आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं श्री जी. पवन कुमार, न्यायिक सदस्य के समक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER

आयकर अपील सं./**ITA Nos. 1339, 1340, 1341 & 1342/Mds/2010**

निर्धारण वर्ष /Assessment Years : 2001-02, 2004-05 to 2006-07

The Assistant Commissioner of Income-tax, Company Circle-II(3), Chennai. (अपीलार्थी/Appellant)	v.	**M/s. The India Cements Ltd.,** Dhun Buildings, No.827, Anna Salai, Chennai – 600 002. PAN AAACT1728P (प्रत्यर्थी/Respondent)

अपीलार्थी की ओर /Appellant by : Shri M.S.V.M. Prasad, CIT

प्रत्यर्थी की ओर से/Respondent by : Shri R. Vijayaraghavan, Advocate

सुनवाई की तारीख/Date of Hearing : 29.03.2017

घोषणा की तारीख/Date of Pronouncement : 12.05.2017

आदेश /O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER

These appeals by the Revenue are directed against the different orders of the Commissioner of Income-tax(Appeals). Since certain common issues are involved in these appeals,

these are clubbed together, heard together and disposed of by this common order.

2. **ITA 1339/Mds/2010 for asst. year 2001-02**:

The only issue in this appeal is with regard to finding of the CIT(Appeals) holding that reopening is bad in law.

3. The facts of the case are that the Assessing Officer found that the profit as per profit and loss account filed by the assessee along with the return of income and as per the annual accounts stands at ₹51,16,14,000/-, which was reduced to ₹27,50,39,369/- by way of adjustments on account or prior period expenses, provisions, reserves, dividend etc. The assessee had taken this amount of ₹ 27,50,39,369/- as the starting point and has made certain adjustments for arriving at the book profit u/s.115JB of the Act amounting to ₹48,41,17,030/-. According to the AO, the net profit should have been taken at ₹51,16,14,000/-. Therefore, the AO observed that the assessee failed to disclose fully and truly all material facts necessary for the assessment and accordingly income chargeable to tax had escaped assessment within the meaning of sec.147 of the Act. The AO issued notice

u/s.148 of the Act dated 28.03.2008 after obtaining approval of the CIT, Chennai-I. The assessment u/s.143(3) r.w.s.147 of the Act was completed on 26.12.2008, wherein profit as per the profit and loss account was adopted at ₹ 5,16,14,000/-, which was increased by the amounts of wealth-tax, provision for excess interest and provision for doubtful debts amounting to ₹4,28,89,085/-. Thus, the book profits as per 115JB was determined at ₹55,15,54,687/- Aggrieved, the assessee went in appeal before the CIT(Appeals), who observed that the re-assessment proceedings were not valid and the ground of appeal is allowed. Against this, the Revenue is in appeal before us.

4. After hearing both the parties, we are of the opinion that similar issue came for consideration in assesse's own case for the asst. year 2000-01 in ITA No.710/Mds/2009. The Tribunal vide order dated 18.2.2014, held here as under:-

> *"37. We have heard both parties and gone through the case file. The judicial precedent quoted hereinabove has also been perused. At the cost of repetition, we re-narrate the facts. The impugned assessment year is 2000-01. Admittedly, the Assessing Officer had framed 'scrutiny' assessment on*

31.3.2003. Thereafter, he issued reopening notice to the assessee on 27.12.2006 ie well after a period of four years from the end of the impugned assessment year. In these circumstances, first proviso to section 147 stipulates that in case of a reopening after a period of four years from the end of the assessment year, the same can only be taken recourse to if there is a failure on assessee's part in disclosing fully and truly all particulars of income. Undisputedly, in the letter according approval for reopening in question, whose contents have been reproduced hereinabove, the CIT himself observes that the Assessing Officer could have detected the alleged wrong computation made by the assessee. In the order under challenge, the CIT(A)'s findings read that the assessee had not enclosed Schedule 2 of printed annual report. In the course of hearing, it is evident to us that in 'scrutiny' assessment and lower appellate proceedings, the issue in question i.e determination of book profits u/s 115JA has been decided without any documentary evidence over and above what was already filed by the assessee. Thus, we conclude that the decision to reopen the assessment is not supported by any fresh material. Once that is so, the impugned reopening turns out to be a mere change of opinion. In observing so, we are also conscious of the fact that in lower appellate proceedings, the CIT(A) has accepted the assessee's contentions by interpretation of section 115JA and not any other material. It is in these specified circumstances that we are holding the reopening in question to be a mere change of opinion which is not permissible in the eyes of law. It is a trite proposition of law that a reopening after four years from the end of the relevant assessment year has to be based on fresh material leading to a conclusion of escapement of income from

being assessed. There is hardly any quarrel that no such circumstances arise in the instant case. So, we hold that once the reopening in question turns out to be mere change of opinion, it is not sustainable in the eyes of law. The assessee's rule 27 petition challenging validity of the reopening succeeds. As a necessary consequence, the Revenue's appeal fails. The findings of the CIT(A) under challenge are confirmed in tune with Rule 27 of the Income Tax (Appellate Tribunal) Rules."

Respectfully following the aforesaid order of the Tribunal,

We dismiss the ground of appeal raised by the Revenue

ITA Nos. 1340, 1341, 1342/Mds/2010 for A.Ys 2004-05, 2005-06, & 2006-07

5. The common ground raised in these appeals relates to deletion of addition of the amount transferred from deferred income [reserves] to profit and loss account.

6. The facts of the case are that the assessee imported waste heat recovery plant, the whole cost of which was met by the subsidy granted by the Japanese Govt. The Govt. of India on its part permitted the import of the assets by payment of concessional duty at the rate of 5 percent only as per Export Promotion Capital Goods Scheme, 2002-2007. This was

allowed subject to condition that the assessee fulfills an export obligation of ₹ 212 crores (subsequently reduced to ₹ 180.78 crores) of clinker or cement. However, upon the import of the capital goods the assessee has accounted for the full obligation of the duty that was allowed as a concession. It debited the asset account and credited the reserve under the head “deferred income”. After fulfillment of the export obligation, the concession so utilized for the import of capital goods was reversed from reserves account (deferred income) to the profit and loss account. This reversal of reserves to the profit and loss account is the amount which was withdrawn by the assessee in the statement of computation of income. The AO, has, however, disallowed the above on the ground that the assessee is not allowed to withdraw the amount of ₹3,35,24,771/- from the computation of income, as the same is chargeable to income-tax as business income as per the provisions of sec.28(iv) of the Act. Aggrieved, the assessee went in appeal before the CIT(Appeals), who allowed the ground of appeal. Against, the Revenue is in appeal before us.

7. We have heard both the parties and perused the material on record. In the first instance, it is seen that the assessee had passed a notional entry debiting its fixed assets and crediting reserves under the head 'deferred income'. The ld. AR agued that no depreciation has been claimed on the increased cost of fixed assets. On fulfillment of the export obligation, the assessee had reversed the reserve and credited its income which was claimed as deduction in the computation of income. The notional entries passed by the assessee cannot result in any income or expenditure. In this regard, we refer the decision of the Bombay High Court in the case of CIT v. Mogul Lines Ltd. (46 ITR 590)(Bom), wherein it was observed that the matter of taxability could not be decided on the basis of the entries, which the assessee might choose to make in his account, but had to be decided in accordance with the provisions of law. What would determine taxability is not whether the assessee has shown a particular item as a profit or loss in the accounting year, but whether the said item could be regarded either as a profit or loss under the provision of the Act. The Supreme Court has also

taken a similar view in the case of CIT v. Shoorji Vallabhdas & Co. (46 ITR 144), wherein it was held as under :

> *"Income-tax is a levy on income. Though the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt, yet the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a "hypothetical income", which does not materialize. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."*

Subsequently, the Supreme Court in the case of State Bank of India v. CIT (157 ITR 67) has referred to the decision of Mogual Lines and has held as follows :

> *"It is well settled that the way in which entries are made by the assessee in its books of account is not determinative of the question whether the assessee had earned any profit or suffered any loss."*

Since the impugned sum has neither accrued nor was received by the assessee and was based only on the reversal of a notional entry passed earlier, the amount of ₹ 3,35,24,771/- cannot be treated as income.

7.1 In our opinion, the provisions of sec.28(iv) of the Act are also not attracted in this case, since the assessee had not received any benefit or perquisite but had only passed notional entries in its books of accounts. When the assessee paid concessional duty, it is the duty payble as per the relevant statute and there was no benefit or perquisite accruing to the assessee. Statutory levy will not result in a concession or benefit to the assessee. Further, it was a conditional concession inasmuch if the assessee did not achieve the required exports, it may have to pay the entire customs duty. The benefit connected with the acquisition of a capital asset cannot be brought to tax u/s.28(iv) of the Act. It is to be noted that the Supreme Court in the case of CIT v. Ponni Sugars and Chemicals Ltd. (306 ITR 392) has held that the character of receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is granted. In other words, one has to apply the purpose test. The point of time at which subsidy is paid is not relevant. The source is immaterial. If the object of the subsidy is to enable the assessee to run the business more profitably then the receipt is on the revenue account. On the

other hand, if the object of the assistance under the subsidy scheme is to enable the assessee to set up new unit or to expand an existing unit then the receipt of subsidy would be on capital account. Applying the above principle laid down by the Apex Court, it may be concluded that since the concession was linked to the import of capital goods, though conditional on fulfilling export obligation, it was a concession on the capital account. The assessee is also not allowed to use the import entitlement in any manner other than for import of capital goods. We agree with the argument of the ld. AR that there is no benefit or perquisite that accrued to the assessee on account of this transaction and it does not have any component of revenue nature and hence, the provisions of sec.28(iv) of the Act does not apply. For invoking sec.28(iv) of the Act, the pre-requisite conditions are that the benefit / pre-requisite must arise from the business of an assessee and that there must be a nexus or connection between the business of an assessee and the benefit / perquisite sought to be taxed. In this case, both the conditions are absent. Therefore, we find that the CIT(Appeals) is justified in giving direction the AO to delete the disallowance made.

Further, in our opinion, it is a notional entry in its books of account and not effecting the real profit and loss account of the assessee and the provisions of sec.28(iv) have no application. This ground is dismissed.

8. The next ground in ITA No.1340/Mds/2010, for the asst. year 2004-05 is with regard to deletion of disallowance of deduction u/s.43Bof the Act.

9. The facts of the issue are that the assessee has reduced from the interest debits during the year, extraordinary item of ₹25,65,81,184/- and also added an amount of ₹17,72,00,000/- (being amount withdrawn from share premium account) for the purpose of computation of deduction u/s.43B of the Act. According to the AO, the adjustment of extraordinary item is permissible only if it is related to any reversal of interest which was outstanding or which had accrued during the year. The assessee has not furnished the nature of the extraordinary item which has been offered as income in the profit and loss account. The AO observed that it is a prior period income. In the case of the debenture interest and premium drawn from share premium

account, this has been shown as ‘below the line’ item in the profit and loss account and claimed as deduction only in the computation statement. This has also been met out of withdrawal from premium of the identical amount and the net debit is ‘Nil’. According to the AO, the assessee’s claim that it has disallowed this item under sec.43B of the Act, needs to be examined. With regard to payments which have been claimed u/s.43B, though the amount was outstanding as on 31.3.2003 or debited to interest account during the year, the same cannot be allowed to be deducted. According to the AO, though one may have a multiple account with a bank, only the interest which had accrued on a particular account before 31.3.2004 and paid before the filing of the return, can be allowed. Out of interest paid of ₹ 8,70,82,831/-, after the end of the accounting year but before filing the return u/s.139(1) of the Act, the assessee that the amount pertain to interest accrued during the FY 2003-04 and accordingly the amount is allowed as deduction u/s.43B of the Act. Against this, the assessee went in appeal before the CIT(Appeals).

10. The CIT(Appeals) observed that the issue for consideration is related to whether the subsequent payment of interest made by the assessee after the end of the year but before the due date of earlier years. The CIT(Appeasl) observed that if the liability pertains to earlier years, the amount cannot be allowed during this asst. year but only in the subsequent year, when the actual payment is made. After going through the details available on record, the CIT(Appeals) observed that the amount debited to profit and loss account towards interest amounts to ₹153,73,85,972/- out of which interest to institutions for which 43B is not applicable amounts to ₹ 24,97,13,458/- as given in the assessment order. Therefore, according to the CIT(Appeals), the net debit to profit and loss account is ₹ 128,76,72,519/- and the amount not paid before due date of filing of return of income is ₹ 88,91,95,993/-. Out of which the amounts paid is as under:

Amount provided during the year		₹ 128,76,72,519/-
Amount paid:		
Paid during the year	₹ 31,13,93,695	
Paid from April 2004 to Sept. 04	₹ 8,70,82,831	
		₹ 39,84,76,526/-
Amount not paid before due date of filing of ROI		₹ 88,91,95,993/-

Accordingly, the CIT(Appeals) held that the amount disallowable u/s.43B of the Act is only ₹ 88,91,95,993/- and the AO is not correct in enhancing the disallowance by a further amount of ₹7,93,60,786/-. Aggrieved, the Revenue is in appeal before us.

11. We have carefully gone through the findings of the CIT(Appeals), we do not find the basis for disallowance computed by the CIT(Appeals) as above. Hence, we remit the issue to the file of the AO to decide the issue afresh. Accordingly, this ground of appeal is allowed for statistical purposes.

11. The next ground in ITA No.1341/Mds/10 for the asst. year 2005-06 is that the CIT(Appeals) has erred in deleting the addition made on account of disallowance of debenture issue expenses of ₹ 2,87,18,609/-.

12. The facts of the issue are that the AO disallowed the debenture issue expenses for the reason that it pertains to the issuance of fully convertible debentures. As the debentures will never get repaid and will only get converted into equity on

conversion within 18 months, he treated the issue expenditure as expenses incurred for raising capital and disallowed the above amount as inadmissible. Aggrieved, the assessee went in appeal before the CIT(Appeals), who following the decision of Madras High Court in the case of CIT v. South India Corporation (Agencies) Ltd. 164 Taxman 249 (Mad), directed the AO to allow the entire debenture issue expenses and allowed the ground of appeal of the assessee. Against this, the Revenue is in appeal before us.

13. We have heard both the parties and perused the material on record. We find that this issue is covered by the judgment of the jurisdictional High Court in the case of South India Agency Ltd. (290 ITR 217) wherein it was held that the expenditure towards issuance of partly convertible debentures are allowable expenditure. Accordingly, this ground is dismissed.

14. The next ground in ITA Nos. 1341 & 1342/Mds/2010 is with regard to allowance of deemed interest on loans to subsidiaries.

15. The facts of the issue are that the assessee has made huge interest payment which it has been netting the interest recognized from advances made to subsidiaries / associates. The assessee follows mercantile system of accounting. Therefore, according to the AO, the interest has to be recognized. In view of the explanation given by the assessee, rate of interest taken is only at the average rate for other loans recognized by corporate debt restructuring cell. Moreover, the debts are also not written off. Therefore, the interest on advances as worked out by the AO is treated as accrued income and assessed accordingly. Aggrieved, the assessee went in appeal before the CIT(Appeals).

16. The CIT(Appeals) observed that the facts are similar to the facts in assessee's own case for asst. years 2003-04 and 2004-05. Therefore, the CIT(Appeals) followed his predecessor's order in ITA Nos.194/06-07/A.III and 838/06-07/A.III dated 31.3.2008 for the asst. years 2003-04 and 2004-05, which was subsequently affirmed by the Tribunal vide its order dated 15.7.2009 in ITA Nos.778 & 779/Mds/2008.

Accordingly, he deleted the addition made by the AO. Against this, the Revenue is in appeal before us.

17. After hearing both the parties, we find that similar issue came for consideration before the Tribunal in ITA Nos.778 & 779/2008 dated 15.7.2009 for the asst. years 2003-04 and 2004-05 and in ITA No.1343/Mds/2010 & others for the asst. year 2007-08 vide order dated 01.01.2016 wherein the Tribunal held as under :-

"10. We have considered the rival submissions on either side and also perused the material available on record. As rightly submitted by the ld. Counsel for the assessee even if the borrowed funds were diverted for making advances to subsidiary companies, this Tribunal is of the considered opinion that there cannot be any addition of notional interest since it is not the case of the Revenue that the subsidiary companies had misused the funds for any other purpose. In other words, since the subsidiary companies used the funds for their business this Tribunal is of the considered opinion that in view of the judgment of the Apex Court in S.A Builders(supra) there cannot be any addition in the hands of the assessee. A bare reading of the order of the CIT(A) shows that similar addition was made by the Assessing Officer in assessment years 2003-04 and 2004-05. The CIT(A), however, deleted the addition. This Tribunal in I.T.A.Nos.778 & 779/Mds/2008 dated 15.7.2009 has confirmed an identical order of the CIT(A). In fact, the CIT(A), by following the decision of this Tribunal in assessee's own case for the

assessment years 2003-04 and 2004-05 and the judgment of the Apex Court in S.A Builders(supra) allowed the claim of the assessee. Therefore, this Tribunal do not find any reason to interfere with the order of the CIT(A). Accordingly, the same is confirmed."

Accordingly, following the aforesaid orders of the Tribunal, this ground of appeal is dismissed.

18. In the result, ITA Nos. 1339, 1341 & 1342/Mds/2010 are dismissed and ITA No.1340/Mds/2010 is partly allowed for statistical purposes.

Order pronounced on 12th May, 2017.

Sd/-	Sd/-
(जी. पवन कुमार)	(चंद्र पूजारी)
(G. Pavan Kumar)	(Chandra Poojari)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

चेन्नई/Chennai,
दिनांक/Dated, the 12th May, 2017.
K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF