

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

BEFORE SHRI P. M. JAGTAP, V.P & SHRI S. S. GODARA, JM

आयकर अपीलसं./I.T.A No.1055& C.O. No.73/Kol/2018

(निर्धारण वर्ष / Assessment Year: 2012-13)

DCIT, Circle-6(1), Kolkata	Vs.	M/s. Universal Cables Ltd.
		9/1, R.N. Mukherjee Road, Kol-1.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No.: AAACU3547P		
(Appellant/Revenue)	..	(Respondent/ Cross-Objector)

Appellant/Revenue by : Smt. Supriyo Pal, JCIT, Sr. DR
Respondent by : None

सुनवाई की तारीख/ Date of Hearing : 17/10/2019

घोषणा की तारीख/Date of Pronouncement : 22/11/2019

आदेश / ORDER

Per Shri S. S. Godara:

This Revenue's appeal and assessee's cross-objection both for assessment year 2012-13 arise against the Commissioner of Income Tax (A) - 7, Kolkata dated 28.02.2018 passed in Case No.1248/CIT(A)-7/Kol/Circle-6(2)/17-18 involving proceedings u/s 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Case called twice. None appears at assessee's behest. The registry has already sent it a common RPAD notice(s) on 03.10.2019 for today's hearing. We therefore proceed ex parte against the assessee/appellant.

2. We come to Revenue's appeal ITA No.1055/Kol/2018. Its first substantive ground pleads that the CIT(A) has erred in law and on facts in allowing additional depreciation claim raised at the assessee's behest amounting to Rs.67,97,280/- vide following detailed discussion:

"4. Ground No. 2 & 3 (Additional Depreciation)

4.1 The Assessing Officer did not allow an additional depreciation @ 10% u/s 32(1)(ii) on the new machine purchased by the assessee during AY 2011-12. Since the asset was used for less than

180 days in AY 2011-12, assessee was allowed only 50% of the eligible depreciation. The Assessing Officer while disallowing the depreciation observed as follow:

During the financial year 2010-11 (Asst. Year 2011-12) the assessee had purchased & installed new plant & machinery for its manufacturing business. Some of such plant & machinery were put to use to a period of less than 180 days during the said financial year and in respect to such plant & machinery the assessee claimed only 50% of Additional Depreciation u/s 32(1)(iia) in view of the second proviso to section 32(1) of the I.T. Act. Now during the year under reference, the assessee claimed further depreciation (balance 10%) on those plant & machinery on the plea that it is entitled to get the balance depreciation this year also.

In support of its claim, the assessee submits that clause (iia) of section 31(1), as it presently stands after substitution by the Finance Act, 2005 w.e.f. the Asst. Year 2006-07, provides for allowance of further depreciation equal to 20% of the actual cost of new plant and machinery acquired and installed after March 31, 2005 by an assessee engaged in the business of manufacture or production of any article or thing. Such initial depreciation is to be allowed as a deduction under clause (ii).

The second proviso to section 31(1) restricts the allowance of depreciation to 50% if the plant & machinery acquired during the previous year is put to use for a period of less than 180 days in that previous year. The said second proviso specifically makes a reference to an asset referred to in clause (iia). It is because of the said proviso that the assessee claimed only 50% initial depreciation during the assessment year 2011-12.

The conditions for allowance of initial depreciation are acquisition, installation and use of the plant & machinery in the manufacturing business and once the conditions are fulfilled, the entire allowance is admissible. The right of the assessee to such initial depreciation in full should not get affected because of the number of days for which the plant & machinery is used in the year of acquisition and installation. Initial depreciation is not the same as normal depreciation allowed under section 32(1)(ii) as it is granted as an incentive to encourage industry. Because of the second proviso to section 32(1), the amount of allowance of initial depreciation may get restricted in the first year but the balance amount has to be allowed in the second year. Unlike the first proviso contained in clause (iia) introduced in 2002, the substituted clause (iia) introduced in 2002, the substituted clause (iia) does not specify the year of allowance of initial depreciation. Therefore there is no prohibition on allowing initial depreciation in two years.

Further clause (iia) is in the nature of incentive or exemption provision and the courts have taken the view that an exemption provision has to be strictly construed for the purpose of finding out whether an assessee is entitled to the exemption and once eligibility is established the exemption provision will be liberally construed in its application to the assessee.

However, contesting to the assessee's above claim, it can be said that nowhere in the act it has been provided that balance 50% of further depreciation can be claimed in the subsequent year if the assessee had claimed initial 50% of further depreciation in the year of purchased because of used for less than 180 days in terms of proviso to section 32(1).

Accordingly the claim for further depreciation to the extent of 67,97,280/-pertaining to additions made during assessment year 2011-12 and used for period of less than 180 days is not accepted. Further, in the I.T. assessment for assessment year 2011-12 also, the department has not accepted the above claim of balance additional depreciation. Hence additional depreciation of Rs. 67,97,280/- is, therefore, disallowed and added with business income.

4.2.1 In support of its claim the appellant submitted as follows:

The second and third grounds are against rejection of the assessee's claim for 50% initial depreciation under section 32(1)(iia) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') amounting to Rs. 67,97,280/- in respect of new plant & machinery purchased and installed in the preceding year but put to use for a period of less than 180 days in that year. In view of the second proviso to section 32(1) of the Act, for the assessment year 2011-12, the assessee claimed

only 50% initial depreciation and the remaining 50% was claimed in the assessment year 2012-13. The Assessing Officer disallowed the claim on the ground that the claim was not in accordance with the provisions of section 32 of the Act.

Ground No. 2 is observed in favour of the assessee by an order dated January 14, 2015 passed by the Hon'ble Tribunal for the assessment year 2007-08 (paragraphs 2-4, pages 1-3) and an order dated February 27, 2015 for the assessment years 2008-09 and 2009-10 (paragraphs 2-5, pages 6-9). Copies of the said orders dated January 14, 2015 and February 27, 2015 are annexed hereto at page no. 1 to 26 of paper book. Further, in assessee's appeals for subsequent asst. Years 2010-11 and 2011-12 before learned CIT(A)-17, Kolkata, the learned CIT(a) following the above decision of Hon'ble Tribunal decided the issue in favour of assessee. Copies of the said orders dated 29.07.2007 and 05.08.2016 are annexed hereto at page no. 41 to 62 (Pp 43 & Pp 54 respectively) of paper book.

It is pertinent to mention that the assessee had determined the written down value after deducting the amount of initial depreciation and accordingly lower normal depreciation was computed by it. It is only such lower normal depreciation computed by the assessee which has been allowed in the assessment. Ground No. 3 raises the alternative contention that the Assessing Officer having rejected the assessee's claim for initial depreciation he should have re-determined the written down value and normal depreciation. It is submitted that in view of the decision on Ground No. 2, it is not necessary so decide the alternative contention in ground No. 3.

4.3 Decision: I have carefully considered the order of Assessing Officer and gone through the submissions of appellant company. It is stated by the appellant that the issue is squarely covered in their favour by the decision of Hon'ble Income Tax Appellate Tribunal, Kolkata Bench in its own case for Asst. Years 2007-08 to 2009-10. On going through the said orders it is observed that the Hon'ble Tribunal after considering certain judicial pronouncements has come to the conclusion that the assessee is entitled for additional depreciation u/s 32(1)(ia) of the Act. This very same issue came up in assessee's own appeals for Asst. Year 2010-11 & 2011-12 where my predecessor has also followed the decision of Hon'ble Tribunal. Respectfully following the said decisions this ground of appeal of the assessee is hereby allowed. The disallowance of Rs. 67,97,280/- on account of the claim of additional depreciation is hereby deleted."

3. We have given our thoughtful consideration to the Revenue's instant grievance. It seeks to revive the A.O's action disallowing the assessee's additional depreciation claim @10%. It has already come on record that the assessee has succeeded on the very issue before the Tribunal right from assessment years 2007-08 to 2011-12 (supra). The Revenue's only case is that its appeal is pending before hon'ble jurisdictional high court. We hold that mere pendency of the Revenue's tax appeal does not form a justifiable reason to adopt a different approach in the subsequent assessment years. We therefore go by judicial consistency to allow CIT(A)'s action granting additional depreciation relief of assessee. This former substantive ground is declined therefore.

4. Next comes the latter issue of section 14A r.w Rule 8D(2)(ii) & (iii) proportionate interest and administrative expenses disallowances of Rs.153.39 lacs and Rs.25.37 lacs; respectively in assessment dated 27.02.2015. The CIT(A) had decided this issue in assessee's favour as under:

"8. Ground No.7 & 8: Disallowance u/s 14A:

8.1 The Assessing Officer disallowed an amount of Rs.1,78,76,000/- as expenditure incurred for the earning of exempted income i.e. dividend of Rs.18,69,380/- applying Rule 80D(2)(ii) and 80D(2)(iii). He observed in the assessment order as follows:

"On perusal of records as well as submissions it is observed from the return that "A" had exempted income of Rs.18,69,380/-. The A.R of 'A' was asked to explain why sec. 14A will not be applicable to this case. In compliance to the above query the A.R of assessee has stated that the 'A' has already added NIL at the time of computation of income.

It was contended by the assessee that it is engaged in the business of manufacturing and selling of power cables, capacitors and optical fibre. As expenses incurred were in relation to business only. The share held by the company have been purchased out of its own funds and the company has not borrowed any money for buying these shares. In support of its stand the assessee activity that can be said to have been carried out in relation to dividend income was depositing four warrants only. The assessee also draws its attention to the tax audit report clause 17(1) which also states that no expenditure has been incurred to earn income which does not form part of the total income. Accordingly it was submitted that the company did not incur any expenditure to earn dividend income.

The assessee's contention is not accepted. Disallowance u/s 14A is worked out by invoking Rule 8D of IT Rules since it is applicable for current assessment. The amount of disallowance is worked out as follows:

Expenditure on account of interest:

Interest paid \times Average of investment = 1390.53 \times 5074.42 Rs.153.39 lacs

Average total asset of balance sheet 46001.16

(1/2 of (45958.87 + 46043.46) 46001.16

Investment : Investment as on 01.04.2010 Rs.5074.42

Investment as on 31.03.2011 Rs.5074.42

Average value of investment Rs.5074.42

1/2 of average value of investment = Rs.25.37

[1/2% of Rs.5074.42]

Therefore applying sec 14A r.w.r 8D Rs.178.76 lacs (153.39 lacs + 25.37 lacs) is disallowed u/s 14A and added back to total income.

8.2 In support of its claim the appellant submitted as follows:

“Ground 7 & 8 are directed against the disallowance of Rs.1,78,76,000/- u/s 14A by invoking rule 8D. the Assessing Officer by applying the formula in rule 8D determined interest of Rs.153.39 lacs for the purpose of disallowance. The remaining amount of Rs.25.37 lacs has also been determined by applying the formula in rule 8D i.e. 0.5% of the average value of opening and closing investments.

During the previous year, the assessee received dividend of Rs.18,69,380/- in respect of shares held by it in three companies in the form of four warrants/cheques (details at page 115 of the paper book). The dividend warrants/cheques so received were simply deposited in the assessee's bank account. The assessee's share investments to the extent of Rs.28.33 crore were made during the years 1972-73 to 2002-03, out of which investments of Rs.25.61 crore were made during the years 1993-94 to 1996-97. All such investments were made out of the assessee's own funds. After 2002-03, it was only during the previous year 2009-10 relevant to the assessment year 2010-11, that the assessee invested Rs.22.41 crore in the joint venture company named Birla Furukawa Fiber Optics Ltd. The assessee's retained earnings year after year run into crores of rupees. The assessee has included in the paper book at page 121-122 a C.A's certificate to the effect that all investments were made out of internal accruals and no borrowed funds were utilized.

The assessee's tax auditor was at one with the assessee's view that no expenditure was incurred in relation to the dividend income and no disallowance was to be made u/s 14A (page 123 to 136, Pp 130, clause 17(h)(b)(I) of the paper book).

In none of the preceding years prior to Assessment Year 2008-09, whilst making the disallowance u/s 14A, the Assessing Officer disallowed any part of the interest debited to the assessee's profit and loss account. The reason was that the Assessing Officer all along found that share investments were made by the assessee out of its own internal accruals and no borrowed funds were used calling for any interest disallowance u/s 14A.

The assessee's past accounts and assessments show the respective years in which investments were made in shares and that such investments were made out of the assessee's internal accruals and no borrowed funds were utilized. As stated hereinbefore, the Assessing Officer did not in any earlier Assessment Year prior to the Assessment Year 2008-09 disallow u/s 14A any part of the interest debited to the assessee's P&L a/c. The factual position with regard to the assessee's investments in shares as per its past accounts and assessments as also with respect to this year is furnished in a statement, which the assessee has got certified by CA.

It is submitted that the Assessing Officer has proceeded in the matter on a wholly erroneous interpretation of section 14A and rule 8D. Under sub-section (1) which does not form part of the total income can be disallowed. Under sub-section(2) of section 14A, the Assessing Officer can make a determination of the expenditure in accordance with rule 8D only if he is not satisfied with the correctness of the claim of the assessee about the expenditure incurred or the assessee's claim that no expenditure has been incurred. Sub-rule (1) of rule 8D is in similar terms. Thus, the question of making determination in terms of sub-rule (2) of rule 8D would arise only if the Assessing Officer is not satisfied with the correctness of the assessee's claim.

In the instant case, it is not the finding of the Assessing Officer that he is not satisfied with the correctness of the assessee's claim that no expenditure was incurred in relation to the dividend income of Rs.18,69,380/- received by the assessee in the form of the four dividend warrants which were merely required to be deposited with the Bank. It is submitted that in the absence of any such findings, it was not open to the Assessing Officer to apply the formula in rule 8D for the purpose of making disallowance u/s 14A.

Further and in any event and without prejudice to the aforesaid, it is submitted that in view of the established factual position as is apparent from the assessee's past assessments, that the investments in shares were made by the assessee out of its internal accruals and that no borrowed funds were used, it was not open to the Assessing Officer to disallow any part of the assessee's interest expenditure by applying the formula in clause (ii) of sub-rule (2) of Rule 8D. In order to apply the said clause, it has to be found as a fact first that the expenditure by way of interest

incurred by the assessee is not directly attributable to any particular income or receipt. In the instant case, there is no such finding, as in fact no such finding could have been arrived at. Since the assessee had not used any borrowed funds for its share investments, the interest expenditure of the assessee had no relation with the dividend received by it and was entirely incurred for its manufacturing business. It is submitted that in the facts and circumstances of the case, the Assessing Officer was wholly unjustified in disallowing interest of Rs.153.39 lacs u/s 14A

The assessee is in the business of manufacture of wires, cables and other electrical goods and the expenditure debited to the assessee's profit and loss account is incurred in relation to the said business. It was merely required to deposit the four dividend warrants in its bank account. It is submitted that the Assessing Officer should have accepted the position that no expenditure was incurred by the assessee in relation to the said dividend income of Rs.18,69,380/- received by the assessee in respect of share investments held by it for years together.

Reliance in this behalf is placed on the decisions in the following cases-

(a) Deputy Commissioner of Income-tax v. REI Agro Ltd. – ITA No.1811/kol/2012 decided by the Hon'ble Tribunal on May 14,2013, appeal against which, being ITAT 161 of 2013, was rejected by the Hon'ble Calcutta High Court on December 23, 2013.

(b) REI Agro Ltd. v. DCIT- ITA Nos.1331 and 1423(Kol.) of 2012 decided by the Hon'ble Tribunal on June 19, 2013 [(2013) 144 ITD 141], appeal against which, being ITAT 220 of 2013, was rejected by the Hon'ble Calcutta High Court on April 9, 2014.

(c) Judgment dated July 15, 2011 of the Hon'ble Calcutta High Court in ITA 649 of 2004, J.K. Industries Ltd. CIT, where, following its previous decisions the Hon'ble court was pleased to hold that if profits exceeded the amount of interest-free loan given from overdraft account, there was a presumption that such loan was given out of profits and not out of borrowed funds.

It is pertinent to mention that the issue relating to disallowance u/s 14A r.w.r. 8D was dealt with by the Hon'ble Tribunal by its common order dated February 27, 2015, r.w. the order dated November 20, 2015 for the Assessment Years 2008-09 and 2009-10. By the order dated February 27, 2015, the issue relating to disallowance of interest was remanded to the Assessing Officer with the direction that if the Assessing Officer wanted to disallow the interest, he had to establish the nexus that loan taken on which interest payment was made was invested in purchase of shares from which the assessee had earned dividend income (para 6-9, pages 9-11). Since the Hon'ble Tribunal did not pass any order/direction with regard to disallowance under rule 8D(2)(iii), on miscellaneous applications filed by the assessee, the Hon'ble Tribunal by its order dated November 20,2015 in M.A Nos.47 and 48/K/2015 was pleased to remand the matter to the Assessing Officer with the direction that disallowance of average of investment @0.5% can be made only with reference to the investments giving rise to the exempted income. The remanded issues for the Assessment Years 2008-09 and 2009-10 were thereafter taken up by the Assessing Officer who by his orders dated April 13,2016 and July 5, 2016 found that no borrowed funds bearing interest were utilized for the purpose of investment in the shares and no disallowance was to be made under Rule 8D(2)(ii). With respect to rule 8D(2)(iii) the Assessing Officer determined the disallowance at Rs.26,900/- with reference to the amount invested in shares of Birla Corporation Ltd., Industry House Ltd., and Baroda Agents & Trading Co. (P) Ltd. in respect of which shares dividend was received. It is submitted that in the year under consideration also dividend was received from the same 3 companies (details at page 102 of the paper book). As such, only an amount of Rs.26,900/- can be disallowed u/s 14A r.w.r. 8D. Copies of the order dated November, 20, 2015 of the Hon'ble tribunal passed in MA No.47 & 48/k/2015 and the orders dated April 13, 2016 and July 5, 2016 passed by the Assessing Officer pursuant to the directions of the Hon'ble Tribunal are annexed hereto at page no.30-40 of paper book.

The learned CIT(A)-17, Kolkata while dealing with the similar issue in appellant's appeal for Assessment Year 2010-11(pg. 41-51, Pp 48) and 2011-12 (Pg 52-62, PP 58) followed the decision of Hon'ble Tribunal for Assessment Years 2008-09 and 2009-10.

Further and in any event and without prejudice to the aforesaid, it is submitted that the formula laid down in rule 8D is wholly arbitrary and irrational. Such arbitrariness is apparent from the fact that though the assessee had to only deposit the four dividend warrants for an aggregate sum of Rs.18,69,380/- in its bank account, by the application of rule 8D, a huge sum of Rs.178.76 lacs has been determined as expenditure.”

8.3 **Decision:** *I have carefully considered the order of Assessing Officer and gone through the submissions of the appellant company. This issue regarding disallowance u/s 14A came up before the Hon'ble ITAT in assessee's own case for the Assessment Years 2008-09 and 2009-10. The issue relating to disallowance of interest was remanded to the Assessing Officer, vide order dated February 27,2015 with the direction to examine the nexus between investment in shares and the interest paid on the loan taken for computing the disallowance of interest under Rule 8D(2)(ii).*

Since the Hon'ble ITAT did not adjudicate the disallowance under Rule 8D(2)(iii), a miscellaneous application was filed by the assessee. The Hon'ble Tribunal by its order dated November 20, 2015 in M.A. Nos.47 & 48/k/2015 directed the Assessing Officer and disallowance of average value of investment @0.5% can be made only with reference to the investments which have given rise to the exempted income. The above issues for the Assessment Years 2008-09 and 2009-10 were disposed off by the Assessing Officer vide orders dated April 13, 2016 and July 5, 2016 respectively. In the said years the Assessing Officer found that no interest bearing borrowed funds were utilized for the purposes of investment in shares and accordingly no disallowance has been made by him under rule 8D(2)(ii). Similarly the A.O has come to the conclusion that the assessee received dividend from investment in shares of Birla Corporation Ltd., Industry House Ltd., and Baroda Agents & Trading Co. (P) Ltd. Accordingly the disallowance being 0.5% of investment in dividend yielding shares, as per Rule 8D(2)(iii) was computed by the Assessing Officer at Rs.26,900/-.

Based on the findings of the Assessing Officer in earlier years, as well as after considering the submissions of the assessee for the year, the claim of the assessee that no interest bearing borrowed funds were utilized for the purpose investment in shares seems to be reasonable. During the course of assessment proceedings the Assessing Officer could not bring on record anything to show that interest bearing funds utilized for generating exempted income. The A.O is therefore directed not to make any disallowance under Rule 8D(2)(ii).

On going through the appear effect order of the Assessment Years 2008-09 & 2009-10 and subsequent orders of my predecessor for Assessment Years 2010-11 & 2011-12, it is seen that the disallowance made under Rule 8D(2)(iii) is Rs.26,900/-. In the said years dividend was received from the same three companies i.e. Birla Corporation Ltd., Industry House Ltd., and Baroda Agents & Trading Co. (P) Ltd. Respectfully following the decisions of appellate orders in appellant's own cases as above, Assessing Officer is directed to recomputed the disallowance under Rule 8D(2)(iii) by considering only investments on which dividend received during the year.”

5. Learned Departmental Representative vehemently contends during the course of hearing that the CIT(A) has erred in law and on facts in deleting the impugned section 14A r.w.r. 8D disallowances. It has come on record that the assessee's exempt income amount is Rs.18,69,380/- only. Hon'ble Delhi high court's decision in Commissioner of Income Tax v. Joint Investment Pvt. Ltd. 372 ITR 694 (Delhi) held that the impugned disallowance cannot exceed the amount of exempt income itself. Coupled with this, there is no reply from the Revenue' side that the assessee's interest free funds are much more than the corresponding exempt investments as per its chartered accountant's certificate (supra). Necessary presumption in such case is

of deployment of interest free funds only as per case law 313 ITR 340 (Bom) CIT vs. Reliance Utilities and Power. The assessee already appears to have succeeded on the very issue in earlier Assessment Years 2008-09 to 2011-12 (supra) regarding proportionate interest expenses disallowance. We therefore adopt judicial consistency to affirm the CIT(A)'s action to this count. Coming to administrative expenditure aspect, the CIT(A) has directed to the Assessing Officer to consider only the exempt income yielding investment going by various judicial precedents (supra). Learned Departmental Representative fails to indicate any illegality or irregularity in the said findings therein. We therefore reject the Revenue's both substantive grounds as well its main appeal ITA No.1055/Kol/2018.

6. Next comes the assessee's cross-objections CO No.73/Kol/2018 raising the sole substantive issue that the lower authorities have erred in law and on facts in declining its leave encashment provision of Rs.4823113/- as neither statutory nor contingent liability u/s 43B(f) of the Act. Hon'ble jurisdictional high court had admittedly quashed the above stated statutory provision itself in Exide Industries Ltd. vs. UOI 212 CTR 206 (Calcutta) and hon'ble apex court has stayed operation therein in SLP Civil No.12060 of 2008 vide order dated 08.09.08. The said *lis* is yet to attain finality. We therefore restore the instant issue back to the Assessing Officer to await hon'ble apex court's final decision and thereafter finalise the same as per law. The assessee's C.O No.73/Kol/2018 is accepted for statistical purposes.

7. The Revenue's appeal ITA No.1055/Kol/2018 is dismissed and assessee's C.O No.73/Kol/2018 is allowed for statistical purposes.

Order is pronounced in the open court on 22.11.2019.

Sd/-
(P. M. JAGTAP)
VICE-PRESIDENT

Sd/-
(S. S. Godara)
JUDICIAL MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 22/11/2019

(RS, Sr.PS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. The Appellant - DCIT, Circle-6(1), Kolkata
2. The Respondent- M/s. Universal Cables Ltd.
3. आयकरआयुक्त(अपील) / The CIT(A), Kolkata [sent through email]
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata [sent through email]
6. गार्डफाईल / Guard file.
सत्यापितप्रति

True Copy

By Order

Assistant Registrar,
I.T.A.T, Kolkata Benches,
Kolkata.