IN THE INCOME TAX APPELLATE TRIBUNAL, 'K' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.4632/Mum/2017
(**Assessment Year :2008-09**)

ITA No.5325/Mum/2017
(**Assessment Year :2009-10**)

ITA No.5326/Mum/2017
(**Assessment Year :2010-11**)

ITA No.5327/Mum/2017
(**Assessment Year :2011-12**

Dy. Commissioner of Income-Tax Central Circle-8(3) Mumbai (Erstwhile DCIT,CC-46 Mumbai) Mumbai – 400 020	Vs.	M/s. JSW Steel Ltd. JSW Center Bandra Kurla Complex Bandra (E) Mumbai – 400 051
PAN/GIR No.AAACJ4323N		
(Appellant)	..	**(Respondent)**

ITA No.4287/Mum/2017
(**Assessment Year :2008-09**)

ITA No.5457/Mum/2017
(**Assessment Year :2010-11**)

ITA No.5458/Mum/2017
(**Assessment Year :2011-12**)
&
ITA No.5459/Mum/2017
(**Assessment Year :2009-10**)

M/s. JSW Steel Ltd. JSW Center Bandra Kurla Complex Bandra (E) Mumbai – 400 051	Vs.	Dy. Commissioner of Income-Tax Central Circle-8(3) Mumbai (Erstwhile DCIT,CC-46 Mumbai) Mumbai – 400 020
PAN/GIR No.AAACJ4323N		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Rakesh Joshi / Shri Gaurav Kabra
Revenue by	Shri Manoj Mishra
Date of Hearing	**01/06/2023**
Date of Pronouncement	**30/06/2023**

आदेश / O R D E R

PER BENCH:

The aforesaid cross appeals have been filed against the order dated 31.03.2017, passed Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2008-09, 2009-10, 2010-11, 2011-12.

2. The facts in brief are that the assessee is public limited company deriving income from manufacturing and selling of steel pellets, hot and cold rolled coils/ sheets, galvanized coils / sheets and plates, blooms, billets, bars, roads and slag cement.

3. For the sake of convenience, the grounds raised by the revenue and the assessee in their appeals for respective years are reproduced as under:

Revenue's grounds of appeal(AY 2008-09):

1. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that interest received by assessee on foreign currency loan advanced to AE at LIBOR + 100 bps is at arm's length by comparing it with interest paid by the assessee on buyers credit facility extended by foreign bank, disregarding the fact that the AE's credit rating and interest rate payable by the AE to banks were relevant rather than the interest rate payable by the assessee to banks"*

2. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) was not justified in determining the Arm's Length Price of fee on corporate guarantee extended to the lenders by assessee to its five AEs at Rs. 13,72,20,858/- by holding that the TPO had not given any reason for rejecting the assessee's benchmarking even though the TPO has discussed the reasons in detail in the TP order, which have not been considered by the Ld. CIT(A)"*
3. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in accepting determination of credit rating of Santa Fe Mining, USA using financials of parent company and holding company and rejecting the contention of the TPO that credit rating shall be determined using its standalone financials"*
4. *"On the facts and the circumstances of the case and in law, the Ld CIT(A) erred in accepting the comparable loans transaction from different geography viz. from USA, Canada and Europe for determining the fee to be charged on corporate guarantee extended on behalf of AEs viz JSW Steel Service Centre (UK) Ltd. and JSW Netherland, (even though the AEs which had taken loan, were situated in UK and Netherland)"*

5. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance u/s 14A of the Act rw.Rule 8D of Rs. 2,04,19,763/- as against a disallowance of Rs 42,84,300/- made by the assessee in the return of income by holding that investment in mutual funds of the nature of growth funds do not yield dividend income ignoring the fact that these investments on holding for more than a year yield exempt income."*
6. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the refund of Sales Tax of Rs. 58,28,74,773/- as Capital Receipt ignoring the fact that the refund was in the nature of incentive/concession and revenue in nature as per the purpose test of Government of Karnataka's scheme."*
7. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the income on sale of Certified Emission Reductions ('CER') receipts as Capital Receipt even though the receipt is attributable to the business carried on by the assessee company."*
8. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the income on sale of Certified Emission Reductions (CER) receipts as Capital Receipt by relying on the judgement of Andhra Pradesh High Court in the case of My Home Power Ltd which has been challenged by the Revenue by filing SLP before the Hon'ble Supreme Court."*
9. *"On the facts and the circumstances of the case und in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the increased written down value of the assets received from the merged companies thereby allowing additional depreciation even though the conditions of Sec 72A(2) were not satisfied rendering the unabsorbed depreciation as not allowable for set off."*
10. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in allowing consequential depreciation in respect of foreign currency loss of incurred during F.Y. 2004-05 & F.Y. 2005-06 on cancellation of*

forward exchange contract considered as capital expenditure in light of the fact thaton cancellation of forward exchange contracts, payments are not actually made and Sec 43A allows adjustments only on actual payment basis."

11. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the refund of Sales Tax of Rs. 58,28,74,773/- as Capital Receipt, directing the deletion of disallowance u/s 14A and to consider the income on sale of Certified Emission Reductions ('CER') receipts as Capital Receipt for the purpose of computing book profit u/s 115JB of the Act.*

The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary.

Assessee's grounds of appeal (AY 2008-09):

1. *"On facts and circumstances of the case and in law, the Hon'ble Commissioner of Income-tax (Appeals) (hereinafter referred to as the 'CIT(A)') has erred in not holding that the order passed by the Assessing Officer (hereinafter referred to as the 'AO') under Section 144C(3) r.w.s 153A r.w.s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') on 30.05.2014 is barred by limitation under the provisions of the Act, and the same is void ab initio"*
2. *On facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in not appreciating that provision of corporate guarantee is not covered under the definition of 'international transaction' under Section 92B of the Act.*
3. *On facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in not appreciating that provision of corporate guarantee is primarily a shareholder service and has no bearings on the profits, income, losses or assets of associated enterprise.*
4. *The Hon'ble CIT(A) has erred in facts and circumstances*

of the case in not appreciating that provision of corporate guarantee is in the nature of 'quasi equity' not subject to any remuneration.

Each of the above grounds are independent of and without prejudice to all others. The Appellant craves leave to add to or modify or amend and or withdraw all or any of the above grounds.

Revenue's grounds of appeal (AY 2009-10):

1. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that interest received by assessee on foreign currency loon advanced to AE at LIBOR + 200/350 bps is at arm's length by comparing it with interest paid by the assessee on buyers credit facility extended by foreign bank, without appreciating that a loan to an AE by the assessee is a different kind of transaction from a buyers credit by a bank to the AE on several factors and under CUP the similarity of products and services is of paramount importance."*
2. *"On the facts and the circumstances of the case and in law, the CIT(A) was not justified in accepting the Arm's Length Price of fee on corporate guarantee extended to the lenders by assessee on behalf of five AEs at Rs. 22,62,06,353/-"*
3. *"On the facts and the circumstances of the case and in law, the CIT(A) erred in accepting determination of credit rating of Santa Fe Mining, USA using financials of parent company and holding company and rejecting the contention of the TPO that credit rating shall be determined using its standalone financials under the arm's length principle."*
4. *"On the facts and in the circumstances of the case and in law, the CIT(A) erred in accepting the comparable loans transaction from different geography viz. from USA, Canada and Europe when the AEs which had taken loan, were situated in UK and Netherland, for determining the fee to charge on corporate guarantee extended on behalf of AEs viz JSW Steel Service Centre (UK) Ltd and JSW Netherland"*

5. *On the facts and circumstances of the case and in law, the CIT(A) was not justified in determining the Arm's Length Price of fee on corporate guarantee extended to the lenders by assessee on behalf of the AE, JSW Steel (USA) Inc. at 133.65 bps, same as that in the case of anther AE. JSW Steel Holding (USA) without determining credit rating of JSW Steel (USA) Inc and without knowledge of terms of loan taken by AE from the lender.*
6. *"On the facts and the circumstances of the case and in law, the CIT(A) erred in deleting adjustments of Interest computed on amount advanced towards preliminary expenses, even though it is in the nature of a loan or credit extended to the AE."*
7. *On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance u/s 14A of the Act rw.Rule 8D of Rs 4,43,17,563/- as against a disallowance of Rs 2,54,20,159/- mode by the assessee in the return of income by holding that investment in mutual funds of the nature of growth funds do not yield dividend income ignoring the fact that these investments on holding for more than a year yield exempt income."*
8. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the refund of Sales Tax of Rs. 89,40,89,905/- as Capital Receipt ignoring the fact that the refund was in the nature of incentive/concession and revenue in nature as per the purpose test of Government of Karnataka's scheme."*
9. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the income on sale of Certified Emission Reductions (CER) receipts as Capital Receipt even though the receipt is attributable to the business carried on by the assessee company."*
10. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the income on sale of Certified Emission Reductions (CER) receipts as Capital Receipt by*

relying on the judgement of Andhra Pradesh High Court in the case of My Home Power Ltd which has been challenged by the Revenue by filing SLP before the Hon'ble Supreme Court."

11. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the increased written down value of the assets received from the merged companies thereby allowing additional depreciation even though the conditions of Sec 72A(2) were not satisfied rendering the unabsorbed depreciation as not allowable for set off."*

12. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in allowing consequential depreciation in respect of foreign currency loss of incurred during F.Y. 2004-05 & F.Y. 2005-06 on cancellation of forward exchange contract considered as capital expenditure in light of the fact that on cancellation of forward exchange contracts, payments are not actually made and Sec 43A allows adjustments only on actual payment basis."*

13. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made on account of purchases of Rs. 2,58,750/- as bogus purchases."*

14. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the refund of Sales Tax of Rs. 89,40,89,905/- as Capital Receipt, directing the deletion of disallowance u/s 14A and to consider the income on sale of Certified Emission Reductions ('CER') receipts as Capital Receipt for the purpose of computing book profit u/s 115JB of the Act"*

Assessee's grounds of appeal (AY 2009-10):

1. *"On facts and circumstances of the case and in law, the Hon'ble Commissioner of Income-tax (Appeals) (hereinafter referred to as the 'CIT(A)') has erred in not holding that the order passed by the Assessing Officer*

(hereinafter referred to as the 'AO') under Section 144C(3) r.w.s 153A r.w.s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') on 30.05.2014 is barred by limitation under the provisions of the Act, and the same is void ab initio."

2. *"On facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in not appreciating that provision of corporate guarantee is not covered under the definition of 'international transaction' under Section 92B of the Act."*
3. *"On facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in not appreciating that provision of corporate guarantee is primarily a shareholder service and has no bearings on the profits, income, losses or assets of associated enterprise."*
4. *"The Hon'ble CIT(A) has erred in facts and circumstances of the case in not appreciating that provision of corporate guarantee is in the nature of 'quasi equity' not subject to any remuneration."*
5. *The Hon'ble CIT(A) has erred in confirming the action of Assessing Officer in making addition u/s 69C on account of unexplained expenditure for alleged payments made to Shri MadhuKoda amounting to Rs. 10,00,00,000.*
6. *"On the facts and the circumstances of the case and in law, the Hon'ble CIT(A) erred in passing order in violation of the principle of natural justice without providing an opportunity for cross examination to the appellant on account of unexplained expenditure."*
7. *"On the facts and the circumstances of the case and in law, the Hon'ble CIT(A) erred in not sharing with Appellant the copies of relevant correspondences and documents and not allowing the Appellant to cross-examine the persons whose views were relied upon by Hon'ble Assessing Officer in the impugned assessment order to substantiate the appellants claim."*

Each of the above grounds are independent of and without prejudice to all others. The Appellant craves leave to add to or modify or amend and or withdraw all or any of the above grounds.

Revenue's grounds of appeal (AY 2010-11):

1. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that interest received by assessee on foreign currency loan advanced to AE at LIBOR+200/350 bps is at arm's length."*
2. *"On the facts and the circumstances of the case and in law, the CIT(A) erred in holding that interest received by assessee on foreign currency loan advanced to JSW Steel Netherland and JNRL Mauritius at LIBOR+ spread is at arm's length by comparing it with interest paid by the assessee on buyers credit facility extended by foreign bank, without appreciating that a loan to an AE by the assessee is a different transaction from a buyers credit by a bank to the AE on several factors and under CUP the similarity of products and services is of paramount importance."*
3. *"On the facts and the circumstances of the case and in law, the CIT(A) erred in holding that interest received by assessee on foreign currency loan advanced to IEL, Chile and JSW Holding USA at LIBOR+ spread is at arm's length by comparing it with lons taken by them from banks even though the terms of loans taken by AE from banks and taken from the assessee are not the same."*
4. *"On the facts and in the circumstances of the case and in law, the CIT(A) was not justifed in accepting the Arm's Length Price of fee on corporate guarantee at Rs. 9,27,13,353/- extended to the lenders by assessee to its three AEs."*
5. *"On the facts and circumstances of the case and in law, the CIT(A) failed to appreciate the fact that in the case of guarantee given to lenders for loans provided in AY 2010-11 to AEs, JSW Holding USA, JSW (USA) and JSW*

Netherland, the assessee, for determining the spread to be charged on loan in case of uncontrolled comparable transaction, has taken the year of loans for such comparable transactions as FY 2007-08 /2008-09, even though the terms of loan taken by AE from bank, for which guarantee was provided by the assessee, where different for the year under consideration i.e. FY 2009-10."

6. *"On the facts and the circumstances of the case and in law, the CIT(A) erred in accepting the comparable loans transaction from different geography viz. from USA, when the AE, which had taken loah, were situated in Netherland, for determining the fee to be charged on corporate guarantee extended on behalf of AE, JSW Netherland."*

7. *"On the facts and the circumstances of the case and in law, the CIT(A) erred in accepting the fee for corporate guarantee extended to lenders on behalf of AEs as determined by the assessee even though credit rating of comparables companies is not same as that of the AEs."*

8. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance w/s 14A of the Act r.w.Rule 8D of Rs.11,71,01,241/- as against a disallowance of Rs. 9,19,70,334/- made by the assessee in the return of income by holding that investment in mutual funds of the nature of growth funds do not yield dividend income ignoring the fact that these investments on holding for more than a year yield exempt income."*

9. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the refund of Sales Tax of Rs. 91,53,07,290/- as Capital Receipt ignoring the fact that the refund was in the nature of incentive/concession and revenue in nature as per the purpose test of Government of Karnataka's scheme."*

10. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the income on sale of Certified Emission Reductions ('CER') receipts as Capital Receipt even though the receipt is attributable to the business carried on by the assessee company."*

11. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the income on sale of Certified Emission Reductions ('CER') receipts as Capital Receipt by relying on the judgement of Andhra Pradesh High Court in the case of My Home Power Ltd which has been challenged by the Revenue by filing SLP before the Hon'ble Supreme Court."*

12. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the increased written down value of the assets received from the merged companies thereby allowing additional depreciation even though the conditions of Sec 72A(2) were not satisfied rendering the unabsorbed depreciation as not allowable for set off."*

13. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in allowing consequential depreciation in respect of foreign currency loss of incurred during FY. 2004-05 & FY. 2005-06 on cancellation of forward exchange contract considered as capital expenditure in light of the fact that on cancellation of forward exchange contracts, payments are not actually made and Sec 43A allows adjustments only on actual payment basis."*

14. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in deletion of disallowance us 37 of the I-T Act, of the payments of Rs.10,00,00,000/- made to manpower supply companies."*

15. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the refund of Sales Tax of Rs. 91,53,07,290/- as Capital Receipt, directing the deletion of disallowance us 144, to consider the income on sale of Certified Emission Reductions ('CER') receipts as Capital Receipt and directing the Assessing Officer to exclude the amount of Rs. 125,00,00,000- transferred to Debenture Redemption Reserve ('DRR') for the purpose of computing book profit us115JB of the Act."*

The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary.

Assessee's grounds of appeal (AY 2010-11):

1. *"On facts and circumstances of the case and in law, the Hon'ble Commissioner of Income-tax (Appeals) (hereinafter referred to as the 'CIT(A)) has erred in not holding that the order passed by the Assessing Officer (hereinafter referred to as the 'AO') under Section 144C (3) r.w. 153A r.w. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') on 30.05.2014 is barred by limitation under the provisions of the Act, and the same is void ab initio."*

2. *"On facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in not appreciating that provision of corporate guarantee is not covered under the definition of 'international transaction' under Section 92B of the Act."*

3. *"On facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in not appreciating that provision of corporate guarantee is primarily a shareholder service*

and has no bearings on the profits, income, losses or assets of associated enterprise."

4. *"The Hon'ble CIT(A) has erred in facts and circumstances of the case in not appreciating that provision of corporate guarantee is in the nature of 'quasi equity' not subject to any remuneration."*

Each of the above grounds are independent of and without prejudice to all others. The Appellant craves leave to add to or modify or amend and or withdraw all or any of the above grounds.

Revenue's grounds of appeal (AY 2011-12):

1. *"On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in holding that interest received by assessee on foreign currency loan advanced to AEs at LIBOR+ spread is at arm's length even though the uncontrolled transactions of loans selected by the assessee were not comparable with the loan transactions between the assessee and As for the reasons pointed out by the TPO at para 5.2 of his order"*

2. *"On the facts and in the circumstances of the case and in law, the CIT(A) was not justified in accepting the Arm's Length Price of fee at Rs. 7,02,52,115/-on corporate guarantees extended to the lenders by assessee to its three AEs, even though loan transactions selected by the assessee for the benchmarking guarantee fee using interest saving approach were not comparable with the loan transactions of these AEs, for which guarantee was provided by the assessee for the reasons pointed out by the TPO at para 6.3 & 6.4 of his order."*

3. *"On the facts and circumstances of the case and in law, the CIT(A) failed to appreciate the fact that in the case of guarantee given by the assesses to lenders on behalf of AEs, JSW Holding USA and JSW (USA), the comparable loan transactions shall be of the same year in which the*

loan with different terms was taken by the AEs and not of earlier years."

4. *"On the facts and the circumstances of the case and in law, the CIT(A) erred in accepting the comparable loans transaction from different geography viz. from USA, for determining the fee to be charged on corporate guarantee extended on behalf of AE, situated in Netherland."*

5. *"On the facts and the circumstances of the case and in law, the CIT(A) erred in accepting the fee for corporate guarantee extended to lenders on behalf of JSW Holding USA, as determined by the assessee, even though credit rating of comparables companies selected by the assessee was not same as that of the AEs and comparable loans were not of the same year in which AE had taken loan from the bank."*

6. *"On the facts and the circumstances of the case and in law, the CIT(A) erred in accepting the fee for corporate guarantee extended to lenders on behalf of AEs as determined by the assessee, even though credit rating of comparables companies selected by the assessee was not same as that of the AEs."*

7. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance u/s 14A of the Act r.w.Rule 8D of Rs.8,47,76,845/- as against a disallowance of Rs. 5,82,845/- made by the assessee in the return of income by holding that investment in mutual funds of the nature of growth funds do not yield dividend income ignoring the fact that these investments on holding for more than a year yield exempt income."*

8. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the refund of Sales Tax of Rs. 174 48,34,433/- as Capital Receipt ignoring the fact that the refund was in the nature of incentive/concession and revenue in nature as per the purpose test of Government*

of Karnataka's scheme."

9. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the income on sale of Certified Emission Reductions ('CER') receipts as Capital Receipt even though the receipt is attributable to the business carried on by the assessee company."*

10. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the income on sale of Certified Emission Reductions (CER') receipts as Capital Receipt by relying on the judgement of Andra Pradesh High Court in the case of My Home Power Ltd which has been challenged by the Revenue by filing SLP before the Hon'ble Supreme Court."*

11. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the increased written down value of the assets received from the merged companies thereby allowing additional depreciation even though the conditions of Sec 72A(2) were not satisfied rendering the unabsorbed depreciation as not allowable for set off."*

12. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in allowing consequential depreciation in respect of foreign currency loss of incurred during FY. 2004-05 on cancellation of forward exchange contract considered as capital expenditure in light of the fact that on cancellation of forward exchange contracts, payments are not actually made and Sec 43A allows adjustments only on actual payment basis"*

13. *"On the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to consider the refund of Sales Tax of Rs. 174,48,34,433/- as Capital Receipt, directing the deletion of disallowance us 14A and to consider the income on*

sale of Certified Emission Reductions (CER') receipts as Capital Receipt for the purpose of computing book profit us 115JB of the Act."

The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

The appellant craves leave to amend or alter any ground and or add new grounds which may be necessary.

Assessee's grounds of appeal (AY 2011-12):

1. *"On facts and circumstances of the case and in law, the Hon'ble Commissioner of Income-tax (Appeals) (hereinafter referred to as the 'CIT(A)') has erred in not holding that the order passed by the Assessing Officer (hereinafter referred to as the 'AO') under Section 144C(3) r.w. 153A r.w.s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') on 30.05.2014 is barred by limitation under the provisions of the Act, and the same is void ab initio."*

2. *"On facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in not appreciating that provision of corporate guarantee is not covered under the definition of 'international transaction' under Section 92B of the Act."*

3. *"On facts and circumstances of the case and in law, the Hon'ble CIT(A) has erred in not appreciating that provision of corporate guarantee is primarily a shareholder service and has no bearings on the profits, income, losses or assets of associated enterprise."*

4. *"The Hon'ble CIT(A) has erred in facts and circumstances of the case in not appreciating that provision of corporate guarantee is in the nature of 'quasi equity' not subject to any remuneration."*

Each of the above grounds are independent of and without prejudice to allothers. The Appellant craves leave to add to or modify or amend and or withdraw all or any of the above grounds.

4. In this background we take up the year-wise cross appeals as follows:

ITA No.4632/Mum/2017 AY 2008-09 (Revenue's appeal)

First we deal with the Transfer Pricing Issue:

Certain International Transactions as carried out by the assessee with its Associated Enterprises [AE] and as reported in Form 3CEB were referred to Ld. Transfer Pricing Officer-1(3), Mumbai [TPO] for determination of Arm's Length Price [ALP]. The details of the transactions, which are subject matter of present appeal before us, are as follows: -

Sr No	Nature of transaction	Adjustment Amount
1.	Interest on loan advanced to AE	2,84,526/-
2.	Guarantee fee on corporate guarantee	19,75,28,327/-

4.1. **Interest received on loan given to Associated Enterprises (Ground 1)**

4.1.1. It transpired that the assessee had advanced

intra-group unsecured loan of USD 15,00,000/- to its AE, JSW Netherlands on 14.01.2008 and was in receipt of interest of Rs 1,92,949/- against the same. The said loan was in the nature of short term loan which was due to be repaid by 06.02.2008. The currency of interest payment as well as principle payments was in US dollars. The said loan was provided by the assessee company to its AE at Libor plus 100 basis points. Since the said loan was in the nature of short term loan, the same was benchmarked using buyer credit facility availed by the assessee from foreign banks. The buyers credit facility availed from foreign banks is at Libor plus 22 basis points. The assessee explained that since the interest rate charged by Assessee Company is more that the interest rate charged by foreign banks for short term credit facility, the transaction of interest received is at Arm's Length.

4.1.2. However upon due consideration, the Ld. TPO opined that the benchmarking by credit facility is not proper as the facility was availed for purchase of goods whereas the loan transaction to AE is not against purchase or sale of goods but a pure loan transaction. Further the assessee failed to furnish any information about the foreign lender bank, where the bank is located, number of days for which credit facility is taken and the country in which payment was made to suppliers. The argument that the loans were advanced

from internal accruals was also rejected since the assessee, in the opinion of Ld. TPO, failed to prove nexus between interest free funds available with the assessee vis-à-vis loans advanced to its AE.

4.1.3. The Ld. TPO also came to a conclusion that interest on outbound loan was not to be benchmarked with LIBOR since no company would like to advance loans outside India without security as the interest rate in India would be higher than those prevailing in the developed country. Therefore, the rates prevailing in India would be an appropriate benchmark to determine the ALP of loans advanced by Indian entities. Although the assessee placed reliance on certain judicial pronouncements for the submission that LIBOR would be appropriate benchmark rate, however Ld. TPO opined that certain vital aspects remained to be considered in the cited decisions. Rather reliance was placed on the decision of Tribunal rendered in Aurionpro Solutions Ltd. [ITA No 7872/Mum/2011] for the conclusion that lending should not be below the cost of the borrowings of the assessee and the assessee should earn income which it would have earned by advancing loans to third parties.

4.1.4. Finally, Ld. TPO proceeded to work out the mean ALP rate on the basis of above factors. The assessee was taken as the tested party and External CUP method was used for benchmarking the aforesaid

transaction. External CUP, as per Ld. TPO, could be the Bank Prime Lending Rate [PLR], Corporate Bond Rates or the cost of borrowings in the domestic market. Applying the average spread of 2.19% to assessee's cost of borrowing i.e. 7.59%, cost of domestic borrowings was worked out to be 9.78%. Relying upon safe harbour rules, Prime Lending Rate was worked out to be 12.75%. The ALP based on Indian Corporate Bond Rates was worked out to be 15%. Finally, the Ld.TPO considered the rate of 12.75% out of three rates to benchmark the stated transactions. The ALP interest, thus, worked out to be Rs.4,77,475/- as per computations made in para 5.10 of learned TPO's order. Adjusting the interest of Rs 1,92,949/- as charged by the assessee from its AE, the net TP adjustment, thus proposed, worked out to be Rs 2,84,526/-

4.1.5. The aforesaid TP adjustment was incorporated in assessment order dated 30/05/2014. The assessee submitted that it did not want to pursue the matter before Ld. Dispute Resolution Panel and expressed its intention to contest the same through normal appellate channel of Ld. CIT(A). Accordingly, the assessment order was passed by Ld. AO on 30/05/2014 which was subjected to further appeal before Ld. First appellate authority.

4.1.6. Before Ld. first appellate authority, the assessee, inter-alia, drew attention to the fact that

similar benchmarking, in assessee's own case for immediately succeeding year i.e. AY 2012-13 and 2013-14, has been done by Ld. TPO himself in its subsequent order dated 29/01/2016 &01.11.2016 respectively has adopted LIBOR rates as the base rates and ruled out the application of Corporate Bond Rate, SBI PLR Rate or Cost of Borrowing rate etc. Reliance was placed, inter-alia, on the decision of Hon'ble Delhi High Court rendered in CIT V/s Cotton Naturals (I) Pvt. Ltd. [55 Taxmann.com 523] to support the submissions that LIBOR would be appropriate benchmarking rate on such outbound loan transactions. The list of other decisions which has also affirmed the said view, as relied upon by assessee during appellate proceedings, has also been tabulated on page nos. 13-14 of the appellate order. Concurring with assessee's submissions, Ld. CIT(A)allowed assessee's ground by observing as under:

"5.8 I have considered the submissions of the assessee, the views of the AO in the assessment order and the material on record.

5.9 The appellant submitted that with respect to cross border transactions, the interest rate is determined by using foreign currency rate (LIBOR/EURIBOR) and the same has been upheld as an appropriate benchmarking rate in various judicial decisions which have been mentioned above in Pt. 5.5.

5.10 Thus considering the above view taken by the appellant and the view taken by the TPO in appellant's own case for later years i.e. AY 12-13 & AY 13-14, the transaction of interest on loan has been benchmarked by using the LIBOR rate and also it is a well settled law that with respect to the cross border transactions,

LIBOR has been considered as an appropriate benchmarking. Further, the TPO/AO had brought nothing on record to prove as to why the buyer's credit facility would not be the appropriate comparable for benchmarking purpose. Thus, this ground of appeal raised by the assessee is allowed."

Aggrieved as aforesaid, the revenue is in further appeal before us.

4.1.7. The Ld. CIT-DR supported the reasoning of Ld. AO / Ld. TPO as enumerated by us in the preceding paragraphs; whereas Ld. AR drew attention to the fact that the issue of benchmarking the transactions using LIBOR stood covered in assessee's favour by catena of judicial pronouncements as enumerated in the impugned order. Further the Ld.AR also drew our attention to the decision of assessee's sister concern i.e **JSW Energy Limited (ITA No.2452/M/2017) for AY 2011-12 and (ITA No. 2316/Mum/2017) for AY 2012-13** wherein identical benchmarking was carried out by the TPO which was subsequently deleted by the CIT (A) as well as the coordinate bench and the method adopted by the assessee was accepted.

4.1.8. We have carefully considered the rival submissions and perused relevant material on record as well as the decision of sister concern. The undisputed fact that emerges is that the assessee has advanced intra-group loan of US Dollar 15 million to its AE

situated in Netherland. The assessee has charged interest against the same on LIBOR which is as per the contractual terms. Another undisputed fact is that as per the terms of the contract, the currency of principal as well as interest repayment was denominated in US Dollars. The Ld. TPO, disregarding the assessee's methodology, opined that the rates prevailing in India would be an appropriate benchmark to determine the ALP of the same, disregarding the binding judicial pronouncements holding the field for outbound investments. The learned first appellate authority accepted the assessee's submissions, inter-alia, by observing that the benchmarking in succeeding AYs i.e. 2012-13 & 2013-14 has been adopted by Ld. TPO on the basis of LIBOR + some spread-over only, which goes on to show the inconsistency in the stand of Ld. TPO while carrying out the benchmarking analysis on similar set of facts and circumstances.

4.1.9. So far as the application of benchmarking rate is concerned, we find that the catena of judicial pronouncements as cited in the impugned order supports the benchmarking of outbound loans on the basis of LIBOR. **The Hon'ble Delhi High Court in in CIT V/s Cotton Naturals (I) Pvt. Ltd. [55 Taxmann.com 523]** while confirming the said view, has observed that there could not be different parameters to benchmark outbound and inbound loans. The Hon'ble

Bombay High Court in CIT V/s Tata Autocomp Systems Ltd. [56 Taxmann.com 206] has concluded the issue as under: -

"7. We find that the impugned order of the Tribunal inter alia has followed the decisions of the Bombay Bench of the Tribunal in cases of VVF Ltd. v. Dy. CIT [ITAppeal No. 673 (Mum.) of 2006] and Dy. CIT v. Tech Mahindra Ltd. [2011] 12taxmann.com 132/46 SOT 141 (Mum.) (URO) to reach the conclusion that ALP in the case of loans advanced to Associate Enterprises would be determined on the basis of rate of interest being charged in the country where the loan is received/consumed. Mr. Suresh Kumar the learned counsel for the revenue informed us that the Revenue has not preferred any appeal against the decision of the Tribunal in VVF Ltd. (supra) and Tech Mahindra Ltd. (supra)on the above issue. No reason has been shown to us as to why the Revenue seeks to take a different view in respect of the impugned order from that taken in VVF Ltd. (supra) and Tech Mahindra Ltd. (supra). The Revenue not having filed any appeal, has in fact accepted the decision of the Tribunal in VVF Ltd. (supra) and Tech Mahindra Ltd. (supra).

8. In view of the above we see no reason to entertain the present appeal as in similar matters the Revenue has accepted the view of the Tribunal which has been relied upon by the impugned order. Accordingly, we see no reason to entertain the proposed questions of law."

4.1.10. A perusal of the above case laws would reveal that the Hon'ble Courts has confirmed the view that the ALP rate of interest in case of loans advanced to Associate Enterprises would be determined on the basis of rate of interest being charged in the country where the loan is received /consumed. Similar is the ratio of

several other judgments rendered by various benches of Tribunal which have already been enumerated in the impugned order. Therefore, the conclusion to the extent that the loan to AE was to be benchmarked on the basis of LIBOR would not require any interference on our part.

4.1.11. Now the only question that survives for our consideration is the determination of ALP rate keeping in view the facts and circumstances of the case. The Ld. first appellate authority has confirmed the determination of ALP on the basis of LIBOR. During the course of proceedings before Ld. TPO, the assessee had arrived at mean spread of 100 basis points over LIBOR which is evident from page no. 2 of Ld. TPO's order. Further since the rate charged by the assessee from the AE is higher than the buyer credit facility availed from foreign bank (Libor plus 22 basis points), the transaction of interest received is considered at Arm's Length. Further, the computation of the same has nowhere been disputed by the revenue. Applying LIBOR + spread-over, ALP interest has been worked out to be Rs 1,92,949/-. We are of the considered opinion that this spread over as computed by the assessee was undisputed, quite fair and reasonable and the same was to be accepted.

Further, reliance is also placed on the decision of assessee's sister concern, i.e., JSW Energy Limited in

the AY 2011-12& 2012-13, wherein TPO rejected the assessee's benchmarking and calculated the interest rate at PLR rates. The ITAT rejected the TPO's benchmarking and stated that loan to foreign AE is to benchmarked on the basis of LIBOR and thereby accepted the method of computation of ALP by the sister concern.

4.1.12. Accordingly, we confirm the benchmarking methodology adopted by the assessee. Accordingly, Ground Nos. 1 of the revenue stands rejected.

5.1. **Commission of corporate guarantee provided to AE (Ground 2 to 4)**

5.1.1. The issue that came up for consideration from ground no 2 to 4 of the revenue appeal is the deletion of commission arrived at by the Ld.TPO. During the year under consideration, the assessee company has given guarantee to lender banks to enable the overseas subsidiaries to borrow funds. The assessee did not make any adjustment on account of Corporate Guarantee facility provided to it's AE. The Transfer Pricing Officer (TPO) held that the Corporate Guarantee is an international transaction. The details of guarantees and related loans as on 31.03.2008 is reproduced on page 16 & 17 of the TPO order dated 30.11.2013.

5.1.2. Further during the course of TP assessment proceedings, the assessee company submitted a without prejudice benchmarking for determination of guarantee fee working. The Ld. TPO contested the without prejudice benchmarking adopted by the assessee company and carried out its own working, wherein the ALP commission rate was finalised at 2.47% for companies situated in USA, 2.09% for companies situated in Netherlands and 3.06% for company situated in UK. Accordingly, the TPO arrived at the amount of Rs 19,75,28,327/- as Arms Length Guarantee Fee the break-up of which is provided on pages nos. 27 and 28 of the TPO's order.

5.1.3. Before us, the ld. Counsel for the assessee in support of his submissions that corporate guarantee is not an international transaction has placed reliance on Tribunal decisions. The contentions raised by ld. Counsel are unsustainable in the light of decision rendered by **Hon'ble Jurisdictional High Court in the case of Everest Kento Cylinders Ltd. (378 ITR 57).** Thus, we hold Corporate Guarantee facility provided to overseas AE by the assessee is an international transaction. In so far as the rate of commission is concerned, the Ld.AR of the assessee company relied upon the following judicial pronouncements wherein the commission on corporate guarantee is restricted at

0.25% -0.50%. The same is tabulated as under:

Case	Authority	Citation	Guarantee Commission
CIT vs. Everest Kento Cylinders Ltd.	Bombay High Court	378 ITR 57	0.50%
Global Offshore Services Limited Vs ACIT	Mumbai Tribunal	ITA No.7321/ MUM /2016	0.25%
SRF Limited Vs DCIT	Delhi Tribunal	ITA no. 356/Del/15 and ITANo.5784/DEL/2016	0.25%
ACIT v. M/s Asian Paints Ltd	Mumbai Tribunal	ITA No. 408/Mum/2010	0.25%-0.35%
Four Soft Ltd. vs. CIT	Hyderabad ITAT	ITA No. 259/Hyd/2017	0.25%

5.1.4. Thus, considering the said decisions, legal position and other factors are same for this year, we direct the transaction of corporate guarantee fee at 0.35% to be charged by the assessee from its AE at arm's length and accordingly, the addition confirm to that extent. Thus the ground raised by the revenue is partly allowed.

Corporate Tax issue

6.1. **Disallowance u/s 14A of the Act(Ground 5)**

6.1.1. The issue that came up for our consideration from ground no 5 of the revenue appeal is deletion of disallowance made u/s 14A r.w.r 8D of the Act amounting to Rs 1,61,35,463/-. The ld. AR for the assessee submitted that suo-moto amount disallowed by the assessee while filing its return of income. The same is tabulated as under:-

Particulars	Amount in Rs.
Direct Expenses 14A r.w.r 8D(2)(i)	20,31,988/-
Indirect Expenses 14A r.w.r 8D(2)(ii)	9,59,025/-
Other Indirect Expenses 14A r.w.r 8D(2)(iii)	12,93,287/-
Total	42,84,300/-

6.1.2. The assessing officer, without examining and referring to the disallowance or recording his dissatisfaction on disallowance made, had invoked and applied Rule 8D of the Income Tax rules, 1962 ('Rules', for short) as if it was mandatory. In doing so, though he has accepted the disallowance made by the assessee company for 14A r.w.r 8D(2)(i) & 14A r.w.r 8D(2)(ii) however, not accepted the disallowance made u/s 14A

r.w.r 8D(2)(iii) on the plea that computation as per rule 8D is higher than the amount worked out by the assessee.

6.1.3. Ld CIT (A) deleted the addition on the plea that there is no exempt income earned by the assessee. He also held that investment in growth mutual fund do not issue dividend hence such investment do not generate any exempt income and the same cannot be considered in the category of assets earning exempt income. Before us, Ld DR stated that CIT (A) eared in holding that growth mutual fund do not generate any exempt income. He further stated that though such investment do not issue dividend but on transfer such investment are exempt from capital gain and accordingly such investment should be considered as investment earning exempt income. Ld AR pleaded that the assessee company has already disallowed Rs.42,84,300/- U/s 14A and Ld AO has only partially accepted the said disallowance as worked out by the assessee without any justification and satisfaction. He further stated that AO cannot reject the working of assessee merely on the plea that the working of disallowance as per Rule 8D is higher than the amount worked out by the assessee. He also relied upon decision of Supreme Court in case of Godrej & Boyce Manufacturing Co. Ltd. Vs. Deputy Commissioner of Income-Tax and another [2017] 394 ITR 449 (SC).

6.1.4. In our opinion, Rule 8D can be applied only if the assessing officer is not satisfied with the correctness of the claim made by the assessee in respect of the expenditure which the assessee claims to have been incurred in relation to income which does not form part of his total income. In the instant case he has accepted the claim made under 2 limbs of 14A r.w.r 8D and has merely rejected the last limb without providing any reasoning.

6.1.5. Rule 8D is not applicable by default but only if and when the Assessing Officer records his satisfaction and rejects the explanation of the assessee regarding the disallowance of expenditure. In the present case the assessment order proceeds on a wrong assumption that Rule 8D would applies and is mandatory.

6.1.6. Legal principle and ratio is no longer *res integra* and is settled by the judgment of the Supreme Court in **Godrej & Boyce Manufacturing Co. Ltd. Vs. Deputy Commissioner of Income-Tax and another [2017] 394 ITR 449 (SC)** in which it has been held as under:-

> *"37. We do not see how in the aforesaid fact situation a different view could have been taken for Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14-A of the Act read with Rule 8-D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part*

of the total income under the Act in a situation where the assessing officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8-D or in the best judgment of the assessing officer, what the law postulates is the requirement of a satisfaction in the assessing officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Sections 14-A(2) and (3) read with Rule 8-D of the Rules or a best judgment determination, as earlier prevailing, would become applicable."

6.2. In the present case, the AO has neither examined the claim in respect of expenditure incurred in relation to exempt income of the assessee nor has recorded any satisfaction with regard to the correctness of assessee's claim with reference to the books of account. Consequently, the disallowance made by applying the Rule 8D is not only against the statutory mandate but contrary to the legal principles laid down. The CIT (A) has rightly deleted the addition made by the AO under Section 14A read with Rule 8D. The ground of appeal raised by the revenue is hereby rejected.

Refund of sales tax treated as Capital receipt (Ground 6)

6.2.1. The next issue that came up for our consideration from ground no 6 of revenue appeal is treatment of sales tax subsidy received of Rs. 58,28,24,773/-, as capital in nature instead of revenue in nature. The ld. AR for the assessee, at the outset, submitted that the issue is squarely covered in favour of the assessee by the decision of **Hon'ble Mumbai ITAT in assessee's own case for AY 2006-07 in [2020] 180 ITD 505 (Mumbai - Trib.),** where it has been held that subsidy received by the assessee from state Government of Karnataka is for the purpose of setting up of a new industry and in the nature of capital receipt not chargeable to tax.

6.2.2. The Ld. DR, on the other hand, strongly opposing the order of the Ld. CIT (A) submitted that the refund was in the nature of concession and revenue in nature as per the 'Purpose test' of Government of Karnataka scheme. However on perusal of the decision of the assessee's own case, the Ld. DR conceded that the ground of appeal is covered by the assessee's earlier year decision.

6.2.3. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that the coordinate bench

of ITAT Mumbai Tribunal in assessee's own case for AY 2006-07 in [2020] 180 ITD 505 (Mumbai - Trib.) had considered an identical issue and held that sales tax subsidy received by the assessee is capital in nature. The relevant findings of the Tribunal are as under:

> *"31. In this case, on perusal of facts, it is abundantly clear that the assessee has setup a new industry under the Industrial policy, 1993 of Government of Karnataka and package of incentives and concessions given by the state of Karnataka was to accelerate industrial development in the state of Karnataka. The said subsidy, although was qualify in terms of sales tax exemption on purchase of raw materials and plant and machinery and also, on sale of finished goods after commencement of production, but the purpose of the subsidy was to reimburse the cost of expenditure incurred for setting up the new industry. Therefore, we are of the considered view that when, the subsidy was given with an object to effect new industries in the backward area of the state in terms of sales tax exemption, then the said subsidy shall be treated as capital receipt. The Ld. CIT(A) after considering relevant facts has rightly held that subsidy received by the assessee from state Government of Karnataka is for the purpose of setting up of a new industry and in the nature of capital receipt not charitable tax. We do not find any error in the findings of the Ld.CIT(A) and hence, we are inclined to uphold the findings of the Ld.CIT(A) and reject ground taken by the revenue."*

6.2.4. A similar issue has been considered by the **Hon'ble Gujarat High Court in the case of Shivshakti Flour Mills (P.) Ltd. v. CIT [2017] 77 taxmann.com 115/390 ITR 346** where it held that the purpose of the transfer subsidy was to encouraging investment and

thereby stimulate industrial activity in difficult and far flung states in the North Eastern region for creating employment opportunities. Therefore, it is in the nature of capital receipt. **The Hon'ble Bombay High Court, in the case of Pr. CIT v. Welspun Steel Ltd. [2019] 103 taxmann.com 436/264 Taxman 252** held that the scheme was envisaged to encourage investment, which would in turn provide fresh employment opportunity in the district, which has suffered due to devastating earthquake. The computation of subsidy may be on the basis of sales tax or excise duty. But, nevertheless, the purpose test would ensure that, the subsidy was capital in nature. **The Hon'ble Kolkata High Court in the case of Pr. CIT v. Shyam Steel Industries Ltd. [2018] 93 taxmann.com 495** had expressed similar view and held that purpose test is most relevant to decide the nature of subsidy. The sum and substance of the ratio laid down by various High Courts are that if the assistance/subsidy was given to enable to set up a new unit or to expand the existing unit in the backward area, the receipt of the subsidy was on capital account.

6.2.5. From the above decisions, we are of the considered view that there is no infirmity in the order of the Ld. CIT(A) in treating the receipt of subsidy from state Government of Karnataka as capital in nature and accordingly, we reject ground taken by the revenue.

6.3. **Treatment of income on sale of Certified Emission Reduction (CER)as capital receipt instead of Revenue receipt (Ground 7 and 8).**

6.3.1. The next issue that came up for our consideration from ground no 7 and 8 of revenue appeal is treatment of income on sale of Certified Emission Reduction (CER) receipts as capital receipts instead of revenue receipts. The ld. AR for the assessee, submitted that the issue is squarely covered in favour of the assessee by the decision of **Hon'ble Mumbai ITAT in assessee's sister concern's case for AY 2008-09 in ITA No. 463/Mum/2014 and ITA No. 982/Mum/2013,** wherein it has been held that receipts on sale of CERs is a capital receipt not chargeable to tax.

6.3.2. The Ld. DR appearing for the Revenue failed to rebut to the arguments put forth by the authorized representative and also failed to provide any justification as to how the case is not covered by the Judgment of Hon'ble Andhra Pradesh High Court in the case of My Home Power Ltd. (supra). On the contrary, he has referred to a decision of Cochin Bench of the Tribunal in the case of Apollo Tyres Ltd. Vs. ACIT [2014] 31 ITR (Trib.) 477 (Cochin) to say that the income on sale of CERs is a benefit resulting out of the business activity and is thus liable to be considered as a revenue receipt.

6.3.3. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that the coordinate bench of ITAT Mumbai Tribunal in assessee's sister concern case for AY 2008-09 in ITA No. 463/Mum/2014 had considered an identical issue and held that a receipt on sale of CERs is a capital receipt not chargeable to tax. The relevant findings of the Tribunal are as under:

> *"10. As per the Hon'ble High Court, the income on sale of excess Carbon Credits was a capital receipt and not a business receipt/income. Notably, even in the case of assessee before the Hon'ble Andhra Pradesh High Court, assessee had earned income on sale of Carbon Credits in the course of carrying on the business of power generation, which is also the fact-position before us. The Hon'ble High Court has held that the income received on sale of excess Carbon Credits was a capital receipt not chargeable to tax. Quite clearly, the said Judgment supports the plea of assessee in the instant case that the receipts on sale of CERs is a capital receipt not chargeable to tax. Following the said Judgment we uphold the plea of the assessee."*

6.3.4. A similar issue has been considered by the **Hon'ble Andhra Pradesh High Court in the case of Commissioner of Income-tax - IV vs. My Home Power Ltd [2014] 46 taxmann.com 314 (Andhra Pradesh)** wherein Hon'ble High Court held as under:

> *"We have considered the aforesaid submission and we are unable to accept the same, as the learned Tribunal has factually found that "Carbon Credit is not an offshoot of business but an offshoot of environmental*

concerns. No asset is generated in the course of business but it is generated due to environmental concerns." We agree with this factual analysis as the assessee is carrying on the business of power generation. The Carbon Credit is not even directly linked with power generation. On the sale of excess Carbon Credits the income was received and hence as correctly held by the Tribunal it is capital receipt and it cannot be business receipt or income. In the circumstances, we do not find any element of law in this appeal."

The Hon'ble High Court has held that the income received on sale of excess Carbon Credits was a capital receipt not chargeable to tax. Quite clearly, the said Judgment supports the plea of assessee in the instant case that the receipt on sale of CERs is a capital receipt not chargeable to tax.

6.3.5. In so far as the reliance placed by the Ld. DR on the decision of Cochin Bench of the Tribunal in the case of Apollo Tyres Ltd (supra) is concerned, ostensibly, the same does not help the case of Revenue, in view of the subsequent Judgment of Hon'ble Andhra Pradesh High Court in the case of My Home Power Ltd. (supra). In fact, the Cochin Bench of the Tribunal has analysed the situation and observed that the earning of Carbon Credits was in the course of carrying on the business

and, therefore, such income was held to be in the nature of revenue receipt. The Hon'ble High Court, however approved the contrary proposition to the effect that the sale of Carbon Credits is not an offshoot of business but it is an offshoot of environmental concerns; and, therefore, it upheld the decision of Hyderabad Bench of the Tribunal holding such income as a capital receipt not chargeable to tax. We are pointing out the aforesaid for the reason that the logic adverted to by the Cochin Bench of the Tribunal has been specifically referred to by the Hon'ble Andhra Pradesh High Court, but the same did not find its favour. Therefore, we conclude by holding that the income received on sale of excess Carbon Credits is liable to be assessed as a capital receipt not chargeable to tax.

6.3.6. From the above decisions, we are of the considered view that there is no error in the findings of Ld.CIT(A) in treating the receipts on sale of CERs as capital receipt not chargeable to tax and accordingly, we reject ground taken by the revenue.

6.4. **Issue regarding allowance of additional depreciation on assets received from merged companies (Ground 9)**

6.4.1. The next issue that came up for our consideration from ground no 9 of revenue appeal is allowances of depreciation of Rs. 4,92,22,196/- on

increased WDV of assets transferred on amalgamation. The ld. AR for the assessee, at the outset, submitted that the issue is squarely covered in favour of the assessee by the decision of **Hon'ble Mumbai ITAT in assessee's own case for AY 2006-07 in [2020] 180 ITD 505 (Mumbai - Trib.),** where it has been held that WDV in the hands of the amalgamated company was to be calculated without considering the unabsorbed depreciation of the amalgamating companies, for which set off was never allowed.

6.4.2. The Ld. DR submitted that the Ld.CIT(A) was not justified in directing the AO to allow depreciation on the increased written down value of the assets, without appreciating the detailed reasons recorded in the relevant assessment order and the AO analysis of the provision of Explanation (2) and (3) to section 43(6) and the provision of section 72A of the I.T. Act, 1961.

6.4.3. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that the coordinate bench of ITAT Mumbai Tribunal in assessee's own case for AY 2006-07 in [2020] 180 ITD 505 (Mumbai - Trib.) had considered an identical issue and held that sales tax subsidy received by the assessee is capital in nature. The relevant findings of the Tribunal are as under:

*"**15.** We have heard both the parties, perused the material available on record and gone through orders of the authorities below along with certain case laws cited by both the parties. The only dispute under consideration is whether, the written down value of the assets transferred on amalgamation was to be computed in the hands of the amalgamated company considering the unabsorbed depreciation, i.e depreciation not given effect to, in the assessment of the amalgamating companies. The provisions of Explanation (2) and (3) to section 43(6), which explains what, will be the WDV of assets in the hands of amalgamated company, in the cases of amalgamation. Similarly, section 32(2), which provides for carry forward of unabsorbed depreciation and section 72A, which provides for carry forward of business loss and unabsorbed depreciation in the hands of the amalgamated company in the cases of amalgamation. If you go through, Explanation (2) to section 43(6), it is very clear that the word used therein speaks about depreciation 'actually allowed' in relation to said preceding year in case of amalgamated company. Thus, in view of Explanation (2) to section 43(6) of the Act, the WDV in the hands of the assessee as on 01/4/2005 (appointed date) would be the WDV of block of assets as on31/03/2004 as reduced by the depreciation 'actually allowed' during the said preceding year i.e*

FY 2004-05 in the hands of the amalgamating companies. Accordingly, the WDV of assets transferred on amalgamation in the hands of the amalgamating company has to be necessarily computed in terms of Explanation (2) to section 43(6) of the Act. As can be seen from the above, in terms of Explanation (2) to section 43(6), while computation the WDV on amalgamation, depreciation actually allowed has to be reduced.

However, the case of the AO is that Explanation (3) has to be read into Explanation (2) and accordingly, the WDV of assets transferred on amalgamation has to be computed after reducing the total depreciation in the hands of the amalgamated companies. Accordingly, it is necessary to read and comprehend as to why provision of section (3) to section 43(6) of the Act, cannot be applied in the facts of the present case. Explanation (3) to section 43(6) states that any depreciation, which is carry forward u/s 32(2) of the Act, shall be deemed to be depreciation actually allowed. As can be seen from the above, Explanation (2) and (3) to section 43(6) of the Act, both used the term depreciation actually allowed. However, as against Explanation (2),Explanation (3) to section 43(6) of the Act, operates as a deeming fiction, wherein depreciation which is carried forward u/s 32(2) of the Act, is deemed to have been actually allowed. In our considered view, Explanation (3) being a deeming

fiction, operates only in a particular conditions and in order to remove an anomaly, which otherwise would have been created under the other provisions of the Act. It thus follows that while interpreting Explanation (3), one needs to beaware of the intention of the statute. These provisions along with their intent have been explained elaborately by the Hon'ble Bombay High Court, in the case of Hindustan Petroleum Corporation Limited (supra), where it was held that Explanation (3) to section 43(6) of the Act, seeks to find certain anomalies which would have otherwise exists under the Act. The intention of explanation (3) is not a simply to nullify the provision of Explanation (2) to section 43(6), as has been read by the Ld.AO. This is also evident from the fact that the Explanation (2) has been introduced from 01.4.1988, whereas Explanation (3) was always on statute, which clearly implies that Explanation (3), which is a legal/deeming fiction, was not introduced to nullify the impact of Explanation (2) of the Act. Accordingly, in terms of Explanation (3) to section 43(6), in the present case, unless the unabsorbed depreciation of the amalgamating companies is carried forward in the hands of the amalgamated company u/s 32(2) of the Act, Explanation (3) cannot be read into Explanation (2) to simply conclude that depreciation 'actually allowed' also includes unabsorbed depreciation.

16. *The meaning of the term actually allowed is interpreted by the Hon'ble Supreme Court, in the case of CIT v. Doom Dooma India Ltd. [2009] 310 ITR 392/178 Taxman 261, wherein it has been held that, the term 'depreciation actually allowed' means depreciation of which the assessee has received effective advantage or benefit and not merely, which is notionally allowed or which is allowable. Accordingly, the words actually allowed under Explanation '(2) only mean depreciation, which has been given effect to, in the computation of income of the amalgamating companies and will not include unabsorbed depreciation. This legal proposition is supported decision of Hon'ble Bombay High Court, in the case of Silical Metallurgic Ltd. (supra). Where, the Hon'ble Court held that the statutory provision makes it clear that the WDV of the asset would be the actual cost of the assets of the assessee less depreciation allowed to the company. Any unabsorbed depreciation, which was not set off for carry forward could not be taken into account. A similar view was taken by the Bombay High Court in the case of Hindustan Petroleum Corpn. Ltd. (supra). Further, it is relevant to note that a Special Leave Petition filed against the aforesaid High Court decision has been dismissed by the Hon'ble Supreme Court on merits in SLP (C) No. 19054 of 2008(SC). A similar proposition has been laid down by the Hon'ble*

Madras High Court, in the case of EID Parry India's v. CIT [2012] 23 taxmann.com 348/209 Taxman 214.

17. In the present case, the Ld. AO has alleged that the unabsorbed depreciation of the amalgamating companies will be carried forward in the hands of the amalgamating companies in terms of section 72A of the Act. We find that in all above decisions of various high courts, we noted that the applicability of provision of section 72A had been considered and even after the courts held that deprecation actually allowed shall not include any unabsorbed depreciation. Therefore, we are of the considered view that the WDV in the hands of the amalgamated company was to be calculated without considering the unabsorbed depreciation of the amalgamating companies, for which set off was never allowed. The Ld.CIT(A) after considering relevant facts has rightly deleted additions made by the Ld.AO. Hence, we are inclined to uphold the findings of Ld.CIT(A) and reject ground taken by the revenue."

6.4.4. From the above decisions, we are of the considered view that the Ld. CIT (A) after considering relevant facts has rightly deleted additions made by the Ld.AO. Hence, we are inclined to uphold the findings of Ld. CIT (A) and reject the ground taken by the revenue.

6.5. **Issue regarding disallowances of depreciation on forward exchange contract (Ground 10)**

6.5.1. The next issue that came up for our consideration from ground no 10 of revenue appeal is disallowances of depreciation of Rs 3,23,41,176/- on loss arising on cancellation of forward foreign exchange contracts during the assessment year 2005-06 and Rs 22,20,563/- for 2006-07. In this ground, the assessee company is seeking consequential depreciation for the current year on loss that arising on the forward foreign contracts settled/ cancellation in the previous year relevant assessment year 2005-06 and 2006-07.The ld. AR for the assessee, submitted that the issue is squarely covered in favour of the assessee by the decision of Hon'ble Mumbai ITAT in assessee's own case for AY 2006-07 in [2020] 180 ITD 505 (Mumbai - Trib.), where it has been held that such loss arising on forward foreign exchange contracts should be added to the cost of asset in terms of section 43A of the Act, and consequently, depreciation should be allowed on the same.

6.5.2. We find that ITAT, Mumbai bench in assessee's own case held that such loss arising on forward foreign exchange contracts should be added to the cost of asset in terms of section 43A of the Act, and consequently, depreciation should be allowed on the same. The

relevant extract is reproduced as under:

> *"10. The next issue that came up for our consideration from ground No.4 of revenue appeal is disallowances of depreciation of Rs.4,47,62,874/- on loss arising on cancellation of forward foreign exchange contracts during the assessment year 2005-06. In this ground, the assessee seeking consequential depreciation for the current year on loss that arising on the forward foreign contracts settled/ cancellation in the previous year relevant assessment year 2005-06.We find that ITAT, Bangalore bench in assessee's own case held that such loss arising on forward foreign exchange contracts should be added to the cost of asset in terms of section 43A of the Act, and consequently, depreciation should be allowed on the same. Accordingly, the assessee is seeking consequential depreciation for the current year on such adjusted cost of assets as, which the Ld. AO has failed to grant. The Ld.CIT(A) after considering relevant facts has rightly directed the Ld. AO to allow consequential depreciation on fixed assets towards adjusted cost on account of loss arising on cancellation of forward foreign exchange contracts during the AY 2005-06. We do not find any error in findings of the Ld. CIT(A), and hence, we are inclined uphold findings of Ld.CIT(A) and reject ground taken by the revenue."*

6.5.3. Accordingly, the assessee is seeking consequential depreciation for the current year on such adjusted cost of assets as, which the Ld. AO has failed to grant. The Ld. CIT (A) after considering relevant facts has rightly directed the Ld. AO to allow consequential depreciation on fixed assets towards adjusted cost on account of loss arising on cancellation of forward foreign exchange contracts during the AY 2005-06 and AY 2006-07. We do not find any error in findings of the Ld.

CIT(A), and hence, we are uphold the findings of Ld.CIT(A) and reject ground taken by the revenue.

6.6. **Issue regarding consideration of refund of sales tax as capital receipt and to consider income on sale of Certified Emission Reductions (CER) as capital receipts for computing book profit u/s 115JB. (Ground 11)**

6.6.1. The said issues have been allowed and treated as capital receipt by us in the earlier paras, thus the question of adding the same to the books profits of the appellant does not arise. Further the authorised representative during the course of hearing submitted that the said issue is covered by the assessee's own case for AY 2006-07, wherein the issue is allowed in favour of the assessee. The Relevant extract is reproduced as under:

> *"In this view of the matter and considering the ratio of case laws discussed hereinabove, we are of the considered view that when a particular receipt is exempt from tax under the Income tax law, then the same cannot be considered for the purpose of computation of book profit u/s 115JB of the I.T. Act 1961. Hence, we direct the Ld. AO to exclude sales tax subsidy received by the assessee amounting to Rs. 36,15,49,828/- from book profits computed u/s 115JB of the I.T. Act, 1961."*

6.6.2. Further the issue of addition of 14A disallowance made to book profits, it is mentioned that

it is well settled law that book profit u/s. 115JB cannot be computed by including disallowance made u/s. 14A of the Act. **Recently the Supreme Court of India in the case of Atria Power Corporation Ltd. [2022] 142 taxmann.com 413 (SC) dismissed the SLP of the Department against High Court ruling that disallowance made under section 14A could not be added in assessee-company's income for purpose of computation of income under section 115JB of the Act. The Karnataka High Court in the case of J.J. Glastronics (P.) Ltd. [2022] 139 taxmann.com 375 (Karnataka) held that amounts disallowed under section 14A could not be added to net profit while computing book profit under section 115JB of the Act.** The Delhi Special ITAT in the case of Vireet Investment (P.) Ltd [2017] 82 taxmann.com 415 (Delhi – Trib.) (SB) held that computation under clause (f) of Explanation 1 to section 115JB(2), is to be made without resorting to computation as contemplated under section 14A read with rule 8D.

6.6.3. In view of the consistent position of law on this issue, we are hereby dismissing Department's appeal with respect to ground number 11.

ITA No.4287/Mum/2017 AY 2008-09 (Assessee's appeal)

6.7. Ground 1 of the assessee appeal related to limitation

issue of the assessment order. Before us Ld.AR of the assessee company submitted that though this ground of the assessee is fully covered by the decision of Madras High Court in case of Roca Bathroom Products Private Ltd (445 ITR 537), however since the other issues raised in department appeal is fully covered in favour of the assessee by previous years orders, hence as per instruction of the assessee he requested not to adjudicate this ground and keep it open. Considering the request of the assessee and since the issues raised in revenue appeal is mostly covered in favour of the assessee, hence the limitation issue become academic and accordingly not required to be adjudicated. Thus, ground raised by the assessee is rejected for statistical purpose.

6.8. Ground 2, 3 & 4 are related to corporate guarantee not being an international transaction. As we already held in revenue appeal while adjudicating this issue that the contentions raised by ld. Counsel are unsustainable in the light of decision rendered by Hon'ble Jurisdictional High Court in the case of Everest Kento Cylinders Ltd. (supra). Thus, we hold Corporate Guarantee facility provided to overseas AE by the assessee is an international transaction. Accordingly, these grounds of assessee appeal rejected.

6.9. **Accordingly, appeal of the revenue partly allowed and appeal of assessee dismissed.**

ITA No.5325/Mum/2017 AY 2009-10 (Revenue's appeal)

7. The issue raised in ground No.1 in Revenue's appeal pertains to interest received by assessee from foreign currency loan. The details of interest charged by the assessee on foreign currency loan to its AE is mentioned on page 2 of the TP order dated 30.11.2013. In this year also, the TPO rejected the benchmarking done using LIBOR rate and proceeded to calculate the ALP interest rate by considering the SBI Prime Lending rate. Since the issue is similar to one as decided by us in ground No.1 in ITA No.4632/Mum/2017 of Revenue's appeal, therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.1 in Revenue's appeal. Accordingly, ground No.1 of Revenue's appeal is rejected.

7.1 The next issue raised in ground No.2 to ground No.5 in Revenue's appeal deals with issue of commission charged on corporate guarantee provided to AE's. The details of guarantee and related loans as on 31.03.2009 is mentioned on page 18 of the TP order dated 30.11.2013. Since the issue involved i.e commission of CG provided is similar to one as decided by us in ground No.2 to ground No.4 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground

No.2 to ground No.5in Revenue's appeal. Accordingly, grounds No.2 to ground No.5 of Revenue's appeal are partly allowed.

7.2 The next issue that came up for our consideration from ground no 6 of revenue appeal is deletion of adjustments of interest computed on preliminary expenses for 2009-10.

7.2.1. The Ld.TPO noticed that the assessee had incurred an amount of Rs 22,32,12,000/- as preliminary expenditure on behalf of its AE i.e JSW Natural Resource Limited. On going through the ledger account, the TPO opined that the said expenditure assumes the nature of loan as the amount incurred was reimbursed back to the assessee company on 31.03.2009 and accordingly calculated an interest of Rs 93,56,558/- (12.75% for 120 days) on the expense incurred.

7.2.2. Before the CIT(A), the assessee submitted the nature of payments were to professional agencies for locating and conducting legal, financial and technical due diligence in relation to acquisition of mines, tax and other advisory services the same are purely administrative expenses which are recovered by the assessee in the same year on cost-to-cost basis. The CIT(A) considered the contentions put forth by the assessee and allowed the ground raised by the assessee by holding as under:

" I have considered the submissions of the appellant, the views of the AO in the assessment order and the material on record. The AO has unnecessarily considered the said transaction is nature of loan and has added the interest component on the same. It's not upto the AO to step into the shoes of the assessee and determine the nature of transaction. Further JSW Steel is a Flagship company of the JSW Group and incurring preliminary expenses on behalf of JNRL was in the nature of commercial expediency. Besides the amount was recovered by the appellant in the same year on cost to cost basis. In view of the above said facts, I am of the view that the AO has erred in computing interest on the said amount and hence the same needs to be deleted. The said ground of appeal is allowed."

7.2.3. We have gone through the findings of the TPO and that of the CIT (A). The CIT(A) after considering relevant facts has rightly directed to delete interest levied by the TPO on preliminary expenses incurred by the assessee which were later recovered on cost to cost basis. We do not find any error in the order of the CIT(A) hence we inclined to uphold the CIT(A) order and reject ground raised by the revenue.Accordingly, ground No.6 of Revenue's appeal is rejected.

7.3 The issue raised in ground No.7 in Revenue's appeal deals with the deletion of disallowance made u/s 14A r.w.r 8D of the Act. Since the issue raised is similar to one as decided by us in ground No.5 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.7 in Revenue's appeal.

Accordingly, ground No.7 of Revenue's appeal is rejected.

7.4 The issue raised in ground No.8 in Revenue's appeal deals with direction given by the CIT(A) to AO to consider the refund of sales tax as capital receipt. Since the issue raised is similar to one as decided by us in ground No.6 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.8 in Revenue's appeal. Accordingly, ground No.8 of Revenue's appeal is rejected.

7.5 The issue raised in ground No.9 and ground No.10 in Revenue's appeal deals with the direction given by the CIT (A) to the AO to consider income on sale of Certified Emission Reduction (CER) receipts as capital receipts. Since the issue involved is similar to one as decided by us in ground No.7 and ground No.8 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/findings in the above grounds would mutatis mutandis apply to ground No.9 and ground No.10 in Revenue's appeal. Accordingly, ground No.9 and ground No.10 of Revenue's appeal are rejected.

7.6 The issue raised in ground No.11 in Revenue's appeal deals with the direction given by the CIT(A) to the AO to consider the increased WDV of assets received from the merged companies thereby allowing additional

depreciation. Since the said issue is similar to one as decided by us in ground No.9 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.11 in Revenue's appeal. Accordingly, ground No.11 of Revenue's appeal is rejected.

7.7 The issue raised in ground No.12 in Revenue's appeal deals with allowance of consequential depreciation in respect of foreign currency loss incurred during FY 2004-05 and 2005-06 on cancellation of forward exchange contract considered as capital expenditure. Since the issue involved is similar to one as decided by us in ground No.10 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.12 in Revenue's appeal. Accordingly, ground No.12 of Revenue's appeal is rejected.

7.8 **Addition made on account of bogus purchase (Ground 13)**

7.8.1. The next issue that came up for our consideration from ground no 13 of revenue appeal is deletion of addition made of Rs. 2,58,750/- on account of bogus purchases. The AO on the basis of information from the sales tax authority held that the assessee

company failed to carry out any business activity with one M/s Riya Trading Company Pvt Ltd and made an addition of Rs 2,58,750/- by treating the same as alleged bogus purchase. On appeal before the CIT(A), the CIT(A) gave a decisive finding that the on perusal of invoices and bank statement it is evident that the transaction entered into with Riya Trading Company Pvt Ltd was genuine in nature. Further the CIT(A) also submitted that the addition cannot be made merely on the basis of information received from sales tax departments and on the statement of party without actually verifying or without providing opportunity of cross examination.

7.8.2. Before us, the ld. AR for the assessee, submitted that the similar additions, i.e., merely on information received from sales tax departments, addition of bogus purchase were made in the hands of the JSW Steel Limited (Successor on amalgamation of JSW Ispat Steel Ltd) Vs. DCIT in AY 2011-12 in ITA No. 4068/Mum/2018, wherein the Hon'ble Mumbai Tribunal held that additions made on account of bogus purchases only on the basis of information received from sales-tax department ignoring evidences filed by the assessee is incorrect and needs to be deleted. The relevant extract is reproduced as under:

> *"8. Coming to the issue in question, the AO has made addition of Rs.5,67,000/- towards purchases claimed to have been made from M/s Kotson Impex Pvt Ltd on the*

ground that although assessee has produced bills and payment proof, but failed to file further evidence in the backdrop of clear findings from the sales-tax department that the dealer is a suspicious / hawala dealer involved in providing accommodation entries. It is the claim of the assessee that merely for the reason of information received from sales-tax department, no adverse inference could be drawn against assessee when assessee has furnished necessary information including purchase bills. The assessee further contended that the total purchase of the assessee for the year under consideration is more Rs.5,000 crores, when such being the case, it is improbable to hold that the assessee was indulging in obtaining accommodation entries of purchase for Rs.5,67,000 to inflate its expenditure. More so, when the assessee has declared huge loss of more than Rs.1,000 crores for the year under consideration. We find that the assessee is a corporate giant involved in the business of manufacturing and selling of iron and steel products. The assessee's turnover for the year under consideration is more than Rs. 8,900 crores. The assessee has declared a net loss of Rs.1098 thousand crores. Under these facts, it is difficult to accept the arguments of the department that assessee was involved in obtaining accommodation entries for purchases amounting to Rs.5,67,000. Therefore, we are of the considered view that the AO as well as the Ld.CIT(A) were erred in making addition towards purchase of Rs.5,67,000 from M/s Kotson Impex Pvt Ltd as unexplained expenditure u/s 69C of the Act only on the basis of information received from sales-tax department ignoring evidences filed by the assessee. Hence, we direct the AO to delete the addition made towards alleged bogus purchases."

7.8.3. Since the facts in the instant case is identical to that of the assessee's own case as mentioned above, we do not find any error in findings of the Ld.CIT(A), and

hence, we are inclined uphold findings of Ld.CIT(A) and reject ground taken by the revenue. Accordingly the ground No.13 of the Revenue's appeal is rejected.

7.9 The issue raised in ground No.14 in Revenue's appeal deals with the directing of the CIT(A) to consider the refund of sales tax as capital receipt and to consider income on sale of Certified Emission Reductions (CER) as capital receipts for computing book profit u/s 115JB. Since the issue involved is similar to one as decided by us in ground No.11 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.14 in Revenue's appeal. Accordingly, ground No.14 of Revenue's appeal is rejected.

ITA No.5459/Mum/2017 AY 2009-10 (Assessee's appeal)

7.10 Ground 1 of the assessee appeal related to limitation issue of the assessment order. Before us Ld.AR of the assessee company submitted that though this ground of the assessee is fully covered by the decision of Madras High Court in case of Roca Bathroom Products Private Ltd (445 ITR 537), however, since the other issues raised in department appeal is fully covered in favour of the assessee by previous years orders, hence as per instruction of the assessee, he requested not to adjudicate this ground and keep it open. Considering

the request of the assessee and since the issues raised in revenue appeal is mostly covered in favour of the assessee, hence the limitation issue become academic and accordingly not required to be adjudicated. Thus, ground raised by the assessee is rejected for statistical purpose.

7.11 Ground 2, 3 & 4 are related to corporate guarantee not being an international transaction. Since the issue involved is similar to one as decided by us in ground No.2-4 in ITA No. 4287/Mum/2017 for AY 2008-09of Assessee's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.2-4 in Assessee's appeal. Accordingly, these grounds rejected.

7.12 **Addition on account of unexplained expenditure for alleged payments made to Shri Madhu Koda (Ground 5, 6 and 7)**

7.12.1. The next issue that came up for our consideration from ground no 5, 6 and 7 of assessee's appeal is addition made on account of unexplained expenditure for alleged payments made to Shri Madhu Koda. The ld. AR for the assessee, submitted that the addition has been made merely on the basis of addition made in the assessment order of Shri Madhu Koda without providing any document or statement having

any relation with the assessee company. He also submitted that the issue is squarely covered in favour of the assessee by the decision of **Hon'ble Mumbai ITAT in case of JSW Steel Limited (Successor on amalgamation of JSW Ispat Steel Ltd) Vs. DCIT for AY 2007-08 in ITA No. 1743/Mum/2015,** where Hon'ble Mumbai Tribunal has deleted the similar additions made by AO, which was subsequently upheld by the CIT(A) on account of unexplained expenditure for alleged payments made to Shri Madhu Koda.

7.12.2. We have gone through the order of AY 2007-08 and find that coordinate bench in case of JSW Steel Limited (Successor on amalgamation of JSW Ispat Steel Ltd) held that no addition can be in the hands of the appellant on account of unexplained expenditure for alleged payments made to Shri Madhu Koda. The relevant extract is reproduced as under:

> *"23. We find that the ld. CIT(A) had stated that all the documents called for by the assessee were duly provided by the ld. AO to the assessee, which in our considered opinion, is factually incorrect in as much as assessee, after inspection of the documents, had written a detailed letter dated 24/06/2015 stating that the documents were made available to it at the time of inspection and various documents were not available in the said folder. The copy of the said letter dated 24/06/2015 has already been reproduced hereinabove. The ld. AR before us submitted that during the course of inspection of records on 10/06/2015, it was noticed that even the ld. AO was not having any of the documents as asked by the assessee in the letters*

dated 10/03/2015, 17/04/2015 and 13/05/2015 and the ld. AO was having only some pages of corroboration of 7 pages of PIL diary in his records. These papers are enclosed in page Nos. 7-13 of the paper book filed before us. We have gone through the same and all those pages does not contain any seized document reference, does not contain the details of persons from whose hands those documents were seized etc., Hence, even on merits, these documents could not be relied upon in any manner whatsoever for framing an addition in the hands of the assessee.

24. We also find that the very basis of addition was primarily reliance on the PIL filed in the Hon'ble Jharkhand High Court .Vide an order dated 06/01/2014,the Hon'ble Jharkhand High Court had categorically taken note of the report of the CBI which mentions that it would not be in a position to register any regular case and it would not be possible for CBI to conduct an enquiry in the matter. Hence, the very basis on which the addition itself was made had been dismissed by the Hon'ble High Court. Hence, the contention of the ld. CIT(A)that these documents were accepted in the PIL filed before the Hon'ble Jharkhand High Court itself is factually incorrect and on the contrary, the CBI had clearly stated that based on these documents, no action can be taken against any private party. Hence, we hold that no addition could be made in the hands of the assessee even on merits. Accordingly, the grounds raised by the assessee are allowed."

7.12.3. On perusal of the facts of case and material available on record we find that similar facts were there during the assessment year 2007-08 and the issue under consideration is squarely covered by the above-mentioned decision. Thus in line of above we are inclined to hold that no addition could be made in the

hands of the assessee and accordingly, the grounds raised by the assessee are allowed.

7.13 Accordingly, appeal of the revenue as well as assessee are partly allowed.

ITA No.5326/Mum/2017 AY 2010-11 (Revenue's appeal)

8. The issue raised in ground No.1, 2 and 3 in Revenue's appeal pertains to interest received by assessee from foreign currency loan. The details of interest charged by the assessee on foreign currency loan to its AE is mentioned on page 2 & 3 of the TP order dated 30.11.2013. In this year also, the TPO rejected the benchmarking done using LIBOR rate and proceeded to calculate the ALP interest rate by considering the SBI Prime Lending rate. Since the issue raised is similar to one as decided by us in ground No.1 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.1,2 and 3 in Revenue's appeal. Accordingly, ground No.1, 2 and 3 of Revenue's appeal are rejected.

8.1 The issue raised in ground No.4 to ground No.7 in Revenue's appeal deals with issue of commission charged on corporate guarantee provided to AE's. The details of guarantee and related loans as on 31.03.2010

is mentioned on page 24 of the TP order dated 30.11.2013. Since the issue involved i.e commission of Commission Guarantee provided is similar to one as decided by us in groundNo.2 to ground No.4 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.4 to ground No.7 in Revenue's appeal. Accordingly, grounds No.4 to ground No.7 of Revenue's appeal are partly allowed.

8.2 The next ground of appeal i.e., ground No.8of Revenue's appeal deals with deletion of disallowance made u/s 14A r.w.r 8D of the Act. Since is raised is similar to one as decided by us in ground No.5 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.8 in Revenue's appeal. Accordingly, ground No.8 of Revenue's appeal is rejected.

8.3 The issue raised in ground No.9 in Revenue's appeal deals with direction of the CIT(A) to AO to consider the refund of sales tax as capital receipt. Since the issue involved is similar to one as decided by us in ground No.6 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.9 in Revenue's appeal. Accordingly, ground No.9 of Revenue's

appeal is rejected.

8.4 The issue raised in ground No.10 and ground No.11 in Revenue's appeal deals with the direction of the CIT (A) to consider income on sale of Certified Emission Reduction (CER) receipts as capital receipts. Since the issues involved is similar to one as decided by us in ground No.7 and ground No.8 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.10 and ground No.11 in Revenue's appeal. Accordingly, ground No.10 and ground No.11 of Revenue's appeal are rejected.

8.5 The issue raised in ground No.12 in Revenue's appeal deals with the direction of the CIT (A) to consider the increased WDV of assets received from the merged companies thereby allowing additional depreciation. Since the issue involved is similar to one as decided by us in ground No.9 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.12 in Revenue's appeal. Accordingly, ground No.12 of Revenue's appeal is rejected.

8.6 The issue raised in ground No.13 in Revenue's appeal deals with allowance of consequential depreciation in respect of foreign currency loss incurred during FY 2004-05 and 2005-06 on cancellation of

forward exchange contract which were considered as capital expenditure. Since the issue involved is similar to one as decided by us in ground No.10 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.13 in Revenue's appeal. Accordingly, ground No.13 of Revenue's appeal is rejected.

8.7 **Deletion of disallowance u/s 37 on account of payments made to manpower supply companies (Ground 14)**

8.7.1. The next issue that came up for our consideration from ground no 14 of revenue appeal is deletion of disallowance of Rs. 10,00,00,000/- u/s 37 on account of payments made to manpower supply companies. Ld.AO made disallowance stating that the appellant was not able to justify that the payments made to alleged parties which were wholly and exclusively for the purpose of the business. Ld.AO further stated that these companies collectively have made donation to a public charitable trust amounting to Rs. 10,00,00,000/- and therefore disallowed an amount of Rs. 10,00,00,000/- to the extent of donation given by these companies..

8.7.2. The assessee during the course of CIT(A) proceedings submitted that the assessee during the

course of scrutiny proceeding had submitted the ledger copies and details of work order to establish the genuineness of the expenses. Further the 3 parties have been regularly supplying skilled and semi-skilled manpower to the assessee or its manufacturing activity. Further there is no co-relation that the payment towards donations made by three independent companies are through assessee company. There is no other connection of the appellant company with these companies. There is no document or other evidence based on which conclusion regarding non commensurate payment to these companies was drawn by the Ld.AO. Ld.CIT(A) considering the facts of the case concluded that the addition made by Ld.AO is purely on surmises and lacks credibility and needs to be deleted.

8.7.3. Aggrieved by the order of CIT (A), the revenue is in appeal before us. Ld. DR argued that placed strong reliance on the order of the AO and stated that the expenses are not incurred for business purpose. The ld. AR for the assessee, submitted that the Ld.AO had proceeded to make the disallowance with pre-conceived baseless notion, without examining and verifying payments made to vendors. The Ld.AR further submitted that the Ld.AO made disallowance without bringing any connection of donation with the appellant or any transactions with the appellant.

8.7.4. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. Ld. CIT(A) has rightly stated that the Ld.AO has made an addition without bringing any connection of donation made by these 3 companies with that to the appellant. It is also surprising that how donation made by supplier can could be a basis for disallowance in the hands of Assessee Company without any tangible material showing the benefits, if any, of the donation flown back to the assessee company. There is no such finding in the assessment order to this effect. We are of the considered view that there is no infirmity in the order of the Ld. CIT(A) in deleting the addition which is purely on surmises & lacks credibility and accordingly, we reject ground taken by the revenue.

8.8 The issue raised in ground No.15 in Revenue's appeal deals with the direction of the CIT (A) to consider the refund of sales tax as capital receipt and to consider income on sale of Certified Emission Reductions (CER) as capital receipts and directing AO to exclude amount transferred to Debenture Redemption Reserve (DRR) for computing book profit u/s 115JB. The issue of refund of sales tax as capital receipt and to consider income on sale of Certified Emission Reductions (CER) as capital receipts to be considered in book profits are similar to one as decided by us in ground No.11 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our

decision/finding in the above ground would mutatis mutandis apply. Further with regards to the direction of CIT(A) to exclude the amount transferred to DRR amounting to Rs 125,00,00,000/- from book profits, the Ld.AR of the placed reliance on the decision of jurisdictional **Bombay HC in the case of CIT vs. Raymond Ltd (23 taxmann.com 427).** On the contrary, the Ld. DR placed reliance on the order of the AO and stated that the said issue was decided against the assessee by ITAT Bangalore in their own matter for AY 2005-06.

8.9 We have perused the records and gone through the decisions relied upon by the parties. It is seen that the debenture redemption reserve is not a reserve in view of the judgment of **Hon'ble Supreme Court in the case of National Rayon Corp. Ltd. Vs. CIT 1997 227 ITR 764.** In this judgment, the Hon'ble Supreme Court has clearly held that debenture redemption reserve is not a reserve but money set apart in the accounts of the company to redeem the debentures and therefore must be treated as money set apart to meet a known liability. While the above Supreme Court decision was given in context of Super Profit Tax Act, 1963 but the ratio of this decision has been applied by the Hon'ble Kolkata ITAT bench in the case of IOL Ltd. Vs. DCIT (2003) 81 TTJ 525. In this direct decision of ITAT, it was held that the sum

appropriated by the assessee as debenture redemption reserve in the P&L account of the relevant previous year cannot be held to be a "reserve" within the meaning of clause (b) or the amount set apart to meet unascertained liabilities within the meaning of clause(c) to the Explanation to Section 115JB(1). In this decision, it was also held that none of the other clauses i.e. clause (a) and clause (d) to (1) of the Explanation to Section 115J are relevant to consider the additions of `50 lakhs i.e. the debenture redemption reserve. Further in the case of Hindalco Industries Ltd. Vs. ACIT (2010) TIOL 762 ITAT Hon'ble Lucknow ITAT Bench had also followed the ratio laid down by the Hon'ble Supreme Court in the case of National Rayon Corporation (supra) to hold that debenture Redemption Reserve is neither covered as "reserve" within the meaning of Clause (b) or the amount set apart to meet unascertained liabilities within the meaning of clause (c) of the Explanation to section 115J.

8.10 In view of the above said two direct decisions of ITAT and further relying upon the judgment of Hon'ble Supreme Court in the case of National Rayon Corpn. Ltd. (supra), it is held that the debenture redemption reserve is not liable to be added back in the "book profit" of the appellant. Accordingly, ground No.15 of Revenue's appeal is rejected.

ITA No.5457/Mum/2017 AY 2010-11 (Assessee's appeal)

8.11 Ground 1 of the assessee appeal related to limitation issue of the assessment order. Before us Ld.AR of the assessee company submitted that though this ground of the assessee is fully covered by the decision of Madras High Court in case of Roca Bathroom Products Private Ltd (445 ITR 537), however since the other issues raised in department appeal is fully covered in favour of the assessee by previous years orders, hence as per instruction of the assessee he requested not to adjudicate this ground and keep it open. Considering the request of the assessee and since the issues raised in revenue appeal is mostly covered in favour of the assessee, hence the limitation issue become academic and accordingly not required to be adjudicated. Thus, ground raised by the assessee is rejected for statistical purpose.

8.12 Ground 2, 3 & 4 are related to corporate guarantee not being an international transaction. Since the issue involved is similar to one as decided by us in ground No.2-4 in ITA No. 4287/Mum/2017 for AY 2008-09of Assessee's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.2-4 in Assessee's appeal. Accordingly, these grounds are rejected.

8.13 Accordingly, appeal of the revenue is partly allowed and appeal of the assessee is dismissed.

ITA No.5327/Mum/2017 AY 2011-12 (Revenue's appeal)

9. The issue raised in ground No.1 in Revenue's appeal pertains to interest received by assessee from foreign currency loan. The details of interest charged by the assessee on foreign currency loan to its AE is mentioned on page nos. 2 & 3 of the TP order dated 30.11.2013. In this year also, the TPO rejected the benchmarking done using LIBOR rate and proceeded to calculate the ALP interest rate by considering the SBI Prime Lending rate. Since the issue involved is similar to one as decided by us in ground No.1 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.1 in Revenue's appeal. Accordingly, ground No.1 of Revenue's appeal is rejected.

9.1 The issue raised in ground No.2 to ground No.6 in Revenue's appeal deals with issue of commission charged on corporate guarantee provided to AE's. The details of guarantee and related loans as on 31.03.2011 is mentioned on page 24 of the TP order dated 30.11.2013. Since the issue involved i.e commission of

CG provided is similar to is similar to one as decided by us in ground No.2 to ground No.4 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.2 to ground No.6 in Revenue's appeal. Accordingly, grounds No.2 to ground No.6 of Revenue's appeal are partly allowed.

9.2 The issue raised in ground No.7 in Revenue's appeal deals with disallowance of addition made u/s 14A r.w.r 8D of the Act. Since the issue involved is similar to one as decided by us in ground No.5 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.7 in Revenue's appeal. Accordingly, ground No.7 of Revenue's appeal is rejected.

9.3 The issue raised in ground No.8 in Revenue's appeal deals with the direction of the CIT(A) to consider the refund of sales tax as capital receipt. Since the issue involved is similar to one as decided by us in ground No.6 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.8 in Revenue's appeal. Accordingly, ground No.8 of Revenue's appeal is rejected.

9.4 The issue raised in ground No.9 and ground No.10

in Revenue's appeal deals with the direction of the CIT(A) to consider income on sale of Certified Emission Reduction (CER) receipts as capital receipts. Since the issue involved is similar to one as decided by us in ground No.7 and ground No.8 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.9 and ground No.10 in Revenue's appeal. Accordingly, ground No.9 and ground No.10 of Revenue's appeal are rejected.

9.5 The issue raised in ground No.11 in Revenue's appeal deals with the direction of the CIT(A) to consider the increased WDV of assets received from the merged companies thereby allowing additional depreciation. Since the issue involved is similar to one as decided by us in ground No.9 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.11 in Revenue's appeal. Accordingly, ground No.11 of Revenue's appeal is rejected.

9.6 The issue raised in ground No.12 in Revenue's appeal deals with the direction of the CIT(A) in allowing consequential depreciation in respect of foreign currency loss incurred during FY 2004-05 and 2005-06 on cancellation of forward exchange contract considered as capital expenditure. Since the issue involved is similar

to one as decided by us in ground No.10 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.12 in Revenue's appeal. Accordingly, ground No.12 of Revenue's appeal is rejected.

9.7 The issue raised in ground No.13 in Revenue's appeal deals with CIT (A) in directing the AO consider the refund of sales tax as capital receipt and to consider income on sale of Certified Emission Reductions (CER) as capital receipts for computing book profit u/s 115JB. Since the issues involved are similar to one as decided by us in ground No.11 in ITA No.4632/Mum/2017 of Revenue's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.13 in Revenue's appeal. Accordingly, ground No.13 of Revenue's appeal is rejected.

ITA No.5458/Mum/2017 AY 2011-12 (Assessee's appeal)

9.8 Ground 1 of the assessee appeal related to limitation issue of the assessment order. Before us Ld.AR of the assessee company submitted that though this ground of the assessee is fully covered by the decision of Madras High Court in case of Roca Bathroom Products Private Ltd (445 ITR 537), however since the

other issues raised in department appeal is fully covered in favour of the assessee by previous years orders, hence as per instruction of the assessee he requested not to adjudicate this ground and keep it open. Considering the request of the assessee and since the issues raised in revenue appeal is mostly covered in favour of the assessee, hence the limitation issue become academic and accordingly not required to be adjudicated. Thus, ground raised by the assessee is rejected for statistical purpose.

9.9 Ground 2, 3 & 4 are related to corporate guarantee not being an international transaction. Since the issue involved is similar to one as decided by us in ground No.2-4 in ITA No. 4287/Mum/2017 for AY 2008-09of Assessee's appeal. Therefore, our decision/finding in the above ground would mutatis mutandis apply to ground No.2-4 in Assessee's appeal. Accordingly, these grounds are rejected.

9.10 Accordingly, appeal of the revenue is partly allowed and appeal of the assessee is dismissed.

Order pronounced on 30th June, 2023.

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 30/06/2023
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai