

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I': NEW DELHI

BEFORE SHRI P.M. JAGTAP, ACCOUNTANT MEMBER &
SHRI C.L. SETHI, JUDICIAL MEMBER

ITA No. 3912/Del/2005
Assessment Year : 2002-03

Growth Avenue Securities
Pvt. Ltd.
811, Kailash Building,
26, Kasturba Gandhi Marg,
New Delhi-110001.
(Appellant)

DCIT,
Circle 12(1)
New Delhi.
Vs.
(Respondent)

Appellant by : Dr. Rakesh Gupta &
Shri Ashwani Taneja, C.As.
Respondent by : Mrs. Anusha Khurana, Sr. D.R.

ORDER

PER: C.L. SETHI, J.M.

The present appeal filed by the assessee, is directed against the order dated 28.07.2005 passed by the Id. CIT(A) in the matter of an assessment made u/s 143(3) of the Income-tax Act, 1961 ('The Act') for the assessment year 2002-03.

2. One of the ground raised by the assessee is against the Id. CIT(A)'s order in rejecting the assessee's claim of deducting a sum of Rs. 41,92,315/- being long term capital gain from the net profit shown in the profit and loss account while computing the book profit in terms of provisions of u/s 115JB of the Act.

3 Briefly stated, relevant facts of the case giving rise to the aforesaid issue are as under:-



3.1 The assessee had shown net profit in the audited profit and loss account at Rs. 77,81,868/-. The assessee's total income computed under the normal provisions of Income-tax Act was determined by the A.O. at nil. The A.O., therefore, proceeded to compute book profit within the meaning of section 115JB of the Act with a view to charge tax on book profit. The A.O. computed the book profit/ total income u/s 115JB as under:-

<u>"Income u/s 115JB</u>		
<i>Net profit as per P&L A/c.</i>	-	77,81,868
<i>Dividend income u/s 10(33)</i>	-	<u>1,34,770</u>
		<u>76,47,098</u>
<i>Rounded off:</i>	-	<u>76,47,100"</u>

3.2 Against the A.O.'s order in computing book profit u/s 115JB at Rs. 76,47,100/-, the assessee preferred an appeal before the Id. CIT(A) by taking a ground that the net profit shown in the profit and loss account at Rs. 77,81,868/- includes a long term capital gain of Rs. 40,57,545/- not liable to be taxed in the light of the provisions contained in section 54 EC of the Act, and thus, the said amount of Rs. 46,57,545/- is to be excluded from the net profit for the purpose of computing book profit u/s 115 JB of the Act. In support thereof, the assessee relied upon the two decisions of the Tribunal in the case of Sotlej Cotton Mills Ltd. vs. ACIT reported in 45 ITD 22 (Calcutta) (SB) and Oswal Agro Mills Ltd. vs. DCIT reported in 51 ITD 447 (Delhi).

4. The Id. CIT(A) rejected the assessee's contention by observing that the book profit u/s 115JB need to be determined as per the method of computation provided u/s 115JB, which does not provide for excluding any long term capital



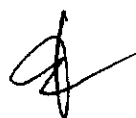
gain exempted u/s 54 EC of the Act from the net profit shown in the P&L account prepared by the assessee under the company Act.

5. Still aggrieved, the assessee has filed an appeal before the Tribunal.

6 In the course of hearing of this case, the ld. counsel for the assessee had placed reliance upon the decision of ITAT, Mumbai Bench 'I' in the case of ITO vs. Frigsales (India) Ltd. reported in (2005) 4 SOT 376 (Mumbai) in support of the contention that while making adjustment to the net profit shown in the profit and loss account for the purpose of computing book profits u/s 115JA of the Act, the amount which are exempted under normal provisions of the Act are to be deducted from net profit while computing the book profit u/s 115 JB otherwise the exemption provision contained in the Act would become redundant.

7. The ld. DR, on the other hand, submitted that the computation of book profit u/s 115JB is to be made in accordance with the method set out in section 115JB itself. He further submitted that in so far as the computation of book profit is concerned, the entire mechanism for its calculation is set out in Explanation (1) thereto and all other provisions of the Act are not relevant to compute the book profit u/s 115JB of the Act. He placed strong reliance upon the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT reported in 255 ITR 273 (SC).

8. We have heard both the parties and have gone through the orders of the authorities below.



9. The question that arises for consideration is as to whether any income exempted under the normal provisions of the Act but not so provided in the Explanation (1) to section 115JB, is to be excluded from the net profit shown in the profit and loss account prepared by the assessee under Part II and III of Schedule VI of Companies Act, which were laid before the annual general meeting of the company, while computing book profit in terms of section 115JB of the Act.

10. We have carefully perused the provisions contained in section 115JB of the Act, and from perusal thereof, it is evident that section 115JB of the Act is a deeming provision and refers to “special provision for payment of tax by certain companies”. It has an overriding effect upon other provisions of the Act. It is applicable only in the case of a company. As per section 115JB, the AO has to find out the normal tax liability as computed as per the normal provisions of the Act ignoring provisions of section 115JB of the Act. Then the A.O. has to compute the “book-profit”. The net profit as per profit and loss account after adjustment provided in the Explanation to section 115JB is book profit. The Explanation to section 115JB defines the words “Book profit”, which means “net profit” as shown in the P&L account for the relevant previous year, and as increased by item nos. (a) to (f) of the said Explanation if they are debited to the P&L account and as reduced by item Nos. (i) to (viii) of the said Explanation. The figure arrived at after the above adjustment provided in the said Explanation is the “book profit” of the assessee for the relevant previous years.



As per sub-section (2) of section 115JB, every assessee, being a company, shall, for the purpose of section 115JB, 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, 1965. The proviso to sub section (2) stipulates 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.

10.1 After ascertaining book-profit as per Explanation, the A.O. shall find minimum alternate tax at the rate specified in the section for relevant assessment year, and if the tax liability computed under the normal provisions of the Act is more than or equal to minimum alternate tax, the provisions of minimum alternate tax contained in section 115JB shall not apply. And, if the tax computed under the normal provisions of the Act is less than the minimum alternate tax, the provisions of minimum alternate tax contained in section 115JB shall be applicable, and then the "Book profit" computed in the manner provided in Explanation shall be deemed to be total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income tax determined at the rate specified in section 115JB of the Act.




11. On going through the mandate of the above provisions contained in section 115JB, it transpires that having increased the amount of net profit as shown in the profit and loss account for the relevant previous year in accordance with clause (a) to (h) of the Explanation, certain items are to be reduced as specified in clause (i) to (vii) of the Explanation to determine the "Book profit". The method of determining of "book-profit" under section 115JB is a self-contained code as so provided in the Explanation thereto. The scheme of section 115JB is to adopt the profit and loss account of the assessee prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act and to treat the net profit shown therein as book profit after making certain adjustments specifically provided in Explanation thereto. The permissible adjustments in the form of additions and deductions are provided under Explanation to section 115JB. No deductions, rebates or allowances other than what is stated in the Explanation are available for computation of book-profit. It is very clear from the non-obstante clause in section 115JB that the assessment under section 115JB override other provisions of Act in respect of the provisions specifically provided in section 115JB of the Act. In fact, the A.O. gets jurisdiction to make assessment under section 115JB only when the income-tax payable on the total income as computed under the normal provisions of the Act is less than specified percentage of book profit as contemplated under the said section. While deductions, rebates and allowances provided in the Act are available in the computation of total income for normal



assessment, additions, deductions and adjustments except to the extent covered by the Explanation to section 115JB are not available in the computation of book profit. In other words, once the A.O. finds that income tax payable on the total income as computed under the normal provisions of the Act is less than the specified percentage of book profit, he has to give up normal assessment and has to opt for the assessment under section 115JB, which does not provide for any deduction in terms of section 54 EC of the Act. It is not in doubt that the deduction available to any assessee u/s 54EC is not an item included in the items specified in clauses (i) to (vii) of the Explanation so as to mandate that it is to be reduced from the net profit as shown in the profit and loss account for the relevant previous year for the purpose of computing "Book profit" under Chapter 115 JB of the Act. The assessee, in the present case, had no case or could not have any case that long term capital gain was not profit includible in the profit and loss account prepared in terms of Parts II and III of Schedule VI to the Companies Act. Since there is no provision in section 115JB for deduction of long term capital gain in terms of section 54E~~A~~, in the computation of book profit, the assessee is not entitled to the deduction of long term capital gain from the book profit.

12. Here, it would be relevant to mention that section 115 J, the original predecessor of section 115JB also has identical Explanation, which provides the mechanism for computing the book profit, and in that respect section 115J, 115JA and 115JB are analogous.



13. In the case of Apollo Tyres vs. CIT (supra), the Hon'ble Supreme Court while elaborating the scope and object of section 115J has observed and held as under:-

"The Assessing Officer, while computing the book profits of a company under section 115J of the Income-tax Act, 1961, has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer, thereafter, has the limited power of making increases and reductions as provided for in the Explanation to section 115J. The Assessing Officer does not have the jurisdiction to go behind the net profits shown in the profit and loss account except to the extent provided in the Explanation. The use of the words "in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act" in section 115J was made for the limited purpose of empowering the Assessing Officer to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company, the Assessing Officer has to accept the authenticity of the accounts with reference to the provisions of the Companies Act, which obligate the company to maintain its accounts in a manner provided by that Act and the same to be scrutinized and certified by statutory auditors and approved by the company in general meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act. Sub-section (1A) of section 115J does not empower the Assessing Officer to embark upon a fresh enquiry in regard to the entries made in the books of account of the company.

13.1 On reading the aforesaid decision of the Hon'ble Supreme Court, it is clear that the A.O. does not have jurisdiction to go behind the net profits shown in the profit and loss account **except to the extent provided in the Explanation.** It has also been observed by the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT (supra) that in the light of the fact that income tax authorities were unable to bring certain companies within the net of income tax because these companies were adjusting their accounts in such a manner as



to attract no tax or little tax, and it is with a view to bring such of these companies within the tax net, the section 115J was introduced in the Income-tax Act with a deeming provision which makes the company liable to pay tax on at least 30% by its book profits as shown in its own account, and for the said purpose, section 115J makes the income reflected in the company's books of account the deemed income for the purpose of assessing the tax.

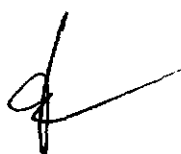
14. The said view taken by the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT (supra) has been reiterated by their lordship of Supreme Court in the case of Commissioner of Income Tax vs. HCL Comnet Systems & Services Ltd. reported in (2008) 13 DTR (SC) 105 where affirming the decision of Hon'ble Delhi High Court in the case of CIT vs. HCL Comnet Systems & Services Ltd. (ITA No. 56 of 2007, decided on 18.05.2007 by the Hon'ble Delhi High Court) and referring to their own decision in the case of Apollo Tyres Ltd. vs. CIT (supra), the Hon'ble Supreme Court observed and held as under:-

6. *At the outset, we quote hereinbelow section 115JA read with clause (c) of the Explanation which defines the expression "book profit" as under :*

"Chapter XII-B

Special provisions relating to certain companies

115JA. Deemed income relating to certain companies.—(1) Notwithstanding anything contained in any other provisions of this Act, where in the case of an assessee, being a company, 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, 1997 (hereafter in this section referred to as the relevant previous year) is less than thirty per cent of its book profit, the total



income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent of such book profit.

(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 profit and loss account, the depreciation shall be calculated on the same method and rates which have been adopted for calculating the depreciation for the purpose of preparing the profit and loss account 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 a company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under the Act, the method and rates for calculation of depreciation shall correspond to the method and rates which have been adopted for calculating the depreciation 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—

- | | | | |
|------------|---------------------------------------------------------------------------------------------------------------------------|-----------|-----------|
| <i>(a)</i> | <i>and (b)**</i> | <i>**</i> | <i>**</i> |
| <i>(c)</i> | <i>the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or</i> | | |
| <i>(d)</i> | <i>to (f)**</i> | <i>**</i> | <i>**</i> |

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

From the above, it is evident that section 115JA of the 1961 Act which refers to "deemed income relating to certain companies" has an overriding effect upon other provisions of the Income-tax Act. It is applicable only in the case of a company. As per section 115JA, the Assessing Officer has to first compute the total income of the assessee as per the provisions of the Income-tax Act. Thereafter, he has to compute 30 per cent of the book profit. Then he has to compare the



total income as computed as per the provisions of the Income-tax Act with 30 per cent of book profit computed as per section 115JA. If 30 per cent of the book profit is more than the total income, then 30 per cent of the book profit shall be deemed to be the "total income" of the assessee for such previous year. As per sub-section (2), the assessee has to prepare the '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. The Explanation defines the words "book profit" which means "net profit" as shown in the profit and loss account for the relevant previous year. Such book profit has to be increased by Item Nos. (a) to (f) of the said Explanation if they are debited to the profit and loss account and from such profit Item Nos. (i) to (ix) of the Explanation are to be reduced. The figure arrived at after the above exercise is the book profit of the assessee for the relevant previous years.

7. This Court has examined the powers of the Assessing Officer while computing the book profits for the purposes of section 115J in the case of *Apollo Tyres Ltd. v. CIT* [2002] 255 ITR 273¹ which reads as under :

"The Assessing Officer, while computing the book profits of a company under section 115J of the Income-tax Act, 1961, has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer, thereafter, has the limited power of making increases and reductions as provided for in the Explanation to section 115J. The Assessing Officer does not have the jurisdiction to go behind the net profits shown in the profit and loss account except to the extent provided in the Explanation. The use of the words 'in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act' in section 115J was made for the limited purpose of empowering the Assessing Officer to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company, the Assessing Officer has to accept the authenticity of the accounts with reference to the provisions of the Companies Act, which obligate the company to maintain its accounts in a manner provided by that Act and the same to be scrutinized and certified by statutory auditors and approved by the company in general meeting and thereafter to be filed



before the Registrar of Companies who has a statutory obligation also to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act. Sub-section (1A) of section 115J does not empower the Assessing Officer to embark upon a fresh enquiry in regard to the entries made in the books of account of the company." (p. 274)

From the above, it is evident that the Assessing Officer has to accept the authenticity of the accounts maintained in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act, which are certified by the Auditors and pressed by the company in the general meeting. The Assessing Officer has only the power of examining whether the books of account are duly certified by the authorities under the Companies Act and whether such books have been properly maintained in accordance with the Companies Act. The Assessing Officer does not have the jurisdiction to go beyond the net profit shown in the profit and loss account except to the extent provided in the Explanation. Thereafter, the Assessing Officer has to make adjustment permissible under the Explanation given in section 115JA of the 1961 Act. It may be noted, that the adjustments required to be made to the net profit disclosed in the profit and loss account for the purposes of section 349 of the Companies Act are quite different from the adjustment required to be made under the Explanation to section 115JA of the 1961 Act. For the purposes of section 115JA, the Assessing Officer can increase the net profit determined as per the profit and loss account prepared as per Parts II and III of Schedule VI to the Companies Act only to the extent permissible under the Explanation thereto.

8. *As stated above, the said Explanation has provided six items, i.e., Item Nos. (a) to (f) which if debited to the profit and loss account can be added back to the net profit for computing the book profit. In this case, we are concerned with Item No. (c) which refers to the provision for bad and doubtful debt. The provision for bad and doubtful debt can be added back to the net profit only if Item (c) stands attracted. Item (c) deals with amount(s) set aside as provision made for meeting liabilities, other than ascertained liabilities. The assessee's case would, therefore, fall within the ambit of Item (c) only if the amount is set aside as provision; the provision is made for meeting a liability; and the provision should be for other than ascertained liability, i.e., it should be for an unascertained liability. In other words,*



all the ingredients should be satisfied to attract Item (c) of the Explanation to section 115JA. In our view, Item (c) is not attracted. There are two types of "debt". A debt payable by the assessee is different from a debt receivable by the assessee. A debt is payable by the assessee where the assessee has to pay the amount to others whereas the debt receivable by the assessee is an amount which the assessee has to receive from others. In the present case "debt" under consideration is "debt receivable" by the assessee. The provision for bad and doubtful debt, therefore, is made to cover up the probable diminution in the value of asset, i.e., debt which is an amount receivable by the assessee. Therefore, such a provision cannot be said to be a provision for liability, because even if a debt is not recoverable no liability could be fastened upon the assessee. In the present case, the debt is the amount receivable by the assessee and not any liability payable by the assessee and, therefore, any provision made towards irrecoverability of the debt cannot be said to be a provision for liability. Therefore, in our view Item (c) of the Explanation is not attracted to the facts of the present case. In the circumstances, the Assessing Officer was not justified in adding back the provision for doubtful debts of Rs. 92,15,187 under clause (c) of the Explanation to section 115JA of the 1961 Act.

9. For the aforesaid reasons, there is no merit in this civil appeal and accordingly, the same is dismissed with no order as to costs.

15. From the aforesaid decisions of the Hon'ble Supreme Court, the following propositions, for the purpose of computing book-profit under section 115J or 115JA or 115JB, as the case may be, may be laid down:-

- (a) The A.O. has to accept the authenticity of the accounts maintained in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act, which are certified by the auditors and laid before Company in the annual general meeting.



- (b) The A.O. has only the power of examining whether the books of accounts are duly certified by the authorities under the Companies Act and whether such books have been properly maintained in accordance with the Companies Act.
- (c) The A.O. does not have the jurisdiction to go beyond the net profit shown in the P&L account prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 except to the extent provided in the Explanation to section 115J or 115JA or 115JB, as the case may be.
- (d) The A.O. has power to make adjustments permissible under the Explanation given in section 115J or 115JA or 115JB of the Act.
- (e) The adjustments required to be made to the net profit disclosed in the P&L account for the purpose of section 349 of the Companies Act are quite different from the adjustment required to be made under the Explanation to section 115J or 115JA or 115JB of the Act.
- (f) For the purposes of section 115J, 115JA or 115JB, the A.O. can increase or reduce the net profit determined as per the P&L account prepared as per Parts II and III of Schedule VI to the Companies Act only to the extent permissible under the Explanation thereto.



16. In the present case, it is not in dispute that the long term capital gain earned by the assessee is included in the net profit determined as per P&L account prepared as per Part II and Part III of Schedule VI to the Companies Act. In other words, it is not the case of the assessee that the capital gain earned by the assessee was not included in the net profit determined as per P&L account of the assessee prepared under the Companies Act. We have perused the audited accounts of the assessee and finds that the auditors in their audit report has stated, amongst others, that, in their opinion, the profit and loss account and the balance sheet are in compliance with the accounting standards referred to in sub-section (3C) of section 211 of the Companies Act, and in their opinion and to the best of their information and according to explanations given to them, the balance sheet and profit and loss account read together with the notes thereon, give the information required by the Companies Act, 1956 in the manner so required and give a true and fair view in conformity with the accounting principles generally accepted in India. In the audited profit and loss account, the assessee has included capital gain (long term) and capital gain (short term) amounting to Rs. 40,57,545/- and Rs. 1,49,422/- respectively. In the notes thereto, it is no-where mentioned and claimed that though the long term capital gain is included in the profit and loss account but it is not includible in the net profit in terms of provisions of Part II and Part III of Schedule VI to the Companies Act or the accounting principles accepted under the Companies Act. It is, thus, not a case of the assessee made out in the audited accounts that



the long term capital gain was not includible in the profit and loss account prepared in terms of Schedule VI to the Companies Act. In the computation of book profit under section 115JB, the assessee claimed exclusion of long term capital gain amounting to Rs. 40,57,545/- u/s 54EC of the Act as the assessee deposited an amount of Rs. 41,00,000/- in specified schemes contemplated u/s 54EC of the Act. The assessee, thus, claimed deduction of long term capital gain from book profit by virtue of investment in specified schemes contemplated u/s 54EC of the Act and not because of the reason that the same was not includible in profit and loss account prepared under Part II and Part III of Schedule VI to the Companies Act. It is pertinent to note here that the assessee has not made any claim of deduction of capital gain (short term) from the book profit, which goes to show that capital gain as such is not deductible from the net profit prepared in accordance with Part II and III of Schedule VI to the Companies Act. Further, the distinction of capital gain as short term and long term is relevant only for the purpose of computation of income from capital gain and determination of tax payable thereupon under the normal provisions of Income Tax Act, and has nothing to do with the preparation of profit and loss account in accordance with the provisions of Part II and III of Schedule VI to the Companies Act. In these circumstances, so long as long-term capital gain is part of profit included in the profit and loss account prepared in accordance with the provisions contained in Part II and III of Schedule VI to the Companies Act, it cannot be excluded from the net profit



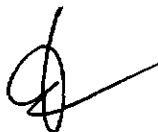
unless so provided under Explanation to section 115JB of the Act for the purpose of computing book profit under section 115JB of the Act. In the absence of any provision for exclusion of capital gains in the computation of book profit under the above provision, the assessee is not entitled to the exclusion claimed. In other words, section 54EC has no application in the computation of book profit under section 115JB of the Act.

17. The assessee's further case is that since the capital gain arising from the transfer of a long term capital asset was invested in the specified schemes within the specified time as contemplated u/s 54EC of the Act, the capital gain arising to the assessee shall not be charged to tax as so provided in section 54EC of the Act, and as such the same is to be reduced from the net profit determined in the P&L account prepared by the assessee while computing "Book-profit" within the meaning of section 115JB of the Act. The ld. Counsel for the assessee has laid down a great deal of emphasis upon the provisions contained in sub section (5) of section 115 JB to contend that since all other provisions of this Act shall also apply to every assessee, being a company, mentioned in the section 115 JB of the Act, the assessee is entitled to reduce the long term capital gain exempted u/s 54EC of the Act.

18. We, therefore, find it necessary to look into sub section (5) of section 115JB of the Act, which reads as "save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section". Having regard to expression "save as otherwise



provided in this section” used in this sub section (5) of section 115 JB, we are of the view that the expression “save as otherwise provided in this section 115 JB” clearly means that what is provided in section 115JB should be religiously followed and anything over and above the matter provided in section 115JB will be subject to other provisions of the Act. The provisions of section 115JB has an overriding effect upon other provisions of the Act as is evident from the section itself. The method of computation of book profit provided in Explanation to section 115JB, should, thus, be followed while computing the book profit, and the normal provisions of computation of profit under any head of the Act shall not be applicable. By no stretch of imagination can it be construed as substituting the other provisions of the Act in place of what is specifically made available in section 115 JB in so far as the computation of book profit u/s 115JB is concerned. The entire mechanism for the computation of book profit is clearly set out in sub section (1) of section 115 JB read with Explanation thereto. Not only starting point being the net profit as shown in the profit and loss account prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act but also the items, which are to be increased as stipulated in clauses (a) to (h), and the items, which are to be reduced as specified in clauses (i) to (vii), find separate mention in the scheme of the section itself. So, the computation of book profit is to be done strictly as per the Explanation to section 115JB of the Act and no assistance from any other section of the Act can be taken for that purpose. The Hon’ble



Supreme Court in the case of Apollo Tyres Ltd. vs. CIT (supra) and CIT vs. HCL Comnet Systems and Services Ltd. (supra) has clearly laid down a law that the A.O. has the limited power of making increases and reductions to the net profit shown in the profit and loss account except as provided for in the Explanation to section 115J or 115JA. In other words, the Hon'ble Supreme Court has clearly held that the A.O., while computing the book profits of a company under section 115J or 115JA of the Income-tax Act, 1961, has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer, thereafter, has the limited power of making increases and reductions except as provided for in the Explanation to section 115J or 115JA or 115JB, as the case may be.

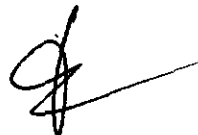
19. In the light of the discussions made above, it is, thus, clear that the view that the A.O., while computing the book profit of a company u/s 115J or 115JA or 115JB of the Act, as the case may be, has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having being properly maintained in accordance with the Companies Act, and the A.O. thereafter has the limited power of making increases and reductions as provided for in the Explanation to section 115J is settled by a decision of Hon'ble Supreme Court in the above referred cases.

20. When a deduction of capital gain available u/s 54EC is not covered by any of a clauses (i) to (vii) of Explanation (1) to section 115JB there is no



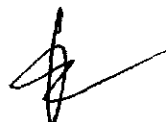
authority for falling upon the command of section 54EC for holding that the capital gain deductible under section 54EC is also to be reduced from the net profit shown in the profit and loss account prepared under the Companies Act for the purpose of computing book profit u/s 115JB of the Act. If such reduction of capital gain, which is eligible for deduction u/s 54EC of the Act, is allowed to be made from the net profit determined in the profit and loss account prepared by the assessee in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act and laid before the company in its annual general meeting, for the purpose of computing "Book-profit" under section 115JB, it would certainly be against the above referred decisions laid down by the Hon'ble Supreme Court in the case of Apollo Tyres vs. CIT (supra) and CIT vs. HCL Comnet Systems & Services Ltd. (supra) wherein the powers of the A.O. while computing the book profits for the purpose of section 115J or 115JA were examined and analyzed.

21. The Id. counsel for the assessee has further contended that the amount of net profit as shown in the profit and loss account, for the purpose of computing "Book profit" u/s 115JB, can be tinkered with and thus, the figures of profit/loss shown in the P&L account is not sacrosanct and it is not as if the same cannot not be varied even if the same is not permitted by the items mentioned in the Explanation to section 115JB of the Act. In support of this contention, the decision of Hon'ble Delhi High Court in the case of CIT vs. Sain Processing



and Weaving Mills (P) Ltd. (ITA NO. 1128/2007 dated 17.12.2008) since reported in (2009) 17 DTR 215 (Delhi) was relied upon.

22. We have carefully gone through the aforesaid decision of Hon'ble Delhi High court in the case of CIT vs. Sain Processing and Weaving Mills (P) Ltd. (supra). From the said decision, it is evident that the current year's depreciation was not charged to the P&L account by the assessee but instead, was disclosed alongwith the quantum of current year depreciation computed in accordance section 205(2) of the Companies Act, as per requirement of clause 3(iv) of Part II of Schedule VI of the Company Act, by way of a note to the accounts. The requirement of such disclosure on failure to provide for depreciation in the P&L account as also, the quantum of arrears of depreciation flow from section 211 read with clause 3(iv) of Part II of Schedule VI of the Companies Act. The reason being that there was an obligation cast on the company to present a true and fair view of its state of affairs to those who rely on its accounts. Thus, in the view of Hon'ble High Court, such disclosure in the notes to the account was obligatory by virtue of the provision of sub-section (1A) of section 115J of the Act which requires that every assessee shall prepare P&L account in accordance with the provisions of Parts II and III of Schedule VI of the Companies Act. The Hon'ble High Court further held that as long as the depreciation which is not charged to P&L account but is otherwise disclosed in the notes to the accounts, it would come within the ambit of the expression "shown" in the P&L account as notes to the account form part of the P&L account by virtue of sub section (6)



of section 211 of the Companies Act, 1956, and 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 115J of the Act. In the light of these facts and in that view of the matter, the Hon'ble High Court held that the assessee is entitled to seek deduction of current year depreciation from net profit to arrive at the "book profit" even though it is not charged to the P&L account though disclosed in the notes appended to the accounts. Similarly, in the case of CIT vs. Khaitan Chemicals and Fertilizers Ltd. (2008) 15 DTR (Delhi) 158, the Hon'ble High Court observed that when accounting standard (AS-5) required prior period expenses/ extraordinary items to be shown separately and the assessee was required to prepare P&L account in accordance with the provisions of Part II and III of Schedule VI of the Companies Act, the fact that prior period expenses/ extraordinary items were shown separately after the figure of net profit had been struck down in the P&L account did not mean that they would not constitute part of the net profit. From the above decision, it is, thus, evident that the net profit as shown in the profit and loss account may be adjusted by the items shown separately or otherwise disclosed in the notes to the accounts as per requirement of the Companies Act, 1956 inasmuch as such disclosure or information given in the notes to the accounts as per requirement of the Companies Act would fall within the ambit of the expression "net profit" as shown in the P&L account. In other words, if the items required to be incorporated in the P&L account as per provisions of



Companies Act are not shown in the P&L account before striking out net profit but are separately shown thereafter or are otherwise disclosed in the notes to the accounts as per requirement of Companies Act, the items so separately shown or disclosed in the accounts would form part of net profit shown in the profit and loss account prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, and the "Book profit", for the purpose of section 115J or 115JA or 115JB, as the case may be, shall be computed accordingly. In our understanding, the view of Hon'ble Supreme Court in the case of CIT vs. Apollo Tyres Ltd. (supra) and CIT vs. HCL Comet Systems and Services Ltd. (supra) to the effect that the A.O. has to accept the authenticity of the accounts maintained in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act being certified by the auditors and laid before the company in its general meeting, and that the A.O. has only the power of examining whether the books of accounts are duly certified by the authorities under the Companies Act and whether such books have been properly maintained in accordance with the Companies Act gives an ample support to the view of the Hon'ble Delhi High Court that the net profit as shown in the P&L account would include such items also which are separately shown or disclosed in the notes to the accounts as per requirement of the Companies Act or Parts II and III of Schedule VI of the Companies Act. In the aforesaid cases before Hon'ble Delhi High Court, the assessee all along contended that the net profit was to be computed on the basis of the P&L account which, in turn, was



required to be prepared in accordance with the provisions of Parts II and III of Schedule VI of the Companies Act and the fact that the items of current depreciation or prior period expenses/ extraordinary items were disclosed or shown separately in the accounts prepared and laid before company under the Companies Act did not mean that they would not constitute part of the net profit as per Companies Act for the purpose of computing “book profit” under section 115J or 115JA of the Act. The Court held that the information disclosed in the notes appended to the accounts or the item shown separately after the net profit had been struck down in the P&L account as per requirement of the provisions of Companies Act would form part of the accounts of the assessee company and would come within the ambit of ‘net profit’ as shown in the P&L account for the relevant assessment year as notes to the account form part of the P&L account by virtue of sub section (6) of section 211 of the Companies Act read with clause 3(iv) of Part II of Schedule VI of the Companies Act. Thus, respectfully following the above referred two decisions of Hon’ble Delhi High Court, we hold that the net profit shown in the profit and loss account may be adjusted by the items, which are separately disclosed in the accounts or in the notes to the accounts as per requirement of Companies Act read with Part II and III of Schedule VI of the Companies Act, 1956, for the purpose of determining net profit as shown in the profit and loss account and, in turn, for the purpose of computing “book profit” under section 115J or 115JA or 115JB, as the case may be.



23. We now come to the facts of the present case before us where the assessee has contended that the amount of capital gain available for deduction u/s 54EC is to be reduced from the net profit while computing "book profit" under section 115JB of the Act. The assessee all along contended that the book profit u/s 115JB was to be computed after reducing the amount of capital gain deductible or exempted u/s 54EC of the Act from the net profit as shown in the profit and loss account. The assessee's counsel urged before us that the amount of capital gain invested in specified schemes in terms of section 54EC and, thus, it becoming exempt should be excluded from the amount of net profit as shown in profit and loss account for the purpose of computing book profit u/s 115JB of the Act. From the facts of the present case and from the submissions of both the parties, it is clear that the claim of the assessee rests upon a footing that since the assessee has invested the amount of capital gain in specified schemes as per requirement of section 54EC of the Act and thus, it being exempt u/s 54 EC is not includible in the total income computed under the normal provisions of the Act, the amount of capital gain deductible u/s 54 EC should also be reduced from the net profit as shown in profit and loss account for the purpose of computing 'book profit' u/s 115JB, and in support of the contention that the net profit shown in the profit and loss account can be tinkered with, a reliance was placed upon the decision of Hon'ble Delhi High Court in the case of Sain Processing and Weaving (supra). As already discussed above, it is true that the net profit shown in the profit and loss account can be adjusted only by the items,



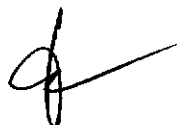
which have been separately shown and/ or disclosed in the accounts or notes to the accounts as per requirement of the provisions of Companies Act read with provisions of Part II and III of Schedule VI to the Companies Act, 1956 as so held by the jurisdictional High Court of Delhi. But, it is not the case of the present assessee that the capital gain included in the profit and loss account prepared by the assessee was not otherwise includible in the net profit as per provisions of Part II and Part III of Schedule VI of Companies Act and a requisite note to that effect was appended to the accounts prepared under the provisions of Companies Act. Thus, the decision of Hon'ble Delhi High Court in the case of CIT vs. Sain Processing and Weaving Mills (P) Ltd. gives no assistance to the assessee's stand, but rather, on facts, it goes against the assessee.

24. In support of the contention that the capital gain cannot be included in book-profit u/s 115JB of the Act, the assessee's counsel cited two decisions, viz; (i) decision of ITAT, Special Bench in the case Satluj Cotton Mills Ltd. reported in 451 ITD 22 (Kol.) (SB) and (ii) ITAT, Mumbai Bench in the case of ITO vs. Frigsales India Ltd. 4 SOT 376 (Mum.).

25. It is undisputed fact that the receipt of capital gain has been included in the profit and loss account prepared by the assessee under the Companies Act, and it is now the claim of the assessee that capital gain being exempted u/s 54EC of the Act should not be included in the book profit computed u/s 115JB of the Act. In this regard, we find that the judgement of Hon'ble Mumbai High



Court in the case of Veekay Lal Investment Co. Pvt. Ltd. reported in 249 ITR 597 (Mum.), which was relied upon by the department in the case of ITO vs. Frigsales Ltd. (supra), is relevant and has important bearing to the controversy arising in the present case. In that case, the assessee filed its return of income declaring a net loss of Rs.29,120/-. In that case, part of land was sold by the assessee and in the return of income, the assessee treated the income derived from the above sale of property as long term capital gain and offered Rs.2.70 lakhs for taxation but as per the P&L A/c for this year, the assessee earned a net profit of Rs.12,76,119/- but the assessee did not offer any income under section 115 J of the Act on the ground that under section 115 J, one has to take commercial profit and if any receipt has no commercial profit element, then such receipt would have to be excluded for the purposes of section 115J. It was also the claim of the assessee that commercial profits or profits under section 115J cannot include capital gains. In that case, the Assessing Officer rejected this claim of the assessee. Ld CIT(A) also confirmed the assessment order but the Tribunal took the view that under the Income Tax Act, 1961, capital gain is deemed to be income under section 45. It is also held that the said section applies only to the limited extent and what is deemed to be income under section 45 is not an income for book profit and on this basis, the Tribunal decided this issue in favour of the assessee. While holding so, the Tribunal followed the judgment of Special Bench of the Tribunal rendered in the case of Sutej Cotton Mills Ltd. (supra). In revenue's appeal, this issue was decided by



the Hon'ble Bombay High Court in favour of the revenue. The question before Hon'ble Bombay High Court was as to whether the income from capital gain should be included for the purposes of computing book profit under section 115J of the Act. The findings of Hon'ble Bombay High Court are reproduced below:

"We find merit in this appeal. According to section 115(1), in the case of an assessee being a company if the total income is less than 30% of its book profits then the total income of such company shall be deemed to be an amount equal to 30% of such book profit and such income shall be chargeable to tax. That, the assessee has to first compute the total income in accordance with the Income Tax Act, 1961 and if the total income is less than 30% of the book profit then the assessee has to prepare a profit and loss account for the previous year in accordance with parts II and III of Schedule VI of the Companies Act. In other words, a plain reading of section 115J shows that if the assessee is a company and its total income under the Income Tax Act, 1961 is less than 30% of its book profits then, fictionally, it will be deemed that its total income chargeable to tax would be an amount equal to 30% of such book profits. Hence, in such a case, the total income of the assessee is first required to be computed under the Income Tax Act, 1961 and if the total income so computed is less than 30% of the book profits then the profit and loss account shall have to be prepared in accordance with Part-II and Part-III of Schedule-VI of the Companies Act. The important thing to be noted is that while calculating the total income under the Income Tax Act, 1961, the assessee is required to take into account income by way of capital gains under section 45 of the Income Tax Act, 1961. In the circumstances, one fails to understand as to how in computing the book profits under the Companies Act. The assessee company cannot consider capital gains for the purposes of computing book profits under section 115J of the Act. Further, under clause 2 of Part II of Schedule VI to the Companies Act where a company receives the amount on account of surrender of lease hold rights, the company is bound to disclose in the profit and loss account 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, page 1669, Fourteenth Edition. Such receipts are also covered by clause 2(b) of Part II of Schedule VI to the Companies Act which, inter alia states that the profit and loss



account shall disclose every material feature, including credits or receipts and debits or expenses in respect of non recurring transactions or transactions of an exception nature. Lastly, even under clause 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 purpose 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 clause 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 page 165) of the Companies Act by A. Samaiya, fourteenth edition). Similarly, profits or losses on such investments are also required to be disclosed (see clause 3(xii)(b) of Part-II of Schedule VI to the Companies Act.

In the circumstances, the question is answered in the affirmative, i.e. in favour of the Department and against the assessee."

26. From the above, it can be seen that this claim of the assessee that capital gain cannot be part of book profit has been rejected by Hon'ble Bombay High Court. Hon'ble Bombay High Court has referred to clause (2) of Part-II of Schedule-VI of the Companies Act and it is observed that where a company receives an amount on account of surrender of lease hold rights, the company is bound to disclose it in the P&LA/c as non recurring transaction or a transaction of exceptional nature irrespective of its nature i.e. whether capital or revenue. It is also noted by the Hon'ble Bombay High Court that it would be inappropriate to directly transfer such amount to capital reserve and in this regard, Hon'ble Bombay High Court has referred to page No.1669 of 14th Edition of the Companies Act by A. Ramaiya. Hon'ble Bombay High Court has also referred to clause (3) (xii)(b) of Part-II of Schedule-VI of Companies Act, as per which, the disclosure is required to be made in respect of profit or losses in respect of



transaction of a kind, not usually undertaken by the company or undertaken in circumstances of an exceptional and non recurring nature, if material in amount. It is held by Hon'ble Bombay High Court that capital gains would certainly be one of the various items whose information is required to be given to the shareholders under this clause of Part-II of schedule-VI of the Companies Act, 1956. Regarding the judgment of Special Bench of the Tribunal rendered in the case of Sutej Cotton Mills (supra), we find that this judgment is not applicable in the present case because it was held by Hon'ble Bombay High Court in the case of Vee Key Lal Investment Company Ltd. (supra) that capital gain is to be included in the book profit. In that case of Veekay Lal Investment Company Ltd. (supra), the Tribunal has decided this issues in favour of the assessee by following the judgment of Special Bench of the Tribunal rendered in the case of Sutej Cotton Mills (supra), but that decision of the Tribunal has been reversed by Hon'ble Bombay High Court, and hence this decision of the Special Bench of the Tribunal rendered in the case of Sutej Cotton Mills (supra) is of no avail to the assessee.

27. In view of the above discussion, it is seen that the capital gain is a part of net profit to be prepared in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act. In the present case, the assessee itself has included the capital gain in the profit and loss account prepared under the Companies Act. The capital gain included in the net profit prepared under the Companies Act has been claimed as exempted for the reason that the assessee




has invested the amount of capital gain in specified schemes within the specified time as per section 54EC of the Act, and not because of the reason that it is not includible in the net profit prepared under the Companies Act. It is further not in dispute that the deduction available u/s 54EC is not covered under any of the items mentioned in the Explanation to section 115JB of the Act. Therefore, in the light of the decision of Hon'ble Supreme Court in the case of CIT vs. Apollo Tyres and CIT vs. HCL Commet Systems and Services Ltd., and decision of Hon'ble Delhi High Court in the case of Sain Processing and Weaving Mills (P) Ltd. (supra), the assessee's claim to reduce long term capital gain exempt u/s 54EC from the net profit as shown in the profit and loss account prepared under the Companies Act for the purpose of computing "book profit" under section 115JB is not tenable on facts and as well as in the eyes of law. We further hold that the decision of Special Bench of the Tribunal rendered in the case of Satluj Cutton Mills (supra) is not applicable to the case in the light of authoritative judgement of Hon'ble Supreme Court in the case of CIT vs. Apollo Tyres (supra) and CIT vs. HCL Commet Systems and Services Ltd. (supra) and decision of Hon'ble Jurisdictional Delhi High Court in the case of CIT vs. Sain Processing and Weaving (P) Ltd. where it has been laid down that the adjustments to the net profit as shown in the profit and loss account prepared under the Companies Act is permissible to the extent provided in the Explanation to section 115J or 115JA or 115JB, and as the case may be, also in respect of items separately shown or disclosed in the accounts as per




requirement of the provisions of Companies Act read with provisions of Part II and Part III of Schedule VI to the Companies Act as elaborately discussed hereinabove by us.

28. Now, we discuss and decide regarding applicability of the decision of the Tribunal, Mumbai Bench rendered in the case of Frig India Ltd. (supra). In that case, it is noted by the Tribunal in para 3.2 of its order that the capital gain earned by the assessee being exempt under section 50 of the Act will not form part of the normal taxable income, and when the receipt is not in the nature of taxable income, it cannot be taxed as income under section 115JA of the Act. The Tribunal applied the provisions of sub section (4) of section 115JA, which provides that "save as otherwise provided in this section (section 115JA), all other provisions of the Act shall apply", in taking a view that all other provisions of the Act would continue to operate and, therefore, the exempt income under section 50 would remain exempted as per the provisions of sub section (4) of section 115JA. The Tribunal further observed that in section 115JA, a new sub section (4) has been brought on the statute, which was not there in section 115J, and sub section (4) has been introduced first time in section 115JA. The Tribunal, therefore, had taken a view that the operation of non-obstante clause is now limited only to determine book profit and the book profits so determined have to be taxed taking into consideration the other provisions of the Act. In other words, the Tribunal hold that section 115JA is a part of the Act now and the exemption allowed by one provision of the Act



cannot be taken away by another provision of the Act, and, thus, in that case, the Tribunal hold that if the exemption allowed under section 50 was taken away while taxing the book profits under section 115JA, it would make the provision of section 50 redundant. In this decision, a reference to the decision of Hon'ble Mumbai High Court in the case of CIT vs. Veekay Lal Investment Co. (P) Ltd. (2000) 249 ITR 597 was made but the same was not discussed or deliberated upon or relied upon by the Tribunal by observing that this decision was rendered as per the provisions of section 115J, which is self contained code, though a new sub section (4) has been inserted first time in section 115JA of the Act. From the above decision of the Tribunal, Mumbai Bench in the case of ITO vs. Frigsales (India) Ltd., it is clear that the Tribunal has upheld the order of the Id. CIT(A) in excluding capital gain exempted u/s 50 of the Act from the book profit determined u/s 115 JA of the Act on the premises that in view of insertion of sub section (4) in section 115JA for the first time, the book profit determined in section 115JA has to be taxed after taking into consideration the other provisions of the Act and if the capital gain earned by the assessee is exempt under section 50 of the Act, they will not form part of the taxable income and cannot be taxed as income under section 115JA of the Act. The Tribunal further observed that section 115J is a self-contained code whereas section 115 JA is not self-contained code but is a part of the Act by virtue of sub-section (4) inserted for the first time in section 115 JA. The Tribunal further observed that the ratio of decision in the case of Apollo Tyres (55 ITR



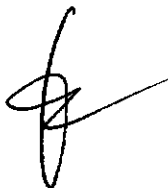
273) is distinguishable because the same was rendered in the context of provisions of section 115J, which is independent code, while section 115JA is not an independent code and the legislature in their wisdom has brought sub section (4) of section 115JA on the statute to make section 115JA also a part of the Act.

29. We have carefully gone through the aforesaid decision of the Tribunal in the case of ITO vs. Frigsales (India) Ltd. We have also perused the provisions of section 115J, 115JA and 115JB of the Act. All these sections are deeming provisions. Section 115J has overriding effect over all other provisions of the Act. Section 115JA and 115JB have also overriding effect over all other provisions of the Act to the extent of matter provided in these sections. Sub section (4) was inserted in section 115JA of the Act. A provision similar to sub section (4) of section 115JA was not there in section 115J of the Act. Sub-section (4) of section 115JA reads as "save as otherwise provided in this section, all other provisions of the Act shall apply". It is, thus, clear that all other provisions of the Act shall apply but subject to the provisions otherwise provided in section 115JA of the Act. In other words, the provisions specifically provided in section 115JA shall have override effect over all other provisions of the Act. The provision for computing book profit by increasing or reducing the net profit as shown in the profit and loss account prepared in accordance with the provisions of Part II and Part III of Schedule VI of the Companies Act are specifically provided in section 115J or 115JA or 115JB



itself, as the case may be, and consequently all other provisions of the Act providing the manner of computation of total income under normal provisions of the Act cannot be applied while computing book profit under section 115J or 115JA or 115JB, as the case may be. We do not find any difference between section 115J or 115JA or 115JB insofar as method of computation of book profit as provided in Explanation appended thereto are concerned. The Tribunal in the case of ITO vs. Frigsales Ltd. (supra) has not applied the ratio of decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) and Hon'ble Mumbai High Court in the case of CIT vs. Veekay Lal Investment Co. (P) Ltd. (supra) for the reason that these decisions were rendered in the context of provisions of section 115J of the Act, but the fact remains that the propositions laid down by Hon'ble Supreme court in the case of Apollo Tyres have been reiterated and relied upon by the Hon'ble Supreme Court in the case of CIT vs. HCL Commet Systems and Services Ltd. (supra) which has been rendered in the context of section 115JA of the Act. Thus, in the light of the decision of Hon'ble Supreme Court in the case of CIT vs. HCL Commet Systems and Services Ltd., the decision of Mumbai Tribunal in the case of ITO vs. Frigsales (India) Ltd. making a distinction between section 115J and 115JA for the purpose of computing book profit under that sections cannot be accepted.

30. Let us now look to the decision of Hon'ble Supreme Court in the case of CIT vs. HCL Commet Systems and Services Ltd. (supra) from one more angle. In that case, it was found that the assessee had debited certain amount on



account of provision for bad debts to the P&L account while computing book profit u/s 115JA of the Act. The A.O. added back the aforesaid item of provision for bad and doubtful debts to the book-profit as per clause (c) of Explanation to section 115JA of the Act. The Hon'ble Supreme Court observed that the provision for bad and doubtful debt can be added back to the net profit only if item (c) of Explanation stands attracted. Item (c) deals with amount(s) set aside as provision made for meeting liabilities, other than ascertained liabilities. The Hon'ble Supreme Court had taken a view that any provision made towards irrecoverability of the debt cannot be said to be a provision for meeting any liabilities, and, therefore, item (c) of Explanation is not attracted. It was, thus, held that the A.O. was not justified in adding back the provision for bad and doubtful debts while computing book profit under section 115 JA of the Act. It is, thus, clear that since provision for bad and doubtful debts is not covered by item (c) of the Explanation to section 115JA of the Act, the same cannot be added back to the net profit for the purpose of computing book profit under section 115JA of the Act. The claim of the assessee was, thus, allowed in the light of the fact that the item is not covered under the Explanation to section 115JA of the Act. The matter was considered and decided in the context of provisions contained in section 115JA of the Act and regular provisions of the Act about admissibility or otherwise of deduction on account of provision for bad and doubtful debts was not applied. From Explanation to section 36(1)(vii) of the Act, it is clear that the provision for bad and doubtful debts is not



admissible deduction while computing income under the head “business or profession”. In other words, the provision for doubtful and bad debts is not allowed as deduction while computing income under the normal provisions of the Act. But still, the provision for doubtful and bad debts debited to the P&L account is not to be added back while computing book profit under section 115JA of the Act. This makes it clear that the normal provisions of the Act are not relevant for the purpose of computing book profit u/s 115JA of the Act, and the book profit u/s 115JA is to be computed only in accordance with the provisions contained in that section read with Explanation thereto. Thus, the view of the Tribunal, Mumbai Bench in the case of Frigsales (India) Ltd. (supra) that the normal provision of the Act shall apply while computing book profit u/s 115JA by virtue of sub section (4) thereof is against the decision of Hon’ble Supreme Court in the case of CIT vs. HCL Commet Systems and Services Ltd. (supra), and is, thus, of no assistance to the assessee’s case and need no further consideration.

31. The ld. counsel for the assessee has also placed reliance upon the decision of Income Tax Appellate Tribunal, Mumbai Bench ‘A’ in the case of Karimjee (P) Ltd. vs. ITO reported in (2007) 15 SOT 128 (Mumbai) and 14 other decisions of Tribunal referred to in said case of Karimjee (P) Ltd. vs. ITO to contend that book profit u/s 115JB cannot be increased by adding capital gain. In that case, the Tribunal has observed as under:-



"28. Copies of these orders have been compiled at pp. 1 to 58 of the Paper book. We find that in these orders various High Courts and Supreme Court decisions have been duly considered including Supreme Court decision in the case of Apollo Tyres Ltd. vs. CIT (2002) 174 CTR (SC) 521 : (2002) 255 ITR 273 (SC) and Bombay High Court decision in the case of CIT vs. Veekaylal Investment Co. (P) Ltd. (2001) 166 CTR (Bom) 96 : (2001) 249 ITR 597 (Bom). It has been consistently held by various Benches of the Tribunal that the book profit cannot be increased by adding capital gain. Since the issue is squarely covered as mentioned above, we direct the AO to exclude capital gain from the book profit for the purpose of section 115JB."

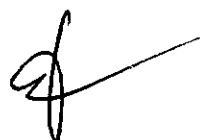
31.1 From the said decision, it is evident that the Tribunal has in a very short judgement ~~has~~ taken a view that the book profit cannot be increased by capital gain. It was, thus, a case where capital gain was added to the book profit implying thereby that the capital gain was not included in the net profit prepared by the assessee but was added to it while computing book profit by the A.O. Thus, relying upon the decision of Hon'ble Supreme Court in the case of Apollo Tyres (supra), it was held that the book profit cannot be increased by adding capital gain. The case before us is about the controversy whether the long term capital gain included in the net profit prepared by the assessee under the Companies Act should be reduced from net profit to determine book profit u/s 115JB of the Act. Thus, we are concerned with the converse situation. Even otherwise, the assessee's stand to exclude capital gain from the book profit when the same was included in the net profit prepared under the Companies Act and is not covered by any of the clauses of the Explanation to section 115JB of the Act, is against the law laid down by Hon'ble Supreme Court in the cases observed and discussed above.



32. The view we have taken above that all other provisions of the Act shall not apply with regard to the matter which have been specifically provided in section 115JB is fortified by the decision of ITAT, Mumbai Bench in the case of *Amline Textiles Pvt. Ltd. vs. ITO* reported in (2009) 27 SOT 152, which decision was put to the assessee by way of clarification, where the Tribunal has held as under:-

We are not convinced with this line of thinking for the reason that what is contemplated by sub-sections (1) and (5) is that the other provisions of the Act should be considered as in operation while giving effect to section 115JB. Reference to "other provisions of this Act" clearly indicates that what is provided in section 115JB should be religiously followed accordingly and anything over and above that will be subject to the other provisions of the Act. By no stretch of imagination can it be construed as substituting the other provisions of the Act in place of what is specifically made available in this section, insofar as the computation of book profit is concerned, the entire mechanism for its calculation is clearly set out in Explanation (1). Not only starting point being the net profit as shown in the profit and loss account but also all the amounts which are to be increased as stipulated in clauses (a) to (h) and those which are to be reduced as specified in clauses (i) to (vii) find separate mention in the scheme of the section itself. So the computation of 'book profit' is to be done strictly as per this Explanation and no assistance from any other section of the Act can be taken for that purpose. When clause (iii) of Explanation (1) clearly states that 'the amount of loss brought forward or unabsorbed depreciation, which is less as per books of account' is liable to be reduced, in our considered opinion, there is no authority for falling upon the command of section 72 for holding that the business loss is to be considered on year to year basis and not as an aggregate figure for all years in unison."

33. In connection to the view we have taken above that the long term capital gain, which is part of book profit included in profit and loss account prepared in accordance with Part II and Part III of Schedule VI of Companies Act, 1956, even if exempted by operation of section 54EC, cannot be excluded from computation of book profit u/s 115JB, we would like to place on record the



decision of Hon'ble Kerala High Court in the case of M.J. Jose & Co. (P) Ltd. vs. ACIT (2008) 174 Taxman 141 (Ker.) where the matter has been discussed and decided in the following terms:-

"3. Ld. Sr. counsel appearing for the revenue, on the other hand, contended that no deduction can be allowed in the computation of book profit except to the extent permissible under section 115J(1A) of the Act. We are unable to accept the contention of the assessee, because assessment under Chapter XII-B on book profit is self-contained code. The scheme thereunder is to adopt the profit and loss account of the assessee prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 and to treat the net profit shown therein as book profit. The permissible adjustments in the form of additions and deductions are provided under Explanation to section 115J(1) that the assessment under section 115J overrides other provisions of the Act. In fact, the Assessing Officer gets jurisdiction to make assessment under section 115J of the Act only when the total income computed under the provisions of the Act is below 30 per cent of the book profit of the assessee as contemplated under the said section. While deductions, rebates and allowances are available in the computation of income for normal assessment additions, deductions and adjustments except to the extent covered by the Explanation to section 115J(1A) are not available in the computation of book profit. In other words, once the A.O. finds that total income as computed under the provisions of the Act is less than 30 per cent of the book profit, he has to give up normal assessment and proceed to make the A.O. has to opt for the assessment under section 115J which does not provide for any deduction in terms of section 54E of the Act. The assessee has no case that the long-term capital gain is not profit includible in the profit and loss account prepared in terms of Schedule VI of the Companies Act. Since there is no provision in Chapter XII-B for deduction of capital gains in the computation of book profit, the assessee is not entitled to the deduction claimed. The Bombay High Court in the decision in CIT v. Veekaylal Investment Co. (P) Ltd. (2001) 249 ITR 597 also took the view that capital gain is part of profit which cannot be excluded in the computation of book profit. Even though ld. Senior Counsel for the assessee contended that the case decided by the Bombay High Court did not involve claim of exemption on capital gains under section 54E of the Act, we do not think this distinction makes any difference, because so long as long-term capital gains is part of profit included in the profit and loss account prepared under Chapter VI of the Companies Act, it cannot be excluded unless so provided



Explanation to section 115J(1)A of the Act. In the absence of any provision for exclusion of capital gains in the computation of book profit under the above provision, assessee is not entitled to the exclusion claimed. In other words, section 54E has no application in the computation of book profit under section 115J."

34. Considering the totality of the facts and circumstances of the case as discussed above and in view of the above reasons, we upheld the order of Id. CIT(A) in holding that the long term capital gain included in the net profit prepared under the Companies Act is not deductible from the net profit for the purpose of computing book profit u/s 115JB. We further hold that merely because the long term capital gain is not liable to be taxed under the normal provision of the Act for the reason that the assessee has made investment in specified schemes as contemplated u/s 54EC, it is not correct to say that it is also to be reduced from the net profit for the purpose of computing deduction u/s 115JB when the Explanation to section 115JB does not provide for any deduction in terms of section 54EC of the Act. In other words, we hold that section 54EC has no application in the computation of book profit u/s 115JB of the Act. To sum up, we hold that in the absence of any provision for exclusion of capital gains exempted u/s 54EC in the computation of book profit under the provisions contained in Explanation to section 115JB, the assessee is not entitled to the exclusion thereof as claimed. The order of Id. CIT(A) is, thus, upheld, and this ground raised by the assessee is rejected.

35. Next ground directed against the Id. CIT(A)'s order in confirming the action of the A.O. in not allowing the set off of the brought forward losses of



Rs. 38,19,415/- while computing book profit u/s 115JB of the Act was not pressed by the ld. counsel for the assessee at the time of hearing of this appeal. Hence, the same stands rejected as not pressed for.

36. The last issue raised by the assessee in this appeal is against the ld. CIT(A)'s order in confirming the disallowance of 15% of dividend income as expenses incurred to earn the dividend income.

37. We have heard both the parties and have carefully gone through the orders of the authorities below.

38. The assessee is engaged in the absence of trading/ investment in shares and securities. On perusal of statement of accounts, we find that the assessee has shown income by way of sale of shares, commission received, professions charges received, interest from bank and others, dividend income and long term and short term capital gain. The assessee has shown the short term and capital gain on sale of shares. It is, also seen that the assessee has also made investment in the shares held as stock-in-trade and as well as investment, and in respect of shares held as investment, the gain has been disclosed under the head "long term capital gain" and as well as "short term capital gain". In the balance sheet, the assessee has shown unsecured loan taken amounting to Rs. 1,17,97,562/-. It is not clear whether the loan obtained by the assessee on which interest has been paid has been utilized for the purpose of acquiring shares held as stock in trade as well as investment. No such details have been produced before us to ascertain as to whether any expenditure by way of interest or any



other expenses have actually been incurred for the purpose of acquiring shares and then in turn for earning dividend income. The A.O. has disallowed the expenses to the extent of 25% of the dividend income towards administrative and other related expenses incurred to earn exempted dividend income, which has been reduced to 15% by the CIT(A). The department is not in appeal against the order of Id. CIT(A) in reducing the disallowance from 25% to 15%. Thus, the issue before us is to the extent of disallowance of 15% of the dividend income on account of expenses incurred to earn dividend income. In the light of the facts and circumstances of the present case, we find that this issue is to be restored back to the file of the AO for his further adjudication in the light of the latest position of law with regard to the applicability of section 14A of the Act. The AO shall examine the matter afresh and decided the same accordingly as per law after providing reasonable opportunity of being heard to the assessee. Further, in the fresh assessment, if any such disallowance is called for, that would invariably be restricted only to the extent of 15% of the dividend income as upheld by the Id. CIT(A) since the matter shall remain confined to that extent only. We order accordingly.

39. In the result, the appeal filed by the assessee is partly allowed in the manner as indicated above for statistical purposes.



40. This decision is pronounced in the open court on ^{29th}..... May, 2009.

(P.M. JAGTAP)
ACCOUNTANT MEMBER

(C.L. SETHI)
JUDICIAL MEMBER

Dated: 29th May, 2009.
Mamta

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.

By Order

Deputy Registrar