IN THE HIGH COURT OF JHARKHAND AT RANCHI

T.A. No. 54 of 2011

The Commissioner of Income Tax,
47 C.H.,Jamshedpur,(Singhbhun East) .... Appellant
Vrs.
M/s International Auto Ltd., Jamshedpur,(Singhbhum East) ..... Respondent

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CORAM: HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE APARESH KUMAR SINGH

For the Appellant: Mr. Deepak Roshan, Sr. S.C.(I.T.)
Mr. Amit Kumar, Adv.
Ms. Rupa Kumari, Adv.
For the Respondent: Mr. Binod Poddar, Sr. Advocate
Mr. Mahendra Choudhary, Adv.
Ms. Darshana Poddar, Adv.
Mr. Piyush Poddar, Adv.
Ms. Amrita Sinha, Adv.

Reportable **Dated 07th September, 2012.**

Heard learned counsel for the parties at length.

2. The following questions of laws are involved in this appeal :

(I) "Whether on the facts and in the circumstances of the case the learned ITAT has erred by holding that the AO has not made the impugned additions under the regular provisions of the Act whereas the records show to the contrary thereby making the said finding perverse?"

(ii) "Whether on the facts and in the circumstances of the case the learned ITAT has erred in law by impliedly upholding the deletion of addition of Rs. 7,49,672/- representing unverifiable transactions?"

(iii) "Whether on the facts and in the circumstances of the Case the learned ITAT has erred in law by impliedly upholding the deletion of addition of Rs. 34,44,754/- representing disallowance under Section 40(a) (ia) of the Act?"

3. Learned counsel for the appellant submitted that in fact the assessee was assessed under Section 143(3) of the Income Tax Act, 1961, which is apparent from the assessment order dated 26.12.2007, copy of which has been placed on record as annexure-1. It is submitted that it is true that the assessee wanted to take benefit under Section 115JB and he has also shown his total income for the assessment year 2005-06 as '*NIL*' but A.O. issue-wise considered various components and before that, he issued letters under Section 133(6) to different

parties. In some of the cases, reply was received and in others, either the letter was remained unserved or no reply was received. Thereafter, a show-cause notice was also given to the assessee about the above facts and he was asked to show reasons as to why the books of account should not be rejected. After considering the contentions of the assessee, the A.O. observed that the representative of the assessee could not produce any evidence for the proof of some of transactions and, therefore, held that assessee was unable to prove the genuineness of transactions with the above parties. The books of accounts were not believed and the transactions made with the above parties are treated as unexplained and relevant amounts were added to the total income of the assessee and thereafter, the A.O. ordered to proceed under Section 271(1)(c) of the Act of 1961 for imposition of penalty. A.O. also considered the claim of the assessee under Section 40(a) (ia) of the Act of 1961 and after rejecting the claim, added the income of Rs.34,44,754.17. Some of the expenses were also found unverifiable expenses and thereafter, specifically in the operative part of the assessment order, ordered " *Assessed under Section 143(3) of the I.T. Act, 1961 on a total income of Rs.67,52,390.00. Allowed B/f Losses if any."* However, it appears that learned A.O. inadvertently or wrongly also ordered- *"The computation as per 115 JB is modified accordingly" and "Charge interest as per Law. Penalty proceeding under Section 271(1)(c) of the I.T. Act, 1961 is hereby initiated for the above. Issued D.N. with Challan."*

This clearly indicates that the assessment order was under Section 143(3) and not under Section 115 JB of the Act of 1961.

4. The assessee preferred appeal against the said assessment order which was partly allowed by the C.I.T.(Appeal) vide order dated 23.01.2009. The C.I.T. (Appeal) also considered each and every component which has been considered by the A.O. and thereafter, deleted the above addition which could have been done only in regular assessment under Section 143(3) only and not under Section 115JB.. However, while considering ground no.4, the C.I.T. (appeal) held that "t*he AO has added back the sum of Rs. 7,49,672/-, Rs. 4,86,973/- and Rs. 34,44,754/- to the Book Profit for the purpose of charging tax*

u/s 115 JB without giving any reason." The C.I.T.(Appeal) directed the A.O. to remove the amounts added by him to the sum of Rs.20,70,995/-.

5. Aggrieved against the order of C.I.T.(Appeal) dated 23.01.2009, the Revenue preferred appeal and the cross objection was submitted by the assessee. The Tribunal was also of the view that the C.I.T.(Appeal) has deleted the addition under Section 40(a)(ia) which does not have any relevance for the calculation made under Section 115 JB. The Tribunal considered the books profit of the assessee which was shown to be Rs.2,05,94,131/-, which is much higher than the profit computed as Rs.67,52,394/-. However, the Tribunal was of the view that a patent mistake has been crept in the order of the A.O. which has been dealt with by the C.I.T.(Appeal) without appreciation of the facts. The Tribunal also held that the endeavour of the A.O. was not to tax under the regular provisions of the Act when the assessee is paying more tax under the provisions of Section 115 JB. The Tribunal also took note of the fact that C.I.T. (Appeal) heard the assessee's appeal on the demand notice issued by the A.O. under Section115 JB and therefore, on the solitary issue of the rectification of the demand notice under Section 115 JB, the matter was restored to the file of the A.O. for recomputing the demand under Section 115 JB.

6. According to learned counsel for the appellant, it was a case of assessment under Section 143(3), whereas according to learned counsel for the assessee, it was assessment under Section 115JB.

7. Learned counsel for the assessee relied upon a judgment of Hon'ble Supreme Court delivered in the case of ***Apollo Tyres Ltd. Vrs. Commissioner of Income Tax*** reported in ***(2002) 255 ITR 273 (SC)*** wherein purpose of introduction of Section 115J has been considered in detail and that too, after considering the Budget Speech of Finance Minister made in Parliament while introducing the said Section.

8. Learned counsel for the assessee vehemently submitted that in view of this decision of Hon'ble Supreme Court, the A.O. had no jurisdiction to even look deeply into the books of account of the assessee when the books of account have been maintained as required under the provisions of Companies

Act and have been duly audited. Hon'ble Supreme Court clearly held that such enquiry is beyond the scope under Section 115JB. According to learned counsel for the appellant, the assessee submitted returns of his income as '*NIL'* and he has right to submit such returns in a case where his case is squarely covered under Section 115 JB which is a special provision for the Companies who are showing less profit than the profit shown in previous years to the relevant year. The provision has been made for taxing such Companies also and in that situation also, some tax can be imposed. The complete proceeding for assessment in such a situation has been given under Section 115 JB wherein the provision has been made with respect to the computation of income and provision for disallowance on certain components whereas some permissible depreciations are allowed. It is submitted that in view of the fact that the petitioner submitted his returns under Section 115JB and the A.O. in his order itself, very clearly mentioned that the computation is required to be as per Section 115JB and such finding has been upheld by the C.I.T.(Appeal), then it is a pure question of fact and that has been upheld by the Tribunal. Therefore, no question of law is involved in the present appeal. Otherwise also, on merit, there is no illegality committed by the C.I.T.(Appeal) as well as by the Tribunal in holding that the case of the petitioner is covered under Section 115 JB.

9. We have considered the submissions of the parties, perused all the facts of the case and reasons given by the A.O., C.I.T.(Appeal) and the Tribunal.

10. After going through the assessment order, annexure-1, we are of the considered opinion that the assessee may have submitted his returns showing his total income as '*NIL'* and has shown book profit of Rs.2,05,86,930/- under Section 115JB but A.O. has not proceeded to consider the case of the petitioner under Section 115 JB and clearly mentioned in first para of the order itself that "the case was duly processed u/s 143(1)(a) and thereafter on selection of the case of scrutiny, statutory notices u/s 143(2) & 142(1) were issued." Such notices were duly responded by the assessee's representative and the case was contested and proceeded under Section 143(1)(a) and assessment was made under Section 143(3) of the Act of 1961. Therefore, before the A.O.,

assessee tried to justify the books of account and did not rely upon the principle that under Section 115 JB, the A.O. need not go into the details of the scrutiny of the books of account. The A.O. not only proceeded in this manner under Section 143, but in fact, disbelieved the books of account and added Rs.7,49,672/- in the income of the assessee as unexplained income. Then, the A.O. proceeded to examine the claim of deduction under Section 40(a)(ia) and added Rs. 34,44,754.17 in the total income of the assessee and thereafter, rejected the certain expenses in unequivocal term and declared the assessment under Section 143(3) of the Act of 1961 on a total income of Rs.67,52,390/-. However, in the entire orders, without there being any consideration of Section 115JB, this line has been mentioned in operative part of the order - "*The computation as per 115JB is modified accordingly.*"

We are of the considered opinion that this assessment was under Section 143(3) of the Act and the two orders cannot coexist, one under Section 143(3) and another under Section115JB. Since in operative part of the order, the purpose was to be under Section 143(3) and that finds support from the reasons mentioned in the order, we are of the considered opinion that it was a mistake on the part of the A.O., who observed that the computation as per under Section 115JB is to be made.

11. The C.I.T.(Appeal) also proceeded to decide the matter as though it was a regular assessment under Section 143(3) and, therefore, after computing each and every addition made by the A.O., on facts, reversed the findings recorded by the A.O. At this juncture, we may make it clear that the issue is not that whether addition made by the A.O. was rightly deleted by the C.I.T.(Appeal) and the issue before us is only with respect to the nature of the order for the purpose of finding out whether under which provision of Section 143(3) or Section 115 JB, the A.O. or the C.I.T.(Appeal) proceeded to decide the matter.

As we have already made clear that A.O. decided the matter as per provisions of Section143(3), the C.I.T.(Appeal) also proceeded to delete the addition by examining the books of account and relevant material facts and not on the ground that the A.O. had no jurisdiction to question the correctness of the

audited accounts, balance sheet, books of accounts under Section 115JB, even C.I.T.(Appeal) also proceeded to examine the matter under Section 143(3) and deleted the addition. At this juncture, it is worthwhile to mention here that C.I.T. (Appeal) also, while considering the ground no.4 of addition of disallowance made to the book profit, held that it is a case under Section 115JB. Therefore, the order of the C.I.T.(Appeal), on the face of it, is contrary to the earlier findings recorded in other additions made by the A.O. and deleted by the C.I.T.(appeal) when it decided the addition of disallowance made to book profit.

12. The Tribunal also held that the A.O. committed error and same error has been committed by the C.I.T.(Appeal) irrespective of the fact that the A.O. decided in favour of the assessee, yet according to Tribunal, both committed mistakes. The Tribunal come to the conclusion that when the assessee paying more tax under Section 115 JB and even observed that it is no body's case that the regular assessment under the provisions of Section 143(3) would have fetched more tax to the Revenue. We do not find any reason for such observation when Tribunal was of the view that neither the A.O. nor the C.I.T. (Appeal) had appreciated the facts. The Tribunal also ignored this fact that the A.O. and C.I.T.(Appeal), both considered each and every fact, which is required to be considered under Section 143(3) and then in that situation, merely because of the one line in the operative part of the order contrary to the specific facts mentioned in the first para that the case is duly processed under Section 143(1)(a), the Tribunal should not have directed the A.O. to rectify the demand notice under Section 115JB and the Tribunal held in this way - "*Therefore, on the solitary issue of the rectification of the demand notice u/s115JB, the issue is restored to the file of the Assessing Officer for recomputing the demand u/s.115JB under the strict provisions of taxation of book profits u/s.115JB.*"

13. In view of the above, the question number- 1 is answered that the ITAT has erred by holding that the AO has not made the impugned additions under the regular provisions of the Act, obviously, under Section 143(3) of the Act of 1961 and the ITAT has also committed error of law in upholding the deletion of addition of Rs.7,49,672/- and Rs.34,44,754/-, referred above.

However, we are of the considered opinion that the A.O. should have considered the plea of the assessee also before holding that he is proceeding under Section 143(1)(ia), and in pursuance of notice under Section 143(2) and 142(1) of the Act of 1961, but he should have considered the asseess's claim under Section 115JB, which has not been and as such, rejected the plea of the assessee in spite of taking note of the fact that assessee has shown the book profit of Rs.2,05,86,930/- under Section 115JB. Therefore, the impugned orders i.e., order of the Tribunal dated 14.07.201; the order of the C.I.T.(Appeal) dated 23.01.2009 and the assessment order dated 26.12.2007; are set aside. The matter is remanded to the A.O. for fresh consideration in the light of the observations made hereinabove, obviously to decide whether the assessment is required to be made under Section 115JB or under Section 143(3) of the Act of 1961.

This appeal is allowed accordingly.

(Prakash Tatia,C.J.)

(Aparesh Kumar Singh, J.)

Sudhir