आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

श्री चंद्र पूजारी,लेखा सदस्य एवं श्रीजी. पवन कुमार,न्यायिकसदस्यकेसमक्ष

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

आयकर अपील सं./I.T.A. No.1124/Mds/2015

निर्धारण वर्ष /Assessment year : 2011-2012

M/s. St. John Freight Systems Ltd, No. C-98, SIPCOT Complex, Harbour, Tuticorin 628 008.	**Vs.**	The Deputy Commissioner of Income Tax, Central Circle 1, Madurai.
[PAN AAACS 4697N] **(अपीलार्थी/Appellant)**		**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by : Shri. R. Vijayaraghavan, Adv

प्रत्यर्थी की ओर से /Respondent by : Shri. D.N. Kar, CIT

सुनवाई की तारीख/Date of Hearing : 14-01-2016

घोषणा की तारीख /Date of Pronouncement : 17-03-2016

आदेश / O R D E R

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The appeal filed by the assessee is directed against order of the Commissioner of Income-tax (Appeals)-19, Chennai in ITA No.359/14-15, dt 30.01.2015 for the assessment year 2011-2012

passed u/s.143(3) and 250 of the Income Tax Act, 1961 (herein after referred to as 'the Act').

2. The assessee has raised two substantive grounds (i) the Commissioner of Income Tax (Appeals) confirmed the denial of deduction u/s.80IA of the Act by the Assessing Officer on the technical grounds as return of income was filed after due date u/s.139(1) of the Act (ii) The Commissioner of Income Tax (Appeals) erred in confirming the disallowance of ₹17,19,907/- as expenditure u/s.14A r.w.r. 8D.

3. The Brief facts of the case, the assesses company is in the business of letting out heavy equipments on hire, goods transportation and vessel chartering at Tuticorin. The assessee has filed return of income electronically on 31.03.2013 with total income of ₹5,31,75,204/- and was processed u/s.143(1) of the Act on 13.03.2014 under scrutiny norms, notice u/s.143(2) of the Act was issued and in compliance to notice, the ld. Authorised Representative of the assessee appeared from time to time and filed details and explanations. The Assessing Officer had considered the submissions and the financial statements and found that assessee has claimed deduction u/s.80IA ₹4,44,77,323/- but as per the provisions of Sec. 80AC of the Act deduction shall be allowed on filing return of income within due time u/s.139(1) of the Act. On application of the above

provisions due date applicable to the assessee company is 30.09.2011 whereas assessee filed return of income belatedly on 31.03.2013. The ld. Authorised Representative substantiated the delay occurred due to technical issues and relied on the decision of Bangalore Bench of ITAT in the case of *M/s. Vanshee Builders and Developers P. Ltd in ITA No.286/Ban/2012, dated 07.012.2012* and argued that the provisions of Sec. 80AC are only directory and not mandatory provided the assessee explain reasonable cause for filing return of income belatedly u/s.139(4) of the Act. The ld. Authorised Representative filed explanation on reasonable cause for delay through letter dated 27.03.2014 page 2 of Assessing Officer order :-

1. *The company has 15 branches all over India.*
2. *A search was conducted on 01.10.09 and the search assessments were completed in December,2011. Only after completion of search assessments, the accounts for the F. Y. 2010-11 was taken up and the opening balances have been brought forward after checking certain impounded records.*
3. *The company has about 700 customers through out India and TDS quantum for A.Y. 2011-12 is ₹1,86,95,887. Reconciliation of TDS with accounts and form 16As and from 16As with 26AS credits took considerable time and hence return of income was filed belatedly after comparing the TDS in form 16As with credits in Form 26AS.*
4. *After completion of the audit of accounts, The DGM, Finance who handled the accounts, left the company abruptly due to family problem as and also left Tuticorin. It took time for the new incumbent to verify the correctness of TDS and other statutory disclosures.*

5. *For development of the company's business, the Managing Director of the company was frequently on business tour and hence cannot give proper attention in the matter of filing return of income".*

The ld. Assessing Officer accepted the information but distinguished the facts of the case with the decisions relied by the assessee. Further delay of 18 months is substantial and there is no reasonable cause and circumstances which prevented the assessee for not filing return of income on or before due date u/s.139(1) of the Act. The ld. Assessing Officer made a finding that CBDT has power under provisions of Sec.119(2)(b) of the Act to condone the delay in filing the return of income. Further the explanations are very clear for claim of deduction u/s.80IA of the Act unless assessee files return of income on or before due date u/s.139(1) of the Act, no deduction is allowed and also observed that assessee has not made any condonation petition before CBDT till the completion of assessment and denied deduction u/s.80IA of the Act. Aggrieved by the order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals).

4. In the appellate proceedings, the ld. Authorised Representative substantiated his arguments on the facts and the reasons for delay in filing return and also reiterated the business operations of the assessee on the management decision to de-merge

certain operations for better control and management of the company. The assessee company has filed company application on 12.7.2010 in the High Court of Judicature at Madras C.A. Nos.1177 to 1183 of 2010. The de-merger of the operations are to be effective retrospectively from 1st April, 2009 but due to various reasons, management of the company decided not to peruse the applications and Hon'ble High Court has passed order permitting the withdrawal on 08.06.2011. And due to search operations u/s.132 of the Act in company on 30.09.2009 there was confusion in looking after the accounts of the company and with the help of accountant and Auditor ultimately return of income was filed on 31.03.2013. The company has filed statutory audit report with Registrar of Companies on 11.12.2013 and the ld. Authorised Representative pleaded as reasonable cause for filing return of income belatedly and further relied on judicial decisions supporting reasonable cause and the directions u/s.139(1) are only directory and not mandatory. The ld. Authorised Representative emphasized on Jurisdictional High Court and Apex Court decisions that the assessee company was prevented from reasonable cause for filing return of income with the due date u/sec. 139(1) of the Act and same was filed u/s.139(4) of the Act. The ld. Commissioner of Income Tax (Appeals) considered the grounds, submissions, facts of the case, findings of the Assessing

Officer and examined the provisions of Sec. 80AC of the Act and relied on the Special Bench decision of *Saffire Garments vs. ITO (2012) 28 taxmann.com 27 (Rajkot)* were Tribunal has held the provisions of Sec.10A(1A) of the Act are similar to the provisions of Sec.80AC and decisions of Apex Court and High Courts was referred and concluded that the provisions of Sec.139(1) of the Act for filing of returns of income is mandatory and no deduction will be allowed if return is not filed within the time allowed u/s.139(1) of the Act. The ld. Commissioner of Income Tax (Appeals) also relied on the recent decision of ITAT, Chandigarh Bench in the case of M/s. *Lakshmi Energy & Foods Ltd. vs. ACIT, (2014) 44 taxmann.com 248* and concluded that assessee company has not filed return within stipulated time under provisions of Sec. 139(1) of the Act hence not entitled for deduction u/s.80IA of the Act and uphold the order of the Assessing Officer. Aggrieved by the order of the Commissioner of Income Tax (Appeals) the assessee filed an appeal before the Tribunal.

5. Before us, the ld. Authorised Representative reiterated his submissions made before Assessing Officer and First appellate proceedings. The ld. Commissioner of Income Tax (Appeals) relied on the Special Bench decision and not considered sufficient reasonable cause of not filing return of income u/s.139(1) of the Act. The

assessee company paid self assessment tax and filed the Return of income belatedly u/s.139(4) of the Act on 31.03.2013. The ld. Commissioner of Income Tax (Appeals) relied on Special Bench decision of *Saffire Garments (supra)* and distinguished the Co-ordinate Bench decisions applicable to the assessee. Further, the ld. Authorised Representative supported the arguments with the Hyderabad Bench Tribunal decision *in the case of ITO vs. S. Venkataiah* in *ITA No.984/Hyd/2011, dated 31.05.2012* where the Bench observed at page no.13 of order.

> *''13. We have heard both the parties and perused the material on record. In this case admittedly, the assessee filed the return of income on 23.12.2008. The due date for filing the return of income u/s. 139(1) of the Act for the assessment year under consideration in the case of the assessee is 31.10.2008. As such the return filed by the assessee is belated. In this the assessee claimed deduction u/s. 80IC of the Act which was disallowed by the Assessing Officer as the return of the assessee was not filed within the time as prescribed u/s. 139(1) of the Act. The assessee has given reasons for delay in filing the return of income that the assessee was preparing its accounts through computer and the computer got corrupted due to viruses and in spite of continuous efforts by the computer technical personnel to retrieve the data in time for filing the return of income, problem persisted in the system. By trying to retrieve the data for 4 days the required data could not be retrieved and the backed up data were available only up to 31st January, 2008 in the CD and the entire data for the two months period, February and March, 2008, had to be re-entered into the computer system again. On preparation of the final accounts and finalising of statutory audit it took a little extra time that resulted in belated filing of return of income. Thus there was a delay of 74 days in filing the return of income which is beyond the control of assessee. This was also confirmed by the statutory auditor vide his letter dated*

20.3.2011. Being so, in our opinion there is a reasonable cause for filing the return of income belatedly and this is beyond the control of the assessee. When the substantial question of justice involved technicalities should be ignored. Further, we are supported by the order of the Tribunal in ITA Nos. 1231 & 1199/Hyd/2010 in the case of DCIT vs. M/sVega Conveyors & Automation Ltd. order dated 31st December, 2010 wherein in para 5 of the order the Tribunal held as follows:

> *"5. We have considered the rival submissions and perused the orders of the lower authorities, and other material available on record, including the case-law relied upon by the parties. It is an undisputed fact that the assessee in the present case has filed the audit report in Form lOCCB during the course of reassessment proceedings. The issue that arises for consideration is whether the Assessing Officer was justified in disallowing the assessee's claim for deduction under S. 80IB on the ground that the audit report in Form 10CCB was not filed along with the return of income; or whether the CIT(A) was correct in proceeding on the basis of Form 10CCB filed during the course of re-assessment proceedings and directing the Assessing Officer to allow the claim of the assessee for deduction under S. 80IB of the Act. It is settled position of law, as consistently held by various Benches of this Tribunal and as held in various decisions referred to by the CIT(A) in the impugned order, that though filing of audit report in Form 10CCB is mandatory and prerequisite for deduction under S. 80IB, non-filing of the same along with the return of income is only a curable defect, and assessee's claim for deduction has to be considered on its merits as and when the defect is cured by filing Form 10CCB. We are fortified in this behalf by the decision of the jurisdictional High Court in the case of Hemsons Industries (Supra), relied upon by the learned counsel for the assessee. It is contended by the Learned Departmental Representative that the assessee's claim for deduction under S. 80IB can be entertained and examined on merits, when the audit report is filed before the completion of assessment, which has not been done in the present case, since the audit report was filed only during the course of reassessment proceedings initiated by the Assessing Officer, which cannot end up giving additional deductions/benefits to the assessee. We do not find merit even in this contention of the learned Departmental Representative.*

> *In the case of Hemsons Industries (Supra), before the jurisdictional High Court, for one of the years under appeal before Hon'ble High Court, viz., assessment year 1979-80, audit report was filed during the course of re-assessment proceedings and in response to the show-cause notice under s. 148 issued by the Assessing Officer. In this view of the matter, respectfully following the decision of the jurisdictional High Court cited above, among others, we find no justification to interfere with the order of the CIT(A). We accordingly uphold the same and reject the grounds of the Revenue in this appeal''.*

The ld. Authorised Representative also relied on the decision of Hyderabad Bench of the Tribunal in the case of *G. Laxmi Devi vs. ACIT in ITA No.294/Hyd/2012* and explained that the Revenue has filed an appeal against the ITAT order of *S. Venkataiah (supra*) in the High Court of Andhra Pradesh and the lordship have confirmed the order of the Tribunal in I.T..T.A. No.114 of 2013 and observed as under:-

> *''The learned Tribunal on fact-finding held that there is a reasonable cause for filing the return on income belatedly and this is beyond the control of the assessee. On this fact-finding the learned Tribunal has dismissed the appeal filed by the Revenue. There is no element of law involved in the appeal and the fact-finding cannot be appreciated by this Court. Moreover, the Tribunal has followed its earlier order in ITA No.1231 & 1199/Hyd/2010 dated 31.12.2010 in the case of DCIT vs M/s. Vega Conveyors & Automation Limited''*.

Further, the assessee company to substantiate its bonafide of reasonable cause based on the directions of the Assessing Officer filed an application for condonation of delay in filing return of income

before CBDT u/s.119(2)(b) of the Act on 03.07.2014 and prayed for allowing the deduction.

6. Contra, the ld. Departmental Representative relied on the decision of lower authorities and distinguished the decision of High Court of Andhra Pradesh and Special Bench Tribunal decision and relied on the decision of Bombay High Court *CIT vs. Smt. Godavaridevi Saraf 113 ITR 589* and vehemently opposed to the ground of THE assessee.

7. We heard the rival submissions and perused the material on record, judicial decisions cited. The ld. Authorised Representative argued that the return of income could not filed within due date and filed detailed submissions in assessment and appellate proceedings relying on the decisions of Co-ordinate Bench of the Tribunal. But the ld. Commissioner of Income Tax (Appeals) considered the decision of Special Bench in the case *Saffire Garments(supra)* and over ruled the assessee's objections and observed filing return of income u/s.139(1) of the Act is mandatory. The ld. Authorised Representative drew attention to the decision of Hyderabad Bench, Tribunal in the case of *S. Venkataiah* (supra) were delay in filing return of income was condoned due to technicalities. Subsequently, on appeal by Revenue u/s.260A of the Act the Hon'ble Andhra Pradesh High Court has

confirmed the order of the Tribunal in I.T.T.A No.114 of 2013, dated 26.06.2013. The Andhra Pradesh High Court considered the technicalities and circumstances were the assessee could not file the return. The assessee company has made a application on 3.07.2014 with CBDT u/s.119(2)(b) of the Act for condonotion of delay in filing return of income. The assessee demonstrated the submissions made before the CBDT. Considering the factual aspects, evidence, provisions of law and decisions of High Court and Tribunal relied by the assessee, we are inclined to remit the issue in dispute to the file of Assessing Officer as the application u/sec. 119(2)(b) of the Act is pending with the CBDT. The Assessing Officer has to pass the order based on the directions from CBDT after providing adequate opportunity of being heard to the assessee. This ground of the appeal is partly allowed for statistical purpose.

8. The next ground raised by the assessee that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of ₹17,19,907/- u/s.14A r.w.r. 8D by the Assessing Officer.

9. The Assessing Officer on perusing the financial statements of the assessee company found that assessee company has made

investments in the shares of its subsidiary companies. And could not distinguish the expenses incurred for earning exempt income from investments and calculated disallowance as per provisions of Sec. 14A r.w. Rule 8D ₹17,19,907/-. Aggrieved by the addition, the assessee filed an appeal before the Commissioner of Income Tax (Appeals).

10. In the appellate proceedings, the ld. Authorised Representative reiterated his submissions on disallowance that the assessee company made investments in associate companies in same line of operations for the purpose of business and predicted favourable factors of relatively higher income in succeeding years. The Assessing Officer failed to consider the income being earned in future by subsidiary companies. The ld. Commissioner of Income Tax (Appeals) has accepted that the assessee company has made huge investments in subsidiary companies and will yield good income. The legislative intent that the expenses incurred in connection with earning of exempted income cannot be allowed and relied on the decisions of Apex Court and Jurisdictional High Court and Co-ordinate Bench of ITAT in the *Southern Petro Chemical Industries vs. DCIT 93 TTJ 161* that the provisions of Sec. 14A and Rule 8D are applicable and it will be proper to make disallowance of proportionate management

expenses and supported the disallowance with the decision of Cheminvest Ltd vs. ITO 121 ITR 318(SB) were the disallowance under provisions of Sec. 14A shall apply irrespective of any exempted income is received or earned by the assessee. The Commissioner of Income Tax (Appeals) concurred with the observations of the Assessing Officer and confirmed the order of the Assessing Officer. Aggrieved by the order of the Commissioner of Income Tax (Appeals), the assessee assailed an appeal before the Tribunal.

11. Before us, the ld. Authorised Representative of the assessee reiterated the submissions made before the Assessing Officer and Commissioner of Income Tax (Appeals) on the factual aspects and provisions and expenditure disallowed. The ld. Authorised Representative accepts the provisions of Sec.14A r.w. Rule 8D are applicable to the assessee company but the disallowance in respect of exempted income is on a higher side compared to the investments made out of own funds in the subsidiary companies. Further no expenditure was incurred for earning such exempted income. The ld. Assessing Officer calculated disallowance u/sec. 14A r.w.Rule 8D without giving proper reasons for rejecting the assessee's explanations and the provisions of Rule 8D(2) shall apply only with expenditure having direct nexus to the income which is not included in the total income of the assessee. Further supported the arguments

with the decision of High Court of Punjab and Haryana in the case of *CIT vs. Hero Cycles 323 ITR 518* and decision of Delhi Tribunal in the cases of *ACIT vs Sun Investments 8 ITR(Tri) 33 and DLF Ltd vs. CIT* were unless Assessing Officer establishes specific expenditure incurred by the assessee for earning exempt income, no disallowance can be made. The assessee company made investments in subsidiary companies and also the assessee company share capital, reserves and surplus and deposits are more than the investments made in the tax free securities. Therefore, no disallowance u/s.14A of the Act is warranted supported the case with the decisions of *CIT vs. HDFC Bank (2014) 89 CCH 0185 (Mum), CIT vs. Reliance Utilities 313 ITR 340(Bom) and CIT vs. Hotel Savera 239 ITR 795 (Mad)*. The rule 8D (2) calculation shall exclude the investments made in the subsidiaries companies and also the interest on bank loan of specific projects be excluded for disallowance. The ld. Authorised Representative submitted Audited financial statements and drew attention to the investments schedule and expenditure. Further demonstrated that the investment in subsidiary companies are out of interest free funds and same shall be excluded for the purpose of disallowance under Rule 8D and prayed for allowing the appeal.

12. Contra, the ld. Departmental Representative relied on the orders of the lower authorities and judicial decisions supporting the disallowance and opposed to the grounds of the assessee.

13. We heard the rival submissions and perused the material on record and judicial decisions cited. The ld. Authorised Representative argued that the investment in subsidiary companies are made out of interest free funds and investment will earn future business and profit to the assessee company. The assessee made substantial investment in shares of subsidiary companies not to earn exempted income but because of commercial expediency. We on perusal of the financial statements as per of Schedule 6 to the Balance Sheet, there is an increase of investments in shares and Government securities of ₹90 crores compared to earlier year and also as per the note 2 to the accounts, the investments are made in the subsidiary companies in foreign countries. The income from subsidiary companies has to be considered on Double Taxation Avoidance Agreements (DTAA) between countries. And prime facie there is no information of any income received by the assessee company from the foreign subsidiaries and Assessing Officer has not referred the working sheet of calculation of disallowance were such foreign investments are kept outside the scope of provisions of Sec. 14A of the Act. Therefore,

considering the Apparent facts and investment pattern, we set aside the disputed issue to the file of the Assessing Officer to verify the application of provisions to foreign subsidiary company and shall pass the order after providing adequate opportunity of being heard to the assessee. This ground of the assessee is partly allowed for statistical purpose.

14. In the result, the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced on Thursday, the 17th day of March, 2016, at Chennai.

Sd/-	Sd/-
(चंद्र पूजारी)	(जी. पवन कुमार)
(CHANDRA POOJARI)	**(G. PAVAN KUMAR)**
लेखा सदस्य /ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

चेन्नई/Chennai.
दिनांक/Dated: 17.03.2016
KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF