

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI R. S. SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No. 1168, 1169 & 1170/PUN/2012

निर्धारण वर्ष / Assessment Year : 2004-05, 2005-06 & 2008-09

Khandesh Builders Ltd,
303, Shivaji Nagar,
Jalgaon-425001
Maharashtra.
PAN : AAVPM4253A

.....अपीलार्थी /

Appellant

बनाम / V/s.

Dy. Commissioner of Income Tax,
Circle-2, Jalgaon,
1st floor, Old Bhiakchand Jain
Market, Jalgaon-425001.

.....प्रत्यर्थी /

Respondent

Assessee by : Shri Sunil Ganoo, AR

Revenue by : Shri Pankaj Garg, DR

सुनवाई की तारीख / Date of Hearing : 14.03.2019

घोषणा की तारीख / Date of Pronouncement : 14.03.2019

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

These three (3) appeals preferred by the assessee emanates from the common order of the Ld. CIT(Appeal)-II, Nashik dated 29.03.12 for AY : 2004-05, 2005-06 & 2008-09 as per the grounds of appeal on record.

2. Since the issue involved in all the appeals are common, therefore they are heard together and disposed of by this consolidated order.

3. The brief facts of the case are that the assessee is engaged in the activities of construction and also trading in shares and securities. The assessee has shown total income at Rs. NIL disregarding the mandatory provisions of section 115JB. The book profit for AYs. 2004-05, 2005-06 and 2008-09 are Rs.5,72,65,157/-, Rs. 2,19,06,533/- and Rs. 3,08,99,000/- respectively. The assessee pleaded before the AO that it has challenged the constitutional validity of the section 115JB in the Bombay High Court, Bench Aurangabad and filed a copy of order dated 11.06.08 in support of his contentions that the writ petition was admitted. The AO did not accept the contention of the assessee by observing that even though constitutional validity of section 115JB was challenged by the assessee, the Hon'ble High Court has not granted any interim relief. Therefore, the AO applied provision of section 115JB and worked out total income calculated on the book profit.

4. That on the issue, the observation of Ld. CIT(A) are as under appearing at para no. 4 onwards of his order:-

4. I have carefully considered the facts of the case, the rival contentions and the position of law on the subject. The appellant is a company engaged in the business of share trading and investment in securities. Its accounts are audited u/s 44AB and as per the audited accounts it has shown net profits as per P & L a/c at Rs. 5,84,86,162/-, Rs.

2,19,92,323/- and Rs. 1,60,97,844/- for AYs 2004-05,05-06,08-09 respectively. Section 115JB(l) reads as under:-

Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2010, is less than fifteen per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of fifteen percent.

4.1 As may be seen section 115JB overrides other normal provisions of the Act, therefore, in case of the book profit was arrived at as per the mechanism provided by the section itself, the AO was duty bound to invoke section 115JB and arrive at a total income. In the present case, the Assessing Officer has precisely done the same by arriving at the total income on the book profits. It is not the case of the assessee that there was no book profits, nor any miscalculation or error in computing the book profit u/s 115JB was brought to my notice. In view of these facts and the position of law, the total income arrived at by the Assessing Officer on the book profits is held to be according to the law, the same is, therefore, upheld and no interference is required by me.

5. With regard to the contention of the appellant that the proceedings before me may be kept pending till the decision of the Hon'ble High Court on their writ petition, on going through the W.B. no. 2071 of 2008,

it is seen that the respondents are CIT-II Nashik, ACIT Cir-2 Jalgaon and Union of India. The CIT(A) is not therefore a respondent in the said petition. Further, on going through the order dated 11/06/2008, it is evident that the Hon'ble High Court has not granted any interim relief with regard to the stay on the operation of section 115JB. Therefore, in view of the fact that there is no pronouncement on the constitutional validity of the section, I see no justification in keeping the appeals pending. Consequently this argument of the assessee is rejected

5. At the time of hearing, Ld.A.R. of the assessee submitted that they have moved a declaration in the prescribed form and manner as mandated u/s 158A(1) of the Act, whereby assessee has submitted that since the constitutional validity of section 115JB has been challenged before the Hon'ble Bombay High Court and for the fact that the Writ Petition has been admitted, therefore the present proceedings may be kept in abeyance till the disposal of the Writ Petition by the Hon'ble Bombay High Court. Per contra, the Ld. D.R contentions were that the provision of section 115JB as on date is valid and entire proceeding in cases of the assessee has been proceeded under the said provision and also that Hon'ble Jurisdictional High Court, Aurangabad Bench has not protected the assessee vis-à-vis tax liability after being assessed during the pendency of the Writ Petition. No interim relief has been provided to the assessee pending disposal of the said Writ Petition.

6. We have perused the case records, heard the rival contentions and analysed the facts and circumstances of the case. The case on record are that the taxability or book profit u/s 115JB has been upheld in the case of the assessee by the revenue authorities. The assessee has filed a Writ Petition before the Hon'ble Bombay High Court, Aurangabad bench, challenging the constitutional validity of the section 115JB of the Act and this Writ Petition is admitted by the Hon'ble Bombay High Court, Bench Aurangabad, however the same has not been disposed of till date.

7. On perusal of the order of Hon'ble Bombay High Court, Aurangabad Bench, the Writ Petition of the assessee was admitted, in view of the S.L.P. on this issue being admitted in the Hon'ble Supreme Court from a decision of the Hon'ble Delhi High Court reported in 192 ITR 187. Further in para no. 5 of the said order categorically states that pendency of the petition does not in any manner provide immunity to the petitioner from paying tax liability as assessed under the provision since the section is in operation w.e.f. 01.04.01. It is correct that the writ petition filed by the assessee has been admitted by the Hon'ble Jurisdictional High Court, Aurangabad Bench, however it is also correct that no interim relief has been provided by the Hon'ble High Court and it is categorically mentioned that irrespective of this petition being pending before the Hon'ble High Court, this in any manner will not provide any immunity to the assessee from paying tax liability as assessed.

8. As may be seen section 115JB overrides other normal provisions of the Act, therefore, in case of the book profit was arrived at as per the mechanism provided by the section itself, the AO was duty bound to invoke section 115JB and arrive at a total income. In the present case, the AO has precisely done the same by arriving at the total income on the book profits. It is not the case of the assessee that there was no book profit nor any miscalculation or error in computing the book profit u/s 115JB of the Act. The total income arrived at by the AO on the book profits was held to be according to the law and the same was, therefore, upheld by the Ld. CIT(A). Therefore, in the present case and as on date provision of section 115JB is valid and the additions have been made accordingly, which is thereby upheld. There is no interim relief provided to the assessee by the Hon'ble High Court.

9. Further more, reading of section 158A(3)(2) with section 158A(4)(a) of the Act, we find that the matter has to be disposed of, therefore respectfully following the order of the Hon'ble Bombay High Court, Aurangabad Bench and in view of the provisions of section 158A of the Act, we do not find any infirmity in the findings so recorded by the Ld. CIT(A) and the same is upheld. In the future, in case of any course of events favourable to the assessee, he will be at liberty to apply for restoration of these appeals as per procedures laid down in law.

10. In the combined result, the appeals bearing ITA No. 1168, 1169 & 1170/Pun/12 are **dismissed**.

Order pronounced on 14th March, 2019.

Sd/-
R. S. SYAL
VICE PRESIDENT

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 14th March, 2019.
SPS, DK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeal)-II, Nashik.
4. The Pr. CIT, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.