

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : CHENNAI**

[BEFORE Dr. O.K.NARAYANAN, VICE PRESIDENT AND
SHRI VIKAS AWASTHY, JUDICIAL MEMBER]

I.T.A. No. 1503/Mds/2012

Assessment year : 2008-09

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| EIH Associated Hotels Limited, 1/24, GST Road, Meenambakkam, CHENNAI – 600 027 [PAN: AAACE 2125 M] | Vs | Dy. Commissioner of Income Tax, Company Circle-II(1), CHENNAI – 600 034 |
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I.T.A. No. 1624/Mds/2012

Assessment year : 2008-09

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| Dy. Commissioner of Income Tax, Company Circle-II(1), CHENNAI – 600 034 | Vs | EIH Associated Hotels Limited, 1/24, GST Road, Meenambakkam, CHENNAI – 600 027 [PAN: AAACE 2125 M] |
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(Appellant)

(Respondent)

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| Revenue by | : | Shri S. Jayaraman, CIT |
| Assessee by | : | Shri A.K. Gupta, FCA |

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| Date of Hearing | : | 27-05-2013 |
| Date of Pronouncement | : | 17-07-2013 |

ORDER

PER VIKAS AWASTHY, JUDICIAL MEMBER

The appeals have been filed by the assessee as well as the Revenue against the order of the Commissioner of Income Tax(Appeals)-III, Chennai dated 11-05-2012 relevant to the Assessment Year (AY) 2008-09.

2. The brief facts of the case are; the assessee is a Public Limited Company and is engaged in the business of luxury hotels. The assessee filed its return of income for the AY. 2008-09 on 26-09-2008 declaring its income as NIL. The Book profits u/s. 115JB of the Income Tax Act, 1961 (herein after referred to as 'the Act') were computed at Rs. 24,43,51,173/- and the assessee paid tax under the provisions of Minimum Alternate Tax (MAT). The case of the assessee was selected for scrutiny and notice u/s. 143(2) of the Act was issued to the assessee on 12-08-2009. During the course of assessment proceedings, the Assessing Officer made certain dis-allowances/additions in the income returned by the assessee.

Aggrieved against the assessment order dated 31-12-2010, the assessee preferred an appeal before the CIT(Appeals). The CIT(Appeals) after going through the documents on record, Remand Report filed by the Assessing Officer and the submissions made by the assessee, partly allowed the appeal of the assessee vide order dated 11-05-2012. Now, both the assessee and the Revenue have come in appeal before the Tribunal assailing the order of CIT(Appeals). The assessee has raised the following grounds of appeal in ITA No. 1503/Mds/2012 before the Tribunal:

1(a) That on the facts and in the circumstances of the case, the Id. CIT(Appeals) erred in holding that the revised Rule 8D, which was introduced on 24th March, 2008 and was not in existence at the beginning of the relevant previous year should be applied for computing disallowance u/s. 14A of the I.T. Act for Assessment Year 2008-09, i.e., the year under appeal.

1(b) That on the facts and in the circumstances of the case, the Id. CIT(Appeals) erred in computing Rs. 34,20,735/- as disallowable u/s. 14A of the I.T. Act.

2. That on the facts and in the circumstances of the case, the Id. CIT(Appeals) was not justified in not allowing a clear relief in respect of notional loss on currency swap for Rs. 1,74,52,712/-

3. *That on the facts and in the circumstances of the case, the Id. CIT(Appeals) erred in holding that Rs. 34,20,735/- computed by applying the deeming provision specified under Rule 8D, should be added back in computing the book profit under MAT.*
4. *That on the facts and in the circumstances of the case, the Id. CIT(Appeals) erred in not allowing a clear relief and taking a definite view and instead reverting back to the Assessing Officer for further verification in respect of the following issues:-*
 - (a) *Appellant's claim in respect of MAT credit entitlement available u/s. 115JAA of the IT Act.*
 - (b) *Appellant's claim towards carry forward of unabsorbed loss/depreciation.*
 - (c) *Appellant's claim towards tax credit available against the TDS/TCS certificates filed.*
5. *The appellant craves leave to add, amend, modify, rescind, supplement or alter any of the grounds stated here-in-above either before or at the time of hearing of the appeal.*

On the other hand, the Revenue has raised six grounds in its grounds of appeal impugning the order of the CIT(Appeals). The grounds of the Revenue in its appeal No. 1624/Mds/2012 are as under:

1. *The order of the learned Commissioner of Income Tax(Appeals) is contrary to the Law and facts of the case.*

2. *The Id. CIT(Appeals) erred in deleting the disallowance made u/s. 40a(i) on other payments amounting to Rs. 12.29 lakhs.*

2.1 *The Id. CIT(Appeals) ought to have appreciated the fact that the assessee did not produced any evidence that reimbursement in quantum are equal to actual expenditure incurred;*

2.2 *The Id. CIT(Appeals) ought to have appreciated the fact that the assessee did not make any submissions at the time of scrutiny proceedings as well as at the time of remand proceedings;*

3. *The Id. CIT(Appeals) has erred in restricting the disallowance made u/s. 14A from Rs. 4.32 crores to Rs. 34.20 lakhs.*

3.1 *The CIT(Appeals) ought to have seen that the additions were made on the basis of fresh investments of Rs. 9.44 crores made during the year alleged out of interest bearing funds.*

3.2 *The CIT(Appeals) ought to have appreciated that examination of bank statements filed during the remand proceedings showed that there had been transfer of funds to account No. CA 64795 of M/s. Island Hotel Maharaj Ltd., from the cash credit of the assessee bearing No. CC 201411 which is sufficient to prove that the funds have gone from cash credit account only for which the assessee pays substantial interest.*

3.3 *It is submitted that the decision of Madras High Court in the case of K. Somasundaram vs. CIT (238 ITR 939) was rendered in the context of allowance of interest paid on borrowed funds wherein it was held that the borrowed funds were to be utilized for the purpose of business or profession and if there was diversion of funds then no allowance of interest can be made which is applicable to the facts of this case.*

3.4 *It is submitted that the decision of Punjab & Haryana Court in the case of CIT Vs. Abhishek Industries Ltd. (286 ITR 1) is applicable to the facts of this case;*

4. *The Id. CIT(Appeals) is erred in restricting the disallowance u/s. 14A to Rs. 34.20 lakhs while computing the book profit u/s. 115JB;*

4.1 *It is submitted that the CIT(Appeals) ought to have upheld the computation made by the Assessing Officer while computing the disallowance under Rule 8D;*

4.2 *It is submitted that the grounds raised on this issue under the normal provisions are applicable for the purpose of book profits purposes also.*

5. *The Id. CIT(Appeals) erred in deleting the addition made towards fringe benefit tax paid while computing the book profit u/s. 115JB.*

5.1 *It is submitted that the assessee's claim is not allowable in view of the principles laid down by the Supreme Court in the case of M/s. Apollo Tyres where in it was held that other than the adjustments specifically mentioned in Sec. 115JB, the net profit as per P&L account prepared in accordance*

with the provisions of part 2 & 3 of Schedule VI to the companies Act should not be disturbed while computing book profit u/s. 115JB.

5.2 It is submitted that according to the adjustments to be made to the book profit under sec. 115JB, FBT does not find a place. In view of the above further appeal is suggested on this issue.

6. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the Id. Commissioner of Income Tax (Appeals) be set aside and that of the Assessing Officer be restored.

3. A perusal of the grounds of appeal in both the appeals shows that issue regarding dis-allowance u/s. 14A r.w.r. 8D and addition of dis-allowance u/s. 14A while calculating book profits under the provisions of Section 115JB have been assailed by both the sides.

4. Shri A.K. Gupta, appearing on behalf of the assessee submitted that the CIT(Appeals) has wrongly sustained addition to the tune of Rs. 34.20 Lakhs u/s. 14A r.w.r. 8D of the Act. The assessee has not received any dividend during the relevant AY. The assessee has investments to the tune of Rs. 64 Crores. In

the relevant period the assessee has made investments of Rs. 9.4 Crores. The entire investments have been made by the assessee either in subsidiary or associated companies. The investments have been made in the companies not for the purpose of earning dividend but out of business expediency. The assessee is not into the business of investments. The Id. AR further submitted that the investments were not made from borrowed funds bearing interest. The assessee had sufficient own funds to make such investments. Therefore, the provisions of Section 14A are not attracted. The Id. AR further contended that the CIT(Appeals) has erred in holding that Rs. 34.20 Lakhs computed under deeming provision of Section 14A r.w.r. 8D should be added back in computing the book profits under MAT provisions.

The Id. AR further submitted that the CIT(Appeals) after coming to the conclusion that the Assessing Officer has wrongly made addition on account of – i) Notional loss on currency swap; ii) MAT credit entitlement u/s. 115JAA; iii) Carry forward of un-absorbed loss/depreciation; and iv) Claim towards tax credit available against TDS/TCS certificates has remitted the issues

back to the Assessing Officer. The CIT(Appeals) ought to have allowed the appeal of the assessee on these issue after setting aside the findings of Assessing Officer.

5. On the other hand, Shri S. Jayaraman, appearing on behalf of the Revenue submitted that the CIT(Appeals) has erred in restricting the dis-allowance u/s. 14A from Rs. 4.32 Crores to 34.20 Lakhs. The Id. DR contended that the Assessing Officer has categorically pointed out that the assessee has taken a fresh secured loan of Rs. 22.22 Crores. During the relevant assessment year the assessee has diverted interest bearing borrowed funds for making investments. As regards dis-allowance u/s. 40(a)(i) on the payments amounting to Rs. 12.29 Lakhs, the Id. DR submitted that the assessee did not produce any evidence to substantiate its claim that the reimbursements are equal to the actual expenditure incurred. The assessee had not made any submissions on the issue at the time of scrutiny proceedings or even at the time of remand proceedings. The Id. DR further submitted that the CIT(Appeals) has erred in deleting

addition made towards Fringe Benefit Tax (FBT) while computing book profits u/s. 115JB.

The AR controverting the submissions made with regard to FBT submitted that FBT has to be excluded while computing book profits under the provisions of Section 115JB. In order to support his contentions, the AR relied on the order of Delhi Bench of the Tribunal in the case of *ITO Vs. Vintage Distillers Ltd.* reported as *130 TTJ (Del) 79* and also the order of Mumbai Bench of the Tribunal in the case of *ASB International (P) Ltd. Vs. Dy.CIT 54 SOT 140 (URO)*. The assessee also relied on the CBDT Circular No. 8/2005 dated 29-08-2005.

6. We have heard the submissions made by the rival parties. We have also examined the orders passed by the authorities below and the judgments/orders cited by the representatives of both the parties. The first issue in the appeal of the assessee relates to dis-allowance made u/s. 14A r.w.r. 8D. The Assessing Officer has made dis-allowance to the tune of Rs. 4,32,66,500/-. The contention of the assessee is that the assessee has earned dividend income of Rs. 4.6 Lakhs which is fully exempt u/s. 10(34)

of the Act. The assessee has made voluntarily dis-allowance of Rs. 45,927/- u/s. 14A. The assessee has made fresh investments to the tune of Rs. 9.4 Crores during the year. The Assessing Officer held that the investments have been made from the fresh secured loans obtained during the year by the assessee. The CIT(Appeals) after going through the submissions made by the parties has come to the conclusion that the assessee has made investments from its own funds except for the short term investments made in HDFC Cash Management Fund and DSPML Cash Plus Fund in respect of which the amounts were invested from interest bearing funds borrowed from HBSC. The Revenue has not been able to controvert the findings of CIT(Appeals).

We are of the considered opinion that the investments made by the assessee in the subsidiary company are not on account of investment for earning capital gains or dividend income. Such investments have been made by the assessee to promote subsidiary company into the hotel industry. A perusal of the order of the CIT(Appeals) shows that out of total investment of Rs. 64,18,19,775/-, Rs. 63,31,25,715/- is invested in wholly owned subsidiary. This fact supports the case of the assessee

that the assessee is not into the business of investment and the investments made by the assessee are on account of business expediency. Any dividend earned by the assessee from investment in subsidiary company is purely incidental. Therefore, the investment made by the assessee in its subsidiary are not to be reckoned for dis-allowance u/s. 14A r.w.r. 8D. The Assessing Officer is directed to re-compute the average value of investment under the provisions of Rule 8D after deleting investments made by the assessee in subsidiary company. Accordingly, this ground of appeal of the assessee is partly allowed and that of the Revenue is dismissed. The findings of the CIT(Appeals) on the issue are accordingly modified.

7. The second ground of appeal of the assessee is with respect to notional loss on currency swap amounting to Rs. 1,74,52,712/-. The CIT(Appeals) has remitted the issue back to Assessing Officer to verify whether the interest and finance charges include the amount of notional loss on currency swap. The CIT(Appeals) had sought Remand Report. The Assessing Officer has not discussed the issue in his Remand Report. We

find that no prejudice will be caused to the assessee if the issue is remitted back to the Assessing Officer for deciding the same afresh. The Assessing Officer is directed to take into consideration all the documents furnished by the assessee in support of his contentions on the issue. Accordingly, the findings of CIT(Appeals) on the issue are confirmed and this ground of appeal of the assessee is dismissed.

8. The third issue in the appeal of the assessee relates to addition of dis-allowance made u/s. 14A r.w.r. 8D to be added back in computing book profits under MAT provisions. The issue has been raised by the Revenue as well in its appeal as ground No.3. We find that the order of the CIT(Appeals) is well reasoned and detailed on the issue. We are in consonance with the findings of the CIT(Appeals) on the issue. In view of the judgment of the Hon'ble Supreme Court of India in the case of *CIT Vs. K.Y. Pillaiiah & Sons* reported as *63 ITR 411 (SC)*, we need not repeat the reason given by CIT(Appeals). No interference is called for in the findings of the CIT(Appeals) with regard to inclusion of the amount dis-allowed u/s. 14A r.w.r. 8D while computing book profit

u/s. 115JB. Accordingly, this ground of appeal of the assessee as well as that of the Revenue is dismissed.

9. The fourth ground of appeal of the assessee is against remitting the following issues back to the Assessing Officer for further verification:

- i) MAT credit entitlement available u/s. 115JAA;
- ii) Claim towards carry forward of un-absorbed loan/depreciation;
- iii) Claim towards tax credit available and against TDS/TCS certificates.

We find that complete facts regarding all these issues could not be culled out from the submissions or the documents available before the CIT(Appeals). The CIT(Appeals) has remitted the issues back to Assessing Officer to verify the claim of the assessee and allow the same in accordance with law. We do not find any error in the findings of the CIT(Appeals). The CIT(Appeals) has merely remitted these issues back to the

Assessing Officer to verify the veracity of the claim of the assessee. If the assessee is found to be entitled to claim, the same shall be accorded to the assessee as per law. Therefore, this ground of appeal of the assessee is dismissed.

The fifth ground of appeal of the assessee is general in nature therefore, needs no adjudication. In view of the above observations, the appeal of the assessee i.e., 1503/Mds/2012 relevant to AY. 2008-09 is partly allowed.

10. Now, we take up the appeal of the Revenue i.e., ITA No. 1624/Mds/2012. Ground No. 1 and 6 in the appeal of the Revenue are general in nature, therefore, the same are not taken up for adjudication.

11. Ground No.2 of the appeal of the Revenue relates to disallowance made u/s. 40(a)(i) on the overseas payments amounting to Rs. 12.29 Lakhs made by the assessee. The said payments have been made by the assessee towards Data Processing Fee, Medical Insurance, Travelling, e-Survey, Admin

Fee, E-mail report charge etc., The payments have been made either towards reimbursement of expenses or for rendering services outside India. Since the payments have been made to non-residents for rendering services out-side India, the same do not fall within the ambit of income accrued or arised in India as envisaged u/s. 9(1) of the Act. Therefore, no tax is to be deducted on such payments. The CIT(Appeals) in his order has categorically stated that the Assessing Officer in the remand proceedings has examined the same and had not offered any remark on the above expenditure. The order of the CIT(Appeals) on this issue is well reasoned, accordingly, the same is confirmed. This ground of appeal of the Revenue is dismissed being devoid of merits.

12. The third and fourth grounds of appeal of the Revenue have already been adjudicated above in paras 6 & 8 respectively along with the appeal of the assessee and the same have been dismissed.

13. The fifth ground of appeal of the Revenue relates to addition made towards FBT paid while computing book profits u/s. 115JB. As per the contentions of the Id. DR, no adjustment was required to be made in the book profits u/s. 115JB with regard to FBT. On the other hand, the AR contended that the amount of FBT has to be excluded in computation of book profits u/s. 115JB. To support his contentions, the Id. AR relied on Board Circular No. 8/2005 dated 29-08-2005 which has been placed on record at Pg.No. 124 to 146 of the Paper Book. Relevant extract of the circular is re-produced herein below:

“Whether expenditure incurred by the employer for the purposes of providing free or subsidized transport for journeys to employees from their residence to the place of work or such place of work to the place of residence would attract FBT?

104. The free or subsidized transport provided to employees for journeys from their residence to the place of work or such place of work to the place of residence is in lieu of conveyance/transportation allowance, which is not liable to FBT. Accordingly, the expenditure incurred by the employer for the purposes of providing free or subsidized transport for journeys to employees from their residence to the place of work or such place of work to the place of residence will not be liable to FBT”.

The AR in support of his contentions has further relied on the order of the Tribunal in the cases of *ITO Vs. Vintage Distillers Ltd.* (supra) and *ASB International (P) Ltd. Vs. Dy.CIT* (supra) wherein, similar view has been taken. The DR has not been able to controvert the submissions made by the assessee on the issue. We find force in the submissions made by the AR of the assessee. It is a well settled law that the Revenue authorities cannot deviate from the Circulars/Notifications issued by the CBDT from time to time. They are binding on the Revenue authorities. Accordingly, this ground of appeal of the Revenue is dismissed and the order of CIT(Appeals) on the issue is upheld.

To conclude, the appeal of the Revenue is dismissed and the appeal of the assessee is partly allowed.

Order pronounced on Wednesday, the 17th July, 2013 at Chennai.

Sd/-
(Dr. O.K. NARAYANAN)
VICE PRESIDENT

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Dated: 17th July, 2013

TNMM

Copy to: Assessee/AO/CIT(A)/CIT/DR