IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH : KOLKATA

[Before Hon'ble Shri S.S.Godara, JM & Hon'ble Shri M.Balaganesh, AM]

I.T.A No. 2005/Kol/2016

Assessment Year : 2011-12

M/s New Kenilworth Hotel Pvt. Ltd. -vs- ACIT, Range-8, Kolkata
[PAN: AABCN 0986 A]
(Appellant) (Respondent)

For the Appellant : Shri Srikumar Banerjee, FCA

For the Respondent : Shri Robin Chowdhury, Addl. CIT Sr. DR

Date of Hearing : 04.12.2018

Date of Pronouncement : 12.12.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Assessee arises out of the order of the Learned Principal Commissioner of Income Tax-2, Kolkata [in short the ld CIT] in Appeal No. 49/CIT(A)-2/16-17 dated 01.07.2016 against the order passed by ACIT, Range-8, Kolkata [in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (in short "the Act") dated 29.03.2014 for the Assessment Year 2011-12.

2. Ground no. 1(a) raised by the assessee is general in nature and does not require any specific adjudication.

3. Ground no. 1(b) is with regard to action of the ld. CIT(A) confirming the disallowance of Rs. 10,39,896/- made u/s 14A read with Rule 8D of the Rules.

3.1. Brief facts of this issue is that the ld. AO on perusal of the audited balance sheet of the assessee observed that the assessee had invested in quoted and unquoted shares and units of mutual funds. But no disallowance u/s 14A of the Act was made in the return of income by the assessee. The ld. AO accordingly invoked the computation mechanism provided under Rule 8D of the Rules and invoked first limb and made an addition of Rs. 1,059/- and invoked third limb and made an addition of Rs. 10,38,873/-. The total disallowance u/s 14A of the Act read with Rule 8D of the Rules was Rs. 10,39,896/-. The assessee pleaded that it had earned exempt dividend income only to the tune of Rs. 674/- and that disallowance should be restricted only to said sum. The assessee also pleaded regarding the non-applicability of Rule 8D of the Rules in the facts and circumstances of the instant case by arguing that the same could not be applied in a mechanical manner. The ld. CIT(A) however did not heed to these contentions of the assessee and upheld the action of the ld. AO. Aggrieved the assessee is in appeal before us.

4. We have heard the rival submissions. The ld. AR argued that the investments made by the assessee in subsidiary company are to be considered as strategic investment and hence the same should be kept outside the ambit of computation mechanism provided in Rule 8D of the Rules. We find this aspect has been settled recently by the Hon'ble Supreme Court in the case of Maxopp Investments against the assessee reported in 402 ITR 640. However, at the outset, we find that the assessee had earned exempt income in the form of dividend only to the extent of Rs. 674.40/-. Hence the disallowance u/s 14A of the Act could be restricted only to the extent of dividend income. Reliance in this regard is placed on the decision of Hon'ble Delhi High Court in the case of Joint Investments Pvt. Ltd. vs. CIT reported in 372 ITR 694 wherein it was held as under:

> ***9.*** *In the present case, the AO has not firstly disclosed why the appellant/assessee's claim for attributing Rs. 2,97,440 as a disallowance under s. 14A had to be rejected. Taikisha Engg. India Ltd. (supra) says that the jurisdiction to proceed further and determine amounts is derived after examination of the accounts and rejection if any of the assessee's claim or explanation. The second aspect is there appears to have been no scrutiny of the accounts by the AO-an aspect which is completely unnoticed by the CIT(A) and the Tribunal. The third, and in the opinion of this Court, important anomaly which we cannot be unmindful is that whereas the entire tax exempt income is Rs. 48,90,000, the disallowance ultimately directed works out to nearly 110 per cent of that sum, i.e., Rs. 52,56,197. By no stretch of imagination can s. 14A or r. 8D be interpreted so as to mean that the entire tax exempt income is to be disallowed. The window for disallowance is indicated in s. 14A, and is only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case.*

Respectfully following the said decision, we direct the ld. AO to restrict the disallowance u/s 14A of the Act to Rs. 674/- in the facts and circumstances of the instant case. Accordingly, ground no. 1(b) raised by the assessee is allowed for statistical purposes.

5. Ground No. 2 raised by the assessee is with regard to the action of the ld. CIT(A) in upholding the disallowance of Rs. 24,30,065/- u/s 40a(ia) of the Act in respect of credit card swiping charges paid to the bank treating the same as commission.

5.1. The amount was paid to the bank towards credit card swiping charges because the bank collect the money from the customers and retained a portion of the same towards its bank charges and passed on the net amount to the assessee company. It was pleaded that the assessee company has not paid any commission to the bank against the credit card facilities. The bank has given services against the credit card like any other services given by it such as opening of letters of credit, issuance of drafts or bankers cheques etc against which the bank generally charges certain amount which are commonly known as 'bank charges'. Both the lower authorities however did not agree to these contentions of the assessee and held that the monies paid by the assessee to the

bank is in the nature of commission paid to the bank and accordingly, liable for deduction of tax at source u/s 194H of the Act and held that failure to do the same warrants disallowance u/s 40a(ia) of the Act. Aggrieved the assessee is in appeal before us.

5.2. We have heard the rival submissions. We find that the monies paid by the assessee to the bank are nothing in the form of bank charges and similar to bank rendering services to the assessee for opening letters of credit, bill discounting, issuing DDs etc.. Merely because the bank collects the money from customer for providing credit card services and retains its charges and passes on net amount to the assessee, it cannot automatically fall within the ambit of the term 'commission' within the meaning of section 194H of the Act. The ld. AR has informed that the similar disallowance made in assessment year 2010-11 in assessee's own case was deleted by the ld. CIT(A) against which the revenue did not prefer any appeal before this Tribunal. He also argued that no such disallowance was made by the ld. AO in subsequent years. These facts are not controverted by the revenue before us. Hence we direct the ld. AO to delete the disallowance made u/s 40a(ia) of the Act in the sum of Rs. 24,30,065/-. Accordingly, ground no. 2 raised by the assessee is allowed.

6. Ground no. 3 raised by the assessee was stated to be not pressed at the time of hearing. The same is reckoned as a statement from Bar and accordingly dismissed as not pressed.

7. Ground no. 4 raised by the assessee is with regard to action of the ld. CIT(A) confirming the addition of Rs. 4,34,194/- on account of interest income as per ITS details.

7.1. The assessee pleaded that the assessee had not received any interest income in the sum of Rs. 4,34,194/- representing interest on IT refund for assessment year 2009-10 u/s 244A of the Act. The ld. AO observed that the assessee was paid interest u/s 244A of Rs. 4,34,194/- on 24.02.2011. Since the said sum was not offered to tax by the assessee the ld.AO sought to tax the same while completing the assessment. The assessee pleaded before the ld. CIT(A) that it had not received any refund from the Income Tax Department for the assessment year 2009-10 and hence no entry was passed in the books towards interest income. The assessee also placed the outstanding demand statement downloaded from the income tax department website wherein the demand was still pending to be paid by the assessee for the said assessment year. The ld. CIT(A) did not heed to these contentions of the assessee and upheld the action of the ld. AO by simply stating the interest on income tax refund is taxable. Aggrieved the assessee is in appeal before us.

7.2. We have heard the rival submissions. The ld. AR having reiterated the submissions made before the lower authorities prayed before us that let this matter be examined by the ld. AO as to whether any refund at all was granted to the assessee for assessment year 2009-10 on 24.02.2011 or adjusted against any other demands thereon. The ld. DR fairly agreed to these proposals. Accordingly, we deem it fit and appropriate, in the interest of justice and fair play, to remand this issue to the file of the ld. AO for de novo adjudication as per law. Needless to mention that the assessee be given reasonable opportunity of being heard in this regard. The ld. AO is also directed to dispose off with cogent evidences , the objections, if any, filed by the assessee in this regard. Accordingly, ground no. 4 raised by the assessee is allowed for statistical purposes.

8. Ground no. 5 raised by the assessee is with regard to the action of the ld. CIT(A) confirming the disallowance of Rs. 2,46,653/- for non-deposit of ESI and PF. This ground was not pressed by the assessee before the ld. CIT(A) and no arguments were

advanced before us by the ld. AR. Accordingly, ground no. 5 raised by the assessee is dismissed.

9. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the Court on 12.12.2018

Sd/- Sd/-

[S.S. Godara] [M.Balaganesh]
Judicial Member Accountant Member

Dated : 12.12.2018
SB, Sr. PS
Copy of the order forwarded to:
1. M/s Kenilworth Hotel Pvt. Ltd., 1 & 2, Little Russel Street, Kolkata-700071
2. ACIT, Range-8, Kolkata
3..C.I.T.(A)- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches