

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "C", MUMBAI

Before Shri Sktijit Dey (JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No. 6461/Mum/2016  
(Assessment year: 2012-13)

Dy.CIT-3(3)(1), Mumbai	vs	M/s RB Holdings Pvt Ltd 9 <sup>th</sup> Floor, Maker Chambers IV, 222, Nariman Point, Mumbai-21 PAN : AADCR98902B
<b>APPELLANT</b>		<b>RESPONDEDNT</b>

Appellant by	Shri Rajat Mittal
Respondent by	None

Date of hearing	07-11--2017
Date of pronouncement	10-11-2017

**ORDER**

Per G Manjunatha, AM :

This appeal filed by the revenue is directed against the order of CIT(A)-7, New Delhi dated 19-08-2016 and it pertains to AY 2012-13. The revenue has raised the following grounds of appeal:-

"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in not appreciating the fact that the amount of disallowance u/s. 14A of the I.T.Act, 1961 has to be computed as per Rule 8D of I.T. Rules, 1962 as held in the order of the Hon'ble High Court of Bombay in the case of M/s. Godrej & Boyce Manufacturing Co. Ltd.

2. Whether on the facts and circumstances of the case and in

*law, the Ld. CIT(A) has erred in not appreciating the CBDT Circular No. 5 of 2014 dated 11/02/2014 laying down the condition that it is not necessary that exempt income should necessarily be included in a particular year's income for the disallowance u/s. 14A of the I.T. Act, 1961 to be triggered.*

*3. The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.”*

**2.** The brief facts of the case are that the assessee company had filed its return of income for the assessment year 2012-13 on 18-09-2012 declaring total income of Rs.5,89,41,360. The case has been selected for scrutiny and assessment was completed u/s 143(3) on 17-03-2015 determining total income at Rs.7,13,90,895 interalia making addition towards disallowance u/s 14A r.w.r. 8D(2)(iii) @0.5% of average value of investments for Rs.1,24,49,534. Aggrieved by the assessment order, assessee preferred appeal before CIT(A).

**3.** Before the CIT(A), the assessee has filed elaborate written submissions to argue that the AO was erred in disallowing expenditure incurred in relation to exempt income by invoking rule 8D(2)(iii) @0.5% of average value of investments as the assessee has not earned any exempt income during the relevant financial year. In this regard the assessee relied upon the decision of Hon'ble Delhi High Court in the case of Chemivest Ltd vs CIT (2015) 378 ITR 33 (Del). The CIT(A), after considering relevant submissions of the assessee and also relying upon the

decision of Hon'ble Delhi High Court in the case of Chemivest Ltd vs CIT (supra) observed that the disallowance made by the AO is not sustainable as there was no exempt income earned during the year. The relevant portion of the order of CIT(A) is extracted below:-

*"4.1. The AO computed disallowance u/s 14A read with Rule 8D(2)(1ii) at Rs.1,24,49,535/- on the average investments of Rs.3,08,98,14,1901/- appearing in the Balance sheet. The Ld. AR has stated that as no dividend is received during the year and claimed as exempt, the provisions of section 14A are not applicable.*

*4.2. In the recent past in a number of decisions pronounced by the Hon'ble Courts and Tribunals, it has been ruled that provisions of section 14A cannot be invoked where no exempt income has been earned in the previous year. The Hon'ble Delhi High Court in the case of CIT vs. Holcim India (P) Ltd. reported in ITA No. 486/2014 & ITA No. 299/2014 has observed as under:*

*1 The following substantial question of law is proposed in these two appeals by the appellant-Revenue which pertain to the Assessment Years 2007-08 and 2008-09:-*

*"Whether the Income Tax Appellate Tribunal was right in deleting the disallowance under Section 14,4 of the Income Tax Act, 1961 amounting to Ps. 8,61,50,3151/- in Assessment Year 2007-08 and Ps. 6,60,93,6781/- in assessment year 2008-09 ho/ding that no dividend income was earned by the assessee ignor'irig the provisions under Sec non 144....."*

*14. On the issue whether the responcient-assessee could have earned dividend income and **even** if no dividend income was earned, yet Section 144 can be invoked and disallowance of expenditure can be made, there are three decisions of the different High courts directly on the issue and against the appellant-Revenue. No contrary decision of a High Court has been*

shown to us. The Punjab and Haryana High court in commissioner of Income tax, faridabad Vs. 44/s. Lakhani Marketing Incl., ITA No. 97012008, decided on 02.04.2014, made reference to two earlier decisions of the same Court in CIT Vs. Hero Cycles Limited, [2010] 323 ITR 518 and CIT Vs. Winsome Textile Industries Limited, [2009] 319 ITR 204 to hold that Section 144 cannot be invoked when no exempt income was earned. The second decision is of the Gujarat High Court in commissioner of Income Tax-I Vs. Cori-tech Energy (P.) Ltd. [2014] 223 Taxmann 130 (Cuj.). The third decision is of the Allahabad High Court in Income Tax Appeal No. 88 of 2014, Commissioner of Income Tax (li) Kanpur, Vs. MIS. Shivarn Motors (P) Ltd. decided on 05.05.2014. In the said decision it has been held:

*"As regards the second question, Section 144 of the Act provides that for the purposes of computing the total income under the Chapter, no deduction shall be allowed in respect of expenditure incurred' by the assessee in relation to income which does not form part of the total income under the Act. Hence, what Section 144 provides V that if there is any income which does not form part of the income under the Act, the expenditure wh, ch is incurred far' earning the income is not an allowable deduction, for the year in question, the finding of fact is that the assessee had not earned any tax free income. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. The view of the CIT(4), which has been affirmed by the Tribunal, hence does not give rise to any substantial question of law. Hence, the deletion of the disallowance of Ps. 2,03,752/- made by the Assessing Officer was in order".*

15. *Income exempt under Section 10 in a particular assessment year, may not have been exempt earlier and can become taxable*

*ii-,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 capita/ 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 sole 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 arid' 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.*

*16. What is also noticeable is that the entire or whole expenditure has been disallowed as If there was no expenditure incurred by the respondent-assessee for conducting business The CIT(A) has positively held that the business was set up and had commenced The said finding is accepted. The respondent-assessee, therefore, had to incur expenditure for the business in the form of investment in shares of cement companies and to further expand and consolidate their business. Expenditure had to be also incurred to protect the investment made. The genuineness of the said expenditure and the fact that it was incurred for business activities was not doubted by the Assessing Officer and has also not been doubted by the CIT(A.)*

*17.In these circumstances, we do not find any merit in the present appeals. The same are dismissed in limine."*

*4 3. The Honble Delhi High Court in the case of Cheminvest Ltd. vs. CIT - VI (ITA 749/2014) decided on 02.09.2014 has ruled that section 14A will not apply if no exempt income is received*

*during the relevant previous year. The Hon'ble Court ruled as under:*

*"23. In the context of the facts enumerated hereinbe fore the Court answers the question framed by holding that the expression 'does not form part of the total income' in Section 14,4 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."*

*4.4. Respectfully following the decision of the Hon'ble High Court of Delhi, the disallowance made by the AO is not sustainable as there was no exempt income earned by the appellant during the year. The disallowance of Rs.1,24,49,5351- made by the AG is, therefore, deleted. This ground of appeal is ruled in favour of the appellant."*

**4.** None appeared on behalf of the assessee. We have heard the Ld.DR. Facts remain unchanged. The Ld.DR failed to bring on record any contrary decision to controvert the findings of fact recorded by the CIT(A). Therefore, we are of the view that the CIT(A) was right in deleting the addition made by the AO towards disallowance u/s 14A r.w.r. 8D(2)(iii). Hence, we are inclined to uphold the order of the CIT(A) and dismiss the appeal filed by the revenue.

5. In the result, appeal of the revenue fails.

Order pronounced in the open court on 10<sup>th</sup> November, 2017.

Sd/-

sd/-

(Saktijit Dey)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 10<sup>th</sup> November, 2017

Pk/-

Copy to :

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

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai