

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

I.T.A. Nos. 7135, 7136/Mum/2017 & 7137/Mum/2018
(Assessment Years: 2012-13, 2013-14 & 2014-15)

Tata Realty and Infrastructure Limited 2 nd Floor, Elphinstone Building, 10, Veer Nariman Road, Mumbai-400 011	Vs.	Pr. CIT-2, Room No. 344, 3 rd Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
PAN/GIR No. AACCT 6242 L		
(Appellant)	:	(Respondent)

Appellant by	:	Shri Niraj Sheth
Respondent by	:	Shri R. Manjunatha Swamy

Date of Hearing	:	11.10.2018
Date of Pronouncement	:	02.11.2018

ORDER

Per Shamim Yahya, A. M.:

These are appeals by the assessee against the respective order of the learned Commissioner of Income Tax (Appeals), Mumbai ('Id.CIT(A) for short) passed u/s. 263 of the Income Tax Act, 1961 (the Act for short) for the assessment years (A.Y.) 2012-13 to 2014-15.

2. The common grounds with change of figures *mutate mutandis* are as under:

1. Ground No. 1: Erroneous exercise of jurisdiction under section 263 of the Act

1.1 .On the facts and in the circumstances of the case and in law, the learned Pr. Commissioner of Income Tax ('the learned Pr. CIT') erred in assuming jurisdiction under section 263 of the Income Tax Act, 1961 ('the Act') and erred in concluding that the impugned assessment order dated 18.03.2016 passed by the learned

assessing officer under section 143(3) of the Act is erroneous and prejudicial to the interests of revenue.

2. Ground No. 2: No adjustment to 'Book Profit' permitted apart from those specified in Explanation 1 to section 115JB of the Act

2.1. On the facts and in the circumstances of the case and in law, the learned Pr. CIT erred in adding notional interest income of INR 12,80,00,000 while computing Book Profits for the purpose of section 115JB of the Act even though such adjustment is neither covered within the adjustments specified under Explanation 1 to section 115JB of the Act nor permitted as per the principles upheld by the Supreme Court and various High Court judgements, which were clearly binding on the learned Pr. CIT.

2.2. On the facts and in the circumstances of the case and in law, the learned Pr. CIT erred in coming to the conclusion that the audited financial statements of the Appellant company as approved by the Board of Directors and the shareholders, inspite of being drawn up in accordance with Part II of schedule VI to the Companies Act, 1956 and applicable Accounting Standards, were erroneous in so far as they do not contain any note on non-recognition of interest on doubtful advance, which advance itself was admittedly written off in a later year.

2.3. On the facts and in the circumstances of the case and in law, the learned Pr. CIT erred in not appreciating that mere offer of notional interest by way of abundant caution in the computation of income under normal provisions with the rider "not considered in the books of Accounts" cannot be the ground for revision of Book Profit computed based on audited financial statements prepared as per the applicable Accounting Standards. Further, the learned Pr. CIT erred in insisting on a mention in the Notes to Accounts of the audited financial statement, which is just a form and ignoring the substance by way of rider in the computation of income.

The Appellant prays that the impugned order passed by the learned Pr. CIT under section 263 of the Act be stuck down as being bad in law and the adjustment made to the Book Profit in relation to interest income of INK 12,80,00,000 be deleted.

3. Since the facts are common, we are referring to facts and figures from the assessment year 2012-13.

4. In this case, the ld. CIT(A) issued the following notice u/s. 263 of the Act :

The assessee has offered the interest to tax at Rs.12,80,00,000/- being 8% receivable from International Amusement Ltd on advance of Rs.160 crores given to them, under the normal provision of the income-tax act, 1961. However, the same was not included in computing the book profit under the provisions of

section 115JB of the Income Tax Act, 1961. The said amount was not added to book profit by the Assessing Officer in the assessment order dated 18.03.2016. the failure to add the aforesaid amount to book profit has rendered the assessment order dated 18.3.2016 erroneous insofar as it is prejudicial to the interest of revenue.

5. The facts of the case in connection of which the notice was issued were noted by the Id. CIT(A) as under:

- The Assessee has filed return of income ('ROI') for captioned assessment year offering income under the provisions of section 115JB i.e. 'MAT provisions', it being higher than the tax liability under the normal provisions of the Act.
- The Assessee had given an advance of INR 160 Crores to International Amusement Limited ('IAL') for purchase of shares of group companies of IAL, which owned certain land parcels. However, the transaction could not fructify and as a result the Assessee asked for the refund of the entire amount advanced to IAL. However due to financial difficulties, IAL was not able to repay such advance.
- According, since there was significant uncertainty of ultimate collection of principal itself, so in accordance with Accounting Standard 9 on revenue recognition ('AS 9') issued by institute of Chartered Accountants of India ('ICAI'), the Assessee has not recognised any notional interest income on such advance in its audited financial statements.
- Further, during the financial year 2016-17, due to non-recovery of advance given to IAL, the Assessee has written off 70% of the principal amount advanced to IAL.
- The books of accounts of the Assessee have been audited by a reputed Audit Firm and has been adopted by the Board of Directors and shareholders of the Assessee.
- This accounting treatment is not only in fullest consonance with the accounting principles and practice laid down but also in fullest consonance with the provisions of section 145.
- The book profit for the purpose of section 115JB has been computed based on the profit and loss account prepared in accordance with Part II of schedule VI to the Companies Act, 1956 which has been duly certified by the auditors of the Assessee.
- Since such notional interest on advance was not recognized as revenue in its audited books of accounts and also the same is not covered in any of the items listed in the Explanation to 1 section 115JB, it was not considered in the books profits for MAT purpose and was not offered to tax under provisions of section 115JB. However, out of abundant caution, such notional interest @ 8% i.e of INR 12.80 Crores on the advance given to IAL was separately offered to tax under the normal provisions of the Act.

- During the assessment proceedings, the Assessing Officer ('the AO') accepted the treatment of the interest income under the normal provisions as well as under MAT provisions.
- Revision proceedings have been initiated under section 263 on the ground that since such interest is not added in the computation of MAT profits, the Assessment order is erroneous and prejudicial to the interest of the revenue.

6. The Id. CIT(A) further noted the submissions of the assessee in this regard as under:

(a) Assessment Order passed by the AO is not 'erroneous' and hence revision proceedings under section 263 cannot be invoked

- In order to give jurisdiction to the Commissioner under section 263, two limbs have to be satisfied cumulatively viz. 1} the assessment order passed by the Assessing Officer has to be 'erroneous' and also (2) order should be prejudicial to the interest of the revenue. If either of limb is missing, the Commissioner cannot assume jurisdiction under section 263. The said principle has been upheld by the jurisdictional Bombay High Court in case of CIT v/s. Gabriel India Ltd [1993] 203 ITR 1 (8 (Bombay HC)).

- With respect to the facts in case of the Assessee, it is pertinent to note that the condition erroneous is conspicuously absent since audited accounts are as per accepted accounting principles and law. The Assessment Order passed by the AO is not erroneous since the assessment of MAT liability is as per the provisions of section 115JB of the Act as explained in point (b) below and hence revision proceedings under section 263 cannot be invoked.

(b) Section 115JB is separate code in itself- No authority to Assessing Officer to make any addition/reduction to the net profit as per audited Profit and loss account (prepared in accordance with Part II of Schedule VI to the Companies Act, 1956) other than those specifically listed under Explanation (1) to section 115JB.

- Section 115JB is a separate code in itself having overriding effect over other provisions of the Act.

- As per Explanation 1 to section 115JB, 'book profits' means 'profits' as per profit and loss account prepared in accordance with Part II of schedule VI to the Companies Act, 1956 as increased/reduced by the specific adjustment listed therein.

- No other adjustments are permitted to be made to such profits other than those listed in Explanation 1 to section 115JB.

- The Assessing Officer does not have power to examine the net profit shown in profit and loss account and has limited powers to make adjustments only to the extent of items specifically listed under Explanation 1 to section 115JB.

- In the given case, since the recovery of loan itself was extremely doubtful at the material time, the notional interest income has rightfully not been recognized

in the books of accounts prepared in accordance with Part 11 of the schedule VI to the Companies Act, 1956.

- The accounting treatment is not only in fullest consonance with the accounting principles and practice laid down but also with the provisions of section 145. Thus no further adjustments to the book profits are permitted.
- The ratio decidendi laid down by the Apex Court in case of Apollo Tyres (supra) fully applies to the facts of the case and has also been upheld by Jurisdictional Bombay High Court in case of Adbhut Trading (supra) and the order of Bombay High Court is binding on the OT. Accordingly we request your Honour to respectfully follow the Jurisdictional HC ruling and drop the 263 proceedings.

(c) Purposive interpretation of section 115JB

- The purpose of introducing section 115JB was to levy minimum alternate tax on Corporates who recognize substantial profits in its annual accounts yet by resorting to various exemptions and deductions paid very little or no tax (popularly known as 'zero tax companies')
- It is pertinent to note that in facts of this case, the Assessee has on the contrary offered higher income by offering notional interest income while computing taxable income under normal provisions of the Act, even though such interest was not recognized in its books of accounts. The issuance of impugned notice attempts to modify audited accounts based on item of income offered to tax under the normal provision of the Act, which is not permitted.

C. Cases laws referred by the Assessee

- CIT v/s. Gabriel India Ltd [1993] 203 ITR 108 (Bombay HC)
Page 114,... "The power of suo motu revision under section 263 (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the revenue....It is clear that an order cannot be termed as erroneous unless it is not in accordance with law"

- CIT v/s. Binani Cement Ltd [2016] 384 ITR 457 Calcutta HC)
Where loss on transfer of investment division was debited to profit and loss account in accordance with the Accounting Standards prescribed by the ICAI and accepted by the AO, the Commissioner could not invoke revision proceedings under section 263 to add back such loss for computation of book profit under section 115JB.

At Para 20 and 21 on page 475, "reliance placed on the authoritative pronouncement laid down by the Apex Court in Apollo Tyres Ltd: vs. CIT [2002] 255 ITR 273 (SC) and held that Once it is realized that the assessee had correctly debited the profit and loss account for the loss arising out of the transfer of investment division, there remains no difficulty in realizing that the Commissioner

proceeded on a wrong premise which was responsible for exercise of jurisdiction under section 253"

- Hindustan Construction Co. Ltd. vs. DCIT [2006] 25 SOT 359 (Mumbai Tribunal)

Where double taxation relief has been rightly allowed by the A.O. while computing taxability under section 115JB of the Act, it has been held at para 6.4 on page 367 that "the order of A.O. is neither erroneous no prejudicial to the interest of the revenue and therefore the CIT is not correct in invoking section 263.

- Apolloy Tyres Ltd. vs. CIT [2002]255ITR273(SC)

At page 280, it has been held that "we are of the opinion, the Assessing Officer while computing the income under Section 115-J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increases and reductions as provided for in the Explanation to the said section. To put it differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in Section 115J."

- The principle laid down in he landmark decision of the Apex Court in case of Apollo Tyres (supra) has been upheld b] following decisions:
- CIT v/s. HCL Comnet System s & Services Ltd [2008] 305 ITR 409 (SC)
- Malayala Manorama Co. Lid. v/s. CIT[2008] 300 ITR 251 (SC)
- CIT V/s. Adbhut Trading Co (P.) Ltd. [2012] 338 ITR 94 (Bombay HC)
- CIT v/s. Binani Cement Ltd, 2016] 384 ITR 457(Calcutta HC)475(Calcutta HC)

7. The ld. CIT(A) was not convinced with the above reply. The reason submitted by the assessee was that there was no likelihood of the recovery and receipt of interest and the assessee has duly followed Accounting Standard-9 of the Institute of Chartered Accountants of India and therefore the interest income has not been recognized. The same was rejected by the ld.CIT(A) by observing that this matter was not disclosed anywhere in the notes to the account in annual report. By only this logic, he held that the reasons given by the assessee is not tenable. He did not make any comment whatsoever on the merits of the assessee's submission. The ld. CIT(A) further emphasized on the

same aspects that this matter was not disclosed in the accounts and proceeded to hold that the accounts was not prepared as per Part II of Schedule VI to the Companies Act, 1956. On this very logic, he proceeded to distinguish the decision of the Hon'ble Apex Court in the case of *Apollo Tyres Ltd. vs. CIT* [2002] 255 ITR 273 (SC). In this background, the Id. CIT(A) proceeded to hold that the order by the A.O. was erroneous insofar as it is prejudicial to the interest of the Revenue. Hence, he directed the A.O. to add Rs.12.8 crores on account of interest on advance to IAL to the book profit u/s. 115JB.

8. Against the above direction, the assessee is in appeal before us.

9. We have heard both the counsel and perused the records. We find that the assessee has not accounted for interest income in the books of account on advance to IAL. The reason for this was that recovery of principal as well as interest was unascertain. The Id. CIT(A) himself has noted the contention of the assessee that the assessee had given an advance of Rs.160 Crores to International Amusement Limited ('IAL') for purchase of shares of group companies of IAL, which owned certain land parcels. However, the transaction could not fructify and as a result the Assessee asked for the refund of the entire amount advanced to IAL. It was further been submitted that due to financial difficulties, IAL was not able to repay such advance. Accordingly, since there was significant uncertainty of ultimate collection of principal itself, so in accordance with Accounting Standard 9 on revenue recognition ('AS 9') issued by Institute of Chartered Accountants of India (MCAI'), the Assessee has not recognized any notional interest income on such advance in its audited financial statements. The Id. CIT(A) has further

noted that it has been argued that since such notional interest on advance was not recognized as revenue in its audited books of accounts and also the same is not covered in any of the items listed in the Explanation to 1 section 115JB, it was not considered in the books profits for MAT purpose and was not offered to tax under provisions of section 115JB. However, out of abundant caution, such notional interest @ 8% i.e. of 1NR 12.80 Crores on the advance given to IAL was separately offered to tax under the normal provisions of the Act.

10. Thus, we note that the assessee has clearly explained that this income was not accounted for in the books of account due to uncertainty. The accounts were duly audited. However, due to abundant caution it was offered in the computation of the normal income. The assessee has further explained that there was uncertainty so it was not accounted for in the books of account which was also accepted by the auditors. Hence, the assessee has not offered the same under MAT provision of section 115JB. From the above, it is amply clear that in the computation of income, the issue was apparent and upon that computation of income, the A.O. has passed the assessment order. Hence, on these facts, it cannot be said that the A.O. has not applied his mind. To support this proposition, we may refer to the decision of the Hon'ble jurisdictional High Court in the case of *State Bank of India vs. Asst. CIT* (in Writ Petition No. 271 of 2008 vide order dated 15.06.2018). Although this decision was in the context of section 147, the exposition by the Hon'ble High Court is very much relevant.

6. We note that the Apex Court in *Income-Tax Officer V/s. Techspan India Private Limited and Another*, reported in [2018] 404 ITR 10(SC) reiterated the settled

principle of law laid down by the Supreme Court in CIT V/s. Kelvinator of India Ltd. [2010] 320 ITR 561(SC) that the Assessing Officer has a power only to reassess and has no power to review the assessment order. Thus, it held that no re-opening notice can be issued which is premised on a change of opinion. It further goes on to hold that before interference with a proposed reopening of the assessment, the Court should verify whether the assessment order made earlier has expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. Infact, in this case we find that the assessment orders passed in regular assessment proceedings do refer to examining the computation of income filed alongwith the Return of Income. Moreover, the Assessment order in regular assessment proceedings in terms disallowed some of the claims made for deduction under Section 143(3) of the Act. Therefore, in the present facts, we are prima-facie of the view that, the Assessing Officer has by necessary implication allowed the claim. Moreover, the basic document for completing the assessment under Section 143(3) of the Act is the computation of income. Therefore, to the extent the claims made for deduction in the computation of come, were disallowed by the Assessing Officer, discussion on the same is found in the assessment order. It is an accepted position that the assessment orders would necessarily deal only with the claims being disallowed and not with the claims being allowed. This is for the reason as observed by the Gujarat High Court in CIT Vs. Nirma Chemicals Ltd 309 ITR 67, that if the Assessing Officer was to deal with all the claims which were to be allowed in the assessment order, the result would be an epictome. This is so, as it would cast an impossible burden upon the Assessing Officer considering his workload and the period of limitation. There was also no reason in the present facts for the Assessing Officer to ask any queries in respect of this claim of the petitioner, as the basic document viz. computation of income at note 21 (Assessment Year 2013-14) and note 22 (Assessment Year 2014-15) thereof explained the basis of the claim being made to the satisfaction of the Assessing Officer. Thus, it must necessarily be inferred that the Assessing Officer has applied his mind at the time of passing an assessment order to this particular claim made in the basic document viz. computation of the income by not disallowing it in proceedings under Section 143(3) of the Act as he was satisfied with the basis of the claim as indicated in that very document. Therefore, where he accepts the claim made, the occasion to ask questions on it will not arise nor does it have to be indicated in the order passed in the regular assessment proceedings. Thus, issuing the impugned notices on the above ground would, prima-facie, amount to a change of opinion.

11. We find that the proposition laid down in the above case law is fully applicable. The A.O. has duly applied his mind and accepted the income offered u/s.115JB which did not include this interest accrued amount as it was not provided in the books of account.

Moreover the Id. CIT(A)'s opinion that the book profit needs to be reworked and the impugned amount added to book profit is not sustainable. In this regard we note on this very issue, the Hon'ble Apex Court has given a decision in *Apollo Tyres Ltd.* (supra). In this case, it was held as under:

It has been submitted that in this decision, at page 280, it has been held that "we are of the opinion that the Assessing Officer while computing the income under section 115J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increase and reductions as provided for in the *Explanation* to the said section. To put it differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the *Explanation* to section 115J." In this regard, it observed that the aforesaid judgment is not applicable in the case of the assessee as it has been discussed in the preceding paragraphs (para 5) that the accounts of the assessee has not been prepared in accordance with provisions of Part II to Schedule VI to the Companies Act.

12. From the above, it is amply evident that the Hon'ble Apex Court has expounded that once the accounts have been certified by the auditors and adopted in the annual general meeting, the A.O. has only the power of examining whether the books of account are certified by the authorities under the Act as having been properly maintained in accordance with the companies act. The A.O. thereafter has a limited power to make adjustments as provided for in the explanation of the said section. From the above exposition, it is amply clear that the Hon'ble Apex Court has duly held that the A.O. does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extend provided in the Explanation to section 115J.

13. We find that the exposition by the Hon'ble Apex Court is the law of the land and if the A.O. had duly followed the same, he did not need to declare so in his assessment order. In fact, what the Id. CIT(A) has done is not at all sustainable in law. He has distinguished the above Hon'ble Apex Court decision on the premise that the accounts have not been prepared as per Part II of Schedule VI of the Companies Act. It is not the case of the Id. CIT(A) that the accounts are not certified by the authorities under the Companies Act. In this view of the matter, the distinction brought on record by the Id. CIT(A) is totally unsustainable in law.

14. We further note that similar view was again taken by the Hon'ble jurisdictional High Court in the case of *Pr. CIT vs. Bhagwan Industries Ltd.* (in ITA No.436 of 2015 vide order dated 18.07.2017) which reads as under:

(i) The learned counsel for the Appellant submits that Tribunal was not justified in not accepting the reworking of the book profits by the Assessing Officer as per the provisions of Section 115JB of the Income Tax Act. The Assessee had directly credited the profit of Rs.2,84,84,000/ arising from sale of land to Capital Reserve Account in the balance sheet rather than routing it through Profit and Loss Account in the manner provided as per Part II and Part III of Schedule VI to the Companies Act, 1956.

(ii) Tribunal while passing the impugned Order observed that while computing the book profit under Section 115JB of the Income Tax Act, the Assessing Officer added the sum of Rs.2,84,84,000/in the book profit. The Commissioner of Income Tax (Appeals) deleted the addition. The Tribunal referring to the Judgment of the Apex Court in a case of *Apollo Tyres Ltd. v. C.I.T.* reported in 255 ITR 273 and Judgment of this Court in case of *Akshay Textiles Trading and Agencies Pvt.Ltd.*, reported in 304 ITR 401 has observed as under:

“Respectfully following the decision of Hon'ble Bombay High Court in the case of *Abdhut Trading Co. Pvt. Ltd.* (supra) and in the case of *Akshay Textiles Trading and Agencies Pvt. Ltd.* (supra), we do not find any infirmity in the order of Id. CIT(A) for deleting the addition under Section 115JB.”

(iii) In light of above, the Tribunal has not committed any error. The Appeal as such is dismissed. No costs.

15. In the background of the aforesaid discussion and precedent, we find that A.O. has taken a correct view as the matter stands covered in favour of the assessee. The reworking of book profit as suggested by the ld. CIT(A) is not permissible. Hence, we quash the order passed by the ld. CIT(A) u/s. 263 of the Income Tax Act, 1961.

16. In the result, the assessee's appeals are allowed.

Order pronounced in the open court on 02.11.2018

Sd/-
(Ram Lal Negi)
Judicial Member

Sd/-
(Shamim Yahya)
Accountant Member

Mumbai; Dated : 02.11.2018

Roshani, Sr. 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