आयकर अपीलीय अधिकरण "आई" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

श्री डी.टी. गरासिया,न्यायिक सदस्य **एवं**
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

BEFORE SHRI D.T. GARASIA, JM AND SHRI MANOJ KUMAR AGGARWAL, AM

आ□कर अपील सं./I.T.A. No. 6760/Mum/2014
&
आ□कर अपील सं./I.T.A. No. 7214/Mum/2014

(**निर्धारण वर्ष** / Assessment Year: 2010-2011)

IMS Learning Resources Pvt. Ltd. E-Block, 6th Floor NCL Bandra Premises Bandra-Kurla Complex Bandra(East) Mumbai 400 051	**बनाम**/ Vs.	**Deputy Commissioner of Income Tax** 5(2) Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. **AAACI-5903-K**		
(□ पीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

□ पीलार्थी की ओर से / **Appellant by**	:	Shri Chetan Karia, Ld. AR
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri B.C.S.Naik, Ld. DR (CIT)

सुनवाई की तारीख / **Date of Hearing**	:	04/04/2017
घोषणा की तारीख / **Date of Pronouncement**	:	12/05/2017

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. These are two appeals-one by assessee and one by revenue for Assessment Year [AY] 2010-11 which assails the order of Ld. Commissioner of Income tax (Appeals)-9 [CIT(A)] dated 05/09/2014 on different grounds. First we take up as assessee's appeal ITA No. 6760/M/2014 where the Ld. Counsel for assessee [AR] has pressed sole ground of addition u/s 14A for Rs.57,65,217/- and hence, the other grounds of assessee's appeal are dismissed as being '*not pressed'.*

2. Briefly stated that the assessee, being *resident corporate assessee*, was engaged in the business of training students for examinations like *CAT, CET, GMAT/GRE* etc. It *e-filed* its return of income for impugned AY on 30/09/2010 declaring a loss of Rs.6,29,78,803/- which was subjected to an assessment u/s 143(3) vide Assessing Officer [AO] order dated 28/03/2013 wherein the total income was determined at Rs.24,28,81,270/- after certain adjustments and disallowances, one of which was disallowance u/s 14A. The assessee was found to have earned exempt dividend income of Rs.11,90,434/- and claimed interest expense of Rs.1,23,21,057/- which called for a disallowance u/s 14A. The assessee made *suo-moto* disallowance u/s 14A for Rs.1,10,528/- while filing return of income but revised the same upwards to Rs.4,97,112/- during the course of assessment proceedings. However, the same was not accepted by the Ld. AO who computed the said disallowance as per Rule 8D at Rs.57,65,217/- which comprised of

interest disallowance of Rs.52,38,990/- u/r 8D(2)(ii) & expense disallowance of Rs.5,26,227/- u/r 8D(2)(iii). The same was contested without any success before the Ld. CIT(A) vide order dated 05/09/2014 who upheld the stand of Ld. AO. Aggrieved, the assessee is in appeal before us and challenged the addition confirmed by the Ld. CIT(A).

3. The Ld. Counsel for Assessee [AR], without contesting the application of Rule 8D, drew our attention to the financial statements of the assessee to contend that the investments figures picked up by the AO were not correct as the assessee hold certain strategic investments in subsidiaries / associated / sister concerns where the primary motive of the investment was to gain controlling interest/ furtherance of assessee's business and not to earn dividend and hence the same were not includible in the value of investments in view of various judicial pronouncements in this regard. Further, the assessee had sufficient owned capital to cover the said investments and therefore, a presumption has to be drawn that the investments were made out of interest free owned funds. Reliance has been placed on the judgment of Mumbai Tribunal in the case of *Garware Wall Ropes Limited Vs. ACIT ITA No. 5408/Mum/2012 order dated 15/01/2014.* Per *contra,* Ld. DR, drew our attention to the fact that the assessee had mixed funds which were used to make the investments and therefore, rightly suffered disallowance u/r 8D in view of the statutory mandate notwithstanding the objective of the investments. Reliance has been placed on the judgment of Hon'ble Punjab & Haryana in the case *Avon Cycles Ltd. Vs. CIT [53 taxmann.com 297] &* Mumbai Tribunal in *DCIT Vs. M/s India Infoline Ltd. ITA No.2490/Mum/2013 dated 01/12/2015.*

4. We have heard the rival contentions and perused the relevant material on record. First of all, a perusal of the Balance Sheet of the assessee reveals that the assessee has reflected an amount of Rs.829.74 Lacs & Rs.833.04 Lacs as on 31/03/2010 & 31/03/2009 respectively as strategic investment in subsidiary / Group cos. The Ld. AR has stressed that point that the objective of these investments was not to earn dividend but to gain controlling interest in these companies and the activities of these group / sister concern was in consonance with the objective of the assessee and hence, the same were excludible for the purpose of Rule 8D. Therefore, the short dispute involved is with reference to computational part only. The assessee has computed the disallowance after excluding strategic investments from the figures of investments whereas the Ld. AO has included these investments for the purpose of computation of disallowance. Further, the assessee has contended that the investment in group concerns was made who all were for the purpose of furtherance of the business interest of the assessee and to earn income from these concerns. We are of the considered opinion that this plea of the assessee require some verification at the level of AO as the issue has not been examined by the AO from this angle and therefore, without delving much deeper into the issue, we restore the matter to the file of AO to reconsider the strategic investment plea of the assessee and decide accordingly in the light of various judicial pronouncements. The assessee, in turn, is directed to substantiate his claim in this regard failing which the AO shall be at liberty to take a stand on the basis of material available on record. The assessee's appeal stands allowed for statistical purposes.

5. Now, we take up revenue's Appeal ITA No. 7214/M/2014 where the revenue is aggrieved by deletion of certain additions viz. Rs.20,44,788/- u/s 40A(2)(b), Rs.10,70,51,133/- u/s 40(a)(ia) and certain advertisement expenses.

6. Facts relevant to the dispute are that the assessee made a payment of Rs.1,02,23,938/- to an associated entity namely *M/s Origin Test & Research Bureau* for conducting CAT exams which included printing and venue expenses. The AO noted that the assessee failed to produce any evidence to justify the necessity and quantum of impugned expenditure and made *adhoc* disallowance of 20% therefrom u/s 40A(2)(b), being excessive and unreasonable, which amounted to Rs.20,44,788/-. The same was deleted by Ld. CIT(A) after noting that the Ld. AO made *adhoc* disallowance without giving any comparable rates which was not justified particularly when the assessee contended that the said payee charged Rs.78/- per student from outside parties as against Rs.70/- charged from the assessee. The Ld. DR placed reliance on the order of Ld. AO whereas the Ld. AR placed reliance on findings of Ld. CIT(A) and contended that the assessee paid similar payment at similar rates over several AY which has never been disputed by the revenue and therefore, there was no reason to make the said disallowance. After considering the rival contentions and material on record, we find that Ld. CIT(A) clinched the issue in right perspective as the disallowance u/s 40A(2)(b) could be made only after having regard to the prevailing market prices of goods / services and no *adhoc* disallowance against the same could be made without bringing on record the comparable rates. Therefore, we find no reason to interfere with the

findings of Ld. CIT(A) and therefore dismiss this ground of revenue's appeal.

7. In second ground of appeal, the revenue is aggrieved by deletion of disallowance u/s 40(a)(ia) for Rs.10,70,51,133/- which was paid as *classroom service fees* by the assessee to its business partners under the contract of revenue sharing arrangement. The assessee deducted TDS thereupon u/s 194C, which in the opinion of Ld.AO, was required to be deducted at higher rate u/s 194J which led to impugned disallowance u/s 40(a)(ia). The Ld. CIT(A) deleted the said disallowance on the premises that Section 40(a)(ia) was not applicable in case of short deduction of Tax. Aggrieved, the revenue is in appeal before us. The Ld. DR supported the stand taken by Ld. AO and placed reliance on the judgment of Hon'ble Kerala High court in *CIT Vs. P.V.S. Memorial Hospital Ltd. [60 taxmann.com 69]* to contend that Section 40(a)(ia) was applicable in case of short deduction also. Per *contra*, Ld. AR drew our attention to the fact that the Ld. AO erred in appreciating the figures properly as the assessee has, *in fact*, deducted tax at source u/s 194J on Rs.10,30,32,766/- & deducted tax at source u/s 194C on Rs.40,18,367/- as per the nature of expenses and the said disallowance was not warranted for at all. Therefore, on the facts of the case, we deem it fit to restore the matter back to the file of Ld. AR for re-adjudication / re-appreciation in the light of the said facts as stated by Ld. AR. The assessee is directed to substantiate his claim forthwith failing which the Ld. AO shall be at liberty to decide the issue on the basis of material available on record.

8. In the last ground of appeal, the revenue is aggrieved by relief provided to the assessee against certain advertisement expenditure. During assessment proceedings, the assessee was found to have incurred advertisement expenditure to the tune of Rs.680.15 Lacs which were stated to be incurred periodically for brand promotion, which in the opinion of Ld. AO, were capital in nature. The assessee contended that the same were incurred for brand promotion and keeping its visibility, the benefit of which was for short term and hence revenue in nature. However, in the absence of documentary evidence, AO made *adhoc* disallowance of 10% against the same which resulted into disallowance of Rs.68.01 Lacs. The assessee contested the same before Ld. CIT(A) and made various submissions, against which remand report was called for wherein Ld. AO found expenses of Rs.39,603/- pertaining to earlier year and also submitted that advertisement expenses were to be borne by the respective franchisees of the assessee and therefore, allowing the same would amount to double deduction. Before Ld. CIT(A), the assessee explained that the said expenditure were incurred mainly towards newspaper advertisement/ posters / banners / conducting seminars, the purpose of which was brand promotion and garner students to the various courses offered by the assessee and hence revenue in nature. Further, the assessee regularly claimed these expenses in earlier as well as succeeding assessment years which were accepted by the revenue in 143(3) proceedings. Moreover, the assessee submitted party-wise details, details of TDS deducted thereupon, ledger copies of advertisement expenses along with sample invoices to AO which are never disputed by the revenue and therefore, *adhoc*

disallowance made by the AO to the extent of 10% was not justified without pointing put any defect in the expenses claim by the assessee. The Ld. CIT(A) after considering assessee's submissions and remand report deleted the said expenditure, barring Rs.39,603/- being related to earlier years. Aggrieved, the revenue is in appeal before us. The Ld. DR placed reliance on the findings of AO and contended that the assessee failed to substantiate the heavy expenditure conclusively and further, these expenses were to be incurred by the franchisees of the assessee and allowing the same here would amount to double deduction. Per *contra,* Ld. AR drew our attention to the fact that the assessee regularly claimed these expenditure in preceding as well as succeeding years which has been accepted by the revenue in 143(3) assessments. Further, these expenses were incurred mainly towards newspaper expenditure after deduction of TDS and hence, the same were clearly revenue in nature and disallowance of 10% was not justified at all without pointing out any defect in the manner / method of expenses claimed by the assessee. Our attention is further drawn to one sample franchise agreement placed in the paper book to contend that the incurring of said expenditure was the responsibility of the assessee and there was no question of double deduction at all as the assessee is either incurring expenditure himself directly or reimbursing the same to the franchisees, which in either case is an expenditure for the assessee. Further, the expenses reimbursed to the franchisees would go on to reduce the expenditure claimed by them and hence the Ld. AO erred in raising the apprehension of double deduction.

9. We have heard the rival contentions and perused the relevant material on record including the documents pointed out by respective representatives. We find that the expenditure being mostly in the nature of newspaper advertisement were revenue in nature as due TDS thereupon has been deducted by the assessee and these expenditure are being regularly claimed & allowed to the assessee. The assessee has already submitted details of the same along with ledger extracts during assessment proceedings and the same has not been disputed by the revenue. Further, we agree with the contention of the Ld. AR that AO erred in raising the apprehension of double deduction in view of the fact that whether the assessee incurred expenditure himself directly or reimbursed the same to the franchises, nevertheless, the same were an item of expenditure for the assessee and whatever expenditure were reimbursed to the franchisees, they would go in reducing their respective expenditure. Even otherwise if the plea of double deduction is accepted, then it should have resulted into full disallowance of the said expenditure as against 10% made by AO. Therefore, finding CIT(A) decision fair and reasonable, we dismiss revenue's ground of appeal.

10. The Ld. AO is directed to re-compute Book Profits u/s 115JB and carry forward / set-off of losses, if required.

11. In nutshell the assessee's appeal as well as revenue's appeal stands partly allowed for statistical purposes.

Order pronounced in the open court on 12th May, 2017.

Sd/-	Sd/-
(D.T. Garasia)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 12 .05.17
Sr.PS:- Thirumalesh

<u>आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**