

Before the CIT(A), the Assessee claimed that the AO should have examined whether the books of accounts are certified by the statutory auditors under the Companies Act as having been properly maintained in accordance with the Companies Act. In the case of the Assessee there is no Profit & Loss account prepared and certified by the statutory auditors. The AO acted beyond his power and considered the amount as book profit which was certified by the authorities as reduction from the capital work in progress. The Assessee submitted the computation of income. CIT(A) appreciated the book profit computed by the Assessee at Rs. 29.28 lakhs and accordingly directed the AO to calculate the tax on this.

3. We have heard the rival submissions and carefully considered the same. We noted that the AO has given a finding in the assessment order that the Assessee had set up essential infrastructure and started cargo handling operations at the port during the impugned assessment year and accordingly he considered that the Assessee has commenced port operations and should have offered the revenue arising from the operation of the port to taxation. While arriving at this conclusion, the AO relied on the observations made in the Audit report as well as the application to the TAMP made by the Assessee. The relevant finding of the AO for arriving at the conclusion under para 5.7.5 are as under :

“5.7.5 Further the following observations are supportive of my contention that the assessee has commenced business:

a) The following observations made in the audit report:

- The company operated in a single business segment i.e. port service [refer to point no.3 in notes to account]*
- Construction of berths were complete and ready for operation in April 2004*
- Two mobile cranes were duly commissioned in may 2004*

- *The first vessel berthed on 19/6/2004 and was successfully discharged at an average rate of 15,222MT/day*
- *Completed handling of 31 panamax and 2 handy max vessels*
- *Handled 2.14 million tonnes of cargo during the year.*
- *Operated for 10 months during the financial year*
- *For the first year of operation, the cargo handled is highest in any Indian terminal.*

b) *In the application to TAMP (refer to TAMP order dated 4/5/2004) the assessee has claimed that the*

(iv) Commercial operations on these berths is proposed to commence around end May 2004 and from January 2005 onwards all cargo handling operations would be fully mechanized.

c) *In the said order of TAMP dated 4/5/2004 it is stated that the terminal operator proposes to commence commercial operations shortly, this authority has decided to accord adhoc approved to tariff which may be levied at the new facility.*

d) *The rates charged to the customers are at the rates prescribed by the TAMP order.*

e) *In the application for No Deduction of Tax (TDS) [ref. SWPL/FA/TDS/01 dated 13/7/2004] the assessee has claimed in Para 2(d) that*

“the first vessel MV Bestore was berthed on 19/6/2004 and from that date onwards, our business has started getting revenue”

f) *Further it is curious to know that 33 ships have berthed in a port which is under trial-run testing. No ship will ever take the risk of discharging at a port which is under trial.”*

4. The AO after giving opportunity to the Assessee took the view that the port has commenced business of providing services and has operated along commercial lines in the impugned assessment year and therefore, the receipt being revenue in nature are liable for taxation and accordingly computed the book profit at Rs. 5.10 crores. The Assessee went in appeal before the CIT(A) but did not challenge the finding of the AO that the business has commenced during the impugned assessment year even though the Assessee has challenged

the computation of the book profit u/s 115JB, disallowance of the deferred revenue expenditure, office renovation expenses, insurance premium, bank guarantee charges and maintenance dredging. Even before us no appeal has been filed by the Assessee. CIT(A), we noted, relied on the computation of income made by the Assessee in respect of book profit but reduced the book profit after adding therein interest and other income amounting to Rs.23.22 lakhs allowing deduction for various expenditure incurred by the Assessee to the tune of Rs.504.32 lakhs. We have gone through the provisions of Sec. 115JB. This section clearly states that *“where in the case of the Assessee being a company, income tax is payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after 1st day of April, 2001 is less than 7.5% of its book profit, the tax payable for the relevant previous year shall be deemed to be 7.5% of such book profit”*. The proviso to this section clearly states that while preparing the annual accounts including Profit & Loss account – account policies, accounting standards adopted for preparing such accounts including Profit & Loss account and the method and rates adopted for calculating the depreciation shall be the same as has been adopted for the purpose of preparing such accounts including Profit & Loss account and laid before the company at its annual general meeting in accordance with the provisions of Sec. 210 of the Companies Act, 1956. Explanation – I defines the book profit to mean net profit as shown in the Profit & Loss account for the relevant previous year prepared under sub-section (2) of Sec. 115JB. Sub-section (2) of Sec. 115JB as it existed during the impugned assessment year states as under :

“Every assessee being a company shall for the purpose of this section prepare its Profit & Loss account for the relevant previous year in accordance with the provisions of Part II and III and Schedule 6 to the Companies Act, 1956.”

In the case of the Assessee, we noted that the Assessee has not prepared the Profit & Loss account but has prepared only the balance sheet which consists of Schedule E in 2 parts (Part-A relates to the work in progress and Part-B relates to the particular operative expenditure net of trial run revenue) as the Assessee was of the opinion that the business has not commenced during the impugned assessment year. Now, the AO has given a finding that the business is set up during the impugned assessment year. Once the business is set up, the profit or loss derived during the year has to be computed and has to be brought to tax during the impugned year. The finding of the AO has not been challenged by the Assessee either before the CIT(A) or by filing appeal before us. Thus finding of the AO, in our opinion, has become final. Now, the question arises before us is when the Assessee has not prepared any Profit & Loss account whether the surplus arising on the basis of Part-B of Schedule-E due to the trial run as the business of the Assessee has been set up during the year can be taken to be the book profit as defined under explanation – 1 to Sec. 115JB. We have gone through the case laws as well as the relevant provisions, especially the decision of the Hon'ble Supreme Court in the case of Apollo Tyres vs. CIT, 255 ITR 274 in which the Hon'ble Supreme Court has held 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 provisions of Parts II and III of Scheduled 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.

Held accordingly, that, while determining the “book profits” under section 115J, the Assessing Officer could not recompute the profits in the profit and loss account by excluding provisions made for arrears of depreciation.”

In the case of the Assessee we noted that the Assessee has not prepared any Profit & Loss account on the presumption that the Assessee has not commenced the business during the year. Once it is held that the Assessee has set up the business during the year, the Profit & Loss account has to be prepared in accordance with Part – II & III of Schedule – VI of the Companies Act and has to be certified by the auditor. We may mention here that both the terms ‘commencement of business’ and ‘set-up of business’ are different. Under the Income Tax Act, once business is set-up, the income earned by the Assessee is chargeable to tax and it cannot be regarded that no business profit is earned. We, therefore, are of the view that the company must prepare its Profit & Loss account for the impugned assessment year in accordance with the provisions of Part II and III of Schedule – VI to the Companies Act and whatever profit is arrived at in the Profit & Loss account, the said profit will be their book profit subject to the adjustment to be made under explanation – 1 to Sec. 115 JB. We, therefore, set aside the order of CIT(A) and restore this issue to the file of the AO with the direction that the AO shall re-decide this issue keeping in view the provisions of Sec. 115JB(1) & (2) and explanation – 1 thereto as was existing during the impugned assessment year and asking the Assessee to furnish the Profit & Loss account as has been prepared in accordance with Part II & III of Schedule – VI to the Companies Act, 1956 as certified by the Assessee’s Chartered Accountant. The Assessee is also directed to comply with the

obligations as are entrusted on it under the provisions of Sec. 115JB of the Income Tax Act.

5. In the result, the appeal filed by the Revenue is allowed for statistical purpose.

6. Order pronounced in the open court on 07.02.2014.

Sd/-
(D.T.Garasia)
Judicial Member

Sd/-
(P.K. Bansal)
Accountant Member

Place : PANAJI / GOA

Dated : 07.02.2014

SSL

Copy to :

- (1) Appellant
- (2) Respondent
- (3) CIT concerned
- (4) CIT(A) concerned
- (5) D.R
- (6) Guard file

True copy,

By order

Sr. Private Secretary
ITAT, Panaji, Goa