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

Before Shri B R Baskaran, AM & Shri Amit Shukla, JM

ITA No.1284/Mum/2013
Assessment Year : 2009-10

Dharmayug Investments Ltd. The Times of India Bldg., Dr D N Road, Fort Mumbai 400 001 PAN AAACD1346D	Vs.	ACIT Range 1(1) Mumbai
(Appellant)		Respondent)

Appellant By : Shri A R S Venkatraman
Respondent By : Shri Santosh Kumar

Date of Hearing :19.03.2015		Date of Pronouncement : 10.06.2015

O R D E R

Per Amit Shukla, Judicial Member

The aforesaid appeal has been filed by the assessee against order dated 09.11.2011 passed by the CIT(A) - 1, Mumbai, for the quantum of the assessment passed u/s. 143(3) for the A.Y. 2009-10. The assessee has raised the following grounds of appeal to challenge the impugned order:

"1. The Learned CIT(A) erred in holding that in computing the book profit under section 115JB of the Income Tax Act, 1961 (the Act), the profit on sale of equity shares of Rs.1,90,39,06,630 ought to be taken and not the income by way of long term capital gain on sale of equity shares amounting to Rs.1,72,55,70,760/- as prescribed by the proviso to Section 10(38) of the Act.

2. The assessee submits that the proviso to section 10(38) of the Act is a charging section and consequently the long term capital gain on sale of equity shares of Rs.1,72,55,70,760/- is chargeable as book profit under section 115JB of the Act and not the profit on sale of equity shares of Rs.1,90,39,06,630 as held by the learned CIT(A)

> *3. The Learned CIT(A) erred in not allowing the securities transaction tax of Rs.25,65,015/- as a deduction in computing the book profit under Section 115JB of the Act."*

2. The brief facts of the case are that the assessee company is engaged in the business of investments, leasing and broking business. The return of income was filed on 29.09.2009 declaring total income of Rs.24,10,290/- under the normal provisions of the Act. Since the tax liability as per the provisions of section 115JB was higher, therefore, taxes were paid as per book profit computed u/s. 115JB. As per the computation of book profit, the income was declared at Rs.21,63,16,156/-. While computing the tax liability u/s. 115JB, the assessee had shown capital gains on sale of shares of HDFC Bank in the month of March 2009, which was claimed as exempt from tax u/s. 10(38) under the normal provisions of the Act. In the computation of income and notes forming part of computation of income, the assessee had shown Long term capital gain claimed as exempt u/s. 10(38) at Rs.1,72,55,70,760/- which was computed in the following manner:

Statement of computation of Capital Gains:

Computation of Long term capital gain on sale of shares of HDFC bank (STT paid)

	Amount (Rs.)
Sale Proceeds	2,046,906,600
Less : Indexed Cost of Acquisition: (COA i.e.142,999,970 * CII of year of sale i.e. 582)/CII of year of purchase i.e. 259)	321,335,840
Long term capital gain exempt u/s. 10(38)	1,725,570,760

In the said notes, the assessee stated that the Long term capital gain to be included in the book profit should be Rs.1,72,55,70,760/- on the following reason:

> *"It is our submission that the book profit u/s. 115JB of the Act is to be computed by reducing the surplus on sale of investments of Rs.1,90,78,63,394/- and adding the long term capital gain of*

> *Rs.172,55,80,760/- on sale of investments as computed in terms of section 45 to section 55 of the Act. This is line with the Proviso to section 10(38) of the Act which requires that "Income by way of Long Term Capital Gain" shall be taken into account in computing the book profit and the income tax payable u/s. 115JB of the Act."*

The AO held that the Long term capital gain after indexation and the deduction of STT paid cannot be accepted for the purpose of computing book profit u/s. 115JB but the entire sale consideration. Accordingly, he included the entire sum of Rs.2,04,94,71,614/- while computing the tax u/s. 115JB and for the purpose of income tax, he computed Long term capital gain was taken at Rs.1,72,81,35,774/-.

3. Before the CIT(A), the assessee submitted that the AO should have considered capital gain of Rs. 1,72,81,35,774/- for computing the book profit u/s. 115JB instead of Rs.1,90,39,06,630/-. It was submitted that as per the proviso to section 10(38), the income by way of Long term capital gain should be taken into account in computing the book profit and income tax payable u/s. 115JB and said Long term capital gain is admittedly at Rs. 1,72,55,70,760/-. However, the learned CIT(A) did not accept the assessee's contention that the amount of capital gain of Rs. 1,72,81,35,774/- should be calculated after giving effect of the indexation provision as required u/s. 48. He held that under section 115JB, book profit is to be calculated as per the Profit & loss account prepared by the assessee. Since the assessee has credited Rs. 1,90,39,06,630/- in the Profit & loss account as capital gain on sale of shares, therefore, this amount alone has to be taken as Long term capital gain for the purpose of computing the book profit. In support of his contention, he relied upon the ratio laid down by Hon'ble Apex Court in the case of Apollo Tyres Ltd. [255 ITR 273].

4. Before us, the learned counsel, Shri A R S Venkatraman, submitted that the company had sold shares of HDFC Bank Ltd. and had thereby earned surplus of Rs.1,90,78,63,394/-, which was credited to the Profit & loss account. Since it was a Long term capital gain asset therefore, in view of the provisions of sections 45 to 55, the said Long term capital gain has to be computed accordingly. Admittedly, the Long term capital gain that works out to Rs.1,72,55,70,760/- was claimed as exempt u/s. 10(38). He drew out attention to the definition of income, which includes capital gain which is chargeable u/s. 45. U/s. 45 only profits or gains arising from the transfer of capital asset alone can be taxed. Such a computation of profits and gains arising out of transfer of a capital asset has been given in section 48, which includes indexed cost of acquisition. He further drew our attention to the legislative history of section 10(38) and corresponding amendment in section115JB. He submitted that proviso to section 10(38) makes it abundantly clear that the income by way of Long term capital gain is to be taken into account while computing the book profit and income tax payable u/s. 115JB. This proviso was inserted by the Finance Act 2006 w.e.f. 01.04.2007. Simultaneously, amendment was brought in section 115JB also in clause (ii) to Explanation (1) in section 115JB. Thus, what is contemplated under the relevant provision is the income by way of Long term capital gain and such Long term capital gain means gains computed u/s. 48 to section 55. The proviso to section 10 should be read as substantive part of the section because it qualifies generality of the main enactment and it has to be read and construed harmoniously with the main enactment. In support of this contention, he strongly relied upon the decision of Hon'ble Supreme Court in the case of CIT vs. Indo Mercantile Bank Ltd. [36 ITR 1] and CCT vs. Ramkishan Shrikishan Jhaver & Ors [66 ITR 664]. Thus, he submitted that Long term capital

gain, which is to be included in computation of book profit should be after indexation as computed u/s. 48 to 55.

5. As an alternative, he submitted that in ground no.3, the assessee has challenged that STT of Rs. 25,65,015/- should be allowed as deduction while computing book profit u/s. 115JB. The assessee while crediting the net gain from sale of shares has deducted the said amount i.e. Rs.1,90,39,06,630/-, which was credited to the Profit & loss account was net of STT.

6. On the other hand, the learned DR, strongly relied upon the order of the CIT(A) and submitted that u/s. 115JB, it is mandatory for the assessee to prepare its Profit & loss account as per the Companies Act and the assessee has credited the net gain on sale of shares at Rs.1,90,39,06,630/- in the Profit & loss account, which alone should be taken as income for the purpose of section 115JB.

7. We have heard the rival submissions and have also perused the relevant material placed on record. During the year ending on 31.03.2009, the assessee company had sold shares and thereby earned a surplus of Rs. 1,90,78,63,394/-, which was net of STT paid. This amount was credited to the Profit & loss account which is evident from the Schedule of income as given at page 2 of the paper-book and credited to the balance sheet as on 31.03.2009. In the computation of book profit u/s. 115JB, the assessee had made a note stating that the Long term capital gain should be taken at Rs. 1,72,55,70,760/-, which is after indexation. The main issue before us is that while computing the book profit u/s. 115JB the income on account of Long term capital gain should include, Rs. 1,90,39,06,630/- i.e. net amount credited or the sum of Rs. 1,72,55,70,760/- computed after indexation. Section 1115JB is non-obstante section and a complete code by itself, which provides that in case of a company, the income tax payable on the total income is

computed under the Income tax Act in respect of any previous year is less than 7.5% (which percentage has been increased from time to time) of its book profit, then such book profit shall be deemed to be the total income of the assessee and tax payable for the relevant previous year shall be such percentage of book profit. It further lays down that every assessee for the purpose of this section "shall" prepare its Profit & loss account for the relevant previous year in accordance with the provisions of part II & III of Schedule 6 of the Companies Act, 1956. Thus, for computing the profit and the taxability u/s. 115JB, it is mandatory for the assessee to compute profit as per Profit & loss account prepared under the relevant provisions of the Companies Act. The relevant Schedule under the Companies Act for the preparation of statement of Profit & loss account provides that in case of sale of investments, net gain/loss should be disclosed. The net gain/loss means sale minus purchase and other cost. The Companies Act does not speak about Long term/ Short term capital gain. In accordance with the requirements of the Companies Act, the assessee has credited the net profit on sale of investment i.e. net gain on shares of HDFC Bank at Rs. 1,90,78,63,394/-,. Accordingly, this amount has been credited in the Profit & loss account. 'Explanation' to subsection (2) of section 115JB provides that, book profit means the net profit as shown in the Profit & loss account (which has been prepared in accordance with the provisions of parts II & III of Schedule 6 to the Companies Act, 1956) and as increased or reduced by certain adjustments as specified in the said explanation. By the Finance Act 2006, w.e.f. 01.04.2007, Clause (f) has been amended to provide that book profit shall be increased by the amount or amounts of expenditure relatable to any income referred to in section 10. However, specific exclusion to the income referred to in sub section (38) of section 10 has been provided. Similar amendment has been brought in clause (ii) of the said Explanation to provide that book profits shall be reduced by the amount of income referred to in section 10. Here also specific exclusion to the income referred to in clause (38) has been made. A simultaneous amendment has also been brought in section 10(38) by the insertion of the 'proviso' whereby it has been provided that, income by way of Long term capital gain of a company shall be taken into account in computing the book profit and the income tax payable u/s. 115JB. Section 10(38) provides that any income arising from the transfer of a long term capital asset as specified therein shall not be included in the computation of the total income of the previous year. In other words, section 10(38) provides that income arising from transfer of a long term capital asset will not be included in the total income. The 'proviso' provides an exception to the said section, which envisages that for the purpose of computing the book profit the income by way of Long term capital gain shall be taken into account on which tax is payable u/s. 115JB. This is in consonance with the amendment brought in section 115JB. From the harmonious reading of the relevant provision as discussed above, it is evident that firstly, the book profit shall be reduced by the amount of income to which provision of section 10 applies. However, income under the provisions contained in section 10(38) will not be reduced. Thus, the income arising from transfer of long term capital asset is to be included in the book profit. The book profits as contemplated in section 115JB means the net profit, which has been shown/credited in the profit & loss account as prepared under the relevant provisions of the Companies Act. Under the Companies Act, only the net gain/loss from sale of shares is to be included. It does not speak of Long term capital gain or Short term capital gain. Thus, while computing the book profit, income u/s. 10(38) will not be reduced and this income here would mean income credited to the Profit

& loss account. Once, Explanation to section 115JB provides that the amount of income which is to be reduced or not, which inter alia means any such amount which is credited to the Profit & loss account then only such amount credited in the Profit & loss account shall alone be taken into consideration for computing the book profit. The concept of indexation while computing the Long term capital gain cannot be imported to the computation of book profit u/s. 115JB as per the expressed provisions of the said section itself which is a complete code in itself. Thus, in our opinion, the net amount on account of sale of shares of Rs. 1,90,39,06,630/- will alone be taken into account in computation of book profit and not the amount of Long term capital gain of Rs. 1,72,55,70,760/-after indexation. Thus, the assessee's ground on this score stands dismissed.

8. Coming to the 3rd ground, that the learned CIT(A) and the AO have erred in not allowing the STT of Rs.25,65,015/- as deduction in computing the book profit u/s. 115JB. Here we agree with the contention of the learned counsel, because the assessee in the Profit & loss account has credited the net gain after net off of STT of Rs.25,65,015/-. Thus, the STT amount will not be included in the computation of book profit and only the net gain of Rs.1,90,39,06,630/- shall alone be taken into account. Accordingly, ground no.3 of the assessee is allowed.

9. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on this day of 10th June 2015.

Sd/-	Sd/-
(B R Baskaran)	**(Amit Shukla)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated :10th June, 2015.

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<u>Copy of the Order forwarded to</u> :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'D' Bench, ITAT, Mumbai

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
Income Tax Appellate Tribunal, Mumbai