

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

[Before Hon'ble Shri A.T.Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No.472/Kol/2016

Assessment Year : 2012-13

D.C.I.T., Circle-5 (2)
Kolkata

-vs.-

M/s Babcock Borsig Ltd.
Kolkata

[PAN : AABCD 4477 A]

(Appellant)

(Respondent)

I.T.A No.512/Kol/2016

Assessment Year 2012-13

M/s Babcock Borsig Ltd.
Kolkata

-vs-

D.C.I.T., Circle-5(2),
Kolkata.

[PAN : AABCD 4477A]

(Appellant)

(Respondent)

For the Department : Shri G.Hanshing, CIT, DR

For the Assessee : Shri Akkal Dudhwewala, FCA

Date of Hearing : 20.02.2018

Date of Pronouncement : 15 .05.2018

ORDER

Per Shri M.Balaganesh, AM

1. These appeals of the revenue and assessee arise out of the orders of the Learned Commissioner of Income Tax (Appeals) -6, Kolkata [in short the ld CITA] in Appeal No. 223/CIT(A)-6/Kol/15-16 dated 15.02.2016 against the orders passed by the D.C.I.T- Circle-5(2), Kolkata [in short the ld AO] under section 143(3) of the Act dated 11.02.2015 for the Asst Year 2012-13. As identical issues are involved, both the appeals are taken up together and disposed off by this common order for the sake of convenience.

2. Disallowance u/s 14A of the Act**Ground Nos. 1 to 4 of assessee appeal & Ground Nos. 1 to 4 of revenue appeal**

The brief facts of this issue are that the assessee is a Non-Banking Finance Company (NBFC) engaged in the business of advancing of loans and making investments. It had filed its return of income for the Asst Year 2012-13 on 28.9.2012 declaring total income of Rs Nil under normal provisions of the Act and Book Loss of Rs 2,81,56,974/- u/s 115JB of the Act. The Id AO observed in his order that the assessee had produced books of accounts, along with supporting g bills, challans, vouchers etc out of which few transactions were test checked and verified on random sample basis. The assessee earned dividend income of Rs 88,75,687/- from its group companies and its associates and claimed the same as exempt in the return of income. The details of dividend income are as under:-

1. Mcleod Russel India Ltd	- Rs 49,79,945/-	Group Company
2. McNally Bharat Engg Ltd	- Rs 26,02 000/-	Group Company
3. Eveready Industries I Ltd	- Rs 4,93,742/-	Group Company
4. McNally Sayaji Engg Ltd	- Rs 8,00,000/-	Subsidiary of a Group Co.

Total Dividend Received Rs 88,75,687/-

2.1. The assessee claimed that these shares and securities were held with these companies for a long time for the purpose of acquiring and retaining control over them and their business. The assessee suo moto disallowed a sum of Rs 1,37,25,202/- as expenditure incurred in relation to earning of exempt income us 14A of the Act in the return of income under normal provisions of the Act. However, no such disallowance was offered by the assessee while computing the book profits u/s 115JB of the Act.

This disallowance was made in the following manner:-

Disallowance of Interest Expenses	- Rs 1,36,80,824/-	**
Disallowance of Indirect expenses @ 0.5% of dividend income	- Rs 44,378/-	++
	-----	Rs 1,37,25,202/-

** The Interest was disallowed voluntarily by the assessee as the investments were made out of its borrowed funds from IL & FS.

++ The assessee submitted that dividends were received by the assessee company through ECS and hence assessee does not have any occasion to incur any expenditure for collection of the dividend warrant or clearing of the same in the bank account or in connection with the deployment of services for this purpose.

2.2. The Id AO however proceeded to make disallowance by applying the provisions of Rule 8D of the Rules as under:-

Under Rule 8D(2)(i)	- Rs Nil
Under Rule 8D(2)(ii)	- Rs 6,52,89,596/-
Under Rule 8D(2)(iii)	- Rs 23,82,248/-

	Rs 6,76,71,844/-
Less: Already disallowed by assessee	Rs 1,37,25,202/-

Amount disallowed u/s 14A	Rs 5,39,46,642/-

The Id AO also added a sum of Rs 6,76,71,844/- u/s 14A of the Act while computing the book profits u/s 115JB of the Act.

2.3. The Id CITA held that proper satisfaction was indeed recorded by the Id AO in terms of section 14A(2) of the Act read with Rule 8D(1) of the Rules for invoking the computation mechanism provided in Rule 8D(2) of the Rules. He also observed that the assessee had also not furnished any justification as to why it had not computed the disallowance under Rule 8D(2) of the Rules. The Id CITA also observed that the assessee had computed the disallowance only on an estimated basis. Based on these observations, he upheld the action of the Id AO in making disallowance u/s 14A of the Act read with Rule 8D of the Rules. However, he deleted the disallowance u/s 14A of

the Act in the sum of Rs 6,76,71,844/- while computing book profits u/s 115JB of the Act.

2.4. Aggrieved, both the assessee as well as the revenue are in appeal before us on the following grounds:-

Revenue's Grounds of appeal

“1. That whether on the facts and circumstances of the case the CIT(A) erred in law in deleting the addition of Rs. 6,76,71,844/- on account of the expenses u/s 14A to ascertain book profit u/s 115JB disregarding Explanation - 1(f) below Section 115JB.

2. Whether on the facts and in the circumstances of the case, the CIT(A) erred in deleting even the amount of Rs. 1,37,25,202/- which the assessee company had itself added in its computation u/s 115JB.

3. Whether on the facts and in the circumstances of the case, the learned CIT(A) erred in relying on the decision of the Hon'ble ITAT in the case of JCIT(OSD), Circle-4, Kolkata Vs. Jayashree Te & Investments Ltd. against which the Revenue is in appeal before the Hon 'ble Kolkata High Court.

4. The appellant shall crave to add, alter or amend any ground before or on the date of hearing.

Assessee's Grounds 1 to 4

“1) For that on the facts and in the circumstances of the case, the CIT (A) was unjustified on facts in upholding the disallowance made by the AO u/s 14A read with Rule BD (2)(ii) & (iii) of the I T Rules 1962 without recording satisfaction as to why the disallowance offered by the appellant u/s 14A was not considered by him to be adequate and blindly invoked Rule 8D of the I T Rules 1962.

2) For that on the facts and in the circumstances of the case, the authorities below were unjustified in holding that expenditure of Rs.6,76,71,844/- was incurred in relation to tax exempt dividend income and hence disallowable u/ s 14A of the Act read with Rule 8D.

3) For that on the facts and in the circumstances of the case, the authorities below were unjustified in computing the expenses disallowable u/s 14A at Rs.

6,76,71,844/- only in conformity with Rule 8D(2)(ii) & (iii) and without properly appreciating the fact that the assessee had not acquired the shares in other bodies corporate for the purposes of earning dividend and capital appreciation but had acquired the shares for acquiring controlling interest.

4. For that on the facts and in the circumstances of the case, the authorities below were not justified in making disallowance out of interest paid and administrative expenses under Rule 8D(2) (ii) & (iii) and that too without establishing nexus between the expenditure incurred and earning of exempt income and in that view of the matter the disallowance u/s 14A amounting to Rs.6,76,71,844/- be held to be unsustainable and be therefore deleted.”

2.5. We have heard the rival submissions. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. The issue of investments in group companies, subsidiary companies, strategic investments etc vis a vis the applicability of provisions of section 14A of the Act are now settled in favour of the revenue by the recent decision of the Hon'ble Supreme Court in the case of Maxopp Investment Ltd vs CIT reported in (2018) 402 ITR 640 (SC). Hence the applicability of computation mechanism provided in Rule 8D of the Rules cannot be ruled out in the instant case. But we find that the total dividend earned by the assessee was only Rs 88,75,687/- and hence the disallowance u/s 14A of the Act cannot exceed the dividend income. Reliance in this regard is placed on the decision of the Hon'ble Delhi High Court in the case of Joint Investments (P) Ltd vs CIT reported in 372 ITR 694 (Del). Since the assessee itself had voluntarily disallowed a sum of Rs 1,37,25,202/-, we direct the Id AO not to make further disallowance beyond that amount under normal provisions of the Act. Accordingly, the grounds 1 to 2 raised by the assessee on non-recording of satisfaction by the Id AO are dismissed. The Grounds 3 and 4 raised by the assessee are allowed.

2.5.1. With regard to disallowance u/s 14A of the Act while computing the book profits u/s 115JB of the Act, the issue is settled by the recent special bench decision of Delhi Tribunal in the case of ACIT vs Vireet Investment (P) Ltd reported in 165 ITD 27

(Delhi)(Special Bench) dated 16.6.2017 , wherein in para 6.22 of the said judgement, it has been held that the computation under clause (f) of *Explanation 1* to section 115JB(2). is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8D of the Income-tax Rules, 1962. We find that the assessee had worked out the disallowance u/s 14A of the Act based on the actual figures from its profit and loss account. By respectfully following the special bench decision supra, we direct the Id AO to make disallowance of Rs 1,37,25,202/- while computing the book profits u/s 115JB of the Act. Accordingly, the grounds raised by the revenue are partly allowed.

3. Addition of Rs 11,64,086/- towards liabilities written back

Grounds 5 & 6 of assessee's appeal

The brief facts of this issue are that during the year , the assessee wrote back the liabilities of Rs 11,64,086/- as no longer required and hence written back and disclosed the same as 'other income' in its profit and loss account. The assessee vide Note No. 20 of its audited financial statements had reported as under:-

20. Amalgamation of International Development and Engineering Associates Limited , a wholly owned subsidiary company (Transferor Company) with Babcock Borsig Limited (Transferee Company)

(a) Pursuant to the Scheme of Amalgamation (the 'Scheme') sanctioned by the High Court at Calcutta on August 25, 2011 under the provisions of the Companies Act, 1956, the Transferor Company has been amalgamated with Transferee Company with retrospective effect from 1st April, 2011 (Appointed Date). The High Court Order has been filed with the Registrar of Companies on December 2, 2011. The Scheme has been given effect to in the financial statements and the amalgamation has been accounted for using the 'Amalgamation in the nature of merger method' set out in Accounting Standard 14 on 'Accounting for Amalgamation'.

(b) The Transferor Company was primarily engaged in the business of Engineering Technology & Designing but had not been pursuing the business since the business was sold off in earlier years.

(c) In accordance with the Scheme, all assets and liabilities including reserves of the Transferor Company immediately preceding the Appointed Date have been incorporated in the books of account of the Transferee Company at their respective book values on the basis of audited accounts of the Transferor Company. The Transferor Company, being a wholly owned subsidiary company of the Transferee Company, the entire shares held by the Transferee Company in the Transferor Company have stood cancelled in terms of the Scheme. The difference between the amount of book value of investments of the Transferee Company in the Transferor Company so cancelled and the amount of share capital of the Transferor Company has been adjusted against General Reserve in the books of the Transferee Company.

(d) In terms of the Scheme, the Authorised Share Capital of the Transferee Company has stood automatically enhanced by an amount of Rs 50,00,000 comprising 4,20,000 Equity Shares of Rs 10 each and 8,000 Preference Shares of Rs 100 each, on account of merger of amounts of the respective Authorised Share Capital of the Transferor Company with the Transferee Company.

3.1. The assessee in its Computation of income, reduced these liabilities no longer required written back of Rs 11,64,086/- and did not offer the same for taxation. The reason behind the same was that these liabilities represent liabilities of the amalgamating company, International Development Engineering Associates Limited and therefore not liable to tax as the same was never incurred by the assessee in the course of its business and the same must have been offered for taxation in those respective years by the amalgamating company. So the same amount cannot be taxed twice. The Id AO observed that no evidence has been furnished by the assessee to the effect that the said liabilities were offered to tax in the hands of the amalgamating company prior to the merger. Accordingly, he brought the said amount of Rs 11,64,086/- as income of the assessee as admittedly the same was written back to profit and loss account by the assessee during the year under appeal after the amalgamation.

This action of the Id AO was upheld by the Id CITA. Aggrieved, the assessee is in appeal before us on the following grounds:-

“5. For that on the facts and in the circumstances of the case, the CIT(A) was unjustified in upholding the inclusion of Rs.11,64,086/- in the computation of total income ignoring the fact that the amount written back to P & L account did not constitute income of the appellant u/s 41(1) of the Act.

6. For that on the facts and in the circumstances of the case, the addition of Rs.11,64,086/- be deleted.”

3.2. We have heard the rival submissions. At the outset, we find that there is no dispute to the fact that the liabilities brought forward from amalgamating company in the sum of Rs 11,64,086/- pursuant to the merger with effect from 1.4.2011 had been written back to profit and loss account by the assessee company (i.e amalgamated / transferee company) having come to a conscious conclusion that those liabilities are no longer required to be paid by the assessee company. Having done so, it automatically becomes the income u/s 41(1) of the Act of the assessee company even though the deduction has not been claimed by the assessee company in the earlier years. It cannot be brushed aside that though the deduction was claimed by the amalgamating company in the earlier years, now pursuant to the merger, the entire assets and liabilities of amalgamating company got merged at book values with the amalgamated company. This issue of claiming deduction in earlier years had already been duly factored in the scheme of amalgamation and the consideration fixed accordingly. The scheme of amalgamation has been approved by the Hon'ble Calcutta High Court. In these circumstances, if the assessee having written back the liabilities brought forward from amalgamating company as no longer payable and by crediting the same to its profit and loss account, cannot have any escape route from offering the same to tax in its hands. Hence we hold that the authorities below had rightly brought the same to tax in the hands of the assessee company during the year under appeal. Accordingly, the Grounds 5 & 6 raised by the assessee are dismissed.

4. The Ground No. 7 raised by the assessee is general in nature and does not require any specific adjudication.

5. In the result, the both the appeals of the assessee as well as of the revenue are partly allowed.

Order pronounced in the Court on 15.05.2018

Sd/-
[A.T.Varkey]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 15 .05.2018

[RG SPS]

Copy of the order forwarded to:

1.M/s Babcock Borsig Ltd. 4, Mangoe Lane, Surendra Mohand Ghosh Sarani, Kolkata-700001.

2. D.C.I.T., Circle-5(2), Kolkata.

3. C.I.T.(A)- 6, Kolkata. 4. C.I.T.-2, Kolkata.

5. CIT(DR), Kolkata Benches, Kolkata.

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Senior Private Secretary
Head of Office/D.D.O.. ITAT, Kolkata Benches

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