INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.:- 5010/Del /2015
Assessment Year: 2011-12

DCIT Circle-19(2),Room No. 221, 2nd Floor, C.R. Building, I.P. Estate, New Delhi.	Vs.	PRL Projects & Infrastructure Lt. 34/1, Vikas Apartment, East Punjabi Bagh, New Delhi – 110 026 AAACP0411D
(Appellant)		**(Respondent)**

Department by:	Shri Surenderpal, Sr. DR
Assessee by :	Shri Tarun Kumar Batra, CA
Date of Hearing	02/11/2017
Date of pronouncement	/2017

O R D E R

PER SUDHANSHU SRIVASTAVA, J.M.

This appeal has been preferred by the department against the order passed by the Ld. CIT (A) 7, Delhi wherein vide order dated 28.5.2015 the Ld. CIT(Appeals) had deleted the disallowance of Rs. 40,19,608/- made under sections 40(a)(ia) and of Rs. 1,32,540/- made

u/s 14A of the Income Tax Act 1961 (hereinafter called 'the Act'). The relevant assessment year is 2011-12.

2. The brief facts of the case are that the assessee had filed its return of income showing a total income of Rs. 26,18,310/- under the normal provisions and Rs. 1,46,26,148/- under provisions of section 115JB of the Act. The case was selected for scrutiny and assessment was completed u/s 143(3) of the Act after making disallowances of Rs. 1,32,540/- u/s 14A and Rs. 40,19,608/- u/s 40(a)(ia) of the Act.

2.1 On appeal by the assessee the Ld. CIT (A) deleted both the additions made by the A.O.

2.2 Now aggrieved the department has approached the ITAT and has challenged the deletions by the Ld. CIT (A).

3. The Ld. Sr. DR submitted that as far as the disallowance of Rs. 40,19,608/- was concerned, the same was made for the amount paid as bank guarantee commission paid to Bank of India and ICICI Bank Ltd. and in view of the notification No. 56/2012 issued by the CBDT dated 31.12.2012, it was clear that this notification exempting persons from deducting tax at source from bank guarantee commission had come into force with effect from 1st January, 2013 and payment made prior to that

period was not covered by the said notification. It was further submitted that, accordingly, the assessee was required to deduct tax at source on the bank guarantee commission and, therefore, the addition had been rightly made by the A.O.

3.1 Regarding the second ground pertaining to disallowance u/s 14A, the Sr. DR submitted that the disallowance u/s 14A read with Rule 8D of the Income Tax Rules is mandatory and has to be calculated at ½ % of the average investment which the A.O. had done. It was further submitted that the Ld. CIT (A) was patently wrong in deleting the said addition.

4. In response, the Ld. Authorised Representative submitted that as far as the issue of disallowance of Rs. 40,19,608/- u/s 40(a)(ia) was concerned, this bank guarantee commission was charged by the respective banks by debiting the same to the bank account of the assessee and that the assessee company had not paid these amounts by issuance of any cheque or pay order. Thus, in such circumstances it was not liable for deduction of tax at source. It was further submitted that the ITAT Mumbai Bench in the case of Kotak Securities Ltd. vs. DCIT (TDS), in ITA No. 6657/Mum/2011 vide order dated 3rd February, 2012, had held that a plain reading of Explanation to section 194H indicated

that element of agency was essential in case of all services or transactions contemplated by Explanation to section 194H and further that those transactions or services which were on principal to principal basis would not be governed by the provision requiring deduction of tax at source. Reliance was also placed on order of ITAT Delhi Bench in the case of Baidynath Ayurved Bhawan Ltd. vs JCIT reported in 83TTJ 409 and ACIT vs. The Samaj reported 71 TTJ 783. Reliance was also placed on judgment of the Hon'ble Gujarat High Court in the case of Ahmedabad Stamp Vendors Association vs. Union of India 257 ITR 202.

4.2 On the issue of disallowances u/s 14A, the Ld. Authorised Representative submitted that the assessee company had an opening balance of investment of Rs. 2,65,08,000/- in shares of private limited companies and during the year under consideration the assessee did not earn any income on the same and also did not attribute any expenditure relating to such investment. It was further submitted that during the year under consideration no fresh investment in shares and securities was made. Reliance was placed on the judgment of the Hon'ble High Court in the case of CIT vs. Holcim India Private Limited in ITA No. 486/2014 and ITA No.291/2014 wherein the Hon'ble Delhi High Court had held that there could be no disallowance of expenditure for earning

of exempt income in case where no exempt income was earned during the year.

5. We have heard the rival submissions and have perused the material on record. Regarding the disallowance of Rs. 40,19,608/- u/s 40(a)(ia) of the Act, it has seen that this issue is covered in favour of the assessee by order of ITAT Mumbai Bench in the case of Kotak Securities Limited vs. DCIT (TDS) (supra) wherein the Mumbai Bench of the ITAT has held that there is no principal – agent relationship between the bank issuing the bank guarantee of the assessee. The Mumbai Bench has noted that when the bank issues a bank guarantee on behalf of the assessee, all it does is to accept the commitment of making payment of a specified amount to the beneficiary on demand and it is in consideration of this commitment that the bank charges of fee which is termed as 'bank guarantee commission'. The ITAT Mumbai Bench has further noted that while it is termed as 'guarantee commission', the same is not in the nature of commission as it is understood in common business parlance and in context of section 194H. The ITAT Mumbai Bench went to hold that no TDS was deductible on such bank guarantee commission. It is seen that the Ld. CIT (A) also has relied on this order of ITAT Mumbai Bench while allowing relief to the

assessee and, further, during the course of proceedings before us, the department could not point out any contrary judgement which could give relief to the department on this issue. Accordingly, we refuse to interfere on this issue and uphold the adjudication of the Ld. CIT (A).

5.2 Regarding the disallowance of Rs. 1,32,540/- u/s 14A, it is undisputed that the assessee had not earned any exempt income during the year and as such no expenditure could be said to have been incurred to earn the exempt income. It is settled law that if there is no exempt income, no disallowance u/s 14A can be made. This issue is also covered in favour of the assessee by order of Hon'ble High Court in the case of CIT vs. Holcim India Pvt. Ltd. (supra). The Hon'ble Delhi High Court has held in paragraph 14 of the said judgment:-

> *14. "On the issue whether the respondent-assessee could have earned dividend income and even if no dividend income was earned, yet Section 14A 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. M/s. Lakhani Marketing Incl., ITA No. 970/2008, 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 14A 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. Corrtech Energy (P.) Ltd. [2014] 223 Taxmann 130 (Guj.). The third decision is of the Allahabad High Court in Income Tax Appeal No. 88 of 2014, Commissioner of Income Tax. (Ii) Kanpur, Vs. M/s. Shivam Motors (P) Ltd. decided on 05.05.2014. In the said decision it has been held:

> *"As regards the second question, Section 14A 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 14A provides is that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for 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(A), 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 Rs.2,03, 752/- made by the Assessing Officer was in order".*

5.3 In view of the above, we find no reason to interfere with the findings of the Ld. CIT (A) on this issue also. The Ld. CIT (A) has also relied upon the judgment of the Hon'ble Delhi High Court in CIT vs. Holcim India Pvt. Ltd. (supra) while allowing relief to the assessee and before us also, the Department could not point out any legal or factual infirmity in the same. Therefore, we uphold the adjudication by the Ld. CIT (A) on this issue also.

6. In the final result appeal of the department is dismissed.

Order pronounced in the open court on 16/11/2017. .

sd/-	sd/-
(B.P. JAIN) ACCOUNTANT MEMBER	(SUDHANSHU SRIVASTAVA) JUDICIAL MEMBER

Dated: 16.11.2017

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi