

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'F' MUMBAI**

**BEFORE SHRI D. MANMOHAN (VICE PRESIDENT) &
SHRI T.R.SOOD, ACCOUNTANT MEMBER**

I.T.A.NO.6049/Mum/2010 – A.Y 2007-08

| | | |
|--|-----|--|
| The Income Tax Officer-7(3)(2), Mumbai. | Vs. | M/s United Estate P. Ltd., 1404, Arcadia, NCPA Marg, Nariman Point, Mumbai 400 020. PAN: AAACU 4558 Q |
| (Appellant) | | (Respondent) |
| | | |
| Appellant by | : | Mr. Subhachan Ram. CIT DR |
| Respondent by | : | Mr. V.C.Shah. |

Date of Hearing: 5-01-2012.

Date of Pronouncement: 03-02-2012.

ORDER

Per T.R.SOOD, AM:

In this appeal, assessee has raised the following two grounds:

1. "On the facts and circumstances of the case and in law the CIT(A) has erred in holding that the reserves created on revaluation of the assets of the amalgamated Company will not be added while calculating Book Profits for the purposes of Sec.1 15JB of the Act."
2. "On the facts and circumstances of the case and in law the CIT(A) has erred in not appreciating that clause(b) of the Explanation(1) of Sec. 11 5JB provides that for calculating book profit the profit as shown in the profit and loss account has to be increased by all reserves by whatever name called, other than a reserve specified u/s.33AC."

2. After hearing both the parties we find that during the assessment proceedings AO noticed that during the F.Y under consideration two companies viz., M/s United Real Estates and Buildings Pvt. Ltd. and M/s. Sukhsagar Developers Pvt. Ltd. [wholly owned subsidiaries of the assessee company] have been amalgamated

under the scheme of amalgamation vide order of the Hon'ble Bombay High Court dated 27-4-2007. These companies were amalgamated into M/s. United Estates Pvt. Ltd., i.e. the assessee company and as per the order of the High Court the effective date of amalgamation was 1-1-2007. The AO verified the profit & loss account and balance sheet of the assessee company and noted that in the balance sheet a reserve of Rs.39,79,89,292/- was credited by transfer the same from profit & loss account. The assessee was asked to explain as to why the same should not be added to the book profits as per the provisions of sec.115JB. In response to this show cause notice it was mainly pleaded that the assessee company prepared the accounts in accordance with Part II & Part III of Schedule VI of the Companies Act, 1956 and none of the provisions of sec.115JB have been violated while preparing the profit & loss account. The break up of the general reserve is as under:

| | |
|-------------------------------|--------------|
| (i) Share premium account | 1,40,00,000 |
| (ii) General Reserve | 38,32,08,934 |
| (iii) Profit and Loss Account | 7,80,348 |
| | ----- |
| Total | 39,79,89,282 |

It was contended that the said general reserve was created on the take over of M/s. United Estates Pvt. Ltd. and M/s.Sukhsagar Developers Pvt. Ltd. in pursuance of the scheme of amalgamation. As per the scheme the assets i.e. work-in-progress were valued at market value basis as per the valuation report which resulted in this reserve and the same has been accounted for in the books of accounts as per the scheme of amalgamation as approved by the Hon'ble High Court as

well as according to the Accounting Standards issued for amalgamation by the Institute of Chartered Accountants of India. It was clarified that debit in the profit & loss account was on account of value of work-in-progress and u/s.115JB and same could be adjusted only in respect of adjustments provided under Explanation 1 to sec.115JB and debit in respect of one work-in-progress was not included as one of the adjustments. The assessee has not debited any reserve to the profit & loss account. It was also argued that assessee has not earned any income on sale of any premises and, therefore, there being no income there was no question invoking provisions of sec.115JB. It was also submitted that as per clause (b) of Explanation 1 to sec.115JB only actual amount carried to reserve arising out of profit could be considered for adjustment and notional increase to reserve by way of revaluation of work-in-progress could not be considered under the same clause. It was also clarified that work-in-progress consisted of cost of work-in-progress acquired on amalgamation and no further cost was incurred. It was also contended that in view of the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT [255 ITR 273], it was not open to the Assessing Officer to re-scrutinize the accounts to verify whether the same have been prepared in accordance with the provisions of the Companies Act. Reliance was also placed on the decision of the Hon'ble Bombay High Court in the case of Kinetic Motor Co. Ltd. vs. DCIT [262 ITR 330]. The AO after examining the above submissions noted that a general reserve

amounting to Rs.39,79,89,282/- has been credited in the balance sheet by transferring the same from profit & loss account. Further a sum of Rs.47,39,19,646/- has been debited to profit & loss account. Out of the above a sum of Rs.39,79,89,282/- has been credited as reserve. The AO also observed that the decisions of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT [supra], and also of Bombay High Court in the case of Kinetic Motor Co. Ltd. vs. DCIT [supra], were of no relevance because he has not altered or disturbed the profit & loss account given by the company. Thereafter he computed the book profits u/s.115JB as under:

| <u>Computation of income u/s 115JB</u> | |
|---|-----------------------|
| Net profit as per P&L A/c | 43,883/- |
| Add:- | |
| Amount referred to in clauses (a) to (f) - of the explanation of Sub-section (2) of this section | |
| i) Provision for Tax | 56,000/- |
| ii) Amount carried to general reserve | <u>39,79,89,282/-</u> |
| Book Profit | Rs 398,089,165/- |
| 10% of the Book Profit | 398,08,917/- |

3. Before the CIT(A) it was mainly contended that the amalgamation was approved by the High Court of Bombay and as per the requirements of amalgamation, assets and liabilities have to be valued at fair market value and the same were valued on the basis of the report of a valuer as on 1-1-07 and the resulting difference due to this amalgamation was credited to general reserve on 1-1-2007. All these transactions have been incorporated in the profit & loss account and the profit & loss account mainly consists of value of work-in-progress received on amalgamation and current revenue transactions. It was argued that perusal of the profit & loss account would show that

no debit was made during the year on account of general reserve and accordingly AO has wrongly concluded that the general reserve amounting to Rs.39,79,89,282/- has been credited in the balance sheet by transferring the same from the profit & loss account. It was contended that Accounting Standards (AS-14) issued by the Institute of Chartered Accountants of India specified accounting for amalgamation provided as per clause 23 as under:

“The Scheme of amalgamation sanctioned under the provisions of the Companies Act,1956 or any other statute may prescribe the treatment to be given to the reserves of the transferor company after its amalgamation. Where the treatment is so prescribed; the same is followed.”

It was contended that assessee has simply followed the order of the High Court and gave the treatment to various items as ordered by the High Court. It was also argued that in any case sec.43C of the I.T.Act, 1961 which has been specifically enacted for valuation of assets in case of amalgamation provides that only the original cost of such assets had to be reckoned, which means any revaluation reserve has to be ignored. Since one could not make any profit on revaluation without any sale, there was no question of invoking the provisions of sec.115JB. Further reference may be made to sec.32 of the I.T.Act which deals with depreciation and clearly provides that when revaluation of fixed assets is done on amalgamation, same has to be ignored for the purpose of grant of depreciation. Reliance was also placed on the decision of Hon'ble Supreme Court in the case of Apollo

Tyres Ltd. vs. CIT [supra], for the proposition that AO has no power to scrutinise the accounts.

4. The Id. CIT(A) after considering the above submissions discussed various clauses of amalgamation scheme approved by the Hon'ble High Court and observed that no reserve has been credited and the excess or deficit in the amalgamation entries has been carried to the reserve account which is not a case of creation of reserve. He also observed that as per sec.43C cost of acquisition in case of amalgamation shall be the cost of asset to the amalgamating company and, therefore, any increase in the cost of assets due to amalgamation would be ignored. He also observed that one cannot make profit merely on revaluation of assets, therefore, same could not be considered for the purpose of sec.115JB and there cannot be any dichotomy between the provisions of sec.115JB and sec.43C(1). The Id. CIT(A) thereafter relied on the decisions of the Hon'ble Madras High Court in the case of CIT vs. M. CT. M. Corporation Pvt. Ltd. [221 ITR 524] and Hon'ble Supreme Court in the case of National Hydroelectric Power Corporation Ltd. vs. CIT [320 ITR 374], and held that additions on account of notional reserve to book profits were not maintainable and accordingly deleted the same.

5. Before us, Ld. DR submitted that the AO has not rescrutinised /recasted accounts, therefore, the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT [supra] has no relevance on the issue before us. He carried us through Explanation 1 (b) to sec.115JB

and pointed out that any amount carried to any reserve by whatever name called has to be added back. In case before us assessee has debited a sum of Rs.47,39,19,646/- in the profit & loss account but that amount also includes the amount of general reserve which was carried to the balance sheet. In this regard he referred to page-22 of the paper book which is the copy of the profit & loss account and also page 23 of the paper book which is copy of Schedule II of the balance sheet dealing with the reserves and surplus. He pointed out that, in fact, the reserve has been credited out of value of opening work-in-progress and, therefore, it is clear that by debiting the profit & loss account by a sum of Rs.47,39,19,646/- assessee has debited profit & loss account even by the amount of reserve, hence, same was clearly covered by the definition of clause (b) of Explanation 1 to sec.115JB. he also submitted that sec.43C has no relevance for computing the profits u/s.115JB.

6. On the other hand, Ld. Counsel of the assessee reiterated the submissions made before the CIT(A) and emphasised that no reserve has been debited to the profit & loss account. In fact, cost of work-in-progress has been revalued as per the valuation report and has been dealt with as per AS-14, which clearly recommends in the scheme of amalgamation treatment to various reserves have to be given as per the various statutory provisions and the scheme. The amalgamation was sanctioned by the Hon'ble High Court and copy of High Court's order is annexed in the paper book wherein it was clearly provided that

excess or deficit shall be credited by the transferee company to the general reserve or debited to the good will, as the case may be. He referred to page-19 of the paper book which is a copy of the journal entries made regarding work-in-progress, which resulted in surplus and has been carried to the general reserve and profit & loss account has not been debited for creation of this reserve and in this regard he referred to pages 22 as well as 41 of the paper book which are the copies of the profit & loss accounts. He also submitted that sec.43C which is applicable to amalgamation, clearly provides that cost of assets has to be taken at the same figure which was for the amalgamating company and increase, if any, has to be ignored. Therefore, assessee could not possibly make any profit merely on revaluation. The Ld. Counsel of the assessee relied on the decision of the Hon'ble Madras High Court in the case of CIT vs. M. CT. M. Corporation Pvt. Ltd.[supra] wherein it was clearly held that any transfer made during the amalgamation cannot give rise to any capital gain.

7. The Ld. Counsel of the assessee also submitted that clause (b) of Explanation 1 to sec.115JB was not applicable in the case before us because no amount has been debited to the profit & loss account. He submitted that the Hon'ble Supreme Court has clearly decided this issue by making similar observations in the case of National Hydroelectric Power Corporation Ltd. vs. CIT [supra]. Alternatively he submitted that addition by the AO on account of reserve also contains

a sum of Rs.1.40 crores on account of share premium account and Rs.7,80,348/- on account of credit balance in the profit & loss account which was merely a transfer entry and cannot be called a debit to the profit & loss account, because such amount already stood on the credit side of amalgamating company and therefore there is no justification for taking these amounts also into reserve account.

8. We have considered the rival submissions carefully. We agree with the submissions of the Ld. DR that the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT [supra] has no relevance because AO has not tried to recast the profit & loss account. Similarly, Ld. DR was right in pointing out that the decision of Hon'ble Madras High Court in the case of CIT vs. M. CT. M. Corporation Pvt. Ltd. [supra] is also of no relevance because that case was decided under the normal provisions of the Act and dealt with an issue whether where companies were amalgamated and allotment of shares on such amalgamation would result into any profit or not. Similarly, sec.43C is also of no relevance because though the section deals with the cost of assets during amalgamation and provides that cost of assets in case of amalgamation has to be reckoned only that cost which was incurred by the amalgamating company as increased by the cost of improvement etc. This means any revaluation has to be ignored but the whole provision deals with the normal provisions of computation and, in our opinion, has no relevance for determination of book profits.

9. The profit & loss account and balance sheet of the assessee company read as under:

P&L for year ended on 31st March 2007

| Particulars (Dr) | | Particulars (Cr.) | |
|--|-------------|---|-------------|
| Expenditure (Cost of properties sold) | 1,517,163 | Income Sale of developed properties | 1,615,000 |
| WIP Opening- NIL | | Other income | 2,046 |
| Add-Addition amalgamation- as per scheme of | 473,919,646 | Closing- Working in progress | 475,598,694 |
| Add — Direct Expenses incurred during the year | 168,915 | | |
| Add- expenses incurred during the year- | | | |
| Finance Cost- | 1,050,714 | | |
| Personnel expenses — | 328,729 | | |
| Depreciation | 83,362 | | |
| Provision for taxes | 56,000 | | |
| | 475,598,694 | | |
| Net Profit (after Taxation) | 43,883 | | |
| | 477,215,740 | | 477,215,740 |

Balance Sheet as on 31st March 2007

| Liabilities | | Asset | |
|------------------------|------------------------|---------------------------------|-------------|
| Share Capitals | 9,000,000 (100,000) | W.I.P. | 475,598,694 |
| Reserve and Surplus | 397,989,282 (NIL) | Current liabilities Advances | 38,626,878 |
| Total | 437,239,171 | Total | 437,239,171 |

This has been recasted in horizontal version at page 41A which is as under:

**UNITED ESTATES PVT. LTD.
FOR THE YEAR ENDED ON 31.03.2007**

| PARTICULARS | DEBIT Rs. | DEBIT Rs. | PARTICULARS | CREDIT Rs. | CREDIT Rs. |
|---|--------------|---------------------|----------------------------------|--------------|---------------------|
| To Stock of Ready Premises Flat at Jogeshwari project | | | By Sale of Flat | | 16,15,000 |
| | 12,40,000 | 1,24,000 | By Other income | | 2,046 |
| To Work in Progress of Amalgamated Companies | | | By Closing Work in Prog. | | |
| Project 1-Aqua Marine I | 24,00,00,000 | | Project 1-Aqua Marine I | 24,08,06,324 | |
| Project 2-Aqua Marine III | 23,00,00,000 | | Project 2-Aqua Marine III | 23,08,26,441 | |
| Project 3-United Tower Phase II | 13,12,355 | | Project 3 –United Tower Phase II | 13,52,860 | |
| Project-4 Kurla | 26,07,291 | 47,39,19,646 | Project 4-Kurla | 26,13,069 | 47,55,98,694 |
| To Direct Expenses | | | | | |
| Project 1-Aqua Marine I | 85,087 | | | | |
| Project 2-Aqua Marine III | 73,727 | | | | |
| Project 3-United Tower Phase II | 10,101 | 1,68,915 | | | |
| To Maint. Exp. of Flat in stock | | 2,77,163 | | | |
| To Finance Expenses | | 10,50,714 | | | |
| To Perssonel Expenses | | | | | |
| Salary | 45,000 | | | | |
| Travelling Exp. | 2,329 | 47,329 | | | |
| To Depreciation Exp. | | 83,362 | | | |
| To Administrative Expenses | | | | | |
| Auditors Remuneration | 52,807 | | | | |
| Legal & Professional Charges | 11,224 | | | | |
| Preliminary expenses W/O | 1,13,822 | | | | |
| Bank Charges | 6,211 | | | | |
| Insurance Expenses | 12,600 | | | | |
| Miscellaneous Expenses | 23,854 | | | | |
| Petrol Expenses | 57,213 | | | | |
| Telephone Expenses | 13,906 | | | | |
| Interest | 37,092 | 3,28,729 | | | |
| By Net Profit Transferred | | 99,883 | | | |
| TOTAL | | 47,72,15,741 | TOTAL | | 47,72,15,741 |

The case of the AO is that when the sum of Rs.47,39,19,646/- was debited to the profit & loss account it consisted the amount of reserve also. The Ld. DR mainly relied on this portion because as per clause (b) of Explanation 1 to sec.115JB amount carried to any reserve by whatever name called has to be considered for adjustment under clause (b) of Explanation 1 to sec.115JB. On the other hand, the case

of the assessee is that in view of the decision of the Hon'ble Supreme Court in the case of National Hydroelectric Power Corporation Ltd. vs. CIT [supra] this cannot be treated as a debit to the profit & loss account. In the case of National Hydroelectric Power Corporation Ltd. vs. CIT [supra] the head note of the decision reads as under:

“To make an addition under clause (b) of Explanation I to sec of the Income-tax Act, 1961, providing for taxing the book profit of certain companies two conditions must be jointly satisfied: (a) there must be a debit of the amount to the profit and loss account, and (b) the amount so debited must be carried to the reserve. Further, the reserve contemplated by clause (b) of Explanation 115JB(2) is required to be carried profit and loss account.”

The facts in this case as recorded by the Hon'ble Supreme Court in para-8 are as under:

“According to the Authority for Advance Rulings (AAR), the assessee supplied electricity at the tariff rate notified by CERC and recovered the sale price, which became its income; that, in future the said sale price was neither refundable nor adjustable against the future bills; that, the sale price (which includes AAD) was shown as "sales" in the P&L a/c; that, it was received in terms of the invoice raised by the assessee and, therefore, it was "income" in the year, of receipt. However, according to AAR, when it came to computation of book profit, assessee deducted the AAD component from total sale price and only the balance amount net of AAD was taken into P&L a/c and book profit. Consequently, AAR ruled (which is challenged herein) that reduction of AAD from the "sales" was nothing but a reserve which has to be added back on the basis of cl. (b) of Expln. 1 to s. 115JB of the IT Act, 1961 ("1961 Act", for short).”

After quoting the provisions of clause (b) of Explanation 1 to sec.115JB the Hon'ble Supreme Court observed that there was no debit in the profit & loss account and the amount did not enter into the stream of income for the purpose of determination of net profit and hence clause (b) of Explanation 1 to sec.115JB was not applicable.

10. Now let us see the facts of the case before us in the light of the above decisions. The AS-14 recommends the treatment of various reserves etc., as under:

“The Scheme of amalgamation sanctioned under the provisions of the Companies Act,1956 or any other statute may prescribe the treatment to be given to the reserves of the transferor company after its amalgamation. Where the treatment is so prescribed; the same is followed.”

The Hon'ble High Court while sanctioning the scheme has dealt with this issue in clause 13 and the issue regarding treatment of reserve is contained in clause 13.4 which reads as under:

“13.4 The excess or deficit, if any, remaining after recording the aforesaid entries shall be credited by the Transferee Company to general reserve or debited to goodwill, as the case may be.”

From the above it is clear that assessee has simply debited the amount of work-in-progress at the new value and therefore it cannot be said that it consists of reserve also. In fact, the reserve was generated because of the journal entries which have been extracted by the Id. CIT(A) at pages 11 to 13 which are as under:

On account of amalgamation of United Real Estate Buildings P.Ltd.

| Date | Details | Debit Rs. | Credit Rs. |
|----------|--|-------------|------------|
| 1-1-2007 | Deposit for Cellular Phone | 8,500 | |
| | Deposit - Universal Motors | 5,000 | |
| | Deposit Tata Tele Service | 500 | |
| | Fringe Benefit Tax (A '(2007-08) | 41,586 | |
| | Advance Income Tax (A.Y. 2006-07) | 614,537 | |
| | Advance Misc. to Staff | 194,000 | |
| | Prepaid Insurance Expenses | 44,656 | |
| | Interest Receivable | 40 | |
| | Proposed Societies A/C | 63,309 | |
| | ICICI Bank Ltd. | 3,787 | |
| | Development Credit Bank | 647 | |
| | Cash on Hand | 101,235 | |
| | At United Tower Jogeshwari | 1,240,000 | |
| | Work In Progress United Tower Phase II | 1,312,355 | |
| | Work In Progress Balmoral Villa | 230,000,000 | |

| | | |
|--|-------------|-------------|
| Work In Progress Kurla | 2,607,291 | |
| Fixed Assets | 1257,984 | |
| Investments - Eq Share - United R E & B P. | | |
| To Ltd.A/C | | 2,503: |
| To Pref. Share Capital A/C | | 200, |
| To Profit & Loss Account | | 874, |
| To ICICI Loan (Car Skoda) | | 834, |
| To Unsecured Loan United Estate P. Ltd. | | 14,080, |
| To United Builders | | 27,646, |
| To Kashmira M U Kaiser | | 1240, |
| To Abdul N Karedia | | 100, |
| To Akberali N Maknoja | | 1,600,(|
| To Amina A Merchant | | 150,(|
| To AminAMerchant | | 150,(|
| To Aziz Merchant | | 100,(|
| To Hafiza U Shama | | 200,(|
| To Imran N Maknoja | | 179,(|
| To Makson Realtors P. Ltd. | | 75,(|
| To Makson Trading & Invest P. Ltd. | | 75,C |
| To Mrs. Mumtaz N Masani | | 280,C |
| To Saizad N Maknoja | | 530,5 |
| To Shamim Merchant | | 100,0 |
| To Unimax Realtors P. Ltd | | 75,0 |
| To United Estate P. Ltd. | | 75,0 |
| To United Ressorts & Retreats P Ltd. | | 65,0 |
| To Utnited Shelters P. Ltd. | | 50,0 |
| To Usman J Shama | | 3,600,0 |
| To Yasmin R Karedia | | 300 0 |
| To telephone Expenses Payable | | 6,5 |
| To Professional Fees Payable | | 70,6 |
| To FBT Payable | | 18,8 |
| To Security Expenses Payable | | 67,4 |
| To TDS Payable | | 303,3 |
| To Rent & Maintenance Payable | | 209,4 |
| To Petrol Expenses Payable | | 5,0 |
| To Electricity Exp. Payable | | 2,5 |
| To BMC Assessment Tax Payable | | 6,0 |
| To Interest Payable | | 2,566,1 |
| To IncomeTax and FBT | | 18,0 |
| To FBT Tax Provisions (A Y 2007-08) | | 22,3 |
| To Income Tax Provisions (AY 2006-07) | | 300,0 |
| To FBT Tax Provisions (A Y 2006-07) | | 20,0 |
| To Income Tax Provisions (AY 2005-06) | | 243,4 |
| To General Reserve | | 178,552,670 |
| TOTAL | 237,495,427 | 237,495,427 |

On A/c of Amalgamation of Sukh Sagar Developers (P) Ltd.

| Date | Details | Debit Rs. | Credit Rs. |
|----------|---|-------------|-------------|
| 1-1-2007 | Deposit for Electric Meter Reliance Energy Ltd. | 7,900 | |
| | Advances to S G Enterprises | 100,000 | |
| | Cash on Hand | 2,656 | |
| | Balances with Scheduled Banks in Current accounts | 7,681 | |
| | Land - Aquamarine I Project | 240,000,000 | |
| | Computers | 40,000 | |
| | Profit & Loss Accounts | 116,542 | |
| | Preliminary Expenses | 99,300 | |
| | To Inv. Eq. Share - Sukh S D. P. Ltd. A/C | | 5,000,000 |
| | To Preference Share Cap. NC | | 200,000 |
| | To Unsecured Loan United Estate P. Ltd. | | 695,000 |
| | To Mr. Nizarali s maknojia | | 16,334,180 |
| | To Mrs. Karima N Maknojia | | 10,214,541 |
| | To Mrs. Mumtaz N Maknojia | | 1,133,999 |
| | To Meher Foundation | | 622,832 |
| | To Professional Fees Payable TDS Payables | | 20,204 |
| | To Interest Payable — | | 101,360 |
| | To Telephone Exp. Payable | | 938,159 |
| | To Security Exp. | | 750 |
| | To Electricity Exp. Payable | | 13,194 |
| | To BMC Assessment Tax | | 450 |
| | To M/S United Builders | | 788 |
| | To Depreciation on Computers | | 433,330 |
| | To General Reserve | | 9,030 |
| | TOTAL | 240,374,079 | 240,374,078 |

The Hon'ble Supreme Court clearly observed in the case of National Hydroelectric Power Corporation Ltd. vs. CIT [supra] that for making an addition under clause (b) of Explanation 1 to sec.115JB two conditions must be satisfied jointly. (1)(a) There must be a debit of the amount to the profit & loss account, (clause (b) of Explanation 1 to sec.115JB) the amount so debited must be carried to the reserve. Further, the reserve contemplated by clause (b) of Explanation 1 to sec.115JB is required to be carried through the profit & loss account.

The Hon'ble court also observed that there can be two types of reserves, namely, those that are routed through the profit & loss account and those which are not routed through the profit & loss account, e.g. capital reserve such as share premium account. Testing the facts on this touchstone it is clear that assessee has debited a sum of Rs.47,39,19,646/- which is the present market value of the work-in-progress which has been taken over and, therefore, it cannot be said that it consists of some portion of reserve also. Therefore, there is no debit for creation of reserve and hence reserve of Rs.39,79,89,282/- has not been carried through the profit & loss account. The debit of work-in-progress cannot be called a reserve. It is also to be noted that the Hon'ble Supreme Court observed that AAD which was before them was not appropriation out of profits. Similarly, creation of general reserve out of revaluation reserve cannot be said to be out of appropriation of profits. Therefore, in our opinion, the amount which was never routed through the profit & loss account and never debited to the profit & loss account could not be considered for the purpose of determination of book profits under clause (b) of Explanation 1 to sec.115JB. Accordingly, we confirm the order of the Id. CIT(A).

11. In the result, revenue's appeal is dismissed.

Order pronounced in the open Court on this day of 3/2/2012.

| | |
|-----------------------|--------------------------|
| Sd/- | Sd/- |
| (D.MANMOHAN) | (T.R.SOOD) |
| Vice President | Accountant Member |

Mumbai: 3rd Feb., 2012.

P/-*