आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री रमित कोचर, लेखा सदस्य के समक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA No.1387/Chny/2017
निर्धारण वर्ष **/Assessment Year: 2012-13**

M/s.Lakshmi Machine Works Ltd., Perianaickenpalayam, S.R.K.V. Post, Coimbatore-641 020.	**v.**	The Addl.CIT, Corporate Range, Coimbatore.
[PAN: AAACL 5244 N] **(**अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Mr. R.Vijayaraghavan, Adv.
प्रत्यर्थी की ओर से /Respondent by	:	Mr. M.Srinivasa Rao, CIT
सुनवाई की तारीख/Date of Hearing	:	07.11.2019
घोषणा की तारीख /Date of Pronouncement	:	20.01.2020

आदेश / O R D E R

PER RAMIT KOCHAR, ACCOUNTANT MEMBER:

This appeal filed by assessee is directed against appellate order dated 31.03.2017 passed by learned Commissioner of Income Tax (Appeals)-1, Coimbatore (hereinafter called "the CIT(A)"), in appeal no.105/15-16 for assessment Year (ay) 2012-13, the appellate proceedings before learned CIT(A) had arisen from assessment order dated 27.03.2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s.143(3) of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by assessee in memo of appeal filed with the Income-Tax Appellate Tribunal, Chennai (hereinafter called "the Tribunal") read as under:-

> *"(i) The learned CIT(A) has completely erred in confirming the disallowance, u/s 14A of 63,53,585/-, without disputing the fact that the appellant has invested in shares of foreign Companies, wholly owned Indian subsidiary company and Group Companies, for strategic purpose, from out of its own Surplus funds and not for the purpose of any earning exempt income from tax, in the facts and the circumstances of the case and in law.*
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> *(2) The learned CIT(A) has grossly erred in relying on certain decisions in support of his decision, which are not applicable to the facts of the case of the appellant and therefore, the disallowance of Rs.63,53,585/- under Rule 8D(2)(iii), clearly unsustainable, in the facts and the circumstances of the case and in law.*
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> *(3) The learned CIT(A)-I, Coimbatore, has grossly erred in confirming the disallowance of Rs.15.52 crores, disregarding that the appellant, in terms of the provisions of Section 43(2) - "Paid", has incurred the expenditure relating to Rs.15.52 crores, during the previous year, in question, wholly and exclusively for the purpose of the business and therefore, the claim should be allowed in the Asst. Year 2012-13, in the facts and the circumstances of the case and in law.*
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> *(4) The learned CIT(A) has grossly erred in holding that the AO was right in disallowing the claim for deduction of Rs.15.52 crores, as it can only be allowed only in the year of actual payment and not on the basis of the method of accounting upon the basis of which the profits or gains are computed, under the head "Profits and gains of business or profession", in the assessment of the appellant, in the facts and the circumstances of the case and in law.*
>
> *(5) The learned CIT(A) has grossly erred in confirming the disallowance, to the extent of Rs.1,21,53,963/-, in computing the income of the appellant from its business, in the facts and the circumstances of the case and in law.*
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> *(6) For these and other additional grounds of appeal that may be adduced at the time of hearing, the order of the CIT(A)-1,*

Coimbatore, is opposed to law and unsustainable in the facts and the circumstances of the case."

3. The brief facts of the case are that the assessee is engaged in business of manufacturing of textile machinery. It was observed by the AO during the course of assessment proceedings u/s 143(3) read with Section 143(2) of the 1961 Act that assessee had made investments in various corporate entities , amounting in aggregate to Rs. 1,54,07,17,035/- as at 31.03.2012. The AO invoked provisions of Section 14A of the 1961 Act read with Rule 8D(2)(iii) of the Income-tax Rules, 1962 and made disallowance of 0.5% of average investments held by assessee during the year under consideration , which led to disallowance of Rs. 63,53,585/- by AO of expenses incurred in relation to earning of an exempt income within provisions of Section 14A of the 1961 Act read with Rule 8D(2)(iii) of the 1962 Rules, vide assessment order dated 27.03.2015 passed u/s 143(3) of the 1961 Act.

3.2 Aggrieved by an assessment framed by AO u/s 143(3) of the 1961 Act, the assessee filed first appeal with learned CIT(A) who was pleased to confirm the disallowance u/s.14A r.w.r.8D(2)(iii) of the 1962 Rules, to the tune of Rs. 63,53,585/- by upholding assessment order passed by AO, vide appellate order dated 31.03.2017 passed by learned CIT(A).

3.3 Still aggrieved by decision of learned CIT(A) upholding additions made by the AO, the assessee had filed second appeal with tribunal and it was submitted by learned counsel for the assessee that it had made

investments in both foreign companies as also in Indian Companies. It was also submitted by learned counsel for the assessee that some of the investee companies are subsidiary companies/ strategic investments/group companies. It was also submitted that with respect to investments made in foreign companies, the dividend income is taxable in India and hence Section 14A of the 1961 Act cannot be invoked as dividend income received from foreign companies in which assessee made investments is itself taxable and not exempt from income-tax . It was further submitted by ld.Counsel for the assessee that in any case the disallowance u/s.14A be restricted with respect to those investments made in Indian Companies which yielded dividend income being actually received during the year under consideration and it was submitted that the dividend received was to the tune of Rs.46.63 lakhs during the year under and in any case the disallowance of expenses u/s 14A of the 1961 Act cannot exceed exempt income. The learned counsel for the assessee had relied upon decision of Hon'ble Delhi High Court in the case of ACB India Limited v. ACIT reported in (2015) 374 ITR 0108(Delhi) and also decision of Special Bench of Delhi-tribunal in the case of ACIT v. Vireet Investment Private Limited reported in (2017) 188 TTJ 0001(Del-trib.)(SB). The Ld.CIT-DR relied upon the order of the authorities below.

3.4 We have considered rival contentions and perused the material on record. We have observed that assessee had made investments in various companies including foreign companies as well Indian companies which ,

inter-alia included associated companies/group companies/subsidiary companies and strategic investments being made in companies promoted by assessee . The assessee has received dividend of Rs. 46.63 lakhs during the year under consideration which was claimed as an exempt income. The authorities below had invoked provisions of Section 14A of the 1961 Act r.w.r.8D of the 1962 Rules and made disallowance to the tune of Rs. 63,53,585/- of expenses incurred in relation to earning of an exempt income. We have observed that authorities below have not dissected the various investments vis-à-vis dividend income received by the assessee and the matter need to be remanded back to the file of AO for fresh adjudication after considering and analyzing various investments made by the assessee vis-a-vis dividend income received which was claimed as an exempt income. We are agreeable with contentions of the assessee that dividend income received from foreign companies are chargeable to income-tax in India and if that be so in the case of the assessee having offered for tax such dividend income received from foreign companies , then no disallowance of expenses u/s 14A of the 1961 Act is warranted so far as such investments in foreign companies as dividend income is already subjected to tax in India. The AO shall verify this aspect and shall then not include such foreign investments for the purpose of making disallowances of expenses u/s.14A of the 1961 Act, the dividend income of which has already been subjected to tax in India for the year under consideration . So far as claim of the assessee having made strategic investments or investments in subsidiary companies or

group /associated companies in India or companies promoted by it and on that short ground seeking exclusion from invocation of Section 14A of the 1961 Act , the issue is no more res integra as Hon'ble Supreme Court has settled this controversy in its judgment in the case of Maxopp Investment Limited v. CIT reported in (2018) 402 ITR 640 (SC) wherein this issue is decided in favour of Revenue and such investments are to be considered/included for making disallowance of expenses u/s.14A of the 1961 Act. The AO is directed to include such investments for making disallowance of expensed incurred in relation to earning of an exempt income by invoking provisions of Section 14A of the 1961 Act. Thirdly, the Hon'ble Special Bench of the Delhi Tribunal in the case of ACIT v. M/s.Vireet Investment Pvt. Ltd. vs. ACIT, reported in (2017) 82 taxmann.com 415 (Del-Trib.) (SB) , dated 16.06.2017 has held that investments which yielded dividend income during the year under consideration are only to be considered for the purposes of making disallowance of expenses u/s 14A of the 1961 Act. We are bound by aforesaid decision of Special Bench of the tribunal. The AO shall verify those investments which yielded dividend income during the year under consideration and then made disallowance u/s 14A of the 1961 Act by including such investments which yielded dividend during the year under consideration . Further, Hon'ble Delhi High Court in the case of Joint Investments Private Limited v. CIT reported in (2015) 372 ITR 694(Del) has held that disallowance of expenses u/s 14A cannot exceed exempt income. The AO is directed to follow the aforesaid decision of Hon'ble Delhi

High Court. Reference is also drawn to decision of Hon'ble Madras High Court in the case of Redington (India) Limited v. Addl. CIT reported in (2017) 392 ITR 633(Mad.) and decision of Hon'ble Madras High Court in the case of CIT v. Chettinad Logistics Private Limited reported in (2017) 80 taxmann.com 221(Mad.), which are relevant to adjudicate the disallowance u/s 14A of the 1961 Act. Under these circumstances keeping in view factual matrix of the case, we are of the considered view that this matter needs to be remanded to the file of the AO for fresh adjudication keeping in view our above observations and AO is directed to analyse every investments in context of our aforesaid observations and made disallowance u/s 14A of the 1961 Act. Thus , the order of learned CIT(A) is set aside and issue is restored to the file of the AO for denovo adjudication after allowing proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice is accordance with law, keeping in view our aforesaid observations .The AO shall admit evidences/explanations filed by assessee in its defense in set aside proceedings. We order accordingly.

4. The second issue is with respect to deduction of expenses claimed by assessee u/s.37(1) of the Act which was disallowed by AO to the tune of Rs. 1,21,53,963/-, out of which, expenses of Rs. 25,60,574/-, were incurred for pooja in temples located outside the factory premises, while the balance expenses were claimed to be incurred by assessee towards local area expenses to the tune of Rs. 95,93,389/- claimed to be for social

contribution for welfare of the residents of the locality where the factory of the assessee is situated. The AO observed that the assessee has incurred these expenses to the tune of Rs. 1,21,53,963/- towards Corporate Social Responsibility but was not incurred wholly and exclusively for the purposes of the assessee's business and hence the AO made disallowance of these expenses while framing assessment u/s 143(3) of the 1961 Act vide assessment order dated 27.03.2015

4.2 The assessee being aggrieved by an assessment framed by the AO filed first appeal with learned CIT(A), which was dismissed by Ld.CIT(A) by holding that these expenses are not connected with the business of the assessee and were not incurred wholly and exclusively in connection with the business of the assessee . The claim of the assessee , inter-alia, before learned CIT(A) was that the learned CIT(A) has in earlier years allowed 50% of the expenses and it was claimed that at least 50% of the expenses be allowed as deduction u/s 37(1) of the 1961 Act . The learned CIT(A) rejected this contention of the assessee as in the opinion of learned CIT(A) , these expenses were not incurred by assessee wholly and exclusively for the purposes of business of the assessee and that is how assessment framed by the AO was upheld by learned CIT(A), vide appellate order dated 31.03.2017.

4.3 The assessee still being aggrieved is now before tribunal as it has filed second appeal before tribunal and claim is made by learned counsel for the assessee that in earlier years, the tribunal in ITA No.1414/Mds/2011

and ITA No.585/Mds/2012 for ay: 2007-08 & 2008-09 vide common order dated 02.01.2015 has allowed 50% of the expenses by upholding appellate order passed by learned CIT(A) and on that basis it was submitted by learned counsel for the assessee to allow at least 50% of the expenses. The Ld.CIT-DR submitted that both the authorities below have confirmed the disallowance and prayed for the disallowance of these expenses.

4.4 We have considered rival contentions and perused the material on record. We have observed that assessee has incurred expenses to the tune of Rs. 95,93,378/- towards local area expenses and Rs.25,60,574/- towards pooja expenses in temples situated outside the factory. We have observed that assessee has not filed any justification/explanation as to how these expenses are incurred wholly and exclusively in connection with the business of the assessee as is mandated u/s.37(1) of the 1961 Act. The onus is on the assessee to prove that these expenses are incurred wholly and exclusively for the purpose of business of the assessee as is required u/s 37(1) of the 1961 Act as it is the assessee who is claiming these expenses as deduction while computing income chargeable to tax under provisions of the 1961 Act. The principles of res-judicata are not applicable to Income-tax proceedings although we agree with the proposition that principles of consistency is required to be maintained in tax proceedings. But, however, every assessment year is a separate unit and the assessee has to prove that expenses incurred in a particular year

are incurred wholly and exclusively for the purposes of the business of the assessee and has a direct nexus with the business of the assessee, satisfying mandate of provisions of Section 37(1) of the 1961 Act. The assessee having failed to prove that in the year under consideration, these expenses were incurred wholly and exclusively for the purposes of business of the assessee as no evidence is produced to justify the same , these expenses cannot be allowed as business deductions and disallowances as were made by the authorities below are hereby confirmed. More over, the assessee is relying on the orders of the authorities for ay(s): 2007-08 and 2008-09, while we are presently concerned with ay: 2012-13 which is a distant ay and onus was on assessee to prove business nexus and expenses being incurred in the year under consideration wholly and exclusively for the purposes of business of the assessee as is mandated u/s 37(1) of the 1961 Act. The assessee fails on this ground. We order accordingly.

5. The third issue raised by assessee in its appeal filed with tribunal is concerning disallowance of an amount of Rs. 15,52,00,000/- which was claimed by assessee as business deduction being provision for profit incentive payable to its employees which was debited to P&L A/c but was not paid during the previous year relevant to the ay: 2012-13. The assessee had claimed before AO that this amount was paid in the following 12 months and at the time of making payment, income-tax was also deducted at source as it is required u/s 192 of the 1961 Act and hence the

said provisions for expenses are allowable as business deduction from income for previous year relevant to the ay: 2012-13. The assessee had submitted that assessee had to pay profit incentive to the employees on the profit during the FY 2011-12 @7% in terms of agreement entered into by assessee company with Employees Union and it was claimed that expenditure be allowed as Revenue expenses but AO was of the view that only provision for expenses has been made in the previous year relevant to impugned assessment year and expenses will only be allowed in the year in which the said expenditure was incurred by the assessee and that is how said expenses were disallowed by AO while framing assessment u/s 143(3) of the 1961 Act vide assessment order dated 27.03.2015.

5.2. Aggrieved by assessment framed by AO, the assessee filed first appeal with Ld.CIT(A) and learned counsel for the assessee relied upon the decision of learned CIT(A) in ITA No. 245-C/84-85 dated 26.02.1985 for ay: 1981-82 and decision of Chennai-tribunal in assessee's own case in ITA No.1418/Mds/89 dated 21.05.1986 for ay: 1981-82 and claimed that these expenditure be allowed as deduction u/s.37(1) of the 1961 Act and Section 36(1) of the 1961 Act is not applicable . The Ld.CIT(A) observed that in ay:1981-82, only expenditure incurred for ex-gratia payment was allowed by Ld.CIT(A) and the tribunal, and not provision made . It was observed that what learned CIT(A) and tribunal allowed was actual payment made and not the provision made by assessee and it was held that these percentage of profit in settlement of the demand of

workers/union did not amount to payment of bonus. The Ld.CIT(A) affirmed the assessment order passed by AO by observing that these expenses are to be allowed when they are actually incurred and provision made by assessee cannot be allowed, vide appellate order dated 31.03.2017.

5.3 Aggrieved by an appellate order passed by learned CIT(A), the assessee filed second appeal before tribunal and submitted that there was an memorandum of settlement entered into by assessee with employees on 04.09.1977, copy of which is produced by learned counsel for the assessee before the Bench(which is placed in file) and it was submitted by learned counsel for the assessee that assessee has debited to P&L A/c provision for liability towards production incentive computed @7% of profits , which was paid in subsequent year and it was submitted that these expenses be allowed. The assessee relied upon the decision of Hon'ble Madras High Court in the case of CIT v. Sivanandha Mills Ltd., reported in (1985) 156 ITR 629(Mad.) and decision of Hon'ble Madras High Court in the case of CIT v. Lakshmi Mills Co. Ltd. reported in (1999) 240 ITR 0081(Mad.) The Ld.CIT-DR submitted that these provisions of expenses claimed by assessee cannot be allowed u/s.37(1). It was submitted by learned CIT-DR that these provision for profit incentive is merely a charge on profits of the assessee company payable @7% of the net profit . It was submitted that it is in the nature of commission paid to workers and is hit by provisions of Section 36(1)(ii) of the 1961 Act read

with Section 43B of the 1961 Act. It was also submitted that Section 43B(c) is attracted and hence deduction can only be allowed on payment basis. The prayers were made by learned CIT-DR to affirm appellate order passed by learned CIT(A).

5.4 We have considered rival contentions and perused the material on record. We have observed that assessee had made provision of Rs. 15.52 Crores by way of debit to its Profit and Loss Account towards profit incentive payable to its employees. The said amount was not admittedly paid during the year under consideration but was claimed to be paid in subsequent years. It is also claimed that income-tax was deducted at source u/s.192 of the Act in subsequent year before effecting payment to the employees. The assessee has produced before us Memorandum of Settlement reached by it with employees u/s.12(3) of the Industrial Dispute Act, 1947 reached before Dy. Commissioner of Labour, Coimbatore on 04.09.1977. We have observed that said Memorandum of settlement is in operation till 31.12.1980. We are presently seized of ay: 2012-13. The assessee has not produced settlement arrived at with its employees which is relevant and applicable to previous year relevant to impugned ay: 2012-13. Coming back, in aforesaid settlement dated 04.09.1977 which is operative till 31.12.1980, it is mentioned that employees unions have given strike notice dated 01.06.1977 and raised demands such as granting of 15 days casual leave per year , payment of house rent allowance, reinstatement of certain workers, revision of

incentive scheme , formation of credit society and co-operative stores by management, increase of wages by 20% and settlement of other pending issues as on 05.12.1975. As part of settlement to settle demands no. 2,4,6 & 7 in strike notice dated 01.06.1977, it was agreed that confirmed employees shall be paid 7% of the net profit of the company as shown in audited balance sheet to be divided equally between employees which is described as profit sharing arrangement. It is also stated that this profit sharing arrangement has nothing to do with payment of Bonus to employees. It is also claimed that aforesaid amount is not a bonus. Reliance is placed by assessee on decision of Hon'ble Madras High Court in the case of CIT v. Lakshmi Mills Co. Limited, reported in (1999) 240 ITR 0081(Mad.) and decision of Hon'ble Madras High Court in the case of CIT v. Sivanandha Mills Limited reported in (1985) 156 ITR 629(Mad.) and it is claimed that Section 36(1)(ii) is not applicable and provision of Section 37(1) is rather applicable . In these cases, amount was paid for better performance and smooth working and if the amount is not paid , the workers would have gone on strike. We have observed that these amounts claimed to be paid under Memorandum of Settlement dated 04.09.1977 was profit sharing arrangement to meet worker demand for increased incentive and in order to avert strike and these amounts are not towards bonus. Thus ratio of aforesaid decision(s) of Hon'ble Madras High Court will squarely apply and provisions of Section 36(1)(ii) read with Section 43B(c) of the 1961 Act cannot be applied , as these payments are not towards bonus but are governed by commercial expediency to have

smooth operations and to avert strike. However, Memorandum of Settlement produced before us is dated 04.09.1977 which is in operation only till 31.12.1980 , while we are presently seized of ay: 2012-13. There is no finding of lower authorities as to whether this Memorandum of Settlement is still operative even in impugned ay. There is no finding/evidence on record to come to the said conclusion that the said memorandum of settlement still hold the field and these payments were made under the said memorandum of settlement . We are of considered view that the matter need to be restored to the file of the AO for fresh adjudication and the assessee is directed to produce agreement/settlement with the employees which is valid and effective for year under consideration and based on that the AO shall adjudicate the matter afresh keeping in view the provisions of Sec.37(1), 36(1)(ii) and 43B of the 1961 Act and also ratio of decision of the Hon'ble Madras High Court in the case of CIT v. Lakshmi Mills Co. Ltd., reported in 154 CTR 0182(Mad.) and Hon'ble Madras High Court decision in the case of CIT v. Sivanandha Mills Ltd., [1987] 63 CTR 11(Mad.) The assessee is directed to appear before AO and furnish relevant agreements/settlement which is applicable/relevant for previous year relevant to impugned ay and to justify that the provisions as aforesaid were made by it as per settlement arrived at with its employees as applicable to the impugned ay. The AO is also directed to verify claim of assessee that income-tax was deducted at source on such provision in subsequent assessment year and said amount was duly paid in subsequent year to employees. The AO shall also

verify that there is no double deduction of the said amount in subsequent years , by verifying assessment record of subsequent years. We order accordingly.

In the result, appeal filed by assessee in ITA No. 1387/Chny/2017 for ay: 2012-13 is partly allowed for statistical purpose as indicated above.

Order pronounced on this 20th day of January, 2020 in Chennai.

Sd/-	***Sd/-***
(एन.आर.एस. गणेशन**)**	**(**रमित कोचर**)**
(N.R.S. GANESAN)	**(RAMIT KOCHAR)**
न्यायिक सदस्य**/JUDICIAL MEMBER**	लेखा सदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 20th January, 2020.
TLN

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF