

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'C' 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. No.3423/Chny/2019
निर्धारण वर्ष/**Assessment Year: 2012-13**

M/s. FLSmidth Private Limited,
No.34, Egatoor, Kelambakkam,
Rajiv Gandhi Salai,
Chennai – 603 103.
[PAN: AAACF4997N]

The Assistant Commissioner of
Income Tax,
Company Circle – 2 (1),
Chennai – 600 034.

(अपीलार्थी /Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri S.P. Chidambaram, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri M. Rajan, CIT
सुनवाई की तारीख/ Date of hearing : 01.03.2023
घोषणा की तारीख /Date of Pronouncement : 08.03.2023

आदेश /ORDER

PER V. DURGA RAO, JUDICIAL MEMBER:

This appeal filed by the assessee is against the order of the Id. Commissioner of Income Tax (Appeals)-5, Chennai dated 11.10.2019, relevant to the assessment year 2012–13. The grounds raised by the assessee are as under:

- “1. *The order of the Commissioner of Income Tax (Appeals) ['CIT (A)'] is contrary to law, facts and circumstances of the case.*
2. **Disallowance under Section 14A of the Act read with Rule 8D**
 - 2.1. *On facts and circumstances of the case and in law, the learned CIT(A) erred in confirming the action of the AO in making disallowance of Rs. 75,94,632 under Section 14A read with Rule 8D.*

- 2.2. *The CIT(A) ought to have appreciated that the Appellant did not incur any expenditure for earning the exempt dividend income.*
- 2.3. *The CIT(A) failed to appreciate that the Appellant had voluntarily made a disallowance in the tax return, the quantum of which was just and equitable and hence there was no requirement to invoke Rule 8D.*
- 2.4. *The CIT(A) failed to appreciate that the investments were not made from borrowed funds but were made out of internal accruals during the year and hence disallowance under section 14A is unwarranted.*
- 2.5. *Without prejudice to the above grounds, the CIT(A) erred in including investments not yielding dividend income while computing the disallowance under Rule 8D.*
- 2.6. *The CIT(A) ought to have appreciated that investments in wholly owned subsidiaries have not yielded any dividend income and these subsidiaries have since merged with the Company and hence such investments not yielding dividend income should be excluded while considering investments for Rule 8D disallowance.*

3. Disallowance of provision for estimated losses on contracts

- 3.1 *On facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the AO in making disallowance of provision for estimated losses on contracts.*
- 3.2 *The CIT(A) failed to appreciate that the Appellant undertakes large construction contracts and consistently follows AS-7: Percentage of Completion Method (“POCM”), as per which estimated losses on construction contracts should be recognised as an expense immediately in the year in which it is clear that a loss will be incurred on the contract.*
- 3.3 *The CIT(A) failed to appreciate that the Appellant makes a scientific estimate of the relevant cost and revenue of contracts, and where a loss is expected to be incurred, the Appellant recognizes the estimated loss in the books of account on a scientific basis.*
- 3.4 *The CIT(A) erred in stating that the provision for estimated losses on contracts is not an ascertained liability without appreciating that the same is made on a scientific basis.*
- 3.5 *The CIT(A) erred in not considering the judicial precedents cited before him.*
- 3.6 *Without prejudice to the above grounds, the Appellant prays that the provision for estimated loss on contracts should be allowed as a deduction in the year in which it is actually incurred/reversed in the books of account.*

4. Denial of brought forward losses

- 4.1. *The CIT(A) erred in denying brought forward losses for AY 2012-13, without appreciating that the Appellant filed an appeal against the Assessment Order for AY 2010-11*
- 4.2. *Without prejudice to the above, the CIT(A) erred in confirming the order of the AO, without appreciating that the CIT(A) has issued the Order for AY 2010-11 reducing the capital gains from Rs. 6,59,07,526 to Rs. 6,39,81,926, hence the differential loss of Rs.19,25,600 should be allowed to be set-off in the subject assessment year.*
5. *The Appellant craves leave to add, alter, amend, substitute, rescind, modify and/or withdraw in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.”*

2. The first ground raised in the appeal of the assessee is general in nature and requires no adjudication.

3. Ground Nos. 2.1 to 2.6 relates to confirmation of disallowance made under section 14A of the Income Tax Act, 1961 [“Act”] in short r.w. Rule 8D of Income Tax Rules, 1962. During the course of assessment proceedings, the Assessing Officer has noticed that the assessee holds investments in shares and mutual funds to the tune of ₹.84,63,98,874/- and earned dividend of ₹.7,18,75,590/- out of such investments and claimed the entire amount as exempt. The assessee has debited only an amount of ₹.14,37,512/- as expenditure for earning this exempted income which was disallowed under section 14A of the Act in the income computation statement. Since the Assessing Officer was not satisfied with the quantum of expense claim by the assessee as attributable for earning exempted income, the Assessing Officer show-caused as to why the provisions of Rule 8D should not be invoked to compute the expense

attributable for earning exempted income. After considering the submissions of the assessee, by invoking the provisions of section 14A r.w. Rule 8D, the Assessing Officer determined the expenditure component for earning of exempt income at ₹.90,32,144/- and after reducing the voluntary disallowance made by the assessee of ₹.14,37,512/-, the Assessing Officer disallowed ₹.75,94,632/- and added to the total income of the assessee. On appeal, after considering the submissions of the assessee, the Id. CIT(A) upheld the disallowance made under section 14A of the Act.

4. On being aggrieved, the assessee is in appeal before the Tribunal. The Id. Counsel for the assessee has submitted that the assessee has raised objections before the Id. CIT(A) at para xviii and para xxi that two companies have merged with the assessee and those companies have not earned any dividend income. It was further submissions that without considering this issue raised by the assessee, the Id. CIT(A) has simply confirmed the order of the Assessing Officer and prayed for suitable directions.

5. On the other hand, the Id. DR has supported the orders of the authorities below.

6. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. Against the disallowance made under section 14A r.w. Rule 8D, before the Id. CIT(A), the assessee made detailed submissions and objections raised before the Id. CIT(A) at para xviii and para xxi are reproduced as under:

“xviii. In this regard, we wish to submit that out of total investments of Rs.272,49,71,216/- as on 31 March 2011, investments in subsidiary company, EEL India amounted to Rs.161,58,47,406. Also, out of total investments of Rs.84,63,98,874 as on 31 March 2012, investments in subsidiary company, Transweigh India Limited (Also known as FLSmidth Pfister India Limited) amounted to Rs.66,22,76,582. EEL India and Transweigh India have since merged with FLSmidth Private Limited during FY 2011-12 and FY 2013-14. The Hon'ble High Court of Madras approved the Scheme of Amalgamation of EEL India with FLSmidth Private Limited with effect from 1 April 2011 and Transweigh India with FLSmidth Private Limited with effect from 1 April 2013. Hence, such investments are strategic investments to have control over the enterprise as per global directions and have not earned any dividend income.

xxi. Accordingly, without prejudice to the above submissions, such strategic investments in EEL India amounting to Rs.161,58,47,406 and Transweigh India Limited amounting to Rs.66,22,76,582 should be excluded while considering investments for computing disallowance under Rule 8D.”

6.1 On perusal of the appellate order, we find that the Id. CIT(A) has not considered or discussed the above objections of the assessee in his order while confirming the disallowance made under section 14A of the Act. Accordingly, we set aside the order of the Id. CIT(A) on this issue and remit the matter back to the file of the Assessing Officer to adjudicate the issue afresh by considering the objections of the assessee keeping in

mind the latest decision of the Hon'ble Jurisdictional High Court in the case of PCIT v. Investor Ventures Ltd. 431 ITR 221 and also in the case of CIT v. Chettinad Logistics (P) Ltd. [2017] 248 taxman 55 (Mad). Thus, the ground raised by the assessee is allowed for statistical purposes.

7. Ground Nos. 3.1 to 3.6 relates to confirmation of disallowance of provision for estimated losses on contracts amounting to ₹.3,52,41,424/-. As per schedule 12 to the financials, the assessee has created ₹.7,91,41,347/- as a provision for estimated future losses on contracts. During the course of assessment proceedings, the assessee was asked to justify the claim. Vide letter dated 10.03.2016, the assessee has stated as under:

“During the year, the company made an incremental provisions (net) of ₹.3,53,41,424/- towards the provision for estimated loss on contracts. The said provision has been created in accordance with the principles laid down in Accounting Standard 7 – Accounting for construction contracts. The same is allowable as deduction under section 37 of the Income-tax Act, 1961.”

After considering the submissions of the assessee, the Assessing Officer has observed that the above claim of deduction under the Act is not permissible since the said loss was only an estimate, which is bound to vary due to variation in input costs and accordingly, the provision created was disallowed and added to the total income of the assessee. On

appeal, the Id. CIT(A) confirmed the disallowance made by the Assessing Officer and dismissed the ground raised by the assessee.

7.1 On being aggrieved, the assessee is in appeal before the Tribunal.

7.2 We have heard the rival contentions. Similar issue on an identical fact was subject matter in appeal before the Tribunal in assessee's own case for the assessment year 2011-12 in I.T.A. No. 1366/Chny/2017 and vide order dated 08.10.2021, by following the decision in the case of EDAC Engineering Limited [2013] 30 Taxmann.com 355 (Chennai – Trib.), the Tribunal has observed as under:

“7. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. The case of the assessee is that as per the Schedule 12 to the financials, ₹.4,38,99,923/- has been created as a provision for estimated future losses on contracts. The Assessing Officer has asked the assessee to justify the claim vide notice dated 05.02.2015. Vide letter dated 24.02.2015, the assessee has submitted that Para 21 of AS-7 stipulates that when the outcome of a construction contract can be estimated reliably, contract revenue and contract costs associated with the construction contract should be recognized as revenue and expenses respectively by reference to the stage of completion of the contract activity at the reporting date and an expected loss on the construction contract should be recognized as an expense immediately in accordance with paragraph 35 of AS-7. The Assessing Officer has considered the explanation of the assessee and observed that the said loss on an estimate, which is bound to vary due to variation in input costs. Accounting Standards are binding on the Company in so far as the preparation of books are concerned, but, are not binding for Income Tax purposes. Further, the Assessing Officer, by following the decision in the case of EDAC Engineering Limited [2013] 30 Taxmann.com 355 (Chennai – Trib.), disallowed the same and the same was confirmed by the Id. CIT(A). The assessee, neither before the Assessing Officer nor before the Id. CIT(A) substantiated the provision made by it is an ascertained liability. Even before us, the assessee has not been able to explain as to what was the necessity for the assessee to make such a provision. The Id. Counsel for the assessee has simply stated that the provision made by the assessee is

an ascertained liability. If at all, it is an ascertained liability, it is the onus on the assessee to establish that the liability is an ascertained liability. No material was placed on record before the Tribunal. Under these facts and circumstances of the case, we are of the opinion that the provision made by the assessee for a loss on contract is not an ascertained liability and it is a simple provision made by the assessee which is not allowable under section 37 of the Act.

8. *So far as case law placed by the assessee are concerned, the decision in the case of Rotork Controls India Limited v. CIT (supra) has no application to the facts of the present case. In the order passed by the Tribunal for the AY 2005-06 dated 03.08.2017, the issue dealt by the ITAT relates to provision of warranty and therefore, in our opinion, the issue under consideration need not be remitted back to the Assessing Officer. In view of the above, the ground raised by the assessee is dismissed.”*

7.3 Against the above order of the Tribunal in assessee's own for the assessment year 2011-12 dated 08.10.2021, the assessee preferred further appeal and vide order in T.C.A. No. 240 of 2022 dated 21.12.2022, the Hon'ble Jurisdictional High Court dismissed the appeal of the assessee and confirmed the order of the Tribunal. In the appellate order also, by following the decision of the Tribunal in the case of EDAC Engineering Limited [2013] 30 Taxmann.com 355 (Chennai – Trib.), the Id. CIT(A) upheld the disallowance towards provision made for expected loss to the tune of ₹.3,52,41,424/- and confirmed the addition. Thus, we find no infirmity in the order of the Id. CIT(A) on this issue and accordingly, the ground raised by the assessee is dismissed.

8. Ground Nos. 4.1 to 4.2 relates to confirmation of denial of brought forward losses. After setting off of the losses, the assessee has declared

taxable long term capital gains of ₹.2,15,20,004/-. However, the Assessing Officer has determined the taxable long term capital gains at ₹.8,74,27,530/- and the relevant portions of the assessment are reproduced as under:

7.1 *A perusal of the computation of income showed that under the head long term capital gains, the assessee has Long term capital gain of Rs.23,23,00,000/- on account of sale of IPR and LTC loss of Rs.8,06,17,310/- on account of sale of mutual funds, resulting in a net long term capital gain of Rs.15,16,82,690/-. The assessee has claimed brought forward capital losses from the A.Y. 2006-07 as under:*

2006-07	1,15,47,932
2008-09	4,95,77,855
2009-10	3,05,06,840
2010-11	13,54,368
2010-11 EEL Ltd.	30,175
2011-12	3,71,45,516

7.2 *After setting off the above losses, the assessee has declared taxable long term capital gain of Rs.2,15,20,004/-. However from the assessment order for the AY 2010-11 it is seen that the assessing officer has made an addition of Rs. 6,59,07,526/ under capital gain and the same has been adjusted against b/f capital loss of previous years amounting to Rs.6,59,07,526/-. Thus LTC losses to the extent of Rs.6,59,07,526/- out of the losses in the table above has already been set off in AY 2010-11 and is not available in the current AY 2012-13. Therefore, the amount of Rs.6,59,07,526/- shall be added to the taxable Long term capital gain returned by the assessee and the taxable long term capital gain will be Rs.8,74,27,530/-."*

On appeal, the Id. CIT(A) has confirmed the addition made by the Assessing Officer.

8.1 Before us, the Id. Counsel for the assessee has submitted that for the assessment year 2010-11, the Id. CIT(A) has reduced the capital gains from ₹.6,59,07,526/- to ₹.6,39,81,926/- and thus, the differential

loss of ₹.19,25,600/- should be allowed to be set-off in the subject assessment year.

8.2 We have heard the rival contentions. In view of the relief granted by the Id. CIT(A) for the assessment year 2010-11, the Assessing Officer is directed to recalculate and allow the claim of the assessee after verification of records by affording an opportunity of being heard to the assessee.

9. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced on the 8th March, 2023 at Chennai.

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-
(V. DURGA RAO)
JUDICIAL MEMBER

Chennai, Dated, the 08.03.2023

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.