

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH (A), KOLKATA
[Before Shri P.M. Jagtap, Vice President & Shri S.S. Viswanethra Ravi, JM]**

I.T.A. No. 1515/Kol/2013
Assessment Year: 2004-05

DCIT, Circle - 1, Kolkata.....Appellant
P-7, Chowringhee Square,
Kolkata - 700 069.

M/s. Stewarts & Lloyds of India Ltd.....Respondent
41, Chowringhee Square,
Kolkata - 700 071.
[PAN: AAEC5 0445 G]

Appearances by:

Shri C.J. Singh, Sr. DR (JCIT) appearing on behalf of the Revenue.

None appearing on behalf of the Assessee.

Date of concluding the hearing : March 18, 2019

Date of pronouncing the order : March 22, 2019

ORDER

Per P.M. Jagtap, Vice President

This appeal is preferred by the revenue against the order of Ld. CIT(A) - 20, Kolkata dated 21.02.2013.

2. At the time of hearing fixed on 18.03.2019, none has appeared on behalf of the assessee in spite of the fact that the notice of the said hearing was sent to the assessee by RPAD. There was a similar non-compliance on the part of the assessee even on the earlier occasions when the appeal was fixed or hearing on 12.12.2017, 03.04.2018, 08.11.2018, 10.01.2019 and 04.02.2019. This appeal of the revenue is, therefore, being disposed of ex-parte qua the respondent assessee after hearing the arguments of the learned DR and perusing the relevant material available on record.

3. In Ground No. 1, the revenue has challenged the action of the Ld. CIT(A) in deleting the disallowance of Rs. 5,55,561/- made by the AO on account of works contract tax.

4. The assessee in the present case is a company which is engaged in the business of fabrication and erection of piping net work, manufacture of buttwelded pipe fittings and super heater economiser coils. The return of income for the year under consideration was filed by it on 01.11.2004 declaring a total income of Rs. 2,15,82,920/-. In the profit and loss account filed along with the said return, a sum of Rs. 16,63,386/- was debited by the assessee on account of works contract tax. On perusal of the details of the same as furnished by the assessee, the AO found that the sum of Rs. 5,55,561/- was not related for the year under consideration. He, therefore, disallowed the claim of the assessee on account of works contract tax to the extent of Rs. 5,55,561/-.

5. The disallowance made by the AO on account of works contract tax was challenged by the assessee in the appeal filed before the Ld. CIT(A) and after considering the submissions made by the assessee as well as the material available on record, the Ld. CIT(A) deleted the said disallowance for the following reasons given in paragraph No. 5.2 of his impugned order:

"I have perused the assessment order and considered the submission of the appellant. The fact of the case is that a work contract tax was levied by the State Govt. on contract receipts as the appellant engaged in the business of construction/fabrication etc. The appellant argued that as per the applicable provisions the tax was deducted at source from the payment received by the appellant and paid to the Government directly by the deductor on behalf of the appellant and certificate confirming the

same was issued to the appellant. The appellant would thus accounted for the works contract tax liability in the year in which the corresponding works receipts were accounted for by it. On the other hand, tax was deducted and paid by the payee in the year in which the corresponding liability was booked by it, pr payment was made by it. In such event the year of claiming deduction for the works contract tax by the appellant and the year of payment of the corresponding amount by the payee might differ. As the liability for payment of works contract tax lies with the payee and not on the appellant, as and when the works was executed and the amount of erection sales was accounted for and offered to tax, the appellant claimed deduction for the corresponding amount of work contract tax incurred on such erection sales/works receipt. The AO had disallowed the claim for deduction on account of works contract tax as aforesaid amount on the sole ground that the same did not relate to the FY under consideration. The AO had come to the aforesaid conclusion because the corresponding certificate had been issued by the deductor in the subsequent year. The appellant had accounted for and claimed deduction for Rs. 5,55,561/- in the instant year as it pertained to the invoices raised in the instant year. I find merit in the argument of the appellant, hence, appeal on this ground is allowed."

6. We have heard the arguments of learned DR on this issue and also perused the relevant material available on record. Although the learned DR has contended that the amount in question on account of works contract tax liability was not related to the year under consideration on the basis of deduction of the said tax by the concerned party and payment thereof in the subsequent year as mentioned in the relevant certificate, it is observed that the corresponding works receipts were accounted for by the assessee in the year under consideration as found by the Ld. CIT(A). As rightly held by him, when the works was executed and amount of erection sales was accounted for and offered to tax in the year under consideration, deduction for the corresponding amount of works contract tax incurred on such erection sales / works receipt was rightly claimed by the assessee as deduction. The Ld. CIT(A) thus

allowed the claim of the assessee by applying the matching principle and we do not find any infirmity in his impugned order giving relief to the assessee on this issue calling for any interference. The same is accordingly upheld and ground No. 1 is dismissed.

7. In Ground No. 2, the revenue has challenged the action of the Ld. CIT(A) in deleting the disallowance of Rs. 1,11,68,443/- made by the AO on account of alleged unascertainable payments to sub-contractors.

8. In the profit and loss account a sum of Rs. 8,38,48,990/- was debited by the assessee on account of payments to sub-contractors. On perusal of the relevant details furnished by the assessee in this regard, the AO found that no tax at source was deducted by the assessee from the labour charges of Rs. 1,11,68,443/-. He held that the said labour charges in the absence of TDS were not ascertainable and a disallowance of Rs. 1,11,68,443/- was made by him observing that the labour charges to that extent were unascertainable and the same were claimed by the assessee on provisional basis.

9. The disallowance made by the AO out of labour charges was challenged by the assessee in the appeal filed before the Ld. CIT(A) and after considering the submissions made by the assessee as well as the material available on record, the Ld. CIT(A) deleted the said disallowance made by the AO for the following reasons given in paragraph No. 6.2 of his impugned order:

"I have perused the assessment order and considered the submission of the appellant. The appellant with supporting facts and figures/documents

submitted that the contractors charges should be at Rs. 94,50,715/- as against taken at Rs. 1,11,68,443/- by the AO. After careful consideration of the details / documents, I agree with the submission of the appellant that these figures should be at Rs.94,50,715/-- The appellant argued that out of total amount towards contract charges, Rs. 3,92,386/- pertains to payment made to the parties which was less than Rs. 20,000/-, Rs. 6,80,969/- was paid directly by the appellant's bankers, SBI in terms of the Session Court's order to T.K. Kar a sub-contractor of the appellant as the amount was paid by the bank sub-contractor debiting the bank account of the appellant there was no scope for the appellant to the effect to make deduction of tax at source. The relevant communication of the SBI intimating the above fact of payment was filed. Balance amount of Rs. 83,77,359/- represents provision in relation to unbilled sales. As it could be seen from the Significant Accounting Policies followed by the company, revenue from erection contracts were recognized on the percentage completion method, in proportion that the contract costs incurred for work performed as techno commercially assessed by the management upto the reporting date bear to the estimated total contracts costs. The impugned amount of Rs. 83,77,359/- pertains to different contracts undertaken by the appellant and remaining under progress at the end of the year. Details of the same showing the amount of revenue booked in the accounts in the instant year in the form of unbilled sales, along with the corresponding cost incurred in relating to the said unbilled sales, including amount payable to sub-contractors for the jobs executed by them were filed. Unbilled sales basically refers to revenue booked in the accounts on the percentage completion method for incomplete contracts at the end of the year. It was stated as unbilled sales because the contracts had to reach the desired stage of completion for rendering the appellant to raise the bills on the client. On back to back basis, the appellant also books corresponding expenditure incurred by it, including sub-contractor charges for earning the revenue so booked in the accounts. The methodology followed by the appellant in order to determine the unbilled revenue as well as the relation to expenses included in the sub-contractor charges was filed. The expense incurred during the year was used to determine its percentage to total estimated cost. The same percentage was used to determine the revenue to be recognized during the year out of total contract revenue. In the unlikely event if the said sub-contractors charges were held to be unascertained and the income chargeable to tax was increased in the hands of the appellant, simultaneously the revenue so booked should also not be considered for the purpose of computing the total income chargeable to tax. The accounting system followed by the appellant and the basis adopted by the

appellant for estimating the value of contract revenue and the corresponding sub-contractors charges was as per the revised accounting standards and accepted accounting principles. In view of the facts and circumstances of the case as discussed above, I find merit in the argument of the appellant in this regard, hence appeal on this ground is allowed."

10. We have heard the arguments of learned DR on this issue and also perused the relevant material available on record. Although the learned DR has strongly supported the order of the AO on this issue, it is observed that the relevant labour charges considered by the AO for disallowance were actually Rs. 94,50,715/- and not Rs. 1,11,68,443/- as found by the Ld. CIT(A) after verifying the relevant details and documents. As further found by the Ld. CIT(A), the said sum was inclusive of two amounts of Rs. 3,92,386/- and Rs. 6,80,989/- on which the assessee was not required to deduct tax at source. Regarding the balance amount of Rs. 83,77,359/-, the same was claimed by the assessee to be a provision in relation to unbilled sales. It was explained by the assessee that the amount of unbilled sales represented revenue booked in the accounts on the percentage completion method for incomplete contracts at the end of the year. It was explained that corresponding expenditure incurred in relation to the unbilled sales including sub-contract charges for earning the revenue so booked was also provided for in the accounts. Since this method was followed by the assessee company consistently in the earlier years, the Ld. CIT(A) allowed the claim of the assessee as the same was made as per the method of accounting consistently followed by the assessee. Moreover, we are of the view that the said claim of the assessee is liable to be allowed even as per the matching principle. We, therefore, find no infirmity in the impugned order of

the Ld. CIT(A) giving relief to the assessee on this issue and upholding the same, we dismiss Ground No. 2 of the revenue's appeal.

11. In Ground No. 3, the revenue has challenged the action of the Ld. CIT(A) in deleting the disallowance of Rs. 44,707/- made by the AO on account of excise duty.

12. In the profit and loss account, a sum of Rs. 44,707/- was debited by the assessee on account of Excise Duty. Since there was no corresponding credit made by the assessee in the profit and loss account on account of Excise Duty, the AO disallowed the claim of the assessee for Excise Duty of Rs. 44,707/-.

13. The disallowance made by the AO on account of Excise Duty was challenged by the assessee in the appeal filed before the Ld. CIT(A) and after considering the submissions made on behalf of the assessee as well as the material available on record, the Ld. CIT(A) deleted the said disallowance made by the AO for the following reasons given in paragraph No. 7.2 of his impugned order:

"I have perused the assessment order and considered the submission of the appellant. The fact of the case is that the AO noted that the appellant had debited a sum of Rs. 44,707/- towards Excise Duty to the P & L account. However, he further noted that the corresponding credit had not been made in the P & L account, therefore, he disallowed the same. But the appellant argued that finished goods are valued inclusive of the excise duty. It had been clearly disclosed by clause 12(b) relating to details of deviations, if any, from the method of valuation prescribed u/s 145A, and the effect thereof on the profit or loss. Clause 12(b) disclosed that 'Finished Products are however valued inclusive of excise duty element. When the finished product was valued at the year end, corresponding credit of excise duty was also given in the amount of finished goods i.e. valuation of finished goods at year end was inclusive of excise duty. The

difference between the closing and opening stock of finished goods had been duly credited to the P & L account. In order to neutralise the excise duty element amounting to Rs. 44,707/- included in the value of 'Finished Products' and credited in the P & L account the corresponding liability was also debited to the P & L account under the head 'Excise Duty'. I find merit in the argument of the appellant in this regard, therefore, appeal on this ground is allowed."

14. We have heard the arguments of learned DR on this issue and also perused the relevant material available on record. It is observed that inclusive method was followed by the assessee in respect of excise duty and since the sales credited by the assessee to the profit and loss account as well as the stock of finished goods were inclusive of excise duty, there was no credit separately made on account of excise duty to the profit and loss account. It appears that this accounting treatment given by the assessee however was not appreciated by the AO while making the disallowance on account of excise duty. The Ld. CIT(A), on the other hand, appreciated the said treatment in the right perspective and since he rightly allowed the claim of the assessee for excise duty on such appreciation, we do not find any justifiable reason to interfere with the impugned order of the Ld. CIT(A) on this issue. Ground No. 3 is accordingly dismissed.

15. In Ground No. 4, the revenue has challenged the action of the Ld. CIT(A) in deleting the addition of Rs. 3,11,81,581/- made by the AO on account of profit on sale of fixed assets while computing the book profit u/s 115JB of the Act.

16. In the profit and loss account, profit on sale of fixed assets amounting to Rs. 3,11,81,581/- was credited by the assessee. While

computing the book profit u/s 115JB of the Act, the said amount however was deducted by the assessee claiming that the profit on sale of fixed assets was not liable to be included in the book profit. This claim of the assessee was not found acceptable by the AO for the following reasons given in his order:

“i. Any adjustment (either negative or positive) to the net profit, for the purpose of computation of book profit, is limited to the specific items as specified in explanation below second proviso to section 115JB. None of the items of the said explanation deals with profit on sale of fixed assets.

ii. Hon’ble Supreme Court in the case of Appollo Tyres Ltd. (255 ITR 273) held that no adjustments other than what has been specified in the explanation below second proviso to section 115JB is permissible for the purpose of computation of book profit.”

The AO accordingly made an addition of Rs. 3,11,81,581/- on account of profit on sale of fixed assets while computing the book profit of the assessee company u/s 115JB of the Act.

17. The addition made by the AO on account of profit on sale of fixed assets while computing the book profit u/s 115JB of the Act was challenged by the assessee in the appeal filed before the Ld. CIT(A) and after considering the submissions made by the assessee as well as the material available on record, the Ld. CIT(A) deleted the said addition for the following reasons given in paragraph No. 8.2 of his impugned order:

“I have perused the assessment order and considered the submission of the appellant. The fact of the case is that the liability of income tax in this case was calculated u/s 115JB of the I.T. Act. While calculating the book profit, the A.O had added profit on sale of fixed asset and investment. However, the appellant cited the following judgements in support of their claim. The ITAT Delhi Bench in the case of JCIT vs. Northern India Theatres Pvt. Ltd. (1996) 133 CTR 326 (Del) (TX). In the said case the

Hon'ble Tribunal has directly dealt with the question of parts II and III of schedule VI, and has held that profit derived on sale of fixed assets yield only capital gains and they do not partake the character of business profits and the same should not be shown as business profits in a properly prepared P & L A/c as per provisions of parts II and III of Schedule VI of Companies Act. The Hon'ble Tribunal has further held that if items of credit which do not relate to the business carried on by the assessee company are found included in its P & L A/c, such a P & L A/c cannot be called as P & L A/c prepared in accordance with the requirements of part II and III of sixth schedule. Accordingly, profit derived on sale of fixed assets should not show as business profits in a properly prepared P & L A/c as per the provisions of parts II and III of schedule VI. Following the ratio of the judgment of the above case, the profit derived on sale of fixed assets is profit realised on capital assets in the hands of the company, and thus cannot be part of the P & L A/c in accordance with the provision of part II and III of the schedule VI of the Companies Act, 1956. Therefore, in order to follow the direction as specified in sec. 115JB(2), the company excluded the profit on sale of fixed assets amounting to Rs.3,11,81,581/- from the computation of book profit.

The Hon'ble Tribunal in the above judgment has relied upon the judgment of the special bench of the ITAT of the Calcutta in the case of Sulej Cotton Mills Ltd. vs. ACIT (1993) 45 ITD 22 Cal (SB). The special bench in the said case had observed that the profit on sale of shares (which were the capital assets in the hands of the appellant) by the appellant would not form part of book profits as required to be shown in the P & L A/c under the provisions of the Companies Act. Hence, it was held by the ITAT, that 'book profit' u/s 115J is intended to be confined to business profit & profits from realisation of any asset should not be included in computing book profit. Similar view was also held by the Delhi Bench of the ITAT in the case of Oswal Agro Mills Ltd vs. DCIT (1994) 51 ITD 447 (Del). In the case it was held that the STCG arising from the sale of Government securities are not to be treated as part of book profit computed u/s 115J.

I have carefully considered the fact of the case and decisions cited by the appellant (supra) and thereby, I find merit in the argument of the appellant, therefore, the appeal on this ground is allowed."

18. We have heard the arguments of learned DR on this issue and also perused the relevant material available on record. As held by the Hon'ble Supreme Court in the case of Appollo Tyres Ltd vs CIT 255

ITR 273 relied upon by the AO in his order and cited by the learned DR at the time of hearing before us, the profit as shown in the accounts of the company, which are certified by the auditors of the company as having been maintained in accordance with the provisions of the Companies Act and which have been accepted in the general meeting of the company as well as by the Registrar of the Company, has to be taken as the starting point for computation of book profit u/s 115J and only the adjustments to the extent provided in the Explanation to Section 115J can be made. It appears that the Ld. CIT(A) however failed to consider this binding precedent and allowed the adjustment beyond what is provided in Explanation to Section 115JB by reducing the profit on sale of fixed assets which was credited by the assessee company to its profit and loss account. It is also observed that the Ld. CIT(A) erred in allowing this claim of the assessee by relying on certain decisions of the Tribunal which were rendered prior to the judgment in the case of Appollo Tyres Ltd. (Supra) came to be delivered by the Hon'ble Supreme Court. The learned DR has also relied by the decision of Hon'ble Kolkata High Court in the case of G.K.W. Ltd. vs CIT (2011) 12 taxmann.com 234 wherein it was held that it is absurd to suggest that the profit on sale of fixed assets do not form part of the book profit u/s 115JA of the Income Tax Act, 1961. Keeping in view the ratio of these decisions of the Hon'ble Apex Court as well as Hon'ble Jurisdictional High Court, we set aside the impugned order of the Ld. CIT(A) giving relief to the assessee on this issue and confirm the addition made by the AO on account of profit on sale of fixed assets while computing the book profit of the assessee company u/s 115JB of the Act. Ground No. 4 is accordingly allowed.

19. As regards the issue involved in Ground No. 5 relating to the deletion by the Ld. CIT(A) of the disallowance of Rs. 10,853/- made by the AO on account of charities and donations, it is observed that the disallowance made by the AO on account of puja donations was deleted by the Ld. CIT(A) after having found that the said donations were made by the assessee to various local entities primarily towards community celebrations in order to build goodwill within the community and to ensure the smooth conduct of business. Being satisfied that the business expediency of the expenses incurred by the assessee on payment of the said donations, the Ld. CIT(A) allowed the same u/s 37(1) of the Act and keeping in view the relevant facts of the case, we do not find any infirmity in the impugned order of the Ld. CIT(A) on this issue. Ground No. 5 is accordingly dismissed.

20. In the result, the appeal of the revenue is partly allowed.

Order Pronounced in the Open Court on 22nd March, 2019.

Sd/-
(S.S. Viswanethra Ravi)
JUDICIAL MEMBER

Sd/-
(P.M. Jagtap)
VICE PRESIDENT

Dated: 22/03/2019

Biswajit, Sr. PS

Copy of order forwarded to:

1. M/s. Stewarts & Lloyds of India Ltd., 41, Chowringhee Square, Kolkata – 700 071.
2. DCIT, Circle – 1, P-7, Chowringhee Square, Kolkata – 700 069.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Assistant Registrar / H.O.O.
ITAT, Kolkata