

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "ए" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE HON'BLE S/SHRI JOGINDER SINGH (JM), AND RAJESH KUMAR,(AM)

आयकर अपील सं./I.T.A. No.796/Mum/2015

(निर्धारण वर्ष / Assessment Year :2006-07)

Dy. Commissioner of Income Tax, Central Circle-8(3), Room No.659, 6 th floor, Aayakar Bhavan, Mumbai-400020	बनाम/ Vs.	M/s JSW Energy Limited, JSW Centre, Bandra Kurla Complex, Bandra (E), Mumbai-400051.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN No. :AAACJ8109N

अपीलार्थी ओर से / Appellant by:	Shri Ramchandran
प्रत्यर्थी की ओर से/Respondent by	Shri Hirva Shah

सुनवाई की तारीख / Date of Hearing : 25.7.2016

घोषणा की तारीख /Date of Pronouncement : 25. 08.2016

आदेश / O R D E R

Per RAJESH KUMAR, Accountant Member:

This is an appeal filed by the revenue and is directed against the order dated 18.11.2014 passed by the Ld.CIT(A)-47,Mumbai for the assessment year 2006-07.

2. The issue raised in ground No.1 of appeal is against the restricting the disallowance u/s 14A of the Income Tax Act, 1961(hereinafter called and referred to the Act) read with Rule 8D of the Income Tax Rules, 1962(hereinafter called and referred to as the Rules) to Rs.7,59,39,128/- by CIT(A) by rejecting the disallowance u/s 14A of Rs.894,26,131/- made by

the AO. In the ground no.2, the issue raised is the deletion the addition made by the AO u/s 14A for the purpose of computing book profit u/s 115JB of the Act. In the third ground the revenue raised the issue of charging of interest u/s 234B of the Act.

3. Brief facts of the case are that the assessee filed its return of income on 21.11.2006 declaring total income at Rs.7,76,71,388/- after claiming deduction under section 80IA to the tune of Rs.1,00,84,71,662/-. The original assessment was completed under section 143(3) of the Act on 31.12.2008 determining total income at Rs.16,70,97,520/- and income under section 115JB was determined at Rs.1,43,52,30,425/-. A search action u/s 132(1) of the Act was carried out in the case of JSW Group of cases on 16.3.2011. Accordingly, a notice u/s 153A dated 24.10.2011 was issued and served upon the assessee which was complied by the assessee by filing return of income on 29.1.2011 declaring a total income at NIL under the normal provision of the Act and Rs.99,35,87,000/- under section 115JB of the Act. Thereafter, scrutiny proceedings were initiated against the assessee and statutory notices under section 143(2) and 142(1) were issued and served upon the assessee. During the course of assessment proceedings, the AO found that the assessee has received tax free dividend income which is exempt u/s **10(34)** of the Act and the assessee has not disallowed the expenses attributable to earning the said income and accordingly made disallowance of Rs.8,94,26,131/- u/s 14A r.w.r 8D of the Rules. The similar

disallowance was made while completing the book profit u/s 115JB of the Act and thus, the assessment was completed u/s 143(3) read with section 153A of the Act vide order passed dated 28.3.2013 determining the total income of Rs.7,76,71,389/- under normal course and Rs.1,43,51,85,192/- under the provisions of section 115JB of the Act. Aggrieved by the order of the AO the assessee preferred an appeal before the Id.CIT(A) challenging the addition as made by the AO u/s 14A of the Act and charging of interest u/s 234B consequent to inclusions of various items. The Id. CIT(A) partly allowed the appeal of the assessee by sustaining the addition to the tune of Rs.7,59,39,128/- as made u/s 14A by observing and holding as under :

"7.2 The facts of case and submission made by appellant have been considered. There is no dispute in view of decision of Hon'ble Bombay High Court and ITAT, that disallowance u/s 14A cannot be computed following Rule 8D for current assessment year. However, both High Court and ITAT have directed, that disallowance should be made on some reasonable basis. It is the argument of appellant that disallowance offered by it in the return, though made on adhoc basis, is based on correct appreciation of provisions of section 14A while AO has followed rule 8D without finding any infirmity in the method adopted by it.

7.3 It is noticed from computation of disallowance u/ s 14A that both the appellant and AO agree with regards to disallowance out of interest expenditure. Only dispute is with regards to disallowance out of administrative expenses. While the AO has calculated this amount at Rs.1,74,03,734/- being 0.5% of average investment as per Rule 8D(iii), the appellant has made adhoc disallowance of Rs.6,16,731/ -. The computation made by AO following Rule 8D(iii) for disallowance of administrative expense is not sustainable. However, the ad hoc disallowance made by appellant is also too meagre in comparison to AO's working. The appellant has offered a lump sum disallowance of Rs.3,00,000/- out of other administrative expenses. I find that CIT(A)-38, Mumbai in appellants own case for AY 2007-08 vide order dated 19.11.2013 had considered a reasonable disallowance of Rs 3,00,000/- per month out of other administrative expenses in the facts and

circumstances of the case. To adopt a consistent policy to determine reasonable disallowance, I also adopt the same disallowance and work out total disallowance for u/ s 14A expenses as follows:

Interest expenses	7,20,22,397
Expenses on finance department employee	141,996
Expenses on secretarial department employee	145,000
Director finance	29,735
Administrative expenses (Rs.3 Lakh per month)	36,00,000
Total disallowance	7,59,39,128

7.4 The disallowance u/ s 14A for the year is therefore confirmed to the extent of Rs 7,59,39,128/ -. The ground of appeal is decided accordingly as partly allowed."

4. We have carefully considered the submissions of the parties, perused the material placed before us including the orders of authorities below. We find that the Id. CIT(A) has passed the order after taking into account the complete matter and reduced the disallowance to Rs.759,39,128/-. We are in agreement with the Id.CIT(A) that the rule 8D is not applicable in the current assessment year as the same is effective from the assessment year 2008-09 and reasonable basis has to be followed in order to work out the disallowance u/s 14A of the Act. Thus, finding no infirmity in the order of Id. CIT(A) on this issue of disallowance of expenses u/s 14A. We find that the appeal filed by the department on this issue cannot be allowed and accordingly this ground of appeal is dismissed.
5. The issue raised in the 2nd grounds of appeal is against the deletion of addition made by the AO u/s 14A of the purpose of computing the book profit

u/s 115JB of the Act. The Id. CIT(A) allowed the appeal of the assessee on this ground by holding that the issue is covered by the order of the co-ordinate bench of the Tribunal by observing and holding as under :

"8.1 This ground of appeal pertains to addition of Rs 8,94,26,131/- being disallowance made u/s 14A to Book Profit for the purposes of MAT. It has been brought to my notice that Hon'ble ITAT Mumbai Bench in its order in ITA No.244/Banga./2010 dated 22.02.2013 against original assessment order for AY 06-07 has decided the issue in favour of appellant. The operative part of order is as follows:

"We have heard the rival contention and the judgement relied upon by the learned counsel of the assessee. It is a well settled proposition of law that the assessee is required to prepare its profit and loss account in accordance with the provisions of Part -II and Schedule VI of the companies Act 1956. Hence these accounts are in accordance with the provisions of Companies Act ,1956 and has been approved by the registrar of companies, the assessing officer does not have much scope to tinker with the accounts. Since the assessee has not debited any actual expenditure relating to the earning of exempt income, therefore, the provisions section 14A, cannot be imported into computation of book profit u/s.115JB. Even clause (j) of explanation to section 115J8 refers to those amounts which are debited to the profit and loss account, can be added to book profit. This issue has already been decided by co-ordinate bench of tribunal in the case of M/s. Essar Teleholdings Limited vs. DCIT (ITA No.3850/Mum/2010) and in the case of of M/s. Quippo Telecom Infrastructure Ltd.Vs. ACIT (ITA No.4931/Del/2010) order dated is 18th Feb 2011 wherein the decision of Delhi tribunal in the case of Goetze India Ltd vs CIT 32 SOT 101 has been followed. Thus respectfully following the same, we allow the additional ground raised by the assessee"

8.2 In the assessment order appealed against, the AO has repeated the addition made in original assessment order. Respectfully following the order of Honourable Mumbai ITAT, AO is directed to delete the adjustment made to book profit on account of disallowance made u/s 14A for the purposes of section 115JB. The ground of appeal is allowed."

6. We have heard the rival contentions and perused the materials placed before us including the order of authorities below. The FAA has deleted the disallowance of Rs.8,94,26,131/- made under section 14A while computing the book profit under the provisions of section 115JB by following the decision of the co-ordinate Bench of the Tribunal in ITA No.244/Bangalore/2010 dated 22.2.2013 for the assessment year 2006-07. The perusal of the said decision reveals that the issue has been decided in favour of the assessee and the Id. CIT(A) has rightly followed the same while passing the order. Moreover, the clause (f) to explanation (1) to section 115JB has been inserted with effect from assessment year 2007-08 and current year is not covered by the said explanation. Accordingly, the order passed by the Id. CIT(A) is as per the law and therefore the same is upheld by dismissing the ground raised by the revenue.

7. The next issue raised in the ground no.3 is that the Id.CIT(A) was wrong in holding not interest u/s 234B can be levied for inclusion of various items for computing profit under section 115JB of the Act.

8. We have carefully considered the rival submissions on this issue. From the order of FAA we find that the Id. CIT(A) held that while computing the disallowance made to the book profit u/s 115JB of the Act the interest u/s 234B was not be charged. The FAA has passed the order by following the decision of the co-ordinate bench of the Tribunal in assessee's own case by observing as under :

"11.1 The ground of appeal is directed against charging of interest u/s 234B in respect of additions u/s 115JB due to retrospective amendment in provisions of the Act. The AR has submitted as follows:

During the course of the Original Assessment proceedings, in the assessment order passed u/s.143(3) of the Income Tax Act' 1961 the AO has computed the Interest u/s.234B of the Income Tax Act' 1961 since inception without appreciating the fact that certain additions in the Working of the Book Profits u/s.1151B were on account of retrospective amendments made in the Finance Act of 2008 in respect of provision for deferred tax. It is submitted that the interest u/s.234B of the Income Tax Act' 1961 was not payable on the additional tax payable by virtue of the said retrospective amendment as at the time of payment of advance tax in FY 2005-06, no such liability could have been anticipated or comprehended by appellant which has been fastened retrospectively by Finance Act, 2008.

In appeal, the Hon'ble ITAT, Mumbai in ITA No 244/Bang/2010 deleted the aforesaid addition vide order dated 22-02-2013. The operating part of the order (Para 14, Page 12) read as under :

"We, thus, respectfully following the aforesaid proposition laid down by the Hon'ble Calcutta High Court that no interest u/s.234B Cm be levied on account of inclusion of various items in the Explanation brought on the statute by the Finance Act 2008 with retrospective effect from 1st April 2001, as at the time of preparing the accounts, the assessee cannot be held to be defaulter of payment of advance tax which has to be paid as per the law then prevailing. Thus, ground no.3, raised by the assessee is allowed."

Hence, in view of the above facts of the case and the position of the law as was held by the Calcutta High Court in Emami Ltd vs CIT 337 ITR 470, decision of which would be binding on the lower authorities, we submit that the interest charged u/s.234B of the Income Tax Act' 1961 may kindly be reworked based on the directions of the Hon'ble ITAT, wherein it has been held that the Assessee cannot be treated as defaulter of tax on account of a retrospective amendment in the Act which was not known to it at the time of payment of the Advance Tax installment which has otherwise been duly paid as per the law prevailing then.

While passing order u/s 143(3) rws 153A, the AO has again charged interest u/s.234B-of the Income Tax Act' 1961 on the entire amount addition to book profit including the sum includible on account of retrospective amendment despite clear directions of Hon'ble ITAT.

11.2 The submission of AR has been considered. The issue is covered by decision of ITAT (supra) is appellants own case for current assessment year. Respectfully following the same, AO is directed to recomputed interest u/s 234B by excluding MAT liability arising due to retrospective amendment in the provisions of section 115JB. The ground of appeal is allowed."

9. From the above, it is clear that the order of Id. CIT(A) is in pursuant to the order passed by the ITAT in assessee's own case and therefore following the ratio laid down in the above decision of the Tribunal, we uphold the order of the Id.CIT(A) by dismissing the ground of revenue.

10. In the result the appeal of the revenue is dismissed.

The above order was pronounced in the open court on 25th Aug, 2016.

घोषणा खुले न्यायालय में दिनांक: 25th Aug, 2016 को की गई ।

Sd

sd

(JOGINDER SINGH)
Judicial Member

(RAJESH KUMAR)
Accountant Member

मुंबई Mumbai: 25th Aug, 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)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

True copy

आदेशानुसार/ BY ORDER,

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