



IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.8926/Mum./2010
(Assessment Year : 2006-07)

Tata Motors Ltd.
Bombay House, 24, Homi Mody Street
Hutatma Chowk, Mumbai 400 001
PAN – AAAC2727Q

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-2(3), Mumbai

..... Respondent

Assessee by : Shri Rajan Vora a/w
Shri Nikhil Tiwari
Revenue by : Shri C.S. Gulati

Date of Hearing – 30.10.2018

Date of Order – 28.01.2019

ORDER

PER SAKTIJIT DEY, J.M.

Aforesaid appeal has been filed by the assessee challenging the assessment order dated 28th October 2010, passed under section 143(3) r/w 144C(13) of the Income Tax Act, 1961 (for short "*the Act*") for the assessment year 2006-07, in pursuance to the directions of the Dispute Resolution Panel-II (DRP), Mumbai.

2. In ground no.1, the assessee has challenged disallowance made under section 14A of the Act.

3. Brief facts are, the assessee an Indian Company is engaged in the business of manufacturing of chassis and vehicles for transportation of goods and passengers including motor cars and parts thereof. For the assessment year under dispute, the assessee filed its return of income on 30th November 2006, declaring total income of ₹ 805,38,61,670, under the normal provisions of the Act and ₹ 1789,41,11,720, under section 115JB of the Act. During the assessment proceedings, the Assessing Officer noticed that in the relevant previous year, the assessee has earned exempt income by way of dividend amounting to ₹ 100,27,21,590. Further, he noticed that the assessee has debited interest expenditure of ₹ 131.50 crore to the Profit & Loss Account. Therefore, he called upon the assessee to explain why disallowance of expenditure for earning exempt income should not be made under section 14A r/w rule 8D. In response, though, the assessee filed a detailed submission stating that no expenditure was incurred for earning the exempt income, hence, no disallowance under section 14A of the Act can be made. However, without prejudice to the aforesaid submission, the assessee furnished a working of notional disallowance under section 14A of the Act which worked out to ₹ 11.63 crore. The Assessing Officer did not find merit in

the submissions of the assessee and proceeded to disallow expenditure under section 14A of the Act by applying the methodology provided in rule 8D. In the process, he disallowed an amount of ₹ 52 crore. The assessee challenged the disallowance before the DRP.

4. The DRP after considering the submissions of the assessee, directed the Assessing Officer to compute the disallowance under section 14A of the Act following the ratio laid down by the Hon'ble Jurisdictional High Court in *Godrej & Boyce Mfg. Co. Ltd. v/s DCIT, 328 ITR 001 (Bom.)*. While implementing the directions of the DRP in the impugned assessment order, the Assessing Officer restricted the disallowance to 5% of the exempt income earned of ₹ 83 crore which worked out to ₹ 4.15 crore.

5. The learned Authorised Representative submitted, initially the Assessing Officer has made the disallowance by applying the provisions of rule 8D which is not applicable to the impugned assessment year. He submitted, in pursuance to the directions of the DRP the Assessing Officer has restricted the disallowance to 5% of the exempt income on estimate basis. He submitted, in assessee's own case under similar facts and circumstances the Tribunal has restricted the disallowance to 1% of the exempt income earned during the year. In this context, he drew our attention to the order passed by the

Tribunal for assessment years 1999–2000 to 2002–03 and for assessment year 2005–06.

6. The learned Departmental Representative relied upon the observations of the Assessing Officer.

7. We have considered rival submissions and perused material on record. It is legally accepted position that the provisions of rule 8D is not applicable to the impugned assessment year. Therefore, what is necessary to examine is, whether the disallowance made @ 5% of the exempt income earned during the year is reasonable. Notably, while deciding identical issue in assessee's own case for assessment year 1999–2000 to 2002–03, in ITA no.3329/Mum./2011 & Ors., dated 31st August 2017, the Tribunal has restricted the disallowance under section 14A of the Act to 1% of the exempt income earned during the year. The same view was reiterated by the Tribunal while deciding assessee's appeal for assessment year 2005–06 in ITA no.3336/Mum./2011, dated 13th April 2018. Consistent with the aforesaid view of the Co-ordinate Bench in assessee's own case, as referred to above, we direct the Assessing Officer to compute the disallowance under section 14A of the Act @ 1% of the exempt income earned during the previous year. This ground is partly allowed.

8. In ground no.2, the assessee has challenged disallowance of expenditure incurred for issue of Foreign Currency Convertible Notes (FCCN).

9. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee has claimed deduction of ₹ 7,60,13,852, towards expenditure incurred for issue of FCCN. Therefore, he called upon the assessee to justify its claim. After considering the submissions of the assessee, the Assessing Officer observed that as per the annual report of the company, the assessee has issued FCCNs aggregating to 11,760 Japanese Yen. He observed, FCCNs were listed in the Singapore Stock Exchange. He observed, as per the terms of issue the holders have an option to convert the FCCNs into ordinary shares or American Depository Shares. Thus, from the aforesaid facts, he concluded that FCCNs are in the nature of convertible debentures. Hence, any expenditure relatable to it has to be considered as share issue expenses, therefore, capital in nature. Accordingly, he disallowed assessee's claim of deduction. Though, the assessee objected to the aforesaid disallowance before the DRP, however, it was unsuccessful. Accordingly, the Assessing Officer carried out the disallowance in the final assessment order.

10. The learned Authorised Representative submitted, while deciding identical issue in assessee's own case for assessment year 2005-06, the Tribunal has deleted the disallowance made by the Assessing Officer. Thus, he submitted, the issue is covered by the decision of the Tribunal in assessee's own case for assessment year 2005-06. In this context, he drew our attention to the relevant observations of the Tribunal. Further, in support of his contention, he relied upon the decision of the Tribunal in *Tata Iron & Steel Co., ITA no.3965/Mum./2003 & Ors.*, dated 7th March 2014. He also relied upon the decision of the Hon'ble Rajasthan High Court in *CIT v/s Secure Meters Ltd., 321 ITR 611 (Raj.)*.

11. The learned Departmental Representative relied upon the observations of the Assessing Officer and the DRP.

12. We have considered rival submissions and perused material on record. Undisputedly, the Assessing Officer has disallowed assessee's claim on the reasoning that FCCNs issued by the assessee are in the nature of convertible debentures, hence, expenditure related to issue of such debenture is capital in nature. However, it is observed that while deciding identical issue in assessee's own case for assessment year 2005-06, in *ITA no.3336/Mum./2011*, dated 13th April 2018, the Co-ordinate Bench following the decision of the Hon'ble Rajasthan

High Court in *Secure Meters Ltd.* (supra) has held that irrespective of the fact whether the debenture issued is convertible or non-convertible, it is in the nature of loan. Therefore, any expenditure incurred in relation to issuance of such debenture is allowable as expenditure. There being no material difference in facts in the impugned assessment year, the aforesaid decision of the Co-ordinate Bench clearly applies to the facts of the present appeal. Therefore, respectfully following the decision of the Co-ordinate Bench referred to above, we delete the addition made by the Assessing Officer.

13. In ground no.3, the assessee has challenged the disallowance of provision for warranty expenses amounting to ₹ 20.77 crore.

14. Brief facts are, on verifying the audited annual report of the assessee, the Assessing Officer found that as per the Balance Sheet, the assessee has made a provision of ₹ 123.86 crore for warranty expenses. Further, he observed, after settlement of the claim made on account of warranty, there is net decrease in warranty provision by 20.77 crore. He observed, the warranty provision relates to the vehicles on which the claim may arise in the next three years. Therefore, according to the Assessing Officer, the liability to pay against the claim has not crystallized during the year. Thus, he

disallowed the amount of ₹ 20.77 crore. The assessee challenged the aforesaid disallowance before the DRP.

15. The DRP after considering the objections of the assessee directed the Assessing Officer to verify all the relevant facts and estimate the disallowance by following the ratio laid down in Rotork India Pvt. v/s CIT, 314 ITR 062 (SC). While implementing the aforesaid direction of the DRP in the final assessment order, though, the Assessing Officer held that the warranty provision amounting to ₹ 20.77 crore is not allowable, however, no specific disallowance in this regard was made in the computation of income.

16. The learned Authorised Representative submitted, there is no financial effect/implication on account of such disallowance in this year since the assessee has already offered to tax the amount on reversal of provision. However, he submitted, in principle assessee's claim is allowable. In this context, he relied upon the decision of the Tribunal in assessment year 2005-06.

17. The learned Departmental Representative submitted, since the assessee did not furnish the required details the Assessing Officer disallowed the provision.

18. We have considered rival submissions and perused material on record. Notably, no specific disallowance has been made by the Assessing Officer on this account in the final assessment order. Therefore, the issue is of mere academic nature. In view of the aforesaid, we do not intend to delve further into the issue. Accordingly, this ground is dismissed.

19. In ground no.4, the assessee has challenged disallowance of write back provisions for doubtful debt of ₹ 9,05,61,633.

20. Brief facts are, during the assessment proceedings, the assessee through letter dated 27th November 2009 stated that in the return of income filed for the impugned assessment year, the assessee has offered an amount of ₹ 22,35,43,479, on account of reversal of provisions for bad debt relating to assessment year 2004-05 and 2005-06. It was submitted, instead of actual reversal of provision during the year amounting to ₹ 18,15,28,430, the assessee has inadvertently offered the amount of ₹ 22,35,43,479, in the return of income. Thus, it was submitted, the excess amount offered of ₹ 4,20,15,049, should be excluded from the computation of total income for the year. Further, it was submitted, an amount of ₹ 4,85,46,584, claimed towards provision of bad debt in assessment year 2004-05 was disallowed in the assessment order passed for the said

assessment year which has been written back and offered to tax in the impugned assessment year is no more taxable. Thus, the said amount also has to be excluded from computation of total income. The Assessing Officer disallowed assessee's claim on the ground that such claim was not made by way of filing a revised return of income.

21. While considering the objections of the assessee, the DRP also agreed with the Assessing Officer.

22. The learned Authorised Representative submitted, since there is a genuine and inadvertent mistake committed in the return of income filed by the assessee, assessee's claim cannot be rejected merely on the ground that non-filing of revised return of income. He submitted, the Assessing Officer may be directed to examine assessee's claim afresh after considering the decisions of the Tribunal in case of Tata Motors Ltd., ITA no.4100/Mum./2011, dated 31st July 2017.

23. The learned Departmental Representative submitted, assessee's claim may be verified by the Assessing Officer.

24. We have considered rival submissions and perused material on record. Undisputedly, the Assessing Officer has disallowed assessee's claim simply on the ground that it was not made by way of a revised return of income. However, fact remains, in course of assessment

proceedings, the assessee did make the claim by placing relevant facts to indicate that write back of provision offered to tax was inadvertently made at a higher figure instead of actual amount accruing as income to the assessee. As per the settled principle of law, real income of the assessee has to be taxed. If by mistake or inadvertence the assessee has offered more than the actual income, assessee's claim has to be considered on the basis of facts and material brought on record. Therefore, the departmental authorities, in our view, were not justified in rejecting assessee's claim on technical ground. Accordingly, we restore this issue to the Assessing Officer for verifying assessee's claim in the context of facts and material brought on record and keeping in view the relevant case laws to be cited by the assessee. The Assessing Officer must afford reasonable opportunity of being heard before deciding the issue.

25. In ground no.5, the assessee has challenged the non-consideration of its claim relating to disallowance of interest on refund under section 244A of the Act.

26. Brief facts are, at the time of processing of the return of income filed by the assessee under section 143(1) of the Act for assessment year 2004-05, interest on refund amounting to ₹ 44,89,065, was granted under section 244A of the Act. On the basis Special Bench

decision of the Tribunal, Mumbai Bench, in *Avada Trading Co. Pvt. Ltd. v/s ACIT, 100 ITD 131 (Mum.)*, the assessee offered it to tax in the impugned assessment year. In the course of assessment proceedings, it was submitted by the assessee that in the assessment order passed under section 143(3) of the Act for assessment year 2004-05, the Assessing Officer has granted interest under section 244A of the Act for an amount of ₹ 24,81,284 and the balance amount of ₹ 20,07,781, was withdrawn by the Department. Thus, it was submitted, income assessable on account of interest granted under section 244A of the Act should be restricted to ₹ 24,81,284. However, the Assessing Officer rejected the aforesaid claim of the assessee since it was not made by filing a revised return of income.

27. The DRP also upheld the aforesaid decision of the Assessing Officer.

28. The learned Authorised Representative submitted, let a direction be issued to the Assessing Officer to correctly compute the addition to be made on account of interest on refund under section 244A of the Act.

29. The learned Departmental Representative, though, relied upon the observations of the Assessing Officer and the DRP, however, he submitted, assessee's claim can be verified.

30. We have considered rival submissions and perused material on record. The dispute precisely is with regard to the quantum of addition to be made on account of interest on refund granted to the assessee under section 244A of the Act for the Assessment Year 2004-05. It is the contention of the assessee that though in the intimation issued under section 143(1) of the Act, interest on refund under section 244A of the Act amounting to ₹ 44,89,065, was granted, however, in the assessment order passed under section 143(1) of the Act, the interest on refund under section 244A was restricted to ₹ 24,81,284. It is the claim of the assessee that on the basis of intimation issued under section 143(1) of the Act the assessee has offered the amount of ₹ 44,89,065, as income instead of ₹ 24,81,284 actually granted to the assessee. We direct the Assessing Officer to verify the facts relating to the claim of the assessee and decide the issue after due opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

31. In ground no.6, the assessee has challenged disallowance of deduction claimed amounting to ₹ 42.70 crore on account of excise duty paid on vehicle held as stock-in-trade as on 31st March 2006.

32. Brief facts are, the aforesaid deduction was not claimed by the assessee in the return of income. In course of assessment

proceedings, the assessee vide letter dated 23rd November 2009, claimed the aforesaid amount as deduction by stating that such amount was paid towards excise duty, education cess on shipment of vehicles held as stock-in-trade on 31st March 2006. Relying upon the decision of the Hon'ble Jurisdictional High Court in Bharat Petroleum Corporation Ltd., [2001] 252 ITR 43 (Bom.) the assessee submitted that since the amount was actually paid in the relevant assessment year it is allowable as deduction under section 43B of the Act irrespective of the fact that excise duty and custom duty is included in the closing stock. However, the Assessing Officer did not allow the deduction claimed by the assessee. While dealing with assessee's objection raised in this behalf, the DRP directed the Assessing Officer to allow assessee's claim after proper verification and following the decisions of the Hon'ble Jurisdictional High Court in Berger Paints India Ltd. v/s CIT, 266 ITR 099 (Bom.) and CIT v/s Bharat Petroleum Corporation Ltd., 252 ITR 043 (Bom.). However, in the final assessment order, the Assessing Officer again disallowed assessee's claim.

33. The learned Authorised Representative submitted, only because such deduction was not allowed in the past the Assessing Officer disallowed assessee's claim. He submitted, excise duty actually paid on

closing stock is allowable as deduction under section 43B of the Act.

For such submission he relied upon the following decisions:–

- i) Berger Paints India Ltd. v/s CIT, 266 ITR 099 (Bom.);*
- ii) CIT v/s Bharat Petroleum Corporation Ltd., 252 ITR 043 (Bom.)*
- iii) Glaxo Smithkline Consumer Healthcare Ltd., 107 ITD 343 (Chandi) (SB)*

34. The learned Departmental Representative submitted, assessee's claim can be verified by the Assessing Officer.

35. We have considered rival submissions and perused material on record. As far as the factual aspect of the issue is concerned, it is the specific claim of the assessee that since the assessee has actually paid the excise duty on vehicles lying in stock, it is allowable under section 43B of the Act. The Assessing Officer has disallowed assessee's claim simply on the reasoning that such claim was not allowed in the earlier assessment years. He has not discussed anything about the applicability of the ratio laid down in the decisions of Berger Paints (supra) and Bharat Petroleum Corporation Ltd. (supra). If as per the ratio laid down in the aforesaid decisions, assessee's claim is allowable, it cannot be disallowed merely for the reason that such deduction was never allowed to the assessee earlier. Therefore, we direct the Assessing Officer to decide the issue following the ratio laid

down in the decisions referred to above. The Assessing Officer must afford reasonable opportunity of hearing to the assessee before deciding the issue. Ground is allowed for statistical purposes.

36. In ground no.7, the assessee has challenged addition made of ₹ 3,79,55,599, on account of transfer pricing adjustment.

37. Brief facts are, in the course of assessment proceedings the Assessing Officer noticing that the assessee course of international transaction with its Associated Enterprises (AE) viz. Tata Technologies USA (TTUS) has received interest on loan amounting to ₹ 9,69,82,205, made a reference to the Transfer Pricing Officer to determine the arm's length price of the interest charged to the AE. The Transfer Pricing Officer after calling for necessary details found that the assessee has bench marked the arm's length price of the interest charged by using Comparable Uncontrolled Price (CUP) method. He observed, the assessee has compared the interest rate received from TTUS at LIBOR Plus 15 basis points with the interest rate of LIBOR plus 30 basis points payable by TTUS to Calyon and Standard Chartered Bank from whom TTUS has availed loan. On further examination, he found that the assessee has lent GBP 53 million to TTUS on 16th August 2005, for a period of six months. The Transfer Pricing Officer observed that since the assessee which has lent the money as an Indian company the

comparable transactions will be those companies which lent money to any U.S. company during that period. Since Calyon and Standard Chartered Bank is not an Indian company, the Transfer Pricing Officer observed that it cannot be considered as a CUP. Further, he observed, the rate of interest in India is higher than the prevalent rate in USA during that period. Thus, he rejected assessee's bench marking. He also rejected assessee's alternative bench marking on the basis of the RBI circular on external commercial borrowing. Thus, ultimately, the Transfer Pricing Officer determined the arm's length price of interest charged to AE at LIBOR Plus 200 basis points. As a result, the arm's length price of the interest charged to the AE was determined at ₹ 13,49,21,896, as against the amount of ₹ 9,69,82,205, charged by the assessee. The resultant shortfall of ₹ 3,79,55,599, was treated as the transfer pricing adjustment to be made to the interest charged. On the basis of the aforesaid adjustment made, the Assessing Officer passed the draft assessment order which was challenged by the assessee before the DRP.

38. The DRP after considering the submissions of the assessee, however, upheld the adjustment made by the Transfer Pricing Officer.

39. The learned Authorised Representative submitted, the assessee had raised U.S. \$ 100 million (approx. ₹ 438 crore) and U.S. \$ 300

million (approx. ₹ 1315 crore) by issue of fully convertible notes. He submitted, pending utilization of the proceeds the money was deposited abroad as per the RBI requirement. Out of the said deposits, the assessee advanced a loan of GBP 53 million to TTUS for a period of six months. He submitted, on the loans advanced the assessee received interest of ₹ 9,69,82,205. He submitted, TTUS had also availed loan from unrelated parties i.e., Calyon and Standard Chartered Bank for a period of three years at LIBOR Plus 30 basis points. He submitted, since the loan advanced by the assessee was for a short period of six months, it was bench marked at four months LIBOR Plus 15 basis points i.e., at 4.72%. He submitted, the bench marking done by the Transfer Pricing Officer at LIBOR Plus 200 basis points is applicable to external commercial borrowing as per RBI Master Circular dated 1st July 2005. He submitted, the loan given to the AE was out of funds received through FCCN. Therefore, there is no interest coupon payable. If notes are not converted, they are redeemable at a discount of 4.12%. Therefore, the effective interest rate works out to 3.78% p.a. Whereas, the assessee has charged interest @ 4.72% which is more than the rate of interest at which the assessee has raised the fund. Further, he submitted, the internal CUP by way of loan availed by the AE from Bank is a valid comparable, hence, should not have been rejected. He submitted, the applicability

of internal CUP also finds support under the OECD guidelines. For such proposition, he relied upon the following decisions:-

- i) *Tecnimont ICB Pvt. Ltd. 138 ITD 23; and*
- ii) *VVF Ltd. v/s DCIT, 31 CCH 474*

40. The learned Departmental Representative relied upon the observations of the DRP and the Transfer Pricing Officer.

41. We have considered rival submissions and perused material on record. The dispute is primarily with regard to the rate at which the assessee should have charged interest on the loan advanced to its AE viz. TTUS. While the assessee has charged the rate of interest at four months LIBOR Plus 15 basis points, the Transfer Pricing Officer has determined the arm's length price of the interest at LIBOR Plus 200 basis points. To substantiate the bench marking made by the assessee the learned Authorised Representative has drawn our attention to the submissions made by the assessee before the Transfer Pricing Officer and the DRP as well as the written notes submitted before us at the time of hearing. Drawing our attention to various workings made in the said notes the learned Authorised Representative has submitted that the bench marking done at four months LIBOR Plus 15 basis points is appropriate. On a careful perusal of the order of the Transfer Pricing Officer as well as the DRP,

we find that various submissions made by the assessee have not been properly dealt with. Further, it appears that the basis for determining arm's length price at LIBOR Plus 200 basis points is the RBI Master Circular dated 1st July 2005, as per which interest rate for external commercial borrowing for a period of three years and up to five years is LIBOR Plus 200 basis points. However, on the basis of the very same circular, the learned Authorised Representative has submitted that the rate of interest applied by the Transfer Pricing Officer will not be applicable to the loan advanced by the assessee, since, it is for a period of six months. In our view, various workings furnished by the learned Authorised Representative in the written notes as well as the submissions made justifying the bench marking of the interest charged at LIBOR Plus 15 basis points requires re-consideration keeping in view the fact, whether the rate provided in the RBI Master Circular dated 1st July 2005 can at all be applicable as in case of the assessee it is a loan advanced and not loan availed. Since, the aforesaid aspects have not been properly examined and various workings furnished in the written notes have not been looked into by the departmental authorities, we are inclined to restore the issue to the Assessing Officer for fresh consideration after due opportunity of being heard to the assessee. Needless to mention that the Assessing Officer must consider all the submissions to be made

by the assessee and should deal with the issue in a speaking order meeting all the submissions to be made by the assessee. This ground is allowed for statistical purposes.

42. In ground no.8, the assessee has challenged the adjustment made to book profit computed under section 115JB of the Act in the final assessment order.

43. Brief facts are, though, in the draft assessment order, the Assessing Officer had not made any adjustment to book profit computed under section 115JB of the Act, however, in the final assessment order, the Assessing Officer enhanced the book profit under section 115JB of the Act by making the following adjustments.

i) Fringe benefit tax	₹ 19,00,00,000
ii) Deferred Tax	₹ 142,15,00,000
iii) Provision for Wealth Tax	₹ 43,00,000
iv) Disallowance u/s 14A	₹ 4,15,00,000

44. However, subsequently, vide rectification order passed under section 154 of the Act, the Assessing Officer himself deleted the addition of fringe benefit tax of ₹ 19 crore.

45. The learned Authorised Representative submitted, without making any adjustment in the book profit in the assessment order, the Assessing Officer cannot make such adjustment in the final

assessment order, since, he has to pass the final assessment order in conformity with the directions of the DRP. He submitted, since there is no direction by the DRP with regard to the adjustment of book profit, the Assessing Officer cannot do so in the final assessment order. In support, the learned Authorised Representative relied upon the following decisions:-

- i) *PCIT v/s Woco Motherson Advanced Rubber Technologies Ltd., [2018] 406 ITR 375 (Guj.);*
- ii) *CIT v/s Sanmina SCI India Pvt. Ltd., [2017] 297 CTR 491 (Mad.); and*
- iii) *Piramal Enterprises v/s ACIT, ITA no.5471/Mum./2017, dated 30.07.2018.*

46. Without prejudice to the aforesaid submissions, the learned Authorised Representative submitted, no adjustment to the book profit can be made in respect of provision of wealth tax since the Assessing Officer is permitted to make only such additions as provided under Explanation-1 to section 115JB(2) of the Act. He submitted, since adjustment to book profit on account of provision for wealth tax is not provided under Explanation-1 to section 115JB of the Act, the Assessing Officer cannot make such adjustment. In this context, he relied upon the following decisions:-

- i) *Reliance Industries Ltd. v/s ACIT, ITA no.5769/Mum./2013, dated 16th September 2015;*

- ii) *Caterpillar India Pvt. Ltd. v/s DCIT, [2017] 80 taxmann.com 325;*
- iii) *Rashtriya Chemicals and Fertilizers Ltd., ITA no.3625/Mum./2017, dated 14.02.2018; and*
- iv) *Vintage Distilleries Ltd., 130 TTJ 79.*

47. As regards adjustment to book profit on account of disallowance made under section 14A of the Act, the learned Authorised Representative submitted, since no such disallowance under section 14A of the Act is provided under Explanation-1 to section 115JB of the Act, the Assessing Officer could not have made the adjustment. In support, he relied upon the decision of the Hon'ble Delhi High Court in *ACIT v/s Vireet Investment Pvt. Ltd., [2017] 165 ITD 27 (Del.)*.

48. The learned Departmental Representative submitted, since the final computation of income in pursuance to the directions of the DRP can only be made in the final assessment order, only at that stage the Assessing Officer can make adjustment under section 115JB of the Act to the book profit shown. Therefore, he submitted, the Assessing Officer was empowered under the Act to make adjustment to the book profit in the final assessment order.

49. We have considered rival submissions and perused material on record. Admittedly, while proposing the draft assessment order, the

Assessing Officer has not made any adjustments to the book profit shown by the assessee. Only in the final assessment order, the Assessing Officer has made adjustment to the book profit computed under section 115JB of the Act by making certain additions / disallowances. On a careful perusal of the provisions contained under section 144C of the Act, it is noted that the power of the Assessing Officer under section 144C(13) of the Act is very limited. As per the said provision, after receipt of the directions issued by the DRP under sub-section (5) of section 144C of the Act, the Assessing Officer shall complete the assessment in conformity with the directions of the DRP. The word "*shall*" used in section 144C(13) of the Act makes it mandatory on the part of the Assessing Officer to pass the assessment order strictly implementing the directions of the DRP. Therefore, any adjustment to the income of the assessee which is not in conformity with the directions of the DRP is invalid and not in strict compliance to the provisions of section 144C(13) of the Act. The very fact that section 144C(13) of the Act mandates the Assessing Officer to complete the assessment without affording any opportunity of being heard to the assessee indicates that while completing the final assessment the Assessing Officer has to implement the directions of the DRP only. If the Assessing Officer does not make any adjustment under section 115JB of the Act in the draft assessment order and only

makes such adjustment in the final assessment order, the assessee is deprived of challenging such adjustment before the DRP. Therefore, the right to objection conferred on the assessee under the provisions of section 144C of the Act is taken away which cannot be the intention of the legislature. The decisions relied upon by the learned Authorised Representative also support this view. In view of the aforesaid, we hold that the Assessing Officer could not have made the adjustment to the book profit computed under section 115JB of the Act in the final assessment order.

50. Even otherwise also, the adjustment made on account of provision of wealth tax and disallowance under section 14A of the Act could not have been made by the Assessing Officer while computing the book profit under section 115JB of the Act, since such adjustments are not permitted under Explanation-1 to section 115JB of the Act. The decisions relied upon by the learned Authorised Representative clearly support this view. Therefore, for the reasons stated above, the adjustment made to the book profit by the Assessing Officer is hereby deleted. Ground raised is allowed.

51. In ground no.9, the assessee has raised the issue of short grant of TDS credit amounting to ₹ 9,95,555.

52. After considering rival submissions, we direct the Assessing Officer to verify the facts and grant actual credit for TDS.

53. Ground no.10, is not pressed, hence, dismissed.

54. Ground no.11, being consequential in nature, does not require adjudication.

55. In view of our decision in ground no.7, grounds no.12 to 14, which have been raised as additional grounds for the first time before us are also restored to the Assessing Officer for adjudication after due opportunity of being heard to the assessee.

56. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 28.01.2019

Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 28.01.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai