

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad**

Before

**Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member**

ITA No.2217/Hyd/2018		
Assessment Year: 2011-12		
The Deputy Commissioner of Income Tax, Circle - 16(1), Hyderabad.	Vs.	M/s. Nikhil Refineries Pvt. Limited. Hyderabad. PAN : AABCN5930G.
(Appellant)		(Respondent)
C.O.No.12/Hyd/2022 in ITA No.2217/Hyd/2018		
Assessment Year - 2011-12		
M/s. Nikhil Refineries Pvt. Limited. Hyderabad. PAN : AABCN5930G.		The Deputy Commissioner of Income Tax, Circle - 16(1), Hyderabad.
(Cross-Objector)		(Respondent)
	Assessee by:	Sri P. Murali Krishna.
	Revenue by:	Sri K.P.R.R. Murthy.
Date of hearing:		27.07.2022
Date of pronouncement:		29.08.2022

ORDER

Per Laliet Kumar, J.M.

The captioned appeal by the Revenue and Cross-Objection by the assessee arise out of the order of Id. Commissioner of Income Tax (Appeals) - 4, Hyderabad, (hereinafter referred as "Id. CIT(A)") passed on 28.09.2018 for the assessment year 2011-12.

2. The only effective ground raised by the Revenue in ITA No.2217/Hyd/2018 reads as under :

“Ld.CIT(A) erred in deleting the addition made in computation of book profit u/s 115JB of the Act when the AO made the addition as the assessee has not declared profits as per accounting principles as pointed out by the Auditors itself.”

3. The brief facts of the case are that the assessee filed its return of income for A.Y. 2011-12 on 09.09.2011, declaring a total income of Rs.2,40,56,230/- and book profits u/s 115JB at Rs.2,93,98,327/-. The return of income was processed u/s 143(3) of the Act and the total income was determined at Rs.2,40,65,456/-. Subsequently, the case was reopened u/s 147 and a notice u/s 148 of the Act was issued and served. Later, notice u/s 143(2) of the Act was also issued and served on the assessee. In response to the notices, the assessee filed submissions. After going through the information, the Assessing Officer completed the assessment by adding Rs.4,05,59,976/- towards the net gain on trade contracts and assessed the total income at Rs.6,99,58,303/-.

4. Feeling aggrieved with the order of Assessing Officer, assessee carried the matter before ld.CIT(A), who partly allowed the appeal of the assessee.

5. Feeling aggrieved with the order of ld.CIT(A), the Revenue is now in appeal before us, and simultaneously, the assessee also appealed before us by filing it's Cross – Objections.

6. At the outset, we notice that the assessee's Cross-Objections suffer from 19 days of delay in filing. Learned counsel for the assessee submitted that the assessee had filed a petition for condonation of delay by mentioning the reasons. It was submitted that the delay was

primarily because the assessee company was in financial crisis and that the banks had declared the assessee company as a defaulter and initiated proceedings under the SARFAESI Act, and that all the assets of the company were taken over and auctioned, resulting in the closure of operations of the company and that considerable time was elapsed in understanding the matter under the appeal and in filing the Cross-Objections resulting 19 days of delay and hence, prayed for condoning the said delay.

6.1. On the other hand, the Id.DR opposed the condonation petition filed by the assessee.

6.2. Heard both sides. In view of the circumstances mentioned in the petition and to cause substantial justice, we hold that assessee's impugned delay of 19 days is neither intentional nor deliberate. Hence, the same stands condoned. The case is now taken up for adjudication on merits.

7. We will first deal with the Cross-Objections filed by the assessee.

7.1. The only ground of Cross-Objections raised by the assessee reads as under :

“The Id.CIT(A)-4 erred in upholding the action of the Assessing Officer in reopening of the assessment under section 147 of the I.T. Act.”

8. The Id.AR for the assessee has submitted that Id.CIT(A), while passing the order, has dismissed the ground of re-opening of assessment raised by the assessee, and our attention was drawn to Para 4.2 of the order passed by Id.CIT(A) to the following effect :

“4.2. I have carefully considered the assessment order, facts of the case and case laws relied upon by the appellant. In this case, this issue was never a subject matter of discussion, and the Assessing Officer never questioned the appellant company on the issue of book profits. Therefore, the issue on which the case was reopened was not at all considered and information / explanation in this regard was never furnished by the app company during the earlier assessment proceedings. Therefore, the ground raised by the appellant is dismissed.”

8.1. The Id.AR further submitted that re-opening made by the Assessing Officer based on the audit report was not in accordance with the law, and in support of the above proposition, the assessee had filed the written submissions dt.18.09.2018. The relevant portion of the written submissions dt.18.09.2018 filed by the assessee read as under :

“In the present case the Appellant company has furnished all the information like the Balance Sheet, Profit and Loss Account and the schedules thereto of the company along with the audit report and the tax report in form 3CA and 3CD. During the course of the assessment proceedings the issue pertaining to the profit on speculation was brought to the notice of the assessee and a reply to that effect was also submitted along with the details of the transaction. As such it is for the assessing officer to decide on the amounts so declared. Further it is not correct to state that the information at the time of the original assessment was not furnished.

The Assessing Officer stated that "As per section 115JB(2), every assessee, being a company, shall prepare its Profit & Loss Account for the relevant previous year in accordance with the provisions of Part II of Schedule VI of the Companies Act, 1956 and while preparing the annual accounts including profit and loss account, (i) the accounting policies, (ii) the accounting standards adopted for preparing such accounts including profit and loss account; (iii) the method and rates adopted for calculating the depreciation, shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account."

It is clear from the provisions of the Act that the Accounts of the Company should be prepared in accordance with the provisions of Part II of Schedule VI to the Companies Act, 1956 and the accounts were so prepared in the present case and the same were duly certified and filed before the Registrar of Companies.

Further the section says that the accounting policies, the accounting standards adopted should be the same as have been adopted for the purpose of preparing such accounts and the same were being consistently followed and the policy adopted by the company was duly qualified by the Statutory Auditor. The loss incurred in the financial year 2008-09 was carried over to the next years as a debit to the Claims Receivable Account in the Balance Sheet of the Company and while completing the assessment for that year, the same was allowed by the Assessing Officer as speculation loss to be carried over to the next year in the Assessment order passed for the assessment year 2009-10. The copies of the Annual Accounts, Income Tax Return filed, computation of income and assessment order are enclosed as Annexure III and the copies of the Annual Accounts, Income Tax Return filed, computation of income and the original assessment order passed under section 143(3) of the Act is enclosed as Annexure IV.

Reliance is placed on the judgement of the Honourable Supreme Court in the case of Apollo Tyres Limited Vs. Commissioner of Income Tax, Supreme Court of India (2002) 255 ITR 0273. The Honourable Court held that "the AO while computing the income under S. 115J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The AO thereafter has the limited power of making increases and reductions as provided for in the Explanation to the said section. To put it differently, the AO does not have the jurisdiction to go behind the net profit shown in the P&L a/c except to the extent provided in the Explanation to s. 115J. The reopening of the assessment under the provisions of the IT Act is not correct as the issue was already discussed during the course of the Assessment proceedings while passing the first assessment order and there was no new evidence that was brought to light subsequent to the completion of the assessment. It was for the Assessing Officer to take a view on the issue at the time of the first assessment itself as all the facts and figures were placed before him. It is not correct to state that the Appellant has not informed the Assessing Officer of the implication of the provisions laid down under section 115JB of the Income Tax Act. Further the Assessing Officer is not empowered to go beyond the book profit as declared by the Appellant which was duly audited and adopted by the company at its Annual general Meeting and submitted to the statutory authority, the Registrar of Companies."

8.2. Again on 22.07.2021, the Id.AR for the assessee filed written submissions in connection with the re-computation of Book Profits u/s 115JB of the Act, which reads as under :

*“The A.O has merely relied and acted upon the **Note to the Auditors Report**, where in it is mentioned as below:*

a) "The Company has made a net gain of Rs.4,05,59,976/- during the current year on account of settlement of trade contracts otherwise than on delivery and forex derivatives explained to be of speculative nature. This has been adjusted and set off against loss of such nature brought forward from earlier year at RS.8,98,97,755/- and balance remaining unabsorbed at Rs.4,93,97,779/- is carried forward: grouped under the head "Claim and other receivables" in the Balance Sheet."

b) "This is against the Accounting Standards and to the extend of Rs.4,05,59,976/-which is not brought to credit in profit and loss account during the current year, the profit for the current year, the profit for the current year is understated and that in the balance sheet accumulated surplus in profit and loss account and current assets(Claims receivable) is overstated by Rs.4,93,37,779/-" A copy of statements of A/c of Auditors reports is enclosed herewith for ready reference.”

*The A.O. in his Assessment Order u/s 143(3) r.w.s. 147 of the IT Act dated 30/11/2016 has discussed the above issue at length and gave a finding that the P&L A/c in this case for the previous year has **not been drawn in accordance with the Companies Act 1956, as prescribed u/s 115313(2) of the I.T.Act**. A copy of the above referred **Auditors Report** for the previous year under consideration **is enclosed herewith for kind consideration**.*

The issue of re-computation of Book Profits as per the provisions of the Companies Act is covered by the jurisdictional ITAT in the case DCIT, Cir- 3(2), Hyderabad V/s Star Features International Private Limited, Hyderabad in ITA No.2217/H/2018 dated 01/02/2022. A copy of the said order is enclosed for ready reference.

In view of the above, the Undersigned relies on the Assessment Order u/s 143(3) r.w.s. 147 of the IT Act dated 30.11.2016 and it is prayed that the said order may kindly be restored.”

9. Ld.AR had relied upon the decision of Hon'ble Supreme Court in the case of ITO Vs. M/s. TechSpan India Private Limited and another dt.24.04.2018, and our attention was drawn to Para 9 of the said order, which is to the following effect :

“9. Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the Assessing Officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the Assessing Officer the power of review and section 147 confers the power to re-assess and not the power to review.”

10. Per contra, the ld.DR opposing the ground of the Cross-Objections had submitted that re-opening of the assessment was done by the Assessing Officer in accordance with law and infact he has taken us to the relevant Auditor's Report at page 89 of the paper book to the following effect :

“Note:

(a) The company has made a net gain of Rs.4,05,59,976/- during the current year on account of settlement of trade contracts otherwise than on delivery and forex derivatives explained to be of speculative nature. This has been adjusted against loss of such nature brought forward from earlier year at Rs.8,98,97,755/- and balance remaining unabsorbed at Rs.4,93,37,779/- is carried forward; grouped under the head “Claim and other receivables” in the Balance-Sheet.

(b) This is against the Accounting Standards and to the extent of Rs.4,05,59,976/- which is not brought to credit in profit and loss account during the current year, the profit for the current year is understated and that in the balance sheet accumulated surplus in profit and loss account and current assets (Claims receivables) is and set off which for the reason that it could not be set off against overstated by Rs.4,93,37,779/-.”

11. It was submitted by the Id.DR that no questions were asked by the AO on the objections raised in the audit report. Ld.DR had drawn our attention to assessment order dt.27.09.2011, based on that it was submitted that there was no whisper on the audit objections raised by the auditors in the order passed by the Assessing Officer. Hence, it cannot be said that Assessing Officer had formed any opinion on the material though available on record.

12. In rebuttal, the Id.AR had drawn our attention to page 145 of the paper book, wherein the details of income after set off of brought forward losses of earlier years and the total amount of set off of brought forward losses were shown to the tune of Rs.4,05,59,976/-.

Schedule BFLA		Details of Income after Set off of Brought Forward Losses of earlier years				
Sl. No	Head/ Source of income	Income after set off, if any, of current year's losses (as per 5 of Schedule. CYLA)	Brought forward loss set off	Brought forward depreciation set off	Brought forward allowance under section 35 (4) set off	Current year's income remaining after set off
		1	2	3	4	5
i	House Property	NIL	NIL	NIL	NIL	NIL
ii	Business (including speculation or specified business profit)	6,58,82,325	4,05,59,976	NIL	NIL	2,53,22,349
iii	Short-term capital gain	NIL	NIL	NIL	NIL	NIL
iv	Long-term capital gain	NIL	NIL	NIL	NIL	NIL
v	Other sources (incl. profit from owning race horses but excluding winnings from lottery)	NIL	NIL	NIL	NIL	NIL
vi	Total of brought forward loss set off		4,05,59,976	NIL	NIL	
vii	Current year's income remaining after set off Total (i5 + ii5 + iii5 + iv5+v5+vi5)					2,53,22,349

13. The Id.AR further submitted that the said aspect of set-off of brought forward losses though had not specifically discussed in the assessment order, but the speculation losses to be carried forward was

mentioned as Rs.8,98,97,755/-. It was further submitted that once the audited balance-sheet and the return of income were before the Assessing Officer depicting the set off of brought forward losses, it would be presumed that the Assessing Officer had applied his mind and thereafter, decided the grounds in accordance with law. The Id.AR had also drawn our attention to the audit report for the year ending 31.03.2009 on page 33, wherein it was mentioned as under :

“Note – 1: The company has suffered net loss of Rs.8,98,97,755/- on account of settlement of trade contracts (settled otherwise than by delivery) and foreign currency forward contracts to hedge its risks associated with foreign currency fluctuations on trade account; explained to be of speculative nature which for the reason that it could not be set off against profits of that year, were carried forward for set off against such profits in future years and hence were instead of charging to profit and loss account during that year have been classified as claims receivable. This is against the accounting standards and hence to that extent reserves and claims receivables forming part of current assets are overstated.”

14. Similarly, he has drawn our attention to the Note in the audit report for the current assessment year vide page 84 of the Paper Book wherein it was mentioned as under :

“Note – 1: The company has suffered in the earlier year (Financial Year ending 31.03.09) net loss of Rs.8,98,97,755/- on account of settlement of trade contracts (settled otherwise than by delivery) and foreign currency forward contracts to hedge its risks associated with foreign currency fluctuations on trade account; explained to be of speculative nature which for the reason that it could not be set off against profits of that year, were carried forward for set off against such profits in future yeas and hence were instead of charging to profit and loss account during that year have been classified as claims receivable. This is against the accounting standards and hence to that extent reserves and claims receivables forming part of current assets are overstated.”

15. Based on the above, it was submitted that the objections of the auditors were not new, and the same have repeatedly been mentioned by the auditors for the earlier three assessment years, and despite that, the Assessing Officer had been passing the orders for all the said assessment years. Hence, reopening made by Assessing Officer is the only amount to change of opinion.

16. We have heard the rival submissions and perused the material on record. If we look into the assessment order dt.27.09.2011, it is clear from the order of the Assessing Officer that there is no discussion about the set off of brought forward losses for the earlier years for an amount of Rs.8,98,97,755/- against the net gain of the assessee to the tune of Rs.4,05,59,976/- and the entire assessment order was silent in all these respects. During the course of the argument, we enquired from the Id.AR, “whether the Assessing Officer asked any question on the aspect of setting off of brought forward losses against the current year income or not”, however, no specific reply was given by the Ld. A.R.

17. In our view, Assessing Officer was bound to examine, enquire and collect facts, which are relevant for determining the income of the assessee and thereafter, record the reasons for accepting or rejecting the contentions of the assessee and complete the assessment in accordance with law. If we look at the order passed by Assessing Officer then it is clear that the Assessing Officer had neither made any enquiry nor examined nor passed any order permitting the set off of brought forward loss of previous years against the current year income of the assessee. Thus, original assessment order of Assessing Officer was non-speaking order and perfunctory order, hence we found no fault in reopening of the assessment by the Assessing Officer. Hence, we do not

find any fault with the decision of Id.CIT(A) in dismissing the grounds challenging the reopening of the assessment proceedings.

18. In fact the brought forward losses mentioned in the earlier assessment years, forming part of the earlier audit reports is no ground for holding that reopening made by the Assessing Officer was not correct, as each year is a separate assessment year and principle of res-judicata is not applicable in tax proceedings. Facts of each year are required to be examined on its own set of facts for the assessment year under consideration; nonetheless, for the earlier year, the assessee has not claimed set off of brought forward losses against the assessee's income. Therefore, there was no occasion for examining the issue by the Assessing Officer whether the brought forward losses can be set off against the business income of the assessee or not. This issue would only be examined in the assessment order in which the assessee seeks the setting off of brought forwarded loss as against the current year income, which is in contradiction to the requirement within the meaning of the preparation of accounts in accordance with the Companies Act and also in accordance with the Income Tax Act. Since this issue had not been examined in earlier assessment years / in original assessment proceedings, therefore, there was no lapse on the part of the Assessing Officer to examine the same in reopening of assessment. The issue in the current year is not about the quantification of the brought forward losses but whether in the current assessment year brought forwarded losses could be set off against the speculative income of the assessee or not. Hence, we do not find any merit in the Cross – Objections filed by the assessee; accordingly, the same are rejected.

19. Though the assessee has relied upon the decision of the Hon'ble Supreme Court in the case of ITO Vs. M/s. TechSpan India Private Limited and another vide Civil Appeal No.2732 of 2007 dt.24.04.2018, but, in our view, the very judgment is against the assessee and the same is clear from para 12 of the said decision, which is to the following effect.

“12. Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings.”

20. In view of the above, respectfully relying upon the judgment of hon'ble Supreme Court in the case of M/s. TechSpan India Private Limited (supra) and based on the above finding, **the Cross - Objection raised by the assessee is dismissed.**

21. Now, we will deal with the appeal of Revenue in ITA No.2217/Hyd/2018 for A.Y. 2011-12.

22. Ld. D.R. had filed the written submissions in support of his case and the same is reproduced hereunder :

“1. In The case of M/s Nikhil Refineries Private Limited, the assessee company has filed its return of income for the assessment year 2011-12 on 09.09.2011 admitting total income at Rs.2,40,56,230- and book Profit u/s 115Jb at Rs. 2,93,98,327/-

Assessment u/s 143(3) was completed on 20.03.2014 determining the total income of the assessee company at Rs. 2,40,65,464/- .

2. Subsequently the case was reopened u/s 147 and a notice u/s 148 was served on the assessee. The assessee has filed a response requesting to treat the return of income filed on 09.09.2011 for A.Y.2011-12 as compliance for the notice u/s 148.

3. The reason for reopening the case u/s 147 is that during the relevant previous year, the company has made a net gain of Rs. 4,05,59,976/- on account of settlement of trade contracts otherwise than on delivery and forex derivatives explained to be speculative in nature. The same has been adjusted and set off against loss brought forward of the same nature. The earlier year at Rs. 8,98,97,755 and the balance unabsorbed loss of Rs,4,93,37,779/- was carried forward and grouped under the head 'claim and other receivables' in the balance sheet. However, the gain of Rs. 4,05,59,976/- was not credited to the profit and loss a/c during the relevant year, and thus the profit for the year is understated to that extent. The income Chargeable to tax u/s 115.IB is short computed, whereas the initial assessment was completed under normal provisions and the credit of Rs. 4,05,59,976/- was not considered.

4. The reasons for reopening are communicated to the assessee and notice u/s 143(2) is also issued and served on the assessee company and the AR has filed response to the same. The Assessing officer has completed the assessment by making the addition of Rs.4,05,59,976/- towards net gain on account of trade contracts to the book profit and assessed the total income at Rs.6,99,58,303/- as per provisions of section 115JB.

5. The assessee company has gone on appeal before the CIT(A) with the following grounds:

- The order of the assessing officer dated 24.12.2016 passed u/s 143(3) r.w.s. 147 of the IT Act,1961 is contrary to law and facts.
- The Assessment officer erred in reopening the assessment u/s 147 of the IT Act due to the facts and circumstances of the case
- The assessment made u/s 143(3) r.w.s 147 of the IT Act is bad in law as no sufficient reason was shown for the re-open of the assessment.
- The assessing Officer erred in holding that the book Profit determined u/s 115./13 by the appellant company is wrong and made an addition of Rs.4,05,59,976/- on account of settlement of trade contracts otherwise than on delivery which is contrary to the case and the conditions laid down u/s 115.IB of the IT Act.

- *The assessing officer erred in determining the tax payable under the provisions of section 115.18 together with interest at Rs. 1,86,66,173/- Whereas the tax was already paid at the regular rate on the regular income of the company.*

6. *The CIT(A) has stated that the grounds 1 and 6 being general in nature are not adjudicated upon Grounds 2 and 3 with regards to reopening of the assessment raised by the appellant are dismissed.*

7. *with regard to grounds 4 and 5, on the addition made of Rs.- 4,05,59,976/- towards net gain on account of settlement of trade accounts, the CIT(A) has allowed the appeal of the assessee, giving the following finding:*

"it is found that the appellant company disclosed return of income of Rs. 2,40,56,230/-and completed the assessment u/s 143(3) of the Act determining the total income of Rs. 2,40,65,456/- and the same was accepted u/s 143(3) of the Act. the book profit of the appellant company was Rs. 2,93,98,327/- the book profit is less than the tax on regular tax. Therefore in this case the regular income disclosed of Rs. 2,40,65,456/- is to be considered instead of book profit since book profit u/s 115.18 is not applicable. Therefore as per the submissions and the case laws submitted by, the appellant book profit u/s 1151E of the Act is not applicable and the adjustment made to the book profit is not accepted. Hence the addition made by the Assessing Officer is deleted."

8. *The finding of the CIT(A) with regard to the grounds no. 4 and 5 are not acceptable for the following reasons:*

1. *Rs.4,05,59,976/- is the net gain received by the assessee company on account of settlement of trade contracts otherwise than on delivery and forex derivatives explained to be speculative in nature. This has been adjusted and set off against the loss of such nature brought forward from the earlier year at Rs. 8,98,97,755/-and balance loss is brought forward. However, the gain of Rs. 4,05,59,976/- is not brought to credit in the profit and loss a/c in the relevant year. The non offering- of the Rs.4,05,59,976/- is against the accounting standards, and the same is clearly observed and stated in the audit report of the assessee company submitted. The amount is not credited to the profit and loss account and so to that extent the profit for that year is understated. The* net profit should have been credited to the profit and loss account and then the net profit*

should have been calculated. Hence the case was rightly reopened u/s 147 and the same was brought to tax vide the AOs order u/s 143(3) r.w.s 147 dt. 30.11.2016.

2. *The CIT(A) has observed that the book profit in this case is less than.. the tax on regular income, and hence the regular income disclosed of Rs. 2,40,65,456/- is to be considered instead of book profit. The initial scrutiny was completed under normal provisions, but however, following the reopening of the case, and the addition of the escaped income of 4,05,59,976/- the income as per MAT provisions is higher, and hence the tax liability is calculated on the book profit as per MAT provisions.*
3. *The assessee has not submitted any factual basis of explanation as to why the deviation from the accounting standards and compliance as per companies Act. The CIT(A) order has not commented on this aspect, but only referenced the case laws as submitted by the assessee in his favor. The assessee has relied upon the supreme court judgment in the case of Apollo Tyres ltd. Vs. CIT (2002) 255 ITR 0273, the Hon'ble High court of karnataka in Sri Harirarh Hostels Private Limited Vs. OT-111(2016), Hon'ble High Court of Delhi in Sun Investment Private Limited Vs. ACIT(2012), Hon`ble High Court of Delhi in BLB Limited Vs. ACIT (2012).*
4. *In the case of Appllo Tyres Vs. CIT(2002) the assessee has claimed that the Hon'ble Supreme Court has held that the AO does not have the jurisdiction to go behind the net profit as shown. in the P&L except to the extent provided in the explanation to S.115JB. The assessee has contended before the CIT(A) that thus the AO has gone out of his jurisdiction in opening the book of accounts and re-computing the book profit as declared u/s 115JB. He also relies on Hon"ble High Court of karnataka judgment in Sri Hariram Hotels private Limited Vs. CIT-111(2016) Where the Hon'ble High Court Qualified that it in light of the Apollo Tyres judgment , it is of the opinion that the AO has no power to re-compute the book profit and must rely on the authentic statements of accounts of the company, being scrutinized and certified by the statutory auditors though with a qualification approved by the company in general body meeting and filed before the ROC Who has a statutory obligation to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the companies Act.*

In this regard, it is submitted that the Hon'ble Supreme Court has already clearly

"We are of the opinion that the assessing Officer while computing the income under section 115J has only the power of examining

whether the books income under; section 115J has only the power of examining where the books of account are certified by the authorities under the companies Act as having been properly maintained in accordance with the companies Act."

9. In this case, the books of accounts are certified by the authorities under the companies Act, however, the audit report clearly states that there is a deviation from the accounting standards and that the amount of Rs. 4,05,59,976/- not credited to the profit and loss account has resulted in the profit being understated to that extent.

Further the Hon'ble supreme Court has observed that:

" While so looking into the accounts of the company, an Assessing Officer under the income-tax Act has accept the authenticity of the accounts with reference to the provisions of the companies Act Which obligates the company to maintain its

account in a manner provided by the companies Act and the same to be scrutinized and certified by statutory auditors and will have to be approved by the company in its general meeting and thereafter to be filed before the registrar of companies who has a statutory obligation also to examine and satisfy that the accounts of the company are maintained in accordance with the requirements of the companies Act. In spite of all these procedures contemplated under the provisions of the companies Act, we find it difficult to accept the argument of the revenue that it is still open to the Assessing Officer to re-scrutinize the accounts and satisfy himself that these accounts have been maintained in accordance with the provisions of the Companies Act"

10. In this case, the assessing officer has not "re-scrutinized the accounts to satisfy himself that the accounts 'have been maintained in accordance with the provisions of the companies Act", But rather , the deviation from the accounting standards is brought on record in the audit report by the statutory auditors, and hence the dame deviation subsequently brought to tax in the reopened re-opened proceedings u/s 147 by re-computing the book profit taking into account the observed deviation of non crediting of income to the extent of Rs. 4,05,59,976/-

5. As regards the mention any "qualifications" made in the certifications of statutory auditors, as mentioned in the judgment of the Hon'ble High Court of karnataka Sri Hariram Hotels Private Limited Vs. CIT-III(2016), The assessee has stated that "the ratio laid down by the above judgment covers the issue under the present case, where in the accounts of the appellant company have been duly certified by the statutory auditor though with a qualification and are filed

before the ROC after being duly adopted by the members of the company at the annual General Meeting Held"

11. *It is submitted that as per the supreme Court judgement of Apollo Tyres, it is clearly mentioned that the AO can look into whether the books are "certified by the authorities under the Companies Act as having been properly maintained in accordance with the companies Act as having been properly maintained in accordance with the companies Act." It nowhere has mentioned that the qualifications, when in deviation of accounting standards and the Companies Act, may be accepted as properly maintained, merely because it is filed before the ROC and duly adopted by the members of the company at the annual General Meeting held*
12. *In light of the above it is submitted that the order of the CIT(A) should be deleted and the appeal of the revenue may be upheld."*

23. The Ld. A.R. submitted before us that the Assessing Officer could not recast the accounts of the assessee. Once the accounts of the assessee are approved by the General Body and submitted to scrutiny by the Registrar of Companies, then the Assessing Officer is bound to accept the books of account of the assessee. He relied on the decision of hon'ble Supreme Court in the case of Apollo Tyres Ltd. reported in (2002) 255 ITR 273, and he has drawn our attention to para 5.3 of the order passed by Ld.CIT(A).

"5.3 I have carefully considered the assessment order, facts of the case, case laws relied upon by the appellant and submissions of the appellant. On verification, it is found that the appellant company disclosed return of income of Rs.2,40,56,230/- and completed the assessment u/s 143(3) of the Act determining the total income of Rs.2,40,65,456/- and the same was accepted u/s 143(3) of the Act. The Book Profit of the appellant company was Rs.2,93,98,327/- the tax on book profit is less than the tax on regular income disclosed of Rs.2,40,56,230/- to be considered instead of book profit, since book profit u/s 115JB not applicable. Therefore, as per the submissions and the case laws submitted by the appellant book profit u/s 115JB of the Act is not applicable and the adjustment made to the book profit is not accepted. Hence, the addition made by the Assessing Officer is deleted."

24. We have heard the rival submissions and perused the material available on record. Undoubtedly, in the case of Apollo Tyres (supra), the Hon'ble Supreme Court held that the Assessing Officer has a limited power to increase or decrease the deduction in the income of the assessee in terms of Explanation 2 of section 115JB of the Act. However, the above said decision is required to be understood in the context of two caveats. (1) Books of accounts were prepared and maintained in accordance with the Companies Act. (2) That the said accounts were certified by the authorities under the Companies Act.

25. The perusal of the Audit Objection clearly shows that the books of accounts had not been prepared in accordance with the Companies Act, and the assessee has wrongly set off the net gain made during the current year on account of the speculation of the trade contract with the brought forward losses of the earlier years. The above set off of brought forward losses against the net gain of the current assessment year is against the accounting standards applicable for the assessee and the provisions of the Income Tax Act, 1961. The perusal of the objections in the audit report clearly shows that auditors have given qualified certificate that the accounts were not prepared in accordance with the Companies Act. On account of qualified audited account, impunity given by the Hon'ble Supreme Court could not be exercised in favour of the assessee as requisite criteria had not been fulfilled by assessee as required under section 115JB of the Act. A person who has not prepared the accounts in accordance with the Companies Act and even the Auditors have objected to the preparation of accounts will not get the immunity u/s 115JB of the Act and variation can not be restricted to class of adjustment or additions as provided under Explanation to section 115 JB of the Act.

26. The assessee company has made a net gain of Rs. 4,05,59,976/- on account of the settlement of trade contracts otherwise than on delivery and forex derivatives and set off this amount against the brought forward losses of earlier year of Rs.8,98,97,755/- and thereafter balance unabsorbed loss of Rs.4,93,37,779/- were carry forwarded and grouped under the head 'claim and other receivables' in the balance sheet. However, the gain of Rs. 4,05,59,976/- was not credited to the profit and loss account during the relevant year, in contradiction of accounting standard / policy under the Companies Act which auditors have qualified in audit report. Thus, assessee had understated the profit for the year to that extent. Hence, this amount is required to be charged along with other income and is required to be brought to tax u/s 115 JB. Thus, the Assessing Officer's order in the present proceedings was in accordance with law. In this connection, we may also draw support from the decision of co-ordinate Bench of the Tribunal in the case of Everest Kanto Cylinders Ltd Vs. ACIT in ITA 764/Mum/2021 wherein at para 5, it was held as under :

“5. The said amount of Rs.30,82,223/- was also added by the Assessing Officer in the book profit of the assessee for the purpose of section 115JB of the Act. The argument of the ld. AR for the assessee is that the amount appearing in Form No.26, accepted and offered as income, cannot be added to the book profit of the assessee, as stipulated in section 115JB of the Act. The perusal to the Explanation 1 to section 115JB clearly shows the book profit, which means the profit as shown in the statement of the profit and loss for the relevant previous year drawn according to the provision of section 129 of the Companies Act, 2013. It is not the case of the assessee that the income shown in Form No. 26AS was not the assessee's income or was not required to be shown by the assessee in the books of account while computing the profit and loss statement. In other words, the income which was now shown and offered by the assessee as income of the assessee was required to be duly shown by the assessee in the book profit while preparing the accounts, including the statement of the profit and loss account in accordance with the Companies Act, 2013. In our view, once the error was committed by the assessee in preparation of Profit and loss statement by not adding the entire amount shown in 26AS as income of the assessee either on account of omission,

inadvertent error or by way of fraud which was otherwise required to be included in the statement of the profit and loss account, then it cannot be said that the said amount which was wrongly or deliberately or otherwise left to be included in the book of accounts, cannot be added to the book profit for the purpose of section 115JB of the Act.

In our considered opinion, no person can be permitted to gain from his own mistake either deliberately or intentionally or otherwise done. Giving a pedantic interpretation to the book profit as mentioned in the Explanation would be the antithesis to the purpose, for which it was enacted by the legislature and would result in absurdity and contradictions. Hence amount which was rightfully offered as income by the assessee during the assessment proceedings is also required to be added to the Book Profit for the purposes of section 115JB also. Hence, we do not find any merit in the appeal of the assessee. Accordingly, the appeal of the is dismissed.”

27. In view of the foregoing discussion and respectfully following the decision in the case of Everest Kanto Cylinders Ltd (supra), we do not find any substance in the submissions of the assessee and accordingly, we allow the appeal filed by the Revenue and restore the Assessing Officer order. Thus, the appeal of Revenue is allowed.

28. In the result, the appeal filed by the Revenue is allowed and the C.O. filed by the assessee is dismissed.

Order pronounced in the Open Court on 29th August, 2022.

Sd/- (RAMA KANTA PANDA) ACCOUNTANT MEMBER	Sd/- (LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 29th August, 2022.

TYNM/SPS

Copy to:

S.No	Addresses
1	M/s. Nikhil Refineries Pvt. Limited, 1-8-663, Azamabad Industrial Area, Hyderabad 500020.
2	The Deputy Commissioner of Income Tax, Circle – 16(1), Hyderabad.
3	The Commissioner of Income Tax (Appeals) – 4, Hyderabad.
4	Pr. CIT – 4, Hyderabad.
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order