

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” Bench, Mumbai**

**Before Shri Ravish Sood, Judicial Member
and Shri N.K. Pradhan, Accountant Member**

**ITA No.6050/Mum/2018
(Assessment Year: 2013-14)**

ACIT, Circle-7(3)(1)
Room No. 142, G,
1st Floor, Aayakar Bhavan,
M.K. Road, Churchgate,
Mumbai – 400020

M/s Essel Infraprojects Ltd.
135, Continental Building ,
Dr. Annie Besant Road, Worli,
Mumbai – 400018

PAN – AAACP6095M

(Appellant)

(Respondent)

Appellant by: Shri Manjunatha Swamy, D.R

Respondent by: None

Date of Hearing: 16.09.2019

Date of Pronouncement: 20.09.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-13, Mumbai, dated 23.07.2018, which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act') for A.Y. 2013-14, dated 28.03.2016. The revenue has assailed the impugned order on the following grounds of appeal before us:

- “1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.12,30,75,760/- made by the Assessing Officer u/s. 14A of the Income Tax Act, 1961 read with Rule 8D of Income Tax Rules, 1962, without appreciating the facts brought out by the Assessing Officer and considering the fact that Section 14A was intended to cover those situation where there is a possibility of exempt income being earned in future and it is not necessary for exempt income to have been included in the income of a particular year for the disallowance to be triggered.
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.12,30,75,760/- made to the Book Profit as per MAT provision u/s.

115JB u/s. 14A of the Income Tax Act, 1961 read with Rule 8D of Income Tax Rules, 1962, without appreciating the facts brought out by the Assessing Officer and considering the fact that Section 14A was intended to cover those situation where there is a possibility of exempt income being earned in future and it is not necessary for exempt income to have been included in the income of a particular year for the disallowance to be triggered".

2. Briefly stated, the assessee company which is engaged in infrastructure activities, project consultancy services and engineering procurement and construction services had filed its return of income for A.Y. 2013-14 on 29.09.2013, declaring its total loss at Rs.34,82,35,219/-. The return of income filed by the assessee company was processed as such under Sec.143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings it was observed by the A.O that the assessee in its 'balance sheet' as on 31.03.2013, had shown investments to the tune of Rs.1356.35 crores. It was observed by the A.O that the assessee had claimed to have earned dividend income of Rs.150/-. As the assessee had not made any disallowance under Sec.14A r.w.s 8D while computing its income for the year under consideration, therefore, it was called upon by the A.O to explain as to why the disallowance under the aforesaid statutory provision may not be made in its hands. In reply, it was submitted by the assessee that it was a flagship company of Essel Group's Infra Business, and was engaged in the business of development of infrastructure facilities viz. Roads, Airports, Recreation facilities, Water and Waste Management Systems, Utilities etc. It was the claim of the assessee that once a project would be awarded, then as per the requirements it would create a 'Special Purpose Vehicle' (SPV) for executing the project. Accordingly, it was submitted by the assessee, that as the projects would be mandatorily required to be executed by creating a separate SPV, therefore, the investments therein made by the assessee were in the nature of strategic investments which were made on account of commercial expediency and not with an intent or purpose to earn any exempt income. Accordingly, it was the claim of the assessee that no disallowance under Sec. 14A was called for in its hands. However, the A.O after deliberating on the contention advanced by the assessee was not persuaded to subscribe to the same. It was noticed by the A.O that the investments of the assessee company had substantially increased from an amount of Rs.1167.96 crores in the last year to Rs.1356.35 crores during the year under consideration. Also, it was noticed by him that most of the investments were made by the assessee in its

group companies. In the backdrop of the aforesaid facts, the A.O held a conviction that the investments of the aforesaid substantial magnitude could not have been made without availing services of skilled, professional and knowledgeable personnel. Apart there from, he was of the view that the man power required for rendering the aforesaid services was not freely available, and hence expenditure was required to be incurred for procuring the same. Accordingly, backed by his aforesaid conviction, the A.O was of the view that the provisions of Rule 8D(2)(iii) would squarely be applicable in the case of the assessee. The contentions of the assessee viz. (i) that, it had substantial self owned funds for making investments; and (ii) that, the netting of interest for computation of disallowance, were also taken cognizance of by the A.O. On the basis of his aforesaid deliberations, the A.O worked out the disallowance under Sec.14A r.w. Rule 8D(2) at an amount of Rs.12,30,75,760/-, as under:

Sr. No.	Particulars	Amount (Rs.)
1.	The amount of expenditure directly relating to income which does not form part of the total income Rule 8D(2)(i).	Nil
2.	Expenditure by way of interest during the previous year which is not directly attributable to any particular income or receipt an amount computed in accordance with the following formula, namely:	
	$A \times \frac{B}{C} = 162500000 \times \frac{12,62,15,50,000}{34,20,16,00,000}$	5,99,68,010
	<p>A = The amount of expenditure by way of interest other than amount of interest included in clause (i) incurred during the previous year Rs.162500000/-.</p> <p>B = The average of value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee on the first day and the last day of the previous year Opening = Rs.11,67,96,00,000/- Opening = Rs.13,56,35,00,000/- Average of investment= Rs.12,62,15,50,000</p> <p>C= the average of total assets as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year – Rule 8D(2)(ii) Opening = Rs.30,39,45,00,000/- Closing = Rs.38,00,87,00,000/- Average of investment = Rs.34,20,16,00,000/-</p>	
3.	<p>i.average value of investments – Opening balance of investments + Closing Balance of investments / 2 Opening = Rs.11,67,96,00,000/- Closing =Rs.13,56,35,00,000/- Average of investment = Rs.12,62,15,50,000/-</p> <p>ii. Disallowance An amount equal to one half per cent of the average of the value of the investment income from which does not or shall not form part of the total income as appearing in the balance sheet of the assessee on the first day and the last day of the previous year.</p> <p>iii. 0.5% of 12,62,15,50,000/-</p>	6,31,07,750
	Total disallowance	12,30,75,760

Accordingly, the A.O after inter alia making the aforesaid disallowance under Sec. 14A r.w.Rule 8D assessed the total income of the assessee at Rs.23,48,14,110/- under the normal provisions. The 'book profit' of the assessee under Sec. 115JB of the Act, after taking cognizance of the disallowance made under Sec.14A r.w.s 8D was worked out by the A.O at Rs.24,38,41,955/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) finding favour with the claim of the assessee that the disallowance under Sec. 14A of the Act cannot be exceed the amount of exempt income earned by the assessee, therein restricted the disallowance to the extent of the exempt dividend income of Rs.150/- that was earned by the assessee during the year under consideration. Also, the CIT(A) was persuaded to subscribe to the claim of the assessee that as it had sufficient own funds i.e Rs.1740.4 crores as on 31.03.2012 and Rs.2966.68 crores as on 31.03.2013 for making of investments of Rs.538.76 crores as on 31.03.2012 and Rs.714.84 crores as on 31.03.2013, therefore, no interest disallowance was even otherwise called for under Rule 8D(2)(ii) of the Act. Also, it was observed by the CIT(A), that as only investments yielding exempt income were to be considered for the purpose of working out the disallowance under Sec. 14A, therefore, the investments made by the assessee in debentures and foreign companies should have been excluded at the time of the quantification of the disallowance under the aforesaid statutory provision. Further, the CIT(A) by relying on the order of the 'special bench' of the ITAT, Delhi in the case of ACIT Vs. Vireet Investments Pvt. Ltd. (2017) 82 taxman.com 415 (Del) (SB), therein concluded that the computation under clause (f) of Explanation 1 to Sec. 115JB (2) of the Act was to be made without resorting to the computation as contemplated under Sec. 14A r.w.Rule 8D.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before the us. We find that the assessee respondent despite having been put to notice as regards the hearing of the appeal had neither put up an appearance before us, nor any application seeking an adjournment has been filed. Accordingly, being left with no other alternative, we are constrained to dispose off the appeal as per Rule 25 of the Appellate Tribunal Rules, 1963 after hearing the appellant revenue and perusing the orders of the lower authorities.

6. The Id. Departmental Representative (for short 'D.R') took us through the observations of the A.O. It was submitted by the Id. D.R, that the A.O had rightly worked out the disallowance as per the procedure envisaged in Sec. 14A r.w Rule 8D. Accordingly, the Id. D.R relied on the order passed by the A.O.

7. We have heard the Id. Departmental Representative, perused the orders of the lower authorities and the material available on record. We are persuaded to subscribe to the view taken by the CIT(A) that a disallowance under Sec. 14A cannot exceed the amount of the exempt income. In fact, we find that the view taken by the CIT(A) is supported by the judgement of the **Hon'ble High Court of Delhi** in the case of **Joint Investments Pvt. Ltd. Vs. CIT (2015) 372 ITR 694 (Del)**. In the aforesaid case, it was observed by the Hon'ble High Court that the disallowance envisaged in Sec. 14A r.w. Rule 8D cannot exceed the amount of the exempt income. The Hon'ble High Court in the said case, had observed as under :

"By no stretch of imagination can Sec. 14A or Rule 8D be interpreted so as to mean that the entire tax exempt income is to be disallowed. The window for disallowance is indicated in Sec.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."

Also, we find that a similar view had been taken by the Hon'ble High Court of Punjab and Haryana in the case of Pr. CIT Vs. Empire Package (P) Ltd. (2017) 81 taxman.com 108 (P & H). Apart there from, we find that a similar view had been taken by the ITAT, Mumbai in the case of viz. (i) Tata Industries Ltd. Vs. ITO (2010) 181 TTJ 600 (Mum): and (ii) Future Corporate Resources Ltd. Vs. DCIT (2017) 85 taxman 190 (Mum). Accordingly, finding ourselves to be in agreement with the view taken by the CIT(A) that the disallowance under Sec. 14A cannot exceed the amount of the exempt income, we uphold his order to the said extent. Accordingly, the order of the CIT(A) restricting the disallowance under Sec. 14A to the extent of the exempt dividend income of Rs.150/- is upheld. The **Ground of appeal No. 1** is dismissed.

8. We shall now advert to the claim of the revenue that the CIT(A) had erred in deleting the disallowance of Rs.12,30,75,760/- while computing the 'book profit' under Sec.115JB of the Act. As is discernible from the assessment order, the A.O while working out the 'book profit' of the assessee under Sec.115JB had added the disallowance made by him under Sec.14A r.w.Rule 8D. On appeal, the CIT(A) had concluded that the computation under clause (f) of

Explanation 1 to Sec.115JB (2) was to be made without resorting to the computation as contemplated under Sec. 14A r.w. Rule 8D. The CIT(A) had fortified his aforesaid view by drawing support from the order of the 'Special bench' of the Tribunal, Delhi in the case of ACIT Vs. Vireet Investments Pvt. Ltd. (2017) 82 taxman.com 415 (Del) (SB).

10. We have given a thoughtful consideration to the aforesaid issue in the backdrop of the observations of the lower authorities and the contentions advanced by the Id. D.R before us. We find that the issue involved in the present appeal is squarely covered by the order of the 'Special bench' of the Tribunal in the case of ACIT Vs. Vireet Investments Pvt. Ltd. (201&) 82 taxman.com 415 (Del) (SB). As observed by us hereinabove, in the aforesaid case, the Tribunal had observed that the computation under clause (f) of Explanation 1 to Sec. 115JB (2) was to be made without resorting to the computation as contemplated under Sec. 14A r.w. Rule 8D. Accordingly, finding the order passed by the CIT(A) in context of the issue under consideration, as being in conformity with the view taken by the 'Special bench' of the Tribunal in the case of Vireet Investments Pvt. Ltd. (supra), we uphold the same. As such, finding no merit in the claim of the revenue that the disallowance worked out under Sec.14A r.w. Rule 8D was to be included for the purpose of computing the 'book profit' under Sec.115JB of the Act, the same is rejected. The **Ground of appeal No.2** is dismissed.

11. The appeal filed by the revenue is dismissed.

Order pronounced in the open court on 20.09.2019

Sd/-
(N.K.Pradhan)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 20.09.2019
PS. Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai