IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B', NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.6387/Del/2015
Assessment Year: 2011-12

Shri Gautam Chadha, L/h. Mrs. Ratna Chadha, 505, Salcon Aurum, 4, Jasola District Centre, New Delhi	**Vs.**	ACIT, Circle-28(1), New Delhi
PAN :AADPC5798A		
(Appellant)		**(Respondent)**

Appellant by	Shri Ashok Sikka, Adv.
Respondent by	Ms. Shaveta Nakra Dutta, Sr. DR

Date of hearing	03.01.2019
Date of pronouncement	14.01.2019

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 21/09/2015 passed by the Ld. Commissioner of Income-tax (Appeals)-18, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2011-12 raising following grounds:

1. *That the Ld. CIT (Appeals) erred in facts and in law in confirming the addition of Rs. 9,59,524/- u/s 14A read with rule 8D in as much as Section 14A was not applicable to the facts of the case.*

That at any rate, without prejudice to the above, the disallowance as made by the CIT (A) is illegal, unjust, arbitrary, factually not tenable and at any rate very excessive.

2. *That the Ld. CIT (A) erred in facts and in law in confirming the addition of Rs.24,88,876/- treating part of Rs. 1,65,92,509/- as income of the appellant although the same being in the nature of advances and partial deposits received by the appellant for and on behalf of its Principal for sailing to be undertaken in the subsequent financial year. At any rate, without prejudice to the above, alternatively, the Ld. CIT (A) ought to have directed the A.O. to allow Rs.77,42,726/-, being the amount which was treated as additional income of the appellant in the AY 2010-11, the income which had already suffered taxation in the earlier year (AY 2010-11) instead of remanding the matter on this issue.*

3. *That the assessment of total income at Rs.9,73,61,300/- and the demand of income tax amounting to Rs. 13,81,660/- including interest there on u/s 234A, 234B & 234D is unjust, arbitrary and illegal.*

2. Briefly stated facts of the case are that the assessee an individual was engaged in the business of booking of USA based travel by Cruise through his proprietary concern M/s Tirun Travel Marketing, being an authorised agent of M/s Royal Caribbean Cruises Ltd, USA. The assessee filed return of income declaring total income of Rs.9,29,17,880/- on 16/08/2011. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued and complied with. In the assessment completed under section 143(3) of the Act 19/03/2014, the Assessing Officer made disallowance of Rs.9,59,524/- under section 14A of the Act invoking rule 8D of Income Tax Rules, 1962 (in short 'the Rules'). The Assessing Officer also made addition of Rs.24,88,876/-in respect of 25% of the amount of advances received from customers related to the Cruise travel business. In addition to these disallowances/additions, certain other disallowances/additions were made in the assessment order to

the income returned by the assessee. Due to demise of the assessee, the proceedings were represented by the legal heir Smt. Ratna Chadda and accordingly the assessment was framed in the capacity of legal heir.

2.1 Aggrieved, the assessee filed appeal through legal heir before the Ld. CIT(A) who partly allowed the appeal of the assessee wide impugned order. Aggrieved the additions/disallowances sustained by the Ld. CIT(A), the assessee is in appeal through legal heir before the Tribunal raising the grounds as reproduced above.

3. The ground No. 1 of the appeal relates to addition of Rs.9,59,524/- under section 14A read with rule 8D.

3.1 The Ld. counsel of the assessee submitted before us that similar disallowance/addition was made in preceding assessment year, i.e., Assessment 2010-11, which the Ld. CIT(A) deleted and no further appeal on that issue was preferred by the Revenue. According to him, once the Department has accepted the finding of the Ld. CIT(A), then preferring the appeal on the same issue in subsequent year is not justified and against the rule of consistency.

3.2 The Ld. DR, on the other hand, relied on the order of the lower authorities and submitted that issue in each year has to be seen in the facts of the relevant assessment year.

3.3 We have heard the rival submission and perused the relevant material on record including the impugned order of the lower authorities and the order of the Ld. CIT(A) in preceding assessment year 2010-11. The Assessing Officer noticed exempt income of Rs.1,03,54,574/- which included long term capital gain (STT) under section 10(38) of the Act amounting to Rs.5,13,725/-, PPF interest amounting to Rs.35,840/- and dividend income of

Rs.98,05,009/-. The Assessing Officer also noticed investments in assets yielding exempted income at Rs.16,83,73,185/- and Rs.21,54,36,270/- as on 31/03/2010 and 31/03/2011 respectively. The Assessing Officer issued show cause notice to the assessee as, why the provisions of section 14A of the Act may not be invoked. The assessee explained that whatever expenditure was deemed to have been incurred, the assessee incurred the same out of his personal withdrawal and no expenditure or part thereof was incurred out of business expenses claimed by the assessee. This contention of the assessee was not accepted by the Assessing Officer and according to him in view of the various judicial decisions discussed in the assessment order, the expenditure was liable to be disallowed under section 14A of the act invoking rule 8D of Rules. The Assessing Officer observed that the assessee failed to prove the claim that amount debited in the capital account as withdrawal also included the expenses incurred toward making transaction in the investment related activities income of which is exempt. Accordingly, the Ld. Assessing Officer computed the disallowance invoking rule 8D(2)(iii) at the rate of 0.5 percentile of the average value of investment, which was worked out to Rs.9,59,524/-.

3.4 Before the Ld. CIT(A), the assessee claimed that the Assessing Officer has not complied with the condition of recording dissatisfaction over the accounts of the assessee for invoking rule 8D of Rules. The Ld. CIT(A), however, was not convinced with the submission and the cases relied upon by the assessee. The Ld. CIT(A) noted that, the Assessing Officer issued show cause notice to the assessee as why the section 14A may not be applied and it

was replied by the assessee that no expenditure was incurred out of the business expenses debited in the books of accounts. In view of the observation, the Ld. CIT(A) was of the view that the argument of the assessee that the Assessing Officer had not expressed his dissatisfaction before invoking rule A.D., is misplaced. The Ld. CIT(A) referred to various decisions of the courts including decision of the Hon'ble Delhi High Court in the case of Joint Investment Private Limited Vs. CIT (2015) TIOL-574-HC-DEL-IT, wherein the Hon'ble High Court observed as under:

> *"Section 14A(2) and Rule 8D(1) in unison and affirmatively indicate that AO has to record that the computation or disallowance made by the assessee or claim that no expenditure was incurred to earn exempt income must be examined with reference to the accounts, and that only and when the explanation/claim of the assessee is not satisfactory, can be proceed to invoke Rule 8D."*

3.5 The Ld. CIT(A) distinguished the decisions relied upon by the assessee and held that the AO's action meets all the criterias for applying rule 8D of Rules and accordingly, he upheld the disallowance dismissing the ground of the appeal of the assessee. Before us the Ld. counsel submitted that the identical exempted income was earned in immediately preceding assessment year i.e. 2010-11 from mutual funds, PPF, shares of companies etc and it was contended that expenditure for earning such exempted income, was incurred out of personal withdrawal. He submitted that the Ld. CIT(A) deleted the disallowance made under section 14A in the said assessment year and no further appeal has been preferred by the Revenue before the Tribunal on this ground, and thus, following the rule of consistency, the Revenue should not

have agitated this issue before the Tribunal. The Ld. CIT(A) in assessment year 2010-11 deleted the disallowance observing as under:

> *"5.1 I have carefully considered the facts of the case and the submission of the appellant. The appellant's investments resulting income not chargeable to tax are mainly in units of Mutual Funds, PPF, Shares of companies, etc. Certain expenditures were bound to be incurred in this regard. According to me, such expenditures are minimal as the above mentioned investments were made through banking channels mainly in preceding years, which do not require substantial expenditure later on. Undisputedly, the appellant has withdrawn Rs.2,60,06,408/- for personal and house hold expenses. The appellant's contention that he has incurred expenditure, which is nominal, relating to the income not chargeable to tax out of his personal withdrawals, appears convincing. Thus, in view of the above mentioned submission, I am satisfied that the appellant has correctly reflected the expenditure relatable to the income not chargeable to tax and thus there is no need to apportion expenditure in accordance with the Rule 8D of the Income Tax Rules for disallowance u/s 14A as there is no specific reasoning given by the AO in rejecting the above mentioned contentions of the appellant."*

3.6 On perusal of the above finding of the Ld. CIT(A), which has not been challenged further by the Revenue before the Tribunal, we find that no issue of dissatisfaction of the Assessing Officer as to the accounts was discussed in the assessment year 2010-11, whereas in the present assessment year, before the Ld. CIT(A) the assessee challenged nonexistence of dissatisfaction as to the accounts of the assessee, which has been rejected by the Ld. CIT(A) after detailed analysis of decisions available on the issue . In our opinion, whether the Assessing Officer was dissatisfied with the accounts of the assessee for determining the expenses disallowable under section 14A of the Act has to be seen on year-to-year basis, in each assessment year and it is not the issue which can be decided only on the basis of the any precedent of

earlier year. The rule of consistency cannot be applied in the circumstances of the case. We are of the view that once the Assessing Officer has crossed the threshold of recording dissatisfaction over the accounts of the assessee, invoking rule 8D of the rules is in accordance with the provisions of the law and we do not find any error in the Ld. CIT(A) in upholding the disallowance in the year under consideration. Accordingly we uphold the same. The ground of the appeal of the assessee is dismissed.

4. The ground No. 2 of the appeal relates to addition of Rs.24,88,876/- made by the Assessing Officer for 25% of the advances received from customers for and on behalf of its principal for sailing to be undertaken in subsequent financial year treated as income of the year under consideration. The assessee has also raised alternative ground for allowing amount of Rs.77,42,726/-which was treated as additional income on the same ground in assessment year 2010-11.

4.1 Before us, the Ld. counsel of the assessee submitted that issue in dispute is covered against the assessee by the order of the Tribunal in ITA No. 4114/Del/2014 for assessment year 2010-11 in the case of the assessee itself.

4.2 We find that the Ld. CIT(A) has sustained the addition following the decision of the Hon'ble High Court in the case of the assessee itself. The relevant finding of the Ld. CIT(A) is reproduced as under :

> *"2.3 I have considered the grounds raised in appeal and the facts of the case. 1 have also considered the submission filed by the AR of the appellant. It is to note that the assessee is engaged in the business of booking of USA based travel by Cruise, run under the name and style*

of M/s Tirun Travel Marketing. The Appellant is an authorized agent of M/s Royal Caribbean Cruise Ltd. with headquarters in U.S.A. The Appellant is responsible for marketing and selling Royal Caribbean's Cruises in India for travel all over the world. Incidentally none of the cruises of the Royal Caribbean touches India. The assessee receives some amount mainly as part payments or advance on account of sailings which were to take place in the subsequent accounting period. As the sailing were to take place in the subsequent year and consequently the services had not been rendered in the year under consideration, the appellant has all along contended that income embedded in such advance could not be taxed in the year of such receipt of advance. The issue first arose in the AY 03-04 where the AO taxed 25% of such advance as income. While the ITAT has allowed the appeal of the assessee, the Hon'ble HC in further appeal vide order dt 27-7-2011 held as follows:

"We therefore hold that the stand taken by the CIT(A) in this regard was correct and 25% of the booking advances received should be treated as income of the assessee assuming that there are no cancellations. However the assessee shall be entitled to 10% of the travel agents commission after ascertaining the actual outgoings in this regard."

2.4 The assessee's AR stated that the matter is now pending before the Hon'ble SC. However considering the decision of the Hon'ble HC in this regard and the detailed discussion of the AO in para 3 of the Asst order which is not reproduced here for brevity, the AO's action in treating 25% of the amount advanced as

4.3 Further, we find that the Tribunal (supra) in assessment year 2010-11, has also decided the issue following the decision of the Hon'ble High Court in the case of the assessee itself. The relevant finding of the Tribunal is reproduced as under:

"5. After hearing the submissions of both the parties and going through the entire material available on record, we find that the issue under consideration is squarely covered in favour of the Revenue and against the assessee by the decision of Hon'ble Jurisdictional High court in assessee's own cases (ITA Nos. 310/2009, 358/2011 and 115/2010 for A.Y. 2003-04, 2005-06 and 2007-08), wherein the Hon'ble Court held as under:

"10. Admittedly, the assessee is following mercantile system of accounting, where under, whenever the right to receive money in the course of a trading transaction accrues or arises, even though

income is not realized, income embedded in the receipt is deemed to arise or accrue as held by the SC in Raja Mohan Raja Bahadur, (Supra). In State Bank of Travancore (Supra) also, the SC has held that it is the income which has really accrued or arisen which is taxable. Similar view has been expressed by this court in Devsons (Supra). It was observed as under:

> *"... Even in the mercantile system of accounting it is the resl income which has accrued in a practical sense that is to be brought to tax. In CIT v Shoorji Vallabhdas and Co. [1959J_36 ITR 25, the Bombay High Court held that the question whether the income accrued or not is not a mere matter of cogency of the entries made in the account books of the assessee, but is essentially one of substance and of the real nature of what happened. A mere book entry is not conclusive of the question whether the assessee had become entitled to the sums or not and whether the income is accessable"*

11. In Amiantit International (Supra), it was observed as under:

> *"We shall now look to the meaning of the expression" accrue or arise". The dicta of Mukherji, in Rogers Pyatt SI llac and Co. v Secretary of Stats for India fl 925] 1 ITR 363 has been quoted with approval in a series of decisions of the Supreme Court (vide E.D. Sassoon and Co. Ltd. v C1T[1954] 26 1TR27 (page 50):*
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> *"Now what is income? The term is nowhere defined in the Act,... In the absence of a statutory definition we must take its ordinary dictionary meaning.... The word clearly implies the idea of receipt, actual or constructive. The Policy of the Act is to make the amount taxable when it is paid or received either actually or constructively. Accrues', 'arises' and 'is received' are three distinct items. So far as receiving of income is concerned, there can be no difficulty; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning planner than the word 'receiving' itself The words 'accrue' and 'arise' also are not defined in the Act. The ordinary dictionary meanings of these words have got to be taken as the meanings attaching to them. 'Accruing' is synonymous with 'arising' in the sense springing as a natural growth or result. The three expressions 'accrues', 'arises' and 'is received' having been used in the section, strictly speaking, 'accrues' should not be taken as synonymous with 'arises' but in the distinct sense of growing up by way of addition or increase or as a accession or advantage, while the word 'arises' means comes into existence or notice or presents itself. The former connotes the idea of growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable."*

12. In Dinesh Kumar Goel (Supra), it was observed as under:

> *"It is important, therefore, that receipt of a particular amount in the relevant year should be an "income' under the aforesaid provision. What is the relevant yardstick is the time of accrual or arisal for the purpose of its taxation, viz, in order to be chargeable, the income should accrue or arise to the assessee during the previous year. If income has accrued or arisen, even if actual receipt of the amount is not there, it would be chargeable to tax in the said year. Though the amount may be received later in the succeeding year, the income would be said to accrue or arise if there is a debt owned to the assessee by somebody at that moment. From this, it follows that there must be the "right to receive the income on a particular date". The court further explained that a right to receive a particular sum under the agreement would not be sufficient unless the right accrued by rendering of services and not by promoting for services and where the right to receive is anterior to rendering of service, the income, therefore, would accrue on rendering of services.... (para 13) "*

13. The question for our consideration is as to when the income can be said to be accrued to the assessee. It is when the ticket is booked by the assessee or when the customer boarded the cruise and it departed? We find force in the contention of the learned counsel for the revenue, that it was RCCL and not the assessee who was responsible to render all post booking services to the customers. As per Section 5 of Article (2J of 2002 International Representation Agreement as executed between the Assessee and RCCL, all bookings which become sailed which wore made in accordance with RCCL's applicable policy and procedures and for which full payment is received by RCCL in accordance with this agreement are termed as qualified bookings. It also provides that bookings that are made by the customers on the Cruise Line's website shall not be considered qualified bookings. As per Section 16 thereof, the assessee was required to remit for each booking to RCCL (a) quoted price or (b) the quoted prices minus the commission payable to the assessee pursuant to Section 6. Section 6 prescribed base commission which is payable by RCCL to the assessee on the bookings. It prescribes 25% as applicable base commission on individual and group bookings. From all this, it is seen that where full payment is received, the latter is to remit to RCCL the quoted booking price minus 25% base commission. Section 12 provides the payment to the travel agents. It states that all commission and other payments due and owing the travel agent, shall be the sole responsibility of the assessee and not RCCL. It also provides that assessee shall deduct and pay any such commissions and payments from the commission. That being so, as per the scheme of agreement, 10% commission payable by the assessee to the travel agent from 25% commission to be

charged from RCCL. was the sole responsibility of the 3ssessee, Thus, as and when the ticket is booked and full payment is received, the assessee becomes entitled to deduct the commission of 25% and remit the balance to RCCL. The commission accrues to the assessee with the booking of tickets and against full payment. This is notwithstanding that the customer may not board the cruise or cancel the trip.

14. There is a procedure prescribed for cancellation of bookings. Section 20 of the Agreement provides for cancellation charges. This section reads as under:

"Section 20. Cancellation Charges.

IR acknowledges that RCCL suffers injury when (i) bookings arc cancelled hut RCCL does not receive proper notice, or (ii) are cancelled close to the schedule departure. IR shall be liable to RCCL for payment of cancellation charges in accordance with RCCL's applicable cancellation charge schedule as may be amended from time to time. The current cancellation charges for individual bookings are set forth in Exhibit B and for group bookings in Exhibit A. These cancellation charges are subject to the following rules:

(a) RCCL reserves the right to change cancellation charges and time frames upon written notice to IR.
(b) RCCL does not take responsibility for cancellations due to visa denials, incorrect documents, incorrect immigration forms, or absence of insurance.

15. As per this section, the assessee shall be liable to RCCL for payment of cancellation charges in accordance with the applicable cancellation charges schedule as may be amended from time to time. Assuming that in some cases, the assessee, in case of cancellation of trip, is liable to return the commission earned, it would be open for the assessee to seek adjustment or claim a refund of tax from the Authorities. We therefore, hold that the stand taken by the CIT (A) in this regard was correct and 25% of the booking advances received should be treated as income of the assessee assuming that there are no cancellations. However, the assessee shall be entitled to 10% credit on account of travel agents commission after ascertaining actual outgoings in this regard."

6. Respectfully following the decision of Hon'ble jurisdictional High Court, we are not inclined to disturb the decision reached by the Id. CIT(A) in the impugned order. Accordingly, the appeal of the assessee has no merits and is liable to be dismissed."

4.4 In view of the above, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute.

5. As far as alternative grounds is concerned the Ld. CIT(A) has directed the Assessing Officer to examine the claim of the assessee and consider the same subject to the decision of the Hon'ble Apex Court on this issue. The finding of the Ld. CIT(A) is reproduced as under:

> *"2.5 As to the alternative ground at para G.2.11 and G.2.12. I find that a reasoned decision has been taken by my predecessor at para 9 in the AY 10-11.*
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> > *xxx The next ground is in respect of double taxation. It is relevant to mention here that the income of Rs.41,71,893/- embedded in the advance receipts of Rs.2,78,12,623/- shown in the balance sheet as on 31.03.2009 of the appellant was taxed in the A.Y.2009-10 after allowing Rs.27,81,262/- @ 10% of advance receipts as expenses against the gross commission receipts of Rs.69,53,155/-(please refer to the AO's order dated 30.05.2013) passed u/s 250). In view of the observation and findings mentioned in para 5.1 to 5.3 of this order, it is hereby held that since the income in advance receipts of Rs.2,78,12,623/- shown in the balance sheet as on 31.03.2009 has been taxed in the A.Y.2009-10; therefore, the same cannot be taxed again in the A.Y.2010-11 as it will amount to double taxation. Accordingly, the AO is directed to allow relief ofRs.41,71,893/- from the income of the relevant A.Y. on this score. Thus, the ground no. 2 stands partly allowed....xxx.*
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> *2.6 Following the same, a similar direction is issued to the AO to examine on a similar basis to see that whatever is taxed as income in the current year is allowed as a reduction from the final income of the next year , (when the balance amount is received on sailing actually taking place,) subject to the ultimate decision by the Hon'ble Apex court in this regard."*

5.1 In our opinion, the direction of the Ld. CIT(A) on the issue in dispute is well reasoned and we do not find any infirmity in the same. Accordingly, we do not find any force in the alternative

ground raised by the assessee. Thus, the ground No. 2 of the appeal is also dismissed.

6. In the result, the appeal filed the assessee is dismissed.

Order is pronounced in the open court on 14th January, 2019.

Sd/-	Sd/-
[BHAVNESH SAINI]	**[O.P. KANT]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 14th January, 2019.
RK/-[d.t.d.s]
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi