IT: Where assessee had made provision for wealth tax, while computing book profit of assessee, it cannot be included in section 115JB

IT: Where on account of attack on World Trade Centre, financial market, collapsed and market value of bonds issued by assessee was brought down below their face value and, hence, assessee purchased its own bonds and extinguished them, profit gained in buy-back process could not be taxable under section 41(1) as assessee had not claimed deduction of trading liability in any earlier year

IT: Where assessee had purchased oil from Iraq and payments were made by an agent, there being no evidence to suggest that assessee had made any illegal commission payment to Oil Market Organization of Iraqi Government as alleged in Volckar Committee Report, Tribunal's order allowing payment for purchase of oil was to be upheld

[2019] 102 taxmann.com 142 (Bombay)

HIGH COURT OF BOMBAY

Commissioner of Income-tax-LTU

v.

Reliance Industries Ltd.*

AKIL KURESHI AND M. S. SANKLECHA, JJ.
IT APPEAL NO. 993 OF 2016†
JANUARY 15, 2019

Section 115JB of the Income-tax Act, 1961 - Minimum alternate tax (Computation of book profits) - Whether under section 115JB, while computing book profit, provision made for payment of wealth tax could not be included in it as section 115JB only refers to income-tax paid or payable or provisions made therefor - Held, yes [Paras 2 and 4][In favour of assessee]

Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability (Claim for deduction) - Whether for applicability of section 41(1), requirement is that assessee has claimed any allowance or deduction which has been granted in any year in respect of any loss, expenditure or trading liability - Held, yes - Assessee issued foreign currency bonds in year 1996-97 - On account of attack on World Trade Centre on 11-9-2001, financial market collapsed and market price of bonds and debenture was brought down at value less than its face value - Assessee purchased bonds from market and extinguished them - In this process of buyback, it gained Rs. 38.80 crores - Assessing Officer treated such amount as assessable to tax under section 41(1) - Whether since assessee had not claimed any deduction of any trading liability in any earlier year, section 41(1) would not be applicable and no addition could be made on extinguishment of bond - Held, yes [Para 6][In favour of assessee]

Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Illegal payment) - Assessee claimed deduction towards payment for purchase of oil - Revenue claimed that assessee had paid illegal commission to State Oil Marketing Organization,

an Iraqi government agency for purchase of oil; therefore, such expenditure was not allowable - However, Commissioner (Appeals) observed that except for Volcker Committee Report there was no evidence that assessee had paid any such illegal commission, that even in said report, there was no finding that assessee had made illegal payments and that payments were made by an agent - Tribunal confirmed view of Commissioner (Appeals) - Whether since entire issue was based on appreciation of evidence, no question of law arose for consideration from Tribunal's order allowing payment for purchase of oil - Held, yes [Para 8][In favour of assessee]

FACTS-I

- It was the case of revenue that for computing the assessee's book profit under section 115JB, provisions made by assessee for wealth tax should be excluded.
- The Tribunal was of the opinion that the section 115JB itself refers to the income tax paid or payable on the provisions made therefor. This would not include the provision made for wealth tax.
- On the revenue's appeal:

HELD-I

- Section 115JB pertains to special provision for payment of tax by certain companies. As is well known, detailed provisions have been made to compute the book profit of the assessee for the purpose of the said provision. Explanation 1 contains list of amounts to be added while computing assessee's book profit under section 115JB.
- In plain terms, clause (a) as noted above refers to amount of income-tax paid or payable or the provision made therefor. The legislature has advisedly not included wealth tax in this clause. By no interpretative process, the wealth tax can be included in clause (a).
- Clause (c) would include the amount set aside for provisions made for meeting liabilities other than ascertained liabilities. For applicability of this clause, therefore, fundamental facts would have to be brought on record which in the present case, the revenue has not done. In fact, the entire thrust of the revenue's argument at the outset appears to be on clause (a) which refers to the income-tax which according to the revenue would also include wealth tax. This question, therefore, is not required to be entertained. [Para 4]

FACTS-II

- The assessee had issued foreign currency bonds in the years 1996 and 1997. On account of the attack on World Trade Centre at USA on 11-9-2001, financial market collapsed and the investors of debentures and bonds started selling them which in turn brought down the market price of such bonds and debentures which were traded in the market at a value less than the face value. The assessee purchased such bonds and extinguished them. In the process of buy back, the assessee gained a sum of Rs. 38.80 crores.
- The Assessing Officer treated such amount assessable to tax in terms of section 41(1).
- The Commissioner (Appeals) and the Tribunal, however, deleted the same. The

Tribunal in its detail discussion came to the conclusion that the liability arising out of the issuance of bonds was not a trading liability and therefore, section 41(1) would have no applicability.

- On the revenue's appeal:

HELD-II

- There is no error in the view taken by the Tribunal. Sub-section (1) of section 41 provides that where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee and subsequently, during any previous year, such liability ceases, the same would be treated as the assessee's income chargeable to tax as income for previous year under which subject extinguishment took place. The foremost requirement for applicability of sub-section (1) of section 41, therefore, is that the assessee has claimed any allowance or deduction which has been granted in any year in respect of any loss, expenditure or trading liability. In the present case, the revenue has not established these basic facts. In other words, it is not even the case of the revenue that in the process of issuing the bonds, the assessee had claimed deduction of any trading liability in any year. Any extinguishment of such liability would not give rise to applicability of sub-section (1) to section 41. [Para 6]
- For applicability of section 41(1), it is a *sine qua non* that there should be an allowance or deduction claimed by the assessee in any assessment year in respect of loss, expenditure or trading liability incurred by the assessee. Then, subsequently, during any previous year, if the creditor remits or waives any such liability, then the assessee is liable to pay tax under section 41. This question, therefore, does not require any consideration. [Para 7]

FACTS-III

- The assessee claimed deduction towards the payment for purchase of oil.
- The Assessing Officer's case was that assessee had paid illegal commission for purchase of such oil to State Oil Marketing Organization and therefore, such expenditure was not allowable.
- On appeal, the Commissioner (Appeals), in detailed order, while reserving the disallowance made by the Assessing Officer, observed that there was no evidence that the assessee had paid any such illegal commission. He noted that except for the Volcker Committee Report, there was no other evidence for making such addition. He noted that even in the said report, there was no finding that the assessee had made illegal payment and it appeared that the payments were made by an agent and there was no evidence to suggest that the assessee had made any illegal commission payment to Iraq Government.
- The Tribunal confirmed the view of Commissioner (Appeals).
- On the revenue's appeal:

HELD-III

- The entire issue is based on appreciation of materials on record and is a factual issue. No question of law arises. [Para 8]

CASE REVIEW

Vista Entertainment (P.) Ltd. v. *Addl. CIT* [IT Appeal No. 5769 (Mum.) of 2013, dated 28-2-2018] *affirmed.*

CASES REFERRED TO

CIT v. *Echjay Forgings (P.) Ltd.* [2001] 116 Taxman 322/251 ITR 15 (Bom.) (para 2), *Mahindra & Mahindra Ltd* v. *CIT* [2003] 128 Taxman 394/261 ITR 501 (Bom.) (para 5), *CIT* v. *T.V. Sundaiam Iyengar & Sons Ltd.* [1968] 88 Taxman 429/222 ITR 344 (SC) (para 5) and *Commissioner* v. *Mahindra & Mahindra Ltd.* [2018] 93taxmann.com 32/255 Taxman 305/404 ITR 1 (SC) (para 7).

Tejveer Singh *for the Appellant.* **Jehangir Mistry**, Sr. Counsel, **Madhur Agrawal**, **P.C. Tripathi** and **Amit R. Mathur** *for the Respondent.*

ORDER

1. Revenue is in the appeal against the Judgment of the Income Tax Appellate Tribunal ("the Tribunal" for short) dated 16.9.2015. Following questions are presented for our consideration:—

> "(*i*) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in deleting the addition of Rs. 6,00,00,000/- being provision for wealth tax, while computing the Book profits u/S. 115JB of the Income Tax Act?
>
> (*ii*) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in deleting the addition of Rs. 38,80,08,397/- being gain on extinguishment of debentures/bonds treated as income u/S 41(1) of the Income Tax Act?
>
> (*iii*) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in allowing commission/surcharge paid to State Oil Marketing Organization ("SOMO"), an Iraqi Government Agency ignoring the Volcker Committee report (India being a member state of the UN) which was prepared after due diligence and investigation of documents as well as personnel interviews?"

2. Question (i) pertains to Revenue's contention that for computing the assessee's Book profits under Section 115JB of the Income Tax Act, 1961 ("the Act" for short), provision made by the assessee for wealth tax should be excluded. The Tribunal was of the opinion that the section itself refers to the income tax paid or payable or the provisions made therefore. This would not include the provision made for wealth tax. The Tribunal relied on a decision of this Court in the case of *CIT* v. *Echjay Forgings (P.) Ltd.* [2001] 116 Taxman 322/251 ITR 15 in which such an issue had come up for consideration.

3. Learned counsel for the Revenue, however, submitted that the decision of this Court in the case of *Echajay Forgings (P.) Ltd.* (*supra*) proceeded on the concession made by the Revenue's counsel and the Tribunal, therefore, committed an error in treating it as ratio of the High Court decision. On the other hand, the learned counsel for the assessee submitted that even otherwise, the statutory provision being clear, there is no scope for interpretation.

4. Section 115JB of the Act pertains to special provision for payment of tax by certain companies. As is well known, detailed provisions have been made to compute the book profit of the assessee for the purpose of the said provision. *Explanation 1* contains list of amounts to be added while computing assessee's book profit under Section 115JB of the Act. Clause (a) thereof reads as under:—

"(*a*) the amount of income-tax paid or payable, and the provision therefor,"

Likewise, clause (c) reads as under:—

"(*c*) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities,"

In plain terms, clause (a) as noted above refers to amount of income tax paid or payable or the provision made therefor. The legislature has advisedly not included wealth tax in this clause. By no interpretative process, the wealth tax can be included in clause (a). The Revenue, further made a vague attempt to bring this item in clause (c) noted above. Clause (c) would include the amount set aside for provisions made for meeting liabilities other than ascertained liabilities. For applicability of this clause, therefore, fundamental facts would have to be brought on record which in the present case, the Revenue has not done. In fact, the entire thrust of the Revenue's argument at the outset appears to be on clause (a) which refers to the income tax which according to the Revenue would also include wealth tax. This question, therefore, is not required to be entertained.

5. Question (ii) relates to Revenue's attempt to bring a sum of Rs. 38.80 Crores (rounded off) under Section 41(1) of the Act. This issue has a brief history which can be noted as under:—

The assessee had issued Foreign Currency Bonds in the years 1996 and 1997 carrying a coupon rate of interest ranging between 10% to 11% having maturity period of 30 to 100 years. The interest would be payable half yearly. According to the assessee, on account of the attack on World Trade Centre at USA on 11.9.2001, financial market collapsed and the investors of debentures and bonds started selling them which in turn, brought down the market price of such bonds and debentures which were traded in the market at a value less than the face value. The assessee, therefore, purchased such bonds and debentures from the market and extinguished them. In the process of buy back, the assessee gained a sum of Rs. 38.80 Crores. The Assessing Officer treated this as assessable to tax in terms of Section 41(1) of the Act. The CIT(A) and the Tribunal, however, deleted the same. The Tribunal in its detail discussion came to the conclusion that the liability arising out of the issuance of bonds was not a trading liability and therefore, Section 41(1) of the Act would have no applicability. The Tribunal relied on and referred to a decision of the Division Bench of this Court in the case of *Mahindra & Mahindra Ltd* v. *CIT* [2003] 128 Taxman 394/261 ITR 501. The Tribunal held that the ratio of the decision of the Supreme Court in the case of *CIT* v. *T.V. Sundaiam Iyengar & Sons Ltd.* [1968] 88 Taxman 429/222 ITR 344 would not apply. It is against this decision, the Revenue has filed this appeal.

6. Having heard the learned counsel for the parties and having perused the documents on record, we do not see any error in the view taken by the Tribunal. Sub-section (1) of Section 41 provides that where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee and subsequently, during any previous year, such liability ceases, the same would be treated as the assessee's income chargeable to tax as income for previous year under which subject extinguishment took place. The foremost requirement for applicability of sub-section (1) of Section 41, therefore, is that the assessee has claimed any allowance or deduction which has been granted in any year in respect of any loss, expenditure or trading liability. In the present case, the Revenue has not established these basic facts. In other words, it is not even the case of the Revenue that in the process of issuing the bonds, the assessee had claimed deduction of any trading liability in any year. Any extinguishment of such liability would not give rise to applicability of sub-section (1) to Section 41 of the Act.

7. We may also notice that the decision of this Court in the case of *Mahindra and Mahindera Ltd* (*supra*) came to be confirmed by the Supreme Court in the case of *Commissioner* v. *Mahindra & Mahindra Ltd.* [2018] 93 taxmann.com 32/255 Taxman 305/404 ITR 1. It was reiterated that for

applicability of Section 41(1) of the Act, it is a *sine qua non* that there should be an allowance or deduction claimed by the Assessee in any assessment year in respect of loss, expenditure or trading liability incurred by the assessee. Then, subsequently, during any previous year, if the creditor remits or waives any such liability, then the Assessee is liable to pay tax Under Section 41 of the IT Act . This question, therefore, does not require any consideration.

8. The last surviving question pertains to Revenue's objection to the assessee's claim of deduction towards the payment for purchase of oil. Revenue argues that the assessee had paid illegal commission for purchase of such oil and therefore, such expenditure was not allowable. The CIT(A), however, in detail order while reversing the disallowance made by the Assessing Officer, observed that there was no evidence that the assessee had paid any such illegal commission. He noted that except for the Volcker Committee Report, there was no other evidence for making such addition. He noted that even in the said report, there is no finding that the assessee had made illegal payment. It appears that the payments were made by an agent and there was no evidence to suggest that the assessee had made any illegal commission payment to Iraqi government. The Tribunal confirmed this view of the CIT(A). The entire issue is thus based on appreciation of materials on record and is a factual issue. No question of law arises.

9. In the result, the appeal is dismissed.

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*In favour of assessee.

†Arising out of order of ITAT in *Vista Entertainment (P.) Ltd.* v. *Addl. CIT* [IT Appeal No. 5769 (Mum.) of 2013, dated 28-2-2018.