

आयकर अपीलीय अधिकरण 'डी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No.479/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2009-10)

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आयकर अपील सं./ ITA No.480/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2010-11)

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आयकर अपील सं./ ITA No.481/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2011-12)

&

आयकर अपील सं./ ITA No.482/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2012-13)

M/s. Ind Eco Venture Limited Kothari Building, 4 th Floor, No. 114, Mahatma Gandhi Road, Nungambakkam, Chennai 600 034.	बनाम/ Vs.	DCIT Corporate Circle -2(2), Chennai.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. AAACL-6460-C		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Shri. S. Sridhar (Advocate) – Ld. AR
प्रत्यर्थी की ओर से/ Respondent by	:	Dr. S. Palani Kumar (CIT) – Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	05-09-2022
घोषणा की तारीख / Date of Pronouncement	:	19-10-2022

आदेश / ORDER**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeals by assessee for Assessment Years 2009-10 to 2012-13 arises out of separate orders of learned first appellate authority. However, the facts as well as issues are pari-materia the same in all the years and it is admitted position that our adjudication in any one year shall have equal application in the other years also. The appeal for AY 2009-10 arises out of the order of learned Commissioner of Income tax (Appeals)-6, Chennai [CIT(A)] dated 31.01.2017 in the matter of an assessment framed by learned Assessing Officer (AO) u/s 143(3) r.w.s. 147 of the Act on 31.03.2015. The grounds raised by the assessee read as under: -

1. The order of The Commissioner of Income Tax (Appeals) 6, Chennai dated 31.01.2017 in I.T.A.No.120/CIT(A)-6/2015-16 for the above-mentioned Assessment Year is contrary to law, facts, and in the circumstances of the case.
2. The CIT (Appeals) erred in confirming the correctness of completing the re-assessment u/s 143(3) r/w section 147 of the Act without assigning proper reasons and justification and ought to have appreciated that the order of re-assessment was passed out of time, invalid, passed without jurisdiction and not sustainable both on facts and in law.
3. The CIT (Appeals) went wrong in recording the findings in this regard in para 4.1 of the impugned order without assigning proper reasons and justification.
4. The CIT (Appeals) erred in dismissing the grounds challenging the disallowance of excess charge of depreciation for book purposes in the MAT regime without assigning proper reasons and justification.
5. The CIT (Appeals) failed to appreciate that the technical reasons given while justifying the power of the original authority in tampering with the audited financial statements prepared within the scope of the MAT regime were wrong, erroneous, unjustified, incorrect and not sustainable in law.
6. The CIT (Appeals) failed to appreciate that the reasons given from para 6.5 onwards would not justify the vesting of powers with the original authority to tinker the audited financial statements and ought to have appreciated that the infringement if any would fall within the domain of the competent authorities under the Companies Act, 1956 inasmuch as ought to have appreciated that such infringement as assumed by him would not alter the basic contentions for charge of higher depreciation for book purposes as per the accepted position for such charge under the Companies Act, 1956.
7. The CIT (Appeals) went wrong in recording the findings in this regard in paras 6.7 to 6.9 of the impugned order without assigning proper reasons and justification.

8. The CIT (Appeals) failed to appreciate that there was no proper opportunity given before passing of the impugned order and any order passed in violation of the principles natural justice would be nullity in law.

As is evident, the assessee is aggrieved by confirmation of certain adjustment made by revenue while computing Book Profits for the purpose of computing Minimum Alternative Tax (MAT) u/s 115JB.

2. Submissions of Ld. AR

2.1 The Ld. AR advanced argument supporting the claim of the assessee and filed written submissions. Reliance was placed on various decisions, the copies of which have been placed on record. The Ld. AR submitted that the legal grounds assailing the validity of reassessment proceedings are not being urged in the appeals and accordingly, no such findings are being rendered on these grounds.

2.2 In the written submissions dated 04.04.2022, the Ld. AR submitted that the prescribed rates of depreciation were minimum rates only. The disclosure was adequately made in the financial statements. The Ld. AR submitted that the performance of windmill was evaluated by the management at the time of preparing the final accounts. It has been submitted that one of the directors i.e., Shri K.V. Bala is the pioneer in the field of renewable energy. Based on his expertise and experience as well as based on Tariff Order No.01/2009 issued by Tamil Nadu Electricity Regulatory Commission (TNERC) dated 20.03.2009, the Board of directors of assessee-company permitted for charge of higher rate of depreciation for the windmills.

2.3 It has further been submitted that there is no deviation in law while preparing financial statements. The accounts were prepared in accordance with Part II and Part III of Schedule VI to the Companies Act,

1956. The financial statements were duly audited and adopted in the Annual General meeting (AGM) and submitted to Registrar of Companies and no deviation has been pointed out by any of the authorities. Therefore, Ld. AO had no power to question the depreciation rate charged by the assessee for want of 'Technical Evaluation Report' (TER). The Ld. AR submitted that the submission of TER was not mandatory in each case. Moreover, in the present case, the technical evaluation was on the basis of expertise of one the directors as well as on the basis of Tariff Order No.01/2009 dated 20.03.2009 issued by TNERC.

2.4 Another line of argument is that there is no qualification / adverse remarks by the Statutory Auditors in the audit report and therefore, it could not be presumed that the financial accounts were not prepared in accordance with the provisions of the Companies Act, 1956. The Auditors has duly confirmed the compliance of relevant provisions of Companies Act, 1956 in preparing the financial statements.

2.5 Regarding issue of capital gains which form subject matter of Appeal for AY 2010-11, Ld. AR relied on various decisions as under: -

- (i) The decision of Hon'ble Madras High Court in CIT V/s Metal Chromium Plater P. Ltd. (415 ITR 123).
- (ii) The decision of Hon'ble Madras High Court in CIT V/s Vijayashree Finance & Inv. Co. P. Ltd. (219 CTR 191).
- (iii) The decision of Hon'ble Madras High Court in CIT V/s Kovai Maruthi Paper & Board Pvt. Ltd (294 ITR 57).
- (iv) The decision of Hon'ble High Court of Karnataka in Shri Hariram Hotels P Ltd. V/s CIT (66 Taxmann.com 233)
- (v) The decision of Hon'ble Apex Court decision in Apollo Tyres Ltd V/s CIT (255 ITR 273).
- (vi) The decision of Hon'ble Apex Court decision in Malyala Manorama Co. Ltd. V/s CIT (300 ITR 251)
- (vii) The decision of Hon'ble Bombay High Court in CIT V/s Nuclear Power Corporation of India Ltd. (132 Taxmann.com 100)

3. Submissions of Ld. CIT-DR

3.1 The Ld. CIT-DR vehemently controverted the arguments of Ld. AR and submitted that the conditions as prescribed to claim higher rate of depreciation was not fulfilled by the assessee and therefore, the orders of lower authorities are to be confirmed. The Ld. CIT-DR submitted that the claim of higher rate of depreciation is not supported by any technical evaluation. The Ld. CIT-DR also filed written submissions and placed reliance on various decisions.

3.2 In the written submissions dated 04.04.2022, Ld. CIT-DR submitted that the assessee did not produce any evidence i.e., 'Technical Evaluation Report' in support of excess claim of depreciation at any stage of proceedings. As per Circular No.2/89, higher rate of depreciation would be justified if it is on the basis of bonafide Technical Evaluation coupled with proper disclosure by way of note forming part of annual accounts. The Ld. CIT-DR submitted that the disclosure made is very general disclosure and not as per the mandate of the circular.

3.3 In the submissions, Ld. CIT-DR also opposed the directions of the Bench to produce the 'Technical Evaluation Report' at this stage of proceedings. The Ld. CIT-DR submitted that such evidences could not be given at this stage of proceedings. It was vehemently submitted that the 'Technical Evaluation Report' never existed which has been confirmed by lower authorities. In subsequent written submissions dated 22.07.2022, Ld. CIT-DR has reiterated that no TER was found during the course of survey. This fact was noted by Ld. AO as well as Ld. CIT(A) in their respective orders.

3.4 Regarding issue of capital gains which form subject matter of Appeal for AY 2010-11, Ld. CIT-DR submitted that surplus / gains were

directly credited to 'Reserves and Surplus account' without routing the same through Profit & Loss Account which is in violation of the provisions of Sec. 211(3C) of the Companies Act, 1956 and the same has resulted into incorrect computation of Book Profits u/s 115JB.

3.5 For this ground, additional submissions have also been filed on 07.04.2022. In these submissions, Ld. CIT-DR has submitted that surplus on sale of investment was not disclosed and not properly explained by the assessee. The Ld. CIT-DR also sought distinction of case law of Hon'ble High Court of Madras in **CIT V/s Metal and Chromium Plater (P.) Ltd. (415 ITR 123)** and submitted that Special Leave Petition (SLP) against this decision has been withdrawn due to low tax effect. The Id. CIT-DR submitted that in the present case the assessee did not prepare the financial accounts as per Accounting Standards as well as in accordance with Parts II and III of Schedule VI to The Companies Act, 1956.

4. The case was put up for clarification to know the status of depreciation claim in subsequent years. The same was duly responded to by the assessee and the status of subsequent years was placed on record.

5. We have carefully heard the rival submissions and perused relevant material on record including case laws cited before us during the course of hearing. The oral arguments as well as written submissions have duly been considered while adjudicating the appeals. Our adjudication would be as under.

Assessment Proceedings

6. The assessee being resident corporate assessee is stated to be engaged in the business of power generation. It filed a revised return on

04.09.2010 for the year declaring loss of Rs.664.96 Lacs which was subjected to scrutiny u/s 143(3) on 17.11.2011 determining loss of Rs.659.98 Lacs. However, the case was reopened consequent to survey u/s 133A and notice u/s 148 was issued on 24.03.2014. The reasons for reopening were communicated to the assessee. The issue which forms the subject matter of appeal is as under.

7. Disallowance of Excess Depreciation as per Schedule XIV

7.1 During the course of assessment proceedings, it transpired that the assessee claimed depreciation on Windmill @40% on 'Written Down Value' (WDV) method in the Books of Accounts as against prescribed rate of 5.28% on 'Straight Line Method' (SLM) in Schedule XIV of the Companies Act, 1956. The opening cost of windmill was shown as Rs.773 Lacs which was increased by purchase of new windmill aggregating to Rs.1646.46 Lacs. The assessee claimed depreciation of 40% on WDV basis whereas Ld. AO, applied rate of 5.28% on SLM basis and computed excess depreciation of Rs.579.25 Lacs. The assessee submitted that due to short performance of the project, such depreciation at higher rates has been claimed. The assessee also relied on Circular No.2/89 dated 07.03.1989 issued by Ministry of Industry, Department of Company Affairs authorizing a company to charge depreciation at rates different from what is specified in Schedule XIV.

7.2 However, rejecting the arguments of the assessee, Ld. AO added excess depreciation to Book Profits as computed u/s 115JB of the Act. The assessee was required to pay tax u/s 115JB since tax payable u/s 115JB was higher than the tax payable under the normal income.

8. Appellate Proceedings

8.1 The Ld. CIT(A) dismissed the legal grounds as urged by the assessee on the ground that reassessment proceedings were initiated on the basis of material gathered during survey u/s 133A.

8.2 On merits, the assessee, inter-alia, submitted that similar issue in the case of sister concern M/s Indowind Energy Ltd. was decided in assessee's favor by first appellate authority on the ground that none of the clauses (a) to (i) of explanation to Sec.115JB were attracted to the facts of the case and the circular issued by finance ministry permits such a change. The appeal filed by the revenue stood dismissed by Tribunal vide order dated 25.10.2016.

8.3 The assessee also drew attention to the provisions of Sec.115JB and submitted that only permissible adjustments were to be made while computing the Book Profits. Another line of argument was that the rates prescribed under the Schedule XIV were only the minimum rates as supported by Circular No.2/89 dated 07.03.1989. The circular stated that the rates were minimum rates. It also permits the company to charge higher rate of depreciation provided it is on the basis of bona-fide technical evaluation and the proper disclosures were made by way of notes forming part of annual account. The circular provide as under: -

(3) Can higher rates of depreciation be charged?

It is stated that Schedule XIV clearly states that a company should disclose depreciation rates if they are different from the principal rates specified in Schedule. On this basis, it is suggested that a company can charge depreciation at rates which are lower or higher than those specified in Schedule XIV.

It may be clarified that the rates as contained in Schedule XIV should be viewed as the minimum rates and therefore, a company shall not be permitted to charge depreciation at rates lower than those specified in the Schedule in relation to assets purchased after the date of applicability of the Schedule. However, if on the basis of a bonafide technological evaluation, higher rates of depreciation are justified, they may be provided with proper disclosure by way of a note forming part of annual accounts.

However, the assessee could not furnish copy of technical evaluation report based on which a higher charge of depreciation was made. The assessee drew attention to Note No.4 of financial statements wherein it was mentioned that depreciation is provided on the Written Down Value Method. The rates of depreciation prescribed in Schedule XIV to the Companies Act, 1956 are considered as the minimum rates and if the management's estimate of the useful life of a fixed asset at the time of acquisition of the asset or of the remaining useful life in the subsequent review is shorter than that envisaged in the aforesaid Schedule, depreciation is provided at higher rates based on the management's estimate of the useful life / remaining useful life. However, Ld. CIT(A) noted that the claim was not backed by any technical evaluation report.

8.4 Considering the factual matrix, Ld. CIT(A) held that justification to charge higher rate of depreciation was not available on record. The rate of 40% was adhoc rate which is not rooted in a genuine technical evaluation. The disclosure made by the assessee is no disclosure. Therefore, it could not be said that the assessee had prepared its accounts in conformity with the stipulations of the Companies Act, 1956 and Circular No. 2/89 (supra).

8.5 The cited decision in the case of M/s Indowind Energy Ltd. for AY 2008-09 was held to be non-applicable since there was no compliance by the assessee of Circular. In the decision of Hon'ble Supreme Court in **Malyala Manorama Co. Ltd. (300 ITR 251)**, the revenue took a stand that for the purpose of computation of book profits, profits as per Income Tax Rules was not admissible and the company should have debited depreciation as per the provisions of The Companies Act. The issue was

whether AO could tinker with the claim of depreciation for the purpose of computation of Book Profits. However, rejecting the same, Hon'ble Court did not accept the argument of the revenue that the AO could scrutinize the accounts and satisfy himself that these accounts as prepared as per the Companies Act. However, this case law was distinguished in subsequent decision of **Dynamic Orthopedics (P) Ltd. V/s CIT (321 ITR 300)**. Accordingly, the action of Ld. AO was upheld. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

9. From the fact, it emerges that the assessee is engaged in the business of power generation through windmill. The assessee has acquired windmills in earlier years as well as in this year also. In the books of accounts, the assessee claim depreciation on windmills by adopting Written-Down Value Method (WDV) at rates higher than the prescribed rates. Such a method does not impact the taxable profit of the assessee but only impact computation of Book Profits u/s 115JB. This methodology has consistently been adopted by the assessee in all the years and there is no change in depreciation policy.

10. As per the directions of the bench, Ld. AR placed on record the outcome of assessment proceedings of AY 2013-14. Upon perusal of the same, we find that in that year also, Ld. AO made similar adjustment in Book Profit while framing an assessment u/s 143(3) on 14.03.2016. However, upon further appeal, Ld. CIT(A), vide appellate order dated 20.09.2017, concurred with assessee' submissions that the prescribed rates of depreciation were minimum rates and the enhanced rate of depreciation as claimed by the assessee was supported by reasons. The assessee also argued that Ld. AO failed to appreciate that the power to

compute Book Profit u/s 115JB was restricted statutorily. Concurring with the same, Ld. CIT(A) held that the Circular No.2/89 dated 07.03.1989 specifically allows such enhanced depreciation and accordingly this issue was decided in assessee's favor. The revenue preferred further appeal against this order before Tribunal vide ITA No.2877/Chny/2017 dated 12.12.2019 wherein the appeal was dismissed by the Bench on low tax effect. Accordingly, this issue has attained finality in assessee's favor in AY 2013-14. Pertinently, learned first appellate authority, in AY 2013-14, has relied on same Circular No.2/89 dated 07.03.1989 to hold that the circular provide for such enhanced depreciation. Proceeding further, it has also been submitted before us that similar claim made in the returns of income filed for AYs 2014-15 to 2018-19 has been accepted by the department in various intimations issued u/s 143(1). Thus, it could be noted that except for the present 4 years, the issue in all the other years have been settled in assessee's favor and the claim of higher rate of depreciation has been allowed.

11. Proceeding further, Schedule XIV of the Companies Act, 1956 prescribes rates of depreciation under the Companies Act. As per this Schedule, the depreciation may be charged at prescribed rates on Straight Line Method (SLM) or on Written-Down Value (WDV) Method. The rates prescribed under SLM method is 5.28% whereas WDV rate is 15.33%. The assessee has applied WDV rate of 40% which is stated to be based on Circular No.2/89 dated 07.03.1989 issued by Ministry of Industry, Department of Company Affairs authorizing a company to charge depreciation at rates different from what is specified in Schedule XIV. It is undisputed position that the prescribed rates are minimum rates of depreciation and a corporate entity is obligated to charge such

minimum rates in the books of accounts. This reasons are simple- the account have to be prepared on mercantile basis on principle of conservatism and therefore, any anticipated losses or wear and tear are to be provided in the books of account so as to reflect true and fair view of states of affairs of an entity. For the same very reason, the law provide for charging of higher depreciation provided the same is on the basis of bonafide technical evaluation. The technical evaluation, in our opinion, would be left to the wisdom of Boards of Directors of the assessee and it is the decision of a prudent businessman as to what would be the most appropriate rates to be charged to provide for wear and tear of the assets. Such technical evaluation, in our considered opinion, need not be a formal document and it may even be oral evaluation since there is no prescribed method or manner in which the same has to be carried out by the assessee. The only requirement is that the same should be bonafide and it should be consistently applied by the assessee. The decision taken by the Board of Directors or Shareholders, in this regard, would be sufficient compliance of the requirement as stipulated in the Circular. In the present case, the Board of Directors of the assessee company has taken a decision to charge higher depreciation and the accounts have duly been approved by the shareholders. No adverse remarks / qualifications have been reported by Statutory Auditor. In such a case, the allegation that the accounts are not prepared in accordance with the requirements of The Companies Act, 1956 and by following applicable accounting standards, would not be a correct proposition. The disclosure made in Note No.4, in our opinion, is sufficient compliance of the requirements of the Circular since it has clearly been stated in the

notes that the depreciation has been charged on Written-Down Value Method.

12. As per the requirements of the Companies Act, 1956, a company has to prepare its financial statements in accordance with the provisions of Part II and Part III of Schedule VI of the Companies Act, 1956. Once the accounts have been prepared in such a manner, it would not be open for revenue authorities to disturb the same. Upon perusal of Statutory Audit Report, it could be seen that the Auditors did not find any infirmity in the financial statements and did not find fault in the provision of higher rate of depreciation made by the assessee. The auditor did not qualify his audit report and has certified that the financial statements reflect the affairs of the company in a true and fair manner. The financial statements have been adopted by the shareholders in the Annual General Meeting. On the basis of all these facts, it could be concluded that the financial statements have been prepared perfectly in accordance with the Companies Act, which is the mandatory requirement of the provisions of sec.115JB of the Act.

13. Proceeding further, as per settled legal position, the provisions of Sec.115JB are complete code in itself. The Book Profits have to be computed strictly as per these provisions and only those adjustments are to be made which have been permitted under the provisions. The Ld. AO would have no authority to tinker with the financial statements except for those permissible adjustments which have been enumerated therein. We find that no such adjustment of excess depreciation is possible under the listed adjustments. The allegation, that the accounts are not prepared in accordance with the requirements of Schedule VI, has already been rejected by us in the preceding paragraphs. Once this is the case, no

additional item of adjustment could be borrowed to compute Book Profits u/s 115JB. This is as per the ratio laid down by Hon'ble Supreme Court in the case of **Apollo Tyres Ltd. V/s CIT (255 ITR 273)**.

14. The decision of coordinate bench in the case of assessee's sister concern **M/s Indowind Energy Ltd. V/s DCIT (ITA Nos.936/Mds/2015 & ors.; dated 25.10.2016)** also support our view. The coordinate bench, confirming the order of first appellate authority, held as under: -

14.3 After hearing both sides and carefully perusing the material on record, we find merit in the order of the learned Commissioner of Income Tax (Appeals) because of the following reasons:-

i) The circular No.2/89 issued by the Finance Ministry clearly states that any company is entitled to provide higher depreciation in the books based on risk like technological risks perceived by the management, genuine realizable value according to market practice etc.

ii) In the case of the assessee, the genuineness of the additional claim of depreciation by the assessee is not disputed.

iii) there is no bar under the Companies Act to charge higher depreciation other than what is recommended under the Companies Act.

iv) The Assessing Officer is barred from making any adjustments on the book profit for the purpose of computing tax under section 115JB of the Act other than what is specified in the Act.

14.4 The learned Commissioner of Income Tax (Appeals) after considering all these facts has rightly held the issue in favour of the assessee. Therefore, we do not find it necessary to interfere with the order of the learned Commissioner of Income Tax (Appeals).

The Ld. CIT-DR has submitted that a contrary view has been taken by coordinate bench in the case of **Indus Finance Corpn. Ltd. V/s DCIT (93 Taxmann.com 215 dated 03.05.2018)**. The relevant findings of the Bench read as under: -

No doubt, assessee is free to provide depreciation at a rate higher than what is mentioned in Schedule XIV of the Companies Act, 1956. However, in opting for this method assessee has to show that the depreciation is calculated in accordance with clause (b) of Section 205(2) of the Companies Act, 1956. Except for the note mentioned above, nothing was brought on record to show how and on what basis the specified period and the higher rate of depreciation was arrived by the assessee. In such circumstances, lower authorities in our opinion were justified in falling to Schedule XIV of the Companies Act, 1956 and holding that assessee had no reason to provide depreciation at a rate, higher than what was specified in the said

Schedule. Coming to the decision of Co-ordinate Bench in the case of Indowind Energy Ltd, relied on by the Id. Authorised Representative, it is clearly mentioned at para 14.2 of the said order, that the claim of the concerned assessee was based on realistic facts. Be that as it may, unless an assessee can show that depreciation was provided, by spreading 95% of the original cost, on the specified period, a claim in excess of what is set out in Schedule XIV of the Companies Act, 1956 cannot be allowed. We are therefore of the opinion that lower authorities were justified in recalculating the profit for the purpose of applying Section 115JB of the Act. We do not find any reason to interfere with the orders of the lower authorities. Grounds 5 to 9 of the assessee stand dismissed.

Upon perusal of this decision, we find that the bench mentions in clear terms that the assessee is free to provide depreciation at a rate higher than what is mentioned in Schedule XIV of the Companies Act, 1956. However, the assessee has to demonstrate calculations to show as to how and on what basis the specified period and the higher rate of depreciation has been arrived at by the assessee. However, in the case before us, there is no such allegation by Ld. AO and no error in computations has been pointed out. The computation of depreciation with respect to each of the windmill has been placed on record. Therefore, this case law would not apply to the case before us particularly when this issue has attained finality in assessee's favor in AY 2013-14.

15. Considering the entirety of facts and circumstances of the case, we would hold that the adjustment as made by Ld. AO of excess depreciation while computing Book Profits u/s 115JB is not sustainable in the eyes of law. We direct Ld. AO to delete the same and re-compute the Book Profits in accordance with our directions. This issue, in all the years, stands allowed in assessee's favor.

Remaining Ground of Appeal in AY 2010-11

16. In this year, the assessee is aggrieved by similar adjustment of Book Profit by Rs.1137.76 Lacs which represent capital gains earned by the assessee on sale of investments. It transpired that the assessee sold investments through Stock Exchanges. The transactions were subjected to Securities Transaction Tax (STT). The assessee earned gain of Rs.1137.76 Lacs which was directly credited to 'Reserves and Surplus Account'. The Ld. AO accepted the same to be exempt under normal provisions but added the same while computing Book Profits u/s 115JB. The same was stated to be in accordance with the provisions of Sec.211(3C) which mandate assessee to follow Accounting standard while preparing financial statements.

17. The Ld. CIT(A) noted that as per AS-13, the assessee has to report surplus on disposal of the investments in the Profit & Loss Account and make appropriate disclosures. The action of the assessee was not in consonance with the requirement of Sec. 211(3C) and therefore, the action of Ld. AO was upheld. To support the conclusion, reliance was placed on various judicial decisions which have been enumerated in the impugned order.

18. We find that the computation of surplus is not under dispute since the Ld. AO has accepted the gains to be exempt under normal provisions. The only dispute is the fact that the gains have directly been credited to 'Reserves and Surplus account' whereas the case of the revenue is that the gains should have been routed through Profit & Loss Account which would result into higher Book Profits. The primary plea of the assessee, before us, is that the gains are capital receipt exempt from

tax and therefore, the same would not form part of Book Profits u/s 115JB.

19. To adjudicate the issue, we directly go to the decision of Hon'ble High Court of Madras in **CIT V/s Metal and Chromium Plater (P.) Ltd. (415 ITR 123)** wherein it has been held by Hon'ble Court as under: -

6. The allowance or otherwise of the claim under Section 54AC has to be seen in the context of the provisions of Section 115JB which is a self contained code of assessment. The levy of tax is on the 'book profits' after effecting various upward and downward adjustments as set out in terms of the Explanation thereto. The provisions of sub-section (5) of s. 115JB open the assessment to the application of all other provisions contained in the Income tax Act except if specifically barred by that section itself. S. 115JB (5) reads as follows:

'(5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.'

7. Thus, the adjusted book profits would be further eligible to the benefits set out in the other provisions of the Act and the plain language of Section 115JB thus admits of the grant of relief under section 54EC in an assessment thereunder. We now deal with the case law relied upon by the Assessing officer in denying relief to the assessee. The Supreme Court, in the case of Apollo Tyres Ltd. (supra) is to the effect that the assessing officer is not empowered to embark on an enquiry with regard to the entries in the profit and loss account maintained in accordance with the provisions of the Companies Act 1956 and approved in the AGM except to the extent of effecting modifications in accordance with the Explanation to section 115J. The Bombay High Court in the case of Veekaylal Investments (supra) considers the inclusion of capital gain for the purposes of assessment under section 115J. Both judgements are rendered in the context of Section 115J which does not contain a provision analogous to sub-sections (4) of section 115JA or (5) of section 115JB of the Act. Thus while an assessment u/s 115J would be concluded exclusively on the basis of the book profits as adjusted by the items set out in the Explanation thereunder, in an assessment in terms of sections 115JA or JB, the adjusted book profits would be further subjected to the effect of other provisions of the Act that are specifically brought into play by virtue of sub-sections (4) of section 115JA and (5) of section 115JB.

8. Reliance of the learned standing counsel on the decision of the Division Bench of the Kerala High Court in the case of N.J. Jose and Co. (P.) Ltd. v. Asstt. CIT [2010] 321 ITR 132/[2008] 174 Taxman 141 is also distinguishable for the same reason as aforesaid.

9. In view of the above discussion, the substantial question of law is answered against the Revenue and in favour of the assessee. The departmental appeal is dismissed without costs.

It has thus been held that the provisions of sub-section (5) of Sec. 115JB open the assessment to the application of all other provisions contained

in the Income tax Act except if specifically barred by that section itself. Accordingly, the adjusted book profits would be further eligible to the benefits set out in the other provisions of the Act and the plain language of Section 115JB thus admits of the grant of relief under section 54EC in an assessment there-under. Applying the same analogy, a conclusion could be drawn that the income / gains which are otherwise exempt under normal provisions would have to be excluded while computing the Book Profits u/s 115JB in view of sub-section (5) of Sec.115JB which open the assessment to the application of all other provisions contained in Income Tax Act. The Ld. CIT-DR has submitted that this decision has not been tested by Hon'ble Supreme Court due to low tax effect. Be that as the case may be, the decision is by jurisdictional High Court and the same stand as such and we are bound to follow it.

20. Similar is the decision of Hon'ble Karnataka High Court in **Sri Hariram Hotels (P.) Ltd. V/s CIT (66 Taxmann.com 233)** which is in the context of Sec. 115JB and it was held as under: -

11. Section 115JB of the Act during the relevant period provides that notwithstanding anything contained in any other provisions of this Act, in the case of an assessee being a company, the income tax payable on the total income as computed under the Act is less than 7½% of the book profit, the tax payable for the relevant previous year shall be deemed to be 7½% of such book profit. Thus, the assessee has to first compute the total income in accordance with the Act and if the total income is less than 7½% of the book profit, then the assessee has to prepare profit and loss account for the previous year, then fictionally, it will be deemed that its total income chargeable to tax would be an amount equal to 7½% of such book profit. The Income Tax Officer has computed the book profit and the regular income. As tax on regular income is more than tax on book profit, tax on regular income is adopted. The Authorities have consistently relied upon Clause 3(XII[b]) of Part-II of Schedule VI to the Companies Act, to come to a conclusion that capital gains has to be mandatorily taken into profit and loss account while computing the book profit. That having not been done by the Assessee, the authorities have recomputed the book profit. At this juncture, it would be beneficial to refer to the Judgment of the Apex Court in Apollo Tyres Ltd. (supra) which is rendered while dealing with an identical provision of Section 115J of the Act. It is held thus:

"Therefore, we are of the opinion, the Assessing Officer while computing the income under section 115J has only the power of examining whether the

books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increases and reductions as provided for in the Explanation to the said section. To put it differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to section 115J."

12. In the subsequent Judgment of the Apex Court in HCL Comnet Systems & Services Ltd. (supra), following the Judgment of Apollo Tyres Ltd. (supra), it is held that the adjustment required to be made to the net profit disclosed in the profit and loss account for the purpose of section 349 of the Companies Act are quite different from the adjustment required to be made under the Explanation to be made under section 115JA of the Act. For the purpose of section 115JA, the Assessing Officer can increase the net profit determined as per the profit and loss account prepared as per Parts II and III of Schedule VI to the Companies Act only to the extent permissible under the Explanation thereto.

13. The Explanation appended to Section 115JB provides certain Items which if debited to the profit and loss account can be added back to the net profit for computing the book profit. Clause (b) of the said Explanation provides for the amount carried to any reserves by whatever name called. In the present case, it is true that the capital gains are directly taken to capital reserve without taking the said amount of capital gain to the profit and loss account however, no such capital gain is debited to the profit and loss account, as such, the said Explanation is not applicable to the facts of the present case.

14. We have noticed the auditor's report, certified with a qualification that the profit and loss account and balance sheet referred to in the report comply substantially in all material respects with the applicable accounting standards referred to in Section 211(3C) of the Companies Act except the land and building sold during the year, the capital gain has been transferred directly to capital reserve account instead of crediting to profit and loss account, which in the opinion of the directors is more appropriate. However, it is not disputed that this auditor's report is accepted by the General Body, the books of account and the balance sheet are filed before the Registrar of Companies. It is also noticed by us that Clause 3(XII)(b) and (c) of Part II of Schedule VI of the Companies Act provides that profit and losses in respect of transactions of a kind, not usually undertaken by the Company or undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount and miscellaneous income, are required to be disclosed in the profit and loss account. Considering, the capital gain income falling under these clauses, it is incumbent on the Company to disclose the said amount of capital gain in the profit and loss account. Section 211 of the Companies Act contemplates, form and contents of balance sheet and profit and loss account. Sub-sections (3A), (3B) and (3C) of Section 211 provides that every profit and loss account and balance sheet of the company shall comply with the accounting standards, where the profit and loss account and balance sheet of the company do not comply with the accounting standards, such companies shall disclose in its profit and loss account and the balance sheet the following mainly:

- (a) the deviation from the accounting standards;
- (b) the reasons for such deviation; and the financial effect, if any, arising due to such deviation.

15. For the purpose of Section (3C) of Sec. 211 of the Companies Act, the expression "accounting standards" means the standards of accounting recommended by the Institute of Chartered Accountants of India constituted under the Chartered Accountants Act, 1949 (38 of 1949) as may be prescribed by the Central Government in consultation with the National Advisory Committee on Accounting Standards established under subsection (1) of Section 210(A).

16. The proviso to the said Section 211(3C) of the Companies Act makes it clear that the standards of accounting specified by the Institute of Chartered Accountants of India shall be deemed to be the accounting standards until the accounting standards are prescribed by the Central Government under the sub-section (3C). The Assessing Officer has placed reliance on the accounting standards, vide No. 9949 dated 25.1.1996 and has held that the transaction of sale of property should have been brought into the profit and loss account as an extraordinary item since the assessee has failed to follow the accounting standards, determined the book profit after allowing the deduction towards cost as per provision to Section 115JB(2) of the Act. This order is confirmed by the appellate authority as well as by the ITAT. However, this exercise of the assessing authorities, in recomputing the book profit of the assessee is contrary to the principles of law laid down by the Apex Court in Apollo Tyres Ltd. (supra). The Apex Court has held that the only power vested with the Assessing Officer is to make increases and deductions as provided in the Explanation to Section 115JB of the Act. Assessing Officer has no power to embark upon a fresh enquiry in regard to the entries made in the books of account of the company. In the light of the judgment of Apollo Types Ltd. (supra), we are of the opinion that the Assessing Officer has no power to recompute the book profit and has to rely upon the authentic statements of account of the company, the accounts being scrutinized and certified by the statutory auditors though with a qualification, approved by the company in general body meeting and thereafter filed before the Registrar of Companies, who has a statutory obligation to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act.

17. Accordingly, we answer the substantial question of law in favour of the assessee and against the revenue. For the foregoing reasons, appeal is allowed.

Respectfully, following the ratio of above decisions, the addition of Capital Gains u/s 115JB could not be held to be justified. Accordingly, Ld. AO is directed to delete the same while computing Book Profits u/s 115JB. This issue stands allowed in assessee's favor.

21. No other ground has been urged before us in any of the appeals.

Conclusion

22. All the appeals stand partly allowed in terms of our above order.

Order pronounced on 19th October, 2022.

Sd/-
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखासदस्य /ACCOUNTANT MEMBER

चेन्नई/ Chennai; दिनांक/ Dated : 19-10-2022
JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

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