

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**(DELHI BENCH 'G' : NEW DELHI)**

**BEFORE SH. N.K.BILLAIYA, ACCOUNTANT MEMBER  
AND  
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.5892/Del/2019, A.Y. 2008-09

M/s. SRF Limited, C-8, Commercial Complex, Safdarjung Development Area, New Delhi-110016	Vs.	ACIT, Circle-1, LTU, New Delhi
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Assessee by	Shri Pradeep Dinodia, Sh. Ravi Kumar, & Sh. Harish Dhamija, CA
Revenue by	Shri H.K.Choudhary, CIT- DR

Date of hearing:	19.01.2023
Date of Pronouncement:	23.01.2023

**ORDER**

**Per Anubhav Sharma, JM :**

The appeal has been filed by the Assessee against order dated 26.03.2013 in Appeal No. 444/11-12 assessment year 2008-09 passed by Commissioner of Income Tax (appeals)-XII, New Delhi (hereinafter referred to as the First Appellate Authority or in short 'Ld. F.A.A.') in regard to the appeal before it arising out of assessment order dated 29/12/2011 u/s 143(3) of the Income Tax Act, 1961 passed by the JCIT(OSD), Circle 9(1), New Delhi (hereinafter referred to as the Assessing Officer or 'AO').

2. The facts in brief are that the assessment of assessee was completed on 29.12.2011 u/s 143(3) of the Act which was challenged by the assessee and the appellate order u/s 250 was passed on 08.07.2016 which was challenged both by the revenue and assessee before this Tribunal and the issue with regard to non-consideration of assessee's claim in respect of certified emission reductions was remitted to Ld. AO and to consider the case of assessee in the light of judgment in **M/s My Home Power Ltd. Vs. DCIT, 151 TTJ 616**. The ld. AO after taking into consideration the submissions of assessee was of view that sale of certified Emission Reduction/ Carbon credit constitutes profit and gains of the business and taking into consideration the manufacturing process of assessee held the Carbon credit to be trading receipts. Ld. AO also relied the action of Ld. Tax Authorities in the case of assessee for assessment year 2006-07. The Ld. CIT(A) in the impugned order had sustained the addition.

3. The assessee is in appeal raising following grounds :-

***“General Ground***

1. *The Ld. Commissioner of income-tax Appeals ('CIT(A')) has erred in law and on facts, and in the circumstances of the appellant's case in not holding receipts from the sale of Carbon Emission Reductions (CER) Certificates / Carbon Credits amounting to Rs. 2,67,71,10,198/- as capital receipts not liable for tax on wholly illegal, erroneous and untenable ground.*

2. *That Ld. CIT(A) has failed to appreciate that the appellant's case is covered by numerous decisions of the Hon'ble Courts in appellant's favor.*

3. *The Ld. CIT(A) has erroneously held that appellant's case is not covered by the case of **My Home Power Ltd. [2014] 365 ITR 82.***

***Book Profits u/s 115JB of the Income Tax Act, 1961***

4. *The Ld. CIT(A) and Ld. AO have grossly erred while calculating Book Profit at Nil u/s 115JB of the Income Tax Act, 1961, i.e., by not excluding the amount of receipt from transfer of CERs of Rs. 2,67,71,10,198/- from the book profit.*

- *The above grounds are without prejudice to each other.*
- *The Appellant craves leave to alter, amend or withdraw all or any of the grounds herein or add any further grounds as may be considered necessary either before or during the hearing.*
- *The appellant prays that the appeal be allowed.”*

4. Heard and perused the record.

5. During the course of arguments Ld. DR defended the order of Ld. Tax Authorities below. However, could not dispute the fact that the order of Id. CIT(A) for A.Y. 2006-07 has been set aside by Co-ordinate Bench vide ITA no. 4853/Del/2010. The copy of same is submitted by the Ld. AR and it is available at page no. 45 to 55 of the paper book and the Co-ordinate Bench has made relevant finding in para 5.0 to 5.4 ;

*“5.0 We have carefully considered the rival contentions and have perused the orders of the lower authorities and judgments relied upon by the revenue and the Ld. AR on the issue under consideration. As observed in various judgments, the ‘Carbon credits’ or CERs represent the ‘privilege /entitlement’ given to the businesses for its efforts resulting in reduction of emission of greenhouse gases. Such CERs are tradable commodity and one party to Kyoto protocol is benefited by selling such entitlement to other parties to Kyoto protocol which are in deficit. During the year under consideration, the assessee has also received certain sum on account of sale of certain CERs entitlement to other parties. All such parties are foreign parties and the amount has been received in foreign currency. The question that we are really required to adjudicate upon is whether such money received by the assessee on sale of CERs/ carbon credits is taxable under Income-tax Act or not. The Hyderabad bench of the Tribunal in case of My Home Power Ltd (Supra) while dealing with the similar issue held as under:*

*“24. We have heard both the parties and perused the material on record. Carbon credit is in the nature of "an entitlement" received to improve world atmosphere and environment reducing carbon, heat and gas emissions. The entitlement earned for carbon credits can, at best, be regarded as a capital receipt and cannot be taxed as a*

*revenue receipt. It is not generated or created due to carrying on business but it is accrued due to "world concern". It has been made available assuming character of transferable right or entitlement only due to world concern. The source of carbon credit is world concern and environment. Due to that the assessee gets a privilege in the nature of transfer of carbon credits. Thus, the amount received for carbon credits has no element of profit or gain and it cannot be subjected to tax in any manner under any head of income. It is not liable for tax for the assessment year under consideration in terms of sections 2(24), 28, 45 and 56 of the Income-tax Act, 1961. Carbon credits are made available to the assessee on account of saving of energy consumption and not because of its business. Further, in our opinion, carbon credits cannot be considered as a by-product. It is a credit given to the assessee under the 16 ITA No.6693/Del/2018 SRF Ltd. vs. ACIT Kyoto Protocol and because of international understanding. Thus, the assessees who have surplus carbon credits can sell them to other assessees to have capped emission commitment under the Kyoto Protocol. Transferable carbon credit is not a result or incidence of one's business and it is a credit for reducing emissions. The persons having carbon credits get benefit by selling the same to a person who needs carbon credits to overcome one's negative point carbon credit. The amount received is not received for producing and/or selling any product, by-product or for rendering any service for carrying on the business. In our opinion, carbon credit is entitlement or accretion of capital and hence income earned on sale of these credits is capital receipt. For this proposition, we place reliance on the judgement of the Supreme Court in the case of CIT vs. Maheshwari Devi Jute Mills Ltd. (57 ITR 36) wherein held that transfer of surplus loom hours to other mill out of those allotted to the assessee under an agreement for control of production was capital receipt and not income. Being so, the consideration received by the assessee is similar to consideration received by transferring of loom hours. The Supreme Court considered this fact and observed that taxability of payment received for sale of loom hours by the assessee is on account of exploitation of capital asset and it is capital receipt and not an income. Similarly, in the present case*

*the assessee transferred the carbon credits like loom hours to some other concerns for certain consideration. Therefore, the receipt of such consideration cannot be considered as business income and it is a capital receipt. Accordingly, we are of the opinion that the consideration received on account of carbon credits cannot be considered as income as taxable in the assessment year under consideration. Carbon credit is not an offshoot of business but an offshoot of environmental concerns. No asset is 17 ITA No.6693/Del/2018 SRF Ltd. vs. ACIT generated in the course of business but it is generated due to environmental concerns. Credit for reducing carbon emission or greenhouse effect can be transferred to another party in need of reduction of carbon emission. It does not increase profit in any manner and does not need any expenses. It is a nature of entitlement to reduce carbon emission, however, there is no cost of acquisition or cost of production to get this entitlement. Carbon credit is not in the nature of profit or in the nature of income.”*

*“25. Further, as per guidance note on accounting for Self-generated Certified Emission Reductions (CERs) issued by the Institute of Chartered Accountants of India (ICAI) in June, 2009 states that CERs should be recognised in books when those are created by UNFCCC and/or unconditionally available to the generating entity. CERs are inventories of the generating entities as they are generated and held for the purpose of sale in ordinary course. Even though CERs are intangible assets those should be accounted as per AS-2 (Valuation of inventories) at a cost or market price, whichever is lower. Since CERs are recognised as inventories, the generating assessee should apply AS-9 to recognise revenue in respect of sale of CERs.”*

*26. Thus, sale of carbon credits is to be considered as capital receipt. This ground is allowed.”*

*5.1 The above order of the Hyderabad Bench has been confirmed by the Hon'ble High Court of Andhara Pradesh. Next, the judgment of Hon'ble High Court of Gujarat in case of Gujarat Flourochemicals Ltd. [ITA Nos. 11/2019 & 28/2019], wherein the facts as noted by the Tribunal are similar with the facts of the assessee, has held the issue in favour of assessee. Undoubtedly, the facts of said case are similar to*

*the case of the assessee which goes a long way to support the claim of the assessee.*

*5.2 The coordinate bench in case of Malana Power Co. Ltd. [ITA Nos. 2281/Del/2013, 1550/Del/2015 & 3957/Del/2015] while adjudicating the additional ground of carbon credits held as under:*

*“5. We have heard the rival submissions in respect of the assessee’s plea for admission of additional grounds and it is our considered opinion that the additional grounds raise a purely legal issue, the facts of which are already available on record. It is well settled that legal ground can be raised any time as per the ratio laid down by the Hon’ble Supreme Court in the case of NTPCLtd. Vs CIT reported in 229 ITR 383 (SC), therefore, these are admitted.”*

*“6. Coming to the merits of the additional grounds of appeal raised by the assessee, we find that this issue is covered in favour of the assessee by the judgment of the Hon’ble Allahabad High Court in the case of Pr. Commissioner of Income Tax vs. L.H. Sugar Factory Pvt. Ltd. reported in 392 ITR 568 (All.) wherein the Hon’ble Allahabad High Court had held that income from sale of carbon credits/profits from sale of carbon credits is capital in nature. We also find that ITAT Bangalore Bench in the case of Subhash Kabini Power Corpn. Ltd. vs. CIT reported in (2015) 37 ITR (T)106 (Bang .Trib.) had held that once the Assessing Officer had allowed the assessee’s claim of deduction u/s 80-IA in respect of income derived from sale of carbon credits, such order was not amendable u/s 263 of the Act. This order of ITAT, Bangalore Bench was also upheld by the Hon’ble Karnataka High Court.”*

*“6.1 Further, ITAT Hyderabad Bench in the case of CIT Vs. My Home Power Ltd. Hyderabad in ITA No. 1114/Hyd/2009 held that carbon credit receipts are capital in nature. This order of ITAT Hyderabad Bench was subsequently upheld by the Hon’ble Andhra Pradesh High Court in 365 ITR 82.”*

*“6.2 Accordingly, respectfully following the ratio of the settled judicial precedent as aforementioned, we allow the additional grounds raised by the assessee and hold that the income from sale of carbon credits is capital in nature.”*

*5.3 Coming to the judgments relied upon by the AO and the Ld. CIT(A) and which have been further relied by the Ld. DR, we are of opinion that*

*such cases do not support the case of revenue. As pointed out by the Ld. AR, the order of the Cochin Bench of the Tribunal in the case of Apollo Tyres Ltd. {[2014] 47 taxmann.com 416 (Cochin Trib.)} had already been analyzed by the Hon'ble Allahabad High Court in the case of L.H. Sugar Factory Pvt. Ltd. (supra) which held it 'not to be good in law'. The other order of the ITAT Ahmedabad Bench in the case of Kalpataru Power Transmission Ltd. {[2016] 68 taxmann.com 237 (Ahm. Trib.)} has been overruled by the later judgment of same bench of Ahmedabad Bench of the Tribunal in the same case of Kalpataru Power Transmission Ltd. [2019-TIOL-1424-ITAT-AHM]. In view of the fact that case laws relied upon by the revenue have already been overruled by higher court or by the same court in later judgment, we are not inclined to consider those judgments while adjudicating the issue under consideration.*

*5.4 We also borrow some reasoning from the fact that Ministry of Finance has inserted a specific provision in form of section 115BBG in the Act which is effective from 1st April, 2018 and will accordingly apply from assessment year 2018-19 and subsequent years. The rate of taxation provided in said section is 10% (in addition to applicable surcharge and education cess). This also corroborates the case of the assessee that CERs are not regular business receipts arising from business of the assessee and this fact has also been recognized by the Government and, therefore, need arose to bring a special provision under the Act and that too at concessional rate of tax. Further, in any case, in view of amendment being applicable from assessment year 2018-19, the taxability in year concerned, which is AY 2006-07, is not governed by said provisions and hence the taxability of carbon credits need to be decided in light of extant judicial position.”*

5.1 In the light of aforesaid, the Bench is inclined to decide the ground no. 1 to 3 in favour of the assessee

6. In regard to ground no. 4, again the assessee's own case in ITA No. 6693/Del/2018 in para no. 6.4 to 6.6 it has been held :

*“6.4 It is a settled law that a capital receipt is not liable to tax under the Act unless it is specifically included in the definition of income u/s 2(24) of the Act and chargeable under any of the charging provisions of the Act. Once a particular receipt is treated as capital receipt, the same cannot be brought to tax in garb of 'minimum alternative tax' applicable on book profits computed u/s 115JB of the Act. The ratio of judgment delivered by the Hon'ble High Court of Calcutta in*

*case of Ankit Metal & Power Ltd. [2019] 109 taxmann 93 (Cal) is worth mentioning. In Para no. 27, the Hon'ble Court held that:*

*“27. In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy' is a 'capital receipt' and does not fall within the definition of 'Income' under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. In the case of AppolloTyres Ltd. (supra) the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under Section 115JB of the Income Tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under Section 115 JB of the Income Tax Act, 1961.”*

*6.5 Further ITAT, Lucknow Bench, in case of L.H. Sugar Factory Ltd. (ITA No. 717 & 418/LKW/2013 and others), held as under: -*

*“4. We have considered the rival submissions. We find that the issue indispute as per Ground No. 1 of appeal is regarding nature of receipt on account of sale of carbon credit and in the case of CIT Vs. My Home Power Ltd. (Supra) also, the dispute before Hon'ble Andhra Pradesh High Court was this as to whether the amount received by the assessee on transfer of carbon credit is capital receipt or Revenue receipt. It was held by Hon'ble Andhra Pradesh High Court in that case that carbon credit is not an offshoot of business but an offshoot of environmental concerns and no assets is generated in the course of business but it is generated due to environmental concerns and therefore, it was held that the Tribunal has correctly held that this is a capital receipt and it cannot be business receipt of income and in this manner, Hon'ble Andhra Pradesh High Court has upheld the Tribunal's order in that case. The dispute in the present case is also regarding nature of receipt on account of transfer of carbon credit. Ld. DR of the Revenue could not*

*point out any difference in facts in the present case and in the case of CIT Vs. My Home Power Ltd. (Supra) and therefore, respectfully following this judgment of Hon'ble Andhra Pradesh High Court, we decline to interfere in the order of Ld. CIT(A) on this issue. Accordingly, Ground No.1 of the Revenue is rejected."*

6.6 We, therefore, respectfully following the aforesaid ratio of Hon'ble High Court hold that Carbon credits being the capital receipts cannot be brought to tax as book profits and are, thus, liable to be excluded from the computation of book profits u/s 115JB. The additional ground of appeal no.4 of the assessee is thus allowed.

6.1 Accordingly, ground no. 4 is also decided in favour of assessee.

7. As a consequence of above determination of ground in favour of assessee, the appeal succeeds, **the same stands allowed.**

**Order pronounced in the open court on 23<sup>rd</sup> January, 2023.**

**Sd/-  
(N.K.BILLAIYA)  
ACCOUNTANT MEMBER**

*Date:- 23 .01.2023*

*\*Binita, SR.P.S\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**Sd/-  
(ANUBHAV SHARMA)  
JUDICIAL MEMBER**

ASSISTANT REGISTRAR  
ITAT, NEW DELHI