

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

ITA Nos.248, 249 & 250/M/2021

Assessment Years: 2008-09, 2009-10 & 2010-11

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ITA No.251/M/2021

Assessment Year: 2010-11

M/s. Ultra Tech Cement Ltd., Ahura Centre, B-Wing, 2 nd Floor, Mahakali Caves Road, Andheri (E), Mumbai – 400 093 PAN: AAACL6442L	Vs.	Dy. Commissioner of Income Tax, Central Circle – 1(4), Room No.902, 9 th Floor, Pratishtha Bhavan, Old CGO Building Annexe, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Manish Kant, A.R.
Revenue by : Shri Prabhat Kumar Gupta, D.R.

Date of Hearing : 15 . 07 . 2022

Date of Pronouncement : 25 . 07 . 2022

ORDER

Per Amarjit Singh, Accountant Member:

These 4 appeals are filed by the assessee against the different orders of the Commissioner of Income Tax (Appeals)-47, Mumbai. Since identical issue on similar facts are involved in these four appeals, therefore for the sake of convenience all these appeals are adjudicated together by taking the ITA No.248/M/2021 for A.Y. 2008-09 as lead case and its findings will be applicable mutatis mutandis to all the other appeals of the assessee.

2. Facts in brief are that AO has passed order giving effect to the order of Ld. CIT(A) and ITAT on 12.04.2018. Against the above referred order giving effect, the assessee filed appeal before the Ld. CIT(A) stating that in the

impugned order the AO has not given effect to the few directions of the ITAT order dated 05.04.2017. In the aforesaid background the relevant fact of the case is as under:

2.1 The assessee company has filed its original return of income under section 139 of the Act for the assessment year 2008-09 on 29.09.2008 declaring total income at Rs.12,90,65,10,414/-. The return of income was revised on 29.03.2010 declaring total income at Rs.12,87,88,13,421/-. The AO completed the assessment under section 143(3) of the Act on 28.02.2011 assessing the total income at Rs.14,90,42,67,863/-. The aggrieved assessee filed appeal before the Ld. CIT(A) and the Ld. CIT(A) partly allowed the appeal of the assessee vide order dated 21.12.2011. The assessee and the Revenue both have filed appeal against the order of the Ld. CIT(A) before the ITAT, Mumbai. Thereafter, order under section 153C read with section 143(3) of the Act was passed on 29.03.2016. The ITAT has decided the pending appeal vide order dated 05.04.2017 and allowed the further claim of the assessee. The assessee company has also contested the order of the Ld. CIT(A) pertaining to assessment made under section 153C read with section 143(3) of the Act. The ITAT has allowed the appeal of the assessee holding that no incriminating material pertaining to the assessee was found under the year under consideration. Thereafter, the AO has passed an order giving effect on 12.04.2018 to the order of Ld. CIT(A) and the ITAT order. However, the assessee has filed appeal before the Ld. CIT(A) stating that in the appeal giving effect order AO has not given effect to the finding of the ITAT orders. Further facts relevant to the grounds of appeal are discussed while adjudicating the ground of appeal of the assessee as follows:

Ground No.1

“Not granting relief in respect of the amount disallowed under section 14A to the amount of Rs.1,48,26,898/-.”

3. The AO completed the assessment under section 143(3) of the Act on 28.02.2011. In the said order the AO has made the following disallowances:

- (1) Disallowance of interest expenses of Rs.3,33,33,824/- under section 14A read with rule 8D(2)(ii).
- (2) Disallowed Rs.1,20,21,635/- as other expenses under section 14A read with rule 8D(2)(iii)
- (3) Disallowed Rs.77,27,928/- towards ESOP expenses

4. The assessee filed appeal before the Ld. CIT(A) and the Ld. CIT(A) has upheld the order passed by the AO under section 143(3) of the Act. Against the decision of Ld. CIT(A) the assessee has taken up the matter in appeal before the ITAT, Mumbai. The ITAT, Mumbai has decided the appeal of the assessee vide order dated 28.02.2014.

4.1 Regarding disallowance of interest expenses of Rs.3,33,33,824/- under section 14A read with rule 8D(2)(ii) after following the decision of jurisdictional High Court in the case of CIT vs. Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom.) the ITAT directed the AO for limited verification of cash flow statement with direction that no disallowance is warranted in case the investment in the instrument generating tax free incomes are made out of own funds.

4.2 Regarding disallowance of Rs.1,20,21,635/- section 14A read with rule 8D(2)(iii) the ITAT has restricted the disallowance to the extent of Rs.5,21,731/- suo moto disallowed by the assessee itself. In respect of disallowance of Rs.77,27,928/- the ITAT has directed the AO that the Employee Stock Option Plan (ESOP) be allowed if the facts in the assessee's case are similar to the fact in the case decided by the Bangalore Special Bench in Biocon Ltd. vs. DCIT vide ITA No.368/Bang./2010.

5. The AO has passed order under section 153C read with section 143(3) of the Act on 29.03.2016 and made disallowance under section 14A read with rule 8D(2)(ii) to the amount of Rs.33,26,994/- and Rs.1,20,21,635/- under section 14A read with rule 8D(2)(iii).

6. On appeal against the addition made under section 153C read with section 143(3) of the Act the Ld. CIT(A) vide order dated 20.12.2017 and the ITAT vide order dated 08.02.2021 have quashed the assessment for assessment year 2008-09 to 2010-11 and decided the issue in favour of the assessee holding that in the absence of any incriminating material no addition or disallowance can be made in the assessment proceedings under section 153C of the Act in case of non abated assessment.

7. While giving effect to the order of the ITAT dated 28.02.2014 the AO has not given effect to the findings of the ITAT pertaining to disallowance made under section 14A of the Act. The relevant operating part of the ITAT order is reproduced as under:

“31. This issue has been discussed at length by us in ITA No. 8143/M/10 and 7502/M/10 for A.Y. 2007-08 wherein we have directed the AO to verify from the cash flow statements whether the investments in the units have been made out of own funds or borrowed capital and then decide whether the proportionate interest has to be disallowed. In so far as other disallowance of expenditure is concerned, no doubt Rule 8D is very much applicable for the year under consideration. But at the same time it is incumbent upon the AO to first show fallacies in the computation of disallowances made by the assessee with regard to the books of accounts. We therefore, restore this issue back to the files of the AO with the direction that so far as disallowance of interest is concerned, follow the findings of A.Y. 2007-08 and in respect of the disallowance of other expenditure is concerned, we find that the assessee has computed the disallowance as under:

a) Full salary of an executive who was partly
looking after the activity of investment in Mutual Fund - Rs.1,51,041/-

b) 50% salary of an executive who was only partly
looking after the activity of investment in Mutual Fund -Rs. 2,24,880/-

c) Payment made to consultant for outsourcing of a

person for the working relating to investment activity -Rs.1,45,810/-

The Total disallowances computed by the assessee comes to -Rs.5,21,731/-
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In addition to this, we find that as an abundant caution the assessee has also disallowed interest on whole of cash credit amounting to Rs. 44,93,553/-. Thus the total disallowance made by the assessee comes to Rs. 50,15,284/-.

32. In our considerate view, the disallowances made by the assessee in respect of other expenditure (other than interest) is reasonable and therefore no further disallowance is called for. The AO is directed to only verify the disallowability of proportionate interest after close verification of the cash flow chart. Ground No. 1 is partly allowed for statistical purpose."

8. Heard both the sides and perused the material on record. With the assistance of the Ld. Representatives of the parties who have perused the order giving effect to the order of Ld. CIT(A) and ITAT dated 12.04.2018 passed by the AO. It is noticed that the AO has not passed separate order for giving effect to the different orders passed by the Ld. CIT(A) and ITAT. The relevant part of this order is reproduced as under:

APPEAL EFFECTIVE - 07 / 12 / 2019
20/8-19

Name & Address of Assessee	M/s UltraTech Cement Limited B-Wing, 2nd Floor, Ahura Center Marg, Mahakali Caves Road, Andheri (E), Mumbai-400093
PAN	AAACL6442L
Status	Company
A.Y.	2008-09
Section Under which order passed was Challenged with Date of order	u/s 153C r.w.s. 143(3) of the Act, dated 29-03-2016
Appeal No. of Order with date	CIT(A)-47/163501451260416 dated 20-12-2017 & ITAT order No.- ITA No.1348/M/2012 & 1831/M/2012 dated 28-02-2014
Date of order	12-04-2018

Order giving effect to order of CIT(A) & ITAT

Pursuant to the Order dated 20-12-2017 of the Commissioner of Income-tax (Appeals) - 47 vide order No.CIT(A)-47/163501451260416 against the order u/s.153A r.w.s.143(3) dated 29-03-2016, and ITAT order No.- ITA No.1348/M/2012 & 1831/M/2012 dated 28-02-2014, the total income of the assessee company for the year is revised as under -

Total income assessed u/s. 153A r.w.s. 143(3) of the I.T Act, 1961, dated 29-03-2016				Rs. 1498,29,58,606/-
Less	Relief allowed by the CIT(A) 1. Spill over Depreciation	Gr. 8	Rs. 10,86,97,573/-	Rs. 10,86,97,573/-
				Rs. 1487,42,61,033/-
Less	Relief allowed by ITAT vide order No.-1348/Mum/2012 and 1813/Mum/2012, dated 28-02-2014 against order of the CIT(A), against the order u/s 143(3) dated 28-02-2014, to be given as per CIT(A)'s direction in respective grounds.			
A. ITA No.-1831/M/2012 dated 28-02-2014				
	1. Sales Tax Exemption being Capital Receipt	2	Rs. 136,18,13,794/-	
	2. 80IA - Rail System	1	Rs. 61,55,72,545/-	Rs. 197,73,86,339/-
B. ITA No.-1348/Mum/2012 dated 28-02-2014				
	3. Carbon Emission Reduction being Capital Receipt	Addl. Gr.-1	Rs. 7,64,56,908/-	Rs. 7,64,56,908/-
Revised Total Income				Rs. 1282,04,17,786/-
Tax	1. Tax on Total Income @ 30%		Rs.1281,98,59,811/-	Rs. 384,59,57,943/-
	2. Tax at Special Rate of Tax @ 20%		Rs. 5,57,975/-	Rs. 1,11,595/-
	Tax on Revised Total income			Rs. 384,60,69,538/-
	Surcharge @10%			Rs. 38,46,06,954/-
	Tax & Surcharge			Rs. 423,06,76,492/-
	Cess @ 3%			Rs. 12,69,20,295/-
	Total Tax			Rs. 435,75,96,787/-

Book Profit u/s 115JB			
	Adjusted Book profit u/s. 115 JB(As per order dated 29-03-16)		Rs. 1508,03,13,738/-

Revised accordingly. Credit for prepaid taxes is given after due verification.
Demand Notice / Challan issued accordingly.



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(KIRAN UNAVEKAR)

Jt. Commissioner of Income Tax(OSD),
Central Circle-1 (4), Mumbai

9. On perusal of the order passed by the AO it is clear that he has not specifically elaborated the findings of the ultimate order passed by the ITAT on the issue of disallowance under section 14A read with rule 8D in accordance with its direction as reproduced above. It is further noticed that

while adjudicating the appeal of the assessee of non giving effect to the order of the ITAT the Ld. CIT(A) has incorrectly referred the order of the ITAT dated 05.04.2017 pertaining to assessment year 2010-11 saying that ITAT has not made any observation/directions in respect of administrative expenditure of Rs.4,92,15,825/- under section 14A read with rule 8D(2)(iii) and sustained the disallowance made by the AO. We find that Ld. CIT(A) has completely passed erroneous order by not directing the AO to give appeal effect on the issue of disallowance made under rule 8D(2)(iii) in accordance with the ITAT order vide ITA No.1348/M/2012 for A.Y. 2008-09 dated 28.02.2014 wherein the ITAT has specifically restricted the disallowance under section 14A read with rule 8D(2)(iii) in respect of other expenses (other than interest) to the extent of computation made by the assessee. Therefore, we direct the AO to give the appeal effect in accordance with the direction of the ITAT as per ITA No.1348/M/2012 for A.Y. 2008-09 dated 28.02.2014. Therefore, this ground of appeal of the assessee is allowed for statistical purposes.

Ground No.2

“Not granting relief for amount disallowed towards Employee Stock Option Plan amounting to Rs.77,27,928/-.”

10. Without reiterating the fact as elaborated above the ITAT by its order vide ITA No.1348/M/2012 for A.Y. 2008-09 dated 28.02.2014 directed the AO to consider the claim of the assessee in the light of the decisions of the Special Bench of the ITAT in the case of Biocon Ltd. vs. DCIT vide ITA No.368/Bang./2010. The relevant operating part of the order is reproduced as under:

“36. Aggrieved by this, the assessee is before us. The Ld. Counsel for the assessee strongly relied upon the decision of the Special Bench of Bangalore in the case of Biocon Ltd. VS DCIT in ITA No. 368/Bang/2010. The ld. Counsel also relied upon the decision of Chennai Bench in ITA No. 1384/Mds/2004 in the case of DCIT Vs PVP Ventures Ltd. It is the say of the Ld. Counsel that the Special Bench has allowed the expenditure in respect of ESOP wherein the Special Bench has considered at length the SEBI guidelines. In our considerate view, the allowability

of the claim of the assessee has to be considered afresh in the light of the findings of the Special Bench (supra). We therefore, restore this issue back to the files of the AO. The AO is directed to consider the claim of the assessee in the light of the decision of the Special Bench of ITAT in the case of Biocon Ltd (supra) after making necessary verification and after giving a reasonable opportunity of being heard to the assessee. Ground No. 2 is allowed for statistical purpose.”

11. However, we find that Ld. CIT(A) has incorrectly mentioned that no such direction was given by the ITAT without considering the specific direction of the ITAT given in the case of the assessee relevant to assessment year under consideration as reproduced above. Therefore, the AO is directed to pass a speaking order giving appeal effect as per the direction of the ITAT as supra after necessary verification. Accordingly, this ground of appeal of the assessee is allowed for statistical purposes. Accordingly, appeal filed by the assessee is allowed for statistical purposes.

ITA No.249/M/2021

Revised Ground No.1

“Non granting relief in respect of the amount disallowed under section 14A amounting to Rs.2,23,67,194/-”

12. Without reiterating the facts we have perused the order giving effect passed by the AO on 12.04.2018. The relevant part of this order is reproduced as under:

APPEAL EFFECT- 08 / PG NO. 707
2018-19

Name & Address of Assessee	M/s UltraTech Cement Limited B-Wing, 2nd Floor, Ahura Center Marg, Mahakali Caves Road, Andheri (E), Mumbai-400093
PAN	AAACL6442L
Status	Company
A.Y.	2009-10
Section Under which order passed was Challenged with Date of order	u/s 153C r.w.s. 143(3) of the Act, dated 29-03-2016
Appeal No. of Order with date	CIT(A)-47/163649921260416 dated 20-12-2017 & ITAT order No.- ITA No. 5065/M/2014 & 5107/M/2014 dated 05-04-2017
Date of order	12-04-2018

Order giving effect to order of CIT(A) & ITAT

Pursuant to the Order dated 20-12-2017 of the Commissioner of Income-tax (Appeals) - 47 vide order No.CIT(A)-47/163649921260416 against the order u/s.153A r.w.s.143(3) dated 29-03-2016, CIT(A) order No.-IT-205/12-13/82/14-15 dated 30-05-2014 and ITAT order No.- ITA No. 5065/M/ 2014 & 5107/M/2014 dated 05-04-2017, the total income of the assessee company for the year is revised as under -

Total income assessed u/s. 153A r.w.s. 143(3) of the I.T Act, 1961, dated 29-03-2016			Rs. 442,84,51,971/-
Less	Relief allowed by the CIT(A) 1. Spill over Depreciation	Gr. 7 Rs. 6,01,74,058/-	Rs. 6,01,74,058/-
			Rs. 436,82,77,913/-
Less	Relief allowed by ITAT vide order No.- 5065/M/ 2014 & 5107/M/2014 dated 05-04-2017 against order of the CIT(A), against the order u/s 143(3) dated 31-12-2012, to be given as per CIT(A)'s direction in respective grounds.		
	1. Sales Tax Exemption being Capital Receipt	Rs. 128,15,74,995/-	
	2. 80IA - Rail System	Rs. 73,13,13,466/-	
			Rs. 201,28,88,461/-
Revised Total Income			Rs. 235,53,89,452/-
Tax	1. Tax on Total Income @ 30%	Rs. 234,67,56,501/-	Rs. 70,40,26,950/-
	2. Tax at Special Rate of Tax @ 20%	Rs. 86,32,951/-	Rs. 17,26,590/-
	Tax on Revised Total income		Rs. 70,57,53,540/-
	Surcharge @10%		Rs. 7,05,75,354/-
	Tax & Surcharge		Rs. 77,63,28,894/-
	Cess @ 3%		Rs. 232,89,867/-
	Total Tax		Rs. 79,96,18,761/-

Book Profit u/s 115JB		
	Adjusted Book profit u/s. 115JB(As per order dated 29-03-16)	Rs. 1324,69,42,177/-

Revised accordingly. Credit for prepaid taxes is given after due verification.
Demand Notice / Challan issued accordingly.



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(KIRAN UNAVEKAR)

Jt. Commissioner of Income Tax(OSD),
Central Circle-1 (4), Mumbai

13. Since the facts and issue involved in this ground are identical to the issue decided above in ITA No.248/M/2021 for A.Y. 2008-09 except different orders of CIT(A) and ITAT, therefore the findings of ground No.1 in ITA No.248/M/2021 for A.Y. 2008-09, mutatis mutandis, would apply to this ground as well and accordingly AO is directed to pass a speaking order giving appeal effect as per the direction of the ITAT after necessary verification. Accordingly, this ground of appeal of the assessee is also allowed for statistical purposes.

Revised Ground No.2

“Additional ground of appeal not granting relief towards Employee Stock Option Plan amounting to Rs.90,50,195/-”

14. Since the facts and issue involved in this ground are identical to the ground No.2 of the ITA No.248/M/2021 for A.Y. 2008-09 except different orders of CIT(A) and ITAT, therefore the findings would apply to this ground as well and accordingly AO is directed to pass a speaking order giving appeal effect as per the direction of the ITAT after necessary verification. Accordingly, this ground of appeal of the assessee is also allowed for statistical purposes.

Revised Ground No.3

15. We restore this issue of claim of the assessee regarding grant of short credit for TDS/TCS to the file of the AO to decide the same after verification of the supporting document and material to be furnished by the assessee. Therefore, this ground of the appeal of the assessee is allowed for statistical purposes.

16. In the result, the appeal of the assessee is allowed for statistical purposes.

ITA No.250/M/2021**Ground No.1:**

“For not granting relief in respect of amount disallowed under section 14A amounting to Rs.4,56,87,584/-”

17. Since the facts and issue involved in this appeal are identical to the issue decided above in ITA No.248/M/2021 for A.Y. 2008-09 except different orders of CIT(A) and ITAT, therefore the findings of ground No.2 in ITA No.248/M/2021 for A.Y. 2008-09, mutatis mutandis, would apply to this ground as well and accordingly AO is directed to pass a speaking order giving appeal effect as per the direction of the ITAT order after necessary verification. Accordingly, this ground of appeal of the assessee is also allowed for statistical purposes.

Ground No.2

“Not granting relief for amount disallowed towards Employee Stock Option Plan amounting to Rs.34,49,626/-”

18. Since the facts and issue involved in this appeal are identical to the issue decided above in ITA No.248/M/2021 for A.Y. 2008-09 except different orders of CIT(A) and ITAT, therefore the findings of ground No.1 in ITA No.248/M/2021 for A.Y. 2008-09, mutatis mutandis, would apply to this ground as well and accordingly AO is directed to pass a speaking order giving appeal effect as per the direction of the ITAT order after necessary verification. Accordingly, this ground of appeal of the assessee is also allowed for statistical purposes.

ITA No.251/M/2021**Ground No.1:**

“For not granting relief in respect of amount disallowed under section 14A”

19. Since the facts and issue involved in this appeal are identical to the issue decided above in ITA No.248/M/2021 for A.Y. 2008-09 except different orders of CIT(A) and ITAT, therefore the findings of ground No.2 in ITA No.248/M/2021 for A.Y. 2008-09, mutatis mutandis, would apply to this ground as well and accordingly AO is directed to pass a speaking order giving appeal effect as per the direction of the ITAT after necessary verification. Accordingly, this ground of appeal of the assessee is also allowed for statistical purposes.

20. In the result, all the appeals filed by the assessee are allowed for statistical purposes.

Order pronounced in the open court on 25.07.2022.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Mumbai, Dated: 25.07.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.