

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD**

**BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. Nos. 2524 & 2525/Ahd/2017

(निर्धारण वर्ष / Assessment Years: 2013-14 & 2014-15)

Mid Valley Health Care Services Pvt. Ltd. 51, 5 th Floor, New York Tower, S.G. Road, Thaltej, Ahmedabad	बनाम/ Vs.	ACIT Cricle- 2(1)(2), Ahmedabad
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAE CM7 777 K		
(अपीलार्थी/Appellant)	..	(प्रत्यर्थी / Respondent)

Mid Valley Health Care Services Pvt. Ltd. 51, 5 th Floor, New York Tower, S.G. Road, Thaltej, Ahmedabad	बनाम/ Vs.	DCIT Cricle- 2(1)(2), Ahmedabad
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAE CM7 777 K		
(अपीलार्थी/Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/Appellant by :	Shri Tushar Hemani, A.R.
प्रत्यर्थीकीओरसे / Respondentby:	Shri S. K. Dev, Sr. DR

सुनवाईकीतारीख/Date ofHearing	26/06/2019
घोषणाकीतारीख /Date of Pronouncement	31/07/2019

आदेश/ORDER

PER AMARJIT SINGH - AM:

These two appeals have been filed by the assessee for A.Ys. 2013-14 & 2014-15, arise from order of the CIT(A)-2, Ahmedabad dated

13.09.2017&14.09.2017, in proceedings under section 143(3) of the Income Tax Act, 1961; in short “the Act”.

ITA No. 2524/Ahd/2017 (A.Y. 2013-14):-

2. The brief fact is that assessee has filed return of income declaring income of Rs. 7,61,31,960/- on 30.11.2013. The case was subject to scrutiny and notice under Sec. 143(2) of the Act, was issued on 16.09.2014. The assessee was engaged in the business of services related to information technology. The issues arising out of the appeal filed by the assessee are discussed while adjudicating the ground of appeal assessee as under:-

“1. The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of the AO of invoking the provisions of Rule 8D without recording any dissatisfaction to the claim of appellant.

2. The learned CIT(A) has erred both in law and on the facts of the case in confirming disallowance made by the AO u/s. 14A of the Act rw.r. 8D of the Income Tax Rules, 1962 to the extent of Rs. 10,28,141/-.

3. The learned CIT(A) has erred both in law and on the facts of the case in confirming that disallowance u/s. 14A is to be made while calculating book profit u/s. 115JB.

4. The learned CIT(A) has erred both in law and on facts of the case in confirming disallowance of expenses to the extent of Rs. 2,79,788/- in the computation of short term capital gain u/s. 48 of the Act.

5. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.

6. The learned CIT(A) has erred in law and on facts of the case in confirming action of the ld. AO in levying interest u/s. 234A/B/C of the Act.

7. The learned CIT(A) has erred in law and on facts of the case in confirming action of the ld. AO in initiating penalty u/s. 271(1)(c) of the Act.”

Ground No. 1:-

Confirming disallowance of Rs. 10,28,141/- under Sec. 14A of the Act:-

3. During the course of assessment the AO noticed that assessee has earned dividend income of Rs. 26,15,624/- claimed as exempt from tax. The AO has further noticed that assessee has shown non-current investment to the amount of Rs. 26,54,75,536/- in its balance sheet during the year under consideration as against non-current investment of Rs. 23,96,32,378/- in the immediate preceding year. Therefore, the assessee was asked to explain why not the provisions of Sec. 14A r.w.r 8D of the Income Tax Rule, 1962 should be applied in its case. The assessee responded that it has been deriving income from long term and short term capital gain from sale and shares and units of mutual funds and various expenses were earned for earning this income. It was also explained that amount disclosed in the statement of income was after deducting expenses in this respect i.e. net of expenses. The AO has not accepted the explanation the assessee. She was of the view that assessee has not maintained any account or record to show that no administrative expenditure has been incurred for the purpose of earning exempt income. The AO has cited instances of some administrative action such as the review of investment, monitoring of the activities of the company in which the assessee company has made substantial investment by the directors of the assessee company and employees etc. Considering the aforesaid perspective the salary paid by the assessee company to those employee and directors have not been utilized exclusively for the purpose of the business. Accordingly, the AO has determined the disallowance of administrative expenditure as per 14A r.w.r. 8D to the amount of Rs. 12,62,770/- and added to the total income of the assessee.

4. Aggrieved assessee file before the Ld. CIT(A). Ld. CIT(A) has partly allowed the appeal of the assessee by reducing the investment in the mutual fund from the total investment on the ground that mutual fund is taxed as short

term capital gain or long term capital gain depending upon the period of holding and no income is shown from mutual fund from year to year basis. Therefore, the Ld. CIT(A) has computed the disallowance to the amount of Rs. 11,01,175/- after reducing the disallowance of Rs. 73,074/- already made by the assessee, the net disallowance of Rs. 10,28,141/- was confirmed.

We have heard the rival contention and perused the material on record. The AO has computed the disallowance under Sec. 14A to the amount of Rs. 12,62,770/-. However, the Ld. CIT(A) has confirmed the disallowance to the extent of Rs. 10,28,141/- after excluding investment in the nature of mutual fund etc.

With regard to the issue in appeal that AO has not recorded any satisfaction for making disallowance under Sec. 14A of the Act, we noticed that AO at Page 5 of the assessment order has clearly stated that assessee has not maintained any record to demonstrate that no administrative expenditure has been incurred for the purpose of earning exempt income. The AO has also cited instances of administrative expenditure such as the review of investment, monitoring of the activities of the company in which the assessee company has made substantial investment by the director of the assessee company and the employees of the assessee company etc. Therefore, the salary paid by the assessee company to those employee and the director who have devoted their time towards investment activities have not been utilised exclusively for the purpose of the business of the company.

In the light of the above facts and circumstances we do not find any merit in the ground of appeal of the assessee that no satisfaction has been recorded by the AO before making disallowance under Sec. 14A of the Act. However, after perusal of the information on record filed by the assessee we observe that assessee has made investment in equity share of listed company's debentures,

bond units of mutual fund etc. and all these have been made through portfolio management consultant who has provided full fledged services in that respect. The assessee had *suo-motu* disallowed an amount of Rs. 73,034/- under Sec. 14A of the Act. However, looking to the quantum of exempt income and investment made by the assessee it will be appropriate to restrict the disallowance out of administrative expenditure to the amount of Rs. 3,00,000/-. Therefore, appeal of the assessee is partly allowed.

Ground No. 3:-

Considering of disallowance made under Sec. 14A for calculating book profit under Sec. 115JB:-

5. The AO has made adjustment to the book profit under Sec. 115JB after including the disallowance under Sec. 14A made by the AO. In appeal the Ld. CIT(A) has dismissed the appeal of the assessee.

We have heard the rival contention of this issue. In view of the decision of Special Bench of ITAT Delhi CIT vs. Vireet Investment Pvt. Ltd. 165 ITD 27 (Del)(SB) wherein it is held that disallowance under Sec. 14A cannot be added to book profit under Sec. 115JB of the Act, the decision of the Ld. CIT(A)'s is not justified. Accordingly, appeal of the assessee is allowed.

Ground No. 4:-

Disallowance of expenses of Rs. 2,79,788 in computation of short term capital gain under Sec. 48:-

6. During the course of assessment the AO has disallowed various expenses while computing short term capital gain arising on transfer of shares aggregating to Rs. 17,97,854/- on the ground that such expenses were not allowable as per the provision of Sec. 48 of the Act.

Aggrieved assessee has filed appeal before Ld. CIT(A). Ld. CIT(A) has partly allowed the appeal of the assessee and restricted the disallowance to the extent of Rs. 2,79,788/- (consisting of Rs. 96,172/- toward management fees and Rs. 1,83,616/- toward portfolio management fees). During the course of appellate proceeding before us the Ld. Counsel has contended that Ld. CIT(A) has failed to appreciate that portfolio management fees are allowable as deduction under Sec. 48 of the Act and reliance was placed on the decision of Joy Beauty Care Pvt. Ltd. vs. DCIT ITA 856/Kol/2017.

We have perused the above cited decision of the Co-ordinate Bench. The relevant part of the above cited decision is reproduced as under:-

“12. We have heard rival submissions. At the outset, we find that the Ld. CIT(A) had accepted that the gains on sale of shares through PMS providers to be taxed under the head capital gains. Against these findings of the Ld. CIT(A), the revenue has not preferred the appeal before us as per the material available on record. The assessee placed reliance on the decision of Co-ordinate Bench of Pune Tribunal in the case of KRA Holding & Trading Pvt. Ltd. vs. DCIT in ITA Nos. 499, 500, 1320 to 1322 of 2008 and 434 of 2009 and 806 of 2009 dated 31.05.2011 reported in 2011 (5) TMI 498 ITAT Pune. There were primarily two issues before the Pune Tribunal in the aforesaid cases:-

- 1. Whether the transactions of purchase and sale of shares carried out through PMS providers would be taxed under business income or under the head capital gain.*
- 2. Whether PMS providers fees paid to M/s. EN AM would be allowable as deduction under section 48 of the Act.*

Both the questions were decided in favour of the assessee by the Pune Tribunal.

13. The revenue preferred further appeal to Hon'ble Bombay High Court against the order. We find that the Hon'ble Bombay High Court while admitting the substantial questions of law admitted only one question which is as under:

"Whether on the facts and circumstances of the case, the ITAT was justified in holding that the income earned by the assessee by the portfolio management scheme was liable to be assessed under the head 'capital gains' instead of being assessed under the head profit & gains of business or profession"

14. This goes to prove that the other issue decided in favour of the assessee by Pune Tribunal i.e. allowability of PMS fees as deduction under section 48 of the Act was not admitted by Hon'ble Bombay High Court Hence the decision of Pune Tribunal had attained finality. Respectfully following the said decision, we hold that the PMS

fees paid by the assessee in the sum of Rs. 18,93,788/- is eligible for deduction while computing Short Term Capital Gain. Accordingly, ground no 2 raised by the assessee is allowed.”

Respectfully, following the decision of the Co-ordinate Bench has cited above on similar issue and fact we allow the claim of the assessee for deduction under Sec. 48 to the extent of expenses incurred toward portfolio manual fees of Rs. 1,83,686/-. Accordingly, the appeal of the assessee is partly allowed.

7. The Ground of Appeal No. 6 is pertained to charging of interest under Sec. 234 A/B/C of the Act. Since charging of interest under the aforesaid provisions of the Act are mandatory. Therefore, this ground of appeal of the assessee is dismissed.

8. The Ground No. 7 regarding initiation of penalty under Sec. 271(1)(c) of the Act is premature at this stage which does not require any adjudication at this stage. Therefore, the same stands dismissed.

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

ITA No. 2525/Ahd/2017 (A.Y. 2014-15):-

Ground No. 1:-

Disallowance of Rs. 14,076 under Sec. 36(1)(va):-

10. During the assessment the AO noticed that assessee has made late payment of employees' contribution towards Provident Fund and ESI on the various date as reported at Page 2 & 3 of the assessment order. Therefore, an aggregating amount of Rs. 14,076/- was disallowed after considering the decision of Hon'ble Gujarat High Court in the case of CIT vs. GSRTC (Tax Appeal No. 637 of 2013) as per provision of Sec. 36(1)(va) r.w.s. 2(24)(x) of the Act.

11. Aggrieved assessee has filed appeal before Ld. CIT(A). Ld. CIT(A) has dismissed the appeal.

We have heard the rival contention and consider that Hon'ble Gujarat High Court in the above cited decision has held that the deduction towards employees' contribution to Provident Fund and ESI is available if such sum is credited by the assessee to the employees account in the relevant fund on or before the due date as per respective Acts. Therefore, considering the decision of Hon'ble Gujarat High Court we do not find any error in the decision of the Ld. CIT(A). Accordingly, this ground of appeal of the assessee is dismissed.

Ground No. 2:-

Confirming disallowance of Rs. 6,15,598 u/s. 14A of the Act r.w.r. 8D:-

12. During the course of assessment the AO has noticed that assessee has earned dividend income of Rs. 26,15,624/- during the year and claimed as exempt from tax. The AO has further noticed that assessee has shown non-current investment to Rs. 26,54,75,536/- in its balance sheet during the year under consideration as against non-current investment of Rs. 23,96,32,378/- in the immediate preceding year. Therefore, the assessee was asked to explain why not the provisions of Sec. 14A r.w.r 8D of the Income Tax Rule, 1962 should be applied in its case. The assessee has responded that it has been deriving income from long term and short term capital gain from sale and shares and units of mutual funds after taking into consideration various expenses incurred for earning such income and it had disclosed net income therefore no further disallowance should be made. The AO has not accepted the explanation the assessee. She was of the view that assessee has not maintained any account or record to show that no administrative expenditure has been incurred for the purpose of earning exempt income. The AO has stated that some administrative action such as the review of investment or monitoring of the activities of the company in which the assessee company has made substantial investment might

have been done by the directors of the assessee company and employees. Therefore, salary paid by the assessee company to those employee and directors have not been utilized exclusively for the purpose of the business. Accordingly, the AO has determined the disallowance of administrative expenditure as per 14A r.w.r. 8D to the amount of Rs. 12,62,770/- and added to the total income of the assessee.

Aggrieved assessee file before the Ld. CIT(A). Ld. CIT(A) has partly allowed the appeal of the assessee by reducing the investment in the mutual fund from the total investment on the ground that mutual fund is taxed as short term capital gain or long term capital gain depending upon the period of holding and no income is shown from mutual fund from year to year basis. Therefore, the Ld. CIT(A) has computed the disallowance to the amount of Rs. 11,01,175/- and after reducing the disallowance of Rs. 73,074/- already made by the assessee, the net disallowance of Rs. 10,28,141/- was confirmed.

We have heard the rival contention and perused the material on record. The AO has computed the disallowance under Sec. 14A to the amount of Rs. 12,62,770/-. However, the Ld. CIT(A) has confirmed the disallowance to the extent of Rs. 10,28,141/- after excluding investment in the nature of mutual fund etc.

With regard to the issue in appeal that AO has not recorded any satisfaction for making disallowance under Sec. 14A of the Act, in this regard, we have noticed that AO at Page 5 of the assessment order has clearly stated that assessee has not maintained any record to demonstrate that no administrative expenditure has been incurred for the purpose of earning exempt income. It is also stated that some administrative expenditure such as the review of investment or monitoring of the activities of the company in which the assessee company has made substantial investment might have been done by

the director of the assessee company and the employees of the assessee company. The AO has also stated that, therefore, the salary paid by the assessee company to those employee and the director who have devoted their time towards investment activities have not been utilised exclusively for the purpose of the business of the company.

In the light of the above facts and circumstances we do not find any merit in the ground of appeal of the assessee that no satisfaction has been recorded by the AO before making disallowance under Sec. 14A of the Act. However, after perusal of the information on record filed by the assessee we observe that assessee has made investment in equity share of listed company's debentures, bond units of mutual fund etc. and all these have been made through portfolio management consultant who has provided full fledged services in that respect. The assessee has *suo-motu* made disallowance to the extent of Rs. 73,034/- only. The assessee however, looking to the quantum of exempt income and related investment made by the assessee company. We are view of the that it will be appropriate to restrict the disallowance out of administrative expenditure to the amount of Rs. 3,00,000/-. Therefore, appeal of the assessee is partly allowed.

Ground No. 3:-

Considering disallowance made u/s. 14A is to be made while calculating book profit u/s. 115JB:-

13. The AO has made adjustment to the book profit under Sec. 115JB after including the disallowance under Sec. 14A made by the AO. In appeal the Ld. CIT(A) has dismissed the appeal of the assessee.

We have heard the rival contention of this issue. In view of the decision of Special Bench of ITAT Delhi CIT vs. Vireet Investment Pvt. Ltd. 165 ITD 27 (Del)(SB) wherein it is held that disallowance under Sec. 14A cannot be

added to book profit under Sec. 115JB of the Act. We consider that Ld. CIT(A)'s decision is not justified. Accordingly, appeal of the assessee is allowed.

14. In the result, the appeal of the assessee is partly allowed.

This Order pronounced in Open Court on 31/07/2019

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Ahmedabad: Dated 31/07/2019

TANMAY

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आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

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2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।