

आयकर अपीलीय अधिकरण, मुंबई "ई" खंडपीठ
Income-tax Appellate Tribunal "E" Bench Mumbai
सर्वश्री राजेन्द्र, लेखा सदस्य एवं पवन सिंह, न्यायिक सदस्य
Before S/Sh. Rajendra, Accountant Member & Pawan Singh, Judicial Member
आयकर अपील सं./ITA/4020/Mum/2017, निर्धारण वर्ष /Assessment Year: 2012-13

Sterlite Technologies Limited 4 th Floor, Godrej Millenium 9, Koregaon Park, Pune-411 001. PAN:AAECS 8719 B	Vs.	DCIT-(LTU)-1 29 th Centre No.1, World Trade Centre Cuffe Parade Mumbai-400 005.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri Manjunath Swamy (CIT-DR)

Assessee by: Shri B.V. Jhaveri-AR

सुनवाई की तारीख / **Date of Hearing:09/04/2018**

घोषणा की तारीख / **Date of Pronouncement: 23/05/2018**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य ,राजेन्द्र के अनुसार- PER RAJENDRA, AM-

Challenging the order of the Commissioner of Income Tax (LTU),dated 29/03/2017, passed u/s.263 of the Act,the assessee has filed the present appeal. Assessee-company, engaged in the business of manufacturing and sales of optical fibre, optical fibre cables and power connectors,filed its return of income on 24/11/201 declaring its income at Rs. NIL. Book profit was computed at Rs. 96.09 crores, as per the provisions of section 115 JB of the Act. Later on,a revised return was filed on 29/03/2014 where total income under the normal provisions and the MAT provisions remained the same.The Assessing Officer (AO) completed the assessment u/s. 143(3)on 14/01/2015,determining the income of the assessee at Rs. NIL under the normal provisions.He calculated book profit at Rs. 96.45 crores u/s.115 JB of the Act and determined the tax payable by the assessee at Rs. 17.84 crores.

2.After going through the records, the CIT was of the opinion that the order passed by the AO was erroneous and prejudicial to the interest of revenue. He issued a notice u/s. 263 of the Act on three counts.Vide its reply,dated 15/12/2016, the assessee filed detailed reply in that regard.The CIT dropped the revisionary proceedings on one of the grounds.

3.First effective ground of appeal(GOA-2)is about Foreign Exchnage(FE)loss.With regard and unrealised exchange loss on purchase of assets of Rs. 10.3 crores, the CIT observed that

while computing the income under the Act any deviation of accounting standard from the provisions of the Act had to be factored. He made a reference to the provisions of section 43 A and observed that same dealt with the rate of exchange of currency and the treatment to be given for fluctuation in foreign exchange transactions, that provisions of the Act had to be applied while computing the income of an assessee irrespective of the mandate of the accounting standards. He referred to the Instruction No.3 of 2010, issued by the CBDT, wherein the judgment of Woodward Governor India Private Ltd.was considered. He held that said instruction was binding on the departmental authorities. He directed the AO to re-compute the income of the assessee by disallowing notional loss resulting from the statement of outstanding liabilities/receivables.

4.Before us,the Authorised Representative (AR) stated that as per the accounting policy followed and recorded by the assessee in the notes to financial statements all foreign currency monetary items were translated using exchange rate prevailing as on 31/03/2012, that the amended section 43A stipulated that factual payment of the decrease/and asked liability was a condition precedent for making adjustment in the carrying cost of the fixed assets, that following the Accounting Standards (AS)11,that the assessee restated its liability for purchase of assets in foreign currency at the FE rate prevailing on the last date of March, 2012, that the assessee had increased the that liability by a sum of Rs. 10,33,11,458/-, that the liability was debited to the profit and loss account,that liability in question was disallowed by the assessee itself as it had not paid the liability till 31/03/2012, that the CIT directed the AO to disallow the loss while computing the book profit on the ground that it was contingent in nature,that the loss was not contingent, that it was actual loss as per the prevailing foreign exchange rate on last day of the relevant financial year.He relied upon the cases of Bharat Serums And Vaccines Ltd. (ITA 3091 and 3375/ Mumbai/2012,dated 15/02/2017), Haldia Petrochemicals Ltd. (70 taxmann. com.70)Vinergy International Private Ltd.(Income tax appeal number 376 of 2014,dated 11/08/2016 of honorable Bombay High Court)and D Chetan and Co. (390 ITR 36).The Departmental Representative (DR) supported the order of the CIT and stated that he had rightly applied the instruction number three of 2010.

5.We have heard the rival submissions and persued the material before us. We find that the assessee had added back unrealised exchange loss on purchase of assets of Rs.10.3 crores to the income chargeable to tax under normal provisions of the Act,that it had claim any unrealised exchange gain,that the provision for FE loss was required to be disallowed and added to book profit.In our opinion,the loss on account of a FE fluctuation was not a

contingent loss, as held by the CIT. The loss was not arising out of any speculative business. The FE loss was due to purchase of capital asset and same was not claimed by the assessee while computing the income under the normal provisions of the Act. We find that similar question has been dealt by the Tribunal in the case of Bharat Serums And Vaccines Ltd. (supra). We are reproducing the relevant portion of the above order of the Tribunal and it reads as under:

“4. Second Ground deals with upholding the disallowance of Rs.4.74 crores being loss incurred due to revaluation of open forward exchange contract. During the assessment proceedings the AO found that the assessee had entered into derivative agreement to swap term loans taken in Rs. against foreign currency, that it had debited “marked to market” losses of Rs.4,74, 24,891/- to the P&L A/c. stating that the said liability had crystallised owing to the revaluation. The AO called for details about the transaction. After considering the same he held that it had entered into derivative transaction by swapping the loan, that the liability was paid in the subsequent year, that the notional loss of Rs.4.74 crores could not be allowed. He referred to Instruction of CBDT dt.23/3/2010 and added the disputed amount to the total income of the assessee. He further held that it was provision and not an ascertained liability, as specified in Explanation 1 to clause (c) to the provisions of section 115JB. Therefore, he added Rs.4.74 crores to the book profit of the assessee.

4.1. After considering the submission of the assessee, the FAA held that the assessee had borrowed funds in foreign currency, that in order to hedge against the exchange fluctuation it had entered into foreign currency swap agreements, that the contracts were of one year, that the loss claimed by the assessee could not be allowed for the year under consideration, that it was a notional /contingent loss, that it was allowed in the next assessment year.

4.2. Before us, the AR relied upon the case of M/s. D. Chetan & Co. (Income tax Appeal No. 278 of 2014 dt.1/10/2016); Woodward Governor India Pvt. Ltd. (312ITR254); Oil and Natural Gas Corporation Ltd. (322ITR18). The DR supported the order of the FAA.

4.3. We have heard the rival submissions and considered the available material. We find that in the case of M/s. D. Chetan & Co. the Hon'ble Bombay High Court had considered the following question of law:

“Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of ‘Mar to Market’ Loss of Rs.78.10,000/- made by the Assessing Officer on account of disallowance of loss on foreign exchange forward contract loss and not appreciating the fact that the said loss was a notional loss and hence cannot be allowed?”

It was held by the Hon'ble Bombay High Court that question formulated by the department did not give rise to any substantial question of law.

Considering the above, we decide second Ground of appeal in favour of the assessee.”

We would also like to rely upon the case of D. Chetan and Co. (supra). In that matter, the assessee was engaged in the business of import and export of diamonds. For the AY.2009-10, the assessee explained that the amount of Rs.78.10 lakhs claimed as loss was on account of hedging transactions entered into to safeguard variation in exchange rates affecting its transactions of import and export. The AO disallowed the claim on the ground that it was a notional loss of a contingent liability debited to the profit and loss account. The First Appellate Authority allowed the loss incurred on the forward contracts as a business loss. The

Tribunal confirmed this. On appeal to the honorable High Court, the matter was decided as under:

“the Tribunal concluded that the transaction entered into by the assessee was not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent findings of fact were not shown to be perverse in any manner. The Assessing Officer in the assessment order did not find that the transaction entered into by the assessee was speculative in nature. At no point of time did the Department challenge the assertion of the assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. The Department never contended that the transaction was speculative but only disallowed on the ground that it was notional. Thus, it was to be concluded that the transactions entered were only in regular course of business and not speculative. Therefore no substantial question of law arose.”

Finally, we would like to refer to judgment of the honorable Bombay High Court, delivered in the case of Vinergy International Private Ltd. (supra) wherein the honorable court has held as under:

“5. The grievance of the Revenue before us is that Instruction No. 3 of 2010 dated 31st March 2010 issued by the CBDT in respect of loss on account of foreign exchange derivatives is subsequent to the Apex Court’s decision in Woodward Governor India private Ltd. (supra) and was not considered by the Tribunal. The instruction according to the Revenue would govern the issue.

6. In the present facts, we find that loss was not on account of derivatives but are in fact losses and gains in foreign exchange relating to purchase and sale transactions i.e. creditors and debtors outstanding as on 31st of March, 2010. Therefore, the Instruction No. 3 of 2010 issued by CBDT would have no application to the facts of the present case. In fact the issue arising year in would be covered by the principle laid down by the Apex Court in Woodward Governor India private Ltd. (supra).....”

Considering the above, we are of the opinion that order of the AO is neither erroneous nor prejudicial to the interest of the revenue. We further hold that the loss is not of contingent nature and the direction of the CIT is contrary to the decision of the Hon'ble Supreme Court delivered in the case of Woodward Governor India private Ltd. (supra). Accordingly, we allow second ground of appeal.

6. Next ground of appeal is about disallowance of production u/s. 80 IC in respect of voluntary transfer pricing adjustment undertaken by the assessee, invoking the provisions of section 92C(4) of the Act. In the revisionary proceedings, the CIT held that the moment an assessee suffers from an adjustment proposed by the TPO which was higher than its voluntary adjustment offer the provision to sub section 4 of section 92(C) of the Act would trigger, that in that situation there would not be any distinction between eligible and non eligible units. He directed the AO to withdraw the deduction under Chapter VIA of the Act.

7. Before us, the AR stated that there was no loss to revenue even if the disallowance was made of Rs.9.86 lakhs, that the order of the AO was not prejudicial to the interest of revenue. Alternatively, it was argued that the deduction u/s. 80 IC was in respect of power transmission

division of the assessee whereas the voluntary transgressing adjustment was made in respect of telecom division for which deduction u/s. 80 IC was not claimed.

7.1.It was brought over notice that in pursuance of the directions of the CIT the AO passed the order u/s.143(3)r.w.s.263 of the Act on 19/06/2017,wherein deduction under Chapter VIA, in respect of voluntary transfer pricing adjustment of Rs. 9.86 lakhs, were withdrawn. It was stated that while computing the income under the normal provisions, the AO had determined the income of the assessee at Rs. NIL. The computation of book profit u/s. 115 JB was made as follow:

	Particulars	Rs.
	Book profit as per order u/s.143(3) Dated 14.01.2015	96,45,56,585
Add:	Disallowance as per Para 4	10,33,11,458
	Total Book Profit	106,78,68,043
	Tax @ 18.50%	19,75,55,588

After considering the above computation of total income under the normal provisions and the MAT provisions,we find that the order of the AO was not prejudicial to the interest of the Revenue,as disallowance of deduction u/s. 80 IC to the extent of Rs. 9,86, 657/-did not affect the tax calculation.Therefore,we decide the third ground of appeal in favour of the assessee. We are not deliberating upon the alternative submissions made by the assessee.

As a result,appeal filed by the assessee stands allowed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील मंजूर की जाती है।

Order pronounced in the open court on 23rd May, 2018.

आदेश की घोषणा खुले न्यायालय में दिनांक 23 मई, 2018 को की गई।

Sd/-

Sd/-

(पवन सिंह /Pawan Singh)

(राजेन्द्र / RAJENDRA)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक/Dated : 23 .05.2018.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR “ E ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अधि.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.