IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC – A" BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER

ITA No.1392/Bang/2017
Assessment year : 2012-13

The Deputy Commissioner of Income Tax, Circle 4(1)(1), Bangalore.	Vs.	M/s. Kesar Marble & Granite Ltd., No.23/2, 'Cafeeday Square', Vittal Mallya Road, Bangalore – 560 001. **PAN: AAACK 4640D**
APPELLANT		RESPONDENT

Appellant by	:	Shri Vikas Suryawanshi, Advocate
Respondent by	:	Shri C. Ramesh, CA

Date of hearing	:	16.11.2017
Date of Pronouncement	:	15.12.2017

O R D E R

This appeal is preferred by the assessee against the order of the CIT(Appeals) *inter alia* on the following grounds:-

"1. The Order of the Ld. CIT (A), in so far as it is prejudicial to the interest of the Revenue, is opposed to law and the fact and circumstances of the case.

2. On facts of the case, Whether the Ld CIT (A) is right in giving relief to the assessee on the disallowance of 14A r.w.r 8D(2) when the assessee has not shown any income by signing an MOU dated 05.04.2010 from the major chunk of investment of Rs. 1.29 Cr in a company, but paid interest of Rs. 1.35 cr on the borrowings done by the company for its business activities.

3. On facts of the case, the Ld CIT (A) has failed to appreciate that the assessee has used colourable device to hide the actual nature of transaction.

4. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT (A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

5. The appellant craves leave to add, alter, amend and / or delete any of the grounds that may be urged."

2. During the course of hearing, the ld. counsel for the assessee has invited our attention to the fact that there was no exempt income earned by the assessee during the impugned assessment year. Therefore, the provisions of section 14A cannot be invoked. In support of this contention, he placed reliance upon the judgment of the Hon'ble Delhi High Court in the case of *Cheminvest Ltd. v . CIT* as reported in *378 ITR 33 (Del)*.

3. The ld. DR simply placed reliance upon the order of the AO.

4. Having carefully examined the orders of authorities below, we find that undisputedly the assessee has not earned any exempted income. Now it is settled position of law that whenever assessee did not earn any exempt income, no disallowance could be made u/s. 14A of the Act. In this regard, the Hon'ble Delhi High Court in the case of *Cheminvest Ltd. v. CIT, 378 ITR 33 (Del)* has categorically held that section 14A envisages that there should be actual receipt of income which was not includible in the total income during the relevant previous year for the purpose of disallowing any expenditure in relation to the said income. Wherever there is no exempt income includible in the total income of the assessee, the provisions of section 14A cannot be invoked. The relevant observations of the judgment of the Hon'ble Delhi High Court are extracted hereunder:-

"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 I. T. A. No. 486 of 2014). In that case, a similar question arose, viz., whether the Income-tax Appellate Tribunal 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 assessment year ? The court referred to the decision of this court in Maxopp Investment Ltd. (supra) and to the decision of the Special Bench of the Income-tax Appellate Tribunal in this very case, i.e., Cheminvest Ltd. v. CIT [2009] 317 ITR (AT) 86 (Delhi) [SB]. The court also referred to three decisions of different High Courts which have decided the issue against Revenue. The first was the decision in CIT v. Lakhani Marketing Incl. (decision dated April 2, 2014, of the High Court of Punjab and Haryana in I. T. A. No. 970 of 2008)—since reported in [2015] 4 ITR-OL 246 (P&H)— which in turn referred to two earlier decisions of the same court in CIT v. Hero Cycles Ltd. [2010] 323 ITR 518 (P&H) and CIT v. Winsome Textile Industries Ltd. [2009] 319 ITR 204 (P&H). The second was of the Gujarat High Court in CIT v. Corrtech Energy (P.) Ltd. [2014] 223 Taxmann 130 (Guj) ; [2015] 372 ITR 97 (Guj) and the third of the Allahabad High Court in CIT v. Shivam Motors (P) Ltd. (decision dated 5th May, 2014, in I. T. A. No. 88 of 2014). These three decisions reiterated the position that when an assessee had not earned any taxable income in the relevant assessment year 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 trans action 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 the total income.

19. In the 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 assessment year 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 (page 522 of 115 ITR) :

> "What section 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 section 57(iii) and that purpose must be making or earning of income. Section 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 section 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 section 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 Income-tax Appellate Tribunal has referred to the decision in Maxopp Investment Ltd. (supra) and remanded the matter to the Assessing Officer 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 14A 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 Act 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."

5. In the light of the aforesaid judgment, the provisions of section 14A cannot be invoked as there is no exempt income in the hands of the assessee. Accordingly, we find no infirmity in the order of the CIT(Appeals) who has rightly deleted the addition.

6. In the result, the appeal of the revenue is dismissed.

Pronounced in the open court on this 15th day of December, 2017.

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Bangalore,
Dated, the 15th December, 2017.

/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Senior Private Secretary
ITAT, Bangalore.