IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)

(THROUGH VIDEO CONFERENE)

SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.5794/Del./2016
(ASSESSMENT YEAR : 2012-13)

M/s. Gujarat Guardian Ltd., 4-7/C, DDA Shopping Centre, New Friends Colony, New Delhi – 110 065.	vs.	DCIT, Circle 10(2), New Delhi.

(PAN : AAACG1622K)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Neeraj Jain, Advocate
Mrs. Shaily Gupta, CA
Shri Akshay Uppal, CA
REVENUE BY : Ms. Sunita Singh, CIT DR

Date of Hearing : 21.07.2020
Date of Order : 27.07.2020

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, Gujarat Guardian Ltd. (hereinafter referred to as the 'appellant') by filing the present appeal sought to set aside the impugned order dated 05.09.2016 passed by the Commissioner of Income - tax (Appeals)-35, New Delhi on the grounds inter alia that :-

"1. That the Commissioner of Income Tax (Appeals) ['CIT(A)'] erred on facts and in law in confirming action of the assessing officer in disallowing expenses of Rs.1,14,00,524/-, against Rs.4,86,374 suo moto disallowed by the appellant, alleging the same to be incurred for earning exempt dividend income of Rs.15,44,59,467/- from investment in mutual funds, invoking provisions of section 14A of the Income Tax Act, 1961 ('the Act') read with Rule 80 of the Income Tax Rules, 1962 ('the Rules').

1.1 That the CIT(A) erred on facts and in law in upholding the action of the assessing officer in making disallowance under section 14A of the Act read with Rule 80 of the Rules by merely following the directions issued by the Dispute Resolution Panel for the assessment years 2010-11 and 2011-12.

1.2 That the CIT(A)/ AO erred on facts and in law in holding that investment activity was not passive activity but was well informed and co-ordinated activity involving input from the various sources and acumen of senior management functionary and hence there was cost in-built into such investment activity.

1.3 That the CIT(A)/ AO erred on facts and in law in holding that the appropriate cost of composite funds needed to be allocated towards earning of exempt income.

1.4 That the CIT(A) erred on facts and in law in not appreciating that under section 14A of the Act and only expenses having direct! proximate nexus with earning of the dividend income could be disallowed.

1.5 That the CIT(A) erred on facts and in law in not appreciating that only expenses to the extent of Rs.4,86,374 were incurred for earning the aforesaid dividend income from the investment made in mutual funds.

1.6 That the CIT(A) erred on facts and in law in not appreciating that the onus to prove that the expenditure was incurred in the taxable business operations and not the exempt income is upon the revenue and not of the appellant.

1.7 Without prejudice, that the CIT(A) erred on facts and in law in not appreciating that sub-section (2) of section 14A cannot be applied without recording satisfaction about the correctness of the claim of the appellant in respect of the expenditure incurred for earning the said income.

1.8 Without prejudice, that the CIT(A) erred on facts and in law in not appreciating that the assessing officer had erroneously computed Rs.12,24,497 as expenses disallowable under section

14A of the Act by applying Rule 8D of the Rules by considering the aggregate value of fixed assets and gross current assets instead of aggregate of fixed assets and net current assets.

1.9 Without prejudice, that the CIT(A) erred on facts and in law in not appreciating that the assessing officer had erroneously computed Rs.12,24,497 as expenses disallowable under section 14A of the Act by applying sub-rule (2)(ii) of Rule 8D of the Rules as against Rs.10,05,522 as expenses disallowance under sub-rule (2)(ii) of Rule 8D.

1.10 Without prejudice, that the CIT(A) erred on facts and in law in not appreciating that the appellant had recorded dividend income in the books of accounts net of administrative charges levied by the mutual funds.

2. That the CIT(A) erred on facts and in law in confirming the action of the assessing officer in disallowing deduction under section 80IA of Rs.21,57,22,785 as claimed by the appellant in the return of income.

2.1 That the CIT(A) erred on facts and in law in arbitrarily holding that no books of accounts were maintained nor the requirement of audit as contained in section 80IA(7) was fulfilled in the present case, not appreciating that proper record and books of account were maintained and were placed on record in the course of assessment proceedings.

2.2 That the CIT(A) erred on facts and in law in holding that the appellant has not complied with the requirement of section 80IA(7) of the Act on the ground that the chartered accountant who issued the audit report in Form 10CCB had not audited the accounts of the undertaking without appreciating that there is no such requirement in law.

2.3 That the CIT(A) erred on facts and in law in arbitrarily holding that the auditor has not taken responsibility of correctness of the claim of the appellant on the ground that the audited financial statements consisted only Trial Balance, Balance Sheet and Profit and Loss account without any notes to accounts or any remarking regarding the maintenance of accounts, revenue recognition, etc."

2. Briefly stated the facts necessary for adjudication of the issue at hand are : Assessee company is in the business of manufacturing and selling of float glass. During the year under

assessment, assessee earned dividend income of Rs.15,44,59,467/-. Assessing Officer (AO) by invoking the provisions contained under section 14A the Income-tax Act, 1961 (for short 'the Act') read with Rule 8D of the Income-tax Rules, 1962 (for short 'the Rules') made a disallowance of Rs.1,18,86,898/- minus Rs.4,86,374/- suo motu disallowance made by the assessee = Rs.1,14,00,524/- and added the same to the income of the assessee on the ground that earning of exempt income is not in the nature of passive activity having no input; that investment made being a cautions decision and having deployment of funds clearly brings into picture expenditure by way of cost of funds invested. AO also made disallowance of Rs.21,57,22,785/- claimed by the assessee as deduction u/s 80IA(4)(iv) of the Act and assessed the total income of the assessee at Rs.28,36,87,040/-.

3. Assessee carried the matter by way of an appeal before the ld. CIT (A) who has partly allowed the appeal. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUNDS NO.1 TO 1.10

5. Undisputedly, ld. CIT (A) confirmed the addition/ disallowance by following his own order passed for AY 2010-11 in assessee's own case. Assessee has earned dividend income of Rs.15,44,59,467/- by making investment of Rs.1,06,62,402/- and made suo motu disallowance of Rs.4,86,374/- towards 25% of the salary of one accounting person along with 5% remuneration of Finance Director. It is also not in dispute that assessee has made investment in the debt mutual fund. It is also not in dispute that assessee is having interest free surplus funds of Rs.4,54,99,30,057/-

6. In the light of the aforesaid undisputed facts, the ld. AR for the assessee contended that the issue in controversy is covered by the ***order dated 16.089.2018 passed by the Tribunal in assessee's own case for AY 2010-11***, which has been confirmed by the Hon'ble Delhi High Court.

7. On the other hand, ld. DR for the Revenue relied upon the orders passed by the AO/CIT (A).

8. When undisputedly assessee has earned exempt dividend income of Rs.15,44,59,467/- by making investment in debt mutual fund out of its own tax free surplus funds of Rs.4,54,99,30,057/- during the year under assessment and has made suo motu disallowance of Rs.4,86,374/- towards 25% of the salary of one

accounting person along with 5% remuneration of the Finance Director by making specific working of the aforesaid disallowance, the AO was required to record his categoric dissatisfaction as to the working of disallowance given by the assessee that the same is not correct. Rather AO has invoked the provisions contained u/s 14A read with Rule 8D on the basis of general principles inter alia that the earning of exempt income is not in the nature of passive activity having no input; that investment being a conscious decision and having deployment of funds clearly brings into picture expenditure by way of cost of funds and that assessee's claim that he has not incurred any expenditure to earn dividend income is not acceptable.

9. Hon'ble Delhi High Court in case of ***Maxopp Investment Ltd. vs. CIT – (2012) 347 ITR 272 (Del.)*** held that AO in order to invoke provisions contained u/s 14A read with Rule 8D is required to return a finding that, *"he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure"***.** Even otherwise *"expenditure incurred does not include imagined expenditure"*.

10. Furthermore, when assessee is having its own huge interest free surplus funds of Rs.4,54,99,30,057/-, there is no question of incurring expenditure by way of interest.

11. The assessee has come up with specific argument that its entire investment on which exempt dividend income of Rs.15,44,59,467/- has been earned is in the debt mutual fund and the investment activity only requires filling of 'Mutual Fund Standard Printed Forms' and issue of cheque or debit instruments to the bank. Thereafter, dividend/mutual fund proceeds are directly credited to the assessee's bank account. It is also contended that assessee has not deployed any specific person to look after its investment activities, but it has suo motu disallowed a sum of Rs.4,86,374/- towards 25% of the salary of one accounting person along with 5% remuneration of the Finance Director having been incurred for earning such dividend income.

12. So, we are of the considered view that when AO has failed to comply with the mandatory requirement of section 14A(2) read with Rule 8D (ia) to record his satisfaction, question of applying Rule 8D(2)(iii) does not arise.

13. Hon'ble Apex Court in ***Godrej & Boyce Manufacturing Company Ltd. vs. DCIT – 394 ITR 449 (SC)*** thrashed the issue in controversy as to invoking of the provisions contained under Rule 8D of the Rules by observing as under :-

> ***"37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act***

> ***read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable."***

14. Moreover, it is undisputed fact on record that the assessee has made no investment in the "Equity Oriented Mutual Fund". Even otherwise, under the SEBI Guidelines, mutual funds charge "fund management charges" out of the income earned by the fund, which are deducted and net income is made available for the distribution of the unit holders. Even tax auditor in its tax audit report, available at page 181 of the paper book, quantified the disallowance u/s 14A of the Act at Rs.4,86,374/-. Apart from this, the assessee has suo motu reasonably apportioned the salary part of the employee and Finance Director looking after investment made for earning dividend income.

15. We have perused the order passed by the coordinate Bench of the Tribunal in assessee's own case for AYs 2009-10 & 2010-11, available at pages 2.1 to 2.29 and 3 to 46 respectively of the paper book, having identical facts deleting similar addition made

by the AO/CIT(A), which order has been affirmed by the Hon'ble Delhi High Court vide order dated 05.12.2017 passed in ITA 1106/2017, available at pages 1 & 2 of the paper book.

16. We are further of the considered view that since there is no change in the suo motu disallowance by the assessee as has been made in AYs 2010-11 & 2011-12, which has been confirmed by the Hon'ble Delhi High Court, making disallowance by the AO without recording satisfaction mandatory u/s 14A(2), is not sustainable.

17. So, in view of what has been discussed above and following the orders passed by the coordinate Bench of the Tribunal for AYs 2010-11 & 2011-12, affirmed by the Hon'ble Delhi High Court, we are of the considered view that disallowance made by the AO and confirmed by the ld. CIT (A) is not sustainable, hence ordered to be deleted. Grounds No.1 to 1.10 are determined in favour of the assessee.

GROUNDS NO.2 TO 2.3

18. AO disallowed deduction claimed by the assessee u/s 80IA to the tune of Rs.21,57,22,785/- which has been confirmed by the ld. CIT(A) on the ground that no books of account were maintained nor requirement of audit as contained u/s 80IA (7) was fulfilled in the present case.

19. Ld. AR for the assessee challenging the impugned order passed by the ld. CIT (A) contended inter alia that ld. CIT (A) has proceeded on the wrong facts and law that the Chartered Accountant who has issued the audit report and Form 10CCB had not audited the accounts of undertaking because there is no such requirement of law; that the issue in controversy is covered by the order passed by the Tribunal in assessee's own case for AY 2010-11 in ITA No.973/Del/2015 setting aside this issue back to the file of the AO with specific direction to grant deduction u/s 80IA of the Act after verifying the assessee's claim on examination of the audited accounts of the eligible undertaking.

20. Undisputedly, this is not first year of the assessee claiming deduction u/s 80IA and otherwise eligibility of assessee claiming deduction u/s 80IA has also not been disputed by the AO. It is also not in dispute that pursuant to the order passed by the Tribunal ***dated 16.08.2018 passed in ITA No.973/Del/2015 (assessee's appeal) & ITA No.1106/Del/2015 (Revenue's appeal) for AY 2010-11*** qua identical issue, AO has given effect to the order of the Tribunal by passing order u/s 254/143(3) allowing deduction claimed by the assessee u/s 80IA of the Act.

21. We have perused the order passed by the coordinate Bench of the Tribunal for AY 2010-11 in which identical issue qua

disallowance claimed by the assessee u/s 80IA has been set aside to the AO who has given effect to the order of the Tribunal. In AY 2010-11, AO disallowed the deduction claimed u/s 80IA on the identical grounds as in the case under consideration. Operative findings returned by the coordinate Bench of the Tribunal qua the issue in controversy are extracted for ready perusal as under :-

> ***"20. We have carefully considered the rival contention and perused the orders of the lower authorities. The brief background of the issue shows that assessee has set up two windmills for its captive consumption. On the same assessee claimed deduction under section 80 IA. Before the assessing officer the assessee submitted the audit report in form No. 10 CCB. The assessee started generating power from assessment year 2004 –05 onwards. For both the windmills the assessee entered into a power purchase agreement, such power generated at the windmill wheeled by that agreement to the manufacturing unit of the assessee, and number of units generated after deduction of the billing charges is granted as set-off in the electricity bill of the assessee. Based on this assessee booked the revenue and burnout profit thereon to derive at the profit generated from the industrial undertaking. During the course of assessment proceedings, the assessee was directed to produce the books of accounts maintained in respect of windmill units, which was produced by the assessee along with the methodology by which the income is booked and expenditure incurred of the windmill. The Ld. assessing officer rejected it on the ground that the appellant is computing sales based on the credit notes and the appellant failed to produce any document vouchers, which could have asserted that the appellant has maintained its accounts separately. Apparently the assessee is booking revenue is based on the credit note issued by the power purchase company wherein the specified number of units generated are shown. Based on that the assessee shows the revenue and further the respective expenditure incurred for the windmill are also recorded in the books of accounts. The assessee has claimed that it is maintaining separate books of accounts with respect to both the windmill undertakings and such books of accounts are duly been audited by an independent auditor and such report of the auditor has been filed before the Ld. assessing officer. The main reason for the rejection of the deduction of the assessee by the Ld. assessing officer is that that assessee is booking revenue based on the credit notes. Looking at the nature of the activities***

carried out by the assessee wherein it has set up industrial undertaking for the purpose of captive consumption of power. For its major requirement, it buys the power from Gujarat electricity board. However to get the benefit of its different industrial undertaking which generates the power, the assessee entered into an agreement with a power transmission company which gives the credit of units generated by the windmill project against the electricity bill of the manufacturing unit of the assessee. Therefore, the assessee is recording the number of units generated by the windmill as unit revenue generated from the industrial undertaking. While paying the electricity bill of the manufacturing unit, such number of units, which were generated by the industrial undertaking such as windmill, was granted as deduction and only the net units charged to the assessee. The assessee has recorded the revenue involved in those units generated by the windmill based on the rate at which power that is supplied to the assessee for the manufacturing unit. According to the subsection 7of section 80 IA the only requirement is that, the accounts of the undertaking are required to be audited. In the present case, the assessee has submitted the audited accounts. If the auditor has not qualified those audited accounts, there is no reason to reject them at the threshold without making further verification. The Ld. assessing officer should have verified whether the assessee has properly computed the income derived from the industrial undertaking or not. If the assessing officer finds that such working is not proper then only he can say that that the audited accounts of the assessee are not reliable. In the present case the revenue has been recorded by the assessee by deriving the units generated based on the credit notes issued by the transmission company, the assessee multiplied those units generated with the power rates for which the manufacturing unit buys the power from an outside agency, reduced the proper expenditure therefrom to derive at the profits of the industrial undertaking. It is further stated that this is not the 1styear of the claim of the assessee under section 80 IA of the act. In the past years, also the assessee was granted deduction on the similar facts and circumstances by the Ld. assessing officer. The principle of consistency also demands the assessee may be treated as eligible for deduction and it may not be rejected merely based on non-maintenance of books of accounts. Same is also not found as the mandatory conditions for deduction. Therefore, we do not approve the approach of the assessing officer in rejecting the claim of the assessee at the threshold merely on the basis that no separate books of accounts are maintained even when the assessee has submitted the audit report of the accounts of the industrial undertaking which was the requirement of subsection 7. Further, the claim of the assessee has been rejected at the threshold itself without verifying that what is the amount of profits that is derived by the industrial undertaking during the year. The assessee has submitted that these details were placed

before the Ld. assessing officer, which is also placed before us at page No. 78 onwards of the paper book. In view of this we set aside this ground of appeal back to the file of the Ld. assessing officer with a direction to verify the claim of the assessee on examination of the audited accounts of the industrial undertaking and then grant deduction under section 80 IA of the income tax act in accordance with the law. In the result ground No. 4 of the appeal of the assessee is allowed with above direction."

22. Keeping in view the fact that the identical issue has already been decided by the coordinate Bench of the Tribunal in assessee's own case for AY 2010-11 (supra), Grounds No.2 to 2.3 raised by the assessee are remitted back to the AO to verify the claim of the assessee made on the basis of the audited accounts and accordingly grant the deduction u/s 80IA in accordance with law.

23. Resultantly, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in open court on this 27th day of July, 2020.

sd/-	**sd/-**
(R.K. PANDA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 27th day of July, 2019/TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(E), New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.