IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.2273/Del/2013
Assessment Year: 2009-10

M/s Liberty Shoes Ltd., **G.T. Road, Gharaunda,** **Karnal.** **PAN: AAACL3146K**	vs	**ACIT, Karnal Circle,** **Karnal.**
(Appellant)		**(Respondent)**

Assessee by: Shri Satish Goel, Advocate
Department by: Smt. Naina Soin Kapil, Sr. DR

Date of Hearing: 28.08.2019
Date of Pronouncement: 10.10.2019

ORDER

PER K. NARASIMHA CHARY, JM

This is an appeal filed by the assessee challenging the order dated 19.02.2013 passed by the Learned Commissioner of Income-tax (Appeals), Karnal {"CIT(A)"} for Assessment Year 2009-10

2. Brief facts of the case are that the assessee is a company engaged in the business of manufacturing of shoes and other leather items. For the Assessment Year 2009-10, they have filed their return of income on 29.9.2009 declaring a total income of Rs.10,50,49,780/- u/s 115JB of the Income-tax Act, 1961 ("the Act"). Assessment was completed by order

dated 30.12.2008 passed u/s 143(3) of the Act by making additions of Rs.35,80,000/- by disallowing u/s 80IC of the Act in respect excise duty refund, Rs.1,15,12,234/- by making disallowance u/s 14A read with 8D of the Rules and Rs.5,22,198/- by making disallowance u/s 40A(1a) in respect of the interest paid of M/s Geofin Investments P. Ltd. Appeal preferred against the said additions was dismissed by the learned CIT(A) by way of impugned order, hence, this appeal by the assessee challenging all the three additions.

3. Now coming to the first addition of Rs.35,80,000/- by disallowing the deduction u/s 80IC in respect of the excise duty refunds, learned AO held that the incentives accrued to the exempt units by reason of export are not related to the activity of manufacture or production as required to be eligible for deduction u/s 80IC and, therefore, while placing reliance on the decision of the Hon'ble jurisdictional High Court in the case of CIT vs J.B. Exports Ltd., (2006), 152 Taxman 189, learned AO denied deduction u/s 80IC of the Act and made such an addition.

4. On this aspect, assessee placed reliance on the decision of the Hon'ble jurisdictional High Court in the case of CIT vs Dharam Pal Prem Chand Ltd.,317 ITR 353 (Del) but the learned CIT(A) distinguished the facts of the said case from the facts of the case in hand. Learned CIT(A) agreed with the learned AO in placing reliance on the decision of the Hon'ble Delhi High Court in the case of J.B. Exports Ltd. (supra).

5. Before us also, learned AR placed reliance on the decision of the Hon'ble jurisdictional High Court in the case of Dharam Pal Prem Chand (supra) and submitted that the SLP against Delhi High Court order was

dismissed by the Hon'ble Apex court vide order dated 7.5.2010 and, therefore, he submitted that the assessee is entitled for the deduction u/s 80IC of the Act in respect of the excise duty refund.

6. Per contra, it is the submission of the learned DR that as rightly observed by the learned CIT(A) vide para 4.07 of the impugned order, the facts of Dharam Pal Prem Chand (supra) are different inasmuch as such was a case of a unit exempt from paying excise duty in respect of the product manufacture, the assessee had received refund on account of excise duty which was held by the AO as an income not derived from the business of the assessee and, therefore, not allowable deduction. She submitted that in those circumstances since the assessee had, on the payment of excise duty, debited the profit and loss account and upon receipt of refund credited the profit and loss account and, therefore, the net effect on the profit and loss was nil on account of the mythology followed by the assessee and accordingly, there was no reason to exclude the amount of refund in arriving at profit derived for the purpose of claiming deduction u/s 80-IB of the Act.

7. She further submitted that the assessee is an entity in the territorial jurisdiction of the Hon'ble P&H High Court and the said Hon'ble High court in the case of CIT vs H.M. Steels Ltd. (2015) 62 Taxman 252 (P&H), after noticing the decision of the Hon'ble Delhi High Court in the case of Dharam Pal Prem Chand (supra) observed that the decision of the Hon'ble Delhi High Court was contrary to the decision of the Hon'ble Supreme Court in the case of Liberty India vs CIT 317 ITR 218 and CIT vs Sterling Foods (1999) 237 ITR 579 (SC) and held in unequivocal terms that

the amount received by the assessee towards the refund of excise duty cannot form part of the profits and gains derived from the undertaking.

8. In so far as the facts are concerned, there is no dispute. The question is whether a refund of excise duty to the tune of Rs.35,80,000/- forms a part of the profits and gains derived by the assessee from the undertaking. Assessee is relying upon the decision of the Hon'ble Delhi High Court in the case of Dharam Pal Prem Chand (supra). Hon'ble Punjab & Haryana High Court in the case of H.M. Steels (supra) noted that the Hon'ble Delhi High Court considered the question whether the refund of excise duty was pivoted on the manufacturing activity carried on by the assessee,and held that the question relevant for this issue is whether the refund of excise duty is a profit or gain derived from business though the incentive may have some connection with or is pivoted on the business.

9. Hon'ble P&H High Court placed reliance on the decision of the Hon'ble Apex Court followed its own decision in CIT vs Sterling Foods (supra) and held that the amount received by the taxpayer towards the refund of excise duty cannot form part of the profits and gains from the undertaking. Hon'ble P&H High Court further held that the decisions of the Hon'ble Delhi High Court in the case of Dharam Pal Prem Chand (supra) and CIT vs Sportking India Ltd. (2009) 183 Taxman 312 were delivered before the judgment of the Hon'ble Supreme Court in the case of Liberty India (supra) and, therefore, such decisions must be deemed to have been impliedly overruled.

10. In the light of the above case law, it is clear that the refund of excise duty does not form part of the profits and gains derived from the undertaking and in view of the decisions of the Hon'ble Apex Court in the case of Sterling Foods (supra) and Liberty India (supra), the findings of the authorities below cannot be found fault with. We, therefore, do not find any irregularity or illegality in the authorities disallowing deduction u/s 80IC in respect of the excise duty refund to the tune of Rs.35,80,000/-. Ground No.2 of the appeal is accordingly dismissed.

11. In so far as the second addition of Rs.1,15,22,224/- is concerned, this addition was made by invoking Section 14A read with Rule 8D. According to the assessee, they invested some amounts in two of their subsidiaries and in a joint venture company with an intention of promoting its business and not for earning the dividends and long term capital gain. Assessee's further case is that such investments were made in the earlier years,that too from out of the accumulated resources and not out of borrowed funds,and no fresh investment was made during the year under consideration. Lastly, it was also contended that the assessee had not received any tax free income by way of dividend and they are not likely to receive any such thing in view of the fact that the subsidiaries are running in losses from the first year of their operation.

12. On this aspect, learned AO recorded that Section 14A is concerned with whether exempt income is arisible or not but not whether it had arisen or not. According to him, even if dividend have not been received or LTCG have not arisen in the given year, funds that stand invested in shares are in relation to income that does not form part of the total

income and, therefore, the provisions u/s 14A read with Rule 8D are attracted.

13. Ld. CIT(A) observed that the assessee had not brought on record the source of investment made by them in subsidiaries and joint venture and if such an investment was not made in subsidiary and joint venture, the same would be available for use in the business of the assessee thereby lessening the need to borrow the funds. According to the learned CIT(A), it is impossible to ascertain whether the amount that was invested in shares was made out of sale receipts or out of borrowed funds.

14. On a careful consideration of the assessment order, it occurs to our mind that the authorities below failed to appreciate the contention of the assessee that Rule 8D(ii) has no application to the facts of the case since no borrowed funds are involved in the investments and it is only out of the accumulated reserves the investments were made in the subsidiaries with an intention to promote its own business. Further, according to the assessee, they have not received any tax-free income by way of dividend in the year.

15. In Joint Investment P. Ltd. vs CIT (2015) 372 ITR 694, the Hon'ble jurisdictional High Court held that the disallowance of expenditure u/s 14A of the Act cannot exceed the amount of tax-exempt income and in CIT vs Holcim India P. Ltd. (2014) 272 CTR 282, it was held that Section 14A cannot be invoked when no exempt income was earned.

16. It is a question of fact to be verified as to whether a taxpayer earned any tax-free income during the year. We, therefore, set aside the

issue to the file of the ld. AO to verify whether any tax-free income by way of dividend from the investments was earned by the assessee during the year and if no such income was earned, then to delete the addition made on this count. We accordingly direct the learned AO to verify and in case the assessee has not earned any dividend on the investments, to delete the additions made by invoking Section 14A of the Act read with Rule 8D of the Rules.

17. Now coming to the disallowance of Rs.5,22,198/- u/s 40(a)(ia). According to the assessee, they have paid interest of Rs.1,01,22,198/- to Geofin Investments P. Ltd. at 12% p.a. without effecting TDS as the recipient had furnished non-deduction certificate u/s 197 of the Act. Assessee is relying upon this certificate wherein under the column estimated amount of interest to be received on amount of Rs.1,25,00,000/- was mentioned whereas learned AO relied upon the column amount of such sum (given on interest) was mentioned Rs.8 crores. According to the learned AO interest @ 12% at Rs.8 crores comes to only Rs.96 lacs whereas the assessee paid Rs.1,01,22,198/- and such portion exceeding Rs.96 lacs attracts TDS provisions. Learned AO, therefore, disallowed a sum of Rs.5,22,198/- u/s 40(a)(ia) of the Act.

18. Neither the learned AO nor the ld. CIT(A) dispute the genuineness of the certificate issued u/s 197 of the Act wherein the amount of Rs.8 crore was mentioned in respect of the amounts to be received and Rs.1.25 crores was mentioned under the estimated amount of interest to be received. Learned AO calculated the amounts to be received as Rs.96 lacs i.e. 12% of Rs.8 croes by ignoring the clearly mentioned figure of Rs.1.25 crore under the estimated amount of interest to be received.

When once a certificate u/s 197 of the Act was producedby M/s Geofin authorizing the assessee not to deduct the tax at source in view of the interest to be paid on the sum of Rs.8 crores specifically mentioning a figure of Rs.1.25 crores of the estimated amount of interest to be received, we find it difficult to go by the reasoning of the authorities below that assessee should have affected the TDS on the amounts exceeding Rs.96 lacs ignoring the amount of Rs.1.25 crore, which was estimated amount of interest to be received, at the time of issuing of a certificate u/s 197 of the Act. If Rs.96 lacs alone has to be considered then there was no purpose of mentioning Rs.1.25 crores in the estimated amount of interest receivable and we cannot attribute redundancy to any particular portion of the certificate issue u/s 197 of the Act. We, therefore, accept the explanation of the assessee and direct the learned AO to delete the addition of Rs.5,22,198/-.

19. In the result, appeal of the assessee is allowed in part.

Order pronounced in the Open Court on 10th October, 2019.

Sd/-	**sd/-**
(PRASHANT MAHARISHI)	**(K.NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 10th **October, 2019.**

VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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