IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE 'C' BENCHES:: PUNE

BEFORE SHRI R.S. SYAL, HON. VICE-PRESIDENT&
SHRI PARTHA SARATHI CHAUDHURY, HON. JUDICIAL MEMBER

ITA No.539/PUN/2022
(A.Y. 2013-14)

DCIT, Circle-8, Pune.	vs	M/s. Finolex Cables Ltd., 26/27, Mumbai Pune Road, Pimpri, Pune. PAN: AAACF 2637 D
Appellant/Revenue		Respondent /Assessee

Assessee by	:	ShriJ.G. Pendse, AR
Revenue by	:	ShriM.M. Chate, CIT DR
Date of hearing	:	24/05/2023
Date of pronouncement	:	26/05/2023

ORDER

PerPARTHA SARATHI CHAUDHURY, JM:

This appeal preferred by the Revenue emanates from the order of Commissioner of Income Tax (Appeals)-13, Pune, dated 19.05.2022for A.Y.2013-14 as per the following revised grounds of appeal:-

"1(a) *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the claim of the assessee u/s 80IC on income earned from sale of scrap without appreciating the fact that assesses itself categorized income earned from sale of scrap as other income in the profit and loss statement of Roorkee unit undertaking and the same is not derived from the activities of the eligible business.*

1(b) *Whether on the facts and circumstances of the case and in law, the Ld.CIT(A)has erred in ignoring the decision of Hon'ble Supreme Court in the case of Liberty India Vs. CIT (2009) 317 ITR 218 (SC) wherein the words "derived from' is explained?*

1(c) *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in allowing the claim of the assessee u/s 80IC on sale of scrap, relying on the decision of the Hon'ble Madras High Court in the case of M/s Fenner India Ltd. (241 ITR 803) without appreciating the facts that the same has been*

rendered without taking into consideration various decision of Hon'ble Apex Court on this issue like CIT vs Sterling Food (199) 237 ITR 579 when it was not derived from the activities of the eligible business?

2(a) Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the allowances made u/s 14A of the Act by relying upon the decision of the Hon'ble ITAT, Pune wherein the Hon'ble Tribunal held that, no satisfaction has been recorded by the assessing officer as per requirement of Rule 8D, ignoring the fact that the necessary satisfaction as mandated under Sec 14A(2) of the Act has been drawn by the AO in the present case.

2(b) Whether on the facts and circumstances of the case, the Ld.CIT(A) is correct by relying upon the decision of the Hon'bleITAT, Pune where in the Hon'ble Tribunal held that holding that the mandatory requirement of recording satisfaction is not fulfilled in terms of law explained by the Hon'ble jurisdiction High court in the case of Pr. Commissioner of Income Tax Vs. Reliance Capital Asset management Ltd. reported as 86 taxmann.com 200?

3(a) Whether on the facts and in circumstances of the case, Ld. CIT(A) was justified in allowing the appeal of the assessee by deleting the transfer pricing adjustment in the transaction of allocation of common expenses to the manufacturing unit in Roorkee for which the assessee is claiming deduction u/s 80IC of the Act and in concluding that the transaction does not fall under the preview of section 92BA and section 92(2) of the Act?

3(b) Whether on the facts and in circumstances of the case, Ld. CIT(A) was justified in placing reliance on the transfer pricing orders for the subsequent assessment years 2016-17 and 2017-18 for allowing the appeal of the assessee for assessment year 2013-14 without appreciating that the principle of res judicata is not applicable to assessment proceeding?

Appellant craves for leave to add, Alter, amend or delete any ground of appeal."

2. The relevant facts of this case are that assessee-company is engaged in manufacturing and sales of electrical cables, optical fiber cables, lamps and switches etc., filed its return of income on 22/11/2013 declaring total income of Rs. 50,28,61,060/-. The case of the assessee was selected for scrutiny under CASS and assessment

was completed u/s. 143(3) r.w.s. 144C(3) of the Act on 23/02/2017 determining the total income at Rs. 61,33,69,562/- by making the following additions/disallowances:

i)	Addition/Disallowance u/s. 14A	Rs. 1,13,63,123/-
ii)	Addition/Disallowance of deduction u/s. 80IC for LDC Division at Roorkee	Rs. 7,38,53,684/-
iii)	Transfer Pricing Adjustment	Rs. 2,56,70,426/-

Aggrieved by the order of the Assessing Officer (AO), the assessee went on appeal before the ld. CIT(A), who vide its order dated 19/05/2022, partly allowed the appeal of the assessee. Being aggrieved with the decision of the ld. CIT(A), the Revenue has preferred this appeal before us.

3. At the time of hearing, ld.DR appraises the Bench regarding revised grounds filed. Ground No.1 comprising of (a)(b)&(c) is on the issue of claim of the assessee u/s. 80IC of the Act. Ground No.2 comprising of (a) & (b) is with regard to deletion of disallowance by the ld. CIT(A) u/s. 14A of the Act and similarly ground No.3 comprising of (a) & (b) is with regard to TP adjustments.

4. First we would adjudicate the claim of the Revenue u/s. 80IC of the Act, which is in ground No.1 of the revised grounds of appeal.

4.1 During the relevant year, the assessee has claimed deduction u/s. 80IC for its LDC Division at Roorkee unit for an amount of Rs.1,18,08,92,057/- being 100% of the profits of Rs. 1,18,08,92,057/-

of the eligible business undertaking. It was observed by the AO from the computation of the quantum of this eligible deduction u/s. 80IC that the assessee has also included scrap of sale of Rs. 7,38,53,684/-. The written explanation was asked from the assessee, which was duly complied with and which forms part of the assessment order. After considering the submission of the assessee, the AO held that as per the provision of sec.80IC, the assessee is entitled to deduction of 100% of profits and gains derived from an industrial undertaking which is engaged in manufacture or production of articles or things. It was further concluded that the words 'derived from' have a definite but a narrow meaning and it cannot be given a flexible or wider concept. As per the AO, the words 'derived from' have restricted domain as against the words 'attributable to' which have a wide import. For the purpose of deduction u/s. 80IC, only direct profits arising from sale of goods manufactured from the eligible business undertaking can be considered. Therefore, the AO interpreting the words 'derived from' observed that only direct profit arising from the sale of manufactured goods in such eligible business unit can only be considered for deduction u/s. 80IC. Placing reliance on the decision of Hon'ble MP High Court in the case of *CIT v. M/s. Alpine Solvex Ltd*. [2005] 276 ITR 92 (MP), the AO observed that deduction u/s. 80IC is to be allowed only to the amount which is derived as direct profit from sale of manufactured goods as eligible business undertaking. The AO further observed that the assessee though had stated that the scrap

generated is directly connected with their manufacturing activity, but nowhere in the audit report it is written that the scrap is the by-product of the assessee-company. The AO further held that scrap is not by-product of the assessee-company since the assessee was the manufacturer of cables and the income of the undertaking can only be said to be what is produced out of its manufacturing activity and sale of manufacturing products. Therefore, the proceeds of scrap sale cannot be classified as income derived from industrial undertaking engaged in manufacture or production of articles or things. The AO reduced the amount of scrap of sale of Rs. 7,38,53,684/- from the net profit for calculating the deduction u/s. 80IC of the Act and in view of the same, an amount of Rs. 110,70,38,373/- was allowed as deduction u/s. 80IC instead of claim of Rs. 118,08,92,057/-.

4.2 Ld. CIT(A), on the other hand, held that as rightly pointed out by the assessee, this issue is covered in favour of the assessee by the decision of the Pune Tribunal in ITA Nos.593 to 596/PUN/2016, dated 21/12/2017 wherein deduction u/s. 80IC was allowed for sale of scrap.

4.3 At the time of hearing, ld.DR placed reliance on the order of the AO, but on principle agreed that, this issue is covered in favour of the assessee by various decisions of the Tribunal in assessee's own case.

4.4 Ld.AR supported the findings of the ld. CIT(A) and also placed reliance on the decision of the Pune Tribunal (supra). He further

submitted that the same decision in assessee's own case was further followed by the Tribunal for A.Y. 2016-17 in ITA No. 479/PUN/2021 order dated 16/12/2021 and relief was provided to the assessee on this issue.

5. We have analyzed the facts and circumstances, heard the submissions of the parties herein and have given considerable thought to the said submissions as well as the judicial pronouncements placed before the Bench.

5.1 The AO had subtracted the value for the sale of scrap while calculating the deduction u/s. 80IC of the Act for the reason that, according to the AO, the words 'derived from' pertains to sale of the goods manufactured in the eligible unit and scrap sales are not by-product of the assessee. For this proposition, he had relied upon certain judicial pronouncements which are on record as appearing in his order. Thereafter, ld. CIT(A), allowed this issue in favour of the assessee placing reliance on the order of the Pune Tribunal (supra). We observe that the same issue had come up before the Pune Tribunal for A.Y. 2016-17 and there also, by placing reliance on the earlier decision of Pune Tribunal in assessee's own case in ITA No.593 to 596/PUN/2016 (supra), the Tribunal had provided the relief to the assessee. The ld.DR also, on principle, conceded that the issue is covered in favour of the assessee. He was unable to demonstrate any contradicting facts with those already on record nor could furnish any

judgment of higher forum favouring the Revenue on this issue. With these facts and circumstances, we are of the considered view that as per principle of consistency, on the same parity of reasoning, deduction u/s. 80IC shall be allowed for the sale of scrap. We order accordingly. Resultantly, grounds No.1 including (a)(b) & (c) of the Revenue are dismissed.

6. Ground No.2 is with regard to disallowance u/s. 14A of the Act and the relevant facts are that during the assessment proceedings, it was noticed by the AO that the assessee-company had claimed interest expenditure for an aggregated amount of Rs. 1338.9 lac. As per the provision of s.14A of the Act, such expenditure attributable to earning income, which is exempt, is not allowable. The assessee was requested to furnish written explanation as to why proportionate amount of interest expenditure etc. should not be disallowed under Rule 8D r.w.s. 14A of the Act. The assessee submitted its submission which was duly considered by the AO, but not found to be acceptable. Accordingly, the AO computed the disallowance at Rs. 1,13,63,123/- u/s. 14Ar.w.r. 8D and added to the total income of the assessee.

7. Ld. CIT(A) , on the other hand, placing reliance in assessee's own case for A.Ys. 2008-09 to 2011-12 by the Pune Tribunal in ITA Nos. 327 to 330/PUN/2016, dated 28/11/2007 observed that since the facts were identical to the year with the appeal following the same, he allowed relief on this issue also to the assessee.

8. Ld.DR vehemently contended that the observation of the ld.CIT(A) in placing reliance on earlier year's decision was incorrect in the present facts and circumstances, since, in the said decision relied on by the ld. CIT(A) of the Pune Tribunal, it was observed that there was no satisfaction arrived at by the AO while working the disallowance u/s. 14A r.w.r. 8D of the Income Tax Rules. But in the present case, the AO had arrived at a specific satisfaction while invoking the said provisions.

9. *Per contra,* ld.AR supported the findings of the ld. CIT(A).

10. We have observed in this issue that the ld. CIT(A) while providing relief to the assessee has simply placed reliance on the order of the Tribunal in assessee's own case for A.Ys. 2008-09 to 2011-12 and then concluded since the facts for the current year are identical, therefore, issue was allowed in favour of the assessee. He has not discussed the specific facts relevant to the present year as appearing in the order of the AO, whether at all in this year, the AO has arrived at any satisfaction or not while invoking s.14A r.w.r. 8D. The principle of *res judicata* are not applicable in the income tax proceedings and, therefore, as a quasi-judicial authority, the ld. CIT(A) should have examined the facts for this year and then compared them with the facts in a definite manner as appearing in the Pune Tribunal's decision which was relied on by him. Such exercise has not been done as is evident in his order. On the contrary, it is evident from the order of

the AO that after considering the submissions filed by the assessee, he has categorically stated why disallowance u/s. 14A is warranted in this case and that he was not satisfied with the calculation of the assessee. It is clearly evident that the AO has recorded his reasons and satisfaction specifically in his order while addressing this issue and invoking sec.14A r.w.r. 8D. The relevant paragraphs are extracted as follows:-

> *"(i) Since the assessee has not categorized the expenses incurred for earning tax free income, the only way is to calculate the expenses as per Rule 8D of LT. Rules 1961.*
>
> *(ii) The applicability of Rule 8D in determining the expenses incurred for earning tax free income has been upheld by Hon'ble High Court of Bombay in the case of Godrej & Boyce Mfg. Co. Ltd. (328 ITR 81).*
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> *Further, reliance is also placed on the decision of Hon'ble ITAT, Mumbai in the case of M/s Gherzi Eastern Limited (ITA No. 6562/Bom/94 dated 23rd September 2002) wherein the Hon'ble Tribunal has made the following remarks:*
>
> > *"Having heard both the parties we are of the opinion that it cannot be denied that some administrative expenditure was definitely attributable towards earning of this dividend income and that had to be deducted while allowing deduction under section 80M"*
>
> *Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of Distributors (Baroda) Pvt. Ltd. 155 ITR 120 and Bombay High Court in the case of Magganlal Chagganlal Pvt. Ltd. 236 ITR 456, which has expressed a similar view, that expenditure may be attributable to earning of dividend income. Reliance in this regard is also placed on the jurisdictional ITAT decision in the case of M/s Citicorp Finance (India) Ltd. 12 SOT 248, the relevant portion contained in Para 13 and 14 are reproduced as under:*
>
> > *"It is difficult to accept the hypothesis that one can earn substantial dividend income without incurring any expenses whatsoever including management or administrative expenses. By same logic, it is equally difficult to accept that the only expenses involved in earning the dividend income are those incurred on collection of dividend or on encashing a few dividend warrants. A company cannot earn dividend without its existence and management. Investment decisions are very complex in*

> *nature. They require substantial market research, day-to-day analysis of market trends and decisions with regard to acquisition, retention and sale of shares at the most appropriate time. They require huge investment in shares and consequential blocking of funds. It is well known that capital has cost and that element of cost is represented by interest. Besides, investment decisions are generally taken in the meetings of the board of directors for which administrative expenses are incurred. It is therefore not correct to say that dividend income can be earned by incurring no or nominal expenditure. All expenses connected with the exempt income have to be disallowed under s. 14A regardless of whether they are direct or indirect, fixed or variable and managerial or financial in accordance with law. In this connection, the provisions of sub-section (2) or(3)of s.14A inserted by the Finance Act, 2006 deserve to be noted".*

In another case of Dag Capital Management Ltd., the Hon'ble ITAT, Mumbai has been held that section 14A is a special provision which deals with disallowance of expenditure incurred by assessee in relation to income which does not form part of total income under the Act and thus, in view of specific provisions of section 14A, expenses falling under any head or section which are otherwise deductible as business expenditure or under other respective heads, would call for disallowance to extent to which those expenses have been incurred in relation to income exempt from tax.

Therefore, in view of provisions of section 14A read with rule 8D and considering the facts of the case, I am not satisfied with calculation of the assessee…..”

In these facts and circumstances, we are inconformity with the submissions of the ld.DR and accordingly, grounds No.2 including (a) & (b) of the Revenue are allowed.

11. Ground No.3 pertains to the transfer pricing adjustment. The TPO has discussed the issue in page No.5 at para 6 onwards of his order and the relevant facts are that during the previous year under consideration, the assessee has allocated expenses of Rs.34,31,87,513/- to its FCL-Roorkee Unit Uttarakhand State (Eligible 80-IC Unit). The assessee has not selected any of the prescribed method to benchmark this transaction. In other words, the assessee

has not demonstrated as to how this transaction is arm's length using one of the six methods prescribed under the domestic transfer pricing regulations. During the course of TP proceedings, the assessee was requested to explain the basis and computation of the allocation of expenses figure of Rs. 34,31,87,513/-. In response, the assessee vide its submission dated 10/08/2016 furnished the statement of allocation of expenses of Rs.34.31 crores as per page 59 to 62 of its submission. As per page 59, out of the total corporate expenses of Rs.101,32,19,316/-, expenses of Rs. 34,31,87,513/- are allocated on turnover basis except the derivative losses and interest. In respect of derivative losses of Rs.26,76,06,438/-, only Rs. 35,933/- are allocated to Roorkee Unit on the ground that an amount of Rs. 9,77,93,106/- has already debited to the profit and loss account of Roorkee Unit. In respect of interest expenses of Rs. 1,93,59,677/-, an amount of Rs.59,22,752/- is allocated to Roorkee unit on the basis of working capital basis for ECB loan and turnover ratio. Such allocation of expenses was found at arm's length, hence show-cause notice was issued to the assessee. After considering the submissions filed by the assessee, it was observed and held by the TPO as follows:-

> *"07. The submission of the assessee is considered. The assessee has explained as to how the corporate allocable expenses of Rs.101,32,19,316/- is worked out. Further the basis of allocating Rs.34,31,87,513/- to Roorkee unit is also explained by the assessee. Thus, the allocation of expenses to Roorkee unit is found acceptable. However the assessee has furnished any satisfactory explanation for the TPO's proposed to charge markup on the cost allocated to Roorkee unit @ 7.48% as mentioned in para 4 & 5 of the show cause notice. The assessee's explanation in this regard is as under:-*

"4. With reference to paragraph 4 of your notice, the auditors have computed the TNMM for cable industry @7.48%. The profitability of the company is in line with the comparables marked by auditors. This is overall profitability of Company. The profitability of Roorkee unit is higher due to excise exemption as explained above.

5. With reference to paragraph 5, it is humbly submitted that total expenses of 434.76 crores are expenses for company as whole and not for corporate expenses alone. The turnover of other plants (other than Roorkee) is Rs.1291.73 crores (Rs.2270.68 - Rs.978.94 crores) (Net of excise duty). The expenses of other plants also need to be considered and reduced from Rs. 434.76 crores to arrive at appropriate corporate expenses. The corporate expenses need to be allocated to all the plants. The details of direct expenses &corporate expenses is enclosed."

From the above explanation of the assessee it can be seen that the assessee has not given any explanation as to why the markup @ 7.48% should not be charged on the cost allocated to Roorkee unit. In fact, during the course of hearing, it was explained by the assessee that in the interunit transfers, 10% markup is added as per Rule 8 of Excise Valuation Rules, 2000. However, the assessee has failed to show that the cost allocated of Rs.34,31,87,513/- includes the markup. The common cost incurred for by the assessee also included the cost of Roorkee unit. Therefore the assessee has allocated to the same to Roorkee unit. However, while allocating such cost to Roorkee unit, the assessee's normal markup is not included in the allocated cost. The profit margin earned by the assessee is 8.64%, however for charging the arm's length markup on the cost allocated to Roorkee, the TPO has adopted the 7.48% which the average PLI margin of the comparables selected by the assessee itself for benchmarking its specified domestic transactions. Since the assessee has failed explain as to why such markup should not be charged on cost allocation, the markup of Rs. 34,31,87,513/- @ 7.48% amounting to Rs. 2,56,70,426/- charged and the same is proposed as TP adjustment to the specified domestic transaction of cost allocation to Roorkee unit. Accordingly, the income of the assessee shall increase by Rs. 2,56,70,426/-."

12. The ld. CIT(A), *per contra*, provided relief to the assessee on the issue by observing that during the TP proceedings, the TPO initially

challenged allocation of certain corporate expenses to the 80IC unit at Roorkee and had initially issued a show-cause notice. After detailed submissions of the assessee, the TPO was satisfied regarding allocation of expenses to the 80IC unit at Roorkee. These expenses are related to the corporate expenses like audit, Directors remuneration etc. Further, it was observed that it is a case specified domestic transaction and what the assessee has done was that they had allocated the expenses to both the units having 80IC and then applied the sale ratio. In fact, there was no transfer of either goods or services from one unit to another. It was only allocation of expenses with the sale ratio derived at in the case of the specified domestic transaction of the assessee and nothing more. Therefore, ld. CIT(A) held that the allocation of expenses was made on actual basis and such allocation was not a transfer of service that requires additional markup as done by the TPO in the present case of the assessee. It was also verified by the ld. CIT(A) that no transfer pricing adjustment on this issue has been done for the subsequent A.Ys.2016-17 & 2017-18. With these observations, this issue was allowed in favour of the assessee.

13. Admittedly, in this case, the allocation of corporate expenses was done for both the units on the basis of sale for the year under consideration. It is not a case of cost allocation for rendering any services by one unit to the other, which otherwise would have required

the ALP determination by applying an arm's length mark-up. Here is a case where common administrative expenses, such as, directors' salary and audit fee etc., have been shared between both the units on the basis of revenue earned by them *de hors* such expenses culminating into rendition or receipt of any services or property by/from one unit to another. We thus uphold the view taken by the ld. CIT(A). Accordingly, grounds No.3 including (a) & (b) of the Revenue stands dismissed.

14. In the result, appeal of the Revenue is partly allowed.

Order pronounced in open Court on 26th May, 2023.

Sd/-	Sd/-
(R.S. SYAL)	(PARTHA SARATHI CHAUDHURY)
VICE-PRESIDENT	JUDICIAL MEMBER

Dated : 26th May, 2023

vr/-

Copy to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
5. The DR, ITAT, "B" Bench Pune.
6. Guard File.

By Order

Senior Private Secretary
ITAT, Pune.