

**IN THE INCOME TAX APPELLATE TRIBUNAL,
"A" BENCH MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER.**

ITA No. 3912/Mum/2017
Assessment Year : 2011-12.

Ambuja Cement Ltd.,
(Formerly known as Gujarat
Ambuja Cement Limited),
Glgant Business Park,
MIDC Cross Road B,
Andheri East,
Mumbai-400 059.
PAN AAACG0569P

Vs.

Commissioner of
Income Tax (LTU),
Mumbai.

Appellant.

Respondent.

Assessee by : Shri Yogesh Thar, Shri Chaitany Joshi &
Shri Hardik Nirml. (A.R.)

Revenue by : Shri Rajiv Harit (CIT D.R)

Date of Hearing : 13-01-2020.

Date of pronouncement : ~~03~~-2020.

1/6/20

आदेश / ORDER

PER SHAMIM YAHYA, A.M.

This appeal by the assessee is directed against the order of the learned
Commissioner of Income Tax dated 29-03-2017 passed u/s 263 of the I.T. Act
pertaining to assessment year 2011-12.

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2. The grounds of appeal are as under :
 1. That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax – LTU (herein after referred to as Ld. CIT-LTU) was not justified in proceedings u/s 263 since the order u/s 143(3) dated 16-03-2015 passed by the Assessing Officer was neither erroneous nor prejudicial to interest of the revenue.
 2. That on the facts and in the circumstances of the case and without prejudice to the ground no. 1 taken here-in-above, the Ld. CIT-LTU was not justified and grossly erred in disallowing provision made for slow moving inventories of stores and spares.
 3. That on the facts and in the circumstances of the case and without prejudice to the ground no. 1 taken here-in-above, the Ld. CIT-LTU was not justified and grossly erred in disallowing provision for mines reclamation expenses.
 4. That the appellant craves leave to add, amend, modify, rescind, supplement or alter any grounds of the grounds stated here-in-above either before or at the time of hearing of the appeal.
3. This appeal was earlier heard by the Tribunal and an order was passed vide order dated 14-02-2018.
4. The Tribunal in its earlier order has decided the issue of disallowance of provision made for slow moving inventories of the stores and spares in favour of the assessee. The second issue relating to provision made by the assessee towards mines reclamation expenses was dealt with by the ITAT s under :

“7. Now we come to the 2nd issue. The CIT found that the appellant had made provisions of Rs.12.06 crore of mines reclamation expenses and the same was contingent in nature, which the AO failed to examine. The CIT held that the allowance can only be made in respect of liability which has accrued and become ascertained which is clearly not the case here. He directed the AO to verify the claim made by the appellant and make disallowance accordingly.

8. Regarding the disallowance of provisions for mines reclamation expenses, the Ld. counsels submit that the same is incurred to restore the mining land to its original position. The same is statutorily required as per the Mineral Concession Rules, 1960. The total estimate of reclamation expenses is apportioned on the basis of mineral extracted during the year. Hence, the same is an allowable expenditure. Reliance is placed by them on the decision in Smt. K. Suryakumari Venu - v.- ACIT (2016) 47 CCH 203 (Vizag-ITAT), Udaipur Mineral Development Syndicate (P) Ltd.-v.-DCIT & Anr. (2003) 261 ITR 706 (Raj-HC), CIT-v.- Gogte Minerals (1996) 220 ITR 29 (Kar-HC) and DCIT-v.-Tata Petrodyne Ltd. (ITA No. 8383/Mum/2010).

Without prejudice to the above, the Ld. counsels submit that if provision made for mines reclamation expenses is not allowed, then actual mine reclamation expenses incurred during the year of Rs.2.18 crore as shown in Note-11 of the audited accounts shall be allowed as deduction.

9. On the other hand, the Ld. DR supports the order passed by the CIT. He submits that the provisions are made against anticipated losses and contingencies and therefore, not allowable.

10. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

We begin with the decisions relied on by the Ld. counsels of the assessee. In Smt. K. Suryakumari Venu (supra), the Tribunal held that "when assessee continuously incurred expenditure towards rehabilitation and reclamation programme, then no addition can be made towards land reclamation and afforestation expenditure."

In Udaipur Mineral Development Syndicate (P) Ltd. (supra), the Hon'ble High Court held that "the assessee-lessee being liable under the terms of lease to restore the surface land used by it for excavating soapstone crud to its original condition as far as possible, liability accrued on the date when the pits were dugged and deduction of restoration expenses was allowable accordingly as the assessee was following mercantile system of accounting."

In Gogte Minerals (supra), the assessee, engaged in extracting iron ore, obtained mining lease from State Government for extracting iron ore in terms of Mineral Conservation and Development Rules, 1988. It entered into

agreements with occupants of land to carry on mining operations. Clause 12 of indenture of mining lease provided that lessee shall be bound by rules framed by Central Government. To restore land, which got disturbed by reason of mining operations, assessee incurred 'pit filling expenses' and claimed these expenses as deduction from income. Claim was rejected on ground that there was no actual or contingent liability. Before Tribunal assessee referred to rule 34 of aforesaid Rules incorporated with effect from 24-10-1988 which provided for reclamation and rehabilitation of land affected by mining operations and contended that this rule must be read along with agreement and, therefore, benefit of deduction should be given as liability did arise in terms of said agreement. Tribunal rejected this contention and did not hold said rule to be retrospective in nature. The Hon'ble High Court held that the said rule would operate even in respect of activities that might have been carried on earlier to its engrafting in agreement and liability could be said to have arisen in terms of said agreement read with rule 34 and assessee was entitled to deduction of 'pit filling expenses' on basis of said rule, irrespective of fact that that rule was incorporated with effect from 24-10-1988.

We find that the question of provision made for mines reclamation expenses or provision for expenses was not the issue in the aforesaid cases. Thus the case of the appellant is distinguishable from the above decisions relied on by the Ld. counsels. We may mention here that we are not in a position to comment on the unreported decision in the case of Tata Petrodyne Ltd. relied on by the Ld. counsel as he failed to file a copy of it before us.

10.1 Now we discuss the decision relied on by the Ld. DR. In *Jawahar Bhattacharjee (supra)*, the Hon'ble High Court held that "jurisdiction u/s 263 of the Act in the present case has not been exercised merely on the ground that the Assessing Officer should have gone deeper into the matter but by pointing out that the Assessing Officer had failed to apply his mind in allowing the benefit u/s 54F of the Act by accepting the genuineness of the capital gain". Therefore, it held that the interference by the Commissioner u/s 263 was valid. The ratio laid down here is relevant to the present case.

10.2 At this juncture, we discuss the characteristics of provisions as discussed in judicial decisions viz. *Metal Box Co. of India Ltd. v. Their Workmen*, (1969) 73 ITR 53, 67, 68 (SC); *CIT v. Eyre Smelting P. Ltd.* (1979) 118 ITR 857, 862-63 (Cal). These are : (a) provisions are made

against anticipated losses and contingencies; (b) provisions are charges against profits; (c) provisions are taken into account in the profit and loss account against gross receipts; (d) an amount set aside out of profits designed to meet a liability or contingency or commitment or diminution in the value of assets known to exist at the date of the balance-sheet can be a provision; (e) an amount set aside to provide for any known liability of which the amount cannot be determined with substantial accuracy is a provision; (f) provisions are usually shown in the balance-sheet by way of deductions from the assets in respect of which they are made.

A provision is a liability which can be measured only by using a substantial degree of examination. As held in Rotork Controls India P. Ltd. v. CIT : CIT v. Wipro GE Medical Systems Ltd.; Hewlett Packard India (P.) Ltd.; Compaq Computer (I.) Pvt. Ltd., (2009) 314 ITR 62, 71 (SC), CIT v. Micro Land Ltd., (2012) 347 ITR 613 (Karn), a provision is recognized when: (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation; and (c) a reliable estimate can be made of the amount of the obligation. No provision can be recognized if the abovementioned conditions are not met.

It is also held in CIT v. Oriental Fire & General Insurance Co. Ltd., (2007) 291 ITR 370, 378 (SC) that every 'provision', however, need not be an expenditure, as the same may represent a liability.

Against the above position of law, we find from the assessment order dated 16.03.2015 passed u/s 143(3) that the AO has not examined the allowability of the provisions made by the appellant towards mines reclamation expenses. In Addl. CIT v. Mukur Corporation (1978) 111 ITR 312 (Guj.), it is held that where the AO allowed certain deductions without probing into the claims, the exercise of power u/s 263 was proper. In Indian Textiles v. CIT (1986) 157 ITR 112 (Mad.), it is held that where the AO granted the relief without proper verification, the exercise of power u/s 263 was proper.

Similar is the instant case.

Further we find that the CIT has directed the AO to verify the claim made by the assessee and disallowance would only be limited to the claim made.

In view of the above factual scenario and position of law, we uphold the order of the CIT u/s 263 in respect of the provisions for mines reclamation expenses and dismiss the ground of appeal with regard to the 2nd issue.”

5. Subsequently, the assessee had filed a miscellaneous application against the above said order. The Tribunal passed an order in miscellaneous application on 15-04-2019. The Tribunal had recalled the above said order partially as under :

“4. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

A perusal of the record clearly indicates that the AO failed to examine the allowability of provision for mines reclamation expenses of Rs.3.98 crores during the impugned assessment year. In the impugned order, we have discussed the characteristics of provisions as discussed in judicial decisions viz. *Metal Box C. of India Ltd. v. Their Workmen*, (1969) 73 ITR 53, 67, 68 (SC); *CIT v. Eyre Smelting P. Ltd.* (1979) 118 ITR 857, 862-63 (Cal). These are : (a) provisions re made against anticipated losses and contingencies; (b) provisions are charges against profits; (c) provisions are taken into account in the profit and loss account against gross receipts; (d) an amount set side out of profits designed to meet a liability or contingency or commitment or diminution in the value of assets known to exist at the date of the balance-sheet can be a provision; (e) an amount set aside to provide for any known liability of which the amount cannot be determined with substantial accuracy is provision; (f) provisions are usually shown in the balance-sheet by way of deduction from the assets in respect of which they are made.

Again we have mentioned in the impugned order that a provision is a liability which can be measured only by using substantial degree of examination. As held in *Copaq Computer (I.) Pvt. Ltd.*, (2009) 314 ITR 62, 71 (SC), *CIT v. Micro Land Ltd.*, (2012) 347 ITR 613 (Karn), a provision is recognized when: (a) an enterprise has a present obligation as a result of past event; (b) it is probable that an outflow of resources will be required to settle the obligation; and (c) reliable estimate can be made of the amount of obligation. No provision can be recognized if the abovementioned conditions are not met.

4.1 However, we find that a mistake has crept into the impugned order by not examining the without prejudice contentions of the Ld. Counsel that “if provision made for mines reclamation expenses is not allowed, then actual mine reclamation expenses incurred during the year of Rs.2.18 crores shown in Note-11 of the audited accounts shall be allowed as deduction.”

Therefore, as there is a mistake apparent from the record, we recall the impugned order in respect of the grounds of appeal regarding provision for mines reclamation expenses and direct the registry to fix a date for hearing before a regular Bench.”

Pursuant to the above said order, this appeal has been heard by us.

6. We have heard both the counsel and perused the records. Learned counsel of the assessee submitted a catena of case laws for the proposition that the provision for mines reclamation expenses was allowable.

7. Per contra, learned DR submitted that the ITAT has already held that the said provision made for mines reclamation expenses are not allowable. He submitted that the Tribunal had only recalled the order only to consider a without prejudice submission which was made before the ITAT in the course of argument that if provision made for mines reclamation expenses is not allowed, then actual mines expenses incurred during the year of Rs.2.18 crores shown in Note No. 11 of the audited accounts shall be allowed as a deduction. Hence the learned DR submitted that this order has been recalled only to consider the above without prejudice argument. He submitted that the decision regarding the allowability of provision made for mines reclamation expenses has already been decided by the ITAT in favour of the Revenue. Hence he submitted that the said order of the ITAT cannot be reviewed.

8. Upon careful consideration we find considerable cogency in the submission of the learned DR. The ITAT in its order had duly adjudicated the issue as

mentioned above. In its recall order the ITAT has reiterated its finding as mentioned above. However, it had found that a mistake had crept into its order by not examining the without prejudice contention of the learned counsel of the assessee that if provision made for mines reclamation expenses is not allowed, then actual mines reclamation expenses incurred during the year of Rs2.18 crores shown in Note No. 11 of the audited accounts, shall be allowed as a deduction.

9. Thus this order has been recalled to consider the limited issue as above. In this regard we are of the considered opinion that this appeal is against the order passed u/s 263 of the I.T. Act. In the order passed u/s 263 of the I.T. Act, in this regard learned CIT had held that the AO failed to examine the aspect of allowability while passing the assessment order leading to the error. That it is not the assessee's claim that the amount claimed had actually become ascertained. That under the Income Tax Act, the allowance can only be made in respect of liability which had accrued and become ascertained which is clearly not the case here. That the AO is accordingly directed to withdraw the allowance. That in so far as the quantum of disallowance is concerned, he is directed to verify the claim made by the assessee and disallowance would only be limited to the claim made.

10. The ITAT in its order had duly upheld the same. It had held that the AO granted the relief without proper verification and exercise of power u/s 263 was proper. Further the Tribunal found that the learned CIT has directed the AO to verify the claim made by the assessee and disallowance would only be limited to the claim made.

11. In this back drop we now refer to the contention of the assessee that if provision made for mines reclamation expenses is not allowed, then actual mines

reclamation expenses incurred during the year of Rs.2.18 crores as shown in Note No. 11 of the audited accounts shall be allowed as such.

12. In our considered opinion, the matter of allowance of the correct amount of reclamation expenses has already been remanded by the learned CIT by his order u/s 263 to the file of the AO. He has found that the AO has not properly examined the assessee's claim. He has directed that the AO shall withdraw the allowance and the quantum of disallowance would be ascertained after verification of the claim in this regard.

13. In our considered opinion, the above said without prejudice ground is already covered in the above said order u/s 263 of the I.T. Act. After his verification the AO shall pass order as per the directions. There is no need of any further direction from us in this regard. Moreover we find that the appeal before the ITAT is against the order passed u/s 263 of the I.T. Act. This has been duly adjudicated. This without prejudice issue raised by the assessee falls under the realm of an order passed u/s 246 of the I.T. Act by the learned CIT(Appeals). However, the present appeal before us is an order passed u/s 263 of the I.T. Act. Hence in our considered opinion, this issue is not arising out of the order in appeal before us. Be as it may, the assessee requests that actual expenses of Rs.2.18 crores debited in the above said note to its accounts should be allowed as a deduction can be considered only if there has not been any provision made in this regard earlier. If the same are against some provision made earlier, there cannot be a double deduction thereof in the current assessment year.

14. Accordingly the issue agitated by the assessee before us stands dismissed.

15. The above said order is to be read along with the order of this ITAT passed on 14-02-2018 wherein the ITAT had concluded that the appeal is partly allowed.

The adjudication according remains the same.

16. The appeal stands partly allowed.

Order pronounced on this 1.6.2020.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 01/06/2020

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./.

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai