

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “C”,MUMBAI
BEFORE SHRI P.K. BANSAL, VICE-PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA No.3747/Mum/2017 (Assessment Year- 2012-13)

M/s Powerica Limited 9 th Floor, Bakhtawar, Nariman Point, Mumbai-400021 PAN: AAACP3812E	Vs.	CIT (LTU), 29 th Floor, World Trade Centre I, Cuffe Parade, Mumbai-400005.
(Appellant)		(Respondent)

Assessee by : Shri Vijay Mehta with
Govind Javeri (AR)

Revenue by : Shri H.N. Singh (CIT-DR)

Date of hearing : 07.08.2017

Date of Pronouncement : 11.10.2017

Order Under Section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee under section 253 of Income Tax Act (the Act) is directed against the order of Ld. Commissioner of Income-Tax (LTU), Mumbai (hereinafter referred as ld. Commissioner) dated 27th March 2017. The assessee has raised following grounds of appeal;

- 1. On the facts and circumstances of the case and in law, the order passed under section 263 of Income tax Act 1961 by learned Commissioner of income tax dated 27 March 2017 is arbitrary, erroneous, invalid and bad in law.*
- 2. On the facts and circumstances of the case and in law, the learned Commissioner of income tax erred in making adjustment of Rs.3,19,30,000/-in respect of forex loss on ECB Loan, in computing book profit under section 115JBof the Act*

3. *The appellant craves leave to add, alter or amend the above grounds of appeal at or before the time of hearing.*
2. Brief facts of the case are that Assessee Company is manufacturer of Diesel Generators filed its return of income for relevant assessment year on 20 September 2012. Subsequently, a revised return was filed on 20 March 2014 declaring total income of Rs. Nil under normal provision of and book profit of Rs. 94,66,55,426/-under section 115JB. The assessee revised the return of income for claiming exchange rate fluctuation loss on account of External Commercial Borrowing ('ECB') loans. The assessment was completed on 15 January 2015 under section 143(3). The assessing officer while passing the assessment order allowed the forex loss of Rs. 3,19,30,000/- on account of ECB availed. Subsequently, the order of assessing officer was revised by learned Commissioner vide order dated 27 March 2017. While revising the assessment order learned Commissioner observed that the Mark to Market loss booked by the assessee company is broadly a Notional loss and is, at the best, a contingent liability which can neither be claimed in the book profit nor in the computation of income. Thus, allowance of such item is erroneous and prejudicial to the interest of revenue. The learned Commissioner passed the following order;

"I have carefully considered the issue. While computing the income under income tax Act, the deviation of accounting standard from the provision of Income tax Act has to be factored. Section 43A of the

Income tax Act prescribes how the changes in rate of exchange of currency has to be treated and the provisions has to be applied while computing the income irrespective of the provisions of account the standard. Further, the CBDT has issued instruction No.3 of 2010 after considering the judgement of honourable Supreme Court in Woodward Governor India (P) Limited. The said instruction is binding on the income tax authorities. Considering this, the order passed by assessing officer is considered erroneous and has prejudicial to the interest of revenue and AO is directed to recompute the income by disallowing such notional loss resulting from a restatement of outstanding liabilities/receivable. MAT liability will also be recomputed accordingly.

The learned Commissioner directed the assessing officer to compute the income by disallowing such Notional loss. Thus, aggrieved by the order of Commissioner the assessee has filed present appeal before the tribunal.

3. We have heard learned AR of the assessee and learned DR for the revenue and perused the material available on record. The learned AR of the assessee argued that the assessee availed loan from Citi Bank of US \$2,00,000/- for financing the installation of windmill at Gujarat. The said loan was valued based on the exchange rate prevailing on the last date of financial year and the assessee claimed the consequential loss incurred as per Accounting Standard-11 (AS-11). The deduction was claimed as per the assessee pertained to the existing loan liability as per the accounting policy followed by the assessee. During the assessment proceedings the assessing officer raised query related to foreign exchange loss on ECB

loan claimed in revised return of income. The assessee furnished all details related with the issue. The assessee further filed the details of exchange rate fluctuations entries as on 31 March 2012 along with the Note on foreign exchange fluctuation copies of which are placed on record. The assessing officer examined the reply and details furnished on question raised by assessing officer. The assessing officer allowed the forex loss of Rs. 3,19,30,000/- on account of ECB loan. The revenue has no right to go behind the assessment. The profit has been disclosed in accordance with the provisions of Companies Act, financial statement as well as Form 29 B are dully certified by CA. The assessing officer has limited power of making increases and reduces as provided for in Explanation to section 115. The assessing officer after considering the entire facts and the submissions which were substantiated along with documentary evidences, taken one of the possible view on the claim of the assessee. The order passed by assessing officer is not erroneous and prejudicial to the interest of revenue. The order passed by Commissioner under section 263 is liable to be set-aside. In support of his submission the learned AR of the assessee relied upon the following decisions;

- (1) Apollo Tyres Ltd Vs CIT (255 ITR 273 SC)
- (2) CIT Vs Adbhut Trading Company Private limited(33 ITR 94 Bom)
- (3) Pr CIT Vs Bhagwan Industries Ltd (ITA No.436of 2015 dated18.07.2017)
- (4) Bharat Serums & Vaccines Ltd Vs ACIT (ITA 3091/M/2012)

- (5) Malabar Industrial Co Ltd versus CIT (243 ITR 83 SC)
 - (6) CIT versus Max India (203 ITR 108 Bom)
 - (7) CIT versus Gabriel India (203 ITR 108 Bom)
 - (8) CIT versus Arvind Jewellers (290 ITR 689 Gujarat)
 - (9) CIT versus Development Credit Bank Ltd(323 ITR 206 Bombay)
 - (10) CIT versus Vikas Polymers (194 TAXMAN 57 Delhi) and
 - (11) CIT versus Anil Kumar Sharma(194 TAXMAN 504 Delhi)
4. On the other hand the learned AR for the revenue supported the order of branded Commissioner. It was argued that the assessing officer has not examined the forex loss. The assessing officer was directed by learned Commissioner to recompute the income by disallowing such notional loss. The learned the AR for revenue argued that order passed by learned Commissioner the justified.
5. We have considered the rival submission of parties and have gone through the orders of authorities below. We have also considered the various decision relied by learned AR of the assessee. For appreciation of facts and the "Section 263(1) in The Income- Tax Act:

“(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he, may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.....”

The sum and substance of the above reproduced section 263(1) can be summarized in the following points:

- (1) The Commissioner may call for and examine the record of any proceeding under the Act;
- (2) If he considers that the order passed by the AO is
 - (i) erroneous; and (ii) is prejudicial to the interest of Revenue;
- (3) He has to give an opportunity of hearing in this respect to the assessee; and
- (4) He has to make or cause to make such enquiry as he deems necessary;
- (5) He may pass such order thereon as the circumstances of the case justify including, (i) an order enhancing or, (ii) modifying the assessment or (iii) cancelling the assessment and directing a fresh assessment.

Now in the light of above words, we are required to examine as to whether the order of the Id. CIT is a valid order in the light of the above stated points/provisions of section 263 of the Act.

6. We have seen that during the assessment proceedings the assessing officer required the statement of exchange rate fluctuations as on 31 March 2012 from the assessee. The assessee furnished the statement of Exchange rate as on 31 March 2012 and the Note on account of Foreign Exchange Fluctuation. In the said note the Auditor has explained that total of Rs. 5,89,26,400/- includes exchange rate fluctuation on account of fluctuation on the payments made in the normal course of business such

as buyers credit, payment to foreign creditors, payment received from export realisation for Rs. 2,69,96,400/- and Rs. 3,19,30,000/- on account of ECB loan availed from Citibank of US Dollar 20,000,000/-. ECB from Citibank was availed for financing of installation of wind mill at Gujarat. The balance part of Rs. 2,69,96,400/- pertains to the normal business operations and is normal business expenditure. Thus, the revised return was filed after incorporating the collection, revised return of income on 20 March 2014. The assessing officer accepted the contention of assessee while passing assessment order on 15 January 2015 under section 143(3). The Id Commissioner revised the order of the assessing officer vide order dated 27.03.2017. The Id Commissioner issued notice under section 263 dated 11.11.2016 in the notice it was contended that forex loss of Rs.3,19,30,000/- was required to be capitalized as per Accounting Standard-11 (AS-11) and should be disallowed. In response to the notice under section 263 of income tax act the assessee filed its reply before the learned Commissioner. In the reply the assessee is specifically contended that para 10 of old Accounting Standard-11 (AS-11) has been deleted in the amended AS-11 effective from first April 2003. Hence, exchange difference arising on repayment of liabilities incurred for acquiring fixed assets should also be recognised as income or expenses in the period in which they arise. Therefore, exchange rate difference of Rs. 3,19,30,000/- on account of ECB loan taken for acquiring windmill is charged to profit

and loss account. The assessee further contended that as per section 115JB only certain adjustments (which were referred in the reply) are permitted to arrive book profit in the profit arrived as per Audited accounts as per Schedule VI of Companies Act 1956. Thus, the assessee explained that accountant treatment given for loss on exchange fluctuation on ECB loan taken for acquiring wind mill turbine mill is as per accounting standard prescribed and no adjustment can be made in the book profit under section 115JB. The contention of the assessee was not accepted by Id Commissioner. The Id Commissioner while revising the order concluded that any deviation from the accounting standard from the provision of the Income tax Act has to be factored. Section 43A prescribed how the changes in the rate of exchange of currency has to be treated and the provision to be applied while computing the income irrespective of the provision of accounting standard and directed the AO to recompute the income by disallowing such notional loss resulting from restatement of outstanding liability. Minimum Alternative Tax (MAT) liability will also be recomputed accordingly.

7. The Hon'ble jurisdictional High Court in Apollo Tyres Ltd *supra* while considering the question if the assessing officer while assessing a company for income tax under section 115 of income tax act can questions the correctness of the profit and loss account prepared by assessee company and certified by the statutory auditors of the company

as having been prepared in accordance with the requirement of part II and III of schedule VI to the companies act. The Hon'ble jurisdictional High Court held ;

“That sub-section (1A) of section 115 does not empower the assessing officer to embark upon fresh inquiry with regard to the entries made in the books of account of the company. The said sub-section, as a matter of fact mandate the company to maintain its account in accordance with the requirement of the Companies Act which mandate, according to us is bodily lifted from the Companies Act into the Income tax Act for limited purpose of making the said accounts so maintained as a basis for computing the companies income for levy of Income tax Act. Beyond that, we do not think that the said sub-section empower the authority under the income tax act to probe into the account accepted by authorities under the companies act. If the statute mandate that income prepared in accordance with the companies act shall be deemed income for the purpose of section 115 of the Act, then it should be that income which is acceptable to the authorities under the Companies Act. There cannot be two income one for the purpose of Companies Act and another for the purpose of Income tax both maintained under the same Act.

.....

Therefore, we are of the opinion, the assessing officer while computing the income under section 115J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The assessing officer thereafter has the limited power of making increase and reduction is provided for the explanation to the said section. To put it differently, the assessing officer does not have the jurisdiction to go behind the net profit shown in the profit and

loss account except to the extent provided in Explanation to section 115J.

8. Similar view was taken in case of CIT Vs Adbhut Trading Company Private Limited *supra* and further in Bhagwan Industries Ltd. Further we have seen that Mumbai Tribunal in case of Bharat Serums & vaccines Ltd (supra) held that when the assessee claimed loss incurred due to revaluation of open forward contracts, which the AO disallowed the same and also recomputed book profit by making consequential addition pursuant to this disallowance by relying CBDT instruction date 23.03.2010. However, the Tribunal allowed the loss as claimed by the assessee by considering the decision of High Court in D Chetan & Co (ITA No.278 of 2014 dated 01.10.2016) . The Tribunal relied on the CBDT Circular, which is also relied by Id CIT in its order. In our view the case of the assessee is on better footing, the assessee has not claimed loss on forward derivative contracts but claimed loss on the existing loan liability for Wind Mill at Gujarat. Thus, the treatment of charging of exchange loss on account of ECB loan availed for Wind Mill for Rs.3,19,30,000/- to profit and loss account is in accordance with the accepted accounting principles as mandated under Accounting Standard (AS-11) as revised up to date (revised in 2003) and at such the book profit should be computed in accordance with the order dated final accounts and provisions of section 115JB of the Act. The perusal of Circular No. 3

issued by CBDT dated 23 March 2010 relied by learned CIT relates to Foreign Exchange Derivative transaction only. Further, we have seen that the assessing officer during the seeking explanation from the assessee along with the details submitted, the assessing officer taken one of the possible views and accepted the contention of the assessee while passing the assessment order regarding Forex Loss.

9. The Hon'ble Bombay High Court in case of Gabriel India Ltd (*supra*) has held that Commissioner cannot initiate proceeding with a view to starting fishing and roving enquiries in matters or orders which are already concluded. There must be material on record to show that tax which was lawfully exigible has not been imposed if claim was allowed by the Income tax officer. On being satisfied with the explanation of the assessee, such decision of the Income tax Officer cannot be held to be 'erroneous' simply because in his order he did not make an elaborate decision in that record. The Hon'ble High Court further held that when Commissioner himself, even after initiating proceeding for revision and hearing of the case, could not say that the disallowance of the claim of the assessee was erroneous and simply ask the assessing officer to re-examine the matter, which was not permissible.

10. In our view while exercising the power under section 263 of income tax Act the learned Commissioner should be able to demonstrate that the decision taken by the assessing officer was not possible being legally

unsustainable and incorrect and this finding must be recorded. Mere conclusion of learned Commissioner that order of assessing officer is erroneous and direction to the assessing officer to recompute the income by is not correct. Even in cases where there is inadequate enquiry but not lake of enquiry, the learned Commissioner must give and record finding that order/enquiry made by assessing officer is erroneous. This can happen if any enquiry and verification is conducted by the learned Commissioner and his able to establish and show the error or mistake make by assessing officer making the order unsustainable in law. The matter cannot be remitted for fresh decision to the assessing officer to conduct further enquiries without a finding that order is erroneous and the learned Commissioner further must also satisfied the second limb of provision that the order is also prejudicial to the interest of revenue.

The Hon'ble Apex Court in case of Malabar Industrial Co. (supra) relied by learned AR of the assessee held that where two views are possible and the AO adopts one of the view possible in law, then the order cannot be treated as erroneous or prejudicial to the interest of revenue, unless the view taken by assessing officer is unsustainable and in law. In view of the above discussion, the assessing officer in the course of assessment proceeding has taken one of the possible view thus the revision proceeding initiated by learned Commissioner under section 263 is invalid. Thus the ground of appeal raised by assessee is allowed.

11. In the result appeal of the assessee is allowed.

Order pronounced in the open court on this 11th October, 2017.

Sd/-
(P.K. BANSAL)
VICE-PRESIDENT

Mumbai; Dated 11/10/2017
S.K.PS

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

(Asstt.Registrar)
ITAT, Mumbai