IN THE INCOME TAX APPELLATE TRIBUNAL, 'G' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.3361/Mum/2019
(**Assessment Year : 2015-16**)

M/s. Gujarat Pipavav Port Limited 301, Trade Centre Bandra-Kurla Complex Bandra (East) Mumbai – 400 051	Vs.	Income Tax Officer-14(1)(1) 431, Aayakar Bhavan M.K.Road, Mumbai- 400 020
PAN/GIR No.AAACG6975B		
(Appellant)	..	**(Respondent**)

ITA No.7194/Mum/2019
(**Assessment Year : 2010-11**)

Income Tax Officer-14(1)(2) 460, 4th Floor, Aayakar Bhavan M.K.Road, Mumbai- 400 020	Vs.	M/s. Gujarat Pipavav Port Limited 301, Trade Centre Bandra-Kurla Complex Bandra (East) Mumbai – 400 051
PAN/GIR No.AAACG6975B		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Manish Kanth
Revenue by	Shri Anand Mohan
Date of Hearing	**24/02/2022**
Date of Pronouncement	**31/03/2022**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

ITA No.7194/Mum/2019 (A.Y.2010-11)

This appeal in ITA No.7194/Mum/2019 for A.Y.2010-11 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-22,

Mumbai in appeal No.CIT(A)-22/DCIT-10/IT-10500/2014-15 dated 16/08/2019 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/03/2014 by the ld. Dy. Commissioner of Income Tax-10(1), Mumbai (hereinafter referred to as ld. AO).

ITA No.3361/Mum/2019 (A.Y.2015-16)

This appeal in ITA No.3361/Mum/2019 for A.Y.2015-16 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-22, Mumbai in appeal No.CIT(A)-22/ITO-14(1)(1)/10343/2017-18 dated 19/03/2019 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 28/12/2017 by the ld. Income Tax Officer-14(1)(1), Mumbai (hereinafter referred to as ld. AO).

ITA No.7194/Mum/2019 (A.Y.2010-11)

2. The ground No.1 raised by the Revenue is challenging the action of the ld. CIT(A) deleting the addition made on account of club membership fees.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is a listed company and engaged in the business of handling containers, bulk and liquid cargo and to provide ancillary port services at Pipavav in Gujarat. We find that assessee had debited a sum of Rs.5,52,847/- on account of club membership fees and expenses. The ld. AO observed that assessee was not able to establish with any cogent evidences that such club membership has resulted in promotion of its business. The ld. AO also

observed that membership of the club is a personal privilege entitling the member to use and enjoy the property of the club and all other amenities, benefits and facilities provided therein. The ld. AO also placed reliance on certain decisions of Tribunal in support of his contention that club expenses are not allowable as business expenditure.

3.1. We find that the undisputed fact is that the club membership has been taken in the name of the assessee company. The assessee company deputes its top executives to utilize the facilities of the club for the purpose of improving and extending business relations with the business tycoons and other multi-national companies and to hold its business meetings, seminars and business conferences in the club. Accordingly, the assessee stated that incurrence of club membership fees was only to promote its business and not otherwise. The assessee also placed reliance on the decision of the Hon'ble Supreme Court in the case of United Glass Manufacturing Company Ltd., in Civil Appeal No.6447 of 2012 wherein it was held that the club membership paid in the normal course of business is purely business expenditure allowable as deduction u/s.37(1) of the Act. The assessee also placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of Otis Elevator Company (India) Ltd., vs. CIT reported in 195 ITR 682 (Bom) wherein it was held that the club fees paid by the company on behalf of its executives is in the interest of its business and the membership of such clubs would provide its Officers and Executives better contact and appreciation with persons with good positions. Accordingly, incurrence of such expenditure should be considered to have been made for promoting the business of the company.

3.2. We find that the ld. CIT(A) had granted relief by placing reliance on the aforesaid decision of the Hon'ble Jurisdictional High Court and also

placing reliance on the decision of the Hon'ble Madras High Court in the case of CIT vs. Sundaram Industries Ltd., reported in 240 ITR 335 (Mad). Since, the issue is covered in favour of the assessee by various High Courts including the Hon'ble Jurisdictional High Court and the decision of the Hon'ble Supreme Court referred to supra, the reliance placed by the ld. AO on various Tribunal decisions would be of no relevance and accordingly, we hold that the order of the ld. CIT(A) granting relief in this regard does not warrant any interference. Accordingly, the ground No.1 raised by the Revenue is dismissed.

4. The ground Nos. 2 & 3 raised by the Revenue are challenging the action of the ld. CIT(A) in deleting the disallowance made u/s.14A of the Act.

4.1. We have heard rival submissions and perused the materials available on record. We find that assessee during the year had not earned any exempt income which fact is not in dispute. The ld. AO directly applied the computation mechanism provided in second and third limb of Rule 8D(2) of the Income Tax Rules and made disallowance of Rs.14,03,84,683/- in the assessment. The ld. CIT(A) placed reliance on the decisions of various High Courts including decision of the Hon'ble Apex Court in the case of PCIT vs. Oil Industry Development Board reported in 103 taxmann.com 326 wherein it was held that the disallowance u/s.14A of the Act could not be made in the absence of exempt income. The law is very much settled in view of the decision of the Hon'ble Supreme Court in the case of Maxopp Investments reported in 402 ITR 640 wherein it had been held that disallowance u/s 14A of he Act cannot be invoked in the absence of exempt income and there cannot be any quarrel on this issue. Hence, we do not find any infirmity in the

order of the ld. CIT(A). Accordingly, the ground Nos.2 & 3 raised by the Revenue are dismissed.

5. In the result, appeal of the Revenue for A.Y.2010-11 is hereby dismissed.

ITA No.3361/Mum/2019 (A.Y.2015-16)

6. The only effective issue on merits to be decided in this appeal is as to whether the ld. CIT(A) was justified in confirming the disallowance of loan processing fees debited in the profit and loss account as an exceptional item while computing the book profit u/s.115JB of the Act in the facts and circumstances of the instant case. The interconnected issue involved herein is as to whether the action of the ld. CIT(A) in confirming the action of the ld. AO for disallowing the loan processing fees while computing book profits u/s.115JB of the Act would result in travelling beyond the scope of "limited scrutiny".

6.1. We have heard rival submissions and perused the materials available on record. We find that assessee is a listed company engaged in the business of developing, constructing, operating and maintaining the port at Pipavav in Gujarat. The return of income for the A.Y.2015-16 was filed by the assessee on 28/11/2015 declaring 'Nil' income under normal provisions of the Act after setting off brought forward loss of Rs.304,22,67,818/- against the current year's income and book profit of Rs.312,78,44,415/- u/s.115JB of the Act. This return of income was selected for "limited scrutiny" under Computer Assisted Selection of Cases for Scrutiny (CASS) for "verification of large expenses debited to profit and loss account" and claimed as Revenue deduction. The ld. AO observed that assessee had debited a sum of Rs.34.58 Crores as fees paid to IFC. This sum represents one time syndicate fees, structuring fees,

commitment fees, legal and administrative fees paid to IFC. The assessee submitted that in the year 2012, it was sanctioned External Commercial Borrowing (ECB) of USD 152 million by IFC for port expansion, however, subsequently the Board on 31/03/2015 cancelled the loan agreement and the fees paid to IFC have been fully written off as an exceptional item. This amount of 34.58 Crores was added back voluntarily by the assessee while computing its income under normal provisions of the Act in the return. However, the assessee did not add back the same while computing the book profits u/s.115JB of the Act. In the profit and loss account of the assessee, this sum of Rs.34.58 Crores was clearly mentioned in the following manner:-

	Rs. In Million
Profit before exceptional item and tax	3608.27
Exceptional Items	345.82
Profit before Tax	**3262.45**
	=====

6.2. The computation of book profit u/s.115JB of the Act was started by the assessee from profit before tax of Rs.326,24,53,348/-. This goes to prove that assessee had indeed claimed deduction of exceptional item of Rs.345.82 Million (Rs.34.58 Crores) while computing its book profit u/s.115JB of the Act. The ld. AO show-caused the assessee as to why this exceptional item of Rs.34.58 Crores should not be added back while computing book profits u/s.115JB of the Act. The main premise of the ld. AO in this regard was that when the very same sum was disallowed by the assessee while computing its income under normal provisions of the Act, why the same should not be the subject matter of disallowance / adjustment while computing book profit u/s.115JB of the Act. The assessee gave a reply stating that this sum of Rs.34.58 Crores reflected under exceptional item in profit and loss account does not fall within the list of items that were to be added back in accordance with Explanation-1

to Section 115JB(2) of the Act. The assessee also drew the attention of the ld. AO on the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Limited reported in 255 ITR 273 wherein it was held that the ld. AO is not empowered to tinker with the audited financial statements which was prepared in accordance with Part II and Part III of Schedule-VI of the Companies Act, 1956 which was approved in the Annual General Meeting of the shareholders, other than those adjustments specifically provided under Explanation-1 to Section 115JB(2) of the Act. The ld. AO did not heed to the aforesaid contentions of the assessee. The main case of the revenue is that since the ECB loan was meant for expansion of business of the assessee which is on capital account, the fees paid to IFC for such loan would also be capital in nature. According to the revenue, since this capital expenditure was claimed as revenue in the profit and loss account prepared under the Companies Act, 1956, the ld. AO can tinker with the audited accounts and make an adjustment while computing book profits u/s.115JB of the Act. The ld. AO also placed reliance on the decision of Mumbai Tribunal in the case of JSW Steel vs. ACIT in ITA No.923 & 930/BANG/2009 for A.Y.2004-05 dated 13/01/2017 wherein the question of a capital receipt (waiver of principal amount of loan) which was credited to profit and loss account which was reduced from the book profit u/s.115JB of the Act was subject matter of adjudication by this Tribunal u/s.115JB of the Act. The ld. AO observed that in the said case, the Mumbai Tribunal held that a capital receipt is one which is not liable to tax as per the provisions of the Act and hence, a receipt which remains exempt from its inception would not fall within the ambit of income u/s. 2(24) of the Act and hence, the same would be outside the scope of taxability even u/s. 115JB of the Act. The ld. DR before us drew the same analogy for stating that when a capital receipt is kept outside the ambit of taxability u/s.115JB of the Act, similarly, the

capital expenditure would become an item of adjustment required to be added back to the book profit u/s.115JB of the Act. Hence the ld DR argued that the ld. AO was justified in adding the sum of Rs.34.58 Crores in the computation of book profits u/s.115JB of the Act.

6.3. Before the ld. CIT(A), the assessee stated that the ld. AO travelled beyond his jurisdiction as admittedly the case was selected for 'limited scrutiny' under CASS wherein one of the items was 'verification of large other expenses claimed in the profit and loss account'. According to the assessee, this item of "large other expenses claimed in the profit and loss account" would only relate to verification of expenses for computation of total income under normal provisions of the Act and the same cannot be extended for computation of book profits u/s.115JB of the Act. This argument did not find favour with the ld. CIT(A) and accordingly, the ld. CIT(A) confirmed the action of the ld. AO by observing that the purpose of scrutiny, be it "complete scrutiny" or "limited scrutiny", is only to determine the total income of assessee and that the determination of total income certainly would include determination of total income under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act.

6.4. The ld. AR before us reiterated the contentions raised before the lower authorities as detailed supra. At the outset, we find that the case of the assessee is selected for limited scrutiny under CASS wherein one of the items that required to be verified is 'verification of large other expenses debited in the profit and loss account'. Admittedly, the fees paid to IFC for a capital project was indeed an exceptional item debited by the assessee in accordance with Accounting Standard-5(AS-5) issued by the Institute of Chartered Accountants of India (ICAI) as a separate line item.

The purpose of selection of a case for scrutiny be it complete scrutiny or limited scrutiny, is only determination of total income of the assessee. In our considered opinion, this would certainly include determination of total income both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act. The ld. AO is bound to compute the total income under both the mechanisms provided under the Act and ultimately determine the higher of the two tax liabilities in the manner provided therein and raise a demand on the assessee. Hence, we are in complete concurrence with the view taken by the ld. CIT(A) in this regard. Hence, we hold that the ld. AO had not travelled beyond the jurisdiction provided under the limited scrutiny by disturbing the computation of book profit u/s.115JB of the Act and which is also relevant for the purpose of determination of total income. Accordingly, the ground Nos.1.1 to 1.2 raised by the assessee are dismissed.

7. Now coming to the issue on merits, admittedly, fee paid to IFC in the sum of Rs.34.58 Crores was for the purpose of expansion of business of the assessee. Hence, there is no doubt that such expenditure is clearly a capital expenditure. When this capital expenditure is debited in the profit and loss account as an exceptional item, then the ld. AO would be entitled to tinker with the audited financial statements, in view of the fact that Part-II and Part-III of Schedule-6 of the Companies Act, 1956 does not permit any capital expenditure to get debited in the profit and loss account. So, once it is undisputedly proved that a capital expenditure is debited to profit and loss account and claimed as deduction while computing book profits u/s.115JB of the Act, the ld. AO would be entitled to tinker with the said approved audited accounts even though it does not fall within the item of adjustments provided in Explanation-1 to Section 115JB(2) of the Act. This Act of the ld. AO would not be in violation of the

ratio laid down by the Hon'ble Apex Court in the case of Apollo Tyres Limited reported in 255 ITR 273. Further, we find that the ld. AO had rightly placed reliance on the decision of Mumbai Tribunal in the case of JSW Steel in ITA Nos. 923 & 930/BANG/2009 dated 13/01/2017, wherein it was held that a particular capital receipt which is not taxable right from its inception would not enter the computation of income at all, whether it is computed under normal provisions of the Act or u/s.115JB of the Act. The same analogy would be applicable in the present case wherein a particular expenditure which is not allowable as deduction from its inception, will not be allowed as deduction while computing book profits u/s.115JB of the Act and the same would have to be added back while computing book profits u/s.115JB of the Act. Hence, we confirm the action of the ld. CIT(A) in this regard. Accordingly, the ground Nos. 2.1 and 2.2 raised by the assessee are dismissed.

8. In the result appeal of the assessee for A.Y.2015-16 is dismissed.

9. In the result, appeal of the Revenue is dismissed and appeal of the assessee is dismissed.

Order pronounced on 31/03/2022 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(KULDIP SINGH)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 31/03/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai