

आयकर अपीलीय अधिकरण, न्यायपीठ – “A” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA**  
(समक्ष) Before श्री महावीर सिंह, न्यायीक सदस्य एवं/and श्री शामीम याहया, लेखा सदस्य)  
[Before Shri Mahavir Singh, JM & Shri Shamim Yahya, AM]

आयकर अपील संख्या / I.T.A No.1159/Kol/2012

निर्धारण वर्ष / Assessment Year: 2003-04

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आयकर अपील संख्या / I.T.A No.870/Kol/2011

निर्धारण वर्ष / Assessment Year: 2007-08

&

आयकर अपील संख्या / I.T.A No.1092/Kol/2009

निर्धारण वर्ष / Assessment Year: 2006-07

&

आयकर अपील संख्या / I.T.A No.1257/Kol/2011

निर्धारण वर्ष / Assessment Year: 2008-09

&

आयकर अपील संख्या / I.T.A No.1160/Kol/2012

निर्धारण वर्ष / Assessment Year: 2009-10

Deputy Commissioner of Income-tax,  
Circle-8, Kolkata.

(अपीलार्थी/Appellant)

Vs. M/s. Ernst & Young Pvt. Ltd.  
(PAN: AABCE9188P)

(प्रत्यर्थी/Respondent)

&

आयकर अपील संख्या / I.T.A No.792/Kol/2009

निर्धारण वर्ष / Assessment Year: 2006-07

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आयकर अपील संख्या / I.T.A No.1215/Kol/2011

निर्धारण वर्ष / Assessment Year: 2008-09

&

आयकर अपील संख्या / I.T.A No.1000/Kol/2012

निर्धारण वर्ष / Assessment Year: 2009-10

M/s. Ernst & Young Pvt. Ltd.

(अपीलार्थी/Appellant)

Vs. Deputy Commissioner of Income-tax,  
Circle-8, Kolkata.

(प्रत्यर्थी/Respondent)

Date of hearing: 30.04.2014

Date of pronouncement: 30.04.2014

For the Revenue: Shri Varinder Mehta, CIT, DR

For the Assessee: Shri R. N. Bajoria, Advocate  
Shri D. Ghosh & Shri K. Manglik, CA

### आदेश/ORDER

#### Per Bench:

This first appeal being ITA No.1159/K/2012 by revenue is arising out of order of CIT(A)-VIII, Kolkata in Appeal No. 50/CIT(A)-VIII/Kol/11-12 dated 17.05.2012.

2. The only issue in this appeal of revenue is against the order of CIT(A) granting interest u/s. 244A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"). For this, revenue has raised following ground no.1:

*"1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in granting interest u/s. 244A on interest and also holding that while issuing refund interest amount will take priority before principal amount."*

3. We have heard rival submissions and gone through facts and circumstances of the case. We find that CIT(A) has factually noted errors committed by AO while computing interest u/s. 244A of the Act and he brought out the factual details under following eight aspects:

*"a) In treating Rs.2,29,85,384/- refunded on 30.9.05 as refund out of gtax paid even though it included Rs.31,63,564 towards interest u/s. 244A of the Income Tax Act,*

*b) In granting interest on Rs.1,49,79,822 for the period 1.10.2005 to 31.7.06 instead of granting interest on Rs.1,81,43,386 and consequently granting short interest;*

*c) In not granting interest on Rs.44,78,062 from 28.7.06 to 31.7.06 i.e. for 1 month as per provisions of Rule 119A of the Income Tax Rules;*

*d) In granting interest on Rs.1,94,57,884 for the period 1.8.06 to 28.2.07 instead of granting interest on Rs.2,26,21,448 and consequently granting short interest;*

*e) In granting interest on Rs.3,05,88,892 for the period 1.3.07 to 29.3.07 instead of granting interest on Rs.3,44,19,137 and consequently granting short interest;*

*f) In reducing Rs.6,66,681 being interest granted in order dt. 29.3.07 passed u/s. 154/251/143(3) of the Act twice. Once as refund granted on 29.3.07 and again as part of Rs.2,07,91,649 refunded on 30.3.07;*

*g)In reducing Rs.2,07,91,469 instead of Rs.2,07,91,649 refunded on 30.3.07 by adjustment against demand of AY 2005-06*

*h) In granting interest on Rs.97,97,423 for the period 1.4.07 to 31.3.09 instead of granting interest on Rs.1,42,94,169 and consequently granting short interest."*

The Ld. CIT, DR stated that the computation of CIT(A) is wrong but he could not point out which part of CIT(A)'s order is wrong and how. He could not identify mistake in allowing interest u/s. 244A of the Act. Despite the entire facts available in the order of CIT(A), the Ld. CIT, DR could not point out any error, we feel that the directions of CIT(A) are as per law and we uphold the same. This appeal of revenue's appeal is dismissed.

4. These cross appeals, being ITA No.1092/K/2009 by revenue and ITA No. 792/K/2009 by assessee, are arising out of order of CIT(A)-VIII, Kolkata in appeal no. 102/CIT(A)-VIII/KOL/CIRCLE-8/2008-09 dated 05.03.2009. Assessment was framed by DCIT, Circle-8, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") for AY 2006-07 vide his order dated 15.07.2008.

5. The only issue in this appeal of revenue (ITA No. 1092/K/2009) is as regards to the order of CIT(A) deleting the disallowance made by AO for non-deduction of TDS by invoking the provisions of section 40(a)(ia) of the Act on reimbursement of cost for providing access to system and management audit methodology updates etc. to EYGS LLP and Ernst & Young LLP, UK. For this, revenue has raised following sole ground:

*"1. That Ld. CIT(A) erred on facts and in law in deleting the disallowance under section 40(a)(ia) of Income Tax Act, 1961 of a total sum of Rs.7,11,91,335/- which was made by the Assessing Officer for non-deduction of tax at source as per provision of Income Tax Act 1961."*

6. Briefly stated facts are that the assessee claimed deduction for Rs.6,88,12,554/- and Rs.23,78,781/- being amount payable to EYGS LLP and Ernst & Young LLP, UK respectively towards reimbursement of costs for providing access to system & management audit methodology updates, knowledge updates through web etc. assistance in development of common programs and policies, endeavoring to ensure that professional and to other people resources are available to assist the firm or its clients in all jurisdiction. But the AO disallowed both these amounts claimed by way of reimbursement of cost for services utilized in the assessee's business. According to him assessee is laible to deduct tax but it has failed to deduct tax under section 195 of the Act. He, accordingly, disallowed a sum of Rs.7,11,91,335/- paid towards 'Cost of Reimbursements' u/s. 40(a)(ia) of the Act. Aggrieved assessee preferred appeal before CIT(A) , who deleted the disallowance by following the decision of ITAT, Kolkata in assessee's own case for AY 2003-04 in ITA No. 1750/Kol/2006 vide order dated 16<sup>th</sup> Nov. 2007, wherein it has been held as under:

*“10. We went through the rival submissions of both the parties and perused the documents. In our considered view as per the provisions of section 195, we agree with the view taken by the Delhi Branch of the Tribunal that before a TDS is required to be charged on any sum, it has to be shown that it is an income as per the provisions of section 195 because the very wording under section 195 “any other sum chargeable under the provisions of the Act” means that chargeable as income as per section 4 of the Income-tax Act. Unless and until it is chargeable, there is no requirement of withholding tax by any India person responsible for paying to any non-resident, not being a company, or to a foreign company, any sum payable on any account. There is no rebuttal from the side of the department that the expenses are relating to reimbursement of expenses for supply of data as per the agreement stated to have been made amongst the global firms to which the assessee company is treated as one of the members. Apart from this factual aspect it has been observed that in the case law reported in 142 ITR 493 in the case of Dunlop India Ltd. the facts appear to be identical to that of the present case in hand. Therefore, both factually as well as legally the assessee has a case and on this issue the assessee, therefore, should succeed in our considered opinion as the amount is towards the reimbursement and with the passage of time, now globalization has been adopted by different countries for facilitating data and technical skill of different countries. Simply because the supply of data pertains to technical services, the department should not be rigid for application of section 195 without examining the actual factual aspect of the matter that it is a result of an agreement in between the parties for sharing the data amongst the members firms in the globalization process. This aspect, in particular, has not been controverted by the department at any stage of the proceeding. Hence, we decide this issue in favour of the assessee and against the Revenue.*

Aggrieved revenue came in appeal before us.

7. We have heard rival submissions and gone through facts and circumstances of the case. Before us, Ld. Counsel for the assessee stated that the issue is squarely covered in favour of assessee and against revenue. We find that the Tribunal is consistently deleting this disallowance as reproduced above one of the Tribunal’s decision in AY 2003-04. We find the factual position that the assessee company is a member of the international organization of Ernst & Young and its several associate concerns worldwide. Ernst & Young Global Services LLP and Ernst Young UK LLP provide administrative and management support services in connection with technology updates, system and methodology and upgrades, training through webs etc. to the assessee and to other associate concerns of the Group. The assessee and its other associate concerns share the costs. A sum of Rs.6,88,12,554 was reimbursed to Ernst & Young Global Services LLP and a sum of Rs.23,78,781 to Ernst & Young UK LLP by the assessee during the current assessment year on account of its share of costs for such services. The said concerns were set up by member firms of Ernst & Young for providing resources to obtain best methodologies at a lower cost which in the present days of globalisation was imperative for any professional firm. Development of such methods by anyone concern would

have been cost prohibitive apart from lacking uniformity and mutual compatibility. Accordingly, arrangement was arrived at for such services to be developed in pool by the said two concerns to which the member firms would have access to it and reimbursing their respective shares of cost incurred therefor. Such reimbursement was agreed on the basis of respective turnover of the member firms. These facts are not denied by revenue even now before us and these are reimbursement of expenses. Once these are reimbursement of expenses the assessee is not liable to deduct TDS u/s. 195 of the Act. Accordingly, we confirm the order of CIT(A) and this issue of revenue's appeal is dismissed.

8. Coming to ITA No. 792/K/2009. The first issue in this appeal of assessee is against the order of CIT(A) in upholding the disallowance made by AO by invoking the provisions of section 14A of the Act read with Rule 8D of the I. T. Rules, 1962 (hereinafter referred to as the "Rules").

9. Briefly stated facts are that the assessee has earned dividend income at Rs.76,34,047/- and claimed the same as exempt. The assessee claimed that it had not incurred any expenditure to earn this dividend income. During the course of assessment proceedings the assessee explained before AO that it has invested short term surplus fund available with it in Grindlays Cash Fund. The assessee also filed complete details i.e. the date of investment, dividend reinvested, refund receipts and closing balance as on 31.03.2003. Completed copy of statement including bank statement was submitted. The assessee explained that these funds were not invested out of borrowed fund but were invested out of surplus funds available with the company for short period. The AO estimated the proportionate management expenses qua the exempted income at 10% and, therefore, computed the proportionate management expenses at Rs.35,23,840/-. Aggrieved, assessee preferred appeal before CIT(A), who invoked Rule 8D of the Rules by noting that the Special Bench in the case of ITO Vs. Daga Capital Management Pvt. Ltd. (2008) 119 TTJ 209 (Mum) (SB) has held that Rule 8D read with section 14A of the Act is retrospectively applicable and, therefore, he asked the assessee to submit computation in term of Rule 8D for making the disallowance. Accordingly, he restricted the disallowance at Rs.14,75,086/-. Aggrieved assessee came in appeal before us.

10. We have heard rival submissions and gone through facts and circumstances of the case. We find that the relevant assessment year involved is AY 2006-07 and Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. vs. DCIT [2010] 328 ITR 81 (Bom.), held

that Rule 8D of the Rules as inserted by the I. T (Fifth Amendment) Rules, 2008 w.e.f. 24.3.2008 is prospective and not retrospective. The CIT(A) restricted the disallowance at 1% of the exempted income u/s. 14A of the Act by observing as under:

*“I find that the decision of Daga Capital has been reversed by Hon’ble Bombay High Court in their above mentioned order dtd. 12.08.2010. In this order Hon’ble Court has held that Rule 8D shall be applicable from assessment year 2008-09 onwards. Here, since the assessment year involved is 2007-08 therefore I hold that Rule 8D will not apply. However, in certain recent decisions Hon’ble ITAT Kolkata has held that out of the administrative expenses, expenses to the tune of 1% of the exempt income can be disallowed u/s. 14A. Following these decisions I hold that an amount of Rs.7,857/- shall be disallowable u/s. 14A.”*

We find that the exempted income is to the extent of Rs.76,34,047/- in AY 2006-07. Rule 8D of the Rules is not applicable in this assessment year in the assessee’s case as held by Hon’ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. (Supra) being prospective. We direct the AO to restrict the disallowance at 1% of the exempted income. This issue of assessee’s appeals is partly allowed as directed above.

11. The next issue in this appeal of assessee is against the order of CIT(A) confirming the disallowance of provision for leave encashment. For this, assessee has raised following ground no.2:

*“2. The Ld. CIT(A) has also erred in not deleting the disallowance of a sum of Rs.1,54,71,071/- being the provision made for leave encashment in the current assessment year on the basis of actuarial valuation.”*

12. At the outset, Ld. counsel for the assessee Shri R. N. Bajoria, Sr. advocate stated that the assessee company has added a sum of Rs.1,54,71,071/- on account of provision for leave encashment. According to him, this amount was added back in the computation of income filed with original return of income in pursuance to section 43B(f) of the Act. He further stated that Hon’ble Calcutta High Court in the case of Exide Industries Ltd. Vs. Union of India (2007) 292 ITR 470 struck down the provisions of section 43B(f) of the Act as being arbitrary and ultra vires. Ld. counsel for the assessee stated that Hon’ble Supreme Court has stayed the judgment of Hon’ble Calcutta High Court in the case of Exide Industries Ltd. (supra) and, therefore, he requested the bench to set aside this issue to the file of the AO with a direction that he will adjudicate the same as per the final judgment of Hon’ble Supreme Court in the case of Exide Industries Ltd. On this, Ld. CIT, DR fairly agreed that the issue can be restored back to the file of the AO.

13. We, after hearing both the side find that the Hon'ble Apex Court in the case of Exide Industries Ltd. in SLP (Civil) 22889 of 2008 has stayed the operation of the judgment of Hon'ble Calcutta High Court. Once this is the position, we restore back this issue to the file of AO to adjudicate the same afresh in terms of the decision of Hon'ble Apex Court in the case of Exide Industries Ltd. (supra). Accordingly, this issue of assessee's appeal is allowed for statistical purposes.

14. Coming to ITA No. 870/K/2011. The first issue in this appeal of revenue is as regards to the order of CIT(A) deleting the disallowance made by AO for non-deduction of TDS by invoking the provisions of section 40(a)(ia) of the Act on reimbursement of cost for providing access to system and management audit methodology updates etc. to EYGS LLP and Ernst & Young LLP, UK. For this, revenue has raised following ground no.1:

*"1. That Ld. CIT(A) erred on facts and circumstances of the case and in treating the amount paid to Ernst & Young LLP UK and Ernst & Young Global Services LLP as reimbursement of expenses instead of treating it as fees for technical services paid to a non resident."*

We have already dealt this issue elaborately while adjudicating the ground of appeal of revenue in ITA No.1092/K/2009 and since we have dismissed this ground of appeal of revenue, following the same analogy we also dismiss this ground of appeal of revenue.

15. The next issue in this appeal of revenue is as regards to the order of CIT(A) allowing the claim of bad debt written off. At the outset, the Ld. Senior counsel for the Assessee stated that no such issue was before CIT(A). Hence, it cannot be raised before Tribunal as it is not arising from the order of CIT(A). On query from the bench, the Ld. CIT, DR fairly conceded that there is no such issue arisen from the order of CIT(A). Hence, the same is dismissed. This ground of appeal of revenue is dismissed.

16. These cross appeals being ITA No.1257/K/2011 by revenue and ITA No. 1215/K/2011 by assessee are arising out of order of CIT(A)-VIII, Kolkata in appeal no. 27/CIT(A)-VIII/Kol10-11 dated 13.07.2011. Assessment was framed by DCIT, Circle-8, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") for AY 2008-09 vide his order dated 24.05.2010.

17. The first issue in this appeal of revenue is as regards to the order of CIT(A) deleting the disallowance made by AO for non-deduction of TDS by invoking the provisions of section 40(a)(ia) of the Act on reimbursement of cost for providing access to system and management audit methodology updates etc. to EYGS LLP and Ernst & Young LLP, UK. For this, revenue has raised following ground no.1:

*“1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance made by the AO u/s. 40(a)(ia) amounting to a total of Rs.24,22,61,039/- paid by the assessee to Ernst & Young LLP UK and Ernst & Young Global Services LLP without deducting tax at source u/s. 195 of the Income-tax Act, 1961 in relation to assessment year 2008-09.”*

We have already dealt this issue elaborately while adjudicating the ground of appeal of revenue in ITA No.1092/K/2009 and since we have dismissed this ground of appeal of revenue, following the same analogy we also dismiss this ground of appeal of revenue.

18. The next issue in this appeal of revenue is as regards to the order of CIT(A) in restricting the disallowance made by AO by invoking the provisions of section 14A read with Rule 8D of the Rules qua the exempted income for AY 2008-09. For this, revenue has raised following ground no.2:

*“2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in restricting the disallowance made by the AO u/s. 14A as per rule 8D to 1% of dividend income in relation to AY 2008-09.”*

19. Briefly stated facts are that the assessee company earned dividend income amounting to Rs.91,24,287/- in addition to dividend of equity shares of CAP Gemini SA amounting to Rs.69,853/-. This dividend received from CAP Gemini SA was offered to tax. The exempt income claimed on account of dividend was qua Rs.91,24,287/-. The AO during the course of assessment proceedings disallowed a sum of Rs.2,94,941/- by invoking the provisions of section 14A read with Rule 8D of the Rules by observing in para 4 as under:

*“4. As per provisions of section 14A of the act read with rule 8D, a sum of Rs.2,94,941/- is disallowed. It includes sum of Rs.2,61,235/- which is 0.5% of the average investment and an amount of Rs.33,706/-, being proportionate interest.”*

Aggrieved, assessee preferred appeal before CIT(A), who restricted the disallowance at 1% of dividend income. Aggrieved, now revenue is in appeal before us.



20. At the outset, Ld. counsel for the assessee stated that Rule 8D of the Rules will apply w.e.f. AY 2008-09 and AO has rightly computed the disallowance. He conceded this issue. Accordingly, this issue of revenue's appeal is allowed.

21. Coming to ITA No. 1215/K/2011. The first issue in this appeal of assessee is against the order of CIT(A) confirming the disallowance of provision for leave encashment. For this, assessee has raised following ground no.1:

*"1. The Ld. CIT(A) has erred on facts and in law in not deleting the disallowance of a sum of Rs.2,04,00,156/- being the provision made for leave encashment in the current assessment year on the basis of actuarial valuation."*

22. Since we have set aside this ground of appeal of assessee in ITA No. 792/K/2009 to the file of AO to adjudicate the same afresh in terms of the decision of Hon'ble Apex Court in the case of Exide Industries Ltd. (supra), this issue also restored to the file of AO to adjudicate afresh. This ground of appeal of assessee is allowed for statistical purposes.

23. The next issue in this appeal of assessee is against the order of CIT(A) in not adjudicating the issue of withdrawal of interest u/s. 234D of the Act. For this, assessee has raised following ground No. 2:

*"2. The Ld. CIT(A) has failed to adjudicate that interest withdrawn under section 244A is not refund granted under sub-section (1) of section 143 on which interest under section 234D can be levied."*

24. At the outset, Ld. counsel for the assessee fairly stated that this issue is a consequential issue so, the AO can be directed to recompute the disallowance as per the provisions of the Act. Ld. CIT, DR has not objected to the same. In view of the above submissions, we feel that this issue needs readjudication and AO will recompute the withdrawal of interest in terms of provisions of section 234D of the Act. This issue of assessee's appeal is allowed for statistical purposes.

25. These cross appeals being ITA No.1160/K/2012 by revenue and ITA No. 1000/K/2012 by assessee are arising out of order of CIT(A)-VIII, Kolkata in appeal no. 28/CIT(A)-VIII/Kol/11-12 dated 17.05.2012. Assessment was framed by DCIT, Circle-8, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") for AY 2009-10 vide his order dated 18.05.2011.

26. Now, coming to ITA No. 1160/K/2012. The sole issue in this appeal of revenue is as regards to the order of CIT(A) deleting the disallowance made by AO for non-deduction of TDS by invoking the provisions of section 40(a)(ia) of the Act on reimbursement of cost for providing access to system and management audit methodology updates etc. to EYGS LLP and Ernst & Young LLP, UK. For this, revenue has raised following ground no.1:

*“1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance made by the AO u/s. 40(a)(ia) amounting to Rs.23,52,28,398/- paid by the assessee to Ernst & Young LLP UK and Ernst & Young Global Services LLP without deducting tax at source u/s. 195 of the Income-tax Act, 1961 in relation to assessment year 2009-10.”*

We have already dealt this issue elaborately while adjudicating the ground of appeal of revenue in ITA No.1092/K/2009 and since we have dismissed this ground of appeal of revenue, following the same analogy we also dismiss this ground of appeal of revenue.

27. Coming to ITA No. 1000/K/2012. The sole issue in this appeal of assessee is against the order of CIT(A) confirming the disallowance of provision for leave encashment. For this, assessee has raised following ground no.1:

*“1. The Ld. CIT(A) has erred on facts and in law in not deleting the disallowance of a sum of Rs.2,77,64,886/- being the provision made for leave encashment in the current assessment year on the basis of actuarial valuation.”*

28. Since we have set aside this ground of appeal of assessee in ITA No. 792/K/2009 to the file of AO to adjudicate the same afresh in terms of the decision of Hon'ble Apex Court in the case of Exide Industries Ltd. (supra), this issue also restored to the file of AO to adjudicate afresh. This ground of appeal of assessee is allowed for statistical purposes.

29. In the result, revenue's appeals are dismissed and that of assessee is partly allowed for statistical purposes.

30. Order is pronounced in the open court.

Sd/-

**शामीम याह्या**, लेखा सदस्य  
(Shamim Yahya )  
Accountant Member

Sd/-

**महावीर सिंह**, न्यायीक सदस्य  
(Mahavir Singh)  
Judicial Member

Dated : 30th April, 2014

वरिष्ठ निजि सचिव Jd.(Sr.P.S.)

आदेश की प्रतिलिपि अग्रेषित:- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – M/s. Ernst & Young Pvt. Ltd., 22, Camac Street,  
Kolkata-16
2. प्रत्यर्थी/ Respondent –DCIT, Circle-8, Kolkata.
3. आयकर कमिशनर (अपील)/ The CIT(A), Kolkata
4. आयकर कमिशनर/ CIT Kolkata
5. विभागिय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.