

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE SHRI R.S. SYAL, VICE PRESIDENT
and
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No.1579/Del/2015
Assessment Year: 2010-11**

Munjal Showa Ltd., 9-11, Maruti Industrial Area, Gurgaon, Haryana. PAN: AAACM0070D	vs	DCIT, Circle 17(1), New Delhi.
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Appellant by	Shri Vishal Kalra, Advocate Shri S.S. Tomar, Advocate
Respondent by	Shri Sanjay I. Bara, CIT DR

Date of Hearing	21.06.2018
Date of Pronouncement	27.06.2018

ORDER

PER K. NARASIMHA CHARY, J.M.

This is an appeal by the assessee against the directions dated 28.11.2014 of the Dispute Resolution Panel -III, New Delhi (for short hereinafter called "DRP").

2. Munjal showa Limited was established in 1985 in technical and financial collaboration with Showa Corporation, Japan the pioneer and leader in the world of Shock Absorbers. The joint venture were brought to India a world of expertise in design and manufacturing of shock absorbers for all leading two wheelers and four wheelers. Showa is one of the largest suppliers of shock absorbers to major Auto Giant in Japan, USA, Germany UK and other developed markets.

Company's products conform to the highest standards of Quality, Safety, Comfort and Dependability. Company's product enjoy wide patronage while serving as original equipment to vehicles like Maruti 800cc, Omni Van, Alto, Esteem, Honda City Car, Complete range of Hero Honda Motor Cycles, Kinetic Honda Scooter, Hero Puch, Hero winner, Hero Majestic and Unicorn.

3. For the Assessment Year 2010-11, assessee filed their return of income on 4.10.2014 declaring a total income of Rs.24,64,74,526/-. During scrutiny thereof, learned AO found that the assessee has paid a sum of Rs.26,50,86,135/- towards royalty, Rs.10,97,167/- towards technical fee and Rs.4,71,50,175/- towards design and drawing fee put together Rs.31,33,33,477/- as royalty, technical fees and drawing and design fee to its AE. For determination of the arm's length price thereof, learned AO referred the issue to the learned Transfer Pricing Officer (Ld. TPO in short).

4. Ld. TPO held that no tangible benefit was passed to the assessee and the arm's length price of the above transactions was reduced to nil. Learned AO treated the expenditure on account of royalty and technical fee as capital in nature and disallowed the expenses to the extent of Rs.35.56 lacs by invoking Section 14A of the Act, and lastly, disallowed set off of short term capital losses to the tune of Rs.22,486/- by invoking Section 94(8) of the Income-tax Act, 1961 ("the Act"). Consequently, assessment order was passed by making addition of Rs.26,61,83,302/- on account of transfer pricing issue, Rs.35,46,805/- on account of disallowance of expenditure u/s 14A of the Act and Rs.22,486/- on account of disallowance u/s 94(8) of the Act.

5. Assessee filed objections before the learned Dispute Resolution Panel (DRP). Learned DRP refused to interfere with the orders of the learned AO to delete the additions.

6. The assessee, therefore, preferred this appeal on as many as 14 grounds. Ground Nos. 1 and 12 are general in nature, Ground Nos. 2 to 8 relate to the transfer pricing issue, ground No.9 relate to the treatment of expenditure on account of royalty and technical fee, Ground Nos. 10 to 10.2 relate to the disallowance of expenditure u/s 14A of the Act, Ground No.11 relate to the disallowance of set off of short term capital losses u/s 94(8) of the Act and Ground Nos.13 & 14 relate to interest and penalty which are consequential and premature in nature.

7. First, taking the transfer pricing issue, as has been stated above, it relates to the determination of arm's length price of international transactions of royalty, fee for technical services and fee paid for design and drawing fee to the tune of Rs.31,33,33,477/-. At the outset, it is submitted by the learned AR that a similar issue had arising for the AYs 2007-08 to 2009-10 before the Tribunal and for all these years the issue was answered in favour of the assessee and effects was given to the orders of the Tribunal. Learned DR does not dispute this fact.

8. We have gone through the record which includes the orders of the Tribunal for the AYs 2006-07 to 2009-10 in ITA No.1030/Del/2014. For AY 2009-10, a coordinate Bench of this Tribunal dealt with this issue vide ground nos. 2 to 2.6 and while referring to the orders in assessee's own case in ITA No.4675/Del/2010 and 4242/Del/2011 for AYs 2006-07 and 2007-08 respectively at paras 27 to 39 of the said earlier year order, it was observed that this issue was decided in favour of the assessee for AYs 2002-03 to 2004-05 also by the Tribunal, appeal against such

order preferred by the Revenue before the Hon'ble Delhi High Court was dismissed and in accordance with such orders, the matter had to be remitted to the TPO to decide afresh after providing an opportunity of being heard to the assessee.

9. In the order for the AYs 2006-07 and 2007-08, a coordinate bench of this Tribunal observed as follows:

“28. The assessee’s case is that it had limited right to use the technology of Showa Japan. The ownership / property rights in technical know how continue to be vested in Showa and the appellant has no authorised approval of company to transfer the know how or any technical information to any third party. There is no explicit or implicit authority to transfer or create ownership in the technology, know how/technical information in the appellant. The expenditure of royalty or technical fee did not result with capital asset or a benefit of enduring nature much less in the capital field. The Appellate Tribunal in the case of the assessee for the asstt. Year 1993-94 to 1995-96 and for Asstt. Year 2002-03 and 2004-05 have deleted the similar disallowance. Revenue appeal for asstt. Year 2002-03 and 2004-05 stands dismissed by the Delhi High Court vide its order dated 6.9.2010 in ITA No. 94, 95 & 96/Del/2014.

29. Heard parties. In the peculiar fact-situation and the judgment of the Hon'ble Delhi High Court in the earlier years in assessee’s own case of which, the AO did not have benefit at the time when he passed the order, we consider it appropriate to remit the matter back to him and take decision afresh, in accordance with law by having regard to the aforesaid judgment. Needless to say the assessee may be granted effective opportunity of being heard.”

10. Respectfully following the same, we remand the case to the TPO to decide afresh in tune with the earlier year orders. Ground Nos. 2 to 8 are answered accordingly.

11. Now coming to Ground No.9, it is the submission of the learned AR that in assessee’s own case following the decision of the Hon'ble Delhi High Court for the AYs 1993-94 to 1995-96 and AYs 2002-03 to 2004-05, a coordinate bench of this Tribunal in ITA No.1030/Del/2014 by order dated 22.11.2017 held that payment of royalty and technical fee does not lead to enduring benefit to the

assessee and hence, the expenditure is allowable as revenue deduction. We have gone through the order dated 22.11.2017 referred to above and found vide paras 16 to 20, this issue was decided in the light of the observations of the Hon'ble jurisdictional High Court in ITA No.5611/Del/2009, ITA No.85/2009 and ITA No.86/2009 by judgment dated 6.9.2010. Since such a finding was returned basing of the binding decision of the Hon'ble jurisdictional High Court, while respectfully following the same, we hold that the addition made on account of royalty and technical fee is not sustainable, hence, ground no.9 is accordingly allowed deleting the addition made on this score. Consequently, depreciation @ 25% will have to be reversed.

12. Now, coming to Ground Nos. 10 to 10.2 relating to disallowance of expenditure u/s 14A. It is the argument of the learned AR that there is tripartite agreement between the assessee, Birla Mutual Fund and the Citi Bank in accordance with which any amount excess of Rs.20 lacs were automatically invested and redeemed when the balance sink below Rs.20 lacs. He submitted that as could be seen from the balance sheet of the company, to be found at page 363, the surplus and reserves of the company is about 172.54 crores whereas the investment is only about Rs.50 crores. He further submitted that under similar circumstances, by order dated 11.11.2017, a coordinate bench of this Tribunal in ITA No.1030/Del/2014 deleted the addition u/s 14A holding that the AO has not invoked Rule 8D of the Act nor has recorded any objective satisfaction that the assessee has used borrowed funds to purchase mutual funds.

13. He further submitted that the AO drew a table at page 41 & 42 of his order wherein he invented a method of estimating interest which is unknown to Rule 8D of the Rules. The sum and substance of the submission of the learned AR is that in view of tripartite agreement between assessee, Birla Mutual Fund and Citi

Bank, there were neither direct nor administrative expenses. So also in view of the fact the reserves and surpluses of the assessee exceed investment, no question of interest element involved in it.

14. We have perused the balance sheet of the assessee incorporated at page 363 of the paper book wherein the share capital and the reserves and surpluses of the assessee for the relevant assessment year are about Rs.180.54 crores and it is recorded that the value of investment was only Rs.50.01 crores. There is a presumption in law that when the assessee's own funds exceed investment, it shall be taken that the assessee own funds are invested and no interest expense could be taken to have been involved. There is no denial of the tripartite agreement between the assessee, Birla Mutual Fund and the Citi Bank in accordance with which there is an automatic investments of the funds to be found in the balance in the account of the assessee in excess of Rs.20 lacs and also automatic redemption of the same when the balance is below Rs.20 lacs.

15. We have also gone through the reasoning of the coordinate bench of this Tribunal vide paras Nos. 29 to 38 in the order dated 22/11/17 in ITA No.1030/Del./14 wherein the Tribunal having found that the assessee is having the reserves and surplus more than the investment dealt with the question whether the surplus funds have been used to make the investment. While respectfully following the decision of the Hon'ble jurisdictional High Court in the case of HT Media vs Pr. CIT (2017) 85 Taxmann.com 113 (Del), CIT vs Reliance Utilities and Powers Ltd. (2009) 313 ITR 340 (Bom); CIT vs Walfort Share & Stock Brokers (P) Ltd. (2010) 326 ITR 1 (SC); and Godrej and Boyce Mfg. Co. Ltd. vs DCIT, 328 ITR 81, it was held that in the absence of AO determining the direct nexus between parties funds and investment, no question of invoking the provisions of Section 14A arises. While respectfully following the decisions cited

(supra), we find that the disallowance to the tune of Rs.35.56 lacs made by the learned AO by invoking Section 14A of the Act cannot be sustained in the eyes of law and has to be deleted. We, therefore, direct the learned AO to delete the same. Ground Nos.10 to 10.2 are answered accordingly in favour of the assessee.

16. Now coming to the disallowance of set off of short term capital losses of Rs.22,486/- by invoking the provisions of Section 94(8) of the Act, learned AO held that since no details have been furnished u/s 94(8) of the Act, short term capital losses cannot be allowed to set off against the capital gains. Learned AR contended that in this matter, Section 94(8) of the Act has no application inasmuch as all the three conditions u/s 94(8) has to be cumulatively satisfied. According to him, clause (b) thereof is not satisfied in this matter inasmuch as there is no question of allotment of additional units without any payment on the basis of holding any units on any date. According to him, the tripartite agreement and the table drawn by the ld. AO at page nos. 41 & 42 of the assessment order and the details furnished vide page nos.114 to 124 of the paper book clearly establish that the investment was made when the balance in the bank account of the assessee was more than Rs.20 lacs and the redemption was there when the balance is less than Rs.20 lacs on any day. He submitted that in the matters of the daily dividend, Section 94(8) has no application because whenever there is redemption such an amount is used for further investment, as such, it cannot be said that there is any allotment of additional units without any payment on the basis of holding of such units on any particular date.

17. We have gone through the provisions of Section 94(8) of the Act and found that all the clauses under (a) to (c) have to be satisfied cumulatively for invoking the said provision. Further, clause (b) thereof speaks of allotment of additional units without any payment on the basis of holding of such units. In this matter

such details as are furnished vide pages 114 to 124 of the paper book establish that there is always investment and redemption at very short durations and in such a situation it cannot be said that there is allotment of units without any payment merely on the basis of holding of the earlier units. We, therefore, hold that to the facts of the case on hand, Section 94(8) has no application and any addition made on that basis cannot be sustained. We, therefore, direct the Ld. AO delete the addition of Rs.22,486/- made on this score. Ground No. 11 is accordingly allowed.

17. In the result, appeal of the assessee is allowed in part for statistical purposes.

Order pronounced in the open court on 27th June, 2018

Sd/-

sd/-

**(R.S. SYAL)
VICE PRESIDENT**

**(K. NARASIMHA CHARY)
JUDICIAL MEMBER**

Dated: 27.06.2018

VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR, ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Draft dictated on	25.06.2018
Draft placed before author	26.06.2018
Draft proposed & placed before the second member	
Draft discussed/approved by Second Member.	
Approved Draft comes to the Sr.PS/PS	
Kept for pronouncement on	
Date of uploading of order on the website	
File sent to the Bench Clerk	
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	