. vs. CIT (supra) as heavily relied upon by the Ld. CIT D.R., however, it does not impinge upon the powers of the appellate authorities including Ld. CIT(A) and Tribunal. This has been clarified by the Hon'ble Supreme Court itself in the concluding part of the said judgment. There is no such bar or statutory restrain on the appellate authorities to permit/entertain such additional claims which has been raised by the assessee before them. This proposition is strongly supported by the decision of Hon'ble Jurisdictional High Court in the case of CIT vs. **Pruthvi Brokers and Shareholders Pvt. Ltd., (2012) 349 ITR 336 (Bom.).** It is also equally a salutary principle of tax laws that entries in the books of account or in the profit & loss account is not a determinative factor for taxing the income because income can be taxed only by the express provisions of law. We have already discussed in detail in our earlier part of the order that waiver of a loan is a capital receipt which is part of the capital reserve and cannot be reckoned as working result of the company and therefore, it does not form part of the net profit as per the profit & loss account. Thus, such a capital receipt cannot be taxed as 'book profit' as envisaged in terms of section 115JB.

19. As regard the decision of the Hon'ble Apex Court in the case of Apollo Tyres (supra), as relied upon the Ld. CIT D.R., we do not find that this judgment in any way envisages that a receipt which is not taxable as book profit nor reckoned as part of net profit as per profit & loss account should be taxed under u/s 115JB, just because it has been credited to profit & loss

account which too has been qualified by a note giving a caveat for non-inclusion in the book profit. Assessing officer or taxing authorities can tinker with the net profit as shown by the assessee if the accounts are not prepared as per Part II & III of Schedule VI of the Companies Act which is a condition precedent for determination of net profit in terms of section 115JB(2). What the Hon'ble Apex court laid down that when assessee company prepares its profit & loss account as per the Companies Act and the accounts is placed before the company in its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956, AO cannot tinker with such accounts except for provided under *Explaination1.* This judgment in no way impinge upon the requirement to comply with the statutory requirement of preparing the accounts in accordance with the accounting standards adopted for preparing the profit & loss account and in accordance with the Part II & III of Schedule VI of the Companies Act. Only when accounts are drawn as provided in section 115JB, then the proposition laid down by the Hon'ble Apex Court will apply. In our humble opinion the Judgment and law as envisaged by the Hon'ble Apex Court will not apply here because, as we have held above that waiver amount is a capital reserve which cannot be included in the net profit as shown in the profit & loss account for the relevant previous year and consequently cannot be taxed as book profit.

20. So far as non-inclusion of interest amount payable to UTI in the net profit or working result of the company, our finding given above will not only apply to waiver of principal loan but also to the waiver of interest payable to UTI for the reason that, it is not taxable as per the provision of section 41(1), because, admittedly the assessee has not claimed the said amount as

deduction in the earlier years in view of the provisions of section 43B. Once it has not been claimed as deduction then there is no question to be offered for tax under section 41(1). Thus it cannot be regarded as income in the hands of the assessee. The legal proposition as discussed above would apply in the case of waiver of interest payable to UTI, because *firstly,* it is not a remission of trading liability or has been allowed as expenditure in any of the earlier assessment year so as to be deemed as taxable under section 41(1); and *secondly,* it is part of capital surplus arising out of waiver of dues and hence it forms part of the capital reserve which cannot be roped in as a part of net profit while computing the book profit under section 115JB. Even otherwise also the provision of section 41(1) is a deeming provision and the fiction cannot be extended either to the provisions of section 115JB or to the provisions of the Companies Act, because the waiver of a liability for interest on loan is not required to be credited to the profit & loss account of the year of the waiver. Thus, the waiver of interest payable to UTI will also not be includable in the book profit and the same has to be deducted.

21. Various decisions have been cited and relied upon by both the parties in support of their contentions which have been listed above. First of all our conclusion as given above is based on our interpretation of various provisions of the Companies Act as well as provision of section 115JB, however, we would discuss in brief firstly the decisions as relied upon by the Ld. CIT D.R.:-

a) **CIT vs. Veekaylal Investment Co. (P) Ltd. (2001) 249 ITR 597 (Bom)**

The relevant facts of the case were that, during the relevant previous year, the assessee earned capital gains arising on sale of land which were credited to the profit and loss account. However, the assessee did not include the said capital gains for the purpose of computing profits u/s. 115J on the premise that, section 115J taxes only commercial profits. The assessing officer included such capital gains (taxable under the Act) for the purpose of computing book profits u/s. 115J. On this background Hon'ble court held as under:-

> *"The important thing to be noted is that while calculating the total income under the IT Act, the assessee is required to take into account income by way of capital gains under section45of the IT Act. In the circumstances, one fails to understand as to how in computing the books profits under the Companies Act, the assessee company cannot consider capital gains for the purposes of computing book profits under section115J of the Act. Further, under cl. (2) of Part II of Sch. VI to the Companies Act where a company receives the amount on account of surrender of leasehold rights, the company is bound to disclose in the P&L a/c the said amount as non-recurring transaction or a transaction of an exceptional nature irrespective of its nature i.e. whether capital or revenue. That, it would be inappropriate to directly transfer such amount to capital reserve [see Companies Act by A. Ramaiya, p. 1669 (Fourteenth Edn.]. Such receipts are also covered by Cl. 2(b) of Part II of Sch. VI of the Companies Act which, inter alia, states that P&L a/c shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature. Lastly, even under cl. 3(xii)(b) profits or losses in respect of transactions not usually undertaken by the Company or undertaken in circumstances of exceptional or non-recurring nature shows clearly that capital gains should be included for the purposes of computing book profits. That, capital gains would certainly be one of the various items whose information is required to be given to the shareholders under the said cl. 3(xii)(b). So also, the disclosure is required to be made in respect of investment in the capital of a partnership firm if the company is a partner on the date of the balance sheet (see pg. 1651 of the Companies Act by A. Ramaiya [Fourteenth Edn.]. Similarly, profits or losses on such*

investments are also required to be disclosed. [See cl. 3(xii)(a) of Part II of Sch. VI of the Companies Act]."

(i) First of all, it is pertinent to note here that, the transaction under consideration in the aforesaid decision was chargeable to tax under the head 'Capital Gains' and thereafter, its assessibility under MAT provisions was determined. In the case of the assessee, the transaction under consideration is a pure capital receipt not chargeable under any of the provisions of the Act at all. The question of law before the Hon'ble High Court was, *"Whether the income from capital* ***gains*** *should be included for the purpose of computing book profits under section 115J of the Income-tax Act?"*.It was never a question before the Hon'ble High Court that a receipt which is not taxable at all under the provisions of the Act should be included for the purpose of computing book profits or not. Accordingly, the decision *per se* does not apply to the fact of the Appellant.

(ii) Secondly, the Hon'ble High Court proceeded on the premise that while calculating the total income under the normal provisions of the Act, the assessee is required to take into account the aforesaid capital gains and if that is so, then capital gains are also required to be considered while computing book profits u/s. 115J. If we apply the same principle or analogy on the present facts, then the capital receipt per se which is not an income chargeable to tax, therefore, should not be taken into account for computing total income under the Act and consequently for the purpose of MAT. Once it is not taken into account for the purpose of computing total income then it should also not be considered for computing book profit for 115JB.

b) Kopran Pharmaceuticals Ltd. vs. DCIT (2009) 121 TTJ 77 (Mum):-

Facts in brief were that during the relevant previous year, the assessee earned capital gains arising on sale of factory premises. The excess of net sale consideration over the original cost price of the property was transferred to the Capital Reserve account. Further, the difference between the original cost and the written down value was treated as profit on sale of factory and said capital gain was credited to the Profit and Loss account as other income. The assessing held that the said amount should form a part of the assessee and accordingly, added back the same for the purpose of assessment u/s. 115JB. In this background it was held as under:-

> *"Now the question is, in such circumstances, where the assessee has option to account the surplus profit in two different methods, one by including in the profits and the other without including in the profits, what should be the implication for the purpose of computing taxable income under a scheme of MAT.*
>
> *11. In this context, particularly in the matter of income by way of capital gains, the Bombay High Court has held in the case of Veekaylal Investment Co. (P.) Ltd. (supra) that clause 3 (xii)(b) of Part II of Schedule VI to the Companies Act, requires disclosure of profits or losses from transactions of an exceptional nature. In the light of the said disclosure and accounting requirement mandated by Schedule VI to the Companies Act, the Hon'ble Bombay High Court has held that the capital gains arising to a company should form part of the book profit for the purpose of section 115J. As far as this issue is concerned, there is no functional distinction between section 115J and section 115JB. Therefore, we find that the specific issue of capital gains, vis-a-vis, MAT profit has been decided by the jurisdictional High Court in the above judgment and we are bound to follow the above judgment. If so, the lower authorities have rightly held that the amount of Rs. 27,01,6 70 should be included in the book profit for the purpose of section 115JB.*
>
> *12. It is true that the Hon'ble Supreme Court has held in the case of Apollo Tyres Ltd. (supra) that the Assessing*

> *Authority does not have the jurisdiction to make adjustments in the book profits certified by the Statutory Auditors of the Company other than the adjustment provided under the Explanation thereto. But that is a general proposition of law declared by the Hon'ble Supreme Court. On the other hand, the Bombay High Court in the case has specifically dealt with the question of capital gains. Therefore, we have to consider the judicial distinction made between the specific issue and the general proposition of law. Therefore, we find that the decision of the Hon'ble Bombay High Court in the case of Veekaylal Investment Co. (P.) Ltd. (supra) is more applicable to the present case. In such circumstances, we hold that this appeal filed by the assessee is liable to be dismissed."*

i. Firstly, here again the transaction under consideration in the aforesaid decision was chargeable to tax under the head 'Capital Gains' and thereafter, its assessibility under MAT provisions was determined. In the case of the assessee the transaction under consideration is a pure capital receipt not chargeable under the provisions of the Act at all.

ii. Secondly, the aforesaid capital gains are taxable under the normal provisions of the Act. Once it taken into account for the purpose of computing 'Total Income', it may also be considered for computing book profit u/s. 115JB.

iii. Thirdly, in the said case, the net profit as per the 'Profit and Loss account' is different than what was ultimately computed by the assessing officer. In other words, the Hon'ble Mumbai Tribunal after considering Hon'ble Supreme Court decision in the case of Apollo Tyres Ltd. has allowed tinkering to the 'Net Profit' which is the starting point for computing 'Book Profit' u/s. 115JB.

iv. Lastly, in the case of the assessee also, it is not the case of assessee that an adjustment should be done while arriving at the 'Book profit' as provided under the Act in *Explanation 1* to sub-section (2) to Section 115JB. What the assessee's case is, first determine the correct amount of 'Net Profit' as per Profit and Loss account which is the starting point for computation u/s. 115JB and then tax the book profit. Whence as per our discussion above the receipts in question itself is not part of net profit, then there is no question of bringing it to tax under MAT.

c) Hindustan Shipyard Ltd. vs. DCIT (2010) 130 TTJ 213 (Vizag):

Relevant facts were that, during the year under consideration, the Government of India had waived loan (a portion by way of conversion of loan into equity) and interest thereon due from the assessee. The assessee did not credit, both, the principal and interest waiver in the Profit and Loss account though the details of waiver disclosed in notes to accounts. Such accounting treatment was qualified by auditor. The assessing officer accepted that waiver of principal amount of loan not taxable. However, according to him, since interest amount was liable to tax u/s. 41(1) and therefore, accounts prepared could be modified to tax such interest u/s. 115JB. In this background it was held as under:-

> "*8.6.2 We notice that the Hyderabad Tribunal in the case of NCL Industries (supra) followed the analogy of the decision of the Special Bench of Tribunal in the case of Sutlej Cotton Mills Ltd. vs. Asstt. CIT (1993) 111 CTR (Cal)(Trib) 321 (1993) 46 7TJ (Cal) 310 to come to the conclusion that the income taxable under s. 41(1) cannot be included for the purpose of computing book profit under s.115J of the Act. The Special Bench in the case of Sutlej Cotton Mills Ltd. (supra), has held that the capital gains chargeable under s. 45, as deemed income, cannot be brought to tax for the purposes of determining the book profits under s. 115J. However, the Hon'ble Bombay High Court in the case of Veekaylal Investment Co. (P)*

Ltd. (supra), has held that the capital gain is includible in the computation of the book profit. According to the legal hierarchy, a lower Court should bow to the wisdom of the higher Court. Hence the decision rendered by a High Court prevails over the decision of the Tribunal. Before us, the assessee did not place any other contrary decision of a High Court. In these circumstances, in view of the decision of the Bombay High Court referred supra, we are unable to agree with the argument of the assessee that the income taxable under s. 41(1) cannot be included in the computation of 'book profit' under s. 115JA of the Act."

i.In this case, Government of India accorded the following benefits to the Assessee i) Waiver of Loan ii) Conversion of Loan into Equity and iii) Waiver of Interest. The said waiver of Principal and interest was not incorporated in the books of account, though the details of the waiver were disclosed in the annual report placed the shareholders.

ii. The only issue that was raised in the assessment was in relation to Waiver of Interest. The Assessing Officer himself has accepted that waiver of principal amount of loan and conversion of loan is not a receipt to be considered for the purpose of Section 115JB.

iii. Further, the Assessing officer held the waiver of interest to be taxable u/s. 115JBas the same was taxable u/s. 41(1) of the Act. In the case of the Appellant, neither the waiver of principal amount of loan (being a capital receipt) nor the interest (not claimed as a deduction in earlier years) is taxable under any provisions of the Act.

iv. In this case also, the Assessing Officer has adjusted the net profit as per Profit and Loss account which is the starting point of calculation under section 115JB, i.e., before one enters the computation of 'Book Profit' under the *Explanation* to sub-section (2) of Section 115JB. In other words, the Hon'ble Tribunal after considering the Hon'ble Supreme Court decision in the case of Apollo Tyres Ltd. has allowed tinkering to the 'Net Profit' which is the starting point for computing 'Book Profit' u/s. 115JB.

d) Duke Offshore Ltd. vs. DCIT (2011) 45 SOT 399 (Mum):-

In this case, the assessee had a settlement with the bank as a result of which there was a waiver/reduction of loan. The assessee had shown the same amount as extraordinary item in the Profit and Loss account. While computing book profits for the purpose of section 115JB, the assessee did not consider the said waiver. However, the assessing officer included such waiver of loan and interest thereon for the purpose of computing book profits u/s. 115JB. The tribunal in this background held as under:-

> *"15. The Jurisdictional High Court in the case of CIT Veekaylal Investment Co P Ltd (249 ITR 597) has held that capital gains credited to profit and Loss account should be take into account in computing Book Profits.*
>
> *16. The Delhi High Court in the case of CIT v Goyal M.G. Gases 2010- TIOL-91HC-DEL has held as under:*
>
> > *"In the present case, the assessee did not claim nor was allowed any deduction or benefit of allowance by way of allowable expenditure and trading liability, and the same being credited to the profit and loss account had been subjected to tax as part of book profit under Section 115JB of the Act. We are, therefore, of the opinion that the conclusions of the Tribunal are based on a correct appreciation of law and, therefore, do not warrant any interference by this Court."*

The High Court has approved the fact that write back of loans, though is not taxable under the normal provisions of the Act are includible for the purpose of computing Book Profits.

17. The Special bench of the Hyderabad Tribunal in the case of Rain Commodities Ltd v DCIT - (2010-TIOL-355-ITAT-HYD-SB) = (131 TTJ 514) has held that profit on sale of capital assets credited to the profit and loss account is includible in computing Book profits, notwithstanding the fact that the same is exempted under the normal provisions of the Income tax Act on account of the investment of capital gains in an approved mode.

18. In the circumstances we are of the opinion that the CIT(A) was correct in holding that starting point for determining the book profit under Section 115JB is Rs.54168537/- and in computing the book profits under Section 115JB no part of the liability of Rs.44513406/- that has ceased on account of settlement of loan liability of global trust bank can be excluded even though part of the liability may represent waiver of principal amount of loan."

i. In this case the Tribunal has essentially relied on the following decisions:

(a) Decision of the Hyderabad Tribunal in the case of Gulf Oil Corporation Ltd. vs. ACIT (2008) 111 ITD 124

(b) CIT vs. Veekaylal Investment Co. (P.) Ltd. (supra)

(c) Rain Commodities Ltd. vs. CIT (2010) 41 DTR 449 (Hyd.) (SB).

ii. In the case of Gulf oil, (Hyderabad ITAT decision), it is noticed that, the issue under consideration was whether *advisory fee* debited as an extra-ordinary item in the Profit and Loss account was to be considered while computing Book profits u/s. 115JB. The premise on which adjustment was sought was that the item under consideration was 'revenue in nature' per se. However, in the case of Duke Offshore Ltd. (supra), the Tribunal was dealing with an item of receipt which is capital in nature and not 'income' per se. Further, from the perusal of the decisions of the Hon'ble Bombay High Court and Hyderabad Special Bench stated at point no. (b) & (c) above, it is seen that both the decisions deal with the issue of taxability of capital gains in computing Book Profit u/s. 115JB of the Act. These capital gains were otherwise income u/s. 2(24) of the Act and exclusion was claimed by the assessee while computing Book Profit u/s. 115JB on the ground that the said capital gains were exempt either u/s. 47(iv) or not constitute commercial profits. However, in the case of Duke shore before the Tribunal, the waiver was not capital gains but pure capital receipts which does not even have any 'income', 'profits', 'gains' embedded therein. Accordingly, all the above decisions relied upon by the Hon'ble Mumbai Tribunal were different on facts as compared to the facts under consideration. Though this decision is against the assessee, however we find that in subsequent decisions on similar facts and issues this matter has been decided by the Mumbai Tribunal and other Tribunals in favour of the assessee. These decisions shall be discussed herein after.

e) B &B Infotech Ltd. vs. ITO [ITA No. 726/Bang/2014 dated 08.09.2015:-

In this case, the assessee entered into a one-time settlement with a bank as a result of which there was a waiver of principal amount of loan. The assessee prepared its Profit and Loss account by including the said amount as income. The assessee submitted before the Assessing Officer that the remission of liability was on account of principal amount of loan and therefore, the same was not in the nature of income which could be considered as part of the book profits u/s. 115JBof the Act. The Assessing Officer rejected the objections of the assessee and added the aid amount while computing book profits u/s. 115JB of the Act. The Tribunal held as under:-

> "*In the case in hand, the assessee got remission of liability of Rs.43lakhs under one time settlement by the ING Vysya Bank which has been disclosed by the assessee in the P&L A/c. This disclosure in the P&L A/c is strictly as per the requirement of Schedule VI of the Companies Act and further in conformity with the mandatory accounting standard AS-5. Therefore, the treatment of the amount in the books of account and particularly in the P&L A/c, is as per the provisions of Schedule VI of the Companies Act as well as accounting standard AS 5. Hence, any disclosure in the notes to accounts would not require any change in the P&L A/c already prepared as per Schedule VI of the Companies Act. The decisions relied upon by the assessee are applicable on the facts and circumstances where if an item of income or expenditure which is required to be disclosed in the P&L A/c prepared as per provisions of Schedule VI of the Companies Act but instead of disclosing the said item in the P&L A/c, it was disclosed in the Notes to the accounts, then such item of income or expenditure will be treated as part of the P&L A/c for the purpose of computing book profits u/s 115JB. Once P&L A/c is admittedly prepared as per Schedule VI of the Companies Act, then neither the AO has any power to tinker with it nor the assessee is permitted to claim exclusion or inclusion of any item of income or expenditure as the case may be, for the purpose of computing book profits u/s 115JB except the permissible adjustment provided under the Explanation to sec.115JB of the Act itself. It is not disputed that this amount does not fall in the ambit of any of the clauses of Explanation to 115JB. Therefore, once this amount has been disclosed in the P&L A/c prepared strictly as per provisions of Schedule VI of the Companies Act, the same cannot be excluded for the purpose of computing book profits u/s 115JB. We find that the CIT(A) has rejected the claim of the assessee by following the judgment of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) as well as the Hon'ble Supreme Court in the case of CIT v. HCL Comnet Systems & Services Ltd. [2008] 305 ITR 4091174 Taxman 118 (SC). Accordingly, in the facts and circumstances of the case as well as above discussion, we do not find any error or*

illegality in the impugned order of the CIT (A)."

This decision is again against the assessee, however at the outset, it is seen that the Tribunal has not at all adjudicated on the contention of the assessee that remission being capital receipt, cannot be considered as income even for the purpose of section 115JB of the Act. The Tribunal has summarily relied on the Supreme Court decision in the case of Apollo Tyres (supra) to reject the contentions of the assessee. Secondly, the Tribunal has distinguished the case laws relied upon by the assessee on the basis that, the ratio of decisions relied upon by the assessee is based on the premise that if an item of income or expenditure is required as per Part II of Schedule VI of the Companies Act to be a part of the P/L account, but the same was not disclosed in the P/L A/c and has been disclosed in the notes forming part of the accounts, then the said disclosure in the notes to the accounts would be treated as disclosure of that particular item or expenditure as the case may be, in the P/LA/c for the purpose of book profits u/s. 115JB. Lastly, the decision has been rendered essentially on the premise that the assessee cannot seek any adjustments except for the permissible adjustment provided under the Explanation to section 115JB itself. Here it is not the case of the assessee that an adjustment should be done while arriving at the 'Book profit' as provided under the Act in *Explanation 1* to sub-section (2) to Section 115JB. The fundamental aspect is to first determine the correct amount of 'Net Profit' as per Profit and Loss account which is the starting point for computation u/s. 115JB. If any receipt is not part of the working result or part of the net profit then it cannot be roped in MAT taxability.

22. As regards the decisions relied upon by the Ld. Counsel the same are discussed in brief hereunder:-

a) Shivalik Venture (P) Ltd. vs. DCIT (2015) 173 TTJ (Mum) 238:

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

b) **ACIT vs. Shree Cement Ltd.** (ITA Nos.614, 615 & 635/JP/2010) following Shree Cement Ltd. vs. ACIT (2015) 152 ITD 561 (Jaipur) wherein it was held that:

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

finding as above, clearly not includible in P&L account prepared under Part II & Part III of Schedule VI to the companies Act."

It has been informed by the ld. Counsel that in fact, the Tribunal order in favour of the aforesaid assessee in its own case for the earlier assessment year in ITA No. 942/Jp/o8 had been appealed before the Hon'ble Jurisdictional Rajasthan and Hon'ble Jurisdictional High Court vide order dated 01-10-2010 has admitted only one ground which is reproduced below:

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

From this it was argued that Hon'ble High Court admitted only the ground as to whether the impugned subsidy was a capital receipt or a revenue receipt. Hon'ble High Court has not admitted the ground of the Revenue against relief granted by Tribunal under Section 115JB of the Act on above capital receipt and to that extent, the order of the Tribunal stands affirmed.

c) **ACIT vs. L. H. Sugar Factory Ltd**. in ITA Nos. 417, 418 & 339/ LKW/ 2013 dated 9 February 2016. wherein Tribunal held that:-

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

it is prerequisite for Section 115JB of the Act. The Tribunal in this case also considered two another Tribunal's orders rendered in the case of DCIT Vs. Bombay Diamond Company Ltd-33 DTR 59 and Syndicate Bank Vs. ACIT, 7 SOT 51 Bangalore where it was held by the Tribunal after considering the decision of Hon'ble Apex Court rendered in the case of Apollo Tyres Ltd. (Supra), and after 28 explaining the same that adjustment to profit and loss account is possible to make it compliant with Schedule VI Part II and Part III of the Companies Act, 1956 which is prerequisite of Section 115JB of the Act. On this basis, the Tribunal in the case of Shree Cement Ltd. (Supra) decided this issue in favour of the assessee and it was held that capital receipt in the form of sales tax subsidy needs to be excluded from profit as per P&L account for the purpose of computing book profit u/s 115JB of the Act. <u>By respectfully following these Tribunal's orders, we hold that in the present case also, the receipt on account of transfer of carbon credit which is held to be a capital receipt needs to be excluded from profit as per P&L account for the present year while computing the book profit u/s 115JB of the Act.</u> This issue is decided in favour of the assessee and accordingly Ground Nos.1 to 5 are allowed. The assessee gets relief of Rs.27,70,880/- and consequent interest being 10% of amount received by the assessee on sale of carbon credit of Rs.27,70,8,800/-."

d) Kolkata Tribunal in the case CIT vs. Binani Industries Ltd. in ITA No.144/Kol/2013, dated 15 February 2016, wherein following the all above decisions, it was held that:

"... respectfully following the aforesaid decision of the Mumbai Tribunal, the profit and loss account prepared in accordance with Part IT and III of Schedule VI of Companies Act 1956, includes notes on accounts thereon <u>and accordingly in order to determine the real pro fit of the assessee as laid down by the Hon'ble Apex Court in the case of Indo Rama Synthetics (I) Ltd vs CIT reported in (2011) 30 ITR (SC), adjustment need to be made to the disclosures made in the notes on accounts forming part of the profit and loss account</u> of the assessee and the profits arrived

after such adjustment, should be considered for the purpose of computation of book profits u/s 115JB of the Act and thereafter, the Learned AO has to make adjustments for additions / deletions contemplated in Explanation to section 115JB of the Act."

In this case Tribunal has discussed the entire issue in detail manner on similar set of facts and relied upon various decisions to come to the aforesaid conclusion.

e) DCIT vs. M/s. Garware Polyester Ltd. (ITA No. 5996/ Mum/ 2013), wherein a similar transaction was involved and the Mumbai Tribunal held that, principal amount of loan taken by the assessee for capital expenditure, subsequently waived by the bank, would not be exigible to tax u/s.115JB. The only difference between the aforesaid case and the case of the assessee is that the principal amount of loan waived was directly routed through the Balance Sheet and credited to the General Reserve account whereas in the case of the Appellant, the waiver of loan has been routed through the Profit and Loss account and credited as an exceptional item.

23. From the perusal of aforesaid decisions, at the outset, it may appear that on similar nature of issues there are divergent views of various benches of the Tribunal, however, one common point/ratio permeating through all the decisions, which can be deduced by us is that, if an assessee company is in receipt of a 'capital receipt' which is not chargeable to tax at all, that is, it does not fall within any of the charging section or can be classified under any heads of income under the Income Tax Act, then same cannot be treated as part of net profit as per Profit & Loss account or reckoned as 'working result' of the company of

the relevant previous year and consequently, cannot be held to be taxable as 'book profit' under MAT in terms of section 115JB. Accordingly, our conclusion remains the same that, the capital surplus on account of waiver of dues neither is nether taxable nor can be included in computation of book profit u/s 115JB.

24. Other grounds raised by the assessee on chargeability of interest have not been argued before us and moreover they are consequential in nature, therefore, they are treated as dismissed.

25. Accordingly, assessee's appeal is treated as partly allowed.

26. Now we will take up Revenue's appeal wherein following grounds have been raised:

> *"1. The Order of the learned CIT (Appeals) is opposed to law and facts of the case.*
>
> *2. The CIT (Appeals) was not justified in deleting the addition mode by the Assessing Officer u/s. 41(1) amounting to Rs.109,41,00,000/- on account of disallowance of depreciation directly attributable to the capital assets acquired out of loans/borrowing from Banking companies/Financial institutions.*
>
> *3. The CIT (Appeals) failed to appreciate that the waiver of loan is respect of the loan availed directly relatable to the purchase of the capital assets and the actual cost of such assets to the assessee, on which the claim of depreciation has been made by the assessee.*
>
> *4. The CIT (Appeals) failed to appreciate the provisions of section 43(1) of the I.T. Act, 1961 as per which " actual cost" means the actual cost of the assets to the assessee, as reduced by that portion of the cost thereof,, if any, as has been met directly or indirectly by any other person or authority.*

5. The CIT(Appeals) failed to appreciate that the loans waived by 'the Banking/ Financial institutions on the assets purchased, directly resulted in the decrease in the actual cost of the assets to the assessee.

6. For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of the Commissioner of Income-tax (Appeals) be cancelled and that the order of the Assessing Officer be restored.

7. The appellant craves leave to add, to alter, to amend or to delete any of the grounds that may be urged at the time of hearing of the appeal."

Besides this, the Revenue has also raised following additional grounds:

"1. On the facts and in the circumstances of the case and in law, the CIT(A) has failed to appreciate that the loans taken for business were in the nature of trading liabilities as the same arose from the business activity of the assessee and as such loans written back on account of waiver of the same is liable to be taxed u/s. 41(1) of the Income Tax Act, 1961 as held by the Bombay High Court in the case of Solid Containers Ltd. (308 ITR 417)"

27. As discussed in the assessee's appeal, assessee has credited sum of Rs.390.76 crores to the profit & loss account on account of waiver of principal amount and interest payable thereon. The Assessing Officer was of the opinion that the waiver of the loan went to reduce the cost of the asset purchased out of such losses and therefore, excess depreciation already allowed in the previous year amounting to Rs.109.41 crores was held to be taxable under section 41(1). While doing so, the Assessing Officer relied upon the decision of Hon'ble Bombay High Court in the case of **M/s. Nectar Beverages Pvt. Ltd. vs. DCIT reported in 267 ITR 385**. In sum and substance the Assessing Officer's conclusion was as under:

> *"(i) Depreciation is in the nature of expenditure and deductible from tax liability and therefore, any subsequent recovery of any amount which can be linked to the depreciation claim is taxable.*
>
> *(ii) Waiver of loan taken for purchase of Plant & Machinery was tantamount to deriving benefit from the articles that had enjoyed depreciation and hence was held to be falling within the purview of section 41(1)."*

28. The Ld. CIT(A), after noting down the various decisions, observed that the decision of Hon'ble Bombay High Court has been reversed by the Hon'ble Supreme Court, since reported as **Nectar Beverages Pvt. Ltd. vs. DCIT (2009) 314 ITR 314** and held as under:

> *"On a careful consideration of the facts brought before me, the basis of the AO's decision, and the arguments adduced by the appellant as well as the plethora of judicial pronouncements on the subject, it is quite evident that the ratio of the decisions enumerated above and which, I might add, are squarely on the point at issue, weigh heavily in favour of the appellant, In brief, it is quite evident from these pronouncements, that depreciation cannot be categorized as a loss or expenditure (in the case of Pandyan Insurance Co. cited supra). In the very same case of Nectar Beverages relied upon by the AO (the decision of the Mumbai High Court), the Hon'ble Supreme Court has clearly held that depreciation cannot be considered a loss, an expenditure, or a trading liability and consequently, the action of the AO in bringing to tax, depreciation earlier claimed u/s 41(l) is quite clearly incorrect. The Supreme Court has also quite clearly held that if the intention of Parliament was to bring depreciation within the fold of S.41 (1), it would not have considered it necessary to bring in a separate clause to deal with it, namely, S. 41(2). It is equally evident that the waiver obtained by the appellant does not constitute remission of a trading liability as the liability on account of the loans was clearly on capital account. In the case of CIT Vs Tata Iron & Steel Co. cited supra, the Hon'ble Supreme Court has clearly laid down certain principles wherein it has held that a financing transaction and the acquisition of a capital*

asset from the finance so raised are two distinct & independent transactions and cannot be mixed up. It has also been explicitly held in the said case that the manner and mode of repayment of the loan have no bearing on and cannot go towards altering the cost of the asset. A logical implication of these principles is that even if the quantum of loan obtained for purposes of acquisition of the capital assets is reduced by waiver or otherwise, since this has no bearing on the cost of the asset itself and, consequently, there is no question of bringing to tax, depreciation that has already been allowed based on the original cost of acquisition of the capital asset.

In these circumstances, I am of the view that the AO was in error in bringing to tax the amount in question. The addition on this count is therefore directed to be deleted."

29. We have heard the rival submissions made by the parties and also considered the relevant finding given in the impugned orders. First of all it is seen that Assessing Officer's case is that provisions of section 41(1) are applicable because the assessee has claimed depreciation in the earlier years on the loan taken for acquisition or capital asset and for coming to this conclusion he has heavily relied upon the decision of Hon'ble Bombay High Court in the case of Nectar Beverages vs. DCIT (supra). This observation and finding of the Assessing Officer now stands negated by the judgment of Hon'ble Supreme Court in the case of Nectar Beverages vs. DCIT (supra) wherein the Apex Court has reversed the said decision of the Hon'ble Bombay High Court and observed that depreciation is neither a trading liability as referred to in section 41(1) nor the principal component of the borrowings for acquisition of a capital asset has not been allowed as an allowance or deduction in the earlier years and hence, any waiver thereof, does not constitute income under section 41(1). In any event an allowance of depreciation can in no way be related to waiver of a loan taken to purchase of the asset in question, since the transaction of borrowing of money for purchase of a capital

asset and the transaction of purchase of capital asset are themselves two independent transactions. This has been held so by the Hon'ble Supreme Court in the case **of CIT vs. Tata Iron and Steel Company Ltd. (1998) 231 ITR 285** wherein it has been observed that cost of an asset and cost of raising money for purchase of the asset are two different and independent transactions. The relevant observation as appearing in the judgment reads as under:

> *"It is difficult to follow how the manner of repayment of loan can affect the cost of the assets acquired by the assessee. What is the actual cost must depend on the amount paid by the assessee to acquire the asset. The amount may have been borrowed by the assessee, but even if the assessee did not repay the loan it will not alter the cost of the asset. If the borrower defaults in repayment of a part of the loan, the cost of the asset will not change. What has to be borne in mind is that the cost of an asset and the cost of raising money for purchase of the asset are two different and independent transactions. Even if an asset is purchased with non-repayable subsidy received from the Government, the cost of the asset will be the price paid by the assessee for acquiring the asset........ The assessee may have raised the funds to purchase the asset by borrowing but what the assessee has paid for it, is the price of the asset. That price cannot change by any event subsequent to the acquisition of the asset. The manner or mode of repayment of the loan has nothing to do with the cost of asset acquired by the assessee for the purpose of his business."*

Explanation 10 to section 43(1) will also not apply here as pleaded by the Ld. CIT D.R. before us, because it is applicable only where there is a subsidy or grant of reimbursement which is not the case here. Even otherwise also section 43(1) is applicable only in the year of purchase of machinery and in the present case the purchase of capital asset was not in the assessment year

2004-05. Thus, we hold that *firstly*, section 41(1) does not apply to the facts of the present case as depreciation is neither a loss nor an expenditure as held by the Hon'ble Supreme Court in the case of Nectar Beverages Pvt. Ltd. (supra); and *secondly,* liability incurred by the assessee was utilized for the purchase of capital asset and therefore, under no circumstances it can be held to be a trading liability. Depreciation allowance has no connection with waiver of the capital loans in question and hence would not attract section 41(1). By way of additional grounds the Ld. D.R. has sought to contend that in view of the decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd. 308 ITR 407 the waiver of a loan is to be reckoned as in the nature of trading liabilities and therefore, it is taxable under section 41(1). As discussed in detail in the earlier part of the order, here it is not the case of the Assessing Officer that the principal amount of loan taken by the assessee was for any trading account, albeit it was for the purchase of a capital asset which has never been allowed as a deduction. The loan taken for an acquisition of a capital asset does not constitute trading liabilities which has been allowed as a deduction in earlier years and any kind of waiver thereof would fall within the deeming fiction of section 41(1). We have already clarified that the amount which can be subjected to tax under section 41(1) can only be those amounts or receipts which have been allowed as deduction in the computation of income in the earlier years and if this primary condition is not satisfied, then there cannot be any addition under this section. In the case of Hon'ble Bombay High Court in Solid Containers (supra) the waiver of loan was taken for trading activity and the assessee has credited such a waiver to the profit & loss account and claimed it to be a capital receipt. Even in the case of Hon'ble Supreme Court to which Hon'ble Bombay High

Court has relied upon in the case of CIT vs. TVS Iyengar & Sons Ltd, reported in 222 ITR 344, it was found that the loan/advance constituted a trading liability or was taken under trading account therefore, the ratio of the said decisions would not be applicable on the loan transaction which has been taken on capital account, even if it is for the business purpose. The Hon'ble Bombay High Court in a subsequent decision in the case of **CIT vs. Softworks Computers Pvt. Ltd. Reported in 354 ITR 16,** has held that loan taken for acquiring a capital asset when subsequently waived is not chargeable to tax. The relevant observation of the Hon'ble High Court wherein they had discussed the ratio of Solid Container Ltd. (supra) and the earlier decision of the Hon'ble Bombay High Court in the case of Mahindra & Mahindra is reproduced as under:

> *"7. We find that the decision of this court in the matter of Solid Containers Ltd. (supra) has also considered the earlier decision in the matter of Mahindra and Mahindra Ltd. (supra) and distinguished the same by holding that in that case the loan was given for purchase of capital assets unlike in the case of Solid Containers Ltd. (supra) where waiver was of a loan taken for trading activity and thus considered to be of a revenue nature. In the present case, the amount which was advanced as a loan to the respondent-assessee was for the purposes of relocating its office premises. The loan taken was utilized for the purposes of acquiring an office at Godrej Soap Complex, Vikroli, Mumbai. Therefore, the loan in the present fact was taken for acquisition of capital asset and not for the purposes of trading activity as in the case of Solid Containers Ltd. (supra). The present case is, therefore, covered in favour of the respondent-assessee by the decision of this court in the matter of Mahindra and Mahindra Ltd. (supra)."*

Therefore the plea raised by the Revenue through additional ground cannot be upheld and same is rejected.

30. Before us one more argument was taken by the Ld. CIT D.R. that provision of section 28(iv) would get attracted because

the waiver of loan amounts to value of any benefit or perquisite, whether convertible into money or not, arising from business. First of all it is seen that it is neither the case of the Assessing Officer nor the case of the Ld. CIT(A) that the amount of waiver of loan is to be taxed under section 28(iv). The Hon'ble Bombay High Court in the case of Mahindra & Mahindra vs. CIT 260 ITR 180 501 held that a loan which is originally taken for capital expenditure, if waived, will not give rise to taxable income either under section 41(1) or under section 28(iv). The relevant observation and finding of the Hon'ble Bombay High Court reads as under:

> *"The income which can be taxed under Section 28(iv) must not only be referable to a benefit or perquisite, but it must be arising from business. Secondly, Section 28(iv) does not apply to benefits in cash or money. Secondly, in this case we are concerned with the purchase consideration relating to capital asset. The toolings were in the nature of dies. The assessee was a manufacturer of heavy vehicles and jeeps. It required these dies for expansion. Therefore, the import was that of plant and machinery. The consideration paid was for such import. In the circumstances, Section 28(iv) is not attracted. In our case, the most fundamental fact which is required to be borne in mind is that there was no deduction given to the assessee in earlier years and, therefore, Rs.57,74,064 could not be included as income under Section 41(1) of the Act. Lastly, it is important to bear in mind that the tooling constituted capital asset and not stock-in-trade. Therefore, taking into account all the above facts, Section 41(1) of the Act is not applicable".*

Similar view has been taken by the other courts like Hon'ble Madras High Court in the case of Iskraeco Regent Ltd. vs. CIT (2011) 237 CTR 239 (Mad) and Hon'ble Delhi High Court in the case of CIT vs. Tosha International Ltd., (2009) 176 Taxman 187 (Del). Thus, the plea taken by the Ld. CIT D.R. as well as in the grounds raised by the Revenue is rejected.

31. Accordingly, the appeal of the Revenue is dismissed.

32. In the result assessee's appeal is partly allowed whereas revenue's appeal is dismissed.

Order pronounced in the open court on 13.01.2017.

Sd/-	**sd/-**
(Ashwani Taneja)	**(Amit Shukla)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 13.01.2017.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.