

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Vice-President (KZ) &
Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. No. 1517/KOL/2015
Assessment Year: 2011-2012**

Deputy Commissioner of Income Tax,.....Appellant
Circle-10(2), Kolkata,
Aayakar Bhawan, 3rd Floor,
P-7, Chowringhee Square,
Kolkata-700 069

-Vs.-

M/s. V2 Retail Limited,.....Respondent
Plot No.08, Pocket No. 02, Rangpuri Extension,
Mahipalpur,
New Delhi-110 037
[PAN: AABCV 5632 P]

&

C.O. No. 123/KOL/2017
(arising out of I.T.A. No. 1517/KOL/2015)
Assessment Year: 2011-2012

M/s. V2 Retail Limited,.....Cross Objector
Plot No.08, Pocket No. 02, Rangpuri Extension,
Mahipalpur,
New Delhi-110 037
[PAN: AABCV 5632 P]

-Vs.-

Deputy Commissioner of Income Tax,.....Respondent
Circle-10(2), Kolkata,
Aayakar Bhawan, 3rd Floor,
P-7, Chowringhee Square,
Kolkata-700 069

Appearances by:

Md. Usman. CIT, D.R., for the Department

Shri R.P. Agarwal Sr. Counsel, Sri K.K. Chhaparia, FCA & Shri Nirav Sheth, ACA,
for the Assessee

Date of concluding the hearing : September 25, 2018

Date of pronouncing the order : October 31, 2018

O R D E R

Per Shri P.M. Jagtap, Vice-President (KZ):-

This appeal is preferred by the Revenue against the order of Id. Commissioner of Income Tax (Appeals)-4, Kolkata dated 01.10.2015 and the same is being disposed of along with the Cross Objection filed by the assessee being C.O. No. 123/KOL/2017.

2. The main issue involved in the appeal of the Revenue relates to the deletion by the Id. CIT(Appeals) of the addition of Rs.605.23 crores made by the Assessing Officer on account of Capital Reserve while computing the book profit of the assessee-company under section 115JB of the Income Tax Act, 1961 and the same is raised by way of Grounds No. 1 to 4, which read as under:-

"1. That the Ld. CIT(A) has erred in law as well as on fact by deleting the addition of Rs. 605,23,24,263/- being the sum credited to Capital Reserve to Book Profit computed u/s. 115JB of the IT Act, 1961.

2. That the Ld. CIT (A) has erred in law as well as on fact that the assessee has not prepared its profit and Loss account in accordance with the provision of Parts II and III of Schedule VI of the Companies Act, 1956 as required by the provisions of sec. 115JB(2) of the Act.

3. That the Ld. CIT(A) has erred in law as well as on fact that while computing the total income as per the normal provision of the Act, the assessee treated the entire surplus capital receipt of Rs.605,23,24,263/- as part of its total taxable income but not considered it for computing its Book Profit.

4. That the Ld. CIT(A) has erred in law as well as on fact that the AO was in his right to recast the P&L Account for arriving at the Book Profit since the assessee has not complied with the requirements of sec. 115JB of the Act".

3. The assessee in the present case is a Company, which is engaged in the business of trading in cloth and plastic goods on retail basis. The return of income for the year under consideration was filed by it on 28.09.2011 declaring a loss of Rs.18,03,12,031/-. During the course of assessment proceedings, it was noticed by the Assessing Officer that the assessee-company has credited an amount of Rs.6,05,23,24,263/- directly to Capital Reserve under the head "Reserves & Surplus" in the balance-sheet. In this regard, he noted that the following Notes to the Accounts have been disclosed by the assessee-company in the Annual Accounts:-

"Business Restructuring:

The company has restructured its business during the year by way of sale of its Wholesale and Retail businesses to TPG Wholesale Private Limited and Airplaza Retail Holdings Pvt. Ltd. (referred to as Acquiring Companies) respectively. The Master Restructuring Agreement and other settlement agreements were entered into by the Company with the Acquiring Companies and its Lenders to effect the said restructuring and COR proposal of the Company. As a result of the said agreement the liabilities to the extent of Rs.823.20 crores and assets of Rs.393.78 crores were taken over by the acquiring companies against a consideration of Rs.70 crores. The Slump Sale transaction resulted in a Capital Reserve of Rs. 499.42 crores.

As a part of the said restructuring some unsecured lenders of the company also waived off their claims to the extent of Rs.105.81 crores which has also been transferred to Capital Reserve Account".

The entire income/surplus accruing to the assessee-company on account of sale of business and waiver of loan thus was treated as capital receipt and credited to the Capital Reserve directly without routing it through the Profit & Loss Account. According to the Assessing Officer, this treatment given by the assessee-company was wrong and it was required to route the said amount through Profit & Loss Account as per the provisions of Part-II and Part-III of the Companies Act, 1956. He, therefore, held that the said amount was required to be added while

computing the book profit of the assessee-company under section 115JB of the Act. Accordingly an adjustment was made by the Assessing Officer while computing the book profit of the assessee under section 115JB of the Act.

4. The addition/adjustment made by the Assessing Officer on account of Capital Reserve while computing its book profit under section 115JB of the Act was challenged by the assessee in the appeal filed before the Id. CIT(Appeals) and after considering the submissions made by the assessee as well as the material available on record, the Id. CIT(Appeals) deleted the said addition/adjustment mainly for the following reasons given in his impugned order:-

"The Supreme Court judgment in the case Apollo Tyres Ltd v CIT (supra) and Malayala Manorama Co Ltd vs CIT (supra) clearly held that the AO has no power to recast the audited profit and loss account. The Apex Court's judgments have been recently applied by some courts in various rulings as below:

In the case of Forever Diamonds (P) Ltd. vs Deputy Commissioner of Income Tax, Central Circle -I, (Mumbai) (supra) - (order passed on 23-01-2013) it has been held as follows:

"The issue raised has already been considered and decided by the Supreme Court In the case of Apollo Tyres Ltd. v CIT [2002] 255 ITR 273/122 Taxman 562 the Supreme Court observed that section 115J provisions of which were similar to those of section 115JB, was introduced in the Income tax Act with a deeming provision which made companies liable to pay tax at least at 30 per cent of book profit shown in its own accounts. For the said purpose, section 115J made income reflected in the company's book of account, the deemed income for the purpose of assessing the tax.

The Supreme Court further observed that the use of the words 'in accordance with the provisions of Part-II and Part-III of Schedule VI of the Companies Act' was made

for the limited purpose of empowering the assessing authority to rely upon the authentic statement of accounts of the company and while so looking into the accounts of the company, the Assessing Officer had to accept the authenticity of the accounts.

It was so held by the Supreme Court that the Assessing Officer has only the power to examine whether books of account are certified by authorities under the Companies Act as having been properly maintained in accordance with the provisions of the Companies Act. The Assessing Officer, thereafter, has limited power of making adjustments as provided in Explanation to section 115J.

It is, thus clear that once accounts are prepared under the Companies Act and have been certified by the authorities. The Assessing Officer cannot tinker with the accounts and make any changes while computing book profit except making adjustments as provided in Explanation to section 115JB. The addition made by the Assessing Officer and confirmed by Commissioner (Appeals) on account of profit on sale of asset not disclosed in the profit and loss account prepared under the Companies Act cannot, therefore, be sustained. Therefore, order of Commissioner is set aside and the addition made is deleted”.

The aforesaid Judgment has been recently affirmed by the Bombay High Court dated August 12, 2015 wherein, it has been held that the issue stands settled by the decision of the Apex Court in Apollo Tyres Ltd v. CIT [255 ITR 273 (SC)], and In Adbhut Trading Co. (e) Ltd.[2012] 338 ITR 94(Bom), the question as proposed does not give to any substantial question of law. Accordingly the appeal was dismissed.

In the case of Adbhut Trading Co. (P.) Ltd. [2012] 338 ITR 94 (Bom.), the Hon'ble Bombay High Court held that where accounts are certified by authorities under Companies Act, the Assessing Officer cannot contend that accounts are not properly maintained.

Thus, in view of the foregoing discussions and relying on the Apex Court judgments in the case of Apollo Tyres Ltd vs. CIT (supra) and Malayala Manorama Co Ltd vs. CIT (supra) on the pertinent issue at hand, I am of the view

that the A.O. has erred in recasting the 'profit' as per audited accounts as laid down at the AGM of the company. In view of this, the AO is directed not to consider the amount of Capital Reserve of Rs.605,23,24.263/- while calculating book profit u/s 115JB of the Act".

5. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. As held by the Hon'ble Supreme Court in the case of Apollo Tyres, the Assessing Officer has no power to recast the audited Profit & Loss Account of the assessee-company and he cannot tinker with such accounts, which are duly certified by the authorities under the Companies Act and make any changes while computing book profit except making adjustments as provided in Explanation to section 115JB and this position well settled by the Hon'ble Supreme Court and followed by the different High Courts has not been disputed even by the ld. D.R. He, however, has relied on Clause (b) of Explanation (1) to Section 115JB to contend that the amounts carried to any reserves, by whatever name called [other than a reserve specified under section 33AC] are required to be added while computing the book profit under section 115JB and the adjustment made by the Assessing Officer on account of the amount in question carried directly by the assessee to Capital Reserve was permissible as per Clause (b) of Explanation (1) to Section 115JB. He has contended that the ld. CIT(Appeals), however, has completely ignored the said provision and deleted the adjustment made by the Assessing Officer by following blindly the decision of the Hon'ble Supreme Court in the case of Apollo Tyres (supra). However, as rightly pointed out by the ld. Counsel for the assessee, the adjustment on account of the amounts carried to any reserves, by whatever name called is permissible as per Clause (b) of Explanation (1) to Section 115JB only if such amounts are debited to the Profit & Loss Account as clearly provided in Explanation (1) to Section 115JB and since the amount in question transferred to the Capital

Reserves directly by the assessee-company was not debited to the Profit & Loss Account as clearly mentioned by the Assessing Officer himself in the assessment order, we find merit in the contention of the Id. Counsel for the assessee that the adjustment made by the Assessing Officer while computing the book profit under section 115JB was not permissible even as per Clause (b) of Explanation (1) to section 115JB. Even the Id. D.R. has not been able to dispute this position, which is clearly evident from the clear language used in Explanation (1) to Section 115JB. We, therefore, find no merit in the case of the Revenue on this issue and upholding the impugned order of the Id. CIT(Appeals) deleting the addition/adjustment made by the Assessing Officer on account of Capital Reserve while computing the book profit of the assessee under section 115JB of the Act, we dismiss Grounds No. 1 to 4 of the Revenue's appeal.

6. As regards the other issue involved in Ground No. 5 of the Revenue's appeal relating to the deletion by the Id. CIT(Appeals) of the addition of Rs.10,58,944/- made by the Assessing Officer by way of disallowance of employees contribution to Provident Fund/Employees State Insurance (ESI) paid by the assessee beyond the due dates prescribed in the respective statute, the Id. Representatives of both the sides have agreed that this issue is squarely covered in favour of the assessee, *inter alia*, by the decision of the Hon'ble Calcutta High Court in the case of Vijay Shree Limited (ITA No. 244/KOL/2011 dated 07.12.2011), wherein it was held by the Hon'ble Jurisdictional High Court by following the decision of the Hon'ble Supreme Court in the case of Alom Extrusion Limited that the amount paid on account of employees contribution before the due date of filing the return of income for the relevant year could not be disallowed as per the amendment made to section 43B by the Finance Act, 2003. Respectfully following the said binding precedent, we uphold the impugned order of the Id. CIT(Appeals) deleting the addition made by the Assessing Officer by way of

disallowance of belated payment of employees contribution to P.F/ESI and dismiss Ground No. 5 of the Revenue's appeal.

7. At the time of hearing before the Tribunal, the Id. Counsel for the assessee has sought permission from the Bench to withdraw the Cross Objection filed by the assessee. Since the Id. D.R. has no objection in this regard, the permission as sought on behalf of the assessee is granted and the Cross Objection filed by the assessee is dismissed as withdrawn.

8. In the result, the appeal of the Revenue and the Cross Objection of the assessee both are dismissed.

Order pronounced in the open Court on October 31, 2018.

Sd/-
(S.S. Viswanethra Ravi)
Judicial Member

Sd/-
(P.M. Jagtap)
Vice-President (KZ)

Kolkata, the 31st day of October, 2018

- Copies to :
- (1) **Deputy Commissioner of Income Tax,
Circle-10(2), Kolkata,
Aayakar Bhawan, 3rd Floor,
P-7, Chowringhee Square,
Kolkata-700 069**
 - (2) **M/s. V2 Retail Limited,
Plot No.08, Pocket No. 02, Rangpuri Extension,
Mahipalpur,
New Delhi-110 037**
 - (3) **Commissioner of Income Tax (Appeals)-4, Kolkata,**
 - (4) **Commissioner of Income Tax-** ,
 - (5) **The Departmental Representative**
 - (6) **Guard File**

By order

**Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata**

Laha/Sr. P.S.