

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

**Before Shri P.M. Jagtap, Accountant Member  
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. No. 170/KOL/ 2012  
Assessment Year : 2008-2009**

***Orient Paper & Industries Limited,.....Appellant***  
***9/1, R.N. Mukherjee Road, 5<sup>th</sup> Floor,***  
***Kolkata-700 001***  
***[PAN : AAACO 3279 J]***

**-Vs.-**

***Deputy Commissioner of Income Tax,.....Respondent***  
***Circle-6, Kolkata,***  
***Aayakar Bhawan,***  
***P-7, Chowringhee Square,***  
***Kolkata-700 069***

**Appearances by:**

*Shri R.N. Bajoria, Sr. Advocate and Shri Asim Choudhury, Advocate, for the assessee*

*Shri Kalyan Nath, JCIT, Sr. D.R., for the Department*

Nate of concluding the hearing : November 27, 2015

Date of pronouncing the order : December 04, 2015

**O R D E R**

**Per Shri P.M. Jagtap:-**

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax (Appeals)-VI, Kolkata dated 22.12.2011 for the assessment year 2008-09 and the grounds as originally raised therein read as under:-

*1.(a) The Commissioner of Income Tax (appeals) erred on facts of the case and in law in confirming allocation of interest of Rs.37,30,477/- made by the Assessing Officer against exempt dividend income under section 14A of the Income Tax Act read with Rule 8D of the Income Tax Rules. On proper appreciation of facts of the case and correct construction of law, the CIT(A) should not have upheld the allocation of interest under section 14A of the Act read with Rule 8D of the Rules.*

*(b) The CIT(A) erred on the facts of the case and in law in confirming allocation of interest related to/ incurred*

*for/ attributable to business and not relating to dividend income.*

*2. The CIT(A) erred in holding that MAT credit has to be allowed after calculation of tax + surcharge + education cess. The CIT(A) should have held that first the MAT credit has to be allowed from gross income tax and then surcharge + education cess is leviable on balance income-tax.*

2. We have heard the arguments of both the sides and also perused the relevant material available on record. As submitted by the Id. Representatives of both the sides, a similar issue as involved in Ground No. 1 relating to the transactions on account of interest under section 14A read with Rule 8D of the Income Tax Rules was also involved in the case of Hindustan Motors Limited in the identical facts and circumstances and the same has already been decided by this Tribunal vide its order dated 20.11.2015 passed in ITA No. 171/KOL/2012. A copy of the said order is also placed on record before us and perusal of the same shows that a similar issue has been decided by the Tribunal in favour of the assessee vide paragraph nos. 10 & 11 of its order, which read as under:-

*"10. We have considered the rival submissions and also perused the relevant material available on record. It is observed that the investment in shares on which the exempt dividend income is earned by the assessee during the year under consideration was actually made in the earlier years and in the assessment completed for assessment year 2006-07 under section 143(3), no disallowance on account of interest was made by the Assessing Officer under section 14A after recording a finding that the borrowed funds were entirely utilized by the assessee for the purpose of business and the same were not used for making any investment in shares. Even in the assessment completed for A.Y. 2007-08 under section 143(3), no disallowance under section 14A on account of interest was made by the Assessing Officer thereby accepting that the investment in shares was made by the assessee out of its own funds and there was no utilization of interest bearing borrowed funds for making such investment. As pointed out by the Id. Counsel for the assessee from the relevant documentary evidence, the investment made in shares by the assessee-company in the earlier years has continued substantially in the year under consideration and there being no fresh investment made by the assessee in shares, it follows that investment in shares is entirely made by the assessee out of its own funds and there was no utilization of borrowed funds for making such*

investment as found by the Assessing Officer himself while completing the assessments for the earlier years. In this regard, Id. D.R. has contended that Rule 8D having been made applicable for the year under consideration for the first time, the issue has to be looked into from different angle and the view taken by the Assessing Officer in the earlier years has no relevance. We are unable to accept this contention of the Id. D.R. Once it is found that the investment in shares is made by the assessee out of its own funds and there is no utilization of borrowed funds for making such investment, we are of the view that no disallowance on account of interest under section 14A can be made even by applying Rule 8D as the said Rule 8D will have application only in such cases where there is any nexus between the interest bearing borrowed funds and investment made in shares. Even a perusal of the balance-sheet of the assessee-company as on 31.03.2008 shows that sufficient own funds to the extent of about Rs.132 crores were available with the assessee-company at the relevant time and the same being more than the investment of about Rs.72 crores made in shares, we are of the view that there was no case for making disallowance on account of interest under section 14A even by applying Rule 8D as the assessee had sufficient own fund to make investment in shares and the interest bearing borrowed funds were not utilized for making such investment.

11. It is also observed that in the computation of total income, disallowance of Rs.2,47,79,104/- was offered by the assessee under section 14A in relation to the expenditure incurred in relation to earning of exempt income and there was no reason given by the Assessing Officer, having regard to the accounts of the assessee, to show his dissatisfaction with the correctness of quantum of expenditure disallowed by the assessee under section 14A. In the case of REI Agro Limited (supra) cited by the Id. Counsel for the assessee, it was held by the Coordinate Bench of this Tribunal that where the assessee makes a claim that only a particular amount is to be disallowed under section 14A and if the Assessing Officer proposes to invoke section 14A, he has to record the satisfaction as to how the claim of the assessee is not correct having regard to the accounts of the assessee. It was held that if there is no such satisfaction recorded by the Assessing Officer, no disallowance could be made by him by invoking the provisions of section 14A. Keeping in view this decision of the Coordinate Bench of this Tribunal in the case of REI Agro Limited, which has been affirmed by the Hon'ble Calcutta High Court, we hold that in the absence of requisite satisfaction recorded by the Assessing Officer showing how the disallowance offered by the assessee under section 14A was not correct having regard to its books of account, it was not permissible to the Assessing Officer in law to invoke section 14A and make a further disallowance. As such, considering all the facts of the case, we are of the view that the disallowance made by the Assessing Officer and

*confirmed by the Id. CIT(Appeals) under section 14A read with Rule 8D is not sustainable either in law or on the facts of the case and deleting the same, we allow Ground No. 1 of the assessee's appeal".*

As the issue involved in the present case as well as all the material facts relevant thereto are admittedly similar to the case of M/s. Hindustan Motors Limited (supra), we follow the decision rendered in the said case and delete the disallowance made by the Assessing Officer and confirmed by the Id. CIT(Appeals) under section 14A of the Act read with Rule 8D. Ground No. 1 is accordingly allowed.

3. As regards the issue involved in Ground No. 2 relating to the dispute as regards the stage at which MAT credit is to be allowed, the Id. Representatives of both the sides have agreed that the same is covered against the assessee and in favour of the Revenue by the decision of the Tribunal rendered in the case of Hindustan Motors Limited vide its order dated 20.11.2015 (supra), wherein a similar issue has been decided against the assessee by the Tribunal for the following reasons given in paragraph 13 of its order :-

*"13. As regards the issue involved in Ground No. 3 relating to the assessee's claim for allowing MAT credit against tax before levy of surcharge and education cess, the Id. Counsel for the assessee at the time of hearing before us has relied, inter alia, on the decision of the Hon'ble Allahabad High Court in the case of CIT -vs.- Vacment India reported in 369 ITR 304, wherein it was held by relying on the entries made in relevant form ITR-6 providing the method of computation of tax liability that the 'tax payable' is to be arrived at after deducting credit on account of minimum alternate tax from 'gross tax payable' and on this amount of 'tax payable', surcharge and cess are to be computed. However, as held by the Hon'ble Supreme Court in the case of CIT -vs.- Tulsyan NEC Limited reported in 330 ITR 226 in the context of calculation of interest under section 234A, 234B and 234C, it is immaterial that relevant form prescribed under the Income Tax Rules provided for set off of the MAT credit balance against the amount of tax plus interest. It was held that this method of working given in the relevant form was directly contrary to a plain reading of section 115JAA(4) and a form prescribed under the Rules, in any case, can never have any effect on the interpretation or operation of the parent statute. It is also interesting to note that in the relevant working as given on page no. 235 of the report and approved by the Hon'ble*

*Supreme Court, the set off of MAT credit was allowed only after levy of surcharge on the tax payable. In our opinion, the issue involved in Ground No. 3 of the assessee's appeal thus is squarely covered against the assessee by the decision of the Hon'ble Supreme Court in the case of CIT -vs. - Tulsyan NEC Limited (supra), and respectfully following the same, we uphold the impugned order of the Id. CIT(Appeals) holding that MAT credit has to be allowed after calculation of tax plus surcharge and education cess. Ground no. 3 is accordingly dismissed".*

4. As the issue involved in the present case is similar to the issue involved in the case of Hindustan Motors Limited (supra), we respectfully follow the decision of the Tribunal rendered in the said case and uphold the impugned order of the Id. CIT(Appeals) on this issue. Ground No. 2 of the assessee's appeal is accordingly dismissed.

5. During the course of appellate proceedings before the Tribunal, the assessee has raised the following ground as additional ground with an application seeking admission thereof:-

*"For that the sum of Rs.10.36 crores realized on sale of 1,07,353 Units of CERS are capital receipt not liable to tax and the same sum be deleted from the assessed income".*

6. We have heard the arguments of both the sides on the application of the assessee for admission of the above additional ground. The Id. Counsel for the assessee has contended that although the amount in question received as compensation by the assessee by way of Carbon Credit in respect of its Cement Division was offered to tax in the return of income and the issue relating to its exemption being capital receipt was not raised either before the Assessing Officer or before the Id. CIT(Appeals), the same is being raised before the Tribunal for the first time by way of an additional ground on the basis of various judicial pronouncements coming to the notice of the assessee afterwards, wherein the similar receipt has been held to be a capital receipt not chargeable to tax. He has contended that the issue raised in the additional ground is purely a legal one and since all the material facts relevant to decide the same are already on the record, the same is deserved to be admitted.

Although the ld. D.R. has contended that the adjudication of the issue raised by the assessee in the additional ground may require investigation into new facts, he has not been able to point out specifically such facts, which are not available on record. Moreover, as rightly contended by the ld. Counsel for the assessee, the question involved in the additional ground is whether the receipts from Carbon Credit are in the nature of capital or revenue receipt and whatever limited facts, which are required to be considered/examined to decide the same, are already available on record in the annual report itself filed by the assessee-Company.

7. While objecting to the admission of additional ground filed by the assessee, the ld. D.R. in support of the Revenue's case has relied on the decision of the Hon'ble Supreme Court in the case of CIT -vs.- Stepwell Industries Limited & Others reported in 228 ITR 171 and pointed out that the decision of the Tribunal in the said case to allow certain claim made by the assessee for the first time before the Tribunal was not upheld by the Hon'ble Apex Court. It is, however, observed that new claim made by the assessee for the first time before the Tribunal in the said case was allowed by it and since the same was allowed by the Tribunal on assumption of certain facts without verification of the relevant details or particulars, the action of the Tribunal was not upheld by the Hon'ble Supreme Court. The power of the Tribunal to entertain the new claim raised for the first time before it was not under challenged in the said case and as is evident from the question referred to the Hon'ble Supreme Court, the decision of the Tribunal allowing the claim of the assessee for weighted deduction under section 35B of the Act, was challenged on merit. On the other hand, in the case of CIT -vs.- Pruthvi Brokers & Shareholders Pvt. Ltd. reported in 349 ITR 336 (Bom.), the issue specifically raised before the Hon'ble Bombay High Court was regarding the power of the appellate authorities to entertain and consider new claim not made in the return and it was held by the Hon'ble Bombay High Court that the appellate authorities have power to consider claim not made in the return of income. It is also observed that in the case of Ultra

Tech Cement Limited (ITA No. 1348/Mum/2012 dated 28.02.2014), a similar issue claiming receipt from Carbon Credit as capital receipt not chargeable to tax was raised by the assessee for the first time before the Tribunal by way of additional ground and the same was admitted by the Coordinate Bench of this Tribunal by relying on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Limited -vs.- CIT reported in 229 ITR 383. Keeping in view the said decision of the Coordinate Bench of this Tribunal as well as having regard to all the relevant aspects of the case as discussed above, we admit the additional ground raised by the assessee and restore the issue raised therein to the file of the Assessing Officer for deciding the same on merit after verifying all the relevant facts of the case from record and after giving the assessee proper and sufficient opportunity of being heard.

**8. In the result, the appeal of the assessee is partly allowed.**

Order pronounced in the open Court on December 04, 2015.

Sd/-

Sd/-

**(S.S. Viswanethra Ravi)**  
**Judicial Member**

**(P.M. Jagtap)**  
**Accountant Member**

***Kolkata, the 4<sup>th</sup> day of December, 2015***

Copies to : (1) ***Orient Paper & Industries Limited,***  
***9/1, R.N. Mukherjee Road, 5<sup>th</sup> Floor,***  
***Kolkata-700 001***

***(2) Deputy Commissioner of Income Tax,***  
***Circle-6, Kolkata,***  
***Aayakar Bhawan,***  
***P-7, Chowringhee Square,***  
***Kolkata-700 069***

(3) ***Commissioner of Income-tax (Appeals)-VI, Kolkata***  
(4) ***Commissioner of Income Tax, Kolkata***  
(5) ***The Departmental Representative***  
(6) ***Guard File***

***By order***  
***Assistant Registrar,***  
***Income Tax Appellate Tribunal,***  
***Kolkata Benches, Kolkata***

***Laha/Sr. P.S.***