

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'ए' अहमदाबाद
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./ ITA No. 504/Ahd/2012

निर्धारण वर्ष/ Assessment Year : 2005-06

Gujarat Dairy Development Corporation Ltd., Patnagar Yojana Bhavan, Block-C, Sector-16, Gandhinagar PAN : AABCG 4321 Q	Vs	Income Tax Officer, Ward-2, Gandhinagar
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आयकर अपील सं./ ITA No. 662/Ahd/2012

निर्धारण वर्ष/ Assessment Year : 2005-06

Income Tax Officer, Ward-2, Gandhinagar	Vs	Gujarat Dairy Development Corporation Ltd., Gandhinagar PAN : AABCG 4321 Q
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri M.G. Patel, AR
Revenue by :	Shri R. I. Patel, CIT-DR

सुनवाई की तारीख/Date of Hearing : 25/10/2016

घोषणा की तारीख /Date of Pronouncement: 11/11/2016

आदेश/O R D E R

PER MAHAVIR PRASAD, JUDICIAL MEMBER:-

These cross appeals by the assessee and Revenue are directed against the order of the Commissioner of Income-Tax (Appeals), Gandhinagar, Ahmedabad dated 27.12.2011 for Assessment Year 2005-06.

2. The grounds raised by the assessee in its appeal read as under:-

1. The learned Commissioner of Income Tax (Appeals), Gandhinagar, Ahmedabad has erred in law and on facts of the case in valuing the assets transferred to National Dairy Development Board at Rs.23,00,00,000/- as per the amount stated in BIFR Order dated 14.01.2003 instead of valuing the same as per the books of the assessee at Rs.4,60,30,533/-

(WDV Rs.4,17,49,679/- + Rs.42,80,854/- inventory) and treating the same as short term capital gain u/s 50 r.w.s. 50A of the Income-tax Act, 1961.

2. The learned Commissioner of Income Tax (Appeals), Gandhinagar, Ahmedabad has erred in law and on facts of the case in confirming action of the Assessing Officer in not following the directions given in 6.7 of the BIFR Order dated 14.01.2003 directing the income-tax authorities to consider exempting the assessee from the liability to tax u/s 41(1) as well as from the liability of capital gain tax.
3. The learned Commissioner of Income Tax (Appeals), Gandhinagar, Ahmedabad has erred in law and on facts of the case in not granting deduction in respect of carried forward losses and depreciation of earlier years though the returns in respect of the same were filed in time.
4. Your appellant, therefore, prays for the following:
 - i. To compute the assets transferred to NDDDB at Rs.4,50,30,533/- only.
 - ii. To compute the income after exempting the appellant from the liability to tax u/s 41(1) as well as from the liability of capital gain tax as directed in the BIFR order.
 - iii. To compute the income after granting deduction in respect of carried forward losses and depreciation of earlier years.

3. The Revenue has taken the following grounds:-

1. The learned CIT(A) has erred in law and on facts in not considering income on account of cessation of liability of Rs.15,86,20,988/- even though assessee has credited the same in P&L account.
2. On the facts and circumstances of the case the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.

4. The facts of the case are that the return of income was filed by the assessee on 29.10.2005 for the year under consideration. Subsequently, vide order u/s 143(3) of the IT Act dated 03.09.2007, the total income was assessed at Nil. Thereafter, the CIT, Gandhinagar vide his order under section 263 dated 17.02.2009 had cancelled the order passed by AO u/s 143(3) with a direction to make fresh assessment. The ld. CIT, Gandhinagar vide his order u/s 263 of the Act dated 17.02.2009 directed to verify that :-

"(1) The AO had treated interest income of Rs. 10,16,010/- earned by the assessee as 'Income from other sources' however wrongly adjusted against the brought forward business losses as the same is already accounted for in P&L account.

(2) Surplus on transfer of assets to NDDDB. This would attract capital gain liability.

(3) Book profit of Rs.26,19,75,975/- claimed exempt under the provisions of SICA, 1985."

4.1 In view of the order u/s.263 of the CIT referred to above, notices under section 142(1), 143(2) of the Act were issued to the assessee and assessee attended the proceedings from time to time and furnished the required details. The assessee was also given a show-cause notice vide letter dated 03.11.2009, which reads as under:-

"(i) In this case, the assessment been completed u/s. 143(3) of the I.T. Act on 3.9.2007 on total income at Rs.10,16,010/- as against Nil returned income. The assessment so made included addition of Rs.10,16,010/- on account of interest income earned by the assessee. The addition so made has been set off to that extent against the unabsorbed depreciation claimed by the assessee for earlier years. The assessee company was declared as sick by the BIFR on 29.10.1994.

(ii) During the course of assessment proceedings, on verification of profit and loss account, it is seen that the assessee has earned interest of Rs.10,16,010/- which is not business activity of the assessee and hence is liable to be taxed under the head 'Income from Other Source' in view of the Supreme Court decision in the case of CIT vs. Lahore Electric Supply Co. (1996), 601 ITR(SC).

(iii) The assessee by the Assessing Officer was, therefore, show caused as to why the said income should not be taxed under the head 'Income from Other Sources'. The assessee had consented to the addition but has requested that the unabsorbed depreciation of earlier years 1998-99 to 2005-06 amounted to Rs.3.28 crores may be adjusted against the same. The Assessing Officer had thus made the proposed addition under the head "Other Income" and had also given set off for the unabsorbed depreciation as claimed by the assessee. The final income assessed was thus "NIL".

(iv) The "other income" was already accounted for in the Profit and Loss Account and adjusted against the brought forward business loss in the statement of total income accompanying the return of income.

(v) Scrutiny of the assessment record reveals that the assessee was declared sick by the order of the BIFR dated 29.10.1994. The BIFR has passed a final order on 14.1.2003 setting out to transfer part of its assets to NDDB against their dues from the assessee as per the terms determined in the said order. The assessee is still having the ownership of surplus land of the Dairy at Jamnagar measuring 20405 sq.mt. and Ahmedabad Dairy alongwith the plant and machinery and measuring 37729 sq. mi. (equivalent to 45107 sq.mt.).

(vi) In compliance to the BIFR's order, the assets were transferred to NDDB on 1.3.2005. The sale consideration in excess of the liability of the assessee receivable from the NDDB was treated by the assessee as capital reserve written back to the profit and loss account amounting to Rs.12.23 crores. Further, an amount of Rs. 15.86 crores was also credited to the profit and loss account as remission of liability of NDDB account.

The assessee has shown a net profit of Rs.26,38,48,1 70/- in the profit and loss account before deducting Voluntary Retirement Scheme expenses. From the above amount, the assessee had reduced Rs.12.23 crores as capital reserve written back and after make some other deductions, there was a positive income of Rs.14,15,00,443/- which was set off against the business losses of the A. Ys. 1 997-98 to 2003-04.

(vii) The business of the assessee has come to a close since long and from the figures of brought forward losses mentioned in the statement of total income, the dates of filing the return for A.Y. 1998-99 to 2002-03 have not been mentioned. Since the assessee is not carrying on the business the question of allowing depreciation for the earlier year does not arise. The assessee has also charged depreciation on the assets transferred to NDDB in the accounts on going on business. This is contrary to the basic principles of accounting.

(viii) Further, the assessee had implemented the BIFR's order by handing over the majority assets to NDDB on 1.3.2005. This was, therefore, not an amalgamations of the assessee with NDDB but a transfer of asset to the said company for a consideration on the basis of the valuation arrived at in the Scheme of transfer of assets as a part of its revival packages determined by the BIFR in its aforesaid order(supra).

(ix) The assessee was having book profit during the year as per Companies Act, 1956 under the provisions of Section 115JB of the Act, 1961 at Rs.26,19,75,975/- which was claimed as exempt under the provisions of Sick Industrial Companies Act, 1 985.

(x) The order of the BIFR lays down the reliefs and concessions, Rights and Obligations in para 6 thereof. As per para 6.1 (g), it has been laid down that the government of Gujarat shall exempt the assessee, as a onetime measure, from applicability of sales tax liability on sale of assets by the assessee in

respect of all the assets identified for sale in the scheme. Regarding the Central Government dues, para 6.7 lays down as under: -

"Income-tax

- (a) To consider exempting the company from, taxation liability, if any, under section 41(1) of the Income-Tax Act
- (b) To consider exempting the company from Capital Gains Tax Liability, if any, arising from proposed sale/transfer of assets.
- (c) To consider permitting free and unhindered sale of assets by GDDCL/GOG as envisaged in the scheme so as to ensure successful implementation of the scheme.
- (d) To consider not insisting on TDS and/demand advance tax whatsoever on the assets sale."

(xi) It is further seen that the assessee has been getting various grants against machineries and also in kind in the past. The assessee has been availing of depreciation on all its assets without deduction of the grant/subsidy as per the Income-Tax. Act. The Auditor's Report, Note No. (iii) of Schedule XV reads as under:

"Note A-7 : Regarding treatment of grants as against AS-12 (Accounting for Government grants) issued by ICAI wherein it is provided that amount of grant equal to to depreciation of assets purchased by these grants, should be credited to profit and loss account by debiting capital reserve. But in absence of details of such assets and depreciation, the said entry could not be passed. This has effect of overstating capital reserve and losses."

(xii) The assesses had deducted Rs.12.23 crores as capital reserve written back from the gross profit of Rs.26.38 crores. The capital reserve would have reduced the WDV of the assets transferred by the company and, therefore, the difference between the WEV and the actual cost at which the machineries were transferred to NDDB would have resulted into capital gain. What was credited to the profit and loss account as remission of liability in profit and loss account is also relatable to the assets and, therefore, liable for capital gain.

(xiii) As stated in the order of BIFR, the assessee does not appear to have applied for any exemption from the Board in relation of the levy of capital gain. BIFR has also not given it in its order mentioned above."

4.2 Thereafter, after considering the submissions of the assessee, vide order dated 21.12.2009, the Assessing Officer framed assessment u/s 143(3) r.w.s. 263 of the Act and worked out the book profit at Rs.26,19,75,975/-. The total income of the assessee was computed at Rs.26,43,52,979/- as under:-

	Net profit as per P & L a/c.	Rs.26,38,48,170/-
Add:	Depreciation as per books	Rs.5,21,203/-
Add:	Loss of assets	Rs.4,22,070/-
		Rs.26,47,91,443/-
Less:	Income considered separately Capital reserve return back	Rs.12,23,31,333/-
		Rs.14,24,60,110/-
Less:	Income from Other sources as per order dtd.	Rs. 10,16,010/-
Less:	1/5 th of VRS expenses	Rs.4,38,464/-
	TOTAL.....	Rs.14,10,05,636/-
I	Business income	Rs.14,10,05,636/-
II	Income From Other Sources as per Para- 4.1 above	Rs.10,16,010/-
III	Income from Capital Gain as per Para-4.2 above	Rs.12,23,31,333/-
	Taxable Total income	Rs.26,43,52,979/-
	Book Profit	Rs.26,19,75,975/-

4.3 Aggrieved by the order of the Assessing Officer, the assessee preferred first statutory appeal before the ld. CIT(A) who, after considering the submissions of the assessee, granted partial relief to the assessee, by following observations:-

"5.3 I have considered the contentions of the appellant as well as the assessment order and the order of the BIFR. Neither the AO nor the appellant have understood the correct nature and issues related to taxable income arising out of the BIFR Order related to settlement of dues of NDDB.

The BIFR in fact has settled the issue of settlement of dues of NDDB as follows in Para 4.4 and 6.2 of its order:

- a) Total dues as on 31.3.2001 as per NDDB (including penal interest not debited by GDDCL in its books) was 41.74 crores. As per appellants audited books these were 25.962 crores. (Para 4.4)*
- b) NDDB was to accept 29 crores as full and final payment. ,*
- c) GDDCL was to give specified assets at settled and accepted value (reached after valuation) at 23 crores and 6 crore in cash.*

Therefore it is clear that assets which have been transferred, have been valued at agreed value of 23 crores. The WDV of these assets was NIL. Therefore, the entire 23 crores is taxable u/s 50 read with 50A of the IT Act as short

terms capital gains. The value as per books is not relevant. What is of importance is the value of consideration settled and WDV.

As far taxability u/s 41 (1) is concerned, in fact as per books total liability is actually less than the value of cash and assets transferred (29 crores). The remaining extra amount given is towards penal interest etc not claimed as expense under IT Act. Therefore no amount is taxable u/s 41(1).

Therefore, on the facts of the case; instead of i) the amount of Rs.12,23,31,333/- brought to tax as capital gain and ii) the amount of W& Rs.15,86,20,988/- as part of business income of the Appellant u/s 41(1) of the Income Tax Act, 1961, holding it as cessation of liability as held by the AO the Appellant is held liable for taxation on 23 crores u/s 50 read with 50A of the IT Act as short terms capital gains.

Another issue raised is against the order of BIFR regarding the Central Government dues and the directions given in para 0.7 reads as under:-

"Income-tax

(a) To consider exempting the company from, taxation liability, if any, under section 41(1) of the Income-Tax Act.

(b) To consider exempting the company from Capital Gains Tax Liability, If any, arising from proposed sale/transfer of assets.

(c) To consider permitting free and unhindered sale of assets by GDDCL/GOG as envisaged in the scheme so as to ensure successful implementation of the scheme.

(d) To consider not insisting on TDS and/demand advance tax whatsoever on the assets sale."

In this respect, the CIT ('Appeals') has no role to play except that I advice the AO to expedite the disposal of the issue.

6. Next effective ground is that the Ld. Assessing Officer has erred in law as well as on the facts by holding that depreciation charged by the Appellant in the books of accounts is on the assets transferred to NDDB in the accounts on the going-on business basis and, therefore, the same is not allowable.

The ground has been raised, but the grievance is not understood. If any asset already stands transferred definitely no depreciation in current year is available on it because depreciation is only allowable on assets owned by the assessee. The ground is therefore dismissed.

7. Next effective ground is that AO has erred in holding that set off in respect of carried forward losses and un-absorbed depreciation is not allowable to the Appellant,

7.1 The AO has discussed the issues in the assessment orders as follows:

"As the assessee company has failed to file return of income in time as mentioned in the chart shown in computation of income carried forward loss is not admissible to be set off against the income of the current year. Further the assessee company has not carried out any business activities, the question of allowing depreciation to the assessee does not arise."

The assessee was required to file return within time allowed u/s 139(1) to get benefit of carrying forward loss u/s 139(3), and to that extent AO is correct. Depreciation brought forward if any is allowable as per law even if business is discontinued as per Deepak Textile Industries Ltd. 168 ITR 773 (Guj). The ground is decided accordingly.

8. Next ground of appeal is -

"The Ld. Assessing Officer has also erred in law and on the facts by determining that the Appellant has book profit u/s 115JB at Rs.26,19,75,975/- though as per the provisions of Explanation (vii) of Section 115JB(2) of the Income Tax Act, 1961 there is no liability to tax on book profits u/s 115JB of the Income Tax Act, 1961."

The AO is directed to verify whether the appellants net worth is still less than accumulated losses, as claimed by appellant, and if so give benefit of Explanation 1 (vii) to section 115JB(2) of reducing current years profits of sick units (if so.)"

4.4 Aggrieved by the aforesaid order of the Id. CIT(A), both the parties are in appeal before us.

5. The Id. Counsel for the assessee reiterated the submissions as were made before the lower authorities and the Id. DR, on the other hand, relied upon the order of the Assessing Officer.

6. We have heard the rival contentions, perused the material available on record and gone through the orders of the authorities below as well as the order of Hon'ble Delhi High Court in WP(C) No.4874/2013, order of DIT (Recovery), assessee's representation before DIT (Recovery) dated 11.05.2015 and assessee's letter dated 09.12.2015 addressed to the Revenue Secretary, New Delhi. We find that in this case the assessee Gujarat Dairy Development Corporation Ltd has filed a writ petition No.4874/2013, CM

Appl NO.3198/2014 before the Hon'ble Delhi High Court and the Hon'ble Delhi High Court has given certain directions to the Department. The relevant portion of the same reads as under:-

"The petitioner approached this Court again through W.P.(C) 3561/2012 which was again disposed off after hearing it and the Income Tax authorities in terms of the order dated 26.09.2012:

"It is thus agreed that the respondent give effect "to the mandate of the scheme of considering the issue of concession, as set out in the scheme dated 14.01.2003 read with the order dated 07.08.2006 and afresh demand would be raised, if any. In the meantime, the demand raised and which is impugned in the appeal would be kept an abeyance. "

After disposal of the above petition, the respondents, by their order dated 30.05.2013, impugned in this case, declined the reliefs sought by the petitioner company. The complaint of the petitioner is that the previous order dated 26.09.2012 requires determination and such determination was to be based on materials called for, and particulars given to the writ petitioner.

The pleadings do not anywhere disclose that the respondents called for the views or granted any opportunity to the petitioner to present its views. At the same time, it is necessary to examine whether the liability under Section 41(1) and capital gains liability etc. is confined to one year and if so the quantum, and whether such liability enured in respect of further assessment periods. It was submitted during the course of hearing that the Assessment Orders have not been completed or at least made known to the petitioner for some periods. Having regard to the fact that the petitioner is subjected to assessment in Gujarat where it carries on its business activity, this Court is of the opinion that the respondents should grant hearing and consider all materials on record, in respect of which assessment orders have been made as well as wherever the returns were made by the assessee/petitioner. The DIT (Recovery) shall also call for other relevant materials and after examining comprehensively the entire relevant materials sought from the petitioner, having regard to the orders made, pass necessary orders as are required in the case. The petitioner shall be afforded reasonable opportunity to present its views, before the DIT (Recovery). To facilitate the process, the petitioner shall be present through its representative before the DIT (Recovery) on 16.04.2014."

Pursuant to the Hon'ble High Court's order, the assessee gave representation to the authority and the Id. DIT(Recovery) passed an order but the same was not upto the expectation/satisfaction of the assessee.

Assessee's grievance is also that the representation placed before the DIT (Recovery) dated 11.05.2015 and the assessee's letter addressed to the Revenue Secretary dated 09.12.2015 have not been considered. Under these facts and circumstances of the case, we are of the considered opinion that the assessee has not been heard properly as per the direction of Hon'ble Delhi High Court (supra). Therefore, we remand this matter back to the file of the Assessing Officer and the Assessing Officer will examine the issues again as per the direction of the Hon'ble High Court after considering the submission/representation of the assessee and thereafter pass an appropriate order in accordance with law. Needless to mention that Assessing Officer will allow adequate opportunity of being heard to the assessee while re-adjudicating the issues.

7. In the result, assessee's appeal as well as Revenue's appeals, both are allowed for statistical purposes.

Order pronounced in the Court on 11th November, 2016 at Ahmedabad.

Sd/-

Sd/-

**N.K. BILLAIYA
(ACCOUNTANT MEMBER)**

Ahmedabad; Dated 11/11/2016

**MAHAVIR PRASAD
(JUDICIAL MEMBER)**

आदेश की प्रतिलिपि बरौचित/Copy of the Order forwarded to :

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

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अहमदाबाद/ BY ORDER,

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