

आयकर अपीलीय अधिकरण, 'ए'/'बी'/'सी'/'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

' C' BENCH : CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं

श्री धुव्वुरु आर.एल रेड्डी न्यायिक सदस्य के समक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND Shri Duvvuru RL Reddy, JUDICIAL MEMBER

आयकर अपील सं./I.T.A.Nos.1323, 1324 & 1325/Mds./2016

निर्धारण वर्ष /Assessment years : 2004-05, 2007-08 & 2010-11

M/s.Sivagami Holdings Pvt
Ltd.,
202 (Od No.742), Anna salai,
Chennai-2.

Vs. The ACIT,
Company Circle VI(3),
Chennai 600 034.

[PAN AAECs 3279 A]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by

: Mr.R.Rajasekaran, C.A

प्रत्यर्थी की ओर से /Respondent by

: Mr.Ashish Tripathi,JCIT, DR

सुनवाई की तारीख/Date of Hearing

: 21-09-2017

घोषणा की तारीख /Date of Pronouncement

: 27-09-2017

आदेश / ORDER

PER BENCH

These three appeals of the assessee are directed against the different orders of the Commissioner of Income-tax (Appeals)-15, Chennai pertaining to assessment years 2004-05, 2007-08 and 2010-11. Since all these appeals are filed by the same assessee, these

appeals are clubbed together, heard together, disposed off by this common order for the sake of convenience.

2. First we take up ITA No.1323/Mds./16 (A.Y2009-10)

The main grievance of the assessee in this appeal is with regard to sustaining the levy of interest of ₹1,52,525/- u/s.234D of the Act.

3. The brief facts of the case are that the assessee is a private limited company, which is primarily an Investment Company registered as an NBFC under RBI guidelines, carrying on its operations in Chennai and through its permanent establishment in Kula Lampur, Malaysia. The assessee has a branch at Balupet, Karnataka, where it is managing an agricultural plantation growing Coffee and other allied products. The Assessment u/s 143(3) read with section 147 of the Act was completed on 31.12.2008. Refund raised u/s143(1) for the year under consideration was adjusted in parts against the demand of the assessee company for the assessment year 2003-04. The said refund amount of ₹10,51,913 was not considered while computing tax for the assessed income at the time of assessment u/s 143(3) read with section 147 of the Act. Corresponding interest u/s.234D of the act was also not charged. Notice u/s 154 dated 02.02.2010 was issued and served on the assessee company. The assessee company through letter dated 08.02.2010 submitted that the demand for assessment year 2003-04 stands deleted after giving effect to

the order of CIT(A)-V, Chennai dated 26.11.2007 of the Act. Though the demand for AY 2003-04 stands reduced to NIL, the actual collectible demand on the date of giving appeal effect stands at ₹12,90,099/-. This mistake apparent from records was rectified. Aggrieved by the order of Id. Assessing Officer, the assessee carried the appeal before the Ld.CIT(A).

3.1 On appeal, Ld.CIT(A) observed that the assessee had submitted that no interest u/s.234D is leviable since the words used in statute is 'any refund is granted' and 'the amount refunded' is not applicable. According to Ld.CIT(A), the Id. Assessing Officer was of the view that though demand for A.Y 2003-04 is "Nil", there is actual collectible demand of ₹12,90,099/- but the refund amount of ₹10,51,913/- was not considered while computing tax for order u/s.143(3) r.w.s.147 of the Act. Further, the Id.CIT(A) observed that as there was a refund amount of ₹10,51,913/- on the date of passing the assessment order which was not considered for tax computation. Accordingly, the action of Id. Assessing Officer in passing order u/s.154 and charging interest u/s.234D of the Act was confirmed by the Id.CIT(A). Against the order of Ld.CIT(A), now the assessee is in appeal before us.

4. Before us, Id.A.R submitted that, after giving effect to the order of Ld.CIT(A), the income of assessee for assessment year 2003-04 is only loss at ₹16,59,760/-. Being so, there is no question of adjusting refund of ₹10,51,913/- relating to assessment year 2004-05 towards outstanding tax liability of assessment year 2003-04. Consequently, there cannot be any levy

of interest u/s.234D of the Act vide rectification proceedings u/s.154 of the Act dated 10.02.2010. He also drew our attention to the copy of proceedings dated 12.03.2008, which is giving effect to the appellate order No.166/06-07 for assessment year 2003-04 by ACIT, Company Circle VI(3),Chennai.

5. On the other hand, Id.D.R submitted that on perusal of the records, though outstanding liability for assessment year 2003-04 was Nil, actually, there was a demand on the date of giving effect to the order of Ld.CIT(A) at ₹12,90,099/- relating to A.Y 2003-04. According to him, there was an adjustment of tax refund vide intimation u/s.143(1) of the Act for assessment year 2004-05 at ₹10,51,913/- towards outstanding liability for assessment year 2003-04. According to him, the rectification proceeding is valid. The Id.D.R relied on the order of lower authorities.

6. We have heard both the parties and perused the material on record. The main controversy herein is that there is no outstanding liability for assessment year 2003-04 so as to adjust out of refund relating to the assessment year 2004-05. The prima facie, it looks that as per giving effect to the order of first appellate authority dated 12.03.2008 for assessment year 2003-04, there was a loss at ₹16,59,760/-. However, the Id. Assessing Officer mentioned that outstanding liability as on 12.03.2008 stands at ₹12,90,099/-. Neither the Departmental Representative nor the assessee's counsel produced any material to suggest the exact amount of tax outstanding for the A.Y 2003-04 at the time of passing rectification order

dated 10.02.2010 relating to the A.Y. 2004-05. Hence, in the interest of justice, we remit the issue in dispute to the file of Id. Assessing Officer to ascertain the exact outstanding liability relating to assessment year 2003-04, so as to make adjustments out of refund of tax relating to assessment year 2004-05. At this stage, we refrain from going into other grounds of appeal raised by the assessee as the Assessing Officer has to decide whether there is outstanding for the A.Y 2003-04 or not. Accordingly, this issue is remitted to the file of Id. Assessing Officer for fresh consideration as indicated above.

6.1. In the result, the appeal of the assessee for assessment year 2004-05 is partly allowed for statistical purposes.

7. **Next we take up ITA No.1324/Mds./16 (A.Y2009-10)**

The main grievance of the assessee in this appeal is with regard to confirming the assessment order by the Ld.CIT(A) without indicating that under what provisions of the Act or the Accounting Standard (AS)-11, the foreign exchange fluctuation reserve, which is akin to a revaluation reserve, arising on restatement of the assets and liabilities of the Malaysian branch in the assessee's Balance sheet is taxable.

8. The facts of the issue are that originally the assessment in this case for assessment year 2007-08 was completed u/s.143(3) of the Act on 03.12.2009 determining the total income of ₹ 76,54,003/-. From the perusal of the Balance Sheet in Schedule-2:Reserve and Surplus, it is seen that the assessee has shown a sum of ₹2,66,80,649/- as addition towards Foreign Exchange Fluctuation Reserve. In the case of M/s.Woodward Governor India Pvt. Ltd., Vs. CIT in 312 ITR 254 (SC) wherein held that any addition byway of Foreign Exchange Fluctuation was to be treated as revenue receipt and should be shown in P&L A/c. By following the decision of Apex Court, addition towards Foreign Exchange Fluctuation Reserve has to be taxed. Accordingly, the order u/s.263 of the Act passed by the Id.CIT on 30.03.2012. Aggrieved by the order of Id. CIT, the assessee carried the appeal before this Tribunal in ITA No.1076/Mds./2012 for assessment year 2007-08 vide order dated 25.07.2012 wherein the Tribunal held that:-

"5. We heard shri S.Thyagarajan, learned Chartered Accountant appearing for the assessee and Dr. S.Moharana, Id. Commissioner of Income Tax(Appeals) appearing for the Revenue.

6. It is the case of assessee that the adjustment in the reserve has been made in view of Accounting Standard-11, which is mandatorily to be followed by the assessee in finalizing its accounts. It is the case of the learned Chartered Accountant that it is necessary for the disclosure purpose to account for the

exchange rate fluctuation in the balance sheet by adjusting the reserve amount for the purpose. But the Commissioner argues in the light of the judgement of Hon'ble Supreme Court in the case of *M/s.Woodward Governor India Private Limited Vs. CIT* in 312 ITR 254 that foreign exchange rate fluctuation gains arising out of revenue items must be treated as part of income of the assessee.

7. After hearing both sides, we find that this issue has not been discussed by the assessing authority in his order. The learned Chartered Accountant has vehemently argued that the particulars relating to the above were filed before the Assessing Officer and so, it is not possible to hold that those particulars were not examined by the Assessing Officer, only for the reasons that the issue is not discussed by the Assessing Officer in his order. In support of the proposition, the learned Chartered Accountant has relied on the judgement of the Hon'ble Bombay High Court in the case of *Commissioner of Income Tax Vs. Gabriel India Ltd.* in 203 ITR 108.

8. Accounting Standards-11 mandates that the assessee should maintain foreign exchange fluctuation reserve wherever necessary and transmit the exchange fluctuation gains or losses to that reserve. This is necessary for a true and fair disclosure of the state of affairs of an assessee as on the balance sheet date and necessitated as the assessee re-states of its assets of the foreign branch in terms of Indian rupee.

9. But, it is also necessary to examine the tax implications of this disclosure exercise. Assessee is basically an investment company. The assessee is investing in all sorts of portfolios. It is necessary, therefore to examine the components of the assets and holdings re-stated by the assessee in terms of Indian rupee

so as to see whether any revenue item is re-stated and if so, whether the gains would be exigible to tax. The learned Chartered Accountant has stated that the decision relied on by the Commissioner of Income Tax is distinguishable as the facts of the assessee's case are different. But the problem is that the assessing authority has not at all discussed anything in his order on this important issue. Therefore, it is not possible to hold at present that whether the assessing authority had in fact examined this aspect of the case and finally come to a conclusion that assessee's case is different from the case considered by the Hon'ble Supreme Court. Everything remains in loose ends.

10. *Therefore, as a matter of fact, we find that the assessment order is erroneous and prejudicial to the interests of the Revenue as far as the addition to the foreign currency fluctuation reserve account is concerned. Accordingly, we hold that the Commissioner of Income Tax is justified in passing the impugned revision order under Section 263 of the Income Tax Act, 1961.*

11. *In result, the appeal filed by assessee is dismissed."*

8.1 Consequent to this, the Id. Assessing Officer passed the order u/s.143(3) of the Act r.w.s. 263 of the Act on 19.03.2013. Aggrieved by the order of Id. Assessing Officer, the assessee carried the appeal before the Ld.CIT(A).

8.2 On appeal, the Ld.CIT(A) observed vide order dated 25.02.2016 as follows:-

"After considering the order u/s.263, detailed submission of the appellant, remand report by Id. Assessing Officer and appellant's

comments on remand report, I am of the view that the AO has passed order u/s.143(3) r.w.s.263 following the directions given by CIT in order u/s.263. Therefore, the action of AO in adding ₹2,66,80,649/- is confirmed. These grounds of appeal are dismissed."

Against the order of Ld.CIT(A), now the assessee is again in appeal before us.

9. Before us, Id.A.R submitted that the lower authorities' decision based on the judgement of Supreme Court in the case of M/s.Woodward Governor India Pvt Ltd., Vs. CIT (supra), it cannot be applied to the facts of the case as that case deals with the Foreign Exchange Fluctuation with reference to the transaction. According to Id.A.R, the Foreign Exchange Fluctuation arising in the case of assessee only with reference to transaction with the branch, as such it cannot be applied to the assessee's case. In our opinion, in the assessee's case the issue is related to foreign currency translations of Malaysian branch assets and liabilities in the financial statement of the Head Office, in accordance with the revised AS-11, particularly, paras 24 & 26 of therein. In other words, the assessee credited the gain due to Foreign Exchange Fluctuation with reference to assets of Malaysia branch to foreign exchange fluctuation reserve account. It was stated by the Id.A.R that the gain has been calculated by the assessee on account of restatement of assets of Malaysian branch, which is by debiting respective assets of Malaysian branch and crediting the foreign

exchange fluctuation reserve account. Further, it was stated that the Tribunal in earlier occasion, confirmed the finding of the Id. CIT's order passed u/s.263 of the Act vide order cited supra. Being so, it cannot be said that there is a final quantification of the taxable gain on account of exchange rate fluctuation in respect of assets of foreign branch. To that extent, we are in agreement with the arguments of Id.A.R. However, in our considered view, the gain on account of restatement of the value of assets on account of foreign exchange fluctuation could be in capital field or in revenue field. If it is in capital field, it cannot be brought to tax. On the other hand, if it is in revenue field, it is an income chargeable to tax. The AO while passing a consequential order to the order of CIT passed u/s.263, brought entire amount into tax, considering the gain in the nature of revenue field. There was no discussion about gain in the nature of capital field. So, when the issue is remitted by Id.CIT vide order u/s.263 of the Act, it is incumbent upon the AO to examine the issue in its entirety, whether it is in capital field or in revenue field and thereafter bring the gain which is in nature of revenue into tax. As per AS-11, the effect of exchange difference has to be recorded on the year end i.e.31st March as on the date of balance sheet and it has to be debited/credited to profit or loss A/c in respect of trading assets. On the other hand, if it is relating to capital asset, it has to go to the reserve account. Since, this issue was not

examined by the lower authorities, in the interest of justice, we remit the issue to the file of Id. Assessing Officer for the purpose of quantification of gain and to bring that portion of gain, which is in the nature of revenue to tax. With this observation, we remit this issue to the file of Id. Assessing Officer for fresh consideration. This appeal is partly allowed for statistical purposes.

10. **Lastly we take up ITA No.1325/Mds./16 (A.Y 2010-11)**

The assessee raised the ground that the Id.CIT(A) erred in confirming the assessment order without indicating under what provisions of the Act or the Accounting Standard (AS)-11, the Foreign Exchange Fluctuation reserve, which is akin to a revaluation reserve, arising on restatement of the assets and liabilities of the Malaysian branch in the assessee's balance sheet is taxable.

11. The only difference in this assessment year is that the Assessing Officer taxed the foreign exchange fluctuation reserve while framing the assessment u/s.143(3) of the Act, which was confirmed by the Id.CIT(A) in his order dated 25.02.2016 passed u/s.250(6) of the Act.

11.1 Since the issue raised by the assessee is similar to the A.Y 2007-08, this is also remitted to the Assessing Officer on similar direction. This appeal is partly allowed for statistical purposes.

12. In the result, all the above appeals of the assessee are allowed for statistical purposes

Order pronounced on 27th September, 2017, at Chennai.

Sd/-
(धुव्वुरु आर.एल रेड्डी)
(DUVVURU RL REDDY))
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(चंद्र पूजारी)
(CHANDRA POOJARI)
लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated: 27th September, 2017.

K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |