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

BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 1397/MUM/2017
Assessment Year: 2007-08

Essel Propack Ltd. Top Floor, Times Tower, Kamala City, Senapati Bapat Marg, Lower Parel, Mumbai-400013.	Vs.	Asst. Commissioner of Income Tax, Range-6(2)(2), AayakarBhavan Mumbai-400020.
PAN No. AAACE1568L		
Appellant		**Respondent**

Assessee by : Mr. Niraj Sheth, AR
Revenue by : Mr. D.W. Pansari, DR

Date of Hearing : 25/09/2018
Date of pronouncement : 28/09/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2007-08. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-12 [in short 'CIT(A)'], Mumbai and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The 1st ground of appeal

Disallowance u/s 14A

i. The Ld. CIT(A) erred in law and facts in upholding disallowance of Rs.7,70,160/- out of expenses u/s 14A of the Act. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

ii. The CIT(A) erred in upholding the disallowance u/s 14A of Rs.7,70,160/-without appreciating that in a case where no exempt income has been earned or received by an assessee, the provisions of section 14A cannot apply.

iii. The CIT(A) erred in law and facts in disallowing expenses of Rs.7,70,160/-without proving live nexus between expenses and exempt income and none of the expenses are proved to have been incurred for other than business purposes by the Assessing Officer

iv. The CIT(A) erred in law and facts in additionally disallowing Rs.7,70,160/- as per Rule 8D without giving specific finding or placing on record the reasons of his dissatisfaction with the claim made by the Appellant in the return of income.

v. The CIT(A) failed to appreciate that investments made in subsidiaries and associates are for strategic purposes and not with the intention to earn exempt income or dividend hence disallowance of expenses with reference thereto is unwarranted.

3. The assessee filed its return of income for the assessment year (AY) 2007-08 on 31.10.2007 declaring total income at Rs.49,41,63,984/-. The Assessing Officer (AO) completed the assessment on 20.12.2010 determining the total income at Rs.54,03,40,178/-. In appeal filed by the assessee, the Ld. CIT(A) partly allowed it. Aggrieved by the order of the Ld. CIT(A), the assessee filed an appeal before the ITAT. We find that the ITAT vide order dated 12.02.2014 (ITA No. 1327/Mum/2012) set aside the issue to the file of the AO for a *de novo* assessment. Then the AO made an assessment u/s 143(3) r.w.s. 254 making the disallowance u/s 14A estimating it @ 0.1% of the total investment of the company of Rs.550,90,38,831 and it comes to Rs.55,09,038/-.

4. In appeal, the Ld. CIT(A) observed that the assessee had not earned any exempt income during the impugned assessment year.

Therefore, the Ld. CIT(A) deleted the disallowance of Rs.55,09,038/- estimated by the AO for disallowance u/s 14A. However, the Ld. CIT(A) directed the AO to restrict the disallowance to Rs.7,70,160/- made *suo motu* by the assessee.

5. Before us, the Ld. counsel of the assessee submits that the assessee has not earned any exempt income during the year and therefore, no disallowance u/s 14A is called for.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

6. We have heard the rival submissions and perused the relevant materials on record. In view of the decision of the Hon'ble Delhi High Court in the case of *Cheminvest Ltd. v. CIT* 378 ITR 33, no expenses can be disallowed u/s 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 *Pr. CIT v. Ballarpur Industries Ltd*. (ITA No. 51 of 2016). We, therefore, deleted the disallowance of Rs.7,70,160/- sustained by the Ld. CIT(A).

Thus, the 1st ground of appeal is allowed.

7. <u>The 2nd ground of appeal</u>

<u>Addition on account of cenvat credit in valuation of Stock</u>

i. The CIT(A) failed to appreciate that even if the Appellant followed the inclusive method of accounting as contemplated under section 145A, there would be no effect to the total income as even certified by the Tax Auditor in Form 3CD. In view of the above, the CIT(A) ought to have deleted the addition of Rs.3,55,56,741/-.

8. The above issue pertains to adjustment made u/s 145A of the Act, wherein the AO has added the value of CENVAT credit availed, to the value of closing stock and accordingly increased the profits for the year under consideration. The ITAT has set aside the issue to the file of the AO holding that the issue stands covered by the decision in the case of *CIT v. Mahalaxmi Glass Works Pvt. Ltd*. 318 ITR 116. The AO has noted that *vide* the said decision, the Hon'ble High Court has observed that once the value of closing stock is increased by making adjustment u/s 145A, correspondingly the value of opening stock should also be given credit for the same.

The AO noted that inspite of being asked to furnish the details/breakup of opening and closing stock, the assessee failed to file the same. Therefore, the AO made an addition of the difference of CENVAT credit of Rs.3,55,56,741/- to the total income shown by the assessee.

9. In appeal, the Ld. CIT(A) directed the AO to give credit as per law in pursuance to the ITAT's order dated 12.02.2014 in appellant's own case (ITA No. 1327/Mum/2012) which reads as under:

> "The Ld. counsel for the assessee submitted that the adjustment has to be made on the purchases also. We agree with the contentions of the Ld. counsel that for the purpose of valuation of purchase and sale of goods and inventories adjustment on account of tax, duty, cess or fee, actually paid or incurred by the assessee has to be made in view of the provisions of section 145A of the Act. Thus, the AO is directed to make necessary adjustment and give CENVAT credit on account of purchases also. Ground No. 2 of the assessee is treated partly allowed."

10. Before us, the Ld. counsel of the assessee relies on the order of the Tribunal in assessee's own case for AY 2008-09 and also the

decision in *CIT v. Diamond Dye Chem Ltd*. (2017) 88 taxmann.com 499 (Bom).

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

11. We have heard the rival submissions and perused the relevant materials on record. Similar issue arose before the ITAT 'E' Bench, Mumbai in assessee's own case for AY 2008-09 in ITA No. 4116/Mum/2013. At para 9 of the said order, the Tribunal held as under:

> "9. We heard the rival submissions and gone through the orders of the tax authorities below. We noted that provisions of Section 145A were effective from 01.04.1999 and applies from A.Y. 1999-200 onwards. The scope and effect of section 145A have been elaborated by the Departmental circular No. 772 dated 23rd December, 1998 as under: -
>
> > "52.1 Method of accounting in certain cases:-52.1 The issue relating to whether the Value of the closing stock of the inputs, work-in-progress and finished goods must necessarily include the element for which MODVAT credit is available, has been a matter of considerable litigation over the years.
> >
> > 52.2 Consistent with the other provisions of the Finance (No.2) Act, 1998, with a view to put an end to this point of litigation and in order to ensure that the value of opening and closing stock reflect the correct value, a new section 145A is inserted. The section provides that the valuation of purchase, sale and inventory shall be made in accordance with the method of accounting regularly employed by the assessee and such valuation shall be further adjusted to include the amount of any tax, duty, cess or fee (by whatever name called), actually paid or incurred by the assessee to

bring the goods to the place of its location and condition as on the date of valuation."

From the said circular it is apparent that the main object to introduce section 145A is to ensure that value of opening and closing stock reflect the correct value so that there is no unnecessary litigation. The assessee in the instant case is following exclusive method. If the AO had to increase the value of closing stock by taking into consideration the Cenvat credit then he has to take into consideration all purchases also to include the Cenvat credit. Had once that included in the purchases ultimately there is no effect on the profit and understatement of the profit would not arise. Similar view has been taken by the Hon'ble Supreme Court in the case of CIT vs. Indo Nippon Chemicals Co. Ltd. 261 ITR 275. Similar view was also taken by the Hon'ble Calcutta High Court in the case of CIT vs. Berger Paints India Ltd. 264 ITR 503. The Hon'ble Bombay High Court in the case of CIT vs. Mahalaxmi Glass Works (P) Ltd. 318 ITR 116 following the Hon'ble Delhi High Court decision in the case of Mahavir Alluminimum Limited 297 ITR 77 held that to give effect to section 145A if there is a change in the closing stock at the end of the year, there must necessarily be a corresponding adjustment made in the opening stock of that year. This does not amount to giving total benefit to the assessee. It would be necessary to compute the true and correct profit for the purpose of the assessment."

Facts being identical, we follow the above order of the Co-ordinate Bench and allow the 2nd ground of appeal.

12. In the result, the appeal is allowed.

Order pronounced in the open Court on 28/09/2018.

Sd/-	Sd/-
(MAHAVIR SINGH)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 28/09/2018
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai