



2024:DHC:9970-DB



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

% Judgement delivered on: 24.12.2024

+ **ITA 468/2024**

**THE PR COMMISSIONER OF
INCOME TAX-4 NEW DELHI**

..... Appellant

versus

M/S HESPERA REALITY PVT. LTD

..... Respondent

Advocates who appeared in this case

For the Appellant : Mr Shlok Chandra, SSC, Ms Naincy Jain
Ms Madhavi Shukla, JSCs and Mr Sushant
Pandey, Advocate.

For the Respondent : Mr Rohit Jain with Mr Aniket D. Agarwal
and Mr Abhishek Singhvi, Advocates.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

VIBHU BAKHRU, ACJ.

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter *the Act*) impugning the order dated 20.07.2023 (hereafter *the impugned order*) rendered by the learned Income Tax Appellate Tribunal (hereafter *the ITAT*) in ITA No.1400/Del/2020 captioned *The Dy. C.I.T., Circle-11(1), New Delhi v. M/s. Hespera Realty*



Private Limited.

2. The Revenue had preferred the said appeal (ITA No.1400/Del/2020) against the order dated 20.01.2020 passed by the learned Commissioner of Income Tax (Appeals) [hereafter the *CIT(A)*] in respect of the assessment year (AY) 2015-16, whereby the *CIT(A)* had held that the respondent (hereafter *the Assessee*) was entitled to exemption of an amount of ₹2,47,52,73,951/- under Section 10 (38) of the Act, which was denied by the Assessing Officer (AO).

3. According to the Revenue, the said decision is erroneous as the Long Term Capital Gains (hereafter *LTCG*), which the Assessee claimed were exempted under Section 10(38) of the Act, were not included in the Assessee's profit and loss account for the relevant period. Therefore, the said gains were excluded from the calculations of the book profits under Section 115JB of the Act. The *CIT(A)* found no merit in the aforesaid contention. The learned ITAT had found no fault with the decision of the *CIT(A)* and rejected the Revenue's appeal.

QUESTION OF LAW

4. Aggrieved by the same, the Revenue has preferred the present appeal and has projected the following question for consideration of this court:-

“Whether on the facts and circumstances of the case and in law, the Ld. ITAT was justified in deleting the addition of Rs.247,52,73,951/- made by the AO on account of disallowance of exemption of LTCG claimed u/s.10(38) of the Act without appreciating the finding and the reasoning



of the AO under normal provision?”

5. The Assessee is a company incorporated under the Companies Act, 1956. On 29.09.2015, the Assessee had filed its return of income for the AY 2015-16 declaring the loss of ₹1,03,42,687/-. The Assessee filed its revised return of income subsequently on 28.03.2017, reflecting the capital loss of ₹25,84,43,953/-, and a book loss of ₹90,74,679/- for the purpose of calculating Minimum Alternate Tax (MAT) under Section 115JB of the Act.

6. It is material to note that this court, by an order dated 08.05.2015 approved the Scheme of Arrangement under Section 391 to 394 of the Companies Act, 1956, whereby five other companies (Hespera Infrastructure Private Ltd., Hespera Real Estate Private Ltd., Hespera Construction Private Ltd., Hespera Properties Private Ltd., and Hespera Realcon Private Ltd) were merged with the Assessee with effect from the appointed date – being 01.08.2014. The said companies held shares in India Bulls Housing Finance Limited (IBHFL) After the appointed date, but during the financial year (FY) 2014-15, three of the aforesaid companies sold the shares of IBHFL resulting in LTCG in the hands of the said amalgamating company (the Assessee). Since the said amalgamating companies were merged with the Assessee with effect from 01.08.2014, the income earned from the said transaction of the sale of IBHFL shares, were required to be assessed in the hands of the Assessee. The sale of the said shares resulted in LTCG amounting to ₹2,80,62,54,440/-, which the Assessee claimed was exempted by virtue of Section 10(38) of the Act. Out of the aforesaid sum, the Assessee accounted for ₹33,09,80,449/- as profits, however, carried the balance amount of ₹2,47,52,73,951/- directly to



the capital reserve as the same represented the difference in the book value of investment in IBHFL held on 31.07.2014 and the book value of those shares held after 01.08.2014, that is, post the amalgamation date.

7. The AO was of the view that the said amount of ₹2,47,52,73,951/- was required to be added to book profits for the purposes of Section 115JB of the Act. Additionally, the AO held that the exemption under Section 10(38) of the Act was not available in respect of the said amount.

8. The income as determined by the AO for the purpose of determination of tax under the normal provision and for determination of MAT under Section 115JB of the Act, as set out in the assessment order dated 31.12.2017, is reproduced below:-

“13. In view of the above discussion, income of the assessee is computed Under normal provisions the Act:

Particulars	Amount (in Rs.)
Business income as shown in ITR	6497469
Less : Brought forward losses	6497469
Capital loss as declared by the assessee	25,84,43,953
Additions	
1. Disallowance of exemption of LTCG claimed u/s 10(38) as discussed above in para 12 above.	247,52,73,951
Total Assessed Income	221,68,29,998
Rounded Off	221,68,30,000

14. In view of the above discussion, book profit of the assessee is computed u/s 115JB of the Act:

Particulars	Amount (in Rs.)
Book loss as declared by the assessee	90,74,679
Additions:	
1. Profit on sale of shares as discussed in para 10 above	247,52,73,951
2. Expenses towards redemption of	28,54,45,463



mutual fund	
Total Assessed Income	275,16,44,735
Rounded Off	275,16,44,730”

9. Aggrieved by the assessment order, the Assessee preferred an appeal before the CIT(A) under Section 246A of the Act. The CIT(A) held that the entire amount of LTCG of ₹2,80,62,54,440/- was not liable to be included as income chargeable to tax by virtue of Section 10(38) of the Act. Accordingly, the CIT(A) deleted the disallowance of ₹2,47,52,73,951/-. However, the CIT(A) did not interfere with the AO's decision regarding the computation of book profits for the purpose of determination of MAT under Section 115JB of the Act.

10. The Revenue appealed the decision of the CIT(A) to exclude the capital gains from the income of the Assessee, by virtue of Section 10(38) of the Act, before the learned ITAT. The said appeal (ITA 1400/Del/2020) was rejected by the impugned order.

REASONS AND CONCLUSION

11. It is material to note that the issue regarding the determination of book profits for the purpose of Section 115JB of the Act and the question whether the amount of ₹2,47,52,73,951/-, which the Assessee had treated as capital reserves was required to be included in the book profits, were not involved in the Revenue's appeal before the learned ITAT (ITA No.1400/Del/2020). Thus, the said appeal as well as the present appeal is confined to the question whether the AO had erred in including ₹2,47,52,73,951/- in the income of the Assessee chargeable under the normal provisions of the Act.



12. It is contended on behalf of the Revenue that the Assessee is not entitled to claim any exemption under Section 10(38) of the Act in respect of LTCG that were not taken into account for computing book profits and income tax (MAT) payable under Section 115 JB of the Act.

13. Mr Chandra, the learned counsel appearing for the Revenue contended that the learned ITAT had failed to appreciate that the Assessee had taken the sale value and book value of the shares of IBHFL for the purpose of computing LTCG, which were exempted under Section 10(38) of the Act, but had not included the said gains as book profits for the purpose of computing profits under Section 115JB of the Act.

14. At the outset it is necessary to observe that the Revenue is conflating the question whether LTCG arising out of the sale of shares of IBHFL are required to be included as book profits for the purposes of Section 115 JB of the Act, and whether the same are liable to be excluded from the income chargeable to tax by virtue of Section 10(38) of the Act, under the normal provisions of the Act.

15. As noted above, the Revenue's appeal before the learned ITAT was confined to the question, whether the LTCG arising from the sale of investments in question were exempted under Section 10(38) of the Act. The Assessee had not succeeded before the CIT(A) in respect of the AO's decision to include gains from sale of shares for computing book profits. The CIT(A) did not interfere with the assessment order adding gains arising from the sale of shares of IBHFL to book profits as computed by the Assessee, for the purpose of Section 115JB of the Act.



16. The question, whether the Assessee is entitled to claim benefit under Section 10(38) of the Act, is required to be determined on the basis of a plain reading of the said provision.

17. Sub-section (38) of Section 10 of the Act is reproduced below:-

“Incomes not included in total income.

10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

.....

(38) any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust where—

- (a) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force; and
- (b) such transaction is chargeable to securities transaction tax under that Chapter:

Provided that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under Section 115JB.”

18. There is no cavil that the conditions as stipulated in clauses (a) and (b) of Section 10(38) of the Act are fully satisfied. However, it is contended on behalf of the Revenue that the income earned by way of LTCG from the shares of IBHFL, cannot be excluded from taxable income under Section 10(38) of the Act by virtue of proviso to sub-section. It is contended that the proviso expressly provides that the LTCG would be taken into account in computing book profits payable under Section 115 JB of the Act. Thus, the



fact that the Assessee had not included the sum of ₹2,47,52,73,951/- as book profits for the purpose of Section 115 JB of the Act, would disentitle it to any benefit under Section 10(38) of the Act.

19. The plain language of proviso to Section 10(38) of the Act does not support the Revenue's contention. The import of proviso is that notwithstanding that LTCG are excluded from the total income of an assessee under Section 10(38) of the Act, the same are required to be taken into account in computing a book profit and income tax payable under Section 115JB of the Act.

20. The legislative history of the said proviso would indicate that it was introduced by virtue of the Finance Act, 2006. The inclusion of the said proviso was corresponding to the amendments to the Explanation 1 of Section 115JB of the Act. By virtue of the Finance Act, 2006, the Explanation to Section 115JB of the Act was amended and expenditure incurred in respect of the income exempt under Section 10 of the Act (with the exceptions of Section 10(38) of the Act) was excluded for the purposes of calculation of book profits and MAT under Section 115JB of the Act. In other words, the expenditure incurred for earning such income as was exempt from taxation (excluded from taxable income) by virtue of Section 10(38) of the Act, was required to be accounted for as expenditure for determining the book profits. Correspondingly, income under Section 10(38) of the Act was also included as a part of the book profits but other incomes covered under Section 10 of the Act were excluded.

21. The relevant extract of the notes on clauses to the Finance Bill, 2006 is set out below:-



“The *Explanation* to sub-section (2) of section 115JB says that “book profit” means the net profit as shown in the profit and loss account for the relevant previous year, prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956, and as increased or reduced by certain adjustments as specified in the said *Explanation*. The aforesaid *Explanation, inter alia*, provides that the book profit shall be increased by the amount or amounts of expenditure relatable to any income referred to in section 10 (other than the provisions contained in clause (23G) thereof) if any such amount is debited to the profit and loss account and it shall be reduced by the amount of income referred to in the said section 10 if any such amount is credited to the profit and loss account.

It is proposed to omit the reference to “other than the provisions contained in clause (23G) thereof” from clause (f) and clause (ii) of the *Explanation* to section 115JB. The proposed amendment is consequential to omission of clause (23G) of section 10 vide clause 4 of the Bill.

It is further proposed to amend clause (f) of the aforesaid *Explanation* to provide that the book profit shall be increased by the amount or amounts of expenditure relatable to any income referred to in section 10 (excluding the income referred to in clause (38) thereof) and to also amend clause (it) of the said *Explanation* to provide that the book profit shall be reduced by the amount of income referred to in section 10 (excluding the income referred to in clause (38) thereof). It is also proposed to amend the provisions of sub section (38) of section 10 so as to provide that income by way of long-term capital gains of a company shall be taken into account in computing the book profit under section 115JB and for payment of income-tax under that



section.”

(emphasis added)

22. It is apparent from the above that the proviso to Section 10(38) of the Act was added by virtue of the Finance Act, 2006 to abundantly clarify that the income from capital gains on certain assets, which are excluded from the income under Section 10(38) of the Act, would nonetheless, be included in computing book profits for the purposes of Section 115JB of the Act.

23. Proviso to Section 10(38) of the Act cannot be read in the reverse to mean that if the gains are not included as book profits under Section 115JB of the Act, the same are liable to be included as income for the purposes of assessment to tax under the normal provisions, notwithstanding that the gains are required to be excluded from income chargeable to tax under Section 10(38) of the Act.

24. In view of the above, we find no fault with the decision of the CIT(A) as well as the learned ITAT in rejecting the Revenue’s contention. Clearly, no substantial question of law arises in the present appeal and same is, accordingly, dismissed.

VIBHU BAKHRU, ACJ

SWARANA KANTA SHARMA, J

DECEMBER 24, 2024

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