

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"A" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, HON'BLE JUDICIAL MEMBER**

**ITA NOs. 6427 & 6732/MUM/2018
(A.Ys: 2013-14 & 2009-10)**

&

ITA NO. 4156/MUM/2019 (A.Y: 2014-15)

Pr. CIT – 9 DCIT Circle – 9(1)(2) Room No. 210, 2 nd Floor Aayakar Bhavan, M.K. Road Mumbai - 400020	v.	M/s. Ascent Hydro Projects Pvt. Ltd., 6, Shiv Wastu, Tejpal Scheme Road No. 5, Vile parle (E) Mumbai – 400 059 PAN: AAFCA1454N
(Appellant)		(Respondent)

Assessee by	:	Shri Madhur Agarwal
Department by	:	Shri Mehul Jain
Date of Hearing	:	13.01.2022
Date of Pronouncement	:	06.04.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. These appeals are filed by the Revenue against different orders of the Learned Commissioner of Income Tax (Appeals)–16, Mumbai

[hereinafter in short "Ld.CIT(A)"] dated 30.08.2018, 14.09.2018 and 27.03.2019 for the A.Y.2013-14, 2009-10 and 2014-15 respectively.

2. Since the issues raised in all the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal in ITA.No. 6427/MUM/2018 for Assessment Year 2013-14 as a lead case.

3. Revenue has raised following grounds in its appeal: -

"1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing to recomputation of deduction u/s 80IA by excluding the profit on sale of Carbon Credit of ₹.15,85,387/- without appreciating the facts that said receipt was not derived from the activity of power generation but it was a receipt which was incidental to the business.*

Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the disallowance of ₹.51,53,632/- on account of Carbon credit accrued but not accounted made by the AO.

2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing addition of Rs.1,21,81,727/- on account of Mark to market income on the foreign exchange rate hedged.*

3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing to exclusion of the Mark to Market income of ₹.90,26,206/- in computing the book profit u/s 115JB in view of the Apex Court judgement in the case of Apollo tyres vs. ACIT 47 Taxmann 416"*

4. Brief facts relating to the Ground No. 1 are, assessee is engaged in the business of generation of power and are eligible for deduction u/s. 80IA of the Act. The assessee computed the deduction u/s. 80IA of the Act in respect of eligible unit at ₹.2,98,97,683/-. The Assessing Officer observed that assessee has earned ₹.15,85,387/- from sale of carbon credits, which was included in the profit of the eligible unit for computing the deduction u/s. 80IA of the Act. The Assessing Officer held that the profit on sale of carbon credits is not eligible for deduction u/s. 80IA of the Act.

5. Further, Assessing Officer observed that in the notes to accounts, assessee made a disclosure regarding change in accounting policy in view of the revised guidelines issued by the ICAI in accounting of revenue from sale of carbon credits. The assessee reported the market on profit was ₹.51,53,632/-. The Assessing Officer taxed the above said amount in the year under consideration and the assessee has offered the above said income in the subsequent year.

6. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) relying on assessee's own case in ITA.No. 3283/MUM/2016 dated 20.12.2017 allowed the ground raised by the assessee.

7. Aggrieved revenue is in appeal before us and at the time of hearing both counsel agreed that the issue under consideration is covered in favour of the assessee and against the revenue. Relevant decision of the Coordinate Bench is reproduced below: -

"2.3. We note that the Hon'ble Karnataka High Court in the case of Subhash Kabini Power Corporation Ltd. (supra) clearly held that the Carbon credit was generated out of environmental concern and was not having character of trading activity, therefore, receipt from sale of carbon credit was a capital receipt and not business income. While coming to this conclusion, the Hon'ble Court followed the decision in the case of CIT vs My Home Power Ltd. 365 ITR 82 (A.P.) and distinguished the decision in Oberai Hotels Pvt. Ltd. (1999) 103 taxman 236 (SC)(Para-11) and Kettlewill Bullen & Co. Ltd. vs CIT (1964) 53 ITR 261 and further affirmed the decision of the Tribunal (Bangalore Bench) in the case of Subhash Kabini Power Corporation Ltd., therefore, considering the above judicial pronouncements, it is now settled proposition in law that in principle the receipts on sale of carbon credits should not brought into the „Profit & Loss Account“ and it relates to the "balance sheet" item. Consequently, we find no infirmity in the conclusion drawn by the Ld. Commissioner of Income Tax (Appeal). The appeal of the Revenue is dismissed.

8. Respectfully following the above said decision, we are inclined to dismiss the Ground No. 1 raised by the revenue.

9. Further, revenue has raised additional ground in the Ground No. 1 itself, objecting in allowing the disallowance of ₹.51,53,632/- on account of carbon credits accrued but not accounted by the assessee. We observe that the Ld.CIT(A) has allowed the issue under consideration in favour of the assessee by referring to the guidance note issued by ICAI and further

he observed that carbon credits were not recognized as income during the year under consideration in view of the above said guidance note. Ld.CIT(A) further observed that the above fact has been mentioned by the auditors in the notes to accounts of the audited financial statement. After considering the submissions, in our considered view the assessee has followed the guidance note issued by the ICAI and there is a merit in argument put forth by the Ld. AR that income from carbon credits is held to be capital receipt, the same cannot be taxed as income even if the same is treated as accrued during the year under consideration. Therefore, we are inclined to accept the finding of the Ld.CIT(A). Accordingly, ground raised by the revenue in this regard is dismissed.

10. With regard to Ground No. 2, the facts are, the Assessing Officer observed that the assessee has not declared the profit on MTM in its Profit and Loss Account by recording the reasons in the notes to accounts as per which assessee has followed the accounting standard issued by ICAI. After considering the submissions made by the assessee the Assessing Officer observed that assessee has unrealized mark to market gains amounting to ₹.1,21,81,727/- as a result of interest rate and currency swap agreement, as he has not convinced with the submissions Assessing

Officer made the addition of ₹.1,21,81,727/- with the observation that it has been settled by the judicial decisions that loss incurred on account of mark to market transactions is allowable and has to be considered as an the expenses for the purpose of taxation. Thus, when such a loss incurred on MTM is allowable as an expense, accordingly, as a corollary the profit so earned on mark to market transactions should also be considered as a part of the taxable income.

11. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and before the Ld.CIT(A) assessee submitted that a loan of US \$4.5 million was taken from Deutsche Investitions (DEG) for construction of power plants. As per the contract, the assessee had hedged the foreign currency exposure by way of foreign exchange derivative instrument to the extent of Euro 1.6 million, with the State Bank of India (SBI), pegging the Euro rate ₹.58.625. Accordingly, irrespective of the prevailing exchange rate, the assessee is entitled to obtain the Euro from SBI at ₹.58.625 over the tenure of the loan i.e., 80,000 Euros every six months for ten years.

12. The assessee submitted that during the year under consideration the outstanding loan as on 31.03.2013 was Euro 9,60,000 and the rate on that day was ₹.72.23. Since the assessee had pegged the Euro at

₹.58.625, there was a notional gain (MTM) of ₹.1,21,81,727/- which was not recognized by the assessee in their books of accounts and the same was mentioned in Note No. 35 of the auditor's report. The Assessing Officer treated the above said amount which is the Mark to Market gain which had not been recognized by the assessee in their books of accounts as income and added the same only the realized gains while computing the taxable income. The assessee further submitted before the Ld.CIT(A) that it has been done as per the guidelines issued by ICAI in AS-1 in respect of non-monetary transaction i.e. derivative transactions.

13. After considering the detailed submissions Ld.CIT(A) allowed the Ground raised with the following observations: -

"6.4.5 As per AS-1, it is a well settled principle that while anticipated losses can be taken into account in computing profit, anticipated profits in the shape of unrealized gains should not be brought into the accounts as no prudent trader would care to show increased profit before its realization. This is what the Supreme Court has held in the case of Chainrup Sampatram V/ s. CIT, West Bengal (1953) (24 ITR 481) (SC). The Hon'ble Apex Court's decision is in keeping with the guidelines laid down by the 'Institute of Chartered Accountant of India which has approved the rule of prudence for not recognizing the anticipated profit before the same is realized. The said decision had been followed in the case of Edelweiss Security Limited V/s Additional CIT (ITA 2193/Mum/ 2009). Identical view was taken by the Hon'ble ITAT in the following cases also:

(i) DCIT V/s. Edelweiss Securities Limited [ITA 7792/ Mum/ 2012]

(ii) DCIT V/s. Edelweiss Securities Limited [ITA 5939/ Mum/ 2021]

(iii) Edelweiss Capital Limited V/s ITO [ITA 5324/Mum/ 2007] °

14. Aggrieved revenue is in appeal before us and at the time of hearing Ld.DR brought to our notice basic facts from the Assessment Order at Page No. 14 and Ld.DR agreed with the Assessing Officer that assessee has not declared the Mark to Market gain in their Profit and Loss Account and he submitted that Ld.CIT(A) has deleted the above addition merely relying on case laws which is distinguishable to the facts of the case. He brought to our notice Page No. 16 and 54 of the case law Paper Book filed by the assessee and submitted that both the case laws relied by the Ld.CIT(A) are relating to stock valuation whereas the issue in this case is different. He relied on the case of Tata Consultancy Services Ltd., v. CIT [108 taxmann.com 41]. He submitted that the issue involved in this appeal are similar to the case of the assessee and he brought to our notice Page No. 14 of the above decision.

15. On the other hand, Ld. AR submitted that assessee has borrowed funds to purchase plant and machinery which is capital assets and assessee has followed accounting standard and guidance note issued by the ICAI, as per which assessee has to record the profit or loss as per prudent method of recording the transactions as per the guidance note, assessee has to record the losses of MTM and gain only when it is actually

realized. In this regard he filed a detailed chart from Financial Year ending 31.03.2009 to 15.04.2017 and highlighted the loan outstanding and remittance and exchange rate as on closing date as well as rates offered by SBI as per the forward contract rate. The Ld. AR brought to our notice that the assessee has offered exchange gain as per realisation basis in respective years. Therefore, he submitted that the method adopted by the assessee is proper and prudent.

16. Considered the rival submissions and material placed on record, we observed from the record that assessee has taken Euro loan to setup power plant and assessee has to pay installments of Euro 80,000/- half yearly. In order to mitigate the exchange fluctuation loss, Assessee had booked forward contract with SBI and hedged the exchange rate at ₹.58.625 for the remaining period of loan outstanding. No doubt assessee has notional gain on loan outstanding amount at the end of the Financial Year but assessee can offer the gain as and when it settles the loan. As per records, for the outstanding loan which is still outstanding at the end of respective years. As per the guidance note and prudent method of accounting issued by ICAI assessee can declare the income as and when it settles the loan or it realizes the gain. We observe from the Assessment

Order that Assessing Officer observed that assessee has allowed to book mark to market loss and it is settled position as per the various judicial pronouncement and he is of the view that when mark to market (notional loss) is allowed then notional gain also should be recorded and brought to tax. It is accepted principle of accounting that the loss has to be recorded as and when it is determined on the other hand the profit has to be recorded as and when it is actually realized, with the above prudent method and as per the guidance note issued by ICAI we are in agreement with the method adopted by the assessee in this regard. Therefore, we are inclined to agree with the finding of the Ld.CIT(A). Accordingly, the ground raised by the revenue is dismissed.

17. With regard to Ground No. 3 raised by the revenue, the Assessing Officer included the mark to market income in computing the book profits u/s. 115JB of the Act. He observed that net profit for computing the book profits are taken from the financials of the assessee and it has not prepared in accordance with the provisions of Schedule VI of Companies Act. The Profit and Loss Account shall have to be prepared in accordance with Part II of Schedule VI of the Companies Act. Assessing Officer is of the view that as per Schedule VI, net exchange/loss on foreign currency

borrowing should either be made a part of finance cost and adjustment in finance cost should be made accordingly. He is of the view that assessee has not followed Part II Schedule VI of the companies Act and Assessing Officer by relying on the decision of the Hon'ble Supreme Court and Hon'ble Jurisdictional High Court of the view that the books of the assessee are not prepared in accordance with Schedule-VI of the Companies Act, accordingly he added the foreign exchange fluctuation gain in the book profits u/s. 115JB of the Act.

18. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) deleted the addition made in book profits u/s. 115JB of the Act with the observation that the assessee has succeeded on merit in the earlier ground in which, whether the mark to market gain on the foreign exchange rate has to be offered for tax, since it was decided that the above said income is not forming part of regular income and it can be offered only when it is actually realized as per the accounting standard issued by ICAI.

19. Aggrieved revenue is in appeal before us and Ld.DR vehemently argued that, as highlighted by the Assessing Officer, accounts are not prepared as per the Schedule VI of the Companies Act, he supported the

finding of the Assessing Officer and he relied on the case of DCIT v. M/s. Bombay Diamond Co. Ltd in ITA.No. 7488/Mum/2007 dated 30.11.2009 and further he relied on the case of Jayanth Packaging Pvt. Ltd., v. DCIT [128 taxman.co 2].

20. On the other hand, Ld. AR relied on the finding of the Ld.CIT(A).

21. Considered the rival submissions and material placed on record, this ground is connected to the Ground No. 2 raised by the revenue and in Ground No. 2 we have already adjudicated that the, assessee has declared the mark to market gain only on the basis of actual realisation which is a prudent method of accounting and we already adjudicated that the method adopted by the assessee is proper and as per the accounting standard and guidance note issued by ICAI. Therefore, we cannot possibly say that assessee has not followed the method of account prescribed under Schedule–VI to the Companies Act. Therefore, we are inclined to agree with the findings of the Ld.CIT(A). Accordingly, ground raised by the revenue is dismissed.

22. Coming to the appeals relating to A.Ys. 2009-10 and A.Y. 2014-15, since facts in these cases are mutatis mutandis, therefore the decision

taken in A.Y. 2013-14 is applicable to these Assessment Years also.

Accordingly, these appeals are also dismissed.

23. In the result, appeals filed by the revenue are dismissed.

Order pronounced in the open court on 06.04.2022.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER
Mumbai / Dated 06.04.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum