

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH : KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM & Shri M.Balaganesh, AM]

I.T.A No. 731/Kol/2015

Assessment Year : 2010-11

Luxmi Co. Ltd.
Kolkata

-vs.-

C.I.T., Central-2
Kolkata

[PAN : AAAC 8466 A]

(Appellant)

(Respondent)

For the Appellant : Shri Soumitra Chowdhury, Advocate

For the Respondent : Shri Niraj Kumar, CIT

Date of Hearing : 25.01.2017.

Date of Pronouncement : 03.02.2017.

ORDER

Per N.V.Vasudevan, JM

This is an appeal by the Assessee against the order dated 26.03.2015 of CIT-Central, Kolkata-II, Kolkata passed u/s 263 of the Act.

2. The Assessee is a company. It is engaged in the business of growing, manufacturing and sale of tea. For A.Y.2010-11 the assessee filed return of income declaring total income of Rs.1,13,99,550/- under the normal provisions of the Income Tax Act, 1961 (Act). The Assessee besides growing, manufacturing and selling tea also purchases tea leaves from third parties and carries out manufacturing process and sells tea so manufactured. Income from the business of growing, manufacturing and sale of tea the computation of income from growing, manufacturing and sale of tea has to be determined in accordance with Rule 8(1) of the Income tax Rules, 1962 (Rules). As per Rule 8(1) the composite income of the assessee has to be arrived at i.e. income from growing of tea and income from manufacturing and sale of tea has to be arrived at. 40% of such composite income is taxable and 60% is deemed income not taxable and attributable to agricultural income. Income from purchase of tea leaves from third parties and carrying out manufacturing process and selling tea cannot form part of the

composite income and has to be regarded as income from business outside the purview of Rule 8(1) of the Rules.

3. The assessee computed the composite income at Rs.41,82,95,456/- . 40% of the above was offered to tax i.e. Rs.1,93,18,182/-. The computation of total income of the assessee under the normal provisions of the Act was as follows :-

	Rs.	Rs.
Net Profit as per Profit & Loss Account		17,52,56,793
Add:i)Depreciation debited to Profit & Loss A/c	1,62,80,290	
ii)Expenses disallowed u/s 14-A of IT Act	6,15,436	
iii)Amount inadmissible(as per computation)	34,737	
iv) Amount disallowed as per Annxure-10	3,776	
v) Advances written off	9,271	
vi)Donation	5,50,000	
		1,74,93,510
Less: i) Depreciation as per I.T.Act	1,99,23,624	19,27,50,303
ii)Dividend income fully exempted u/s 10(34) of the Act	1,08,73,870	
iii)Replantation Subsidy fully exempted u/s 10(30) of I.T.Act	9,87,630	
iv) Profit on sale of green leaf	26,146	
v)Long Term Capital gains(considered under Capital Gains)	1,50,00,000	
vi)Expenses Allowed u/s 43B	9,62,398	4,77,73,668
Less:Proportionate profit on sale of Tea out of purchased Tea		14,49,76,635
Total Tea Manufactured (Kgs)	57,91,372	
Total tea purchased (Kgs.)	<u>7,95,125</u>	
Total Tea	<u>65,86,497</u>	
Rs.14,49,76,635X7,95,125Kgs/65,86,497 Kgs.		1,75,01,647
		12,74,74,988
Less : Proportionate profit on sale of Tea made out purchased leaf		
Tea Manufactured from own leaves (Kgs.)	21,94,132	
Tea Manufactured from bought leaves (Kgs.)	<u>35,97,240</u>	
Total Tea Manufactured (Kgs)	<u>57,91,372</u>	
Rs.12,74,74,988X35,97,240Kgs/57,91,372 Kgs		<u>7,91,79,532</u>
COMPOSITE INCOME		4,82,95,456
Computation of Total Income: The Composite Income having been computed as discussed above, the total income chargeable to tax under the normal provisions of the Act is derived as under :		

BUSINESS INCOME :	Rs.	Rs.
40% of Composite income being treated as Business income		1,93,18,182
Proportionate profit on sale of Tea made out of purchased Tea		1,75,01,647
Proportionate profit on sale of Tea made out of purchased leaf		7,91,79,532
BUSINESS INCOME		11,59,99,361
LONG TERM CAPITAL GAINS :		
Sale Value of Shares of Invent Assets Recons	2,50,00,000	
Less: Indexed cost of Shares : 100,00,000x632/551	<u>1,14,70,054</u>	
	1,35,29,946	
Less: Loss carry forward for A.Y.2002-03	<u>21,30,399</u>	<u>1,13,99,547</u>
GROSS TOTAL INCOME		12,73,98,908
Less: Deduction u/s 80-IB of I.T.Act for Manu Tea Factory (10 th Yr.) (Fully exempted since Rule 8 is not applicable as tea fully manufactured out of bought leaf)	<u>6,11,90,887</u>	6,11,90,887
Deduction u/s 80-IE of I.T.Act for Narayanpur T.E.(2 nd Yr. Profit of the Unit as per Form No.10CCB	<u>6,75,65,742</u>	
Total Production of the unit 20,76,146Kgs. Production from own leaf 10,70,954 Kgs. Applying Rule 8, 60% of own tea is exempted 642,572Kgs Therefore exempted income not deductible mu/s 80IE : Rs.675,65,742X642,572Kgs/20,76,146 Kgs.		
TAXABLE INCOME	<u>2,09,11,753</u>	<u>4,66,53,989</u>
Income Tax @ 20% on Long Term Capital gains		1,95,54,032
Income tax on other Business Income @30%	1,13,99,547	22,79,909
	81,54,486	<u>24,46,346</u>
Add: Surcharge @ 10%		47,26,255
		<u>4,72,625</u>
Add: Education Cess @ 3%		51,98,880
Total Income tax payable		<u>1,55,966</u>
Less : tax Deducted at source		53,54,847
Advance Income tax paid by 15.03.2010	1,76,674	
Payable	50,00,000	<u>51,76,674</u>
		<u>1,78,173</u>

4. It can be seen from the aforesaid computation of total income that the assessee has not considered income that it derived from purchase of tea leaves from third parties and manufacturing of tea from and out of the tea leaves so purchased as part of the

composite income. The above computed by the assessee is the computation of the total income under the normal provisions of the Act.

5. The assessee was a company and therefore under the provisions of section 115JB of the Act if income tax payable on the total income of an Assessee which is a company as computed under the normal provisions of the Act is less than 15% of its book profit then tax has to be paid by the assessee on the book profit at 15% of the book profit. The manner of computation of book profit is laid down u/s 115JB(2) of the Act.

6. The provisions of section 115JB of the Act are applicable to the Assessee and therefore the assessee computed the book profits under the provisions of section 115JB of the Act at Rs.6,56,04,291/- as follows :

COMPUTATION OF INCOME U/S 115JB FOR THE ASSTT. YEAR 2010-11

	Rs.	Rs.
Net Profit as per Profit & Loss Account		17,52,56,793
Add:Expenses disallowed u/s 14A read with Rule 8D		<u>6,15,436</u>
		17,58,72,229
Less: i)Dividend Income fully exempted u/s 10(34) of I.T.Act	1,08,73,870	
ii) Replantation Subsidy fully exempted u/s 10(30) of I.T.Act	9,87,630	<u>1,18,61,500</u>
		16,40,10,729
Less:Agricultural income exempted u/s 10(1) of 60% of Rs.	16,40,10,729	<u>9,84,06,437</u>
BOOK PROFIT		<u>6,56,06,437</u>
Income Tax under section 115JB of Income tax Act @15%		98,40,644
Add: Surcharge @ 10%		<u>9,84,064</u>
		1,08,24,708
Add : Education Cess @ 3%		<u>3,24,741</u>
		1,11,49,449
Less: Tax Deducted at Source:		<u>1,76,674</u>
		1,09,72,775
Advance Income tax paid by 15.03.2010		<u>50,00,000</u>
		59,72,775
Add: Interest under section 234C		
1 st Instalment 15% on Rs.10972775 for 3 months @ 1% p.m.	49,377	
2 nd Instalment 45% on Rs.10972775 for 3 months @ 1% p.m.		1,48,132
3 rd Instalment 75% on Rs.10972775 for 3 months @ 1% p.m.		2,46,887
4 th Instalment 100% on Rs.5972775 for 1 month @ 1% p.m.		

Interest under section 234-B : On Rs.5972775 for 3 months @ 1% p.m.	<u>59,728</u>	5,04,125 <u>1,79,183</u> 66,56,084
Less: Tax paid on self assessment Income Tax Refundable/Due		<u>66,60,000</u> <u>3,916</u>
Carry Forward MAT credit u/s 115JAA:		
Assessment Year 2006-07	4,37,822	
Assessment Year 2007-08	9,12,103	
Assessment Year 2008-09	4,76,236	
Assessment Year 2009-10	32,89,818	
Assessment year 2010-11	<u>57,94,602</u>	
Total MAT credit carry forward	<u>1,09,10,581</u>	

7. The AO passed order of assessment u/s 143(3) of the Act dated 24.09.2012 wherein he computed the total income of the assessee under the normal provisions of the Act at a sum of Rs.1,13,99,547/- on which the tax payable was Rs.25,83,138/-. The tax payable was less than 15% of the book profit and therefore the assessee's total income and tax payable was not determined by the AO under the normal provisions of the Act but as per the provisions of section 115JB of the Act. While computing total income u/s.115JB of the Act, the AO accepted the computation of book profit u/s 115JB of the Act as given by the assessee.

8. The CIT in exercise of his powers u/s 263 of the Act was of the view that the aforesaid order of AO accepting the computation of book profits u/s.115JB of the Act as given by the assessee was erroneous and prejudicial to the interest of the revenue. The CIT therefore issued a show cause notice u/s 263 of the Act dated 10.03.2015. The case of the CIT for initiating proceedings u/s 263 of the Act was that on perusal of the assessment records it was seen that during the F.Y. 2009-10 relevant to the A.Y. 2010-11, the assessee computed book profit u/s, 115JB deducting Rs.9,84,06,438/- being 60% of composite profit as per provisions of Rule 8(1) of the Rules. On perusal of the assessment records the CIT also noticed that the composite profit determined by the Assessee also contained profit from non-agricultural activities also i.e. income from sale

of tea manufactured and sold from tea leaves purchased from third parties. According to the CIT only a sum of Rs. 2,09,11,766/- being 60% of composite income being attributable to agricultural income, only was to be deducted from the net profit of Rs.16,40,10,729/- for computation of book profit. As stated in the assessment, 60% of the total amount of Rs.16,40,10,729/- i.e. Rs.9,84,06,438/- was deducted for computation of book profit, which has resulted in possible underassessment of book profit of Rs.7,74,94,671/- with under charge of tax of Rs.1,71,21,282/- under the provisions of section 115JB of the Act.

9. Another aspect noticed by the CIT in exercise of powers u/s.263 of the Act was that that the Assessee claimed deduction of Rs.10,78,44,575/- u/s. 80IB & 80IE of the Act which according to the CIT included a sum of Rs.24,22,983/- which was income from sale of DEPB license. According to CIT income from sale of DEPB license cannot be regarded as income derived from industrial undertaking and therefore was not eligible for deduction u/s. 80IB & 80IE of the Act. According to him the action of the AO in allowing the claim of the Assessee in this regard resulted in underassessment of income of Rs.24,22,983/- under normal provisions which would have adverse revenue implication in the form of consequential excess carry forward of MAT to the extent of Rs.8,23,571/-

10. Apart from the above, the CIT also noticed from the Assessment records that in working out the disallowance under Rule 8D(2)(ii) of the Rules, the assessee adjusted interest paid against the figure of interest earned. According to the CIT interest expenses alone ought to be considered for disallowance under rule 8D(2)(ii) of the Rules without set off of interest earned. According to CIT such setting off of interest paid against received allowed by AO resulted in less disallowance of Rs.11 ,46,644/- as per Rule 8D(2)(ii) and thereby possible underassessment of income of Rs.11 ,46,644/-.

11. The plea of the assessee was that while computing the book profit u/s 115JB of the Act the assessee need not exclude the income that arises out of tea manufacturing from tea leaves that are purchased. It was the contention of the assessee that even the profit obtained from manufacturing and sale of tea from tea leaves purchased should be regarded as part of the composite income under the provisions of section 115JB of the Act. Only 40% of such composite income should be taken as book profits for the purpose of section 115JB of the Act and the action of AO in this regard was proper. The assessee in this regard placed reliance on the decision of the Hon'ble Supreme Court in the case of Apollo Tyres vs CIT 255 ITR 273 (SC) wherein it was held that the AO while arriving at the book profits has limited power of making adjustments only to the extent specified in Explanation to section 115JB (2) of the Act. The assessee also pointed out that similar method has been adopted by the assessee in the past and accepted by the department. The CIT however rejected the plea of the assessee observing as follows :-

“6. I have considered the matter. I fully agree that the AO cannot make adjustments to book profit for the purposes of section 115JB except those that are provided in explanation (1) to section 115JB. The assessee himself has reduced agricultural income as per sub-clause (ii) of explanation (1) to section 115JB. Therefore, on principal there is no disagreement about the adjustments that can be made in the book profit. However, the AO while computing book' profit under 115JB had reduced 60% of Rs.16,40,10,729/- which is shown as composite profit available for book profit u/s. 115JB in his computation of book profit u/s. 115JB. However, profit attributable to sale of tea out of purchased tea amounts to Rs.1,75,01,647/- (as calculated in this assessment order) and profit attributable to tea manufactured out of bought leaf amounting to Rs.7,91,79,532/- (as calculated in this assessment order) should have been reduced from the composite profit while calculating agricultural income as per Rule 8D. It is only 60% of the income from the growing, manufacturing and selling of tea that qualifies as agricultural income as per Rule 8D. Thus, income from sale of tea out of purchased tea and income from profit attributable to tea manufactured out of bought leaf cannot be a part of the composite income as per provisions of Rule 8D. As the AO has not taken this into consideration, the assessment has been rendered erroneous and prejudicial to the interest of revenue and is therefore, set aside. The AO is directed to pass a fresh assessment order after calling for the necessary details and examining the matter in depth and after correctly computing composite profit so as to arrive at the correct figure of the agricultural income as per Rule 8D.”

12. With regard to the income from sale of DEPB license being regarded as part of income eligible for deduction u/s.80IB & 80IE of the Act, the CIT held as follows :-

“8. It was further stated that in any way even if this amount of Rs.24,22,983/- is treated as income not adjustable against the deduction u/s. 80IB & 80IE, there is no effect of deduction under section 80IB & 80IE. As per order u/s. 154/143(3) dated 16/07/2013, business income is Rs.11,59,99,361/- and deduction u/s. 80IB & 80IE is Rs.10,78,44,875/- Tax calculated on business income of Rs.81,54,486/- came to Rs.24,46,346/-. During the course of hearing, the Ld. A/R explained that since the tax paid by the assessee was on account of tax calculated u/s 115JB amounting to Rs. 1,11 ,49,449/- which was higher than the tax on business income amounting to Rs.24,46,346/-. It was further stated that therefore, even if the amount of DEPB receipt of Rs.24,22,983/- was treated as being income not from industrial undertaking, it would have no tax effect. I have considered the matter. It may perhaps be correct that even if the amount of DEPB receipt is reduced from the computation of deduction u/s. 80IB & 80IE, it would have no tax effect as the tax payable as per MAT provisions is higher. Nonetheless, the AO is directed to examine the matter and determine as to whether the DEPB licence receipts were received in course of the business eligible for deduction u/s. 80IB & 80IE respectively. If this be the case, the assessee would be entitled to include the same in the computation of deduction u/s. 80IB & 80IE. However, if the DEPB receipt is not connected with the eligible business, the same has to be excluded irrespective of the fact that it may not have any tax effect.”

13. With regard to the disallowance u/s 8D(2)(ii) of the Act of interest expenses incurred in earning exempt income, the assessee took a plea that the method of netting of interest income against the aforesaid expenses and applying Rule 8(2)(ii) of the Rules on the resultant interest net interest expenditure was accepted in the past by the assessee and in A.Y.2004-05 such an approach has been approved by the Hon'ble ITAT.

14. The CIT however rejected this plea of the assessee also and held as follows :-

“11. I have considered the matter. It is correct that netting of interest as a principle has been accepted in the assessee's own case by the ITAT and the Tribunal. However, those decisions were not specifically in the context of disallowance under Rule 8D. It is not known whether the Jurisdictional Tribunal decision in the Trade Apartment case (Supra) has been accepted by the department. The issue is contentious and still not settled. The AO is directed to examine the matter afresh after ascertaining whether the department has gone in appeal on this issue and also after referring to the latest Jurisdictional ITAT and High Court decision on the issue and pass the order as per law.”

15. Aggrieved by the order of CIT the assessee has preferred the present appeal before the Tribunal.

16. We have heard the submissions of the Id. Counsel for the assessee, who took a stand which was almost identical to the stand taken by the assessee in the proceedings u/s 263 of the Act. Our attention was also drawn to the fact that the ITAT 'B' Bench Kolkata in the case of JCIT vs Kanco Enterprises Ltd in ITA NO.17/Kol/2012 order dated 08.10.2015 has taken a view that the manner of computation of composite income in the case of a company which is engaged in the growing, manufacturing and sale of tea should be done in accordance with the CBDT Circular No.495 dated 22.09.1987. According to him therefore as per the CBDT Circular only adjustment not permissible to the book profit was adjustment under clause (f) and sub-clause (ii) of Explanation to section 115JB(1) of the Act which inter-alia deals with the amount of expenditure relatable to any income to which the provision of Chapter-III applies. In all other respects the AO has to make an adjustment referred to in Explanation to section 115J(1) of the Act. It was pointed out by him that the adjustment proposed by the CIT, in so far as excluding the income from manufacturing and sale of tea from tea leaves purchased from third parties is not one such adjustment permitted under the explanation to section 115JB(2) of the Act. He relied on the decision of the Hon'ble Supreme Court in the case of Apollo Tyres (supra) and submitted that the AO cannot be permitted to make any adjustment to the profit as per the profit and loss account prepared in accordance with the provisions of the Companies Act, 1956 except to the extent permitted by the Explanation to section 115JB(2) of the Act. In respect of the income from sale of DEPB licence he reiterated the submissions made before CIT. In so far as the disallowance under Rule 8D(2) (ii) of the Rules is concerned the Id. Counsel submitted that the proposed direction of the CIT in the impugned order is acceptable to the assessee and to this extent the order u/s 263 of the Act may be upheld. In so far as the other aspects dealt in the order of 263 are concerned the Id. Counsel prayed that the same may be quashed as the order of AO was neither erroneous nor prejudicial to the interest of the revenue. He drew our attention to the fact that similar computation of composite income

u/s.115JB of the Act has been accepted by the revenue in A.Y.2012-13, 2013-14 and 2014-15. The relevant orders of assessment are also filed in the paper book. The ld. DR, on the other hand, reiterated the stand of the CIT in the impugned order u/s 263 of the Act and submitted that the action of the CIT was fully justified in the light of the specific provision of Rule 8(1) of the Rules.

17. One preliminary objection raised by the ld.counsel for the assessee is that 263 cannot be initiated on the basis of audit objection. In this regard reliance was placed on the decision of the Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Sohana Wollen Mills 296 ITR 238 (P&H). The ld. DR however submitted that any fact coming to the notice of the CIT even through audit objection if the order passed by the AO is erroneous and prejudicial to the interest of the revenue then section 263 can be invoked.

18. We have considered the preliminary objection raised by the learned counsel for the Assessee. We find that the Hon'ble P & H High Court in the case of Sohana Wollen Mills has observed as follows:

“7. A reference to the provisions of [Section 263](#) of the Act shows that jurisdiction thereunder can be exercised if the CIT finds that the order of the AO was erroneous and prejudicial to the interest of Revenue. Mere audit objection and merely because a different view could be taken, were not enough to say that the order of the AO was erroneous or prejudicial to the interest of the Revenue. The jurisdiction could be exercised if the CIT was satisfied that the basis for exercise of jurisdiction existed. No rigid rule could be laid down about the situation when the jurisdiction can be exercised. Whether satisfaction of the CIT for exercising jurisdiction was called for or not, has to be decided having regard to a given fact situation.

8. In the present case, the Tribunal has held that the assessee had disclosed that out of sale consideration, a sum of Rs. 1 lac was to be received for sale of permit. If that is so, there was no error in the view taken by the AO and no case was made out for invoking jurisdiction under [Section 263](#) of the Act.”

19. It can be seen from the aforesaid observation of the Hon'ble High Court that it has been made clear that no rigid rule can be laid down and that facts of each case will have to be seen to come to a conclusion whether audit objection was sufficient to come to a conclusion that the order of the AO that is sought to be revised in exercise of powers u/s.263 of the Act was erroneous and prejudicial to the interest of the revenue. On the facts of the present case, we are satisfied that the CIT applied his mind independently and that he had not proceeded purely on the basis of any audit objection. Therefore the preliminary objection raised by the Assessee in this regard is hereby rejected.

20. We have given a very careful consideration to the rival submissions. It is no doubt true that the assessee had income from growing, manufacturing and sale of tea as well as income from tea leaves purchased from third parties which were processed /manufactured and sold by the assessee. In so far as the first category of income is concerned, the same has to be regarded as part of the composite income for the purpose of applying Rule 8(1) of the Rules. In so far as the second category of income is concerned it cannot be regarded as part of the composite income under rule 8(1) of the Rules. This position has been accepted by the assessee itself in the computation of the total income under the normal provisions of the Act. We have referred to the computation of the total income by the assessee under the normal provisions of the Act in the earlier part of this order.

21. Now the question is whether the position will change when it comes to computation of book profit u/s 115JB of the Act. In the context of section 115J of the Act, the CBDT in Circular No.495 dated 22.09.1987 has set out the manner of computation of book profits and composite income in the case of an Assessee to which Rule 8(1) of the Rules, for the purpose of Sec.115J of the Act. This tribunal in the case of M/s. Kanco Enterprises Ltd. (supra) has taken a view that the aforesaid circular would be applicable in the context of section 115JB of the Act also. The following are the relevant observations of the tribunal :-

“20. We have heard the rival submissions. Section 115JB of the Act in Explanation 1 (ii) which gives the list of amounts that has to be reduced from the book profits, provides as follows :-

“(ii) the amount of income to which any of the provisions of [section 10 (other than the provisions contained in clause (38) thereof)] or section 11 or section 12 apply, if any such amount is credited to the profit and loss account; or “

Section 295 (2) (b) provides as follows :-

“295 Power to make rules.

(1) The Board may, subject to the control of the Central Government, by notification in the Gazette of India, make rules for the whole or any part of India for carrying out of the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters :-

(a) The ascertainment and determination of any class of income;

(b) The manner in which and the procedure by which the income shall be arrived at in the case of –

(i) income derived in part from agriculture and in part from business;

(ii) persons residing outside India;

[(iii) an individual who is liable to be assessed under the provisions of sub-section (2) of section 64;”

Pursuant to the aforesaid provision of Rule 8 of IT Rules 1962 provides that in the case of income derived from sale of tea grown and manufactured by the seller in India, the income shall be computed as if they were income derived from business and 40% of such income shall deemed to be income liable to tax. It is thus clear from the reading of Rule 8(1) that 60% of the income computed as aforesaid is to be treated as agricultural income exempt u/s 10(1) of the Act. Since 60% of the income is exempt u/s 10(1) of the Act. The Assessee’s claim is that 60% of the income which is exempt in terms of Rule 8 of the Rules, is nothing but income exempt u/s.10(1) of the Act and hence the same should be reduced from the book profits under Explanation 1 clause (ii) listing amounts to be reduced u/s 115JB of the Act. We are of the view that the stand taken by the revenue deserves acceptance. The CBDT in the context of Sec.115J of the Act had in CIRCULAR NO. 495 DATED 22ND SEPTEMBER, 1987 in para 36.4 taken the same view:

“36.4 In the case of a tea company where income is derived from the sale of tea grown and manufactured by the seller, only 40 per cent of such income is liable to tax under r. 8 of the IT Rules, 1962. Sixty per cent of the income, which is disregarded for the purposes of taxation is considered to be agricultural income and is, therefore, exempt under the provisions of Chapter III. The net profit determined in accordance with Schedule VI to the Companies Act, 1956, has to

be adjusted, inter alia, in accordance with cl. (f) and sub-cl. (ii) of the Explanation to s. 115J(1). In the case of the tea companies, the book profit should be computed by making all the adjustments referred to in the Explanation. However, no adjustment in respect of cl. (f) and sub-cl. (ii) of the Explanation is to be made for the agricultural income earned by tea companies from tea business. 40 per cent of the adjusted amount arrived at in this manner will be the book profit of the tea company in accordance with r. 8 of the IT Rules.”

The provisions of Sec.115JB of the Act are on the same basis as that of Se.115J of the Act. There is no reason why the aforesaid principle laid down in the CBDT Circular, which is in tune with the provisions of law referred to above, should not be applied to the computation of books profits u/s.115JB of the Act. We therefore hold that the determination of books profits u/s.115JB of the Act should be worked out by the AO on the lines indicated in the Circular. We hold that the determination of books profits u/s.115JB of the Act should be worked out as done by the Assessee and in accordance with the directions laid down in the Circular referred above. We hold and direct accordingly and allow grounds raised by the assessee.”

22. It is clear from the CBDT Circular that there is no provision for bifurcating income from growing, manufacturing and sale of tea and income from manufacturing and sale of tea out of leaves purchased from third parties. In other words, the proposed adjustment in the impugned order u/s 263 of the Act was beyond the scope of determining of book profit u/s 115JB of the Act r.w. CBDT Circular No.495 dated 22.09.1987 as well as the decision of the Hon’ble Supreme Court in the case of Apollo Tyres (supra). In Apollo Tyres Ltd. (supra), the Hon’ble Supreme Court had to decide the following question of law:

“Can an Assessing Officer while assessing a company for income tax under [Section 115-J](#) of the Income Tax Act question the correctness of the profit and loss account prepared by the assessee company and certified by the statutory auditors of the company as having been prepared in accordance with the requirements of Parts II and III of Schedule VI to the [Companies Act](#) ?”

The Hon’ble Supreme Court after extracting the provisions of Sec.115J of the Act found that the intent and purpose of Sec.115J of the Act, as explained by the Hon’ble Finance Minister when he introduced the relevant Bill containing the said provisions, was that

highly profitable companies were showing nil income for the purpose of income tax calling them as "zero-tax" companies and that the provisions of Sec.115J were being inserted so that all profitable companies pay some tax and hence a provision whereby every company will have to pay a "minimum corporate tax" on the profits declared by it in its own accounts was being introduced. The Hon'ble Court thereafter held that for the said purpose, [Section 115-J](#) makes the income reflected in the companies books of accounts as the deemed income for the purpose of assessing the tax. The books of accounts of the company is prepared in accordance with the provisions of Part II and III of Schedule VI to the [Companies Act](#). The Hon'ble Court held that while so looking into the accounts of the company, an assessing officer under the [IT Act](#) has to accept the authenticity of the accounts with reference to the provisions of the [Companies Act](#) which obligates the company to maintain its account in a manner provided by the [Companies Act](#) and the same to be scrutinised and certified by statutory auditors and will have to be approved by the company in its General Meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and satisfy that the accounts of the company are maintained in accordance with the requirements of the [Companies Act](#). It was also held that if the legislature intended the assessing officer to reassess the company's income, then it would have stated in [Section 115-J](#) that "income of the company as accepted by the assessing officer". The final conclusion of the Hon'ble Supreme Court on the issue was:

"9. Therefore, we are of the opinion, the assessing officer while computing the income under [Section 115-J](#) 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 115-J](#)."

23. Therefore the AO has to accept the profit as per the profit and loss account prepared in accordance with the companies Act and thereafter he can proceed to make

the additions and deletions set out in the Explanation to Sec.115JB of the Act. He cannot make any adjustment which is not permitted under Explanation to Sec.115JB of the Act. The interpretation as above by the Hon'ble Supreme Court will equally apply to the provisions of Sec.115JB of the Act as well, as those provisions are identical to the provisions of Sec.115J of the Act with certain variations, which does not in any way alter the starting point of computation of book profit u/s.115J of the Act. If the CBDT Circular referred to above and the decision of the Hon'ble Supreme Court in the case of Apollo Tyres (supra) are read together, the only conclusion that can be reached that the computation of book profit as done by the Assessee is correct and cannot be termed as erroneous and prejudicial to the interest of the revenue.

24. We also find that similar computation has been accepted by the revenue even in A.Y.2012-13 to 2014-15. Orders of assessment for A.Y.2013-14 and 2014-15 have been passed after order passed u/s 263 of the Act. We therefore are of the view that the CIT was not justified in invoking the provision u/s 263 of the Act, in so far as it relates to determination of book profit u/s 115JB of the Act.

25. So far as the action of CIT in invoking Sec.263 of the Act on the ground that income from sale of DEPB license ought to have been reduced from the profits eligible for deduction u/s 80IB and 80IE of the Act, the Id. Counsel had pointed out that there will be no prejudicial to the revenue in as much as tax liability of the assessee is being determined u/s 115 JB of the Act on book profits and therefore the computation of total income under the normal provisions of the Act will have no effect on the tax payable by the assessee. This has been accepted by the CIT in the impugned order in para-8 but nevertheless he has directed the AO to examine as to whether DEPB receipts were received in the course of business eligible for deduction u/s 80IB and 80IE of the Act respectively. In our view such an exercise will be futile when the admitted position is that even if such exercise turns out against the assessee that might not have any impact

on the tax liability of the Assessee. In that sense the order of the AO cannot be termed as prejudicial to the interest of the revenue. The law is well settled that for invoking the provision of section 263 of the Act, the order sought to be revised ought to be both erroneous as well as prejudicial to the interest of the revenue. Since the condition that the order should be prejudicial to the interest of the revenue is not satisfied, the order of CIT u/s 263 in so far as it is concerns computation of deduction u/s 80IB and 80IE of the Act, cannot be sustained and the same is hereby quashed.

26. In so far as the disallowance under Rule 8D(2)(ii) is concerned the Id. Counsel fairly conceded that the action of CIT in the impugned order is justified. Hence the order of CIT to this extent is sustained.

27. In the result the appeal of the assessee is partly allowed.

Order pronounced in the Court on 03.02.2017.

Sd/-
[M.Balaganesh]
Accountant Member

Sd/-
[N.V.Vasudevan]
Judicial Member

Dated : 03.02.2017.

[RG PS]

Copy of the order forwarded to:

- 1.Luxmi Tea Company Limited, 17, R.N.Mukherjee Road, Kolkata-700001.
2. C.I.T.- Central-2, Kolkata.
3. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata Benches

