

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA**

Before **Shri Mahavir Singh, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.550/Kol/2010 Assessment Year :2003-04
--

Apeejay Shipping Ltd., 15, Park Street, Kolkata-700001 [PAN No.AADCS 7605P]	V/s.	DCIT, Central Circle-III, 18, Rabindra Sarani, Kolkata-700 001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Manish Tiwari, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri G Mallikarjuna, CIT-DR
सुनवाई की तारीख/Date of Hearing	18-02-2016
घोषणा की तारीख/Date of Pronouncement	19-04-2016

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Appeals), Central-I, Kolkata in appeal No.414/CC-III/CIT(A),C-I/08-09 dated 09.12.2009. Assessment was framed by DCIT Circle-III, Kolkata u/s 263/143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 30.12.2008 for assessment year 2003-04. Grounds raised by assessee are as under:-

"1. That on the facts and in the circumstances of the case, Ld. CIT(A) is wrong in dismissing ground No. 1 to 4 wherein it was contended that order passed by AO U/s 263 dt. 2803.2008 was not maintainable for want of proper application of mind and / or without a speaking order.

2. (a) V ground No. 5 by referring to I.T.A.T's order in IT No. 829/Kol/2008 dt. 23/01/2009, which is irrelevant and extraneous.

(b) That on the facts and in the circumstances of the case, Ld. CIT(A) is wrong and unjustified in confirming the action of Assessing Officer who determined the book profit without considering amount transferred to reserve specified U/s. 33AC as contemplated in clause (b) of Explanation 1 to Section 115JB of IT Act, 1961.

3. That on the facts and in the circumstances of the case, Ld. CIT(A) is wrong in dismissing the assessee's appeal without considering that the order U/s 263 of the Income Tax Act, 1961 directing re-adjudication and re-computation of income is sub judice before the Hon'ble Calcutta Hon'ble High Court."

2. Solitary issue raised by assessee in its appeal is that Ld. CIT(A) erred in deleting the deduction claimed in clause (b) Explanation to Section 115JB of the Act.

3. The facts in brief are that assessee a Limited Company registered under the Companies Act 1956 and engaged in the cargo shipping business. The original assessment was framed by the Assessing Officer at the returned income under the normal provisions of the Act and also under the Minimum Alternate Tax (MAT for short) provisions as specified under section 115JB of the Act. In the original assessment the book profit of Rs.6,14,13,839/- was shown but the entire profit was transferred to reserve account in terms of the provisions of Section 33AC of the Act, so the book profit became nil for the purpose of tax calculation u/s 115JB of the Act. However the Id. CIT u/s 263 of the Act found that the assessment made by the AO is erroneous and prejudicial to the interest of revenue in view of the deduction claimed by the assessee u/s 33AC of the Act. As per the Id. CIT there was no profit under the normal provisions of IT Act so the assessee was not entitled to claim the deduction in clause (b) of explanation to section 115JB of the Act for the reserve as specified u/s 33AC of the Act. Accordingly the AO frame the assessment under section 263/143(3) of the Act and taxed the book profit under section 115JB of the Act.

4. Aggrieved, assessee preferred an appeal to Id. CIT(A) who has upheld the action of AO by observing as under:-

"5. I have carefully considered the submission of the L.d A.r. All the grounds taken by the appellant is against the calculation of book profit of Rs.6,14,13,839/- u/s 115JB of the Ac. In this case the original order u/s. 143(3) was passed on 2.02.2006 and the book profit u/s. 115JB was calculated at Nil. Subsequently the case was set aside by CIT(Central1) Kolkata under section 263 after holding that omission to invoke provision of section 115JB by the A.O had led to underassessment of income of Rs.6,14,13,839/-. The detail reason and calculation of the same was given in the said order and it was held that deduction u/s. 33AC will be limited to the amount of profit as calculated in accordance with the provision of the Act. Further since there was no profit chargeable under the income tax Act, the assessee was not entitled to deduction u/s. 33AC of the Act, hence the book profit in this case u/s. 115JB would be the net profit i.e. Rs.6,14,13,839/-. Subsequently order under section 263/143(3) was passed by the AO determining book profit at Rs.6,14,13,839/- after giving proper opportunity to the assessee in the said claim of deduction u/s. 33AC could not be established. Hence there is no merit in the ground no 1 to 4 taken by the appellant, hence the same is dismissed accordingly.

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us.

Shri Manish Tiwari, Ld. Authorized Representative appearing on behalf of assessee and Shri G. Mallikarjuna, Ld. Departmental Representative appearing on behalf of Revenue.

5. Before us the learned AR submitted the paper book which is running pages from 1 to 32 and stated that the AO has disallowed the deduction claimed by the assessee under section 115JB AC of the Act for the reserve as specified under section 33AC of the Act for computing the profit under the MAT provisions by recording that this disallowance is consequential to the order passed by the Id. CIT u/s 263 of the Act on dated 28th March 2008. However, from the order passed u/s 263 of the Act, it is clear that no such direction was given to the AO by the Ld. CIT. The AO was directed for fresh assessment in terms of order u/s 263 of the Act. So in the instant case, the

AO has not made the fresh assessment but just made the disallowance of the deduction claimed by the assessee u/s 33AC of the Act in spite of the fact that the notices u/s 143(2) and 142(1) were issued to the assessee. So the present order of the AO is bad in law and needs to be quashed. Besides the above, the Ld. AR also submitted that clause (b) of Explanation to Section 115JB excludes for making the addition of the reserve as specified u/s 33AC of the Act. Accordingly the lower authorities have not correctly applied the provisions of Section 115JB of the Act for working out the book profit. On the other hand the learned DR vehemently relied on the order of the authorities below.

6. From the aforesaid discussion, we understand that the assessee has declared the income at Rs.-7,04,41,568/- under the normal provisions of Income Tax Act. However the assessee declared the book profit of Rs. 6,14,13,839/- u/s 115JB of the Act. At the same time the assessee claimed deduction of the aforesaid book profit by transferring the same to a reserve account as a specified u/s 33AC of the Act by virtue of the clause (b) to Explanation 115JB of the Act. So the profit u/s 115JB of the Act was made nil. However the lower authorities disallowed the deduction claimed under section 115JB of the Act for the reserve as a specified under section 33 AC of the Act on the ground that there was no profit chargeable under the income tax act under its normal provisions. Accordingly the book profit of Rs.6,14,13,839/- was brought to the net of tax u/s 115JB of the Act. Now the question before us is that when there is a loss under the normal provisions of the Income Tax Act but profit under the provisions of MAT then whether the book profit can be increased by the amount transferred to the reserve account as specified u/s 33 AC of the Act. At the outset, we find that similar question was also raised by the assessee before the Hon'ble jurisdictional High Court in its own case in **ITA 163 of 2009** where the issue was decided to against the assessee. The relevant extract of the order is reproduced below :

“Therefore, a reserve created by the assessee from out of the profits derived from the business of operation of ships is alone a reserve contemplated by Section 33AC and that lone is saved by clause (b) of

explanation 1 to Section 115JB. But if it is a reserve not created out of the profits derived from the operation of the ships then that reserve does not have any claim for any distinction nor does it come within the purview of section 33AC. The assessee in this case did not make any profit. Therefore there was no case for creation of any reserve. Even assuming that on the basis of section 349 and 350 of the Companies Act, the assessee had in computing its depreciation, claimed depreciation at a lower rate and on that basis there was a book profit of Rs.6,14,13,839/-, the fact remains that the assessee was entitled to a higher rate of depreciation under the Income Tax Act. Once that is taken into account, the figure comes at a loss of Rs.7,04,41,568/-. In the absence of profit within the meaning of IT Act there could be no valid basis for creation of a reserve under section 33AC.

If an assessee chooses to make any such reserve in the absence of profit, and brands sit to have been made under section 333AC, that does not qualify for the protection under clause (b) of explanation 1 to section 115JB.

On the top of that, even assuming for the sake of arguments that such a reserve could be created out of the book profit of a sum of Rs.6,14,13,839 as contended by Mr Bajoria, the reserve could not have been created for the entire sum under Section 33AC. The reserve could have only been created for 50% of the aforesaid sum. It is, therefore, clear that the alleged reserve had no claim to legitimacy.

We are, as such, of the opinion that the views expressed by the learned Tribunal are unexceptionable.

The question formulated, at the tem of admission of the appeal, is accordingly answered against the assessee.”

From the aforesaid decision of Hon'ble jurisdictional High Court we are of the view that in the instant case, the assessee has filed return of income declaring loss for an amount of Rs.7,04,41,568/-, so the question for creating the reserve u/s 33AC does not arise. As per Section 33AC of the Act, there shall be allowed deduction of an amount not exceeding 50% of the profit derived from the business of operations of ships computed under the head “profit and gains” of business or “profession” and before making any deduction under such section, as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve

account. As there is no profit under the normal provisions of income tax then the question of creating the reserve under section 33AC does not arise. Accordingly relying on the aforesaid judgment of this Hon'ble jurisdictional High Court, we have no hesitation in upholding the order passed by Ld. CIT(A). Hence, this ground of assessee's appeal is dismissed.

7. In the result, assessee's appeal stands dismissed.

Order pronounced in the open court 19/04/2016

Sd/-
(Mahavir Singh)
(Judicial Member)
Kolkata,

Sd/-
(Waseem Ahmed)
(Accountant Member)

*Dkp

दिनांक:- 19/04/2016 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Apeejay Shipping Ltd., 15, park Street, Kolkata-700 001
2. प्रत्यर्थी/Respondent-DCIT, Central Circle-III, 18 Rabindra Sarani, Kolkata-01
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।