IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**C**" KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.1011/Kol/2013 Assessment Year:2008-09

DCIT, Circle-4, Kolkata, P-7, Chowringhee Square, Kolkata-700 069	बनाम / **V/s**.	M/s Madhu jayanti International Ltd, 46, B.B. Gangduly, Street, 3rd Floor, Kolkata-700 012 [**PAN No.AABCM 7502 R**]
अपीलार्थी /Appellant	··	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Pinaki Mukherjee, JCIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Aakash Monsinka, AR
सुनवाई की तारीख/Date of Hearing	01-06-2016
घोषणा की तारीख/Date of Pronouncement	20-07-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-IV, Kolkata dated 23.01.2013. Assessment was framed by JCIT(OSD), Circle-4, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 05.12.2011 for assessment year 2008-09.

Shri Aakash Mansinka, L'd Authorized Representative appeared on behalf of assessee and Shri Pinaki Mukherjee, L'd Departmental Representative appeared on behalf Revenue.

2. First issue raised by Revenue in its ground No. 1 & 2 is that L'd CIT(A) erred in deleting the addition made by Assessing Officer for ₹1,93,07,205/- on account of non-deduction of Tax Deducted at Source (TDS for short). For this, Revenue has raised following grounds:-

> *"1. That on the facts and circumstances of the case the Ld. CIT(A) has erred in law in deleting the addition made by the AO of Rs.1,93,07,205/- in respect of payment made to the shipping companies without giving cognizance to the decision of Supreme Court in the case of M/s Transmission corporation of India reported in 239 ITR 587.*
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> *2. That on the facts and circumstances of the case the Ld. CIT(A) has erred in law in deleting the addition made by the AO of Rs.1,93,07,205/- for non deduction of TDS in respect of payments made to the shipping agents as reflected in the asst order who are assessed to tax in India and the payments received by them are taxable in India."*

3. Facts in brief are that assessee in the present case is a Limited Company and engaged in manufacturing, processing, trading and export of tea, jute, coffee, black paper (golmarich) and other spices. The assessee, for the year under consideration has filed its return of income declaring total income at ₹1,20,29,840/-. Thereafter a notice u/s. 143(2)/142(1) of the Act was issued for conducting the scrutiny assessment upon assessee.

3.1 During the year, assessee has made payments for an amount of Rs. 1,93,07,205.00 to Indian Shipping agent of non-resident shipping companies for transportation of goods to the outward country. The said Shipping Companies were non-resident and therefore payment was made through their agents who are based in India. The Assessing Officer during assessment proceedings found that in none of the case TDS was deducted from the payment made to these Shipping Companies and/or no certificate under section 197A of the Act was furnished. On query by AO, assessee submitted that the payment to non-resident Shipping Companies are governed under provision of Sec. 172 of the Act which provides non obstante clause which has an overriding effect over the other provision of the Act. Therefore, the TDS was not deducted. However, the AO perused one TDS certificate issued under

section 197 of the Act which states that income of foreign shipping line is not taxable in India by virtue of the provisions of DTAA. However the AO was not satisfied with the reply of the assessee. The AO further found that the payments made to the agents by the assessee are based in India and their incomes are liable to tax in India. The assessee also failed to furnish the details as to which agent represents the foreign shipping lines. It is nowhere mentioned that these agents had made the payment to the foreign shipping lines. Finally, AO after having reliance in judgment of Hon'ble Supreme Court in case of *Transmission Corporation of B Ltd. v. CIT* (1999) 105 taxmann 742 (SC) has disallowed a sum of ₹ 1,93,07,205/- and added back to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before L'd CIT(A) who deleted the addition made by AO by observing that on similar issue for AY 2007-08, his predecessor deleted the same which made by AO u/s 40(a)(ia) of the Act.

Being aggrieved by this order of L'd CIT(A) Revenue is in appeal before us. Before us both the parties relied on the orders of Authorities Below as favourable to them. In regard to this Ld. DR submitted copy of Mumbai Tribunal in the case of *ACIT vs. Raj GrishkKria 48 taxmann.com 175.* The DR vehemently supported the order of the AO. on the other hand before us Ld. AR filed a paper book which is running pages from 1 to 194 and submitted that the payment was made through the agents of non-residents which is duly covered in the circular no. 723 dated 19-09-1995. The Ld. AR vehemently supported the order of the ld. CIT(A).

5. We have heard the contentions of the rival parties and perused the materials available on record. At the outset, we find that similar issue has already been covered by this co-ordinate Bench in assessee's own case in **ITA No.683/Kol/2012** dated 13.11.2015 relating to AY 2007-08 where the relevant extract is reproduced below:-

We also understand that section 172 of the Act is applicable for the purpose of the levy and recovery of tax in case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India. The non-resident shipping companies are liable to pay taxes u/s 172 of the Act and such companies have to discharge tax liability on payments for carriage of goods from India or have to make satisfactory arrangements for discharge of tax liability thereof. Accordingly in case shipping company is taxable u/s 172 of the Act and the obligation to pay taxes arises in the hands of the master of the ship or any agent appointed by assessee in India. In this regard, reliance could be placed upon ***Circular No. 723*** *issued by CBDT clarifying the scope of Section 172, 194C and 195 of the act in connection with deduction of tax at source from payments made to foreign shipping companies or their agents. The said Circular No. 723 provides as follows:-*

> *"*The provisions of Section 172 of the Act are to apply, notwithstanding anything contained in other provisions of the Act. Therefore, in such cases, the provisions of sections 194C and 195 are not applicable. The recovery of tax is to be regulated, for a voyage undertaken from any port in India by a ship under the provisions of section 172. There is no overlapping in the areas of operation of section 172 or 194C as former section deals with payments to non-resident and latter with payments to residents.
>
> Where payments are made to agents of non-resident ship-owners or charters for carriage of passengers etc. shipped at a port in India, since the agent acts on behalf of the non-resident ship-owner or charterer, he steps into the shoes of the principal. Accordingly, provisions of Section 172 of the Act shall apply and those of sections 194C and 195 of the Act will not apply"

Respectfully following the above precedent of the co-ordinate Bench, we uphold the order of L'd CIT(A). This ground raised by Revenue is dismissed. AO is directed accordingly.

6. Next issue raised by Revenue in ground No.3 is as regards that Ld. CIT(A) erred in deleting the addition made by AO for ₹ 24,41,655/- on account of payment made to non-resident in respect of advertisement of products. For this, Revenue has raised following grounds:-

"3. That on the facts and circumstances of the case the Ld. CIT(A) has erred in law in deleting the addition made by the AO of Rs24,41,655/- in

respect of payment made to non-resident in respect of advertisement of products and commission for selling products outside India without deducting TDS without giving cognizance to the decision of Supreme Court in the case of M/s Transmission Corporation of India reported in 239 ITR 587."

7. During the year, assessee has incurred expenses on advertisement and agency commission to the non-residents for selling the goods and these expenses were incurred outside India. The assessee on the payment of such advertisement and agency commission has not deducted TDS. During the course of assessment proceedings, AO observed that assessee failed to furnish the certificate u/s 197 of the Act and also provided no details whether, if any, are under DTAA. Therefore, above expense was disallowed and added back to the total income of assessee.

8. Aggrieved, assessee preferred an appeal before L'd CIT(A) who has deleted the addition made by AO by observing that similar issue was placed before him for AY 2007-08 as the addition made by AO was deleted by his predecessor and in terms of above contention he deleted the same.

Being aggrieved by this order of L'd CIT(A) Revenue is in appeal before us. Before us both the parties relied on the orders of Authorities Below as favourable them.

9. We have heard rival contentions and perused the materials available on record. At the outset, we find that similar issue is already covered in favour of assessee in assessee's own case in **ITA No.683/Kol/2012** dated 13.11.2015 relates to AY 2007-08. The relevant extract in para-6 reproduced below:-

6. From the aforesaid discussion, we find that the AO has disallowed the expenses due to the violation of TDS provisions of the assessee. However the transaction for making the advertisement payment and commission are out of the purview of the TDS provisions in terms of the provisions of section 195 of the Act which reads as under :

"**195.** [(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest [(not

being interest referred to in section 194LB or section 194LC)] [or section 194LD] [***] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "**Salaries"** [***] shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:…"

Now it can be understood from the above that the income chargeable under the provisions of this Act, shall only be subject to the provisions of TDS. Now the questions arises what incomes are chargeable to tax in India, for this we need to refer section 5(2) of the Act which says that a non resident is taxable in India on the following incomes during the previous year :

- Income received/ deemed to be received in India.
- Income accruing/ arising or deemed to accrue/ arise in India.

Section 7 & 9 of the Act provides the income deemed to be received AND income deemed to accrue or arise in India. As per the section 9 of the Act, the above expenses for advertisement in Russia and commission payment to foreign parties/ NRI are not the income deemed to accrue or arise in India, Hence not chargeable to tax."

Respectfully following the decision of this coordinate Bench, we uphold the order of L'd CIT(A) and ground raised by Revenue is dismissed.

10. Next issue raised by Revenue in ground No.4 is as regards that Ld. CIT(A) erred in restricting the disallowance of ₹10,93,477/- to the extent of 1% of the exempted income without considering the provision of Sec. 14A r.w.r 8D of the IT Rules.

11. During the year, assessee has earned exempted income but made no disallowance in terms of Sec. 14A of the Act. Accordingly, AO has invoked the Sec. 14A r.w.r. Rule 8D of IT Rules and has made the following disallowance:-

"I. direct expenses Nil
II. A.1. interest debited to P/L
A/c (as per computation) =6,54,807

III. 0.5% of average value of investment = 0.5% of 87734000 = 4,38,670/-
(Addition Rs.10,93,477)

12. Aggrieved, assessee preferred an appeal before L'd CIT(A) who has partly given the relief to assessee by observing as under:-

"5.3 I have examined the rival arguments and submissions. From the assessment order it appears that the AO has made addition u/s. 14A read with Rule 8D(2)(ii) for Rs.6,54,807/- and Rule 8D(2)(iii) for Rs.4,38,670/- together totaling Rs.10,93,477/-. The appellant has contested application of Rule 8D as it has not incurred any expenditure to earn dividend income of rs.25,370/-. The AR has further stated that the appellant has earned only a nominal amount of rs.25,370/- and the action of the AO to arbitrarily fixed disallowance of expenditu5re at Rs.10,93,477/- was unreasonable and bad in law. In support the AR has cited the case of ACIT vs. Punjab state Co-operative and marketing Federation Ltd, 2011 IT No. 548 passed by the Hon'ble ITAT, Chandigarh Bench. I have examined the annual report FY 2007-08 of the appellant and find that the company as on 31.03.2008 had no unsecured loans and the only secured loan was from Karnataka Bank which was to be utilized only towards the working capital of the appellant. Hence, no amount of borrowed fund can be said to have been utilized for the purpose of making investment in shares/mutual funds from which exempt income has been earned. I further notice from the balance sheet as on 31.03.2008 that for making investment the appellant had substantial own funds under the head 'reserve and surplus' (Rs.43.89 crores0. Hence I do not find any outflow of interest to earn exempt income in the case of the appellant. I, therefore, hold that no disallowance should have been made by the AO under Rule 8D(2)(ii) of the IT Rules. Addition made on this account by the AO for Rs.6,54,807/- is deleted. As far as application of Rule 8D(2)(iii) is concerned, the AO has made a disallowance of Rs.4,38,670/- after considering 0.5% out of the average value of investment at Rs.8,77,34,000/-. The appellant has pointed out that although 8D is not applicable in its case, the average value of investment from which exempt income has been earned is only Rs.2,06,61,500/- and if this amount is kept in view, 0.5% of the disallowance will be only Rs.1,03,308/-. I do not agree with the view of the appellant that Rule 8D will not be applicable to it. The appellant maintains an establishment with manpower for its various areas of business interest which includes investments. There can be no denying the facts that establishment and manpower require expenditure I am therefore, of the view that Rule 8D(20(iii) will be applicable in the case of the appellant. However, disallowance on this account will be limited to only Rs.1,03,308/- as has

been calculated by the ape. The appellant gets a relief of Rs.9,90,169/- (Rs.10,93,477 – Rs.1,03308).”

Being aggrieved by granting partly relief to assessee by this order of L’d CIT(A) Revenue is in appeal before us.

13. Before us the Ld DR vehemently relied on the order of AO and he left the issue to the discretion of the Bench.

On the other hand, L’d AR submitted that AO has made the disallowance without recording the satisfaction in terms of Sec. 14A of the Act. He further stated that there was sufficient fund of making such investment in share and securities and as such there was no need of making any disallowance for the expenditure of interest incurred by assessee. The interest paid on the secured loan was obtained for the specific business purpose and no money was diverted for making the aforesaid investment. He stated that investment was made by assessee in foreign entities and dividend income of those activities was not exempted income and it was chargeable to tax. Therefore AO should have considered only investments which are yielding dividend income in India only.

14. We have heard the rival contentions and perused the materials available on record. From the foregoing discussion, we find that AO has invoked the provision of Sec. 14A has made the disallowance under Rule 8D of the IT Rule without recording any satisfaction. We also find that assessee has sufficient fund in making investment in Indian companies which are placed on page 153 of the assessee’s paper book. Therefore we can infer borrowed money has not been utilized in investment in Indian companies. AO has applied the formula given under Rule 8D of the IT Rules even on those investments which were made in foreign companies of the assessee without appreciating that the dividend income from foreign companies is not exempted to tax. Therefore, the disallowance cannot be made for the investment made

in foreign companies. Considering the facts and circumstances of the case and in our considered view, we find that L'd CIT(A) has deleted the disallowance as per Rule 8D of IT Rules after taking into account the investment made in the Indian companies and for this reason, we find no reason to interfere in the order of Ld. CIT(A). We also find that this Hon'ble jurisdictional Court of Calcutta has decided the similar issue in favour of assessee in the case of CIT Vs. R.E.I. Agro limited GA 3022 of 2013. Accordingly, we uphold the order of Ld. CIT(A) and ground raised by Revenue is dismissed.

15. Next issue raised by Revenue in ground No.5 is that L'd CIT(A) erred in deleting the addition made by AO for ₹97,721/- representing to employees' contribution of PF without considering the provisions made u/s 36(1)(va) of the Act.

16. During the year under consideration, AO disallowed the PF contribution of employer's within the due date of filing its return.

17. Aggrieved, assessee preferred an appeal before L'd CIT who deleted the addition made by AO by having the reliance in the decision of Hon'ble Supreme Court in the case of *CIT vs. Alom Extrusions Ltd.* (2009) 319 ITR 306 (SC).

Being aggrieved by this order of L'd CIT(A) Revenue is in an appeal before us.

18. We have heard the rival contentions of both the parties and perused the materials available on record. Before us both the parties relied on the orders of Authorities Below as favourable to them. Considering the above facts and circumstances and relied on the case law of Hon'ble Supreme Court in the case of *Alom Extrusions Ltd.* (supra) in favour of assessee and against the

Revenue. Hence, we uphold the order of Ld CIT(A) and ground raised by Revenue is dismissed.

19. Last issue raised by Revenue in ground No.6 is that L'd CIT(A) erred in deleting the addition made by AO for ₹10,93,477/- on account of expense u/s 14A to ascertain book profit u/s 115JB disregarding Explanation-(f) to Sec. 115JB of the Act.

20. In assessment order, AO has added a sum of ₹10,93,477/- to the book profit u/s 115JB of the Act and disallowance made u/s. 14A of the Act was added to the book profit in terms of provision of Explanation1(f) to Sec. 115eJB of the Act.

21. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who has deleted the addition made by AO by observing as under:-

> *"8.3 I am of the view that the contention of the appellant is correct. There is no denying the act that 115JB starts with a non-obstante clause which has overriding effect over any other provision of the act. Therefore, no blind import of provisions of the Act is possible as far as Section 115JB is concerned. I am also of the view that what is to be added or reduced from the book profit has been duly incorporated in Explanation 1 to Section115JB. Explanation 1 does not suggest that disallowances made u/s. 14A is to be added to the book profit of the appellant. I also agree with the case law cited by the AR in the case of Goetze (India) td. Vs. CIT 32 SOT 101 (ITAT, Delhi) where it has been held no addition to the book profit shall be made on account of expenditure incurred to earn exempt income. The AO is directed to re-compute MAT u/s. 115JB accordingly."*

Being aggrieved by this order of L'd CIT(A) Revenue is in appeal before us.

22. At the outset, we find that provisions to Sec. 115JB are starred with a *non obstante* clause which has overriding effect on the other provisions of Act. Therefore, the disallowance made under any other provision cannot be imported to the provision of Sec. 115JB of the Act. In this connection, we rely

on the judgment of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT 255 (2002) ITR 273 (SC), we find that the issue is squarely covered in favour of the assessee and against the Revenue. Even otherwise, the assessee's issue is also covered by the decision of Hon'ble Apex Court in the case of *Apollo Tyres Ltd.* (supra). Respectfully following the Hon'ble Apex Court, we uphold the order of CIT(A) allowing the claim of the assessee. This issue of the Revenue's appeal is dismissed.

23. **In the result, Revenue's appeal stands dismissed.**

Order pronounced in open court on 20/07/2016

Sd/-	Sd/-
(S.S.Viswanethra Ravi)	(Waseem Ahmed)
Judicial Member	Accountant Member

*Dkp

दिनांकः- 20/07/2016 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-DCIT, Circle-4, P-7, Chowringhee Square, Kolkata-69
2. प्रत्यर्थी/Respondent-M/s Madhu Jayanti International Ltd., 46, B.B Ganguly, Street 3rd Floor, Kolkata-700 012
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता