IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD ñBò BENCH

Before: Shri Rajpal Yadav, Judicial Member
And Shri Amarjit Singh, Accountant Member

ITA No. 2133/Ahd/2015 **Assessment Year 2010-11**

Symphony Ltd. Saumya, Near Bakeri Circle, Navrangpura, Ahmedabad PAN: AACCS6739B (Appellant)	Vs	The DCIT, Circle-8, Ahmedabad (Respondent)

Revenue by: **Shri Mudit Nagpal, Sr. D.R.**
Assessee by: **Shri Bharat Shah, A.R.**

Date of hearing : 01-11-2018
Date of pronouncement : 16-01-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assesseeôs appeal for A.Y. 2010-11, arises from order of the CIT(A)-9, Ahmedabad dated 24-04-2015, in proceedings under section 143(3) of the Income Tax Act, 1961; in short ñthe Actò.

2. The assessee has filed return of income on 6th Sep, 2010 declaring total income of Rs. 66,39,57,520/-. Subsequently, the case was selected under scrutiny by issuing of notice u/s. 143(2) of the act on 26th Sep, 2011.

Assessment order u/s 143(3) of the act was passed on 27/01/2014. The assessee has filed appeal against the decision of ld. CIT(A) on the two issues i.e. disallowance u/s. 14 of the act and disallowance on sale tax expenses. Both these two issues under the grounds of appeal are discussed as under.

Disallowance u/s. 14A

3. During the course of assessment proceedings, the assessing officer noticed that assessee has made huge investment and earned substantial exempt income however, it has not made any disallowance u/s. 14A of the act. Therefore, the query was raised to the assessee to explain why disallowance u/s. 14A should not be made as it has earned exempt income during the year under consideration. The assessee responded that it has made investment from its own fund in the mutual fund, therefore, no disallowance was required to be made u/s. 14A of the act. The assessing officer had not accepted the explanation of the assessee on the ground that it had given general explanation and could not establish by way of submitting fund flow that there was no diversion of interest bearing fund. Consequently, as per provision of section 14 r.w.s Rule 8D of the act the assessing officer has computed disallowance to the amount of Rs. 30,93,671/- and added to the total income of the assessee.

4. Aggrieved assessee filed appeal before the ld. CIT(A). The ld. CIT(A) has partly allowed this ground of the appeal of the assessee by restricting addition to the amount of Rs. 12,52,481/-. Relevant part of the decision of ld. CIT(A) is reproduced as under:-

> *"3.2 I have carefully considered the rival contentions. I have also perused various case laws relied upon by the appellant. It is seen that the assessing officer made disallowance u/s. 14A as per the provisions of Rule 8D of I.T. Rules, 1962. The provisions of rule 8D were inserted with effect from 24-03-2008 and the same is applicable from A.Y. 2008-09 and subsequent years. This*

view was expressed by Bombay High Court in Godrej and Boyece Mfg. Co. Ltd. (2010) 328 ITR 81 (Bom).

3.3 Provisions of sec. 14A(3) expressly provides that provisions of sec. 14A(2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this act. Provisions of sec. 14A(2) further provides that the A.O. shall made disallowance for the purpose of sec. 14A as per the provisions of rule 8D of I.T. Rules, 192. This way, provisions of sec. 14A r.w. rule 8D are mandatory and in my considered view the A.O. had rightly followed provisions of sec. 14A r.w. rule 8D of the I.T. Rules, 1962. It is also a matter of record that the appellant has not pointed out any defect in the computation of disallowance as per the provisions of rule 8D as adopted by the A.O. is taken correct for the purpose of this order.

3.4 It is seen that the ld. AR has relied upon various cases. A perusal of these cases reveals that the Hon'ble ITAT allowed the appeal of the appellant as the A.O. has not recorded his satisfaction that the expenses claimed by the assessee is incorrect and the A.O. had straightway applied the provisions of rule 8D. The ratio of these cases will not be applicable in the instant case as the A.O. was not satisfied with the expenses claimed by the appellant and the A.O. and confronted this view to the appellant. In view of these facts, with due respect, I am not inclined to follow the ratio of these cases. I have further observed the facts of the case and the submissions of the appellant. It is seen that appellant's total investments amount to Rs. 6,24,69,511/- this year, as against the surplus own funds of Rs. 9,66,05,405/-. As per appellant the A.O. has not been able to prove the fact of utilization of interest bearing funds for earning of exempt income. Gist of the appellant's submission is that since he has enough interest free funds which far exceeds the investments made by him, therefore, no allocation of interest expenditure can be made towards earning of interest free income. In this regard it is seen from the assessment order that appellant has not furnished any evidence to show that investments were made from interest free funds. This issue has been dealt in the case of Gujarat Gas Financial Services Ltd, Hon'ble Special Bench of ITAT Ahmedabad 115 ITD 218 the issue of disallowance u/s. 14A has been discussed in para 101 of the order of the Hon'ble ITAT Special Bench as under:-

> *"there is no dispute and there cannot be any doubt, that some expenditure is incurred for making or earning from dividend. In case of Mixed Accounting the expenditure is not identified as such is directly is related to earning of dividend. But that cannot be a ground to say that no expenditure is incurred for earning dividend income or that no expenditure could be related to that income. Upon hearing both the parties and considering material available on record interest of justice will be served if 10% of the expenditure is allocated for earning dividend and disallowed u/s. 14A of the I.T. Act."*

The appellant contended that it was having sufficient interest free funds to invest in the shares and mutual funds and the A.O. has not proved nexus between the investment in equity shares and the interest bearing funds and accordingly disallowance u/s. 14A cannot be made. As per the provisions of rule 8D of I.T. rules, 1962 the A.O. is not required to prove nexus between investments in equity shares and interest bearing fund. In view of these fact I am not inclined to agree with the contentions of the Ld. A.R. The appellant also contended that disallowance u/s. 14A should be made on net interest and not at the gross interest expenditure. I am also not inclined on this issue with he appellant since section 14A refers to interest expenditure on rent, taxes, salaries, interest etc. in respect of which allowances are provided for. These deductions are for the debits in the real sense. The pay back does not constitute expenditure incurred in terms of section 14A. In view of these facts, I hold that disallowance for the purpose of section 14A is to be made against interest expenditure debited in the Profit & Loss account. This way, I am inclined to agree with the disallowance made by the A.O.

Further in the case of M/s. Dhanuka & Sons 339 ITR 319 Hon'ble Kolkata High Court has held that, it is for the assessee to show the source of acquisition of these shares by production of material that these were acquired from the funds available in the hands of the asessee at the relevant point of time without taking benefit of any loan. Hon'ble Ahmedabad Bench in the case of ACIT vs. Transformer & Rectifiers (India) Ltd. ITA No. 3090/Ahd/2011 has held that the onus is

on the assessee to establish that there is no nexus between the exempt income and the interest expenditure incurred. In the case of Cheminvest Ltd. [212 ITD 318 2009 (DEL)] Delhi Special Bench held that Sec. 14 disallowance had to be made in respect of interest on loans, which were utilized for investment in shares, even though no dividend income was earned in those shares during the relevant year. Whereas Hon'ble ITAT Chennai in the case of Siva Industries & Holding Ltd. ITS-438-ITAT-2011 (CHNY) and TS-317-ITAT-2012(CHNY)]Relying on the Special Bench ruling in Cheminvvet Ltd, Chennai ITAT held, that the disallowance u/s. 14A was applicable, even though the assessee did not earn any exempt income in AY 2007-08. ITAT noted that while disposing the appeal for the earlier year, the ruling of was incorrect. In the earlier year, ITAT had held that the disallowance for interest paid on loans borrowed for making investment in shares was not applicable as the assessee did not earn any dividend from such investment. In the case of Technopack Advisors P Ltd [(2012) 50 SOT 31 (Delhi)(URO) it is held that Even if the interest in shares did not yield any dividend in the year under consideration, the disallowance u/s. 14A on the expenditure incurred for earning income was disallowable, notwithstanding the fact that no such income was earned. Hon'ble Kerala HC in case of Popular Vehicles & Services Ltd. [(2010) 325 ITR 523 (Kel)] has held. The assessee borrowed funds from banks, which were diverted to partnership firms, in which it was a partner HC noted that the assessee did not receive any interest from those firms. The only benefit derived was share of profit which was exempt u/s. 10(2A). HC sustained the disallowance of interest by invoking provisions of Sec. 14A similarly in the case of Vishnu Anant Mahajan [TS-396-ITAT-2012(Ahd)] Ahmedabad Special Bench of Hon'ble ITAT held, that Sec. 14A disallowable is applicable to parnters' share in the firm's firm profit which is exmept u/s. 10(2A). ITAT SB held that profit from firm is not included in the total income of the partner by virtue of exemption provisions of Sec. 10(2A). ITAT held that a partnership firm is not a pass through vehicle and the firm and partners are separately assessable to tax, despite the position of law under the Partnership Act that the firm is a compendium or collective name.

The CBDT has recently issued circular no. 5/2014 dated 11 Feb, 2014 through which it has taken view that disallowance of expenditure for earning exempt income u/s. 14A r.w. rule 8D would be attracted even if the corresponding exempt income has not been earned during the financial year, thereby superseding a few decisions rendered in this regard.

In view of detailed discussion in above paragraphs, the contentions of appellant is not fully acceptable. However it is seen that the stand taken by the A.O. of applying rule 8D is correct but the A.O. has not considered the interest already disallowed by appellant in computation of income. The appellant has disallowed the interest on Income-tax i.e. Rs. 35,06,675/- (interest on FBT Rs. 21,200, Interest on Income-tax Rs. 34,68,428 Interest on TDS Rs. 7,082 Interest on Wealth Tax Rs. 9,965) but the A.O. has erred in computation u/s. 14A the correct amount comes to Rs. 12,52,481/- instead disallowed amount of Rs. 30,93,671/- as worked out by appellant in its submission. Accordingly the A.O. is directed to work out correct disallowance u/s. 14A I.T. Act."

5. During the course of appellate proceedings before us, the ld. counsel contended that assessee has made investment out of surplus interest free fund available with the assesse therefore no expenditure under rule 14D of the IT act should be disallowed. He has also placed reliance on the decisions of Co-ordinate Bench of the ITAT in the case of assessee itself vide ITA No. 1817 & 1896/Ahd/2014 assessment year 2009-10 dated 311-08-2018.

On the other hand, ld. departmental representative has supported the order of lower authorities.

6. We have heard the rival contentions and perused the material on record carefully. We have gone through the balance sheet of the assessee for the period as on 31st March, 2010 and observed that assessee was having interest free reserve and surplus fund to the amount of Rs. 6286.04 lacs as against investment of Rs. 2965.21 lacs made during the year under consideration. We have also noticed that Co-ordinate Bench of the ITAT in the case of the assessee itself vide ITA No. 1817/Ahd/2014 on 31st August, 2018 has decided the identical issue on identical facts as under:-

> *"5. We have gone through the relevant record and in the impugned order. Ld. A.R. filed voluminous paper book in support of its contention and stated that his reserve and surplus are of Rs. 156067282/- and his investment of Rs. 125383779/- and same is evident from the paper book at page no. 5. Therefore, Section 14A read with Rule 8D is not applicable to him read with Rule 8D is not permissible. In the case of Pr. Commissioner Of Income Tax vs. Sintex Industries Ltd. 2018) 93 Taxmann.com 24 (SC) has held in favour of assessee holding that where assessee had surplus fund against which minor investment was made, no question of making any disallowance of expenditure u/s. 14A of the Act arose and therefore, there was no question of any estimation of expenditure under Rule 8D of the Income Tax Act. Thus, respectfully following the aforesaid Apex Court judgment, we delete the addition made by the lower authorities."*

Respectfully following the decision of the Co-ordinate Bench in the case of the assessee itself on identical fact and similar issue, we allow the appeal of the assesse.

7. During the course of assessment, the assessing officer has noticed that assessee has claimed sale tax expenses of Rs. 8,74.889/- pertaining to earlier years (2000-01 to 2001-02). The assessee explained that these expenses pertained to Patna branch and the same were related to the payment made in the earlier year against which the appeal was filed, therefore, the impugned expenses was shown as advances in the balance sheet as the said liability was not accepted by the assessee. And after dismissal of the appeal the

amount paid was treated as expenses for the year under consideration . The assessing officer has not accepted the explanation of the assessee. He observed that such expenditure can be claimed only in the year in which it has been incurred and filing of appeal cannot be based for claiming prior period expenses. Consequently, he has disallowed the claim of expenses of Rs. 8,74,889/- and added to the total income of the assessee.

8. Aggrieved assessee filed appeal before ld. CIT(A). The ld. CIT(A) has sustained the disallowance. The relevant part of decision of ld. CIT(A) is reproduced as under:-

> *"9.2 I have carefully considered the rival contentions. It is seen that the appellant has claimed expenses of Rs. 8,74,889/- which per tins to earlier years (2000-01 & 2001-02). This fact is admitted by the appellant also. Even if the appellant did not accept the sales-tax demand raised by the lower authorities, it should have claimed the expenditure during the those years only. Filing of appeal cannot be the basis for claiming prior period expenses. The appellant has failed to establish as to how the said expenditure crystalized during the year under consideration. As these expenses pertain to the earlier years, accordingly, I am of the considered opinion that these expenses cannot be allowed in the current assessment year as per the consistent accounting policy of the appellant. In view of the above, disallowance of prior period expenses of Rs. 8,74,889/- is confirmed."*

9. During the course of appellate proceedings before us, the ld. counsel has contended that the sale tax expenses were claimed on the basis of crystallization of the said liability. He has also placed reliance on the decision of Co-ordinate Bench of ITAT in ITA 3484/Ahd/2010 in the case of ITO vs. National Ginning & Processing Factory order dated 22-07-2015 and ITA Nos. 714 to 715 and 996/Ahd/2009 in the case of M/s. Transpek Industry vs. ACIT order dated 30-12-2011. On the other hand, ld. departmental representative relied on the order of ld. CIT(A).

10. We have heard the rival contentions and perused the material on record carefully. The ld. CIT(A) has stated that assessee has failed to establish how said expenditure crystalized during the year. After taking into consideration the submission of the assessee and the decision of Co-ordinate Benches of the ITAT, we consider it will be appropriate to restore this issue to the file of assessing officer to examine the claim of the assessee after affording reasonable opportunity to the assessee to substantiate its claim that liability has crystalized during the year under consideration. Therefore, this ground of appeal of the assessee is allowed for statistical purposes

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

Order pronounced in the open court on 16-01-2019

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(AMARJIT SINGH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad : Dated 16/01/2019

आदेश क□□□त□ल□प **अ**□**षत** / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपील□य आ□धकरण,
अहमदाबाद