INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'B' BENCH, MUMBAI

[Coram: Pramod Kumar, Vice President
and, Amarjit Singh, Judicial Member]

ITA No.: 1767/Mum/2019
Assessment year: 2015-16

Bank of India …….. Appellant
Taxation Department, 8th floor, Star House, C 5 G Block, BKC, Bandra East, Mumbai 400 051 [PAN: AAACB0472C]

Vs.

Assistant Commissioner of Income Tax
Circle 2(1)(1), Mumbai ……Respondent

ITA No.: 2048/Mum/2019
Assessment year: 2015-16

Assistant Commissioner of Income Tax
Circle 2(1)(1), Mumbai …….. Appellant

Vs.

Bank of India ……Respondent
Taxation Department, 8th floor, Star House, C 5 G Block, BKC, Bandra East, Mumbai 400 051 [PAN: AAACB0472C]

Appearances:
C Naresh, *for the assessee*
Rahul Raman, for the revenue

Date of concluding the hearing: October 27, 2020
Date of pronouncing the order: December 11, 2020

O R D E R

Per Pramod Kumar, VP:

1. This set of cross appeals, consisting of an appeal filed by the assessee as also another appeal filed by the Assessing Officer, call into question correctness of the order dated 25th April 2019, in the matter of assessment under section 143(3) of the Income Tax Act, 1961 *[hereinafter referred to as 'the Act']*, for the assessment year 2015-16.

2. These appeals raise two interesting issues, with wider ramifications, for our adjudication- first, whether or not the income of the assessee bank from its foreign branches, amounting to Rs 1,408.32 crores, is required to be excluded from its income taxable in India; and, second, whether or not the assessee bank is liable to subjected to Minimum Alternate Tax under section 115 JB, and, if so, whether the income of the foreign branches, amounting

to Rs 1,408.32 crores, and, provision for bad doubtful debts amounting to Rs 5,359.64 crores in required to be excluded from the computation of book profits computed under section 11JB of the Act. Let us take up these two issues first, and then we will proceed to take up the remaining issues raised in the appeal.

3. So far as the first issue is concerned, i.e. exclusion of profits of foreign branches from taxable income in India, this is certainly an issue of wider ramification touching the assessment of every Indian enterprise which has branch offices abroad inasmuch as whatever we decide in this case of a public sector undertaking will have equal application in other cases of Indian companies having branch offices abroad in the countries with which India has entered into the double taxation avoidance agreements. The related grounds of appeal are as follows:

> **3. On the facts and in the circumstances of the case and in law, the learned ACIT has erred in disallowing exclusion of profits of branches of the Appellant Bank situated in countries with whom India has entered into a Double Taxation Avoidance Agreement (DTAA) namely United Kingdom, France, Belgium, Kenya, Japan, United States of America, Singapore, China and South Africa (herein after referred to as "foreign branches of the Appellant Bank") aggregating to Rs.1408,32,77,584 and the Hon'ble CIT(A) has erred in upholding the decision of the learned ACIT. The learned ACIT be directed to allow deduction for exclusion of profits of foreign branches of the Appellant Bank aggregating to Rs.1408,32,77,584 and reduce the total income accordingly.**
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> **3A. Without prejudice to Ground no. 3 above, assuming without accepting that the exclusion of profit of the aforesaid foreign branches aggregating to Rs. 1408,32,77,584 is not allowed and therefore, taxed in India , then the Appellant Bank prays that the credit for taxes paid by the said branches in their respective countries be allowed as a deduction while determining tax liability in India in accordance with Sec.90 of the Act.**

4. The assessee bank has branches abroad, in Belgium, China, France, Japan, Kenya, Singapore, South Africa, United Kingdom, and United States of America. During the relevant financial period, the assessee earned income aggregating to Rs 1408,32,77,584 (i.e Rs 1408.32 crores) from these foreign branches. While filing its income tax return, however, the assessee did not include this income of Rs 1,408.32 crores in its taxable income. The plea of the assessee was that since India has Double Taxation Avoidance Agreements with all these countries, the right to tax the profits of these foreign branches exclusively vests with the respective tax jurisdictions and these profits cannot be taxed in India. This plea was negated by the Assessing Officer on the ground that, under the scheme of the law as it prevails- particularly in the light of the provisions of Section 90(3) read with notification no SO 2123(E) dated 28th August 2008, entire global income of an Indian resident assessee is to be taxed in India and that where a DTAA provides that "any income of a resident of India 'may be taxed' in the other country, such income shall be included in his total income chargeable to tax in India, in accordance with the provisions of the Income Tax Act, 1961, and relief shall be granted in accordance with the method of elimination or avoidance of double taxation provided in such agreement". Aggrieved, assessee carried the matter in appeal

before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

5. Learned counsel's contention, as articulated in the written note filed before us, is that the issue in appeal is covered, in favour of the assessee, by decisions of the coordinate benches in two immediately preceding assessment years, namely 2013-14 and 2014-15, wherein the matter has been remitted back to the file of the Assessing Officer in the light of certain directions. It is thus contended that when profits of a branch abroad has been subjected to tax abroad, under article 7 of the applicable double taxation avoidance agreement, the same income cannot again be taxed in India. On the first principle, the merits of this argument, merit if there is any, could only be its simplicity, or naivety- to be more apt, in its approach. It proceeds on the fallacy that there is only one method of relieving double taxation of an income, due to inherent conflict of the source taxation vs residence taxation rule, and that method is exemption method, and that is the method of relieving double taxation of income in the Indian tax treaties as well. Nothing can be farther from the truth. Not only that credit method is an equally, even if not more, effective a method of relieving double taxation of income in a cross border situation, that is the method which is used in an overwhelming majority of the Indian tax treaties- including, of course, all the tax treaties that we are concerned about in this case. What essentially follows is that the so far income of the branches, which are subjected to tax abroad under the respective tax treaties, is to be included in the taxable income of the assessee, and so far as taxes paid abroad are concerned, credit for the taxes so paid abroad is to be given to the assessee, in computation of its Indian income tax liability, in accordance with the provisions of the related tax treaty. Having so set out the correct position from an academic point of view, we may hasten to add that there is indeed a judicial precedent from Hon'ble Supreme Court, in the case of **CIT Vs PVAL Kulandagan Chettiar [(2004) 267 ITR 654 (SC)],** which touches a different chord, but then, in the light of subsequent legal amendments, the impact of this judicial precedent stands nullified. What is thus correct on the first principles and as per the text books, is also the binding legal position.

6. When we put our above understanding to the learned counsel in the beginning of hearing on this issue, learned counsel did fairly admit that, even on the same facts of the case this issue was decided in favour of the assessee by the coordinate benches, this issue is now covered against the assessee, by a rather recent coordinate bench decision in the case of **Technimont Pvt Ltd Vs ACIT [(2020) 116 taxmann.com 996 (Mum)]**. Learned counsel frankly submits that the reasoning adopted by those coordinate benches, in the light of this recent decision, does not hold good, and he has nothing to say on the same on the same- except for one new reason which we will take up a little later. In the case of Technimont Pvt Ltd *(supra)*, the coordinate bench, speaking through one of us (i.e. the Vice President), has, *inter alia*, observed, and we are in considered agreement with these observations, as follows:

> *4. To adjudicate on the issue on merits, only a few undisputed material facts need to be taken note of. The assessee before us is an Indian company with branch offices in UAE and Qatar. The assessee has earned profits aggregating to Rs. 11,91,18,391 in these branches, which, for the purposes of the provisions of the respective tax treaties, constitute permanent establishments. The claim of the assessee, as noted by the DRP at page 10, is that "the foreign branches create permanent establishments (PEs) in the foreign countries, the income from the same is liable to tax in these foreign countries, i.e. source states, and, hence, the income from*

aforesaid foreign branches should be exempt in India as per Article 7 of the tax treaties". The assessee has further contended that "according to many judicial precedents cited below, it has been held that under a tax treaty, it has been provided that tax 'maybe' charged in a particular state in respect of specified income, it is implied that tax will not be charged by the other state in respect of such income". As noted in the DRP's order, further at page 11, the contentions of the assessee have been that "it has been held that once an income is held to be taxable in a particular jurisdiction under a tax treaty, unless there is a specific mention that it can be taxed in the other jurisdiction as well, the latter is denuded of the powers to tax such income" and that "accordingly, income earned by the foreign branches in UAE and Qatar where the assessee was forming PE should not be liable to tax in India based on relevant tax treaties". The assessee has also relied upon a large number of judicial precedents, including the judicial precedents in the cases of PAVL Kulandayan Chettiar v. ITO [1983] 3 ITD 426 (Mad.) (SB), which has been upheld right upto Hon'ble Supreme Court P.V.A.L. Kulandayan Chettiar (supra) and a review petition has also been dismissed by Hon'ble Supreme Court CIT v. P.V.A.L. kulandayan Chettiar [2008] 300 ITR 5, CIT v. Bank of India [64 taxmann.com 335 (Bom)], CIT v. VRSRM Firm [1994] 208 ITR 400 (Mad.), CIT v. R M Muthiah [1993] 67 Taxman 222/202 ITR 508 (Karnataka), Dy. CIT v. Patni Computer Systems Ltd. [2008] 114 ITD 159 (Pune), Apollo Hospitals Enterprises Ltd. v. Dy. CIT [2012] 23 taxmann.com 168/53 SOT 103 (Chennai)], Dy. CIT v. Turquoise Investments & Finance Ltd. [2008] 168 Taxman 107/300 ITR 1 (SC), Ms. Pooja Bhatt v. DY. CIT [2008] 26 SOT 574 (Mum.), Dy. CIT v. Mideast India Ltd. [2009] 28 SOT 395 (Del.), CIT v. Patni Computer Systems Ltd. [2013] 33 taxmann.com 3/215 Taxman 108 Hon'ble Bombay High Court and Apollo Enterprises Ltd. v. (supra)

5. Learned counsel for the assessee has more armoury in store. He begins by inviting our attention to a coordinate bench decision in the case of Bank of India v. Dy. CIT, and vice versa [IT Appeal Nos 5977 and 6016 (Mum.) of 2011, order dated 26-7-2017] wherein it has been held that the income of the foreign branches, covered by tax treaties with respective jurisdictions, is to be excluded from total income of the assessee and is to be held as not taxable in India. It is submitted that this decision is a binding judicial precedent and it is not open to us to deviate from the stand so taken by the coordinate bench. When learned counsel's attention was invited to the provisions of Section 90(3) read with notification no. 91/2008 dated 28th August 2008, and impact of this legal position on the claim of the assessee, he submits that section 90 was re-enacted with effect from 1st October 2009, and the notifications issued prior to re-enacted section 90 will not hold good in law. In support of this proposition, our attention is invited to a coordinate bench decision in the case of Essar Oil Ltd. v. Addl.CIT [2014] 42 taxmann.com 21 wherein it is said to have been held, in paragraph no. 76, that notifications issued under earlier section 90 shall hold good till 1st October 2009. As a corollary to this observation, according to the learned counsel, the notifications issued under earlier section 90 will not hold good after 1st October 2009. He submits that in this view of the matter, nothing really turns on the notification no 91/2008 under section 90(3). He submits that the impact of notification having been nullified by re-enactment of section 90, the law laid down by Hon'ble Supreme Court in the case of CIT v. PVAL Kulandagan Chettiar [2004] 137 Taxman 460/267 ITR 654 (SC) will hold the field, and, therefore, income taxable in the source jurisdiction under the treaty provisions cannot be included in total income of the assessee. He hastens to add, and rather curiously so, that he would once again urge us not to decide the matter on merits and simply remit the matter to the file of the Assessing Officer. Learned Departmental Representative, on the other hand, vehemently relies upon the stand of the authorities below, and leaves the matter to us.

6. For the sake of completeness, we may also place on record that the fact that in assessee's own case for the assessment year 2012-13, the Dispute Resolution Panel has given relief of

Rs. 10,81,17,104 on this issue, and likewise for the assessment year 2013-14, the Dispute Resolution Panel has given relief of Rs. 28,47,44,212 on the same issue. That is what probably explains the assessee's eagerness to go back to the assessment stage, and claim it as a covered issue before them. The reasoning adopted by the Dispute Resolution Panel, for example for the assessment year 2013-14 (at page 294 of the paper book, and internal page 15 of the respective order), is as follows:

> *9.1 We have gone through the core objection raised with respect to inclusion of foreign branches income in the hands of the assessee. It is a fact that the assessee has two foreign branches situated in UAE and Bahrain. It is also a fact that there exists a DTAA between India and UAE. Reference is made to the decision of Hon'ble Supreme Court in PAVL Kulandagan Chettiar's case (267 ITR 654) wherein Hon'ble Court has upheld the finding of the High Court which took the view that where there exists a provision to the contrary in the agreement, there is no scope for applying the law of any one of the respective contracting stares to tax paid on the liability to tax has to work doubt (sic- out) in the manner and to the extent permitted and allowed under the terms of the agreement. The AO is directed to verify the total income of the UAE branch and reduce the same from assessee's total income. The ground of objection is, accordingly, accepted.*

9.2 Similar views have been taken in the assessee's case by the DRP during the assessment year 2012-13.

7. Undoubtedly, as a result of Hon'ble Supreme Court's judgment in the case of PAVL Kulandagan Chetttiar's case (supra), the legal position was that once an income is held to be taxable in a tax jurisdiction under a double taxation avoidance agreement, and unless there is a specific mention that it can also be taxed in the other tax jurisdiction, the other tax jurisdiction was denuded of its powers to tax the same. To that extent, the worldwide basis of taxation in the scheme of the Indian Income-tax Act was no longer applicable in a situation provisions of a double taxation avoidance agreement entered into under section 90 apply. That was the scheme of law, as evident from the following observations, as settled by Hon'ble Supreme Court:

> *13. We need not to enter into an exercise in semantics as to whether the expression "may be" will mean allocation of power to tax or is only one of the options and it only grants power to tax in that State and unless tax is imposed and paid no relief can be sought. Reading the Treaty in question as a whole when it is intended that even though it is possible for a resident in India to be taxed in terms of sections 4 and 5, if he is deemed to be a resident of a Contracting State where his personal and economic relations are closer, then his residence in India will become irrelevant. The Treaty will have to be interpreted as such and prevails over sections 4 and 5 of the Act. Therefore, we are of the view that the High Court is justified in reaching its conclusion, though for different reasons from those stated by the High Court.*

8. We are, at this stage, not concerned about how the above legal position was at some variance with the first principles and what impact the aforesaid decision had on the workability of the double taxation relief mechanism. It would appear that the very scheme of tax credit, as envisaged in the international tax treaties, was perhaps rendered redundant. There was no question of tax credits being granted in India in view of the fact that any income taxed by source jurisdiction abroad was held to be exempted from taxation in India, and if these tax credits were to be granted it would have resulted in plain and simple refund of the taxes paid abroad since the incomes relating thereto were held to be not at all taxable in

India. A double dip of losses abroad, howsoever inappropriate on the first principles, was actually possible, and was approved by the coordinate benches of this Tribunal, as in the case of Patni Computers (supra), wherein speaking through one of us (i.e. the Vice President), the legal position was respectfully followed nevertheless and it was also observed thus:

> *The law laid down by the Hon'ble Supreme Court in binding on us under Article 141 of the Constitution of India. The prevailing legal position, therefore, is that once an income is held to be taxable in a tax jurisdiction under a double taxation avoidance agreement, and unless there is a specific mention that it can also be taxed in the other tax jurisdiction, the other tax jurisdiction is denuded of its powers to tax the same. To that extent, the worldwide basis of taxation in the scheme of the Indian Income-tax Act is no longer applicable in a situation provisions of a double taxation avoidance agreement entered into under section 90 apply. The law laid down by the Hon'ble Supreme Court in binding on us under Article 141 of the Constitution of India. The prevailing legal position, therefore, is that once an income is held to be taxable in a tax jurisdiction under a double taxation avoidance agreement, and unless there is a specific mention that it can also be taxed in the other tax jurisdiction, the other tax jurisdiction is denuded of its powers to tax the same. To that extent, the worldwide basis of taxation in the scheme of the Indian Income-tax Act is no longer applicable in a situation provisions of a double taxation avoidance agreement entered into under section 90 apply.*

9. The development of law, however, did not stop at that.

10. It may be recalled that, with effect from 1st April 2004, a new sub-section 3 was inserted in Section 90, and this new sub-section provided that "(a)ny term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf". In exercise of the powers so vested in the Central Government, vide notification no. 91 of 2008 dated 28th August 2008, it was notified as follows:

> *In exercise of the powers conferred by sub-section (3) of section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that where an agreement entered into by the Central Government with the Government of any country outside India for granting relief of tax, or as the case may be, avoidance of double taxation, provides that any income of a resident of India "may be taxed" in the other country, such income shall be included in his total income chargeable to tax in India in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), and relief shall be granted in accordance with the method for elimination or avoidance of double taxation provided in such agreement.*

11. The effect of Hon'ble Supreme Court's judgment in Kulandagan Chettiar's case (supra) thus was clearly overruled by the legislative developments. It was specifically legislated that the mere fact of taxability in the treaty partner jurisdiction will not take it out of the ambit of taxable income of an assessee in India and that "such income shall be included in his total income chargeable to tax in India in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), and relief shall be granted in accordance with the method for elimination or avoidance of double taxation provided in such agreement". A coordinate bench of this Tribunal, in the case of Essar Oil Ltd (supra) also proceeded to hold that this notification was

retrospective in effect inasmuch as it applied with effect from 1st April 2004 i.e. the date on which sub-section 3 was introduced in Section 90.

12. When we invited learned counsel's attention to these legal developments, he submitted that as Section 90 has now been redrafted and a new Section 90 is in place, with effect from 1st October 2009, the notification issued under old section 90(3) ceases to be relevant. The legal position is, as he contended, that as on now there is no notification is in force under the present section 90, and, therefore, Hon'ble Supreme Court's judgment in the case of Kulandagan Chettiar (supra) still holds good in law. In support of this proposition, learned counsel for the assessee relies upon an observation by the coordinate bench, in the case of Essar Oil Ltd. (supra) to the effect that "We are, therefore, of the considered view that the substitution of Section 90, which has come into effect from 1st April 2004, and notification issued therein shall continue to hold at least upto 1st October 2009". By implication, therefore, according to the learned counsel, the notification issued under old section 90(3) will not hold good in law after 1st October 2009, unless such notification is reissued on or after 1st October 2009.

13. The argument of the learned counsel is only fit to be noted and rejected. It is only elementary that merely because a section is amended or even substituted, whether by repeal of the legislation itself or by amendment in the legislation, the notifications, circulars and instructions issued therein do not cease to hold good. Section 297(2)(k) of the Income-tax Act, 1961, specifically provides that notwithstanding the repeal of Income-tax Act, 1922, "any agreement entered into, appointment made, approval given, recognition granted, direction, instruction, notification, order or rule issued under any provision of the repealed Act shall, so far as it is not inconsistent with the corresponding provision of this Act, be deemed to have been entered into, made, granted, given or issued under the corresponding provision aforesaid and shall continue in force accordingly". On a similar note, under section 24 of the General Clauses Act, "Where any Central Act or Regulation, is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided any appointment notification, order, scheme, rule, form or bye-law, made or issued under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted……" The scheme of law is thus unambiguous. Its only when an notification issued under the old statutory provision, whether repealed or modified, is inconsistent with the corresponding new statutory provisions, that such an notification ceases to hold good in law. In a rather recent judgment in the case of Fibre Boards (P.) Ltd. v. CIT [2015] 62 taxmann.com 135/[2017] 376 ITR 596 (SC), Hon'ble Supreme Court has reiterated this principle, and, inter alia, observed as follows:

> *34. In CIT v. Venkateswara Hatcheries (P.) Ltd. [1999] 237 ITR 174/103 Taxman 503 (SC), this Court was faced with an omission and re-enactment of two Sections of the Income-tax Act. This Court found that Section 24 of the General Clauses Act would apply to such omission and re-enactment. The Court has stated as follows:*
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> > *"As noticed earlier, the omission of Section 2(27) and re-enactment of Section 80-JJ was done simultaneously. It is a very well-recognized rule of interpretation of statutes that where a provision of an Act is omitted by an Act and the said Act simultaneously re-enacts a new provision which substantially covers the field occupied by the repealed provision with certain modification, in that event such re-enactment is regarded having force continuously and the modification or changes are treated as amendment coming into force with effect from the date of enforcement of the re-enacted*

> *provision. Viewed in this background, the effect of the re-enacted provision of Section 80-JJ was that profit from the business of livestock and poultry which enjoyed total exemption under section 10(27) of the Act from Assessment Years 1964-65 to 1975-76 became partially exempt by way of deduction on fulfilment of certain conditions." (At para 12)*
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> *35. For all the aforesaid reasons, we are therefore of the view that on omission of Section 280ZA and its re-enactment with modification in Section 54G, Section 24 of the General Clauses Act would apply, and the notification of 1967, declaring Thane to be an urban area, would be continued under and for the purposes of Section 54A.*

14. When such are the views of Hon'ble Supreme Court in respect of validity of notifications in respect of amendment in law by re-enactment of the statutory provisions under the Income-tax Act, in which these provisions are of similar nature though by way of different provisions, it is futile to argue that when re-enactment of law has exactly the same provisions, so far as the related notification is concerned, the mere fact of re-enactment of law will be fatal to the notification. As regards learned counsel's reliance on observations made by a coordinate bench, in the case of Essar Oil (supra), to the effect "We are, therefore, of the considered view that the substitution of Section 90, which has come into effect from 1st April 2004, and notification issued therein shall continue to hold at least upto 1st October 2009", the import of words "at least" is being missed out. The issue for consideration by the coordinate bench was pre 1st October 2009 situation, and the coordinate bench was of the view that "at least" for this period, the validity of notification cannot be called into question. As held by Hon'ble jurisdictional High Court in the case of CIT v. Sudhir Jayantilal Mulji [1996] 84 Taxman 205/[1995] 214 ITR 154 (Bom.), a judicial precedent is only "an authority for what it actually decides and not what may come to follow from some observations which find place therein". The issue regarding validity of notification after 1st April 2009 was not before the coordinate bench, and these observations thus have no relevance on the proposition being canvassed before us. The law laid down by Hon'ble Supreme Court, as analysed above, is against the plea advanced by the learned counsel. In any case, the argument of the learned counsel, howsoever absurd, destroys his own case. If all the notifications under the old section 90 are to be held to be not good in law under the present section 90, the assessee cannot claim the benefits of the related tax treaties either since these treaties were also notified prior to 1st April 2009.

15. Let us now turn to judicial precedents cited by the learned counsel.

16. None of these judicial precedents take into account the developments with respect to the provisions of Section 90(3) and the notification issued thereunder. The only exception is a coordinate bench decision in the case of Bank of India (supra) wherein the issue of notification was specifically raised but then the coordinate bench, following Hon'ble jurisdictional High Court's judgment in assessee's own case for the assessment year 2003-04 and without realizing that the amendment in law was effective 1st April 2004 i.e. assessment year 2004-05, decided the issue in favour of the assessee. The impact of amendment with effect from 1st April 2004 not having been noted or having been brought to the notice of the coordinate bench, this decision is clearly per incuriam and, as such, not a binding judicial precedent. As a matter of fact, when subsequent assessment years of this very assessee came up for consideration of another bench, the said precedent was not followed and, vide order dated 30th November 2018, it was observed that "the decision of the Hon'ble High Court in assessee's own case pertained to the assessment years 2001-01 and 2003-04 and the Hon'ble High Court never had any occasion to examine the taxability of income of foreign branches in India keeping in view provisions of Section 90(3) read with the Government notification dated

28th August 2008" and that " we are unable to accept the submission of the learned authorised representative that the issue is covered earlier decisions of the Tribunal". The assessee, therefore, does not derive any benefit from this legal precedent relied upon. All other judicial precedents hold good in respect of the pre-amendment law, but then the legal position, as analysed above, has changed, and, under the changed legal position, these judicial precedents do not hold good. As regards the DRP decisions for the immediately two preceding assessment years, we have noted that the post amendment legal position was not even brought to the notice of the Dispute Resolution Panel. There is not even a whisper of a suggestion that the amendment in law in Section 90(3) and the post amendment notification was brought to the notice of the DRP. Learned counsel's arguments before the DRP simply proceeded on the basis that there was no change in statutory provisions after the Kulangadan Chettiar's judgment. That is simply unacceptable. While we restrain from making any observations on the conduct of the representatives of the assessee, we find it difficult to believe that a big-4 accounting firm, as the assessee's representative before the DRP, as indeed before us, is, would really be oblivious of the correct legal position and it was anything less than a calculated ignorance, before the DRP, on the basic legal position. Advising the correct legal position and then making whatever aggressive claim one makes is one thing, but not explaining the correct legal position and then hoping to succeed with the claim, by keeping the adjudicator in dark about the statutory developments, is quite another. The path chosen by the assessee could have fallen in the first category if submissions were made before the DRP about the amendment in law by way of Section 90(3) and notification thereunder, and yet the exemption claim was to be justified due to no fresh notification being issued after the substitution of section 90(3) with effect from 1st October 2009. That is not the case. In any case, the DRP decisions cannot fetter our adjudication.

17. We have also noted that, as per details furnished before us at pages 327 to 376 of the paper-book, the Assessing Officer has accepted the claim of the assessee, in the assessment year 2016-17, for exclusion of Rs. 56,39,11,560 from its taxable income on the ground that it pertains to the profits of its branches in Italy, UAE, Qatar and Saudi Arab and India has DTAAs with these countries. This decision by the Assessing Officer, whatever its merits, certainly does not constitute any estoppel against the statute, and, in any case, there is no res judicata in the income tax proceedings. Just because the Assessing Officer himself has allowed a relief to the assessee, which, in our humble understanding of law- whatever is its worth, is patently inadmissible in law, we are not obliged to give the assessee the same relief. If at all the stand of the Assessing Officer indicates or explains anything, it explains the anxiety of the assessee to go back to the assessment stage on this issue. We are, however, not inclined to follow the plan so laid out.

18. In the light of the above discussions, as also bearing in mind entirety of the case, ; we reject the claim of the assessee on merits. No matter how tempting is it to get a quick disposal by remitting the matter to the assessment stage, as the matter was not adjudicated on merits at that stage, when, in our considered view, quite clearly it is a patently inadmissible claim, we have to hold so and thus decline to remit it to the assessment stage.

7. Learned counsel has shown, in accepting the fact that even though the issue is covered in favour of the assessee by earlier decisions of the coordinate benches, these coordinate bench decisions cease to be binding judicial precedents inasmuch as reasoning adopted therein does not hold good any longer in the light of the decision in the case of Technimont *(supra),* admirable grace. It is not clear to us whether this approach is to preempt a detailed discussion on merits of the matter, or whether this approach is indeed *bonafide* stand of the assessee. That does not, however, matter much at this stage, as all the facets of this matter are covered above nevertheless. The basis on which the relief was granted in the earlier years has

been examined and that basis being ex facie incorrect and even rendered by inadvertence is glaring in the analysis that has been extensively reproduced above. Learned counsel for the assessee, however, does not give up; he has an even more innovative plea now. He submits that above decision is *per incuriam* for some other reason, which has not been discussed in any judicial precedent so far, inasmuch as it overlooks the fact that the notification dated 28th August 2008 was not issued in the context of the business income, and, should accordingly not be applicable so far as business income earned abroad, as in this case, is concerned. We see no substance in this plea either. The notification deals with connotations of the expression "may be taxed", appearing in the tax treaties entered into by India, and there is absolutely no basis whatsoever to support the proposition that the effect of the notification has to be restricted in its application to non-business income only. No such differentiation in treatment of business and non-business income is envisaged in the said notification, nor to do we see any justification for inferring the same. Learned counsel does not have any material whatsoever in support of the proposition canvassed by him, nor does this proposition make any sense on the first principles- inasmuch as once the notification is issued without any such specific restriction for application to business income, we cannot infer a restriction in its application. We, therefore, reject the plea of the assessee, and thus decline to interfere in the matter. We uphold the action of the Assessing Officer in including the profits of the assessee's overseas branches, amounting to Rs1,408.32 crores, in its taxable income in India.

8. So far as the tax credit for the taxes paid abroad is concerned, the assessee has not given specific details of the taxes so paid abroad in respect of which tax credit is sought. On a perusal of the material before us, we find that the assessee has claimed a deduction of Rs 46,96,14,034 in connection with the taxes paid abroad which has been granted by the Assessing Officer, though under section 91. It is not clear whether this tax credit is in respect of the income of the overseas branches in question of the assessee, or in respect of some other income. We, therefore, direct that in case the assessee furnishes the requisite details of the taxes paid abroad in respect of the profits of these branches, no tax credit has been claimed in respect of the same so far, and in case the claim so made is admissible in terms of the provisions of the related double taxation avoidance agreement, the Assessing Officer will allow the tax credit, to the extent admissible, for the taxes so paid abroad on incomes of the branches abroad earned in tax jurisdictions with which India has entered into double taxation avoidance agreement. While granting the tax credit, the Assessing Officer will examine the provisions of the respective tax treaty, and compute the admissible tax credit separately for each jurisdiction in accordance with the scheme of related treaty. With these directions, the matter stands restored, for the limited purposes of granting tax credit, in terms of the related double taxation avoidance agreements, if, and to the extent, admissible.

9. The action of the authorities below is thus upheld in principle, but its clarified that the tax credits for the taxes paid abroad, in treaty partner countries, will be admissible in terms of the provisions of the respective treaty.

10. Ground no. 3 raised in the appeal filed by the assessee, is thus dismissed and ground no. 3 A therein is allowed for statistical purposes in the terms indicated above.

11. The second important issue in this appeal is with respect to levy of Minimum Alternate Tax under section 115 JB, i.e. whether or not the assessee bank is liable to subjected to Minimum Alternate Tax under section 115 JB, and, if so, whether the income of

the foreign branches, amounting to Rs 1,145.14 crores, and, provision for bad doubtful debts amounting to Rs 5,359.64 crores in required to be excluded from the computation of book profits computed under section 11JB of the Act. The related grounds of appeal are as follows:

> **5. On the facts and in the circumstances of the case and in law, the learned ACIT has erred in invoke the provisions of Sec 115JB of the Act while determining the tax liability. The learned ACIT be directed not to the provisions of Sec 115JB of the Act in the case of the Appellant Bank and determine the total income and income tax thereon under normal provisions of the Act only.**
>
> **5A. Without prejudice to Ground no. 5 above, on the facts and in the circumstances of the cases and in law, assuming without accepting that your honours are of the opinion that the provisions of Sec 115JB are applicable to the Appellant Banks's case, then on the facts and in the circumstances of the case and in law, the learned ACIT has erred in disallowing exclusion of profits of branches in countries with whom India has entered into DTAA namely UK, France, Belgium, Kenya, Japan, USA, Singapore, China, South Africa amounting to Rs. 1145,14,40,634 u/s 90 of the Act. The learned ACIT be directed to exclude the profits of aforesaid foreign branches amounting to Rs. 1145,14,40,634 while computing Book reduce the Book Profit accordingly.**
>
> **5B. Without prejudice to Ground no. 5B above, on the facts and in the circumstances of the cases and in law assuming without accepting that the exclusion of profits of the aforesaid foreign branches aggregating to Rs.1145,14,40,634 is not allowed while computing Book Profit u/s 115JB and therefore, taxed in India, then the Appellant Bank prays that the credit for taxes paid by the said branches in their respective countries be allowed as a deduction in accordance with Sec. 90 of the Act while determining tax liability in India.**
>
> **5C. Without prejudice to Ground no. 5 above, on the facts and in the circumstances of the case and in law assuming without accepting that your Honor's is of the opinion that the provisions of Sec 115JB are applicable to the Appellant Banks's case, then on the facts and in the circumstances of the case and in law, the learned ACIT has erred in adding back the provision for bad and doubtful debts of Rs.5359,64,38,015 while computing Book Prfits u/s 115JB of the Act without appreciating that the same does not constitute a provision for diminution in the value of asset. The learned ACIT be directed to delete the addition of provision for bad and doubtful debts of Rs.5359,64,38,015 and reduce Book Profit accordingly.**

12. The first point, so far as this set of grievances is concerned, is like this. The stand of the assessee, as culled out from his arguments and the material on record, is that the provisions of Section 115JB donot apply to the assessee bank at all. His submission is that the assessee bank is not a company incorporated under the Companies Act, 1956, nor recognized under section 3 of the Companies Act, which is *sine qua non* for applicability of Explanation 3 to Section 115JB, inasmuch as the assessee bank came into existence under the Banking Companies (Acquisition and Transfer of Undertaking Act, 1970. He submits that since section 115JB starts with a *non obstante* clause, i.e. "notwithstanding anything contained in

any other provisions of this Act", it should be treated as a complete code in itself, no other provisions of law in the context of the Income Tax Act, 1961 should be held to be applicable here, and the expression 'company' should be construed as to a company incorporated under the Companies Act, 1956. He virtually argues for its being seen as a standalone provision and be seen as a complete code in itself. A lot of emphasis is repeatedly placed on Section 115 JB being a the "non obstante" provision, which does not allow anything in the Income Tax Act 1961 being imported into the said provision, and different terminologies being employed in section 36 and elsewhere, for the nationalized banks. Learned counsel submits that it is a drafting error in section 115JB, even if the intention was to include banks in the ambit of this section, that the references to nationalized banks and the Banking Companies (Acquisition and Transfer of Undertaking Act, 1970 is missing. It is submitted that in view of these submissions, the provisions of Section 115 JB be held to be not applicable on the facts of this case. That is the only point, regarding inadmissibility of Section 115JB, on the nationalized banks. He submits that the authorities below have rather summarily rejected these arguments. It is also pointed out that in the immediately two preceding assessment years, the coordinate benches have noted some judicial precedents in favour of the assessee, on this issues, and remitted this issue back to the file of the Assessing Officer for adjudication *de novo*. He, however, submits that the appeal effect is not yet given, and prays that the matter being a purely legal issue, the same may be adjudicated by us on merits. Learned Departmental Representative, on the other hand, relies upon the orders of the authorities below, submits that the scheme of section 115JB does not call for exclusion of nationalized banks from the levy of Section 115JB, justifies section 115JB being invoked on the facts of this case, and yet leaves the matter to us.

13. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

14. We find that Section 11 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, provides that "**for the purposes of the Income Tax Act, 1961, every corresponding new bank shall be deemed to be Indian company and a company in which public is substantially interested**". This provision is not for any specific purposes in the Income Tax Act, 1961, such as assessment, but for *(all)* "the purposes of the Income Tax Act, 1961". It is thus not possible to read the provision, as has probably been sought to be read, that while the nationalized banks are to be treated as Indian companies in which public is substantially interested, so far as assessment of their income is concerned, but they will not be treated as such for other purposes. We see no support of such an approach, as is implicit in the stand taken by the assessee bank. Once the provisions of Section 11 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, provides that "**for the purposes of the Income Tax Act, 1961, every corresponding new bank shall be deemed to be Indian company and a company in which public is substantially interested"**, a new bank established under the said Act, as is the assessee before us, is required to be treated as an Indian company in which public is substantially interested, for all the purposes of the Act. No exclusions can be inferred. Once the assessee bank is required to be treated an Indian company for the purposes of the Income Tax Act, 1961, it cannot be open to us to hold that it will not be treated as a company for the purposes of Section 115JB of the Income Tax Act, 1961.

15. A lot of emphasis is then placed on the fact that the provisions of Section 115 JB start with a non obstante clause, and, therefore, this section is to be treated as a complete code by itself- without importing any inputs from the Income Tax Act, 1961, or, for that purpose, any other legislation not specifically referred to therein. Section 115JB (1), as we have noted above, provides that **"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, 2012, is less than eighteen 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 eighteen and one-half per cent". It is in this light that we have to see the impact of non-obstante clause in this provision.

16. Elaborating upon the nature of a non-obstante clause, a full bench of Hon'ble Uttarakhand High Court, in the case of **DIT Vs Schlumberger Asia Services Ltd [(2019) 414 ITR 1 (Uttarakhand FB)]**, in an extended and profound discussion, has observed as follows:

> ……A "non obstante clause" is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found in the same enactment, that is to say, to avoid the operation and effect of all contrary provisions. (Laxmi Devi v. State of Bihar [2015] 10 SCC 241; Union of India v. G.M. Kokil [1984] Supp SCC 196. It is equivalent to saying that, inspite of the provisions mentioned in the non-obstante clause, the provision following it will have full operation, or the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs. State of Bihar v. (Bihar Rajya M.S.E.S.K.K. Mahasangh [2005] 9 SCC 129 ; South India Corpn. (P.) Ltd. v. Secretary, Board of Revenue AIR 1964 SC 207. Use of such an expression is another way of saying that the provision, in which the non-obstante clause occurs, would wholly prevail over the other provisions of the Act. Non-obstante clauses are to be regarded as clauses which remove all obstructions which might arise out of any of the other provisions of the Act in the way of the operation of the principal enacting provision to which the non-obstante clause is attached. (Bihar Rajya M.S.E.S.K.K. Mahasangh (supra); Iridium India Telecom Ltd. v. Motorola Inc. [2005] 2 SCC 145. **While interpreting a provision containing a non-obstante clause, it should first be ascertained what the enacting part of the Section provides, on a fair construction of the words used according to their natural and ordinary meaning, and the non-obstante clause is to be understood as operating to set aside as no longer valid anything contained in any other provision which is inconsistent with the Section containing the non-obstante clause**. (Aswini Kumar Ghosh v. Arabinda Bose [1953] SCR 1; A.V. Fernandez v. State of Kerala [1957] SCR 837).
>
> *[Emphasis, by underling, supplied by us now]*

17. Clearly, therefore, what is to be seen is to "what the provision containing non obstante clause provides", and, to that extent, the provision containing non-obstante clause sets aside, as no longer valid, any other provision which is inconsistent with such a provision. As

Chaturvedi & Pithisaria's Income Tax Law [2020 edition; page 626] puts it, citing authorities for this proposition, a non-obstante clause "**is equivalent to saying that in spite of the provisions of the Act, or any other Act mentioned in the non-obstante clause, or any contract or document embraced in the non-obstante clause, it will have its full operation, and that the provisions embraced in non-obstante clause would not be an impediment for operation of the enactment**".

18. In the case of **A G Vardarajulu Vs State of Tamilnadu [(1998) 146 CTR 117 (SC)],** Hon'ble Supreme Court has, inter alia, observed as follows:

> **In Madhav Rao Scindia Vs. Union of India [1971 (1) SCC 85 139] Hidayatullah. CJ observed that the non-obstante clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but "for that reason alone we must determine the scope" of that provision strictly, when the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. "A search has, therefore, to be made with a view to determining which provision answers the description and which does not".**

19. Viewed thus it is incorrect to say that just because the provisions of Section 115JB(1) start with the words "**notwithstanding anything contained in any other provision of this Act**", section 115JB should be seen as a provision which, as observed by Hon'ble Supreme Court above, **"it excludes the whole Act and stands all alone by itself**". As is the mandate of Hon'ble Supreme Court's above observations, **"A search has, therefore, to be made with a view to determining which provision answers the description** *(for being overridden)* **and which does not".**

20. Could it be, therefore, said that even though the assessee before us is a 'company' for the purpose of assessment of income in the Income Tax Act, 1961, it is not required to be treated as a company for the purposes of Section 115JB of the Act? As we do so, let us take a quick look at the relevant legal provision in this context. The relevant extracts from the provisions of Section 115 JB, for ready reference and as they stood at the relevant point of time, are as follows:

> **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, 2012, is less than eighteen 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 eighteen and one-half per cent.**
>
> **(2) Every assessee,—**
>
> **(a) being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its profit and loss account for the relevant**

previous year in accordance with the provisions of Part II of Schedule VI to the Companies Act, 1956 (1 of 1956); or

(b) being a company, to which the proviso to sub-section (2) of section 211 of the Companies Act, 1956 (1 of 1956) is applicable, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of the Act governing such company:

Provided ……..

Explanation 3.—For the removal of doubts, it is hereby clarified that for the purposes of this section, the assessee, being a company to which the proviso to sub-section (2) of section 211 of the Companies Act, 1956 (1 of 1956) is applicable, has, for an assessment year commencing on or before the 1st day of April, 2012, an option to prepare its profit and loss account for the relevant previous year either in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act, 1956 or in accordance with the provisions of the Act governing such company.

……

21. The answer has to emphatically in negative, as, Section 11 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, categorically provides that "**for the purposes of the Income Tax Act, 1961, every corresponding new bank shall be deemed to be Indian company and a company in which public is substantially interested"**. This provision does not exclude any area for the purpose of which, even for the purposes of the Income Tax Act, 1961, this provision cannot be pressed into service. The only plea available to the assessee thus is the section 115JB being a non-obstante clause, but then, as has been observed by Hon'ble Supreme Court in Vardarajulu's case *(supra)*, a non obstante clause does not mean that it is a standalone provision and it denies the applicability of the other provisions of the law, but it does only mean that any provisions which are inconsistent with the provisions of Section 115JB, will have to make way for the provisions of Section 115JB. The scheme of the section 115 JB is that *de hors* the manner in which taxable income of a company is required to be computed in accordance with the provisions of the Income Tax Act, 1961 and *de hors* the rate at which an income is taxed, or is already taxed, under the provisions of the Income Tax Act, 1961, where such a taxable income is less than the specified percentage of book profits of the assessee company- computed in accordance with the provisions of the regulatory mechanism in the related legislation, the assessee shall pay a certain percentage as income tax on the book profits computed in accordance with the manner prescribed. It is only to this extent that the provisions of the Income Tax Act, 1961, have to make way for implementation of the scheme of section 115JB. However, we see no conflict in this scheme of section 115JB and the assessee being treated as a company for any purpose of the Income Tax Act, 1961. This part of the tax law position cannot come in the way of implementing the scheme of Section 115 JB, and, cannot, therefore, be overridden.

22. The next point raised by the learned counsel is that the expression 'banking company' is well defined in the provisions of the Banking Regulation Act, 1949 read with the related provisions of the Companies Act, 1956, and, unless the conditions so set out in those definitions are satisfied, section 115 JB cannot come into play. It is contended that the term

"banking company" has been defined in section 5(c) of Banking Regulation Act, 1949, as any company which transacts the business of banking in India, and the term 'company' has been defined in section 5(d) of Banking Regulation Act, 1949 to mean any company as defined in section 3 of Companies Act, 1956 and includes a foreign company within the meaning of section 591 of that Act. It is further contended that the term 'company' has been defined in section 3 of Companies Act, 1956 as " a company formed and registered under this Act (i.e. the Companies Act , 1956" and includes (a) any Act or Acts relating to companies in force before the Indian Companies Act, 1866 (10 of 1866) and repealed by that Act; (b) the Indian Companies Act, 1866 (10 of 1866); (c) the Indian Companies Act, 1882 (6 of 1882); (d) the Indian Companies Act, 1913 (7 of 1913); (e) the Registration of Transferred Companies Ordinance, 1942 (54 of 1942); and (f) any law corresponding to any of the Act or the Ordinance aforesaid and in force in the merged territories or in a Part B State, or any part thereof, before the extension thereto of the Indian Companies Act, 1913 (7 of 1913)". It is contended that a nationalized bank does not fit into the above description as it comes into existence by the virtue of Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, and is not specifically covered in the definition of a 'banking company'. In support of this proposition and for this limited purpose, our attention is invited to a decision of a coordinate bench in the case of **UCO Bank Vs DCIT [(2015) 64 taxmann.com 51 (Kol)],** and of another coordinate bench in the case of **Indian Overseas Bank Vs DCIT** *and vice versa* (ITA Nos 777 and 948/Chny/2018; order dated 22nd January 2020)

23. The coordinate bench decision in the case of UCO Bank *(supra)* relates to the assessment year 2002-03 when the Explanation 3 to Section 115 JB was not even in existence. The discussions with respect to Explanation 3 to Section 115 JB are in the nature of no more than obiter, and the bench itself has observed that "the amendment brought in section 115 JB of the Act read with Explanation 3 thereon by the Finance Act, 2012, is applicable only with effect from assessment year 2013-14 onwards in line with the notes to clauses of Finance Act, 2012". Clearly, therefore, this decision does not hold good for the assessment year before us. Be that as it may, this plea, on the first principles, proceeds on the fallacy that the statutory definitions are always in absolute terms, without offering any flexibility for the context in which the definitions are required to be interpreted, and that the words of the definition must be honoured, in letter- even if not in spirit, in all the situations in which the defined terms are required to be used. Nothing can be farther from the correct legal position, which is that all the statutory definitions generally come with a rider to the effect that "unless context requires otherwise", the defined meanings are to be adopted. Unlike a charging provision under the tax laws, which fails when conditions precedent for charging the income to tax fail, every definition has the saving clause enabling improvising the definition to meet the contextual requirements. Whether this is section 5 of the Banking Regulation Act 1949 which has the opening words as "**In this Act, unless there is anything repugnant in subject or context**" before setting out the definitions, or Section 2 of the Companies Act, 1956 which begins with the words "**In this Act, unless context otherwise requires**" and then sets out the definition, it is absolutely clear that these definitions will have to make way for the requirements of the context in which the definitions are required to be interpreted. Elaborating upon this aspect, a coordinate bench of this Tribunal, in the case of **Maharashtra State Electricity Board vs. JCIT [(2002) 82 ITD 422 (Mum)]**, has observed that, "**The definition as given in section 2 of the Act begins with the qualifying words, 'unless the context otherwise requires'. Text and context are the basis of interpretation. If the text is the texture, context is what gives the colour. Neither can be ignored. Both**

are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. Word in a section is skin of the living thought. It may vary in colour and content according to the context". The coordinate bench then concluded, noting that the assessee does not distribute dividends, that the assessee is not a company. In their inimitable language, the bench observed that "**It is a trite law that deeming provision should be narrowly watched, jealously regarded and never to be pressed beyond its true limits. It is applicable to a company. The assessee is not a company. <u>It is not required to distribute any dividend. As such it does not come within the mischief of this section.</u> We have considered the various precedents relied upon. Legal precedents are like statistics. If you manipulate them, you can prove anything. Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. Minutest differences on facts have swayed the judicial decisions one way or the other. In deciding such cases, one should avoid temptation as said by Cordozo, by matching the colour of one case against the colour of another**. *(Emphasis, by underlining, supplied by us)*". When the bench was of the view that declaration of dividend was the key factor, the bench did note that the assessee was not required to distribute any dividend, and, as such, the assessee did not come within mischief of that section. Incidentally, it is not even in dispute, and cannot be- as a simple google search would show, that the assessee before us was all along paying dividends. Coming back to the proposition being discussed, it is clear that the definitions assigned under the Banking Regulation Act and the Companies Act are not absolute and inflexible, and they yield to the contextual requirements. Nothing, therefore, turns on these definitions. What is to be essentially examined is what was the requirement of the context. The contextual requirement of Section 115JB, for taxation of book profits, was with respect to the companies which were able to distribute dividends on the basis of book profits even though the taxability of their profits, for the income tax purposes, was on a much lower amounts. We are unable to see any reasons as to why in this scheme of taxation of book profits, an assessee like the assessee before us, i.e. a bank distributing dividends on the basis of books profits but paying tax on a substantially lower amount of taxable profits, should be excluded. It is a corporate entity treated as such for the purposes of Income Tax Act 1961 by the virtue of specific legal provisions to that effect, it pays dividends, its taxable profits are substantially lower than book profits, and, therefore, in our humble understanding, there is no good reason not to treat it as a company- at least no good reasons are shown to us. All that has been said is that there is a drafting error in the legislation, by not specifically including the nationalized banks- as for the purpose of some other deduction provisions, but then what this argument overlooks is that definition provision is not the same thing as charging provision or even computation provision, and that the statutory definitions- on account of specific provision to that effect in the definition itself, have to yield to the contextual meanings. While on this aspect of the matter, we may also add that Hon'ble Authority of Advance Ruling, in assessee's own case- reported as **Bank of India In Re. [(2007) 295 ITR 529 (AAR)],** had observed, although in a different context but equally relevant in the present context, as follows:

> **"When a statute defines a particular term or expression, it is that definition which has to be taken for construing the meaning of that term or expression, wherever it occurs in the statute. Normally, it would not be permissible to construe it in any other manner. In other words, once an expression is defined in the Act, that expression wherever it occurs in the Act, rules or notifications,**

made thereunder, should be understood in the same sense, unless there is anything repugnant in the subject or context. At the same time, it is also a settled position of law that even where an Act contains a definition section, it does not necessarily apply in all the contexts in which a defined word may be used. If a defined expression is used in a context in which the definition would not fit, the context must be allowed, to prevail over the definition clause, and the word must be given its contextual meaning. It is for this reason that the definition or interpretation section generally contains an expression similar to the one used at the beginning of section 2 of the Act. The Supreme Court in the case of CIT v. Indira Balkrishna [1960] 39 ITR 546 held—

". . .The meaning to be assigned to the words must take colour from the context in which they occur. . . ." (p. 551)

The Apex Court again in the case of Dy. Chief Controller of I. & E. v. K.T. Kosalram 1999 (110) ELT 366 has held as follows—

". . .What particular meaning should be attached to words and phrases in a given instrument is usually to be gathered from the context, the nature of the subject matter, the purpose of the intention of the author and the effect of giving to them one or the other permissible meaning on the object to be achieved." (p. 373)

24. Of course, that is apart from the fact, as we will see a little later, that if some other provisions of the same enactment are looked at, these definitions will, in the light of the specific provisions applicable to the assessee and the requirements of accounts being prepared in the format prescribed under that enactment, relegate into insignificance.

25. As regards the decision of the coordinate bench in the case of Indian Overseas Bank *(supra)*, it does pertain to a post-amendment year, i.e. 2014-15, but it mechanically relies upon the decision in the case of UCO Bank *(supra)* without even taking note of the fact that the said decision pertained to the pre-amendment assessment year, i.e. 2003-04. As for the obiters of the coordinate bench, these obiters anyway have to make way for the obiters of Hon'ble jurisdictional High Court, as we see a little later, which touch a different chord These *obiters* in the coordinate bench decision, which do not bind us anyway- as is the settled legal position, proceed on the assumption that the provisions of the Banking Regulation Act, 1949 do not cover the nationalized banks, and that the assessee cannot be considered to be a company for the purposes of Section 115JB.. As for the latter proposition, we have already discussed the matter at length to make our point, As for the former proposition, in our considered view, what really matters is whether the provisions of the Banking Regulation Act govern the format of annual accounts of the assessee, and, to that extent, the requirements of Schedule VI make way for these specific requirements of other enactments. That is the context in which the Explanation 3 to Section 115 JB comes into play. Let us, in this light, see provisions of the Banking Regulation Act. Section 51 of the Banking Regulation Act, 1949, specifically provides that "**Without prejudice to ……..any other enactment, <u>the provisions of sections</u> 10, 13 to 15, 17, 19 to 21A, 23 to 28, <u>29</u> excluding sub-section (3,) sub-section (1B), (1C) and (2) of sections 30, 31, 34, 35, 35A, 35AA, 35AB and excluding clause(d) of sub-section (1), 45Y to 45ZF, 46 to 48, 50, 52 and 53 shall also apply; so far**

as may be, to and in relation to …… <u>any corresponding new bank</u>". The expression "corresponding new bank" is defined, under section 5(da) as "corresponding **new <u>bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970</u>; or under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980**" and section 29 (1) provides that requires that that "**a balance-sheet and profit and loss account as on the last working day of that year or the period, as the case may be in the forms set out in the Third Schedule or as near thereto as circumstances permit**". Effectively, therefore, so far preparation of annual accounts is concerned, a nationalized bank is covered by the scope of requirements of Third Schedule to Banking Regulation Act, and, for that reason, the requirement of Sixth Schedule to the Companies Act, 1956 does not come into play. Let us, in this light, take a look at the provisions of Explanation 3 to Section 115JB and Section 211(2) of the Companies Act, 1956- as reproduced below:

> Explanation 3.—For the removal of doubts, it is hereby clarified that for the purposes of this section, the assessee, **<u>being a company to which the proviso to sub-section (2) of section 211 of the Companies Act, 1956 (1 of 1956) is applicable,</u>** has, for an assessment year commencing on or before the 1st day of April, 2012, **<u>an option to prepare its profit and loss account</u>** for the relevant previous year either in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act, 1956 or **<u>in accordance with the provisions of the Act governing such company.</u>**
>
> *[Emphasis, by underlining, supplied by us]*

26. Proviso to Section 211 (2) of the Companies Act, 1956, referred to in the aforesaid provision, is also reproduced below for ready reference:

> Provided that nothing contained in this sub-section shall apply to any insurance or **<u>banking company</u>** or any company engaged in the generation or supply of electricity, **<u>or to any other class of company for which a form of profit and loss account has been specified in or under the Act governing such class of company</u>**
>
> *[Emphasis, by underlining, supplied by us]*

27. Quite clearly, therefore, the annual accounts of a nationalized bank, like the assessee before us, are required to be prepared in accordance with the requirements of the Banking Regulation Act, 1949, and, for that reason, it has an option to prepare its profit and loss account in accordance with act governing the assessee company. In any case, in the light of the above legal position- particularly provisions of Section 51 read with Section 5(da) of the Banking Regulation Act, 1949. it is not even in dispute that the provisions of the Banking Regulation Act, 1949 to the assessee company, as indeed every nationalized bank. Yet, if anyone has any doubts about even this elementary legal position, even a casual look at published annual accounts of any nationalized bank, which can be freely accessed on the respective bank's websites, or even basic experience in the accountancy profession, would set such doubts as rest.

28. It is also contended that the assessee bank is paying huge income tax and is declaring dividends too, and the intention of the legislature was to pay companies paying zero or

minimal taxes and yet paying dividends, in view of background in which section 115 JB was brought and underlying intention of MAT provisions, it is clear that the legislature never intended to levy MAT on assesses like the nationalized banks. As to what is huge tax and what is minimal tax is a subjective and perception based understanding, and such notions cannot govern the applicability of MAT. In any event, the parameters governing the decision as to what is less than reasonable tax vis-à-vis book profits is embedded in the scheme of Section 115JB itself, and, as long as that criterion is fulfilled, the applicability of MAT cannot be repudiated by the assessee. The scheme of Section 115JB, so far as computation of book profits is concerned, looks like this. It applies on a company. Under section 11 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, which provides that "**for the purposes of the Income Tax Act, 1961, every corresponding new bank shall be deemed to be Indian company and a company in which public is substantially interested**". Section 115 JB does start with a *non-obstante* clause, but, as we have seen above in our detailed analysis and particularly in the light of Hon'ble Supreme Court's judgment discussed above, a *non-obstante* clause is not a standalone provision which disregards everything else in the enactment but a *non-obstante* clause "**is equivalent to saying that……..the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs**". There is nothing in the scheme of Section 115 JB which does require that the assessee should not be treated as a company, and, therefore, this proviso being a non-obstante clause does not come in the way of the assessee being treated as a company. The annual accounts of the assessee company are required to be drawn up as the Banking Regulation Act, 1949, and, therefore, the assessee is not required to prepare its annual accounts in terms of the requirements of the Companies Act, 1956. When the profit and loss account is drawn up as the per the related provisions of the Companies Act, the starting point for computation of taxable book profits is the profit as computed in accordance with these provisions. However, when profit and loss account is drawn up, in accordance with the requirements of, say, the Banking Regulation Act, 1949, the starting point of computation of book profits is the profit computed as computed in accordance with the provisions of the said legislation. In this light, and bearing in mind the fact that the provisions of preparing profit and loss account in accordance with the provisions of the Banking Regulation Act 1949 applies to the assessee before us, which is treated as a company for the purposes of the Income Tax Act, the provisions of Section 115JB clearly apply to the assessee as well.

29. While dealing with this issue, we may add that our own Hon'ble jurisdictional High Court, in assessee's own case- though reported as **CIT Vs Union Bank of India,** *and others* **[(2019) 105 taxmann.253 (Bom)],** has, inter alia, observed as follows:

> **14. There are certain significant legislative changes made by Finance Act, 2012, which must be noted before concluding this issue. In the present form, post amendment by Finance Act, 2012, relevant portion of Section 115JB of the Act reads as under—**
>
> **"Special provision for payment of tax by certain companies.**
>
> **115JB. (1) Notwithstanding anything contained in any other provision of this 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, (2012), is less than (eighteen and one-half percent) of its book profit, (such book profit shall be deemed to**

be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of (eighteen and one-half percent).

(2) Every assessee,-

(a) being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its (statement of profit and loss) for the relevant previous year in accordance with the provisions of (Schedule III) to the (Companies Act, 2013 (18 of 2013); or

(b) being a company, to which the (second proviso to sub-section (1) of section 129) of the (Companies Act, 2013 (18 of 2013) is applicable, shall, for the purposes of this section, prepare its (statement of profit and loss) for the relevant previous year in accordance with the provisions of the Act governing such company:) Provided that while preparing the annual accounts including (statement of profit and loss),-

(i) the accounting policies;
(ii) the accounting standards adopted for preparing such accounts including (statement of profit and loss);
(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 (statement of profit and loss) and laid before the company at its annual general meeting in accordance with the provisions of (section 129) of the (Companies Act, 2013(18 of 2013)):"

15. The memorandum explaining the provisions made in the Finance Bill, 2012, in relation to minimum alternative tax stated as under :—

> **"Minimum Alternate Tax (MAT)**
>
> **I. Under the existing provisions of section 115JB of the Act, a company is liable to pay MAT of eighteen and on half percent of its book profit in case tax on its total income computed under the provisions of the Act is less than the MAT liability. Book profit for this purpose is computed by making certain adjustments to the profit disclosed in the profit and loss account prepared by the company in accordance with the Schedule VI of the Companies Act, 1956.**
> **As per section 115JB, every company is required to prepare its accounts as per Schedule VI of the Companies Act, 1956. However, as per the provisions of the Companies Act, 1956, certain companies, e.g. insurance, banking or electricity company, are allowed to prepare their profit and loss account in accordance with the provisions specified in their regulatory Acts. In order to align the provisions of Income-tax Act with the Companies Act, 1956, it is proposed to amend section 115JB to provide that the companies which are not required under section 211 of the Companies Act to prepare their profit and loss account in accordance with Schedule VI of the Companies Act, 1956, profit and loss account prepared in accordance with the provisions of their regulatory Acts shall be taken as a basis for computing the book profit under section 115JB.**
>
> **II. It is noted that in certain cases, the amount standing in the revaluation reserve is taken directly to general reserve on disposal of a revalued asset. Thus, the gains attributable to revaluation of the asset is not subject to MAT liability.**

It is, therefore, proposed to amend section 115JB to provide that the book profit for the purpose of section 115JB shall be increased by the amount standing in the revaluation reserve relating to the revalued asset which has been retired or disposed, if the same is not credited to the profit and loss account.

III. It is also proposed to omit the reference of Part III of Schedule VI of the Companies Act, 1956 from section 115JB in view of omission of Part III in the revised Schedule VI under the Companies Act, 1956.

These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years."

16. It can be seen that sub-section (2) of Section 115JB of the Act has now been bifurcated in two parts covered in the clauses (a) and (b). Clause (a) would cover all companies other than those referred to in clause (b). Such companies would prepare the statement of profit and loss in accordance to the provisions of schedule III of the Companies Act, 2013 (which has now replaced the old Companies Act, 1956). Clause (b) refers to a company to which second proviso to sub-section (1) of Section 129 of the Companies Act, 2013 is applicable. Such companies, for the purpose of Section 115JB, would prepare the statement of profit and loss in accordance with the provisions of the Act governing the company. Section 129 of the Companies Act, 2013 pertains to financial statement. Under sub-section (1) of Section 129 it is provided that the financial statement shall give a true and fair view of the state of affairs of the company, comply with the accounting standard notified under Section 113 and shall be in the form as may be provided for different classes of companies. Second proviso to sub-section (1) of Section 129 reads as under:—

"Provided further that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply of electricity, or to any other class of company for which a form of financial statement has been specified in or under the Act governing such class of company:

17. This proviso thus refers any insurance or banking companies or companies engaged in the generation or supply of electricity or to any other class of company in which form of financial statement has been specified in or under the Act governing such class of company. Combined reading of this proviso to sub-section (1) of Section 129 of the Act, 2013 and clause (b) of sub-section (2) of Section 115JB of the Act would show that in case of insurance or banking companies or companies engaged in generation or supply of electricity or class of companies for whom financial statement has been specified under the Act governing such company, the requirement of preparing the statement of accounts in terms of provisions of the Companies Act, is not made. Clause (b) of sub-section (2) provides that in case of such companies for the purpose of Section 115JB the preparation of statement of profit and loss account would be in accordance with the provisions of the Act governing such companies. This legislative change thus aliens class of companies who under the governing Acts were required to prepare profit and loss accounts not in accordance with the Companies Act, but in accordance with the provisions contained in such governing Act. The earlier dichotomy of such companies also, if we accept the revenue's contention, having the obligation of preparing accounts as per the provisions of the Companies Act has been removed.

18. These amendments in section 115JB are neither declaratory nor classificatory but make substantive and significant legislative changes which are admittedly applied prospectively. The memorandum explaining the provision of the Finance Bill, 2012 while explaining the amendments under Section 115JB of the Act notes that in case of certain companies such as insurance, banking and electricity companies, they are allowed to prepare the profit and loss account in accordance with the sections specified in their regulatory Acts. To align the Income Tax Act with the Companies Act, 1956 it was decided to amend Section 115JB to provide that the companies which are not required under Section 211 of the Companies Act, to prepare profit and loss account in accordance with Schedule VI of the Companies Act, profit and loss account prepared in accordance with the provisions of their regulatory Act shall be taken as basis for computing book profit under Section 115 JB of the Act.

30. Interestingly, it was not even plea of the assessee, and rightly so, that section 115JB will have no application on the assessee because the assessee could not be treated as a company for the purposes of Section 115 JB. This matter was argued before Their Lordships on 16th April 2019, and, as on that point of time, the school of thought that a banking company could not be treated as a company, for the purposes of section 115 JB, was in public domain on account of a decision of the coordinate bench upholding that proposition- obviously overlooking the statutory provisions discussed in paragraphs 23, 24 and 25 earlier in this order, rendering that line of reasoning *per incuriam* in our humble understanding. This line of reasoning does not even find place in the arguments, as recorded by Their Lordships, before the Hon'ble High Court. Quite to the contrary, the observations by Hon'ble High Court show that post 2012 amendment, Section 115JB will apply to the banking companies, including, of course, nationalized banks which are, by the virtue of Section 51 of Banking Regulation Act 1949, covered by the accounting requirements therein.

31. The plea of the assessee, with respect to non-applicability of section 115JB to the banking companies like the assessee before us, is, therefore, rejected.

32. Let us now move to the alternate pleas, so far as levy of MAT under section 115JB is concerned, as raised by the learned counsel.

33. Learned counsel contends that profits of the branches, in countries with whom India has entered into DTAA- namely UK, France, Belgium, Kenya, Japan, USA, Singapore, China and South Africa, amounting to Rs. 1145,14,40,634 should be excluded. His contentions that so far as these profits are concerned, as these profits have already been subjected to tax in the respective countries, the same cannot be taken into account for the taxation of income, including the minimum alternate tax, in India. Without prejudice to this line of argument, it is further submitted that the credit for taxes paid by the said branches in their respective countries be allowed as a deduction in accordance with Sec. 90 of the Act while determining tax liability in India.

34. This plea is only to be noted and rejected. We have already discussed, at length, as to how taxation of profits of foreign branches, outside India and under the tax treaties entered into by India, does not imply that the said income cannot be taxed in India. Irrespective of whether or not the same income is taxed abroad, the entire global income, including such income, is to be taxed in India in the hands of a resident, though the credit for taxes paid

abroad, as admissible under the treaty or, in the alternative, under the domestic law, will be available to the assessee nevertheless. We are unable to see any rationale in exclusion of profits in respect of branches abroad, which have already been taxed abroad under the applicable tax treaties, from computation of books profits for the purpose of levy of minimum alternate tax. As for the tax credits, we have already given directions with respect to grant of the foreign tax credit, as may be admissible. When learned counsel submits that the provisions of Section 90 will override the provisions of Section 115JB, and, for this reason, the incomes taxed abroad under the tax treaties should be excluded from taxation of book profits under section 115 JB, he overlooks the fundamental position that such a treaty protection will come normally into play for taxation of non-resident in India, i.e. source country taxation, and not for taxation of resident in whose hands global income is to be taxed anyway. All that one gets in the residence jurisdiction, by the virtue of tax treaties, is tax credits for the taxes paid abroad, and we have already given suitable directions for the same.

35. That leaves us, so far as computation of book profits under section 115 JB is concerned, with the plea of the assessee that the Assessing Officer has erred in adding back the provision for bad and doubtful debts of Rs.5359,64,38,015 while computing Book Profits u/s 115JB of the Act without appreciating that the same does not constitute a provision for diminution in the value of asset.

36. So far as this issue is concerned, we have noted that the learned CIT(A) has, in the impugned order, upheld the action of the Assessing Officer by observing as follows:

> **14.8 Ground No. 9E - Vide this ground, Appellant had claimed that provision for bad and doubtful debts amounting to Rs. 5359,64,38,015/- should be allowed. In supports of its claim, Appellant placed reliance on judgement of Hon'ble High Court of Gujarat in the case of CIT V/s Vodaphone Essar Gujarat Ltd. After considering the argument of both sides, the Hon'ble High Court has held as under:**
>
> > **"The situation that arises is that prior to the introduction of clause (i) to the Explanation to section 115JB, as held by the Supreme Court in case of HCL Comnet Systems & Services Ltd (supra), the then existing cause (c) did not cover a case where the assessee made a provision for bad or doubtful debt. With insertion of clause (i) to the Explanation with retrospective effect, any amount or amounts set aside for provision for diminution in the value of the asset made by the assessee, would be added back for computation of book profit under section 115JB. However, if this was not a mere provision made by the assessee by merely debiting the Profit and Loss Account and crediting the provision for bad and doubtful debt, but by simultaneously obliterating such provision from its accounts by reducing the corresponding amount from the loans and advances on the asset side of the balance sheet and consequently, at the end of the year showing the loans and advances on the asset side of the balance sheet as net of the provision for bad debt, it would amount to a write off and such actual write off would not be hit by clause (i) of the Explanation to section 115JB. The judgement in case of Deepak Nitrite Ltd (supra) fell in the former category whereas from the brief discussion available in the**

judgement it appears that case of Indian Petrochemicals Corpn Ltd. (supra), feel in the later category."

14.9 From the perusal of the findings given by the Hon'ble Gujarat High Court, it is evident that insertion of clause (i) to the Explanation with retrospective effect, any amount or amounts set aside for provision for diminution in the value of the asset made by the assessee, would be added back for computation of book profit under section 115JB. The Hon'ble Court further clarified that if this was not a mere provision made by the assessee by merely debiting the Profit and Loss Account and crediting the provision for bad and doubtful debt, but by simultaneously obliterating such provision from its accounts by reducing the corresponding amount from the loans and advances on the asset side of the balance sheet and consequently, at the end of the year showing the loans and advances on the asset side of the balance sheet as net of the provision for bad debt, it would amount to a write off and such actual write off would not be hit by clause (i) of the Explanation to section 115J B.

14.10 In Appellant's case, it was not demonstrated that the Appellant had fulfilled the addition by reducing the asset side of balance sheet, therefore, the case laws cited by the Appellant will not be applicable. Appellant had also relied upon the judgement of Hon'ble Apex Court in the case of Vijaya Bank 323 ITR 166. After considering the judgement of Hon'ble Apex Court in Vijaya Bank, the Hon'ble ITAT, Mumbai Bench "E" in the case of Shakti Insulated Wires (P) Ltd v/s (TO Wd 9(3) 2014 (45taxmann.com 31) Mumbai, the Hon'ble ITAT in Para 5.1 of the order held as under:

> **"5.1 We heard Ld D.R on this issue who contended that the Provision for bad and doubtful is necessarily to be added in view of the statutory provision contained in sec. 115JB of the Act On consideration of rival submissions, we are unable to agree with the contentions of Ld A.R. The decision in the case of Vijaya Bank (supra) has been rendered in the context of sec 36(1)(iii) of the Act, which is required to be considered while computing total income under normal provisions of the Act. In the instant case, we are concerned with the provisions of sec. 115JB, wherein the book profit is required to be computed from the audited accounts prepared under the provisions of the Companies Act. Under the accounting principles, on the basis of which the accounts are prepared under the Companies Act, the terms "Bad debts" and the "Provision for bad and doubtful debts" have distinct meaning and has got different accounting treatment. Hence, in our view, the decision rendered by Hon'ble Supreme Court in the case of Vijaya Bank (supra) under the normal provisions of Income tax Act cannot be applied to the provisions of sec. 115JB of the Act. We notice that the Co- ordinate bench in the case of Tainwala Chemicals & Plastics India Ltd., did not consider the applicability of the Companies Act to the book profit computed under sec. 115JB Act. In view of the foregoing, in our view, the Ld CIT was justified in upholding the addition of "Provision for bad and doubtful debts" to the book profit. Accordingly, we uphold his order on this issue."**

Recently, the Hon'ble ITAT Hyderabad "B" Bench in the case of M/s Southern Power Distribution Company of Andhra Pradesh Ltd V/s DCIT Cir 2(1), Tirupati in ITA No. 1460/Hyd/2013 has held as under:

> **"Having regard to the rival contentions and the materiel on record, we find that the assessee has made a provision of Rs.22.81 crores for bad and doubtful debts during the relevant previous year. The AO added it back to the book profit holding that it is not an ascertained liability. The CIT(A) has confirmed the addition by observing that subsequent to the amendment to Explanation 1 (i) to section 115JB, any provision leading to diminution in the value of any asset, has to be added to the book profit. The fact is that the assessee has debited the provision for bad and doubtful debts to the P&L A/c and therefore, it has to be added back to the book profit while making the computation of tax payable u/s 115JB of the Act. What the assessee is now seeking is to reduce the book profit by the actual bad debts written off as it has debited the said mount to the provision for bad and doubtful debts A/c and not the profit and loss account. Whether such an adjustment is permissible is to be seen. The Legislature has provided that for computing the income u/s 115JB of the Act, the 'book profit' means the net profit as shown in the Profit & Loss Account A/cc for the relevant previous year prepared under sub-section (2) and as increased by the items in clauses (a) to (k) under Explanation (1) to section 115JB and thereafter reduced by the items under clauses (i) to (viii) there under. The bad debts written off is not an item under the Explanation (1) to section 115JB of the Act. The assessee's contentions that the bad debts written off is more than the provision made during the relevant year and therefore, nothing should be added also cannot be accepted for the simple reason that the assessee has prepared its P&L A/c in accordance with the provisions of the Companies Act and the net profit as per such P&L A/c is to be adopted and thereafter the adjustments under the Explanation (1) are to be made. The Hon'ble Supreme Court in the case of Apollo Tyres (cited Supra) has clearly held that the AO has no jurisdiction to tinker with the net profit arrived at under the provisions of-the Companies Act. There is also no doubt that the provision made for bad and doubtful debts has to be added back to the net profit. The bad debts written off ought to have been debited to the P&L A/c as per the provisions of the Companies A/c and thereafter the net profit is to be arrived at to which the adjustments under the Explanation (1) are to be made. Where the AO has no jurisdiction to tinker with the accounts of the assessee, likewise the AO has no authority to make an adjustment not provided under the explanation Therefore, we see no reason to interfere with the order of the CIT (A) on this issue as the assessee as clearly debited the provision of Rs.22.81 crores to the P&L A/c. The assessee's ground of appeal No. 4 is accordingly rejected."**

Respectfully following judgement of Hon'ble ITAT in the case of Shakti Insulated Wires (P) Ltd (supra) and M/s Southern Power Distribution Company of Andhra Pradesh Ltd (supra), the ground raised by the Appellant is, dismissed.

37. In the course of arguments before us, learned counsel for the assessee has simply placed his reliance on the judgment of Hon'ble Gujarat High Court in the case of **CIT Vs Vodafone Essar Gujarat Limited [(2017) 85 taxmann.com 32 (Guj)]** but has not even dealt with the specific issues, as discussed above, by the learned CIT(A). Be that as it may, one thing that is clear is that the Assessing Officer has not, at any stage, even verified whether the assessee has reduced the corresponding amount, of the provision of Rs 5359,64,38,015, from the loans and advances on the asset side of the balance sheet, because, if that be so, in terms of Vodafone Essar *(supra)* judgment of Hon'ble Gujarat High Court- particularly as there is nothing contrary thereto by Hon'ble jurisdictional High Court, that amount will have to be reduced from the book profits. It cannot indeed by open to us to disregard the law laid down by Hon'ble non jurisdictional High Court, on the ground that coordinate benches of the Tribunal have taken a particular view- as has been done by the CIT(A), and that it is not the view of Hon'ble jurisdictional High Court, as is laid down by Hon'ble Bombay High Court in the matter of **CIT v. Godavari Devi Saraf [(1978) 113 ITR 589 (Bom.)]**. In the hierarchical judicial system that we have, wisdom of the Court below has to yield to higher wisdom of the Court above and, therefore, one a authority higher than this Tribunal has expressed an opinion on that issue, we are no longer at liberty to rely upon earlier decisions of this Tribunal. The decisions of the coordinate bench, on that issue, cease to be relevant, nor is it open to us to take a call on merits, and thus sit *de facto* in judgment over what a higher judicial authority has decided. Whatever be the merits of the stand of the revenue on this issue, it is not for us to take call on merits. That exercise on merits, in the light of the non-jurisdictional High Court judgment, can only be done by Hon'ble Courts above. In the light of these discussions, and having clarified the legal position as such, we remit the matter to the file of the learned CIT(A) for limited examination of facts so far as reduction of the corresponding amount, of the provision of Rs 5359,64,38,015, from the loans and advances on the asset side of the balance sheet, is concerned. In the event it is found that the correspondence amount is indeed reduced form the loans and advances reflected in the assets of the balance sheet, the learned CIT(A) will direct CIT(A) the AO for excluding the same in the computation of book profits. Ordered, accordingly.

38. So far as the issue regarding alleged inapplicability of Section 115JB on the assessee is concerned, we reject the plea of the assessee in principle. However, so far as the computation of book profits for levy of MAT is concerned, we have upheld one of the grievances of the assessee and remitted the matter to the file of the CIT(A) for factual verification.

39. Ground no. 5, raised in the appeal filed by the assessee, is thus partly allowed for statistical purposes in the terms indicated above.

40. Let us now take up the other issues raised in the cross appeals. We will fist take up the remaining issues in appeal filed by the assessee.

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41. In the first set of grounds of appeal, the assessee-appellant has raised the following grievance:

> **1. In the facts and in the circumstances of the case and in law, the learned Assistant Commissioner of Income tax - 2(1)(1) (herein after referred to as 'ACIT') has erred in disallowing Rs.158,75,16,480 u/s. 14A r.w.r 8D of the income tax Act, 1961 (herein after referred to as "the Act") towards expenditure incurred in relation to income claimed exempt u/s. 10(34) and 10(15) of the Act and the Hon'ble Commissioner of Income tax (Appeals) - 4 (herein after referred to as "CIT(A)") has erred in confirming the said disallowance u/s. 14A r.w.r 8D. The learned ACIT be directed not to disallow any expenditure in relation to the income claimed exempt u/s. 10(34) and 10(15) of the Act and delete the addition of Rs. 158,75,16,480 made to the total income and reduce the total income accordingly.**
>
> **1A. Without prejudice to Ground no. 1 above, on the facts and in circumstances of the case and in law, assuming without accepting that your Honours is of the opinion that disallowance u/s. 14A is warranted in the case of the Appellant Bank, then the learned ACIT be directed to restrict the disallowance u/s. 14A in respect of expenses incurred by the Treasury Division of the Bank to the extent of the amount already disallowed by the Appellant Bank in its Return of Income, i.e., Rs. 21,32,383 and reduce the total income accordingly.**

42. Learned representatives fairly agree that identical issue came up for consideration before a coordinate bench of the Tribunal, in assessee's own case for the immediately preceding assessment year, and the matter was remitted to the file of the Assessing Officer for adjudication *de novo* in the light of certain new judicial precedents. We are, however, urged to decide the matter on merits, even though learned counsel fairly points out that the matter for the immediately preceding assessment year, which was set aside to the file of the Assessing Officer, is yet to be finalized. Learned Departmental Representative urges us to, on the same lines as in the preceding assessment year, remit the matter to the file of the Assessing Officer so that a uniform call may be taken for both the assessment years.

43. We see no reasons to take any other view of the matter than the view taken by the coordinate bench, particularly as there is no categorical findings by any of the authorities below with respect to the factual aspects regarding the related shares being held as stock in trade- as has been claim of the assessee before us. Consistent with the stand taken by the coordinate bench, we, therefore, remit the matter to the file of the Assessing Officer for fresh adjudication, in the light of the correct facts of the case, as also the law laid down by the binding judicial precedents. The observations made by the coordinate bench, for the assessment year 2014-15, will apply *mutatis mutandis* for the present assessment year as well.

44. Ground nos. 1 and 1A are thus allowed for the statistical purposes, in the terms indicated above.

45. In the second set of ground of appeal, the assessee-appellant has raised the following grievances:

> **2. On the facts and in the circumstances of the case and in law, the learned ACIT has erred in disallowing amortization of lease premium paid in respect of various lease hold properties aggregating to Rs.4,08,67,975 by treating the same as capital expenditure and the Hon'ble CIT(A) has erred in confirming the disallowance made by the learned ACIT. The learned ACIT be directed to allow amortization of lease premium paid in respect of various lease hold properties aggregating to Rs.4,08,67,975 as revenue expenditure and reduce the total income accordingly.**
>
> **2A. Without prejudice to Ground no. 2 above, on the facts and in the circumstances of the case and in law, assuming without accepting that your Honours is of the opinion that amortization of lease premium paid in respect of various lease hold properties aggregating to Rs.4,08,67,975 is in the nature of capital expenditure, then the learned ACIT be directed to allow depreciation u/s. 32 of the Act on the same and reduce the total income accordingly.**

46. Learned counsel for the assessee fairly submits that, as on now, the issue is covered, against the assessee, by decisions of the coordinate benches, and he does not, therefore, press the issue any further. Obviously, however, he retains his right to carry the matter further in appeal, if so advised. Learned Departmental Representative does not oppose the submissions of the learned counsel.

47. In view of the above, and subject to the rider that this matter not being pressed before us should not be construed as prejudicial to the interests of the assessee for carrying the matter in further appeal before Hon’ble Courts above, these grounds of appeal are dismissed as not pressed.

48. Ground nos. 2 and 2A are dismissed.

49. Ground nos. 3, including its sub grounds, have already been disposed of earlier in this order, ground no. 4 does not find in the memorandum of appeal at all, and ground nos. 5, including its sub grounds, have also been disposed of earlier in this year.

50. We now take up the additional ground of appeal filed by the assessee.

51. The assessee has also moved a petition dated 3rd October 2020 for admission of an additional ground of appeal. Having perused the petition, as also material on record, and having heard the rival contentions on the same, and having noticed that it is a purely legal ground which could not be taken up bonafide earlier, we admit this additional ground. It is reproduced below for ready reference:

> **The amount of education cess and higher and secondary education cess, not being in the nature of tax is not covered by the provisions of Section 40(a)(ii)**

and, accordingly, ought to be allowed as deduction in computation of income from business and profession, as held by Hon'ble jurisdictional High Court in the case of Sesa Goa Limited (423 ITR 426) and other decisions.

52. Learned representatives fairly agree that the issue is covered, in favour of the assessee, by Hon'ble jurisdictional High Court's judgment in the case of **Sesa Goa Ltd Vs Joint Commissioner of Income Tax [(2020) 423 ITRR 426 (Bom)]** but as the related facts have not been examined at any stage, the matter can be remitted to the file of the Assessing Officer for examination de novo in accordance with the law, including the above cited judicial precedent. We accept this suggestion, and, therefore, remit the matter to the file of the Assessing Officer for fresh adjudication as above. Ordered accordingly, and the additional ground of appeal is thus allowed, for statistical purposes, in these terms.

53. In the result, the appeal of the assessee is partly allowed in the terms indicated above.

54. We now take up the appeal filed by the Assessing Officer.

55. In the first ground of appeal, which is raised by way of a question for our consideration, the assessee has raised the following grievances:

Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is correct in upholding that the broken period interest paid is taxable on due basis instead of accrual basis relying on the decision of the Bombay High Court in the case of State Bank of India without appreciating the fact that the assessee follows accrual basis of accounting during the year.

56. Learned representatives fairly agree that this issue is covered by several decisions of the coordinate benches in assessee's own case, and that is a fact noted by the learned CIT(A) in the impugned order itself as well. There is no good reason, nor has any reason been pointed to us, to take a different view of the matter. Respectfully following the esteemed views of the coordinate bench, and particularly as no contrary view by a higher judicial forum, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

57. Ground no. 1 is thus dismissed.

58. In the ground no. 2, the Assessing Officer has raised the following grievance:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the provision for Wage revision of Rs. 540,06,00,000/- without appreciating the fact that the provision was made for a contingent liability."

59. Learned representatives fairly agree that this issue is covered by several decisions of the coordinate benches in assessee's own case, and that is a fact noted by the learned CIT(A) in the impugned order itself as well. There is no good reason, nor has any reason been pointed to us, to take a different view of the matter. Respectfully following the esteemed views of the coordinate bench, and particularly as no contrary view by a higher judicial

forum, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

60. Ground no. 2 is thus dismissed.

61. In ground no. 3, the assessee has raised the following grievance:

> **On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the amortization of premium of investments without appreciating the fact that RBI circular dtd 12.07.2005 clearly mentions that the prescribed accounting treatment does not take into account the applicability of I.T. law and decision of Hon'ble Supreme Court in the case of M/s. Southern Technologies Ltd. vs. JCIT in Civil Appeal No. 1337/ 2003 makes it very clear that RBI Guidelines themselves will not decide taxability of the income."**

62. Learned representatives fairly agree that this issue is covered by several decisions of the coordinate benches in assessee's own case, and that is a fact noted by the learned CIT(A) in the impugned order itself as well. respectfully following the esteemed views of the coordinate bench, and particularly as Hon'ble jurisdictional High Court, in the case of CIT Vs HDFC Bank Ltd [(2016) 366 ITR 5050 (Bom)] has taken the same view, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

63. Ground no. 3 is thus dismissed.

64. In ground no. 4, the assessee has raised the following grievance:

> **On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in upholding that the Perpetual Bonds cannot be compared to the equity/ share capital of the banks without considering as per settled legal position in 130 ITR 18 (P&H) of Hon'ble Punjab & Haryana High Court in the case of Pepsu Road Transport Corp vs CIT that an element of refund or repayment is a must in the concept of borrowing.**

65. So far as the deductibility of interest on perpetual bonds is concerned, we have noted that the Assessing Officer has disallowed the said deduction, which amounted for Rs 197.62 crores, in computation of taxable income, and he justified the said action by observing, inter alia, as follows:

> **The assessee during the course of assessment proceedings was asked to show cause why perpetual bonds should not be treated as equity in nature and consequently the interest paid on such bonds should be allowed under 36(1)(iii) of the IT Act. The assessee was asked to provide the details of the interest cost debited to the P&L A/c on account of such perpetual bonds.**
>
> **12.1 The assessee vide letter dated 24.03.2018 inter-alia submitted as under:-**
>
> **"The Bank has issued perpetual debt instruments over the years. The outstanding balance of perpetual debt as on 31st March 2016 was at Rs.2212.34**

crores. These instruments is classified as borrowing in Bank's Balance Sheet. The Interest paid on the above instruments is provided in the Books as Interest Expenses

The above accounting treatment of the interest and presentation in Balance sheet is in tune with the RBI guidelines and Accounting Standard 16 issued by ICAI on Borrowing Cost. As such, the same is allowable expenses."

12.2 Assessee submission has been considered. Admittedly, the assessee has stated that the said payment happens out of distributable profits of previous year or current year and the nature of payments is different from the interest that is borrowed for the purpose of business which is allowed u/s 36(1)(iii). Therefore, the assessee stand is not acceptable. As per details furnished by the assessee bank in its reply, the assessee bank has issued Innovative Perpetual Debt Instruments (IPDI) which qualify as Tier I capital of Bank and book value of such bonds, was at Rs.2212.34 crores on the balance sheet date. The assessee has claimed deduction on account of interest paid of Rs 197 crores on these bonds u/s 36(1)(iii). The Bank has discretion to exercise the call option for the said bonds as per applicable guidelines. It has further been claimed that the interest paid to the bondholders unlike dividend income is not exempt as per provisions of the Act and the bondholders would have accordingly offered the same to income in their respective returns, disallowance of the said interest would result in double taxation of the same income.

12.3 Perpetual Bonds or Debt instruments are in nature of debt instruments or bonds with no maturity date. The RBI guidelines have allowed treating the perpetual bond as tier I capital subject to certain conditions. The investors do not get the fight to redeem the bonds at any given point of time. Only the issuing company can buy back the bonds from the Investors. Therefore, even if subsequently borrower buys back these bonds, it will not alter the nature and character of these bonds because it is the borrower and not the lender who has every right in such bonds to redeem it. Once the bond is sold, the rights of future interest passes to the new bond holder. To sum up the perpetual bonds are quasi equity and they have following equity like features:-

- **Perpetual in nature**

- **High loss absorption capacity. Provisions for write down of principal or conversion to equity on trigger**

- **Discretionary pay-out with existence of full coupon discretion.**

12.4 Normally, the amount is not shown in the balance sheet as debt or borrowing. It is shown below share capital and interest payable is not charged to profit and loss account. The assessee company in its reply has also admitted that the interest is paid out of distributable profits of previous year or current year. As per the section 36(1)(iii), deduction is allowed in respect of the amount of interest in respect of capital borrowed for the business and profession. Before

allowing interest u/s 36(1)(iii), the Assessing Officer was required to examine as to whether the issue of perpetual bond qualifies as 'borrowing' for the purposes of the said section.

12.5 In this regard, reference may be made to the decision of the Hon'ble Punjab & Haryana High Court in the case of Pepsu Road transport Corpn v CIT, reported in 130 ITR 18 (P&H), that an element of refund or repayment is a must in the concept of borrowing. If there is no obligation to refund the capital provided, interest on such capital is not deductible under section 36(1)(iii). Therefore, in case of perpetual bonds, where the lender does not have authority to claim refund of the amount given, the said amount cannot be held as 'borrowing and hence the interest on such bonds was not admissible as deduction u/s 36(1)(iii) hence the said amount of Rs.197,62,83,800/- does not qualify for claim under section 36(1)(iii) and accordingly disallowed. Therefore Rs.197,62,83,800/- claimed as deduction is added back to the total income.

66. In appeal, however, the learned CIT(A) reversed the action of the Assessing Officer and allowed the said deduction. While doing so, learned CIT(A) observed as follows:

13.2 Before the A.O, the bank has claimed that it has discretion to exercise the call option for such bonds as per applicable guidelines. The Appellant also claimed that the interest paid to the bond holders unlike dividend income was not exempt as per provision of the Act and the bondholders accordingly had offered the interest receipts as their income. The Appellant claimed that as per RBI Guidelines, the Perpetual Bond were treated as Tier I capital subject to certain conditions. The Investors do not get the right to redeem the bonds at any given point of time. Only the issuing company can buy back the bonds from the investors. Therefore, even if subsequently borrower buys back these bonds, it will not alter the nature and character of these bonds because it is the borrower and not the lender who has every right in such bonds to redeem it. A.O further mentioned that the amount was not shown in the Balance Sheet as debt or borrowing. It was shown as share capital and interest payable was not charged to profit and loss account. According to the A.O, the assessee also admitted that the interest was paid out of distributable profits of previous year or current year. As per section 36(1)(iii), deduction was allowed in respect of the amount of interest in respect of capital borrowed for the business and profession.

13.3 During the course of appellate proceedings, a written submission was filed which finds place in Para 5 of this order. The appellant has submitted that Ld. A.O was not correct in giving the observation that the amount was not reflected as borrowings in its books of accounts. According to the Appellant, the same was shown as borrowing in Schedule IV of the Annual Report. In support of its claim, a copy of the Annual Report was filed by the Appellant during the course of Appellate proceedings. The Appellant further clarified that the interest paid on such bonds was debited to P & L A/c under the head "Interest Expenditure". It was further clarified that A.O was not correct in stating that the lender had no

authority to claim the refunds. According to the Appellant, these bonds were listed in Stock Exchange and the lender had choice to exit at any point of time by selling them through Stock market. The Appellant emphasized that in case of share capital, the assessee company had an option to declare or not to declare dividends depending upon the financial requirement of the company, whereas, a fixed interest liability has to be paid by the Appellant on such bonds annually without any failure. The Appellant further contended that on share capital, dividend is paid out of the reserves which is purely discretionary whether to pay dividend in a particular year or not. On the other hand, according to the Appellant, on these bonds fixed interest has to be paid whether there is any profit or not. It was also argued that on share capital, dividend is paid out of reserve and surplus which is exempted from tax for the recipient, because tax has been already paid by the company on such reserves and surplus, whereas interest on such bonds is taxable in the hands of the recipient. In view of these facts, it is clear that liability of bank in respect to Perpetual Bonds is totally different from capital of the bank, therefore, the Perpetual Bonds cannot be compared to the equity / share capital of the banks, hence appeal of the assessee on this ground is, allowed.

67. The Assessing Officer is aggrieved and is in appeal before us.

68. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

69. We find that the short grievance of the Assessing officer is that it is incorrect that the perpetual bonds cannot be compared to equity share capital of the assessee- particularly in the light of Hon'ble Punjab & Haryana High Court decision in the case of **Pepsu Road Transport Corp Ltd Vs CIT [(1981)130 ITR 18 (P&H)]** wherein it is inter alia held that there is an element of refund or repayment inherent in borrowing, and in the light of the fact that there is o element of refund or repayment inherent in the present arrangements. The related observations of Hon'ble High Court are as follows:

Thus, the sole question for determination is : " Whether the capital provided under section 23 of the Act, by the Central Govt. as well as the State Govt. is the capital borrowed for the purposes of the business or profession?" The main argument of the learned counsel is that since the interest is payable thereon, as provided under section 28 of the Act, the assessee is entitled to claim this deduction under section 36(1)(iii) of the Income-tax Act.

The word "borrow" has not been denned in the statute and, therefore, its dictionary meaning has to be looked up. The meaning of the word "borrow" as given in the Shorter Oxford Dictionary (3rd edn.), is "to take (a thing) on security given for its safe return. To take a thing on credit on the understanding of returning it or an equivalent". Reference in this respect may also be made to CEPT v. Bhartia Electric Steel Co. Ltd. [1954] 25 ITR 192 (Cal). In this also, the question was whether it was "money had and received"; or "borrowed money". It was held that there has to be a positive act of lending coupled with acceptance

by the other side of the money, as a loan. Thus, it is clear that an element of refund or repayment is inherent in the concept of borrowing. There is no provision in the Act which contemplates the repayment of the capital so provided under section 23 of the Act.

Apart from that, section 23 of the Act provides that the Central Govt. and the State Govt. may provide any capital. In other words, it is not by virtue of any agreement, etc., between the parties, but because of the statutory provision that the Governments are obliged to provide the capital. It is under section 26 of the Act that the corporation may borrow money in the open market for the purpose of raising its working capital. Thus, the distinction has been made in the Act itself between the "capital provided" under section 23 and the "capital borrowed" under section 26. It is further clear from the provisions of section 39(2), which reads:

> **"In the event of a Corporation being placed in liquidation, the assets of the Corporation, after meeting the liabilities, if any, shall be divided among the Central and the State Governments and such other parties, if any, as may have subscribed to the capital in proportion to the contribution made by each of them to the total capital of the Corporation."**

There is no obligation to refund the capital provided by the Governments. In this view of the matter, the "capital provided" under section 23 of the Act by the two Governments, cannot be said to be "capital borrowed" as contemplated under section 36(1)(iii) of the Income-tax Act.

70. We have noted the stand of the assessee that the perpetual bonds issued by the assessee are in nature of borrowings only as interest on these bonds are paid at pre fixed rate, the interest so paid is classified only under schedule -15 - Interest expended in the financial statements. Further, interest paid on these bonds are also subjected to TDS, and that even though the bonds are stated to be perpetual, the bank has an option of issuing call option after a period of 10 years. None of these submissions, however, address the core issue regarding the bonds having an element of refund or repayment. How the interest is shown in the boks of accounts, and whether or not the tax is deducted at source will not govern the issue of deductibility of these amounts, or addresses the issue raise in the judicial precedent in question. The judicial precedent relied upon by the revenue authorities cannot simply br brushed aside; the issue needs to be addressed. In none of the orders of the authorities below the terms on which the perpetual bonds have been issued are discussed in adequate detail, and there is no material before us to come to a categorical finding one way or the other. In these circumstances, in our considered view, the right course of action will be to remit the matter to the file of the Commissioner (Appeals) for adjudication *de novo* after taking on record all the related material facts on record so far as the terms on which the perpetual bonds are concerned and the element of refund or repayment are concerned. As we have not taken a call on merits on this issue, we make it clear that all the aspects remain open and the assessee is at liberty to take any such plea as he deems fit on this issue. The matter thus restored to the file of the learned Commissioner (Appeals) as such.

71. Ground no. 4 is thus allowed for statistical purposes.

72. In ground no. 5, the Assessing Officer has raised the following grievance:

> **On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing relief the assessee relying on the decision of Hon'ble Special Bench of ITAT Delhi in the case of Vireet Investment (P) Ltd., without appreciating the facts that the issue has not reached to its finality as the Hon'ble Delhi High Court in its decision in the case of Goetz India Ltd., reported in 361 ITR 505 held that while computing Book Profit disallowance u/s 14A is required to be made. However, in its later judgment the Hon'ble Delhi High Court in the case of Bhushan Steel Ltd. (ITA No. 593 & 594/2015) has taken a contrary view".**

73. Even going by the ground so raised by the Assessing Officer, there is a cleavage of opinion on the issue by Hon'ble non-jurisdictional High Court, and the special bench decision in the case of **ACIT Vs Vireet Investments Pvt Ltd [(2017) 82 taxmann.com 415 (Del)]** is in favour of the assessee. When decisions of on jurisdictional High Court are in conflict, we are bound to follow, till the time Hon'ble jurisdictional High Court takes a call on the issue one way or the other, the decision in favour of the assessee. The reason for our following this path is as follows. It will be wholly inappropriate to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoints as such an exercise will *de facto* amount to sitting in judgment over the views of the High Courts something diametrically opposed to the very basic principles of hierarchical judicial system. We have to, with our highest respect of both the Hon'ble High Courts, adopt an objective criterion for deciding as to which of the Hon'ble High Court should be followed by us. We find guidance from the judgment of Hon'ble Supreme Court in the matter of **CIT v. Vegetable Products Ltd. [(1972) 88 ITR 192 (SC)]** Hon'ble Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This principle has been consistently followed by the various authorities as also by the Hon'ble Supreme Court itself. It is in this backdrop that, while taking cognizance of the fact that there is indeed one decision of Hon'ble non-jurisdictional High Court, against the view taken by the special bench of this Tribunal, we are nevertheless following another decision of the non- jurisdictional High Court, which is in favour of the assessee on the same point and which has taken the same view as is the view taken by the special bench in the case of Vireet Investments *(supra).* Given this factual backdrop, it is now for the Hon'ble jurisdictional High Court to take a call, in an appropriate case, on merits on this issue.

72. In any event, the issue is directly covered by the Special Bench decision and there is no way, contrary thereto, by Hon'ble jurisdictional High Court, and the learned CIT(A), in the impugned order, has simply followed the said Special Bench decision. We see no infirmity in this approach on the given facts. In the light of these discussions, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

74. Ground no. 5 is thus dismissed.

75. Ground no. 6 is general in nature and does not call for any adjudication.

76. In the result, the appeal of the Assessing Officer is partly allowed in the terms indicated above.

77. To sum up, both the appeals are partly allowed in the terms indicated. Pronounced in the open court today on the 11th day of December, 2020.

Sd/-	Sd/-
Amarjit Singh	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 11th day of December, 2020

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai

https://itatonline.org