INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3984/Del/2014
(Assessment Year: 2008-09)

ACIT, Circle-II, Block-B, New CGO Complex, NH-IV, NIT, Faridabad	Vs.	Lakhani India Ltd, Plot No. 131, Sector-24, Faridabad PAN: AAACL3113G
(Appellant)		(Respondent)

ITA No. 3736/Del/2014
(Assessment Year: 2008-09)

Lakhani India Ltd, Plot No. 131, Sector-24, Faridabad PAN: AAACL3113G	Vs.	ACIT, Circle-II, Block-B, New CGO Complex, NH-IV, NIT, Faridabad
(Appellant)		(Respondent)

Revenue by :	Shri Amit Jain, Sr. DR
Assessee by:	None
Date of Hearing	27/07/2018
Date of pronouncement	10/09/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are cross appeals filed by assessee, Lakhani India Ltd, and Learned Assistant Commissioner Of Income Tax, Circle –II, Faridabad (the learned AO) against the order of the Learned Commissioner Of Income Tax (Appeals) – 2, Faridabad dated 7/5/2014 for A.Y. 2008 – 09 passed by him in the appeal filed by the assessee against the order of the learned AO passed u/s 143 (3) of The Income Tax Act, 1961 [The Act] dated 31/12/2010 determining total income of the assessee at Rs. Nil against the returned loss of Rs. 22748533/–.

2. Grounds of appeal raised by ld AO are as under:-

"I. Whether on the facts and in the circumstances of the case, the ld CIT(A) was right on facts and in law in deleting the disallowance of

Rs. 3559022/- made by the Assessing Officer being Rs. 861700/- on a/c of unascertained provision of gratuity and Rs. 2697322/- on a/c of unascertained provision for earned leave even though the assessee was not able to substantiate that the estimation/ calculation of these liabilities have been made on scientific basis with reasonable certainty.

II. Whether on the facts and in the circumstances of the case, the ld CIT(A) was right on facts and in law in deleting the disallowance of Rs. 3559022/- made by the Assessing Officer even though the assessee did not file details of liability neither during the assessment proceedings before the AO nor during appellate proceedings before the ld CIT(A). It has neither filed any calculation nor any certificate from actuary for calculation of liabilities of gratuity and earned leave."

3. Grounds of appeal raised by assessee are as under:-

"*1. That the order passed by the ld CIT(A)-2, Faridabad is bad in law and on facts.*

2. That the ld CIT(A) erred in confirming the disallowance of legal and professional charges of Rs. 16.60 lacs holding the same to be of capital expenditure.

3. That the ld CIT(A) has erred in confirming the disallowance of Rs. 2372070/- u/s 40(ia) of Income Tax Act, 1961.

4. That the ld CIT(A) has erred in confirming the disallowance of interest and other expenditure of Rs. 380023/- u/s 14A of the Income Tax Act, 1961 and as per Rule 8D(2)(iii) of Income Tax Rules."

4. Despite notice, none appeared on behalf of assessee and therefore the issue is decided on the merits of the case as per information available on record.

5. The learned departmental representative vehemently supported the order of the lower authorities in appeal of the assessee. With respect to appeal of the learned assessing officer, he supported the order of the learned AO.

6. Brief facts of the case shows that assessee is a company engaged in manufacture of footwear. Assessee filed return of income on 30/9/2008

offering income u/s 115JB of the act showing income of Rs. 434336463/-. Various issues raised in both appeals are discussed as under.

7. Ground number 1 of appeal of assessee is general in nature hence it is dismissed.

8. Ground number 2 of appeal of assessee is against conformation of disallowance of legal and professional fees of ₹ 16.60 Lacs as capital expenditure. The ld. AO on examination of the legal and professional fees, found that assessee has paid a sum of ₹ 1 660000/– to Sri Sunil Saini and Shushil Agarwal as architect fees for the construction of building. Learned AO asked for the relevant details stating that why architect fee paid should not be capitalized. Assessee did not make any specific submission on this issue and as assessee is undertaking the construction of a building, AO held that it is part of total capital cost. Accordingly architect fees of ₹ 1 660000/– was treated as capital expenditure. This addition was challenged by assessee before ld. CIT (A) wherein addition was confirmed as capital expenditure. This issue is agitated by assessee vied ground number 2 of the appeal.

9. We have carefully considered the argument of the learned departmental representative as well as the submission made by assessee before the lower authorities. Before the learned CIT (A) , the assessee could only submit that AO has not allowed the depreciation in respect of expenses capitalized having direct Nexus with the building. It was also requested by assessee that direction might kindly be given to the learned AO for allowance of depreciation u/s 32 of the income tax act. In view of above, facts we do not find any infirmity in the order of learned CIT (A) who has held that legal and professional expenditure incurred by the assessee were incurred in relation to construction of a building is a capital expenditure , which was not used for the purpose of the business during the year under consideration. The assessee during appellate proceedings have admitted for allowance of depreciation on the above amount therefore it is apparent that the expenditure incurred by the assessee in

the form of legal and professional fees paid to an architect is for the purpose of construction of building and is capital in nature. Before the lower authorities, assessee could not show that how the architect fee paid is not a capital expenditure. In view of this ground number 2 of appeal of assessee is dismissed.

10. Ground number 3 is with respect to conformation of disallowance of ₹ 2 372070/– u/s 40 (a) (ia) of the income tax act. Facts leading to above disallowance shows that assessee has debited advertisement and interest expenditure on which tax has not been deducted at source. The learned assessing officer enquired that why disallowance should not be made for failure to deduct tax at source. It was stated by the learned authorized representative that the loan was taken by the company through Mr. Lakhani and interest is directly paid to the bank and not to Mr . Lakhani. The learned AO did not believe the explanation of assessee and held that even if the loan is taken by Mr. PD Lakhani which has been given to the assessee, it is not material that interest has been paid directly by the assessee to the bank. Therefore he disallowed the amount of interest on which no tax has been deducted by the assessee of ₹ 1 575000/–. Further, with respect to the various expenditure on advertisement, the assessee could not explain why tax has not been deducted and therefore it was disallowed by the AO. On appeal, assessee reiterated the same submission. ld. CIT (A) confirmed the disallowance. Therefore, it is agitated by ground number 3.

11. We have carefully considered the contentions raised by the assessee before the lower authorities as well as the arguments of the learned Department representative. In the present case the assessee has paid interest on loan borrowed from Mr. PD Lakhani without deducting tax at source of ₹ 1575000/–. It is apparent that Mr. PD Lakhani was merely a conduit to circumvent problem of financial crisis and closure of the business. Mr. Lakhani borrowed the sum, from bank it was deposited with the company, and interest was paid by assessee to Mr. PD Lakhani

however, on behalf of Mr. PD Lakhani the assessee paid same amount to the loan account of Mr. PD Lakhani with the bank. Merely because the same amount has been deposited by the assessee in the bank account of the lender to the assessee but borrower of the bank does not make any difference as assessee has incurred an interest expenditure of ₹ 1 575000/– on which tax was required to be deducted u/s 194A of the act. In view of this, we do not find any infirmity in the order of the learned CIT (A) in confirming the above disallowance. With respect to the advertisement expenditure assessee could not give any explanation why tax has not been deducted on the same amount therefore in absence of any explanation disallowance require to be confirmed. Accordingly, ground number 3 of appeal of assessee is dismissed.

12. Ground number 4 is with respect to disallowance u/s 14 A of the income tax at 1961 of ₹ 380023/– confirmed by the learned CIT (A). Facts leading to above disallowance shows that assessee has made investment in shares of various companies. Above investment has been shown as a capital investment and capitalized the interest on investment. However several other expenditure incurred in the form of establishment etc, assessee has not disallowed any sum u/s 14 A of the income tax act. As no expenses were disallowed by the assessee, learned assessing officer asked the assessee that why disallowance should not be made u/s 14 A of the income tax Act . Assessee submitted that investments were made in group companies for promotion of business or commercial expediency and therefore provisions of section 14 A do not apply. The learned assessing officer did not believe explanation and noted that 0.5% of the average investment of ₹ 7 6004625/– is worked out at ₹ 380023/– in terms of rule 8D and therefore same is thus allowed. The matter reached before the learned Commissioner of income tax (Appeals) who confirmed above disallowance.

13. We have carefully considered the contentions raised by the assessee before the lower authorities as well as the arguments of the learned

departmental representative. In the present case assessee has made investment in several group companies and stated that provisions of section 14 A of the act does not apply as these are all investment in group companies for the purpose of business expediency of the assessee. It is not the case where the assessing officer has disallowed any interest expenditure u/s 14 A of the act only issue involved is whether 0.5% of the average investment made by the assessee in these companies is required to be disallowed u/s 14 A of the income tax act or not. Such an contention has already been negatived by the Hon'ble Supreme Court in case of 402 ITR 640 holding that the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessees would apply while interpreting section 14A or one has to go by the theory of apportionment. The dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure, which is attributable to the dividend income, has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind section 14A in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle, which is engrained in section 14A of the act. In view of this, we reject the contention raised by the assessee before the lower authorities and confirm the finding of the learned CIT (Appeals) in confirming the disallowance on account of expenditure at the rate of 0.5% of average value of investment on investments u/s 14A of the Act . Accordingly ground number 4 of appeal is dismissed.

14. Accordingly appeal of assessee is dismissed.

15. Now we come to appeal of the revenue. Learned assessing officer has challenged the action of the learned CIT – A in deleting the disallowance of ₹ 3559022. As this is the only issue involved in the appeal of the revenue and the tax effect in the issue of the appeal is less than ₹ 2,000,000/– .

16. At the time of framing the order of the appeal, it is noticed that Section 268A has been inserted by the Finance Act, 2008 with retrospective effect from 01/04/99. The said section 268 of the Act provides that the Board may issue instruction or directions to the other income-tax authorities fixing monetary limits for not filing the appeals before the Appellate Tribunal or the Courts; said instructions/directions are binding on the income tax authorities. It is noticed that the CBDT has issued ***Circular No. 3*** of 2018 dated 11.07.2018, vide which it has revised the monetary limit to Rs. 20,00,000/- for not filing the appeal before the Tribunal, the said circular reads as under:

"Subject: Revision of monetary limits for filing of appeals by the Department before Income Tax Appellate Tribunal, High Courts and SLPs/appeals before Supreme Court measures for reducing litigation-Reg.

*Reference is invited to Board's **Circular No. 21** of 2015 dated 10.12.2015 wherein monetary limits and other conditions for filing departmental appeals (in Income-tax matters) before Income Tax Appellate Tribunal, High Courts and SLPs/appeals before Supreme Court were specified.*

2. In supersession of the above Circular, it has been decided by the Board that departmental appeals may be filed on merits before Income Tax Appellate Tribunal and High Courts and SLPs/appeals before Supreme Court keeping in view the monetary limits and conditions specified below.

3. Henceforth, appeals/SLP

S No	***Appeals/SLPs in Income-tax matters***	***Monetary Limit (in Rs)***
1	*Before Appellate Tribunal*	*20,00,000/-*
2	*Before High Court*	*50,00,000/-*
3	*Before Supreme Court*	*1,00,00,000/-*

s shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

4. For this purpose, 'tax effect' means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as 'disputed issues). Further, 'tax effect' shall be tax including applicable surcharge and cess. However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, appeals shall be filed in respect of all such assessment years even if the tax effect is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which tax effect exceeds the monetary limit prescribed. In case where a composite order/judgement involves more than one assessee, each assessee shall be dealt with separately.

6. Further, where income is computed under the provisions of section 115JB or section 115JC, for the purposes of determination of 'tax effect', tax on the total income assessed shall be computed as per the following formula-

(A - B) + (C - D)

where,

A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);

B = the total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of the disputed issues under general provisions;

C = the total income assessed as per the provisions contained in section 115JB or section 115JC;

D = the total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 1I5JCwas reduced by the amount of disputed issues under the said provisions:

However, where the amount of disputed issues is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D.

7. In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Pr. Commissioner of Income-tax/Commissioner of Income Tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this Circular". Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits.

8. In the past, a number of instances have come to the notice of the Board, whereby an assessee has claimed relief from the Tribunal or the Court only on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the assessee for any other assessment year or in the case of any other assessee for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives/counsels must make every effort to bring to the notice of the Tribunal or the Court that the appeal in such cases was not filed or not admitted only for the reason of the tax effect being less than the specified monetary limit and, therefore, no inference should be drawn that the decisions rendered therein were acceptable to the Department. Accordingly, they should impress upon the

Tribunal or the Court that such cases do not have any precedent value and also bring to the notice of the Tribunal/Court the provisions of sub section (4) of section 268A of the Income-tax Act, 1961 which read as under :

"(4) The Appellate Tribunal or Court, hearing such appeal or reference, shall have regard to the orders, instructions or directions issued under sub-section (1) and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case."

9. As the evidence of not filing appeal due to this Circular may have to be produced in courts, the judicial folders in the office of Pr. CsIT/CsIT must be maintained in a systemic manner for easy retrieval.

10. Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect:

(a) Where the Constitutional validity of the provisions of an Act or Rule is under challenge, or

(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra fires, or

(c) Where Revenue Audit objection in the case has been accepted by the Department, or

(d) Where the addition relates to undisclosed foreign assets/bank accounts.

11. The monetary limits specified in para 3 above shall not apply to writ matters and Direct tax matters other than Income tax. Filing of appeals in other Direct tax matters shall continue to be governed by relevant provisions of statute and rules. Further, in cases where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12A/ 12AA of the IT Act, 1961 etc., filing of appeal shall not be governed by the limits specified in para 3 above and decision to file appeals in such cases may be taken on merits of a particular case.

12. It is clarified that the monetary limit of Rs. 20 lakhs for filing appeals before the ITAT would apply equally to cross objections under section 253(4) of the Act. Cross objections below this monetary limit, already filed, should be pursued for dismissal as withdrawn/not pressed. Filing of cross objections below the monetary limit may not be considered henceforth. Similarly, references to High Courts and SLPs/ appeals before Supreme Court below the monetary limit of Rs. 50 lakhs and Rs. 1 Crore respectively should be pursued for dismissal as withdrawn/not pressed.

References before High Court and SLPs/appeals below these limits may not be considered henceforth.

13. This Circular will apply to SLPs/appeals/cross objections/references to be filed henceforth in SC/HCs/Tribunal and it shall also apply retrospectively to pending SLPs/appeals/cross objections/references. Pending appeals below the specified tax limits in pare 3 above may be withdrawn/not pressed.

14. The above may be brought to the notice of all concerned.

15. This issues under Section 268A of the Income-tax Act 1961."

17. Subsequently above circular was modified on 20/8/2018 as under :-

LETTER [F.NO.279/MISC.142/2007-ITJ (PT)], DATED 20-8-2018

Kindly refer to the above.

2. The monetary limits for filing of appeals by the Department before Income Tax Appellate Tribunal, High Courts and SLPs/appeals before Supreme Court have been revised by Board's Circular No. 3 of 2018 dated 11.07.2018.

3. Para 10 of the said Circular provides that adverse judgments relating to the issues enumerated in the said para should be **contested on merits** notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 thereof or there is no tax effect. Para 10 of the Circular No. 3 of 2018 dated 11.07.2018 is hereby amended as under:

*"10. Adverse judgments relating to the following issues should be **contested on merits** notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect:*

a) *Where the Constitutional validity of the provisions of an Act or Rule is under challenge, or*

(b) *Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or*

(c) *Where Revenue Audit objection in the case has been accepted by the Department, or*

(d) *Where addition relates to undisclosed foreign income/undisclosed foreign assets (including financial assets)/undisclosed foreign bank account.*

(e) *Where addition is based on information received from external sources in the nature of law enforcement agencies such as CBI/ED/DRI/SFIO/Directorate General of GST Intelligence (DGGI).*

(f) *Cases where prosecution has been filed by the Department and is pending in the Court."*

4 . The said modification shall come into effect from the date of issue of this letter.

5. The same may be brought to the knowledge of all officers working in your region.

18. Learned departmental representative could not show us that appeal of the learned assessing officer false into any of the exceptions carved out in para number 10 of the circular. We have also on our own referred to the orders of the lower authorities and could not find that appeal of the learned assessing officer is covered by para number 10 of the revised circular.

19. From Clause 12 & 13 of the above said circular it is clear that these instructions are applicable to the pending appeals also and as per clause 13, there is clear cut instruction to the department to withdraw or not to press the appeals filed before the ITAT wherein tax effect is less than Rs.

20,00,000/-. These instructions are operative retrospectively to the pending appeals.

20. Keeping in view the CBDT ***Circular No. 3*** of 2018-dated 11.07.2018 subsequently modified on 21/8/2018 and the provisions of Section 268A of Income Tax Act, 1961, we are of the view that above appeal of the learned assessing officer cannot survive.

21. In the result, the appeal of the ld. AO is dismissed.

22. In the result appeal of the assessee as well as of the learned assessing officer are dismissed.

Order pronounced in the open court on 10/09/2018.

-Sd/-	-Sd/-
(AMIT SHUKLA) JUDICIAL MEMBER	(PRASHANT MAHARISHI) ACCOUNTANT MEMBER

Dated:10/09/2018
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi