

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

Before Shri Amarjit Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.4107/Mum/2016	-	AY 2009-10
I.T.A No.4052/Mum/2016	-	AY 2010-11
I.T.A No.4053/Mum/2016	-	AY 2011-12
I.T.A No.4054/Mum/2016	-	AY 2012-13

Confreight Shipping Agency (India) P Ltd, Unit No.801, Godrej Coliseum, C-Wing Off Somaiya Hospital Road Sion, Mumbai 400 022 PAN : AAACC1594L	vs	The Dy.CIT, Cent.Cir.6(4), Mumbai
APPELLANT		RESPONDENT

Appellant by	Shri Harsh Shah
Respondent by	Shri H.M. Singh

Date of hearing	17-04-2018
Date of pronouncement	04-05-2018

ORDER

Per G Manjunatha, AM :

These four appeals filed by the assessee are directed against separate, but identical orders of the CIT(A)-54, Mumbai dated 21-03-2016 for the assessment years 2009-10, 2010-11, 2011-12 and 2012-13. Since all the appeals pertain to same assessee and identical issues are involved, for the sake of convenience, these appeals were heard together and are disposed of by this common order.

2. The assessee has raised more or less common grounds of appeal for all the years. For the sake of brevity, the grounds of appeal taken for the assessment year 2009-10 are reproduced below: _

“The Learned CIT (A) erred in upholding the disallowances made by the Assessing Officer while passing the order under section 143 (3) r.w.s. 153 A of the Income Tax Act, 1961 dated 27/02/2014.

The Learned CIT (A) ought to have held that since no incriminate documents / material were found during search, the disallowance made by Assessing Officer were illegal & unwanted while passing the order under section 143 (3) r.w.s. 153 A of the Income Tax Act, 1961 dated 27/02/2014.

Without prejudice to above, the following grounds are made:

1) The Learned CIT (A) erred in confirming disallowance of contribution of Rs. 19,30,895/- towards Gratuity fund maintained by Life Insurance Corporation of India.

2) The Learned CIT (A) erred in not considering the submissions and the plea of the appellant that the Employees Group Gratuity Scheme was duly filed with the Commissioner of Income -tax, Central - III, Mumbai for approval.

3) The Learned CIT (A) erred in confirming disallowance of Rs.3,13,152/- in respect of Gift and Entertainment Expenses.

4) The Learned CIT (A) has erred in confirming above expenses on the ground that similar disallowances were made in assessment year 2008-09 on identical facts and same was accepted by the appellant,

5) The Learned CIT (A) has failed to appreciate that in earlier year, appellant did not file any appeal before higher authority on grounds of cost and time constraint as cost of filing and arguing the appeal could be more than tax effects. Further in earlier assessment years 2005-06 to 2007-08, the CIT (A) had deleted similar disallowances made by the Assessing Officer.”

3. The brief facts of the case extracted from ITA No.4107/Mum2016 are that the assessee is a company engaged in the business of shipping agency filed its return of income for AY 2009-10 on 29-09-2009 declaring total loss of Rs.1,10,69,014. The assessment was completed u/s 143(3) of the Act on 28-12-2011 determining the total loss of Rs.88,24,967 interalia making addition towards disallowance of gift and entertainment expenses of Rs.3,13,152 and contribution to group

gratuity fund u/s 40A(7) for Rs.19,30,895. A search and seizure action was carried out on the assessee including JM Baxi group on 20th March, 2012. Consequent to search, notice u/s 153A of Income-tax Act, 1961 was served on the assessee calling for return of income. In response to notice, the assessee has filed return of income on 28-08-2012 declaring total loss of Rs.1,10,69,014 as was already declared in the original return of income. The assessment was completed u/s 143(3) r.w.s. 153A of the Act, on 27-02-2014 determining the total loss at Rs.88,24,967 by making similar disallowances of contribution to group gratuity u/s 40A(7) of Rs.19,30,895 and disallowance of gift and entertainment expenses of Rs.3,13,152.

4. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), assessee has taken a legal ground challenging the validity of assessment framed u/s 143(3) r.w.s. 153A of the Income-tax Act, 1961 on the ground that the addition made by the AO without reference to any seized material found as a result of search is bad in law and liable to be deleted. The assessee also challenged addition made by the AO towards disallowance of contribution to group gratuity fund and disallowance of gift and entertainment expenses on the ground that the issue of disallowance of group gratuity fund is covered in favour of the assessee by the decision

of ITAT, in its own case for AY 2009-10 in regular assessment proceedings wherein, the ITAT has deleted additions made by the AO towards contribution to group gratuity fund. Insofar as disallowance of gifts and entertainment expenses, though it has not challenged the addition before ITAT, considering the amount involved in appeals a similar issue has been considered by the ITAT in assessee's group concern, M/s J Baxi & Co wherein the ITAT, has restricted disallowance of gift and entertainment expenses to 50% of actual expenses disallowed by the AO. The CIT(A), after considering relevant submissions of the assessee dismissed appeal filed by the assessee by holding that as per facts borne out of records, the AO has not made any fresh disallowance in the assessment framed u/s 143(3) r.w.s. 153A of the Act. In fact, the disallowance made by the AO towards group gratuity fund and on account of gift and entertainment were actually made in the order u/s 143(3) dated 28-12-2011. Therefore, it cannot be said that the assessee is aggrieved by the impugned order especially when no fresh disallowance / addition made therein and the loss assessed u/s 143(3) r.w.s. 153A of the Act remains same as that was assessed u/s 143(3) of the Act. If at all assessee had any grievance against the disallowance / addition made in the assessment order u/s 143(3) dated 28-12-2011, then the assessee should have filed appeal

against said order. With these observations, the CIT(A) dismissed the appeal filed by the assessee.

5. Aggrieved by the order of the CIT(A), assessee is in appeal before us.

6. The first issue that came up for our consideration is disallowance of contribution towards gratuity fund maintained with LIC of India of Rs.19,30,895. The Ld.AR for the assessee, at the time of hearing submitted that the issue is squarely covered in favour of the assessee by the decision of ITAT, Mumbai Bench "F" in ITA o.4350/Mum/2016 for AY 2009-10, wherein in earlier proceedings against order passed by the AO u/s 143(3) of the Act, the ITAT has deleted addition made by the AO towards payment of group gratuity fund to LIC towards employer's group gratuity fund after creating a trust and also after filing an application before the Commissioner for approval, there is no reason for the AO to disallow such contribution merely for the reason that the application filed by the assessee for approval of group gratuity fund trust is pending.

7. On the other hand, the Ld.DR submitted that contribution to group gratuity fund cannot be allowed as deduction u/s 37(1) r.w.s. 40A(7) when the trust created by the assessee is not approved by the Competent Authority. In this case, the AO has brought out clear facts to the effect that the assessee's gratuity fund trust was not approved by the

CIT, and therefore, any contribution made to such trust cannot be allowed as deduction. In this regard, he relied upon the decision of Hon'ble Allahabad High Court in the case of CIT vs Laxmi Sugar & Oil Mills Ltd (1993) 204 ITR 265 (All).

8. We have heard both the parties, perused the materials available on record and gone through the orders of authorities below. We find that the issue of contribution to employer's group gratuity fund maintained with LIC is covered in favour of the assessee by the decision of ITAT in assessee's own case for impugned assessment year in earlier proceedings, wherein the ITAT has deleted additions made by the AO.

The relevant portion of the order is extracted below:-

7. We have heard the rival submissions and also perused the material on record including the case law relied upon by the Ld. CIT(A). The Ld. CIT(A) has decided this ground of appeal in favour of the assessee by following the ratio of law laid down by the Hon'ble Bombay High Court in *CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra)*. The relevant portion of the findings of the Ld. CIT(A) is reproduced below:

8.4.1 I have considered the submissions of the appellant and perused the materials available on record. The appellant has requested to deleted the disallowance made by the Ld. AO of Rs. 52,22,8867- being contribution Gratuity fund maintained by LIC. The appellant main contentions are that it has subscribed to the Employees Group Cum Life Assurance Scheme with LIC and has executed a trust deed and the same has been filed with the Ld. Pr. Commissioner of Income Tax, Central-Hi, Mumbai for approval and considerable time has elapsed still approval has not been received. It was further argued that the sum of Rs. 52,22,8S6/- has been paid to such gratuity fund maintained with the LIC The appellant has also raised preliminary objection that for the assessment year under consideration the assessment was already finalized u/s 143 (3) of the Act on 31.07.2009 and as on date of initiation of search no assessment proceedings for the relevant assessment year was pending and hence the assessment order u/s 143 (3) of the Act dated 31.07.2009 was not abated and hence had become final. It has also been argued that such completed assessment i.e. the assessment which

does not get abated can only be disturbed on the basis of any incriminating document/material found during the course of search. In view of same it has further been argued that the Ld. AO ought not to have made disallowance/addition on account of gratuity payments under consideration while finalizing the assessment u/s 143 (3) rws 153A of the Act which is the subject matter of appeal. The Contentions of the appellant have been considered carefully. From the impugned assessment order U/s 143 (3) rws 153A of the Act dated 27.02.2014 it is observed, that while making disallowance of gratuity payment of Rs.52,22,886/- on the ground that such gratuity fund has not been approved by the Pr. CIT, Central-Ill, Mumbai, the Ld. AO has not made any reference to the books of account or other documents not produced in the course of original assessment but found in the course of search. As discussed above the Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation .(Nhava Sheva) Ltd. (supra), while defining the scope of assessment U/s 153A of the Act has held as under:

(a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and oay other material existing or brought on the record of the AO. ~

(b) In respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search."

8. Since, no incriminating document/material was found during the course of search the Ld. CIT(A) has rightly deleted the addition by following the judgment delivered by the Hon'ble High in Court *CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd.* referred above. Hence, we do not find any reason to interfere with the findings of the Ld. CIT(A). Accordingly, we dismiss this ground of appeal of the revenue."

9. In this view of the matter and consistent with the earlier decision arrived at by the Tribunal, we are of the considered view that the assessee is eligible for deduction towards contribution to group gratuity fund maintained with LIC of India. Therefore, we direct the AO to allow deduction towards contribution to group gratuity fund.

10. The next issue that came up for our consideration is disallowance of gift and entertainment expenditure. The AO has disallowed

expenditure incurred under the head 'gifts and entertainments' on the ground that the assessee has failed to prove such expenses is incurred wholly and exclusively for purpose of business with necessary evidence. The Ld.AR for the assessee submitted that the issue squarely covered in favour of the assessee by the decision of ITAT, in assessee's own group case, M/s JM Baxi & Co in ITA No.4301/Mum/2012 for AY 2009-10 wherein under similar circumstances, the ITAT has restricted disallowance to 50% of actual expenses disallowed by the AO.

11. Having heard both the sides, we find that the ITAT, in the case of M/s JM Baxi & Co in ITA No.4301/Mum/2012 for AY 2009-10, under similar circumstances restricted disallowance of gifts and entertainment expenditure to the extent of 50% of actual disallowance made by the AO.

The relevant portion of the order is extracted below:-

“We have heard the arguments of both the sides and also perused the relevant material on record. It is observed that the disallowance sustained by the Id. CITfAJ on this issue was challenged by the assessee in the appeal filed before the Tribunal and the Tribunal vide its order dated 01.08.2013 passed in ITA no.4414/Mum/2012 has restricted the disallowance sustained by the Id. CIT(A) to the extent of 50% allowing part relief to the assessee. This issue thus decided by the Tribunal while disposing of the appeal of the assessee for A.Y. 2009-10 and consequently ground no.5 raised by the Revenue challenging the action of the Id. CIT(A) in deleting the addition made by the AO on this issue to the extent of Rs.3,00,000/-is liable to be dismissed.”

12. In this view of the matter and consistent with the view taken by the co-ordinate bench in assessee's own group cases, we direct the AO to

restrict disallowance of gift and entertainment expenses to the extent of 50% of actual disallowance.

13. The next issue that came up for our consideration is challenging the validity of assessment framed u/s 143(3) r.w.s. 153A of the Income-tax Act, 1961. The Ld.AR for the assessee, at the time of hearing submitted that since the issues involved in this appeal are covered in favour of the assessee, he did not want to press the ground challenging the validity of assessment framed u/s 143(3) r.w.s. 153A of the Income-tax Act, 1961. Hence, the same is dismissed, as not pressed.

14. In the result, appeal filed by the assessee is partly allowed.

ITA Nos. 4052 to 4054/Mum/2016

15. The first issue that came up for our consideration from these appeals is disallowance of contribution towards group gratuity fund maintained with LIC of India. We have considered similar issue in ITA No.4107/Mum/2016. The facts are identical. Therefore, the reasons given by us in the preceding paragraphs in ITA No. 4107/Mum/2016 shall mutatis mutandis apply to these appeals also. Therefore, for the same reasons, we direct the AO to delete addition towards disallowance of contribution to group gratuity fund.

16. The next issue that came up for our consideration is disallowance of gift and maintenance expenses. We find that similar issue has been

considered by us in 4107/Mum/2016 for AY 2009-10. There is no change in facts. The reasons given by us in ITA No.4107/Mum/2016 shall mutatis mutandis apply to these appeals also. Therefore, for the same reasons, we direct the AO to restrict disallowance of gift and entertainment expenses to the extent of 50% of actual expenses disallowed for the year.

17. The next issue that came up for our consideration is disallowance of expenditure incurred in relation to exempt income u/s 14A r.w.r. 8D(2) of Income-tax Rules, 1962. The assessee has made suo moto disallowance of Rs.10,000 u/s 14A of the Act. The AO has determined disallowance of Rs.75,000 being $\frac{1}{2}\%$ of average value of investment of Rs.1,50,00,000 and after deducting suo moto disallowance of Rs.10,000 made by the assessee, balance amount of Rs.65,000 has been disallowed u/r 8D2)(iii). According to the AO, disallowances contemplated u/s 14A shall be worked out as per the prescribed method provided under rule 8D(2) of the Income-tax Rules, 1962. Since the assessee has made suo moto adhoc disallowance of Rs.10,000, the AO rejected assessee's disallowance and invoked rule 8D(2)(iii) to work out disallowance of Rs.75,000. It is the contention of the assessee that it has made suo moto disallowance of Rs.10,000 towards expenses incurred in relation to exempt income considering the nature of

investment, therefore, the AO was incorrect in applying Rule 8D(2) to quantify disallowances without recording his satisfaction as to incorrectness of disallowance worked out by the assessee.

18. We have heard both the sides and perused the material available on record. There is no dispute with regard to the applicability of provisions of section 14A of the Act. The assessee itself has made suo moto disallowance of Rs.10,000. The question is whether, the disallowance worked out by the assessee is in accordance with law having regard to the provisions of section 14A r.w.r. 8D(2) or not. The disallowance contemplated u/s 14A shall be worked out as per the prescribed method provided u/r 8D(2). As per the prescribed method provided u/r 8D(2)(iii), in respect of other expenses, 0.5% of average value of investment shall be disallowed. Though, the assessee has made suo moto disallowance of Rs.10,000, failed to show how the disallowance worked out by the assessee is in accordance with rule 8D(2)(iii). Therefore, we are of the considered view that the AO was right in quantifying disallowance of expenses by invoking rule 8D(2)(iii). The CIT(A), after considering relevant submissions has rightly upheld addition made by the AO. We do not find any error in the order of the CIT(A). Hence, we are inclined to uphold the findings of CIT(A) and reject ground raised by the assessee.

19. The next issue that came up for our consideration is challenging the validity of assessment framed u/s 143(3) r.w.s. 153A of the Income-tax Act, 1961. The Ld.AR for the assessee, at the time of hearing submitted that since the issues involved in this appeal are covered in favour of the assessee, he did not want to press the ground challenging the validity of assessment framed u/s 143(3) r.w.s. 153A of the Income-tax Act, 1961. Hence, the same is dismissed, as not pressed.

20. In result, appeals filed by the assessee in ITA Nos. 4052 to 4054/Mum/2016 are partly allowed.

21. As a result, all the appeals filed by the assessee are partly allowed
Order pronounced in the open court on 04th May, 2018.

Sd/-

sd/-

(Amarjit Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 04th May, 2018

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Sr.PS, ITAT, Mumbai