

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI**

श्री चंद्र पूजारी, लेखा सदस्य एवं श्रीजी. पवन कुमार, न्यायिक सदस्यकेसमक्ष

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No.829/Mds/2016

निर्धारण वर्ष /Assessment year : 2011-2012

The Deputy Commissioner of
Income Tax,
Corporate Circle 1(2)
Chennai 600 034.

Vs.

M/s. Chettinad Builders Pvt. Ltd,
Rani Seethai Hall, 5th Floor,
No.603, Anna Salai,
Chennai 600 006.

(अपीलार्थी/Appellant)

[PAN AACCC 4133B]

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Shri. Shiva Srinivas, IRS, JCIT.
: Shri. K.B. Muralidaran, C.A.

सुनवाई की तारीख/Date of Hearing

: 22-08-2016

घोषणा की तारीख /Date of Pronouncement

: 08-09-2016

आदेश / ORDER

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The appeal filed by the Department is directed against order of the Commissioner of Income-tax (Appeals)-1, Chennai in ITA No.32/14-15/A-1, dated 29.12.2015 for the assessment year 2011-2012 passed u/s.143(3) and 250 of the Income Tax Act, 1961 (herein after referred to as 'the Act').

2. The Revenue has raised the following grounds of appeal:-

2.1 The learned CIT(A) erred in deleting the disallowance made u/s.14A of Rs. 35,00,000/-.

2.2 The learned CIT(A) ought to have appreciated the fact that the decision of the Jurisdictional ITAT in the case of EIH Associated Hotels in ITA NO.1503/Mds/20 12 for A.Y.2008-09 dated 17-07-2013 has not been accepted by the department and appeal u/s.260A has been preferred which is pending before the Hon'ble High Court.

2.3 The learned CIT(A) ought to have appreciated the Board's Circular No.5/2014 dated 11-02-2014 wherein it is stated that disallowance u/s. 14A can be made even in cases where the taxpayer has not earned exempt income in any particular.

3.1 The learned CIT(A) erred in directing the Assessing Officer to allow additional depreciation on plant and machinery to the tune of Rs.62,63,733/-

3.2 The learned CIT(A) failed to note that the additional depreciation is available for those engaged in the manufacture of production .and the instant assessee company is engaged in the business of civil construction.

3.3 The learned CIT(A) failed to appreciate the Apex Court's decision in the case of N.C. Budharaja & Company reported in 204 ITR 412 (SC) the facts of which is squarely applicable to the facts of the assessee company wherein it was held that production of ready mix concrete does not amount to 'manufacture' as defined u/s.32(1)(iia).

3.4 The learned CIT(A) ought to have appreciated the decision of the Apex Court in the case of Builders Association of India vs. UOI reported in 209 ITR 877 (SC) and the Allahabad High Court's decision in the case of Agra construction Corporation reported in 146 Taxman 31 which are favourable to revenue.

3.5 The learned C1T(A) ought to have appreciated the fact that the on similar issue for A.Y.2009-10 in the assessee's own case, the department has filed appeal before the Hon'ble High Court. Since the issue has not reached finality, filing further appeal is necessitated on this issue.

4.1 The learned C1T(A) erred in allowing the deduction u/s.80IA of the Act.

4.2. The learned CIT(A) erred in not appreciating the fact that the loss on account of depreciation on windmills in earlier years. had to be set off notionally against the deduction as per Section 801A(S) as per the Special Bench decision of Ahmedabad Tribunal in the case of M/s.Goldmine Shares & Finance Private Ltd (2008) 113 1TD 209.

4.3 The learned CIT(A) ought to have- appreciated the fact that the decision of the jurisdictional High Court in the case of Velayudhaswamy Spinning Mills Private Limited (2012) (38 DTR 57) (340 1TR 477) has not been accepted by the department and SLP has been filed before the Hon'ble Supreme Court”.

3. The Brief facts of the case that the assessee company is engaged in Civil construction and industrial constructions, construction of IT Parks and Hotels and manufacturing and selling of ready mix concrete and filed Return of income electronically on 30.09.2011 with total income of ₹12,51,60,370/-. Subsequently Revised Return of income was filed on 23.12.2011 with total income of ₹12,50,59,350/- and notice u/s.143(2) of the Act was issued and the Id. Assessing Officer also called for information. The Id. Authorised Representative appeared from time to time and filed the details and the Id. Assessing Officer found from the financial statements that the assessee company has made investments in M/s. Chettinad Cement Corporation Ltd ₹69,99,99,940/- being group concern and no expenditure was disallowed as per provisions of Sec. 14A of the Act. Considering the submissions of the assessee and the Id. Assessing

Officer discussed elaborately on the applicability of provisions at page 2 to 5 order and computed disallowance u/sec. 14A r.w.s.8D (iii) ₹35,00,000/-. Aggrieved by the addition, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

3.1 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the grounds, submissions and relied on findings of the Id. Assessing Officer and observed at para 6 & 7 of the order as under:-

"6. I have carefully considered the facts in issue, the view taken by the AO, the arguments advanced by the appellant and material on record. The plea made by appellant that disallowance u/s.14A r.w. Rule 80 is not triqgered in view of the investments being made in sister concerns as also, that no dividend was. earned during the year. This proposition finds support in the decisions of the Jurisdictional IT T in the case of EIH Hotels Ltd v. DCIT, ITA No.1503 & 1624/Mds/2012 dated 17. 7.2013 chennai Tribunal), and jurisdictional Tribunal in ACIT vs. M Baskaran in ITA No.1717/Mds/2013 order dt. 31st of July, 2014. In Ell-I Hotels (supra) it was he Id by the ITAT that where investments were made by the assessee in the subsidiary company the same are not to earn capital gains or dividend income. They were made to promote the subsidiary company. The assessee not being in the business of investment, such investments were made on account of business expediency. The dividend earned by the assessee from investment in subsidiary company is purely incidental. Therefore the investment made by the assessee in its subsidiary are not to be reckoned for disallowance u/s 14A r.w. u/s 8D. In the decision of jurisdictional ITAT in DCIT v. MIs Amalgamations

Ltd in ITA No,811 &1712/Mds/2015 order dt. 16.9.2015), it was held similarly, reliance being placed in the ratio in EIH Associates Hotels v. CIT.

7. *In ACIT vs. M. Baskaran (supra) the facts related to the assessee which had not received any exempt income. The ITAT held therein that disallowance u/s.14A could not be sustained in such circumstances. In Chemivest Ltd vs. CIT 378 ITR 33 order dated 2.09.2015 in ITA No.749/2014, the Hon'ble Delhi High Court held that disallowance u/s.14A envisages that there should be a actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Sec. 14A will not apply if no exempt income is received or receivable during the relevant previous year".*

and deleted the addition. Aggrieved by the Commissioner of Income Tax (Appeals) order, the Revenue assailed an appeal before the Tribunal.

3.2 Before us, the Id. Departmental Representative argued that the Id. Commissioner of Income Tax (Appeals) erred in deleting the addition u/sec. 14A of the Act and the Revenue has filed appeal against the ITAT order of *EIH Associated Hotels Limited vs. DCIT in ITA No.1503/Mds/2012, dated 17.07.2013* in the jurisdictional High Court and Id. CIT(A) overlooked the Board Circular were the provisions

of Sec. 14A of the Act are applicable in cases where no exempted income received and prayed for setting aside the order of the Commissioner of Income Tax (Appeals).

3.3 Contra, the Id. Authorised Representative relied on the orders of the Id. Commissioner of Income Tax (Appeals) and vehemently opposed to the grounds.

3.4 We heard the rival submissions, perused the material on record and judicial decisions cited. The crux of the issue being the assessee has made investments in sister company and the contention that own funds are generated out of business and no borrowed funds were utilized for the purpose of investments. Further, investments in sister/group company shall not be considered for the purpose of calculation of disallowance under Rule 8D(2) and relied on judicial decisions. The assessee company made investments on Business expediency and no income has been generated by sister/group company. The provisions of Sec. 14A r.w.r. 8D are mandatorily applicable from assessment year 2008-09 but while calculating the disallowance u/sec. Rule 8D(2), the Id. Assessing Officer shall consider that the investments in group/ sister company are made in ordinary course of business. Similar issue was considered by the Tribunal in the

case of DCIT vs. M/s. Regen Powertech (P) Ltd. in ITA No.766 & 786/Mds /2016, assessment year 2011-12, dated 17.08.2016 at page 24, para 9.4 as under:-

9.4 We heard the rival submissions, perused the material on record and judicial decisions cited. The crux of the issue being the assessee has made investments in subsidiary/sister companies and the contention that own funds are generated out of business and no borrowed funds were utilized for the purpose of investments. Further, investments in subsidiary/sister company shall not be considered for the purpose of calculation of disallowance under Rule 8D(2). The Id. Authorised Representative drew our attention to the statement of details of subsidiary group companies and the investments reflected in financial statements and relied on judicial decisions. The assessee company made investments in these companies on Business expediency and no income has been generated by sister/group companies and also shareholding pattern varied from company to company. The provisions of Sec. 14A r.w.r. 8D are mandatorily applicable from assessment year 2008-09 but while calculating the disallowance u/sec. Rule 8D(2), the Id. Assessing Officer shall consider that the investments in subsidiaries are made in ordinary course of business. We found that there are no findings in the assessment order on this subsidiary/group companies which are considered as investments for calculating disallowance u/sec. 14A r.w.r.8D(2) and rely on the Co-ordinate Bench decision of M/s. Rane Holdings vs. ACIT, Chennai in ITA No.115/Mds/2015, dated 06.01.2016 were it was held as under:-

“Taking note of the above decisions and the decision of the Chennai bench of the Tribunal in ITA No.156/Mds/13 cited supra, we hereby remit the matter back to the file of Ld. Assessing Officer to examine the issue involved in this case afresh and pass appropriate order as per law and merits and in the light of the decisions cited herein above. While

doing so, we also direct the Ld. Assessing Officer to consider the decision of the Tribunal in the case M/s Agile Electric Sub Assembly Pvt. Ltd. cited supra wherein it was held as follows:-

7.2 In regard to applicability of Section 14A of the Act read with Rule 8D also; the above view will be applicable. Moreover in the case EIH Associated Hotels Ltd v. DCIT reported in 2013 (9) TMI 604 in ITA No.1503, 1624/Mds/2012 dated 17th July, 2013, it has been held by the Chennai Bench of the Tribunal as follows:-

“Disallowance U/s. 14A rw Rule 8D – CIT upheld disallowance – Held that – investments made by the assessee in the subsidiary company are not on account of investment for earning capital gains or dividend income. Such investments have been made by the assessee to promote subsidiary company into the hotel industry. A perusal of the order of the CIT(Appeals) shows that out of total investment of Rs.64,18,19,775/-, Rs.63,31,25,715/- is invested in wholly owned subsidiary. This fact supports the case of the assessee that the assessee is not into the business of investment and the investments made by the assessee are on account of business expediency. Any dividend earned by the assessee from investment in subsidiary company is purely incidental. Therefore, the investments made by the assessee in its subsidiary are not to be reckoned for disallowance U/s. 14A r.w.r. 8D. The Assessing Officer is directed to re-compute the average value of investment under the provisions of Rule 8D after deleting investments made by the assessee in subsidiary company – Decided in favour of assessee.”

For the above said reasons, we hereby hold that in the case of the assessee the provisions of Section 14A read with Rule 8D will not be applicable in regard to investments made for acquiring the shares of the assessee’s sister concerns. Accordingly we restrain ourselves from interfering with the Order of the Ld.CIT(A) on this regard.”

It is ordered accordingly’.

and we remit the disputed issue to the file of the Id. Assessing Officer to verify and exclude the investments in group companies for the purposes of calculation of disallowance under Sec. 14A r.w.Rule 8D(2)

and the assessee should be provided adequate opportunity of being heard before passing the order on merits. The ground of the Revenue is allowed for statistical purpose.

4. The next ground raised by the Revenue that the Id. Commissioner of Income Tax (Appeals) erred in deleting the additional depreciation on Plant and Machinery ₹62,63,733/-.

4.1 The Id. Assessing Officer found that assessee company has claimed depreciation on additions of ₹3,41,98,133/- to plant and machinery- RMC and issued show cause notice. In the assessment proceedings, the Id. Authorised Representative filed explanations referred at page 2, para 6.1. of the order as under:-

"Note on additional depreciation claimed in respect of mechneries used for production of Ready Mix Concrete (RMC):-

The assessee is engaged in manufacturing of ready mix concrete. The assessee procures necessary raw materials such as sand, crushed stone, cement, flyash and gypsum. These are poured into the batching plant in the desired proportion and properly mixed by using water. The plant is run for certain duration depending upon the desired mixture and product manufactured is mixed with another chemical called add-mixture. The final product after mixing has to be used

within specified time. The product produced is altogether a different product from the material out of which it was produced. The product produced is known by name "Ready Mix Concrete (RMC)" and is sold as such in the market. This final mixture is poured into the vehicles mounted with transit mixtures and are taken to construction sites in rotating condition so that the materials do not get solidified and maintained in proper condition to be used for construction purposes. The raw materials once mixed cannot be reconverted into their original shape and character. Thus, from the above process, it could be understood that the raw materials by themselves are independent products and gets transformed into a different product known as RMC with totally varied character. Thus the process involves a manufacturing activity and hence the assessee has claimed additional depreciation for the additions to fixed assets".

But the Id. Assessing Officer relied on judicial decisions and disallowed the claim of additional depreciation. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

4.2 In the appellate proceedings, the Id. Commissioner of Income Tax (Appeals) considered the grounds, submissions and findings of the Id. Assessing Officer and on similar issue for assessment year 2009-2010 observed at page 5 at para 11 of order as under:-

"11. I have carefully considered the facts in issue, the view taker by the AO, the arguments advanced by the appellant and material on record. Similar issue was considered by my predecessor in the case of the appellant for the AY. 2009-10 in ITA NO.373/13-14 dated 25.11.2013. Since the facts obtaining in the case of the appellant in the appeal under consideration are same; I do not find any reasons to take different view in the matter as taken in AY 2009-10. Respectfully following the same, the AO is directed to modify the order by deleting the addition of Rs.62,63,733/-. This ground of appeal is allowed".

The Id. Commissioner of Income Tax (Appeals) relying on the earlier year order directed the Id. Assessing Officer to allow the deduction. Aggrieved by the order, the Revenue assailed an appeal before the Tribunal.

4.3 Before us, the Id. Departmental Representative argued that the Id. Commissioner of Income Tax (Appeals) erred in deleting the addition, of additional depreciation, where such depreciation is allowed to entity engaged in manufacture or production but not civil construction works and relied on the Apex Court decision and other judicial decision where production of ready mix concrete does not amount to manufacture and the appeal is pending on similar issue and prayed for allowing the ground of the Revenue.

4.4 On the other hand, the Id. Authorised Representative relied on earlier year orders and supported the order of Commissioner of Income Tax (Appeals) and opposed to the grounds.

4.5 We heard the rival submissions, perused the material on record and judicial decisions cited. The assessee is in the business of Civil construction works and has claimed additional depreciation on ready mix concrete as the activity of assessee company cannot be manufacture or production to allow additional depreciation. The Id Departmental Representative argued that the Apex court decision squarely cover the case. On the other hand, the Id. Authorised Representative explained that similar issue of the assessee for earlier year was decided in assessee favour.. We perused the order of Id. Assessing Officer and activity of the assessee company engaged in the Business of manufacturing of readymix concrete and once the raw material is mixed which cannot be reconverted in shape. The Hon'ble Apex Court in the case of *CIT vs. N.C. Budharaja & Company 204 ITR 412 (SC)* has held that readymade mixed concrete cannot be in the nature of manufacture. We also find similar issue dealt in the case of *CIT vs. Agra Construction Corpn. (2005) 146 Taxmann 31 (All)* and *M/s. Cherian Varkey Construction Co. (P) Ltd vs. ACI in ITA No.25/Coch/2014, dated 20.03.2015 at para 20 & 21 of order as under:-*

"20. I have heard the rival submissions and perused the record. It is common knowledge that an uneducated mason does the work of preparation of readymix concrete for construction of houses and it is never

treated as manufacturing activity either in the common parlance or in the commercial parlance. The readymix concrete can be produced in huge volume with the help of machines with less manpower but merely because there is increase in volume, it cannot automatically be treated as manufacturing activity. At any rate, the end product is only an intermediate product which is used for construction of buildings, roads, dams etc. and when the end product is not considered as manufacturing activity, then it is difficult to hold that the intermediate product can be classified as manufacture or production of article or thing.

21. The Ld. Judicial Member, while following the decision of the ITAT, Delhi Bench in the case of YFC Projects (P) Ltd. (cited supra), might have taken note of the observations of the said Bench that once it is mixed with cement, water, etc., it cannot be segregated and hence it amounts to manufacturing activity. Even for preparation of food, such as idli etc, once the item is prepared or mixed, it cannot be segregated and brought back to its original shape and merely on that count, it cannot be treated as manufacturing activity. The Hon'ble Kerala High Court in the case of CIT vs. Casino (Pvt) Ltd. 91 ITR 289 observed that while considering the taxing statute, the real test is to ascertain whether the commodity either in common parlance or commercial parlance can be treated as a manufactured product. In the ordinary sense, the production of food materials in a hotel cannot be treated as manufacture. In the same way, the production of ready mix concrete, in the common parlance or commercial parlance cannot be treated as manufacturing activity; As rightly observed by the Hon'ble Supreme Court in the case of N.C.

Budharaja & Co. (cited supra) a statute cannot always be construed with dictionary in one hand and the statute in the other hand. (pg. 204 ITR 434). Regard must also be had to the scheme, context and to the legislative history of the provision. Having regard to the ratio laid down by the Hon'ble Apex Court, bearing in mind the fact that the end product should amount to manufacture or production of an article or thing, the readymix concrete manufactured by the assessee, which is also engaged in the construction activity, cannot be said to be a manufacturing activity.

Respectfully following the Tribunal decision, we set aside order of Commissioner of Income Tax (Appeals) and allow the ground of the Revenue.

5. The last ground raised on claim of deduction under Section 80-IA of the Income Tax Act, 1961 (in short "the Act") in respect of windmills.

5.1 The Id. Assessing Officer denied the deduction of ₹34,30,895/- under section 80IA of the Act by notionally bringing in and setting off the brought forward loss for determining the profits qualifying for deduction u/s.80IA from the initial assessment year being the year relevant to the financial year in which operations relating to the windmill infrastructure commenced. Aggrieved, the

assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

5.2 On appeal, the Commissioner of Income Tax (Appeals) observed that the issue is covered by the jurisdictional High Court order in the case of *CIT vs. Velayuthasamy Spinning Mills 231 CTR 368 /340 ITR 477* and allowed the claim of the assessee by directing the Id. Assessing Officer to withdraw the disallowance. . Against Commissioner of Income Tax (Appeals) order, the Revenue assailed an appeal before Tribunal.

5.3 We heard the rival submissions and perused the material on record. The only contention of the Department before the Tribunal that the Revenue has not accepted the judgment of Madras High Court and an appeal has already been filed along with Special Leave Petition and the same is pending before the Apex Court. This Tribunal is of the considered opinion that mere pendency of Special Leave Petition before the Apex Court cannot be a reason to take a different view. The judgment of Madras High Court is binding on all the authorities in the State of Tamil Nadu and Union Territory of Pondicherry. Therefore, the Commissioner of Income Tax (Appeals) has rightly allowed the claim of the assessee by following the binding judgment of Madras High Court in *Velayudhaswamy Spinning Mills (P) Ltd (supra)*.

Therefore, this Tribunal do not find any infirmity in the order of the Commissioner of Income Tax (Appeals). The ground of the Revenue is dismissed.

6. In the result, the appeal of the Revenue is partly allowed.

Order pronounced on Thursday, the 8th day of September, 2016, at Chennai.

Sd/-
(चंद्र पूजारी)
(CHANDRA POOJARI)
लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-
(जी. पवन कुमार)
(G. PAVAN KUMAR)
न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated:08.09.2016

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |