

आयकर अपीलीय अधिकरण 'बी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, CHENNAI

मासनीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य एवं
मासनीय श्री अनिकेश बनर्जी, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
AND HON'BLE SHRI ANIKESH BANERJEE, JM

आयकर अपील सं./ **ITA No. 1275/Chny/2017**
(निर्धारण वर्ष / **Assessment Year: 2010-11**)

Forbes Campbell Finance Limited Catholic Center, 108, Armenian Street, Chennai – 600 001.	बनाम/ Vs.	DCIT Company Circle – II(3), Chennai – 34.
स्थायी लेखा सं./जी.आइ.आर.सं./ PAN/GIR No. AAACL-0532-H		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकी ओरसे/ Appellant by	:	Shri S.P. Chidambaram (Advocate) – Ld. AR
प्रत्यर्थीकी ओरसे/ Respondent by	:	Shri Guru Bashyam (CIT) – Ld. DR

सुनवाईकी तारीख/ Date of Hearing	:	17-03-2022
घोषणाकी तारीख / Date of Pronouncement	:	24-05-2022

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2010-11 arises out of the order of learned Commissioner of Income Tax (Appeals)-6, Chennai [CIT(A)] dated 05.04.2017 in the matter of assessment framed by Ld. Assessing Officer [AO] 143(3) of the Act on

20.03.2013. The only ground urged in the appeal is ground no.1 which read as under: -

1. Disallowance of investments written off of Rs. 16,82,92,557

1.1 On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the AO of disallowing an amount of Rs.16,82,92,557, towards write off of investments consequent to reduction in capital of the subsidiary, in computing book profits under provisions of section 115JB of the Act.

1.2 The learned CIT(A) erred in not appreciating that section 115JB is a self-contained code and hence only specified adjustments can be added or excluded from book profits. The learned CIT(A) ought to have appreciated that write off of investment does not fall within specified adjustments and consequently cannot be excluded in computing book profit.

As evident, the sole subject matter of the appeal is computation of book-profits u/s 115JB.

2. The Ld. AR advanced arguments to support the case of the assessee whereas Ld. CIT-DR submitted that the impugned order is in accordance with law. Reliance has been placed by Ld. AR on the decision of Chennai Tribunal in the case of M/s PVP Corporate Parks Private Ltd. V/s DCIT (ITA No.497/Mds/2016 dated 01.08.2016) to support the arguments.

Having heard rival submissions and after due consideration of relevant material on record, our adjudication would be as given in succeeding paragraphs.

Assessment Proceedings

3. The assessee being resident corporate assessee is stated to be engaged in providing financial services and making investment. An assessment was framed for the year u/s 143(3) on 20.03.2013. While computing Tax Payable u/s 115JB, Ld. AO increased Book-Profits by sum of Rs.1682.92 Lacs, being write-off of losses of investment in the subsidiary company which would be equivalent to provision for loss.

Since tax payable u/s 115JB was higher than the tax payable under normal computation, the assessee was directed to pay tax as per the provisions of Sec.115JB. There is no discussion of the issue in the assessment order and the Book Profits u/s 115JB has been computed in the computation of income.

Appellate proceedings

4.1 During appellate proceedings, the assessee explained that another entity Forbes Finance Ltd. (FFL) got merged with the assessee w.e.f. 01.04.2008 as per the order of Hon'ble Madras High Court. FFL had wholly owned subsidiary namely Forbes Technosys Ltd. (FTL) wherein FFL held 210 Lacs equity shares of Rs.10/- each. As a result of amalgamation, the shares of FTL were held by the assessee and FTL became direct subsidiary of the assessee. The investments were valued at Rs.2061.17 Lacs. Subsequently a special resolution was passed by the equity shareholders of FTL on 05.01.2010 approving the reduction of paid-up share capital by cancelling the equity shares against debit balance of Rs.1710.28 Lacs standing in the Profit & Loss Account as on 31.03.2009. Accordingly, 1,71,02,800 shares of Rs.10/- each got cancelled and extinguished leaving remaining equity shares numbering 38,97,200 with the assessee. The reduction was duly approved by Hon'ble Bombay High Court vide order dated 26.02.2010. Accordingly, the shares were cancelled as under: -

Particulars	No. of Shares	Cost in Rs.
Equity Shares Acquired on amalgamation	2,10,00,000	20,61,17,902
Add: Subscription to right issue made during the year	30,00,000	3,00,00,000
Less: Reduction of capital pursuant to the Hon'ble Bombay High Court order dated 26.02.2010 u/s 100 of The	(1,71,02,800)	(16,82,91,552)

Companies Act, 1956		
Balance As on 31.03.2010	68,97,200	6,78.26,350

Accordingly, the assessee wrote-off the investment of Rs.1682.91 Lacs held in FTL and debited the same to the Profit & Loss Account. The same was treated by Ld. AO as provision for losses of subsidiary companies as per Explanation (1)(d) for Section 115JB of the Act.

4.2 The assessee submitted that the write-off of the investment was actual write-off and it could not be taken as provision for losses of subsidiary companies. Alternatively, it was ascertained liability. Reliance was placed on the decision of **Apollo Tyres Ltd. (255 ITR 273)** for the submissions that Ld. AO had no jurisdiction to go behind the Profit shown in the Profit & Loss Account except to the extent as provided in Explanation to Sec.115JB of the Act.

4.3 The Ld. CIT(A), relying on the decision of Special Bench Mumbai Tribunal in **Bennett Coleman & Co. Ltd. V/s Addl. CIT (141 TTJ 777)** held that loss on reduction of equity capital could at best be a notional loss. The shareholders' percentage of shareholding before and after the reduction of share capital remained the same and the loss was notional loss. Upon reduction of capital, nothing moves from the coffers of the company. Accordingly, the loss was held to be notional loss. Reliance was also placed on the decision of Mumbai Tribunal in **Shivalik Venture Private Ltd V/s DCIT (173 TTJ 238)** wherein it was held that the profit arising on transfer of capital asset by assessee to its wholly owned subsidiary company is liable to be excluded from the net profit.

Since FTL was wholly owned subsidiary company of the assessee, assessee's shareholding immediately before the reduction of capital and thereafter remains the same. Therefore, the notional loss arising on

capital reduction of equity shares of wholly owned subsidiary company is not to be factored for the purposes of computation of Book profit u/s 115JB of the Act. Nothing was shown by the assessee that the aforesaid notional loss was required to be debited to the final accounts in terms of the Companies Act. Accordingly, the action of Ld. AO was upheld. The relevant observations were as under: -

4.2 The following arguments have been forwarded by the Id. Authorized Representative against addition to the Book Profit made by the AO:

i. That the write off of investments in the profit and loss account for the year ended 31.03.2010 was actual write off of investment pursuant to the approval of the same by **Hon'ble Bombay High Court** and it cannot be taken as provision for losses of subsidiary company.

ii. Without prejudice, it has been argued that even if the actual write off is held as equivalent to provision for loss, it is art ascertained liability and only_ provision for unascertained liability are required to be added .back in computing book profit under Section 115JB of the Act.

iii. placing reliance on the decision of **Hon'ble Supreme Court** in the case of **Apollo Tyres Limited** reported in 255 ITR 273 (SC), it has been argued without prejudice that the AO does not have jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115JB of the Act.

4.3.1 The matter is considered. As narrated in the background facts earlier, the appellant company, as a result of the approval of **Hon'ble Bombay High Court** to the proposal of FTL to cancel its equity and reduce its capital has seen its investment reduce to the extent of Rs.16,82,91,552/-. It has also to be kept into consideration that loss is on account of investments in a subsidiary company. The issue for consideration here is whether the impugned loss is actual loss or a notional loss, hi the case of **Bennett Coleman & Co. Ltd. Vs Addl. Commissioner of Income-tax** reported in [2011] 141 TTJ 777 (Mumbai SB), the **Id. Mumbai Tribunal** has held that loss on reduction in paid up equity share capital can at best be said to be a notional loss. The Id. Tribunal had held that assesses shareholder's percentage of shareholding before the reduction of share capital by the company and immediately after such reduction having remained the same, the loss, if any, is a notional loss. It was further held that in the case of reduction of capital nothing moves from the coffers of the company and, therefore, it is a simple case of no consideration which cannot be substituted to zero and the so-called loss arising to the assessee who has not received any consideration reduction of share capital cannot be subjected to the provisions of Section 45 read with Section 48 and such loss is not allowable as capital loss. Following the judicial derision of Id. Mumbai Tribunal, I hold that the loss incurred by the appellant company by voluntary reduction of share capital by its subsidiary is nothing but a notional loss.

4.3.2 The moot issue is whether this notional loss can be considered for the purpose of computation of book profit as per the provisions of Section 115JB of the Act. In the case of **Shivalik Venture Private Limited Vs. Deputy Commissioner of Income-tax** reported in [2015] 173 TTJ 238 (Mumbai), the assessee company was engaged in the business of development and leasing of commercial complexes and rehabilitation of buildings under Slum Rehabilitation Scheme. It held a parcel of its land as its capital asset and the said land was attached with development rights/ FSI. It transferred development rights / FSI available on the portion of aforesaid land, to Us wholly owned Indian Subsidiary company. As the provision of Section 47(iv) were applicable to the transfer made by the assessee to itss subsidiary company, such gain was not regarded as 'Capital Gains' under Section 45 while computing total income under normal provisions of the Act. The assessee did not offer the amount while computing the 'Book Profit' under Section 115JB also on the ground that since it was not in the nature of income, it

did not come within the purview of Section 115JB. The **Id. Mumbai Tribunal** agreed with the logic of the assessee, and in its judgement distinguished the ruling of **Id. Hyderabad Tribunal in Rain Commodities Limited Vs. Deputy Commissioner of Income-tax** reported in [2010] 40 SOT 265 (Hyd) (SB), The **Id. Mumbai Tribunal**, in its findings held as under:

- *The expression 'transfer' is defined in section 2(47) which, inter includes the sake, exchange or relinquishment of the asset. Hence, the sate of a capital asset by the assessee to its subsidiary company should normally fall under the definition 'transfer' given in section 2(47). However, the provisions of section 47 provide certain exceptions by holding that certain transactions shall not be regarded as 'transfer', meaning thereby, even if a transaction falls under the definition of transfer as per the provisions of section 2(47), yet they shall not be chargeable to tax under section 45, in view of the provisions of section 47. The transaction involving any transfer of capital asset by a company to its wholly owned Indian subsidiary company is included in section 47 under clause (vi) and, hence, the said transaction is not regarded as 'transfer'. The existence of the element of 'transfer' is an essential condition for bringing the profits and gains arising on a transfer of a capital asset into taxation under section 45. Accordingly, in the absence of 'transfer', the profits and gains arising on said transfer of capital asset by a company to its wholly owned subsidiary is not chargeable to tax under 45. If the said profits and gains is not chargeable to tax under section 45, the same would not be considered as 'income' at all under the definition of income given in section 2(24). [Para 241].*
- *The provisions of section 10 list out various types of income, which do not form part of total income. All those items of receipts shall otherwise fall tinder the definition of the term 'transfer' as defined in section 2(24), but they are not included in total income in view of the provisions of section 10. Since they are considered as 'incomes not included in total income for some policy reasons, the legislature, in its wisdom has decided not to subject them to tax under section 115JB also, except otherwise specifically provided for. Clause (ii) of Explanation I to section 115JB specifically provides that the amount of income to which any of the provisions of section 10 (other than the provisions contained in clause (38) thereof) is to be reduced from the. net profit, if they are credited to the profit and loss account. The logic of these provisions is that an item of receipt which falls under the definition of 'income', is excluded for the purpose of computing 'book profit', since the said receipts are exempted under section 10 while computing total income. Thus, it is seen that the Legislature seeks to maintain parity between the computation of 'total income' and 'book profit', in respect of exempted category of income. If the said logic is extended further, an item of receipt which does not fall under the definition of 'income' at all and hence, falls outside the purview of the computation provisions of Income tax Act, cannot also be included in 'book profit' under section 115JB [Para 26].*
- *In view of the foregoing discussions, the profit arising on transfer of capital asset by assesses to its wholly owned Indian subsidiary company is liable to be excluded from the net profit i.e. the net profit disclosed in the profit and loss account should be reduced by the amount of profit arising on transfer of capital asset and the amount so arrived at shall be taken as 'net profit is shown in the profit and loss account' for the purpose of computation of book profit under Explanation I to section 115JB. Alternatively, since the said profit does not fall under the definition of 'income' at all and since it does not enter into the computation provisions at all, there is no question of including the same in the book profit its per the scheme of the provisions of section 115JB. [Para 28] " (emphasis supplied)*

4.3.3 In the case of the appellant company, the situation is converse. While in the matter before **Id. Mumbai Tribunal** issue was of exclusion of 'gains' made on transfer to subsidiary company, in the appellant's case the issue is of inclusion of loss due to reduction in equity shares of subsidiary company. I have already discussed in the foregoing paragraphs that the loss is nothing but a notional loss In so far as the appellant company is considered. As FTL Is a hundred percent owned subsidiary company, appellant's percentage of shareholding

immediately before the reduction of share capital and thereafter remains the same. It is settled law that income includes 'loss' or 'negative income'- In the appellant's case, the notional loss cannot be classified as a 'loss' for the purposes of computation of income. This point of view also gets corroboration by the action of the appellant company in not claiming the transaction as Long Term Capital Loss in its computation of income under the normal provisions of the Act, **The Id. Mumbai Tribunal in the Shivalik Venture** case (*supra*) has categorically held that items falling outside the purview of the computation provisions of the Income-tax Act, cannot also be included in the 'book profit'⁷ under Section 115JB of the Act Hence, in view of the facts, circumstances and judicial decisions discussed above. I am of the considered view that the notional loss arising out of the capital reduction of equity shares of wholly owned subsidiary company, is not to be factored for the purposes of computation of book profit under Section 115JB of the Act. nothing has been produced by the appellant to demonstrate that aforesaid notional loss were required to be debited to the final accounts in terms of the erstwhile Companies Act, 1956, Hence for these reasons, the action of the AO in disallowing the loss claimed by the appellant in computation of book profit, stands confirmed, These grounds are dismissed.

Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

5. Upon careful consideration, it could be gathered that FFL got merged with the assessee w.e.f. 01.04.2008 and the amalgamation was accounted for by the assessee on 'Pooling of interest' method. According to this method, the assets and liabilities are recorded at Book Value. The resultant gains / losses of the amalgamation have been adjusted through Capital Reserves / General Reserves & Surplus and the same have not been routed through Profit & Loss Account. This would show that the transactions were capital in nature.

6. M/s FFL was having 100% subsidiary in the name of Forbes Technosys Ltd. (FTL) wherein it held 210 Lacs equity shares of Rs.10/- each. As a result of amalgamation, the shares of FTL were held by the assessee and FTL became direct subsidiary of the assessee. The Book Value of the investments was Rs.2061.17 Lacs. Subsequently a special resolution was passed by the equity shareholders of FTL on 05.01.2010 approving the reduction of paid-up share capital by cancelling the equity shares against debit balance of Rs.1710.28 Lacs standing in the Profit &

Loss Account as on 31.03.2009. It could be seen that there was existing accumulated losses to the extent of Rs.1710.28 Lacs as on 31.03.2009 which were sought to be wiped-off by cancellation of shares. Accordingly, 1,71,02,800 shares of Rs.10/- each got cancelled and extinguished leaving remaining equity shares numbering 38,97,200 with the assessee. In other words, the Share Capital was reduced with a corresponding reduction in the existing accumulated losses and the transaction was a mere Book-entry and nothing more. The assessee wrote-off the amount of Rs.1682.91 Lacs in the Profit & Loss Account and added back the same while computing the income under normal provisions. However, while computing Book-Profits u/s 115JB, the assessee does not add back the same on the ground that it is actual loss. However, we concur with the findings in the impugned order that the assessee's ownership in FTL remains the same i.e., 100% before and after the cancellation of shares and nothing moves from the coffers of the assessee company on this transaction. Therefore, the write-off would be nothing but a notional loss of subsidiary company. The decision of Special Bench Mumbai Tribunal in **Bennett Coleman & Co. Ltd. V/s Addl. CIT (141 TTJ 777)** clearly support this proposition wherein it was held that loss on reduction of equity capital could at best be a notional loss. The shareholders' percentage of shareholding before and after the reduction of share capital remained the same and the loss was notional loss. Upon reduction of capital, nothing moves from the coffers of the company. Accordingly, the loss was held to be notional loss. For the said very reason, the decision of Chennai Tribunal in **M/s PVP Corporate Parks Private Ltd. V/s DCIT (ITA No.497/Mds/2016 dated 01.08.2016)** would not be applicable since in that case, there was

actual sale of fixed assets by the assessee and the capital profits were directly absorbed in the Balance Sheet without routing it through Profit & Loss Account. In the present case, the loss is not actual loss but the same is specifically to be added to Book Profits as per Explanation (1)(d) of Section 115JB(2) of the Act.

7. Proceeding further, we find that Mumbai Tribunal in **Shivalik Venture Private Ltd V/s DCIT (173 TTJ 238)** held that the profit arising on transfer of capital asset by assessee to its wholly owned subsidiary company is liable to be excluded from the net profit. It was held by the bench that for the purpose of Section 115JB, net profit shown in profit and loss account should be understood as net profit arrived at after giving effect of notes, if any, given in Notes to Accounts. Accordingly, if an item of receipt which does not fall under definition of 'income' at all, the same would fall outside purview of computation provisions of Act and therefore, would not be includible in 'book profit' u/s 115JB. Applying the analogy, a reverse conclusion could be drawn that such losses were not to be deducted while computing Book-Profits u/s 115JB.

8. In view of the above, the impugned order could not be faulted with. We concur with the findings of Ld. CIT(A) and accordingly, dismiss ground nos. 1.1. & 1.2. The other grounds have not been urged before us.

9. The appeal stand dismissed in terms of our above order.

Order pronounced on 24th May, 2022.

Sd/-

(ANIKESH BANERJEE)

न्यायिकसदस्य/Judicial Member

Sd/-

(MANOJ KUMAR AGGARWAL)

लेखासदस्य /ACCOUNTANT MEMBER

चेन्नई/ Chennai; दिनांक/ Dated : 24-05-2022

JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR6. गार्डफाईल/GF