आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

माननीय श्री महावीर सिंह, न्यायिक सदस्य **एवं**
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.7351/Mum/2017
(**निर्धारण वर्ष** / Assessment Year: 2010-11)
&
आयकर अपील सं./ I.T.A. No.7352/Mum/2017
(**निर्धारण वर्ष** / Assessment Year: 2010-11)

DCIT-3(2)(2) Room No.674, 6th Floor Aaykar Bhavan, M.K. Road Mumbai-400 020.	**बनाम**/ Vs.	**M/s. Pidilite Industries Ltd.** 7th Floor, Regent Chambers Nariman Point Mumbai-400 021.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAACP-4156-B**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Revenue By	:	Shri Awungshi Gimson-Ld.CIT-DR
Assessee By	:	Shri Yogesh Thar / Ms. Vidhi Doshi-Ld.ARs

सुनवाई की तारीख/ **Date of Hearing**	:	19/03/2019
घोषणा की तारीख / **Date of Pronouncement**	:	06/06/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals, both by revenue, for Assessment Year [AY] 2010-11 contest the order of Ld. Commissioner of Income-Tax (Appeals)-8, Mumbai, [CIT(A)], *Appeal No. CIT(A)-8/IT-156/14-15* dated 04/09/2017 and rectification order passed u/s 154 against the same on 30/10/2017. The revenue has filed two appeals since Ground No. 7 of the assessee's appeal, before first appellate authority, in order dated 04/09/2017 was decided against the assessee. However, the same has

subsequently been allowed by first appellate authority by rectifying its earlier order u/s 154 on 30/10/2017. ITA No.7351/Mum/2017 is against order dated 04/09/2017 whereas ITA No.7352/Mum/2017 is against rectification order u/s 154 dated 30/10/2017. The combined effective grounds raised in both the appeals reads as under: -

ITA No. 7351/Mum/2017

1. Whether on the facts and circumstances of the case and in law the Ld CIT(A) has erred in deleting the disallowance of Rs. 45,85,68,733/-made u/s 40(a)(ia) of the I T Act 1961 in respect of the local purchases without appreciating that the disallowance made by the AO was after analyzing the facts of the case and after concluding that the purchases were in nature of job work liable to the provision of tax deducted at source u/s 194C of the Act.

2. Whether on the facts and circumstances of the case and in law the Ld CIT(A) has erred in deleting the disallowance of Rs. 44,65,86,415/-made u/s 40(a)(ia) of the I T Act 1961 in respect of the import purchases without appreciating that the disallowance made by the AO was after analyz ng the facts of the case and after concluding that the purchases were in nature of job work liable to the provision of tax deducted at source u/s 194C of the Act

3. Whether on the facts and circumstances of the case and in law the Ld CIT(A) has erred in deleting the disallowance of Rs. 2,88,52,671/-made u/s 40(a)(ia) of the I T Act 1961 in respect of the freight payment on raw-materials without appreciating that the disallowance made by the AO was after analyzing the facts of the case and on the AO had concluded that the freight payment on raw-materials were in nature of job work liable to the provision of tax deducted at source - u/s 194C of the Act. The CIT(A) has failed to appreciate that for the purpose of application of provisions of tax deducted at source there is no condition that the contract has to be a written and that the contract could be oral or implied contract.

4. Whether on the facts and circumstances of the case and in law the Ld CIT(A) has erred in deleting the disallowance of Rs. 1,24,96,386/- made u/s 40(a)(ia) of the I T Act 1961 in respect of payment of professional fees to foreign parties without appreciating that the "disallowance made by the AO was after analyzing the facts of the case and on the AO had concluded that the payment of professional fees to foreign parties were paid for services utilized by the Indian Company in its business carried on by it in India irrespective of place where the services were rendered, and such the services were within ambit of provisions of section 194J of the I T Act 1961.

5. Whether on the facts and circumstances of the case and in law the Ld CIT(A) has erred in deleting the disallowance of Rs. 4,30,371/- made u/s 14A of the I T Act 1961 to without appreciating that the disallowance made by the AO was after analyzing the accounts of the assessee and was based on the Rules which were laid specifically to compute the disallowance u/s 14A of the Act?

6. Whether on the facts and circumstances of the case and in law the Ld CIT(A) has erred in deleting the disallowance of Rs. 4,30,371/- made u/s 14A r.w.Rule 8D [over and above the suo-moto disallowance of Rs. 22,60,000/-] without appreciating that the disallowance u/s 14A of the I. T. Act, 1961 has to be computed as per Rule 8D of I. T. Rules, 1961 as held in the order of the Hon'ble High Court in the case of M/s Godrej & Boyce Manufacturing Co. Ltd?

7. Whether on the facts and in the circumstances of the case and in law the Ld CIT(A) was justified in deleting the addition of Rs.2,13,09,500/- made by the A.O. u/s. 28(iv) of the I.T. Act on account of discount received on FCCB buy back without appreciating that the said discount received was taxable as revenue receipts u/s 28(iv) of the Act?

8. Whether on the facts and in the circumstances of the case and in law the Ld CIT(A) was justified in holding that the deduction u/s. 80IB is admissible to the assessee without appreciating the fact that the assessee does not fulfill the condition laid down u/s. 80IB(2)(iv) of the Income Tax Act 1961?

9. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has in erred in deleting the disallowance deduction claimed of Rs. 81,96,759/- u/s. 80IA of the Act without considering the fact that the assessee did not set-off unabsorbed depreciation before making the claim in violation of the provision of section 80IA(5) of the Act when the law is very clear that brought forward unabsorbed depreciation has to be first adjusted against the profit of the undertaking and only such profit of the undertaking which are in excess of such unabsorbed depreciation can be allowed as deduction u/s 80IA of the Act .

10. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) is perverse in applying the decision of the Hon'ble Bombay High Court in assessee's own case for AY 2006-07 and 2007-08 when the Hon'ble Court's order was in the context of applicability of CBDT Circular No.1 of 2016 whereas the issue in the impugned matter is different and not covered by CBDT Circular No. 1 of 2016?"

Ground Nos. 1 to 8 are subject matter of ITA No.7351/Mum/2017 whereas ground Nos. 9 to 10 are subject matter of ITA No. 7352/Mum/2017.

2. The Ld. Authorized Representative for assessee [AR], *Shri Yogesh Thar,* at the outset, placed on record issue-wise chart to submit that most of the issues under appeal are squarely covered by the judgment of this Tribunal / Hon'ble Bombay High Court for other years in assessee's own case. The decisions of Hon'ble Bombay High Court / Tribunal could be tabulated in the following manner: -

No.	Particulars	ITA Nos.	Judicial Authority	AYs
1.	CIT V/s Pidilite Industries Ltd.	ITA No. 2099 of 2012 dated 06/03/2013	Hon'ble Bombay High Court	2007-08
2.	Pidilite Industries Ltd. V/s CIT	ITA No.2571 of 2011, 566 of 2012 dated 30/06/2017	Hon'ble Bombay High Court	2006-07, 2007-08
3.	DCIT V/s Pidilite Industries Ltd.	ITA Nos.2824,5869/Mum/2010 dated 25/07/2012	Mumbai Tribunal	2007-08

4.	Pidilite Industries Ltd. V/s DCIT	ITA Nos.681/M/12 & 744,1054/M/13 dated 06/12/2017	Mumbai Tribunal	2008-09 & 2009-10
5.	DCIT Vs Pidilite Industries Ltd.	ITA No.3300/Mum/2009 dated 30/09/2010	Mumbai Tribunal	2006-07
6.	DCIT Vs Pidilite Industries Ltd.	ITA No.1560 & 4474.Mum/2008 dated 19/01/2010	Mumbai Tribunal	2004-0, 2005-06

The Ld. DR, while relying on the order of Ld. AO, could not controvert the aforesaid fact. In the above background, we proceed to dispose-off the appeals as argued before us.

3.1 The assessee being *resident corporate assessee* stated to be engaged in *manufacturing of adhesives* was assessed for impugned AY in scrutiny assessment u/s 143(3) by Ld. Additional Commissioner of Income Tax-Range 3(2), Mumbai [AO] on 08/03/2013 wherein the income was determined at Rs.222.98 Crores after certain additions / disallowances as against returned income of Rs.119.60 Crores e-filed by the assessee on 29/09/2010

3.2 The assessee has been saddled with certain disallowances u/s 40(a)(i) & 40(a)(ia) in he impugned AY in view of the fact that the assessee was treated as *assessee-in-default* vide orders passed u/s 201(1) / 201(1A) etc. dated 25/03/2011 for AY 2009-10 & order dated 28/01/2009 for AY 2007-08, with respect to certain payments made in those years and the assessee was saddled with disallowances u/s. 40(a)(i) & 40(a)(ia) in those years. Since similar payments were made by the assessee during impugned AY, the same also called for similar disallowance. The details of these payments were as follows: -

i) Trading purchase-local purchases *Rs.45,85,68,733/-*
ii) Trading purchase-Import purchases *Rs.44,65,86,415/-*
iii) Freight on raw material *Rs. 2,88,52,671/-*
iv) Professional fee paid to foreign parties *Rs. 1,24,96,386/-*

3.3 The assessee vide submissions dated 12/02/2013, *inter-alia,* submitted that the issue of deduction of tax on account of trading purchases stood covered in assessee's favor by the order of the Tribunal for AY 2007-08 by way of dismissal of revenue's appeal whereas the revenue accepted the stand of Ld. CIT(A) in granting relief to the assessee in AY 2007-08 on account of payment made for freight on raw material. The arguments were raised for payment of professional fees to submit that the majority of payments were made to foreign parties for services rendered abroad. TDS was stated to be deducted against few payments whereas in few cases, it was submitted that TDS was not applicable due to the nature of payments and after considering the beneficial provisions of Double Taxation Avoidance Agreement [DTAA] with respective countries.

3.4 However, Ld. AO rejected the same on the ground that the department had not accepted the decision of the Tribunal for AY 2007-08 and filed an appeal before Hon'ble Bombay High Court.

3.5 Upon further appeal, Ld. CIT(A) provided relief to the assessee by following the binding decision of this Tribunal for AY 2007-08 [as tabulated above] and the decision by its predecessor for AY 2009-10. Aggrieved the revenue is in further appeal before us.

3.6 Upon careful consideration, the undisputed position that emerges is the fact that issue of disallowance u/s 40(a)(i) & 40(a)(ia) stood covered in assessee's favor by the decision of this Tribunal for AY 2007-08. It has been brought to our notice that the revenue further contested the issue of disallowance on account of import / local purchases & freight payment before **Hon'ble Bombay High Court vide ITA No.2099 of 2012** dated

06/03/2013 wherein the question of law, as urged by the revenue, has not been admitted by Hon'ble High Court. Further, similar issue of disallowance on account of import / local purchase arose in AY 2009-10 which was agitated before this Tribunal wherein the view taken in AY 2007-08 was followed by the Tribunal. Nothing has been demonstrated before us to suggest any change in material facts or circumstances. Further, nothing contrary has been brought on record to suggest that aforesaid rulings are not applicable to the facts of the present case. Therefore, respectfully following the consistent view of the Tribunal, we dismiss ground nos. 1 to 4.

4.1 Ground Nos. 5 & 6 are related with disallowance u/s 14A. During assessment proceedings, it transpired that the assessee earned exempt income of Rs.2.93 Crores and offered *suo-moto* disallowance of Rs.22.60 Lacs against the same in the computation of income. However, not satisfied with assessee's working, Ld. AO computed aggregate disallowance u/r 8D for Rs 26.90 Lacs which comprised-off of interest disallowance u/r 8D(2)(i) for Rs.20.95 Lacs and expense disallowance u/r 8D(2)(iii) for Rs.5.95 Lacs. After adjusting *suo-moto* disallowance offered by the assessee, the net disallowance thus worked out to be Rs.4.30 Lacs. The Ld. first appellate authority observed that Ld. AO did not specify the cause of dissatisfaction with assessee's working and applied Rule 8D mechanically as against the stipulations laid down in Section 14A(2). Therefore, Ld. AO was directed to accept the *suo-moto* disallowance offered by the assessee and delete the additional disallowance of Rs.4.30 Lacs.

4.2 Upon due consideration, we find that the observations as well as conclusions of Ld. first appellate authority were quite reasonable and

reasoned one. it was incumbent on the part of Ld.AO to form an opinion as to why the disallowance offered by the assessee, having regards to its accounts, was not satisfactory or correct. The aforesaid satisfaction of Ld. AO, is sine-qua-non before clothing Ld. AO the power to acquire jurisdiction u/r 8D. Therefore, finding no infirmity in the decision on this issue, we dismiss ground nos. 5 & 6.

5.1 Ground No.7 is related with deletion of addition of Rs.213.09 Lacs u/s 28(iv) on account of discount received on *Foreign Currency Convertible Bonds [FCCB]* buyback. During assessment proceedings, it transpired that the assessee reduced its *business income* by an amount of Rs.213.09 Lacs. This amount represent discount received by the assessee for *FCCB* buy-back. It was submitted that during Financial Year 2007-08, the assessee issued *zero coupon convertible bonds* in foreign currency mainly for capital expenditure and funding the international acquisitions. The size of *FCCB* was US $40 Million and denomination of each bond was US $1,00,000/-. The FCCBs were convertible, at the option of the investor, any time prior to their maturity i.e. 01/12/2012. In case of maturity, the *FCCB* were to be redeemed at a premium of 39.37% of issue price. The net proceeds of US $ 3,89,56,135 was partly used for investment in foreign subsidiaries and partly for ongoing capitalization programs. The assessee, in terms of RBI Circular No.39 dated 8/12/2008, sought the permission of RBI to buy-back *FCCB,* which was granted. Accordingly, the assessee purchased 17 Bonds of face value of US $ 1 Lacs each at a discount of 25%, thus earning discount of US $ 4,25,000/-. The same as converted into Indian Rupees amounted to Rs.213.09 Lacs. The deduction of the same was claimed while computing business income, being capital receipts.

However, Ld. AO, treating the same as income u/s 28(iv) and relying upon the decision of Hon'ble Bombay High Court rendered in **Solid Containers Ltd. V/s DCIT 178 Taxman 192**, added the same to the income of the assessee.

5.2 The Ld. CIT(A) observed that, in terms of RBI circular, the proceeds of *FCCB* could be used only for the purpose of import of capital goods, new projects, expansion and modernization or overseas direct investment in joint ventures / wholly owned subsidiaries and expressly prohibits utilization of *FCCBs* for working capital, general corporate purpose and repayment of existing Rupee loans. It was also observed that since the assessee was not engaged in the business of giving and taking loans through debt instruments, the aforesaid reduction in loan liability could not be said to be on account of appellant's business or profession in the context of Section 28(iv). Relying upon the decision of Hon'ble Bombay High court rendered in **Bombay Gas Co. Ltd. Vs ACIT ITA No 646 and 1188 of 2009** for the proposition that waiver of loan taken for the purpose of acquiring capital assets would be on capital account and by making an observation that since the proceeds of bonds were not used for trading purposes, discount on repurchase of bonds could not be said to be gains as envisaged by Section 28(iv). Therefore, the impugned additions were deleted. Aggrieved, the revenue is in further appeal before us.

5.3 The Ld. AR has placed reliance on the following decisions, to further support the stand of Ld. first appellate authority: -

No.	Particulars	Judicial Authority	Citation
1.	CIT V/s Mahindra & Mahindra Ltd.	Hon'ble Supreme Court	255 Taxman 305
2.	CIT V/s Xylon Holdings Pvt. Ltd.	Hon'ble Bombay High Court	211Taxman 108

3.	CIT V/s Santogen Silk Mills Ltd.	Hon'ble Bombay High Court	57 Taxmann.com 208
4.	Bombay Gas Co. Ltd. V/s ACIT	Mumbai Tribunal	54 SOT 13
5.	Cipla Investments Ltd. V/s ITO	Mumbai Tribunal	33 SOT 317

5.4 Upon careful consideration, it emerges that the assessee has repurchased certain *FCCB* during impugned AY at a discount of 25%. The fact that the proceeds of these bonds was utilized partly for investment in foreign subsidiaries and partly for ongoing capitalization programs remain unrebutted before us. In fact, the RBI's terms of issue of bonds prohibits utilization of proceeds for trading purposes. The said facts lead us to form an opinion that the gains were on capital account. The Ld. AO, while making additions has invoked the provisions of Section 28(iv). These provisions consider value of any benefit or perquisite, whether convertible in money or not, arising from the business as business income. However, the benefit has to be in some form other than in the shape of money, as held by higher judicial authorities.

5.5 The Hon'ble Supreme Court in recent decision of **CIT V/s Mahindra and Mahindra Ltd. [93 Taxmann.com 32]** has observed as under: -

10. The term "loan" generally refers to borrowing something, especially a sum of cash that is to be paid back along with the interest decided mutually by the parties. In other terms, the debtor is under a liability to pay back the principal amount along with the agreed rate of interest within a stipulated time.

11. It is a well-settled principle that creditor or his successor may exercise their "Right of Waiver" unilaterally to absolve the debtor from his liability to repay. After such exercise, the debtor is deemed to be absolved from the liability of repayment of loan subject to the conditions of waiver. The waiver may be a partly waiver i.e., waiver of part of the principal or interest repayable, or a complete waiver of both the loan as well as interest amounts. Hence, waiver of loan by the creditor results in the debtor having extra cash in his hand. It is receipt in the hands of the debtor/assessee. The short but cogent issue in the instant case arises whether waiver of loan by the creditor is taxable as a perquisite under Section 28(iv) of the IT Act or taxable as a remission of liability under Section 41 (1) of the IT Act.

12. The first issue is the applicability of Section 28(iv) of the IT Act in the present case. Before moving further, we deem it apposite to reproduce the relevant provision herein below: —

> 28. Profits and gains of business or profession. — The following income shall be chargeable to income-tax under the head "Profits and gains of business profession",—
> ** ** **
> (iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;
> ** ** **'

13. On a plain reading of Section 28(iv) of the IT Act, prima facie, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28(iv) of the IT Act, the benefit which is received has to be in some other form rather than in the shape of money. In the present case, it is a matter of record that the amount of Rs. 57,74,064/- is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28(iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case. Hence, in our view, in no circumstances, it can be said that the amount of Rs 57,74,064/- can be taxed under the provisions of Section 28(iv) of the IT Act.

We agree with the submissions of Ld AR that the propositions laid down in the above decision squarely apply to factual matrix before us. Therefore, the benefit to be received by the assessee has to be in some form other than in the shape of money so as to bring the same within the ambit of Section 28(iv).

5.6 Similar view has been taken by Hon'ble Bombay High Court in **CIT V/s Xylon Holdings Pvt. Ltd [supra]** wherein the case law of **Solid Containers Ltd. [supra]** as relied upon by Ld. AO, has been distinguished. Similar view has been expressed in **CIT V/s Santogen Silk Mills Ltd. [supra].**

5.7 Respectfully following the aforesaid binding judicial precedents, we confirm the view taken by Ld. first appellate authority. This ground stands dismissed.

6.1 In ground No.8, the revenue is aggrieved by grant of deduction u/s 80-IB. The assessee claimed deduction u/s. 80IB amounting to

Rs.515.68 Lacs, being 30% of profit earned from *M-seal* unit situated at *Daman*. The said unit became operational in 2002 and thereafter, the assessee had been claiming the said deduction from year to year. However, the same was disallowed by the department in all the earlier years. Keeping in view the same, the said deduction was disallowed in this AY also. The Ld. CIT(A), following the favorable decision of Tribunal for AY 2006-07 vide ITA No.3300/Mum/2009, allowed the deduction, against which the revenue is in further appeal before us.

6.2 Upon perusal, we find that the stated issue stood covered in assessee's favor by the earlier orders of the Tribunal, which Ld. first appellate authority has followed. The latest order of the Tribunal for AYs 2008-09 & 2009-10 also follows the consistent view taken by Tribunal in earlier years. Therefore, finding no difference in material facts, this ground stands dismissed.

7.1 Ground Nos.9 & 10 arises out of Rectification order passed u/s 154 by the Ld. CIT(A) on 30/10/2017 *qua* deduction u/s. 80IA. The assessee had claimed deduction u/s 80IA to the tune of Rs.81.96 Lacs on account of windmills set up at different places in earlier AYs. The said deduction, in the opinion of Ld.AO, was claimed without considering the provisions of Section 80IA(5). The Ld. AO opined that since the assessee had unabsorbed depreciation in respect of said windmills, the same should have been first set-off against the profit for the years before claiming deduction u/s 80IA. Noticing that the said issue was decided against the assessee by the Tribunal for AYs 2006-07 & 2007-08, the deduction of the same was denied to the assessee. Although Ld. CIT(A) initially dismissed assessee's ground in original appellate order dated 04/09/2017. However, the said order has subsequently been rectified u/s

154 on 30/10/2017 wherein the said ground was allowed in assessee's favor in view of the fact that this issue stood decided in assessee's favor by the decision of Hon'ble Bombay High Court for AYs 2006-07 & 2007-08. Aggrieved, the revenue is in appeal.

7.2 Upon perusal, we find that this issue stood covered in assessee's favor by the aforesaid decision of Hon'ble Bombay High Court rendered for AYs 2006-07 & 2007-08, as rightly observed by Ld.CIT(A). The Hon'ble Court has followed its own decision rendered in **CIT V/s Hercules Hoists Ltd. [ITA No. 707/2014 dated 14/06/2017]** while adjudicating the assessee's appeal**.** Further, following the same reasoning, the stated issue has also been adjudicated in assessee's favor by the Tribunal in its latest order for AYs 2008-09 & 2009-10 dated 06/12/2017. Respectfully following the same, both these ground stands dismissed.

Conclusion

8. Both the appeals stand dismissed.

Order pronounced in the open court on 06th June, 2019.

Sd/-	**Sd/-**
(Mahavir Singh)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 06/06/2019
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant

2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**