IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD ' B ' BENCH, HYDERABAD.

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

ITA No.888/Hyd/2018
(Assessment Year : 2012-13)

M/s. Transgene Biotek Limtied,
Medak.
PAN AABCT 3840P .....Appellant.

Vs.

Income Tax Officer,
Ward 1, Sangareddy. .....Respondent.

Appellant By : Shri Shilpa Maniyar.
Respondent By : Shri Narayana Murthy Naik (D.R.)

Date of Hearing : 11.05.2021.
Date of Pronouncement : 24.08.2021.

O R D E R

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

This assessee's appeal for Asst. Year 2014-15 arises from the Commissioner of Income Tax (Appeals)-2, Hyderabad's order dt.27.03.2017 passed in case No.48/CIT-2/263(3)/2016-17 in proceedings under Section 143(3) of Income Tax Act, 1961 ('the Act').

Heard both the parties. Case file perused.

2. We notice at the outset that assessee's instant appeal suffers form 331 days delay in filing. The assessee submitted an application dt.7.5.2018 for condonation of delay and explained the circumstances for impugned delay in filing of the instant appeal. Case law Collector Land Acquisition Vs. Mst. Katiji & Ors, 1987 AIR 1353 (SC) and University of Delhi Vs. Union of India, Civil Appeal No.9488 & 9489/2019 dated 17th Dec., 2019, hold that such a delay; supported by cogent reasons, deserves to be condoned so as to make way for the cause of substantial justice. We accordingly hold that assessee's impugned delay of 331 days is neither intention nor deliberate but due to the circumstances beyond his control. Case is now taken up for adjudication on merits.

3. Coming to the assessee's sole substantive grievance that the Pr. CIT hereunder has erred in law and on facts in invoking his 263 revision jurisdiction, both the learned representatives took us to the corresponding detailed discussion under challenge reads as under :

ORDER U/S. 263 OF THE INCOME TAX ACT, 1961

The assessee company has filed its return of income for the Asst. Year 2012-13 on 29/9/2012 admitting total income at Rs.16,49,870/-. The case was selected for scrutiny under CASS. The Assessing Officer has completed the assessment u/s. 143(3) of I.T. Act on 31/3/2015 by making disallowance of miscellaneous expenditure to the tune of Rs.1,82,160/-, thereby determining the total income at Rs.18,32,030/-

2. Subsequently, on perusal of the file, it is noticed that as per the Profit & Loss account, the profit before tax was shown at Rs.17,25,16,724/-, which includes the forex gain offered vide Schedule XIX. As tax payable under the provisions of Section 115JB is more than the tax payable under normal provisions, the tax payable is required to be computed u/s. 115JB of the I.T. Act. However, book profit was not computed / offered and not assessed to tax u/s. 115JB of I.T. Act. The A.O. erred in computing the taxable income without invoking the provisions of sec.115JB of the I T Act, 1961 and this tantamount to non-application of mind. This non-application of mind is to be termed as "error" as held by the Hon'ble Supreme Court in the cases of Tara Devi Agarwal (88 ITR 323 - SC) and Ram Pyari Devi (67 ITR 84 – SC).

2.1. Since this is an error and the same caused prejudice to the interest of revenue, a show cause notice u/s. 263 was issued to the assessee on 27/6/2016 calling for the assessee's objections, if any, as to why revisionary action should not be taken.

3. In response to the show cause notice, Sri M.S.Srinivas, CA and Authorised Representative of the assessee company, appeared and filed written submissions stating that the profit before tax shown at Rs.17,25,16,724/- includes forex gain of Rs.16,99,89,543/- and furnished the detailed break-up of forex gain. The assessee submitted that as per AS-11, exchange difference arising on account of non-monetary item should not be recognized in the Profit and Loss Account on the Balance Sheet date and the non-monetary items should be continued to be reported using the exchange rate as at the date of transaction itself and as the said transactions fall within the meaning of non-monetary items, the foreign exchange gains on such transactions should not have been taken to the Profit and Loss Account as per AS-11. The assessee further submitted that according to Section 115JB(2) of the I.T. Act, every assessee being a company shall prepare its Profit and Loss Account

for the relevant previous year in accordance with the provisions of Part II of Schedule VI of the Companies Act, 1956, but evidently the profit & loss account pertaining to A.Y.2012-13 has not been prepared by the assessee in accordance with the provisions of Part II of Schedule VI, since AS-11 has not been complied with. The assessee company also relied on the decision of Hon'ble ITAT, Hyderabad, in the case of Rain Commodities Ltd. vs. Dy. CIT (2010) 004 ITR (Trib) 0551, wherein it was held that "*the A.O. should recalculate the net profit and then follow the adjustments of the minimum alternate tax as usual; (1) if it is discovered that the P&L a/c is not drawn up in accordance with Part II and Part III of Schedule VI to the Companies Act ..... (2) If accounting policies, accounting standards are not adopted for preparing such accounts and method, rates of depreciation which have been incorrectly adopted for preparation of the Profit and Loss Account laid before the annual general meeting*".

3.1. The case was again posted for hearing on 14/3/2017. In response, Sri M.S.Srinivas and Ms. Mouktika, CAs and Authorised Representative of the assessee company, appeared and reiterated the submissions made earlier and requested to drop the proceedings as the provisions of Section 115JB are not applicable.

4. I have carefully considered the submissions of the assessee and perused the case records. The AO has not computed the Book Profits invoking the provisions of sec.115JB of the I T Act, 1961 while finalizing the scrutiny proceedings and as mentioned at para - 2 above, this tantamount to non-application of mind. This non-application of mind is to be termed as "error" as held by the Hon'ble Supreme Court in the cases of Tara Devi Agarwal (88 ITR 323 - SC) and Ram Pyari Devi (67 ITR 84 - SC).

5. In light of the facts enumerated above, I have come to the conclusion that the assessment made is erroneous and prejudicial to the

interests of the revenue and hence the same is set aside on the limited issue of applicability of provisions of Section 115JB of I.T. Act, 1961 as discussed above by virtue of powers vested in me u/s. 263 of the I.T. Act. Needless to say that, an opportunity should be given to assessee before completing the set aside assessment.

6. Thus, the order of the Assessing Officer is hereby set aside.

Sd/-
(Ch. OMKARESWAR)
Pr. Commissioner of Income Tax-2,
Hyderabad

Copy to: 1. The assessee company
2. The Addl Commissioner of Income Tax, Range-2, Hyderabad

4. We have given our thoughtful consideration to rival pleadings against and in support of the foregoing revision directions. We find no reason to sustain the same. This is for the sole reason that the learned Pr. CIT's detailed discussion makes it clear that the assessee's profit before tax, inclusive of various gains, a sum of Rs.71,25,16,724. And that the section 115JB MAT computation is more than the tax under the normal provisions of the Act. We find that the learned Pr. CIT has nowhere not even indicated as to in what terms the assessee's MAT computation exceeds the normal one so as to exigible to 115JB of the Act. The learned Pr. CIT's directions qua this sole issue are found to

be vague qua this solitary issue allegedly inviting application of 115JB MAT computation.

5. Learned CIT-DR further contended during the course of hearing that the impugned revision direction ought to be upheld since the Assessing Officer had not adequately examined the impugned MAT computation issue. On our query, the learned departmental representative has not given satisfactory reply under which limb of 115JB Expl.(1) that the assessee's foreign exchange gain exceed its normal computation. We therefore quote hon'ble apex court land mark decision in **Malabar Industrial Co. Ltd. Vs. CIT** 243 ITR 83 (SC) that an assessment has to be both erroneous as well as causing prejudicial to the interest of Revenue; simultaneously, so as to be subjected u/s. 263 revision mechanism. We make it clear that there is not even an indication in the learned Pr. CIT's order under challenge pin-pointing a specific error which could said to have prejudiced to the interest of Revenue. We therefore reverse his order under challenge and restore the impugned assessment dt.31.3.2015 as a necessary corollary.

6. 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.

7. This assessee's appeal is allowed.

Order pronounced in the open court on 24th August, 2021.

Sd/- Sd/-

(L.P. SAHU) **(S.S. GODARA)**
Accountant Member Judicial Member
Hyderabad, Dt.24.08.2021.

* Reddy gp

Copy to :

1.	M/s. Transgene Biotek Ltd., 68 – 70, Anrich Industrial Area, IDA, Bollaram, Medak District.
2.	ITO, Ward 1, Sangareddy.
3.	Pr. C I T-2, Hyderabad.
4.	Addl. CIT, Range-2, Hyderabad.
5.	DR, ITAT, Hyderabad.
6.	Guard File.

By Order

Sr. Pvt. Secretary, ITAT, Hyderabad.