

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

**BEFORE SHRI PRASHANT MAHARISHI, AM
AND MS. KAVITHA RAJAGOPAL, JM**

ITA No.5850/Mum/2015
(Assessment Year: 2011-12)

Guruvastu Properties P. Ltd. 47, 7 th Floor, Tardeo AC Market Tardeo, Mumbai – 400 034	Vs.	DCIT – 1(1)(4) 5 th Floor, Aayakar Bhavan, M K Road, Mumbai-400 020
PAN/GIR No. AACCG 4501 H		
(Assessee)	:	(Respondent)
Assessee by	:	Shri Hiten M. Vasant
Respondent by	:	Shri H. M. Bhatt
Date of Hearing	:	26.03.2024
Date of Pronouncement	:	21.06.2024

ORDER

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) -2, Mumbai ('Id.CIT(A) for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2011-12.

2. The assessee has challenged the Id. CIT(A)'s order in upholding the order of the Id. Assessing Officer ('A.O.' for short) in computing the book profit at Rs.71,10,711/- u/s. 115JB of the Act as against the computation of the assessee at Rs.21,10,711/- and also challenging the denial of benefit of reinvestment u/s. 54EC as not being applicable for computing the book profit.

3. The brief facts are that the assessee is a private limited company which had filed its return of income for the year under consideration dated 26.09.2011, declaring total income at Rs.23,92,583/- under the normal provision and book profit u/s. 115JB of the Act at Rs.21,10,711/- having derived income from long term capital gain (LTCG for short) on sale of land and income from other sources. The assessee's case was selected for scrutiny and notice u/s. 143(2) and 142(1) of the Act were duly issued and served upon the assessee. The Id. A.O. then passed the assessment order u/s. 143(3) dated 17.01.20214, determining the total income at Rs.24,07,798/- under the normal provisions and Rs.71,10,711/- u/s. 115JB of the Act by making a disallowance of Rs.50 lacs which was claimed as exempt u/s. 54EC of the Act on the investment made in REC bonds.

4. The assessee then challenged the assessment order before the first appellate authority who vide order dated 30.10.2015 upheld the disallowance made by the Id. A.O.

5. The assessee is in appeal before us challenging the impugned order of the Id. CIT(A).

6. It is observed that the assessee has sold a plot of land jointly with three other group companies for which long term capital gain (LTCG for short) of Rs.71,60,630/- was determined. The assessee is said to have invested Rs.50 lacs in REC Bonds and had claimed exemption u/s. 54EC for the said investment. The assessee then offered the balance amount of Rs.21,60,630/- @ 20% as LTCG. The assessee has also reduced the said amount of Rs.50 lacs from the book profits as income being exempt from 'income tax' and determined the book profit at Rs.21,10,711/- out of the net profit of

Rs.71,10,711/- as per the profit and loss account of the assessee and offered to tax the total income determined as per the normal provisions being higher than that on book profit. The Id. A.O. during the assessment proceeding had sought for explanation from the assessee for excluding the amount of exemption claimed u/s. 54EC of the Act from the book profits u/s. 115JB of the Act as being ineligible as per the provisions of section 10(38) of the Act. The submission of the assessee before the Id. A.O. is extracted hereunder for ease of ready reference:

For computing the book profit u/s. 115JB, exempted income (u/s. 10/11/12 except 10(23G), 10(38), 10A, 10B) credited to the P & L A/c has to be reduced. In the instant case, the capital gain arising on transfer of capital asset is exempt u/s. 54EC by virtue of investment in Bonds to the tune of Rs.50 lakhs. As per Explanation 1 below to the second proviso to sub section (2) to section 15JB, the amount to be reduced does not include exempted income u/s. 54EC. Further, the capital gain u/s. 45 of the Act is a profit arising on transfer of capital asset and though chargeable to income tax, the benefit of deduction/exemption available on investment made in specified assets in terms of section 54EC of the Act, cannot be denied to the assessee even if assessment is made u/s. 115JB of the Act. There is nothing in Chapter XII-B providing for disallowance of eligible exemption u/s. 54EC of the Act on capital gains in the course of assessment based on book profit.

It is submitted that what was specifically exempted u/s. 45 r.w.s. 54EC could not be taxed vide 115JB of the Act... Capital receipts which do not have the character of income cannot be liable to income tax by adding the same to the book profit. The non obstante clause by which section 115JB beings could only mean that the other sections which impose tax on book profit alone are to be ignored and not that a capital receipt deemed as income should be taken as part of the book profit for the purpose of the section, more so when section 45 declares that it cannot be taken as income of section 54EC is attracted.... what is deemed to be income u/s. 45 cannot be deemed to be income for the purpose of section 115JB for the simple reason that "book profits" cannot include the deemed income. The proceeds by way of sole of an investment not being income, it is not liable to tax u/s. 115JB unless there is a clear intendment. It is well recognized that there cannot be a charge by implication. Thus capital gain which is not chargeable even as deemed income because of section 54EC, cannot be brought to tax as part of the book profit under the explanation to the section 115JB.

It is therefore submitted that the capital gain to the event of exemption u/s. 54EC is correctly reduced while computing the book profit u/s. 115JB of the Act.

The assessee also placed reliance on the cases of Sulej Cotton Mills Ltd. vs. ACIT 45 ITD 22 (Cal.) (SB) (1993) and ITO vs. Suraj Jewellery (I) P. Ltd. (2008) 21 SOT 79 (Mum).

7. The Id. A.O. not being convinced with the assessee's submission relied on the amendment to definition of the book profit as per Explanation [1] to section 115JB of the

Act and also the amendment in section 10(38) of the Act vide insertion of proviso by Finance Act, 2006 w.e.f. 01.04.2007, thereby held that while computing the book profits, LTCG of a company should be included as there was no express provision which excludes the amount of exemption claimed u/s. 54EC of the Act. The Id. A.O. denied the benefit of reinvestment u/s. 54EC of the Act while computing book profit u/s. 115JB of the Act and relied on the catena of decision to substantiate his stand. The Id.CIT(A) upheld the order of the Id. A.O.

8. During the appellate proceeding, the learned Authorised Representative ('Id. AR' for short) for the assessee extensively relied on the decision of Hon'ble Madras High Court in the case of *CIT vs. Metal & Chromium Platter (P.) Ltd.* [2016] 76 taxmann.com 229 (Mad), which has held that the assessee was entitled to relief u/s. 54EC of the Act while adjusting book profit u/s. 115JB of the Act. The Id. AR also relied on the decision of the Tribunal in the case of *Mountpart Creative Pvt. Ltd. vs. ITO* (in ITA No. 3910/Mum/2016 vide order dated 08.08.2018) which has followed the decision of the Hon'ble Madras High Court in the case of *Metal & Chromium Platter (P.) Ltd.* (supra).

9. The learned Departmental Representative ('Id.DR' for short), on the other hand, had relied on the decision of the Hon'ble Jurisdictional High Court in the case of *CIT vs. Veekaylal Investment Co. (P.) Ltd.* [2001] 116 Taxman 104 (Bom), wherein it was held that while the computing book profit u/s. 115J of the Act, the capital gain u/s. 45 should also be included. The Id. DR also relied on the Special Bench decision of the Tribunal in the case of *Rain Commodities Ltd. vs. DCIT* 40 SOT 265 (Hyd) (SB) and also the decision of the Tribunal in the case of *Growth Avenue Securities Pvt. Limited vs. DCIT*

[2010] 128 ITJ 426 (Del), *Chheda Electricals and Electronics (P.) Ltd vs. Dy. CIT* [2022] 138 taxmann.com 221 (Pune-Trib) in support of the Revenue's contention.

10. We have heard the rival submissions and perused the materials available on record. The only moot question to be decided in this appeal is whether or not section 54EC of the Act would be applicable for computation of book profits u/s. 115JB of the Act as per various judicial findings cited by both sides. The learned Authorised Representative (ld. AR for short) for the assessee contended that the decision of the Hon'ble Madras High Court in the case of *Metal & Chromium Platter (P.) Ltd.* (supra) was squarely applicable to the facts of the present case where the Hon'ble High Court has held that as per the provisions of sub section 5 of section 115JB of the Act, the assessee is entitled to claim benefits u/s. 54EC of the Act while making the adjustment to book profits u/s. 115JB of the Act for the reason that sub section (5) emphasizes that all other provisions of this Act shall apply to every assessee being a company mentioned in section 115JB of the Act and further unless a particular provision of the Act is specifically barred, the same cannot be denied to the assessee. It is also observed that the said decision has considered the decision of the Hon'ble Apex Court in the case of *Apollo Tyres Ltd. vs. CIT* [2002] 255 ITR 273 (SC), which has held that the ld. A.O. is not entitled to enquire the entries in the profit and loss account, except in accordance with *Explanation* to section 115J of the Act. The said decision has also considered the decision of Hon'ble Jurisdictional High Court in the case of *Veekaylal Investment Co. (P) Ltd.* (supra) which again is said to be in the context of section 115J of the Act which does not

have a clause similar to clause (5) of section 115JB/clause (4) of section 115JA of the Act. The relevant extract of the said decision is cited hereunder for ease of reference:

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 115 JB thus admits of the grant of relief under section 54 EC in an assessment there under. 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, (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 Veekayal Investments (supra) considers the inclusion of capital gain for the purposes of assessment under section 115 J. Both judgements are rendered in the context of Section 115 J which does not contain a provision analogous to sub-sections (4) of section 115 JA or (5) of section 115 JB 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 115 JA 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. vs. Asst. Commissioner of Income Tax and another (321 ITR 133) is also distinguishable for the same reason as aforesaid.*

11. It is also observed that the Tribunal in the case of *Mountpart Creative Pvt.* (supra) has followed the proposition laid down by the Hon'ble Madras High Court in the case of *Metal & Chromium Platter (P.) Ltd.* (supra) and held that the assessee is entitled to claim deduction u/s. 54EC of the Act while computing book profit u/s. 115JB of the Act. The assessee has also placed reliance on the decision of the co-ordinate bench in the case of *Neha Home Builders (P.) Ltd. vs. Dy. CIT* [2018] 98 taxmann.com 102 (Mum-Trib) which has held that the assessee is entitled to deduction u/s. 80IB(10) of the Act while computing the book profit u/s. 115JB of the Act which again supports the contention of the assessee. It is pertinent to point out that the Mumbai Tribunal in the case of *ITO vs. Frigsales (India) Ltd.* [2005] 4 SOT 376 (Mum) has held that exemption u/s. 50 of the Act is not a taxable income and the same cannot be taxed u/s. 115JA of the Act as per sub section (4) of the provision.

12. The Revenue, on the other hand, has relied on the Special Bench decision of the Tribunal in the case of *Rain Commodities Ltd.* (supra) which has relied on the Hon'ble Jurisdictional High Court decision in the case of *Veekaylal Investments Co. Pvt. Ltd.* (supra) and held that the assessee is not entitled to claim u/s. 47(iv) of the Act while computing the book profits u/s. 115JB of the Act and in case of *B & B Infratech Ltd. vs. ITO* [2016] 76 taxmann.com 188 (Karnataka) where the Hon'ble Karnataka High Court has held that the provision of section 115JB of the Act has a overriding effect over the other provisions of the Act and it excludes those that are outside the purview of *Explanation* to section 115JB of the Act. The Id. DR has also placed reliance on the decision of *Growth Avenue Securities Pvt. Limited* (supra) which has held that sub section 5 of section 115JB of the Act does not include the normal provisions of the Act for the purpose of computing the book profits.

13. On considering the rival contentions, it is observed that the issue in hand has been dealt with by various benches of the Tribunal and various high courts including the Hon'ble Jurisdictional High Court which have taken diametrically opposite views. The primary contention of the Revenue is that the Hon'ble Jurisdictional High Court in the case of *Veekaylal Investments Co. Pvt. Ltd.* (supra) has held that section 115J of the Act in the case of a company whose total income is less than 30% of its book profits then the deemed total income has to be 30% of such book profit for which the assessee shall prepare P & L account in accordance with Part II & III of schedule VI of the Companies Act. It further held that for the purpose of computing the book profits, the assessee shall disclose all material facts which includes credits or receipts and debits or expenses which

are in the nature of non recurring transactions or are of exceptional nature in which capital gains would be one of the items which is required to be included while computing the book profits. The assessee's contention on the reliance placed by the Revenue on the above said decision is that the issue in this pertains to the capital gain u/s. 45 of the Act in computing the book profits u/s. 115J of the Act which does not have sub clause (5) of section 115JB of the Act which is cited hereunder for ease of reference:

Section 115JB

(5) Save as otherwise provided¹⁵ in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.

14. On considering the decision of the Special Bench in the case of *Rain Commodities Ltd.* (supra) it is pertinent to point out that the Tribunal has decided whether or not the exemption u/s. 47(iv) would be applicable while computing the book profit u/s. 115JB of the Act. The decision of the Hon'ble Jurisdictional High Court in the case of *Veekaylal Investments Co. Pvt. Ltd.* (supra) was considered by the Tribunal wherein it was held that capital gain is part of the profit which cannot be excluded while computing book profit.

15. Interestingly, the Tribunal has also dealt with another division bench decision of the Hon'ble Bombay High Court in the case of *CIT vs. Akshay Textiles Trading Agencies (P.) Ltd.* [2008] 304 ITR 401 (Bom), wherein the question on identical issue was raised before the Hon'ble High Court and decided in favour of the assessee without any discussion on the said issue. The Tribunal concluded that since it could not come to a conclusion whether *Veekaylal Investments Co. Pvt. Ltd.* (supra) was overriding the subsequent decision in *Akshay Textiles Trading Agencies (P.) Ltd.* (supra), the Tribunal, therefore, held that on this ambiguity, it could not hold the view in favour of the assessee. The relevant extract of the Tribunal decision is cited hereunder for ease of reference:

In the decision of the Bombay High Court in the case of CIT v. Akshay Textiles Trading & Agencies (P.) Ltd. [2008] 304 ITR 401¹, the question referred to the High Court and the decision of the High Court, as reported are as under :

"C. Whether on the facts and the circumstances of the case and in law, the Hon'ble Income-tax Appellate Tribunal was correct in upholding the order of the Commissioner of Income-tax (Appeals) in holding that the capital gains of Rs. 19,74,489 are not to be taken into account while computing the profits liable to be taxed under section 115JA of the Income-tax Act, 1961 and that the decision of the Hon'ble Bombay High Court in CIT v. Veekaylal Investment Co. (P.) Ltd. 249 ITR 597 was not applicable ?

Insofar as question No. "C", our attention is invited to the judgment of the Supreme Court in Apollo Tyres Ltd. v. CIT 255 ITR 273. The question framed therein which is similar to question No. "C" has been answered in favour of the assessee and against the revenue. In the light of that, the question of law as framed would not arise."

From the above, it is difficult to conclude that the Division Bench of Bombay High Court in this case has overruled the decision of another Division Bench without even a line of discussion. The decision of the Bombay High Court in the case of Veekaylal Investment Co. (P.) Ltd. (supra) holding that the book profits have to be computed in accordance with Parts II and III of Schedule VI to the Companies Act. This is in line with the decision of the Apex Court in the case of Apollo Tyres Ltd. (supra). The Mumbai High Court in the case of Akshay Textiles Trading & Agencies (P.) Ltd. (supra) has held that there is no question of law in view of the decision of the Apex Court in the case of Apollo Tyres Ltd. (supra). From this we are not able to infer that the decision of the Bombay High Court in the case of Veekaylal Investment Co. (P.) Ltd. (supra), is no longer good in law. Therefore, this case does not help the assessee.

16. From the above observation, it is evident that there are conflicting decisions on the interpretation of section 115JB of the Act where diametrical views are taken. While going into the depth of the judicial decision cited by both the sides, it is observed that the decision of the Hon'ble Madras High Court in the case of *Metal & Chromium Platter (P.) Ltd.* (supra) is exactly on the present issue in hand, where it has been interpreted that sub section (5) of section 115JB of the Act includes the applicability of all other provisions of this Act to every assessee which is a company specified in this section, in this case section 54EC of the Act. Whereas section 115J of the Act does not contain an identical provision as that of sub section (4) of section 115JA of the Act and sub section (5) of section 115JB of the Act holding the view that section 115J of the Act is not *pari materia* with section 115JA and 115JB of the Act to that extent. We infer that the intention of the legislature in bringing about sub section (4) and (5) of section 115JA and 115JB of the

Act respectively is to include the other provisions of the Act while computing book profits which would include exemptions claimed under the normal provisions of the Act. Even otherwise, assuming section 115J of the Act to be on same line as that of section 115JA and 115JB of the Act, the decision of Hon'ble Apex Court in the case of *Apollo Tyres Ltd.* (supra) has held that the Assessing Officer has only limited powers of examining whether the books of accounts are certified by the authorities and that the income has been prepared as mandated under the Companies Act. Beyond that, the Assessing Officer cannot embark upon fresh inquiry pertaining to the entries made in the books of accounts. The Legislature in its wisdom has provided for certain exemptions which are intended solely for the purpose of benefiting and are not to burden the assessee directly or indirectly for the reason that the very purpose of such exemption will be hit by interpreting the provision, otherwise than for which it was enacted for. We find justification in relying on the proposition laid down by the Hon'ble High Court of Madras in the case of *Metal & Chromium Platter (P.) Ltd.* (supra) for deciding the issue in this present appeal.

17. In view of the above discussion, we are inclined to decide the issue in favour of the assessee.

18. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 21.06.2024

Sd/-

(Prashant Maharishi)
Accountant Member

Mumbai; Dated : 21.06.2024

Sd/-

(Kavitha Rajagopal)
Judicial Member

Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai