IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, CHANDIGARH

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND MS. RANO JAIN, ACCOUNTANT MEMBER

ITA No.651/Chd/2014
(Assessment Year : 2007-08)

M/s Trident Limited(Formerly Abhishek Industries Ltd.), E-212, Kitchlu Nagar, Ludhiana. PAN: AABCA4139J	Vs.	The Addl.C.I.T., Range-I, Ludhiana.

And

ITA No.756/Chd/2014
(Assessment Year : 2007-08)

The A.C.I.T., Range-I, Ludhiana.	Vs.	Abhishek Industries Limited, E-212, Kitchlu Nagar, Ludhiana. PAN: AABCA4139J
(Appellant)		(Respondent)

Assessee by	:	Shri Ashwani Kumar
Department by	:	Shri S.K. Mittal, DR
Date of hearing	:	14.10.2015
Date of Pronouncement	:	27.10.2015

O R D E R

PER RANO JAIN, A.M. :

Both the cross appeals are directed against the order of learned Commissioner of Income Tax (Appeals)-II, Ludhiana dated 9.6.2014 for assessment year 2007-08.

ITA No.651/Chd/2014 :

2. The ground No.1 raised by the assessee relates to the disallowance of Rs.5 lacs out of total disallowance of Rs.46,91,849/- made by the Assessing Officer by resort to provisions of section 14A of the Act.

3. Briefly, the facts of the case are that the assessee had invested an amount of Rs.5038.88 lacs on 31.3.2006 and Rs.4575.77 lacs as on 31.3.2007 in various equity funds having tax free income. During the assessment proceedings, the Assessing Officer noticed that the assessee had incurred interest expenditure. Accordingly, he held that the provisions of section 14A of the Income Tax Act were applicable in assessee's case. It was observed that the assessee had earned dividend income of Rs.46,91,849/- during the year. The Assessing Officer computed disallowance under Rule 8D of the Income Tax Rules at Rs.65,30,803/-.

4. Before the learned CIT (Appeals), it was argued by the learned counsel for the assessee that the assessment order in question being for assessment year 2007-08, the provisions of Rule 8D of the Income Tax Rules are not applicable in view of the ratio of Hon'ble Mumbai High Court in the case of Godrej & Boycee Ltd. Vs. DCIT, 328 ITR 81. The learned CIT (Appeals) noted that similar disallowance was made amounting to Rs.2,37,67,894/- in assessment year 2008-09, which was deleted by the learned CIT (Appeals). It

was noted by the learned CIT (Appeals) that during the assessment year 2005-06, the assessee had received dividend income of Rs.25,75,000/- and a disallowance of Rs.2,50,000/- was made by the Assessing Officer. This disallowance was confirmed by the learned CIT (Appeals). On an appeal filed by the assessee, the Hon'ble I.T.A.T. reduced the disallowance to Rs.1,25,000/-. Keeping in view the totality of the facts and circumstances, the learned CIT (Appeals) found it fair and reasonable to restrict the disallowance to Rs.5 lacs.

5. The learned counsel for the assessee relied upon the order of the I.T.A.T. for assessment year 2005-06 and prayed that a reasonable relief may be given to it.

6. On perusal of the order of Hon'ble I.T.A.T. for assessment year 2005-06 restricting the disallowance to Rs.1,25,000/-on a dividend income of Rs.25,75,000/-, we consider it fair and reasonable to restrict the disallowance to Rs.2.5 lacs on a dividend of Rs.46,91,849/- received by the assessee this year. This is in consonance with the fact that the computation as per Rule 8D of the Income Tax |Rules is not applicable in the assessment year 2007-08 in view of the Mandate given by the Mumbai High Court in the case of Godrej & Boycee Ltd. (supra).

7. The ground No.2 raised by the assessee relates to the disallowance of Rs.22,49,634/- out of expenses relating to the payment made to PSEB for laying high power electric lines.

8. The facts of the case are that the assessee had paid Rs.22,49,634/- to PSEB for electric feeder line and claimed the same as revenue expenditure. The Assessing Officer holding the said expenses to be capital in nature disallowed the same. The learned CIT (Appeals) following the decision of the Hon'ble Punjab & Haryana High Court in the case of Sriyansh Industries Ltd., reported in ITA No.277 of 2004, dated 15.11.2013 dismissed the appeal of the assessee on this ground.

9. Before us, it was brought to our notice that similar issue was raised in assessee's own case for assessment year 2005-06, whereby while adjudicating the same the Chandigarh Bench of the Tribunal in ITA No.859/Chd/2012 dated 20.3.2014 set aside the matter to the file of the Assessing Officer to apply the ratio laid down by the Hon'ble Punjab & Haryana High Court in the case of Sriyansh Industries Ltd. (supra). The findings of the I.T.A.T., Chandigarh are at page 8 in paras 16 to 18, which read as under :

> *16. The issue of allowability of the claim of the assessee was set aside to the file of the Assessing Officer to establish whether the amount had actually been spent for bringing the said asset into existence or it is mere work-in-progress. We find that the issue raised in the present appeal is identical to the issue before the Tribunal in assessment year 2006-07 (supra) and the same is set aside to the file of the Assessing Officer with similar directions.*
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> *17. We further find that the Hon'ble Punjab & Haryana High Court in CIT-I, Ludhiana Vs. Shreyans*

Industries Ltd. reported in ITA No.277 of 2004 (supra) vide judgment dated 15.11.2013 had held as under:

> *"Any expenditure incurred in complying with statutory requirements particularly where the asset concerned would enure to the benefit of the assessee from year to year, would necessarily be an asset of enduring nature and, therefore, categorised as capital expenditure. The mere fact that the land is not owned by the assessee, is irrelevant as by excavating the drain through forest land on the basis of approval granted by the Forest Department, the assessee has been able to overcome statutory requirements for release of effluents as prescribed under the Pollution Control Act, the rules and notifications etc. issued thereunder, thereby conferring benefit of an enduring nature that would be available to the assessee from year to year. The fact that the assessee has transferred land to the forest department or has paid money for compensatory forestry does not denude the assessee's rights vis-a-vis the asset created.*
>
> *A perusal of the approval granted to the assessee, consideration of the nature of the expense incurred and the statutory obligations for discharge of effluents, in or considered opinion, leave no ambiguity that expense incurred upon construction of the drain for release of effluents have conferred benefit of an enduring nature upon the assessee. We, therefore, answer this question in favour of the revenue and against the appellant."*

18. The Assessing Officer is directed to apply the ratio laid down by the Hon'ble Punjab & Haryana High Court in Shreyans Industries Ltd. Vs. CIT (supra) while adjudicating the issue in the present case after establishing the fact situation of the issue raised. The ground of appeal No.1 raised by the Revenue is allowed for statistical purposes.

9. On perusal of the orders of the lower authorities, we see that at the time of finalization of the assessment, the order of the I.T.A.T., as stated hereinabove, was not available

to the Assessing Officer. Therefore, he did not have any occasion to consider the proposition laid down by the Punjab & Haryana High Court in the case of Sriyansh Industries Ltd. (supra), as directed by the I.T.A.T. The learned CIT (Appeals) had the benefit of the directions of the I.T.A.T., as during the appellate proceedings, the order was available to him. However, on perusal of the order of the learned CIT (Appeals), we see that after quoting the findings of the Hon'ble Punjab & Haryana High Court in the case of Sriyansh Industries Ltd. (supra), he comments as under :

> *"The issue is squarely covered by the aforesaid decision of the Hon'ble P&H High Court. The AO was therefore fully justified in treating the expenditure as capital expenditure. The disallowance made by the AO is confirmed. This ground of appeal is accordingly dismissed."*

10. We do not appreciate the way learned CIT (Appeals) has adjudicated the issue, despite the directions of the I.T.A.T. (although in a different assessment year). It is incumbent upon the authorities below to bring out the facts of the assessee, before relying on any of the judgments. We, therefore, restore the issue to the file of the learned CIT (Appeals), to decide the issue as per the directions given by the I.T.A.T. He should bring all the facts on record while applying the judgment, before reaching to any conclusion.

11. The ground No.3 raised by the assessee relates to disallowance of Rs.2,09,58,801/- out of financial expenses relating to the exempt unit under section 80IA of the Act.

12. The facts of the case are that the assessee had claimed financial expenses of Rs.38,07,84,433/-. The Assessing Officer noted that no expenditure out of these financial expenses had been allocated to the units claiming deduction under section 80IA of the Act. The Assessing Officer was of the view that the provisions of section 14A of the Act were applicable to the income on which deduction under section 80IA of the Act was allowable. Therefore, the allocated financial expenses of Rs.2,09,58,801/- to the unit claiming deduction under section 80IA of the Act. The assessee made submissions challenging the said action of the Assessing Officer before the learned CIT (Appeals). The learned CIT (Appeals) held that the assessee had not raised any objection on this issue in his written submissions or in his grounds of appeal. Relying on a number of judgments he held that the assessee is not entitled to deduction under section 80P(2)(d) of the Act after deducting the expenditure attributable to the earning of such income. In this view, he dismissed the ground raised by the assessee.

13. Before us, it was submitted that the ground specifically raised before the learned CIT (Appeals) was also agitated but is not being adjudicated by the learned CIT (Appeals) in right perspective. It was argued that no financial expenses can be attributed to unit claiming deduction under section 80IA of the Act in view of the fact that the separate books of account for both the units are maintained by the assessee and books of account have not been rejected by the

Assessing Officer. In this view, it was prayed to sent back this issue to the filed of the learned CIT (Appeals) to give a proper finding.

14. The learned D.R. relied upon the order of the learned CIT (Appeals).

15. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. From the perusal of the order of the learned CIT (Appeals) in this regard and submissions made by the learned counsel for the assessee, we find that the issue of applicability of section 14A of the Act on the income of the unit claiming exemption under section 80IA of the Act was confused by the disallowance made by the Assessing Officer otherwise under section 14A of the Act by the learned CIT (Appeals) while adjudicating this issue.

16. In this view, we find it appropriate to send this ground back to the file of the learned CIT (Appeals) to adjudicate the same in proper perspective. Needless to say, the assessee be given proper opportunity of being heard and filed relevant evidence.

17. The learned counsel for the assessee preferred not to press ground No.4 of the appeal. The same is dismissed as not pressed.

18. The appeal of the assessee is partly allowed.

ITA No.756/Chd/2014 :

19. The ground No.1 raised by the Department is with regard to disallowance made under section 14A of the Act.

20. Since the issue has been discussed under ground No.1 in ITA No.651/Chd/2014, and the findings given in ITA No.651/Chd/2014 shall apply to this case also with equal force.

21. The ground No.2 raised by the Department reads as under :

> *"2. That the Ld. C1T(A) has erred in law and on facts in deleting the addition of Rs. 60,00,000/-, made u/s 40A(2)(a) r.w.s. 37 of the l.T. Act, 1961 by the A.O. out of salary paid to Managing Director, relying upon the case of C1T Vs. Siyaram Garg HUF(2011) 49 DTR 126 which is different from the facts of the case. The A.O. had rightly made the addition as per law and facts of the case."*

22. Briefly, the facts of the case are that the assessee had paid an amount of Rs.2.40 crores as salary to the Managing Director in addition to commission amounting to Rs.63,36,283/- and a sitting fee of Rs.8,20,000/-. During the course of assessment proceedings, the Assessing Officer noted that the remuneration paid to Managing Director in the year 2006-07 was only Rs.1.20 crores. He observed that the turnover of the company had increased only by 9.8% while the salary had been increased by 100%. He also noted that assessee company had not declared the dividend to the share

holders or increased the salary of other employees in the top management by the same amount. He pointed out that the Managing Director and his family members who are specified persons under section 40A(2)(b) of the Act were holding substantial interest in the company and, therefore increase in the salary was approved by practically family members only. Keeping in view the aforesaid facts, the Assessing Officer held that the increase in salary by 100% was unreasonable. Accordingly, he held that the increase of 50% in the salary was considered as reasonable and disallowed the balance amount of Rs.60 lacs under section 40A(2)(b) of the Act.

23. Before the learned CIT (Appeals), the assessee submitted an analysis of turn over, exports and return of net worth as percentage increase for the year ending December, 2002 to March, 2005. The details of employees, whose salary had increased more than 70% was also given to the learned CIT (Appeals). It was submitted that the remuneration paid to the Managing Director is duly covered by the provisions of sections 198 and 309 of the Companies Act.

24. After considering the submissions made by the assessee, the learned CIT (Appeals) allowed the ground of appeal of assessee stating as follows :

> *7.5 In this regard, the following facts need consideration:-*
>
> *(a) The person to whom salary under reference has been paid is Managing Director of the company and is the main person managing all the business affairs of the company.*

(b) As mentioned in the assessment order on page 27, performance of the company in various areas of performance indicators has increased in range of 34% to 123% between the period December, 2002 to March 2005.

(c) The company is a Public Limited Company i.e Company in which Public is substantially interested and its shares are listed on stock exchange.

(d) Remuneration paid to the Managing Director was duly approved by the Board of the Directors and share holders of the company.

(e) As per the details filed by the appellant (Annexure - 1 to this order) there are large numbers of employees whose remuneration has increased by 100% or more during the period 2002-05.

7.6 Keeping in view the aforesaid facts, it cannot be said that the remuneration paid to Managing Director during the year was excessive. Even otherwise, as referred to in Para 7.3 above, for the purpose of section 40A(2)(a), whether the expenditure is excessive or reasonable has- to be seen with respect to the fair market value of the facilities. In the instant case, the AO has not brought out any material to show that the remuneration paid to the Managing Director was excessive having regard to the fair market value of these facilities. No comparative case has been referred to by the AO where the remuneration paid to the Managing Director was shown to be less than the Managing Director of the appellant's company. Merely because the salary of the Managing Director has been increased by 100% after a period of 3 years does not by itself show that salary is excessive.

7.7 There is another aspect to this issue. During the appellate proceedings the appellant was asked to furnish the details of tax paid by the Managing Director. As per the details filed by the appellant, the Managing Director had returned an income of Rs 21745128/- and had paid tax on the returned income at the maximum marginal rate. That being so, it is evident that both, the appellant and its Managing Director were being taxed at the same rate proving that there was no reason for the appellant to show higher salary payment being paid to the Managing Director.

Reference in this regard may be made to the decision of the Hon'ble P &H High Court in the case of CIT vs. Siyaram Garg HUF (2011) 49 DTR 126. In this case the AO had made an addition u/s 40A (2) of the I.T. Act on the ground that the appellant had paid higher rate to its sister concern while purchasing the cotton and waste. The CIT(A) allowed the appeal of the appellant. On further appeal, the Hon'ble IT AT held as under:

> *" On this issue, -we find that indeed, the details filed by the assessee showed that its sister concerns were being taxed at the same rate at which the assessee was being taxed, proving that there was no reason for the assessee to show higher rate purchases made by the assessee from its sister concerns. The assessee's sister concern had offered their income from such sales, which fact has not been disputed. Therefore, the AO erred in invoking the provisions of s. 40A(2) of the Act and the learned CIT (A) has correctly deleted the disallowance. "*

The Hon'ble P&H High Court upheld the order of the Hon'ble Tribunal and dismissed the appeal of the department.

25. Before us, the learned D.R. relied upon the order of the Assessing Officer and further submitted that the Managing Director is being paid commission as well as sitting fee. The remuneration was increased by 100% from the year 2006-07. There is no increase in the salary of other employees. Therefore, the disallowance made by the Assessing Officer be confirmed.

26. The learned counsel for the assessee while arguing before us reiterated the submissions made before the learned CIT (Appeals) and submitted that the Assessing Officer has made disallowance under section 40A(2)(a) of the Act without bringing on record any comparable instance and adhoc disallowance of Rs.60 lacs has been made on this account. In this way, it was prayed that the order of the learned CIT

(Appeals) be confirmed on this ground.

27. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. On perusal of the findings given by the learned CIT (Appeals) in this regard, we do not find any infirmity in the same. It is a fact of record that the disallowance has been made on adhoc basis though made under section 40A(2)(a) of the Act. The requirement of section 40A(2)(a) of the Act is to disallow any expenditure which the Assessing Officer considers to be excessive or unreasonable having regard to the fair market value of the goods, service or facilities for which the payment is made. However, to bring on record the fair market value of such facilities, the Assessing Officer has to bring certain comparable instances of the same, which in this case the Assessing Officer has not done. The disallowance has been made by the Assessing Officer holding 50% increase in salary to be reasonable. There is no basis before the Assessing Officer to treat 50% of salary as reasonable. Thus just an estimate which is not permitted under the provisions of section 40A(2)(a) of the Act. This ground of appeal raised by the Department is dismissed.

28. The ground Nos.3 and 4 raised by the Revenue are general and hence need no adjudication.

29. The appeal of the Revenue in ITA No.756/Chd/2014 is partly allowed.

30. In the result, both the cross appeals are partly allowed.

Order pronounced in the open court on this 27th day of October, 2015.

Sd/-	Sd/-
(BHAVNESH SAINI)	**(RANO JAIN)**
JUDICIAL MEMBER	**ACOUNTANT MEMBER**

Dated : 27th October, 2015

Rati

Copy to: The Appellant/The Respondent/The CIT(A)/The CIT/The DR.

Assistant Registrar,
ITAT, Chandigarh