

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI
BEFORE,
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.9604/Del/2019
(ASSESSMENT YEAR 2008-09)**

SICPA India Private Limited 308-312, Mercantile House, 15 K.G. Marg New Delhi-110 001 PAN-AADCS 6121L (Appellant)	Vs.	Asst.CIT Circle- 23(2) New Delhi (Respondent)
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Appellant by	Mr. Anuj Tiwari, CA
Respondent by	Mr. Anuj Garg, Sr. DR

Date of Hearing	07/08/2023
Date of Pronouncement	18/08/2023

ORDER

PER YOGESH KUMAR U.S., JM:

This appeal by Assessee is filed against the order of Learned Commissioner of Income Tax (Appeals)-XXV, New Delhi ["Ld. CIT(A)", for short], dated 01/11/2019 for Assessment Year 2008-09.

2. The grounds of Appeal are as under:-

"1. The Ld. CIT(A) has grossly erred both on facts and in law in upholding the action of the Ld AO of apportioning the expenditure in the nature of Advertisement & Publicity Expenses and Business Promotion Expenses aggregating to INR 14,25,570/- for the purpose of computing the profits of the eligible undertaking and thereby re-computing deduction under section 80-IC of the Act.

2(a) The Ld CIT(A) has grossly erred both on facts and in law in upholding the action of the Ld AO of allocating 'Foreign Exchange Fluctuation Loss' of INR 1,53,24,254/- for the purpose of computing the

profits of the eligible undertaking and thereby re-computing the deduction under section 80-IC of the Act.

2(b) Without prejudice to Ground no 2(a) above, the Ld CIT(A) has grossly erred both on facts and in law in upholding the action of the Ld AO of allocating Foreign Exchange Fluctuation Loss to the eligible undertaking in the ratio of closing value of inventory of raw materials & finished goods.

3(a) The Ld. CIT(A) has grossly erred both on facts and in law in upholding the action of the Ld AO of disallowing the closing balance of Provision for Leave Encashment' amounting to INR 26,08,537/- as appearing in the balance sheet of appellant instead of the Provision for Leave Encashment of INR 4,80,093/- created and debited to the Profit & Loss a/c during the year under consideration.

3(b) Without prejudice to Ground no 3(a) above, the Ld CIT(A) has grossly erred both on facts and in law in upholding the action of the Ld. AO in not allowing deduction for Provision Leave Encashment amounting to INR 480,093/- created and debited to the Profit & Loss a/c during the year under consideration.

4(a) The Ld CIT(A) has grossly erred both on facts and in law in upholding the action of the Ld AO in carrying out disallowance of INR 23,32,900/- by invoking the provisions of section 14A of the Act and applying Rule 8D of the Rules.

4(b) Without prejudice to Ground No 4(a) above, the Ld. AO has grossly erred both on facts and in law in considering the value of all the investments for computing disallowance under section 14A of the Act read with Rule 8D(2)(i) of the Rules.

5. The Ld. CIT(A) has grossly erred both on the facts and in law in upholding the action of the Ld. AO in not allowing deduction for 'Fringe Benefit Tax' amounting to INR 8000,000/- for the purpose of computing book profits under section 115JB of the Act.

6. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.”

3. The brief facts of the case are that the assessee filed return of income declaring income of Rs.17,65,38,023/- under normal provisions of the Act and

book profit u/s 115JB of Rs.56,41,92,385/-. The case was selected for scrutiny and assessment order came to be passed u/s 143(3) of the Act by making following additions.

Gross Total Income as per return	:Rs.59,09,18,041/-
Add: Provision for leave encashment as discussed	: Rs.26,08,537/-
Disallowance u/s 14A as discussed	<u>:Rs.23,32,900/-</u>
Gross Total Income as assessed	:Rs.59,58,478/-
Less: <u>Deduction under Chapter VIA--</u>	
u/s 80G as per return	:Rs.92,91,475/-
u/s 80IC as discussed above	:Rs.38,50,64,733/-
	<u>:Rs.39,43,56,208/-</u>
Total Income as assessed	:Rs.20,15,03,270/-

Book Profit u/s 115JB:

Book profit as per return	: Rs.56,41,92,385/-
Add: Claim of provision for FBT disallowed as discussed	: <u>Rs. 8,00,00/-</u>
Book profit u/s 115JB as assessed	:Rs.56,73,25,285/-
Rounded off	:Rs.56,73,25,290/-

4. Aggrieved by the assessment order dated 08/12/2011, the assessee preferred an appeal before the Ld. CIT(A), the Ld.CIT(A) partly allowed the appeal by upholding the disallowance of Allocation of Advertisement & Publicity expenses to 80-IC undertaking at Sikkim to the tune of Rs.14.25 lacs, allocation of foreign exchange Fluctuation loss to 80IC undertaking at Sikkim, provision for Leave Encashment of Rs.26.08 lacs, u/s 14A r.w. Rule 8D(2)(iii) of Rs.23.33 lacs and further upheld the disallowed for Fringe benefit Tax in computing books profits u/s 115JB of Rs.8 lacs.

5. Aggrieved by the order of the Ld. CIT(A) dated 01/11/2019, the assessee preferred the present appeal on the ground mentioned above.

6. The ground No.1 is regarding Allocation of Advertisement & Public Expenses to Industrial undertaking u/s 80-IC Unit at Sikkim. During the year, the assessee claimed advertisement and publicity expenses amounting to Rs.35,30,000/- and business promotion expenses amounting to Rs.5,70,000/-. As per assessee the said allocations have no direct or immediate connection with the Sikkim unit eligible for deduction under Section 80-IC. The above said issue has been dealt and decided in assessee's own case for AY 2011-12 in ITA No.7483/Kol/2017, wherein it is held that the general head office expenditure shall not be allocable to unit eligible for deduction u/s 80-IC of the Act.

“49. So, following the decision rendered by the Co-ordinate Bench of the Tribunal, we are of the considered view that Ld. CIT(A) has rightly decided the issue in favour of the assessee in deleting the proportionment of Head Office expenses to the unit eligible for deduction u/s 80IC of the Act. Consequently, ground no.2 raised by the Revenue's appeal for AY 2011-12 is determined against the Revenue.”

7. The similar issue was also cropped up in the Assessment Year 2006-07, which has been decided in favour of the assessee. By respectfully following the ratio laid down by the orders of the Tribunal (Supra) and finding the parity, we allow the ground No.1 of the assessee.

8. Ground No.2 is regarding allocation of foreign exchange fluctuation loss to Industrial undertaking u/s 80-IC at Sikkim. The Ld. counsel for the assessee submitted that the said issue has been decided in favour of assessee

in Assessee's own case for AY 2009-10 in ITA No.704/Kol/2015, Assessment Year 2010-11 & 2011-12 therefore, prayed for allowing ground No.2.

9. During the year, the assessee incurred 'Foreign Exchange Fluctuation Loss' amounting to INR. 3.67 Cr. and according to the assessee, the said expenses has been incurred in relation to import value of Raw Material & finished goods to 80-IC undertaking at Sikkim Unit, therefore, such expenses do not have direct nexus with the industrial undertaking, no allocation was made to said undertaking. The Ld. AO allocated the above stated foreign loss in the ratio of closing value of inventory of raw materials to sum of closing value of raw materials and finished goods on the ground that the assessee had only one manufacturing unit at Sikkim and materials required for the said unit only. The above issue is also covered in assessee's own case for AY 2009-10, the Kolkata Bench vide its order dated 31/01/2020 in ITA No.704/Kol/2015 it is held as under:

"18. So far as question of reducing the foreign exchange loss pertaining to Sikkim unit to the tune of Rs.68,33,228/- for the purpose of computing deduction u/s 80IC is concerned, the ld. AR for the assessee contended that since the foreign exchange fluctuation loss is in the nature of indirect/non-operating expenses, it must be allocated to the eligible industrial undertaking. Ld. DR for the Revenue, however, relied upon assessment orders passed by AO.

19. Assessee company has brought on record detail of foreign exchange loss incurred on account of import of raw material used at the industrial undertaking, available at page 193 of the paper book. Ld. CIT (A) after taking into account working given by the assessee company at page 193 of the paper book restricted the allocation to the tune of Rs.68.33 lakhs. No doubt, foreign exchange loss being in

the nature of indirect/non-operating expenses must not be allocated to the eligible industrial undertaking. However, when the assessee company has come up with specific working/details of suffering foreign exchange loss on account of import of raw material used at the industrial undertaking, the ld. CIT (A) has rightly thrashed the issue on facts and directed the AO to reduce such allocation to Rs.68.33 lakhs as against Rs.1 crore estimated by the AO. So, again we find no illegality or perversity in the findings returned by the ld. CIT(A). Consequently, Ground No.1 of assessee's appeal for AY 2009-10 is allowed and Grounds No.1, 2 & 3 of Revenue's appeal for AY 2009-10 are dismissed.”

By respectfully following the above ratio and finding the parity, the ground No.2 of the assessee is allowed.

10. The assessee has not pressed ground No.3, accordingly, ground No.3 of the assessee is dismissed as not pressed.

11. Ground No.4 is regarding disallowance u/s 14A r.w. Rule 8D(2) (iii) of Rs.23,32,900/-. During the year assessee earned exempt income to Rs.3,68,51,090/- from the debt oriented mutual fund. The assessee also incurred short term capital loss of Rs.6,41,190/- from such investments which have been duly considered in the return of income for AY 2008-09. No disallowance on account of section 14A was made in tax audit for assessment year 2008-09. The Ld. AO computed the disallowance of Rs.23,33,900/-.

12. The Ld. Counsel for the assessee submitted that issue involved in Ground No.4 is also covered in Assessee's own case for AY 2009-10, AY 2010-

11 & A.Y 2011-12 in ITA No.704/Kol/2015 dated 31/01/2020, thus, sought for allowing the ground No.4.

13. The Ld. DR relied upon finding of the lower authorities.

14. We have heard both the parties and perused the materials available on record. The identical issue came up for consideration by the Tribunal in ITA No.704/Kol/2015 for AY 2009-10 and AY 2010-11, wherein by order dated 31/01/2020, the Co-ordinate Bench of the Tribunal held as under:

“22. First of all, when we examine the satisfaction recorded by the AO for all the three assessment years i.e. 2009-10, 2010-11 & 2011-12 in order to invoke the provisions contained under Rule SD, no satisfaction has been recorded by the AO that the working provided by the assessee company that no expenditure has been incurred to earn the dividend income except with general observations that, "a company cannot earn dividend without its existence and management. Investment decisions are very complex in nature which are generally taken by management personnel or other professional experts employed for the purpose for which administrative, managerial and administrative expenses are incurred.”

22.1 To our mind, this is no satisfaction rather AO proceeded on the basis of assumptions and guesswork. In AY 2011-12. AO while invoking the provisions contained under Rule 8D recorded that, "since the assessee has not maintained any separate books of account for accounting of expenses incurred in relation to income not includible in its total income the amount of expenses actually incurred cannot be ascertained from the assessee's books of account satisfactorily and proceeded to invoke the provisions contained w/s 14A of the Act the Rule 8D of the Rules”

23. Hon'ble Apex Court in *Godrej & Boyce Manufacturing Company Ltd. vs. DCIT-394 ITR 449 (SC)* thrashed the issue in controversy as to invoking of the provisions contained under Rule 8D of the Rules by observing as under:-

"37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable."

24. Hon'ble Delhi High Court in case of **HT Media Ltd. vs. Pr. CIT** (supra) also held that broad and general nature of observation made by the AO are not enough to invoke the provisions contained under Rule 8D. So, we are of the considered view that when AO has failed to comply with the mandatory provisions of section 14A (2) of the Act r/w Rule 8D(1)(a) of the Rules to record a valid satisfaction, provisions contained under Rule 8D(2)(iii) cannot be invoked.

25. Moreover, it is categoric case of the assessee company that it has invested in debt oriented mutual fund as is evident from page 41 of the paper book for AY 2009-1- So, this investment has earned taxable income in the capital gain in which case provisions contained under section 14A are otherwise not attracted.

26. Identical issue has been decided by the coordinate Bench of the Tribunal in favour of the assessee in case of **Avshesh Mercantile**

(P) Ltd. vs. ITO 148 TTJ 607 (ITAT Mumbai) by following the judgment of Hon'ble Bombay High Court in *Delite Enterprises Pvt. Ltd.* (ITA No.110 of 2009) by returning following findings:-

“22. We have heard the rival submissions and also perused the relevant material on record. It is observed that the proceeds of premium notes (OCPN) on which the impugned redemption premium was paid by the assessee had been invested in the shares debentures of RUPI, and although the dividend income and income from long term capital gain from the said investment was exempt from tax u/s 10(236), perusal of the copy of relevant Notification issued u/s 10(23G) placed at page No. 24 of the paper book, shows that such exemption was initially granted only for the specific period i.e. assessment year 1999-2000 to 2001- 2002. No doubt, the said exemption was further extended upto assessment year 2004-05 as submitted by the learned DR, a perusal of the copy of relevant notification placed at page No. 29 of the paper book clearly shows that such extension was granted subject to satisfaction of certain conditions. Keeping in view all these uncertainties and contingencies, we are inclined to agree with the contention of the learned counsel for the assessee that the premium paid by the assessee on redemption of premium notes (OCPN) utilized for making investment in the shares/debentures of RUPIL cannot be regarded as expenditure incurred exclusively in relation to earning of exempt income so as to invoke the provisions of section 14A. Moreover, the said investment had the potential of generating taxable income also as explained by the learned counsel for the assessee in the form of short term capital gains etc. In this regard, the learned DR has submitted that no such taxable income however was actually earned by the assessee during the years under consideration. The learned counsel for the assessee on the other hand has pointed out that no exempt income from the said investment was also actually earned by the assessee in the years under consideration. He has also relied on the decision of coordinate bench of this Tribunal in the case of *Delite Enterprises Pvt. Ltd.* (supra) as affirmed by the Hon'ble Bombay High Court stating that in the

similar facts and circumstance, disallowance made under section 14A was held to be not sustainable."

27. So, an amount of Rs.89.68 lakhs, Rs.32.44 lakhs and Rs.17.76 lakhs in AY 2009-10, 2010-11 & 2011-12 respectively earned by the assessee as capital gain from debt oriented mutual funds cannot be placed in the category of exempt income u/s 14A of the Act and in these circumstances, Rule 8D(2) cannot be invoked.

28. Moreover, AO himself has excluded the investment from which non-exempt income has been earned by the assessee company in AY 2011-12 for purpose of computing average company in AY 2011-12 for purpose of computing average investment under Rule 8D(2)(iii) of the Rules.

29. So, we are of the considered view that disallowance made by the AO and sustained by the ld. CIT (A) u/s 14A of the Act r/w Rule 8D(2)(iii) of the Rules is not sustainable, hence ordered to be ITA No.1586/Kol./2016 ITA No.7048/Kol./2017 ITA No.838/Kol./2015 ITA No.7483/Kol./2017 deleted. Consequently, Ground No.3 of AY 2009-10, Ground No.1 of AY 2010-11 & Grounds No.1 & 2 of AY 2010-11 in assessee's appeals are allowed".

15. By respectfully following the above ratio laid down by the order of the Tribunal (supra) and finding the parity we allow Ground No. 4 of the assessee and delete the disallowance made by the AO.

16. The Ground No. 5 is regarding disallowance made for Fringe Benefit Tax in the computed book profits u/s 115JB of the Act. During the year under consideration, in computing the book profit u/s 115JB of the Act, the assessee considered the net profit before tax as per the audited financial statement and separately claimed deduction For Fringe Benefit Tax of Rs. 8,00,000/-. The

A.O. concluded that, the amount of provision for fringe benefit tax was not debited to P & L account as an expense and net profit before tax was taken in order to compute the book profits u/s 115JB of the Act, hence opined held that deduction for provision of fringe benefit tax is not allowable and also held that such claim is not in consonance with adjustments mentioned in Explanation 1 to 5 Section 115JB. The CIT(A) has confirmed the said action of the A.O.

17. The Ld. Counsel for the assessee submitted that the said issue has been decided in Assessee's favour for Assessment Year 2007-08 by the CIT(A) which has not been contested by the Department. Apart from the same, the CBDT Circular No. 8/2005 dated 29/08/2005 clearly states that Fringe Benefit Tax is an allowable deduction in computing book profit as per Section 115JB of the Act. Therefore, submitted that the Ground No. 5 of the assessee deserves to be allowed.

18. Per contra, the Ld. Departmental Representative relied on the findings and conclusion of the Lower Authorities.

19. Heard both the parties. In computing the book profit u/s 115JB of the Act the assessee considered the net profit before tax as per audited financial statement and separately claimed deduction for fringe benefit tax of Rs. INR. 8,00,000/-. The A.O. held that the deduction for provision for fringe benefit tax is not allowable and the claim of the assessee is not in consonance with

adjustment mentioned in Explanation 1 to Section 115JB of the Act. The assessee taken a specific plea before the CIT(A) regarding applicability of the CBDT vide Circular No. 8/2005 dated 29/08/2005, wherein it is clarified that fringe benefit tax is an allowable deduction in computing book profit as per Section 115JB of the Act. It is found that the CIT (A) has not considered the Circular of the CBDT (supra), therefore, we restore the issue involved in Ground No. 5 to the file of the CIT(A) to consider the CBDT Circular mentioned above and decide the issue afresh in accordance with law.

20. In the result, the Ground No. 5 of the assessee is partly allowed for statistical purpose.

21. In the result, the appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in open Court on 18th August, 2023

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER
Dated: 18/08/2023
Pk/R.N, Sr ps

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI

