

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4844/MUM/2015
Assessment Year: 2009-10**

&

**ITA No. 4845/MUM/2015
Assessment Year: 2010-11**

&

**ITA No. 2120/MUM/2017
Assessment Year: 2011-12**

DCIT (IT)- 1 (2)(1), Room
No. 118, 1st floor, Scindia
House, N.M. Road, Ballard
Estate, Mumbai-400038.

M/s Bank of Bahrain &
Vs. Kuwait B.S.C., Jolly
Maker Chambers II, Gr.
Floor, 225 Nariman
Point, Mumbai.

**PAN No. AAACB2140F
Appellant**

Respondent

Revenue by : Mr. Suhas Kulkarni, DR
Assessee by : Mr. KetanVed, AR

Date of Hearing : 21/08/2019
Date of pronouncement: 28/08/2019

ORDER

PER N.K. PRADHAN, AM

The captioned appeals filed by the Revenue are directed against the order of the Commissioner of Income Tax (Appeals)-55, Mumbai [in short 'CIT(A)'] and arise out of the assessment completed u/s 143(3) r.w.s144C(3) of the Income Tax Act 1961 (the 'Act'). As common issues

are involved, we are proceeding to dispose them off through a consolidated order for the sake of convenience.

2. The 1st ground of appeal for AY 2009-10, the 2nd ground of appeal for AYs 2010-11 and 2011-12 address a common issue. For brevity, the 1st ground of appeal for AY 2009-10 is mentioned below:

“Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to make necessary verification from the Assessee’s case records in respect of set off of provisions of nonperforming assets written back which is defacto setting aside of the matter not permissible u/s 251(1)(a) of the I.T. Act inspite of the fact that Ld. CIT(A) found no jurisdiction in the claim raised by the assessee.”

3. Briefly stated, the facts are that the Assessing Officer (AO) made an addition of Rs.23,44,26,771/- as provision for non-performing assets written back, while computing the book profit u/s 115JB of the Act. During the course of appellate proceedings, the assessee submitted before the Ld. CIT(A) that the above amount being provision for non-performing assets written back ought to have been reduced while computing the book profit u/s 115JB of the Act. The Ld. CIT(A) *vide* order dated 27.04.2015 held as under :

“7. I find that the appellant's this claim has been dealt with by the A.O in para 8 of the Assessment Order wherein the AO took note of the said claim as detailed in para 8. However, subsequently, the A.O. made detailed note of the appellant's such claim and its allowability as detailed in para 8.1 to para 24 of the Assessment Order. The AO discussed in detail the relevant provisions of the Act and the appellant's claim made in earlier years which were dealt with by the respective AO in those assessment years as dealt by the A.O. in the

above referred paras of the Assessment Order. After the detailed reasons assigned therein, the A.O. rejected the claim of the appellant. However, I do not find any such discussion in the computation of income of the appellant in relation to the deduction of an amount of Rs.23,44,26,771/- as provision of asset written back from the book profit. In this background of the fact, I find that there is no justification in the appellant's claim raised through this ground of appeal.

7.1 However, taking note of the appellant's claim and in the interest of natural justice, I direct the A.O. to verify the appellant's claim from the case records for different assessment years to which the total sum of Rs.23,44,26,771/- pertains to as detailed in the appellant's submission. In view of the same, I consider it proper and appropriate to direct the AO to make necessary verification from the appellant's case records of those respective assessment years in which such provisions were actually added back to the income of the appellant in those respective years as submitted by the appellant in its submission. After taking note of the same and also after taking note to the provisions of I.T. Act for giving set off of such provisions of non-performing assets written back, if the AO finds that the appellant's claim is in accordance with the provisions of law as well as justified under the accounting principle as specified for such accounting, the AO may allow the claim of the appellant if it is an allowable deduction under the respective provisions of Income-tax Act. With this observation, the appellant's this ground of appeal is adjudicated."

4. Before us, the Ld. DR submits that such setting aside of the matter is not permissible u/s 251(1)(a) of the Act and the Ld. CIT(A) may be directed to decide the issue on merits. The Ld. counsel for the assessee agrees that fully setting aside of the matter is not permissible u/s 251(1)(a) of the Act.

5. We have heard the rival submissions and perused the relevant materials on record. We find that the power of the first appellate authority to set aside the assessment order u/s 251(1)(a) has been withdrawn w.e.f. 01.06.2001. It is pertinent to mention here that due to the omission (w.e.f. 01.06.2001) by the Finance Act, 2001 (14 of 2001) of certain words, viz-

- “or he may set aside the assessment and refer the case back to the Assessing Officer for making a fresh assessment in accordance with the directions given by the Commissioner (Appeals) and after making such further inquiry as may be necessary, and the Assessing Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment” from section 251(1)(a), the power of the first appellate authority to set aside the assessment order has been withdrawn (w.e.f. 1-6-2001).

In the instant case, the Ld. CIT(A) has set aside the above matter to the file of the AO which is not permissible u/s 251(1)(a) of the Act. Therefore, we restore the matter back to the file of the Ld. CIT(A) to decide the matter afresh after giving reasonable opportunity of being heard to the assessee. Thus the 1st ground of appeal for AY 2009-10, the 2nd ground of appeal for AYs 2010-11 and 2011-12 are allowed for statistical purposes.

6. The 1st ground of appeal for AYs 2010-11 and 2011-12 also address a common issue. For brevity we produce below the 1st ground of appeal for AY 2010-11 :

“Whether on the facts and circumstances and in law, the Ld. CIT(A) was justified in relying on the order of the ITAT, in the case of the assessee for the A.Y 2002-03 and thereby allowing relief, when on the issue of addition of Rs.1,25,58,475/- being the adjustment made by the TPO, the facts of the instant case are clearly distinguishable from the facts of the case of the assessee for the A.Y 2002-03 in as much as the TPO, after duly following the directions of the ITAT in the A.Y 2002-03 and due verifications has made the adjustments for the reason of non-furnishing of requisite information by the assessee?”

7. The issue relates to the total adjustment of Rs.1,25,58,475/- made by the Transfer Pricing Officer (TPO) *vide* order dated 30.01.2014 framed u/s 92CA(3) of the Act, which is adopted by the AO. The Ld. CIT(A) followed the order of Tribunal in assessee’s own case for AY 2002-03 and directed the AO to follow the order of the Tribunal (paras 16 to 18) and thus allowed the appeal filed by the assessee.

8. Before us, the Ld. DR relies on the order of the AO whereas the Ld. counsel for the assessee relies on the order of the CIT(A).

9. We have heard the rival submissions and perused the relevant materials on record. We find from the order dated 27.04.2015 passed by the Ld. CIT(A) that he has clearly directed the AO to follow the order of the ITAT in assessee’s own case for AY 2002-03 in ITA No. 6731 & 6605/Mum/2006. Specific mention has been made by him to paras 16 to 18 of the above order of the Tribunal. It is the responsibility of the AO to follow the above direction of the Ld. CIT(A). During the course of hearing before us, the Ld. counsel for the assessee submits that the said

direction of the CIT(A) has not been followed in its entirety by the AO. Having considered the above submissions and facts of the case, we direct the AO to carry out in its entirety the direction of the Ld. CIT(A) by following the order of the Tribunal in assessee's own case for AY 2002-03. Thus 1st ground of appeal for AYs 2010-11 and 2011-12 is dismissed.

10. Finally what remains is the 3rd ground of appeal for AY 2010-11 which is as under :

“Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to verify the allowability of exemption u/s 10(34) of the I.T.Act while arriving at Book Profit for the purpose of section 115JB which is de facto setting aside of the matter and not permissible within the meaning of Section 251(1)(a) of the I.T. Act?”

11. Before us, the Ld. DR submits that the above matter may be restored to the Ld. CIT(A) so that the interest of the revenue is protected. On the other hand, the Ld. counsel for the assessee submits that as the AO has given appeal effect to the order of the Ld. CIT(A), there is no necessity of further restoring the matter.

12. Having heard the rival contentions and examined the materials on record, we find that the AO has given effect to the order of the Ld. CIT(A) and therefore, there is no merit in the above ground of appeal filed by the revenue. Accordingly, the 3rd ground of appeal for AY 2010-11 is dismissed.

13. To sum up, the appeal for AY 2009-10 is allowed for statistical purposes; for AYs 2010-11 and 2011-12 are partly allowed.

Order pronounced in the open Court on 28/08/2019.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER
Mumbai;

Dated: 28/08/2019

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai