

आयकर अपीलिय अधिकरण
मुंबई पीठ "एच", मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री अमरजीत सिंह, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " H ", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आअसं. 7400 / मुं/ 2017 (नि. व. 2013-14)
ITA NO.7400/MUM/2017(A.Y.2013-14)

Strides Pharma Science Limited
[Formerly known as Strides Arcolab Limited/
Strides Shasun Limited]
201, Devavrata, Sector -17,
Vashi, Navi Mumbai – 400 703
PAN: AADCS-8104-P

..... अपीलार्थी/ Appellant

बनाम Vs.

The Deputy Commissioner of Income Tax
Circle – 15(3)(2), Mumbai
Room No.451, 4th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai – 400 020

..... प्रतिवादी/ Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Nitesh Joshi, Advocate with
Shri Ninand Patade
प्रतिवादी द्वारा/ Respondent by : Shri Anoop Hiwase &
Dr. Samuel Pitta

सुनवाई की तिथि/ Date of hearing : 30/10/2023

घोषणा की तिथि/ Date of pronouncement : 15/01/2024

/01/2024

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the final assessment order dated 30/10/2017 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [in short 'the Act'], for the Assessment Year 2013-14.

2. The assessee in appeal has raised ten grounds of appeal. The assessee has also raised additional grounds of appeal vide application dated 26/10/2023.

3. The ground No.1 of appeal is general in nature, hence, require no separate adjudication.

4. In ground No.2 of appeal, the assessee has assailed charging of interest on share application money pending allotment. Shri Nitesh Joshi appearing on behalf of the assessee submitted that the issue raised in ground No.2 is identical to the issue raised in ground No.3 of appeal for Assessment Year 2012-13. There is no change in facts, hence, the submissions made in Assessment Year 2012-13 would equally hold good for the present appeal.

5. Shri Anoop Hiwase representing the Department vehemently defended the impugned order, however, he fairly stated that the issue raised in ground No.2 is similar to the one raised by the assessee in Assessment Year 2012-13.

6. We find that the action of Transfer Pricing Officer (TPO) in charging interest on share application money pending allotment by re-characterizing investment as loan is recurring. In assessee's appeal ITA No.932/Mum/2017 for Assessment Year 2012-13 similar issue was decided by us vide separate order of even date, in favour of assessee by following the earlier order of Tribunal in assessee's own case. For the sake of brevity the findings are not reproduced herein again. Both sides are unanimous in stating that the facts in the impugned assessment year are identical except the amount of interest. It is observed that the companies in which investments are made are also same i.e. Agila Specialization Ltd. & Strides Acrolab International Ltd. We see no

reason to take a different view on identical facts in the impugned assessment year. For parity of reasons, the interest charged on share application money pending allotment is directed to be deleted. Thus, ground No.2 of appeal is allowed.

7. In ground No.3 the assessee has assailed disallowance of employees contribution to Provident Fund(PF) and ESIC amounting to Rs.39,61,170/- u/s. 36(1)(va) of the Act. The Id. Counsel for the assessee submitted that the Assessing Officer has disallowed assessee's claim of deduction in respect of employees share of contribution to PF and ESIC on the ground that the said contribution was not deposited on or before the due date as specified under the respective Acts. The Id. Counsel for the assessee submitted that employee's shares of contribution to PF and ESIC was deposited by the assessee within 5 days grace period as allowed vide para 5.1.3 of Manual of Accounting Procedure (Part-I- General). The said grace period was subsequently withdrawn vide communication dated 08/01/2016, hence, the grace period of five days was applicable to the period relevant to the Assessment Year under appeal. The Id. Counsel for the assessee also furnished a chart giving details of the date of payment of employee's share of contribution to PF.

8. Per contra, Id. Departmental Representative submitted that five days grace period as referred to in communication dated 08/01/2016 from Employees Provident Fund Organization applies only to Employers contribution. The grace period does not apply to employees shares.

9. We have heard the submissions made by rival sides. The assessee has placed on record communication dated 08/01/2016 from Employees Provident Fund Organization regarding removing of grace period of five days. The relevant extract of the letter is reproduced herein below:

“ Sub: Payment of contribution by the employers by 15th of the following month - Removing of grace period of 5 days.

Sir/Madam,

As per paragraph 38(1) of the EPF Scheme, 1952, paragraph 3 of EPS, 1995 and paragraph 8(1) of EDLI Scheme, 1976, the employers are required to pay the contributions and administrative charges within fifteen days of close of every month. The employer, as per para 5.1.3 of Manual of Accounting Procedure (Part-I General), is also allowed a grace period of 5 days to remit the contribution.

2. The grace period of five days have been allowed for the employers to remit the contributions as the system of calculation of wages of the employees and their corresponding dues under the three schemes (Employees' Provident Fund Scheme 1952, Employees' Pension Scheme 1995 & Employees' Deposit Linked Insurance Scheme 1976) were done manually and its remittances in the bank required additional time in the earlier manual setup.

3. In the present era, employers compute the wages and EPF liabilities electronically (in most of the cases on real time basis) and file Electronic Challan-cum-Return (ECR). The remittances are also being deposited through Internet Banking. This has reduced the process and time taken in calculation of PF dues and its remittances in the bank. Accordingly, it has been decided that concession of grace period of 5 days available to the employers for depositing the contribution & other dues is withdrawn herewith. This decision shall apply from February, 2016 (contributions for month of January, 2016 and payable in the month of February, 2016).”

A perusal of the aforesaid communication reveals that the grace period of five days was allowed to the Employers to remit the contribution as the system of calculation of wages to the employees and their corresponding claims were done manually and remittance to the bank required additional time in the earlier manual set up. After introduction of electronic challan-cum-return the concession of five days grace period was withdrawn. The said communication does not in particular referred to employers contribution or employees

contribution. The grace period was allowed during the era when wages and corresponding dues under EPF schemes were calculated manually. The assessee has also furnished relevant extract of Manual of Accounting procedure. Para 5.1.3 of the manual reads as under:

“ 5.1.3 All the covered establishments are required to pay the dues within 15 days of the close of every month. If the amount is not deposited within the stipulated time (including the 5 days grace period), Penal Damages, not exceeding the amount of arrears can be imposed under section 14-B of the Act.”

A bare reading of above shows that it refers to dues. It does not in particular specify Employees' share or Employers' share. Therefore, we are of the considered view that the said 5 days grace period applies both to employers contribution as well as employee's contribution. We deem it appropriate to restore this issues to the file of Assessing Officer to re-examine assessee's claim. In case employees' share of contribution in the impugned assessment year is deposited within the stipulated time including five days grace period, no disallowance of such payment should be made. The Assessing Officer before verifying the date of deposits, shall grant opportunity to the assessee to furnish necessary details. Thus, ground No.3 of appeal is allowed for statistical purpose.

10. In ground No.4 of appeal, the assessee has assailed additional disallowance made u/s. 14A of the Act r.w. Rule 8D. In ground No.5 the assessee has assailed recomputation of Book Profits u/s. 115JB of the Act after considering disallowance u/s. 14A r.w.r. 8D of the Act. The assessee has also raised additional grounds of appeal with respect to disallowance of Rs.5,04,577/- made u/s. 14A of the Act suo-moto while computing total income and consideration of disallowance u/s. 14A while computing Book

Profits u/s. 115JB of the Act. Since, ground No.4, 5 and additional grounds of appeal are connected, they are taken up together for adjudication.

11. The Id. Counsel for the assessee at the outset submitted that during the period relevant to the Assessment Year under appeal, the assessee has not earned any income exempt from tax, hence, no disallowance u/s. 14A is warranted. The Id. Counsel for the assessee further submitted that the assessee has made suo-moto disallowance of Rs.5,04,577/-. The Assessing Officer applied Rule 8D and made further disallowance of Rs.17,30,77,993/-. Since, no exempt income was earned no disallowance u/s. 14A of the Act including suo-moto disallowance was required to be made. Once no disallowance u/s. 14A of the Act is made there is no question of considering it for the purpose of computing Book Profits u/s. 115JB of the Act.

11.1 The Id. Counsel for the assessee submitted that for deciding additional ground of appeal no fresh documents are to be filed. The additional grounds of appeal are legal in nature, and can be decided on the basis of documents already on record.

12. Per contra, Id. Departmental Representative vehemently opposed admission of additional grounds of appeal at this belated stage. The Id. Departmental Representative strongly supported the assessment order and the directions of the DRP on merits of the disallowance/additions.

13. Both sides heard. The assessee has raised additional ground of appeal in respect of suo-moto disallowance made u/s. 14A of the Act and adjustment of disallowance u/s. 14A of the Act while computing book profit u/s. 115JB of the Act. We find that both the issues raised in additional grounds of appeal are

legal issues. No fresh evidence are required to be adduced for deciding the additional grounds of appeal, hence, the additional grounds of appeal are admitted.

14. It is an undisputed fact that during the period relevant to the Assessment Year under appeal the assessee has not earned any income exempt from tax. It is a settled legal position that where the assessee has not earned any exempt income no disallowance u/s. 14A of the Act is required to be made. The assessee has raised a ground and additional ground of appeal that while computing book profits u/s. 115JB of the Act disallowance (including suo-moto disallowance) u/s. 14A of the Act should not be considered. The Special Bench in the case of Vireet Investment P. Ltd. 82 taxmann.com 415 has held that disallowance u/s. 14A of the Act could not be added while computing book profits u/s. 115JB of the Act.

14.1 The assessee has raised another additional ground of appeal, which if allowed would result in reducing the suo-moto disallowance while determining the taxable income. We find that similar prayer was made by the assessee in Assessment Year 2011-12 and 2012-13, the same was accepted by the Tribunal while deciding the appeals for the respective Assessment Years. The relevant extract of findings of the Tribunal in ITA No.1992/Mum/2016 for Assessment Year 2011-12 are as under:

“20. Undisputedly during the year under consideration the assessee has not earned any exempt income from its investment. By now it is settled principle of law that when there is no exempt income no disallowance under section 14A is required to be made. The co-ordinate Bench of the Tribunal in case of Orix Auto Infrastructure Services Ltd. (supra) decided the identical issue where the assessee has not earned any exempt income but made suo-moto disallowance, come to the conclusion that no disallowance is required to be made in this case. Though the assessee has not earned any exempt income but made suo-moto disallowance of Rs.58,53,114/- as a

precautionary measure and requested that the same should be reduced while determining the taxable income as there was no exempt income derived by the assessee. The co-ordinate Bench of the Tribunal after following the decision rendered by Hon'ble Bombay High Court in case of CIT vs. Prithvi Brokers and Shareholders Pvt. Ltd. 349 ITR 336 (Bom.) held that "no disallowance under section 14A of the Act could be made when there is no exempt income." Operative part of the findings returned by the co-ordinate Bench of the Tribunal in case of Orix Auto Infrastructure Services Ltd. (supra) by returning following findings:

"3.2. We find that assessee had made suomoto disallowance under Rule 8D(2)(iii) of Rs.33,62,493/- and had indeed pleaded before the lower authorities that the same should be reduced while determining taxable income as there was no exempt income derived by the assessee. We find that this request was rejected by the lower authorities.

3.2.1. We find that assessee is entitled to make a claim before the Id. AO or before the Id. CIT(A) even though it had made certain erroneous disallowance in the return of income. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Pruthvi Brokers and Shareholders Pvt Ltd., reported in 349 ITR 336 (Bom). Respectfully following the said decision of the Hon'ble Jurisdictional High Court, we hold that the lower authorities ought to have entertained the claim of the assessee. We also find that the Id. CIT(A) in para 4.14 had categorically agreed to the legal proposition that no disallowance u/s.14A of the Act could be made when there is no exempt income. Having said so, he ought to have entertained the plea of the assessee and directed the Id. AO to reduce even the suomoto disallowance of Rs.33,62,493/- made by the assessee. To this extent, we are inclined to modify the order of the Id. CIT(A) and direct the Id. AO to delete Rs.33,62,493/- being the suomoto disallowance made by the assessee.

3.3. We are conscious of the fact that this deletion of suomoto disallowance would result in assessed income going below the returned income. In this regard, we find that the Hon'ble Gujarat High Court in the case of Gujarat Gas Company Ltd., vs. JCIT reported in 245 ITR 84 and also in later decision in the case of Milton Laminates Ltd., vs CIT reported in 37 Taxmann.com 249 had categorically held that the assessed income could go below the returned income if assessee had disclosed certain income which is not supposed to be disclosed as per law. Respectfully following the said decision, we direct the Id. AO to delete the voluntary disallowance of Rs.33,62,493/- made by the assessee u/s.14A of the Act even if ultimately the assessed income goes below the returned income."

21. So following the decision rendered by co-ordinate Bench of the Tribunal which is based upon the decision rendered by the Hon'ble jurisdictional Bombay High Court in case of CIT vs. Prithvi Brokers and Shareholders Pvt. Ltd. (supra) and decision rendered by Hon'ble Gujarat High Court in case of Gujarat Gas Company Ltd., vs. JCIT

reported in 245 ITR 84, AO is directed to delete the addition made by him as well as suo-moto disallowance of Rs.58,53,114/- made by the assessee and reduce the same while determining the taxable income as no exempt income has been derived by the assessee during the year under consideration. Similarly when there could be no disallowance under section 14A no adjustment could be made to the book profit computed in terms of section 115JB of the Act with respect to disallowance under section 14A. Consequently ground Nos.6 & 7 and additional ground No.1 are allowed.”

Since, facts in the impugned assessment year are identical, following the decision of Co-ordinate Bench we allow additional ground of appeal No.1 and 2 as well.

14.2 In the result, ground No.4 and 5 of appeal and additional ground of appeal No.1 and 2 are allowed.

15. In ground No.6 of appeal, the assessee has assailed disallowance of business promotion expenditure. The Id. Counsel for the assessee stated at Bar that he is not pressing this ground of appeal. In view of above statement made by Id. Counsel for the assessee, ground No.6 of appeal is dismissed as not pressed.

16. In ground No.7 of appeal, the assessee has assailed short credit of tax deducted at source. We deem it appropriate to restore this issue back to the file of Assessing Officer to verify the records and allow TDS credit, in accordance with law. The Assessing Officer before deciding the issue shall grant reasonable opportunity to the assessee to make submissions.

17. In ground No.8 and 9 of appeal, the assessee has assailed levy of interest u/s. 234B and 234C of the Act, respectively. The Id. Counsel for the assessee submitted that there is no shortfall in deposits of advance tax, therefore, no interest u/s. 234C of the Act could be charged. Charging of

interest u/s. 234B and 234C of the Act are consequential and mandatory. In view of the contention raised by Id. Counsel for the assessee, we deem it appropriate to restore the issue to the file of Assessing Officer to verify the claim of assessee. Thus, ground No.8 and 9 of appeal area allowed for statistical purpose.

18. In ground No.10 assessee has assailed initiation of penalty proceedings u/s. 271(1)(c) of the Act. Challenge to penalty proceedings at this stage is premature, hence, the same is dismissed as such.

19. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on Monday the 15th day of January, 2024.

Sd/-

(AMARJIT SINGH)

लेखाकार सदस्य / ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/ Dated 15 /01/2024

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य / JUDICIAL MEMBER

प्रतिलिपि अग्रेषित **Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि. , मुंबई / DR, ITAT, Mumbai
5. गार्ड फाइल / Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar) ITAT, Mumbai