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**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'C' BENCH
MUMBAI BENCHES, MUMBAI**

BEFORE SHRI R K PANDA, AM & SHRI VIJAY PAL RAO, JM

**ITA No. 3449/Mum/2009
(Asst Year 2001-02)**

Century Textiles & Industries Ltd Century Bhavan Dr A B Road, Worli Mumbai	Vs	The Dy Commr of Income Tax Cir 6(2), Mumbai
(Appellant)		(Respondent)

PAN NO.AAACC2659Q

Assessee by S/Shri F Y Irani/Yogesh Thar/P R Toprai
Revenue by Shri Ajit Kumar Sinha /CIT-DR

PER R K PANDA, AM

This appeal filed by the assessee is directed against the order dated 30.3.2009 passed by the CIT-VI, Mumbai under section 263 of the Act for the Assessment Year 2001-02.

2 Facts of the case, in brief, are that the original assessment in the case of the assessee for Assessment Year 2001-02 was completed by the ACIT, Circle 6(2), Mumbai, u/s 143(3) of the I T Act on 22.3.2004 determining the book profit u/s 115JB of the I T Act at Rs.55,45,06,947/-. Thereafter, the case was reopened u/s 147 of the I T Act on the ground that book profit u/s 115JB of the I T Act had been under assessed. Subsequently, order u/s143(3)/147 was passed by the ACIT, Circle 6(2) Mumbai on 29.11.2006. On going through the said order dated 29.11.2006, it was noticed by the Id CIT that while completing the reassessment, the Assessing Officer has failed to make necessary disallowance in terms of clause (f) of explanation (1) to section 115JB of the Act in respect of

dividend income claimed exempt u/s 10 of the I T Act, which resulted in under assessment of book profit u/s 115JB of the I T Act. Therefore, the CIT was of the opinion that the order passed by the Assessing Officer u/s 143(3)/147 on 29.11.2006 was erroneous in so far as it is prejudicial to the interest of the revenue. Accordingly, proceedings u/s 263 were initiated by the CIT.

2.1 In response to the notice issued u/s 263, it was submitted that while completing the assessment u/s 143(3)/147 on 29.11.2006, the Assessing Officer had made two additions viz Rs. 6.87 crores in respect of arrears of depreciation and Rs. 1.35 crores in respect of revaluation reserve for the purpose of computing book profit u/s 115JB of the Act. Both these additions were subsequently knocked down by the CIT(A). It was submitted that in view of the CIT(A)'s order and the Supreme Court's decision in the case of CIT vs Apollo Tyres Ltd reported in 255 ITR 273, there was no case for disallowance in terms of clause (f) of explanation (1) to section 115JB of the Act in respect of dividend income claimed exempt u/s 10 of the I T Act for the purpose of computation of book profit u/s 115JB of the I T Act. Accordingly, it was submitted that since there was no error in the assessment order passed by the Assessing Officer; therefore, the CIT was not justified in initiating proceedings u/s 263.

2.2 However, the CIT was not convinced with the various explanations given by the assessee. He noted that the issues dealt in by the CIT(A) were altogether different. He was of the opinion that the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd (supra) has no relevance to the issue raised in the notice u/s 263. It was observed by the CIT that the issue raised in the notice u/s

263 relates to failure on the part of the Assessing Officer to make disallowance in terms of clause (f) of Explanation (1) to section 115JB of the Act in respect of dividend income claimed exempt u/s 10 of the I T Act. Since the Assessing Officer has failed to make necessary addition to the book profit u/s 115JB in terms of clause (f) of explanation (1) to sec. 115JB of the I T Act, therefore, the assessment order passed by him u/s 143(3)/147 of the I T Act on 29.11.2006 was erroneous in so far as it is prejudicial to the interest of revenue. Accordingly, he set aside the assessment order and directed the Assessing Officer to pass fresh assessment order computing book profit u/s 115JB of the Act after making necessary adjustment to the book profit in terms of clause (f) of explanation (1) to section 115JB of the Act and after giving reasonable opportunity of being heard to the assessee.

3 Aggrieved with such order of the CIT, the assessee is in appeal here before us with the following grounds;

"1. On the facts and circumstances of the case and in law, the Id CIT-VI, erred in invoking provisions of sec 263 of the I T Act and directing revision of the assessment order dated 29.11.2006 passed u/s 143(3) r.w.s 147 of the act by the ACIT Cir 6(2), on the alleged ground that the assessment order was erroneous and prejudicial to the interest of the revenue.

The appellant prays that order passed u/s 263 of the Act to be struck down as null and void-ab-initio.

2. On the facts and circumstances of the case and in law, the CIT erred in invoking provisions of section 263 of the Act and directing the revision of assessment order dated Nov 29, 2006 passed u/s 143(3) r.w.s147 of the Act without appreciating the fact that the CIT(A)/VI has deleted all the additions/deletions/adjustments made by the A?O in t he said order and thus, the order of the Cit(A) got merged with assessment order passed by the Assessing Officer u/s 143(3) r.w.s 147.

The appellant prays that order passed u/s 263 of the Act to be struck down as null and void-ab-initio.

3. On the facts and circumstances of the case and in law, the CIT erred in directing the Assessing Officer to compute book profit u/s 115JB of the Act after making necessary adjustment to the book profit in terms of clause (f) of explanation (1) to sec.115JB of the act.

The appellant prays that it be held that on the facts and circumstances, invoking section 263 for directing such disallowance is not in accordance with law and that no addition to the book profit u/s 115JB in terms of clause (f) of explanation (1) to sec. 115JB of the act is called for”

The assessee has also taken additional ground which reads as under:

“The order dated 30.3.2009 passed by the CIT u/s 263 of the I T Act is beyond the limitation period as the issue on which revision has been made by him is on an item which was not subject matter of reassessment proceedings and therefore, period of limitation begins from original assessment made on 22.3.2004.

4 The Id counsel for the assessee, at the time of hearing, submitted that the above additional ground relating to limitation period is filed in view of the decision of the Hon'ble Supreme Court in the case of CIT vs Alagendran Finance Ltd reported in 293 ITR 1(SC). He submitted that the additional ground relating to limitation goes to the root of the matter and the same does not require any fresh investigation of the facts. Referring to various decisions, he submitted that the additional ground should be accepted for adjudication.

4.1 The Id counsel for the assessee, at the outset drew the attention of the Bench to the chart giving the chronology of events which is as under:

S.No	Dated	Event
1	22.3.2004	Original order assed by the Assessing Officer u/s 143(3) of the I T Act assessing total income u/s 115JB at Rs. 55,45,06,947/- (adjustment made for provision for doubtful debts)
2	30.3.2005	Order passed by the CIT(A) in appeal filed against original order of assessment (addition made for provision for doubtful debts while computing book profits u/s 115JB upheld by CIT(A).
3	9.6.2005	Notice u/s 148 issued for reopening of assessment
4	9.6.2005	Reasons recorded for reopening stated that following two adjustments are required to be made while computing book profit u/s 115JB: i)Arrears of deprecation debited to P&L are required to b added to book profit; ii)Revaluation reserve credited to P&L account should not be reduced while computing book profits
5	29.11.2006	Asst order passed u/s 143(3) r.w.s 147 increasing book profits in respect of aforesaid two adjustments.
6	31.3.2006	Expiry of limited u/s 263(2) if limited reckoned from SI No.1 i.e. the original assessment order.
7	17.1.2008	Order passed by CIT(A) giving relief to the assessee in respect of aforesaid two adjustments made by the AO in his order passed u/s 143(3) r.w.s 147
8	25.3.2009	Notice u/s 263 issued by CIT stating that book profit computed by the AO u/s 155jB in his order passed on 29.11.2006 is erroneous and prejudicial to the interest of revenue as no disallowance of expenditure in respect of exempt income is made by the AO under clause (f) to explanation
9	30.3.2009	Order passed by CIT holding that order passed by the Assessing Officer on 29.11.2006 is erroneous and prejudicial to the interest of revenue as no disallowance of expenditure in respect of exempt income is made by the AO under clause (f) to explanation
10	31.3.2009	Expiry of limited u/s 263(2) if limited reckoned from SI No.5 i.e. the assessment order.
11	19..2009	Finance Act no.II got the assent from the President

4.2 Arguing the additional ground first the Id counsel for the assessee referring to the decision of the Hon'ble Supreme Court in the case of Alagendra Finance Ltd (supra) submitted that in a case of reassessment of items other than item sought to be revised by the CIT, the period of limitation commences from the date of original assessment order. Since in the instant case the reassessment was made on 29.11.2006 on the issues of arrears of deprecation debited to the P&L account and revaluation of reserve

credited to the P&L account for the purpose of calculation of profit u/s 115JB and since the order sought to be revised u/s 263 relates to addition of dividend income claimed exempt u/s 10 for the purpose of computation of book profit u/s 115JB, therefore, the order sought to be revised is the order passed u/s 143(3) on 22.3.2004. Therefore, the order passed u/s 263 on 30.3.2009 is barred by limitation.

4.3 In his alternate contention, he submitted that the original assessment order and the reassessment order are merged with the order of the CIT(A) dated 17.1.2008 and 13.3.2005 and therefore, the order passed u/s 263 for seeking to revise the reassessment order dated 29.11.2006 is void and bad in law.

4.4 The Id counsel for the assessee, referring to pages 1 to 19 of the paper book, drew the attention of the Bench to clause 32 at page 41 of the assessment order where the Assessing Officer had discussed the claim of interest u/s 36(1)(ii) of the Act attributable to investment made by the assessee company.

4.5 Referring to page 43 of the assessment order, he invited the attention of the Bench to the query raised by the Assessing Officer as to why part of the claim as aforesaid should not be disallowed on the ground that the relevant borrowings are attributable to the investments made in shares and on the ground that dividend on shares is an exempt income and that the expenditure in relation to such exempt income is not allowable as a deduction under the provisions of sec. 14A w.e.f.1.4.1962.

4.6 Referring to page 48 of the assessment order, he further invited the attention of the Bench regarding the findings of the Assessing Officer where he has mentioned the applicability of sec. 14A to the facts of the case.

4.7 Referring to page 52 of the assessment order, he drew the attention of the Bench that the Assessing Officer has discussed the computation u/s 115JB.

4.8 Referring to pages 59 to 61 of the assessment order, the Id counsel for the assessee, drew the attention of the Bench to the final computation made by the Assessing Officer determining the book profit u/s 115JB. Referring to the said computation, he submitted that the Assessing Officer has made addition on account of amount referred to clause (f) of Explanation (1) to sub.sec (2) of section 115JB.

4.9 Referring to the copy of the order of the CIT(A) against the order passed by the Assessing Officer, he drew the attention of the Bench to para 17.6 at page 23 of the order and submitted that the issue relating to disallowance of interest u/s 36(1)(ii) was decided by the CIT(A) wherein he has given part relief to the assessee.

4.10 Referring to page 91 of the paper book, the Id counsel for the assessee drew the attention of the Bench to the notice dated 9.6.2005 issued u/s 148. Referring to the reasons for reopening of the assessment at page 92, he submitted that the reasons for reopening of the assessment u/s 147 of the Act was on account of computation of book profit u/s 115JB due to reduction of arrears of depreciation amounting to Rs. 6,86,82,986/- and revaluation reserves of Rs.1,35,09,886/-.

4.11 Referring to the order passed u/s 143(3)/147, a copy of which is placed at pages 93 to 100 of the paper book, he submitted that the Assessing Officer has calculated the revised book profit at Rs. 63,66,99,819/- as against Rs. 55,45,06,447/- determined by him in the order dated 22.3.2004.

4.12 Referring to the decision of the Hon'ble Bombay High Court in the case of Ashok Buildcon Ltd vs ACIT & another reported in 325 ITR 574 (Bom) and the decision of the Hon'ble Supreme Court in the case of CIT vs Alagendran Finance Ltd reported in 293 ITR 1(SC), he submitted that in the case of revision of the assessment of items other than the items sought by the CIT, the period of limitation begins from the original assessment and not from reassessment in which the items was not dealt with. The doctrine of merger does not apply to such order.

5 In his other alternate contention, he submitted that both the original order and the reassessment order are beyond the reach of the CIT since both the orders were merged with the order of the CIT(A) dated 30.3.2005 and 17.1.2008. For this proposition, he relied on the following decisions:

- i) Marico Industries Ltd vs ACIT 115 TTJ 497 (Mum)
- ii) Smt Sujata Grover vs DCIT 74 TTJ 347 (Del)
- iii) Sonal Garments vs JCIT 95 ITD 363 (Mum)

5.1 He submitted that the order passed by the Id CIT u/s 263 is based on presumption and assumption that there is expenditure relatable to exempt income. The CIT, without arriving at the conclusion that there was in fact expenditure relatable to exempt income could not have directed the Assessing Officer to make addition in terms of clause (f) of Explanation (1) to sec. 115JB of

the Act. For this proposition, he relied on the decision of the Delhi Bench of the Tribunal (Third Member) in the case of Wimco Seedlings Ltd vs DCIT reported in 107 ITD 267 at page 268. (Delh) (TM).

5.2 Referring to the decisions, reported in 104 ITR 490; 192 ITR 547; 207 ITR 108 & 236 ITR 156 he submitted that the Tribunal cannot support the order of the CIT on any other ground

5.3 Referring to the decisions of the Hon'ble Supreme Court in the case of Malabar Industrial Company vs CIT reported in 243 ITR 83 (SC) and CIT vs Max India reported in 295 ITR 288 , he submitted that when the Assessing Officer adopts one of the two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view, with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue, unless the view taken by the AO is unsustainable in law. He accordingly submitted that the order of the CIT passed u/s 263 should be quashed.

5.4 The Id DR, on the other hand, submitted that jurisdictional issue was never before the CIT. While supporting the order of the CIT, the Id DR submitted that the CIT has not at all passed the order based on presumption and surmises and in fact he has quantified the amount of disallowance u/s 14A attributable to such exempted dividend income. He submitted that the decision of the jurisdictional High Court in the case of Godrej & Boyce Mfg P Ltd vs ACIT reported in 328 ITR 81 is binding on the assessee as well as the revenue and the decision of the Third Member in the case of Wimco Seedlings Ltd (supra) is not applicable.

6 The Id counsel for the assessee, in his rejoinder submitted that the assessee can always raise a legal issue at any point of time in the shape of additional grounds in view of the decision of the Hon'ble Supreme Court in the case of NTPC reported in 229 ITR 383. He also relied on the decision of the Hon'ble Supreme Court in the case of Jute Corporation of India reported in 263 ITR 245.

6.1 After hearing both the sides and in view of the decision of the Hon'ble Supreme Court in the case of NTPC Ltd reported in 229 ITR 383 and in the case of Jute Corporation of India Ltd reported in 187 ITR 688, the additional ground raised by the assessee is admitted for adjudication.

7 We have considered the rival submissions made by both the parties, perused the orders of the authorities below and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the assessee, in the instant case has filed the return of income on 30.10.2001 declaring total income of Rs. 47,71,76,553/- u/s 115JB of the Act since as per the computation of income under other provisions of Income Tax Act, there was a gross loss of Rs.12,83,58,029/-. There is also no dispute to the fact that the Assessing Officer completed the assessment u/s 143(3) on 22.3.2004 determining the total income u/s 115JB at Rs. 55,45,06,947/- after making adjustments for provisions of doubtful debts. There is also no dispute to the fact that the CIT(A) vide order dated 30.3.2009 has upheld the addition made on account of provisions for doubtful debts for the purpose of computation of the book profit u/s 115JB . There is also no dispute to

the fact that the Assessing Officer issued notice u/s 148 on 9.6.2005 for reopening of the assessment on the ground that the following two adjustments are required to be made while computing the book profit u/s 115JB:

- i) Arrears of depreciation debited to P&L are required to be added to book profit;
- ii) Revaluation reserve credited to P&L account should not be reduced while computing book profits

7.1 We find the assessment order was passed u/s 143(3)/147 increasing the book profits in respect of the aforesaid two adjustments on 29.11.2006. We find the CIT(A) vide order dated 17.1.2008 gave relief to the assessee in respect of the aforesaid two adjustments made by the Assessing Officer u/ 143(3)/147. Now, The CIT issued notice u/s 263 on the ground that the book profit computed by the Assessing Officer u/s 115JB in his order dt 29.11.2006 is erroneous and prejudicial to the interest of revenue as no disallowance of expenditure in respect of exempt income has been made by the Assessing Officer under clause (f) of explanation (1) to sec. 15JB. Accordingly in the order passed u/s 263 on 30.3.2009, the CIT held that the order passed by the Assessing Officer on 29.11.2006 is erroneous in so far as it is prejudicial to the interest of revenue as no disallowance of expenditure in respect of exempt income is made by the Assessing Officer under clause (f) of explaining (1) to sec. 115JB of the Act. In our opinion, the issue stands covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of Alegendran Finance Ltd (supra) and the decision of the jurisdictional High Court in the case of Ashok Buildcon Ltd (supra).

7.2 We find. In the case Alagendran Finance Ltd (supra) the assessment for the AYs 1994-95, 1995-96 and 1996-97 were completed in 1997 and 1998. In

the orders of assessment, the assessee's claim relating to "lease equalisation fund" was accepted. Thereafter, orders of reassessment were initiated in respect of three other items but not the item relating to "lease equalisation fund" and reassessment were made. Thereafter, the Commissioner by an order dated 29.3.2004, initiated revision proceedings only in relation to the item 'lease equalisation fund'. The Tribunal held that the revision proceedings were barred by limitation as they were initiated more than four years after the original assessment, which was upheld by the Hon'ble High Court. On further appeal, the Hon'ble Supreme Court has held as under: (*short note*)

"Affirming the decision of the High Court, that the Commissioner had sought to revise only that part of the order of assessment which related to Lease Equalisation Fund; but the proceedings for reassessment had nothing to do with that item of income. The doctrine of merger did not apply in a case of this nature; the period of limitation commenced from the dates of the original assessments and not from the reassessments since the latter had not had anything to do with the lease equalisation fund. This was not a case where the subject-matter of reassessment and the subject matter of the assessment were the same.

{CIT vs Shri Arbuda Mills Ltd 231 ITR 50 (SC) relied on CWT vs A KThanga Pillai 252 ITR 260 (Mad) approved.}

There may not be any doubt or dispute that once an order of assessment is reopened, the previous under assessment will be held to be set aside and the whole proceedings would start afresh, but that would not mean that even when the subject matter or reassessment is distinct and different, the entire proceedings would be deemed to have been reopened.

Explanation (c) appended to sub-sect (1) of sec 263 of the I T Act, 1961 which deals with the power of the Commissioner in revision, is clear and unambiguous, as in terms thereof the doctrine of merger applies only in respect of such items which were the subject matter of appeal and not in respect of those were not.

Decision of the Madras High Court affirmed."

7.3 We find, the Hon'ble jurisdictional High Court in the case of Ashok Buildcon Ltd (supra) following the decision of the Hon'ble Supreme Court in the case of Alagendran Finance Ltd (supra) held that where an assessment has been reopened u/s 147 of the I T Act, 1961 in relation to a particular ground or in relation to certain specified grounds and, subsequent to the passing of the order of reassessment, jurisdiction u/s 263 is sought to be exercised with reference to issues which did not form the subject of the reopening of the assessment or the order of reassessment, the period of limitation provided for in sub-sec. (2) of sec. 263 would commence from the date of the order of assessment and not from the date on which the order reopening the reassessment had been passed. In respect of issues which did not form the subject matter of the reassessment proceedings u/s 143(3) r.w.s 147 limitation would commence with reference to the original order of assessment.

7.4 Since in the instant case, the original order was passed on 22.3.2004 u/s 143(3) of the I T Act and since the reassessment notice was issued for the purpose of adding the arrears of depreciation debited to P&L account and the revaluation reserves credited to P&L account to be reduced while computing book profit and since the order of the CIT relates to non disallowance of expenditure in respect of exempt income under clause (f) to Explanation(1) of sec 115JB; therefore, in view of the decisions cited above, the period of limitation provided for in 263(2) would commence from the date of original assessment which, in the instant case is 22.3.2004. Since the order of the CIT u/s 263 is dated 30.3.2009, therefore, the same is barred by limitation. Since the assessee succeeds on the additional ground the other grounds being academic in nature are not being adjudicated.

8 In the result, the appeal filed by the assessee is allowed

Order pronounced on the 6th day of April 2011.

Sd/-

Sd/-

(VIJAY PAL RAO) Judicial Member	(R K PANDA) Accountant Member
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Place: Mumbai : Dated: 6th, April 2011
Raj*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai