

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA

[Before Sri N.V. Vasudevan, Judicial Member & Sri J. Sudhakar Reddy Accountant Member]

I.T.A. No. 1798/Kol/2014

Assessment Year: 2009-10

&

I.T.A. No. 2161/Kol/2014

Assessment Year: 2009-10

Hindustan Gum & Chemical Ltd.....Appellant
Birla Building
4th Floor
9/1, R. N. Mukherjee Road
Kolkata - 700001
[PAN : AAACH 7214 E]

The Deputy Commissioner of Income Tax, Circle-12, Kolkata.....Respondent
Aayakar Bhawan
7th Floor
P-7, Chowringhee Square
Kolkata - 700 069

Appearances by:

Shri J.P. Khaitan & Shri Sanjay Bhaumik, AR, appeared on behalf of the assessee.
Shri Arindam Bhattacharjee, Addl. CIT, DR, appearing on behalf of the Revenue.

Date of concluding the hearing : September 14, 2017

Date of pronouncing the order : October 25, 2017

ORDER

Per J. Sudhakar Reddy :-

These are cross-appeals filed for the Assessment Year 2009-10, by the assessee and the revenue, directed against the order of the Id. Commissioner of Income Tax (Appeals)-XII, Kolkata ('Id. CIT(A)'), passed u/s 250 of the Income Tax Act (the 'Act'), order dt. 11/07/2014.

2. First we take up the assessee's appeal in *ITA No. 1798/Kol/2014* for the Assessment Year 2009-10. The grounds of appeal for the same read as under:-

“1. That on the facts and in the circumstances of the case, the learned CIT (Appeals) erred in not deleting the disallowance of Rs.5,61,305/- treated by learned DCIT as expenses attributable to earning dividend income and did not hold that no expenses have been incurred to earn the said income.

2. That on the facts and in the circumstances of the case, the learned CIT (Appeals) erred in not holding that provision for leave encashment of Rs.17,63,884/- is neither statutory liability nor contingent liability and therefore not to be considered for the purpose of computing disallowance u/s.43B(f) of the I.T. Act, 1961.

3. That on the facts and in the circumstances of the case, the Learned CIT (Appeals) erred in not holding that Penalty of Rs.24,000/- is not paid for violation of any law and therefore the same is allowable as business expenditure.

That the appellant craves leave to. add to. alter amend and/or withdraw all or any of the above grounds at or before the hearing of the appeal.”

3. We have heard the Id. Senior Counsel Shri J.P. Khaitan, on behalf of the assessee and Shri Arindam Bhattacharjee, on behalf of the Revenue. On careful consideration of the papers on record, case laws cited and orders of the Authorities below, we hold as follows:-

4. Ground No. 1 of the assessee’s appeal is on the disallowance made u/s 14A of the Act.

4.1. The Id. Counsel for the assessee, submits that the Tribunal in the assessee’s own case, in the earlier assessment year, in *ITA No. 462/Kol/2014*,

Assessment Year 2008-09, order dt. 08/03/2017, had considered the issue and held that no disallowance was called for under Rule 8D2(ii) of the Income Tax Rules, 1962 (the 'Rules'), for the reason that the assessee had sufficient interest from own funds to make the investments and that the assessee has made strategic investments and under those circumstances, no disallowance can be made under Rule 8D2(ii) of the Rules.

4.1.1. The assessee's submission is that only dividend bearing investments should be taken into account for the purpose of working out disallowance under Rule 8D2(ii) of the Rules.

4.2. On consideration of these submissions, we are of the considered opinion that the issue should be restored to the file of the Assessing Officer with a direction that the disallowance under Rule 8D2(ii) of the Rules, should be determined by applying the following propositions of law:-

The Bombay High Court in the case of *HDFC Bank Ltd. v. DCIT (2014) 366 ITR 505(Bom HC)*, held as follows:-

Income—Expenditure incurred in relation to income not includible in total income—Exempt income—Assessee made investment in tax free securities—AO disallowed proportionate disallowance u/s 14A—Tribunal deleted disallowance holding that investment in tax free securities/investments was made by assessee's own funds—Held, finding of fact was given by tribunal that assessee's own funds and other non-interest bearing funds were more than investment in the tax—free securities—Said factual position was not disputed—Thus assessee's capital, profit reserves, surplus and current

account deposits were higher than the investment in tax-free securities—It would have to be presumed that investment made by the Assessee would be out of the interest-free funds available with Assessee—Tribunal was justified in deleting addition made by AO—Revenues' appeal dismissed

5. This Bench of the Tribunal in the assessee's own case for the earlier Assessment Years, in ITA No. 4622/Kol/2014, A.Y. 2008-09, order dt. 08/03/2017 has taken a similar view. The Assessing Officer is directed to apply this proposition of law as laid down in the above decision to the facts of this case and determine the disallowance under Rule 8D2(ii) of the Rules. The claim of the assessee that it has made strategic investments and that these investments should not be considered while computing disallowance under Rule 8D2(ii) of the Rules, has also to be adjudicated by the Assessing Officer.

6. The Hon'ble Special Bench of the ITAT in the case of *ACIT vs. Vireet Investment Pvt Ltd.* held that only those investments are to be considered for computing the average value of investment which yielded exempt income during the year.

6.1. The Assessing Officer is directed to apply this proposition of law and work out the disallowance, if any, under Rule 8D2(ii) of the Act. Accordingly, this ground of the assessee is allowed for statistical purposes.

7. Ground No. 2 is on the disallowance of the provisions for leave encashment.

7.1. We find that the Kolkata 'A' Bench of the Tribunal in the assessee's own case for the Assessment Year 2007-08, while adjudicating the same issue remitted the issue to the file of the Assessing Officer to decide the same taking into consideration the outcome of the case in *SLP civil 22889/2008 of the file of the Hon'ble Supreme Court*.

8. Respectfully following the same, we set aside this issue to the file of the Assessing Officer, for fresh adjudication in accordance with law.

9. Ground No. 3 is on the levy of penalty of Rs.24,000/-.

9.1. The Assessing Officer disallowed an amount of Rs.24,000/-, on the ground that it is hit by Explanation 1 to Section 37 of the Act. The assessee submits that this amount was not paid for violation of any law but was just a penalty ordered by the Chief Judicial Magistrate for a finger injury caused to the worker in the assessee's plant at Bhiwani.

10. The Id. Counsel for the assessee did not press this ground due to the smallness of the amount. Hence this ground of the assessee is dismissed as not pressed.

11. In the result, the appeal of the assessee is allowed in part.

12. Now we take up the revenue's appeal *ITA No. 1798/Kol/2014* for the Assessment Year 2009-10. The grounds of appeal for the same read as under:-

"1. That in the facts and circumstances of the case the Ld. CIT(A) erred in deleting the disallowance of Rs. 10,57,671/- made u/ s. 10B by the A.O. on account of other income."

2. That in the facts and circumstances of the case the Ld. CIT(A) erred in deleting the disallowance of Rs. 16,17,999/- against the claim of addl. depreciation by the assessee."

3. That in the facts and circumstances of the case the Ld. CIT(A) erred in deleting the addition of Rs. 2,12,48,372/- made under the head current liabilities without considering the CBDT instruction No. 03/2011."

11. The Id. CIT(A), has dealt with this issue at page 11, para 4.2.1. of his order, wherein he has held as follows:-

"It is noted that, this issue has been decided by the Hon'ble Tribunal in the appellant's favour by vide order dated December 28, 2007 passed in ITA Nos. 150 and 277 (Kol) of 2007 for the assessment year 2003-04- and in ITA Nos. 567 and 580/Kol/2009 for the assessment year 2004-05. The Hon'ble Tribunal considered the decision of Hon'ble Supreme Court in the case of CIT v in Sterling Foods (1999) 2371TR 579(SC)) and noted that the same was rendered with reference to section 80HH, whereas the provisions of section 10B were material different. It is also seen that the similar issue has come up for consideration while adjudicating the appellant's appeal for AY 2007-08 and AY 2008-09 and the issue was decided in favour of the appellant in Appeal No.428/XII/R-12/10-11 Dated 12.03.2013 & Appeal No.

475/XII/12/08-09 dated 13.01.2014 following the above mentioned orders of the jurisdictional ITAT, Kolkata.

In the light of the above discussion & findings, after perusing the facts of the case and respectfully following the decision of the Hon'ble Jurisdictional Tribunal in the case of the appellant and the Appellate Orders for A Y 2007-08 & A Y 2008-09, the addition made by the AO is directed to be deleted. Hence, this ground of appeal is allowed."

12. We find that the Tribunal in the assessee's own case on the very same issue for the Assessment Year 2004-05 up to Assessment Year 2008-09, has adjudicated the issue in favour of the assessee. It was held that rent realized from staff, insurance claim realized in respect of damage of goods, excess liability from sundry creditors written back, for revenue expenses and miscellaneous incomes and receipts including duty draw back have to be treated as income from business and have to be considered while calculating deduction u/s 10B of the Act. The Hon'ble Calcutta High Court in the assessee's own case for the Assessment Year 2003-04 in ITA No. 666/2008, judgement dt. 30th June, 2016, has upheld this order of the Tribunal.

13. Respectfully following the same, we uphold the order of the Id. CIT(A) and dismiss this Ground of the Revenue.

14. Ground No. 2 is against the direction of the Id. CIT(A) to allow the additional depreciation. The claim for additional depreciation.

14.1. This issue is covered in favour of the assessee by the decision of the Kolkata 'A' Bench of the Tribunal in the assessee's own case for the Assessment Year 2007-08 & 2008-09. The Id. CIT(A) has allowed the claim of the assessee by following this order of the Jurisdictional Tribunal.

15. We find no infirmity in the same. In the result, we uphold the finding of the Id. CIT(A) at para 4.2.2., of his order. In the result, this ground of the Revenue is dismissed.

16. Ground No. 3 is on the issue of provision for market to market losses.

16.1. The assessee has accounted for the losses that arose due to exchange rate fluctuations. The losses as on 31st March, 2009 was computed and claimed. The Assessing Officer disallowed the same on the ground that this is a notional loss the Kolkata 'B' Bench of the Tribunal, for the assessee's own case for the Assessment Year 2008-09, had adjudicated the issue in favour of the assessee.

16.2. The Tribunal held as follows:- P.T.O.

7.5. We have heard the rival submissions and perused the materials available on record. We find that the Id AO had placed heavy reliance on Instruction No. 3/2010 dated 23.3.2010. From the perusal of the said Instruction, we find that the same was issued in respect of loss on account of trading in foreign exchange derivatives. The assessee had entered into forward contracts in order to hedge its exchange risk in respect of export proceeds receivable by it in foreign exchange. The assessee's forward contracts were not by way of trading as such in foreign exchange derivatives. Hence, Instruction No. 3/2010 cannot be made applicable to the facts of the instant case. We find that the decision relied upon by the Id AR on the decision of the Hon'ble Bombay High Court supra is in favour of the assessee wherein the question raised before the Hon'ble Court and the decision rendered thereon is as under:-

"The Revenue has urged the following question of law for our consideration:-

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of 'Mark to Market' Loss of Rs.78,10,000/- made by the Assessing Officer on account of disallowance of loss on foreign exchange forward contract loss and not appreciating the fact that the said loss was a notional loss and hence cannot be allowed?"

7. The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently, come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safe guard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard-I I is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative but



only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in *S. Vinodkumar Diamonds (P) Ltd. (supra)* in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in *S. Vinodkumar (supra)* are identical/similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in *S. Vinodkumar Diamonds (P.) Ltd. (supra)*, the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in *CITv. Badridas Gauridu (P.) Ltd. [2003] 261 ITR 256/[2004] 134 Taxman 376 (Mum.)* was not brought to the notice of the Tribunal when it rendered its decision in *S. Vinodkumar Diamonds (P.) Ltd. (supra)*. In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity.

8. In the above view, the question of law, as formulated by the Revenue, does not give rise to any substantial of law. Thus, not entertained."

17. The Id. CIT(A) has applied this decision of the Tribunal in the assessee's own case and granted relief. We find no infirmity in the same and dismiss this ground of the revenue.

18. To sum up, assessee's appeal in *ITA No. 1798/Kol/2014* for the assessment Year 2009-10, is allowed for statistical purposes and revenue's appeal in *ITA No. 1798/Kol/2014* for the Assessment Year 2009-10, is dismissed.

Kolkata, the 25th day of October, 2017.

Sd/-

[N.V. Vasudevan]
Judicial Member

Dated : 25.10.2017
{SC SPS}

Sd/-

[J. Sudhakar Reddy]
Accountant Member

Copy of the order forwarded to:

1. Hindustan Gum & Chemical Ltd
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Kolkata - 700001

2. The Deputy Commissioner of Income Tax, Circle-12, Kolkata
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7th Floor
P-7, Chowringhee Square
Kolkata - 700 069

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

 Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches