

IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

ITA No.830/Mum/2019
(Assessment Year: 2013-14)

Goldman Sachs (India) Finance Private Limited 951 A, Rational House, Appasaheb Marathe Marg, Prabhadevi, Mumbai-400 025	Vs.	Dy. CIT-1(1)(2), Mumbai
PAN/GIR No. AAACP 2448 J		
(Appellant)	:	(Respondent)
Appellant by	:	Shri Jahangir Mistri/Hiten Chande
Respondent by	:	Shri Rakesh Garg
Date of Hearing	:	03.03.2021
Date of Pronouncement	:	27.05.2021

ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-2, Mumbai ('Id.CIT(A) for short) dated 19.12.2018 and pertains to the assessment year (A.Y.) 2013-14.

2. The grounds of appeal read as under:

1. In disallowing the claim of the appellant to reduce the reversal of provision for bad and doubtful debts amounting to Rs.31,30,20,000 from the book profits computed under section 115JB of the Act.
2. In not appreciating the fact that even if the provisions for bad and doubtful debts were added back to the book profits in the FY 2008-09 and FY 2009-10, the tax would still be computed under the normal provisions of the Income Tax Act, 1961, thereby not resulting in any loss to the revenue.
3. In not appreciating that the issue is covered by the decision of the Hon'ble Agra Tribunal in the case of ACIT vs. Srinivas Synthetics Packers Pvt. Ltd. (22 DTR 562) [Agra Tribunal] which was issued in the context of clause (i) of the Explanation 1 to section 115JB of the Act.
4. In placing reliance on the decision of the Hon'ble Supreme Court in case of Apollo Tyres Ltd. [2002] 255 ITR 273.
5. In levying interest under section 234C of the Income Tax Act, 1961.
6. In initiating penalty proceedings under section 271(1)(c) of the Act.

Apropos ground relating to disallowance of Rs.31,30,20,000/-

3. Brief facts of the case are that the assessee company is engaged in the business of Financial Services as NBFC. The Assessing Officer noted that the assessee has claimed write off bad debt, disallowed in earlier years at Rs.36,60,10,774/-. Upon the A.O.'s enquiry, the assessee explained that the entire bad debts written off of Rs.36,60,10,774/- during the year pertains to only one party i.e. Sanghi Industries Limited (SIL). A loan of Rs.66,60,00,000/- was granted by assessee to SIL in F.Y. 2008-09. Interest accrued on the loan given to SIL was credited to the profit and loss account for the years ended 31.03.2009, 31.03.2010, and 31.03.2011, and was offered to tax under the head "Income from business or profession". Based on the Non – banking Financial Companies Prudential Norms (NBFC) (Reserve Bank) Directions, 2007 issued by RBI, where an asset has remained overdue for a period of six months or more, the asset shall be classified as a non-performing asset (NPA), a provision was created in the books of accounts of assessee in respect of the loan given to SIL from FY 2008-09 onwards.

4. The A.O. further made the following observation based upon his enquiry and the assessee's reply:

i) In F.Y. 2008-09 (A.Y. 2009-10), the assessee had shown Profit/(Loss) before tax at Rs.(16,83,85,897) after debiting Provision for Non Performing Loans at Rs.19,98,00,000/-. The said amount of Rs.19,98,00,000/- was added in Computation of Income, however not added back in the book profits. The Book Profit/(Loss) was computed at Rs.(16,84,76,331).

ii) In F.Y. 2009-10 (A.Y. 2010-11), the assessee had shown Profit/(Loss) before tax at Rs.(6,57,42,330) after debiting Provision for Non Performing Loans at Rs.11,32,20,000/-. The said amount of Rs.11,32,20,000/- was added in Computation of Income, however not added back in the Book Profits. The Book/Profit/(Loss) was computed at Rs.(6,57,42,330).

iii) In F.Y. 2010-11 (A.Y.2011-12), the assessee had shown Profit/(Loss) before tax at Rs.(1,49,35,520) after debiting Provision for Non Performing Loans at Rs.8,65,80,000/-. The said amount of Rs.8,65,80,000/- was added in Computation of Income, as well in book profits.

iv) In F.Y. 2011-12 (A.Y. 2012-13), no provision was made for non performing assets.

5. The A.O. referred to explanation (1) of section 115JB and held as under:

5.7 A reference to the above provisions of IT Income Tax Act, 1961 makes it clear that the amount withdrawn from any provision made in earlier year can be reduced from book profits only if the book profits of such year had been increased by such provision

(i.e. considering it an other than ascertained liability). In the present case, the assessee had made relevant provisions in previous years, i.e., A.Y. 2009-10 (Rs.19,98,00,000), A.Y. 2010-11 (Rs.11,32,20,000), & A.Y. 2011-12 (Rs.8,65,80,000), out of which the assessee has withdrawn the amount for writing off in the year under consideration. Out of above, it is evident that the assessee had not added back the amount of Rs.19,98,00,000/- & Rs.11,32,20,000/- in A.Y. 2009-10 & A.Y. 2010-11 respectively while computing the book profits for respective years, hence while making reversal of such provisions in the year under consideration, reduced the amount of Rs.36,60,10,774/- from book profits, the amount of Rs.19,98,00,000/- & Rs.11,32,20,000/- i.e. total Rs.31,30,20,000/- is to be added back to Book Profits of the assessee.

5.8 Accordingly, the amount of Rs.31,30,20,000/- is added back to Book profit u/s. 115JB of the assessee. Penalty proceedings u/s. 271(1)© are initiated separately for concealing of income and/or furnishing of inaccurate particulars of income.

6. Against the above order, the assessee appealed before the Id. CIT(A). The Id. CIT(A) found the provision of section 115JB Explanation 1 to be fully applicable. He dislodged the submissions of the assessee as well as reliance upon Agra Bench of ITAT decision, which was found to be in a different context and not applicable. The Id. CIT(A) held as under:

5.5.1 It is clear that the A.O. is bound to compute the book profit in the manner provided in Sec. 115JB and there is no error in the computation of book profit made by the A.O. since it is an admitted fact that the appellant company has not added back the provision for NPA while computing the book profits for A.Y. 2009-10 amounting to Rs.199,800,000/- and for A.Y. 2010-11 amounting to Rs.113,220,000/- although it has made a wrong claim to reduce the book profit by including the above said amounts when the provision has been written back and credited to the Profit & Loss Account in A.Y. 2013-14.

5.1.2 The Appellant has further submitted that it had inadvertently not added back the provision created for bad and doubtful debts to the book profit u/s. 115JB of the Act in A.Y. 2009-10 and A.Y. 2010-11 and even if the book profit of the appellant were to be revised to add the provision for bad and doubtful debts, the appellant would still fall under the normal provisions of the Act in A.Y. 2009-10 and A.Y. 2010-11. Accordingly, there would be no impact on the taxes payable in A.Y. 2009-10 and A.Y. 2010-11. This contention is found to be without merit since the book profit in A.Y. 2013-14 has to be computed in light of the provisions of Sec. 115JB which clearly provides for not allowing the reduction of book profit on account of write back of provision in the year of write back if the provision was not added back in the book profit in the year in which the provision was made. Further, there is no scope for any interpretation of the provisions which has to be followed strictly and if the appellant has made an error in A.Y. 2009-10 and 2010-11, the only recourse left is to compute the income in A.Y. 2013-14 as per the provisions of sec. 115JB and pay the due taxes in A.Y. 2013-14 as determined by the A.O. Reliance is placed on the decision of the Hon'ble Apex Court in the case of Apollo Tyres vs. CIT (2002) 122 Taxman 562.

5.1.3 The appellant has relied on a decision of Hon'ble ITAT Agra Bench in the case of ACIT vs. Srinivas Synthetics Packers Pvt. Ltd. (supra) which relates to write back of

excess depreciation for A.Y. 2001-02 on account of change in the method of claiming depreciation from WDV to Straight Line Method. Further, the provision regarding reduction of depreciation [as per clause (iia) to Explanation 1 of Sect. 115JB] has come from A.Y. 2007-08 and there was no such provision for A.Y. 2001-02 in respect of which the ITAT has given the finding. However, the present clause (i) alongwith the proviso to Explanation 1 of Sect. 115JB is in place from A.Y. 2001-02. The facts in the case of the appellant are different and therefore, the above said decision of the ITAT, Agra Bench, do not help the case of the appellant in any manner.

5.1.4 In view of the above discussion, the addition of Rs.313,020,000/- made by the A.O. while computing the book profit is upheld.

7. Against the above order, the assessee is in appeal before us.

8. We have heard both the parties and perused the records.

9. The Id. Counsel of the assessee submitted that the authorities below have wrongly invoked the proviso, as the same is applicable when no tax is paid on book profit. The counsel of the assessee further submitted that the assessee has actually paid more taxes. He referred to Board Circular No. 530 dated 01.01.1990. He submitted a computation wherein it was shown that even if the provision were added back to the book profit in concerned assessment year, there would not have been any MAT payable on book profit. As the assessee has paid tax on normal profit, there is no impact. He placed reliance upon the following case laws:

1. *Asst. CIT vs. Srinivas Synthetics Packers (P) Ltd.* [2009] 122 TTJ 832 (Agra)
2. *ACIT vs. M/s. Rational Handloom Co. Pvt. Ltd.* (in ITA No. 6481/Mum/2016 vide order dated 23.07.2019)
3. *UCO Bank vs. CIT 237 ITR 879*

10. Per contra, the Id. Departmental Representative (Id. DR for short) relied upon the order of the authorities below.

11. We have carefully considered the submissions and perused the records. As per the undisputed facts in this case, the assessee has claimed write back/off to credit to the profit and loss account of the provision for bad debt amounting to Rs.36,60,10,774/-, made in earlier year.

12. The assessing officer has invoked the provisions of section 115JB explanation 1 which is reproduced as under:

5.6 As per Explanation (1) of Section 115JB, "For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as reduced by,-

"(i) the amount withdrawn from any reserve or provision (excluding a reserve created before the 1st day of April, 1997 otherwise than by way of a debit to the profit and loss account), if any such amount is credited to profit and loss account: Provided that where this section is applicable to an assessee in any previous year, the amount withdrawn from reserves created or provisions made, in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation or Explanation below the second proviso to section 115JA, as the case may be; or...."

The referred second proviso to section 115JA provides that, "For the purposes of this section, "book profit" mean the net profit as shown in the profit and loss account for the relevant previous year prepared under subsection (2), as increased by- (c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or....."

13. Now while examining the claim of the assessee, the assessing officer found that in earlier year, i.e., assessment years 2009 -10 and 2010 -11, the provisions made were not added back to the book profit. Hence, he made the impugned addition of equivalent amount of Rs.31,30,020/- to the book profit. The assessee has contended before the learned CIT appeals as well as before us that this exercise in earlier years would have been futile and academic exercise. This was on the reasoning that the impugned amounts when added to the concerned assessment year's book profit would still not have called upon the assessee to pay any tax on the book profit, as the tax payable on normal computation of profits were much higher than the tax on book profits. This contention is duly recorded by the learned CIT appeals in his order. The learned counsel of the assessee has also submitted a chart before us to this effect.

14. The Id.CIT appeals has rejected the aforesaid argument on the premise that the provision of act has to be strictly construed and hence, he has rejected the aforesaid plea of the assessee. We find that the aforesaid view of the learned CIT appeals is not sustainable, if we apply the purposive test of the enactment being considered here. To recapitulate the provision of the act mandates that if assessee writes back provision for bad debt made in appeal years, the deduction of the same from the book profit is permissible if the provision created in the earlier year has been added back to the book

profit. In this regard, the CBDT circular No. 550 (supra) explains that such an action in earlier year should have gone to increase the book profit of the said year.

15. We are of the considered opinion that in this regard if the assessee is not called upon to pay any tax on book profit as taxes on normal computation are higher even after the aforesaid exercise of increase of the book profit by the amount of provision for the concerned year, the exercise would be an empty exercise and revenue neutral. This means that the assessee would not have been called upon to pay any extra tax whatsoever had this exercise been done. The Hon'ble Supreme Court had an occasion to expound in the case of *CIT vs. Excel Industries* vide order dated 09.10.2013 that when the exercise is revenue neutral, the action on the part of revenue authority is not sustainable. The Hon'ble Apex Court had observed that such an exercise is fruitless (on merits) but also it may not have added anything much to the public coffer. In this case, it is amply clear that such an exercise in earlier year would not have added anything to the public coffer.

16. Hence, from the above it is amply clear that the explanation invoked by the authorities below is not applicable on the facts of this case. Even for argument sake, we consider the view that there are two views possible, we are of the considered opinion that the view in favour of assessee is on an overwhelming higher side. In this view of the matter, as expounded by the Hon'ble Court's Constitution bench in the case of *Dilip Gandhi* (supra), if two views are possible in a statutory tax provisions, the one in favour of the assessee should be adopted. Accordingly, in the background of the aforesaid discussion and precedent, we are of the considered opinion that the order of the Id. CIT(A) is not sustainable. Accordingly, we set aside the order of the Id. CIT(A) and decide the issue in favour of the assessee.

Apropos issue of interest u/s.234C

17. On this issue, the Id. Counsel of the assessee has been submitted that interest is leviable on returned income and not on assessed income. That this submission was made but not considered by the Id. CIT(A). Upon careful consideration we find that this issue is consequential, the A.O. shall consider the same as per law.

18. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in open court on 27.05.2021

Sd/-
(Amarjit Singh)
Judicial Member

Mumbai; Dated : 27.05.2021
Roshani, Sr. PS

Sd/-
(Shamim Yahya)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai