IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 16 .11.2016

PRONOUNCED ON : 23 .12.2016

CORAM

THE HONOURABLE MR.JUSTICE NOOTY. RAMAMOHANA RAO
&
THE HONOURABLE DR.JUSTICE ANITA SUMANTH

T.C.A.NO.1418 OF 2007 &
T.C.A.NO.1419 OF 2007

M/s.V.G.P. Housing P Ltd.,
V.G.P. Square, Saidapet,
Chennai 600 015 .. Appellant

Vs

Assistant Commissioner of Income Tax,
Company Circle III (4),
121, Nungambakkam High Road,
Chennai 600 034 .. Respondent

TCA.NO.1419 OF 2007

M/s.V.G.P. Housing P Ltd.,
(Wrongly mentioned)
M/s.VGP Golden Beach Resorts P Ltd.,
V.G.P. Square, Saidapet,
Chennai 600 015
Appellant

Vs

Assistant Commissioner of Income Tax,
Company Circle III (4),
121, Nungambakkam High Road,
Chennai 600 034.
Respondent

Prayer in T.C.A.No.1418 of 2007 : Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order dated 27.7.2007 passed by the Income Tax Appellate Tribunal 'C' Bench, Chennai in ITA No.433/MDS/2005 for the assessment Year 1998-99.

Prayer in T.C.A.No.1419 of 2007 : Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order dated 27.7.2007 passed by the Income Tax Appellate Tribunal 'C' Bench, Chennai in ITA No.434/MDS/2005 for the assessment Year 1999-2000.

For Appellant in both cases : Mr. S. Sridhar

For Respondent in both cases : Mr.Mr. M. Swaminathan
assisted by
K. Suresh Kumar

C O M M O N   J U D G M E N T

[Judgment of the Court was made by Anita Sumanth, J.]

1. The appeals relate to assessment years 1998-99 and 1999-00 and are disposed of by means of a common order. The substantial questions of law admitted for consideration are as follows:

T.C.A.No.1418 of 2007

'*1. Whether the Appellate Tribunal is correct in Law in concluding that the additions made by the Respondent towards excess depreciation written back and provision for land development withdrawn while computing the book profits in terms of Section 115JA of the Act even though the provisions governing permissible adjustments would not authorise such additions in the computation?*

2. Whether the Appellate Tribunal is correct in law in sustaining the action of the Respondent in tinkering the profit and loss account prepared in accordance with the Companies Act while computing book profits under section 115JA of the Act even though the appropriation account appearing 'below the line' was part of the profit and loss account especially in terms of section 349 of the Companies Act and Accounting standard AS 5?'

T.C.A.No.1419 of 2007

> '*1. Whether the Appellate Tribunal is correct in Law in concluding that the additions made by the Respondent towards excess depreciation written back and provision for Taxation while computing the book profits in terms of Section 115JA of the Act even though the provisions governing permissible adjustments would not authorise such additions in the computation?*
>
> *2. Whether the Appellate Tribunal is correct in law in sustaining the action of the Respondent in tinkering the profit and loss account prepared in accordance with the Companies Act while computing book profits under section 115JA of the Act even though the appropriation account appearing 'below the line' was part of the profit and loss account especially in terms of section 349 of the Companies Act and Accounting standard AS 5?'*

2. The appellant is a company engaged in the business of managing resorts. Returns of income were filed in respect of A Y 98-99 and 99-00 on 31.12.99 and 30.10.98 that were taken up for assessment under scrutiny, in particular in terms of section 115 JA of the Income tax Act 1961 (in short, 'the Act') for the computation of Minimum Alternate Tax (MAT).

3. Upon perusal of the profit and loss account, the assessing authority noticed two amounts credited to P and L a/c at the stage of appropriation, Rs.1,43,29,001/- being 'excess depreciation withdrawn' (AY 1998-99) and Rs.3,35,44,591/- (AY1999-2000) and

Rs.1,07,82,000 being 'provision for land development withdrawn' (AY 1998-99) and a debit of Rs.2,00,000/- being 'provision for taxation' (AY 1999-2000). The Assessing officer was of the view that the amounts were liable to be added to enhance book profits u/s 115 JA of the Act and the assessment was thus completed effecting the above adjustments to the book profits returned by the assessee. Unfortunately, the orders of assessment, both dated 12.2.2004, are rather cryptic and give no indication as to under which specific clause of the Explanation to section 115 JB the adjustments have been made.

4. Appeals were filed before the Commissioner of Income Tax (Appeals) who allowed the same on the ground that the adjustments were not contemplated under sub-clauses (a) to (f) under the Explanation to section 115JA. Surprisingly, the latter part of the Explanation relating to the reduction from book profits has neither been noticed nor adverted to. The Revenue approached the Income Tax Appellate Tribunal, which by order dated 27.7.2007, reversed the order of the Commissioner of Income Tax (Appeals) restoring the computation of the assessing officer.

5. The Tribunal was of the view that the adjustment was in consonance with sub-clause (i) in the Explanation to Section 115 JA and the proviso thereunder that reads as follows;

> '*(i) the amount withdrawn from any reserves or provisions if any such amount is credited to the profit and loss account:*
>
> *Provided that, where this section is applicable to an assessee in any previous year (including the relevant previous year), the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 (but ending before the 1st day of April, 2001) shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation;'*

The above sub-clause was inserted by Finance No:2 of Act 1989 with retrospective effect from 1.4.1988 and hence would be applicable to both assessment years in question.

6. The Tribunal was also of the view that the embargo placed on an assessing officer by the Supreme Court in interpreting the provisions of section 115 JA (2) was restricted to the items in profit and loss account, which in this case had not been disturbed except to the extent permissible under the Explanation. Reliance was placed by the Tribunal on the decision of the Coordinate Bench of the Tribunal in the case of Southern Petro Chemicals Limited Vs

Deputy Commissioner of Income Tax since affirmed by this Court in T.C. (Appeal) Nos.1109/2004, 1444 to 1445 of 2005 and 872/2010, vide order dated 22.8.2011.

7. As noted earlier, the assessing authority does not refer to any specific clause in the Explanation to Section 115JA while effecting the adjustments to the book profits and the order of assessment is blissfully vague. The CIT(A) also does not note the provisions of sub-clause (i) of the Explanation to section 115JA and merely notes the upward adjustments stipulated therein in sub-clauses (a) to (f) thereof. It was left to the Tribunal to note the downward adjustments, specifically sub-clause (i) and the proviso thereunder and apply the same in the assessment of the assessee under MAT.

8. The assessee, admittedly had claimed excess depreciation in the previous years that was written off/waived in the present financial year (AY 1998-99 and 1999-00). Likewise, a provision had been made towards land development that was withdrawn in the present financial year (AY 1998-99). In the computation of MAT, the assessee appears to have reduced the aforesaid two amounts from book profits in accordance with sub-clause (i) of the

Explanation. The satisfaction of the mandatory condition set out in the proviso thereto is, however, moot.

9. The provisions of Section 115JA were inserted primarily to ensure that companies with substantial book profits and dividend payout would also be invested with appropriate tax liability. Sub clause (i) in the Explanation and the proviso thereunder were specifically inserted for the following reasons as explained by the Central Board of Direct Taxes in Circular No.550 bearing F.No.133/513/89 TPL dated 1.1.1999;

> *'24.4 Further, under the existing provisions certain adjustments are made to the net profit as shown in the Profit and Loss account. One such adjustment stipulates that the net profit is to be reduced by the amount withdrawn from reserves or provisions, if any such amount is credit to the P&L account. Some companies have taken the advantage of this provision by reducing their net profit by the amount withdrawn from the reserve created or provision made in the same year itself, though the reserve when created had not gone to increase the book profit. Such adjustments lead to unintended lowering of profits and consequently the quantum of tax payable gets reduced. By amending s.115JA with a view to counteract such a tax avoidance device, it has been provided that the "book profits" will be allowed to be reduced by the amount withdrawn from reserves or provisions only in two situations, namely:*
>
> *(i) if the reserves have been created or provision have been made in a previous year relevant to the assessment year commencing before 1st April 1988, or*

(ii) If the reserves have been created or provisions have been made in a previous year relevant to the assessment year commencing on or after 1st April 1988, and have gone to increase the book profits in any year when the provisions of s.115J of the IT Act were applicable.

24.5. This amendment will come into force w.e.f. 1st April 1988 and will accordingly apply in relation to the asst. Year 1988-89 and subsequent years'

10. The object of the amendment is to permit the reduction from book profit of any amount withdrawn from reserves or provisions and credited to the profit and loss account upon condition that the book profits for the year in which such provisions or reserves had been created had been correspondingly increased by such reserves or provisions.

11. The Tribunal proceeds on the basis that the adjustment was, in fact, made in terms of sub-clause (i) of the Explanation. However there is no finding as to the satisfaction or otherwise of the condition set out in the proviso thereunder which is fundamental to the adjustment itself. The decision of the Madras High Court in the case of Southern Petro Chemicals Industry deals with whether the amount withdrawn from a revaluation reserve created prior to assessment year 1997-98 did not merit exclusion in terms of sub-clause (i) of the Explanation to Section 115JA and

the proviso thereunder. The Court concluded that the bar set out in the proviso to clause (i) of the Explanation to section 115JA would be attracted on the facts and circumstances of that case.

12. In the present case, we are concerned with excess depreciation claimed as well as provision for land development both reduced by the assessee from book profits in its computation for MAT in terms of clause (i) of the Explanation to section 115JA. However, the downward adjustment in terms of this provision is conditional upon satisfaction of the requirement under the proviso thereto i.e. whether the book profit of the earlier year when the reserve/provision was created, was increased by the amounts credited to the profit and loss account in the financial year relevant to the assessment year in question. There is no finding in the orders of the lower authorities in this regard. In fact, reference to clause (i) of the Explanation to section 115JA finds place for the first time at the level of the Tribunal. Submissions have been advanced before us on behalf of the assessee on the satisfaction of the condition set out in the Proviso to sub-clause (i) of the Explanation to s.15JA. This is however, an exercise in fact finding, that has to be gone into by the assessing officer. We thus have no choice but to remit the matter to the file of the assessing officer to

redo the computation of book profits in terms of Section 115 JA as it stood at the relevant time, including the applicability of sub-clause (i) of the Explanation to section 115JA and render a finding on the applicability of the proviso thereto. Both parties have cited case law relying upon the decisions of the Supreme Court reported in *Commissioner of Income Tax Vs. Lovely Exports (P) Ltd ((2008 216 CTR 0915); Indorama Synthetics (I.) Ltd Vs. Commissioner of Income Tax (330 ITR 363)* and decisions of the High Court in *Tamilnadu Cements Corporation Ltd Vs. Joint Commissioner of Income Tax ((2012) 349 ITR 0058)*; Commissioner *of Income Tax Vs. W.S.Industries (India) Ltd* in TCA.No.200 of 2005 vide order dated 22.08.2011 and *Southern Petro Chemicals Industry Vs. Deputy Commissioner of Income Tax* in T.C.A.Nos.1109 of 2004 etc. batch vide order dated 22.8.2011. The officer shall take note of the same in the proceedings to be completed denovo. We are conscious that the assessment years in question are 1998-99 and 1999-2000. However in the circumstances as seen above, we believe that a remand is called for even at this distance of time.

13. We now address the second question in both appeals. The contention of the learned counsel for the assessee is to the

effect that the assessing officer, by effecting the impugned adjustments, 'tinkered' with the P and L a/c, which is impermissible. We don't agree. All that the assessing officer had done is to commence application of the Explanation to s.115JA to the book profits, albeit, in an incomplete fashion. Admittedly, the assessee has availed the reduction in terms of sub-clause (i) of the Explanation and it remains to be seen if the condition precedent to availing of the reduction as per the proviso thereto has been satisfied. The exercise has to be carried to its logical conclusion and the error committed by the officer is limited to this aspect of the matter. To label the action of the assessing officer as 'tinkering' even at this stage would be putting the cart before the horse, and rather premature. The learned counsel also seems to suggest that the credits sought to be added back are part of p and l appropriation a/c and not the p and l a/c as required by sub-clause (i) of the Explanation. We refrain from probing further into this aspect as we have, in paragraph 15 above, directed the assessing officer to undertake, denovo, the exercise of ascertaining the liability of the assessee to MAT.

14. In the course of hearing, it is contended that the Tribunal has not considered the ground relating to 'provision for

land development'. That appears to be correct. However, since the adjustment relating to reversal of depreciation is being remanded back to the file of the assessing officer and the principle to be applied would be similar in relation to 'provision for land development' as well, we consider it appropriate to remit this issue to the file of the assessing officer to be adjudicated upon denovo after affording proper opportunity to the assessee.

15. In summary we direct the assessing officer to re-do the assessments (AY 1998-99 and 1999-2000) with respect to excess depreciation reversed and provision for land development withdrawn at the stage of appropriation of profits in P & L Account in the light of the provisions of s. 115 JA of the Act and relevant case-law after affording due opportunity to the assessee in this regard. The proceedings are directed to be completed within a period of three months from the date of receipt of a copy of this order by the assessing officer. TC(A) 1418 and 1419 to this extent, are allowed by way of remand.

16. TC(A) No.1419 of 2007 relating to assessment year 1999-00 raises the additional issue in substantial question no:1,

relating to an adjustment made of a provision for taxation in the computation of MAT. The upward adjustments to be effected to book profits are set out in the Explanation to Section 115JA and sub-clause (a) specifies an increase by '*the amount of income tax paid or payable and the provision therefor'*. In the light of the clear mandate of the law, substantial question of law no:1 to the extent to which it relates to the adjustment toward provision for taxation, is answered in favour of the department.

17. Both tax case (Appeals) are disposed off in the above terms. No costs.

(N.R.R.J.,) **(A.S.M.J.,)**
23 .12.2016

msr
Index : Yes/No
Internet : Yes/No

<u>NOOTY. RAMAMOHANA RAO, J.</u>

<u>AND</u>

DR.JUSTICE ANITA SUMANTH

msr

PRE-DELIVERY JUDGMENT IN

<u>TCA.NOS.1418 AND 1419 OF 2007</u>

23.12.2016