

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

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA NOS. 900 TO 906/MUM/2019 : A.Ys : 2006-07 TO 2011-12

DCIT, Central Circle – 6(2),
Mumbai. (Appellant)

vs. M/s. Alok Industries Limited
Tower B, 2nd floor, Peninsula
Business Park, G.K. Marg, Lower
Parel, Mumbai 400 013.
PAN : AAACA0210C (Respondent)

**Appellant by : Shri Rajiv Harit (CIT-DR) &
Shri Michael Jerald (Sr.DR)**

Respondent by : Shri Nimesh K. Chothani

Date of Hearing : 05/02/2020

Date of Pronouncement : 16/07/2020

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER

These are appeals by the Revenue directed against respective orders of CIT(A) for the respective assessment years. The issues are common and connected and the appeals were heard together. These are being consolidated and disposed of by this common order.

2. One common issue raised in these appeals relates to the direction of learned CIT(A) to delete the addition on account of subsidy received on the Technology Upgradation Fund (TUF). The Revenue's ground further states that the ITAT order in this regard has not been accepted by the Department and the appeal has been filed before the Hon'ble Bombay High Court.

3. Brief facts on this issue are that consequent upon the disallowance of the aforesaid sum by the Assessing Officer, the learned CIT(A) had deleted the disallowance by referring to ITAT decision in assessee's own case. Against this order, Revenue has filed appeal before us.

4. Upon hearing both the Counsel and perusing the records, we find that ITAT in assessee's own case has decided this issue in favour of assessee. No contrary decision has been produced before us. Merely on the ground that the said decision of ITAT has been appealed before the Hon'ble High Court, the same does not warrant that we depart from the same. Accordingly, respectfully following the aforesaid precedent in assessee's own case from the ITAT, we uphold the order of learned CIT(A). The ITAT order in assessee's case for assessment year 2012-13 and 2013-14 in ITA Nos. 1017/Mum/2017 and 7243/Mum/2017 dated 26.07.2019 and 21.05.2018 respectively are germane and have not been reversed by the Hon'ble Bombay High Court.

5. Another common issue raised in these appeals is that learned CIT(A) erred in directing the Assessing Officer to exclude the interest subsidy while calculating

the income under Section 115 JB of the Act.

6. This issue relates to the treatment of subsidy received under TUF for the purpose of computation of book profit under Section 115JB of the Act. The Assessing Officer having noted that the aforesaid sum was duly credited in the Profit and Loss Account of the assessee, has included the same in the computation of book profit. The learned CIT(A) by referring to ITAT order in assessee's own case has directed that the said sum should be excluded while computing the income under Section 115JB of the Act. Against this order, Revenue has filed appeal before us.

7. We have heard both the Counsel and perused the records. Learned counsel of the assessee submitted that the issue is decided in favour of the assessee by the ITAT decisions in assessee's own case, as referred above.

8. *Per contra*, learned Departmental Representative submitted that this issue has already been dealt with by Hon'ble Jurisdictional High Court in several decisions. He submitted that in those decisions the Hon'ble Jurisdictional High Court held that such income have to be taken into account for computation of book profit. In this regard, learned Departmental Representative referred to the judgment of Hon'ble Bombay High Court in the case of *CIT vs Veekaylal Investment Co. (P.) Ltd.*, 249 ITR 597 (Bom.)

9. The Learned Departmental Representative further submitted that ITAT,

Hyderabad Special Bench in *Rain Commodities Ltd. vs DCIT, 131 TTJ 514 (Hyderabad) (SB)* has duly taken note of these decisions and has held that in view of these decisions such exempt capital gain have to be computed and taken into account for the purpose of application of book profit.

10. The learned Departmental Representative further submitted that the ITAT decision in assessee's own case has a mistake apparent from record is in as much as it has not considered the Hon'ble Jurisdictional High Court order as well as the Special Bench decision.

11. In rejoinder, the learned counsel of the assessee submitted that the Hon'ble Bombay High Court decision in the cases referred by learned Departmental Representative have been duly considered and distinguished by the Hon'ble Madras High Court in the case of *CIT vs. Metal & Chromium Plater (P.) Ltd., 415 ITR 123 (Madras)*. He also submitted that ITAT decision in assessee's own case should be assumed to have considered this decision.

12. Upon careful consideration, we find ourselves in agreement with the submission of the learned Departmental Representative that the ITAT orders relied upon by the learned counsel of the assessee do not consider aforesaid Hon'ble Jurisdictional High Court decision. It is without any doubt that the decision of Hon'ble Jurisdictional High Court is exactly on the same subject as is being discussed hereunder. Furthermore, the proposition that book profit is not to be tinkered with is duly supported by Hon'ble Jurisdictional High Court decision

in further following decisions: -

- “1. *Pr. CIT vs. Bhagwan Industries Ltd in ITA No. 436 of 2015 vide order dated 18.07. 2017.*
2. *CIT vs. Akshay Textile Trading & Agencies Pvt Ltd 304 ITR 401 (Bom).*
3. *CIT vs. Adbhut Trading Co. Pvt. Ltd. (2011) 338 ITR 94 (Bom)”*

Furthermore, we note that Hon’ble Supreme Court in the case of ACIT vs Saurashtra Kutch Stock Exchange Ltd., 305 ITR 227 (SC) has expounded that non-consideration of jurisdictional High Court decision can render a decision of the Tribunal suffering from mistake apparent from record.

13. Furthermore, we note that honourable Supreme Court in the case of Kapurchand Shrimal v CIT, 131 ITR 451 (SC) had expounded that it is the duty of the appellate authority to correct the errors in the orders of the authorities below and remit the matter, with or without directions for their consideration, unless prohibited by law.

14. Considering this present issue on the conspectus of aforesaid discussion and case laws, in our considered opinion, this issue needs to be remitted to the file of learned CIT(A). The learned CIT(A) is directed to consider this issue *de novo* after taking into account the aforesaid Hon’ble Jurisdictional High Court decisions. Needless to add, the assessee should be granted adequate opportunity of being heard.

15. Another common issue raised in these appeals for assessment years 2008-09 to 2011-12 is that learned CIT(A) erred in directing to delete disallowance under Section 14A of the Act read with rule 8D(2)(ii) by relying on *HDFC Bank* decision of the Hon'ble Bombay High Court reported in 366 ITR 505, without appreciating that the same has been superseded by the decision of Hon'ble Supreme Court in the case of *Maxopp Investment Ltd. Vs CIT*, 402 ITR 640 (SC).

16. Brief facts on this issue are that while discussing the aforesaid disallowance, the Assessing Officer has noted that assessee has duly submitted that it had sufficient interest free funds to make those investment which earned exempt income . The assessee further contended before the Assessing Officer that these were strategic investments. The Assessing Officer rejected the contention of sufficient interest free funds by holding that assessee has not submitted cash flow statement. However, he did not dispute, that interest free funds available were more than the investments made. Upon assessee's appeal in this regard, learned CIT(A) allowed the issue in favour of assessee by agreeing with the contention that Hon'ble Bombay High Court decision in the case of *HDFC Bank* is applicable in as much as sufficient interest free funds are available.

17. Against this order, Revenue is in appeal before us. We have heard both the Counsel and perused the records. We find that it has not been denied by the Assessing Officer that assessee has sufficient interest free funds. However, the Assessing Officer has held that assessee has not submitted the cash flow statement. Furthermore, the Revenue now contends that the said decision of

Hon'ble Jurisdictional High Court has been superseded by the decision of Hon'ble Supreme Court in the case of *Maxopp Investment Ltd.* We find that learned CIT(A) is correct in holding that if assessee has sufficient interest free funds, no disallowance under Section 14A of the Act on account of interest for funds utilised for earning the exempt income needs to be done. The reference by the Revenue to the aforesaid Hon'ble Supreme Court decision, claiming that the said decision has superseded the decision of Hon'ble Bombay High Court is totally misplaced. We have gone through the entire decision. Nowhere it was pointed out by the Revenue as to which portion of this decision supersedes the decision of Hon'ble Bombay High Court. Accordingly, respectfully following the aforesaid decision of the Hon'ble Jurisdictional High Court, we uphold the order of the learned CIT(A). Furthermore, ITAT on similar reasoning has also upheld the similar order of learned CIT(A) in earlier years, in assessee's own case.

18. Another issue raised for assessment years 2010-11 and 2011-12 is with respect to disallowance under Section 36(1)(iii) of the Act. The Revenue contends that assessee did not have adequate interest free funds, and that assessee could not establish commercial expediency.

19. The disallowance in this regard has been done on the same reasoning as in the case of disallowance under Section 14A of the Act. The Assessing Officer has disregarded the assessee's submission that assessee has sufficient interest free funds to make these investments/advances on the ground that assessee has not

submitted the cash flow statement. It is not denied that assessee had sufficient interest free funds. The learned CIT(A) has noted this aspect and he has decided this issue solely on the basis of the fact that assessee has sufficient interest free funds to give those advances and he has relied upon the decision of Hon'ble Bombay High Court in the case of *HDFC Bank (supra)*. The learned CIT(A) has not allowed this issue in favour of assessee on the ground of commercial expediency. In this view of the matter, in our considered opinion, there is no infirmity in the order of learned CIT(A) in this regard. Accordingly, we uphold the same.

20. Another issue raised in assessment year 2011-12 relates to disallowance with respect to employees contribution to the Provident Fund under Section 36(1)(va) of the Act amounting to Rs.23,85,474/-.

21. Upon hearing both the Counsel and perusing the records, we find ourselves in agreement with the submission of the learned counsel of the assessee that the issue is squarely covered in favour of the assessee by the decision of Hon'ble Bombay High Court in *CIT vs Ghatge Patil Transports Ltd., 368 ITR 749 (Bom)* and Hon'ble Supreme Court referred in ITAT order in assessee's own case as above for the proposition that the said contributions made before the due dates of return or grace period is allowable. Hence, we uphold the order of Id. CIT(A) in this regard.

22. Before parting, we note that this appeal was heard on 06.02.2020. The pronouncement is delayed due to lockdown in view of Covid-19 pandemic. The

pronouncement is as per Rule 34(5) of Appellate Tribunal Rules and Hon'ble Bombay High Court decision vide order dated 15.04.2020 extending the time bound periods specified by Hon'ble High Court by removing the period under lockdown. This aspect is also dealt with in detail in ITAT Mumbai order in case of *DCIT vs JSW Steel* vide order dated 15.05.2020.

23. In the result, the appeals of Revenue are partly allowed for statistical purposes.

Order pronounced in the court on 16th July, 2020 as per Rule 34(4) by placing the pronouncement list on notice board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai, Date : 16th July, 2020

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "A" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai