IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND

SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA no.6654/Mum./2013
(Assessment Year : 2010–11)

M/s. Aptech Limited
A–65, MIDC, Marol
Andheri (E), Mumbai 400 093
PAN – AADCA0602L

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle–8(1), Mumbai

..... Respondent

Assessee by : Shri S.C. Tiwari a/w
Ms Rutuja Pawar
Revenue by : Rajesh Kumar Yadav

Date of Hearing – 09.10.2017	Date of Order – 04.12.2017

O R D E R

PER SAKTIJIT DEY, J.M.

Aforesaid appeal by the assessee is against the order dated 18th September 2013, passed by the learned Commissioner (Appeals)–16, Mumbai, for the assessment year 2010–11.

2. In ground no.1, the assessee has challenged the disallowance of ₹ 21,96,361 under section 14A of the Income–tax Act, 1961 (for short *"the Act"*) r/w rule 8D of the Income–tax Rules, 1962.

3. Briefly stated the facts are, the assessee a company filed its return of income for the impugned assessment year on 9th October 2010, declaring nil income after claiming carry forward of current year's loss of ₹ 10,81,32,278. During the assessment proceedings, the Assessing Officer on verifying the Balance Sheet of the previous year found that the assessee has invested in equity shares of company, the income from which will not form part of total income. He, therefore, called upon the assessee to explain why disallowance of expenditure under section 14A r/w rule 8D should not be made in respect of such exempt income yielding assets. In response, the assessee objected to the proposed disallowance by stating that no expenditure was incurred for making such investments. As far as the interest expenditure is concerned, it was submitted that netting–off has to be allowed. The Assessing Officer, however, did not find merit in the submissions of the assessee and proceeded to compute disallowance in terms of rule 8D which was quantified at ₹ 21,96,361.

4. While challenging the aforesaid disallowance before the first appellate authority, the assessee submitted that, since, it had sufficient interest free funds available for making the investments in equity shares, disallowance of interest expenditure should not be made. As far as administrative expenditure is concerned, it was submitted, no specific expenditure was incurred for investment

activities. After considering the submissions of the assessee, learned Commissioner (Appeals) did not find merit in the same. Accordingly, he confirmed the disallowance made by the Assessing Officer. However, he directed the Assessing Officer to exclude the investments from disallowance under section 14A where the assessee had offered the dividend income for taxation.

5. Learned Authorised Representative submitted before us, in the relevant previous year, the assessee has not earned any exempt income byway of dividend, therefore, no disallowance under section 14A should be made.

6. Learned Departmental Representative relied upon the observations of the Assessing Officer.

7. We have heard rival contentions and perused the material available on record. The specific contention of the assessee before us is, in the relevant previous year, it has not earned any exempt income by way of dividend. In fact, the learned Counsel for the assessee has made this contention in writing before us. On a perusal of the impugned assessment order or even the order of the first appellate authority, we do not find any finding of fact recorded by them that in the relevant previous year the assessee has earned any exempt income by way of dividend. It appears from the orders of the

Departmental Authorities that the disallowance under section 14A r/w rule 8D has been made considering the fact that investments made by the assessee in the equity shares of companies would give rise to exempt income. Thus, prima–facie, assessee's claim / contention that it has not earned any exempt income by way of dividend in the relevant previous year appears to be correct. That being the case, following the decision of the Hon'ble Delhi High Court in Cheminvest Ltd. v/s CIT, 378 ITR 33 and the consistent view of the different Benches of the Tribunal, we delete the addition made by the Assessing Officer and sustained by the learned Commissioner (Appeals).

8. In ground no.2, the assessee has challenged disallowance of deduction claimed of ₹ 22,70,225, on account of provision for leave encashment.

9. Brief facts are, during the assessment proceedings, the Assessing Officer noticing that the assessee has debited an amount of ₹ 22,70,225, towards provisions for leave encashment called upon the assessee to explain why it should not be disallowed in terms of section 43B(f). After considering the submissions of the assessee, the Assessing Officer disallowed the deduction claimed, since, it was not actually paid in the relevant previous year.

10. Though, the assessee challenged the disallowance before the first appellate authority, he also confirmed the disallowance.

11. The learned Authorised Representative submitted before us that the Assessing Officer may be directed to allow assessee's claim of deduction on actual payment.

12. Learned Departmental Representative supported the decision of the learned Commissioner (Appeals).

13. We have heard rival contentions and perused the material available on record. As could be seen, deduction claimed by the assessee was disallowed on the reasoning that the amount was not actually paid by the assessee in the relevant previous year. As per section 43B(f) of the Act, which was introduced to the statute by Finance Act 2001 w.e.f. 1st April 2002, any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee is allowable in the relevant previous year, wherein, such amount was actually paid. Keeping in view the aforesaid statutory provision, we direct the Assessing Officer to verify assessee's claim and allow it in the assessment year, wherein, the assessee has actually paid the amount towards leave encashment. This ground is allowed for statistical purposes.

14. Grounds no.3, 4 and 5 being general in nature do not require adjudication.

15. Besides the aforesaid grounds, the assessee has raised following effective additional grounds:–

> *"1. That on the facts and in the circumstances of the case, the appellant be allowed deduction of provision for bad and doubtful debts of ₹ 5,95,24,304 in computation of book profit under section 115JB erroneously included by the Assess ng Officer.*
>
> *2. That on the facts and in the circumstances of the case and in law, the appellant be allowed credi of tax of ₹ 1,60,00,000, paid by the appellant on 31.03.2009, erroneously not allowed by the Assessing Officer.*
>
> *3. That On the facts and in the circumstances of the case and in law, levy of interest under section 234B and 234C corresponding to the tax of ₹ 1,60,00,000 paid by the appellant on 31.03.2009, be deleted."*

16. Additional grounds no.4 and 5 being general in nature do not require adjudication.

17. As far as additional grounds no.1, 2 and 3 are concerned, the learned Authorised Representative submitted, adjudication of these grounds do not require investigation into fresh facts and can be decided on the basis of facts and material already available on record. Hence, additional grounds may be admitted for adjudication.

18. Learned Departmental Representative opposing admission of additional ground submitted, the additional grounds raised by the

assessee involve factual issues, hence, requires examination of facts, therefore, such grounds should not be admitted.

19. We have heard rival contentions and perused the material available on record. As far as the additional ground no.1, is concerned, it pertains to disallowance of deduction claimed for write−off of provisions for bad and doubtful debts of ₹ 5,95,24,304. We find from the facts on record, the aforesaid amount of ₹ 5,95,24,304, was claimed as deduction by the assessee while computing the book profit under section 115JB of the Act for the assessment year 2004−05 and the disallowance made by the Assessing Officer was sustained by the Tribunal. It is the contention of the learned Authorised Representative before us that in view of subsequent decision of the Hon'ble Supreme Court in Vijaya Bank Ltd. v/s CIT, [2009] 323 ITR 126 (SC), the assessee has ra sed the additional ground. We find that in assessment year 2004−05, though, the Assessing Officer disallowed the aforesaid deduction claimed by the assessee, however, the learned Commissioner (Appeals) delete the addition. Subsequently, while deciding the Revenue's appeal, the Tribunal restored the disallowance / addition made by the Assessing Officer taking note of the Explanation (i) of section 115JB which speaks of addition to the book profit of any amount in the nature of provisions made for meeting liabilities other than ascertained liabilities. Thus, as could be seen, the issue raised by

the assessee did not require investigation into fresh facts and can be decided on the basis of facts already available in the records of the Department. Therefore, we admit this additional ground for adjudication. As far as the merits of the issue is concerned, the learned Authorised Representative submitted, the Tribunal did not allow assessee's claim as it was in the nature of provision. He submitted, in the impugned assessment year also the assessee has not actually written–off the provision. He submitted, the Assessing Officer may be directed to allow assessee's claim in the assessment year, wherein, the amount is actually written–off. In view of the aforesaid submissions of the assessee, we restore the issue to the file of the Assessing Officer to examine assessee's claim and allow it in the year of actual write–off subject to fulfillment of other conditions of the Act. This ground is allowed for statistical purposes.

20. As far as additional grounds no.2 and 3 are concerned, the facts are, the assessee on 31st March 2009, paid an amount of ₹ 1.60 crore through challan towards payment of advance tax for the assessment year 2009–10. Subsequently, assessee vide letter dated 20th February 2009, stated before the Assessing Officer that the said amount was wrongly paid towards advance tax for assessment year 2009–10 and the assessee actually intended to pay the said amount for assessment year 2010–11. He further submitted that it will not claim credit for the

said amount in assessment year 2009−10 and requested the Assessing Officer to credit the said amount towards assessee's tax liability for assessment year 2010−11. Keeping with its declaration, assessee filed its return of income for the assessment year 2009−10 without claiming credit for the tax paid of ₹ 1.60 crore. However, while filing the return of income for assessment year 2010−11, the assessee claimed credit for the tax paid of ₹ 1.60 crore and adjusted it against the tax liability for the assessment year 2010−11. Since, the assessee did not claim credit for the amount of ₹ 1.60 crore in assessment year 2009−10, the Assessing Officer while processing the return of income for the said assessment year did not give credit for the said amount. Whereas, while processing the return of income for the assessment year 2010−11 under section 143(1) on 15th April 2011, the Assessing Officer did not allow credit for he amount of ₹ 1.60 crore. Thus, the tax paid of ₹ 1.60 crore was neither credited in assessment year 2009−10 nor in 2010−11. Therefore, the assessee filed an application for rectification under section 154 before the Assessing Officer on 2nd January 2013, requested for giving credit of ₹ 1.60 crore towards tax liability for assessment year 2010−11. Along with the said application, the assessee also submitted indemnity bond by declaring that it had not claimed the credit of the amount of ₹ 1.60 crore in the assessment year 2009−10. As it appears, the rectification application filed by the

assessee remained cold shelved and while giving effect to the order of the learned Commissioner (Appeals) order arising out of regular assessment done under section 143(3) of the Act, for the assessment year 2010−11, the Assessing Officer vide order dated 30th September 2015, held that the tax paid of ₹ 1.60 crore can only be credited towards advance tax for the assessment year 2009−10 and not for assessment year 2010−11. Thus, as a result of such decision of the Assessing Officer in allowing credit for the tax paid of ₹ 1.60 crore in assessment year 2009−10, the assessee became liable to pay interest under section 234B and 234C of the Act for short fall in payment of advance tax. Thus, as could be seen from the aforesaid facts, the assessee's request for giving credit for the tax paid of ₹ 1.60 crore was pending before the Assessing Officer since 22nd September 2009. However, the Assessing Officer has not taken care to atleast look into the claim of the assessee. Further, even after the assessee filed a rectification application under section 154 again requesting the Assessing Officer to allow credit for tax paid of ₹ 1.60 crore in assessment year 2010−11, the Assessing Officer was least bothered to look into the assessee's claim. Only after the disposal of assessee's appeal for assessment year 2010−11 by the first appellate authority, the Assessing Officer while giving effect to the directions of the learned Commissioner (Appeals) has decided to credit the amount of ₹ 1.60

crore for the assessment year 2009–10. In the process, six long years have passed from the date assessee claimed before the Assessing Officer to credit the tax payment of ₹ 1.60 crore towards advance tax for assessment year 2010–11. It is apparent, due to inaction of the Assessing Officer in giving credit to the tax paid of ₹ 1.60 crore in a particular assessment year, the assessee was saddled with the levy of interest under section 234B and 234C. Had the Assessing Officer decided assessee's claim made vide letter dated 22nd September 2009, within a reasonable time the assessee could have taken appropriate steps for either payment of advance tax for impugned assessment year or other remedial measures in the matter. However, since this issue is raised for the first time before us, while admitting the additional grounds, we are inclined to restore the matter to the file of the Assessing Officer for verifying assessee's claim in accordance with law. As already observed by us, a prompt action on the part of the Assessing Officer in disposing off assessee's request for giving credit to the tax paid of ₹ 1.60 crore in assessment year 2010–11 would have saved the assessee from unnecessary hardship. Therefore, while deciding this issue, the Assessing Officer must consider this aspect. These grounds are allowed for statistical purposes.

21. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 04.12.2017

G.S. PANNU
ACCOUNTANT MEMBER

SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 04.12.2017

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Dy./Asstt. Registrar)
ITAT, Mumbai