

IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 970/Mum/2022

(A.Y: 2017-18)

Trafigura India Pvt Ltd., Unit No. 1101, A-Wing, Plot No. C, 66G Block, BKC, Mumbai – 400051.	Vs.	Pr. CIT-6 501, 5 th Floor, Aaykar Bhavan, MG Road, Mumbai – 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCT3128N		
Appellant	..	Respondent

Appellant by :	Shri Madhur Agrawal.AR
Respondent by :	Shri H. N. Singh. CIT DR

Date of Hearing	18.10.2022
Date of Pronouncement	16.11.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE, JM:

The assessee has filed the appeal against the order of the Pr. Commissioner of Income Tax (Pr.CIT)-6, Mumbai passed u/s 263 of the Act. The assessee has raised the following grounds of appeal:

Ground No.1

The Principal Commissioner of Income Tax, Mumbai-6 (hereinafter referred to as PCIT) erred in passing an order under section 263 of the Income Tax Act. The Appellants

submits that the order passed by the Assistant Commissioner of Income Tax, Range-14(3)(1), Mumbai (hereinafter referred to as AO) is neither erroneous nor prejudicial to the interest of the revenue as the assessment order has been passed in accordance with applicable provisions of law and after considering all the facts on record.

Ground No.1(a)

Without prejudice to above, the PCIT has erred, in Law as well as in facts and circumstances of the case, in directing to reduce the Book Profit u/s 115JB by an amount of Rs. 74,29,230 only whereas the admissible amount, i.e., lower of 'unabsorbed depreciation' or 'business loss' was actually Rs.4,75,89,669.

The Appellants pray that the order passed under section 263 be quashed.

The Appellant craves leave to, add to, alter or amend the above grounds of appeal or to add a new ground of appeal at any time before hearing of the appeal.

2. The brief facts of the case are that the assessee company is engaged in the business of importing ferrous metals and non-ferrous metals and selling them in Indian market. The assessee has filed the return of income for the A.Y 2017-18 on 27.03.2018 disclosing a total income of Rs. Nil, after claiming of set off of brought forward losses to the extent of income of Rs.24,31,74,130/-and computed Book

profits u/s 115JB of the Act at Rs.5,05,46,247/-, after claiming set off of lower of brought forward business loss and unabsorbed depreciation as per the books of accounts, to the extent of book profit of Rs. 4,76,89,669/-. Subsequently, the case was selected for scrutiny and the Assessing officer (AO) has issued notice u/s 143(2) and 142(1) of the Act along with questionnaire and in compliance, the assessee has furnished the details. The AO has gone through the audited accounts and audit report of the statutory auditor and submissions made in the course of hearing and has observed that the assessee has unabsorbed carry forward losses and was set off to the extent of Rs.24,31,74,127/- and assessed the total income of Rs. Nil. Whereas under provisions of Sec. 115JB of the Act, the AO has set off the lower of the brought forward book losses and unabsorbed depreciation of Rs. 4,76,89,669/- and worked out the Book Profit u/s 115JB of the Act of Rs. 23,68,43,754/- and passed the order u/s 143(3) of the Act dated 07.12.2019.

3. Subsequently, the Pr. CIT on perusal of the facts and assessment record found that the assessee has reduced the unabsorbed depreciation of Rs.

4,76,89,669/- and computed Book profit of Rs. 23,68,43,754/-. The Pr. CIT on verification of facts found that the assessee has adjusted unabsorbed depreciation of Rs. 4,02,60,439/- for the A.Y 2016-17, out of the total unabsorbed depreciation. Hence an amount of Rs.74,29,230/- was the only quantum unabsorbed depreciation is left for carry forward and to be set off in subsequent years and further the assessee has claimed bad debts to the extent of Rs. 19,91,13,984/-. The Pr. CIT observed that the AO has not made any enquiry on the claim of unabsorbed depreciation and claim of bad debts. Finally the Pr. CIT is of the opinion that the assessment order passed u/s 143(3) of the Act is erroneous and prejudicial to the interest of the revenue and issued notice u/s 263 of the Act dated 03.03.2022. In compliance to notice, the assessee has filed the information and it was brought to the knowledge of the Pr.CIT that the MAT report in Form 29B was submitted with the revised computation of income. Whereas the Pr. CIT has dealt on the computation of book profits submitted at Para 3.5 of the order read as under:

3.5 On merits it was stated that the computation of book profits for A.Y 2017-18 is as under:

<i>Particulars</i>	<i>Amount</i>	<i>Amount</i>
<i>Book profits as per P&L before tax</i>		28,45,33,423
<i>Less</i>		
<i>Unabsorbed depreciation</i>	4,76,89,669	
<i>Business Losses</i>	206,52,56,399	
<i>Deduction allowed under clause (iii) of explanation 1 to section 115JB is lower of the above</i>		4,76,89,669
<i>Book Profits as per sec 115JB</i>		23,68,43,754

The above computation was accepted by the Assessing Officer. The assessee further referred to the provision of Clause (iii) to Explanation 1 of Section 115JB and stated there is no provision similar to section 32(2) and Section 72 under section 115JB and therefore the amount computed under clause (iii) of Explanation 1 to Section 115JB is the simple numerical figure being the amount of loss brought forward or depreciation whichever is less. Therefore it was stated that the provision of Clause (iii) to Explanation 1 of Section 115JB is a simple determination of the numerical amount which would be eligible for reduction in computing book profits u/s 115JB. Since the expression used is "as per books of accounts" unless the entire book losses gets wiped out by the profits earned in subsequent years the said loss would continue to remain in the balance sheet and would be eligible for reduction while computing book profits under section 115JB. It was further averred that Clause (iii) to Explanation 1 of Section 115JB only provides the mechanism to compute the amount of reduction in book profits and there is no provision regarding the mechanism for computation of amount to be carried forward as

business loss and unabsorbed depreciation. Hence it is the legal right of the assessee to allocate the reduction claimed against the available business loss or unabsorbed depreciation as per books of accounts till the entire loss is erased. The assessee then relied on the decision of the ITAT, Mumbai Bench in the case of Go Airlines (India) Ltd. V. Dy.CIT [2021] 127 taxmann.com 803 (Mumbai-Trib) and Dy.CIT v. Binani Industries Ltd. in ITA 144/Kol/2013-A-AM [2017] 82 taxmann.com 320 (Kol-Trib) to canvass its case.

4. Finally the Pr.CIT was not satisfied with the explanations and observed that the order passed u/s 143(3) of the Act is erroneous and prejudicial to the interest of the revenue and has observed at Para 17 of the order u/s 263 of the Act dated 30.03.2022 as under:

17. in view of the above discussion, I hold that the order passed by the assessing officer is erroneous and prejudicial to the interest of revenue as far as allocation of reduction of lower figure towards brought forward losses is concerned while retaining the original figure of unabsorbed depreciation and thereby claiming a deduction of the book losses effectively and not reducing the unabsorbed depreciation while calculating the book profits under section 115JB. Hence, I direct the assessing officer to find out from records the actual amount of depreciation allowable to the assessee and restrict the allowance to that extent. The assessment order is set aside to this extent. If the AO finds out that the effect of assessee's method of allocation of reduction from book profits in earlier years has resulted in incorrect computation of book profits in any earlier assessment year then he shall take

effective steps as per law to compute the correct amount of book profits in those years and bring the same to tax if any discrepancy is found.

5. Aggrieved by the revision order, the assessee has filed an appeal before the Honble Tribunal. At the time of hearing the Ld. AR submitted that the Pr.CIT has erred in set aside the order under section 143(3) of the Act on the ground that it satisfy the twin conditions of erroneous and prejudicial to the interest of the revenue and directed the AO to re-do the calculation applicable u/s 115JB of the Act as referred in the order. The contention of the Ld.AR are that Pr.CIT has erred in interpreting the carry forward losses and unabsorbed depreciation in the books of accounts and the Ld.AR substantiated the submissions with the factual paper book and prayed for allowing the assessee appeal. Contra, the Ld. DR submitted that the assessee should not be allowed the benefit as it has reduced the unabsorbed depreciation in the earlier year and the quantum has to be recalculated and relied on the order of the Pr.CIT.

6. We heard the rival submissions and perused the material on record. The Ld. AR contentions are that the order passed by the Pr. CIT does not satisfy the twin conditions that erroneous and prejudicial to the interest of the revenue. The Ld. AR further submitted that the Pr. CIT is of the opinion that the AO has not conducted proper examination of claim of deduction or losses in computing the book profits U/sec 115JB of the Act. The Ld. AR demonstrated the chart placed at page 8 of the paper book explaining the business loss and unabsorbed depreciation and set off claimed on the lower of the two. Further the Ld.AR referred to the notice issued u/sec142(1) of the Act along with the questioner at page at page 23 to 27 of the paper book and the assessee has filed the reply on line on 29-10-2019 along with the computation of income under normal provisions and revised computation of income U/sec115JB of the Act and MAT report in Form 29B were submitted along with other information and there cannot be non application of mind by the Assessing officer on the disputed issues in the Assessement proceedings. The Ld.AR contentions are that as per provisions of Clause (iii) to Explanation 1 of section

115JB of the Act , the reduction of amount/ losses shall always be as per books of accounts and unless the entire losses get wiped out by the profits earned in subsequent years, the said loss would continue to remain in the balance sheet and would be eligible for reduction in computing the book profits U/sec115J B of the Act. The Ld. AR has relied on the decision DCIT Vs. Binani Industries Ltd, [2017] 82 taxmann.com 320 (Kolkata-Trib) held as under:

The assessee-----

Section 115JB of the Income-tax Act, 1961 Minimum - alternate tax (Depreciation/brought forward loss, unabsorbed) - Assessment year 2009-10 - Losses (both cash loss and depreciation loss) would continue to remain in books of account till they are wiped off by earning profits by assessee company and accordingly same would be available for reduction from book profits under section 115JB [In favour of assessee]

The losses (both cash loss and depreciation loss) would continue to remain in the books of account till it is wiped off by earning profits by the assessee company and, accordingly, the same would be available for reduction from book profits under section 115JB. The least of the cash loss or depreciation loss once adjusted/reduced from book profits in earlier assessment years, do not vanish out of the books until it is wiped out by profits in subsequent years. Till such time, the losses would only continue to remain in the books. For the purpose of computation of book

)(2)(ii) profit under section 115JB, every year the situation of least of cash loss and depreciation loss needs to be worked out and reviewed and accordingly, the understanding of the Assessing Officer that such loss once adjusted in earlier year is no longer available for set off is misconceived.

(ii) Similarly in the case of Go Airlines Vs. DCIT, [2021] 127 taxmann.com803 (Mum-Trib) held as under:

Section 115JB, read with section 32, of the Income-tax Act, 1961 Minimum alternate tax Payment of (Unabsorbed depreciation) - Assessment year 2014-15 Whether losses (both cash loss and depreciation loss) would continue to remain in books of account till it is wiped off by earning profits by assessee company and accordingly same would be available for reduction from book profits under section 115JB Held, yes - Assessee-company, engaged in business of operating air craft for carriage of passengers and goods, declared loss and book loss under section 115JB Assessing Officer had observed that while determining book profit under section 115JB for assessment years 2011-12 and 2013-14, had already availed reduction on account of depreciation respectively for those years and had observed that if adjustment was not done while computing book profit under section 115JB in respect of set-off allowed in earlier years, assessee company would avail undue tax relief multiple times and, therefore, assessee would not be entitled for reduction as contemplated in year under consideration - Whether, on facts, Assessing Officer would be directed to grant reduction of unabsorbed depreciation and re-compute book profits under section 115JB - Held, yes [Paras 3.3 and 4] [In favour of assessee]

7. The Ld. AR submitted that the Pr.CIT has only directed the A.O to verify from the records on the disputed issue, whereas the A.O in the notice u/s 142(1) of the Act has called for the information and dealt on the issues. The Ld. AR also submitted that the Pr.CIT has not considered these facts that the A.O has called for the information and there cannot be any non application of mind by the A.O. We find that the A.O has considered one of the possible views based on the information and it is not necessary that the A.O should put all the discussions/observations in the assessment order, as per explanations (2) to sec 263 of the Act the authority has to invoke provisions only when there is no verification and enquiry conducted by the A.O. Whereas the A.O has applied his mind and verified the facts. The Ld. AR referred to the submissions and explanations filed before the A.O. We find the Hon'ble High Court Bombay in CIT Vs. Gabriel India Ltd.203 ITR 108.(Bom) has observed as under:

Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 1973-74 - Assessee claimed a sum of Rs. 99,326 described 'as plant relay out expenses' as revenue expenditure and ITO, after making

enquiries in regard to nature of said expenditure and considering explanation furnished by assessee in that regard, allowed assessee's claim - Subsequently, Commissioner, exercising powers under section 263, cancelled order of ITO observing that order of ITO did not contain discussion in regard to allow ability of claim for deduction which indicated non-application of mind and that claim of assessee required examination as to whether expenditure in question was a revenue or capital expenditure and directed ITO to make a fresh assessment on lines indicated by him - Whether under section 263 substitution of judgment of Commissioner for that of ITO is permissible - Held, no - Whether ITO's conclusion can be termed as erroneous simply because Commissioner does not agree with his conclusion - Held, no - Whether ITO's order could be held to be 'erroneous' simply because in his order he did not make an elaborate discussion - Held, no - Whether provisions of section 263 were applicable to instant case and Commissioner was justified in setting aside assessment order - Held, no

8. We Considering the overall facts, circumstances, ratio of the judicial decision and the details submitted in the course of hearing are of the view that the if any query is raised in the assessment proceedings and it was responded by the assessee, mere fact that it is not dealt with by the A.O. in the order cannot implied that there is no application of mind. Hence, the Pr.CIT action cannot be acceptable as the order passed by the A.O. does not satisfy the twin conditions of erroneous and prejudicial to the interest of the revenue.

Accordingly, we set aside the order of the Pr.CIT and allow the grounds of appeal in favour of the assessee.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 16.11.2022

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 16.11.2022
KRK, PS

Copy of the Order forwarded to :

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

//True Copy//

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आदेशानुसार/ BY ORDER,

(Asst. Registrar)
ITAT, Mumbai