आयकर अपीलीय अधीकरण, न्यायपीठ – " ऐ" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

(समक्ष)Before श्री महावीर सिंह, न्यायीक सदस्य **एवं/and श्री,** सी.डी.राव लेखा सदस्य)

[Before Hon'ble Sri Mahavir Singh, JM & Hon'ble Shri C. D. Rao, AM]

आयकर अपील संख्या / I.T.A No. 1275/Kol/2010

निर्धारण वर्ष/Assessment Year: 2007-08

J. K. Lakshmi Cement Ltd. (PAN-AAACJ 6715 G) (अपीलार्थी/Appellant)	**Vs.**	**Assistant Commissioner of Income-tax,** Central Circle-VI, Kolkata (प्रत्यर्थी/Respondent)

&

आयकर अपील संख्या / I.T.A No. 1417/Kol/2010

निर्धारण वर्ष/Assessment Year: 2007-08

Deputy Commissioner of Income-tax, Central Circle-VI, Kolkata (अपीलार्थी/Appellant)	Vs.	J. K. Lakshmi Cement Ltd. (प्रत्यर्थी/Respondent)

&

आयकर अपील संख्या / I.T.A No. 1470/Kol/2009

निर्धारण वर्ष/Assessment Year: 2006-07

Assistant Commissioner of Income-tax, Central Circle-VI, Kolkata (अपीलार्थी/Appellant)	**Vs.**	**J. K. Lakshmi Cement Ltd.** (प्रत्यर्थी/Respondent)

&

C.O. No.69/Kol/2009

In **आयकर अपील संख्या / I.T.A No.1470/Kol/2009**

निर्धारण वर्ष/Assessment Year: 2006-07

J. K. Lakshmi Cement Ltd. (Cross Objector)	Vs.	**Assistant Commissioner of Income-tax,** Central Circle-VI, Kolkata (Respondent)

For the Assessee: S/Shri J. P. Khaitan & R. Salarpuria
For the Respondent: Shri M. P. Agarwal

आदेश/ORDER

Per Mahavir Singh, JM/(महावीर सिंह, न्यायीक सदस्य):

Out of above, cross appeals being ITA No1275/K/2010 and ITA No1417/K/2010 are arising out of order of CIT(A), Central-1, Kolkata in appeal No.70/CIT(A)C-1/CC-VI/09-10 dated 7.4.2010 for the Assessment Year 2007-08 and appeal being ITA No.1470/K/2009 filed by revenue and CO 69/Kol/2009 by assessee are arising out of order of CIT(A), Central-1, Kolkata in appeal N.314/CC-VI/CIT(A),C-1/08-09 dated 10.6.2009for the Assessment Year 2006-07. Assessments were framed by ACIT, CC-VI, Kolkata for Assessment Year 2007-08 u/s. 143(3) of the Income Tax Act, 1961(hereinafter referred to as "the Act") vide his order dated 19.11.2009 and for Assessment Year 2006-07 u/s. 143(3) r.w.s.115JB of the Act vide his order dated 5.12.2008. For the sake of brevity and clarity, we dispose of both these appeals and cross objections by this consolidated order as issues are common.

2. The first common issue in revenue's appeal in ITA No 1470/K/2009 for Assessment Year 2006-07 and assessee's appeal in ITA No.1275/K/2010 for Assessment Year 2007-08 is as regards to computation of income u/s. 115JB of the Act for both years. For this, assessee as well as revenue have raised following grounds:

"Grounds in Assessee's appeal in ITA No 1275/K/2010:

1.0. Confirming the action of Assessing Officer in determining the Book Profit u/s. 115JB of the Act for the year under appeal at Rs.1823380456 as against Rs. 'Nil' declared in the return on the alleged ground that there was no Brought Forward Business loss & Depreciation as per books of account available for reducing from the net profit as shown in the profit and loss account under clause (iii) of Explanation 1 to Sec. 115JB(1).

1.1. Holding that the adjustment of Rs.381.55 cr. being the loss incurred by the appellant company in the earlier years, against the Share Premium account/Revaluation Reserve, pursuant to scheme sanctioned by the High Courts is not in contravention to the provisions of Companies Act.

1.2. Not appreciating that set off of Brought Forward loss amounting to Rs.1823380456 was available this being part of Rs.2465335924 determined in order u/s. 143(3) for the Asstt. Year 2005-06."

Grounds in Revenue's appeal in ITA No 1470/K/2009:

1. That Ld. CIT(A) has erred in deleting addition made u/s. 40A(9) of the Act of Rs.11,92,645/- on account of expenditure incurred for running School and other facilities.

2.i) That, the Ld. CIT(A), Central-1, Kol has erred in allowing the assessee's appeal against assessment of Book profit of Rs.56,24,31,715/- by the A.O. as per provision of Section 115JB of the Act and as per the decision of the Hon'ble Supreme Court in the case of Apollo Tyres 255 ITR 273.

ii) That, in doing so, Ld. CIT(A) has erred in holding that the A.O. cannot revise Auditor certificate for reversal of the loss 'incorrectly' removed/adjusted in F.Y. 1999-2000 in Revaluation Reserve and share premium A/c, to implement H.C's order, and has also erred in observing that if the ratio of Apollo Tyres is to be followed, the Auditor's view should prevail and should not be challengeable by the A.O.

iii) That, in doing so, Ld. CIT(A) has erred in relying on the assessment order for the A.Y. 2005-06 for which proposal u/s. 263 has already been submitted to Ld. CIT by the A.O."

3. The brief facts in assessment year 2006-07 are that assessee's gross total income under normal computation of income was 'Nil' and balance carried forward business loss and unabsorbed depreciation was at Rs.800,95,43,604/-. Accordingly, Assessing Officer noticed from computation of book profit u/s. 115JB of the Act filed by assessee in its return of income as under:

"Profit after depreciation
Rs.56,25,04,996/-

Adjustment vide explanation to Section 115JB		*Rs.56,25,04,996/-*
Net effect	*(-)*	*Rs.56,25,04,996/-*
Balance i.e. adjusted Book Profit u/s. 115JB		*NIL*
Tax payable u/s. 115JB		*NIL"*

The Assessing Officer required assessee company to explain as to why 'book profit' Rs.56,25,04,996/- should not be taken for the purpose of computation of income under section 115JB of the Act and assessee replied vide letter dated 12.11.2008 as under:

"The net profit of the company for the year as per P&L A/c is Rs.56,25,04,996/-. In the return vide Schedule-15, an equal amount has been deducted as adjustment vide explanation to Section 115JB and both the Book profit and the tax payable thereof have been shown at 'NIL'."

The Assessing Officer gone through clause (iii) of Explanation 1 to section 115JB of the Act, as amended and effective from 1.4.2001, and noted that audited accounts of assessee reveals that balance brought forward is Rs.34.90 cr. which is unabsorbed depreciation. According to AO, as per books of account, brought forward unabsorbed depreciation is Rs.34.90 cr. and brought forward losses are NIL, therefore, as per clause (iii) of Explanation 1 to section 115JB of the Act no amount is required to be reduced for the purpose of computing book profit on this account. The Assessing Officer computed the book profit at Rs.56,24,31,715/- by giving following finding:

"It is apparent from the submission of the assessee that the assessee's claim is to reverse the adjustments of loss with the Revaluation Reserve and share premium A/c made in F Y 1999-2000, for the purpose of computation of Book Profit of the company for this A.Y. 2006-07. But there is no provision in the relevant section 115JB which permits such adjustment for this A.Y.2006-07. Provisions of the relevant clause (iii) of Explanation-1 to Section 115JB, as amended w.e.f. 1.4.2001, and as reproduced in the show-cause notice quoted above, permits reduction of the amount of brought forward loss or unabsorbed loss, whichever is less, as per Book of A/C. The provision is clear

and there is no scope for going beyond the figures of brought forward loss or unabsorbed depreciation, as per Books of A/C of the assessee.

There is no provision in Section 115JB either to resort to any provision of the companies Act, so far as the reduction as per clause (iii) supra is concerned. As regards the claim of the assessee that the Net profit is to be recalculated as provided in Sub-section(2) of section 115JB is also not tenable since the accounts of the assessee company are audited and certified by the Auditors and the same has been adopted by the general meeting. In this respect, decision of the Hon'ble Supreme Court in the case of CIT Vs. Apollo Tyres Ltd. [2002] 255 ITR 273(SC) is relied upon.

Regarding the assessee's claim of computation of Book Profit u/s.115JB for A.Y.2005-06 and loss/depreciation brought forward as per reworking, there is no provision for brought forward of any loss or unabsorbed depreciation if any determined u/s.115JB, and this year's assessment for Block period is separate and res-judicate is not applicable. Besides, any error in earlier assessment can be subjected to remedial measures. In fact, remedial measure is being taken for the A.Y. 2005-06."

4. Aggrieved against action of AO, assessee preferred appeal before CIT(A), who allowed the claim of assessee by going through auditors certificate vide para 6.1 to 7.6 as under:

"6.1. The submissions are carefully considered. It is seen that there is an order on the petition under Sec. 391(2) and 394 of the Companies Act by the High Court of Orissa at Cuttack. It sanctioned the scheme of compromise and/or arrangement approved by the creditors of long term debts and the Equity Shareholders.

6.2. Section 391(2) is reproduced for ready reference:

> *"(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed [under the rules made under section 643], by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may he, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company:"*

The High Court has approved a scheme of compromise arrived at with the creditors and equity shareholders.

Article 9 of the scheme has the following sentence.

> *"The debit balance in the Profit and Loss Account as on 30 9 2000 of JKCL shall stand adjusted against the Share Premium Account and/or Revaluation Reserve Account of JKCL"*

It is in terms of this agreement that the normal accounting of brought forward loss of Rs 391 crore is given the extra-ordinary treatment of set off against the balance in the Share Premium A/c and Revaluation Reserve Account.

6.3. While giving effect to this debt re-structuring exercise, the auditors reported to the company as follows in the annual report for financial year 1999-2000:

"Regarding adjustment of debit balance in Profit and Loss Account, attention is invited to Note 1 - Scheme 20, according to which the debit balance in Profit and Loss Account has been adjusted against Share Premium and Revaluation Reserve amounting to Rs 281.55 crores and Rs.100.00 crores respectively pursuant to the sanction of Scheme of Compromise and/or Arrangement by Hon'ble High Courts of Orissa and Gujarat, which though not in line with the generally accepted accounting practices, has been carried out as per the Orders of the said High Courts, implementation whereof is binding on the Company."

This was further noted in Notes Accounts No. 1:

"Pursuant to the Scheme sanctioned by the Hon'ble High Courts of Orissa and Gujarat, debit balance of Profit and Loss Account as on 30th September 2000 amounting to Rs. 381 55 crores transferred to Balance Sheet and stands adjusted to the extent of Rs. 281.55 crores against Share Premium Account and Rs.100.00 crores against Revaluation Reserve. These adjustments have been carried out as per the Orders of the said High Courts, implementation whereof is binding on the company."

The compromise is an agreement with the creditors, with statutory backing Nevertheless, it was remarked that the compromise provision was "not in line with the generally prevailing accounting practices". This is contemporary evidence of the view taken by the auditors about the accounting treatment of debit balance as on the date of compromise by orders of the High Court.

6.4. Thereafter, item 5 of Notes on Accounts , Part B in Schedule 19 of Auditors Report for financial year 2006-07 refers to provision for taxation including the MAT as follows:

> *"No provision for taxation including MAT is considered necessary since the loss is being carried over for taxation purpose (adjusted Rs. 281. 55 crores in Share Premium and Rs. 100.00 crore in Reva1uation Reserve pursuant to the scheme for the purpose of accounts in earlier year)."*

There is no reference to the accounting adjustment in any intervening years.

6.5. It is claimed both in the year of adjustment (FY. 2000-01) and in the year of the MAT liability (F. Y. 2005-06) that net profit according to normal accounting practice and according to company law provisions of Parts II & III of Schedule VI of Companies Act was different from the net profit in consequence of giving effect in F Y 99-2000 to the order of the High Court under Sec. 391(2) of the Companies Act. Debit balance of Rs.381.55 crores in the Profit & Loss Account for financial year 1999-2000 would not be adjustable against Share Premium and Revaluation Reserve according to the generally accepted accounting practices. It had to be done on account of the overriding effect of the High Court orders. Nevertheless the debit balance according to the principles of the theory of real income, continues to exist as real loss. Its adjustment by the order of the Court is a notional adjustment in the speciality of the situation.

The appellant's claims about the reality of the loss adjusted notionally against Revaluation Reserve A/c and Share Premium A/c is not a claim to reverse the

adjustment but to acknowledge the continued existence of brought forward loss in accounts in line with generally accepted accounting practices.

The argument of the Assessing Officer is that the audited profit and loss account does not refer to brought forward loss. Audited Accounts cannot he tampered with for the purpose of the MAT. This is said on the authority of the Supreme Court judgement in the case of Apollo Tyres (Supra).

6.6 But in my opinion, the general proposition in that judgement is that the Assessing Officer cannot look into and reexamine the correctness of the entries in the audited Profit & Loss Account. The limitation is on the powers of the Assessing Officer. In the present case, it is the auditors who have expressed certain opinion about the nature of adjustments of debit balance in Profit & Loss Account of financial year 1999-2000 by transferring them to balance sheet giving effect to the High Court order and the availability of such artificially adjusted loss in financial year 2005-06 and 2006-07 in computation of book profit for determination of the MAT liability. The Assessing Officer cannot revise the auditors' version of Profit & Loss Account. But the auditor himself has proposed two sets of Profit & Loss A/c : one incorporating the directions of the order of the High Court u/s 391(2) of the Companies Act and the other without such directions but under normal accounting practice. The auditors report that the latter must be adopted for the purpose of profit u/s 115JB. The Assessing Officer would not revise the audited accounts following the Supreme Court judgment. But according to the assessing officer, following the same judgment the auditor also would not he permitted to comment on the Profit & Loss A/c prepared by it. In my opinion, the Supreme Court judgment denies the right of rewriting the accounts to the Assessing Officer even on the ground that they are not in conformity with Parts II & III of Schedule VI of the Companies Act since auditors are expected to take care of this. But the judgment does not deny the auditors the right to observe that certain adjustments entries in the Profit & Loss A/c and Balance sheet are not in conformity with the normal accounting practice and by implication, with Parts II & III of Schedule VI of the Companies Act, that they were following High Court order in making departure from normal practice. The Assessing Officer, following the same Supreme Court judgment, must accept the auditors' observation on the accounting treatment to debit balance in the Profit & Loss Account in financial year 1999-2000. If they are accepted, the argument that such loss was available for adjustment against real profit also has to b considered on merits. While the Assessing Officer cannot say that certain entries in the audited accounts are not in accordance with Parts II & II of' Schedule VI of Companies Act, the auditors themselves can certainly say so and have said so. And when they say so, the Assessing Officer must deal with those observations.

7.1. The book profit u/s 115JB is computed in the following manner in A.Y. 2005-06.

BOOK PROFIT U/S 115JB

1.	*Net profit as per P&L A/c (Rs. 256l9886 + Rs. 4263000)*		*260461886*
2.	*Add:*		
	(a) <u>Unascertained Liabilities (Net)</u>		
		Provision for Doubtful debts	*31300193*
		Impairment of assets	*6272114*
		Diminution in value of Investments	*<u>(35713560)</u>*
3.	*Less:*		
	(a)	*Dividend Income*	*10870255*
	(b)	*Deferred Tax*	*4263000*

	(c) Lower of' loss B/F (Rs.2721534810) or Unabsorbed Depreciation (Rs.3314300127) per books of account as certified by statutory Auditors filed vide Annex 13 of letter dt. 7.12.2007	
4.	*Book Profit (1+2-3)*	_____ *(2736668065)* *(2474347432)*
5.	*Loss C/F (Rs.2721534810 -Rs.256198886) [Assessees claim that C/F works out to Rs. 260601576 nade on Page 3 of letter dt. 7.12.2007 being nor in accordance with I. Tax provisions is rejected]"*	*2465335924*

It will be seen that for the purpose of Explanation 1(iii) to section 115JB, the lower of the loss brought forward (Rs.2,72,15,34,810/-) or unabsorbed depreciation (33,43,00,127/-) is the amount of brought forward loss. It is not NIL. It is based on the certificate of statutory auditors as per books of Account. The auditor's certificate is reproduced here:

'T() WHOMSOEVER IT MAT CONCERN

We Lodha & Co. Chartered Accountants, the Statutory Auditors of J K Lakshmi Cement Ltd., formerly J K Corp. Ltd. (the Company) have checked up books of accounts and other documents of the Company. Based on our checking we certify chat the Company had debit balance of Rs.381.55 crores as on 30.09.2000 in Profit and Loss Account of the Company, which Pursuant to the Scheme of Compromise and/or Arrangements sanctioned by the Hon'ble High Courts of Orissa and Gujarat was transferred to Balance Sheet and stood adjusted against balance in Share Premium Account and Revaluation Reserve.

We have been asked by the Company to work out status of losses and unabsorbed depreciation without considering above adjustment, adjustment of Debit Balance in Profit & Loss Account made against balance available in General Reserve, transfer of other reserves as available to/from profit & loss account and Deferred Tax Credit, accordingly the position of losses and unabsorbed depreciation as on 31-3-2004 is as under:-

Financial Year (April-March)	*Asstt. Year*	*Losses Cr./Rs.*	*Unabserbed Dep. Cr./Rs.*	*Total Cr./Rs.*
1997-98	*1998-99*	*34.07*	*45.58*	*79.65*
1998-99	*1999-00*	*114.02*	*61.81*	*175.83*
1999-00	*2000-01*	*-*	*63.99*	*63.99*
2000-01	*2001-02*	*111.22*	*48.62*	*159.84*
2001-02	*2002-03*	*12.84*	*50.36*	*63.20*
2002-03	*2003-04*	*-*	*36.39*	*36.39*
2003-04	*2004-05*	*-*	*24.68*	*24.68*
		272.15	*331.43*	*603.58*

For Lodha & Co.
Chartered Accountants"

while principle of res judcata is not applicable to the decisions of the assessing officers, there are certain obvious….. to the operation of this doctrine. According to Bombay High Court judgment in Shah & C (H.A) vs CIT (30 ITR 618, 624-26) tax authorities

would not be entitled to unsettle the earlier finding where the earlier finding is not arbitrary or perverse, and is arrived at after making due enquiries, where, subsequent to the earlier finding no fresh facts are placed for consideration, where the earlier decision has considered all the relevant material. Departure from an earlier decision must be justified on the ground of fresh material for consideration, or obvious errors in the earlier decision. In my view the Book Profit determined for section 115JB in A.Y 2005-06 is based on the certificate from the statutory auditors, is not arbitrary or perverse and has considered all relevant material. For A.Y. 2006-07 a different view about the adjustment of brought forward loss in terms of Explanation 1(iii) of section 115JB was not justified.

7.2. The assessing officer was aware that this decision about adjustment of brought forward loss was different from that of his predecessor in identical case and identical circumstances. According to him there is an error in the order of earlier AY. It accepted the claim of the assessee to reverse adjustment of loss with Revaluation, Reserve and Share Premium A/c in F.Y 99-2000 for the purpose 115JB in this year. But the figures of brought forward loss cannot be other than what is reflected in the audited accounts. No authority can modify the audited profit & loss Account on any ground. This is finally settled by the Supreme Court judgment in CIT vs. Apollo Tyres Ltd. (255 ITR 273).

7.3. In my view this is not exactly a çase where this judgment is required to be pressed into service, In that judgment, the Assessing Officer is precluded from rewriting P & L A/c when auditors have done their job. In the present case, it is auditors who point out that there is a profit & loss A/c not prepared "in line with the generally accepted accounting practices" in F.Y 99-2000, which they had certified in implementation of a High Court order. The auditors further certify to the assessing officer in A.Y. 2005-06 that there is brought forward loss available for set off in A.Y. 2005-06 if the P & I. accounts of AY. 2000-01 to 2005-06 are recast in accordance with normal accounting principles & practices. The view in .the case of the: Apollo Tyres is that the profit & loss Account certified by the auditors cannot be revised by the assessing officer since it is presumed that auditors prepare the annual accounts in conformity with Part II & III Schedule VI of the Companies Act. But auditors themselves testify that a certain profit and loss Account in the earlier assessment year incorrectly removed the debit balance from the profit & loss account. It was necessary for the purpose implementing the High Court Order. But it need not determine the loss to be carried forward to the following assessment years. The losses to brought forward year after year for the purpose of the MAT provisions, should disregard the set off of debit balance in the P & L Accounts of FY. 99 - 2000 as it was for a specific purpose. Now this is the view of the statutory auditors. If the ratio of the Apollo Tyres is to be followed, the auditors view should prevail & should not be challengeable by the assessing officer.

7.4. The case of Apollo Tyres supports the finality of the auditors' opinion and consequently the case of the appellant. As a result, the assessing officer's only reason for making a departure from the earlier assessment year is not supported by the reasoning of' the Supreme Court judgment as argued in the assessment order.

7.5. But more important than this technical argument is the need to acknowledge that real loss incurred by the appellant company in A.Y 2000-01 was artificially removed from the profit & loss A/c and balance sheet by accounting entries. These entries were declared to be extraordinary aid out of harmony with the accepted accounting practices or with the relevant provisions of the Companies Act by the auditors in that year's report itself. The auditors do not issue a certificate to accommodate the appellant company in tax dispute. The certificate about brought forward loss given by auditors in A.Y. 2005-06 is in line with their views in the annual report for F.Y. 99-2000.

7.6. In my view the assessment order for AY. 2005-06 is the correct position in computing the book profit u/s 115JB. The departure from this in A.Y. 2006-07 is not supported by the ratio of the Supreme Court judgment in the case of Apollo Tyres. Ground No. 3 is allowed."

Aggrieved, now revenue is in appeal before us.

5. This departmental appeal for Assessment Year 2006-07 and assessee's appeal for Assessment Year 2007-08 involves common question to be adjudicated with reference to the provisions of section 115JB of the Act. In assessment year 2006-07, as is seen above, assessee succeeded before CIT(A) and revenue is in appeal, whereas in Assessment Year 2007-08, the claim of the assessee was dismissed by CIT(A) by affirming the action of AO and assessee is in appeal. The CIT(A) while dismissing the appeal of the assessee for AY 2007-08, held as under:

"8. I have carefully considered the fact of the case and the submission of the Ld. A.r. There cannot be two opinion that section 391 is a complete code in itself and any scheme sanctioned under this section will have over riding effect. Further if any of the conditions or directions stipulated in the scheme was prejudicial to the interest of any party it could have been put up for reconsideration before the Hon'ble Courts itself. However once the scheme is approved it is binding on all concerns and has to be implemented in totally Further whether the scheme of sanctioned by the Hon"ble High Courts of Orissa and Gujarat was in accordance with the provision of the Company Law or not is not at all relevance for determining the issue in question. Once the effect to the High Court order has been given and necessary adjustments has been made in the books of accounts maintained as per requirement of Company Law, the book profit of the Company for the purpose of section 115JB of the Act has to be calculated on the basis of the Balance sheet and P& L a/c subsequently prepared on the basis of the relevant books of accounts.

8.1 The decision of the Apex Court relied by the assessee is not applicable as the fact of the case is totally different. Moreover the principle laid in the case that neither any fresh enquiry can be made in regard to the entries made in the books of the accounts of the company nor the audited accounts certified by statutory auditors and approved by the Registrar of the Companies can be recasted for the purpose of calculating Book Profit of the company is against the claim of the Company. In the case of the assessee company, it has been duly certified by the auditors that the books of accounts have been maintained as per requirement of the Company Law and the Company does not have accumulated losses at the end of the financial year.

8.2 The submission made by the Ld. A.r that, since the A.O has quantified the Loss in the assessment order for A.Y 2005-06, hence the same should be followed in the subsequent years was considered and found to have no merit. Under the provisions of the Income Tax Act 1961, the A.O is only required to quantify the Loss as per provision of section 72 of the Act. For the Purpose of Section 115JB the Loss has already been quantified in the books of accounts of the Company and no further quantification is permissible. In the order under section 143(3) while calculating the Book Profit u/s 115JB of the Act, the A.O has not taken loss as per books as on 31.03.2005 as certified by the auditors. In the audit report for the year ending 31.03.2005 the Auditor has duly

reported that as per books of accounts the company does not have accumulated loss. It has been clearly mentioned that what ever loss was there has been already adjusted in Pursuant to the Scheme sanctioned by the Hon"ble High Courts of Orissa and Gujarat. It has been further specified by auditors that, "these adjustment has been carried out as per the Orders of the said High Courts, implementation whereof is binding on Company" . However it appears that the A.O in the assessment order form AY 2005-06 has taken the loss as per books on 30.09.2000 calculated by Lodha & Co Chartered Accountants on request of the Assessee Company. The letter issued dt 03.10.2007 issued by the said partner of the said C.A firm reads as under-

TO WHOMSOEVER IT MAY CONCERN

We Lodha & Co. Chartered Accountants, the Statutory Auditors of J K Lakshmi Cement Ltd., formerly J K Corp. Ltd. (the Company) have checked up books of accounts and other documents of the Company. Based on our checking we certify chat the Company had debit balance of Rs.381.55 crores as on 30.09.2000 in Profit and Loss Account of the Company, which Pursuant to the Scheme of Compromise and/or Arrangements sanctioned by the Hon'ble High Courts of Orissa and Gujarat was transferred to Balance Sheet and stood adjusted against balance in Share Premium Account and Revaluation Reserve.

We have been asked by the Company to work out status of losses and unabsorbed depreciation without considering above adjustment, adjustment of Debit Balance in Profit & Loss Account made against balance available in General Reserve, transfer of other reserves as available to/from profit & loss account and Deferred Tax Credit, accordingly the position of losses and unabsorbed depreciation as on 31-3-2004 is as under:-

Financial Year (April-March)	*Asstt. Year*	*Losses Cr./Rs.*	*Unabserbed Dep. Cr./Rs.*	*Total Cr./Rs.*
1997-98	*1998-99*	*34.07*	*45.58*	*79.65*
1998-99	*1999-00*	*114.02*	*61.81*	*175.83*
1999-00	*2000-01*	*-*	*63.99*	*63.99*
2000-01	*2001-02*	*111.22*	*48.62*	*159.84*
2001-02	*2002-03*	*12.84*	*50.36*	*63.20*
2002-03	*2003-04*	*-*	*36.39*	*36.39*
2003-04	*2004-05*	*-*	*24.68*	*24.68*
		272.15	*331.43*	*603.58*

8.3. From the perusal of the said letter it is clear, that it has not been issued by the statutory Auditors under requirement of any statutory Act or rule. It is a general calculation of status of losses and unabsorbed depreciation as on 30.09.2000 made by a accountant on instruction of the client. Further it is a pure statement of fact of debit balance in the books of the Company prior to the scheme sanctioned by the Honble High Courts of Orissa and Gujarat and making necessary adjustments in the Profit and Loss a/c. thereof. Moreover in the order under section 143(3), the A.O has not discussed the issue in question. While calculating Book Profit under section 115JB the A.O, has deducted Rs. 2721534810/ with following narration " Lower of loss B/F (Rs. 2721534810) or Unabsorbed Depreciation (Rs. 3314300127) as per books of accounts as certified by statutory Auditors filed vide Anxee 13 of letter dt. 7.12.2007." No where in the above mentioned letter, it has been certified by the auditor that Loss B/f as per books of accounts for the purpose of section 115JB is Rs. 2721534810/ . Moreover for the year ending 31.03.2005 the Auditor has duly reported that as per books of accounts the company does

not have accumulated loss. Hence the loss taken by the A.O while calculating the Book profit in A.Y 2005-06 is not the loss as per books of the Company, hence it will not help the assessee to take a ground for further allowance of the loss in the year under consideration.

8.3 Considering above facts and the provisions of the Act it is held that the amount of loss brought forward as per books of the company is Nil and the A.O has rightly calculated the Book Profit under section 115JB. Accordingly the ground no 5 taken by the appellant is dismissed."

6. We have heard rival contentions and gone through facts and circumstances of the case. The facts giving rise to above controversy for two years are that Hon'ble High Courts of Orissa and Gujarat sanctioned a scheme of compromise and/or arrangement between assessee and its lenders, bankers and shareholders and Central Pulp Mills Limited and its shareholders for restructuring of debts of assessee due to its lenders and bankers and for reconstruction of said two companies by transfer of paper undertaking of assessee to Central Pulp Mills Limited. Clause 10 of Part II of the sanctioned scheme provided that debit balance in the Profit and Loss Account as on September 30, 2000 of the assessee shall stand adjusted against Share Premium Account and/or Revaluation Reserve Account and for this relevant financial year was 2000-01. Accordingly, in financial year 2000-01 relevant to assessment year 2001-02, debit balance of Rs.381.55 crore in assessee's Profit and Loss Account as on September 30, 2000 was adjusted to the extent of Rs.281.55 crore against Share Premium Account and remaining Rs.100 crore was adjusted against Revaluation Reserve with appropriate disclosure in the accounts including by way of Notes on Accounts. In final accounts of assessee company in respect of said adjustment, statutory auditors in their report dated September 29, 2001 to the shareholders of the assessee, stated as under:-

"Regarding adjustment of debit balance in Profit and Loss Account, attention is invited to Note 1 - Schedule 20, according to which the debit balance in Profit and Loss Account has been adjusted against Share Premium and Revaluation Reserve amounting to Rs.281.55 crores and Rs.100.00 crores respectively pursuant to the sanction of Scheme of Compromise and/or Arrangement by Hon'ble High Courts of Orissa and Gujarat which though not in line with the generally accepted accounting practices has been carried out as per the Orders of the said High Courts, implementation whereof is binding on the Company".

(emphasis added)

The assessee during assessment proceedings for AY 2005-06 took a stand that said adjustment was made on September 30, 2000, which was not in accordance with generally accepted accounting practices as opined by its auditors, was not to be considered in computing book profit under section 115JB of the Act and accordingly, computation u/s. 115JB of the Act

computing book profit was filed along with return of income. AO while making computation of book profit under section 115JB of the Act for assessment year 2005-06 u/s. 143(3) of the Act, made computation, which is as under :-

"BOOK PROFIT U/S 115JB

1. Net Profit as per P&L A/c (Rs.256198886 + Rs.4263000)	*260461886*
2. Add:	
a) Unascertained Liabilities (Net)	
▪ *Provision for Doubtful debts*	*31300193*
▪ *Impairment of assets*	*6272114*
▪ *Diminution in value of Investments*	*(35713560)*
	1858747
3. Less:	
a) Dividend Income	*10870255*
b) Deferred Tax	*4263000*
c) Lower of loss B/F (Rs.2721534810) or Unabsorbed Depreciation (Rs.3314300127) per books of account as certified by statutory Auditors filed vide Annex 13 of letter dated 7.12.2007	*2721534810*
	(2736668065)
4. Book Profit (1+2-3)	*(2474347432)*
5. Loss C/F(Rs.2721534810 - Rs.256198886) [Assessees claim that C/F works out to Rs.260601576 made on Page 3 of letter dt.7.12.2007 being not in accordance with I. Tax provisions is rejected]"	*2465335924*

7. The AO while framing assessment u/s. 143(3) of the Act for AY 2005-06 agreed with submissions of assessee that adjustment made on September, 30, 2000 of debit balance in P&L Account against share premium account and revaluation reserve will not be considered while computing book profit and allowed deduction of brought forward losses of Rs.272.15 crore, which was lower than unabsorbed depreciation. AO considered statutory auditor's certificate dated December 3, 2007, which is to the effect, that without considering adjustment made on September 30, 2000 of debit balance in the Profit and Loss Account against Share Premium Account and Revaluation Reserve, brought forward loss as on March 31, 2004 was Rs.272.15 crore and unabsorbed depreciation was Rs.331.43 crore. For assessment year 2006-07 issue involved herein, that assessee persisted with same stand and in its computation of book profit, adjusted the profit after depreciation of Rs.56.25 crore by identical amount claiming it to be an adjustment in terms of clause (iii) of Explanation to section 115JB(2) of the Act on account of brought forward loss. The assessee claimed that brought forward loss was Rs.246.53 crore which was lower than the amount of unabsorbed depreciation and as such the profit of Rs.56.25

crore for the assessment year 2006-07 was correctly reduced by brought forward loss. In support of its stand, assessee drew attention of AO to qualified auditors' report in respect of accounts as on September 30, 2000 with regard to adjustment made in terms of sanctioned scheme and explained reasons for statutory auditors' qualification. Assessee contended that the adjustment of debit balance in Profit and Loss account with Share Premium Account and Revaluation Reserve was contrary to accounting standards/principles and was not to be taken into account in computing the book profit under section 115JB of the Act. It was contended that provisions of sanctioned scheme did not bind computation under the Act and the computation had to be made in accordance with provisions of section 115JB of the Act which assessee had followed. AO, however, did not agree and held that assessee was seeking an adjustment which was not permitted for assessment year 2006-07 and that there was no scope for going beyond figures of brought forward loss or unabsorbed depreciation as per books of account of assessee. AO could not reverse adjustment of loss with Revaluation Reserve and Share Premium Account made in F.Y. 1999-2000. According to AO, section 115JB of the Act did not enable AO to resort to any provision of the Companies Act, 1956 and to the audited accounts and held that assessee had only unabsorbed depreciation of Rs.34.09 crore and there was no brought forward loss and as such no adjustment in terms of clause (iii) of the Explanation to section 115JB (2)of the Act could be made. The assessee's accounts were audited and certified by auditors and same were adopted by Annual General Meeting of assessee-company approving final accounts. AO held that no recalculation in terms of sub-section (2) of section 115JB of the Act could be made in view of the decision of the Hon'ble Supreme Court in CIT v Apollo Tyres Ltd (2002) 255 ITR 273 (SC). He further held that computation of book profit under section 115JB of the Act for assessment year 2005-06 and loss/depreciation shown as carried forward therein was not binding upon him. He stated that principle of res judicata will not be applicable to income tax proceedings and observed that remedial measure was being taken for assessment year 2005-06. Similar are observations made by AO in assessment year 2007-08. As observed above, the CIT(A) in AY 2006-07 allowed the claim of the assessee and in AY 2007-08 confirmed the action of AO.

8. Ld. Senior counsel appearing for revenue Shri M. P. Agarwal argued on behalf of revenue, supported orders passed by AO for two years and order of CIT(A) for assessment year 2007-08. He argued that the scheme was sanctioned by Hon'ble High Courts and was binding on all concerned and book profit under section 115JB of the Act could not be computed contrary to orders passed by Hon'ble High Courts as that would amount to contempt of court.

He further stated that books of account did not show any brought forward loss and no adjustment in terms of clause (iii) of the Explanation to section 115JB(2) of the Act was called for. He heavily relied on decisions of Hon'ble Supreme Court in the case of Apollo Tyres (supra) and also in the case of Malayala Manorama Co. Ltd. Vs. CIT (2008) 300 ITR 251 (SC) and stated that AO had only power of examining whether the books of account were certified by the authorities under Companies Act as having been properly maintained in accordance with Companies Act. He stated that in instant case, books of account were so certified and as such, AO had no jurisdiction to go beyond the net profit shown in Profit and Loss Account or to make any adjustment not provided for by Explanation to section 115JB(2) of the Act. Ld. Counsel Shri M. P. Agarwal cited several decisions in support of proposition that res judicata was not applicable in taxation matters and determination made by AO for assessment year 2005-06 was not binding in any subsequent year. He further argued that, in any event, such determination was erroneously made and had since been rectified under section 154 of the Act by an order dated April 18, 2011. In support of contempt of court Shri M. P. Agarwal cited the case law of Hon'ble Supreme Court of R. L. Kapur Vs. State of T. N. AIR 1972 SC 858 and referred that jurisdiction conferred on High Courts under Art. 215 to punish for contempt itself is a special one, not arising or derived from Contempt of Court Act, 1952 and therefore, not within the purview of Penal Code. Such a position is also clear from provisions of Contempt of Courts Act. The effect of sec. 5 of that Act is only to widen the scope of existing jurisdiction of a special kind and not conferring a new jurisdiction. So far as contempt of the High Court itself is concerned, as distinguished from that of a court subordinate to it, the Constitution vests these rights in every High Court, and so no Act of a legislature could take away that jurisdiction and confer it afresh by virtue of its own authority. That being the position, S. 25, General Clauses Act cannot apply. Further, High Court, as a court of record, being clothed with a special jurisdiction, has also all incidental and necessary powers to effectuate that jurisdiction. Consequently, it can order satisfaction of file imposed by it from out of an individual fund deposited by or on behalf of or for the benefit of the accused. In view of these arguments, Ld. Counsel Shri M. P. Agarwal stated that orders of AO in both assessment years be restored.

9. The learned senior counsel appearing on behalf of the assessee Shri J. P. Khaitan along with Shri R. Salarpuria, on the other hand, argued that the view taken by CIT(A) for assessment year 2006-07 was the correct view. He argued that scheme sanctioned by Hon'ble High Courts was primarily one of compromise between assessee and its lenders and bankers for adjustment or rescheduling of assessee's debts and rationalization of interest on working capital facilities

provided by banks. He stated that as part of assessee's debt restructuring exercise, Hon'ble High Courts permitted adjustment of debit in Profit and Loss Account against Share Premium Account and Revaluation Reserve. The statutory auditors of assessee had clearly mentioned in their report to shareholders that the adjustment, though made as per orders of Hon'ble High Courts, was not in accordance with generally accepted accounting practices. He argued that accounting standards did not permit adjustment of debit balance in Profit and Loss Account against Revaluation Reserve or Share Premium Account. For this argument Ld. Counsel drew attention to Guidance Notes issued by Institute of Chartered Accountants of India on treatment of reserve created on revaluation of fixed assets and Accounting Standard 10 relating to "Accounting for Fixed Assets". He elaborated that according to sub-section (1) of section 78 of Companies Act, 1956, provisions relating to reduction of share capital were applicable in respect of Share Premium Account as if Share Premium Account were paid up share capital of the company. According to him, scheme of arrangement neither provides for reduction of share capital of assessee nor provisions of Companies Act, 1956 in that behalf followed and further, assessee's case did not fall within any of exceptions specified in sub-section (2) of section 78 of Companies Act, 1956. Thus, adjustment of debit balance in Profit and Loss Account against Share Premium Account did not have statutory backing though permitted by sanctioned scheme as part of debt restructuring exercise. Merely because Hon'ble High Courts had permitted such adjustment, it did not imply that the same was in accordance with accounting standards or that books of account containing such adjustment were in conformity with the requirements of company law. The scheme sanctioned by Hon'ble High Courts, unlike a scheme sanctioned by Board for Industrial and Financial Reconstruction under provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (by virtue of section 32 of that Act), did not have any over-riding effect. A scheme of compromise and/or arrangement under sections 391 and 394 of the Companies Act, 1956 did not over-ride or dispense with provisions of any other law including Companies Act. Computation of book profit was required to be made strictly in accordance with section 115JB of the Act. In view of these Ld. Counsel stated that making such computation, adjustment made in terms of sanctioned scheme was not conclusive or binding. If, as in the instant case, adjustment made in the books of account was not in accordance with the accounting standards/principles and/or the provisions of the Companies Act, 1956, though permitted by scheme, the same was required to be excluded from consideration for arriving at correct amount of book profit. And he argued that statutory auditors' opinion that adjustment was not in accordance with the generally accepted accounting practices could not be ignored,

hence, CIT(A) in his order for assessment year 2007-08 failed to take note of auditors' opinion as regards to adjustment. Clause (iii) of the Explanation to section 115JB(2) of the Act required that any profit as shown in Profit and Loss Account prepared under 115JB (2) shall be reduced by the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account. Sub-section (2) of section 115JB of the Act required that Profit and Loss Account should be prepared in accordance with provisions of Parts II and III of Schedule VI to the Companies Act, 1956. The books of account adverted to in clause (iii) must be proper books of account in conformity with the law and accounting standards/principles within the meaning of the Companies Act, 1956. Since adjustment in terms of clause (iii) was to be made in respect of losses/depreciation for past period, it was incumbent upon AO to take into consideration accounts for the past period. If any adjustment in the accounts of an earlier year affecting the amount of loss or depreciation had been stated to be not as per generally accepted accounting practices by the statutory auditors, it was incumbent upon AO to determine correct amount of loss/depreciation for the purposes of reduction in terms of clause (iii) of Explanation on the basis of statutory auditors' opinion. In terms of sub-section (6) of section 211 of the Companies, 1956, the Balance Sheet and Profit and Loss Account included notes thereon and documents annexed thereto and such notes and documents could not be ignored by AO in computing book profit under section 115JB. Ld. Counsel Sh J.P. Kaithan placed reliance on judgment of Hon'ble Delhi High Court in CIT v Sain Processing and Weaving Mills P Ltd (2010) 325 ITR 565 (Del) and on the decision of Mumbai Bench of Tribunal in DCIT v Bombay Diamond Company Ltd (2010) 33 DTR 59(Mumbai) (Trib) in support of proposition that where accounts were not prepared in accordance with Parts II and III of Schedule VI to the Companies Act, 1956, AO had powers to go beyond book profit as per audited accounts. It was argued that though principle of res judicata was not applicable in taxation matters, but rule of consistency required that a different view should not be taken in a subsequent year on the self-same facts and law. Relying upon the said principle, it was argued that AO should not have for the assessment years 2006-07 and 2007-08 departed from the view taken by him in assessment year 2005-06, which was a reasonable one. It was further stated that rectification subsequently made for assessment year 2005-06 was without jurisdiction and had been appealed against by assessee.

10. Assessee also filed its return for assessment year 2007-08 computing its book profit following same basis as in preceding years. The profit for assessment year 2007-08 of Rs.182.34 crore was adjusted against the carried forward loss of Rs.190.37 crore and book

profit was returned as 'nil'. Before AO, assessee cited the decision of CIT(A) for assessment year 2006-07. However, AO reiterated the view taken by him in assessment year 2006-07 was subject matter of appeal before Tribunal. Assessee preferred an appeal before CIT(A) who did not agree with his predecessor and took the view that sanctioned scheme had over-riding effect and was binding on all concerned and had to be totally implemented. Whether the scheme was in accordance with the provisions of company law was not relevant. Once effect was given to sanctioned scheme and adjustment had been made, book profit had to be computed with reference to the adjusted figures as appearing in the books of account and adjustment could not be ignored. He further held that the books of account of assessee for the previous year 2006-07 were duly audited and the audited balance sheet and profit and loss account of assessee as on March 31, 2007 were certified by auditors to be in agreement with books of account according to which assessee did not have any accumulated losses and its book profit was Rs.182.34 crore. He therefore held that no further quantification was required to be made and since there was no brought forward loss as per books, no deduction was to be made.

11. The facts are not in dispute and both parties agreed on facts.

The principal questions are as to –

(i) Whether, in the given facts and circumstances of the case, assessee is entitled to deduction of brought forward losses for the purpose of computation of book profit u/s. 115JB of the Act in relevant assessment year 2006-07 as adjusted by AO in assessment year 2005-06, even though the losses have been liquidated by adjusting debit balance against share premium and revaluation reserve pursuant to scheme of compromise sanctioned by Hon'ble High Courts of Orissa and Gujarat as on September 30, 2000 in the normal computation of profit as per Profit and Loss Account of assessee.

(ii) Whether, in the given facts and circumstances of the case, for the purpose of computation of book profit adjustment under Explanation (iii) of section 115JB of the Act books of account are to be adjusted as per additional information in accordance with the provisions of Part II & III of Schedule VI of Companies Act, 1956.

The provisions enacted in Chapter XII-B i.e special provisions relating to certain companies are that if the assessee be a company and its total income determined under the Act in respect of previous year is less than specified book profit, fictionally it will be deemed that the total

income is chargeable to tax will be such book profit. This new Chapter XII-B, containing section 115J has been inserted by the Finance act 1987 w.e.f 1st April 1988 and this new section makes provision for levy of minimum tax on book profit of certain companies. This provision was enacted as a measure of equity, as certain companies which have, in fact, large profits in its books but, for the purpose of the Act, by virtue of various deductions which have been claimed, very little taxable income is disclosed. It is an effort to bring such type of companies within the taxable net that section 115J of the Act was inserted by Parliament. This is a deeming provision and fictionally it will be deemed total income chargeable to tax as per section 115J of the Act. Time to time after section 115J, the same was substituted by section 115JA, 115JAA of the Act and finally by section 115JB of the Act. We, after reading provisions of sub-section (2) of section 115JB of the Act, are of the view that this provision mandates that the Profit and Loss Account for the relevant previous year should be prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956. In terms of clause (iii) of Explanation to the sub-section, net profit as shown in such Profit and Loss Account is required to be reduced by the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account. The "books of account" adverted to in clause (iii) must be proper books of account which give true and fair view as required by section 209 of the Companies Act, 1956. The Profit and Loss Account and Balance Sheet have to be in agreement with the books of account. The Profit and Loss Account and Balance Sheet have to comply with the accounting standards. Profit and Loss Account prepared on the basis of books of account which are not proper books of account within the meaning of the Companies Act, 1956 or which is not in compliance with the accounting standards cannot be said to have been prepared in accordance with the provisions of the Companies Act. If such accounts have been commented upon by the statutory auditors and any entry therein is reported to be not in accordance with the accounting standards/principles or not in accordance with the provisions of the Companies Act, the computation of the book profit under section 115JB must take note of it and appropriately adjust book figures. The statutory auditors' report would naturally mention the fact since such accounting would be contrary to generally accepted accounting practices. We are of the view that assessee would be fully within provision of law to take note of auditors' report and adjust book figures so that they are in conformity with the accounting standards and provisions of Companies Act and to determine the correct amount of loss. Even Hon'ble Supreme Court in the case of Apollo Tyres (supra), has laid down the principle that whether books of accounts are certified by authorities under Companies Act as having been properly maintained in

accordance with Companies Act. Hon'ble Supreme Court in Apollo Tyres (supra) at page 280 of 255 ITR held as under:

> *"Therefore, we are of the opinion, the Assessing Officer while computing the income under section 115J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increases and reductions as provided for in the Explanation to the said section. To put it differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to section 115J."*
>
> (emphasis added)

But what if books of account are not so certified and statutory auditors have given a qualified report adversely commenting upon some accounting made by the company, assessee must then take note of auditors' qualification and make such working as is required so as to arrive at correct figures for the purpose of computing book profit. Even it is not disputed by Department that debit balance in Profit and Loss Account cannot be adjusted against Revaluation Reserve or Share Premium Account and that such adjustment is not in accordance with accounting standards/principles and provisions of the Companies Act, 1956. In the instant case, we are concerned with clause (iii) of the Explanation which refers to amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account, statutory auditors of assessee in their report to shareholders in respect of the accounts for 1999-2000 expressly stated that adjustment of debit balance in Profit and Loss Account against Share Premium Account and Revaluation Reserve was not in line with generally accepted accounting practices and thereby qualified their report. Because of said adjustment, accumulated losses of Rs.381.55 crore got reduced to nil though in normal course and in accordance with the generally accepted accounting practices, books of account should have continued to reflect said losses. Now, can AO computing book profit for assessment years 2006-07 and 2007-08 ignore statutory auditors' qualification in their report to shareholders on the ground that such qualification was contained in report for the year 1999-2000 and was not repeated in accounts for relevant previous years 2005-06 and 2006-07? In our view, since in terms of clause (iii), AO is required to look at amount of loss brought forward and unabsorbed depreciation as per books of account, he must take into account auditors' qualification even if expressed with reference to accounts of earlier year, where such qualification has a direct and immediate bearing upon the amount of loss brought forward and unabsorbed depreciation reflected or not reflected in books of account for relevant previous years under consideration before AO. Fact that auditors' qualification is not repeated in their reports in respect of accounts for relevant previous years under consideration

before the AO cannot be a reason for ignoring it particularly when it reflects upon the correctness of the amount of loss/unabsorbed depreciation appearing in books of account for relevant previous years. No doubt, in the instant case, assessee wants the AO to take into account the auditors' opinion in the earlier year for obtaining a tax advantage for itself. That however cannot make the principle to be applied any different irrespective of who stands to gain, if auditors' opinion in an earlier year reflects upon correctness of amount of loss/unabsorbed depreciation appearing in the books of account of a subsequent year, the AO must take into consideration such opinion and determine correct amount of brought forward loss/unabsorbed depreciation in computing the book profit of such subsequent year.

12. Another facet of argument is as regards the effect of orders of Hon'ble High Courts sanctioning the scheme of compromise/arrangement which provided for adjustment. In our view, Company Court whilst sanctioning scheme under sections 391 and 394 of Companies Act, 1956 does not determine how company before it should be assessed under provisions of the Act consequent to implementation of such scheme. That is a matter which can only be decided in appropriate proceedings under the Act. A scheme sanctioned under sections 391 and 394 of Companies Act does not have any over-riding effect or dispense with provisions of any other law including Companies Act. Such a scheme, unlike a scheme sanctioned by BIFR under provisions of SICA, is not conclusive or binding in an income tax assessment. The effect of any accounting made on the basis of scheme of compromise/arrangement under Companies Act, 1956 will have to be independently judged in accordance with provisions of the Act in assessment and subsequent proceedings. Supposing sanctioned scheme permits an assessee to account for expenditure on capital account as a revenue expense and result is that book losses stand increased and statutory auditors adversely comment on such accounting in their report, can AO still compute book profit for making income tax assessment not taking view that having regard to auditors' opinion, he will consider only loss as per books of account excluding capital item permitted to be treated as revenue expense? In our view, AO must take such a view. The primary duty of AO whilst computing book profit is to see that accounts have been maintained in accordance with the requirements of Companies Act and he would be failing in such duty if, inspite of the auditors' opinion, he does not appropriately adjust book figures to bring them in line with requirements of Companies Act.

13. We find that even Hon'ble Apex Court in the case of Indo Rama Synthetics (I) Ltd. Vs. CIT (2011) 330 ITR 363 (SC) held that the adjustment made in the P&L Account was primarily

in the nature of contra-adjustment in the P&L Account and not a case of effective credit in the P&L Account. According to Hon'ble Court the amount withdrawn from any reserve must in effect impact the net profit as shown in P&L Account and unless an adjustment has the effect of increasing net profit as shown in P&L Account, that entry cannot be said to be a credit to P&L Account and, therefore, though the amount has been literally credited to P&L Account but in substance there was no credit to P&L Account. Hon'ble Court noted that though profit was not impacted, depreciation as the head of account was impacted and by interplay of Balance Sheet items with P&L Account items, assessee had sought to project the loss as profit. Hence, Hon'ble Court ruled that as the amount of revaluation reserve had not gone to increase the book profit at the time it was created, reduction sought by assessee under clause (i) to Explanation u/s. 115JB(2) of the Act in respect of depreciation had rightly been rejected by AO. Hon'ble Supreme Court in Indo Rama Synthetics (I) Ltd (supra) held as under:-

> *We agree with the Assessing Officer. Under the provisions, as they then existed, certain adjustments were required to be made to the net profit as shown in the profit and loss account. One such adjustment stipulated that the net profit shall be reduced by the amount(s) withdrawn from any reserves, if any such amount is credited to the profit and loss account. Thus, if the reserves created had gone to increase the book profits in any year when the provisions of section 115JB were applicable, the assessee became entitled to reduce the amount withdrawn from such reserves if such withdrawal is credited to the profit and loss account. Now, from the above facts, it is clear that neither the said amount of Rs. 288,58,19,000 nor Rs. 26,11,74,000 had ever gone to increase the book profits in the said year ending March 31, 2000 (being the financial year). Thus, when such amount(s) has not gone to increase the book value at the time of creation of reserve(s), there is no question of reducing the amount transferred from such revaluation reserves to the profit and loss account. Thus, the proviso to clause (i) of the Explanation to section 115JB(2) comes in the way of the claim for reduction made by the assessee. In our view, the reduction under clause (i) to the Explanation could have been availed of only if such revaluation reserve had gone to increase the book profits. As the amount of revaluation reserves had not gone to increase the book profits at the time it was created, the benefit of reduction cannot be allowed. One more fact needs to be high- lighted. In this case, as indicated above, the revaluation reserve stood created during the earlier assessment year 2000-01. It has been vehemently argued on behalf of the assessee that creation of such reserve did not impact the profits of that year. The facts enumerated hereinabove shows that though the profit was not impacted, depreciation as the head of account was impacted. By inter play of the balance-sheet items with the profit and loss account items the assessee, as stated above, has sought to project the loss of Rs. 7,38,09,000 as profit of Rs. 18,73,65,000.*
>
> *Conclusion*
>
> *For the above reasons, we see no reason to interfere, hence, the civil appeal filed by the assessee shall stand dismissed with no order as to costs."*

But facts, in present case before us, are reverse that assessee liquidated losses by adjusting debit balance against share premium and revaluation reserve pursuant to scheme of compromise

sanctioned by Hon'ble High Courts of Orissa and Gujarat as on September 30, 2000 in the normal computation of profit of the assessee and now for computation of book profit u/s. 115JB of the Act it has claimed reduction of brought forward losses earlier liquidated by debiting against share premium and revaluation reserve. In view of this fact, we are of the view that for the purpose of computation of book profit for the purpose of adjustment under Explanation (iii) of Section 115JB of the Act, books of account are to be adjusted in view of loss liquidated by adjusting debit balance against share premium and revaluation reserve in accordance with provisions of Part II & III of Schedule VI of Companies Act, 1956. Tribunal in the case of Bombay Diamond Co. Ltd. (Supra) in similar circumstances has held as under:

> *"16. We have considered the rival submissions made by both the sides, perused the orders of the AO and the C1T(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the assessee in the impugned assessment year has earned gross profit of Rs. 10,38,13,765 on account of sale of its rights in an immovable property. There is also no dispute to the fact that this income has not been passed through the P&L a/c but has directly been taken to the balance sheet as capital reserve. According to the AO since the assessee has not prepared its accounts in the manner provided in Part II and Part III of Sch. VI to the Companies Act, therefore, the amount of Rs. 10,38,13,765 having not routed through the P&L a/c has to be added to the book profit for the purpose of provisions of s. 115JB. It is the submission of the learned counsel for the assessee that in view of the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra), the decision of the Hon'ble Bombay High Court in the case of Kinetic Motor Co. Ltd. (supra) and the decision of the Co-ordinate Bench of the Tribunal in the case of Orson Trading (P) Ltd. (supra) the AO has no power to go beyond the accounts adopted in the AGM.*
>
> *17. We find Part II and Part III of Sch. VI to the Companies Act read as under:*
>
> *"PART II*
>
> *Requirements as to P&L a/c*
>
> *1. The provisions of this part shall apply to the income and expenditure account referred to in sub of s. ( ) of s. 210 of the Act, in like manner as they apply to a P&L a/c, but subject to the modification of references as specified in that sub-section.*
>
> *2. The P&L a/c –*
>
> *(a) shall be so made out as clearly to disclose the result of the working of the company during the period covered by the account; and*
>
> *(b) shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature.*
>
> *3. The P&L a/c shall set out the various items relating to the income and expenditure of the company arranged under the most convenient heads; and in particular, shall disclose the following information in respect of the period covered by the account:*
>
> *(i)….*
>
> *(ii)….*
>
> *(xi) (a) The amount of income from investments, distinguishing between trade investments and other investments.*
>
> *(b) Other income by way of interest, specifying the nature of the income.*
>
> *(c) The amount of income-tax deducted if the gross income is stated under sub-paras (a) and (b) above.*

(xii) (a) Profits or losses on investments showing distinctly the extent of the profits or losses earned or incurred on account of membership of a partnership firm to the extent not adjusted from any previous provision or reserve.
Note : Information in respect of this item should also be given in the balance sheet under the relevant provision or reserve account.
(b) Profits or losses in respect of transactions of a kind, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount.
(c) Miscellaneous income.
(xiii) (a)….
(b)….
(xiv) …..
(xv) …..”

18. From a bare reading of the above it is clear that the P&L a/c of a company shall disclose every material feature including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of exceptional nature also. Further the company is also required to set out the various items relating to the income and expenditure of the company arranged under most convenient heads and disclosing profit or loss in respect of transactions of a kind not usually undertaken by the company or undertaken in circumstances of exceptional or non-recurring nature in amount.

19. However, in the instant case we find although the assessee has earned a profit of Rs.10,38,13,765 from the sale of rights in an immovable property the same has not been routed through the P&L a/c and has directly been credited to the balance sheet. Therefore, in our opinion, accounts are not prepared in •accordance with the manner provided in Part II and Part III of VI to the Companies Act.

20. The various decisions relied on by the learned counsel for the assessee are not applicable to the facts of the present case. In the case of Apollo Tyres Ltd. (supra) the question No. (i) before the Hon'ble Supreme Court was as under:

"(i) Can an AO while assessing a company for income-tax under s. 115J of the IT Act question the correctness of the P&L a/c prepared by the assessee company and certified by the statutory auditors of the company as having been prepared in accordance with the requirements of Parts II and III of Sch. VI to the Companies Act ?"

21. From the above it is clear that the issue before the Hon'ble Supreme Court was under the provisions of s. 115IJ and when the accounts of the company are prepared in accordance with the requirements of Part II and Part III of Sch. VI to the Companies Act. However, in the instant case the issue is relating to the provisions of s. 115JB and the accounts are not prepared in accordance with the provisions of Part II and Part III of Sch. VI to the Companies Act. Merely because the auditors have certified the accounts which apparently are not prepared in accordance with Part II and Part III of Sch. VI to the Companies Act, therefore, the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra), in our opinion is not applicable to the facts of the present case.

22. Similarly in the case of Kinetic Motor Co. Ltd. (supra) the assessee had debited an amount of Rs. 6,32,65,430 on account of depreciation on the basis of WDV which is one of the permissible methods under the Companies Act although the assessee used to provide the depreciation on the straight-line method in its corporate accounts. The above resulted in a book loss of Rs. 1,64,49,937. These accounts were certified to be true and fair by the auditors. The AO took the view that there was no justification for the assessee to change the basis of providing depreciation and reworked the depreciation

and arrived at a book profit of Rs. 2,22,10,525 as against the book loss of Rs. 1,64,49,937 which was confirmed by the Tribunal. On further appeal to the High Court, the Hon'ble High Court had held that under the Companies Act both straight-line method and written down method are recognised, therefore, once the amount of depreciation actually debited to the P&L a/c and was certified by the auditors it was not permissible for the AO to make book adjustments.

23. Thus from the above it is clear that the assessee has debited the depreciation in the P&L a/c as per one of the recognised methods. Further the issue before the Hon'ble High Court was under the provisions of s. 115J of the Act. However, in the instant case the assessee has bypassed the provisions of Part II and Part III of Sch. VI of the Companies Act and directly credited the profit to the reserve account. Therefore, the decision of the jurisdictional High Court is also not applicable to the facts of the present case. Similarly the decision of the Co-ordinate Bench of the Tribunal in the case of Orson Trading (P) Ltd. (supra) is also distinguishable and not applicable to the facts of the present case since it relates to the provisions of s. 115JA and it has not been held that even if the accounts are not prepared in the manner prescribed as per Part II and Part III of Sch. VI of the Companies Act, 1956, the AO has no power to disturb the book profit declared by the assessee.

24. The various other decisions relied on by the learned CIT(A) in his order are also not applicable. In none of the case it has been held that even where the accounts are not prepared in the manner provided as per Part II and Part III of Sch. VI to the Companies Act, 1956 the AO has no power to go beyond the book profit as per the audited accounts. In our opinion, the AO cannot go beyond the book profits as per the audited accounts provided they are prepared as per the manner in Part II and Part III of Sch. VI to the Companies Act, 1956 and are adopted in the AGM. However, in the instant case, admittedly the accounts are not prepared in the manner provided in Part II and Part III of Sch. VI to the Companies Act, 1956 since the profit on sale of investments amounting to Rs. 10,38,13,765 which is a material amount, has not been routed through the P&L a/c. Therefore, the AO, in our opinion has the power to re-work the book profit by recasting the accounts in the manner provided as per Part II and Part III of Sch. VI to the Companies Act, 1956. In this view of the matter, the order of the CIT(A) on this issue is set aside and that of the AO is restored."

14. To sum up, in our view, in computing the book profit for the assessment years 2006-07 and 2007-08, the assessee was entitled to deduction in terms of clause (iii) of the Explanation to section 115JB(2) of the Act the adjustment of debit balance in the Profit and Loss Account with share Premium Account and Revaluation Reserve made on September 30, 2000, which is required to be excluded from consideration and accordingly, AO is required to determine amount of loss brought forward or unabsorbed depreciation for each of years without taking said adjustment into consideration and allow deduction in respect of lesser of two amounts. Hence, both questions framed by us are answered in favour of assessee on the given facts and circumstances of the case. In view of the above facts and circumstances, we allow this issue in favour of assessee and against revenue.

15. The next common issue in these appeals of revenue in ITA No.1470/K/2009 for Assessment Year 2006-07 and ITA No.1417/K/2010 for Assessment Year 2007-08 is as regards to the order of CIT(A) deleting the addition made u/s. 40A(9) of the Act on account of expenditure incurred for running school and other facilities. For this, revenue has raised the following ground no.1 in Assessment Years 2006-07 and 2007-08:

> *"A.Y. 2006-07:*
> *1. That Ld. CIT(A) has erred in deleting addition made u/s. 40A(9) of the Act of Rs.11,92,645/- on account of expenditure incurred for running school and other facilities.*
>
> *A.Y. 2007-08*
> *1)(i) That, the Ld. CIT(A),C-1, Kol has erred in deleting disallowance of Rs.12,25,190/- made u/s. 40A(9) when the assessee has failed to specify its business interest by making said donations.*
>
> *ii) That the Ld. CIT(A) has not considered that the assessee intended to diverse its profit by making such donation to school and the schools are run by the same group for making profit."*

16. Since facts are identical and grounds are common except variance in amount, we deal the issue by taking the facts in Assessment Year 2006-07. The brief facts leading to the above issue are that assessee made contribution to clubs and also contributed to school funds in running school which was included in employee's welfare expenses. The details of such expenses are as under:

1. Expenses & Subsidy to Staff Workers Club at Jaykaypura	*Rs. 1,35,170*
2. Expenses & subsidy to Ladies Club at Jaykaypuram, Sirohi	*Rs. 32,105*
3. Expenses for running school at Jaykaypuram	*Rs.10,25,370*
	Rs.11,92,645

17. The assessee before Assessing Officer contended that major payment to school was in the nature of subsidy to employees as the school is run being near to assessee's cement manufacturing unit at Jaykaypuram, Rajasthan. According to Assessing Officer, these expenses are directly falling under mischief of section 40A(9) of the Act and accordingly, he disallowed the same. Another reason for disallowance was that assessee was requested to submit details of students of school, school running expenses, number of employees' children admitted in school etc. but assessee could not submit any details. Hence, entire expenditure was disallowed by Assessing Officer. Aggrieved, assessee preferred appeal before CIT(A), who relying on ITAT's order for Assessment Year 1999-2000 allowed the claim of assessee vide para 2.2 of his appellate order as under:

> *"2.2. It was pointed out in the course of appeal proceedings that identical dispute in Assessment Year 2005-06 in appellant's own case was decided in favour of the assessee following ITAT's order in its own case in Assessment Year 1999-2000, which relied upon Kerala High Court judgment reported in 243 ITR 284. This ground of appeal is allowed consistent with the appellate order in the earlier assessment years."*

18. Before us, Ld. Sr. counsel Shri M. P. Aggarwal appearing for revenue stated that Tribunal's order for Assessment Year 1999-2000 is challenged before Hon'ble High Court and the same is pending for disposal. Hence, he stated that even assessee could not submit details, the CIT(A) wrongly allowed claim of assessee. On the other hand, Ld. Sr. Counsel for the assessee Shri J. P. Khaitan stated that CIT(A) has allowed assessee's claim relying on Tribunal's order in assessee's own case for Assessment Year 1999-2000 in ITA No.1315/K/2006 dated 19.3.2008 by dismissing revenue's appeal relying on Hon'ble Kerala High Court decision in the case of P. Balakrishnan Vs. Travancore Cochin Chemicals Ltd. (2000) 243 ITR 284. We in principle are in agreement with arguments of assessee and issue is covered in favour of the assessee by Tribunal's decision in assessee's own case, but keeping in view the fact that assessee could not furnish details of expenditure before Assessing Officer and even now before us, are of the view that let this issue be examined by Assessing Officer on facts. The assessee will produce details as required by Assessing Officer and Assessing Officer after considering the details, whether actually the assessee has incurred expenditure on school and club, will consider the claim. This issue of revenue's appeals for both Assessment Years is allowed for statistical purposes.

19. First issue in assessee's C.O. for Assessment Year 2006-07 is as regards to the order of CIT(A) upholding the action of Assessing Officer in adding notional interest. For this, assessee has raised the following ground no.1:

> *"1. On the facts and in the circumstances of the case Ld. CIT(A) erred in upholding Ld. Assessing Officer's unjustified action in adding notional interest of Rs.3,82,500 and Rs.5,00,000 and treating it as income of the appellant."*

20. We have heard rival contentions and gone through facts and circumstances of the case. We find that Assessing Officer while making addition of notional interest of Rs.3,82,500/- and Rs.5,00,000/- have listed following facts and reasons:

> *"The Assessee Company had made deposit of Rs.40 lacs. The assessee has submitted that "this represents deposit of Rs.1500000 given to M/s Oswal Food Limited which carried interest rate of 25.5% and Rs.2500000 to M/s HMG Financial Services Limited which carried interest rate of 20%. The two parties defaulted in repayment of the amount*

deposited and the legal case was filed by us. In view of the fact that principal deposit amount recovery itself was doubtful, we had not provided for the notional interest on the said deposit in the accounts under consideration and the amount principal was written off in the previous year relevant to Asstt Year 2006-07.

The facts/ status is the same which was recorded under Para 4 of Sec.143(3) order dt.29.12.2006 for Asstt. Year 2005-06 (t Page 672 of Paper Book dt.10.05.2010) which is as under:

Interest bearing — Inter-Corporate Deposits

	Amount Lac/Rs.
Oswal Foods Ltd. (Legal Suit Filed) — Interest on ICD was @ 25.50% p.a. — Notional Interest works-out to Rs.382500 for financial year Ending March 2004.	*3.82*
HMG financial Services Ltd.(Legal Suit filed) — Interest on ICD was @20% P.A. — Notional Interest works-out to Rs.500000 for Financial year Ending march 2004	*5.00*

The following is the status of legal cases filed in respect of the above referred two interest bearing Inter-Corporate deposits:

1) Oswal Foods Limited

On our filing legal case against the Company the Allahabad High Court passed an ex parte order in May 2001 for winding-up of the Company and official liquidator was ordered to be appointed. Oswal Food Ltd on knowing about the order passed by the Allahabad High Court made a recall application for stay of the ex parte order and the matter has yet to be taken up by the High Court.

ii) HMG Financial Services Ltd. (now known as M/s Ensources Pvt. Ltd.)

We had filed a petition for winding up of the Company. High Court passed a conditional order in March 2001 directing HMG Financial services to deposit Rs.40 lacs within 4 weeks from 9th March 2001. The said Company did not deposit the above amount but preferred an appeal before the division bench of Bombay High Court. The division Bench granted stay for deposit of Rs.40 lacs and the matter was remanded back to single Judge for further adjudication. The case is pending for adjudication.

The assessee submitted that the facts of legal cases in respect of above referred two interest bearing Inter Corporate deposits clearly show that it was rightly considered desirable by the management not an account for interest for the 12 months ending on 31.03.2006. Further that this method of accounting is also in line with AS-9 which provides that where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of any receipt, revenue recognition is to be postponed to the extent of uncertainty involved. The case facts clearly demonstrate that in view of legal cases pending it was uncertain whether the interest on the said inter- corporate deposits would ultimately be received or not. Therefore, there is no justification for bringing to the tax the notional interest as an income for the previous year relevant to the Assessment year 2006-07.

Since the assessee follows mercantile system of accounts the interest of Rs.382500/- on ICD of Rs.15 lacs given to M/s Oswal Food Products Ltd. and Rs.500000/- on ICD of Rs.25 lacs given to M/s H.M.G.financial Services Pvt. Ltd. definitely accrued at the year end especially because assessee had legal right in enforcing the collection of accrued amount. As such interest of Rs.882500/- is treated as income on accrual basis."

We find that this issue is squarely covered in favour of assessee and against the revenue by Tribunal's decision in earlier four years in assessee's appeal starting from Assessment Years 2001-02 to 2005-06 in ITA No759/K/2007, ITA No.2074/K/2007, ITA No.530/K/2008, ITA No. 531/K/2008 and ITA No.2124/K/2008. Respectfully following the Tribunal's decision in earlier years as cited above, we find that the facts are exactly identical, hence this ground of assessee's CO is allowed.

21. Next common issue in this C.O. of assessee and ground no.2 of assessee's appeal in ITA No.1275/K/2010 is against the order of CIT(A) in not adopting the opening WDV as computed for the purpose of allowance of depreciation. For this assessee has raised following ground no.2 in its CO and ground nos. 2 and 2.1 in its appeal being ITA No.1275/K/2010:

"C.O 69/K/2009

2. On the facts and in the circumstances of the case Ld. CIT(A) erred in not directing the Assessing Officer that for the purpose of computing the depreciation admissible for the Assessment Year 2006-07, the opening WDV (As on 01.04.2005) should be the same which was the closing WDV of the Asstt. Year 2005-06 (As on 31.3.2005) determined in Section 143(3) order for the Asstt. Year 2005-06 which inter alia includes WDV of the expenditure held to be capital in nature in various years prior to the Asstt. Year 2005-06."

ITA No.1275/K/2010

2.0. On the facts and in the circumstances of the case and in law, Ld. Commissioner of Income Tax (Appeals) Central-1, Kolkata erred in not appreciating that the depreciation of Rs.8552528 @ 15% on the WDV of Rs.57016850 as on 31.03.2006/01.04.2006 is available to the appellant company, being the expenditure on account of interest etc. incurred in earlier years for acquisition of capital assets, when such expenditure was held as capital expenditure in the earlier assessment years.

2.1 Not appreciating the fact that in earlier assessment years, depreciation on same was allowed by the Assessing Officer."

22. We have heard the rival contentions and gone through facts and circumstances of the case. We find that Ld. Counsel for the assessee stated that in the return of income for earlier years interest, for the purpose of acquisition of capital assets had been claimed as revenue expenditure which was held as capital expenditure in the assessment order passed u/s 143(3) of the Act. The Hon'ble ITAT also upheld the view of Assessing Officer to treating the same as

capital expenditure. No further appeal against the order of Hon'ble ITAT has been preferred by the assessee company. Consequential to such treatment, Assessing Officer has consistently allowed depreciation on such expenditure as per Rules upto Assessment Year 2005-06 in orders passed u/s 143(3) of the Act. However, for AY 2006-07, instead of allowing depreciation on W.D.V as on 31.03.2005 as per assessment order for AY 2005-06, Assessing Officer erred in allowing depreciation as per return which does not factor the above mentioned treatment of interest capitalization. Hence, Ld. Counsel stated that suitable directions may be given to the Assessing Officer to rectify the depreciation amount in assessment order for AY 2006-07. We are of the view that opening WDV for A.Y 2006-07 (i.e. as on 31.03.06) has necessarily to be the closing WDV of the immediately preceding year (i.e. As on 01.04.06) which the A.O. in his order dated 19,12,2007 for A.Y 2005-06 has recorded at Rs.1557645289. The A.O will recompute the depreciation allowable for A.Y 2006-07 by adopting the opening WDV at Rs.1557645289. Accordingly, this issue of the assessee's appeal is allowed for statistical purposes.

23. The next common issue in this C.O. and ITA No.1275/K/2010 of assessee is against the order of CIT(A) upholding the action of Assessing Officer charging interest u/s. 234B of the Act. For this, the assessee has raised following ground no.3 in its CO and following ground No.3.0 in its ITA No.1275/K/2010 :

> *"C.O. No.69/K/2009*
> *3. On the facts and in the circumstances of the case Ld. CIT(a) erred in not holding that the provisions of Sec. 234B of the Act are not applicable since in the impugned order dt. 05.12.2008 passed u/s. 143(3), the tax payable was computed u/s. 115JB of the Act.*
>
> *ITA No. 1275/K/2010*
> *3.0. On the facts and in the circumstances of the case and in law, Ld. CIT(a), Central-1, Kolkata erred in not directing the Assessing Officer not to charge interest u/s. 234B and u/s. 234D of the Act on tax computed u/s. 115JB of the Act as the provisions of these sections are not attracted in a case where total income is computed and determined u/s. 115JB of the Act."*

24. We have heard rival submissions and gone through facts and circumstances of the case. We find that the issue is covered in favour of revenue and against the assessee by the decision of Hon'ble Apex Court in the case of JCIT Vs. Rolta India Ltd. (2011) 330 ITR 470 (SC), wherein Hon'ble Court has held that it is clear from reading sections 115JA and 115JB of the Act that the question whether a company which is liable to pay tax under either provision does not assume importance because specific provision is made in the section saying that all other provisions of the Act shall apply to a MAT company (section 115JA(4) and section 115JB(5)).

It was further held that amendments have been made in the relevant Finance Acts providing for payment of advance tax under sections 115JA and 115JB of the Act and section 234B of the Act is clear that it applies to all companies and further pre-requisite condition for applicability of section 234B of the Act is that the assessee is liable to pay tax under section 208 and the expression "assessed tax" is defined to mean the tax on the total income determined under section 143(1) of the Act or under section 143(3) of the Act as reduced by the amount of tax deducted or collected at source. Thus, Hon'ble Apex Court held that there is no exclusion of section 115J / 115JA of the Act in the levy of interest under section 234B of the Act of the Act and the expression "assessed tax" is defined to mean the tax assessed on regular assessment which means the tax determined on the application of section 115J / 115JA of the Act in the regular assessment and interest under section 234B of the Act of the Act is payable on failure to pay advance tax in respect of tax payable under section 115JA of the Act. Similar is the view in respect to chargeability of interest u/s. 234C of the Act. Respectfully following the aforesaid decision of Hon'ble Apex Court in the case of Rolta India Ltd. (supra), we do find infirmity in the order of CIT(A) and the same is hereby upheld. Grounds of Appeal and C.O. of assessee are dismissed.

25. The next issue in this CO of assessee is against the order of CIT(A) in not allowing credit available for earlier years u/s. 115JAA of the Act. For this, the assessee has raised following ground no.4:

> *"4. On the facts and in the circumstances of the case Ld. CIT(A) erred in not directing the Assessing Officer that the tax computed as payable u/s. 115JB in the impugned order dt. 05.12.2008 passed u/s. 143(3) should have been quantified as available for credit u/s. 115JAA of the Act and is to be carried forward/set off in accordance with provisions of Sec. 115JAA of the Act."*

26. We have heard rival contentions and gone through facts and circumstances of the case. We find that the CIT(A) has dismissed the issue by stating as under:

> *"Since ground no.3 is allowed, ground No. 5 and 6 do not remain relevant. They are treated as dismissed."*

But we are of the view that MAT credit quantification as made in the order u/s. 143(3), which is to be carried forward/set off in accordance with the provisions of section 115JAA of the Act, is to be further carried forward accordingly. Accordingly, we direct the AO to make quantification of the same as per the provisions of section 115JAA of the Act. Accordingly, AO will quantify the MAT credit.

27. The next issue in ITA No.1417/K/2010 of revenue's appeal is against the order of CIT(A) deleting the addition of notional interest in respect of H. M. Co. Financial Services Ltd. For this, revenue has raised following ground no.2:

> *"2.i) That the Ld. CIT(A) has erred in deleting addition on account of notional interest of Rs.88,25,000/- when Hon'ble High Court has directed M/s. H. M. Company Financial Services Ltd., a debtor to make payment to the assessee.*
>
> *ii) That, the Ld. CIT(A)-C-1, Kol has not considered that even if BIFR proceedings are going on in respect of both the debtors, there is hope of recovery."*

28. We have heard rival contentions and gone through facts and circumstances of the case. We find that this issue was decided by Tribunal in ITA No.1759/K/2007 vide order dated 9.10.2009 for Assessment Year 2001-02 and which was followed in subsequent four assessment years and held as under:

> *"6. We have considered rival submissions and material available on record. Hon'ble Allahabad High Court in the case of CIT Vs. Abbas Wazir (P) Ltd. (274 ITR 448) held as under:*
>
> > *"Held, that the Tribunal from the evidence and material on record had found that the financial position of the debtors had deteriorated to such an extent that even the chance of the principal amount being recovered was very dim. The Tribunal was justified in deleting the additions."*
>
> *Hon'ble Allahabad High Court in the case of Jwala Prasad Radha Krishna vs CIT [198 ITR 415) held as under:-*
>
> > *"Held, that the material on record showed that the assessee and the debtor-companies were sister concerns and that the assessee had stopped charging interest from the debtor-companies with effect from June 30, 1969, for the simple reason that the debtor-companies had run into financial straits and the debtor-companies had also stopped claiming deduction of interest. Further, the fact that the assessee had been paid interest by the debtor-companies for a few years could not by itself and without anything more justify the inference that there was some agreement between the parties for payment of interest. Hence, the Tribunal was justified in holding that no interest accrued to the assessee in the assessment year 1974-75."*
>
> *Hon'ble Rajasthan High Court in the case of CIT vs. Banswara Fabrics Ltd. [267 ITR 398] confirmed the order of the Tribunal in which C.I.T.(A) found in favour of the assessee that both the parties, in whose names the debit bàlances were shown in the books of account of the assessee, had incurred losses and cases were pending before the BIFR suggesting that both the parties had negative net worth of capital. The Ld. Commissioner (Appeals) came to the conclusion that when the recovery of principal itself was in doubt, the waiver of interest could be considered to be in the interest of business and not conferring any favour by transferring profits to the debtors. The departmental*

appeal was dismissed. Hon'ble Delhi High Court in the case of CIT vs. Goyal MG Gases P. Ltd. [303 ITR 159] held - when principal amount itself not recoverable and interest amount not recorded in the books of account, no real income accrued to the assessee by way of interest even if assessee was following mercantile system of accounting. Hon'ble Supreme Court in the case of Mercantile Bank Ltd. Vs. CIT [283 ITR 84] held that where, for the assessment year 1978-79, the assessee, which was following the mercantile system of accounting, had credited interest on doubtful advances to the interest suspense account, the interest could not be brought to tax.

7. Considering the facts and circumstances in the light of various judgments cited by both the parties at bar as well as noted above, it is clear that the proceedings of winding up as well as BIFR were going on against both the parties in different forum. Despite order by the High Court, the principal amount itself was not paid to the assessee, what to say of the interest. The above facts clearly suggest that in the assessment year in question as well as in the subsequent assessment years, the principal amount itself was in doubt for recovery. Therefore, there was no question of accruing any interest in favour of the assessee. Learned counsel for the assessee on the basis of the findings of various authorities has been able to point out that even the assets of the various parties have wiped out. Therefore, there was no real accrual of interest to the assessee. The above facts clearly prove that the financial position of the debtors had deteriorated to such an extent that even the change of principal amount being recovered was very dim. Despite orders of various authorities, the principal amount as well as interest is not paid to the assessee. No material is brought on record to show if assessee has been able to recover any amount of interest from the above parties. The authorities below have heavily relied upon the Notes on annual account filed with the return of income in which the assessee apart from what is recorded by the A.O. has also mentioned that for recovery of advance, legal and other actions have been taken. It would, therefore; show that there was no question of any hope of recovery of principal amount as well as interest on such loans. Since both the debtor-parties have defaulted in making payment of loans as well as interest to the assessee not only in the assessment year in question but in subsequent assessment year also, therefore, assessee was justified in not declaring interest income in the assessment year in question having regard to principle of real income. Our findings are supported by various decisions referred to above.

8. In this view of the matter, we do not justify action of the authorities below in sustaining the additions in the hands of the assessee. We, accordingly, set aside the orders of authorities below and delete the entire addition on this issue. As a result, ITA No.1759 (Kol)/2007 is allowed."

Since the issue is covered by Tribunal's order exactly on same facts, we confirm the order of CIT(A) deleting the addition of notional interest. This issue of revenue's appeal is dismissed.

29. The next issue in this appeal of revenue in ITA No.1417/K/2010 is regarding the order of CIT(A) allowing deduction u/s. 35(1)(ii). For this, revenue has raised following ground no.3:

"3.i) That, the Ld. CIT(A),C-1, Kol has erred in allowing deduction claimed u/s. 35(1)(ii) by the assessee on account of donation made to Pushpawati Singhania Research Institute (PSRI).

ii) That the Ld. CIT(A) has failed to consider that such associations requires to be notified and also to be approved for the time being by the appropriate authority. Mere notification is not sufficient for getting the allowance u/s. 35(1)(ii).

iii) That, the Ld. CIT(A) has erred in giving relief to the assessee in violation of Rule 46A of the Act."

30. We have heard rival contentions and gone through facts and circumstances of the case. We find that, according to Ld. Counsel for assessee, in the Paper Book Assessee has enclosed CBDT's Notification dated.12.04.2007, which notified the donee i.e. Pushpawati Singhania Research Institute under Section 35(1)(ii) of the Act and this Certificate was made effective retrospectively from 1.4.2001 which covers the year under appeal. There is no requirement that once the Notification is issued by the CBDT the said Institute has to be approved by any other authority. Once Notification is issued donor is qualified for weighted deduction referred in Sec.35 of the Act. He further submitted that there is no violation of Rule 46A since the relevant CBDT's Notification dated.12.04.2007 was produced before the Assessing Officer as recorded in Point No.9 of the Assessee's letter dated.22.07.2009 written to the AO and which has also been available in assessee's Paper Book. Since CBDT's Notification dated.12.04.2007, which approves donee i.e. Pushpawati Singhania Research Institute for the purpose of clause (ii) of section 35(1) of the Act and same was furnished by assessee during assessment proceedings, the CIT(A) has rightly deleted the disallowance as made by Assessing Officer. Accordingly, this ground of revenue's appeal is dismissed.

31. In the result, all the appeals as well as Cross Objection are partly allowed for statistical purposes.

32. Order pronounced in open court on 30.08.2011.

Sd/-
सी.डी.राव, लेखा सदस्य
(C. D. Rao)
Accountant Member

Sd/-
महावीर सिंह, न्यायीक सदस्य
(Mahavir Singh)
Judicial Member

(तारीख) Dated 30th August, 2011

वरिष्ठ निजि सचिव Jd.(Sr.P.S.)

आदेश की प्रतिलिपि अग्रेषितः- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – J. K. Lakshmi Cement Ltd., 7, Council House Street, Kolkata-700 001.
2 प्रत्यर्थी/ Respondent, ACIT, Central Circle-VI, Kolkata.
3. आयकर कमिशनर (अपील)/ The CIT(A), Kolkata
4. आयकर कमिशनर/CIT, Kolkata
5. वभागिय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy, आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.