

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : "B", BANGALORE**

**BEFORE SHRI N.V.VASUDEVAN, VICE PRESIDENT
AND
SHRI B.R.BASKARAN, ACCOUNTANT MEMBER**

**ITA No.1527(Bang)/2018
(Assessment Year : 2013-14)**

M/s Tanglin Developments Ltd.,
No.23/2, Coffee day Square,
Vittal Mallya Road,
Bangalore-560 001
PANNo.AABCT0356N

Appellant

Vs

The Deputy Commissioner of Income Tax,
Circle-1(3), CR Buildings,
Queen's Road,
Bangalore

Respondent

**Appellant by : Shri C. Ramesh, CA
Revenue by : Shri Muzaffar Hussain, CIT**

**Date of hearing : 24-06-2020
Date of pronouncement : 29-06-2020**

ORDER

PER B.R.BASKARAN, AM

The assessee has filed this appeal challenging the revision order dated 23-03-2018 passed by Ld Pr.CIT, Bangalore for assessment year 2013-14 u/s 263 of the IT Act, 1961. The assessee is contending that the impugned revision order is bad in law and is liable to be quashed.

2. The facts relating to the case are stated in brief. The assessee company is engaged in the business of setting up of

Special Economic Zone and is also providing IT Park for information technology enabled services and allied services. The assessment for the assessment year: 2013-14 was completed by the AO u/s 143(3) of the IT Act on 28-06-2016. Since the total income computed under normal provisions of the Act turned out to be a negative income, the assessee had computed the total income total income u/s 115JB of the IT Act, 1961. The total income computed by the AO also turned out to be negative and hence the AO accepted the book profit of Rs.9,89,054/- reported by the assessee in the return of income as total income of the assessee.

3. The Id.Pr.CIT, upon examination of record, noticed that the assessment order passed by the AO is erroneous insofar as it is prejudicial to the interests of revenue on the following two points:

a) Addition to be made as per Explanation-1(f) to sec.115JB of the IT Act, while computing the book profit, has not been made.

b) The assessee had re-stated outstanding foreign currency loan as at the year end to make it marked to market. The same has resulted into loss of Rs.22.93 crores and the assessee had claimed the same as deduction. The AO has also allowed the same.

The Ld Pr. CIT was of the view that both the above said issues have rendered the assessment order erroneous and prejudicial to the interests of revenue. Accordingly, he initiated revision proceedings u/s 263 of the IT Act, 1961.

4. The ld. Pr.CIT noticed that the AO had computed disallowance u/s 14A read with Rule 8D of IT Rules at Rs.20.02 lakhs in the computation of income under normal provisions of the Act. The Ld Pr. CIT took the view that the above said amount should be added to the book profit under Explanation 1(f) to sec.115JB of the Act.

5. Before the ld. Pr. CIT, the assessee submitted that it did not earn any exempt income during the year and also did not incur any expenditure relating thereto. Accordingly, it was submitted that the provisions of Explanation -1(f) to sec.115JB is not applicable to the assessee. The assessee also objected to the adoption of the amount disallowed u/s 14A under normal provisions of the Act for computing book profit u/s 115JB of the Act by submitting that the disallowance u/s 14A read with Rule 8D is quantified only notionally and it should not be adopted, since the book profit u/s 115JB of the IT Act is computed on the basis of accounts maintained in accordance with the provisions of Companies Act. In this regard, the assessee placed reliance on the decision rendered by the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. Vs CIT(2002) 255 ITR 273(SC). The assessee has also submitted Delhi Special Bench of ITAT in the case of ACIT Vs Vireet Investments (P) Ltd (2017) 82 Taxmann.com 445 (Del. Trib.) (SP) has held that for the purpose of adjustments contemplated in clause(f) of Explanation-1 to sec.115JB(2) of the IT Act, the computation contemplated u/s 14A of the IT Act r. w. Rule 8D of the IT Rules cannot be considered.

6. The next issue that was considered by Ld Pr. CIT relates to marked to market loss of Rs.22.93 Crores arising on re-statement

of outstanding foreign currency loan. The assessee submitted before Ld Pr. CIT that it had availed loan of Rs.400 Crores on 30-06-2011 and Rs.120 Crores on 29-06-2012 and utilized them for purchase of assets within India. The assessee converted the "Indian rupee loans" into "US Dollar loans" in order to get the benefit of lower rate of interest charged on foreign currency loan. It was also submitted that the principal amount of loan is repayable from 7th year onwards only, while the interest was paid on quarterly basis as and when it became due. It was submitted that in terms of Accounting Standard -10 and Accounting Standard-11, the outstanding foreign currency loan is required to be revalued as at the year end. Due to re-statement of both loans referred above as on 31-03-2013, there was a loss of Rs.28.86 crores on the first loan and again Rs.5.92 crores on the second loan. Therefore, the net loss worked out to be Rs.22.93 crores. The assessee submitted since the loans were taken for acquisition of assets and for expansion of the project expenditure, the above said loss was capitalized in the books of accounts. It was submitted that under sec. 43A of the Act, the foreign currency fluctuations should be adjusted to the value of capital assets, provided the capital assets were purchased from a foreign Country. It was submitted that the assessee has purchased assets within India and hence the provisions of sec.43A are not applicable to the assessee. Hence the net loss arising on restatement of foreign currency loan has been claimed as revenue expenditure. It was also submitted that the assessee did not claim depreciation on the amount so capitalized. In this regard, the assessee placed reliance on the decision rendered by the Pune Bench of ITAT in the case of Copper Corporation Ltd. (69 Taxman.com244) and submitted that the foreign exchange

fluctuation loss was allowable as expenditure. The assessee also placed reliance on the decision rendered in the case of Tata Iron & Steel Co.Ltd. 231 ITR 285(SC) and submitted that the foreign exchange fluctuation loss, though notional, is allowable as revenue expenditure.

7. The Ld Pr. CIT did not agree with the contentions of the assessee. The ld. Pr.CIT observed that the assessee did not claim loss arising on foreign exchange fluctuations as expenditure in its Profit and loss account and instead capitalized the same for book purposes. It was noticed that the above said loss has been claimed as revenue expenditure for income tax purposes. The Ld Pr. CIT noticed that the Hon'ble Supreme Court has held in the case of M/s Wood word Governor India Pvt. Ltd. 312 ITR 254, that notional foreign exchange loss on loans outstanding are required to be allowed as revenue expenditure, if the assessee follows prescribed Accounting Standards and has debited the forex loss to the P & L account. Accordingly, the ld. Pr.CIT expressed the view that the claim of the assessee is not allowable, since it did not debit the loss in to P&L account. With regard to decision rendered by Pune Bench of the ITAT in the case of Copper Corporation Ltd.(Supra) the ld. Pr.CIT held that the facts prevailing in that case is distinguishable, in the sense, that foreign currency loan was taken in the above cited case by edging its revenue receipts in order to save interest.

8. With regard to the claim of the assessee that the provisions of sec. 43A of the IT Act requiring capitalization of foreign fluctuation loss is not applicable, the Ld Pr CIT observed that the said provision is applicable for the adjustments required to be

made at the time of repayment of loan. In the instant case, the loss has arisen due to restatement of outstanding foreign currency loan as at the yearend and not on account of repayment of loans. Hence, the provisions of sec.43A of the IT Act itself are not applicable to the facts of the present case.

9. The Id. Pr.CIT relied on the decision rendered by the Hon'ble Supreme Court in the case of Sulej Cotton Mills Vs CIT (116 ITR 1), wherein it was held as under:-

“.....the law may therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by him, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held to by the assessee on revenue account or as a trading asset. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature”.

The Id. Pr.CIT held that the above said decision rendered by the Hon'ble Supreme Court is squarely applicable to the facts and circumstances of the case. The Id. Pr.CIT also referred to the decision rendered by the Hon'ble Supreme Court in the case of Punjab Industrial Development Corporation 225 ITR 792 and Brook Bond India Ltd., 225 ITR 798 (SC) and held that certain expenses are not allowable either as revenue expenditure nor capital expenditure.

10. The Pr.CIT also expressed the view that foreign fluctuation loss is a notional expenditure and hence it could not be

capitalized. Accordingly, he observed that when notional expenditure is not allowed to be capitalized, then it does not automatically lead to the conclusion that the same is allowable as revenue expenditure.

11. Accordingly, ld. Pr.CIT setaside the assessment order passed by the AO with the following directions;

“ ..11.6.. In view of the discussion, it is clear that the AO has not applied correct position of law and has not carried out necessary inquiry and verification with regard to assessee’s claim of foreign exchange fluctuation loss u/s 37(1) and hence the order passed on this issue is also not only erroneous but also prejudicial to the interests of revenue.

12. In view of the above, I, the Principal CIT(Central), Bengaluru, by virtue of powers conferred on me u/s 263 of the Act, m satisfied that the assessment order passed by the AO is erroneous in so far as it is prejudicial to the interest of revenue as the AO failed to add back to book profit u/s 115JB the amount of disallowance u/s 14A and also to disallow the claim of foreign exchange fluctuation loss of Rs.22,93,48,566/- which is nothing but notional liability and claimed u/s 37(1) without debiting the same to the P&L account. Therefore, the AO is directed to redo the assessment accordingly in the light of the findings on the above mentioned issues and by allowing the assessee adequate opportunity of being heard and in accordance with law”.

12. Aggrieved, the assessee has filed this appeal before us.

13. We heard the parties and perused the record. The Ld A.R submitted that the AO has applied his mind on both the issues and hence the impugned assessment order cannot be considered as erroneous and prejudicial to the interests of revenue. On the contrary, the Ld D.R supported the order passed by Ld Pr. CIT and submitted that the assessing officer has failed to apply law properly and hence the assessment order was rendered erroneous and prejudicial to the interests of revenue.

14. In *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 83, the Hon'ble Supreme Court held that the provision of 263 of the Act cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer and it is only when an order is erroneous that the section will be attracted. The Supreme Court held that an incorrect assumption of fact or an incorrect application of law, will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. With regard to the expression "prejudicial to the interests of the Revenue", the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (head note) :

"The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for

example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law.”

15. A perusal of the assessment order would show that the assessing officer has accepted the book profit declared by the assessee u/s 115JB of the Act. It is pertinent to note that clause (f) of Explanation 1 to sec.115JB of the Act provides that the expenditure relatable to any income to which sec. 10 (other than the provisions contained in clause (38) thereof) or section 11 or section 12 apply, should be added to Net profit while computing the book profit. Even though the assessing officer has worked disallowance u/s 14A of the Act while computing total income under normal provisions of the Act, yet he has omitted to examine the applicability of clause (f) of Explanation 1 to sec.115JB. Hence omission to apply provisions of the Act would make the assessment order erroneous.

16. We notice that the Ld Pr CIT has taken the view that the amount disallowed u/s 14A of the Act while computing total income under normal provisions of the Act should be adopted for making addition to Net profit under clause (f) to Explanation 1 to sec. 115JB of the Act. We notice that the view so expressed by Ld Pr. CIT was against the decision rendered by Special bench of Tribunal in the case of Vireet Investments (P)

Ltd (supra), wherein it was held that the disallowance computed u/s 14A for the purpose of computing income under normal provisions of the Act cannot be imported for the purpose of addition to be made under clause (f) to Explanation 1 to sec.115JB for computing book profit, i.e., the amount to be added under above said clause has to be computed from the Profit and Loss account. The Ld A.R submitted that the assessee did not earn any exempt income and hence the question of making addition clause (f) does not arise. However, the fact remains that the AO did not examine this claim also while passing the assessment order.

17. Accordingly, we modify the order passed by Ld Pr. CIT and direct the AO to examine the claim of the assessee and compute the addition to be made under clause (f) to Explanation 1 to sec.115JB of the Act independently without having regard to the provisions of sec.14A of the Act.

18. The next issue related to the foreign exchange fluctuation loss arising on account of re-statement of outstanding foreign currency loan. It is the contention of Ld A.R that the AO did make enquiries on this issue and has accepted the explanations of the assessee. In this connection, the Ld A.R invited our attention to the letters dated 26-08-2015 and 12.01.2016 furnished before the AO, wherein the assessee has given explanations with regard to the above said claim. However, the Ld D.R submitted that the AO has simply accepted the explanations of the assessee without examining as to whether those explanations are applicable to the issue or not.

19. We notice from the above said letters furnished by the assessee before the AO that the assessee has explained as to how the loss has arisen, why the provisions of sec.43A are not applicable and why the claim is on account of revenue expenditure. We have noticed that the Ld Pr. CIT has correctly explained that the provisions of sec.43A shall apply only to those fluctuations in foreign currency which arises at the time of making repayment of loan, i.e., it does not apply to market loss arising on account of restatement of loan at the year end. We also notice that the assessee has placed reliance on the following case law before the AO in order to contend that such kind of losses are revenue in nature:-

(a) CIT vs. Indian toners & Developers Ltd (326 ITR 435)(Delhi)

(b) Woodward Governor India (P) Ltd (2009)(312 ITR 254)(SC)

(c) Oil & Natural Gas Corpn. Ltd vs. CIT (189 Taxman 292)(SC).

20. We notice that the Ld Pr. CIT has brought out the fact that the notional foreign currency loan has been taken by the assessee for acquiring fixed assets and hence it has capitalized the foreign currency fluctuation loss arising on restatement of outstanding loan in its books of accounts. The Ld Pr. CIT has also placed reliance on the decision rendered by Hon'ble Supreme Court in the case of Sulej Cotton Mills (supra), wherein it has been held that the deduction of foreign currency fluctuation loss would depend upon the question as to whether the same is on capital account or revenue account. Admittedly, the AO did not examine this important aspect while completing

the assessment proceedings. Hence, we are of the view that the assessment order is rendered erroneous, in view of the non examination of the issue in proper perspective.

21. We have noticed earlier that the Ld Pr. CIT has also taken a view that the market to market loss is a notional loss. However, various case laws discussed above do not support the view taken by Ld Pr. CIT. Accordingly we set aside the said view of Ld Pr. CIT.

22. In view of the foregoing discussions, we are of the view that the Ld Pr. CIT was justified in restoring this issue to the file of the AO.

23. However, we make it clear that the AO shall examine both the issues without being influenced by the views expressed by Ld Pr. CIT.

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

Order pronounced on

(N.V.VASUDEVAN)
VICE PRESIDENT

Dated:

***am**

(B.R.BASKARAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
- 5.DR
- 6.Guard File

By Order
Asst. Registrar