

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND SHRI MANISH BORAD, ACCOUNTANT MEMBER
ITA No.453/Ind/2016
Assessment Year 2010-11

M/s. NMI Industries Pvt. Ltd, 314 Bhagirathpura, Indore	Vs.	ITO-4(1) Indore
(Appellant)		(Respondent)
PAN No.AABCN9571B		

ITA No.529/Ind/2016
Assessment Year 2010-2011

ACIT 3(1), Indore	Vs.	M/s. NMI Industries Pvt. Ltd, 314 Bhagirathpura, Indore
(Appellant)		(Respondent)
PAN No. AABCN9571B		

Revenue by	Shri K.G. Goyal, Sr.DR
Assessee by	Shri C.P. Rawka, ,CA
Date of Hearing	01.11.2018
Date of Pronouncement	06.11.2018

ORDER

PER MANISH BORAD, AM.

The above captioned two appeals are filed at the instance of the assessee and Revenue vide IITA No.453/Ind/2016&ITA

NMI Industries Pvt. Ltd
ITA No.453/Ind/2016 & 529/Ind/2016

No.529/Ind/ 2016 respectively pertaining to same Assessment Year 2010-11 are directed against the orders of Ld. Commissioner of Income Tax (Appeals)-I (in short 'Ld.CIT(A)'], Indore dated 29.02.2016 which are arising out of the order u/s 143(3) of the Income Tax Act 1961(In short the 'Act') dated 28.03.2013 framed by ITO-4(1), Indore.

2. Briefly stated facts as culled out from the records are that the assessee is a Private Limited Company engaged in manufacturing of TOR steels. Nil income declared and return was filed on 15.10.2010 after setting off the current years income from business at Rs.74,62,470/- against the unabsorbed business loss/unabsorbed depreciation pertaining to earlier years. The case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act were served upon the assessee. Necessary details as required were furnished. Ld.A.O disallowed the selling and administrative expenses at Rs.5,00,000/- for want of necessary details and proof. Ld.A.O also denied the brought forward business loss and depreciation claimed by the assessee at Rs.74,53,205/-. Ld.A.O observed that the assessee while calculating the book profit has not included the

sundry balance written off at Rs.2,57,30,466/-. He accordingly calculated the book profit for the purpose of application u/s 115JB of the Act at Rs. 2,24,33,925/-.

3. Aggrieved assessee preferred appeal before Ld.CIT(A) and partly succeeded. The Ld.CIT(A) confirmed the disallowance of expenses at Rs.5,00,000/- and also confirmed the book profit of addition made by the Ld.A.O and as regards the claim of set off on unabsorbed business loss and unabsorbed depreciation directed the Assessing Officer to verify the claim and allow it as per rules.

4. Now aggrieved both the assessee and Revenue is in appeal before the Tribunal.

5. We will first take I.T.A. No.453/Ind/2016 of the assessee raising following grounds;

1. That the learned CIT appeals erred in law and the facts of the case confirmed the disallowance of Rs.5,00,000/- made by Assessing Officer out of selling and administrative expenses on ad hoc basis. The action of learned CIT Appeals is totally wrong on facts of the case.

2. That the learned CIT erred on facts of the case confirmed the action of Assessing Officer in computing the book profit under section 115JB. In spite of the facts that the assessee company prepared its profit and loss a/c as per Schedule V of the Income Tax Act.

6. At the outset Ld. Counsel for the assessee requested for not pressing Ground No.1 relating to disallowance of selling and administrative expenses at Rs.5,00,000/-. We therefore dismiss assessee's Ground No.1 as not pressed and uphold the finding of Ld.CIT(A) confirming the disallowance of selling and administrative expenses on ad-hoc basis at Rs.5,00,000/- by Ld.A.O. In the result Ground No.1 is dismissed.

7. As regards Ground No.2, Ld. Counsel for the assessee referring to the audited balance sheet submitted that the sundry balance written off were unsecured loans which were not payable and are being in the nature of capital receipt would not form part of the book profit and therefore lower authorities erred in adding the same to the book profit for the purpose of calculating taxes u/s 115JB of the Act. In support of his contention following judgments were referred and relied;

(i) CIT Vs Chetan Chemicals Pvt. Ltd, 267 ITR 770 (Gujarat)

(ii) CIT and ANR Vs. Compaq Electric Ltd, 249 CTR 214 (Karnataka)

(iii) CIT Vs Shivali Construction Pvt. Ltd, 355 ITR 218(Delhi)

(iv) CITVs Pradeshiya Industrial and Investment Corporation U.P, 95 DTR 421 (All.)

(v) Appollo Tyres Vs CIT, 122 taxman 562

8. Per contra Ld. Departmental Representative vehemently argued and supporting the detailed finding of Ld.CIT(A) referring to various judgments considered by him.

9. We have heard rival contentions and perused the records placed before us and also gone through the judgments referred and relied by both the parties.

10. The issue to be adjudicated is that “whether the book profit figure adopted by the Ld.A.O for the purpose of application of provision of Section 115JB of the Act is correct”. From the perusal of the audited profit and loss account as on 31.3.2010 certified by the Auditor Shri C.P. Rawka, CA dated 3.9.2010 we find that the net profit after prior period adjustment has been shown at Rs.74,53,205/- and to this figure brought forward loss have been adjusted and the amount available for appropriation has been shown in negative at Rs.7,91,91,532/-. In this figure of accumulated loss an amount representing to sundry balance of unsecured loan written off (i.e. income) at Rs.2,57,30,466/- has been reduced leaving net carry forward loss of Rs.5,34,61,066/-.

11. For the purpose of the application of the provision u/s 115JB of the Act explanation 1 to this section refers to the book profit which needs to be increased by certain amounts as referred in explanation 1(a) to (k) and similarly the book profit needs to be reduced by certain amounts mentioned in explanation 1(i) to (viii) of

the Act. Now these adjustments of increase and decrease are to be made to the “book profit”, which is the profit as shown in the statement of Profit & Loss Account for the relevant previous year which is prepared in accordance with the provisions of the Act governing, such companies. For better understanding we need to go through the relevant portion of 115JB of the Act which reads as follows;

115JB. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2010, is less than ten per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent.

(2) Every assessee,—

(a) being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its ⁷⁶[statement of profit and loss] for the relevant previous year in accordance with the provisions of ^{76a}[Part II of Schedule VI] to the ^{76b}[Companies Act, 1956 (1 of 1956)]; or

(b) being a company, to which the ^{76c}[proviso to sub-section (2) of section 211 of the ^{76d}[Companies Act, 1956 (1 of 1956)]] is applicable, shall, for the purposes of this section, prepare its ^{76e}[statement of profit and loss] for the relevant previous year in accordance with the provisions of the Act governing such company:

Provided that while preparing the annual accounts including ^{76e}[statement of profit and loss],—

- (i) the accounting policies;
- (ii) the accounting standards adopted for preparing such accounts including ^{76e}[statement of profit and loss];
- (iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including ^{76e}[statement of profit and loss] and laid before the company at its annual general meeting in accordance with the provisions of ^{76f}[section 210] of the ^{76d}[Companies Act, 1956 (1 of 1956)] :

Provided further that where the company has adopted or adopts the financial year under the ^{76d}[Companies Act, 1956 (1 of 1956)], which is different from the previous year under this Act,—

- (i) the accounting policies;
 - (ii) the accounting standards adopted for preparing such accounts including ^{76e}[statement of profit and loss];
 - (iii) the method and rates adopted for calculating the depreciation,
- shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including ^{76e}[statement of profit and loss] for such financial year or part of such financial year falling within the relevant previous year.

Explanation 1.—For the purposes of this section, "book profit" means the ⁷⁷[profit] as shown in the ^{76e}[statement of profit and loss] for the relevant previous year prepared under sub-section (2), as increased by—

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12. From perusal of the sub section 2 of the Section 115 JB of the Act we observe that the book profit means the profit as shown in the statement of Profit & Loss account prepared for the previous year in accordance with Schedule-VI of the Companies Act 1956. The bone contention in this case is only with regard to the book profit adopted by Ld.A.O. The adjustment of sundry balance written off i.e. unsecured loans not payable, have been added in the profit and loss account below the amount available for appropriation. Now whether this particular amount of Rs.2,57,30,466/- being sundry balance written off is a part of miscellaneous receipts to be added under the head income which will thereafter form the part of net profit before taxes or same could be adjusted to the amount available for appropriation needs to be looked into.

13. The Hon'ble Supreme Court in the case of Apollo Tyres Vs CIT 122 taxman 562 while adjudicating similar type of issue u/s 115J of the Act held that *“therefore, we are of the opinion, the Assessing Officer while computing income u/s 115J has only the power of examining whether books of accounts are certifies 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 increases and reductions as provided for in 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 the explanation to Section 115-J of the Act.”*

14. Examining the facts of the instant appeal and in the light of the judgment of Hon'ble Apex Court, we are of the view that the book profits in the case of the private limited company are to be computed as per Schedule-VI of the Companies Act, 1956. Now whether the audited balance sheet of the assessee as submitted before us is prepared as per the Schedule VI of the Companies Act, 1956 needs to be examined. For the information purpose we mention below the format of statement of profit and loss account Part-II of Schedule-VI of the Companies Act, 1956 which was applicable in the case of assessee for Assessment Year 2010-11.

PART II - Form of STATEMENT OF PROFIT AND LOSS
Name of the Company .
Profit and loss statement for the year ended.

			(Rupees in)			
	Particulars	Note No.		Figures for the current reporting period		Figures for the previous reporting period
1.	Revenue from operations			xxx		xxx
II.	Other income			xxx		xxx
m.	Total Revenue (I + II)			xxx		xxx
IV.	Expenses:					
	Cost of materials consumed			xxx		xxx
	Purchases of Stock-in-Trade			xxx		xxx
	Changes in inventories of finished goods work-in-progress and Stock-in-Trade			xxx		xxx
	Employee benefits expense					
	Finance costs					
	Depreciation and amortization expense					
	Other expenses					
	Total expenses			xxx		xxx
V.	Profit before exceptional and extraordinary items and tax (III-IV)			xxx		xxx

VI.	Exceptional items		xxx		xxx
VII.	Profit before extraordinary items and tax (V - VI)		xxx		xxx
VIII.	Extraordinary Items		xxx		xxx
IX.	Profit before tax (VII-VIII)		xxx		xxx
X	Tax expense:				
	(1) Current tax	-	xxx		xxx
	(2) Deferred tax		xxx		xxx
XI	Profit (Loss) for the period from continuing operations (VII-VIII)		xxx		xxx
XII	Profit/Closs) from discontinuing operations		xxx		xxx
XII I	Tax expense of discontinuing operations		xxx		xxx
XI V	Profit/Closs) from Discontinuing operations (after tax) (XII-XIII)		xxx		xxx
X V	Profit (Loss) for the period (XI + XIV)		xxx		xxx
X VI	Earnings per equity share:				
	(1)Basic		xxx		xxx
	(2)Diluted		xxx		xxx

15. Book profit as mentioned in the Provision 115JB of the Act refers to the profit before taxes which is arrived at S.No. IX of the above referred statement of profit and loss account. The format of the Profit & Loss Account in the case of the assessee as placed on record before us deviates from the standardized format of statement of profit and loss as per Schedule-VI of 1956 at some places.

16. In normal parlance such sundry balance written off which the assessee has itself accepted to be an income forming part of the head "Income" whereas in audited balance sheet the adjustment has been made from the amount available for appropriation. In such situation there needs proper verification at the end of the Assessing Officer who shall verify/ examine the audited balance sheet of the assessee vis-à-vis Part-II of Form of statement of Profit & Loss Schedule-VI of the Companies Act, 1956. He should also procure certificate from the auditor of the company that whether the adjustment of sundry balance written off is as per Schedule-VI of the Companies Act, 1956 and the book profit in the computation of income is as per Schedule-VI of the Companies Act, 1956. Ld.A.O should also get the audited balance sheet verified from the office of the Registrar of Companies under whose jurisdiction assessee company falls so as to get it confirmed that the audited balance sheet produced before the Tribunal is as per Schedule-VI of the Companies Act, 1956. In case a positive reply is received in favour of the assessee, then Ld.A.O should decide accordingly as

per law. Needless to mention that reasonable opportunity of being heard should be provided to the assessee. Ground No.2 of the assessee is allowed for statistical purposes.

17. Appeal of the assessee is allowed for statistical purpose.

18. Now we take up Revenue's appeal I.T.A. No.529/Ind/2016 raising following ground;

"Whether in the facts and in the circumstances of the case, the Ld. CIT(A)

(i) erred in allowing the carry forward losses & unabsorbed depreciation claimed by the assessee for the A.Y 2008-09 although no such carry forward loss is allowable in view of findings given by the AO as per assessment order for A.Y 2008-09.

19. From perusal of records we find that the only issue is set off of brought forward losses and unabsorbed depreciation. We find that the Ld.CIT(A) has already directed the Ld.A.O to verify the claim brought forward and the unabsorbed depreciation. We find that in the return for the year under consideration the appellant company had set off brought forward losses and depreciation to the tune of Rs.74,62,470/-. The set off of unabsorbed depreciation is regulated by provision of Section 32(2) of the Act subject to the provision of sub-section 72(2) of Section 73(3) of the Act. It is also evident from the perusal of assessment record that Learned Assessing Officer has not given any specific finding for denying the set off of unabsorbed loss and unabsorbed depreciation. We, therefore in the interest of justice and in the given facts and circumstances of the

case set aside the issues raised by revenue to the file of Ld.A.O for afresh adjudication in the light of provision of law as applicable in the instant issue i.e. Section 32(2) of the Act read with respect to 72(2) of the Act. We also direct the Learned Assessing Officer to verify the details of brought forward business loss and unabsorbed depreciation after examining the relevant income tax returns filed by the assessee for the Assessment Years wherein such claims have been made. Needless to mention that proper opportunity of being heard should be provided to the assessee to file the details mentioned herein above.

20. In the result the appeal of the revenue is allowed for statistical purposes.

21. In the result the appeal of the assessee is partly allowed for statistical purposes and that of the revenue is allowed for statistical purposes.

The order pronounced in the open Court on 06.11.2018.

Sd/-

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 06 November, 2018

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Copy to: The Appellant/Respondent/CIT concerned/CIT(A)
concerned/ DR, ITAT, Indore/Guard file.