

IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 605/2012

CIT Appellant

Through: Mr Sanjeev Rajpal, Sr. Standing
Counsel.

versus

ORIENTAL STRUCTURAL

ENGINEERS PVT LTD Respondent

Through: Mr Rajat Navet with Ms Prachi V.
Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE R.V.EASWAR

O R D E R

15.01.2013

This appeal has been preferred by the revenue against the order dated 02.12.2011 passed by the Income Tax Appellate Tribunal, New Delhi in ITA No.4245/Del/2011 in respect of the assessment year 2008-09. The issue before the Tribunal, which is also an issue before us, was whether in the facts and circumstances of the case the Commissioner of Income Tax (Appeals) had erred in restricting the disallowance under section 14A of the Income Tax Act, 1961 to 2% of dividend income of `20,27,812/-.

It was the contention of the revenue that Rule 8D of the Income Tax Rules, 1962 had not been applied properly in respect of the assessment year 2008-09. This aspect has been considered by the Tribunal in detail and it has observed as under: -

'6.3 We have carefully considered the submissions and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has given a finding that only interest of Rs 2,96,731/- was paid on funds utilized for making investments on which exempted income was receivable. Further, Ld. Commissioner of Income Tax (Appeals) has observed that in respect of investment of Rs 6,07,775,000/- made in subsidiary companies as per documents produced before him, they are attributable to commercial expediency, because as per submission made by the assessee, it had to form Special Purpose Vehicles (SPV) in order to obtain contracts from the NHA and the SPVs so formed engaged the assessee company as contract to

execute the works awarded to them (i.e. SPVs) by the NHAI. In its profit and loss account for the year, the assessee has shown the turnover from execution of these contracts and therefore no expense and interest attributable to the investments made by the appellant in the PSVs can be disallowed u/s 14A r.w. Rule 8D because it cannot be termed as expense/ interest incurred for earning exempted income. Under the circumstances, Ld. Commissioner of Income Tax (Appeals) is correct in holding that disallowance of a further sum Rs 40,556/- calculated @ 2% of the dividend earned is sufficient. Under the circumstances, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals), hence we uphold the same.'

On going through the above observations we are of the view that this is merely a question of fact and does not involve any question of law much less a substantial question of law, as the Tribunal held that the expenses which have been claimed by the assessee were not towards the exempted income. The disallowance, therefore, was rightly limited to a sum of Rs 40,556/-. The question of interpreting Rule 8-D is not in dispute and the only dispute is with regard to facts which have been settled by the Tribunal.

The appeal is dismissed.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

JANUARY 15, 2013

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E" NEW DELHI
BEFORE SHRI A.D. JAIN, JUDICIAL MEMBER
AND
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
I.T.A. No. 4245/Del/2011
A.Y. : 2008-09

ACIT, CIRCLE 13(1),
ROOM NO. 406, CR BUILDING,
I.P. ESTATE, NEW DELHI

(Appellant)

vs. M/S ORIENTAL STRUCTURAL
ENGINEERS (P) LTD.,
21/48, MALCHA MARG,
COMMERCIAL COMPLEX,
DIPLOMATIC ENCLAVE,
NEW DELHI – 110 021
(PAN/GIR NO. : AAACO0054F)
(Respondent)

Asseessee by : Sh. K.V.S.R. Krishna, CA
Department by : Sh. R.S. Negi, Sr. D.R.

ORDER

PER SHAMIM YAHYA: AM

This appeal by the Revenue is directed against the order of the Ld. Commissioner of Income Tax (Appeals) dated 30.5.2011 pertaining to assessment year 2008-09.

2. The grounds raised read as under:-

- “1. That on the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred in restricting the disallowance u/s 14A to ₹ 40,556/- (@2% of dividend income) and not applying Ruled 8D of the Income Tax Rules which is mandatory from A.Y. 2008-09.

2. That on the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred by ignoring the ratio decided in case of Godrej and Boyce Manufacturing Co. Ltd. DCIT (2010) 234 (Bom.).
3. That on the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred in deleting the disallowance made by the Assessing Officer on account of Director's Travelling without considering whether any identifiable benefit accrued to the business.
4. That on the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred by ignoring the fact that the assessee did not provide any material to support that the expenditure is a business expense.
5. That on the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred in deleting the disallowance on account of VAT not paid before the due date of filing of the return of income and by ignoring the provisions of section 43B of the IT Act, 1961.
6. That the appellant craves to be allowed to add any fresh grounds of appeal and / or delete or demand any of the grounds of appeal."

3. Apropos disallowance u/s 14A

In this case return of income had filed on 30.9.2008 declaring an income of ₹ 67,14,94,245/-. The assessment was framed u/s 143(3) of the IT Act at an income of ₹ 68,05,79,170/-. In the assessment order

Assessing Officer disallowed the expenses related to exempt income u/s 14A r.w. Rule 8D amounting to ₹ 35,85,121/-.

4. Upon assessee's appeal Ld. Commissioner of Income Tax (Appeals) considered the issue and held as under:-

"I have considered the submission of the appellant and also gone through the observations of the Assessing Officer as contained in the assessment order, as well as the judicial pronouncements on the issue.

It is seen that during the year under consideration even though the appellant company has made borrowings from banks and financial institutions on which it had paid interest, investments in Mutual Funds and Short Term Funds were made out of surplus funds available with the appellant from time to time as per the Bank Statements produced. Only the interest of ₹ 2,96,731/- was paid on funds utilized for making investments on which exempted income was receivable (as admitted by the appellant during the course of appellate proceedings) and hence the same is treated as expense attributable to exempt income.

In respect of investments of ₹ 6,07,775,000/- made in subsidiary companies as per documents produced before me, they are attributable to commercial expediency, because as per submission made by the appellant, it had to form Special Purpose Vehicles (SPVs) in order to obtain contracts from the NHAI and the SPVs so formed engaged the appellant company as contract to execute the works awarded to them (i.e. SPVs) by the NHAI. In its profit and

loss account for the year, the appellant has shown the turnover from execution of these contracts and therefore no expense and interest attributable to the investments made by the appellant in the SPVs can be disallowed u/s 14A r.w. Rule 8D because it cannot be termed as expense /interest incurred for earning exempted income.

In view of the facts mentioned above:-

- (i) Interest expenses amounting to ₹ 2,96,731/- have been directly found to be incurred for earning exempt income and hence disallowed u/s 14A.
- (ii) Further, the company has earned dividend in respect of investments made and some administrative expenses like management's salary, telephone, stationery, postage expenses, etc. must have been incurred thereon. Keeping in view the aforesaid, I am of the opinion that addition of ₹ 40,556/- calculated @ 2% of the dividend earned has to be made i.e. 2% of ₹ 2,027,812/-. Hence, addition made by the Assessing Officer is upheld to the extent of ₹ 3,37,287/- (₹ 2,96,731/- + ₹ 40,556/-.) This ground of appeal is partly allowed.

5. Against the above order the Revenue is in appeal before us.

6. We have heard the rival contentions in light of the material produced and precedent relied upon.

6.1 Ld. Departmental Representative relied upon the order of the Assessing Officer.

6.2 Ld. counsel of the assessee supported the order of the Ld. Commissioner of Income Tax (Appeals). He placed reliance upon the Hon'ble Jurisdictional High Court decision in the case of Maxopp Investment Ltd. vs. C.I.T. in ITA NBo. 687/2009 wherein vide order dated 18.11.2011 the Hon'ble Jurisdictional High Court has expounded that determination of the amount of expenditure in relation to exempt income under Rule 8D would only come into play when the Assessing Officer rejects the claim of the assessee in this regard. It is further expounded that condition precedent for the Assessing Officer to himself determine the amount of expenditure is that he must record his dissatisfaction with the correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred. It is only when this condition precedent is satisfied that the Assessing Officer is required to determine the amount of expenditure in relation to income not includable in total income in the manner indicated in sub-rule (2) of Rule 8D of the said Rules.

6.3 We have carefully considered the submissions and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has given a finding that only interest of ₹ 2,96,731/- was paid on funds utilized for making investments on which exempted income was receivable. Further, Ld. Commissioner of Income Tax (Appeals) has observed that in respect of investment of ₹ of ₹ 6,07,775,000/- made in subsidiary companies as per documents produced before him, they are attributable to commercial expediency, because as per submission

made by the assessee, it had to form Special Purpose Vehicles (SPVs) in order to obtain contracts from the NHAI and the SPVs so formed engaged the assessee company as contract to execute the works awarded to them (i.e. SPVs) by the NHAI. In its profit and loss account for the year, the assessee has shown the turnover from execution of these contracts and therefore no expense and interest attributable to the investments made by the appellant in the SPVs can be disallowed u/s 14A r.w. Rule 8D because it cannot be termed as expense /interest incurred for earning exempted income. Under the circumstances, Ld. Commissioner of Income Tax (Appeals) is correct in holding that disallowance of a further sum ₹ 40,556/- calculated @2% of the dividend earned is sufficient. Under the circumstances, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals), hence, we uphold the same.

7. Apropos next issue Director's Travelling

Assessing Officer on this issue noted that assessee has claimed Director's Travelling of ₹ 21,24,882/-. Assessing Officer observed that from the examination of the details it was observed that for following visits made no correspondence or material has been submitted to the support the expenditure is a business expense.

<u>S.No.</u>	<u>Visits</u>	<u>Expenditure incurred</u>
1.	Mr. K.S. Bakshi, Managing Director Visited London/USA during May/June, 2007	₹ 2,95,292/-
2.	Mr. K.S. Bakshi, Managing Director Visited USA in June, 2007.	₹ 41,748/-
	Total	₹ 3,37,040/-

Assessing Officer held that in the absence of proper supporting document for this expenditure, the amount of ₹ 3,37,040/- is disallowed.

8. Before the Ld. Commissioner of Income Tax (Appeals) assessee submitted as under:-

“In our submission dated 10.8.2010 to Assessing Officer, we have submitted detailed chart in which all relevant information regarding Director’s travelling i.e. Name of the Directors, Destination, Purpose of Travelling, Name of the Airways, Bill No., Date and amount were mentioned. All the above details were duly supported by the travelling bills.

Assessing Officer in his order has mentioned that, “.... no correspondence or material has been submitted to support that the expenditure is business expenditure.”

Assessing Officer is wrong in stating that no correspondence or material has been submitted. Probably Assessing Officer has not gone through all the details and supporting properly.

The supporting in regard to Foreign travel expenses disallowed are already submitted in our previous submission dated 17.3.2011.”

“The purpose of visit was to attend meeting with senior officials of Leighton Contractors Mauritius for discussions on progress of work in regard to Agra and Indore SPV’s.”

9. Considering the above Ld. Commissioner of Income Tax (Appeals) held that the foreign travel expenses disallowed by the Assessing Officer was incurred for the purpose of business of the assessee and

he has explained both in assessment and appellate stages and the disallowance made by the Assessing Officer was not satisfied and the same was deleted.

10. Against the above order the Revenue is in appeal before us.

11. We have heard both the counsel and perused the records. We find that assessee has given sufficient details regarding the foreign travel expenditure. The disallowance in this regard cannot be sustained. Hence, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals) and uphold the same.

12. Apropos next issue disallowance on account of VAT

On this issue Assessing Officer noted as per the Tax Audit Report VAT liability of ₹ 1,51,200/- has not been paid by the assessee company stating that there is refund due to the assessee as per the legal opinion. Assessing Officer held that as the liability has not been paid before the due date of filing of the return the same has to be added to the income of the assessee.

13. Upon assessee's appeal Ld. Commissioner of Income Tax (Appeals) noted the submissions of the assessee as under:-

“As per Tax Audit Report VAT liability of ₹ 1,51,200/- has not been paid by the assessee. As stated by Assessing Officer in the order, assessee has stated that there is refund due to assessee as per legal opinion and therefore there was no liability outstanding in actual. This liability is in respect of sale of

equipment amounting to ₹ 37,80,000/- for which liability was debited to party as recoverable and not debited in P&L A/c.

This is to bring to your kind notice that the liability outstanding was regarding A.Y. 2006-07, the details of the case are as follows:-

- Assessee company had received a sum of ₹ 3,04,19,803/- on account of work contract executed and on account of sale of earth moving equipment worth ₹ 37,80,000/- (on which VAT @4% i.e. 1,51,200/- has not been deposited).
- Assessee company had entered into a contract agreement with M/s Simplex Infrastructure Ltd. for executing the construction and development work at Central Park II in the capacity of principal contractor and sub-contractor.
- As per agreement and assignment deed M/s Simplex Infrastructure Ltd. was liable to perform the said agreement.
- It was contended by assessee that, as during the execution of the works property in goods has been transferred only once i.e. at the time of execution of works at the hands of sub contractor i.e. M/s Simplex Infrastructure, hence if the sub contractor has discharged his tax liability in respect of work executed, no tax was payable by the main contractor i.e. assessee company.
- This is to inform you that stand of assessee has been considered and order dated 31.3.2010 u/s. 15(3) of the HVAT has been issued by Excise and Taxation Officer cum

Assessing Authority, Gurgaon (East). As per the assessment order issued there was refund due to assessee instead of VAT payable.

- Keeping in view above facts, the disallowance of ₹ 1,51,200/- on account of VAT liability outstanding is erroneous and needs to be deleted.”

14. Considering the above, Ld. Commissioner of Income Tax (Appeals) observed that after the order of the Excise and Taxation Officer cum Assessing Authority, there was refund to the assessee instead of VAT payable. Hence, Ld. Commissioner of Income Tax (Appeals) accepted the contention of the assessee that no disallowance in this regard was called for. Ld. Commissioner of Income Tax (Appeals) also accepted the contention of the assessee that this amount was not claimed in the P&L account. On that account also the disallowance was not called for. Accordingly, Ld. Commissioner of Income Tax (Appeals) deleted the addition.

15. Against the above order the Revenue is in appeal before us.

16. We have heard both the counsel and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has given a finding that as per order of the Excise and Taxation Officer cum Assessing Authority, there was refund to the assessee instead of VAT payable. Hence, Ld. Commissioner of Income Tax (Appeals) has rightly

held that no disallowance in this regard is called for. Accordingly, we do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals) and uphold the same.

17. In the result, the appeal filed by the Revenue stands dismissed.

Order pronounced in the open court on 02/12/2011.

Sd/-

[A.D. JAIN]
JUDICIAL MEMBER

Date 02/12/2011

SRB

Copy forwarded to: -

1. Appellant 2. Respondent
5. DR, ITAT

Sd/-

[SHAMIM YAHYA]
ACCOUNTANT MEMBER

3. CIT 4. CIT (A)

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches