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

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

I.T (SS) A.Nos.94 & 95/Kol/2014

Assessment Years : 2008-09 & 2009-10

D.C.I.T., Central Circle-XX, Kolkata	. -vs.-	M/s Chemical & Metallurgical Design Co. Ltd., Kolkata [PAN : AACCP 4492 L]
(Appellant)		(Respondent)

I.T.A Nos.1090-1092/Kol/2014

Assessment Years : 2008-09, 2009-10 & 2010-11

M/s. Chemical & Metallurgical Design Co. Ltd., Kolkata [PAN : AACCP 4492 L]	-vs-	J.C.I T (OSD) Central Circle-XX, Ko kata
(Appellant)		(Respondent)

For the Assessee Shri D.S.Damle, AR
For the Department : Shri G.Mallikarjuna, CIT(DR)

Date of Hearing : 07.05.2018
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) –Central-III, Kolkata [in short the ld CITA] in Appeal Nos. 289-291/CC-XX/CIT(A)C-III/2011-12/Kolkata dated 30.12.2011 against the orders passed by the J.C.I.T (OSD),Central Circle-XX, Kolkata [in short the ld AO] under section 143(3)/153A of the Act dated 30.12.2011 for the Asst Years 2008-09, 2009-10 and 2010-11 respectively.

Let us take Revenue appeals first

2. Recently the CBDT has issued Circular No. 21/2015, dated 10th December, 2015, whereby the monetary limits for filing of appeals by the Department before Income Tax

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Appellate Tribunal and High Courts and SLP before Supreme Court have been increased as measure for reducing Litigation. The revised monetary limits laid down in para-3 of this Circular and the manner of computing tax effect as laid down in para-4 of this Circular are as follows:

> *"3. Henceforth, Appeals/ SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder: -*

Sl. No.	*Appeals in Income-tax matters*	*Monetary Limit (in Rs)*
1.	*Before Appellate Tribunal*	*10,00,000/-*
2.	*Before High Court*	*20,00,000/-*
3.	*Before Supreme Court*	*25,00,000/-*

> *It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.*
> *4. For this purpose, "tax effect" means he difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as "disputed issues"). However the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect In cases where returned loss is reduced or assessed as income, the tax effect would nclude notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against."*

3. In para-10 of the said circular it has further been clarified that the revised monetary limits will apply retrospectively. The relevant para-10 of the Circular reads thus:

> *"10. This instruction will apply retrospectively to pending appeals and appeals to be filed henceforth in High Courts/ Tribunals. Pending appeals below the specified tax limits in para 3 above may be withdrawn/ not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such appeal was filed."*

4. In the present case, the tax effect in these appeals by the revenue is less than Rs.10,00,000/-. Though this appeal had been filed by the revenue on 30.05.2014 and was within the monetary limit in the form of tax effect for filing appeals before

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Tribunal, in view of para-10 of the Circular of CBDT, even such appeals will be governed by the new monetary limits laid down in the CBDT Circular No.21/2015 referred to above. At the time of hearing the ld. Counsel for the assessee has submitted a table in respect of tax effect for both A.Yrs.2008-09 and 2009-10 which is reproduced below :

Particulars		AY 2008-09	AY 2009-10
Income as per order passed u/s 153A by the A.O.	(A)	79,781,890	38,353,040
Income as per order passed u/s 251 dated 15-05-2014	(B)	77,980,987	35,690,914
Relief Allowed by Ld. CIT(Appeal) vide his order dated 18-03-2014	(C = A-B)	**1,800,903**	**2,662,126**
Tax Payable as per Order u/s 153A (incl. Surcharge and E.Cess)	(D)	27,117,864	13,036,198
Tax Payable as per Order u/s 251 (incl. Surcharge and E.Cess)	(E)	26,505,737	12,131,342
Tax Relief from the Order of Ld. CIT(Appeal)	(F = D-E)	**612,127**	**904,857**

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5. It is a settled law that the Circulars issued by CBDT are binding on the Revenue. This position was confirmed by the Apex Court in the case of Commissioner of Customs vs Indian Oil Corporation Ltd. reported in 267 ITR 272 wherein their Lordships examined the earlier decisions of the Apex Court with regard to binding nature of the Circular and laid down that when a circular issued by the Board remains in operation then the Revenue is bound by it and cannot be allowed to plead that it is not valid or that it is contrary to the terms of the statute. The appeal under consideration has certainly been filed contrary to the Circular issued by the CBDT Circular No.21 dated 10.12.2015.

6. In the event the Revenue finds at a later point of time that the tax effect in the appeal is more than Rs.10 lakhs or despite low tax effect the appeal of the revenue is maintainable, the revenue is at liberty to move this Tribunal for recall of this order.

7. In view of the above, we hold that the appeals filed by the Department, against the impugned orders of the Ld. CIT(A), is contrary to the policy decision of the Department and as such the appeals filed by the Department are dismissed *in limine*.

8. In the result, the appeals of the Revenue are dismissed.

Let us take up assessee's appeal for A.Y.2008-09 in ITA No.1090/Kol/2014

Disallowance u/s 14A of the Act r.w.r.8D of the Rules

Grounds 1 to 3 of A.Y.2008-09

9. Brief facts of this issue is that the assessee is a company engaged in the business of running business centre, tours and travels, house keeping, leasing, consultancy etc. The return of income for A.Y.2008-09 was filed by the assessee on 27.09.2008 declaring total income of Rs.7,57,16,616/-. The ld. AO observed that the assessee has made substantial investments to the tune of Rs.9,92,20,896/- n shares and securities. He observed that the assessee had also earned tax free div dend income of Rs.49,48,462/- from its investment in shares and securities. The AO applied the provisions of section 14A of the Act r.w.r. 8D of the Rules and made disallowance of Rs.4,16,882/- under third limb of the rule 8D(2). The assessee had computed disallowance under Rule 8D(2) for the very same sum of Rs.4,16,882/- but had not made any disallowance as it claimed that the said disallowance perta ns to 10A unit of the assessee and hence any disallowance made thereon would only go to increase the claim of deduction u/s 10A of the Act. In view of this, the assessee stated that no disallowance was made by it in the return of income. Before the ld. CIT(A) the assessee identified six specific items under the head " administrative expenses " as under :-

(1)Salary for Personnel incharge of investment activities	:	Rs.2,11,932/-
(2)Printing and stationery	:	Rs.5,58,542/-
(3)Rent	:	Rs. 59,808/-
(4)Office expenses	:	Rs.8,82,325/-
(5)Rates and taxes	:	Rs.8,91,912/-
(6)Audit Fees	:	Rs. 73,000/-
		Rs.26,77,519/-

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The assessee computed the proportionate disallowance to be made u./s 14A of the Act towards expenses incurred for the purpose of earning exempt dividend income as under :-

A) Total dividend income	:	Rs. 49,48,462/-
B) Six specific expenses as above	:	Rs. 26,77,519/-
C) Total turn over	:	Rs.20,21,70,653/-

Amount disallowable u/s 14A = $\frac{A \times B}{C}$ = Rs.65,537/-

10. The ld. CIT(A) held that the assessee itself had identified a sum of Rs.65,537/- as direct expenses to be disallowed under Rule 8D(2)(i) of the Rules which he disallowed in addition to the disallowance made by the ld. AO under the third limb at Rs.4,16,882/-. In effect the total disallowance u/s 14A of the Act was made at Rs.4,82,419/-.

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Aggrieved the assessee is in appeal before us on the following grounds :-

> *"l. For that on the facts and in the circumstances of the case and in law, the CIT(Appeals) erred in upholding the disallowance under Section 14A read with Rule 8D of the l.T. Act, 1961 without properly appreciating the jurisdictional facts.*
>
> *2. For that on the facts and in the circumstances of the case and in law, the Id. CIT(Appeals) erred in enhancing the amount disallowable under Section 14A of the Income-tax Act, 1961 observing that his directions did not result in enhancement of income.*
>
> *3. For that on the facts and in the circumstances of the case and in law, the authorities below erred in making the disallowance under Section 14A read with Rule 8D and therefore the disallowance be appropriately reduced."*

11. We have heard the rival submissions. We find that the assessee before the ld. CIT(A) had only identified six specific items towards administrative expenses and had given the computation of disallowance u/s 14A of the Act. The ld. AR stated that this working was also furnished before the ld. AO by the assessee. The lower authorities having ignored the computation of disallowance u/s 14A of the Act given by the

assessee, and having proceeded to invoke that provision of Rule 8D(2) for arriving at the disallowance figure u/s 14A of the Act, cannot again make further addition of Rs.65,537/- (i.e. working given by the assessee). At any stretch of imagination the said specified items cannot be construed as direct expenses incurred for earning dividend income as stated by the ld. CIT(A). Hence we direct the ld. AO to delete the disallowance u/s 14A of the Act to the tune of Rs.65,537/- made in the first limb of Rule 8D(2) of the rules.

11.1. With regard to the disallowance made under the third limb of Rule 8D, we direct the ld. AO to consider only those investments that had yielded dividend income in consonance with the decision rendered by this Tribuna in the case of REI Agro Ltd reported in 144 ITD 141. Accordingly the grounds raised by the assessee for A.Y.2008-09 are allowed for statistical purposes.

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Deduction u/s 10A of the Act

Grounds No.4 to 7 of A.Y 2008-09

12. Brief facts of this issue is that the assessee during the year under appeal commenced ‘computer software development and online recruitment service business’ in addition to its regular business of mainly running of business centre, tours and travels etc. The assessee had treated the computer software development and online recruitment services as a separate undertaking and net profit of such undertaking was claimed as deduction u/s 10A of the Act. This is the first year of operation of software development and online recruitment service and accordingly this is the first year of claim of deduction u/s 10A of the Act. The ld. AO observed that the assessee has disclosed substantial net profit in its 10A unit and accordingly proceeded to make further investigation thereon. He observed that the assessee was carrying on software development business from the very same premises wherein other regular business activities were performed by the assessee using the very same infrastructure. The

assessee had only 18 laptops at its disposal which were used for its software development and online recruitment services for its client in USA. The ld. AO observed that the assessee had both taxable undertaking as well as 10A undertaking. He observed that the common expenses were not properly apportioned by the assessee between these two units. The ld. AO observed that in respect of software division, it did not own any office space nor had to pay any rent. It also did not have infrastructure whatsoever apart from 18 laptops. Even the telephone/mobiles used in the office for recruitment services belonged to the principal business of the assessee. Other overhead expenses were too meager, only about 5% to be treated as reasonable, compared to the total turnover of the 10A unit. Accordingly the ld. AO proceeded to compute the deduction eligible u/s 10A of the Act using the following formula :

$$\frac{\text{Profits of the business X Export turnover}}{\text{Total turnover}}$$

The ld. AO adopted the profit of the business (excluding other income of schedule-13 of profit and loss account and income from house property) at Rs.7,40,46,584/-. The export turnover of the unit was arrived at Rs.1,18,55,867/-. The total turnover (excluding other income of schedule-13 of profit and loss account and income from house property) was arrived at Rs.18,73,43,882/-. Accordingly the deduction u/s 10 A of the Act was computed as under :-

$$\frac{74046584 \text{ X } 11855867}{187343882} = 46,22,679/$$

13. The ld. CIT(A) ignored the computation mechanism followed by the ld. AO and proceeded to identify certain specific expenses which in his opinion were common expenses and observed that the same requires apportionment between taxable unit and 10A unit as under :

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A)Up keep and service cost (schedule 16 of profit and loss account) Rs.1,53,57,583/-

B) Administrative selling and other expenses

Subscription	9,75,915
Rates & Taxes	8,91,912
Office Expenses	8,82,325
Gardening Expenses	2,78,732
Security Service Charges	36,20,494
Flower Expenses	1,86,558
Pantry Purchases	55,87,037
House Keeping Expenses	10,05,603
TOTAL	1,34,28,576

C) Depreciation as per Income Tax Act Rs.28,18,519/-

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The ld. CIT(A) observed that revenue from business centre and tours and travels was Rs.17,54,88,015/- and revenue from software development and on line recruitment services was Rs.1,18,55,867/-. Thus the oftware development and online recruitment service income worked out to 6.76% of total revenue from operations. The ld. CIT(A) applied this 6.76% to the above mentioned common expenses i.e. A+B+C and reduced the claim of deduction u/s 10A of the Act accordingly. In effect the ld. CIT(A) directed the ld. AO to allow deduction u/s 10A of the Act to the tune of Rs.64,89,119/- as against the claim of the assessee at Rs..89,75,946/-. Aggrieved the assessee is in appeal before us on the following grounds :

"4. For that on the facts and in the circumstances of the case and in law, the CIT(Appeals) erred in directing the AO to re-compute the profits derived by the assessee in respect of its EOU Unit in conformity with directions in the appellate order without correctly appreciating the relevant facts of the case.

5. For that on the facts and in the circumstances of the case and in law, the directions given by the CIT(Appeals) for making re-computation of profits of EaU suffered from arithmetical inaccuracies and in that view of the matter the directions of the CIT(Appeals) deserves to be set aside and/or modified.

6. For that on the facts and in the circumstances of the case and in law, the authorities below ought to have allowed the deduction under Section l0A of the

Income-tax Act, 1961 with reference to profits/income as certified in the audited accounts prepared and certified in the prescribed form.

7 . For that on the facts and in the circumstances of the case and in law. without prejudice to the preceding ground the authorities below be directed to compute the profits of the eligible undertaking under Section 10A after allocating the common expenses on fair & equitable basis and not in the arbitrary manner as done in the orders of lower authorities."

14. We have heard the rival submissions and perused the materials available on record. At the outset, we find that the assessee had set up a software development and online recruitment service unit during the year under appeal. This unit has been recognized by the software technology part of India (STPI) and STPI had allowed the assessee to set up the undertaking in the assessee's already existing business premises. Hence, the assessee is entitled to have deduction u/s 10A of the Act being registered and recognized by STPI. It is not in dispute that the assessee is entitled to get deduction u/s 10A of the Act in respect of its software unit. The only dispute is with regard to apportionment of common expenses between taxable unit and 10A unit which has a bearing on the quantum of deduction eligible u/s 10A of the Act. We find that the assessee had maintained separate balance sheet and separate profit and loss account for its software unit and online recruitment service in the name and style of PBC Software. We find from profit and loss account for the year ending on 31.03.2008 of PBC Software, the total income was Rs.1,19,73,467/- comprising of recruitment service (Rs.25,58,417) software development charges (Rs.92,97,450/-) , foreign exchange fluctuation income (Rs.1,17,100/-) and miscellaneous income Rs.500/-. The assessee has debited the following expenses in the books of PBC Software :

i) Electricity expenses	:	Rs. 83,160/-
ii) Goods	:	Rs. 3,30,247/-
iii) HRD expenses (under salaries)	:	Rs. 2,28,067/-
iv) Professional and consultancy expenses	:	Rs.22,47,531/-
v) Dues and subscription expenses	:	Rs. 25,000/-

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vi) E-mail and internet expenses	:	Rs.3,03,920/-
Total	:	Rs.33.01,441

14.1. We find that the ld. CIT(A) had identified certain common expenses as detailed in earlier paragraphs and had apportioned the same as attributable to 10A unit on the basis of the turnover of each unit. The ld. AR argued that none of the expenses identified by the ld. CIT(A) are relatable to 10A unit and hence such apportionment ought not to have made by the ld. CIT(A) which resulted in reduction of claim of deduction u/s 10A of the Act. He placed reliance on certa n decisions of high court which were rendered in the context of eligibility of intere t income vis-a-vis claim of deduction u/s 80IB/80HH of the Act. He argued that the first degree nexus of expenses vis-à-vis 10A unit is required to be proved by the revenue before making any apportionment of common expenses. In this regard we find that business of PBC Software is carried on in the very sam premises using the very same infrastructure of the assessee's already existing regular business. Hence it cannot be disputed that the common infrastructure is being used by PBC Software unit also i.e. 10A unit. We find that though the assessee had identified certain direct expenses and had debited the same in PBC Software unit, but from a perusal of the profit and loss account of the assessee, there are several expenses that are common in nature which are attributable to both 10A unit as well as taxable unit. Hence, the primary decision of apportionment of common expenses between taxable unit and 10A unit cannot be faulted with. With regard to the decisions relied upon by the ld. AR, we find that these decisions were rendered in the context of eligibility of interest income for deduction u/s 80IA/80IB/80HH of the Act. The ld. AR also placed reliance on the decision of the coordinate bench of this tribunal in the case of Graphite India Limited vs Additional CIT in ITA No.304-305/Kol/2008 and ITA No.559/Kol/2008 for A.Y.2003-04 dated 24.08.2016 in support of his contentions. From the perusal of the said order we find that the plants were located in different locations in the case of Graphite India Limited. Hence it was possible for the

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assessee as well as by the revenue to identify specific expenses which are relatable to the eligible unit thereon. But in the instant case business of PBC Software (10A unit) is also carried on in the same business premises where other business are carried on. Hence the decision relied on Kolkata Tribunal relied upon by the ld AR vehemently is factually distinguishable and does not come to the rescue of the assessee. In these circumstances, we hold that the ld. CIT(A) had rightly apportioned the common expenses by identifying certain specific expenses thereon and had apportioned the same to 10A unit which in turn had resulted in corresponding reduction in the claim of deduction u/s 10A of the Act. We find no infirmity in the order of the ld. CIT(A) in this regard. Accordingly the grounds raised by the assessee for A.Y.2008-09 in this regard are dismissed.

15. The decision rendered for A.Y.2008-09 for grounds in respect of disallowance u/s 14A of the Act and deduction u/s 10A of the Act would apply with equal force for A.Y.2009-10 and 2010-11 also except with variance in figures.

16. In the result the app als of the assessee for A.Y.2008-09, 2009-10 and 2010-11 are partly allowed for statistical purposes. The appeals of the revenue are dismissed as not maintainable.

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Order pronounced in the Court on 15.05.2018

Sd/-	Sd/-
[A.T.Varkey]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 15.05.2018

[RG SPS]

Copy of the order forwarded to:

1.Chemical & Metallurgical Design Co. Ltd., 25, Community Centre, East of Kailash, New Delhi-110065.

2. J.C.I.T. (OSD), Central Circle-XX, Kolkata.

3. C.I.T.(A)- Central-III, Kolkata. 4. C.I.T.-Central-III, Kolkata.

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

True copy

By Order

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

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