

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH : KOLKATA

[Before Hon’ble Shri S.S. Godara, JM & Shri M.Balaganesh, AM]

I.T.A No. 813/Kol/2018

Assessment Year : 2012-13

M/s Himadri Chemicals & Industries Ltd.
(Now known as Himadri Speciality Chemical Ltd)
[PAN: AAACH 7475 H]
(Appellant)

-vs-

Pr. CIT, Circle-1, Kolkata

(Respondent)

For the Appellant : Shri Ravi Tulsiyan, FCA

For the Respondent : Shri Md. Usman, CIT DR

Date of Hearing : 29.08.2018

Date of Pronouncement : 05.09.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the assessee arises out of the order of the Learned Principal Commissioner of Income Tax, Circle-1, Kolkata [in short the Id. CIT] in Memo no. Pr. CIT(C)-1/sec.263/2017-18/10180-183 dated 28.03.2018 passed u/s 263 of the Act against the order passed by the ACIT, Central Circle-2(1), Kolkata [in short the Id. AO] under section 143(3) of the Income Tax Act, 1961 [in short “the Act”] dated 01.02.2016 for the Assessment year 2012-13.

2. The only effective issue involved in this appeal is as to whether the Id CIT was justified in invoking revisionary jurisdiction u/s 263 of the Act in the facts and circumstances of the case.

3. The brief facts of this appeal are that the assessee filed its return of income on 30.11.2012 declaring total income of Rs Nil under normal provisions of the Act and Book Profits u/s 115JB of the Act of Rs 80,89,27,608/- . The loss returned by the assessee under normal provisions of the Act in the return was Rs 46,64,69,826/-. The assessment was completed u/s 143(3) of the Act on 1.2.2016 determining the assessed loss of Rs 23,14,14,360/- under normal provisions of the Act. The Book Profits of Rs 80,90,27,270/- u/s 115JB of the Act after making disallowance of Rs 99,658/- u/s 14A of the Act was determined by the Id AO in the scrutiny assessment completed u/s 143(3) of the Act dated 1.2.2016. Later the said assessment was sought to be revised by the Id CIT u/s 263 of the Act for which a show cause notice was issued on 26.3.2018 to the assessee on the following grounds :-

“1. Foreign Exchange Fluctuation Loss:

It was noticed from Note 33 of annual accounts- “Change in Accounting Policy” that the assessee company had exercised option under Para 46A of AS 11 “The Effect of Change in foreign Exchange Rates” in respect of the accounting for fluctuations in foreign exchange relating to long term moneraty items. Accordingly, the assessee company had adjusted exchange fluctuations amounting to Rs. 2235.41 lakh to the cost of its fixed assets including capital work in progress during the year which was hitherto charged to profit & Loss Account.

1.2 In this context it was also observed that during the F.Y. 2010-11, the assessee had taken various ECB loans which were available only for establishment of new projects or expansion of existing projects.

1.3 It was further noticed from the computation of income that the assessee claimed deduction of 27,56,16,665/- towards exchange fluctuation loss on O/s ECB which was to be capitalized during the year and inadvertently at the time of assessment, the same was allowed in the assessment order.

1.4 Since, the ECB was taken for purchase of capital asset, the foreign exchange fluctuation loss arising there from was also to be treated as capital expenditure and as a result, the assessee capitalized the same in the balance-sheet. Therefore, there was no scope claiming deduction of foreign exchange fluctuation loss which was capitalized and thus, required to be disallowed. This resulted in excess carry forward of loss amounting to Rs. 27,46,16,665/-.

2. Provision for Marked to Market loss on foreign currency swaps.

2.1 It was noticed from clause 17(k) of Tax Audit Report that the assessee debited an amount of Rs. 29,92,34,031/- to the Profit and Loss account being provision for Market to Market loss on Foreign Currency Swaps and in its computation of income the assessee added back the above expenditure for determining the taxable income, under normal provision. The said expenditure was disallowed and added back for computing taxable income under normal provision. However, while computing Book Profit u/s 115JB, the said provision was not added back.

2.2 Para 2 of the CBDT instruction No. 3 of 2010 dated 23.03.2010 provides that 'MTM losses' on forex derivatives, being the difference between the purchase price and the values as on the valuation date, is a notional loss and is contingent in nature and therefore not allowable in computing the taxable income.

2.3 Therefore, as per provision u/s 115JB below Explanation I(c), book profit be increased by an amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities. Since, a notional loss or contingent liability is an unascertained liability. The provision for Market to Market loss on Foreign Currency Swaps amounting to Rs. 29,92,34,031/- was inadvertently not added back while computing book profit u/s 115JB at the time of assessment. This resulted in under assessment of income to the tune of Rs. 29,92,34,031/-.

3. Exemption u/s 10B of the I.T. Act.

3.1 In the profit and loss account, assessee has shown income from SEZ unit of Rs. 12,98,79,467/- which was exempt u/s 10B and in the computation of income the assessee had deducted the same before arriving at the Gross Total Income. However, inadvertently at the time of assessment, the exemption u/s 10B was allowed.

3.2 As per CBDT circular on section 10A, 10AA, 10B and 10BA dated 16.07.2013 the income computed under various heads of income in accordance with the provisions of chapter IV of the IT Act shall be aggregated in accordance with the provisions of Chapter IV of the I.T. Act, 1961. This means that first the income/loss from various sources i.e. eligible and ineligible units, under the same head are aggregated in accordance with the provisions of section 70 of the Act, Thereafter the income from one head is aggregated with the income or loss of the other head in accordance with the

provision of section 71 of the Act. if after giving effect to the provisions of section 70 and 71 of the Act there is any balance income, then the same is eligible for deduction in accordance with the provision of Chapter VI-A or Section 10A, 10B etc of the Act and the same shall be allowed in computing the total income of the assessee.”

4. The Id CIT after issuing the show cause notice to the assessee on 26.3.2018 proceeded to pass the order u/s 263 of the Act on 28.3.2018 by upholding the view taken by him in the show cause notice except in respect of the third issue i.e the claim of deduction u/s 10B of the Act. The Id CIT vide his order dated 28.3.2018 treated the order passed by the Id AO u/s 143(3) of the Act as erroneous in as much as it is prejudicial to the interest of the revenue and accordingly set aside the same by restoring to the file of the Id AO. Aggrieved, the assessee is in appeal before us.

5. We have heard the rival submissions. With regard to the claim of deduction u/s 10B of the Act, we find that the Id CIT by placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT vs Yokogawa India Ltd reported in 391 ITR 274 (SC) held that the claim of section 10A and 10B of the Act falls only under the expression 'deduction' and not 'exemption'. Accordingly it was held by the Hon'ble Apex Court that the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of total income under Chapter VI which covers section 70 and 71 of the Act. We find from the materials available on record that assessee had claimed exemption from its SEZ unit u/s 10AA of the Act as is evident from Form No. 56F issued by a chartered accountant enclosed at page nos. 110 to 112 of the paper book before us. No deduction u/s 10A / 10B of the Act was claimed by the assessee as stated by the Id CIT in his order. We find that the *Hon'ble Delhi High Court in the case of TEI Technologies P Ltd reported in 361 ITR 36 (Del)* had held that the stage of deduction u/s 10AA of the Act would be while computing the total income of the eligible unit under Chapter IV of the

Act and not at the stage of computing income as per Chapter VI of the Act (which covers section 70 and 71 of the Act). We find that the Id CIT had also agreed to this proposition in his revision order passed u/s 263 of the Act and had directed the Id AO to grant deduction u/s 10AA of the Act accordingly. Hence we hold that the Id CIT himself in his order passed u/s 263 of the Act had admitted deduction of Rs 12,98,79,467/- u/s 10AA of the Act while computing the Gross total income under Chapter IV of the Act as has been claimed by the assessee company in its return of income and accepted by the Id AO in the course of assessment proceedings. Accordingly, the Ground No. 5 raised by the assessee is allowed.

6. With regard to Foreign Exchange Fluctuation Loss , the primary facts emanating from record are that the assessee had availed External Commercial Borrowings (ECB in short) from abroad and had utilized the same for purchase of assets in India. As per mandatory Accounting Standard 11 (AS-11) issued by The Institute of Chartered Accountants of India (ICAI in short) , the outstanding foreign currency loan is required to be translated into Indian rupees by applying the foreign exchange rate as on the closing day of reporting period and the net exchange difference resulting on such translation is required to be recognized as income or expense for the respective financial year. Accordingly, in compliance with AS-11 , the assessee had claimed deduction of foreign exchange fluctuation loss on restatement of ECB loans to the tune of Rs 27,46,16,665/- in the return of income . The breakup of foreign exchange fluctuation loss is as under:-

	Rs in lacs
Capitalised to fixed asset (As per Note 33 of Balance Sheet)	1751.95
Capitalised to Capital Work in Progress (As per last para of Note 11 of Balance Sheet)	483.46
	----- 2235.41

Capitalised to Capital Work in Progress
(Adjustmetn to 'interest cost'. Refer Finance
Cost head in Note 11 of Balance Sheet and
Para 11(a) of Note 1 of Balance Sheet)

510.76

2746.17

We find that this sum of Rs 510.76 lacs was finally charged off to Finance Cost in the books of accounts as mandated in Accounting Standard -16 (AS-16) issued by ICAI on 'Borrowing Costs'. We find from the Tax Audit Report issued by the Tax Auditor, in response to question no. 11 b), the Tax Auditor had replied as under:-

11 b) Whether there has been any change in the method of accounting employed vis-à-vis the method employed in the immediately preceding previous year ?

Reply - The Company has exercised option available to it under Para 46A of AS 11 "The Effects of Changes in Foreign Exchange Rates" as per Notification No. GSR No. 914(E) issued by the Ministry of Corporate Affairs, Government of India on 29th December, 2011 in respect of accounting for fluctuations in Foreign Exchnage relating to long term monetary items. Accordingly, the Company has adjusted exchange fluctuations amounting to Rs 2235.41 lacs to the cost of its Fixed Assets (including Capital Work in Progress) during the year which was hitherto charged to Profit & Loss Account.

Consequent to the change in the accounting policy, additions to Fixed Assets (including Capital Work in Progress) as at 31st March 2012 are higher by Rs 2235.41 lacs, depreciation for the year higher by Rs 94.20 lacs and the profit for the year higher by Rs 2141.21 lacs.

6.1. We find the break up of exchange fluctuation loss party wise is as under:-

Detail of Exchange Fluctuation Loss on ECB capitalised

Bank	Loan Outstanding in USD as on 31.03.2012	Exchange Fluctuation Loss in Rs.
ECB From		
DBS Bank	1,00,00,000	3,78,90,439
International Finance Corporation	65,00,000	2,56,69,203
HSBC Bank	1,50,00,000	6,60,89,149
ICICI Bank	89,08,769	6,03,83,373
DEG Bank	60,00,000	3,90,39,000
FCCB		
International Finance Corporation	70,00,000	4,55,45,500
		27,46,16,664

We find that the assessee had duly furnished the party wise workings of exchange fluctuation loss as could be evident from the aforesaid table before the Id AO itself and the Id CIT had grossly erred in stating that the workings were not given by the assessee before the Id AO.

6.2. We find that the Id AO had duly examined the entire aspect of allowability of foreign exchange fluctuation loss by issuing a notice u/s 142(1) of the Act together with the questionnaire dated 9.7.2015 asking for the following details , among others :-

7. Please furnish the details of exchange fluctuation loss on o/s ECB capitalize under Rule 46 of AS-11.

We find that the assessee had duly responded to the same before the Id AO in the course of assessment proceedings. We find that the assessee had also given a detailed write up vide its letter dated 29.12.2015 on the allowability on the said foreign exchange

fluctuation loss in response to a specific query raised by the Id AO as to why the loss on foreign exchange fluctuation on ECB utilized for the purpose of acquiring fixed assets should not be capitalized /adjusted with the cost of assets and WIP in terms of section 43A of the Act.

6.2.1. The Id AO having examined the various details furnished by the assessee together with the relevant supporting explanations , consciously had reached a conclusion that the said exchange fluctuation loss is squarely allowable as deduction and hence it cannot be said that the requisite enquiry has not been made by the Id AO in the assessment . It is not the case of the Id CIT that the Id AO had allowed the claim of the assessee based on incorrect assumption of facts and incorrect application of law. Since due enquiries were duly made by the Id AO in the assessment, the same cannot be termed as erroneous warranting revisionary jurisdiction u/s 263 of the Act by the Id CIT.

6.3. We find that the Id CIT by referring to certain invoices for purchase of fixed assets which represent certain equipments imported from china such as invoice of Doright Co. Ltd, 668, Binzhou Road, Jiaozhou Ojngdao, China. We find that this observation of the Id CIT only mentions that some equipments were purchased from China. We find that the Id CIT had no where mentioned in his order that the said equipment was purchased out of ECB loan availed by the assessee company so as to apply the provisions of section 43A of the Act. The Id CIT had just made sample verification of some invoices and had reached to this erroneous conclusion. Whereas, there was a specific query raised by the Id AO in the assessment proceedings for the applicability of provisions of section 43A of the Act, for which a detailed reply was given by the assessee on the non-applicability of the said provision in view of the fact that ECB loans were utilized only

for purchase of assets within India. The Id AO was duly satisfied with the said reply on verification of the requisite documents. We find that the Id CIT had proceeded on an assumption of fact which does not exist in the materials available on record.

6.4. In any case, we find that this issue has been the subject matter of adjudication by the co-ordinate bench of *Pune Tribunal in the case of Cooper Corporation P Ltd vs DCIT reported in 159 ITD 165 (Pune Trib.)* and by the co-ordinate bench of *Chennai Tribunal in the case of Hyundai Motor India Limited in ITA Nos. 853/Chny/2014 and 563/Chny/2015; ITA Nos. 739/Chny/2014 and 614/Chny/2015 ; ITA No. 842/Chny/2016 ; ITA No. 761/Chny/2016 ; CO No. 73/Chny/2016 dated 27.4.2017 for Asst Years 2009-10 , 2010-11 and 2011-12.* Admittedly, these two orders were not available before the Id AO while framing the assessment. But we hold that from the very fact the impugned issue had reached the corridors of various tribunals makes the issue, debatable and hence the Id AO having taken a possible view on the matter cannot be held to have passed an erroneous order warranting revision u/s 263 of the Act merely because it is prejudicial to the interests of the revenue. It is now well settled by the Hon'ble Supreme Court that the twin conditions precedent for invoking revisionary jurisdiction viz. (i) Order of AO should be erroneous and (ii) it should be prejudicial to the interests of the revenue , and both these conditions should be satisfied cumulatively in any case , in order to invoke revisionary jurisdiction u/s 263 of the Act. Even if one is absent, then the proceedings u/s 263 of the Act fails. Reliance in this regard is placed on the decision of *Hon'ble Apex Court in the case of Malabar Industrial Co Ltd reported in 243 ITR 83 (SC).*

6.5. We find that there is no discrepancy in claim of figures of Rs 1751.95 lacs ; Rs 483.46 lacs and Rs 510.76 lacs as all these figures are duly reflected in the tax audit

report and also in the details furnished by the assessee before the Id AO. It can at best be held to be incorrect appreciation of facts by the Id CIT in his revision order u/s 263 of the Act probably due to limited time available with him for passing the revision order u/s 263 of the Act. This is stated in as much as the proceedings u/s 263 of the Act were started by the Id CIT by issuing show cause notice to the assessee on 26.3.2018 fixing the date of hearing on 28.3.2018 and replies were duly filed by the assessee on the scheduled date of hearing i.e on 28.3.2018 and the revision order u/s 263 of the Act was also passed by the Id CIT on 28.3.2018 itself. This action clearly goes to prove the complete non-application of mind by the Id CIT on the impugned issue while passing the revision order u/s 263 of the Act. We find that the assessee in the instant case had opted for one of the options given to it in para 46A of AS -11 issued by ICAI with regard to treatment of the said loss in its books. This is relevant only for the purpose of books and not for income tax purposes. In income tax proceedings, the assessee has been consistently claiming the said exchange fluctuation loss as a deduction. Hence even on the principle of consistency as has been held by the *Hon'ble Supreme Court in the case of Radhasaomi Satsang reported in 193 ITR 321 (SC)*, the claim of exchange fluctuation loss deserves to be allowed, which was done by the Id AO. The Id DR vehemently argued that the assessee had given two differential treatments with regard to the subject mentioned exchange fluctuation loss in its books and for income tax purposes and hence the Id CIT was right in pointing out this error that had crept in the order of the Id AO. We hold that the *Hon'ble Supreme Court in the case of Taparia Tools reported in 372 ITR 605 (SC)* had held that the entries in the books of accounts are not relevant for determination of income for income tax purposes. As far as income tax proceedings are concerned, there is no dispute that the assessee had been consistently claiming the said loss as a deduction in the past. Hence no error could be attributed in his order by the Id CIT in revisionary jurisdiction u/s 263 of the Act.

6.6. In view of the aforesaid observations, we hold that there is absolutely no case for invoking revisionary jurisdiction u/s 263 of the Act with regard to allowability of foreign exchange fluctuation loss. Accordingly, the Grounds 3(a) to 3(c) raised by the assessee are allowed.

7. With regard to claim of deduction of Mark to Market Loss of Rs 29,92,34,031/- while computing the book profits u/s 115JB of the Act, the Id CIT is of the opinion that the said loss is contingent in nature and hence required to be added back while computing the book profits u/s 115JB of the Act. The brief facts of this issue are that the assessee entered into derivative financial instruments with banks to hedge foreign currency risk of firm commitments and highly probable forecasted transactions and interest rate risks. The assessee had not used these hedging instruments / contracts for speculative or trading purposes. In respect of derivative instruments being foreign currency swaps which are not classified as hedging instruments, the assessee made provision for Mark to Market Losses arising in respect thereof as at the end of the relevant financial year. Accordingly, during the relevant financial year, the assessee made provision of Rs 29,92,34,031/- for Mark to Market Losses (MTM losses) on foreign currency swaps. In this regard, it would be relevant to reproduce the relevant portion of the Announcement of ICAI dated 29.3.2008 on Accounting for derivatives, as per which, an entity is required to provide for losses in respect of all outstanding derivative contracts on the balance sheet date by marking them to market. The relevant extract of the above-mentioned announcement of ICAI is as under:-

“Announcement – Accounting for Derivatives

1. Certain issues have been raised with regard to the foreign currency derivative exposures of various corporates that are not being fully accounted for. These exposures may translate into heavy losses due to fluctuations in the foreign exchange rates. The matter was considered by the Council of the ICAI at its meeting held on March 27-29,

2008. The Council decided to clarify the best practice treatment to be followed for all derivatives, which is contained in the following paragraphs.

2. It may be noted that although the ICAI has issued AS 30, Financial Instruments: Recognition and Measurement, which contains accounting for derivatives, it becomes recommendatory from 1.04.2009 and mandatory from 1.04.2011. In this scenario, the Council expressed the view that since the aforesaid Standard contains appropriate accounting for derivatives, the same can be followed by the entities, as the earlier adoption of a standard is always encouraged.

3. In case an entity does not follow AS 30, keeping in view the principle of prudence as enunciated in AS 1, Disclosure of Accounting Policies, the entity is required to provide for losses in respect of all outstanding derivative contracts at the balance sheet date by marking them to market.

4. The entity needs to disclose the policy followed with regard to accounting for derivatives in its financial statements.

In case AS 30 is followed by the entity, a disclosure of the amounts recognized in the financial statements should be made.

In case AS 30 is not followed, the losses provided for as suggested in paragraph 3 above should be separately disclosed by the entity.

5. The auditors should consider making appropriate disclosures in their reports if the aforesaid accounting treatment and disclosures are not made.

6. In case of forward contracts to which AS 11, 'The Effects of Changes in Foreign Exchange Rates', applies, the entity needs to fully comply with the requirements of AS 11. Accordingly, this Announcement does not apply to such contracts.

7. This clarificatory Announcement applies to financial statements for the period ending March 31, 2008, or thereafter.

7.1. We find that the assessee company in its profit and loss account had made provision in respect of MTM losses of foreign currency swaps. The Id AR argued that the tax auditor had reported the said provision in clause 17K of the Tax Audit Report under the head 'particulars of any liability of a contingent nature' which was not accepted by the assessee company, as according to assessee, the said provision is mandatorily to be made as per the announcement provided by the ICAI. However, no revised return was filed by the assessee company in this regard as there was no change in tax liability of

the assessee company as ultimately income was determined only u/s 115JB of the Act and according to assessee, there would be no change in the computation of book profits u/s 115JB of the Act.

7.2. It is not in dispute that the announcement of ICAI in the form of Accounting Standards are mandatorily to be followed by every Indian company u/s 211(3C) of the Companies Act, 1956. Hence a provision when made in accordance with the notified accounting standards u/s 211(3C) of the Companies Act, 1956 which is mandatory in nature and the same are subject to certification by the statutory auditors of the company that the said standards are followed or not, then the said provision cannot be considered as contingent in nature. We find that the tax auditor has certified the tax audit report in accordance with the mandate provided as per the provisions of the Income Tax Act and by following the Instruction No. 3/2010 issued by Central Board of Direct Taxes (CBDT in short) in this regard. This has been duly clarified during the course of assessment proceedings by the tax auditor himself vide its letter dated 1.12.2015 before the Id AO that the reporting under clause 17(k) of Form No. 3CD has been made by placing reliance on Instruction No. 3/2010 dated 23.3.2010 issued by CBDT, on the basis of which, the assessee had also added back the said provision of Rs 29,92,34,031/- while computing the income under the normal provisions of the Act. It was specifically clarified by the tax auditor himself before the Id AO that the said provision has not been considered as a contingent liability. However, since the said provision has been made as per the mandate provided by the accounting standards issued u/s 211(3C) of the Companies Act, 1956, the said provision is an ascertained liability and hence does not fall under any of the items mentioned in Explanation to section 115JB(2) of the Act. Hence the same was not added back to the book profits u/s 115JB of the Act.

7.3. We find that the Id AO had raised a specific query in this regard during the course of assessment proceedings and the assessee had furnished a detailed reply thereon by stating that as per the provisions of section 115JB of the Act, the profit as shown in the profit and loss is increased by specific items indicated in Explanation to section to determine the book profits. The profit and loss account is to be prepared as per the provisions of Part II of Schedule VI of the Companies Act 1956 and in accordance with the relevant accounting policies adopted by the Company and Accounting Standards issued by ICAI. The financial statements of the company have been prepared in accordance with the provisions of Part II of Schedule VI of the Companies Act, 1956. In accounting the provision for MTM losses on foreign currency swaps, the company has followed Accounting Standards 1, 11 and 29 as is indicated in its Accounting Policies. As per the Accounting Policy of the company read with Accounting Standard 29 issued by ICAI, Contingent Liabilities do not warrant provisions, but are disclosed unless the possibility of outflow of resources is remote. We find that when the provisions has been duly made for MTM losses in respect of foreign currency swaps and the same has been duly certified by the statutory auditors of the company, then the said provision cannot fall under the ambit of contingent liability. As stated earlier , even the accounting standards does not mandate making of provision for contingent liability. The very fact that the provision has been made for MTM losses in the profit and loss account itself goes to prove that the said provision is not a contingent liability. The MTM loss is on an onerous contract and had arose out of a contractual obligation existing as at the reporting date. The reliable estimate of the amount of loss could be ascertained on the basis of the valuation document provided by the contracting bankers. The mere fact that such losses are to be discharged at a future date shall not construe the same as being unascertained in nature. We find that as on the date of the balance sheet, the trigger for the loss i.e the event which is the contract has already taken place and therefore it is not contingent. Hence in our considered opinion, the same does not fall

under the ambit of 'unascertained liability' as per clause (c) of Explanation to section 115JB(2) of the Act.

7.4. We find that ordinarily under the mercantile system of accounting, expenditure is deductible when the liability to settle the same is accrued, irrespective of whether it is 'due' or not. However, in the case of a contingent liability, there is no present existence to discharge the same ; it is payable only when the contingency occurs. A contingent liability is essentially a conditional liability which is uncertain and may or may not materialise. Thus, any amount payable in respect of a contingent liability cannot be considered as expenditure for the purpose of computing the taxable income. In contrast, the MTM losses arise on account of a fall in the value of the underlying derivative contract as on the reporting date. The same represents a loss on an onerous contract existing as on the reporting date, albeit to be discharged / settled on a future date. Thus, MTM losses are not notional or contingent but accrue as on the balance sheet date and hence should be allowable. Moreover, we find that the *Hon'ble Supreme Court in the case of CIT vs Woodward Governor of India Ltd reported in 312 ITR 254 (SC)* had held that "*the expression 'any expenditure' has been used in section 37 of the Income Tax Act, 1961, to cover both 'expenses incurred' as well as an amount which is really a 'loss' even though such amount has not gone out from the pocket of the assessee.*"

Accordingly we hold that the MTM loss is an actual and ascertained liability and only the payment of the same falls on a future date after the Balance Sheet date and the loss is real and accurately determined on such date. Accordingly the view of the Id CIT while invoking revisionary jurisdiction u/s 263 of the Act that the provision for MTM lossess on foreign currency swaps is contingent liability is totally wrong.

7.5. Moreover, we find that the entire gamut of the said provision for MTM losses in the context of computation of book profits u/s 115JB of the Act has been the subject matter of verification and examination by the Id AO in the assessment proceedings and a conscious decision has been taken by the Id AO allowing the said claim under section 115JB of the Act. Hence it cannot be said that no enquiry was made by the Id AO. Infact the requisite enquiries have been duly made in this regard by the Id AO in the assessment and all the replies filed thereon are already on record. We find that the only ground on which the Id CIT seeks to treat the order of the Id AO as erroneous as far as the impugned issue is concerned is that , the assessee had added back the said provision for MTM losses under normal computational provisions of the Act but had inadvertently not added the same under clause(c) of Explanation 1 to section 115JB(2) of the Act (i.e increasing the net profit as shown in the profit and loss account by “the amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities”) which was not corrected by the Id AO in his order. Accordingly, the order of the Id AO is erroneous to this extent as per Id CIT. In this regard, we hold that an addition / disallowance made under normal provisions of the Act need not necessarily be made in the computation of book profits u/s 115JB of the Act automatically. We hold that the provisions of Section 115JB of the Act , being a self contained code in itself, which starts with a non-obstante clause, specifically provides for specific items of additions and deletions to net profit as profit and loss account in order to arrive at the book profits thereon. We hold that this provision for MTM losses does not fall under any of the items of additions mentioned in the said section. We hold that in the absence of any specific requirement by any of the clauses (a) to (k) of Explanation 1 of section 115JB of the Act, the provision for MTM losses not added back while computing the book profits u/s 115JB of the Act, is in order. When this has been allowed by the Id AO after due examination of the same with reference to the legal provision and settled legal principles thereon, no error could be attributed in the said order of the Id AO warranting revisionary jurisdiction u/s 263 of the Act.

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

Sd/-
[S.S. Godara]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

SB, Sr. PS

1. M/s Himadri Chemicals & Industries Ltd. (Now known as Himadri Speciality Chemical Ltd.) Fortuna Tower, 8th Floor, Room No. 15, 23A, Netaji Subhas Road, Kolkata-700001.
2. Pr. CIT, Central-1, Kolkata, ACIT, CC-2(1), Aayakar Bhawan Poorva, 110, Shantipally, E.M. Bye Pass, Kolkata-700107.
- 3..C.I.T.(A)- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches