

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A', NEW DELHI**

**BEFORE SH. AMIT SHUKLA, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 6079/Del/2014
Assessment Year: 2010-11

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| M/s. Anjaneya Cold Storage Limited, B-35, Lawrence Road Industrial Area, New Delhi | Vs. | ACIT, Circle-1(1), New Delhi |
| PAN : AAACA0597R | | |
| (Appellant) | | (Respondent) |

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| Appellant by | S/sh. K. Sampath & V. Raja Kumar, Advocates |
| Respondent by | Sh. R.C. Danday, Sr.DR |

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| Date of hearing | 14.09.2017 |
| Date of pronouncement | 25.10.2017 |

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 07/07/2014 passed by the Commissioner of Income-tax (Appeals)-IV, New Delhi [in short ~~the~~ CIT-(A)] for assessment year 2010-11, raising following grounds:

- 1. On the facts and circumstances of the case Ld. CIT(A)/ACIT has erred both in law and facts in making a disallowance u/s 14A by invoking the provisions of Rule 8D although on facts, there was no case for applying said Rule.*
- 2. On the facts and circumstances of the case Ld. CIT(A)/ACIT has erred both in law and facts in making a disallowance u/s 14A in making an incorrect presumption that Appellant invested in mutual*

funds during the year, without considering the facts on record that assessee has made no such investment.

3. *On the facts and circumstances of the case Ld. CIT (A)/ACIT has erred both in law and facts in making a disallowance u/s 14A, on the basis of an assumption that suo moto disallowance of all direct and indirect expenditure relating to exempt Income, by assessee itself is incorrect.*
 4. *Without prejudice to above on the facts and circumstances of the case Ld. CIT (A)/ACIT has erred both in law and facts in taking average value of all investments in the Books of assessee instead of one investment, of Rs.1,04,19,272/- on which the assessee has earned exempt Income.*
 5. *Without prejudice to above on the facts and circumstances of the case Ld. CIT (A)/ACIT has erred both in law and facts in making disallowance under Rule 8D amounting to Rs. 14,01,058/- which has exceeded the exempt income of Rs. 6,62,660/-.*
 6. *The Appellant craves leave to add, alter or amend the grounds as may be advised from time to time.*
2. Briefly stated facts of the case are that the assessee was engaged in the business of manufacturing and export of frozen foodstuff. The assessee filed return of income on 30/09/2010, declaring total income of Rs.12,30,92,137/-. The assessee also declared dividend income of Rs.6,62,660/- from shares. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Act was issued on 29/08/2011 and complied with. The Assessing Officer was not satisfied with the disallowance of Rs.6,021/- made by the assessee under section 14A of the Act, therefore, he invoked Rule 8D of the Income Tax Rules, 1962 (in short ~~the Rules~~) and computed disallowance of Rs.14,01,057/-. After considering the disallowance of Rs.6,021/- made by the assessee, the Assessing Officer made addition of Rs.13,95,036/-. The learned CIT-(A) upheld the addition made by the Assessing Officer. Aggrieved, the

assessee in appeal before the Tribunal raising the grounds as reproduced above.

3. All the grounds raised are in relation to disallowance under section 14A of the Act invoking Rule 8D of the Rules.

4. Before us, the learned counsel submitted that the Assessing Officer has not recorded the dis-satisfaction with respect to the claim of the assessee of *suo motu* disallowance of Rs. 6,021/-, which being a prerequisite for disallowance under section 14A of the Act. He further submitted that the satisfaction recorded by the Assessing Officer was based on the wrong facts. According to him, the assessee has not made any investment in mutual funds during the year under consideration, whereas, the Assessing Officer has relied on this fact while making disallowance invoking Rule 8D of the Rules and therefore, the disallowance need to be deleted. He further submitted that without prejudice to the earlier arguments, in view of the decision of the Hon^{ble} Delhi High Court in the case of Cheminvest Ltd. Vs. CIT reported in 378 ITR 33(Del), the disallowance under section 14A of the Act cannot exceed the exempt income earned by the assessee. Accordingly, he submitted that disallowance in the case of the assessee cannot exceed Rs.6,62,660/-.

5. Learned Sr. DR, on the other hand, relied on the order of the lower authorities.

6. We have heard the rival submission and perused the relevant material on record. We find that in para-4.3 of the impugned assessment order, the Assessing Officer has recorded his dissatisfaction as under:

- i) *The assessee has made investment in units of mutual funds during the year under consideration. First of all, the assessee must have taken decision to invest in mutual funds for which board resolution in this regard would have been passed. Further to maintain, switching in and out of funds or their*

redemption, decision and necessary formalities would be required. For all these activities, the assessee must have used resources entailing some expenditure. Therefore, it is inconceivable that no expenses on earning exempt income have been incurred by the assessee. Therefore, I am satisfied that assessee has incurred expenses in earning exempt income which needs to be disallowed u/s 14A r.w rule 8D.

- ii) That the provisions of Section 14A (1) are substantive in nature. As per the provisions, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of total income under the Act.*
- iii) That the provisions of sub sections (2) & (3) of Section 14A are procedural in nature which provide for computation of disallowance. These provisions seek to achieve the objectives of substantive provision contained in sub section (1) of Section 14A.*
- iv) That the various courts have held that the expenses connected with the exempt income have to be disallowed irrespective of the fact that they are direct or indirect, fixed or variable, managerial or financial, in accordance with the provisions of the law. Hon'ble High Court of Mumbai in the case of Godrej And Boyce Manufacturing Company Limited Vs. Deputy Commissioner of income Tax and another (234 CTR 1) concluded that:
 - *The provisions of sub-ss. (2) and (3) of S. 14A of the I.T. Act, 1961 are constitutionally valid;*
 - *The provisions of Rule 8D of the I.T. Rules as inserted by the I.T (fifth Amendment) Rules, 2008 are not ultra vires the provisions of Section 14A, more particularly sub-Section (2), and do not offend Art. 14 of the constitution.*
 - *The provisions of Rule 8D of the I.T. Rules which have been notified w.e.f. 24th March, 2008 shall apply with effect from A.Y. 2008-09.**

7. In view of above, the contention of the learned counsel that no dissatisfaction was recorded by Assessing Officer, is not correct and accordingly, we reject the said contention.

8. Further, the Ld. counsel has contended that said dissatisfaction is based on the wrong facts of investment in mutual funds during the year under consideration. On perusal of the dissatisfaction recorded by the Assessing Officer, we find that in addition to the issue of investment in mutual funds during the year under consideration, he has also referred use of resources and expenditure related to maintain, switching in and out of the funds. In our opinion, by making one factual mistake, other facts for recording the dissatisfaction required in terms of section 14A of the Act cannot be ignored. Accordingly, we reject the contention of the learned counsel challenging the prerequisite of recording the satisfaction under section 14A of the Act.

9. Regarding the alternative ground No. 5 of the assessee, we agree with the contention that disallowance under section 14A of the Act cannot exceed the exempt income earned by the assessee during the year under consideration, in view of the decision of the Hon^{ble} Delhi High Court in the case of Cheminvest Ltd, (supra), wherein it is held as under:

“15. Turning to the central question that arises for consideration, the Court finds that the complete answer is provided by the decision of this Court in CIT v. Holcim India (P) Ltd. (decision dated 5th September 2014 in ITA No. 486/2014). In that case a similar question arose, viz., whether the ITAT was justified in deleting the disallowance under Section 14A of the Act when no dividend income had been earned by the Assessee in the relevant AY? The Court referred to the decision of this Court in Maxopp Investment Ltd. (supra) and to the decision of the Special Bench of the ITAT in this very case i.e. Cheminvest Ltd. v. CIT (2009) 317 ITR 86. The Court also referred to three decisions of different High Courts which have decided the issue against Revenue. The first was the decision in Commissioner of Income Tax, Faridabad v. M/s. Lakhani Marketing Incl. (decision dated 2nd April 2014 of the High Court of Punjab and Haryana in ITA No. 970/2008) which in turn referred to

two earlier decisions of the same in *CIT v. Hero Cycles Limited* [2010] 323 ITR 518 and *CIT v. Winsome Textile Industries Ltd.* [2009] 319 ITR 204. The second was of the Gujarat High Court in *Commissioner of Income Tax-I v. Corrttech Energy (P) Ltd.* [2014] 223 Taxmann 130 (Guj.) and the third of the Allahabad High Court in *Commissioner of Income Tax, Kanpur v. Shivam Motors (P) Ltd.* (decision dated 5th May 2014 in ITA No. 88/2014). These three decisions reiterated the position that when an Assessee had not earned any taxable income in the relevant AY in question “corresponding expenditure could not be worked out for disallowance.”

16. In *CIT v. Holcim India (P) Ltd.* (*supra*), the Court further explained as under:

“15. Income exempt under Section 10 in a particular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax. It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not an improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax.”

17. On facts, it was noticed in *CIT v. Holcim India (P) Ltd.* (*supra*) that the Revenue had accepted the genuineness of the expenditure incurred by the Assessee in that case and that expenditure had been incurred to protect investment made.

18. In the present case, the factual position that has not been disputed is that the investment by the Assessee in the shares of Max India Ltd. is in the form of a strategic investment. Since the business of the Assessee is of holding investments, the interest

expenditure must be held to have been incurred for holding and maintaining such investment. The interest expenditure incurred by the Assessee is in relation to such investments which gives rise to income which does not form part of total income.

19. In light of the clear exposition of the law in Holcim India (P) Ltd. (supra) and in view of the admitted factual position in this case that the Assessee has made strategic investment in shares of Max India Ltd.; that no exempted income was earned by the Assessee in the relevant AY and since the genuineness of the expenditure incurred by the Assessee is not in doubt, the question framed is required to be answered in favour of the Assessee and against the Revenue.

20. Since the Special Bench has relied upon the decision of the Supreme Court in Rajendra Prasad Moody (supra), it is considered necessary to discuss the true purport of the said decision. It is noticed to begin with that the issue before the Supreme Court in the said case was whether the expenditure under Section 57 (iii) of the Act could be allowed as a deduction against dividend income assessable under the head "income from other sources". Under Section 57 (iii) of the Act deduction is allowed in respect of any expenditure laid out or expended wholly or exclusively for the purpose of making or earning such income. The Supreme Court explained that the expression "incurred for making or earning such income", did not mean that any income should in fact have been earned as a condition precedent for claiming the expenditure. The Court explained:

"What s. 57(iii) requires is that the expenditure must be laid out or expended wholly and exclusively for the purpose of making or earning income. It is the purpose of the expenditure that is relevant in determining the applicability of s. 57(iii) and that purpose must be making or earning of income. s. 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of s. 57(iii) to suggest that the purpose for which the expenditure is made should fructify into any benefit by way of return in the shape of income. The plain natural construction of the language of s. 57(iii) irresistibly leads to the conclusion that to bring a case

within the section, it is not necessary that any income should in fact have been earned as a result of the expenditure."

21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in Rajendra Prasad Moody (supra) was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is „for the purpose of making or earning such income“. Section 14A of the Act on the other hand contains the expression „in relation to income which does not form part of the total income.“ The decision in Rajendra Prasad Moody (supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act. 22. In the impugned order, the ITAT has referred to the decision in Maxopp Investment Ltd. (supra) and remanded the matter to the AO for reconsideration of the issue afresh. The issue in Maxopp Investment Ltd. (supra) was whether the expenditure (including interest on borrowed funds) in respect of investment in shares of operating companies for acquiring and retaining a controlling interest therein was disallowable under Section 14 A of the Act. In the said case admittedly there was dividend earned on such investment. In other words, it was not a case, as the present, where no exempt income was earned in the year in question. Consequently, the said decision was not relevant and did not apply in the context of the issue projected in the present case.

23. In the context of the facts enumerated hereinbefore the Court answers the question framed by holding that the expression „does not form part of the total income“ in Section 14A of the envisages that there should be an 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, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year.

24. Consequently, the impugned order of the ITAT is set aside and the appeal is allowed in the above terms. This Court should not be understood to have expressed any opinion on the issue of whether for the AY in question the interest expenditure incurred by the Assessee would be allowable as business expenditure under Section 36 (1)(iii) of the Act."

10. In view of the binding precedent, respectfully following the decision of the Hon^{ble} Delhi High Court in the case of Cheminvest Ltd (supra), we restrict the disallowance under section 14A of the Act to Rs.6,62,660/-.

11. In the result, appeal of the assessee is allowed partly.

The decision is pronounced in the open court on 25th Oct., 2017.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 25th October, 2017.

RK/(D.T.D)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi