

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

PRESENT :

THE HON'BLE CHIEF JUSTICE T.S SIVAGNANAM

And

THE HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)

ITAT/89/2025
IA NO: GA/2/2025

PRINCIPAL COMMISSIONER OF INCOME TAX 1, KOLKATA
VS
M/S ITC LTD

For Appellant : Mr. Prithu Dudhoria, Advocate

For Respondent : Mr. J.P. Khaitan, Senior Advocate
Ms. Nilanjana Banerjee Pal, Advocate

Heard on : July 21, 2025

Judgment on : July 21, 2025

1. **T.S. SIVAGNANAM, CJ :** This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated May 10, 2024 passed by the Income Tax Appellate Tribunal "C" Bench, Kolkata (the Tribunal) in ITA No.1068/Kol/2017 & 1222/Kol/2017, both relating to the Assessment Year 2010-11. Two appeals have been filed before the learned Tribunal – one by the assessee and the other by the revenue which have been disposed of by a common order, impugned in this appeal.
2. The revenue has raised the following substantial questions of law for consideration :

- (a) Whether the Learned Income Tax Appellate Tribunal was justified in law in holding that the foreign payment amounting to Rs.7,28,07,989/- had been made on account of export commission inasmuch as such conclusion had been reached without ascertaining the true nature and purpose of the foreign payments and without appreciating that the said payments were not supported by any evidence including evidence of services rendered, tax residency certificates, PE declaration etc.?*
- (b) Whether the Learned Income Tax Appellate Tribunal has committed substantial error of law by rendering a judgment contrary to the decision rendered by this Hon'ble Court in the case of CIT Vs. Andaman Sea Food Pvt. Ltd. (ITAT No.19 of 2013) ?*
- (c) Whether the Learned Income Tax Appellate Tribunal was justified in law in holding that market to market (MTM) Loss of Rs.99.96 lacs was real in nature and not notional, inasmuch as such conclusion had been reached by the learned Tribunal without considering the CBDT instruction number 3/2010 and without appreciating that, the assessee company itself reversed the notional debit on the immediately succeeding day and that the assessee had itself refrained from offering to tax the MTM gain resulting on other receivable/payables treating the same to be notional in nature?*
- (d) Whether the Learned Income Tax Appellate Tribunal was justified in deleting the addition of Rs.1,49,54,059/- by holding that the same being liquidated damages received from the suppliers on account of delayed installation of machineries and delayed construction of*

building was a capital receipt without examining the nature, specific terms and conditions of each of the contracts?

- (e) Whether the Learned Income Tax Appellate Tribunal was justified in presuming that the investment in tax free securities were made out of own interest free fund and thereby deleting the disallowance of Rs.21,16,23,729/- of interest in terms of Section 14A of the Income Tax Act, 1961 read with Rule 8D (2)(ii) of the Income Tax Rules 1962, without considering the fact that the assessee was having interest bearing borrowings which were used for mixed purposes including investment and without appreciating the effect of the clarificatory amendment brought in by insertion of Explanation to Section 14A of the Act by the Finance Act, 2022 ?*
- (f) Whether the Learned Income Tax Appellate Tribunal was justified in law in holding that the advances written off amounting to Rs.1,49,00,000/- to be in the nature of business loss without considering that the provisions for doubtful debts/advances were made on estimated basis is not an admissible expenditure?*
- (g) Whether the Learned Income Tax Appellate Tribunal was justified in law in allowing the interest paid on income tax of Rs.25,39,625/- as an allowable deduction without considering the fact that the same is neither eligible for deduction under section 40a(ii) nor allowable as business expenditure under any provision of the Act, including Section 37(1) of the Act being the personal liability of the assessee?*

(h) Whether the Learned Income Tax Appellate Tribunal was justified in law in admitting fresh claim of ESOP raised by the assessee which was not made in the return of income and in the course of assessment and which involved fresh introduction and investigation of facts in the light of decision of the Hon'ble Supreme Court in the case of Shriram Investments Vs. CIT (167taxmann.com139) ?

(i) Whether the Learned Income Tax Appellate Tribunal was justified in law in treating the expenditure of Rs.27,38,000/- incurred for registering new patents or registering existing patents in new countries as revenue expenditure without considering the nature of expenditure incurred for acquiring or improving valuable capital asset being intangible asset as defined in Section 2(11) of the Act which would qualify for capital expenditure only?

3. We have heard Mr. Prithu Dudhoria, learned standing Counsel for the appellant/revenue and Mr. J.P. Khaitan, learned Senior Counsel assisted by Ms. Nilanjana Banerjee Pal, learned Advocate for the respondent/assessee and carefully considered the materials placed on record.
4. The assessee filed their return of income for the assessment year under consideration A.Y. 2010-2011 on 30.09.2010 showing the total income of Rs. 61,09,14,46,480/- and book profit under Section 115JB at Rs. 5883,58,39,895/-. Subsequently, the assessee filed revised return on 30.03.2012 showing the total income of Rs. 58,19,55,22,380/- and book profit under Section 115JB at Rs. 59,03,41,20,702/-. The case was selected

for scrutiny and notices under Section 143(2) of the Act was issued on 30.08.2011. Subsequently, notice under Section 142(1) was issued along with a questionnaire.

5. The assessee company is engaged in the business of (i) manufacture and sale of cigarettes and smoking tobacco in domestic and export market; (ii) development projects, process and sale of unmanufactured tobacco for export and domestic market; (iii) manufacture and sale of printed and packaged materials including educational and other stationary products for export and domestic market; (iv) hotels business; (v) branded packaged food business; (vi) agri commodity, marine products etc. for both domestic and export market; (vii) manufacture and sale of wide range of speciality papers and paper board for various applications; (viii) other business include garments and accessories personal care products, agarbattis, matches and other infrastructure business namely generation of electricity from TG and windmill and steam power for captive consumption etc.
6. During the financial year 2009-2010 relevant to the assessment year 2010-2011, the assessee company had carried out certain international transactions within the meaning of Section 92B of the Act with associated enterprises. The said international transactions were referred to Transfer Pricing Officer (TPO) for determination of Arm's Length Price and adjustment, if any, and by order dated 30.01.2024, TPO did not make any transfer pricing adjustment. Thereafter the assessing officer called for various details and the matter was discussed with the assessee. The issue which was considered by the assessing officer are with regard to the

unexpired discount on forward contracts, market to market loss of forward contracts, designed charges, non-deduction of TDS for information technology expense, information technology expense, patent registration charges, advances written off, excise duty debited to profit and loss account, disallowance under Section 40(a) for payment made for export commission, disallowance under Section 40(a) for payment made to foreign parties, bogus purchases, liquidated damages, income tax interest expense, commission to non-executive directors, disallowance under Section 14A read with Rule 8D, deduction under Section 801A, deduction under Section 80IC. The assessment was completed under Section 143(3) of the Act by order dated 29.03.2014. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) 2, Kolkata. The appeal was partly allowed by order dated 27.03.2017. Challenging the said order, the assessee as well as the revenue preferred appeals before the learned tribunal and by the impugned order, the appeals filed by the revenue was dismissed, and the appeal filed by the assessee was partly allowed. The learned tribunal had passed the impugned order in four appeals which were heard analogously for two assessments years i.e. 2010-2011, 2011-2012. The present appeal is against the order passed by the learned tribunal in respect of the assessment year 2010-2011 in ITA No. 1068/Kol/2017 (filed by the assessee) and ITA No. 1222/Kol/2017 (filed by the revenue).

7. The revenue would contend that the learned Tribunal was not justified in holding that the foreign payment amounting to Rs.7,28,07,989/- had been

made on account of export commission inasmuch as such conclusion had been reached without ascertaining the true nature and the purpose of the foreign payment without appreciating that the payments were not supported by any evidence including evidence of services rendered, tax residency certificate, PE declaration etc. The revenue further would contend that the learned Tribunal ought to have taken note of a decision of this Court in the case of *CIT vs. Andaman Sea Food Pvt. Ltd.* (ITAT/19/2013) dated July 23, 2014.

8. The assessee's contention was that in the light of the decision of the Hon'ble Supreme Court in *CIT vs. Toshoku Ltd.* (1980) 125 ITR 525 (SC) as also CBDT Circulars, such export commission paid to non-residents for services rendered abroad without carrying out any business operations in India was not taxable in India. As could be seen from the assessment order, the Assessing Officer held against the assessee on the ground that the previous CBDT's Circulars which were in favour of the assessee were withdrawn by Circular No.7/2009 dated October 23, 2009 and therefore, the Assessing Officer held that export commission payment had become taxable from the financial year 2009-10. In support of his conclusion, a reference was made to the decision of the Authority for Advance Ruling in the case of *SKF Boilers & Driers (P) Ltd.* (2012) 343 ITR 385 (AAR).
9. It is not in dispute that the decision of the Hon'ble Supreme Court in *Toshoku Ltd.* holds the field. This was taken note of by the Tribunal since it was not in dispute that the non-resident commission agents did not carry out any activity in India and the entire services were provided abroad. With

regard to the effect of withdrawal of circulars, the Tribunal held that it can have no effect in the light of the statutory provisions, namely Section 9(1)(i) and Explanation 1 to the Section which provided that income deemed to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried in India. With regard to the decision relied on by the Assessing Officer/revenue in the case of *Andaman Seafood Pvt. Ltd.*, the same is distinguishable and not applicable to the facts of the present case because it was rendered in respect of a payment for expert guidance and consultancy in relation to the foreign exchange derivative transactions to which Section 9(1)(vii) was applicable and the applicability of the double taxation avoidance agreement between India and Singapore was involved. This aspect is evident from perusing the decision of the Division Bench in the case of *Andaman Seafood Pvt. Ltd.* more particularly, substantial question of law therein which related to forex derivative transactions whether it is chargeable to tax in India under Section 9(1)(vii). Therefore, the Tribunal rightly distinguished the said decision. Accordingly, the substantial questions of law (a) and (b) are answered against the revenue.

10. Substantial question of law (c) pertains to liability of market to market loss of Rs.99.96 lacs on forward contracts. We note that this issue is squarely covered in favour of the assessee in the light of the decision of this Court in *Principal Commissioner of Income Tax-I, Kolkata vs. M/s. Pricewaterhouse Coopers Pvt. Ltd., in 2021 (12) TMI 1400 (Cal)*. In the said decision, the Court took into consideration the CBDT Circular dated 23.3.2010 and held

that it is not possible for the Board to give any direction to the Assessing Officer as the Board under law cannot issue any positive direction as the settled legal principle is that the Assessing Officer is an independent authority and none can dictate him as to how and in what manner he is to complete the assessment. Conscious of this legal position, the Board in the instruction dated 23.3.2010 had stated that the Assessing Officer may “follow the guidelines given in the instruction”, which is also one more indication to show that the Assessing Officer is not bound by the instruction given by the Board. That apart, the CBDT instruction cannot override the decision of the Hon’ble Supreme Court. Therefore, the substantial question of law (c) is answered against the revenue.

11. The next substantial question of law, namely, question (d) pertains to liquidated damages of Rs.1,49,54,059/- received from suppliers as compensation for failure to deliver installed machineries/complete construction of building within the stipulated time. On this issue the Assessing Officer was of the view that such liquidated damages were in the nature of regular business income and further, the assessee had not adjusted the amount against block of capital assets. The Commissioner of Income Tax (Appeals) [CIT(A)] agreed with the Assessing Officer. When the matter travelled to the Tribunal, the Tribunal, in our view, rightly took note of the decision of the Hon’ble Supreme Court in Commissioner of Income Tax Vs. Saurashtra Cement Ltd., reported at [2010] 325 ITR 422 (SC) wherein the Hon’ble Supreme Court held as follows :

“We have considered the matter in the light of the aforementioned broad principle. It is clear from clause No. 6 of the agreement dated September 1, 1967, extracted above, that the liquidated damages were to be calculated at 0.5 per cent. of the price of the respective machinery and equipment to which the items were delivered late, for each month of delay in delivery completion, without proof of the actual damages the assessee would have suffered on account of the delay. The delay in supply could be of the whole plant or a part thereof but the determination of damages was not based upon the calculation made in respect of loss of profit on account of supply of a particular part of the plant. It is evident that the damages to the assessee was directly and intimately linked with the procurement of a capital asset, i.e., the cement plant, which would obviously lead to delay in coming into existence of the profit-making apparatus, rather than a receipt in the course of profit earning process. Compensation paid for the delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee as supplier had failed to supply the plant within time as stipulated in the agreement and clause No. 6 thereof came into play. The aforesaid amount received by the assessee towards compensation for sterilization of the profit earning source, not in the ordinary course of their business, in our opinion, was a capital receipt in the hands of the assessee. We are, therefore, in agreement with the opinion recorded by the High Court on questions Nos. (i) and (ii) extracted in paragraph 1 (supra) and hold that the amount of Rs. 8,50,000 received by the assessee from the suppliers of the plant was in the nature of a capital receipt.”

12. The Tribunal rightly applied the above legal position and held that the supplier delayed in coming into existence of profit making apparatus and the liquidated damages paid by the supplier for such delay was in capital receipt and not the receipt in the regular course of business and that the liquidated damages were not to be reduced from the cost of the assessee.

The finding rendered by the Tribunal reflects the correct position and, accordingly, substantial question of law (d) is decided against the revenue.

13. The next substantial question of law (e) is with regard to disallowance under Section 14A read with Rule 8D to the tune of Rs.21,16,23,729/-. The Assessing Officer made the disallowance on account of interest paid by invoking Rule 8D(2)(ii) and the rest of disallowance being under Rule 8D(2)(iii). We find that the Assessing Officer lost sight of the fact that a sum of Rs.83,98,00,000/- was actually net interest income earned by the assessee. In other words, the assessee's net interest income was greater than its interest expenditure of Rs.83,98,00,000/-. When the assessee challenged this disallowance by way of an appeal, the Appellate Authority deleted the disallowance of interest since the assessee had net interest income. When the matter travelled to the Tribunal, the Tribunal rightly took note of the decision in the case of South Indian Bank Limited Vs. DCIT, reported at [2021] 438 1 (SC) wherein the Hon'ble Supreme Court held that if investments in securities were made out of common funds and the assessee had available, non-interest bearing funds larger than the investments in tax-free securities, disallowance under Section 14A could not be made. Furthermore, there was no statutory provision which obligated the assessee to maintain separate accounts which may justify proportionate disallowance. The nexus between expenditure disallowed and earning of exempt income had not been established. The disallowance under Section 14A of the Act for the investment made by the assessee in bonds and shares, would be legally impermissible. With regard to the

expenditure incurred in relation to investments capable of exempt income, the Tribunal found that the assessee's apportionment of such expenditure of Rs.45,14,500/- was reasonable and accepted the same in the light of the decision of the co-ordinate Bench of the Tribunal in the case of Ultratech Cement Ltd. Vs. DCIT (ITA Nos.5065, 7614, 5107 and 7631/Mum/2014 relating to the assessment years 2009-10 and 2010-11 dated April 5, 2017). The said order passed by the co-ordinate Bench dated April 5,2017 was followed in the decision in Ultratech Cement's case for the assessment year 2008-09 reported in 2014(4) TMI 663. Against the said decision of the learned Tribunal, the revenue preferred an appeal before the High Court of Bombay but the question relating to disallowance under Section 14A was not admitted since the finding of the Tribunal that the apportioned expenditure was reasonable was one of fact and was not shown to be perverse in any manner.

14. In the substantial question of law which has been framed the revenue has referred to the clarificatory amendment brought in by insertion of explanation to Section 14A of the Act by Finance Act, 2022. The reference to the explanation inserted in 14A of the Finance Act, 2022 can be of no consequence as the assessee before us has worked out disallowance of Rs.45,14,500/- with reference to all its investment capable of leading exempt income and not only those which, accordingly, yielded exempt income. Thus, the finding recorded by the learned Tribunal in respect of disallowance under Section 14A read with Rule 8D does not call for any

interference. Accordingly, the substantial question of law (e) is answered against the revenue.

15. The next substantial question of law is with regard to advance of Rs.1,49,00,000/- given to 6256 farmers in earlier years which were written off. In this regard, the CIT granted relief to the assessee after calling for a remand report from the assessing officer, as to support the disallowance only on the ground that the advance was never credited to the profit and loss account and cannot be claimed as deduction upon write off. The CIT(A) held that the advances given were in the nature of trade advances and were not profitable. The learned Tribunal had agreed with the finding recorded by the CIT(A). Thus, we find that there is no substantial question of law arising for consideration on this aspect.

16. The next substantial question of law suggested by the revenue is with regard to set off incomes in excess of Rs.25,39,625/- against the interest paid on income revised. In this regard, the Tribunal had followed the decision of the High Court of Bombay in the case of *The Director of Income Tax (International Taxation) Vs. Bank of America NT and SA Income Tax Appeal No. 177 of 2012 dated 3rd July, 2014*. In the said decision while affirming the view taken by the learned Tribunal it was held that where interest was paid to and received from the same party (in the instant case primarily from the Income Tax Department), both transactions should be taken together and the amount of interest paid by the assessee should be allowed to be set off interest paid by the department and tax in the case of

the assessee. Therefore, the finding recorded by the learned Tribunal in this regard does not call for any interference.

17. The revenue placed reliance on the decision of the Hon'ble Supreme Court in *Shriram Investments Vs. Commissioner of Income Tax reported in [2024] 167 taxmann. Com 139(SC)*. The said decision cannot be applied to the facts and circumstances of this case as the Hon'ble Supreme Court was dealing with the case where the Tribunal did not exercise its power under Section 254 of the Act to consider the claim made by the assessee, instead directed the assessing officer to consider the appellant's claim when the assessing officer had no jurisdiction to consider the claim made by the assessee in the revised return filed after the time prescribed under Section 139(5) for filing a revised return had already expired. Therefore, the decision in *Shriram Investments(Supra)* can be of no assistance to the case of the revenue.

18. With regard to this issue, we find that the learned Tribunal took note of the decision of the Coordinate Bench in the assessee's own case for the assessment year 2009-10 and assigned reasons to admit the question raised before the learned Tribunal for the first time and also observed the claim made is admittedly and undoubtedly allowable to the assessee and restored the same for adjudication before the assessing officer after doing verification of the facts and decide the same.

19. The next question of law suggested is with regard to fresh claim to Employee Stock Option Plan (ESOP) which was raised for the first time

before the learned Tribunal. We find there is no question much less substantial question of law arises for consideration on this issue.

20. The last substantial question of law suggested by the revenue is as regards patent registration charges. The revenue cannot dispute the fact that this issue is squarely covered by the decision of the Hon'ble Supreme Court in *Commissioner of Income Tax, Bombay Vs. Finlay Mills Limited* wherein Supreme Court held as follows:-

“By registration, the owner is absolved form the obligation to prove his ownership of the trade mark. It is treated as prima facie proved on production of the registration certificate. It thus merely saves him the trouble of leading evidence, in the event of a suit, in a court of law, to prove his title to the trade mark. It has been said that registration is in the nature of collateral security furnishing the trader with a cheaper and more direct remedy against infringers. Cancel the registration and he has still his right enforceable at common law to restrain the piracy of his trade mark. In our opinion, this is neither such an asset nor an advantage so as to make payment for its registration a capital expenditure.”

21. The other decision in favour of the assessee on the same issue is in the case of *Dalmia Jain and Co. Ltd. Vs. Commissioner of Income-Tax, Bihar and Orissa* reported in 1971(81) ITR 754, wherein the Hon'ble Supreme Court held as follows:

“The principle which has to be deduced from decided cases is that, where the expenditure laid out for the acquisition or improvement of a fixed capital asset is attributable to capital, it is a capital expenditure but if it is incurred to protect the trade or business of the assessee then it is a revenue expenditure. In deciding whether a particular

expenditure is capital or revenue in nature, what the courts have to see is whether the expenditure in question was incurred to create any new asset or was incurred for maintaining the business of the company. If it is the former it is the capital expenditure; if it is the latter, it is the revenue expenditure.”

22. Thus, the Tribunal rightly held that legal expenses incurred for the purpose of protecting the assessee's business was a revenue's expenditure. Accordingly, this question of law is answered against the revenue.

23. For all the above reasons, the appeal fails and stands dismissed and the substantial questions of law are answered against the revenue and two of the substantial questions of law which were suggested we find neither question of law nor substantial question of law arises for consideration.

24. Accordingly, the application stands closed.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

I agree.

(CHAITALI CHATTERJEE (DAS), J.)