

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A. No733/AHD/2014

निर्धारण वर्ष/Assessment Years : 2007-08

Deputy Commissioner of Income Tax, Circle-1, Surat – 395 001.	Vs.	M/s.Nakoda Ltd, A-701, International Trade Centre, Majura Gate, ring Road, Surat. [PAN: AAACN 7282 L]
अपीलार्थी Appellant		प्रत्यर्थी/Respondent
निर्धारिती की ओर से /Assessee by:	Shri H.R.Vepari - CA	
राजस्व की ओर से /Revenue by:	Shri O.P.Singh - Ld.CIT-DR & Smt.Anupama Singla - Ld.Sr.DR	
सुनवाई की तारीख/ Date of hearing:	01.05.2019	
उद्घोषणा की तारीख/Pronouncement on:	02.05.2019	

आदेश / O R D E R

PER H.S.SIDHU, JM:

1. The Department has filed the present appeal against the impugned order dated 24.12.2010 passed by the Learned Commissioner of Income (Appeals)-II, Ahmedabad for the assessment year 2007-08 on the following grounds:-

“(1) On the facts of the circumstances of the case, whether the Ld. CIT(A) was justified in deleting the penalty u/s 271(1)(c) of the I.T.Act levied by the AO, while the assessee had committed a default by claiming wrong deduction of unabsorbed loss and unabsorbed depreciation from the profit calculated u/s 115JB of the I.T.Act.

(2) On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.

(3) It is therefore, prayed that the order of the CIT(A) may be set-aside and that of Assessing Officer may be restored to the above extent.”

2. Assessee is a public limited company engaged in the business of manufacturing yarn as well as texturized yarn. During the year, the

assessee has shown the books profit of Rs.3,36,41,656/- against which he claimed the deduction of Rs.3,36,41,656/- under clause (iii) of explanation 1 to section 115JB of the I.T.A t on the ground that it had brought forward loss of Rs.6,10,02,257/- and unabsorbed depreciation of Rs.3,70,99,277/-. The Assessing Officer rejected the claim of the assessee and completed the assessment on 31.12.2009 u/s.143(3) of Income Tax Act, 1961 and also initiated the penalty u/s.271(1)(c) of the Income Tax Act. After drafting the prescribed procedure under the law the Assessing Officer levied the penalty in dispute vide order dated 30.03.2012.

3. Aggrieved by the same, the assessee filed an appeal before the Learned First Appellate Authority who vide order dated 24.12.2010 deleted the penalty in dispute and allowed the appeal filed by the assessee.

4. Now, the Revenue is aggrieved against the impugned order dated 24.12.2010 passed by the Learned Commissioner of Income Tax(Appeals) and filed the present appeal.

5. At the time of hearing, Learned Departmental Representative relied upon the order passed by the Assessing Officer as well as the contention raised by the Revenue in the grounds of appeal.

6. The Learned Counsel for the assessee relied on the order passed by the Learned First Appellate Authority and stated that the Learned First Appellate Authority has passed the well reasoned order, therefore the appeal filed by the Revenue may be dismissed.

7. We have heard the both the parties and perused the record available with us, especially the orders passed by the Revenue Authorities. We are of the view that assessee filed its return on 27.03.2009 declaring nil income and Assessing Officer completed the assessment u/s.143(3) of the Act on 31.12.2009 by book profit of Rs.3,36,41,456/- by disallowing the deduction of unabsorbed loss and unabsorbed depreciation from book profits calculated u/s.115JB of the Act and also initiated the penalty proceedings and levied the penalty in dispute on the appeal filed by the assessee. The Learned First Appellate Authority deleted the penalty in dispute by allowing the appeal filed by the assessee on the ground that in the case of assessee there are two conflicting view are possible as seen from the history of the assessee's case itself, because in the assessment year 2003-04 penalty was initiated but subsequently it was not levied. Similarly, in the assessment year 2004-05, 2006-07 and 2007-08 no penalty was initiated and levied by the Assessing Officer. Therefore, the issue of disallowance of deduction u/s.115JB of the Act there are two conflicting views are possible and penalty is not permissible in view of various decisions of the Hon'ble Courts. The relevant portion of the findings of the Learned First Appellate Authority from para 6 to 7 are reproduced as under :

"6. I have carefully perused the assessment order, the penalty order as well as the written submissions made by the learned A.R. of the appellant. It is observed that the penalty has been levied in respect of disallowance of deduction on account of unabsorbed loss and unabsorbed depreciation from the book profits calculated u/s.115JB of the I.T.Act. The relevant portion of section 115JB(2), explanation (1) is reproduced as under:

"Sec.115JB(2)-expl.(1)

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) the amount of income to which any of the provisions of section 10 (other than the provisions contained in clause **(38)** thereof)] or section 11 or section 12 apply, if any such amount is credited to the profit and loss account; or*

[(iia) the amount of depreciation debited to the profit and loss account (excluding the depreciation on account of revaluation of assets); or

(iib) the amount withdrawn from revaluation reserve and credited to the profit and loss account, to the extent it does not exceed the amount of depreciation on account of revaluation of assets referred to in clause (iia); or]

[(iii) 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; or]"

6.1 Further, plain reading of section, it shows that the lower of the brought forward amount of book loss and unabsorbed book depreciation is allowable as deduction. It has been stated that

there was total brought forward amount of loss as on 1st April, 2006 to the extent of Rs.9,81,01,534/- and it had two main components one related to unabsorbed book loss and another one was related to book depreciation. During the course of assessment proceedings, the break up was given to the Assessing Officer which mentioned that out of total of Rs.9,81,01,534/-, an amount of Rs.3,70,99,277/- pertained to unabsorbed depreciation and the balance amount i.e. Rs.6,10,02,257/- was towards unabsorbed business loss.

6.2 It is seen that the profit or loss in the case of corporate assessee is to be computed as per Part 2 & 3 of Schedule VI of Companies Act, 1956. It has also been contended that there are specific ingredients like dividend, bonus, shares, right shares etc. that go to contribute towards loss as per Part-2 of Schedule -VI of the Companies Act, 1956. The Assessing Officer is of the view that any allowance/disallowance which has to be made, it has to be made only with reference to the provisions of Income-tax Act.

6.3 It is thus seen that the Assessing Officer has based his disallowance on the logic that the following three items would not go to contribute towards loss:

- i) dividend pay out;
- ii) transfer to general reserve out of P&L account balance; &
- iii) expenses directly debited to the P&L account and debit balance without routing through the expenditure portion of the Income and Expenditure Account.

According to the Assessing Officer, these items are below the line i.e. the appropriations and do not qualify for the computation of unabsorbed loss.

6.4 The A.R. has also put an argument that any business is run in terms of various transaction on day today basis and it is only an artificial cut off that requires to drop the position of state of affairs of the business as on a particular date (e.g. 31st March), and also to determine the profit and enable appropriations thereof. According to him even after appropriation out of P&L Account balance, the balance remains as P&L A/c. balance which is required to be disclosed as per Part-1 of Schedule VI of the Companies Act. In other words, the Companies Act, even after appropriations recognizes P&L A/c. Balance, be it credit or debit,

as P&L A/c. only and this amount so outstanding, needs to be treated as amount brought forward as loss in terms of clause (iii) of Explanation to section 115JB(2) of the Act.

6.5 The learned A.R. has further contended that the decision of Apollo Tyres Ltd. (255 ITR 273), is very relevant which lays down that the Assessing Officer is not permitted to read beyond the Companies Act, 1956 or beyond the permissible deductions/additions stipulated in explanation to section 115JB(2) of the Income-tax Act, 1961. It has also been submitted by the learned A.R. that the issue of section] 115JB in the case of the appellant company itself travelled upto the ITAT for A.Y.2005-06 and in the order giving effect to the said appellate order, the Assessing Officer has followed the directions and carried out year-wise working of such unabsorbed brought forward loss. However, the Assessing Officer ignoring the working as per the directions of the Hon'ble ITAT, has again disallowed the amount subsequently and levied the penalty also.

6.6 It is seen that in the case of the appellant, as mentioned above, the Hon'ble ITAT in its order for A.Y.2005-06, has given directions to the Assessing Officer for carrying out year-wise working of losses and the Assessing Office has passed order u/s. 143(^8) r.w.s. 256 for the said assessment order dated 06.05.2009, wherein the working of brought forward loss on account of unabsorbed book loss as well as unabsorbed depreciation has been done and the deduction of Rs.3,00,91,030/- was allowed.

6.7 It is also seen that on this issue of disallowance/deduction u/s.115JB of the Act two conflicting views are possible as seen from the history of the appellant's case itself. It has also been explained that in the case of the appellant, in A.Y.2003-04, penalty was initiated in the assessment but subsequently it was not levied. In A.Y.2004-05, the question of penalty did not arise as there was no addition u/s.115JB of the Act. In A.Y.2005-06, penalty was not initiated on the ground of addition u/s.115JB but it was initiated on the different ground and in the second ground of the assessment since the issue was accepted, no penalty was levied. As regards A.Y.2006-07, i.e. in the preceding assessment year, it is seen that although the addition was made u/s.115JB, no penalty was initiated and A.Y.2007-08 is the only year where the penalty has been initiated and levied.

6.8 In view of the above discussion, it is clear that there have been divergent views in different assessment years. In the assessment year in question also, though the addition has been made, there are conflicting views possible. Hence, I am of the considered view

that the penalty u/s.271(1)(c) of the Act is not attracted in this case and the Assessing Officer was not justified in levying penalty u/s.271(1)(c) of the I.T.Act. The same is hereby deleted.

7. In the result, the appeal is **allowed.**"

8. Keeping in view of the aforesaid finding given by the Learned First Appellate Authority by deleting the penalty in dispute we are of the considered view that no interference is called in the well reasoned order by the Learned First Appellate Authority, we uphold the impugned order by dismissing the appeal by the Revenue.

9. In the result, appeal filed by the Revenue is dismissed.

10. The order pronounced in the open court on 02.05.2019.

Sd/-
(O.P.MEENA)

(लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER) (न्यायिकसदस्यतथा/JUDICIAL MEMBER)

सुरत/ Surat, दिनांक Dated: 2nd May , 2019/S.Gangadhara Rao, Sr.PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, Surat