

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 1357/MUM/2016
Assessment Year: 2007-08
&
ITA No. 1566/MUM/2016
Assessment Year: 2010-11**

DCIT 3(2)(2)
6th Floor, R. No. 674
Aayakar Bhavan, M.K. Rd.
Mumbai - 400020

Vs.

M/s. Premier Limited
58 Nariman Point
Mumbai - 400021

PAN No. AAAC5523G

(Appellant)

(Respondent)

Assessee by: Shri Purushottam Kumar,DR
Revenue by: Shri Jayesh Dedia,AR

Date of Hearing : 08/02/2017
Date of pronouncement: 28/04/2017

ORDER

PER N.K. PRADHAN, AM

These two appeals by the Revenue for the assessment year 2007-08 and 2010-11 are filed against the order of the Commissioner of Income Tax (Appeals) - 08, Mumbai and arise out of order u/s 143(3) of the Income Tax Act, 1961, (the 'Act'). As common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience.

2. The 1st, 2nd and 3rd ground in the appeal are against the deletion made by the learned CIT(A) in respect of addition of Rs. 3,75,03,182/-

(A.Y. 2007-08) and Rs. 16,85,44,684/- (A.Y. 2010-11) done by the Assessing Officer (A.O.) u/s 69A of the Act. It- is stated that (i) the learned CIT(A) failed to appreciate that the assessee had accepted that it had taken bogus bills for such expenditures and these were recorded in the books of accounts after payments were made to such bogus bills providers through bank account, (ii) the learned CIT(A) failed to appreciate that the A.O. made the addition u/s 69A on the basis of circumstantial evidence since the assessee did not file necessary evidence and details in respect of bogus billing.

3. We begin with the A.Y. 2007-08. The assessee M/s. Premier Limited filed its return of income for the A.Y. 2007-08 on 29.10.2007 declaring (i) total income of Rs. nil (ii) book profits of Rs. 5488.58 lacs u/s 115JB. Subsequently it filed a revised return on 23.04.2008 declaring book profit at Rs. Nil. The A.O. made the assessment u/s 143(3) on 30.11.2009 assessing the total income on book profit u/s 115JB at Rs. 55,90,30,000/-. In appeal the book profit got reduced to Rs. Nil vide CIT(A)'s order dated 03.09.2010. The A.O. passed the order on 15.10.2010 giving effect to CIT(A)'s order determining income at Rs. Nil.

3.1 Now we come to the A.Y. 2010-11. The assessee filed its return of income for the above assessment year on 29.09.2010 declaring total income at Rs. Nil. It filed a revised return on 14.02.2011 declaring total income at Rs. Nil. The return was processed u/s 143(1) of the Act.

3.2 The Department carried out a survey u/s 133A in the business premises of the assessee on 28.12.2010. The ledger accounts and relevant bills were impounded by the Department. As per the AO, during the course of survey proceedings, Shri Maitreya V Doshi, the

Chairman & Managing Director and Shri K Somasundaran Nair, General Manager (Finance & Accounts) of the company admitted to have taken accommodation entries in the nature of various expenses debited as capital expenditure, consumption, trading purchase and land development expenses. The relevant portion of statement of Shri Maitreya V Doshi, is reproduced below:

“A.11 Now I am showing the statement given by Shri K.S. Nair, recorded during the course of survey proceedings. In this statement Shri Nair has admitted that no material has been received from these parties and that these are only accommodation entries, done under your instructions. In light of the above, please explain the transactions with these concerns mentioned above.

Ans: The statement of Shri K.S. Nair has been perused by me & I take this opportunity to come clear on this issue and admit that transactions with the above mentioned parties are only adjustment entries.

However, I would also like to put on record that the amount under the head of capital expenditure amounting to Rs. 30,67,76,084/- has not been claimed as revenue expenditure in any of the years. I promise to withdraw the depreciation that has already been claimed on wrongly capitalized asset till date and also promise to withdraw this capitalization & not to claim any further depreciation on this amount. The revised depreciation schedule as per Income Tax Act shall be submitted before your goodself in due course.

I would also like to bring on record the fact that the amount of Rs. 14,60,42,078/- on account of purchase of trading goods is a tax neutral payment as identical adjustment sale entries have been made against such purchases and thus the same has no element of profit in it.

I would further like to take this opportunity to state that amount of Rs. 1,44,54,564/- booked under the head of consumables in the profit & loss account shall be reversed in the respective years and taxes, if any, shall be paid on the same.

It is also brought on record that the amount of Rs. 9,07,83,728/- under the head of land development expenses incurred for Dombivali land has no tax effect as the same is a capital expenditure on which no depreciation has been claimed. I promise that I shall reduce the cost of the land by this amount & hence, there is no question of claim of any depreciation whatsoever manner on this amount.”

3.3 The A.O. vide his office letter dated 26.12.2012 asked the assessee to file details regarding (i) the modus operandi of the accommodation entries, (ii) the fate of Rs. 41,20,14,376/- (Rs. 30,67,76,084/- + Rs. 1,44,54,564/- + Rs. 9,07,83,78/ spread across 5 assessment years) which were transferred to the accommodation entry providers and the manner in which such sums have been received back after deduction of commission by the entry providers, (iii) the source of funds for purchases / investments of Rs. 14,60,42,078/- (subsequently enhanced to Rs. 15,17,96,680/-), (iv) evidence that the admitted bogus expenses were capital in nature and (v) explanation regarding transfer of items / entries from 'capital work-in-progress' account to 'building account'.

3.4 In response to the above, the assessee filed a reply before the A.O. on 04.01.2013 stating that (i) Rs. 23,07,041/- are in the nature of revenue and the assessee-company has withdrawn the entire amount partly in A.Y. 2010-11 (Rs. 7,87,280/-) and partly in A.Y. 2011-12 (Rs. 15,19,761/-), (ii) the entire trading purchases of Rs. 15,17,96,684/- which according to survey is not genuine which was disclosed as part of inflated purchases have been resold at figure of Rs. 15,74,66,691/-; thus in the accounts against these purchases there is a corresponding sales; the company has in fact made profit of Rs. 56,70,007/- which had been shown as income in the A.Y. 2009-10 and A.Y. 2010-11, (iii) out of capital WIP, only Rs. 23,02,268/- was transferred to building account in A.Y. 2007-08. In A.Y. 2009-10, Rs. 7,77,18,265/- was transferred to building account.

3.5 The A.O. noted that the assessee-company failed to explain the modus operandi of the accommodation entries. As per the A.O. the assessee failed to explain before him the transaction in relation to Rs.

41,20,14,376/- (Rs. 30,67,76,084/- + Rs. 1,44,54,564/- + Rs. 9,07,83,78/ spread across 5 assessment years) which were transferred to the accommodation entry providers and the manner in which the above sum was received back after deduction of commission by the entry providers.

3.6 Therefore, the A.O. made an addition u/s 69A of Rs. 3,75,03,182/- for the A.Y. 2007-08 and Rs. 16,85,44,684/- for the A.Y. 2010-11.

4. Aggrieved by the order of the A.O., the assessee filed an appeal before the learned CIT(A). The learned CIT(A) allowed the appeal filed by the assessee on the above issue on the ground that (i) nowhere the A.O. has mentioned that any money, bullion, jewellery or other valuable article was found during the course of survey, (ii) if nothing is found in the possession of the assessee and / or if the assessee establishes that he does not have the ownership of what is found, then the provision of section 69A cannot be invoked, (iii) the alleged 'bogus purchases' were recorded in the books of accounts of the assessee. The payments to suppliers were also made through cheques from the assessee's bank accounts and duly recorded in the audited accounts, (iv) the A.O. has not rejected the books of accounts.

The learned CIT(A) held that the A.O. made the addition on the basis of certain presumption which in his opinion were unwarranted and unjustifiable. Therefore, he deleted the addition of Rs. 3,75,03,182/- (A.Y. 2007-08) and Rs. 16,85,44,684/- (A.Y. 2010-11).

5. Before us, the learned DR referred to the relevant portion of statement of Shri Maitreya V. Doshi wherein the disclosure was made. He referred to para 4.1.3 of the assessment order in this regard. Also

the learned DR referred to the letter dated 26.12.2012 issued by the A.O. and the reply dated 04.01.2013 filed by the assessee before him. It is thus submitted by him that the assessee failed to file before the A.O. the modus operandi of the accommodation entries. The learned DR supported the order passed by the A.O.

6. The learned counsel of the assessee filed a paper book containing (i) copy of balance sheet, profit & loss account along with investment schedule (ii) copy of submission before DDI (Investigation) dated 28.02.2011 (iii) copy of submission before the A.O. vide letter dated 08/06/2011 & 01.02.2013 (iv) copy of submission before the A.O. dated 28/03/2012 & 13.03.2013 (v) assessment year-wise details of steel purchased (vi) detail of year-wise capital work-in-progress (vii) party-wise and head-wise details of purchase (viii) copy of accounts of parties from whom purchased (ix) copy of assessment order for A.Y. 2009-10 (x) copy of revised computation (xi) copy of submissions filed before CIT(A).

Reliance was placed by him on the decision in the case of *CIT vs. Nikunj Eximp Enterprises (P) Ltd.* (2013) 35 taxmann.com 384 (Bombay) and *CIT vs. M/s. Ashish International* (ITA No. 4299 of 2009).

7. We have heard the rival submissions and perused the relevant material on record. We begin with the decisions relied on by the learned counsel of the assessee. In the case of *Nikunj Eximp Enterprises (P) Ltd.* (supra), it has been held that merely because the suppliers had not appeared before the A.O. or the CIT(A), it could not be concluded that purchases were not made by the assessee. The same is not the issue in the instant case.

In *M/s. Ashish International* (supra), the Tribunal has recorded a finding of fact that the assessee had disputed the correctness of the statement given by the Director of M/s. Thakkar Agro Industrial Chem Supplies P Ltd. and admittedly the assessee was not given any opportunity to cross-examine the concerned Director. The appellate authority had sought remand report and even at that stage the genuineness of this statement had not been established by allowing cross-examination of the person whose statement was relied on by the revenue. The Hon'ble High Court held that the decision of the Tribunal being based on the fact, no substantial question of law can be said to arise from the order of the Tribunal and, therefore, dismissed the appeal of the revenue.

In the instant case Shri Maitreya V. Doshi, the Chairman and Managing Director of the assessee-company has given a statement which has been relied on by the A.O. Therefore, the instant case is distinguishable from the above decisions relied on by the learned counsel of the assessee.

7.1 We find that Shri Maitreya V. Doshi, the Chairman and Managing Director of the assessee-company has gone through the statement of Shri K.S. Nair, General Manager (Finance & Accounts) and admitted that the transactions with the concerned parties were only adjustment entries. Shri Doshi has stated that the amount under the head capital expenditure amounting to Rs. 30,67,76,084/- has not been claimed as revenue expenditure in any of the years. He promised to withdraw the depreciation that has been claimed wrongly on capitalised asset till date and also promised to withdraw the concerned capitalisation and not to claim any further depreciation on that amount. Shri Doshi has also stated that (i) the

amount of Rs. 14,60,42,078/- on account of purchase of trading goods is a tax neutral, (ii) the amount of Rs. 1,44,54,564/- booked under the head consumables in the P&L Account shall be reversed in the respective years and taxes, if any shall be paid on the same and (iii) the amount of Rs. 9,07,83,728/- under the head land development expenses incurred for Dombivali land has no tax effect.

Shri Doshi was the Chairman and Managing Director of the assessee-company during the relevant period. His statement is of seminal value. He has given the above statement after perusing the statement given by Shri K.M. Nair, General Manager (Finance & Accounts) of the company.

We find that neither the A.O. nor the learned CIT(A) has done proper analysis of the above statement of Shri Doshi. The assessee has also failed to file the complete details before the A.O. to substantiate the statement of Shri Doshi.

In *CIT vs. Calcutta Agency Ltd.* (1951) 19 ITR 191 (SC), it has been held that the burden of proving the necessary fact in order to entitle the assessee to make a claim is on the assessee. The same ratio has been reiterated in *Nund & Samont Co. (P) Ltd. vs. CIT* (1970) 78 ITR 268 (SC). The burden of proof is limited to primary or initial onus. One such primary onus is discharged, such burden shifts to revenue. We find that in the instant case the assessee has not discharged the primary onus. In view of the above, the order of the learned CIT(A) is set aside and the case is restored to the file of the A.O. with a direction to make an order afresh as per the provisions of the Act after giving a reasonable opportunity to the assessee to substantiate the statement of Shri Maitreya V. Doshi. The assessee is

directed to file the relevant details before the A.O. Thus the 1st, 2nd and 3rd ground of appeal are allowed for statistical purposes.

8. The 4th and 5th ground of appeal relate to the deletion made by the learned CIT(A) of the disallowance u/s 14A by the A.O. of Rs. 73,62,370/- (A.Y. 2007-08) and Rs. 7,68,742/- (A.Y. 2010-11). It is stated for A.Y. 2007-08 that (i) the learned CIT(A) merely relied upon the appeal order in the original assessment proceedings without appreciating the fact that the department has not accepted such appeal order and has filed appeal before the ITAT which is pending, (ii) the learned CIT(A) failed to appreciate that the assessee failed to prove that investments yielding exempt income were made from non-interest bearing fund. It is stated for the A.Y. 2010-11 that (i) the learned CIT(A) failed to appreciate the fact that in view of the judgement of the Hon'ble Bombay High Court in *of Godrej & Boyce Mfg. Co. Ltd. vs. Dy. CIT* (2010) 194 Taxman 203, the disallowance u/s 14A in respect of A.Y. 2008-09 and onwards are to be made following Rule 8D of the Income Tax Rules 1962 and (ii) the learned CIT(A) failed to appreciate that the assessee failed to prove that the investment yielding exempt income were made from non-interest bearing funds.

8.1 The A.O. has made disallowance u/s 14A r.w.r. 8D of Rs. 73,62,370/- for the A.Y. 2007-08 and Rs. 7,68,742/- for the A.Y. 2010-11. The learned CIT(A) has followed the order of his predecessor-in-office and restricted the disallowance to Rs. 5,000/- for the A.Y. 2007-08 and 2010-11.

8.2 Before us, learned DR relies on the order of the A.O. On the other hand, the learned counsel of the assessee relies on the order of the learned CIT(A).

8.3 We have heard the rival submissions and perused the relevant material on record. We begin with the A.Y. 2007-08. We find that the AO has worked out the disallowance u/s 14A r.w.r. 8D. The same rule is not retrospective as it was notified on 24/03/2008 and would be applicable only from AY 2008-09. In *Godrej & Boyce Mfg. Co. Ltd. (supra)*, it has been held that Rule 8 D is not retrospective. The Hon'ble Bombay High Court in *CIT vs. M/s. Godrej Agrovet Ltd* vide Income Tax Appeal No. 934 of 2011, dated 8.1.2013, has held that percentage of the exempt income can constitute a reasonable estimate for making disallowance in the years earlier to the assessment year 2008-09. In the above case it upheld the disallowance to the extent to 2% of the total exempt income. Respectfully following the above decision, we direct the AO to restrict the disallowance to 2% of the total exempt income. Thus the above ground of appeal is partly allowed.

8.4 For the A.Y. 2010-11, it is the contention of the learned counsel of the assessee that the total net own funds of the company is Rs. 18,813.65 lacs while the investment is Rs. 363.22 lacs. The learned counsel of the assessee has relied on the judgement of the Hon'ble Bombay High Court in the case of *Reliance Utility & Power Ltd.* 313 ITR 340 wherein it has been held that 'it can be assumed that investment is out of own funds if the amount of own fund is substantially higher than the amount of investment.' Also it is stated by him that almost 100% investment made in associate companies and group companies as promoter and, therefore, no expenditure was

incurred in maintaining portfolio of these investments or for holding the same.

Having examined the relevant accounts, we find that there is merit in the above contention of the assessee. The assessee has *suo motu* disallowed Rs. 1,81,485/- u/s 14A r.w.r 8D. Hence we uphold the order of the learned CIT(A) and dismiss the appeal on the above ground filed by the revenue for the A.Y. 2010-11.

9. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 28/04/2017

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-

(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai:

Dated: 28/04/2017

Biswajit, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai