आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ, राजकोट।

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

श्री राजपाल यादव, न्यायिक सदस्य **एवं** श्री वसीम अहमद, लेखा सदस्य **के समक्ष**।

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER &
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.184/Rjt/2011
(निर्धारण वर्ष/Assessment Year : 2007-08)

Shree Digvijay Cement Co. Ltd., Digvijaygram Sikka, Jamnagar.	**बनाम**/ Vs.	A.C.I.T, Circle-2, Jamnagar.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCS0957J		
(अपीलार्थी/**Appellant**)	..	(प्रत्यर्थी/**Respondent**)

अपीलार्थी ओर से/**Appellant by** :	Shri Vimal Desai, A.R
प्रत्यर्थी की ओर से/**Respondent by** :	Shri Jitender Kumar, CIT.D.R

सुनवाई की तारीख / **Date of Hearing**	19/09/2019
घोषणा की तारीख /**Date of Pronouncement**	22/10/2019

आदेश / O R D E R

PER WASEEM AHMED ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals) Jamnagar [Ld. CIT(A) in short] dated 29/03/2011, arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") dated 21/12/2009 relevant to Assessment Years (A.Y.) 2007-08.

The assessee has raised the following grounds of appeal:

> *1. The assessment order u/s.143(3) r.w.s 147 is bad in law.*
>
> *2. The learned Assessing Officer has erred on facts and in law in making disallowance of claim of liability of Rs.2,02,45,000/- towards Mumbai Port Trust on the alleged ground that it is not crystalised liability and it pertains to earlier year. The learned CIT(A) has erred in confirming the same.*
>
> *3. The learned Assessing Officer has erred on facts and in law in making disallowance of additional royalty claims of Rs.31,29,000/- considering it as previous year expenses. The learned CIT(A) has erred in confirming the same..*
>
> *4. The learned Assessing Officer has erred on facts and in law in making disallowance of expenses of Rs.16,62,000/- incurred on exploratory / evaluation studies considering it as capital expenditure. The learned CIT(A) has erred in confirming the same.*
>
> *The appellant craves leave to add, alter, amend, delete or withdraw one or more grounds of appeal.*

2. The 1st issue raised by the assessee is that the Ld. CIT (A) erred in confirming the order of the AO by sustaining the addition of Rs. 2,02,45,000.00 as the liability for the has not been crystallized in the year under consideration.

3. The facts in brief are that the assessee in the present case is a limited company and engaged in the business of manufacturing and sale of cement clinker and cement. The assessee in the year 1973 has acquired the land on lease for 30 years from Mumbai Port Trust (for short MPT). The necessary details stand as under:

Land area	*Period of contract*	*Lease rent p.m. as per contract*
1341.52	*14-01-1973 to 13-01-2003*	*Up to 13-01-88 Rs.4225.79 14-01-1988 to 13-1-2003 Rs.5,282.24*
1373.94	*15-09-1973 to 14-09-2003*	*Up to 14-09-88 Rs.4760.70 15-09-1988 to 14-9-2003 Rs.5,951.45*

3.1 However, the assessee claimed that it, vide letter dated 7th April, 1998 had handed over the possession of the plots of land to the MPT as the impugned plots were encroached by the slum dwellers in unauthorized manner.

3.2 The assessee also submitted that its financial position was not good and subsequently it was declared as the sick company by the BIFR vide order dated 6th September, 2000.

In view of the above the assessee claimed that it has not provided the lease rental in its books of accounts from October 1998.

3.3 However, the Estate Office of MPT raised a demand towards the outstanding amounting to Rs. 2,02,45,000.00 along with the interest vide order dated 28th February, 2007. The assessee against such order of MPT carried the matter to the civil court but no success. Accordingly the

assessee carried the matter before the Hon'ble Bombay High Court which is pending therein. However the assessee was of the view that such liability has arisen in the year under consideration and accordingly it recognized the same in the books of accounts.

4. However, the AO was of the view that such liability represents the contingent liability as the same has been litigated by the assessee before the Hon'ble Bombay High Court.

4.1 Similarly, the AO was also of the view that such liability towards the lease rent along with interest pertains to the earlier years. Therefore the same cannot be allowed as deduction in the year under consideration.

In view of the above the AO disallowed the claim of the assessee for Rs. 2,02,45,000.00 towards the lease rent as discussed above and added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the Ld. CIT (A). The assessee before the Ld. CIT (A) submitted that the liability towards the lease rent to the MPT has been crystallized in the year under consideration. As such the liability crystallized during the year cannot be characterized as contingent merely on the ground that the same was challenged before the Hon'ble competent court. The assessee further reiterated the submissions as made before the AO during the assessment proceedings.

6. However the Ld. CIT (A) was of the view that since the matter is pending in the court of law, therefore the same cannot be called a crystallized liability. Accordingly he confirmed the view of the AO.

Being aggrieved by the order of the Ld. CIT-A, the assessee is in appeal before us.

7. The Ld. AR before us filed a paper book running from pages 1 to 154 and submitted that the liability was crystallized in the year under consideration. Therefore the same should be allowed as deduction.
On the other hand the ld. DR vehemently supported the order of the authorities below.

8. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case relates whether the assessee is eligible for deduction under section 37(1) of the Act for the liability on account of rent to Mumbai Port Trust in pursuance to the order of the estate officer of the Mumbai port trust dated 28th February, 2007. The facts of the case have already been discussed in the preceding paragraph and there is no dispute regarding the same. Therefore we are not inclined to repeat the same for the sake of brevity and convenience.

8.1 There is no dispute that there was a demand raised by the estate officer of the Mumbai port trust amounting to Rs. 2,02,45,000.00 vide order dated 28th February, 2007 for the rent not paid by the assessee for the period beginning from October, 1998 till the end of February, 2007.

The details of the outstanding rent are placed on page-B of the paper book.

8.2 The assessee subsequently has challenged the order of the estate officer of the Mumbai port trust to the Civil Court in its petition which was dismissed. The assessee further carried the matter before the Hon'ble Bombay High Court which is pending as on date.

8.3 However the assessee in pursuance to the order of the estate officer of the Mumbai port trust has provided/accounted its liability in its books of accounts and accordingly claimed the deduction against its profit on the ground that the liability has been crystallized in the year under consideration though the same has been challenged before the competent court of law and pending as on date.

8.4 The contractual liability may arise under two situations 1- From Statutory Order and 2- From Contract. The liability arising in situation 1 is covered by the provision of section 43B of the Act meaning thereby, it will be allowed as deduction in the year in which it is paid. However the liability arising under situation 2 is difficult to ascertain in view of the contradictory stand taken by the parties involved in the dispute. As such the contractual liability is in the nature of contingent liability which cannot be allowed as deduction under the provisions of the Act. Such liability may arise on the happening of an event in future. In this connection, we draw support and guidance from the orders of Delhi High Court in the case Oswal Agro Mills Ltd. v/s CIT reported in 42 Taxmann.com 100 wherein it was held as under;

> *"A liability which is contingent and which may arise in future on happening of an event cannot be deducted as expenditure. The controversy that needs to be addressed is whether in the facts of the present case, a liability in praesenti can be stated to have accrued in the relevant previous year or whether the subject liability is a contingent one. While the former is allowed as a deduction, the latter is not.*
> *A contingent liability cannot be allowed as a deduction for the purpose of calculating the taxable income of an assessee. And, a provision can only be recognized when the obligation has already fructified and is not contingent upon an occurrence of any uncertain event in the future. It is not necessary that the obligation must result in a minimum outflow of resources. It is sufficient, if the liability has arisen although the outflow in respect of the same may result later."*

8.5 Now, turning to the present facts of the case, we find that liability raised by the MPT has been disputed by the assessee in the court of law which is pending as on date. We also note that the assessee has not made any payment towards such liability. Therefore in over considered view entire liability is contingent in nature and its outcome depends upon the event in future. However, we further note that the Hon'ble Gujarat High Court in the case of Navjivan Roller Flour & Pulse Mills Ltd. Vs. DCIT reported in 224 CTR 55 has allowed deduction for such kind of liability. The relevant extract of the judgment reads as under:

> *"Held that on 28-5-1987 when the Trade Association made an award for damages for breach of contract, the liability to pay such damages had already been incurred by the assessee. Merely because the award was challenged in appeal by the assessee, that could not be a ground for holding that the liability had not been incurred. The Tribunal was not justified in holding that the liability arose only on 22-3-1989, when the appellate forum confirmed the award. Thus, the liability to make payment arising under the arbitration award declared in the relevant accounting period for the assessment year 1988-89, had accrued in that year.*

In view of the above, we hold that the assessee is entitled for the deduction of the liability raised by the MPT despite the fact that the same

is pending in the court of law. Hence, the ground of appeal of the assessee is allowed.

9. The 2nd issue raised by the assessee is that the Ld. CIT (A) erred in upholding the addition made by the AO for Rs. 31,29,000.00 on account of additional royalty payment which was treated as prior period expenses.

10. The AO during the assessment proceedings observed that the assessee has claimed an expense for the additional royalty of Rs. 31,29,280.00 pertaining to the earlier assessment year. As per the AO such liability represents the prior period expenses and accordingly the same cannot be allowed as deduction in the year under consideration. Thus the AO disallowed the same and added to the total income of the assessee.

Aggrieved assessee preferred an appeal to the Ld. CIT (A).

11. The assessee before the Ld. CIT (A) submitted that the liability towards the additional royalty was crystallized in the year under consideration and therefore the same was claimed as per mercantile system of accounting.

12. However, the Ld. CIT (A) disagreed with the submission of the assessee by observing that the assessee has shown such liability in its audited financial statements as pertaining to the financial year 2003-04. Accordingly the Ld. CIT (A) was of the view that the same needs to be

accounted for in the financial year 2003-04 as per the mercantile system of accounting. Accordingly the Ld. CIT (A) upheld the order of the AO.

Being aggrieved by the order of the Ld. CIT (A), the assessee is in appeal before us.

13. The Ld. AR before us submitted that the liability on account of additional royalty was raised by the Department of Geology and Mining of Gujarat in the year under consideration. Therefore the same has to be allowed as it was determined/ crystallized in the year under consideration.

14. On the other hand, the Ld. DR vehemently supported the order of the authorities below.

15. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case relates whether the assessee is eligible for deduction under section 37(1) of the Act for the liability pertaining to the year 2003-04 on account of the royalty but paid/ crystallized in the year under consideration to the Department of Geology and Mining. Admittedly, the demand was raised by the Department of Geology and Mining of Gujarat upon the assessee vide letter dated 13-11-2006 which was pertaining to the earlier year 2003-04. Thus, it is inferred that the liability was crystallized in the year under consideration. As such, the liability for the royalty was provided by the assessee in the books of accounts in the previous year 2003-04 but some part of it crystallized in the year under consideration. Therefore we

are of the view that, the assessee was not in a position to ascertain such liability in that relevant year. Accordingly, it was not possible for the assessee claimed the deduction of such liability in the year 2003-04.

15.1 Now the question arises whether the assessee can claim the deduction of such liability crystallized in the year under consideration. There is no ambiguity to the fact that it was not possible for the assessee to claim the deduction for the differential amount of the royalty paid/ crystallized in the year under consideration pertaining to the year 2003-04. Thus, there was no fault of the assessee to claim the deduction and moreover it was not possible to do so. Therefore, we hold that the deduction pertaining to the earlier year but claimed in the year under consideration cannot be denied in the given facts and circumstance as it was impossible for the assessee to perform its duty.

15.2 It is well-settled law that an obligation gets discharged due to impossibility of performance. The law of impossibility of performance does not necessarily require absolute impossibility, but also encompass the concept of severe impracticability. In our humble opinion, the doctrine of impossibility of performance applies in this case. Due to uncontrollable circumstances, the performance of the obligation to record the liability in the year 2003-04 for the royalty expenses was not booked in the that year. The impossibility of performance releases the assessee from its obligation to account for such liability in the year 2003-04. A default occurs only when an obligation is not performed. We also find support from the legal maxim ñ*lex non cogit ad impossibilia" meaning*

thereby that the law does not compel a man to do what he cannot possibly perform. In holding so we find support & guidance from the judgment of Hon'ble Supreme Court in the case of Krishna Swamy S. PD. & ANR Vs. Union of India & ors reported in 281 ITR 305 wherein it was held that :

> *"The other relevant maxim is, **lex non cogit ad impossibilia**—the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. [See : U.P.S.R.T.C. vs. Imtiaz Hussain 2006 (1) SCC 380, Shaikh Salim Haji Abdul Khayumsab vs. Kumar & Ors. 2006 (1) SCC 46, Mohammod Gazi vs. State of M.P. & Ors. 2000 (4) SCC 342 and Gursharan Singh vs. New Delhi Municipal Committee 1996 (2) SCC 459]."*

Thus in view of above we hold that the assessee would be discharged from such an obligation and hence cannot be regarded a defaulter. We also note that, the law is fairly settled the assessee can claim the deduction for the liabilities in the year in which these were crystallised. In holding so we find support and guidance from the judgement of Hon'ble Ahmedabad Tribunal in the case of Sate Bank of Saurashtra, Bhavnagar v/s DCIT reported in 93 ITD 662, the relevant portion of held part is reproduced hereunder;

> *"A liability to an assessee may either be arising out of contractual obligation or it may arise under a statutory provision. Statutory liability is generally ascertainable and can be determined by applying the provisions of law and could be allowed as a deduction either in the year to which the transaction pertains has occurred, namely, taxable event has happened or it may be allowed in the year in which a demand was raised on the assessee by the statutory authority. It could also be claimed and allowed when it is finally settled by due process of law. The dispute raised by an assessee for its non-levy cannot deter its allowability in any of the three situations.*

15.3 We also note that the genuineness of the expenses and proximity of such expenses with the business of the assessee has not been doubted by the authorities below. Thus it can be inferred that the impugned expenses were incurred wholly and exclusively by the assessee for the purpose of its business. But the only drawback is that the same was not claimed in the year to which it pertains. However, we also note that there was no change in the rate of tax under the Act. Thus, there cannot be any loss to the revenue even if the assessee claimed such expenses in the year under consideration. In this regard we find support and guidance from the judgment of Hon'ble Bombay High Court in the case of *CIT v. Nagri Mills Co. Ltd.[1958] 33 ITR 681 has held as under:*

> *"3. We have often wondered why the Income-tax authorities, in a matter such as this where the deduction is obviously a permissible deduction under the Income-tax Act, raise disputes as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of bonus was granted in the assessment year 1952-53 or in the assessment year corresponding to the accounting year 1952, that is in the assessment year 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would not fritter away its energies in fighting matters of this kind. But, obviously, judging from the references that come up to us every now and then, the Department appears to delight in raising points of this character which do not affect the taxability of the assessee or the tax that the Department is likely to collect from him whether in one year or the other."*

In view of the above and after considering the facts in totality, we are of the view that the assessee is entitled to claim the deduction of the impugned expenses. Accordingly we set aside the order of the Ld. CIT (A) and direct the AO to delete the addition made by him. Hence the ground of Appeal of the assessee is allowed.

16. The last issue raised by the assessee is that the Ld. CIT (A) erred in upholding the addition made by the AO for Rs. 16,62,000.00 by treating the expenditure incurred on exploratory/evaluation studies as capital in nature.

17. The assessee in the year under consideration has incurred certain expenditures of Rs. 16,62,000.00 on exploratory/evaluation studies which were claimed as revenue expenses in the profit and loss account. As per the assessee there was neither any new assets came into existence out of such expenditure nor any benefit of enduring nature out of such expenditure.

18. However the AO found that the auditor of the company in his audit report has clearly remarked in clause No. 17 that the impugned expenditures are in the nature of capital expenses. On question by the AO about the auditor remark for treating such expenditure as capital in nature, the assessee could not explain. Accordingly the AO disallowed the same by treating as capital expenditure after allowing the depreciation at the rate of 25% on such expenditure.

Aggrieved assessee preferred an appeal to the Ld. CIT (A).

19. The assessee before the Ld. CIT (A) submitted that the impugned expenditure are not generating any enduring benefit and therefore the same needs to be treated as revenue expenses.

19.1 The assessee also claimed that the AO has not given the benefit of the depreciation on such expenditure though it was recorded in his assessment order.

19.2 However, the Ld. CIT (A) observed that the impugned expenditure was incurred on the preparation of techno economic feasibility report which will benefit to the assessee for a long time. Accordingly the Ld. CIT (A) upheld the order of the AO.

Being aggrieved by the order of the Ld. CIT (A), the assessee is in appeal before us.

20. The Ld. AR before us reiterated the submission as made before the authorities below whereas the Ld. DR supported the order of the lower authorities.

21. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case relates whether the assessee has rightly claim the expenditure incurred on exploratory/evaluation studies as revenue expenditure while the auditor in the audit report mentions the same as capital expenditure. From the preceding discussion we note that there is no doubt about the genuineness of the expenses.

21.1 Before, we proceed to adjudicate the issue of allowability of such expenses, it is pertinent to note that the study was conducted on the existing project and there was no fixed asset came into existence out of such expenditure. This fact has not been doubted by any of the authorities below. Similarly, the learned CIT (A) has assumed that such study will result in the enduring benefit to the assessee without referring to any material on record.

22. The learned DR has also not brought anything on record suggesting that there was some enduring benefit to the assessee out of such expenses. We also draw the support and guidance from the judgment of Hon'ble Andhra Pradesh High Court in the case of CIT v/s Coromandel Fertilzers reported in 105 Taxman 490 wherein it was held as under:

> *"Admittedly, on the facts of the instant case, the feasibility report submitted by Consultancy Services had not resulted in establishing a new unit. Further, the object of the expenditure was to utilise the surplus funds more efficiently and more profitably while leaving the fixed capital untouched. The study taken up by the assessee was for utilisation of surplus funds alone. Therefore, as long as it had not resulted in setting up of a new unit and as long as the object of the assessee was to utilise the surplus funds profitably and efficiently, it could not be said that the expenditure incurred was on capital account."*

Thus, from the above it is clear that the study conducted on the existing business in the given facts and circumstances cannot be treated as capital expenditure.

23. We are also conscious to the fact that the auditor in his report has held that such expenditure is capital in nature. However, in this regard we

note that the audit report cannot replace the provisions of law and the principles laid down by the Hon'ble Court's. In this regard we find support and guidance from the judgment of Hon'ble Supreme Court in the case Sutlej Cotton Mills Ltd. Vs. CIT reported in 116 ITR 1 wherein it was held as under:

> *"It is now well settled that the way in which entries are made by an assessee in his books of account is not determinative of the question whether the assessee has earned any profit or suffered any loss. The assessee may, by making entries which are not in conformity with the proper accountancy principles, conceal profit or show loss and the entries made by him cannot, therefore, be regarded as conclusive one way or the other."*

In view of the above, we hold that the assessee is entitled for the deduction of the expenses incurred on the study/feasibility report on the existing business being revenue in nature. Hence the ground of appeal of the assessee is allowed.

24. In the result the appeal of the assessee is allowed.

This Order pronounced in Open Court on 22/10/2019

-Sd-	**-Sd-**
(राजपाल यादव)	(वसीम अहमद)
□या□यक सद□य	लेखा सद□य
(RAJPAL YADAV)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Dated 22 /10/2019
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