

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

ITA No. 3517/Mum/2017

(A.Y: 2008-09)

ACIT – 3(1)(2), Room No. 607, 6 <sup>th</sup> Floor Aayakar Bhavan, Mumbai – 400020.	Vs.	M/s Hikal Ltd 717/718, Maker Chambers V, Nariman Point, Mumbai – 400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACH0383A		
Appellant	..	Respondent

Appellant by :	Smt .Madhumalti Gosh.CIT DR
Respondent by :	Sri.Sanjay Parikh.AR

Date of Hearing	16.11.2022
Date of Pronouncement	25.01.2023

आदेश / O R D E R

**PER PAVAN KUMAR GADALE JM:**

The revenue has filed the appeal against the order of the Commissioner of Income Tax (Appeals)-8, Mumbai, passed u/s 154 and 250 of the Act. The revenue has raised the following grounds of appeal:

- 1. "Whether on the facts and circumstances of the case and in law, the ld.CIT(A) has erred in deleting the addition of Rs. 15,23,15,159/- to the book profit u/s 115JB of the I.T. Act, 1961 on account of notional & Unrealized income without appreciating the facts that the said income had been added to the book profit by the*

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*assessee itself and the deduction/adjustment to book profit allowed does not fulfill the conditions laid down in explanation 1 of section 115JB-Apollo Tyre Ltd. Vs CIT (SC), 255 ITR 273.*

*2. Whether on the facts and circumstances of the case and in law, the ld.CIT(A) has erred in deleting the addition of Rs. 15,23,15,159/- to the book profit u/s 115JB of the I.T. Act, 1961 on account of notional & unrealized income without appreciating the facts that assessing officer rectified the mistake apparent from record as assessee is not entitled to reduction of such credits in P&L account for computing book profit u/s 115JB. There is no decision which allows such adjustment as claimed by the assessee. Hence, it cannot be said that the issue is debatable.*

*3. The appellant prays that the order of CIT(A) on the above ground be set aside and that of the assessing officer be restored. 4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.*

2. The brief facts of the case are that the assessee company is engaged in the business of manufacturing of organic chemicals, intermediates, pharmaceuticals and bulk drugs. The assessee has filed the return of income for the A.Y 2008-09 electronically on 24.09.2008 disclosing a total income of Rs.Nil after claiming deduction u/sec10B of the Act and the return of income was processed u/s 143(1) of the Act. Subsequently the case was selected for scrutiny under

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CASS and the assessee has filed the revised return of income. Subsequently the notice u/s 143(2) of the Act was issued. In compliance to notice, the Ld. AR of the assessee appeared from time to time and submitted the details and the case was discussed. The Assessing Officer (AO) found that the assessee company has Non-EOU plants and EOU plants, further the AO observed that the assessee earned dividend income of Rs.19,59,039/- and claimed exemption u/s 10(34) of the Act. The assessee was called to explain the reasons for non disallowance of any expenditure incurred for earning dividend income. In compliance, the assessee has filed submissions on 3-11-2010 referred at Para 4.3 of the order explaining that the assessee has made an investment of Rs. 15.05 Cr in F.Y 2007-08 in Acoris Research Ltd, a 100% subsidiary of Hikal Ltd, since the investment was made out of internal cash accruals during the year and therefore there was no necessity of disallowance of expenditure. Whereas the AO was not satisfied with the explanations and worked out the disallowance u/s 14A r.w.r 8D of Rs. 1,65,74,240/-.

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3. On the second disputed issue, the AO found that the assessee has incurred losses in non EOU plants and has gained profit in EOU plants from the business operations and the trend is consistent from the last three years. The AO has dealt on the computation and profit and loss account of the assessee company in allocating certain Head Quarter expenses to all the plants. The assessee has given bifurcation of Head Office expenses for EOU and non EOU. Further the assessee has made this bifurcation based on the man power cost, turnover and fixed assets of each unit. The assessee also filed the information in respect of allocation expenses referred at Para 5.3 of the assessment order. The AO was not satisfied with the ratio of the allocation of Head Office expenses and the assessee has allocated disproportionate expenses to the EOU units and made disallowance of expenses of Rs. 19,00,000/- dealt at page 8 of the order. Similarly the AO found that the assessee has allocated the R & D expenses to different units and the assessee has not followed some uniformity code criteria. The assessee has submitted the details of R & D expenditure and basis of

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allocation. Whereas the AO was not satisfied with the allocation and has made the rejection of allocation basis of turnover ratio and has dealt on the facts with respect to claims, allocation and judicial decisions and made addition of proportionate R & D expenses as per Annexure A at Para 5.12 of the order. Further considering the notional income and disallowance u/s 14A of the Act and interest on deposits and worked out the income and deduction u/s 10B of the Act and also worked out the book profits u/s 115JB of the Act of Rs.57,58,57,628/- and passed the order u/s 143(3) of the Act dated 25.11.2010.

4. Subsequently the assessee has filed a rectification petition and the AO has passed the order u/s 154 of the Act on 23.10.2011 after reducing the unrealized the notional gain of Rs.15,08,27,712/- in computing the Book profits U/sec115JB of the Act. Subsequently the AO realized that there is a mistake apparent in the order dated 23-10-2011 and has issued notice u/s 154 of the Act whereby it was mentioned that the amount of Rs. 15,23,18,159/- was wrongly allowed as a deduction from computation of

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book profits u/s 115JB of the Act and the assessee has filed explanations on 24.01.2015. But the AO did not accept the contentions and has computed the book profits u/s 115JB of the Act as per the original assessment order and passed the order u/s 154 dated 18.03.2015.

5. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). Whereas the CIT(A) considered the grounds of appeal, submissions of the assessee and findings of the AO and assessment record and relied on the judicial decisions and finally granted relief to the assessee and allowed the assessee appeal. Aggrieved by the order of the CIT(A), the revenue has filed an appeal before the Hon'ble Tribunal.

6. At the time of hearing, the Ld. DR submitted that CIT(A) has erred in granting relief to the assessee overlooking the notional gain/unrealized profit should not be deducted from book profit and there is no provision under the act and relied on the order of the AO and subsequent report of the A.O and prayed for allowing the appeal. Contra, the Ld. AR submitted that the assessee has complied with the notices u/s

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154 of the Act and has rightly claimed the deduction in the course of hearing and relied on the judicial decisions and substantiated the submissions with the judicial decisions and paper book and supported the order of the CIT(A).

7. We heard the rival submission and perused the material on record. The sole crux of the disputed issue as envisaged by the Ld. DR that the CIT(A) has erred in deleting the addition on account of notional unrealized income from the book profit u/sec115JB of the Act without realizing that the transaction is forming part of the profit and loss account. The Ld. AR emphasized on the findings of the CIT(A) and substantiated the submissions on disputed issues as unde:r

1). "that the AO has kept quiet regarding the fate of notice dated 2/11/2012 in the letter dated 28.9.2022. Accordingly, it can be presumed that the AO having considered Respondent's reply dated 28th November, 2012 filed on the 3rd December, 2012 (Refer pages 56 to 64 of paper book) had dropped the rectification proceedings initiated against the assessee. This fact is corroborated by the fact that the notice dated

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2/11/2012 was issued by the Assistant Commissioner of Income Tax and was bearing no. ACIT/Cr.3(1)/154/2012-13 (Refer page 55 of paper book). Whereas the notice dated 26.12.2014 was issued by the Deputy Commissioner of Income Tax-3(1)(2) and was bearing no. DCIT Cir. 3(1)(2)/Notice u/s. 154/2014-15 (Refer page 65 of paper book).

2) The AO having dropped the rectification proceedings initiated against the assessee, fresh rectification proceedings on the very same issue could not have been initiated by the AO. There has to be finality in tax proceedings. Hence, the Order u/s. 154 dated 18/3/2015 is bad in law.

3) Without prejudice to the above, the AO while completing the assessment u/s. 143(3) had vide paragraph 6.5 stated that the notional gain or income of Rs. 18,63,74,462/- could not form part of total income and hence was not considered as income of Respondent (Refer Para 6.5 on page 46 of paper book). As the same could not form part of Total Income, the same could also not form part of income computed u/s. 115JB. Accordingly, the AO had rightly rectified the order u/s. 143(3) vide order dated 23.03.2011

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u/s. 154 and granted relief to Respondent (Refer para 54 of paper book).

4) In this regard, it is submitted that clause (45) to section 2 defines the term "total income" to mean the total amount of income referred to in section 5, computed in the manner laid down in this Act (which includes the provisions of section 115JB).

5) As there is no mistake in this order dated 23.3.2011, the question of any rectification to add the notional gain to the "book profits" of Respondent does not arise.

6) Further, as the order u/s. 154 only rectifies the mistake in order u/s. 154, the question of invocation of Explanation 1 to section 115JB or the decision of the hon'ble Supreme Court in Apollo Tyre Limited 255 ITR 273 at the time of rectification of order, did not arise. Hence, the CIT(A's) order needs to be confirmed.

7) Without prejudice, the AO who had assessed the income of Respondent had allowed deduction of notional gain vide order u/s. 154. The ACIT had vide notice u/s. 154 dated 2.11.2012 sought to revise the order u/s. 154 dated 23.3.2011 (Refer page 55 of paper book). After considering the reply of Respondent

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(Refer pages 56 to 64 of paper book), ACIT has dropped the rectification proceedings.

- 8) The AO issuing a fresh notice dated 26.12.2014 leads to once again revisiting the taxability of notional gain to the book profit u/s. 115JB. This itself shows that the issue is debatable i.e. (a) a view taken originally by AO assessing income of Respondent, (b) ACIT having issued notice u/s. 154 and having not taken any action after receiving reply from Respondent and (c) the AO passing the order under appeal withdrawing the deduction allowed by the AO assessing Respondent. No proceedings u/s. 154 can be taken where issue is debatable. Reliance in this regard is placed on the following decisions: a) T. S. Balaram, ITO v. Volkart Bros. (1971) 82 ITR 50 (SC).  
b) CIT v. Nathpa Khakri Joint Venture (2013) 358 ITR 233 (Bom) at page 236  
c) Lakshmi Card Clothing Mfg. Co. (P.) Ltd. v. DCIT (2018) 98 taxmann.com 445 (Mad)  
d) Sandeep Bhargava (HUF) v. CIT (2020) 83 ITR (Trib.) 217 (Chd.)
- 9) Hence, even on this count, CIT(A's) order needs to be confirmed. Respondent had vide reply to notice

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u/s. 154 dated 26.12.2014 had informed the Deputy Commissioner of Income Tax that a notice u/s. 154 was issued on 2/11/2012 to which the Respondent had filed reply vide letter dated 28.11.2012, which was accepted by the AO and accordingly the proceedings were not given effect (Refer para 1 on page 66 of paper book). It was also contended that the fresh notice u/s. 154 was to revisit the very same issue which was concluded. However, the AO's order u/s. 154 is totally silent regarding this aspect.

10) Without prejudice, the original AO having held vide order u/s. 143(3) that the notional gain of Rs. 18,63,74,462/- was to be excluded while computing the income of Respondent, the issue of notice u/s. 154 amounts to review of order of original AO, which is not permissible u/s. 154. Reliance in this regard is placed on CIT v. O. RM. M. SM. SV. Sevugan (1948) 16 ITR 59,66, (Mad) and DCIT v. Haryana Warehousing Corporation (2020) 188 DTR 360 (Trib.)(Chd.). Hence, even on this count, the order of CIT(A) needs to be confirmed.

11) Without prejudice, as the notional gain has been held by the AO as not being "income", the same

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cannot even form part of "book profits" for the purposes of section 115JB. Reliance in this regard is placed on the following decisions: a) Pr. CIT v. Ankit Metal and Power Ltd. (2019) 416 ITR 591 (Cal)-decision of hon'ble Supreme Court in Apollo Tyres Ltd. v. CIT (2002) 255 ITR 273 (SC) has been considered in this decision.

b) M/s. Batliboi Limited v. DCIT [ITA No. 6228/M/2017; Order dated 21/5/2021]

Accordingly, even on this count, the order u/s. 154 is bad in law.

12) Without prejudice, as per Board Circular no. 14(XL-6) dated 12-5-1955, the Board has directed as under (Refer 349 ITR 410 (Bom)):

"3. Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax- payer in every reasonable way, particularly in the matter of claiming and securing reliefs in this regard the officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the Department for it

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would inspire confidence in him that he may be sure of getting a square deal from the Department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should-

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other:  
(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs."

13) As the AO had in the order u/s. 143(3) held that notional income was not taxable, AO was right in reducing it while computing income under u/s. 115JB. Hence, the subsequent order u/s. 154 withdrawing the said claim was not justified. Hence, the order of CIT(A) may be upheld."

8. The Ld.AR relied on the decision of Hon'ble High Court of Calcutta in the case of Pr. CIT Vs. Ankit Metal and Power Ltd (2019) 416 ITR 591 (Cal) held as under:

*The law is settled that the nature of incentives or subsidies granted by the Government under any scheme*

*to any enterprise would totally depend upon the salient features of such scheme. The purpose for which the incentive or subsidy is given under the scheme is the determining factor to lay down the nature of the incentive or subsidy. If an incentive or subsidy is given as a general assistance to the assessee to carry on his business or trade, it would be an operational incentive and thus a trading receipt in the hands of the assessee. However if the object of the subsidy, irrespective of its source, is to enable the assessee to acquire new plant and machinery or for further expansion of its manufacturing capacity or for setting up a new unit, the entire subsidy must be held to be a capital receipt. The incentives or subsidies, depending upon the purpose for which they are granted, fall under two categories, namely: (a) operational incentives or subsidies which are given to the assessee to carry on his business or trade, and (b) fixed capital incentives or subsidies which are given to the assessee to set up a new unit or to expand its existing unit.*

*The assessee was a manufacturer. For the assessment year 2010-11, it disclosed "nil" income under the normal computation and an amount as book profits under section 115JB of the Income-tax Act, 1961. The assessee made investment in a sponge iron plant and mega project which made the assessee eligible for subsidy under the West Bengal Incentive Scheme, 2000 and the West Bengal Incentive to Power Intensive Industries Scheme, 2005. During the course of the assessment proceedings, the assessee filed a revised computation of income under the normal provisions and section 115JB in order to claim deduction of the sums of interest subsidy and power subsidy amounts received by it under those schemes, as capital receipts, which it had treated as revenue receipts in the original return. The Assessing Officer however*

*treated the subsidies as revenue receipts and brought them to tax. The Tribunal on consideration of the factual and legal position and scope of the schemes in question, held that the "interest subsidy" and "power subsidies" were capital receipts and would be excluded while computing the book profits under section 115JB. On appeal:*

*Held, dismissing the appeal, (i) that according to the West Bengal Incentive Scheme, 2000 and the West Bengal Incentive to Power Intensive Industries Scheme, 2005 the subsidies were granted with the sole intention of setting up new industry and attracting private investment in the State W*

*est Bengal in the specified areas which were industrially backward and hence the subsidies were of the nature of non-taxable capital receipts. Thus according to the "purpose test" laid out by the Supreme Court and the High Courts the subsidy should be treated as a capital receipt in spite of the fact that the computation of "power subsidy" was based on the power consumed by the assessee. Once the purpose of a subsidy was established, the mode of computation was not relevant. The mode of computation of form of subsidy was irrelevant. The mode of giving incentive was reimbursement of energy charges. The nature of subsidy depended on the purpose for which it was given. The entire reason behind receiving the subsidies was for setting up of a plant in the backward region. Therefore, the incentive subsidies of interest subsidy and power subsidy received by the assessee were "capital receipts" and not "income" liable to be taxed in the assessment year 2010-11. The amendment to the definition of income under section 2(24) wherein sub-clause (xviii) has been inserted including "subsidy" for the first time by the Finance Act, 2015 with effect from April, 2016, i. e.,*

*assessment year 2016- 17 has prospective effect and has no effect on the law on the subject applicable to the assessment years in question.*

*CIT v. PONNI SUGARS AND CHEMICALS LTD. [2008] 306 ITR 392 (SC) and CIT v. RASOI LTD. [2011] 335 ITR 438 (Cal) followed.*

*(ii) That where a receipt was not in the nature of income it could not be included in the book profits for the purpose of computation under section 115JB. Therefore, the interest and the power subsidies received by the assessee under the Government schemes would have to be excluded while computing the book profits under section 115JB, when they were capital receipts and did not fall within the definition of income under section 2(24).*

*APOLLO TYRES LTD. v. CIT [2002] 255 ITR 273 (SC) distinguished.*

*(iii) That since the time to file the revised return had lapsed, for claiming that the incentive subsidies in question be treated as capital receipts instead of revenue receipts as claimed in the original return, following the decision in CIT v. Britannia Industries Ltd. [2017] 396 ITR 677 (Cal) as well as the view taken that the subsidies were capital receipts and not income liable to tax, the Tribunal in exercise of its power under section 254 was justified in allowing this claim though no revised return under section 139(5) was filed before the Assessing Officer.*

*CIT v. BRITANNIA INDUSTRIES LTD. [2017] 396 ITR 677 (Cal) followed. GOETZE (INDIA) LTD. v. CIT [2006] 284 ITR 323 (SC) distinguished.*

*Cases referred to:*

*Apollo Tyres Ltd. v. CIT [2002] 255 ITR 273 (SC) (paras 12,30)*

*CIT v. Britannia Industries Ltd. [2017] 396 ITR 677 (Cal) (paras 23, 33)*  
*CIT v. Chaphalkar Brothers [2018] 400 ITR 279 (SC) (para 15)*  
*CIT v. Gloster Jute Mills Ltd. [2019] 416 ITR 458 (Cal) (para 15)* *CIT v. Keventer Agro Ltd. [2019] 416 ITR 482 (Cal) (para 15)*  
*CIT v. Ponni Sugars and Chemicals Ltd. [2008] 306 ITR 392 (SC) (paras 15, 24, 25, 26, 28)*  
*CIT v. Rasoi Ltd. [2011] 335 ITR 438 (Cal) (para 15, 28)*  
*CIT v. Shree Balaji Alloys [2016] 7 ITR-OL 50 (SC) (para 15)*  
*CIT (Principal) v. Shyam Steel Industries Ltd. [2018] 12 ITR-OL 342 (Cal) (para 15)*  
*Goetze (India) Ltd. v. CIT [2006] 284 ITR 323 (SC) (paras 13, 31)*  
*Sahney Steel and Press Works Ltd. v. CIT [1997] 228 ITR 253 (SC) (paras 11, 24, 25, 26, 28)*  
*Shree Balaji Alloys v. CIT [2011] 333 ITR 335 (J&K) (para 15)*

9. Similarly the Ld.AR has also relied on the decision of the Honble Tribunal in the case of M/s Baltiboi Ltd Vs. DCIT ITA no 6228/M/2017 dated 21-5-2021 has observed at page 14 Para 7.3 read as under:

*7.3. We have heard rival submissions and perused the materials available on record. We find that the decision relied upon by the ld AR was rendered in the context of section 143(1A) of the Act. The provisions of Section 115JB of the Act start with a non-obstante clause and is a self contained code by itself. By giving due weightage to the intention behind introduction of provisions of section 115J, 115JA and 115JB of the Act, we are not inclined to agree to the contentions of the ld AR. We find*

*that this issue has already been addressed by this Tribunal elaborately in assessee"s own case for the Asst Year 2011-12 referred to supra in para 4.3 thereon. It is reproduced for the sake of convenience:-*

*"4.3. We find that if the argument advanced by the ld. AR is to be accepted, then the entire intention behind introduction of provisions of Section 115J, 115JA, 115JB of the Act gets completely defeated and becomes redundant, as these provisions were admittedly introduced in the statute to collect tax as per their book profits when they had declared loss or liable to pay zero tax under the normal computation of income. Moreover all the companies in India are governed by the very same provisions wherein if they suffered nil taxes or zero taxes under the normal provisions of the Act or the tax payable under normal provisions is less than tax @18.5% of book profits, then the provisions of Section 115JB of the Act would be applicable to those companies and assessee company alone cannot be singled out or isolated from the same. Moreover, we have also seen that these provisions are in force from the year 1987 onwards commencing from Section 115J which had gradually migrated to Section 115JB of the Act without digressing from the true intention behind introduction of these provisions in the Act. Hence, the primary argument that Section 115JB of the Act is not applicable to the assessee company in the instant case is hereby rejected. Accordingly, the ground No.1 raised by the assessee is dismissed."*

*7.4. We do not deem it fit to interfere in the said judgement of this Tribunal at this stage. Accordingly, the original ground No.3 raised by the assessee is dismissed.*

10. Whereas, the Ld.DR could not controvert the findings of the CIT(A) with any new evidence or

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information to take a different view. We find that the CIT(A) relied on the findings of the A.O. Notices issued, provisions of the Act, assessee's submissions and catena of judicial decisions and has directed the assessing officer to allow deduction on account of notional unrealized income after verifying the actual amounts claimed by the assessee and passed a reasoned order. Accordingly, we are not inclined to interfere with the order of the CIT(A) and uphold the same and dismiss the grounds of appeal of the revenue.

11. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 25.01.2023.

Sd/-

(PRASHANT MAHARISHI)  
**ACCOUNTANT MEMBER**

Sd/-

(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated .01.2023

KRK, PS

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)

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4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

सत्यापित प्रति //True Copy//

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( Asst. Registrar)  
ITAT, Mumbai