

IN THE INCOME TAX APPELLATE TRIBUNAL "C"
(Virtual Court Hearing) BENCH KOLKATA

Before Shri Sanjay Garg, Judicial Member & Shri Girish Agrawal, Accountant Member

I.T.A. No.1272/Kol/2018
Assessment Year: 2013-14

Orient Cement Ltd.....Appellant
9/1, R.N. Mukherjee Road,
Kolkata-1.
[PAN:AABCO5420A]

vs.

DCIT, Circle-6(1), Kolkata.....Respondent

Appearances by:

Shri Akkal Dudhwewala, FCA, appeared on behalf of the Appellant.

Shri Sallong Yaden, Addl. CIT, DR, appeared on behalf of the Respondent.

Date of concluding the hearing : February 08, 2022

Date of pronouncing the order : March 16, 2022

Hearing through Video Conferencing

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 14.05.2018 of the Commissioner of Income Tax (Appeals)-2, Kolkata [hereinafter referred to as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act'). The assessee in this appeal has taken the following grounds of appeal:

"1. For that the Commissioner of Income Tax (Appeals)(CIT(A)) erred in not allowing the loss arising out of the writing off the Carbon Emission Reduction (CER) amounting to INR 3,04,93,228/

2. For that the CIT(A) erred in not appreciating the fact that the CER was offered to tax in an earlier/ preceding year in the demerged company and hence the amount was liable to be claimed as a loss in the year in which the same is written off by the resulting company as the resulting company had taken over the assets and liabilities of the Cement undertaking as a going concern under an approved scheme of demerger.

3. For that the CIT(A) erred in not appreciating the fact that the CER was offered to tax by the demerged company in an earlier/ preceding assessment year under the head Income from Profits from business which was assessed to tax by the Assessing Officer and hence there was no question as to whether the loss related to the running of business or not.

4. For that the order of the CIT(A) to extent of not granting loss of CER is perverse and is Contrary to law and hence was an allowable expense under section 36(1)(vii) r.w.s 36(2)(i) of the Income Tax Act, 1961.

5. For that with prejudice to the above the CIT(A) erred in not allowing the CER loss under section 37 of the Income Tax Act, 1961.

6. For that the CIT(A) erred in charging to tax hypothetical CER income by not allowing the CER written off loss.

7. For that the Appellant craves leave to add and/or amend any ground of appeal at the time of hearing.”

2. The assessee, apart from the above grounds, has also taken the following Additional Grounds of appeal:

“1. That on the facts and circumstances of the case, Education Cess amounting Rs.2,11,51,380/- paid till the date of filing of return of income for the relevant previous year, be excluded in computing total income under normal provisions of the Act.

2. That the appellant is entitled to make an additional claim at any time before the Income Tax Appellate Tribunal.

3. That the appellant craves leave to add, amend, modify, rescind, supplement or alter the ground stated hereinabove, either before or at the time of hearing of appeal.”

3. Grounds No 1 & 2 : The assessee, through these grounds, has contested the action of the lower authorities in not allowing the loss arising out of the writing off the Carbon Emission Reduction (CER) amounting to Rs.3,04,93,228/-.

3. The brief facts relating to the case are that during the assessment proceedings, the Assessing officer (AO) observed that during the year, the assessee had debited Rs.3,04,93,228/- under the head Miscellaneous expenses being Certified Emission Reduction. He further observed that there was no income relating to Certified Emission Reduction credited to Profit & Loss account during this year. The AO, therefore, asked the assessee to justify the reason for claiming the expenses of Rs.3,04,93,228/- relating to Carbon Credit expenses.

The assessee, in its reply dated 28.01.2016, stated as under:

“During the assessment year 2012-2013 an amount of Rs.3,33,04,288 was credited to Profit & Loss account being Certified Emission Reduction (CER) under Clean Development Mechanism

from United Nations Geneva General Fund, New York (please refer Note 20 of Annual Report). The amount of Rs.3,33,04,288 was included in the assessed income of Orient Paper & Industries Ltd in the order u/s.143(3) dated 28.03.2015. The amount of Rs.3,33,04,288 relates to Cement Undertaking owned by Orient Paper & Industries Ltd in that year. The Cement Undertaking was demerged from Orient Paper & Industries Ltd to our company w.e.f. 01.04.2012 under order of Orissa High Court dated 27.07.2012 and 23.02.2013. The value of Rs.3,33,04,288/- was determined as under:

<i>A)</i>	<i>No. of units allotted</i>	<i>1,26,317</i>
<i>B)</i>	<i>Current CER rate (Euro)</i>	<i>3.89</i>
<i>C)</i>	<i>Current exchange rate as on 30.03.2012</i>	<i>67.778</i>
<i>D)</i>	<i>Total value of CER as on 31.03.2012 (A x B x C)</i>	<i>3,33,04,288</i>

Thereafter the value of per unit of CER decreased substantially. The value as on 31.03.2013 was as under:

<i>A)</i>	<i>No. of units allotted</i>	<i>1,26,317</i>
<i>B)</i>	<i>Current CER rate (Euro)</i>	<i>0.32</i>
<i>C)</i>	<i>Current exchange rate as on 30.03.2012</i>	<i>69.5438</i>
<i>D)</i>	<i>Total value of CER as on 31.03.2012 (A x B x C)</i>	<i>28,11,060</i>

The difference between the value as on 31.03.2012 and the value as on 31.03.2013 amounting to Rs.3,04,93,228 (Rs.3,33,04,288 - Rs.28,11,060) was written off to Profit & Loss account under the head Miscellaneous expenses. The said amount of Rs.3,04,93,228 written off during the assessment year 2013-2014 was included in the total income and assessed to tax in the assessment of the demerged company Orient Paper & Industries Ltd" (PAN-AAACO3279J) for assessment year 2012-2013. Consequently, the amount of Rs.3,04,93,228 has been claimed as deductible revenue expenses under section 36(1)(vii) read with section 36(2)(i) of the Act as the amount written off had been taken into account in computing the income of earlier year. Without prejudice to our contention the said amount is allowable under section 36(1)(vii) read with section 36(2)(i) of the Act, the said amount is also deductible under section 37 of the Act.

Your attention is invited to the following judgments:

1) CIT v. VeerabhadraRao [1985] 155 ITR 152/22 Taxman 45 (SC.)

2) CIT-VI v. Times Business Solution Ltd. [2013] 33 Taxmann.com 173 (HC. Delhi)"

4.3 However, the assessing Officer did not get satisfied from the above explanation given by the assessee. He disallowed the claim of the assessee relating to Carbon credit expenses of Rs.3,04,93,228/- on the following grounds:

i) The amount of Rs.3,04,93,228/- debited to Miscellaneous expenses has not been incurred. It is a contingent loss.

ii) The CER units held as on 31.03.13 were valued at the rate prevailing on 31.03.13 i.e. Euro 0.32. The assessee is not dealing in CER units. They are not assessee's stock in trade which can be valued at cost or market value whichever is lower. The amount of Rs.3,04,93,228/- debited to Miscellaneous expenses during the year is a provision for "Marked to Market Loss".

iii) The assessee has not written off the amount as bad debt and has not claimed it as bad debt.

iv) CBDT circular no.3/2010 dated 23.03.2010 has laid down the following principal in relation to "Marked to Market Loss".

"Marked to Market' is in substance a methodology of assigning value to a position held in a Financial instrument based on its market price on the closing day of the accounting or reporting record. Essentially, 'Marked to Market' is a concept under which financial instruments are valued at market rate so as to report their actual value on the reporting date. This is required from the point of view of transparent accounting practices for the benefit of the shareholders of the company and its other stakeholders. Where companies make such an adjustment through their Trading or Profit/Loss Account, they book a corresponding loss (i.e the difference between the purchase price and the value as on the valuation date) in their accounts. This loss is a notional loss as no sale/conclusion/settlement of contract has taken place and the asset continues to be owned by the company.

A Marked to Market loss may be given different accounting treatment by different assesses. Some may reflect such loss as a balance sheet item without making any corresponding adjustment in the Profit and Loss Account. Other may book the loss in the Profit and Loss Account which may result in reduction of book profit. In cases where no sale or settlement has actually taken place and the loss on Marked to Market basis has resulted in reduction of book profits, such a notional loss would be contingent in nature and cannot be allowed to be set off against

the taxable income. The same should therefore be added back for the purpose of computing the taxable income of an assessee."

The Assessing Officer, therefore, disallowed the Mark-to-Market loss in respect of valuation of CER on the ground that the same was contingent in nature.

4. The Id. CIT(A) upheld the findings made by the Assessing Officer. The assessee, thus, has come in appeal before us.

5. Before us, the contention of the Id. counsel for the assessee has been that the assessee is entitled to the claim of loss on account of bad debts written off. The Id. counsel for the assessee, in this respect, has submitted that an amount of Rs.3,04,93,228/- was credited to Profit & Loss A/c on account of CER as per the exchange rate at that time. He has submitted that since the income on account of CER was duly taken up in account during the assessment year 2012-13 and since the value of per unit of CER has decreased substantially during the assessment year under consideration, therefore, the assessee's claim is allowable as bad debts written off.

The Id. counsel has further submitted even otherwise, it has been held in various decisions of the Coordinate Benches of Tribunal that Mark-to-Market loss is not a contingent loss and, therefore, allowable to be set off against the business profits. He, in this respect, has relied upon the following case laws:

1. PCIT vs. Suzlon Energy Ltd. (121 taxmann.com 137) (SC)
2. Kesoram Industries Ltd. vs. DCIT (ITA No. 1195 & 1176/Kol/2019 dated 21.10.2020) (ITAT Kol)
3. DCIT vs. McLeod Russel India Ltd. (ITA No. 114-115/Kol/2016 dated 03.05.2019) (ITAT Kol)

6. The Id. DR, on the other hand, has relied upon the findings of the lower authorities. She has further contended that the CER credits as per the settled law are capital receipts and, therefore, the loss, if any, during the year is capital loss which cannot be set off against the business profits.

7. We have considered the rival contentions of both the parties and gone through the records. So far as the contention of the ld. counsel for the assessee that the decrease in the value of the CER should be treated as bad debts written off is concerned, we are not convinced with the aforesaid contention of the ld. counsel for the assessee. It is not a case of any bad debt rather it is a case of valuation on account of fluctuation in foreign currency exchange rate. It is not a case of any debt, what to say of any bad debt.

However, so far as the contention of the ld. counsel for the assessee that Mark-to-Market loss is not a contingent loss and that the assessee is entitled to set off the same against the business profits is concerned, we find force in the above contention of the ld. counsel for the assessee. The issue is squarely covered by the various decisions of the Coordinate Benches of the Tribunal, wherein, it has been held that the loss arising on account of valuation of asset arising from exchange rate variation is real loss and it is not a contingent loss. The Coordinate Bench of the Tribunal in the case of “DCIT vs. McLeod Russel India Ltd.” (supra), while relying upon the decision of the Hon’ble Apex Court in the case of Woodward Governor of India Ltd vs. CIT(312 ITR 254), has made the following observations:

*“18. The facts on record demonstrate that the foreign exchange forward contracts were entered into by the assessee with reference to underlying which were export bills in the ordinary course of its business. In our considered view therefore any gain or loss arising on restatement of such foreign exchange forward contracts also arose in the ordinary course of assessee's business. Similarly we note that the intent & purpose of the interest rate derivative was to reduce effective interest cost in respect of loan of Rs.40 crores borrowed in the ordinary course of business. Interest paid on such loan has been allowed as revenue deduction by the AO. Accordingly any gain or loss arising from such interest rate derivative was also in the revenue field since the underlying was the interest payable on the loan. Now the issue as to whether the loss arising on account of restatement of foreign currency denominated trade payables or receivables arising from exchange rate variation is real or contingent has been dealt with by the Hon'ble Apex Court in the case of *Woodward Governor of India Ltd vs. CIT*(312 ITR 254) and *CIT Vs. ONGC Ltd* (322 ITR 180). In both these judgments the Hon'ble the Supreme Court categorically held that the loss debited in the P & L account by an assessee on account of restatement of foreign currency denominated trade payables or receivables pursuant to exchange rate variation at the year- end is defined or ascertained loss and not contingent loss and hence allowable as deduction from the business profits. Applying the ratio laid down in these judgments to the facts of the present case, in our considered view since the underlyings of the derivative contracts entered into by the assessee were export bills & loan commitments, the gain/loss arising its restatement as on 31st March was real in nature and in the revenue field.*”

19. We also find that the decision relied upon by the Ld AR in the case of CIT Vs D Chetan & Co (supra) is squarely applicable to the facts involved in the present case. In the decided case the question raised before the Hon'ble Bombay High Court and the decision rendered thereon is as under:-

"The Revenue has urged the following question of law for our consideration:-

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of 'Mark to Market' Loss of Rs.78,10,000/- made by the Assessing Officer on account of disallowance of loss on foreign exchange forward contract loss and not appreciating the fact that the said loss was a notional loss and hence cannot be allowed?"

7. The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently, come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent findings of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard-I is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative but only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in S. Vinodkumar Diamonds (P) Ltd. (supra) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in S. Vinodkumar (supra) are identical/similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in S. Vinodkumar Diamonds (P.) Ltd. (supra), the Tribunal held the forward contract on facts before it to be speculative in nature in view of [Section 43\(5\)](#) of the Act. However, it appears that the decision of this court in CITv. Badridas Gauridu (P.) Ltd. [2003] 261 ITR 256/[2004] 134 Taxman 376 (Mum.) was not brought to the notice of the Tribunal when it rendered its decision in S. Vinodkumar Diamonds (P.) Ltd. (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity.

8. In the above view, the question of law, as formulated by the Revenue, does not give rise to any substantial question of law. Thus, not entertained."

20. We further find that the co-ordinate bench of this Tribunal in the case of Bechtel India Pvt. Ltd Vs Addl. CIT (supra) had decided an identical issue in favour of the assessee after considering the Instruction No. 3/2010 wherein it was held as follows :-

"8. Coming to the corporate additions i.e. disallowance of loss, it clearly emerges from the record that the assessee in respect of foreign exchange realization follows mercantile system of accounting and not cash system of accounting. The loss has been incurred for hedging of foreign

currency fluctuation involved in sales invoices on the basis of forward contracts, which is a business decision to safeguard its interest. The loss has been incurred on the basis of scientific method in the ordinary course of business. The loss being based on a scientific method, on the basis of contractual liability with banks and on mercantile system has to be allowed to the assessee following Hon'ble Supreme Court judgment in the case of Woodward Governor India (P) Ltd. (supra). Our view is further fortified by the fact that DRP in its own order in subsequent year has itself held that the issue about the loss on mercantile system is pending dispute in AY 2008-09. Therefore, the allowability of the loss on actual payment in AY 2009-10 has been made subject to the allowability of the loss for AY 2008-09. This stand of the DRP itself negates the observations of assessing officer that it is a notional loss and establishes that it is a business loss incurred by the assessee on mercantile system which method is consistently followed by the assessee. Under these circumstances, we are inclined to allow the foreign exchange fluctuation loss to assessee in this year. This ground of the assessee is allowed."

21. In respect of the interest rate derivative, we additionally note that when such contract was finally settled in AY 2010-11 the assessee had accounted for a profit of Rs.97.39 lacs after taking into re-aligned position of the derivative contract i.e. after accounting for the MTM losses of earlier years. In the income tax assessment order passed u/s 143(3) for AY 2010-11 which was much later than passing of the impugned order for AY 2008-09, the AO assessed such profit of Rs.97.39 lacs without allowing the deduction for the MTM losses disallowed in the earlier AYs 2008-09 & 2009-10. We therefore note that the Revenue authorities did not faithfully follow the proposition incorporated in the CBDT Instruction of 2010 in the subsequent year but adopted a selective criteria by assessing the profit arising in AY 2010-11 (computed based on the re-aligned position) without allowing for the deduction of MTM losses which was disallowed in the prior years.

22. In view of the facts as discussed above and respectfully following the judgment of the Hon'ble Supreme Court in the case of Woodward Governor of India Ltd (supra) and Bombay High Court in the case of D Chetan & Co. (supra), we do not find any infirmity in the order of the Ld.CIT(A) in this regard. Hence this ground raised by the revenue is dismissed."

8. Further the issue relating to Mark-to-Market loss also came for consideration by the Coordinate Bench of the Tribunal in the case of "Kesoram Industries Ltd." (supra) wherein, the Tribunal has relied upon other decisions of the Tribunal and further placed reliance on the decision of the Hon'ble Apex court in the case of CIT vs. Woodward Governor India Private Limited (supra) has decided the issue in favour of the assessee. The relevant portion of the order of the Tribunal is reproduced as under:

"11. We have heard the arguments of both the side and also perused the relevant materials available on record. The Ld. DR has mainly relied on the order of the Assessing Officer in support of the Revenue's case on this issue. The Ld. Counsel for the assessee on the other hand, has submitted that this issue involved in the Revenue's appeal is squarely covered, besides the judicial pronouncements/referred to and relied upon by the ld. CIT(A) in his impugned order, by the various decisions of the co-ordinate benches of this Tribunal. In one of such decisions rendered in the case of [Hindustan Gum & Chemical Ltd. vs. DCIT, Circle-12 Kolkata](#) vide its order dated 08.03.2017 passed in

ITA No.462/Ko/2014, a similar decision was decided by the Tribunal vide paragraph No.7.5 to 7.5.3 as under:-

"7.5. We have heard the rival submissions and perused the materials available on record. We find that the Id AO had placed heavy reliance on Instruction No. 3/2010 dated 23.3.2010. From the perusal of the said Instruction, we find that the same was issued in respect of loss on account of trading in foreign exchange derivatives. The assessee had entered into forward contracts in order to hedge its exchange risk in respect of export proceeds receivable by it in foreign exchange. The assessee's forward contracts were not by way of trading as such in foreign exchange derivatives. Hence, Instruction No. 3/2010 cannot be made applicable to the facts of the instant case. We find that the decision relied upon by the Id AR on the decision of the Hon'ble Bombay High Court supra is in favour of the assessee wherein the question raised before the Hon'ble Court and the decision rendered thereon is as under:-

"The Revenue has urged the following question of law for our consideration:-

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of 'Mark to Market' Loss of Rs.78,10,000/- made by the Assessing Officer on account of disallowance of loss on foreign exchange forward contract loss and not appreciating the fact that the said loss was a notional loss and hence cannot be allowed?"

7. The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently, come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safe guard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard-II is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative but only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in S. Vinodkumar Diamonds (P) Ltd. (supra) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in S. Vinodkumar (supra) are identical/similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in S. Vinodkumar Diamonds (P.) Ltd. (supra), the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act.

However, it appears that the decision of this court in CIT v. BadridasGauridu (P.) Ltd. [2003] 261 ITR 256/[2004] 134 Taxman 376 (Mum.) was not brought to the notice of the Tribunal when it rendered its decision in S. Vinodkumar Diamonds (P.) Ltd. (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity.

8. In the above view, the question of law, as formulated by the Revenue, does not give rise to any substantial of law. Thus, not entertained."

7.5.1. We find that the co-ordinate bench of Mumbai Tribunal *supra* had also decided this issue in favour of the assessee wherein it was held that:-

"8. We have carefully considered the order of Ld. Commissioner of Income Tax and the submissions of Ld. Representatives of the parties. We have also carefully considered the cases cited before us (*supra*). It is relevant to state that in the case of Woodward Governor India (P.) Ltd. (*supra*), the Hon'ble Apex Court observed and held that the assessee debited to its profit and loss account certain unrealized loss due to foreign exchange fluctuation in foreign currency transactions towards revenue items as on the last day of the accounting year. The A.O. held that the liability as on the last date of the previous year was not an ascertained but a contingent liability. Resultantly, the same was added back to the total income. The CIT(A) echoed the assessment order. However, the Tribunal held that the claim of the assessee for deduction of unrealized loss due to foreign exchange fluctuation as on the last date of the previous year was deductible. The said order of the Tribunal was upheld by the Hon'ble High Court. On further appeal by the department, the Hon'ble Supreme Court held that the loss suffered by the assessee is on revenue account towards foreign exchange difference as on the date of balance sheet and is an item of expenditure deductible u/s 37(1). It further observed that an enterprise has to report outstanding liability relating to import of raw material using closing rate of foreign exchange and any difference, loss or gain, arising on conversion of said liability at closing rate should be recognized in profit and loss account for reporting period. From the judgment of the Hon'ble Supreme Court it can be clearly deduced that unrealized loss due to foreign exchange fluctuation in foreign currency transactions on revenue item as on the last the accounting year is deductible."

7.5.2. We also find that the co-ordinate bench of Delhi Tribunal *supra* had rendered a decision in favour of the assessee on an identical issue after considering the Instruction No. 3/2010 wherein it was held that :-

"8. Coming to the corporate additions i.e. disallowance of loss, it clearly emerges from the record that the assessee in respect of foreign exchange realization follows mercantile system of accounting and not cash system of accounting. The loss has been incurred for hedging of foreign currency fluctuation involved in sales invoices on the basis of forward contracts, which is a business decision to safeguard its interest. The loss has been incurred on the basis of scientific method in the ordinary course of business. The loss being based on a scientific method, on the basis of contractual liability with banks and on mercantile system has to be allowed to the assessee following Hon'ble Supreme Court judgment in the case of Woodward Governor India (P) Ltd. (*supra*). Our view is further fortified by the fact that DRP in its own order in subsequent year has itself held that the issue about the loss on mercantile system is pending dispute in AY 2008-09. Therefore, the allowability of the loss on actual payment in AY 2009-10 has been made subject to the allowability of the loss for AY 2008-09. This stand of the DRP itself negates the observations of assessing officer that it is a notional loss and establishes that it is a business loss incurred by the assessee on mercantile system which method is consistently followed by the assessee. Under these circumstances, we are inclined to allow the foreign exchange fluctuation loss to assessee in this year. This ground of the assessee is allowed."

7.5.3. Respectfully following the aforesaid decisions and in view of the facts and circumstances, we do not find any infirmity in the order of the ld CITA in this regard. Hence the Ground No. 3 raised by the revenue is dismissed."

12. A similar view was also taken by this tribunal while deciding an identical issue in the case of DCIT, Central Circle-XVI, Kolkata vs. South Asian Petrochem Ltd., in ITA No.1222/Kol/2014 vide paragraph Nos 18 to 20 of its order dated 03.05.2017 which read as under:-

"18. We have heard rival contentions and perused the materials available on record. From the aforesaid discussion, we find that the AO treated the loss arising on account of forward contracts in foreign currency which has not been settled in the year under consideration as notional loss. However the Id. CIT(A) allowed such loss having reliance on judgment of the Hon'ble Delhi High Court in the case CIT Vs Woodward Governor India Ltd. reported in 294 ITR 451. In rejoinder Id. DR stated that the said judgment of the Hon'ble Delhi High Court was delivered much earlier whereas the Instruction No. 3/2010 was issued dated 23.03.2010. Thus the instruction issued by the CBDT was not considered by the Hon'ble Delhi High Court. However, we find that the instructions issued by the CBDT are not binding on the Courts. So there is no value in the argument of the Id. DR. However, we disagree with the view of the AO on the ground that the adjustment was made by the assessee in terms of AS 11 issued by ICAI and in pursuance of mercantile system of accounting as notified u/s 145 of the Act. The relevant extract of Accounting Standard 11 is reproduced below:-

"3.6 The Accounting Standards (A) 11, the Effects of changes in Foreign Exchange Rates (revised 2003), issued by the Council of the Institute of Chartered Accountants of India, comes into effect in respect of accounting periods commencing on or after 1- 4-2004. Relevant extract of the Accounting Standard is reproduced as follows:-

'9. A foreign currency transactions should be recorded on initial recognition in the reporting currency, by applying to the foreign currency amount the exchange rate between the reporting currency and the foreign currency at the date of the transactions.

10...

11 (a) At each balance sheet date foreign currency monetary items should be reported using the closing rate. However, in certain circumstances, the closing rate may not reflect with reasonable accuracy the amount in reporting currency that is likely to be realized from, or required to disburse, a foreign currency monetary item at the balance sheet date, e.g. where there are restrictions on remittances or where the closing rate is unrealistic and it is not possible to effect an exchange of currencies at that rate at the balance sheet date. In such circumstances, the relevant monetary item should be reported in the reporting currency at the amount which is likely to be realized from, or required to disburse, such item at the balance sheet date: 11(b)....

11(c)...

12. Cash receivables and payables are examples of monetary items....

13. Exchange differences arising on the settlement of monetary items or on reporting an enterprise's monetary items at rates different from those at which they were initially recorded during the period, or reported in previous financial statements, should be recognized as income or as expenses in the period in which they arise..."

19. At this juncture we also wish to reproduce the provisions of Section 145 of the Act which reads as under:-

"3.4 As per section 145 of the Act, '(1) Income chargeable under the head "Profits and gains of business or profession" or "income from other sources" shall, subject to the provisions of sub-section (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

(2) The Central Government may notify in the Official Gazette from time to time accounting standards to be followed by any class of assesseees or in respect of any class of income.

(3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub- section (1) or accounting standards as notified

under sub-section (2), have not been regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided in section 144."

20. We also find support from the decision of Hon'ble Delhi High Court in the case of CIT vs Woodward Governor India Private Limited [2007] 294 ITR 451 (Del) where it was held that:-

"We affirm the decision of the Income-tax Appellate Tribunal in Oil and natural Gas Corporation Ltd. V. Deputy CIT (Asstt.) [2003] 261 ITR (AT) 1 (Delhi) which rightly follows the settled position as explained in the judgment of the Hon'ble Supreme Court which we have referred to. We, therefore, reject the submission of the Appellant in these appeals that the increase in liability on account of the fluctuation in the rate of foreign exchange remaining on the last day of the financial year is notional or contingent and, therefore, cannot be allowed as a deduction."

From the aforesaid discussion we find no reason to interfere in the order of LdCIT(A) and accordingly we uphold. Hence this ground of Revenue's appeal is dismissed."

13. It is thus clear that the solitary issue involved in this appeal of the Revenue is squarely covered by the various judicial pronouncements referred to and relied upon by the ld. CIT(A) in his impugned order as well as the orders of this Tribunal as discussed above, and respectfully following the same, we uphold the impugned order of ld. CIT(A) allowing the claim of the assessee for loss on derivative trading. The appeal of the Revenue is dismissed."

9. In view of the above proposition laid down by the different benches of the Tribunal, the action of the lower authorities in treating the Mark-to-Market loss on account of foreign exchange rate fluctuation as contingent in nature cannot be held to be justified.

Moreover, in this case, the assessee has already offered gains for taxation in the year 2012-13, hence, following the same method of valuation, the assessee otherwise is entitled the claim of loss on account of decrease in the price of the CER as per exchange rate. When the AO, in the earlier year, has taxed the assessee on account of gain in valuation of CER on account of exchange rate fluctuation, then the AO, under the same circumstance, cannot deny the loss arrived in subsequent year due to exchange rate fluctuation.

So far as the contention of the Ld. DR that the same is a capital loss, is concerned, the ld. counsel has submitted that during the assessment proceedings for assessment year 2012-13, the assessee has claimed CER credits as capital receipts. However, the Assessing Officer rejected the claim of the assessee and treated the same as business receipts/income of the assessee. Under the circumstances, the assessee is, otherwise, entitled to the loss on account of decrease in valuation exchange rate of the said CARBON Emission Credits. The Revenue cannot change its stand now especially when

it is already taxed the assessee on the said receipts in the year 2012-13. The issue is accordingly decided in favour of the assessee. The Assessing Officer is directed to allow the claim of Mark-to-Market loss to the assessee in respect of CER valuation.

Additional Ground:

10. The ld. counsel for the assessee has submitted at bar that the issue raised vide this ground is covered against the assessee by the decision of the Coordinate Bench of the Tribunal in the case of “M/s Kanoria Chemicals & Industries Ltd. vs. ACIT” in ITA No.2184/Kol/2018 vide order dated 26.10.2021. He, therefore, has submitted that he does not press this ground. The additional ground of the assessee is, therefore, dismissed as not pressed.

In view of the above discussion, the appeal of the assessee is treated as partly allowed.

11. In the result, the appeal of the assessee is treated as partly allowed.

Order is pronounced in the open court on 16.03.2022.

Sd/-
[Girish Agrawal]
Accountant Member

Dated: 16.03.2022.

RS

Sd/-
[Sanjay Garg]
Judicial Member

Copy of the order forwarded to:

1. The Appellant-Orient Cement Ltd
2. The Respondent-DCIT, Circle-6(1), Kolkata
3. The CIT concerned-
4. The CIT(A) -
5. The DR -
6. Guard File

//True copy//

By order

Assistant Registrar, Kolkata Benches