

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'B', CHENNAI

श्री संजय अरोड़ा, लेखा सदस्य एवं
श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI SANJAY ARORA, ACCOUNTANT MEMBER
AND SHRI DUVVURU RL REDDY, JUDICIAL MEMBER

आयकर अपील सं./ITA Nos.148 & 149/Mds/2015
निर्धारण वर्ष / Assessment Year : 200-10

Olympus Elevator Pvt. Ltd., by L/r Kone
Elevator India Pvt. Ltd.,
No.50-55, Vanagaram Road,
Chennai – 600 095.
[PAN: AAACO 7123P]

(अपीलार्थी /Appellant)

Asst. Commissioner of Income
Vs. Tax,
Corporate Range-V(1),
Chennai – 600 034.

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri G.Baskar, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri Sanath Kumar Raha, Jt. CIT
सुनवाई की तारीख/ Date of hearing : 15.05.2017
घोषणा की तारीख /Date of Pronouncement : 15.06.2017

आदेश /ORDER

Per Sanjay Arora, AM:

This is a set of two appeals by the Assessee arising out of the common order dated 21.10.2014 by the Commissioner of Income Tax (Appeals)-V, Chennai ('CIT(A)' for short), dismissing the assessee's appeals contesting its assessments u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for assessment year (AY) 2009-10 dated 30.12.2011.

ITA No.148/Mds/2015

2. The first issue arising in the instant appeal is the maintainability of the assessee's claim in the sum of ₹. 32,52,541/- in respect of security deposit written off. The reason for its disallowance by the Revenue is that the same has been forfeited by the customers due to breach/s of the terms of the contract, so that it is penal in nature, attracting *Explanation* to s. 37(1).

3. We have heard the parties, and perused the material on record.

The first aspect of the matter that needs to be clarified is if the claim is u/s. 36(1)(vii) or u/s. 37(1). This is in view of the contrary claims by the assessee in the assessment and the appellate proceedings. While before the Assessing Officer (AO) it contended the same to have been deducted by the customers from the amounts due to it, so that the impugned sums, subsequently written off, stand credited to the Profit & Loss Account (income statement) of the relevant year, before the Tribunal, per the written submissions, the assessee contends that the impugned sums also include amounts which stand paid upfront to the concerned customers at the time of applying for the contract or at the time of its award, to secure performance thereof. The difference assumes significance as it is only in the case of the latter, i.e., deduction u/s. 37(1), that *Explanation* thereto can apply. Two, and more importantly, it is only in case of a claim u/s. 36(1)(vii), i.e., *qua* a bad debt written off as irrecoverable, that the claim shall arise in the year of its write off by the assessee in its books of account. A claim for expenditure or business loss (falling u/s. 28(i)) shall fall in the year in which the loss arises, i.e., in the year there is/was a breach of contract by the assessee, leading to the (proportionate) amount being not refundable, resulting in a loss to that extent. The assessee in fact claims that there has been no breach of contract by it, and the amount stands written off as the recovery of the corresponding amount/s, despite completion of contract and due performance by it, would entail an expenditure higher than the amount/s to be recovered, necessitating a business decision in writing off the same. This is bizarre, yet, if true, the

assessee, as a business entity, is entitled to its claim of the amount written off as business loss. Loss becomes allowable if it springs directly from and is incidental to the business of the assessee (*CIT v. Abdullabhai Abdulkadar* [1961] 41 ITR 545 (SC)). There is no question of penalty or the debility of *Explanation* to s. 37(1) being attracted. While the Revenue alleges breach of contract by the assessee and, in any case, forfeiture of the amount/s by its' customers, in which either case the year/s of deduction becomes relevant, the assessee contends it as not so. There is thus inconsistency not only in the assessee's own claims, but also contrary claims by the parties, so that the correct facts would need to be ascertained and brought on record. This is in view of the different sections, with concomitant implications, that would come into play. The matter is factually indeterminate, and would require being proved on the basis of material on record, which is conspicuous by its absence. There is then the issue of the debt being due from Government/Government organizations, making the claim of a debt being not realizable or even of entailing expenditure that much improper, i.e., assuming, as contended by the assessee, no breach of contract (refer: *South India Surgical v. Asst. CIT* [2006] 287 ITR 62 (Mad)). The matter, which is principally factual, is, accordingly, setting aside the impugned order, restored the file of the AO for fresh determination. Here it may be pertinent to mention that a debt written off u/s. 36(1)(vii) has to be, nevertheless, a genuine claim (*DIT(IT) v. Oman International Bank SAOG* [2009] 313 ITR 128 (Bom)).

4. The second issue arising in the assessee's appeal is *qua* the addition on account of a liability/s written back in accounts (to the income account), being no longer required, i.e., as not representing a liability or anticipated expenditure. The background facts of the case are that the assessee, a wholly owned subsidiary of Kone Elevators India Pvt. Ltd., engaged in the business of installation and maintenance of elevators and supply of elevator components,

acquired the division manufacturing and supplying elevators (under the brand name 'Olympus') of the M/s. Bharat Bijlee Ltd. (BBL), along with brand Olympus, and where-after it's name was changed from Tiger Elevators Ltd. to its present name, under the scheme of arrangement u/s. 391 of the Companies Act, 1956, effective 01.04.2004, the appointed date under the arrangement. While calculating the purchase consideration, by valuing assets and liabilities being taken over (as on 31.03.2004), provisions for expenditure for completing work and quality improvement (at ₹. 694.01 lacs) were made i.e., on estimated basis, deducting the same from the purchase consideration (Valuation Report at PB pgs. 12-13). The expenditure subsequently incurred toward the same being only ₹. 285.33 lacs, the outstanding in the provision accounts as on 31.03.2009, i.e., ₹. 408.67 lacs, was therefore deemed surplus, necessitating its write back in accounts, which was to the profit and loss account. This amount was neither included in the computation of book profit u/s. 115JB nor as income under the normal provisions of the Act. In the view of the AO, *Explanation 1(i) to s. 115JB(2)*, reading as under, stood attracted:

'Special provision for payment of tax by certain companies.

115JB. (1) Notwithstanding anything contained in any other provision of this Act, where in case of an assessee, being a company,.....

(2) Every assessee,-

(a) - (b).....

Explanation 1 – For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by –

(a) - (b).....

(c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or

(d) - (i).....

if any amount referred to in clauses (a) to (i) is debited to the profit and loss account, and as reduced by,–

(i) the amount withdrawn from any reserve or provision (excluding a reserve created before the 1st day of April, 1997 otherwise than by way of a debit to the profit and loss account), if any such amount is credited to the profit and loss account;

Provided that where this section is applicable to an assessee in any previous year, the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the

1st day of April, 1997 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this *Explanation* or *Explanation* below the second proviso to section 115JA, as the case may be; or

(ii) to (viii).....’

He, accordingly, completed the assessment by adding this amount to the returned income of ₹. 660.47 lacs, assessing the business income at ₹. 1101.67 lacs. In appeal, the same stood confirmed for the same reason/s, with the assessee being, despite the matter being remanded to the AO, unable to improve its case in any manner. Aggrieved, the assessee is in further appeal.

5. We have heard the parties, and perused the material on record.

We are completely at loss to understand the Revenue’s case. To begin with, while the assessee was show caused by the AO u/s. 115JB, i.e., under which section the adjustment is proposed to be made, the addition is made under the normal provisions of the Act. Further still, the provision of s. 41(1) has no application in the facts of the case in-as-much as no deduction on account of the provision/s, since written back, stands claimed by the assessee at any stage. In fact, in-as-much as the relevant provision/s has not been debited to the profit and loss account for any year, its’ reversal, to the extent made, shall not attract *Explanation 1(i)* to s. 115JB (2), which has a direct reference to *Explanation 1(c)* (supra). The impugned addition is therefore without any basis, both in law and on facts, and is hereby directed for deletion.

At the same time, however, the Id. AR was questioned by the Bench as to why, the provision being on account of the liabilities in respect of the assets taken over, the difference between the two representing the acquisition cost of the latter, was the provision/s, on being found to be in excess, not written back to the accounts of the relevant assets, being impliedly overstated (over-valued) to that extent. The reason is simple. The assets, irrespective of their fair market values - at which they were ostensibly taken over, have costed the assessee that

much less. In fact, the confusion in the present case has arisen principally on account of the assessee passing a wrong journal entry in its books of account on reversal of the provision, i.e., crediting the profit and loss account instead of the asset/s account/s inasmuch as it shall go to reduce the cost of the assets acquired on the takeover of the business of the Elevator Division of BBL. The Id. AR could not furnish any answer, much less satisfactory. The assets taken over thus stand in the assessee's accounts at amounts higher than the actual cost incurred in acquiring the same, resulting in additional charge of depreciation. This is against all principles/norms of accountancy, to which the law gives due credence (refer, *inter alia*, *Challapalli Sugars Ltd. v. CIT* [1975] 98 ITR 167); Accounting Standard (AS) 10 issued by ICAI (which also has primacy u/s. 211 of the Companies Act), as well as the clear provisions of s. 32 and s. 43(1) of the Act. The reversal of the provision has to be accordingly adjusted proportionately against the cost of the relevant assets. The concomitant would be a revision in the charge of depreciation thereon. We direct accordingly. Lest we may be considered as having travelled outside the purview of this appeal, reference is made to the decisions, *inter alia*, in *Hukumchand Mills Ltd v. CIT* [1967] 63 ITR 232 (SC); *CIT v. Assam Travels Shipping Service* [1993] 199 ITR 1 (SC); *CIT v. C.C.C. Holdings* [2003] 260 ITR 433 (Mad); *CIT vs. Ramnath Goenka (Decd.) & Others* [2001] 252 ITR 653, 654 (Mad); *Thanthi Trust v. Asst. CIT* [1999] 238 ITR 117 (Mad); *CIT vs. Rayala Corporation (P.) Ltd.* [1995] 215 ITR 883 (Mad); *CIT v. Indian Express (Madurai) Pvt. Ltd.* [1983] 140 ITR 705 (Mad); *Ahmedabad Electricity Co. Ltd. v. CIT* [1993] 199 ITR 351 (Bom-FB); *Controller of Estate Duty v. R. Brahadeeswaran* [1987] 163 ITR 680 (Mad); *CIT v. Cellulose Products of India Ltd.* [1985] 151 ITR 499 (Guj-FB), considering the issue in its different aspects. That rules 11 & 27 of the Income Tax (Appellate Tribunal) Rules, 1963 are not exhaustive of the powers of the tribunal stands clarified as far back as in *Hukumchand Mills Ltd* (supra). The assessee's ground is, accordingly, allowed on the aforesaid terms.

6. In the result, the assessee's appeal (in ITA No.148/Mds/2015) is allowed on the terms afore-stated.

ITA No.149/Mds/2015

7. The assessee's second appeal is in respect of the adjustment to book profit carried out on account of the excess liability written off to the profit and loss account under rectification proceedings by the AO upon discovering that the proposed addition had in fact not been carried out by him while framing the assessment. We have already explained (refer para 5) that the write back of the provision/s to the profit and loss account, which is, by definition, the operating statement of an enterprise, is, on facts, a wrong entry; the liability being on capital account, so that the same impacts only the value/s at which the corresponding asset/s acquired on the takeover of business stand to be carried in the assessee's books of account. The value of the liability, which is what its reversal in effect impinges on, would thus impact only the valuation of the corresponding assets, i.e., the value at which they are recorded in the assessee's books. A wrong entry is void *ab initio*, and no law can be applied on its basis / edifice. Rather, any contrary view, presuming so, would stand ousted on the premise of being debatable, precluding section 154, which is confined to a mistake apparent from the record. In fact, it is the non-adjustment of the provision written back against the value of the corresponding asset/s that constitutes a mistake, inasmuch as the provision directly impacted the purchase consideration thereof, and which we have directed in the assessee's appeal against regular assessment (in ITA No.148 of 2015). We decide accordingly.

8. In the result, the assessee's appeal (in ITA No.149/Mds/2015) is allowed.

Order pronounced on June 15, 2017 at Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)

(Duvvuru RL Reddy)

न्यायिक सदस्य/Judicial Member

Sd/-

(संजय अरोड़ा)

(Sanjay Arora)

लेखा सदस्य/Accountant Member

न्नई/Chennai,

दिनांक/Dated, June 15, 2017

EDN

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF