SURYAIN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.A. No.6315&6316/DEL/2014
Assessment Year:2010-11

Surya Food & Agro Ltd. 2nd Floor, 9 DDA Commercial Complex Madangir, New Delhi	v.	Addl. CIT Range 9 New Delhi
TAN/PAN:AAACS3026P		
(Appellant)		(Respondent)

Appellant by:	None		
Respondent by:	Shri Kaushlendra Tiwari, D.R.		
Date of hearing:	24	10	2017
Date of pronouncement:	24	10	2017

O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid appeals have been filed by the assessee against separate impugned orders of common date 17/9/2014, passed by the ld. CIT(Appeals)-XII, New Delhi for the quantum of assessment passed under section 143(3) of the Income Tax Act, 1961 for assessment years 2010-11 and 2011-12.

2. Since common issues are involved in both the appeals arising out of identical set of facts, therefore, the same were heard together and are being disposed of by way of this consolidated order.

3. In assessment year 2010-11, the only issue raised is disallowance of Rs.12,50,315/- made under section 14A read with Rule 8D.

4. The Assessing Officer, after noting the investments shown in the balance sheet for the sums amounting to Rs.13,28,59,890/- in the equity shares and Rs.2.25 crores and in mutual funds, held that provisions of section 14A is applicable, because the dividend income earned thereon would be exempt from tax. However, during the year assessee has not earned any dividend income or has claimed any exempt income, despite that he has worked out disallowance under section 14A at Rs.12,50,315/- in accordance with the formula laid down in Rule 8D. The ld. CIT (A) too has confirmed the said finding.

5. None appeared on behalf of the assessee despite service of notice; therefore, the appeal of the assessee is being decided on merits after hearing the ld. D.R.

6. At the outset, we find that no exempt has been earned by the assessee during the year and, therefore, in view of the principle laid down by the Hon'ble jurisdictional High Court in the case of **Cheminvest Ltd. Vs. CIT reported in [2015] 378 ITR 33 (Del),** no addition is warranted on account of disallowance under section 14A. The Hon'ble High Court held that there should be an actual receipt of income which is not includible in the total income during the relevant previous year, and it that is not so, then no disallowance under section 14A can be triggered. Thus, respectfully following the ratio laid down by the Hon'ble jurisdictional High Court, we hold that no

disallowance should be made and accordingly ground raised by the assessee is allowed.

7. In assessment year 2011-12, first issue, which has been raised, relates to the disallowance of Rs.7,66,536/- made under section 14A read with Rule 8D.

8. In this year also, admittedly there is no exempt income which has been claimed by the assessee. However, assessee for the purpose of disallowance under section 14A has made *suo moto* disallowance of Rs.8,03,510/-. The Assessing Officer held that disallowance is to be made in accordance to Rule 8D and accordingly, he calculated the disallowance at Rs.15,70,046/- and after setting off disallowance offered by the assessee at Rs.8,03,510/-, he made the addition of Rs.7,66,736/-. The ld. CIT(A) too has confirmed the said disallowance.

9. As noted above, since no exempt income has been earned, therefore, disallowance under section 14A cannot be triggered as held by the Hon'ble jurisdictional High Court in the case of **Cheminvest Ltd. Vs. CIT (supra).** However, the assessee itself has disallowed a sum of Rs.8,03,510/-, therefore, disallowance made over and above the said amount is directed to be deleted. Accordingly, ground No.1 raised by the assessee is allowed.

10. The second issue, which has been raised vide ground No.2, is disallowance of Rs.2,14,590/- on account of expenses and depreciation on use of vehicles.

11. The assessee has debited an expenditure of Rs.26,60,231/- under the head “vehicle expenses” in the profit &

loss account. The Assessing Officer noted that, out of this amount, a sum of Rs.10,23,800/- pertains to private vehicles and also huge depreciation has been claimed at Rs.11,22,103/- on the use of private vehicles. The Assessing Officer required the assessee as to whether any logbook has been maintained regarding personal use of vehicles; assessee submitted that no separate logbook has been maintained for personal use of vehicles. Accordingly, the Assessing Officer proceeded to make disallowance @ 10% on account of usage of vehicle expenses and depreciation which worked out to Rs.2,14,590/-, which has been confirmed by the ld. CIT(A) on same reasoning.

12. Since there is no rebuttal of the finding given by the Assessing Officer and the ld. CIT (A) that the expenses, which have been debited including depreciation on vehicle, are also for personal use of vehicles and in the absence of maintenance of any logbook, personal usage cannot be ruled out and hence, we hold that ad hoc disallowance of 10% on account of personal usage of vehicle is quite reasonable and accordingly the same is confirmed.

13. Next issue raised in ground No.3 is with regard to the addition of Rs.2,62,489/- pertaining to interest on service tax which has been added by the Assessing Officer in terms of section 37(1). The interest is on account of late payment of service tax which has been determined as per order of the Assistant Commissioner of Central Excise (Audit), Noida. Assessee's contention is that this interest is not in the nature of penalty but compensatory in nature. The Assessing Officer held that levy of interest is because of default of the assessee in the previous and current financial year for late payment of service

tax and, therefore, the same cannot be allowed in terms of Explanation to section 37(1). The ld. CIT (A), has confirmed the said addition on the same reasoning.

14. On a perusal of the impugned order as well as the submissions of the assessee as has been incorporated in the impugned orders, we find that the assessee has claimed deduction of Rs.2,62,489/- on account of interest on late deposit of service tax by treating the same as compensatory in nature, which has been disallowed by the Assessing Officer on the ground that it is penal. Assessee's case has been that out of the aforesaid amount of Rs.2,62,489/-; a sum of Rs.2,46,168/- was paid by the assessee on the basis of demand raised by the Department of Central Excise and since due to inadvertent error, assessee failed to deposit the duly collected service tax with the Government authorities, a further sum of Rs.16,321/- was paid under protest. It was further submitted that though it was primary liability of the assessee to collect service tax, but the same has been done on behalf of service recipients and due to inadvertent error in delay in depositing service tax to the Government, demand has been created by the Central Excise and, therefore, it is purely compensatory in nature. On these facts, we agree with the contention of the assessee, because what is stipulated in terms of *Explanation* to section 37(1) is that, if any expenditure incurred by the assessee for any purpose which is an offence or which is prohibited by law, then the same cannot be allowed as business expenditure under section 37(1). Here, levy of interest of delayed payment of service tax ostensibly is compensatory in nature and cannot be reckoned as penalty and

accordingly the same is directed to be deleted. Accordingly, ground No.3 is allowed.

15. In the result, appeal of the assessee for assessment year 2010-11 is allowed and appeal for assessment year 2011-12 is partly allowed.

Order pronounced in the open Court on 24th October, 2017.

Sd/-
[PRASHANT MAHARISHI]
ACCOUNTANT MEMBER

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER

DATED: 24th October, 2017

JJ:2510

Copy forwarded to:

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3. CIT(A)
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5. DR

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