

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : "I" : NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER

ITA No.6046/Del/2019
Assessment Year: 2014-15

ACIT, Central Circle-29, New Delhi.	vs.	Jaypee Capital Services Ltd., FA-45, Shivaji Enclave, New Delhi. PAN: AAACJ0628A
ITA No.5169/Del/2019 Assessment Year: 2014-15		
Jaypee Capital Services Ltd., FA-45, Shivaji Enclave, New Delhi. PAN: AAACJ0628A	vs.	ACIT, Central Circle-29, New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Ved Jain, Advocate & Ms Supriya Mehta, CA
For Revenue :	Shri Mrinal Kumar Das, Sr. DR

Date of Hearing :	04.10.2022
Date of Pronouncement :	31.10.2022

ORDER

PER CHANDRA MOHAN GARG, J.M. :

These are cross appeals filed by the Revenue as well as the Assessee and are directed against the order dated 30.04.2019 of the CIT(A)-44, New Delhi, relating to

Assessment Year 2014-15. Since common issues are involved, these appeals were heard together and are being disposed of by this consolidated order.

2. Briefly stated facts of the case are that the assessee is a company stated to be engaged in the business of trading in shares and securities or various commodities through recognized stock and commodity exchange i.e., NSE, BSE, MCX and NCDEX. During the year under consideration the assessee company had filed its return of income on 29.11.2014 which was subsequently revised on 30.03.2016 declaring loss of Rs.(-)16,69,10,860/- under normal provisions and Rs.46,23,044/- under 115JB of the I.T. Act, 1961. The case of the assessee company was selected for scrutiny and notice under section 143(2) dated 28.08.2015 was issued and served upon the assessee. Further, the A.O. also issued notices under section 142(1) of the I.T. Act, 1961 on 12.08.2016 and 21.09.2016 and in response to the said notices, the A.R. of the Assessee appeared before the A.O. from time to time and filed details/information/documents which are placed on record

by the A.O. During the course of assessment proceedings the A.O. noted that the assessee had substantial amount of investment in the shares of companies and assessee company had earned dividend out of such investments. As per the return of income, the assessee had tax free exempt income of Rs.1,70,76,212/-. The A.O. called for the explanation of the assessee company as to why the provisions of Section 14A read with Rule 8D should not be made on such exempt income. In response to the same, the assessee submitted that as on 31.03.2014 the net worth of the assessee company was at Rs.130.11 crores consists of share capital, reserve and surplus, whereas total investment was only at Rs.39.49 crores. Thus, the net worth of the company is far exceeds the investment made by it. In such circumstances, the provisions of Section 14A of the I.T. Act, 1961 are not applicable and no disallowance can be made. However, the A.O. was of the view that since the assessee had substantial investments in shares of other companies and had received huge amount as dividend, the assessee required to incur expenses on manpower, office expenses

etc., for the purpose of maintaining and keeping track of the fund and, therefore, the A.O. computed the expenditure to earn dividend income at Rs.1,24,00,298/- under section 14A of the I.T. Act, 1961 and made addition accordingly to the return of income of the assessee company.

2.1. The A.O. further noted that the assessee company had made investment of Rs.59,70,996/- towards the equity of wholly own foreign subsidiary company in USA i.e., Jaypee International Inc (USA) and Rs.5,97,40,706/- in Singapore i.e., Singapore Pte Ltd. The A.O. noted that the assessee company has not obtained or filed a report from the Auditor in Form No.3CEB in respect of the above international transactions for the impugned assessment year. Therefore, the A.O. referred the matter to TPO under section 92CA(1) of the I.T. Act, 1961 for determining the Arm's Length Price ["ALP"] of the international transactions with the prior approval of PCIT, Central-3, New Delhi. The TPO recommended an addition of Rs.1,34,91,351/- on account of ALP @ 12.83% for the loan advanced by the assessee with its foreign AE. The said order of the TPO was

confronted to the assessee company for its comments. Since the assessee company did not file any reply, the A.O. made addition of Rs.1,34,91,351/- on account of interest on loan to its foreign AE viz., Jaypee Singapore Pte Ltd. Thus, the A.O. passed assessment order under section 144C(4)/143(3) of the I.T. Act, 1961 dated 28.02.2018 by determining the total loss of the assessee company at Rs.14,10,19,210/- as against the revised returned loss of (-) Rs.16,69,10,860/- filed by the assessee company.

2.2. Aggrieved by the order of the A.O, the assessee company carried the matter in appeal before the Ld. CIT(A), who vide order dated 30.04.2019 partly allowed the appeal of the assessee company.

3. Aggrieved by the order of the Ld. CIT(A), the assessee carried the matter in appeal before the Tribunal, and has raised the following grounds :

“1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income

Tax (Appeals) [CIT(A)] is bad both in the eye of law and on facts.

2. (i) *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the disallowance of an amount of Rs.1,24,00,298/- made by the AO invoking the provisions of Section 14A read with Rule 8D.*

(ii) *That the disallowance has been confirmed rejecting the contention of the assessee that AO has made the disallowance without recording satisfaction as specified under 14A(2) of the Act having regard to the correctness of the claim made by the assessee in respect of expenditure in relation to the exempt income.*

(iii) *That the disallowance has been confirmed ignoring the fact that assessee having sufficient owned funds, investments having not been made out of borrowed funds, no disallowance of interest under Section 14A can be made.*

(iv) *That the learned CIT(A) has erred both on facts and in law in not taking into consideration of the interest*

cost of Rs. 7,84,50,864/- already capitalized by the assessee while computing disallowance under section 14A of the Income Tax Act.

(v) Without prejudice to the above, learned CIT(A) has erred both on facts and in law in confirming the action of the learned AO considering the entire value of investments as against only those investments which yielded exempt income during the year for computing average value of investment.

3. (i) On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law in confirming the addition of Rs. 1,34,91,351/- made by the AO on account of interest on loan to AE.

(ii) That the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the transaction of providing equity to the AE is not an international transaction as defined under Section 92B of the Act.

(iii) That the addition has been confirmed despite that the fact that addition has been made without bringing

any comparable on record to determine the arm's length price is bad in law.

4. *On the facts and circumstances of the case, the learned CIT(A) has erred in rejecting the contention that AO has erred both on facts and in law in referring the case to the TPO u/s 92CA(1) despite the fact that transaction of providing equity to the AE is not an international transaction as defined under Section 92B of the Act.*

5. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in ignoring the fact that transfer pricing provision cannot override the provision of charging section 4 of the Act to bring to tax fictional/assumed or hypothetical income, where no income otherwise results.*

6. *On the facts and circumstances of the case, the learned CIT(A) has erred both, on facts and in law in rejecting the contention of the assessee that the TPO has erred in re-characterizing the transaction of providing equity into a loan transaction.*

7. *Without prejudice to the above and in the alternative, the learned CIT(A) has erred in rejecting the contention of the assessee that the transaction being in foreign currency the LIBOR rate is the appropriate rate of interest, not the rate as applied by the AO.*

8. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of the TPO considering Prime Lending Rate (PLR) of SBI without appreciating that such rate is applicable on the loan availed in India in domestic currency.*

9. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the above additions despite that the same have been made on the basis of material collected at the back of the assessee without giving assessee an opportunity to rebut the same in violation of provisions of the Act.”*

4. Though the assessee has raised various grounds of appeal, but, they are relates to only two issues viz., (1) addition of Rs.1,24,00,298/- made on account of disallowance under section 14A read with Rule 8D of the I.T. Act, 1961 vide grounds of appeal no.2(i) to 2(v) and the second issue relates to transfer pricing adjustment on account of non-payment of interest on loan to the AE amounting to Rs.1,34,91,351/- vide grounds of appeal no.3(i) to 9.

5. During the course of hearing, the Learned Counsel for the Assessee submitted that the disallowance of Rs.1,24,00,298/- made by the A.O. and partly confirmed by the Ld. CIT(A) by invoking the provisions of Section 14A of the I.T. Act, 1961 is not sustained in law as the authorities below failed to consider that the assessee company had not incurred expenses to earn the dividend income and the investment in shares have been made by the assessee company out of its surplus funds in subsidiary companies and in the shares of NCDEX. He submitted that when investment in subsidiaries were made from surplus own

funds and no borrowed funds were used for making them, then the provisions of Section 14A are not applicable in respect of investment made in the subsidiary companies. He submitted that the assessee company had received dividend income out of its investment in shares of NCDEX, for which, the assessee company had taken loan from three different financiers. The assessee company had not claimed any interest while computing total income to comply with provisions of Section 14A read with Rule 8D of the I.T. Rules. Despite of the fact that assessee had not claimed any expenditure that was relatable for earning exempt income, the A.O. made the addition on surmises and conjectures and the Ld. CIT(A) partly sustained the addition by directing the A.O. to restrict the disallowance under section 14A of the I.T. Act, 1961 to the amount of dividend earned by the assessee company.

5.1. The Learned Counsel for the Assessee drew the attention of the Bench to the paper book pages 1 to 160 which are acknowledgment of return of income along with computation of income, audited financial statements, copy

of reply dated 29.11.2016 filed before A.O, copy of reply dated 30.08.2017, 06.09.2017 filed before TPO, copy of Financial statements of Jaypee Singapore Pte Ltd., for the A.Y. 2014-15, copy of Financial statements of the assessee company for the A.Y. 2013-14, Copy of Order of ITAT in assessee's own case for the A.Y. 2013-14 in ITA.No.1384/Del./2017 and copy of written submissions filed before the Ld. CIT(A).

5.2. The Learned Counsel for the Assessee further drew the attention of the Bench that similar issue has been raised by the assessee company in preceding A.Y. 2013-14 before the Tribunal and the Tribunal vide order dated 17.01.2020 in ITA.No.1384/Del.,/2017 deleted the addition. Copy of the order of the Coordinate Bench of the Tribunal dated 17.01.2020 is placed on record at pages 90-106 of the paper book. He, accordingly, prayed that the disallowance made by the lower authorities, be deleted.

6. The Ld. D.R. on the other hand relied on the orders of the lower authorities, though, not disputed the contentions raised by the assessee with respect to deletion

of addition by the Tribunal in assessee's own case vide order dated 17.10.2020 (supra) in the preceding A.Y. 2013-14.

7. We have heard the rival submissions and perused the material available on record. We find that in the instant case the assessee company had substantial net worth of Rs.130.11 crores as against the investment made in shares at Rs.39.49 crores. Since the assessee company has sufficient own interest free funds and had not borrowed the funds to make investment in shares to earn the dividend income, the provisions of Section 14A is not applicable and consequently, the addition made by the authorities below cannot be sustained in the eye of law. Further, when the A.O. is not accepting the contention of the assessee company that no expenditure is incurred in relation to earning exempt income, then the burden lies on the Revenue to prove that assessee company had incurred the expenditure to earn the dividend income. In the instant case, the A.O. made the impugned addition of Rs.1,24,00,298/- on conjectures and surmises and applied the provisions of Section 14A read with Rule 8D of the I.T.

Act, 1961. We find that on identical facts in assessee's own case for the preceding A.Y. 2013-14, the Coordinate Bench of the Tribunal in its order dated 17.01.2020 (supra) decided the matter in issue in favour of the assessee by observing as under:

“9. Undisputedly, during the year under assessment, assessee company has earned dividend income of Rs.1,36,19,200/- and claimed the same as exempt u/s 10(34) of the Act. Ld. AR for the assessee challenging the impugned order contended that the entire investment in the shares have been made by the assessee company out of its own funds and drew our attention towards balance sheet, available at page 16 of the paper book. Perusal of the balance sheet qua the year under assessment shows that the assessee company is having paid up share capital of Rs.7,64,75,500/- with reserve and surplus of Rs.3,17,17,14,177/- (total Rs.3,24,81,89,677/-). These facts go to prove that as against the total investment of Rs.2,97,33,89,709/-, assessee company was having its

own share capital and surplus & reserves to the tune of Rs.3,24,81,89,677/-. It is settled principle of law that in case the assessee company is having sufficient own interest free funds, it is to be presumed that the investment is not made out of borrowed funds but out of its own interest free funds. Reliance in this regard is placed on the decision rendered by Hon'ble Supreme Court in case of [CIT vs. Reliance Industries Ltd.](#) in Civil Appeal No.10 of 2019 dated 02.01.2019 and decision rendered by Hon'ble High Court of Punjab & Haryana in [CIT vs. Max India Ltd.](#) in ITA No.186 of 2013 dated 06.09.2016.

10. *More-so, before invoking the provisions contained u/s 14A of the Act, AO has not recorded his satisfaction as required u/s 14A(2) that the working given by the assessee is not correct. Hon'ble High Court of Delhi in case of [Maxopp Investment Ltd. vs. CIT](#) 347 ITR 272 (Del.), confirmed by Hon'ble Supreme Court, held that, "it is incumbent upon the AO to record satisfaction as to the working given by the assessee that no expenses*

have been incurred by it to earn the dividend income".

In view of the matter, we are of the considered view that addition made by the AO and confirmed by the ld. CIT (A) u/s 14A is not sustainable, hence ordered to be deleted.

7.1. Since the facts and circumstances of the case are similar to that of the matter in issue decided by the Coordinate Bench of Delhi Tribunal in assessee's own case in its order dated 17.01.2020 (supra), respectfully following the reasoning given by the Tribunal, we delete the addition of Rs.1,24,00,298/- made by the A.O. and partly sustained by the Ld. CIT(A) on account of disallowance made under section 14A read with Rule 8D of the I.T. Act, 1961. Accordingly, the grounds of appeal raised by the assessee on this issue are allowed.

8. With respect to second issue of ALP determined by the A.O. at Rs.1,34,91,351/-, the Learned Counsel for the Assessee submitted that the TPO re-characterized the equity amount to AE as a loan transaction and treated the

equity amount to AE as loan and determined the Arm's Length interest on loan @ 12.83% and computed the interest amount at Rs. Rs.1,34,91,351/- which was added by the A.O. to the returned loss of assessee company and in appeal, the addition made by the A.O. was confirmed by the Ld. CIT(A). He submitted that on identical facts, the Tribunal in assessee's own case in preceding A.Y. 2013-14 in ITA.No.1384/Del./2017 deleted the addition made by the lower authorities. He prayed that similar directions may be given in the present A.Y. 2014-15 also.

9. The Ld. D.R. on the other hand relied on the orders of the lower authorities, but, did not dispute the arguments advanced by the Learned Counsel for the Assessee on the issue.

10. We have heard the Learned Representatives of both the parties and perused the material on record. We find that the assessee company had provided equity to AE, whereas, the TPO treated it as loan transaction and recommended the addition of Rs.1,34,91,351/- on account of the Arm's Length interest on loan @ 12.83%. We find

force in the arguments of the Learned Counsel for the Assessee that the TPO treated the equity fund to AE as a loan transaction. On identical facts, the Tribunal in assessee's own case for the preceding A.Y. 2013-14 vide order dated 17.01.2020 (supra), decided the issue in favour of the assessee by deleting the addition made by the lower authorities. The relevant findings of the Tribunal are as under :

“24. Ld. DR for the Revenue by relying upon the order passed by the AO/CIT (A) contended that health of the AE needs to be looked into and it is not disclosed by the assessee company that if the loan was given and later on converted into equity. This contention of the ld. DR is not tenable for the reason that it is categoric case of the assessee company since very outset that funds were given to the subsidiary for business purpose and to have control over it. Moreover it was investment in equity.

25. *In view of the decisions rendered by Hon'ble High Courts and coordinate Bench of the Tribunal discussed in the preceding paras, we are of the considered view that firstly, AO has no authority to re-characterize the transaction of making investment by the assessee company in equity shares of subsidiaries as a loan; secondly, OECD Guidelines also discourage restricting of legitimate business transaction; thirdly, when the AO has not come up with specific finding that the transaction in question is a sham transaction, he cannot treat the transaction of "capital infusion" by the assessee company as a loan and to charge the interest thereon on notional basis; and fourthly, in the absence of any specific finding by the AO that any income has arisen from international transaction, TP provisions contained in Chapter-X of the Act do not apply. [Section 92\(1\)](#) of the act says that income arisen from international transaction is a condition precedent for application of Chapter-X of the Act. Consequently, we are of the considered view that addition made by the*

AO and confirmed by the ld. CIT(A) on account of arm's length price of value of interest receivable on loans outstanding of Rs.1,04,24,675/- in the name of Jaypee Singapore Pte Ltd. is not sustainable, hence ordered to be deleted. So, grounds no.10 to 13 are determined in favour of the assessee.

10.1. Since the facts and circumstances of the case are similar for the impugned assessment year also, respectfully following the decision of Coordinate Bench of the Tribunal in assessee's own case for the preceding A.Y. 2013-14 (supra), we delete the addition of Rs.1,34,91,351/- made by the A.O. on account of Arm's Length interest on loan @ 12.83% and sustained by the Ld. CIT(A). Accordingly, the grounds of the assessee company on this issue are allowed.

11. In the result, appeal of the assessee is allowed.

ITA.No.6046/Del./2019 : A.Y. 2014-15 :

12. The grounds raised by the Revenue in it's appeal are as under :

“1. On the facts and in the circumstances of the case, the Ld.CIT(A) was not legally justified in ignoring the fact that the details regarding the loan availed from different financiers and the consequent interest of Rs.7,84,50,864/- accrued on this loan have not been provided by the assessee during the assessment proceedings.

2. That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.

13. During the course of hearing, the Ld. D.R. fairly admitted that the tax effect involved in Revenue's appeal is below Rs.50 lakhs and in view of the CBDT Circular 17/2019 dated 08.08.2019 the appeal of Revenue is not maintainable and deserves to be dismissed.

14. The Learned Counsel for the Assessee, on the other hand, supported the submissions of the Ld. D.R. that the tax effect involved in the grounds raised by the Revenue is less than Rs.50 lakhs and, therefore, the appeal of the

Revenue needs to be dismissed by virtue of CBDT Circular 17/2019 dated 08.08.2019.

15. We have heard the Learned Representatives of both the parties and perused the material on record. Since in the Revenue's appeal the tax effect is below Rs.50 lakhs as is evident from Form No.36 of Revenue's Appeal the total tax effect was at Rs.42,14,861/- and as per the CBDT Circular No.17/2019 dated 08.08.2019 the appeal of Revenue is not maintainable and, therefore, the same is dismissed.

16. In the result, appeal of the Revenue is dismissed.

17. To sum-up, appeal of Assessee is allowed and appeal of Revenue is dismissed.

Order pronounced in the open Court on 31.10.2022.

Sd/-
[NARENDRA KUMAR BILLAIYA]
ACCOUNTANT MEMBER

Sd/-
[CHANDRA MOHAN GARG]
JUDICIAL MEMBER

Delhi, Dated 31st October, 2022

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	Ld. CIT(A) concerned
4.	CIT concerned
5.	DR ITAT "I" Bench, Delhi
6.	Guard File

//By Order//

Assistant Registrar, ITAT, Delhi Benches,
Delhi.