

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "C", MUMBAI**

**BEFORE SHRI S. RIFAUH RAHMAN (AM) AND SHRI RAM LAL NEGI
(JM)**

**ITA No. 572/MUM/2016
Assessment Year: 2009-10**

Infolink Solutions Pvt. Ltd., 45/2225, 2 nd Floor, Samadhan CHS Ltd. Near MHADA Office, Gandhi Nagar, Bandra (East), Mumbai - 400051 PAN: AAACI9120N	Vs.	The Deputy Commissioner of Income Tax, Central Circle-09, Mumbai
(Appellant)		(Respondent)

Assessee by : Manish Shah/Ms. Miyanta Mehta (AR)
Revenue by : Shri Awungshi Girison (DR)

Date of Hearing: 09/09/2019
Date of Pronouncement: 29/10/2019

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 30.11.2015 passed by the Commissioner of Income Tax (Appeals)-48 (for short 'the CIT(A), Mumbai, for the assessment year 2009-10, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143(3) r.w.s 153C of the Income Tax Act, 1961 (for short the 'Act').

2. In this case, search and seizure action u/s 132 (1) of the Income Tax Act (for short the Act) was conducted by DIT (Investigation), Mumbai in the case of Global Telecom Ltd. group, its associated concerns, Directors and related persons on 28.09.2010, wherein certain papers documents and computer data found were seized from the premises belonging to the assessee. After verification of the assessee's material, notice u/s 153C of the Act was issued calling for true and correct return of income for the

assessment year 2009-10. The assessee accordingly filed return of income on 01.12.2011 declaring the total income of Rs. 3,60,53,893/-. The AO issued notice u/s 148 and 142 (1) of the Act in response to which the AR appeared and filed the details called for. It was noticed that during the year under consideration, the assessee earned dividend of Rs. 10,164/- and the AO asked the assessee to furnish the details of expenses incurred in relation to the exempt income. The assessee contended that it has no incurred any expenditure to earn the exempt income. The AO rejecting the contention of the assessee made disallowance of Rs. 5,13,186/- u/s 14A read with rule 8D of the Income Tax Rules and added the said amount to the income of the assessee. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee partly allowed the assessee's appeal, however confirmed the disallowance u/s 14A read with rule 8D amounting to Rs. 5,13,186/- apart from the treating the interest income as income from other sources.

3. Still aggrieved, the assessee is in appeal before the Tribunal by raising the following effective grounds:

- 1.1 *“On the facts and in circumstances of the case and in law, the Commissioner of Income-Tax (Appeals)-48, Mumbai [the CIT (A)] erred in confirming the action of the Deputy Commissioner of Income Tax, Central Circle-09 (“the AO”) in framing and completing the assessment u/s 143 (3) r.w.s 153C of the Income Tax Act, 1961 (“the Act”) in the absence of the Satisfaction Note required to be prepared by the A.O. of the searched person.”*
- 1.2 *The Learned CIT (A) further erred in not appreciating the fact that the Satisfaction Note for issuing Notice u/s 153C of the Act did not mention the Assessment Year for which it belongs.*
- 1.3 *The Learned CIT (A) erred in not appreciating the fact that the seized material referred in the Satisfaction Note was not “belonged” to the Appellant.*
- 1.4 *The Learned CIT (A) further erred in not appreciating the fact that the Satisfaction Note was not displaying*

any reason or basis concluding that the seized material was belonged to the Appellant.

- 1.5 The Appellant prays that the order passed u/s 143 (3) r.w.s. 153C of the Act be held as bad in law or void ab initio and as such was liable to be quashed.

Without prejudice to the above,

- 2.1 On the facts and in circumstances of the case and in law, the Learned CIT (A) erred in not appreciating the fact that there was no “incriminating material” being found during the course of search based on which additions/disallowances were made under the assessment u/s 143 (3) r.w.s. 153C of the Act on the alleged ground that the assessment u.s 143 (3) of the Act was pending and was abated due to initiation of assessment u/s 153C of the Act and as such the AO would have the jurisdiction to assesse/reassess issues arising out of regular assessment.
- 2.2 The Learned CIT (A) erred in not appreciating the fact that the AO did not have jurisdiction to make additions/disallowance without referring to the “incriminating material.”
- 2.3 The Appellant prays that the order passed u/s 143 (3) r.w.s. 153C of the Act be held as bad in law or void ab initio and as such was liable to be quashed.

Without prejudice to the above,

- 3.1 On the facts and in the circumstances of the case and in law, the CIT (A) erred in confirming the action of the AO in disallowing a sum of Rs. 5,13,186/- u/s 14A of the Act r.w.r. 8D of the Income Tax Rules, 1962 (“the Rules”).
- 3.2 The Appellant therefore prays that the disallowance of Rs. 5,13,186 u/s 14A of the Act be deleted.

Without prejudice to the above,

- 4.1 On the facts and in the circumstances of the case and in law, the Learned CIT (A) erred in confirming the disallowance of Rs. 5,13,186/- u/s 14A of the Act even though the exempt income claimed was Rs. 10,164/-.
- 4.2 The Learned CIT (A) erred in appreciating the fact that the disallowance u/s 14A of the Act could not exceed the exempt income claimed by the Appellant.

4.3 *The Appellant prays that the disallowance be restricted to Rs. 10,164/-.*

Without prejudice to the above,

5.1 *On the facts and in the circumstances of the case and in law, the Learned CIT (A) erred in dismissing the ground for claiming capitalization of the amount of disallowance u/s 14A r.w.r. 8D to the cost of investments.*

5.2 *The Appellant prays that the A.O. be directed to capitalize the amount disallowed u/s 14A of the Act r.w.r. 8D of the Rules with the cost of investments and to allow the expenditure as a deduction in the year in which the said shares would be transferred.*

6.1 *On the facts and in the circumstances of the case and in law, the Learned CIT (A) erred in confirming the action of the A.O. in adding the sum of Rs. 5,13,186/-, being the expenses disallowed u/s 14A of the Act r.w.r. 8D, while computing Book Profit u/s 115JB on the alleged ground that the expense were incurred in relation to earning of exempt income for the purpose of provision of clause (f) of Explanation to Section 115JB of the Act.*

6.2 *The Appellant prays that in the absence of any proximity having been proved between earning exempt income and expenditure attributable to earning such exempt income, it be held that no expenditure would be said "relatable to" any income to which sec 10 or 11 or 12 of the Act apply, and as such no addition under Clause (f) of Explanation 1 to Sec 115JB of the Act would be made.*

7.1 *On the facts and in circumstances of the case and in law, the learned CIT (A) erred in confirming the action of A.O. in assessing certain interest income amounting to Rs. 91,86,888/- under the head 'Income from other Sources' as against claimed under the head 'Profit and Gain from Business and Profession.'*

7.2 *The Appellant prays that it be held that the said interest income be assessed as business income.*

8.1 *On the facts and in circumstances of the case and in law, the learned CIT (A) also erred in levying interest u/s 234B and 234C of the Act.*

8.2 *The Appellant prays that levying of interest be deleted.”*

4. The Ld. Counsel for the assessee submitted before us, that the assessee does not want to press ground No. 1, 2 and 7 of its appeal. As regards Ground No. 3 to 6, which pertain the disallowance u/s 14A read with rule 8D of the Act, The Ld. Counsel submitted that during the previous year the assessee earned exempt income amounting to Rs. 10,164/- and the AO computed the disallowance at Rs. 5,13,186/-. In the first appeal, the Ld. CIT (A) confirmed the said addition. The Ld. Counsel further pointed out that, the findings of the authorities below are contrary to the ratio of law laid down in the following cases.

1. *PCIT v. Caraft Builders & Constructions (P) Ltd. (261 taxmann 47) (Delhi HC)*
2. *PCIT v Mcdonald's India Pvt. Ltd. (ITA 725/2018) (Delhi Trib.)*
3. *PCIT v. State Bank of Patiala (2018) 99 taxmann. Com 285 (Punjab & Haryana HC)]. SLP dismissed in (2018) 99 taxmann.com 286*
4. *PCIT v. HSBC Invest Direct (India)Ltd. (ITA No. 1672 of 2016 (Bom HC)].*
5. *PCIT v. Oricon Enterprises Ltd. (ITA No. 384of 2015) (Bom HC)*
6. *ACIT v. Tata Housing Development Company Ltd. [ITA No. 1549 of 2017 (Mum Trib.)*
7. *Sangam Spinfab Ltd. v. ITO (ITA No. 807 of 2018 (Mum Trib)*
8. *ACIT v. Golden Life Financial Services Pvt. Ltd. [ITA No. 3053 of 2017 (Mum Trib)*
9. *Entertainment Network (India) Ltd. vs JCIT [ITA No. 643 of 2017 (Mum Trib)]*

5. In the light of the ratio of law laid down in the aforesaid cases, the decision of the Ld. CIT (A) is liable to set aside.

6. On the other hand, the Ld. Departmental Representative (DR) supporting the findings of the authorities below submitted that since the AO has computed the disallowance u/s 14A read with Rule

8D(2)(iii) of the Rules, the Ld. CIT (A) has rightly confirmed the addition made by the AO.

7. We have heard the rival submissions and gone through the relevant material on record in the light of the rival contentions of the parties. As pointed out by the Ld. counsel for the assessee, the findings of the Ld. CIT (A) are not in accordance with the ratio of law laid down in the aforesaid cases relied upon by the Ld. counsel for the assessee. The Hon'ble Delhi High Court in the case of *PCIT v. Caraft Builders & Constructions (P) Ltd.* (*supra*) has held that the upper disallowance u/s 14A r.w.r.8D (2) (iii) of the Rules cannot exceed exempt income of relevant year. The observations of the Hon'ble High Court read as under:-

"25. Total exempt income earned by the respondent-assessee in this year was Rs. 19 lakhs. In these circumstances, we are not required to consider the case of the Revenue that the disallowance should be enhanced from Rs. 75.89 crores to Rs. 144.52 crores. Upper disallowance as held in Pr. CIT v. McDonalds India (P.) Ltd. ITA 725/2018 decided on 22nd October, 2018 cannot exceed the exempt income of that year. This decision follows the ratio and judgment of the Supreme Court in the case of Maxopp Investments Ltd. v. CI T[2018] 402 ITR 640/254 Taxman 325/91 taxmann.com 154 and the earlier judgments of the Delhi High Court in Cheminvest v. CIT [2015] 378 ITR 33/234 Taxman 761/61 taxmann.com 118 and CIT v. Holcim (P.) Ltd. [2015] 57 taxmann.com 28 (Delhi). Relevant portion of the judgment in McDonalds India (P.) Ltd. (supra) reads:—

'8. The decision in the case of Maxopp Investment Ltd. (supra) is significant and does answer the question in issue. This decision does not support the Revenue as the Assessing Officer in the case of Maxopp Investment Ltd. (supra) had himself restricted the disallowance to the extent of exempt income. After referring to Walford Share and Stock Brokers P. Ltd. (supra) it was held—

"Axiomatically, it is that expenditure alone which has been incurred in relation to the income which is includable in total income that has to be disallowed. If an expenditure incurred has no causal connection with the exempted income, then such an expenditure would obviously be treated as not related to the income that is exempted from

tax, and such expenditure would be allowed as business expenditure. To put it differently, such expenditure would then be considered as incurred in respect of other income which is to be treated as part of the total income."

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10. The decision of the Delhi High Court in Holcim India Pvt. Ltd. (supra) had referred to the issue whether disallowance of expenditure under Section 14A of the Act would be made even when no exempt income in the form of dividend was earned in the year, and it was observed:

"14. On the issue whether the respondent-assessee could have earned dividend income and even if no dividend income was earned, yet Section 14A can be invoked and disallowance of expenditure can be made, there are three decisions of the different High Courts directly on the issue and against the appellant-Revenue. No contrary decision of a High Court has been shown to us. The Punjab and Haryana High Court in Commissioner of Income Tax, Faridabad v. M/s. Lakhani Marketing Incl., ITA No. 970/2008, decided on 02.04.2014, made reference to two earlier decisions of the same Court in CIT v. Hero Cycles Limited, [2010] 323 ITR 518 and CIT v. Winsome Textile Industries Limited, [2009] 319 ITR 204 to hold that Section 14A cannot be invoked when no exempt income was earned. The second decision is of the Gujarat High Court in Commissioner of Income Tax-I v. Corrttech Energy (P.) Ltd. [2014] 223 Taxmann 130 (Guj.). The third decision is of the Allahabad High Court in Income Tax Appeal No. 88 of 2014, Commissioner of Income Tax (Ii) Kanpur, v. M/s. Shivam Motors (P.) Ltd. decided on 05.05.2014. In the said decision it has been held:

"As regards the second question, Section 14A of the Act provides that for the purposes of computing the total income under the Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. Hence, what Section 14A provides is that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for earning the income is not an allowable deduction. For the year in question, the finding of fact is that the assessee had not earned any tax free income. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. The view of the

CIT (A), which has been affirmed by the Tribunal, hence does not give rise to any substantial question of law. Hence, the deletion of the disallowance of Rs. 2,03,752/- made by the Assessing Officer was in order" .

15. Income exempt under Section 10 in a particular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax. It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not an improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax."

11. Decision in Holcim India (P.) Ltd. (supra) was followed and elaborated in Cheminvest Ltd. (supra).'

26. There is another error made by the Assessing Officer in computing the disallowance under clauses (ii) of Rule 8D (2) with reference to the formula prescribed. Numerical B in clause (ii) refers to average value of the investment, income from which does not form part or shall not form part of the total income. The Assessing Officer for numerical B in clause (ii) had taken the total value of the investment and not the investment that had yielded exempt income. The Delhi High Court in ITA No. 615/2014, ACB India Ltd. v. Asstt. CIT [2015] 62 taxmann.com 71/235 Taxman 22 has held that only average value of the entire investment that does not form part of the total income is the factor which could be covered by the numerical B for computing disallowance under clause (ii) of Rule 8D(2) of the Rules."

8. The issue aforesaid, raised by the assessee is covered in favour of the assessee by the judgment of the Hon'ble Delhi High Court, discussed

above. Since, the findings of the Ld. CIT (A) are not in accordance with the judgment of Hon'ble Delhi High Court, we find merit in the contention of the assessee. Hence, respectfully following the judgment of the Hon'ble Delhi High Court, we allow Ground No. 4.3 of appeal of the assessee and set aside the findings of the Ld.CIT (A). Accordingly, we direct the AO to restrict the addition to the exempt income earned by the assessee during the previous year relevant to the assessment year under consideration.

9. No other issue was raised by the assessee during the course of arguments.

In the result, appeal filed by the assessee for assessment year 2009-2010 is partly allowed.

Order pronounced in the open court on 29th October 2019.

Sd/-

(S. RIFAUR RAHMAN)

ACCOUNTANT MEMBER

Sd-

(RAM LAL NEGI)

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 29/10/2019

Alindra, PS

आदेश 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.

आदेशानुसार/ BY ORDER,

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उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai