

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

BEFORE SHRI JASON P. BOAZ ACCOUNTANT MEMBER
AND SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No. 5616/MUM/2013
(Assessment Year : 2011-12)

Asstt. Commissioner of Income Tax,
Cen. Cir.18 & 19,
Room |No.401, 4th Floor,
Aaykar Bhavan, MK Road,
Mumbai -20.
Vs.

... Appellant

M/s. J.S.W. Ispat Steel Ltd.,
(Formerly known as M/s. Ispat Industries Ltd.)
Casablanca, Plot No.45,
Sector-11, CBD Belapur,
Navi Mumbai.
PAN: AAACI 6293E

.... Respondent

Appellant by : Ms. Savita Bundas
Respondent by : Shri Rakesh Joshi

Date of hearing : 17/11/2015
Date of pronouncement : 20/11/2015

ORDER

PER JASON P. BOAZ, A.M:

This appeal by the Revenue is directed against the order of the
CIT(A)-39, Mumbai dated 28/6/2013 for the assessment year 2011-12.

2. The facts of the case briefly are as under:-

2.1 The assessee is a company engaged in the production of sponge iron, galvanized sheets, cold rolled coils and hot rolled coils. A search and seizure action under section 132 of the Income Tax Act, 1961 (in short 'the Act') was conducted in the group of concerns on 30/11/2010. For the assessment year 2011-12, the assessee filed the return of income on 29/9/2011 declaring loss of Rs.10,98,47,11,129/-. The assessee subsequently filed revised return of income on 29/3/2012 declaring loss of Rs.10,90,99,86,534/- and again on 28/9/2012 declaring loss of Rs.11,07,08,83,371/-, which included unabsorbed depreciation of Rs.5,04,44,93,834/- and business loss of Rs.6,00,63,89,537/-. The assessment was completed under section 143(3) of the Act vide order dated 28/2/2013, wherein the income of the assessee was estimated at Rs.91,00,00,000/-(net of losses) as the Assessing Officer was of the view that the books of account are unreliable and the advance tax payment of Rs.29.00 crores translates into such income. The Assessing Officer also did not allow the assessee's claim for carry forward and set off of earlier years as well as current years losses and unabsorbed depreciation.

2.2 Aggrieved by the order of assessment dated 28/2/2013 for assessment year 2011-12, the assessee preferred an appeal before the CIT(A)-39, Mumbai. The Ld. CIT(A) disposed of the assessee's appeal vide order dated 28/6/2013, allowing the assessee partial relief.

3. Revenue, being aggrieved by the order of the CIT(A)-39, Mumbai has preferred this appeal raising the following grounds:-

1."On the facts and in the circumstances of the case, the Ld.CIT(A) erred in disallowing the addition made by the AO on the basis of advance tax & by

investigating six points i.e. fluctuation in GP ratio, erratic yield ratio from sponge and plant, difference in commission declared in 153A return viz a vis details given to service tax authority, power and fuel consumption vis a vis total turnover and comparison of GP ration of the assessee with other companies & determined the total income at Rs.91,00,00,000/- against the total loss of Rs.11,07,08,83,371/-“

2. 'On the facts and circumstances of the case, the Ld.CIT(A) failed to appreciate the fact mentioned by the AO in his assessment order and directed the AO to allow the carry forward and set off of unabsorbed business loss and depreciation of earlier years & apply the relevant provisions of the Act for the purpose determining the correct figure of loss.”

3. The Appellant craves to leave to add, to amend and/or to alter any of the grounds of appeal, if need be.

4. The appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-39, Mumbai may be set aside and that of the Assessing Officer be restored.”

4. The grounds raised at Sl.Nos. 3 & 4 are general in nature and, therefore, no adjudication is called for thereon.

5. Ground No.1 – Estimation of Income at Rs.91.00 crores

5.1 In this ground Revenue contends that the Ld. CIT(A) erred in disallowing the addition on account of estimation of income of Rs.91.00 crores made by the Assessing Officer on the basis of advance tax and the following six points i.e. (i) fluctuation in G.P ratio; (ii) Erratic yield from sponge iron plant; (iii) difference in commission declared in 153A return vis-à-vis details given to Service Tax authority; (iv) power and fuel consumption vis-à-vis total turnover; (v) comparison of G.P. ratio of the appellant with other companies and (vi) huge amount of advance tax of Rs.29.00 crores paid in March, 2011. The Ld. DR was heard in support of the ground raised and placed reliance on the order of the Assessing Officer on this issue.

5.2 Per contra, the Ld. AR supported the impugned order of the Ld. CIT(A) on this issue. The Ld. AR reiterated the submissions put up before the Ld.CIT(A) at para 5 to 14 of the impugned order submitting that each of the seven observations of the Assessing Officer have been rebutted in detail. It was submitted that the order of the Ld. CIT(A) deleting the estimation of the assessee's total income at Rs.91.00 crores based on advance tax payment of Rs.29.90 crores is in order and is to be upheld. In this regard reliance was placed on the order of the Hon'ble Apex Court in the case of ACIT vs. A.R. Enterprises reported in (2013) 350 ITR 489(SC), wherein it has been held that it would be difficult to accept the plea that the payment of advance tax is tantamount to the disclosure of income or that it indicates the intention of the assessee to disclose commensurate income in the return of income.

5.3.1 We have heard the rival contentions and perused the material on record. According to the Assessing Officer, in view of the fact that (i) the assessee paid advance tax of Rs.29.90 crores in March, 2011 and subsequently declared loss of Rs.11,07,08,83,371/-, the book results of the assessee were not reliable and the other discrepancies such (ii) erratic yield from sponge iron plant;(iii) difference in commission declared in return of income vis-à-vis details given to service tax authorities;(iv) power and fuel consumption vis-à-vis total turnover; (v) comparison of G.P. rates of the assessee with other companies, etc. called for rejection of the assessee's books of account and estimation of income at Rs.91.00 crores on the basis of advance tax payments.

5.3.2 It is seen that the Ld. CIT(A) after examining the Assessing Officer's findings and the submissions of the assessee was of the view that if material defects or anomalies were found in the assessee's books, it would be a basis for estimation of income. The Ld. CIT(A) observed that, however, in the case on hand, the estimation of the assessee's income by the Assessing Officer based on advance tax/payments was not called for, when the Assessing Officer has failed to point out defects in the assessee's audited books of accounts. The Ld. CIT(A) further observed that in the case on hand, no suppression of turnover has been established and that low G.P by itself is not a valid reason for rejecting the book results and estimation of income. At paras 9.3 and 9.4 of the impugned order, the Ld. CIT(A) has held as under:-

"9.3 The A.O. thus estimated the total income for the impugned year solely on the basis of the advance tax paid. What is required to be examined is whether the estimate based on the advance tax paid can be equated with the total taxable income of a previous year. A low G.P. by itself is certainly not a valid reason for rejecting the book results and estimation of income. Certainly if there are material defects, the income can be estimated but it has to be on a sound basis. Certainly, if there are anomalies noticed in the books as maintained it calls for addition/disallowances, but it would not be fair to estimate the income solely on the basis of the advance tax remitted. It is to be agreed that in the present case, no suppression of receipts have been pointed out. Though certainly the advance tax is an indication of the taxable profits of the company, the estimation made for the purpose of advance tax is at best only an estimate and cannot partake of the character of total taxable income of a given year. The fact that in this case there was a search action and that a declaration was made cannot be lost sight of. When a declaration is made consequent to a search, taxes commensurate with the declaration have to be remitted. This argument raised by the appellant, on the facts of this case, cannot be lost sight of.

9.4 Apart from pointing out certain anomalies, no major defects in the books of accounts maintained by the appellant have been pointed out by the A.O. It

is reckoned that the appellant is a widely held public company and that its accounts are subject to statutory audit .. The estimation of income is on the basis of payment of taxes, ignoring the audited annual accounts and the past years' affairs and without pointing out major defects in the books of accounts as maintained. The payment of taxes cannot be a basis for estimation of income. In fact in the present case income has been estimated at Rs. 91,00,00,000/- which is based on the income estimated for the purpose of advance tax remittance. As per the scheme of the Act the advance tax is paid on estimate of income and is not the final tax payment; there could be excess payment or short payment. In fact it is during the process of assessment that the A.O. has to correctly determine the assessable income and the taxes due. As per the provisions of sec. 209 which lays the method for computation of advance tax, it is stipulated that the assessee shall first estimate its current income and income tax there on has to be calculated. After the said estimation of current income in accordance with section 210, every person liable to advance tax shall pay advance tax on the current income calculated in the manner laid down in sec. 209. In other words, the "current income" which forms the basis for advance tax is an estimation and not the final total income. As per provisions of law advance tax is pre-assessment collection of taxes which is to be later adjusted towards the income tax levied on the total income as finally determined. An estimate by its very nature has an element of guess work and hence prone to be inaccurate. For the said reasons, it has to be held that the payment of taxes cannot be a basis for estimation of income. Therefore, I am unable to sustain the action of the A.O. in assessing the total income at Rs. 91 Crs. also ignoring the accumulated losses as determined in the earlier years as per returns of income filed."

5.3.2 Before us, Revenue has failed to contravene the finding of the Ld. CIT(A) in the impugned order that the Assessing Officer's estimation of the assessee's income, primarily on the basis of advance tax paid and rejection of books of account without finding any discrepancy or suppression of turnover, etc., is not sustainable. We concur with the view of the Ld. CIT(A) that it is difficult to accept the Revenue's plea that payment of advance tax is tantamount to disclosure of income by the assessee or that it can be the sole basis for estimation of the assessee's income. In this factual matrix of the case, we uphold the action of the Ld. CIT(A) in deleting the Assessing Officer's estimation of

the assessee's income at Rs.91.00 crores. Consequently, Ground No.1 of Revenue's appeal is dismissed.

6. Ground No.2 – Carry forward and set off of business loss and unabsorbed depreciation:

6.1 In this ground, Revenue contends that the Ld. CIT(A) erred in directing the Assessing Officer to allow carry forward and set off of brought forward business loss and unabsorbed depreciation of earlier years.

6.2 We have heard both the Ld.DR for the Revenue and the Ld. AR for the assessee. The facts that emanate from the record are that the Assessing Officer estimated the assessee's income at Rs.91.00 crores, net of losses. In these circumstances, as observed by the Ld. CIT(A), it is clearly evident that the Assessing Officer had not examined the assessee's claim for carry forward and set off of earlier year's business losses and unabsorbed depreciation. Revenue's contention that the Ld. CIT(A) had directed the Assessing Officer to allow the assessee's claim in this regard is factually incorrect. The Ld. CIT(A), in fact, has observed at para 9.4 of the impugned order that since the Assessing Officer had rejected the assessee's books of account summarily, he would not have examined the assessee's claim for carry forward and set off of business losses and unabsorbed losses of earlier years and, therefore, directed the Assessing Officer to examine the assessee's claim in accordance with law and also to dispose off the pending rectification applications, if any, in this regard. The Ld. AR of the assessee drew the attention of the Bench to the order giving effect to the impugned order

of the Ld. CIT(A) dated 31/03/2014 placed at page 85 and 86 of the assessee's Paper Book, wherein the Assessing Officer has examined and adjudicated on the assessee's claim for carry forward and set off of unabsorbed losses and depreciation. In the above factual matrix, we are of the opinion that there is no merit in this Ground No.2 raised by the Revenue and accordingly dismiss the same.

7. In the result, Revenue's appeal for assessment year 2011-12 is dismissed.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER
Mumbai, Dated 17/11/2015

Sd/-
(JASON P. BOAZ)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

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

//True Copy//

Vm, Sr. PS

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai