IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai
Before Hon'ble Justice P.P.Bhatt, President
and
Shri Shamim Yahya, Accountant Member

ITA Nos.5421& 5422 /Mum/2019
(Assessment Years: 2009-10 & 2010-11)

Reliance Industries Limited 3rd Floor, Maker Chamber IV 222, Nariman Point Mumbai-400 021	Vs.	DCIT(LTU)-2 29th Floor, Center No.1 World Trade Centre Cuffe Parade, Mumbai-400 005
PAN/GIR No. AAACR5055K		
(Revenue)	:	**(Assessee)**

Assessee by	:	Shri Nimesh Vora-AR
Revenue by	:	Ms. R.M.Madhavi-CIT(DR)

Date of Hearing	:	18.08.2021
Date of Pronouncement	:	03.09.2021

ORDER

Per Shamim Yahya, A. M.:

These are appeals by the assessee against the order of learned Commissioner of Income Tax (Appeals), Mumbai ('ld.CIT(A) for short) for the concerned assessment years.

ITA No.5421/Mum/2019:-

2. Grounds of appeal read as under:-

> 1. The learned Commissioner of Income-tax - (Appeals - 1) {hereinafter referred to as CIT(A) erred in confirming the order passed by the Assessing Officer (AO) under section 154 of the Act by holding that there is a mistake apparent from record in computing book profit u/s 115JB of the Income tax Act, 1961 {'Act').
>
> The Appellant submits that the order under section 154 of the Act is bad in law and not in accordance with the provisions of the Act as there is no mistake apparent from records.

The Appellant therefore submits that the order passed by the CIT (A) confirming the order under section 154 of the Act shall be vacated

2. The learned CIT (A) erred in confirming the action of the AO of adding interest on income tax refund of Rs 17,19,28,805 to the book profit of the appellant u/s 115JB of the Act.

The appellant submits that since the interest on income fax refund was not credited to profit and loss account as per the accounting policy consistently followed by the appellant, the learned CIT{A) erred in confirming the action of the AO in making adjustment to the book profit, which is not enumerated in clause (a) to (k) of Explanation 1 to section 115JB of the Act. The CIT (A) ought to have deleted the addition of interest on income tax refund to the book profit u/s 115JB of the Act.

3(a) The learned CIT (A) erred in confirming the action of the AO of adding pre-operative income of erstwhile RPL of Rs 23,80,33,573 to the book profit of the appellant u/s 115JB of the Act.

The appellant submits that since the pre-operative income was not credited to profit and loss account by the appellant, the learned CIT (A) erred in confirming the action of the AO in making adjustment to the book profit, which is not enumerated in clause (a) to (k) of Explanation 1 to section 115JB of the Act. The CIT(A) ought to have deleted the addition of pre-operative income to the book profit u/s 115JB of the Act.

(b) Without prejudice to the above, the learned CIT (A) erred in confirming the action of the AO in not reducing the pre-operative expenses of Rs. 3,308 crores which was not debited to profit and loss account by the appellant, on the ground that it was not the subject matter of the order under appeal.

Following the principle of uniformity, the learned CIT (A) ought to have directed the AO to also reduce the pre-operative expenses of Rs. 3,308 crores from the book profit u/s 115JB of the Act.

(c) In the alternative and without prejudice to Ground No 3(a) and 3(b) above, the learned CIT (A) erred in not directing the AO to add back pre-operative income to the cost of the asset in the subsequent year.

4 The learned CIT (A) erred in confirming the chargeability of interest u/s 234D and 220(2) of the Act, which was not in accordance with the provisions of the Act, since no intimation u/s 143(1) was issued w.r.t the revised return of income.

5. Each of the above Grounds of Appeal are without prejudice to each other.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.

3. The assessee has also raised following additional grounds:-

> On the facts and in circumstances of the case and in law, the order passed u/s 154 of the Act is liable to be quashed as same is passed beyond the time limit prescribed u/s 154(7) of the Act.

4. Brief facts of the case are that assessee is a public limited company. During the year under appeal, the appellant was engaged in Business of Oil Exploration, Manufacturing and trading of Petrochemicals, Polyester, Fibre intermediate, Textiles, Generation and Distribution of Power and Operation of Jetties and related Infrastructure and investments. The assessee filed its return of income on 30.09.2009 declaring total income of Rs.2551,67,29,0787- under normal provision and Rs. 10648,47,54,158/- under section 115JB of the Income Tax Act, 1961 (Act). The assessee electronically filed a revised return on 23.03.2011 declaring total income of Rs.2905,36,58,6047- under normal provisions and Rs.10634,55,98,256/- under section 115JB of the Act. The Assessment u/s 143(3) of the Income Tax ,1961 was completed determining the total assessed income at Rs.3714,73,24,1977- as per normal provision of the Act and Rs.10735,83,89,2607- u/s 115JB of the Act.

5. Thereafter, the Deputy Commissioner of Income-tax, LTD, Mumbai {hereinafter referred to as DCIT} had issued a notice u/s. 154 of the Act on 21.05.2018 proposing to increase the book profit u/s 115JB of the Act by rectify the following mistakes i.e. adding the following income not credited to profit and loss account of the appellant.

(i) Interest on income tax refund of Rs 17,19,28,805/-

(ii) Pre-operative income of erstwhile RPL of Rs 23,80,33,573/-

6. In response, the assessee filed its reply vide letter dated 12.09.2018 that there was no mistake apparent form records which can be rectified u7s.154 of the Act. However, the DCIT rejected the submissions of the assessee and passed a rectification order u/s 154 of the Act dated 30.11.2018 and added the above amounts to book profit

of the appellant and computed the book profit u7s 115JB of the Act at Rs.10763,40.22,838/-

7. Aggrieved the order passed under section 154, the assessee filed appeal with the CIT(A), who confirmed the order of the DCIT and aggrieved against the order of CIT(A), the assessee has field appeal before the ITAT.

8. We have heard both the parties and perused the records. It has been pleaded by assessee that the order passed under section 154 is bad in law as there is no mistake apparent from records. Further the assessee has moved for admission of additional ground of appeal where in appellant has challenged the order under section 154 as invalid as same is passed beyond the time limit prescribed under section 154(7) of the Act.

9. It is submitted that the additional ground of appeal may kindly be admitted as same is pure legal ground of appeal and goes to the root of the matter and all the relevant facts to decide the ground are on records. In this respect, reliance is placed on following decisions:

- Mahalakshmi Textile Mills Limited 66 ITR 710 (SC)
- Jute Corporation of India 187 ITR 688 (SC)
- National Thermal Power Company Ltd. v. CIT[1998] 229 ITR 383 (SC)
- Ahmedabad Electricity Company Ltd 199 ITR 351 (Bom)(FB)

In view of the above, the additional ground of appeal filed may be admitted and decided on merits.

10. It has been submitted that the order under section 154 passed on 30-11-2018 is barred by limitation as per section 154(7) of the Act. For ready reference, section 154(7) is reproduced below:

> *(7) Save as otherwise provided in section 155 or sub-section (4) of section 186, no amendment under this section shall be made after the expiry of four years from the end of the financial year in which the order sought to be amended was passed* It is

submitted that the order under section 154 shall be passed within 4 years from the end of financial year in which order sought to be amended was passed.

11. The Ld. Counsel of assessee in a below chart summarised various orders passed by the AO for the relevant assessment year

Sr No	Order u/s	Date of order	Particulars	time limit as per section 154(7)
1	143(3)	26-12-2011	Regular assessment order u/s 143(3)	31-03-2016
2	143(3) rws 147	11-05-2012	Reopening of assessment disallowing deduction for professional fees paid and recomputation of deduction u/s 10B to exclude other income	31-03-2017
3	154	23-04-2013	To withdraw consequential deduction allowed u/s 10B in view of relief by. CIT(A) depreciation and sales lax incentive claim	
4	154	06-03-2017	To withdraw allowance of mark to market loss on account of derivatives pursuant to ITAT order of AY 2008-09	
5	154	30-11-2018	Impugned order making addition of interest on Income Tax refund and pre operative income u/s 115JB	

12. Further submissions on this issue are as under:-

10. From the notice under section 154 issued on 21-05-2018 (pg 155 of the FPB) and the order passed on 30-11-2018 (pg 153-154 of FPB), it can be noted that the AO sought to amend the rectification order passed on 06-03-2017. When one refers to the order under section 154 dated 06-03-2017 (pg 148 of the FPB), it can be seen that the said order was passed to withdraw the allowance of mark to market loss on account of derivatives pursuant to ITAT order of AY 2008-09 where said losses were held to be allowable. Thus there was no discussion / reference to the issues listed in para 3 above in the said order. In fact, same is case with all the orders listed in serial no 1 to 4 listed in the table above i.e. the issues pointed out in the notice and finally adjudicated in the order under section 154 are not at all discussed in any of the aforesaid orders.

11. It is submitted that the period of limitation for section 154(7) shall be reckoned from the date of the order where said issue is the subject matter of said order and if it

is not subject matter of any of the intervening orders, then at best said period of limitation shall be reckoned from the date of the original assessment order filed. In this respect, we rely on the following decisions:

• Shree Naw Durga Bansal Cold Storage & Ice Factory v CIT 397 ITR 626 (All) (pg 38-47 of LPB II)

In this case, the set off of Long-Term Capital Loss (LTCL) was not allowed by the AO in the original assessment, though was claimed in the Return of Income. Assessee had filed appeal on computation of Long-Term Capital Gain (LTCG) and not on non-grant of set off of brought forward LTCL. On remand by ITAT to rework LTCG. The AO reworked the LTCG in the order giving effect to ITAT order and did not allow set off of LTCL. On Assessee's rectification application to allow set off of LTCL, AO held that same emanates from original assessment order and not from any intervening order and hence it is barred by limitation.

- The High Court confirmed the action of the AO holding that issue of set off of LTCL was not subject matter of intervening orders and thus the assessee sought amendment in the original order and hence limitation as prescribed uin section 154(7) shall be counted from date of original assessment order. While holding so, the HC also considered SC decision in case of Hind Wire Industries Ltd 212 ITR 639 and held that said decision is already considered by the SC in later case of CIT v Alagendran Finance Ltd 293 ITR 1 and accordingly upheld the action of the AO holding that in the garb of remand order in relation to some other aspect, the assessee could not have taken advantage of extension of limitation by seeking commencement thereof from the order passed by the AO on the issue on which remand is made.

• ACIT v Precott Mills Ltd 178 Taxman 15 (Chennai)(Mag) (pg 48-53 of LPB II)
In this case, on appeal after completion of original assessment, CIT(A) allowed certain relief to the assessee and a consequential order was passed. Thereafter, several rectification orders were passed to rectify different types of mistakes. Later on, the AO issued notice under section 154(3) seeking to rectify the last rectification order in respect of deduction under section 10B and then passed the rectification order. On appeal against the rectification order, the CIT(A) held that since matter of exemption under section 10B was not dealt with in any of the intervening orders passed by the AO under section 154 and that issue was before the AO only in the original assessment order, impugned rectification order was barred by limitation and hence invalid and void ab initio. In the department appeal before the ITAT, the ITAT upheld the view of the CIT(A). While holding so, the ITAT also considered the decision of the SC in the case of Hind Wire Industries Ltd (supra) and followed the later decision in case of Waldies Ltd v CIT 223 ITR 163 (SC)

• Similar view is also taken by the Jodhpur Tribunal in the case of A K Modi v DCIT 4 SOT 473 (pg 54-56 of LPB II).

12. In view of the above, it is submitted that in the appellant's case before your honour, addition to the book profits i.e. interest on income tax refund of Rs

17,19,28,805 and pre- operative income of erstwhile RPL of Rs 23,80,33,573, are not subject matter of any of the order including the original assessment order under section 143(3) and hence at best the time limit, shall be counted from the original assessment order in such case and that being so, the impugned order being passed on 30-11-2018 is barred by limitation as the due date was 31-03-2016. Accordingly, the order being invalid and void ab initio, shall be quashed.

13. The assessee has made further submissions on the merits as under:-

Ground of appeal No 1:

13. Vide ground of appeal number 1, the appellant has challenged that the order passed under section 154 is bad in law as there is no mistake apparent from records. In this connection, we plead on the below two propositions. Proposition 1

14. As submitted in earlier paras, the additions made in the impugned order under section 154 are not discussed in any of the orders passed till date and in such a case, it is submitted that where the point which is not examined on fact or in law cannot be dealt as mistake apparent on the record. For this proposition, we rely on the following decisions:

- CIT v Hero Cycles (P) Ltd 94 Taxman 271 (SC) (pg 5-11 of LPB I)
- Punjab Fibres Ltd V ITO 110 Taxman 35 (Del Trib) (pg 22 of LPB I)

Proposition 2

15. It is trite law that only mistake apparent from records can be rectified under section 154 of the Act and any debatable issue can not be matter of rectification under section 154. Also, where more than one view is possible on an issue, same cannot be subject matter of rectification. In other words, rectification u/s 154 of the Act can be made only when there is patent mistake which is apparent from record and on which two views are not possible and it should not be something which can be established by a long-drawn process of reasoning.

16. In the appeal before your honour, interest on income tax refund has not been credited to Profit & Loss A/c following the Accounting Standard - 9 as the relevant assessment orders are disputed before the various appellate authorities and there is no certainty to the quantum of interest to be received by the Appellant. Furthermore, this accounting principle has been consistently been followed by the Appellant year after year for preparation of its books of accounts. The books of accounts has been certified by the Independent Auditor as depicting the True and Fair view and same has been adopted by the Shareholders in its Annual General Meeting. The book profit u/s 115JB of the Act was assessed by the AO. after fully considering the fact that both the aforesaid incomes have not been added to book profit, though the same have been considered while assessing the income under normal computation of the Act. In fact, post filing the Return of Income and offering interest on income tax refund of Rs. 17,19,28,805 to tax under normal provisions, the interest pertaining to AY 2004-05

was reduced from Rs. 13,44,22,401 to Rs. 6,43,41,230, thus interest of Rs. 7,00,81,171 was withdrawn. Following the order of SB of ITAT in the case of Avada Trading Co (P) Ltd, the AO accepted the appellant's claim and reduced the interest on income tax refund by Rs. 7,00,81,171 under normal provisions in the order under section 143(3). (pi refer relevant para of the order at pg no 94-95 of the FPB). This shows that there is no certainty of receipt of income being interest on income tax refund. Further this also shows that, the AO was aware of the aforesaid fact that the appellant as well as the department being in appeal on multiple issues. Further, he was also aware of the consistent policy being followed by the appellant in accounting of interest on income tax refund, since as per Accounting Standard 9, which governs the recognition of revenue, it has been stated that that no revenue shall be recognised unless there is certainty of collection. Hence the AO in the assessment order passed u/s 143(3) of the Act has accepted the books of accounts and has taken a view and consciously not added the interest on income tax refund to book profit computed u/s 115JB of the Act.

17. Similarly, the AO was aware of the fact that the appellant company claimed deduction of pre-operative expenses of Rs.3308,81,37,971 u/s 37 of the Act and had offered pre-operative income to tax, since during the course of assessment proceedings the AO had called for justification of the claim u/s 37 of the Act in respect of the pre-operative expenses (pg 164-171 of FPB). Hence, the AO was aware of the fact that the pro-operative income though offered for tax under normal provisions has not been offered to tax u/s 115JB of the Act. Thus, assessment u/s 143(3} was completed by the AO without making any adjustment to the book profit on account of the difference in accounting of the aforesaid 2 type of income. The Appellant therefore respectfully submit that the non-addition of above two income to book profit cannot be termed as a 'mistake apparent from record' and same cannot be added to book profit u/s 115JB of the Act by passing a rectification order u/s 154 of the Act.

18. It is also submitted that book profit shall be computed as per the Profit and Loss Account is prepared in accordance with part - II and Part -III of schedule VI to the Companies Act and same shall be adjusted as per Explanation 1 to Section 115JB. It shall not be disturbed otherwise. In the case of the appellant, the Profit and Loss account is prepared in accordance with Schedule VI to the Companies Act and same is certified by the Auditor as such. Therefore, the AO has no power to disturb the book profits as mandated by Section 115JB of the Act. In this respect, reliance is placed on the following decisions:

- Apollo Tyres Ltd v CIT 255 ITR 273 (SC) (Pg 23-30 of LPB I)

In this landmark decision, the SC has held that AO does not have jurisdiction to go behind the net profit shown in profit and loss account as prepared under Companies act except to the extent provided in Explanation to Section 115J.

- PCIT v Bhagwan Industries Ltd ITA No 436 of 2015 (Bom) (Pg 31-32 of LPB I)

In this case, the assessee had directly credited the profit on sale of land to Capital Reserve Account in the balance sheet rather than routing it through the Profit and

Loss account. The Tribunal following the decision of SC in case of Apollo Tyres Ltd (supra) and Bombay HC decision in case of Akshay Textiles Trading and Agencies Pvt Ltd 304 ITR 401, held that book profits cannot be reworked under section 115JB of the Act and profit on sale of land cannot be brought to tax. Said conclusion of the Tribunal was affirmed by the High Court.

- DCIT v Dune Leasing & Finance Ltd 126 ITD 255 (Del Trib) (Pg 33-37 of LPB I) In this case, interest income and interest expenses related to certain loans were not provided in the books of accounts, though same were claimed under normal provisions in computation of income. On facts, the ITAT allowed taxability of interest income and deductibility of interest expenditure under normal provisions. However, while computing book profits the ITAT held that since neither interest income nor interest expenditure were routed through profit and loss account, interest income cannot be taxed under book profits and interest expenses cannot be allowed as deduction while computing book profits under section 115JB of the Act.

19. It is. therefore submitted that AO has taken one of the possible views of not taxing aforesaid two items while computing book profits and in any case, when a receipt is not credited to Profit and Loss account following accounting standard and which accounts are accepted by the auditors and they have not made any adverse comments on non-inclusion of said items to P/L account, book profit shall not be disturbed since said items does not fall under Explanation 1 to Section 115JB of the Act.

20. For this proposition, we rely on the following judgements:

- ITO v Volkart Bros 82 ITR 50 (SC) (pg 1-4 of the LPB I)

In this case, the SC has held that a mistake apparent from record must be an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may be conceivably two opinions.

- CIT v Hero Cycles (P) Ltd 94 Taxman 271 (SC) (pg 5-11 of LPB I)

In this case, the SC has held that rectification is not possible if the question is debatable.

- CIT v Reliance Industries Ltd 228 Taxman 184 (Bom) (Appellant's own case for AY 2002-03) (pg 12-16 of LPB I)

In this case, the Bombay HC has held that exercise of powers under section 154 is limited to rectify mistakes which are apparent from record and not to carry out exercise of rectification of debatable issues.

- DCIT v India Jute & Industries Ltd 156 ITD 912 (Kol Trib) (pg 17-21 of LPB I)

21. Our submissions in aforesaid paras on validity of order passed under section 154 are summarized as under:

- The order is barred by limitation as per section 154 (7) of the Act

- The order is invalid and void ab initio as additions made in the impugned order under section 154 are not discussed in any of the orders passed till date
- The order is invalid and void ab initio as additions made are not mistake apparent from records but are debatable in nature and the SC and HC have held that no addition to book profits can be made except to the extent provided in Explanation 1 to Section 115JB of the Act

Ground of Appeal No 2 and 3(a)

22. Vide ground of appeal no 2 and 3(a), the appellant has challenged the additions made on merits. For this in addition to relying on the para 16 to 18 above, appellant would further like to state as under:

23. The Appellant submits that section 115JB of the IT. Act is a special provision for payment /of tax by certain companies based on book profit. Section 115JB is in itself a code for computing tax payable under that section. It is submitted that the Book Profit under section 115JB has to be computed on the basis of net profit disclosed as per the Profit & Loss account prepared under the provisions of Part II and III of schedule VI to the Companies Act - 1956 and laid before the Company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act - 1956. Once the accounts have been prepared in the manner aforesaid and adopted at the annual general meeting of the company, the net profit disclosed in such accounts shall be considered for computing the book profit u/s 115JB of the Act.

24. The Appellant submit that section 211(3A) of the Companies Act - 1956 provides that while preparing the accounts, Accounting Standard have to be followed which reads as under:

> *"(3A) Every profit and loss account and balance sheet of the company shall comply with the accounting standard."*

The Appellant respectfully submits that its books of accounts are prepared under the Companies Act, 1956 in due compliance with accounting policies and Accounting Standards. The recognition of revenue is governed by Accounting Standard 9 which states that no revenue shall be recognized unless there is certainty of collection. The operative part of the Accounting Standard - 9 reads as under:

9.1 Recognition of revenue requires that revenue is measurable and that at the time of sale or the rendering of the service it would not be unreasonable to expect ultimate collection.

9.2 Where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim, e.g., for escalation of price, export incentives, interest etc., revenue recognition is postponed to the extent of uncertainty involved. In such cases, it may be appropriate to recognise revenue only when it is reasonably certain that the ultimate collection will be made. Where there is no uncertainty as to ultimate collection,

revenue is recognised at the time of sale or rendering of service even though payments are made by installments.

9.3 *When the uncertainty relating to collectability arises subsequent to the time of sale or the rendering of the service, it is more appropriate to make a separate provision to reflect the uncertainty rather than to adjust the amount of revenue originally recorded.*

9.4 An essential criterion for the recognition of revenue is that the consideration receivable for the sale of goods, the rendering of services or from the use by others of enterprise resources is reasonably determinate. When such consideration is not determinate within reasonable limits, the recognition of revenue is postponed.

9.5 When recognition of revenue is postponed due to the effect of uncertainties, it is considered as revenue of the period in which it is properly recognised."

25. It is also submitted that there was no certainty with the quantum of interest on income tax refund as the appellant as well as the department is in appeal on multiple issues before the ITAT/HC/SC. Thus, no finality has been obtained with respect to assessment and consequential interest. This can also be seen from the fact that post filing the Return of Income and offering interest on income tax refund of Rs. 17,19,28,805 to tax under normal provisions, the interest pertaining to AY 2004-05 was reduced from Rs. 13,44,22,401 to Rs. 6,43,41,230, thus interest of Rs. 7,00,81,171 was withdrawn. Following the order of SB of ITAT in the case of Avada Trading Co (P) Ltd, the AO accepted the appellant's claim and reduced the interest on income tax refund by Rs. 7,00,81,171 under normal provisions in the order under section 143(3). (pi refer relevant para of the order at pg no 94-95 of the FPB). For this reason, the interest on income tax refund was not credited to Profit and Loss Account as per the policy consistently followed by the Appellant which is also in accordance with the Accounting Standard - 9 issued by ICAI.

Similarly, the Appellant has earned Pre-Operative income of Rs.23,80,33,5737- being in the nature of interest income, which was reduced from Capital Work in Progress and has not been credited to the profit and loss following the accounting policies as well as Accounting Standards in compliance to which the financial statement of the Appellant has been prepared as required under the Companies Act.

26. The Appellant in the light of above facts submit that the interest on income tax refund and Pre-Operative income has not been credited to the profit and loss following the accounting policies as well as Accounting Standards in compliance to which the financial statement of the Appellant has been prepared as required under the Companies Act Thus, the Appellant has not credited the interest on income tax refund and Pre-Operative income in accordance with the provisions of Accounting Standard - 9 and generally accepted accounting principles in India which is also in compliance of provisions of section 211 of the Companies Act - 1956. The Appellant further submits that the statutory auditor of the company has certified the accounts of

the Appellant as prepared in compliance of the provisions of part II and III of schedule VI of the Companies Act- 1956 and the same has also been adopted by the Board of Directors and approved by the shareholders in their Annual General Meeting; hence the net profit shown in its accounts shall be taken as book profit u/s 115JB of the Act and no further addition can be made in respect of aforesaid two items.

Ground of appeal no. 3(b)

27. Vide Ground of appeal No 3(b), appellant is seeking consequential deduction on account of pre-operative expenses of Rs. 3,308 crs which was not debited to P/L Account and claimed and allowed under normal provisions

28. Without prejudice to our submissions that pre-operative interest income was not credited to P/L Account and was reduced from Capital Work in Progress and hence same shall not be taxed under book profit, if the action of AO is upheld, then on similar analogy, the pre-operative expenses which are not routed through P/L account and are capitalized under capital work in progress, shall be allowed as deduction while computing book profits as same are allowed as deduction under normal provisions.

29. The ClT(A)'s contention that such a claim cannot be entertained as it was not subject matter of the order in appeal, we would like to submit that it is the duty of the AO and appellate authorities to assess correct income of the assessee and hence this deduction should have been allowed following the analogy of taxing the pre-operative interest income. For this proposition we rely on the CBDT Circular No 14(XL-35) of 1955 dt. 11-04-1955 and also below decisions:

- Nirmala L Mehta v CIT 269 ITR 1 (Bom)
- Balmukund Acharya v DCIT 310 ITR 310 (Bom)

30. In any case, the fact of non-claiming of pre-operative expenses of Rs. 3,308 crs was brought to the attention of the AO in the response dated 12-09-2018 to notice issued under section 154. (pi refer pg 156 to 161 of FPB @ pg 160-161)

Ground of appeal no. 3(c)

31. Vide ground of appeal no 3(c), without prejudice to contentions raised in ground of appeal no 3(a) and 3(b), the appellant contends that in the event pre-operative income is taxed under book profits, same shall be added to cost of assets in subsequent year and depreciation for the book profits shall be computed accordingly.

Ground of appeal no. 4

32. Vide ground of appeal no 4, the appellant has challenged levy of interest under section 234D and 220(2) of the Act.

33. In this connection, it is submitted that section 234D of the Act authorizes levy of interest in a case where any refund is granted to the assessee u/s 143(1) of the Act but no refund is due on regular assessment or the amount refunded u/s 143(1) exceeds the amount refundable on regular assessment.

34. Further, interest u/s 220(2) is levied for non-payment of the demand as specified in the notice of demand issued u/s 156 of the Act and is consequential in nature.

35. In the case of appellant, the intimation u/s 143{1) of the Act was issued w.r.t the original return and refund of Rs. 909,10,86,680 was determined on 30.09.2010. Further additional refund of Rs. 79,36,72,126 was determined on 31 03.2011 pursuant to rectification application filed by the appellant.

36. However, no intimation u/s 143(1) was issued w.r.t the revised return. The regular assessment u/s 143(3) was completed based on the revised return

37. Further, it is also submitted that as per amendment made by the Finance Act 2012 w.e.f 01.07.2012, the processing of a return u/s 143(1) before the expiry of time period specified in second proviso to sub-section 1, was not necessary, when a notice has been issued to the assessee u/s 143(2). However, since we are concerned with AY 2009-10, the said amendment made by the Finance Act 2012 is not applicable to the facts of our case.

38. Thus, since no intimation u/s 143(1) was issued w.r.t the revised return, hence, the precondition of invoking provisions of section 234D is not fulfilled and accordingly, interest u/s 234D has been erroneously charged by the AO.

39. In light of the above, it is submitted that interest u/s 234D cannot be levied by the AO.

40. Similarly, interest u/s 220(2) is consequential in nature and once the demand is deleted or reduced, the interest u/s 220(2) would accordingly be deleted or reduced.

14. Upon careful consideration, we first refer to the additional ground. Since, the additional ground challenged the very jurisdiction of the 154 of the order passed in this case. We refer to the same in the first place Since it is a legal issue on the touchstone of Hon'ble Supreme Court decision in the case of National Thermal Power Company, we admit the additional ground. It is noted that the additional ground, it is the plea of the assessee that the rectification order passed by the AO in this case, which is dated 30.11.2018 is time barred inasmuch as section 154(7) provides that no order u/s. 154 shall be passed after expiry of four years from the end of the financial year in which the order sought to be amended was passed.

15. Now, we note that in the rectification order passed, AO has sought to rectifying the following mistakes.

i) Interest on income tax refund.
ii) Pre-operative income of erstwhile RPL

It is undisputed that in the chart of assessment orders passed in this case referred hereinabove except for the final order dated 30/11/2018, these issues where never subject matter or any of the orders passed be it under 143(3) and 154. It is not the case of the revenue that in the reassessment order passed in the rectification order passed and the intervening periods, there was a proposal for the rectification on these issues. Hence, it is undisputed that this rectification is being sought to be made with reference to the assessment order passed u/s.143(3) of the Act, which is dated 26/12/2011. As noted above, the intervening reopening was done for disallowance deduction for professional fee paid and computation for deduction u/s. 10B. Thereafter, vide order dated 23/04/2013 order u/s. 154 was made to withdraw consequential deduction allowed u/s. 10B. Thereafter, order u/s. 154, dated 06/03/2017 was passed to withdraw allowance mark to market loss on account of derivative pursuant to ITAT order of AY 2008-09. In the above background, it is abundantly clear that the order dated 30/11/2018 passed u/s. 154 of the Act in which the impugned additions had been made are with reference to the original order of assessment, dated 26/12/2011. The time limit specified in the Act of four years is certainly crossed in the order dated 30/11/2018 passed in the present case. Hence, this order u/s. 154 is certainly time barred inasmuch as it has been passed four years after the end of the financial year in which order sought to be amended was passed. In the present case, the order u/s. 143(3) was passed on 26/12/2011 and the financial year is FY 2010-11. The impugned order passed dated 30/11/2018 is certainly beyond four years thereof. Hence, in our considered opinion, the assessee succeeds on the additional ground. The rectification order passed u/s. 154 in this case is accordingly time barred and hence, the same is squashed as such. Since, we have already held that the order passed is time

barred and hence without jurisdiction, the other issues on merits are only of academic interest and hence, we are not adjudicating upon the same.

16. In the result, appeal by the assessee is partly allowed.

ITA No.5422/Mum/2019:-

17. Grounds of appeal read as under:-

> 1. The learned Commissioner of Income-tax - (Appeals - 1) {hereinafter referred to as CIT(A) erred in confirming the order passed by the Assessing Officer (AO) under section 154 of the Act by holding that there is a mistake apparent from record in computing book profit u/s 115JB of the Income tax Act, 1961 ('Act').
>
> The Appellant submits that the order under section 154 of the Act is bad in law and not in accordance with the provisions of the Act as there is no mistake apparent from records.
>
> The Appellant therefore submits that the order passed by the CIT(A) confirming the order under section 154 of the Act shall be vacated
>
> 2. The learned CIT (A) erred in confirming the action of the AO of adding interest on income tax refund of Rs 99,96,73,345 to the book profit of the appellant u/s 115JB of the Act.
>
> The appellant submits that since the interest on income tax refund was not credited to profit and loss account as per the accounting policy consistently followed by the appellant, the learned CIT (A) erred in confirming the action of the AO in making adjustment to the book profit, which is not enumerated in clause (a) to (k) of Explanation 1 to section 115JB of the Act. The CIT (A) ought to have deleted the addition of interest on income tax refund to the book profit u/s 115JB of the Act.
> The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.

18. The assessee has also raised following additional grounds:-

> On the facts and in circumstances of the case and in law, the order passed u/s 154 of the Act is liable to be quashed as same is passed beyond the time limit prescribed u/s 154(7) of the Act.

19. We note that the additional ground in this case is on the same footings as for A.Y. 2009-10 dealt by us hereinabove. Our above order shall apply mutatis mutandis

in this case also. Summary of various orders passed by the Assessing Officer in this case are duly submitted by learned Counsel of the assessee as under :

Sr No	Order u/s		Particulars
1	143(3)	25-03-2013	Regular assessment order u/s 143(3)
2	154	21-05-2015	To grant correct TDS credit To grant Forerign Tax credit Rectifying levy of interest u/s. 234D and 220(2) Totaling error in computation of income u/s 115JB Reduce taxable interest u/s 244A while computing normal income in view of lower Refund of AY 2003-04 and 2003-04 and 2004-05 due to order giving effect to CIT(A) order Consequential withdrawal of depreciation where expenses are allowed as revenue in AY **2003-04 by appellate order**
3	154	06-03-2017	To withdraw allowance of mark to market loss on account of derivatives pursuant to CTT(A) order of AY 2009-10
4	143(3) r.w.s 147	27-12-2017	Assessment reopened to recompute deduction allowed u/s 10B and other issues. However, no additions made in the order passed
5	154	30-11-2018	Impugned order making addition of interest on Income Tax refund u/s 115JB

11. From the notice under section 154 issued on 21-05-2018 (pg 125-126 of the FPB) and the order passed on 30-11-2018 (pg 122-124 of FPB), it can be noted that the AO sought to amend the rectification order passed on 06-03-2017. When one refers to the order under section 154 dated 06-03-2017 {pg 115-116 of the FPB), it can be seen that the said order was passed to withdraw the allowance of mark to market loss on account of derivatives pursuant to CIT(A) order of AY 2009-10 where said losses were held to be allowable. Thus there was no discussion/ reference to the issue of interest on income tax refund in the said order. In fact, same is case with all the orders listed in serial no 1 to 4 listed in the table above i.e. the issues pointed out in the notice and finally adjudicated in the order under section 154 are not at all discussed in any of the aforesaid orders.

20. From the above chart it is abundantly clear that in this case also rectification order under section 154 of the Act passed on 13.11.2018 was time barred in as much as it was rectifying the mistake in assessment order passed on 25.3.2013. In the intervening order there was no issue as dealt with in the rectification order. Hence, on the same footings as held by us in previous income tax appeal as the rectification

order fails in as much as it was passed four years after financial year in which the order sought to be rectified was passed. Hence, we quash the order of rectification passed by the Assessing Officer. Our earlier order applies mutatis mutandis for this year also.

21. Other issues on merits are now of academic interest and hence, we are not engaging into the same.

22. In the result, this appeal by the assessee is partly allowed.

Order pronounced in the open court on 03.09.2021

Sd/-	Sd/-
(JUSTICE P.P.BHATT)	(SHAMIM YAHYA)
PRESIDENT	ACCOUNTANT MEMBER

Mumbai; Dated :. 03.09.2021

Thirumalesh, Sr. PS/PS

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai