<u>आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता</u>

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

<u>श्री राजपाल यादव,उपाध्यक्ष(कोलकाता क्षेत्र) एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष</u>

[Before Shri Rajpal Yadav, Vice-President (KZ)& Shri Rajesh Kumar, Accountant Member]

I.T.A. No. 1070/Kol/2018
Assessment Year : 2010-11

The Tinplate Company of India Ltd. (PAN: AABCBT 0129 P)	Vs.	DCIT, Circle-3, Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

I.T.A. No. 1595/Kol/2018
Assessment Year : 2010-11

DCIT, Circle-3, Kolkata	Vs.	The Tinplate Company of India Ltd. (PAN: AABCBT 0129 P)
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	06.09.2022
Date of Pronouncement / आदेश उद्घोषणा की तिथि	29.09.2022
For the Appellant / निर्धारिती की ओर से	Shri K Ved, VA Shri Alpesh Gupta, A.R
For the Respondent / राजस्व की ओर से	Shri Amal Kamat, CIT

ORDER/ आदेश

Per Shri Rajesh Kumar, AM:

These are the appeals preferred by the revenue as well as the assessee against the separate orders of the Commissioner of Income Tax(Appeals)-6, Kolkata [hereinafter referred to as 'CIT(A)'] dated 06.04.2018 for the assessment year 2010-11.

2. Issue raised in ground no. 1 is against the confirmation of addition of Rs. 1,72,94,960/-by the Ld. CIT(A) as disallowed by the AO on account of leave encashment.

3. Facts in brief are that the AO observed from clause **21(i) at Annexure 'IX'** attached with Form 3CD of TAR that an amount of Rs. 1,72,94,960/- under head "sum payable by employee in lieu of the leave at the credit of the employees" which was not paid before the due date of return u/s 139(1) of the Act. Accordingly assessee was given show cause which was replied vide written submission dated 19.12.2012 by filing the details thereof however the AO came to the conclusion that the said amount was not paid within the time allowed and added the same to the income of the assessee in view of provisions of Section 43B of the Act.

4. In the appellate proceedings, the Ld. CIT(A) confirmed the addition of Rs. 1,72,94,960/-.

5. After hearing the rival submissions and perusing the material on record, we find that out of the said provisions, the assessee has already paid 52.00Lakhs which needs to be allowed subject to the verification by the AO. The case of the assessee is squarely covered by the decision of Supreme court in the case of Union of India & Ors. Vs. Exide Industries & Ors. Reported in [2020] 425 ITR 1 (SC) which provides that any amount paid against the provisions for leave encashment has to be allowed on payment basis. The AO is directed accordingly to allow the deduction following the said decision of the Hon'ble Supreme Court in respect of any payment made after necessary verification. The ground no. 1 is allowed for statistical purpose.

6. Issue raised in ground no. 2 is not pressed due to small amount and therefore dismissed as not pressed.

7. Issue raised in ground no. 3 is against the confirmation of addition of Rs. 40.00 Lakhs by Ld. CIT(A) as made by the AO by disallowing the provisions created for other benefit of the director of the assessee company under head provision for General Expenses.

8. Facts in brief are that the AO observed during the course of assessment proceedings that the assessee has debited an amount of Rs. 2,12,48,926/- under the head provisions for general expenses which comprised of provisions created for ex-managing director retirement benefit on actuarial basis Rs. 1,74,13,987/-, director's commission of Rs. 30 Lakhs and other benefits of Rs. 40 Lakhs. Out of said expenses, the Ld. CIT(A) allowed the expenditure incurred on actuarial basis in respect of ex-managing director's retirement benefit Rs. 1,74,13,987/- and also Rs. 30 Lakhs incurred on director's commission whereas the remaining amount was of Rs. 40 Lakhs was disallowed which was incurred and provided in respect of other benefits payable to the directors on scientific basis.

9. After hearing the rival contentions and perusing the material on record, we find that the Ld. CIT(A) has disallowed the said expenditure on the ground that the explanation given by the assessee is not plausible whereas as a matter of fact the said expenditure were provided with regard to other benefits payable to the directors of the company on scientific basis by following the mercantile system of accounting and therefore has to be allowed by following the decision of Hon'ble Supreme Court in the case of Bharat Earth Movers vs. CIT reported in 245 ITR 428 (SC) and Metal Box Company of India Ltd. vs. Their Workman reported in 73 ITR 53 (SC) wherein it has been provided that any liability though payable in future should be allowed on accrual basis. Accordingly, we set aside the findings of the Ld. CIT(A) on this issue and direct the AO to allow the deduction of Rs. 40 Lakhs. The ground no. 2 is allowed accordingly.

10. Issue raised in ground no. 4 is against the order of Ld. CIT(A) confirming the action of AO in not granting set off of brought forward business loss and unabsorbed depreciation against the assessed income of AY 2010-11 in accordance with the provisions of the Act which is an amended grounds filed by the assessee vide letter dated 18.10.2021.

11. After hearing the rival submissions and perusing the material on record, we find that the issue needs to be examined by the AO we note that a rectification application is also pending before the AO which has been filed by the assessee requesting the AO to allow/grant the set off of brought forward losses and unabsorbed depreciation against the income of AY 2010-11 in accordance with law. Accordingly we set aside the order of Ld. CIT(A) on this issue and direct the AO to decide the issue by disposing off the rectification application in accordance with law. The ground is set aside to the file of AO to decide the same in terms of our above directions.. The ground no. 3 is allowed statistically.

Accordingly, the appeal of the assessee is partly allowed for statistical purposes.

12. **Now we shall adjudicate revenue's appeal in ITA No. 1595/Kol/2018 for AY 2010-11.**

13. Issue raised in Ground no. 1 is against the deletion of addition of Rs. 8,98,00,000/- by the Ld. CIT(A) as made by the AO while disallowing interest u/s 36(1)(iii) of the Act.

14. The AO during the course of assessment proceedings observed that the assessee has shown capital work-in-progress to the tune of Rs. 250.58 crores and further observed that the assessee has charged interest of Rs. 21.09 crores to the profit and loss account. Accordingly a show cause notice was issued to the assessee calling upon to explain as to why the said interest should be not be disallowed proportionately u/s 36(1)(iii) of the Act as the assets has not been put to use. The factual position is that the assessee has already capitalized interest to the tune of Rs. 4.06 crores however the

AO again issued show cause notice vide order dated 22.02.2013 and 25.03.2013 as to why the interest should not be disallowed as interest has not been capitalized correctly and also that the flow of funds have not been produced to verify the correct amount of interest to be capitalized. The AO noted that the ratio of the fixed assets as well as capital work in progress was not taken into account for calculating the disallowance of interest. Finally the AO calculated the interest to be disallowed in respect of capital work in progress at 61.85% on the basis of above ratio which comes to Rs. 13.04 crores and made the net disallowance of Rs. 8.98 crores after allowing credit of Rs.4.06 crore suo-moto capitalized by the assessee.

15. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee by holding that the assessee has correctly capitalized the interest and charged the remaining amount of interest of Rs. 21.09 crores in profit and loss account and whatever was attributable to the capital work in progress was duly capitalized. The Ld. CIT(A) recorded a finding that AO has wrongly applied CWIP, fixed asset to calculate the disallowable u/s 36(1)(iii) of the Act as there was no such formula prescribed under the Act or Rules and thus deleted the disallowance of Rs. 8.98 crores.

16. After hearing the rival submissions and perusing the material on record, we find that the assessee has correctly apportioned the gross interest into an amount to be capitalized Rs. 4.06 Cr and to be charged to the profits and loss account of Rs. 21.09 crores. We have perused the appellate order and do not find any infirmity in the same. In this case, the AO has made disallowance on surmises and conjectures and on estimated basis which is not sustainable in the law as has been held by the following decisions:

i) Dhakeshwari Cotton Mills Ltd. vs. CIT [26 ITR 775 (SC)]

ii) JCIT vs. ITC Ltd., [2008] 112 ITD 57 (Kolkata)

iii) Monarch Foods Pvt. Ltd. vs. CIT (Ahd) [54 TTJ 405]

iv) Chaudhary Hammer Works Ltd. vs. DIT [ITA No. 5333/Del/2011]

v) Universal Construction Machinery and Equipments Ltd. vs. ACIT (Pun) [ITA No. 975/PN/2013 and ITA Nos. 1465 & 1466/PN/2013]

Accordingly we uphold the order of Ld. CIT(A) by dismissing the ground raised by the revenue.

17. Issue raised in ground no. 2 is against the confirmation of disallowance of Rs. 1,74,13,987/- by the Ld. CIT(A) as made by the AO on account of actuarial provisions for ex-managing director's retirement benefit.

Issue raised in ground no. 3 is against the order of Ld. CIT(A) deleting the disallowance of Rs. 30 lakhs as made by the AO on account of expenditure of director's commission.

18. Facts qua this issue has already been discussed by deciding ground no. 3 of the assessee's appeal. Therefore are not being repeated for the sake of brevity.

19. The Ld. CIT(A) allowed the appeal of the assessee on this issue by directing the AO to delete the disallowance of Rs. 1,74,13,987/- by reasoning that the assessee has provided expenditure by following the accounting standard issued by the ICAI and mercantile system by accounting on the basis of actuarial valuation certificate. The Ld. CIT(A) recorded a finding that the AO has wrongly added Rs. 31,65,071/- mentioned herein to be allowable whereas the amount as per actuarial basis was Rs. 1,74,13,987/- as mentioned under actuarial gain/loss on obligation and thus allowed the appeal of the assessee on this issue.

20. We have heard rival submissions and perusing the material on record.We find that the addition has rightly been deleted by the Ld. CIT(A) on the ground that the same has been claimed on the basis of accounting standard issued by ICAI and also based upon the actuarial valuation certificate. We also note that the AO has himself considered the figure of Rs. 31,65,071/- to be allowed as against the figure of Rs. 1,74,13,987/- mentioned under actuarial gain/loss which has to be allowed.

Accordingly we upheld the order of Ld. CIT(A) by dismissing the ground raised by the revenue.

21. So far as the ground no. 3 is concerned the Ld. CIT(A) allowed the claim of assessee of Rs. 30 Lakhs which is in respect of director's commission provided in the books of account by referring to the details of such expenditure available at para 4.3 at page 63 of annual report. The Ld. CIT(A) noted as per the annual report , the director's commission as already accrued and accordingly directed the AO to delete this amount.

22. After perusing the order of AO and hearing the contentions of both sides, we do not find any infirmity in the order of Ld. CIT(A) as the same has been allowed on the ground that the expenditure has already accrued during the year. Accordingly we upheld the order of Ld. CIT(A) by dismissing the ground raised by the revenue.

23. Issue raised in ground no. 4 is against the deletion of Rs. 1,17,56,000/- by Ld. CIT(A) as disallowed by the AO on account of BEBP charges.

24. Facts in brief are that the AO observed during the course of assessment proceedings that the assessee has debited in the profit and loss account a sum of Rs. 1,17,56,000/- under the head miscellaneous expenses which in fact represented BEBP royalty charges. The assessee submitted before the AO that the said expenditure were incurred for the purpose of business and TDS was duly deducted and deposited. It was also submitted that the said account was paid for using TATA brand name under scheme TATA Brand Equity and business promotion scheme'. According to AO, the expenditure is found to be capital in nature which provides an enduring benefit over a period of time to the assessee and accordingly after issuing show cause notice the same were disallowed and added to the income of the assessee.

25. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee by observing and holding as under:

> *8. Ground Nos. 5(a) to 5(b) (are directed against the disallowance made by the AO on account of annual subscription of Brand equity and business promotion royalty charges'; paid by the appellant to M/s TATA Sons Ltd.*

I have gone through the assessment order, written submission and paper books filed by the appellant and various judicial precedents relied upon. I find that the assessee has debited an amount of Rs. 117.56 lacs on accounts of BEBP Royalty Charges under the head general expenses. The AO in the Assessment order held that the payment of annual subscription on account of BEBP Royalty charges is of capital nature as it provides an enduring benefit over a period of time to the assessee. The A/R of the appellant has invited my attention to the copy of relevant agreement entered into by the assessee company with TATA sons Ltd. annexed at page no. 142 to 160 of the paper book in order to point out the obligation of TATA sons Ltd. to look after the entire brand of TATA Group. The A.R's further argued that the payments are made on the basis of net annual income during the year and does not include any lump-sum payment and the benefits accruing out of the said payment were utilized in the year itself. It was further explained that the appellant has deducted tax at source from the payments made to M/s TATA sons Ltd. It was further explained by the A.R's that the payment of subscription/BEBP royalty charge under the agreement depends on the extent of use of the brand name, marks and marketing indicia by the appellant and the same is computed as a percentage of Annual Net Income of the appellant. No subscription is payable that the said agreement in no way provides for any transfer of ownership of the brand name, marks and marketing indicia and the proprietor remains the sole and rightful owner of the same during the term of the agreement and even on termination of the same. The A.R.'s further argued that the said BEBP scheme entered into by the appellant, there is no capital asset of enduring benefit accruing to the appellant under the said agreement/scheme as alleged by the AO. The Annual subscription payment of BEBP royalty charges depends on the extent of annual use and annual income of the appellant. On this issue, the appellant has relied upon the decision of the ITAT Mumbai in the cases of ACIT vs. Rallis India Ltd. (ITA No. 5701/Mum/2008) and M/s TATA Autocomp Systems Ltd. vs. ACIT (IT(TP)A No. 7596/Mum/2012). I find that both the cases relied upon by the appellant relate to the TATA group companies, which entered into identical agreements for payment of BEBP charges with TATA Sons Ltd. and in both the cases payment of BEBP subscription charges were held to be of revenue in nature. Further, the case of appellant is also covered by its own case for AY 2011-12 and AY 2012-13 in appeal nos. 167/CIT(A)-1/Circle-3/2014-15 and 1026/CIT(A)-1/Circle-3(1)/2015-16 wherein under the similar circumstances the Ld. CIT(A)-1, Kolkata has adjudicated the issue in favour of appellant.

In view of the above discussion and material on record, I am of the view that the payment of annual subscription BEBP Royalty Charges is revenue in nature and accordingly, the AO is directed to delete the disallowance.

Since, appeal on Ground No. 5(a) is allowed, therefore, alternate plea of the appellant becomes infructuous and is accordingly dismissed.

This ground of appeal is partly allowed."

26. After hearing rival submissions and perusing the material on record, we find that the Ld. CIT(A) has allowed this expenditure by following the decision of Co-ordinate Benches as cited herein above wherein under similar circumstances the claim has been allowed as revenue expenditure in TATA Group companies. Accordingly we do not find any infirmity in the order of Ld. CIT(A) and same is affirmed by dismissing the appeal of the revenue.

27. Issue raised in ground no. 5 is against the order of Ld. CIT(A) allowing the carry forward of unabsorbed depreciation beyond the period of 8 years.

28. We note that the Ld. CIT(A) has allowed the appeal of the assessee on this issue by following the decision of Gujarat High Court in the case of General Motor India Pvt. Ltd. vs. DCIT reported in 354 ITR 244 (Guj) and also following the various other decisions. In our opinion, the brought forward of unabsorbed depreciation becomes the part of the current year's depreciation and has to be allowed as there is no stipulation of period of 8 years. Therefore the Ld. CIT(A) has allowed the appeal of the assessee on this issue by directing the AO to allow the carry forward and setting aside beyond the period of 8 years. The case of the assessee is squarely covered by the following decisions:

i) CIT vs. Associated Cables Pvt. Ltd. [2019] 105 taxmann.com 113 (Bom). SLP dismissed by Supreme court on revenue appeal [2019] 263 Taxman 250 (SC)

ii) General Motors India Pvt. Ltd. vs. DCIT [354 ITR 244 (Guj)]

iii) CESC Ltd. vs. CIT [WP No. 722 of 2015 (Cal)]

iv) RB Polymers Ltd. vs. CIT [2008] 89 taxmann.com 87 (Kolkata-Trib)

Since the facts before us are similar to ones as involved in the above decisions, we respectfully following the the above decisions uphold order of ld CIT(A) by directing the AO to allow the set off of the brought forward depreciation even beyond 8 years.

28. Issue raised in ground no. 6 is against the order of Ld. CIT(A) allowing credit of MAT u/s 115JAA of the Act including surcharge and cess.

29. Facts in brief are that the AO did not allow the credit of service and education cess while completing MAT u/s 115JAA of the Act.

30. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee by following the decision of Hon'ble Calcutta High Court in the case of SREI Infrastructure Finance Ltd. vs. DCIT [2016] 72 taxmann.com 239 (Cal).

31. After carefully perusing the order of Ld. CIT(A), we note that MAT credit has to be allowed u/s 115JAA of the Act including surcharge and cess which is in accordance with ratio laid down by the Hon'ble Calcutta High Court in SREI Infrastructure Finance Ltd. (supra) wherein it has been held that MAT credit brought forward from earlier years should be set off against tax on total income including surcharge and cess. Accordingly we upheld the order of Ld. CIT(A) by dismissing the ground raised by the revenue.

32. In the result, the appeal of the assessee is partly allowed and the appeal of the revenue is dismissed.

Order is pronounced in the open court on 29th September, 2022

Sd/-	Sd/-
(Rajpal Yadav /राजपाल यादव)	(Rajesh Kumar / राजेश कुमार)
Vice-President /उपाध्यक्ष	Accountant Member / लेखा सदस्य

Dated: 29th September, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- The Tinplate Company of India Ltd., 4, Bankshall Street, Kolkata-700001.
2. Respondent – DCIT, Circle-3, Kolkata
3. CIT(A)-6, Kolkata (sent through e-mail)
4. PCIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata