



ITA No.3092/M/2009  
Skil Infrastructure Limited  
Assessment Year-2005-06

**आयकर अपीलीय अधिकरण “ई” न्यायपीठ मुंबई में।**

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

श्री शक्तिजीत दे, न्यायिक सदस्य एवं  
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

**BEFORE SHRI SAKTIJIT DEY, JM AND  
SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./I.T.A. No.3092/Mum/2009  
(निर्धारण वर्ष / Assessment Year: 2005-06)

<b>Deputy Commissioner of Income Tax Central Circle 25 Room No. 404 4<sup>th</sup> Floor, Aaykar Bhavan M.K.Road Mumbai – 400 020</b>	<b>बनाम/ Vs.</b>	<b>Skil Infrastructure Limited</b> <i>(consequent to amalgamation with Horizon Infrastructure Ltd.)</i> 534/535, Vyapar Bhavan 49, P.D. Mello Road Carnac Bunder Mumbai – 400 009
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. <b>AABCS-7689-F</b>		
(□ पीलार्थी / <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

□ पीलार्थी की ओर से / <b>Appellant by</b>	:	S.S. Kemwal, Ld. CIT DR
प्रत्यर्थी की ओर से / <b>Respondent by</b>	:	J.D. Mistri & S.K. Mutsaddi Ld. ARs

सुनवाई की तारीख / <b>Date of Hearing</b>	:	27/04/2017
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	07/06/2017



## आदेश / ORDER

### Per Manoj Kumar Aggarwal (Accountant Member)

1. The Captioned appeal by revenue for Assessment Year [AY] 2005-06 assails the order of Ld. Commissioner of Income Tax (Appeals)-Central-V [CIT(A)], Mumbai dated 12/03/2009 *qua* computation of *book profits* u/s 115JB consequent to capital gains on sale of certain shares. The main issue under dispute is adjustment to book profits u/s 115JB vis-à-vis conversion of certain investments into stock-in-trade and capital gains / business income/loss arising there-from at the time of sale.
2. As per record, the assessee namely *SKIL Infrastructure Limited* has amalgamated with *Horizon Infrastructure Ltd.* w.e.f. 01/04/2011 as per order of Hon'ble Bombay High Court dated 27/09/2013, a copy of which has been placed before us. Thereafter, *Horizon Infrastructure Ltd.* has changed its name w.e.f. 22/01/2014 to *SKIL Infrastructure Ltd.* (CIN L36911MH1983PLC178299) *vide fresh certificate of incorporation consequent upon change of name* issued by Registrar of Companies, Maharashtra dated 22/01/2014 which is taken on record. With this background, we proceed further in the matter.
3. Briefly stated the assessee, being *resident corporate assessee*, engaged in the business of *infrastructure development and technical consultancy relating to infrastructure development*, was assessed u/s 143(3) at loss of Rs.208.75 Crores under normal provisions and at book profit of Rs.141.63 crores u/s 115JB as against returned loss of Rs.209.33 crores filed by the assessee in 29/10/2005.



4. The assessee claimed *Long Term Capital Gains* as exempt u/s 10(23G) for Rs.343.97 crores on sale of 5,11,27,400 number of shares of *Gujarat Pipavav Port Ltd. [GPPL]*. These shares were earlier held as investment but converted from investment to *stock-in-trade* in AY 2002-03 at fair market value of Rs.80/- per shares as against average cost of Rs.12.72 per equity shares. The surplus thus arising for Rs.67.28 per equity share aggregating to Rs.343.97crores was credited to *capital reserve account* in AY 2002-03 at the time of conversion. To support the market value of Rs.80/- in the year of conversion, the assessee explained that the shares were purchased at the same price by *Unit Trust of India & New York Life International India Fund Mauritius LLC*. The copies of agreement for purchase of shares of GPPL by UTI and New York Life were furnished to AO.

5. The shares in question were sold during impugned AY i.e. on 30/03/2005 @ Rs. 40/- per share to consortium of investors led by *APMT Mauritius Ltd.* resulting into business loss of Rs.40/- per share aggregating to Rs.204.50 crores which was debited to *Capital Reserve Account* but claimed as *business loss* in the computation of income.

6. The Long Term Capital Gains claimed exempted u/s 10(23G) was found acceptable during the assessment proceedings in terms of statutory provisions and CBDT circular No. 772 dated 23/12/1998.

7. However, the Ld. AO proposed to include the exempt *Long Term Capital Gains* of Rs.343.97 crores for the purpose of computation of *book profits* u/s 115JB which was objected to by the assessee on the ground that the capital gains, whatever accrued to the assessee in the impugned AY, was recorded in the year of conversion i.e. AY 2002-03



itself and carried to *capital reserve account* having regard to the provisions of Part III of Schedule VI to the Companies Act, 1956. Further, bifurcation of gains / losses was done only in accordance with the provisions of Section 45(2). The *Long Term Capital Gains* so arrived was exempt u/s 10(23G) which led to this peculiar situation where there was no credit to Profit & Loss Account and yet there was a Long Term Capital Gain exempt u/s 10(23G) which was only due to the provisions of Section 45(2). Further, upon conjoint reading of proviso to Section 10(23G) & Section 115JB(2), no adjustment was called for this item. However, not convinced, Ld. AO added the amount of *Capital Gains* of Rs.343.97 crores to Book Profits u/s 115JB and reduced the Business Loss of Rs.204.50 Crores from the same and arrived at adjusted book profits of Rs.141.63 crores.

8. Aggrieved, the assessee carried the matter before Ld. CIT(A) successfully vide impugned order dated 12/03/2009 and raised similar pleas and placed reliance on the judgment of Apex court in *Apollo Tyres Ltd. Vs. CIT [255 ITR 273]* to contend that AO had no power to make adjustments in the Profit & Loss Account prepared in accordance with Part II & Part III of Schedule VI of the Companies Act. After considering the statutory provisions, submissions made by the assessee and material on record, Ld. CIT(A) was convinced with the arguments of the assessee and decided the issue in favor of assessee with following observations:-

*2.3. I have considered the assessment order and the submissions of the appellant. Looking into the relevant provisions of section 10(23G) and 115JB of the ITA, the provisions of the Companies Act, 1956, the principles of interpretation and the facts brought on record, I agree with the appellant that the Long Term Capital Gain cannot be included for the purpose of book profit. To this end, in the first place, I*



find that the Assessing Officer has placed a lopsided emphasis on the provisions of section 10(23G) of the ITA at the expense of the corresponding provisions of section 115JB of the ITA particularly, the meaning of the term book profit as envisaged in the Explanation to the section. As may be seen, this Explanation delineates book profit to mean 'the net profit as shown in the profit & loss account for the relevant previous year under sub-section(2)....' This would mean, the foundation of the book profit as envisaged in section 115JB of the ITA is the net profit of the relevant previous year as shown in the Profit & Loss Account of that year. Pitted against this test, I find that the Long Term Capital Gain added to the book profit by the Assessing Officer is not a component of the Profit & Loss Account of the year ended 31.03.2005. This is so because the Long Term Capital Gain already stands credited to the Capital Reserve Account for the previous year relevant to the assessment year 2002-03 as the conversion of these shares into stock in trade took place during this previous year and this accounting was also done in terms of Schedule VI of the Companies Act. Accordingly, I find that the Long Term Capital Gain in question not being part of 'the net profit as shown in the profit & loss account for the relevant previous year under sub-section(2).....' cannot be a subject matter of adjustment u/s115JB of the ITA. As may be seen, in this case, the Long Term Capital Gains arising out of the provisions of the section 45(2) of the ITA led to a situation where as per accounts the surplus on conversion was relatable to the previous year relevant to the assessment year 2002-2003, although in terms of section 45(2) of the ITA, it had to be offered for tax in the present year under consideration. This required a cumulative interpretation of the amendments in section 10(23G) and section 115JB of the ITA which the Assessing Officer failed to do. In this context, I find that taking a cue from the relevant amendment in section 10(23G) of the ITA, the corresponding amendment in sub clause (ii) of the Explanation to section 115JB of the ITA also had to be simultaneously taken into reckoning. The Assessing Officer has omitted to do this. From this perspective, as pointed out by the appellant, I find that sub clause (ii) of the Explanation to Section 115JB of the ITA dovetails the provisions of section 10(23G) in a manner that it talks of the retention of section 10(23G) income in the Profit & Loss account only if 'such amount is credited to the Profit & Loss Account'. It may also be noted that the sub clause (ii) talks of reduction of a number of items of incomes from the book profit if they stand credited to the Profit & Loss Account with the only exception in the case of section 10(23G) income, which is stipulated to be retained and not reduced. Pitted against this test, it may be seen that the Long Term Capital Gain in question here is not possible to be retained in the book profit for the simple basic reason that it is not credited to the Profit & Loss Account. It is obvious, what is not there is not possible to be retained. The Assessing Officer has done this without any corresponding enabling provision. In this respect, as pointed out by the appellant, I further found that the Long Term Capital gain in question is also not includible in the Profit & Loss Account of either the assessment year 2002-2003 or 2005-2006. This is in terms of Schedule VI of the Companies Act, in which, 'surplus on the valuation of assets and liabilities' is considered as Capital Reserve. Seen in this backdrop, I find that the appellant had rightly credited the surplus on account of conversion of the shares into the Capital Reserve Account in the previous year relevant to the assessment year 2002-03. For the A.Y. 2005-06 also, the surplus could not have been a part of the Profit & Loss account for the related previous year because the surplus actually



*pertained to the previous year relevant to the assessment year 2002-03. Clued into the foregoing, I find that the Long Term Capital Gain in question cannot be a subject matter of adjustment in section 115JB of the ITA as in terms of the sub clause (ii) of Explanation to the section 115JB of the ITA, the Long Term Capital Gain is found to be outside its ambit by virtue of being not includible in the Profit & Loss Account.*

*2.3.1. In this context, I find that sub section (2) of section 115JB of the ITA specifically stipulates that for the purposes of this section, a company has to prepare its Profit & Loss Account for the relevant previous year in accordance with the provisions of parts II and III of Schedule VI of the Companies Act, 1956. From this, it would follow that once the accounts are prepared as per schedule VI of the Companies Act, the profit arising out of such account would be the starting point for computation of the profit u/s 115 JB of the ITA and that only the adjustments sanctioned in Explanation to the section 115JB can be made to the profit computed in accordance with Schedule VI of the Companies Act. Placed on these touchstones, I find that the book profits in terms of the Explanation can be increased only by the amounts mentioned in clauses (a) to (h) of the Explanation to section 115JB. The inclusion of the Long Term Capital gain by the Assessing Officer does not figure in these clauses. In similar vein, it may be seen that the book profit can be reduced by the amounts mentioned in clauses (i) to (viii) of the Explanation. Placed on this touchstone, I find that the adjustment made is not in terms of any of the items listed in the Explanation i.e, either clauses (a) to (h) or clauses (i) to (viii). In adding the Long Term Capital Gains to book profit, the Assessing Officer has imported a surplus relating an earlier year (the previous year relevant to the assessment year 2002-03) to the Profit & Loss Account for the assessment year 2005-06 without there being any enabling provision either in section 115JB of the ITA or Schedule VI of the Companies Act. In this respect, as relied upon by the appellant, the decision of the Hon'ble Supreme Court in the case Apollo Tyres(supra) bears special mention. In this decision, the Hon'ble Supreme Court has specifically held that the Assessing Officer does not have the sanction to go behind the net profit shown in the Profit & Loss Account except to the extent provided in Explanation to section 115 J of the ITA. This also stands followed by the Hon'ble Bombay High Court in the case Kinetic Motors Company Ltd. Vs. DCIT(supra). As I note, so long as book profit has been drawn as per the Companies Act, it can be subjected to adjustment only in terms of the Explanation to section 115JB of the ITA and the adjustment in question here is against this basic premise. If at all, the section 10(23G) income could only have been retained in the book profit in terms of clause (ii) to explanation of Section 115JB of the ITA only if it stood credited to the Profit & Loss Account. As discussed above, this is also not the case here. The enabling provision for allowing retention of section 10(23G) income cannot be interpreted as enabling provision for making an addition to the book profit from the statement of income, of an item, which is legitimately outside the book profit and also not even a transaction of that year.*

*2.3.2 I also find that the unique nature of Long Term Capital Gain arising out of operation of section 45(2) of the ITA also should have been factored by the Assessing Officer. The peculiar nature of the incomes arising out of section 45(2) of the ITA creates a situation where the period of accounting treatment of the conversion given in the accounts is different from the period in which Long Term Capital gains becomes taxable. It is because of this that the appellant did not have*



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*to credit the surplus arising out of the conversion to the Profit and Loss account during the assessment year under consideration. Once this happened, the Long Term Capital gain being relatable to an earlier year went outside the purview of section 115JB of the ITA for the assessment year under consideration. Had the Long Term Capital Gain arisen u/s 45(1) of the ITA, its direct incidence would have been in the contemporaneous year and accordingly section 10(23G) and sub clause (ii) of Explanation to section 115JB of the ITA would have been in harmony. As against this, in the appellant's case, this harmony is missing since in its case, whereas the Long Term Capital Gain u/s 45(2) had its accounting implications during the assessment year 2002-03, it had its Capital Gain incidence during the assessment year 2005-06. In this respect, the appellant's reliance on the decisions on interpretation of statutes is apt and appropriate. As mentioned by the Hon'ble Supreme Court in the case K.P Verghes Vs. ITO (supra) statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. Similarly, in the case Polestar Electronics (P) Ltd. (supra), it has been categorically emphasized that interpretation of statutes should be construed according to the plain natural meaning of its language and that no words are to be added or modified unless it is plainly necessary to do so. The essence of the decisions relied upon by the appellant is that interpretation of statutes should be harmoniously done so that interpretation is reconcilable with the rest of the statutes. In this case, the Assessing Officer has not reconciled the provisions of section 10(23G) with the corresponding provisions of section 115JB of the ITA.*

*2.3.3 In the light of the foregoing, I find that there is no case for addition of the Long Term Capital Gain of Rs.343,97,14,143/- to the book profit u/s 115JB of the ITA. The addition is deleted and the ground of appeal is allowed.*

Aggrieved, the revenue is in appeal before us.

9. The Ld. Departmental Representative [DR] drew our attention to the provisions of Section 10(23G) and contended that the income arising under these provisions was clearly includible for the purpose of *book profits* u/s 115JB. Further, no adjustment of this income was required to be done in terms of Explanation-1 to Section 115JB. Therefore, the assessee was under an obligation to credit the surplus to Profit & Loss Account but failed to do so and therefore, AO rightly added the same to Book Profits u/s 115JB.

10. Per contra, Ld. AR placed reliance on the findings of Ld. CIT(A) and raised similar contentions and explained that the assessee



converted its investments into stock-in-trade in AY 2002-03 as per prevailing fair market price on the date of conversion and credited the notional surplus to *capital reserves account* in terms of Schedule VI to the Companies Act. The revenue has accepted the factum of conversion and nowhere disputed the same. The said shares were sold in the impugned AY and therefore, the resultant profit / gain was to be bifurcated as '*Capital Gains*' or '*Business Income*' as per the provisions of Section 45(2) and following the same the assessee has done so. The *Long Term Capital Gains* has been found to be exempted u/s 10(23G) by the revenue whereas business loss is clearly allowable to the assessee in terms of statutory provisions. Therefore, whatever accounting methodology has been adopted by the assessee to record the above transactions in the books of accounts, they are in consonance with the requirements of Schedule VI of the Companies Act. Our attention has been drawn to the fact that starting point for computation of Book Profit u/s 115JB is '*Net Profit As shown in the Profit & Loss Account*' which is to be increased / decreased by certain items as given in the explanation 1 to Section 115JB and nothing more and nothing less. Therefore, AO had no power to tinker with the financial statements of the assessee which has been drawn as per the requirements of Schedule VI as per the decision of Hon'ble Supreme Court in *Apollo Tyres Ltd. Vs. CIT [255 ITR 273]*. Further, the *Long Term Capital Gain* earned by the assessee could be a part of Book Profit only if the same was credited to the profit & loss account, which was not the case here and therefore, Ld. CIT(A) after due application of mind provided relief to the assessee.



Reliance has been placed on the decision of Hon'ble Bombay High Court in *CIT Vs. Bisleri Sales Ltd. [ITA No. 1436 of 2013 dated 30/06/2015]*.

11. We have heard the rival contentions and perused relevant material on record including cited case laws. The undisputed facts are that the assessee has earned certain Long Term Capital Gains on certain shares which were converted from investment into stock-in-trade during AY 2002-03 but finally sold in impugned AY and therefore, taxable as per the provisions of Section 45(2). The fair market value of Rs.80/- per share adopted by the assessee in the year of conversion and final sale value of Rs.40/- per share earned by the assessee is nowhere in dispute. The resultant surplus upon conversion amounting to Rs.343.97 Lacs has been transferred to *Capital Reserve Account* as per the requirement of Schedule VI of the Companies Act.

12. We find that the above facts have given rise to a peculiar situation in the impugned AY where the assessee, although has earned capital gains, but no credit is there in the Profit & Loss Account which is only due to the provisions of Section 45(2).

13. We also find that, whatever accounting methodology has been adopted by the assessee to record the above transactions in the books of accounts, they are in consonance with the requirements of Schedule VI of the Companies Act and the Ld. AO, as per the decision of Hon'ble Supreme Court in *Apollo Tyres Ltd. Vs. CIT [supra]* could not tinker with the profits shown by the assessee as per the Companies Act. In the said judgment, the Apex court clearly held that the Assessing Officer has to accept the authenticity of the accounts maintained in accordance with the provisions of Companies Act, 1956 which are duly audited and



passed in general body meeting of shareholders. It was also held that the Assessing Officer has no power to disturb the profits in the Profit & Loss Account except to the extent provided in explanation to Section 115J. To put it differently, the assessing officer does not have the jurisdiction to go beyond the net profit shown in the Profit & Loss Account except to the extent provided in the Explanation to Section 115J and therefore, the AO has to accept the profit as per the profit & loss account prepared in accordance with the companies act and thereafter he can proceed to make the additions and deletions set out in the explanation to Sec 115J of the act. He cannot make any adjustment which is not permitted under explanation to Sec 115J of the Act. The interpretation as above by the Apex court will equally apply to 115JB as those provisions are identical to provisions of Sec 115J with certain variations which does not in any way alter the starting point of computation of book profit u/s 115J of the act. It is also well settled that the MAT provisions are a complete code in itself and deeming fiction to be construed strictly and therefore, whatever computations are to be made, they are to be made strictly in accordance with the provisions provided in the code itself.

14. Therefore, on the facts and circumstances, we find that Ld. CIT(A) clinched the issue in the proper perspective and provided relief to the assessee in accordance with the law. This being so, we find no reason to interfere with the same and no hesitation in dismissing revenue's appeal. Both the adjustments of '*Capital Gains*' and '*Business Loss*' done in the computation of MAT profits u/s 115JB stands deleted. The Ld. AO is



directed to re-compute Book Profit u/s 115JB in terms of our above order.

15. In nutshell, the revenue's appeal stands dismissed.

*Order pronounced in the open court on 07<sup>th</sup> June, 2017.*

Sd/-  
(Saktijit Dey)

न्यायिक सदस्य / **Judicial Member**  
मुंबई Mumbai; दिनांक Dated : 07.06.2017  
Sr.PS:- Thirumalesh

Sd/-  
(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

**आदेश की प्रतिलिपि □ प्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**  
**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**