IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI ' J ' BENCH
MUMBAI BENCHES, MUMBAI

BEFORE SHRI SHRI T R SOOD ,AM & SHRI VIJAY PAL RAO, JM

ITA No. 5117/Mum/2007 (Asst Year 2004-05)

The Asst Commr of Income Tax 2(3), Mumbai	Vs	Tata Petrodyne Ltd The Metropolitan West wing -3rd Floor, Bandra Kurla Complex Bandra (E) Mumbai
(Appellant)		**(Respondent)**

ITA No.5306/Mum/2008(Asst Year 2002-03)
ITA No. 4804/Mum/2007 (Asst Year 2004-05)

Tata Petrodyne Ltd The Metropolitan West wing -3rd Floor, Bandra Kurla Complex Bandra (E) Mumbai	Vs	The Asst Commr of Income Tax 2(3), Mumbai
(Appellant)		**(Respondent)**

PAN No.	**AAACT0090N**
Assessee by	Sh Purziz Taraporewala
Revenue by	Mrs Kusum Ingale
Dt.of hearing	27th March, 2012
Dt of pronouncement	11th, April 2012

ORDER

PER VIJAY PAL RAO, JM

For the assessment year 2002-03, the assessee has filed the appeal against the order dated 2.6.2008 of the CIT(A) whereas for the AY 2004-05, cross appeals have been filed against the order dated 18.4.2007 of the CIT(A).

2 For the AY 2002-03, the assessee has raised the following grounds:

1) The CIT erred in holding that the loss on fluctuation of foreign currency for the year ended 31 March 2002 of Rs. 1,68,004 cannot be capitalised under section 43A of the Income-tax Act, 1961 ('the Act') as the asset (Sub-sea Equipment) did not exist in the Block of Assets. The CIT further erred in denying the Appellant deduction of deprecation 100% under section 32 of the Act with respect to the addition made to Sub-sea Equipment of the loss of fluctuation of foreign currency of Rs. 1,68,004.

2) The CIT erred in holding that the loss on fluctuation of foreign currency of Rs.61,54,496 is not allowable under section 42 of the Act as the said loss is not with respect to expenditure specified under section 42(1)(a) of the Act.

3 Ground no.1 is regarding depreciation on loss due to fluctuation of foreign exchange and capitalization u/s 43A of the I T Act.

4 We have heard the ld AR of the assessee as well as the ld DR and considered the relevant material on record. At the outset, we note that an identical issue has been considered and adjudicated by the Tribunal in assessee's own case for the AY 2000-01 in ITA No.5569/Del/03 vie order dated 14.11.2008 in paras 3 to 5 as under:

3. We have heard the rival submissions in the light of the material placed before 'is and the precedents relied upon. The first item of disallowance is Rs.12.37 lakhs which was capitalized by the assessee on account of loss on fluctuation of foreign exchange towards repayment of loan acquired for purchasing sub-sea equipment in respect of which 100% depreciation was allowed to the assessee in the preceding year. The authorities below have not accepted the assessee's claim on the ground that such asset does not exist in the block of assets because of the allowability of 100% depreciation and hence it could not be recognized for the purposes of section 43A. At this juncture it would be relevant to note the provisions of section 43A as under:

> *"Notwithstanding anything contained in any other provision of this Act, where an assessee has acquired any asset from a country outside India for the purpose of his business or profession and, in consequence of a change in the rate of exchange a! any lime after the acquisition of such asset, there is an increase or reduction in (the liability of the*

> *assessee as expressed in Indian currency for making payment towards the whole or a part of the cost of the asset or for repayment of the whole or a part of the moneys borrowed by him from any person, directly or indirectly, in any foreign currency specica1ly for the purpose of acquiring the asset (being in either case the liability existing immediately before the date on which the change in the rate of exchange takes effect), the amount by which the liability aforesaid is so increased or reduced during the previous year shall be added to, or, as the case may be, deducted from, the actual cost of the asset as defined in clause (1) of section 43 or the amount of expenditure of a capital nature referred to in clause (iv) of sub-section (1) of section 35 or in section 35A or in clause (ix) of sub-section (1) of section 36, or, in the case of a capital asset (not being a capital asset referred to in section 50), the cost of acquisition thereof for the purposes of section 48, and the amount arrived at after such addition or deduction shall be taken to be the actual cost of the asset or the amount of expenditure of a capital nature or, as the case may be, the cost of acquisition of the capital asset as aforesaid."*

4. A bare perusal of this section reveals that if there is a change in the rate of foreign exchange after the acquisition of assets, as a result of which there is an increase or reduction in the liability of the assessee as expressed in the Indian currency, then such increase or reduction shall be added to or deducted from the actual cost of the asset and after giving effect to this adjustment the actual cost of the assets shall stand substituted with the new figure. There is no dispute about the fact that the assessee borrowed the money from Barclays Bank for the purchase of the equipment. Even though 100% depreciation was allowed in first year itself as per the relevant rules, liability towards repayment of the loan continued and is still continuing in the year in question. Albeit the assessee had claimed l00% depreciation on the amount yet the asset is continuing with the assessee and the Revenue has not denied that it was not utilized for the purpose of its business in the year in question. The provisions of section 43A are crystal clear in the sense that it is mandatory for the assessee to compute actual cost of the asset in the light of increase or decrease in the liability due to exchange rate fluctuation. It is not in the discretion of the assessee to follow or ignore the prescription of the section. Rather it is mandatory to act upon it. The assessee has not claimed the sum of Rs. 12.37 lakhs as revenue expenditure but included it in the cost of assets and then claimed 100% depreciation admissible as per rules on this amount. In our considered opinion no infirmity can be found in the assessee's action as is appeares from the bare reading of section 43A. The Hon'ble Supreme Court in the case of Vs. An'ind Mills Limited [(1992) 193 ITR 255 (SC)] has held as under:

> *"We may now turn to the second question posed earlier and consider the position on general principles. So far as depreciation allowance is concerned, the position is perhaps a little simpler because it is a recurrent claim. Under the definitions contained in section 32 read with section 43(1) and (6) of the Income-tax Act, the depreciation is 10 be allowed on the actual cost of the asset less all depreciation actually*

allowed in respect thereof in earlier years. Thus, where the cost of the asset subsequently goes up because of devaluation, whatever might have been the position in the earlier year, it is always open to the assessee to insist, and for the Income-tax Officer to agree, that the written down value in the year in which the increased liability has arisen should be taken on the basis of the increased cost minus depreciation earlier allowed on the basis of the old cost."

5. The same view ha been reiterated by the Hon'ble Bombay High Court in the case of Padamjee Pulp And Paper Mills Lid. VS. CIT (1994) 210 ITR 97 (BoM). The Full Bench of the Hon'ble Gujarat High Court in the case of CIT Vs. Gujarat State Fertilizer Co. Limited (200,) 259 ITR 526 (Guj.)(FB) has also held that increase in the liability has to be taken as actual cost u/s 43A. In our considered opinion the authorities below have erred in rejecting the assessee's claim simply for the reason that 100% depreciation was allowed to the assessee in earlier year, without considering the relevant fact that the assets still continued to remain with the assessee and was used for the purpose of business. The increase in the liability arose due to the repayment of the instalments of the loan originally taken by the assessee for the acquisition of asset. We, therefore, overturn the impugned order on this score and order for the inclusion of the amount of Rs. 12,37 lakhs in the cost of asset uls.43A and then allowing the depreciation u/s.32 for the equal amount."

5 Since the facts and issues are identical in the AY 2000-01 and in the year under consideration; therefore, following the earlier order of the Tribunal in assessee's own case, we decide this issue in favour of the assessee.

6 The second issue is regarding loss on fluctuation of foreign currency in respect of development cost u/s 42 of the I T Act.

7 We have heard the ld AR of the assessee as well as the ld DR and considered the relevant material on record. The ld AR has pointed out that this issue was also considered in the AY 2000-01 (supra). The ld AR has further pointed out that the Assessing Officer has considered the claim of the assessee u/s 42(1)(a) whereas the claim falls under section 42(1)(b). The ld DR on the other hand, relied upon the orders of the authorities below.

8 After considering the rival contention and relevant material on record, we find that the Tribunal in assessee's own case for the AY 2000-01(supra) has considered and adjudicated an identical issue in para 6 & 7 as under:

> *"6 The second aspect of this ground is about the upholding of disallowance of Rs. 77.07 lakhs towards deduction claimed by the assessee u/s.42(l)(b) towards foreign exchange fluctuation included in the Development cost. The Assessing Officer did not accept the assessee's claim on the ground that such liability was in relation to a capital expenditure. On the other hand the learned CIT(A) upheld the addition by forming the opinion that the commercial production had not yet started which was a prime condition for claiming deduction u/s.42(1)(b).*
>
> *7. After considering the rival submissions and perusing the relevant material on record we observe that there is an apparent contradiction in the finding arrived at by the learned CIT(A) qua. the non-commencement of the production vis-à-vis the contrary claim put up by the assessee in this regard. Undoubtedly section 42(l)(b) entitles the assessee to deduction after the beginning of the commercial production. The case of the assessee is that it was working in consortium. However necessary details could not be placed before us to show that the assessee had commenced production. We, therefore, set aside the impugned order on this issue and restore the matter to the file of the learned CIT(A) for deciding it afresh after allowing a reasonable opportunity of being heard to the assessee."*

9 Accordingly, respectfully following the earlier order of the Tribunal, we set aside this issue to the record of the CIT(A) for deciding the issue afresh in terms of the directions of the Tribunal in the earlier year. Since the assessee has claimed the deduction u/s 42(1)(b); therefore, the CIT(A) may consider the same while deciding the issue afresh.

10 For the AY 2004-05, the assessee has raised the following grounds:

> *1) The CIT(A}erred in not admitting the altered ground raised by the Appellant by which it contended that each well constitutes an undertaking by itself for the purpose of claiming deduction under section 80-IB(9) of the Income-tax Act, 1961).*

2) The CIT(A) erred in not considering the Appellant's contention that each well constitutes an undertaking by itself for the purpose of claiming deduction under section 80-IB(9) of the Act.

3) The CIT(A) erred in confirming that the interest received on fixed deposits placed with Barclays Bank as security deposit for the purpose of securing a foreign currency loan, was to be considered as 'Interest from Other Sources' and not 'Business Income'.

4) The CIT(A) erred in not giving directions to the Assistant Commissioner of Income- tax-Circle 2(3) ('Assessing Officer') for setting off brought forward losses and unabsorbed depreciation against the business profit determined by the Assessing Officer.

11 At the time of hearing, the ld AR of the assessee has submitted that in view of the retrospective amendment of provisions of sec. 80IB(9), the assessee does not press the ground nos 1 & 2 and the same may be dismissed as not pressed.

11.1 The ld DR has no objection, if the ground nos 1 & 2 of the assessee's appeal are dismissed as requested.

11.2 Accordingly, ground nos 1 & 2 of the assessee's appeal are dismissed being not pressed.

12 Ground no.3 is regarding treating the interest income as income from other sources instead of business income claimed by the assessee for the purpose of deduction u/s 80IB(9).

13 We have heard the ld AR of the assessee as well as the ld DR and considered the relevant material on record. The ld AR of the assessee has submitted that this issue has been considered and decided by the Tribunal in assessee's own case for the AY 2003-04 in ITA No.4887/Mum/2008 vide order dated 23.3.2010. He has further submitted that the appeal filed by the revenue against the order has also dismissed

by the Hon'ble jurisdictional High Court vide order dated 20.8.2011. Thus, the ld AR has submitted that this issue is decided in favour of the assessee by the earlier order of the Tribunal.

14 On the other hand, the ld DR has submitted that this issue is directly covered against the assessee by the decision of the Hon'ble supreme court in the case of Pandian Chemicals as well as Liberty India. The ld DR has pointed out that in the earlier order of the Tribunal, the decision in the case of Pandian Chemicals was not considered whereas the decision in the case of Liberty India was not available.

15 After considering the rival contention and careful perusal of the relevant material on record, we find that this issue was considered and adjudicated by the coordinate Bench of the Tribunal in the case of the assessee for the AY 2003-04 in para 6 as under:

> *"6. We have considered the rival submissions. We are of the view that the appeal at the revenue is without any merit. In Assessment Year 1999-2000, the ld CIT(A) has taken the following view*
>
> > *"I have considered the facts of the case and the submissions made by the learned AR of the appellant. The appellant obtained loan from Barclays Rankat US$ 10 millions. As per the terms of agreement for borrowing funds from Barclays Bank, the appellant was to maintain four secured collateral accounts namely PY-3 Dollar Proceeds Account, PT-3 Rupee Operating Account. PY3 Debt Service Reserve Account and PT3 Rupee Reserve Account. Therefore, it is clear that these accounts were opened for the purpose of securing loan from the bank and therefore, interest earned on fixed deposits is inextricably linked with the business activities of the appellant. I am included to agree with the learned AR of the appellant. Following the order of ITAT, Delhi in the ease of Jay Bharat Maruti Ltd. (supra), it is held that interest income is assessable under the head income from business or profession and not under the income from other sources. The Assessing Officer is directed to treat the interest income as business income allow the relief accordingly."*

16 As it is clear from the order (supra), that the Tribunal has allowed this claim of the assessee on the principles of consistency because for the AY 1999-00, 2000-01 and 2002-03, the revenue has not filed any appeal against the order of the CIT(A). The Hon'ble High Court has dismissed the appeal of the revenue for AY 2003-04 by observing as under:

> *"2. Admittedly, similar interest earned by the Assessee for AY 1999-2000 to 2002-02003 have been assessed as "business income" and the said orders have attained finality. In this view of the matter, the order passed by the ITAT cannot be faulted. Accordingly, the appeal is dismissed with no other."*

17 It is to be noted that at the time of deciding the appeal for the earlier year, the benefit of the decision of the Hon'ble Supreme Court in the case of Liberty India was not available before the Tribunal. Therefore, the principles of consistency cannot be applied for the year under consideration when the CIT(A) has disallowed the claim of the assessee. In the case of Pandian Chemicals Ltd vs CIT reported in 262 ITR 278(SC), the Hon'ble Supreme Court has observed as under:

> *"The word "derived" has been construed as far back in 1948 by the Privy Council in CIT v. Raja Bahadur Kamakhaya Narayan Singh [1948] 16 ITR 325 when it said (page 328) :*
>
> *"The word 'derived' is not a term of art. Its use in the definition indeed demands an enquiry into the genealogy of the product. But the enquiry should stop as soon as the effective source is discovered. In the genealogical tree of the interest land indeed appears in the second degree, but the immediate and effective source is rent, which has suffered the accident of non-payment. And rent is not land within the meaning of the definition."*

17.1 Further, the Hon'ble Supreme Court in the case of Liberty India v. Commissioner of Income-tax Liberty reported in 317 ITR 218 (SC) the Hon'ble Supreme Court has observed that ;

"The words "derived from" are narrower in connotation as compared to the words " attributable to" . In other words, by using the expression "derived from" , Parliament intended to cover sources not beyond the first degree".

17.2 In view of the above facts and circumstances of the case and in view of the decisions of the Hon'ble Supreme Court (supra), we are of the considered opinion that the deduction u/s 80IB(9) is not available to the interest received from bank deposits as the receipt of interest does not comes within first decree source as derived from the undertaking. Accordingly, this issue is decided against the assessee.

18 Next issue is regarding setting off of brought forward losses and unabsorbed deprecation against business profit determined by the Assessing Officer.

18.1 We have heard the ld AR of the assessee as well as the ld DR and considered the relevant material on record. Both the parties fairly submitted that this issue is subjected to the outcome of the issue involved for the AY 2001-02 and therefore, the same may be remanded back to the record of the Assessing Officer to decide the issue as per the outcome of the appeal for the AY 2001-02.

19 Since the appeal for the AY 2001-02 is pending before the Tribunal and therefore, with the consent of both the parties, we remand this issue to the record of the Assessing Officer with a direction to reconsider the same as per the outcome of the appeal for the AY 2001-02.

20 The revenue for the AY 2004-05 has raised the following grounds:

i) The CIT(A) erred in holding that extraction of oil from oil field is production of mineral oil and is eligible for deduction u/s 80IB.

ii) The CIT(A) erred in treating the provisions for site restoration expenses as ascertained liability."

21 Ground no.1 is regarding eligibility of deduction/s 80IB on extraction of oil from oil field.

21.1 The dispute is on the point whether the extraction of oil from oil field is production of mineral oil as contemplated u/s 80IB(a) or not.

22 We have heard the ld DR as well as the ld AR and considered the relevant material on record. The ld AR has pointed out that in the case of the other partner in the consortium i.e. M/s Hindustan Oil Exploration Co Ltd in ITA No.179/Mum/2007 dated 28th Dec 2012 an identical issue was considered and decided by the Tribunal in favour of the assessee. The ld DR has not disputed the factual position that M/s Hindustan Oil Exploration Co Ltd is one of the parties of the consortium for extraction of oil from the same oil field. Therefore, in view of this fact, we find that an identical issue has been considered and adjudicated by the coordinate Bench of the Tribunal in the case of M/s Hindustan Oil Exploration Co Ltd (supra) and one of us – Judicial Member – is the party to the said order. The relevant part of the order of the Tribunal is reproduced as under:

> *8 We have considered the rival contention and carefully perused the relevant material on record. The Assessing Officer denied the deduction on the ground that the assessee is not carrying out any process by which brings into existence new goods or brings series of changes which takes the commodity to the point where commercially it can no longer be regarded as original commodity. The Assessing Officer observed that the assessee does not undertake any process which gives crude oil new form, qualities or combination. Though, the Assessing Officer has also denied deduction for want of 10CCB report as it was not filed at the time of submission of the return; but, since the CIT(A) has decided the issue of filing of 10CCB report subsequent to the filing of the return in favour of the assessee and the revenue is not in appeal before us; therefore, the said issue attain the finality at the stage of CIT(A) order. The CIT(A) confirmed the action of the Assessing Officer on similar lines and mainly on the ground that what is extracted and transported by the assessee is nothing but crude oil which remains as it is without undergo any change or any process. The CIT(A) was of the view that*

some distillation process would not render the product different than the one extracted i.e. the crude oil itself.

8.1 It is to be noted that the term used in section 80IB(9) is production and more specific, the production of mineral oil and not the mineral. Therefore, the issue is related with the 'production' and not 'mineral'. It is settled proposition of law as laid down by the Hon'ble Supreme Court that the word production as used in sec. 80IB of the I T Act has a wider connotation as compared to the word manufacture. In all the cases, on which reliance has been placed by the ld Sr counsel for the assessee, some amount of process at various stages was involved and in that view of the matter, the Hon'ble Supreme Court as well as Hon'ble High Courts have held that there certainly an activity which gives in the character of production.

8.2 In the case of CIT vs Sesa Goa Ltd , the Hon'ble Supreme Court had an occasion to consider mining of ore production. It was noted that the assessee in the extracting process of iron ore, the High Court came to the conclusion that extraction of iron ore and the various process would involve 'production' within the meaning of sec 32A(2)((b)(iii) of the I T Act and consequently, the assessee was entitled to the benefit of investment allowance under sec. 32A. The view expressed by the High Court that the activity of extraction and processing of iron ore constitute production has been affirmed by the Hon'ble Supreme Court. It was held by the Hon'ble Supreme Court that the word 'production' has a wider connotation than the word 'manufacture. It was further observed that every manufacturer can be characterised as production, every production need not amount to manufacture.

23 Accordingly, by following the order of the Tribunal (supra) we decide this issue in favour of the assessee and against the revenue. The order of the CIT(A), qua this issue is upheld.

24 Next issue is regarding treating the provision of site restoration expenses as ascertain liability while computing the book profit u/s 115JB of the Act.

25 We have heard the ld DR as well as the ld DR and considered the relevant material on record. During the year, the assessee debited an amount of Rs. 2,20,96,256/- being site restoration fund to its P&L account. The Assessing Officer asked the assessee to show cause as to why the said debit should not treated as an unascertained liability to be added for the purpose of computing the profit u/s 115JB

of the Act. The assessee explained before the Assessing Officer that as per the terms and conditions of Production sharing contract, the assessee is under obligation that on the expiry or termination of the contract, the contractor is required to remove all its equipment and installations from the contract area as well as perform all necessary site restoration in accordance with good international petroleum practices and take all other action necessary to prevent hazards to human life or the property of others or the environment.

25.1 The assessee has contended that the amount debited by the assessee is as per an independent enquiry carried out by M/s Institute of Oil and Gas Production Technology and therefore, it cannot be held as unascertained liability. The Assessing Officer did not accept the explanation of the assessee and added this amount for the purpose of computing the book profit.

25.2 On appeal, the CIT(A) has analysed various clauses of the production sharing agreement and held that provision is made for an ascertain liability.

26 We have heard the ld DR as well as the ld AR and considered the relevant material on record. The ld AR has reiterated the submissions as made before the lower authorities whereas the ld DR relied upon the order of the Assessing Officer. We note that the CIT(A) after considering the relevant clauses of the agreement found that liability is not contingent in nature but a definite liability of the assessee to restore the site in order to avoid the damages and hazards. The concluding part of the order of the CIT(A) in para 10.4 is as under:

> *"10.4 From the above two extracts, it is seen that the abandonment costs should be paid in each year. Even though the total costs for abandonment are found out on estimate basis, the liability is certain. In this case, the Site Restoration expenses are scientifically estimated by an independent agency*

M/s Institute of Oil and Gas Production Technology. The provision has been made as per the requirement under the Production Sharing Contract and the appellant is liable to contribute this amount to site restoration fund in each year. In view of these facts, I am of the view that the provision is made for an ascertained liability. The Assessing Officer is directed to delete the addition from the book profits."

27 After going through the various clauses of the production sharing contract, we are in agreement with the findings of the ld CIT(A) that liability itself is not contingent though there may be some variation in estimation of the quantum of the liability but when the estimation is based on a scientific method carried out by the an independent agency M/s Institute of Oil and Gas Production Technology for determining the abandonment costs of contracted area in accordance with the guidelines issued by the Institute of Chartered Accountants of India, then it cannot be said as contingent liability. Therefore, we do not find any error or illegality in the order of the CIT(A), qua this issue.

28 In the result, the appeals of the assessee are partly allowed whereas the appeal of the revenue is dismissed.

Order pronounced on this 11th, day of April 2012

Sd/ **Sd/-**

(T R SOOD) Accountant Member	**(VIJAY PAL RAO)** Judicial Member

Place: Mumbai : Dated: 11th, April 2012
Raj*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai