

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA
[Before Shri P.M. Jagtap, AM & Shri K. Narasimha Chary, JM]

I.T.A No. 1513/Kol/2008
Assessment Year: 2004-05

Deputy Commissioner of Income-tax, Vs. M/s. T.M. International Logistic Ltd.
Circle-8, Kolkata. (PAN: AABCT5399M)
(Appellant) (Respondent)

&

C.O. No. 109/Kol/2008
In I.T.A No. 1513/Kol/2008
Assessment Year: 2004-05

M/s. T.M. International Logistic Ltd. Vs. Deputy Commissioner of Income-tax
(Cross Objector) Circle-8, Kolkata.
(Respondent)

&

I.T.A No. 1914/Kol/2008
Assessment Year: 2005-06

Deputy Commissioner of Income-tax, Vs. M/s. T.M. International Logistic Ltd.
Circle-8, Kolkata. (PAN: AABCT5399M)
(Appellant) (Respondent)

&

C.O. No. 133/Kol/2008
In I.T.A No. 1914/Kol/2008
Assessment Year: 2005-06

M/s. T.M. International Logistic Ltd. Vs. Deputy Commissioner of Income-tax
(Cross Objector) Circle-8, Kolkata.
(Respondent)

Date of hearing: 28.09.2016
Date of pronouncement: 04.10.2016

For the Revenue : Shri R. K. Kureel, JCIT
For the Assessee/Cross Objector: Shri Manish Sheth, CA &
Shri Nimish Kumar, CA

ORDER

Per Bench:

Both these appeals by revenue and cross objections by assessee are arising out of order of CIT(A)-VIII, Kolkata vide Appeal No. 233/CIT(A)-VIII/Cir-8/Kol/06-07 and 752/CIT(A)VIII/Kol/07-08 dated 29.05.2008 and 03.06.2008. Assessments were framed by DCIT, Circle-8, Kolkata u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the "Act") for AYs 2004-05 and 2005-06 vide his separate orders dated 29.12.2006 and 31.12.2007. Since some of the grounds are common and facts are identical, we dispose of both the appeals and the CO by this consolidated order.

2. Brief facts are that the assessee is an Indian company engaged in business, inter alia, terminal port operations including development, operation and maintenance thereof, logistics solutions provider and agency work. With their Head office at Kolkata, Assessee engaged in ort activities at Haldia, Paradeep and Mumbai. At Haldia they have activities at berth No 12 and it is eligible for deductions under section 80-IA, and others not eligible for deductions under section 80-IA of the Act.

3. For the AY 2004-05, they filed their return of income on 31.10.2004 declaring income of Rs.12,174,610/- computed under provisions other than section 115JB of the Act. By way of order dated 29.12.2006 passed under section 143(3) of the Act, Assessment Officer, determined the income of Assessee as Rs. 11,51,27,120/- after making various additions. Such additions, for the purpose of this appeal, are disallowance of claim under section 80-IA of the Act, expenses for repairs and maintenance of building, on account of 14A of the Act, disallowance of telephone expenses to an extent of 5% thereof , expenses relating to repairs and maintenance on building at Kolkata, allowability of club expenditure etc.

4. So also for the AY 2005-06, they filed their return of income on 31.10.2005 declaring income of Rs.11,38,54,010/- computed under provisions other than section 115JB of the Act. By way of order dated 31.12.2007 passed under section 143(3) of the Act, Assessment Officer, determined the income of Assessee as Rs.15,66,22,310/- after making various additions. Such additions, for the purpose of this appeal, are disallowance of claim under section 80-IA of the Act, expenses for repairs and maintenance of building, on

account of 14A of the Act, disallowance of commission to non-executive directors, allowability of club expenditure etc.

5. Aggrieved by the said orders, the Assessee preferred two different appeals before the learned CIT(A), and the learned CIT(A) by way of impugned orders deleted certain additions based on disallowance of deductions under section 80-IA, section 14A of the Act read with Rule 8D of the Rules etc.

6. Challenging the said orders of the learned CIT(A), in respect of AY 2004-05 Revenue carried the matter in appeal in ITA 1513/Kol/2008 and the Assessee preferred appeal in CO 109/Kol/2008 on the following grounds:

“Grounds of ITA No. 1513/Kol/2008

1. *That Ld.CIT(A) erred in the facts and circumstances of the case and in law in allowing assessee's appeal in respect of claim of deduction u/s.80IA of Income Tax Act,1961 even when the assessee-company is operating from Berth No.12 of Haldia dock and not operating and maintaining the Haldia Port Dock.*
2. *That Ld.CIT(A) erred in the facts and circumstances of the case and in law in allowing assessee's appeal in respect of claim of deduction u/ s.80IA of Income Tax Act,1961 even when the assessee has not furnished any evidence in respect of purchase of Plant & Machinery as requested. The assessee also did not segregate direct and indirect expenses in the P & L a/ c. No separate computation has been made so as to identify the direct and indirect expenses attributable to the unit eligible for deduction u/s.80IA.*
3. *That Ld.CIT(A) erred in the facts and circumstances of the case and in law in allowing assessee's appeal in respect of claim of Repairs & Maintenance expenses on the basis of details filed by the assessee during appellate proceedings even when these details were not forwarded to the A.O. for verification.*
4. *That Ld.CIT(A) erred in the facts and circumstances of the case and in law in allowing assessee's in respect of disallowance u/ s.14A by holding that provisions of section 14A(2) and (3) do not apply to the instant year even when this section was introduced w.e.f. 01.04.1962.*
5. *That Ld.CIT(A) erred in the facts and circumstances of the case and in law in deleting the addition in respect of telephone expenses ignoring the findings of the A.O. that telephones and mobiles were installed at the residential addresses of employees and that non-business use of such telephones cannot be ruled out.”*

Grounds of C.O. No. 109/Kol/2008

1. *That on the facts and circumstances of the case, the learned CIT (Appeals) failed to appreciate that the assessment order was barred by limitation, void ab initio and should have been quashed.*
2. *That on the facts and in the circumstances of the case, the CIT(Appeals) erred in upholding the disallowance of Rs.8,243/- incurred on account of repair to building.*

3. *That on the facts and in the circumstances of the case, the CIT(Appeals) erred in upholding the disallowance on account of club membership expenses.”*

Like wise challenging the said orders of the learned CIT(A), in respect of AY 2005-06 Revenue carried the matter in appeal No ITA 1914/Kol/2008 and the Assessee preferred appeal in CO 133/Kol/2008 on the following grounds:

“Grounds of ITA No. 1514/Kol/2008

1. *That Ld. CIT(A) erred on facts and circumstance of the case and in law in allowing the claim of deduction u/s.80IA of Income Tax Act, 1961 .*
2. *That Ld. CIT(A) erred on facts and circumstance of the case and in law in allowing the claim of repairs & maintenance expenses of Rs.8,57,861/- of Haldia unit, although the assessee failed to give complete details of this expenditure in the course of assessment proceedings.*
3. *That Ld. CIT(A) erred on facts and circumstance of the case and in law in allowing the payment of Rs.10 lakhs to non-executive director, although no details, copy of resolution, nature of service provided by above director could be given in the course of assessment proceedings.*
4. *That Ld. CIT(A) erred on facts and circumstance of the case and in law in deleting the addition of Rs.2,77,121/- which was made u/s.14A of Income Tax Act, 1961.”*

Grounds of C.O. No. 133/Kol/2008

1. *That on the facts and circumstances of the case, the learned CIT(Appeals) failed to appreciate that the assessment order was barred by limitation, void ab initio and should have been quashed.*
2. *That on the facts and in the circumstances of the case, the CIT(Appeals) erred in upholding the disallowance on account of club membership expenses.”*

Grounds 1 and 2 in ITA 1513/Kol/2008 and ground No.1 in ITA 1914/Kol/2008

7. It is the argument of the learned AR that the Assessee is an undertaking deriving income from the business referred to in Sub-section 4 of Section 80-IA, and the gross total income of the assessee includes any profits and gains a deduction of an amount equal to hundred per cent of profits and gains derived from such business for ten consecutive assessment years. According to him, previous years relevant for AY 2004-05 and 2005-06 are the second and third years of claim of deduction under section 80-IA in respect of Berth No 12. He submitted that for the first year of claim in the AY 2003-04, the Assessing Officer disallowed the claim for deduction under section under section 80-IA, but on appeal

learned CIT(A) allowed the claim and the same was confirmed by the ITAT. While allowing deduction of the full claim, the Assessing Officer observed as follows:

"It is found from the assessment records that a separate profit & loss account & balance sheet was prepared for Berth No. 12, Haldia Dock Complex. These documents were submitted along with return of income. Further, it is found that as per provision of Act, there is no need for assessee to give evidence of acquisition of new plant and machinery for the eligible unit for claiming deduction u/s.80IA of Income Tax Act, 1961 because the assessee maintains port. As per Circular No. 10/2005 dated 16.12.2005, the business activity of assessee in relation to Berth No. 12, Haldia Dock Complex falls within the meaning of "Port" in Explanation below Section 80(IA)(i)(c) of the Income Tax Act, 1961."

Learned AR submits that the learned CIT(A) having taken cognizance of the same, adopted consistent approach in respect of the same Assessee for these two years also.

8. We have perused the material papers on record. A coordinate Bench of this Tribunal in ITA NO 450/Kol/2007 dated 30.10.2007 in the case of Assessee's own case in respect of AY 2003-04 confirmed the finding of the learned CIT(A) to the effect that the Assessee is entitled to the deductions under section under section 80-IA of the Act. Rule of consistency, as laid down by the Hon'ble Kerala High Court in CIT Vs. N.P.Mathew 280 ITR 44, demands that the department should adopt consistent approach on an issue in respect of the same Assessee in different years. While respectfully following the decision of the coordinate Tribunal in ITA NO 450/Kol/2007 dated 30.10.2007 and the decision of the Hon'ble Kerala High Court, we find that the findings of the learned CIT(A) on this aspect are proper and legal. No need to interfere with the same. Hence these grounds are dismissed.

Grounds 3 in ITA 1513/Kol/2008 and ground No.2 in ITA 1914/Kol/2008

9. On this aspect, it is the argument of the learned AR that at Paradeep, Mumbai and Haldia they have their activities and at Haldia itself they have two activities one at Berth No12 which is eligible for deduction under section 80-IA of the Act and at other places not eligible for deduction under section 80-IA of the Act. During the AY 2004-05 the assessee incurred an expenditure of Rs.7,12,810/- towards the repair and maintenance charges for the units at Haldia which are not eligible for deduction u/s. 80IA of the Act whereas the same were Rs.2,91,148/- in respect of berth no. 12 which is eligible for deductions u/s. 80IA of

the Act. So also, in respect of the year 2005-06 the assessee incurred Rs.5,57,861/- towards the repair and maintenance charges in respect of the units which are not eligible for deduction u/s.80IA of the Act. According to the Assessee they have debited the expenditure relating to the ports not eligible for deduction under section 80-IA of the Act in their account books, they have not debited the same in the account books of Berth No 12 eligible for deduction under section 80-IA of the Act. Learned AR submitted that the Assessing Officer, without proper examination of the facts, disallowed the expenditure relating to other unit of Haldia Port. Learned AR further submitted that even for the Assessment Year 2003-04 Assessing Officer disallowed the expenditure for repairs and maintenance in respect of the unit not eligible for deduction under section 80-IA of the Act. However, on appeal learned CIT(A) deleted the addition made on this score and the department has not preferred any appeal.

10. Ld. CIT(A) in the impugned order, on this aspect observed that in the year 2003-04 the issue was decided in favour of the assessee by the CIT(A) and the same was upheld by the Tribunal. While following the orders of the earlier years and also the rule of consistency, Ld. CIT(A) decided this issue in favour of the assessee. We do not find any need to interfere with this finding of the Ld. CIT(A) and dismiss these grounds of appeal for both the years.

Grounds 4 in ITA 1513/Kol/2008 and ITA 1914/Kol/2008

11. It is the argument of the Ld. AR that in the year 2006-07 and 2007-08 also, there was disallowance of the expense u/s. 14A of the Act and the Ld. CIT(A) after considering the submissions restricted the disallowance to 1% of the dividend income because the provisions of Rule 8D have no application prior to the AY 2008-09. A coordinate bench of this Tribunal in ITA No. 377 & 378/Kol/2012 and C.O. Nos. 37 & 38/Kol/2012 upheld the findings of the CIT(A) while observing as follows:

“7.1. There is no dispute to the fact that Rule 8D is not applicable prior to A.Yr.2008-09. The contention of the assessee before Ld.CIT(A) and before us that no expenditure has been incurred to earn the exempt income and therefore we find no infirmity in the order of Id. CIT(A) in sustaining the disallowance @ 1 % of the exempt dividend income. Our view find support from the decision of Kolkata Tribunal in the case of DCIT vs M/s.Varanasi Commercial Ltd., vide ITA NO.15391K01I2011 order dated 07.03.2012 for A.yr.2007-08.

"3. After hearing the rival submissions and on careful perusal of materials available on record keeping in view of the fact that since the assessment year involved in this appeal is relating to A. Yr. 2007-08 as per the decision of the Hon'ble Bombay High Court in the case of Godrej and Boyee Mfg. Pvt. Ltd. (supra) relied upon by the ld. Counsel for the assessee, Rule 8D is not applicable in the assessment year under consideration. This Tribunal has been taking a consistent view of sustaining the disallowance u/s 14A at 1% of the dividend income. Accordingly we direct the AO to disallow 1% of the dividend income as expenditure relevant to earning of dividend income. We order accordingly. "

Thus ground no. 2 of the revenue is dismissed."

12. Thus ground no.2 of the revenue is dismissed. These appeals relating to the assessment years 2004-05 and 2005-06 to which years Rule 8D of the Rules has no application. Rule of consistency, as laid down by the Hon'ble Kerala High Court in CIT Vs. N. P. Mathew 280 ITR 44 (Ker) demands that the same approach should be adopted in respect of the same assessee in different years. While respectfully following the decision of the coordinate bench of this Tribunal referred supra, we hold that the findings of the Ld. CIT(A) in the impugned orders on this ground needs no interference and accordingly, we dismiss these two grounds.

Grounds 5 in ITA 1513/Kol/2008

13. This ground relates to the disallowance of the telephone expenses to an extent of 5% by the AO on the ground that the expenses on account of personal calls by the employees of the company were debited and also the expenses for residential phones and mobile phones were claimed. AO further observed that element of non business use cannot be ruled out. However, Ld. CIT(A) found that such an allegation was without any material and unsustainable. On this aspect, the assessee relied on the decisions reported in Sayaji Iron & Engg. Co. Vs. CIT 253 ITR 749 (Guj) and Intersil India Ltd. Vs. ACIT 101 ITD 85 (Mum), and it is submitted that since the assessee is a corporate entity, there cannot be any personal expenditure. It is further submitted that in respect of AY 2005-06 the Ld. CIT(A) deleted such an addition based on ad hoc disallowance in the telephone expenses and the department has not preferred any appeal against such finding. On a careful consideration of the orders of the authorities below the judgments cited by the assessee and also in view of the fact that as against the deletion of the disallowance of a portion of telephone charges the department preferred no appeal, we find that the order of the Ld. CIT(A) is consistent with

the judgment of the Hon'ble Kerala High Court in N. P. Mathew, supra and we uphold the same. This ground is dismissed accordingly.

Grounds 3 in ITA 1513/Kol/2008

14. AO disallowed a sum of Rs.10,00,000/- said to have been paid to the non executive directors of the company, on the ground that no details resolution, nature of service provided by them etc. were not furnished before the AO. However, Ld. CIT(A) observed that a similar disallowance was deleted by Ld. CIT(A) in respect of AY 2003-04 and such finding of Ld. CIT(A) was approved by the Tribunal. He further observed that even in respect of the AY 2004-05 Ld. CIT(A) allowed such a claim. In view of this set of circumstances, and need to follow the rule of consistency, we allow such a claim by upholding the finding of the Ld. CIT(A). With this view of the matter this ground of revenue's appeal is dismissed.

Ground No 1 in Co 109/Kol/2008 And Co 133/Kol/2008

15 So far as these grounds are concerned, there is no dispute that the AO passed the orders well within time inasmuch as the assessment order for the AY 2004-05 was passed on 29.12.2006 and 2005-06 was passed on 31.12.2007. The contention of the assessee is that such orders were received at the office of the assessee by courier on 29.01.2007 and 28.01.2007 respectively. Inasmuch as the assessment orders were passed well within the time stipulated by section 153 of the Act, the assessee cannot be allowed to plead that the orders are barred by limitation and bad under law. We do not find any merit in these grounds and accordingly dismiss the same.

Ground No 2 in Co 109/Kol/2008

16. AO disallowed the expenses relating to repairs and maintenance on a building located at Kolkata to the tune of Rs.8243/-. Ld. CIT(A) after looking into the papers found that the earlier such disallowance was confirmed by the Tribunal for the AY 2003-04. We have gone through the order dated 30.10.2007 in ITA NO. 450 & 282/Kol/2007. Vide paragraph no. 8 to 11 the ITAT discussed this aspect and found that disallowance on this aspect was reasonable as the premises occupied by the assessee does not belong to them but

belong to the sister concern. No new facts are brought to our notice and the finding in the appeal above hold good. We, therefore, find no need of any interference on this aspect. Hence, this ground of Cross Objection of assessee is dismissed.

Ground No 3 in Co 109/Kol/2008 And Ground No 2 in Co 133/Kol/2008

17. On the aspect of allowability of club expenditure the AO disallowed the club payments of Rs.7,260/- as club membership, Rs.36,022/- towards club services and Rs.5,500/- towards entrance fee for the AY 2004-05 and Rs.7,10,320/- towards club entrance fee, Rs.1,09,303/- as club services for the AY 2005-06. Ld. CIT(A) disallowed such expenditure holding that it was covered by the orders of the CIT(A) for the AY 2003-04.

18. It is the argument of the Ld. Counsel for the assessee that CIT(A) confirmed the disallowance of membership fee for the years 2003-04 and was upheld by the Hon'ble ITAT as such the balance amount relating to club services may be allowed as business expenditure. In view of the decision of Hon'ble Supreme Court in CIT Vs. United Glass Manufacturing Co. Ltd., Civil Appeal No. 30146 of 2008 dated 13.09.2012, the membership expenses of the club incurred by the assessee are allowable as deduction u/s. 37(1) of the Act. Ld. AR fairly conceded that club membership is to the individual whereas the expenditure relating to club services and entrance fee are for business purpose. In these circumstances, we uphold the disallowance of the expenditure relating to the club membership for both the assessment years. However, disallowance in respect of the club services and the entrance fee are relatable to the United Glass Manufacturing Co. Ltd., supra, we delete the disallowance relating to the club services and entrance fee. To this extent these two grounds of cross objections of assessee are allowed in part.

19. In the result, appeals of revenue are dismissed and cross objections of the assessee are allowed in part.

Order is pronounced in the open court on 04.10.2016

Sd/-
(P. M. Jagtap)
Accountant Member

Sd/-
(K. Narasimha Chary)
Judicial Member

Dated : October, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – DCIT, Circle-8, Kolkata.
2. Respondent –M/s. T.M. International Logistic Ltd., Tata Centre, 43, J. L. Nehru Road, Kolkata-71.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.