

IN THE INCOME TAX APPELLATE TRIBUNAL

“A” BENCH : BANGALORE

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER AND SMT.
BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No. 815 & 816/Bang/2017
Assessment years : 2011 – 12 & 2012 – 13

DCIT Circle – 2 (1) (1), Bengaluru	Vs.	M/s Coffee Day Global Limited, No. 32/2, Coffee Day Square, Vittal Malya Road, Opp. U B City Building, Bengaluru – 560001 PAN : AABCA5291P
APPELLANT		RESPONDENT
Assessee by	:	Shree C. Ramesh, C. A.
Revenue by	:	Shree T Roumuan Paite, CIT DR
Date of hearing	:	02.09.2020
Date of Pronouncement	:	30.09.2020

ORDER

PER ARUN KUMAR GARODIA, A. M.:

Both these appeals are filed by the revenue and the same are directed against a combined order of learned CIT (A) – 1 Bengaluru dated 20.12.2016 for the assessment years 2011 – 12 & 2012 - 13. Both these appeals were heard together and are being disposed of by way of this common order for the sake of convenience.

2. In both years, the revenue has filed revised grounds of appeal containing identical 8 grounds in each year. First Ground and Ground No. 8 in each year are

general. As per Ground No. 2 in each year, the grievance of the revenue is this that Learned CIT (A) has erred in allowing deduction in respect of belated payment of Employee's contribution to PF Rs. 43,484/- in A. Y. 2011 – 12 and Rs. 26,73,156/- in A. Y. 2012 – 13. As per Ground No. 3 to 5, the grievance of the revenue is about deletion of disallowance of Rs. 77,97,732/- in A. Y. 2011 – 12 and Rs. 136,64,024/- in A. Y. 2012 – 13 being the project expenses capitalised by the AO and as per Ground No. 6, the grievance of the revenue is about deletion of disallowance of Rs. 235,60,711/- in A. Y. 2011 – 12 and Rs. 146,80,683/- in A. Y. 2012 – 13 being the interest on capital work in progress and in A. Y. 2012 – 13, this is one more grievance of the revenue that learned CIT (A) has erred in deleting the disallowance made by the AO of Rs. 39,32,28,754/- being Forex Loss by holding that the judgment of Hon'ble Apex Court rendered in the case of Woodward Governor India Pvt. Ltd., 312 ITR 254 is applicable in this regard.

3. Regarding all these issues, learned DR of the revenue supported the assessment orders and learned AR of the assessee supported the order of CIT (A). In course of hearing, the learned AR of the assessee also placed reliance on the judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Sabari Enterprises, 298 ITR 141 in respect of deletion of addition in respect of belated contribution of employees contribution to PF being disputed by the revenue as per Ground No. 2 in both years.

4. Regarding Ground Nos. 3 to 5 in both years raised by the revenue in respect of deletion of disallowance of Rs. 77,97,732/- in A. Y. 2011 – 12 and Rs. 136,64,024/- in A. Y. 2012 – 13 being the project expenses capitalised by the AO but deleted by CIT (A), he placed reliance on the tribunal order rendered in assessee's own case for A. Y. 2013 – 14 & 2014 – 15 in ITA Nos. 3040 & 3041/Bang/2018 dated 24.02.2020 and submitted that copy of this tribunal order is available on pages 108 to 152 of the paper book. He submitted that as per Para 9.9.1 of this tribunal order, the issue involved in Ground Nos. 3 to 5 in both years was decided by the tribunal in favour of the assessee.

4. Regarding Ground No. 6 in both years in respect of interest incurred on borrowed funds on account of Capital Work in Progress, he pointed out that on pages 12 and 13 of written submissions dated 13.03.2018 filed by the assessee before tribunal, it is pointed out that in A. Y. 2010 – 11 in ITA No. 1501 & 1586/Bang/2013 r.w. M. P. No. 211 & 212/Bang/2017, the tribunal in para 20 of its order has decided similar issue against the assessee in view of Proviso to section 36 (1) (iii) but this is the submission of the assessee that the tribunal has misinterpreted the proviso and the assessee also contends that the tribunal has not considered its order rendered in the case of M/s Emdee Apparels vs. ACIT as reported in 28 Taxman.com 10 (Bang). It was submitted that instead of tribunal order in own case of assessee for A. Y. 2010 – 11, the tribunal should follow this tribunal order rendered in the case of M/s Emdee Apparels vs. ACIT (Supra) . It was also submitted that this is the finding of CIT (A) in the

impugned order that the expenditure is incurred to expand the business of the assessee and therefore, it cannot be considered as having created a new asset. Reliance is also placed on the judgment of Hon'ble apex court rendered in the case of M/s Vardhman Polytex Ltd. Vs. CIT, 349 ITR 690 and also in the case of DCIT vs. Core Healthcare Limited, 298 ITR 194. He also submitted that this tribunal order in A. Y. 2010 – 11 has been followed by the tribunal in A. Y. 2013 – 14 and 2014 – 15 also in ITA Nos. 3040 & 3041/Bang/2018 dated 24.02.2020. He submitted a copy of this tribunal order and drawn our attention to para no. 8.9.1.

5. Thereafter, he submitted that as per Para 10.8 of this tribunal order, the issue involved in A. Y. 2012 – 13 in respect of deletion of the disallowance of Rs. 39,32,28,754/- on account of Forex Loss was decided by the tribunal in favour of the assessee. At this juncture, the bench wanted to see the factual aspect as to how the Forex loan was utilised in the years when it was borrowed because there is no specific finding of the tribunal in Para 10.8 or any other Para in this regard. In reply, learned AR of the assessee submitted that these loans were borrowed in F. Y. 2005 – 06 to 2010 – 11 and he will submit the copy of audited accounts for these years to establish that these loans were not used for purchasing capital assets from abroad. Accordingly, he has filed the audited accounts for these years along with written submissions dated 04.09.2020. As per the same, an amount of Rs. 86,75,194/- was incurred on import of Capital Goods in F. Y. 2005 – 06 and it was pointed out that this amount is disclosed

by the assessee in Note No. 12 (a) of the Audited Accounts for the year ended as on 31.03.2006 enclosed with the written submissions. It is also submitted that during the F. Y. 2006 – 07, an amount of Rs. 244,16,467/- was incurred on import of Capital Goods and it was pointed out that this amount is also disclosed by the assessee in Note No. 12 (a) of the Audited Accounts for the year ended as on 31.03.2007 enclosed with the written submissions. It is also submitted that during the F. Y. 2009 – 10, an amount of Rs. 492,85,853/- was incurred on import of Capital Goods in and it was pointed out that this amount is also disclosed by the assessee in Note No. 20.5 of the Audited Accounts for the year ended as on 31.03.2010 enclosed with the written submissions. It is also submitted that during the F. Y. 2010 – 11, an amount of Rs. 1091,92,389/- was incurred on import of Capital Goods in and it was pointed out that this amount is also disclosed by the assessee in Note No. 20.4 of the Audited Accounts for the year ended as on 31.03.2011 enclosed with the written submissions. Hence, it is seen that this is admitted by the learned AR of the assessee that at least an amount of Rs. 19,15,69,903/- was incurred on import of Capital Goods in F. Y. 2005 – 06, 2006 – 07, 2009 – 10 and 2010 – 11. But this is also submitted in the same written submissions that during Financial Years 2005 – 06 to 2010 – 11, the assessee has made exports of Rs. 673,98,91,815/- and based on these figures, this is the contention raised that the import of capital goods is out of export revenue and not out of ECB Loans in foreign currency. It is also submitted that in para 8.3 on page 16 of the assessment order for

A. Y. 2012 – 13, the AO has himself noted that this Exchange loss of Rs. 31.32 Crores is in respect of loans borrowed for acquiring the machinery i.e. the fixed assets in India. The disallowance was made by the AO only on this basis that it is only notional loss and not actual loss. It was submitted that this aspect is covered in favour of the assessee by the judgment of Hon'ble apex court rendered in the case of Woodward Governor India Pvt. Ltd. Vs. CIT (Supra) and section 43A is not applicable in the present case because the loans were not used for import of capital goods.

6. We have considered the rival submissions. Regarding the issue involved in Ground no. 2 in both years in respect of delayed payment of the Employees' contribution to PF, we find that this issue is squarely covered in favour of the assessee by the judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Sabari Enterprises (Supra) and respectfully following the same, we decline to interfere in the order of CIT (A) on this issue and accordingly, Ground No. 2 in both years is rejected.

7. Regarding the issue involved in Ground Nos. 3 to 5 in both years, we find that this issue is squarely covered in favour of the assessee by the tribunal order rendered in assessee's own case for A. Y. 2013 – 14 & 2014 – 15 (Supra) and respectfully following the same, we decline to interfere in the order of CIT (A) on this issue also and accordingly, Ground Nos. 3 to 5 in both years are also rejected.

8. Regarding the issue involved in Ground No. 6 in both years, we find that this issue is squarely covered against the assessee by the tribunal orders rendered in

assessee's own case for A. Y. 2010 – 11 and also for A. Y. 2013 – 14 & 2014 – 15 (Supra). Although reliance is placed by the learned AR of the assessee on several other judicial pronouncements but the facts in any two cases cannot be identical and when tribunal order in assessee's own case is available for immediately preceding year i.e. A. Y. 2010 – 11 and immediately succeeding years i.e. A. Y. 2013 – 14 & 2014 – 15, we find no reason to consider any other judicial pronouncement and respectfully following the tribunal orders in assessee's own case for immediately preceding year i.e. A. Y. 2010 – 11 and immediately succeeding years i.e. A. Y. 2013 – 14 & 2014 – 15, we reverse the order of CIT (A) on this issue in both years and restore that of the AO and accordingly, Ground Nos. 6 in both years is allowed.

9. Regarding the issue involved in Ground No. 7 in A. Y. 2012 – 13 in respect of order of learned CIT (A) in deleting the disallowance made by the AO of Rs. 39,32,28,754/- being Forex Loss by holding that the judgment of Hon'ble Apex Court rendered in the case of Woodward Governor India Pvt. Ltd., 312 ITR 254 is not applicable in this regard, we find that in para 8.5 on page 17 of the assessment order, the AO has observed that the issue involved is loss or gain on reinstatement of capital loans not falling within the ambit of section 43A and has also observed that the issue involved is about forex losses on ECB loans which were utilised for acquiring machinery in India and not abroad. Finally, in para 8.8 on page 18 of the assessment order, the AO disallowed this loss by holding that this loss is ineligible for claim as revenue as

neither the Act nor the judicial understandings provide for it. This disallowance was deleted by CIT (A) by following the judgment of Hon'ble apex court rendered in the case of Woodward Governor India Pvt. Ltd. (Supra). Learned CIT (A) has also noted in para 7.10 of the impugned order that in earlier years also, there is no disallowance of forex loss and similar forex gain was also offered to tax by the assessee in various years. We also find that in para 10.8 of the tribunal order in assessee's own case for A. Ys. 2013 – 14 & 2014 - 15, this issue was decided by the tribunal in favour of the assessee and for ready reference, we reproduce this para of the tribunal order from pages 150 to 151 of the case law paper book filed with written submissions dated 24.08.2020.

10.8 We have heard the rival submissions and perused the record. The Supreme Court in the case of Sutlej Cotton Mills Ltd. vs. CIT reported in (1979) 116 ITR 1 held as under:

"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee of account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature".

The ratio of the above decision is whether the gain or loss should be brought to tax or allowed as deduction depends upon whether the foreign currency transactions were carried on account of capital or revenue items. If the foreign currency transactions are undertaken on capital account, the gain made out of such transaction is outside ambit of taxation, of course subject to the application of provisions of section 43A of the Act. If the transactions undertaken are on account of revenue items, the gain is clearly taxable and so the loss also is clearly allowable. In the present case, in the assessment year 2013-2014, Rs.18.12 crore

represent the notional forex loss that is reinstatement of loan as on 31st March by marking to marketing rate and the balance amount is incurred on actual payment made during the year. In the assessment year 2014-2015, Rs.25.55 crore represent notional forex loss as above and balance amount is incurred on actual payment during the year. The Assessing Officer except making bald assertion that the transactions were undertaken on account of capital items no evidence was brought on record to establish that the foreign currency transactions were undertaken on capital items.

The Supreme Court in the case of CIT vs. Woodward Governor India Pvt. Ltd. (2009) 312 ITR 254 had already held that the actual payment was not a condition precedent for making adjustment in respect of foreign currency transactions at the end of the closing year. We are, therefore, unable to concur or agree with the view of the Assessing Officer that liability could arise only when the contract would have matured as such a stand is totally divorced from the accounting principles and is in variance with the principle upheld by the Apex Court in the case of Woodward Governor India Pvt. Ltd. (supra). It is also not in dispute that assessee is following the mercantile system of accounting consistently. The foreign exchange loss is due to the reinstatement of the accounts at the end of the financial year as well as loss incurred on account of exchange fluctuation on repayment of borrowings is similar to the interest expenditure and it is to be allowed as revenue expenditure u/s 37 of the I.T.Act, as per the accounting standard approved by the Institute of Chartered Accountants of India. Hence, we do not find any infirmity in the finding of the CIT(A) on this issue and confirm the same. This ground of appeals of the Revenue is dismissed.”

10. As per above para, it is seen that the tribunal decided similar issue in favour of the assessee by following the judgment of Hon’ble Apex Court rendered in the case of Woodward Governor India Pvt. Ltd. (Supra). Learned DR of the revenue could not point out any difference in facts in the present year as compared to these two years for which the tribunal order is available.

11. Regarding the applicability of section 43A, we find that this is stated by the AO in the assessment order itself that this section is not applicable. In spite of this, being final fact finding authority, we made efforts to examine the facts and found that although there was import of capital assets in those years when ECB loans were borrowed but there was substantial exports also and the assertion of the assessee is

this that such export proceeds were used for import of capital assets and ECB loan was not used for that purpose and the learned DR of the revenue could not bring any evidence on record to show that ECB loans were used for import of capital goods. Under these facts, we have no hesitation in holding that this issue is covered in favour of the assessee by the tribunal order in assessee's own case for A. Ys. 2013 – 14 & 2014 – 15 (Supra) and respectfully following the same, we decline to interfere in the order of CIT (A) on this issue and accordingly, Ground Nos. 7 in A. Y. 2012 – 13 is rejected. We find that in A. Y. 2011 – 12 also, similar Ground No. 7 is raised by the revenue but in this year, this ground is not arising out of the order of CIT (A) because in this year, there is no similar disallowance made by the AO and hence, this ground in A. Y. 2011 – 12 is rejected for this reason that this ground is not arising out of the order of CIT (A).

12. In the result, both appeals of the revenue are partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(BEENA PILLAI)

Judicial Member

Sd/-

(A.K. GARODIA)

Accountant Member

Bangalore,

Dated: 30th September, 2020.

/NS/*AKG

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|---------------|-------------------------|---------------|
| 1. Appellants | 2. Respondent | 3. CIT |
| 4. CIT(A) | 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.