

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' NEW DELHI**

**BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No. 5374/Del/2014
AY: 2010-11**

**ITO,
Ward 2(2),
Intl. Tax,
New Delhi.**

**vs AVH Resourses India Pvt. Ltd.,
D-139, First Floor, East of Kailash,
New Delhi-110065
(PAN: AADCB2711K)**

(Appellant)

(Respondent)

Appellant by: Shri Atiq Ahmad, Sr. DR
Respondent by: None

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

This appeal has been preferred by the revenue against the order dated 11.07.2014 passed by the ld. CIT(A)-V, New Delhi for assessment year 2010-11 wherein assessee's appeal was allowed.

2. This appeal was first fixed for hearing on 5.6.2017 but none was present on behalf of the assessee and, therefore, DR was directed to serve the notice through the department and the hearing was fixed for today. Today also, none is present for the assessee and department has placed on record a letter confirming that the notice has been served on the assessee. Therefore, we are proceeding to hear the department ex parte qua the assessee.

3. Brief facts of the case are that the return of income was filed declaring nil income and the assessment u/s 143(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') was completed after making the following disallowances:-

- i) Addition on account of Arm's Length Price – Rs. 16,441/-
- ii) Disallowance u/s 14A of the Income Tax Act, 1961 (hereinafter called 'the Act') – Rs. 40,01,541/-

3.1 The assessee's appeal before the Id. Commissioner of Income Tax(A) was accepted and both the additions in the assessment order were deleted by the Id. Commissioner of Income Tax(A) and now the department has approached the ITAT and has raised the following grounds of appeal:-

“Whether the Ld. CIT (A) has erred on facts and in Law in deleting the addition of Rs. 16441/- made by the A.O. on account of Arms Length Price.

Whether the Ld. CIT (A) has erred on facts in Law deleting the addition of Rs. 40,01,541/- made by the A.O. on account of u/s 14A of the IT Act.

The appellant craves leave for reserving the right to amend, modify, alter add or forego any grounds of appeal at any time before or during the hearing of this appeal.”

4. Ld. Departmental Representative submitted that the assessee company was a 100% subsidiary of AvH NV, Belgium and AvH

NV, the holding company intended to utilise the service of its subsidiary i.e. the assessee for the purpose of gathering sector information, investment advice and marketing services. It was submitted that during the year, the assessee company had received dividend of Rs. 55,44,885/- on investment in M/s Sagar Cements Ltd. It was further submitted that the assessee had made further investments amounting to Rs. 62,26,360/- in addition to already existing investment of Rs. 79,71,73,523/- in the same company. It was submitted that, therefore, the Assessing Officer proceeded to invoke the provisions of section 14A(2) r/w section 14A(3) of the Act and proceeded to compute the disallowance @ $\frac{1}{2}\%$ of the average investment which worked out to Rs. 40,01,541/- and therefore on the facts and circumstances of the case, the disallowance was rightly made.

4.1 On the second issue, it was submitted that in terms of the service agreement entered into with the holding company, the assessee company was entitled to charge a mark up of 22.5% to the direct as well as indirect cost attributable to said services. The ld. AR pointed out that while calculating the arm's length price, the assessee had not included auditor's remuneration amounting to Rs. 66,798/-, rates and taxes amounting to Rs.

4275/- and bank charges amounting to Rs. 1997/- for the purpose of charging the holding company and therefore, there was under-reporting of the arm's length price. It was submitted that this addition by the Assessing Officer was also in order. It was submitted that the order of the ld. Commissioner of Income Tax(A) be set aside and the additions be restored.

5. We have heard the Ld. Departmental Representative and have also perused the impugned order as well as the assessment order. As far as issue of disallowance u/s 14A of the Act is concerned, the ld. Commissioner of Income Tax(A) has discussed the issue in great detail in para 4 of the impugned order. The ld. Commissioner of Income Tax(A) while deleting the disallowance has noted that the Assessing Officer has not disputed the expenditure of Rs. 46,74,147/- debited to the accounts and that all the expenses have been accepted as genuine by the Assessing Officer.

5.1 Ld. Commissioner of Income Tax(A) has also noted that beyond making the investment, there was nothing further that the assessee had to do for earning the dividend income. The ld. Commissioner of Income Tax(A) has also noted that investment in the shares have not been shown to have come out of borrowed

funds and, therefore, no finance charges can be said to have been incurred in relation to the dividend income. It is also noted by the ld. Commissioner of Income Tax(A) that the earning of dividend was incidental to the holding of shares and since the assessee's investments consisted only of shares of one company M/s Sagar Cements Ltd., there was no reason to maintain any investment portfolio division. The ld. Commissioner of Income Tax(A) has also noted that a very small and negligible amount of time, effort and expenditure was required to earn the dividend income and therefore, the disallowance to the tune of Rs. 40,01,541/- was unjustified. The ld. Commissioner of Income Tax(A) has also noted that the Assessing Officer had not pointed out any expenditure as having proximate nexus with the earning of exempt income and, therefore, the provisions of Rule 8D of the Income Tax Rules, 1962 could not be applied automatically and in a mechanical manner. The ld. Commissioner of Income Tax(A) while deleting the disallowance has also noted that a similar addition in assessee's appeal for assessment year 2009-10 was deleted by his predecessor on identical facts.

5.2 During the course of proceedings before us, the Ld. Departmental Representative could not point out any factual or

legal error in the findings arrived at by the ld. Commissioner of Income Tax(A). The Hon'ble Apex Court has held in Commissioner of Income Tax(A) vs Walfort Share and Stock Brokers Pvt. Ltd. reported in (2010) 326 ITR 1(SC) that while attracting the provisions of section 14A, there should be a proximate cause for disallowance which has a relationship with a tax exempt income. Such a proximate cause has not been brought out by the department neither in the assessment order nor during the course of proceedings before us. Therefore, we find no reason to interfere with the findings of the ld. Commissioner of Income Tax(A) on this issue and dismiss ground no. 2 of the department's appeal.

5.3 As far as ground no. 2 relating to deletion of addition on account of arm's length price is concerned, the issue has been discussed in para 5 of the impugned order. The ld. Commissioner of Income Tax(A) has noted that he has examined the service agreement with the holding company and as per the terms of the service agreement, the assessee could not have charged mark up of auditor's remuneration, rates and taxes and bank charges. This factual finding of the ld. Commissioner of Income Tax(A) also could not be negated by the ld. Sr. DR during

the course of proceedings before us. Therefore, keeping in view the factual circumstances and the fact that the department could not lead any evidence to the contrary against the findings of the ld. Commissioner of Income Tax(A), we find no reason to interfere with this adjudication by the ld. Commissioner of Income Tax(A). Accordingly, ground no. 2 of the department's appeal also stands dismissed.

6. In the result, the Department's appeal is dismissed.

Order pronounced in the Open Court on 25th October, 2017.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

DT. 25th OCTOBER, 2017
'GS'

Copy forwarded to:-

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

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

By Order

Asstt. Registrar