

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH, VISAKHAPATNAM**

**ITA No.280/Vizag/2010
Assessment Year: 2000-2001**

**M/s SUSI SEA FOODS PVT LTD
VISAKHAPATNAM
PAN NO:AADCS1206N**

Vs

**ASST COMMISSIONER OF INCOME TAX
CIRCLE-4(1), VISAKHAPATNAM**

Sunil Kumar Yadav, JM and B R Baskaran, AM

Dated: May 09, 2011

ORDER

Per: B R Baskaran:

The appeal of the assessee is directed against the order dated 29.01.2010 passed by learned CIT(A), Visakhapatnam and it relates to the assessment year 2000-01. According to the registry, there is a delay of 1 day in filing the appeal, where as according to the assessee there is a delay of five days in filing the present appeal. Having regard to the submissions made in the petition filed by the assessee seeking condonation of delay, we condone the delay and admit the appeal.

2. The issue urged before us relates to the computation of book profit under section 115JA of the Act, more particularly, the amount of deduction to be allowed against the clause (iii) of Explanation to sec. 115JA of the Act. Besides the above, the assessee is also contesting the interest charged under section 220(2) of the Act.

3. The facts relating to the issues are stated in brief. The assessee is a private limited company and since its total income for the year under consideration was less than 30% of the book profit, the deeming provisions of sec.115JA became applicable to the assessee for the year under consideration. As per Explanation to sec. 115JA, the "book profit" means the net profit as shown in the Profit and loss account for the relevant previous year prepared in accordance with sub section (2), as increased by items mentioned in Clause (a) to Clause (g) if any amount referred to in clauses (a) to (g) is debited to the Profit and Loss account and as reduced by clauses (i) to (ix) mentioned therein. There is no dispute with regard to the method of computation. The dispute is with regard to the determination of amount to be deducted as per clause (iii) of the Explanation. The said clause reads as under:

(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

Explanation.- For the purposes of this clause,-

(a) the loss shall not include depreciation.

(b) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is nil.

The assessee was having accumulated balance of loss to the extent of Rs.38,84,365/- as on 31.3.1999 in its books of account. The said accumulated loss is the cumulative figure of losses incurred and profit earned in the earlier years, i.e. it was having accumulated balance of loss up to 31.3.94. It made profits in the year ending 31.3.95, 31.3.98 and 31.3.99. It incurred losses in the intervening years, i.e. year ending 31.3.1996 and 31.3.97. The dispute arose between the assessee and the department with regard to the manner of adjustment of profit earned in the three years cited above. The assessee followed "First in First out" (FIFO) method for adjusting the profit, i.e. it adjusted the profit of a particular year against the loss of the earliest possible year. For example, the profit made for the year ending 31.3.95 was adjusted against the loss incurred for the year ending 31.3.88. In this way, the assessee bifurcated the accumulated loss as on 31.3.99 into business loss of Rs.28,56,756/- and depreciation loss of Rs.10,27,609/-. Accordingly, the assessee deducted Rs.10,27,609/-, being the lower of business loss and depreciation under clause (iii), referred (Supra).

3.1 It is pertinent to note that the assessee is before us in second round of proceedings. In the first round, the then Assessing Officer did not accept the computations made by the assessee. He observed that in respect of assessment year 1999-2000 the assessee made a profit of Rs.47,01,377/- and hence the provisions of sec.115JA were applicable for that year also. If the assessee's claim is accepted, then the lesser of two cumulative figures, i.e. Rs.10,27,609/- should be presumed to have been set off against the net profits available for the assessment year 1999-2000 and thus, for the succeeding year, i.e. the year under consideration, there would be no unabsorbed depreciation making it NIL. Hence the lower of unabsorbed loss or unabsorbed depreciation being Nil, the assessee is not entitled to deduct any amount under the said clause. Accordingly, the Assessing Officer rejected the claim of deduction of Rs.10,27,609/- in the first round of proceeding. The Learned CIT(A) also confirmed the order of Assessing Officer. The assessee carried the matter before the ITAT and contended that the unabsorbed loss as per books of account as on 31.3.99 has to be bifurcated into unabsorbed business loss or unabsorbed depreciation and for carrying out such bifurcation, no specific method has been prescribed in the Act. It was contended that the method of adjusting the profit earned in a particular year against the loss of earliest year is a rational and logical method. The SMC bench of the Tribunal considered the said argument of the assessee to be a novel one and accordingly deemed it fit to set aside the matter to the file of Assessing Officer in order to consider the said claim of the assessee.

3.2 The Assessing Officer, in the second round of proceeding, took support of the decision dated 24.1.2006 rendered by Learned CIT(A-II), Visakhapatnam in the case of M/s Radhika Vegetable Oils (P) Ltd in ITA Nos.47-48/R-4/VSP/04-05 for the assessment year 1998-99 and 1999-2000. In the above cited case, the Learned CIT(A) held that, in the absence of any specific provision in sec. 115JA with regard to the manner of set off of carry forward losses, the provisions of Income tax Act relating to carry forward and set off of losses would apply. He further held that as per the provisions of income tax Act, the profit of a year should be first set off

against the business loss and thereafter the unabsorbed depreciation would be set off.

3.3 Accordingly, the Assessing Officer adjusted the profits earned in the years ending 31.3.95, 31.3.98 and 31.3.99 against the business loss. While doing so, he also ignored losses of the years which are more than 8 years old as on 31.3.2000. In this process he arrived at the unabsorbed business loss at NIL figure and the unabsorbed depreciation at Rs.34,79,749/- . Accordingly he did not allow any deduction since lower of the two was NIL. The Assessing Officer also levied interest under section 220(2) of the Act. Aggrieved, the assessee carried the matter in appeal before Learned CIT(A), who affirmed the order of the Assessing Officer in respect of computation of book profit. However, she set aside the matter of charging of interest under section 220(2) of the Act to the file of Assessing Officer with a direction to verify the claim of the assessee. Aggrieved, the assessee is in appeal before us.

4. We have heard the rival contentions and carefully perused the record. It is now well settled proposition that the provisions of sec. 115JA is a complete code by itself and it, subject to sub. sec. (4), over rides all other provisions of the Income tax for the matters provided in that section. In this back ground, we shall address the dispute between the parties, i.e. the interpretation of clause (iii) to Explanation to Sec. 115JA extracted (Supra).

5. There cannot be any dispute that the manner of determination of "Net Profit" under accounting principles and the manner of determination of total income under Income tax Provisions are different. Under the companies Act, for accounting purposes, the loss of any year is not segregated into "Business loss" and "Depreciation loss". Only under the Income tax Act, the loss computed under the head "Profits and Gains of Business" is segregated into "Business Loss" and "*Depreciation Loss*". Since it is specifically provided in section 115JA that the loss shall not include depreciation, it becomes necessary to bifurcate the brought forward loss as per books of account into "*Unabsorbed business loss*" and "*Unabsorbed depreciation*".

6. Under Income tax Act, the business loss incurred in a particular year is allowed to be carried forward only for next succeeding eight years and thereafter the said loss should be ignored if it could not be adjusted against the profits earned within the period of succeeding 8 years. Further there is a restriction that the business loss can be adjusted against business profits only. However, under the accountancy principles, there is no such restriction, i.e. the loss can be carried forward for any number of years and it can be adjusted against the income from any source also. The loss incurred in a year cannot be ignored, i.e. it is not possible to omit past loss from the books of account under double entry system of accounting. The loss can only be adjusted against any types of income earned in the succeeding years. One more option is that the loss can be adjusted against the Share capital under Capital reduction scheme. However, such capital reduction scheme is not taken cognizance of under Income tax Act. Hence there is drastic variation between the income tax provisions and accountancy principles in respect of the manner of carry forward and set off of the losses. Hence, in our view, both systems should not be mixed out, lest it should give misleading results.

7. We have already stated that the provisions of sec. 115JA are a complete code by itself; however it is subject to sub section (4). The said sub section reads as under:

(4) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.

8. As per clause (iii) of Explanation to sec, 115JA, "the amount of loss brought forward or unabsorbed depreciation which ever is less as per books of account" is required to be deducted from the net profit. There is no dispute that the amount to be deducted as per this clause has to be arrived from the books of account of the assessee. We have already noticed that the accountancy principles do not bifurcate the loss into "*Business loss*" and "*Depreciation Loss*". Only, by virtue of explanation to clause (iii), it is necessary to so segregate the loss. However, the said section does not provide for the manner of segregation of brought forward loss into business loss and depreciation. In that case, by virtue of sub. sec. (4), one shall look into the other provisions of Income tax Act. However, sections 70 to 79 of the Income tax provide for set off or carry forward and set off of losses computed under the Income tax Act only. The Income tax Act no where prescribes the manner of set off or modalities of carry forward and set off of loss to be followed for book purposes. Hence sub. sec (4) of sec. 115JA cannot have application for the said purpose.

9. In these circumstances, in our view, it would not be correct on the part of the Assessing Officer to apply the principles prescribed in sec. 70 – 79 of the Act for accumulated losses shown in the books of account. Accordingly, we set aside the order of Learned CIT(A) and restore the matter back to the file of Assessing Officer with a direction to compute the eligible amount of deduction under clause (iii) of Explanation to sec. 115JA after examining the method followed and the relevant computations submitted by the assessee.

10. The next issue relates to the charging of interest under section 220(2). The Learned CIT(A) has already set aside the matter to the file of Assessing Officer with a direction to examine the claim made by the assessee in this regard. Hence, we feel that no interference is called for in the order of Learned CIT(A) on this issue.

11. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

(Pronounced in the open Court on 9.5.2011.)