

आयकर अपीलीय अधिकरण , ' ए ' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
"A " BENCH, CHENNAI**

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

**BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 3398/Chny/2018

निर्धारण वर्ष/Assessment Year : 2012-13

M/s. Sundaram Clayton Limited,
No 29, Jayalakshmi Estates,
Haddows Road, Chennai – 600 006.

Deputy Commissioner of Income Tax,
Vs. Corporate Circle -6(2),
Chennai – 600034.

[PAN: AAACS 4920J]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri. Vikram Vijayaraghavan, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri. AR V Sreenivasan, JCIT

सुनवाईकीतारीख/Date of Hearing : 19.11.2019

घोषणाकीतारीख/Date of Pronouncement : 12.02.2020

आदेश/ O R D E R

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

The assessee filed this appeal against the order of the Commissioner of Income Tax (Appeals)-15, Chennai in ITA No. 155/2015-16/CIT(A)-15 dated 26.09.2018 for assessment year 2012-13.

2. M/s. Sundaram Clayton Ltd., the assessee, is carrying on Manufacture of Automotive Components and Application. While making

the assessment for assessment year 2012-13, the Assessing Officer, inter alia, made disallowance u/s. 14A r.w.r. 8D and disallowed certain foreign remittances which he considered that they fall under the category of fees for technical and professional services, of which the assessee has not deducted TDS. Therefore, he disallowed them. Aggrieved, the assessee filed appeal before the CIT(A). The Ld. CIT(A) confirmed the disallowances. Aggrieved against the order of the Ld. CIT(A), the assessee filed this appeal.

3. The Ld. AR submitted that the Ld. CIT(A) erred in not appreciating that the assessee has sufficient own funds/internal accrual to cover the entire investments made and that no part of the borrowed funds were used by the assessee to make the investments. Since no part of the borrowed funds could be attributed for making the investments, no part of the interest expenditure could be disallowed by invoking section 14A r.w.r. 8D2(ii). In this regard, the Ld. AR relied on the order of this tribunal's decision in the assessee's own case for assessment year 2010-11 in ITA No. 2612/Mds/2014 & CO No. 137/Mds/2014 dated 19.08.2015 for assessment year 2010-11, wherein accepting the assessee's stand, the Ld. CIT(A) directed the AO to delete the interest disallowance u/s. 14A which was upheld by the ITAT.

4. We heard the rival submissions. The relevant portion of the order is as under:

"6. Heard both sides. Perused orders of lower authorities. The issue in appeal has been elaborately considered by the Commissioner of Income Tax (Appeals) with reference to the submissions made by the assessee and the observations of the Assessing Officer and partly sustained the disallowance 4 ITA No.2612/Mds/2014 & C.O. No.137/Mds/2014 to the extent of ` 35,18,000/- and deleting the interest component of ` 2,66,89,000/- observing as under:- "5.2.2 The AR of the appellant also drawn to my attention the order passed by CIT(A) in ITA No.39 & 394/2011-12 dated 28.03.2013 for the A.Y. 2009-10 in the appellant's own case wherein the disallowance of interest expense under rule 8D(ii) was deleted by my predecessor on the ground that own funds were deployed for making investments. I have considered the findings of the AO as well as the submissions made by the AR of the appellant on this issue carefully. I have also gone through the Commissioner (Appeals) order for the Asst. Year 2009- 10 in ITA Nos 39&394/2011-12 dated 28.03.2013 relied on by the appellant. I find that there is considerable force in the submissions of the appellant. The appellant submitted that none of the borrowed funds have been used directly or indirectly for making the investments. The appellant also submitted that for all the investments made in earlier years, the company has sufficient own funds for making the investments. The appellant has clearly established with the financial statements for the period from 2001-02 to 2009-10 that (a) it had sufficient funds to make the investments (b) It had sufficient profits in the earlier years when the investments were made (c) And in all the years the borrowed funds were utilized for the purpose of the business and (d)The borrowed funds were actually reduced to Rs.28869.44 lakhs as on 31.03.2010 compared to Rs.33929.88 lakhs as on 31.03.2009. 5 ITA No.2612/Mds/2014 & C.O. No.137/Mds/2014 On the other hand, the AO estimated the disallowance of interest amount without any material placing on the record. The Hon'ble High Court of Bombay in the case of HDFC Bank Ltd. cited (supra) explained the legal position of law in para 5

of the order dated 27.03.2014 as under: "we find that facts of the present case are squarely covered by the judgement in the case of Reliance Utilities and Power Ltd. (supra). The finding of the fact given by the ITAT in the present case is that the assessee's own funds and other non-interest bearing funds were more than the investment in tax free securities. This factual position is not one that is disputed. In the present case, undisputedly the assessee's capital, profit and reserve, surplus and current account deposits were higher than the investment in the tax free securities. In view of this factual position, as per the judgement of this Court in the case of Reliance Utilities and Power Ltd.(supra), it would have to be presumed that investment made by the assessee would be out of interest free funds available with the assessee." Applying the above principles to the facts of the case, it is presumed that the appellant had made investments only out of the surplus funds available from the earlier years. Respectfully following the decision of the High Court of Bombay in the case of HDFC Bank Ltd. cited (supra), decision of the learned CIT(Appeals) in the appellant's own case for the A.Y. 2009-10, I am fully convinced that the AO has legally erred in making disallowance on the component of interest. Under the facts and circumstances of the case and legal position, I am of the considerate view 6 ITA No.2612/Mds/2014 & C.O. No.137/Mds/2014 that there can be no disallowance in so far as interest of borrowings is concerned u/s 14A. The AO, therefore, is directed to delete the interest amount of Rs.2,66,89,000/- out of the total amount of Rs.3,02,07,000/-. Hence, this ground of appeal is allowed.

5.2.3 During the course of appellate proceedings, the AR of the appellant was required to give explanation as to basis of allocation of expense of Rs.27,87,500/- in relation to exempt income. To this query, the AR of the appellant failed to give basis for allocation of the expense. However, in the annual accounts, the appellant claimed huge expense for earning exempt income and non-exempt income. No separate accounts are maintained for earning exempt income. The size of the investment portfolio was RS.73.43 crores which is huge. I am of the view that the AO has correctly applied the provisions of sec.14A read with Rule 8D and applied 0.5% of average investments which work out to Rs.35,18,000/- which is reasonable and justifiable. This ground of appeal, as it relates to

disallowance of 0.5% of average investments as expenditure is confirmed. The total disallowance u/s 14A is restricted to Rs.35,18,000/-. Hence ground No.2 of the appeal relating to disallowance of expenditure for earning the exempt income u/s 14A is treated as partly allowed." 7. On going through the above order of the Commissioner of Income Tax (Appeals), we do not find any valid reason to interfere with his findings in partly deleting the disallowance made under section 14A of the Act. The Revenue also did not rebut the findings of the Commissioner of Income Tax (Appeals) with evidences. Thus, we sustain the order of the Commissioner of Income Tax (Appeals) and reject the grounds of appeal raised by the Revenue. "

Therefore, following the above order, the AO is directed not to make any disallowance u/s. 14A r.w.r 8D(2)(ii). Thus, the corresponding grounds of the assessee on this issue are allowed.

5. Further, the Ld. AR submitted that the Ld. CIT(A) ought to have appreciated that only those investment that had yielded exempt income during the year under the consideration ought to have been considered for computing the disallowance u/s. 14A r.w.r. 8D(2)(iii). In this regard, the Ld. AR relied on this Special Bench decision in the case of ACIT, Circle-17, New Delhi vs Vireet Investment Pvt. Ltd., ITA No. 502/Del/2012 & CO No. 68/Del/2014 for assessment year 2008-09 dated 16.06.2017.

6. We heard the rival submissions. Following the Special Bench decision, *supra*, we direct the AO to compute disallowance u/s. 14A r.w.r. 8D(2)(iii) by considering only those investments which yielded exempt income during the year for the purpose of computing average value of investment and accordingly, recompute the disallowance u/s. 14A r.w.r. 8D(2)(iii).

7. With regard to the disallowance u/s. 40(a)(ia) in the case of Mr. John Lyons the AR submitted that the payment to Mr. John Lyons is made towards the fees for consultancy services rendered by him. This is covered by Article 14 – Independent Personal Services of the DTAA between India and Ireland, according to which, the income is taxable in India, only (i) the consultant has stayed for a period of 183 days or more in India and the income is attributable to the activities carried out by him in India, or (ii) the consultant has a fixed base in India and the income is attributable to that fixed base. Since the period of his stay in India during the FY is less than 183 days and he does not have a fixed base in India, the same is not taxable in India. Hence, no tax has been deducted on the same. In this regard, he invited our attention to the copy of the sample invoice and DAA are enclosed in the paper book.

7.1 In the case of Mr. Walter Sturmer, the AR submitted that the payment to Mr. Walter Sturmer is made towards the fees for consultancy services rendered by him. This is covered by Article 14-Independent Personal Services of the DTAA between India and Austria, according to which, the income is taxable in India, only (i) the consultant has stayed for a period of 183 days or more in India and the income is attributable to the activities carried out by him in India, or (ii) the consultant has a fixed base in India and the income is attributable to that fixed base. Since the period of his stay in India during the FY is less than 183 days and he does not have a fixed base in India, the same is not taxable in India. Hence, no tax has been deducted on the same. In this regard, he invited our attention to the copy of the sample invoice, declaration of period of stay from the consultant and DAA are enclosed in the paper book.

7.2 In the case of Mr. Detlef Hasenfuss, the AR submitted that the payment to Mr. Detlef Hasenfuss is made towards the fees for consultancy services rendered by him. This is covered by Article 14 – Independent Personal Services of the DTAA between India and Germany, according to which, the income is taxable in India, only (i) the consultant has stayed for a period of 183 days or more in India and the income is attributable to the activities carried out by him in India, or (ii)

the consultant has a fixed base in India and the income is attributable to that fixed base. Since the period of his stay in India during the FY is less than 183 days and he does not have a fixed base in India, the same is not taxable in India. Hence, no tax has been deducted on the same. In this regard, he invited our attention to the copy of the sample invoice, declaration of period of stay from the consultant and DAA are enclosed in the paper book.

7.3 Per contra, the Ld. DR invited our attention to the order of the CIT(A) and submitted that with regard to the above three payments, the Ld. CIT(A) called for the copies of agreement with foreign agents. In spite of the reasonable opportunities made by the Ld. CIT(A), the assessee could not submit the copy of the agreements. The assessee could not even submit the correspondence with regard to the nature of services rendered by the foreign agents. With regard to the stay of foreign agents, the Ld. CIT(A) asked the assessee to give documents related to stay of foreign agent in India such as passport and visa, but the assessee could not furnish them. In the circumstances, the Ld. CIT(A) confirmed the above disallowances made by the AO. Even before the Hon'ble ITAT, the assessee has not furnished any evidences with regard to the services rendered and the stay of foreign agents in

India. In the circumstances, the Ld. DR pleaded that the assessee's plea may not be considered.

8. In the case of HSBC (Mauritius) Ltd, the Ld. AR submitted that the payment made to HSBC (Mauritius) Ltd is towards the interest on buyer's credit. This is covered by Article 11 – Interest of the DTAA between India and Mauritius, according to which, interest arising from a contracting state shall be exempt from tax in that state, if it is derived and beneficially owned by any bank carrying on a bonafide business which is a resident of the other contracting state. In the instant case, interest is paid to HSBC (Mauritius) Ltd, which is a bank carrying on a bonafide banking business in Mauritius and hence is exempt from tax in India as per the DTAA provisions. Hence no tax has been deducted on the same. In this regard, he invited our attention to the copy of the buyer's credit agreement, payment advice and DTAA are enclosed in the paper book. Per contra, the Ld DR supported the orders of the lower authorities.

9. We heard the rival submissions and gone through the relevant material. On the disallowances made towards the payments made to Mr. John Lyons, Mr. Walter Sturmer & Mr. Detlef Hasenfuss, since the relevant materials were not placed before the lower authorities, we

deem it fit to remit these issues back to the AO for a fresh examination. The assessee shall lay relevant materials in support of its contention before the AO and comply with the requirements of the AO in accordance with law. The AO is free to conduct appropriate enquiry as deemed fit, but he shall furnish adequate opportunity to the assessee on the material etc to be used against it and decide the matter in accordance with law.

9.1 With regard to the payment to HSBC, we find merit in the submissions made by the Ld. AR for the reason that this issue is covered by Article 11(3), which is reproduced as under:

"3. Interest arising in a Contracting State shall be exempt from tax in that state provided it is derived and beneficially owned by:

- a. The Government or a local authority of the other contracting state.*
- b. Any agency or entity created or organised by the Government of the other contracting state; or*
- c. Any bank carrying on a bonafide banking business which is a resident of the other contracting state."*

Since, the assessee has made out of a case under item (c) of Article 11(3), supra, the corresponding grounds of the assessee are allowed.

10. In the result, the assessee's appeal is treated as partly allowed for statistical purposes.

Order pronounced on Wednesday, 12th February, 2020 at Chennai.

Sd/-

(एन.आर.एस .गणेशन)

(N.R.S. GANESAN)

न्यायिकसदस्य/Judicial Member

Sd/-

(एसजयरामन)

(S. JAYARAMAN)

लेखासदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated: 12th February, 2020

JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त) अपील(/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF