

आयकर अपीलीय अधिकरण ,इन्दौर न्यायपीठ ,इन्दौर  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
INDORE BENCH, INDORE

श्री कुल भारत, न्यायिक सदस्य

तथा

श्री मनीष बोरड, लेखा सदस्य के समक्ष

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER  
AND  
SHRI MANISH BORAD, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A. Nos. 227 & 228/Ind/2017		
निर्धारणवर्ष/ Assessment Years: 2010-11 & & 2011-12		
Assistant Commissioner of Income-tax (Central)-I, Indore.	vs.	M/s Prakash Asphaltting & Toll Highway Limited, 76, Mall Road, Mhow, Indore.
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent
स्था.ले.सं./PAN: AABCP0398N		

अपीलार्थी की ओर से/Appellant by	:	Shri Rajeev Jain, Sr. DR
प्रत्यर्थी की ओर से/Respondent by	:	Shri Anil Garg & Shri Arpit Gaur, CAs

सुनवाई की तारीख/Date of hearing	:	21.03.2018.
उद्घोषणा की तारीख/Date of pronouncement	:	25.04.2018

**आदेश /O R D E R**

**PER KUL BHARAT, J.M. :**

These two appeals by the Revenue pertaining to assessment years 2010-11 and 2011-12 are directed against the orders of CIT(A)-II, Indore, dated 2.12.2016 and 1.12.2016 respectively.

2. Since identical grounds have been taken by the Revenue, both the appeals have been taken up together and are being disposed of by this common order for the sake of convenience.

3. First, we take up the appeal in I.T.A.No. 228/Ind2017 for the assessment year 2011-12.

**I.T.A.No. 228/Ind/2017 – A.Y. 2011-12 :**

4. The only effective ground taken by the Revenue reads as under :-

*"On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition made by the AO of Rs. 1,00,97,137/- on account of disallowance of interest u/s 14A without appreciating the facts and evidences brought into light by the AO during assessment proceedings and remand proceedings."*

5. Briefly stated, the facts of the case are that the case of the assessee was reopened and the assessment u/s 143(3) of the Income-tax Act was framed vide order dated 4<sup>th</sup> March, 2014. While framing the assessment, the AO invoked the provisions of Section 14A and proceeded to make disallowance by applying the provisions of Rule 8D of the Income Tax Rules, 1962, and, thus, made the addition of Rs. 1,00,97,137/-. Aggrieved by this, the assessee preferred the appeal before the Ld. CIT(A), who after considering the submissions deleted the addition.

6. The Ld. Counsel for the assessee further submitted that the facts are identical as are in the assessment years 2008-09 and 2009-10. In the assessment year 2008-09 and 2009-10, the issue of disallowance u/s 14A reached up to the stage of the Tribunal. The Tribunal vide its order dated 30.09.2013 passed in I.T.A.No. 580/Ind/2012 for assessment year 2008-09, restored the matter back to the file of AO for decision afresh. In pursuance to the order of the Tribunal, the AO made enquiries and came to the conclusion that the assessee has not made any investment out of borrowed funds. The Ld. Counsel for the assessee further submitted that the order pertaining to the assessment year 2008-09 was revised by the

Learned Commissioner of Income-tax vide order dated 22<sup>nd</sup> March, 2017. This order of the Learned Commissioner of Income-tax passed u/s 263 was challenged before the Coordinate Bench of this Tribunal in I.T.A.No. 301/Ind/2017 and the order passed u/s 263 was quashed. The Ld. Counsel for the assessee, therefore, submitted that this issue being identical is covered in favour of the assessee in both the appeals.

7. On the contrary, the Ld. Departmental Representative opposed the submission of the Ld. Counsel for the assessee.

8. We have considered the facts, rival submissions and perused the material available on record. We find that the Ld. CIT(A) has given finding of facts from para 3.8 to 3.13, which are reproduced as under :-

*"3.8 Based on the similar facts the Hon'ble CIT (Appeal)-II in the assessment year 2009-10 vide appeal No. IT-784/1-12/9 dated 30.04.2015 have allowed the wrong disallowance of Rs. 1,80,71,675/- made u/s 14A of the Act with the finding that appellant's had not used the borrowed funds for making subject investments and it was directed to delete the above addition.*

3.9 *The appellant further relied on following judgments details as under :-*

- i) *The Hon. Mumbai Tribunal in **Avshesh Mercantile Pvt Ltd Vs. DCIT** has laid down following proposition, which support the argument which the assessee would like to advance that intention of acquiring investment is important and revenue cannot disregard the underlying intention. A copy of the Judgment is attached for ready reference,*
- (a) *Section 14A cannot be invoked if earning of exempt income is based on certain uncertainty and contingencies.*
- (b) *If the investment has the potential of generating taxable income like short term capital gain, disallowance U/s. 14A could not be invoked.*
- (c) *If during the year under consideration, the assessee has not earned the exempt income, provision of sec.14A is not to be invoked.*
- ii) *In the case **Reliance Utilities & Power Ltd (ITA No 1398 of 2008-order dated 9.1.2009 of Hon'ble Bombay High Court)**, the assessee made investment of Rs.389.60 Crs. in*

*shares on which tax free dividend income was received. It was the case of the assessee that there were sufficient funds available in the form of share capital (180 Crs.), reserve & surplus (215 Crs) for making investment in shares. On the other hand, case of revenue was that share capital and reserves etc. had already been invested in acquiring in fixed assets. The Tribunal found force in the contention of assessee. On appeal, the Hon'ble high court observed that there was no evidence to show that share capital, reserves etc. were invested in fixed assets and therefore finding of fact recorded by tribunal was to be accepted. However, it is pertinent to note the observations of the Hon'ble Court in para 10*

*"If there be interest free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest free funds available."*

***iii) In case of CIT Vs Lakhani Marketing INCL (2014) 272 CTR (P&H) 265, The Punjab & Haryana High Court held "that Business expenditure-Disallowance under s. 14A-***

*absence of dividend income-Findings recorded by the CIT (A) as well as the Tribunal that the assessee has not earned any dividend income from shares have not been shown to be erroneous-Therefore, deduction of interest liability out of other income cannot be disallowed under s. 14A". The Hon'ble High Court also considered the findings made in case of **CIT vs. Hero Cycles Ltd. (2010) 233 CTR (P&H) 74** reproduced here. It is clear that the expenditure on interest was set off against the income from interest and the investments in the share and funds were out of the dividend proceeds.*

*In view of this finding of fact, disallowance under s.14A was not sustainable. Whether, in a given situation, any expenditure was incurred which was to be disallowed, is a question of fact. The contention of the Revenue that directly or indirectly some expenditure is always incurred which must be disallowed under s. 14A and the impact of expenditure so incurred cannot be allowed to be set off against the business income which may nullify the mandate of s. 14A, cannot be accepted. Disallowance under s.14A requires finding of incurring of expenditure; where it is found that for earning exempted*

*income no expenditure has been incurred, disallowance under s.14A cannot stand. In the present case finding on this aspect, against the Revenue, is not shown to be perverse. Consequently, disallowance is not permissible. We have taken this view earlier also in IT Appeal No. 504 of 2008, CIT vs Winsome Textile Industries Ltd., decided on 25th Aug., 2009, wherein it was observed as under: "The contention raised on behalf of the Revenue is that even if the assessee had made investment in shares out of its own funds, the assessee had taken loans on which interest was paid and all the money available with the assessee was in common kitty", as held by this Court in **CIT vs Abhishek Industries Ltd. (2006) 205 CTR (P&H) 304: (2006) 286 ITR 1 (P&H)** and therefore, disallowance under s.14A was justified.*

*"We do not find any merit in this submission. Judgment of this Court in Abhishek Industries (supra) was on the issue of allowability of interest paid on loans given to sister concerns, without interest. It was held that deduction for interest was permissible when loan was taken for business purpose and not for diverting the same to sister concern without having*

*nexus with the business. Observations made therein have to be read in that context. In the present case, admittedly, the assessee did not make any claim for exemption. In such a situation, s.14A could have no application."*

**iv) In case of CIT vs. Holcim India (P) Ltd. (2014) 272 CTR (Del) 282, the Hon'ble Delhi High Court held that the stand taken by the Revenue is confusing. Thus, counsel for the Revenue was asked, to state in his own words, their stand before the Court. The submission raised was that the shares would have yielded dividend, which would be exempt income and therefore, the CIT (A) had invoked s. 14A to disallow the entire expenditure. The aforesaid submission does not find any specific and clear narration in the reasons or the grounds given by the CIT (A) to make the said addition.**

*"On the issue whether the assessee could have earned dividend income and even if no dividend income was earned, yet s. 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 Revenue. No contrary decision of a High Court has been shown. Income*

*exempt under s. 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 transaction 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 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. What is also noticeable is that the entire or whole expenditure has been disallowed as if there was no expenditure incurred by the 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 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 AO and has also not been doubted by the CIT (A). Tribunal was therefore right in deleting the disallowance under s.14A”.*

- v) ***In case of CIT vs. Shivam Motors (P) Ltd. (2014) 272 CTR (All) 277, Hon’ble Allahabad High Court held 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 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. Therefore, Tribunal was justified in upholding the decision of CIT(A) in deleting the***

*disallowance under s. 14A and no substantial question of law arises. Sec. 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 s.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.*

**vi. The Hon'ble ITAT Jabalpur Bench has also given same finding in case of ACIT Vs. Ramesh Singh (2014)23 ITJ 245** *"there is no dispute to the well settled proposition that interest bearing funds are required to be utilized for business purposes and in case of any diversion of such interest bearing*

*funds to non-business purposes, disallowance in warranted u/s 36(1)(iii) of the Act. However, Hon'ble Supreme Court in case of S.A.Builder Ltd. Vs CIT (2007) 8 ITJ 101(SC) : (2007) 288 ITR 1 have observed that before disallowing interest, AO is required to see business expediency. As assessee has advance to its sister concern as per the business requirements, the matter is restored back to the AO keeping in view the proposition laid down by Hon'ble Supreme court in case of S.A. Builder Ltd. Vs CIT".*

*g. There is no doubt that SPV was formed for the each BOT projects taken by the group. The appellant company is also in the business of infrastructure development and road construction. The testimony of its engagement in the BOT projects of Road is that NHAI being the apex body in infrastructure development being satisfied allotted to it the contract. Had it not been in the business of road construction, the NHAI would not have prequalified it for the tender. Therefore it is beyond dispute that appellant is in business of construction. The Company also enjoys deduction u/s 80IA which further amplify its business character being engaged in*

*road construction and infrastructure development projects business. If there is a condition being imposed by the NHAI to form a separate company in view of the reason that JV is not a person in the eye of the law unlike a company or partnership and therefore if an assessee form a separate company and hold a controlling stake (nearly 50%) in the same together with another shareholder, it cannot be said that this was not the business of the Company. The pith and substance of the amount being given is subscription to the Company's share capital which too was engaged in business of construction, it cannot be said that it was other than business."*

*3.10 Thus, it was further submitted that there was no justification to have invoked 14A qua the amount of interest expenditure claimed by the assessee. Section 14A(I) puts a embargo on AO to first satisfy at threshold, where there is any expenditure incurred for the purpose of earning any income which does not form part of total income. If the investment is made in shares without any borrowings there against, one cannot attribute it to the borrowed funds thereby disallowing legitimate expenditure. The predecessor AO in its assessment*

*order has not disputed the business purpose of interest expenditure claimed and considered it as allowable U/s 36(1) (iii). Therefore there has to be a close nexus between expenditure and exempt income (Refer SC Decision in Wallfort and Bombay HC in Godrej Case). There is ample availability of interest free funds as on 31<sup>st</sup> March, 2010, in the form of equity Rs. 5,89,35,000/- and reserves amounting to Rs. 79,50,36,303/-, the sum total of these comes to Rs. 85,39,71,303/-. Hence as these funds were available for the investment in shares and mutual funds stood at Rs. 38,83,12,641/-. This clearly shows the availability of non interest bearing funds is abundantly available.*

*3.11 The Secured loans on the same date stood at Rs. 44.15 Crs. which is secured by either current assets or fixed assets. My attention was drawn that none of these loans were taken to acquire investment as the auditors have certified in their report in para 16 of CARO Report attached with audited financial statement which is a mandatory disclosure of the loan by which asset they are secured. It has been submitted*

*that a glance the Secured Loan as on 31.3.2011 in Audited Balance Sheet Schedule -3 would give automatic conclusion that borrowed funds were not used for acquiring investment. It was argued that the Secured Loans were taken and used for mobilizing/creation of the assets. A close view of the Audited Balance Sheet as on 31.3.2011 shows gross fixed asset at Rs. 108.45 Crs whereas the secured loans are only Rs. 44.15 Crores. However, it has been claimed that after taking the net fixed assets stand at Rs. 79.63 Crs. Therefore, the Financial Statement itself broadly suggests that no interest bearing fund were used for investment in shares/mutual fund and internal accrual were sufficient for investment.*

*3.12 Thereafter the appellant submitted and I reproduced the same for clarity:-*

*“ that if cheques for investment in shares are given from CC/OD revolving facility account which is in the nature of a revolving loan account, it cannot be said that loan fund was used. Business receipts are credited to the same and expenditure is debited in this account concurrently. It is submitted that in a*

*combined account one to one correspondence of every outgo with the inflow cannot be established. In a chest various rupee are being dumped and while payment is made, there can be no distinction as to which rupee notes are used whether given by customer ram, given by bank etc. Once it is being mixed in a common hotchpotch there is no mechanism to distinguish. Therefore it is humbly prayed that disallowance of interest expenditure made by the Ld. A.O. invoking Section 14A read with rule 8D be deleted by appreciation of following factual and legal position;*

- a. There are ample interest free funds available for investment in shares. A table showing year wise accruals are testimony to the same.*
- b. The intention of investment was not to earn dividend. There has been no dividend during the period of holding is a testimony to that proposition. Also the objective of investment was to sit in management to influence decision making of that company and fetch construction contract and also to gain capital appreciation in value of shares by selling the same*

*when execution risk is overcome. Therefore even presuming that the same was out of borrowed funds, it is clearly manifested that there has been no dividend but the income from acquiring contract was offered to tax. Also capital gains on sale of shares were offered to tax. Therefore in the peculiar facts and circumstances, it is demonstrated by the assessee by actually offering the income to taxation then it cannot be said that shares were intended to earn income which is tax exempt.*

*c. If the investment has a potential to earn non exempt income 14A cannot be invoked.*

*d. The visit to 14A (2) or (3) is permissible only when the claim of the assessee has been held to be incorrect by showing cogent reason. Satisfaction or dissatisfaction is to be supported by valid reasons."*

*3.13 After a detailed examination and analysis of the balance sheet, the various judicial decision cited by the appellant including the appellant's own case decided by the jurisdictional bench of I.T.A.T. for assessment year 2008-09, the consequential appeal effect order passed by the AO and my predecessor's order for assessment year 2009-10, I am inclined to hold this*

*issue in favour of the appellant. This ground of appeal is accordingly allowed. "*

9. From the order of the Ld. CIT(A), it is evident that the Ld. CIT(A) has examined the factual aspects of the case. The Revenue has not rebutted the finding by placing any contrary material on record. Therefore, we do not see any reason to interfere with the orders of the Ld. CIT(A).

10. In the result, both the appeals of the Revenue are dismissed.

The order pronounced in the open court on 25.04.2018.

**Sd/-**  
(मनीष बोरड)  
लेखा सदस्य  
(MANISH BORAD)  
ACCOUNTANT MEMBER

**Sd/-**  
(कुल भारत)  
न्यायिक सदस्य  
(KUL BHARAT)  
JUDICIAL MEMBER

Indore; दिनांक Dated : 25/04/2018

**CPU/SPS**

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

**Private Secretary/DDO, Indore**