

आयकर अपीलीय अधिकरण 'डी' न्यायपीठ चेन्नई में।

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

माजनीय श्री महावीर सिंह, उपाध्यक्ष एवं

माजनीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।

BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND

HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM.

आयकर अपील सं./ **ITA No.1390/Chny/2016**
(निर्धारण वर्ष / **Assessment Year: 2008-09**)

M/s. Siva Industries and Holdings Ltd. (merged entity of M/s Siva Ventures Ltd.) New No.19, Old No.32, Cathedral Garden Road, Nugambakkam Chennai – 600 034	बनाम/ Vs.	DCIT Corporate Circle-3(2), Chennai.
स्थायी लेखा सं./जी आइ आर सं./ PAN/GIR No. AAACS-8496-D		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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आयकर अपील सं./ **ITA No.1417/Chny/2016**
(निर्धारण वर्ष / **Assessment Year: 2008-09**)

DCIT Corporate Circle-3(2), Chennai.	बनाम/ Vs.	M/s. Siva Industries and Holdings Ltd. (merged entity of M/s Siva Ventures Ltd.) New No.19, Old No.32, Cathedral Garden Road, Nugambakkam Chennai – 600 034
स्थायी लेखा सं./जी आइ आर सं./ PAN/GIR No. AAACS-8496-D		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकी ओरसे/ Assessee by	:	Shri B. Ramakrishnan (CA) – Ld. AR
प्रत्यर्थीकी ओरसे/ Department by	:	Ms. Ann L.Kapthuama (CIT) –Ld. DR
सुनवाईकी तारीख/ Date of Hearing	:	29-09-2022
घोषणाकी तारीख / Date of Pronouncement	:	23-12-2022

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1.1 Aforesaid cross-appeals for Assessment Year (AY) 2008-09 arises out of the order of learned Commissioner of Income Tax (Appeals)-15, Chennai [CIT(A)] dated 09.02.2016 in the matter of an assessment framed by learned Assessing Officer u/s 143(3) r.w.s. 92CA on 25.01.2012.

1.2 The erstwhile assessee M/s Siva Venture Limited has merged with M/s Siva Industries and Holdings Limited. The assessee is stated to be a venture capital infrastructure company with an aim of promoting strategic tie ups in emerging sectors such as telecom, shipping, realty, renewable energy, media etc. The assessee creates sector specific special purpose vehicle (SPV) and invests in capital intensive projects having long gestation period to harness value of investments.

1.3 The grounds raised by the assessee read as under: -

1. The order passed by the learned Commissioner of Income-tax Appeals ["CIT(A)"] under section 250(6) of the Income-tax Act, 1961 ("Act") confirming the order of the learned Assessing Officer ("AO") passed under section 143(3) of the Act is not in accordance with law, contrary to the facts and circumstances of the present case and is in violation of principles of equity and natural justice.

Validity of the Assessment Proceedings

2. The Learned CIT(A) and the Learned AO erred in passing the assessment order in the name of a non-existent company and hence, the order passed by the learned AO is bad in law and liable to be quashed.

Corporate Tax Adjustment

Disallowance under section 14A

3. The Learned CIT(A) and Learned AO have erred in law and on facts by disallowing INK 7,76,81,139 under section 14A of the Act read with Rule 8D of the Rules.

4. The Learned CIT(A) and Learned AO erred in law and on facts by applying the provisions of under section 14A of the Act read with Rule 8D of the Rules, without any satisfaction on record to prove that the claim of the appellant is incorrect.

5. The Learned CIT(A) and Learned AO have erred in law and on facts by not considering the favorable decision of the Hon'ble Tribunal of Chennai in the appellant's own case for the AY 2006-07 on similar facts.

6. The Learned CIT(A) and Learned AO have erred in law and on facts in failing to appreciate that the loans were utilised for making strategic investments into wholly

owned subsidiary companies outside India, which was with the intention of harnessing long term benefit in the form of increase in business value and with the intention of earning income by way of interest and dividend income which are subject to tax in India, in respect of which section 14A of the Act ought not to apply.

7. The Learned CIT(A) and Learned AO have erred in not appreciating that section 14A of the Act was not applicable because the expenditure incurred by the appellant does not have any nexus with the exempt income earned by the appellant.

8. The Learned CIT(A) and Learned AO have erred in not appreciating the fact the appellant has proved that investments from which the dividend has been received during the year, have been made out of own funds (i.e. internal accruals).

9. The Learned CIT(A) and Learned AO have failed to appreciate that during the relevant financial year the appellant had more interest income than interest expenses and hence, the provisions of section 14A of the Act ought not to apply.

10. The Learned CIT(A) and Learned AO has erred in making the disallowance merely for the reason that the appellant had interest expenditure in its business without establishing any nexus between the expenditure and exempt income, and without establishing any proximate cause for disallowance under section 14A of the Act and merely on the basis of presumptions.

11. The Learned CIT(A) and Learned AO have erred in law and on facts by making disallowance under section 14A of the Act without appreciating that the scope of disallowance under the said provision is limited to expenditure incurred 'in relation to' income which does not form part of total income under the Act.

12. The Learned CIT(A) and Learned AO erred in law and on facts by relying upon ***Cheminvest Limited vs ITO (121ITD 318)***, though they are on a completely different set of facts, clearly distinguishable and not applicable to the appellant's case, also without appreciating the fact the decision of Cheminvest Limited (Supra) has been over turned by the Hon'ble Delhi High Court.

Disallowance of consulting fee

13. The Learned CIT(A) and the Learned AO failed to appreciate that the consulting fee was incurred in the normal course of business and does not result in any enduring benefit to the appellant.

14. The Learned CIT(A) erred in upholding the action of the Learned AO ignoring the fact the appellant has incurred the expenses towards receiving advisory services in relation to setting up of subsidiary and not towards setting up of subsidiary itself.

15. The Learned CIT(A) and the Learned AO erred in ignoring the fact that the expression "for the purpose of business or profession" occurring under the provision is wider in scope and even includes expenditure voluntarily incurred for commercial expediency and it is immaterial even if a third party also benefits thereby.

Disallowance of escrow fee

16. The Learned CIT(A) and the Learned AO failed to appreciate that the escrow fee was incurred in the normal course of business and does not result in any enduring benefit to the appellant.

17. The Learned CIT(A) and the Learned AO erred in ignoring the fact that the expression "for the purpose of business or profession" occurring under the provision is wider in scope and even includes expenditure voluntarily incurred for commercial expediency and it is immaterial even if a third party also benefits thereby.

Transfer Pricing Adjustment

OFCD Interest

18. The Learned CIT(A) and the Learned AO erred in law and on facts in not considering the valuation report provided by a professional, which proves that the effective rate of interest annualized yield on the investment in OFCDs is higher than the arm's length rate of interest on a lending in foreign currency.

19. The Learned CIT(A) and the Learned AO erred in law and on facts in not appreciating the fact that the investments in OFCDs are quasi-equity investments, since OFCDs have an inherent option to convert into equity shares and further, not

appreciating the fact that part of the investments in OFCDs were actually converted into equity in the AY 2010-11.

20. The Learned CIT(A) and the Learned AO erred in rejecting zero percent Fully and Compulsorily Convertible Bonds ("FCCBs") which were issued by third parties during the same period as Comparable Uncontrolled Price ("CUP") transactions for the OFCDs and hence, the receipt of interest at the rate of 2 percent was at arm's length.

21. The Learned CIT(A) and the Learned AO erred in law and on facts in not appreciating that the overseas subsidiaries have incurred loss and therefore, there is no question of shifting profits.

22. Without prejudice to the other grounds, the Learned CIT(A) and the Learned AO erred in not considering the alternate plea of the appellant that at best the rate of interest earned on OFCD can be compared to LIBOR. The LIBOR for the year was 4.41 percent. Therefore, addition at best could have been to the extent of 2.41 percent, amounting to INR 11,666,280.

23. The Learned CIT(A) and the Learned AO erred in not giving the TDS credit of INR 7,81,05,442 while computing the tax payable.

Ground number 1 is general in nature. Ground No.2 has not been pressed. Ground Numbers 3 to 12 are connected with disallowance u/s 14A. Ground Numbers 13 to 15 are connected with disallowance of consulting fees. Ground Numbers 16 to 17 are connected with disallowance of escrow fees. In Ground Numbers 18 to 22, the grievance of the assessee is Transfer Pricing (TP) adjustment on debentures. In ground no.23, the assessee seeks correct TDS credit for which it would suffice on our part to direct Ld. AO to grant TDS credit in accordance with law considering the submissions made by Ld. AR that the assessee has already furnished the copies of TDS certificates to Ld. AO. This ground stand allowed for statistical purposes.

1.4 The grounds raised by the revenue read as under: -

1. The order of the Ld. CIT(A), is contrary to the law and facts of the case.
2. The Ld. CIT(A) has directed the AO to delete upward adjustment of Rs.40,96,82,652/-
 - 2.1 The Ld. CIT(A) has failed to note that the TPO after due consideration of the all issues raised by the assessee has considered adjustment to the tune of Rs.42,45,31,144 to the value of international transactions.
 - 2.2 The Ld. CIT(A) has failed to note that the TPO added the amount of Rs.42,45,31,144/- that the income of the assessee company as adjustment u/s 92CA of the IT Act.
 - 2.3 The Ld. CIT(A) failed to note the order of the DRP for the Asst year 2010-11 in the assessee's case has been further appealed against.

2.4 The Ld. CIT(A) has directed the AO to recompute book profit U/s 115JB after excluding disallowance u/s 14A.

2.5 The Ld. CIT(A) (A) failed to consider a divergent view taken in the case of DCIT Vs M/s Shoba Developers 58 Taxmann.com 107 (Bangalore)

As is evident, the revenue is aggrieved by relief provided by Ld. CIT(A) on account of certain Transfer Pricing Adjustment. The revenue also assails the findings that disallowance u/s 14A was not to be added back while computing Book-Profits u/s 115JB.

1.5 The Ld. AR advanced arguments assailing the findings rendered in impugned order which has been controverted by Ld. CIT-DR. Having heard rival submissions and after perusal of case records including the documents placed before us, the cross-appeals are disposed-off as under.

2. Transfer Pricing Adjustments

2.1 The assessee, as an investment organization, seeks to make strategic investments in wholly owned subsidiaries. The assessee advanced funds to two of its Associated Enterprises (AE) i.e., Avis Ventures Ltd., Mauritius (AVL) and Daleworld Ltd., Cyprus (Dale). Both these entities are subsidiaries of the assessee and have business objectives which are similar to parent assessee entity. The assessee advanced loans and subscribed to debentures of its Associated Enterprises (AE) which were subjected to determination of Arm's Length Price (ALP) before Ld. Transfer Pricing Officer, Chennai (TPO) vide order dated 31.10.2011. The Ld. TPO proposed certain adjustments which are as under.

2.2 The assessee advanced loan of USD 25 Million to AVL on 15.06.2006. The loan was for a period of 5 years and interest was chargeable as 2% in first year, 8% in next two years and 6% in last two

years. The assessee also advanced corporate guarantee for this entity for Euro 40 million against term loan availed by AVL from Standard Chartered Bank, Mauritius on 14.03.2007. The assessee did not charge any fees on corporate guarantee.

2.3 The assessee subscribed to optionally fully convertible debentures (OFCD) of USD 73.4 million issued by Dale during February, 2008. The OFCD had tenure of 10 years and carried coupon of 2%. The OFCD were subscribed with a view to enable Dale to acquire a shipping company (JB, Uglund, Norway) through another newly incorporated entity namely Avis Ventures, Norway (AVL, Norway) in which Dale held 85% of equity. The assessee provided bank guarantee of USD 197 million for AVL, Norway whereas Dale advanced loan of USD 120 million and corporate guarantee of USD 197 million to this entity. The loan of USD 120 million was funded by Dale out of issuance of OFCD to the assessee for USD 89 million whereas AVL, Mauritius advanced loan of 30 million to Dale.

2.4 In the above facts, Ld. AO held that the funding of Avis Ventures, Norway through Dale appeared to be corporate veil masking the actual motive behind the arrangement. The funds to Avis Ventures, Norway were met by the assessee and funds have finally been used to acquire a shipping company. The Dale has been roped into reap the benefits of capital gains for the assessee. Therefore, the arrangement was to be viewed as one made between the assessee and Avis Ventures, Norway without the involvement of Dale. The terms of the debentures would show that the same could not be called as OFCD in strict sense but at best could be viewed as loan and therefore, the assessee's plea that the same should be bench-marked at FCCB rates could not be

accepted. The effective rate charged by the assessee from AVL was 6.77% as against ALP rate of LIBOR+1.9%=6.31% taken by the assessee. Accordingly, ALP rate on OFCD was to be considered as 6.31%. Applying the same to the transaction of OFCD, Ld. TPO worked out TP adjustment of Rs.148.48 Lacs.

2.5 Proceeding further, the Ld. TPO benchmarked the corporate guarantee given by the assessee to its subsidiaries. The Ld. TPO benchmarked the same @3.5% and arrived at TP adjustment of Rs.4096.82 Lacs and proposed this adjustment in its order.

2.6 Both the above adjustments were incorporated by Ld. AO in assessment order dated 25.01.2012 which was subjected to further challenge before Ld. CIT(A).

2.7 In connection with above acquisition of JB, Ugland, the assessee entered into consultancy agreement on 11.10.2007 with Standard Chartered Bank and paid advisory fees of Rs.1370.90 Lacs. Since no investment was made by the assessee in JB, Ugland directly, Ld. AO held that such expenditure should have been debited in the books of Dale and not in the books of the assessee. Therefore, the claim of expenditure was disallowed. The assessee paid escrow fees of Rs.2.01 Lacs in connection with the above transaction which was also disallowed in similar logic.

2.8 The Ld. CIT(A), following DRP order for AY 2010-11, upheld the ALP rate of LIBOR+1.9% and confirmed the TP adjustment on OFCD. The TP adjustment of corporate guarantee was deleted by following DRP order for AY 2010-11 wherein it was held that this transaction would not constitute international transaction. The disallowance of

consultancy fees and escrow fees was confirmed. Aggrieved, the assessee as well as the revenue is in further appeal before us.

3. Our findings and Adjudication

3.1 So far as the TP adjustment against OFCD is concerned, we find that the assessee has subscribed to debentures of its subsidiary foreign entity and the same carry coupon rate of 2%. The debentures would give an option to the assessee to subscribe to the shares at a later date and therefore, the same would carry inherent benefit for the assessee in future. The recharacterization of the same into a loan transaction could not be held to be justified since this is mere presumption without there being anything contrary on record. The investment in OFCD, therefore, could not be equated to a grating of loan. The benchmarking rate, on such a transaction, could be compared with Foreign Currency Convertible Bonds (FCCB) which provide similar right of conversion to the investors. The assessee, in its submissions to Ld. TPO vide reply dated 05.09.2011, provided data available in public domain wherein interest rate charged by issuer on FCCB carried zero interest rate as against the fact that the assessee has received coupon rate of 2%. Therefore, the adjustment so made by lower authorities could not be upheld. By deleting the same, we allow this ground raised by the assessee.

3.2 So far as the benchmarking of corporate guarantee is concerned, we find that this issue is squarely covered by the decision of Mumbai Tribunal in **Everest Kanto Cylinders Ltd. vs. DCIT (34 Taxmann.com 19)** as affirmed by Hon'ble Bombay High Court on 08/05/2015 (58 Taxmann.com 254) wherein this transaction was held to be an international transaction and the same was benchmarked

@0.50%. Respectfully following the same, we direct Ld. AO / TPO to adopt benchmarking rate of 0.50% and recompute the adjustment. The grounds raised by the revenue stand partly allowed.

3.3 So far as the payment of advisory fees and escrow fees is concerned, we find that the assessee has incurred such expenditure in furtherance of business interest of making investment since the ultimate purpose of expenditure was to acquire a shipping company. The payment has been made as per contractual term and the same was in connection with achieving business objective. Therefore, the ratio of decision of Hon'ble Apex Court in **S.A.Builders V/s CIT (288 ITR 1)** would apply wherein it was held that the expenditure borne out of commercial expediency would be allowable to the assessee. It was also held by Hon'ble Apex Court that once it was established that there was nexus between the expenditure and purposes of business, which need not be the business of the assessee, deduction u/s 36(1)(iii) was to be allowed. It was further held that the expression 'commercial expediency' is an expression of wide import and includes such expenditure as prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency. Further, the expression 'for the purpose of business' is wider in scope than the expression 'for the purpose of earning profits'. Considering the same, both expenditures would be allowed to the assessee. We order so. The corresponding grounds raised by the assessee stand allowed.

4. Disallowance u/s 14A

4.1 The assessee earned exempt dividend income of Rs.1155.20 Lacs whereas assessee debited interest expenditure of Rs.2283.17 Lacs. The same led Ld. AO to invoke disallowance u/s 14A. The assessee had made suo moto disallowance of Rs.4.13 Lacs as quantified by Tax Auditor and submitted that no expenditure was incurred to earn the exempt income. The investment in share was purely strategic investment. At the same time, the assessee pointed out that during the year, the investment of the assessee increased by Rs.1494 Crores which was sourced out of internal accruals generated out of profits earned during the current year as well as from accumulated profits and cash flow from working capital reduction. The assessee further submitted that income from overseas subsidiaries in the form of interest and dividend would be taxable and not exempt. Therefore, the provisions of Sec.14A would not apply in such a case. However, rejecting the same, Ld. AO worked out aggregate disallowance of Rs.934.74 Lacs u/r 8D which was interest disallowance u/r 8D(2)(ii) for Rs.157.95 Lacs and indirect expense disallowance u/r 8D(2)(iii) for Rs.776.81 Lacs. After adjusting suo moto disallowance of Rs.4.13 Lacs as offered by the assessee, net disallowance of Rs.930.60 Lacs was made. The Ld. CIT(A) directed Ld. AO to re-compute the disallowance after excluding a sum of Rs.369.56 Lacs. The assessee also assailed the adjustment of disallowance u/s 115JB. The Ld. CIT(A) directed Ld. AO to not to make this adjustment. Aggrieved, the assessee as well as revenue is in further appeal before us.

4.2 The short submissions of Ld. AR are that investment made in overseas entities would not yield any exempt income. Further, considering average of exempt yielding investments, the disallowance u/r 8D(2)(iii) would work out to be Rs.114.86 Lacs. Another submission is that the investments have been sourced out of internal accruals and therefore, interest disallowance would not be justified. Concurring with the same, we direct Ld. AO to consider only those investments which have actually yielded exempt income during the year and re-compute disallowance u/r 8D(2)(iii). If the assessee's own funds exceed the investments made, no interest disallowance would be justified. The assessee is directed to furnish requisite details and computations. The grounds raised by the assessee stand partly allowed.

4.3 The disallowance made u/s 14A could not be added back u/s 115JB as per the decision of Special Bench of ITAT in **ACIT vs. Vireet Investment (P.) Ltd. 82 Taxmann.com 415**. Therefore, the impugned order, on this count, could not be faulted with. The grounds raised by the revenue stand dismissed.

Conclusion

5. The appeal of the assessee as well as the appeal of the revenue stand partly allowed in terms of our above order.

Order pronounced on 23rd December, 2022.

Sd/-

(MAHAVIR SINGH)

उपाध्यक्ष / VICE PRESIDENT

चेन्नई/ Chennai; दिनांक/ Dated :

JPV

Sd/-

(MANOJ KUMAR AGGARWAL)

लेखासदस्य / ACCOUNTANT MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त (अपील)/CIT(A) 4. आयकरआयुक्त/CIT 5. विभागीयप्रतिनिधि/DR6. गार्डफाईल/GF