



**IN THE INCOME TAX APPELLATE TRIBUNAL "J", BENCH
MUMBAI**

**BEFORE SHRI M.BALAGANESH, AM
&
SHRI RAM LAL NEGI, JM**

**ITA No.696/Mum/2017
(Assessment Year :2009-10)**

M/s. Wartsila India Private Limited (Formerly known as "Wartsila India Limited") 21 st Floor, Kesar Solitaire, Plot No.5, Sector 19 Palm Beach Road, Sanpada Navi Mumbai – 400 705	Vs.	Deputy Commissioner of Income Tax-15(3)(1) Aayakar Bhavan Mumbai
PAN/GIR No.AAACW0345D		
(Appellant)	..	(Respondent)

**ITA No.1440/Mum/2017
(Assessment Year :2009-10)**

Deputy Commissioner of Income Tax-15(3)(1) Aayakar Bhavan Mumbai	Vs.	M/s. Wartsila Diesel India Private Limited 21 st Floor, Kesar Solitaire, Plot No.5, Sector 19 Palm Beach Road, Sanpada Navi Mumbai – 400 705
PAN/GIR No.AAACW0345D		
(Appellant)	..	(Respondent)

Assessee by	Shri J.D.Mistri
Revenue by	Shri Manish Kumar Singh
Date of Hearing	18/04/2019
Date of Pronouncement	24/04/2019

आदेश / O R D E R

PER M. BALAGANESH (A.M):

These cross appeals in ITA Nos.696/Mum/2017 & 1440/Mum/2017 for A.Y.2009-10 arise out of the order by the Id. Commissioner of Income

Tax (Appeals)-58, Mumbai in appeal No. CIT(A)-58/336/2013-14 dated 29/11/2016 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 23/04/2013 by the Id. Dy. Commissioner of Income Tax, Circle 3(3), Mumbai (hereinafter referred to as Id. AO).

I. Disallowance u/s.14A of the Act r.w.r. 8D of the rules

Ground Nos. 1 to 3 of assessee's appeal and Ground No.3 of revenue's appeal

2. The brief facts of this issue are that the assessee is engaged in the business of manufacturing / trading of diesel engine, trading in engineering goods and other engineering services. The assessee claimed dividend income as exempt in the sum of Rs. 3,07,16,292/- in the return of income. The assessee did not make any disallowance of expenses u/s.14A of the Act in respect of earning such exempt income. The Id. AO asked the assessee to furnish details of expenses incurred for earning exempt income and also show-caused as to why the expenses incurred and claimed in respect of exempt income should not be disallowed u/s.14A of the Act r.w.r 8D of the rules.

2.1. In response, the assessee vide its letter dated 30/01/2013 submitted that it had not incurred any expenditure in relation to exempt income and hence, no disallowance u/s.14A was *per se* called for. The Id. AO not satisfied with this reply observed that assessee failed to bring on record that it has not incurred any expenditure for earning such exempt income. Accordingly, he proceeded to derive the disallowance figure by adopting the computation mechanism provided in rule 8D of the rules as under:-

(i)	Under rule 8D(2)(ii)	-Rs.14,93,095/-
(ii)	Under rule 8D(2)(iii)	- Rs.56,76,077/-
		=====
	Total	Rs.71,69,172/-
		=====

2.2. This sum of Rs. 71,69,172/- was disallowed by the Id. AO u/s.14A of the Act. The Id. CIT(A) observed that in A.Y.2007-08, similar disallowance of interest under second limb of rule 8D was made by the Id. AO wherein the issue was restored back to the file of the Id. AO for considering it afresh. In giving effect proceedings, the Id. AO passed an order u/s.250 r.w.s 143(3) dated 31/01/2013 wherein no disallowance of interest was made under rule 8D(2)(ii) for A.Y.2007-08. The Id. CIT(A) also took note of the submission made by the assessee that the facts for the year under consideration remain the same with that of A.Y.2007-08 as the assessee had not taken any new loan during the year, and that the term loan which was there in earlier years continued during the year under reference. Hence, there cannot be any disallowance of interest under rule 8D(2)(ii) as the term loan and other loans were used only for business purposes of the assessee and not for making investments. Apart from this, the Id. CIT(A) also made an observation that assessee is having sufficient own funds which are staring on prima facie perusal of the balance sheet. However, he directed Id. AO to decide this aspect in the light of the decision given by the Hon'ble Jurisdictional High Court in the case of HDFC Bank Ltd., reported in 49 taxman.com 335.

2.3. With regard to disallowance of administrative expenses under rule 8D(2)(iii), the Id. CIT(A) without giving any finding upheld the action of the Id. AO with an exception that strategic investment to the expenditure of Rs.3,58,86,000/- should be excluded while computing disallowance under this sub-rule.

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

4. We have heard rival submissions. At the outset, we find that assessee had made a preliminary claim that it had not incurred any expenditure for the purpose of earning exempt income. We find from the perusal of the assessment order that the only basis for which the Id. AO proceeds to adopt computation mechanism under rule 8D of the rules is that the assessee was not able to prove the fact that it had not incurred any expenditure in respect of earning exempt income. This, in our considered opinion, is not warranted as the assessee cannot be forced to prove the negative and hence we are unable to persuade ourselves to agree to this observation of the Id. AO. We hold that the Id. AO had not recorded any satisfaction having regard to the accounts of the assessee with regard to the claim of the assessee that no expenditure was incurred for earning exempt income in terms of 14A(3) r.w.r. 8D(1) of the rules. It is now well settled that without recording any subjective satisfaction with cogent reasons, the Id. AO cannot proceed to make disallowance u/s.14A of the Act or by adopting computation mechanism provided in rule 8D(2) of the rules. This position has been made very clear by the recent decision of Hon'ble Supreme Court in case of Maxopp Investment Ltd., vs. CIT reported in 402 ITR 640.

4.1 Respectfully following the aforesaid decision and in view of the fact that the Id. AO had not recorded any satisfaction with cogent reasons for rejecting the claim of the assessee that no expenditure was incurred for earning exempt income, the disallowance u/s.14A of the Act made by the Id. AO deserves to be deleted.

4.2. We also find that assessee had suo-moto offered a sum of Rs.5 lakhs for disallowance u/s.14A on an adhoc basis during the course of assessment proceedings. Even this was not considered by the Id. AO while framing the assessment.

4.3. It is now well settled that only dividend bearing investments are to be considered for the purpose of computing the disallowance u/s.14A of the Act r.w.rule 8D of the rules. Reliance in this regard is placed on the special bench decision of Delhi High Court in the case of ACIT vs. Vireet Investments Pvt. Ltd., reported in 165 ITD 27.

4.4. However, these observations and findings would be relevant only for addressing alternative arguments and plea of the assessee before us. We direct the Id. AO to delete the disallowance in toto made u/s.14A of the Act for the A.Y.2009-10 for non-recording of subjective satisfaction with cogent reasons, Accordingly, the grounds raised by the assessee are allowed and ground No.3 raised by the revenue is dismissed.

II. Consideration of revised claim made by the assessee towards deduction of provision for bad and doubtful debts written back

Ground No.1 of revenue appeal

5. The brief facts of this issue is that the assessee during the course of assessment proceedings noticed that it had written back provision for doubtful debts amounting to Rs.23,96,673/- which was already disallowed in the computation of income in earlier years. This sum should not have been offered to tax again in the year of write back i.e. during the year under consideration. Hence, the assessee vide submission dated 15/02/2013 requested the Id. AO to reduce the total income to the extent of Rs.23,96,673/- as the same was wrongly considered by them as taxable income while filing the return of income. It was also pleaded that since the time limit for filing revised return had expired u/s.139(5) of the Act, this revised claim was made during the course of assessment proceedings by way of letter dated 15/02/2013. This request was denied by the Id. AO at the time of assessment. Accordingly, a sum of Rs.23,96,673/- was subjected to tax thereby resulting in double addition

though not reflected in the computation of total income in the assessment order. This claim however, was accepted by the Id. CIT(A) by placing reliance on the decision of Jurisdictional High court in the case of CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd., reported in 349 ITR 233.

6. Against this action of the Id. CIT(A), revenue is in appeal before us vide ground No.1.

7. We have heard rival submissions. We find that the Id. CIT(A) had accepted the claim for reducing the provision for doubtful debts written back in the sum of Rs.23,96,673/- from the total income after considering the fact that the said sum was duly disallowed by the assessee in the computation of income in earlier years in the year in which said provisions were made. Hence, adding the very same sum in the year under consideration would lead to double addition. Accordingly, we hold that the Id. CIT(A) had rightly granted relief to the assessee by placing reliance on the decision of Hon'ble Jurisdictional High Court in the case of Pruthvi Brokers and Shareholders Pvt. Ltd., supra wherein the Hon'ble Jurisdictional High Court clarified that the judgment of Hon'ble Supreme Court in the case of Goetze India Ltd., reported in 284 ITR 323 does not impinge upon the hearing of the Income Tax Appellate Tribunal as well as CIT(A) to consider the claim of the assessee and direct the Assessing Officer to allow the claim of the assessee. Thus, the Hon'ble Supreme Court has not negated the jurisdiction of the appellate authorities to entertain such claim. Accordingly, ground No.1 raised by the revenue is dismissed.

III. Addition made towards compensation in the form of mark-up of reimbursement: Rs.8,98,575/-.

Ground No.2 of revenue's appeal

8. We have heard rival submissions. Both the parties mutually agreed that this issue is covered in favour of the assessee in its own case for A.Y.2008-09 by the order of this Tribunal in ITA No.5002/Mum/2013 dated 04/10/2018 wherein relevant grounds raised was as under:-

“A. ADDITION IN RESPECT WITH ADJUSTMENTS MADE BY THE TRANSFER PRICING OFFICER UNDER SECTION 92CA(3) OF THE ACT RS.2,44,896/- (PARA 4 OF THE ORDER 1. On the facts and in the circumstances of the case and in law, the Honorable Commissioner of Income Tax (Appeals) - 15 (hereinafter referred to as the "the CIT (A)") erred in confirming the action of learned Assistant Commissioner of Income Tax - Range 3(3) (hereinafter referred to as the "the learned ACIT") and the learned Transfer Pricing Officer (hereinafter referred to as TPO) in adding an amount of Rs.2,44,893/- to the total income through an adjustment made to the Arm's Length Price with regards to international transactions entered into by the Appellant with its Associated Enterprises, without considering the facts of the case and the submission of Appellant in this respect.

2. In view of the above, the learned ACIT be directed to allow the whole of the above adjustment made.”

9. This ground had been addressed by this Tribunal in A.Y.2008-09 in assessee's own case as under:-

“Apropos ground A:

3. Brief facts of the case are as under:

The assessee company is engaged in the business of manufacturing and trading of diesel engine, trading in engineering goods, other engineering service. On the impugned issue, the TPO noted that the assessee has shown among others international transaction of reimbursement at cost from AE in Finland. In this connection, as regards the actual reimbursements made/recovered by assessee during the year, the assessee had furnished the items wise expenses which were recovered from the AEs amounting to Rs.3,84,06,755/- and expenses paid to the AEs of Rs.38,30,014/-. From examination of the reimbursement recovered by the assessee, it was noticed by the TPO that an amount of Rs.24,48,960/- has been recovered towards marketing and promotion expenses which TPO observed that prima facie, carries a service element in it. He further observed that since the recovery was towards a service rendered by the assessee to the AE, the assessee ought to have charged a mark-up on the amount of service charges recovered from the AE. The TPO also observed that since, this transaction has not been conducted at arm's length, the AR of the assessee was asked by the him to

explain as to why a mark-up of 10% shall not be charged by the assessee on the above amount of services rendered to the AE.

4. The AR of the assessee contended that the amount represented reimbursement of actual expenditure, hence no mark-up should be charged thereon. However the TPO did not find such submission of the appellant as acceptable. He observed that the very narration of the expenditure suggested that the assessee had rendered marketing and promotional services, the cost of which has been recovered without charging any markup thereon. As the transaction was not at arm's length, 10% mark-up was imputed there upon to bring the transaction on par with arm's length price. Accordingly, Rs.2,44,896/- was adjusted to this transaction, representing 10% on the cost of expenditure recovered.

5. Upon the assessee's appeal, the ld. CIT(A) confirmed the TPO's action and inter alia observed as under:

It can be seen from the above table that the appellant has recovered expenses totaling to Rs.2,44,48,960/- which it has incurred towards Marketing and Communications expenses on behalf of the AEs. Even if these Marketing and Communication expenses were the payments initially made to the third party by the appellant then to there would be element of services rendered in identifying the parties to render services to the AEs, commensurating paper work, utilization of appellant's money for the purposes etc, In a third party situation, there could be no such practices followed. In the facts of the case, it is clear that the appellant initially performed as an agent of the AEs through which the services rendered by the third parties were delivered the AEs. In such facts of the case, the appellant performing as an agent for delivery of such services should have been adequately at arm's length compensated.

6. He proceeded to affirm the TPO's order.

7. Against this order assessee is in appeal before us.

8. We have heard both the counsel and perused the records. Learned counsel of the assessee submitted that this is a mere reimbursement of some expenses on cost to cost basis. That there is no element of service; hence he submitted that the action of the revenue in providing a markup of 10% is not at all sustainable. Furthermore, the ld. Counsel of the assessee submitted that the method adopted for computing the arm's length price by the transfer pricing officer is not as per the provision of law. In this regard he referred to that methods for computation of arm's-length price prescribed in section 92C(1). He further submitted that the other method u/s. 92C(f) has been inserted subsequently and the same is not applicable from the concerned assessment year.

9. *Per Contra*, the learned departmental representative submitted that transfer pricing officer has carefully analyzed the reimbursements. He submitted that only those reimbursements which have an element of service have been identified by the transfer pricing officer. Upon that markup of 10 % has been added. He submitted that the services are in the nature of selection of advertiser, identification for specific bookings etc. He submitted that these certainly include an element of service. However, the learned departmental representative would not dispute the proposition that the computation of arm's-length price is not as per the any prescribed provision of the Act.

10. Upon careful consideration we find that section 92C(1) provides the following methods for computation of arm's-length price:

Computation of arm's length price .

92C. (1) *The arm's length price in relation to an international transaction or specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely :—*

- (a) *comparable uncontrolled price method;*
- (b) *resale price method;*
- (c) *cost plus method;*
- (d) *profit split method;*
- (e) *transactional net margin method;*
- (f) *such other method as may be prescribed²³ by the Board.*

11. *It is undisputed that the method of computation of arm's-length price adopted by the transfer pricing officer is not as per any of the method prescribed under the act for the extant period. In similar circumstances, the Hon'ble jurisdictional High Court in the case of CIT vs. Kodak India (P) Ltd. [2017] 79 taxmann.com 362 (Bombay) vide order dated 11.07.2016 in ITA No. 15 OF 2014 has held as under:*

The assessee, an Indian subsidiary of an American company sold its imaging business to Indian subsidiary of another American company. The Assessing Officer held that even if transaction was between two domestic non-AEs, yet it would still be considered to be an international transaction and Chapter X of Act would be applicable as holding companies of both the companies had entered into a global agreement for sale of its business. On appeal, the Tribunal held that the transaction would not be covered by the definition of international transaction as ALP for transfer of its imaging business as determined by assessee was reasonable and ALP was arrived at by the Transfer Pricing Officer (TPO) by not adopting any of the methods prescribed under section 92C. The prayer for restoration to TPO to apply the prescribed method was rejected.

Held that the revenue had not disputed finding of fact arrived at by the Tribunal that transfer of imaging business was independently done on its own terms and conditions de hors global agreement arrived at between their holding companies and ALP for transfer of its imaging business as determined by assessee was reasonable. The Tribunal held that method adopted by revenue to determine ALP was alien to the methods prescribed under section 92C and, therefore, declined to restore the issue to the Assessing Officer for redetermining the ALP by adopting one of the methods as listed out in section 92C. The revenue having accepted finding of fact arrived at by the Tribunal, no question of law arose from Tribunal's order.

12. Respectfully following the precedent we hold that since the method adopted by the transfer pricing officer for computing the arm's-length price is not as per the provision of law, the action of the authorities below is not sustainable. Hence, we direct that addition in this regard should be deleted.”

10. The decision rendered hereinabove in the light of the aforesaid facts shall apply *mutatis mutandis* for the year under consideration also and accordingly the ground No.2 raised by the revenue is dismissed.

IV. Disallowance of liquidated damages :Rs.1,64,43,351/-

Ground No.4 of revenue's appeal

11. The brief facts of this issue are that the Id. AO observed that assessee has claimed expenditure of Rs.1,64,43,351/- on account of liquidated damages in respect of following parties:-

Sr.No.	Name	Amount
1.	Sterlite Industries India Limited	44,62,112
2.	Toyota Kirloskar Auto Parts Private Ltd	1,28,240
3	Ajanta Manufacturing Limited	3,33,333
4.	Reliance Infocomm In	36,821
5.	Cement Corporation	2,650
6.	Material Organization	6,91,909
7.	Vedanta Aluminum Ltd	25,88,286

8.	OPG Metals Pvt Ltd	45,00,000
9.	Saint Gobain	37,00,000
	Total	1,64,43,351/-

12. During the course of assessment proceedings, the assessee was asked to furnish the evidences and establish that the assessee was liable to pay liquidated damages to the clients mentioned above. The Id. AO observed that assessee did not furnish any evidence to show that the liability had in fact accrued and / or the payments are made. Hence, he observed that assessee had not established the fact that it had any liquidated damages or not. Accordingly, he concluded that the said liquidated damages are liable to be disallowed by applying the Explanation to Section 37(1) of the Act as the same tantamounts to default committed by the assessee warranting penalty for violating the law in force. Accordingly, he disallowed the sum of Rs.1,64,43,351/- on account of liquidated damages in the assessment.

13. Before the Id. CIT(A), the assessee stated that similar disallowance had been deleted in assessee's own case in earlier years for A.Yrs. 2001-02 to 2006-07 and the issue for the year under consideration is exactly similar to that in the earlier years. Ld. CIT(A) also observed that for A.Y.2007-08, this issue was restored back to the Id. AO for considering it afresh. After due verification, the Id. AO in giving effect to the order

passed u/s.250 r.w.s. 143(3) dated 31/01/2013 deleted the entire disallowance made on account of liquidated damages and accepted the claim of the assessee. The Id. CIT(A) appreciated the fact that in the normal course of business, the assessee had entered into various contracts with its customers, as per which, it is required to fulfill certain obligations of adhering to certain terms and conditions of dispatch, delivery and commissioning specific performances etc., In case if the assessee does not fulfill any of the said terms, then it is liable to incur certain damages to its customers under the concerned contract. Moreover, it was pleaded that the corresponding income in respect of such customers has been offered in the books of accounts of the assessee and the liquidated damages, if any, are later determined and debited to the profit and loss account of the assessee and claimed as deduction. In other words, the liquidated damages are payable by the assessee as and when the same are being claimed by the customers as per the contract.

14. The Id. CIT(A) duly appreciated the fact that this expenditure was incurred under the contractual obligation and incurred in the normal course of business of the assessee. The Id. CIT(A) also found that this issue has been decided in favour of the assessee by this Tribunal in earlier years and accordingly, deleted the disallowance.

15. Aggrieved, the revenue is in appeal before us for ground No.4.

16. We have heard rival submissions. The Id. AR placed on record the copy of the order of this Tribunal in ITA No.2162/Mum/2006 for A.Y.2002-

03 and ITA No.2459/Mum/2006 for A.Y.2002-03 dated 10/04/2013 in assessee's own case wherein it was held as under:-

“7. Ground No. 2 of the Revenue's appeal relates to the disallowance of Rs.66,58,662/- on account of bad debts and liquidated damages made by the AO and the same deleted by the Ld.CIT(A). The Ld.AR has pointed out that similar issues have been decided in favour of the assessee by the ITAT in its own cases for the assessment years 2000-01, 2001-02, 2003-04 and 2004-05 in ITA Nos. 7926/Mum/2004, 8794/Mum/2004, 4740/Mum/2008 and 1278/Mum/2009 respectively and copies of the said orders have also been submitted. Since identical issue has been decided in favour of the assessee on the said orders by the ITAT, we do not see any reason for taking a different view on this issue in the absence of any material change in the facts of the case and thus the order of the Ld.CIT(A) on this count is upheld.”

17. Respectfully following the same, we do not find any infirmity in the order of Id. CIT(A) deleting said disallowance. Accordingly, ground No.5 raised by the revenue is dismissed.

18. Ground No.5 & 6 raised by the revenue are general in nature and does not require any specific adjudication.

19. Ground No. 'B' raised by the assessee in its appeal are general in nature and does not require any specific adjudication

20. In the result, appeal by the assessee is allowed and appeal by the revenue is dismissed.

Order pronounced in the open court on this

24/04/2019

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 24/04/2019
Karuna Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai