

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 612/JP/2017
निर्धारण वर्ष / Assessment Year :2012-13

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| The DCIT, Circle-6, Jaipur. | बनाम Vs. | M/s Anamika Conductors Ltd., B-129 Rajendra Marg, Bapu Nagar, Jaipur. |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCA5681P | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

आयकर अपील सं./CO No. 32/JP/2017
(Arising out of ITA No. 612/JP/2017)
निर्धारण वर्ष / Assessment Year :2012-13

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| M/s Anamika Conductors Ltd., B-129 Rajendra Marg, Bapu Nagar, Jaipur. | बनाम Vs. | The DCIT, Circle-6, Jaipur. |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AACCA9996N | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

निर्धारिती की ओर से / Assessee by : Shri G.M. Mehta (C.A.)
राजस्व की ओर से / Revenue by : Smt. A.S. Nehra (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 24/10/2017
उदघोषणा की तारीख / Date of Pronouncement: 26/10/2017

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is the appeal by the Revenue and the cross objection filed by the assessee against the order of Id. CIT(A)-II, Jaipur dated

23.05.2017 for A.Y. 2012-13 wherein the Revenue has taken the following grounds of appeal:-

"(i) whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in deleting the addition made by the AO by way of disallowance of depreciation claimed on wind mill for Rs. 29,68,289/- by holding that depreciation @ 80% has to be allowed on complete wind mill without segregating investment on building part and on electric item without appreciating that depreciation 80% is allowable only on wind mill plant not on the other electrical fitting and building etc.

(ii) whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in deleting the addition of Rs. 27,94,439/- made on account of disallowance u/s 40(a)(ia) without appreciating the fact that the second proviso to this section was inserted w.e.f. 01.04.2013 and it applicable in relation to the AY 2013-14 and subsequent AYrs.

(iii) whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in deleting the addition of Rs. 21,250/- made by the AO for depositing the employees' contribution to PF & ESI beyond the prescribed time limit provided in respective Acts.

(iv) whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in holding that employees' contribution to PF & ESI are governed by the provisions of section 43B and not by section 36(1) (va) r.w.s. 2(24)(x) of the Act.

(v) whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in restricting the disallowance made u/s 14A by considering the investment in equity shares of Rs. 40,00,000/- only."

Ground of appeal in assessee's cross-objection are as under:

"(1) That Id. CIT(A), after appreciating the facts of the case and the law laid down by Hon'ble Jurisdictional High Court { CIT vs. Mehru Electricals & Mechanical Engg. (P) Ltd. (2016) 388 ITR 169 (Raj)} was legally correct in deleting the addition of Rs. 29,68,289/- on account of depreciation allowable @ 80% on civil construction and electric installation on the wind mills, which the Id. AO by avoiding it, raised ground before this Hon'ble ITAT.

(2) That Id. CIT(A) was justified in deleting following additions for which Id. AO, without appreciating the legality of issue, preferred appeal before this Hon'ble ITAT:

(i) Rs. 27,94,439/- u/s 40(a)(ia) of IT Act when the assessee Company is not in default and has submitted Form 26A as per provisions of section 201(1) of IT Act;

(ii) Rs. 21,250/- on account of payment of PF/ESI {(2017) 393 ITR 421 (Raj)};

(3) Ld. CIT(A) erred in law and on facts in sustaining addition of Rs. 2,82,352/- u/s 14A of IT Act.

(4) Ld. CIT(A) was not justified in sustaining addition of Rs. 29,350/- for business exp. ignoring the fact that the assessee Company."

2. Regarding ground no. 1 of the Revenue's appeal and the ground no. 1 of the assessee's cross objection, the Id. AR submitted that in appellant's own case for earlier years, depreciation @ 80% on Wind mill, its civil construction and electrical installation was found to be allowable by this Hon'ble Tribunal. Further, the Hon'ble Rajasthan High

Court in case of CIT vs. Mehru Electricals & Mechanical Engg. (P) Ltd. reported in 388 ITR 169 has held that assessee was entitled to depreciation on a room construction along with the cost of erection and installation of electrical items covered under "Plant and machinery" for a wind mill, entitled for depreciation at the same rate as applicable to the wind mill.

3. In this regard, the relevant finding of the Id. CIT(A) as contained at para 2.3 of his order is reproduced as under:-

"2.3 I have perused the facts of the case, the assessment order and the submissions of the appellant. This issue had arisen in the case of the assessee for the assessment year 2010-11 in appeal No. 138/13-14 also wherein it was held as follows:

"2.3 I have perused the facts of the case, the assessment order and the submission of the appellant. This is a case where the Assessing Officer has not allowed depreciation @ 80% on foundation and installation civil work (considered as a building) and on electrical items and internal/external lines (considered as ordinary plant & machinery) on the new windmill purchased during the year as well as on the opening WDV of the Windmills. The facts of this case are similar to the facts in the appellant's case in the preceding years where the CIT(A) and ITAT have decided the matter in appellant's favour. In A.Y. 2005-06, the ITAT (in ITA No. 852/JP/2009) has held that-

"After hearing both the parties and on perusal of the records, we find that such issue has already been decided by this Bench vide its order dated 18.07.2008 in the cross appeal in I.T.A. No. 745/JP/07 Vijay industries Vs. I.T.O. and in I.T.A. No. 731/JP07-ACIT Vs. M/s Vijay Industries for the assessment year 2003-04. The Id. CIT(A) has following the order of this Bench in the case of

Vijay Industries, supra, wherein facts of case are identical to the facts of the present case and we find no infirmity in the order of the Id. CIT(A). Thus Ground No. 1 and 2 of the Revenue are dismissed."

This decision has been followed by the ITAT in A.Y. 2007-08 to 2009-10 and by the CIT(A)-II in subsequent assessment years. Respectively, following the above orders, depreciation is directed to be allowed @ 80% on foundation and installation civil work and electrical items and internal/external lines. The disallowance made by the Assessing Officer is directed to be deleted. This ground is allowed."

In view of the above, the disallowance made by the Assessing Officer is deleted. The ground of appeal is allowed."

4. In case of CIT vs. Mehru Electricals & Mechanical Engg. (P) Ltd (supra), the Hon'ble Rajasthan High Court has held as under:-

"8. The first issue is regarding depreciation claimed on civil foundation as well as on electric turbine generator for the windmill. The Commission has made a reference to the judgment of the Madras high Court in the case of Hi Tech Arai Ltd. (Supra) as the order passed by the Tribunal at Delhi. The observations are however that the Department has not accepted the verdict of the High Court, though the judgment of the Madras High Court in the case of Hi Tech Arai Ltd. (Supra) has been affirmed by the Apex Court. In view of the above, learned counsel for the Revenue could not contest the issue in regard to the admissibility of depreciation. The issue before the Madras High Court was again of a wind mill where depreciation on power generation was claimed. It was found that main business of the assessee was not of producing or generating electricity and thus, the Madras High Court decided the issue in favour of the assessee and against the Revenue. The issue having been confirmed by the apex court on

dismissal of appeal, we are unable to take a different view as has been taken by the Madras High Court and has to be applied herein also.

9. The other issue is regarding the rate of depreciation.

10 According to the Revenue, rate of depreciation claimed by the assessee submitted not have been allowed. The issue aforesaid has not been decided by the Tribunal properly.

11. We find that when the civil work and electric generator are taken to be a part of the wind mill, rate as is applicable for the depreciation for the wind mill would apply to the present case also.

12. In the background aforesaid, we do not find that even a dispute can be raised regarding the rate of depreciation admissible to the assessee. In our opinion, the Tribunal has rightly allowed the appeal. Finding no illegality therein, we are unable to cause interference in the order passed by the Tribunal.”

5. In light of above, respectfully following the decision of the Hon'ble Rajasthan High Court in case of Mehru Electricals & Mechanical Engg. (P) Ltd. (Supra) and the consistent view taken by the Co-ordinate Benches in assessee's own case in the earlier years, we do not see any infirmity in the order of the Id. CIT(A), hence, the same is confirmed. The ground of appeal taken by the Revenue is dismissed and the cross objection which is in support of the Id. CIT(A) order is allowed.

6. Regarding Ground no. 2 of the Revenue's appeal and the cross objection no. 2(ii) of the assessee's cross objection, the Id AR submitted that the issue is covered in assessee's own case by the Hon'ble Tribunal

decision for A.Y. 2011-12 and there is no infirmity in the order of the Id CIT(A) who has followed the same and remanded the matter to the AO to verify the certificates given by the payees evidencing reporting of income and payment of taxes thereon.

7. The relevant finding of the Id. CIT(A) is contained at para 3.3 which is reproduced as under:-

" I have perused the facts of the case, the assessment order and the submissions of the appellant. An amount to Rs. 29,18,171/- was disallowed in terms of section 40(a)(ia) on which provisions of section 194A, 194J and 194C were applicable. In the present proceedings, the Authorized Representative stated that in the appellants own case for the assessment year 2011-12, the issue has been decided by the ITAT, Jaipur in ITA No. 818/JP/2014 dated 22.08.2016 wherein it was held as under:-

"We have also gone through judgment in the case of CIT Vs. Ansal Plaza Mark Township P. Ltd (supra), in fact the assessee has not raised this issue before the Id. Assessing Officer as well as before the Id. CIT(A). This issue has a factual determination and verification, therefore, it will be in the interest of justice to remand the matter back to the file of the Assessing Officer to verify the truthfulness on the submissions made by the Id. AR whereby it was contended that the creditors had already deposited the tax on interest amount. In the light of the fact, the appeal is allowed for statistical purposes only. It is made clear that if the creditors have deposited the tax on the interest accrued in their favour after having received from the assessee, which was not deducted by the assessee, in that eventuality benefit be extended to the assessee in terms of amended section 40(a)(ia) of the Act."

The assessee also filed certificates from TATA capital Limited, Bajaj Finance Ltd. Magam Fincorp Ltd. and Reliance Capital Ltd.

These certificates were not before the Assessing Officer and in the case of Indiabulls Financial Services Ltd. the certificate in the prescribed format has not been filed. In view of the directions of the Hon'ble ITAT the Assessing Officer to verify the same in the light of the directions as above.

With regard to an amount of Rs. 1,23,732/- relating testing charges paid to Shri Ramesh Kumar and Tag Corporation, the Authorized Representative relying on the decision of Hon'ble Allahabad High Court 357 ITR 642 for the fact that these amounts had been paid during the year and hence, the provisions of section 40(a)(ia) were not applicable. However, in view of the decision of the Hon'ble Supreme Court in the case of Palam Gas Service 81 Taxman.com 43 (SC) has held that section 40(a)(ia) covers not only those cases where the amount is payable but also when it is paid and the decision of the Allahabad High Court relied on by the assessee has been over ruled. In view of the above discussion, the disallowance with regard to the testing charges is upheld."

8. We have heard the rival contentions and perused the material available on record. We find that the Id. CIT(A) has followed the directions of the Co-ordinate Bench in assessee's own case for A.Y. 2011-12 and has remanded the matter back to the Assessing Officer to verify the certificates from various NBFCs to whom the assessee has paid interest during the year in order to verify where they have offered the same in their return of income and deposited taxes thereon. Further in respect of testing charges of Rs. 1,83,732/-, the Id. CIT(A) has confirmed the disallowance on account of non-deduction of TDS following the decision of the Hon'ble Supreme Court in case of Palam Gas Service and in respect of which there is no dispute. We accordingly

do not see any infirmity in the order of the Id. CIT(A) hence, the same is confirmed. The ground of appeal taken by the Revenue is dismissed and the cross objection which is in support of the Id. CIT(A) order is allowed.

9. Regarding ground no. 3 and 4 of the Revenue's appeal and the ground no. 2(ii) of the assessee's cross objection which relates to disallowance of contribution to PF & ESI beyond the prescribed time limit. The Id. CIT(A) has given a finding that the contribution to PF & ESI has been paid by the appellant before due date of filing the return of income u/s 139(1) and the said finding remained uncontroverted before us. Further, the issues is covered in favour of the assessee by the decision of Hon'ble Rajasthan High Court in case of CIT vs. State Bank of Bikaner & Jaipur and other cases which has rightly been followed by the Id. CIT(A). We accordingly do not see any infirmity in the order of the Id. CIT(A) hence, the same is confirmed. The ground of appeal taken by the Revenue is dismissed and the cross objection which is in support of the Id. CIT(A) order is allowed.

10. Regarding ground no. 5 of the Revenue's appeal and ground no. 3 of the cross objection filed by the assessee which relates to disallowance u/s 14A, the relevant facts and findings of the Id. CIT(A) are contained at para 5.3 of his order which is reproduced as under:-

"I have perused the facts of the case, the assessment order and the submissions of the appellant. A disallowance of Rs. 6,00,493/- was made under section 14A as the assessee had made investments in equity shares. No reply had been filed during the assessment proceedings, on this issue and the Assessing Officer

after recording his satisfaction had added the above amount. In the present proceedings, it is submitted that an amount of Rs. 45,07,000/- had been invested as on 31.03.2011 and Rs. 40,00,000/- as on 31.03.2012. it was further contended that no dividend was received from equity shares of Anamika Oil Pvt. Ltd. and also that the assessment for the A.Y. 2011-12 had been made under section 143(3) and the issue of investment had been examined by the Assessing Officer and no disallowance under this section had been made for the assessment year 2011-12. In the present year also it was claimed that the investments has been made from interest free funds available with the assessee company and no interest bearing funds had been used for the same. However, a perusal of the balance sheet of the assessee shows that interest free funds were not available for the investment made by the assessee. However, the alternative claim of the assessee that the disallowance be restricted to investment of Rs. 40,00,000/- made during the year is reasonable. Considering the same proportionate deduction would come to Rs. 2,82,352/- which is confirmed.”

11. During the course of hearing, the Id AR submitted that the investments in equity shares of M/s Anamika Oil Pvt. Ltd. were made as under:

| Equity shares | 31.03.2011 | 31.03.2012 | Total (31.03.2012) |
|-----------------------|------------|------------|--------------------|
| Anamika Oil Pvt. Ltd. | 45,07,000 | 40,00,000 | 85,07,000 |

New equity shares of Rs. 40,00,000/- of M/s Anamika Oil Pvt. Ltd. were purchased by the assessee company on 29th March 2012. However Id. CIT(A) sustained addition of Rs. 2,82,352/- on proportionate basis but of Rs. 6,00,493/- without considering following facts:

(i) The assessment for the A.Y. 2011-12 was completed u/s 143(3) of IT Act on 23rd December 2011 in which purchase of equity shares of Rs. 45,07,000/- of M/s Anamika Oil Pvt. Ltd. was considered as made out of interest free funds of the assessee company. The question becoming final in preceding year (CIT Vs. Aventis Pharma Ltd. (2017) 396 ITR 688 (Pat)).

(ii) No nexus was established by Id. AO in between interest bearing loans and investments in equity shares of Anamika Oil Pvt. Ltd.

(iii) The interest free funds available with the assessee company as on 31.03.2011 and 31.03.2012 were as under:

| Interest free funds | 31.03.2011 | 31.03.2012 |
|---------------------------|--------------|--------------|
| Share capital | 2,68,31,610 | 2,95,31,610 |
| Reserves and surplus | 15,50,93,619 | 18,59,20,100 |
| Securities premium | 2,18,42,240 | 4,26,42,240 |
| Total interest free funds | 20,37,67,469 | 25,80,93,950 |

During the year, there was increase in interest free funds f Rs. 5,43,26,481/-, the presumption is that new shares were purchased out of interest free funds unless nexus of interest bearing loans is proved by Id. AO.

(iv) No dividend or exempt income was received from equity shares of Anamika Oil Pvt. Ltd. therefore in absence of exempt income, no disallowance can be made. Reliance is placed on following judgments:

(a) CIT Vs. Lakhani Marketing Industries (2014) 272 CTR (P&H) 265: In absence of dividend income for shares, deduction of interest liability out of other income cannot be disallowed under section 14A.

(b) CIT Vs. Holcim India Pvt. Ltd. (2014) 272 CTR (Del) 282: When there is no dividend income during the year, section 14A cannot be invoked.

(c) CIT Vs. Shivam Motors Pvt. Ltd. (2014) 272 CTR (All) 277: What section 14A provides is that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for earning the income is not an allowable deduction. In absence of any tax free income, the corresponding expenditure could not be worked out for disallowance.

(d) CIT Vs. Corrtch Engery Pvt. Ltd. (2015) 376 ITR 97(Guj): Disallowance of expenditure relating to non-taxable income. No claim for exemption-expenditure relating to such amount cannot be disallowed.

(v) The circular of CBDT referred to by the Id. AO in order u/s 143(3) is against the law laid down by various High Courts.

On the facts and considering the law position, Id. CIT(A) was not justified in sustaining disallowance of Rs. 2,82,352/- applying provisions of section 14A of IT Act and that too on proportionate basis when shares of Anamika Oil Pvt. Ltd. were purchased on fake end of year on 29.03.2012.

12. We have heard the rival contentions and perused the material available on record. It is noted that the investment worth Rs. 45.07 lacs in equity shares of M/s Anamika Oil Pvt. Ltd. have been made by the assessee in the earlier years and further, fresh investment worth Rs 40 lacs have been made on 29.03.2012. If we consider the availability of

interest free funds during the year, it is noted that interest free funds at the beginning of the year stood at Rs 20.38 crores and at the end of the year stood at Rs 25.81 Cr. A presumption will therefore arise that the investment were made out of interest free funds and not out of the borrowed funds especially in view of the fact that no nexus has been established between the borrowed funds and the investment in the equity shares by the AO. In light of above, no disallowance under section 14A is called for in the instant case. The revenue's ground of appeal is dismissed and the assessee's cross objection is allowed.

13. Regarding ground no. 4 of the assessee's cross objection wherein the assessee has challenged the action of the Id. CIT(A) in sustaining addition of Rs. 29,350/- for business expenses, it is noted that the Assessing Officer has disallowed 10% of the conveyance and telephone holding that the expenses are not open for verification and the element of personal use cannot be ignored, which has been confirmed by the Id. CIT(A). There is no basis for adhoc disallowance in the eyes of law. Hence, the disallowance so made by the AO and confirmed by the Id CIT(A) is hereby deleted.

In the result, appeal of the Revenue is dismissed and cross objection of the assessee is allowed.

Order pronounced in the open court on 26/10/2017.

Sd/-
(कुल भारत)
(Kul Bharat)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 26/10/2017.

*Santosh.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- DCIT, Circle-6, Jaipur.
2. प्रत्यर्थी / The Respondent- M/s Anamika Conductors Ltd.,
B-129 Rajendra Marg, Bapu Nagar, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 612/JP/2017, CO No. 32/JP/2017}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar