आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "ई" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE HON'BLE S/SHRI JOGINDER SINGH (JM), AND B.R.BASKARAN (AM)
सर्वश्री जोगिन्दर सिंह, न्यायिक सदस्य एवं बी.आर.बास्करन, लेखा सदस्य

आयकर अपील सं./I.T.A. No.2008/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2009-10)

M/s Shivalik Venture Pvt.Ltd., A-104, Shiva Parvati Co-OP.Hsg.Ltd, MHADA Layout Four Bunglows, Andheri(W), Mumbai-400053	बनाम/ Vs.	Dy.Commissioner of Income Tax -8(3), Aayakar Bhavan, M.K.Road, Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AALCS7683R

अपीलार्थी ओर से / Appellant by	Shri Vijay Mehta
प्रत्यर्थी की ओर से/Rspondent by	Shri Neil Philip

सुनवाई की तारीख / Date of Hearing : 12.6.2015
घोषणा की तारीख /Date of Pronouncement : 19. 8.2015

आदेश / O R D E R

PER B.R. BASKARAN (AM)

The assessee has filed this appeal challenging the order dated 31.01.2012 passed by Ld CIT(A)-18, Mumbai and it relates to the assessment year 2009-10.

2. The grounds urged by the assessee give rise to the following issues:-

a) Whether the profit arising on transfer of development rights to the fully owned subsidiary company is required to be included in the book profit u/s 115JB of the Income Tax Act, 1961(the Act) or not; and

b) Whether the disallowance made by the AO u/s 14A is to be sustained or not.

3. The facts relating to the above said issues are stated in brief. The facts relating to the first issue are that the assessee company is engaged in the business of Development and leasing of Commercial Complexes and Rehabilitation of buildings under Slum Rehabilitation Scheme. The assessee company was formed on 24.3.2008 by converting an earlier partnership firm into a company under the provisions of PART-IX of the Companies Act, 1956. The assessee company also owns a wholly owned Indian subsidiary company named "SVI Realtors Private Limited". The assessee company held a parcel of land admeasuring about 61,506/- sq.mtr., as its capital asset and the said land was attached with development rights/FSI. The assessee transferred development rights/FSI of 55,464.04 sq.mtr which was available on a portion of above said land, i.e., on a land admeasuring 19,423 sq.mts (out of 61506 sq.mt) to its wholly owned Indian subsidiary company viz., SVI Realtors Pvt Ltd (referred above). The above said transfer generated Long Term Capital Gain (LTCG) of 300.68 crores. The assessee disclosed the same as "Extra Ordinary Income" in the profit and loss account. Under the provisions of sec. 47(iv) of the Act, the transfer of a capital asset by a company to its wholly owned Indian subsidiary company (subject to certain conditions) is not regarded as "transfer" and hence the Capital gain arising on such transfer is not chargeable to tax u/s 45 of the Act. In the instant case, there is no dispute that the provisions of sec. 47(iv) of the Act are applicable to the transfer made by the assessee to its subsidiary company and hence the gain of Rs.300.68 crores was not regarded as "Capital gains" u/s 45 of the Act while computing total income under normal provisions of the Act, i.e., the above said amount of Rs.300.68 crores did not enter the computation of total income.

4. Since the assessee is a company, the provisions of sec. 115JB are applicable to it. The assessee did not offer the above said amount of Rs.300.68 crores while computing the "book profit" u/s 115JB of the Act by attaching following Notes to its accounts:-

> "During the year the company has derived a surplus over cost of acquisition of assets held by it as CWIP amounting Rs.300.24 crores. In view of the fact that it is a capital receipt and a transaction is not regarded as a transfer under the Income-Tax Act, the company interprets that since it is not being in the nature of income it does not came within purview of Section 115JB.
>
> The company interpretation on the matter of applicability to minimum alternative tax on such book profits is also supported by opinion of the experts which were taken on the issue."

The AO did not agree with the contentions of the assessee and accordingly, he included the above said amount as part of "net profit" for the purpose of computing the "book profit" under the provisions of section 115JB of the Act.

5. The ld. CIT(A) noticed that an identical issue was considered by the Hyderabad Bench of the Tribunal in the case of Rain Commodities Ltd V/s DCIT (2010) (40 SOT 265; 131 TTJ 514). In the above said case also, the assessee therein generated a gain of Rs. 99.42 crores on transfer of assets to its 100% subsidiary company and claimed that the same was exempt under the provisions of sec. 47(iv) of the Act. The Special bench took the view that the same cannot be excluded from the Net profit, since the Explanation to section 115JB does not specifically provide for exclusion of income covered by sec. 47(iv) of the Act, while computing the book profit. Accordingly, the Ld CIT(A) upheld the order of the AO by following the above said decision rendered by the Special Bench. Aggrieved, the assessee has filed this appeal before us.

6. The ld. Counsel appearing for the assessee submitted that the decision rendered by the Special Bench of Tribunal in the case of Rain Commodities Ltd (supra) is not applicable to the facts prevailing in the instant case. The Ld A.R submitted that the Special bench has specifically observed that the capital gains arising in the hands of assessee therein has been included in the profit and loss account and it has further been accepted that the accounts have been prepared in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act. He submitted that the Special bench has specifically observed that the assessee before it did not clarify anything about the same in the Notes to accounts. He submitted that the Special bench, based on the above said facts, held that the profit arising on transfer of capital assets to a wholly owned Indian subsidiary company cannot be excluded while computing book profit. In this regard, the Ld A.R invited our attention to the following observations made by the Special bench in paragraph 24 of its order:-

> "24. It is undisputed fact that the long term capital gain earned by the assessee is included in the net profit determined as per profit and loss account prepared as per Part II and Part III of Schedule VI to the Companies Act. In other words, it is not the case of the assessee that the capital gain earned by the assessee was not included in the net profit determined as per profit and loss account of the assessee prepared under the Companies Act. As per the audited accounts of the assessee, the statutory auditors have reported that amongst others, that in their opinion, the profit and loss account and the balance sheet are in compliance with the accounting standards referred to in sub-section (3C) of section 211 of the Companies Act, and further reported that the balance sheet and profit and loss account read together with the notes thereon, give the information required by the Companies Act, 1956 in the manner so required and give a true and fair view in conformity with the accounting principles generally accepted. As per audited profit and loss account, the assessee has included long term capital gain. In the notes on accounts, it is nowhere mentioned and clarified that though the long term capital gain is included in the profit and loss account but it is not to be includible in the net profit in terms of provisions of Part II and Part III of Schedule VI to the Companies

> Act or the accounting principles accepted under the Companies Act…..
>
> 25. It is to be noted that the assessee has not made any claim of deduction of long term capital gain from the book profit, which goes to show that capital gain as such is not deductible from the net profit prepared in accordance with Parts II and III of Schedule VI to the Companies Act. Moreover, the taxability of capital gain is relevant only for the purpose of computation of income under the normal provisions of Income tax Act, and has nothing to do with the preparation of profit and loss account in accordance with the provisions of Part II and III of Schedule VI to the Companies Act…."

The Ld A.R submitted that, since the assessee before the Special Bench did not comment about such inclusion in the Notes of accounts, but claimed deduction only at the time of computing "Book Profit" u/s 115JB of the Act, the Special Bench took the view that the assessee, having included the capital gain in the Profit and Loss account which was agreed to have been prepared in accordance with Parts II and III of the Schedule VI to the Companies Act, cannot claim that the same should be excluded from net profit for the purpose of computing book profit u/s 115JB of the Act.

7. The ld. Counsel submitted that the assessee herein has taken a specific stand that the impugned profit is not includible in the net profit for the purposes of sec. 115JB of the Act and accordingly attached a specific note in the "Notes to accounts" clearly stating that the gains arising on transfer of assets to the subsidiary company is not includible in the book profit and further the said interpretation is supported by the opinion of experts. The ld. Counsel accordingly submitted that the accounts prepared by the assessee is subject to the qualification made in the Notes on accounts and hence the decision rendered by the Special Bench in the Rain Commodities Ltd (supra) is not applicable to the facts of present case.

8. The ld. Counsel further submitted that the Notes forming the part of accounts should also be read along with the profit and loss account and hence expression "net profit as shown in the profit and loss account" used in the section 115JB is required to be understood by giving due effect to the items stated in Notes to accounts accompanying annual accounts and having effect over the net profit, i.e., the Profit and loss account should be read along with the Notes to accounts. For this proposition, the ld.AR placed reliance on the following case law:

a) CIT V/s Sain Processing & Wvg. Mills (P.) Ltd.
(2010) 325 ITR 565 (Delhi)
b) K.K. Nag Ltd. V/s Additional Commissioner of Income-tax
[2012] 52 SOT 381 (Pune).

9. The Ld A.R next raised a legal contention, i.e., he submitted that transfer of a capital asset by a holding company to its wholly owned indian subsidiary company is not regarded as "transfer" under sec. 47 of the Act and hence the profits or gains arising from such transfer is not chargeable to tax under the head "Capital gains" in terms of provisions of sec. 45. Hence the profits or gains so generated shall not fall within the definition of "income" at all as per the definition of the term "Income" given in sec. 2(24) of the Act. In view of the above said provisions, such profit is not includible in computing the total income under the normal provisions of the Act. Since the profits arising on transfer of a capital asset to a wholly owned Indian subsidiary company is not treated as "income" at all under the provisions of the Act, the Ld A.R submitted that the same falls outside the computation provisions of the Income tax Act and hence such profit should not be included while computing Book Profit under sec. 115JB of the Act also. Accordingly he submitted that such kind of profit, which is not considered as income at all, is required to be excluded at the source level itself. Accordingly he contended that there is no requirement of

making specific provision to exclude the same in the Explanation to sec. 115JB of the Act.

10. The Ld D.R, on the contrary, submitted that the provisions of sec. 115JB is a self contained code and hence only those items prescribed under that section can alone be added or excluded from the Net Profit disclosed in the Profit and Loss account. He further submitted that the assessee has credited the Profit and Loss account with the profit or gains arising on transfer of capital assets to its subsidiary company and hence the same forms part of the Net profit. He submitted that the assessee has prepared the Profit and Loss account in accordance with Part II and Part III of Schedule VI to the Companies Act. The Ld D.R submitted that the provisions of sec. 115JB do not provide for the exclusion of gain arising on transfer of asset to its subsidiary. He submitted that the identical issue was considered by the Special bench in the case of Rain Commodities Ltd (supra) and the Special bench of Tribunal has held that such kind of profit cannot be excluded while computing "Book Profit". Accordingly he submitted that the facts prevailing in the instant case and the case considered by the Special bench are identical in nature and hence the decision rendered by the Special bench shall be squarely applicable to the facts of present case. Accordingly, he submitted that the Ld CIT(A) was justified in upholding the order of the AO on this issue.

11. We have heard rival contentions and perused the record. There is no dispute that the profit arising on transfer of a capital asset by the assessee to its wholly owned Indian subsidiary company was not assessed as "Capital Gain" while computing total income under normal provisions of the Act. The contention of the assessee is that the same is also required to be excluded while computing "Book Profit" u/s 115JB of the Act for the reasons cited by it. The contention of the revenue is that the provisions of

sec. 115JB are a self contained code and the "Book Profit" has to be strictly computed in accordance with the provisions stated therein.

12. The provisions of sec. 115JB shall come into operation, only if the income tax payable under the normal provisions of the Act by an assessee, being a company, is less than the prescribed percentage of "book profit". The expression "Book Profit" is defined under Explanation 1 to sec. 115JB of the Act. According to this Explanation "book profit" means the net profit shown in the profit and loss account for the relevant previous year prepared under sub-section (2) (i.e., prepared in accordance with the provisions of Part II of Schedule VI to the Companies Act, 1956..), as increased/reduced by the items listed out in the Explanation. In the instant year, the provisions of sec. 115JB come into operation for the assessee, since the tax payable by the assessee under the normal provisions of the Act is less than the amount of tax prescribed u/s 115JB of the Act.

13. Though the assessee has credited the profit and loss account with the profits arising on transfer of a capital asset to its subsidiary company, yet it has excluded the same from the net profit while computing "book profit" in terms of sec. 115JB of the Act. Admittedly, the said profit is not an item of exclusion prescribed under the Explanation 1 to sec. 115JB of the Act. The contentions advanced by the assessee in support of its action are twofold, viz.,

(a) it has clearly stated in the Notes forming part of accounts that the said profit is not includible for computing book profit u/s 115JB of the Act, even though it is credited to Profit and Loss account. The profit and loss account prepared in accordance with the provisions of Part II to Schedule VI of the Companies Act should be read along with the 'Notes forming part of accounts'. Hence the net

profit shown in the Profit and loss account shall be first adjusted to take care of the qualifications given in the Notes. Thereafter only, the provisions of Explanation 1 to sec. 115JB should be applied.

(b) the gain arising on transfer to assets to subsidiary company does not fall under the definition of "income" at all. Hence, once a particular receipt is not regarded as income at all, the question of bringing the same to tax under any of the provisions of the Act does not arise.

14. It is an undisputed fact that the assessee has attached a note in the Notes forming part of accounts explaining therein that the profits arising on transfer of capital asset to its subsidiary company is, in its opinion, not coming within the purview of sec. 115JB of the Act. It is contended that the Profit and loss account should be read along with the Notes forming part of accounts and the net profit should be understood as the net profit shown in the profit and loss account as adjusted by the notes given in the Notes to the accounts. In this regard, the assessee has placed reliance on the decision rendered by the Hon'ble Delhi High Court in the case of Sain Processing & Weaving Mills (P) Ltd (supra). In the case before Hon'ble Delhi High Court, the assessee therein issue did not charge depreciation to the Profit & Loss account, but disclosed the same in the Notes forming part of accounts. However, while computing book profit u/s 115J of the Act, it claimed the amount of depreciation as deduction from the Net profit disclosed in the Profit and loss account. The Hon'ble High Court considered the aforesaid aspect of the controversy in the following words:-

> "The answer to this poser is found in sub-section (6) of section 211 of the Companies Act, which provides that except where the context otherwise requires any reference to a balance sheet or profit and loss account shall include the notes thereon or documents annexed thereto, giving information required to be given and/or allowed to be given in the form of notes or documents by the Companies Act.

> As already noted it is obligatory under clause 3(iv) of Part II to Schedule VI to the Companies Act to give information with regard to depreciation, which has not been provided for along with the quantum of arrears. **According to us, once this information is disclosed in the notes to the accounts it would clearly fall within the ambit of the Explanation to section 115J of the Act which defines "book profit" to mean "net profit as shown in the profit and loss account for the relevant assessment year**".
>
> To our minds, as long as the depreciation which is not charged to the profit and loss account but is **otherwise disclosed in the notes of the accounts, it would come within the ambit of the expression "shown" in the profit and loss account**, as notes to accounts form part of the profit and loss account by virtue of sub-section (6) of section 211 of the Companies Act, 1956. This is quite evident if the provisions of sub-section (6) of section 211 of the Companies Act, are read in conjunction with sub section (1A) as well as the Explanation to section 115J of the Act".

15. The decision rendered by Hon'ble Delhi High Court, cited above, was followed by the Pune "A" Bench of the Tribunal in the case of K.K. Nag Ltd Vs. Addl CIT (2012)(52 SOT 381). In this case, the incremental liability towards leave encashment was not debited to Profit and Loss account, but otherwise disclosed in Notes to Accounts. The Tribunal held that the said liability would have to be deducted while determining "Book Profits" under section 115JB of the Act.

16. We notice that an identical issue was considered by the Visakhapatnam bench of ITAT also in the case of Hindustan Shipyard Ltd Vs. DCIT (6 ITR (Trib) 407). In the case of assessee therein, it was noticed that the Government of India, by an order dated 24.3.99, had waived loan and interest accrued thereon to the tune of Rs.591.13 crores which was otherwise payable by that assessee. However, the said company did not incorporate the effect of such waiver in its books of accounts, though it disclosed the details of waiver in the notes on

accounts. The assessing officer noticed that the assessee would be liable to pay tax as per the provisions of Section 115JA of the Act, (Minimum Alternative tax), if the waiver benefits are incorporated in the books of accounts accordingly he included the waiver benefits in the book profit. The Tribunal, after considering the decision of Hon'ble Delhi High Court in the case of CIT Vs. Sain Processing Mills (P) Ltd. (2010)(325 ITR 565), held that the Assessing Officer is entitled to include the waiver benefit that was disclosed in the notes on accounts.

17. We shall now examine about the ratio of all the above said decisions vis-à-vis sec. 115JB of the Act. Since the term "Book Profit" is defined in Explanation-1 to sec. 115JB, we need to refer the same, which starts with the following expression:-

> " For the purposes of this section, "book profit" means the net profit as shown in the Profit and Loss account for the relevant previous year prepared under sub-section (2), as increased by----"

In sec. 115JB(2), it is provided that the profit and loss account shall be prepared in accordance with the provisions of part II of Schedule VI to the Companies Act, 1956. So the profit and loss account prepared as per the provisions of Companies Act is required to be considered for the purpose of provisions of sec. 115JB of the Act, meaning thereby the interpretation given to the various provisions of Companies Act are relevant here. We have noticed that the starting point for computation of "book profit" is the "Net profit as shown in the Profit and Loss account". In the above said three decisions, it has been held that the items disclosed in the Notes to accounts are required to be adjusted to the Net profit disclosed in the Profit and loss account. In order to understand the significance of "Notes to accounts" or "Notes forming part of accounts", we may refer to the provisions of sec. 211(6) of the Companies Act, which read as under:-

> "(6) For the purpose of this section, except where the context otherwise requires **any reference to a balance sheet or**

> **profit and loss account shall include any notes thereon or documents annexed thereto giving information required by this Act** and allowed by this Act to be given in the form of such notes or documents."

Hence, in the case of Sain Processing Mills (P) Ltd (supra), the Hon'ble Delhi High Court observed as under, after considering the provisions of Companies Act:- (extracted below again at the cost of repetition)

> **"According to us, once this information is disclosed in the notes to the accounts it would clearly fall within the ambit of the Explanation to section 115J of the Act which defines "book profit" to mean "net profit as shown in the profit and loss account for the relevant assessment year**".
>
> To our minds, as long as the depreciation which is not charged to the profit and loss account but is **otherwise dis)closed in the notes of the accounts, it would come within the ambit of the expression "shown" in the profit and loss account**, as notes to accounts form part of the profit and loss account by virtue of sub-section (6) of section 211 of the Companies Act, 1956. This is quite evident if the provisions of sub-section (6) of section 211 of the Companies Act, are read in conjunction with sub section (1A) as well as the Explanation to section 115J of the Act".

Hence, in the decision given by Hon'ble Delhi High Court (supra and also other two decisions rendered by the Tribunal (supra), it has been held that the notes given in the Notes forming part of accounts have to be read along with the Profit and Loss account, meaning thereby the items having effect over the Net profit shown in the Profit and Loss account, but otherwise disclosed in the Notes to accounts should be adjusted to the said Net profit. Such kind of adjustment is held to be falling "within the ambit of the expression 'shown' in the profit and loss account". The ratio of these decisions is that the expression "net profit as shown in the profit and loss account" should not be understood as the net profit disclosed in the profit and loss account, but the net profit adjusted to the effects of notes given in the Notes forming part of accounts. Hence the Court as well as Tribunals, in the above cited cases, held that the depreciation,

incremental liability on leave encashment, loan waiver benefits have to be adjusted to the profit/loss shown in the Profit and loss account, which means that the "Net profit shown in the profit and loss account" is the figure arrived at after making such kind of adjustments. From these discussions, it follows that, for the purpose of making such kind of adjustments, it is not necessary that those items should have been specified in items of "increase" or "reduction" given in the Explanation 1, since the "net profit" itself is arrived at by adjusting the effects of notes given in the Notes to accounts, i.e., the same forms part of the process of arriving at "Net Profit" at the source level.

18. In the case of Sain Processing Mills (P) Ltd (supra) and other two decisions rendered by the Tribunal (supra), the items not disclosed in the Profit and Loss account, but disclosed in the Notes forming part of accounts was held to be adjusted while arriving at Net profit. However, in the instant case, the assessee has disclosed an item of income in the Profit and Loss account, but claims that the same should be excluded by referring to the Notes to accounts. However, in our view, the principle that the profit and loss account should be read along with Notes of account should be applied uniformly in all kind of situations and hence due adjustment needs to be done for the effect of items disclosed in the Notes to accounts.

19. In view of the foregoing discussions, we are of the view that the ratio of the decisions rendered in the case of Sain Processing Mills (P) Ltd (supra) and other two decisions rendered by the Tribunal (supra) should be applied in the instant case also. This factual aspect distinguishes the instant case against the facts available in the case of Rain commodities Ltd, which was decided by the Special bench. Accordingly, we are of the view that the ratio of Special bench decision cannot be applied straingly in

the instant case and hence we are unable to agree with the decision rendered by Ld CIT(A).

20. Accordingly, we find merit in the contentions of the assessee that the notes given to Notes to accounts should be read along with the Profit and Loss account. Hence, the Net profit shown in the Profit and loss account should be adjusted with the items given in Notes to accounts, meaning thereby, the profits arising on sale of capital asset to its wholly owned subsidiary company should be excluded from the Net profit and the Net profit so arrived at should be considered as "Net profit as shown in the profit and loss account" used in Explanation 1 to sec. 115JB of the Act.

21. We have earlier noticed that the Special bench of Tribunal, in the case of Rain Commodities (supra) had specifically observed about the absence of any comment in the notes of accounts. The Ld Counsel sought to distinguish the decision rendered by the Special bench by submitting that the assessee herein has furnished a note with regard to the profit arising on transfer of a capital asset to the wholly owned Indian subsidiary company. The Special bench was also conscious of the fact that the notes given in the Notes forming part of accounts might alter the net profit shown in the profit and loss account. The following observations made by the Special bench in paragraph 18 of the order also clarify the above said view:-

> "18…… We agree that it is settled law that Assessing Officer has the power to alternate (sic. alter) the net profit. In the following two cases, the Assessing officer can rewrite the profit and loss account, i.e., to say that Assessing Officer should recalculate the net profit and then follow the adjustments of MAT as usual….

In view of the foregoing discussions, we find merit in the submission of the assessee that the facts prevailing in the instant case is distinguishable from the facts of the case before the Special bench.

22. At this stage, we feel it relevant to discuss about a decision rendered by the co-ordinate Mumbai bench and which stands approved by Hon'ble Bombay High Court. In the case of ACIT Vs. Akshay Textiles Tdg & Agencies P Ltd (ITA No.1139/M/2002 dated 28-06-2005), the assessee earned capital gains and the same was directly credited to Capital reserve account, i.e., it was not credited to the Profit and Loss account. The said method of accounting was approved in the Annual General Meeting. The AO sought to bring the above said Capital gain within the ambit of "Book Profit", since it was not credited to the Profit and Loss account. The Tribunal rejected the said action of the AO. The Hon'ble Bombay High Court also upheld the order of the Tribunal in its order reported in (2008)(304 ITR 401). The said decision was later followed by the Tribunal in a group of cases, viz., DCIT Vs. M/s Arundhati Traders Pvt Ltd and others (ITA No.6293/Mum/2006 and others dated 02-12-2009). In all these cases, there is no mention about the notes, if any, given in the Notes to accounts with regard to the method of accounting followed by these assessees. Hence, the assessing officer was held to be not justified in including the income that was directly credited to Capital reserve account in the Book Profits. The Tribunal, in the case of M/s Arundhati Traders Pvt Ltd and others (supra) concluded as under:-

> "19. In view of the ratio laid down by the Hon'ble Supreme Court in Appollo Tyres Ltd Vs. CIT (supra) and by the jurisdictional High Court in CIT Vs. M/s Akshay Textiles Trading & Agencies Pvt Ltd (supra), we hold that where the accounts of a Company are maintained as per the Provisions of Companies Act and are Certified by the Auditors to the effect that the same are maintained as per the requirements of the Companies Act and the same are approved by the shareholders of the company in its annual general meeting and filed before the Registrar of companies, the authenticity of such accounts has to be accepted by the Assessing Officer, while computing the book profits under section 115J/115JA/115JB of the I.T. Act. The assessing officer is however empowered to make such adjustments as provided for in the Explanation to the respective section."

We have earlier expressed the view that the Net profit shown in the Profit and Loss account should be understood as the net profit arrived at after giving to the effect of notes, if any, given in Notes to Accounts. The same has to be accepted by the assessing officer and he is empowered to make only those adjustments which are prescribed in the Explanation 1 to sec. 115JB of the Act.

23. We shall now examine the second contention urged by the assessee, viz., since the profit arising on transfer of a capital asset by a company to its wholly owned subsidiary company is not treated as income" u/s 2(24) of the Act and since it does not enter into computation provision at all under the normal provisions of the Act, the same should not be considered for the purpose of computing book profit u/s 115JB of the Act. In order to appreciate the contentions of the assessee, we feel it pertinent to extract the relevant provisions here. The provisions of sec. 2(24) of the Act defines the term "income" and under clause (vi), the capital gains is included in the definition. For the sake of convenience, we extract below the said definition:-

> "2(24) "income" includes –
>
> (vi) any capital gains chargeable under section 45".

The provisions of sec. 45 of the Act reads as under:-

> "45 (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income tax under the head "Capital gains" and shall be deemed to be the income of the previous year in which the transfer took place."

We notice that the provisions of sec. 45 postulate three conditions, viz.,

(a) There is a capital asset.

(b) There is a transfer of the above said Capital asset.

(c) The said transfer results in any Profits or gains.

If all the above said three conditions are satisfied, then the profits or gains arising from the transfer of a capital asset shall be chargeable to income tax under the head "Capital gains" and the same is included in the definition of "income" u/s 2(45) of the Act.

24. The expression "transfer" is defined in sec. 2(47) of the Act. We have earlier noticed that the profits and gains arising from the **transfer** of a capital asset shall be chargeable to tax u/s 45 of the Act. Hence the expression "transfer" is defined in sec. 2(47) of the Act, which, inter alia, includes the sale, exchange or relinquishment of the asset. Hence the sale of a Capital asset by the assessee to its subsidiary company should normally fall under the definition of "transfer" given in sec. 2(47) of the Act. However, the provisions of sec. 47 of the Act provides certain exceptions by holding that certain transactions shall not be regarded as "transfer", meaning thereby, even if a transaction falls under the definition of transfer as per the provisions of sec. 2(47) of the Act, yet they shall not be chargeable to tax u/s 45 of the Act, in view of the provisions of sec. 47 of the Act. For the sake of convenience, we extract below the provisions of sec. 47 of the Act.

> "47 Nothing contained in section 45 shall apply to the following transfers:-
>
> ……
>
> (iv) any transfer of a capital asset by a company to its subsidiary company, if—
>
> (a) the parent company or its nominees hold the whole of the share capital of the subsidiary company, and
>
> (b) the subsidiary company is an Indian Company."

It can be noticed that the transaction involving any transfer of capital asset by a company to its wholly owned Indian subsidiary company is included in sec. 47 of the Act under clause (iv) and hence the said transaction is not

regarded as "transfer". The existence of the element of "transfer" is an essential condition for bringing the profits and gains arising on a transfer of a capital asset into taxation u/s 45 of the Act. Accordingly, in the absence of "transfer", the profits and gains arising on said transfer of capital asset by a company to its wholly owned subsidiary is not chargeable to tax u/s 45 of the Act. If the said profits and gains is not chargeable to tax u/s 45 of the Act, the same would not be considered as "income" at all under the definition of income given in sec. 2(24) of the Act.

25. In view of the above said legal provisions, the assessee has contended that the profits and gains arising on transfer of a capital asset by a company to its subsidiary company does not fall under the definition of "Income" as given in sec. 2(24) of the Act and hence it does not enter into the computation provisions of the Income tax Act. Accordingly it was contended that, an item of receipt which is not considered as "income" at all and which does not enter into the computation provisions of the Income tax Act, cannot be subjected to tax u/s 115JB of the also.

26. We shall now examine the scheme of the provisions of sec. 115JB of the Act. It is pertinent to note that the provisions of sec. 10 lists out various types of income, which do not form part of Total income. All those items of receipts shall otherwise fall under the definition of the term "income" as defined in sec. 2(24) of the Act, but they are not included in total income in view of the provisions of sec. 10 of the Act. Since they are considered as "incomes not included in total income" for some policy reasons, the legislature, in its wisdom, has decided not to subject them to tax u/s 115JB of the Act also, except otherwise specifically provided for. Clause (ii) of Explanation 1 to sec.115JB specifically provides that the amount of income to which any of the provisions of section 10 (other than

the provisions contained in clause (38) thereof) is to be reduced from the Net profit, if they are credited to the Profit and Loss account. The logic of these provisions, in our view, is that an item of receipt which falls under the definition of "income", are excluded for the purpose of computing "Book Profit", since the said receipts are exempted u/s 10 of the Act while computing total income. Thus, it is seen that the legislature seeks to maintain parity between the computation of "total income" and "book profit", in respect of exempted category of income. If the said logic is extended further, an item of receipt which does not fall under the definition of "income" at all and hence falls outside the purview of the computation provisions of Income tax Act, cannot also be included in "book profit" u/s 115JB of the Act. Hence, we find merit in the submissions made by the assessee on this legal point.

27. A careful perusal of the decision rendered by the Special bench in the case of Rain Commoditites Ltd (supra) would show that the above said legal contentions were not considered by the Special bench. We notice that the Special bench considered the following decisions:-

(a) Malayala Manorama Co. Ltd Vs. CIT (2008)(300 ITR 251)(SC)

(b) N.J. Jose & Co. (P) Ltd (321 ITR 132)(Ker)

(c) CIT Vs. Veekaylal Investment Co. (P) Ltd (249 ITR 597)(Bom)

In all these cases, the Courts were dealing with the issue of inclusion of Capital gains in the computation of "Book Profits", but such capital gains were otherwise chargeable to capital gain tax u/s 45 of the Act under the normal provisions of the Act. However, here is the case that the profits and gains arising on transfer of capital is not falling under the definition of "transfer" and hence under the definition of "Capital gains chargeable u/s 45" and consequently, the same does not fall within the purview of the definition of "income" given u/s 2(24) of the Act. Further, we notice that the Special bench did not have occasion to consider the argument urged

before us that the profits and gains arising on transfer of a capital asset by a holding company to its wholly owned Indian Company does not fall under the definition of "income" at all u/s 2(24) of the Act and hence the same does not enter into the computation provisions of the Act at all. We are impressed by the arguments advanced in this regard and we have also extensively dealt with the relevant provisions and also about the scheme of the provisions of sec. 115JB of the Act. We are of the view that the said contentions distinguish the decision rendered by the Special Bench in the case of Rain Commodities (supra). On merits also, we have earlier seen that the assessee herein has attached a note in the notes forming part of accounts and in the case before the Special bench, no such notes has been inserted, which fact was specifically noted by the Special bench. Hence on this factual aspect also, the decision rendered by the Special bench is distinguishable.

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

29. The next issue urged by the assessee relates to the disallowance made u/s 14A of the Act. The assessee had earned dividend income of Rs.3,49,66,452/- and claimed the same as exempt. It also disallowed a sum of Rs.60,01,613/- as per the provisions of sec. 14A of the Act. The AO noticed that the disallowance worked out by the assessee is not in accordance with the provisions of Rule 8D of the I.T Rules. Hence the AO computed the disallowance in accordance with the provisions of Rule 8D at Rs.96,42,062/- and accordingly disallowed the same. Before Ld CIT(A), the assessee contended that the disallowance worked out by the AO was on the higher side and accordingly pleaded that the disallowance made by it in the return of income should be upheld. The assessee also submitted that the average value of investments worked out by the AO was not correct. The Ld CIT(A), however, did not agree with the contentions of the assessee, but directed the AO to re-work the disallowance by adopting correct amount of average value of investments. Aggrieved, the assessee is challenging the decision of Ld CIT(A) before us.

30. The Ld A.R submitted that the assessee is possessing sufficient amount of interest free funds, which is far in excess of the investments and hence it cannot be presumed that the assessee has used interest bearing funds for making investments. He further submitted that interest bearing funds have been utilized for specific purposes. Accordingly he submitted that there was no requirement of making any disallowance out of interest expenditure. He further submitted that the AO had adopted incorrect figure of average value of investments and hence the Ld CIT(A) has restored the matter to the file of the AO. On the contrary, the Ld D.R submitted that the Ld CIT(A) has upheld the disallowance, in principle, but set aside the matter to correct the clerical mistakes.

31. A perusal of the orders of the tax authorities would show that they have not considered the submission about the availability of interest free funds. Before us, the ld A.R has contended that the interest free funds available with the assessee is sufficient to cover the value of investments and it was further submitted that the interest bearing funds were used for specific purposes. Accordingly, it was contended that there was not requirement of making any disallowance out of interest expenditure. Since this aspect has not been examined, we are of the view that this issue requires fresh examination. Accordingly, we set aside the order of Ld CIT(A) on this issue and restore the same to the file of the AO with the direction to examine this issue afresh by duly considering all the contentions of the assessee, including the contention with regard to the availability of interest free funds and the average value of investments, and take appropriate decision in accordance with the law.

32. In the result, the appeal filed by the assessee is treated as allowed.

Pronounced accordingly on 19th August, 2015.

घोषणा खुले न्यायालय में दिनांकः 19th August, 2015 को की गई ।

Sd	**sd**
(जोगिन्दर सिंह/**JOGINDER SINGH**)	(बी.आर. बास्करन,/ **B.R. BASKARAN**)
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य/**Accountant Member**

मुंबई Mumbai:19th August, 2015.

व.नि.स./ SRL , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai