आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'B' BENCH, CHENNAI
श्री वी दुर्गा राव न्यायिक सदस्य एवं श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष
Before Shri V. Durga Rao, Judicial Member &
Shri G. Manjunatha, Accountant Member

आयकर अपील सं./**I.T.A. Nos. 2334, 2335 & 2336/Chny/2017**
निर्धारण वर्ष/**Assessment Years:2008-09, 2009-10 & 2010-11**

M/s. Empee Distilleries Ltd., Empee Tower, No. 59, Harris Road, Pudupet, Chennai 600 002. **[PAN:AAACE1687N]**	Vs.	The Assistant Commissioner of Income Tax, Company Range II, Chennai presently Corporate Circle 2(1), Chennai 600 034.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri S. Sridhar, Advocate
प्रत्यर्थी की ओर से/Respondent by	:	Shri Raveendra Benakatti, JCIT
सुनवाई की तारीख/ Date of hearing	:	05.07.2022
घोषणा की तारीख /Date of Pronouncement	:	30.08.2022

आदेश /O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER:

These three appeals filed by the assessee are directed against the common order of the ld. Commissioner of Income Tax (Appeals) 9, dated 28.07.2017, relevant to the assessment years 2008-09, 2009-10 and 2010-11. Since the facts are identical and common issues have been raised, all the appeals were heard together and are being disposed of by this common order for the sake of brevity. The assessee has raised the following common grounds:

1. The common order of The Commissioner of Income Tax (Appeals) 9, Chennai dated 28.07.2017 in I.T.A.No.20/2010-11/CIT(A)-9 for the above

mentioned Assessment Year is contrary to law, facts, and in the circumstances of the case to the extent challenged herein.

2. The CIT (Appeals) erred in confirming the disallowance of Rs.1,15,84,285/- being sales promotion expenses incurred and claimed in the computation of taxable total income without assigning proper reasons and justification.

3. The CIT (Appeals) failed to appreciate that the details furnished in support of the claim were not considered in proper perspective and non consideration of relevant facts would vitiate his action in making the disallowance in the computation of taxable total income.

4. The CIT (Appeals) failed to appreciate that the provisions in explanation to Section 37(1) of the Act had no application to the facts of the case inasmuch as the evidence placed on record would clearly disprove such finding recorded in the impugned order.

5. The CIT (Appeals) failed to appreciate that the provisions of Section 40A(3) of the Act as well as the provisions in section 40(a)(ia) of the Act had no application to the facts of the present case in so far as the said addition/disallowance made in the computation of taxable total income.

6. The CIT (Appeals) failed to appreciate the proviso below sub section (3A) to section 40A of the Act in proper perspective and further ought to have appreciated that the exceptions carved out for the non application of the said provision is not restricted to the circumstances envisaged in Rule 6DD of the Income Tax Rules, 1962, thereby vitiating his findings in this regard.

7. The CIT (Appeals) erred in partially disallowing the notional expenditure on the application of Section 14A of the Act r/w Rule 8D of Income Tax Rules, 1962 without assigning proper reasons and justification and further ought to have appreciated that the said Rule 8D of the Income Tax Rules 1962 was brought into this statute only at the fag end of the assessment year under consideration, thereby vitiating his decision in that regard.

8. The CIT (Appeals) failed to appreciate that having failed to record satisfaction with regard to claim of expenditure to earn the tax free income, the application of Rule 8D to the facts of the case was erroneous and unjustified.

9. The CIT (Appeals) failed to appreciate that there was no proper opportunity given before passing of the impugned order and any order passed in violation of the principles natural justice would be nullity in law.

10. The Appellant craves leave to file additional grounds/arguments at the time of hearing.

2. Brief facts leading to first ground raised in the appeal of the assessee relates to confirmation of disallowance of sales promotion expenses incurred. In the assessment order, the Assessing Officer has disallowed a sum of ₹.1,15,84,285/-, ₹.4,73,74,018/- and ₹.3,40,30,732/- for the assessment years 2008-09, 2009-10 and 2010-11 respectively against the total sales promotion expenses debited of ₹.2,48,73,275/-, ₹.4,73,74,018/- and ₹.4,53,74,309/- for the respective assessment years. The Assessing Officer has disallowed the same on the ground that the assessee is selling the liquor products to Tamilnadu State Marketing Corporation (TASMAC), a public sector undertaking of the Government of Tamil Nadu and the products are delivered at the Depots of TASMAC. The transportation from depots to sales counter is undertaken by TASMAC and all the expenses on marketing sales are incurred by TASMAC. The Assessing Officer has mentioned that the employees of TASMAC are employees of the Government. Therefore, the Assessing Officer concluded that there is no question of incurring any such expenses for promotion of the sale. The Assessing Officer also extracted the order of the ld. CIT(A) who has confirmed a similar disallowance by invoking the provisions of explanation to section 37 of the Act. In that

order, the CIT(A) has mentioned that TASMAC is a State Government undertaking engaged in the exclusive sale of liquor in Tamil Nadu. These amounts were paid directly to the employees of TASMAC and therefore the claim of the assessee that these were paid to middlemen or brokers cannot be accepted. Nothing prevented the assessee to furnish the name and designation of the persons to whom the sums were paid. The assessee could have produced the parties before the AO to prove the genuineness of payments and could also have proved that those persons have offered such income in their hands. Therefore, the CIT(A) upheld the additions made by invoking the explanation to Section 37 of the Act.

2.1 In the assessment order, the Assessing Officer also mentioned that the payments include various expenses incurred by cash and therefore provisions of section 40A(3) of the Act are applicable. The Assessing Officer also stated in the assessment order that the provisions of section 40(a)(ia) of the Act are also applicable since there are instances where no TDS was made. During the course of assessment proceedings, the assessee was able to produce evidence only in respect of part of the expenses for travelling undertaken by employees in connection with sales promotion for the assessment year 2010-11. The Assessing Officer has also accepted certain expenses for the assessment year 2008-09

whereas the Assessing Officer disallowed the entire expenses claimed in the assessment year 2009-10. By taking into account all the above aspects, the Assessing Officer disallowed expenses amounting to ₹.1,15,84,285/-, ₹.4,73,74,018/- and ₹.3,40,30,732/- for the assessment years 2008-09, 2009-10 and 2010-11 respectively. On appeal, by considering the submissions of the assessee and vide his common order, the ld. CIT(A) confirmed the assessment orders.

3. On being aggrieved, the assessee is in appeal before the Tribunal. By referring to the grounds of appeal, the ld. Counsel for the assessee has submitted that the details furnished in support of the claim and the relevant facts were not considered in proper perspective and prayed that the sales promotion expenses incurred and claimed in the computation of taxable total income may be allowed for claiming deduction.

4. On the other hand, the ld. DR strongly supported the orders of authorities below.

5. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. In this case, the assessee has claimed sales promotion expenses. However, the Assessing Officer disallowed the same on the ground that the assessee is

selling the liquor products to Tamilnadu State Marketing Corporation (TASMAC), a public sector undertaking of the Government of Tamil Nadu and the products are delivered at the Depots of TASMAC. The transportation from depots to sales counter is undertaken by TASMAC and all the expenses on marketing sales are incurred by TASMAC. The Assessing Officer has mentioned that the employees of TASMAC are employees of the Government. Therefore, the Assessing Officer concluded that there is no question of incurring any such expenses for promotion of the sale. Further, the Assessing Officer has also observed that the payments include various expenses incurred by cash and therefore provisions of section 40A(3) of the Act are applicable. Moreover, the provisions of section 40(a)(ia) of the Act are also applicable since there are instances where no TDS was made. On appeal, by considering the submissions of the assessee, the ld. CIT(A) has observed as under:

> *"7.3.1 I have considered the AO's observation in para 7.1 and the appellant's submission in para. 7.2. The appellant is selling its liquor products to TASMAC, a public sector undertaking of the Government of Tamil Nadu and also to Kerala State Beverages Corporation (KSBC). The products are sold at the fixed rates as agreed between the appellant and the Government of Tamil Nadu and KSBC. The appellant is not required to incur any expense for the purpose of sales promotion. Marketing and sales expenses are incurred by TASMAC and KSBC. If appellant has incurred any such expenses, the onus for explaining the genuineness of such expense squarely vests with the appellant. In this case, the appellant has not even furnished the names and address of the parties to whom such payments have been made. This precluded the AO from verifying the veracity of the claim of the appellant. In similar situations where payment of commission is involved, the Supreme Court in the case of M/s. Lachminarayan Madan Lal, 86 ITR 439 has held that Although there might be such an agreement in existence and the payments might have been made, it was still open to the Income-tax Officer to consider the relevant factors and determine for himself whether the commission said to have been made to the selling agents or any part*

thereof was properly deductible u/s 37. The onus is upon the appellant to establish that the sales promotion expenses have been incurred, whereas the appellant did not even furnish the details of the parties to whom such payments have been made.

7.3.2. It was also submitted that payments made to the contract employees of retail/distributing arm of State Government i.e. TASMAC or Kerala State Beverages Corporation (KSBC) have been wrongly disallowed as payments prohibited by law. It is the submission of the appellant that these contract employees cannot be equated with Government servants. The submission of the appellant is not acceptable. In my view, these payments will fall under explanation to section 37(1) of the Act because the employees of TASMAC or KSBC are indirectly employees of the Government because TASMAC and KSBC are Government undertakings. Any payment made to these person otherwise than a legal remuneration is an offense under the Prevention of Corruption Act. The AO disallowed 2/3rd of expenses for the assessment year 2010-11. He also accepted certain expenses for the Assessment Year 2008-09. But no allowance was given in the Assessment Year 2009-10 after examination of the details submitted by the appellant. For the Assessment Year 2009-10, the AO disallowed the entire payments as per the provisions of explanation to Section 37(1) of the Act.

7.3.3 During the course of appeal proceedings, the AR of the appellant also furnished a copy of the ITAT Chennai decision in the case of M/s. Empee Breweries Ltd., ITA No. 2677/Mds/2016 and ITA No. 2590/Mds/2016 dated 28.04.2017 wherein the Hon'ble ITAT restricted the disallowance of marketing and promotion expenses to 7.5%. The said decision is not applicable to the facts of the appellant's case: In the case of M/s. Empee Breweries Ltd., the issue is allowing marketing and promotion expenses which are on account of purchase of gift articles said to have been given to customers at the retail shops of TASMAC, whereas the appellant's case is that such expenses have been incurred for the employee of TASMAC and also to KSBC. No details of persons to whom such payments were made are provided.

7.4 In the written submissions, the AR of the appellant also submitted that expenses are incurred for various purposes as mentioned vide items listed in "a to j" in para 7.2. In this regard, it is clarified that the items mentioned in "a to j" are claimed under the head selling expenses, out of which only those expenses falling under item "(i) i.e. sales scheme expenses have been identified for disallowance. The other selling expenses have been accepted. To this extent, the submission of the AR of the appellant is misleading. It is also to be further mentioned that most of these expenses are incurred by cash and even provisions of Section 40A(3) are attracted. The AR mentioned in the written submissions that the proviso under Section 40A(3A) is applicable. The submission is not acceptable because, the first proviso to. section 40A(3A) allows payments in cash in excess of the limits provided therein only if it falls under Rule 6DD of IT Rules. The AR of the appellant did not even cite the relevant clause falling under Rule 6DD. No case is made out to show that it falls under Rule 6DD. In these circumstances, the disallowance of Rs.1,15,84,285/-, Rs.4,73,74,018/- and Rs.3,40,30,732/- made for the Assessment Years 2008-09, 2009-10 and 2010-11 respectively are hereby confirmed.

5.1 Against the total sales promotion expenses claimed by the assessee of ₹.2,48,73,275/-, ₹.4,73,74,018/- and ₹.4,53,74,309/-, after examining the details furnished by the assessee, the Assessing Officer has disallowed a sum of ₹.1,15,84,285/-, ₹.4,73,74,018/- and ₹.3,40,30,732/- for the assessment years 2008-09, 2009-10 and 2010-11 respectively. Over and above, the ld. CIT(A) has observed that the payments made to the contract employees of retail/distributing arm of State Government i.e. TASMAC or Kerala State Beverages Corporation (KSBC) fall under explanation to section 37(1) of the Act for the reason that the employees of TASMAC or KSBC are indirectly employees of the Government as TASMAC and KSBC are Government undertakings and any payment made to these person otherwise than a legal remuneration is an offense under the Prevention of Corruption Act. Further, it was observed that most of the expenses are incurred by cash and the provisions of section 40A(3) of the Act are attracted and moreover, the assessee has also not made out his case to show that it falls under Rule 6DD of Income Tax Rules, 1962. Under the above facts and circumstances and since the assessee has not been able to substantiate with any form of evidence towards sales promotion expenses, we find no reason to interfere with the order passed by the ld. CIT(A) on this issue

and accordingly, the ground raised by the assessee is dismissed for the assessment years under consideration.

6. The next ground raised in the appeals of the assessee relates to confirmation of disallowance under section 14A of the Act r.w. Rule 8D. In the assessment orders, the Assessing Officer noted that the assessee had earned dividend income of ₹.80,47,766/-, ₹.1,85,36,653/- and ₹.4,793/- for the assessment years 2008-09, 2009-10 and 2010-11 respectively and claimed the same as exempt. The Assessing Officer also observed that the expenditure attributable to earning the above exempt income ought to be disallowed under section 14A r.w. Rule 8D. Since the assessee has not admitted any expenditure to earn the exempted dividend income, by invoking the provisions of section 14A r.w. Rule 8D, the Assessing Officer worked out the expenditure attributable to earning the exempt at ₹.50,81,323/-, ₹.5,70,595/- and ₹.5,31,095/- for the assessment years 2008-09, 2009-10 and 2010-11 and disallowed the same. On appeal, the ld. CIT(A) confirmed the disallowance made by Assessing Officer.

6.1 On being aggrieved, the assessee is in appeal before the Tribunal. With regard to the disallowance of expenses under section 14A r.w. Rule 8D, the ld. Counsel for the assessee has submitted that the Assessing

Officer has not recorded satisfaction with regard to the claim of expenses to earn the tax free income for the assessment year 2008-09 & 2009-10. Moreover, for the assessment year 2010-11, the ld. Counsel has submitted that the disallowance under section 14A of the Act cannot be made while computing book profit under section 115JB of the Act.

6.2 On the other hand, the ld. DR supported the orders of authorities below.

6.3 We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. So far as satisfaction recorded by the Assessing Officer while invoking the provisions of section 14A r.w. Rule 8D is concerned, the Assessing Officer has clearly recorded in the assessment orders that the assessee has incurred expenses towards managerial remuneration and other routine administrative expenses, a portion of which must have been attributed towards earning of exempt income. Moreover, the Assessing Officer has noticed that the assessee has debited interest payments towards secured and unsecured loans. It is only after examining the books of accounts, the Assessing Officer came to the conclusion that the assessee has incurred administrative and managerial expenses and on finding that a portion of such expenses were not attributed towards

earning of exempt income, he came to the conclusion that Rule 8D must be invoked and a portion of expenditure must be disallowed a portion of such expenditure. The above findings are recorded by the ld. CIT(A) in his order at para 8.3.1 to 8.3.12.

6.4 After considering the assessment order and the appellate order, we came to a conclusion that the Assessing Officer was fully satisfied that the provisions of Rule 8D has to be invoked based on the materials available on record. Therefore, it cannot be said that the Assessing Officer has not recorded satisfaction. Under the above facts and circumstances, the ground raised by the assessee is dismissed.

6.5 So far as issue of disallowance under section 14A of the Act vis-à-vis computation of book profits under section 115JB of the Act is concerned, in the assessment order for the assessment year 2010-11, the Assessing Officer has made disallowance under section 14A of the Act while computing book profit under section 115JB of the Act also.

6.6 We have considered the rival contentions. In an identical issue, the Delhi Special Bench decision of the Tribunal in the case of ACIT v. Vireet Investment (P) Ltd. [2017] 82 taxmann.com 415 (Delhi – Trib.)(SB), has considered this issue and held that the scheme of the Act is that the

computation is first made under the normal provisions of the Act and, thereafter, under an alternate scheme provided u/s 115JB for computing total income as per the prescribed method. If the tax liability on the basis of total income as per MAT provisions is more than the tax computed under the normal provisions of the Act then the former becomes the final tax liability of the assessee. The mode of computation of book profit has been prescribed under MAT provisions. Clause (f) of Explanation 1 to section 115JB(2) of the Act is in conformity to matching principles of accounting. As per the provisions of section 115JB(1) of the Act, a comparison of the total income computed under the normal provisions of the Act is to be made with the book profits as computed u/s 115JB of the Act. This makes it clear that total income as contemplated under normal provisions is inextricably linked with book profits under MAT provisions and it is wrong to suggest that both operate in entirely different fields. The Tribunal further held that if different modes of computation are followed u/s 14A and in clause (f) of Explanation 1 to section 115JB(2) of the Act, then the comparison will not be on same footing and will produce absurd results. The phrase "in relation to" used in section 14A of the Act and the phrase "expenditure relatable to earning of exempt income", under clause (f) of Explanation 1 to section 115JB(2) of the Act, the word "relatable to" has wider connotation than the words "in relation to", where

the proximate relationship is required. The computation under clause (f) of Explanation 1 to section 115JB(2) of the Act, is to be made without resorting to the computation as contemplated u/s 14A of the Act read with Rule 8D of the Rules.

6.7 Similar issue was subject matter in appeal in the case of Sobha Developers Ltd. v. DCIT, LTU, Bangalore [2021] 434 ITR 266 (Kar.), wherein, the Hon'ble Karnataka High Court has considered the entire provision of section 115JB of the Act in para 7 of its order and the relevant para is reproduced as under:

> *"7. Thus from perusal of the relevant extract of section 115JB, it is evident that sub-section (1) of section 115JB provides the mode of computation of the total income of the assessee and tax payable on the assessee under section 115JB of the Act. Sub-section (5) of section 115JB provides that save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee being a company mentioned in this section. Therefore, any expenditure relatable to earning of income exempt under section 10(2A) and section 10(35) of the Act is disallowed under section 14A of the Act and is, added back to book profit under clause (f) of section 115JB of the Act, the same would amount to doing violence with the statutory provision viz., sub-sections (1) and (5) of section 115JB of the Act. It is also pertinent to mention here that the amounts mentioned in clauses (a) to (i) of Explanation to section 115JB(2) are debited to the statement of profit and loss account, then only the provisions of section 115JB would apply. The disallowance under section 14A of the Act is a notional disallowance and therefore, by taking recourse to section 14A of the Act, the amount cannot be added back to book profit under clause (f) of section 115JB of the Act. It is also pertinent to mention here that similar view, which has been taken by this court in Gokaldas Images (P.) Ltd. (supra) was also taken by High Court of Bombay in CIT v. Bengal Finance & Investments (P.) Ltd. [IT Appeal. No. 337 of 2013, dated 10-2-2015 . It is pertinent to note that in Rolta India Ltd., the Supreme Court was dealing with the issue of chargeability of interest under sections 234B and 234C of the Act on failure to pay advance tax in respect of tax payable under section 115JA/115JB of the Act and therefore, the aforesaid decision has no impact on the issue involved in this appeal. Similarly, in Maxopp Investment Ltd. (supra) the Supreme Court has dealt with section 14A of the Act and has not dealt with section 115JB of the Act. Therefore, the aforesaid decision also does not apply to the fact situation of the case.*

In view of preceding analysis, the substantial questions of law framed by a bench of this court are answered in favour of the assessee and against the revenue. In the result, the order passed by the tribunal dated 9-1-2015 insofar as it pertains to the findings recorded against the assessee is hereby quashed."

6.8 Since, the issue is covered by Special Bench of this Tribunal in the case of ACIT Vs. Vireet Investment Pvt. Ltd. (supra) and by the decision of Hon'ble Karnataka High Court in the case of Sobha Developers Ltd. v. DCIT, LTU, Bangalore (supra), We set aside the order of the ld. CIT(A) on this issue and direct the Assessing Officer to delete the addition.

7. In the result, the appeals for the assessment year 2008-09 and 2009-10 are dismissed and the appeal filed for the assessment year 2010-11 is partly allowed.

Order pronounced on the 30th August, 2022 in Chennai.

Sd/-	Sd/-
(G. MANJUNATHA)	(V. DURGA RAO)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai, Dated, 30.08.2022
Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy 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.