

Dy. Cit Vs. U.P. Straw and Agro Products Ltd.

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Court : Delhi

Decided On : Aug-25-2000

Reported in : [2001]79ITD372(Delhi)

Appeal No. : M.K. Chaturvedi, J.M. & R.S. Syal, A.M. IT Appeal No. 4134 (Del) of 1993 A.Y. 1990-91 25 August

Appellant : Dy. Cit

Respondent : U.P. Straw and Agro Products Ltd.

Advocate for Pet/Ap. : M.P. Mehrotra, for the Revenue; S.R. Malik, for the Assesse

Judgement :

ORDER

Chaturvedi, J.M.

This appeal by the revenue is directed against the order of the Commissioner (Appeals), Bareilly, and relates to the assessment year 1990-91.

2. The assessed is a company. It computed book profit under section 115-J of the Income Tax Act, 1961 (hereinafter referred to as the Act) at NIL in Annexure 'D' of the income-tax return. The assessing officer found that the profit and loss account of the assessed for the relevant previous year was not in accordance with the provisions of Parts II & III of Schedule VI to the Companies Act, 1956, in as much

as the assessed debited arrears of depreciation to the extent of Rs. 1,65,18,620.

3. It was explained before the assessing officer that in the preceding years, depreciation was not claimed because of non-availability of profit to the extent of Rs. 2,50,25,974. Out of that in the year under consideration depreciation amounting to Rs. 1,65,18,620 was debited to the books of account. The assessing officer did not allow the claim of the assessed in respect of arrears of depreciation to the extent of Rs. 1,65,18,620. He, therefore, recomputed the book profits as per the provisions of section 115-J at Rs. 44,11,746. Being aggrieved the assessed preferred appeal before the Commissioner (Appeals). It was contended that the assessing officer was not justified in determining the book profits. The Commissioner (Appeals) following the order dated 1-7-1992 in appeal No. 42/DC(A)/MBD/91-92 for the assessment year 1989-90 allowed the claim of the assessee. Being aggrieved of the order of the Commissioner (Appeals) the revenue is in appeal.

4. Shri M.P. Mehrotra, the learned counsel for the assessee, appeared before us. It was vehemently contended that the assessed correctly computed the book profit as per the prescription of section 115-J. It is beyond the powers of the assessing officer to tinker the book profits computed in accordance with the provisions of law. The profits were computed in accordance with the provisions of Parts II & III of Schedule VI to the Companies Act, 1956. Further it was stated that the arrears of depreciation is nothing, but the unabsorbed depreciation and the issue apropos the allowability of unabsorbed depreciation was adjudicated by the Apex Court in the case of Surana Steels (P) Ltd. v. Dy. CIT : [1999]237ITR777(SC) .

5. It was further contended that the decision of the Apex Court rendered in the case of Surana Steels (P) Ltd. (supra) over-ruled the decision of the Kerala High Court rendered in the case of CIT v. Appollo Tyres Ltd. : [1999]237ITR706(Ker) . It was submitted that the Kerala High Court relied on the decision of the Dy. CIT v. Surana Steels (P) Ltd. : [1994]207ITR508(AP) . Our attention was also invited on the provisions of section 205(1)(a) of the Companies Act, 1956. It was stated that arrears of depreciation is nothing but unabsorbed depreciation and under the Companies Act, there is no bar for debiting the amount of arrears of depreciation

in the current years profit and loss account.

6. Reliance was also placed on the decision of the Madhya Pradesh High Court rendered in the case of CIT v. Shree Synthetics Ltd. : [1998]233ITR333(MP) wherein it was laid down that in computing the book profits of a company for the purposes of section 115-J of the Income Tax Act, 1961, the unabsorbed depreciation of earlier years can be deducted. The learned counsel also relied on the decision of CIT v. Modi Tea & Industries (P) Ltd. 154 Taxation 387 (Gau). The Honble High Court has held that the unabsorbed depreciation of earlier years can be allowed for computing profits under section 115-J. The learned counsel also invited our attention on the decision of the Tribunal rendered in assessee's own case for the assessment year 1989-90 wherein the Tribunal following the decision of the Apex Court rendered in the case of Surana Steels (P) Ltd. (supra) allowed the claim of the assessee. The learned counsel relied on some other precedents also to buttress his point.

7. Shri Malik, the learned Departmental Representative vehemently submitted that profit as shown in the books can only be disturbed, if it is not, in accordance with the provisions of Companies Act. In the instant case book profit was not calculated in consonance with the canone contained in the Companies Act. The assessing officer was, therefore, correct in recasting the book profit. Reliance was placed on the decision of the Special Bench rendered in the case of Sutej Cotton Mills Ltd. v. Asstt. CIT (1993) 45 ITD 22. It was stated that the profit as shown by the assessed is not sacrosanct. It is open to scrutiny. It is to be seen that whether the assessed has acted in accordance with the parameters, set out in the Companies Act, or not, for computing such book profit. It was further submitted that the assessed debited arrears of depreciation against the current years profit.

8. Shri Malik vehemently opposed the contention of Shri Mehrotra that arrears of depreciation and unabsorbed depreciation are the same. It was explained that the two things cannot be placed on the same footing. In respect of unabsorbed depreciation the assessed makes provision for the depreciation, but because of the inadequacy of profits when the amount of depreciation remains not fully absorbed-the balance amount becomes unabsorbed depreciation i.e., the

depreciation which is claimed, but could not be absorbed fully against the profits, because of the paucity of profit. In respect of arrears depreciation, the assessed is not required to make any provision. Inviting our attention on the facts of the present case, Shri Malik submitted that the purpose of the assessed in claiming the amount of arrears of depreciation was to reduce the book profit. He did not claim the entire amount of arrears of depreciation. He claimed only Rs. 1.65 crores whereas the total arrears was Rs. 2.5 crores. Such a leverage cannot be given to the assessed to adjust the profit as per the requirement. Shri Malik also read out the provisions of section 205(1)(a) of the Companies Act, 1956.

9. Shri Malik heavily relied on the decision rendered in the case of Appollo Tyres Ltd. (supra). Our attention was invited on page 708. The Honble High court has held that Parts II & III of Schedule VI of the Companies Act do not contemplate making of a provision for arrears of depreciation either separately or Along with the current years depreciation to be a charge against the profits of that year. It was submitted that this finding of the Honble High Court was not reversed by the Apex Court in the case of Surana Steels (P) Ltd. (supra). Shri Malik further relied on the decision of the Tribunal rendered in the case of ITO v. Parbhat Forgings, (P) Ltd. ; and Sipani Automobiles Ltd v. Dy. CIT . It was further submitted that if the assessed does not claim depreciation it cannot be allowed automatically. For this proposition reference was made to the decision of the Apex Court rendered in CIT v. Mahendra Mills (2000) 159 CTR (SC) 381. The learned Departmental Representative further submitted that the decision of the Tribunal for the assessment year 1989-90 was rendered per incuriam, inasmuch as the Tribunal did not make any distinction between the unabsorbed depreciation and arrears of depreciation. It simply followed the case of Surana Steels (P) Ltd. (supra) which is not applicable in the present case. Besides, the decision rendered in the case of Appollo Tyres Ltd. (supra) which is direct on the point was not discussed.

10. We have heard the rival submissions in the light of material placed before us and precedents relied upon. It is well accepted axiom that tax is levied on the basis of ability to pay. It was found that due to the various tax concessions and incentives certain companies making huge profits and also declaring substantial dividend were managing their affairs in such a way so as to avoid the payment of

income-tax. To cure this mischief, as a measure of equity, section 115-J was introduced by the Finance Act, 1987. As per the mandate of this section, in the case of a company whose total income as computed under the provisions of Income Tax Act is less than 30 per cent of the book profit computed under the section, the total income chargeable to tax will be 30 per cent of the book profit as computed. For the purposes of section 115-J, book profit will be the net profit as shown in the profit and loss account prepared in accordance with the provisions of the VIth Schedule to the Companies Act, 1956 after certain adjustments.

11. Adverting to the provisions of section 115-J, we find that it involves two processes. Firstly, the assessing officer has to determine the income of the company under the provisions of the Income Tax Act. Secondly, the book profit is to be worked out in accordance with the Explanationn to section 115-J(1) and it is to be seen whether the income determined under the first process is less than 30 per cent of the book profit. Section 115-J would be invoked if the income determined under the first process is less than 30 per cent of the book profit. The Explanationn to sub-section (1) of section 115-J gives the definition of the 'book profit' by the incorporating the requirement of section 205 of the Companies Act in the computation of the book profit. Brought forward losses or unabsorbed depreciation, whichever is less, would be reduced in arriving at the book profits. Sub-section (2), however, provides that the application of this provision would not affect to carry forward of unabsorbed depreciation, unabsorbed investment allowance, business losses to the extent not set off, and deduction under section 80-J to the extent not set off as computed under the Income Tax Act.

12. Coming back to the facts of the present case, we find that the assessed did not claim depreciation in the preceding assessment years due to the non-availability of profit to the extent of Rs. 2,50,25,974. In the year under consideration the assessed debited an amount of Rs. 1,65,18,620 in the books of account. The first question which arose that whether such depreciation which was debited by the assessed in the profit and loss account could be construed to be unabsorbed depreciation. The learned counsel, Shri Mehrotra, pointed out that the depreciation claimed by the assessed was computed in accordance with section 205(2) of the Companies Act and this fact was disclosed by way of a note in accordance with

the provisions of the Companies Act. In Schedule VI-Part II (3)(iv) it is laid down as under :

'If no provision is made for depreciation, the fact that no provision has been made shall be stated and the quantum of arrears of depreciation computed in accordance with section 205(2) of the Act shall be disclosed by way of a note.'

The learned counsel admitted that the assessed did not provide for depreciation in the preceding years because of the inadequacy of profits. Now whether the arrears of depreciation as reflected by the assessed in the accounts prepared in accordance with the requirement of Schedule VI-Part II of the Act could be construed to be unabsorbed depreciation The learned counsel could not enlighten us on this issue. He made a reference to section 205(1)(b) of the Companies Act, 1956. This section deals with the manner and time for payment of dividend out of profits. It is nowhere laid down in the section that arrears of depreciation should be treated at par with the unabsorbed depreciation. The Apex Court in the case of Mahendra Mills (supra) has held that if the assessed does not claim depreciation and does not furnish particulars for claiming depreciation as prescribed under section 34, depreciation cannot be thrust upon him. It was laid down in the case of Appollo Tyres Ltd. (supra) that parts II & III of Schedule VI do not contemplate making of a provision for arrears of depreciation either separately or along with the current years depreciation to be a charge against the profits of that year. This finding of the Honble High Court was not disturbed by the apex court. The term 'unabsorbed depreciation' cannot be equated with the 'arrears of depreciation'. For unabsorbed depreciation the procedure is prescribed under the Act for its adjustment. The assessed first makes a claim in respect of depreciation as per law. If the profits are not adequate to absorb the entire amount of depreciation claimed, the remaining balance is treated as unabsorbed depreciation and for its adjustment procedure is prescribed under the Income Tax Act. The depreciation which is not provided and claimed and only for the purposes of Companies Act, a note is furnished apropos the same can by no stretch of imagination be construed to be unabsorbed depreciation.

13. We have considered the factual submissions of the case. We have also perused the ruling rendered by the Apex Court in the case of Surana Steels. (P) Ltd. (supra). What is 'law' in a precedent is its ruling or ratio decidendi. Three shades of meaning can be attached to expression 'ratio decidendi' :

(i) The reason for (or of) deciding;

(ii) The rule of law proffered by the judge as the basis of his decision;

(iii) The rule of law which other regard as binding authority.

14. No rule should be treated as ratio which would not support the ultimate order. The ratio is essentially a pointer as to the direction which subsequent decisions should take within a broad spectrum of different statement of facts. Later judge may review the facts of the precedent and add to or subtract from the sum total of facts selected by the deciding judge. Ratio has to be malleable in the case of Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai, : (1976)11LLJ186SC , the Apex Court has held :

'The ruling of the superior court is binding law. It is not of scriptural sanctity but is of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame.'

15. In the case of Surana Steels (P) Ltd. (supra), the Apex Court considered the question in relation to unabsorbed depreciation. Reference was made to the provisions of section 205 of the Companies Act which prescribed that past losses or Unabsorbed depreciation, whichever is less, are allowed to be set off against the book profits of the current year for determining profits for the purpose of declaring dividend. Lord Blackburn was quoted as under :

'When a single section of an Act of Parliament is introduced into another Act, it must be read in the sense it bore in the original Act from which it was taken.'

16. Honble Supreme Court ascertained the object behind legislation and held that the provisions of section 205 stand bodily lifted and incorporated into the body of section 115-J of the Income Tax Act. therefore, provisions ought to be read

plainly. Rules of interpretation to be applied, if any ambiguity survives. The Apex Court held that the words 'the amount provided for depreciation' and 'arrived at in both cases after providing for depreciation' make it abundantly clear that in this clause 'loss' refers to the amount of loss arrived at after taking into account the amount of depreciation provided in the profit and loss account.

17. In the present case assessed did not provide depreciation in the profit and loss account of the preceding years. It was not claimed because of the paucity of profits. Schedule VI-Part II (3)(iv) of the Companies Act prescribes that if no provision is made for depreciation assessed shall disclose this fact by way of a note. As such it was disclosed by way of a note. It is, therefore, clear that the facts of the present case are different from the facts of the Surana Steels case. The Apex Court did not contemplate the eventuality-'Where no depreciation is provided for'.

18. The ratio of the decision of the Apex Court rendered in the case of Mahendra Mills (supra) was not available before the Tribunal when the case for preceding year came for adjudication. As such some of the dark nooks concerning the issue could not be lightened. No part of a provision of a statute can be just ignored by saying that the legislature enacted it not knowing what it was saying. Where an expression is used by the legislature the court must assume that the legislature deliberately used that expression and that it intended to convey some meaning thereby.

19. The entire edifice of the case rests on the interpretation of the word 'arrears of depreciation'. The benefit claimed by the assessed can be availed only in respect of 'Unabsorbed Depreciation'. We have considered the character of arrears of depreciation. It cannot be equated with unabsorbed depreciation. The panoply of section 115-J is erected on a set of regulations which were made to tackle the problem of zero tax prosperous companies to ensure minimum corporate tax. The sweep of this section cannot be elongated beyond its limits. As per the mandate of the section assessed is required to compute the profit in accordance with the provisions of Parts II & III of the Schedule VI of the Companies Act. We have perused the provisions of the Companies Act. Making of a provision for arrears of

depreciation is not contemplated under the Companies Act. As such it is evident that the book profit was not calculated in conformity with the tenets laid down in the Companies Act. The profit as shown by the assessed in its profit and loss account is not sacrosanct. In our opinion, the assessing officer was correct in recasting the book profit. We, therefore, find no infirmity in the order of the assessing officer. We uphold the same by reversing the order of the Commissioner (Appeals).

20. Next issue relates to the deletion of addition of Rs. 2,06,787. We have heard the rival submissions. The assessing officer made this addition on the ground that the assessed borrowed the money for the purchase of raw material, as such, the interest was relatable to the cost of production. This should, therefore, form part of the closing stock. There is absolutely nothing to indicate that the amount was borrowed specifically for the purchase of raw material. It was not directly utilised, towards the cost of production. Money was borrowed for the business purposes. As such, interest thereon was debited in the profit and loss account. It cannot be attributed towards the cost of production. The assessing officer appreciated the facts and deleted the addition. We find no infirmity in the impugned order on this count. Accordingly, we uphold the same.

21. Next issue relates to the deletion of disallowance of Rs. 15,326 towards the food etc. provided to the contractors. We have heard the rival submissions. We have noted that some repairs and replacements were necessary. This was done in house by engaging the contractors. Factory was situated away from the city. Contractors workmen were housed in the factory premises. Workmen were provided food at the cost of the assessee. The contractors charges were fixed accordingly. This, in our opinion, is a business expenditure. We, therefore, uphold the impugned order on this point.

22. Next issue relates to the deletion of disallowance of depreciation on tubewell by treating it plant and machinery. We find that this issue was decided by the Commissioner (Appeals) by following the decision of the Calcutta High Court rendered in the case of CIT v. Hindustan Motors Ltd. (1988) 1701 ITR 431. No contrary decision was brought to our notice. As such, we find no infirmity in the

impugned order on this count. Accordingly, we uphold the same.

23. In the result, the appeal of the revenue, stands partly allowed.

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