IN THE INCOME TAX APPELLATE TRIBUNAL, KOLKATA 'A' BENCH, KOLKATA

Before : **Shri M.Balaganesh, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A. No.2725/KOL/2013
Assessment Year: 2009-10

D.C.I.T., Cir-4, Kolkata,
Aaykar Bhawan, 8th Floor,
P-7, Chowringhee Square,
Kolkata-700 069. Appellant

-Vs-

The Scottish Assam (India) Ltd,
1, Crroked Lane,
Kolkata-700 069,
PAN: AAACT9788P. Respondent

Appearances by:
Shri S.Singhi, FCA, AR for Assessee
Shri Sallong Yaden, Addl.CIT, DR, for Revenue

Date of hearing : 26-10-2016
Date of pronouncement : 25-11-2016

Shri. S.S.VISWANETHRA RAVI, JM:

This appeal by the Revenue is directed against the order dated 26-07-2013 passed by the Commissioner of Income Tax(Appeals)-IV, Kolkata for the assessment year 2009-10.

2. It is noticed that the appeal filed by the revenue is time barred by 18 days. For which the revenue filed an affidavit dated

05-12- 2013 stating the reasons for delay in filing the appeal. On perusing the same and hearing both the parties, we condone the delay and dispose off the same on merits.

3. The appellant Revenue has raised following grounds:-

> *1. That CIT(A) erred in deleting the disallowance U/s. 14A read with Rule 8D(2)(ii), ignoring the fact that assessee failed to prove that borrowed fund was not used in investment from where dividend received.*
>
> *2. That CIT(A) erred in deleting the disallowance of cess on green leaf, ignoring the facts that cess on green leaf attributable to agriculture activities does not fall in the ambit of I.T Act and on this issue SLP pending before apex court in the case of AFT Industries.*
>
> *3. That CIT(A) erred in deleting the liability written back on account of gratuity, ignoring the provisions of section 40(A)(7).*

4. Brief facts of the case are that the assessee is company and involved in the business of manufacturing of Tea and filed return of income through online on 24.09.2009 showing a total income of Rs.81,85,769/-. Under scrutiny, notices u/s. 143(2) and 142(1) were issued and, in response to the said notices, the assessee appeared.

5. Ground no-1 is relating to disallowance made U/Sec 14A r/w Rule 8D(2)(ii) of the Act.

6. The AO found that the assessee earned dividend income and while claiming as exempt income did not make any provision for disallowance u/s. 14A towards the expenditure incurred. According to AO, the assesse should have incurred direct as well as indirect expenditure for earning exempt income. Since the Assessee made no calculation in respect of expenditure, the AO adopted the method as prescribed in Rule 8D, as per the ratio in the case of ITO –vs- Daga Capital Market Pvt. Ltd (2009) 312 ITR 1 (SB) (Mumbai) and

disallowed of Rs.15,63,660/- u/s.14A of the Act, the computation of which is as under:

i.	*Direct expenses related to exempt income*		*Nil*
ii.	*Interest debited to P/L A/c*	*(A) 13,09,358/-*	
	Average value of investment	*(B) 10,10,09,365/-*	
	Average value of assets	*(C) 12,49,34,581/-*	
	A X B/C		*10,58,613*
iii.	*0.5% of 10,10,09,365/-*		*5,05,047*
	Total Disallowance U/s. 14A		***15,63,660***

7. In first appeal, before the CIT-A the Assessee submitted that the investments made in shares and in mutual funds from its surplus funds and submitted a tabular form as below:-

"The Assessee also submitted the fact that investments in shares and mutual funds were made out of its own funds and not out of borrowed funds which is demonstrated below:-

Sl.No.	*Sources of Funds*	*Amount(Rs.)*	*Utilisation*
1.	*Share Capital and Reserves & Surplus*	*11,41,24,395*	*For Investments and Other operating activities*
2.	*Book Entry for non Cash items*		
	a) Provision for Accumulated Depreciation	*5,06,49,702*	*For Fixed Assets, Investments and other*
	b) Provision for Diminution in Value of Investments	*93,00,000*	*Investments in Shares and Mutual Funds*
	c) Provision for Doubtful Advance	*23,905*	*For Working Capital Requirements*
3.	*Total Non Interest Bearing Funds*	*17,40,98,002*	

4.	*Secured Loans*		
	a) From United Bank of India	*2,17,62,275*	*For Working Capital Requirements*
	b) From Tea Board- Special Purpose Tea Fund Scheme	*27,78,081*	*Replanting in Heelaksh Tea Estate*

From the above table, it can be seen that the Assessee had total owned/ non-interest bearing funds of Rs. 17,40,98,002/- whereas the amount utilized for investments are Rs. 12,05,10,473/-only. Thus, it can be inferred that the investments have been made from the own funds and no part of borrowing costs/ interest is incurred for earning such exempt income."

4.1 The Ld. A.R. further drew my attention to the terms of loan sanctioned by United Bank of India which were at pages 12 to 22 of the additional paper book and sanction letter for loan availed from Tea Board of India under the Special Purpose Tea Fund Scheme which were at pages 23 to 29 of the additional paper book. On perusing these documents it is observed that the loan from United Bank of India was obtained for the specific purpose of meeting the working capital requirements of the Company during the seasonal period from the month of January, 2009 to December, 2009 whereas loan from Tea Board of India was for the specific purpose of carrying out replanting in their Heeleakah Tea Estate. In fact a separate bank account with no-lien consent from Bank has been maintained in compliance of Clause 9 of the Loan Sanction Letter of the Tea Board of India. The Ld. AR further drew my attention to point (xvi) of the Annexure to the Auditor's Report wherein it is stated that:

> *"To the best of our knowledge and belief and according to the information and explanations given to us, term loans have been applied for the purposes for which they were obtained".*

4.2 The Ld. AR argued that the Appellant had sufficient owned/ non-interest bearing funds to fund its investment activities. The Ld. AR relied on the case of Reliance Utilities & Power Limited (ITA No 1398 of 2008- Order dated 09.01.2009 of the Hon'ble Bombay High Court) wherein the Hon'ble Bombay High Court observed that "if there be interest free funds available to an Assessee sufficient to meet its investments and at the same time the Assessee had raised a loan it can be presumed that the investments were made from the interest free funds available".

4.3 The Ld. AR argued that Section 14(2) does not ipso facto enable the Assessing Officer to apply the method prescribed by the rules straightaway without considering whether the claim made by the Assessee in respect of the

expenditure incurred in relation to exempt income is correct. The Assessing Officer must first determine whether the claim of the Assessee in that regard is correct and the determination must be made having regard to its accounts. The satisfaction of the Assessing Officer must be arrived on an objective basis. It is only when the Assessing Officer is not satisfied with the claim of the Assessee that the legislature directs him to follow the method that is prescribed. The Ld. AR relied on the following decisions:

a. Walfort Share & Stock Brokers P. Ltd.
b. ACIT v/s Eicher Ltd [Reported in 101 TT) 309 (Del)]
c. Wimco Seedlings Ltd vs DCIT referred in 293 ITR (A.T) 0216,ITAT Delhi
d. Thacker and Co Ltd vs ITO referred in 290 ITR (A.T) 0154, ITAT Delhi
e. CIT vs Hero Cycles 323 ITR 158 (PH)
f. Reliance Utilities & Power Ltd (ITA No 1398 of 2008 order dated 09.01.2009 of Hon'ble Bombay High Court)
g. East India Pharmaceutical Works 224 ITR 627.
h. Assessee's own case (Reported in ITAT No.2638/Kol/2004,dt.28/07/2005 for the assessment Year 2001-02.
i. REI Agro Ltd [ITA No 1331/Kol/2011 & ITA No 1423/Kol/2011 dated 19/06/2013]

4.4 The Ld AR further argued that the expenses incurred can be disallowed only to the extent the same are relatable to the earning of exempt Income. The Ld AR argued that the dividend was deposited in the Bank Account through ECS directly and the Appellant had no occasion to incur any expenditure for collection of the dividend warrant or clearing of the same in the bank account. The fact that the Assessee did not incur any administrative expenses for investing activities is further supported from the Cash Flow Statement attached to the audited accounts.

4.5 I have heard the rival contentions, perused the material on record and duly considered factual matrix of the case and also applicable legal position.

4.6 Let us discuss the applicability of Section 14A first, as the Ld AR challenges the every application of Section 14A to the facts of the case, because the Assessing Officer has not recorded a specific satisfaction to the effect that claim of the assessee, i.e. no expenditure is incurred on earnings the tax exempt dividend, is incorrect. I see no substance in this plea. Section 14 A (2) provides that, "(t)he Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not part form of the total income under this Act" and section 14 A (3) provides that, "(t)he provision of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act". While a lot of emphasis is placed by the Ld AR of wordings of Section 14A(2) which refer to the need of Assessing Officer's

satisfaction to the effect that the claim made by the assessee is incorrect, he simply overlooks the provisions of Section 14A (3). Therefore, a plain reading of the statutory provisions of Section 14A(2) and (3) shows that when assessee offers a disallowance under section 14A, the provisions of Section 14A(2) read with rule 8 D cannot be invoked unless the Assessing Officer is satisfied about incorrectness of the disallowance so offered, but when assessee does not offer any disallowance under section 14 A on his own, the provision of section 14A(2) with rule 8D can be invoked without there being any need to express satisfaction about incorrectness of such claim.

4.7 Rule 8D(2) has three sub-parts. The first sub-part i.e. (i) deals with the amount of expenditure directly relating to the income which does not form part of the total income. That issue is not in dispute here and therefore, we do not go into it in this case. In second sub-part i.e.(ii), it is a computation provided in respect of expenditure incurred by the assessee by way of interest during the previous year which is not directly attributable to any particular income or receipt. This clearly means that if there is any interest expenditure, which is directly relatable to any particular income or receipt, such interest expenditure is not to be considered under rule 8D(2)(ii). In the assessee's case here the interest has been paid by the assessee on the loans taken from the United Bank of India and Tea Board of India for its business purpose. There is no allegation from either the bank or the Tea Board nor the AO that the loan funds have been diverted for making the investment in shares or for non-business purposes. Further rule 80(2)(ii) clearly is worded in the negative with the words "not directly attributable". Thus for bringing any interest expenditure, claimed by the assessee, under the ambit of rule 80(2)(ii) it will have to be shown by the AO that the said interest is not directly attributable to any particular income or receipt.

4.8 In the appellant's case, admittedly, the appellant has sufficient owned/ interest free funds amounting to Rs. 17,40,98,002/- whereas amount utilized for investments are Rs.12,05,10,473/- only. The loans taken during the year admittedly are for the working capital requirement of the assessee and for replanting at Heelakh Tea Estate and the assessee are bound to provide to the bank Cash Budgets and Final Crop Reconciliation Statement and other details to show the utilization of the loans. Moreover, a separate bank account with no-lien consent from Bank has been maintained for loans from Tea Board of India. No bank would permit the loan given for one purpose to be used for making any investment in shares and securities. After considering these facts that the appellant had not used any of its borrowings for purchasing the shares, the disallowance made by the AO applying sub-part (ii) of Rule 80 is deleted in full.

8. Aggrieved by the order of CIT-A the Revenue before this Tribunal challenging the same. The Ld. DR submits that the Assessee could not file anything to show that the borrowed funds were not used in investments and without considering the same the CIT-A deleted the addition made on account

of disallowance and relied on the order of AO. The Ld.AR reiterated the submissions as made before the CIT-A and supported the order of CIT-A.

9. Heard rival submissions and perused the evidence available on record. We find From the tabular form schedule as reproduced in para no-7 herein above that the Assessee has surplus non-interest funds to an extent of Rs. 17,40,98,002/- and also shows the Assessee made investments to an extent of Rs. 12,05,10,473/-only and we hold that the investments were made from its surplus own funds. In this regard, the discussion in order of CIT-A at para no-7, the CIT-A examined the evidence available before him and found that the assesse paid the interest on the loans taken from the United Bank of India and Tea Board of India for its business purpose more specifically as mentioned at tabular form schedule in para no-7 and he pointed out that there was no allegation from either the united bank of India or the Tea Board nor the AO that the loan funds have been diverted for making the investment in shares or for non-business purposes. In view of the above, we find no infirmity in the order of CIT-A and the CIT-A is justified in deleting the addition made on account of Rule 8D(2)(ii) of the Rules and the ground no-1 raised to that effect is fails and it is dismissed.

10. Ground no.2 is relating to disallowance made on account of Cess on green leaf. The contention of the Assessee is that it has tea gardens in Assam and the production of the green leaf is purely an agricultural activity and as such, the cess levied on the production of the green leaf does not come under the purview of composite income and claimed deduction before applying Rule 8. According to AO the Revenue challenged the order of the Hon'ble Calcutta High Court in the case of AFT Industries before the Hon'ble Supreme Court and the Hon’ble Supreme Court admitted said SLP and in view of pendency of the

matter, the AO treated the cess is non deductible expenditure from the composite income of the assesse and added an amount of Rs.18,37,501/-.

11. The Assessee submitted the following before the CIT-A as under:

> *7.1 In response the Ld AR argued that the Appellant submitted that the Cess on Green Leaf is a levy on the raw material for manufacture and sale of tea. It adds to the cost of green leaf plucked and bought for manufacturing of tea. Therefore, it is exclusively an expenditure for the purpose of the business activities of the Assessee and, therefore, allowable as an expenditure to arrive at the profit from the business of growing, manufacturing and sale of tea. The expenditure of Green Leaf Cess is allowable from the composite income of the 100% tea business before computation of taxable income under Rule 8 of the Income Tax Act, 1961. The Ld AO relied on a number of decisions including decision in the Appellant's own case of the ITAT, Kolkata benches in ITA No. 2627/Kol/2004 dt.28-7-2005 for the Assessment Year 2001-02 in favour of the Assessee*
>
> *7.2 Further the LD AR argued that, as held in the case of DCIT vs. M/S Assambrook Ltd. - ITA No. 2049/Ko1j2010 - Assessment Year 2006-07, SLP is pending before the Hon'ble Supreme Court against the decision of the Hon'ble Calcutta High Court in respect of AFT Industries Ltd. Vs. CIT(270 ITR 167) which have no effect since the Hon'ble Apex Court has neither set aside the order of the Hon'ble Calcutta High Court nor granted any stay.*
>
> *7.3 I am of the view that the Hon'ble Apex Court has not stayed or set aside the order of the Hon'ble Jurisdictional High Court of Kolkata and hence as on date the order of Jurisdictional High Court will continue to be effective. Ground No.5 raised by the assessee is thus allowed and thus addition of Rs.18,37,501/-is deleted.*

12. We find that, as matter stood thus, the Honourable Supreme Court dismissed the SLP filed by the appellant revenue and agreed with the interpretation of scope of Rule 8 of Income Tax Rules 1962 rendered by the Honourable High Court of Calcutta. The Learned AR placed copy of such order before us and submitted that the present appeal may be disposed of in pursuance of the decision of Honourable Supreme Court and learned DR submits that the appellant revenue did not succeed in SLP and the decision of Honourable High Court of Calcutta has become final and binding on the appellant revenue in view of the confirmation of the such decision by the

Honourable Supreme Court. The relevant portion of which is reproduced herein below:

> *"The respondent-assessee had paid cess on green leaf to the Government of Assam which was levied under Assam Taxation (On Specified Land) Act, 1990. In its income tax return, it had claimed the same as deduction which has been allowed by the High Court. The relevant discussion in this behalf is as under:-*
>
> > *"However, the learned Tribunal had held that the deduction is eligible after computing the income under Rule 8 and the apportionment is to be made only after the income is so computed. Such apportionment cannot be made before the deduction. Rule 8 of the Income Tax: Rules, 1962 requires that the computation is to be made as if by fiction the entire income out of the tea grown and manufactured as income assessable under the Income Tax Act, 1961. In view of Rule 8, the income so computed is to be apportioned 60: 40 of which 40 is assessable to tax under the Act. It does not provide that after apportionment of the 60 % of the income so computed shall again be required to be computed under the Agricultural Income Tax Act. On the other hand, this 60% is exposed and becomes exigible to tax under the Agricultural Income Tax Act. without being required to be assessed under the said Act by reason of the fiction so created. Therefore, the cess paid has rightly been excluded while computing the income under Rule 8 of the tea grown and manufactured."*
>
> *In arriving at the aforesaid conclusion, the High Court has referred to the various judgments of this Court.*
>
> *We are of the opinion that the High Court has rightly interpreted the scope of Rule 8 of the Income Tax Rules 1962. We, thus, find no merit in this appeal which is, accordingly, dismissed. "*

13. In accordance with the principle as laid by the Hon'ble High Court of Calcutta in the case of AFT Industries which has been further strengthened by dismissal of SLP by the Honble Supreme Court, we hold that the income so computed is to be apportioned 60: 40 of which 40 is assessable to tax under the Act. Thus, ground no-2 raised is, accordingly dismissed.

14. Ground no.3 is relating to deletion of addition made as disallowance thereon U/Sec 40(A)(7) of the Act. The AO found that assessee the written back liability towards Gratuity in the Profit and Loss account from Annexure 6 in Tax Audit Report and found from computation the same was deducted from the total income. The AO disallowed of Rs.1,77,319/- and added to the total income. The Assessee challenged the same before the CIT-A and CIT-A deleted the same by observing as under:

> *8. The sixth ground of appeal is against the addition of provisions made against gratuity liability written back in the Profit and Loss Account amounting to Rs 1,77,319/-. Brief facts of the issue is that during the year the Appellant has written back Rs. 1,77,319/- being excess provision for gratuity liability provided in earlier year. According to section 40 A (7) no deduction shall be allowed in respect of any provision (whether called as such or by any other name) made by the assessee for the payment of gratuity to his employees on their retirement or on termination of their employment for any reason. Mere provision of the liability so written back in fact was never allowed in any earlier tax assessment. Hence, the excess provision for gratuity written back during the year is therefore not liable for tax during the year in any circumstance. Ground No 6 raised by the assessee is thus allowed. I direct the AO to delete the addition of Rs 1,77,319/-.*

15. Heard rival submissions and perused the material available on record. We find that the addition made on account of writing back of gratuity to the profit and loss account was excess provision found during the year under consideration. As rightly pointed out by the CIT-A that provision of liability of gratuity written back was never allowed in earlier assessment and we find that the assessee has offered the same in its computation of income in the previous years. Therefore, we find no infirmity in the order of the CIT-A and it is justified . Thus, ground no. 3 raised in this regard by the revenue is dismissed.

16. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open Court on 25th November,2016.

Sd/-	Sd/-
M.Balaganesh	**S.S. Viswanethra Ravi**
Accountant Member	**Judicial Member**

Dt: 25-11-2016

Copies to :
**PP/SPS
(1) Appellant/Assessee:
(2) Assessee/Department:
(3)Commissioner of Income-tax (Appeals)
(4) Commissioner of Income Tax, Kolkata
(5) The Departmental Representative
(6) Guard File By order

Assistant Registrar,
Income Tax Appellate Tribunal, Kolkata