

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'D' BENCH, KOLKATA
(Virtual Court)**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member)

**I.T.A. Nos. 1212, 1410 & 1950/Kol/2018
Assessment Years: 2012-13, 2013-14 & 2015-16**

DCIT, Circle-8(2), Kolkata.....Appellant

Vs.

**M/s. SPML Infra Limited.....Respondent
[PAN: AADCS 2469 K]**

Appearances by:

Sh. Jayanta Khanra, JCIT, Sr. DR, appeared on behalf of the Revenue.

Sh. S.K. Tulsian, Adv., appeared on behalf of the Assessee.

Date of concluding the hearing : June 17th, 2020

Date of pronouncing the order : July 10th, 2020

ORDER

Per J. Sudhakar Reddy, AM:

All these appeals filed by the Revenue in I.T.A. Nos. 1212, 1410 & 1950/Kol/2018 are directed against the order of the Commissioner of Income Tax (Appeals)-3, Kolkata ['CIT(A)' for short] dated 28.03.2018, 24.04.2018 & 23.07.2018; respectively passed u/s 250 of the Income Tax Act, 1961 ('the Act' for short).

2. We first take ITA No. 1212/Kol/2018 for the AY 2012-13. Ground no. 1 is on the issue of disallowance u/s 14A of the Act read with Rule 8D(2)(ii) of the Income Tax Rules, 1962 ('the Rules' for short). The ld. CIT(A) in this case has held that no disallowance can be made since the own interest free funds of the assessee company was ₹43,663.79 lakhs, and that there are far in excess of the investments of ₹17,923.79 lakhs held by the company. As the interest free funds are in excess of the investments, the presumption that arises is that interest free funds have been invested in investments which do not yield taxable income as held by the Hon'ble Bombay High Court in the case of *CIT vs. Reliance Utilities & Power Ltd.* reported in [2009] 313 ITR 340 (Bombay) order dated 09.01.2009. We find no infirmity in the order of the ld. CIT(A).

Thus, we uphold the deletion of the disallowance made under Rule 8D(2)(ii) of the Rules.

3. Coming to disallowance made under Rule 8D(2)(iii), the Id CIT(A) has directed the AO to consider only those investments which have earned dividend during the year for the purpose of computation of disallowance under the Rules. This direction is in line with the propositions of law laid down by the Hon'ble Calcutta High Court in the case of *CIT vs. M/s. REI Agro Ltd.* in GA No. 3581 of 2013 I.T.A.T. No. 220 of 2013 order dated 09.04.2014 and the order of the Special Bench of the ITAT in the case of *Vireet Investment Pvt. Ltd.* Thus, we see no reason to interfere with the direction of the Id. CIT(A) on this issue. Thus we dismiss ground no. 1 of the Revenue.

4. Ground no. 2 is on the issue of deduction u/s 80-IA of the Act. The Id. CIT(A) held as follows:

"The Hon'ble ITAT in ITA Nos. 1291-1292/Kol/2013 for Asst. Yr. 2006-07 & 2009-10 has allowed the claim of the appellant for deduction u/s. 80-IA(4). The salient points with regard to allowability of deduction u/s. 80-1A which emerges from the above order is as follows:

i. In a case where a person makes the investment and himself executes the development work i.e. carries out the civil construction work he will be eligible for tax benefit u/s. 80-IA of the Act.

ii. "Works contract" used in Explanation to section 80-1A(13) means a contract of developing infrastructure by merely employing labour and making no investments.

iii. However, if under a contract, the contractor employs his capital and enterprise in addition to labour, then the said contract does not constitute a works contract under the Explanation to section 80-IA(13) and the contractor shall be eligible for deduction U/S 80-IA.

iv. Even if an assessee is merely developing the infrastructural facility (without operating and maintaining the same), it is entitled to deduction u/s 80-IA.

v. Merely because the transferee had paid for the development of infrastructure facility carried out by the assessee, it cannot be said that the assessee did not develop the infrastructure facility. If the interpretation done by the Assessing Officer is accepted, no enterprise carrying on the business of only developing he infrastructure facility would be entitled to deduction under section 80-IA (4).

vi. As regards the observation of the AO that the assessee is executing the contract of civil construction at the predetermined rate, and hence it is a works contract the Hon'ble I IA I has observed that "the assessee was responsible for overall development of the infrastructure facility It was merely provided with the site 'which it had to develop into an infrastructural facility by deploying his resources i.e. material, plant A machinery, labour, supervisors etc. It was responsible for any damage/loss caused to any property or life in course of execution of the works. It was even responsible for remedying of the defects in the works at its cost ".

vii. The assessee vide the agreements has clearly demonstrated the various risks undertaken by it. The assessee was to furnish a security deposit to the Employer and indemnity the employer of any losses/damage caused to am property/life in course of execution of works, further, it was

responsible for the correction of defects arising in the works at its cost. Thus, it cannot be said that the assessee had not undertaken any risk.

viii. The assessee was not a works contractor simpliciter and was a developer and hence Explanation to section 80-IA(13) does not apply to the assessee.

On perusal of the above order it is seen that the Hon'ble ITAT in the case of the assessee has discussed as to what are the ingredients for allowing deduction u/s 80-IA. It has been held that the appellant is not a mere works contractor. In this case it is observed that the appellant has been carrying out similar projects with similar functional responsibilities. Respectfully following the above findings of the Hon'ble ITAT I am of the considered opinion that the assessee is a developer, and not merely a works contractor and is eligible for deduction u/s. 80-IA. Accordingly, the claim for deduction u/s. 80-IA(4) is hereby allowed."

5. The ld. DR, though not leaving his ground, ultimately agreed that the issue is covered in favour of the assessee by the judgement of the Tribunal for the AY 2011-12. There is no dispute that the facts of this year are the same as that of the previous year.

6. In view of the above, respectively following the decision of the coordinate Bench of the Tribunal for the AY 2011-12 on this issue, we uphold the finding of the ld. CIT(A) and dismiss this ground of the Revenue.

7. Ground no. 3 is on the disallowance of employees' contribution to PF & ESI. This issue is covered in favour of the assessee by the judgement of the Hon'ble Supreme Court in the case of *PCIT vs. Rajasthan State Beverages Corporation Ltd. [2017] 84 taxmann.com 185 (SC)*. Thus we dismiss this ground of the Revenue.

8. Ground no. 4 is on the issue of deductibility of the provision for future losses. The Revenue's contention is that these are unascertained liability and hence not deductible. The ld. CIT(A) in his order held as follows:

"These grounds are regarding disallowance made by the AO on account of deduction for Future loss of Rs. 4,73,81,883/-. The AO has made the disallowance on the ground that the future losses were in the nature of an unascertained and anticipated liability. The AO was of the opinion that since the expenditure was contingent in nature the liability had not crystallized and hence not allowable.

Before me the A/R of the appellant has stated that the appellant enters into fixed price contracts and the estimated future losses are made in accordance with Accounting Standard (AS-7). It has been submitted that the total revenue of the appellant company during the previous year was Rs. 886.17 Crores. The unbilled revenue of the fixed price contract, offered to taxation, as submitted by the A/R was Rs. 58.25 Crores. Accordingly, it was argued that as the entire revenue of the fixed price contract had been offered to taxation the immediate and foreseeable losses as per AS-7 was accordingly claimed as a deduction. The loss has been explained to be computed according to the guidelines as provided in the Para 35 of AS-7.

The future losses have been claimed on account of the fact that the revenue which has not been billed to the principal, as the work has not been done, has been recognized. Accordingly, it has

been stated that the excess revenue has been recognized by the assessee therefore the estimated future losses on the same should be allowed.

A similar issue regarding fixed price contract and future losses claimed as per AS-7 came before the Hon'ble ITAT Mumbai Bench in the case of Dredging International N.V. [2011] 15 taxmann.com 198 (Mumbai). The facts in the said case were as follows:

The assessee made provisions for foreseeable loss amounting to Rs. 32,86,17,293 and claimed deduction on same. The Assessing Officer disallowed said claim on the reason that the expenses were contingent upon occurrence or non-occurrence of certain events and assessee itself had classified it as a provision for future losses. The contingent liability did not constitute expenditure as the same could not be subject matter of deduction and the expenditure which was deductible for this purpose was only those liabilities which were not contingent. By holding this, Assessing Officer disallowed the provisions for future losses. The assessee raised objection against said disallowance before the DRP. The DRP however, rejected said objection with a single sentence that assessee did not file proper reply.

The Hon'ble Tribunal on the said issue of claim for future losses has held as under:

As far as the factual position is concerned assessee has given detailed explanation for estimating the future losses which in fact it had suffered and the final loss was already determined by the Assessing Officer in the next assessment year, the order of which does not contain any disallowance. There is evidence on record that assessee has suffered loss and loss claim id in that year on completion of the project stood allowed. No adjustments have been made to the loss claimed in later year. In view of this we are of the opinion that as far as quantification of loss is concerned assessee has made a justifiable claim in arriving at the future loss for this year. [Para 24]

Further, the assessee was following the guidelines of AS-7 which provided for the estimated loss in books of account. This issue about the claim of future loss on the basis of AS-7 was also examined by various Coordinate Benches of ITAT and claim of future losses on the basis of AS-7 was considered as allowable deduction while computing profit of the year. [Para 26]

In the case of Jacobs Engg. Private Ltd. v. ACIT [IT Appeal Nos. 7017 and 7018 (Mum.) of 2006 and 335 and 336 (Mum.) of 2007, dated 26-5-2009] the Mumbai Tribunal has held that the provision for foreseeable losses under AS-7 is an allowable expenditure. Mazagaon Dock Ltd. v. Jt. CIT [2009] 29 SOT 356 (Mum.). [Para 27]

Keeping the principle laid down on this issue in various coordinate bench decisions, it is held that assessee's claim for provision for loss, which was made in accordance with the guidelines of AS-7 and duly debited in the audited accounts of the company is an allowable expenditure. Therefore, DRP was not correct in rejecting the same without assigning any reason. The Assessing Officer is directed to allow the claim of future loss in this year. Since assessee's claim was rejected by the Assessing Officer in the order and adjusted in the next assessment year, Assessing Officer is free to pass necessary modification order, if necessary in Assessment Year 2007-08 withdrawing the claim to that extent being allowed in this year. [Para 29]

Further, the Hon'ble ITAT Pune Bench in the case of Ashoka Buildcon Ltd. [2015] 61 taxmann.com 330 (Pune - Trib.) on the issue of allow ability of future losses has held as under:

15. It is not in dispute that the assessee is executing fixed price contract which means that the contractor has agreed to a fixed contract price or rate in so ne cases subject to cost escalation prices. As per AS-7, the assessee is entitled to make provision for foreseeable losses.

16. A perusal of the accounting statement of the assessee for the year- under consideration shows that at para 1.6 to the notes to the financial statement, the auditors have provided as under:

'Revenue recognition on contracts Contract prices are either fixed or subject to price escalation clause. Revenue from contracts is recognized on the basis of percentage completion method, and the level of completion depends on the nature and type of each contract including:

Unbilled work-in-progress valued at lower of cost and net realizable value upto the stage of completion. Cost includes direct material, labour cost and appropriate overheads; and Amounts due in respect of the price and ether escalation, bonus claims and/or variation in contract work approved by the customer/third parties etc. where the contract allows for such claims or variations and there is evidence that the customer/third party has accepted it.

In addition, if it is expected that the contract will make a loss, the estimated loss is provided for in the books of account.

Contractual liquidated damages, payable for delays in completion of contract work or for other causes, are accounted for as costs when such delays and causes are attributable to the Company or when deducted by the client.'

17. A similar issue has been considered by the Tribunal in the case of Mazagon Dock Ltd. v. Jt. CIT (supra) wherein the Tribunal has held as under:

The question that came up for consideration was as to whether the anticipated loss on the valuation of fixed price contract in view of the mandatory requirements of the AS-7, was to be allowed in the year in which the contract had been entered into or it war to be spread over a period of contract, as was done by the assessee in earlier years. As far as the change in the method of valuation of work-in-progress was concerned, it could not be disputed that in view of mandatory requirements of the AS-7, it was a bona fide change in the method of valuation of work-in-progress, particularly in view of the qualification made in this regard by statutory auditors as well as by the Comptroller & Auditor General of India. Therefore, the observation of the CIT(A) that the assessee had booked bogus loss was not correct. As far as the basis of estimation was concerned, the same was done on technical estimation basis and, therefore, merely because there were some variations in the figures furnished by the assessee at different stages, it could not be said that the estimated loss war not allowable, h was not disputed that the Department in earlier years had allowed the loss on estimated basis having regard to the expenditure actually incurred in various years. Therefore, in principle, it was not disputed that the estimated loss under the present circumstances was an allowable deduction. However, merely because the change in method of accounting was bona fide, it could not lead to the inference that the income was also deductible property under the Act. This aspect is very evident from the first proviso to s. 145 as it stood prior to the amendment by the Finance Act, 1995 w.e.f. 1st April, 1997. It could not be disputed that from the method adopted by the assessee, the assessee's income could not be deducted properly in the year in which the loss had been anticipated. As a matter of fact this aspect war not disputed by the AO also. He had swayed more by the revenue loss than by the correct principle to be applied. The matching principle of accounting war not of much significance in the present context because if the loss had been properly estimated in the year in which the contract had been entered into, then it had to be allowed in that every year and could not be spread over the period of contract, the matching principle is of relevance where income and expenditure, both are to be considered together. However, in the instant case, the effect of valuation of WIP would automatically affect the profits of subsequent years accordingly. Therefore, there was no reason for not accepting in principle the assessee's claim as being allowable. However, in view of discrepancies pointed out by the CIT(A) for correct estimation of loss, the matter was to be restored to the file of the AO to examine the correctness of amount claimed.'

18. A similar view has been taken by the Tribunal in the case of Jacobs Engineering India (P.) Ltd. v. Asstt. CIT (supra) wherein the assessee's claims of foreseeable losses were allowed irrespective of method of accounting in terms of AS-7. In the case of Dredging International (supra), the issue before the Tribunal was whether under s. 37(1) of the Act provision for foreseeable loss made in accordance with guidelines of AS-7 and duly debited in audited accounts of company is an allowable expenditure. The Tribunal decided the case in favour of

the assessee and held that 'yes' it is an allowable expenditure. The Tribunal while deciding this issue has also considered the decision of Mazagon Dock Ltd. v. Jt. CIT (supra).

19. Considering the facts of the case in the light of the accounting standards and the decisions of the Tribunal (supra), and as no distinguishing cases have been brought on records by the Revenue, reversing the findings of the learned CIT(A), we direct the AO to recompute the business profits by allowing the losses provided by the assessee in its books. The appeal filed by the assessee is allowed."

12. To the similar effect is the decision of the Mumbai Bench of the Tribunal in the case of Mazagaon Dock (supra) which has also been relied upon by the Tribunal in the case of LTD Cementation India Ltd. (supra). Therefore, in view of the aforesaid precedents in principle, it has to be inferred that where an assessee is executing an infrastructure development fixed price contract, the foreseeable losses of future years can be recognized following the rationale of AS-7 issued by ICAI and such a provision is an allowable deduction.

A similar issue has been decided in the case of ITD Cementation India Ltd. [2013] 36 taxmann.com 74 (Mumbai - Trib.) by the Hon'ble 1TAT Bench, Mumbai. In the said case the facts are as follows:

h During the remand report proceedings, the Assessing Officer issued show cause notice to the assessee requiring to explain as to why 100 per cent loss was claimed even when the project was not completed 100 per cent. He asked the assessee to explain why loss, should not be allowed only up to the per cent of work completed and why the excessive loss should not be disallowed and added back to its income of the assessment year 2004-05. The Assessing Officer further after considering the submissions of the assessee observed that the assessee had claimed entire foreseeable losses of future years in the assessment year 2004-05. He opined that such claim could not be allowed because it was only based on estimate and was contingent in nature.

The Commissioner (Appeals) held that the expenses relating to business were allowable as per provisions of sections 28 to 43. The expenses allowable had been specifically mentioned in the relevant section of the Act. The residuary expenses were allowable under section 37(1) only. He concluded that the assessee's claim of future losses was not fitting in the frame work of provisions of section 37(1). He observed that the provisions of accounting standards could not over write the statutory provisions of the Act. Accordingly, he directed to rework out the accounts/work in progress by excluding therefrom the claim of future losses.

The Hon'ble Tribunal in this case has held as under:

Section 145(2) provides that the Central Government may notify in the Official Gazette from time to time accounting standards to be followed by any class of assessee or in respect of any class of income. It is a fact that AS-7 has not been notified by the Central Government. This does not mean that the assessee is precluded from following AS-7. A perusal of the provisions of section 145 show that accounting standards which have been notified by the Central Government have to be mandatorily followed by the assessee. But this does not mean that the assessee cannot follow the other accounting standards issued by ICAI. The accounting standards issued by ICAI cannot be brushed aside lightly. On the contrary, if an assessee is following the accounting standards issued by ICAI, it would give more credibility and authenticity to its account. [Para 14]

It is not in dispute that the assessee is executing fixed price contract, which means that the contractor has agreed to a fixed contract price or rate in some cases subject to cost escalation prices. As per AS-7 the assessee is entitled to make provision for foreseeable losses. [Para 15]

A perusal of the accounting statement of the assessee for the year under consideration shows that in the financial statement, the auditors have provided as follows: Contract prices are either fixed or subject to price escalation clauses. Revenue from contracts is recognized on the basis of percentage completion method, and the level of completion depends on the nature and type of

each contract. In addition, if it is expected that the contract will make a loss, the estimated loss is provided for in the books of account. [Para 16]

Considering the facts of the case in the light of the accounting standard and the decisions of the Tribunal rendered in the cases of Mazagaon Dock Ltd. v. Jt. CIT [2009] 29 SOT 356 (Mum.) and Jacobs Engg. India (P.) Ltd. v. Asstt. CIT [2011] 14 taxmann.com 166 (Mum.) and Dredging International v. Asstt. DIT (IT) 120111 48 SOT 430/15 laxmann.com 198 (Mum.), the Assessing Officer was to be directed to recompute the business profits by allowing the losses provided by the assessee in its books. [Para 19]

The salient features emerging from the above discussion are as follows:

- 1. The contract should be fixed price contracts.*
- 2. The contractor is liable to claim foreseeable losses on the basis of AS-7.*
- 3. AS-7 is acceptable for contract accounting.*
- 4. The losses are not contingent or unascertained.*

Further in this case it is observed as follows:

1. In the Tax Audit Report it has been stated that the loss of Rs. 4,73,81,883/- has been provided as per AS-7.

2. The AO has merely rejected the claim of the appellant by calling it a contingent and unascertained expenditure. However, as per the discussion, in the various decisions discussed above it has been held that applicability of AS-7 is acceptable. In this case it has been argued that as the unbilled revenue has been offered for taxation therefore the provision for future losses, as per AS-7 should be allowed. The AO has not pointed out any defect in the estimate or application of AS-7.

3. The sum and substance of the above decisions, is that in fixed price contracts, the appellant having credited all its revenue, as per the contract, has to provide for all the foreseeable expenses which it is bound to incur as per the contract. The accounting standard AS-7 provides for such an eventuality.

In view of the facts discussed above it is observed that the; company has followed AS-7 and has debited the future losses. Respectfully following the various decisions as discussed above, I am of the considered opinion that deduction for Future loss of Rs. 4,73,81,883/- is allowable. Therefore, these grounds of appeal of the appellant are hereby allowed."

9. Thus we find that this issue is covered in favour of the assessee by the order of the ITAT in his own case for the AY 2011-12. The ld. DR fairly agreed that the issue is covered in favour of the assessee. Consistent with the view taken therein we dismiss this ground of the Revenue.

10. In the result, the appeal of the Revenue is dismissed.

11. Now we take up ITA No. 1410/Kol/2018 for the AY 2013-14.

12. Ground no. 1 is against the disallowance made u/s 14A of the Act read with Rule 8D(2)(ii) of the Rules.

13. Consistent with the view taken by us while dealing with ground no. 1 in ITA No. 1212/Kol/2018 for the AY 2012-13, we uphold the order of the Id. CIT(A) and dismiss this ground of the Revenue for the reason that interest free own funds are much higher than the investments made by the assessee.
14. Ground no. 2 is on the disallowance of the deduction u/s 80-IA of the Act.
15. Consistent with the view taken by us in ITA No. 1212/Kol/2018 for the AY 2012-13 on this issue, we uphold the order of the Id. CIT(A) and dismiss this ground of the Revenue.
16. Ground no. 3 is on the disallowance of employees' contribution to PF & ESI.
17. Consistent with the view taken by us in ITA No. 1212/Kol/2018 for the AY 2012-13 while disposing off ground no. 3, we dismiss this ground of the Revenue.
18. Ground no. 4 is on the issue of disallowance u/s 14A of the Act while computing book profits u/s 115JB of the Act. This issue is covered in favour of the assessee by the order of the Tribunal for the AY 2011-12 in assessee's own case as well as the judgement of the Special Bench of the Delhi Tribunal in the case of *Vireet Investment Pvt. Ltd.* [2017] 82 taxmann.com 415 (Delhi-Trib.).
19. Consistent with the view taken by us in ITA No. 1212/Kol/2018 for the AY 2012-13, we uphold the order of the Id. CIT(A) and dismiss this ground of the Revenue.
20. In the result, this appeal of the Revenue is dismissed.
21. Now we take up ITA No. 1950/Kol/2018 for the AY 2015-16.
22. Ground no. 1 is against the disallowance made u/s 14A of the Act read with Rule 8D(2)(ii) of the Rules.
23. Consistent with the view taken by us while dealing with ground no. 1 in ITA No. 1212/Kol/2018 for the AY 2012-13, we uphold the order of the Id. CIT(A) and dismiss this ground of the Revenue for the reason that interest free own funds are much higher than the investments made by the assessee.

24. Ground no. 2 is on the issue of disallowance u/s 14A of the Act while computing book profits u/s 115JB of the Act. This issue is covered in favour of the assessee by the order of the Tribunal for the AY 2011-12 in assessee's own case as well as the judgement of the Special Bench of the Delhi Tribunal in the case of *Vireet Investment Pvt. Ltd.* [2017] 82 taxmann.com 415 (Delhi-Trib.).
25. Consistent with the view taken by us in ITA No. 1212/Kol/2018 for the AY 2012-13, we uphold the order of the Id. CIT(A) and dismiss this ground of the Revenue.
26. Ground no. 3 is on the disallowance of the deduction u/s 80-IA of the Act.
27. Consistent with the view taken by us in ITA No. 1212/Kol/2018 for the AY 2012-13 on this issue, we uphold the order of the Id. CIT(A) and dismiss this ground of the Revenue.
28. Ground no. 4 is on the disallowance of employees' contribution to PF & ESI.
29. Consistent with the view taken by us in ITA No. 1212/Kol/2018 for the AY 2012-13 while disposing off ground no. 3, we dismiss this ground of the Revenue.
30. In the result, this appeal of the Revenue is dismissed.
31. In the result, all the appeals filed by the Revenue are dismissed.

Kolkata, the 10th July, 2020.

Sd/-
[S.S. Godara]
Judicial Member
Dated: 10.07.2020
Bidhan

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Copy of the order forwarded to:

1. ***DCIT, Circle-8(2), Kolkata***
2. ***M/s. SPML Infra Limited, 22, Camac Street, A-Block, 3rd Floor, Kolkata-700 016.***
3. CIT(A)-3, Kolkata. (sent through mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches