

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
 (समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. Nos. 1133/Kol/2015
Assessment Year: 2011-12

CESC Limited (PAN: AABCC2903N)	Vs.	Deputy Commissioner of Income-tax, Circle-6(1), Kolkata
Appellant		Respondent

&

I.T.A. Nos. 1186/Kol/2015
Assessment Year: 2011-12

Deputy Commissioner of Income-tax, Circle-6(1), Kolkata	Vs.	CESC Limited
Appellant		Respondent

Date of Hearing	29.01.2019
Date of Pronouncement	15.03.2019
For the Assessee	Shri J. P. Khaitan, Sr. Counsel & Shri P. Jhunjhunwala, AR
For the Revenue	Shri A. K. Singh, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

These are cross appeals preferred by the assessee and the revenue which are against the order of the Ld. CIT(A)-2, Kolkata dated 29.06.2015 for AY 2011-12.

2. First we take up assessee's appeal. The sole ground involved in this appeal of assessee is against the action of Ld. CIT(A) in confirming the action of AO in disallowing a sum of Rs.753 lakhs representing provision for leave encashment.

3. At the outset, it has been brought to our notice by the Ld. Counsel for the assessee that this issue needs to be remitted back to the AO who has to await the decision of the Hon'ble Supreme Court in the light of Department's special Leave Petition pending before the Hon'ble Supreme Court and wherein the Hon'ble Apex Court was pleased to stay the order of the Hon'ble Calcutta High Court in the case of M/s. Exide Industries Ltd. reported in 292 ITR 470. Per contra, Learned Departmental Representative did not raise any objection.

4. We have considered the submissions of both the parties and have perused the records of the case. We find that Tribunal on identical issue in ITA No. 1787/Kol./2008 in the case of M/s. Ernst & Young Pvt. Ltd. has accepted the aforesaid course of action as suggested by Ld. Counsel for assessee wherein the Tribunal observed at para 12 in page 6 as under :-

"12. Ground No. 5 of the revenue's appeal is against the relief allowed by the CIT(A.) in respect of provision for leave encashment which was deleted by the CIT(A.) following the decision of the Hon'ble jurisdictional High Court in the case of M/s. Exide Industries Ltd. (supra). It was pointed out by the ld. DR that the Hon'ble Apex Court in "SLP (Civil) 22889 of 2008 has stayed the operation of the decision of the Hon'ble jurisdictional High Court. In view of the above, we set aside the orders of the authorities below on this point and restore the matter back to the file of the AO with the direction that he will readjudicate this issue as per decision of the Hon'ble Apex Court in the case of M/s. Exide Industries Ltd. (supra).

Respectfully following the same we set aside the orders of authorities below on this point and restore the matter back to the file of Assessing Officer for adjudication as per the decision of the Hon'ble Apex Court in the case of M/s. Exide Industries Ltd.(supra)."

In view of the above and respectfully following the same, we set aside the order of the Ld. CIT(A) and restore the matter back to the file of Assessing Officer for adjudication as per the decision of Hon'ble Apex Court in the case of M/s. Exide Industries Ltd. (Supra). This ground of appeal of assessee is allowed for statistical purposes.

5. Revenue's appeal in respect of ground nos. 1 to 3 are in respect of depreciation of the trade mark purchased by the assessee from "Spencers".

6. Briefly stated facts are that the assessee (licensor) had entered into a Trade Mark Licence Agreement with M/s. Spencer's Retail Ltd. (licensee) dated 31.03.2009 (AY 2009-

10) for licensee to pay a consideration to the licensor a royalty of 0.5% on the net actual sales generated by using the Trade Mark "Spencer" w.e.f. 01.04.2009 for a period of 20 years. The AO noted that the assessee did not reflect this income in the return of income. When the assessee was confronted with this, the assessee immediately filed a revised return of income suo-moto and offered the same to tax and paid taxes thereon. However, the AO did not allow the claim of depreciation of this intangible asset (Trademark Spencer). Against the same, the assessee has gone on appeal before the Ld. CIT(A), which is still pending for adjudication before him. Thereafter, in AY 2010-11 though the AO allowed the depreciation, the Ld. CIT invoking his revisional jurisdiction u/s. 263 of the Act set aside the order of AO and remitted back this issue of depreciation back to his file for re-adjudication of the issue as to whether depreciation needs to be allowed or not. It was pointed out to us that AO has not passed the giving effect order and since the AO had to give effect to the order within one year from the date of passing of the order passed u/s. 263 of the Act i.e. before 31.03.2017 which he did not do means AO's order allowing depreciation has crystallised. It was also brought to our notice that only in this assessment year i.e. AY 2011-12, the AO again disallowed the depreciation which has been allowed in appeal by the Ld. CIT(A). It was also brought to our notice that from AY 2012-13 onwards the AO is consistently allowing the depreciation on the Trade Mark and these aforesaid facts have been taken note by the Ld. CIT(A) while giving relief to the assessee.

7. Coming back to the AY 2011-12 after the AO has disallowed the depreciation the assessee preferred an appeal before the Ld. CIT(A) who was pleased to grant the relief. Aggrieved, revenue is before us.

8. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee the licensor had entered into a Trademark License Agreement with M/s. Spencers Retail Pvt. Ltd. vide agreement dated 31.03.2009 whereby M/s. Spencers Retails Pvt. Ltd. the licensee, had to pay a consideration to the licensor (assessee) a royalty of 0.5% on the net actual sales generated by using the Trade Mark "Spencer" w.e.f. 01.04.2009 for a period of 20 years. We note that for AY 2010-11 the AO

himself has given the depreciation except for AY 2011-12 onwards which has been allowed by the Ld. CIT(A) ; And from AY 2012-13 onwards, the AO is consistently allowing the claim of assessee for depreciation on this intangible asset. Therefore, we note that consistently the depreciation was allowed for the issue in question except for this year. We note that the Ld. CIT(A) has given relief to the assessee by observing as under:

“2.4 I have carefully perused the submissions made on the issue involved and have heard the A/R. I have also perused the Trademark License Agreement dated 31st March, 2009 entered by the appellant with Spencer Retail Limited and the submissions and details filed by the appellant in course of the assessment proceedings in relation to the issue involved.

I note that in terms of the said agreement, the appellant granted an exclusive license to Spencer Retail Limited in consideration for royalty, to use the trademark "Spencer's" as more particularly set out in the agreement, in relation to its business for a period of twenty years commencing from 31st March, 2009. In terms of clause 4 of the agreement (consideration), for the permitted use of the trademark, Spencer Retail Limited is to pay the company a royalty of 0,5% 011 the net actual sales generated by using the trademark net of taxes with effect from 1st April, 2009. I also note that for the year under consideration the appellant has duly offered to tax the said royalty income amounting to Rs. 4,64,95,455 accruing to it in terms of the above agreement during the year and the Assessing Officer has also taxed the said royalty amount as income of the appellant for the year under consideration which appears at page 7 of the order passed by him.

Thus, from the documents on record I find that there cannot be any iota of doubt that the appellant owns the trademark 'Spencer's' and has used the same for the purpose of its business during the period under appeal and further that the royalty income for the year accruing to it in terms of the subject Trademark License Agreement has been duly offered and assessed to tax.

The only allegation of the Assessing Officer while making the impugned disallowance of depreciation on the trademark "Spencer's" is that the appellant did not account for any income in its books of account against the said royalty for use of trademark. However, in my view, whether or not such royalty income has been accounted for in the books of accounts of the appellant for the year has no relevance in the matter of allowance of depreciation on the trademark. It is well settled position in law that whether or not the assessee is entitled to a particular deduction will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights; nor can the existence or absence of entries in his books of account be decisive or conclusive in the matter. The said proposition in law has been very clearly laid down by the Hon'ble Supreme Court in the case of Kedarnath Jute Manufacturing Co. Ltd. vs. CIT 82 ITR 363 (SC) and in Tuticorin Alkali Chemicals & Fertilizers Ltd. vs. CIT 227 ITR 172 (SC). In fact, as stated above, at page 7 of the order under appeal, the Assessing Officer, has himself taxed the royalty income of Rs. 4,64,95,455/- accruing to the appellant during the year in terms of the-Trademark License Agreement dated 31st March, 2009.

Allowance of depreciation on an asset is governed by the provisions of section 32 of the IT Act and as per the said provisions for the purpose of allowing depreciation, the asset, in the present case the trademark "Spencer's", has to be owned by the assessee and is to be used

for the purpose of its business. There is no dispute to the fact that the trademark "Spencer's" is wholly owned by the appellant and is being used for the purpose of its business from the date of the subject Trademark License Agreement as and in the manner provided therein. Accordingly, there cannot be any reason for denying depreciation allowance on the trademark "Spencer's" while computing its total income under the provisions of the Act.

In view of the above, I delete the disallowance of Rs. 24,60,93,750/- being depreciation on the trademark "Spencer's" 'made by the Assessing Officer in the order under appeal and direct him to allow the same while computing the total income of the appellant for the year under consideration. This ground of appeal is thus decided in favour of the appellant."

9. We note that the Ld. CIT(A) has made a finding of fact from perusal of the documents on record that there cannot be any iota of doubt that the assessee owns the trademark 'Spencer's and has used the same for the purpose of its business during the period under appeal and further that the royalty income for the year accruing to it in terms of the subject Trademark License Agreement has been duly offered and assessed to tax. This finding of fact the Ld. DR could not controvert, so the decision of Ld. CIT(A) need to be upheld. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) and the same is hereby upheld. Therefore, this ground of appeal of revenue is dismissed.

10. The next issue of revenue is regarding disallowance u/s. 14A of the Act. Brief facts of the case as observed by the AO are that the assessee company claimed exempted dividend income of Rs.30,00,000/- during the year under consideration and has added back an amount of Rs.9,05,854/- on account of administrative expenses u/s. 14A of the Act in its computation of income. However, the AO found that the calculation made by the assessee has not been done in accordance with sec. 14A read with Rule 8D of the Rules. He, therefore, computed the disallowance u/s. 14A read with Rule 8D of the Rules at a sum of Rs.4,40,72,637/-, the calculation of which is given at page 5 of the assessment order and added back the same to the total income of the assessee along with the sum of Rs.9,05,854/- shown by the assessee totaling to Rs.4,49,78,491/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who directed the AO only to consider the dividend yielding investments while computing of disallowance u/s. 14A of the Act read with Rule 8D of the Rules. Aggrieved, revenue is before us.

11. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the Ld. CIT(A) while granting this relief has followed the decision of ITAT in DCIT Vs. REI Agro Limited in ITA No. 1811/Kol/2012 wherein the Tribunal observed that while applying Rule 8D only that investment has to be considered which has yielded exempt income during the year. Since Ld. CIT(A) by following the decision in the case of REI Agro Ltd. (supra) granted relief to the assessee and the Ld. DR could not controvert the decision of Tribunal by any order of the Hon'ble High Court and /or Apex Court, the judicial discipline warrants us to follow the ratio laid by the Co-Ordinate Bench, so we find no infirmity in the order of Ld. CIT(A) and confirm his action. Therefore, this ground of appeal of revenue is dismissed.

12. In the result, the appeal of assessee is allowed for statistical purposes and that of the revenue is dismissed.

Order is pronounced in the open court on 15th March, 2019.

Sd/-
(Dr. A. L. Saini)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 15th March, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – CESC Ltd., CESC House, Chowringhee Square, Kolkata-700 001.
- 2 Respondent – DCIT, Circle-6(1), Kolkata
- 3 CIT(A)-2, Kolkata (sent through e-mail)
- 4 CIT , Kolkata.
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Assistant Registrar