आयकर अपीलीय अधिकरण ' बी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, CHENNAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ **ITA No.2707/Chny/2017**
(निर्धारण वर्ष / Assessment Year: 2011-12)

DCIT Corporate Circle-2(2), Chennai.	**बनाम** / Vs.	**M/s. ISS SDB Security Services Pvt. Ltd.,** No.4, Deccan House, 7th Avenue, Harrington Road, Chetpet, Chennai-600 031.
स्थायी लेखा सं./जीआइ आर सं./**PAN/GIR No. AAACT-3628-C**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकर अपील सं./ **ITA No. 3536/Chny/2018**
(निर्धारण वर्ष / Assessment Year: 2014-15)

JCIT(OSD) Corporate Circle-2(2), Chennai.	**बनाम** / Vs.	**M/s. ISS SDB Security Services Pvt. Ltd.,** Bascon Futura, 5th Floor, No.10/1, Venkatanarayana Road, T.Nagar, Chennai-600 017.
स्थायी लेखा सं./जीआइ आर सं./**PAN/GIR No. AAACT-3628-C**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओरसे/ **Appellant by**	:	Shri MP Lohia (CA) – Ld. AR
प्रत्यर्थी की ओरसे/**Respondent by**	:	Shri P. Sajit Kumar (JCIT) –Ld. DR
सुनवाई की तारीख/ **Date of Hearing**	:	17-02-2022
घोषणा की तारीख / **Date of Pronouncement**	:	21-02-2022

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by revenue for Assessment Year (AY) 2011-12 & 2014-15 arises out of separate orders of learned first appellate authority. However, the facts as well as issues are substantially the

same and therefore, the appeals are being disposed-off by way of this common order for the sake of convenience & brevity. First we take up appeal for AY 2011-12 which arises out of the order of learned Commissioner of Income Tax (Appeals)-9, Chennai [CIT(A)] dated 31.07.2017 in the matter of assessment framed by Ld. Assessing Officer [AO] u/s. 143(3) on 30.03.2014. The grounds raised by the revenue read as under:

1. The Order of the learned Commissioner of Income Tax (Appeals) is contrary to the Law and facts of the case.
2.1. The CIT(A) erred in deleting the addition made on account of belated remittance of employees' contribution on ESI & PF relying on the decision of the Hon'ble High Court in the case of M/s. Industrial Security & Intelligence India Pvt. Ltd. which has not been accepted by the Department and a Review Petition has been preferred by the Revenue.
2.2. The CIT(A) ought to have appreciated that the employee's contribution of ESI & PF are governed by the section 36(1)(va) of the Act and not under section 43B of the Act.
2.3. The recent Board's Circular No.22/2015, dt.17.12.2015 has accepted the decision of the Supreme Court in the case of Alom Extrusions only in respect of disallowance u/s 43B of the Act and has stated that this Circular does not apply to the claim of deduction relating to employee's contribution to welfare funds which are governed by section 36(1)(va) of the Act.
3.1. The CIT(A) erred in holding that the royalty payment is to be treated as revenue expenditure.
3.2. The CIT(A) failed in not appreciating the fact that when royalty falls under the definition of intangible assets as per the provisions of Sec.32(1)(ii), and the said expenditure is to be treated only as capital expenditure.
3.3. The CIT(A) failed in not appreciating the fact that as the assessee had got enduring benefit would be treated as capital expenditure.
3.4. The CIT(A) ignoring the decision of the Bangalore Tribunal in the case of Bosch Ltd vs ACIT [2016] 74 taxmann.com 161, wherein it was held that the amount paid by the assessee for acquisition of right to use trademark for a period of three years was covered by Section 32(1)(ii) and thus the same could not be allowed as revenue expenditure, which is squarely applicable to the instant case.
4.1 The CIT(A) erred in directing the AO to exclude the investments made in subsidiary company the for the purpose of working out the average value of investments computed under Rule 8D(2).
4.2 The CIT(A) failed to consider the fact that the investments in subsidiary companies will yield only dividend income which is exempt from income tax and hence provisions of sec.14A are applicable.
4.3. The CIT(A) erred in directing the AO to verify and held that if the own funds available in the possession of the assessee is more than the tax free investments, no disallowance could be made under Rule 8D(2)(ii) of IT Rules.

4.4 The CIT(A) erred in holding that no disallowance was warranted u/s.14A when the own funds are more than the tax free investments, whereas the provisions of the said section as well as Rule 8D does not provide for any such exception.

4.5 The CIT(A) omitted to consider the CBDT circular No. 5/2014 wherein it is clarified that, disallowance u/s.14A r.w.r. 8D has to be made even if the taxpayer in a particular year not earned any exempt income.

5. For these and other grounds that may be adduced at the time of hearing, it is prayed that the Order of the learned Commissioner of Income Tax (Appeals) be set aside and that of the Assessing Officer be restored.

As evident, the revenue is aggrieved by deletion of addition made by Ld. AO on account of belated remittance of employees' contribution to ESI. The second grievance of the revenue is that royalty payment and management service charges paid by the assessee have been held to be revenue in nature. The same were held to be capital in nature by Ld. AO. The last issue is disallowance u/s 14A.

2. The learned DR supported the orders of Ld. AO and assailed the relief granted in the impugned order. The Ld. AR, on the other hand,supported the impugned order. For the same, our attention has been drawn to various documentary evidences as placed on record. The Ld. AR submitted that royalty and management service charges were paid as certain percentage of annual sales turnover and no enduring benefit arose to the assessee.

3. Having heard rival submissions and after going through the order of lower authorities, our adjudication would be as given in succeeding paragraphs.

4. The assessee being resident corporate assessee is stated to be engaged in providing security services and sale of electronic equipments. An assessment was framed u/s 143(3) wherein certain additions / disallowance were made. The additions / disallowances which are the subject matter of appeal before us are as under:

(i) Disallowance of delayed payment of ESI

It transpired that the assessee delayed remittance of employees' ESI contribution to ESI corporation. Accordingly, the sum of Rs.26.60 Lacs was disallowed and added to the income of the assessee.

Upon further appeal, Ld. CIT(A) allowed the claim by relying upon various decisions. Notable amongst the same was the decision of Hon'ble Bombay High Court **in CIT V/s Ghatge Patil Transporters Ltd. (53 Taxmann.com 141)**as well as the decision of Hon'ble High Court of Madras in the case of **CIT V/s M/s Industrial security and intelligence India Private Limited (TA No.585 of 2015 &ors. dated 24.07.2015)** wherein it was held that if the assessee had deposited employees' contribution towards PF and ESI after due date as prescribed under the relevant act but before the due date of filing of return of income then no disallowance could be made u/s 43B. Aggrieved, the revenue is in further appeal before us.

Upon due consideration, we find that this issue stand covered in assessee's favor by the decision of Hon'ble High Court of Madras in the case of **CIT V/s M/s Industrial security and intelligence India Private Limited (supra).** Further, the coordinate bench of Chennai Tribunal in recent decision of **Adyar Anand Bhawan Sweets India Pvt. Ltd. V/s ACIT (ITA Nos. 402-403/Chny/21 dated 08.12.2021)**has held that the amendment to Sec.36(1)(va) by way of insertion of explanation-2 would operate prospectively only. Therefore, respectfully following the same, we confirm this issue in assessee's favor. The ground thus raised stand dismissed.

(ii) Nature of Royalty payments / Management Service Charges

The assessee paid sum of Rs.332.67 Lacs to M/s ISS A/S Denmark as royalty payment. The same was to be paid on annual basis @1.3% of net sales turnover. The royalty was to be paid for use of ISS Brand. The assessee paid management services charges also under separate contractual terms on similar payment basis. The same was in lieu of the right to use the management services including correspondences, reports manuals and training. However, Ld. AO, relying upon the decision of Hon'ble Supreme Court in the case of **Southern Switchgear V/s CIT (232 ITR 359)** held that depreciation of 25% would be allowable to the assessee.In other words, the expenditure was held to be capital in nature.

During appellate proceedings, the assessee submitted that as per the agreement, ISS A/S Denmark agreed to grant the right to the assessee to use 'ISS' name and ISS proprietary trademark etc. The payment of royalty was based on percentage of net annual sales turnover and it was payable annually. However, the licensor shall continue to have the ownership of the trademark, trade-names, patents etc. The assessee had only a limited right to use the same in India. Upon termination of the royalty agreement, all rights & benefits granted under the license shall lapse and assessee was to return all manuals, reports etc. without making any copies. Similarly, as per the management service agreement, ISS A/S Denmark provided various support services in the field of operation management, human resource management, support towards corporate finance, legal affairs etc. which were to be remunerated on Annual basis as fixed percentage of net sales turnover. Upon termination of the managerial service agreement, all rights& benefits shall lapse. Therefore, the payments were merely for right to

use and not towards acquisition of any property, rights or otherwise. The royalty was not a lump sum payment to purchase or acquire any IPR, technical know-how, license etc. Therefore, the expenditure could not be regarded as capital expenditure by any stretch of imagination. The Ld. CIT(A), upon perusal of factual matrix, concurred with assessee's submissions and observed that the payment was as license fees only and not price for acquisition of any capital assets. The ratio of decision of Hon'ble Apex Court in **Alembic Chemicals Works Co. Ltd. (177 ITR 377)** was noted wherein similar expenditure were held to be allowable deduction. Similar was the decision of Hon'ble Delhi High Court in **Jubilant Foodwork Pvt. Ltd. (52 Taxmann.com 215)** wherein it was held that the franchise fees paid annually at fixed percentage of sales turnover for using trademark would be revenue expenditure. Similar was the decision in **Hero Honda Motors Ltd. (372 ITR 481)** wherein it was held that ownership and intellectual property rights in the know-how or technical information were never transferred or became an asset of the assessee. Therefore, the payment would be revenue in nature. This case law has distinguished the case law of **Southern Switchgear V/s CIT (supra)** as relied upon by Ld. AO. The Ld. CIT(A) also relied on the decision of Hon'ble High Court of Madras in the case of **CIT V/s Hitech Arai Ltd. (368 ITR 577**) wherein similar expenditure was held to be revenue expenditure. Similar was the ratio of decision in **CIT V/s Panasonic Carbon India Co. Ltd. (TCA Nos.552 of 2010 &ors. Dated 12.07.2010).** On the basis of all these decisions, it was held by Ld. CIT(A) that there was no transfer of any rights or assets. The assessee merely uses the benefits / licenses / services of ISS A/S Denmark. The termination clause provides for return of such benefits or licenses or

services. The royalty as well as management service fees was paid in proportion to sales turnover. Therefore, the disallowance as made by Ld. AO was to be deleted. Aggrieved, the revenue is in further appeal before us.

After due consideration of factual matrix as enumerated in preceding paragraphs, the undisputed position that emerges is that the assessee is using the trade name as well as management services under contractual terms. The payment was to be made on annual basis and the same was based on fixed percentage of net sales turnover. Upon termination of the agreement, the benefits / licenses / services were to lapse and the assessee was to return the manuals, reports etc. No new asset was acquired by the assessee. The assessee merely acted as user. Therefore, it could not be said that the rights acquired by the assessee were enduring in nature. The Ld. CIT(A), in our considered opinion, has clinched the issue in the correct perspective and therefore, the same would not require any interference on our part. The grounds raised by the revenue, in this regard, stand dismissed.

(iii) Disallowance u/s 14A

The assessee earned exempt dividend income of Rs.2.84 Lacs. The assessee submitted that investments were out of internal accruals. However, rejecting the same, Ld. AO computed aggregate disallowance of Rs.0.39 Lacs u/r 8D(2) which comprised-off of interest disallowance u/r 8D(2)(ii) for Rs.0.20 Lacs and indirect expense disallowance u/r 8D(2)(iii) for Rs.0.19 Lacs.

The Ld. CIT(A) directed Ld. AO to exclude strategic investments to compute the disallowance. The Ld. AO was also directed to verify if the own funds were more than the investment. If so, the disallowance was to

be deleted on the presumption that investments were out of own funds as per the decision of Hon'ble Bombay High Court in the case of **HDFC Bank Ltd (89CCH 185)** as well as the decision of Hon'ble Madras High Court in the case of **Hotel Savera (239 ITR 795).** Aggrieved the revenue is in further appeal before us.

At the outset, so far as the exclusion of strategic investment is concerned, the directions of Ld. CIT(A) stand reversed in the light of the decision of Hon'ble Supreme Court in the case of **Maxopp Investment Limited V/s CIT (91 Taxmann.com 154).** At the same time, no infirmity could be found in the direction of Ld. CIT(A) for verification of plea of own funds since a presumption would run in assessee's favor that the investments were out of own funds in case own funds exceed the investments made by the assessee. Additionally, Ld. AR has pleaded that there is no opening and closing investments and therefore, no disallowance could be computed u/r 8D(2). However, this plea could not be accepted in revenue's appeal. Finally, finding no infirmity in the order of Ld. CIT(A), we dismiss the ground raised by the revenue. The appeal stands partly allowed in terms of our above order.

Revenue's Appeal for AY 2014-15

6. The first issue in revenue's appeal is nature of royalty payment and management fees. It is admitted position that the facts as well as issues are quite identical to the issue in AY 2011-12. Facts being pari-materia the same, our findings as well as adjudication as for AY 2011-12, on this issue, shall mutatis-mutandis apply to this year also. The grounds thus raised stand dismissed.

7. Another ground of revenue's appeal is disallowance u/s 14A. In this year, the assessee has not earned any exempt income. However, Ld.

AO has computed disallowance of indirect expenditure u/r 8D(2)(iii) for Rs.0.19 Lacs, being 0.5% of average investments. The same was added while computing income under normal provisions as well as while computing Book Profits u/s 115JB.

The Ld. CIT(A), inter-alia, relying on the decision of Hon'ble High Court of Madras in **Redington India Ltd. V/s Addl. CIT (392 ITR 633)** directed Ld. AO to delete the disallowance if no exempt income was earned by the assessee during the year. It was also held that disallowance could not be added back to Book Profits u/s 115JB as per the decision of Special Bench of Delhi Tribunal in **ACIT V/s Vireet Investment (P) Ltd. (165 ITD 27).** Aggrieved, the revenue is in further appeal before us.

After careful consideration, we concur with the adjudication of Ld. CIT(A) since no disallowance could be computed in the absence of exempt income. Further, the disallowance could not be added back to Book Profits u/s 115JB as per the decision of Special Bench of Delhi Tribunal in **ACIT V/s Vireet Investment (P) Ltd. (supra).** Finding no infirmity in the impugned order, we dismiss the grounds urged by the revenue. The appeal stands dismissed.

Conclusion

8. The appeal for AY 2011-12 stands partly allowed whereas the appeal for AY 2014-15 stands dismissed.

Order pronounced on 21st February, 2022.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(MANOJ KUMAR AGGARWAL)**
उपध्यक्ष /VICE PRESIDENT	**लेखसदस्य / ACCOUNTANT MEMBER**

चेन्नई / Chennai; दिनांक / Dated : 21-02-2022

EDN/-

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded 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