



IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI AMARJIT SINGH, JM

ITA No.5312/Mum/2015

(Assessment Year :2009-10)

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| M/s. Essel Propack Ltd., Top Floor, Times Tower Kamala City, Senapati Bapat Marg Lower Parel, Mumbai – 400013 | Vs. | DCIT RG 6(2) R.No.563, 5 th Floor Aayakar Bhavan Mumbai – 400 020 |
| PAN/GIR No.AACE1568L | | |
| Appellant) | .. | Respondent) |

ITA No.5258/Mum/2015

(Assessment Year :2009-10)

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| DCIT CIR 6(3)(2) R.No.522, 5 th Floor Aayakar Bhavan Mumbai – 400 020 | Vs. | M/s. Essel Propack Ltd., Top Floor, Times Tower Kamala City, Senapati Bapat Marg Lower Parel, Mumbai – 400013 |
| PAN/GIR No. | | AACE1568L |
| Appellant) | .. | Respondent) |

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|------------------------------|---|
| Assessee by | Shri Madhur Agarwal and Shri Jay Bhansali |
| Revenue by | Shri V. Justin |
| Date of Hearing | 03/01/2018 |
| Date of Pronouncement | 08/01/2018 |
| | |

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the cross appeals filed by assessee and revenue against the order of CIT(A)-12, Mumbai dated 04/08/2015 for A.Y.2009-10 in the matter of order passed u/s.143(3) of the IT Act.

2. The grievance of assessee relates to disallowance made u/s.14A and disallowance of foreign exchange loss on forward contracts. Revenue

is aggrieved for deleting disallowance of interest u/s.36(1)(iii) on the plea that assessee was having sufficient own funds for investment in subsidiary company.

3. At the outset, learned AR placed on record the order of the Tribunal for A.Y.2008-09 dated 11/09/2017, wherein both the issues raised by assessee during the year under consideration were decided in favour of the assessee. We had carefully gone through the orders of the Tribunal wherein disallowance made u/s.14A was deleted by Tribunal after observing as under:-

“6. We heard the rival submissions and gone through the orders of the tax authorities below. We have also gone through the case law relied upon before us. From the computation statement as well as the Balance Sheet as submitted by the assessee we noted that the assessee had made investments in foreign subsidiary companies and from those companies it got the dividend income. The assessee has not claimed the said dividend income as exempt. The dividend income has been shown as income from other sources and due tax has been computed by the assessee in the computation statement. Therefore no question arises on making disallowance in respect of investment made in foreign subsidiary company. The assessee has also made investments in Indian companies but did not earn any dividend income. In view of the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd. vs. CIT 378 ITR 33 no expenses can be disallowed under section 14A as the assessee has not earned any exempt income. Same view has been taken by the Hon'ble Bombay High Court in the case of Principal CIT vs. Ballarpur Industries Ltd. ITA No. 51 of 2016. No contrary decision was brought to our knowledge. We, therefore, delete the disallowance made by the AO and sustained by the CIT(A). Thus ground No. 1 taken by the assessee is allowed.”

4. During the year under consideration also assessee has not earned any exempt income, accordingly following the order of the Tribunal in assessee's own case, we do not find any merit for the disallowance made u/s.14A.

5. Next grievance of assessee relates to disallowing foreign exchange loss on forward contracts treating the same as speculation loss.

6. We found that this issue is also covered in favour of assessee by the order of the Tribunal. We have gone through the order of the Tribunal dated 11/09/2017, wherein the Tribunal concluded as under:-

“We have heard the rival submissions and carefully considered the same along with the orders of the tax authorities below. We have gone through the provisions of Section 43(5) which defines speculative transaction. We noted that as per the definition given in sub-section (5) the transaction entered into cannot be treated to a speculative transaction. The definition of speculative transactions under section 43(5) is an exhaustive one and the term 'commodity' including shares and stocks but does not include currency. (a) The term 'commodity' is defined neither in the Income-tax Act nor in the General Clauses Act. (b) Dictionary meaning of the term 'commodity' is 'raw material or agricultural product that can be bought and sold — something useful or valuable'. (c) Another definition for the term 'commodity' is 'any product that can be used for commerce or an article of commerce which is traded on an authorised commodity exchange is known as commodity'. The article should be movable of value, something which is bought or sold and which is produced or used as the subject of barter or sale. (d) In short, commodity includes all kinds of goods. The Forward Contracts (Regulation) Act, 1952 (FCRA) defines 'goods' as 'every kind of movable property other than actionable claims, money and securities'. (e) The Delhi Bench of ITAT in the case of Munjal Showa Ltd. v. DCIT 94 TTJ 227 has held as under:

8 "Foreign currency or any currency is neither commodity nor shares. The Sale of Goods Act specifically excludes cash from the definition of goods. Besides, no person other than authorised dealers and money changers are allowed in India to trade in foreign currency, much less speculate. S. 8 of the Foreign Exchange Regulations Act, 1973, provides that except with prior general or special permission of the RBI, no person other than an authorised dealer shall purchase, acquire, borrow or sell foreign currency. In fact, prior to the LERMS, residents in India were not even permitted to cancel forward contracts. The presumption of any speculative transaction is, therefore, directly rebutted in view of the legal impossibility and in view of the fact that foreign currency was neither commodity nor shares."

(f) The Special Bench of ITAT Kolkata in the case of Shree Capital Services Ltd. v. ACIT 121 ITD 498 has held that derivatives with

underlying as shares and securities should be also considered as commodities as the underlying shares and securities as specifically included within the term commodities. Accordingly, transactions in security derivatives are subject to the provisions of S. 43(5). However, a currency cannot be termed as a commodity so as to attract the provisions of S. 43(5).

Jurisdictional Bombay High Court in the case of Badridas Gauridu (P) Ltd. 261 ITR 256 has held that the assessee is not a dealer in foreign exchange but an exporter. In order to hedge against losses, the assessee had booked foreign exchange in forward market with the bank. The loss suffered by assessee on cancellation of such forward contracts is not speculative and loss is deductible as business loss.

13. We noted that similar issue has again came up before the Jurisdictional High Court in Tax Appeal No. 278 of 2014 in the case of M/s. D. Chetan & Co. In which the question before the Hon'ble High Court was: - "Whether on 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."

The Hon'ble High Court after discussing the submissions of both parties held as under: -

"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 safeguard 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 11 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 (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 (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 CIT vs. Badridas Gauridas (P) Ltd. was not brought to the notice of the Tribunal when it rendered its decision in S. Vinodkumar (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.”

14. Similarly the Hon'ble Bombay High Court in the case CIT vs. M/s. London Star Diamond Co. (India) Pvt. Ltd. in appeal No. 712 of 2014 vide its order dated 19th October, 2016 on similar question decided the issue in favour of the assessee. Following the decision of the CIT vs. M/s. D. Chetan & Co. again when similar issue went before the Hon'ble Bombay High Court in ITA No. 1440 of 2014 in the case of CIT vs. M/s. Jaimin Jeweller Exports Pvt. Ltd. the Hon'ble High Court vide its order dated 17th February, 2017 decided the issue in favour of the assessee in view of the decision in the case CIT vs. M/s. D. Chetan & Co. and that of CIT vs. M/s. Jaimin Jeweller Exports Pvt. Ltd.

15. The learned D.R. before us vehemently relied on the order of the CIT(A) but could not convince us that the facts involved in the case of the assessee are different to the decisions as has been given by the Hon'ble Bombay High Court in the above noted case law. 16. Respectfully following the decisions of the Hon'ble Bombay High Court we set aside the order of the CIT(A) on this issue and delete the disallowance of Rs.1,40,84,283/-.”

7. As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in assessee's

own case, we do not find any merit for the disallowance of foreign exchange loss so made by the AO treating the same as speculation loss.

8. With regard to disallowance of interest explained u/s.36(1)(iii), the CIT(A) has recorded the following findings:-

11.1 CIT(A)'s order for A.Y. 2008-09 vide order dt.22.2.2013, has deleted the addition of the A.O. since A.Y. 2003-04 onwards till A.Y. 2007-08 on identical issue: Such order of CIT(A) has also been accepted by the Department. Therefore, ground of appeal No.4 is allowed. Since the issue is the same for this assessment year.

9. It is clear from the findings recorded by CIT(A) that similar disallowance made by the AO was deleted by CIT(A) since A.Y.2003-04 to 2008-09 on identical issues, however, Department did not file any appeal and accepted assessee's contention.

10. We have considered rival contentions and found from record that the assessee has incurred expenses on behalf of certain foreign subsidiaries and Indian subsidiary and shown them under the head Advances Recoverable. The assessee has not made any non business advance to these companies, but these amount represents various debits in the nature of sale of spares, royalty receivable, service charges and the expenses incurred on their behalf such as traveling expenses, establishment expenses, financial guarantees, communications expenses, etc. The assessee does not have system of charging interest on such debits of expenses incurred on their behalf. Such advances did not attract any adjustment in Transfer Pricing order also. However, the Ld. AO considered these debit balances as advances without interest and

disallowed Rs. 1,07,54,398/- out of interest u/s 36(1)(iii). We do not find any merit for the disallowance so made by the AO.

11. In the result, appeal of the assessee is allowed whereas appeal of the Revenue is dismissed.

Order pronounced in the open court on this

08/01/2018

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 08/01/2018

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai