IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
and
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.6702/Del./2014
(Assessment Year : 2007-08)

ITA No.6703/Del./2014
(Assessment Year : 2008-09)

M/s. Caparo Enginering (I) P. Ltd., 1st Floor, Naurang House, 21, Kasturba Gandhi Marg, New Delhi.	vs.	ITO, Ward 3 (2), New Delhi.
(PAN : AABCC7862N)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri P.C. Yadav, Advocate
REVENUE BY : Shri Sarabjeet Singh, Senior DR

Date of Hearing : 09.12.2019
Date of Order : 18.12.2019

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER

Since common questions of facts and law have been raised in both the aforesaid appeals, the same are being disposed off by way of composite order to avoid repetition of discussion.

2. The Appellant, M/s. Caparo Enginering (I) P. Ltd (hereinafter referred to as 'the taxpayer') by filing the present appeals sought to set aside the impugned orders both dated

12.09.2014 passed by the Commissioner of Income-tax (Appeals)-XX, New Delhi in consonance with the orders passed by the ld. TPO/AO qua the assessment years 2007-08 & 2008-09 on the grounds inter alia that :-

"ASSESSMENT YEAR 2007-08

1. That the Ld. CIT (Appeal) has erred in law and on facts in sustaining disallowance of Rs.1,21,854/- u/s 14A of the Income Tax Act, 1961.

2. That the Ld. CIT (Appeal) has erred in law and on facts in confirming the disallowance of depreciation of Rs.3,15,00,000/- on Non compete Fee.

3. That the impugned appellate order is arbitrary, illegal, bad in law and in violation of rudimentary principles of contemporary jurisprudence."

"ASSESSMENT YEAR 2007-08

1. That the Ld. CIT (Appeal) has erred in law and on facts in sustaining disallowance of Rs.7,93,184/-out of the disallowance of Rs.1,11,72,735/- made by the TPO with respect to the transactions with the Associated Enterprise.

2. That the Ld. CIT (Appeal) has erred in law and on facts in sustaining disallowance of Rs.5,60,984/- u/s 14A of the Income Tax Act, 1961.

3. That the Ld. CIT (Appeal) has erred in law and on facts in confirming the disallowance of depreciation of Rs.2,36,25,000/- on Non compete Fee.

4. That the impugned appellate order is arbitrary, illegal, bad in law and in violation of rudimentary principles of contemporary jurisprudence."

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Caparo Engineering India Pvt. Ltd., the taxpayer is into the business of manufacturing of sheet metal components and weld assemblies, metal fastners, aluminum

foundry, forging and tool room business. The taxpayer is a wholly owned subsidiary of Caparo Group in India and was set up in 2003. Caparo India Ltd., UK holds almost 91.7% of the share capital of the taxpayer and almost 8.3% is held by Caparo India Ltd., India.

4. Assessing Officer (AO) by invoking the provisions contained under section 14A of the Income-tax Act, 1961 (for short 'the Act') read with Rule 8D of the Income-tax Rules, 1962 (for short 'the Rules') made addition of Rs.8,87,378/- & Rs.51,47,448/- for AYs 2007-08 & 2008-09 respectively after noticing that taxpayer company has earned dividend income from mutual funds and claimed the same as exempt income but has not added back any expenses to earn the dividend income.

5. The taxpayer carried the matter before the ld. CIT (A) by way of filing the appeal who has restricted the disallowance to Rs.1,21,854/- instead of Rs.8,87,378/- and Rs.5,60,984/- instead of Rs.51,47,448/- for AYs 2007-08 & 2008-09 respectively made by the AO on account of administrative expenses by partly allowing the appeal. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

6. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1 OF AY 2007-08
GROUND NO.2 OF AY 2008-09

7. Undisputedly, the taxpayer has earned dividend income of Rs.29,21,709/- and Rs.20,11,752/- for AYs 2007-08 & 2008-09 respectively from its investment in mutual fund and has claimed the same as exempt income. It is also not in dispute that the taxpayer has come up with specific plea that no expenditure has been incurred by the assessee company to earn the dividend income. It is also not in dispute that for AY 2007-08, provisions contained under Rule 8D were not applicable

8. Ld. AR for the taxpayer challenging the impugned order contended inter alia that when no direct expenses have been incurred by the taxpayer to earn the dividend income, there is no question of disallowance under section 14A; that the taxpayer has used only equity money for investment in units and no interest bearing funds have been used for such purpose.

9. However, on the other hand, ld. DR for the Revenue, relied upon the orders passed by the lower Revenue authorities.

10. Bare perusal of the assessment order passed by the AO goes to prove that AO has erred in invoking the provisions contained

under Rule 8D which was undisputedly not applicable for assessment year 2007-08. Furthermore, bare perusal of the assessment order also proves that AO has nowhere recorded his dissatisfaction that the working given by the taxpayer that no direct expenses have been incurred by it in earning the dividend income is not correct rather mechanically applied the provisions contained under section 14A read with Rule 8D in AY 2008-09. In para 4.3, ld. CIT (A) has categorically held that taxpayer has used only the equity money for investment in units and no interest bearing funds were used for this purpose.

11. We are of the considered view that when satisfaction has not been recorded by the AO that the working given by the taxpayer that no expenditure has been incurred nor any discrepancy has been pointed out in the books of account and it is proved on record that the taxpayer has used only equity money for investment in units and no interest bearing funds have ever been used for this purpose, there is no question of making disallowance on presumptive basis.

12. Hon'ble Apex Court in ***Godrej & Boyce Manufacturing Company Ltd. vs. DCIT – 394 ITR 449 (SC)*** thrashed the issue in controversy as to invoking of the provisions contained under Rule 8D of the Rules by observing as under :-

> ***"37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable."***

13. So, following the aforesaid decision rendered by Hon'ble Apex Court, we are of the considered view that when AO has failed to record his dis-satisfaction as to the claim of the taxpayer that no direct expenses have been incurred to earn the dividend income and moreover equity money is proved to have been used for investment in units and no interest bearing funds have ever been used, there is no question of resorting to provisions of section 14A of the Act.

14. In similar set of facts and circumstances, coordinate Bench of the Tribunal in ***taxpayer's own case in Revenue's appeal for AY 2007-08 in ITA No.6838/Del/2014 vide order dated 22.02.2018*** and for ***AY 2008 in ITA No.444/Del/2015 vide order dated 02.05.2018*** confirmed the identical deletion made by the ld.

CIT (A). Consequently, additions confirmed by the ld. CIT (A) to the tune of Rs.1,21,854/- & Rs.5,60,984/- for AYs 2007-08 & 2008-09 respectively on account of disallowance made under section 14A are ordered to be deleted, hence ground no.1 of AY 2007-08 and ground no.2 of AY 2008-09 are determined in favour of the taxpayer.

GROUND NO.1 OF AY 2008-09

15. During the year under assessment, the taxpayer entered into international transactions as under :-

S.No.	*Description of transaction*	*Method*	*Value (in Rs.)*
1	*Purchase of machinery and accessories along with reimbursement of freight, insurance and handling charges*	*CUP*	*3,36,19,164/-*
2	*Sale of finished goods*	*RPM*	*75,83,899/-*
3	*Commission on sales*	*Cost Plus*	*1,11,72,735/-*
4	*Reimbursement of Expenses*	*-*	*3,22,276/-*

16. The taxpayer in its transfer pricing study in order to benchmark its international transactions qua commission on sales by making payment of Rs.1,11,72,735/- applied PSM method. The taxpayer has made payment to Bull Moose Tube (BMT) in terms of the agreement made with AE. Ld. TPO in its TP analysis applied CUP method and reached the conclusion that since intra-group services are not found to exist the arrangement between the

taxpayer and its AE is not subjected to Arm's Length Price (ALP), hence ALP of the alleged services is held to be nil because no uncontrolled enterprise would have paid any amount for services which do not tantamount to intra group services with demonstrable benefits and consequently, made addition of Rs.1,11,72,735/- to the taxable income of the taxpayer. Ld. TPO, however, found other three transactions entered into by the taxpayer with its AE at arm's length.

17. Assessee carried the matter before the ld. CIT (A) who has restricted the disallowance on account of intra-group services to Rs.27,93,184/- instead of Rs.1,11,72,735/- as made by the TPO.

18. When we examine the impugned order passed by the ld. CIT(A) particularly para 3.4, ld. CIT (A) has restricted the addition to Rs.27,93,184/- merely on the basis of guesswork without examining the TP study carried out by the taxpayer as well as ld. TPO. Ld. CIT (A) has also not determined the question if intra-group services were in existence and that such services were actually rendered/received. So, the addition sustained by ld. CIT(A) merely on the basis of guesswork is not sustainable in the eyes of law.

19. Coordinate Bench of the Tribunal in ***taxpayer's own case for AY 2008-09 in Revenue's appeal*** (supra) dealt with the identical

issue wherein the ld. CIT (A) has restricted the disallowance on account of intra-group services on guesswork, restored the matter back to the AO/TPO to decide afresh by returning following findings :-

> ***"10. When we come back to the facts of the instant case, it turns out that the TPO proposed the transfer pricing adjustment equal to the stated value of the international transaction at Rs.1.11 crore and odd, inter alia, by holding that no benefit was received by the assessee and hence no payment on this score was warranted. The AO in his order has taken the ALP of the international transaction at Nil on the basis of such recommendation of the TPO without carrying out any independent investigation for the deductibility or otherwise of such payment in terms of section 37(1) of the Act. This addition has been made by the AO in his order without invoking section 37(1) of the Act. As per the ratio decidendi of Cushman &Wakefield India (P.) Ltd. (supra), the TPO was required to simply determine the ALP of the international transaction, unconcerned with the fact, if any benefit accrued to the assessee and thereafter, it was for the AO to decide the deductibility of this amount u/s 37(1) of the Act. As the TPO in the instant case initially determined Nil ALP by holding that no benefit accrued to the assessee etc. and the AO made the addition without examining the applicability of section 37(1) of the Act, we find the actions of the AO/TPO running in contradiction with the ratio laid down in Cushman & Wakefield (supra). In these circumstances, we set aside the impugned order on this score and send the matter to the file of AO/TPO for deciding it in conformity with the above discussion and the law laid down by the Hon'ble jurisdictional High Court in the aforenoted case. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in such proceedings."***

20. So, following the aforesaid decision rendered by the coordinate Bench of the Tribunal, we are of the considered view that the issue in question is required to be decided by the AO/TPO independently to examine if such payment is deductible in terms of section 37(1) of the Act in view of the law laid down by the

Hon'ble High Court in the case of ***Cushman &Wakefield India (P.) Ltd. (2014) 367 ITR 730 (Del.).*** So, the issue is remitted back to the AO/TPO to decide afresh in view of the findings returned in the preceding paras as well as in view of the findings returned by the coordinate Bench of the Tribunal in taxpayer's own case in ITA No.444/Del/2015 in Revenue's appeal for AY 2008-09, hence ground no.1 of AY 2008-09 is determined in favour of the taxpayer for statistical purposes.

GROUND NO.2 OF AY 2007-08
GROUND NO.3 OF AY 2008-09

21. Ld. CIT (A) confirmed the disallowance of Rs.3,15,00,000/- & Rs.2,36,25,000/- for AYs 2007-08 & 2008-09 respectively on account of non-compete fee. Ld. AR for the taxpayer contended that this issue is covered by the order dated 22.09.2017 passed by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2009-10 in Revenue's appeal being ITA No.3661/Del/2013. Ld. AR for the taxpayer further contended that this issue is covered by the case of Sharp Business System vs. CIT-III in ITA 492/2012 order dated 05.12.2011 decided by the Hon'ble Delhi High Court.

22. Perusal of the order passed by the coordinate Bench of the Tribunal in ***taxpayer's own case for AY 2009-10*** (supra) apparently shows that the issue is identical and the coordinate

Bench of the Tribunal has restored the matter back to the AO to decide the issue afresh in the light of the decision rendered by Hon'ble Delhi High Court in Sharp Business System vs. CIT-III (supra) and in the light of the judgment of Hon'ble Supreme Court in the case of Nut Steel Equipments vs. Collector of Central Excise reported in AIR 988 SC 631 by returning following findings :-

> ***"5. After hearing the rival submissions, we do agree that each decision has to be applied on the facts and context therein. In the case of the assessee, we noted that the terms and conditions of the agreement has not been examined by A.O. to the right perspective and has not been compared with the facts and circumstances in the case of Sharp Business Systems(supra). We, therefore, in the interest of justice set aside the order of Ld. CIT(A) and restore this issue to the file of the Assessing Officer with the direction that the Assessing Officer shall redecide this issue afresh after comparing the facts in the case of the assessee with the case of Delhi High Court in Sharp Business Systems (supra) in accordance with law and give clear finding how the case of assessee is covered or not covered by the decision of Delhi High Court in the case of Sharp Business Systems. We may point out that in the case of the assessee there was no joint venture between the person paying the non competition fee and the person receiving the non competition fee. Both the parties were entirely outsiders and the time of the continuity of the agreement was also 10 years not 07 years. We also direct the Assessing Officer that while considering the decision of Delhi High Court he should also consider the decision of Hon'ble Supreme Court in the case of Nut Steel Equipments vs. Collector of Central Excise reported in AIR 988 SC 631 as in our opinion this decision will also have bearing in the case of the assessee. The A.O. is also directed to give proper and sufficient opportunity to the assessee to produce all the relevant evidences and the case laws on which he may rely in this regard. Thus in the result the appeal filed by the revenue is allowed for statistical purposes."***

22. Following the order passed by the coordinate Bench of the Tribunal in ***taxpayer's own case for AY 2009-10*** (supra), we are of the considered view that in the present case also, AO as well as ld.

CIT (A) have relied upon ***Sharp Business System vs. CIT-III*** (supra) case without thrashing the facts of this case. So, in the interest of justice, the case is remitted back to AO to decide afresh in the light of the observations made in the preceding paras as well as observations made by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2009-10 (supra) after giving an opportunity of being heard to the taxpayer, hence Ground No.2 of AY 2007-08 and Ground No.3 of AY 2008-09 is allowed for statistical purposes.

GROUND NO.3 OF AY 2007-08
GROUND NO.4 OF AY 2008-09

23. Grounds No.3 of AY 2007-08 & Ground No.4 of AY 2008-09 are general in nature and do not require any adjudication.

24. Resultantly, both the appeals filed by the taxpayer are allowed for statistical purposes.

Order pronounced in open court on this 18th day of December, 2019.

Sd/-	**sd/-**
(PRASHANT MAHARISHI)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 18th day of December, 2019
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Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.