

आयकर अपीलिय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मंजुनाथ. जी, लेखा सदस्य के समक्ष

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANJUNATHA.G, ACCOUNTANT MEMBER**

आयकर अपीलसं./**ITA Nos.1976 & 1977/CHNY/2019 &
576/CHNY/2021**

निर्धारण वर्ष/Assessment Years: 2008-09, 2009-10 & 2010-11

1. The JCIT (OSD),
Large Taxpayer Unit-2,
Chennai.

Saint Gobain India Pvt. Ltd.,
vs. **(formerly known as Saint
Gobain Glass India Ltd.,)**
Plot No.A-1, SIPCOT Industrial
Park, Sriperumbudur – 602 105.

2. The ACIT,
Non-Corporate Circle-8,
Chennai.

PAN: AABCS 4338M

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

&

आयकर अपीलसं./**ITA No.: 1978/CHNY/2019**

निर्धारण वर्ष/Assessment Year: 2009-10

Saint Gobain India Pvt. Ltd.,
**(formerly known as Saint
Gobain Glass India Ltd.,)**
Plot No.A-1, SIPCOT Industrial
Park, Sriperumbudur – 602 105.

The DCIT,
vs. Large Taxpayer Unit-2,
Chennai.

PAN: AABCS 4338M

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

राजस्व की ओर से /Revenue by

: Shri R. Mohan Reddy, CIT &
Shri AR.V. Sreenivasan, Addl.CIT

निर्धारिती की ओर से/Assessee by

: Shri Vikram Vijayaraghavan, Advocate

सुनवाई की तारीख/Date of Hearing

: 25.07.2023

घोषणा की तारीख/Date of Pronouncement

: 28.07.2023

आदेश / O R D E R**PER MAHAVIR SINGH, VICE PRESIDENT:**

These three appeals by the Revenue are arising out of different orders of the Commissioner of Income Tax (Appeals)-10, Chennai in ITA Nos.57/11-12/CIT(A)-10(Tr.), 27/12-13/CIT(A)-10(Tr.) & 121(Tr.)/CIT(A)-10/2014-15 dated 30.04.2019, 22.04.2019 & 28.02.2020. The assessments for the assessment years 2008-09 & 2009-10 were framed by the DCIT, Large Taxpayer Unit, Chennai u/s.143(3) of the Income Tax Act, 1961 (hereinafter the 'Act'), vide orders dated 24.12.2011 & 05.02.2023 respectively and for the assessment year 2010-11 by the ACIT, Large Taxpayer Unit-1, Chennai u/s.143(3) r.w.s. 92CA of the Act vide order dated 27.03.2014. The assessee has also filed cross appeal for the assessment year 2009-10.

2. At the outset, it is noticed that the appeal filed by the Revenue in ITA No.576/CHNY/2021 for the assessment year 2010-11 is barred by limitation by 575 days. The Revenue received the impugned appellate order on 13.03.2020 as per Form 36 and appeal was to be filed on or before 12.05.2020 but actually it was filed on 08.12.2021, thereby there was a delay of 575 days. The Revenue

has filed affidavit for condonation of delay stating that this delay is due to pandemic period of Covid 19 and subsequent events. We noted that the Hon'ble Supreme Court in Miscellaneous Application No.665 of 2021 vide order dated 23.03.2020 has given directions that the delay are to be condoned during this period 15.03.2020 to 14.03.2021 and they have condoned the delay up to 28.02.2022 in Miscellaneous Application No.21 of 2022 vide order dated 10.01.2022. Since the Hon'ble Supreme Court has condoned the delay during the said period, respectfully following the same we condone the delay and admit the appeal.

Revenue's Appeal in ITA Nos.1976 & 1977/CHNY/2019 & 576/CHNY/2021:-

3. The first common issue in these three appeals of Revenue is as regards to the orders of CIT(A), in all these three years, deleting the addition made by the AO by making disallowance of managerial service expenses categorized as 'fee for technical services' for non-deduction of TDS by invoking the provisions of section 40(a)(i) of the Act. For this, Revenue has raised identically worded grounds in all the three years and the ground as raised in ITA

No.1976/CHNY/2019 for the assessment year 2008-09 reads as under:-

2. The learned CIT(A) has erred in deleting the addition made u/s 40(a)(i) and failed to observed that as per the Indo Belgium DTAA- Article 12, the payment related to the managerial services was categorized as "fees for technical services" and was taxable in the other contracting state.

3.1 The facts and circumstances in all these three years are exactly identical, hence we will take the facts from assessment year 2008-09.

4. Brief facts are that the assessee has paid export commission of Rs.9,58,38,828/- out of which a sum of Rs.3,92,87,048/- was paid to Saint Gobain Exprover, Belgium and Rs.5,65,51,780/- was paid to other commercial agents residing outside India. The assessee has not deducted any TDS on these payments. The AO stated that the services rendered by the assessee amounts to managerial services and thus the payments were in the nature of 'fee for technical services' and since, the assessee failed to deduct TDS on these two payments, the AO disallowed by invoking the provisions of section 40(a)(i) of the Act. The CIT(A) deleted the disallowance by relying on the assessee's own case for assessment year 2007-08 by observing in para 6.3 to 6.5 as under:-

“6.3 The appellant's contentions are duly considered. It is noticed that CIT(A)-17, Chennai vide order dated 30-06-2017 in ITA No. 23/13-14/CITA)-1 in appellant's own case for AY 2007-08, had allowed relief to the appellant by holding that the payments made to Saint Gobain Exprover, Belgium cannot be considered to partake the nature of Fees for Technical Services having regard to the MEN clause in the India - Belgium Treaty and by alluding to the benefit of the restrictive definition of Fees for Technical Services contained in the subsequently entered India - UK DTAA.

6.4 Further, the CIT(A)-17 had also held that the payments made to other agents located outside India to the tune of Rs. 5,65,51,780/-, were similar to the payments made to Saint Gobain Exprover, Belgium and held that the services rendered were not in the nature of Managerial services'/ Fee for Technical Services and thus allowed relief by placing reliance on binding jurisdictional judicial precedents.

6.5 The facts of the case for the year under consideration being identical to the facts of the appellant's case for AY 2007-08, respectfully following the decision of CIT(A)-17, Chennai, AO is hereby directed to delete the disallowance made u/s 40(a) (i) of the Act to the tune of Rs. 9,58,38,828/-.”

Aggrieved, now Revenue is in appeal before the Tribunal.

5. Before us, now the Id.counsel for the assessee first of all argued on the issue of impossibility of the performance of the Act as an amendment brought in by the legislature in the provisions of section 9(1)(vii) of the Act by amending Explanation 9(2) with retrospective effect from 01.04.1976 by the Finance Act, 2010, the assessee could not have foreseen the provisions of the Act for assessment years 2008-09, 2009-10 & 2010-11 and this being impossible on the part of the assessee to deduct TDS by foreseeing future amendment. The Id.counsel for the assessee relied on the

decision of Chennai Tribunal in the case of TVS Electronics Ltd., vs. ACIT in ITA No.949/CHNY/2017 dated 24.09.2021, wherein it is held as under:-

“8. Be that as it may. The issue before us is not taxability of payment made by the assessee to non-resident entity for services rendered outside India as fees for technical services or not in terms of section 9(1)(vii) of the Act. The issue before us is disallowance of sum paid to non-resident without TDS u/s 40(a)(i) of the Act. Admittedly, the AO has brought amended explanation 9(2) with retrospective effect from 1-4-1976 by the Finance Act, 2010 and held payment made by the assessee as FTS u/s 9(1)(vii) of the Act and further, for non TDS disallowed the same u/s 40(a)(i) of the Act. Therefore, to decide the issue, one has to understand the judgment of Hon’ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd., vs. DIT, (supra. The Hon’ble Supreme court while deciding the issue of FTS has considered preamended provisions of section 9(1)(vii) and held that if any payment in the nature of FTS to be taxed in India, as per provisions of section 9(1)(vii) of the Act, then, both services rendered and services received to be in India. If services are rendered outside India, even such services are received in India then same cannot be brought to tax under Indian Income-Tax laws as per the judgment of Hon’ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd., vs. DIT. Although, definition of FTS was amended by the Finance Act, 2010 with retrospective effect from 01.06.1976 but, the law prevailing at the time of making payment by the assessee to the non-resident was on the basis of judgment of Hon’ble Supreme Court which clearly held that payment made to a non-resident for services rendered outside India cannot be brought to tax in India as fees for technical services in absence of place of business / permanent establishment in India. Since, there was clear law by the decision of Hon’ble Supreme Court, the assessee has made payment without deducting tax at source. Therefore, liability towards TDS cannot be fastened on the assessee on the basis of subsequent amendment to law with retrospective effect, because it was impossible on the part of assessee to deduct tax on income of non-resident because the assessee cannot foresee the amendment and deduct TDS on said payments. This view is supported by various decisions of Tribunal including decision of ITAT, Mumbai Bench in the case of Channel Guide India Ltd., vs. ACIT and the Ahmadabad Tribunal in the case of Sterling Abrasive Ltd., vs. ACIT and Agra Bench in

the case of Metro & Metro vs. Addl.CIT, where the Tribunal by following the decision of Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd., vs. DIT, held that at the relevant point of time, it was impossible on the part of the assessee to deduct tax at source on income of non-resident and thus, on that basis no disallowance can be made towards payment made to a nonresident u/s.40(a)(i) of the Act."

6. When this was confronted to Id. CIT-DR, he could not controvert the above case law of this Co-ordinate Bench of Chennai Tribunal and could not cite any contrary decision before us.

7. As the issue is squarely covered in favour of assessee for these three assessment years i.e., 2008-09, 2009-10 & 2010-11, we affirm the order of the CIT(A) deleting the disallowance made by AO u/s.40(a)(i) of the Act. Accordingly, this issue in all these three assessment years is decided against Revenue and in favour of assessee and this issue in all the three appeals of the Revenue is dismissed.

8. The next common issue in all these three appeals of Revenue is as regards to the order of CIT(A) directing the AO to recomputed the disallowance of expenses u/s.14A r.w.rule 8D(2)(ii) & 8D(2)(iii). For this, Revenue has raised identically worded grounds in all the three years and hence, we will take the facts and grounds from assessment year 2008-09. The relevant grounds raised in assessment year 2008-09 read as under:-

3. *The Learned CIT(A) has erred and directed the AO to re-compute the disallowance u/s 14A to the extent of investments which yielding exempt income during the year under consideration.*

4.1 The learned CIT(A) has erred and held that the disallowance u/s 14A cannot be added in the book profit u/s 115JB of the I.T. Act.

4.2 The learned CIT(A) has failed to appreciate the ruling in the case of DCIT, Central Circle 18 and 19, Mumbai Vs Viraj Profiles Limited in 64 Taxmann.com 52(2015) (Mumbai-Trib) wherein it was held that AO has rightly disallowed the expenditure u/s 14A of the Act read with Rule 8D of the Income Tax Rules for computing book profit u/s 115JB(2) of the Act read with clause (f) to Explanation 1 to Section 115JB(2) of the Act.

9. Brief facts are that the assessee has earned dividend income from mutual funds amounting to Rs. 1,50,03,369/- and claimed the same as exempt. The AO noted that the assessee has not made any disallowance and hence, he invoked the provisions of section 14A r.w.rule 8D(2)(ii) and made disallowance of interest expenses at Rs.26,48,570/- and rule 8D(2)(iii) i.e., 0.5% of the average value of investment and disallowed a sum of Rs.20,95,343/- thereby total disallowance was made at Rs.47,43,913/-. The AO also computed this disallowance u/s.115JB of the Act as well as under normal computation. The assessee preferred appeal before CIT(A).

10. The CIT(A) deleted the disallowance made by the AO by invoking the provisions of section 115JB of the Act by disallowing expenses u/s 14A r.w.rule 8D(2)(ii) & (iii) by observing as under:-

In this regard, it is to state that on similar facts, the Special Bench decision in the case of Vireet Investments has held that while computing the disallowance under section 14A of the Act read with Rule 8D(2)(ii) / (iii) of Income-tax Rules, 1962 only the investments which yielded exempt income during the year under consideration are to be included for the purpose of average value of investments. Respectfully following the above cited decision, the AO is directed to recompute the disallowance accordingly.

Aggrieved, assessee is in appeal before the Tribunal.

11. We noted that this issue is squarely covered by the decision of the Delhi Special Bench of this Tribunal in the case of ACIT Vs. Vireet Investments Pvt. Ltd., in ITA No.502/Del/2012 & CO No.68/Del/2014, reported in 165 ITD 27. As regards to normal computation, the CIT(A) directed the AO to restrict the disallowance to the extent of investment yielding dividend income only. For this, the CIT(A) observed as under:-

(i) The AR of the appellant also argued that without prejudice to their submission that the disallowance under Rule 8D is not applicable, the average value of investments ought to have been computed by taking into account only those investments on which the appellant had received dividend income during the year for calculating the disallowance under Rule 8D(2) (ii)/(iii).

Now the Id.counsel for the assessee before us stated that the Tribunal has already remitted the matter back to the file of the AO in assessment year 2007-08 directing to verify the availability of interest free funds in regard to disallowance under Rule 8D(2)(ii) and he has not raised any objection on the CIT(A) remitting the

matter back to the file of the AO in restricting the disallowance to the extent of investment yielding dividend income only. The Id.DR has not raised any objection.

11.1 After hearing both the sides, we direct the AO to restrict the disallowance under Rule 8D(2)(ii) after verifying the interest free funds available with the assessee and in case, the assessee has more interest free funds available with it for making investment giving rise to exempt income, no disallowance is to be carried out. As regards to disallowance under Rule 8D(2)(iii), the AO will restrict the disallowance to the extent of investment yielding exempt income only and he will recompute 0.5% average value of those investments only, accordingly. In the result, this issue in all the three appeals of Revenue is partly allowed for statistical purposes.

Assessee's Appeal in ITA No.1978/CHNY/2019

12. The only issue in this appeal of assessee is as regards to the order of CIT(A) confirming the action of the AO in not allowing depreciation on disallowance of interest on borrowed funds utilized for capital assets.

13. Brief facts are that the AO during the course of assessment proceedings noticed that the assessee claimed interest of Rs.3,42,29,512/- u/s.36(1)(iii) of the Act as per column No.17(m) of Form 3CD. The AO noted that the assessee mentioned this expenditure as capital in nature but claimed the same in computation of income. The AO disallowed but assessee made alternative claim that depreciation in respect of the said amount on the capital investment be allowed. For this, it was claimed that although the expenditure is capital in nature it was incurred during construction period. The AO in the absence of any details of assets purchased in order to quantify the eligible rate of depreciation did not allow the claim of depreciation. Aggrieved, assessee preferred appeal before CIT(A). The CIT(A) also dismissed the claim of assessee in absence of details by observing in para 7.3 as under:-

7.3 The submissions made are duly considered. It is seen that the disallowance of interest on loan funds is not disputed by the appellant. However, the AR of the appellant has requested that depreciation on the same be allowed. It is observed from the assessment order that the AO had not considered the appellant's request for allowing depreciation for the reason that the appellant failed to furnish the details of assets purchased, the date of purchase and the dates on which they were put to use etc. in order to consider the same. Since, no relevant details as mentioned above, have been furnished by the appellant even during the course of appeal proceedings, the said claim for depreciation cannot therefore be allowed at this juncture too, in the absence of such details.

Aggrieved, assessee is in appeal before the Tribunal.

14. Now before us the assessee contended that the Tribunal in assessee's own case for the assessment year 2007-08 in ITA No.2096/Mds/2011, order dated 13.07.2016 has considered the issue of depreciation vide para 6.1 as under:-

Ground No.3 : Addition of 3, 04.15,010/- in relation to interest on loan for acquiring fixed assets under normal computation as well as in computing book profit under section 115JB of the Act.

6.1 Since we have already held that foreign exchange loss relating to interest on loan for acquisition of fixed assets under normal computation cannot be treated as an allowable deduction under the normal provisions of the Act as the same has to be capitalized by virtue of section 43A of the Act, however, the benefit of depreciation is allowable as deduction and at the same time such loss cannot be excluded from the book profit under computation of profit and loss under section 115JB of the Act because a provision with fiction cannot be imposed on another provision with fiction, the same treatment will also be applicable in the case of interest payment of 23,04,15,010/-. However, since the learned Authorized Representative submitted before us that the assessee was not granted the benefit of depreciation, we hereby remit back the issue with respect to depreciation to the file of the learned Assessing Officer in order to grant the benefit of depreciation in accordance with law, if the same is not already granted by the Revenue.

He particularly drew our attention to last four lines of the above reproduced para 6.1 and stated that on similar direction, matter can be remitted back to the file of the AO to grant benefit of depreciation after verification of eligible rate of depreciation, date of purchase and date of put to use of assets, etc.

15. When this was confronted to Id. CIT-DR, he has raised no objection in remitting the matter back to the file of the AO.

16. After hearing both the sides and going through the facts of the case and relying on the Tribunal's order in assessee's own case for assessment year 2007-08, we remit this issue back to the file of the AO, who will examine the claim of depreciation in accordance with law and hence, this issue of assessee's appeal is allowed for statistical purposes.

17. In the result the appeals filed by the Revenue in ITA Nos.1976 & 1977/CHNY/2019 & 576/CHNY/2021 are partly-allowed for statistical purposes and the appeal filed by the assessee in ITA No.1978/CHNY/2019 is allowed for statistical purposes.

Order pronounced in the open court on 28th July, 2023 at Chennai.

Sd/-

(मंजुनाथ. जी)

(MANJUNATHA.G)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai,

दिनांक/Dated, the 28th July, 2023

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती/Assessee
2. राजस्व/Revenue
3. आयकरआयुक्त /CIT
4. विभागीय प्रतिनिधि/DR
5. गार्डफाईल/GF.