IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'C', NEW DELHI
BEFORE
SHRI S. V. MEHROTRA, ACCOUNTANT MEMBER
AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

I.T.A. Nos.276 & 1057/Del/2014
(Assessment Year 2007-08 & 2010-11 respectively)

Holtech Consulting Pvt. Ltd., C- Block, 01-0103, Imperial Tower, Community Centre, Naraina Vihar, New Delhi-110 028 GIR / PAN :**AAACH0031H**	Vs.	DCIT, Circle 12(1), New Delhi

I.T.A.No. 2280/Del/2014
(Assessment Year 2010-11)

DCIT, Circle 12(1), New Delhi	Vs.	Hotech Consulting Pvt. Ltd., C-Block 01-0103, Imperial Tower Community Centre, Naraina Vihar, New Delhi

C.O.No.16/Del/2015
(Assessment Year 2010-11)

Holtech Consulting Pvt. Ltd., C- Block, 01-0103, Imperial Tower, Community Centre, Naraina Vihar, New Delhi-110 028	Vs.	DCIT, Circle 12(1), New Delhi
(Appellant)		(Respondent)

Appellant by :Shri Akhilesh Gupta, CA
Respondent by :Shri A. K. Saroha, CIT DR

Date of hearing: 13.06.2016
Date of Pronouncement: 18.08.2016

ORDER

PER BEENA A. PILLAI, JM:

These are bunch of cases for assessment year 2007-08 and 2010-11 filed by the assessee as well as the Revenue, against the impugned order passed by the Ld. CIT (A) for the relevant assessment years under consideration. We shall deal with these appeals in sequence.

A.Y: 2007-08: ITA No. 276/del/2014 (Asessee's Appeal):

2. The present appeal has been filed by the assessee against the order dated 11/11/2013 passed by CIT (A) 28 New Delhi for assessment year 2007-08 on the following grounds of appeal:

> *"1) The order of the Learned Assessing Officer is bad in law and on the facts and circumstances of the case.*
>
> *2) The Learned Assessing Officer has erred in Law and on the facts of the case in making addition of Rs.8,25,697/- on account of commission paid to directors by the assessee company.*
>
> *3. The Learned Assessing Officer has erred in Law and on the facts of the case in making addition of Rs.3,11,30,314/- (subsequently rectified to Rs.8,86,275) under section 14A on account of expenditure incurred for incurring dividend i.e. exempt income.*
>
> *3.2 The Learned Assessing Officer has erred in Law and on the facts of the case in making addition of Rs.3,11,30,314/- under section 14A ignoring the*

prospective operation of Rule 8D of the Income-tax Rules, 1962 notified on 24 March 2008.

3.3 The Learned CIT(A) has erred in directing the Assessing Officer to decide the matter afresh ignoring the material and other facts brought on record.

4) The Learned Assessing Officer has erred in Law and on the facts of the case in making addition of Rs.3,19,588/- on account of depreciation on computer peripherals, printers, UPS.

5.1 The Learned Assessing Officer has erred in Law and on the facts of the case in making addition of Rs.31,66,650/- wrongly considering provision of dividend as included in foreign travelling expenses.

5.2 The Learned CIT(A} has erred in directing the Assessing Officer to decide the matter afresh ignoring the material and other facts brought on record.

6) The Learned Assessing Officer has erred in Law and on the facts of the case in making addition of Rs.32,17,320/- on account of expenditure in the nature of payments for external services and recruitment expenses on which tax has not been deducted at source on his own presumptions and surmises without looking into/asking for the evidence of the same.

7) The Learned Assessing Officer has erred in Law and on the facts of the case in making addition of Rs.29,39,405/- on account of bad debts written off.

8) The above grounds are without prejudice to each other."

The brief facts of the case are as under:

2.1 Assessee is a company engaged in the business of providing engineering and management consultancy services. For the year under consideration the assessee

filed its return of income declaring a total income of Rs.30,42,18,189/- on 15/11/2007. The return was processed under section 143(1) and the case was selected for scrutiny and notice under section 143 (2) was issued to the assessee.

2.2 During the year under consideration the Ld. AO observed that the assessee had paid commission to its employee directors to tune of Rs.3,05,14,588/-. It was observed that these two employee directors were also shareholders of the company holding 19.8% and 12.4% of the shares of the company. The Ld. AO held that the amount do not qualify for elements under section 36 (1) (iii) and worked out the disallowance to an extent of Rs. 98,25,697/-.

2.3 The Ld. AO made the following additions during the assessment:

- addition on account of commission paid - Rs. 98,25,697/-
- addition under section 14 a read with rule 8D- Rs. 3,11,30,314/-
- disallowance of depreciation on computer peripherals- Rs.3,19,588/-
- disallowance of travelling expenses - Rs.31,66,650/-
- disallowance of expenditure that TDS not made- Rs.32,17,320/-
- disallowance of bad debts and advance written off- Rs.29,39,405/-

2.4 Aggrieved by the addition made the assessee preferred an appeal before the Ld. CIT (A). The Ld. CIT(A) confirmed the addition so made by the Ld. AO.

2.5 Aggrieved by the order of the Ld. CIT (A) the assessee is in appeal before us now.

3. Ground No. 1, 8 and 9 are general in nature and do not call for any adjudication.

4. Ground No. 2: At the outset, the ld. AR submitted that ground No. 2 stands covered by the order of this Tribunal in assessee's own case for assessment year 2005-06 and 2006-07. He referred to the relevant pages of the order being 481-486 of the paper book. The findings of the tribunal are reproduced herein below:

> *"17.3We have carefully considered the submissions and pursued the records. We find that assessee has paid commission to the Directors as part of the remuneration. In the agreement, it was clearly specified that commission is payable at 5% of the net profits of the company. Thus, the payment was duly approved by the Board of Directors.*
>
> *17.4 We further find that Hon'ble Jurisdictional High Court in the case CIT vs. Dalmia Promoters Developers (P) Ltd. 281 ITR 346 has held that for rejecting the view taken in earlier assessment years, there must be material change in the fact, situation or in law. In this case, clearly there is neither any change in the fact, situation or in law. We agree with the contention of the assessee that the compensation for both the directors were structured in such a way that apart from getting a fixed remuneration for their services rendered. they could also be entitled to receive commission based on the profitability of the company. We also find that assessee has paid taxes at maximum marginal rate. Both the Directors have admitted the payment of commission received and offered the same in their income tax returns and had*

paid at a maximum marginal rate. This clearly establishes the fact that there has been no tax avoidance motive behind the payment of commission to the directors by the assessee company. We further find that the case law referred by the Id. counsel of the assessee are also germane and support the case of the assessee."

4.1 On the contrary the ld. DR relied upon the orders of the authorities below.

4.2 We have perused the records placed before us and orders referred and relied upon by the Ld. AR in assessee's own case for assessment year 2005-06 and 2006-07. It is observed that the similar payment has been made to the same employee directors during those preceding years. The facts and circumstances being similar and identical to the year under consideration we respectfully following the decision of the coordinate bench of this tribunal in assessee's own case for the previous assessment years hold that the payment of commission was justified and is allowable under section 36 (1) (iii) of the Act.

4.3 Accordingly ground No. 2 raised by the assessee stands allowed.

5. Ground No. 3: The assessee has raised the ground against the addition made under section 14 A read with Rule 8D of the act on account of expenditure incurred for incurring dividend, being exempt income.

5.1 At the outset the Ld. AR submitted that the Ld. A O has applied rule 8D for the disallowance to be worked out under section 14 A of the act in respect of earning of the exempt income. He submitted that rule 8D stands applicable from assessment year 2008-09. He relied upon the decision of Hon'ble jurisdictional High Court in the case of M/s Maxopp Investment Ltd Vs. ACIT reported in 15 Taxmann.com 390.

5.2 It is undisputed facts that Rule 8D is not retrospective and therefore is applicable from assessment year 2008-09. We accordingly set aside this issue to the Ld. AO for calculating the disallowance under section 14 A of the act by applying the ratio laid down by the Hon'ble jurisdictional High Court in the case of M/s Maxopp Investment Ltd (supra).

5.3 Accordingly ground No. 3 stands allowed for statistical purposes.

6. Ground No. 4: The assessee company had claimed depreciation at the rate of 60% on addition of computer peripherals, printers, UPS etc. The Ld. AO and the Ld. CIT (A) allowed the depreciation @ 15% on the basis that the UPS is not an integral part of the computer as the computer can function without these peripherals.

6.1 The ld.AR submitted that for assessment year 2008-09 the Ld. CIT(A) had allowed the depreciation on computer peripherals printers and the UPS @ 60%,

against which the revenue had preferred an appeal before this Tribunal. He referred to page 488 of the paper book where the relevant order for assessment year 2008-09 has been placed in assessee's own case. This tribunal has dismissed the appeal filed by the revenue thereby upholding the findings of the Ld. CIT (A) which is as under:

"Disallowance of Rs.7,07,412/- on account of depreciation of Computer Peripherals, printer and UPS:

With regard to the above issue the appellant made the following submission the gist of which is as under:

" .... The appellant company has claimed depreciation at the rate of 60% on addition of computer peripherals, printers, UPS etc. All these items as claimed form an integral part of the computer,……"

"UPS/ switches/ cable/ port/ connectors etc. can be used only with the computers and cannot be used on standalone basis during the course of the Assessment proceedings! a detailed list of the additions made to computers on which 60% depreciation was claimed by the assessee company was provided to the LO AO (copy enclosed as annexure-9) it is a well settled law now that the word computer has ,to be read as computer system comprising of the all connecting devices which are essential parts of the computers. In the light of judicial pronouncement of ACIT Vis. Container Corporation! ITAT Delhi Bench and ITO Vs. Samiran Majumdar, ITAT Kolkata bench (Copy of judgements are attached as per Annexure 10 & 11). ----H

10. I have carefully considered the contentions of the appellant and have gone through the various judicial

precedents relied upon by the appellant. Since the expenditure is with regard to the computer peripherals, printers, UPS which cannot be used stand alone, therefore, in view of the decision relied upon by the appellant, I agree that in the facts and circumstances of the appellant's case, he is entitled for depreciation @ 60%."

6.2 Ld. DR has relied upon the orders of the authorities below.

6.3 Respectfully following the same we are inclined to allow this ground of appeal raised by the assessee.

7. Ground No. 5: The assessee had claimed expenses amounting to Rs.133,141,216/-, which included foreign travel and conveyance expenses amounting to Rs.62,82,197/-.. On perusal of the schedules to the profit and loss account placed at page 89 105 of the paper book, the Ld. AO observed that this amount included provision for dividend amounting to Rs.31,66,650/-. The Ld. AO disallowed the sum on the basis that the same included foreign travel expenses claimed by the assessee and no details had been filed by the assessee.

7.1 Aggrieved by the addition made by the Ld. AO assessee preferred an appeal before the Ld. CIT (A). The Ld. CIT (A) on the basis of the submissions and explanation provided by the assessee has remanded the issue back to the Ld. AO to verify the facts stated by the assessee and to allow the claim accordingly.

7.2 Aggrieved by the directions of the Ld. AO the assessee is in appeal before us now.

7.3 The Ld. AR submits that the details of the foreign travel expenses have been provided in the paper book at page 189 which include the provision for dividend amounting to Rs.31,66,650/-. He submitted that these details has been provided to the Ld. AO at the time of assessment proceedings as is evident from the letter dated 11/11/2009 placed at page 171 of the paper book addressed to the Ld. AO. The Ld. AR submitted that the accounts have been prepared as required by Schedules VI to the Companies Act, 1956. He submitted that the provision or dividend has already been added back to the profits of the assessee as per the financials for the computation of taxable income. He referred to page 98 of the paper book where the actual payment has been added back.

7.4 On the contrary the Ld. DR supported the orders passed by the authorities below.

7.5 We have perused the details and the orders passed by the authorities in specific reference to the paper book relied upon by the assessee. We agree with the contentions of the Ld. AR that the provision for dividend has been added back in the computation. Therefore we are inclined to modify the directions

issued by the Ld. CIT (A) that the Ld. AO may allow the same as an expenses.

7.6 Accordingly this ground raised by the assessee stands allowed.

8. <u>Ground No. 6:</u> During the year under consideration the assessee had made a payment of external services and recruitment expenses amounting to Rs.32,17,320/- without deducting TDS. The Ld. AO made disallowance of Rs.32,17,320/- on the basis that taxes have not been deducted at source on these expenses.

8.1 Aggrieved by the order of the Ld. AO assessee preferred an appeal before Ld. CIT (A). It was submitted by the assessee that the payment have been made by the assessee to Hepano, Australia, which was in the nature of agency commission, procured for the purposes of business on which no tax was deductible by the assessee in view of the DTAA with Australia. The assessee submitted that out of the external services amounting to Rs.15,62,916/-, Rs.10,78,128/- has been paid to Dr. Lotafi Bakshi and TDS has been deducted on this payment. Out of recruitment expenses amounting to Rs.16,54,404 which were paid to 3 vendors, on which TDS was duly deducted. The Ld. CIT (A) forwarded these details under rule 46A to the Ld. AO on 19/11/2010. The ld. AR submitted that several

reminders were issued to the Ld. AO on 7/11/2011, 17/12/2012, 10/07/2013 and 02/08/2013. He submitted that in spite of numerous reminders issued to the Ld. AO for sending a remand report, the same has not been complied with. The Ld. CIT(A) directed the Ld. AO to verify that the TDS as claimed has been deducted by the assessee for the purposes of allowing relief on those amounts.

8.2 Aggrieved by the order passed by the Ld. CIT (A) the assessee is in appeal before us now.

8.3 The Ld. AR submitted that the payment has been made by the assessee to a non-resident entity with no permanent establishment in India for services rendered outside India for the purposes of business of the assessee outside India. He placed his reliance upon the CBDT circular No. 786 dated 07/02/2000 and CBDT circular No. 23 dated 23/07/1969 where it has been stated that if a non-resident agent operates outside the country no part of its income arises in India.

8.4 On the contrary the Ld. DR submitted that assessee has not submitted any details in respect of the payments made to the non-resident in the form of any agreement, MOU etc. He submitted that whether the payment has been made wholly and exclusively for the purpose of business needs to be verified.

8.5 We have perused the details and the orders passed by the authorities in specific reference to the paper book relied upon by the assessee. It is observed that the Ld. AO has not verified the details in respect of the submissions made by the assessee till date. The Ld. AR has placed reliance upon the certificate issued by the Chartered Accountants for the assessee dated 3rd of November 2006, which was a part of the additional evidence demanded to the assessing officer for verification by the Ld. CIT (A). It has also been further submitted by the Ld. AR that no payment arises or accruing in India as the services are rendered outside India and the payment is also made outside India. The certificate relied upon by the Ld. AR is placed at page 310 of the paper book and that the said payment has been made in terms of invoice No. 64 dated 17/09/2009 as per MOU dated 10/07/2006.

8.6 The Ld. AR has placed reliance upon the decision of jurisdictional High Court in the case of CIT versus EON technology (P) Ltd reported in (2011) 15 Taxmann.com 391. The Hon'ble High Court has held as under:

"Head note:

according to the revenue, commission income had accrued and arisen in India and when credit entries were made in the books of the assessee in favour of ETUK and the said income towards commission was received in India. The stand of the revenue is contrary

to the 2 circulars issued by the CBDT in which it is clearly held that when a non-resident agent operates outside the country no part of his income arises in India and since payment is remitted directly abroad and merely because an entry in the books of account is made it does not mean that the non-resident has received any payment in India. This fact alone does not establish business connection. In circular No. 786 dated 07/02/2008 has been stated that in such cases the Indian assessee is not liable to deduct TDS under section 195 from the commission and other related charges payable to such non-resident having rendered services outside India."

8.7 We find that similar is the situation before as in case of the present assessee. The said certificate placed at page 311 of the paper book establishes a business connection between the assessee and the non-resident. Hon'ble Supreme Court has interpreted the term 'business connection' to mean something more than mere business not being equal carrying on business, but of a relationship between the business carried on by a non-resident which yields profits and gains and some activities in India, which contributes directly or indirectly to earning of those profits or gains.

8.8 In the instant case the assessing officer has not discussed any factual aspect in respect of the payment made by the assessee to the non-resident. The Ld. AR has submitted before us the MOU dated 10/07/2006 entered into by the assessee with the non-resident. We accordingly remand the issue to the Ld. AO for verifying the details as submitted by the assessee before the Ld.

CIT (A) and to examine the issue in the light of the decision by Hon'ble High Court in the case of CIT versus EON technology private limited (supra).

8.9 Accordingly this issue raised by the assessee stands allowed for statistical purposes.

9. <u>Ground No. 7</u>: Assessee had claimed bad debt and advances reimbursed amounting to Rs.23,39,405/- as bad debts being outstanding for more than a year and a recovery was remote. The assessee claimed the said amount as bad debt under section 36 (1) (vii) of the act. The Ld. AO rejected assessee's contentions as the companies were well-known group and there was no reason for the bad debts to become bad.

9.1 Aggrieved by the order of the Ld. AO assessee preferred an appeal before the Ld. CIT (A).

9.2 The Ld. CIT (A) held that the assessee had not given any evidence that the amount was reflected in the earlier in its P&L account. Relying upon the decision of Hon'ble Kerala High Court in the case of M/s Travancore TS State company Ltd Vs. CIT reported in 197 ITR 528, he upheld the actions of the AO and confirmed the addition.

9.3 Aggrieved by the order of the Ld. CIT (A) the assessee is in appeal before us now.

9.4 The Ld. AR has submitted that the authorities below has not disputed regarding the said amount being offered to tax in the preceding years. He submitted that the authorities below has ignored the evidence and submission placed on record wide letter dated 11/09/2013 and 31/10/2013 whereby details/documents substantiating the said amounts being offered to tax in the preceding years along with documentary evidences with regard to communication held with the companies to recover the same were produced.

9.5 On the contrary the Ld. DR submitted that the assessee has not proved that the amount claimed was in the nature of a trading debt or not.

9.6 We find that similar is the situation before as in case of the present assessee.

9.7 The Ld. AR had referred to page 89 of the paper book wherein the bad debts written off have been claimed in the profit and loss account for the year under consideration. On perusal of the notes to the audited accounts No. 20 (9) refers to the return of debts which includes the dead from previous years. During assessment proceedings the Ld. AO was well possessed with these details, to prove that the debts were written off. A similar issue arose before Hon'ble Supreme Court in the case of M/s Vijaya bank versus CIT and Anr.,

reported in (2010) 190 taxman 257 wherein the Hon'ble court has held that an assessee debits the amount of bad debts to the profit and loss account and credits the said account it would constitute a write-off of actual bad. In the light of the ratio laid down by Hon'ble Supreme Court in the case of M/s Vijaya bank Vs.CIT (supra) the claim of bad debts stands allowed.

9.8 Accordingly this ground raised by the assessee stands allowed.

9.9 In the result the appeal filed by the assessee for assessment year 2007-08 stands allowed as per the discussion above.

A Y 2010-11: (ITA No. 1057/Del/14, ITA No. 2280/Del/14 and CO No. 16/Del/15):

10. These appeals have been filed by the assessee and revenue against order dated 23/01/2014 passed by Ld. CIT (A) 15, New Delhi for assessment year 2010-11 on the following grounds of appeal.

ITA No. 1057/Del/2014(Assessee's appeal):

The assessee preferred this appeal on the following grounds:

"1.The order of the Ld. A.O. is bad in law and on the facts and circumstances of the case.

2. The Ld. A.O. has erred in law New Delhi on the facts of the case in making addition of Rs.43,40,745/-

under section 14A on account of expenditure incurred for earning dividend or other exempt income.

3. The above grounds are without prejudice to each other."

10.1 The only issue raised by the assessee in this appeal is in respect of the disallowance made by the Ld. AO under section 14 A on account of expenditure incurred for earning dividend income during the year under consideration. At the outset the Ld. AR submitted that the issue needs to be restored back to the Ld. AO by relying upon the order of this Tribunal in assessee's own case for assessment year 2009-10 in ITA No. 4563/del/2012 placed at page 228 of the paper book. He referred to para 12 of the said order wherein this Tribunal has dealt as under:

"12.) As regards ground No.1 in IT.A.No. 4563/De1/2012, and ground No.2 in IT.A.No. 4706/De1/2012 with regard to upholding of partial disallowance u/s 14A, we find that Ld. CIT(A) has not considered the submissions of the assessee regarding break-up of investment which included investment in group companies and also has not considered that a major part of investment in mutual funds was in debt related investments where the investments generally earn fixed income but distribution of income is in the form of dividends. We are of the opinion that fixed maturity plans offered by mutual funds definitely require much less professional expertise as compared for making investments in equity related schemes and therefore, less expenditure is involved in managing such schemes. Moreover before upholding partial disallowance u/s 14A, Ld. CIT(A) should have considered the submissions of assessee that a part of investments were not for earning dividends but were

strategic investments. In view of the above, we are of the opinion that the issue of disallowance be readjudicated by the Assessing Officer and the Assessing Officer should decide the disallowance on the basis of his objective findings after giving a reasonable opportunity to the assessee of being heard. In view of the above, the appeal of the assessee in LT.A.No.4563/De1/2012 is allowed for statistical purposes and the Revenue's appeal in LT.A.No. 4706/De1l2012 is partly allowed for statistical purposes."

10.1 Respectfully following the same we set aside this issue to be re-adjudicated by the Ld. AO in accordance with law, after giving a reasonable opportunity of being heard to the assessee.

10.2 In the result the appeal filed by the assessee stands allowed for statistical purposes.

I.T.A.No. No. 2280/Del/2014 (Revenue's appeal):

11. The issue raised by the revenue in this appeal ease in respect of the deduction under section 36 (1) (ii) being granted by the Ld. CIT (A) on the commission paid to the employee directors.

11.1 We have dealt with this issue in assessee's appeal for assessment year 2007-08 being ground No. 2 therein . Facts for the year under consideration being identical with that of assessment year 2007-08, we dismiss this ground of revenue's appeal by relying upon the discussions and findings given there in.

11.2 Accordingly the appeal filed by the revenue stands dismissed.

CO No. 16/del/2015: (Assessee's Cross Objections):

12. At the outset the Ld. DR and has objected to the maintainability of this cross objection by the assessee under section 253 (5) of I.T.Act, as the assessee has filed across appeal for the year under consideration against the impugned order dated 23/01/2014 passed by the Ld. CIT (A).

12.1 It is anyways observed that the cross objection filed by the assessee is against the appeal filed by the revenue and is in support of order passed by the Ld. CIT (A). As we have dismissed the appeal filed by the revenue, the cross objection filed by the assessee stands infructuous.

13. Accordingly the cross objection filed by the assessee stands dismissed.

Order pronounced in the open court on 18th Aug., 2016.

Sd/-	Sd/-
(S. V. MEHROTRA) ACCOUNTANT MEMBER	(BEENA A. PILLAI) JUDICIAL MEMBER

Date: 18.08. 2016
Sp.

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order

S.No.	Details	Date	Initials	Designation
1	Draft dictated on			Sr. PS/PS
2	Draft placed before author			Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	18/8/16		Sr. PS/PS
6	Kept for pronouncement	18/8		Sr. PS/PS
7	File sent to Bench Clerk	22/8		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			

(ITAT, New Delhi)