

Delhi, qua the assessment year 2012-13 on the grounds inter alia that :-

“1. The order of ld. CIT(A) is not correct in law and facts.

2. On the facts and circumstances of the case, The Ld. CIT(A) has erred in law in deleting the addition of Rs. 1,55,32,844/- made by AO on account of rotation of disallowance of u/s 14A read with Rule 8D.

3. On the facts & circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition of Rs. 4,93,806/- made by AO on account of disallowance of EPF & ESI-contribution.

4. On the facts & circumstances of the case, the ld. CIT(A) has erred in law in deleting the addition of Rs. 12,22,278/- made by AO on account of disallowance of u/s 80IB of the Income Tax Act, 1961.

5. On the facts & circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition of Rs. 1,83,13,000/- made by AO on account of unexplained cash/income found during the search operation.

6. The appellant craves leave to add, amend any/ all grounds of appeal before or during the course of hearing of the appeal.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : assessee company is into business of Manufacturing and Sale of P.U. foam products and coir mattresses. A search and seizure operation was carried out at the premises of Sheela Foam Private Limited in which cash amounting to Rs. 92,83,000/- was found out of which Rs. 60,83,296/- was seized.

3. During the assessment proceedings AO noticed that no suo moto disallowance u/s 14A has been made by the assessee on its investment and by invoking the provisions contained u/s 14A read

with Rule 8D made disallowance of Rs. 1,55,32,844/- and made addition thereof to the total income of the assessee.

4. Assessing Officer also made addition of Rs. 4,93,806/- by way of disallowance u/s 36(1)(va) of delayed payment of employee's contribution to Provident Fund (in short "PF") and the Employee State Insurance (in short "ESI") towards PF and ESI which was deposited beyond the due date.

5. AO also made disallowance of Rs. 12,22,278/- on account of disallowance u/s 80IB of the Act. AO also made addition of Rs. 1,83,13,000/- on the ground that the assessee has failed to explain the aforesaid surrendered amount and as such made addition thereof to the taxable income of the assessee. Accordingly, Assessing Officer framed the assessment at the total income of Rs.21,28,77,854/- u/s 143(3) of the Act.

6. Assessee carried the matter before Ld. CIT(A) by way of filing the appeal who has partly allowed the same. Feeling aggrieved, revenue has come up before the Tribunal by way of filing the present appeal.

GROUND NO. 1 :

7. Ground no. 1 is general in nature and needs no specific findings.

GROUND NO. 2

8. At the very outset, Ld. AR for the assessee contended that since no exempt income has been earned by the assessee company during the year under consideration, no disallowance can be made. This fact is also evident from para 7 of the assessment order wherein not a single word has been written by AO if assessee has earned any exempt dividend income during the year under assessment rather invoked the provisions contained under Rule 8D 2(ii) and (iii). However, Ld. CIT(A) deleted this disallowance in view of the settled principle of law that when there is no dividend income earned during the year under consideration disallowance u/s 14A read with Rule 8D2 is not sustainable. This issue has been set at rest by the Hon'ble Delhi High Court in case of *Cheminvest Ltd. vs. CIT, 378 ITR 33 (Del.)*. Finding no infirmity or illegality in the impugned deletion made by Ld. CIT(A). So, Ground no. 2 is determined against the revenue.

GROUND NO. 3

9. Ld. CIT(A) deleted the addition of Rs. 4,93,806/- made by the AO on account of disallowance of employee's contribution towards EPF and ESI contribution, which is under challenged by the revenue. Ld. DR for the revenue challenging the impugned deletion relied upon the order passed by AO. However, on the other hand, Ld. AR for the assessee relied upon order passed by Ld. CIT(A) and contended that this issue has already been decided in favour of the assessee by the Tribunal in assessee's own case for A.Y. 2013-14.

10. We have perused order passed by Co-ordinate Bench of Tribunal in assessee's own case in *ITA no. 5417/Del/2016, M/s. Sheela Foam Ltd. vs. The ACIT* which is on identical issue, and has been decided in favour of the assessee by returning following finding :-

“7. We find that the present issue raised in the appeal against disallowance made u/s 2(24)(x) r.w.s. 36(1)(va) of the Act stands covered in favour of the assessee by the decision of Hon'ble Supreme Court in CIT vs Alom Extrusions [2009] 319 ITR 306 (SC). Following the same parity of reasoning, we hold that where the assessee has deposited the said amount on account of employee's contribution to Provident Fund and Employee State Insurance before the due date of filing of return of income, then, the assessee

cannot be held to be in default. The Assessing Officer may verify this particular aspect of depositing the alleged amount before the due date of filing the return of income. The assessee is directed to file the requisite details before the Assessing Officer in this regard and the Assessing Officer is also directed to afford reasonable opportunity of hearing to the assessee and decide the issue in line with our direction. Grounds of appeal raised by the assessee are thus allowed.”

Following the order passed by Co-ordinate Bench of Tribunal which is based upon law laid down by the Supreme Court in case of *CIT vs. Alom Extrusions [2009] 319 ITR 306 (SC)*, we are of the considered view that when the assessee has deposited the employee's contribution towards PF and ESI before the due date of filing return of income, no disallowance can be made. Hence, finding no infirmity or illegality in the impugned deletion made by Ld. CIT(A), ground no. 3 is determined against revenue. However, this is subject to the verification of date of depositing of the alleged amount before the due date of filing of the return.

GROUND NO. 4

11. Deletion of disallowance of deduction of Rs. 12,22,278/- u/s 80IC (mistakenly mentioned as Section 80IB in the assessment order) claimed by the assessee in respect of Kala Amb Unit on account of allocation of interest expenses is under challenge by the

revenue. Ld. AR for the assessee contended that this issue has already been decided in favour of the assessee by the Co-ordinate Bench of Tribunal in assessee's own case in earlier years i.e A.Y. 2000-2001, 2006-07 to 2008-09, 2009-2010 to 2012-13 and 2013-14.

12. Ld. AR for the assessee further contended that in A.Y. 2014-15, this issue was restored for allocation of interest expenditure to the AO with direction to determine the amount of interest/finance cost which was not relatable to non-eligible unit of the assessee for being allocated to the eligible unit on the basis of allocation key and then compute the margin of eligible unit for determining the specified domestic transfer pricing adjustment. However, it is brought to our notice that assessee has already challenged this decision of the Tribunal in the Hon'ble High Court which is pending adjudication.

13. It is categorical case of the assessee that no borrowed funds were ever utilized for setting up or in functioning of the Kala Amb unit and only surplus available with the head office / assessee company were utilized. It is also contended by Ld. AR for the assessee that eligible unit for deduction u/s 80IC is a cash generating unit earnings substantial profits year on year and

brought on record audited accounts of eligible units from 2013-14 to 2019-20, which is as under :-

A.Y.	Profit/ (Loss) of the Eligible Unit	Refer P & L account of Kala Amb unit placed in caselaw paperbook	Amount receivable from the head office appearing in the books of the eligible unit	Refer Notes to Account of Kala Amb unit placed in caselaw paperbook
2013-14	104,723,576	122	(38,836,963)	123
2014-15	297,029,204	125	(86,258,747)	126
2015-16	565,063,905	128	(306,075,835)	129
2016-17	655,221,211	131	(552,132,880)	132
2017-18	701,868,305	134	(731,292,940)	135
2018-19	708,066,128	137	(830,305,389)	139
2019-20	894,391,535	141	(601,376,019)	143

14. Ld. AR for the assessee contended that identical issue has already been decided in favour of the assessee by the Co-ordinate Bench of Tribunal in A.Y. 2009-10 to 2011-12, following the earlier years order for A.Y. 2006-07 to 2008-09. We have perused the order passed by Co-ordinate Bench of Tribunal which is qua identical issue, operative part thereof is extracted as under for ready perusal :-

“14. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below and with the assistance of the Id. Counsel for the assessee, we have considered the relevant documentary evidences brought on record in

the form of paper book in the light of Rule 18(6) of the ITAT Rules, 1962. Exhibit 36, 44,53 and 62 exhibit financial statements of four eligible units. It can be seen that in all these eligible units, the Head Office account was showing debit balance which was converted into credit balance only when profit for the year was transferred. Therefore, it cannot be said that the eligible units had borrowed funds from the Head Office.

Further, we find that the debtors of the eligible units were realized by the Head Office and accordingly, necessary entries were passed through Head Office account. Considering the factual matrix exhibited in the statement of account, it can be stated that the eligible units have not borne any financial charges and therefore, no allocation of financial charges is to be made between these eligible units. We do not find any error or infirmity in the finding of the Id. CIT(A). Ground No.2 is accordingly dismissed.”

15. However, Ld. DR for the revenue contended that this issue may be restored back to the AO for verification of the accounts. However, we are of the view that order passed by Ld. CIT(A) is exhaustive who has examined the entire accounts and reach the conclusion that the assessee company had sufficient funds for setting up the eligible units during the year under consideration. Consequently eligible unit had earned substantial sales, surplus funds were transferred by the eligible units to the head office. In view of the matter, we are of the considered view that there is no

need to restore to the issue back to the AO as the Ld. CIT(A) after perusing the audited financial concluded that when eligible unit has not utilized any interest bearing funds as it has its own sufficient funds for setting up the units no disallowance u/s 80IB on account of interest allocation to Kala Amb unit can be made. So following the order passed by Co-ordinate Bench of the Tribunal in assessee's own case in earlier year and by following the rule of consistency, Ld. CIT(A) has rightly held that no further allocation of interest is required to be made during the year under consideration. So, finding no infirmity or illegality, this ground is determined against the revenue.

GROUND No. 5

16. Deletion of addition of Rs. 1,83,13,000/- by Ld. CIT(A) is under challenge before the Bench by the revenue. Ld. DR for the revenue challenging the impugned addition relied upon order passed by AO.

17. Undisputedly during the search and seizure operation carried out at the premises of the assessee on 28.11.2011 cash amounting to Rs. 92,83,000/- was found out of which Rs. 60,83,296/- was seized being unexplained cash qua which complete details /

reconciliation was provided by the assessee which is as under :-

<i>Sl. No.</i>	<i>Particulars</i>	<i>Amount</i>
1.	<i>Cash pertaining to M/s. Auora Foams Private Limited</i>	<i>45,90,000/-</i>
2.	<i>Cash pertaining to collections at sales counter in Greater Noida plant</i>	<i>13,98,681/-</i>
3.	<i>Cash pertaining to other units / group companies</i>	<i>85,000/-</i>
4.	<i>Un-reconciled amount representing soiled/spoilt currency notes</i>	<i>9,615/-</i>
	<i>Total</i>	<i>60,83,296</i>

18. Ld. CIT(A) after threshing the issue on facts in the light of the law applicable thereto deleted the amount of Rs. 1,83,13,000/- on account of no evidence on record, however, the cash amounting to Rs. 60,83,296/- seized during the search has been held as unexplainable by returning following findings :-

“5.3.6 In respect of the connected ground of surrendered income of Rs. 1,83,13,000/- it has been submitted that the AO has made the addition of Rs. 1,83,13,000/- solely on the basis of surrender made by the Managing Director of the appellant, Sh. Rahul Gautam, considering the applicable effective tax rate of 33% (aprox) on the cash Rs.60,83,296/- seized, and that during the course of the assessment proceedings the appellant had emphatically submitted that the aforesaid surrender of Rs.1.83 crores was made on the misconceived notion that in order to cover so-called unexplained cash of Rs. 60,83,296/-, the appellant was required to make surrender of a gross amount by treating the said cash as tax on the surrendered amount. It has also been submitted that no incriminating material/document,

whatsoever (other than aforesaid alleged unexplained cash of Rs.60,83,296/-) was found during the course of search on the basis of which the aforesaid addition could at all be made or justified-. The appellant has- relied upon various judgments including that of the Hon'ble Supreme Court for its contentions that admissions/surrenders are not conclusive piece of evidence and the addition cannot be made solely on the basis of statement, and the AO has to consider apply his mind to the facts of the matter before reaching at a conclusion. From the assessment order, and the statement u/s 132(4) of the Act (supra), as mentioned at para 5.3.2 herein above, I find that there is not a whisper of the impugned addition having been linked to any incriminating material found during the survey/search, or for that matter any issue of relevance having any implication on the taxable income of the appellant, and the AO has made the addition with the simple observation "the assessee's surrendered amount of Rs.1,83,13,000/- remained unexplained, hence it will be added to the assessee's declared income", but the AO has not mentioned any thing as to why the explanation of the AO remains unexplained nor the manner in which the impugned income to the tune of Rs.1,83,13,000/- was earned and as to what does the impugned amount relate to and under which head of income the same is taxable. I am inclined to agree with the appellant that the Investigation Wing officers resorted to reverse calculation so as to ensure that the entire cash seized is appropriated by the department, and only such a view can explain the unlikely and abstract figure of Rs. 1,83,13,000/-. While noting that the surrender/disclosure was 'obtained' by the Investigation Wing officers without there being any shred of evidence found during survey/search which could suggest that undisclosed income to the tune of Rs. 1,83,13,000/- was earned by the appellant, I hold that there is no evidence brought on record which could lead me

to accept the conclusions of the Investigation Wing and the AO that there is undisclosed income to the extent of, and relatable to, the impugned addition of Rs. 238,239,240 & 241/15-16 found and seized of Rs. 60,83,296/- has been held as unexplained herein above, and there is no justification for sustaining the further addition of Rs. 1,83,13,000/-. This addition is therefore deleted. This ground is therefore allowed.”

19. In view of what has been discussed above, we are of the considered view that Ld. CIT(A) rightly deleted the addition made by the AO to the tune of Rs. 1,83,13,000/- on the basis of surrendered made by the Managing Director of the assessee company by applying the affective rate of 33% approximately on the cash of 60,83,296/- seized from the assessee. Entire addition has been made by the AO on the basis of surmises without an iota of evidence. So, we find no ground to interfere into the findings returned by Ld. CIT(A). So, ground is decided against revenue.

20. In view of our findings in the preceding paras, present appeal filed by the revenue is hereby dismissed.

Order pronounced in open court on this 24th day of November, 2021.

**Sd/-
(R.K.PANDA)**

ACCOUNTANT MEMBER

Dated the 24th day of November, 2021
Binita

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Copy forwarded to:

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

AR, ITAT
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