IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI A K GARODIA, ACCOUNTANT MEMBER

ITA No.776/Bang/2019
Assessment year: 2010-11

HMA Data Systems (P) Ltd., G-1, RIO Grande, No.7/3, Bruton Road, Bengaluru – 560 001. **PAN: AAACH 3508D**	Vs.	The Deputy Commissioner of Income Tax, Circle 11(4), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri V. Narendra Sharma, Advocate
Respondent by	:	Smt. R. Premi, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	22.10.2020
Date of Pronouncement	:	28.10.2020

O R D E R

Per N.V. Vasudevan, Vice President

This appeal by the assessee is against the order dated 15.03.2019 of the CIT(Appeals)-3, Bengaluru relating to assessment year 2010-11.

2. Ground No.3 was not pressed by the assessee for adjudication and the same is dismissed as not pressed.

3. There are two issues that remain to be decided in this appeal. The first issue is as to, whether the CIT(Appeals) was justified in confirming the order of AO in making disallowance of expenses to the extent of Rs.1,22,50,626. The break-up of the sum disallowed is as follows:-

a. Depredation of Rs. 55,11,911/-;
b. Employee Cost of Rs. 27,34,237/-;
c. Repairs and Maintenance of Rs. 10,48,926/-;
d. Travelling and conveyance of Rs. 4,43,957/-;
e. Professional & Consultancy Charges of Rs. 5,55,000/-;
f. Audit Fees of Rs. 4,41,930/-;
g. Interest expenses of Rs. 7,14,805/-;
h. Gifts of Rs. 11,998/-
i. Other genuine business expenditures - Rs.7,87,862.

4. The assessee is a company engaged in the business of distributing security products like self-service terminals like ATMs and other lines of business including software, hardware, middleware and switching solutions.

5. For the AY 2010-11, the assessee filed a return of income declaring total income at NIL. The AO has noticed that in the past assessment years, the percentage of business income to the total income declared by the assessee was as follows:-

A.Y.	Income from Business	Other income as rent & interest received	% of business income of total income	Expenditure claimed
07-08	2.20.000	2,13,12,630	1.02%	1,94,70,714
08-09	6,15,000	1,90,77.569	3.12%	2,15.56,158
09-10	8,02,240	1,12,56,015	6.65%	3,11,10,524

6. With this background, the AO examined the Profit & Loss account for the year ended 31.3.2010 and found that the expenditure incurred with reference to the stream of revenue earned by the assessee. The AO found that the income declared was rental income i.e., chargeable to tax under the head ‘income from house property’ and income in the form of fees for professional of Rs.6 lakhs which was declared as income derived from

business. Apart from that, the assessee derived income from other sources. The details of income received by the assessee was as follows:-

	Sche-dule	Year Ended	
INCOME		**31-Mar-2010**	**31-Mar-2009**
Fees for Professional Services		6,00,000	
Other Revenues	7	2,20,925	
Dividend Received		22,13.427	
Interest Received (Tax deducted at Source Rs. 4,21,724/-)		34,76,973	
Net Profit (Loss) on		3.06,078	

7. As against the aforesaid stream of income, the assessee has claimed expenditure of Rs.1,34,00,000. The AO therefore examined the various expenses debited in the P&L account and also the nexus of those expenses with the income earned by the assessee. The AO firstly noticed that the sum of Rs.6 lakhs which was shown as fees for professional services rendered was based on an invoice raised at the fag end of March, 2009 and the invoice was Inv. No.1. Invoice was raised on a company by name, 'Vencap Holdings P. Ltd.' [**VHPL**]. The AO called for a report of commission from ACIT, Company Circle 3(4), Chennai on the nature of services rendered by the assessee to VHPL for which Invoice of Rs.6 lakhs was raised by assessee. The Inspector deputed to make enquiry found that the assessee and VHPL were located in the same floor and the same address and that VHPL had no staff for the past 7 years and did not pay any rents to the assessee. It also emerged that the directors of VHPL and assessee were one and the same. VHPL had offered loss of Rs.19,313 for AY 2012-13 and Rs.74,80,750 for AY 2010-11. The nature of services received could not be explained by VHPL Vice President, Mr. G. Kishor

when he was examined. Based on the above, the AO came to the conclusion that income of Rs.6 lakhs offered by the assessee as business income was unexplained credit and required to be added u/s. 68 of the Act. In the computation of total income, the AO included a sum of Rs.6 lakhs.

8. The AO then found that out of expenditure of Rs.1.3 crores claimed by the assessee in the P&L account, the AO found that the rent of Rs.2,27,142 was claimed by the assessee. The assessee had office in Bangalore and Chennai and both were owned by assessee. The godown in Pondicherry was taken on rent of Rs.1,300 per month. The AO's conclusion was that except the sum of Rs.15,600 being rent for godown at Pondicherry, the remaining rental expenditure debited in the P&L account had to be treated as unexplained expenditure u/s. 69C of the Act. The AO, however, has not made a separate addition u/s. 69C as he had disallowed the entire expenditure claimed in the P&L account.

9. The AO then examined the claim of depreciation of assessee which was at a sum of RS.54,71,780. The conclusion of the AO was that one of the items of the asset on which depreciation was claimed was a BMW car, which was used by Director of company for personal purpose and depreciation cannot be allowed. A perusal of depreciation chart reproduced in para 6.4.2 of the AO's order shows that apart from vehicle, the assessee owned several other assets and the depreciation component on the vehicle was only Rs.32,52,495.

10. The AO thereafter examined the employee cost of Rs.27,34,237 and came to the conclusion that only 3 employees were working for past 3 years and therefore the employee cost was not genuine.

11. Thereafter the AO gave the following conclusion for disallowing expenditure debited in the P&L account of Rs.1.34 crores:-

> "6.6.1. The above discussion clearly states that the expenditure claimed by the Company is not genuine. Moreover, the Company has debited expenditure towards business promotion, entertainment expenses, gifts & donation against which no supporting documents, vouchers, bills are produced to substantiate the claim.
>
> 6.6.2. Hence, the Company HMA Data Systems Pvt Ltd., is neither having a genuine business income nor genuine business expenditure. Hence, the entire business expenditure claimed is hereby disallowed as there is no business income."

12. Before the CIT(Appeals), the assessee pointed out that in AY 2009-10, identical disallowance of expenditure was made by the AO, but the same was deleted by the CIT(Appeals) and upheld by the Tribunal vide order dated 30.12.2014 in ITA No.701/Bang/2013. Apart from the above, the assessee submitted that it was a going concern and had to incur various expenses on day to day basis. The assessee submitted that the business activity of the assessee had not been closed, but there was only a temporary lull in its activity. The assessee pointed out that since there was no intention on its part to close down its business permanently and since it was exploring possibilities of doing business, the expenses in question had to be incurred. The assessee pointed out that in law it was not necessary that for a business to be in existence, it should always have work and that there may be long intervals of inactivities, but still the concern will be a going concern. The assessee relied on judicial pronouncements in support of the arguments so advanced.

13. The CIT(Appeals), however, was not convinced and was of the view that the AO was justified in disallowing expenses. He also found that VHPL was operating from the same premises of assessee and had no employees for carrying out its day to day functions and expenditure claimed by assessee included expenditure of VHPL also. On the legal proposition advanced by the assessee that expenses have to be allowed, when the

business has not been closed permanently and that in periods of lull, there is bound to be absence of income, but expenses will have to be incurred; the CIT(A) took the view that assessee has not brought on record any evidence to show that business has not ceased and expenses were incurred only to keep business alive.

14. On the issue that similar expenses were allowed by the Tribunal in AY 2009-10, the CIT(Appeals) took the view that the fact that prevailed in AY 2009-10 were different and therefore the decision for that year was not relevant, since in AY 2009-10 there was no enquiry conducted by the AO as was done in the present AY 2010-11.

15. For all the above reasons, the CIT(Appeals) confirmed the order of AO.

16. Before us, the ld. counsel for the assessee reiterated the submissions that were made before the CIT(Appeals) and further placed reliance on the following decisions:-

1. CIT v. Lawrence D'Souza [2011] 203 Taxman 200 [Kar]
2. CIT v. Integrated Technologies Ltd. (ITA No.530/2011 dated 16.12.2011).
3. DCIT v. IDEB Builders Pvt. Ltd. (ITA Nos.517 & 1390/Bang/2014 dtd. 7.11.2018).
4. Hirsh Bracelet India P. Ltd. v. ACIT (ITA No.3392/Bang/2018 dtd. 3.7.2019).

17. The ld. counsel for the assessee also brought to our notice that in the subsequent Assessment Year i.e., AY 2012-13, the AO after examining all the expenses and after analysis of the submissions made by the assessee passed an order dated 30.1.2015 u/s. 143(3) of the Act wherein no disallowance of expenses whatsoever was made by the AO. It was reiterated by him that there is a difference between a closure of business and a temporary lull in business and in case of assessee, there was only a

temporary lull and not a closure. In this regard, it was also submitted by the ld. counsel for the assessee that for the subsequent assessment year, the business of assessee as ATM suppliers had considerably increased and streams of revenue also increased. It was therefore submitted that assessee should be allowed deduction.

18. The ld. DR relied on the order of CIT(Appeals) and brought to our notice that the order of Tribunal for AY 2009-10 was not relevant because in that assessment year, the AO did not make any enquiries whereas in the present AY 2010-11, the AO had made detailed enquiries. The ld. DR reiterated the findings of AO in the order of assessment.

19. We have given a careful consideration to the rival submissions. We find that the action of the AO in treating the sum of Rs.6 lakhs which was shown as income in the form of professional fees received as unexplained credit u/s. 68 of the Act cannot be sustained. There is no dispute with regard to the identity and capacity of VHPL. The genuineness of the transaction cannot be disputed merely on the basis that no services were rendered. The basic presumption u/s. 68 is that the sum treated as unexplained has to be assessee's money. TDS has been deducted on the sum payable by VHPL. The AO himself has found that VHPL does not have employees and assessee catered to the needs of VHPL. In these circumstances, the addition of Rs.6 lakhs u/s. 68 was not justified.

20. As far as disallowance of expenses is concerned, what we notice is that out of rental expenditure of Rs.2,27,142 claimed by assessee, the AO has treated a sum of Rs.2,11,542 as unexplained expenditure u/s. 69C of the Act. The assessee has explained that apart from the rent for godown of the previous year, which was allowed by the AO at Rs.15,600, the balance amount of Rs.2,11,542 was rent paid to accommodation provided to the assessee's director. This fact is evidenced in the Notes to the Accounts at

Point No.9. In these circumstances, the addition u/s. 69C of the Act was not justified.

21. As far as depreciation claimed by the assessee is concerned, the first thing which we notice is that the assessee is in business of security product distribution. A perusal of depreciation schedule given in the order of assessment shows that apart from BMW Car, there are other assets on which depreciation has been claimed by the assessee. Depreciation is an item of expenditure which has to be statutorily allowed u/s. 32 of the Act, irrespective of its user in view of the concept of block of assets. The only reason given by the AO for disallowance of depreciation is use of BMW car by the director of assessee. As rightly contended, there is use of car by director of company for the purpose of business of assessee and this is not disputed. There is nothing to show that property was used only for personal purposes. The car in question was a business asset and depreciation had to be allowed on the same. The AO could have disallowed depreciation on the ground of personal user in respect of a particular item of depreciable asset. He could not have disallowed the entire claim of depreciation. Disallowance of depreciation on the ground that there was no business activity, cannot also be sustained, for the reasons which will be given later.

22. Similarly, the employee cost was salary paid to 3 employees and had to be allowed as a deduction. There is no dispute that salary was paid to employees of the assessee. Thus, we do not find any valid justification for the comments and conclusions of AO in the order of assessment which was endorsed by the CIT(Appeals).

23. As far as the question whether lack of business activity can result in disallowance of expenses incurred by the assessee, firstly we notice that business of assessee has not been closed and there has been a temporary

lull. There is nothing brought on record that the assessee has ceased to carry on business. As a going concern, expenses have to be incurred and disallowance of expenses on the ground that there is no flow of revenue cannot be sustained. As far as nature of expenses to be incurred is concerned, it is left to the wisdom of a businessman. The Hon'ble High Court of Karnataka in the case of *Lawrence D'Souza [2011] 203 Taxman 200 (Kar)* has held that expenses incurred to keep the business going even in absence of income should be allowed as a deduction. The Hon'ble Allahabad High Court in the case of *Inderchand Hari Ram v. CIT, 23 ITR 437 (All)* held that a company is deemed to be carrying on business even during the period of lull and inactivity. It is not necessary that the business in existence should have work all the time. There may be a long interval of inactivity and a concern may still be a going concern, though it may for some time, be quiet and dormant, would not mean that it has ceased to exist. If the assessee continues to maintain an establishment and incur expenses in the expectation that work would come and the business would be successful, the expenses have to be allowed and has to be considered as having been incurred for the purpose of business of assessee. In the light of the legal position emerging from the aforesaid decisions and in the facts and circumstances of the present case, we are of the view that the business of assessee had not come to a complete halt and it was a going concern and expenses in question had to be incurred to keep the concern going. We are therefore of the view that the expenses in question should be allowed as a deduction.

24. We also find that the Tribunal in the appeal of the revenue for AY 2009-10, on the aforesaid reasoning had upheld the order of CIT(Appeals) deleting the addition made by AO by way of disallowance of expenses. We are therefore of the view that the expenses claimed by the assessee should be allowed as a deduction and it has also to be held that income of Rs.6

lakhs has to be regarded as operating business income. We hold and direct accordingly. The relevant grounds of appeal of the assessee are allowed.

25. The next issue that arises for consideration is disallowance of expenses u/s. 14A of the Act. The first aspect we notice on this issue is that the AO had disallowed a sum of Rs.7,85,024 u/s. 14A. It is not in dispute that the assessee received dividend income of Rs.22,13,427 which was claimed exempt u/s. 10(35) of the Act. The break-up of disallowance u/s. 14A made by the AO was as follows:-

A	Total amount of Direct interest/other expenses pertaining to tax-exempt investments	0		
B	Total amount of indirect interest pertaining to tax-exempt investments	300000		
		2009-10	**2010-11**	**AVERAGE**
C	Average amount of tax exempt investments	122608979	137507153	130058066
D	Average amount of total assets	282039250	297140638	289589944
E	Proportionate indirect interest Disallowed	**BX(C/D)**		134733
F	0.5 % of average amount of tax exempt Investments			650290
	Total disallowance attracted u/s. 14A read with Rule 8D	**A+E+F**		**785024**

26. Before the CIT(Appeals), the assessee pointed out that in the computation of total income, the assessee had already disallowed a sum of Rs.9,71,314 as expenditure incurred for earning exempt income u/s. 14A. The assessee has pointed out that the AO has made a much less computation of deduction of expenses to be disallowed u/s. 14A. The assessee therefore submitted that the disallowance being a double

disallowance should be deleted. The CIT(A), however, did not agree that the assessee has already disallowed expenses u/s. 14A of the Act. He gave the following reasons:-

> "6.2 The submissions of the appellant have duly been considered. As regards claim of the appellant that in its return of income it had already disallowed an expenditure of Rs 9,71,317/- for earning of such income, the same is not found to be correct. A perusal of the return of income shows that in Part A-OI(7)(g) relating to *'Amount of expenditure in relation to income which does not form part of the total income*' the amount given is 'Nil'. Although the appellant has disallowed certain expenses under Part A-OI(7)(i), but the same are the amount not allowable under Section 37 of the Act. The appellant is now trying to claim that the same include disallowance under Section 14A of the Act, which cannot be accepted."

27. The CIT(Appeals) thereafter held that since he had disallowed the entire expenditure, there was no question of making disallowance u/s. 14A. He, however, added a rider that in the event of appellate authorities allowing the claim of assessee for deduction, the disallowance u/s. 14A would survive. Aggrieved by the aforesaid order of CIT(Appeals), the assessee is in appeal before the Tribunal.

28. We have heard the rival submissions. We have perused the computation of total income of the assessee which is at page 3 of the assessee's PB, which is a loss of (1,18,41,024). It is thus clear that the disallowance u/s. 14A as made by the assessee in computation of income has already been subsumed in total income declared by the assessee. Since the total income of assessee has been computed by the AO in the order of Assessment with the starting point as loss declared by the assessee in the return of income, which also includes disallowance u/s. 14A, there was no occasion to further make a disallowance u/s. 14A. Moreover, the disallowance made by the assessee is greater than the

disallowance made by the AO. In these circumstances, we hold that no separate disallowance u/s. 14A is warranted in the facts and circumstances of the present case. We hold and direct accordingly.

29. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 28th day of October, 2020.

Sd/-	Sd/-
(A K GARODIA)	(N V VASUDEVAN)
ACCOUNTANT MEMBER	VICE PRESIDENT

Bangalore,
Dated, the 28th October, 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.