

आयकर अपीलिय अधिकरण “B” न्यायपीठ मुंबई मे ।

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री मनोज कुमार अग्रवाल लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No. 4925/Mum/2015

(निर्धारण वर्ष / Assessment Year 2011-12)

M. Pallonji & Co. Pvt. Ltd. 46-A, Taj Printing Work, Cawasji Patel Street, Fort, Mumbai-400 001	Vs.	The Asst. Commissioner of Income Tax, Range 2(2)(2), Room No. 545, 5 th Floor, Aayakar Bhavan, Churchgate, Mumbai-400 020
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AAACM3525B		

आयकर अपील सं./ ITA No. 4969/Mum/2015

(निर्धारण वर्ष / Assessment Year 2011-12)

The Asst. Commissioner of Income Tax, Range 2(2)(2), Room No. 545, 5 th Floor, Aayakar Bhavan, Churchgate, Mumbai-400 020	Vs.	M. Pallonji & Co. Pvt. Ltd. 46-A, Taj Printing Work, Cawasji Patel Street, Fort, Mumbai-400 001
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by : Shri Jehangir Mistri, AR

प्रत्यर्थी की ओर से / Respondent by : Shri Padma Ram, DR

सुनवाई की तारीख / Date of hearing:	09.10.2018
घोषणा की तारीख / Date of pronouncement :	09.10.2018



आदेश / ORDER

PER MAHAVIR SINGH, JM:

These cross appeals are arising out of the order of Commissioner of Income Tax-5, Mumbai [in short CIT(A)], in appeal No. IT-22/14-15, order dated 10.07.2015. The Assessment was framed by the Deputy Commissioner of Income Tax, Circle 2(2), Mumbai (in short 'DCIT/ AO') for the A.Y. 2011-12 vide order dated 28.03.2014 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The first common issue in these appeals of assessee and Revenue is as regards to partly allowing the disallowance made by AO of expenses relatable to exempt income by invoking the provisions of section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 (hereinafter the 'Rules'). For this assessee has raised the following three grounds: -

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in rejecting the assessee's method of computing disallowance u/s 14A of the Act and continuing disallowance u/s 14A made by the Id A.O. to the extent of Rs 60,6,213/- as against Rs 28,66,758/- disallowed in the return of income.

2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in disallowing 0.5% of below investments as per Rule 8D(2)(iii):

<i>Nature of investment</i>	<i>Amount</i>	<i>Strategic in nature</i>	<i>No dividend earned</i>
<i>Incremental investment</i>	<i>Rs.33,42,61,380/-</i>	<i>Yes</i>	<i>Yes</i>



<i>in Metlife India Insurance Co. Ltd</i>			
<i>Share application money</i>	<i>Rs.23,92,75,570/-</i>	<i>Yes</i>	<i>Yes</i>
<i>Sri City Power Gen (TN) Pvt. Ltd.</i>	<i>Rs.55,00,00,000/-</i>	<i>Yes</i>	<i>Yes</i>

3. *On the facts and iii the circumstances of the case and in the Ld. CIT(A) erred in including the above investments in computing the average of value of exempt investments as per Rule 8D(2)(iii) despite the fact that were strategic in nature and that no exempt dividend income was earned on the subject investments.”*

Revenue has raised the following ground No. 2:-

“2. On the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in restricting the disallowance u/s. 14A r.w. Rule 8D(2)(iii) after excluding the long term investments in subsidiary / group concerns relying on the decision of the ITAT in the case of Garware Wall Ropes Ltd. (65 SOT 86) without appreciating the fact that the decision of the ITAT has not been accepted by the department and appeal has been admitted by the Hon'ble High Court.”

3. Briefly stated facts are that the assessee has earned the dividend income of ₹ 1,46,98,558/- and claimed the same as exempt under section 10(34) of the Act. The assessee itself disallowed the expenditure relatable to exempt income under section 14A read with Rule 8D of the Rules amounting to ₹ 28,66,758/- being expenses for investment in shares, management and consultancy fee paid etc. The AO not satisfied with the



disallowance made by the assessee of the expenditure, he invoked the provisions of section 14A of the Act read with Rule 8D of the Rules and computed the disallowance as under: -

“(i) under Rule 8D(2)(i) ₹ 47,686/- being direct expense. On this there is no dispute by the Revenue or by the Assessee.

(ii) under Rule 8D(2)(ii) i.e. interest disallowance of ₹ 4,90,783/-.

(iii) Under Rule 8D(2)(iii) i.e. administrative expenses being 0.5% of average value of investment of ₹ 7,37,57,783/-.”

4. The AO considered the disallowance already made by assessee itself and by allowing credit for the same he disallowed the balance amount at ₹ 7,08,91,025/- under section 14A of the Act read with rule 8D of the Rules. Aggrieved, assessee preferred the appeal before CIT(A) and only requested that there is no dividend income earned by assessee on the following three investments but CIT(A) sustain the addition: -

<i>Nature of investment</i>	<i>Amount</i>
<i>Incremental investment in Metlife India Insurance Co. Ltd</i>	<i>Rs.33,42,61,380/-</i>
<i>Share application money</i>	<i>Rs.23,92,75,570/-</i>
<i>Sri City Power Gen (TN) Pvt. Ltd.</i>	<i>Rs.55,00,00,000/-</i>

5. On the other hand, Revenue has challenged the deleting of disallowance under Rule 8D(2)(ii). The learned Counsel for the assessee stated that this issue is squarely covered in favour of assessee and against the Revenue by the decision of Tribunal in assessee's own case for AY 2008-09 in ITA No. 3739/Mum/2015 and others vide order dated 28.02.2018 vide Para 25 reads as under: -



“25. Having considered the rival submissions we are of the view, the assessee's claim that investment made in Sri Citi Power Generation (T.N) Pvt. Ltd. is in the nature of strategic investment is not acceptable in view of the reasoning of the first appellate authority. Therefore, for that reason, it cannot be excluded from the average value of investment for computing disallowance under rule 8D(2)(iii). However, we find force in the alternative contention of the learned Authorised Representative that since the investment in Sri Citi Power Generation (T.N) Pvt. Ltd. has not yielding any income in the relevant previous year no disallowance should be made. We direct the Assessing Officer to examine this aspect and if it is found that in the relevant previous year, assessee has not earned any dividend income on the investment in shares of Sri Citi Power Generation (T.N) Pvt. Ltd. such investments have to be excluded from the average value of investment for computing disallowance under rule 8D(2)(iii). These grounds are allowed for statistical purposes.”

6. The learned Counsel for the assessee took us through the investment details which are enclosed in assessee's paper book at page 13, schedule B of the balance sheet which are giving rise to dividend i.e. exempt income and some of the investments are not giving any exempt income which he requested for exclusion. The learned Counsel for the assessee requested that the issue can be remitted back to the file of the



AO for verification. The learned Counsel for the assessee also filed details of investment wherein direct expenditure under Rule 8D(2)(i) and under Rule 8D(2)(iii) is computed at ₹ 12,78,182/- by the assessee. But he stated that this is subject to verification. The learned Counsel for the assessee also argued that the disallowances challenged by assessee which does not give rise to any exempt income is also covered by the decision of ITAT Delhi Bench i.e. Special Bench in the case of ACIT vs. Vireet Investments (P.) Ltd [2017] 58 ITR(T) 313 (Delhi - Trib.) (SB), he particularly referred to Para 11.16 to 11.18 as under: -

“11.16 Therefore, in our considered opinion, no contrary view can be taken under these circumstances. We, accordingly, hold that only those investments are to be considered for computing average value of investment which yielded exempt income during the year.

11.17 As far as argument relating to meaning to be ascribed to the phrase 'shall not' used in Rule 8D(2)(iii) is concerned, the Revenue's contention is that it refers to those investments which did not yield any exempt income during the year but if income would have been yielded it would have remain exempt. There is no dispute that if an investment has yielded exempt income in a particular year then it will enter the computation of average value of investments for the purposes of Rule 8D(2)(iii). The assessee's contention that if there is no certainty that an income, which is exempt in current year, will continue to be so in future years and therefore, that investment



should also be excluded, is hypothetical and cannot be accepted.

11.18 In view of above discussion, the matter is restored back to the file of AO for recomputing the disallowance u/s 14A in terms of above observations. Thus, revenue's appeal is dismissed and assessee's cross-objection, on the issue in question, stand allowed for statistical purposes, in terms indicated above."

On the other hand, the learned Sr. Departmental Representative only relied on the assessment order.

7. We have heard rival contentions and gone through the facts and circumstances of the case. We find that the issue is covered by the Tribunal's decision in assessee's own case for AY 2008-09 in ITA No. 3739/mum/2015 and others order dated 28.02.2018, wherein Tribunal has directed the Assessing Officer to exclude the investments which are not yielding any exempt income and no disallowance in respect to those investments should be made. We have also considered the decision of Special bench of this Tribunal i.e. Delhi Bench in the case of Vireet Investments (P.) Ltd: (supra) and we direct the AO to exclude the investments which does not given any exempt income for the purpose of computation of disallowance under section 14A of the Act read with Rule 8D(2)(iii). In term of the above, we set aside this issue to the file of the Assessing Officer.

8. The next issue in this appeal of Revenue is against the order of CIT(A) deleting the addition made by AO due to inclusion of service tax as part of trading receipt. For this Revenue has raised the following ground No. 3 and 4: -



"3. "on the facts and in the circumstances of the case and in law, the CIT(A) was correct in deleting the addition u/s. 145A of the Act, 1961 due to inclusion of service tax as part of trading receipts, by holding that the provisions of Section 145A of the I.T. Act, 1961 are applicable to manufacturing segment of business and not to a service provider company without appreciating that service tax stands on same footing as excise or sales tax vis-a-vis the phrase 'tax, duty, cess or fee (by whatever name called) used in section 145A(a)(ii) of the I.T. Act, 1961 and required to be included in the trading receipts.

4. On the facts and in the circumstances of the case and in law, the CIT(A) was correct in deleting the addition u/s. 145A of the I.T. Act, 1961 due to inclusion of service tax as part of trading receipts, by holding that the provisions of section 145A of the I.T. Act, 1961 are applicable to manufacturing segment of business without appreciating that Hon'ble Supreme Court in the case of CIT v/s. Thirumalaiswamy Naidu & Sons (230 FIR 534) held that sales tax collected has to be treated as income. Service tax being an identical levy of tax would also thus be of the same character."

9. The learned Sr. Departmental Representative supported the order of the Assessing Officer. On the other hand, the learned Counsel supported the order of CIT(A).



10. We have heard rival contentions and gone through the facts and circumstances of the case. According to AO, the service tax liability in respect of debtors of the previous year worked out to be ₹ 1,28,55,341/- and the CENVAT credit in respect of outstanding creditors is amounting to ₹ 31,90,134/-. According to AO, this liability to be taken as inclusive and treating the service tax as part of trading receipt. Accordingly, the trading profit will be increased by this amount of ₹ 96,65,207/-. Accordingly, he made addition. Aggrieved, assessee preferred the appeal before CIT(A), the CIT(A) following his predecessors order for AY 2010-11, wherein the Tribunal decision in assessee's own case for AY 2007-08 in ITA No. 1893/Mum/2011 vide dated 30.06.2014 was followed by observing as under: -

"I had considered the appellant's submissions. The issue has come into considered under CIT(A)'s order for AY 2010-11 in para 4.2.1 in page 54 in which he held as under:

4.2.1. The relevant part of the written submissions finds place in para (3) of this order. The issue is considered. In this case, the AO observed that service tax is booked at the time of sale as an expense but under the service tax law, the liability of the assessee to pay the service tax accrues only when he receives the payment from client. Thus, the AO made disallowance u/s 145A of Ps 1,02,30,894/- of service tax. However, as pointed by the assessee that the issue is squarely covered by the Hon'ble ITAT's decision in the assessee '5 own case for A. Y. 2007-



08 dated 30-06-2014, which held as follows:

"We have heard the arguments and have perused the orders of the revenue authorities. The fact is that the assessee is a service provider company and potently, the provisions of Section 145A cannot be made applicable, because the provision was specifically introduced for the purposes of manufacture segment of business.....Considering the settled nature of the issue, we are of the opinion that the decision taken by the CIT(A) is required to be reversed. Accordingly Ground no 2 raised by the assessee is allowed.

Since the Hon'ble ITAT has already decided the issue in favour of the assessee, respectfully following the said decision of the Hon'ble ITAT, I delete the addition made by the AO on account of service tax u/s 145A of the Act of Ps 1,02,30,894/-. The AO is directed to give appeal effect accordingly."

Following the above order of CIT(A), my predecessor, wherein he deleted the addition made by the AO in previous year, the AO's addition is deleted."



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11. We find that this issue is also covered in favour of assessee in earlier year and hence, respectfully following the same we confirm the order of CIT(A) deleting the addition. This issue of Revenue's appeal is dismissed.

12. In the result, both, the appeal of assessee as well as Revenue are partly allowed.

Order pronounced in the open court on 09-10-2018.

आदेश की घोषणा खुले मे दिनांक 09-10-2018 को की गई ।

Sd/-

(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

Mumbai, Dated: 09-10-2018

Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.
//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI