

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'SMC, अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“SMC” BENCH, AHMEDABAD**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER  
& SMT. MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 209/Ahd/2018  
(निर्धारण वर्ष / Assessment Year : 2011-12)

<b>M/s Milan Intermediates LLP,</b> (Erstwhile M/s. Milan Intermediates Private Limited) 2, Jasmit Duplex, Patel Society, Gulbai Tekra, Ellisbridge, Ahmedabad - 380006	<b>बनाम/</b> Vs.	The Income Tax Officer, Ward-2(1)(4), Ahmedabad
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCM0999H</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	Shri Saumil Jain, A.R
प्रत्यर्थी की ओर से/Respondent by :	Shri Saurabh Singh, Sr. D.R

सुनवाई की तारीख / Date of Hearing	08/05/2018
घोषणा की तारीख/Date of Pronouncement	26/ 07/2018

**आदेश/O R D E R**

**PER PRADIP KUMAR KEDIA - AM:**

The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income Tax(Appeals) dated 13.11.2017 arising in the assessment order dated 23.12.2016 passed by the Assessing Officer under section 143(3) read with section 263 of the Income-tax Act, 1961 (the Act) concerning assessment year 2011-12.

2. The assessee in the present appeal seeks to agitate the action of the lower authorities in limiting the claim of the assessee for reduction in book profit as computed under section 115JB of the Act by the amount of loss brought forward or unabsorbed depreciation whichever is less, as per books of account to Rs. 18,43,991/- as against the claim of the assessee for Rs. 55,01,780/-. The assessee thus seeks relief by way of its claim for reduction of net profits by the amount of Rs. 55,01,780/- (being the lower of loss brought forward or unabsorbed depreciation as per books of account) for the purposes of calculation of book profit under section 115JB of the Act.

3. Briefly stated, in the assessment proceedings pursuant to directions by the Principal CIT under section 263 of the Act, the Assessing Officer observed that the assessee has wrongly calculated the eligible amount of set off towards lower of the brought forward losses and unabsorbed depreciation while computing the book profits under section 115JB of the Act. The Assessing Officer perused a tabulated statement of business loss and depreciation as per books beginning from assessment year 2003-04 as referred to in the assessment order and observed that the assessee is entitled to a lower set off as tabulated and consequentially, the book profit was determined at Rs. 44,94,813/- in place of Rs. 9,06,945/- shown by the assessee in terms of provisions of section 115JB read with Explanation below section 115JB. The methodology towards adjustment and set off of brought forward loss and unabsorbed depreciation while calculating the book profit was thus disputed by the Assessing Officer and the book profit was assessed at a higher figure in the assessment framed.

4. Aggrieved, the assessee preferred appeal before the CIT(A) and challenged the quantification of book profit under section 115JB by the Assessing Officer. The assessee alleged that the action of the Assessing Officer is in contravention of Explanation (1)(iii) below section 115JB of the Act. It was contended before the CIT(A) that Income tax Act does not prescribe any particular methodology/chronology with regard to carry forward and set off unabsorbed losses/depreciation other than a mere statement of law that the net profit as shown in the profit and loss account is to be reduced by amount of loss brought forward or unabsorbed depreciation whichever is less as per books of account. It was further contended by the assessee before the CIT(A) that in the present case, the assessee, following FEFO method for setting off the losses, first adjusted the loss out of brought forward losses accumulations and therefore out of remaining unabsorbed depreciation against the book profits in the ensuing assessment year on year to year basis. For doing so, the assessee relied upon the decision of the Hon'ble Delhi High Court in the case of Eli Lilly & Company 334 ITR 186 where similar methodology in the matter of carry forward and set off losses was accepted for MAT purposes and was not interfered. The CIT(A) however did not find merit in the plea raised on behalf of the assessee and refused to interfere with the re-computation of book profit at higher figure by the Assessing Officer.

5. Further aggrieved, the assessee preferred appeal before the Tribunal.

6. The Ld. Authorized Representative for the assessee C.A Saumil Jain submitted at the outset that the only dispute involved in the present

appeal is with regard to the methodology followed by the assessee company in adjustment and set off of brought forward business loss and unabsorbed depreciation while calculating the book profit under the provisions of section 115JB of the Income Tax Act. It was submitted that the assessee company has total brought forward losses including unabsorbed depreciation as per its audited books of account at the beginning of the financial year 2010-11 i.e as on 01.04.2010 of Rs. 2,12,22,430/-. It was submitted that the assessee has followed FIFO method for setting off the losses. While applying this method, the assessee also first adjusted the brought forward business losses and then unabsorbed depreciation against the profit earned in the subsequent assessment years consistently on year to year basis.

6.1 A tabulated statement showing position of brought forward business losses and unabsorbed depreciation after adjustment and set off as made by the assessee company in the books of account on year to year basis was inter alia referred which is reproduced hereunder for ready reference.

AY	Profit or loss	Current year Depreciation	Profit after depreciation	Brought forward loss	Unabsorbed depreciation	Book profit	Position of carried forward loss	Position of unabsorbed depreciation
2007-08	7,398,921	1,517,629	5,881,292	28,234,876	6,748,000	NIL	23,534,309	5,567,275
2008-09	9,367,857	3,168,860	6,198,997	23,534,309	5,567,275	631,722	17,964,906	4,937,682
2009-10	5,880,373	2,020,549	3,859,824	17,964,906	4,937,682	NIL	14,623,670	4,419,093
2010-11	99,522	1,943,433	-1,843,911	14,623,670	4,419,093	NIL	14,623,670	6,263,004
2011-12	6,338,724	-	6,338,724	14,623,670	6,263,004	NIL	9,051,044	5,496,906

6.2 Addressing the issue further, the Ld. A.R submitted that the action of the Assessing Officer in re-computing the book profits is fallacious and unrealistic in as much as if the assessee follows the methodology adopted by the Assessing Officer as referred to at page No. 7 of assessment order, then the total brought forward losses available to the assessee company as on 01.04.2010 stands at a higher figure of Rs. 3,00,78,787/- as against the brought forward losses as per audited books of account of Rs. 2,12,22,430/-. It was thus contended that the action of the A.O is, in fact, detrimental to revenue. A reference to Explanation (1)(iii) was made and it was submitted that the deduction to be allowed under section 115JB in calculating the book profit is the lower of the brought forward losses or unabsorbed depreciation as per “books of account” and thus methodology followed by the Assessing Officer totally fails as it computes the available brought forward losses as on 01.04.2010 at Rs. 3,00,78,787/- as against actual brought forward losses as per books of account which stands at Rs. 2,12,22,430/-.

6.3 Learned AR thus submitted that for the purposes of quantification of Income tax liability under section 115JB, although the reduction from current year profit to be made is the lower of book depreciation or book loss brought forward from earlier years, yet for the purposes of quantification of carry forward of unabsorbed loss and depreciation (as per books) to the next assessment year, the assessee has the option and liberty to reduce from the current year profit, either the book loss or the book depreciation, irrespective of which one is lower albeit to extent of lower of the two in terms of quantum. The Ld. A.R contended in elaboration that the scope of adjustment provided as per the Explanation is limited and operates only for the purposes of

deciding the quantum of the amount to be reduced from the net profit as per books in order to arrive at the book profit for the purpose of quantification of Income tax liability under section 115JB. The Ld. A.R thus contended that the Explanation to section 115JB is silent and does not compel an assessee to reduce the unabsorbed depreciation (where it represents lower amount) instead of unabsorbed loss (by the lower figure) and vice versa. It merely provides for extent of deduction which is quantified to be lower of two types of unabsorbed items. The Ld. A.R, accordingly exhorted that the methodology consistently followed by the assessee in the matter of adjusting and setting off brought forward business losses and unabsorbed depreciation in the books of account does not call for any disturbance and the assessee should be allowed and be considered eligible for reduction out of unabsorbed loss as per its option to the extent of lower figure between unabsorbed loss and unabsorbed depreciation as per the books of account for the purposes of the calculating book profits under section 115JB of the Act.

7. The Ld. Departmental Representative, on the other hand, relied upon the order of the Assessing Officer and CIT(A) and submitted that the Explanation to section 115JB provides for deduction of the lower of book loss or unabsorbed depreciation as per books and therefore the proposition made on behalf of the assessee that deduction amount is for the purposes of quantification alone is not correct. The Ld. D.R submitted that the Assessing Officer has rightly appreciated the issue in perspective which is in line with the ruling delivered by the authority for advance rulings in AAR No. 652 of 2004 in the case of Rastriya Ispat Nigam Ltd. dated 19.07.2006. The Ld. D.R accordingly submitted that no interference with order of lower authorities is called for.

8. We have carefully considered the rival submissions and perused the orders of the authority below and case laws cited. In the instant case, the short issue in controversy is computation of 'book profit' under section 115JB with reference to Explanation (1)(iii) below 115JB. The interpretation of Explanation is thus in question. In this backdrop, we take note of Section 115JB of the Act which contains a special mechanism i.e. Minimum Alternate Tax (MAT) whereby the tax liability of a corporate assessee determined as per normal and regular provisions is to be tested against specified percentage of its books profits. Consequently, if the regular tax liability is lower, MAT becomes payable. MAT is to be computed with reference to Companies' accounting profit for the year after making specified adjustments. One of the critical adjustment is deduction of lower of brought forward losses or unabsorbed depreciation as per books of accounts. Explanation (1)(iii) to section 115JB also enjoins that no deduction is permissible if either amount is NIL. In a scenario, where a corporate assessee has incurred book losses (losses as per accounts subject to adjustments) in the initial years and has become profitable in later years, the book profits of later years with reference to Section 115JB shall be computed after setting off the lower of loss incurred or depreciation of the earlier years remaining unabsorbed against the accounting profits/book profits earned in succeeding years.

8.1 In this background, let us advert to Explanation 1(iii) to Section 115JB which enables an assessee to avail deduction from 'book profits' towards unabsorbed loss/unabsorbed depreciation whichever is less as per books of accounts. It will be apposite to reproduce the

aforesaid clause to the Explanation for ready reference which reads as under:

“ (iii) *the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.*

*Explanation.-For the purposes of this clause,-*

- (a) The loss shall not include depreciation;*
- (b) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is nil;”*

8.2 A bare reading of the Explanation quoted above would show that Clause (iii) to Explanation 1 to Section 115JB (‘Explanation’ in short) provides that while computing the book profits for the relevant assessment year for the purposes of Section 115JB, the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of accounts, is required to be reduced.

8.3 In this regard, it is firstly the case of the assessee that it is consistently following FIFO method for setting off year-wise brought forwarded losses. Following this method, unabsorbed loss of earlier year, longest outstanding, is first set off against the current year’s book profit and thereafter in tandem. Secondly and importantly, while applying the aforesaid method, the assessee had first adjusted the book profit of the current year out of brought forward business losses accumulations in preference to the unabsorbed depreciation (quantified to the extent of the lower of the two) regardless of the fact that amount set off represents unabsorbed depreciation being a lower figure. It is the case of the assessee that this method has been adopted consistently on year to year basis. The AO, on the other hand, has purportedly declined to agree with the aforesaid policy of the assessee and has

revised the figures of set off while computing the book profit as tabulated. The controversy essentially lies in the manner and methodology of reduction of current years' profits adopted by Assessee necessarily out of brought forward losses in preference to unabsorbed depreciation (subject to quantification of amount being lower of the two) irrespective of the fact that unabsorbed depreciation is lower than unabsorbed losses.

8.4 To illustrate, supposedly the assessee has carried forward unabsorbed loss of Rs.75 and unabsorbed depreciation of Rs.25 from the preceding financial year. The book profit is, say, Rs.35 in the current year. The assessee has reduced Rs.25/- (being lower of unabsorbed losses and unabsorbed depreciation) from the book profit and adjusted the same under unabsorbed losses and consequently carried forward unabsorbed loss at Rs.50 and unabsorbed depreciation at Rs.25 in the succeeding assessment year as an available set off against the book profit of that year. While the assessee has propounded that the tax payer is fully entitled to exercise its discretion in claiming reduction out of unabsorbed losses in preference to unabsorbed depreciation in the absence of any specific suggestion in Explanation to Section 115JB, the Revenue, on the other hand, seeks to reduce the amount so adjusted from unabsorbed depreciation (being lower figure) and thus, grants benefit of carry forward under the head of 'unabsorbed loss' at Rs.75 and unabsorbed depreciation at Rs.0 (zero). Thus, as illustrated, notwithstanding that the assessee has restricted the quantification of set off to be lower to the two (namely unabsorbed loss and unabsorbed depreciation) but, however, has given primacy to unabsorbed losses in the matter of reduction and quantification of

unabsorbed loss in preference to unabsorbed depreciation available for set off in succeeding year. For doing so, it is the case of the assessee that in the absence of any particular form of methodology prescribed for set off in the Explanation and thus owing to Explanation being silent towards the position of law, the assessee, as per its option, is entitled to first reduce quantum of unabsorbed losses to the extent of book profits subject however to the lower of the unabsorbed depreciation as per its books of accounts.

8.5 On a conspectus on the facts of the case and on perusal of Explanation, we do not consider the methodology adopted by the assessee in affirmative. The controversy involves interpretation of Clause (iii) to Explanation 1 to Section 115JB. Clause (iii) (as reproduced the above) requires to be given full effect as per letter as well as in spirit. Apparently, it provides for deduction of lower of unabsorbed loss or unabsorbed depreciation out of book profits. Noticeably, benefit of Explanation to Clause (iii) is not available in the event either unabsorbed loss or unabsorbed depreciation becoming NIL. Thus, in the event where either of the two becomes zero, the assessee will not be entitled for set off against books profits as beneficially provided in Clause (iii) to Explanation 1. The spirit of the clause thus requires to be gauged from this restriction placed statutorily. If the methodology adopted by the assessee is endorsed, it may generally defeat a situation where one of the two i.e. unabsorbed loss and unabsorbed depreciation turning NIL. To give effect to the object of Clause (iii), we are of the view that like should be reduced from like and not differently. This means if the lower of the two happens to be unabsorbed depreciation, reduction need to be done from depreciation

kitty and not out of unabsorbed loss. Doing so would give fair treatment to the language employed and will be in consonance with the object of Clause (iii) for the purposes of set off.

8.6 At this stage, we also take notice of the Ruling rendered by the Authority of Advance Rulings in the case of Rastriya Ispat Nigam Ltd. (supra) and find that almost similar view has been taken by the authority. While the ruling may not necessarily have the binding force, we are persuaded to adopt the view expressed by the authority rendered after objective analysis of facts. Thus, on first principles and without going into arithmetical accuracy of working of carry forward of set off losses etc., we are of the clear view that the methodology adopted by the assessee to prioritise set off of unabsorbed loss regardless of unabsorbed depreciation being lower is not in tune with the aim and object of Clause (iii) to Explanation 1 of Section 115JB of the Act. The decision rendered in the case of Eli Lilly relied upon by assessee does not provide answer to the controversy in issue. The Hon'ble Delhi High Court merely found that mistake, if any, is not in the nature of apparently mistake and thus not susceptible to rectification under s.154 of the Act. The issue raised by the assessee is therefore decided in negative on principle.

8.7 At this point, we also observe that assessee has simultaneously pointed out certain factual errors such as quantum of carry forward loss of Rs.3,00,78,787/- as on 01.04.2010 as per the method adopted by the AO as against the loss at Rs.2,12,22,430/- as per the books of accounts of the assessee. We do not propose to go into arithmetical accuracy of quantum of carry forward and restrict ourselves to adjudicate the issue

on the first principles. The factual aspects are thus remanded back to the file of the AO for determination of quantification of set off as per the aforesaid principle after giving proper opportunity to the assessee in this regard. Therefore, the issue is remanded back to the file of the AO for limited purposes of applying the principles narrated above and for re-determination of quantum of unabsorbed loss/depreciation available for set off in current year and succeeding year.

9. In the result, appeal of the assessee is dismissed.

**This Order pronounced in Open Court on 26/07/2018**

Sd/-  
(SMT. MADHUMITA ROY)  
**JUDICIAL MEMBER**  
Ahmedabad; Dated 26/07/2018

Sd/-  
(PRADIP KUMAR KEDIA)  
**ACCOUNTANT MEMBER**

*True Copy*

Mukul / S K Sinha

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-5, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad