

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F' : NEW DELHI)**

**BEFORE SHRI B.C. MEENA, ACCOUNTANT MEMBER
and
SHRI C.M. GARG, JUDICIAL MEMBER**

**ITA No.2449/Del./2008
(Assessment Year : 2004-05)**

ACIT, Range II,
Faridabad.

vs.

M/s. NHPC Limited,
Sector 33, NHPC Complex,
Faridabad.

(PAN : AAACN0149C)

(Appellant)

(Respondent)

Assessee by : Shri Ved Jain & Ms. Rano Jain, CAs
Revenue by : Shri Sunil Bajpai, CIT DR

ORDER

PER B.C. MEENA, ACCOUNTANT MEMBER :

This appeal filed by the revenue emanates from the order of CIT (Appeals), Faridabad dated 25.04.2008 for the Assessment Year 2003-05.

The revenue has taken the following grounds of appeal :-

“1. That, on the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) has erred in deleting the disallowance of Rs.24,29,89,211/- made by the Assessing Officer in computing the book profit u/s 115JB in respect of provisions made for Gratuity, Leave Encashment and Post- Retirement Medical Benefits.

2. That, on the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) has erred in applying section 43B unnecessarily as the section 43B(a) to (f) would not relate to section 115JB of the Income Tax Act, 1961, more so when sub-clauses IV & V of sub section 1 of section 36 read with section 43B speak of payments and not provisions.

3. That, on the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) has erred in treating the disallowance made in computation of 115JB as allowable liabilities u /s 43B whereas in the normal computation made under Chapter IV-D, the assessee itself had added these sums but has not added while calculating 'Book-Profit' under Chapter XIIB.

4. That, on the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) has erred in deleting the disallowance of Rs. 8,76,59,179/- made by the Assessing Officer in computing the book-profit u /s 115JB in respect of provisions for doubtful debts claimed by the assessee.

5. That, on the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) has erred in deleting disallowance of Rs. 6,12,00,000/- made by the Assessing Officer in computing the book-profit u /s 115JB in respect of depreciation claimed on land after amortization of land by the assessee because there is no depreciation allowable on land under Companies Act and no rate of depreciation is provided in schedule XIV of Companies Act.

6. That the appellant craves for the permission to add, delete or amend the grounds of appeal before or at the time of hearing of appeal.”

2. Ground No.1, 2 and 3 are regarding adjustment made by the AO by making addition to the Book-Profit in respect of Gratuity, Leave Encashment and Post-Retirement Medical Benefits.

3. This issue is covered in favour of the assessee company by the order of the ITAT in assessee's own case in assessment year 2002-03 in ITA No. 1105/Del/2006 where it was held as under:-

“24. We have heard both the parties and perused the material available on record. In this case the assessee has made provision on account of gratuity, leave encashment and post retirement medical benefit on actuarial basis. Under section 115-JB of the Act where in the case of an assessee, being a company, Income-tax, payable on the total income as computed under this Act in respect of any previous year in relevant to the assessment year commencing on or after 1st April, 2001 is less than seven and one half per cent of its book

profit, the tax payable for the relevant previous year shall be deemed to be seven and one half per cent of such book profit. Explanation to section 115-JB of the Act defines the term "book profit" and means the net profit as shown in the profit and loss account for the relevant previous year prepared in accordance with the provisions of Part II and III of Schedule VI of the Companies Act, 1956, as increased by the amounts mentioned in clause (a) to (g), if any such amount referred to in clauses (a) to (g) is debited to the profit and loss account and reduced by the amount specified in clause (i) to (vii) of the Explanation. Clause (c) of the Explanation talks about the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities. The assessee had made provisions in respect of gratuity, leave encashment and post retirement medical benefits based on actuarial valuation. Hon'ble Supreme Court in the case of Bharat Earth Movers (supra) has held that if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in present though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain. In the case before us the liability on account of gratuity, leave encashment post retirement medical benefit have been estimated on actuarial basis. Therefore, the liability so estimated can be said to have been estimated with reasonable certainty and, therefore, such an estimate is not a contingent one.

25. Hon'ble Bombay High Court in the case of Echjay Forgings P. Ltd. (supra) has held that where the assessee has made a provision for gratuity on the basis of actuarial calculations, it cannot be said that provision for gratuity was not ascertained liability. Likewise in the case of Vinitech Corp. P. Ltd. (supra) Hon'ble jurisdictional High Court has held that where a liability which was capable of being construed in definite terms, which had arisen in the accounting year, although its actual quantification and discharge might be deferred to a future date. Once the assessee is maintaining his accounts on mercantile system, a liability accrued though to be discharged at a future date would be a proper deduction while working out the profits and gains of business, regard being had to be accepted principles of commercial practice and accountancy. If the facts of the case are viewed in the light of the decisions referred to above, we find that the provision made by the assessee in respect of gratuity, leave

encashment and post retirement medical benefit on actuarial basis cannot be said provisions for unascertained liability so as to fall in clause (c) of the Explanation to section 115-JB (2) of the Act. Accordingly the Id. CIT (Appeals) and the assessing officer erred in holding the provisions made by the assessee were on account of un-ascertained liability to be added back under clause (c) of the Explanation to section 115-JB (2) of the Act. Accordingly, we set aside the order of the authorities below and direct the assessing officer to allow the claim of the assessee.”

The facts are identical, therefore, respectfully following the above said decision, these grounds of Revenue’s appeal are dismissed.

3. Ground no.4 is regarding provisions made for the bad and doubtful debts. The Ld. AR fairly conceded that in view of the retrospective amendment made by the Finance (No.2) Act, 2009 this issue is covered against the assessee. This ground of the revenue’s appeal for making addition on account of the provisions for bad and doubtful debts is allowed.

4. Ground no.5 is regarding addition of Rs.6,12,00,000/- made by the AO in computing the book profit in respect of the expenditure on account of the amortization of the land on the reasoning that no depreciation is allowable on land under the Companies Act as no rate of depreciation is provided in Schedule XIV of Companies Act.

5. It was submitted by the Ld. DR that the addition made by the AO is correct. No depreciation is permissible under the Companies Act in respect of the land and accordingly the debit made to the profit and loss account by the assessee company on account of amortization of land is not in accordance with the provisions of the Companies Act and hence the AO was correct in computing the profit and loss account strictly in accordance with the provisions of the Companies Act. A reference was also made to the

Accounting Standards 6 issued by the Institute of Chartered Accountants of India to point out that depreciable assets are assets which have a limited useful life. It was argued that since land does not have a limited useful life the same cannot be considered to be a depreciable asset and hence debit made to the profit and loss account by the assessee company is not in accordance with law as well as accounting standards and the addition made by the AO is correct.

6. As against this the Ld. AR submitted that the contention of the Revenue is not in accordance with the facts. In this regard, ld. AR invited our attention to the letter dated 28th December, 2006 submitted to the AO whereby a note was appended. Para 2.4 of the Notes to Accounts clarify the nature of the land which reads as under:-

"Land taken for use from State Government (without transfer of title) and expenses on relief and rehabilitation as also on creation of alternate facilities for land evacuates or in lieu of existing facilities coming under submergence and where construction of such alternate facilities is a specified pre condition for the acquisition of land for the purpose of the project, are accounted for as "Land-unclassified" to be amortized over the useful life of the project, which is taken as 35 years from the date of commercial operation of the project. Amount of Rs.6.2 crores has been calculated as per Accounting Policy stated at Para 2.4 (as produced above). The above accounting Policy is in line with Accounting Standard – 6 of ICAI. Thus amount amortized is necessary requirement of Companies Act, 1956. The assessee company has prepared the Audited Annual Accounts for the A.Y. 2004-05 as per the requirement of Accounting Policies, Accounting Standards and other applicable provisions of Companies Act and any deviation there from would have attracted adverse remarks of Auditors."

That Assessee's annual Accounts has been duly adopted by the shareholders and amount charged in depreciation chart is the same as required by accounting standard and declared accounting policy.

- That section 115JB required that company to prepare accounts as per requirement of Companies Act (i.e. to observe accounting standard of ICAI where ever applicable and that specifically provides that method and rate adopted for calculating depreciation shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year falling within the relevant previous year.
- The assessee has also filed form No.29B in respect of book profit as certified by the Auditors.
- That no adjustment can be made to the profit computed under the Companies Act, 1956 except those which are permitted by explanation to sub section (2) of Section 115JA, as it has been held by the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs CIT (2002) 255 ITR 273 (SC). The use of the words "in accordance with the provision of Part II & III of Schedule VI to the Companies Act" was made for the limited purpose of empowering the assessing authority to rely upon the authentic statement of accounts of the Company. While so looking into the accounts of the company the A.O. has to accept the authenticity of the accounts with reference to the provision of the Companies Act. It is not open to the A.O. to re-scrutinize with accounts to satisfy whether the accounts have been maintained in accordance with the provision of the Companies Act.

Thus, the assessee has rightly charged Rs.6.12 crores in the books and requires to no further adjustment in book profit."

It was further submitted by the Ld. AR that this issue is also covered by the judgment of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs CIT 255 ITR 273 (SC) whereby the Court has held that section 115J does not empower the AO to embark upon a fresh enquiry in regard to the entries made in the books of account.

7. We have heard both the parties. From the facts we notice, as pointed out by the Ld. AR that this land is not a land which is owned by the assessee company. This is a land taken for use from the State government without

transferring the title for relief and rehabilitation for land evacuees because of submerges and where construction of such alternative facility is a condition for setting up a project. The cost so incurred by the assessee company is amortized over useful life of the project. The above policies have been approved by the auditors of the company as well as the C&AG. The accounts of the assessee company are subject to audit not only by the statutory auditors but also by the C&AG also. Further the accounts so prepared has been approved and adopted by the company in the Annual General Meeting and filed with the Registrar of Companies.

8. The Supreme Court in the case of Apollo Tyres Ltd. (Supra) has held that the AO under the Income-tax Act has to accept the authenticity of the accounts with reference to the provisions of the Companies Act which obligates the company to maintain its account in a manner provided by the Companies Act and the same to be scrutinised and certified by the statutory auditors and will have to be approved by the company in its general meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and satisfy that the accounts of the company are maintained in accordance with the requirements of the Companies Act. The Supreme Court has further held that the AO while computing the income under section 115J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increases and reductions as provided for in the Explanation to the said section (115J). The Supreme Court has further went on to hold "To put it

differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to section 115J”.

9. It is not the case of the Revenue here that the adjustment made by the AO is under Explanation to section 115J. The contention of the Revenue here is that land is not a depreciable asset and depreciation charged in the profit and loss account which is not in accordance with the provisions of the Companies Act read with Accounting Standard 6. As stated hereinabove, the contention of the Revenue that the land in question of the assessee company is not a depreciable asset is factually incorrect and further as held by the Supreme Court no adjustment can be made to net profit as certified by the statutory auditors.

10. Accordingly we uphold the order of CIT(A) deleting this addition and this ground of appeal of the Revenue is rejected.

11. In the result, the appeal filed by the revenue is partly allowed.

Order pronounced in open court on this 30TH day of September, 2014.

**SD/-
(C.M. GARG)
JUDICIAL MEMBER**

**SD/-
(B.C. MEENA)
ACCOUNTANT MEMBER**

**Dated the 30TH day of September, 2014
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Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A), Faridabad.
- 5.CIT(ITAT), New Delhi.

AR/ITAT