

आयकर अपीलीय अधिकरण “बी” न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, CHENNAI

मजनीय श्री महावीर सिंह, उपाध्यक्ष एवं
मजनीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं. ITA No.159/Chny/2022
(निर्धारण वर्ष / Assessment Year: 2009-10)

M/s. Cognizant Technology Solutions India Pvt. Ltd. New No.165, Old No.110, Menon Eternity Building, 6 th floor, St. Mary’s Road, Alwarpet, Chennai-600 018.	बनस/ Vs.	ACIT Central Circle-1(1), Chennai.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. AAACD-3312-M		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Shri N.V.Balaji (Advocate)-Ld.AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri S.Senthil Kumaran (CIT) -Ld. DR

Date of final Hearing	:	01-11-2023
Date of Pronouncement	:	06-11-2023

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2009-10 is in second round of appeal. The sole issue in the appeal is allowability of Marked-to-market (MTM) foreign exchange losses incurred on outstanding forward contracts under the normal provision as well as while computing Book Profits u/s 115JB. The grounds raised by the assessee read as under: -

“The order of the learned Commissioner of Income-tax (Appeals) - 18, Chennai [CIT(A)] is erroneous, bad in law, prejudicial to the Appellant and contrary to the facts and circumstances of the case.

Allowability of marked-to-market ('MTM') foreign exchange loss incurred on outstanding forward contracts under the normal provisions of the Act

2. The learned CIT(A) has failed to appreciate that the Hon'ble Income-tax Appellate Tribunal (ITAT) had remanded the matter back to the learned CIT(A) for determining whether the foreign exchange loss on outstanding forward contracts is revenue in nature.

3. The learned CIT(A) has erred by not allowing the fresh claim made by the Appellant towards claim of foreign exchange loss incurred on outstanding forward contracts under the normal provisions of the Act.

4. The learned CIT(A) has failed to appreciate that it is a settled position of law that the CIT(A), being an appellate authority is entitled to allow a fresh claim made by the Appellant before the learned CIT(A), even if the same was not claimed in the return of income of the Appellant.

5. The learned CIT(A) has failed to consider the binding Circular No. 14 (XL-35) dated 11 April 1955 issued by the Central Board of Direct Taxes ('CBDT') and several judicial pronouncements in this regard for granting of fresh claim.

6. The learned CIT(A) has failed to appreciate that the Appellant has accounted the foreign exchange loss incurred on outstanding forward contracts in accordance with 'Accounting Standard 11 - Effects of changes in Foreign Exchange Rates' which is mandatorily applicable to the Appellant and has erred in stating that the foreign exchange loss has been accounted notionally and artificially by the Appellant.

7. The learned CIT(A) has failed to appreciate the principle laid down by the Hon'ble Supreme Court in the case of Woodward Governor India Pvt Ltd (312 ITR 254) which is squarely applicable to the Appellant's case as the foreign exchange loss on outstanding forward contracts arising on the balance sheet date is on revenue account.

8. The learned CIT(A) has also failed to appreciate that the Hon'ble ITAT, while remanding the matter back to the learned CIT(A), had also held that the foreign exchange loss incurred on outstanding forward contracts is squarely covered by the judgement of the Hon'ble Supreme Court in the case of Woodward Governor India Pvt Ltd (supra) if the loss relates to revenue items.

9. The learned CIT(A) has failed to consider the several binding judicial precedents relied upon by the Appellant in support of the contention that MTM losses are not contingent or artificial in nature and ought to be allowed as a deduction in computing the total income of the Appellant.

10. The learned CIT(A) failed to appreciate that the Appellant has been adopting a consistent approach in relation to MTM gains / losses on outstanding forward contracts for the purpose of computing income under the head 'profits and gains from business or profession' and that the said consistent stand has been accepted in other assessment years.

Allowability of MTM foreign exchange loss on outstanding forward contracts in computing the book profit under section 115JB of the Act

11. The learned CIT(A) has erred in facts and law by adding the MTM foreign exchange loss on forward contracts to the book profits of the Appellant computed under section 115JB of the Act.

12. The learned CIT(A) has failed to appreciate that it is a settled position of law that section 115JB of the Act is a self-contained code and the adjustments to the book profit under section 115JB of the Act shall be restricted only to the extent of explanation to the section.

13. The learned CIT(A) has failed to appreciate that the foreign exchange loss on unexpired forward contracts is not a provision for unascertained liability and shall not be added back to book profits under section 115JB of the Act."

2. The directions of Tribunal, on this issue, in first round, vide ITA No.1799/Mds/2014 & ors., in order dated 15.07.2016 were as under: -

11. Second issue relates to the non-adjudication of the additional ground raised by the assessee before the CIT(A). Assessee reported the earning of loss of Rs.50,38,20,000/- on account of foreign exchange loss. The same was considered as a speculation loss by the officers below. The CIT (A) did not give a categorical finding on the specific ground raised before him. The allowability of the said loss as a permissible loss was not appreciated by passing a speaking order on the specific additional ground raised before him. In this regard, Ld Counsel for the assessee submitted that the same is an allowable loss in view of the binding judgment of the Apex Court in the case of CIT vs. Woodward Governor India (P.) Ltd (312 ITR 254) (SC):

12. On the other hand, Ld DR for the Revenue submitted that the same may be remanded to the file of the CIT (A) for specific adjudication and also for specific finding, the said loss incurred by the assessee falls in the 'revenue field' which is a condition precedent for invoking the said judgment of the Hon'ble Apex Court judgment in the case of Woodward Governor India (P.) Ltd (supra).

13. On hearing both the parties, we find the loss in question relates to the 'mark-to-market' (MTM) loss and the cited judgment of the Apex Court (supra) should be applicable if the loss in question falls in revenue field. There is no categorical finding in the orders of the Revenue on this issue. Considering the fact, it is premature for us to adjudicate this issue when the CIT(A) has not given a categorical finding on this issue of mixed issue of law and fact. So long as the loss in question relates to the 'revenue account', without any dispute, the above cited judgment of the Apex Court is applicable. Therefore, we remand the matter to the file of the CIT(A) and direct him to adjudicate the issue afresh and pass a speaking order in accordance with the provisions of section 250(6) of the Act, who shall grant a reasonable opportunity of being heard to the assessee as per the set principles of natural justice. We order accordingly. Thus, this issue is allowed for statistical purposes.

14. Third issue relates to the addition of Rs.50,38,20,000/- on account of foreign exchange loss on forward contracts (MTM) for the purpose of computing the book profits u/s 115JB of the Act. In this regard, it is the submission of the assessee that the said loss is an ascertained liability and the same could be added back in view of the provisions of clause (c) of Explanation-1 u/s 115JB of the Act. After hearing both the parties on this issue, we find the same is relatable to the issue adjudicated by us vide Ground no.2 of this appeal, wherein we decided that the issue has to be remanded to the file of the CIT(A) for ascertaining if the said liability, in principle, falls in the revenue field or not. Considering the nexus of the issue, we are of the opinion that

this issue should also be remanded to the file of the CIT(A) for fresh adjudication considering the outcome of his findings on the said Ground no.2 above. Accordingly, this part of the issue stands remanded and allowed for statistical purposes.”

Accordingly, the matter was remitted back to the file of Ld. CIT(A) to ascertain whether the loss was in revenue field or not.

3. Pursuant to the aforesaid directions of the Tribunal, Ld. CIT(A) has passed another order on 13.01.2022 disallowing the claim of the assessee against which the assessee is in further appeal before us. The Ld. CIT(A) noted that the assessee itself added back this loss of Rs.5038.20 Lacs in the computation of income and the assessee did not raise this issue during original assessment proceedings. The said claim could not be entertained except by filing belated return or revised return. Further, forex loss / gains arising out of actual settlement /cancellation of forward contracts entered into with reference to exports / receivables have already been allowed to the assessee as claimed. On merits, Ld. CIT(A), inter-alia, held that the loss was not arising out of any revenue account relating to the software business of the assessee. It was booked notionally and artificially. The adjudication of Ld. CIT(A) was as under: -

9.6 Having said it at the outset, let us go into the merits of the issue. It has to be noted that foreign exchange loss/ gain. It is the Marked to Market (MTM) loss claimed on account of restatement of the forward contracts on forex as on 31.03.2009 at Rs.50,38,20,000/- has been disallowed and added back by the assessee itself in its normal computation.

9.6.1 First of all, it is not a balance sheet item for the assessee to restate it as on 31.3.2009 and book the loss in its Profit and Loss account.

9.6.2 Secondly, the assessee is not in foreign exchange trade/forex business. Foreign exchange is not appearing as a separate stock-in-trade in its balance sheet. Hence there is no question of marking it to market as on 31.3.2009 and book the loss notionally and artificially in the profit and loss account.

9.6.3 Thirdly, the forex loss/ gain arising out of exports/receivables, relating to the revenue account of software development business of the assessee has already been allowed to the assessee as duly accounted by the assessee in accordance with AS11.

9.6.4 Fourthly, the forex loss/ gain arising on account of actual settlement/ cancellation of forward contracts entered into on revenue account relating to such exports/receivables, if any, was also duly allowed to the assessee as accounted by the assessee in accordance with AS 11.

9.6.5 Lastly, as the assessee is not into the forex business trade *per se*, and forex assets are not appearing as stock-in-trade in the balance sheet of the assessee, there is no possibility of marking it to market and restate it as on 31.3.2009 as per AS11 and book the loss to the P&L account, as it is not the balance sheet item and not arising on any revenue account relating to the software business of the assessee. If booked notionally and artificially, it has to be added back and the assessee itself has rightly added it back. Hence, there is no possibility of allowing it in the normal computation.

9.6.6 The question taken by the Hon'ble Supreme Court in the case of Woodward Governor is "Whether, on the facts and circumstances of the case and in law, the additional liability arising on account of fluctuation in the rate of exchange in respect of loans taken for revenue purposes could be allowed as deduction under Section 37(1) in the year of fluctuation in the rate of exchange or whether the same could only be allowed in the year of repayment of such loans?" On this question, the Court has ruled: "we hold that, in the present case, the "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure under Section 37(1) of the 1961 Act." Thus, it is very clear that if the loss arises on account of restatement of balance sheet item on revenue account as on 31.3.2009, it is allowable. In the instant case, it is not a balance sheet item at all and is not arising on any revenue account relating to the software business of the assessee. Hence not allowable.

9.6.7 On AS 11, the Apex Court in the above case has observed as follows:

"18. AS-11 deals with giving of accounting treatment for the effects of changes in foreign exchange rates. AS-11 deals with effects of Exchange Differences. Under para 2, reporting currency is defined to mean the currency used in presenting the financial statements. Similarly, the words "monetary items" are defined to mean money held and assets and liabilities to be received or paid in fixed amounts, e.g., cash, receivables and payables. The word "paid" is defined under Section 43(2). This has been discussed earlier. Similarly, it is important to note that foreign currency notes, balance in bank accounts denominated in a foreign currency, and receivables/ payables and loans denominated in a foreign currency as well as sundry creditors are all monetary items which have to be valued at the closing rate under AS-11. Under para 5, a transaction in a foreign currency has to be recorded in the reporting currency by applying to the foreign currency amount the exchange rate between the reporting currency and the foreign currency at the date of the transaction. This is known as recording of transaction on Initial Recognition. Para 7 of AS-11 deals with reporting of the effects of changes in exchange rates subsequent to initial recognition. Para 7(a) inter alia states that on each balance

sheet date monetary items, enumerated above, denominated in a foreign currency should be reported using the closing rate. In case of revenue items falling under Section 37(1), para 9 of AS-11 which deals with recognition of exchange differences, needs to be considered. Under that para, exchange differences arising on foreign currency transactions have to be recognized as income or as expense in the period in which they arise, except as stated in para 10 and para 11 which deals with exchange differences arising on repayment of liabilities incurred for the purpose of acquiring fixed assets, which topic falls under Section 43A of the 1961 Act. At this stage, we are concerned only with para 9 which deals with revenue items. Para 9 of AS-11 recognises exchange differences as income or expense. In cases where, e.g., the rate of dollar rises vis-a-vis the Indian rupee, there is an expense during that period. The important point to be noted is that AS-11 stipulates effect of changes in exchange rate vis-a-vis monetary items denominated in a foreign currency to be taken into account for giving accounting treatment on the balance sheet date. Therefore, an enterprise has to report the outstanding liability relating to import of raw materials using closing rate of exchange. Any difference, loss or gain, arising on conversion of the said liability at the closing rate, should be recognized in the P&L account for the reporting period".

As already stated that in accordance with AS 11, foreign exchange loss/gain arising out of exports/receivables on revenue account of assessee's software business has already been allowed to the assessee, and the foreign exchange loss/gain arisen on account of actual settlement/cancellation of forward contracts entered into with reference to revenue account of exports/receivables, if any, relating to the software business of the assessee was also duly allowed to the assessee. Thus, from the above observation of Apex Court on AS11, it is clear that as no balance sheet item has been restated as on 31.3.2009 in the instant case relating to any revenue account of assessee's software business, the loss booked artificially and notionally by restating the forex forward contracts which is not a balance sheet item as on 31.03.2009 is not allowable in the normal computation.

9.6.8 In so far as applying the decision of Apex Court in the case of Woodward Governor (312 ITR 254), and decisions in the cases of CIT vs Echjay Forgings P Ltd (251 ITR 15) and ONGC Vs DCIT (261 ITR 1), the decisions have been on account of restatement of liabilities relating to trading/revenue account which is present and existing as part of balance sheet items. In the instant case, it is not so.

9.6.9 The assessee also quoted Mumbai Special Bench ITAT decision in the case of Bank of Bahrain and Kuwait [5 ITR(T)\301] (in which Woodward Governor case was also discussed) in its favour. It is a case of bank which has foreign currency as its balance sheet item as its stock-in-trade and hence the forex forward contract has to be marked to market as on the last date of the FY and hence the Tribunal allowed the loss. The instant assessee is not a bank; forex trading is not its business; foreign currency is not its stock-in-trade; what the assessee sought to restate is not a balance sheet item for it to be marked to market. Hence, the assessee misplaced its reliance on this decision. In fact, for the same reasons, the tenets of the decision is in favour of department relating to the facts of this instant case on hand conversely.

9.6.10 In view of the above, it is held that the assessee has rightly added it back to the total income in the normal computation and there is no case to interfere with it. Assessee's ground in this regard is **dismissed** accordingly.

4. Regarding adjustment of this item u/s 115JB, the adjudication of Ld. CIT(A) was as under: -

10. The next grounds are on adding back the said loss for the purpose of computation u/s 115JB. As has already been held, as the assessee is not in trading in forex and what was sought to be restated as on 31.3.2009 is not a balance sheet item as stock-in-trade to be market to market and as the loss was booked notionally and artificially, it is to be treated as unascertained liability and is liable to be added back in terms of clause (C) of explanation 1 to Sec.115JB. What has been correctly added by the assessee for normal computation was omitted to be added by the assessee under clause (C) of explanation 1 to Sec.115JB is to correct the omission and not to alter the computation of book profits carried out by the assessee company in a substantial manner and so the addition made by the AO is within the precincts of Hon'ble Supreme Court decision in the case of Apollo Tyres Ltd. (255 ITR 273) and needs no interference. Accordingly, this ground of the assessee is also dismissed.

In other words, the adjustment of this item was not allowed under normal provisions as well as while computing Book Profits u/s 115JB. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

5. From the fact, it emerges that forex gains / loss arising to the assessee on actual settlement / cancellation of contracts have already been allowed to the assessee. The other forex gains were debited in the Profit & Loss Account but the same has been added back by the assessee itself in the computation of income under normal provisions as 'unrealized forex on forward contract'. However, this adjustment has not been made by the assessee while computing Book Profits u/s 115JB but Ld. AO made this adjustment u/s 115JB. During the course of appellate proceedings, the assessee made a new claim and submitted that the said item would be an allowable deduction. This claim was not

adjudicated by Ld. CIT(A) in the first round. Upon further appeal, Tribunal directed Ld. CIT(A) to ascertain whether the loss arose on revenue account or not and re-adjudicate the issue. Pursuant to the same, Ld. CIT(A) has rendered a finding that the loss was only a notional loss and the same was not arising on any of the Balance Sheet items. Accordingly, the adjustment thereof in normal provisions as well as while computing Book Profits u/s 115JB was upheld and the action of Ld. AO was confirmed. Aggrieved, the assessee is in further appeal before us.

6. The appeal was initially heard on 16.05.2023 and the matter was put up for clarification by the bench. Per query by the bench regarding position of this claim in subsequent year, Ld. AO placed on record computation of income for AY 2010-11. The Ld. AR also clarified the position and filed written submissions which have been perused. It emerges that the identical claim was made by the assessee in the computation of income itself for AY 2010-11. Upon perusal of computation of income for AY 2010-11, it could be seen that the assessee has made claim of Rs.5038.20 Lacs as reduction of business income under the head 'unrealized forex on forward contract disallowed in earlier years.' The return of income for AY 2010-11 was filed by the assessee much before the conclusion of first appellate proceedings for AY 2009-10. This being the position, identical claim raised by the assessee in this year is clearly a misleading claim and merely an attempt to claim the double deduction of same amount in two years. This fact was never brought to the notice during first round proceedings as well as during the initial hearing of the present appeal, before the bench. Under these circumstances, the claim made by the assessee is to be rejected,

at the outset, being a double claim. We order so. Rendering into other arguments of Ld. AR has been rendered merely academic in nature.

7. The Ld. AR submitted that the adjustment of this item, being an ascertained liability, should be provided while computing Book Profits u/s 115JB. However, as rightly held by Ld. CIT(A), the same was only an unascertained liability and booked artificially. The same is further evidenced by the fact that the provision so made by the assessee has been reversed by the assessee himself, in the next year. The same is therefore, liable to be added back in terms of clause (C) of Explanation 1 to Sec.115JB. We order so.

8. The appeal stand dismissed.

Order pronounced on 6th November,2023

Sd/-
(MAHAVIR SINGH)
उपाध्यक्ष / VICE PRESIDENT

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य / ACCOUNTANT MEMBER

चेन्नई Chennai; दिनांक Dated :06-11-2023

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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त/CIT 4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF