IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA NO. 3699/MUM/2018 : **A.Y : 2014-15**

Bank of India 8th floor, Taxation Department, Star House, C-5, G Block, Bandra Kurla Complex, Bandra (E), Mumbai 400 051. **PAN : AAACB0472C** (Appellant)	Vs.	JCIT (OSD) – 2(1)(1), Mumbai. (Respondent)

Assessee by : Shri C. Naresh
Revenue by : Shri Rahul Raman, CIT-DR

Date of Hearing : 15/09/2020
Date of Pronouncement : 05/10/2020

O R D E R

PER S. RIFAUR RAHMAN, A.M

This appeal is filed by the assessee against the order passed by Principal Commissioner of Income Tax -2 (in short 'PCIT') under Section 263 of the Income Tax Act, 1961 (in short 'the Act')for assessment year 2014-15 dated 27.03.2018.

2. At the time of hearing, the ld. DR submitted that the appeal filed by the assessee involves transfer pricing issue and he requested that this matter be transferred to transfer pricing bench and he filed a letter in this regard on

12.02.2020, which is placed on record. However, we noted that this appeal is filed by the assessee against the order of ld. PCIT passed under Section 263 of the Act, which is on jurisdiction issue and not on transfer pricing issue, therefore, we rejected the submissions of ld. DR and proceeded to hear the appeal.

3. The brief facts of the case are that assessee filed its return of income for assessment year 2014-15 dated 27.03.2018, declaring total loss of Rs.2187,39,64,977/- and book profit of Rs.2673,16,90,715/-. The assessee filed revised return of income on 29.03.2016, revising the total income to Rs.(-) 2167,65,72,076/- and book profit to Rs.3082,62,82,624/-. The assessment under Section 143(3) of the Act was completed on 29.03.2016.

4. On examination of records by ld. PCIT, he observed that the order passed by the Assessing Officer was erroneous insofar as it is prejudicial to the interests of the Revenue and required revision. Accordingly, a show cause notice was issued on 09.03.2018 and the reasons recorded for revision was sent along with the show cause notice, which for the sake of clarity is reproduced below.

> *"(i) It is observed that while computing book profit, the reduction of Rs. 813,47,01,960/-has been claimed towards 'Profit of foreign Branches'. It is further observed that in the P & L A/c, the assessee has debited an amount of Rs.5693,63,27,000/- towards various provisions and contingencies, out of which Rs.1232,08,78,207/- was only added back and the balance was allowed while computing book profit, though the above were provisions and contingencies which were duly disallowed in the computation of income under the normal provisions. The Explanation 1 to section 115JB prescribes certain adjustments to be carried out for computing books profit and further as per amendment brought out by the Finance Act, 2009, one of the specified*

adjustments to be carried to book profits is towards the 'Provision for Diminution in the value of any Asset' debited to P & L A/c. Accordingly, the following adjustments were required to be made to Net Profit as per P & L A/c.

Net Profit *272927.11*

Add:

i) Provision for Bad Debts & Contingencies (NPA) : 399586.83
ii) Provision for Standard assets : 42266.62
iii) Provision for Country Risk : 3378.00
iv) Depreciation on investment : 7255.27
v) Provision for other : 35148.30
vi) Provision for Tax : 81578.24
vii) Provision for Tax (Singapore Branch 150.00
569363.26

Less:

i) Dividend (as per Comput.) : 4590.38
ii) Interest on Tax Free Bond (As per computation) :1957.45
iii) Bad Debts claimed in the computation of income : 383625.46
iv) 14A expenses : 21.79
390151.51

Book Profit *452138.89*

Add:

Adjustment made in the assessment order *26994.69*

Book Profit Chargeable *479133.58*

Omission to carry out aforesaid adjustment to Book Profit had resulted in underassessment of book profit by Rs.143876.06 lakh and has therefore rendered the assessment order u/s 143(3) dated 29.3.2016 erroneous in so far as it is prejudicial to the interest of the revenue.

ii) It is observed that section 36(1)(vii) of the Act provides that subject to subsection 2, in respect of an assesee to which clause (viia) applies. The amount of deduction allowed in respect of bad debts written off shall be

limited to the amount by which such debt exceeds credit balance in the provision for bad and doubtful debt account made under section 36(1)(viia). The Finance Act 2013 has inserted an Explanation 2 to section 36(1)(vii) to clarify the scope and applicability of section 36(1)(vii) & (viia) stating that for the purposes of the proviso to section 36(1)(viia) and section 36(2)(v), only one account as referred to therein is made in respect of provision for bad and doubtful debts under clause (viia) of sub-section (1) of section 36 and such account relates to all types of advances, including advances made by rural branches. Therefore, in the case of the assessee section 36(1)(viia) applies without any distinction between rural advances and other advances. The CBDT, vide instruction no. 17/2008 dated 26.11.2008 had clarified that while considering the claim of bad debt under section 36(1)(vii), the credit balance for this purpose will be the opening credit balance i.e. the balance brought forward as on 1st April of the relevant accounting year.

In view of the above provisions, it is observed that during AY 2013-14, the deduction of Rs.2039,27,67,628/- was allowed on account of provision for bad debt u/s 36(1)(viia) and accordingly the assessee had opening credit balance of the like amount in the accounts of provision for bad and doubtful debt made u/s 36(1)(viia) of the Act. Hence, the bad debt written off during AY 2015-16 in excess of opening credit balance of Rs. 2039,27,67,628/- was only allowable u/s 36(1)(vii) of the Act. Thus, the actual deduction allowable u/s 36(1)(vii) works out to Rs.1759,01,09,372/- (Rs.3834,28,77,000-Rs.2039,27,67,628) as against Rs.3834,28,77,000/- claimed and allowed by department therefore rendering the assessment order u/s 143(3) dated 29.3.2016 erroneous in so far as it is prejudicial to the interest of the revenue.

iii) Explanation 1 to section 115JB provides for adjustment to be carried out for computing book profit which interalia included that the net profit shall be increased by the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause 38 thereof) or section 11 or section 12 apply. Provisions of section 14A r.w.r. 8D of I. T. Rule prescribes the working for disallowance of expenditure relatable for earning exempt income. Further, it has been judicially held that for AY 2008-09 onward, the computation of disallowance of expenses relatable to exempt income u/s 14A shall be as per rule 8D of I. T. Rule."

5. Further, the ld. PCIT observed that the assessee had claimed exempt income of Rs.65,47,83,668/- and the Assessing Officer has made disallowance under Section 14A of the Act at 1% of the exempt income relying on assessee's submission that in its own case, the Hon'ble ITAT for assessment year 2001-02 held that the disallowance under Section 14A of the Act should be restricted to 1% of the exempt income and accordingly, the Assessing Officer made disallowance of Rs.65,47,837/- being 1% of the exempt income. The ld. PCIT observed that the ITAT's order relied by the assessee pertains to assessment year prior to introduction of Rule 8D and hence not applicable for the current year. Furthermore, on introduction of Rule 8D, it is not open for the Assessing Officer to make disallowance under Section 14A of the Act other than following Rule 8D. However, it was observed that in earlier assessment years, which was relied by the assessee, was not accepted by the Department and disallowance was made as per Rule 8D and the same was also upheld by the ld. PCIT. As the facts and circumstances remain same in the year under consideration, the disallowance in the year is also required to be made as per Rule 8D only. Even on this count, the assessment order passed under Section 143(3) of the Act is erroneous insofar as it is prejudicial to the interests of the Revenue.

6. In response to the above show cause notice, assessee filed detailed submissions and ld. PCIT summarised the submissions made by the assessee, which is reproduced below :-

> "I. The order passed u/s. 143(3) dated 29-Mar-2016 by the learned DCIT-2(1)(1) is sought to be revised as the same is considered erroneous, in so far as it is prejudicial to the interests of the revenue, on the following matters:
>
> a. Adjustments for computation of book profit u/s. 115JB

b. Disallowance u/s. 14A in accordance with method prescribed under Rule 8D
c. Deduction of bad debts written off u/s. 36(1)(vii).

II. An appeal was preferred before the Hon'ble CIT (Appeals) [bearing Appeal No. CIT(A)-4/IT- 139/DCIT-2(1)/2016-17] against the order passed u/s. 143(3) dated 29-Mar-2016 on various matters including, inter alia, matters relating to items 'a' and 'b' above — applicability of provisions of Section 115JB to the case of the Assessee Bank, adjustments for computation of book profit u/s. 115JB and disallowance u/s. 14A. The said appeal was disposed off by the Hon'ble CIT (Appeals) vide order u/s. 250 dated 21-June-2017. The Hon'ble CIT (Appeals) held that the provisions of Section 115JB of the Act do not apply to the case of the Assessee Bank for the year under consideration.

iii. On the ground of disallowance u/s. 14A of expenditure incurred in relation to exempt income, the Hon'ble CIT (Appeals) confirmed the disallowance of expenditure of Rs.65,43,837/- u/s 14A.

iv. Since the Hon'ble CIT (Appeals) has already considered and decided the matters in respect of applicability of provisions of Section 115JB of the Act and disallowance u/s. 14A, the order passed u/s. 143(3) dated 29-Mar-2016 stands merged with the order of the CIT (Appeals) dated 21-June-2017 to the extent of the subjectmatters considered therein. Therefore, in light of clause (c) of Explanation 1 to Section 263 the power of revision of order u/s. 143(3) dated 29-Mar-2016 in so far as it relates to subject-matter of adjustments for computation of book profit u/s. 115JB and disallowance u/s. 14A is without jurisdiction.

v. IN RESPECT OF POINT C— DEDUCTION OF BAD DEBTS WRITTEN OFF U/S. 36(1)(vii)

a. In its return of income for AY 2014-15, the Assessee Bank claimed a deduction u/s. 36(1)(vii) of the Act in respect of bad debts written off relating to all types of advances, including advances made by rural branches, aggregating to Rs.3834,28,77,000.

b. During the course of the assessment proceedings, the learned DCIT 2(1)(1) called for details and explanations regarding the above claim. The Assessee Bank submitted detailed written submissions on the allowability of the above claim vide letter dated 29-Mar-2016.

c. the learned DCIT 2(1)(1) has properly allowed the deduction of bad debts written off of Rs.3834,28,77,000 u/s. 36(1)(vii) in the assessment and the deduction allowed is notso erroneous.

d. i. The proviso to Section 36(1)(vii) requires maintenance of Provision for Bad and Doubtful Debts ("PBDD") account u/s. 36(1)(viia). The deduction in respect of PBDD allowed u/s. 36(1)(viia) is required to be credited to this account by the Assessee Bank. Section 36(2)(v) requires bad debts written off by the Assessee Bank to be debited to this account. The proviso to Section 36(1)(vii) states that opening credit balance in this account as on first day of the previous year should be reduced from the amount of bad debts written off during the previous year and excess of bad debts written off, if any, shall be allowed as a deduction u/s. 36(1)(vii).

ii. Asper combined reading of the proviso to Section 36(1)(vii) read with Section 36(2)(v) of the Act and the Explanation inserted vide Finance Act 2013 in Section 36(1)(vii), only one account in respect of PBDD should be maintained relating to all types of advances, including advances made by rural branches, and the bad debts written off relating to all such types of advances should be debited to such PBDD account maintained u/s. 36(1)(viia) in order to be eligible to claim deduction of such write off u/s. 36(1)(vii). Accordingly, the bad debts written off relating to all types of advances amounting to Rs.4,550.50 crores was debited to the PBDD account maintained u/s. 36(1)(viia) for AY 2013-14.

In view of the above, the PBDD account u/s. 36(1)(viia) was prepared as under:

FY	*AY*	*Opening Balance*	*Claim u/s. 36(1)(viia)*	*Bad Debts written off*	*Closing Balance*
2012-13	*2013-14*	*123.12*	*2,039.28*	*4,550.50*	*(2,388.11)*
2013-14	*2014-15*	*(2,388.11)*			

iii. As can be observed, the opening balance as on 1-April-2013in the PBDD account maintained u/s. 36(1)(viia)is a debit balance of Rs.2388.11 crore. The PBDD account maintained u/s. 36(1)(viia)does not have credit balance as on 1-April-2013. Hence, no amount is reduced from the bad debts of Rs.3834,28,77,000 written off by the Assessee Bank while determining deduction of bad debts written off u/s. 36(1)(vii) of the Act.

iv. The order u/s. 143(3) dated 29-Mar-2016 is not erroneous in respect of allowability of bad debts written off of Rs.3834,28,77.000 as the same was allowed by the learned DCIT 2(1)(1) after making sufficient enquiries and due consideration of all facts of the case and position of law on the matter.

vi. Detailed notes explaining the allowability of each of the matters sought to be revised were provided in the notes to return annexed to the revised computation of income and/or during the scrutiny assessment proceedings for AY 2014-15. The order passed u/s. 143(3) dated 29-Mar-2016 for AY 2014-15 is not erroneous or prejudicial to the interests of the revenue as the same was made after proper enquiry and dueconsideration of all facts and circumstances of the case and provisions of the Act."

7. After considering the submissions of the assessee, ld. PCIT analysed the issues as under :-

A) The main contention of the assessee is that issues related to disallowance under Section 14A of the Act r.w.r. 8D and applicability of Section 115JB of the Act are covered in the order of CIT(A) dated 21.06.2017. He observed that as per the provisions of clause (c) of Explanation 1 to Section

263 of the Act, the power of revision extends to such matters which were not considered and decided in appeal. In view of the aforesaid provisions of law, the power of revision can be exercised on such matters which have not been considered and decided in appeal.

B) So far as applicability of Rule 8D r.w.s 14A of the Act is concerned, he observed that application of Rule 8D in calculating the amount of disallowance is compulsory, however, since the amount (quantum) of disallowance under Section 14A of the Act has been confirmed, the undersigned is restrained from exercising the power of revision on the matter of quantum of disallowance.

C) Assessee has contended that the CIT(A) in his order dated 21.06.2017 has held that the provisions of Section 115JB of the Act are not applicable in case of assessee. The ld. PCIT observed that the above said decision has been appealed against before the Hon'ble ITAT and the said appeal is pending. He further observed that so far as the addition of Rs.813.47 crores on account of profit of foreign branches and Rs.143.76 crores on account of provisions as computed in the show cause notice dated 09.03.2018 are concerned, the ld. PCIT in his order has not considered and decided these matters. Therefore, the power of revision can be exercised on these matters. Further, he observed that the provision of Rs.143.47 crores was required to be added back in the computation of book profits in view of clause (c) of Explanation 1 to Section 115JB of the Act. Similarly, exclusion of the profit of foreign branches from the computation of book profits is not in accordance with the law as the items mentioned in the said section can only be excluded in the computation of book profits. Failure to follow the correct position of law and failure to make

aforesaid two additions have rendered the assessment order erroneous insofar as it is prejudicial to the interests of the Revenue.

D) The next issue relates to allowance of bad debts under clause (vii) of Sub-section (1) of Section 36 of the Act. As per the applicable provisions of law for the assessment year under consideration, the proviso to Section 36(1)(vii) requires maintenance of Provision for Bad and Doubtful Debts (in short 'PBDD') account under Section 36(1)(viia) of the Act. The deduction in respect of PBDD allowed under Section 36(1)(viia) of the Act is required to be credited to this account. Section 36(1)(v) of the Act requires bad debts written off to be debited to this account. The proviso to Section 36(1)(vii) of the Act states that opening credit balance in this account as on 1st day of previous year should be reduced from the amount of bad debts written off during the previous year and excess of bad debts written off, if any, shall be allowed as deduction under Section 36(1)(vii) of the Act. The ld. PCIT observed that assessee has claimed that the opening balance of PBDD is negative and has given the computation of opening balance as on 31.03.2013, which is the opening balance for the assessment year under consideration. It is further observed that the computation given by the assessee is not correct. In the assessment year 2013-14, the PBDD is required to be debited to opening balance only and the remaining PBDD is allowed under Section 36(1)(vii) of the Act. He observed that the amount of PBDD claimed under Section 36(1)(viia) of the Act will remain as closing balance even when the whole opening balance is reduced to Nil on account of debit of PBDD during the assessment year 2013-14 and the unadjusted or excess PBDD will be allowed under Section 36(1)(vii) of the Act. Thus, for the assessment year under consideration, i.e. assessment year 2014-15, the minimum opening balance shall be Rs.2039.28 crores which has been

claimed as deduction under Section 36(1)(viia) of the Act during the preceding assessment year, i.e. 2013-14. Thus, excess claim of PBDD to the extent of Rs.2039.28 crores has been allowed. This has rendered the assessment order erroneous insofar as it is prejudicial to the interests of the Revenue.

8. Further, he observed that the contention of the assessee is that the Assessing Officer passed the assessment order after examining the details of the aforesaid issues and such order cannot be revised. In this regard, the ld. PCIT observed that the assessment order is found to be erroneous insofar as it is prejudicial to the interests of the Revenue on law as well as on facts as discussed in the above paragraphs. Accordingly, he invoked the provisions of Section 263 of the Act and held that the order passed by the Assessing Officer is erroneous and prejudicial to the interests of the Revenue.

9. Further, the ld. PCIT observed that during the course of revisionary proceedings, on further examination of assessment records, he observed that the reason for selection of the case in scrutiny was 'large international transactions and large specific domestic transactions'. As per the CBDT Circular in force, the case was required to be referred to the Transfer Pricing Officer (TPO) under Section 92CA of the Act for computation of arm's length price in relation to the said international transactions and specified domestic transactions. He observed that no such reference was made by the Assessing Officer and the assessment order was passed on 29.03.2016. A new show cause notice was issued to the assessee on 23.03.2018 wherein it was informed to the assessee that reference to TPO by the Assessing Officer in accordance with the CBDT Circular was mandatory for the Assessing Officer and non-reference to TPO amounted to making an assessment without proper

inquiry and investigation as required by law, which was also warranted in the facts of this case. It was informed that even on this ground also the assessment order is erroneous insofar as it is prejudicial to the interests of the Revenue.

10. In response, assessee filed its submission that the assessee is a public sector bank engaged in the business of banking and other related financial activities and is subject to tight supervision, regulatory directions, close monitoring and extensive reporting requirement of the Government of India and RBI. The above is an important factor to be considered while assessing transfer pricing for various transactions that the bank has entered into with its Associated Enterprises. All the international transactions and specified domestic transactions with the Associated Enterprises and related parties are carried out at prevailing market price/arm's length price without any scope of shifting of profits.

11. He further submitted that the assessee bank has complied with all the provisions of transfer pricing and submitted the Transfer Pricing report as required under Section 92E of the Act for assessment year 2014-15. The same was submitted before the ld. DCIT-2(1)(1) during the scrutiny assessment proceedings. After due consideration of the said report, the documents, facts and circumstances of the bank as discussed above and the provisions of the Act, the ld. Assessing Officer assessed the international transactions and specified domestic transactions reported by the bank at arm's length and did not consider it necessary or expedient to refer the case to the TPO. The assessment order was passed after making an informed decision and was, therefore, not erroneous and prejudicial to the interests of the Revenue.

12. After considering the submissions of the assessee, ld. PCIT observed that facts of the case and provisions of law were examined in this case. The CBDT vide Instruction No. 3/2016 dated 10.03.2016 issued guidelines for reference to the TPO. As per clause 3.2 of the above said instructions, all cases selected for scrutiny either under CASS on the basis of transfer pricing risk parameter in respect of international transactions or specified domestic transactions, or both, have to be referred to the TPO after obtaining the approval of the jurisdiction PCIT or CIT. The fact that the case has been selected for scrutiny on a transfer pricing risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected, and the same are invariably available with the jurisdictional Assessing Officer. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a transfer pricing parameter, then, the case has to be mandatorily referred to the TPO by the Assessing Officer after obtaining the approval of the jurisdictional PCIT/CIT. The aforesaid instruction was binding on the Assessing Officer. Since the basis of selection of the case under CASS was international transactions and specified domestic transactions, it was mandatory for the Assessing Officer to refer the above transactions to the TPO, which was not done. The reference was very necessary as only the TPO was empowered to determine the arm's length price after due inquiry and verification and after giving opportunity of hearing to the assessee in respect of international transactions and specified domestic transactions and completion of assessment without making such reference has rendered the assessment order erroneous insofar as it is prejudicial to the interests of the Revenue. The ld. PCIT by referring to the case laws of *Ranbaxy Laboratories Ltd.dated 18.11.2011 in ITA No. 504/2008* of Hon'ble Delhi High Court and the judgment in the case of *Malabar Industrial*

Co. Ltd. vs CIT, (2000) 243 ITR 83 (SC) held that the assessment order passed by the Assessing Officer was erroneous insofar as it is prejudicial to the interests of the Revenue.

13. Further, the ld. PCIT by referring to clause (a) to Explanation to Section 263 of the Act (amended by Finance Act, 2015 w.e.f. 01.06.2015) observed that order passed by the Assessing Officer shall be deemed to be erroneous insofar as it is prejudicial to the interests of the Revenue if, in the opinion of the ld. PCIT/CIT, it was made without making inquiry or verification which should have been made. He held that in the present case, order passed by the Assessing Officer is without making any inquiry and verification which are required in the facts and circumstances of the case and failed to make reference to the TPO to make proper inquiry and verification, which are mandatorily required by law, therefore, the assessment order is erroneous insofar as it is prejudicial to the interests of the Revenue.

14. With the above observation, ld. PCIT set-aside the assessment order as being erroneous and prejudicial to the interests of the Revenue with the direction to the Assessing Officer to –

(i) refer the case to the TPO under Section 92CA of the Act for determination of arm's length price in accordance with CBDT instructions and follow the subsequent provisions of law;
(ii) allow deduction of bad debts under Section 36(1)(vii) of the Act in accordance with the findings/observations given in its order;
(iii) make adjustment to book profits in respect of profit of foreign branches and provisions in accordance with the findings/observations in its order.

15. Aggrieved with the above order, assessee is in appeal before us raising the following grounds of appeal.

"1. Ground no. 1:

On the facts and in the circumstances of the case and in law, the Hon'ble Principal Commissioner of Income-tax - 2 ["PCIT"] has erred in revising the order passed u/s. 143(3) of the Income-tax Act, 1961 ("the Act") dated March 29, 2016 considering the same as erroneous in so far as it is prejudicial to the interests of revenue. The Appellant Bank prays that the initiation of revision proceedings u/s. 263 is without jurisdiction and bad in law and the resultant order passed u/s. 263 dated March 27, 2018 be quashed accordingly.

2. Without prejudice to Ground no. 1 above:

Assuming without accepting that Your Honours is of the view that the order passed u/s. 263 dated March 27, 2018 is valid, then on the facts and in the circumstances of the case and in law:

Ground no. 2-A:

The Hon'ble PCIT has erred in considering the claim made u/s. 36(1)(viia) in AY 2013-14 as the opening credit balance of Provision for Bad and Doubtful Debts ('PBDD') account maintained u/s. 36(1)(viia) for the year under appeal and accordingly, directing the learned Assessing Officer ("A.O.") to disallow bad debts written off of Rs.2039,27,67,628 u/s. 36(1)(vii) of the Act. The Appellant Bank prays that the learned A.O. be directed to allow bad debts written off of Rs.2039,27,67,628 u/s. 36(1)(vii) of the Act and reduce the total income accordingly.

Ground no. 2-B:

The Hon'ble PCIT has erred in directing the learned A.O. to make various adjustments while computing book profit u/s. 115JB without appreciating that the Hon'ble CIT(Appeals), vide order u/s. 250 dated June 21, 2017, has held that the provisions of Sec. 115JB are not applicable to the case of the Appellant Bank for the year under appeal. The Appellant Bank prays that the issue has been considered and decided by

the Hon'ble CIT(Appeals) and therefore, the impugned order u/s. 263 is without jurisdiction and be quashed accordingly.

Ground no. 2-C:

Without prejudice to Ground no. 2-B above:

Assuming without accepting that Your Honours is of the view that the power of revision u/s. 263 can be exercised in respect of adjustments to computation of book profit u/s. 115JB for the year under appeal, then on the facts and in the circumstances of the case and in law:

The Hon'ble PCIT has erred in invoking the provisions of Sec.115JB of the Act for determining tax liability of the Appellant Bank for the year under appeal. The Appellant Bank prays that the learned A.O. be directed not to invoke the provisions of Sec. 115JB of the Act for determining tax liability of the Appellant Bank for the year under appeal and determine the total income and tax liability thereon in accordance with normal provisions of the Act only.

Ground no. 2-D:

Without prejudice to Ground no. 2-C above:

Assuming without accepting that Your Honours is of the view that the provisions of Sec.115JB of the Act are applicable to the case of the Appellant Bank for the year under appeal, then on the facts and in the circumstances of the case and in law:

(i) The Hon'ble PCIT has erred in directing the learned A.O. to disallow exclusion of profits of foreign branches of the Appellant Bank situated in countries with whom India has entered into a Double Taxation Avoidance Agreement (DTAA) aggregating to Rs.813,47,01,960 while computing book profit u/s. 115JB without appreciating that the provisions of Sec. 90 override the provisions of Sec. 115JB of the Act. The Appellant Bank prays that the learned A.O. be directed to allow deduction for exclusion of profits of foreign branches of Rs.813,47,01,960 while computing book profit u/s. 115JB and reduce the book profit accordingly.

(ii) Without prejudice to Ground no. 2-D-(i) above:

Assuming without accepting that the exclusion of profits of the aforesaid foreign branches aggregating to Rs.813,47,01,960 is not allowable while computing book profit u/s. 115JB and therefore, taxable in India, in such case the Appellant Bank prays that the learned A.O. be directed to allow the credit for taxes paid by such branches in their respective countries while determining tax liability u/s. 115JB of the Act.

(iii) The Hon'ble PCIT has erred in directing the learned A.O. to add back Provision for NPAs and Restructured Assets aggregating to Rs.4331,09,09,314 while computing book profit u/s. 115JB without appreciating that the same does not constitute a provision made for meeting unascertained liabilities as per clause (c) of Explanation 1 to Sec. 115JB. The Appellant Bank prays that the learned A.O. be directed to delete the addition of Provision for NPAs and Restructured Assets aggregating to Rs.4331,09,09,314 and reduce the book profit u/s. 115JB accordingly.

(iv) The Hon'ble PCIT has erred in directing the learned A.O. to add back Provision for Country Risk of Rs.33,78,00,000 while computing book profit u/s. 115JB without appreciating that the same does not constitute a provision made for meeting unascertained liabilities as per clause (c) of Explanation 1 to Sec. 115JB. The Appellant Bank prays that the learned A.O. be directed to delete the addition of Provision for Country Risk of Rs.33,78,00,000 and reduce the book profit u/s. 115JB accordingly.

(v) The Hon'ble PCIT has erred in directing the learned A.O. to add back Provisions for Investment Depreciation aggregating to Rs.72,55,27,495 while computing book profit u/s. 115JB without appreciating that the same does not constitute a provision made for meeting unascertained liabilities as per clause (c) of Explanation 1 to Sec. 115JB. The Appellant Bank prays that the learned A.O. be directed to delete the addition of Provisions for Investment Depreciation aggregating to Rs.72,55,27,495 and reduce the book profit u/s. 115JB accordingly.

(vi) The Hon'ble PCIT has erred in directing the learned A.O. to add back Provision for PLIS and Provision for Perpetrated Frauds aggregating to Rs.22,15,42,524 while computing book profit u/s. 115JB without appreciating that the same do not constitute a provision made for meeting unascertained liabilities as per clause (c) of Explanation 1 to Sec. 115JB. The Appellant Bank prays that the learned A.O. be directed to delete the addition of Provision for PLIS and Provision for Perpetrated Frauds aggregating to Rs.22,15,42,524 and reduce the book profit u/s. 115JB accordingly.

Ground no. 2-E:

On the facts and in the circumstances of the case and in law, the Hon'ble PCIT has erred in directing the learned A.O. to refer the case of the Appellant Bank to the Transfer Pricing Officer u/s. 92CA for determination of arm's length price in relation to international transactions and specified domestic transactions. The Appellant Bank prays that the learned A.O. be directed not to refer the case to the Transfer Pricing Officer u/s. 92CA of the Act."

16. Before us, the ld. AR submitted that show cause notice under Section 263 of the Act dated 09.03.2018 was issued to assessee for the reason given therein, viz.

i) in computing book profits under Section 115JB of the Act, profits of foreign branches was wrongly excluded and certain provisions were omitted to be added back.

ii) deduction under Section 36(1)(vii) of the Act in respect of bad debts written off was incorrectly allowed by the Assessing Officer.

iii) addition as per Rule 8D was not made in computing book profits.

17. He submitted that the order passed under Section 143(3) of the Act by the Assessing Officer was neither erroneous nor prejudicial to the interests of the Revenue for the reason. With regard to additions to book profits, he submitted that the issue of applicability of book profits to the assessee, which is a nationalised bank, was agitated before the ld. CIT(A) and ld. CIT(A) in his order dated 21.06.2017 held that the provisions of Section 115JB of the Act did not apply to the assessee. A copy of the order is placed on record in the paper

book. He submitted that the assessment order as far as computation of income under Section 115JB of the Act is merged with the order of ld. CIT(A) and hence cannot be the subject matter of proceedings under Section 263 of the Act. He placed relied on the decision in the case of *Oil India Ltd., [2019] 103 taxmann.com 339 (Gauhati)* and *Kochi Refineries, [2019] 101 taxmann.com 95 (Bombay),* copy whereof is placed on record in the paper book.

18. With regard to the issue of deduction under Section 36(1)(vii) of the Act, he submitted that the issue was examined by the Assessing Officer at the time of original assessment under Section 143(3) of the Act. He brought to our notice, pages 48 to 50 of the paper book as per which it is evident that full details of the claim were furnished by the assessee in the note forming part of the return of income and that during the assessment proceedings, the Assessing Officer asked the assessee to file a detailed note justifying the above claim and assessee has submitted the same taking into consideration that there was no opening credit balance in PBDD under Section 36(1)(vii) of the Act. The Assessing Officer after examining the details submitted before him satisfied himself to allow the claim of bad debts written off by the assessee. Further, he submitted that the decision of the Assessing Officer to allow the claim cannot be held to be erroneous or prejudicial to the interests of the Revenue just because in his order he does not make any elaborate discussion in respect of the claim. He submitted that merely because the Commissioner has a different opinion in the matter, it cannot render the order of Assessing Officer erroneous and prejudicial to the interests of the Revenue. In this regard, he relied on the following case laws :-

A) CIT vs Gabriel *India Ltd., 203 ITR 108(Bom.)*

B) Anil Shah vs ACIT, (2007) 162 taxman 39 (Mum.)

C) Reliance Money Inf Ltd. vs PCIT, [2017] 88 taxmann.com 871 (Mumbai Trib.)

19. With regard to the third issue of disallowance under Section 14A of the Act in computing book profits, he submitted that the ld. PCIT in his order under Section 263 of the Act had not directed any revision in respect of this issue, therefore, the order of Assessing Officer is neither erroneous and prejudicial to the interests of the Revenue. Further, he submitted that even on merits, the directions of ld. PCIT to make reference/additions in order under Section 263 of the Act is not valid for the above reasons. He submitted that subsequently during the revision proceedings, ld. PCIT issued a show cause notice on the issue of reference to the TPO. He submitted that an issue which does not form part of show cause notice under Section 263 of the Act cannot be a matter which can be decided in order under Section 263 of the Act. For this purpose, he relied on the decision of Hon'ble Bombay High Court in the case of *Maharashtra Hybrid Seeds Co. Ltd.,[2019] 102 taxmann.com 48 (Bombay)*.

20. With regard to disallowance of deduction under Section 36(1)(vii) of the Act, he submitted that ld. PCIT erred in concluding that deduction allowed under Section 36(1)(viia) of the Act for the preceding assessment year has to be considered as opening credit balance in provision for bad and doubtful debts opened under Section 36(1)(viia) of the Act. Ld. PCIT failed to appreciate that there is no such provision in the Income Tax Act which deems the deduction allowed under Section 36(1)(viia) of the Act for the preceding assessment year as opening credit balance. He submitted that assessee has computed the opening credit balance by considering the deduction allowed

under Section 36(1)(viia) of the Act and bad debts written off in each of the assessment years in which the said section became applicable to it and accordingly arrived at the balance in the provision account. Since the bad debts written off was in excess of the deduction allowed under Section 36(1)(viia) of the Act, there was a debit balance of Rs.2388.11 crores. Since there was no opening credit balance, but only a debit balance of Rs.2388.11 crores, the opening credit balance was considered as Nil and the entire amount was written off correctly and allowed in the order under Section 143(3) of the Act.

21. He further submitted that without prejudice to the above submissions, even considering the credit balance of Rs.123.12 crores as per the assessment order for assessment year 2013-14, the opening credit balance for assessment year 2014-15 was only debit balance of Rs.2388.11 crores as stated in page 5 of ld. PCIT order and hence there is no opening credit balance to be set off against the bad debts written off during the year. Accordingly, the entire bad debts written off has been correctly allowed in the order under Section 143(3) of the Act. In this regard, he relied on the decision of ITAT Mumbai Benches in the case of SIDBI in ITA No. 743/Mum/2008 dated 15.02.2012 in which it was held that when there is no opening credit balance in provision for bad and doubtful debts account under Section 36(1)(viia) of the Act, the entire bad debts written off has to be allowed as deduction.

22. With regard to adjustment to book profits of foreign branches and provisions made, he submitted that on the issue of exclusion of profits of foreign branches in computing book profits, as per the specific provisions of Section 90 read with Article 7 of DTAA, the income of foreign branches cannot

be taxed in India and accordingly has been rightly reduced in computing book profits. With regard to various provisions, he submitted that the said provisions are reduced from respective assets in the Balance-sheet and accordingly, as held by the Hon'ble Supreme Court in the case of *Vijaya Bank vs CIT*, *323 ITR 166(SC)*it tantamount to write off of these amounts. Since these amounts are written off, these are not mere provisions which can be disallowed in computing book profits under Section 115JB of the Act. At the end, he prayed that the order passed under Section 263 of the Act may be quashed.

23. On the other hand, the ld. DR heavily relied on the order of ld. PCIT and supported the order passed by ld. PCIT.

24. Considered the rival submissions and material placed on record, we notice that ld. PCIT initiated the proceedings under Section 263 of the Act by issuing show cause notice and the reasons mentioned in the show cause notice was that in computing the book profits under Section 115JB of the Act, the profits of foreign branches was wrongly excluded and certain provisions were omitted to be added back, deduction under Section 36(1)(vii) of the Act in respect of bad debts written off was incorrectly allowed and disallowance made as per Rule 8D was not considered in computing the book profits. After careful consideration of the submissions of both the parties, we observe that the issue of applicability of book profits to the nationalised banks was agitated by the assessee before the ld. CIT(A) and the ld. CIT(A) has already passed an order on 21.06.2017 in favour of the assessee that the provisions of Section 115JB of the Act does not apply to the assessee. Now, in the show cause notice, similar issue was raised by ld. PCIT and passed an order on 27.03.2018,

therefore, in our considered view, ld. PCIT cannot invoke the provisions of Section 263 of the Act in this matter. With regard to issue of deduction claimed under Section 36(1)(vii) and 36(1)(viia) of the Act, assessee has filed detailed submissions before the Assessing Officer and the Assessing Officer has considered the submissions even though he has not discussed it in his order under Section 143(3) of the Act. The material submitted before us clearly indicate that assessee has made elaborate submissions on this issue and the Assessing Officer has satisfied himself that assessee is eligible to claim deduction under Section 36(1)(vii) and 36(1)(viia) of the Act and, therefore, in our considered view, ld. PCIT cannot form another view on the same issue in which the Assessing Officer has already satisfied himself and passed an order which clearly indicates that the Assessing Officer has verified and investigated the matter in detail. Therefore, even in this issue, the provisions of Section 263 of the Act cannot be invoked. With regard to the third issue raised in the show cause notice, i.e. disallowance under Rule 8D which was not considered in computing the book profits, we notice that the ld. PCIT himself dropped this issue and has not directed any revision to the Assessing Officer. From the above discussion, it is clear that the issues raised in the show cause notice issued under Section 263 of the Act do not survive. Therefore, in our considered view, the order passed under Section 263 of the Act deserves to be quashed.

25. However, in the same order, during revision proceedings, the ld. PCIT came across that the assessee has made large international transactions during this year and the Assessing Officer failed to refer this case to the TPO even though it is a fit case to be referred to the TPO as per the CBDT Circular in force at that point of time under Section 92CA of the Act for computation of arm's

length price in relation to the said international transactions. He observed that this issue itself is good enough to treat the assessment order as erroneous insofar as it is prejudicial to the interests of the Revenue. For that purpose, the ld. PCIT issued show cause notice on 23.03.2018 wherein it was brought to the notice of assessee that the Assessing Officer failed to refer the case to the TPO in accordance with the CBDT Circular which is mandatory for the Assessing Officer and non-reference to the TPO amounted to making assessment without proper inquiry and investigation as required by law, which was also warranted in the facts of the case. We notice that the assessee was provided an opportunity and assessee made submissions before the ld. PCIT, and for the sake of brevity it is reproduced below :-

> *I. The Assessee Bank is a public-sector bank engaged in the business of banking and other related financial activities and is subject to the tight supervision, regulatory directions, close monitoring and extensive reporting requirements of the Government of India and RBI. The above is an important factor to be considered while assessing transfer prices for various transactions that the Bank has entered into with its Associated Enterprises. All the international transactions and specified domestic transactions with the Associated Enterprises or Related Parties are carried out at prevailing market prices / arms length price without any scope of shifting of profits.*
>
> *ii. The Assessee Bank has complied with all the Transfer Pricing provisions and submitted the Transfer Pricing Report as required u/s. 92E for AY 2014-15. The same was submitted before the learned DCIT 2(1)(1) during the scrutiny assessment proceedings. After due consideration of the said Report, the background, facts and circumstances of the Bank as discussed above and the provisions of the Act, the learned DCIT 2(1)(1) assessed the international transactions and specified domestic transactions reported by the Bank at arm's length and did not consider it necessary or expedient to refer the case to the Transfer Pricing Officer. The assessment order was passed after making an informed decision and was therefore, not erroneous and prejudicial to the interests of the Revenue."*

26. In our considered view, even though ld. PCIT came across the issue of reference to the TPO during the review proceedings under Section 263 of the Act after serving the show cause notice for initiating the revision proceedings and however, the ld. PCIT has issued another show cause notice drawing the attention of assessee on the failure of the Assessing Officer to refer the case to the TPO and the Assessing Officer has completed the assessment without reference to the TPO under Section 92CA of the Act. In our view, issue of separate show cause notice, even though during revision proceedings, amounts to issue of fresh show cause notice under Section 263 of the Act and we may say it is issued and part of Section 263 proceedings. It is a fact that the case of assessee falls under the provisions of Section 92CA of the Act and the matter must have been referred to the TPO. In the records it does not show or quantified how much interest of the Revenue is lost since the issue was not referred to the TPO as the Assessing Officer does not have the qualification or facility to verify the international transactions. This is clearly against the provisions of Section 92CA of the Act and CBDT Circular in force and it is binding on the Assessing Officer to refer this issue to the TPO even though he may be of the opinion that the international transactions carried by the assessee are within arm's length. The statute and instructions of CBDT are to the Assessing Officer to refer the matter to TPO clearly indicates that the order passed by the Assessing Officer under Section 143(3) of the Act is without proper inquiry and investigation particularly on the issue of computation of 'ALP' in relation to international transactions and ld. PCIT is right in treating the order passed under Section 143(3) of the Act as erroneous insofar as it is prejudicial to the interests of the Revenue.

27. Similarly, the Hon'ble Delhi High Court had held in *Ranbaxy Laboratories Ltd. vs CIT, 345 ITR 193 (Delhi)*that non-reference to TPO renders the order 'erroneous' and prejudicial to Revenue.

28. In this case,the transactions undertaken by the assessee are domestic as well as international transactions and the issues involving domestic and corporate issues were already verified by the Assessing Officer and also the order of ld. CIT(A) merged with the assessment order, therefore, in our considered view, the Assessing Officer should have referred the international transactions to the TPO to verify the international transactions whether the transaction are at arm's length. Since the Assessing Officer failed to follow the due procedure, and the fact that the Revenue Department created specialized cell to deal with the complicated and complex issues arising out of transfer pricing mechanism, the assessment by this special officer (TPO) is an additional assessment of 'ALP' of international transactions and it can be assessed separately without disturbing the regular assessment carried out by Assessing Officer under Section 143(3) of the Act. Therefore, we are retaining the directions of ld. PCIT in his order relevant only to reference to TPO with a further direction to the Assessing Officer to refer the case to TPO and any adjustment recommended by the TPO alone may be assessed separately and merge the same in the draft assessment order if there is any adjustment to be made, it may be assessed to tax as per law.

29. We notice that ld. AR referred to the decision of Hon'ble Bombay High Court in the case of *Maharashtra Hybrid Seeds Co. Ltd. (supra)* wherein it has been held that the Tribunal had set-aside the revisionary order finding that while issuing notice under Section 263 of the Act, Commissioner had referred to only one ground that deduction under Section 80-IA of the Act had been

wrongly allowed, however, final order was passed on various grounds as well, hence the impugned order of Tribunal did not require any interference. However, we find that even though in the present case the ld. PCIT raised three grounds in the show cause notice, he himself dropped one of the grounds and retained two grounds, however, after giving a fresh show cause notice, he came across legal issues binding both the Assessing Officer and the assessee. Therefore, the facts in the present case are distinguishable with the above case. Therefore, it is not considered. Accordingly, the grounds raised by the assessee with reference to the first show cause notice are allowed and ground no. 2(E) is dismissed. Accordingly, the appeal filed by the assessee is partly allowed.

30. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 5th October, 2020.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Date : 5th October, 2020
SSL
Copy to :
1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "B" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai