IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "G", MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No.3123/M/2019
Assessment Year: 2012-13

M/s. SJR Commodities & Consultancies Pvt. Ltd., 73-C, Su-Raj House, Cross Road, MIDC, Marol, Andheri (East), Mumbai – 400 093 **PAN: AAACS9779H**	Vs.	Dy. Commissioner of Income Tax, Circle 11(2)(1), Maharshi Karve Road, Aayakar Bhavan, Mumbai - 400020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Rajesh Shah, A.R.
Revenue by : Shri Satyapal Kumar, D.R.

Date of Hearing : 20 . 09 . 2022
Date of Pronouncement : 30 . 11 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, M/s. SJR Commodities & Consultancies Pvt. Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 18.04.2018 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2012-13 on the grounds inter-alia that :-

> ***"Ground of Appeal 1)***
> ***On the facts and under the circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals), erred in confirming***

disallowance of Rs.47,15,061/-, being 0.5% of average investments of Rs.94,30,12,1367- for the purpose of calculating disallowance u/s 14A without considering the fact that only the investments of Rs.20,85,76,735/- had generated income of Rs.79,21,406/- and hence only those investments ought have been considered under Rule 8D(iii) for the purpose of disallowance u/s 14A, thereby restricting the disallowance to Rs.10,42,884/- only.

Ground of Appeal 2)
a) On the facts and under the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), erred in confirming the action of the AO in confirming that the business of SEZ unit and non SEZ units is same, without appreciating the fact that the SEZ unit is into business of manufacturing of Gold coins whereas non SEZ unit is into trading of gold and diamond jewellery, hence both the line of businesses although in gold industry cannot be deemed to be same by any stretch of imagination.

b) On the facts and under the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), erred in confirming the action of the AO in arriving at conclusion that the profitability should be same between SEZ and non SEZ businesses as the goods from both the units are exported to common importer without appreciating the fact that different goods/products are exported. Gold coins are exported by SEZ and Jewellery and diamonds are exported by non SEZ units.

c) On the facts and under the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), erred in confirming the action of the AO in restricting the benefit of Sec IDA at NIL instead of Rs. 1.59 Crores on the basis of relying on some case of other assessee where even the facts are not similar. Such adhoc assumption of profit @ 3% of turnover is bad in law and not called for.

d) On the facts and under the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), erred in confirming the action of the AO in arriving at a conclusion that the profits were inflated for SEZ units without appreciating the fact that 100% of export and import documents were furnished by the appellant during the assessment.

Ground of Appeal 3)
On the facts and under the circumstances of the case and in law, the learned CIT(A) erred in confirming the action of the AO of allocating 20% of various expenses as follows:

- ***a) Employee Benefit Expenses: Rs.9,00,502/-***
- ***b) Finance Cost: Rs. 89,31,807/-***
- ***c) Other Expenses: Rs. 6,09,43,990/-***
- ***d) Deferred Tax Expense: Rs. 19,00,375/-***

totaling to Rs. 7,26,76,674/- to the cochin SEZ unit without appreciating the fact that these were specifically incurred by non SEZ units and that proportionate theory cannot be adopted for all type of expenses. The expenses pertaining to SEZ are duly accounted and charged to the profits of the SEZ by the appellant.

Ground of Appeal 4)
On the facts and under the circumstances of the case and in law, the learned CIT(A) erred in not directing the AO to verify the claim of the appellant of TDS, wrongly mentioned as interest u/s 234B by the AO while computing the demand.

The appellant craves for leave to add to alter and/or withdraw the above ground of appeal, if necessary."

2. Briefly stated facts necessary for adjudication of the issue at hand are : assessee is into the business of manufacturing and exporting of plain gold jewellery and trading in diamonds, dealing in commodity, shares and units of mutual funds. For the year under assessment the assessee credited sale receipts aggregating to Rs.1,43,81,24,368/- and other receipts aggregating to Rs.14,76,75,855/- on account of sale receipts and dividend interest etc. in its P&L account. The assessee, after debiting various expenses viz. manufacturing, payments and provisions for employees, selling and administrative expenses and interest and finance charges, has declared loss of Rs.10,29,60,185/-. The AO invoked the provisions contained under section 14A read with rule 8D and thereby made disallowance under section 14A to the tune of Rs.47,27,561/-. The assessee disputed the disallowance made by the Assessing Officer (AO) under section 14A on its dividend income of Rs.79,21,046/- claimed exempt under section 10(34) of the Income Tax Act, 1961 (for short 'the Act').

3. The AO also allocated 20% of the various expenses amounting to Rs.7,26,76,674/- and thereby framed the assessment

at the total income of (-)Rs.8,23,06,394/- under section 143(3) of the Act. The AO also questioned the deduction claimed by the assessee under section 10A of the Act to the tune of Rs.1,59,15,570/- and thereby computed the deduction under section 10A at nil and thereby framed the assessment at the total income of (-)Rs.8,23,06,394/- under section 143(3) of the Act.

4. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the same. Feeling aggrieved the assessee has come up before the Tribunal by way of filing present appeal.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

Ground No.1

6. Undisputedly, the Ld. CIT(A) vide impugned order has confirmed the disallowance to the extent of Rs.47,15,061/- being 0.5% of average investment of Rs.94,30,12,136/- for the purpose of computing disallowance under section 14A of the Act. It is also not in dispute that as per the working given by the assessee in tabulated form available at page 2 of the submissions made before the Ld. CIT(A) the investment made by the assessee in Suraj Diamond Ltd., the average of which is Rs.208366501/-, has only generated the dividend income and rest of the investment has not generated any dividend income which is extracted for ready perusal as under:

Investment	2012	2011	Average Investment	Exempt Income Earned	Disallowance u/s 14A i.e 0.5% of the avarage investment
LIC MF Liquid Fund	2,16,982	2,03,487	2,10,234	67,218	1051
Union KBC Tax Saver Scheme	10,00,000	0	5,00,000	Nil	-
Union KBC Dynamic Bond Fund	1,00,00,000	0	50,00,000	Nil	-
Professional Diamond Limited	4,05,000	4,05,000	4,05,000	Nil	-
Suraj Diamond Dealers Limited	10	10	10	Nil	-
SJR Diamonds & Jewellery Limited	130	130	130	Nil	-
Suraj Diamond Industries Pvt Ltd	20,35,00,000	10,35,00,000	15,35,00,000	Nil	-
Forever Diamonds Private Limited	15,00,000	15,00,000	15,00,000	Nil	-
Forever Precious Jewellery and Diamonds Ltd	57,35,30,261	57,35,30,261	57,35,30,261	Nil	-
Nifty Outperformer -Non convertible NCD	0	50,00,000	25,00,000	Nil	-
NSC	1,00,000	1,00,000	1,00,000	Nil	-
Suraj Diamonds and Jewellery Limited	27,73,66,501	13,93,66,501	20,83,66,501	78,54,187	10,41,833
(Also known as Winsome Diamonds and Jewellery Limited)					
		Total Disallowance u/s 14A			**10,42,884**

7. It is also not in dispute that the total income generated by the assessee from the investment made is Rs.79,21,406/-. The Ld. A.R. for the assessee contended that for the purpose of computing disallowance under section 14A only the investment of Rs.20,85,76,735/-, which had generated income of Rs.79,21,406/- is to be taken under rule 8D(iii). The Ld. A.R. for the assessee relied upon the decision rendered by the Hon'ble High Court of Calcutta in case of Pr.CIT vs. REI Agro Ltd. (2022) 140 taxmann.com 71 (Calcutta) wherein it is held that while making disallowance under section 14A read with rule 8D in relation to

income which does not form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income, meaning thereby only investments which yield exempt income during the year only are to be considered for the purpose of making disallowance under section 14A for computing the average value of the investment.

8. In view of the matter, we are of the considered view that the Ld. CIT(A) has erred in making disallowance under section 14A by taking into consideration all investments made by the assessee which have not generated any income rather he was required to take into consideration only investment of Rs.20,85,76,735/- which attracted dividend income to the tune of Rs.79,21,406/- for the purpose of rule 8D(iii) of the Income Tax Rules. So we hereby set aside the findings returned by the Ld. CIT(A) and direct the AO to make disallowance under section 14A by taking into consideration average investment of Rs.20,85,76,735/- as explained in the table extracted in the preceding paras after due verification. So ground No.1 raised by the assessee is allowed.

Ground Nos.2 & 3

9. The Ld. CIT(A) confirmed the findings returned by the AO denying the claim made by the assessee seeking deduction of Rs.1.59 crore under section 10A by restricting the same at nil by following the order passed by his predecessor, the Ld. CIT(A) in A.Y. 2011-12 vide order dated 07.03.2017.

10. The Ld. A.R. for the assessee challenged the impugned order on the sole ground that this issue has already been decided in

favour of the assessee in its own case by the Tribunal for A.Y. 2011-12 in ITA No.4548/M/2017 order dated 14.06.2019 and brought on record, copy available at page 84 to 102 of the paper book.

11. We have perused the order passed by the co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 2011-12 which is on identical issue and has been decided in favour of the assessee. Operative part of the order passed by the co-ordinate Bench of the Tribunal is extracted for ready perusal as under:

> ***"11. We have carefully considered the rival submissions.***
>
> ***11.1 The first issue concerns maintainability of estimation of profit of SEZ unit at 3% of the turnover by replacing 6.95% which is claimed to be actual profit of the unit eligible for deduction under s.10AA of the Act. The AO has alleged that the assessee produced more than ordinary profits that is expected to arise in eligible business. As a consequence, the benefit of deduction under s.10AA of the Act has been scaled down from Rs.13.69 Crores claimed by the assessee to Rs.5.92 Crore estimated by the AO. On the basis of the factual data, it is the case of the AO that the eligible unit in SEZ at Cochin has yielded net profit of Rs.13,69,95,563/- on a turnover of Rs.197.34 Crore which works out to 6.95% of the turnover which when compared with non SEZ units at Mumbai and Surat gives an impression of yielding extraordinary profits in eligible unit. It is the case of the AO that both eligible and non eligible units are engaged in similar line of business. While Cochin unit is engaged in selling of plain gold coins, the non eligible units are also engaged in selling of gold and diamond. The parties to whom the aforesaid commodities are supplied from different units are also the same. It is also the case of the AO that Cochin unit is merely engaged in conversion of gold bar to gold coin and therefore hardly any manufacturing activity is involved which is also proved by meager manufacturing expenses in few thousands. While the Cochin unit where the deduction is available under s.10AA of the Act and consequently the profit is not taxable, the assessee has declared a whopping profit of Rs.13.69 Crores on a turnover of Rs.197.34 Crores, the Mumbai & Surat units (non eligible units) on the other hand have declared a loss of Rs.66.06 Lakhs on a turnover of Rs.165.42 Crores despite similarity in business model. It is thus the case of the AO that in view of similar nature of business of SEZ unit and non SEZ unit, substantial variation in the net profit ratio requires to be tested under the provisions of Section 80IA(8) and 80IA(10) of the Act owing to the***

provisions of Section 10AA(9) of the Act in terms of which the assessee would be eligible for deduction under s.10AA of the Act only to the extent of ordinary profits from the SEZ unit. While holding the profits arising from SEZ unit at Cochin to be extraordinary vis-à-vis non SEZ unit, it is also the case of the AO that both units have supplied goods to the same set of customers and one of the customer M/s. Suraj Diamond Industries Pvt. Ltd. is an associate company of the assessee. It is also alleged that the assessee has claimed meager expenses in respect of its units at SEZ and inflated the profits. This apart, it is further case of the AO that the assessee had made an arrangement whereby it shifted the profit from non SEZ units on account of sale to associated parties namely M/s. Suraj Diamond Industries Pvt. Ltd. and two other parties in Dubai and generated extraordinary profits from sale of goods from its Cochin SEZ unit from supply to the similar parties. It is the case of the AO that the manufacture at SEZ unit is simply a process for conversion of gold bar into gold coins which does not require any value addition to the final product and therefore would entail low profit margins of 1% to 2% as against profit of 6.95% shown by the assessee. The AO further claimed that the assessee has not shown any wastage of gold in SEZ unit which is inevitable and thereby profits have further gone upward.

11.2 The assessee, on the other hand, has rebutted the basis of the AO and submitted that supply to associate company M/s. Suraj Diamond Industries Pvt. Ltd. is only Rs.20 Crores out of Rs.165 Crores of non SEZ unit (wrongly mentioned to be Rs.130 Crores by the AO) and therefore supply to the associate company is meager. It is further case of the assessee that Cochin SEZ is engaged in manufacturing activities whereas non SEZ segment has done only trading business and therefore disparity in profit margins are bound to occur. The Cochin SEZ has exported the manufactured goods to unrelated parties and therefore there is clear absence of any possibility towards 'arrangement' for declaring extraordinary profit. It is also the case of the assessee that neither Section 80IA(8) is applicable nor Section 80IA(10) is applicable to the facts of the case and therefore, adjustment to the eligible profit under s. 10AA of the Act is without authority of law. It is also the case of the assessee that the AO could not have estimated profit @ 3% under the normal provisions in the absence of rejection of books accounts under s.145(3) of the Act and in the absence of any specific defects pointed out in the books.

11.3 At this stage, we observe that the profits eligible for deduction under s.10AA of the Act can suitably be reduced by the AO where the provisions of Section 80IA(8) or 80IA(10) of the Act found to be attracted. At this juncture, we refer to Sub-section (8) and Subsection (10) to Section 80IA of the Act to which the reference has been made under s.10AA(9) of the Act. It is the case of the assessee that it has neither transferred any goods or services held for the purpose of eligible business to any other business carried on by the assessee nor

has transferred any goods or service held for the purpose of any other business carried on by the assessee to the eligible business. The AO has not brought any material on record to prove so. In the light of such fact situation, we hold that the conditions for applicability of Sub-section (8) to Section 80IA of the Act are clearly not met.

11.4 We now advert to Section 80IA(10) of the Act to find out as to whether the AO was empowered to make adjustments to the eligible profit claimed under s.10A of the Act on the grounds of extraordinary profits. As noticed, it is the case of the AO that assessee has indulged in arrangement whereby the profits of non eligible units have been shifted to eligible unit through the conduit of same set of customers and related parties. The AO has accordingly alleged that assessee has made an 'arrangement' whereby it did not make any profit from non SEZ unit for supply of similar commodity while has generated extraordinary profits in SEZ units in the similar circumstances. In this context, we take note of the plea on behalf of the assessee that there must be a 'close connection' between the assessee carrying on eligible business and the other person i.e. its customers in the instant case for Section 80IA(10) of the Act to come into play. The assessee has pointed out that Cochin SEZ has exported goods to unrelated parties and therefore there is total absence of any close connection contemplated in the aforesaid provision and consequently no arrangement can be inferred. The Hon'ble Bombay High Court in the case of Malay Sanghvi (supra) relied upon by the assessee has observed that the test of common customers of eligible unit and non eligible unit by itself would not indicate transfer of profits to eligible units in the absence of some arrangement. Pertinent here to say, the observations made by AO towards absence of profits as non-eligible unit qua eligible unit engaged in similar business do raise strong suspicion. However, such circumstances can not in our view, lead to inference of presence of 'arrangement' in the absence of any objective material. The arrangement demonstrated by the AO by circumstantial inference is obscure. The AO has primarily compared the profits of the two units and has inferred the presence of arrangements which to our mind would not fulfill the objective requirement of law without anything more. Similar view has been taken by the co-ordinate bench in Aquila Software Services Hyderabad (P) Ltd. (supra) and Pramukh International (supra). The Hon'ble Delhi High Court in the case of CIT vs. Delhi Press Patra Prakashan Ltd. (2013) 355 ITR 1 (Delhi HC) has emphasized on presence of justifiable reasons for invoking Section 80IA(8), (9) & (10). The Hon'ble Bombay High Court in Schmetz India (P) Ltd. (supra) has also observed that merely because an assessee makes an extraordinary profit, it would not lead to the conclusion that same was organized / arranged. The onus is on AO to prove the presence of any arrangement between the parties which have resulted in extraordinary profits to the eligible unit. The AO could have, at least, brought variation in price of supply of commodity from different

units on record to establish collusion/arrangement. The onus remains undischarged except for presence of suspicious circumstances.

11.5 We have perused the decision rendered by Hon'ble Punjab & Haryana High Court in the case of Deepak Verma (supra) relied upon on behalf of the Revenue. The aforesaid case relates to re-allocation of expenses between eligible unit and non eligible unit. We agree with the case made out on behalf of the AO for re-allocation of expenses to the extent of Rs.17.70 Lakhs and therefore do not delineate with the same any further.

11.6 Therefore, in the light of factual position and applicable law as interpreted by the judicial fiats, we are of the view that Section 80IA(8) and 80IA(10) of the Act has not applicability to the facts of the Case. Therefore, the adjustments made by the AO scaling down the deduction under s.10AA of the Act, is without sanction of law. The order of the CIT(A) is accordingly set aside. At this stage, we however also notice that the AO had made re-allocation of expenditure to Rs.17,70,848/- to SEZ unit on account of common expenses debited in non SEZ unit on account of salary, bank charges, legal and professional fees and repair & maintenance fees etc. The CIT(A) has granted relief towards this adjustment for the reason that once the adjustment has been made by applying net profit rate of 3%, no separate re-allocation would be necessary. However, once the regular profits as declared for eligible unit is restored, the re-allocation of expenses relatable to eligible unit would be necessary. This aspect was confronted to the assessee in the course of hearing. It was fairly conceded on behalf of the assessee that it does not seek to press the aforesaid re-allocation on restoring the claim of deduction of the assessee. In the light of the aforesaid decision, the AO directed to restore the claim of deduction under s.10AA of the Act subject to adjustment towards re-allocation of expenses to the extent of Rs.17.70 Lakhs.

11.7 Accordingly, the issue concerning deduction of expenses under s.10AA of the Act is allowed in part."

12. Following the order passed by the co-ordinate Bench of the Tribunal which is applicable to the issue at hand we are of the considered view that the AO as well the Ld. CIT(A) have arrived at factually wrong finding that both eligible and non eligible units of the assessee are engaged in similar line of business. Because Cochin unit is into manufacturing and exporting of plain gold coin whereas non Special Economic Zone (SEZ) unit is into trading of

gold and diamond jewellery and the same cannot be treated at the same footing. At the same time profitability in case of both the business in SEZ and non SEZ cannot be the same. So in the absence of rejection of books of account adhoc assumption of profit at 3% of turnover is not sustainable in the eyes of law.

13. So far as question of allocating 20% of the various expenses to the tune of Rs.7,26,76,674/- to the Cochin SEZ unit is concerned, out of employees benefit expenses, finance cost and other expenses and deferred tax expenses the last head of deferred tax expenses of Rs.19,00,375/- are not liable to be considered because the same are not expenses in fact. The Ld. A.R. for the assessee contended that allocating 20% of the various expenses to Cochin SEZ unit is not sustainable because these were specifically incurred by non SEZ unit and in such cases proportionate theory cannot be adopted for all types of expenses and further contended that the expenses pertaining to SEZ are duly accounted and charged to the profits of the SEZ by the assessee. This issue was also come up before the Tribunal in assessee's own case for A.Y. 2011-12 which was decided by returning following findings:

> ***"At this stage, we however also notice that the AO had made re-allocation of expenditure to Rs.17,70,848/- to SEZ unit on account of common expenses debited in non SEZ unit on account of salary, bank charges, legal and professional fees and repair & maintenance fees etc. The CIT(A) has granted relief towards this adjustment for the reason that once the adjustment has been made by applying net profit rate of 3%, no separate re-allocation would be necessary. However, once the regular profits as declared for eligible unit is restored, the re-allocation of expenses relatable to eligible unit would be necessary. This aspect was confronted to the assessee in the course of hearing. It was fairly conceded on behalf of the assessee that it does not seek to press the aforesaid re-allocation on restoring the claim of deduction of the assessee. In the light of the aforesaid decision, the AO directed to restore the claim of deduction under***

s.10AA of the Act subject to adjustment towards re-allocation of expenses to the extent of Rs.17.70 Lakhs."

14. Following the aforesaid order passed by co-ordinate Bench of the Tribunal, we are of the considered view that the AO is directed to make the adjustment towards re-allocation of expenses of Rs.7,26,76,674/- as per findings given by Tribunal in A.Y. 2011-12. Accordingly, grounds no.2 & 3 are partly allowed in favour of the assessee.

15. In view of what has been discussed above, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 30.11.2022.

Sd/-	**Sd/-**
(GAGAN GOYAL)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 30.11.2022.

* 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//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.