

IN THE INCOME TAX APPELLATE TRIBUNAL
“G” Bench, Mumbai
Before Shri B.R. Baskaran (AM)& Shri Pawan Singh (JM)

I.T.A. No. 4004/Mum/2014
(Assessment Year 2011-12)

M/s. Shloka Traders Pvt. Ltd. Shop No. G-3, Anand Sagar Building, 14, Guzdar Street Chira Bazar Mumbai-400 002. (Appellant)	Vs.	DCIT Central Circle-13 Mumbai (Respondent)
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PAN No. AAJCS5915N

Assessee by	Shri Anuj Kisnadwala
Department by	Shri Goli Srinivas Rao
Date of Hearing	17.1.2017
Date of Pronouncement	05.4.2017

O R D E R

Per B.R. Baskaran (AM) :-

The appeal filed by the assessee is directed against the order dated 7.04.2014 passed by learned. CIT(A)-37, Mumbai and it relates to the assessment year 2011-12. The assessee is aggrieved by the decision of Ld CIT(A) in upholding the inclusion of long term capital gain earned by a partnership firm, in which the assessee is the major partner, as part of book profit of the assessee computed u/s. 115JB of the Act.

2. The facts relating to the issue are set out in brief. The assessee is a private limited company covered by the provisions of section 115JB of the Act. The assessee along with three other partners formed a partnership firm by name M/s. S.K. Enterprise. The assessee-company held certain shares in another company named M/s. Asian Star Company Ltd. Upon formation of the partnership firm, the assessee-company transferred 3,14,127 shares of M/s. Asian Star Company Ltd. to the partnership firm cited above as its capital contribution. The partnership firm sold 99,394 shares of M/s. Asian

Star Company Ltd. in financial year 2010-11 and earned long term capital gain of ₹ 8.66 crores. The assessee received its share of profit from the partnership firm and the same credited to the profit and loss account of the assessee. While computing book profit u/s. 115JB of the Act, the assessee excluded the same from Net profit as the share profit received from a partnership firm is exempt u/s. 10(2A) of the Act. The Assessing Officer noticed that, if long term capital gain had been earned by the assessee, the same would have been added to the book profit computed u/s. 115JB of the Act. Accordingly the AO took the view that the assessee has formed partnership firm only to avoid payment of tax u/s. 115JB of the Act. The learned CIT(A) also confirmed the order passed by the Assessing Officer and hence, the assessee has filed this appeal before us.

3. At the time of hearing learned AR submitted that an identical issue was considered by the Coordinate Bench of the Tribunal in the case of M/s. Rahil Implex Pvt. Ltd. in ITA No. 4002/Mum/2014 dated 10.6.2016 and the issue has been decided in favour of the assessee. Learned Departmental Representative also accepted the submissions made by the learned AR.

4. Having heard the rival submissions, we noticed that the impugned issue is covered in favour of the assessee by the order passed by the Coordinate Bench in the case of Rahil Implex Pvt. Ltd. (supra). For the sake of convenience, we extract below the order passed by the Coordinate Bench in the case M/s. Rahil Impex Pvt. Ltd. (supra):-

“The appeal filed by the assessee is directed against the order dated 7-04-2014 passed by ld CIT(A)-37, Mumbai and it relates to the assessment year 2011-12. The assessee is aggrieved by the decision of Ld CIT(A) in upholding that the long term capital gain earned by a partnership firm, in which the assessee is the major partner, is includible in book profit computed u/s 115JB of the Act.

2. *The facts relating to the issue are set out in brief. The assessee is a private limited company liable to pay tax on book profit u/s 115JB of the Act. It held equity shares in some companies. The assessee along with*

two of its directors formed a partnership firm in the year 2009, in which the assessee held 99% share and the other two partners held 1% shares. The shares held by the assessee were given to the firm as its capital contribution. Subsequently the partnership firm sold the shares and earned Long term capital gain. The assessee received its share of profit from the firm and claimed the same as exempt u/s 10(2A) of the Act and the said amount was excluded from book profits as per the Explanation given in sec. 115JB of the Act.

3. The AO noticed that, if the long term capital gains had been earned by the assessee, the same would have been added to the book profit computed u/s 115JB of the Act. The AO also noticed that the shares were continued to be held by the assessee only in its demat account, even though it had been claimed that the shares have been given as capital contribution. Further, it was also noticed that the shares have also been sold from the demat account of the assessee. Hence the AO took the view that the assessee has adopted a colourable device of creating a partnership firm in order to convert the long term capital gain into "share income from partnership firm", so that it could escape from the taxation u/s 115JB of the Act, by availing exemption u/s 10(2A) of the Act. The AO took support of the decision of Hon'ble Supreme Court rendered in the case of *Mc Dowell (1985)(154 ITR 148)* to discard the colourable device adopted by the assessee to escape from the provisions of sec. 115JB of the Act. Though the assessee contended that it has only done a legitimate tax planning by placing reliance on the decision rendered by Hon'ble Supreme Court in the case of *Vodafone International Holdings BV Vs. Union of India (17 Taxmann.com 202)*, yet the same did not find favour with the AO. Accordingly he included the long term capital gains earned by the partnership firm as income of the assessee while computing the book profit u/s 115JB of the Act.

4. Before Ld CIT(A), the assessee placed reliance on the decisions rendered by the Hon'ble Supreme Court in the cases of *Apollo Tyres Ltd (255 ITR 273)* and the decision rendered in the case of *Malayala Manorama Ltd (300 ITR 251)* to contend that the accounts adopted in the Annual General Meeting should not be disturbed by the AO. However, the Ld CIT(A) held that Hon'ble Supreme Court has expressed the view in the case of *Dynamic Orthopaedic (190 Taxman 288)(SC)* that the decision taken in the case of *Malayala Manorama (supra)* was incorrectly decided and hence the matter was referred to a larger bench. Accordingly he agreed with the view taken by the AO that the assessee has adopted a colourable device to evade minimum alternative tax prescribed u/s 115JB of the Act. Aggrieved, the assessee has filed this appeal before us.

5. We heard the parties and perused the record. The issue, in essence, is whether the arrangement made by the assessee by transferring the

shares held by it to a partnership firm, so that the long term capital gain could be earned by the firm is a legitimate tax planning or a colourable device adopted by the assessee to evade minimum alternative tax prescribed u/s 115JB of the Act.

6. The Ld A.R submitted that the legitimate tax planning within the provisions of the Act cannot be considered as colourable device adopted by the assessee. He submitted that the decision rendered by the Hon'ble Supreme Court in the case of *McDowell Ltd (supra)* has been explained by the Hon'ble Apex Court in many of its subsequent decisions. The Ld A.R submitted that the Hon'ble Supreme Court has held in the case of *CIT Vs. Walfort Share and Stock Brokers P Ltd (2010)(326 ITR 1)* that the better use of the provisions of the Act cannot be called "abuse of law". In that case, the assessee had purchased mutual fund units just before the record date fixed for declaration of dividend, since the dividend income was exempt. After declaration of the dividend, the net asset value of the mutual fund units would go down and upon selling the units purchased, the assessee would incur loss. The dividend income was claimed as exempt and the loss was set off against the other income. The revenue took the view that the assessee has adopted a pre-planned method to claim exemption as well as set off. The Hon'ble Supreme Court held as under:

"The real objection of the Department appears to be that the assessee is getting tax free dividend; that at the same time it is claiming loss on sale of the units; that the assessee had purposely and in a planned manner entered into a pre-mediated transaction of buying and selling units yielding exempted dividends with full knowledge about the fall in the NAV after the record date and the payment of tax-free dividend and, therefore, the loss on sale was not genuine. We find no merit in the above argument of the Department. At the matter covers assessment years before insertion of section 94(7) vide the Finance Act, 2001 with effect from April 1, 2002. With regard to such cases we may state that on the facts it is established that there was a "sale". The sale price was received by the assessee. That, the assessee did receive dividend. The fact that the dividend received was tax free is the position recognized under section 10(33) of the Act. The assessee had made use of the said provision of the Act. That such use cannot be called 'abuse of law'. Even assuming that the transaction was pre-planned there is nothing to impeach the genuineness of the transaction. With regard to the ruling in *McDowell and Co. Ltd v. CTO (1985) 154 ITR 148 (SC)*, it may be stated that in the later decision of this court in *Union of India v. Azadi Bachao Andolan (2003) 263 ITR 706* it has been held that a citizen is free to carry on its business within the four corners of the law. That, mere tax planning, without any motive to

evade taxes through colourable devices is not frowned upon even by the judgment of this court in McDowell and Co Ltd's case (supra). Hence, in the cases arising before April 1, 2002, losses pertaining to exempted income cannot be disallowed...."

It can be seen that the Hon'ble Supreme Court has distinguished the colourable device against the legitimate tax planning adopted by the assessee within four corners of the law. Hence, every tax planning cannot be considered to be a colourable device, if it is otherwise made within the provisions of the Act.

7. *In the instant case, the formation of partnership firm and transfer of shares held by the assessee as its capital contribution has not been doubted with. With regard to the observations that the shares were continued to be held in the demat account of the assessee, the Ld A.R submitted that a partnership firm cannot become a share holder and hence it is not entitled to open a demat account. Hence the shares belonging to a partnership firm is usually held in the name of its partner. Further it is seen from the paper book that the partnership firm has filed declaration before the Registrar of Companies that it is the beneficial owner of the shares held by assessee company. Further the declaration in Form No. I, as prescribed under the section 187-C of the Companies Act, has also been filed by the assessee company to the companies in which shares were held declaring that the partnership firm is the beneficial owner of the shares. Hence we are of the view that the assessee has adopted a tax planning within the four corners of law and hence the same cannot be considered as a colourable device.*

8. *Further, the accounts of the assessee have been audited and the same has been approved by the Share holders by adopting the same in the Annual General Meeting. The Hon'ble Supreme Court has held in the case of Apollo Tyres Ltd (255 ITR 273) that the accounts prepared and audited under the Companies Act, which has been approved by the share holders should not be disturbed by the assessing officer. It is also well settled proposition that the provision of sec. 115JB is a code by itself and hence the book profit has to be computed strictly in accordance with the said provisions. Under the provisions of sec. 115JB the share of profit from a partnership firm, which is exempt u/s 10(2A), is required to be excluded from book profit. In this view of the matter also, the action of the tax authorities cannot be upheld.*

9. *We also notice that the partnership firm cited above has filed its return of income for the year under consideration on 30-07-2011. It is stated that the return of income has been accepted as it is by the department.*

10. *In view of the foregoing, we are of the view that the assessee has adopted a legitimate tax planning within the provisions of the Act and the same cannot be considered to be a colourable device. Accordingly we set aside the order of Ld CIT(A) and direct the AO to exclude the share income from the partnership firm while computing the book profit u/s 115JB of the Act.*

11. *In the result, the appeal filed by the assessee is allowed.”*

5. Since the facts are identical in the instant case, consistent with the view taken by the co-ordinate bench in the case of M/s. Rahil Impex Pvt. Ltd. (supra), we set aside the order passed by the learned CIT(A) and direct the Assessing Officer to exclude share income from partnership firm while computing book profit u/s. 115JB of the Act.

6. In the result, appeal filed by the assessee is allowed.

Order has been pronounced in the Court on 5.4.2017.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 5/4/2017

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

PS

(Dy./Asstt. Registrar)
ITAT, Mumbai