

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER**

ITA No.95/Bang/2018
Assessment Years : 2011-12

M/s. Buhler India Pvt. Ltd., 13-D, 12-D, 13C and 13-B, KIADB Indl. Area, Attibele, Bangalore – 562 107. PAN : AAACB 5987 A	Vs.	Deputy Commissioner of Income-Tax, Circle 1(1)(2), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Keerthi Narayanan, CA
Revenue by	:	Shri. Vikas Suryavamshi, Addl. CIT

Date of hearing	:	16.07.2019
Date of Pronouncement	:	02.08.2019

ORDER

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of CIT(A) - 1, Bangalore, dated 31.08.2017 for Assessment Year 2011-12.

2. Briefly stated, the facts of the case are as under:-

2.1 The assessee, a company engaged in business of manufacture, trading, servicing and maintenance of food processing machines, filed its return for Assessment Year 2011-12 on 28.11.2011 and subsequently a revised return of income on 24.08.2012 declaring income of Rs.11,82,67,813/-. The case was

taken up for scrutiny for this Assessment Year and the assessment was concluded under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') vide order dated 23.03.2015 wherein the assessee's income was determined at Rs.26,49,55,970/-. The assessee's appeal was disposed off by the CIT(A)-1, Bangalore vide order dated 31.08.2015.

3. Aggrieved by the order of CIT(A)-1, Bangalore, dated 31.08.2017, for Assessment Year 2011-12, the assessee has preferred this appeal before the Tribunal, wherein it has raised the following grounds:-

(i) **General**

1. The order of the learned CIT(A), in so far as it is prejudicial to the interests of the Appellant, is based on incorrect appreciation of facts and interpretation of law and is, therefore, bad in law and on facts.

(ii) **Disallowance under Section 14A of the Act**

2. The learned CIT(A) has erred in law and on facts, in upholding the disallowance under Section 14A of the Act amounting to INR 9,28,747.

3. The learned Assessing Officer ("learned AO") and learned CIT(A) ought to have appreciated that the dividend income was earned on investments made by the Appellant out of its own funds and that no expenditure was incurred by the Appellant in earning such dividend income to warrant a disallowance computed as per Rule 8D(2)(iii) of the Income-tax Rules, 1962 ("the Rules").

4. The learned AO and learned CIT(A) has erred in law and on facts, in computing disallowance of INR 9,28,747 under Section 14A of the Act read with Rule 8D of the Rules by holding that the contention of the Appellant is not acceptable without objectively satisfying himself of the incorrectness of the aforesaid claim of the Appellant, having regard to its books of accounts.

5. The learned AO and learned CIT(A) has erred, in law and on facts, by not appreciating the Appellant's submission that Section 14A disallowance operates in respect of only those expenses which have proximate nexus with the exempt income and therefore, has erred in applying the provisions of Section 14A(3) read

with Rule 8D(2)(iii) in a routine manner.

(III) Disallowance of Commission expenses amounting to INR 68,68,580 under the provisions of Section 40(a)(i) of the Act

6. The learned CIT(A) has erred in law and on facts, in upholding the disallowance of Commission expenses amounting to INR 68,68,580 paid by the Appellant to M/s Ameerjee Valleejee & Sons Pvt Limited ("AV & Sons"), on the ground that the Company has not withheld tax on such payment.
7. The learned AO and the learned CIT(A) has erred in law and on facts, in not appreciating the submission of the Appellant that the transaction with AV & Sons is not chargeable to tax in India under the charging Section 4, 5 and 9 of the Act since no part its income arises in India and or is received by it/on its behalf in India or deemed to accrue or arise in India.
8. The learned AO and the learned CIT(A) has erred in law and on facts, in not appreciating the Appellant's submission that the commission paid by it to AV & Sons, a foreign agent, rendering services outside India would not establish business connection in India in terms of Section 9(1)(i) of the Act and thus, the same is not liable to withholding tax provisions under Chapter XVIB of the Act.
9. The learned CIT(A) has erred in law and on facts, in not following the jurisdictional Bangalore Tribunal decision in the case of Exotic Fruits Pvt Ltd. v. Income-tax Officer (International Tax) (40 taxmann.com 348) holding that commission payment to foreign agents is not taxable in India.
10. The learned AO and the learned CIT(A) has erred, in law and on facts, in not appreciating that subsequent withdrawal of Circular No. 23 dated 23 July 1969 and Circular No. 786 dated 7 February 2000 by way of issuance of Circular No. 7 dated 22 October 2009, would not have any effect on the taxability of such payments in India since the services rendered outside India by the non-resident agent *per se* does not establish business connection in India in terms of Section 9(1)(i) of the Act.
11. Without prejudice to the above, the learned CIT(A) has failed to appreciate the settled position of law that the CBDT Circulars are binding only on the Revenue authorities and not on the taxpayers, while upholding the disallowance made by the learned AO.

(IV) Short grant of credit in respect of Taxes Deducted at Source ("TDS") by INR 2,68,927

12. The learned AO has erred, in law and on facts, in not granting complete credit of TDS, as claimed by the Appellant in its Revised Return of Income filed for FY 2010-11 and also reflected in Form No. 26AS of the Appellant for AY 2011-12.

4. **Ground No.1 (supra)**, being general in nature, no adjudication is called for thereon.

5. (II) Ground Nos.2 to 5 – Disallowance under section 14A of the Act

5.1 In these grounds (supra), the assessee, *inter alia*, contends that the CIT(A) erred in upholding the disallowance of Rs.9,28,747/- under section 14A of the Act r.w.Rule 8D(2)(iii) of the Income Tax Rules, 1962, made by the AO. Before us, the learned AR for the assessee submitted that in the year under consideration, the assessee has admittedly earned exempt dividend income of Rs.5,46,848/- and therefore contended that, without prejudice to the other arguments put forth, the CIT(A) ought to have restricted the disallowance under section 14A of the Act to the extent of exempt income i.e., Rs.5,46,848/-. In this regard, the learned AR placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of ACIT Vs. Mantri Technology Constellations Pvt. Ltd., in ITA No.744/Bang/2018 dated 03.04.2019; which followed the decisions of the Delhi High Court in the case of Joint Investments (P) Ltd., Vs. CIT (372 ITR 694) (Del) and CIT Vs. Holcim Indi Pvt. Ltd., in 272 CTR 282 (Del).

5.2 Per contra, the learned DR for Revenue supported the orders of the authorities below.

5.3 We have heard and considered the rival contentions and perused the material on record and the judicial pronouncements cited in this regard. In the case on hand, admittedly the assessee earned exempt dividend income of Rs.5,46,848/- in the year under consideration. In the order of assessment, the AO made disallowance of Rs.9,28,747/- under section 14A r.w.r. 8D(2)(iii)). On appeal, the CIT(A) upheld the aforesaid disallowance u/s 14A r.w.r. 8D. Before us, the assessee / learned AR were unable to controvert the orders of the authorities below to support its claim that no disallowance was called for u/R 8D(2)(iii) and therefore the following alternate argument was put forth by the learned AR. According to the learned AR, the alternate argument of the assessee

is that disallowance under section 14A of the Act cannot exceed the exempt income earned by the assessee. In this regard, the Hon'ble Delhi High Court in the case of Joint Investments (P) Ltd., Vs. CIT (372 ITR 694) has taken the view that the disallowance u/s 14A of the Act cannot exceed the exempt income. Similar view has been expressed by the Hon'ble High Court in the case of CIT Vs. Holcim India Pvt. Ltd., (272 CTR 282) (Del HC). These decisions were considered and followed by the Mumbai Bench of the Tribunal in the case of Future Corporate Resources Ltd., Vs. ACIT (ITA No.4658/Mum/2015 dated 26.07.2017 and by the Co-ordinate Bench of this Tribunal in the case of Lamina Suspension Products Ltd., in ITA Nos.336 & 337Bang/2018 dated 11.01.2019 wherein it was held that the disallowance u/s 14A of the Act cannot exceed the exempt income. Respectfully following the aforesaid judicial pronouncements (supra), we hold that the disallowance u/s 14A of the Act in the case on hand should be restricted to the exempt dividend income of Rs.5,46,848/- earned by the assessee in the year under consideration. We hold and direct accordingly. Since the assessee's alternate argument put forth in the course of appellate proceedings has been allowed and there is no merit in the grounds raised at Sl. Nos. 2 to 5, the same are rejected.

6. III Ground Nos.6 to 11 – Disallowance under section 40(a)(i) of the Act

6.1 In these grounds (supra), the assessee assails the order of CIT(A) in upholding the disallowance of commission expenses amounting to Rs.68,68,580/- paid by the assessee to M/s. Ameerjee Valleejee and Sons (AV & Sons); a foreign agent; on the grounds that the assessee had not withheld tax on such payments. The learned AR contended that the said payments were not chargeable to tax under charging sections 4, 5 and 9 of the Act since no part of the income arises in India or is received by it / on its behalf in India or is deemed

to accrue or arise in India. According to the learned AR, since the agency activity of 'A V & Sons' was rendered outside India and payments were made outside India, therefore the said commission payments to 'A V & Sons' cannot be said to be taxable in India. It is contended that since no income accrues or arises in India or is deemed to accrue or arise in terms of section 5 r.w.s. 9(1)(i) of the Act, the aforesaid commission payments to 'AV & Sons' is not subject to the provisions for withholding tax thereon. In support of the assessee's contentions, the learned AR placed reliance on the decisions of the Co-ordinate Bench of this Tribunal in the assessee's own case in ITA No.2167/Bang/2016 dated 17.11.2017 for Assessment Year 2010-11 on the very same issue.

6.2 Per contra, the learned DR for Revenue placed reliance on the orders of the authorities in the matter.

6.3.1 We have considered the rival contentions / submissions and perused the material on record; including the judicial pronouncements cited / relied on. We find that the similar issue of taxability of payments of commission to 'A V & Sons' foreign agents for services rendered outside India and payments of commission also paid outside India was considered by a Co-ordinate Bench of this Tribunal in the assessee's own case in immediately preceding year i.e., Assessment Year 2010-11; and therein following the decisions of other Co-ordinate Benches in the cases of Exotic Fruits (P) Ltd., Vs. ITO (IT) (2013) 40 taxmann.com 348 (Bang – Trib.) and Puma Sports India Pvt. Ltd., Vs. DCIT in IT(TP)A No.1611/Bang/2017 dated 28.09.2017; held as under at para 3.5.3 thereof:-

3.5.3 Respectfully following the decisions of the co-ordinate bench of this Tribunal in the cases of Exotic Fruits (P) Ltd (supra); and Puma Sports India Pvt. Ltd. (supra); we also hold that the income of the non-resident, 'A V & Sons' by way of payment of commission in the case on hand cannot be considered as being accrued or arisen or deemed to accrue or arise in India as the services were rendered outside India and the commission was also paid outside India. We also hold that in the absence of permanent establishment of 'A V & Sons' in India, the income of the said agent is not exigible to tax in India. Therefore, the assessee

was not obliged to effect any deduction of tax on the commission payment to the agent 'A V & Sons', who is stationed outside India. We, therefore, reverse the findings of the authorities below in this regard and allow the grounds raised in the appeal by the assessee.

6.3.2 Respectfully following the aforesaid decision of the Co-ordinate Bench of this Tribunal in the assessee's own case for Assessment Year 2010-11 (supra), we also hold that the payment of commission to non-resident agent 'AV & Sons' in the case on hand cannot be considered as having been accrued or arisen or deemed to accrue or arise in India as the services were rendered outside India and the payment of commission was also outside India. In this view of the matter, the assessee was not obliged to effect any deduction of tax on the commission payments to the foreign agent 'AV & Sons' who is stationed outside India. Consequently grounds 6 to 11 raised by the assessee are allowed.

7. IV Ground No.12 – Short grant of credit in respect of TDS by Rs.2,68,927/-

7.1 In this ground (supra), the assessee contends that the AO has not granted it TDS credit to the extent of Rs.2,68,927/- as reflected in the 26AS of the assessee. In the circumstances, as contended above, we direct the AO to examine / verify the assessee's claim that of short grant of credit for TDS to the extent of Rs.2,68,927/- in accordance with law. Consequently, ground No.12 of assessee's appeal is allowed for statistical purposes.

8. In the result, the assessee's appeal for Assessment Year 2011-12 is partly allowed.

Pronounced in the open court on 02nd August, 2019.

Sd/-
(N. V. VASUDEVAN)
VICE PRESIDENT

Sd/-
(JASON P. BOAZ)
Accountant Member

Bangalore.

Dated: 02nd August, 2019.

/NS/*

Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.