IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH, KOLKATA

Before Shri Sanjay Garg, Judicial Member
&
Shri Girish Agrawal, Accountant Member

I.T.A. No. 1318/KOL/2019
Assessment Year: 2013-2014

M/s. Srei Infrastructure Finance Limited,....Appellant
86C, Vishwakarma, Topsia Road (South),
Topsia, Kolkata-700046
[PAN: AAACS1425L]

-Vs.-

Assistant Commissioner of Income Tax,....Respondent
Circle-11(2), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069

-Vs.-

I.T.A. No. 1538/KOL/2019
Assessment Year: 2013-2014

Assistant Commissioner of Income Tax,.....Appellant
Circle-11(2), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069

-Vs.-

M/s. Srei Infrastructure Finance Limited,.Respondent
86C, Vishwakarma, Topsia Road (South),
Topsia, Kolkata-700046
[PAN: AAACS1425L]

Appearances by:
Shri S.K. Tulsiyan, Advocate, appeared on behalf of the assessee
Shri Subhrajyoti Bhattacharjee, CIT (DR), appeared on behalf of the Revenue

Date of concluding the hearing : April 17, 2023
Date of pronouncing the order : May 22nd , 2023

O R D E R

Per Sanjay Garg, Judicial Member:-

The captioned are cross appeals, one by the assessee and the other by the revenue are directed against the order of ld. Commissioner of Income Tax (Appeals)-22, Kolkata dated 29.03.2019 passed for A.Y. 2013-14. First we take up the assessee's appeal ITA No. 1318/KOL/2019. The assessee in this appeal has raised the following grounds:-

> *"(1) That on the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals) [here-in-after referred to as Ld. CIT(Appeals)] was not justified and grossly erred in confirming the disallowance of provision for leave encashment of Rs. 37,73,360/- in computing total income.*
>
> *(2) That on the fact and in the circumstances of the case, the Ld. CIT(Appeals) was not justified & grossly erred in confirming the disallowance of claim of Education Cess amounting to Rs. 86,70,456/- as allowable expenditure in computing total income.*
>
> *(3) That on the fact and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in confirming the disallowance of claim for exclusion of amount transferred to Special Reserve u/s 45IC of the RBI Act, 1934 amounting to Rs.19,00,00,000/- in computing total income under normal provisions of the Act.*
>
> *(4) That on the fact and in the circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in confirming the addition of amount transferred to Special Reserve u/s 45IC of the RBI Act, 1934 amounting to*

Rs.19,00,00,000/- in computing Book Profits u/s 115JB of the Act".

2. Ground No. 1 relates to disallowance of provision for leave encashment amounting to Rs.37,73,360/-.

3. At the outset, the ld. Counsel for the assessee has fairly stated that the issue raised vide ground no. 1 is squarely covered against the assessee by the judgment of Hon'ble Supreme Court dated 24.04.2020 in the case of Union of India & Ors. -vs.- Exide Industries Limited & Anr. in Civil Appeal No. 3545/2009. Respectfully following the judgment of the Hon'ble Supreme Court, we reject the Ground No. 1 raised by the assessee.

4. Ground No. 2 of the assessee's appeal relates to disallowance of claim of Education Cess amounting to 86,70,456/-. We find that this issue is covered against the assessee by virtue of amendment with retrospective effect made by the Finance Act, 2022, whereby the Cess has been held to be part of income-tax and not allowable deduction in computing total income. Therefore, this ground of appeal is dismissed.

5. Ground No. 3 relates to exclusion of special reserve in computation of total income under the normal provisions of the Act amounting to Rs.19,00,00,000/-.

6. Brief facts of the case are that the assessee-appellant, being an NBFC, is mandatorily required to transfer at least 20% of their net profits to a Reserve Fund as per section 45-IC of the RBI Act. The claim of the appellant is that the aforesaid amount meant to be transferred to reserve fund should not be included for the purpose of computation of income under the Income Tax Act.

7. Ld. Counsel for the assessee in this respect has submitted that the assessee does not have control over the reserve and is not permitted to withdraw or utilize any sum once transferred to the reserve fund. That the said fund can be utilized only in such manner and on such terms and conditions as may be laid down by RBI from time to time. Further Section 45Q of the RBI Act provides an overriding effect over other laws.

7.1. However, ld. Counsel for the assessee has been fair enough to submit that the said issue has been decided by the Coordinate Bench of this Tribunal in ITA Nos. 1302 & 1318/DEL/2012 for AY 2008-09 and ITA Nos. 1821 & 2003/KOL/2016 for AY 2011-12 against the assessee and, therefore, the issue is already covered by the said decision against the assessee. He has further agreed that the issue has already been decided by the Hon'ble Delhi High Court in assessee's own case reported in (2015) 54 taxmann.com 254 (Delhi), wherein the Hon'ble Delhi High Court has held that "Where amount was credited by assessee-NBFC to statutory reserve pursuant to section 45IC of the Reserve Bank of

India Act, 1934 and same was not an amount diverted at source by overriding title, said amount was to be added during computation of book profit under section 115JB".

8. Ld. D.R. relied on the order of ld. CIT(Appeals) as well as the judgment dated 13.02.2015 of the Hon'ble Delhi High Court in I.T. Appeal Nos. 371 & 372 of 2012 in the case of Srei Infrastructure Finance Limited –vs.- Addl. CIT (2015) 54 taxmann.com 254 (Delhi).

9. We have considered the rival contentions and gone through the record carefully. In our view, merely because the assessee is required to transfer the profits to special reserve or there are certain restrictions for using the said profits that itself is not enough to hold that the same is not the income of the assessee. That special reserve belongs to the assessee only and is reserved for utilization in certain eventualities for the safety and benefit of assessee and its customers as per the RBI guidelines. This fund is in the type of savings that belongs to the assessee itself. Therefore, it cannot be said that transfer of certain profits to reserve fund will not fall in the definition of income of the assessee. Moreover, this issue is squarely covered by the decision of the Hon'ble Delhi High Court in assessee's own case i.e. Srei Infrastructure Finance Limited –vs.- Additional Commissioner of Income Tax reported in (2015) 54 taxmann.com 254 (Delhi),

wherein the Hon'ble Delhi High Court has categorically held as under:-

> *"Whether where amount was credited by assessee-NBFC to statutory reserve pursuant to section 45IC of the Reserve Bank of India Act, 1934 and same was not an amount diverted at source by overriding title, said amount was to be added during computation of book profit under section 115JB".*

Respectfully following the judgment of the Hon'ble Delhi High Court, we dismiss this ground raised by the assessee.

10. With regard to Ground No. 4, the assessee has contested that the aforesaid special reserve as discussed vide Ground No. 3 should not be taken for computation of income in the book profit under section 115JB of the Income Tax Act. As observed above, this issue is squarely covered by the decision of the Hon'ble Delhi High Court in the case of Srei Infrastructure Finance Limited – vs.- Additional Commissioner of Income Tax reported in (2015) 54 taxmann.com 254 (Delhi) (supra). This issue is accordingly decided against the assessee.

11. In view of our finding, there is no merit in the appeal of the assessee and accordingly the same is dismissed.

12. Now we take up the Revenue's appeal being **ITA No. 1538/KOL/2019**.

This appeal is directed at the instance of Revenue against the order of ld. Commissioner of Income Tax (Appeals)-22, Kolkata dated 29.03.2019 passed for A.Y. 2013-14, wherein the Revenue has raised the following grounds of appeal:-

(1) *That on the facts and the circumstances of the case, the ld. CIT(A) erred in deleting the receipts from transfer of voting rights amounting to Rs.20,00,00,000/- in the computation of income under both the normal provisions and the book profit of the Income Tax Act, 1961.*

(2) *That on the facts and the circumstances of the case, the ld. CIT(A) erred in deleting the receipts from transfer of rights to acquire sale shares amounting to Rs.20,00,00,000/- in the computation of income under both normal provisions and the book profit of the Income Tax Act, 1961.*

(3) *That on the facts and the circumstances of the case, the ld. CIT(A) erred in deleting the receipt from assignment of rights amounting to Rs.15,00,00,000/- in the computation of income under both normal provisions and the book profit of the Income Tax Act, 1961.*

(4) *That on the facts and the circumstances of the case, the ld. CIT(A) erred in deleting the disallowance amounting to Rs.14,467,83,685/- u/s 14A of the Act in the computation of income under both normal provisions and the book profit of the Income Tax Act, 1961.*

(5) *That on the facts and the circumstances of the case, the ld. CIT(A) erred in deleting the disallowance amounting to Rs.48,83,800/- u/s 36(1)(iii) in the*

computation of income under normal provisions of the Act.

(6) *That on the facts and the circumstances of the case, the ld. CIT(A) erred in deleting the disallowance of modified claim of deduction u/s 36(1)(vii) of the Act amounting to Rs.7,61,48,526/-.*

(7) *That on the facts and the circumstances of the case, the ld. CIT(A) erred in deleting the addition of contingent provision against standard assets amounting to Rs.1,61,00,000/- in the computation of book profit u/s 115JB of the Act.*

13. Vide Ground No. 1, the Revenue has contested the action of the ld. CIT(Appeals) in deleting the addition made by the ld. Assessing Officer on account of short-term capital gain on the receipt from transfer of voting rights amounting to Rs.20,00,00,000/-.

14. Brief facts of the case are that the assessee along with ECI Engineering & Construction Company Limited (hereinafter referred to as 'ECI') had entered into a joint bidding agreement dated 10.12.2010 agreeing to form a consortium and jointly bid for the project of widening of existing road to two lane national highways standards along with improvement and realignment from Potin to Pangin, as a part of trans- Arunachal Highway on the section of National Highway No. 229 in the State of Arunachal Pradesh on design, build, finance, operate and transfer (DBFOT) basis. The inter-se shareholding amongst the company, assessee

and ECI shall be in the ratio of 50:50 respectively as per joint bidding agreement. Ministry of Road Transportation & Highways accepted the bid of the consortium and issued its Letter of Award dated 18.01.2012. Pursuant to the acceptance, in compliance with the letter of award, the consortium members incorporated a Private Limited Company under the name and style M/s. Potin Pangin Highway Pvt. Limited (in short 'M/s. Potin Pangin Highway'). In terms of the letter of award, M/s. Potin Pangin Highway entered into a concession agreement dated 14.08.2012 with Ministry of Road Transportation & Highways. Subsequently, the assessee entered into an agreement dated 22.03.2013 with the other consortium member, 'ECI' for transfer of voting rights in the shares of M/s. Potin Pangin Highway for an amount of Rs.20 crores.

15. The ld. Assessing Officer taxed the said amount as short-term capital gains. However, the ld. CIT(Appeals) deleted the addition made by the ld. Assessing Officer holding that since the cost of acquisition of the said rights could not be determined, therefore, the computation machinery will fail. He in this respect relied upon the decision of the Hon'ble Supreme Court in the case of Cit –vs.- B.C. Srinivasa Setty (1981) 128 ITR 294 (SC).

16. Ld. D.R. could not point out any distinguishable fact on law for interference in the aforesaid order of the ld. CIT(Appeals), the said is accordingly upheld.

17. Ground No. 1 of the Revenue's appeal is therefore, dismissed.

18. Vide Ground No. 2, the Revenue has agitated the action of the ld. CIT(Appeals) in deleting the addition made by the ld. Assessing Officer on the receipt from transfer of rights to purchase 'the sale shares' at a future date treated as 'Short Term Capital Gain".

19. The ld. Assessing Officer treated the said right to purchase the 'sale shares' by the assessee to ECI as sale of shares itself. However, the ld. CIT(Appeals) deleted the addition made by the ld. Assessing Officer observing that there was a lock in period during which the shares in question could not be transferred. The amount was received by the assessee as an advance on account of transfer of right to purchase pursuant to agreement to sale of shares at a future date. The ld. Counsel for the assessee has submitted that the said shares were actually sold in the assessment year 2021-22 and the amount received of Rs.20 crores was duly offered for taxation in the said year. Even during the course of assessment year 2021-22, a query was raised on account of the said sum and reply was furnished by the assessee, which has been duly accepted and no adjustment was made.

20. Since the assessee had only entered into an agreement for selling its right to purchase the 'sale shares' of M/s. Potin Pangin Highway, a joint venture of assessee and 'ECI' and the actual transaction had taken place in the assessment year 2021-22 and no transfer of shares took place in the assessment year under consideration and further the amount has been offered for taxation when the transfer was complete in the A.Y. 2021-22. Therefore, we do not find any infirmity in the order of ld. CIT(Appeals) on this issue also. This ground is hereby dismissed.

21. Vide Ground No. 3, the Revenue has agitated the action of the ld. CIT(Appeals) in deleting the addition made by the ld. Assessing Officer on account of receipt from assignment of rights amounting to Rs.15,00,00,000/-.

22. The assessee during the year entered into an agreement with other consortium member 'MBL' for assignment of its rights to subscribe to 14.5% shares in M/s. Suratgarh Road Company.

23. Brief facts of the case are that the assessee along with MBL Infrastructure Limited ('MBL') had entered into a joint bidding agreement dated 05.04.2011 and formed a consortium to jointly bid for development and operation of the Bikaner-Suratgarh Section of NH-15 by two laning with paved shoulder in Rajasthan through Public Private Partnership on Design, Build, Finance,

Operate and Transfer (DBFOT) basis. The inter-se shareholding amongst the assessee and MBL shall be in the ratio of 50:50 respectively as per joint bidding agreement. Further, PWD-Rajasthan accepted the bid of the consortium and issued its Letter of Award dated 09.01.2012. Pursuant to the acceptance, in compliance with the letter of award, the consortium members incorporated a Private Limited Company under the name and style M/s. Suratgarh Bikaner Toll Road Company Private Limited (in short 'M/s. Suratgarh Road Co.). In terms of the letter of award, M/s. Suratgarh Road Co. entered into a concession agreement dated 09.05.2012 with Government of Rajasthan acting through its Chief Engineer (NH), Public Works Department. Subsequently, the assessee entered into an agreement dated 29.06.2012 with the other consortium member 'MBL' for assignment of its right to subscribe to 14.5% shares in M/s. Suratgarh Road Co. out of total right to subscribe to 50% of the equity share capital in consideration of Rs.15,00,00,000/-.

24. The ld. Assessing Officer treated the said receipt as short-term capital gain. However, the ld. CIT(Appeals) deleted the addition made by the ld. Assessing Officer holding that there was no mechanism to determine the cost of acquisition of assignment of right to subscribe to 14.5% shares in the joint venture company M/s. Suratgarh Road Company. In this regard, he relied on the decision of the Hon'ble Supreme Court in the case of CIT –vs.- B.C. Srinivasa Setty (1981) 128 ITR 294(SC).

25. The ld. D.R. could not point out any distinguishable facts on law to interfere in the order of ld. CIT(Appeals) and the same is accordingly upheld. This ground of Revenue is hereby dismissed.

26. Vide Ground No. 4, the revenue has agitated the action of the ld. CIT(Appeals) in deleting the disallowance of Rs.14,47,83,685/- made by the ld. Assessing Officer under section 14A of the Income Tax Act in computation of income under normal provisions of profit under section 115JB of the Income Tax Act.

27. The ld.. CIT(Appeals) noted that the assessee during the year earned dividend income of Rs.2,78,53,622/-. The assessee had made suo motu disallowance of Rs.5,44,466/- being the direct expenses incurred. The ld. CIT(Appeals) further relied upon the decision of Hon'ble Special Bench of ITAT, Delhi in the case of Vireet Investment P. Limited (ITA No. 502 of 2012) and held that the disallowance under section 14A is to be computed on only shares generating exempt income during the year. The ld. CIT(Appeals) also invited the calculation from the appellant and considering the investment of the appellant vis-à-vis the dividend income earned, he noted that for the purpose of calculation of disallowance of administrative expenses @ 1% of average investments was to be applied only on the investment yielding

exempt income. He, accordingly, restricted the disallowance to Rs.21.47 lacs on account of administrative expenses. However, in respect of the notional interest expenditure, ld. Counsel for the assessee has explained that no borrowed funds were used for the investment and that own funds were used by the assessee for the purpose of investment. The issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of Reliance Industries Limited (2019) 410 ITR 466 (SC), wherein the Hon'ble Supreme Court has upheld the proposition made by the various High Courts that if the assessee is possessed of own/interest-free funds sufficient to make the investment, then, under the circumstances, presumption will be that the investments have been made by the assessee out of own funds/interest-free funds available to it.

28. Ld. D.R. has not disputed the fact that own/interest-free funds of the assessee were more than the investments made.

29. In view of this, we do not find any infirmity in the order of ld. CIT(Appeals) on this issue and the same is upheld. Therefore, the ground raised by the Revenue is dismissed.

30. Vide Ground No. 5, the Revenue has agitated the action of the ld. CIT(Appeals) in deleting the disallowance amounting to

Rs.48,83,800/- under section 36(1)(iii) in the computation of income under the normal provisions of the Act.

31. The ld. Assessing Officer computed the notional interest at the rate of 10% on the average investments in SPVs and held that the same cannot be allowed under section 36(1)(iii), on the contention that these investments were not for generating any income nor was there any certainty that they would generate any income in near future and thus were not for the purpose of business. The ld. CIT(Appeals), however, deleted the disallowance made by the ld. Assessing Officer observing that the assessee was having sufficient own funds to make investment and further that investments in SPV (Special Purpose Vehicle) have been made during the course of business. The ld. Counsel for the assessee has further submitted that the assessee was only a financial member of the SPV. That the assessee had entered into an agreement with the other parties only pursuant to the nature of its business and acted only as financial member of the SPV and that the shares in the SPV were held only pursuant to the agreement and to promote the business of the financing and not with the intention to make the investment. The SPV was formed for the purpose of business of the assessee and that it was not for the purpose of investment. Considering the nature of business of the assessee and the purpose of forming the SPV to secure infrastructure, contracts etc., we do not find any infirmity in the order of ld. CIT(Appeals) in holding that the said

expenditure/investment was made for the business purposes. This ground of Revenue's appeal is, therefore, dismissed.

32. Vide Ground No. 6, the Revenue has agitated the action of the ld. CIT(Appeals) in allowing and considering the modified claim of deduction under section 36(1)(viii) of the Income Tax Act.

33. Brief facts relating to this issue are that the assessee had claimed deduction under section 36(1)(viii) of Rs.1,69,484/- in the return of income. During the course of assessment proceedings, the assessee filed a modified computation of deduction at Rs.7,6,1,48,526/-. The ld. Assessing Officer, however, rejected the revised claim made by the assessee. The ld. CIT(Appeals) however, relied upon the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Limited –vs.- CIT reported in 229 ITR 383 (SC) and further of the Hon'ble Bombay High Court in the case of CIT –vs.- Pruthvi Brokers & Shareholders (2012) 23 taxmann.com 23 (Bom.), wherein the Hon'ble High Court has observed that the assessee is entitled to raise additional grounds not merely in terms of legal submissions before the authorities but is also entitled to raise additional claim not made in the return filed by it. That the appellant authority have jurisdiction to take not merely that additional grounds, which become available on account of change of circumstances or law, but that additional grounds which were available when the return was filed.

34. The ld. D.R. has not furnished any distinguishable case law in this respect. We, therefore, do not find any infirmity in the order of ld. CIT(Appeals) in this respect also.

35. Vide Ground No.7, the Revenue has agitated the action of the ld. CIT(Appeals) in deleting the contingent provision against standard assets amounting to Rs.1,61,00,000/- in the computation of book profit under section 115JB of the Act.

36. Brief facts of the case are that the appellant-assessee had created contingent provision on standard assets of Rs.161 lacs in accordance with the Prudential Norms of the RBI. Every NBFC has to create a provision at 0.25% of the standard assets outstanding on the balance-sheet date as per Notification No. DNBS(PD)CC No. 207/03.02.002/2010-11 dated January 17, 2011 issued by the RBI. The said notification further provides that the provisions on standard assets should not be reckoned for arriving at net NPAs as well as no netting off was required to be done from gross advances instead it should be separately shown as 'Contingent Provisions against Standard Assets' in the balance sheet. Contingent Provision against Standard Asset not covered by any clause of Explanation 1 to Section 115JB(2).

37. The ld. Counsel for the assessee however submitted that the contingent provision against the standard asset is made as per the RBI guidelines and not on adhoc basis. It cannot be treated as an unascertained liability.

38. The ld. CIT(Appeals) considering the above submission of the assessee deleted the addition so made by the assessee observing as under:-

> *"The written submissions and case laws/judicial precedents cited by the ld. ARs have been duly perused and carefully considered. The appellant has prepared its financial statements in conformity, inter alia with the guidelines issued by the Reserve Bank of India as applicable to an 'Infrastructure Finance Company' Non Banking Finance Company. Accordingly, the appellant has created "Contingent Provision against Standard Assets" as per Notification No. DNBS(PD) CC. No. 207/03.02.002/2010-11 dated January 17, 2011 issued by the RBI wherein every NBFC has to create a provision at 0.25% by the RBI. Thus clause (c) of Explanation 1 to sec. 115JB which provides for addition of amount set aside to provision made for meeting liabilities other than ascertained liabilities is not applicable. Reliance is placed on the decision of Hon'ble Apex Court in Metal Box Co. of India Ltd. –vs.- Their Workmen (19690) 73 ITR 53 (SC) wherein it was held that a liability accrued during the year through discharged at a future date would be a proper deduction while working out profits of the business.*
>
> *3. Further, clause (i) to Explanation 1 of sec. 115JB provides for addition of amount set aside as*

provision for diminution in the value of any asset. In accordance with Notification No. DNBS.223/CGM(US)-2011 dated 17.01.2011, the appellant has reflected the "Contingent Provision against Standard Assets" under the head "Long Term Provisions" on the liability side of the balance sheet and has not netted off from gross advances. Thus, there is no diminution in the value of asset. Hon'ble Apex Court in Southern Technologies Ltd. – vs.- JCIT (2910) 321 ITR 577 (SC) has held that by making provision for NPA, there will be no reduction in NPA. Applying similar principles for contingent provision against standard assets, the ground of the appellant is allowed. Hence, the same should also be excluded in the computation of book profits u/s 115JB, and therefore, the ld. AO is directed to exclude the amount of Rs.1,61,00,000/- in computing the book profits u/s 115JB. The ground of the appellant stands allowed".

39. However, we are not satisfied with the above finding of the ld. CIT(Appeals). Since clause (i) to Explanation 1 of Section 115JB provides for addition of amount set aside as provision made for meeting liability and other ascertained liabilities is not applicable and further though the RBI has directed for creation of contingent provision on standard assets in accordance with the prudential norms of RBI, however, that itself cannot be said to be ascertained liability of the assessee. In view of this, we do not find justification on the part of ld. CIT(Appeals) in deleting the impugned disallowance made by the ld. Assessing Officer while computing the book profit under section 115JB of the Income Tax Act. The order of the ld. CIT(Appeals) on this issue is set aside and this ground of Revenue is allowed.

40. In the result, the appeal of the Revenue is treated as partly allowed.

41. To sum up, the appeal of the assessee is dismissed, whereas the appeal of the Revenue is partly allowed.

Order pronounced in the open Court on 22nd May, 2023.

Sd/-	Sd/-
(Girish Agrawal)	**(Sanjay Garg)**
Accountant Member	**Judicial Member**

Kolkata, the 22nd day of May, 2023

Copies to :(1) ***M/s. Srei Infrastructure Finance Limited,***
86C, Vishwakarma, Topsia Road (South),
Topsia, Kolkata-700046

(2) Assistant Commissioner of Income Tax,
Circle-11(2), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069

(3) Commissioner of Income Tax (Appeals)-22, Kolkata;
(4) Commissioner of Income Tax- , Kolkata;
(5) The Departmental Representative
(6) Guard File

TRUE COPY

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.