

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एफ' मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

श्री बी. आर. बास्करन, लेखा सदस्य, एवं श्री अमरजीत सिंह, न्यायिक सदस्य, के समक्ष
BEFORE SHRI B.R.BASKARAN, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.4818/M/10
(निर्धारण वर्ष / Assessment Year: 2006-07)

Star India Private Limited Star House, Off. Dr. E. Moses Road, Mahalaxmi, Mumbai 400011	बनाम/ Vs.	Additional Commissioner of Income Tax - Range 11(1) Aayakar Bhavan, Maharishi Karve Marg, Mumbai 400020
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आयकर अपील सं/ I.T.A. No. ITA 4675/M/10
(निर्धारण वर्ष / Assessment Year: 2006-07)

Asstt. Commissioner of Income Tax - Range 11(1) Room No. 439, Aayakar Bhavan, Maharishi Karve Marg, Mumbai 400020	बनाम/ Vs.	Star India Private Limited Star House, Off. Dr. E. Moses Road, Mahalaxmi, Mumbai 400011
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACN1335Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Porus Kaka & Shri Divesh Chawla
Department by:	Shri Sumit Kumar

सुनवाई की तारीख / Date of Hearing: 11.03.2016
घोषणा की तारीख /Date of Pronouncement: 01.04.2016

आदेश / ORDER

PER AMARJIT SINGH, JM:

This order shall dispose of both the appeals together bearing ITA No. 4818/M/10 titled as Star India Pvt. Ltd. Vs Addl CIT Rg. 11(1) and ITA No. 4675/M/10 titled as Addl. CIT Rg. 11(1) Vs Star India Pvt. Ltd. being the parties are the same and the matter of controversy is also similar in nature which can be conveniently adjudicated by a single order. The said appeals are pertaining to the A.Y. 2006-07.

2. The assessee is in the profession of producing & procuring television programmes and supplying the same to the overseas media companies, agent for advertisement sales for overseas media companies and carries on channel subscription business. The return of income of the assessee for the assessment year 2006-07 was finalized by the A.O. vide order dated 07.12.2009 assessing the total income of Rs.166,20,10,410/-. Feeling aggrieved, the assessee filed an appeal before learned Commissioner of Income Tax (Appeal) 8, Mumbai [hereinafter referred to as “the CIT(A)”], who passed the order dated 22.03.2010 in question. Since both the parties were not satisfied with the finding of learned CIT(A) therefore both the appeals have been filed.

3. The assessee has taken the following grounds:-

“1. The learned CIT(A) has erred in upholding the disallowance of Rs.16,86,893/- representing expenditure incurred by the Appellant on leasehold improvements as being capital in nature.

2. The learned CIT(A) has erred in upholding the addition of Rs.69,883/- on account of advances written off by the Appellant eventhough the advance was given for the purpose of business of the Appellant in the normal course of its activities.

3. (a) *The learned CIT(A) erred in confirming the disallowance made under section 14A read with Rule 8D.*

(b) *Without prejudice the learned CIT(A) has erred in disregarding the Appellant's submissions regarding working of estimated expenses of Rs.50,000/- and directing the Assessing Officer to make disallowance as per Rule 8D*

(c) *Without prejudice to the above, the learned CIT(A) has erred in not appreciating the Appellant's submissions that where the Appellant has both own funds as well as borrowed funds and the own funds are sufficient as compared to the amount of investments, then it is to be presumed that the investments have been made out of own funds.*

d) *Without prejudice to the above, the learned CIT(A) has erred in disregarding the Appellant's submissions that long term investments made by Appellant for capital appreciation (when ever arises) on which tax is payable, should not be considered while computing the average value of investments for the purpose of computing the disallowance as per Rule 8D.*

e) *Without prejudice to the above, the learned CIT(A) has erred in not appreciating the Appellant submissions that disallowance as per Rule 8D should be restricted to the extent of exempt income earned by the Appellant of Rs.9,15,734/-.*

f) *Without prejudice to the above, the learned CIT(A) has erred in disregarding the Appellant's submissions that the provisions of Section 14A read with Rule 8D are applicable only from Assessment Year 2007-08.*

4. *The learned CIT(A) has erred in upholding the disallowance of Rs.30,63,248/-, representing expenditure incurred by the Appellant in respect of reimbursement of property taxes to Precision Component (P) Ltd. (PCPL)''*

4. On the appeal filed by the revenue, the revenue has also taken the following grounds:-

“1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A)-3, Mumbai has erred in directing the Assessing Officer to allow entire expenditure incurred for advertisement and promotion at Rs.57,78,45,583/- ignoring the fact that the same has also benefitted the foreign associated enterprises.

2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A)-3, Mumbai has erred in holding that the commission would accrue to the assessee on the date of actual receipt of commission or on the payment by the client directly to the principal and not on the raising of invoices.

3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A)- 3, Mumbai has erred in directing the Assessing Officer to allow depreciation @ 60% on computer peripherals, treating the same as computers, though the same is not specified in the Act.

4. On the facts and in the circumstances of the case and in law, the Ld.CIT(A)- 3, Mumbai has erred in directing the Assessing Officer to delete the disallowance made u/s14A r.w.Rule8D of the Act with respect to interest expense, ignoring the fact that the assessee earned exempted income and incurred direct and indirect expenses to earn the said exempted income and the Assessing Officer was rule bound by Rule 8D(2)(ii) of the I T Rules, 1962, to calculate the disallowance taking into account interest expense also.”

ITA No. :- 4818/M/10(Assessee's Appeal):-

ISSUE NO . 1&2:-

5. The issue number 1 and 2 raised by the assessee are not pressed by the learned representative of the assessee due to smallness of amount involved, therefore, these grounds are dismissed as not pressed.

ISSUE NO. 3:-

6. The learned representative of the assessee has argued that the learned CIT(A) has erred in confirming the disallowance u/s 14A read with Rule 8D of the Income Tax Act, 1961(in short “the Act”). The assessee has taken the various grounds such as he has earned the exempt income from the investment of his own funds and the long term capital gain is not required to be considered for the purpose to calculate the expenditure to earn the exempt income and the provision contained in section 14A read with Rule 8D of the Act is not applicable and the disallowance should be restricted up to the exempted income earned by the appellant to the tune of Rs.9,15,734/-. It is apparent that the provisions of Section 14A read with Rule 8D of the Act is not applicable for the assessment year in question i.e. 2006-2007 and was to be applicable from the assessment year 2008-09 onwards. The Bombay High Court has settled law in this connection in case Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT 2010(43 DTR 177). The finding is hereby reproduced below to arrive at conclusion:-

Conclusion:-

“74. Our conclusions in this judgment are as follows:

(i) Dividend income and income from mutual funds falling within the ambit of s. 10(33) of the I.T. Act, 1961, as was applicable for asst. yr. 2002-03 is not includible in computing the total income of the assessee. Consequently, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to such income which does not form part of the total income under the Act, by virtue of the provisions of s. 14A(1);

(ii) The payment by a domestic company under s.115-O(1) of additional income-tax on profits declared, distributed or paid is a charge on a component of the profits of the company. The company is chargeable to tax on its own liability and not on behalf of or as an agent for its shareholders. In the hand of the shareholder as the recipient of dividend, income by way of dividend does not form part of the total income by virtue of the provisions of s.10(33). Income from mutual funds stands on the same basis;

(iii) The provisions of sub-ss (2) and (3) of s. 14A of the IT Act, 1961 are constitutionally valid;

(iv) The provisions of r. 8D of the IT Rules as inserted by the IT (Fifth Amendment)Rules, 2008 are not *ultra vires* the provisions of s. 14A, more particularly sub-s. (2) and do not offend Art. 14 of the Constitution;

(v) The provisions of r.8d of the IT Rules which have been notified w.e.f. 24th March, 2008 shall apply with effect from asst. yr. 2008-09;

(vi) Even prior to asst. yr. 2008-09, when r.8D was not applicable, the AO has to enforce the provisions of sub-s (1) of s. 14A. For that purpose, the AO is duty bound to determine the expenditure which has been incurred in relation to income which does not form part of the total income under the Act. The AO must adopt a reasonable basis or method consistent with all the relevant facts and circumstances after furnishing a reasonable opportunity to the assessee to place all germane material on the record.

(vii) The proceedings for asst. yr. 2002-03 shall stand remanded back to the A.O. The AO shall determine as to whether the assessee has incurred any expenditure (direct or indirect) in relation to dividend income / income from mutual funds which does not form part of the total income as contemplated under s. 14A. The AO can adopt a reasonable basis for effecting the apportionment. While making that determination, the AO shall provide a reasonable opportunity to the assessee of producing its accounts and relevant or germane material having a bearing on the facts and circumstances of the case.

In view of the finding of the Hon'ble Bombay High Court no doubt the expenditure incurred to earn the exempt income is liable to be disallowed on

reasonable basis by providing the reasonable opportunity to the assessee in accordance with the law specifically in view of the observations made by the Hon'ble Bombay High Court (Supra). Accordingly this issue is hereby restored to the file of Assessing Officer to re-examine the matter afresh in accordance with law. Accordingly this issue is decided in favour of the Assessee.

ISSUE NO. 4:-

7. According, to this issue the matter of controversy is that whether, the learned CIT(A) has erred in upholding the disallowance of Rs.30,63,248/- represented the expenditure incurred by the Appellant in respect of reimbursement of property taxes to Precision Component(P) Ltd.(PCPL). It is argued by the assessee that in accordance with the letter dated 01.04.2001 to the PCPL, the assessee company was under obligation to pay that property tax and the said tax was paid. Therefore, the expenditure to the tune of Rs.30,63,248/- is required to be allowed. The learned A.O. recorded the findings that in view of the clause 4 of the agreement dated 01.04.2001 the liability was with the licensor i.e. PCPL and PCPL was under obligation to pay the tax. Therefore, this expenditure was not found to be justified and disallowed the same. There should not be any dispute that the issue relating to payment of rent is normally decided between the land lord and tenant. Though the agreement has fastened the liability about payment of property tax upon the land lord, yet the fact remains that the assessee has reimbursed its property tax which was contrary to the term of license agreement. Under normal circumstances, such kind of violation of agreement does not happen. However, the assessee has drawn support from a letter claimed to have been

signed by the assessee and the land lord, which states that the assessee here in should reimburse the property tax.

We notice that the monthly rent paid by the assessee was Rs.1,16,000/-. However, the property tax reimbursed by the assessee works out to Rs.30,63,248/-, which works out to about 26 months of rent. This proportion appears to be highly disproportionate and beyond human conduct and probabilities. A tenant, under normal circumstances would not agree to bear such a high cost. Hence there appears to be merit in view taken by tax authorities. However, we notice that they have taken adverse view without conducting any enquiry.

The learned A.R. contended the reimbursement of property tax partakes the character of rent only. There is merit in its said contention also. Hence, what is required to be seen is as to whether to aggregate amount of rent plus reimbursements compares well with the earlier years payment. If it does not compare well, then it is the duty of the assessee to justify the payment.

In view of the above, this issue required fresh examination at the end of Assessing Officer. Accordingly we set aside the order of learned CIT(A) on this issue and restore this issue to the file of Assessing Officer for fresh examination.

ITA No. :- 4675/M/10 (Revenue's Appeal) :-

ISSUE NO. 1:-

8. The first point which has been raised by the revenue is in connection with the allowance of the expenditure incurred upon the advertisement and

promotion at Rs.57,78,45,583/-. The learned Departmental Representative has claimed that the said expenditure incurred for advertisement and promotion has been allowed by the learned CIT(A) wrongly and illegally therefore the same is not required to be allowed in the interest of justice. However, on the other hand learned representative of the assessee has refuted the said contentions. Keeping in view of the argument advanced by the learned representative of the parties and perusing the record, it is observed that this matter of controversy, has already been adjudicated by the **Income Tax Appellate Tribunal in the assessee's own case in ITA No. 1249/M/04 & ITA 378/M/04 decided on 16.04.2008 and (2006) 103 ITD 73, (Mum)TM in the ITAT Mumbai bench 'D', Third Member case of Star India (P) Ltd. Vs. Addl. CIT Rg. 11(1) dated 13.07.2006.** Moreover, this matter of controversy has also been adjudicated by the Hon'ble Bombay High Court in assessee's own case for the A.Y. 1998-99, ITA No 165 of 2009 and A.Y.2001-02, ITA No.1119 of 2009. Wherein, such expenditure has been treated as revenue expenditure. Therefore, in the said circumstance by honoring the judgment passed by the co-ordinate bench this Tribunal find nowhere, reasons to interfere with the order passed by the learned CIT(A) on this ground.

ISSUE NO. 2:-

9. The revenue has taken the second ground of appeal that the learned CIT(A), has erred in holding that commission accrued to the assessee on the date of actual receipt of commission or on the date of payment by the client directly to the principal and not on the raising of invoices. The only question which is required to be decided that when the commission received by the

assessee company is required to be taxed. The assessee company in the assessment year 1997-98 changed his method of accounting to show the said commission on receipt basis. No doubt, the A.O. disallowed the same but the Hon'ble Tribunal in his judgment dated 13.07.2006 cited as Star India Pvt. Ltd. Vs. ACIT [2006]103 ITD 73, Mumbai found justifiable to tax an amount at the time of receipt and appeal against the said order was dismissed by the Hon'ble Bombay High Court in ITA No.165 of 2009 dated 24.03.2009. No doubt in the said circumstance the ground raised by revenue does not seem justifiable therefore we have arrived at this conclusion that the learned CIT(A) has passed the order correctly and judiciously on this issue which does not require to be interfered with at this appellate stage. Hence, this issue is decided in favour of the assessee and against the revenue.

ISSUE NO. 3:-

10. The revenue has raised an objection on account of allowance of depreciation @ 60% on computer peripherals like rack, printer, port, routers, cord etc. This controversy has been decided by the Tribunal in case filed as DCIT Vs. Datacraft India Ltd. cited as (2011)9 ITR (Trib) 712 (Mumbai)(SB) and by the Hon'ble High Court of Delhi while the deciding the case of CIT Vs. BSES Rajdhani Powers Ltd. The plea which has been taken by the revenue is that the depreciation which has been allowed @ 60% and the value of the paper and other materials, is higher but the matter has been considered by the learned CIT(A) who allowed the same on the basis of the assessment held in the year of 2003-04, 2004-05 and 2005-06. We find no reason to interfere with the order passed by the learned CIT(A). Hence, the plea of the revenue is hereby declined.

ISSUE NO. 4:-

11. While raising the issue no.4 the revenue has taken the plea with regard to disallowance made u/s 14A read with Rule 8D. While, objecting the exempt income and incurring the expenditure thereon. As a matter of controversy, has already been adjudicated, while deciding the appeal filed by the assessee which certain directions which has been given to the A.O. with regard to the implementation of provision containing section 14A of the Act and in view of judgment passed by the Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT 2010(43 DTR 177), Bombay High Court. Therefore, there is no need to decide the matter again. The directions given above has resolved the controversy between the parties. Hence this issue is accordingly decided in favour of assessee.

12. The revenue has also filed the additional grounds with regard to the determination of arm's length compensation as per order of the Transfer Pricing Officer(T.P.O). The assessee filed the form no. 3CEB relating to the arm's length transaction u/s 92E of the Act r.w. Rule 10E of the I.T. Rules, which, speaks about the transactions exceeding Rs. 12 crores. The said form was referred to T.P.O, Mumbai with the prior approval of CIT(A) and order u/s 92CA(3) was passed by the T.P.O. dated 27.02.2009 and was received by the A.O. which restricts the T.P.O. for passing the said order. The T.P.O. has held in his order that :

"Based on the discussions in the preceding paragraphs, the arm's length price for this transaction is not being disturbed and the transaction is considered at the transaction value.

Therefore, there will be no adjustment to the total income of the assessee.

It is hereby clarified that the findings and discussions made in this order are applicable only in respect of reference received for A.Y. Considering, the same, no adjustment is made to the declared arm's length price by the assessee. Accordingly, no addition on account of transfer pricing adjustment is being made to the taxable income declared by the assessee."

13. In view of the report of Transfer Pricing Officer no adjustment was made to declare the arm's length price by the assessee, therefore, in view of the said circumstance no addition on account of transfer pricing adjustment was being made to taxable income declined by the assessee. Nothing came into notice that the findings given by the Assessing Officer as well as learned CIT(A) were wrong against law and fact. Hence this issue is decided in favour of assessee and against the revenue.

14. In view of the said circumstances the appeal filed by the assessee is hereby partly allowed as well as appeal of the revenue is hereby ordered to be dismissed.

Order pronounced in the open court on 1st April 2016.

Sd/-

(B.R.BASKARAN)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 1st April, 2016

MP

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.
Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai