

IN THE INCOME TAX APPELLATE TRIBUNAL
"E" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)
AND
SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)

I.T.A. No.4444/Mum/2019
(Assessment year : 2015-16)

Jt CIT (OSD)-2(3)(1), Mumbai	vs	M/s Tata Industries Ltd Bombay House, Homi Modi Street Fort, Mumbai-400 001 PAN : AA ACT4058L
APPELLANT		RESPONDENT

I.T.A. No.4500/Mum/2019
(Assessment year : 2015-16)

M/s Tata Industries Ltd Bombay House, Homi Modi Street Fort, Mumbai-400 001 PAN : AA ACT4058L	vs	Assistant Commissioner of Income- tax-2(3)(1), Mumbai
APPELLANT		RESPONDENT

Assessee by	Smt. Aarti Vissanji, AR
Respondent by	Smt. Padmaja Siripurapu [CIT(DR)] / Shri Vijaykumar Menon, Sr DR

Date of hearing	17-09-2021
Date of pronouncement	14-12-2021

ORDER**Per Saktijit Dey (JM)**

Captioned cross appeals arise out of order dated 03-04-2019 of learned Commissioner of Income-tax (Appeals)-6, Mumbai for the assessment year 2015-16.

ITA 4444/Mum/2019 (Appeal by revenue)**2. Grounds raised by the revenue are as under:-**

"1. On the facts and circumstances of the case and in law, the Ld CIT(A) has erred in directing the A.O to exclude appreciating the facts that the assessee has earned exempt dividend income by incurring establishment and administrative expenditure on strategic investment.

2. On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the facts that as per clause (f) of explanation 1 of section 115JB(2) "the book profit means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by the amount or amounts of expenditure relatable to any income to which (section 10 (other than the provisions contained in clause (38) thereof for section 11 or section 12 apply and all the relevant expenditure bias to be added back to income for MAT con-mutation."

3. As could be seen from the grounds raised, the dispute is with regard to the disallowance made under section 14A of the Income Tax Act, 1961 r.w.r. 8D(2), both, under the normal provisions as well as under section 115JB of the Act.

4. Briefly the facts are, as stated by the assessing officer, assessee is a non banking financial company (NBFC). For the assessment year under dispute, assessee filed its return of income on 22-03-2016 declaring nil income. In course of assessment proceedings, the assessing office noticed that the assessee had earned exempt income by way of dividend amounting to Rs.41,56,53,446/-. Whereas, the assessee has disallowed an amount of Rs.5,82,35,000/- under rule 8D(2)(iii). After verifying the details furnished by the assessee and considering the submissions made, the assessing officer was of the view that the disallowance made by the assessee is not in accordance with rule 8D(2). Therefore, he proceeded to compute disallowance and ultimately worked out the disallowance at Rs.1,713.27 lakhs. The assessee having disallowed an amount of Rs.582.36

lakhs, he made a net disallowance of Rs.1,130.91 lakhs. Assessee contested the aforesaid disallowance before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record and relying upon the ratio laid down in various judicial precedents cited before him, learned Commissioner (Appeals) directed the assessing officer to compute the disallowance under section 14A r.w.r. 8D(2)(ii) after excluding the investments, the income from which are chargeable to tax as well as the investments on which the assessee has not earned any exempt income during the year. As regards disallowance made under section 14A r.w.r 8D while computing book profit under section 115JB, relying upon his decision for assessment years 2013-14 and 2014-15, learned Commissioner (Appeals) directed the assessing officer to disallow only those expenditure which are directly relatable to earning of exempt income, in terms of Explanation 1(f) to section 115JB(2). Further, he held that no disallowance under section 115JB(2) can be made by resorting to section 14A r.w.r. 8D(2).

5. We have considered rival submissions and perused materials on record. Insofar as ground 1 is concerned, in our view, it is totally misconceived. A careful reading of first appellate authority's order clearly reveals that he never directed the assessing officer to exclude strategic investments from the total investments for computing disallowance under rule 8D(2)(iii). He has only directed the assessing officer to exclude those investments, which have not given rise to tax free income as well as the investments on which the assessee had not earned any exempt income during the year. Thus, in our considered opinion, ground 1 does not arise out of the order of learned Commissioner (Appeals), hence, does not merit consideration. Accordingly, dismissed.

6. As far as ground 2 relating to disallowance under section 14A r.w.r. 8D(2) while computing book profit under section 11JB, we fully subscribe to the view expressed by the learned Commissioner (Appeals), as, it is in consonance with the ratio laid down by the Special Bench of ITAT in case of ACIT vs Vireet Investments Pvt Ltd (2017) 165 ITD 27 (Del)(SB). In any case of the matter, learned Commissioner (Appeals) has held that expenses directly relatable to earning of exempt income can be disallowed under Explanation 1(f) to section 115JB(2) of the Act. In view of the aforesaid, we uphold the decision of the learned Commissioner (Appeals) by dismissing the ground raised.

7. In the result, appeal is dismissed.

ITA 4500/Mum/2019 (Appeal by assessee)

8. At the outset, Smt. Aarti Vissanji, learned counsel appearing for the assessee, on instruction, did not press ground 3. Accordingly, ground 3 is dismissed as not pressed.

9. In ground 1, assessee has challenged disallowance of legal and professional fees of Rs.68,79,915/-.

10. Briefly the facts are, in course of assessment proceedings the assessing officer noticed that the assessee had claimed deduction of Rs.68,79,915/- on account of legal and professional fees. After calling for necessary details and examining them, he found that the payments were made to Nielson India Pvt Ltd and Quantum Consumer Solutions Pvt Ltd for feasibility study and expansion into new business. The assessing officer observed that the project for which feasibility study was prepared has not yet commenced. Thus, according to him, such pre-operative expense has to be capitalized as the assessee is following percentage completion method for recognizing revenue. Thus, ultimately he disallowed

assessee's claim of deduction. Learned Commissioner (Appeals) also sustained the disallowance in appellate proceedings.

11. Learned Counsel for the assessee submitted, one of the business activities of the assessee is of promoting companies to carry on business. She submitted, it is not a fact that this is the only business activity of the assessee. She submitted, since the expenditure was incurred in relation to the business activity of promoting new company, it is allowable as revenue expenditure. She submitted, in assessee's own case in assessment year 2004-05 in ITA No.4894/Mum/2008 dated 20-07-2016, the Tribunal has accepted that promoting new companies is a business activity of the assessee. Thus, she submitted, the expenditure incurred is in the nature of revenue expenditure; hence, has to be allowed. Finally, she submitted, expenditure incurred for procuring feasibility report for expansion of business has to be allowed. In support of such contention, learned counsel relied upon the following decisions:-

1. Jai Engineering Works Ltd vs CIT(2008) 166 Taxman 10 (Del)

2. CIT vs Euro India Ltd (2014) 4 taxmann.com 173 (Del)

12. The learned departmental representative strongly relied upon the observations of the assessing officer and learned Commissioner (Appeals).

13. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. Undisputedly, the legal and professional expense claimed by the assessee was disallowed on the reasoning that they are pre-operative expenses before commencement of business activity. From the assessment order itself it is evident that the assessee is engaged in various business activities, such as, providing business investment and promotion of new companies in various fields, etc. It is the contention of the

assessee that while carrying out the business activity of promotion of new companies / start-ups, the assessee has to procure feasibility report. From the details of expenditure incurred placed at page 9 of the paper book, assessee's submission appears to be correct. In case of Jai Engineering Works Ltd vs CIT (supra), the Hon'ble Delhi High Court while considering allowability of expenses in the nature of pre-operative expenses under section 37(1) of the Act has observed that a particular assessee may be having a number of business activities. Therefore, the nature of new business is not a decisive test for determining whether or not there is an expansion of an existing business. What is important is that the control of all business, the existing one as well as the new venture, must be in the hands of one establishment or management or administration. The funds utilized for such business activities must have come from the common source as reflected in the balance-sheet of the company. Therefore, if separate business activities are under common management and funds utilized have come from the common management, the pre-operative expenditure is allowable. In case of CIT vs Euro India Ltd (supra), the Hon'ble Delhi High Court has observed, where the feasibility report is procured for expansion of existing business and where there is unity of control and common funds, then such expenditure would be treated as business expenditure. Thus, in our view, assessee's claim of deduction of legal and professional fee paid has to be considered by applying the parameters/guidelines laid down in the decisions referred to above. Accordingly, we restore the issue to the assessing officer for fresh adjudication after due opportunity of being heard to the assessee. This ground is allowed for statistical purpose.

14. In ground 2, assessee has challenged write off of value of investment made in Tata Industrial Services Ltd amounting to Rs.39,70,12,410/-.

15. Briefly the facts are, in course of assessment proceedings, the assessing officer noticed that the assessee has written off an amount of R.39,70,12,410/- being investment in a subsidiary, viz. Tata Industrial Services Ltd. When called upon to justify the claim, the assessee submitted that it has made investment in the subsidiary, which is treated as capital investment in the books and represented long term investment. Though, the assessee continues to hold the shares in the company, however, due to the continuous loss suffered by the subsidiary, the assessee cannot recover any money from the investment. Therefore, the value of investment is written off in the books of account. The assessing officer observed, while computing income under the normal provisions of the Act, the assessee itself has not claimed the write off of the amount of Rs.39,70,12,410/-. However, while computing book profit under section 115JB of the Act, the assessee has not added back the amount. Referring to the Memorandum to Finance Act, 2009, the assessing officer observed that since the assessee is still holding the shares, there cannot be actual write off of shares. Liability still exists for Tata Industrial Services Ltd and disposal of assets has not happened to treat the same as write off. He observed, even if any gain / loss occurs on disposal of shares, the assessee can route the proceeds through profit & loss account for computing book profit. He observed, the subsidiary is still active and filing returns of income regularly. Thus, ultimately, he concluded that the write off is merely diminution in value of investment squarely falling under Explanation 1(i) to section 115JB(2). Accordingly, he added back the amount to the book profit computed under section 115JB of the Act. While deciding the

issue in appeal, learned Commissioner (Appeals) also upheld the decision of the assessing officer.

16. Reiterating the stand taken before the departmental authorities, learned counsel for the assessee submitted, the assessee had invested in the equity shares of the subsidiary. However, due to continuous loss suffered by the subsidiary, there was total erosion of net worth. Therefore, as against totally paid up equity capital of Rs. 43,83,07,410 there is a debit balance of Rs.50,75,66,746/. Drawing our attention to the profit and loss account of the subsidiary as on 31-03-2015, she submitted, there is no revenue from operation, whereas, total loss for the year stood at Rs.12,61,27,268/-. She submitted, even the Board of Directors at their meeting held on 03-09-2014 have taken a decision to discontinue the business activity of rendering customized and focused solutions in areas of contractual project management, supply chain solutions and offset solutions in the field of aerospace, defense and home land security. She submitted, for this reason, out of the total investment made in equity capital of the subsidiary, the assessee has written off Rs.39,70,12,410/-. The learned counsel, drawing our attention to the profit and loss account submitted, provision made for diminution in value of Investment in Tata Tele Services Ltd amounting to Rs.119 crores has not been claimed by the assessee and added back to the book profit. She submitted, since the investment in the other subsidiary, Tata Industrial Services Ltd. was actually written off in the books of account, it was claimed as deduction. She submitted, since the amount is not in the nature of provision, it is not covered under Explanation 1(i) to section 115JB(2) of the Act. She submitted, though, some investments still remain in the subsidiary, however, it has zero value. She submitted, the write off in the books of account is in accordance with guidelines

prescribed under Accounting Standard 13 issued by ICAI. In support of her contention, learned counsel relied upon the decision of Hon'ble Gujarat High Court in case of PCIT vs Torrent Private Limited (2019) 108 taxmann.com 375 (Guj).

17. Strongly relying upon the observations of the departmental authorities, learned departmental representative submitted, the very fact that the assessee has not claimed the deduction while computing income under the normal provisions of the Act makes it clear that it is not an allowable deduction. Therefore, the assessee should have added it back to the book profit computed under section 115JB of the Act. Reiterating the stand taken by the departmental authorities, the learned departmental representative submitted, since the assessee has invested in shares of the subsidiary and still holds such shares, the writing off of the value of shares has actually resulted in diminution in value. Hence, is covered under Explanation 1(i) to section 115JB(2). Further, he submitted, though, the assessee claims to have written off the value of shares in its books, however, it needs to be verified what accounting treatment has been given in the books of the subsidiary.

18. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. As far as the factual aspect of the issue is concerned, there is no dispute that the write off of Rs.39.70 crores was added back by the assessee itself while computing income under the normal provisions. However, the assessee did not do so while computing book profit under section 115JB of the Act on the plea that it does not come within the purview of any of the adjustment as provided under Explanation 1 to section 115JB(2). However, the departmental authorities have rejected the claim of the

assessee on the reasoning that the so called write off, in reality, is a provision for diminution in the value of shares as provided under Explanation 1(i) to section 115JB(2).

19. At this stage it is necessary to look into the provision contained under Explanation 1(i) to section 115JB(2) of the Act, which reads as under:-

“The amount or amounts set aside as provision for diminution in the value of asset.”

20. Thus, the language of the provision is very clear and it speaks of an amount set aside as provision for diminution in the value of asset. Whereas, it is the specific contention of the assessee that the amount written off has not been set aside as a provision in the books. The entries in assessee's books and as reflected in the profit and loss account, of course, show the amount as having been written off. However, it is a fairly well settled principle that accounting entries are not conclusive. At this stage, we may observe that in case of PCIT vs Torrent Private Ltd (supra), the Hon'ble Gujarat High Court has held that if provision for diminution in value of investment is actually written off, it cannot be added to book profit under section 115JB. Admittedly, the aforesaid decision of the Hon'ble Gujarat High Court was not available either before the assessing officer or before the first appellate authority. The assessee has stated that the equity investment written off related to offset business undertaken by the subsidiary, which ran into heavy loss and was subsequently discontinued. Whereas, the shares still held by the assessee aggregating to Rs.4,12,95,000/- represents equity investment in e-retail business conducted by the subsidiary in the name and style of Tata Unistores Limited. This factual aspect needs to be verified. Further, the

corresponding entries in the books of the subsidiary as regards write off of the investment has to be examined by the departmental authorities.

21. In view of the aforesaid, we are inclined to restore the issue to the assessing officer for fresh adjudication after examining various aspects as discussed hereinbefore. The assessing officer must also examine the applicability of ratio laid down by the Hon'ble Gujarat High Court in case of PCIT vs Torrent Private Ltd (supra). Needless to mention, while deciding the issue, assessee must be provided a reasonable opportunity of being heard. Ground is allowed for statistical purpose.

22. In the result, appeal is allowed for statistical purposes.

23. To sum up, revenue's appeal is dismissed and assessee's appeal is allowed, for statistical purpose.

Order pronounced on 14/12/2021.

Sd/-

Sd/-

(S.RIFAUR RAHMAN)	SAKTIJIT DEY
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dt : 14/12/2021

Pavanan

Copy to :

1. Appellant
2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
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By Order

Asstt. Registrar, ITAT, Mumbai