

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं श्री जी. पवन कुमार, न्यायिक सदस्य केसमक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER

आयकर अपील सं./ITA No.1155/Mds/2016

निर्धारण वर्ष / Assessment Year : 2011-12

M/s Redington (India) Ltd.,
No.95, Mount Road,
SPL Guindy House,
Guindy, Chennai - 600 032.

v. The Deputy Commissioner of
Income Tax,
Corporate Circle – 5(1),
Chennai - 600 034.

PAN : AABCR 0347 P

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.1145/Mds/2016

निर्धारण वर्ष / Assessment Year : 2011-12

The Deputy Commissioner of
Income Tax,
Corporate Circle – 5(1),
Chennai - 600 034.

v. M/s Redington (India) Ltd.,
No.95, Mount Road,
SPL Guindy House,
Guindy, Chennai - 600 032.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से /Assessee by : Sh. R. Vijayaraghavan, Advocate

राजस्व की ओर से /Revenue by : Sh. Jayaram Raipura, CIT

सुनवाई की तारीख/Date of Hearing : 22.09.2016

घोषणा की तारीख/Date of Pronouncement : 18.10.2016

आदेश / O R D E R

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The assessee has filed the appeal against the order of the Assessing Officer passed under Section 143(3) of the Income-tax Act, 1961 (in short 'the Act') r.w.s. 92CA r.w.s. 144C(1) of the Act in pursuance of directions of Dispute Resolution Panel dated 22.12.2015. The Revenue has also filed an appeal against the very same order of Dispute Resolution Panel.

Let's first take the assessee's appeal in I.T.A. No.1155/Mds/2016.

2. The assessee has raised three major grounds. The first ground is with regard to guarantee commission. At the time of hearing, the Ld. AR of the assessee has not pressed ground Nos. 2.1 to 2.1.6 as the same was allowed by the DRP in favour of the assessee. The second ground being trademark licence fee payments and the last ground is with regard to disallowance under Section 14A of the Act.

3. The brief facts of the case are that the assessee-company is distributor of information technology products, telecom products, consumer durables and also after sales service. The assessee-

company filed its return of income on 29.11.2011 with a total income of ₹1,98,82,01,376/-. Subsequently a revised return was filed on 30.03.2013 with taxable income of ₹1,98,32,01,376/-. As the case was selected for scrutiny, notice under Section 143(2) of the Act was issued. In compliance to the notice, the Ld. AR of the assessee appeared and filed the details. The Assessing Officer found that the assessee-company is having international transactions and for determining the arm's length price, the matter was referred to the Transfer Pricing Officer. The Ld. TPO vide order dated 28.01.2015, based on the information submitted and the international transactions with Associate Enterprises, made upward adjustment of ₹9,62,22,632/- and also downward adjustment of ₹1,81,51,501/- on trademark fees, total aggregating to ₹11,43,74,133/-. The Assessing Officer considered this information in the assessment order and the assessee was provided an opportunity to file objections before the Dispute Resolution Panel. The draft assessment order was passed under Section 143(3) r.w.s. 92CA and 144C(1) of the Act on 23.03.2015 along with disallowance under Section 14A of the Act of ₹5,95,44,737/-. Against the draft assessment order, the assessee filed objections before the Dispute Resolution Panel. The Ld. DRP considered the

submissions and passed an order on 22.12.2015. The DRP allowed the objections in respect of guarantee commission both for corporate and bank in favour of the assessee. However, the DRP upheld the disallowance under Section 14A of the Act and also the directions of Transfer Pricing Officer on trademark fees. The assessment was completed by order under Section 143(3) r.w.s. 92CA r.w.s. 144C(1) of the Act dated 05.02.2016. Aggrieved, the assessee has filed appeal before this Tribunal.

4. On the issue of trademark licence fee, the Ld. AR of the assessee argued that the assessee has paid an amount of ₹1,81,51,501/- as trademark fees to M/s Redington Distribution Pte Ltd. The facts are that the Ld. Transfer Pricing Officer was not satisfied with the submissions since no documentary evidence was produced in respect of legal owner of trademark. Whereas, the assessee-company has entered into an agreement with its wholly owned subsidiary company for payment of trademark licence fees of USD 4,00,000 per annum for a period of ten years with effect from 1st April, 2006 and whereas, the amount of ₹1.81 Crores was paid during the financial year 2010-11. It was explained that the assessee-company is using the logo "Redington" from the date of

commencement of its operations. This trademark was held by Redington Pte Ltd., Singapore. As per the agreement, these trademarks were transferred from Redington Pte. Ltd., Singapore to Redington Distribution Pte Ltd. As the claim of its parent company for use of such trademark and logo, the assessee-company has paid trademark fees in order to fulfillment of its objectives. The Ld. TPO considered the submissions and is of the view that the trademark is not registered in Singapore and there is no clarity and there is no authentic evidence that Redington Pte Limited, Singapore is the actual legal owner of trademark. Further, there is no documentary evidence in respect of such transactions. This trademark was promoted by the Indian company in the year 1993 and shall be attributable to Indian company's growth. Therefore, the Ld. TPO found that there is no rationality behind the payment of trademark licence fee. The assessee-company had applied Transaction Net Margin Method (TNMM) as most appropriate method which the TPO has not accepted. The assessee relied on the judicial decisions and also made a finding that the Hon'ble Tribunal in the assessee's own case has allowed this issue in favour of the assessee, but the Revenue being not satisfied with the decision, has filed appeal before the jurisdictional High Court and

the matter is pending and the TPO made downward adjustment of ₹1,81,51,501/-. The Ld. DRP has confirmed the action of the TPO. The Ld. AR in support of his arguments, relied on the orders of the co-ordinate Bench of this Tribunal in the assessee's own case in I.T.A. No.1743/Mds/2011 dated 26.06.2015 for assessment year 2007-08 and I.T.A. No.221/Mds/2013 dated 07.08.2015 for assessment year 2008-09 and I.T.A. Nos.513/Mds/2014 & 619/Mds/2014 dated 07.07.2014 for assessment year 2009-10 and prayed for allowing the grounds.

5. Contra, the Ld. Departmental Representative opposed to the grounds raised by the assessee and argued vehemently that the Revenue has filed an appeal against the earlier order of the Tribunal before the High Court and the same is pending. He relied on the orders of the lower authorities.

6. We heard the rival submissions, perused the material available on record and judicial decisions cited. The Ld. AR has contended that a similar issue in the case of the assessee for assessment year 2009-10 was decided in the assessee's favour. We find that in the assessee's own case in I.T.A. No.513/Mds/2014

& 619/Mds/2014 dated 7th July, 2014 for the assessment year 2009-10, it was held by this Bench of the Tribunal as under:-

“97. We think that this adjustment made by the TPO is not proper. The assessee is exploiting the trademark “REDINGTON” for the purpose of carrying on its business. Therefore, there is nothing uncommon in assessee’s making payment to the use of the trade-mark to M/s Redington Distribution Pte. Ltd., Singapore. It is not necessary for the TPO to go beyond this plausible explanation, since it is a widely accepted business practice around the world. This is not an unique case for the assessee company alone. Further, it is for the assessee to decide the dynamics of its business. The assessee is the best judge to decide on such issues. The Hon'ble Supreme Court in the case of S.A. Builders vs. CIT (288 ITR 01) has held that any expenditure incurred by the assessee, if justified by commercial expediency, is an expenditure allowable for the purpose of taxation and what is commercial expediency is a matter to be decided by the assessee. In the facts and circumstances of the case, the said addition is deleted.”

Following the earlier decision of the Tribunal in the assessee's own case, we direct the Assessing Officer to allow the expenditure of trademark licence fees.

7. Coming to the last ground, the Assessing Officer made disallowance of ₹5,95,44,737/- under Section 14A of the Act, in the assessment proceeding. The Assessing Officer found from the balance sheet that the assessee has made investment of ₹231.03 Crores as on 31st March, 2011 and ₹227.07 Crores as on

01.04.2010. The Ld. AO considered that the assessee-company must have incurred certain expenditure in respect of investments, therefore, such expenditure has to be disallowed under the provisions of Section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962. The Ld. AR explained before the Assessing Officer that the income from these investments shall not be part of total income and no expenditure was incurred for earning such exempt income. The Ld. AO was of the view that no deduction shall be allowed in respect of expenditure incurred by the assessee. During the financial year 2010-11, the subsidiary company M/s Easyaccess Financial Services Limited, which is owned 100% by the assessee-company, has paid dividend of ₹3,02,06,000/- which is tax free. During the financial year 2010-11, the assessee-company has made investment of ₹395 lakhs as an additional investment along with other sister concern. The contention of the Ld. AR that these investments were made out of accruals and income earned and not out of any borrowed capital, therefore, disallowance under Section 14A of the Act does not apply. Further, the assessee has incurred interest expenses of ₹43,05,28,000/- and also administrative and other expenses were claimed in the Profit & Loss account. But, the Assessing Officer was of the strong view

that the provisions of Section 14A read with Rule 8D(2) are mandatory from the assessment year 2008-09, therefore, the assessee-company shall necessarily disallow the expenditure in respect of such investments. The Ld. AO calculated the disallowance under Rule 8D(2)(ii) and (iii) considering the investments made in the subsidiary companies and interest expenditure, and worked out the total disallowance to ₹5,95,44,737/-. The Ld. TPO and the DRP have confirmed the disallowance. Aggrieved by the disallowance, the assessee has filed appeal before the Tribunal.

8. The Ld. AR of the assessee submitted that these investments are made in subsidiary companies and such investments are made for business expediency and exigencies and also to promote business on profit motive. Whereas, the dividend income is only incidental and which is claimed as exempt. Further, the assessee-company has not used the borrowed funds for making investment in the subsidiary companies. The Ld. AR relied on the decisions of Delhi Bench of this Tribunal in ACIT v. Sun Investment Pvt. Ltd. [8 ITR (Trib.) 33] and Punjab & Haryana High Court in CIT v. Hero Cycles Ltd. (323 ITR 518) where it was held that the

Assessing Officer has to establish that specific expenditure was incurred for earning the exempt income, then only disallowance can be made. Similarly, to substantiate net worth the assessee-company has reserves and surplus in their balance sheet and these investments are made out of such accumulated profits and also submitted that interest-free funds were available and relied on the judgments of Bombay High Court in CIT v. HDFC Bank Ltd. (366 ITR 505) and CIT v. Reliance Utilities & Power (313 ITR 340). With these submissions, the Ld. AR prayed that the disallowance made under Section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 be deleted.

9. Contra, the Ld. Departmental Representative relied on the orders of the lower authorities.

10. We heard the rival submissions, perused the material available on record and judicial decisions cited. The Ld. AR submitted that the assessee-company was having adequate liquid funds and the investments were made out of own accruals and no part of borrowings were utilised for investment in tax-free securities. Further, the investments in subsidiary companies are for business prospective and for earning the profits and the dividend income is

only incidental on investments. We find that neither the Assessing Officer nor the assessee-company could establish whether the cash flow statement or receipts and payments regarding the investment made out of own funds. Further, on similar issue, co-ordinate Bench of this Tribunal in Regen Powertech (P) Ltd. in I.T.A. No.766/Mds/2016 and 786/Mds/2016 dated 17.08.2016 at para 9.4 on page 24, held as follows:-

“9.4 We heard the rival submissions, perused the material on record and judicial decisions cited. The crux of the issue being the assessee has made investments in subsidiary/sister companies and the contention that own funds are generated out of business and no borrowed funds were utilized for the purpose of investments. Further, investments in subsidiary/sister company shall not be considered for the purpose of calculation of disallowance under Rule 8D(2). The Id. Authorised Representative drew our attention to the statement of details of subsidiary group companies and the investments reflected in financial statements and relied on judicial decisions. The assessee company made investments in these companies on Business expediency and no income has been generated by sister/group companies and also shareholding pattern varied from company to company. The provisions of Sec. 14A r.w.r. 8D are mandatorily applicable from assessment year 2008-09 but while calculating the disallowance u/sec. Rule 8D(2), the Id. Assessing Officer shall consider that the investments in subsidiaries are made in ordinary course of business. We found that there are no findings in the assessment order on this subsidiary/group companies which are considered as investments for calculating disallowance u/sec. 14A r.w.r.8D(2) and rely on the Co-ordinate Bench decision of *M/s. Rane Holdings vs. ACIT, Chennai* in ITA No.115/Mds/2015, dated 06.01.2016 were it was held as under:-

“Taking note of the above decisions and the decision of the Chennai bench of the Tribunal in ITA No.156/Mds/13 cited supra, we hereby remit the matter back to the file of Ld. Assessing Officer to examine the issue involved in this case afresh and pass appropriate order as per law

and merits and in the light of the decisions cited herein above. While doing so, we also direct the Ld. Assessing Officer to consider the decision of the Tribunal in the case M/s Agile Electric Sub Assembly Pvt. Ltd. cited supra wherein it was held as follows:-

7.2 In regard to applicability of Section 14A of the Act read with Rule 8D also; the above view will be applicable. Moreover in the case EIH Associated Hotels Ltd v. DCIT reported in 2013 (9) TMI 604 in ITA No.1503, 1624/Mds/2012 dated 17th July, 2013, it has been held by the Chennai Bench of the Tribunal as follows:-

“Disallowance U/s. 14A rw Rule 8D – CIT upheld disallowance – Held that – investments made by the assessee in the subsidiary company are not on account of investment for earning capital gains or dividend income. Such investments have been made by the assessee to promote subsidiary company into the hotel industry. A perusal of the order of the CIT(Appeals) shows that out of total investment of Rs.64,18,19,775/-, Rs.63,31,25,715/- is invested in wholly owned subsidiary. This fact supports the case of the assessee that the assessee is not into the business of investment and the investments made by the assessee are on account of business expediency. Any dividend earned by the assessee from investment in subsidiary company is purely incidental. Therefore, the investments made by the assessee in its subsidiary are not to be reckoned for disallowance U/s. 14A r.w.r. 8D. The Assessing Officer is directed to re-compute the average value of investment under the provisions of Rule 8D after deleting investments made by the assessee in subsidiary company – Decided in favour of assessee.”

For the above said reasons, we hereby hold that in the case of the assessee the provisions of Section 14A read with Rule 8D will not be applicable in regard to investments made for acquiring the shares of the assessee’s sister concerns. Accordingly we restrain ourselves from interfering with the Order of the Ld.CIT(A) on this regard.”

It is ordered accordingly’.

We remit the disputed issue to the file of the Id. Assessing Officer to verify and exclude the investments in subsidiary companies for the purposes of calculation of disallowance under Rule 8D(2) and the assessee should be provided adequate opportunity of being heard before passing the order on merits. The ground of the Department is allowed for statistical purpose.”

Based on the above decision of this Tribunal, we remit the issue back to the file of the Assessing Officer to verify and exclude the investments made in subsidiary companies for the purpose of calculation of disallowance under Rule 8D(2) of the Income-tax Rules, 1962 and also verify interest expenditure whether directly attributable to the exempt income.

11. In the result, the appeal of the assessee is partly allowed for statistical purposes.

12. Now, let's take Revenue's appeal in I.T.A. No.1145/Mds/2016.

13. The Revenue has raised the following grounds:-

- (1) The DRP has erred in law and in facts in not considering the decision of the Hon'ble ITAT, "K" Bench, Mumbai in the case of Everest Kanto Cylinders Ltd., which is squarely applicable to the facts of the instant case, wherein it has clearly been mentioned that " the guarantee commission" falls under the purview of "international transaction".
- (2) The DRP has erred on facts and in law in restricting the TP adjustment to the extent of fresh "guarantee commission" giving during the year.

14. The Ld. AR explained the facts and submitted that this issue was already covered in favour of the assessee in the assessee's own case in I.T.A. No.1743/Mds/2011 dated 26.06.2015 for the

assessment year 2007-08, and in I.T.A. No.221/Mds/2013 dated 07.08.2015 for assessment year 2008-09. Also, we find that in I.T.A. No.513/Mds/2014 and 619/Mds/2014 dated 07.07.2014, in the assessee's own case, this Tribunal at para 95 on page 67 held as follows:-

“95. In view of the nature of corporate and bank guarantees given by the assessee company and in the light of the above order of the ITAT, Delhi Bench, we hold that the TP addition made against corporate and bank guarantees is not sustainable in law. The addition is therefore deleted.”

15. Respectfully following the orders of this Tribunal, we dismiss the grounds taken by the Revenue.

16. In the result, the appeal of the Revenue is dismissed.

17. To sum up, the appeal filed by the assessee is partly allowed for statistical purposes and the appeal filed by the Revenue is dismissed.

Order pronounced on 18th October, 2015 at Chennai.

sd/-

(चंद्र पूजारी)

(Chandra Poojari)

लेखा सदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 18th October, 2015.

sd/-

(जी. पवन कुमार)

(G. Pavan Kumar)

न्यायिक सदस्य/Judicial Member

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती /Assessee
2. Assessing Officer
3. Principal CIT-5, Chennai
4. आयकर आयुक्त/CIT(TP), Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.