IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE

BEFORE SHRI. B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No. 59/Bang/2017
Assessment Year : 2011-12

M/s. Asia Power Projects Pvt. Ltd., No. 6, Lakeside Residency, 4 Annaswamy Mudaliar Road, Bangalore – 560 042. PAN: AADCA0485B	**Vs.**	The Deputy Commissioner of Income Tax, Circle – 11 (1), Bangalore.
APPELLANT		**RESPONDENT**

&

ITA No. 211/Bang/2017
Assessment Year : 2011-12
(By Revenue)

Assessee by	**:**	Shri Chavali Narayan, CA & Shri Keerthi Narayan, CA
Revenue by	**:**	Shri Srinath Sadanala, Addl. CIT (DR)

Date of Hearing	**:**	15-12-2021
Date of Pronouncement	**:**	07-03-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present cross appeals are filed by assessee as well as revenue against the order dated 09.09.2016 passed by the Ld.CIT(A)-1, Bangalore for Assessment Year 2011-12 on following grounds of appeal.

ITA No. 59/Bang/2017 (Assessee's appeal)

> *"The grounds of appeal listed below are without prejudice to each other.*
> *1. That the order of the learned Deputy Commissioner of Income-tax (`A0') dated 31 January 2014 and the order*

passed by the learned Commissioner of Income-tax (Appeals) [CIT(A)1 dated 9 September 2016 received by the Appellant on 15 November 2016 is erroneous and bad in law.

A. Computation of income other than income under section 115JB

Issue 1 — Disallowance of payment to Individual Freelancers

2. During the subject AY the Company had availed services from certain non-resident freelancers and made payment of Rs 20,56,737 for the services rendered by them and has not deducted Tax Deducted at Source (`I-DS') by invoking provisions of the Article 14 and Article 15 of the India-Italy Double Taxation Avoidance Agreement (`DTAA') and India-Germany DTAA respectively ie "Individual Personal Service"' (`IPS').

3. The learned AO disallowed the payment made to non-resident freelancers considering the same as Fees for Technical Services (`FTS') and on account of non-deduction of TDS under section 195 of the Act.

4. The learned CIT(A) erred in confirming the disallowance made by the learned AO.

Issue 2 — Setoff of brought forward losses

5. The learned CIT(A) erred in not adjudicating on the issue of non-allowance of credit of brought forward losses to the extent available as per Return of Income (Roll

B. Computation of income under section 115JB of the Act - Minimum Alternate Tax (`MAT)

Issue 3 — Provision for future losses

6. The learned CIT(A) erred in not appreciating the fact that the in the earlier AYs when the provision for future losses was created, the same was added back while computing book profits under section 115JB of the Act and since during the subject AY there was reversal of the provision (amount credited to profit and loss account) to the extent of Rs 2.25,89.037 the same needs to be deducted from the book profits.

Issue 4 — Set off of brought forward losses

7. The learned CIT(A) without appreciating the fact that during the subject AY taxes under the normal provisions of the Act was higher than minimum alter tax erred in upholding the disallowance of credit of brought forward losses / unabsorbed depreciation of Rs 6.21,36,080 by stating that Form 29B was not provided .

8. The Appellant craves leave to add, alter, amend, substitute, rescind, modify and/or withdraw in any manner whatsoever all or any of the foregoing grounds appeal at or before the hearing of the appeal."

ITA No. 211/Bang/2017 (Revenue's appeal)

"1. The order of the Learned CIT(Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.
2. The learned CIT(A) erred in accepting the contention of the assessee regarding disallowance of foreign exchange loss without considering the Board's Instruction No.3/2010 dated 23.03.2010, which is binding on the Assessing Officer.
3. The Ld.CIT(A) erred in placing reliance on the decision of Hon'ble Supreme Court in the case of M/s.Woodward Governor India Pvt.Ltd., without appreciating that the case relied upon, dealt with the issue of additional liability arising on account of fluctuation in the rate of exchange in respect of loans taken for revenue purposes whether could be allowed as a deduction u/s 37(1) and not adjudicated or decided the issue with respect to 'marked to market loss'.
4. The learned CIT(A) erred in deleting the addition of Rs.22,648,000/-made by the AO on account of Forex losses as the assessee could not clearly establish that the said expenses are not contingent in nature and also not in the category of capital expense.
5. The Ld.CIT(A) erred in deleting the addition made by the AO on account of foreign exchange fluctuation relying on the assessee's submission that for the AY 2009-10 the exchange fluctuation loss on account of restatement of the ECB was allowed as a deduction u/s 37 of the Act, as the assessment order dtd.22.02.2013 was set aside by invoking provisions of section 263 and the AO has made fresh assessment dtd.10.03.2016 for the A.Y.2009-10 disallowing the loss occurred on account of restatement of foreign exchange.
6. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the Ld.CIT(A) be reversed and that of the Assessing Officer be restored.
7. The appellant craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of appeal."

Brief facts of the case are as under:

2. The assessee is a private limited company, engaged in the business of building projects and providing supplies and services in the area of power projects. The assessee also supplies full range of plant solutions on different types of packages such as turnkey, engineered and individual components. For your under consideration assessee filed its return of income declaring total income of Rs.6,28,10,420/- and claimed set off of brought

forward loss of earlier years. The Assessee also declared 'Nil' income under MAT after claiming set off of brought forward losses. The return was processed under section 143(1) of the act and was selected for scrutiny. Accordingly, notice under section 143(2) was served on assessee. In response to the statutory notices, the authorised representative of assessee appeared before the Ld.AO and filed details and submissions. The Ld.AO observed that, assessee debited exchange loss of ₹ 2,20,60,455/- in the P&L account. Assessee was therefore asked to submit the details in respect of the same and to explain the earning of loss. The assessee filed detailed submissions and breakup of the foreign exchange losses to the Ld.AO. After going through the submissions by assessee, the Ld.AO was of the opinion that the foreign-exchange loss is from the reinstatement of ECB loans, which according to him is not revenue in nature. He thus proposed to disallow the same in the hands of assessee. The Assessee relied on the decision of *Hon'able Supreme Court* in case of *CIT vs Woodward Governor India Pvt.Ltd.,* reported in *(2009) 312 ITR 154* in support of its claim. The Ld.AO after considering the submissions of assessee relied on CBDT instruction dated 3/2010 dated 23/03/2010, and disallowed the entire amount of ₹ 2,26,48,000/- in the hands of assessee.

2.1. The Ld.AO observed that assessee during the year made following payments in foreign currency without deducting TDS:

Sl.	Name of the Party	Nature of payment	Amount in Rs.
1	Perusin Dario	Fee for Technical services	7,80,434
2	Mularoni Enrico	-do-	6,07,560

3	Eric Gunther Wolters	-do-	4,86,475
4	Aguglia Franscesco	-do-	1,82,268
	Total		**20,56,737**

2.2 The Assessee was called upon to explain the reason for non-deduction of tax on these amounts. The Ld.AR submitted that these payments were made to the parties located in Italy and Germany and India has entered into double taxation avoidance agreement(DTAA). It was submitted that, as per the DTAA, these payments are not taxable in India and therefore provisions of section 195 were not applicable.

2.3. The Ld.AO after considering the submissions of assessee was of the opinion that the nature of services rendered by these people were some kind of technical expertise, skill or know how, and therefore it clearly covered by the definition of fee for technical services under the said tax treaties. The Ld.AO disallowed the payment of ₹ 20,56,737/- under section 40(a)(i) of the Act.

2.4. The Ld.AO observed that, assessee offered 'Nil' taxable income and also declared book profits as 'nil' for the computation of MAT under section 115JB of the Act. The Ld.AO observed that assessee deducted ₹ 2,25,89,037/- as provision for future losses credited to P&L account from the net profit of ₹ 8,47,25,117/-. It was also observed by the Ld.AO that, assessee claimed deduction of ₹ 10,96,72,305/- as amount of loss brought forward or unabsorbed depreciation, whichever is lower, as per the books. Ld.AO was of the opinion that, such deductions were not expressly allowed under section 115JB of the Act and that, assessee had not furnished the required certificate on Form 29B

in support of the brought forward or unabsorbed depreciation. He therefore disallowed the claim of assessee amounting to ₹ 6,21,36,080/- being brought forward or unabsorbed depreciation whichever is lower.

3. Aggrieved by the additions made by the Ld.AO, assessee preferred appeal before the Ld.CIT(A).

The Ld.CIT(A) allowed the claim of foreign exchange loss of Rs.2.26 cross by relying on the decision of *Hon'ble Supreme Court* in case of *CIT vs Woodward Governor India Pvt.Ltd., (supra)*.

3.1 In respect of disallowance under section 40(a)(i) and disallowance of the claim of brought forward in the unabsorbed depreciation of the Rs.6.28 crore, the addition made by the Ld.AO was upheld.

4. Aggrieved by the order of Ld.CIT(A), both assessee as well as revenue and appeal before the *Tribunal*.

We shall 1st take of the appeal filed by the revenue.

The only issue raised by revenues against of allowance of foreign-exchange losses claimed by assessee on account of reinstatement of ECB loans.

5. The Ld.AR submitted that ECB loans amounting to Euro 10,600,000 was borrowed in the financial year 2002-03 from the holding company being Ansaldo Energia S.P.A to meet the working capital requirements and necessary approval from reserve Bank of India was obtained regarding the same. He submitted that at the end of each year, as on balance sheet date, the difference in the exchange being gain or loss is accounted based on the prudent accounting principles as approved by the Institute of chartered accountants of India. During the year

under consideration, the Ld.AR submitted that foreign-exchange loss on account of reinstatement was claimed as deduction under section 37 of the Act. It is also submitted that in the immediately preceding assessment year being 2010-11 the result and exchange fluctuation was gain, which was credited to the profit and loss account and was taxed in the hands of assessee *suo moto* which is accepted by the revenue. It is therefore submitted that no disallowance is called for.

The Ld.DR relied on order passed by the Ld.AO.

On the contrary, the Ld.AR supported the view taken by the Ld.CIT(A).

We have perused submissions advanced by both sides in light of records placed before us.

6. We note that the Ld.AO denied the deduction on the ground that the assessee utilized the ECB loans for the purpose of acquiring fixed assets. Be that as it may, it is an admitted position that, in the preceding as well as subsequent assessment years, foreign exchange gains offered to tax by the assessee has been accepted by the revenue. The Ld.AR filed before us the following chart in respect of the same:

AY	**Exchange Gain/ Loss**	**Treatment in Books and Computation**	**AO's treatment**	**Remarks**	**Reference (Page No of Paper Book)**
2010-11	Exchange Gain of INR 5,94,64,215	Offered to Tax	Exchange Gain — Accepted by AO	No adjustments made by AO. Returned Income	554-560
2011-12	Exchange Loss of **INR** 2.20,60,455	Deduction claimed	**Disallowed by AO**	**Disallowed by AO**	**561-564**

2012-13	Exchange Loss of INR 3.81.85,962	Deduction claimed	Allowed by AO	No adjustments made by AO. Returned Income	565-573
2013-14	Exchange Loss of **INR** 1,38,38.172	Deduction claimed	Allowed by AO	No adjustments made by AO. Returned Income	574-581

7. Undoubtedly, as per Accounting Standard 11, assessee is required to reinstate the loan amount on the closing date of the balance sheet, on the basis of the value of foreign currency resulting in notional foreign exchange loss. For year under consideration it is submitted that the reinstatement as on the balance sheet dated resulted in loss, which the assessee claimed as deduction.

Hon'ble Supreme Court in case of *Sutlej cotton Mills Ltd. vs CIT* reported in *(1979) 116 ITR 1* wherein *Hon'ble Supreme Court* is observed as under:

> *"Whether the loss suffered by the assessee was a trading loss or not would depend on the answer to the question, whether the loss was in respect of a trading asset or a capital asset. In the former case, it would be a trading loss but not so in the latter. The test may also be formulated in another way by asking the question whether the loss was in respect of circulating capital or in respect of a fixed capital."*

The court further observed that:

> *"if the amount in foreign currencies utilised or intended to be utilised in the course of the business or for trading purposes or for effect thing a transaction on revenue account, is loss arising from the depreciation in its value on account of alteration in the rate of exchange would be a trading loss, but if the amount is held as a capital asset, the loss arising from depreciation would be a capital loss. This is clearly borne out by the decided cases which we shall presently discuss."*

8. From the above observation, it is clear that foreign exchange loss if for the purposes of business, would be treated to be a trading loss.

At this juncture two issue that needs to be verified is;

Whether the foreign exchange loss is a trading loss? and

whether the mark to market losses are within the limits of the receivables, which is not discernible from the records?

The Ld.CIT(A) has not verified these facts before allowing the claim. Assessee is directed to file all relevant documents to establish the nexes with the business of assessee and also the fact that such loss are on account of revenue and not on capital in nature.

Hon'ble Karnataka High Court in case of *CIT vs Wipro Finance Ltd.* reported in *351 ITR 153* following the decision of *Hon'ble Supreme Court* in case of *CIT vs Woodward Governor (India) Pvt.Ltd., (supra)* held as under:

> *"4. The view taken by the Supreme Court in this judgment is to the fact that while even notional loss can be claimed by way of a business loss as to a deductible item in computing the income of the assessee for the year, as it is a computation on notional basis, it is made dependent on the manner of conduct of the assessee is in respect of the earlier assessment period and particularly as to the assessee has been following this uniformly over the period of years and the test being when there was a notional gain as to whether it had been offered for tax etc. The Supreme Court took the view that such claim can be entertained subject to fulfillment of the following 6 conditions:*
>
> *(i) whether the system of accounting followed by assessee is the Mercantile system, which brings into debit the expenditure 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 bona fides;*
>
> *(iii) whether the assessee has given the same treatment to losses claimed to have accrued and the gains that may have accrued to it;*

(iv) whether the assessee has been consistent and definite 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 the books both in respect of losses and gains is as per nationally accepted accounting standards;

(vi) whether the system adopted by the assesseee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation.

5. In the wake of the judgment of the Supreme Court, it is now submitted that while the view of the tribunal that the assessee can claim such deduction has to be affirmed, the matter does not end with that, but such claim will have to be examined in the light of the fulfilment of the conditions as indicated by the Supreme Court for which purpose, the matter may have to go back to the assessing officer, who has to apply these tests to the claim made by the assessee and then either admit the claim or rejected depending upon the assessee being in a position to satisfy the fulfilment of the conditions.

6. In the view of joint submission made by both Council, the question is apparently answered in favour of the revenue and in sense that though the view of the tribunal is to be affirmed on the principle that being further made subject to the fulfilment of the conditions, the matter has to go back to the assessing officer for examination. In this view of the matter the appeal is allowed in these terms. The claim of the assessee to be re-examined by the assessing officer and respect of the assessment year applying the test of fulfilment of the 6 conditions mentioned above. The assessing officer to issue notice to the assessee, fixing the date of hearing the assessee or its counsel and then pass orders."

9. Accordingly, in view of the above decision of *Hon'ble Karnataka High Court* in case of *CIT vs Wipro Finance Ltd.* (supra), we direct the Ld.AO to examine and decide the issue and consider the claim of assessee in accordance with the principles laid down by *Hon'ble Karnataka High Court* in case of *CIT vs Wipro Finance Ltd.*

(supra). Needless to say that proper opportunity of being heard must be granted to assessee.

Accordingly this Ground raised by revenue stands allowed for statistical purposes.

Assessee's Appeal

10. Ground no.1 is general in nature and therefore do not require any adjudication.

11. Ground No.2-4 is regarding the disallowance of payment made to individual freelancers.

The Ld.AR submitted that, during the year under consideration assessee received services from certain non-resident free lancers to whom payment of ₹ 20,56,737/- was made towards the services rendered by them. Assessee had not deducted any TDS on such payment made to the non-resident freelancers. The Ld.AO invoked provisions of fee for technical services under India-Italy and India-Germany DTAA, and disallowed the expenditure under section 40(a)(i) of the Act.

12. The Ld.AR submitted that, revenue authorities treated the payment made to following persons as Fee for technical services:

Sl.	Name of the Party	Nature of payment	Amount in Rs.
1	Perusin Dario	Fee for Technical services	7,80,434
2	Mularoni Enrico	-do-	6,07,560
3	Eric Gunther Wolters	-do-	4,86,475
4	Aguglia Franscesco	-do-	1,82,268
	Total		**20,56,737**

13. The argument of the Ld.AR is that, the above payments fall under Article 15 of the double taxation avoidance agreement between India Italy and India Germany. He further submitted that the said income would be taxable in India if the same has been earned out of any fixed place in India or in the event such individuals have stayed in India for more than the specified period of time during the relevant period. The Ld.AR emphasised that these amounts to not fall within the category of fee for technical services, rather it is squarely covered under Article 15 of the double taxation avoidance agreement of Italy and Germany with India, which is basically "Independent Personal services".

It has been vehemently argued by the Ld.AR that provisions of section 195 do not attract to the above payments.

On the contrary and the Ld.DR relay on orders passed by authorities will.

We have perused submissions advanced by sites in light of records placed before us.

14. We note that the addition is confirmed by the Ld.CIT(A) under section 40(a)(i) of the Act. The Ld.AO disallowed expenditure as FTS by holding that assessee has not demonstrated that there was no technical knowledge, skill, know-how that was "made available" to assessee by these personnel. It is not in dispute that, these personnel do not satisfy the requirement of having a fixed place of business in India and also that it is admitted position that these personnel were there in India only for a few days which is within the period that was allowable as per the respective double taxation avoidance

agreement. The Ld.AR relied on the table that formed part of the paper book at page 115 which is reproduced as under:

Name of the freelancers	**Country**	**Relevant clause of DTAA**	**Maximum permissible stay in**	**Date of Entry**	**Date of Exit**	**Period of Stay in**
Perusin Dario	Italy	Article 15	183 Days	20 August 2010	27 September 2010	39 Days
Mularoni Enrico	Italy	Article 15	183 Days	20 August 2010	22 September 2010	34 Days
Aguglia Francesco	Italy	Article 15	183 Days	19 September 2010	27 September 2010	9 Days
Eric Gunther Wolters	Germany	Article 14	120 Days	01 September 2010	27 September 2010	27 Days

15. We note that there is nothing on record to establish that these were independent personal services. It is also not identifiable, if these personals were associated with the holding company of assessee. In order to fall within the category of Independent personal services, the assessee will first have to establish that the services rendered do not fall within the definition of Article 13 of India Italy DTAA and Article 12 of India Germany DTAA (FTS clause).

The Ld.AO has noted that assessee did not file any details in order to establish that the payments fall outside the preview of FTS under both the DTAA. The decisions relied by assessee shall come to assessee's assistance only when it is established that the services rendered do not fall with in the definition of Article 13 of India-Italy DTAA and Article 12 of India Germany DTAA.

Assessee is therefore directed to file all requisite details to establish its claim. Only when the payment falls outside the preview of FTS that Article 15 of India Italy DTAA and Article 14 of India Germany DTAA (Independent Personal Services) will have

to be looked into. Accordingly in the interest of justice we remand this issue back to the Ld.AO to verify necessary details in accordance with law. Needless to say that proper opportunity of being heard shall be granted to assessee.

Accordingly these grounds raised by assessee stands allowed for statistical purposes.

16. Ground No.5 is on respect of non allowance of credit of brought forward losses.

We direct the Ld.AO to grant the credit of brought forward losses to the extant available in accordance with law.

Accordingly these grounds raised by assessee stands allowed for statistical purposes.

Ground nos. 6 & 7 are considered together as under:

17. Ground No.6 is in respect of provision of future loss.

It is submitted by the Ld.AR that the Ld.AO has computed the brought forward future loss at Rs.2,12,32,215/-, whereas while computing the MAT under section 115JB, the Ld.AO considered 2.25 crores. The Ld.AR submitted that the provision was made by debiting the profit & loss account of earlier years , where in the same has been added to the net profit of the assessee while computing book profit.

18. Ground No.7 is in respect of brought forward or unabsorbed depreciation amounting to Rs.6,21,36,080/-.

The Ld.AR submitted that the claim was disallowed to assessee on the ground that Form 29B was not filed by assessee.

It is the submission o the Ld.AR that assessee according to the assessee it was not subjected to the MAT provision since its normal taxes was not lesser than the MAT. However, during the

assessment proceedings, assessee vide submission dated 17/09/2012 and 14/08/2013 filed details which were not considered by the Ld.AO.

The Ld.DR relied on the orders passed by the authorities below.

We have perused the submissions advanced by both sides in light of records placed before us.

19. We note that this issue needs to be considered by the Ld.AO in the light of evidences filed by assessee. In the event it is found that the provision was made by debiting the profit & loss account of earlier years, where in the same has been added to the net profit of the assessee while computing book profit, then the brought forward future loss needs to be considered at Rs.2,12,32,215/-.

In respect of brought forward or unabsorbed depreciation amounting to Rs.6,21,36,080/-, we direct the Ld.AO to consider the claim in accordance details filed by assessee.

Accordingly these grounds raised by assessee stands allowed for statistical purposes.

In the result appeals filed by assessee as well as revenue stands allowed for statistical purposes.

Order pronounced in open court on 07th March, 2022.

Sd/-	Sd/-
(B.R. BASKARAN)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 07th March, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore