

IN THE INCOME TAX APPELLATE TRIBUNAL " B " BENCH, AHMEDABAD
(BEFORE SHRI G.C.GUPTA VICE PRESIDENT & SHRI ANIL CHATURVEDI, A.M.)

I.T.A. No. 50/AHD/2010 (By Assessee)
I.T.A. No.470/AHD/2010 (By department)
(Assessment Year: 2005 -06)

Deepak Nitrite Limited,
9-10 Kunj Society,
Alkapuri,
Baroda-390 007.

Vs. Deputy Commissioner of
Income Tax, Circle-1(1),
Aayakar Bhavan,
Near Race Course Circle,
Baroda.

(Appellant)

(Respondent)

PAN: AAACD7468A

Appellant by : Shri Sunil Bhandari.
Respondent by : Shri Samir Tekriwal, Sr.D.R.

(आदेश)/ORDER

Date of hearing : 20-3-2012
Date of Pronouncement : 20-4-12

PER: SHRI ANIL CHATURVEDI, A.M.

These are the cross appeals, one filed by the assessee and the other filed by the Revenue against the order of Ld. CIT(A)-I, Baroda dated 9-10-2009 for the Assessment Year 205-06.

2. ITA No.50/AHD/2010 (Assessee's Appeal) -

In this appeal, the assessee has taken following grounds :-

“1. The Ld. A.O. has erred in holding the interest of Rs.1,55,357/- on sales tax is not eligible for deduction.

2. The Ld. A.O. has further erred in assessing a sum of Rs.38,20,047/- as deemed dividend.

3. The Ld. A.O. has further erred, in the process of computing book profits under section 115JA(2) of the Act, in adding deemed dividend of Rs.38,20,047/-.

4. The Ld. A.O. has further erred in the process of computing book profits under section 115JA(2) of the Act, in adding Provision for Gratuity of Rs.12,03,707/-.”

3. Ground No.1 is with respect to interest on sales tax.

Since the ground No 1 of Assessee’s and Revenue’s appeal are connected the same are taken together for disposal.

Brief facts are that during Assessment Year 2005-06 the assessee availed certain benefits under the Sales tax Amnesty Scheme in order to discharge unpaid sales tax dues of financial year 1995-96, 1996-97 and 1997-98. The total amount of outstanding arrears of sales tax of the erstwhile amalgamating company was to the order of Rs. 36,43,260/-. Against this, the amnesty scheme permitted the full and final settlement by payment of Rs 20,06,132/- comprising of Rs 18,35,946/- towards sales tax, Rs 1,55,357/- towards interest and Rs

14,829/- towards penalty. Before the A.O. it was submitted by the assessee that the dues pertained to the earlier years and the same was not claimed as deduction in the respective years. The assessee claimed the payment of Rs 20,06,132 and requested that the same should be allowed as deduction to it on payment basis u/s 43B. The assessee claimed this expenditure for the first time during the assessment proceedings. The A.O. did not take cognizance of the claim and neither he admitted nor allowed the assessee's claim.

3.2. Being aggrieved with the order of A.O., assessee preferred appeal before the CIT (A).

3.3. On going through the Balance Sheets and Profit and Loss accounts for financial years 1995-96, 1996-97 and 1997-98, CIT(A) observed that in those years the sales tax had been directly taken to Balance Sheet without debiting/crediting to the Profit and loss account and hence the payment of sales tax had not been allowed as deduction in earlier years. He further observed that even otherwise the claim would have been disallowed u/s 43B in the earlier years since the tax was not actually paid during those years. However, since the total tax payment of Rs 20,06,132/- comprised of sales tax (Rs 18,35,946/), interest (Rs 1,55,357/-) and penalty (Rs 14,829/-), he allowed only the payment of sales tax amounting to Rs 18,35,946/- and disallowed the balance amount Rs. 1,70,186/- for the reason that amount was in the nature of penal interest and penalty.

3.4. Aggrieved by the disallowance of interest of Rs.1,55,357/-, the assessee is in appeal before us and the Revenue is aggrieved by the decision of allowance of deduction of Rs. 18,35,946/- u/s 43B.

3.5. Before us, the Ld. A.R. submitted that in respect of sales tax liability for FY 95-96, 96-97 & 97-98 the assessee had made the payments under the Sales tax Amnesty scheme during the assessment year under consideration. The total aggregate payment made was Rs 20,06,132/- which consisted of sales tax of Rs 18,35,946/-, interest of Rs. 1,55,357/-, and penalty of Rs. 14,820/-. The payment was not charged to the Profit & loss account and taken directly taken to the Balance sheet as per the accounting policy consistently followed by the assessee. CIT (A) allowed the claim of sales tax u/s 43B but not of interest holding the same to be of penal in nature. It was submitted by the Assessee that it had complied with the sales tax law, though belatedly. For such delay, in depositing the sales tax it had to pay interest and penalty. The Ld. A.R. strongly argued and stated that the interest charged and paid under the Amnesty Scheme is only for deferment of payment of sales tax and was not penal in nature and therefore the same should be allowed as deduction u/s 43B.

3.6. Ld. D.R. on the other hand argued and pointed out that the assessee has not debited/credited Sales tax to the Profit and loss account and the sales tax was directly taken to Balance Sheet. He further stated that nothing is available on record to prove that in the earlier year the sales tax that was collected and not paid was added to

the total income. According to him as per the provisions of section 43B, the sales tax deduction can only be allowed on payment basis in the year of payment only if in the earlier year the amount was debited to the Profit and loss account and while computing the income the same was disallowed and was added to the income. Further, the Ld. D.R. could not controvert the fact that the interest paid on sales tax was of penal in nature.

3.7 We have heard the rival contentions, perused the material on records placed before us. The issue before us is whether the interest paid on sales tax under the amnesty scheme is an allowable deduction as business expenditure. The law is well settled that the interest paid on sales tax is not of penal in nature and is therefore allowable as business expenditure. Therefore, in our opinion the interest on sales tax is an allowable business expenditure. Further, the interest paid on sales tax under the amnesty scheme is not for infringement of any law. We accordingly hold that the entire amount of interest of Rs. 1,55,357/- as allowable. As far as the fact of allowance of sales tax in earlier years is concerned, nothing has been placed on before us to prove that in earlier years the sales tax that remained unpaid was added to the income. We therefore feel that this aspect needs to be verified. We accordingly, remit this issue back to the file of A.O. for limited purpose to verify as to whether in the earlier years the unpaid amount of sales tax at the year-end was added to the income. If the same was added then the same should be allowed as deduction in the current assessment year u/s. 43B. As far as the

Revenue's appeal is concerned, based on the above facts, we do not find any infirmity in the order of the CIT (A) and accordingly dismiss the Revenue's 1st ground. The claim of the assessee is accordingly allowed for statistical purposes and of the Revenue is dismissed.

Regarding ground No.2.

4. The A.O. observed that the assessee had paid purchase consideration of Rs.53,92,50,000/- to acquire 2876 equity shares of Rs.10 each of Yerrowada Investment Pvt. Ltd. (YIPL). This amount was shown under the schedule of fixed assets as part of "Building". Assessee claimed that by virtue of its holding the shares, it holds occupancy rights of the property owned by YIPL. YIPL had acquired land and had constructed about 5 lac sq. ft. of residential and commercial space. In the year 1996, YIPL allotted occupancy rights to its shareholders with respect to constructed, unconstructed and unutilized FSI. The A.O. was of the view that in the present case, YIPL has distributed its assets which are in the form of occupancy rights in respect of the properties owned by it to its shareholders. According to A.O., the income in respect of the properties in which the assessee has been transferred occupancy rights will be in the nature of deemed dividend. The A.O. held that the annual rental value in respect of the occupancy rights held by the assessee has to be computed and to be taxed in the hands of assessee as "deemed dividend" under the head "Income from other sources". He considered the rate for residential property at Rs.8.855 per sq. ft. per month and computed deemed

dividend and taxed it as “Income from other sources”. The computation of deemed dividend was made as under:-

Residential property area	Rate per sq. ft. per month.	Total annual rental value.
35950 sq. ft.	8.855	38,20,047/-

5. The assessee being aggrieved with the decision of the A.O. carried the matter in appeal before the CIT (A). CIT (A) confirmed the addition made by A.O. by relying on the order of CIT(A) for Assessment Year 2004-05.

6. Now the assessee is in appeal before us. Ld. A.R. of the assessee at the outset, stated that on identical facts, in the assessee’s own case, Hon’ble ITAT (in ITA No.2778/AHD/2008) vide order dated 29-1-2010 has deleted the addition. He further stated that there are no change in the facts of the assessment year under consideration and the facts for which the H’ble Tribunal had decided the issue in its favour. He placed on record the copy of ITAT order.

7. Ld. Departmental Representative fairly conceded that the issue is covered by ITAT’s decision in Assessee’s own case and in its favour.

8. We have heard the rival contentions and perused the material on record. We find that the issue under consideration has been dealt by the co-ordinate Bench for AY 2004-05 and 2000-01 vide common order

dated 29th January 2010. The Co-ordinate Bench has deleted the addition by holding as under:-

“4.4 We have considered the rival submissions. We find that the provisions of section 2(22)(a) has been extracted by CIT(A) in paragraph 6.6. of his order. By reading the aforesaid definition it is clear that dividend will include under clause (a) only when it amounts to distribution by a company out of accumulated profits coupled with release of any part of the assets of the company. Therefore, to attract section 2(22)(a), the dividend can be taxed only when there is distribution out of accumulated profits by way of release of any part of the assets. In the present, case it is seen that when the assessee acquired the shares, it also acquired the occupancy right in the premises. Such rights were acquired during F.Y. relevant to assessment years 1997-98. There is no amendment to the Articles after the shares are acquired by the assessee. Thus, there is no release of assessment year assets by YIPL to the assessee who is a shareholder therein. There is also no finding that the distribution is out of accumulated profits. What is brought to tax is the annual value of the property and not property itself. Since, there is no release by the company to the assessee of any assets and that too out of accumulated profits during the year in appeal, the addition u/s. 2(22)(a) is not called for. We, therefore, delete addition made u/s. 2(22)(a) of the Act.”

In view of the fact that there being no change in the facts and following the decision of the co-ordinate Bench we hold that the addition of Rs.38,20,047/- as deemed dividend is uncalled for. We therefore, delete the addition made and accordingly allow this ground of appeal of the assessee.

9. The next ground is against adding deemed dividend of Rs.38,20,047/- to the book profits u/s. 115JA.

10. The A.O. was of the view that the deemed dividend of Rs.38,20,047/- which was computed by him and which has been discussed hereinabove, should have been added to the book profits for the purpose of computation of book profit u/s. 115JA. Accordingly he added it for computation of book profits.

11. The assessee being aggrieved with the order of A.O. carried the matter in appeal before the Ld. CIT (A). CIT (A) confirmed the action of A.O. by following the decision in earlier year.

12. Being aggrieved by the decision of the CIT (A), the assessee is in now appeal before us.

13. Before us the Ld. A.R. stated that on similar facts, the assessee had raised identical ground before the Hon'ble Tribunal for A.Y. 2004-05. The Hon'ble Tribunal deleted the addition made by the A.O. The Ld. A.R. placed before us the copy of the order dated 29.10.2010 (ITA No.2778/AHD/2008) of co-ordinate Bench.

14. Ld. Departmental Representative on the other hand fairly conceded that the issue is covered by ITAT's decision in assessee's own case and in its favour.

14.1. We have heard the rival contentions and perused the material on record. We find that the issue under consideration has been dealt

by the co-ordinate Bench for AY 2004-05 vide order dated 29th January 2010. The Co-ordinate Bench has deleted the addition by holding as under:-

“9.5. As regards the addition to book profit by an amount of deemed dividend taxed u/s. 2(22)(a), since such deemed dividend did not form the part of book profit computed as per Part-II addition III of Schedule VI to Companies Act, 1956, in view of the decision of the Supreme Court in the case of Apollo Tyres (supra) no adjustment is called for. We, therefore, delete the addition made in the book profit in respect of gratuity and deemed dividend.”

15. In view of the fact that there being no change in the facts and following the decision of the co-ordinate Bench we hold that the addition of Rs.38,20,047/- for computing the book profits is uncalled for. We therefore, delete the addition made and accordingly allow this ground of appeal of the assessee.

16. The next ground of appeal relates to adding of provision for gratuity of Rs.12,03,707/- to book profit u/s. 115JA.

17. The A.O. was of the view that the provision of gratuity of Rs 12,03,707/- was in the nature of unascertained liability, and therefore the same was added by him to compute book profits in view of Explanation to section 115JB.

18. The assessee being aggrieved with the order of A.O. carried the matter in appeal before the Ld. CIT (A). CIT (A) confirmed the action of A.O. by following the decision in earlier year.

19. Being aggrieved by the decision of the CIT(A), the assessee is in now appeal before us.

20. Before us the Ld. A.R. stated that on similar facts, the assessee had raised identical ground before the Hon'ble Tribunal for A.Y. 2004-05. The Hon'ble Tribunal deleted the addition made by the A.O. The Ld. A.R. placed before us the copy of the order dated 29.10.2010 (ITA No.2778/AHD/2008) of co-ordinate Bench.

21. Ld. Departmental Representative on the other hand fairly conceded that the issue is covered by ITAT's decision in assessee's own case and in its favour.

22. We have heard the rival contentions and perused the material on record. We find that the issue under consideration has been dealt by the co-ordinate Bench for AY 2004-05 vide order dated 29th January 2010. The Co-ordinate Bench has deleted the addition by holding as under:-

“9.4. We have considered the rival submissions. The decision referred to by the Tribunal in the case of ACIT Vs HOEC Bhardhi

India Ltd (supra) was rendered ex-parte and without considering the decision of the Hon. Bombay High Court in the case of CIT Vs Echjay Forgings Pvt Ltd (251 ITR 15). The Hon. Bombay High Court held that the provision for gratuity on the basis of actuarial valuation could not be said that it was not an ascertained liability. Since the adjustment to book profit u/s 115JB permits increase by only those provisions other than the ascertained liability and since as per the Hon Bombay High Court, the provisions for gratuity on the basis of actuarial calculation was not an unascertained liability, the adjustment to book profit is not called for. We therefore delete the addition made in this regard.”

23. In view of the fact that there being no change in the facts or any contrary decision and following the decision of the co-ordinate Bench we hold that the provision for gratuity amounting to Rs.12,03,707/- not as unascertained liability for the purpose of calculation of book profits u/s 115JB and therefore considering the same for computing the book profits is uncalled for. We therefore, delete the addition made and accordingly allow this ground of appeal of the assessee.

24. ITA No.470/AHD/2010

The Revenue in its appeal has taken following two grounds of appeal:-

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in directing to allow deduction of Rs.18,35,946/- u/s.43B of the Act on account of sales tax amnesty which was not claimed in the return of income. The Assessing Officer has power not to entertain a claim for deduction, if claimed otherwise than by filing return or revised return in view of Hon’ble Supreme Court decision in the case of Goetz (India) Ltd. v. CIT 157 Taxman 1 (SC).

2. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting the provisions for assets amounting to Rs.7 lacs held for disposal while computing the book profit u/s. 115JB of the Income Tax Act.”

24.1. Regarding No.1, the same has been adjudicated together with ground No.1 of assessee’s appeal earlier vide paragraph-3.5 above and therefore, the same is decided in the manner indicated above.

25. Regarding Ground No.2, A.O. observed that assessee had not added provision for fixed assets held for disposal amounting to Rs.7,00,000/- for computing book profit u/s. 115JB. According to the A.O. since it was in the nature of unascertained liability, the same should have been added as per Explanation to Sec.115JB for computation of book profits. He accordingly added the same.

26. On appeal, CIT (A), deleted the addition made by the A.O. following the decision of CIT (A) in earlier year.

27. Aggrieved by the order of CIT (A), the Revenue is now in appeal before us.

28. The Ld. D.R. stated that by virtue of amendment brought by Finance (No.2) Act,2009 w.e.f. 1-4-2001, by insertion of Cl. (i) to Explanation (1) to section 115JB, the amount set aside as provision for diminution in the value of any assets, needs to be added to arrive at “book profits”.

29. The Ld. A.R. of the assessee fairly conceded that by virtue of retrospective amendment amount of Rs.7 lacs needs to be added to arrive at book profits. He, however stated that the amount of Rs.7 lacs is a provision made in the books in earlier years. No new provision has been made in the Assessment Year under consideration. He, therefore, requested that the matter be remitted to the A.O. for limited purpose of verification so as to verify as to whether any new provision has been made in the current year.

30. The Ld. D.R. did not object to it.

31. We have considered the facts brought before us. It is a fact that there has been retrospective amendment to Sec. 115JB as a result of which provision for diminution in the value of assets needs to be added to arrive at the book profits. We therefore, remit the matter to the file of the A.O. for limited purpose to verify as to whether the provision of Rs.7 lacs includes any provision made in the current assessment year. Addition is to be made of only the incremental amount of provision made during the year. Therefore, this ground is allowed for statistical purpose.

32. In the result, appeal of the assessee is allowed whereas the appeal of the Revenue is partly allowed for statistical purpose.

Order pronounced in Open Court on 20-4 - 2012.

Sd/-
(G.C.GUPTA)
VICE PRESIDENT

Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Ahmedabad.

S.A.Patki.

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) I, Baroda.
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad.

- 1.Date of dictation 12 - 4 -2012
- 2.Date on which the typed draft is placed before the Dictating Member.....Other Member..... 19 / 4 / 2012
- 3.Date on which the approved draft comes to the Sr.P.S./P.S 19 -4 -2012.
- 4.Date on which the fair order is placed before the Dictating Member for pronouncement 20 - 4 -2012
- 5.Date on which the fair order comes back to the Sr.P.S./P.S 20 - 4 -2012
- 6.Date on which the file goes to the Bench Clerk 20 - 4 -2012.
- 7.Date on which the file goes to the Head Clerk.....
- 8.The date on which the file goes to the Asstt. Registrar for signature on the order.....
- 9.Date of Despatch of the Order.....