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IN THE HIGH COURT OF ORISSA AT CUTTACK

ITA No.27 of 2006

National Aluminium Company Appellant
Limited, NALCO, Bhubaneswar

Mr. Sudipta Kumar Singh, Advocate
-versus-

The Commissioner of Income Tax, Respondents
Bhubaneswar and another

Mr. Tushar Kanti Satapathy, Senior Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R. K. PATTANAIAK

ORDER
09.03.2022

Order No.

Dr. S. Muralidhar, CJ.

08. 1. This is an appeal by National Aluminium Company Limited (NALCO) against an order dated 30th November, 2005 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT) in ITA No.459/CTK/2003 for the Assessment Year (AY) 1997-98.

2. While admitting the appeal on 2nd February, 2022, the following questions of law were framed for consideration:

“(i) Whether in excluding the ‘book profit’ derived by the assessee from the generation of power under clause (iv) of Explanation to Section 115JA(2) of the Income Tax Act, 1961, the profit is to be computed on the basis of the ‘realizable value’ of such power which has been utilized by the Smelter unit for the manufacture of aluminum?”

(ii) Whether on the facts and in the circumstances of the case the Tribunal was justified in law in not allowing the entire claim for leave encashment and post retirement medical benefit which has been determined as an accrued liability and computed on the basis of actuarial valuation?”

Question (i)

3. The background facts are that the Appellant-Assessee is a Government of India enterprise engaged in the business of mining, manufacturing, production, generation and dealing in Bauxite Alumina, Aluminium and Power and operating under the Ministry of Mines, Government of India. The Assessee follows a mercantile system of accounting and its accounts are maintained on accrual basis.

4. The Profit and Loss Account (P&L Account) of the Assessee is drawn up in accordance with the provisions contained in Parts II and III of Schedule VI to the Companies Act. After the accounts are scrutinized and certified by the statutory auditors as well as by the Comptroller and Auditor General of India (C&AG), it is approved by the Appellant in its general meeting and thereafter filed with the Registrar of Companies as required under the Companies Act, 1956.

5. It is not in dispute that for the AY in question, the Appellant was liable to pay “Minimum Alternative Tax” (MAT Tax) under Section 115JA of the Income Tax Act, 1961 (Act) based on its “book profits”. In other words, for the AY in question on account of brought forward depreciation and investment allowance, the

taxable income of the Assessee was 'Nil' and, therefore, this attracted the MAT Tax under Section 115JA of the Act.

6. The Appellants generates power in its Captive Power Plant (CPP) at Angul. The power so generated is internally consumed in its Smelter Plant at Angul for production of Aluminium. Surplus power is sold by the Assessee to Grid Corporation of Orissa (GRIDCO).

7. According to the Assessee, the CPP is a separate and independent accounting unit and separate books of accounts are maintained for the transactions of the CPP. The profit/loss from CPP is separately computed. The profit for a year as shown in the P&L Account of the Assessee is stated to be the sum total of the profit/loss from its different accounting/functioning units viz., Mines, Alumina Refinery, CPP, Smelter and so on.

8. The question that arose before the Assessing Officer (AO), who picked up the return of the Appellant for scrutiny, was the manner in which profit derived from power generation (referred to as 'power profits') is to be reduced from the book profits. According to the Appellant, the profit derived from power generating unit (CPP), being power profit, is eligible for deduction under Section 115JA(2)(iv) of the Act in computing the taxable book profits under the said provisions.

9. The further question that arose was whether power profits are to be determined on the basis of the 'realizable price' i.e. the price at which the power is sold to GRIDCO? The AO while assessing the Assessee's MAT Tax under Section 115JA, in computing the book profits, disallowed the claim of power profits to the extent of Rs.32.74 crores. The Assessee then went in appeal before the Commissioner of Income Tax (Appeals) II, Bhubaneswar [(CIT (A)], who upheld the disallowance by the AO. After the appeal before the ITAT on this aspect was rejected by the impugned order, the present appeal has been filed.

10. Mr. Sudipta Kumar Singh, learned counsel appearing on behalf of the Appellant-Assessee has drawn attention of the Court to a judgment of the Delhi High Court dated 21st November, 2008 in ITA No.1187 of 2005 (*Commissioner of Income Tax Delhi-IV, New Delhi v. M/s. DCM Sriram Consolidated Ltd.*) to urge that power profit cannot be determined by excluding the component of power generated and consumed by the Assessee. On the other hand, Mr. Satpathy, learned Senior Standing Counsel appearing for the Department-Respondents supported the view of the CIT (A), which has been endorsed in toto by the ITAT.

11. The above submissions have been considered. The CIT (A) has in the order dismissing the Assessee's appeal gone by the logic of the Assessee not being able to sell power to itself and derive profit therefrom. It was held that "the words 'derived by' used in Clause (iv) cannot have a wide import so as to include any income which

can in some manner be attributed to the business. The profit derived by the eligible business has to mean profit and gains “includible in the computation of total income chargeable to tax.” It was held that “it will be difficult to hold that the appellant has derived profit from internal consumption of power.”

12. The ITAT has adopted the above reasoning in toto and observed that Section 115JA(2)(iv) of the Act “does not mean that a person can sell to himself.”

13. The relevant portion of Section 115JA(2)(iv) of the Act reads as under:

“115JA. *Deemed income relating to certain companies.*—

(1) Notwithstanding anything contained in any other provisions of this Act, where in the case of an assessee, being a company, the total income, as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 (hereafter in this section referred to as the relevant previous year) is less than thirty per cent. of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent. of such book profit.

(2) Every assessee, being a company, shall, for the purposes of this section prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956):

Provided that while preparing profit and loss account, the depreciation shall be calculated on the same method and rates which have been adopted for calculating the depreciation for the purpose of preparing the profit and loss account laid before the company at its annual general

meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956):

Provided further that where a company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under the Act, the method and rates for calculation of depreciation shall correspond to the method and rates which have been adopted for calculating the depreciation for such financial year or part of such financial year falling within the relevant previous year.

Explanation.—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by—

- (a) the amount of income-tax paid or payable, and the provision therefor; or
 - (b) the amounts carried to any reserves by whatever name called; or
 - (c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or
 - (d) the amount by way of provision for losses of subsidiary companies; or
 - (e) the amount or amounts of dividends paid or proposed; or
 - (f) the amount or amounts of expenditure relatable to any income to which any of the provisions of Chapter III applies;
 - (g) the amount or amounts set aside as provision for diminution in the value of any asset,
- if any amount referred to in clauses (a) to (g) is debited to the profit and loss account, and as reduced by,—
- (i) the amount withdrawn from any reserves or provisions if any such amount is credited to the profit and loss account:

Provided that, where this section is applicable to an assessee in any previous year (including the relevant previous year), the amount withdrawn from reserves created or provisions made in a previous year relevant to the

assessment year commencing on or after the 1st day of April, 1997 [but ending before the 1st day of April, 2001] shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this *Explanation*; or

(ii) the amount of income to which any of the provisions of Chapter III applies, if any such amount is credited to the profit and loss account; or

(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*; or]

(iv) the amount of profits derived by an industrial undertaking from the business of generation or generation and distribution of power; or xxx"

14. In almost similar circumstances, the Delhi High Court in *M/s. DCM Sriram Consolidated Ltd.*, (*supra*) considered the question whether an Assessee would be entitled to reduce the book profits to the extent of power profit derived from its CPPs, while computing MAT under Section 115JA of the Act. A similar argument was advanced by the Revenue before the Delhi High Court that there was no sale, inasmuch as, the transfer of power was not to a third party and consequently, “no profits could have been earned by the assessee.” Further it was argued by the Revenue, just as it is argued in the present case, that the main line of activity of the Assessee is not the business of generation of power and that there was no mechanism to compute the sale price and consequently the profits

which should be derived on transfer of energy from the Assessee's CPPs to its other units.

15. As far as the first contention is concerned, the Delhi High Court referred to the decision of the Supreme Court of India in ***Tata Iron & Steel Ltd. v. State of Bihar*, 48 ITR 123 (SC)** and concluded that “in arriving at an amount that is to be deducted from book profits - which is really to the benefit of the assessee as it reduces the amount of tax which it is liable to pay under the provisions of Section 115JA of the Act, the principle of apportionment of profits resting on disintegration of ultimate profits realized by the assessee by sale of the final product by the assessee has to be applied.” It was further observed:

“11. When looked at from this angle it is quite clear that the profit derived by the assessee on transfer of energy from its CPPs to its other units was embedded in the ultimate profit earned on sale of its final products. The assessee by taking resort to Explanation (iv) to Section 115JA has sought to apportion, and consequently, reduce that part of the profit which is derived from transfer of energy from its CPPs in arriving at book profits amenable to tax under Section 115JA of the Act.

11.1 The aforesaid principle as evolved by the Supreme Court in the case of ***Tata Iron & Steel Ltd (supra)*** has been applied by it in a later decision entitled ***Textile Machinery Corporation Ltd. v. CIT, West Bengal :107 ITR 195(SC)*** as also, by a Division Bench of this Court in ***CIT v. Orissa Cement Ltd :254 ITR 412 (Del)***. 12. In view of the ratio of the judgments of the Supreme Court referred to above, i.e., ***Tata Iron & Steel Ltd (supra)***, ***Textile Machinery Corporation Ltd (supra)***, as well as, that of the Division Bench of this Court in ***Orissa Cement (supra)*** it is quite evident that assessee's CPPs can as a matter of principle derive

profits which is in point of fact embedded in the ultimate profit earned on the sale of the final product.”

16. On the issue whether the Assessee could be denied the power profit as computed by it on the ground that power generation was not its main line of business, the Delhi High Court held that

“the term business which prefixes generation of power in Clause (iv) of the Explanation to Section 115JA is not limited to one which is prosecuted only by engaging with an outside third party. The meaning of the word ‘business’ as defined in Section 2(b) of the Act includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The definition of ‘business’, which is inclusive, clearly brings within its ambit the activity undertaken by the assessee, which is, captive generation of power for its own purposes. The approach of the CIT(A) and, consequently the Tribunal, both in law and on facts cannot be faulted with. We are of the opinion that the Assessing Officer clearly erred in holding that, since the main business of assessee is of manufacture and sale of urea it could not be said to be in the business of generation of power in terms of Explanation (iv) to Section 115JA of the Act.”

17. This Court concurs with the above interpretation placed on the expression ‘business’ used in Section 2(b) of the Act and holds that the Assessee here is entitled to reduce from its book profits, the profits derived from its CPPs, in determining the MAT payable for the purpose of Section 115JA of the Act. Question (i) is therefore answered in favour of the Assessee and against the Department by holding that the AO, the CIT(A) as well as the ITAT erred in law in not allowing the claim of the Assessee of Rs.45,48,73.179 as deduction under Section 115JA(2)(iv) of the Act relating to ‘power profits’.

Question (ii)

18. As regards question (ii), up to the accounting year 1995-96, the Assessee did not provide for any liability towards leave encashment and post retirement medical benefits to its employees. On account of the comments and qualification by the CAG under Section 619 (4) of the Companies Act and on account of the Accounting Standard 15 issued by the Institute of Chartered Accountants of India read with amendment to Section 145 of the Act, the Assessee, with effect from AY 1997-98 was required to make 'actuarial valuation' in respect of the said leave encashment and post retirement medical benefits. Based on such 'actuarial valuation' the Assessee charged to its account Rs.441.28 lakhs during the accounting year 1996-97 as liability towards the said leave encashment and post retirement medical benefits.

19. The AO has treated the liability of Rs.441 lakhs on the above ground as a contingent liability and added it to the book profits. This has been upheld by the CIT(A) and ITAT.

20. Mr. Singh, learned counsel appearing for the Assessee placed reliance on the decision of the Supreme Court dated 23rd September, 2008 in Civil Appeal No.5800 of 2008 (***Commissioner of Income Tax-IV, Delhi v. M/s. HCL Comnet Systems & Services Ltd.***) to urge that since Chapter XII-B contains Special provisions relating to companies for which 'Deemed income' is to be determined under Section 115JA for the purposes of MAT, the

manner of treating certain liabilities on accrual basis for using the actuarial system should be accepted as ‘ascertained liability.’

21. Mr. T. K. Satpathy, on the other hand, referred to Clause (c) of the Explanation below Section 115JA(2) of the Act and submitted that ‘ascertained liabilities’ i.e. only the amount actually paid will be eligible for deduction from the profits on which MAT has to be paid. He accordingly submitted that the AO was justified in allowing only such amount that was actually paid on this score in the previous year and not the entire amount as claimed by the Assessee.

22. Having considered the above submissions, the Court is of the view that the reasoning of the Supreme Court in ***HCL Comnet Systems & Services Ltd.*** (*supra*) should prevail. The Supreme Court there was considering, for the purposes of Section 115JA (common explanation (c)), whether the provisions for bad and doubtful debts as claimed by the Assessee should be treated as ‘ascertained’ or ‘unascertained’ liability. In that context, it was observed as under:

“As stated above, the said Explanation has provided six items, i.e., Item Nos.(a) to (f) which if debited to the profit and loss account can be added back to the net profit for computing the book profit. In this case, we are concerned with Item No. (c) which refers to the provision for bad and doubtful debt. The provision for bad and doubtful debt can be added back to the net profit only if Item (c) stands attracted. Item (c) deals with amount(s) set aside as provision made for meeting liabilities, other than ascertained liabilities. The assessee's case would, therefore, fall within the ambit of

Item (c) only if the amount is set aside as provision; the provision is made for meeting a liability; and the provision should be for other than ascertained liability, i.e., it should be for an unascertained liability. In other words, all the ingredients should be satisfied to attract Item (c) of the Explanation to Section 115JA. In our view, Item (c) is not attracted. There are two types of "debt". A debt payable by the assessee is different from a debt receivable by the assessee. A debt is payable by the assessee where the assessee has to pay the amount to others whereas the debt receivable by the assessee is an amount which the assessee has to receive from others. In the present case "debt" under consideration is "debt receivable" by the assessee. The provision for bad and doubtful debt, therefore, is made to cover up the probable diminution in the value of asset, i.e., debt which is an amount receivable by the assessee. Therefore, such a provision cannot be said to be a provision for liability, because even if a debt is not recoverable no liability could be fastened upon the assessee. In the present case, the debt is the amount receivable by the assessee and not any liability payable by the assessee and, therefore, any provision made towards irrecoverability of the debt cannot be said to be a provision for liability. Therefore, in our view Item (c) of the Explanation is not attracted to the facts of the present case. In the circumstances, the AO was not justified in adding back the provision for doubtful debts of Rs.92,15,187/- under clause (c) of the Explanation to Section 115JA of the 1961 Act."

23. Adopting the same reasoning, as far as the present case is concerned, the Assessee's treatment of the liability in respect of the post retirement medical benefits as reflected in its P&L account should be accepted by the Department and cannot be questioned.

24. Consequently, question (ii) is answered in the negative by holding that the ITAT was not justified in not allowing the entire

claim for leave encashment and post retirement medical benefit determined as an accrued liability and computed on the basis of actuarial valuation.

25. The impugned order of the ITAT and the corresponding orders of the CIT(A) and AO on the above two issues are accordingly set aside. The appeal is allowed, but in the circumstances, with no order as to costs.

M. Panda



(Dr. S. Muralidhar)
Chief Justice

(R. K. Pattanaik)
Judge