

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

BEFORE SHRI M. BALAGANESH (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 5069/MUM/2018
Assessment Year: 2013-14**

The DCIT, Cent. Cir. 6(4), R. No. 1925, 19 th Floor, Air India Building, Nariman Point, Mumbai - 400021	Vs.	M/s Mumbai SEZ Limited, 1 st Floor, Jai Centre, 34 P.D. Mello Road, Masjid Mumbai - 400009 PAN : AABCG2739C
(Appellant)		(Respondent)

Revenue by : Shri D.G. Pansari (DR)
Assessee by : Shri Madhur Agarwal &
Shri Fenil Bhatt (AR)

Date of Hearing: 05/09/2019
Date of Pronouncement: 28/11/2019

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 12.06.2018 passed by the Commissioner of Income Tax (Appeals)-54 (for short 'the CIT(A), Mumbai, for the assessment year 2012-13, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee engaged in the business of setting up and development of infrastructure facilities, filed its return of income for the assessment year consideration declaring the nil income after claiming loss of Rs. 6,04,36,617/-. The return was processed u/s 143 (1) of the Act. Since, the case was selected for scrutiny, the AO issued notice u/s 143 (2) and 142 (1) of the Act calling for details and explanations. In response thereof, the authorized representative of the assessee appeared before the AO and filed details called for. It was noticed that the assessee had shown income of Rs. 12,39,045/- and claimed expenditure amounting to Rs. 6,45,78,616/- on

account of SEZ Project under the heads Development and related expenditure, change in the inventories of Work in Progress (WIP), interest and finance charges and depreciation for the assessment year 2013-14. The AO rejected the assessee's claim holding that the business of the assessee had not commenced during the relevant year. The AO further pointed out that assessee claim was not accepted in assessment years 2008-09, 2009-10, 2010-11 and 2011-12 and since there is no material change in the facts in the present case, there is no reason to take a view different from the view taken in the earlier years. The AO also assessed the interest income of Rs. 2,569/- earned from the bank under the head income from other sources. The AO further made addition of Rs. 10,99,015/- u/s 14A read with rule 8D of the Income Tax Rules. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) decided the first issue in favour of the assessee by following the decision of his predecessor, which was based on the order of the ITAT in the assessee's own case for the assessment year 2010-11. The Ld. CIT (A) further decided the issue regarding interest income in favour of the assessee holding that the interest income in question is business income and not the income from other sources. The Ld. CIT (A) further deleted the addition made by the AO on account of disallowance made u/s 14A read with rule 8D of the Rules. Aggrieved by the findings of the Ld. CIT (A), the revenue is in appeal before the Tribunal.

3. The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

"1 (a) "Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in holding that the business was set up and the expenditure claimed of s. 3,05,05,240/- was allowable as revenue expenditure?"

(b) Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in not appreciating the fact that business activity of the assessee had not commenced and was in pre-operative stage?"

2. Whether on the facts and circumstances and in law, the Ld. CIT (A) has erred in holding that the interest income earned from bank of Rs. 2569 as income from business

and erred by not appreciating the fact that the business of the assessee has not been commenced.

3. (a) *Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition of Rs. 10,99,015/- u/s 14A of the Income Tax Act, 1961 ignoring that the provisions of Section 14A which apply even if no exempt income has actually been earned or received during the year in any form whatsoever?*
- (b) *Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition u/s 14A of the Income Tax Act, 1961 by ignoring the provisions of CBDT Circular no. 5/2014 dated 11.02.2014 wherein, it has been clarified that the Rule 8D r.w.s 14A provides for disallowance of expenditure even where the assessee in particular has not earned exempt income?*
- (c) *Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition u/s 14A of the Income Tax Act, 1961 relying upon the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd., overlooking the fact that the above decision has not been accepted by the revenue and SLP has been filed before the Hon'ble Supreme Court and same is pending."*

4. Vide the first ground of the appeal, the revenue has challenged the action of the Ld. CIT (A) in allowing the expenditure amounting to Rs. 3,05,05,240/- claimed by the assessee as revenue expenditure. At the outset, the Ld. counsel for the assessee submitted before us that this ground of appeal is covered in favour of the assessee by the order of the ITAT in assessee's own case ITA No. 4939/Mum/2014 for the AY 2010-11. Since, Ld. CIT (A) has decided this issue by following the decision of the ITAT in assessee's case aforesaid, there is no infirmity in the order passed by the Ld. CIT (A) to interfere with.

5. On the other hand, the Ld. Departmental Representative (DR) fairly admitted that the Ld. CIT (A) has decided this issue in favour of the assessee by following the decision of the ITAT, however relying on the assessment order passed by the AO submitted that since the business activity of the assessee

had not commenced and it was in pre operative stage, the Ld. CIT (A) ought to have confirmed the action of the AO.

6. We have perused the material on record in the light of the rival submissions of the parties. As pointed out by the Ld. counsel for the assessee, the Ld. CIT (A) has decided this issue in favour of the assessee by following the common order dated 26.07.2019 passed by the coordinate Bench in assessee's case ITA No. 4939/Mum/2014 for the AY 2010-11 and ITA No. 2830/Mum/2017, ITA No. 3073/Mum/2017 and ITA No. 5515/Mum/2017. The relevant part of the said order reads as under:

"27. The revenue has filed this appeal being aggrieved with the decision of learned Commissioner (Appeals) in holding that assessee's business has commenced.

28. It is relevant to observed, while deciding assessee's appeal in assessment year 2003-04, the Tribunal has held that assessee's business has already commenced. Following the aforesaid decision of the Tribunal, learned Commissioner (Appeals) while deciding the assessee's appeal for the assessment year 2010-11 and 2011-12 has held that assessee's business has commenced since the assessment year 2003-04. In fact, the aforesaid decision of learned Commissioner (Appeals) has been accepted by the Revenue in assessment year 2010-11. In view of the aforesaid, we do not find any infirmity in the order of the learned Commissioner (Appeals). Ground is dismissed."

7. The coordinate Bench of the Tribunal has decided the identical issue, in revenue's appeal ITA No. 2830/Mum/2017 for the AY 2011-12, in favour of the assessee by upholding the findings of the Ld. CIT(A) passed in accordance with the decision of the coordinate Bench in assessee's case for the assessment year 2003-04. Further as pointed out by the coordinate Bench the department has accepted the findings of the Ld. CIT(A) in assessee's case for the assessment year 2010-11 and 2011-12, that the business of the assessee has commenced in AY 2003-04. Hence, respectfully following the decision of the coordinate Bench we dismiss this ground of appeal of the revenue and uphold the findings of the Ld. CIT(A).

8. Vide Ground No. 2 the revenue has challenged the action of the Ld. CIT (A) in holding that the interest income earned from bank amounting to Rs. 2,569/- as income from business. The AO notice that the assessee had earned interest income of Rs. 2,569/- from ICDs and the AO treated the said income as income from other sources. In the first appeal, the Ld. CIT (A) reversed the findings of the AO and held that the said income has to be treated as business income and not income from other sources. The Ld. DR relying on the assessment order submitted before us that that Ld. CIT (A) has wrongly reversed the findings of the AO.

9. On the other hand, the Ld. counsel for the assessee submitted that the Tribunal has dealt with the identical issue in assessee's case ITA NO. 4939/Mum/2014 in assessee's own case for the AY 2010-11 and decided the same in favour of the assessee. Since, the findings of the Ld. CIT (A) are in accordance with the decision of the ITAT, there is no merit in the appeal of the revenue.

10. We have carefully perused the material on record in the light of the rival submissions of the parties. As pointed out by the Ld. counsel for the assessee, the coordinate Bench has decided the identical issue in favour of the assessee in assessee's own case for the AY 2010-11. The operative part of the decision of the coordinate Bench reads as under:-

"7. We have considered rival submissions and perused the material on record. Though, the Assessing Officer has treated the interest income received by the assessee as income from other source on the reasoning that assessee's business has not yet commenced, however, learned Commissioner (Appeals) has given a factual finding that assessee's business has commenced. Further, learned Commissioner (Appeals) has also accepted assessee's claim of interest earned on fixed deposits with bank as business income. The only interest earned on fixed deposits with bank as business income. The only reason on which he has rejected assessee's claim of interest earned on ICDs as business income is, the assessee is not in money lending business. In our view, the aforesaid reasoning of the learned Commissioner (Appeals) defies

logic. There is no dispute that the assessee has parked surplus business funds, which is not immediately required for utilization in business, in short term deposits with bank or IDCS. The entire purpose of such deposits was not to keep the funds idle and earn some income. If the aforesaid reasoning of the assessee is valid for the interest earned on fixed deposits, the same cannot be invalid or unacceptable in case of interest earned on ICDs. When it is accepted that the assessee has taken a prudent business decision to earn some income by utilizing the idle business funds, no differentiation can be made between the investments made in banks and ICDs. In view of the aforesaid, we hold that the interest income earned on ICDs should be treated as income from business. This ground is allowed.”

11. The coordinate Bench has decided this issue in favour of the assessee in assessee's own case aforesaid. The findings of the Ld. CIT (A) are based on the decision of the coordinate Bench rendered in the assessee's own case for the AY 2010-11. The Ld. DR has not pointed out any change of facts in the present case. Hence, we do not find any reason to interfere with the findings of the Ld.CIT (A). We therefore, respectfully following the decision of the coordinate Bench uphold the findings of the Ld.CIT (A) and dismiss this ground of appeal of the revenue.

12. Vide Ground No. 3, the revenue has challenged the action of the Ld. CIT (A) in deleting the addition of Rs. 10,99,015/- u/s 14A of the Act. The Ld. DR submitted before us that the Ld CIT (A) has deleted the addition ignoring that the provisions of section 14A apply even if the assessee has not earned exempt income during the year. The Ld. DR further submitted that since the AO had computed the disallowance in accordance with section 14A read with rule 8D of the Income Tax Rules, the Ld. CIT (A) ought to have confirmed the addition made by the AO.

13. On the other hand, the Ld. counsel for the assessee submitted that the findings of the Ld.CIT (A) are in accordance with the law laid down by the Courts, there is no infirmity in the order passed by the Ld.CIT (A) to interfere

with the findings of the Ld. CIT(A). The Ld. counsel placed reliance on the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd. 378 ITR 33 (Delhi) to substantiate the contention of the assessee.

14. We have heard the rival submissions of the parties and perused the material on record including the case law relied upon by the Ld. counsel for the assessee. The Ld. CIT(A) has decided the identical issue in favour of the assessee holding as under:

“9.3 The submissions of the ld. Counsel have been carefully considered. It is the contention of the ld. Counsel that all the investments are made in mutual fund units which will not yield dividend. The assessee's contention is that not only dividend is received by the assessee but that the investment did not have the potential to earn the dividend, Further, the investment have been made out of the appellant's own funds. The Ld. AO placed his reliance on the judgment of Hon'ble Special Bench of ITAT, Delhi in the case of Cheminvest Ltd. vs. ITO, supra, however, this judgment of ITAT, Delhi, has been reversed by the Delhi High Court wherein it was held categorically that section 14A will not apply if no exempt income is received or receivable during the relevant previous year. In view of the judgment of the Delhi High Court referred to supra, it is held that no disallowance can be made u/s 14A when there is no exempt income earned as in the instant case. Therefore, the addition made by the Ld. AO of Rs. 10,99,015/- u/s 14A is directed to be deleted. This ground of appeal is allowed.”

15. Admittedly, the assessee has not received any dividend or exempt income during the year relevant to the assessment year under consideration. The Ld. CIT(A) has deleted the addition made on account of disallowance made u/s 14A of the Act, by following the ratio laid down by the Hon'ble Delhi High Court in the case of *Cheminvest Ltd.* (supra), in which the Hon'ble High Court has held that section 14A will not apply if no exempt income is received or receivable during the relevant previous year. The findings of the Ld. CIT(A) is also in conformity with the judgment of the Nagpur Bench of the Hon'ble Bombay High

Court in the case of *Pr. CIT vs. Ballarpur Industries, ITA No 15 of 2016* dated 13.10.2016, in which the Hon'ble Court has held that, if no exempt income is received or receivable during the relevant previous year, no disallowance u/s 14A can be made. Since, the findings of the Ld. CIT(A) are based on the ratio of law laid down by the Hon'ble Bombay High Court and the Hon'ble Delhi High Court, we do not find any legal infirmity in the findings of the Ld. CIT(A). Hence, we dismiss this ground of revenue's appeal and uphold the findings of the Ld. CIT(A) and accordingly, direct the AO to delete the addition.

In the result, appeal filed by the revenue for assessment year 2012-13 is dismissed.

Order pronounced in the open court on 28th November, 2019.

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 28/11/2019

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,

सत्यापित प्रति //True Copy//

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