

आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL " C " BENCH, MUMBAI

सर्वश्री संजय गर्ग, न्यायिक सदस्य एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष ।
BEFORE HON'BLE S/SHRI SANJAY GARG, JM AND SHRI RAJESH KUMAR, AM

आयकर अपील सं./I.T.A. No.3902/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2008-09)

Clariant Chemicals (India) Ltd, P O Sandoz Baug, Kolshet Road, Thane -400607	बनाम/ Vs.	Addl. Commissioner of Income Tax, Range 1(1), Aayakar Bhavan, M K Road, Mumbai.
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.4804/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2008-09)

Dy. Commissioner of Income Tax, Range 1(1), Aayakar Bhavan, M K Road, Mumbai.	बनाम/ Vs.	Clariant Chemicals (India) Limited, P O Sandoz Baug, Kolshet Road, Thane -400607
स्थायी लेखा सं./ PAN : AAACC5602P		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/Assessee by :	Shri Salman Khan
प्रत्यर्थी की ओर से/ Revenue by :	S/Shri F V Irani and R P Acharya

सुनवाई की तारीख / **Date of Hearing** : **10.3.2016**
घोषणा की तारीख / **Date of Pronouncement** : **11.5.2016**

आदेश / ORDER

PER RAJESH KUMAR, AM :

These cross appeals are directed against the order dated 01/03/2013 of Commissioner of Income Tax (Appeals)- 1, Mumbai

(Hereinafter called as the CIT(A) for assessment year 2008-09. The assessee has raised the following grounds of appeal:-

"1. On the facts and in circumstances of the case and in law, the learned CIT(Appeals) has erred in confirming disallowance made by the Assessing officer amounting to Rs.32,00,034/- under section 14A read with Rule 8D. He ought not to have done so.

In doing so, the learned CIT(A) has erred in not accepting the appellant's contention that investments were made out of owned funds. He ought not to have done so.

2. On the facts and in circumstances of the case and in law, the learned CIT(Appeals) has erred in confirming the disallowance of purchases of Rs.39,21,907/- treating the same as bogus purchases. He ought not to have done so.

In doing so, the learned CIT(A) has erred in doubting the genuineness of purchases without looking into the evidences of the transaction submitted. He ought not to have done so.

2. Grounds of appeal taken by the revenue are as under :

"On the facts and in circumstances of the case and in law, the learned CIT(Appeals) has erred in holding that the software expenses (lotus notes charges) of Rs.5,63,49,510/- was a revenue expenditure""

3. First we shall take up the appeal of the revenue.

3.1 Only ground raised by the revenue is against deletion of additions by the Id. CIT(A) by holding that the software expenses (lotus notes charges) of Rs.5,63,49,510/- were a revenue expenditure.

3.2 The facts of the case are that the assessee company filed its return of income on 30.9.2008 declaring a total income of Rs.60,64,27,520/-. The company was engaged in the business of manufacturing and trading of dyes and intermediates, specialty chemicals textiles, plastic etc. The

case of the assessee was selected for scrutiny and notices u/s 143(2) and 142(1) were issued and served upon the assessee. The assessment was framed by the assessing officer u/s 143(3) of the Act vide order dated 29.12.2011 at Rs.66,66,66,700/- by making various additions as incorporated in para 7 of the assessment order including the addition on account of software expenses of Rs. 5,63,49,510/- which was deleted by the Id CIT(A) and is agitated before us by the revenue.

3.3. At the outset, the Id. AR of the assessee submitted before us that the issue involved in the present appeal of the revenue qua treating the software expenses as revenue in nature was covered in favour of the assessee by the decision of Co-ordinate Bench of the Tribunal in assessee's own case in ITA No.4983/Mum/2011 (AY-2006-07) vide order dated 19.9.2014. The Id. AR, therefore prayed that this issue be decided in favour of the assessee by dismissing the appeal of the revenue. The Id. DR reasonably and fairly appeared to be in agreement with the submissions of the Id.AR on this issue.

3.4. We have considered the rival submissions and perused the material on record placed before us and find that the identical issue in assessee's own case for the assessment year 2006-07 vide order dated 19.9.2014 was decided by the tribunal in favour of the assessee. The relevant para of which is reproduced below for the sake of convenience:

"15. After considering the findings of the Assessing Officer and the learned Commissioner (Appeals) and also the earlier year orders of the Tribunal, we find that the Tribunal has relied upon various decisions of the High Court, including that of the decision of the Hon'ble Jurisdictional High Court in CIT v/s Raychen RPG Ltd., [2012] 346 ITR 183 (Bom.) for coming to the conclusion that the expenditure incurred by the assessee on the software was in the nature of the revenue expenditure. The relevant observation and the findings of the Tribunal are as under:—

"13. Apropos Ground No5; this issue is discussed by A.O in para- 3 at pages 9 & 10 of assessment order. A sum of Rs.23,30,926/- was claimed by the assessee as software expenses. This amount represent payment made to Clariant International Ltd. Towards acquisition of right to use the software —Lotus Notes|| developed by Clariant International Ltd. which according to assessee is powerful, multifaceted software that help to work effectively. It extends the power of messaging and data exchange to bring all information whether from notes or from Internet and offers very useful tools like e-mail, Calender, To-do lists etc. All Clariant Group companies are inter connected with —Lotus Note|| and connectivity is effected, administered. The AO rejected the claim of the assessee of the expenditure being in the nature of Revenue and held that as it had provided enduring benefit and the expenditure being on account of capital, the assessee was entitled to claim depreciation only. He provided depreciation @ 25% and the balance amount of Rs.17,48,195/- was added to the income of the assessee. The Ld. CIT(A) has sustained the action of A.O. The assessee is aggrieved, hence, has filed aforementioned grounds.

13.1 It was submitted by Ld. AR that similar expenses in respect of A.Y 2002-03 and 2003-04 were held to be allowable as revenue expenditure by Ld. CIT(A). He further submitted that the expenditure is in the nature of user of software which by no stretch of imagination can be said to be of expenditure in the nature of capital. It did not provide any enduring benefit to the assessee and was a powerful tool to carry out the work of the assessee effectively. Reliance was placed on the following decisions to contend that the expenditure was in the nature of Revenue. (i) CIT vs. Raychem RPG Ltd., 346 ITR 183 (Bom) (ii) CIT vs. Asahi India Safety Glass Ltd. 346 ITR 329(Del) (iii) CIT vs. Amway India Enterprises, 346 ITR 341(Del) (iv) Sanghvi Salvi Stock Broker Ltd, ITAT Mumbai (unreported) 13.2 On the other hand, Ld. DR relied upon the order passed by A.O and Ld. CIT(A). 13.3 We have heard both the parties and their contentions have carefully been considered. According to decision of Hon'ble Bombay High Court in the case of Raychem RPG Ltd.(supra), if the expenditure incurred on software are to facilitate the assessee's business or enabling the management to conduct

the business more efficiently or more profitably then it cannot be said to be in the nature of profit making and has to be treated as revenue expenditure. Similarly, Hon'ble Delhi High Court in the case of Asahi India Safety Glass Ltd (supra) held that software expenditure were revenue in nature. In the case of CIT vs. Amway India Enterprises (supra) also it was held that purchase of software is revenue expenditure. The contentions raised by the assessee before AO were that this expenditure was incurred by the assessee to effectively carry on its business has not been controverted by any material brought on record. In this view of the situation, we hold that Ld. CIT(A) was not right in upholding the action of AO. The expenditure incurred by the assessee on software was in the nature of revenue, hence, allowable as an expenditure. This ground of the assessee is allowed.

16. Thus, consistent with the view taken in the earlier years by the Tribunal, we also hold that the expenditure incurred by the assessee on the software is to be treated as revenue expenditure and, accordingly, the order of the learned Commissioner (Appeals) is affirmed. Ground no.3, raised by the Revenue is dismissed."

Respectfully following the decision of the Co-ordinate Bench of the Tribunal on this issue, we uphold the order of Id.CIT(A) and dismiss the appeal of the Revenue.

4. Now, we shall take up the appeal of the assessee.

4.1. The first ground of appeal taken by the assessee is with regard to disallowance of Rs.32,00,034/- under section 14A read with Rule 8D by the AO which was confirmed by the Id. CIT(A).

4.2. The AO disallowed the amount of Rs.32,00,034/- comprising of Rs.17,24,784/-- as interest under Rule 8D(2)(ii) on pro-rata basis and Rs.14,75,250/- being 0.5% average u/s Rule 8D(2)(iii) of the Act. Aggrieved by the order of the AO, the assessee preferred an appeal

before the Id. CIT(A) who dismissed the appeal on this issue and sustained the disallowance made by the AO u/s 14A r.w.rule 8D of Rs.32,00,034/- by considering the submission of the assessee as incorporated on page no 4.3 by observing and holding as under:

"4.5 I have carefully considered the submissions of the appellant, assessment order and the facts of the case. The appellant submits that it had not borrowed specifically for making investments in the mutual funds, as it had tax free funds by way of share capital and reserves and substantial profits, This contention cannot be accepted as the AO brought on record that the assessee incurred interest expenditure for short term and unsecured loans. The Hon. Bombay High Court in the case of Godrej & Boyce (supra) observed as under in para-71:

Even if the assessee has utilized its own funds for making investments which have resulted in income which does not form part of the total income under the Act, the expenditure which is incurred in the earning of that income would have to be disallowed. That is exactly a matter which the Assessing Officer has to determine, Whether or not any expenditure was incurred by the assessee in relation to the earning of non-taxable income falls within the domain of the Assessing Officer. The basis on which the Tribunal had come to its decision for assessment years 1998- 99, 1999-2000 and 2001-02 would not conclude that question.

4.5.1 Further, I find that the since, the AO having also recorded his satisfaction as to the incorrectness of the assessee's claim, as required u/s 14A and in terms of the Hon. Bombay High Court decision in the case of Godrej & Boyce (supra), the disallowance was rightly made as per rule-8D. In view of this, the addition made is sustained."

4.3. The Id. AR submitted before us that the total own funds of the assessee were Rs. 325.22 Cr on 31.3.2008 vis-à-vis Rs.322.7 crores at the year end in the immediately preceding previous year. The Id AR further submitted that loan funds of Rs.3.86 crores are not for any secured or unsecured loan but represents the interest free tax deferral

scheme granted by State Industrial Promotion Corporation of Tamil Nadu Limited. Whereas the investment of the assessee were Rs.295.3 crores and Rs.5548 crores in current and preceding year . The Id. AR submitted that in view of the facts that the assessee's own funds were far more from investments and therefore the provisions of section 14A r.w.Rule 8D(2)(ii) could not be invoked to the assessee and therefore the order of CIT(A) was wrong and be quashed. In support of his arguments the Id counsel of the assessee relied on the judgement of the jurisdictional High Court in the case of HDFC Bank Ltd V DCIT 366ITR505(Bom). As far as the disallowance of Rs.14,75,250/- made under rule 8D(2)(iii) qua indirect expenses @ 0.5% of average investment is concerned the Id.AR for the assessee submitted by referring to the page 51 of the paper book, Schedule 6, the various investments at the year end were Rs.29.53 crores as against Rs.55.48 crores in the preceding years. The Id. Counsel submitted that the assessee had redeemed the 5.15% Rural Electrification Corporation Limited Bonds worth Rs.26 crores. As regards remaining investments these were switched over investments and no investment were made during the year. The counsel finally prayed that the reasonable disallowance be made under rule 8D(2)(iii). On the other hand, the Id. DR supported the orders of the authorities below.

4.4. We have considered the rival submissions and perused the relevant materials on records. We find from the balance sheet as at 31.3.2008 placed at page no 45 of the paper book that the assessee's own funds were more than the investment at the end of the year and find merit in the argument of the Id. AR that the disallowance u/s 14A read with rule 8D(2)(ii) is wrong and against the ratio laid down in HDFC V ACIT (Supra).In the said decision the Hon'ble Court has held that in case assessee's own funds are more than the investments in shares then it has

to be presumed that investments in shares were made out own funds and not out of loan funds. We also find from page balance sheet page 49 of the paper book that there was no secured funds outstanding at the year and the only outstanding under the head unsecured loans - Schedule-IV was interest free as well as tax deferral scheme granted by State Industrial Promotion Corporation of Tamil Nadu Limited. We therefore are of the considered view that the assessee's own funds were far adequate to cover the investment made by the assessee and therefore the interest disallowance as made by the AO and sustained by the Id. CIT(A) at Rs.17,24680/- is wrong and is ordered to be deleted. In respect of Rs.1470,250/- , we find that during the year the assessee has not made any fresh investments and a few switching over of investments have taken place. Thus We find the disallowance made u/r 80D(2)(iii) is excessive and unreasonable and therefore, we restrict the disallowance to 10 lakhs.

4.5. The issue raised in the ground No.2 by the assessee relates to confirmation of Rs.39,21,907/- by CIT(A) as made by the AO on a/c of bogus purchases.

4.6. The AO during the course of assessment proceedings issued notices u/s 133(6) of the Act to some of the suppliers. The notice issued to one M/s Dujodwala Impex Ltd was served on "62, Rambha, 6th floor, Petit Hall Nepeansea Road, Mumbai-400006" which was replied vide letter dated 15.2.2011 accompanying the copy of account of the assessee in the books of the supplier which was signed by some person without mentioning name by filing in "TAPAL" on 17.11.2011. Further in the said letter the address of the assessee company was shown as "A, Commerce House, 7th floor, 2-A, Ganeshchandra Avenue, Kolkatta -700013". The AO got

suspicion due as the said letter was bearing postal of Colaba Post office Mumbai dt 16.11.2011 and also due to incomplete details received from the said supplier and asked the assessee to submit the latest contact details of the company vide letter dated 2.12.2011 which were supplied as "814/815. Tulsiani Chamber, 212 Nariman Point, Mumbai-400021, Telephone No.022-22823535". Upon verification it was found that this address as well as telephone numbers were not of the supplier. The AO during the course of verification found from the web-site of Ministry of Corporate affairs, Government of India that the said company was wound up and the office letter dated 16.11.2011 issued under section 133(6) at the company's Calcutta address was returned unserved. In view of this facts, the AO came to the conclusion that purchases were non-genuine and added the same to the total income of the assessee as being bogus.

4.7. Aggrieved by the order of the AO, the assessee preferred an appeal before the Id. CIT(A), who confirmed the action of the AO by holding as under:

"6.4 I have carefully considered the submissions of the case, assessment order and the facts of the case. The AO having doubted the genuineness of the impugned purchases made necessary enquiries which revealed that transactions were not genuine for the reasons mentioned above. Before the AO the assessee stated that the AO's notice u/s 133(6) was served at first mentioned address which is now a residential address, and that the concerned person had forwarded the same to the directors in Kolkatta. Even during the course of appellate proceedings, to a query as to how the persons residing at the time of inquiry at this address knew about the address at Kolkatta, no satisfactory reply -was given. Also, even before me no information was given as regards this concerned person. Therefore, in view of the above discussion, I hold that the appellant could not prove the genuineness of the purchases. Therefore, this ground of appeal is dismissed. "

4.8. We have considered the rival submissions and perused the material on record. The Id. AR of the assessee submitted before us that similar purchases were made by the assessee from the said supplier M/s Dujodwala Impex Ltd, Mumbai were accepted in the earlier years by referring to copy of account of the said supplier for the financial years 2006-07 and 2007-08 filed at page no.34-35 of the paper book. From the said accounts, we find that the sales on various dates were made by the said supplier company to the assessee which were also paid by the assessee through account payee cheques. The Id. Counsel also placed before the Bench a copy of bank account of the assessee in respect of financial year 2007-08 in defence and to prove that all payments made to the said supplier were made by account payee cheques. The Id. AR fairly conceded that the department faced a little difficulty in getting account the said company confirmed since the company was wound up since then which stands corroborated by the AO himself while making inquiries from the Registrar of Companies, Ministry of Corporate Affairs. The Id. Counsel submitted that in view of this fact the Id. CIT(A) was not justified in confirming the order passed by the AO, when the material was actually received, supported with bills and vouchers which were actually placed before the AO for verification and the payments were also made through banking channel. The Id. DR relied on the orders of authorities below. As discussed above we find that the material was purchased from the supplier which was since wound up and the place of business was also closed down, whereas the assessee had actually received material and the payment thereof was made through cheques of HSBC Bank, Mumbai as is apparent from the statement of account of HSBC bank which is placed at pages 72 and 74 of the paper book. We certainly agree with the authorities below that the confirmation was not proper however the same was primarily because of the closure of the company and its office but the

purchases could not be treated as bogus for the reasons of non confirmation especially when there existed sufficient reasons. In view of the above facts, we are of the opinion that the order of the Id. CIT(A) confirming the addition made on account of being bogus is wrong and cannot be sustained. We, therefore, reverse the finding of the Id. CIT(A) by allowing the appeal of the assessee on this issue.

13. In the result, the appeal of the assessee is partly allowed.

14. In sum and substance, the appeal of the revenue stands dismissed and the appeal of the assessee is partly allowed.

Order pronounced in the open court on 11th May, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 11th May, 2016 को की गई।

Sd
(संजय गर्ग/SANJAY GARG)
न्यायिक सदस्य/Judicial Member

sd
(राजेश कुमार/RAJESH KUMAR)
लेखा सदस्य/Accountant Member

मुंबई Mumbai; दिनांक Dated 11/05/2016

व.नि.स./ SRL , Sr. PS

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

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

आदेशानुसार/ BY ORDER,

True copy

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai