IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

BEFORE SHRI JOGINDER SINGH (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)

I.T.A. No.1272 & 1273/Mum/2013
(Assessment Years: 2006-07 & 2007-08)

Torm Shipping India Pvt Ltd (formerly known as Orinoco Marine Consultancy India Pvt Ltd) II Floor, Leela Business Park Andheri Kurla Road,Andheri (E), Mumbai 400 059	vs	ITO, 93)(4), Mumbai
PAN : AACO1884D		
(Assessee)		(Respondent)

Assessee by	Shri Girish Dave
Respondent by	Shri Mallikarjun Utture

Date of hearing : 10-10-2016
Date of pronouncement : 14 -10-2016

O R D E R

Per ASHWANI TANEJA, AM:

There are two appeals filed by the assessee for assessment years 2006-07 and 2007-08. First we shall take up the appeal for A.Y. 2006-07 in ITA No.1272/Mum/2013.

First we shall take up appeal for AY 2006-07 in ITA 1272/Mum/2013:

2. This appeal has been filed by the assessee against the order of Commissioner of Income-tax (Appeals)-7, Mumbai [hereinafter called

CIT(A)] dated 26-09-2012 passed against the assessment order u/s 143(3) r.w.s. 147 dated 30-12-2009 on the following grounds:

The assessee objects to the order dated 26 September 2012 passed by the Commissioner of Income-tax (Appeals) - 7, Mumbai ("CIT(A)") for the assessment year 2006-07 on the following among other grounds:
1. The CIT(A) erred in holding that the Dy. Commissioner of Income Tax- 3(3) ("DCIT") was justified in reopening the assessment under section 147 of the Act.
2. The CIT(A) erred in confirming the addition of Rs.1,16,50,971 as deemed income under sections 69B/69C of the Act.
3. The CIT(A) erred in confirming the disallowance of Rs. 9,00,000 being professional fees paid to consultants.
4. The CIT(A) erred in confirming the disallowance of Rs. 7,65,120 towards rent paid to OMCI Marine Services Private Limited by invoking provisions of section 40A(2)(b) of the Act.
5. The above grounds are without prejudice to each other."

3. During the course of hearing, it was stated at the very outset by the Ld. Counsel appearing on behalf of the assessee that in this case, the impugned order passed u/s 147 of the Act is illegal in the eyes of law. Our attention was drawn to the additional grounds filed by the assessee vide its petition dated 21-06-2016, which are as under:

"1. On the facts and circumstances of the case, the learned Assessing Officer erred in not following the procedure for reassessment as laid down by the Supreme Court in its decision in GKN Driveshafts (India) Pvt Ltd vs. ITO (259 ITR 19).
2. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in affirming the reassessment proceedings when no addition is made by the Assessing Officer for the issue on which reassessment proceedings were initiated. The reassessment order dated 30 .12.2009 is contrary to Jurisdictional Bombay High Court decision in the case of CIT vs. Jet Airways (331 ITR 236). Therefore, the reassessment proceeding on other income deserves to be quashed as bad in law.
3. On the facts and circumstances of the case, the assessment proceedings were initiated with the issue of notice under Section 143(2) and 142(1) of the Act on 24.07.2008 without disposing the

objection filed by the Assessee for reopening of assessment. Therefore, the reassessment order dated 30.12.2009 passed deserves to be set aside."

4. During the course of hearing it was argued that additional grounds are purely legal grounds and go to the root of the matter and do not require any investigation of fresh facts and, therefore, they should be admitted in the interest of justice and fairness.

5. Per contra, the Ld. DR did not raise any objection with regard to the additional grounds raised and, therefore, the additional grounds are admitted for adjudication.

6. It was stated at the very outset by the Ld. Senior Counsel appearing on behalf of the assessee that in this case, there has been a gross failure on the part of the Assessing Officer in not following the mandate of the law while framing assessment order u/s 147. It was submitted that though the Reasons were furnished by the Assessing Officer in response to the request of the assessee and the objections were raised by the assessee with regard to reopening of the case but the objections raised by the assessee were not disposed of by the Assessing Officer before framing the assessment order. It was explained to the Assessing Officer that the income alleged to have been escaped in the Reasons had already been included by the assessee in its return of income filed originally. It was also requested to the Assessing Officer to drop the reassessment proceedings as there was no escapement of income. The Assessing Officer was satisfied with the reply of the assessee and, therefore, he did not make any addition in the re-assessment order in respect of the income alleged to have been escaped in the Reasons recorded. But the Assessing Officer did not accept the request of the assessee for dropping the proceedings

and framed the assessment order making additions on other issues which were not raised in the reasons recorded. It was submitted that the assessment order framed by the Assessing Officer is not permissible under the law in view of the judgment of the Hon'ble Bombay High Court in the case of CIT(A) vs Jet Airways Ltd 331 ITR 236 (Bom). Reliance was also placed on another judgment of the Hon'ble Bombay High Court in the case of V.M. Salgaonkar Sales International vs ACIT 59 Taxman.com for the proposition that the Assessing Officer could not have completed the reassessment proceedings without disposing of the objections raised by the assessee. Reliance was also placed in this regard on the judgment of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd 259 ITR 19 (SC).

7. Per contra, the Ld. DR submitted that on perusal of the assessment order, admittedly, in this case the objections were not disposed of by the Assessing Officer and admittedly no addition has been made in the reassessment order framed by the Assessing Officer with regard to the income which was alleged to have been escaped in the Reasons recorded by the Assessing Officer. But in view of judgment of Hon'ble Karnataka High Court in the case of N Govindraju vs ITO ITA No. 504/2013, the assessment order passed by the Assessing Officer was not bad in law.

8. We have gone through the submissions made by both the sides, details and evidences brought before us as well as judgments placed before us by both sides. The brief background and facts of the case as noted from the orders of lower authorities are that earlier a survey action u/s 133A was carried out by the department on the premises of the assessee company on 23-08-2005. In the said survey proceedings, the survey officers noticed that the company had rendered certain services

to M/s. Belmont Ship Management B.V. during the F.Y.2005-06 which was not recorded in the books of accounts till the date of survey. Consequent to that, the Managing director of the company offered the aforesaid sum as income to be taxed in the survey proceedings. Subsequent to that, when the assessee's returned income was filed on 18/11/2006 declaring total income of Rs.1,57,70,538/- , but from the perusal of the computation of income of the assessee, the AO could not find mention of the disclosure which was made by the Managing Director of the assessee company during the survey proceedings conducted in office premises of the assessee company on 23/08/2005. Therefore taking note of the aforesaid non-disclosure of additional income which was offered to tax by the assessee company during the survey proceedings, the AO issued notice dated 2/6/2008 u/s 148 of the Act asking the assessee to file the return of income for reassessment for the escapement of income which was not disclosed.

9. In response, the assessee filed its return of income and requested for supplying copy of reasons. Accordingly, the Assessing Officer supplied copy of reasons recorded to the assessee which reads as under:

> *"A survey under section 133A of the Act was carried out on 23.08.2005 at the office premises of the assessee at Leela Business Park, Andheri (E), Mumbai 400059.*
> *During the course of survey a statement of Capt. Shridhar Bharalhan, Managing Director was recorded. In answer to question no.25 of his statement, the MD has admitted undisclosed income at Rs.50,00,000/-.*
> *The assessee has filed return of income on 18.11.2006, a paper copy of which was furnished on 21.11.2006. In the return of income the assessee has not shown any income from other sources. The additional income disclosed during survey should have been disclosed in the return as income from other sources. The return fled does not indicate that the additional income of Rs.*

50,00,000/- admitted during the course of survey, has been included in the total income.

I have, therefore, reason to believe that the income of Rs.50,00,000/- has escaped assessment."

10. In response, the assessee filed detailed reply clarifying that the income alleged to have been escaped in the Reasons has already been included by the assessee while filing its original return and, therefore, there was no escapement of income, therefore, the proceedings should be dropped. Relevant part of assessee's reply dated 23-08-2008 reads as follows:

"The income referred to during the survey u/s 133A is contained in the head Management Fees' and the amount of USD 100.0001- due from M/s Belmont Ship Management B V. has been included in the income of the company and contained in the profit of the company. The same has been considered for computation of the total income in the return of income filed with the department."

11. Again, vide letter dated 09-10-2009 it was submitted by the assessee that the amount of so called Rs.50 lacs was in fact an amount of USD 1,00,000 which has already been included in the income of the impugned assessment order and offered to tax by the assessee and, therefore, the same cannot be added again. It was requested by the assessee to drop the re-assessment proceedings. But the Assessing Officer went on with the reassessment proceedings and completed the same and framed impugned reassessment order. It is noted that the income alleged to have been escaped in the Reasons recorded by the Assessing Officer was not added by the Assessing Officer in the reassessment order. Subsequently, during the course of appellate proceedings before the Ld. CIT(A), a remand report was called for. In the remand report, it was admitted by the Assessing Officer that the impugned income has been included by the assessee in the return of income filed on 21-11-2006 for

A.Y. 2006-07, but the re-assessment proceedings were initiated because the Assessing Officer was not able to make out from the perusal of return filed by the assessee whether impugned income has been included in the return or not.

12. We have gone through the assessment order, remand report of the Assessing Officer and the order of Ld. CIT(A). It is an admitted fact that the impugned income has already been included by the assessee in the return filed originally. The only difficulty with the Assessing Officer was that from perusal of the return he was not able to make out whether the impugned income has been included in the return or not. Even if we appreciate the difficulty faced by the Assessing Officer, then also, the same was clarified by the assessee by way of his reply submitted during the course of re-assessment proceedings. The facts and evidences were brought on record showing that the impugned income has been included in the return filed by the assessee. Thereafter, no doubt was left and, therefore, no further query was asked by the Assessing Officer in this regard. It was so confirmed by the AO when he made no addition in this regard in the assessment order. This factual situation has been accepted by the Assessing Officer in his remand report also. Under these circumstances, the Assessing Officer was obliged under the law to drop the re-assessment proceedings as per the mandate given under the law as also explained by the jurisdictional High Court in the case of **CIT vs Jet Airways Ltd (supra)** observing as under:-

> *"14. The second line of precedent is reflected in a judgment of the Rajasthan High Court in (CIT v. Shri Ram Singh 306 ITR 343. The Rajasthan High Court construed the words used by Parliament in section 147 particularly the words that the Assessing Officer 'may assess or reassess such income and*

also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings' under section 147. The Rajasthan High Court held as follows:

". . . if is only when, in proceedings under section 147 the Assessing Officer, assesses or reassesses any income chargeable to tax, which has escaped assessment for any assessment year, with respect to which he had "reason to believe" to be so, then, only in addition, he can also put to tax, the other income, chargeable to tax, which has escaped assessment, and which has come to his notice subsequently, in the course of proceedings under section 147.

To clarify it further, or to put it in other words, in our opinion, if in the course of proceedings under section 147, the Assessing Officer were to come to the conclusion, that any income chargeable to tax, which, according to his "reason to believe", had escaped assessment for any assessment year, did not escape assessment, then, the mere fact that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction, to subject to tax, any other income, chargeable to tax, which the Assessing Officer may find to have escaped assessment, and which may come to his notice subsequently, in the course of proceedings under section 147."

15. Parliament, when it enacted the Explanation (3) to section 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Explanation 3 to section 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain courts that the Assessing Officer has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by "Parliament in the form of Explanation 3 consequently provides that the Assessing Officer may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice under

section 148 (2). The decisions of the Kerala High Court in Travancore Cements Lid. 's case (supra) and of the Punjab & Haryana High Court in Vipan Khanna's case (supra) would, therefore, no longer hold the field. However, insofar as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in Shri Ram Singh's case (supra), Explanation 3 as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgment of the Punjab & Haryana High Court in CIT v. Atlas Cycle Industries [19891 180 IJR 319[1]. The decision in Atlas Cycle Industries' case (supra) held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under section 148 were incorrect or non-existent. The decisions of the Punjab & Haryana High Court in Atlas Cycle Industries' case (supra) and of the Rajasthan High Court in Shri Ram Singh's case (supra) would not be affected by the amendment brought in by the insertion of Explanation 3 to section 147. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148 setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance Act (No. 2) of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of

the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

16. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in section 147(1) and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147(1) as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion of Explanation 3 to section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in Shri Ram Singh case (supra). Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of section 147(1) as they stood after the amendment of 1-4-1989 continue to hold the field.

In that view of the matter and for the reasons that we have indicated, we do not regard the decision of the Tribunal in the present case as being in error. The question of law shall, accordingly, stand answered against the revenue and in favour of the assessee. The appeal is, accordingly, dismissed. There shall be no order as to costs."

13. It is well accepted legal position that the judgment of jurisdictional High Court is binding upon all the authorities working under the jurisdiction of the High Court. It is further noted by us that identical view

has been taken by Hon'ble Delhi Court in the case of **Ranbaxy Laboratories Ltd vs CIT 12 taxmann.com 74 (Delhi),** wherein it was held that where reasons for initiation of reassessment proceedings ceased to survive then the AO had no jurisdiction to reassess issues other than the issues in respect of which proceedings were initiated. This judgment was followed by Hon'ble Delhi High Court in its recent judgment in the case of **Oriental Bank of Commerce vs Addnl. CIT 49 taxmann.com 485 (Delhi)**.

13.1. Hon'ble Gujrat High Court in the case of **CIT vs Mohmed Juned Dadani 30 taxmann.com 1(Gujarat)** held that when on ground on which reopening of assessment was based, no addition was made by the AO in the order of reassessment, then he could not have made additions on some other grounds which did not form part of reasons recorded by him.

13.2. In the case of **DCIT v. Takshila Education Society 378 ITR 520 (Pat),** it was observed by the Hon'ble Patna High Court that if in the course of proceedings under section 147 of the Income tax Act, 1961, the Assessing Officer comes to the conclusion that any income chargeable to tax which, according to his "reason to believe" had escaped assessment for any assessment year, did not escape assessment, then the mere fact that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction to subject to tax any other income chargeable to tax which the Assessing Officer may find to have escaped assessment and which may come to his notice subsequently in the course of proceedings under section 147. Hon'ble Patna High Court discussed in detail and followed the ratio laid down by the Hon'ble Rajasthan High Court in the case of **CIT v. Shri Ram Singh 306 ITR 340** wherein it was held by the Hon'ble Rajasthan High Court that once Assessing officer comes to conclusion that income with

respect to which he had entertained "reason to believe" to have escaped assessment, was found to have been explained, his jurisdiction come to a stop at that, and he does not continue to possess jurisdiction to put to tax any other income which subsequently comes to his notice in course of proceedings, which was found by him to have escaped assessment.

13.3. Hon'ble Chattisgarh High Court in the case of **ACIT v. Major Deepak Mehta 344 ITR 641** held that if AO finally found that there was no escapement of income in respect of the head which form "reason to believe" in notice issued u/s 148, then impugned reassessment order was to be set aside.

13.4. Under these circumstances, we find that the re-assessment order passed by the Assessing Officer is not valid in the eyes of law. The Assessing Officer was bound to drop the re-assessment proceedings. The Assessing Officer was of course at liberty to record fresh reasons and initiate re-assessment proceedings in case any another escaped income was found by him, as permitted under the law. But once the Assessing Officer was of the view that the escaped income as alleged in the reasons recorded by him was not the income actually escaped, but already included in its taxable income and offered to tax by the assessee, it was not legally permissible for him to continue with the reassessment proceedings.

14. It is further noted by us from the perusal of the Reasons recorded that Reasons have been recorded on the basis of mere doubts. There were no bases with the AO to allege that too with the support of any cogent material that impugned income was not included by the assessee in its income offered to tax. Reopening of an assessment is not permitted merely on the basis of some notions or presumptions. Nor it is allowed

merely for making verification of some basic facts. There must be existence of some tangible material indicating escapement of income. Then only, an AO is permitted to resort to provisions of reopening contained in sections 147 to 151 of the Act. Because, once an assessment is reopened on valid basis, entire pandara's box is open before the AO. Therefore the AO may then bring to tax not only income escaped from tax which was mentioned in the Reasons recorded, but also any other escaped income that may come to his notice during the course of reassessment proceedings. Reopening of an assessment attacks and pierces the concept of finality of litigation. Therefore, an invalid reopening done in the casual manner and without following parameters of law may cause undue hardship to the taxpayers. Thus, in view of the aforesaid legal discussion and facts of the case before us, we find that AO's action of continuing with the reassessment proceedings and framing of the impugned reassessment order is contrary to law and facts and, therefore, the same is hereby quashed.

15. Since we have quashed the re-assessment order on the jurisdictional aspect, we do not find it necessary to go into the merits of the case.

Now we shall take up appeal for AY 2007-08 in ITA No. 1273/Mum/2013:

16. This appeal has been filed by the assessee against the order of Commissioner of Income-tax (Appeals)-7, Mumbai [hereinafter called CIT(A)] dated 06-09-2012 passed against the assessment order u/s 143(3) dated 06-12-2009 on the following grounds:

> *"The appellant objects to the order dated 6 September 2012 passed by the Commissioner of Income-tax (Appeals) - 7, Mumbai ("CIT(A)")*

for the assessment year 2007-08 on the following among other grounds:

1. The CIT(A) erred in confirming the disallowance of Rs. 7,83,672 being professional fees paid to consultants.

2.The leaned CIT(A) erred in confirming the action of the Dy. Commissioner of Income Tax - 3(3) ("DCIT") in making an addition of Rs. 38,33,170 towards provision for leave encashment while computing income under section I15JB of the Income-tax Act.

3.The above grounds are without prejudice to each other."

17. Ground 1: In this ground, the assessee has challenged the action of Ld. CIT(A) in confirming the aggregate disallowance of Rsa.7,83,672 made by the Assessing Officer on the ground that these expenses represent the amount of professional fees paid by the assessee for issuing fresh shares and, therefore, these are capital in nature.

18. The brief facts are that during the year, the assessee paid a sum of Rs.7,50,000 to M/s DM Harish & Co and a sum of Rs.33,672 to M/s Lodha & Co on account of professional fees for consultancy in various matters. The Assessing Officer disallowed the same on the ground that this consultancy was given for valuation of shares carried out for issuance of shares of the company and, therefore, these are not allowable as revenue expenses. Being aggrieved, the assessee filed appeal before the Ld. CIT(A) and submitted that these expenses are revenue in nature in as much as the expenditure has been incurred for valuation of shares. It was alternatively argued that in any case, the entire amount of professional fees is not connected with valuation of shares. But, Ld. CIT(A) was not satisfied with the submissions of the assessee and, therefore, he confirmed the disallowance.

19. During the course of hearing before us, the Ld. Senior Counsel of the assessee fairly submitted that even if some part of its expenses may

not be allowable as revenue expenses, but the entire professional consultancy was not rendered in connection with valuation / issuance of shares of the company only, and, therefore, the disallowance made is factually incorrect.

19.1. Per contra, the Ld. DR relied upon the orders of the lower authorities.

20. We have gone through the orders of lower authorities. It is noted by us that the Ld. CIT(A) has not carefully analysed the alternate submission of the Ld. Senior Counsel wherein it was submitted that the entire amount of fee paid did not belong to consultancy rendered for valuation / issuance of shares. It was reiterated before us that the assessee company regularly seeks information on various matters and expenses incurred for other routine matters would fall in the revenue field and, therefore, wrongly disallowed. We find force in the argument of the Ld. Senior Counsel and, therefore, we send this issue back to the file of the Assessing Officer for verifying these facts. The assessee shall submit requisite details to show for what purposes consultancy fees was paid by the assessee. The consultancy fee paid by the assessee in connection with day to day legal matters and other matters which are not connected with issuance of shares should be allowed as revenue expenses. Thus, this issue is sent back to the file of the Assessing Officer. This ground may be treated as allowed, for statistical purpose.

21. **Ground 2**: In this ground, the assessee has contested the action of the Ld. CIT(A) in confirming the action of the Assessing Officer in making an addition of Rs.38,33,170 on account of provision for leave encashment while computing book profit u/s 115JB of the Act.

22. During the course of assessment proceedings, the Assessing Officer

added provision on account of leave encashment u/s 115JB on the ground that the provision represents unascertained liabilities. Being aggrieved, the assessee filed appeal before the Ld. CIT(A) and submitted that the provision of leave encashment has been made on the basis of actuarial valuation report and keeping in views the requirements of Accounting Standard-15. The assessee filed detailed submission before the Ld. CIT(A) attacking the addition made by the Assessing Officer. Relevant part of the same is reproduced hereunder for the sake of ready reference:-

> "*5.1 The relevant portion of section 115JB of the Act is reproduced herewith for your good self's ready reference:*
>
> *"115JB*
> *Explanation [1].—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by—*
> *(a) the amount of income-tax paid or payable, and the provision thereof, or*
> *(b) the amounts carried to any reserves, by whatever name called other than a reserve specified under section 33.4C; or*
> *(c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or*
> *(d) the amount by way of provision for losses of subsidiary companies; or*
> *(e) the amount or amounts of dividends paid or proposed; or*
> *(f) the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause (38) thereof) or section 11 or section 12 apply; or*
> *(g) the amount of depreciation,*
>
> *h) the amount of deferred Ins and the provision therefore,*
>
> *(i) the amount or amounts set aside as provision for diminution in the value of any asset,*
> *if any amount referred to in clauses (a) to (i) is debited to the profit and loss account, and as reduced by.....*

5.2 It *may be noted that the leave encashment could only fall under clause (c) of the Explanation I to section 115./B of the Act. Clause (c) categorically states that ascertained liabilities should not be considered while increasing the book profits of the company.*

5.3 *The DCIT has also rightly accepted that if the liability is ascertained, it can be claimed under 115JB of the Act.*

5.4 The company would like to invite your attention to the Note No. 10 of the Schedule 14 forming part of the Audited Balance Sheet and Profit and Loss Account of the company for the year ending 31 March 2007 (Refer page 19 & 20 of the compilation). In Note No. 10, it is dearly stated that the provision of the Leave encashment as per AS 15 has been done by actuarial valuation.

5.5 However, the learned DCIT failed to appreciate that the valuation done by the company is by actuarial valuation and as the said pro vision is for an ascertained liability, the provision for leave encashment ought not to added to the book profits of the appellant company under section 115/B of the Act.

5.6 Reliance in this connection is placed in the ruling of Mumbai Tribunal in the case of ACJT v/s Piramal Holdings Ltd (ITA No. 3224/M/200) (Refer page 170-175 of the compilation) wherein the Tribunal has held as under:

"...We have perused the records and considered the matter carefully. The dispute is regarding addition of Rs. 4,40,526/- being the provision for leave encashment while computing the book profit under section 115/B. It is a settled legal position that while computing the book profit only the specified adjustments as mentioned in Explanation 1 to section 115JB(2) can be made. Clause (c) of use Explanation 1 provides for adjustment of amount set aside as provision for meeting liability other than ascertained liabilities. The provision for leave encashment calculated as per the scheme is an ascertained liability actually incurred by the assessee in view of the judgment of Hon'ble Supreme Court in case of Bharat Earthmovers (supra). Therefore in our view no adjustments could be made on this account

while computing the book profit. The order of CIT(A) deleting the addition is accordingly upheld"

Treatment under normal provisions of the Act and under section 115JB are not comparable

5.7 *At para 7.5 of the assessment order the DCIT also observed as under:*

"The two different stands of the assessee on the same issue is contradictory. While computing – the profit ***u/s*** *115JB, the provisions of the Ad cannot change. A provision cannot become ascertained liability if the taxes are paid according to provisions of section 115JB….."*

5.8 The relevant portion of section 43B of the Act is reproduced here under for your Honour's ready reference:

43B.

Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

(a)

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee,

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in Section 28 of that previous year in which such sum is actually paid by him"

5.10 Under provisions of the Act, Section 43B provides for allowabiity of certain expenditure only on payment basis. As per clause (7) of Section 43B of the Act, any sum payable as an employer in lieu of any leave at his credit to employee is allowed only in the year in which such sum is actually paid.

5.9 The relevant portion of section 115JB of the Act has been reproduced above in para 5.2.

5.10. Under section I15JB, Explanation (1) to the section provides that the book profits should be increased by the amount set aside to provisions made for meeting liabilities other than ascertained liabilities.

5.11 Thus, the appellant submits that it is clear from the above that the treatment as required by the legislature under normal provisions is for allowability of leave encashment on payment

basis whereas under section 115JB the book profits should be increased by the leave encashment if the liability is not an ascertained liability.

5.12 Accordingly, the appellant submits that treatment of leave encashment as required by the legislature under normal provisions and under section 115JB are different and not comparable with each other and the observation made by the learned DCIT is incorrect.

5.13 Further, the appellant submits that while computing the income under section 115JB of the Act, the learned DCIT cannot make any additions or deletions to the book profit other than those specifically mentioned in the Explanation to section 115JB of the Act.

5.14 Reliance in this connection is placed on the decision of the Supreme Court in the case of Apollo Tyres Ltd. (255 ITR 273) (Refer 176- 186 of the compilation) wherein the Apex Court has held :

We notice that the use of the words "in accordance with the provisions of Parts II and III of Schedule VI to 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.

Therefore, we are of the opinion, the Assessing Officer while computing the income under section 1 15J 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....."

5.15. In view of the above, the Company submits Book Profits under section 115JB ought not to be increased by the leave encashment provision."

23. Per contra, the Ld. DR relied upon the orders of the lower authorities. It is noted that it is an admitted fact that provision for leave encashment has been made on the basis of actuarial valuation report.

Relevant notes in this regard have also been given by the assessee in its annual financial statements. These facts have not been disputed by the lower authorities. Under these circumstances, it cannot be said that provision for leave encashment is an unascertained liability. We find force in the submissions of the assessee made before the Ld. CIT(A) wherein relying upon the judgement of Hon'ble Supreme Court in the case of Bharat Earth Movers (supra) as well as the decision of the Tribunal in the case of ACIT vs Piramal Holdings Ltd in ITA No.3224/Mum/2007, it was argued that while computing the book profits, the provision for leave encashment (if calculated on scientific basis as per the actuarial valuation) is not required to be added back as it cannot be said to be an unascertained liability. Further, it is not the case of the lower authorities that Profit & Loss Account of the assessee company has not been prepared in accordance with provisions of Parts II & III of Schedule VI of the Companies Act, 1956. Under these circumstances, the Assessing Officer is not permitted to make any adjustment in view of well settled position of law as has been clarified by Hon'ble Supreme Court in the case of Apollo Tyres Ltd 255 ITR 273 (SC). It is noted that reliance by the lower authorities upon the provisions of section 43B is misplaced here. Thus, the lower authorities have misunderstood and misapplied the provisions of law on the facts of the case before us. In our view, provision for leave encashment debited by the assessee in its P&L Account cannot be added while computing book profits u/s 115JB in the given facts of the case and, therefore, the same is directed to be deleted. The Assessing Officer is directed to re-compute the income u/s 115JB after excluding the aforesaid amount**.** This ground is allowed.

24. In the result, appeal for A.Y. 2006-07 is allowed and appeal for A.Y. 2007-08 is partly allowed.

Order pronounced was pronounced in the open court at the conclusion of the hearing.

Sd/-	Sd/-
(JOGINDER SINGH)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt: 14th October, 2016
Pk/-
Copy to :

1. The assessee
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, E-Bench

(True copy) By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES