

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

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER  
AND  
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

|                                |
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| ITA Nos.1916 to 1918/Bang/2017 |
| Assessment Year: 2010-11       |

|  |            |                                     |
|--|------------|-------------------------------------|
| M/s. Nitesh Estates Ltd.<br>8 <sup>th</sup> Floor, Nitesh Timesquare, #8, M.G. Road<br>Bengaluru<br><b>PAN NO : AABCN9267C</b> | <b>Vs.</b> | DCIT<br>Circle-5(1)(1)<br>Bangalore |
| <b>APPELLANT</b>   |            | <b>RESPONDENT</b>                   |

|                          |
|--------------------------|
| ITA No.1917/Bang/2017    |
| Assessment Year: 2011-12 |

|                                     |            |                             |
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| M/s. Nitesh Estates Ltd., Bangalore | <b>Vs.</b> | ACIT, Range-12<br>Bangalore |
| <b>APPELLANT</b>                    |            | <b>RESPONDENT</b>           |

|                          |
|--------------------------|
| ITA No.1918/Bang/2017    |
| Assessment Year: 2012-13 |

|                                     |            |                                   |
|-------------------------------------|------------|-----------------------------------|
| M/s. Nitesh Estates Ltd., Bangalore | <b>Vs.</b> | ACIT, Circle-5(1)(1)<br>Bangalore |
| <b>APPELLANT</b>                    |            | <b>RESPONDENT</b>                 |

|                           |
|---------------------------|
| ITA No.2005/Bang/2017     |
| Assessment Years: 2012-13 |

|                                   |            |                                     |
|-----------------------------------|------------|-------------------------------------|
| ACIT, Circle-5(1)(1)<br>Bangalore | <b>Vs.</b> | M/s. Nitesh Estates Ltd., Bangalore |
| <b>APPELLANT</b>                  |            | <b>RESPONDENT</b>                   |

|                      |   |                          |
|----------------------|---|--------------------------|
| <b>Appellant by</b>  | : | Shri V. Srinivasan, A.R. |
| <b>Respondent by</b> | : | Smt. R. Premi, D.R.      |

|                       |   |            |
|-----------------------|---|------------|
| Date of Hearing       | : | 09.12.2020 |
| Date of Pronouncement | : | 09.12.2020 |

**ORDER**

**PER BENCH:**

The assessee has filed appeals for AY 2010-11 to 2012-13. The revenue has filed appeal for AY 2012-13. Since common issues are being agitated in these appeals, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The assessee company is engaged in the business of undertaking Engineering Contracts, undertaking real estate development, maintenance of buildings etc.

3. The common issue urged in all the three appeals filed by the assessee and the appeal filed by the revenue relates to disallowance made by A.O. u/s 14A of the Income-tax Act, 1961 ['the Act' for short]. In all the years, the A.O. noticed that the assessee had made investments and received exempt dividend income also. However, the assessee did not make any disallowance u/s 14A of the Act. Accordingly, the A.O. computed disallowance u/s 14A of the Act as per rule 8D of I.T. Rules as given below:

| <i>Asst. Year</i> | <i>Disallowance made by A.O.</i> |                    |                    |
|-------------------|----------------------------------|--------------------|--------------------|
|                   | <i>Interest</i>                  | <i>Expenditure</i> | <i>Total</i>       |
| <i>2010-11</i>    | <i>32,30,142</i>                 | <i>25,23,026</i>   | <i>57,53,168</i>   |
| <i>2011-12</i>    | <i>1,73,66,708</i>               | <i>90,46,806</i>   | <i>2,64,13,517</i> |
| <i>2012-13</i>    | <i>1,67,25,716</i>               | <i>74,64,982</i>   | <i>2,41,90,698</i> |

3.1 In the appellate proceedings for A.Y. 2010-11 & 2012-13, the Ld. CIT(A) directed the A.O. to restrict the disallowance u/s 14A of the Act to the extent of dividend income earned by the assessee. In assessment year 2011-12, the Ld. CIT(A) noticed that the dividend income earned by the assessee was more than the amount of disallowance made by A.O. Accordingly, the Ld. CIT(A) confirmed the disallowance made in A.Y. 2011-12.

4. Aggrieved by the order passed by Ld. CIT(A), the assessee has filed appeal for all the 3 years and the revenue has filed the appeal for assessment year 2012-13.

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5. We heard the parties on this issue and perused the record. We shall first take up the appeal filed by the assessee for AY 2011-12. The Ld. A.R. submitted that the disallowance made by the AO consisted of interest disallowance made u/r 8D(2)(ii) as well as expenditure disallowance made u/r 8D(2)(iii) of I T Rules. He submitted that no disallowance out of interest expenditure under rule 8D(2)(ii) is called for, in A.Y. 2011-12, since the own funds available with the assessee is more than the value of investments. The Ld. A.R. submitted that the above said proposition is supported by the decision rendered by Hon'ble Jurisdictional Karnataka High Court in the case of Micro Labs Limited 383 ITR 490. Accordingly, he contended that the disallowance made out of interest expenditure u/r 8D(2)(ii) should be deleted.

5.1 The Ld. D.R., however, submitted that the contentions of the assessee require examination at the end of the A.O.

5.2 We heard rival contentions on this issue. According to the Ld. A.R., disallowance out of interest expenditure is not required to be made under rule 8D(2)(ii) as the own funds available with the assessee in that year was in excess of the value of investment. The Ld. A.R. has taken the support of decision rendered by the jurisdictional High Court in the case of Micro Labs Ltd. (supra). However, as rightly pointed out by Ld. D.R., this submission of the Ld. A.R. requires verification of facts and hence it requires to be examined by the A.O. Accordingly, we set aside the order passed by Ld. CIT(A) on the issue of disallowance of interest expenditure under rule 8D(2)(ii) and restore the same to the file of the A.O. for examining the same in accordance with the decision rendered by jurisdictional High Court in the case of Micro Labs Ltd. (supra). The disallowance

of administrative expenses made under rule 8D(2)(iii) in AY 2011-12 is confirmed.

6. We shall now take up the issue of disallowance made u/s 14A of the Act in assessment years 2010-11 & 2012-13. We have noticed earlier that the Ld. CIT(A) has directed the A.O. to restrict the disallowance u/s 14A of the Act to the extent of dividend income. We notice that the assessee has argued for the above said proposition before Ld CIT(A) as an alternative contention and the same was accepted by Ld CIT(A). We also notice that the assessee had relied upon the decision rendered by the coordinate bench in the case of M/s. Tranquil Realty P. Ltd. (ITA No.185/Bang/2016 dated 15.7.2016) in support of the above said alternative contention, which was accepted by Ld CIT(A). Despite this, the assessee has challenged the above said decision of Ld. CIT(A) in AY 2010-11 and 2012-13.

6.1 We notice that the Ld. CIT(A) has followed the decision rendered by the coordinate bench in holding that the disallowance u/s 14A of the Act should not exceed the amount of exempt income. The Ld. CIT(A) referred to the decision rendered by Hon'ble Delhi High Court in the case of Joint Investments Pvt. Ltd. (372 ITR 694). We also notice that the decision of Ld. CIT(A) is supported by the decision rendered by Hon'ble Delhi High Court in the case of PCIT vs. Caraf Builders & Construction (P) Ltd (2019)(101 taxmann.com 167), wherein it was held 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.”

6.2. The revenue has challenged the above said decision of Ld. CIT(A) in the A.Y. 2012-13 contending that the Ld. CIT(A) should have followed the CBDT circular No.5/2014. The Ld. D.R. submitted that the Ld. CIT(A) was not justified in ignoring the above said circular of CBDT.

6.3 We notice that the decision rendered by Ld. CIT(A) is supported by the orders passed by coordinate bench as well as Hon'ble Delhi High Court referred (supra). Hence, we do not find any infirmity in the decision rendered by Ld. CIT(A) on this issue in A.Y. 2010-11 & 2012-13. Accordingly, we confirm his order passed on this issue in the above said two years.

7. The assessee has raised two more issues in assessment year 2010-11. The first issue relates to disallowance of compensation amount of Rs.74,32,777/- paid to a person named Shri Mahesh Bhupathi and claimed as expenditure. The facts in brief are that the assessee entered into a Joint development agreement (JDA) with Mr. Mahesh Bhupathi on 25.9.2004 for development of 3 acres of land belonging to Mr. Mahesh Bhupathi which was located at Jakkur. Thereafter the JDA was cancelled and the assessee agreed to pay a compensation of Rs.8.50 crores to Mr. Mahesh Bhupathi, which was subsequently reduced to Rs.6.70 crores.

7.1 The background of cancellation of JDA is discussed in brief. The assessee was negotiating with M/s. ITC Limited for participating in a project involving development of land under construction of residential apartments for its officers. The requirement of ITC Ltd. was 6 to 7 acres. The assessee identified around 7 acres of land belonging to M/s. Sunrise Realty and Leisure Pvt. Ltd. However, M/s. Sunrise Realty and Leisure Pvt. Ltd. agreed to sell the land to

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M/s. ITC Ltd. on the condition that the land belonging to Mr. Mahesh Bhupathi should be sold to them. Under these conditions, Mr. Mahesh Bhupathi agreed to cancel the JDA and sell the land to M/s. Sunrise Realty & Leisure Pvt. Ltd. subject to the condition that he should be paid a compensation of Rs.8.50 crores. The assessee agreed to pay the compensation to Mr. Mahesh Bhupathi. As noticed earlier the compensation was reduced to Rs.6.70 crores.

7.2 The assessee also got the contract from M/s ITC Ltd for development of land and construction of buildings. The assessee treated the compensation so paid to Mr. Mahesh Bhupathi as part of its "cost of project" of developing the land & building for ITC Ltd. Since the assessee was following percentage completion method for the above said project, it claimed the compensation amount also proportionately. Accordingly, a sum of Rs.74,32,777/- was claimed during the year under consideration. The A.O. disallowed the claim for the following observations:

*"4. In view of the fact and circumstances discussed above, I am of the opinion that*

*a. NEPL, facilitated the transfer of land from M/s. Sunrise Realty Leisure Pvt. Ltd. primarily to earn profit and not to secure the construction and development contract from to ITC Ltd.*

*b. NEPL has independently and separately entered into agreements with Mr. Mahesh Bhupathi and ITC Ltd. for development of the property at different points of time.*

*c. There is no nexus between the compensation payable on account of cancellation of joint development agreement with Mr. Mahesh Bhupathi and the project NLI that is executed on the land owned by ITC Ltd.*

*Moreover the payment is made without deducting any tax at source to Mr. Mahesh Bhupathi, a non-resident, which is against the provisions u/s 195 of the Act. Therefore, the sum of Rs.74,32,777 debited to the profit and loss account for A.Y. 2010-11 is disallowed as expenditure."*

7.3 In the appellate proceedings, the Ld. CIT(A) noticed that an identical claim made by the assessee in A.Y. 2009-10 was disallowed

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by the A.O. and the same was confirmed by Tribunal also. Accordingly, he confirmed the disallowance made by the A.O.

7.4 We heard the parties and perused the record. We notice that the Ld. CIT(A) has extracted the decision rendered by coordinate bench of the Tribunal in A.Y. 2009-10 on an identical issue, which reads as under:

*“28. A perusal of the aforesaid clause would show that Mr. Mahesh Bhupathi agreed that his property would be sold in favour of the nominees of the Second party. We fail to see as to how in light of the aforesaid clause that the agreement in question cannot be said to be compensation agreement entered into for breach of the agreement dated 25.9.2004. It is also seen that in none of the registered documents by which the property of SRLPL was conveyed, is there a reference to the agreement between the assessee and Bhupathi. In these circumstances, we are of the view that the conclusion of the revenue authorities that the payment of Rs.8.5 crores has no nexus with NLI property is correct and therefore has to be upheld. In view of the above conclusions, the plea of commercial expediency in making the payment to Mr. Mahesh Bhupathi for NLI property cannot also be accepted.*

7.5 Since the Ld. CIT(A) has followed the decision rendered by coordinate bench on an identical issue in the assessee's own case and since there is no change in the facts relating to the impugned disallowance, we do not find any infirmity in the order passed by Ld. CIT(A) on this issue. Accordingly, we confirm the same.

8.0 The next issue contested in assessment year 2010-11 relates to disallowance made by the A.O. u/s 40(a)(ia) of the Act. The A.O. noticed that the assessee has paid interest of Rs.3,79,041/- to M/s. Kotak Mahindra Prime Ltd., and claimed the same as deduction. Since the assessee did not offer proper explanation for not deducting tax at source from the above said payment, the A.O. disallowed the same u/s 40(a)(ia) of the Act. The Ld. CIT(A) also confirmed the same.

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8.1 The Ld. A.R. submitted that the second proviso inserted by the Finance Act, 2012 w.e.f. 1.4.2013 provides an exception to disallowance to be made u/s 40(a)(ia) of the Act. As per the said proviso, no disallowance is required to be made if the assessee is not deemed to be an assessee in default under the first proviso to section 201(1) of the Act. The Ld. A.R. submitted that the above said proviso is held to be retrospective in many judicial decisions. He submitted that the coordinate bench in the case of Ananda Markala (ITA No.1584/Bang/2012 dated 13.9.2013) has expressed the view at para 26 of the Order that the second proviso inserted to section 40(a)(ia) of the Act is intended to remove hardship. Accordingly, the Ld. A.R. submitted that the second proviso should be applied to the instant year also and the matter may be restored to the file of the A.O. for examining the applicability of the second proviso.

8.2 We heard Ld. D.R. on this issue. We notice that the Hon'ble Bombay High Court has considered the question as to whether the second proviso inserted in sec. 40(a)(ia) is retrospective in nature or not, in the case of M/s Perfect Circle India P Ltd vs. CIT (ITA No.707 of 2016 dated 7.1.2019). The order of Hon'ble Bombay High Court rendered in the above said case is extracted below:-

*"1. This appeal is filed by the Revenue challenging the judgment of the Income Tax Appellate Tribunal ("Tribunal" for short) dated 27.3.2015.*

*Following question is presented for our consideration:-*

*"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in rejecting the disallowance of Rs. 1,44,78,000/- made by the AO u/S. 40(a)(ia) of the Act by holding that the amendment to the proviso of the said section was retrospective in nature without appreciating that the Act specifically provides that the said proviso comes into operation w.e.f. 1.4.2013 and is prospective in nature and cannot be applied retrospectively?"*

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2. It is not necessary to record background facts since the question of law raised by the Revenue is whether the second proviso to Section 40(a)(ia) of the **Income Tax Act, 1961** (“the Act” for short) would have retrospective effect. We may notice that the said proviso was inserted w.e.f 1.4.2013 and in essence, it provides that where an assessee fails to deduct whole or any part of the tax at source but is not deemed to be an assessee in default under the first proviso to Section 201(1), then for the purpose of clause 40(a)(ia), it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the payee. The Revenue would content that the benefit of this proviso would be available to the assessee only prospectively w.e.f. 1.4.2013. **Various Courts, however, have seen this proviso as beneficial to the assessee and curative in nature.** The leading judgment on this point was of the Division Bench of Delhi Court in the case of **CIT Vs. Ansal Land Mark Township P Ltd (377 ITR 635)(Delhi)**. The Court held that Section 40(a)(ia) is not a penalty and insertion of second proviso is declaratory and curative in nature and would have retrospective effect from 1.4.2005 i.e the date from the main proviso 40(a)(ia) itself was inserted. Several High Courts have adopted the same lines. We may also note that the Supreme Court in the case of *Hindustan Coca Cola Beverages P Ltd Vs. CIT (293 ITR 226)(SC)* even in absence of second proviso to **Section 40(a)(ia)** had noticed that the payee had already paid the tax. Under such circumstances, the Court held that the payer / deductor can at best be asked to pay the interest on delay in depositing tax.

3. Under such circumstances, no question of law arises.

*Tax appeal is dismissed.”*

8.3 In view of the above said decision of Hon’ble Bombay High Court, we find merit in the submission made by the Ld. A.R. Accordingly, we restore this issue to the file of A.O. for examining the

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applicability of second proviso to section 40(a)(ia) of the Act in AY 2010-11 in the light of above said decision of Hon'ble Bombay High Court.

9. In the result, the appeal filed by the revenue and the appeal of the assessee for AY 2012-13 are dismissed. The appeal of the assessee for AY 2010-11 and 2011-12 are treated as partly allowed.

Order pronounced in the open court on 9<sup>th</sup> Dec, 2020

**Sd/-**  
**(George George K.)**  
**Judicial Member**

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

Bangalore,  
Dated 9<sup>th</sup> Dec, 2020.  
VG/SPS

**Copy to:**

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.