Srei Infrastructure Finance Ltd.,, New ... vs Assessee on 24 December, 2008

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: "G" NEW DELHI

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND
SHRI B.C.MEENA , ACCOUNTANT MEMBER

ITA No: 617/Del/2010
&
ITA No: 618/Del/2010
A.Y. : 2006-07 & 2007-08

Srei Infrastructure Finance Ltd. D 2, Southern Park, 5th floor Saket Place, Saket New Delhi 17 PAN/GIR No: AAACS 1425L (Appellant)	vs.	ACIT, Range 9 New Delhi (Respondent)

Appellant by : Dr. Pal Sr. Adv. & Sh AK Mishra, C.A.
Respondent by : Sh.Niranjan Kauli, CIT, D.R.

ORDER

PER DIVA SINGH, JUDICIAL MEMBER

Both these appeals have been filed by the assessee against two separate orders dt. 26.10.2009 and 27.10.2009 of CIT(A)-XII, New Delhi pertaining to A.Yrs 2006-07 and 2007-08 respectively.

2. In view of the fact that ground no.1 to 4 are identical in both the appeals, it was a common stand of the parties before the Bench that arguments advanced in ITA 617/Del/2010 may be considered for deciding the 4 grounds agitated in ITA 618/Del/10 since facts, circumstances and position of law apart from the differences in amounts remain the same. For the remaining ground in ITA 618/Del/10 namely ground no.5 separate arguments would be advanced. 2.1. For ready reference we reproduce grounds agitated in ITA 617/Del/2010.

> "1. That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) (hereinafter referred to as Ld.CIT(Appeals) has grossly erred in disallowing the claim of the appellant for depreciation @ 30% on vehicles given on lease and thereby reducing the claim for depreciation by Rs. 97,707,271, (Rs. 149,159,686/- for A.Y. 2007-08) on the ground that the appellant was a non banking finance company and it by itself is not a transportation company running the vehicles on hire. 1(b) That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not following the orders of Jurisdictional Tribunal in the appellant's own case merely on

the ground that the same has been challenged before the High Court.

2(a) That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in confirming the disallowance of notional interest of Rs. 1,404,000(Rs.2,484,000 for A.Y. 2007-

08) pertaining to interest free loans to subsidiaries.

2(b) That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating the fact that the appellant had sufficient internal funds in the form of share capital and reserves & surplus to fund the interest free loans. 2(c) That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in basing her conclusion solely on the judgement of CIT vs. Abhishek Industries Ltd. (P&H) without appreciating that the said decision has been impliedly overruled by the subsequent decision of the Hon'ble Supreme Court in the case of Munjal Sales Corproajtion vs.CIT.

3(a) That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in confirming the disallowance u/s 14A as per Rule 8D without appreciating the fact that Rule 8D is not applicable for the instant A.Y. under appeal. 3(b) That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in holding that Rule 8D of the I.T.Rules, 1962 is procedural and clarificatory in nature. 3(c) That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating the fact that the Ld.ACIT has mechanically applied Rule 8D without forming and recording an objective satisfaction as required u/s 14A of the I.T.Act, 1961 read with Rule 8D.

3(d) That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in confirming the disallowance u/s 14A of Rs. 50,050,000 (Rs.91,932,000 for A.Y. 2007-08) computed as per the provision of Rule 8D, without appreciating that the appellant has not incurred any expenditure to earn exempt income.

3(e) That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not directing to compute the disallowance u/s 14A as per Rule 8D by considering only those investments on which the appellant has actually earned exempt income during the relevant A.Y. under appeal.

4. That on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in confirming the addition of Rs. 98,000,000 (Rs.160,000,000 for A.Y. 2007-08) being the amount transferred to special reserve, in the computation of book profit as per s.115 JB.

3. The relevant facts qua the first issue are that the A.O. considering that the assessee has claimed depreciation @ 30% on the vehicles given on lease required the assessee to justify higher depreciation.

3.1. Considering the explanation of the assessee offered vide letter dt. 26.12.2008 which is reproduced in para 4.3 of the assessment order the A.O. rejected the claim of the assessee holding

that the business of the assessee does not consist of running trucks on hire as the assessee is engaged in the business of extending finance and lease is only mode of giving finance as such he held it cannot be concluded that the assessee was engaged in the business of running vehicles on hire. Accordingly the claim of the assessee for higher rate of depreciation was not accepted.

3.2. In appeal before the CIT(A) the submissions advanced before the A.O. were reiterated and reliance was placed on the judgements which had been relied upon before the A.O. 3.3. However not convinced with the assessee's arguments on facts and law, the action of the A.O. was confirmed observing as under:-

> "As the assessee himself claiming that he is a non banking company and does not derive any income from hiring of vehicles/transportation business, hence in view of the discussion and facts brought on record by the AO, the stand of the AO is confirmed, respectfully bringing on record that Department is further contesting in the assessee's own case for A.Y. 2000-2001 before the High Court. It is further brought on record that in this case leasing of the vehicles as independent entity is never undertaken and vehicles have been financed by NBC only as a part of projects."

3.4. Aggrieved by this the assessee is in appeal before the Tribunal. Ld.A.R. apart from reiterating the facts as available in the orders of the authorities below and inviting our attention to I.T.Rules, 1962 Rule 5 Appendix I contended that the issue is fully covered in favour of the assessee by virtue of judgement of Jurisdictional High Court in CIT vs. MGF (India) Ltd. 285 ITR 142 (Del). Referring to a copy of the said judgement which was placed before the Bench it was submitted that the assessee therein was also a Non banking finance company who owned the vehicles and let them out to third parties as such claim of depreciation at a higher rate has been held to be allowable. It was submitted that in the said judgement the Jurisdictional High Court has relied upon CIT vs. Bansal Credits Ltd. 259 ITR 69(Delhi) which again was a case wherein the assessee was engaged in the business of leasing out commercial vehicles. It was submitted that the S.L.P. filed by the department against the judgement of the Jurisdictional High Court in the case of CIT vs. MGF (India) Ltd. was dismissed as reported in 259 ITR 69. It was also submitted that on facts the assessee was carrying out the business of leasing out vehicles to other parties and he is also in the business of non banking financing. Specific attention was invited to the observations of the Jurisdictional High Court as found mentioned at page 74 in CIT vs. Bansal Credits Ltd. cited (supra). For ready reference we reproduce the relevant portion :

> "In our opinion on a plain reading of the Section and the relevant entry in the Appendix it is clear that it is the end user of the specified asset which is relevant for determining the percentage of depreciation. The section requires that the asset should be used for the purposes of the assessee's business and the entry in the Appendix refers to the user it should be put to. Apart from the fact that the leasing out of the vehicles is by itself tantamount to hire of vehicles, we are unable to read into any of the aforenoted provisions the requirement that the assets are to be used by the assessee for the purposes of "his" business or profession. Once it is accepted that the leasing out of the vehicles is one of the modes of doing business by the

assessee and in fact the income derived from such leasing is treated as business income of the assessee, it would be clearly contradictory in terms to hold that the vehicles in question were not used wholly for the purpose of the assessee's business, which, as noted above, is one of the requisites stipulated in s.32, apart from the other two conditions indicated above, which all the assessees indubitably fulfill".

3.4.1. In the facts of the present case it was submitted that the end user has used these vehicles for the purpose of hiring. Reliance was also placed upon the judgements of the Apex Court in CIT vs. Shan Finance P.Ltd. 231 ITR 308(S.C.). Referring to the said judgement it was submitted that in that case the issue which came up for examination was whether for grant of investment allowance u/s 32A of the Act in respect of specified machinery it was necessary that the assessee should not merely use the machinery for the purpose of its business but should "himself used" it for the purpose of manufacture etc. Considering the relevant provisions their Lordships came to the conclusion that they did not specify that the assessee himself used the machinery for these purposes despite the fact that the wording in section 32A under examination was ".....owned by the assessee and is wholly used for the purposes of the business carried on by him...". In section 32 of the Act the words "carried on by him" are absent. Section provides ownership and user and the rules provide the rate.

3.4.2. It was submitted that on the other hand the CIT(A) has relied upon CIT(Guj.) vs. Gupta Global Exim P.Ltd. on which the A.O. has also relied which is reported in 305 ITR 132 (S.C.) Referring to the same it was submitted that the facts are entirely distinguishable as the assessee therein was not in the business of transportation and was only in the business of trading timber logs and leasing out was not a regular part of its activity. As such the facts are distinguishable. It was also submitted that the judgement reported in CIT vs. Madan & Co. 254 ITR 445 (Mad.) has not been considered properly and is distinguishable. In the facts of the present case it was submitted that the judgement in assessee's own case as per the observations made by CIT(A) are available on record, copy of which is placed at pages 15 to 16 and the same view has been consistently followed in the subsequent years. As such on facts and the position of law along with taking into consideration the past history of the assessee the issue deserves to be allowed. 3.5. The Ld.D.R. placed reliance upon the impugned order. It was his submission that the A.O. has followed the judgement of the Apex Court in the case of CIT, Gujarat vs. Gupta Global Exim Pvt.Ltd. (cited supra) and the CIT(A) has confirmed the action of the A.O. taking note of the fact that the assessee is a non banking company and does not derive any income from hiring of vehicles/transportation business and further on account of the fact that the department is contesting the issue in assessee's case for A.Y. 2000-2001 before the Hon'ble High Court. It was his submission that the vehicles have been financed by the assessee and leasing of the vehicles as an independent entity is never undertaken. 3.6. We have heard the rival submissions and perused the material available on record. A perusal of assessment order para 2 shows that the assessee is a non banking finance company engaged in the business of leasing of commercial vehicles, infrastructure, construction machinery and financing of infrastructure projects as in the last year. The A.O. while relying upon the judgement of the Hon'ble Supreme Court in the case of CIT Gujarat vs.Gupta Global Exim P.Ltd. which we shall discuss subsequently has also taken into consideration the judgement of the Hon'ble Calcutta High Court in Soma Finance and Leasing Co.Ltd. vs CIT, 244 ITR 440 (Calcutta). As set out in the earlier part of this order, Dr.Pal, Ld.A.R. apart from relying upon the orders of the Tribunal in its own case has

placed heavy reliance on the judgement of Jurisdictional High Court in the case of CIT vs. Bansal Credits and others, 259 ITR 69 (Delhi).

3.6.1. We would first consider the judgement relied upon by the department namely CIT, Gujarat vs. Gupta Global Exim P.Ltd. 305 ITR 132 (S.C.). A perusal of the same shows that the assessee therein was in the business of timber trading and occasionally gave out the trucks owned by it to outside parties on hire. The A.O.'s view of rejecting the claim of higher depreciation was upheld by CIT(A) which was affirmed by the Tribunal and the Hon'ble High Court on appeal refused to interfere on the ground that the matter was essentially one of fact. In appeal the decision of Hon'ble High Court was set aside and the issue was remanded back for fresh decision to the CIT(A) holding that no question of law arose in the matter. The CIT(A) was directed to decide the question as to whether the assessee who was engaged in the business of importing timber logs from abroad and selling them in India was in the business of running the trucks for hire on account of the "occasional user" of hiring out these trucks. Their Lordships were careful in observing that they expressed no opinion on the merits of the case and the assessee was given liberty to seek amendments of the grounds of appeal if so advised and the contentions were kept open both for the assessee and for the department. Thus on a careful perusal of the principle laid down therein it does not help the department in any manner.

3.6.2. It has been canvassed that Jurisdictional High Court in CIT vs. MGF (India) Ltd. 285 ITR 142 (Del) has followed Bansal Credits and has also considered Soma Finance & Leasing relied by Calcutta High Court as such the issue has to be decided as per facts in assessee's case and principle laid down by the Jurisdictional High Court. 3.6.3. A perusal of the judgement in Bansal Credits show that their Lordships after referring to relevant provisions namely S.32 along with Rule 5 and Appendix to the said Rule held as under.

13. From a conjoint reading of the afore-noted provisions it is clear that higher rate of depreciation in respect of motor buses, motor lorries and motor taxis is admissible if these are used in a business of running them on hire. The existence of the specified assets, assessees ownership thereof and these being used in running them on hire are not indispute. The only objection of the Revenue to the grant of higher rate of depreciation is that the assessee is not himself running these vehicles on hire. Therefore, the short question for consideration is whether for availing higher rate of depreciation, it is mandatory that the said vehicles are not merely used in a business of running themon hire but the assessee should himself use these vehicles for the said purpose ?

14. In our opinion on a bare reading of the afore-noted provisions, answer to the question has to be in the negative. In support of the Revenue's stand, Mr. Khanna has laid too much emphasis on the expression "as are used for the purposes of the business or profession of the assessee" appearing in r. 5. The submission is that it is the nature of the assessee's business which is the determining factor for rate of depreciation. If the assessee, even though the owner of the vehicles, does not use these for running them on hire himself, higher rate of depreciation cannot be granted. We are unable to persuade ourselves to agree with the learned counsel .

15. The cardinal rule of interpretation is that the statute must be construed according to its plain language and neither should anything be added nor subtracted therefrom unless there are adequate grounds to justify the inference that the legislature clearly so intended. It is also well-settled that in a taxing statute one has to look merely at what is clearly stated. The meaning and extent of the statute must be collected from the plain and unambiguous expression used therein, rather than from any notions which may be entertained by the Court as to what is just or expedient. In Cape Brandy Syndicate vs. IRC (1921) 1 KB 64 it was said that one must look at what is clearly stated in the statute. 3.6.4. Their Lordships held that it is the end user of the specified asset which is relevant for determining the percentage of depreciation and held that they were not in agreement with the view canvassed by the department that the assets are to be used by the assessee for the purpose of "his" business or profession. We reproduce para 17 of the said judgement.

17. In our opinion, on a plain reading of the section and the relevant entry in the appendix, it is clear that it is the end user of the specified asset which is relevant for determining the percentage of depreciation. The section requires that the asset should be used for the purposes of assessee's business and the entry in the appendix refers to the user it should be put to. Apart from the fact that the leasing out of the vehicles is by itself tantamount to hire of vehicles, we are unable to read into any of the aforenoted provisions the requirement that the assets are to be used by the assessee for the purposes of "his" business or profession.

Once it is accepted that the leasing out of the vehicles is one of the modes of doing business by the assessee and in fact the income derived from such leasing is treated as business income of the assessee, it would be clearly contradictory in terms to hold that the vehicles in question were not used wholly for the purpose of assessee's business, which, as noted above, is one of the requisite stipulated in s. 32, apart from the other two conditions indicated above, which all the assesses indubitably fulfil. 3.6.5. Accordingly in these circumstances the judgements relied by the department were considered to be not applicable as set out in para 22 of the said judgement.

In our view, the ratio of the decisions, relied upon by learned counsel for the Revenue, is not applicable on the facts of the instant cases. These decisions are clearly distinguishable on facts. In all these cases it has been found as a fact that the trucks were being used by the assessees for the transportation of their own products. Noticing that the dominant purpose for which assessees were required to use the said vehicles to be entitled to higher rate of depreciation was in a business of running them on hire and the occasional use of trucks for hiring was not sufficient for availing a higher rate of depreciation, the issue was decided against the assessees. As noted above, it is not the case here.

3.6.6. Considering the cases wherein the Tribunal had remanded the matters back to the A.O. to examine whether the leased out vehicles had been actually used by lessee in the business of hire, their Lordships held that they did not find any infirmity in such a direction. For ready reference we reproduce para 23.

Before we close, we may point out that in some of the cases before us (ITAs No. 64/99, 65/99,73/99 & 74/99), the Tribunal has remanded the matters back to the AOs to examine whether the leased out

vehicles had been actually used by the lessee in the business of hire. In the light of the view taken by us, we do not find any infirmity in such a direction. As a matter of fact, wherever there is a doubt it must be examined whether the leased out vehicles are actually being used in the business of hiring. Only in such a situation depreciation at the higher rate of 40 per cent or 50 per cent as the case may be, is to be allowed under the relevant entry in Appendix 1 to the Rules. 3.6.7. Accordingly in the light of the principle laid down by their Lordships of the Jurisdictional High Court, we are of the view that the reliance placed by the department on Soma Finance and Gupta Global is misplaced. The issue has to be restored back to the file of A.O. with the direction to decide the same in accordance with law i.e. end user on the part of the persons who put these vehicles to use. Although this fact has been canvassed on behalf of the assessee, however, necessary verification at the end of A.O. has to be done.

3.7. In the result ground no.1 raised by assessee is allowed for statistical purposes.

4. The facts relevant to the next ground are found discussed at pages 8 to 15 of the assessment order. A perusal of which shows that the A.O. considering the audited accounts of the assessee observed that the assessee has given Rs. 117 lakhs as interest free loans to its subsidiaries. The A.O. required the assessee to explain as to why proportionate interest relatable to extending interest free loan to sister concern should not be disallowed as it has borrowed substantial funds for which substantial amount of interest had been paid. The assessee vide letter dt. 26.12.2008 submitted his reply which is found reproduced in para 5.2 of the assessment order. On facts it was submitted that the assessee has given interest free loans to its 100% subsidiaries on account of commercial expediency for the purposes of utilizing the same in the business of subsidiary. As such it was contended that on facts that since the loan was given for a business purpose notional interest on the said loan cannot be disallowed. Reliance was placed upon S.A.Builders Ltd. vs CIT(A) & Another (2007) 288 ITR 1 (SC); D & H Secheron Electrodes P.Ltd. (1984) 149 ITR 400 (MP); CIT vs. Premier Auto Finance P.Ltd. (1981) 128 ITR 540 (Del). It was further contended on facts that in the instant case the assessee has Reserves and Surplus of Rs. 30143 lakhs which far exceed the interest free loan of Rs.117 lakhs as such the entire interest expenditure of the assessee is allowable u/s 36(1)(iii) and the question of disallowance of notional interest expenses does not arise.

4.1 . Not convinced with the explanation offered the A.O. relying upon K.Somasundaram & Bros. vs CIT (1999) 238 ITR 939 (Mad.); CIT vs. M.S.Venkateswaran (1996) 222 ITR 163 (Mad.) ; CIT vs. P.Ganu Rao & Sons (1990) 185 ITR 324 (Mad.); CIT vs. V.I.Baby & Co. (2002) 254 ITR 248 (Ker); CIT vs. Motor General Finance Ltd. (2002) 54 ITR 449 (Del); CIT vs. H.R.Sugar Factory P.Ltd. (1991) 187 ITR 363 (Alla); Indian Metals & Ferro Alloys Ltd. vs CIT (1992) 193 ITR 344 (Orissa); CIT vs. Saraya Sugar Mills P.Ltd. (1993) 201 ITR 181 (Alla); Phaltan Sugar Works Ltd. vs CIT (19195) 215 ITR 582; Elmer Havell Electrics vs CIT (2005) 277 ITR 549 (Del); CIT vs. Sujanni Textiles P.Ltd. (1997) 225 ITR 560 (Mad.) disallowed proportionate interest @ 12% holding that it is attributable on account of business funds used for non business purposes. 4.2. Aggrieved by this the assessee came in appeal before the CIT(A) who considering the legal precedents relied upon by the A.O., confirmed the disallowance.

4.3. Aggrieved by this the assessee is in appeal before the Tribunal.

4.4. Ld.A.R. apart from relying upon the arguments and facts advanced before the A.O. and the CIT(A) submitted that the availability of funds in the reserves & surplus has not been disputed by the department. It was his submission that the reliance has been placed by the department on the judgement of P&H High Court in CIT vs. Abhishek Industries 157 Taxman 257 which has been overruled by the Apex Court in Munjal Sales Corporation vs CIT 288 ITR 1 (S.C.). It was further submitted that apart from relying upon the judgements relied upon before the CIT(A) namely S.A.Builders Ltd. 288 ITR 1 (S.C.) and CIT vs Tin Box Co. 260 ITR 637 (Delhi); reliance was also placed upon 2010 4 ITR(Trib.) 435 (Del) DCIT vs. UK Paints India Ltd. Heavy reliance was also placed upon East India Pharmaceutical Works Ltd. vs CIT 224 ITR 627 (S.C.); CIT vs. Reliance Utilities and Power 313 ITR 343 (Bom.) and Woolcombers of India Ltd. vs CIT 134 ITR 219 (Cal.) on the basis of which it was argued that the claim of the assessee is to be allowed. 4.5. The Ld.D.R. on the other hand placed reliance upon the order of the CIT(A) and it was his submission that the judgements relied upon by the ld.A.R. have no relevance as the assessee has to establish business purposes and commercial expediency and the judgement of the Apex Court on which reliance has been placed are based on the finding that the loans were advanced for business purposes, as such the claim of the assessee has rightly been rejected.

4.6. We have heard the rival submissions and perused the material available on record. The judgements relied upon have also been taken into consideration. It is seen that in regard to the interest free loans to its subsidiaries amounting to Rs.117 lakhs wherein the A.O. required the assessee to explain as to why proportionate interest relatable to extending interest free loans to sister concerns ought not be disallowed as it had borrowed substantial funds for which substantial amount of interest had been paid. The assessee in its reply vide letter dt. 26.12.2008 contended that the interest free loans had been advanced to 100% subsidiary on account of commercial expediency for the purpose of utilizing the same in the business of the subsidiary. Various decisions of various Courts were also relied upon by the assessee. It was also contended that the assessee had reserves and surplus of Rs.3143 lakhs which far exceeded the interest free loans of Rs.117 lakhs given to the subsidiary. However the said explanation was not accepted by the A.O. who held that deduction of interest on borrowed funds can be allowed only if such funds are used only for the purposes of business and in the eventuality the payment is not for business it puts extra burden on the company by way of excess avoidable interest expenditure. Reliance was placed by the A.O. upon the judgement of P&H High Court in the case of Abhishek Industries and other decisions referred to in the assessment order which have been referred to in the earlier part of this order for making a disallowance on proportionate interest on the grounds of diversion of business funds for non business purposes. The said action was confirmed by the CIT(A). On these facts we propose to question which their Lordships were seized with in the case of Munjal Sales Corporation vs CIT 298 ITR 298 (SC) which has been referred to by ld.A.R. in the context that the said judgement has overruled the judgement of P&H High Court in Abhishek Industries (supra) which has been followed by the CIT(A).

4.6.1. A perusal of the judgement of the Apex Court in Munjal Sales Corpn. Vs CIT (supra) would show that they were called upon to decide whether Sec.40(b) of 1961 Act is a stand alone Section or whether it operates as a limitation to the deductions u/s 30 to 38 of the 1961 Act. Their Lordships therein agreed with the view canvassed by Additional Solicitor General as they were pleased to hold

that S.40 before and after the Finance Act, 1992 has remained the same in the sense that it begins with the non-obstante clause. It starts that the words 'not withstanding anything to the contrary to Sections 30 to 38" which shows that even if an expenditure or disallowance comes within the purview of Sections 30 to 38 of the 1961 Act, the assessee could take the benefit of deduction if the case falls u/s 40. As such their Lordships held that "In other words every assessee including a firm has to establish in the first instance, its right to claim deduction in one of the sections between sections 30 to 38 and in the case of the firm if it claims special deduction it has also to prove that it is not disentitled to claim deduction by legal applicability of S.40(b)(iv). Accordingly their Lordships held that the assessee was required to establish in the first instance that it was entitled to claim deduction u/s 36(1)(iii) and that it was not disentitled to claim such deduction on account of applicability of sec.40(b)(iv). Considering the legal position thus their Lordships held that the conclusions of the Tribunal in A.Years 1992-93 and 1993-94 had to be upheld as the loans were advanced to assessee's sister firm for business purposes and the conclusions of the Tribunal in 1993-94, 1994-95 to 1997-98 which were not allowed was not correct on the reasoning that once it is found that the loans granted in August/September,1991 continued up to A.Y. 1997- 98 and once it had been held that the loans were advanced for business purposes and the interest paid thereon did not exceed the 18%/12% p.a. the assessee was entitled to deductions u/s 36(1)(iii) r.w.s. 40(b)(iv). 4.6.2. For ready reference a portion of the judgement is reproduced hereunder.

16. As stated above, in this batch of civil appeals we are concerned with the asst. yrs. 1993-94, 1994-95, 1995-96,1996- 97 and 1997-98. At this stage, it may be mentioned that as far back as in August/September, 1991 assessee herein had given interest free advances to its sister concerns. These advances stood reduced over a period, till asst. yr. 1997-98. Each year the balances stood reduced. Further, vide order dt. 3rd Jan., 2003 the Tribunal held, for asst. yr. 1992-93, that the assessee had given interest free loans from its own funds and not from interest bearing loans taken by the firm from third parties and consequently the assessee was entitled to claim deduction under s.36(1)(iii). In other words, the Tribunal held that loans were given for business purposes. Similarly, for asst. yr.1993-94, the Tribunal had taken the view that the said loans given to the firm's sister concerns were for business purposes. Accordingly, the Tribunal had deleted the disallowances during the asst. yrs. 1992-93 and 1993-94. It is equally true that for the asst. yr. 1994-95 the Tribunal took a contrary view in view of change in law brought about by Finance Act, 1992. Prior to 1st April, 1993 payment of interest to the partner had to be added back to the assessable income of the firm whereas after Finance Act, 1992 such payment became an item of deduction for computing the assessable income of the firm and it became part of the business income of the partner. In view of this change of law, the Tribunal disallowed payment of the interest in the present case for asst. yrs. 1994-95, 1995-96, 1996-97 and 1997-98. However, the point which has been left out from consideration is that the loans which were given in August/September 1991 to the sister concerns got wiped out only in asst. yr. 1997-98. As stated above, for asst. yr. 1992-93 and asst. yr. 1993-94, the Tribunal held that the loans given to the sister concerns were out of the firm's funds and that they were advanced for business purposes. Once it is found that the loans granted in August/September 1991 continued up to asst. yr. 199798 and that the said loans were advanced for business purposes and that interest paid thereon did not exceed 18/12 per cent per annum, the assessee was entitled to deductions under s. 36(1)(iii) r/w s. 40(b)(iv) of the 1961 Act.

17. One aspect needs to be mentioned during the asst. yr. 1995- 96, apart from the loan given in August/September1991, the assessee advanced interest free loan to its sister concern amounting to Rs. 5 lacs. According to the Tribunal, there was nothing on record to show that the loans were given to the sister concern by the assessee firm out of its own funds and, therefore, it was not entitled to claim deduction under s. 36(1)(iii). This finding is erroneous. The opening balance as on 1st April, 1994 was Rs. 1.91 crores whereas the loan given to the sister concern was a small amount of Rs. 5 lacs. In our view, the profits earned by the assessee during the relevant year were sufficient to cover the impugned loan of Rs. 5 lacs.

18. Before concluding, we may mention that the importance of the judgment is the clarification which we were required to give in the context of deductions under ss. 30 to 38 to be read with the limitation prescribed under s. 40.Since there was some confusion with regard to the status of s. 40, particularly, after enactment of Finance Act, 1992, we have explained the law in the context of deductions under Chapter IV-D of the 1961 Act. We have accepted the submissions advanced by the learned Addl. Solicitor General in that regard. However, the assessee succeeds in this batch of civil appeals on the peculiar facts of this case.

Accordingly, the impugned judgments of the High Court are set aside and the civil appeals preferred by the assessee stand allowed with no order as to costs.

(Highlighting for emphasis by the Bench) 4.6.3. We may also refer to the judgements referred to in by the A.O. and CIT(A) namely CIT vs. Abhishek Industries Ltd. (2006) 157 Taxman 257 (P&H)/288 ITR 1 (P&H) wherein there is a finding of the fact that loan had been advanced to sister concern for non business purposes as would be evident from para 14 and 16 of the said judgement at pages 12 and 13 which judgement has been heavily relied upon by the CIT(A). The Apex Court in the case of Munjal Sales Corporation cited supra has not given a burial to the criteria of business purpose/commercial expediency as has been consistently held by various judgements.

4.6.4. Reliance has also been placed upon the judgement of the Apex Court in the case of East India Pharmaceutical Works Ltd. vs CIT 224 ITR 627 (S.C.); Woolcombers of India Ltd. vs CIT, 134 ITR 219 (Cal.). In the facts before the Hon'ble Calcutta High Court in the case of Woolcombers of India Ltd. vs CIT the entire profits were deposited in the Overdraft account and the amount of profits far exceeded the advance tax liability monies withdrawn from the Overdraft account both for business purposes and also for payment of advance tax. On these facts their Lordships held that there is a presumption that advance tax was paid out of profits and not out of Overdraft account, as such, disallowance of interest on account of Overdraft on payment of advance tax was held to be not justifiable.

4.6.5. On the other hand in the case of East India Pharmaceutical Works Ltd. (supra) their Lordships of the Apex Court affirmed the decision of the Hon'ble Calcutta High Court holding that interest on O.D. for payment of income tax is not an expenditure wholly and exclusively for the purpose of business as such not deductible rejecting the contention on behalf of the assessee that the liability being to the tune of a couple of lakhs of rupees and if it was not discharged the entire business would have affected. The contention of the assessee before the Apex Court that the assessee

had deposited its entire profits in O.D.account and that amount being much more than the income tax liability and the tax paid. As such it should have been presumed that the taxes were paid out of profits of relevant year and not from O.D.account for running of the business. The appellant there had produced a schedule appended to the assessment order indicating that the amounts deposited in the O.D.account was much more than the taxes paid. Their Lordships holding that there was a considerable force in appellant's contention the question whether a presumption could be drawn that the taxes were paid out of profits of relevant year and not out of O.D. account for the running of the business would essentially depend upon whether the entire profits have been pumped into the O.D.a/c and whether this amount is more than the taxes paid and other factors. Since the contentions were not advanced before the Tribunal or High Court their Lordships held that the amplitude of the question posed did not bring any relevance and as such it would not be appropriate for the Court to look into the additional papers produced by the appellant for answering the question as such decision of the Calcutta High Court in 114 ITR 591 (Cal) was affirmed.

4.6.6. Further reliance has been placed upon the judgement of the Jurisdictional High Court in the case of CIT vs. Tin Box Co. 260 ITR 637 (Delhi). A perusal of the said judgement shows that the assessee being a registered firm engaged in the business of manufacture and sale of tin containers had been advancing interest free loans to sister concerns. At the same time was also availing of O.D. loan facilities from SBI against hypothecation of stock and was paying interest to the bank. The A.O. disallowed Rs.3 lakhs out of the total interest paid by the assessee to the bank in its O.D.a/c the Tribunal found that the assessee had substantial capital and interest free funds available with it not only in the preceding years but also in the years under consideration which far exceeded the interest free advances to the sister concern. But deletion of disallowance was upheld by the Hon'ble High Court holding that there was no question of law as the finding of the Tribunal was based on the relevant evidence on record.

4.6.7. Reliance before us has also been placed upon the judgement in the case of S.A.Builders Ltd. vs CIT(A) & Another (2007) 288 ITR 1 (SC). A perusal of the said judgement shows that their Lordships therein did not approve the approach of the Tribunal. And of the Hon'ble High Court as according to their Lordships considering the provisions of S.36(1)(iii) what was relevant was "commercial expediency" and not direct nexus between the availability of funds and the loans advanced by the assessee to its sister concern. For ready reference we reproduce the same from page 7 of the said judgement.

> "22. In our opinion, the High Court in the impugned judgement, as well as the Tribunal and the income tax authorities have approached the matter from an erroneous angle. In the present case, the assessee borrowed the fund from the bank and lent some of it to its sister concern (a subsidiary) as interest free loan. The test, in our opinion, in such a case is really whether this was done as a measure of commercial expediency.
>
> 23. In our opinion, the decisions relating to section 37 of the Act will also be applicable to section 36(1)(iii) because in section 37 also the expression used is "for the purpose of business". It ahs been consistently held in the decisions relating to

> section 37 that the expression "for the purpose of business" includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby....."

4.6.8. Accordingly considering the legal position as considered in Atherton vs. British Insulated and Helsby Cables Ltd. (1925) 10 TC 155 wherein it was held that to claim deduction it is enough to show that the money is expended not of necessity and with a view to direct an immediate benefit but voluntarily and on the grounds of commercial expediency and in order to indirectly facilitate the carrying on of the business. The said test in Atherton's case which had been approved by the Apex Court in several decisions for example Eastern Investments Ltd. vs CIT (1951) 20 ITR 1, CIT vs. Chandulal Keshavlal and Co. (1960) 38 ITR 601, etc. their Lordships were of the view:

> "25. In our opinion, the High Court as well as the Tribunal and other income tax authorities should have approached the question of allowability of interest on the borrowed funds from the above angle.
>
> In other words the High Court and other authorities should have enquired as to whether the interest free loan was given to the sister company (which is a subsidiary of the assessee) as a measure of commercial expediency, and if it was, it should have been allowed.
>
> 26. The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.
>
> 4.6.9. Accordingly holding that in the present case neither the High Court nor the Tribunal or other authorities have examined whether the amount advanced to sister concern was by way of 'commercial expediency'. Their Lordships remanded the matter back to the Tribunal with the following observations.
>
> "35. We agree with the view taken by the Delhi High Court in CIT vs. Dalmia Cement (B) Ltd. (2002) 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the revenue cannot justifiably claim to put itself in the arm-chiar of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the

amount was advanced for earning profits.

36. We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the directors of the sister concern utilize the amount advanced to it by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. However, money can be said to be advanced to a sister concern for commercial expediency in many other circumstances (which need not be enumerated here). However, where it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans.

37. In view of the above, we allow these appeals and set aside the impugned judgements of the High Court, the Tribunals and other authorities and remand the matter to the Tribunal for a fresh decision, in accordance with law and in the light of the observations made above.

38. We also make it clear that we are not setting aside the order of the Tribunal or other income tax authorities in relation to the other points dealt with by these authorities, except the point of deduction of interest on the borrowed funds."

4.6.10. It is seen that their Lordships therein made a reference to the judgement of the Apex Court in the case of CIT vs. Malayalam Plantations Ltd. (1964) 53 ITR 140 (S.C.) wherein Justice Subbarao sitting for the Apex Court observed that "the expression 'for the purpose of business' is wider in scope than the expression "for the purpose earning profits". In the facts of the present case also it is seen that the assessee has sought to place reliance upon the judgements in the context of availability of funds so as to contend that the assessee had sufficient Reserves & Surpluses.

4.6.11. We may also refer to K.Somasundaram & Bros. vs CIT (1999) 238 ITR 939 (Mad.) which has been referred to by the parties before the Bench. The assessee therein had advanced substantial part of borrowed funds interest free to the relatives of the partners it was clearly a case of non business purposes and a situation of diversification of funds. Similarly in the case of CIT vs. M.S.Venkateswaran (1996) 222 ITR 163 (Mad) the father of the assessee had diverted a portion of the borrowed capital for his own purposes which were held to be not for business purposes, as such the facts again are distinguishable. Same was the decision in CIT vs. P.Ganu Rao & Sons (1990) 185 ITR 324 (Mad.) where interest on borrowed capital to the extent the same was utilized for non business purposes the sum was held to be disallowed u/s 36(1)(iii). Reliance has also been placed upon CIT vs. V.I.Baby & Co. (2002) 254 ITR 248 (Ker) wherein it was found that advances had been made to the partners, their relatives and sister concerns and the assessee was found to have not derived any benefit out of the same as such it was held to be a case of non business purposes. Similarly in CIT vs. Motor General Finance Ltd. (2002) 54 ITR 449 (Del) it has been held that the

nexus between the amount paid by way of advance to sister concern and the fund available at the relevant time in assessee's hands must be found out from the advances taken by the assessee. On the other hand it is seen that the Apex Court in the case of S.A.Builders Ltd. vs CIT(A) cited (supra) it is necessary to see whether the amount advanced to the subsidiary or associated company or any other party was advanced as a measure of commercial expediency which requirement has not been nullified by Munjal Sales. 4.6.12. Referring to the facts which have been brought to our notice it is seen that the assessee has argued that the assessee had sufficient funds in the form of Reserves & Surpluses to fund the interest free loans to the sister concern. The assessee has advanced arguments to show that as per audited accounts of the assessee as on 31.3.2006 the opening balance of Reserves & Surpluses stood at Rs. 11,048 lakhs and closing balance at Rs. 30,143 lakhs. Over and above this, the assessee earned profit after tax Rs. 4,842 lakhs. As such it has been contested that the internal accruals of assessee far exceeded Rs.117 lakhs advanced to the subsidiaries.

4.6.13. Similarly in the next A.Y. before us it has been canvassed that as per audited accounts as on 31.3.2007 the opening balance of Reserves & Surpluses stood at Rs. 30,143 lakhs and closing balance at Rs. 36,794 lakhs. Similarly it had earned profit after tax Rs. 7,925 lakhs. Accordingly it has been canvassed that for advancing loans of Rs.207 lakhs the assessee had sufficient internal accruals these facts are found in the respective paper books for the two A.Ys at pages 10 and 11 of the paper book respectively.

4.6.14. In the light of the above facts and position of law as we have discussed, it is seen that the enquiry whether the Reserves & Surpluses were lying in liquid funds or lying invested may be an irrelevant enquiry in the light of the principle laid down by the Apex Court in the case of S.A.Builders. The only relevant fact is 'commercial expediency'. Accordingly after considering the judgements relied upon by the parties before us, we are of the view that it is relevant to consider the minutes of the Board of Directors whereby the loans were advanced to the 100% Subsidiary of the assessee. It is this sanction which will address the 'commercial expediency of business purpose' which is a relevant fact to be taken into consideration. We have taken cognizance of the fact that the assessee is a Non Banking Finance Company who is in the business of leasing and finance for which interest is charged as such for advancing of loans to its 100% Subsidiary the purpose of advancing the loan has to be established and relevant facts addressing the issue need to be brought on record. Accordingly we restore the issue back to the file of the A.O. with the direction to decide the same in accordance with law. The assessee would be at liberty to place relevant facts and evidences in support of its claim. The case law shall apply only after the facts have been marshaled. Ground no.2 as such is restored with the above observations.

5. Vide Ground nos. 3(a) to 3(e) the assessee has agitated that the CIT(A) has erred in confirming the disallowance u/s 14A as per Rule 8D. A perusal of the facts available on record show that the A.O. on perusing Sch.VI to the Balance Sheet as on 31.3.2006 observed that the assessee made an investment of Rs. 10389 lakhs in the government securities, equity shares of listed companies and subsidiary companies on which the assessee has earned a dividend income of Rs.6,75,285/- which was claimed as exempt. The A.O. required the assessee to explain the same and after considering the reply and taking into consideration the order of the Special Bench in ITO vs. Daga Capital made a disallowance u/s 14A amounting to Rs. 5,00,50,000/-. In appeal the said action was upheld by the

CIT(A) relying upon the same order of the Tribunal. Still aggrieved the assessee is in appeal before us.

5.1. The ld.A.R. contended that in view of the judgement of the Bombay High Court in Godrej Boyce Ltd. 328 ITR 81 Bombay the orders of the A.O. and the CIT(A) are no longer good in law as they have followed Special Bench decision in Daga Capitals. Relying upon the order of the Calcutta Bench in ITA no. 1724/Kol/2010 dt. 11.5.2011 it was requested that herein also the issue should be restored to the A.O. with the direction to restrict the disallowance to 1% of the dividend income. 5.2. The ld.D.R. though conceding that the issue as considered by the tax authorities in the light of the judgement of the Special Bench is no longer good in law. However contended that even with the judgement of the Bombay High Court the disallowance has to be made and the issue has to be considered by the A.O. and the order of the Kolkata Bench wherein disallowance is restricted to 1% should not be followed.

5.3. We have heard the rival submissions and perused the material available on record. On a careful consideration of the same we are of the view that in the peculiar facts and circumstances of the case it would not be appropriate to restore the issue back to the file of the A.O. The view taken in Calcutta Benches was in consonance with the consistent view taken by various orders of the Calcutta Benches as pleaded by the ld.A.R. and the plea was not opposed by the Ld.Sr.D.R.. Moreover in the facts of the present case the issue has to be decided in terms of the directions contained in the judgement rendered on 18.11.2011 by the Jurisdictional High Court in the case of Maxopp Investment Ltd. Vs CIT in ITA 687/2009. As such the issue is restored to the A.O. to decide the same applying the principle laid down by the Jurisdictional High Court in the above mentioned judgement. Accordingly ground nos.3(a) to 3(e) of the assessee are allowed for statistical purposes.

6. The facts relevant to the next issue agitated vide ground no.4 by the assessee are found discussed at pages 20 to 22. A perusal of the same shows that the assessee made a provision for special reserve for Rs. 980 lakhs, the A.O. observed that the same was not added back to the computation of book profit. The assessee was required to explain the same. In response to which the assessee offered its reply dt. 24.12.2008 which is found reproduced in para 9.3 of the assessment order, for ready reference it is reproduced hereunder:-

> 9.3 In response to the same the assessee has vide letter dated 24.12.2008 submitted as follows;
>
> "1.0 In the year under consideration the company has made a provision for special Reserve for Rs. 9.80 crores as per the RBI Act and the same has not been added back in computation of book profit.
>
> 2.0 In this regard, it is humbly submitted that Sec. 115JB of the Income Tax Act, deals with computation of Book Profit. Explanation to Sec. 115JB(2) provides the basis for computation of Book Profit under the said section. The said explanation to the said section provides the items which have to be added to the profit as per the Profit and Loss Account. On perusal of the said Explanation it could be seen that only Clause (b)

& (c) has any relevance in respect of addition of amount transferred to Special Reserve in the computation of Book Profit. 2.1 As regards applicability of Clause (b) it is submitted that as per the said clause any amount transferred to a reserve has to be added back in the computation of Book Profit. The term 'reserve' has not been defined in the Income-tax Act. However, reserve has been defined in Part III, Schedule-VI, to the Companies Act, 1956 as under:

"(2) Where,-

(a) any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets, not being an amount written off in relation to fixed assets before the commencement of this Act; or

(b) any amount retained by way of providing for any known liability; is in excess of the amount which in the opinion of the directors is reasonably necessary for the purpose, the excess shall be treated for the purposes of this Schedule as a reserve and not as a provision."

[Emphasis added] 2.2 From the perusal of the above it can be seen that if any amount is retained in excess of any known liability which is reasonably necessary for the purpose, in the opinion of the directors, shall be treated as a reserve. On the contrary, if the said provision is not in excess it can be termed as a provision. In the instant case, we have transferred the amount to Special Reserve in order to meet future exigencies. It is also submitted that the said provision can never be treated as excess in any way. Further, the transfer to Special Reserve has been made as per the RBI Act and therefore, is statutory in nature. In the above backdrop, the said transfer can be termed as a provision and not a reserve, even though it is reflected in the audited accounts as "special reserve".

3.0 As regards applicability of clause (c) of Explanation to Sec. 115JB it is submitted that the said clause states that any amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities is required to be added to the Book Profit. In this regard, it is submitted that the transfer to Special Reserve is made as per the RBI Act and not on ad-hoc basis. Keeping in mind the future contingencies of NBFC, the RBI has directed all NBFCs to create such reserve and thus, it cannot be said that the said provision has been made to meet any liabilities other than ascertained liability. Thus, the provision made for Special Reserve cannot be added to Book Profit u/s 115JB.

3.1 In this regard, we reproduce Sec. 451C of the RBI Act, 1935 which reads as under...

3.2 On perusal of the above, it could be seen that the said transfer to Special Reserve is a statutory provision and has to me made every year by all NBFCs. It is thus evident that in compliance with the aforesaid statutory requirements, we have transferred Rs. 9.80 crores to Special Reserve. Hence, the same cannot be treated as a reserve within the meaning of the Companies Act, 1956 and as such it cannot be added to the Book Profit.

3.3 In this regard reliance is placed on the decision of the Apex Court in the case of National Rayon Corporation Ltd. - vs- CIT (1997) 227 ITR 764 (SC) wherein it has been held that amount transferred to debenture redemption reserve cannot be treated as a reserve particularly when the amount transferred is not in excess of amount which had to be paid for the redemption of the debentures.

3.4 Further, reference is also made to the decision in the case of Vazir Sultan Tobacco Co. Ltd. -vs- CIT (1981) 132 ITR 559 (SC) where it was held that whether retention or appropriation of a sum constitute a reserve will have to be decided having regard to the true nature and character of the sum so retained or appropriated depending on intention with which and purpose for which retention for appropriation has been done.

4.0 In view of the aforesaid, it is reiterated that Special Reserve is not a reserve but instead it is a provision and it cannot be added to the Book Profit either under clause (b) or (c) to Explanation of Sec. 115JB read with the judicial decisions referred to in Para D above.

6.1. Not convinced with the explanation offered the A.O. considering the provisions of the Act and the facts on record along with the past history of the assessee decided the issue against the assessee holding as under.

> "9.4. I have considered the submissions of the assessee and the same is not acceptable. Law on this issue is unambiguous. Explanation 1 to S.115JB is reproduced below:
>
> 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 -
>
> (b) the amounts carried to any reserves, by whatever name called (other than a reserve specified u/s 33AC).

9.5. Thus as per clause (b) of Explanation 1 to s.115JB the amount transferred to any reserve by whatever name called is to be added back in the computation of book profit except a reserve specified u/s 33AC. Admittedly, the Special Reserve is not a reserve specified u/s 33AC (for shipping business).

9.6. It is interesting to note that in the earlier A.Ys the assessee has itself offered this transfer to special reserve for taxation. The assessee can not take different positions in respect of the same item in different years.

9.7. In view of the above discussion, the amount transferred to Special Reserve by the assessee is to be added back to book profit.

(Addition: Rs. 9,80,00,000/-) 6.2. Aggrieved by this the assessee came in appeal before the CIT(A) who confirmed the action of the assessee on the basis of the past record wherein the assessee has himself been offering special reserve for taxation in the earlier years. The addition was considered to be rightly made in the light of the legal provisions.

6.3. Aggrieved, the assessee is in appeal before the Tribunal. 6.4. On behalf of the assessee the submissions advanced before the A.O. and the CIT(A) reporudced in para 9.3 of the Assessment order were reiterated. It was argued that the provision is a known liability and it is to be allowed in line with the judgement of the Apex Court in the case of National Rayon Corpn. Ltd. vs CIT (S.C.) as reported in 227 ITR

764. Relying on the same it was contended that "The expression 'provision' and 'reserve' have not been defined under the Companies (Profits) Surtax Act, 1964. Therefore, the two concepts 'reserve' and 'provision' which are fairly well known in commercial accountancy and which ;are used under the Companies Act dealing with the preparation of balance sheet and profit and loss accounts, have to be gathered from the meanings attached to them by the Companies Act itself. "Provision" and 'reserve' have been defined in Part III of Schedule VI to the Companies Act, 1956. The definition clearly indicates that if an amount is retained by way of providing for any known liability that amounts shall not be treated as reserve. Clause 7(2)(b) makes it clear that only an amount which is in excess of what is reasonably necessary for meeting a known liability shall be treated as reserve and not as provision. The directors will have to form an opinion as to what is reasonably necessary for meeting the known liability of a company. The opinion of an accountant or an auditor or a lawyer is quite immaterial for this purpose."

6.4.1. Referring to the said judgement it was submitted that the term 'reserve' and 'provision' have not been defined under the Act. Thus, in order to interpret the said terms, it is necessary to consider the meaning assigned to them under the Companies Act, 1956 since the relevant section 115JB deals with assessment of companies. In this connection reference was invited towards the decision of the Hon'ble Bombay High Court in the case of Petrosil Oil Company Limited vs. CIT 236 ITR 220 (Bom), wherein following the decision of the Hon'ble Supreme Court in the case of Howrah Trading Company Ltd. vs CIT 35 ITR 215 (S.C.) it has been held that for the purpose of construing the provisions of the Income Tax Act dealing with the assessment of companies, undefined words used in the Act may be interpreted by importing the definition accorded to them in the Companies Act. 6.4.2. Reliance was also placed on the decision in the case of Vazir Sultan Tobacco Co.Ltd. vs CIT 132 ITR 559 (SC) where it was held that whether retention or appropriation of a sum constitute a reserve will have to be decided having regard to the true nature and character of the sum so retained or appropriated depending on intention with which and purpose for which retention for appropriation has been done. 6.4.3. Reliance was also placed upon the order of the Co-Ordinate Bench rendered in the case of Hitkari Fibres Ltd. vs. JCIT (2004) 90 ITD 654 (Mumbai) and the judgement of M.P. High Court in the case of Keshkal Marketing Society Ltd. vs CIT 165 ITR 437 (M.P.) for the proposition that the amount was transferred to Reserve fund by way of statutory regulation at the instance of the Registrar of Co-Operative Societies and the amount was not available to the assessee society. Reliance was further placed upon an unreported order of the Mumbai Bench in ACIT vs. M/s Wockhard Ltd. reported in ITA 3556/Mumbai/2007 dt. 9th July,

2010. Accordingly it was argued that the judgements relied upon have not been considered at all. 6.5. The Ld.D.R. heavily relied upon the impugned order on the basis of which it was his submission that there is no mention of this reserve and the assessee itself has been showing the same in the earlier years and there is no change in the facts and circumstances as such the claim of the assessee has to be rejected. The case law it was argued is entirely on different facts and circumstances and as such not relevant as has been the consistent view of the A.O. and the CIT(A) before whom also similar arguments in facts and on law were advanced. It was also his stand that the the assessee's own treatment on this issue in the past is a relevant fact which has been taken into consideration. 6.6. We have heard the rival submissions and perused the material available on record as well as the judgements referred to before us for our consideration. On a consideration of the facts as available on record vis-à-vis the provision of the Act, we find ourselves unable to come to any contrary finding than the consistent finding available on record. Being satisfied with the reasoning and finding ground no.4 of the assessee is dismissed.

7. In the result ITA 617/Del/2010 is partly allowed for statistical purposes.

8. It was a common stand of the parties before the Bench that the arguments in ITA 617/Del/10 would apply to ground no. 1 to 4 in ITA 618/Del/10.

8.1. Accordingly ground no.1 of the assessee is allowed for statistical purposes, the reason of findings given in ITA 617/Del/2010. 8.2. Ground no.2 is allowed for statistical purposes for the reasons, and identical directions given in ITA 617/Del/2010 are given while restoring the issue to the A.O. as in the earlier appeal. 8.3. Ground no.3 in terms of the findings and reasoning given in ITA 617/Del/2010 is restored to the file of A.O. to decide by applying the principle laid down by the Jurisdictional High Court in the judgement of Maxopp Investments Ltd.

8.4. Ground no.4 is rejected for the reasoning and finding in ITA 617/Del/2010 as facts, arguments and legal position remains the same.

9. The sole surviving ground remaining in ITA 618/Del/2010 is ground no.5. The facts qua the same are found discussed in pages 23 to 29 of the assessment order in para 9. A perusal of the same shows that the A.O. took cognizance of the fact that the assessee company had transferred amount of Rs.1866 lakhs from the Profit and Loss a/c the debt reduction reserve and that the same has not been added back in the computation of book profit. The assessee was required to explain the same. The explanation offered on behalf of the assessee is found reproduced in para 9.3 of the assessment order.

9.1. The claim of the assessee was rejected by the A.O. observing as under.

9.4 I have considered the submissions of the assessee and the same is not acceptable. Law on this issue is unambiguous. Explanation 1 to section 115JB is reproduced below:

> "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-

(c) the amounts carried to any resen1es, by whatever name called [other than a reserve specified under section 33AC};"

9.5. Thus as per clause (b) of Explanation 1 to sec. 115JB the amount transferred to any reserve by whatever name called is to be added back in the computation of Book Profit except a Reserve specified under section 33AC. Admittedly, the Special Reserve is not a reserve specified under Section 33AC (for shipping business). 9.6. It is interesting to note that in the earlier assessment years, the assessee has itself offered this transfer to debt redemption reserve for taxation for the purpose of computation of book profit. The assessee can not take different positions in respect of the same item in different years.

9.7.The reliance on the decision of Supreme Court in the case of National Rayon Corporation Ltd. (Supra) is misplaced as the said decision has been rendered in respect of interpreting Surtax Act. The said decision has not been given in respect of computation of book profit under Income Tax Act. Therefore, the order can not be applied in this case. Without prejudice to this fact, it is observed that the said decision has examined the nature of Debenture Redemption Reserve. However, in this case the issue is Debt Redemption Reserve. If the argument of the assessee is accepted, then the assessee shall be at liberty to transfer to a reserve in the garb of making provision for meeting any liability towards any type of debt. If such a situation is allowed, an assessee may claim any future liability arising in a subsequent year in the current year itself. In this way, the whole purpose of taxing book profits u/s 115JB would be frustrated and become redundant. Therefore the argument deserves to be rejected on this ground also. 9.8 Further, in preceding year also such liabilities were existing but the assessee had not made any provision by transferring to any reserve. Therefore, change in the accounting in this respect in the year under consideration amounts to making change in the method of accounting policy regularly followed by the assessee. 9.8.2 The Central Government has notified Accounting Standard 1 issued by the Institute of the Chartered Accountants of India u/s 145(2) of the Act to be mandatorily followed by the assesses. 9.8.3 As per Accounting Standard 1, the assessee has to disclose any change in the accounting to obey. In this case, the assessee has made a change from last year but has not made any disclosure in the final accounts in this regard. Therefore, no such change in the accounting policy from last year i.e. not providing for any amount for meeting any liability towards debt can be recognised in the year under consideration.

9.8.4 Reliance in this regard is placed on Sriram Bearing Ltd. v. CIT (1993) 199 ITR 584 (Cal.) and Hada Textile Ind. Ltd. v. CIT(1991) 187 ITR 371 (Cal.) - holding that casual deport use is not permissible in law.

9.8.5 The change of accounting here is not found bonafide but only for the purpose of claiming deduction in computation of book profits. Such a change can not be allowed. Reliance is placed on CIT v. Cosmopolitan Trading Company (1979) 116 ITR 728 (All); Snow White Food Products Co. Ltd. v. CIT (1982) 141 ITR 861 (Cal); Reform Flour Mills P. Ltd. v. CIT (1978) 114 ITR 227(Cal). 9.8.6 Further a change in accounting policy can be accepted only where such a change is necessitated by any change in statute or where the assessee can prove that such a change is required

for the purpose of better disclosure and presentation of accounts. 9.8.7 In this case, the assessee has failed to prove any justification for change in accounting policy. The same is found to be not bonafide and is therefore rejected.

9.9. In view of the above discussion, the amount transferred to Debt Redemption Reserve by the assessee is held to be a transfer to a reserve and therefore is being added back to the book profit. 9.2. In appeal before the First Appellate Authority it is seen that apart from relying upon the National Rayon Corporation Ltd. vs CIT 227 ITR 764 (S.C.) no other argument was advanced. The CIT(A) rejecting the same holding that the said decision has already been considered while rejecting the assessee's claim by the A.O. Being satisfied with the conclusion the action of the A.O. was confirmed.

9.3. Aggrieved by this the assessee is in appeal.

9.4. Arguments advanced before the authorities below were reiterated on behalf of the assessee. The ld.D.R. on the other hand relied upon the past conduct of the assessee itself on the issue.

9.5. We have heard the rival submissions and perused the material available on record. The facts as taken into consideration ;by the A.O. which have been upheld by the CIT(A), have been set out in the earlier part of this order at considerable length. Being satisfied by the reasoning and finding on the facts as they stand considering the provision of law, the ground of the assessee is dismissed.

10. In the result the appeals of the assessee are partly allowed for statistical purposes.

Pronounced in the open court on 23rd February, 2012.

Sd/-	Sd/-
(B.C.MEENA)	(DIVA SINGH)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 23rd Feb., 2012

*manga

Copy of the Order forwarded to:

1. Appellant; 2.Respondent; 3.CIT; 4.CIT(A); 5.DR; 6.Guard File By Order Dy. Registrar // C o p y //