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

[Before Hon'ble Sri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

I.T.A No.100/Kol/2011

Assessment Year : 2006-07

D.C.I.T-Circle-1, Kolkata	-vs.-	M/s. McNally Bharat Engineering Co.Ltd. Kolkata [PAN : AABCM 9443 R]
(Appellant)		(Respondent)

C.O.No.13/Kol/2011
(A/o I.T.A No.100/Kol/2011)
Assessment Year : 2006-07

M/s. McNally Bharat Engineering Co.Ltd., Kolkata [PAN : AABCM 9443 R]	-vs-	D.C.I.T., Circle-1, Kolkata
(Cross Objector)		(Respondent)

I.T.A No.532/Kol/2012
Assessment Year : 2007-08

D.C.I.T-Circle-1, Circle-1, Kolkata	-vs.-	M/s. McNally Bharat Engineering Co.Ltd. Kolkata [PAN : AABCM 9443 R]
(Appellant)		(Respondent)

I.T.A No.217/Kol/2012
Assessment Year : 2007-08

M/s. McNally Bharat Engineering Co.Ltd., Kolkata [PAN : AABCM 9443 R]	-vs-	D.C.I.T., Circle-1, Kolkata
(Appellant)		(Respondent)

I.T.A No.533/Kol/2012
Assessment Year : 2008-09

D.C.I.T-Circle-1, Kolkata	-vs.-	M/s. McNally Bharat Engineering Co.Ltd. Kolkata [PAN : AABCM 9443 R]
(Appellant)		(Respondent)

I.T.A No.218/Kol/2012
Assessment Year : 2008-09

M/s. McNally Bharat Engineering Co.Ltd., Kolkata [PAN : AABCM 9443 R] (Appellant)	-vs- D.C.I.T., Circle-1, Kolkata (Respondent)

For the Department : Shri Vijayendra Kumar, JCIT
For the Assessee : Shri Soumen Adak, FCA

Date of Hearing : 21.02.2017.
Date of Pronouncement : 01.03.2017.

ORDER

Per N.V.Vasudevan, JM

These group of cross appeals by the Revenue and the Assessee for AY 2006-07 to 2008-09 were heard together and involve common issues. We deem it convenient to pass a common order.

ITA No.100/Kol/2011(Revenue's appeal) & C.O.No.13/Kol/2011 (Assessee's Cross-Objection) A.Y.2006-07

2. ITA No.100/Kol/2011 is an appeal filed by the Revenue against the order dated 30.09.2010 of CIT(A)-I, Kolkata relating to A.Y 2006-07. The assessee has filed a Cross Objection against the very same order of CIT(A) which is C.O. 13/Kol/11.

3. Ground No.1 raised by the revenue in its appeal and the only ground of cross objection raised by the assessee in its Cross Objection can be conveniently disposed off together. These grounds read as follows :-

Ground of appeal of the Revenue:

"1. That on the facts and in the circumstances of the case Ld. CIT (Appeals) is not justified and erred in allowing leave encashment of Rs.13,82,121/- u/s. 43B of the IT Act."

Ground of appeal in C.O.No.13/Kol/2011

"1. That on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified and erred in disallowing provision for leave encashment amounting to Rs.44,57,282/- u/s 43B of the Act."

4. The Assessee is a company. It is engaged in the business of manufacture and sale of metallurgical machinery, materials handling and conveying plant/machinery/spares and coal washing plant on a turnkey contract basis. For A.Y.2006-07 the assessee filed return of income on 28.11.2006 declaring total income of 'Nil 'as per the normal provisions of the Act and book profits as per the provisions of section 115JB of the Income Tax Act, 1961 (Act) at Rs.5,71,66,526/-. The assessee had debited a sum of Rs.44,57,282/- in the profit and loss account on account of leave encashment which was outstanding on 31.03.2006. Under the provision of section 43B(f) of the Act any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee shall be allowed as deduction in computing the total income only in the year in which the sum is actually paid by him. In other words, the deduction on account of expenditure in the form of leave encashment paid by an employer to the employee cannot be allowed on the basis of the provision or on the basis of accrual under the mercantile system of accounting, made in the books of account and will be allowed only to the extent the leave encashment is actually paid to the employee by the employer. The plea of the assessee before the AO was that since section 43B(f) of the Act was declared unconstitutional by the Hon'ble Calcutta High Court in the case of Exide Industries Limited vs UOI 292 ITR 470 (Cal) provision for leave encashment thus based on proper estimate is a certain liability and should be allowed as deduction. The AO however after making a reference to the fact that an appeal against the decision of the Hon'ble Calcutta High Court in the case of Exide Industries Ltd. (supra) has been preferred

before the Hon'ble Supreme Court by the Revenue which has been admitted for adjudication, and the fact that in such appeal, the operation of the Hon'ble High Court of Calcutta has been stayed, was of the view that deduction on account of provision for leave encashment cannot be allowed as deduction.

5. Before CIT(A) the assessee, apart from reiterating its claim for deduction of the entire sum of Rs.44,57,282/- based on the decision of the Hon'ble Calcutta High Court in the case of Exide Industries Ltd. (supra) made an alternative submission that the assessee in any event should be allowed a deduction of Rs.13,82,121/- which was the leave encashment actually paid by the assessee from 01.04.2007 till the due date for filing the return of income u/s 139(1) of the Act. The CIT(A) accepted the alternative argument of the assesee and deleted the addition made by AO to the extent of Rs.13,82,121/-. Aggrieved by the order of CIT(A) allowing deduction to the extent of Rs.13,82,121/- the revenue has raised ground No.1 before the Tribunal. Aggrieved by the order of CIT(A) sustaining the addition of the remaining sum which was the provision made for leave encashment the assessee has filed the cross objection.

6. We have considered the rival submissions. As far as the ground of appeal of the revenue is concerned, we do not find any merits in the grounds of appeal raised by the revenue. The proviso to section 43B clearly lays down that nothing contained in section 43B(f) shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 of the Act, in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return. It is no doubt true that the assessee in the present case did not file the evidence regarding payment of Rs.13,82.121/- before the due date of filing the return of income u/s 139(1) of the Act by the assessee for the

relevant assessment year along with the return of income. Nevertheless the assessee had filed the details of payment of leave encashment before the due date of filing the return of income before the due date and the same is placed at page 29 of the assessee's paper book and the same has been given as **Annexure-1** to this order. The requirement of furnishing evidence of payment along with the return of income is only directory and is not mandatory. The ld. DR however submitted that the evidence of actual payment as given in page-29 of the assessee's paper book should be directed to be verified by the AO. We are of the view that it would be just and proper to uphold the order of CIT(A), however, with a direction that the payments said to have been made by the assessee as given in annexure-1 to this order should be verified by the AO and if the claim is found to be correct the deduction to that extent should be allowed. With these observations ground no.1 raised by the revenue is dismissed.

7. As far as the Cross Objection filed by the assessee is concerned, in view of the pendency of the constitutional validity of section 43B(f) of the Act before the Hon'ble Supreme Court, it would be just and proper to direct the AO to follow the ultimate decision that might be taken in the said proceedings and decide the grievance projected by the assessee in the cross objection. Thus the cross objection filed by the assessee is treated as allowed for statistical purposes.

8. Ground No.2 raised by the revenue reads as follows :-

> *"2. That on the facts and in the circumstances of the case Ld. CIT (Appeals) has erred in directing to delete the addition of Rs.99,237/-."*

9. The Assessee as an employer withheld the provident fund contribution payable by its employees from their salaries payable, as their share of contribution to PF. As per section 36(1)(va) of the Act, the sum so withheld as employees contribution to PF, if it is not paid on or before the due date as provided under the relevant law governing the

provident fund, will not be allowed as deduction. It is the plea of the assessee that the employees' contribution to PF had been paid by the assessee on or before the due date of filing the return of income for the relevant assessment year u/s 139(1) of the Act and therefore deduction claimed should be allowed as provided under the proviso to section 43B of the Act. The said plea of the assessee was rejected by the AO for the reason that the proviso to section 43B of the Act cannot be read into the provision of section 36(1)(va) of the Act.

10. On appeal by the assessee, the CIT(A) directed the AO to allow the claim of the assessee for deduction and in doing so, the CIT(A) followed the decision of the Hon'ble Delhi High Court in the case of CIT vs AIMIL Ltd. & Ors. 229 CTR 418 (Del) wherein it was held that employees' contribution to PF should be allowed as deduction which is paid on or before the due date of filing the return of income u/s 139 of the Act. Aggrieved by the order of CIT(A) the revenue has raised ground no.2 before the Tribunal.

11. At the time of hearing it was brought to our notice that the Hon'ble Calcutta High Court has also taken the view that employees' contribution to PF paid on or before the due date of filing the return of income u/s 139(1) of the Act should be allowed as deduction. In this regard the decision of the Hon'ble Calcutta High Court in the case of M/s. Akzo Nobel India Ltd. Vs CIT in ITA 110 of 2011 order dated 14.06.2016 and in the case of CIT vs Vijayshree Ltd., of the Hon'ble Calcutta High Court in GA No.2607 of 2011 order dated 06.09.2011 was filed before us. In the order in the case of Vijayshree Ltd., (supra), the Hon'ble Calcutta High Court held as follows :

> *"The only issue involved in this appeal is as to whether the deletion of the addition by the Assessing Officer on account of Employees'Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not. It appears that the Tribunal below, in View of the decision of*

the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified.

Being dissatisfied, the Revenue has come up with the present appeal.

After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec. 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nat.ure and is required to be applied retrospectively with effect from 1 st April, 1988.

Such being the position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.

We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal."

12. In view of the aforesaid decision of the Hon'ble Calcutta High Court, we do not find any merits in ground no.2 raised by the revenue and accordingly the same is dismissed.

13. Ground No.3 raised by the revenue reads as follows :-

"3. That on the facts and in the circumstances of the case Ld. CIT (Appeals) has erred in directing to delete the addition of Rs. 1,34,11,254/-. "

14. During the year under consideration, the company issued unsecured Foreign Currency Convertible Bonds(FCCB) amounting to Rs. 30 crores. At the time of issuance of FCCB, the Assessee had incurred an expenditure of Rs. 1,34,11,254/- in relation to above issue. During the course of assessment proceedings, the AO called upon the Assessee to explain as to why the said expenditure should not be treated as capital expenditure. In response to the said query, the Assessee filed detailed reply vide its letter dated 08-10-2009 contending that since expenditure has been incurred for

raising debts to be utilized for the purposes of business, the expenditure has to be considered as revenue in nature and allowable as deductible expenditure in computing total income.

15. Disregarding the above submission, the AO. in the order u/s 143(3) disallowed the expenditure incurred on issue of FCCB on the basis that since the expenses does not represent interest expenses, the same are not allowable. The AO further observed that since FCCBs are convertible into equity share, expenses incurred for such issue is in the nature of capital expenditure and not allowable as deduction in computing Total Income.

16. Before CIT(A) the assessee primarily placed reliance on the decision of the Hon'ble Rajasthan High Court in the case of CIT vs Secure Meters Ltd. (2010) 321 ITR 611 (Raj.) wherein it was held that debentures when issued are loans and whether it is convertible or non convertible does not militate against the nature of the debenture being in the nature of the loan and therefore expenditure incurred would be admissible as revenue expenditure. It was also brought to the notice of CIT(A) that SLP filed by the department against the aforesaid decision of the Hon'ble Rajasthan High Court was rejected. Further reliance was placed on the Hon'ble Mumbai ITAT in the case of Mahindra & Mahindra vs JCIT 36 SOT 348 (Mum) wherein it was held that the expenditure incurred on account of foreign currency convertible bonds (FCCB) would be admissible as revenue expenditure.

17. The CIT(A) on consideration of the above submissions was of the view that the expenditure in question has to be allowed as deduction. The following were the relevant observations of CIT(A):-

> "I have gone through the contention of the appellant and the A.O. and read through the judgments relied upon by the A/R. The matter has already been decided by the

Rajasthan High Court which has further been affirmed by the Apex Court. In the said case, it has been categorically held that the debentures when issued is a loan, whether it is convertible or non-convertible, does not militate against the nature of the debenture being loan. Therefore, the expenditure incurred would be admissible as revenue expenditure in the light of the judgment of the apex Court in the case of India Cements Ltd. Contention of the A.O, that aforesaid judgments relate to debentures and not FCCBs does not hold good as relying on the judgment of the Hon'ble Rajasthan High Court, Hon'ble Mumbai Tribunal has already held that FCCB expenses is an allowable expenditure. Since the issue under consideration is directly covered by the aforesaid judgments, the ground is allowed in favour of the appellant. The A.O. is directed to allow Rs. 1,34,11,254/- as revenue expenditure in computing Total Income."

18. Aggrieved by the order of CIT(A) the revenue has raised ground no.3 before the Tribunal.

19. Before us the ld. DR relied on the order of AO. The ld. Counsel for the assessee reiterated the submissions as were made before CIT(A). It was also brought to our notice that in assessee's own case in ITA No.840/Kol/2013 by order dated 15.07.2016 this tribunal allowed similar claim of the assessee.

20. We have considered the rival submissions. We are of the view that the issue in question is squarely covered by the decisions referred to by the assessee before CIT(A). The debentures whether convertible or non convertible are in the nature of loan at the time of their issuance and any expenditure incurred on issue of such debentures or bonds had to be regarded as part of the borrowing cost and have to be allowed as a deduction and as a revenue expenditure. This expenditure cannot be regarded as capital. We do not find any infirmity in the order of CIT(A) and accordingly ground no.3 raised by the revenue is dismissed.

21. Ground No.4 raised by the revenue reads as follows :-

"4. That on the facts and in the circumstances of the case Ld. CIT (Appeals) has erred in directing to delete the addition of Rs.2,15,00,000/-. "

22. The assessee entered into an agreement dated 11.08.1999 with M/s. Hooghly Mills Co.Ltd for purchase of the property owned by M/s. Hooghly Mills Co.Ltd at at Raja Santosh Roy Road, Kolkata. The assessee paid a sum of Rs.3 crores as advance at the time of the agreement for sale. It is the plea of the assessee that the property in question which was agreed to be purchased by the assessee was a land on which the assessee wanted to construct a building to be used as its office premises. However due to disputes the ultimate sale did not fructify. In full and final settlement, M/s. Hooghly Mills Co.Ltd., refunded only a sum of Rs.85 lacs, by way of refund of advance paid under the agreement of sale. The assessee thus incurred a loss of Rs.2,15,00,000/-. The cancellation of the agreement and repayment of Rs.85 lacs was in the month of May, 2004 and therefore the loss of Rs.2,15,00,000/- was written off in the books of account and claimed as a deduction while computing the total income of the assessee.

23. The AO was of the view that the loss in question was a capital loss and cannot be allowed as deduction as the advances in question was given for acquiring the capital asset. The AO in this regard made a reference to the decision of the Hon'ble Supreme Court in the case of Hashimara Industries Limited 230 ITR 927 (SC) wherein it was held that the deposit made by the assessee in connection with a leave and license agreement to work in a mill and loss due to irrecoverability of such deposit was to be regarded as a capital loss and not a business loss.

24. Before CIT(A) the assessee submitted that deduction u/s 28 or 37(1) of the Act is admissible for loss incidental to business and the only test to be satisfied is that the loss must arise from or spring directly from carrying on business. In other words, in order that loss occasioned from non-realisation of the advances should be allowed as business

loss, there must be nexus between the business and the loss which has been incurred by the assessee. The assessee pointed out that the property in question was intended to be purchased for the purpose of constructing office premises and was directly related to the business of the assessee and therefore the deduction claimed should be allowed. The assessee also distinguished the decision relied upon by the AO in the case of Hashimara Industries Ltd. (supra). The assessee pointed out that in the aforesaid decision the assessee deposited Rs.20,00,000/- and the property was handed over to the assessee on which the mills were run. The seller went into liquidation and subsequently the amounts were written off as bad debts by the assessee on account of incapacity of the seller to pay the same. The court held that by making a deposit of Rs.20,00,000/- the assessee had acquired licence of the cotton mill due to which the assessee was able to carry on the cotton business. Hence the loss suffered was on capital account and cannot be deducted as a business loss. It was pointed out that in the present case the Assessee did not acquire any capital asset and merely paid advance. The assessee also placed reliance on the decision of the Hon'ble Rajasthan High Court in the case of CIT vs Anjani Kumar Co. Ltd. 259 ITR 114 (Raj.) wherein it was held that advances made to agriculturist for purchase of land which was not refunded was a business loss and had to be allowed as deduction. Reliance was also placed on the decision of ITAT Mumbai in the case of Pik Pen Pvt. Ltd. Vs ITO in ITA No.6847/Mum/2008 order dated 28.01.2010 laying down the identical proposition.

25. The CIT(A) was of the view that the decisions relied upon by the assessee before him directly supported the plea of the assessee that the loss in question was a loss incidental to the business and was not a capital loss. He therefore held that the disallowance made by the AO cannot be sustained. Aggrieved by the order of CIT(A) the revenue has raised ground no.4 before the Tribunal.

26. We have heard the submissions of the ld. DR, who relied on the order of AO. The ld. Counsel for the assessee relied on the order of CIT(A).

27. We have given a very careful consideration to the rival submissions. We are of the view that order of the CIT(A) does not call for any interference. The decision of the Hon'ble Rajasthan High Court in the case of Anjani Kumar Co. Ltd. (supra) and the decision of ITAT, Mumbai in the case of Pik Pen Pvt. Ltd. (supra) clearly support the conclusions arrived at by CIT(A). As far as the decision of the Hon'ble Supreme Court in the case of Hashimara Industries Co.Ltd. (supra) is concerned, as rightly contended by the ld. Counsel for the assessee, in the aforesaid decision the assessee acquired right to carry on the business which itself was on capital account and the loss suffered on such capital account was also held to be a capital loss and not a business loss. In the present case the Assessee did not acquire any capital asset and merely paid advance for acquiring capital asset. We are therefore of the view that there is no merit in ground no.4 raised by the revenue and the same is dismissed.

28. Ground No.5 raised by the revenue reads as follows :-

> *"5. That on the facts and in the circumstances of the case Ld. CIT (Appeals) has erred in directing to exclude retention money of Rs. 28,87,72,022/- in computing total income under normal provision as well as in computing Book Profit u/s. 115JB."*

29. We have already seen that the assessee filed its return of income disclosing the total income as 'Nil 'under the normal provisions of the Act besides declaring book profits under the provision of section 115JB of the Act. In the proceedings before CIT(A) the assessee filed an additional ground of appeal where in the assessee claimed that a sum of Rs.28,87,72,022/- was retention money over which the assessee has no rights and therefore the sum in question cannot be considered as income both under the normal provision of the Act as well as while computing the book profit u/s 115JB of the Act.

The break up of the retention money over which the assessee does not have a title and therefore cannot be regarded as income is given at page 49 of the assessee's paper book and the same is given as **Annexure-2** to this order. As we have already seen that the assessee executes turnkey contracts. Under the terms of contract a certain percentage of the value of the contract is retained by the persons for whom the assessee executes the contract. This is referred to as retention money and will be given to the assessee only on successful trial run of the final acceptance by the customer. According to the assessee therefore this is an air of suspense over the right of the assessee to the money which it had received unless and until successful trial run and final settlement is obtained. It was the plea of the Assessee that till such time the receipt in question cannot be regarded as income even though the assessee follows mercantile system of accounting. The assessee placed reliance on the decision of the Hon'ble Calcutta High Court in the case of CIT vs Simplex Concrete Piles (India)P.Ltd. 179 ITR 8 (Cal) and several other high courts in support of its claim that the sum in question cannot be regarded as income under the normal provisions of the Act.

30. With regard to the claim of the assessee that the said sum cannot also be regarded as part of the book profits u/s 115JB of the Act. The assessee relied on the following decisions :-

(i) Bangalore ITAT in the case of Syndicate Bank -vs.- ACIT (2006) 7 SOT 51 (Bang) where it has been held that the entry by way of crediting the profit and loss account in respect of zero coupon bond is of notional credit and not in respect of interest accruing during the year. Hence, even though the same has been credited to profit and loss account, it needs to be excluded while computing the book profit as per Section 115JA. If notional income has been credited to P&L account and the said income has not accrued during the year, the same cannot be considered as "to disclose the result of working of the company during the financial year as provided under Part-I and Part- II of Schedule VI to the Companies Act, 1956."

(ii) Hon'ble Mumbai Tribunal in the case of Hitkari Fibres Ltd. -vs.- JCIT (2004) 90 ITD 654 (Mum) after referring to the case of Bangalore Tribunal, wherein it

was held that MAT has to be levied on the real book profits which have been earned by the companies during the relevant assessment years and not on artificial income which has not accrued to the companies but has been credited to the profit and loss account.

(iii) Hon'ble Mumbai Tribunal in the case of ITO -vs.- Frigsales (India) Ltd. (2005) 4 SOT 376 (Mum) wherein it was held that a receipt which is not in the nature of income cannot be taxed as income under section 115JA. When the accounts are prepared in accordance with Part-Il and Part-Ill of Sch. VI of the Companies Act while making adjustments as per the provisions of s.115JA to compute book profits, the amounts which are not taxable or exempt are excluded, because such amounts do not really reflect a receipt in the nature of income and, therefore, such amounts cannot form part of the profit reflecting real working results. While rendering the above decisions, the Hon'ble Tribunal has referred to the decision of Apex Court in the case of Apollo Tyres -vs.- CIT (2002) 255 ITR 273 (SC) and held that the above decision does not debar the assessee to make the above adjustment in computing Book Profit u/s 115JA/JB.

31. The CIT(A) agreed with the contentions put forth by the assessee. On the admission of the additional ground, the CIT(A) was of the view that the facts to decide the additional ground were already available on record and therefore there should not be any hindrance in entertaining the additional ground. The CIT(A) placed reliance on the decision of the Hon'ble Supreme Court in the case of Jute Corporation of India 187 ITR 688 (SC) and the decision in the case of NTPC Ltd. 229 ITR 383(SC) to come to the conclusion that when facts to decide an additional ground of appeal are available on record and when it was only a question of applying the law to those facts for correctly deciding the liability to tax of an assessee in accordance with law, the additional grounds of appeal should be permitted to be raised.

32. As far as the question whether retention money can be regarded as income under the normal provisions of the Act is concerned, the CIT(A) was of the view that even in the mercantile system of accounting, income cannot be said to have resulted even though the entry might have been made in the books of accounts. In this regard the

CIT(A) placed reliance on the decision of the Hon'ble Supreme Court in the case of Shoorji Vallabhdas and Co. 46 ITR 144 (SC).

33. With regard to including the retention money in computing the book profits the CIT(A) held as follows :-

> "11.9 Whether the above amount needs to be excluded in computing Book Profit u/s 115JB or not, the above issue is only academic as once it is upheld that the income has not accrued to the assessee, the same cannot be brought to tax under the special provisions of Section 115JB of the Act. In a plethora of decisions it has been held that MAT cannot be levied on notional income which has not accrued to the assessee. It can be levied only on real book profits which have been earned by the company. If the notional income has been credited to P&L account and the said income has not accrued during the year, the same cannot be considered as "to disclose the result of working of the company during the financial year as provided under Part-I and Part-II of Schedule VI to the Companies Act, 1956." The above principle has been upheld by Hon'ble Bangalore Tribunal in the case of Syndicate Bank (supra) & Hon'ble Mumbai Tribunal in the case of Hitkari Fibres Ltd. (supra) & Frigsales (I) Ltd. (supra). It may be noted that in rendering the above decisions, the Hon'ble Tribunal has referred to the decision of Apex Court in the case of Apollo Tyres vs CIT (2002) 255 ITR 273 (SC) and held that the above decision does not debar the assessee to make the above adjustment in computing Book Profit u/s 115JA/JB.
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> 11.10 On careful consideration of the facts and circumstances of the case and the decisions of the Courts referred to above including the decision of jurisdictional Calcutta High Court, the above ground is decided in favour of the appellant and the A.O. is directed to exclude retention money in computing total income amounting to Rs.28,87,72,022/- both under the provisions of the Act other than Section 115JB as well as in computing Book Profit u/s 115JB of the Act. "

34. Aggrieved by the order of CIT(A) the revenue has raised ground no.5 before the Tribunal.

35. We have heard the submissions of the ld. DR, who submitted that the CIT(A) ought not to have admitted the additional ground for adjudication. In our view this is not the grievance projected by the revenue in the grounds of appeal. Apart from the above we

are of the view that the legal question arising out of facts already available on record can be entertained by CIT(A) in the form of an additional ground. We therefore reject the arguments of the ld. DR.

36. The ld. DR submitted that the assessee was following the mercantile system of accounting and therefore had to account for all receipts on accrual basis and cannot seek to exclude the retention money on the ground that the assessee's is titled over the retention money remains in suspense till the conclusion of all the terms of contract to the satisfaction of the customer. With regard to the excluding the aforesaid receipts from the book profits u/s 115JB of the Act it was submitted by him that the provision of explanation to section 115JB of the Act clearly lays down what are the sums to be excluded and included to the profit as per profit and loss account prepared in accordance with the provisions of the Companies Act, 1956 and the retention money is one of the sums that had to be excluded from the book profits as laid down in Explanatin-1 to section 115JB(2) of the Act.

37. The ld. Counsel for the assessee while reiterating the plea of the assessee as put forth before CIT(A) further placed reliance on the decisions of the Hon'ble ITAT, Kolkata Bench in the case of DCIT vs Binani Industries Ltd. In ITA NO.144/Kol/2012 for A.Y.2009-10 order dated 02.03.2016 wherein the entire case laws on the issue has been discussed. The Tribunal finally concluded in the aforesaid decision that if the receipt is not in the nature of income then it cannot be considered as income for the purpose of book profit u/s 115JB of the Act. On the other hand if a receipt is considered as income but is exempt by virtue of any specific provision of the Act, then the same would be treated s part of the book profit u/s 115JB of the Act. Thus the ld. Counsel for the assessee submitted that since the retention money in question was not in the nature of income at all it should not be included as part of the book profit u/s 115JB of the Act.

38. We have given a very careful consideration to the rival submissions. As far as the question with regard to excluding the retention money while computing the total income under the normal provisions of the Act is concerned, it is not disputed by the revenue that the sum in question is in the nature of retention money. In such circumstances we are of the view that the retention money cannot be regarded as income of the assessee. The issue is no longer res integra and has been concluded by the Hon'ble Calcutta High Court in case of CIT Vs. Simplex Concrete (Piles) India Pvt. Ltd. [179 ITR 8]. In the aforesaid decision the Hon'ble Calcutta High Court on identical facts held that having regard to the terms and conditions of the contract, it could not be held that either 10 per cent. or 5 per cent., as the case may be, being retention money, became legally due to the assessee on the completion of the work. Only after the assessee fulfilled the obligations under the contract, the retention money would be released and the assessee would acquire the right to receive such retention money. Therefore, on the date when the bills were submitted, having regard to the nature of the contract, no enforceable liability accrued or arose and, accordingly, it could not be said that the assessee had any right to receive the entire amount on the completion of the work or on the submission of bills. The assessee had no right to claim any part of the retention money till the verification of satisfactory execution of the contract. Therefore, the Tribunal was right in holding that the retention money in respect of the jobs completed by the assessee during the relevant previous year should not be taken into account in computing the profits of the assessee for the assessment year in question. In view of the aforesaid decision of the Hon'ble Calcutta High Court rendered on identical facts as that of the Assessee's case, we are of the view that there is no merit in one part of Gr.No.5 raised by the Revenue viz., that retention money has to be considered as income for computing total income under the normal provisions of the Act and accordingly the same is dismissed.

39. As far as the excluding the retention money from computation of book profit u/s 115JB of the Act is concerned, the provisions of Sec.115JB of the Act have to be looked at. Section 115JB of the Act as applicable for AY 2006-07 provides that notwithstanding anything contained in any other provision of the Act, where in the case of an Assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April,*2001*, is less than seven and one half percent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of seven and one half *ten per cent*. The Assessee being a company the provisions of Sec.115JB of the Act were applicable. It is also not in dispute that the income tax payable on the total income as computed under the Act in respect of the previous year relevant to AY 2006-07 was less than Seven and one half percent of its book profits and therefore book profit should be deemed to be the total income of the Assessee and tax payable by the Assessee on such total income shall be seven and one half percent of such total income. Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956). In so preparing its book of accounts including profit and loss account, the company shall adopt the same accounting policies, accounting stand and method and rates for calculating depreciation as is adopted while preparing its accounts that are laid before the company at its annual general meeting in accordance with provisions of Sec.210 of the Companies Act. Explanation below Sec.115JB of the Act provides that for the purposes of section 115JB of the Act, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by— certain items debited in the profit and loss account in arriving at the net profit and as reduced by- certain items that are credited in

the profit and loss account. In other words, all that one has to do, while computing book profits is to take the profit as per profit and loss account prepared in accordance with Companies Act, 1956 and make additions or subtraction as is given in the explanation to Sec.115JB(2) of the Act.

40. We have already seen that the issue whether retention money in the case of contracts executed on a turkey basis can be regarded as income at all is no longer res integra and has been concluded by the Hon'ble Calcutta High Court in case of CIT Vs. Simplex Concrete (Piles) India Pvt. Ltd. [179 ITR 8]. In the aforesaid decision the Hon'ble Calcutta High Court on identical facts held that having regard to the terms and conditions of the contract, it could not be held that either 10 per cent. or 5 per cent., as the case may be, being retention money, became legally due to the assessee on the completion of the work. Only after the assessee fulfilled the obligations under the contract, the retention money would be released and the assessee would acquire the right to receive such retention money. Therefore, on the date when the bills were submitted, having regard to the nature of the contract, no enforceable liability accrued or arose and, accordingly, it could not be said that the assessee had any right to receive the entire amount on the completion of the work or on the submission of bills. The assessee had no right to claim any part of the retention money till the verification of satisfactory execution of the contract. Therefore, the Tribunal was right in holding that the retention money in respect of the jobs completed by the assessee during the relevant previous year should not be taken into account in computing the profits of the assessee for the assessment year in question. In view of the aforesaid decision of the Hon'ble High Court rendered on identical facts as that of the Assessee's case, there can be no doubt that retention money does not have any character of income.

41. When a receipt is not in the character of income, can it form part of the book profits for the purpose of Sec.115JB of the Act, is the question that arises for consideration. The ITAT Kolkata Bench in the case of Binani Industries Ltd. ITA No.144/Kol/2013 order dated 2.3.2016 reported in (2016) 178 TTJ 0658 (Kol) : (2016) 137 DTR 0185 (Kol)(Trib) had to deal with a case where the question was as to whether receipts on account of forfeiture of share warrants amounting to Rs. 12,65,75,000/-, being a capital receipt, would be liable for taxation u/s 115JB. The tribunal after referring to several decisions on the issue viz., the Hon'ble Apex Court in case of Indo Rama Synthetics (I) Ltd vs CIT 330 ITR 336 (SC), Apollo Tyres Ltd. 255 ITR 273 (SC), Special Bench ITAT in the case of Rain Commodities Ltd. Vs. DCIT (2010) 131 TTJ (Hyd)(SB) 514, ITAT Luknow Bench in the case of ACIT vs. L.H.Sugar Factory Ltd and vice versa in ITA Nos. 417 , 418 & 339/LKW/2013 dated 9.2.2016 and decision of Mumbai ITAT in the case of Shivalik Venture (P) Ltd. Vs. DCIT (2015) 173 TTJ (Mumbai) 238 dated 19.8.2015, came to the conclusions

(i) the object of Minimum Alternate Tax (MAT) provisions incorporated in Sec.115JB of the Act was to bring out real profit of companies and the thrust was to find out real working results of company.

(ii) Inclusion of receipt which are not in the nature of income in computation of book profits for MAT would defeat two fundamental principles, it would levy tax on receipt which was not in nature of income at all and secondly it would not result in arriving at real working results of company. Real working result could be arrived at only after excluding this receipt which had been credited to P&L a/c and not otherwise.

(iii) There was a disclosure of the factum of forfeiture of share warrants amounting to Rs. 12,65,75,000/- by the Assessee in its notes on accounts vide Note No. 6 to Schedule 11 of Financial Statements for year ended 31.3.2009. Profit and loss account prepared in accordance with Part II and III of

Schedule VI of Companies Act 1956, included notes on accounts thereon and accordingly in order to determine real profit of Assessee, adjustment need to be made to disclosures made in notes on accounts forming part of profit and loss account of Assessee. Profits arrived after such adjustment, should be considered for purpose of computation of book profits u/s 115JB of the Act and thereafter, AO had to make adjustments for additions/deletions contemplated in Explanation to section 115JB of the Act.

42. The Tribunal in the aforesaid decision made a reference to the decision of the Special Bench of the ITAT in the case of Rain Commodities (supra) which in turn was based on the ratio laid down in the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) as a case in which the income in question was taxable but was exempt under a specific provision of the Act and but for the exemption, the income would be chargeable to tax and such items of income should also be included as part of the book profits. But where a receipt is not in the nature of income at all it cannot be included in book profits though it is credited in the profit and loss account. The Bench followed the decision of the Lucknow Bench in the case of L.H.Sugar Factory Ltd.(supra), where receipts on account of carbon credits which were capital receipts not chargeable to tax and hence not in the nature of income were held not included in the book profits. The Bench also referred to the decision of the Mumbai Bench of the ITAT in the case of Shivalik Venture Pvt. Ltd. (supra) which was a case where the question was whether profits arising on transfer of a capital asset by a company to its wholly owned subsidiary company which is not treated as income" u/s 2(24) of the Act and since it does not form part of the total income u/s.10 of the Act and therefore does not enter into computation provision at all under the normal provisions of the Act, the same should be considered for the purpose of computing book profit u/s 115JB of the Act. The Mumbai Bench held as follows:

"26.We shall now examine the scheme of the provisions of sec. 115JB of the Act. It is pertinent to note that the provisions of sec. 10 lists out various types of income, which do not form part of Total income. All those items of receipts shall otherwise fall under the definition of the term "income" as defined in sec. 2(24) of the Act, but they are not included in total income in view of the provisions of sec. 10 of the Act. Since they are considered as "incomes not included in total income" for some policy reasons, the legislature, in its wisdom, has decided not to subject them to tax u/s 115JB of the Act also, except otherwise specifically provided for. Clause (ii) of Explanation 1 to sec.115JB specifically provides that the amount of income to which any of the provisions of section 10 (other than the provisions contained in clause (38) thereof) is to be reduced from the Net profit, if they are credited to the Profit and Loss account. The logic of these provisions, in our view, is that an item of receipt which falls under the definition of "income", are excluded for the purpose of computing "Book Profit", since the said receipts are exempted u/s 10 of the Act while computing total income. Thus, it is seen that the legislature seeks to maintain parity between the computation of "total income" and "book profit", in respect of exempted category of income. If the said logic is extended further, an item of receipt which does not fall under the definition of "income" at all and hence falls outside the purview of the computation provisions of Income tax Act, cannot also be included in "book profit" u/s 115JB of the Act. Hence, we find merit in the submissions made by the assessee on this legal point."

43. The admitted factual and legal position in the present case is that retention money is not in the nature of income till such time the contractual obligations are fully performed to the satisfaction of the customer by the Assessee. Therefore the retention money cannot be regarded as income even for the purpose of book profits u/s.115JB of the Act though credited in the profit and loss account and have to be excluded for arriving at the book profits u/s.115JB of the Act. We hold accordingly and confirm the order of the CIT(A) in this regard. In light of the aforesaid discussion, we are of the view that there is no merit in the other part of ground no.5 with regard to excluding retention money from the book profits for the purpose of Sec.115JB of the Act, and consequently the same is dismissed.

44. In the result the appeal by the revenue is dismissed and the Cross Objection by the assessee is allowed for statistical purpose.

ITA No.532/Kol/2012(Revenue's appeal) & ITA No.217/Kol/2012 (Assessee's Appeal) A.Y.2007-08

45. ITA No.532/Kol/2012 is an appeal by the revenue while ITA NO.217/Kol/2012 is an appeal by the assessee. Both these appeals are directed against the order dated 30.12.2011 of CIT(A)-I, Kolkata relating to A.Y.2007-08.

ITA No.532/Kol/2012 (Revenue's appeal):

46. Ground no.1 raised by the revenue in its appeal and ground no.1 and 1.1 raised by the assessee in its appeal can be conveniently decided together . These grounds are as follows :-

Ground of appeal of the Revenue:

"1. That on the facts and in the circumstances of the case Ld. CIT(A) was not justified and erred in confirming the addition of an amount of Rs.18,41,476/- on account of provision for leave encashment u/s43B of the Act. "

Grounds of Appeal of the Assessee:

1.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and erred in disallowing provision for leave encashment amounting to Rs. 25,29,397/- u/ s 43B of the Act.

1.1 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in referring the matter relating to the payment made for leave encashment before the date of filing the return back to the Assessing Officer instead of outright deciding the issue.

47. The facts and circumstances under which these grounds of appeal arise for consideration are identical to ground no.1 raised by the revenue in ITA No.100/Kol/2011 for A.Y.2006-07 and C.O.No.13/Kol/2011 for A.Y.2006-07. For the reasons stated therein ground no.1 raised by the revenue is dismissed while grounds 1.0 & 1.1 raised by the assessee are treated as allowed for statistical purposes.

48. Ground No.2 raised by the revenue reads as follows :-

"2. That on the facts and in the circumstance of the case the Ld. CIT(A) was not justified and erred in allowing the expenditure of Rs.1,74,19,164/- under the head Foreign Currency Convertible Bond being revenue in nature although the addition was rightly made by the A.O. being the said expenditure as Capital in nature. "

49. This ground of appeal is identical to ground no.3 raised by the revenue in A.Y.2006-07 in ITA NO.100/Kol/2011. For the reasons stated while deciding the said identical ground of appeal of the revenue in AY 2006-07, we uphold the order of CIT(A) and dismiss ground no.2 raised by the revenue.

50. Ground No.3 raised by the revenue in its appeal and ground no.3 raised by the assessee in its appeal can be conveniently decided together. These grounds of appeal read as under :-

Ground of appeal of the Revenue:

"3. That on the facts and in the circumstances or the case Ld. CIT(A) was not justified and erred in deleting the addition of an amount of Rs.57,25,701/- on account of income from Service Charges not credited to Profit & Loss A/c but as appearing in the TDS Certificates filed u/s 194J of the Act. "

Ground of appeal of the Assessee:

"3.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and erred in referring the matter in relation to addition of income from service charges not credited to P&L account amounting to Rs.57,25,701/-

back to the Assessing Officer instead of outright deciding the issue in spite of holding that the disallowance made by the A.O. is totally unjustified."

51. In the course of assessment proceedings, the AO noticed that the Assessee had claimed credit for Tax deducted at Source (TDS) in respect of certain payments received by the Assessee on which tax had been deducted at source u/s 194J of the Act amounting to Rs. 3,99,472/-. Sec.194J of the Act is applicable when payment is made by way of fees for professional or technical services rendered. The AO called upon the Assessee to show how corresponding income of Rs.71,20,701 is shown in the profit and loss account as or under the head fees for professional or technical services. In its reply to the aforesaid query of the AO, the Assessee filed reply dated 08-11-2010 in which the Assessee claimed that receipts from contract credited in profit and loss account amounting to Rs. 4,74,82,22,653/- includes both income from contractors as well as professional services. The A.O., however found that there was only a sum of Rs.13,95,000/- reflected in the profit and loss account as receipts under the head service charges. The AO while passing the order u/s 143(3) dated 21-12-2010, considered income from service charges amounting to Rs. 13,95,000/- as the only income received from professional services and disallowed balance amount of Rs. 57,25,701/- stating that there was nothing on record to prove that the differential amount of Rs. 57,25,701/- has been duly accounted for in the accounts as income.

52. Before CIT(A), the Assessee submitted that it is involved in the business of manufacture and sale of metallurgical machinery, materials handling and conveying plant/machinery/spares and coal washing plant on a turnkey contract basis. After the contract is undertaken, the scope of work required for execution of the contract includes designing, engineering, manufacture, construction, erection etc. Contract revenue received for carrying out all the above activities is booked under the head 'contract sales' in the P&L account. The Assessee further pointed out that while executing the contract,

some of the activities like designing and engineering involve technical expertise to the party which is liable to deduction of TDS u/s 194J and not under 194C. Hence, even though amount received on account of designing & engineering is included in the contract sales, as the amount forms part of the total contract revenue, the payment received on account of above is Iiable for deduction of TDS u/s 194J. The Assessee pointed out that out of the total amount of Rs. 71,20,701/-, a sum of Rs. 70,65,601/- pertains to professional services rendered to CESC Ltd. with respect to the contract undertaken for Coal Washery project at Sarasthali Open Cast Mines. Further, a sum of Rs. 55,100/- was received from Eastman Crusher Co. Pvt. Ltd. on account of design and engineering charges of Ball Mill as per purchase order entered with the said company. Copies of all ledger account showing the income already booked under the head 'Contract Sales' were also filed before the CIT(A). The Assessee pointed out that the above details was never asked by the A.O. during the course of assessment proceedings, the same could not be produced before the A.O. Hence the additional evidence can be considered as admissible under Rule 46A(1) clause (d) to the Income Tax Rules, 1962 (Rules). It was argued that since the income is already credited to Profit & Loss account for the year under consideration, the disallowance as made by the A.O. is grossly unjustified.

53. The CIT(A) on perusal of the details/ information filed before him and after confronting the said details to the AO for his comments and after recording the fact that the AO did not give any comments despite adequate opportunity was of the view that the evidence filed before him needs to be taken into consideration for deciding the issue. The CIT(A) found that TDS certificate from CESC which reflected that they have paid Rs.70,65,601 to the Assessee as professional charges was in respect of 300 TPH Coal washery at Sarasthali Open Cast Mines having a total contract value of Rs. 1,40,00,000/-. The CIT(A) found that as per the contract with CESC activities like

designing and engineering involving technical expertise had to be carried out by the Assessee for which payments tax deduction at source was to be made in terms of Section 194J and not under 194C of the Act. The CIT(A) also found that even though the amount received is on account of designing & engineering the same was credited under the head 'contract sales' by the Assessee and was part of the total contract revenue reflected in the profit and loss account.

54. In respect of the balance income of Rs. 55,100/-, the CIT(A) found that the same has been received by the Assessee from Eastman Crusher Company (P) Ltd. for which copy of the invoice filed by the Assessee showed that the said receipt was on account of design and engineering charges of ball mill against Customer Purchase Order No. 154/VIII: 752V-1:2005:29910. The CIT(A) also found that the said sum was also duly reflected as part of the contract sales credited in the profit and loss account.

55. The CIT(A) was therefore of the view that since the amount of income as reflected in the TDS certificate is already booked under the head 'Contract Sale' and not shown separately under the head 'services charges/ professional charges', disallowance made by the A.O. was totally unjustified. The CIT(A) also held that before making the disallowance, no opportunity was given to the Assessee to explain the above discrepancy by the A.O. which was against the basic principle of natural justice. The CIT(A) was of the view that although the TDS has been deducted u/s 194J of the Act, it does not automatically imply that the income shall be booked under that specific head. The CIT(A) found that the Assessee's total revenue for the relevant previous year from contract was Rs. 475 Crs which included all types of contracts like supply contracts, erection & service contract, design & engineering contract as well as composite contracts (comprising of either or all of above types). He held that the AO before coming to a conclusion that income as shown in TDS certificate has not been credited to

P&L account, should have verified other revenues as booked in Profit & Loss account also. As the amount of income from the contracts has been duly booked under the head contract sales, the CIT(A) held that there was no reason to disallow the above amount by the A.O. Hence, the A.O. was directed to verify the same and allow if the contention of the appellant is found to be correct on the basis of records.

56. Aggrieved by the order of CIT(A) observing that the amounts represented by TDS certificate has already been booked under the head "Contracts "and his further conclusion that the disallowance made by AO seems to be unjustified, the revenue has raised ground no.3 before the Tribunal. The assessee is aggrieved by the direction of CIT(A) in and by which the CIT(A) directed the AO to verify other revenues as booked in the profit and loss account to come to a definite conclusion that the amounts represented by TDS certificates has been booked as part of the contract sale receipts, the assessee has raised ground no.3 before the Tribunal.

57. At the time of hearing it was brought to our notice that the AO gave effect to the directions of CIT(A) in the impugned order and passed an order dated 2.7.2012. In the said order the AO has accepted that the disputed income as shown in the TDS certificate has been included in the contract sales already disclosed by the assessee. The following were the relevant observations of the AO in this regard :-

> "In respect of credit of income under Service Charges, the A/R produces all the relevant documents wherefrom it is found that the income relating to TDS deducted u/s 194J included in the total turnover which is also verified from the TDS certificates issued by CESC. Hence, the claim of the assessee made before ld. CIT(A) is found correct and accordingly the same is allowed."

58. Since the AO has himself accepted the claim of the assessee, we are of the view that there is no merit in ground no.3 raised by the revenue. As far as ground no.3 raised by

the assessee is concerned, in view of the order dated 2.7.2012 passed by the AO, the ground raised by the assessee becomes infructuous and hence dismissed.

59. Ground no.4 raised by the revenue in this appeal read as follows :-

"4. That on the facts and in the circumstances of the case the Ld. CIT(A) was not justified and erred while directing the A.O. to exclude the amount of retention money of Rs.46.01,77,049/- in computing total income as well as computing book profit u/s.115JB of the I.T. Act. "

60. This ground of appeal is identical to ground no.5 raised by the revenue in ITA No.100/Kol/2011 for A.Y.2006-07. The details of the retention money in this year are given in page no.29 of the assessee's paper book and the same is given as **Annexure-3** to this order. All the other facts and circumstances are identical to the facts and circumstances as it prevailed in A.Y.2006-07. For the reasons stated therein we uphold the order of CIT(A) directing the AO to exclude the amount of retention money while computing the total income as per the normal provisions of the act as well as while computing the book profit u/s115JB of the Act. Ground no.4 raised by the revenue is accordingly dismissed.

61. Ground No.5 raised by the revenue reads as follows :-

"5. That on the facts and in the circumstances of the ease the Ld. CIT(A) was not justified and erred while giving direction to the A.O. to verify the account of' provision made for employees' benefit in computing book profit 115JB of the Act and grant the relief accordingly, if the contention of the appellant is found to be correct. The direction of the Ld. CIT(A) tentamounts to set aside the case to the file of the A.O. which is not empowered to do and this is a question of involvement of law."

62. At the time of hearing it was admitted by the parties that no such issue arises out of the order of CIT(A) and that this ground of appeal has been erroneously raised in the

grounds of appeal. Accordingly ground no.5 raised by the revenue is dismissed as not arising out of the order of CIT(A).

63. Ground No.6 raised by the revenue reads as follows :-

> *"6. That on the facts and in the circumstances of the case Ld. CIT(A) was not justified and erred in deleting the addition made of an amount of Rs.1,28.35,000/- by the A.O on account of Advances written off on the contention that the said advances are not incidental to the business of the assessee and has not been given during the normal course of business."*

64. During the previous year, advances amounting to Rs. 1,29,40,600/- was written off In the books of accounts of the Assesssee, as they could not be recovered from the concerned parties. Break-up of the sum so written off is as follows:-

Particulars	Amount (Rs.)
Inter-Corporate advances to McNaeill Engineering (later converted to ODC Carriers Pvt Ltd and ODC Engineering & Constructions Pvt. Ltd)	1,00,00, 000
Interest on inter-corporate deposits given to McNaeill Engineering	27,50,000
Advance for purchase of goods, consumable stores and electrical installation to Jharkhand Steel Trader	1,35,000
Old Government Deposits	55,600

The Assessee claimed the sums as advances written off as allowing deduction while computing the total income as these were incidental to the business and allowable as deduction in terms of Sec. 28 r. w.s. 37(1) of the Act.

65. The AO was of the view that Inter-corporate advance cannot be allowed as deduction because the assessee was not engaged in the business of advancing inter-corporate loans and the loss in question does not spring directly from or is not incidental to business of the assessee. The AO further held, as interest on such advances was never shown to have been receivable or receivable from M/s. ODC Carriers Pvt. Ltd., advances written off due to irrecoverability cannot be said to be a business loss. Advance to Jharkhand Steel Traders was disallowed for the reason that no verifiable details were produced to show immediate nexus with business.

66. On appeal by the Assessee, the CIT(A) relying on decision Hon'ble ITAT in assessee's own case in A.Y. 2003-04 and decision of Hon'ble Hyderabad ITAT in ITW Signode Ltd -vs.- DCIT (2007) 110 TTJ 170 (Hyd) held that advances written off in the course of business needs to be allowed u/s 28 read with section 37(1) of the Act.

67. Aggrieved by the order of CIT(A) the revenue has raised ground no.6 before the Tribunal.

68. We have heard the submissions of the ld. DR and the ld. Counsel for the assessee. The ld. DR relied on the order of AO. The ld. Counsel for the assessee submitted that the issue has been decided in favour of assessee by Hon'ble Kolkata Tribunal in assessee's own case in A.Y.2003-04 vide order dated 11-01-2017 (ITA No.99/Kol/.2011) wherein it was held that advances represent the money given in relation to business contracts of the assessee and as the necessary details of the parties were duly furnished, the order of CIT(A) holding that advances written off in the course of business is allowable u/ s 28 r.w.s. 37(1) was upheld. Further reliance was placed on the decision of the Hon'ble Supreme Court in the case of Badridas Daga -vs.- CIT (1958) 34 ITR 10 (SC) has held that :-

> "When a claim is made for a deduction for which there is no specific provision u/s 10(2), whether it is admissible or not will depend on whether, having regard to accepted commercial practice .and trading principles, it can be said to arise out of the carrying on of the business and be incidental to it. The loss for which a deduction is claimed must be one that springs directly from carrying on of the business and is incidental to it, and not any loss sustained by the assessee even it has some connection with his business. If that is established, then the deduction must be allowed, provided that there is no provision against it, expressed or implied, in the Act."

Reliance was placed on Hon'ble Supreme Court in the case of CIT -vs.- Abdullabhai Abdulkadar (1961) 41 ITR 345 (SC) wherein it has been held that :-

> "In order that a loss might be deductible it must be a loss in the business of the assessee and not a payment relating to the business of somebody else which under the provisions of the Act was deemed to be and became the liability of the assessee. Loss was allowable if it "sprang directly from and was incidental to" the business of the assessee;"

Reliance was further placed on CIT -vs.- Gillanders Arbuthnot & Co. Ltd. (1992) 195 ITR 331 (Cal) wherein it was held that when a subsidiary company receives an advance from its holding company, such advance could be claimed as a loss if it turns out to be bad from the holding company's point of view.

69. It was submitted that names of the parties to whom advances were given along with its purpose and other relevant details pertaining to the same had duly been furnished before the A.O vide letter dated 20~12-2010. It was submitted that when the principal amount is doubtful to be recovered, interest is not required to be booked in the accounts since it is not probable that income would arise to the assessee. Hence, following the principle of prudency, no interest was booked from ODC Carriers. With regard to the Inter corporate deposits/advances it was submitted that these were advances given in the normal course of business. Reliance was placed on the decision of ITAT Hyderabad

Bench in the case of ITW Signode Ltd.-vs.-DCIT (2007) 110 TIJ 170 (Hyd) wherein it was held that:

- Inter-corporate deposits are quite common and corporate houses accommodate each other on short-term basis on grounds of commercial expediency.
- Placing of ICDs is in the usual course of business and a company doing so need not be in money lending business.
- Hence the loss on account of K'Ds has to be treated as arising in the normal course of business.

It was submitted that the Assessee is not required to be in the money lending business to give advances in the normal course of business. Attention was invited to the decision of the Hon'ble Madras High Court in the case of CIT -vs.- Crescent Films (P) Ltd. (2001) 248 ITR 670 (Mad) wherein it was held that in any business, credit is an indispensable part and advances of the temporary nature with or without interest are a common incident of business. It is not necessary that every business should register itself under the Money Lenders Act and make a claim in relation to any advance made by it only in the capacity of a person carrying on money lending business.

70. We have given a very careful consideration to the rival submissions. The factual details with regard to the corporate advances have to be narrated for the purpose of deciding the issue raised by the revenue in ground no.6 in respect of Inter corporate deposits and interest on intercorporate deposits of Rs.1,27,50,000/-.

71. The assessee had given a sum of Rs.1 crore as advances to MacNeill Engineering Ltd.(NEL). It is not in dispute that the advances given to MacNeill Engineering Ltd represented money given in relation to business contracts of the assessee. MEL was a company belonging to Willamson Magor group. ODC Engineering and Constructions Pvt. Ltd owed a sum of Rs.50,00,000/- to MEL. MEL requested ODC Engineering &

Constructions Pvt. Ltd to pay the aforesaid sum to the assessee in discharge of the amounts due by MEL to the assessee. This was agreed to by both the assessee and MEL as well as ODC Engineering & Construction Pvt. Ltd.

72. Similarly ODC Carriers Pvt. Ltd owed a sum of Rs.75.5 lakhs to MEL and MEL requested ODC Carriers Pvt. Ltd to pay the aforesaid sum due to it to the assessee in discharge of MEL's liability to the assessee.

73. The letters exchanged between the parties in this regard are placed at page nos. 69 to 77 of the assessee's paper book. After the aforesaid arrangement ODC Engineering & Constructions Pvt. Ltd and ODC Carriers Pvt. Ltd., requested their dues to the assessee to be converted into ODCss. The details of the conversion of the amounts originally given as advances to MEL and conversion into ODC is given below :

Date	Particulars	Amount
01-04-2000 2000-01	Advance given to Mcneil Engineering Ltd. Add Interest on above	1,00,00,00 12,17,788
2000-01	Interest paid	1,12,17,788 3,00,000
2001-02	Add Interest on above	1,09,17,788 12,73,600
2002-03	Add Interest on above	1,21,91,388 16,00,000
	(A)	1,37,91,388
2004-05 2004-05 2004-05	Advances converted to ODC carriers instead of Mcneill Advances converted to ODC engineering instead of Mcneill Less Interest written off in the books (B) (A)- (B)	77,50,000 50,00,000 10,41,388 1,27,50,000
31-03-2007	Advances written off in the books - ODC Carriers - ODC Engineering	 77,50,000 50,00,000
		1,27,50,000

74. It is clear from the aforesaid details that the amount in question represented the money given in relation to contracts and had nexus with the business of the assessee.

The amounts due from the aforesaid two companies were irrecoverable. It is evident from the fact that neither the interest nor the principal amount had been settled by the two companies right form A.Y.2004-05. The advances were therefore written off in the books of accounts of the assessee. Therefore the conclusions of CIT(A) that the advances written off have to be allowed as deduction u/s 28 r.w.s. 37(1) of the Act are correct and does not call for any interference.

75. As far as the remaining sum of Rs.1,35,55,600/- being old government deposits are concerned the details of old government advances off are given at page-66 of the assessee's paper book. The old Govt deposits which were written off were so written off owing to the smallness of the amount and the efforts involved in recovering these deposits. We are satisfied that the claim for deduction on account of write off of these sums had to be considered as allowable expenditure u/s 28 r.w.s. 37(1) of the Act.

76. As far as the advance written off of Rs.1,35,000/- of Kumardhubi division is concerned, these advances were given for business purpose to various parties for purchase of goods , consumable stores and electrical installation. These advances had nexus with the business of the assessee and their write off in the books of accounts has to be considered as allowable deduction u/s 28 r.w.s. 37(1) of the Act. We therefore are of the view that CIT(A) was fully justified in allowing deduciton claimed by the assessee. We also find that the arguments advanced by the assessee before us clearly supports the conclusion arrived at by CIT(A). For the reasons given above we dismiss ground no.6 raised by the revenue.

77. In the result the appeal by the revenue is dismissed.

ITA NO.217/Kol/2012 (Assessee's appeal)

78. Ground Nos. 1 and 3 raised by the assessee in its appeal have already been decided while deciding the connected grounds of appeal in the revenue's appeal. Ground no.2 raised by the assessee reads as follows :-

> *"2.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and erred in disallowing Rs. 85,125/- u/ s 36(1)(va) read with 2(24)(x) of the Act on account of contribution made to Provident Fund on the contention that the same was not paid within due date."*

79. This ground of appeal is identical to ground no.2 raised by the revenue in its appeal in ITA NO.100/Kol/2011 for A.Y.2006-07. For the reasons stated there in while decided the aforesaid ground of appeal we hold that the deduction on account of employees contribution to Provident Fund paid by the assessee on or before the due date of filing the return of income u/s 139(1) of the Act is allowed as deduction. Ground no.2 raised by the assessee is accordingly allowed.

80. Ground No.4 raised by the assessee reads as follows :-

> *"4.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and erred in disallowing provision for doubtful debt amounting to Rs. 8,72,921/- as diminution in the value of assets and not considering the same as provision for losses in computing book profit u/ s 115JB of the Act."*

81. During the relevant previous year, an amount of Rs. 8,72,921/ - was debited to P&L account on account of provision for doubtful debts. Such provision was duly reduced from the Total Debtors as per Schedule 9 of the Balance Sheet and the net figure of Debtors after reducing such provision was shown in the Annual Accounts. In the return of income, provision for doubtful debts amounting to Rs. 8,72,921/ - was not added back while computing Book Profit u/s 115JB of the Act.

82. In the order of assessment passed u/s 143(3) of the Act, provision for doubtful debt was added back while computing Book Profit u/s 115JB of the Act. The AO did not give any reasons in the order of assessment for doing so.

83. On appeal by the Assessee, the CIT(A) held that provision for doubtful debt is nothing but diminution in the value of investments and as per the amendment brought in section 115JB by Finance Act, 2009 with retrospective effect which was applicable for the relevant AY in quest, disallowance made by A.O was upheld.

84. Before us it was submitted by the learned counsel for the Assessee that the amount of Rs. 8,72,921/- although termed as provision, represents bad debts written off. The assessee debited the aforesaid amount in the profit and loss account and also reduced the corresponding amount in Schedule 9 - to the Balance Sheet, against 'Sundry Debtors '. Besides debiting P&L A/ c and creating a provision for bad and doubtful debt, assessee simultaneously obliterated said provision from its accounts by reducing corresponding amount from debtors on assets side of Balance Sheet. Hence, the amount provided represents bad debts written off. In this connection, he placed reliance on the decision of the Hon'ble Apex Court in the case of Vijaya Bank -vs.- CIT (2010) 323 ITR 166 (sq, wherein it was held that once an amount was debited in the Profit & Loss account and corresponding debts were reduced, it was nothing but a write-off of bad debt. Since the amount debited has been reduced from debtors, it represents bad debts and therefore the same cannot be added in computing Book profit. He relied on the following decisions in support of his claim as aforesaid:

- CIT-vs.-Yokogawa India Ltd. (2012) 204 Taxman 305 (Kar)
- CIT -vs.- Kirloskar Systems Ltd. (2014) 220 Taxman 1 (Kar)
- Flex Foods Ltd. -vs.- DCIT (ITA N 0.4800/DeV2011)
- Murugappa Morgan Thermal Ceramics Ltd. -vs.- ACIT (IT A No.2208/Mds/2010)
- Trent Ltd, Mum -vs.- Department of Income Tax (IT A no. 1073/Mum/2005)

The ld. DR relied on the order of CIT(A).

85. After considering the rival submissions we are of the view that the question before us is as to whether the debit in the profit and loss account under the head “provision for

doubtful debts is really a provision for doubtful debts or write off of doubtful debts as bad debts. The CIT(A) has not appreciated the contention of the assessee in this regard in the light of the above question. It is clear from a perusal of the Schedule-9 to the Balance Sheet as well as profit and loss account and debtors on the asset side of the balance sheet that the assessee had in fact written off a sum of Rs.8,72,921/- as bad debts. In view of the above, the amount in question cannot be considered as provision for doubtful debts which is to be added to the net profit as per the profit and loss account to arrive at the book profit. In other words the sum in question was a bad debt written off which had to be reduced even while arriving at the profit as per profit and loss account and was accordingly reduced. Addition of the said sum to the net profit as per profit and loss account for the purpose of arriving at book profit u/s.115JB of the Act was therefore not warranted. We therefore accept the plea of the assessee in this regard and hold that a sum of Rs.8,72,921/- be excluded for the purpose of computing book profits u/s 115JB of the Act.

86. In the result the appeal of the assessee is partly allowed.

ITA No.533/Kol/2012(Revenue's appeal) & ITA.No.218/Kol/2012 (Assessee's Appeal) A.Y.2008-09

87. ITA No.533/Kol/2012 is an appeal by the revenue while ITA No..218/Kol/2012 is an appeal by the assessee. Both the appeals are directed against the order dated 30.12.2011 of CIT(A)-I, Kolkata relating to A.Y.2008-09.

88. Ground No.1 raised by the revenue in its appeal and ground no.1 and 1.1. raised by the assessee in its appeal can be conveniently decided together. These grounds of appeal are as follows :-

Revenue's appeal:

"1. That on the facts and in the circumstances of the case Ld. CIT(A) was not justified and erred in confirming the addition of an amount of Rs.10,24,152/- on account of provision for leave encashment uss43B of the Act. "

Assessee's appeal

"1.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and erred in disallowing provision for leave encashment amounting to Rs. 1,15,42,000/- u/ s 43B of the Act.

1.1 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in referring the matter relating to the payment made for leave encashment before the date of filing the return back to the Assessing Officer instead of outright deciding the issue."

89. The facts and circumstances under which these grounds of appeal arise for consideration are identical to ground no.1 raised by the revenue in ITA No.100/Kol/2011 for A.Y.2006-07 and C.O.No.13/Kol/2011 for A.Y.2006-07. For the reasons stated therein ground no.1 raised by the revenue is dismissed while ground 1.0 & 1.1 raised by the assessee are treated as allowed for statistical purposes.

90. Ground No.2 raised by the revenue reads as follows :-

"2. That on the facts and in the circumstance of the case the Ld. CIT(A) was not justified and erred in allowing the expenditure of Rs.2,58,997/- under the head Foreign Currency Convertible Bond being revenue in nature although the addition was rightly made by the A.O. being the said expenditure as Capital in nature. "

91. This ground of appeal is identical to ground no.3 raised by the revenue in A.Y.2006-07 in ITA No.100/Kol/2011. For the reasons stated therein we uphold the order of CIT(A) and dismiss ground no.2 raised by the revenue.

92. Ground No.3 raised by the revenue reads as follows :-

"3. That on the facts and in the circumstances of the case the Ld. CIT(A) was not justified and erred while directing the A.O. to exclude the amount of retention money of Rs.45,45,81,644/- in computing total income as well as computing book profit u/s.115JB of the I.T. Act."

93. This ground of appeal is identical to ground no.5 raised by the revenue in A.Y.2006-07 in ITA No.100/Kol/2011. The details of the retention money in this A.Y. are given at page no.29 of the assessee's paper book and the same is given as **Annexure-4** to this order. All the other facts and circumstances are identical to the facts and circumstances as it prevailed in A.Y.2006-07. For the reasons stated therein we uphold the order of CIT(A) directing the AO to exclude the amount of retention money while computing the total income as per the normal provisions of the act as well as while computing the book profit u/s115JB of the Act. Ground no.3 raised by the revenue is accordingly dismissed.

94. Ground No.4 raised by the revenue in its appeal and ground no.3. raised by the assessee in its appeal can be conveniently decided together. These grounds of appeal are as follows :-

Revenue's appeal:

"4. That on the facts and in the circumstances of the case the Ld. CTT(A) was not justified and erred while giving direction to the A.O. to verify the account of provision made for employees' benefit in computing book profit 115JB of the Act and grant the relief accordingly, if the contention of the appellant is found to be correct. The direction of the Ld. CIT(A) tentamounts to set aside the case to the file of the A.O. which is not empowered to do and this is a question of involvement of law."

Assessee's appeal

"3.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and erred in referring the matter relating to exclusion of amount withdrawn from General Reserve on account of reinstatement of employees benefit obligation amounting to Rs. 1,02,88,421/ - while computing Book Profit u/ s 115JB of the Act back to the Assessing Officer instead of outright deciding the issue."

95. The issue involved in the aforesaid grounds of appeal is with regard to exclusion of amount withdrawn from General Reserve on reinstatement of employees benefits obligation while computing Book Profit U/s 115JB of the Act of a sum of Rs.1,02,88,421/-. During the year under consideration, Assessee adjusted Rs. 1,02,88,421/ - against General Reserve for reinstatement of employee benefit obligation on account of adoption of AS-15 (Revised 2005) "Employee Benefits'. The said amount was claimed under regular provisions and while computing book profit since the expenses are allowable expenditure incurred during the normal course of business. The A.O. did not allow said exclusion in computation of Book Profit u/s 115JB of the Act stating that such downward adjustment is not allowed in the explanation below Sec.115JB(2) of the Act.

96. On appeal by the Assessee, the CIT(A) found that as per Note 21 of Schedule 22 to the Balance Sheet all defined benefit plans recognised in Financial Statements including contribution to employee's benefit were adjusted with General Reserve and was made as per actuarial valuation. The CIT(A) therefore held that the amount represents ascertained liability. The CIT(A) following the decision of CIT -vs.- Sain Processing & Weaving Mills P. Ltd (2010) 325 ITR 565 (Del) held that since provision for contribution to employee's benefit is a normal business expenditure and same has been disclosed in the notes to accounts, said expenditure is to be taken into account for the purpose of arriving at book profits u/s 115JB of the Act. He held that normally the provision for employee’s benefit is required to be debited to the P&L account. Hence in order to arrive at correct Book Profit, same is required to be reduced from net profit. The issue was however set aside to the file of A.O. to verify the account of provision made for employee's benefit while computing Book Profit and grant relief accordingly.

97. Aggrieved by the order of the CIT(A) directing the AO to reduce the aforesaid sum for arriving at book profit u/s.115JB of the Act, the revenue has raised ground No.4

before the Tribunal. Aggrieved by the order of the CIT(A) directing the AO to verify the account of provision made fore employee's benefit while computing book profit and grant relief, the Assessee has raised Gr.No.3 in its appeal.

98. We have heard the rival submissions. The learned DR relied on the order of the AO. The learned counsel for the Assessee submitted that expenses incurred on contribution to employees' benefit is a normal allowable business expenditure. It was submitted that as per clause (c) of Explanation (1) of Sec. 115JB of the Act only ascertained liability is required to be added back while computing Book Profit. Since provision on account of employees' benefit is created on the basis of actuarial valuation, it is an ascertained liability which is not required to be added back while computing book profit. Reliance in this regard can be placed on the decision of CIT - vs.- National Hydro Electric Power Corporation Ltd (2010) 45 DTR 117 (P&H) wherein similar view was upheld by the Hon'ble High Court. It was submitted that the issue is squarely covered by the decision of Hon'ble Pune Tribunal in K.K Nag Ltd -vs.- ACIT (2012) 52 SOT 0381 (Pune Trib) wherein it was held that on a conjoint reading of sub-sections (2), (3A) of section 211 and Part 11 of Schedule VI to the Companies Act, 1956 and the Accounting Standard - 15, it was imperative for the assessee to set out the incremental liability towards leave encashment in the annual accounts. If the same is set out by way of a disclosure in the Notes forming part of the annual accounts and not by way of an entry in the P&L account, the same is sufficient because the net profit as shown in the P&L account for the purposes of Explanation 1 to the second Proviso to section 115JB of the Act is to be understood with reference to the Notes to accounts accompanying the annual accounts also. It was held that use of the expression 'net profit' in Explanation 1 to the second Proviso to section 115JB of the Act makes it clear that the impugned incremental liability towards leave encashment not debited to the Profit & Loss account but otherwise disclosed in the Notes to Accounts will have to be taken into account

while determining the "book profits" under section 115JB of the Act. It was submitted that the provision made on account of employees' benefits is an ascertained liability which is to be deducted from net profit as per P&L account in order to compute correct book profit u/ s 115JB. Reliance in this regard is placed on decision of Hon'ble Delhi High Court in CIT -vs.- Sain Processing & Weaving Mills P. Ltd (2010) 325 ITR 565 (Del) wherein the question was whether depreciation not debited in the profit and loss account of an Assessee whether can be reduced from the net profit as per profit and loss account for the purpose of Sec.115JB of the Act. It was held that current year depreciation not debited to P&L account but disclosed in notes to accounts is eligible to be deducted from net profit while computing book profit u/ s 115JB as notes to accounts form part of the P&L a/ c by virtue of Sec. 211(6) of the Companies Act, 1956.

99. At the time of hearing it was brought to our notice that pursuant to the directions of CIT(A) in the impugned order AO passed an order dated 05.07.2012 giving effect to the directions of CIT(A) in which the AO had not accepted the claim of the assessee and made the following observations :-

> "In respect of disallowance of claim of downward adjustments of Rs.1,02,88,421/- in the computation of Book of Profit, the direction of Ld. CIT(A) relates to verification on account of provision made for Employees benefit while computing book profit cannot be carried out for giving relief because the amount of rs.1,02,88,421/- was excluded by the AO in computing book profit, but there was no scope to verification of Provision from P&L accounts, Ld. CIT(A) did not give order to verify from which angle the provision has to be verified. Hence, no further relief may be allowed against the disallowance of claim."

100. Before us the ld. DR reiterated the stand of the AO as reflected in the assessment order as well as in the order giving effect to the order of CIT(A). The ld. Counsel for the assessee reiterated the submissions as were made before CIT(A). The ld. Counsel for the assessee also attempted to argue that the findings of the AO in the order dated 05.07.2012 giving effect to the directions of CIT(A) in the impugned order are

incorrect. The Bench however pointed out that any grievance against the order dated 05.07.2012 has to be projected by way of an appeal against the said order and cannot be the subject matter for consideration in the present appeal filed against the impugned order.

101. We have considered the order of CIT(A) and are of the view that the conclusions drawn by CIT(A) are clearly supported by the decisions referred to by CIT(A) as well as the decisions referred to by the ld. Counsel for the assessee before us. Since the amount in question was an obligation of the assessee as an employer the liability arising on account of such obligation should also be considered while arriving at the book profit for the purpose of Sec.115JB of the Act. Thus on the principle laid down in the decisions on which the ld. Counsel has placed on reliance, we are of the view that CIT(A) was justified in accepting the plea of the assesses. With regard to the directions of CIT(A) to verify whether the account of the provisions made for employee benefit has already been debited in the profit and loss account, the directions of CIT(A) his order is correct and is for the assessee to explain as to how the sum in question are not debited in the profit and loss account but nevertheless need to be excluded . We do not find any merits in the grounds raised by the assessee also.

102. In the result ground no.4 raised by the revenue and ground no.3 raised by the assessee are dismissed.

103. In the result the appeal by the revenue in ITA No.533/Kol/2012 is dismissed.

ITA No.218/Kol/2012 (Assessee's appeal)

104. Ground Nos 1 and 3 raised by the assessee have already been decided while deciding the connected grounds of appeal raised by the revenue in its appeal. Ground

No.2 raised by the assessee in its appeal is identical to ground no.2 raised by the revenue in ITA No.100/Kol/2011 for A.Y.2006-07. For the reasons stated therein while deciding the aforesaid grounds of appeal we hold that the assessee is entilted to deduction on account of employees contribution to PF paid on or before the due date of filing the return of income u/s 139(1) of the Act for the relevant assessment year. Ground no.2 raised by the assessee is accordingly allowed.

105. Ground No.4 raised by the assessee reads as follows :-

> *"4.0 That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and erred in disallowing provision for doubtful debt amounting to Rs. 9,34,523/- as diminution in the value of assets and not considering the same as provision for losses in computing book profit u/ s 115JB of the Act."*

106. The issue that arises for consideration in the aforesaid ground of appeal is with regard to Disallowance of provision for doubtful debts for the purpose of arriving at book profit u/s.115JB of the Act of Rs. 9,34,523/-. During the relevant previous year an amount of Rs. 9,34,523/ - was debited to P&L account on account of provision for doubtful debts. Such provision was duly reduced from the Total Debtors as per Schedule 8 of the Balance Sheet and the net figure of Debtors after reducing such provision was shown in the Annual Accounts. In the return of income, provision for doubtful debts amounting to Rs. 9,34,523/ - was not added back while computing Book Profit u/s 115JB of the Act. In the Assessment passed order u/s 143(3), the AO added back the provision for doubtful debt while computing Book Profit u/s 115JB of the Act.

107. On appeal by the Assessee, the CIT(A) held that provision for doubtful debt is nothing but diminution in the value of investments and as amendment brought in section 115JB by Finance Act, 2009 is retrospectively applicable, disallowance made by A.O was upheld.

108. Aggrieved by the order of the CIT(A), the Assessee has raised Ground No.4 before the Tribunal. We have heard the rival submissions. After considering the rival submissions we are of the view that the question that ought to have been considered by the CIT(A) was as to whether the debit in the profit and loss account under the head "provision for doubtful debts" is really a provision for doubtful debts or write off of doubtful debts as bad debts. The CIT(A) has not properly appreciated the contention of the assessee in this regard. It is clear from a perusal of the Schedule-9 to the Balance Sheet as well as profit and loss account and debtors on the other side of the balance sheet. The assessee had in fact written off a sum of Rs.9,34, 523/- as bad debts. In view of the above, the amount in question cannot be considered as provision for doubtful debts which is to be added to the net profit as per the profit and loss account to arrive at the book profit. We therefore accept the plea of the assessee in this regard and hedl that a sum of Rs.9,34,523/- be excluded for the purpose of computing book profits u/s 115JB of the Act.

109. In the result the appeal by the assessee is partly allowed.

110. In the result all the appeals by the revenue are dismissed, cross objection of the Assessee is allowed for statistical purpose and the other two appeals by the assessee are partly allowed.

Order pronounced in the court on 01.03.2017.

Sd/-	Sd/-
[Waseem Ahmed]	[N.V.Vasudevan]
Accountant Member	Judicial Member

Dated : 01.03.2017.

[RG PS]

Copy of the order forwarded to:

1. M/s. McNally Bharat Engineering Company Limited, 4, Mangoe Lane, Kolkata-700001.
2. D.C.I.T. Cirle-1, Kolkata.
3. CIT(A)-I, Kolkata 4. CIT- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata Benches