

IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "F",
MUMBAI

**BEFORE SHRI RAJENDRA SINGH, ACCOUNTANT MEMBER AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA No. 5720/Mum/2011
Assessment Year : 2004-05

M/s. Forever Diamonds Pvt. Ltd. Su-Raj House, 73-C, Corss Road Marol, MIDC, Andheri (E) Mumbai-400 093. PAN No.AAACF 0602 J	Vs.	Dy. Commissioner of Income tax Central Circle-1 Mumbai.
(Appellant)		(Respondent)

Appellant by	:	Shri Dillip J. Thakkar and Shri Rajesh P. Shah
Respondent by	:	Shri A.P. Singh
Date of hearing	:	09.01.2013
Date of Pronouncement	:	23.01.2013

ORDER

PER RAJENDRA SINGH, AM:

This appeal by the assessee is directed against the order dated 31.5.2011 of CIT(A) for the assessment year 2004-05. The assessee in this appeal has raised disputes on two different grounds which relate to adjustment made under section 115JB of the Income tax Act, 1961 (the Act) and disallowance of expenses under section 14A of the Act.

2. We first take up the dispute relating to adjustment made by AO in computation of book profit under section 115JB. Under the provisions of section 115JB, in case, total income computed under normal provisions of the Act is less than certain percentage of book profit, the book profit is deemed to be total income of the assessee on which tax is payable on a specified rate. The book profit under the said provisions is computed on the basis of profit shown in the P&L Account prepared in accordance with provisions of Part-II and Part-III of Schedule-VI of Companies Act to which certain adjustments as provided in the Explanation-1 to Section 115JB(2) are required to be made. In the present case, the AO noted that the assessee had earned gross profit of Rs.1,68,95,500/- from sale of its rights in the immovable property which had not been shown in the P&L Account but had been taken directly to the balance sheet. He referred to the sub-clause (xi) of clause-3 of Part-II of Schedule-VI as per which the assessee is required to show the amount of income earned from investment in the P/L Account, distinguishing between trade investments and other investments. It was thus mandatory for the company to show profit/loss on sale of assets in the P&L Account which had not been done. The AO thus concluded that the P/L account had not been prepared in accordance with Part-II and Part-III of Schedule-VI of the Companies Act. He referred to the decision of the Tribunal in the case of M/s. Bombay Diamonds Co. P. Ltd. in ITA No.7488/Mum/07 order dated 30.11.2009 in which in an identical situation,

the assessee had not shown the profit on sale of investments in P&L Account and AO had re-worked the profit for the purpose of Section 115JB. The Tribunal held that the AO had power to re-work the book profit by re-casting the P/L account in the manner provided in Part-II and Part-III of Schedule-VI of the Companies Act. The AO, therefore, re-worked the book profit in which addition on account of sale of investment was made and tax computed accordingly. In appeal, CIT(A) confirmed the adjustment made by AO to the book profit aggrieved by which the assessee is in appeal before the Tribunal.

3. Before us, the Id. AR for the assessee submitted that the issue was covered in favour of the assessee by the judgment of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT (255 ITR 273) in which it was held that once accounts prepared as per Companies Act are verified by the authorities under Companies Act, it is not open to the AO to make changes in the accounts so prepared for the computation of book profit. The Id. AR also referred to the judgment of Hon'ble High Court of Bombay in case of CIT vs. Akshay Textiles Trading And Agencies P. Ltd. (304 ITR 401) and the judgment of same High court in case of CIT vs. Adbhut Trading Co. P. Ltd. (338 ITR 94) in which the Hon'ble High Court following the judgment of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra), held that the accounts prepared under the Companies

Act and certified by the authorities under the said Act have to be accepted. It was accordingly urged that the adjustment made by the AO on account of profit from sale of investment was not justified.

3.1 The Id. DR on the other hand submitted that the specific issue as to whether capital gain not routed by the assessee through P&L Account prepared under the Companies Act can be added to the book profit had been considered by the Hon'ble High Court of Bombay in the case of CIT vs. Veekaylal Investment Co. P. Ltd. (249 ITR 597) and it was held that the adjustment by the AO was correct. It was argued that it was within the power of AO to go into the accounts prepared by the assessee under the Companies Act and re-cast the accounts in case the same was not prepared correctly. He placed reliance on the decision of the Tribunal in the case of Sumer Builders (P) Ltd. (50 SOT 198) in which the Tribunal after considering the judgment of the Hon'ble Supreme Court in case of Apollo Tyres (supra) and the judgment of Hon'ble High Court of Bombay in case of CIT vs. Akshay Textiles Trading And Agencies P. Ltd. (supra), had upheld the adjustment made by the AO on account of profit from sale of investments. He also referred to the decision of the Mumbai Bench of the Tribunal in the case of Koproan Pharmaceuticals Ltd. Vs. DCIT (119 ITD 355) in which the Tribunal after referring to the judgment of Hon'ble Supreme Court in the case of Apollo Tyres (supra), held that the Hon'ble

Supreme Court in the said case had laid down the general proposition of law whereas the judgment of the Hon'ble High Court of Bombay in case of Veekaylal Investment Co. P. Ltd. (supra) was specific on the issue of capital gain and, therefore, the judgment of Hon'ble High Court would prevail on the issue.

3.2 In reply, the Id. AR stated that none of the decisions of the Tribunal cited by the Id. AR had considered the later judgment of Hon'ble High Court of Bombay in the case of CIT vs. Adbhut Trading Co. P. Ltd. (supra), in which following the judgment of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra), it was held that once the P/L account prepared under the Companies Act had been certified by the authorities under the said Act, it was not open for the AO to say that P&L Account had not been prepared in accordance with the provisions of Companies Act. It was accordingly argued that the issue being clearly covered by the judgment of Hon'ble Supreme Court and the Hon'ble Jurisdictional High Court, adjustment made by AO on account of profit on sale of investment has to be deleted.

4. We have perused the records and considered the rival contentions carefully. The dispute raised in this appeal is regarding adjustment made by AO to the book profit computed under the provisions of section 115JB. Under the said provisions, in case, the total income computed under the

normal provisions of the Act is less than specified percentage of book profit, the book profit is deemed to be the total income on which tax is required to be levied at a specified rate. The book profit under section 115JB is required to be computed on the basis of P&L Account prepared in accordance with the provision of Part II and Part-III of Schedule VI of the Companies Act and, to such profit, certain adjustments as provided in the Explanation-1 to Section 115JB(2) is required to be made. The issue is whether the AO has power to re-cast the accounts prepared and certified by the authorities under the Companies Act. The case of the revenue is that, in case, accounts are not prepared in accordance with the provisions of Part-II and Part-III of Schedule VI of the Companies Act, the AO has the power to go into accounts and re-cast the same as per requirement of the Companies Act. The assessee on the other hand has argued that the accounts prepared under the Companies Act and certified by the authorities under the said Act can not be tinkered with by the AO and have to be accepted for computation of the book profit.

4.1 We have carefully considered the various aspects of the matter. We find that the issue raised before us has already been considered and decided by the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT(255 ITR 273). In that case, the assessee had claimed arrears of depreciation in the P&L Account prepared under the Companies Act. The AO held that the

accounts prepared were not in accordance with Part-II and Part-III of Schedule-VI of the Companies Act and, therefore, disallowed the arrears of depreciation which had been upheld up to the level of the High Court. The Hon'ble Supreme Court observed that Section 115J provisions of which were similar to those of 115 JB was introduced in the Income tax Act with a deeming provision which made Companies liable to pay tax at least 30% of book profit as shown in its own accounts. For the said purpose, the section 115J made income reflected in the compan's books of account, the deemed income for the purpose of assessing the tax. The Hon'ble Supreme Court further observed that the use of the words "in accordance with the provisions of part-II and Part-III of Schedule-VI of the Companies Act" was made for the limited purpose of empowering the assessing authority to rely upon the authentic statement of accounts of the company and while so looking into the accounts of the company, the AO had to accept the authenticity of the accounts. It was so held by the Hon'ble Supreme Court that the AO has only the power to examine whether books of account are certified by authorities under the Companies Act as having been properly maintained in accordance with the provisions of the Companies Act. The AO, thereafter, has limited power of making adjustments as provided in Explanation to section 115J. The relevant portion of the judgment of the Hon'ble Supreme Court is reproduced below as a ready reference.

“The Assessing Officer, while computing the book profits of a company under section 115J of the Income-tax Act, 1961, 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 section 115J. The Assessing Officer does not have the jurisdiction to go behind the net profits shown in the profit and loss account except to the extent provided in the Explanation. The use of the words “in accordance with the provision of Parts II and III of Schedule VI to the Companies Act” in section 115J was made for the limited purpose of empowering the Assessing Officer to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company, the Assessing Officer has to accept the authenticity of the accounts with reference to the provisions of the Companies Act, which obligate the company to maintain its accounts in a manner provided by that Act and the same to be scrutinised and certified by statutory auditors and approved by the company in general meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act. Sub-section (1A) of section 115J does not empower the Assessing Officer to embark upon a fresh enquiry in regard to the entries made in the books of account of the company.”

4.2 The revenue has relied on the judgment of Hon'ble High Court of Bombay in the case of Veekaylal Investment Co. P. Ltd. (supra), but the said judgment had been delivered prior to the judgment of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) and, therefore reliance on the judgment of Hon'ble High Court of Bombay is misplaced. The Hon'ble High Court of Bombay, subsequent to the judgment of Hon'ble Supreme Court in case of Apollo Tyres Ltd. (supra), have reconsidered the issue and have held in case of CIT vs. Akshay Textiles Trading And Agencies P.

Ltd. (supra), that capital gain not shown in the P&L Account under the Companies Account cannot be added while computing to the book profit. The same position was reiterated by the Hon'ble High Court in case of CIT vs. Adbhut Trading Co. P. Ltd. (supra) in which it was held that once accounts including the P&L Account had been prepared and certified by authorities under the Companies Act, it was not open for the AO to state that P&L Account has not been prepared in accordance with the provisions of the Companies Act. The ld. DR pointed out that the Tribunal in case of Sumer Builders (P) Ltd. (supra) even after considering the judgment of the Hon'ble High Court of Bombay in case of CIT vs. Akshay Textiles Trading And Agencies P. Ltd. (supra), have held that the AO has power to re-cast the accounts prepared under the Companies Act, in case, these were not correctly prepared. Arguments advanced by the revenue have no merit in view of the issue having been already settled by the judgment of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra), as pointed out earlier. Moreover, the Tribunal in the case of Sumer Builders (P) Ltd. (supra) had no occasion to consider the latest judgment of the Hon'ble High Court of Bombay in the case of Adbhut Trading Co. P. Ltd. (supra) in which the Hon'ble High Court following the judgment of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) have allowed the claim of the assessee. In the case of Appolo Tyres Ltd. (supra), it has been clearly held that the AO has only power of examination whether books of account

prepared under the Companies Act have been certified by the authorities under the Companies Act and, therefore, he could only make adjustments as provided in Explanation to Section 115JB(2) of the Act. It is thus clear that once accounts are prepared under the Companies Act and have been certified by the authorities, the AO cannot tinker with the accounts and make any changes while computing book profit except making adjustments as provided in Explanation to Section 115JB. The addition made by AO and confirmed by CIT(A) on account of profit on sale of asset not disclosed in the P&L Account prepared under the Companies Act cannot, therefore, be sustained. We, therefore, set aside the order of CIT(A) and delete the addition made.

5. The second dispute is regarding disallowance of expenses under section 14A of the Act in relation to income exempt from tax. The AO noted that the assessee had earned tax free dividend income of Rs.1,56,408/-. The AO therefore, allocated expenses relating to exempt income on proportionate basis and disallowed a sum of Rs.8,02,702/-. In appeal CIT(A) directed the AO to re-compute the disallowance as per Rule-8D of Income tax Rule aggrieved by which the assessee is in appeal before the Tribunal.

5.1 We have heard both the parties, perused the records and considered the matter carefully. The dispute is regarding disallowance of expenses

relating to exempt income under section 14A of the Act. Under the said provisions, the disallowance of expenses relating to exempt income is required to be computed as per Rule 8D. The Hon'ble High Court of Bombay in the case of Godrej and Boyce Mfg. Co. vs. DCIT (328 ITR 81) have held that Rule 8D is applicable only from assessment year 2008-09 and in respect of prior years, it was held that disallowance had to be made on a reasonable basis after hearing the assessee. In this case, CIT(A) directed the AO to make disallowance as per Rule 8D which is not correct. We, therefore, set aside the order of CIT(A) and restore the matter back to him for necessary examination in the light of judgment of Hon'ble High Court of Bombay in case of Godrej and Boyce Mfg. Co. vs. DCIT (supra) and for passing a fresh order after affording opportunity of hearing to the assessee .

6. In the result the appeal of assessee is allowed.

Order pronounced in the open court on 23.01. 2013.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(RAJENDRA SINGH)
ACCOUNTANT MEMBER

Mumbai, Dated: 23.01.2013.
Jv.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR “ ” Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1609 OF 2013

The Commissioner of Income Tax, Central-1,
Mumbai.

... Appellant

v/s

M/s. Forever Diamonds Pvt. Ltd., Mumbai

... Respondent

Mr.P.C. Chhotary for the appellant.

Mr.Atul Jasani for the respondent.

**CORAM: M.S. SANKLECHA &
N.M. JAMDAR, JJ.**

DATED : 12TH AUGUST 2015

PC.:

This appeal by the revenue challenges the order dated 23 January 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2004-05.

2 The revenue urges the following question of law for our consideration :

Whether on the facts and in the circumstances of the case and in law the Income Tax Appellate Tribunal was correct in holding that the Assessing Officer has no power to recast the profit and loss

account even when the same is, according to him, not correctly prepared in accordance with Schedule VI to the Companies Act, 1956 ?

3 The grievance of the revenue is that, when according to the Assessing Officer the accounts as prepared and as audited are manifestly in conflict with the manner in which the accounts have to be prepared under the Companies Act, then it is open to the Assessing Officer to recast the accounts for the purposes of Section 115JB of the Act. The Tribunal, by the impugned order negated the revenue's contention by relying upon the decision of the Supreme Court in ***Apollo Tyres Ltd. v/s C.I.T.***, reported in **255 ITR 273**. It has very pertinently quoted the following observations from ***Apollo Tyres Ltd.*** in the impugned order as under:

“The Assessing Officer, while computing the book profits of a company under section 115J of the Income Tax Act, 1961, 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 section 115J. The Assessing Officer does not have the jurisdiction to go behind the net profits shown in the profit and loss account except to the extent provided in the Explanation. The use of the words “in accordance with the provision of Parts II and III of Schedule VI to the Companies Act” in section 115J was made for the limited purpose of empowering the Assessing Officer to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the

company, the Assessing Officer has to accept the authenticity of the accounts with reference to the provisions of the Companies Act, which obligate the company to maintain its accounts in a manner provided by that Act and the same to be scrutinized and certified by statutory auditors and approved by the company in general meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act. Sub-section (1A) of section 115J does not empower the Assessing Officer to embark upon a fresh enquiry in regard to the entries made in the books of account of the company.”

The aforesaid observations of the Apex Court concludes the issue by holding that the Assessing Officer does not have a power to embark upon the fresh enquiry with regard to the entries made in the books of accounts of the Company when the accounts of an assessee Company is prepared in terms of Part II Schedule VI of the Companies Act scrutinized and certified by the statutory auditors, approved by the Company in general meeting and thereafter filed before the Registrar of Companies who has a statutory obligation also to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act. Thus, the issue is no longer *res integra*. Moreover, if the grievance of the revenue is to be accepted, then the conclusiveness of accounts prepared and audited in terms of Section 115JB of the Companies Act would be set at naught. This without successfully impeaching the Auditor's certificate or without the Registrar of Companies holding that the accounts have not been prepared in accordance with the provisions of the Companies Act.

4 Mr.Chhotaray, learned counsel for the revenue submitted that ***Apollo Tyres Ltd.*** (supra) was dealing with Section 115J of the Act, while this appeal deals with Section 115JB of the Act, therefore not applicable. However, we do not find any such distinction which could warrant the Assessing Officer ignoring the decision of the Apex Court in ***Apollo Tyres Ltd.*** (supra) while applying the provisions of Section 115JB of the Act which, according to us, are similar in nature to the provisions of Section 115J of the Act. It may also be noted that no such distinction was sought to be made either before the Tribunal or raised in the grounds of appeal filed before us.

5 It is also pertinent to note that while correcting this order dictated in Court, we found that in the grounds of appeal taken before us, the revenue concedes that the reliance in the impugned order on the decision of this Court in ***C.I.T. v/s Adbhut Trading Co. (P) Ltd.***, reported in ***338 ITR 94***, would conclude the issue. However, the grounds mention that the same need not be followed as it is not accepted by the revenue, although no appeal was filed to the Apex Court in view of low tax effect. In spite of the very issue being concluded by an order of this Court in respect of Section 115JB of the Act, the same was not pointed out at the hearing. Instead the counsel for the revenue insisted on seeking to make distinction between Sections 115JB and 115J of the Act without pointing out the decision of this Court in ***Adbhut Trading*** (supra) and taking up the Court's time. We expect the counsel

appearing before us to be candid and when matters are covered by orders of this Court or the Apex Court and to state so. This would ensure quicker disposal of matters.

6 In view of the above, as the issue stands settled by the decision of the Apex Court in *Apollo Tyres Ltd.* (supra), and of this Court in *Adbhut Trading* (supra), the question as proposed does not give rise to any substantial question of law. Accordingly, appeal dismissed. No order as to costs.

(N. M. JAMDAR, J.)

(M.S. SANKLECHA, J.)