

INCOME TAX : Commissioner was not justified in revising order and directing Assessing Officer to add decommissioning levy, interest on decommissioning fund, interest on R & M fund and interest on R & D fund to profit as per profit and loss account to arrive at book profit under section 115JB, particularly when in order passed by Commissioner, there was no mention as to under which category of Explanations (A) to (K) of section 115JB(2) these four items would fall

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[2021] 132 taxmann.com 100 (Bombay)

HIGH COURT OF BOMBAY

Commissioner of Income-tax, LTU

v.

Nuclear Power Corporation of India Ltd.*

K.R. SHRIRAM AND R.I. CHAGLA, JJ.

IT APPEAL NO. 1356 OF 2017†

SEPTEMBER 30, 2021

Section [115JB](#), read with section [263](#), of the Income-tax Act, 1961 - Minimum alternate tax (Computation of book profit) - Assessment year 2009-10 - Assessee, a Government of India enterprise, filed its return of income declaring total income as Nil under normal provisions and as per provisions of section 115JB - An order under section 143(3) was passed - Thereafter, Commissioner noted that while computing book profit under section 115JB Assessing Officer did not add decommissioning levy, interest on decommissioning fund, interest on R & M fund and interest on R & D fund to book profits and directed Assessing Officer to add same to profit as per profit and loss account to arrive at book profit under section 115JB - In order passed by Commissioner, there was no mention as to under which category of Explanations (A) to (K) of section 115JB(2), these four items would fall - Further, Tribunal, on appeal, had also observed that disputed four items were not part of list appearing in section 115JB and without identifying under which part of list disputed four items would fall, Commissioner could not have exercised revisionary powers - Whether Tribunal was justified in its decision - Held, yes [Para 5 to 6][In favour of assessee]

Suresh Kumar for the Appellant. K. Gopal, Jitendra Singh and Ms. Simran Hasija for the Respondent.

ORDER

1. The assessee *i.e.*, respondent Nuclear Power Corporation of India Ltd., is a Government of India enterprise. Respondent filed its return of income for assessment year 2009-10 declaring total income as NIL under normal provisions of the Income-tax Act, 1961 (the Act). The Book Profit as per the provisions of section 115JB of the Act was Rs. 28,003.83 Lakhs MAT (Minimum Alternate Tax) and amount payable under section 115JB of the Act was worked out to Rs. 3,172.83 Lakhs. Respondent has claimed TDS credit of Rs. 94.3 Lakhs. The return of income was processed under section 143(1) of the Act and notice dated 18-8-2010 under section 143(3) of the Act was issued. An order under section 143(3) of the Act was passed on 9-12-2011 wherein the addition of Rs. 109,31,36,711/- was made under

normal provisions of the Act. The Assessing Officer while computing the book profit under section 115JB of the Act did not add this amount of Rs. 109,31,36,711/- to the book profits. The breakup of this Rs. 109,31,36,711/- is as under :

Sl. No.	PARTICULARS	AMOUNT IN LAKHS (Rs.)
1.	Decommissioning levy	25,56,97,007
2.	Interest on Decommissioning Fund	50,02,87,862
3.	Interest on R&M Fund	10,46,52,546
4.	Interest on R&D Fund	23,24,99,296
	TOTAL	109,31,36,711

2. On 12th March, 2014 CIT-LTU (Large Tax Payer Unit) (hereinafter referred to as CIT) issued a notice to respondent calling upon respondent to show case as to why the amount of Rs. 109,31,36,711/- should not be added to the book profit. Respondent replied to the said show cause notice and after considering the response, CIT passed the order dated 26th March, 2014 exercising powers under section 263 of the Act and set aside the order dated 9th December, 2011 of the Assessing Officer. The Assessing Officer was also directed to add that amount of Rs. 109,31,36,711/- to the profit as per Profit and Loss Account to arrive at the book profit under section 115JB of the Act.

3. Aggrieved by this order of CIT, respondent preferred an appeal to the Income Tax Appellate Tribunal (ITAT). The ITAT *vide* its order dated 11th January, 2017 allowed the appeal filed by respondent. The ITAT held that nobody can travel beyond the line drawn by section 115JB of the Act. The disputed four items are not part of the list appearing in the said section and therefore there was no justification for CIT to use his revisionary powers in the case under consideration. Impugning this order of the ITAT, appellant has approached this court proposing the following questions of law to be framed.

SUBSTANTIAL QUESTION OF LAW

- i. "Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was right in holding that, the AO had applied his mind while passing the order u/s. 143(3) of the Act and after application of mind the amount of Rs. 109,31,36,711/- was not added in Book profits of the assessee computed u/s. 115JB of the Act ignoring the fact that there is no discussions in the Assessment order passed u/s. 143(3) of the Act with regard to addition of impugned amount in book profit u/s. 115JB of the Act?"
- ii. "Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was right in holding that, the act of the AO in dropping the proceedings initiated u/s 154 of the Act suggests that he had applied his mind in not adding the amount of Rs. 109,31,36,711/- in Book profits of the assessee computed u/s 115JB of the Act ignoring the fact that the remedial action for the loss of the Revenue has to be taken when the order is erroneous and prejudicial to the interest of the Revenue?"
- iii. "Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was right in deleting the addition of Rs. 109,31,36,711/- in book profit of the assessee computed u/s 115JB of the Act holding that the four items are not part of the list appearing in the section ignoring the fact that the amount of levies and interest on various funds transferred by the assessee to reserves in the Balance Sheet are clearly covered by clause (b) of the *Explanation* (1) to section 115JB also ignoring the decision of the Hon'ble Apex Court in the case of *Apollo Tyres Ltd. v. CIT* [255 ITR 273](#), wherein, the Hon'ble Apex Court has permitted the making of adjustments to

the net profit shown in the P&L Account on account of various items specified in the explanation to section 115JB of the Act?"

4. We have considered the order passed by the Assessing Officer, CIT as well as the ITAT. We see no reason to interfere and do not find any perversity in the order passed by the ITAT. Respondent had furnished all the documents called for by the Assessing Officer during the assessment proceedings. The Assessing Officer has applied his mind while computing the income under the normal provisions as well as under section 115JB of the Act. The Assessing Officer had issued notice under section 154 of the Act wherein he had asked respondent as to why remedial action should not be taken for computing income under the MAT provisions. Respondent had made detailed submissions in that regard, the method of computation of book profit had been provided as per the explanation below section 115JB(2) of the Act and based on that Assessing Officer concluded that no adjustment on account of decommissioning levy and interest thereon, interest on renovation and modernization fund and income interest on research and development would fall under any of the heads of items given in the explanation below sub-section (2) of section 115JB of the Act.

5. Therefore, in our view, the Assessing Officer has applied his mind while passing the original order and dropping the rectification proceedings. It is settled law that no revisionary jurisdiction would lie on which issues are debatable. It is also settled law that once the Assessing Officer has taken one of its two possible views it cannot be regarded as being erroneous. What we find is in the order passed by CIT, there is no mention anywhere as to under which category of the explanations A to K below sub-section (2) of section 115JB of the Act these four items mentioned above would fall. If the CIT felt that the Assessment Order passed by the Assessing Officer is erroneous, he ought to have identified under which category from A to K in the explanation below sub-section (2) of section 115JB of the Act these four items would fall. This is mainly because the Assessing Officer took a view that these four items would not fall under the items mentioned in the explanation. In fact, the ITAT has also observed that the disputed four items are not part of the list appearing in the section. Without identifying under which part of the list disputed four items form part of CIT could not have exercised its revisionary powers.

6. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.

The appeal is devoid of merits and it is dismissed with no order as to costs.

Pooja

*In favour of assessee.

†Arising out of order of Tribunal dated 11-1-2017.