IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA No.4143/Del/2014
Assessment Year : 2010-11

Towerbase Services Pvt. Ltd., 3rd Floor, Western Wing, Thapar House, 124, Janpath, New Delhi.	**Vs.**	ACIT, Circle- 16(1), New Delhi.
PAN : AABCT5717H		
(Appellant)		**(Respondent)**

ITA No.4146/Del/2014
Assessment Year : 2008-09

Towerbase Services Pvt. Ltd., 3rd Floor, Western Wing, Thapar House, 124, Janpath, New Delhi.	**Vs.**	ACIT, Circle- 16(1), New Delhi.
PAN : AABCT5717H		
(Appellant)		**(Respondent)**

ITA No.1711/Del/2016
Assessment Year : 2011-12

Towerbase Services Pvt. Ltd., Mezzanine Floor, Western Wing, Thapar House, 124, Janpath, New Delhi.	**Vs.**	DCIT, Circle- 16(1), New Delhi.
PAN : AABCT5717H		
(Appellant)		**(Respondent)**

Assessee by	:	Shri Upvan Gupta, Adv.
Department by	:	Shri Amit Jain, Sr.DR
Date of hearing	:	09-01-2018
Date of pronouncement	:	16-01-2018

O R D E R

PER R. K. PANDA, AM :

ITA No.4143/Del/2014 filed by the assessee is directed against the order dated 20.03.2014 of CIT(A)- 19, New Delhi relating to assessment year 2010-11. ITA No.4146/Del/2014 filed by the assessee is directed against the order dated 25.03.2014 of CIT(A)- 19, New Delhi relating to assessment year 2008-09. ITA No.1711/Del/2016 filed by the assessee is directed against the order dated 04.01.2016 of CIT(A)- 9, New Delhi relating to assessment year 2011-12. For the sake of convenience these were heard together and are being disposed of by this common order.

ITA No.4146/Del/2014 (A.Y. 2008-09) :

2. Although a number of grounds have been raised by the assessee, they all relate to the order of the ld. CIT(A) in confirming the penalty of Rs.16,04,451/- levied by the Assessing Officer u/s 271(1)(c) of the I.T. Act.

3. Ld. counsel for the assessee at the outset filed a copy of the order of the Tribunal in assessee's own case for assessment year 2008-09 and submitted that

various additions made by the Assessing Officer and upheld by the ld. CIT(A) have been deleted by the Tribunal. Therefore, penalty does not survive.

4. Ld. DR on the other hand fairly conceded that the Tribunal has deleted the various additions made by the Assessing Officer and upheld by the ld. CIT(A).

5. We have considered the rival arguments made by both the sides. We find the Tribunal in ITA No.2481/Del/2012 and batch of other appeals vide order dated 19.06.2017 has deleted the disallowance of interest expenditure of Rs.34,16,863/- and disallowance of Rs.2,90,321/- made by the Assessing Officer u/s 14A.

6. So far as addition relating to professional and consultancy charges of Rs.13,03,500/- is concerned, the Tribunal has restored the issue to the file of the Assessing Officer for fresh adjudication. Since out of the three additions made by the Assessing Officer on which penalty was levied, two additions have already been deleted by the Tribunal and the addition relating to professional and consultancy charges has been restored to the file of the Assessing Officer for fresh adjudication, therefore, the very basis of levy of penalty does not survive. We, therefore, set-aside the order of the ld. CIT(A) and direct the Assessing Officer to cancel the penalty. However, the Assessing Officer is at liberty to initiate fresh penalty proceedings in the assessment order passed in

consequence to the order of the Tribunal. The appeal filed by the assessee is accordingly allowed.

ITA No.4143/Del/2014 (A.Y. 2010-11) :

7. The first issue raised by the assessee in the grounds of appeal relates to the order of the ld. CIT(A) in confirming the disallowance of interest expenditure to the extent of Rs.6,94,831/- on account of borrowed funds given by way of interest free advance to The Waterbase Ltd. (TWL).

8. After hearing both the sides, we find the Assessing Officer following his order for preceding assessment years disallowed an amount of Rs.6,94,831/- on account of interest free advance of Rs.8.4 crores and ICD of Rs.4 crores to the company "The Waterbase Ltd." during the year out of the borrowed funds on which interest has been paid. We find in appeal the ld. CIT(A) following his order for earlier years upheld the action of the Assessing Officer. We find the Tribunal in assessee's own case vide ITA No.4905/Del/2010 and ITA No.4970/Del/2010 and batch of other appeals vide consolidated order dated 19.06.2017 for assessment year 2007-08 has decided the issue in favour of the assessee by observing that the assessee has established the live link between the advance and the purpose of the business. The relevant observations of the Tribunal from para 8 to 11 read as under :-

> *"8. We have heard the rival submissions and perused the record and the judgments relied upon. It is an admitted fact that the assessee had acquired 50%*

shares in the JV company. The letter dated 06.07.2006 would reveal that in order to carry out the operations of the JV, it had requested TWL for the services of their CEO as a representative on the Board of the JV company so that the JV continues to have the benefit of his expertise and advice regarding the entire production process. In response and acceding to the request, TWL requested for an advance of Rs.10 crores instead of monthly management fee for rendering the aforesaid services. It is evident from the letter dated 11.08.2006 and 14.08.2006 that the JV expressed its inability to make the advance and requested the assessee company to make the advance. The said request was accepted by the assessee company by making the interest free advance of Rs. 4 crores to TWL.

9. The aforesaid sequence of events would leave no manner of doubt that the interest free advance was made by the assessee company as a measure of commercial expediency since it had acquired 50% shareholding in the JV company. The correspondence referred to above company would show that the said funds were required for the proper functioning of the JV company. The date of actual acquisition of shares would not alter the nature of transaction of the advance made by the assessee company. The letter dated 14.08.2006 by the JV to the assessee company would reveal the actual intention behind the transaction was procurement of services for the profitable functioning of the JV company. The contents of the said letter are extracted hereinbelow:

> *"Towerbase Services Pvt. Ltd.,*
> *Thapar House,*
> *124, Janpath*
> *NEW DELHI-110001*
>
> *Kind Attn: Mr. S.K. Ganju*
>
> *Dear Sir,*
> *SUB: MANAGEMENT SUPPORT AND RENDERING OF SERVICES*
> *You are aware that pursuant to acquisition of shares of HWIL by Towerbase Services Pvt. Ltd. (TSPL) from The Waterbase Ltd. (TWL), TWL is not responsible for managing the operations of Handy Waterbase (I) Ltd. (`HWIL').*
>
> *We had requested TWL to continue to provide their support and advice for smooth carrying on business operations of HWIL after acquisition of shares by TSPL against consideration in the form of monthly service fee.*
>
> *TWL has acceded to the aforesaid request of providing services. However they have proposed grant of interest free loan of Rs.10 crores instead of any monthly fees, in view of certain financial distress.*
>
> *The support of TWL is essential for continuous and efficient business functions of HWIL, for which no other alternative is available, TSPL also does not possess such expertise. However, HWIL does not have sufficient funds for making the aforesaid payment nor is in a position to borrow to make further advances.*

Since, TSPL will hitherto step into the shoes of TWL, we request TSPL to lend the aforesaid amount to us or directly to TWL to meet the aforestated purpose. The continuous availability of aforesaid services are very crucial for profitable functioning of HWIL. We, therefore, request you to please consider the aforesaid proposal seriously and provide early solution.
Thanking you,
Yours faithfully,
For HANDYWATERBASE INDIA (P) LTD.
Dr. B.S. AJITHA KUMAR
GENERAL MANAGER"

10 The Hon'ble Supreme Court in the case of S.A. Builders Ltd. (Supra) held as under:

`We agree with the view taken by the Delhi High Court in CIT VsDalmia Cement (Bharat) Ltd. [2002] 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits.'

11. The assessee has established the live link between the advance and the purpose of the business. The revenue cannot step into the shoes of the assessee and suggest that the advance should have been made to the JV company instead of TWL. In view thereof, the grounds raised by the assessee are allowed."

9. Since the Assessing Officer and the ld. CIT(A) have followed their respective earlier orders and since the Tribunal has deleted such disallowance, therefore, following the order of the Tribunal in assessee's own case in the immediately preceding assessment years and in absence of any contrary material brought to our notice, we set-aside the order of the ld. CIT(A) and

direct the Assessing Officer to delete the addition. The grounds raised by the assessee are accordingly allowed.

10. The second issue raised by the assessee in the grounds of appeal relates to the order of the ld. CIT(A) in confirming the disallowance of Rs.40,55,582/- u/s 14A of the I.T. Act.

11. After hearing both the sides, we find the Assessing Officer during the assessment proceedings observed that the assessee has made certain investments in shares and mutual funds/ bonds etc. out of funds either borrowed by the assessee or from company's own sources. Since these investments have yielded exempt income of Rs.17,33,192/-, the Assessing Officer asked the assessee to explain as to why expenses should not be disallowed under the provisions of section 14A r.w. Rule 8D. Rejecting the various explanations given by the assessee and observing that no disallowance has been made by the assessee suo motu, the Assessing Officer invoking the provisions of section 14A r.w. Rule 8D disallowed an amount of Rs.40,55,582/-.

12. In appeal, the ld. CIT(A) upheld the action of the Assessing Officer.

13. Aggrieved with such order of the ld. CIT(A), the assessee is in appeal before the Tribunal.

14. After hearing both the sides, we find identical issue had come up before the Tribunal in assessee's own case in the immediately preceding assessment

years. We find the Tribunal in assessee's own case in ITA No.2481/Del/2012 and batch of other appeals order dated 19.06.2017 has decided the issue in favour of the assessee by observing as under :-

> *"22. We have heard the rival submissions and perused the judgments relied upon by the assessee. The assessee has received exempt dividend income during the relevant year. The assessee has itself disallowed an amount of Rs.49,39,553/- in the computation of income. For invoking the provisions contained in section 14A of the Act the AO is required to record the dissatisfaction w.r.t. the correctness of the claim of expenditure made by the assessee. From the bare perusal of the assessment order, no such dissatisfaction is revealed. The AO has simply calculated the disallowance by invoking Rule 8D. It is not shown as to how the disallowance suomoto claimed by the assessee in the computation of income does not represent the true picture. The requirement of the satisfaction is not an empty formality. The revenue has failed to establish a link between the earning of dividend income and the expenditure disallowed in the case of the assessee. The Hon'ble Supreme Court in the case of Godrej & Boyce Manufacturing Company Ltd. Vs DCIT 81 TAXMAN.COM 111 (SC) 2017 held as under:*
>
> > *"We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, <u>what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee.</u> It is only thereafter that the provisions of Section 14A(2) and(3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable."*
>
> *23. In view of the aforesaid, ground no.2 raised by the assessee is allowed."*

15. We find the Tribunal followed the above order in assessment year 2009-10. Since the facts of the instant appeal are identical to the facts of the appeal decided by the Tribunal in assessee's own case in the preceding two

assessment years, therefore, following the order of the Tribunal in assessee's own case and in absence of any contrary material brought to our notice, the grounds raised by the assessee on this issue are allowed.

16. Ground no.3 by the assessee relates to the levy of interest u/s 234B of the I.T. Act.

17. After hearing both the sides, we find the levy of interest u/s 234B is mandatory and consequential in nature. Accordingly, this ground raised by the assessee is dismissed.

18. In the result, the appeal filed by the assessee is partly allowed.

ITA No.1711/Del/2016 (A.Y. 2011-12) :

19. In ground no.1.1 to 1.5, the assessee has challenged the order of the ld. CIT(A) in confirming the disallowance of Rs.16,38,308/- u/s 14A r.w. Rule 8D by the Assessing Officer.

20. After hearing both the sides, we find the above issue is identical to ground raised by the assessee in ITA No.4143/Del/2014 vide ground no.2.1 to 2.4. We have already decided the issue and the grounds raised by the assessee are allowed. Following similar reasoning, these grounds raised by the assessee are allowed.

21. The next ground raised by the assessee relates to levy of interest u/s 234D of the I.T. Act.

22. After hearing both the sides, we are of the considered opinion that the levy of interest u/s 234D is mandatory and consequential in nature. Accordingly, this ground raised by the assessee is dismissed.

23. Resultantly, ITA No.4146/Del/2014 by the assessee is allowed and ITA No.4143/Del/2014 and ITA No.1711/Del/2016 filed by the assessee are partly allowed.

Order pronounced in the open Court on this 16th January, 2018.

Sd/-	**Sd/-**
(BEENA A. PILLAI)	(R. K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 16-01-2018.
Sujeet

Copy of order to: -

1) The Appellant
2) The Respondent
3) The CIT
4) The CIT(A)
5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi