



\$~16

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 167/2023**

**THE PR. COMMISSIONER OF INCOME
TAX -CENTRAL -1**

..... Appellant

Through: Mr. Ruchir Bhatia, Sr.SC.

versus

PEPSICO INDIA HOLDING PVT. LTD. Respondent

Through: Mr. Anmol Anand and Ms.
Sheetal Kandpal, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE PURUSHAINdra KUMAR
KAURAV**

ORDER

16.04.2024

%

1. The Principal Commissioner seeks to impugn the judgment rendered by the Income Tax Appellate Tribunal dated 14 January 2020 and has proposed the following questions of law for our consideration:

“2.1 Even though expenditure incurred wholly and exclusively for purposes of earning income often exceeds the income, thereby giving rise to loss and is allowed as such in computing income under the Income tax Act, whether that general principle be given a go-by while computing the expenditure incurred in connection with income which is exempt from tax and can it be said that the expenditure should not exceed the income?

2.2 Whether the Tribunal was correct in upholding the decision of the Id. CIT(A) with respect to deletion of addition of Rs. Rs. 4,49,72,528/- made u/r 8D(2)(ii), deleting net addition of Rs. 17,51,238/- u/r 8D(2)(iii) and holding that disallowance under section 14A of the Act cannot exceed the exempt income earned during the year despite the statute not laying down any such rule?



2.3 Whether computation of the expenditure incurred in connection with exempt income, for purposes of computing book profit u/s 115JB of the Income tax Act has to be made without reference to the provision of Rule 8D r.w.s. 14A of the Income tax Act?

2.4 Whether the Tribunal was correct in holding that the computation under clause (f) of explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated under section 14A of the I.T. Act read with Rule 8D(2) of the I.T. Rules 1962?

2.5 Whether the Tribunal was correct in holding that expenditure relatable to exempt incomes, for the purposes of section 115JB, is not to be calculated by the method prescribed under rule 8D r.w.s. 14A without suggesting any other objective method?

2.6 Whether depreciation u/s 32 of the Income tax Act is allowable on payment on non-compete fee?

2.7 Whether the Tribunal was correct in upholding the decision of the Id. CIT(A) with respect to deletion of addition of Rs. 26,80,668/- on account of depreciation of non-compete fee on the ground that the department had not made similar additions in the earlier years notwithstanding the facts that the principle of res-judicata does not apply to tax matters and also that non-compete fee was not a depreciable intangible asset?"

2. We note that insofar as the applicability of Section 14A of the Income Tax Act, 1961 [**“Act”**] to assessments which would be governed by Section 115JB of the Act is concerned, stands conclusively answered against the appellant in light of the judgment rendered by us in **CIT v. Moon Star Securities Trading & Finance Co. (P) Ltd.**, [2024 SCC OnLine Del 1748].

3. Dealing with the aforesaid aspect, we had in *Moon Star Securities* held as follows:

“18. A bare perusal of the abovementioned provisions would signify that sub-Section (1) prescribes the mode and manner for computing the total income of the assessee under Section 115JB of the Act. However, Clause (f) of Explanation 1 only alludes to the amounts of expenditure relatable to any income to which Section 10 (excluding provisions contained in Clause 38 thereof) or Section 11 or Section 12 apply. Thus, the said explanation nowhere



mentions or denotes any mandate to import the disallowance as per Section 14A of the Act for computing MAT under Section 115JB of the Act.

19. It is also apposite to refer to the decision of the Hon'ble Supreme Court in the case of *Indo Rama Synthetics (I) Ltd.* (supra) to understand the nature and scope encompassed in Section 115JB of the Act. Paragraph no. 14 of the said decision succinctly encapsulates the position of Section 115JB in the following words:—

“14. It is, thus, clear that what is “book profit” has been defined and explained in the above explanation. **Section 115-JB is a self-contained code. It applies notwithstanding other provisions of the Act. There is no scope for any allowances or deductions under any other section from what is deemed to be the total income of the company (the assessee).**”

20. This Court *vide* order dated 29.09.2015 in ITA no. 593 of 2015 titled as *PCIT v. Bhushan Steels Ltd.*, has held that since Explanation to Section 115JB does not specifically mention Section 14A of the Act, the view taken by the ITAT therein regarding deletion of addition cannot be held to be erroneous. The relevant paragraph of the said decision reads as under:—

“7. Question No. 6 concerns deletion of addition of Rs. 89,00,000 made by the AO for computation of the income for the purposes of Minimum Alternate Tax (‘MAT’) under Section 115 JB of the Act. This pertained to the expenditure incurred for earning exempt income under Section 14A read with Rule 8D. The ITAT has rightly held that this being in the nature of disallowance, and with Explanation 115JB not specifically mentioning Section 14A of the Act, the addition of Rs. 89,00,000 was not justified. The view taken by the ITAT cannot be faulted with. It is consistent with the decision in *Apollo Tyres Ltd. v. Commissioner of income Tax*, (2002) 255 ITR 273 (SC) which held that “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 115J.” The Court declines to frame a question on the above issue.”

21. The Karnataka High Court in the case of *Sobha Developers Ltd.* (supra) while rejecting the permissibility of adding back the disallowance on exempt income as per Section 14A of the Act to book profit under Section 115JB of the Act, has held as under:—



“7. Thus from a perusal of the relevant extract of section 115JB, it is evident that sub-section (1) of section 115JB provides the mode of computation of the total income of the assessee and tax payable on the assessee under section 115JB of the Act. Sub-section (5) of section 115JB provides that save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee being a company mentioned in this section. **Therefore, any expenditure relatable to earning of income exempt under section 10(2A) and section 10(35) of the Act is disallowed under section 14A of the Act and is added back to book profit under clause (f) of Explanation 1 to section 115JB of the Act, the same would amount to doing violence with the statutory provision, viz., subsections (1) and (5) of section 115JB of the Act.** It is also pertinent to mention here that the amounts mentioned in clauses (a) to (i) of Explanation 1 to section 115JB(2) are debited to the statement of profit and loss account, then only the provisions of section 115JB would apply. The disallowance under section 14A of the Act is a notional disallowance and therefore, by taking recourse to section 14A of the Act, the amount cannot be added back to book profit under clause (f) of Explanation 1 to section 115JB of the Act. It is also pertinent to mention here that similar view, which has been taken by this court in *Gokaldas Images (P.) Ltd.* (supra) was also taken by the High Court of Bombay in *CIT v. Bengal Finance and Investments Pvt. Ltd.* I.T.A. No. 337 of 2013, dated February 10, 2015]. It is pertinent to note that in *Rolta India Ltd.*, the Supreme Court was dealing with the issue of chargeability of interest under sections 234B and 234C of the Act on failure to pay advance tax in respect of tax payable under section 115JA/115JB of the Act and therefore, the aforesaid decision has no impact on the issue involved in this appeal. Similarly, in *Maxopp*”

22. Further, in the case of *Apollo Tyres Ltd. v. CIT* [(2002) 9 SCC 1], the Hon'ble Supreme Court was of the opinion that the AO is not vested with an authority to travel beyond the net profit shown in the profit and loss account and the said jurisdiction is confined to the extent provided in the Explanation to Section 115J of the Act. Paragraph no. 8 of the said decision reads as under:—

“8. Therefore, we are of the opinion, the Assessing Officer while computing the income under Section 115-J 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-J.**”

23. A conspectus of the aforementioned judicial pronouncements would lead us to safely conclude that the scheme of Section 115JB, particularly in relation to Clause (f) of Explanation 1 therein, does not envisage any addition of disallowance computed under Section 14A of the Act to calculate MAT as per Section 115JB of the Act. Rather, both the provisions stand separately as no correlation exists between them for the purpose of determining the taxable income. The addition of the concerned disallowance made by the AO while computing MAT is *dehors* the provisions of the Act and hence, cannot be sustained.”

4. That only leaves us to deal with the question of depreciation on non-compete fee. We note that the issue of deprecation on non-compete fee is an issue which is no longer *res integra* and stands answered by our Court in **Sharp Business System v. Income Tax-III**, [2012 SCC OnLine Del 5639] in favour of the appellant.

5. However, insofar the present case is concerned, the ITAT has taken into consideration the following facts as would be evident from paragraph no.26, which is reproduced as under:

“26. We have gone through the details of the noncompete fees incorporated at page No. 70 of the paper book which clearly reveals that for the earlier years, namely, 2005-06 to 2007-08 the Revenue accepted the depreciation claimed at Rs. 63,54,176/-, Rs. 47,65,632/-, and Rs.35,74,224/-, but in respect of the assessment year 2008-09 the depreciation on the capitalised noncompete fee claimed that Rs.26,80,668/-was disallowed. Reasoning given by the Assessing Officer to disallow this claim is that the issue hinges around the interpretation of the phrase "business or commercial rights of similar nature" used in clause (ii) of section 32, and a careful reference to the language of the provisions in section 32 makes it clear that all the specific awards that a preceding general words "business or commercial rights of similar nature" are related to a class of rights which are intellectual property rights whereas the alleged payment is for noncompete fee. Further, according to the learned Assessing Officer the right to noncompete acquired by



the assessee is only a right in personam and therefore the assessee is not entitled to claim depreciation on the noncompete fee. Learned Assessing Officer does not refer to any change of circumstances from the earlier years so as to deviate from the view that was taken for earlier years. We therefore do not find anything illegality or irregularity in the Ld. CIT(A) following the view taken for the earlier years under identical circumstances. Ground No. 6 is accordingly devoid of merits and is dismissed.”

6. The ITAT has essentially followed the principle of consistency insofar as the case of the respondent – assessee is concerned.
7. We consequently find no justification to interfere with or disturb the ultimate conclusions rendered by the ITAT, notwithstanding it having failed to notice or consider the judgment rendered in *Sharp Business System*.
8. We find sufficient merit in the path that we propose to take since although the issue which arises *inter partes* and for the year in question would be rendered a quietus consequent to the disposal of the present appeal, the question of law already stands settled by *Sharp Business System* and would govern the issue if it arise in any subsequent adjudication.
9. The appeal consequently fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

APRIL 16, 2024/p