आयकर अपीलीय अधीकरण, न्यायपीठ – "A" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**A**" KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.2216/Kol/2013 & **ITA No.18/Kol/2017** Assessment Years :2008-09 & 2009-10

Florence Investech Ltd. (***earlier known as J.K. Agri Genetics Ltd***) 7, Council House Street, Kolkata-700 001 [**PAN No.AACCR 3859 F**]	**V/s**.	Addl. CIT, Range-10, / DCIT, Circle-5(2),P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No.2128/Kol/2013 Assessment Year :2008-09

DCIT, Circle-10, P-7, Chowringhee Square, 3rd Floor, Kolkata-69	**V/s**.	M/s J.K. Agri Genetics Ltd. 7, Council House Street, Kolkata-700 001 [**PAN No.AACCR 3859 F**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri D.S. Damle, FCA
राजस्व की ओर से/By Revenue	Shri Rabin Chowdhury, CIT-DR
सुनवाई की तारीख/Date of Hearing	25-07-2019
घोषणा की तारीख/Date of Pronouncement	18-09-2019

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

The instant batch of three cases pertains to a single assessees M/s Florence Investech Ltd. earlier known as *M/s J.K. Agri Genetices Ltd*. Assessment Year 2008-09 contains the Revenue and assessee's cross-

appeals ITA No.2128/Kol/0213 and 2216/Kol/2013 arising against the Commissioner of Income Tax (Appeals)-XII, Kolkata's order dated 12.03.2013 passed in case No.361/XII/Ci-10/10-11. Latter assessment year 2009-10 comprises only taxpayer's appeal ITA No.18/Kol/2017 directed against the CIT(A)-10 Kolkata's order dated 05.10.2016 passed in case No.485/CIT(A)-10/11-12/2014-15/Kol. Relevant proceedings in both assessment year(s) are u/s 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file(s) perused.

2. We come to Revenue's appeal ITA No.2128/Kol/2013. Its sole substantive grievance is that the CIT(A) has erred in law and on facts in reversing the Assessing Officer's action disallowing aassessee's scientific expenditure incurred on research and development amounting to ₹1,85,49,462/- during the course of assessment. The CIT(A)'s findings under challenge to this effect read as follows:-

> "*4. I have considered the finding of the A.O. in his order dt. 31-12-2010 and the written submission filed by the A.R. during the appellate proceeding. Appeal on ground no. is against non-consideration of revised income by the A.O. during the appellate proceeding the A.R. submitted that assessee does not intend to press this ground. Accordingly, appeal on this ground is dismissed.*
>
> *5. Appeal on grounds no. 2, 3 and 4 are against the disallowance of Rs. 44,29,779/- as depreciation on WDV of intangible asset being trade mark and brand. The A.O has given his finding that the cost attributed towards intangible assets is not brand but goodwill and no depreciation is allowable on the same. The A.O. has further held that no evidence is there to prove that the intangible asset is a trade mark or brand. The AR. has submitted that during A.Y. 2003-04 CIT, Kol-IV, Kolkata had issued notice u/s. 263 on the same issue and after examining the submissions and evidences produced the CIT was satisfied that depreciation u/s. 32(1l(ii) was allowable in this case have considered the finding of the AO. and 'the written submission. I think that on actual cost of trade mark and brand name depreciation on WDV is allowable. It is a known fact that J.K. Brahd is a famous in the field of seeds of agro products. Therefore, it cannot be denied that it is a brand in itself, accordingly, allowability of depreciation' on WDV of the actual cost is required in this field. Thus, AO's appeal, on' grounds no. 2, 3 and 4 are allowed.*
> *6. Appeal on grounds no. 5, 6 and 7 are, against the disallowance of sundry creditors. The AO.' has given his findings that the assessee did not file all the required details during the assessment proceeding. Therefore, the Assessing Officer disallowed Rs. 9053492/- u/s. 68 of the I.T.Act, 1961. The AR. has submitted a written submission explaining that due to paucity of time the assessee was unable to provide certain documentary evidence in respect of creditors. So in the appellate proceeding that has been filed. The mater was referred to the AO for verification and remand report. The AO. has filed a remand report vide letter no. DCIT, Cir-1O/Kol/Report/2011-12/1025 dt. 24-08-2011. The AO has submitted that on addresses provided by the AR. the existence of many parties are not established.*

The AO. has further submitted in the remand report that ledger accounts of many suppliers in the books of accounts in the assessee has been subsequently adjusted. So it is not possible to comment on the genuineness of such creditors. I have considered the finding of the AO. in the assessment order as well as in the remand report and the written submission filed by the AR. From the remand report it is clear that in many cases existence of creditors' on the given address have not been found. Similarly, in the case of suppliers, genuineness regarding their transactions has not been proved beyond doubt. Therefore, assessee's appeal on grounds no. 5, 6 and 7 are dismissed.

7. Appeal on grounds no. 8 to 11 are against the disallowance of Rs. 79,42,598/- made by the AO. under Rule 8D read with Sec 14A of the IT. Act, 1961 as expenses in order to earn exempted income. The AR. has submitted that the assessee has not incurred expenditure in order to earn exempted income. I have considered the finding of the A.O. and the written submission filed by the A.R. I find that assessee's argument on this issue cannot be accepted. Because after the amendment in Sec.. 14A inserted in the Finance Act, 2006 w.e.f. 01-04-2007 the Act says 11 the Assessing Officer shall determine the amount of expenditure lncurrec in relation to such income ..... " Thus, it is clear that this provision is mandatory as per the statue book. Therefore, calculation of expenditure under Rule 8d read with Sec. 14A w.e.f. A.Y. 2008-09 is justified. Hence, assessee's appeal on grounds no. 8 to 11 are dismissed.

8. Appeal on ground no. 12 to 14 are against the disallowance of Rs.10665536/- u/s. 40(a)(ia) in respect of cash discount allowed to customers. The A.O. in the assessment order has given his finding that the discount is in the nature of commission/brokerage. Therefore, TDS should have been there u/s. 194H of the IT. Act, 1961. During the appellate proceeding the A.R. has submitted that in order to reduce dependence of bank borrowings and reduce interest burden and to improve the liquidity the company follows practice of offering prepayment/ cash discounts to its customers to pay the invoice value ahead of credit period of 90 days. I have considered the finding of the A.O. and the written submission filed by the A.R. I think cash incentives for full invoice payment before the credit period may be treated as incentive and by no stretch of imagination it can be called commission/brokerage. Therefore, assessee's appeal on grounds no., 12 to 14 are allowed.

9. Appeal on ground no. 15 to 18 are against the disallowance of Rs. 7419691/- being notional interest on interest free .advance to suppliers. The A.O has made an addition on the presumption that such interest free advances might have been paid from borrowed funds. The A.R. during the appellate proceeding has submitted that in the line of business of the assessee giving and receiving interest free advances to suppliers and purchasers is a normal practice. The A.R. has also brought on record that during the year the assessee has given advances to its suppliers and business associates amounting to Rs. 61830760/- and it has also received interest free advances against its own supplies to purchasers amounting to Rs 283059000/-. I have considered the finding; of the AO and the written submission filed by the AR. I find that giving and received advances in assessee's line of business is a normal practice. In fact the assessee has received more advances than it has given to its own suppliers. Therefore, the AO is not justified to make addition of notional interest on this ground. Accordingly, assessee's appeal on ground no: 15 to 18 are allo.wed .

10. Appeal on ground no. 19 to 21 are against the disallowance of Rs.1,13,52,917/- on account of failure to deduct" tax u/s. 194H of the I.T. Act, 1961. The A.O. has held that the real character of transaction between the assessee and the seed growers is of a principle agent nature of relationship. Therefore, the assessee should have

deducted TDS on payments to seed growers. During the appellate proceeding the AR. has submitted that although there is an arrangement/understanding between the appellant and the growers. But all acts, deed and things relating to cultivation ad harvesting of un processed seeds are carried out by the growers in their own right at their own cost and risk and on their own land. I have considered the finding of the A.O and the written submission filed by the AR. I find that it is true that all acts, deeds and things relating to cultivation, harvesting and processing of seeds are carried out by cultivators on their own risk, on their own land and at their own' cost. But there is no denying the facts that cultivators do so with understanding/contract between the assessee and themselves (seed growers/cultivators). Therefore, the assessee should have deducted tax at source u/s. 194H of the I.T. Act, 1961 in this case. Accordingly, assessee's appeal on grounds no. 19 to 21 ore dismissed.

11. Appeal on ground no. 22 to 26 are against the disallowance of deduction u/s. 35 of Rs. 18549462/-. The AO has given his finding that equipments used by the assessee at its research centers of development of new hybrid seeds can also be used by the assessee in the ordinary course of business as well. Therefore, such equipments would not qualify for deduction u/s. 35 of the IT. Act, 1961. The AR. during the appellate proceeding has submitted that the -finding of the AO. is on the basis of his apprehension and not on some concrete finding. I have considered the finding of the AO and the submission filed by the AR. I think the AO has disallowed deduction u/s35 of the I. T Act. 1961 without giving any specific finding of the dual use of machines. Therefore, AOP's action cannot be justified on the basis of apprehension only. Accordingly, assessee's appeal on ground No. 22 to 26 are allowed."

3. Mr. Chowdhury, vehemently contends during the course of hearing that the CIT(A) has erred in law and on facts in deleting the impugned disallowance. His case is that the Assessing Officer had rightly rejected the assessee's deduction claim since it had purchased the corresponding R & D items for carrying out its normal business activity than that any scientific research and development (R&D only). We find no merit in the Revenue's instant grievance. The relevant assessment order dated 31.12.2010 nowhere indicates that the assessee had put to use the impugned plant and machinery in regular business operations and *vice versa*. It is made clear that the Department of Scientific and Industrial Research (DSIR) had duly granted approval to the taxpayer's capital expenditure as per rules. We conclude in this factual backdrop that the CIT(A) has rightly deleted the impugned scientific research and development disallowance of ₹1,85,49,462/- made u/s 35(1)(i) made during the course of assessment without any material but on assumptions and presumptions. The Revenue's instant sole grievance as well the main appeal ITA No.2128/Kol/2013 fail accordingly.

4. Next comes the assessee's cross appeal ITA No.2216/Kol/2013. Its first and foremost substantive ground challenges sec. 68 addition of bogus / sundry liability of ₹92,53,492/- treated as unexplained during the course of assessment as well as the lower appellate proceedings.

5. The assessee-company is a manufacturer / producer of hybrid seeds. It carried out research, production & marketing of hybrid seeds as well. There is further no quarrel that the assessee had a very wide portfolio of all major crops including bajra, jowar, cotton, hybrid rice, maize, sunflower as well as vegetables tomato, chilli, ladiesfinger brinjal, gourds &melons etc. in latter line of seed development business.

6. Case file suggests that the assessee had submitted a list of 246 parties / payees. The Assessing Officer's observed in his assessment order dated 31.12.2010 that the assessee had not furnished complete addresses of 109 out of said 240 parties involving the sum in question of ₹90,53,492/-.He therefore was of the view that the said 109 parties could not be put to confirmation either u/s 131 summons u/s 133(6) notice. And also that the assessee had not placed on record their PAN details & bank statements as well. The assessee's gross credit figure in case of all 109 parties involved a sum of ₹6,21,48,167/- against the closing balance of ₹90,53,492/-. The Assessing Officer therefore treated the latter sum as unexplained sec. 68 of the Act. The CIT(A) has upheld the same in his lower appellate discussion.

7. We have given our thoughtful consideration to rival pleadings on the instant first issue. The assessee-company; admittedly engaged in seed development and procurement thereof in various crops and vegetable, does not own any land for the purpose of field trials in research development. Learned departmental representative fails to rebut the clinching fact that the assessee has to conduct the field trials of all foregoing crops and vegetables throughout the country by way of its engagement with the farmers / growers. The assessee is therefore required to issue the modified / processed seed to

the growers by way of incentive and said growers are supposed to return the entire seed produce at higher incentives rates than only the minimum support price shall the produce involving seeds are yet to be introduced in the market. We find that the lower authorities have failed to consider this cumbersome process involved in assessee's line of seed processing and production business.

8. Learned departmental representative at this stage invited our attention to pages 9 to 14 in the assessment order that the Assessing Officer could not have issued the relevant factual verification process to 109 parties on account of their incomplete addresses. We find that only 24 out of the said 109 creditors did not contain the complete addresses. It further emerges that the Assessing Officer is himself very fair in making it clear in his assessment order that the total credit figure in respect of these 109 parties was ₹6,21,48,167/- as against closing balance in issue (supra) which stand treated as bogus. This action of Assessing Officer part is hardly acceptable being an instance of mutual contradictory findings. We make it clear that the Assessing Officer has treated the differential figure of ₹530,94,675/- in case of very parties as correct. The fact also remains that the assessee has not completely discharged its onus of proving liability by filing all the necessary particulars as well. Faced with this peculiar situation, we deem it appropriate that a lump sum disallowance of ₹5 lac only than ₹90,53,743/- in issue would meet the ends of justice with a rider that same shall not be treated as precedent in any other assessment year; as the case may be. The assessee's first substantive grievance partly succeeds to the ₹85,53,942/-. Necessary computation to follow as per law.

9. Next comes the second issue of sec. 14A r.w.s. Rule 8D disallowance of ₹79,42,598/- comprising of proportionate interest and administrative expenditure figure(s) of ₹46,08,448/- and ₹3,34,150 under Rule 8D(2)(ii) &(iii) of the Income Tax Rules, 1962; respectively. There is no dispute that the

assessee's relevant exempt income derived from dividend reads an amount of ₹416,41,398/- as against its *suo motu* disallowance of ₹3.26 lac only. Paper book page 43 suggests that the assessee had held shares in M/s J.K.Paper Ltd. M/s Ashim Investment Co. Ltd., J.K. Industries Ltd. & JK Lakshmi Cement Ltd. involving 6675248, 758057, 4525553 and 6822520 units earning dividends of ₹2.25, 1, 2.7 and 2 per share; respectively. Suffice to say, both the lower authorities have computed impugned proportionate interest and administrative expenditure disallowance as per the statutory formula in Rule 8D of the Income-tax Rules, 1962.

10. Learned authorized representative vehemently submits during the course of hearing that both the lower authorities have erred in law and on facts in invoking the impugned disallowance u/s.14A r.w.s Rule 8D disallowance during the course of assessment as well as in lower appellate proceedings. We are taken to pages 44 to 81 in paper book containing the relevant amalgamation scheme(s) approved by hon'ble jurisdictional high court in company application No.16 of 2003 regarding transfer of investments of the above stated first entity M/s J.K. Industries Ltd. to the assessee and hon'ble Karnataka high court's order in company application No. 58 of 2003 to this effect. The assessee appears to have acquired shares of M/s J.K. Industries Ltd. and M/s J.K. Paper Ltd. including 667524 and 4525553 units; respectively. It derived dividend income in respect of these two companies in assessment year 2004-05 as well. The CIT(A)'s corresponding lower appellate order dated 09.09.2014 page 82 to 93 and more particularly at pages 92 held that the above stated amalgamation scheme involved zero coupon bonds and zero coupon preference shares not including any interest at all. This clinching fact has not been rebutted in either of the lower proceedings nor before us. We therefore direct the Assessing Officer to delete the impugned proportionate interest expenditure disallowance in respect of assessee's dividend income of ₹150,19,308 and ₹7,58,057/- relating to these two entities; respectively.

11. Coming to assessee's remaining dividend income in respect to M/s Ashim Investment Co. Ltd., & JK Lakshmi Cement Ltd. it emerges that Assessing Officer has nowhere given a clear-cut finding about its non interest bearing fund available at the time of making tax free income yelding investments. We therefore deem it appropriate to restore the instant remaining component of proportionate interest disallowance back to the Assessing Officer for finalizing consequential computation as per law in view of interest free funds available in the taxpayer's balance-sheet. Necessary computation to follow as per law.

12. We now advert to the latter limb of disallowance of administrative expenditure amounting to ₹33,34,150/- (supra). Page 11 of the paper book reveals that assessee's other income and income from investments. Mr. Damle submits that the assessee's other income relating to investments read figure of ₹4.16 lac out of which it had itself disallowed ₹3.26 lac (supra) @ 78.33% on *pro rata* basis. We make it clear that the impugned head of administrative expenditure is an indirect one wherein the necessary computation *pro rata* basis cannot be faulted. We hold in these facts that both the lower authorities have erred in going by the statutory computation than taking into consideration the relevant actual figure(s) hereinabove. We therefore direct the Assessing Officer to delete the impugned administrative expenditure disallowance. This second substantive grievance is taken as partly accepted in foregoing terms.

13. Next comes the assessee's third and last grievance of sec. 194H r.w.s 40(a)(ia) disallowance of ₹1,13,52,917/- on account of its failure in deducting TDS on seed purchases treated as brokerage and commission payments in both the lower proceedings. The CIT(A)'s detailed discussion on the issue reads as under:-

> *"10. Appeal on ground no. 19 to 21 are against the disallowance of Rs.1,13,52,917/- on account of failure to deduct tax u/s. 194H of the I.T. Act, 1961. The AO has held that the real character of transaction between the assessee and the seed growers is*

> *of a principle agent nature of relationship. Therefore, the assessee should have deducted tDS on payments to seed growers. During the appellate proceeding the AR has submitted that although there is an arrangement/understanding between the appellant and the growers. But all act, deed and things relating to cultivation and harvesting of unprocessed seeds are carried out by the growers in their own right, at their own cost and risk and n their own land. I have considered the finding of the AO and the written submissions filed by the AR. I find that it is true that all acts, deeds and tings relating to cultivation, harvesting and processing of seeds are carried out by cultivators on their own risk, on their own land and at their own cost. But there is no denying the facts that cultivators do so with understanding/contract between the assessee and themselves (**seed growers/cultivators**). Therefore, the assessee should have deducted tax at source u/s. 194H of the I.T. Act, 1961 in this case. Accordingly assessee's appeal on grounds no. 10 to 21 are **dismissed**."*

14. It therefore emerges that both the lower authorities haves treated the assessee's payments to its growers for the purpose of crops / seeds trials as commission / brokerage payments requiring TDS deduction u/s. 194H of the Act. We find that the CIT(A) himself is very fair in holding that growers / recipients enjoy title on their own agricultural lands, they have themselves carried out all activities of cultivation, harvesting and seed processing at their own risk. It is therefore an instant of outright purchase of the seed produce between the assessee and said seed growers without involving an agent or middleman. This tribunal's co-ordinate bench's decision in (2011) 46 SOT 133 (Visakh.)/10 taxmann.com 47 (Visakh.-ITAT) *Additional Commissioner of Income-tax, Rang-4, Visakhapatnam vs. Pearl Bottling (P) Ltd.* holds that 194H does not apply in case of principal-to-principal relationship between the "buyer and the recipient" . We therefore direct the Assessing Officer to delete the impugned sec. 194H disallowance of ₹1,13,52,917/- on this count alone. The assessee's cross-appeal ITA No.2216/Kol/2013 is partly allowed in above terms.

15. Mr. Damle invites our attention the assessee's latter appeal ITA No.18/Kol/2017 for assessment year 2009-10 raising the sole substantive issue of Sec. 194H r.w.s. 40(a)(ia) disallowance of ₹90,24,062/- involving payments to farmers / growers without deducting TDS identical to our foregoing discussion in preceding assessment year. We adopt judicial consistency to accept the impugned sole grievance raised in the main appeal.

16. To sum up, the Revenue's appeal **ITA No.2128/Kol/2013** for assessment year 2008-09 is dismissed. The assessee's cross-appeal ***ITA No.2216/Kol/2013*** is partly allowed and latter appeal *ITA No.18/Kol/2017* for assessment year 2009-10 is allowed in above terms.

Order pronounced in the open court 18/09/2019

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(A.L.Saini)	(S.S.Godara)
(Accountant Member)	(Judicial Member)

Kolkata,

*Dkp

दिनांकः- 18/09/2019 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Florence Investech Ltd.7, Council House Street, Kolkata-001 / M/s J.K. Agri Genetics Ltd.,7, Council House St, Kolkata-001
2. राजस्व/Revenue-ACIT, Range-10/DCIT, Circle-5(2),/DCIT, Cir-10, P-7, Chowringhee Square, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।