

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH : KOLKATA

[Before Hon'ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No. 483/Kol/2014

Assessment Year : 2010-11

Balmer Lawrie & Co. Ltd.
[PAN: AABCB 0984 E]
(Appellant)

-vs-

DCIT, Circle-5, Kolkata

(Respondent)

I.T.A No. 496/Kol/2014

Assessment Year : 2010-11

DCIT, Circle-5, Kolkata

(Appellant)

-vs-

Balmer Lawrie & Co. Ltd.
[PAN: AABCB 0984 E]
(Respondent)

I.T.A No. 421/Kol/2016

Assessment Year : 2011-12

Balmer Lawrie & Co. Ltd.
[PAN: AABCB 0984 E]
(Appellant)

-vs-

DCIT, Circle-5(2), Kolkata

(Respondent)

I.T.A No. 471/Kol/2016

Assessment Year : 2011-12

DCIT, Circle-5(2), Kolkata

(Appellant)

-vs-

Balmer Lawrie & Co. Ltd.
[PAN: AABCB 0984 E]
(Respondent)

For the Assessee : Shri J.P. Khaitan, Sr. Advocate
Mrs. Sanjukta Gupta, Advocate

For the Department : Shri Sallong Yaden, Addl. CIT, Sr. DR

Date of Hearing : 14.08.2018

Date of Pronouncement : 05.09.2018

ORDER

Per M.Balaganesh, AM

1. These cross appeals by the Assessee as well as Revenue arise out of the common order of the Learned Commissioner of Income Tax(Appeals)-VI, Kolkata [in short the Id CIT(A)] in Appeal No. 65/CIT(A)-VI/Cir-513-14/Kol dated 27.12.2013 against the order passed by the DCIT, Circle-5, Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 07.03.2013 for the Assessment Year 2010-11.

These cross appeals by the Assessee as well as Revenue arise out of the common order of the Learned Commissioner of Income Tax(Appeals)-8, Kolkata [in short the Id CIT(A)] in Appeal No. 970/2014-15 dated 12.01.2016 against the order passed by the DCIT, Circle-5, Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 31.01.2014 for the Assessment Year 2011-12.

Since identical facts are involved in both the appeals, they are taken up together and disposed off by this common order for the sake of convenience.

2. WRITE OFF OF ADVANCES – Rs 12,92,000/-

Ground No.1 of Revenue Appeal for Asst Year 2010-11

The brief facts of this issue are that the assessee is a Government of India Enterprise under the administrative control of the Ministry of Petroleum & Natural Gas, engaged in the business of manufacturing of industrial container grease & lubricants, leather chemicals, trading in tea, logistic infrastructure (CFS) , Engineering & Technology Service Division and Travel & Tour Services. The return of income for the Asst Year

2010-11 was filed by the assessee on 23.9.2010 declaring total income of Rs 153,93,56,690/- . The Id AO observed that the assessee had debited advances written off of Rs 12,92,000/- in its profit and loss account and claimed the same as deduction. The assessee submitted the break up of the same and from the perusal of the same, the Id AO observed that the assessee had not accounted for the same as income in the earlier years and accordingly the same was sought to be disallowed u/s 36(1)(vii) read with section 36(2) of the Act.

2.1. The assessee submitted that in its annual accounts for the financial year 2009-10 corresponding to Asst Year 2010-11, had written off an amount of Rs 12,92,000/- on account of advances, being in the nature of security deposit, and claimed the same as allowable business loss. A statement showing item wise details of the amount of advances and security deposit extended by the assessee to its customer either in the form of security deposit or tender deposits during the course of business was filed by the assessee. The assessee explained the business expediency of the payment of security deposits and advances and submitted that the same were given solely and exclusively for business purposes. The Id CITA observed that it could be seen from the details produced, that the write off of advances / claims are mostly in nature of security deposits, apart from some small bad debts (which are even otherwise allowable). The allowability of write off of irrecoverable security deposit is also a recurring issue in the assessee's case. Following the orders passed in the earlier year by his predecessor, he deleted the disallowance made by the Id AO in the sum of Rs 12,92,000/-. Aggrieved , the revenue is in appeal before us.

2.2. We have heard the rival submissions and perused the materials available on record. The details of advances and claims which were sought to be written off by the assessee in the sum of Rs 12,92,000/- are as under:-

Divn.	Party	Amount (Rs.)	Year of origin	Reasons
CARGO KOLKATA	NTPC	1.04	1994	Amount represents extra amount billed due to demurrage incurred at discharge point, but disputed by NTPC. This is lying in the books for more than three years and could not be recovered despite vigorous follow-up and persuasion. Chances of recovery are remote since the details are not available at both ends. In view of that written off.
IP-PANIPAT	SAVITA GAS AGENCY	0.02	2006	The Security Deposit made in connection with the business, pertains to a very old period, which was made as per tender requirements of this party, business irregular, despite follow up no collection, claim arising in the course of business, and charged off in the books, hence written off.
LOBP TALOJA	PANNZOIL QUACKER LTD	0.78	2006	This party was a regular customer, who wanted to store material beyond normal period. Debit Note raised for storing their material beyond the contract period in order to pressurize them for removing their material from our premises. Party removed the some flood effected material but debit note was not paid in respect of rent. This is a regular customer, and debt was incurred in regular course of business, hence, to be written off.
CARGO KOLKATA	KINGFISHER - IT DED SOURCE	3.16	2006	The amount represents purported deduction on account of ITDS made by various cargo carriers who deducted tax but ultimately denied to issue certificates. Amounts are lying in the books for more than three years and could not be recovered. Chances of recovery are remote since the parties are not transacting in this business. Amount represents debts incurred in the ordinary course of business. In view of that recommended for write off.
IP-PANIPAT	STATE ELECTRICTY BOARD	2.81	2004	Security Deposit made with State Elec Board for connection, in the course of business. Accruing Interest on security deposit pertains to a various period from the Board, despite vigorous follow up and amount remains unpaid, hence written off.
LS-BANGALORE	HINDUSTAN NEWSPRINT LTD	0.45	2001	The Security Deposit pertains to a very old period, which was made as per tender requirements of this party, business irregular, despite follow up no collection, claim arising in the course of business, and charged off in the books, hence written off.
GL- SEWRI	BPCL	4.22	2008	On demand from BPCL small pack supply of grease to Silvassa but on movement from Mumbai octroi was charged. During the payment ob bill payment of octroi was denied by the party and remaind outstanding. Debt has arisen in the course of business, but remains unpaid due to dispute raised by customer, hence, written off.
LS-MUMBAI	JNPT	0.24	2004	Accruing Interest on security deposit pertains to a very old period from JNPT despite follow up and amount remains uncollectible due to change in office of incumbent, hence written off.
IP-CHENNAI	BPCL	0.13	2005	Company paid Security Deposit as per Tender requirements. Business continuing with the party, though old division with which we transacted has been split up, hence, though several attempts at conciliation and follow up have been made, no positive response elicited. Hence write off of the claim, incurred in the course of business, undertaken.
IP-MATHURA	ADV AGST FRT	0.07	2007	Amount incurred on behalf of customers for loading / transportaion etc; but as the division was closed in Oct 2007 and the amount could not be recovered despite vigorous follow up, it is lying unadjusted and there is no chance of recovery. Hence, the amount being incurred in the course of business activities, to be written off
TOTAL		12.92		

From the aforesaid details, we find that the assessee had duly credited its profit and loss account in the earlier years either by offering the income or reducing its expenses thereby making it eligible for deduction u/s 36(1)(vii) read with section 36(2) of the Act. We also find that certain advances were actually made in the normal course of its business which was meant wholly and exclusively for the purpose of its business. We find further that certain amounts lying in the advances recoverable became

irrecoverable for quite a long time and the assessee had consciously taken a call to write off the same during the year under consideration which would be squarely allowable as trading loss. We find that the reliance placed by the Id AR on the decision of Hon'ble Apex Court in the case of CIT vs Mysore Sugar Co. Ltd reported in 46 ITR 649 (SC) and the Hon'ble Jurisdictional High Court in the case of CIT vs Rohtas Industries Ltd reported in 120 ITR 110 (Cal) are very well founded, among others. In view of the aforesaid observations and respectfully following the aforesaid judicial precedents, we find no infirmity in the order of the Id CITA granting relief to the assessee in this regard. Accordingly, the Ground No.1 raised by the revenue for Asst Year 2010-11 is dismissed.

3. DEDUCTION U/S 80IA OF THE ACT

Ground No. 2 of Revenue Appeal for Asst Year 2010-11

Ground No. 3 of Assessee Appeal for Asst Year 2010-11

The brief facts of this issue are that the assessee claimed deduction of Rs 17,95,43,785/- in respect of Container Freight Station (CFS) activity carried on by it. There is no dispute with regard to the fact that the CFS activity is an industrial undertaking and is entitled for deduction u/s 80IA of the Act. The assessee filed the break up of its income before the Id AO. In the said break up, there were certain items like interest on security deposits / loans , interest on delayed payment by customers, charges towards warehousing of cargo, revenue profit on disposal of fixed assets, sale of tender documents etc . The details of other income are as under:-

Nature of Income	Amount (₹.lakhs)
<i>Interest on Security Deposit / Loans</i>	0.71
<i>Revenue Profit on disposal on fixed assets</i>	0.10
<i>Rent Receipts</i>	1.59
<i>Credit Balances written back</i>	12.39
<i>Hire charges received on assets</i>	0.07
<i>Forfeiture of deposit</i>	2.69
<i>Sale of tender document</i>	0.46
<i>Disposal of pallets / garbage</i>	6.26
<i>Net realization from auction of cargo</i>	55.72
<i>Hire charges received on home-desk PC</i>	0.02
Total	80.01

The Id AO held that the said receipts were not derived from the industrial undertaking of CFS activity and denied the deduction u/s 80IA of the Act to the extent of Rs 80,01,000/- in the assessment.

3.1. The Id CITA granted partial relief to the assessee and the revenue by observing as under:-

“6.2. It is true, that section 80IA is available only on the income derived from eligible undertaking / enterprise engaged in development / operation / maintenance of infrastructure facility. However, it is also not proper to summarily conclude that all items of income under the head 'other income' are not derived from such enterprise. Rather, the nature of each item under the head 'other income' should be closely examined. In this regard, it may be mentioned that similar issue had arisen in earlier assessment years also in the appellant's case and my Id. predecessors have also done such analysis. In case of a CFS, the operator earns income from uploading, downloading and warehousing of goods and containers at the facility developed. The

operator also derives income from related services like custom clearing, cargo handling etc. The break- up of 'other income' in the year under consideration has been mentioned in the appellant's submission reproduced earlier. On examining the same, it is seen that there are certain items which are closely related to operation of CFS facility. These are net realization of auction of cargo, credit balance written back, disposal of pallets and forfeiture of deposits, which aggregate to Rs.77.06 lacs. Therefore, in my opinion, these are eligible for deduction u/s 80IA of the Income Tax Act, 1961. However, the remaining items such as interest, profit on disposal of asset, rent, hire charges and sale of tender documents etc., which aggregate to Rs.2.95 lacs, cannot be called to be derived from operation of the undertaking, as they are one step removed from the main function of CFS. It may be mentioned here, that in the appellate order for immediately preceding assessment year, it has been held by my Id. predecessor, that receipt from sale of tender documents, interest and profit from disposal of assets etc. are not eligible for deduction u/s 80IA. Similar finding has been given in respect of rent in the appellate order for A.Y. 2008-09. Considering this, the amount on which deduction is not allowable is taken as Rs. 2.95 lacs. The assessing officer is directed to reduce the disallowance accordingly."

3.2. Aggrieved, both the assessee as well as the revenue are in appeal before us.

3.3. We have heard the rival submissions. It is not in dispute that the CFS activity of the assessee falls under the ambit of an industrial undertaking thereby making it eligible to claim deduction u/s 80IA of the Act. The only dispute to be decided here is as to whether certain receipts earned by the assessee could be construed to be 'profits derived from CFS undertaking' and consequential eligibility of the same for deduction u/s 80IA of the Act. The details of other income earned by the assessee are tabulated above. The Id DR argued that the Id CITA ought not to have given relief to the assessee in respect of credit balances written back in the sum of Rs 12.39 lakhs; forfeiture of deposit of Rs 2.69 lakhs; disposal of pallets / garbage in the sum of Rs 6.26 lakhs and net realization from auction of cargo in the sum of Rs 55.72 lakhs. According to Id DR, these receipts does not have first degree nexus with the CFS activity of the assessee. He placed reliance on the decision of the Hon'ble Supreme Court in the case of Liberty India vs CIT reported in 317 ITR 218 (SC) wherein it was held that the source of DEPB and

duty drawback was the Government and not the business of the assessee. He further argued that there is a huge difference between the expression profits and gains 'derived from' any business and profits 'attributable to' any business and that since the section speaks of profits and gains 'derived from' any business, such profits and gains must have a close and direct nexus with the business of the assessee . According to Id DR, in the instant case, the receipts from aforesaid 4 items does not fall under the expression of profits and gains 'derived from' CFS activity and hence deduction u/s 80IA of the Act is not eligible to the assessee for the same. With regard to net realization from auction of cargo and disposal of pallets / garbage, the same could at best be construed as receipt attributable to the CFS unit and not derived from the same. He argued that the assessee had not furnished the details of credit balances written back and forfeiture of deposits so as to bring the business nexus between the same and the CFS activity carried on by the assessee.

3.3.1. In response, the Id AR argued that the credit balances written back and forfeiture of deposit represents advances and deposits received from customers which were treated as no longer payable and hence written back to income. When asked for the details for the same, the Id AR prayed for one opportunity before the Id AO for furnishing the same. Accordingly we direct the Id AO to verify this aspect in order to ascertain whether the same relates to CFS activity so as to fall within the expression ' derived from' from the details to be filed by the assessee in this regard . After verification of the details, the Id AO is directed to give a definite finding as to whether the same has a first degree nexus with the CFS unit. If so, deduction is to be granted u/s 80IA of the Act to the assessee.

3.3.2. With regard to income derived from disposal of pallets / garbages, the Id AR argued that the same are equivalent to sale of scrap. We find that the pallets are not owned by the assessee but the same are owned by the customers who stack their

products in the pallets. While removing the goods from the warehouse of the assessee, the assessee stated that the pallets are left by the parties, which were unnecessarily occupying the space of the assessee and hence the same were disposed off. We find that this does not have any first degree nexus with the CFS activity of the assessee and cannot be construed as income derived from the said undertaking. Hence we hold that the Id AO had rightly denied deduction u/s 80IA of the Act for the same.

3.3.3. With regard to income earned on net realization from auction of cargo, the Id AR argued that the assessee has got lien over the goods stored in the warehouse belonging to the assessee in the CFS unit. When those goods are not taken / removed by the customers within the prescribed time, the assessee in order to utilize the relevant space for better commercial purposes and derive more income, would resort to auction the said goods and realize proceeds thereon, which proceeds would only be substitute for receipt of rental income by the assessee which has got first degree nexus with CFS activity. We are not in agreement with this argument of the Id AR in as much as, the assessee would be having lot of business expediency in disposing off the cargo from its warehouse and for that purpose would even resort to auction the same. It is not in dispute that the goods/ cargo belongs to the customers who had stored the same in the warehouse of the assessee. The assessee at best would be entitled for claiming demurrage for storing the goods beyond the prescribed time which would be construed as first degree nexus with the CFS activity. Moreover, these are extraneous circumstances which the assessee would not undergo in the normal course of its business. We find that the assessee did not furnish any evidence on record to prove that it has got lien over the goods stored in the CFS unit. In any case, the proceeds realized were only from auction of goods and not from storage of goods and hence the first degree nexus with the CFS activity is conspicuously absent. Hence we hold that the Id CITA erred in granting relief to the assessee in this regard.

3.3.4. With regard to the interest on security deposits of Rs 0.71 lakhs, we find that the Id AR fairly stated that this tribunal in assessee's own case for the earlier year had held that it is not derived from CFS unit and accordingly not eligible for deduction u/s 80IA of the Act. Accordingly, we do not find any infirmity in the order of the Id CITA denying relief to the assessee in this regard.

3.3.5. With regard to revenue profit on sale of fixed assets to the tune of Rs 0.10 lakhs, the same would take the character of sale of scrap as it is not in dispute that the fixed assets were utilized by the assessee only in its CFS unit and the sale thereon would have first degree nexus with the said unit and accordingly would be eligible for deduction u/s 80IA of the Act. We find that the reliance in this regard has been rightly placed on the decision of the Hon'ble Jurisdictional High Court in the case of Reckitt Benckiser (India) Ltd vs Additional CIT reported in 56 taxmann.com 415 (Cal HC). Accordingly we direct the Id AO to grant deduction u/s 80IA of the Act for the same.

3.3.6. With regard to rent receipts of Rs 1.59 lakhs, we find that the same is similar to demurrage claims of the assessee and hence has got first degree nexus with the CFS unit and eligible for deduction u/s 80IA of the Act. Accordingly we direct the Id AO to grant deduction u/s 80IA of the Act for the same.

3.3.7. On hire charges received on assets to the tune of Rs 0.02 and Rs 0.07 lakhs, we find that the assessee had provided refrigerators, generator sets and personal computers to the customers who had stored the goods in the godown / warehouse of the assessee and had collected hire charges. These assets are given to the customers as part and parcel of the CFS activity carried on by the assessee for smooth and effective storage of the goods and income derived thereon in the form of hire charges is inextricably linked

with the CFS activity carried on by the assessee. Hence we direct the Id AO to grant deduction u/s 80IA of the Act for the same.

3.3.8. With regard to sale of tender documents in the sum of Rs 0.46 lakhs, the assessee being a Government of India Enterprise, would have to invite tenders from the customers in connection with its CFS unit. For this purpose, the tender documents were printed by the assessee and had incurred expenses for the same. These tender documents, when remaining unutilized, were sold by the assessee in order to recover its cost / expenses incurred thereon. Hence it would only tantamount to recovery of expenses incurred directly in connection with the CFS unit. We find that the reliance has been rightly placed by the Id AR on the decision of the Hon'ble Supreme Court in the case of CIT vs Meghalaya Steels Ltd reported in 383 ITR 217 (SC) in this regard. Hence we direct the Id AO to grant deduction u/s 80IA of the Act for the same.

3.3.9. Accordingly, the Ground No. 2 raised by the revenue for Asst Year 2010-11 is partly allowed for statistical purposes and Ground No. 3 raised by the assessee for Asst Year 2010-11 is partly allowed.

4. DISALLOWANCE OF PRIOR PERIOD EXPENSES

Ground No.3 of Revenue Appeal for Asst Year 2010-11

The brief facts of this issue are that the Id AO observed that the assessee company had debited Rs 14,04,000/- on account of prior period adjustments during the year 2009-10 relevant to Asst Year 2010-11 as per Schedule 13 of Audited Balance Sheet. The assessee has claimed this expenditure relating to earlier years which is not liable for deduction since it maintains its accounts on mercantile basis for which the said expenses should have been claimed in the respective years for which it pertains. Therefore the above amount of Rs 14,04,000/- on account of prior period adjustment

was disallowed and added to the total income. The assessee submitted that during the course of assessment proceedings the detailed break up of expenses relating to prior period, liability in respect of which crystallized during the year were submitted before the Id AO giving justification for each one of them. It was specifically submitted that although the expenses were relating to the earlier year, the liability for such expenses crystallized during the relevant previous year and hence the entire amount was deductible in computing the business income. It was also specifically pointed out that no deduction was claimed in respect of such expenditure in earlier year on mercantile basis. It was pointed out before the Id CITA that similar disallowance made in Asst Year 2002-03 was deleted by the Id CITA vide order dated 29.9.2005 and for the Asst Year 2003-04, no disallowance was made by the Id AO u/s 143(3) of the Act towards prior period expenditure. It was also pointed out that similar disallowances made for the Asst Years 2005-06 , 2007-08 , 2008-09 and 2009-10 were deleted by the Id CITA.

4.1. The Id CITA by following the order of his predecessor for Asst Year 2009-10, gave a finding that liability in respect of the prior period expenses crystallized during the year which are quite evident from the details filed before the Id AO. The Id CITA also observed that no discrepancy was noticed by the Id AO on the said details of prior period expenditure. The Id CITA noticed that the prior period expenditure debited during the year include depreciation of Rs 7,16,473/- being the depreciation as per books, which in any case, would have to be added back while computing the business income of the assessee. Accordingly, he confirmed the disallowance of Rs 7,16,473/- and granted relief for the remaining sum of Rs 6,83,527/- (14,04,000 – 7,16,473) to the assessee. Aggrieved, the revenue is in appeal before us.

4.2. We have heard the rival submissions. We find that the entire details of prior period expenses of Rs 14,03,667/- are enclosed in page 77 of the paper book. It is not in dispute that these details were also filed before the lower authorities. From the perusal of the said details, we are convinced of the fact that the liability for such expenses had crystallized during the year excluding depreciation of Rs 7,16,473/- and hence we hold that the Id CITA had rightly granted relief to the assessee in this regard. Accordingly, the Ground No. 3 raised by the revenue for the Asst Year 2010-11 is dismissed.

5. The Ground No. 4 raised by the revenue for the Asst Year 2010-11 is general in nature and does not require any specific adjudication.

6. The Ground Nos. 1 & 5 raised by the assessee for the Asst Year 2010-11 are general in nature and does not require any specific adjudication.

7. The Additional Ground Nos. 1 & 3 raised by the assessee for the Asst Year 2010-11 are general in nature and does not require any specific adjudication.

8. DISALLOWANCE OF LEASE PREMIUM

Ground No. 2 of Assessee Appeal for Asst Year 2010-11

The brief facts of this issue are that the Id AO observed that the assessee had claimed lease premium of Rs 45,58,305/- as deduction u/s 37 of the Act. The assessee submitted the details of claim in respect of the said lease premium which revealed that the assessee company had paid proportionate premium on leasehold land as advance rent payable by it in accordance with the term of lease agreement and claimed the same

as revenue expenditure. The Id AO observed that the assessee had acquired the said land at different localities from various lessors in different years for long period of time i.e 60 years, 77 years, 88 years, 99 years etc. The said period gives the assessee an advantage of enduring benefit of said leasehold land. Therefore, he held that the lease premium amounting to Rs 45,58,305/- cannot be treated as revenue expenditure and not liable for deduction u/s 37 of the Act.

8.1. The assessee submitted before the Id CITA as under:-

"The appellant is engaged in the business of manufacturing barrels, lubricating oils and also rendering services from Container Freight Station etc. entered into several agreements with different authorities like City & Industrial Development Corporation (CIDCO), Maharashtra Industrial Development Corporation (MIDC), Tamil Nadu Industrial Development Corporation, Kolkata Port Trust, for obtaining land on long-term lease towards setting up of industrial undertaking thereon. The lease period varies 10 to 95 years, and an amount of ₹.45,58,305/- for Assessment Year 2010-11 was charged to the profit & loss account during the year towards proportionate amount of advance rent paid in respect of such land taken on lease. The said amount of ₹.45,58,305/- for Assessment Year 2010-11 towards the proportionate amount of lease premium on lease-hold land was claimed by the appellant as allowable business expenditure u/s. 37 as advance rent payable in accordance with the term of the agreement.

During the course of assessment, the Assessing Officer held the appellant's claim that the proportionate lease premium to be revenue expenditure was not acceptable. The Assessing Officer further held that the amount was spent to acquire leasehold right for a long period, which was a capital asset, and the benefit available to the assessee due to the aforesaid leasehold right was of enduring nature without citing any case report.

In the case of the appellant, the agreements were entered into with MIDC and CIDCO whereby license were granted in respect of lands to the appellant towards setting up of factory building, plant and industrial undertaking. In accordance with the said agreement, the

appellant company should pay an yearly rent of ₹.1/- and a lumpsum amount at the beginning of the lease period which neither adjustable against the monthly rent nor refundable at the end of lease tenure. On termination or expiry of the lease, the appellant company is obliged to deliver to MIDC /CIDCO the demised premises and all erections and buildings thereon, and there exists a clear distinction of the merit of the case of Pingle Industries Ltd. and that of the merit in the instant case of the appellant.

The appellant relies on the decision of Hon'ble Kamataka High Court in the case of CIT -vs- HMT Ltd. 203 ITR 820 (Kar.), which is squarely applicable to the merit of the instant case of the appellant. In that case. the assessee company engaged in the manufacture of machines tools entered into a lease agreement with MIDC for granting a lease of a plot of land at Aurangabad for a period of 95 years upon payment of rent of ₹.1/- p.a. in addition to further payment of ₹.12,09,200/- as premium for acquiring such lease of land. The said agreement envisages surrender of factory, building etc. on the expiry of lease period subject to the condition that the assessee company is at the liberty to remove all buildings, erections and structures from the said land. It was held by the Hon'ble Court that this is evident from the fact that the assessee was paying ₹.1/- p.a. which is obviously for the purposes of retaining the character of the transfer of property as a lease not for any other purposes. It is pertinent to note that the facts of this case is identical to the facts in the case of the appellant. The Hon'ble Kamataka High Court while deciding on the merit of the case relied on the decision of the Hon'ble Supreme Court in the case of CIT vs- Panbari Tea Co. Ltd. 57 ITR 422 (SC) wherein this aspect was explained as "in the circumstances, it seems to us that use of the term 'premium' in the agreement in respect of advance rent paid does not render the payment anything more than rent paid in advance instead of paying the same in future periodically. There is absolutely no indication in the agreement with the amount paid by the assessee as a consideration paid by it for being let into possession of the premises while reserving a separate or economic rate of rent to be paid periodically thereafter.

In addition to the submissions made above, the appellant relies upon the decisions of the Hon'ble Supreme Court in the cases of CIT vs. Associated Cement Companies Ltd. [172 ITR 257 (SC)], CIT vs. Madras Auto Services (P.) Ltd. [233 ITR 468 (SC)] and the recent decision of the Hon'ble Gujarat High Court in the case of DCIT vs. Sun Pharmaceuticals Ind. Ltd. [329 ITR 479 (Guj.)], wherein it has been held that the entire premium paid in lumpsum may be claimed as a deductible business expenditure in the very first year having regards to the fact that such payment obviates the need for making periodical payments of higher rent, which is nothing but on revenue account.

It is worthwhile to mention that the Revenue's Special Leave Petition (SLP) to the Hon'ble Supreme Court against the decision of the Gujarat High Court in the case of DCIT vs. Sun Pharmaceuticals Ind. Ltd. [supra] has been dismissed.

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The Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. vs. CIT 225 ITR 802 (SC) wherein it has been held that facts may justify an assessee, who has incurred expenditure in a particular year, to spread and claim it over a period of ensuing years. In fact, allowing the entire expenditure in one year might give a much distorted picture of the profits of a particular year.

The Hon'ble ITAT, Kolkata Bench, has in the assessee's own case for the Assessment Year 2003-04, upheld the contention of the assessee on an identical issue, held that the entire lease premium ought to be allowed as deductible business expenditure, as per its decision in ITA No. 348/K/2007. Moreover, the Ld. CIT (Appeals) in the appellant's own case, and in identical issue, has decided in its favor for the Assessment Years 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09.

In view of the above submissions, it is prayed that the decision of the Assessing Officer be struck down and the disallowance of ₹.45,58,305/- be deleted. "

8.2. The Id CITA followed the tribunal order in assessee's own case for the Asst Year 2008-09 in ITA No. 1481/Kol/2011 dated 30.4.2012 and decided the issue against the assessee. Aggrieved, the assessee is in appeal before us.

8.3. We have heard the rival submissions. The details of claim in respect of lease premium are as under:-

Claim in respect of Lease Premium								
Assessment Year 2010-2011								
Financial Year 2009-2010								
Details of the Land	Leasor	Original Cost	Amortised in Accounts	Lease Premium	Others	Lease Executed	Lease Period	Amount of Claim for Claim
C F S Mumbai	CIDCO Maharashtra	196490810	3487579	130000000	66490810	07.05.1997	60 Yrs	2166667
Nerul Housing (Gen Mumbai)	CIDCO Maharashtra	2226726	37112	2171700	55026	15.06.1990	60 Yrs	36195
LCD Chennai	TN Industrial Dev	1382891	14406	1380000	2891	1986-87	99 Yrs	13939
OSD Talaja II	MIDC Maharashtra	15079173	199061	1535020	100000	30.01.1992	77 Yrs 9 Month	19680
OSD Talaja I	MIDC Maharashtra	618000	0	1801800	8153	23.07.1997	88 Yrs 10 Mon	20245
CFS Kolkata	Calcutta Port Trust	26500030	1057146	24145283	2354747	2009-10	15 Yrs	1609686
W & D	Calcutta Port Trust	10423831	171436	10378400	45431	2009-10	15 Yrs	691893
Total :		252721461	4966740	161033803				4558305

The assessee had claimed the proportionate premium on lease hold land as advance rent payable by it in accordance with the terms of the lease agreement as business expenditure allowable u/s 37 of the Act. Apparently, the issue is already decided against the assessee by this tribunal in its own case for the Asst Year 2008-09 in ITA No. 1481/Kol/2011 dated 30.4.2012 . But we find that the ld AR was trying to make out a case on the ground that there were fresh facts involved in this year which make it distinguishable from the facts of the Asst Year 2008-09. He brought the following fresh facts in the year under appeal by stating that during the year under appeal, the assessee had entered into a fresh lease agreement with Kolkata Port Trust for a fresh period of 15 years in respect of land situated at CGS Kolkata and W&D (i.e last 2 items in the aforesaid table) for which it had claimed a sum of Rs 16,09,686/- and Rs 6,91,893/- respectively as is evident from the aforesaid table. The ld AR argued that there is a difference between the term 'rent' and 'premium'. He argued that the payment made for getting into a premises is called 'premium'. He argued that the payment made for using the premises is called 'rent'. Admittedly, the payments made during the year contains payment towards lease rent for fresh lease and for existing leases. Obviously differential treatment need to be given for both in the light of difference between the term ' rent' and 'premium' as the said difference has been duly noted by the Hon'ble Supreme Court in the case of CIT vs Panbari Tea Company Ltd reported in 57 ITR 422 (SC). In the absence of proper finding in the order of the authorities below with regard to the same, we deem it fit and appropriate, in the interest of justice and fairplay, to remand this issue to the file of ld AO for denovo adjudication of the issue afresh and pass orders in accordance with law. The assessee is at liberty to advance fresh arguments and adduce fresh evidences in support of its contentions. Accordingly, the Ground No. 1 raised by the assessee for the Asst Year 2010-11 is allowed for statistical purposes.

9. DISALLOWANCE U/S 14A OF THE ACT READ WITH RULE 8D OF THE RULES**Ground No. 4 of Assessee Appeal for Asst Year 2010-11****Additional Ground No. 2 of Assessee Appeal for Asst Year 2010-11**

At the outset, we find that the assessee had raised additional ground of appeal in respect of this issue contesting the disallowance u/s 14A of the Act. We find that this issue goes to the root of the matter and does not involve verification of facts and hence by placing reliance on the decision of the Hon'ble Apex Court in the case of National Thermal Power Corporation Ltd case reported in 229 ITR 383 (SC), we admit the additional ground raised by the assessee for adjudication.

We find that the assessee had derived exempt income in the form of dividend to the tune of Rs 1,37,01,000/- and had made suo moto disallowance of expenses u/s 14A of the Act to the tune of Rs 9,67,000/- in the return of income. The ld AO however invoked Rule 8D(2) of the Rules and made disallowance under second and third limb thereon to the tune of Rs 36,90,606/-, from which he reduced Rs 9,67,000/- and made effective disallowance of Rs 27,23,606/-. The assessee submitted that it had sufficient own funds at its disposal which were much more than the investments made. It was also submitted that in any case, only dividend bearing investments alone should be considered while making disallowance under Rule 8D(2) of the Rules. It was submitted further that foreign investments held by the assessee company should be excluded as the dividend from the same, if any, would be taxable as per the Act and accordingly would be outside the ambit of provisions of Section 14A of the Act. The ld CITA directed the ld AO to exclude the foreign investments made by the assessee accepting the contention of the assessee in that regard and sustained the remaining disallowance made by the ld AO. We find that this tribunal had already held that only dividend bearing investments should be considered for the purpose of working out the

disallowance under second and third limb of Rule 8D(2) of the Rules. In the instant case, since the assessee company is having sufficient own funds , by placing reliance on the decision of the Hon'ble Bombay High Court in the case of Reliance Utilities and Power Ltd reported in 313 ITR 340 (Bom), we direct the ld AO not to make any disallowance of interest under second limb of Rule 8D(2) of the Rules. With regard to the disallowance under third limb of Rule 8D(2) of the Rules, in consonance with the decision of this tribunal in the case of REI Agro Ltd reported in 144 ITD 141 , we direct the ld AO to consider only investments (excluding foreign investments) that had yielded dividend income should be considered for working out the disallowance under third limb of Rule 8D(2) of the Rules. Accordingly, the Ground No. 4 of original grounds of appeal in assessee appeal for Asst Year 2010-11 and Additional Ground No. 2 of assessee appeal for Asst Year 2010-11 is partly allowed for statistical purposes.

10. The Ground Nos. 1 and 3 raised by the assessee for Asst Year 2011-12 are general in nature and does not require any specific adjudication.

11. The Ground No.2 raised by the assessee in Asst Year 2011-12 is similar to Ground No. 2 raised by the assessee in Asst Year 2010-11 and the decision rendered thereon would apply with equal force for Asst Year 2011-12 also except with variance in figures .

12. The Ground No.1 raised by the revenue in Asst Year 2011-12 is similar to Ground No. 1 raised by the revenue in Asst Year 2010-11 and the decision rendered thereon would apply with equal force for Asst Year 2011-12 also except with variance in figures.

13. The Ground No.2 raised by the revenue in Asst Year 2011-12 is similar to Ground No. 2 raised by the revenue in Asst Year 2010-11 and the decision rendered thereon would apply with equal force for Asst Year 2011-12 also except with variance in figures .

14. The Ground No.3 raised by the revenue in Asst Year 2011-12 is similar to Ground No. 3 raised by the revenue in Asst Year 2010-11 and the decision rendered thereon would apply with equal force for Asst Year 2011-12 also except with variance in figures .

15. The Ground No. 4 raised by the revenue for Asst Year 2011-12 is general in nature and does not require any specific adjudication.

16. To sum up,

ITA No.	Appeal by	Asst Year	Result
496/Kol/2014	Revenue	2010-11	Partly allowed for statistical purposes
483/Kol/2014	Assessee	2010-11	Allowed for statistical purposes
471/Kol/2016	Revenue	2011-12	Partly allowed for statistical purposes
421/Kol/2016	Assessee	2011-12	Allowed for statistical purposes

Order pronounced in the Court on 05.09.2018

Sd/-
 [A.T. Varkey]
 Judicial Member

Sd/-
 [M.Balaganesh]
 Accountant Member

Dated : 05.09.2018

SB, Sr. PS

ITA Nos.421&471/Kol/2016
ITA Nos.483&496/Kol/2014
Balmer Lawrie & Co. Ltd.
A.Yrs.2010-11 & 2011-12

Copy of the order forwarded to:

1. Balmer Lawrie & Co. Ltd., 21, Netaji Subhas Road, Kolkata-700001.
2. DCIT, Circle-5(2), Kolkata, Aaykar Bhavan, P-7, Chowringhee Square, Kolkata-69.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

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