IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER

IT(ss)A No.69/CTK/2013: Assessment year: 2008-2009
IT(ss)A No.50/CTK/2013: Assessment year: 2009-2010
ITA No.400/CTK/2015: Assessment Year: 2011-2012
ITA No.215/CTK/2020: Assessment Year: 2009-2010

M/s. Fahmida International Pvt Ltd., HIG-19, BDA Housing Colony, Jayadev Vihar, Bhubaneswar.	Vs.	ACIT, Circle-1(2), Bhubaneswar.
PAN/GIR No.AABCF 1461 A		
(Appellant)	..	(**Respondent**)

IT(ss)A No.72/CTK/2013: Assessment year: 2009-2010

ACIT, Circle-1(2), Bhubaneswar	Vs.	M/s. Fahmida International Pvt Ltd., HIG-19, BDA Housing Colony, Jayadev Vihar, Bhubaneswar
PAN/GIR No.AABCF 1461 A		
(Appellant)	..	(**Respondent**)

Assessee by : Shri Sunil Mishra, AR
Revenue by : Shri M.K.Gautam, CIT DR

Date of Hearing : 27/12/2022
Date of Pronouncement : 27/12/2022

O R D E R

Per Bench

Shri Sunil Mishra, ld appeared for the assessee and Shri M.K.Gautam, ld CIT DR appeared for the revenue.

IT(SS) A No.69/CTK/2013: Asst.Year: 2008-09

2. This is an appeal filed by the assessee against the order dated 30.3.2013 of the ld CIT(A)-1,Bhubaneswar in Appeal No.0339/10-11 for the assessment year 2008-09.

3. In this appeal, the assessee has challenged the addition of Rs.50,000/- made on estimate basis.

4. At the time of hearing, ld AR of the assessee submitted that, as per instruction of the assessee, he does not wish to press this ground and endorsed to this effect in the grounds of appeal. Consequently, the ground is dismissed as withdrawn.

5. In the result, appeal of the assessee stands dismissed.

IT(ss)ANo.50/CTK/2013: A.Y. 2009-1-- Assessee's appeal
IT(ss)ANo.72/CTK/2013: A.Y. 2009-10 – Revenue's appeal

6. These are cross appeals filed by the assessee and revenue against the order dated 20.3.2013 of the ld CIT(A)-1, Bhubaneswar in Appeal No.0340/10-11 for the assessment year 2009-10.

7. In assessee's appeal, the assessee has challenged the action of the ld CIT(A) in estimating the income of the assessee at 10% of the administrative expenses and export expenses.

8. At the time of hearing, ld AR submitted that the issue was squarely covered by the decision of this Co-ordinate Bench in

the case of Aliza International Pvt Ltd in IT(ss)A Nos.51 & 52/CTK/2013 for the assessment year 2008-09 & 2009-10 order dated 13.10.2022, wherein, this Co-ordinate Bench of the Tribunal in paras 15 & 16 held as follows:

> " 15. In reply, ld. AR vehemently supported the order of the CIT(A) and submitted that the disallowance made itself is very high and it should be reduced in line with the decision of the coordinate bench of the Tribunal in the case of M/s Serajuddin & Co. in IT(SS)A Nos.30&31/CTK/2013, order dated 10.10.2022.
>
> 16. We have considered the rival submissions. A perusal of the order of the ld. CIT(A), it is noticed that the ld. CIT(A) when disallowing 10% out of the administrative and other expenses, has directed to reduce the director's remuneration. In fact, this is a right method insofar as the director's remuneration has already been taxed in the hands of the directors. So further taxing the same in the hands of the assessee would actually be a miscarriage of justice. Further in the interest of justice, we are of the view that the disallowance at 10% as made by the ld. CIT(A) is excessive and the same is reduced to 5%."

9. In reply, ld CIT DR vehemently supported the order of the ld CIT(A). It was the submission that the disallowance at 10% was reasonable and should not be disturbed.

10. We have considered the rival submissions. As it is noticed that the issue is squarely covered in the group concern of the assessee being in the case of M/s. Serajuddin & Co. and in the case of Aliza International Pvt Ltd.,(supra), respectfully following the decisions of the Co-ordinate Bench of this Tribunal (supra), the disallowance as confirmed by the ld CIT(A) at 10% stands reduced to 5%.

11. In the result, appeal of the assessee stands partly allowed.

12. In regard to Revenue's appeal, it was submitted by ld CIT DR that Ground Nos.1 & 9 are general in nature.

13. Ld CIT DR submitted that in Ground No.2, the revenue has challenged the action of the ld CIT(A) in deleting the disallowance of auxiliary service addition. Ld CIT DR drew our attention to page 5 para 4 of the order of the ld CIT(A). It was submitted that the ld CIT(A) ought not to have reduced the addition made by the Assessing officer.

14. In reply, ld AR submitted that the assessee has shown higher sales, which has been considered by the AO in his remand report as also the ld CIT(A) at page 13 of his order. It was the submission that the Assessing Officer had expressed his inability to provide the copy of the letter/information on the basis of which income of Rs.5,96,35,878/- was adopted in respect of the business. As the revenue has not been able dislodge the findings of the ld CIT(A), we are of the view that the findings of the ld CIT(A) on this issue is on right footing and does not call for any interference.

15. In regard to Ground No.3 of appeal, ld CIT DR submitted that the ld CIT(A) erred in reducing the disallowance to 10%. He vehemently supported the order of the Assessing officer.

16. In reply, ld AR drew our attention to page 13 of the order of the ld CIT(A). It was the submission that the ld CIT(A) had reduced the disallowance of the administrative and other expenses and export expenses

to 10%. It was the submission that in assessee's appeal in IT(ss) A No.50/CTK/2013, the Tribunal has already reduced this disallowance to 5%. It was submitted that consequently, the order of the ld CIT(A) is liable to be modified to reduce the disallowance to 5%.

17. We have considered the rival submissions. As it is noticed that this issue has already been considered in IT(ss) A No.50/CTK/2013 and we have reduced the said disallowance made from 10% to 5%, Ground No.3 of the revenue stands dismissed.

18. In Ground Nos.4 & 5, the revenue has challenged the direction of the ld CIT(A) in adopting the total income at Rs.1,54,98,904/- before depreciation.

19. Ld CIT DR submitted that the Assessing Officer had made an assessment of Rs.15,39,73,507/-, which had been reduced by the ld CIT(A) to Rs.1,54,98,904/-. It was the submission that the ld CIT(A) ought not to have considered the audit report of the assessee to reduce the income.

20. In reply, ld AR submitted that the said audit report which had been relied by the assessee and ld CIT(A) was produced before the Assessing Officer in the remand proceedings and no adverse comment of the AO was available in the remand report. It was the submission that it was only after considering the remand report that the ld CIT(A) has reduced the addition. It was the submission that the order of the ld CIT(A) is liable to be upheld.

21. We have considered the rival submissions. As it is noticed that the ld CIT(A) has reduced the total income assessed by the Assessing Officer by considering the remand report as filed by the AO and as it is noticed that the said remand report has also been extracted by the ld CIT(A) in his order, we find no reason to interfere with the order of the ld CIT(A) on this issue. Ground Nos.4 & 5 of the revenue stand dismissed.

22. In Ground No.6, it was submitted by ld CIT DR that the issue was against the action of the ld CIT(A) in deleting the addition made by the Assessing Officer on account of deemed dividend. It was submitted by ld CIT DR that the assessee had received loan from M/s. Aliza International Pvt. Ltd., to the extent of Rs.5,43,00,000/-. It was the submission that Mohd Intekhab Alam held 96.96% share in Aliza International Pvt Ltd., and held 99% in Fahmida International Pvt Ltd. It was the submission that M/s. Aliza International Pvt Ltd., had given loan to the assessee and the same was not for any business purposes and also no interest was charged. It was the submission that consequently deemed dividend was assessed in the hands of the assessee. It was the submission that the ld CIT(A) had deleted the addition on the ground that the assessee was not the shareholder in M/s. Aliza International Pvt Ltd. It was the submission that the ld CIT(A) had relied on various decisions including that of the Special Bench of the ITAT in the case of ACIT vs Bhaumik Colours Pvt Ltd., 317 ITR (AT) 146 (SB). It was the submission that in view of the decision of the

Hon'ble Supreme Court in the case of Gopal and Sons (HUF) vs CIT (2017) 77 taxmann.com 71 (SC), the deemed dividend is liable to be assessed in the hands of the assessee insofar as in the said case, the Hon'ble Supreme Court has categorically held that the HUF has received the loan and that HUF is liable to be assessed in respect of the dividend income.

23. Ld AR submitted that the decision in the case of Gopal and Sons (HUF) (supra) in para 7 clearly showed that the Gopal & Sons (HUF) was the shareholder in the company and it was only because the said Gopal & Sons (HUF) was the shareholder, the deemed dividend was added. It was the submission that in the impugned case, the assessee is not the shareholder in M/s. Aliza International Pvt Ltd. It was the submission that the order of the ld CIT(A) is liable to be upheld.

24. We have considered the rival submissions. A perusal of the provisions of section 2(22)(e) clearly shows that the word used is "*on behalf, or for the individual benefit, of any such shareholder*". Thus, the deemed dividend, if at all, can be assessed is to be assessed in the hands of the shareholder on whose behalf or individual benefit, the loan has been given. In the present case, the assessee is not the shareholder of M/s. Aliza International Pvt Ltd., which would attract the provisions of section 2(22)(e) of the Act. In these circumstances, we are of the view that the findings of the ld CIT(A) is on right footing and does not call for any interference. Ground No.6 of the revenue stands dismissed.

25. In regard to Ground No.7, it was submitted by ld CIT DR that in the course of hearing before the ld CIT(A), it was noticed that the assessee had shown other income of Rs.1,03,19,594/-. It was the submission that the ld CIT(A) did not add the same on the ground that the net profit as shown by the assessee was inclusive of the said amount of other income. It was the submission that the ld CIT(A) ought to have considered the said amount as the income and enhanced the assessment.

26. In reply, ld AR submitted that the said amount of Rs.1,03,19,594/- has already been considered while arriving at the net profit, which was part of the audit report u/s.44AB of the Act. It was the submission that no further addition was liable to be made.

27. We have considered the rival submissions. As it is noticed that the ld CIT(A) has taken into consideration the fact that the said other income has already been considered while determining the net profit as per the accounts which are audited u/s.44AB, we are of the view that no addition of the said amount is called for. Consequently, Ground No.7 of the revenue stands dismissed.

28. In regard to Ground No.8, it is noticed that multiple remand reports from the Assessing Officer and there is no question of violation of Rule 46A of IT Rules.

29. In the result, appeal of the revenue stands dismissed.

ITA No.400/CTK/2015: Asst.Year – 2011-12

30. This is an appeal filed by the assessee against the order of the ld CIT(A)-1, Bhubaneswar dated 4.6.2015 in Appeal No.0050/14-15 for the assessment year 2011-12.

31. The assessee has challenged the action of the ld CIT(A) in confirming the peripheral development expenses and the addition representing maintenance expenses.

32. Ld Representatives of both the parties have agreed that the issue was squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the case of Aliza International Pvt Ltd., in ITA No.399/CTK/2015 for A.Y. 2011-12 order dated 13.10.2022.

33. As it is noticed that the issue was squarely covered by the decision of the Co-ordinate bench of this Tribunal in assessee's favour in the case of Aliza International Pvt Ltd., (supra), wherein, in para 5 it has been held as follows:

> "5. We have considered the rival submissions. Admittedly, the assessee is not in the business of mining, therefore, the said expenditure cannot be said to be peripheral development expenditure. In such circumstances, we are left with only issue as to whether the said expenditure was business expenditure or not. The evidence produced by the assessee clearly shows that the expenditure has been incurred at the direction from BMC. The payments have been made by cheque to the contractor sponsored by the BMC. Obviously, the beautification work had been done at the direction of the BMC and a Board is required to put up specifying that

> the work has been done by a particular individual or company. This is also in the form of advertisement. Here, as it is noticed that the expenditure has been incurred at the instruction of the BMC, we are of the view that it cannot be said the payment has been made for extraneous consideration. This being so, we are of the view that the expenditure is incurred for the purpose of business of the assessee and same is allowable."

Respectfully following the decision of the Co-ordinate Bench in the case of Aliza International Pvt Ltd. (supra), the addition as made by the AO and confirmed by the ld CIT(A) in respect of peripheral development expenses and maintenance expenses stands deleted.

34. In the result, appeal of the assessee stands allowed.

ITA No.215/CTK/2020: Asst.Year: 2009-10

35. This is an appeal filed by the assessee against the order of the ld CIT(A)-1, Bhubaneswar dated 3.9.2020 in Appeal No.0125/15-16 for the assessment year 2009-10 against the confirmation of penalty levied u/s.271(1)(c) of the Act.

36. It was submitted by ld AR that the search in the case of the assessee took place on 28.5.2008 and the assessment year 2009-10 was the specified period and for the purpose of levying the penalty, if at all, was u/s.271AAA and not u/s.271(1)(c) of the Act. He submitted that this issue was covered by the decision of the Co-ordinate Bench of this Tribunal in the case of

S.M.Enterprises in ITA Nos.233 & 234/CTK/2020 order dated 20.10.2022, wherein in para 6, it has been held as follows:

> "6. We have considered the rival submissions. For the assessment years 2008-2009 & 2009-2010, which are the years in respect of which the AO issued notice u/s.271(1)(c) as also penalty notice u/s.271AAA of the Act, but has levied the penalty u/s.271(1)(c) of the Act by its order dated 16.03.2015 and has not levied any penalty u/s.271AAA of the Act is considered, the penalty as levied by the AO is 100% of the tax sought to be evaded. The penalty leviable u/s.271AAA of the Act is only 10% of the undisclosed income. Thus, clearly the intention of the AO was to levy penalty u/s.271(1)(c) of the Act and it cannot be considered as a mistake on the part of the AO. A perusal of the provisions of Section 271AAA of the Act shows that when a search has been conducted on or after 1st June, 2007 but before 1 st day of July, 2012 then for the specified previous year being the previous year which has ended before the date of search but the date of filing of the return u/s.139(1) of the Act has not expired and the assessee has not filed his return as also the year in which the search was conducted are to be considered only u/s.271AAA of the Act. The provisions of Section 271AAA(3) of the Act specifically excludes the provisions of Section 271(1)(c) of the Act for the said two specified previous years. The search in assessee's case having been conducted 27.09.2008. Two specified previous years are AYs.2008-2009 & 2009- 2010. For these two assessment years, the penalty, if at all leviable, was u/s.271AAA of the Act and not u/s.271(1)(c) of the Act. Consequently, on this ground, the penalty as levied by the AO and as confirmed by the CIT(A) for the said two assessment years, stands deleted. Thus, ITA Nos.233 & 234/CTK/2020 stand allowed."

37. In reply, ld CIT DR submitted that a show cause notice had been issued under both the sections i.e. 271AAA and 271(1)(c) and it was only a typographical error.

38. We have considered the rival submissions. The penalty leviable u/s.271AAA is 10% of the concealed income whereas under section 271(1)(c), the penalty is leviable at 100% of the tax sought to be evaded.

A perusal of the order of the Assessing officer shows that the AO has levied penalty at 100% of tax sought to be evaded. Consequently, the order passed by the AO cannot be held as typographical error. In regard to levy of penalty u/s.271AAA of the Act, assessment year 2009-10 is the specified year in respect of the assessee, as the search took place on 28.5.2008. Respectfully following the decision of the Co-ordinate bench of this Tribunal in the case of S.M.Enterprises (supra), the penalty levied u/s.271(1)(c) by the AO and confirmed by the CIT(A) stands deleted.

39. In the result, appeal of the assessee is allowed.

Order dictated and pronounced in the open court on 27/12/2022.

Sd/-	sd/-
(Arun Khodpia)	**(George Mathan)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 27/12/2022
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The assessee: M/s. Fahmida International Pvt Ltd., HIG-19, BDA Housing Colony, Jayadev Vihar, Bhubaneswar
2. The revenue: ACIT, Circle-1(2), Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack