

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
"B" BENCH, MUMBAI

**BEFORE SHRI D.K. AGARWAL, JM & SHRI R.K. PANDA, AM**

I.T.A. No. 7488/Mum/07  
(Assessment year 2004-05)

DCIT, Circle 3(1)  
Room No. 607, 6<sup>th</sup> Floor,  
Aayakar Bhavan  
Mumbai-400 020

**Appellant**

**Vs.** M/s. Bombay Diamond Co. Ltd.  
Su-Raj House, 73-C Cross Road  
MIDC Marol, Andheri (East)  
Mumbai-400 093  
PAN:AAACB0495K

**Respondent**

Appellant by: Shri S.S. Rana  
Respondent by: Shri Dilip J. Thakkar  
Shri Rajesh P. Shah

**ORDER**

Date of hearing: 22.09.2009  
Date of order: 30.11.2009

**PER R.K. PANDA, AM:**

This appeal filed by the Revenue is directed against the order dated 29.9.2007 of the CIT(A)-XXVII, Mumbai relating to assessment year 2004-05.

2. Grounds of appeal No. 1 by the Revenue reads as under:

*"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in treating the loss incurred on cancellation of foreign exchange forward contract as business loss."*

3. After hearing both the sides, we find the Assessing Officer treated the loss on cancellation of foreign exchange forward contract at Rs.25,75,000 as speculation loss and added to the total income of the assessee.

4. In appeal, the learned CIT(A) following the decision of the Hon'ble jurisdictional High Court in the case of ITO vs. Badradas Gauridu Pvt. Ltd. reported in 261 ITR 256 (Bom) and the guidelines issued by RBI with

reference to FEMA, 1999 held the transaction as business loss as against speculation loss treated by the Assessing Officer. Aggrieved with such order of the CIT(A), the Revenue is in appeal before us.

5. The learned DR fairly conceded that the issue is against the Revenue and in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of CIT vs. Woodward Governor (I) Pvt. Ltd., reported in 294 ITR 481. In view of the above submission of the learned DR, this ground raised by the Revenue is dismissed.

6. Grounds of appeal No. 2 by the Revenue reads as under:

*"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of interest amounting to Rs.82,49,728/-."*

7. Facts of the case, in brief, are that the assessee has debited a sum of Rs.82,49,728 being interest paid on borrowed funds and claimed the same as business expenditure. The Assessing Officer observed that the funds on which the interest has been paid were utilised for the purpose of making investment from which the income has to be computed u/s. 45 of the Income-tax Act, 1961 (the Act) and not u/s. 28 of the Act. Since the assessee has not utilised the borrowed funds for the purpose of its business, therefore, the assessee has not fulfilled the conditions of section 36(1)(iii) of the Act for allowing the said expenses from the business income. He accordingly disallowed the amount of Rs.82,49,728.

8. In appeal the CIT(A) held that the financial statements of the assessee do not show any investment made by the assessee during the year. Rather the assessee has availed the loan and paid to the creditors and the amount has not been utilised for any non business purposes. He observed that the liability on sundry creditors is reduced in comparison to the previous year and, therefore, the borrowed funds are utilised for payment of sundry creditors. He accordingly allowed the claim of the assessee holding that the interest payments are allowable u/s. 36(1)(iii)

of the Act. Aggrieved with such order of the CIT(A), the Revenue is in appeal before us.

9. After hearing both the sides, we find the CIT(A) has given a finding that no investment has been made during the year and the borrowed funds are utilised for making payments to the sundry creditors. The factual findings given by the CIT(A) could not be controverted by the learned DR. Therefore, we find merit in the submission of the learned counsel for the assessee that the Assessing Officer disallowed the interest expenditure only on mere presumption without bringing any material or evidence on record. In absence of any material brought before us to controvert the factual findings given by the learned CIT(A) that no fresh investment has been made during the year, therefore, this ground by the Revenue being devoid of merit is dismissed.

10. Grounds of appeal No. 3 by the Revenue reads as under:

*“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.10,38,13,765/- being the surplus from the sale of rights in the premises made by the AO to the book profit u/s. 115JB.”*

11. Facts of the case, in brief, are that the assessee has made investment in the rights in booked premises at Bharat Diamond Bourse in the preceding years. The said rights were sold during the year and the assessee earned a profit of Rs.10,38,13,765 which was taken directly to the Balance Sheet as “capital reserve” without routing the same through the Profit and Loss A/c. The assessee did not consider the above amount as a part of book profit u/s. 115JB of the Act. On being questioned by the Assessing Officer it was submitted that since the rights in booked premises were held as capital asset, the profit arising from the sale thereof was not credited to the Profit and Loss A/c. It was submitted that the surplus of Rs.10,38,13,765 arising on the sale of the rights in the booked premises did not constitute trading profit. It was further submitted that the accounts of the assessee company were duly certified by the auditors and the same has been adopted in the AGM. The said

audited accounts were filed with ROC. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT reported in 265 ITR 273 and the decision of Hon'ble Bombay High Court in the case of Kinetic Motor Co. Ltd. vs. DCIT reported in 262 ITR 340 and it was argued that no adjustment can be made to the book profit of the assessee u/s. 115JB of the Act on account of this profit.

12. However, the Assessing Officer was not convinced with the above submissions of the assessee. Referring to the provisions of Companies Act, he observed that every company has to prepare its accounts in the manner provided in Part II and Part III of Schedule VI to the Companies Act. He extracted Part II and Part III of the Schedule VI to the Companies Act relating to requirement as to Profit and Loss A/c. in the assessment order and observed that the assessee company has clearly violated the provisions of sub-clause (xi)(a) of clause (3) of Part II of the Schedule VI. He further held that the assessee company had not prepared its Profit and Loss A/c. in accordance with the provisions of Part II and Part II of Schedule VI to the Companies Act. He accordingly recomputed the book profit for the purpose of section 115JB of the Act and computed the book profit at Rs.7,61,36,607/-.

13. In appeal, the CIT(A) following the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra), Kinetic Motor Co. Ltd. (supra) and the decision of the Tribunal in the case of Orson Trading Pvt. Ltd. reported in 2 SOT 503 (Mum) held that the Assessing Officer does not have the jurisdiction to go beyond the net profit shown in the Profit and Loss A/c. except to the extent provided in Explanation to section 115JB of the Act. Aggrieved with such order of the CIT(A), the Revenue is in appeal before us.

14. The learned DR referring to the provisions of Part II and Part III of Schedule VI to the Companies Act submitted that the profit amounting to Rs.10,38,13,765 is a material amount which has not been routed through

the Profit and Loss A/c. Relying on the decision of the Hon'ble Bombay High Court in the case of Veekay Lal Investment Co. Pvt. Ltd. reported in 249 ITR 597 he submitted that the decision of the jurisdictional High Court is squarely applicable to the facts of the present case and has not been overruled by the Hon'ble Supreme Court. Referring to the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) he submitted that the Hon'ble Supreme Court has decided the issue in favour of the assessee in a case where the accounts were prepared as per Part II and Part III to Schedule VI of the Companies Act whereas in the instant case, admittedly, the accounts are not prepared as per the provisions of Companies Act. Simply because the auditors have certified the Profit and Loss A/c. in violation of the provisions of Companies Act it cannot be said that the Assessing Officer has no jurisdiction to go beyond the audited accounts adopted in the AGM. He further submitted that the company Apollo Tyres Ltd. was a widely held public limited company whereas the assessee in the instant case is a closely held company. He further submitted that the various decisions relied on by the learned counsel for the assessee were rendered in the context of the provisions of section 115J or 115JA whereas the section involved in the appeal relates to provisions u/s. 115JB.

15. The learned counsel for the assessee, on the other hand, reiterated the same submissions as made before the Assessing Officer and the CIT(A) and submitted that the assessee company has correctly credited the above amount to the Balance Sheet instead of Profit and Loss A/c.

16. We have considered the rival submissions made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the assessee in the impugned assessment year has earned gross profit of Rs.10,38,13,765 on account of sale of its rights in an immovable property. There is also no dispute to the fact that this income has not been passed

through the Profit and Loss A/c. but has directly been taken to the Balance Sheet as capital reserve. According to the Assessing Officer since the assessee has not prepared its accounts in the manner provided in Part II and Part III of Schedule VI to the Companies Act, therefore, the amount of Rs.10,38,13,765 having not routed through the Profit and Loss A/c. has to be added to the book profit for the purpose of provisions of section 115JB. It is the submission of the learned counsel for the assessee that in view of the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra), the decision of the Hon'ble Bombay High Court in the case of Kinetic Motor Co. Ltd. (supra) and the decision of the co-ordinate Bench of the Tribunal in the case of Orson Trading Pvt. Ltd. (supra) the Assessing Officer has no power to go beyond the accounts adopted in the AGM.

17. We find Part II and Part III of Schedule VI to the Companies Act read as under:

*PART II*

*REQUIREMENTS AS TO PROFIT AND LOSS ACCOUNT*

*1. The provisions of this Part shall apply to the income and expenditure account referred to in sub-section (2) of section 210 of the Act, in like manner as they apply to a profit and loss account, but subject to the modification of references as specified in that sub-section.*

*2. The profit and loss account—*

*(a) shall be so made out as clearly to disclose the result of the working of the company during the period covered by the account; and*

*(b) shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature.*

*3. The profit and loss account shall set out the various items relating to the income and expenditure of the company arranged under the most convenient heads ; and in particular, shall disclose the following information in respect of the period covered by the account:*

*(i) ....*

*(ii) ....*

(xi) (a) *The amount of income from investments, distinguishing between trade investments and other investments.*

(b) *Other income by way of interest, specifying the nature of the income.*

(c) *The amount of income-tax deducted if the gross income is stated under sub-paragraphs (a) and (b) above.*

(xii) (a) *Profits or losses on investments showing distinctly the extent of the profits or losses earned or incurred on account of membership of a partnership firm to the extent not adjusted from any previous provision or reserve.*

*Note : Information in respect of this item should also be given in the balance sheet under the relevant provision or reserve account.*

(b) *Profits or losses in respect of transactions of a kind, not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount.*

(c) *Miscellaneous income.*

(xiii) (a) ....

(b) ....

(xiv) ....

(xv) ....

18. From a bare reading of the above it is clear that the Profit and Loss A/c. of a company shall disclose every material feature including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of exceptional nature also. Further the company is also required to set out the various items relating to the income and expenditure of the company arranged under most convenient heads and disclosing profit or loss in respect of transactions of a kind not usually undertaken by the company or undertaken in circumstances of exceptional or non-recurring nature if material in amount.

19. However, in the instant case we find although the assessee has earned a profit of Rs.10,38,13,765 from the sale of rights in an immovable property the same has not been routed through the Profit and Loss A/c. and has directly been credited to the Balance Sheet. Therefore, in our opinion, the accounts are not prepared in accordance with the manner provided in Part II and Part III of Schedule VI to the Companies Act.

20. The various decisions relied on by the learned counsel for the assessee are not applicable to the facts of the present case. In the case of

Apollo Tyres Ltd. (supra) the question No. I before the Hon'ble Supreme Court was as under:

*“(i) Can an Assessing Officer while assessing a company for income-tax under section 115J of the Income-tax Act question the correctness of the profit and loss account prepared by the assessee company and certified by the statutory auditors of the company as having been prepared in accordance with the requirements of Parts II and III of Schedule VI to the Companies Act?”*

21. From the above it is clear that the issue before the Hon'ble Supreme Court was under the provisions of section 115J and when the accounts of the company are prepared in accordance with the requirements of Part II and Part III of Schedule VI to the Companies Act. However, in the instant case the issue is relating to the provisions of section 115JB and the accounts are not prepared in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act. Merely because the auditors have certified the accounts which apparently are not prepared in accordance with Part II and Part III of Schedule VI to the Companies Act, therefore, the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd., in our opinion is not applicable to the facts of the present case.

22. Similarly in the case of Kinetic Motor Co. Ltd. (supra) the assessee had debited an amount of Rs.6,32,65,430 on account of depreciation on the basis of WDV which is one of the permissible methods under the Companies Act although the assessee used to provide the depreciation on the straight line method in its corporate accounts. The above resulted in a book loss of Rs.1,64,49,937. These accounts were certified to be true and fair by the auditors. The Assessing Officer took the view that there was no justification for the assessee to change the basis of providing depreciation and reworked the depreciation and arrived at a book profit of Rs.2,22,10,525 as against the book loss of Rs.1,64,49,937 which was confirmed by the Tribunal. On further appeal to the High Court, the Hon'ble High Court had held that under the Companies Act both straight



line method and written down method are recognised, therefore, once the amount of depreciation actually debited to the Profit and Loss A/c. and was certified by the auditors it was not permissible for the Assessing Officer to make book adjustments.

23. Thus from the above it is clear that the assessee has debited the depreciation in the Profit and Loss A/c. as per one of the recognised methods. Further the issue before the Hon'ble High Court was under the provisions of section 115J of the Act. However, in the instant case the assessee has bypassed the provisions of Part II and Part III of Schedule VI of the Companies Act and directly credited the profit to the reserve account. Therefore, the decision of the jurisdictional High Court is also not applicable to the facts of the present case. Similarly the decision of the co-ordinate Bench of the Tribunal in the case of Orson Trading Pvt. Ltd. is also distinguishable and not applicable to the facts of the present case since it relates to the provisions of section 115JA and it has not been held that even if the accounts are not prepared in the manner prescribed as per Part II and Part III of Schedule VI of the Companies Act, 1956, the Assessing Officer has no power to disturb the book profit declared by the assessee.

24. The various other decisions relied on by the learned CIT(A) in his order are also not applicable. In none of the case it has been held that even where the accounts are not prepared in the manner provided as per Part II and Part III of Schedule VI to the Companies Act, 1956 the Assessing Officer has no power to go beyond the book profit as per the audited accounts. In our opinion, the Assessing Officer cannot go beyond the book profits as per the audited accounts provided they are prepared as per the manner provided in Part II and Part III of Schedule VI to the Companies act, 1956 and are adopted in the AGM. However, in the instant case, admittedly the accounts are not prepared in the manner provided in Part II and Part III of Schedule VI to the Companies Act, 1956 since the profit on sale of investments amounting to Rs.10,38,13,765/- which is a

material amount, has not been routed through the Profit and Loss A/c. Therefore, the Assessing Officer, in our opinion has the power to re-work the book profit by recasting the accounts in the manner provided as per Part II and Part III of Schedule VI to the Companies Act, 1956. In this view of the matter, the order of the CIT(A) on this issue is set aside and that of the Assessing Officer is restored.

25. In the result, the appeal filed by the Revenue is partly allowed.

Order pronounced on 30<sup>th</sup> November, 2009.

**Sd/-**  
**(D.K. AGARWAL)**  
JUDICIAL MEMBER

**Sd/-**  
**(R.K. PANDA)**  
ACCOUNTANT MEMBER

MUMBAI, dated 30<sup>th</sup> November, 2009

Copy to:

- (1) The Appellant,
- (2) The Respondent,
- (3) The CIT (A)-XXVII, Mumbai,
- (4) The CIT, City-3, Mumbai,
- (5) The DR, 'B' Bench, ITAT, Mumbai.

**//True Copy//**

BY ORDER

ASSISTANT REGISTRAR  
ITAT, Mumbai Benches, Mumbai

*tprao*