IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 37 of 2007

The Commissioner of Income Tax,
Having Office at Aayakar Bhavan
Patto Plaza, Panaji, Goa .. Appellant.

Versus

M/s. Salgaonkar Mining Industries
Pvt. Ltd.,
Salgaonkar Chamber,
Margao, Goa. .. Respondent.

Ms. Asha Dessai, Advocate for the appellant.

Mr. A. D. Bhobe, Advocate for the respondent.

CORAM :- **F. M. REIS &**

M. S. SANKLECHA, JJ.

DATE : 23th April, 2015

ORAL JUDGMENT : (Per M. S. SANKLECHA, J.)

This appeal, under Section 260A of the Income Tax Act, 1961 (the Act, for short), assails the order dated 17/01/2007 passed by the Income Tax Appellate Tribunal (Tribunal).

2. The impugned order relates to assessment year 1997-1998. This appeal was admitted on 06/08/2007 on the following substantial questions of law :

"A) Whether on the facts and in the circumstances of the case the ITAT erred in law in deleting the addition of Rs.20,05,744/- being provision for doubtful debt on the ground, that the provision for doubtful debt are doubtful for recovery and therefore cannot be equated with liability, which is contrary to provisions of Section 115JA, by ignoring the finding of the CIT(A) that the entire provision represented advances towards sister concern and not trade debts and that it was an adhoc provision made towards advances of doubtful recovery and therefore cannot be treated as unascertained liability u/s 115JA ?

B) Whether on the facts and in the circumstances of the case the ITAT erred in law by deleting the interest u/s 234B&C of the IT Act, by relying on the decision of the Hon'ble Karnataka High Court in "Kwality Biscuit Ltd. V/s CIT (243 ITR 519) and Hon'ble Supreme Court in dismissing the Appeal filed by the Department against the said decision, in "284 ITR 434(SC)" which is not applicable to the Assessee's case in view of sub-section (4) of Section

115JA of the IT Act?

3. On 30/11/1997, the respondent assessee filed its return of income for the subject assessment year. As the respondent's income, under the normal provisions of the Act, was less than 30 % of its book profits, the Assessing Officer invoked Section 115JA of the Act and in terms of the explanation therein, added a sum of Rs.20.5 lakhs to the book profits, to compute the income at Rs.2.76 crores. Besides, as the respondent assessee had not computed advance tax, interest under Sections 234B and 234C of the Act was also imposed aggregating to Rs.30.71 lakhs, while computing the amount payable to the Revenue by the respondent assessee.

4. Being aggrieved, on both counts, namely addition on account of provision of doubtful debts to revise book profits and also imposition of interest under Section 234B and 234C of the Act, the respondent assessee filed an appeal to Commissioner of Income Tax (Appeals) (CIT(A)). By an order dated 23/02/2001, the CIT(A) upheld the order of the Assessing Officer on both counts and so far as the adjustment of book profits in terms of explanation (c) to Section 115JA(2) of the Act, it was noted that the provision represented advances made by the respondent

assessee to its sister concern and the non-recovery of the same was provided as provision for bad debts on an adhoc basis. The CIT(A) held the same to be covered by clause (c) of explanation to Section 115JA(2) of the Act as being in the nature of unascertained liability. So far as interest payable under Section 234B and 234C of the Act as default and delay of advance tax payment was concerned, the order of the Assessing Officer was upheld.

5. Being aggrieved by the order dated 23/02/2001 of CIT(A), the respondent filed an appeal to the Tribunal. By the impugned order, the Tribunal held that the provision in respect of doubtful debts is not a liability much less an ascertained liability for the purposes of application of clause (c) of the explanation to Section 115JA(2) of the Act. Thus, the impugned order held that the book profits cannot be increased by Rs.20.05 lakhs being a provision for doubtful debts to determine book profits in accordance with Section 115JA of the Act. So far as interest payable in respect of the default and delay in payments of advance tax under Section 234B and 234C of the Act is concerned, the Tribunal held that the same was not payable in view of the decision of the ***Karnataka High Court in Kwality Biscuits Ltd. Vs. CIT***, reported in 243 ITR 519 and subsequent

dismissal of the Revenue's Appeal by the Apex Court.

6. Re:- Question (A)

(i) For proper appreciation of the controversy, it may be necessary to reproduce clause (c) of explanation to Section 115JA(2) of the Act as in force during the subject assessment year :

Section 115JA.- Deemed income relating to certain companies.
"Explanation. - 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) and (b) xxx xxx xxx
(c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or
(d), (e) and (f) xxx xxx xxx;"

(ii) Ms. Desai, the learned Counsel for the Revenue, in support of the appeal, submits that an amount of Rs.20.5 lakhs, which has been debited to the profit and loss account under the head provision for doubtful debts, would stand covered by clause (c) of the explanation to Section 115JA(2) of the Act. It is further submitted that in the present facts, there is no justification for the Tribunal to delete the addition of provision for doubtful debts made to the book profits of Rs.20.5 lakhs under Section 115JA of the Act.

(iii) Mr. Bhobe, learned Counsel for the respondent assessee reiterates the findings in the impugned order.

(iv) It is very clear from the language of clause (c) of the explanation to Section 115JA(2) of the Act that it only refers to the amount set aside for provisions made for meeting liabilities, which are not ascertained. In the present case, indisputably, the amount of Rs.20.5 lakhs sought to be added to the book profits, is in fact a provision made in respect of unlikely recovery of an advance made by the respondent to its sister concern. Thus, the same is not in the nature of a liability of the respondent assessee, but is in the nature of a recoverable from its sister concern. Such a provision causes a possible diminution in the value of asset i.e. amount recoverable. Thus, on the plain reading, clause (c) of the explanation to Section 115JA(2) of the Act, would have no application to the present facts. In any case, the aforesaid issue now stands concluded in favour of the respondent assesee, by the decisions of the Apex Court in ***CIT V. HCL Connect Systems and Services Ltd,*** reported in 305

ITR 405. In this case, the Court, in respect of assessment year 1997-1998 (same in this case), has held that a provision for bad and doubtful debts would not be covered by clause (c) of the explanation to Section 115JA(2) of the Act. This is so because even if debt is not recoverable by an assessee, it cannot become as liability of the assessee. Similarly, the Apex Court in ***Joint Commissioner of Income Tax Vs. M/s. Rolta India Ltd,*** reported in 330 ITR 470, wherein it held that where the provision has not been made for meeting liability, no occasion to apply clause (c) of the explanation to Section 115JA(2) of the Act can arise. The Apex Court observed that :

> *"A debt payable by the assessee is different from a debt receivable by the assessee. A debt is payable by the assessee where the assessee has to pay the amount to others whereas the debt receivable by the assessee is an amount which the assessee has to receive from others. In the present case "debt" under consideration is "debt receivable" by the assessee."*

In this case also, there is no debt payable by the respondent assessee, but it is a debt receivable and would not stand covered by clause (c) of the explanation to Section 115JA(2) of the Act. Thus, the issue stands concluded in favour of the respondent by the decision of the Apex Court in ***HCL Connect System and Services Ltd*** (supra) and ***Rolta India Ltd*** (supra).

(v) In view of the above, the substantial question of law at serial No.A is answered in the negative i.e. in favour of the respondent Assessee and against the appellant Revenue.

7. Re:- Question (B).

The Counsel for both sides are agreed that this question stands concluded in favour of the Revenue, by the decision of the Apex Court in ***Joint Commissioner of Income Tax Vs. Rolta India Ltd.*** (supra). Consequently, it is answered in the affirmative i.e. in favour of the appellant Revenue and against the respondent Assessee.

8. In view of the above, the appeal is partly allowed. Appeal with regard to question A is dismissed and appeal with regard to question B is allowed.

9. The above appeal is disposed of in above terms. No order as to costs.

M. S. SANKLECHA, J. F. M. REIS, J.

SMA