IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT), 'B' BENCH MUMBAI

BEFORE SHRI M.BALAGANESH, AM

&

SHRI PAVAN KUMAR GADALE, JM

ITA No.5428/Mum/2015
(**Assessment Year :2011-12**)

M/s. Batliboi Limited Bharat House, 5th Floor, 104 Mumbai Samachar Marg Fort, Mumbai -400 001	Vs.	Dy. CIT, Circle 2(1) Aayakar Bhavan 5th Floor, Mumbai-400001
PAN/GIR No. AAACB4408L		
(**Appellant**)	..	(**Respondent**)

Assessee by	Shri S. Vankatraman
Revenue by	Shri Shishir Dhamija
Date of Hearing	**05/01/2021**
Date of Pronouncement	**17/02/2021**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.5428/Mum/2015 for A.Y.2011-12 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-4, Mumbai in appeal No.CIT(A)-4/IT-202/DCIT.2(1)/2013-14 dated 21/09/2015 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 31/01/2014

by the ld. Dy. Commissioner of Income Tax, Circle-2(1), Mumbai (hereinafter referred to as ld. AO).

2. Though the assessee had raised several grounds, the only effective issue to be decided in this appeal is as to whether the ld CITA was justified in upholding the taxability of Rs 4.27 crores received by the assessee from the welfare trusts under normal provisions of the Act as well as while computing the book profits u/s 115JB of the Act, in the facts and circumstances of the case.

3. We have heard the rival submissions and perused the materials available on record. The undisputed facts are that the assessee is a public limited company engaged in the business of manufacturing of machine tools, textile machines, Air conditioning & Refrigeration work , Casting & Job work for Air Conditioning & Humidification , Air Control Equipment and Trading in Engineering goods. The return of income for the Asst Year 2011-12 was filed by the assessee company on 28.9.2011 declaring Nil income under normal provisions of the Act and book profit of Rs 5,30,89,000/- u/s 115JB of the Act. In the year ended 30th September 1980, the assessee company established 33 irrevocable trusts to provide medical benefits, scholarships and educational assistance and for the general welfare of its employees and made an aggregate contribution of Rs 12,50,000/- in the year ended 30th September 1981 (relevant to Asst Year 1982-83) and an aggregate contribution of Rs 10,00,000/- in the year ended 30th September 1983 (relevant to Asst Year 1984-85) to the said welfare trusts. While filing its return of income for the Asst Years 1982-83 and 1984-85, the assessee company claimed the said contributions of Rs 12,50,000/- and Rs 10,00,000/- respectively as deductions.

3.1 The contributions received by the welfare trusts were partially invested in equity shares of listed / unlisted companies on which the trusts received dividends which were duly offered to tax in the respective years by the trusts and also claimed credit for Tax deducted at source thereon. Similarly part of the contributions received by the welfare trusts were advanced by way of loans to parties on which interest was received, which was also duly offered to tax in the respective years by the trusts and also claimed credit for Tax deducted at source thereon. The welfare trusts have been duly assessed to income tax by the income tax authorities on the income returned by them.

3.2. The Finance Act, 1984, with retrospective effect from 1st April 1980, inserted sub section (9), (10) and (11) to section 40A of the Act. Sub section (9) of section 40A of the Act provided for disallowance of amounts contributed to welfare trusts, other than recognized provident funds, approved superannuation funds and approved gratuity funds. Consequently, in the assessments of the assessee company for Asst Years 1982-83 and 1984-85 , the ld AO disallowed the contributions of Rs 12,50,000/- and Rs 10,00,000/- respectively made to the welfare trusts by the assessee company.

3.3. Sub section (11) of section 40A of the Act inserted by Finance Act 1984 provided as follows:-

"(11) Where the assessee has, before the 1st day of March, 1984, paid any sum to any fund, trust, company, association of persons, body of individuals, society or other institution referred to in sub-section (9), then,

> *notwithstanding anything contained in any other law or in any instrument, he shall be entitled—*
>
> *(i) to claim that so much of the amount paid by him as has not been laid out or expended by such fund, trust, company, association of persons, body of individuals, society or other institution (such amount being hereinafter referred to as the unutilised amount) be repaid to him, and where any claim is so made, the unutilised amount shall be repaid, as soon as may be, to him;*
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> *(ii) to claim that any asset, being land, building, machinery, plant or furniture acquired or constructed by the fund, trust, company, association of persons, body of individuals, society or other institution out of the sum paid by the assessee, be transferred to him, and where any claim is so made, such asset shall be transferred, as soon as may be, to him."*

3.4. The Board of Directors of the assessee company, in terms of the above sub section, passed a resolution at their meeting held on 30.10.2010 falling in Asst Year 2011-12, for claiming back the unutilized amounts lying with the welfare trusts, consequent to which the Trusts withdrew the amounts given as loans to parties and sold the shares held by them and repaid the unutilized amounts of Rs 4,27,43,000/- to the assessee company.

3.5. The assessee company had irrevocably contributed the amounts to the trusts. As stated earlier, the earnings by way of dividends and interest from the amounts contributed by the assessee company had been duly offered to tax by the welfare trusts in the respective years while filing their returns of income and assessed as such. There is absolutely no dispute on this aspect.

3.6. Having given the contributions irrevocably to the Trusts, the assessee company never contemplated at the time when these amounts were given, that they would ever come back to the company. It was only by virtue of insertion of sub section (11) of section 40A of the Act, which overrides any instrument, that the assessee company was able to

claim back the unutilized amount lying with the trusts. Besides, the earnings by way of dividend and interest on the amounts contributed have already been offered to tax by the trusts and hence cannot once again be taxed in the hands of the assessee company when received back by the assessee company. Accordingly, the assessee company sought reduction of the same from the taxable income while filing its return of income for the year under consideration. The claim of receiving back the money was made in the Asst Year 2011-12 and unutilized portion lying with the trust also was received back by the assessee company during the Asst Year 2011-12.

3.7. Upto this stage, the facts are undisputed and indisputable.

3.8. We find that the assessee company had resorted not to offer the amounts claimed back from the welfare trusts on the following grounds:-

a) The welfare trusts had already offered to tax the accretions on over and above the contributions received by it from Asst Years 1982-83 onwards in their returns of income for the respective years.

b) The contributions made by the assessee company to the irrevocable welfare trusts in Asst Years 1982-83 and 1984-85 were duly disallowed by the ld AO pursuant to the retrospective amendment brought in section 40A(9) of the Act. Hence the capital contributions made by the assessee company in the welfare trusts got duly disallowed.

c) The amounts claimed back from the welfare trusts by the assessee company was never contemplated at all to receive back, being irrevocable in nature, and hence the same would partake the character of a windfall receipt or a capital receipt and not liable to income tax.

d) Since the capital contributions made per se were disallowed in the hands of the assessee company and the amounts received back from welfare trusts would also partake the character of capital receipt not liable for capital gains u/s 45 of the Act and therefore would be outside the ambit of definition of 'income' u/s 2(24) of the Act. Hence the entire accretion to the capital contributed would only be a windfall receipt in the capital field in the hands of the assessee company and moreover, the welfare trusts had already paid taxes on the accretion portion in the form of dividends, interest and capital gains in the respective years.

e) The said exemption from income tax was also claimed while computing book profits u/s 115JB of the Act during the course of assessment proceedings eventhough the same was offered to tax voluntarily by the assessee in the computation of book profits u/s 115JB of the Act while filing its return of income.

3.9. We find that the assessee company had placed reliance on the following decisions in support of its propositions that the amounts received back from welfare trusts was never in contemplation of the assessee and hence would be a windfall receipt :-

a) Decision of Privy Council in the case of The Commissioner of Income Tax, Bengal vs Shaw Wallace and Company reported in 2 Company Cases 276 vide order dated 14.3.1932

b) Decision of Hon'ble Jurisdictional High Court in the case of Cadell Weaving Mill Co. Ltd vs CIT reported in 249 ITR 266 (Bom) which was subsequently affirmed by the Hon'ble Supreme Court in the case of CIT vs D.P.Sandu Bros (Chembur) Pvt Ltd reported in 273 ITR 1 (SC)

c) Decision of Hon'ble Jurisdictional High Court in the case of Mehboob Productions Pvt Ltd vs CIT reported in 106 ITR 758 (Bom)

d) Decision of Hon'ble Supreme Court in the case of Universal Radiators vs CIT reported in 201 ITR 800 (SC)

3.10. We find that the ld AO did not appreciate the contentions of the assessee and observed that the receipt of Rs 4.27 crores cannot be regarded as 'windfall' within the meaning of the word arrived at by the Hon'ble Bombay High Court in the case of Mehboob Productions Pvt Ltd vs CIT supra because of the following reasons :-

a) It is not an unexpected receipt out of the ordinary contemplation of the party obtaining or receiving it. The provision of section 40A(11) of the Act was inserted by the Finance Act 1984, w.r.e.f. 1.4.1980 , whereas the contributions were all made by 1983. For all the years between 1984 to 2010, the assessee company had the option to recall the unutilized amount lying in the Trusts. It has consciously decided to recall it through a Board Resolution on 30.10.2010. The assessee company knows the unutilized amount lying in the Trusts and it has the right to exercise its option of recalling whenever it wants. Therefore this receipt of Rs 4.27 crores is out of the ordinary contemplation of the assessee. However in the case of Mehboob Productions supra, the company has no guarantee of the award given by the Government and hence it was out of its ordinary contemplation.

b) It is receipt directly attributable to or occurring by way of its business profits. The initial contributions to the trusts were made out of the business profits of the assessee. It was also intended to be used for the welfare of its employees who are contributing to its business profits.

3.11 We find that the ld. AO placed reliance on the decision of Hon'ble Supreme Court in the case of Emil Webber vs CIT reported in 67 Taxman

532 (SC) to state that the definition of 'income' u/s 2(24) of the Act is an inclusive definition which adds several artificial categories to the concept of income. The ld. AO also placed reliance on the decision of Hon'ble Apex Court in the case of CIT vs G R Karthikeyan reported in 68 Taxman 145 (SC) to drive home the point that even if a receipt does not fall within the ambit of any of the sub-clauses of section 2(24) of the Act, it may still be income if it partakes the nature of income. Based on these observations, the ld AO brought to tax a sum of Rs 4.27 crores as income both under normal provisions of the Act as well as while computing book profits u/s 115JB of the Act.

3.12. We find that the ld. AO had also stated in his order that if the contention of the assessee is to be accepted, then every assessee would create a welfare trust and make an initial contribution to the said trust for investing it prudently and reclaim the unutilized amount in terms of 40A(11) of the Act and claim that the same is not exigible to tax on the accretions which has never suffered tax in anybody's hands.

3.13 We find that the substance of the essence of the argument of the ld. AO is that every receipt would fall within the ambit of Section 2(24) unless it is specifically exempted under the provisions of the Act.

3.14. We find at the outset that the welfare trusts had duly paid its taxes on the accretions by way of dividends from investment in shares and interest on loans advanced in its income tax returns and the same were duly assessed as such in the hands of the said welfare trusts. This point is absolutely not in dispute before us. Hence the alternative contention of the ld. AO that this accretion has never suffered any tax in anybody's

hands is factually incorrect and does not hold water in the peculiar facts and circumstances of the instant case.

3.15. We find that the ld. AO had addressed the entire issue in dispute before us about the taxability of the amounts received back from welfare trust on the premise that it was not an unexpected receipt and the assessee was always in contemplation of receiving it from the welfare trusts, pursuant to provisions of Section 40A(11) of the Act. In this regard, we find that the mute point which the lower authorities had failed to address is that the contribution made by the assessee company to the welfare trust is fully irrevocable. This fact is already stated in the primary facts hereinabove which is not disputed at all by the lower authorities in any of the orders. Once, the contribution to welfare trusts which are created by the assessee company is irrevocable and the assessee gains the eligibility to get back its contributions from the said welfare trusts, being the unutilized amount, pursuant to an amendment brought in Section 40A(11) of the Act, which is by operation of law, the Act of the assessee cannot be faulted with. No doubt, there was a considerable delay on the part of the assessee in not claiming the said unutilized amounts from welfare trusts from the years 1984-2010. This delay however, in our considered opinion, does not change the character of the receipt per se. To put it differently, if this contention of the ld. AO is to be accepted then can it be said that had the assessee company claimed the said monies from the welfare trust in the year 1984, would it be treated as a capital receipt, and the same would take the character of a revenue receipt merely because it was claimed belatedly by the assessee company. Hence, the answer is an emphatic no and the period of delay alone would not determine the character of the receipt. What is to be seen, in our considered opinion, in the peculiar facts and circumstances of

the instant case, is that the contribution having made in an irrevocable way to the trust fund by the assessee company was never in contemplation by the assessee company to get back the same. In the instant case but for the provision of Section 40A(11) of the Act, the assessee company would not be eligible at all to claim unutilized portion back from the welfare trust. Hence, it is the specific provision in the statute which had enabled the assessee to gain eligibility to claim the unutilized portions from the welfare trusts despite being the irrevocable contribution. Hence, it could be safely concluded that the said receipt was never in contemplation of the assessee company to get back the receipts from the welfare trusts. Once, the receipt falls under this category of never contemplated receipt in its ordinary course, the said receipt would not partake the character of the revenue receipt and would only had to be categorized as a windfall receipt. It is a trite law that every receipt is not income unless specified in the Act. No doubt the definition of income u/s.2(24) of the Act is an inclusive definition. It never says that every receipt would fall within the ambit of income u/s.2(24). First the nature of receipt should be "income" in the hands of the assessee or the revenue receipt in the hands of the assessee. The expression 'inclusive' definition need to be understood in this perspective. The same definition does contemplate taxation of a capital receipt representing capital gain which is chargeable to tax specifically u/s.45 of the Act. The said definition does not contemplate taxation of all capital receipts other than capital gains u/s.2(24) of the Act. In our considered opinion, this should be the correct understanding of inclusive definition of income u/s.2(24) of the Act.

3.16. We find that the Hon'ble Jurisdictional High court in the case of Maharashtra in the case of Mehboob Productions Pvt. Ltd., vs. CIT reported in 106 ITR 758 (Bom) had an occasion to consider the meaning

of "non-recurring receipt" and it held that *all receipts by the assessee would not necessarily be deemed to be income of the assessee and the question as to whether any particular receipt is income or not will have to be determined depending upon the nature of the receipts and the true scope and effect of the relevant taxing provision.*

3.17. It also held that *income is a monetary return expected by the assessee for the labour and/or skill bestowed, and/or capital invested by him; coming in from a definite source, which need not be a legal source, in the sense that the failure to pay the same need not be enforceable in a court of law; and excluding a receipt 'in the nature of' a mere windfall which, would mean a windfall in regard to its very nature and not in regard to its extent or quantum. When talking of a windfall receipt in connection with the consideration of a question whether such receipt would be income or not, we will have to restrict the concept of such windfall to a case where the unexpectedness of the advantage pertains to the factum of receipt and not to the quantum of receipt. What we are considering as "windfall" is some unexpected receipt not in the contemplation of the assessee and not directly attributable to or occurring by way of its business profits. On the other hand, where there was clear expectation, though small, of receiving such advantage or profit, then it cannot be properly regarded as windfall merely because the advantage or receipt is much more than could have been reasonably contemplated.*

3.18. We find that the Hon'ble Jurisdictional High Court while rendering the aforesaid decision, had placed reliance on the decision of privy Council in the case of CIT vs. Shaw Wallace & Co. (1932) 2 Company Cases 276. The relevant operative portion of the judgement of Hon'ble Jurisdictional High Court are as under:-

32. In Commissioner of Income-tax v. Shaw Wallace & Co. it was observed that in order to be income, the receipts must be something which came in (1) periodically, (2) as a return, (3) with some sort of regularity or expected regularity, and (4) from a definite source. The Supreme Court in the case of Raghuvanshi Mills has indicated decisively that in order to constitute income, the receipt need not be one coming in with some sort of regularity or expected regularity and even a single payment received by the assessee may, in the circumstances of the case, constitute its income. In some cases it had been contended on behalf of the assessee that in order to constitute income, the receipt must not be gratuitous or ex gratia in character but must arise from some legal obligation on the part of the donor or a corresponding legal right to receive on the part of the donee. In Maharani of Morvi's case , which decision being that of a Division Bench of this court is binding on us, it was been held that even a voluntary payment made entirely without consideration can be considered to fall within the category of "income" provided it is traceable to a real source and is not something dependent entirely on the whim of the donor. It was expressly held by the Division Bench that it is not necessary that in order that a payment may constitute income, it must proceed from a legal source, and it is not necessary that if payments are not made, the enforcement can be secured by the payee in a court of law. However, as indicated by Braund J. in Rani Amrit Kunwar's case , a receipt must be one having the character of income according to the ordinary meaning of that word in the English language and not one which is in the nature of a windfall. The expression "windfall" had also been earlier used by Sir George Lowndes J. in shaw Wallace & Co.'s case . The result of all this discussion is that in order to constitute "income", the receipt must be one which comes in, (a) as a return, and (2) from a definite source. It must also be of the nature which is of the character of income according to the ordinary meaning of that word in the English language and must not be one of the nature of a windfall.

33. At this juncture a few words are necessary in order to appreciate the true nature of what, according to me, would be a "windfall", having relevance to the question being considered by us. In the Oxford English Dictionary, volume II, the word "windfall" has been given the meaning of a casual or unexpected acquisition or advantage. Now, it has to be made clear that when we are talking of a windfall receipt in connection with the consideration of a question whether such receipt would be income or not, we will have to restrict the concept of such windfall to a case where the unexpectedness of the advantage pertains to the factum of receipt and not to the quantum of receipt. By reason of the exigencies of the economic situation or political or international situation a trader or a businessman or an industry may make unduly large profits which are often loosely expressed as windfall profits. But this is not the nature of the windfall we are contemplating. Where the element of windfall or unexpectedness pertains only to the quantum of receipt, such element will not have any bearing on the question we are considering and such receipt will be profit or income of the assessee although unusually large. What we are considering as "windfall" is some unexpected receipt not in the contemplation of the assessee and not directly attributable to or occurring by way of its business profits. To put it in other words, if the assessee had produced the picture, Mother India, or if it can be said

that it was producing motion pictures with the idea that they would be exempted from entertainment duty by the Government of Bombay and the amount attributable to the collections of entertainment duty would be paid over to the assessee, then such receipt, perhaps, may not be said to be a windfall received by the assessee. Similarly, if the assessee had produced a motion picture with a particular situation which becomes extremely successful commercially by reason of some extraneous fact, the extra profits received by the assessee or by the exhibitors may be called windfall profits loosely or in ordinary parlance, but would not be a "windfall" for our purposes. Where the obtaining of a particular advantage or receipt could not be said to be within the ordinary contemplation of the party obtaining or receiving it, then only would it be proper to characterise the advantage or receipt as a windfall. On the other hand, where there was clear expectation, though small, of receiving such advantage or profit, then it cannot be properly regarded as windfall merely because the advantage or receipt is much more than could have been reasonably contemplated.

34. That the advantage received must be attributable to some conscious process on the part of the assessee also appears to be implicit in the aspect of a "return". Now, it must be made clear that when we talk of return in the context of this aspect of the question, we are not considering the return on any outlay or investment made by the assessee in the sense of capital employed. This may be one of the ways of securing a return, but not the only way. But, return will involve conscious outlay of resources or of the effort or of talent. It is the consciousness of the effort made which invests the receipt with the character of a return and removes it from the category of a windfall.

35. Mr. Joshi, on behalf of the revenue, urged that the receipts in the present case are receipts arising from business and even if in the nature of a windfall they would still be income and liable to tax unless the assessee can satisfactorily show that the income fell within the exemption. Alternatively it was submitted that even assuming that the receipts cannot be said to directly arise from the business of the assessee, the receipts in the present case are attributable to a definite source, viz., the Government notification, dated 25th October, 1957, and the various orders passed there-under. Accordingly, it was submitted that the receipts cannot be regarded as non-recurring or in the nature of a windfall and would have to be properly regarded as income of the assessee. The submission proceeded upon the footing that windfall receipts attributable to the business activity of the assessee are taxable as income. As indicated earlier, in my opinion, windfall receipts would have to be understood as falling into two broad categories; and receipts which are of the nature of a windfall as to the factum as explained by me earlier can normally be not regarded as income of the assessee. It becomes, therefore, necessary now to refer to a few decisions cited on behalf of the revenue in connection with this aspect of the matter.

36. One of these cases on which great reliance was placed by Mr. Joshi was Janab Syed Jalal Sahib v. Commissioner of Income-tax . In the said decision the assessee before the Madras High Court carried on the business of manufacturing and selling bidis but attended horse-races regularly every year

and indulged in betting and also entering in the races, horses, some of which were his own and some of which he owned in partnership with others. He maintained a separate set of accounts for these racing activities. The excess of the receipts over expenditure in these activities amounted to a substantial amount. The question being considered by the Madras High Court was whether these amounts were taxable income of were casual and non-recurring receipts and exempt from tax under section 4(3)(vii) of the Act. It was held by the Madras High Court that whether taxable or not, the amounts constituted income. It was held further that the income was not taxable as it was income of a casual and non-recurring nature within the scope of exemption granted by section 4(3)(vii) of the Income-tax Act. The question is whether the decision of the Madras High Court in the above case really helps Mr. Joshi for the purpose of the decision to be given in the present case. When the assessee before the Madras High Court undertook racing and betting activities, he did so with an expectation of a return and the receipts received from these activities, although the activities could not be regarded as his business or vocation and even though the receipts or items of receipts could be regarded as casual or non-recurring, were attributable to definite sources, viz., these activities, and, therefore, would satisfy both the requirements as postulated by me. These receipts were in the nature of return as also from the definite source. In the ordinary parlance these receipts would comprise the assessee's income from racing and betting activities. As indicated above, if these activities had been embarked upon with the hope of earning some money therefrom, the receipts could not be properly regarded as a windfall in the limited sense of the term "windfall" that I have enunciated. There was a definite expectation of an income, and it is irrelevant to consider whether in fact such expectation was based on a sound or unsound foundation. The above decision of the Madras High Court, therefore, really does not help Mr. Joshi.

37. Mr. Joshi also referred us to and relied on the case decided by the Calcutta High Court in In re Susil C. Sen [1941] 9 ITR 261 (Cal). In that case the assessee, an attorney and advocate, acting for a shareholder of a limited company, interviewed the managing agents of the company, attended a meeting of the shareholders of company as a proxy, made a speech at the meeting a secured a substantial issue of new shares to the public. The firm of stock-brokers who benefited by the issue of the new shares paid a sum of Rs. 10,000 to the assessee, even though the assessee had not acted for them and they were not legally bound to pay anything to the assessee. It was held that assuming that the receipt was of a casual and non-recurring nature, it arose from the exercise by the assessee of his profession as a lawyer and advocate and it was accordingly not exempt under section 4(3)(vii) of the Indian Income-tax Act. Now, it may be pointed out that the only question which arose in the reference before the Calcutta High Court was whether the amount received by the assessee was exempt under the provisions of section 4(3)(vii) of the Indian Income-tax Act, 1922, and that question was decided against the assessee in the court holding that the receipt could be said to be one arising from the exercise of profession, vocation or occupation. It is clear that the broader question similar to the one placed before us, viz., whether the receipts constitutes income at all, was not being directly considered by the Calcutta High Court. Further, according to the

Calcutta High Court, the amount of Rs. 10,000 had been paid to a person, who was an advance and attorney, in appreciation of the part played by him in securing that benefit. In the words of the Calcutta High Court [1941] 9 ITR 261, 274 (Cal.) : "It was as anything could be that the causa causans of the payment was what Mr. Sen had done on the instructions of his client (shareholder whose proxy he held) at the shareholders' meeting." It was on that footing that it was held that the receipt arose from the exercise by the assessee of his profession as lawyer and advocate and, therefore, could not be exempt from taxation. To repeat, the broader question which we are considering was not canvassed before nor decided by the Calcutta High Court in the above decision.

38. Mr. Joshi also referred us to an English case, Herbert v. McQuade [1902] 4 TC 489, 500 (CA). The assessee concerned in that case was a vicar of the parish of St. John de Sepulchre in the city of Norwich and the assessments made upon him were in respect of a certain amount granted to him by the Queen Victoria Clergy Sustentation Fund (Norwich Diocese). This fund was established in the year 1997 and was incorporated under the above name by a charter. It was controlled entirely by the local diocesan council which reserved to itself the entire control over the apportionment and distribution of grants and the right to consider all the circumstances of the case where applications were made to it for grants from the fund. The assessee had applied for and received the grant from the fund each year since its institution. It was held that the payments received by the assessee were chargeable as they must be deemed to have accrued to him by reason of his office. According to the Master of the Rolls :

> *"... a payment may be liable to income-tax although it is voluntary on the part of the persons who make it, and that the test is whether from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it as voluntary of whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to his - that it has come to him by virtue of his office, accrued to him in virtue of his office - it seems to me that it is not negatived, that is not impossible merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money, to pay it."*

39. Now, bearing in mind the various facts as found by the High Court in Herbert's case [1902] 4 TC 489 (CA) which need not be fully set out, it would be possible to say that the receipt of the amounts by the vicar were attributable to his vocation and arose in the circumstances of the case from a definite source, viz., the fund, and could not be regarded, although complete discretion did vest in the controlling council, to be in the nature of windfall. As a matter of fact, the object of the fund was to help clergymen who were in receipt of emoluments bellow a certain limit to make up for their loss. Such payments, although having the nature of subsidy, would rightly be regarded in the ordinary parlance as having the character of income and would be assessable to tax unless the said receipt would fall within any of the exemptions. This case, therefore, will have to be distinguished on its own facts as not detracting from the principle which I

have indicated earlier, which appears to be the correct basis of considering whether the receipts could be properly regarded as income or not. On the same footing one would have to reject from consideration the decision in Seaham Harbour Dock Company v. Crook [1931] 16 TC 333 (HL), which also turns on its own facts. In that case the court was considering a subsidy given by the grants committee to the dock company and although the amount had been first credited to revenue in the account of the company, were held not to be profits or gains of trade bearing in mind the purposes for which the grants were made.

40. On the material before us there is nothing to show that assessee-company had produced the said picture Mother India with the slightest expectation that the same would be exempt from entertainment duty and that the amounts collected by the exhibitors as and by way of such duty would be directed to be paid over to it as producers by the Government of Bombay. It is true that we may consider the two notifications of the Government (annexures "A" and "A-1" to the statement of case) and the various letter or orders made pursuant to the later notification dated 25th October, 1957, as the definite source to which the receipts are attributable. The fact that the payments appear to be entirely at the discretion of the Government and that the exemption can be withdrawn by the Government even without any default on the part of the assessee (see clause 4 of annexure A-1) would not be sufficient to disentitle the receipts from being considered as income. It is true that the object of the subsidy was to assist the producers (as annexure "A" shows) and to encourage future production of films of sufficiently high quality and which served a high social purpose. Bearing the factual position in mind, which has been indicated earlier in this judgment, I would hold that these receipts do not partake of the element of a return which is necessary for it to constitute income, and further that it was of the nature of a windfall-a windfall as to the factum and not a windfall as to mere quantum. On both the counts, therefore, the answer to the question whether these receipts constitute income of the assessee must be in the negative and in favour of the assessee, viz., that they did not constitute income.

41. To turn again to the test of the ordinary connotation of the word "income", the proper approach to the question would be to regard the amount received by the assessee as some sort of a subsidy, subvention or grant given to them to encourage them to produce similar good pictures in future. The occasion to give grant to them or to pay them subsidy or subvention or what may be properly called a prize (though the computation of the quantum has been fixed in an uncertain manner, depending upon the entertainment duty payable by the patrons at the cinemas) was because they had produced the picture, Mother India. But from this it cannot be said that this was their income in the ordinary or normal sense of the term from the picture, Mother India. The income of the assessee from the picture, in the normal parlance of the expression, would be attributable to what their distributors and exhibitors have paid to them. This would be their income from the picture, Mother India, as also the income from their normal business activity. If the view canvassed for by the department were to prevail, then any prize or subsidy or award given to an individual or business concern for some aspect of their business activity would have to be comprised in its income

and would be held taxable unless it qualified for any particular exemption as such."

....

52. It is unnecessary to consider the matter of exemption in any further detail in the view that I have taken that the receipt does not represent income and, therefore, the question of considering whether the assessee is entitled to exemption would not arise. It may just be indicated that the word "non-recurring" does not mean that the receipt is a single one or which has in fact not been repeated, but only that there is no claim or right in the recipient to expect its recurrence. It is further to be noted that merely because the mode of payment in the instant case is one that would ensure to the assessee receipt of the amounts in driblets, it would not necessarily characterise the receipt as a recurring receipt. It is unnecessary to consider this aspect of the matter any further in the view that I have indicated regarding whether such receipts can be regarded as income of the assessee.

53. In the view that I have taken, the first question would have to be answered in favour of the assessee."

3.19. Hence, from the detailed reading of the aforesaid decision of the Hon'ble Jurisdictional High Court, it could be deciphered that unless the assessee was in contemplation to receive a particular receipt from a definite source, it would not fall within the ambit of income u/s.2(24) of the Act. In the instant case, as submitted in the preliminary facts hereinabove, the assessee company was never in contemplation to receive the unutilized portions back from the welfare trusts, in view of the fact that contributions were made to an irrevocable trust fund. But for the amendment in Section 40A(11) of the Act, the assessee could not have gained the eligibility to get back the unutilized monies back from the welfare trusts. Hence, it could be safely concluded that the said eligibility to receive the money was never in contemplation of the assessee company and that the said receipt would squarely fall within the ambit of

expression "windfall" and hence, does not constitute income within the meaning of the Act. We also find that similar view was also taken by the Hon'ble Supreme Court in the case of Universal Radiators vs. CIT reported in 201 ITR 800 (SC) wherein it was held as under:-

> *"Coming to the issue whether devaluation surplus earned by the assessee consequent on the settlement of the claim by the insurance company could be treated as revenue receipt, it may be stated that taxability on profit or deduction for loss depends on whether profit or loss arises in course of business. The Courts have maintained a distinction between insurance against loss of goods and insurance against loss of profits. The latter is undoubtedly taxable as is clear from the decision in Raghuvanshi Mills (supra) where any amount paid by the insurance company, `on account of loss of profit' was held taxable. But what happens where the insurance company pays any amount against loss of goods. Does it by virtue of compensation become profit and is taxable as such. Taxability of the amount paid on settlement of claim by the insurance company depends both on the nature of payment and purpose of insurance. Raghuvanshi Mills' decision is an authority for the proposition where the very purpose of insurance itself is profit or gain. Result may be the same where the payment is made for goods in which the assessee carried on business. Any payment being accretion from business, the excess or surplus accruing for any reason may be nothing but profits. [See The King vs. B.C. Fir and Cedar Lumber Co. Ltd. (1932) AC 441, Green (RM Inspector of Taxes) vs. J. Gliksten & Sons Ltd. (Reports of Tax Cases Vol. 14 p. 365), CIT vs. Popular Metal Works & Rolling Mills (1982) 30 CTR (Bom) 216 : (1983) 142 ITR 361 (Bom)]. But where payment is made to compensate for loss of use of any goods in which the assessee does not carry on any business or the payment is a just equivalent of the cost incurred by the assessee, but excess accrues due to fortuitous circumstances or is a windfall, then the accrual may be a receipt, but it would not be income arising from business, and, therefore, not taxable under the Act. In IRC vs. William's Executors 26 Tax Cases 23, distinction was explained thus.*
>
> *"A manufacturer can, of course insure his factory against fire. The receipts from that insurance will obviously be capital receipts. But supposing he goes further, as the manufacturer did in that case, and insures himself against the loss of profits which he will suffer while his factory is out of action; it seems to me it is beyond question that sums received in respect of that insurance against loss of profits must be of a revenue nature."*
>
> *10. The assessee did not carry on business of buying and selling ingots. The compensation paid to the assessee was not for any trading or business*

activity, but just equivalent in money of the goods lost by the assessee which it was prevented from using. The excess arose on such payment in respect of goods in which the assessee did not carry on any business. Due to fortuitous circumstances of devaluation of currency, but not due to any business or trading activity the amount could not be brought to tax.

11. The Tribunal in the instant case had found;

> *"the profit on account of devaluation is not business profit or income as it has nothing to do with the business or trading activity of the assessee. The profit arose since the claim was settled by the Insurance Company and the Indian rupee was devalued. Even without paying for the goods contracted for, the assessee by an extraordinary set of fortuitous circumstances earned a profit which by its very nature is casual and non-recurring. In this view of the matter the profit cannot be charged to tax."*

12. The High Court of Kerala in CIT vs. Union Engg. Works 1976 CTR (Ker) 45 : (1976) 105 ITR 311 (Ker) held :

> *"In the instance case, the excess profit, as found by the Tribunal, was not a receipt arising from business; nor was it, as admitted on both sides, capital gains. This was part of the compensation received by the assessee from the insurer for damage caused to its goods. The claim for the compensation for damage caused to the goods had been settled with the insurer and the sum so settled did not include any excess profit. The excess profit arose entirely due to the devaluation. This excess amount was in the nature of a windfall, being the unexpected fruit of devaluation, and it cannot, therefore, be regarded as a receipt arising from business though it may be said in a sense to be a receipt in the course of business. We hold that the Tribunal had correctly held that the sum of Rs. 13,455.75 received by the assessee was not a receipt arising from its business within the meaning of s. 10(3)(ii) of the IT Act, 1961."*

13. We are of the view that on the facts of that case, the High Court of Kerala was right in law in upholding the findings of the Tribunal, while on the facts found in the instant case, the High Court of Madras was wrong in law in reversing the well-considered order of the Tribunal.

14. For reasons stated by us this appeal succeeds and is allowed. Both the questions referred by the Tribunal to the High Court are answered in the affirmative, i.e., in favour of assessee and against the Department. The assessee shall be entitled to its costs.

3.20. It would also be relevant to consider the meaning of expression "casual" receipt which had been discussed in various decisions of Hon'ble High Courts and Hon'ble Supreme Court as under:-

> ***130. RM. AR. AR. RM.AR.AR Ramanathan Chettiar v CIT (1967) 63 ITR 458(SC)***
> *The expression 'casual' has not been defined in the Act and must, therefore, be construed in its plain and ordinary sense. According to the Shorter Oxford English Dictionary, the word 'casual' is defined to mean; (i) subject to or produced by chance; accidental, fortuitous, (ii) coming at uncertain times; not to be calculated on, unsettled. A receipt of interest which is foreseen and anticipated cannot be regarded as casual even if it is not likely to recur again.*
>
> ***B. Malick v. CIT (1968) 67 ITR 616 (All.)***
> *The word 'casual' may have several meanings. It may be something which comes in at uncertain times and something which cannot be relied upon or calculated to produce income or it may be something which is the result of chance, or the result of a fortuitous circumstance. One test which has been laid down in some cases is whether the receipt is one which is foreseen, known and anticipated and provided for by agreement. If it is a result thereof, then it cannot be described as casual even if it is not likely to recur for a considerable time.*
>
> ***CIT vs. J.C. Wahal (1988) 170 ITR 635 (All.)***
> *'Casual' means something which comes in at uncertain times and something which cannot be relied upon or calculated toproduce income or it may be something which is the result of chance or the result of a fortuitous circumstance.*

3.21. Considering the totality of facts and circumstances of the instant case and the ratio decidendi of the aforesaid judgements and applying the same to the facts of the instant case, we have no hesitation to hold that unutilized portion lying in the trust funds which were claimed back by the assessee company was never in contemplation by the assessee company as assessee had all along treated the said contribution being made to an irrevocable trust fund and the eligibility to get back the monies got triggered only pursuant to insertion of provisions of Section

40A(11) of the Act in the statute and not otherwise. Hence, the said receipt of Rs.4.27 Crores, being the unutilized portions, received back from the welfare trusts by the assessee company would not partake the character of a revenue receipt constituting income and would merely have to be treated as a windfall or non-recurring receipt not liable to tax, though not exempted under specific provisions of the Act. It is not in dispute that the welfare trusts had duly suffered taxes on the accretions to the contributions received in the form of dividends and interest on loans in its regular returns and assessed as such. Hence, the accretion portion had already suffered taxes in the hands of the welfare trusts. Taxing the same again in the hands of the assessee company while getting back the unutilized portion would tantamount to double taxation. Accordingly, we hold that the receipt of Rs.4.27 Crores have to be excluded while computing total income of the assessee under normal provisions of the Act. Accordingly, ground Nos. 4 & 5 raised by the assessee are allowed.

4. The ground No.1 raised by the assessee is with regard to non-applicability of provisions of Section 115JB of the Act to the peculiar facts and circumstances of the instance case. The ground Nos. 2 & 3 raised by the assessee are with regard to non-taxability of the receipt of Rs.4,27,43,000/- from the welfare trusts by the assessee company while computing book profits u/s.115JB of the Act, even though the same was credited by it in its profit and loss account.

4.1. We have heard rival submissions and perused the materials available on record. At the outset, the ld. AR raised a preliminary argument that the provisions of Section 115JB of the Act are not applicable to the facts

of the instant case in view of the fact that Section 115JB starts with a non-obstante clause by stating as under:-

> *"1.Notwithstanding anything contained in any other provision of the Act, where in the case of an assessee, being a company, the income-tax payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, (2012), is less than (eighteen and one-half per cent) of its book profit, (such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be amount of income-tax at the rate of (eighteen and one-half per cent)."*

4.2. From the aforesaid reading of the provisions of the Act, the ld. AR argued that unless there is tax payable under normal provisions of the Act, and which is less than tax payable u/s.115JB of the Act, there would be no obligation for the assessee to get impleaded with the provisions of Section 115JB of the Act at all. In other words, when there is no income tax payable on the normal provisions of the Act for an assessee, charging provision u/s.115JB of the Act fails and accordingly, would not get attracted.

4.3. We find that if the argument advanced by the ld. AR is to be accepted, then the entire intention behind introduction of provisions of Section 115J, 115JA, 115JB of the Act gets completely defeated and becomes redundant, as these provisions were admittedly introduced in the statute to collect tax as per their book profits when they had declared loss or liable to pay zero tax under the normal computation of income. Moreover all the companies in India are governed by the very same provisions wherein if they suffered nil taxes or zero taxes under the normal provisions of the Act or the tax payable under normal provisions is less than tax @18.5% of book profits, then the provisions of Section 115JB of the Act would be applicable to those companies and assessee

company alone cannot be singled out or isolated from the same. Moreover, we have also seen that these provisions are in force from the year 1987 onwards commencing from Section 115J which had gradually migrated to Section 115JB of the Act without digressing from the true intention behind introduction of these provisions in the Act. Hence, the primary argument that Section 115JB of the Act is not applicable to the assessee company in the instant case is hereby rejected. Accordingly, the ground No.1 raised by the assessee is dismissed.

5. Now, let us get into the aspect of taxability of the receipt of Rs.4,27,43,000/- being the amount claimed back from the welfare trusts by the assessee company, which was duly credited by it in its profit and loss account and offered to tax while computing book profits u/s. 115JB of the Act in the return of income filed by the assessee company.

5.1. We have already held hereinabove that the receipt of Rs.4,27,43,000/- by the assessee company received from the welfare trusts is a capital receipt not liable to income tax. Hence, a receipt which from its inception is not the income u/s.2(24) of the Act cannot be taxed u/s.115JB of the Act also. To put it differently, what cannot be taxed directly cannot be taxed indirectly. Moreover, this aspect has been elaborately dealt by the Co-ordinate Bench decision of this Tribunal in the case of JSW Steel Ltd. vs. ACIT in ITA Nos.923/BANG/2009 & 930/BANG/2009 for A.Y.2004-05 dated 13/01/2017. The facts before the case of JSW Steel Ltd., and the manner in which the same has been adjudicated by Mumbai Tribunal by taking into account the specific provisions of Section 115JB of the Act ; provisions of Companies Act, 1956 ; relevant accounting standards issued by the Institute of Chartered

Accountants of India and the various decisions of Tribunals, Hon'ble High Courts and the Hon'ble Supreme Court are reproduced hereunder for the sake of convenience.

*"**4.** The facts in brief qua the issue raised in the aforesaid grounds are that, assessee is a public limited company engaged in the business of manufacturing of hot rolled steel sheets and steel plates. For the assessment year 2004-05 assessee had filed its original return of income u/s 139(1) on 30.10.04, declaring loss of (-)Rs.262,53,15,582/-. Later on the said return was revised on 17.02.05 whereby "nil" income was declared under the normal provision of the Act and the tax liability under MAT provision of section115JB was shown at Rs.22,33,03,139/- on a book profit of Rs.297,73,75,188/-. In the course of the assessment proceedings, the Assessing Officer noted that assessee company had shown extraordinary item of income amounting to Rs.390,76,03,999/- on account of waiver of loan, which was obtained by the assessee in the earlier years. The breakup of this waiver amount was as under:—*

Particulars	*Amount (Rs.)*
Waiver of principal loans	*228,46,76,328*
Waiver of interest payable to UTI	*86,01,30,698*
Waiver of interest, guarantee & commitment fees	*76,27,96,973*
Total	***390,76,03,999***

In the computation of income assessee added back only the amount of Rs.76,27,96,981/- on the ground that it was claimed as deduction in the earlier years. Regarding waiver of principal loan amount and interest payable to UTI, it was submitted that it was not claimed as allowance or deduction in the earlier years. Therefore, it does not constitute income under section 41(1) of the Act. However, the Assessing Officer vide his order dated 29.12.06 passed u/s 143(3) determined the income under the normal provisions of the Act at Rs.152,58,98,970/- and book profit was computed at Rs.529,36,24,104/- under section 115JB after disallowing the following expenses/deductions claimed by the assessee in the normal computation of income and also making other adjustments while computing the book profits:

- *Addition of Rs.109,41,00,000/-, being the amount of depreciation attributable to the capital assets purchased out of loans taken from financial institutions but subsequently waived, liable to be taxed u/s. 41(1) of the Act.*
- *Non reduction of Rs.314,48,07,026/-, being waiver of loans, while determining Net Profit for the purpose of computing book profits u/s. 115JB.*

__5.__ The background of the waiver of the loan is that, assessee had availed 'rupee term loans' and 'foreign currency loans' from various Indian and foreign financial institutions and banks for setting up of integrated steel plants. The foreign lenders

had sanctioned foreign currency loans of about Rs.1000 crores as buyer's credit for purchase of various equipment, plant and machinery etc. The assessee had utilized the above loans to pay the purchase price of the imported plant and machinery for setting up of the Steel plants. The loans were repayable over various maturity dates up to 2010. After setting up the steel plants, the assessee had incurred huge loss due to economic recession in general and steel industry in particular and was under severe financial crisis. Hence, the assessee was unable to meet its financial commitments in respect of the above loans. Accordingly, the assessee entered into a financial restructuring package, i.e., 'Corporate Debt Restructuring Package' (CDR) in respect of loans taken from various Indian and foreign financial institutions. After negotiations with the foreign lenders, the assessee entered into agreements to settle the dues, pursuant to which the principal and interest payable were reworked and part of the principal and interest amounts aggregating toRs.390,76,03,999/-were waived. Accordingly, the entire sum of Rs. 390,76,03,999/- was credited to the Profit and Loss account as an exceptional item on account of waiver of the principal and interest payable thereon with a specific note in 'Notes to Account' that the exceptional item represents waiver of dues on settlement with certain lenders and since the principal amount of the borrowing of Rs.228.46 crores was utilized to pay the purchase price of the imported plant and machinery for setting up the steel plants, therefore, it amounts to capital surplus and not trading ability. Assessee thus contended that, since the waiver of principal amount of borrowing was utilized on capital account, therefore, it is a capital receipt not taxable while computing the income of the assessee. As regards the interest payable to UTI amounting to Rs.86,01,30,698/-, it was contended that the same was never claimed as deduction in the earlier years due to provision of section 43B and hence the amount waived has not been offered to tax as per section 41(1). However a vital fact to be noted in the present case is that, the assessee while computing the book profit under section 115JB in the revised computation of income has included the amount of Rs.314.14 crores (i.e. Rs.228.46 + Rs.86.01) which represented the exceptional items of receipts on account of waiver of loan and same was not taken to 'capital reserve' or excluded by the assessee from the net profit as per profit & loss account. Instead, in the computation of income the assessee by way of a note gave a caveat that the amount of Rs.314.14 crores which represents capital receipt is not in the nature of profit and gains of business and therefore, is not includable in the book profit under section 115JB. This note has given in the para 10.1 of the revised computation which reads as under:

"The company submits that the above item is not in the nature of profits and gains of business and accordingly, is not includible within the Book Profits under Section 115JB. In any event, the principal amount waived and written back cannot be considered as income and the same should not be included in the Book Profit. While the Company has, out of abundant caution, included the above item in the computation of Book Profits to the extent of Rs.3,907,603,999, the Company reserves its right to exclude such sum from Book Profits during the course of assessment/appellant proceedings.

For this purpose, the assessee relies on the following decisions of the Income-tax Appellate Tribunal.

- *Sutlej Cotton Mills Ltd. v. ACIT [1993] 45 ITD 22 (Cal) (SB)*

- *Sipani Automobiles Ltd. v. DCIT [1993] 46 ITD 280 (Bang)*
- *NCL Industries Ltd. v. JCIT [2004] 88 ITD 150 (Hyd)*

Even while filing the Auditor's report in form no. 29B in accordance with section 115JB(4) along with return of income, the assessee company again mentioned that exceptional item representing waiver of loan was capital receipt and hence could not be considered to be part of book profits for the purpose of section 115JB. The Assessing Officer, however, while computing the book profit in the assessment order considered the figure as given in the profit & loss account and did not agree to reduce the aforesaid waiver of dues as stated by the assessee in the 'notes' as well as in the accountant's report that it should not be included in the profit & loss account.

***6.** The assessee's submissions in the first appellate proceedings have been summarized by the Ld. CIT(A) in the following manner:—*

"The AO had erred in including the aforesaid dues waived while computing the Book Profits u/s 115JB of the Act, in view of the following:

i) Firstly, the principal amount waived and written back being an 'exceptional item' cannot be considered as income for the purposes of determining "Book Profits" u/s 115JB;

ii) Secondly, the principal amount waived and written back would be chargeable to tax only by the provisions of Section 41(1) by deeming it to be the income of the previous year;
iii) Thirdly, if the conditions prescribed in Section 41(1) are not satisfied, such deeming would not apply and the waiver of dues would not be chargeable to tax; and
iv) Lastly, in support of the above contention, the appellant placed reliance on the following judicial precedents in the cases of:
(a) NCL Industries Ltd. v. JCIT - 88 ITD 150 (ITAT, Hyderabad Bench).
(b) Sutlej Cotton Mills Ltd. v. ACIT - 45 ITD 22 (Kol) (SB)

To sum up, as the principal amount waived and written back would not satisfy the conditions prescribed in Section 41(1), the same would not be deemed as income chargeable to tax. Even otherwise, assuming without admitting, that such waiver of dues are chargeable to tax due to deeming provisions of Section 41(1), it was submitted that such deemed income cannot be included for the purposes of computing Book Profits u/s 115JB of the Act as held by the ITAT, Hyderabad Bench in the case of NCL Industries (supra)."

***7.** The Ld. CIT(A) rejected the assessee's contention on the ground that assessee is required to prepare its profit & loss account in accordance with Part II & III of VIth Schedule of the Companies Act,1956 and the book profit so arrived is to be taken at the basis for MAT calculation subject to certain specific adjustments of amount/data prescribed in the Explanation-1 thereto. The assessee in its computation of book profit once has adopted the said amount as the part of the book profit then the same has to be accepted as such. He rejected the assessee's contention that notes given in the statement of accounts that it is not includable within book profit cannot be considered. He distinguished the judgments relied*

upon by the assessee and finally he upheld the action of the Assessing Officer for including the waived amount for the purpose of arriving the book profit.

8. *Before us, the Ld. Counsel for the assessee, Mr. Kanchan Kaushal submitted that the amount of waiver of loans needs to be reduced from the net profit for the purpose of computing the book profit u/s 115JB to the extent of Rs.314.14 crores on the ground that firstly, the exclusion of capital receipt though credited to the profit & loss account is in accordance with Part II & III of VIth Schedule of the Companies Act, 1956 as only the 'working results' of the company is required to be considered for the purpose of computing the book profit under the provisions of section 115JB; and secondly, the waiver of loan is a 'capital receipt' because it was taken for the purchase of capital assets and hence it does not fall within the definition of income under the provisions of the Income Tax Act, therefore it is neither a profit nor revenue nor income nor gain which can be said to be chargeable to tax under the Income Tax Act. Once the particular receipt is not recognized as income at all under the charging provisions of Sections 4 & 5, there is no question of taxing the same under any other provisions of the Act. For the first proposition, after referring to the provisions of section 115JB read with Explanation-1, he submitted that the book profit has been defined as net profit shown in the profit & loss account and such a profit & loss account is to be prepared in accordance with the provisions of Part II & III of 6th Schedule of the Companies Act. The surplus arising on waiver of loan is though required to be credited to the profit & loss account as provided under section 211(2) of the Companies Act, however he pointed out that section 211(3A) as well as sub section (2) of section 115JB envisages that such profit & loss account is to be prepared in accordance with the accounting standards. After referring to theAS-5 and AS-9, he submitted that such waiver of a loan amounts to gain resulting from discharge of an obligation which is not considered as revenue, therefore, such a waiver of loan amount cannot be treated as revenue as per accounting standards. Mere disclosure of an extraordinary item in the profit & loss account does not mean that the item represents the 'working result' of the company. He submitted that even the Part II of VIth Schedule provides that Profit &Loss account shall be so made which clearly discloses the result of the working of the company during the period covered by the account and shall disclose every material after including the credits or receipts and debits or expenses in respect of non-recurring transaction or transaction of exceptional nature. The waiver of loan can no way be reckoned as working result of the company for the period. He referred to the decision of Hon'ble Supreme Court in the case of Indo Rama Synthetics (I) Ltd. v. CIT [2011] 330 ITR 363/196 Taxman 539/9 taxmann.com 25 wherein it has been held that object of the MAT provision is to bring out the 'real profits' of the companies and the main thrust is to find out the working result of the company. The real working result of a company can be arrived only after excluding the capital receipt and not otherwise. On the issue that assessee itself has included the waiver of amount in its profit & loss account, Mr. Kaushal submitted that the said working has to be read with the caveat given in notes to the account which has to be read along with the balance sheet of the profit & loss account. The assessee has very categorically stated that the waiver amount is not includable in the working of the book profit and it has been shown out of abundant precaution to avoid any amount of interest or penalty. In support of his contention, he relied upon the decision of Hon'ble Delhi High Court in the case of CIT v. Sain Processing & Weaving Mills (P.) Ltd. [2010] 325 ITR 565/[2009] 176*

Taxman 448. In the case before the Hon'ble Delhi High Court, the assessee did not charge depreciation to the Profit & Loss account, but disclosed the same in the Notes forming part of accounts. However, while computing book profit u/s 115J of the Act, it claimed the amount of depreciation as deduction from the net profit disclosed in the profit and loss account. The relevant observation of the Hon'ble High Court in respect of the said controversy was as under:

"The answer to this poser is found in sub-section (6) of section 211 of the Companies Act, which provides that except where the context otherwise requires any reference to a balance sheet or profit and loss account shall include the notes thereon or documents annexed thereto, giving information required to be given and/or allowed to be given in the form of notes or documents by the Companies Act. As already noted it is obligatory under clause 3of Part II to Schedule VI to the Companies Act to give information with regard to depreciation, which has not been provided for along with the quantum of arrears. According to us, once this information is disclosed in the notes to the accounts it would clearly fall within the ambit of the Explanation to section 115 J of the Act which defines "book profit" to mean "net profit as shown in the profit and loss account for the relevant assessment year.

To our minds, as long as the depreciation which is not charged to the profit and loss account but is otherwise disclosed in the notes of the accounts, it would come within the ambit of the expression "shown" in the profit and loss account, as notes to accounts form part of the profit and loss account by virtue of subsection (6) of section 211 of the Companies Act, 1956. This is quite evident if the provisions of sub-section (6) of section 211 of the Companies Act, are read in conjunction with sub section (1A) as well as the Explanation to section 115J of the Act". (Emphasis added)

***9.** On the second proposition that the receipt which is not chargeable to tax under section 4 cannot be brought to tax under section 115JB, Mr. Kaushal submitted that the first and foremost condition for taxing an income is that such a receipt should be first held as an income under the charging sections and if it is not an income then same cannot be brought to tax under the MAT provision also. The waiver/remission of a loan taken for the purchase of a capital asset is a capital receipt which is not chargeable to tax and therefore, waiver of a loan being a capital receipt cannot be indirectly brought to tax under section 115JB as it would defeat the entire purpose of the legislative intend behind introducing the provisions of MAT in section 115J/115JA/115JB. He also relied upon the decision of Hon'ble Kerala High Court in the case of Karimtharuvi Tea Estates Ltd. v. Dy. CIT [2001] 247 ITR 22/[2000] 113 Taxman 514 (Ker.), wherein the Hon'ble Kerala High Court after examining the object of section 115JB observed and held as under:*

"The object of insertion of section 115J of the Income Tax Act, 1961, was to ensure levy of minimum tax on what are known as 'prosperous zero-tax companies'. Under the scheme of the section, where the total income of companies as computed under the provisions of the Act, in respect of the previous year relevant to the assessment year, is less than 30 per cent of their book profits, the total income of such companies chargeable to income-tax for the relevant previous year is treated as income equal to 30 per cent of such book profits and is taxed accordingly. It also provides for certain adjustments by way of adding amounts and granting

deductions for computing the chargeable income under section 115J (1). Sub-section (2) provides that determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years will have to be made unaffected by the provisions in sub-section (1) of section 115J. The very object of the provisions of section 115J is to tax such companies which are making huge profits and also declaring substantial dividends but are managing their affairs in such a way as to avoid payment of income-tax, as a result of various tax concessions and incentives and for that purpose, the taxable income is determined under sub-section (1) of section 115 J. An assessee is enabled to claim carry forward and set-off of losses, unabsorbed allowance, in view of the specific provisions of the Act enabling an assessee to claim. But because of this provision a company will have to pay tax on at least 30 per cent of its book profits. Therefore, what is taxed is not fictional or hypothetical income. Under the law though it is permissible to bring to tax hypothetical income, what is really done under section115 J is not exactly bringing to tax hypothetical income. What is really done is to limit or restrict or curtail deduction, carry-forward and set-off of losses, unabsorbed depreciation, unabsorbed allowance, etc. Ordinarily these deductions are permissible in view of the provisions introduced in the statute by the Parliament and the Parliament is equally competent to take away or restrict or limit such allowances for a definite purpose."

Thus, he submitted that the legislature never intended to bring tax in such events which otherwise are not taxable at all under the provisions of the Act and such a provision cannot be so interpreted so as to tax any capital receipt. He also strongly referred and relied upon the decision of a special bench in the case of Sutlej Cotton Mills Ltd. v. Asstt. CIT [1993] 45 ITD 22 (Cal.) (SB), wherein it was held that particular receipt which is admittedly not an income cannot be brought to tax under the deeming provision of section 115J as it defies the basic intention behind introduction of provision of section 115J. By way of illustration, he pointed out that clause (f) of Explanation-1 and clause (2) itself shows that any income to which provision of section 10, 10A, 10B or section 11 applies, then it requires exclusion of such income from the book profit which has so credited to the profit & loss account likewise if a capital receipt which is not taxable under the Act is credited to the profit & loss account it does not ipso facto reached to a conclusion that it is to be treated as part of book profit. He also relied upon following case laws wherein on similar issues; the matter was decided in favour of the assessee by the various Tribunals:-

i. *Shivalik Venture (P.) Ltd. v. Dy. CIT [2015] 70 SOT 92/60 taxmann.com 314 (Mum. - Trib.)*
ii. *ACIT v. Shree Cement Ltd. [IT Appeal Nos. 614, 615 & 635 (JP) of 2010]*
iii. *ACIT v. L.H. Sugar Factory Ltd. [IT Appeal Nos. 339, 417 & 418 (LKW) of 2013, dated 9-2-2016]*
iv. *Dy. CIT v. Binani Industries Ltd. [IT Appeal No. 144 (Kol.) of 2013, dated 15-2-2016]*
v. *Dy. CIT v. Garware Polyester Ltd. [IT Appeal No. 5996 (Mum.) of 2013]*

10. *On the other hand, the Ld. CIT D.R. submitted that once the assessee itself has credited the waiver amount to the profit & loss account, then neither the Assessing*

Officer nor the assessee can tinker with such profit & loss account. In support of it, he strongly relied upon the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. v. CIT [2002] 255 ITR 273/122 Taxman 562 (SC) . The assessee is required to prepare its Profit &Loss account as per part II & III of VIth Schedule of the Companies Act and here in this case assessee did prepared its Profit &Loss account as per the requirement of the Companies Act and therefore, said Profit &Loss account cannot be disturbed while computing the book profit under section 115JB which are the non obstante provisions and code by itself. Once the assessee itself has offered the amount as income under section 115JB which has been accepted by the Assessing Officer as such then how the assessee can claim that the same should be reduced from the book profit. The notes appended to the profit & loss account cannot be read into because ultimately the results shown by the assessee are to be reckoned and considered for the profit & loss account disclosed in the books. In all the judgments relied upon by the Ld. Counsel, the assessee had made a claim for deduction from the book profit in the computation of book profit itself and not when assessee himself has shown as a part of Profit & Loss Account and offered it as a book profit. Therefore, on facts all these judgments relied upon by the assessee are not applicable at all. The assessee herein the present case has made a claim before the Assessing Officer by way of simple note which cannot be accepted in view of the decision of Hon'ble Supreme Court in the case of Goetz (India) Ltd. v. CIT [2006] 284 ITR 323/157 Taxman 1 (SC), which clearly envisages that a claim can only be made through revised income of return. On merits, he submitted that the issue is covered in favour of the department in view of the following decisions:

(i) *CIT v. Veekaylal Investment Co. (P.) Ltd. [2001] 249 ITR 597/116 Taxman 104 (Bom.)*

(ii) *Kopran Pharmaceuticals Ltd. v. Dy. CIT [2009] 119 ITD 355 (Mum.)*

(iii) *Hindustan Shipyard Ltd. v. Dy. CIT [2010] 130 TTJ 213 (Vizag)*

(iv) *Duke Offshore Ltd. v. Dy. CIT [2011] 45 SOT 399/9 taxmann.com 214 (Mum.)*

(v) *B & B Infotech Ltd. v. ITO [2015] 155 ITD 1040/63 taxmann.com 122 (Bang. - Trib.)*

His strong contention was that once the amount of waiver of loan is part of profit & loss account duly credited to the P&L account and also clarified by the auditor, then neither the Assessing Officer nor the assessee can tinker with such profit & loss account while computing the book profit.

11. *We have heard the rival submissions of both the representatives, perused the relevant material referred to before us and the relevant findings given in the impugned order. The main issue involved here in this appeal is, whether the amount of Rs.314,48,07,026/- being waiver of loan amount can be reduced while determining the net profit for the purpose of computing the 'book profits' under section 115JB. The waiver of the loan amount has arisen on account of the fact that assessee had availed rupee term loan and foreign currency loan from various institutions in India and foreign financial institutions for setting up of integrated steel plants. It is an undisputed fact that loan taken and utilized was for the purchase of plant and machinery for setting up of steel plant, i.e., for acquisition of capital assets. The assessee due to heavy losses and its inability to meet its financial*

commitment, entered into a 'corporate debt restructuring package' in respect of the loan taken from various Indian and foreign financial institutions. After negotiations the principal and interest amount which was waived by the institutions were calculated at Rs.390,76,03,999/- which consists of following amounts:-

Particulars	*Amount (Rs.)*
Waiver of principal loans	*228,46,76,328*
Waiver of interest payable to UTI	*86,01,30,698*
Waiver of interest, guarantee &commitment fees	*76,27,96,973*
Total	***390,76,03,999***

Out of the said amount it is an admitted fact that sum of Rs.76,27,96,973/- has been added back by the assessee in its computation of income and has been offered to tax as it was claimed in the earlier years. The balance amount aggregating to Rs. 314.4 crores which was though in the nature of exceptional item representing the waiver of loan amount as aforesaid was not excluded by the assessee from the net profit as per the profit & loss account while computing the book profit, instead assessee made a caveat by way of notes in the computation itself that the said amount represents capital receipt, hence was not in the nature of profit and gains of business and accordingly, was not includable in the book profit under section 115JB. In the notes to the computation of income which has been reproduced above, the assessee categorically mentioned that such capital receipt is not in the nature of income and hence it is not includable in the book profit, but same has been included only out of abundant portion in order to avoid any interest and penalty exposure.

***12.** Before we dwell upon the controversy involved, it needs to be first determined, whether the amount of waiver of loan is taxable under the normal provisions of the Income Tax Act, 1961 or not. It is axiomatic that under the Income Tax Act only those receipts which are in the nature of income can alone be subject to tax and such a nature of income should fall within the charging section as provided under the Act. All the receipts by an assessee would not necessarily be deemed to be income of the assessee for the purpose of income tax and the question whether the particular receipt is income or not will depend upon the nature of the receipt as well as the scope and effect of the relevant taxing provision. The Hon'ble Supreme Court in the case of Parimisetti Seetharamamma v. CIT [1965] 57 ITR 532 (SC) has observed as under:*

"By sections 3 and 4, the Indian Income-tax Act, 1922, imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision. Where, however, a receipt is of the nature of income, the burden of proving that it is not taxable because it falls within an exemption provided by the Act, lies upon the assessee.

Where the case of the assessee is that a receipt did not fall within the taxing provision, the source of the receipt is disclosed by the assessee and there is no dispute about the truth of that disclosure, the income-tax authorities are not entitled to raise an inference that the receipt is assessable to income-tax on the ground that

the assessee has failed to lead all the evidence in support of his contention that it is not within the taxing provision."

Generally the waiver of remission of a liability cannot be regarded as income in the hands of the assessee unless it is a trading liability and if the waiver of a loan is on capital account then certainly it cannot be reckoned as income or revenue, which is clearly evident from the relevant provisions of section 41(1) which reads as under:

"(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,-

(a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income- tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not;…………"

From the plain reading of above section it is quite ostensible that before this section can be invoked it is sine-qua-non that assessee should establish that first of all an allowance or deduction has been granted during the course of assessment for any year in respect of, (i) loss; (ii) expenditure; or (iii)trading liability, which is incurred by the assessee; and subsequently during any previous year the assessee obtains, whether in cash or in any other manner, whatsoever; (i) any amount in respect of such loss or expenditure, or (ii) some benefit in respect of such trading liability by way of remission or cessation of such liability. Thus, a remission or cessation of liability which can be deemed to be as an income must be a trading liability for which an allowance or deduction has been made in the assessment for an earlier year. A Companies liability on account of the principal amount of loan borrowed by it on a capital account, i.e., for acquisition of a capital asset cannot be reckoned as a nature of trading liability as envisaged in section 41(1), therefore, its remission cannot be deemed as income under the said provision. When a remission of a particular liability cannot even be deemed as income pursuant to a provision which has been enacted specifically for the purpose of treating it as a deeming income, then how can it be treated as income for the purpose any other provisions of the Act, unless specially provided to be taxed under any provision. Here, in this case admittedly the pre-requisite condition for invoking the provision of section 41(1) has not been satisfied/fulfilled at all for the reason that the pre-component of the borrowing for acquisition of capital asset has neither been allowed as allowance nor as deduction in the earlier years and being for the purpose of acquisition of a capital asset any waiver thereof will not constitute income under section 41(1).

***13.** The aforesaid proposition is also well supported by Hon'ble Bombay High Court in the case of Mahindra & Mahindra v. CIT [2003] 261 ITR 501/128 Taxman 394 (Bom.). Similarly, in a later judgment Hon'ble Court in the case of CIT v. Softworks Computers (P.) Ltd. [2013] 354 ITR 16/216 Taxman 219 (Mag.)/35 taxmann.com 610 (Bom.), after considering the said judgment and also the*

judgment of Solid Containers Ltd. v. Dy. CIT [2009] 308 ITR 417/178 Taxman 192 (Bom.), observed and held as under:—

"7. We find that the decision of this court in the matter of Solid Containers Ltd. (supra) has also considered the earlier decision in the matter of Mahindra and Mahindra Ltd. (supra) and distinguished the same by holding that in that case the loan was given for purchase of capital assets unlike in the case of Solid Containers Ltd. (supra) where waiver was of a loan taken for trading activity and thus considered to be of a revenue nature. In the present case, the amount which was advanced as a loan to the respondent-assessee was for the purposes of relocating its office premises. The loan taken was utilized for the purposes of acquiring a office at Godrej Soap Complex, Vikroli, Mumbai. Therefore, the loan in the present fact was taken for acquisition of capital asset and not for the purposes of trading activity as in the case of Solid Containers Ltd. (supra). The present case is, therefore, covered in favour of the respondent-assessee by the decision of this court in the matter of Mahindra and Mahindra Ltd. (supra)."

Thus, waiver of loan taken for acquisition of a capital asset and on capital account cannot be taxed u/s 41(1), as it is neither on revenue account nor a remission of a trading liability so as to attract tax in the year of remission.

***14.** Now we come to the core issue, whether the amount of waiver amount would at all form part of the 'book profit' of the company for the purpose of levy of MAT under section 115JB. Relevant portion of section 115JB as it stood at the relevant period reads as under:*

"115JB.(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one-half per cent of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of seven and one-half per cent].

(2) Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956) :

Provided that while preparing the annual accounts including profit and loss account,—

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

(iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956) :

Provided further *that where the company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under this Act —*

(i) *the accounting policies;*

(ii) *the accounting standards adopted for preparing such accounts including profit and loss account;*

(iii) *the method and rates adopted for calculating the depreciation,*

shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year falling within the relevant previous year.

Explanation.—*For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2),* ***as increased by-***

*(a) to (f)*** **

if any amount referred to in clauses (a) to (f) is debited to the profit and loss account, and ***as reduced by—***

*(i) to (viii)*** **

From the reading of the above provision it can be seen that;

Firstly, it is a non-obstante provision which provides that if the income tax payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year is less than 7½% of its 'book profit', then such 'book profit' shall be deemed to be the total income of the assessee and assessee shall pay tax on the book profit at the rate of 7½%.;

Secondly, the assessee company is required to prepare its profit & loss account in accordance with the provision of Part II & III of VIth Schedule of the Companies Act, 1956 and while preparing the annual accounts including profit & loss account, accounting policies, accounting standards shall be the same which has been adopted for the purpose of annual general meeting in accordance with provision of section 210 of the Companies Act and;

Lastly, book profit has been defined to mean 'net profit' as shown in the Profit &Loss account for a particular year prepared under sub section (2) of this section, as increased by the items in clause (a) to (f) (if these items are debited to the P & L Account)and is to be reduced by the items mentioned in clause (i) to (viii) as listed in the Explanation-1.

The purpose and legislative intent behind introduction of provisions of section 115J/ 115JA/115JB was to take care of the phenomenon of prosperous zero tax companies which had continued but were paying no income tax even though they had profits and were declaring dividends. It was therefore, sought that minimum

corporate tax should be paid by these prosperous companies and accordingly, MAT was introduced. The Hon'ble Kerala High Court in case of Karimtharuvi Tea Estate Ltd. and another v. DCIT (supra) as reproduced above explains the main purpose and intent behind these sections. It was never the intention of the legislature that any receipts which is not taxable per se within the income tax provision or not reckoned as part of net profit as per the profit & loss account as per Companies Act can be brought to tax as a book profit. This has been held so by Spl. Bench in case of Sutlej Cotton Mills Ltd. (supra) and by Cochin Bench of ITAT in the case of Asstt. CIT v. Nilgiri Tea Estate Ltd. [2014] 65 SOT 14 (URO)/47 taxmann.com 329 (Cochin), wherein the Tribunal held that, an item of income which does not come within the purview of the Income Tax cannot be subjected to tax under any other provision of the Act.

***15.** Now whether the surplus arising on account of waiver of the principal amount of loan is required to be credited to the profit & loss account in terms of provisions of Part II & III of VIth Schedule of the Companies Act needs to be seen. The starting point for computation of book profit under section 115JB is the 'net profit' as per the profit & loss account prepared in accordance with the provisions of the Companies Act. The primary purpose of preparing profit & loss account under the Companies Act is to find out the result of the working of the company during the period covered by the profit & loss account which has been enshrined in Part II of the Companies Act. The relevant portion of Part II reads as under:—*

"1. The provisions of this Part shall apply to the income and expenditure account referred to in sub-section (2) of section 210 of the Act, in like manner as they apply to a profit and loss account, but subject to the modification of references as specified in that sub-section.

2. The profit and loss account—

(a) shall be so made out as clearly to disclose the result of the working of the company during the period covered by the account, and

(b) shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature.

3. The profit and loss account shall set out the various items relating to the income and expenditure of the company arranged under the most convenient heads; and in particular, shall disclose the following information in respect of the period covered by the account

*(xii) ** ***

*(a) ** ***

(b) Profits or losses in respect of transactions of a kind, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount."

Further, section 211(2) of the Companies Act provides for the form and contents of profit & loss account in the following manner:

"(2) Every profit and loss account of a company shall give a true and fair view of the profit and loss account of the company for the financial year and shall, subject

as aforesaid, comply with the requirements of Part II to Schedule VI, so far as they are applicable thereto:"

Further, sub-section (3A) provides that,

"Every profit and loss account and balance sheet of the company shall comply with the accounting standards".

From the harmonious reading of the above provisions of the Companies Act, it can be gathered that firstly, the Profit & Loss account must disclose the result of the working of the company during the period covered by the account; secondly, it should disclose every material feature including credits or receipts and debits or expenses in respect of non-recurring transaction or transaction of an exceptional nature; thirdly, the profit and loss account should set out the various items relating to the income and expenditure of the company arranged under the most convenient heads and disclose all such information as set out therein; fourthly, profits or losses in respect of transactions of a kind, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, should also be disclosed; and lastly, profit & loss account should give the fair view of the working result and accounting standards should be complied with. A clear cut distinction has been made for disclosing the true working result of the company and a disclosure of non-transaction or transaction of an exceptional nature. One has to keep in mind that the aforesaid provisions mainly requires a broad disclosure of the exceptional items or non-recurring transactions referred to therein and if for some reason or the other they have been accounted for in the profit & loss account then those provisions do not require that those items must necessarily be accounted as a part of the profit & loss account. Separate disclosure is intended to ensure that the reader of the profit & loss account gets a fair and clear picture of the result of the working of the company during the period covered by the profit & loss account. The aforesaid provision cannot be so read so as to require that every non-recurring transaction or transaction of an exceptional nature to be debited/credited to the Profit & Loss account. Accounting Standard-5 prescribes the classification and disclosure requirements of certain items in the statement of profit & loss account, whereas the Accounting Standard-9 gives the illustration of revenue recognition. AS-5 defines Profit or Loss for the period in the following manner:

"All items of income and expense which are recognised in a period shall be included in the determination of the net profit or loss for the period unless an Accounting Standard requires or permits otherwise."

Thus, what is contemplated is that, all items of income and expenses which are recognised in a period alone are reckoned as net profit or loss. The recognition criteria of revenue by a company in the profit & loss account is however determined as per Accounting Standard-9. Clause 3 of AS-9 gives illustration of the items which are specifically not to be included within the definition of 'Revenue', the same reads as under:—

"3. Examples of items not included within the definition of revenue for the purposes of this Statement are:

(i) *Realised gains from the disposal of, and unrealised gains resulting from the holding of, non-current assets e.g. appreciation in the value affixed*

assets;

(ii) *Unrealised holding gains resulting from the change in value of current assets, and the natural increases in herds and agricultural and forest products;*

(iii) *Realised or unrealized gains resulting from changes in foreign exchange rates and adjustments arising on the translation of foreign currency financial statements;*

(iv) *Realised gains resulting from the discharge of an obligation at less than its carrying amount;*

(v) *Unrealised gains resulting from the restatement of the carrying amount of an obligation."*

As can be seen, clause (iv) clearly excludes the cases of remission of liability, because it is nothing but gains realised from discharge of an obligation at less than carrying amount, which herein this case is gain on account of waiver of part of obligation to repay the loan. Further, Accounting Standard - 5 also states that, extra-ordinary items should be disclosed separately in the profit and loss account. The objective of AS-5 is to prescribe the classification and disclosure requirements. The relevant text of the standard 5 reads as under:

"8. Extraordinary items should be disclosed in the statement of profit and loss as a part of net profit or loss for the period. The nature and the amount of each extra ordinary item should be separately disclosed in the statement of profit and loss in a manner that its impact on current profit or loss can be perceived."

A conjoint reading of the above accounting standards suggests that, there are two types of compulsions while preparing annual accounts, one are accounting compulsions and second are disclosure compulsions. The accounting compulsion comes into play since there is a double entry system of accounting, for instance, when a loan amount is waived, a debit goes to the liability account and a credit has to go to any of the liability/ reserve account, which in the present case has been taken to the Profit and Loss account. The disclosure compulsions merely require the assessee to disclose the material items in the Profit & Loss account. A mere disclosure of an extraordinary item in the profit & loss account statement does not mean that the said item represents the 'working result' of the company, when the accounting standard, especially AS-9 clearly provides that remission of a liability is not to be recognized as revenue, then it has to be reckoned that it cannot be treated as revenue for the purpose of either net profit or consequently book profit. The primary purpose of preparing the Profit &Loss account in Part II of the Companies Act is to find out the result of the company, during the period covered by the profit & loss account and the exceptional nature items are required to be disclosed separately so as to assess the correct impact on the profit & loss account of the company. What is required under clause (3) of Part II of Schedule VI of the Companies Act, is that, a profit & loss account should set out various items relating to the income and expenditure of the company arranged under the most convenient heads and then it provides to list out the various information which needs to be disclosed in the profit & loss account. The profit & loss account contains income and expenditure of a company in respect of the period covered by the account and therefore, there cannot be any question for including a capital surplus in that account which cannot be reckoned as income. Clause (3)(xii)(b) of Part II of

schedule also shows that what is to be included in the profit & loss account is in respect of transactions of an account, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount. This clearly indicates that only those items can be regarded as part of the profit & loss account which is in respect of similar type of transaction and not which are exceptional in nature. Waiver of a loan certainly cannot be reckoned as transaction of a kind usually taken but it is an item of exceptional and non-recurring nature. A capital surplus on account of waiver of loan in no way can be recorded as operational profit or profit which is to be included in the profit & loss account. There can be absolutely no question for accounting in the Profit and Loss Account something which cannot be regarded as income, profit or gain. This view is further reiterated by the interpretation clause 7 appearing in Part III of Schedule VI of the Companies Act which reads as under:

'7(1) For the purpose of Parts I and II of this Schedule, unless the context otherwise requires._

*(a) and (b) ** **

(c) the expression "capital reserve" shall not include any amount regarded as free for distribution through the profit and loss account; and the expression "revenue reserve" shall mean any reserve other than a capital reserve; ……….'

A capital surplus thus, in respect of waiver of loan amount cannot be regarded as being amount available for distribution through the profit & loss account. This follows from the very definition of expression 'capital reserve' that it must be accounted directly to the credit of the capital reserve account instead of being credited to the profit & loss account so as to ensure that it is not left for being distributed through the profit & loss account.

***16.** From our above analysis and discussion of the various provisions of the Companies Act as well as Accounting Standards it can be ostensibly deduced that an item of 'capital surplus' can never be a part of profit & loss account albeit it is a part of a capital reserve as the waiver of a loan taken for acquisition of a capital asset is a capital receipt falling within the category of capital surplus which is non-recurring and exceptional item which to be disclosed as per the requirement of the Companies Act. Further it is quite pertinent to note that, clause (ii) of Explanation -1 of section 115JB is also an indicator of the intention of the legislature and also the scheme of the section that the incomes which are treated as exempt under the Income Tax Act are to be excluded from the profit & loss account. The said clause excludes;*

(ii) the amount of income to which any of the provision 0f section 10 or section 11 or section 12 apply, if any such amount is credited to the profit and loss account;

When the said clause requires exclusion from the book profit all that amount of income which are exempt and are not in the nature of income, if any such amount is credited to the profit & loss account, then on same logic it would be inconceivable that this provision intends that 'book profit' should include something which is in the nature of a capital surplus on account of waiver of a loan. Even if a company has credited the amount of remission to its profit & loss account, then such a profit &loss account needs to be adjusted with the amount of remission so as to arrive at

the net profit as per the profit & loss account prepared in accordance with provisions of Part II & III of VIth Schedule of the Companies Act and this is what has been envisaged in the operating lines of Explanation-1 to section 115JB, that, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year. Net profit as per profit and loss account can never meant to include capital reserve or capital receipts. The object of enacting of section 115J, 115JA & 115JB was never to fasten any tax liability in respect of something which is not an income at all or even if it was income but is not taxable under the normal provisions of the Act. The provisions of section 115JB cannot be so interpreted so as to require accounting of what in substance is capital in nature to the credit of the profit & loss account and get indirectly taxed under book profit. The Special Bench of ITAT, Kolkata in the case of Sutlej Cotton Mills Ltd. (supra) observed and held as under:—

"The pattern of the income-tax Act is that certain receipts are not to be taken as income at all while, in respect of certain receipts, there is an exemption from tax on fulfilling certain conditions and, in respect of certain other incomes, certain concessions or deductions are given. There is a basic dichotomy between receipts which are not taxable at all and receipts which are taxable but subject to exemption on fulfilling certain conditions. In the case of capital gains, it is a receipt which is not taxable at all but for a deeming provision. Even the deeming provision is subject to exclusion in respect of certain receipts which fulfill certain conditions such as reinvestment. Section 115J has recognized this and has provided in Explanation, clause (f), item (ii), that the amounts falling under Chapter III are to be excluded. When an amount which forms part of the book profit itself cannot be taxed under section 115J when it does not have the income character, it has to be accepted that, when what is routed through the profit and loss account and carried to re-.serve is of a capital nature and does not have an income character, it cannot be added back to the book profits merely because of the enabling provision in the Explanation to section 115J for the purpose of imposing a tax thereon. Apart from the fact that capital gains is deemed to be income under section 45, it has to be kept in mind that even section 115J deems 30 per cent of the book profit to be total income chargeable to tax. The legislative history shows that the tax under section 115J was with reference to the business profit as it was in replacement of section 80VVA which sought to reduce the deductions available in computing the income from business. When section 80VVA was introduced in 1983-84, the intention was to restrict the various tax incentives and concessions available in computing the income from business to 70 per cent thereof. Significantly, the deduction under section 80T in respect of capital gains was not one of the items of concession or tax rebate which was to be restricted under that section. This shows that exemption of capital gains was not intended to be restricted. Subsequently also when that section was replaced by section 115J, the object was to introduce the provision whereby every company will have to pay a minimum corporate tax on the profits declared by it in its own accounts. These profits can only be those which are assessable as income under the Act. It is now well-settled that, in the interpretation of statutes, one has to adopt such a construction as will promote the general legislative purpose underlying the provision. In the present case, as can be seen from the Finance Minister's speech and the Memorandum explaining the provisions, the intention was to make the company pay tax on income which would otherwise be reduced by reason of certain deductions available under the Act. Even the

adjustments specified in section 115J refer only to appropriation from the profits of the business. The mandate given by section accordance with the provisions of Part-II and Part -III of the Sixth Schedule to the Companies Act" and the "net profit as shown in the profit and loss account". These two expressions convey an idea of an implied mandate given to the Assessing Officer to verify and satisfy himself that the net profit was as shown in the profit and loss account and the profit and loss account was prepared in accordance with Part II and Part Ill of the Sixth Schedule to the Income-tax Act. A reference to the requirements of the Companies Act shows that it is concerned with the result of the working of the company. Consequently, it cannot be directly concerned with changes in the capital structure. In particular, the profit and loss account is concerned with items of income and expenditure and, therefore, any profit derived by realization of a capital asset would not be an item of income. In a case where the profit and loss account was prepared in accordance with the provisions of Part II and Part Ill of Sixth Schedule to the Companies Act, the Assessing Officer will have no power to disturb the book profit except as stated in section 115J. The Assessing Officer is bound to proceed with the computation only on the basis of the book profit as shown in the profit and loss account unless it is discovered that the profit and loss account is not drawn up in accordance with the provisions of the Companies Act. As far as fixed assets and investments are concerned, the valuation of such assets is not a necessary part of the process of determining the trading result since they do not form part of the stock-in-trade. Any revaluation of fixed assets or investments does not indicate the accrual of any profit because profit or loss will arise only on sale or disposal and not on revaluation and such unrealized profit on revaluation cannot be brought to tax. However, it is well recognized that, in case of unrealized appreciation of fixed assets, they are written up on revaluation on the assets side of the balance-sheet to give a true and fair view of the company's affairs on a particular date, i.e. balance sheet date and the net surplus is shown as a capital reserve. This is not a regular annual feature but an exercise undertaken at appropriate junctions in the career of a company. In contrast, in the case of stock-in-trade, if the assessee had been following the method of valuing at cost and changes to the method of valuation at market value, such a valuation has to be made thereafter every year at market value on the valuation date. But, in the case of fixed assets, if the investments have been shown at cost for some years and the value is written up or written down on revaluation at market rate on a particular date, there is no change in the method of accounting so as to require the company to again revalue the investments at market rate on subsequent annual valuation dates. What will be shown in the subsequent years will be only the revised book value. The method of accounting is an essential and integral process to ascertain the income or loss after the end of the previous year within the meaning of section 145 and it does not apply to revaluation of fixed assets or investments. The proceeds by way of sale of an investment not being income, they are not liable to tax under section 115J unless there is a clear intendment. It is well recognized that there cannot be a charge by implication. The non obstante clause with which this section begins could only mean that the other sections which impose tax on book profit alone are to be ignored and not that the section which deems a capital receipt as income should be taken as part of the book profit for the purpose of the section, more so when section 45 declares that it cannot be taken as income if section 54E is attracted. Hence a capital gain which is not chargeable even as deemed income because of section 54E, cannot be brought to tax as part of the book profit under the Explanation to section 115J.............................."

17. *From the above discussion we are of the opinion that surplus resulting in the books of the assessee company consequent upon waiver of loan amount is not required to be credited to the profit & loss account for the year in which waiver is granted and in any case it cannot be reckoned as working result of the company during the period covered by the account, so as to be treated as part of book profit of the company for that year under the Companies Act.*

18. *Before us the Ld. CIT D.R. has strongly contended that the when the assessee itself has shown the waiver of loan as part of the book profit therefore, it is precluded from claiming the deduction from the book profit, because once it has been shown and declared as part of book profit then neither the Assessing Officer nor the assessee can tinker with such a result and any adjustment if at all can only be made as provided in Explanation- 1 to sub section (2) of section 115JB. First of all, from the perusal of the Profit &Loss account for the year ending 31.03.2004 it is seen that assessee had shown profit before exceptional item at Rs.571.84 crores. Thereafter, it has disclosed exceptional item of Rs.390.76 crores which is on account of waiver of dues. However, while computing the book profit and tax payable under section 115JB the assessee included the said amount for calculating the tax under MAT. Along with the said computation, the assessee has given the following note which reads as under:*

"The Company has credited an amount of Rs. 390,76,03,999 as an exceptional item in its Profit and Loss account. This includes write-back of certain principal amounts and certain interest dues, as a part of a restructuring package with its lenders Out of these amounts, the Company has not considered the write back of principal amounts (amounting to Rs 228,46,76,328) as a taxable income since the same is in the nature of capital receipt in the hands of the Company. Further, these amounts do not represent the reversal of any amount allowed as a deduction in any earlier year. Hence the provisions, of section 41(1) do not apply in respect of this write-back.

As regards the write-back of the balance amount relating to waiver of interest dues, the Company has offered for tax those amounts which had been claimed as a deduction in earlier years on provision basis amounting to Rs. 76,27,96,973 (refer clause A(1) of Annexure 8 of TAR). The balance amount of Rs. 86,01,30,698 had not been allowed as a deduction in earlier years due to the provisions of Section 43B of the Act and consequently, the write-back of this amount is not considered as a taxable income in this year Accordingly, the loss computed has been increased to the extent of the provision written-back.

In connection with the above contentions, the Company relies on the following decisions -

> *Tirunelveli Motor Bus Service Co. P Ltd. v. CIT 78 ITR 55 (SC)*
>
> *CIT v. Chetan Chemicals (P) Ltd. 188 CTR 572 (Guj)*
>
> *Mahindra & Mahindra Ltd v CIT 261 ITR 501 (Bom)*
>
> *CIT v. Usha Ranjan Bhadra 126 ITR 44 (Gauhati)"*

Then again in note no.10.1 (the relevant portion of which has already been incorporated above) the assessee specifically gave a caveat that this amount on account of waiver of loan is not includable in the 'book profit' and same has been

included only out of abundant precaution as the assessee company reserves the right to exclude such sum and contest during the course of assessment proceedings. Thus, at the very initial stage itself the assessee had disclosed all the particulars and had also given a detailed note as to why the said amount will not form part of the 'book profit'. Once that is so, then such notes qualifying the computation of book profit has to be read into it, that is, notes accompanying computation of income cannot be segregated or completely ignored. It is not the case of the assessee that an adjustment should be done while arriving at the book profit as provided in Explanation-1,albeit its claim is that correct amount of net profit as per the profit & loss account should be taken as 'book profit' which is the starting point of computation under section 115JB. As discussed in detail in our earlier part of the order that, a receipt which could never enter the stream of taxation either under the normal provisions of the Act or under the MAT provisions under section 115JB, then the said receipt neither constitutes profit nor revenue nor income nor any kind of gain which needs to be included in the net profit. It is a equally a trite proposition of law that an income cannot be taxed by an acquiescence or consent of the assessee but as per the mandate of the statutory provision and if assessee shows that a particular income is not taxable then he can always demonstrate and satisfy to the authorities that a particular income was not taxable in his hand and it was returned under an erroneous impression of law. There cannot be imposition of tax without the authority of law. One has to look what is envisaged under the Act to be taxed and there is no room for intendment or tax authorities can capitalize on acquiescence by assessee sans any authority by law. The court and taxing authorities have bounden duty to decide as to whether a particular category of assessee is to pay a particular tax or not. Even if we agree that Assessing Officer could not have entertained such a fresh claim but in view of the decision of Hon'ble Supreme Court in the case of Goetz India Ltd. v. CIT (supra) as heavily relied upon by the Ld. CIT D.R., however, it does not impinge upon the powers of the appellate authorities including Ld. CIT(A) and Tribunal. This has been clarified by the Hon'ble Supreme Court itself in the concluding part of the said judgment. There is no such bar or statutory restrain on the appellate authorities to permit/entertain such additional claims which has been raised by the assessee before them. This proposition is strongly supported by the decision of Hon'ble Jurisdictional High Court in the case of CIT v. Pruthvi Brokers & Shareholders (P.) Ltd. [2012] 349 ITR 336/208 Taxman 498/23 taxmann.com 23 (Bom.). It is also equally a salutary principle of tax laws that entries in the books of account or in the profit & loss account is not a determinative factor for taxing the income because income can be taxed only by the express provisions of law. We have already discussed in detail in our earlier part of the order that waiver of a loan is a capital receipt which is part of the capital reserve and cannot be reckoned as working result of the company and therefore, it does not form part of the net profit as per the profit & loss account. Thus, such a capital receipt cannot be taxed as 'book profit' as envisaged in terms of section 115JB.

19. *As regard the decision of the Hon'ble Apex Court in the case of Apollo Tyres Ltd. (supra), as relied upon the Ld. CIT D.R., we do not find that this judgment in any way envisages that a receipt which is not taxable as book profit nor reckoned as part of net profit as per profit & loss account should be taxed under u/s 115JB, just because it has been credited to profit & loss account which too has been qualified by a note giving a caveat for non-inclusion in the book profit. Assessing*

officer or taxing authorities can tinker with the net profit as shown by the assessee if the accounts are not prepared as per Part II & III of Schedule VI of the Companies Act which is a condition precedent for determination of net profit in terms of section 115JB(2). What the Hon'ble Apex court laid down that when assessee company prepares its profit & loss account as per the Companies Act and the accounts is placed before the company in its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956, AO cannot tinker with such accounts except for provided under Explaination1. This judgment in no way impinge upon the requirement to comply with the statutory requirement of preparing the accounts in accordance with the accounting standards adopted for preparing the profit & loss account and in accordance with the Part II & III of Schedule VI of the Companies Act. Only when accounts are drawn as provided in section 115JB, then the proposition laid down by the Hon'ble Apex Court will apply. In our humble opinion the Judgment and law as envisaged by the Hon'ble Apex Court will not apply here because, as we have held above that waiver amount is a capital reserve which cannot be included in the net profit as shown in the profit & loss account for the relevant previous year and consequently cannot be taxed as book profit.

***20.** So far as non-inclusion of interest amount payable to UTI in the net profit or working result of the company, our finding given above will not only apply to waiver of principal loan but also to the waiver of interest payable to UTI for the reason that, it is not taxable as per the provision of section 41(1), because, admittedly the assessee has not claimed the said amount as deduction in the earlier years in view of the provisions of section 43B. Once it has not been claimed as deduction then there is no question to be offered for tax under section 41(1). Thus it cannot be regarded as income in the hands of the assessee. The legal proposition as discussed above would apply in the case of waiver of interest payable to UTI, because firstly, it is not a remission of trading liability or has been allowed as expenditure in any of the earlier assessment year so as to be deemed as taxable under section 41(1); and secondly, it is part of capital surplus arising out of waiver of dues and hence it forms part of the capital reserve which cannot be roped in as a part of net profit while computing the book profit under section 115JB. Even otherwise also the provision of section 41(1) is a deeming provision and the fiction cannot be extended either to the provisions of section 115JB or to the provisions of the Companies Act, because the waiver of a liability for interest on loan is not required to be credited to the profit & loss account of the year of the waiver. Thus, the waiver of interest payable to UTI will also not be includable in the book profit and the same has to be deducted.*

***21.** Various decisions have been cited and relied upon by both the parties in support of their contentions which have been listed above. First of all our conclusion as given above is based on our interpretation of various provisions of the Companies Act as well as provision of section 115JB, however, we would discuss in brief firstly the decisions as relied upon by the Ld. CIT D.R.:—*

(a) Veekaylal Investment Co. (P) Ltd (supra)

The relevant facts of the case were that, during the relevant previous year, the assessee earned capital gains arising on sale of land which were credited to the profit and loss account. However, the assessee did not include the said capital gains for the purpose of computing profits u/s.

115J on the premise that, section 115J taxes only commercial profits. The assessing officer included such capital gains (taxable under the Act) for the purpose of computing book profits u/s. 115J. On this background Hon'ble court held as under:-

"The important thing to be noted is that while calculating the total income under the IT Act, the assessee is required to take into account income by way of capital gains under section45of the IT Act. In the circumstances, one fails to understand as to how in computing the books profits under the Companies Act, the assessee company cannot consider capital gains for the purposes of computing book profits under section115J of the Act. Further, under cl. (2) of Part II of Sch. VI to the Companies Act where a company receives the amount on account of surrender of leasehold rights, the company is bound to disclose in the P&L a/c the said amount as non-recurring transaction or a transaction of an exceptional nature irrespective of its nature i.e. whether capital or revenue. That, it would be inappropriate to directly transfer such amount to capital reserve [see Companies Act by A. Ramaiya, p. 1669 (Fourteenth Edn.]. Such receipts are also covered by Cl. 2(b) of Part II of Sch. VI of the Companies Act which, inter alia, states that P&L a/c shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature. Lastly, even under cl. 3(xii)(b) profits or losses in respect of transactions not usually undertaken by the Company or undertaken in circumstances of exceptional or non-recurring nature shows clearly that capital gains should be included for the purposes of computing book profits. That, capital gains would certainly be one of the various items whose information is required to be given to the shareholders under the said cl. 3(xii)(b). So also, the disclosure is required to be made in respect of investment in the capital of a partnership firm if the company is a partner on the date of the balance sheet (see pg. 1651 of the Companies Act by A. Ramaiya [Fourteenth Edn.]. Similarly, profits or losses on such investments are also required to be disclosed. [See cl. 3(xii)(a) of Part II of Sch. VI of the Companies Act]."

(i) *First of all, it is pertinent to note here that, the transaction under consideration in the aforesaid decision was chargeable to tax under the head 'Capital Gains' and thereafter, its assessibility under MAT provisions was determined. In the case of the assessee, the transaction under consideration is a pure capital receipt not chargeable under any of the provisions of the Act at all. The question of law before the Hon'ble High Court was, "Whether the income from capital gains should be included for the purpose of computing book profits under section 115J of the Income-tax Act?". It was never a question before the Hon'ble High Court that a receipt which is not taxable at all under the provisions of the Act should be included for the purpose of computing book profits or not. Accordingly, the decision per se does not apply to the fact of the Appellant.*

(ii) *Secondly, the Hon'ble High Court proceeded on the premise that while calculating the total income under the normal provisions of the Act, the assessee is required to take into account the aforesaid capital gains and*

if that is so, then capital gains are also required to be considered while computing book profits u/s. 115J. If we apply the same principle or analogy on the present facts, then the capital receipt per se which is not an income chargeable to tax, therefore, should not be taken into account for computing total income under the Act and consequently for the purpose of MAT. Once it is not taken into account for the purpose of computing total income then it should also not be considered for computing book profit for 115JB.

(b) Kopran Pharmaceuticals Ltd. (supra)

Facts in brief were that during the relevant previous year, the assessee earned capital gains arising on sale of factory premises. The excess of net sale consideration over the original cost price of the property was transferred to the Capital Reserve account. Further, the difference between the original cost and the written down value was treated as profit on sale of factory and said capital gain was credited to the Profit and Loss account as other income. The assessing held that the said amount should form a part of the assessee and accordingly, added back the same for the purpose of assessment u/s. 115JB. In this background it was held as under:—

"Now the question is, in such circumstances, where the assessee has option to account the surplus profit in two different methods, one by including in the profits and the other without including in the profits, what should be the implication for the purpose of computing taxable income under a scheme of MAT.

11. In this context, particularly in the matter of income by way of capital gains, the Bombay High Court has held in the case of Veekaylal Investment Co. (P.) Ltd. (supra) that clause 3 (xii)(b) of Part II of Schedule VI to the Companies Act, requires disclosure of profits or losses from transactions of an exceptional nature. In the light of the said disclosure and accounting requirement mandated by Schedule VI to the Companies Act, the Hon'ble Bombay High Court has held that the capital gains arising to a company should form part of the book profit for the purpose of section 115J. As far as this issue is concerned, there is no functional distinction between section 115J and section 115JB. Therefore, we find that the specific issue of capital gains, vis-a-vis, MAT profit has been decided by the jurisdictional High Court in the above judgment and we are bound to follow the above judgment. If so, the lower authorities have rightly held that the amount of Rs. 27,01,6 70 should be included in the book profit for the purpose of section 115JB.

12. It is true that the Hon'ble Supreme Court has held in the case of Apollo Tyres Ltd. (supra) that the Assessing Authority does not have the jurisdiction to make adjustments in the book profits certified by the Statutory Auditors of the Company other than the adjustment provided under the Explanation thereto. But that is a general proposition of law declared by the Hon'ble Supreme Court. On the other hand, the Bombay High Court in the case has specifically dealt with the question of capital gains. Therefore, we have to consider the judicial distinction made between the specific issue and the general proposition of law. Therefore,

we find that the decision of the Hon'ble Bombay High Court in the case of Veekaylal Investment Co. (P.) Ltd. (supra) is more applicable to the present case. In such circumstances, we hold that this appeal filed by the assessee is liable to be dismissed."

i. *Firstly, here again the transaction under consideration in the aforesaid decision was chargeable to tax under the head 'Capital Gains' and thereafter, its assessibility under MAT provisions was determined. In the case of the assessee the transaction under consideration is a pure capital receipt not chargeable under the provisions of the Act at all.*

ii. *Secondly, the aforesaid capital gains are taxable under the normal provisions of the Act. Once it taken into account for the purpose of computing 'Total Income', it may also be considered for computing book profit u/s. 115JB.*

iii. *Thirdly, in the said case, the net profit as per the 'Profit and Loss account' is different than what was ultimately computed by the assessing officer. In other words, the Hon'ble Mumbai Tribunal after considering Hon'ble Supreme Court decision in the case of Apollo Tyres Ltd. has allowed tinkering to the 'Net Profit' which is the starting point for computing 'Book Profit' u/s. 115JB.*

iv. *Lastly, in the case of the assessee also, it is not the case of assessee that an adjustment should be done while arriving at the 'Book profit' as provided under the Act in Explanation 1 to sub-section (2) to Section 115JB. What the assessee's case is, first determine the correct amount of 'Net Profit' as per Profit and Loss account which is the starting point for computation u/s. 115JB and then tax the book profit. Whence as per our discussion above the receipts in question itself is not part of net profit, then there is no question of bringing it to tax under MAT.*

(c) *Hindustan Shipyard Ltd. (supra)*

Relevant facts were that, during the year under consideration, the Government of India had waived loan (a portion by way of conversion of loan into equity) and interest thereon due from the assessee. The assessee did not credit, both, the principal and interest waiver in the Profit and Loss account though the details of waiver disclosed in notes to accounts. Such accounting treatment was qualified by auditor. The assessing officer accepted that waiver of principal amount of loan not taxable. However, according to him, since interest amount was liable to tax u/s. 41(1) and therefore, accounts prepared could be modified to tax such interest u/s. 115JB. In this background it was held as under:-

"8.6.2 We notice that the Hyderabad Tribunal in the case of NCL Industries (supra) followed the analogy of the decision of the Special Bench of Tribunal in the case of Sutlej Cotton Mills Ltd. v. Asstt. CIT [1993] 111 CTR (Cal)(Trib) 321 (1993) 46 TTJ (Cal) 310 to come to the conclusion that the income taxable under s. 41(1) cannot be included for the purpose of computing book profit under s.115J of the Act. The Special Bench in the case of Sutlej Cotton Mills Ltd. (supra), has held that the capital gains chargeable under s. 45, as deemed income, cannot be brought to tax for the purposes of determining the book profits under s. 115J. However, the Hon'ble Bombay High Court in the case of Veekaylal Investment Co. (P) Ltd. (supra), has held that the capital gain is

includible in the computation of the book profit. According to the legal hierarchy, a lower Court should bow to the wisdom of the higher Court. Hence the decision rendered by a High Court prevails over the decision of the Tribunal. Before us, the assessee did not place any other contrary decision of a High Court. In these circumstances, in view of the decision of the Bombay High Court referred supra, we are unable to agree with the argument of the assessee that the income taxable under s. 41(1) cannot be included in the computation of 'book profit' under s. 115JA of the Act."

i. *In this case, Government of India accorded the following benefits to the Assessee i) Waiver of Loan ii) Conversion of Loan into Equity and iii) Waiver of Interest. The said waiver of Principal and interest was not incorporated in the books of account, though the details of the waiver were disclosed in the annual report placed the shareholders.*

ii. *The only issue that was raised in the assessment was in relation to Waiver of Interest. The Assessing Officer himself has accepted that waiver of principal amount of loan and conversion of loan is not a receipt to be considered for the purpose of Section 115JB.*

iii. *Further, the Assessing officer held the waiver of interest to be taxable u/s. 115JBas the same was taxable u/s. 41(1) of the Act. In the case of the Appellant, neither the waiver of principal amount of loan (being a capital receipt) nor the interest (not claimed as a deduction in earlier years) is taxable under any provisions of the Act.*

iv. *In this case also, the Assessing Officer has adjusted the net profit as per Profit and Loss account which is the starting point of calculation under section 115JB, i.e., before one enters the computation of 'Book Profit' under the Explanation to sub-section (2) of Section 115JB. In other words, the Hon'ble Tribunal after considering the Hon'ble Supreme Court decision in the case of Apollo Tyres Ltd. has allowed tinkering to the 'Net Profit' which is the starting point for computing 'Book Profit' u/s. 115JB.*

(d) *Duke Offshore Ltd(supra)*

In this case, the assessee had a settlement with the bank as a result of which there was a waiver/reduction of loan. The assessee had shown the same amount as extraordinary item in the Profit and Loss account. While computing book profits for the purpose of section 115JB, the assessee did not consider the said waiver. However, the assessing officer included such waiver of loan and interest thereon for the purpose of computing book profits u/s. 115JB. The tribunal in this background held as under:-

"15. The Jurisdictional High Court in the case of CIT Veekaylal Investment Co P Ltd (249 ITR 597) has held that capital gains credited to profit and Loss account should be take into account in computing Book Profits.

16. The Delhi High Court in the case of CIT v Goyal M.G. Gases 2010- TIOL-91HC-DEL has held as under:

"In the present case, the assessee did not claim nor was allowed any deduction or benefit of allowance by way of allowable expenditure and trading liability, and the same being credited to the profit and loss account had been subjected to tax as part of book profit under Section 115JB of

the Act. We are, therefore, of the opinion that the conclusions of the Tribunal are based on a correct appreciation of law and, therefore, do not warrant any interference by this Court."

The High Court has approved the fact that write back of loans, though is not taxable under the normal provisions of the Act are includible for the purpose of computing Book Profits.

17. The Special bench of the Hyderabad Tribunal in the case of Rain Commodities Ltd v DCIT - (2010-TIOL-355-ITAT-HYD-SB) = (131 TTJ 514) has held that profit on sale of capital assets credited to the profit and loss account is includible in computing Book profits, notwithstanding the fact that the same is exempted under the normal provisions of the Income tax Act on account of the investment of capital gains in an approved mode.

18. In the circumstances we are of the opinion that the CIT(A) was correct in holding that starting point for determining the book profit under Section 115JB is Rs.54168537/- and in computing the book profits under Section 115JB no part of the liability of Rs.44513406/-that has ceased on account of settlement of loan liability of global trust bank can be excluded even though part of the liability may represent waiver of principal amount of loan."

i. *In this case the Tribunal has essentially relied on the following decisions:*

(a) *Decision of the Hyderabad Tribunal in the case of Gulf Oil Corpn. Ltd. v. Asstt. CIT [2008] 111 ITD 124 (Hyd.)*

(b) *Veekaylal Investment Co. (P.) Ltd. (supra)*

(c) *Rain Commodities Ltd. v. Dy. CIT [2010] 40 SOT 265 (Hyd.) (SB)*

ii. *In the case of Gulf oil, (Hyderabad ITAT decision), it is noticed that, the issue under consideration was whether advisory fee debited as an extra-ordinary item in the Profit and Loss account was to be considered while computing Book profits u/s. 115JB. The premise on which adjustment was sought was that the item under consideration was 'revenue in nature' per se. However, in the case of Duke Offshore Ltd. (supra), the Tribunal was dealing with an item of receipt which is capital in nature and not 'income' per se. Further, from the perusal of the decisions of the Hon'ble Bombay High Court and Hyderabad Special Bench stated at point no. (b) & (c) above, it is seen that both the decisions deal with the issue of taxability of capital gains in computing Book Profit u/s. 115JB of the Act. These capital gains were otherwise income u/s. 2(24) of the Act and exclusion was claimed by the assessee while computing Book Profit u/s. 115JB on the ground that the said capital gains were exempt either u/s. 47(iv) or not constitute commercial profits. However, in the case of Duke shore before the Tribunal, the waiver was not capital gains but pure capital receipts which does not even have any 'income', 'profits', 'gains' embedded therein. Accordingly, all the above decisions relied upon by the Hon'ble Mumbai Tribunal were different on facts as compared to the facts under consideration. Though this decision is against the assessee, however we find that in subsequent decisions on similar facts and issues this matter has been decided by the Mumbai Tribunal and other Tribunals in favour of the assessee. These decisions shall be discussed hereinafter.*

(e) *B &B Infotech Ltd. (supra)*

In this case, the assessee entered into a one-time settlement with a bank as a result of which there was a waiver of principal amount of loan. The assessee prepared its Profit and Loss account by including the said amount as income. The assessee submitted before the Assessing Officer that the remission of liability was on account of principal amount of loan and therefore, the same was not in the nature of income which could be considered as part of the book profits u/s. 115JBof the Act. The Assessing Officer rejected the objections of the assessee and added the aid amount while computing book profits u/s. 115JB of the Act. The Tribunal held as under:—

"In the case in hand, the assessee got remission of liability of Rs.43lakhs under one time settlement by the ING Vysya Bank which has been disclosed by the assessee in the P&L A/c. This disclosure in the P&L A/c is strictly as per the requirement of Schedule VI of the Companies Act and further in conformity with the mandatory accounting standard AS-5. Therefore, the treatment of the amount in the books of account and particularly in the P&L A/c, is as per the provisions of Schedule VI of the Companies Act as well as accounting standard AS 5. Hence, any disclosure in the notes to accounts would not require any change in the P&L A/c already prepared as per Schedule VI of the Companies Act. The decisions relied upon by the assessee are applicable on the facts and circumstances where if an item of income or expenditure which is required to be disclosed in the P&L A/c prepared as per provisions of Schedule VI of the Companies Act but instead of disclosing the said item in the P&L A/c, it was disclosed in the Notes to the accounts, then such item of income or expenditure will be treated as part of the P&L A/c for the purpose of computing book profits u/s 115JB. Once P&L A/c is admittedly prepared as per Schedule VI of the Companies Act, then neither the AO has any power to tinker with it nor the assessee is permitted to claim exclusion or inclusion of any item of income or expenditure as the case may be, for the purpose of computing book profits u/s 115JB except the permissible adjustment provided under the Explanation to sec.115JB of the Act itself. It is not disputed that this amount does not fall in the ambit of any of the clauses of Explanation to 115JB. Therefore, once this amount has been disclosed in the P&L A/c prepared strictly as per provisions of Schedule VI of the Companies Act, the same cannot be excluded for the purpose of computing book profits u/s 115JB. We find that the CIT(A) has rejected the claim of the assessee by following the judgment of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) as well as the Hon'ble Supreme Court in the case of CIT v. HCL Comnet Systems & Services Ltd. [2008] 305 ITR 409/174 Taxman 118 (SC). Accordingly, in the facts and circumstances of the case as well as above discussion, we do not find any error or illegality in the impugned order of the CIT (A)."

This decision is again against the assessee, however at the outset, it is seen that the Tribunal has not at all adjudicated on the contention of the assessee that remission being capital receipt, cannot be considered as income even for the purpose of section 115JB of the Act. The Tribunal has summarily relied on the Supreme Court decision in the case of Apollo Tyres (supra) to reject the contentions of the assessee. Secondly, the Tribunal has distinguished the case laws relied upon by the

assessee on the basis that, the ratio of decisions relied upon by the assessee is based on the premise that if an item of income or expenditure is required as per Part II of Schedule VI of the Companies Act to be a part of the P/L account, but the same was not disclosed in the P/L A/c and has been disclosed in the notes forming part of the accounts, then the said disclosure in the notes to the accounts would be treated as disclosure of that particular item or expenditure as the case may be, in the P/LA/c for the purpose of book profits u/s. 115JB. Lastly, the decision has been rendered essentially on the premise that the assessee cannot seek any adjustments except for the permissible adjustment provided under the Explanation to section 115JB itself. Here it is not the case of the assessee that an adjustment should be done while arriving at the 'Book profit' as provided under the Act in Explanation 1 to sub-section (2) to Section 115JB. The fundamental aspect is to first determine the correct amount of 'Net Profit' as per Profit and Loss account which is the starting point for computation u/s. 115JB. If any receipt is not part of the working result or part of the net profit then it cannot be roped in MAT taxability.

22. *As regards the decisions relied upon by the Ld. Counsel the same are discussed in brief hereunder:—*

(a) *Shivalik Venture (P) Ltd (supra)*

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

(b) *ACIT v. Shree Cement Ltd. [IT Appeal Nos. 614, 615 & 635 (JP) of 2010] following Shree Cement Ltd. v. Addl. CIT [2015] 152 ITD 561/[2014] 49 taxmann.com 274 (Jaipur - Trib.) wherein it was held that:*

"13.4. From perusal of the decisions of Rain Commodities (supra) and Growth Avenues (supra), we notice that both the decision dealt with the issue of taxability of capital gains in computing Book Profit u/s 115JB of the Act. These capital gains were otherwise income u/s 2(24) of the Act and exclusion was claimed in computing Book Profit u/s 115JB on the ground that the said capital gains was exempt either u/s 47(iv) or u/s 54EC of the Act, which the Tribunal did not agree. In the present case, however, we are dealing not with capital gains but with pure capital receipt, which does not even have anti 'income', 'profits or, gains'

embedded therein. The impugned incentive granted to the Assessee is pure and simple capital receipt, in terms of our decision on ground no. i at Para 10 hereinabove, which in turn is supported by the principles laid down by the Apex Court, various high courts & Special Bench of the Tribunal. That being the case, it does not have any income or profit element embedded in it, since the incentive was granted to encourage industrial growth of industrially non developed area. No one can make profit out of the subsidy or incentive granted to it. Hence, it is not chargeable to tax under the Income Tax Act as held by the Apex Court in the case of Padmaraje (supra) and in the light of our fact finding as above, clearly not includible in P&L account prepared under Part II & Part III of Schedule VI to the companies Act."

It has been informed by the ld. Counsel that in fact, the Tribunal order in favour of the aforesaid assessee in its own case for the earlier assessment year in ITA No. 942/Jp/o8 had been appealed before the Hon'ble Jurisdictional Rajasthan and Hon'ble Jurisdictional High Court vide order dated 01-10-2010 has admitted only one ground which is reproduced below:

"Whether on the facts & circumstances of the case, the Tribunal was justified in holding that the Sales Tax Subsidy received by the Assessee of Rs. 18,48,85,506 in the form of Sales Tax Exemption was a capital receipt & not a revenue receipt, ignoring the basic purpose for which the same was given which itself provides that the subsidy was given to the Assessee to enhance the production, employment & sales in the state of Rajasthan, which are all post operational activities"

From this it was argued that Hon'ble High Court admitted only the ground as to whether the impugned subsidy was a capital receipt or a revenue receipt. Hon'ble High Court has not admitted the ground of the Revenue against relief granted by Tribunal under Section 115JB of the Act on above capital receipt and to that extent, the order of the Tribunal stands affirmed.

(c) L. H. Sugar Factory Ltd. (supra) wherein Tribunal held that:—

"From the above paras, we find that the Tribunal has duly considered the judgment of the Hon'ble Apex Court rendered in the case of Apollo Tyres Ltd. ((Supra) and thereafter, it was noted by the Tribunal in this case that as per the decision of Special Bench of the Tribunal rendered in the case of Rain Commodities Ltd. v. DCIT, 41 DTR 449, if profit and loss account is not in accordance with Part II & Part III of Schedule VI to the Companies Act, 1956 because it is prerequisite for Section 115JB of the Act. The Tribunal in this case also considered two another Tribunal's orders rendered in the case of DCIT v. Bombay Diamond Company Ltd-33 DTR 59 and Syndicate Bank v. ACIT, 7 SOT 51 Bangalore where it was held by the Tribunal after considering the decision of Hon'ble Apex Court rendered in the case of Apollo Tyres Ltd. (Supra), and after 28 explaining the same that adjustment to profit and loss account is possible to make it compliant with Schedule VI Part II and Part III of the Companies Act, 1956 which is prerequisite of Section 115JB of the Act. On this basis, the Tribunal in the case of Shree Cement Ltd. (Supra) decided this issue in favour of the assessee and it was held that capital receipt in the form of sales tax subsidy needs to be excluded from profit

as per P&L account for the purpose of computing book profit u/s 115JB of the Act. By respectfully following these Tribunal's orders, we hold that in the present case also, the receipt on account of transfer of carbon credit which is held to be a capital receipt needs to be excluded from profit as per P&L account for the present year while computing the book profit u/s 115JB of the Act. This issue is decided in favour of the assessee and accordingly Ground Nos.1 to 5 are allowed. The assessee gets relief of Rs.27,70,880/- and consequent interest being 10% of amount received by the assessee on sale of carbon credit of Rs.27,70,8,800/-."

(d) *Kolkata Tribunal in the case Binani Industries Ltd (supra) wherein following the all above decisions, it was held that:*

"... respectfully following the aforesaid decision of the Mumbai Tribunal, the profit and loss account prepared in accordance with Part IT and III of Schedule VI of Companies Act 1956, includes notes on accounts thereon and accordingly in order to determine the real pro fit of the assessee as laid down by the Hon'ble Apex Court in the case of Indo Rama Synthetics (I) Ltd v. CIT reported in [2011] 30 ITR (SC), adjustment need to be made to the disclosures made in the notes on accounts forming part of the profit and loss account of the assessee and the profits arrived after such adjustment, should be considered for the purpose of computation of book profits u/s 115JB of the Act and thereafter, the Learned AO has to make adjustments for additions / deletions contemplated in Explanation to section 115JB of the Act."

In this case Tribunal has discussed the entire issue in detail manner on similar set of facts and relied upon various decisions to come to the aforesaid conclusion.

(e) *Garware Polyester Ltd (supra) wherein a similar transaction was involved and the Mumbai Tribunal held that, principal amount of loan taken by the assessee for capital expenditure, subsequently waived by the bank, would not be exigible to tax u/s.115JB. The only difference between the aforesaid case and the case of the assessee is that the principal amount of loan waived was directly routed through the Balance Sheet and credited to the General Reserve account whereas in the case of the Appellant, the waiver of loan has been routed through the Profit and Loss account and credited as an exceptional item.*

***23.** From the perusal of aforesaid decisions, at the outset, it may appear that on similar nature of issues there are divergent views of various benches of the Tribunal, however, one common point/ratio permeating through all the decisions, which can be deduced by us is that, if an assessee company is in receipt of a 'capital receipt' which is not chargeable to tax at all, that is, it does not fall within any of the charging section or can be classified under any heads of income under the Income Tax Act, then same cannot be treated as part of net profit as per Profit & Loss account or reckoned as 'working result' of the company of the relevant previous year and consequently, cannot be held to be taxable as 'book profit' under MAT in terms of section 115JB. Accordingly, our conclusion remains the same that, the capital surplus on account of waiver of dues neither is nether taxable nor can be included in computation of book profit u/s 115JB."*

5.2. We also find that the issue regarding non-taxability of Rs.4,27,43,000/- by treating the same as capital receipt for the purpose of Section 115JB of the Act though not claimed before the lower authorities by the assessee, is being claimed for the first time before this Tribunal. We find that this is purely a legal issue and does not involve verification of any facts and hence, the same can be claimed for the first time before this Tribunal. Reliance in this regard is placed on the decision of Hon'ble Supreme Court in the case of NTPC Ltd., reported in 229 ITR 383 and CIT vs. Sinhgad Technical Education Society reported in 397 ITR 344 and the decision of Hon'ble Jurisdictional High Court in the case of CIT vs. Pruthvi Brokers and Shareholders Pvt Ltd., reported in 349 ITR 336 (Bom). We also find that the Hon'ble Calcutta High Court in the case of PCIT vs. Ankit Metal and Power Ltd., reported in 109 Taxmann.com 93 dated 09/07/2019 had specifically held that where the receipt is not in nature of income, it cannot be included in book profits u/s.115JB of the Act. The relevant portion of the said judgment is reproduced hereinabove.

> *"**26.** Now the second issue which requires adjudication is as to whether the aforesaid incentive subsidies received by the assessee from the Government of West Bengal under the schemes in question are to be included for the purpose of computation of book profit under Section 115 JB of the Income Tax Act, 1961 as contended by the revenue by relying on the decision in the case of Appollo Tyres Ltd. (supra).*
>
> ***27.** In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy' is a 'capital receipt' and does not fall within the definition of 'Income' under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. In the case of Appollo Tyres Ltd. (supra) the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under Section 115JB of the Income Tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under Section 115 JB of the Income Tax Act, 1961."*

5.3. Respectfully following the Co-ordinate Bench decision of JSW Ltd., and the decision of the Hon'ble Calcutta High Court in the case of Ankit Metal and Power Ltd., referred to supra, we hold that the sum of Rs.4,27,43,000/- to be a capital receipt and not liable to tax while computing books profits u/s.115JB of the Act. Accordingly, the ground Nos. 2 & 3 raised by the assessee are allowed.

6. In the result, appeal of the assessee is allowed in part.

Order pronounced on 17/02/2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(PAVAN KUMAR GADALE)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 17/02/2021

KARUNA, *sr.ps*

<u>Copy of the Order forwarded to</u> :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai