IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
[Before Shri M. Balaganesh, AM & Shri S. S. Viswanethra Ravi, JM]

I.T.A No. 70/Kol/2014
Assessment Year: 2009-10

Deputy Commissioner of Income-tax, Circle-12, Kolkata.	Vs.	Haldia Petrochemicals Ltd. (PAN: AAACH7360R)
(Appellant)		(Respondent)

Date of hearing: 13.07.2016
Date of pronouncement: 03.08.2016

For the Appellant: Shri Niraj Kumar, CIT, DR
For the Respondent: Shri Harakamal Chakravorty, Sr. General Manager

ORDER

Per Shri M. Balaganesh, AM:

This appeal by revenue is arising out of order of CIT(A)-XII, Kolkata vide appeal No. 431/xii/12/11-12 dated 03.10.2013. Assessment was framed by DCIT, Circle-12, Kolkata u/s. 143(3) of the Income tax Act, 1961 (hereinafter referred to as the "Act") for AY 2009-10 vide his order dated 27.12.2011.

2. The only issue to be decided in this appeal is as to whether the book profits of the merged entity could be brought to tax in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee is a domestic company registered under the Companies Act, 1956 and has a petrochemicals plant at Haldia, Dist. Midnapur, West Bengal for the manufacture and sale of petrochemical products. The assessee had prepared its annual accounts for the AY 2009-10 relating to the FY 2008-09 that was subject to audit by the statutory auditors appointed by the Comptroller and Auditor General of India (hereafter referred to as the C&AG) since the assessee was covered under the provisions of section 619B of the Companies Act, 1956. However, due to a company case, there was an order of the Courts restraining the assessee from considering, amongst others, the accounts at the meeting of the Board of directors and also from holding the Annual

General Meeting (AGM) of the Shareholders as prescribed under the Companies Act till the disposal of the case. Consequently, the accounts of the assessee for the relevant financial year could not be approved by the Board of Directors or laid before the shareholders for their approval at the AGM. The assessee filed its original return of income on 24.09.2009. In the said return, the total loss as per the normal provisions of the Act was computed by the assessee at Rs.313,57,98,702/- and hence there was no taxable income. However, under Section 115JB of the Act (hereinafter referred to as MAT), in view of the accounts not being approved by the Board of Directors and due to restriction on holding the AGM, the 'book profit' on which the MAT was to be calculated in terms of section 115JB of the Act could not be determined and hence, the assessee claimed in the return that book profit u/s 115JB of the Act was not determinable in this case. Consequently, the entire TDS amounting to Rs.2,08,95,853/- was refundable. On 28.03.2011 the assessee filed a revised return to further claim Rs.6,04,010/- on account of TDS. Therefore, the assessee, having declared nil income, claimed the entire TDS amounting to Rs. 2,14,99,863/- as refund in its return. In the meanwhile a company named HPL Cogeneration Limited (HPLCL) was merged with the assessee pursuant to the scheme of merger sanctioned by the Hon'ble Calcutta High Court vide order dated 21.05.2009 with retrospective effect from 01.04.2008. The order was received on 23.09.2009. Thereafter, the Assessee filed the Form 21 prescribed under the Companies Ac with the Registrar of Companies (ROC) on 19.10.2009.

3.1. The said HPLCL had filed its own return of income (i.e. as a separate entity) for the A. Y. 2009-10 on 24.09.2009 on stand alone basis. As per the said return, it had a gross total income of Rs.25,70,79,700/- and the entire amount was deductible u/s 80IA of the Act. Therefore, the total income of HPLCL for the A.Y. 2009-10 was nil as per the normal provisions of the Act. Under section 115JB of the Act, HPLCL calculated tax of Rs.34,29,654/- on a book profit of Rs. 3,02,70,551/-. As HPLCL had paid Rs.2,06,00,000/- and Rs.2,22,86,212/- as advance tax and TDS respectively it claimed refund of Rs.3,94,56,558/- in its return of income. It is reiterated that the Income-tax returns for A.Y. 2009-10 were filed by both the companies on a standalone basis i.e. without considering the effect of the merger as on the last date for filing the return, the Form 21 was not yet filed

with the ROC. Subsequent to the filing of the Form 21 with the ROC on 19/10/2009, the assessee wrote a letter to the Assessing officer of the HPLCL i.e. the Deputy Commissioner of Income Tax, Circle-8 Kolkata on 26/10/2009 informing of the developments and requesting that in view of the merger of HPLCL with assessee, if the return of HPLCL should be transferred to the jurisdictional Income tax office of the assessee i.e. DCIT, Circle-12, Kolkata and the return of the assessee and HPLCL be assessed together. A copy of the letter was also sent to the AO of the Assessee. The assessee wishes to place on record that there is a factual error in the 3rd paragraph of the Ld. AO's order where he asserts that it was only during the assessment proceedings that it was informed that HPLCL has merged with the assessee, whereas the assessee had duly informed the ld AO on 26.10.2009 itself intimating the fact of merger at which point of time, even the notice u/s 143(2) of the Act was not issued by the ld AO. During the assessment proceedings, in response to a query from the Ld. AO, the assessee vide letter dated 14/l2/2011 informed the Ld. A.O. that since HPLCL was merged with the assessee with retrospective effect from 01/04/2008, then it had to be held that the provisions of section 115JB of the Act did not apply to the profits of the said HPLCL as well as for the same reasons set out above as the income of HPLCL is merged with HPL w.e.f the date of merger i.e. 01/04/2008 (AY 2009-10) and has become the income of the assessee. There is no separate existence of the profits of the assessee any longer. Consequently, the assessee was also entitled to refund of the tax paid by HPLCL (Rs.4,28,86,212/-).

3.2. The Ld. A.O. proceeded as under-

(i) The Ld. A.O. agreed that the income of the Appellant and HPLCL will have to be assessed together as a single unit post the date of merger i.e. from l.4.2008 (AY 2009-10) and thereby issued one assessment order in the name of the assessee.
ii) The Ld. A.O. assessed the income under the normal provisions of the Income tax Act taking the income of both the companies together as a single unit at (-) Rs.287,87,19,002/-.
(iii) But under section 115JB the Ld. A.O. split the assessments. The Ld. A.O. assessed the assessee’s portion as not determinable due to AGM not being held while he assessed that of

erstwhile HPLCL as Rs.3,02,70,551/- (which was the book profit as per return filed by HPLCL on a standalone basis). The Ld. A.O.'s logic was that as "the accounts and financial statements [of HPLCL] were finalized and placed before the AGM" the book profit of HPLCL has to be considered on a standalone basis as profit u/s 115JB.

3.3. The assessee submitted that the Ld. A.O. grossly in assessing book profit of HPL u/s 115JB as Rs. 3,02,70,551/- based on the book profits of HPLCL as if it existed separately as an independent entity. As HPLCL had ceased to exist from 01/04/2008 it was incumbent on the part of the Ld. A.O. to consider a single income for the assessee. The Ld. A.O. has done this in the case of computation of income under normal provisions of the Income tax Act but not for the book profit u/s 115JB of the Act. The Income-tax Act does not contemplate that income under section 115JB of the Act in the hands of a single entity will have different treatment than that under normal tax computation. The Ld A.O. also erred in failing to appreciate that once a company merged into another from the effective date as pronounced by the High Court, it ceases to have any existence and consequently its income loses its separate character and so no separate treatment or segregation is possible during assessment. Income of the merging company arising prior to the date of the merger will be determined separately but assessed in the hands of the merged company if, at the time of assessment, the merging company is not in existence i.e. the assessment takes place after the date of the merger. But the income of the merging company post the date of the merger cannot be separately determined and it forms part and parcel of the income of the merged company.

4. The assessee also placed reliance on the decision of Co-ordinate Bench of Mumbai Tribunal in the case of Deputy Commissioner Of Income-tax vs. Beck India Ltd. (2008) 26 SOT 141, wherein the Hon'ble High Court sanctioned the scheme of amalgamation on 20/9/2001 with retrospective effect from 1/1/2001. Here also the two companies had filed their returns separately and had also held their AGM separately but the Mumbai Tribunal held that the merging company was entitled to prepare second set of accounts combining the book profits u/s 115JB of both companies as well as their unabsorbed losses and depreciation. This decision flows from the principle that once a company is merged into

another it cannot have a separate income and so no assessment can be made considering separate incomes.

5. The ld CITA appreciated the contentions of the assessee and allowed the grounds raised by the assessee in this regard. Aggrieved, the revenue is in appeal before us on the following grounds:-

> *"1. That is the facts and in law of the case the Ld. CIT(A) erred in directing the AO to recomputed the book profit as per the I. T. Act, after taking income combining the book profits of the merged company with the merging company.*
>
> *2. That in the facts and in the law, the Ld. CIT(A) erred in allowing the assessee the effect of amalgamation while computing book profit even though the assessee two different returns."*

6. The ld DR narrated the facts of the case and argued that M/s HPLCL had voluntarily filed its return of income for the Asst Year 2009-10 on standalone basis declaring book profits u/s 115JB of the Act and had even paid sufficient advance tax and claimed TDS refund thereon. The return was filed on 24.9.2009 by HPLCL. Similarly M/s HPL also had filed its return of income for the Asst Year 2009-10 on standalone basis on 24.9.2009 disclosing huge loss . He argued that on the date of filing the return, both the companies were very well aware of the fact of merger that had took place on 21.5.2009 itself with effect from 1.4.2008. So M/s HPLCL had consciously disclosed the book profits tax in the return on standalone basis voluntarily which cannot be ignored but for the merger with effective date from 1.4.2008. Section 115JB starts with a non-obstante clause and that would override all other provisions of the Act and makes it independent of other provisions of law even if it is contrary to other provisions. In response to this, the ld AR argued that the process of merger gets completed only when the court order approving the merger is received and filed with the Registrar of Companies by filing of statutory Form No. 21 by paying appropriate fees. Only on intimation of the same, the assessee (merged entity) is entitled to take legal cognizance of the merger. Immediately on filing of the same, the assessee had duly intimated the fact of merger to the ld AO vide its letter dated 26.10.2009 filed on 27.10.2009 enclosing the copy of the court order approving the merger.

7. We have heard the rival submissions and perused the materials available on record including the paper book filed by the assessee comprising of appeal memo together with its supporting documents (pages 1 to 22) ; amalgamation order approved by Hon'ble Calcutta High Court (pages 23 to 42) ; Intimation of amalgamation dt 19.10.2009 u/s 391(3) of the Companies Act 1956 in Form 21 to the Registrar of Companies (pages 43 to 48) ; ITR acknowledgement form of the assessee for AY 2009-10 on standalone basis (page 49) ; ITR acknowledgement form of HPLCL for AY 2009-10 on standalone basis (page 50) ; Intimation of amalgamation vide letter dated 26.10.2009 to the ld AO (page 51) ; letter dated 14.12.2011 to the ld AO submitting the combined income of the assessee after amalgamation both under normal provisions as well as under section 115JB of the Act stating that there was no positive book profits to be taxed u/s 115JB at the combined entity level (pages 52 to 55) and income tax assessment order u/s 143(3) for AY 2009-10 (pages 56 to 61). The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. We have gone through in detail the contents of the paper book filed by the assessee. It would be relevant to reproduce the relevant clauses in the scheme of amalgamation as below:-

<u>Clause 10 – CONDUCT OF BUSINESS OF THE TRANSFEROR COMPANY</u>

With effect from the Appointed Date and upto the Effective Date:

10.3. All profits or income accruing or arising to the Transferor Company or expenditure or losses arising or incurred by the Transferor Company shall for all purposes be deemed to have accrued as the profits or income or expenditure or losses, as the case may be, of the Transferee Company.

<u>Clause 15 – SCHEME CONDITIONAL UPON</u>

The Scheme is conditional upon and subject to :

15.2. Sanction of the Scheme by the Hon'ble High Court at Calcutta.

Accordingly, the Scheme although operative from the Appointed Date shall become effective on the Effective Date, <u>being the date or last of the dates on which a certified</u>

copy of the order of the Hon'ble High Court at Calcutta sanctioning the scheme is filed with the Registrar of Companies, West Bengal by the Transferor Company.

7.1. We find that the arguments advanced by the ld DR that section 115JB of the Act starts with a non-obstante clause and would override all other provisions of the Act and hence the return filed voluntarily by HPLCL offering book profits cannot be ignored by the revenue, does not hold water as the scheme of amalgamation has been approved by the Hon'ble Calcutta High Court and pursuant to the merger, M/s HPLCL ceases to exist in the eyes of law. HPLCL had been given its legal death. The non-obstante clause in section 115JB of the Act has been incorporated only with a view to tax the book profits computed in accordance with Part II and III of Schedule VI of the Companies Act , 1956 and the book profits so computed shall be chargeable to tax at the prescribed rates , irrespective of existence of lesser profits or huge losses under normal provisions of the Act. We hold that the non-obstante clause would not tamper the legal death of HPLCL pursuant to the scheme of amalgamation approved by the Hon'ble Calcutta High Court with effective date from 1.4.2008. We find that the Co-ordinate Bench decision of this Tribunal in the case of Pampasar Distillery Ltd vs ACIT reported in (2007) 15 SOT 331 (Kol) dated 28.2.2007 had held in Para 19 of its order that the AO can make the assessment of the income prior to the period of amalgamation of Pampasar Distillery Ltd in the hands of the successor company. In other words, the question of assessing the income of Pampasar Distillery separately after the period of amalgamation does not arise at all. We also find that the Co-ordinate Bench decision of Mumbai Tribunal in the case of DCIT vs Beck India Ltd reported in (2008) 26 SOT 141 (Mum) , the High Court sanctioned the scheme of amalgamation on 20.9.2001 with retrospective effect from 1.1.2001. Here also the two companies had filed their returns separately and had also held their AGM separately but the Mumbai Tribunal held that the merging company was entitled to prepare second set of accounts combining the book profits u/s 115JB of both companies as well as their unabsorbed losses and depreciation.

7.2. The ld AO observed that in the instant case , M/s HPLCL had merged with M/s HPL and that the company M/s HPLCL had ceased to exist since its date of merger and has dissolved. We find that the ld AO had accepted the fact that HPLCL is not in existence for

the purpose of computation of income under normal provisions of the Act. But for the purpose of computation of book profits u/s 115JB of the Act, the ld AO deviates from his stand and states that M/s HPLCL continues to exist and have life ignoring the well settled legal principles and judicial precedents on the subject. We find that there was profit as per profit and loss account in the case of HPLCL and loss in the case of HPL on standalone basis. Pursuant to the merger, there was only combined loss as per profit and loss account and hence there cannot be any liability that could arise u/s 115JB of the Act in the hands of the merged entity. It is not in dispute that the merger had taken place with retrospective effect from 1.4.2008 as approved by the Hon'ble Calcutta High Court and hence valid for the period commencing from 1.4.2008 to 31.3.2009 relevant to the Asst Year 2009-10 (i.e the year under appeal before us). Pursuant to the merger, M/s HPLCL does not exist in the eyes of law. We hold that the department cannot be unjustly enriched by the taxes paid by M/s HPLCL based on standalone financials. It is well settled that the Constitution of India mandates the collection of taxes only when it is in accordance with law as per Article 265. In view of the aforesaid findings and discussions, we hold that the ld CITA had rightly directed the ld AO to recompute the book profits u/s 115JB of the Act after taking into accounts the combined accounts of both the companies (i.e merged entity) as well as their unabsorbed losses and depreciation, if any. Accordingly, we find no infirmity in the order of the ld CITA in this regard and dismiss the grounds raised by the revenue.

8. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 03.08.2016

Sd/	Sd/-
(S. S. Viswanethra Ravi)	(M. Balaganesh)
Judicial Member	Accountant Member

Dated :3rd Aug, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – DCIT, Circle-12, Kolkata.
2 Respondent –M/s. Haldia Petrochemicals Ltd., 1, Auckland Place, Kolkata-700 017.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.