IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' NEW DLEHI

BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

I.T.A. No.280/Del/2016
Assessment Year: 2009-10

Ratna Commercial Enterprises P. Ltd. **4th Floor, Punjabi Bhavan,** **10 Rouse Avenue, New Delhi.** **(PAN: AAACR0354B)**	**vs**	**DCIT, Circle –15(1),** **New Delhi.**
New Delhi		
(Appellant)		(Respondent)

Appellant by: Shri M.P. Rastogi, Advocate
Respondent by: Shri S.S. Rana, CIT DR
Date of hearing: 18.07.2019
Date of Pronouncement: 03.09.2019

ORDER

PER K. NARASIMHA CHARY, JM

Challenging the order dated 04.12.2015 of the learned Commissioner of Income-tax(Appeals)-7 {for short "Learned CIT(A)"}, passed in Appeal No.626/Del/14-15 for the Asstt. Year 2009-10, assessee preferred this appeal.

2. Briefly stated facts are that the assessee is a non-banking financial company deriving its income from investment in shares

and mutual funds and also one of the holding companies of Dabur Group of Companies. During the financial year 2008-09, they have sold the share of Dabur Pharma Ltd. for a sale consideration of Rs.76,90,62,303/- and offer the same as long term capital gain @ 10% of market transaction. They have filed their return of income on 29.9.2009 for the Asstt. Year 2009-10 declaring a gross total income of Rs.29,88,08,201/- and a book loss of Rs.10,43,99,519/- u/s 115JB of the Income-tax Act, 1961 ('the Act'). Learned AO computed the income of the assessee at Rs.67,14,57,651/- u/s 115JB of the Act which is more than tax on regular income which was assessed at Rs.35,72,54,455/-. In that process, ld. AO held that the capital gain on the sale of shares of Dabur Pharma which was directed credited to the capital reserve account by the assessee should have been entered in the Profit and Loss account and added the same to the income of the assessee u/s 115JB of the Act. Ld. AO also made an addition of Rs.24,46,254/- and Rs.43,42,613/- u/s 14A of the Act. Simultaneously, ld. AO initiated penalty proceedings u/s 271(1)(c) of the Act by issuance of notice dated 28.12.2011 and concluded the same by order dated 31.3.2014 by levying a penalty of Rs.26,37,12,000/- u/s 271(1)(c) of the Act.

3. In appeal, learned CIT(A) deleted the penalty in relation to the addition made on account of the disallowance u/s 14A of the Act. Learned CIT(A), however, sustained the penalty on account

of inclusion of capital gain on sale of shares of Dabur Pharma in the profit and loss account for the purpose of Section 115JB of the Act and sustained the penalty. The assessee is in this appeal before us challenging the same.

4. It is the argument of the ld. AR that the assessee had neither concealed the income nor furnished any inaccurate particulars thereof inasmuch as the assessee furnished the said information in the Notes on Account No.B-11 forming part of the balance sheet which was duly audited by the auditors and also offered the capital gains to tax at 10%. Learned AR submitted that in view of the decision of the Special Bench of the Tribunal in the case of Sutluj Cotton Mills Ltd. vs ACIY (1993) 199 ITR (AT) 164, the assessee is not required to credit the profit realized on a capital assets to the profit and loss account and such realized amount has to be credited to the capital reserve account of Part II and III of Schedule VI of the Companies Act because it is not a regular income but only a deemed income u/s 45 of the Income-tax Act and not under the Companies Act. Learned AR submitted that the decision of Sutluj Cotton (supra) has been noticed by number of other judgments subsequently and in the case of CIT vs Akshay Textiles and Trading P. Ltd., 304 ITR 4012 (Bom) and in the case of CIT vs Sain Processing & Weaving Mills P. Ltd., 325 ITR 565(Del), the Hon'ble Delhi High Court while noticing the decision of the Hon'ble Apex Court in the case of Apollo Tyres Ltd. vs CIT,

255 ITR 273 held that no profit shown in the profit and loss account should be taken into consideration and the AO has no jurisdiction to go beyond the profit shown in the profit and loss account to the extent provided in Explanation 1 to Section 115JB. Further, according to the ld. AR, whether the crediting of the capital gain to the capital reserve account is proper is a debatable issue and in view of the decision of the Hon'ble jurisdictional High Court in the case of Devsons P. Ltd., 329 ITR 483 (Del), no penalty could be levied.

5. Per contra, it is the argument of the ld. DR that the assessee had filed appeal against the assessment but subsequently withdrew the same which clearly shows that the assessee had admitted the default and, therefore, in view of decision in the case Union of India vs Dharmendra Textile Processors (2007) 295 ITR 244, CIT vs Zoom Communication (P) Ltd. (2010) 327 ITR 510 (Del) and Mak Data P. Ltd. (2013) 358 ITR 593 (SC), the assessee has no escapement from the penalty.

6. We have gone through the record in the light of the submissions made on either side. There is no dispute that the assessee had credited the capital gain accrued on the sale of Dabur Pharma share to the capital reserve account and a note has been given in the Notes on Accounts No.B-11 forming part of the balance sheet which was duly audited by the auditors. It is not the case of the revenue that the assessee had not disclosed

such capital gains at all. The issue in this matter revolves around the question as to whether, while preparing the profit and loss account in terms of Part II and III of Schedule VI of Companies Act, the capital gain accrued on account of sale of capital assets should have been credited to the profit and loss account for the purpose of computation u/s 115JB of the Act.

7. As stated above, reliance is placed on the decision of the special bench of the tribunal in the case of Sutluj Cotton Mills (supra). In that decision after considering the entire gamut of Section 115J which is in pari-materia to Section 115JB of the Act clearly held, -

(i) that having regard to the pattern of the Income-tax Act, the capital receipts which do not have the character of income cannot be made liable to income-tax by adding them to the book profit;

(ii) that the capital gain is deemed to be income u/s 45 and a deeming provision can be applied only to the extent to which the legislature has intended and cannot be extended to any other provision; and that what is deemed to be income under section 45 cannot be deemed to be income for the purpose of section 115 J, for the simple reason that "book profits" cannot include the deemed income and more particularly when, because of the operation of section 54E of the Act, the item in question is saved from that deeming provision;

(iii) that the legislative history shows that the tax u/s 115J was with reference to the business profit and there is sufficient indication that the provisions was not intended

to withdraw the concession granted in respect of computation of capital gains;

(iv) that the proceeds by way of sale of an investment not being income, is not liable to tax u/s 115J unless there is a clear intendment; and

(v) that if the book profits have been worked out in accordance with part II and III of schedule VI to the Companies Act, in the absence of any allegation of fraud or misrepresentation, but only a difference of opinion as to the question whether a particular amount should be properly shown in the Profit and Loss Account or in the Balance Sheet, the provisions of section 115 J do not empower the assessing officer to disturb the profit as shown by the assessee.

8. It is, therefore, clear that whether the capital gain that had arisen on the sale of Dabar Pharma share was rightly credited by the assessee to the capital reserve account or rightly rejected by the AO on the ground that it has to be routed through profit and loss account, is a debatable issue.

9. Further, there is no dispute that the accounts of the assessee were prepared in accordance with the provisions of Part II of Schedule VI of the Companies Act and the Hon'ble Apex Court in thecase of Apollo Tyres,(supra) held in unequivocal terms that the Ld. AO while computing the income u/s 115J has only the power of examining whether the books of accounts are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act; that the AO thereafter has the limited power of making the increases and reduction as provided for in the Explanation to the said section and

to put it differently, the AO 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.

10. It is not the case of the Revenue that the profit and loss account of the assessee was not prepared in accordance with the provisions of Part II of Schedule VI of the Companies Act nor has it been that the same does not contain any certificate by the competent authority under the Companies Act as having been properly maintained in accordance with the provisions of the Companies Act. In such a situation, we are in agreement with the submission of the assessee that the non-inclusion of the capital gains by the assessee in the profit and loss account is not a ground for the AO to levy the penalty. In fact, in DCIT vs. Arundhati Traders P. Ltd. (2009) 27 SOT 305 (Mum), the Tribunal held that once an asset is held as an investment by the Company and reflected as an investment in the balance sheet of the company from year to year, then any gain on sale of such investment is not a link or to profit and gain of business carried on by respective company, and the same could not be adjusted for working out book profit of the company under section 115 JB of the Act. Similar view is taken by the Hyderabad Bench of the Tribunal in the case of New Oriental Trollers P. Ltd. vs DCIT (2011) 10 Taxmann.com 252 (Hyd).

11. Having regard to the facts and circumstances and in view of the law laid down by the decisions referred to above, we are of the

considered opinion that the inclusion or otherwise of the capital gains in the capital reserve account directly without routing it through the profit and loss account is a debatable issue and no penalty can be levied basing on that issue. Assessee, however, revealed the same by offering it to tax and also in the notes of accounts. It is only a difference of opinion between the Revenue and the assessee as to the treatment given to the capital gain either or not by routing it through the profit and loss account. We, therefore, do not have any reason to sustain the penalty and the same is directed to be deleted.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 3rd September, 2019.

Sd/- sd/-

(O.P. KANT) **(K. NARASIMHA CHARY)**
ACCOUNTANT MEMEBR **JUDICIAL MEMBER**

Dated 3rd September, 2019
VJ'
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

By order

Asstt. Registrar

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