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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 1155/2011

% **Date of Decision** : 14th November, 2011.

CONTROLA & SWITCHGEAR CO LTD ..... Appellant
Through Mr. Kaanan Kapur, Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX ..... Respondent
Through None

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA,J: (ORAL)

This appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) filed by the assessee Controls & Switchgear Co. Ltd. impugns order dated 18.2.2011 passed by the Income Tax Appellate Tribunal (Tribunal, for short) on two grounds which have been urged and argued.

2. It is submitted that the direction to compute expenditure under Section 14A is not justified and contrary to law and secondly, the findings recorded by the tribunal in para 5.5 relating to apportionment of head office

expenses to compute the deduction under Section 80IC is perverse and does not take into account the contentions and arguments raised by the appellant.

3. With regard to apportionment of expenses under Section 14A of the Act, the Tribunal has held as under

> "4. Ground no. 1 is that ld. CIT (Appeals) erred in disallowing a sum of Rs. 16,67,053/- by invoking the provision contained in section 14A. The disallowance was upheld by following the decision of Special Bench of Mumbai Tribunal in the case of ITO Vs. Daga Capital Management Pvt. Ltd., 119 TTJ 289, in which it was held that section 14A is applicable in respect of direct and indirect expenses incurred for earning any income, which is not included in the total income. The onus of proving that no such expenditure has been incurred is on the assessee. The retroactive operation of Rule 8D was also approved. In the course of hearing before us, it was submitted by both the parties that the aforesaid decision stands modified in view of the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Co. Ltd. Vs. Dy. CIT, (2010) 194 Taxman 203, in which it has been held that provisions contained in section 14A and Rule 8D are not ultra-vires. However, Rule 8D is applicable prospectively from assessment year 2008-09. Prior to that, the AO could examine all the facts and make reasonable disallowance on the basis of conclusion arrived at from the facts. It is also the common ground that the issue is pending before Hon'ble Delhi High Court. Therefore, it has been suggested that the matter may be restored to the file of the AO to work out the disallowance, if any, on the basis of the decision of Hon'ble Bombay High Court. However, if the decision of Hon'ble Delhi High Court is

> received till passing the follow up order, the AO shall take such decision also into account. It is ordered accordingly. The AO is directed to hear the matter again for considering all the facts and compute the amount to be disallowed as per law. Thus, this ground is treated as allowed for statistical purposes."

4. It is clear from the said paragraph that the tribunal has held that Assessing Officer shall follow the judgment of the Bombay High Court in ***Godrej &. Boyce Manufacturing Co. Ltd. Vs. Deputy Commissioner of Income Tax***, (2010) 194 Taxman 203, in which it has been held that Rule 8D is applicable from Assessment Year 2008-09 and is not retrospective. This is a finding in favour of the assessee. It may be noted that Revenue has filed appeals and have submitted that Rule 8D is retrospective. In the present case, the Revenue is not in appeal before us. The order with regard to first issue does not call for any interference.

5. The second issue relates to apportionment of head office expenses for computing deduction under Section 80IC. The appellant has three units located at Noida, Kasna and Haridwar, Uttarakhand. The third unit at Haridwar is eligible for deduction under Section 80IC, whereas the units at Noida and Kasna are not eligible. To this extent there is no dispute. 6.

The total head office expenses incurred and claimed as an expenditure in the profit and loss account were to the tune of

Rs.5,23,05,926/-. The question is whether this amount relates to and should be apportioned to compute income of the Haridwar unit.

7. The Assessing Officer in paragraph 6.3 of the assessment order noticed that the assessee had furnished working of common expenses at Haridwar unit but as per the said working the assessee had not considered financial expenses of Rs.1,30,91,339/- for the purpose of allocation of common expenses. He, accordingly, apportioned administrative personal expense etc. incurred at the head office and held that they were partly relatable to Haridwar unit. In view of the reason given in the assessment order an addition of Rs.69,67,762/- was made, reducing the claim of deduction under 80IC. This included addition on account of transfer of goods from Kasna unit to Haridwar unit of Rs.6,62,900/-. This addition of Rs.6,62,900/- could not be seriously contested during the course of arguments. This addition was made on the basis of market value of the goods transferred to the Haridwar unit.

8. In the first appeal, CIT(Appeals) examined the issue in great detail and has recorded as under :

> "4.1 Briefly stated facts of the case are that the assessee company has claimed deduction u/s 80IC for Uttaranchal Unit of Rs. 4,42,62,395/-. The Assessing Officer raised various queries with regard to claim u/s 80IC and observed that the stock has been transferred at

cost plus overhead expenses to Haridwar Unit. As per the working furnished by the assessee, the difference between the market rate and the rate at which goods are transferred is Rs. 6,62,900/-. IN view of the provisions of section 80IC (7), read with sub-section (5), (8) & (10) of section 80IA, the Assessing Officer concluded that the market value of the transfer of goods is to be taken. He, therefore, reduced Rs. 6,62,900/- from the profits of the Unit. He also observed that the assessee has not considered the financial expenses of Rs. 1,30,91,339/- for the purpose of allocation of common expenses. Therefore, the common expenses were apportioned to Haridwar unit by including the financial expenses. Thus, the Assessing Officer worked out the EOU profits to Rs. 3,72,96,632/-. As a result, an addition of Rs. 69,67,762/- has been made by the Assessing Officer.

4.2 During the proceedings before me, it was submitted that the assessee had set up a unit in Haridwar i.e. in Uttaranchal which started production from 23.10.2005. The ld. Assessing Officer was of the view that the total proportionate Head Office expenses under various heads have to be transferred to the Haridwar Unit. The details of which were furnished. It was submitted that the Assessing Officer has taken the administrative expenses of Rs. 2,67,06,226/- which also included proposed dividend tax and proposed dividend which were not claimed as an expense. So it cannot be transferred proportionately to the Haridwar Unit. Besides, the assessee has also incurred court fee expenses for the old cases which also cannot be considered relating to Haridwar unit. The Assessing Officer has not reduced financial expenses of Rs. 4,63,401/- recovered from other units and out of the interest payment to bank, the assessee had already recovered Rs. 12,26,065 from the Haridwar unit which has not been deducted by the Assessing Officer. Moreover, the Assessing Officer should have calculated the disallowance from 23.10.2005 instead of 1.10.2005. Further, whatever expenses are

directly relating to this unit has been transferred to this unit from the Head Office as well as from the Kasna Unit. So, there is no justification whatsoever in making any disallowances. The separate Profit & Loss a/c of the Haridwar Unit has been prepared. The financial expenses i.e. interest on loan which is related to the Haridwar unit has been debited in that unit itself and the expenses directed to Haridwar unit are being accounted for in that unit. Reliance was place on the case of Kolkata ITAT in the case ACIT Vs. Tide Water India.

4.3 I have carefully considered the submissions by ld. AR and have gone through the assessment order. The Assessing Officer has made addition on two accounts i.e. on account of difference between the market rate and the rate at which the goods are transferred, amounting to Rs. 6,62,900/-; an on account of allocation of common expenses. As far as addition of Rs. 6,62,990/- is concerned, I find that the same has been made strictly in view of the legal provisions of section 80IC(7) read with sub-section (5), (8) & (10) of Section 80IA of the Act. The same is, therefore, upheld.

As regards allocation of common expenses, including financial expenses of Rs.1,30,91,339/-, it is observed that these expenses are common in nature and include financial expenses e.g. interest paid to bank, interest to directors, interest to others etc. The appellant was specifically required during the appellate proceedings to give details of expenses pertaining to EOU and Non-EOU Units and the justification as to why they should not be apportioned. The appellant has filed the consolidated statement without specifying & substantiating individual items as to why these should not be considered for the purpose of allocation of common expenses. Ld. AR has also relied on the case of ACIT Vs. Tide Water India Ltd. (Kolkatta (sic) ITAT). However, neither the complete citation of this case was given nor the copy of complete judgment was submitted. Only the extracts of the case were filed. In such circumstances, the applicability of the

above judgement (sic) to the facts of the present case cannot be ascertained. In view of the above discussion, I find that the Assessing Officer was justified in making addition on account of allocation of common expenses, including the financial expenses and the same is upheld.

The ld. AR has submitted that while making the calculation, the Assessing Officer has included certain expenses which were not claimed or which pertain to old period or which have already been recovered from Haridwar unit. Moreover, the amount is to be calculated from 23.10.2005 instead of 1.10.2005. In this regard, the Assessing Officer is directed to verify and make the necessary adjustment, if required."

9. The nature of financial expenses which have been treated as common expenses and included in the amount of Rs.1,30,91,339/- as recorded by the CIT(Appeals) included interest paid to the banks, interest to directors, interest to others etc. It is recorded that the assessee was specifically required to furnish details of common expenses and justify why they should not be apportioned. The appellant filed a consolidated statement without substantiating individual items as to why they should not be considered for the purpose of allocation of common expenses.

10. The Tribunal has recorded the following findings :

"5.5 Coming to adjustment on account of common expenses, we may gainfully refer to the provision contained in sub-section(5), which mandates that the same have to be computed as if eligible business was the only source of income of the

> assessee during the previous year. Seen in this context, if certain expenses incurred by head office lead to benefit to the eligible business also, the expenses will have to be apportioned to it. This has not been done. Therefore, such an apportionment was necessary to work out eligible profits for deduction. The assessee has not furnished unit-wise details with narration to find out which expenses could be allocated to eligible business from the head office. In absence thereof, the ld. CIT(Appeals) correctly came to the conclusion that common expenses have to be allocated to the eligible business in the ratio of turnover of the eligible business to the total turnover. He has also adequately justified the reasons for calculating financial expense for the purpose of allocation. The assessee had furnished details of some expenses, which could not be considered for allocation for the reason that those contained proposed dividend, proposed dividend tax, court fee for old cases and expenses recovered from the respective units, being Rs.4,53,401/- from other units and Rs.12,26,065/ from eligible unit. We do not find the necessity of making any interference with these findings as these are based on sound logic. He has also granted relief to the assessee to calculate the disallowance for the period 23.10.2005 to 31.3.2006 as the eligible unit was set up on 23.10.2005 and not on 1.10.2005. There seems to be no scope for any further relief in this matter also. Accordingly, it is held the ld. CIT(appeals) was right in disallowing Rs.69,67,762/- from the deduction subject to some adjustment to be made by AO on verification. Thus, this ground is dismissed."

11. As noticed above, the Tribunal has also given a factual finding that the appellant assessee has not tried to bifurcate the common head office expenses, which are also relatable to the Haridwar unit as well as the units at Noida and Kasna. Thus, there is a concurrent finding of fact both by the

CIT(Appeals) and the Tribunal that the aforesaid bifurcation exercise was not undertaken by the assessee.

12. During the course of hearing before us, ld. counsel for the appellant had produced copy of the paper book, which was filed before the Tribunal and drawn our attention to the profit and loss account of the Haridwar unit as on 31st March, 2006. He has also drawn our attention to the column relating to expenditure and it is pointed out that personal expenses, administrative expenses, selling expenses, financial expenses have been reduced from the income earned by the Haridwar unit. It is accordingly, submitted that the finding recorded by the Tribunal/CIT(A) are not factually correct. He has also relied upon the decision of the Hon'ble Supreme Court in ***Liberty India Vs. Commissioner of Income Tax*** (2009) 317 ITR 218. In particular reliance is placed in para 15 of the said judgment, which is reproduced below.

> "15. Continuing our analysis of Sections 80IA/80IB it may be mentioned that Sub-section (13) of Section 80IB provides for applicability of the provisions of Sub-section (5) and Sub-sections (7) to (12) of Section 80IA, so far as may be, applicable to the eligible business under Section 80IB. Therefore, at the outset, we stated that one needs to read Sections 80I, 80IA and 80IB as having a common scheme. On perusal of Sub-section (5) of Section 80IA, it is noticed that it provides for manner of computation of profits of an eligible business. Accordingly, such profits are to be computed as if

> such eligible business is the only source of income of the Assessee. Therefore, the devices adopted to reduce or inflate the profits of eligible business has got to be rejected in view of the overriding provisions of Sub-section (5) of Section 80IA, which are also required to be read into Section 80IB. [see Section 80IB(13)]. We may reiterate that Sections 80I, 80IA and 80IB have a common scheme and if so read it is clear that the said Sections provide for incentives in the form of deduction(s) which are linked to profits and not to investment. On analysis of Sections 80IA and 80IB, it becomes clear that any industrial undertaking, which becomes eligible on satisfying Sub-section(2), would be entitled to deduction under Sub-section (1) only to the extent of profits derived from such industrial undertaking after specified date(s). Hence, apart from eligibility, Sub-section(1) purports to restrict the quantum of deduction to a specified percentage of profits. This is the importance of the words "derived from industrial undertaking" as against "profits attributable to industrial undertaking"."

13. In the aforesaid decision the Supreme Court has interpreted the words "derived from" and has highlighted the legislative intent. It states that devices adopted to reduce/inflate the profits of eligible business have to be checked. We fail to understand how this decision helps appellant. Regarding the contention raised on the basis of profit and loss account as on 31st March, 2006 of the Haridwar unit, which has been audited by the Chartered Accountant, the same is not relevant and does not deal with the contention and the findings recorded by the CIT(Appeals) and the Tribunal. The question raised and which has been dealt elaborately by the CIT(A)/Tribunal was with regard to the head office finance expenses and

whether the said expenses are common head expenses, which are also relatable to the Haridwar unit. The assessee, as per the CIT(Appeals) and the tribunal, did not furnish and give the said bifurcation and details or justify their exclusion. We do not think the statement of profit and loss account, which has been relied upon by the appellant before us shows that the bifurcation or details of the head office expenses was given and should have been accepted as justifying their exclusion. For the sake of convenience we are reproducing the details mentioned in the profit and loss account as on 31st March, 2006 of the Haridwar unit. They prescribe broad heads and read :

Expenditure	Sch. No.	Amount
"MANUFACTURING EXPS.	13	4056572.93
PERSONNEL EXPS.	14	2253818.00
ADMN.EXPS.	15	2227494.82
SELLING EXPS.	17	1092651.31
FINANCIAL EXPS.	18	2590690.15
DEPRECIATION		899584.77
INCREASE/DECREASE OF STOCK	19	0.00
PRIOF PERIOD EXPS"		0.00

14. Ld. counsel for the appellant has drawn our attention to the findings recorded by the tribunal with regard to the proposed dividend, dividend tax, court fees for old cases, expenses recovered from respective units. This aspect has been dealt with and examined by the CIT(Appeals) in para 4.2 of

its order, which has been quoted above. This contention does not impress us. It cannot be said that the order passed by the Tribunal is factually perverse.

15. We do not think there is any perversity in the order of the tribunal and accordingly we are not inclined to admit the appeal. The same is dismissed. No costs.

SANJIV KHANNA,J

R.V.EASWAR, J

NOVEMBER 14, 2011
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