

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "SMC", MUMBAI**

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER

**ITA No.6310/M/2017
Assessment Year: 2013-14**

Income Tax Officer-11(1)(3), Room No.201, Aayakar Bhavan, M.K. Marg, Mumbai – 400 020	Vs.	M/s. Savannah Real Estate Pvt. Ltd., 401/B, West View, Bajaj Road, Vile Parle, Mumbai-400 057 PAN: AAICS6458B
(Appellant)		(Respondent)

Present for:

Assessee by : Shri B.V. Jhaveri, A.R.
Revenue by : Ms. Aarjoo Garadia, D.R.

Date of Hearing : 16.01.2018
Date of Pronouncement : 07.02.2018

ORDER

Per D.T. Garasia, Judicial Member:

The present appeal has been preferred by the Revenue against the order dated 01.06.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2013-14.

2. The assessee company has filed the appeal on 17.02.17 whereas the date for filing the appeal under section 250 as per Form No.35 was 13.04.16. Thus, there was delay of 10 months in preferring the appeal. The Ld. CIT(A) has condoned the delay and admit the appeal by observing as under:

“16.The appellant company also relied on the decision of the Supreme Court in the case of Collector, Land Acquisition vs. *Mst. Katiji & Ors.* (167 ITR 471) wherein the Supreme Court had observed that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be

preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

After considering the application for condonation of delay and the affidavit of Mr. Mohamed Husain Patel, I am satisfied that there is no mala fide in not filing the appeal within the prescribed time provided under the Act. In fact, the appellant company had acted as per the advice of the Advocate who is supposed to know the law. In these circumstances, I condone the delay in preferring the present appeal and admit the appeal.”

3. I have heard the rival contentions of both the parties. I find that the Ld. CIT(A) has condoned the delay on the ground that one Mr. Husain Patel, Advocate from M/s. CG Kaka and Co. who was the authorised representative of the company attended before the AO advised the company not to file appeal in this case. Thereafter, he has also filed the affidavit that he has advised the assessee not to file an appeal and due to his advice assessee could not file an appeal within time. Therefore, there was delay. The Ld. CIT(A) has condoned the delay by following the Hon’ble Supreme Court judgment in the case of Collector, Land Acquisition vs. Mst. Katiji & Ors. 167 ITR 471.

4. The short facts of the case are as under:

On perusal of the P&L Account, it is seen that the net profit of the assessee company is Rs.82,98,960/-. However, on perusal of the statement of computation of income, it is seen that while computing the normal income, the assessee company has deducted Rs.82,86,067/- being profit on sale of office and taxable profit was shown at Rs.12,893/-. Further, it is also seen that, while computing the book profit u/s 115JB, the assessee has taken book profit at Rs.12,893/- instead of net profit of Rs. 82,98,960/-. Therefore, vide

order sheet noting dated 29.10.2015, the Ld. AR of the assessee was asked to explain as to why the book profit should not be taken at Rs.82,98,960/- (i.e. net profit as per P&L Account) without reducing the profit on sale of office which is considered under Long Term Capital Gain. In response to the same, the Ld. AR of the assessee vide letter dt. 25.02.2016 has submitted its submission which is reproduced as under:

"During the year our client has shown book profit Rs. 82,98,9601- which includes Long Term Capital Gain of Rs. 82,86,0671- on Sale of the office premises. Therefore, the said capital gain was excluded from the book profit as capital gain on the same was shown under the head Capital Gain on Sale of the office premises and the necessary tax thereon was paid. Since capital gain is taxed separately the provision of MAT u/s 11 5JB does not apply. However, as required by your goodseif we enclose a working u/s 11 5JB taking also the Capital Gain as book profit."

5. The AO has considered the explanation and held that there is no provision under section 115JB of the Act that the profit on long term capital gain should be reduced from net profit while calculating the book profit and he disallowed the same.

6. Matter carried to the Ld. CIT(A) and the Ld. CIT(A) has allowed the claim by observing as under:

"7. In this respect the assessee relies on the decision of the Hon'ble Tribunal, Bangalore Bench, in the case of Karnataka State Industrial Infrastructure Development Corporation Ltd. vs DCIT (76 taxmann.com 360) wherein the Hon'ble Tribunal held as under:

"Therefore following the same ratio, we hold that the amount of profit eligible u/s 10(38) should alone be considered for the purpose of tax liability u/s 115JB of the Act. The co-ordinate bench in the case of M.S.R & Sons Investments Ltd. v. Dy. CIT [IT Appeal No.769 (Bang.) of 2000, dated 20-05-2005] held while computing capital gains, benefit of indexed cost of acquisition is to be considered for the purpose of computing tax liability u/s 115JB. This decision was appealed by the Revenue before the Hon'ble jurisdictional High Court in ITA No.3189 of 2005 and the Hon'ble jurisdictional High Court by its judgment dated 14th September 2011 had upheld the order of the Tribunal. The same ratio is squarely applicable to the facts of the case. Therefore, the assessee-company is entitled to the

benefit of indexation while calculating long-term capital gains which are to be considered for the purpose of computing tax liability u/s 1 15JB of the Act. This ground of appeal viz. 2(b) is allowed."

8. In view of the above, the assessee submits that the benefit of indexation u/s. 48 of the Act, i.e., the indexed cost of acquisition, is to be allowed to the assessee while computing the capital gain to be added to the book profit to be computed u/s. 11 5JB of the Act.

9. The assessee further submits that the assessee is also entitled to exemption of Rs.50,00,000/- claimed by the assessee u/s. 54EC of the Act for the purpose of computation of long term capital gain to be added to the book profit u/ s. 11 5JB of the Act.

10. In this respect, the assessee relies on the decision of the Madras High Court in the case of CIT vs. Metal & Chromium Plater P. Ltd. (76 taxman n.com 229) wherein the High Court held as under:

The allowance or otherwise of the claim under Section 54EC has to be seen in the context of the provisions of Section 1 15JB which is a self contained code of assessment. The levy of tax is on the book profits after effecting various upward and downward adjustments as set out in terms of the Explanation thereto. The provisions of sub-section (5) of s. 1 15JB open the assessment to the application of all other provisions contained in the Income tax Act except if specifically barred by that section itself. S. 1 15JB (5) reads as follows:

"(5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.'

"7. Thus, the adjusted book profits would be further eligible to the benefits set out in the other provisions of the Act and the plain language of Section 115JB thus admits of the grant of relief under section 54EC in an assessment there under. We now deal with the case law relied upon by the Assessing officer in denying relief to the assessee. The Supreme Court, in the case of Apollo Tyres Ltd. (supra) is to the effect that the assessing officer is not empowered to embark on an enquiry with regard to the entries in the profit and loss account maintained in accordance with the provisions of the Companies Act 1956 and approved in the AGM except to the extent of effecting modifications in accordance with the Explanation to section 11 5J. The Bombay High Court in the case of Veekaylal Investments (supra) considers the inclusion of capital gain for the purposes of assessment under section 115J. Both judgements are rendered in the context of Section 115J which does not contain a provision analogous to subsections (4) of section 1 15JA or (5) of section 1 15JB of the Act. Thus while an assessment u/s 115J would be concluded exclusively on the basis of the book profits as adjusted by the items set out in the Explanation there under, in an assessment in terms of sections 115JA or JB, the adjusted book profits would be further subjected to the effect of other provisions of the Act that are specifically brought into play

by virtue of sub-sections (4) of section 115JA and (5) of section 115JB.

8. Reliance of the learned standing counsel on the decision of the Division Bench of the Kerala High Court in the case of N.J. Jose and Co. (P.) Ltd. v. Asstt. CIT [2010] 321 ITR 132/[2008] 174 Taxman 141 is also distinguishable for the same reason as aforesaid.

11. In view of the above discussion, the substantial question of law is answered against the Revenue and in favour of the assessee. The departmental appeal is dismissed without costs."

12. Therefore, the assessee is also entitled to exemption of Rs.50,00,000/- claimed by the assessee u/s. 54EC of the Act for the purpose of computation of long term capital gain to be added to the book profit u/s. 115JB of the Act."

7. I have heard the rival contentions of both the parties. Looking to the facts and circumstances of the case, I find that the issue in controversy is covered by the decision of Hon'ble Madras High Court in the case of CIT vs. Metal & Chromium Plater P. Ltd. 726 ITR 29. Respectfully following the same, we dismiss the departmental appeal.

Order pronounced in the open court on 07.02.2018.

**Sd/-
(D.T. Garasia)
JUDICIAL MEMBER**

Mumbai, Dated: 07.02.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.