

आयकर अपीलिय अधिकरण  
कोलकाता 'सी' पीठ, कोलकाता में  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'C' BENCH, KOLKATA**

श्री राजेश कुमार, लेखा सदस्य  
एवं  
श्री संजय शर्मा, न्यायिक सदस्य  
के समक्ष  
**Before**

**SRI RAJESH KUMAR, ACCOUNTANT MEMBER  
&  
SONJOY SARMA, JUDICIAL MEMBER**

**I.T.A. No.: 272/KOL/2021  
Assessment Year: 2016-17**

**Indian Explosives Pvt.  
Ltd.....Appellant  
[PAN: AAACI 6548 N]**

**Vs.**

**DCIT, National E-Assessment Centre,  
Delhi.....Respondent**

**Appearances by:**

**Assessee represented by – Sh. K.M. Gupta, Adv.**

**Department represented by – Sh. Sunil Kr. Agarwala, CIT, D/R.**

Date of concluding the hearing : August 3<sup>rd</sup>, 2023

Date of pronouncing the order : September 14, 2023

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

This is an appeal preferred by the assessee against the order of Learned DCIT, National E-Assessment Centre, Delhi dated 30.03.2021 for the Assessment Year (in short 'AY') 2016-17.

2. Though the Registry has pointed out that the appeal is time barred by 88 days, however, in view of the decision of the Hon'ble Supreme Court in the case of Miscellaneous Application No. 665 of 2021 in SMW(C ) No. 3 of 2020, the period of filing appeal during the COVID-19 pandemic is to be excluded for the purpose of counting the limitation period. In view of this, the appeal is treated as filed within the limitation period. We find that there was no delay in filing the appeal as per the Hon'ble Supreme Court's order (supra), therefore the appeal is taken for adjudication.

3. Ground no. 1 raised by the assessee is general in nature and therefore, needs no specific adjudication.

4. The issue raised in ground nos. 2, 3 & 4 are different, however, the adjudication of these grounds depends on the fact that whether the excise duty has to be deducted from the exporter for the purpose of determining the transfer price of the assessee in respect of international transactions of sale of goods with the Associated Enterprises (in short the 'AE').

5. Ld. Counsel for the assessee stated that the Transfer Pricing Officer (in short Ld. 'TPO') in para 2.1 & 2.2 page 2 order passed u/s 92CA(3) of the Act that there was total excise duty of Rs. 42,34,67,906/- and it is apparent from the segmental accounts of the AE that the said excise duty has been allocated to the to third party segment only whereas sale of products/goods to the AE account for 1.80% of the total sales of the assessee and hence, component of excise duty has to be allocated on the basis of sale

of to the AE. Ld. Counsel for the assessee submitted that excise duty is not leviable on the export turnover and therefore, to reduce the same from the export turnover will affect the operating margin of the assessee. Ld. A/R therefore, prayed that the issue may be restored to the file of the TPO/AO to not to deduct the excise duty from the export sale and then decide the issue raised in ground nos. 2, 3, & 4 of the appeal afresh accordingly.

6. Ld. D/R on the other hand fairly left the issue to the wisdom of the Bench.

7. After hearing the rival contentions and perusing the material available on record, we note that the excise duty is not to be deducted from the export turnover for determining the Arm's Length Price (in short the 'ALP') of the goods supplied by the assessee to its AEs abroad. As submitted before us the issue needs examination at the end of the AO and accordingly, we restore this issue to the file of the AO with the direction to re-adjudicate ground nos. 2, 3 & 4 in the light of our above observations. Therefore, ground nos. 2, 3 & 4 raised by the assessee are allowed for statistical purposes.

8. The issue raised in ground no. 5 is against the adjustment of transfer price of the assessee's international transactions of payment of royalty to the AEs amounting to Rs. 1,70,19,072/-. Ld. Counsel for the assessee at the outset, submitted that the issue is squarely covered by the decision of the Coordinate Bench of the Tribunal in assessee's case for the AY 2010-11, 2011-12, 2012-13 & 2013-14 wherein the said issue has been decided in

favour of the assessee qua the transfer price adjustment. Accordingly, Ld. A/R submitted that the ground may be allowed in view of the decisions of the Coordinate Benches as stated above.

9. Ld. D/R fairly agreed to the contention of the Counsel for the assessee.

10. After perusing the orders of the Hon'ble Coordinate Benches in the above said years, we note that the issue is squarely covered by the decision of the Coordinate Benches wherein the issue of transfer pricing has been decided in favour of the assessee by deleting the adjustment to transfer price of the assessee with the AEs abroad. We have specifically perused the decision of the Coordinate Bench in ITA Nos. 418/KOL/2015 and 85/KOL/2016 and find that the transfer pricing adjustment on account of royalty payment has been deleted. Accordingly, we direct the AO to delete the addition of Rs. 1,70,19,072/-. Hence, ground no. 5 raised by the assessee is allowed.

11. The issue raised in ground no. 6 is against the disallowance of leave encashment of Rs. 63,30,289/- u/s 43B of the Act. Ld. Counsel for the assessee submitted before us that out of the said amount the assessee has paid Rs. 79,76,729/- on account of provisions for leave encashment on accrual basis following the decision of Hon'ble Jurisdictional High Court in the case of *Exide Industries Ltd. Vs. Union of India* reported in 292 ITR 470 (Cal). However, the AO denied the deduction to the assessee on the ground that the issue is subjudice before the Hon'ble Apex Court.

Ld. Counsel for the assessee submitted that subsequently, the Hon'ble Apex Court in the case of *Union of India and others Vs. Excise Industries Ltd.* in *Civil Appeal No. 3545/2009* dated 24.04.2020 has upheld the constitutional validity of leave encashment disallowance u/s 43B of the Act meaning thereby that the deduction is not allowable to the assessee on the basis of provisions created. However, Ld. Counsel for the assessee submitted that the actual payment which is made by the assessee on account of leave encashment has to be allowed. Ld. A/R stated that out of the total disallowance, as stated earlier, Rs. 63,13,389/- was paid towards the existing liability which has to be allowed under the provisions of Section 43B of the Act and accordingly, Ld. A/R referred to the tax audit report to corroborate his submissions. Ld. A/R prayed that the issue may be restored to the file of the AO with the specific direction to allow the deduction in respect of the leave encashment paid during the year.

12. Ld. D/R on the other hand, stated that the AO may be directed to examine this issue and decide accordingly.

13. After considering the facts on record, we note that during the year the assessee has made certain payments in respect of leave encashment which was stated to be Rs. 63,13,289/- which apparently has to be allowed to the assessee on the basis of actual payment during the year. Accordingly, we restore this issue to the file of the AO to verify this amount. Needless to say that the amount paid against the provisions for leave encashment

has to be allowed as deduction. Hence, ground no. 6 is allowed for statistical purposes.

14. The issue raised in ground no. 7 is in respect of disallowance of club expenses made for the welfare of the employers of the assessee of Rs. 17,38,319/- u/s 40A(9) of the Act. The AO during the course of assessment proceedings, the ld AO observed that the assessee has during the year charged to the profit & loss account a sum of Rs. 17,38,319/- towards cost of services and facilities meant for recreation purposes which was duly reported in the tax audit report *Clause 21 sub-Clause* of TAR. Ld. Counsel for the assessee stated that the issue is squarely covered by the decision of the Coordinate Bench in assessee's own case in *ITA No. 1957/KOL/2017* for AY 2013-14 and *ITA Nos. 407 & 418/KOL/2015* for AY 2010-11 & 2011-12 wherein the Coordinate Bench has held that the provisions of Section 40A(9) of the Act are not attracted where the claim is made u/s 37(1) of the Act pertaining to the club expenses. Ld. A/R therefore, stated that the issue may be allowed following the decisions of the Coordinate Bench as these are the expenses which are wholly and exclusively made for the purpose of business of the assessee.

15. A perusal of the decision of the Coordinate Bench reveals that the issue has been decided by the Coordinate Bench in favour of the assessee as stated herein above. Accordingly, we direct the AO to allow the deduction in respect of club expenses. Therefore, ground no. 7 raised by the assessee is allowed.

16. Ground no. 8 is not pressed, therefore, is dismissed as not pressed.

17. The issue raised in ground nos. 9 & 10 is against the disallowance of commission expenditure amounting to Rs. 1,93,98,230/- u/s 69C of the Act. Ld. Counsel for the assessee at the outset, submitted that though the issue has been decided in favour of the assessee by the DRP by giving a specific direction. The A/R while referring to page nos. 19 & 20 submitted that though the DRP has given specific direction to the AO however, the same has not been given effect to by the AO.

18. After hearing the rival contentions and perusing the material on record, we direct the AO to give effect to and decide the same in terms of the DRP direction. Therefore, ground nos. 9 & 10 are allowed for statistical purposes.

19. The issue raised in ground no. 11 is against the disallowance of interest income of Rs. 39,491/- on account of difference in interest income as per books of accounts and as per Form 26AS.

20. After hearing rival contentions and perusing the material on record, we are of the view that the issue needs to be examined at the level of the AO and accordingly, we restore the issue to the file of the AO with the direction to decide the same after providing sufficient opportunity to the assessee of being heard. Therefore, this ground no. 11 is allowed for statistical purposes.

21. The issue raised in ground no. 12 is against the wrong calculation done by the AO of business loss available for set off of

Rs. 11,66,92,236/- instead of Rs. 17,93,96,054/- assessed as per the assessment order.

22. After hearing the rival contentions and perusing the material on record, we are of the view that the issue needs to be examined at the level of the AO and the AO is directed to decide the same and compute the business loss available for set off correctly. Therefore, ground no. 12 raised by the assessee is allowed for statistical purposes.

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

***Kolkata, the 14th September, 2023.***

Sd/[Sonjoy Sarma]  
Judicial Member

Sd/[Rajesh Kumar]  
Accountant Member

Dated: 14.09.2023

*Bidhan (P.S.)*

*Copy of the order forwarded to:*

- 1. Indian Explosives Pvt. Ltd., Apeejay House, Block C, 6<sup>th</sup> Floor, 15 Park Street, Kolkata-700 016.**
- 2. DCIT, National E-Assessment Centre, Delhi.**
3. CIT(A)-
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

*//True copy //*

By order

Assistant Registrar  
ITAT, Kolkata Benches  
Kolkata