

आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI PAWAN SING, JM

आयकर अपील सं./I.T.A. Nos. 29/Mum/2016 & 3683/Mum/2014
(निर्धारण वर्ष / Assessment Year: 2009-10)

Unilever India Export Limited Unilever House, B. D. Savant Marg, Chakala, Andheri (East), Mumba-400 099	बनाम/ Vs.	Dy. CIT – 1(3)1, Aayakar Bhavan, Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACI 0991 D		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri P. J. Pardiwala Shri Hiten Chande
प्रत्यर्थी की ओर से/Respondent by	:	Shri S. Padmaja
सुनवाई की तारीख / Date of Hearing	:	12.03.2018
घोषणा की तारीख / Date of Pronouncement	:	01.06.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

These are two appeals by the assessee one against the order of the Id. Commissioner of Income Tax u/s. 263 of the Income Tax Act, 1961 and another one against the order of the Id. Commissioner of Income Tax (Appeals), both for the assessment year 2009-10.

2. The grounds of appeal raised by the assessee in ITA No. 29/Mum/2016 read as

under:

1. The learned CIT(A) erred in confirming the order passed by the Learned AO u/s 143(3) r.w.s. 263 of the Act.
2. The learned CIT(A) erred in law in confirming the adjustment to the book profit u/s 115JB of the Act merely basis the change of view taken at the time of original assessment u/s 143(3) of the Act.
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3. He failed to appreciate that the facts were already submitted and were available with the then learned AO and therefore, order u/s 143(3) can't be revised basis the directions u/s 263 merely on the basis of change of view on the same facts.
4. The learned CIT(A) erred in law and on facts in confirming that brought unabsorbed depreciation can't be set off against the book profit computed u/s 115JB of the Act.
5. He failed to appreciate that the unabsorbed depreciation was correctly allowed to be set off against the book profit u/s 115JB of the Act in order u/s 143(3) of the Act.
6. He erred in holding that unabsorbed loss and unabsorbed depreciation does not exist in the balance sheet of the company. He failed to appreciate profit and loss accounts prepared in accordance with the Parts II and III of Schedule VI to the Companies Act, 1956 clearly reflects brought forward loss and merely showing the net balance of Reserve and surplus in the balance sheet as per the presentation requirement of the format of part 1 to the schedule VI of the Companies Act, 1956 does not mean that the appellant has set off debit balance of the P&L against the reserves.

3. The grounds of appeal raised by the assessee in ITA No. 3683/Mum/2014 read

as under:

1. The learned CIT erred in passing order u/s 263 of the Act.
2. The learned CIT erred in setting aside the assessment order.
3. The learned CIT erred on facts and in law in holding that, order of Assessing officer is erroneous and prejudicial to the interest of the revenue.
4. He further erred in directing the Assessing officer to pass assessment order afresh and to determine book profit under section 115JB of the Act without reducing the book profit by the amount of brought forward unabsorbed depreciation of Rs.23,98,823.
5. The learned CIT failed to appreciate that, Assessing officer after proper enquiry in this respect had correctly allowed deduction of brought forward

unabsorbed depreciation from the book profit under clause (iii) of Explanation (1) of Section 115JB and passed the order u/s 143 (3). Thus, the order passed by Assessing officer u/s 143 (3) was neither erroneous nor prejudicial to the interest of the revenue.

6. The appellant humbly requests that, the order passed by learned GT u/s 263 was not warranted in the present case. Therefore, it ought to be quashed and order of assessing officer passed u/s 143 (3) be restored as much as the reduction of book profit by brought forward unabsorbed depreciation is concerned.

4. ITA No. 3683/Mum/2014 relates to the order of the Id. Commissioner of Income Tax u/s. 263 of the Act for the assessment year 2009-10 and ITA No. 29/Mum/2016 relates to the consequential years pursuant to the above said 263 order.

ITA No. 3683/Mum/2014

5. In this case, the Id. Commissioner of Income Tax issued show cause notice u/s. 263 of the Act. The issue under consideration was the deduction of unabsorbed depreciation of Rs.23,98,823/- in calculation of book profit under the provision of clause (iii) of *Explanation 1* of section 115JB of the Act. The Id. Commissioner of Income Tax proposed to amend/set aside the order of the Assessing Officer to deny deduction of profit as above. We may gainfully refer to the order of the Id. Commissioner of Income Tax u/s. 263 of the Act in this case as under:

A show cause was issued to assessee u/s 263 of the Act. The issue under consideration was reduction of un-absorbed depreciation of Rs.23,98,823/- in calculation of Book Profit under provision of Section 115JB Explanation (1) Clause (iii). It was proposed to amend/set-aside the order of A.O. on incorrect reduction of book profit as above.

The facts are that the cumulative figures of un-absorbed loss and un-absorbed depreciation computed from the Balance-sheet of the assessee of the earlier years were as under:-

- i) Brought forward business loss - Rs.7,21,57,000/-

ii) Un-absorbed depreciation - Rs.71,09,000/-

Cut of un-absorbed depreciation figure given above, the assessee has already absorbed part of it for calculation of Book Profit in the earlier years and the balance available for set off was only Rs.23,98,823/- which is the figure being considered.

3. In response to Show Cause, Shri Lalit Advani, C.A. and Authorised Representative of the assessee, attended from time to time. He has filed written submissions which are on record. The issues have been discussed with him in details.

4. A perusal of the order of assessment reveals that in calculating Book Profit u/s.115JB, the A.O. has mechanically given the credit for un-absorbed depreciation as stated above. The A.O. did not take care to look into two aspects of the issue. These are as under:-

(i) In the Balance-sheet of the assessee, the so claimed un-absorbed loss and un-absorbed depreciation do not exist. To elaborate, as has been explained by the Counsel of the assessee, the manner in which the accounts are finalized is that the net profit or the net loss which crystallizes in the Profit & Loss Account every year is taken to a Schedule of Balance-sheet and gets finally adjusted in General Reserve Account. The Id. Counsel of the assessee has objected to idea of adjustment of the loss, as and when it appears, in the general reserves. According to him, there is no adjustment of loss into general reserve and it is only a method of a depiction in the Balance-sheet. This objection is not justified because general reserves are the accumulated profits of the company over the years. The loss which is nothing but negative profits, as and when it appears, has also to be 'accumulated in the general reserve. It is obvious from analysis of the Balance-sheet that there are no losses at all, the figure of general reserves being substantial. The A.O also ignored the method of claim of the assessee of absorbed depreciation coming from earlier years. Under Company's Act, there is absolutely no distinction between un-absorbed depreciation and un-absorbed losses. The figure finally emerging in the Profit & Loss Account, when it is a loss, is considered as a business loss alone, irrespective of the fact that this figure of loss may have a component of depreciation debited in the Profit & Loss Account. Despite this absence of distinction between un-absorbed depreciation and un-absorbed loss, the I.T. Act in Explanation (1) Clause(iii) has provided for "the amount of loss brought forward or un-absorbed depreciation, whichever is less as per books of account". Further, the explanation clarifies that the loss shall not include depreciation. In so doing, the Act has outlined the method of calculating, from the Balance-sheet of the Assessee Company, the components of the loss, business loss and un-absorbed depreciation. To illustrate by an example, if the loss in Profit &

Loss Account crystallize as say Rs. 1 lakh and there is a debit of depreciation of Rs.20,000/-, then the components of loss as per Profit & Loss Account would be un-absorbed depreciation at Rs.20,000/- and business loss at Rs.80,000/-.

The A.O. totally ignored the situation as illustrated above, in What will happen in subsequent year if there are profits of say Rs.30,000/-. On an overall analysis, this would result in set off of un-absorbed total loss (including both business and depreciation) A resulting in carried forward figure of Rs.70,000/-. However, j (whether this carried forward figure of Rs.70,000/- is out of business loss of Rs.80,000/- of the earlier year or, it is Rs.20,000/- being depreciation of the earlier year and the balance Rs.50,000/- being business loss of earlier year has not at all been looked into by the A.O.

5. For the above reasons, the order of assessment passed by the A.O. is erroneous, has been passed without application of mind, and is also prejudicial to the interest of revenue in as much as in the computation of Book Profit, a reduction of Rs.23,98,823/- has been done which, as subsequent paragraphs of this order would reveal, was not available to the assessee.

6. The Balance-sheet of the assessee does not show any un-absorbed loss (including un-absorbed depreciation). The primary reason for this state of affairs is huge general reserve coming from earlier years. It has already been stated in the preceding paragraphs that general reserve are nothing but accumulation of the profits. Also, any profit/loss of the current year has also to be adjusted against the general reserve. Therefore, whatsoever unabsorbed losses and depreciation have arisen to the assessee in the earlier years have all got absorbed in the general reserves and as per position emerging, there is no balance available either of business loss or of un-absorbed depreciation coming from earlier years. Therefore, the assessee was not entitled for any reduction of book profit in terms of clause (iii) of Explanation (1) of Section 115JB.

7. Further, without prejudice to what has been stated in the preceding paragraphs, the manner in which the claim of un-absorbed loss and un-absorbed depreciation as per books of account has been claimed by the assessee is that in a situation as illustrated in preceding paragraphs no. 4, when there is a profit of Rs.30,000/- in the subsequent year, the loss set off of Rs.1 lakh would be taken to mean Rs.30,000/- set off out of business loss of Rs.80,000/- of earlier years, resulting in carried forward of business loss at Rs.50,000/- and, independent of the set off carried forward of depreciation of earlier year of Rs.20,000/-, which remains untouched. However, there is no rationale for preferring set off of business loss carried forward from earlier years against profits of next year in preference to set off of first depreciation coming from earlier year and then business loss. This issue was discussed with Ld. Counsel of the assessee. He was

asked to explain the specific provision of Company's Act. under which such calculation of claim was made. He was unable to specify. As a matter of fact, since there is no specification of un-absorbed depreciation in the Company's Act, and further because the entire final figure of loss emerging in Profit & Loss Account is considered under the Company's Act to be business loss only, it is logical and rational to first adjust and set off the un-absorbed depreciation giving it priority for set off over business loss, which business loss is a recognized fact of Company's Act.

8. When this exercise is undertaken, in the claim of the assessee, the un-absorbed depreciation figure emerges at Nil. Consequently, Explanation (b) to Clause(iii) of Explanation (1) to Section 115JB suggests that the un-absorbed depreciation being Nil, the provision of said Clause (iii) shall not apply to the assessee. That means, the assessee shall not be entitled to reduction of the book profit on an account of un-absorbed depreciation or un-absorbed loss.

9. For either of the reasons detailed in the preceding two paragraphs, the order of the A.O. is prejudicial to the interest of revenue. It follows the assessee is not entitled to reduction of book profit to the extent of Rs.23,98,823/- as was granted by the A.O. in the original order of assessment. Consequently, the order of assessment passed by the A.O. on 16.11.2011 for A.Y.2009-1C under consideration is hereby set aside with direction to the A.O. to pass assessment order afresh without reducing the book profit by the amount of Rs.23,98,823/-.

6. Against the above order, the assessee has filed the appeal before the tribunal.

7. We have heard both the counsel and perused the records. The Id. Counsel of the assessee submitted that clause (iii) of *Explanation 1* of section 115JB of the Act mandates that for the purpose of this section, book profit needs to reduced by any amount of loss brought forward or unabsorbed depreciation whichever is less as per the books of account. In this regard, the Id. Counsel of the assessee took us to paper book page no. 87 being a statement showing computation u/s. 115JB. The said computation reads as under:

Income-tax Asst. Year 2009-10

Previous year ended 31st March.2009

**STATEMENT SHOWING COMPUTATION UNDER SECTION 115 JB OF INCOME TAX ACT.
1961**

		Rupees	Rupees
I.	BUSINESS INCOME		
	NET PROFIT As per Profit & Loss Account		36,713,000
<u>Add:</u>	Provision for Tax (including deferred tax and tax on exceptional items)	25,979,000	25,979,000
			62,692,000
Less:	Dividend income exempt u/s 10(35)	11,422,000	
(1)			
(2)	Unabsorbed depreciation as per books of accounts 2,398,623 Brought forward business loss (excluding unabsorbed dep. <u>76,867,377</u> whichever is less	2,398,623	13,820,623
	BOOK PROFIT U/S. 115 JB		48,871,377
	<u>TAX PAYABLE U/S. 115 JB</u>		
	-TAX @10%	4,887,138	
	- SURCHARGE@10%	488,714	
	- EDUCATION CESS @ 3%	161,276	
	TOTAL		5,537,127

8. Referring to the above, the Id. Counsel of the assessee submitted that from the above, it is manifest that the assessee could adjust Rs.23,98,823/- from the book profit which has been done as per law. Hence, he submitted that there is no infirmity in the order of the Assessing Officer and hence there is no jurisdiction for the Id. Commissioner of Income Tax to exercise his power u/s. 263. In this regard, the Id. Counsel of the assessee referred to the decision of the ITAT in ITA Nos. 356 & 343/Kol/2009 in the case of M/s. Vodafone Essar East Ltd. vide order dated 15.12.2017. In this case, it has been held that the assessee can claim the deduction

either of brought forward loss or undisputed depreciation, whichever is less as per books u/s. 115JB of the Act.

9. Per contra, the ld. Departmental Representative relied upon the orders of the ld. Commissioner of Income Tax. He submitted that the explanation below the said clause of section 115 JB of the Act clearly provides that the provision of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is nil.

10. We have carefully considered the submissions and perused the records. In this regard, we may gainfully refer to the provision of section 115JB of the Act. This section vide *Explanation* III mandates that the book profit needs to be reduced being the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

Explanation. - For the purposes of this clause, -

- (a) the loss shall not include depreciation;
- (b) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is nil.

11. The above said provision is paramateria with the similar clause in section 115JA of the Act. This clause u/s. 115JA was the subject matter of adjudication by the Hon'ble High Court of Kearala in the case of *CIT vs. Carban & Chemicals India Ltd.* [2011] 196 Taxman 302 (Ker). In the said decision, the Hon'ble High Court was

considering the proposition that by virtue of clause (b) of *Explanation* (iii) to section 115JA deduction is admissible only if the assessee had brought forward business loss as well as depreciation for the previous year. The Hon'ble High Court had elaborately considered the said explanation. We may gainfully refer to the Hon'ble High Court decision as under:

5. The next question is on the merits of the case where the issue is only a factual one, that is, whether assessee had brought forward business loss as well as depreciation in the end of the previous year. According to the assessee, depreciation is lesser when compared to the brought forward business loss. On this issue, the Tribunal allowed the claim based on assessee's contention that, if FIFO method is applied, assessee is entitled to limit the set off of business loss brought forward up to the year 1993-94 against profit for the financial year 1995-96 on Rs. 7,36,68,187 so that, the balance brought forward business loss is available with them, which will be Rs. 3,40,76,274. It is seen that the Tribunal had accepted the FIFO method furnished by the assessee, the details of which are stated in the Tribunal's order in paragraph 8. However, we do not know how the FIFO method can help the assessee in this case because, it authorizes only setting off profit of the subsequent year against brought forward business loss or depreciation of the earliest years first, then next year's and so on and it does not entitle the assessee to bifurcate the brought forward business loss, partly set off against profit and then to allow part of the carried forward loss again to be retained when there is profit to absorb the full loss. What is referred to in clause (b) of *Explanation* (iii) to section 115JA is about the brought forward business loss or unabsorbed depreciation available at the end of the previous year. It is for the assessee to first set off the profit against brought forward business loss and then to set off the balance profit, if any, against brought forward depreciation. Admittedly, if the brought forward business loss of Rs. 10,77,44,461 is set off against the profit, then the balance brought forward business loss available will be *nil* because, the profit available during 1995-96 was Rs. 11,71,61,492. We do not know on what basis the Tribunal allowed the brought forward business loss to be bifurcated with the figure available up to the end of 1994-95 and permitted the assessee to set off only the loss up to that year retaining a balance of Rs. 3,40,00,000 towards balance brought forward business loss. In our view, the FIFO method of setting off applies only when more than one year's brought forward business loss or unabsorbed depreciation are set off against profit available in later years. Since the profit for 1995-96 was such as to absorb the entire brought forward business loss, the whole loss gets set off leaving no carried forward business loss for the next year.

6. Counsel for the assessee submitted that assessee is entitled to set off brought forward business loss and unabsorbed depreciation simultaneously for the succeeding year. We are of the view that when business loss carried forward is set off against profit for the year 1995-96, assessee is not entitled to limit set off of loss brought forward up to 1993-94. It is pertinent to note that even if profit was set off only against brought forward depreciation, then under the head of unabsorbed depreciation, there would have been nothing left entitling the assessee for deduction in terms of clause (b) of *Explanation (iii)* of section 115JA(2) of the Act. Since nothing is left after setting off brought forward business loss up to 1994-95 against profit, assessee is not entitled to any relief under clause (b) of *Explanation (iii)* of section 115JA of the Act.

12. Now we examine the present case on the touchstone of aforesaid decision. The method applied by the Id. Commissioner of Income Tax is in consonance with the method expounded by the Hon'ble High Court above. By taking the exercise in accordance with the above said ratio, the Id. Commissioner of Income Tax has held that the unabsorbed depreciation figure emerges at nil. Hence, the Id. Commissioner of Income Tax has rightly observed that "Consequently, Explanation (b) to Clause(iii) of Explanation (1) to Section 115JB suggests that the un-absorbed depreciation being Nil, the provision of said Clause (iii) shall not apply to the assessee. That means, the assessee shall not be entitled to reduction of the book profit on an account of un-absorbed depreciation or un-absorbed loss. The above position can be clarified by the following workings:

In the assessee's case, the position of loss brought forward (without including depreciation) and unabsorbed depreciation are as under:

A.Y.	Book Loss (A)	Book unabsorbed depreciation (B)	A or B whichever is less
2003-04	1,15,58,000/-	27,39,000/-	27,39,000/-
2004-05	10,41,24,000/-	29,82,000/-	29,82,000/-

2005-06	7,94,16,000/-	35,01,000/-	35,01,000/-
2006-07	9,35,51,000/-	36,08,000/-	36,08,000/-
Total	28,86,49,000	1,28,30,000	1,28,30,000/-

13. From the above chart it is clear that it was the unabsorbed depreciation of Rs.1,28,30,000/- which was to be adjusted as per the mandate of law. The assessee had following profits in the subsequent assessment years:

A.Y. 2007-08 Rs.50,95,000/-

A.Y. 2008-09 Rs.6,37,34,000/-

14. These profits for the assessment years 2007-08 and 2008-09 have completely absorbed the unabsorbed carried forward depreciation and there was no unabsorbed depreciation to be adjusted for the present assessment year, i.e., of Rs.1,28,30,000/- for A.Y. 2009-10. As per the mandate of law, the provision of this clause was not to comply if the amount of loss brought forward or unabsorbed depreciation is nil. From the above, it is evident that the said explanation of section 115JB mandates the above said computation of loss brought forward or unabsorbed depreciation, whichever is less to be adjusted. Since as per the computation as above, the unabsorbed depreciation was nil, the deduction of Rs.23,98,823/- claimed by the assessee has rightly been disallowed by the Id. Commissioner of Income Tax.

15. In the background of the aforesaid discussion and precedent, we are of the considered opinion that the order of the Id. Commissioner of Income Tax is in accordance with the law as confirmed by the Hon'ble Kerala High Court as above. Since we are deciding the issue in favour of the Revenue, on the touch stone of the above said Hon'ble

Kerala High Court decision, the decision of the ITAT referred by the Id. Counsel of the assessee loses its significance, as it is the settled law that the decision of the Hon'ble High Courts takes precedence over that of the ITAT. Hence, we hold that since the Assessing Officer has not at all considered the above provision of law while allowing the deduction to the assessee, the assessment was erroneous in so far it was prejudicial to the interest of revenue. Hence, the Id. Commissioner of Income Tax (Appeals) has rightly exercised his jurisdiction u/s. 263 of the I. T. Act. Accordingly, we affirm the order of the Id. Commissioner of Income Tax u/s. 263 of the Act.

ITA No. 29/Mum/2016

16. In this order, the Id. Commissioner of Income Tax (Appeals) has confirmed the order of the Assessing Officer in pursuance to the above said order of the Id. Commissioner of Income Tax (Appeals) u/s. 263 of the I. T. Act. the Id. Commissioner of Income Tax (Appeals) has also shown working which are in accordance with law. Since we have already upheld the order of the Id. Commissioner of Income Tax (Appeals) u/s. 263 of the Act, we are of the opinion that the consequential order of the Assessing Officer confirmed by the Id. Commissioner of Income Tax (Appeals) is also in accordance with the law as elaborately discussed by us hereinabove. Accordingly, we confirm the order of the Id. Commissioner of Income Tax (Appeals).

17. In the result, both the appeals by the assessee stand dismissed.

परिणामतः निर्धारिती की अपीलें खारिज की जाती है ।

Order pronounced in the open court on 01.06.2018

Sd/-

Sd/-

(Pawan Singh)

(Shamim Yahya)

न्यायिक सदस्य / Judicial Member

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 01.06.2018

व.नि.स./Roshani, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai