

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

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No.349/MUM/2020
(Assessment Year: 2012-13)

M/s JSW Steel Limited.
(Successor on amalgamation with M/s
JSW Ispat Steel Ltd.)
[PAN: AAACI6293E]

Appellant

Vs

Assistant Commissioner of Income Tax,
Central Circle – 3(2), Mumbai,
JSW Centre, BKC Bandra (East),
Mumbai - 400051

Respondent

ITA No. 1016/MUM/2020
(Assessment Year: 2012-13)

DCIT, Central Circle –8(3),
Room No. 656, 6th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai - 400020

Appellant

M/s JSW Steel Limited.
(Successor on amalgamation with M/s
JSW Ispat Steel Ltd.)
[PAN: AAACI6293E]

Vs

Respondent

Appearances

For the Appellant/Assessee : Shri Rakesh Joshi
For the Respondent/Department : Shri Achal Sharma

Date of conclusion of hearing : 13.09.2022
Date of pronouncement of order : 12.12.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. The present cross appeals arise from the order of Commissioner of Income Tax (Appeals)-51, Mumbai

[hereinafter referred to as 'the CIT(A)'], passed on 15.11.2019 for the Assessment Year 2012-13, which in turn arose from the Assessment Order, dated 31.03.2015, passed under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'].

2. ITA No. 349/Mum/2020 has been filed by the JSW Steel Ltd. as a successor on amalgamation of erstwhile JSW Ispat Steel Ltd. Following grounds have been raised in the appeal:

"1. On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in directing to disallow an amount of Rs. 40,00,00,000/- being liability towards custom duty actually paid without appreciating the fact that the same is allowable."

3. In addition following additional grounds has also been raised in the appeal:

"1. On the facts and circumstances of the case as well as in Law, the Learned Assessing Officer as well as Ld. CIT(A) has erred in not appreciating the fact that the claim of the assessee is allowable as business loss U/s 37(1) of the Income Tax."

4. The Revenue has raised following grounds of appeal in ITA No. 1016/Mum/2020:

"1. Whether the facts and the circumstances of the case and in law, the Ld. CIT(A) is justified in deleting the disallowance a sum of Rs. 296,19,07,058/- being the business advances waived off, given to subsidiary company against power purchase agreement"

5. The relevant facts in brief are that the Assessee filed return of income on 28.09.2012 declaring loss of INR 19,48,72,74,365/-. The case of the Assessee was selected for scrutiny. During the assessment proceeding, the Assessing Officer noticed that the Assessee had, in capacity as corporate guarantor, assumed the

liability of making payment of custom duty and interest thereon aggregating to INR 7,86,10,866/- Crores payable by Ispat Energy Ltd., a wholly owned subsidiary of the Assessee. The aforesaid amount was payable by Ispat Energy Limited (IEL) in respect of demand for the differential custom duty raised by Customs Department for non-fulfillment of export obligation connected with the power plant equipment imported by IEL that was cleared by the Custom Authorities under EPCG Scheme (with corresponding export obligations). The Assessing Officer also noticed that the Assessee had debited to Profit & Loss Account INR.2,96,19,07,058/- under the head '*advance given to the subsidiary company written off*'. The Assessee was asked to show cause why the deduction for, both, the aforesaid amounts should not be disallowed. In response the Assessee filed reply dated 18.02.2015 and 24.03.2015 placing on record Power Purchase Agreement, dated 23.10.1998 and Deed of Settlement, dated 27.12.2011. However, the Assessing Officer was not convinced with the reply/submission of the Assessee. The Assessing Officer made disallowance of INR 7,86,10,866/- holding that the aforesaid expenditure was not deductible under Section 37(1) of the Act as the same has not been incurred wholly and exclusively for the purpose of business of the Assessee. IEL was a separate legal entity from the Assessee and therefore, IEL was liable to pay differential customs duty and interest thereon and not the Assessee. The Assessee was merely inducted as a supporting manufacture to enable IEL to fulfill the requirements of export obligation and to make available essential credit facilities. Further, the Assessing Officer also disallowed deduction claimed by the Assessee in respect of advances of INR 2,96,19,67,058/- given to IEL which

were written off during the relevant previous year. The Assessing Officer was of the view that the advances were given to EIL for setting up of power plant and therefore, were capital in nature and waiving off of such advance by the Assessee could not be allowed deduction for bad-debt. Thus, vide Assessment Order, dated 31.03.2015, the Assessing Officer completed assessment under Section 143(3) of the Act after making, inter alia, the aforesaid disallowance of INR 2,96,19,67,058/- and INR 7,86,10,866/-.

6. Being aggrieved, the Assessee preferred appeal before CIT(A) on this issue. It was contended by the Assessee before CIT(A), that the disallowance of INR 70,86,10,866/- was made by the Assessing Officer ignoring the fact that the Assessee had only claimed deduction of INR 40,00,00,000/- under Section 43(B) read with Section 37(1) of the Act as against total liability of INR 70,86,10,866/- and therefore, disallowance cannot, in any case, exceed INR 40,00,00,000/-. It was contended on behalf of the Assessee that IEL was wholly owned subsidiary of the Assessee. The Assessee was supporting the setting up of the power plant with the object of obtaining benefit by way of subsidized and continuous of power supply from this power plant. For setting up of the power plant IEL wanted to import second hand power plant under EPCG scheme which had corresponding export obligations which were to be fulfilled by November, 2013. Therefore, the Assessee was required to give corporate guarantee of INR 134.43 Crores to the custom authorities. For reason beyond the control of IEL and the Assessee the power plant project had to be shelved and the export obligations under EPCG scheme could not be fulfilled leading to a demand of INR 37.9 Crores and INR 32.95 Crores

being raised by the Customs Department for custom duty and interest thereon, respectively. Since IEL did not have capacity to pay the demand, the Assessee, being the corporate guarantor for IEL, was under obligation to make payment of the aforesaid aggregate demand of INR 73.83 Crores. It was contended on behalf of the Assessee that the power plant was being set up for supply of electricity to the Assessee exclusively and therefore, it was foregone conclusion that the Assessee was required to fulfill export obligations which position was also accepted by the customs authorities. The Assessee would have benefitted by getting continuous electricity supply at subsidized rates leading to reduction in operational cost. However, the project could not be commissioned, and export obligations could not be fulfilled, resulting in demand having been raised by the Customs Department. The amount paid to discharge the aforesaid demand was, thus, allowable as deduction for expenses incurred wholly and exclusively for the purpose of business of the Assessee under Section 37(1) of the Act. Alternatively, the aforesaid amount was also allowable as a business loss incurred by the Assessee on account of commercial expedience in the anticipation of saving future power and fuel cost. However, the CIT(A) not being convinced rejected both the contention raised by the Assessee. However, the CIT(A) granted relief to the extent that the Assessing Officer was directed to restrict the amount of disallowance to the extent of deduction claimed by the Appellant during the relevant previous year. Thus, confirming the disallowance to the extent claimed by the Assessee. However, the CIT(A) granted relief to the Assessee by overturning the decision of the Assessing Officer and allowing deduction for

INR.2,96,19,67,058/- being advances given to IEL written off during the relevant previous year. While doing so the CIT(A) placed reliance on the decision of the Tribunal in the case of IEL for the Assessment Year 2011-12 (Ispat Enegery Ltd Vs ACIT Circle 3(2), Mumbai : ITA No. 2399/Mum/2017, dated 19.08.2019) [hereinafter referred to as the 'IEL Decision']

7. The Revenue as well as the Assessee being aggrieved by order of the CIT(A), dated 15.11.2019, are in cross appeals before us. Revenue has challenged the order of the CIT(A) allowing deduction for INR.2,96,19,67,058/- while the Assessee has challenged the order of CIT(A) to the extent it directed the Assessing Officer to verify and restrict the disallowance to the amount claimed by the Assessee during the relevant previous year.
8. The Learned Authorised Representative for Appellant reiterated the submission made before Assessing Officer and CIT(A). While the Learned Departmental Representative relied upon the relevant extracts of the order passed by the Assessing Officer and CIT(A).
9. We have considered the rival submission, perused the material on record, and considered the legal position including the judicial precedents cited by both the sides.

Departmental Appeal : ITA No. 1016/Mum/2020

10. We would first take up Ground No. 1 raised by the Revenue in its appeal.
11. Revenue is aggrieved by the fact that the CIT(A) has granted relief to the Assessee by treating the advance of INR

2,96,19,67,058/-, given by the Assessee to IEL and written off by the Assessee during the relevant previous year, as business loss deductible under Section 37(1) of the Act. While arriving at the aforesaid conclusion, the CIT(A) had relied upon the IEL Decision. The issue before the Tribunal in that case was whether the advance received by IEL from the Assessee could be treated as revenue receipt in the hands of IEL. The Tribunal held that the advance received by IEL from the Assessee was revenue in nature and therefore, taxable as income in the hands of IEL. While holding as aforesaid the Tribunal observed that the advance (paid for setting up of power plant) was to be discharged/repaid/adjusted by way of supply of electricity to the Assessee and therefore, it was in the nature of advance for supply of electricity.

- 11.1 We note that in that case the Tribunal had accepted the contention of the Revenue that the advance given by the Assessee to IEL was revenue in nature in the hands of IEL being trade advance/receipt. However, in the present case the Revenue has taken opposite stand by contending that the advance given was capital in nature. We are alive to the situation where a transaction may result in capital expenditure in the hands of one taxpayer and revenue receipt in the hands of another. For example in case purchase of machinery, the price of machinery is capital expenditure in the hands of the purchaser and revenue receipt in the hands of the machine manufacturer/supplier. However, this is not the situation in the case before us. The Assessee had entered into Power Purchase Agreement, dated 23.10.1998 and also Deed of Settlement, dated 27.12.2011, with IEL and its veracity of the same has not been doubted by the Revenue. The Assessee had paid advance

to IEL which was, as per IEL Decision, discharged/repaid/adjusted by way of supply of electricity. Since the aforesaid has become irrecoverable and the same was allowable as business loss under Section 37(1) of the Act.

11.2 It would be pertinent to note that the Assessing Officer had disallowed deduction by treating the claim made by the Assessee as a claim for bad debts. The Learned Departmental Representative had also relied upon following decision wherein deduction for bad debts was not allowed - Southern Technologies Ltd. vs. Joint Commissioner of Income Tax, Coimbatore (2010) 187 Taxman 346 (SC), Commissioner of Income Tax vs. Epsilon Advisers (P.) Ltd. (2012) 22 taxmann.com 284 (Kar.), VST Industries Ltd. vs. Assistant Commissioner of Income Tax, Circle 3(4), Hyderabad: (2010) 41 SOT 415 (Hyd), Malbros Investments Ltd. vs. Deputy Commissioner of Income-tax (2004) 90 ITD 688 (Delhi). However, as rightly observed by the CIT(A), the Assessee had set up the claim for deduction under Section 37(1) for business loss and not under Section 36(1)(vii) of the Act for bad debts. Therefore, the aforesaid judicial precedents relied upon by the Learned Departmental Representative were not applicable to the facts of the present case.

11.3 Further, the Learned Departmental Representative had also cited the following decisions which are also distinguishable on facts.

(a) In the case of Pragati construction Co. vs. Dy. Commissioner of Income-tax (2011) 11 taxmann.com 203 (Delhi) the assessee's claim for deduction was not

accepted as the Hon'ble Delhi High Court doubted the substance of the transaction and concluded that the transaction was not undertaken for the business of the assessee in that case and that the transaction failed to meet the test of prudence even when applied from the perspective of a businessman (and not Revenue). In the present case the Revenue has not doubted the genuineness of the transaction.

- (b) In the case of Commissioner of Income Tax vs. Coimbatore Picture (P.) Ltd.: (1973) 90 ITR 452 (Mad) the Hon'ble Madras High Court held that the advance, which had become irrecoverable, was in the nature of an amount deposited for acquisition of a business, a sort of a temporary investment necessary for getting a business of distribution, and therefore, capital in nature. Accordingly, the Hon'ble Madras High Court allowed the Appeal of Revenue holding that deduction for the aforesaid amount could not be allowed to the assessee.
- (c) The decision of the Tribunal in the case of Grindwell Norton Ltd. vs. Deputy Commissioner of Income Tax (2004) 91 ITD 412 (Mum) also does not assist the case of Revenue. In this case the holding company had given loan to one subsidiary and provided financial assistance to another subsidiary to rescue it from financial crisis. Both the subsidiaries went into liquidation and the assessee in that case claimed deduction for the amount given to subsidiaries as business loss. Since there was difference of opinion between the members, the issue was referred to the Third Member. It was held that it was

sine qua non to consider the nature of advantage, which the assessee has derived, in commercial sense by advancing the funds to the subsidiaries. It was to earn interest and to rescue the subsidiaries from financial crisis. The advantages derived by the assessee were held to be in capital field. Therefore, it was concluded the loss was also occasioned in the capital field and deduction for capital loss could disallowed in the hands of the assessee. Whereas in the present case the advance was given in the commercial sense to reduce the future operating cost and therefore, this case does not aid the case of Revenue.

12. In view of the above, we are not inclined to overturn the decision of the CIT(A). Ground No. 1 raised by the Revenue in appeal is dismissed.

Appeal by the Assessee: ITA No. 349/Mum/2020

13. We would now take up appeal of the Assessee.
14. The Assessee is aggrieved by the fact that the CIT(A) has confirmed the disallowance of INR 40,00,00,000/- in respect of payment made by the Assessee to the Customs Department for discharge of custom duty and interest liability which had arisen in connection with the import of power plant equipment by IEL a wholly owned subsidiary of the Assessee. Before us the Appellant had contended that deduction for the aforesaid amount was allowable as business expenditure or as business loss under Section 37(1) of the Act. We note that both the aforesaid contentions were raised by the Assessee before

CIT(A). Before us, the Assessee had raised additional ground specifically contending that CIT(A) erred in not allowing deduction for the aforesaid amount as business loss in terms of Section 37(1) of the Act. Thus, additional ground raised by the Assessee is admitted as the relevant facts are already on record.

15. We note that the Assessing Officer had disallowed the deduction claimed by the Assessee holding that the payment made by the Assessee was for discharge of liability of IEL which was an entity separate and distinct from the Assessee. The CIT(A) concurred with the Assessing Officer and observed that at best it could be said that the Assessee had made payment on behalf of IEL.
16. The Assessing Officer did not doubt the veracity of the transaction and accepted the same as genuine. Thus, it was admitted position that:
 - (a) the Assessee wanted to set up a power plant in a wholly owned subsidiary (i.e. IEL) to ensure continuous supply of electricity to the Assessee in future that would have resulted in savings in operational cost on account of reduction of cost of fuel and electricity. In support the Assessee had filed Power Purchase Agreement, dated 23.10.1998.
 - (b) IEL imported second hand equipment for setting up 110 MW (55MWx2) power plant. The Assessee was roped in as a supporting manufacturer in relation to export obligations connected with the import of second hand power plant equipment originally imported under project

imports but cleared by the Customs Department for home consumption under EPCG Scheme with corresponding export obligations. It was also admitted position that the Assessee also stood as corporate guarantor to IEL and executed bond which was furnished to the Customs Department.

- (c) IEL was not able to set up power plant as the equipment was not fit for use and export obligations were also not fulfilled within time.
- (d) Demand for differential customs duty and interest therein was raised by the Customs Department which IEL was not in a position to pay.
- (e) The Assessee assumed the liability to pay the aforesaid demand for custom duty and interest amount as it stood as corporate guarantor to IEL.

17. The contention of the Learned Authorised Representative for Assessee before us was that the amount paid towards discharge of liability must be allowed as deduction under Section 37(1) of the Act either as business expenditure or as business loss.

18. We note that the Assessing Officer has in Paragraph 5.5 of the Assessment Order observed as under:

"5.5 Further, the business exigency/commercial expediency etc.....As per page 8 of the show cause issued by the CIU of Customs, it is seen that it is only due to non-availability of the credit facility to Ispat Entergy Limited and to fulfill the export obligation, the assessee company

was inducted into the scheme as a supporting manufacturer.....”

19. On perusal of the above it can be seen that the Assessing Officer noted that the Assessee was inducted as supporting manufacturer on account of non-availability of credit to IEL and for fulfillment of export obligation. The Assessee had also furnished bond to Customs Department and had stood as corporate guarantor to performance of export obligations by IEL. Thus, the Assessee was under legal obligation. The reason given by the Assessing Officer and CIT(A) for rejecting the claim for deduction is that the to pay custom duty and interest therein was of IEL and not the Assessee. In our view, it cannot be said that the Assessee did not have any obligation/liability whatsoever. While the primary liability could have been of IEL, the Assessee at least had secondary liability. However, the extent/scope of liability of the Assessee, its quantification as well as discharge by the Assessee along with applicable terms and conditions requires verification. Accordingly, we remand the issue back to the file of the Assessing Officer for denovo adjudication after verifying the scope/extent of liability undertaken by the Assessee as per the terms and conditions of the Corporate Guarantee given by the Assessee and the Bond Executed by the Assessee in relation to clearance of power plant equipment by the Customs Department and the related export obligations. The Assessee is directed to produce before the Assessing Officer all the relevant documents (including copy of the license along with applicable the relevant provisions of EPCG Scheme, Corporate Guarantee and Bond) to support its claim for deduction as business expenses or business loss under Section 37(1) of the Act, and to this extent

all rights and contentions of the Assessee are left open. The Assessing Officer shall grant reasonable opportunity of being heard to the Assessee. In terms of the aforesaid directions, this issue is remanded back to the file of the Assessing Officer. Ground No. 1 and Additional Ground raised by the Assessee are treated allowed for statistical purposes.

In result, the appeal for the Revenue is dismissed while appeal for the Assessee is allowed for statistical purposes.

Order pronounced on 12.12.2022.

Sd/-
(Prashant Maharishi)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 12.12.2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai