**IN THE INCOME TAX APPELLATE TRIBUNAL**
**HYDERABAD ' A ' BENCH, HYDERABAD.**

**BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER AND**
**SHRI L. P. SAHU, ACCOUNTANT MEMBER**
**(Through Virtual Hearing)**

| ITA No. & Asst. Year | Appellant | Respondent |
|---|---|---|
| 708/Hyd/2015 2008-09 | Dy. Commissioner of Income Tax, Circle 17(1), Hyderabad. | M/s. Divi's Laboratories Ltd., Hyderabad. PAN AAACD6745J |
| 709/Hyd/2015 2009-10 | -do- | -do- |
| 710/Hyd/2015 2008-09 | M/s. Divi's Laboratories Ltd., Hyderabad. | Addl. CIT, Range-1, Hyderabad. |
| 711/Hyd/2015 2009-10 | -do- | DCIT, Cir. 1(2), Hyderabad. |

Assessee By : Shri S. Rama Rao.
Revenue By : Shri R. Dipak (D.R.)

Date of Hearing : 28.04.2021.
Date of Pronouncement : 17.08.2021.
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**O R D E R**

**Per Shri S.S. Godara, J.M.** :

These Revenue's and assessee's cross appeals ITA Nos.708/Hyd/2015 and 710/Hyd/2015 for Assessment Year 2008-09

and ITA Nos.711/Hyd/2016 and 709/Hyd/2015 for Assessment Year 2009-10 arise against the Commissioner of Income Tax (Appeals)-X, Hyderabad's separate orders; both dt.27.02.2015 passed in case Nos.0367/Addl. CIT, R-1/CIT(A)-X/2014-15 and 0367/Addl. CIT, R-1/CIT(A)-X/2014-15 (assessment year wise) in proceedings u/s.143(3) r.w.s. 144C(4) and 143(3) r.w.s. 92CA(3) of the Income Tax Act, 1961 ('the Act'); respectively.

Heard both the parties. Case files perused.

2. We advert to the assessee's appeals ITA 710 & 711/Hyd/2015. Its first and foremost substantive ground in Assessment Year 2008-09 ITA 710/Hyd/2015 seeks to reverse both the lower authorities action making 115JB MAT adjustment of Rs.62,49,631 involving provision for bad and doubtful debts. Learned counsel vehemently argued that the impugned MAT adjustment is not sustainable in law being an

ascertained than a contingent liability. Both the lower authorities have invoked u/s. 115JB Expln. (1)(i) stipulating such MAT adjustment qua "the amount or amounts set aside as provision for diminution in the value of any asset." The legislature had admittedly made the corresponding amendment in the Finance Act No.2 of 2009 with retrospective effect 1.4.2001 to this effect. Hon'ble Gujarat high court's Full Bench decision in CIT Vs. Vodafone Essar Gujarat Limited Dt.16.08.2017 has also settled the law that a mere provision for doubtful debts has to be included in section 115JB MAT adjustment. Their lordship's further conclude that a provision amounts to write off if there is simultaneous reduction form the loans and advances in the asset side of the balance sheet in terms of Vijaya Bank case 323 ITR 166 (SC). We thus find no reason to reverse the learned lower authorities' action making the impugned

section 115JB MAT adjustment qua assessee's provision made for bad and doubtful debts. The assessee's first and foremost substantive ground in Assessment Year 2008-09 is rejected.

3. The assessee's 2nd substantive ground is Second substantive ground in Assessment Year 2008-09 and sole ground in Assessment Year 2009-10 is that both the lower authorities' have erred in law and on facts in excluding the corresponding gain qua duty draw back amounts of Rs.1,04,83,421 and Rs.1,84,89,636; respectively not eligible for the purpose of computing profits in its section 10B deduction claims. The Revenue's case in tune with the lower authorities' identical reasoning is that such an income could not be held to have been "derived from" from the eligible unit and therefore, the same is not entitled for section 10B deduction. We find that the instant issue is no more res integra as per PCIT Vs. Dishman

Pharmaceuticals and Chemicals Ltd. (2019) 417 ITR 373 (Guj) that such an income arising from sale of duty draw back also amounts to profits and gains derived from 100% export oriented unit. We accordingly adopt the very reasoning mutatis mutandis and direct the Assessing Officer to treat the assessee's impugned duty draw back gain (supra) in both these assessment years as eligible for 10B deduction as per law. Necessary computation shall follow. The assessee's second and sole substantive ground in these twin assessment years (supra) to this effect succeeds.

4. It further transpires during the course of hearing that the assessee also filed identical petitions in both these appeals seeking to raise additional ground(s) of Education Cess deduction(s) of Rs.1,05,97,230 and Rs.1,3,81,150; respectively. The Revenue's case in the light of its written submissions coming

from the CIT's side is that this additional ground gives altogether a new texture to the already pleaded issues and not allowable therefore as per hon'ble jurisdictional high court in **CIT Vs. Begumnoor Banu** (1993) 204 ITR 166 (AP). We find no merit in the Revenue's instant technical argument as per this tribunal Special Bench decision All Cargo Global Logistics Ltd. Vs. DCIT 137 ITD 287 (SB) after considering the decision NTPC Ltd. vs. CIT (229 ITR 383 (SC); holds that we can very well entertain such a pure question of law so as to determine the correct tax liability wherein the relevant facts are already on record. We make it clear that the assessee had duly filed its computation(s) regarding the impugned education cess(es)' corresponding figures. We thus accept the assessee's identical petition(supra) dt.23.11.2020.

5. Coming to merits of the assessee's education cess claim, we notice that Sesa Goa

Limited Vs. JCIT (2020) 423 ITR 426 (Bom) as well as (2019) 107 Taxman.com 484 (Raj) Chambal Fertilisers Ltd. Vs. JCIT take into consideration the CBDT's Circular dt.18.05.1967 that the clinching expression "tax" employed in section 40(a)(ii) does not include "cess" and therefore the same is very much allowable as a deduction. We adopt the very reasoning mutatis mutandis and direct the Assessing Officer to accept the assessee's impugned education cess deduction claim in both these assessment years involving sums, as per law. Necessary computation shall follow.

6. The assessee's identical third and second substantive grievances in both assessment years 2008-09 and 2009-10 succeed in above terms. Its appeal ITA Nos.710/Hyd/2015 is partly accepted & 711/Hyd/2015 is accepted in foregoing terms.

7. We next advert to the Revenue's appeals ITA Nos.708 & 709/Hyd/2015. Its first and foremost substantive ground in both these assessment years seeks to revive the Transfer Pricing Officer's identical action adopting "CRISIL against LIBOR" rates whilst computing the interest on loans and advances made to oversees Associated Enterprises involving adjustments of Rs.2,08,27,493 and Rs.84,52,506; respectively. We notice at the outset that the TPO's order(supra)) for Assessment Year 2009-10 and 2010-11 had adopted LIBOR rates only in computing the Arm's Length Price (ALP) of the impugned loans and advances in corresponding foreign currency. This tribunal's co-ordinate bench decision in the Foursoft India Limited 142 TTJ 358 (Hyd) also holds that it is only "LIBOR" rate what needs to be adopted qua international financial transactions. We thus find no illegality

or irregularity in the CIT(A)'s order to this effect. This Revenue's first and foremost identical substantive ground fails.

8. The Revenue's 3rd and 4th substantive grounds in Assessment Year 2008-09 and 5th ground in A.Y. 2009-10 challenge correctness of CIT(A)'s action holding the assessee eligible for section 10AA deduction qua its contract fee receipts of Rs.1,29,53,790 and Rs.1,36,77,199; respectively. Its case is that the assessee had filed additional evidence regarding approval of its corresponding unit(s) wherein neither there was any sanction for export of services nor the same had been put to the Assessing Officer for his necessary factual verification. The CIT(A)'s detailed discussion accepting the assessee's claim to this effect reads as under :

**7.** Ground No.I (3) (ii) is with regard to non-inclusion of contract research fee of Rs.1,29,53,790 in export turnover for deduction u/s 10AA.

**7.1** The AO observed as mentioned in Para.6.1 of this order

**7.2** During the appellate proceedings, the A.R. submitted has under:

*"The appellant submits that it had earned an amount of Rs.1,29,53,790/- towards export of services being Contract Research Fee which is an eligible activity of the SEZ Unit as approved by the competent authority. Accordingly the same has been included by the appellant in export turnover for calculation of deduction U/s 10AA of the Income Tax Act, 1961. However the learned assessing officer has excluded contract research fee of Rs.1,29,53,790/- for arriving at the amount of export turnover. The appellant submits that as per Clause (i) of Explanation 1 to Section 10AA of the Income Tax Act 1961 Export turnover includes export of Services also.*

*Accordingly the appellant submits that contract research fee (Export) of Rs. 1,29,53,790/- be included in export turnover for arriving at deduction u/s 10AA of the Income Tax Act 1961."*

**7.3** I have carefully considered the submissions of the appellant and the assessment order and find force in the contentions of the appellant. Section 10AA (1), Explanation (1) defines 'export turnover', which includes 'export of services' also and also as stated in Para.6.3 of this order, the VSEZ, vide its letter dated 13-8-2007, also accorded approval for inclusion of 'additional services'. For the same reasons, I also direct the AO to include the Contract Research Fee of Rs.1,29,53,790 in the 'export turnover' for arriving at the deduction of profits u/s 10AA of the IT Act.

We find no merit in the Revenue's instant substantive ground not only going by the statutory provisions i.e. section 10AA(1) Expln.(1) defining "export turnover" as also including export of services but also keeping in mind the fact that the Visakhapatnam SEZ ("VSEZ") had been granted approval vide letter dt.13.08.2007 as against these assessments

framed on 31.01.2012 and 20.09.2011; respectively. There is further no indication that the assessee had filed any additional evidences to this effect before the CIT(A). We hold in this factual backdrop that the CIT(A) has rightly treated the assessee's contract research fee receipts as “export turnover” for arriving at section 10AA deduction. The Revenue’s corresponding grounds to this effect in both assessment years stand declined.

9. The Revenue’s fifth and sixth substantive grounds in Assessment Year 2008-09 and third and fourth substantive grounds in Assessment Year 2009-10 challenge the CIT(A)’s action reversing the assessment findings disallowing Mark to Market (MTM) losses of Rs.18,92,87,645 and Rs.45,21,01,025; respectively. The CIT(A)’s detailed discussion to this effect reads as under :

**10.** Ground No.II (2) is with regard to disallowance of MTM losses of Rs.18,92,87,645.

**10.1** The AO observed as under:

> *"Verification of the forex gain account during the proceedings revealed that the assesse is claiming deduction for market to market losses of Rs. 7,98,76,565/- following AS – 11. The account was examined in detail and it was found that an amount of Rs. 18,92,87,645/- is on account of MTM losses on unexpired forward contracts. These transactions are recorded on 31-03-2008 as debits vide JV – 1782 for Rs. 21,49,94,625 and JV – 1784 for Rs. 2,84,657 and credits vide JV – 1783 for Rs. 46,70,252 and JV – 1785 for Rs. 2,13,21,385. The assesse filed written submissions on this issued stating that the transactions are only to cover foreign currency exposure of imports and exports. They are related to operations of the company and hence the MTM loss is allowable. It is also stated that in the next year, there is gain of Rs. 22.46 Cr. which is offered to tax. The arguments of the assessee have been examined and found to be untenable for the following reasons. The assessee could not have entered into forward contracts for currency exposure but for the operations as otherwise it would be illegal. This does not mean that MTM losses would be allowed as deduction. As per the provisions of I.T. Act, MTM losses on forward contracts are not allowable as deduction as the loss is contingent in nature. Reliance is placed on instruction No. 3/2010 of CBDT dated 23-03-2010 and the deduction claimed is disallowed."*

**10.2** During the appellate proceedings, the appellant submitted as under:

> *"The learned assessing officer erred in disallowing an amount of Rs. 18,92,87,645/- representing forex loss on forward contracts entered by the company on the ground that the losses claimed on account of MTM losses are contingent in nature. The appellant submits that it had entered into forward contracts for covering the underlying foreign exchange exposures in respect of imports and exports. The foreign*

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*exchange exposures have been converted at their exchange rate prevailing on 31-3-2008 being the last date of the financial year and accounted for the loss by debiting the same to the P&L Account as the appellant has been following the mercantile system of accounting and followed the standard issued by the Institute of Chartered Accountants of India being mandatory as per Companies Act, 1956, being AS-11. The appellant has accounted for the Foreign Exchange transactions in the books of account as per Accounting Standard 11and the losses are not contingent or speculative in nature and accordingly they are not disallowable as per the Income Tax Act. In view of the highly volatile forex market, the appellant had taken a future cover for the underlying foreign exchange exposures of imports/exports and accordingly the same are not disallowable. The appellant had been following the method of accounting consistently for changes in value of foreign currency in relation to indian currency and accordingly*

*The above stand is supported by the decision of Hon'ble ITAT Delhi Special Bench in the case of Oil and Natural Gas Corpn. Limited Vs DCIT, 83 ITD 151 (Delhi) (SB).*

*The above stand is supported by the following decisions also*

- *CIT Vs. Woodward Governor India Pvt. Ltd (S.C) 312 ITR 254,*
- *DCIT Vs. Bank of Bahrain & Kuwait (Mum) 132 TTJ 505 (SB).*

*In view of the above, the appellant submits that the loss incurred on account of foreign exchange fluctuations amounting to Rs.18,92,87,645 is not a contingent or notional loss but is allowable as claimed in view of the order of the Hon'ble ITAT and the instruction issued by CBDT vide Instruction No.3/2010 dt 23-3-2010 is not applicable.*

**10.3** I have carefully considered the submissions of the appellant and the assessment order and find force in the contentions and case laws cited.

**10.4** The Hon'ble ITAT, Delhi Special Bench in the case of Oil and Natural Gas Corpn Limited, 83 ITD 15 (Delhi) (SB) had enunciated certain test questions with a view to deciding the issue as mentioned in Para.23 of the order of ITAT, which is reproduced hereunder:

**Para.23:**

*On the basis of principles enunciated in various judicial decision, we propose to formulate certain test questions with a view to deciding the issue before us in the light of answers to those questions, which are as under:*

*i. Whether the system of accounting followed by the assessee is mercantile system, which brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately, it becomes due and before it is actually received.*

*ii. whether the same system is followed by the assessee from the very beginning and, if there was a change in the system, whether the change was bana fide;*

*iii. Whether the assessee has given same treatment to the losses claimed to have accrued and to the gains that may accrue to it;*

*iv. Whether there has been consistently and definiteness in making entries in the account books in respect of losses and gains;*

*v. Whether the method adopted by the assessee for making entries in he books both in respect of losses and gains is as per nationally accepted accounting standards;*

*vi. Whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation.*

**10.5** It is also relevant to quote Para.34 and Para.35 of the ITAT's order referred to above.

**Para.34:**

*Before concluding, we would like to point out that the assessee's claim for loss arising as a result of fluctuation in foreign exchange rates on the closing day of the year has been disallowed by the AO, inter alia, on the ground that this liability was a contingent liability and the loss was a notional one. The main ingredient of a contingent liability is that it depends upon happening of a certain event. We are of the considered opinion that in the case of the assessee the 'event' i.e. the change in the value of foreign currency in relation to Indian currency has already taken place in the current year. Therefore, the loss incurred by the assessee is a fate accompli and not a notional one.*

**Para.35**

*On a careful consideration, of all facts and circumstances and the decisions of the various Benches of the Tribunal, High Courts and Supreme Court, as discussed above, the only conclusion which can be drawn is that the assessee's claim fo loss on account of fluctuation in foreign currency rate is allowable. Accordingly, we allow the claim of the assessee."*

**10.6** On perusal of the above extracts of the ITAT's order in Para.23, and the assessee's submissions, the assessee undoubtedly satisfies all the criteria laid down by the ITAT for holding that the losses incurred by the assessee in foreign exchange fluctuations are not contingent liability and the loss was not a notional one. Vide Para.34 of the ITAT's order also, the Hon'ble ITAT held the loss incurred by the assessee is a fate accompli and not a notional one and vide Para.35 of its order, the ITAT had allowed the assessee's claim of loss on account of fluctuation in foreign currency rate.

**10.7** The Supreme Court in the case of Woodward Governor India (P) Limited, 179 Taxman 326 (SC), has laid down certain principles in respect of deduction on account of foreign exchange fluctuations in Para.21, of its order, which is also the same as laid down in the preceding Paras 10.4 & 10.5 of this order, quoted in the case of ONGC Limited (supra).

**10.7.1** The brief facts of the case of Woodward Governor India Limited are as under:

*"5. The assessee filed its return of income on 28-1-1998 for the A.Y.1998-99 on a total income of Rs.1,10,28,190/-. The return was processed u/s 143 (1) (a) on 23-3-1999. On 16-8-1999, a notice u/s 143 (2) was issued to the assessee stating that in the course of assessment proceedings u/s 143, it was noticed by the Department that the assesee had debited to its P&L Account a sum of Rs.41,06,746 out of which a sum of Rs.29,49,088 was the unrealised loss due to foreign exchange fluctuation on the last date of the accounting year. The AO held that the liability as on the last date of the pervious year under consideration was a contingent liability, it was not an ascertained liability and consequently it had to be added back to the total income of the assessee. Accordingly, he added back Rs.29,49,088 being the unrealised loss due to foreign exchange fluctuation. In other words, the debit to the P&L Account was disallowed. This order of the AO was upheld by the CIT (A) vide decision*

*dated 29-11-2001. Being aggrieved, the assessee went in appeal to the Tribunal.* ***By judgment and order dated 1-4-2005, the Tribunal relying on its earlier decision in the case of M/s Woodward Governor India Ltd, for the A.Ys 1995-96, 1996-97 and 1997-98 held that the claim of the assessee for deduction of unrealised loss due to foreign exchange fluctuation as on the last date of the previous year had to be allowed. This decision of the Tribunal has been upheld by the Delhi High Court vide the impugned judgment dated 30-4-2007.....***

*7. .....According to the learned counsel, the assessee has been following mercantile system of accounting, which is also known as accrual system of account, whenever the amount is credited to the account of the payee (creditor) liability stands incurred by the assessee even though the amount is actually not paid. In this connection, learned counsel placed reliance on the definition of the word 'paid' in Section 43 (2). According to him,* ***in the past in some years when the value of the rupee becomes stronger vis-à-vis US $, the Department had taxed the gains as income. Therefore, according to him, when it comes to 'income', the Dept. says that accrual is enough for taxability and 'payment' is irrelevant but when it comes to 'loss', the Dept. says that 'payment' alone is relevant for taxability. According to him, such double standards cannot be countenanced...***

**10.7.2** The Supreme Court in Civil Appeal No.2206 of 2009 (arising out of SLP © No.593 of 2008), vide order dated 8-4-2009, in the above case, vide its detailed reasons mentioned in the order, had upheld the decision of the Delhi High Court's order dated 30-04-2007 holding that the **claim of the assessee for deduction of unrealised loss due to foreign exchange fluctuation as on the last date of the previous year had to be allowed.**

**10.8** The ITAT, Mumbai 'C' Bench, in the case of Bank of Bahrain and Kuwait, 41 SOT 290 (Mum) (SB) also held that wherever forward contract is entered into by the assessee to sell the foreign currency at an agreed price at a future date falling beyond the last date of accounting period, the loss incurred by the assessee on account of evaluation of contract on the last date of the accounting period i.e. before the date of maturity of the forward contract was not a contingent or notional loss. **The ITAT at Para.57 of its order also held that "when profits are being taxed by the Department in respect of such unmatured forward foreign exchange**

**contracts, then there was no reason to disallow the loss as claimed by the assessee in respect of same contracts, on the same footing.**

**10.9** It is also relevant to note that the assessee has submitted a statement showing foreign exchange loss/gain for F.Ys 2007-08, 2008-09, 2009-10, 2010-11 and 2011-12 i.e. relevant to A.Ys 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13 respectively. As noticed from the statement for the assessment year under consideration i.e. A.Y.2008-09, there was loss of Rs.18,92,87,645, for A.Y.2009-10, there was loss of Rs.45,21,01,025, for A.Y.2010-11, there was gain of Rs.15,27,55,585, for A.Y.2011-12, there was gain of Rs.8,93,78,415 and for A.Y.2012-13, there was gain of Rs.7,07,40,891, which clearly substantiates that the assessee was offering both loss/gain out of foreign exchange fluctuations for taxation or for claiming of loss.

**10.10** The appellant also submitted a Certificate from State Bank of India, Corporate Accounts Group Branch, Panjagutta, Hyderabad, to the effect that the assessee entered into forward /derivative contracts with the bank.

**10.11 Respectfully following the various case laws quoted above, which are squarely applicable to the facts of the assessee's case, I hold that the loss as a result of fluctuation in foreign exchange rates is not a contingent and notional liability and is an ascertained liability and direct the AO to allow the assessee's claim of loss on account of fluctuations in foreign currency rate amounting to Rs.18,92,87,645.**

10. The Revenue's sole substantive argument before us is that the CIT(A) has erred in law and on facts in deleting the impugned MTM losses disallowance despite the fact that the CBDT Circular No.3 of 2010 dt.23.03.2010 has held

the same to be a notional and not an actual loss. All these Revenue's arguments fails to convince us as not only the assessee had filed all the details of corresponding forward / derivative contracts, necessary certificate from the SBI but also the relevant statements thereof since F.Y.2007-08 to 2011-12 along with the catena of case law(s) holding that such losses are in fact in the nature of an ascertained liability than a contingent one. We thus find no reason to interfere with the CIT(A) detailed discussion extracted above to this effect. The Revenue's corresponding instant substantive grounds stand rejected.

11. This leaves us with Revenue's identical 7th and 6th substantive grounds in both these assessment years that the CIT(A) has erred in law and on facts while directing the Assessing Officer to exclude the assessee's freight and insurance charges of Rs.4,21,48,702 and

Rs.4,58,34,902; respectively not only from "export" but also from "total turnover". We find that the instant issue is also no more *res integra* as per hon'ble apex court's decision in CIT Vs. HCL Technologies Ltd. (2018) 404 ITR 719 followed by CBDT Circular No.4 of 2018 dt.14.08.2018 that whatever item is to be excluded from "export" must also follow the suit regarding the "total turnover". The Revenue's instant substantive last ground is rejected therefore. So is the outcome of its twin appeals ITA 708 & 709/Hyd/2015 (supra).

12. We lastly acknowledge that although the instant appeals are being decided after a period of 90 days from the date of hearing as per Rule 34(5) of the IT(AT) Rules 1963, the same however, does not apply in the covid lockdown situation as per hon'ble apex court's recent directions dated 27-04-2021 in M.A.No.665/2021 in SM(W)C

No.3/2020 'In Re Cognizance for extension of limitation' making it clear that in such cases where the limitation period (including that prescribed for institution as well as termination) shall stand excluded from 14th of March, 2021 till further orders.

13. To sum up, assessee's appeals ITA 710 & 711/Hyd/2015 are partly allowed and allowed & Revenue's appeals ITA 708 & 709/Hyd/2015 are dismissed in above terms. A copy of this common order be placed in the respective case files.

*Order pronounced in the open court on 17th Aug.,2021.*

| Sd/- | Sd/- |
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| **(LAXMI PRASAD SAHU)** | **(S.S. GODARA)** |
| Accountant Member | Judicial Member |

Hyderabad, Dt.17.08.2021.

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Copy to :

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|---|---|
| 1. | M/s. Divi's Laboratories Limited, 7-1-77/E/1/303, Dharam Karan Road, Ameerpet, Hyderabad-500016. |
| 2. | DCIT, Circle 17(1), Hyderabad. |
| 3. | Pr. C I T-5, Hyderabad. |
| 4. | CIT(Appeals)-X, Hyderabad. |
| 5. | DR, ITAT, Hyderabad. |
| 6. | Guard File. |

By Order

Sr. Pvt. Secretary, ITAT, Hyderabad.