

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain , Judicial Member**

ITA No. 8073/Mum/2011
(Assessment Year: 2004-05)

M/s. Forbes & Company Ltd. (Formerly Forbes Gokak Ltd.) Gr. Floor, Forbes Building Charanjit Rai Marg, Fort Mumbai 400001	Vs.	D C I T – 1(1) Room No. 579/533 Aayakar Bhavan M.K. Road, Mumbai 400020
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PAN – AAACF1765A

Appellant

Respondent

ITA No. 3643/Mum/2011
(Assessment Year: 2004-05)

D C I T – 1(1) Room No. 579/533 Aayakar Bhavan M.K. Road, Mumbai 400020	Vs.	M/s. Forbes & Company Ltd. (Formerly Forbes Gokak Ltd.) Gr. Floor, Forbes Building Charanjit Rai Marg, Fort Mumbai 400001
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PAN – AAACF1765A

Appellant

Respondent

Revenue by: Shri Grish Dave & Ms. Kadambari Dave
Assessee by: Shri Pratap Singh & Shri V.K. Bora

Date of Hearing: 29.09.2016
Date of Pronouncement: 26.10.2016

ORDER

Per Jason P. Boaz, A.M.

These are cross appeals, by both Revenue and the assessee, directed against the order of the CIT(A)-1, Mumbai dated 15.12.2010 for A.Y. 2004-05.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, a company engaged in the business of manufacturing of yarn, engineering goods, shipping and a host of other business, filed its return of income for A.Y. 2004-05 on 27.10.2004 declaring Nil income,

after claiming setting off of brought forward unabsorbed depreciation. 'Book Profits' under section 115JB of the Income Tax Act, 1961 (in short, 'the Act') was declared at Rs.4,74,77,483/-. The case was taken up for scrutiny and the assessment completed under section 143(3) of the Act, vide order dated 29.12.2006 wherein the assessee's income under normal provisions of the Act was determined at Rs.11,35,58,715/- and 'Book Profits' under section 115JB were computed at Rs.10,94,92,680/-. On appeal, the CIT(A), Mumbai vide order dated 24.12.2008 allowed the assessee partial relief.

2.2.1 Subsequently, the Assessing Officer (AO) initiated proceedings under section 147 of the Act as he was of the view that there was reason to believe that income of the assessee, exigible to tax in the period relevant to A.Y. 2004-05, had escaped assessment and after recording reasons for the same, issued notice under section 148 of the Act. In response, the assessee submitted that the original return of income for A.Y. 2004-05 filed on 27.10.2004 be treated as filed in response to the notice under section 148 of the Act. The re-assessment proceedings were completed under section 143(3) r.w.s. 147 of the Act vide order dated 30.11.2009 wherein the income of the assessee under normal provisions was computed at Rs.11,87,35,567/- in view of the following additions/disallowances: -

(i)	Disallowance u/s. 14A r.w. Rule 8D	Rs.25,70,121/-
(ii)	Non Compete Fee	Rs.17,58,598/-
(iii)	Provision of Gratuity	Rs.6,49,135/-
(iv)	Share issue expenses	Rs.1,99,000/-

'Book profits' under section 115JB were computed as under: -

(i)	Disallowance u/s. 14A	Rs.1,03,08,885/-
(ii)	Contingent liabilities	Rs.80,00,000/-
(iii)	Interest on UTI-64	Rs.6,16,561/-

2.2.2 On appeal, the CIT(A)-1, Mumbai vide the impugned order dated 15.12.2010 allowed the assessee partial relief.

2.3 Subsequently, the cross appeals of Revenue and the assessee preferred before the Tribunal in respect of the order of the CIT(A)-1,

Mumbai dated 24.12.2008 on the original order of assessment for A.Y. 2004-05 dated 29.12.2006, was disposed off by the Coordinate Bench in ITA No. 1382 & 1573/Mum/2009 dated 07.10.2016 allowing both Revenue and the assessee partial relief.

3. Aggrieved by the order of the CIT(A)-1, Mumbai dated 15.12.2010 for A.Y. 2004-05 in respect of the re-assessment order passed under section 143(3) r.w.s. 147 of the Act vide order dated 30.11.2009, both Revenue and assessee have preferred cross appeals which are being disposed off hereunder.

Assessee's appeal in ITA No. 8073/Mum/2011

4. In this appeal, the assessee has preferred the following grounds: -

“Ground I: Disallowance of interest and administrative expenses under section 14A

1. *On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals)-1, [“the CIT(A)"] erred in not deleting the disallowance of the interest of Rs.77,67,700 and administrative expenses of Rs.25,70,121 under section 14A of the Income Act, 1961 (“the Act”), while computing total income under normal provisions of the Act.*
2. *Without prejudice, the learned CIT(A) erred in not considering the disallowance under section 14A at Rs.25,41,154 as against Rs.25,70,121 as considered by the Assessing Officer.*
3. *The CIT(A) erred in referring the matter to the Deputy Commissioner of the Income Tax - 1(1), Mumbai (“the AO”) for recomputing the disallowance in relation to exempt income under section 14A of the Act.*

Ground II: Disallowance of non-compete fees amounting to Rs.17,58,598

4. *On the facts and in circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO of disallowing non-compete fees paid to the ex-directors of the appellant on the alleged ground that such expenditure is capital in nature.*
5. *Without prejudice to the above, if the expenditure is treated as capital in nature instead of revenue, then the appellant humbly submits that depreciation on the impugned expenditure should be allowed to the appellant.*

Ground III: Addition of Rs.80,00,000 to the book profit as well as under normal provisions

6. *On the facts and in circumstances of the case and in law, the*

CIT(A) erred in confirming the action of the AO of adding an amount of Rs.80,00,000 to the book profit computed under section 115JB as well as under normal provisions of the Act, on the alleged ground that the provision is made towards unascertained liability.

7. *The CIT(A) ought to have held that based on the facts and circumstances of the case, the provision is made towards known/ascertained liability of the appellant.*

Ground No. IV: Addition for disallowance under section 14A to the book profit

8. *On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of AO with respect to the disallowance under section 14A of Rs. 1,03,08,885, while computing the book profit under section 115JB of the Act.*

IV: Validity of reopening the assessment under section 147 of the Act jnd No.

9. *On the facts and circumstances of the case, the CIT(A) erred in confirming the action of AO in reopening the assessment under section 147 of the Income-tax Act ("the Act")*
10. *The CIT(A) ought to have held that based on the facts and circumstances of the case and in law, the reopening was unjustified, unwarranted and bad in law.*

General

11. *Each one of the above grounds of appeal is without prejudice to the other.*
12. *The appellant reserves the right to add, alter or amend to the grounds of appeal."*

5. Ground No. I (1 to 3) and IV (8): Disallowance under section 14A r.w. Rule 8D

5.1 In these grounds (supra), the assessee at ground No. I contends that the learned CIT(A) erred in directing the AO to re-compute the disallowance under section 14A of the Act in relation to exempt income by the assessee under the normal provisions of the Act. In respect of ground No. IV, the assessee contends that the learned CIT(A) erred in confirming the action of the AO with respect of the disallowance under section 14A of the Act while computing 'Book Profits' under section 115JB of the Act. At the outset, the learned AR submitted before us that the Coordinate Bench of the Tribunal in the assessee's own case in ITA No.6720/Mum/2007 dated 12.06.2013 for A.Y. 2002-03 had restricted the disallowance under section 14A of the

Act to Rs.7,61,476/- and complete relief was granted to the assessee by another Coordinate Bench in the assessee's own case for A.Y. 2003-04 in ITA No. 6721/Mum/2007 dated 10.08.2016. The learned A.R., however, fairly submitted that since Rule 8D of the I.T. Rules, 1962 (in short 'the Rules') was not applicable for the year under consideration, i.e. A.Y. 2004-05, the matter may be restored to the file of the AO for recomputing the disallowance under section 14A of the Act. The learned D.R. did not oppose this proposition of the learned A.R.

5.2 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements cited. As contended by the assessee, it is settled position of law that the provisions of Rule 8D of the Rules are applicable prospectively, for and from A.Y. 2008-09, and would not operate retrospectively for the assessment years prior thereto. In the Coordinate Bench order in ITA No. 1382/Mum/2009 dated 07.10.2016 in the assessee's own case for A.Y. 2004-05 in respect of the original assessment proceedings at para 5.2 thereof, we have already set aside the disallowance under section 14A r.w. Rule 8D made by the AO and restored the matter of computation of the disallowance under section 14A of the Act to the file of the AO for fresh computation, both under normal provisions and under clause (f) to Explanation 1 of section 115JB of the Act, in accordance with law prevalent for the year under consideration, after affording the assessee adequate opportunity of being heard and to file details/submissions required in this regard. The same would hold good in this appeal too and we hold and direct accordingly in this appeal too. Consequently, grounds I and IV of the assessee's appeal are treated as allowed for statistical purposes.

6. **Ground No. II (4 & 5): Disallowance of non-compete fee paid to ex-Directors**

6.1 In this ground, the assessee challenges the action of the learned CIT(A) in confirming the AO's action in disallowing non-compete fee paid to ex-Directors.

6.2 We have heard both parties in the matter. This issue has already been considered and decided against the assessee in the order of the Coordinate Bench in the assessee's own case in ITA No. 1382/Mum/2009 dated 07.10.2016 for A.Y. 2004-05 in respect of original assessment proceedings, at para 6.2 thereof. In this view of the matter, ground No. II of the assessee's appeal is dismissed.

7. **Ground No. III (6 & 7): Contingent Liability – Rs.80,00,000/- - Computation of 'Book Profits' under section 115JB**

7.1 In this ground, the assessee assails the decision of the learned CIT(A) as erroneous in confirming the action of the AO in adding an amount of Rs.80 lakhs in the computation of book profits under section 115JB of the Act on the ground that the provision made towards an unascertained liability was not satisfactorily done and was inserted only to declare reduced profit exigible to tax. The learned A.R. for the assessee reiterated the submissions put forth before the learned CIT(A) that the said provision of Rs.80 lakhs was made for ascertained liability in respect of salaries, wages and other related costs of the employees in one of the Divisions of the assessee company. It is submitted that payments were made to its employees out of the total provisions and the balance was written back and offered to tax under the head 'Miscellaneous Income' in the period relevant to A.Y. 2007-08. It is prayed that the liability being an ascertained one, no addition to 'Book Profits' under section 115JB of the Act is called for. It was alternatively prayed that if the said provision is treated as an unascertained liability and included in the 'Book Profits' under section 115JB of the Act, then the AO be directed to exclude the said provision in computing 'book profits' under section 115JB for A.Y. 2007-08, being the year in which the provision was reversed and offered to tax by the assessee.

7.2 Per contra, the learned D.R. supported the impugned order of the learned CIT(A) on this issue.

7.3.1 We have heard the rival contentions and perused and carefully considered the material on record. According to the assessee, its claim is

that this provision was made for an ascertained liability in respect of salaries, wages and other related cost of employees of one of its Divisions in respect of which payments were made and the balance written back and offered to tax in subsequent year. On examination of the details thereof, the AO/CIT(A) were of the view that the assessee had itself claimed this amount as a contingent liability and was not able to satisfactorily explain how this provision was an ascertained liability. The break up furnished by the assessee indicates that there was no scientific method adopted to create the provision, but rather it was just lumpsum provisioning that was done in two years and the relevant heads were not ascertainable at that point of time. Consequently, the disallowance was warranted by the provisions of Explanation (c) to section 115JB of the Act while computing the 'book profits' as it was a contingent liability.

7.3.2 In the impugned order at paras 8.1 and 8.2 thereof, the learned CIT(A), after considering the assessee's submissions, has decided the issue as under: -

"8.1 During the appellate proceedings, the appellant AR filed written submission in support of his contention. The relevant portion of the appellant AR's submission is extracted herein below:-

"1. In the assessment order the AO has added a sum of Rs.80,00,000 in computing book profit under sec. 115JB of the act.

2. It was submitted before the AO that the said provision was made for ascertained liability in respect of salaries, wages and other related cost of employees of the one of the division of the appellant. The nomenclature provision for contingency used by the appellant was business decision and management of the appellant did not want to make the workers aware that the additional benefit would flow. A copy of the letter dt. 28.10.2009 addressed to the AO in this regard is submitted with you. Please refer para 6 thereof.

3. We may also mention that the payments were made to employees out of the total provision made in this respect and the balance written back was offered for tax in the year of reversal as under:-

	Rs.
<i>Provision made for the year ended</i>	
31.3.2003	81,00,000
31.3.2004 i.e. year under appeal	80,00,000
Balance as on 31.3.2004	1,61,00,000
<i>Paid as under:</i>	
31.3.2005	19,91,538
31.3.2006	31,90,106
31.3.2007 (written back to miscellaneous income)	1,09,18,356
	1,61,00,000

The above position and the fact that a portion of total provision was reversed on final settlement shows that the provision was made for known liability.

4. *It is submitted that entries in the books of account are not determinative of the taxability thereof and whether the appellant is entitled to a particular deduction or not will depend on the substance of the transaction. For this proposition reliance is placed on the decision of the Supreme Court in case of .Kedarnath Jute Mfg. Co. Ltd Vs. CIT (82 ITR 363).*

5. *It is therefore prayed that no addition to book profit under sec. 115JB be made in this respect.*

6. *In the event it is held that the said provision should be included in computing book profit under sec. 115JB of the Act then the AO be directed to exclude the said provision in computing book profits under sec. 115JB for the assessment year 2007-08 being the year in which the provision was reversed and offered for tax"*

8.2 *I have considered the AO's order as well as appellant AR's submission. Having considered both, I find that the AO was completely justified in his action as the said sum was contingent in nature. The appellant's submission as depicted above clearly denotes to this fact that the appellant company has made the provision of Rs.80,00,000 as on 31.03.2004 grossly as contingent and it was nowhere ascertained and also the same was not done by any scientific manner. This fact completely establishes with the fact that the appellant company had made provision of Rs.81 lakhs and Rs.60 lakhs under this head in two different financial years as on 31.3.2003 and 31.3.2004 as per the submission given by the appellant in para 3. Whereas against the provisions made of Rs.80 lakhs as on 31.3.2004 the appellant company has made the payment at the end of the financial year i.e. 31.3.2006*

after two years and that's too a sum of Rs.31,90,106/- only. Thus, the appellant company even made the provisions of another excess amount of Rs.48.09 lakhs in excess than what was needed and even the said provision was also not warranted to be made as on 31.03.2004 as the payment has been made by the appellant company nearly after two years Thus, charging of sum of Rs.80 lakhs to the income of the appellant reducing the book profit was completely unwarranted and unjustified on the part of the appellant company. Even I find that the appellant company has made provision in excess as on 31.3.2003 also of Rs.81 lakhs against the mere payment of Rs.19,91,538/- subsequently and that's too after nearly two years i.e. 31.03.2005. Thus, the appellant's own submission suggests that the provision was completely unascertained and contingent in nature. Hence, action of the AO is completely justified. Even I find that the said disallowance was warranted as per Explanation I, sub clause (c) of Section 115JB of the I.T. Act. Accordingly, the addition made by the AO is confirmed.”

7.3.3 In the factual matrix of the case as emanate from the orders of the authorities below and the material on record, it is seen that the assessee itself had made the provision for contingent claims amounting to Rs.80 lakhs. It is on being queried in this regard that the assessee put forward the claim that this provision for contingent claims was actually an ascertained liability made in respect of salaries, wages and other related costs of employees of one of its Divisions. From the detailed break up of these provisions submitted by the assessee itself which is extracted from para 8.1 of the CIT(A) order (supra), it would appear to us that the observations of the authorities below, that huge lump sums have been provided for in a couple of years and meagre payments have been made out of those provisions in subsequent years, to heads that are not ascertainable, establish that no scientific method has been adopted; are relevant and belie the assessee's claim that this is a provision created for an ascertained liability; but could in fact be a contingent liability. Provisions for ascertained liabilities are made based on actuarial certificates issued to the company concerned. In the case on hand, it appears that this basic fact has neither been examined by the authorities below nor put forth by the assessee suo moto. It is also seen that no finding has been rendered by the learned CIT(A) on the assessee's alternate argument/claim put forth, that if it is held that the said provision for contingent claims is included in computing the 'Book Profits' under section

115JB, then the AO be directed to exclude the said provision in computing 'Book Profits' under section 115JB for A.Y. 2007-08; being the year in which the provision was written back. In these circumstances, we are of the opinion that the interests of equity and justice would be served if this issue, in respect of whether the provision for contingent claims put forth by the assessee is to be added back while computing the Book Profits under section 115JB of the Act in view of Explanation 1(c) thereto, is restored to the file of the AO for fresh consideration and adjudication in the light of our observations above and in accordance with law, after affording the assessee adequate opportunity of being heard in the matter and to file submissions/details required. We hold and direct accordingly. Consequently ground III (6 & 7) of the assessee's appeal is treated as allowed for statistical purposes.

8. Ground No. V (9 & 10): Validity of reopening the assessment under section 147 of the Act

8.1 In this ground, the assessee assails the impugned order of the learned CIT(A) in confirming the action of the AO in reopening the assessment under section 147 of the Act instead of holding that the reopening was unjustified, unwarranted and bad in law.

8.2 We have perused the impugned order of the learned CIT(A) and observe that the ground raised is factually incorrect, as nowhere therein has the learned CIT(A) upheld the action of the AO in reopening the assessment under section 147 of the Act; for the simple reason that he was not called upon to adjudicate on this issue as it was never before him. This ground being factually incorrect, it is not maintainable and is accordingly dismissed.

9. General (11 & 12)

9.1 The general grounds 11 and 12 being general in nature, no adjudication is called for thereon.

10. In the result, the assessee's appeal for A.Y. 2004-05 is partly allowed for statistical purposes.

Revenue's appeal in ITA No. 3463/Mum/2011

11. In this appeal Revenue has raised the following grounds: -

- "1. Whether on the facts and circumstances of the case and in law, the CIT(A) is justified in rejecting the A.O.'s working of expenses u/s. 14A as per rule 8D by observing that jurisdictional High Court in the case of Godrej Boyce Mfg. Co. Ltd. has decided this issue that rule 8D will be applicable only from A.Y. 2008-09 onwards.*
- 1.1 The decision of the Hon'ble Court in the case of Godrej & Boyce has not been accepted & SLP has been filed against the said decision.*
- 2. Whether on the facts and circumstances of the case and in law, the CIT(A) erred in deleting the disallowance of Rs. 17,29,632/- on account of administration expenses in respect of general and administrative expenses allocated toward earning of Dividend income."*

11.1 The grounds 1 & 2 raised in Revenue's appeal (supra) are on the issue of disallowance under section 14A of the Act in the year under consideration. This issue has been addressed by us while disposing off grounds I & IV of the assessee's appeal at para 5.2 of this order (supra) restoring the matter to the file of the AO for fresh computation in accordance with law, after affording the assessee adequate opportunity of being heard in the matter. Accordingly, Revenue's grounds are treated as allowed for statistical purposes.

12. In the result, Revenue's appeal for A.Y. 2004-05 is treated as allowed for statistical purposes.

13. To sum up, the assessee's appeal for A.Y. 2004-05 is treated as partly allowed for statistical purposes and Revenue's cross appeal is treated as allowed for statistical purposes.

Order pronounced in the open court on 26th October, 2016.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 26th October, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -1, Mumbai*
4. *The CIT – 1, Mumbai*
5. *The DR, “F” Bench, ITAT, Mumbai*

By Order

//True Copy//

*Assistant Registrar
ITAT, Mumbai Benches, Mumbai*

n.p.