

IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

ITA No.1734/Bang/2016
Assessment year: 2010-11

The Deputy Commissioner of Income Tax, Circle 1(1)(2), Bangalore.	Vs.	M/s. Bhoruka Power Corporation Ltd., No.48, Lavelle Road, Bangalore – 560 001. <b>PAN: AACCB 1422A</b>
APPELLANT		RESPONDENT

Appellant by	:	Shri Pradeep Kumar, CIT(DR)(ITAT), Bengaluru.
Respondent by	:	Smt. Sheetal Borkar, Advocate

Date of hearing	:	05.08.2020
Date of Pronouncement	:	07.08.2020

**ORDER**

*Per N.V. Vasudevan, Vice President*

This appeal by the revenue is against the order dated 04.08.2016 of CIT(Appeals)-14, LTU, Bangalore relating to assessment year 2010-11.

“1. The order of the Learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.

2. The Learned CIT(Appeals) erred in allowing the alternate plea of the assessee that the consideration received on sale of carbon credits was a capital receipt without appreciating that Certified Emission Reduction (CER) are not awarded as a subsidy but granted as an incentive for use of alternative fuel which is a revenue item; that they are not granted against or in lieu of any capital asset; that it is not granted in lieu of

destruction or impairment of profit making apparatus; that it is not awarded for transfer of any capital asset nor granted as subsidy or compensation for partly meeting the cost of the plant and machinery and that according to AS-9, CERs are considered as inventories and valued accordingly by the industry.

3. The Ld.CIT(A) erred in upholding the ground on claim of carbon credits as capital receipts by the assessee by relying on the decisions in the case of M/s My Home Power Ltd. (Vol.365 page 82 of ITR) and M/s Ambuthirtha Power Pvt. Ltd in ITA No.465(BNG)/2013 as the aforesaid decisions have not been accepted by the department and Revenue is in further appeal, hence the issue has not reached finality.

4. The Ld.CIT(A) erred in allowing the ground of appeal of the assessee pertaining to disallowance u/s 14A r.w.r 8D of the IT Act thereby deleting the addition of Rs.2,91,230/- because in the case of Maxopp Investments Ltd. Vs. CIT (TS-668-HC-2011(HC)) and ITAT Kolkata Bench 'B' order in the case of Coal India Ltd. dtd. 13.5.2015 it is held that investments in subsidiary companies also attract disallowance u/s 14A.

5. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer be restored.

6. The appellant craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of appeal.”

2. Ground Nos. 1, 5 & 6 are general in nature and do not call for any specific adjudication.

3. As far as grounds No.2 & 3 are concerned, the issue is with regard to taxability on account of carbon credit. The assessee is a company engaged in the business of generation of hydro and wind power. The assessee was entitled to claim deduction u/s. 80IA of the Income-tax Act, 1961 [the Act] in respect of business of generation of power. The assessee

claimed a sum of Rs.20,74,42,471 as deduction u/s. 80IA of the Act. In the claim for deduction u/s. 80IA, the assessee also included receipt of Rs.5,91,59,000 from sale of carbon credit. The AO held that receipt of account of sale of carbon credit is not derived from eligible business and denied the benefit u/s. 80IA of the Act, to the extent of receipt on account of sale of carbon credit. Alternatively, the assessee claimed that the receipt on account of carbon credit is a capital receipt not chargeable to tax. The AO, however, rejected this contention and held that it is a revenue receipt chargeable to tax.

4. On appeal by the assessee, the CIT(Appeals) allowed the alternative claim of the assessee following the decision of the Hon'ble Andhra Pradesh High Court in *CIT v. My Home Power Ltd., 385 ITR 82 (AP)*. Aggrieved by the order of CIT(Appeals), the revenue has raised ground Nos.2 & 3 before the Tribunal.

5. The Hon'ble Andhra Pradesh High Court in case of *My Home Power Ltd. (supra)* held that "carbon credit was not an offshoot of business of the assessee but an offshoot of environmental concerns. No asset was generated in the course of business but it was generated due to environmental concerns. There was no cost of acquisition or cost of production to get entitlement for the carbon credits. Therefore, the income from sale of carbon credits was to be considered as capital receipt and not liable to tax under any head of income under the Income-tax Act, 1961. "

6. The ITAT Chennai in case of *Ambika Cotton Mills Ltd. v. Deputy Commissioner of Income- tax [27 ITR(Trib) 44]* held that "the realisation of carbon credit was to be considered as capital receipt".

7. The ITAT, Jaipur in case of Shree Cement Ltd. Vs. ACIT [31 ITR(Trib) 513] held that "Carbon credit is in the nature of 'an entitlement' received to improve world atmosphere and environment reducing carbon, heat and gas emissions. The entitlement earned for carbon credits is a capital receipt and cannot be taxed as a revenue receipt. It is not generated or created due to carrying on business but it is accrued due to 'world concern'. It has been made available assuming character of transferable right or entitlement only due to world concern. The source of carbon credit is world concern and environment. Due to that the assessee gets a privilege in the nature of transfer of carbon credits. Thus, the amount received for carbon credits has no element of profit or gain and it cannot be subjected to tax in any manner under any head of income." In CIT Vs. Subhash Kabini Power Corporation Ltd. 385 ITR 592 (Karn.), the Hon'ble Karnataka High Court upheld the view taken by the Tribunal that receipts on account of carbon credit are capital receipts not chargeable to tax.

8. In view of the aforesaid judgments, we do not find any merit in ground no.2 & 3 raised by the revenue. Accordingly ground no.2 & 3 raised by the revenue are dismissed.

9. As far as ground No.4 raised by the revenue regarding disallowance u/s. 14A r.w. Rule 8D is concerned, the AO on noticing that the assessee has earned exempt income, invoked the provisions of section 14A of the Act and disallowed a sum of Rs.2,91,230 as expenses attributable to earning of exempt income as per the following details:-

A.	Total amount of Direct interest/ other expenses pertaining to tax-exempt investments U/R 8D(2)(i)	NIL		
B.	Total amount of indirect interest pertaining to tax-exempt investments	2,19,22,000		
		<b>A.Y 09-10</b>	<b>A.Y 10-11</b>	<b>Average</b>
C.	Average amount of tax exempt investments	37,14,000	83,98,000	60,56,000
D.	Average amount of total assets	466,02,36,000	551,45,49,000	508,73,92,500
E.	Proportionate indirect interest to be disallowed	$\frac{B \times C}{D}$	2,19,22,000 x 60,56,000	
			508,73,92,500 = 2,60,950	
F.	0.5% of average amount of tax exempt investments		30,280	
G.	<b>Total disallowance attracted u/s. 14A read with Rule 8D</b>	A + E + F	<b>2,91,230</b>	

This amount of **Rs.2,91,230/-** was held to be liable to be disallowed u/s. 14A read with Rule 8D of the Income Tax Act and accordingly addition of rs. 2,91,230/- was made to the returned income.”

10. Before the CIT(Appeals), the assessee raised ground No.4 in which the contention of the assessee was that the assessee had own source of income out of which investments were made and therefore no disallowance u/s. 14A of the Act should have been made. However, in the submission before the CIT(Appeals), the assessee submitted that investments were made in subsidiary company and one such company was an Indonesian company and dividend received from the said company to the extent of Rs.46.84 lakhs was chargeable to tax and not exempt. Investment was made in another company, M/s. Bhoruka Energy Ltd. owing to business

exigencies and therefore no disallowance could have been made u/s. 14A of the Act. The CIT(Appeals) deleted the addition made by the AO. The submission made by the assessee before the CIT(Appeals) and the observations of the CIT(Appeals) are as follows:-

“6.1 The appellant in his written submission stated that :

" A. The Company has continued investment during the year to the extent of Rs. 30 lakhs in M/s. Bhoruka Energy Limited and also made a new investment in M/s. PT Bhoruka, Indonesia which is 100% subsidiary of the Company. As per the decision of Appellate Tribunal in case of Dy Commissioner of Income Tax vs Amalgamations Ltd 2015 43 TTR (Trib) 540 [ITAT(Chen)], it was mentioned that the investment made by the Assessee purely incidental on account of business expediency will not be subject to disallowance of interest on the proportionate investment under section 14 A. As per this, the investment made by the Company in M/s. Bhoruka Energy Ltd and also M/s. PT Bhoruka, Indonesia are purely of business expediency. The proportionate interest disallowance as compiled by the Assessing officer are not to be reckoned for disallowance under section 14 A read with Rule 8D. Investment in M/s. P T Bhoruka, Indonesias is Rs.46.84 lakhs, even dividend received from Mis. PT Bhoruka is not exempt hence no disallownce of interest u/s 14 A Read with 8D is not applicable .

B. Sec.14A will not apply if no exempt income is received or receivable during the relevant previous year - as per case law [2015] 378 TTR 33 in the case of Cheminvest Ltd. v. CIT , [Delhi], case law [2014] DTRJ 506 [Allh.HC) in the case of CIT v. Shivram Motors P Ltd, case law [2015] 372 ITR 97 in the case of CIT v. Corrttech Energy P Ltd."

6.2 With regard to the interest disallowance u/s. 14A of the IT Act, the appellant relied on the decision of the ITAT, Chennai Bench in the case of DCIT Vs. Amalgamations Ltd. in 43 ITR 540 (2015) wherein it is held that the investment made by the assessee purely incidental on account of business expediency will

not be subject to disallowance of interest on the proportionate investment u/s. 14A.

6.3 The appellant contends that the investment made by the company in M/s. Bhoruka Energy Ltd an also M/s. PT Bhoruka, Indonesia are purely of business expediency. The proportionate interest disallowance as complied by the AO are not to be reckoned for disallowance u/s. 14A read with Rule 8D. Investment in M/s. P.T. Bhoruka, Indonesias is Rs.46.84 lakhs even dividend received from M/s. PT Bhoruka is not exempt hence the appellant claims that no disallowance of interest u/s. 14A read with 8D is not applicable.

6.4 It is seen that AO did not examine the fact that investments made by the appellant are in the subsidiary companies and also did not give a valid reason for invoking Rule 811 The submission made by the assessee are seen and after going through the decision of ITAT Chennai referred above, this ground is allowed.”

11. Aggrieved by the order of CIT(Appeals), the revenue is in appeal before the Tribunal.

12. We have heard the rival submissions. Pursuant to the decision of the Hon'ble Supreme Court in the case of *Maxopp Investments Ltd., 402 ITR 640 (SC)*, the dominant purpose of making the investment is irrelevant. The decision of the Hon'ble Supreme Court was rendered after the passing of the impugned order by the CIT(Appeals). Since the purpose of making the investment is no longer relevant, the basis on which the relief was given to the assessee by the CIT(Appeals) no longer survives.

13. The Id. counsel for the assessee, however, submitted that since the issue of disallowance u/s. 14A of the Act has not been examined either by the AO or the CIT(A) on the basis of availability of own funds of the assessee which have been utilized for making investments which are likely to yield tax free income and other relevant considerations, the issue should

be remanded to the AO for *de novo* consideration of disallowance u/s. 14A of the Act.

14. We are of the view that the prayer for remanding the issue to the AO as put forth by the Id. counsel for the assessee has to be accepted as neither the AO or the CIT(Appeals) has examined this issue. In this regard, the Id. counsel for the assessee submitted that a perusal of balance sheet would show availability of own funds. We are of the view that this aspect can be looked into by the AO in the set aside proceedings. We hold and direct accordingly.

15. In the result, the appeal by the revenue is treated as partly allowed for statistical purposes.

Pronounced in the open court on this 07<sup>th</sup> day of August, 2020.

Sd/-

( B R BASKARAN )  
ACCOUNTANT MEMBER

Sd/-

( N V VASUDEVAN )  
VICE PRESIDENT

Bangalore,  
Dated, the 07<sup>th</sup> August, 2020.

*/Desai S Murthy/*

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar  
ITAT, Bangalore.