

**IN THE INCOME TAX APPELLATE TRIBUNAL,
NAGPUR BENCH, NAGPUR**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER..**

I.T.A. No. 18/Nag/2011.
Assessment Year : 2005-06.

M/s Anuradha Sugar Mills Ltd., At Warud (Dhad), Tah. & Dist., Buldhana. PAN AADCA 0617P Appellant.	Vs.	Asstt. Commissioner of Income-tax, Akola Circle, Akola. Respondent.
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Appellant by : Shri C.J. Thakar..
Respondent by : Shri A.R. Ninawe.

Date of Hearing : 20-03-2017.
Date of Pronouncement : 21st March, 2017.

ORDER.

PER SHAMIM YAHYA, A.M. :

This appeal by the assessee is directed against the order of learned CIT(Appeals)-I, Nagpur dated 22-11-2010 and pertains to assessment year 2005-06. The grounds of appeal read as under :

1. Learned C.I.T.(A)-I erred in confirming the determination of book profit at Rs.92,93,383/- as against actual and real book loss of Rs.1,46,53,691/-.
2. Learned C.I.T.-I failed to see that the amount of interest charged by the bank amounting to Rs.2,39,44,064/- during the year was clearly a revenue expenditure of the year debitable to profit and loss account and was liable to be deducted from the profit shown at Rs.92,90,383/- resulting in book loss of Rs.1,45,53,681/- and thus there was no book profit and consequently there was no liability under section 115JB.
3. The case law relied on by C.I.T.(A) in the case of Rain Commodities Ltd. vs. CIT 41 ITD P. 449 also envisages that if it is discovered that P and L A/c in not drawn in accordance with Part II and III of Sch. VI of

the Companies Act proper adjustment is possible to arrive at correct book profit. Law does not prohibit the working of correct book profit.

4. Learned C.I.T.(A) having accepted that the legislative intent behind section 115JB was to tax Zero tax companies and not to rope in the sick companies or the companies actually suffering huge losses erred in confirming application of Sec. 115JB to the assessee Co.1 which was admittedly suffering huge losses year after year and were not even able to pay huge bank loans or interest and was almost a sick company.

2. Brief facts of the case are as under :

In this case in the course of assessment proceedings the appellant has raised an issue vide letter dated 21-02-2008 that interest paid on term loans treated on preoperative expenditure of Rs.2,39,44,064/- and capitalized in the balance sheet was not claimed as revenue expenditure in the audited profit and loss account but would have to be adjusted for the purpose of working out book profits. If this is claimed then there would be no book profit available. The AO has considered the same in the assessment order and discussed the issue as follows :

“ The contention cited by the assessee has been verified from the records and seen that as nper schedule G forming part of audited report u/s 44AB, the details of preoperative expenses are certified by th auditor s under :-

Opening balance (as per last balance sheet)	Rs.7,29,03,123
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M.T. Act interest L.C. interest (during the year)	Rs.2,39,44,064
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	Rs.9,68,47,187
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The said expenses of Rs.9,68,47,187/- treated as preoperative expenses, has not taken into account since from the commencement of the business on account of depreciation asset in the balance sheet and considered as “deferred revenue expenditure”. It is pertinent to mention that the contents of schedule M of “Significant Accounting Policies” as per S. No. (g) remarks of the auditor is as hereunder:-

“ The company management have decided that preoperative expenses treated as ‘deferred Revenue Expenditure’ and amortized over a period of 5 years from next year due to unabsorbed loss during the year of the company and company have debited long term bank loan interest and medium term bank loan interest of Rs.2,39,44,064/- which was not paid during the year, that account are not depreciated and that amount transferred to preoperative expenses accrued.”

In view of this, the expenses or interest related to preoperative loans or expenditure no more stands as revenue expenditure as contended by the assessee. Hence, this is nothing but another after thought of the assessee. Further, the notice u/s 148 was issued requiring assessee to furnish the return of income but the assessee did not file revised return of income in response to notice u/s 148 of the I.T. Act, in view of this, the unpaid expenses relating to long term loan and medium term loan being relatable preoperative expenses do not deserve to be allowed as “revenue expenditure”.

As far as the claim of income/expenditure/deduction/exemption is concerned the assessee should have filed revised return of income in view of the decision of Hon’ble Supreme Court in the case of Goetze (India) Ltd. Vs. Commissioner of Income tax dt. 23.03.2006 for assessment year 1995-96, the contents of the decision is as under :

“Assessing Officer can not entertain claim for deduction other wise than by filing a revised return”. In accordance with the decision the claim of the assessee of interest as pre-operative expenses should be considered as revenue expenditure is liable to be rejected and hence, rejected.”

3. Upon assessee’s appeal, learned CIT(Appeals) noted that following issue emerges from assessee’s submission :

- (a) Whether the interest liability on the term loan of Rs.2,39,44,064/- is debitable to the P&L a/c as revenue expenditure.
- (b) If this interest liability of Rs.2,39,44,064/- is treated as revenue expenditure, whether this amount is to be reduced for working out the book profits u/s 115JB once the accounts in the case of a company have been audited and accounts as contemplated in Part II & III of Schedule VI of the Companies Act, 1956 can be said to be drawn up.

4. Considering the facts and circumstances, learned CIT(Appeals) noted that said amount cannot be held to be revenue expenditure, as it was possible that the amount can be treated as capital expenditure to be added to the cost of the asset. Further learned CIT(Appeals) held that in absence of adequate material showed that this is a revenue expenditure he was of the opinion that the Assessing Officer's finding in the assessment order are correct.

5. Against this order assessee is in appeal before us.

6. We have heard both the counsel and perused the records. Learned counsel of the assessee submitted that there has been a wrong treatment in the accounts of the assessee regarding the terms loan interest and LC interest. Learned counsel submitted that the company has been in operation for several years and that there is no reason why the term loan interest on machinery should be added

to the cost of the machine in the current year. Further learned counsel submitted that since the company is already functioning and in operation there is no reason as to why any portion of the interest should be treated as preoperative expenses. Learned counsel submitted that prima facie the only reason that can be attributed for this treatment is that assessee did not want to show loss figures in order to give a good picture. But learned counsel submitted that this clearly means that the book profit was erroneously determined and is not in accordance with provisions of the Company's Act and section 211 of the Company's Act. Thus learned counsel submitted that when it is amply clear that the accounts prepared were not in accordance with the Companies Act there is no reason why the adjustment sought should be denied. In this regard Ld counsel placed reliance upon the decision of Honourable Delhi High Court in the case of CIT vs Sain processing & Weaving Mills 325 ITR 0565.

7. Per Contra learned Departmental Representative relied upon the orders of the authorities below.

8. Upon careful consideration we find that in this case it is plea of the assessee that term loan interests were taken to balance sheet under preoperative expenditure erroneously. That the company has been in operation for several years and there is no reason why the term loan interest should not be treated as revenue expenditure attributable to profit and loss account. Learned CIT(Appeals) has not accepted this proposition on the ground that adequate materials are not on record to established that the concerned expenditure were revenue in nature. We find that there is no dispute that if the amount involved was debitable to the profit and loss account as it was revenue in nature then clearly the accounts prepared are not in accordance with the Companies Act. In such situation assessee's plea will have to be accepted. This view draws support from the case law from Honourable Delhi High Court referred here in above. We may gainfully refer to the head notes in the said decision as under :

1.

“Company-Book profit under s. 11sJ-Depreciation not debited to P&L a/c-It is obligatory under cl. 3(iv) of Part 11 of Sch. VI to the Companies Act to give information with regard to depreciation which has not been provided for, along with the quantum of arrears-Once this information is disclosed in the notes to the accounts, it would clearly fall within the ambit of the Explanation to s. 11s)-Notes to the accounts form part of the P&L a/c by virtue of sub-so (6) of s. 211 of the Companies Act and thus the depreciation which is not charged to P&La/c but is disclosed in the notes to the accounts would come within the ambit of the expression 'shown in the P&L a/c occurring in Explanation to S. 115)-Further, the net profit of a company cannot be determined till all the items of income and expenses as well as depreciation are taken into account-Depreciation, even if not debited to the P&L a/c has to be taken into account while determining 'book profit' under s. 115) as long as it forms part of the prescribed accounts-That apart, S. 205(1), proviso (b) of the Companies Act r/w cl. (iv) of Explanation to S. 115) permits reduction of net profit to the extent of past losses or unabsorbed depreciation, whichever is less-If unabsorbed depreciation can be reduced from net profit to arrive at book profit, there is no reason why current year's depreciation which is not charged to the P&L a/c cannot be deducted from the net profit in determining boo profit.”

9. We find that the ratio of the above case law can also be applied to the facts of the present case. In this case also we find that the nature of the impugned amount was duly disclosed in the notes of account attached to the balance sheet. The said note mentioned that the amount involved was long term bank interest and medium term banking on interest. If that be so there was no reason to treat the same as preoperative expenses. However this aspect needs factual examination at the level of the Assessing Officer. Learned CIT(Appeals) also has principally agreed with the proposition of the assessee but has held that adequate materials are not on record. In these circumstances in our considered opinion, the issue as to whether the amount involved is actually revenue in nature needs to be remitted to the file of the Assessing Officer. Accordingly the issue is remitted to the file of the Assessing Officer. The Assessing Officer shall examine this issue after giving the assessee an opportunity of being heard. After due examination if he finds that the amount involved was revenue in nature liable to be debited to the profit and loss account, the assessee's claim would deserve to be allowed

10. In the result this appeal by the assessee stands allowed for statistical purposes

Order pronounced in the Open Court on this 21st day of March, 2017.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER.

Nagpur,
Dated: 21st March, 2017.

Copy forwarded to :
2. M/s Anuradha Sugar Mills Ltd. At Warud (Dhad), Tah. & Dist. Buldhana.
3. AC.I.T., Akola Circle, Akola.
4. CIT(Appeals)-1, Nagpur.
5. C.I.T.-I, Nagpur.
6. D.R., ITAT, Nagpur.
7. Guard File

True Copy

By Order

Assistant Registrar,
Income Tax Appellate Tribunal,
Nagpur Bench, Nagpur.

Wakode.