

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "B" DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER  
AND  
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.2573/DEL/2023  
Assessment Year 2010-11

<b>M/s. Genus Power Infrastructure Limited</b> G-14, Sector-63 Noida	Vs.	<b>Assistant Commissioner of Income Tax</b> Central Circle Moradabad
TAN/PAN: AACCG1218P		
(Appellant)		(Respondent)

I.T.A. No.2680/DEL/2023  
Assessment Year 2010-11

<b>Assistant Commissioner of Income Tax</b> Central Circle Moradabad	VS.	<b>M/s. Genus Power Infrastructure Limited</b> G-14, Sector-63 Noida
TAN/PAN: AACCG1218P		
(Appellant)		(Respondent)

Appellant by:	Shri Akshay Jain, Chartered Accountant Shri Alok Kumar, Advocate		
Respondent by:	Shri Vivek Kumar Upadhyay, Sr.DR		
Date of hearing:	21	03	2024
Date of pronouncement:	10	05	2024

**ORDER**

**PER PRADIP KUMAR KEDIA-AM:**

The captioned cross appeals have been filed by the Revenue and the assessee against the order of the Commissioner of Income Tax (Appeals)-3, Lucknow ['CIT(A)' in short] dated 20.07.2023 arising from the assessment order dated 31.12.2017 passed by the Assessing Officer (AO) under Section 143(3) r.w. Section 147 of the Income Tax Act, 1961 (the Act) concerning Assessment Year (A.Y.) 2010-11.

2. The assessee as per its cross appeals has challenged the jurisdiction assumed under Section 147 of the Act and consequent

efficacy of the re-assessment order passed in pursuance of purportedly *non-est* jurisdiction. Thus, we take up the appeal of the assessee in ITA No.2573/Del/2023 for A.Y. 2010-11 for adjudication purposes for the sake of convenience.

3. At the beginning, the ld. counsel pointed out that the efficacy of order passed under Section 147 of the Act is *inter alia* in question. On behalf of the assessee, the ld. counsel submitted that in the instant case, the assessee filed ROI on 23-09-2010 declaring total income at NIL. The return filed by the assessee was subjected to regular assessment dated 28-03-2013 under s. 143(3) of the Act. The income was assessed at Rs. 8,71,08,200/- and book profit under s. 115JB at Rs. 31,04,38,156/-. Thereafter, notice under Section 148 was issued by the AO to the assessee on 31.03.2017, that is, after a period of four years from the end of the assessment year where the original assessment was earlier completed under Section 143(3) of the Act. The assessee filed return of income in response to such notice issued under Section 148 of the Act and declared total income under the normal provisions at ₹ Nil. The re-assessment was however completed making certain disallowances and adjustments under the normal provisions of the Act as well as book profit computed under Section 115B of the Act. The income under normal provisions were re-assessed at ₹13,67,21,152/- and the book profit under Section 115JB were re-assessed at ₹35,31,97,481/- for MAT purposes.

3.1 In this backdrop, the ld. counsel submitted that in the instant case where the re-assessment proceedings were initiated for A.Y. 2010-11 after a period of four years from the end of the assessment year and the original assessment was completed previously under Section 143(3) of the Act. In view of the First Proviso of the erstwhile provisions of Section 147 of the Act, the AO could not have assumed jurisdiction under Section 147 of the Act unless the embargo placed in the 1<sup>st</sup> proviso towards failure on the part of the assessee to disclose fully and truly all material facts for assessment are met. The limitation period would thus extend from 4 years to 6 years only where the conditions of first proviso

are simultaneously met in addition to the conditions stipulated in main provision of s. 147 of the Act. The ld. counsel adverted to the reasons recorded and submitted that an adjustment at ₹4,28,41,017/- was proposed to the book profit on the ground that provision on repair of partly damaged assets has been wrongly allowed and not eligible for deduction while computing book profits. The reasons recorded also made allegations towards escapement of income on varied grounds[ viz prior period expenses, deduction under s. 80IC, calculation mistakes etc.] while reassessing the taxable income under the normal provisions of the Act. The book profit was thus reassessed at ₹35.31 crore [ Rs. 31.04 cr. in original assessment] whereas the taxable income under the normal provisions were assessed at ₹ 13.67 crore [ original assessment Rs. 8.71 cr.] as earlier pointed out.

3.2 In the context, the ld. counsel submitted that the reasons recorded comprises of two sets of escapement of income (i) escapement of book profit under s. 115JB to the tune of Rs. 4,28,41,017/- towards provisions for repairs and (ii) aggregate escapement of approx 4.96 cr under normal provision.

3.2.1 The ld. AR submits that the assessee itself had added the 'provision for repair' while making the computation of income *albeit* under the normal provisions of the Act and hence one cannot say that there was any failure attributable to assessee to disclose all material facts fully and truly in this regard. The fact that the assessee did not add back the same provision for repair while determining the book profits under MAT, cannot *per se* be called as failure towards disclosure of material facts on the part of the assessee. Hence, in view of embargo placed under the 1<sup>st</sup> proviso, the issuance of notice beyond four years is clearly barred by limitation qua alleged book profit escapement. Consequently, re-assessment proceedings must fail on this account.

3.2.2 Coupled with this, the ld. counsel submitted that the other allegations in the reasons recorded relates to assessment under the

normal provisions whereby escapement of Rs. 4.96 cr. approx. alleged has no bearing for determination of issue towards validity of re-assessment notice. The Id. counsel submitted that in view of the fact that tax on income determined under Special Provision of Section 115JB exceeds the taxes payable on computation of income as per normal provisions, the reasons recorded in relation to adjustments under normal provision has no bearing for the purposes of determination of jurisdiction and unless the tax as per normal provision exceeds the tax payable under 115JB of the Act, the alleged escapement of income under normal provision would not permit the revenue to usurp jurisdiction under s. 147 of the Act. A reference was made to the decision rendered by the Hon'ble Gujarat High Court in the case of *Motto Tiles Pvt. Ltd. vs. ACIT (2016) 368 ITR 280 (Guj)* for such proposition of law.

3.2.3 It was pointed out in conclusion that even if entire amount of disallowances made by the AO on account of reasons attributable to determination of taxable income under the normal provisions of the Act is sustained, there would be no increase to tax liability of assessee and the assessee will still be governed by the provisions of Section 115JB of the Act and would continue to be assessed on the basis of book profit. It was thus submitted that in the light of the *Motto Tiles* (supra), in the absence of any additional tax liability, it cannot be said that there is an escapement *per se* in terms of Section 147 of the Act. The Id. counsel thus urged for cancellation of the re-assessment of the notice under Section 147 of the Act.

3.3 On merits, the Id. counsel submitted that the provisioning for repairs of damaged assets was done as per the established significant accounting principles of prudence as provided by AS-29 which requires an assessee-company to make such provision. Such provision was in the nature of an ascertained liability and therefore, no adjustment towards such provision on account of repair was called for, being ascertained liability and thus the computation of book profit by the assessee cannot be faulted even on merits. A proper disclosure towards such provisioning

was made in the audited financial statement also.

4. The Id. DR, on the other hand, relied upon the action taken by the AO under Section 147/148 of the Act. In furtherance, the Id. DR for the Revenue referred to the scheme provided under Section 147 of the Act and submitted that in view of the Explanation 2(c) below Section 147 of the Act, a completed assessment can be reopened even where excessive loss or excessive allowance has been claimed or where income chargeable to tax has been under-assessed *de hors* the ultimate assessed income. It was submitted that as per categorical legislative intent, reopening of assessment is not dependent upon the ultimate tax liability but is dependent upon escapement of chargeable income from taxation. The learned DR submitted that the assessee has claimed prior period expenses of ₹11,65,00/- which is not eligible under s.37(1) of the Act or other provisions of the Act. Likewise, the assessee has wrongfully gained by extra claim of deductins under S. 80IC under normal provisions and consequently understated the chargeable income. In this scenario, the case of the assessee clearly falls within the sweep of Explanation 2 below Section 147 of the Act which envisages escapement of income in the circumstances specified therein. The learned DR for the Revenue thus contended that the express provisions of statute require to be accorded primacy and no other interpretative process in deviation thereof is called for.

5. We have carefully considered the rival submissions. The jurisdictional controversy has been raised on behalf of the assessee whereby the Tribunal has been called upon to adjudicate as to whether re-opening under s. 147/148 of the Act is maintainable where MAT liability as per book profits computed under s. 115JB of the Act would not get disturbed on correct application of law and tax on such book profits also exceeds the total income determined as per normal provisions.

5.1 To adjudicate the appeal, few material facts requires to be taken into account. It is the case of the assessee that as per the original assessment, the tax liability under s. 115JB as per 'book profits' exceeds the tax liability as per normal provisions. The case has been reopened to adjust the book profits as well as to assess escaped income under normal provisions. It is further case of the assessee that escapement alleged qua book profits do not meet the conditions embodied in the first proviso having regard to full and true disclosure of the relevant / material facts attributable to provisions for repairs in the ROI by making disallowances under normal provisions and suitable declarations in the audited financial statement. We agree. One cannot say that when the adjustment on account of such provision for repairs have been made by the assessee while determining the income as per normal provisions of the Act, there was a failure on the part of the assessee to disclose facts in not making such corresponding adjustments while determining the book profit. The disclosures were also made in Financial Statement. The condition of 1<sup>st</sup> proviso is thus clearly not satisfied in the instant case. Hence, the escapement qua book profits are not sustainable in law.

5.2 As a sequel to such plea, the assessee thus submits that in the absence of escapement *qua* book profits, the escapement alleged under normal provisions are of no consequence since despite the purported escapement *qua* normal provision may led to enhancement of taxable income under normal provision, the tax liability thereon would be lower than the book profits assessable in law.

5.3 On facts thus, the assessee argues that tax liability on book profits under s. 115JB amounting to Rs. 31,04,38,156/- [ without provision for repair which adjustment is impermissible in reassessment proceedings] exceeds the tax liability on Rs. 13,67,21,152 [ income assessed earlier under s. 143(3) plus the income allegedly escaped under normal provision]. On such facts, it is the plea of the assessee that its case is covered by the judgment rendered in the case of *Motto Tiles P. Ltd. vs. ACIT (2016) 386 ITR 280 (Guj.)*

6. The Hon'ble Gujarat High Court in the case of India Gelatine and chemicals Ltd. vs. ACIT (2014) 364 ITR 649 (Guj) observed that even if the entire amount which is proposed to be added by the AO is sustained, there would be no addition to the tax liability of the assessee and the petitioner would be still governed by the provisions of S. 115JB of the Act and would be assessed on same book profit. In such circumstances, reopening of assessment was not found sustainable. The Hon'ble Gujarat High court in the case of *Motto Tiles P.Ltd. vs. ACIT (2016) 386 ITR 280(Guj)* has reiterated the ratio yet again. The relevant operative para in later decision of Hon'ble Gujarat in *Motto Tiles (P.) Ltd. (supra)* is reproduced hereunder:

*"11. Insofar as the second contention raised on behalf of the petitioner is concerned, the controversy stands squarely concluded by the decision of this court in the case of India Gelatine and Chemicals Ltd. (supra) wherein, the court in a case where the assessee had declared a loss of Rs. 1.44 crores under the normal computation and the assessment was framed on book profit of Rs.2.89, had held that even if the expenditure of Rs.116.86 lakhs is disallowed, there would be no resultant change in the petitioner's tax liability since the petitioner had already paid much higher tax and had allowed the petition. It appears that the revenue has accepted the said decision and has not challenged the same before the higher forum. The learned counsel for the respondent has urged that the decision requires reconsideration. Having regard to the facts and circumstances of the case, as well as the fact that the revenue has accepted the said decision, the court does not find any reason to refer the matter for consideration to a Larger Bench.*

*12. In the light of the decision of this court in the case of India Gelatine and Chemicals Lid. (supra) having regard to the fact that even if the entire amount which is proposed to be added by the Assessing Officer is sustained, there would be no addition to the tax liability of the petitioner and the petitioner would still be governed by the provisions of section 115JB of the Act and assessed on the same book profit, it cannot be said that there was sufficient material before the Assessing Officer to form the belief that income chargeable to tax has escaped assessment. The impugned notice issued under section 148 of the Act, therefore, cannot be sustained.*

*For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dated 02.03.2015 issued by the respondent under section 148 of the Income Tax Act, 1961 is hereby quashed and set aside. Rule is made absolute, accordingly, with no order as to costs."*

7. The claim of the assessee that the tax liability on book profit is

higher than the income assessable under normal provisions including escapement alleged qua normal provisions, has not been disputed by the revenue.

8. Governed by the view expressed in the decisions noted above, we find merit in the plea raised by the assessee towards lack of jurisdiction on first principles.

9. The re-assessment notice is accordingly quashed. The re-assessment order is declared null and void. As the assessee succeeds on absence of jurisdiction usurped under s. 147 of the Act, which strikes to the root of the matter, the merits of additions and disallowances carried out merges in void at the threshold. Hence, we do not seek to delineate on the merit of additions and disallowances as challenged on behalf of the assessee and Revenue in their respective appeals.

10. In the result, the appeal of the assessee is allowed whereas cross appeal of the Revenue is dismissed.

**Order pronounced in the open Court on 10/05/2024**

**Sd/-**

**[KUL BHARAT]  
JUDICIAL MEMBER**

**Sd/-**

**[PRADIP KUMAR KEDIA]  
ACCOUNTANT MEMBER**

DATED: **/05/2024**

*Prabhat*