

आयकर अपीलिय अधीकरण, न्यायपीठ – “C” कोलकाता,  
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA  
(समक्ष)Before श्री जे. सुधाकर रेड्डी, लेखा सदस्य एवं/and श्री ऐ. टी. वर्की, न्यायीक सदस्य)  
[Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

**I.T.A. No. 1316/Kol/2013**  
**Assessment Year: 2008-09**

|                                      |     |  |
|--------------------------------------|-----|--|
| Income-tax Officer, Wd-8(1), Kolkata | Vs. | M/s. Merlin Resources Pvt. Ltd.<br>(PAN: AABCM7285P) |
| Appellant                            |     | Respondent   |

|                       |                             |
|-----------------------|-----------------------------|
| Date of Hearing       | 16.01.2020                  |
| Date of Pronouncement | 19 .02.2020                 |
| For the Appellant     | Shri Vijay Shankar, CIT, DR |
| For the Respondent    | Shri A. K. Tibrewal, FCA    |

**ORDER**

**Per Shri A.T.Varkey, JM**

This is an appeal filed by the revenue against the order of Ld. CIT(A)-VIII, Kolkata dated 28.02.2013 for AY 2008-09.

2. At the outset, we note that by an order dated 31.12.2018 this Tribunal was pleased to adjudicate this appeal as well as the assessee's appeal for AY 2008-09. However, it is noted that the revenue preferred a Misc. Application being M.A. N9o.156/Kol/20-19 against the order of the Tribunal dated 31.12.2018 wherein revenue raised a ground that the Tribunal while adjudicating the appeal considered both ground nos. 3 and 4 together without adjudicating ground no.4 specifically. In the light of the same, the Tribunal vide order dated 22.11.2019 was pleased to recall the decision in respect of ground nos. 3 and 4 for fresh adjudication. Hence, this appeal is again before us for the limited purpose of adjudication of ground nos. 3 and 4.

3. At the outset itself, the Ld. Counsel for the assessee Mr. Tibrewal contended that ground no. 3 had been adjudicated by the Tribunal vide order dated 31.12.2018

and Tribunal has not adjudicated ground no.4 which is the only remaining ground of appeal which needs to be adjudicated by this Tribunal. The Ld. DR could not controvert this fact, and after going through the records and order of this Tribunal, we find force in the contention of the Ld. AR of the assessee and we reiterate the decision given by the Tribunal in respect of ground no.3 which we note as under:

*“24. We have given a careful consideration to the rival submissions and perused the materials available on record, we note that shares of Galaxy Entertainment Corp Ltd. is quoted on Bombay Stock Exchange. The Galaxy Entertainment Corp Ltd, is not a group company of the assessee company. The shares were purchased by the assessee on the stock exchange. The assessee company incurred long term capital loss of Rs.5,92,14,631/- and the assessee company also incurred short term capital loss of Rs.46,56,642/-. We note that before the ld CIT(A), the assessee had filed copy of purchase note and sale bill etc. of shares of M/s Galaxy Entertainment Corp. Ltd. These documents were sent by the ld CIT(A), to the AO, during the appellate proceedings. The AO in his remand report had objected to the admission of these documents. The ld CIT(A) admitted these documents stating that purpose of assessment proceedings is to assess the correct tax liability of the assessee in accordance with law.[ National Thermal Power Corporation Vs.CIT 229 ITR 383 ]. The ld CIT(A), considering the facts of the assessee`s case, directed the assessing officer to work out the long term capital loss and short term capital loss. We are of the view that there is no infirmity in the order of ld CIT(A) in directing the AO to compute the long term/short term capital loss. That being so, we decline to interfere in the order passed by the ld. CIT(A), his order on this issue is hereby upheld and grounds of appeal raised by the Revenue is dismissed.”*

So, we reiterate the order of the Tribunal and dismiss ground no.3 of the revenue's appeal.

4. Coming to ground no. 4 raised by the revenue which is as under:

*“That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the profit from sale of shares of TCG Urban Infra Holding Limited (TUIHL) was Capital Gain and indexation was to be allowed, without having regard to the fact that the genuineness of transactions and antecedents of that company was not established in course of assessment proceedings or before the Ld. CIT(A) to be genuine transactions.”*

5. Brief facts of the case as noted by the AO are that during the year the assessee company sold its investments in foreign companies viz. TCS Urban Infra Holding Limited (in short “M/s. TUIHL)” which also holds beneficial shareholding in the assessee company directly or indirectly. According to AO, the assessee had computed arms length price for receiving the consideration at Rs.9,96,87,219/- and gained profit

of Rs.7,05,25,524/- and computed the index gain at Rs.6,60,14,128/-. According to AO, the aforesaid investment in foreign company was made in equity share/preference share/stock etc and the said company M/s. TUIHL is neither a listed company in stock exchange of India nor did the company produce evidence to prove that the said company is listed in an exchange in a foreign country. According to AO, the index cost in shares is allowed in respect of quoted shares listed in stock exchange and deduction, benefit etc. is allowable as per nature of the capital asset. According to AO, the aforesaid investment was sold on 20.09.2007 which the assessee had acquired in the year 2002 and on 09.07.2005. According to AO, the specified period of three years was not completed for the said investments to be considered as Long Term Capital Gain and furthermore, indexation on foreign holdings which is not listed in stock exchange is not allowable. The AO also noted that the Ld. AR of the assessee has not produced any evidence of purchase and sale of these investments and such dividend income received from foreign companies are also not exempt to tax. The AO noted that no STT was paid on the aforesaid investments and so the benefit of special rate of tax, indexation deduction is also not allowable on foreign investments on which the Indian Income Tax Act and Rules do not apply, therefore, the AO concluded that income received on foreign transactions amounting to Rs.7,05,25,524/- needs to be taxed under the head "Income from other sources" and accordingly assessed. Aggrieved, assessee preferred an appeal before the Ld. CIT(A), who was pleased to give relief to the assessee. Aggrieved, revenue is before us.

6. The Ld. CIT, DR Shri Vijay Shankar assailing the decision of the Ld. CIT(A) submitted that since the assessee failed to produce any evidence before the AO that M/s. TUIHL is not a foreign company, the AO had proceeded to make the assessment. According to the Ld. CIT, DR, the assessee did not produce any evidence before the AO, however, the assessee preferred to produce certain evidence before the Ld. CIT(A) who had taken note of the same and had given relief to the assessee which is not correct since assessment has to be carried out by the AO and not by the Ld. CIT(A).

Therefore, he prays that the order of Ld. CIT(A) may be reversed and that of the AO be upheld.

7. Per contra, the Ld. AR for the assessee supporting the decision of the Ld. CIT(A) contended that M/s. TUIHL is very much an Indian company and is registered with the Registrar of Companies (ROC), Kolkata since 1981 and according to the Ld. AR, the AO in the remand proceedings/remand report has gone through the documents of incorporation in India and having gone through the ROC documents and has not given any adverse report against it. The only contention of the AO was that since these documents were not produced before the predecessor AO, the same cannot be accepted by the Ld. CIT(A). According to the Ld. AR, the stand of the AO itself is wrong and since there is no adverse remark against the documents of incorporation of M/s. TUIHL before the ROC, Kolkata from year 1981 this fact is not disputed and therefore, the question of treating M/s. TUIHL as a foreign company does not arise and the Ld. CIT(A) has rightly taken note of the facts and given relief to the assessee and, therefore, he does not want us to interfere with the order of the Ld. CIT(A).

8. We have heard rival submission and perused the material available on record. We note that the AO had proceeded to make the addition on the basis that the assessee had sold the shares of M/s. TUIHL which was a foreign company. However, during the appellate proceedings the assessee was able to produce documents to substantiate that it (M/s. TUIHL) was indeed is an Indian company which was duly registered with ROC, Kolkata since year 1981 and, therefore, is an Indian Company. We note that the remand report of the AO called for by the Ld. CIT(A) does not controvert this fact. Therefore, we note that the basic premise on which the AO has made the addition fails and the Ld. CIT(A) is right in his conclusion that M/s. TUIHL is an Indian Company and its equity shares were in fact sold by the assessee. Further, the AO was of the view that since M/s. TUIHL was not listed on any stock exchanges hence, the benefit of indexation could not be allowed to the assessee company and that since no STT was paid on sale of shares, according to him, no benefit of special rate of tax indexation,

deduction is allowable. The Ld. CIT(A) has noted the submission of the assessee that M/s. TUIHL is an Indian company and since the equity shares of the company's share was held for more than twelve months it has to be treated as a capital asset and the indexation benefit was available on the said asset. For that Ld. CIT(A) relied on section 2(29A), 2(42A) and 2(48A) of the Act and the Ld. CIT(A) noted that the STT is to be paid only if the shares were sold in the stock exchange and since the assessee has not sold the shares on the stock exchange, according to him, the question of payment of STT does not arise. The Ld. CIT(A) has taken note that the assessee had held the shares of M/s. TUIHL for more than twelve months and hence, the gain on sale of shares is to be treated as long term capital gain and in view of the provision of sec. 48 of the Act he was of the opinion that the assessee had correctly deducted the index cost of acquisition from the sale proceeds of the shares. The Ld. CIT(A) has noted that the assessee was holding the shares of M/s. TUIHL as investment and, therefore, the gain on its sale is to be taxed under the head long term capital gain. It is also noted that in the instant case assessee has not claimed special tax rate or exemption of long term capital gains. In the light of the above facts and law as discussed by the Ld. CIT(A) and in the light of the remand report of the AO, we do not find any infirmity in the order of the Ld. CIT(A) and, therefore, we uphold the same. Therefore, the ground of appeal raised by the revenue is dismissed.

9. In the result, the limited issue of revenue appeal is dismissed.

Order is pronounced in the open court on 19th February, 2020

Sd/-  
(J. Sudhakar Reddy)  
Accountant Member

Sd/-  
(Aby. T. Varkey)  
Judicial Member

Dated : 19th February, 2020

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – ITO, Ward-8(1), Kolkata.
2. Respondent – M/s. Merlin Resources Pvt. Ltd., 9B, Wood Street, Kolkata-700 016.
3. The CIT(A)-VIII, Kolkata (sent through e-mail)
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Asstt. Registrar.