

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER &
SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No. 4260/Mum/2013 Assessment year : 2006-07

Times Guaranty Ltd Times of India Building Dr D.N. Road, Fort Mumbai 400 001 PAN : AABCT2481Q	vs	ACIT-1(3), Mumbai
APPELLANT		RESPONDEDNT

Appellant by	Shri S Venkataraman -AR
Respondent by	Shri Amit Pratap Singh Sr DR
Date of hearing	03-10-2019
Date of pronouncement	06-11-2019

ORDER

Per Pawan Singh, Judicial Member :

1. This appeal by assessee is directed against the order of CIT(A)-7, Mumbai dated 16-01-2013 for assessment year 2006-07. The assessee has raised the following grounds of appeal:-

"1) On the facts and in the circumstances of the case, the learned CIT(A) erred in considering the Income from Bank deposits, interest on bonds and Interest on IT refund as "Income from Other Sources".

2) The learned CIT(A) erred treating the Income from Bank Deposits. Interest on Bonds and Government Securities and Interest on Income Tax Refund as "Income from Other Sources" instead of Income from Business and consequently erred in not allowing set off of brought forward business loss u/s 72 of the Income Tax Act, 1961 against such Income. He further erred in not allowing set off of unabsorbed depreciation u/s 32(2) of the Income Tax Act, 1961 against such income.

3) On the facts and in the circumstances of the case, the learned CIT(A) failed to allow the set off of "Unabsorbed Depreciation" against Income from Other Sources u/s 32(2) of the Income Tax Act, 1961.

4) The learned CIT(A) erred in charging Interest u/s 234C of the Income Tax Act, 1961 without appreciating the fact that the assessee's liability arises on account of MAT and there is no liability arising on account of Advance Tax.”

2. The assessee, vide application dated 08-07-2019, raised the following additional ground of appeal:-

“1.) "On the facts and in the circumstances of the case and in law, the Assessee submits that since there is no Income Tax payable on the total income computed under the normal provisions of the Income Tax Act, 1961, the provisions of Section 115JB are not attracted and the Assessing Officer erred in taxing a sum of Rs. 3,76,24,820/-, under Section 115JB of the Act as book profits."

3. The brief facts of the case are that assessee is a company engaged in the business of advisory services and investment activities. The assessment for the year under consideration was completed u/s 143(3) on 24-12-2008. The AO besides, other additions and disallowances, treated the interest income on bank deposits, interest on Government bonds and Government securities as income from other sources as against the claim of ‘business income’ and not allowed the set off of brought forward business loss. The AO also not allowed the unabsorbed depreciation u/s 32(2) against the income from other sources. On appeal before the Commissioner (Appeals), the action of AO was sustained. Thus, further aggrieved, the assessee has filed present appeal before the Tribunal.

4. We have heard the submission of Ld.AR of the assessee and Ld. DR for the revenue and perused the order of lower authorities, carefully. At the outset of hearing, the Ld.AR of the assessee submits that he is not pressing grounds 1 & 2. Considering the submission of Ld.AR of the assessee, grounds 1 & 2 are dismissed, as not pressed.
5. The Ld.AR further submits that he has filed additional ground of appeal which relates to applicability of provisions of section 115JB. The Ld.AR submits that no new facts are necessary to be brought on record. The ground of appeal raised by assessee is purely legal in nature. On the other hand, the Ld. DR for the revenue submits that in the grounds of appeal the assessee has stated that section 115JB is not attracted. Thus, there is no need to raise additional grounds of appeal.
6. We have considered the submission of both the parties and considering the fact that no new fact is necessary to be brought on record and that the additional ground of appeal raised by assessee is purely legal in nature and ultimately would affect the tax liability of the assessee, the additional ground of appeal raised by the assessee is admitted.
7. In support of ground 3, the Ld.AR of the assessee submits that on identical issue for A.Ys 2003-04 & 2004-05, the Tribunal passed the order against the assessee and on further appeal, the Hon' ble jurisdiction High Court has decided the issue in favour of the assessee in

ITA No.841 of 2011 with ITA No.842 of 2011 vide judgement dated 03-08-2018. Therefore, this issue stands covered in favour of the assessee.

On the other hand, the Ld. DR for the revenue supported the order of the lower authorities.

8. We have considered the submission of both the parties and gone through the orders of lower authorities. We have noted that in assessee's own case for A.Ys 2003-04 & 2004-05, the Hon'ble Bombay High Court on the following question of law passed the order in favour of the assessee:-

"Whether the set off of carried forward unabsorbed depreciation relating to A. Y. 1997-98 to 1999-2000 is to be dealt with in accordance with the provisions of section 32(2) as applicable for A. Y. 1997-98 to 1999-2000 or the same has to be dealt with in accordance with the said provisions as applicable to A. Y. 2003-04 and 2004-05?"

9. The Hon'ble Bombay High Court, while following the decision of Hindustan Unilever Ltd 394 ITR 73 (Bom) passed the following order. For appreciation of facts and clarity, the entire order of the Hon'ble High Court is extracted below:-

“3 Both these Appeals by the Assessee were kept today for final disposal along with other Appeals filed by the Revenue on the same issue. This by our order dated 2nd August, 2018.

4 Mr. Dalai, learned Counsel for the Appellant in support of the Appeals submits that the issue raised herein above stands concluded in favour of the Appellant-Assessee by the decision of this Court in *CIT v/s. Hindustan Unilever Pvt. Ltd., 394 ITR 73*. The aforesaid

decision has been followed by this Court in Revenue's appeal on an identical question in CIT v/s. M/s, Arch Fine Chemicals (P) Ltd., (Income Tax Appeal No. 1037 of 2014) dismissed on 6th December, 2016, CIT v/s. Bajaj Hindustan Ltd., (Income Tax Appeal Nos. 134, 135, 136, 140, 141 and 143 of 2016) a common order dated 28th February, 2018 dismissed six appeals and in Principal CIT v/s. Hindustan Antibiotics (Income Tax Appeal No. 1042 of 2015) dismissed on 20th February, 2018. Thus, Mr. Dalai submits that the Appeals should be allowed.

5 Mr. Pinto, learned Counsel for the Revenue submits that the issue should be referred to the Larger Bench, as an Appeal on an identical question has been admitted by this Court in CIT v/s. M/s. Milton's Pvt. Ltd., (Income Tax Appeal No. 2301 of 2013) on 20th February, 2017 and CIT v/s. M/s. Confidence Petroleum India Ltd., (Income Tax Appeal No. 582 of 2014) on 3rd April, 2017. Thus, the aforesaid admission, according to Mr. Pinto, would justify the referring the question of law to a Larger Bench.

6 The decision rendered in Hindustan Unilever Ltd., (supra) finally disposes of the Appeal, by relying upon the decision of the Gujarat High Court in *DCIT v/s. General Motors India Pvt. Ltd., 354 ITR 244* and the Circular dated 22nd November, 2001 issued by the Central Board for Direct Taxes. Thus, the order admitting an Appeal, cannot be considered similar to a speaking order which has finally disposed of the Appeal, At the time of admission, no concluding view is taken.

7 It was next submitted that in any case, the decision of this Court in M/s. Hindustan Unilever Ltd., (supra) is not correct. However, no submission in support of the same is made. Thus, no case to refer this question to a larger bench, can arise. We note that in the decision rendered in M/s. Hindustan Unilever Ltd., (supra), the

Revenue was not able to point out any reason as to why the decision of the Gujarat High Court in *General Motors (I) Ltd.*, (supra) should not be followed. Even before us today, no submissions are made in support of the Revenue's contention that the decision in *Hindustan Unilever Ltd.*, (supra) is not correct or in view of some distinctive facts here which would lead to not following the decision of this Court in *M/s. Hindustan Unilever Ltd.*, (supra).

8 We are informed that the Revenue has filed an SLP to the Apex Court, challenging the order of this Court in *M/s. Hindustan Unilever Ltd.*, (supra). However, mere filing of an SLP would not by itself make the decision in *Hindustan Unilever Ltd.*, (supra) not binding. Needless to state that in case the Revenue is aggrieved by this order, it is always open to challenge the same before the Apex Court and tag it along with the pending SLP in case of *Hindustan Unilever Ltd.*, (supra).

9 In the above view, the substantial question of law in both these Appeals are answered in favour of the Appellant-Assessee and against the Respondent-Revenue.”

10. In view of the aforesaid decision of Hon' ble jurisdictional High Court, the ground of appeal raised by the assessee is allowed. Ground 3 is allowed.
11. Ground 4 relates to charging of interest u/s 234C. The Ld.AR of the assessee fairly submits that this ground of appeal is covered against the assessee by the decision of Hon' ble Supreme Court in the case of *Rolta India* 330 ITR 470 (SC). Considering the submission of assessee, ground 4 of the assessee is dismissed.

12. The additional ground of appeal relates to computation of income as per section 115JB. The Ld.AR of the assessee submits that no tax is payable as per computation of income. Therefore, the provisions of section 115JB are not applicable. The Ld. DR, on the other hand, submits that if no tax is payable, there was no need to raise additional ground of appeal and supported the order of AO.

13. We have considered the submission of both the parties and perused the records. We find that provisions of section 115JB(1) reads as follows:-

“Special provision for payment of tax by certain companies

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 day of April, ⁸⁷[2012], is less than [eighteen and one-half 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]].”

⁸⁷Substituted for “2011 by the Finance Act, 2011, w.e.f. 1.4.2012. Earlier, “2011” was substituted for “eighteen per cent” was substituted for “fifteen per cent” by the Finance Act, 2010, w.e.f. 1-4-2011, “fifteen per cent” was substituted for “ten per cent” by the Finance (No.2) Act, 2009, w.e.f. 1-4-2010 and “ten per cent” for “seven and one-half per cent” by the Finance Act, 2006, w.e.f. 1-4-2007.

14. Before us, the ld. AR for the assessee states that no tax is payable; so provisions of section 115JB are not applicable. The Ld. DR also did not state anything to contradict the contention of the assessee. In such

situation, we deem it necessary to restore the issue back to the file of the assessing officer and direct him to decide the issue of applicability of provisions of section 115JB of the Act. We accordingly do so. The assessee is directed to provide the details as may be required by the AO in support of its claim. The issue is accordingly restored to the file of the assessing officer with the above directions. The additional ground of appeal is treated as allowed for statistical purpose.

15. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 06 -11-2019.

Sd/-

sd/-

(Shamim Yahya)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 06th November, 2019

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Asstt. Registrar, ITAT, Mumbai