**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"E" Bench, Mumbai**

**Before Shri P K Bansal, Vice President**
**and Shri Pawan Singh, Judicial Member**

**ITA No.4116 /Mum/2013**
(Assessment Year: 2008-09)

| M/s. Essel Propack Ltd.<br>(Formerly Essel Packaging Ltd.<br>Top Floor, Times Tower<br>Kamla City, Senapati Bapat Marg<br>Lower Parel, Mumbai 400013 | Vs. | ACIT, Range - 6(2)<br>Room No. 504, 5th Floor<br>Aayakar Bhavan, M.K. Road<br>Mumbai 400020 |
|---|---|---|

PAN – AAACE1568L

**Appellant** **Respondent**

Appellant by: Shri Rajesh Chamaria
Respondent by: Shri V. Justin

Date of Hearing: 02.08.2017
Date of Pronouncement: 11.09.2017

**O R D E R**

**Per P.K. Bansal, Vice President**

This appeal has been filed by the Revenue against the order of the CIT(A)-12, Mumbai dated 27.01.2013 for A.Y. 2008-09.

2. Ground No. 1 taken by the assessee relates to the sustenance of the disallowance of Rs.92,68,533/- out of interest and Rs.38,50,802/- out of expenses under section 14A of the Income Tax Act totalling to Rs.1,31,19,335/-.

3. The brief facts of the case are that the AO while examining the Balance Sheet noted that there were investments in equity shares totalling to Rs.5,74,03,16,008/-. Out of these investments Rs.4,97,41,55,660/- was in foreign subsidiaries and Rs.77,01,60,348/- was in Indian subsidiaries. The assessee has received dividend from foreign subsidiaries to the tune of Rs.15,47,12,858/- which was offered as income from other sources. It was further noted that in the original computation of income the disallowance under section 14A has been mentioned by the assessee as Rs.73,81,010/-

but in the revised computation this disallowance was withdrawn. The Auditors also in Annexure K corresponding to clause 17(1) in Form 3CD computed the disallowance under section 14A at Rs.73,81,010/-. When asked for the assessee submitted that no disallowance is required to be made. The AO did not agree with the submission of the assessee but made disallowance as per para 7 of the order under section 14A r.w. Rule 8D amounting to Rs.1,31,19,335/-. Assessee went in appeal before the CIT(A. The CIT(A) partly allowed the appeal of the assessee.

4. The learned A.R. before us referred to page 2 of the paper book which contains the computation of income and on that basis it was submitted that the assessee got the dividend from foreign subsidiary companies amounting to Rs.15,47,12,858/- and the same has been shown as income from other sources. It is not the case that the dividend earned by the assessee has been claimed as exempt. It was also submitted that the assessee has not earned any dividend from the investments made in Indian companies. Therefore, in view of the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd. vs. CIT 378 ITR 33 no disallowance under section 14A can be made. Referring to the said decision it was submitted that the Hon'ble Jurisdictional High Court in the case of Principal CIT vs. Ballarpur Industries Ltd. ITA No. 51 of 2016 has also taken the same view.

5. The learned D.R., on the other hand, relied on the orders of the authorities below and vehemently contended that the AO has rightly computed the disallowance under section 14A r.w. Rule 8D.

6. We heard the rival submissions and gone through the orders of the tax authorities below. We have also gone through the case law relied upon before us. From the computation statement as well as the Balance Sheet as submitted by the assessee we noted that the assessee had made investments in foreign subsidiary companies and from those companies it got the dividend income. The assessee has not claimed the said dividend income as exempt. The dividend income has been shown as income from other sources and due tax has been computed by the assessee in the

computation statement. Therefore no question arises on making disallowance in respect of investment made in foreign subsidiary company. The assessee has also made investments in Indian companies but did not earn any dividend income. In view of the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd. vs. CIT 378 ITR 33 no expenses can be disallowed under section 14A as the assessee has not earned any exempt income. Same view has been taken by the Hon'ble Bombay High Court in the case of Principal CIT vs. Ballarpur Industries Ltd. ITA No. 51 of 2016. No contrary decision was brought to our knowledge. We, therefore, delete the disallowance made by the AO and sustained by the CIT(A). Thus ground No. 1 taken by the assessee is allowed.

7. Ground No. 2 relates to the addition made on account of inclusion of cenvat credit in valuation of closing stock.

8. The facts relating to this ground are that the AO noted that the assessee is following the exclusive method of accounting and cenvat has not been included in the inventory and consumption. The AO, therefore, after considering the submissions of the assessee added the unutilised cenvat credit in the value of the closing stock as on 31.03.2008 and thereby made an addition of Rs.1,79,57,029/-. When the matter sent before the CIT(A), the CIT(A) upheld the action of the AO ion invoking section 145A of the Income Tax Act to compute closing stock but on the issue of correctness of the calculation of the AO he directed the AO to take into consideration the grievances of the assessee and verify the calculation as made at the time of assessment proceedings by strictly keeping in view the provisions of Section 145A alongwith the directions of the CIT(A) as given in A.Y. 2006-07. Thus allowed this ground statistically.

9. We heard the rival submissions and gone through the orders of the tax authorities below. We noted that provisions of Section 145A were effective from 01.04.1999 and applies from A.Y. 1999-200 onwards. The scope and effect of section 145A have been elaborated by the Departmental circular No. 772 dated 23rd December, 1998 as under: -

> "52.1 Method of accounting in certain cases:-52.1 The issue relating to whether the Value of the closing stock of the inputs, work-in-progress and finished goods must necessarily include the clement for which MODVAT credit is available, has been a matter of considerable litigation over the years.
>
> 52.2 Consistent with the other provisions of the Finance (No.2) Act, 1998, with a view to put an end to this point of litigation **and in order to ensure that the value of opening and closing stock reflect the correct value, a new section 145A is inserted.** The section provides that the valuation of purchase, sale and inventory shall be made in accordance with the method of accounting regularly employed by the assessee and such valuation shall be further adjusted to include the amount of any tax, duty, cess or fee (by whatever name called), actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation."

From the said circular it is apparent that the main object to introduce section 145A is to ensure that value of opening and closing stock reflect the correct value so that there is no unnecessary litigation. The assessee in the instant case is following exclusive method. If the AO had to increase the value of closing stock by taking into consideration the Cenvat credit then he has to take into consideration all purchases also to include the Cenvat credit. Had once that included in the purchases ultimately there is no effect on the profit and understatement of the profit would not arise. Similar view has been taken by the Hon'ble Supreme Court in the case of CIT vs. Indo Nippon Chemicals Co. Ltd. 261 ITR 275. Similar view was also taken by the Hon'ble Calcutta High Court in the case of CIT vs. Berger Paints India Ltd. 264 ITR 503. The Hon'ble Bombay High Court in the case of CIT vs. *Mahalaxmi Glass Works (P) Ltd***.** 318 ITR 116 following the Hon'ble Delhi High Court decision in the case of Mahavir Alluminimum Limited 297 ITR 77 held that to give effect to section 145A if there is a change in the closing stock at the end of the year, there must necessarily be a corresponding adjustment made in the opening stock of that year. This does not amount to giving total benefit to the assessee. It would be necessary to compute the true and correct profit for the purpose of the assessment. In our view, under either system of accounting the

profit computed is a result of operation of an enterprise are identical as is evident from the following illustration: -

Assume that in case of an Assesses:

| | Year | | |
|---|---|---|---|
| Item | Qty | Rate | Amount |
| Opening Stock | 20 | | |
| Purchases | 150 | 10 | 1500 |
| ED on Purchases | 150 | 2 | 300 |
| Closing Stock | 40 | | |
| Sales | 130 | 15 | 1950 |
| ED on Sales | 130 | 5 | 650 |

Under the Exclusive Method:

P & L Account

| Dr Particulars | Rs. | Cr. Particulars | Rs. |
|---|---|---|---|
| Opening Stock | 200 | Sales | 1950 |
| Purchases | 1500 | Closing Stock | 400 |
| Excise Duty | 0 | | |
| Gross Profit | 650 | | |
| Total | 2350 | | 2350 |

Under the Inclusive Method:

P & L Account

| Dr Particulars | Rs. | Cr. Particulars | Rs. |
|---|---|---|---|
| Opening Stock | 240 | Sales | 2600 |
| Purchases | 1800 | Closing Stock | 480 |
| Excise Duty | 650 | Credit obtained on consumption | 260 |
| Gross Profit | 650 | | |
| Total | 3340 | | 3340 |

From the aforesaid illustration it is clear that the profit computed under the inclusive and the exclusive method of accounting are the same and there would not be any change even if the profit computed by the assessee is adjusted in accordance with the provisions contained u/s 145A of the I.T. Act because to the extent the closing stock will be increased. In respect of raw materials the cost of the purchase and the opening stock will be increased by the component of the excise duty. Since the issue involved related to the valuation of the closing stock in respect of raw material, the question of any disallowance u/s 43 B will also not arise. We have gone through the decision of the Hon'ble Supreme Court in the case of CIT vs. Indo Nippo Co. Ltd. This case relates to the provisions of section 145 and not to the provisions of section 145 A because Section 145 A was inserted from the Assessment Year 1999-2000. We have also gone through the order of the Maruti Udyog Ltd. vs. CIT reported in 92 ITD 119. Although this case relates to the claim of the deduction u/s 43B but the proposition laid down in this case is equally applicable to the facts of the case of the assessee. We have already held that he profit of the assessee cannot be effected if the assessee followed the inclusive method of accounting or the exclusive method of accounting because in any case the stock is increased to that extent the debit side in the P & L account which will be increased by the increase in value of opening stock as well as the cost of the purchase due to the inclusion of the excise duty incurred by the assessee at the time of the purchase of the raw materials. In view of the aforesaid discussion the second ground is allowed.

10. Ground No. 3 relates to the sustenance of disallowance of foreign exchange loss of Rs.1,40,84,283/- on forward contracts related to foreign exchange currency.

11. The facts relating to this ground are that the AO noted that the assessee has debited a sum of Rs.1,40,84,283/- in respect of the loss on account of cancellation of the forward contract. When questioned the assessee submitted that it is a multinational company and 50% raw materials are imported and 10% sales are exports. The foreign exchange

risks are hedged using forward contracts on the basis of underlying purchases, sale contracts. The definition of speculative transactions under section 43(5) is an exhaustive one and the term does not include currency. The AO was not satisfied with the assessee's explanation. Therefore he treated the loss on cancellation of the forward contract as loss arising from speculation activities and disallowed the same. Assessee went in appeal before the CIT(A). The CIT(A) confirmed the order of the AO.

12. Aggrieved, assessee is in appeal before us. We have heard the rival submissions and carefully considered the same along with the orders of the tax authorities below. We have gone through the provisions of Section 43(5) which defines speculative transaction. We noted that as per the definition given in sub-section (5) the transaction entered into cannot be treated to a speculative transaction. The definition of speculative transactions under section 43(5) is an exhaustive one and the term 'commodity' including shares and stocks but does not include currency.

(a) The term 'commodity' is defined neither in the Income-tax Act nor in the General Clauses Act.

(b) Dictionary meaning of the term 'commodity' is 'raw material or agricultural product that can be bought and sold — something useful or valuable'.

(c) Another definition for the term 'commodity' is 'any product that can be used for commerce or an article of commerce which is traded on an authorised commodity exchange is known as commodity'. The article should be movable of value, something which is bought or sold and which is produced or used as the subject of barter or sale.

(d) In short, commodity includes all kinds of goods. The Forward Contracts (Regulation) Act, 1952 (FCRA) defines 'goods' as 'every kind of movable property other than actionable claims, money and securities'.

(e) The Delhi Bench of ITAT in the case of Munjal Showa Ltd. v. DCIT 94 TTJ 227 has held as under:

> *"Foreign currency or any currency is neither commodity nor shares. The Sale of Goods Act specifically excludes cash from the definition of goods. Besides, no person other than authorised dealers and money changers are allowed in India to trade in foreign currency, much less speculate. S. 8 of the Foreign Exchange Regulations Act, 1973, provides that except with prior general or special permission of the RBI, no person other than an authorised dealer shall purchase, acquire, borrow or sell foreign currency. In fact, prior to the LERMS, residents in India were not even permitted to cancel forward contracts. **The presumption of any speculative transaction is, therefore, directly rebutted in view of the legal impossibility and in view of the fact that foreign currency was neither commodity nor shares.**"*

(f) The Special Bench of ITAT Kolkata in the case of Shree Capital Services Ltd. v. ACIT 121 ITD 498 has held that derivatives with underlying as shares and securities should be also considered as commodities as the underlying shares and securities as specifically included within the term commodities. Accordingly, transactions in security derivatives are subject to the provisions of S. 43(5). However, a currency cannot be termed as a commodity so as to attract the provisions of S. 43(5).

Jurisdictional Bombay High Court in the case of Badridas Gauridu (P) Ltd. 261 ITR 256 has held that the assessee is not a dealer in foreign exchange but an exporter. In order to hedge against losses, the assessee had booked foreign exchange in forward market with the bank. The loss suffered by assessee on cancellation of such forward contracts is not speculative and loss is deductible as business loss.

13. We noted that similar issue has again came up before the Jurisdictional High Court in Tax Appeal No. 278 of 2014 in the case of M/s. D. Chetan & Co. In which the question before the Hon'ble High Court was: -

> *"Whether on facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of 'Mark to Market' Loss of Rs.78,10,000/- made by the Assessing Officer on account of disallowance of loss on foreign exchange forward contract loss and not appreciating the fact that the said loss was a notional loss and hence cannot be allowed."*

The Hon'ble High Court after discussing the submissions of both parties held as under: -

> *"7. The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard11 is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative but only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in **S. Vinodkumar** (supra) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in **S. Vinodkumar** (supra) are identical / similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in **S. Vinodkumar** (supra), the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in **CIT vs. Badridas Gauridas (P) Ltd.** was not brought to the notice of the Tribunal when it rendered its decision in **S. Vinodkumar** (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity."*

14. Similarly the Hon'ble Bombay High Court in the case CIT vs. M/s. London Star Diamond Co. (India) Pvt. Ltd. in appeal No. 712 of 2014 vide its order dated 19th October, 2016 on similar question decided the issue in favour of the assessee. Following the decision of the CIT vs. M/s. D. Chetan & Co. again when similar issue went before the Hon'ble Bombay High Court in ITA No. 1440 of 2014 in the case of CIT vs. M/s. Jaimin Jeweller Exports Pvt. Ltd. the Hon'ble High Court vide its order dated 17th February, 2017 decided the issue in favour of the assessee in view of the decision in the case CIT vs. M/s. D. Chetan & Co. and that ofCIT vs. M/s. Jaimin Jeweller Exports Pvt. Ltd.

15. The learned D.R. before us vehemently relied on the order of the CIT(A) but could not convince us that the facts involved in the case of the assessee are different to the decisions as has been given by the Hon'ble Bombay High Court in the above noted case law.

16. Respectfully following the decisions of the Hon'ble Bombay High Court we set aside the order of the CIT(A) on this issue and delete the disallowance of Rs.1,40,84,283/-.

17. Ground No. 4 relates to the disallowance of repairs and maintenance of plant and machinery amounting to Rs.4,42,922/-. The facts relating to this issue are that the AO noted that the assessee has claimed a sum of Rs.97,15,541/- on repairs and maintenance of plant and machinery. The AO disallowed a sum of Rs.4,42,922/- as the assessee failed to produce bills of the said amount to Topwin Equipment System. When the matter went before the CIT(A), the CIT(A) confirmed the addition. The learned A.R. before us vehemently contended that the assessee has produced the bills before the AO. The amount of Rs.4,42,822/- relates to the repairs of the plants which were duly accounted and paid after deduction of TDS by the assessee. The learned D.R., on the other hand, relied on the order of the AO. We, therefore, in the interest of justice and fair play to both parties set aside the order of the CIT(A) on this issue and restore this issue to the file of the AO with direction that the AO shall verify whether the assessee had made the payment to these parties through an account payee cheque and

has duly accounted for the payment after deducting TDS on the bills. In the case the AO is not satisfied he may make and independent inquiry from the concerned parties and taken decision n accordance with law as in our opinion keeping in view the quantum of repairs and maintenance incurred by the assessee at Rs.97,15,541/-, the sum of Rs.4,42,822/- is very small. Non-production of bills relating to this amount should not be considered as these expenses are non-genuine. Thus, this ground is allowed for statistical purposes.

18. Fifth ground relates to repairs and maintenance of other assets amounting to Rs.18,18,800/-. The facts relating to this ground are that the AO noted that during the year the assessee had incurred a sum of Rs.90,93,999/- on other repairs and maintenance. The assessee produced the bills during the course of assessment proceedings. The AO disallowed 20% of the expenses on the ground that no vouchers were produced and therefore the expenses were not verifiable. When the matter went before the CIT(A), the CIT(A) confirmed the action of the AO. Aggrieved, assessee is in appeal before us. We have heard the submissions of both parties and carefully considered the orders of the Tax Authorities below. The learned A.R. has drawn out attention to the letter dated 23.12.2011 from which it is apparent that the assessee had duly produced the bills for verification. Therefore, in our opinion, the observation made by the AO that the assessee did not produce the bills does not have any leg to stand. Not only this we also noted that in the preceding assessment year 2007-08 the assessee had incurred expenditure on other repairs and maintenance to the extent of Rs.89,41,982/- and during the impugned assessment year there is only a minor increase of Rs.15,20,117/-. If we compare these figures as percentage to the sale we noted that there has been slight decrease in the expenses. We, therefore, delete the said disallowance. Thus, this ground stands allowed.

19. Ground No. 6 relates to the claim of depreciation by the assessee on UPS @60% but allowed by the AO and confirmed by the CIT(A) @15% and thereby a sum of Rs.21,69,239/- was disallowed out of the

depreciation claimed by the assessee. After hearing the rival submissions and going through the orders of the Tax Authorities below we noted that this issue is duly covered by the decision of the Mumbai Special Bench in the case of DCIT vs. Datacraft India Ltd. 40 SOT 295 [9 ITR(T) 712] in which it was specifically held that the UPS shall be entitled for depreciation @60%. Similar view has been taken by "B" Bench of this Tribunal in the case of Macawber Engineering Systems (I) P. Ltd. 19 ITR(T) 302 in which it was held that UPS was an essential ingredient in order to run computer effectively, therefore the assessee shall be entitled for depreciation @60%. No contrary decision was brought to our knowledge by the learned D.R. Even though he has vehemently relied on the order of the CIT(A), we are bound to follow the decision of the Coordinate Bench. We accordingly direct the AO to allow depreciation to the assessee @60%. This, this ground of the assessee is allowed.

20. In the result, the assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 11th September, 2017.

| Sd/- | Sd/- |
|---|---|
| **(Pawan Singh)** | **(P.K. Bansal)** |
| **Judicial Member** | **Vice President** |

Mumbai, Dated: 11th September, 2017

Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A) -12, Mumbai
4. The CIT - 6, Mumbai
5. The DR, "E" Bench, ITAT, Mumbai

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.