IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.1808/Bang/2013 : Asst.Year 2008-2009

M/s.ABB India Limited (Formerly known as ABB Limited) 1st Floor, Khanija Bhavan East Wing, No.49, Race Course Road,Bangalore – 560 001. **PAN : AAACA3834B.**	v.	The Additional Commissioner of Income-tax, LTU Bangalore.
(Appellant)		(Respondent)

ITA No.1837/Bang/2013 : Asst.Year 2008-2009

The Additional Commissioner of Income-tax, LTU Bangalore.	v.	M/s.ABB India Limited 1st Floor, Khanija Bhavan East Wing, No.49, Race Course Road, Bangalore – 560 001.
(Appellant)		(Respondent)

Revenue by : Sri Dilip, Advocate and Standing Counsel
Assessee by : Sri.Percy Pardiwala, Sr.Advocate

Date of Hearing : 24.03.2022		**Date of Pronouncement : 28.03.2022**

O R D E R

Per George George K, JM :

These cross appeal are directed against CIT(A)'s order dated 30.09.2013. The relevant assessment year is 2008-2009. We shall adjudicate the assessee's appeal first.

ITA No.1808/Bang/2013 (Assessee's appeal)

2. Eight grounds are raised in the memorandum of appeal. Ground 1 is general in nature and no specific adjudication is called for, hence, the same is dismissed. Grounds 6, 7 and 8 are consequential, hence, the same are dismissed. The learned AR during the course of hearing did not press

grounds 3 and 5, hence, the same are dismissed. The surviving grounds, namely, grounds 2 and 4 reads as follows:-

> *"2. Provision for warranty expenses.*
> *2.1 On the facts and in the circumstances of the case, the ld.CIT(A) grossly erred in law and in fact in confirming the disallowance made by the Assessing Officer (AO) with respect to provision for warranty expenses of Rs.300,726,000 which was made on the basis of past experience and on a scientific basis.*
>
> *2.2 On the facts and circumstances of the case, the ld.CIT(A) erred in law and facts in not following the favourable judicial precedent of the Hon'ble jurisdictional Tribunal in appellant's own case for A.Y. 1996-97.*
>
> *4. Disallowance under section 14A of the Act, read with Rule 8D of the Income Tax Rules, 1962 (Rules).*
>
> *4.1 On the facts and in the circumstances of the case, the ld.CIT9A) erred in sustaining disallowance made by the AO of Rs.9,304,441 under section 14A of the Act by applying the provisions of Rule 8D of the Rules.*
>
> *4.2 On the facts and in the circumstances of the case, the ld.CIT(A) erred in not appreciating the fact that no part of the investment was made out of interest bearing loan funds.*
>
> *4.3 On the facts and in the circumstances of the case, the ld.CIT(A) erred in not appreciating the fact that the AO had not discharged the onus of establishing the dissatisfaction with correctness of the appellant's claim before invoking provisions or Rule 8D of the Rules."*

3. We shall adjudicate the above grounds as under.

Provision for warranty expenses (Ground 2)

4. At the very outset, the learned AR submitted that the above issue was decided in favour of the assessee by various orders of the ITAT in assessee's own case for assessment years 1996-1997 to 2007-2008. The learned AR placed on record the orders of the ITAT for assessment year 1996-1997

in ITA No.894/Bang/2007 (order dated 29.02.2008) and the order of the ITAT for assessment year 2007-2008 in ITA No.317/Bang/2012 (order dated 24.02.2022).

4.1 The learned Standing Counsel did not controvert the submissions of the learned AR.

4.2 We have heard rival submissions and perused the material on record. There is no dispute before us that the basis on which the provision for warranty has been made in the past assessment years as well as in the relevant assessment year is identical. It was submitted that the ITAT's order granting deduction for provision for warranty for assessment year 1996-1997 to 2007-2008 has attained finality. The Tribunal in the orders for assessment years 1996-1997 to 2007-2008 after considering the method of providing for warranty liability by way of provision, held that provision made was based on past history and was on scientific method of estimating the liabilities on account of warranty claim. The relevant finding of the ITAT in assessee's own case for assessment year 1996-1997, reads as follows:-

> *"2. We have heard both sides and perused the records. The issue relates to the claim of expenditure of Rs.3,78,000/- towards provision for warranty. The AO came to the conclusion that the provision for warranty is a contingent liability and denied the claim of the assessee. On first appeal, the learned CIT(A), relying on the decision of the Hon'ble Apex Court in the case of BEML (245 ITR 428)(concluded the issue in favour of the assessee. From the facts, it is seen that the assessee is under contractual obligation to provide warranty to their customers. The assessee has provided warranty on the supplies made. The liability to pay for warranty claim arises no sooner sales is effected. Therefore, the assessee had provided for liability on the basis of sales made during the*

year. Though exact amount cannot be quantified, however, the same is based on scientific approach and based on past experience.

3. At the time of hearing, the learned DR relied on the decision of the Madras High Court in the case of CIT v. Rotork Controls India Ltd. & Others (293 ITR 311). In the aforesaid decision, as there was no evidence of actual expenditure in prior years, the provision was concluded as not deductible. Facts are different in the present case. The learned CIT(A) has considered the details meticulously and then granted relief to the assessee. After going through the facts of the case, we do not find any infirmity in the order of the learned CIT(A) granting relief to the assessee as the provision was made on the sales effected during that year. It is ordered accordingly."

4.3 In view of the co-ordinate Bench order of the Tribunal in assessee's own case, which is identical to the facts of the instant case, we direct the A.O. to allow the provision for warranty as an allowable deduction. Therefore, ground 2 is allowed.

Disallowance u/s 14A of the I.T.Act (Ground 4)

5. The Assessing Officer had made disallowance u/s 14 of the I.T.Act r.w.r. 8D, as under:-

As per Rule 8D(2)(i)	Nil
As per Rule 8D(2)(ii)	Rs.11,30,281
As per Rule 8D(2)(iii)	Rs.81,74,160

Total disallowance	Rs.93,04,441
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5.1 In further appeal, the CIT(A) granted partial relief to the assessee in 154 proceedings.

5.2 Aggrieved, the assessee has raised this issue before the ITAT. The learned AR as regards disallowance u/s 14A r.w.r.

8D(2)(ii) is concerned, took us through the financial and submitted that the assessee is having own interest free funds and the same is sufficient to cover the investment. In this context, the learned AR relied on the judgment of the Hon'ble jurisdictional High Court in the case of CIT v. Micro Labs Limited reported in (2016) 383 ITR 490 (Kar.). As regards the disallowance u/s 14A r.w.r. 8D(2)(iii) is concerned, the learned AR submitted that the matter may be restored to the files of A.O. to re-determine the disallowance by excluding the value of investments which did not yield exempt income while computing average value of investment. In this context, the learned AR relied on the Special Bench order of the ITAT in the case of ACIT v. Vireet Investment Pvt. Ltd. reported in 165 ITD 27 (Delhi) (SB).

5.3 The learned Departmental Representative was duly heard.

5.4 We have heard rival submissions and perused the material on record. As regards disallowance u/s 14A r.w.s. 8D(2)(ii) is concerned, we have gone through the financial. We find that the assessee has total investment as on 31.03.2008 at Rs.70.45 crore. The assessee's interest free fund, namely, share capital and reserves and surplus is far exceeding the above investment. Therefore, going by the dictum laid down by the Hon'ble jurisdictional High Court in the case of CIT v. Micro Labs Limited (supra), no disallowance of interest u/s 14A r.w.r. 8D(2)(ii) is called for and we delete the same (Rs.11,30,281).

5.4.1 As regards disallowance u/s 14A r.w.r. 8D(2)(iii) is concerned, the A.O. had made disallowance amounting to Rs.81,74,160. At the time of hearing, the learned AR took us to the various types of expenses incurred by the assessee and submitted that most of the expenses are not related to the earning of exempt income. It was submitted that the issue may be restored to the files of the A.O. to re-determine the disallowance by excluding the value of investment which did not yield exempt income while computing average value of investments, as per order of Special Bench in the case of ACIT v. Vireet Investment Pvt. Ltd. (supra). The learned DR did not have objection to the above submission of the learned AR. Therefore, we set aside the order passed by the CIT(A), as regards the disallowance u/s 14A r.w.rule 8D(2)(iii) of the I.T.Rules and restore the matter to the files of the A.O. The A.O. is directed to follow the ratio of the decision rendered by the Special Bench in case of ACIT v. Vireet Investment Pvt. Ltd. (supra). It is ordered accordingly.

6. In the result, the appeal filed by the assessee is partly allowed.

ITA No.1837/Bang/2013 (Revenue's appeal)

7. Five grounds are raised in the memorandum of appeal, Ground 1 and 5 are general in nature and no adjudication is called for, hence, the same are dismissed. The effective grounds read as follows:-

> *"2. The ld.CIT(A) erred in directing the AO to deduct telecommunication expenses incurred in foreign currency from*

total turnover and from export turnover as this is against the provisions of section 10A.

3. The ld.CIT(A) ought not to have admitted additional evidence of commission payment disallowed u/s 40(a)(ia) as cash discount without providing opportunity to AO.

4. The ld.CIT(A) erred in allowing the claim of assessee of customs duty included in the closing stock u/s 43B."

8. As regards the issue raised in ground 2 is concerned, we notice that the same is no longer *res integra*. The Hon'ble Apex Court in the case of HCL Technologies Ltd. reported in 404 ITR 719 (SC) has held that when expenditure is reduced from export turnover, the same should be reduced also from the total turnover while computing deduction u/s 10A of the I.T.Act. In view of the judgment of the Hon'ble Apex Court in the case of HCL Technologies Ltd. (supra), we hold that the CIT(A) is justified in directing the A.O. to reduce expenditure reduced from export turnover also from total turnover, while computing deduction u/s 10A of the I.T.Act. It is ordered accordingly.

9. The brief facts of the issue raised in ground 3 are as follows:

The A.O. had disallowed a sum of R.4.30 crore (being cash discount and foreign commission) on the ground that TDS has not been effected on the payments. The relevant finding of A.O. reads as follows:-

"5.2 To verify whether the assessee has deducted tax at source on all the expenses claimed as per the provisions of Chapter XVII B of the I.T.Act and with reference to section 40(a)(i) and 40(a)(ia), the assessee was requested by letter dated 25.10.2011 to reconcile the P&L account amounts subject to TDSX. The assessee has replied by letter dated

8.11.2011. From assessee's reply, it is seen that amount of Rs.19,86,60,762/- is debited as "commission and discount" in the P&L a/c whereas an amount of Rs.15,56,67,169/- only has been subjected to TDS. The payment of Rs.4,29,93,593/-, the assessee has stated the reason as `cash discount and foreign commission'. The assessee has not given any details of the amount of cash discount.

5.3 The amount claimed by the assessee as foreign commission refer to the commission paid by the assessee to persons outside India. The amount is liable for tax deduction at source as per the provisions of Chapter XVII B of the I.T.Act. Since the assessee has failed to deduct the tax at source, the amount is disallowed u/s 40(a)(i) of the I.T.Act. It is further verified that the amount has not been disallowed by the assessee in the statement of total income submitted during the assessment proceedings.

In the result, the amount of Rs.4,29,93,593/- is disallowed u/s 40(a) added back to the total amount of the assessee (Addition Rs.4,29,93,593/-)."

9.1 The CIT(A), on further appeal, granted partial relief. The CIT(A) directed the A.O. to delete the disallowance made on cash disallowance by holding that cash discount by its very nature is not liable for TDS as amount is given as reduction in invoice for prompt payment.

9.2 The learned Standing Counsel's limited prayer is that the matter needs to be restored to the A.O., since the CIT(A) decided the issue in favour of the assessee by admitting additional evidence and without giving the A.O. an opportunity to examine the additional evidence.

9.3 The learned AR, on the other hand, submitted that no additional evidences were produced before the CIT(A). It was stated that the details of cash discount and foreign commission were already on record before the A.O. On the break-up of same was provided to CIT(A) on his request.

9.4 We have heard rival submissions and perused the material on record. The limited submission of the learned Standing Counsel is to remit the issue to A.O. According to the learned Standing Counsel, the CIT(A) has admitted additional evidence without giving the A.O. an opportunity to examine the same. We find that no additional evidence was produced by the assesee before the CIT(A). The details of the cash discount and foreign commission were already on record before the A.O. The cash discount and foreign commission in total was Rs.4.30 crore and break-up of the same was provided (the break-up of cash discount of Rs.3,24,37,251 and foreign commission of Rs.1,05,56,342). Providing the break-up of figure which already on record, does not amount to production of additional evidence. Moreover, no useful purpose would be served at this point of time to remand the matter (since we are concerned with A.Y. 2008-2009) to A.O., to examine the break-up of figure which is already available before him at the time of assessment. It is ordered accordingly.

10. As regards the issue raised in ground 4 is concerned, we find that the CIT(A) had decided the issue in favour of the assessee by the following ITAT order in assessee's own case reported in ACIT v. ABB Limited (2007) 14 SOT 18 (Mumbai). The relevant finding of the CIT(A) reads as follows:-

> "8.*2 The appellant relied upon the decision of the Hon'ble Gujarat High Court the case of Lakhanpal National Ltd., Vs. ITO (1986) 27 Taxman 462, which was followed in CIT Vs. Bharat Petroleum Corporation Ltd (2001) 116 Taxman 775 (Bom) and Chemical and Plastics India Ltd. Vs. CIT (2003) 260*

ITR 193. The Hon'ble Supreme Court in the case of Berger Paints India Ltd Vs. CIT (2004) 135 Taxman 586 has approved of the Hon'ble Gujarat High Court decision and has affirmed the principle laid down in it. The ITAT, Bangalore has followed the Hon'ble Supreme Court's decision in the case of Berger Paints while deciding the appellant's own appeal in ITA No.6612/Mum/2002 and ACIT Vs. ABB Ltd (2007) 14 SOT 18 (Mum).

8.3 I have considered the appellant's submissions as above and the judicial decisions relied upon and I am firmly convinced that the present appeal is covered by the said decisions. Accordingly, the AO is directed to allow the deduction u/s 43B with respect to payments made towards entire custom duty paid in respect of goods lying in closing stock. This ground, therefore, succeeds."

10.1 The learned Standing Counsel has not able to controvert the above finding of the CIT(A). Hence ground 4 is rejected.

11. In the result, the appeal filed the assessee is partly allowed and the appeal filed the Revenue is dismissed.

Order pronounced on this 28th day of March, 2022.

Sd/-	**Sd/-**
(Padmavathy S)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 28th March, 2022.
Devadas G*
Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A) LTU, Bangalore.
4. The CIT, LTU, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore