

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 552 of 2023

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THE PRINCIPAL COMMISSIONER OF INCOME TAX 1
Versus
M/S SETCO AUTOMOTIVE LTD

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Appearance:

MR NIKUNT K RAVAL(5558) for the Appellant(s) No. 1

MR B S SOPARKAR(6851) for the Opponent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 12/03/2024

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

[1] By this Tax Appeal under Section 260A of the Income Tax Act, 1961 (for short, “the Act”), the appellant – Revenue has proposed the following question of law arising out of the impugned order dated 13th March 2023 passed by the Income Tax Appellate Tribunal, Ahmedabad ‘E’ Bench, Ahmedabad (for short, “the Tribunal”) in ITA No.1497/Ahd/2019 for A.Y. 2011-12:

“(i) Whether the Ld. ITAT was right in law and facts in holding that non-inclusion of income surrendered u/s. 115 JB could not have been corrected in rectification proceedings u/s. 154 of the Income Tax Act, 1961?”

[2] The respondent – assessee filed return of income on 29th September 2011 declaring total income of Rs.27,73,80,140/-. The assesment was completed under Section 143(3) of the Act on 25th February 2014 determining total income at Rs.27,82,83,960/- by making addition of Rs.9,03,820/- on which the tax was determined at Rs.8,34,85,188/- and book profit under Section 115JB of the Act was calculated at Rs.42,41,33,837/- on which the tax was determined at Rs.7,63,44,091/-.

[3] As the tax on normal rates being higher, the provision of Section 115JB of the Act was not applied by the Assessing Officer.

[4] A survey action under Section 133A of the Act was carried out on 23rd June 2011. During the course of survey, the assessee company declared additional income of Rs.17 Crores. It was reflected in the scrutiny Note-35 of the financial statement for A.Y. 2012-13 relevant to F.Y. 2011-12 as the assessee declared such additional income amounting to Rs.17 Crores.

[5] The assessee company had re-worked tax benefits for A.Y. 2011-12 resulting into additional tax liability of Rs. Nil, after

adjusting MAT credit entitlement of Rs.9,04,26,348/- and thereby, changing tax base from MAT to normal taxation. However, the amount of Rs.17 Crores was not recorded in the books of account and therefore, the Assessing Officer issued notice under Section 154 of the Act on 20th March 2018 and added Rs.17 Crores in the book profit for the purpose of calculation of book profit under Section 115JB of the Act as per Schedule VI of the Companies Act, 1956 on the basis of declaration made by the assessee during the course of survey.

[6] The Assessing Officer, thereafter, re-worked the tax payable by the assessee company by determining the book profit of Rs.59,41,33,837/- and computing the tax at the rate of 18% of Rs.11,84,13,845/- together with surcharge.

[7] Being aggrieved, the assessee company preferred the appeal before the CIT(A), who, by order dated 30th August 2019, confirmed the addition and the rectification order passed by the Assessing Officer under Section 154 of the Act.

[8] Being aggrieved, the assessee company preferred the appeal

before the Tribunal, who, by impugned order dated 13th March 2023, allowed the appeal on the ground that the amount included in the book profit of the assessee on the basis of the voluntary disclosure made during the course of survey under Section 133A of the Act, was not supported by any incriminating material found during the course of survey, revealing the nature and manner of earning income surrendered by the assessee company and therefore, it could not have been considered as a mistake apparent on record by the Assessing Officer for considering such disclosure as a part of the book profit for the purpose of applying Minimum Alternate Tax (MAT) under Section 115JB of the Act. The Tribunal, on the basis of the fact on record, came to the conclusion that without any incriminating material found, the amount of disclosure could not have been necessarily included in the profit and loss account / book profit as such inclusion would require a long drawn reasoning and debate.

[9] Learned advocate Mr. Nikunt Raval for the appellant – Revenue submitted that the CIT(A) has relied upon and referred the decision of the Hon'ble Bombay High Court in the case of **Blue**

Star Engineering Co. (Bombay) (P) Ltd vs. Commissioner of Income-tax reported in [1969] 73 ITR 283 (Bombay), wherein the Hon'ble Bombay High Court has analyzed the power under Section 154 of the Act to rectify an error apparent on the face of the record. It was submitted that the amount of disclosure made by the assessee company during the course of survey which represents the profit of the company is required to be shown in the profit and loss account and therefore, the Assessing Officer has rightly invoked the power under Section 154 of the Act to rectify the assessment order by considering the disclosure as a part of the book profit for the purpose of applying Section 115JB of the Act.

[10] On the other hand, learned advocate Mr. B. S. Soparkar for the respondent – assessee company, on caveat, submitted that the CIT(A) has rightly held that the amount of Rs.17 Crores cannot be added in the book profit under Section 154 of the Act as such issue is a debatable issue. In support of his submission, reliance was placed on the decision of the Hon'ble Delhi High Court in the case of **Commissioner of Income-tax vs. R.T.C.L. Ltd** reported in [2012] taxmann.com 434 (Delhi), wherein it is held that jurisdiction under

Section 154 of the Act is confined and restricted to rectification of errors and when the issue is debatable and in absence of any initiation or specific conclusion arrived at by the Assessing Officer as well as the Commissioner (Appeals), whether the issue was clear and that no debate or two views were possible. In similar facts, it was held that power under Section 154 of the Act for making addition on the basis of the book profit under Section 154JB of the Act could not have been invoked.

[11] Learned advocate Mr. Soparkar also placed reliance on the decision of the Hon'ble Calcutta High Court in the case of **Principal Commissioner of Income-tax vs. Lanshree Products and Services Ltd** reported in [2023] 150 taxmann.com 389 (Calcutta), wherein the Hon'ble Calcutta High Court, in similar facts, held relying upon the decision of the Hon'ble Supreme Court in the case of **T.S. Balaram, ITO vs. Volkart Brothers** reported in [1971] 82 ITR 50, that it was not open to the Income Tax Officer to go into the true scope of the relevant provisions of the Act in a proceeding under Section 154 of the Act.

[12] Considering the submissions made by the learned advocates

appearing for the parties and the facts of the case, we are in agreement with the reasoning given by the Tribunal for allowing the appeal filed by the assessee by deleting the adjustment made by the Assessing Officer and confirmed by the CIT(A) under Section 154 of the Act, whereby the surrendered income by the assessee was included in the book profit of the assessee as per Section 115JB of the Act and as such the action could not have been taken while invoking the power under Section 154 of the Act. The Tribunal has held as under:

“12. We are in agreement with the Id. Counsel for the assessee in this regard that it is surely not a clear case of the amount being invariably included in the book profits of the assessee on the basis of the facts before us. In the absence of any incriminating material found, substantiating the surrender made, the same cannot invariably be said to represent the profit of the assessee for disclosure to its shareholders. If the surrender was corroborated with some undisclosed asset or incriminating document found, revealing the nature and manner of earning the income surrendered, it necessarily represented profits which needed to be disclosed in the profit and loss account also for the benefit of shareholders of the company. But without any incriminating material and without any clue about the nature of the disclosure also, the same could not be said to invariably represent undisclosed income/profits of the assessee to be included in its

profit and loss account. The assessee at its discretion may include the surrender in its income for paying taxes thereon, but this fact ipsodixit will not mandate inclusion of the surrender in its Book Profits also.

Therefore it is not plain and simple that the surrender made during survey, on adhoc basis without any incriminating material found, was to be necessarily included in its profit and loss account/book profits. We agree with the Ld. Counsel for the assessee that to arrive at such a conclusion required a long drawn process of reasoning and debate.

For the above reasons therefore, we hold, that the noninclusion of surrendered income in the Book Profits of the assessee as per section 115JB of the Act, was not a patent error amenable to rectification u/s. 154 of the Act. The adjustment so made, therefore, is directed to be deleted.”

[13] The Hon’ble Delhi High Court in the case of **I.T.C.L. Ltd (supra)** has held that the book profits as declared by the assessee was in conformity and as per the provisions of parts II and III of the Schedule VI of the Companies Act, 1956 and there was nothing on record to suggest that the book profits were contrary to such provisions or not in consonance with such provisions. In view of the conclusion arrived at by the Tribunal that such inclusion of the disclosure made by the assessee company would require long

drawn reasoning and debate and therefore, when the issues and contentions being debatable on uncertainty, the Assessing Officer could not have invoked the power under Section 154 of the Act for rectification of the mistake apparent on record. The Tribunal, therefore, was right in observing that the action of the Assessing Officer as well as the CIT(A) under Section 154 of the Act was not warranted. We are, therefore, of the opinion that no question of law much less any substantial question of law would arise from the impugned order passed by the Tribunal. This appeal is accordingly dismissed.

(BHARGAV D. KARIA, J)

(NIRAL R. MEHTA, J)

CHANDRESH