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

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.5483/Del/2018
Assessment Year : 2015-16

ACIT, Circle-7(2), Delhi	**Vs.**	**M/s DS Group Hospitality Pvt. Ltd., 3rd Floor, SCO No. 310, Ansari Road, Daryaganj, New Delhi-110002** **PAN-AAECD7010Q**
(Appellant)		(Respondent)

Appellant by : Sh. Rajesh Kumar, Sr. DR
Respondent by : Sh. Satyajeet Goel, CA

Date of hearing : **10.03.2021**
Date of pronouncement : **10.03.2021**

ORDER

PER K. NARASIMHA CHARY, JM:

Aggrieved by the orders dated 1/6/2018 in Appeal Numbers 128/2017-18 passed by the learned Commissioner of Income

Tax (Appeals)-3, Delhi ("Ld. CIT(A)") in the case of M/s DS Group Hospitality Pvt. Ltd ("the assessee") for the assessment years 2015-16 assessee preferred this appeal.

2. Brief facts of the case are that the assessee company is engaged in the business of hospitality sector or in India. They have filed their return of income for the assessment year 2015-16 and while computing the taxable income of the assessee for both the years, learned Assessing Officer made an addition of Rs. 1, 88, 21, 632/- both the to the tax computed under the normal provisions of the Act and also to the book profits under section 115 JB of the Act, for the assessment year by invoking the provisions under section 14A of the Income Tax Act, 1961 (for short "the Act") read with Rule 8D of the Income Tax Rules1962 ("the Rules").

3. Case of the assessee all through the proceedings is that the assessee did not earn any exempt income during the year and, therefore, the provisions of section 14A of the Act read with Rule 8D of the Rules have no application to the facts of the case and on that score the addition is not maintainable. Ld. CIT(A), in the appeal, accepted the contention of the assessee and while placing reliance on the decision of the Hon'ble jurisdictional High Court in the case of Cheminvest Ltd vs. CIT (2015) 378 ITR 33 (Delhi), Holcim India private limited in ITA No. 486/2014 and also the Special Bench decision of the Tribunal in the case of ACIT vs. Vireet investment Pvt. Ltd (2017) 82 taxmann.com 415 (Delhi-Trib) and a deleted the addition.

4. Revenue is aggrieved by such deletion and preferred these appeals. Ld. DR placed reliance on the assessment order and submitted that insofar as the expenditure is concerned, if not in this year, in the future the assessee is likely to earn the dividends and because the assessee incurred some expenditure in the investment which will early exempt income, such part of expenditure allocatable to the investment has to be disallowed.

5. Per contra, it is the submission on behalf of the assessee that the Ld. CIT(A) followed the binding precedent in the case of Cheminvest (supra) and also the decision of the Special Bench in the case of Vireet investments (supra) and therefore, such a considered findings of the Ld. CIT(A) cannot be disturbed.

6. We have gone through the record in the light of the submissions made on either side. There is no dispute and as a matter of fact authorities below categorically recorded that the assessee had not earned any exempt income during these assessment years and therefore the decision of the Hon'ble jurisdictional High Court in the cases of Cheminvest Ltd (supra) and Holcim India Pvt. Ltd (supra) are applicable to the facts of the case. There is no expiration from the Revenue as to how the binding decisions need not or cannot be followed by the Ld. CIT(A).

7. Hon'ble Jurisdictional High Court in PCIT vs. IL & FS Energy Development Company Ltd. (2017) 99 CCH 0190 DelHC, (2017) 297 CTR 0452 (Del) decided on 16th August, 2017, after considering a catena of decisions, held the issue in favour of the assessee and observed that,-

9. Mr. Zoheb Hossain, learned Senior Standing Counsel for the Revenue, submitted that, in Cheminvest Ltd. (supra), this Court had no occasion to consider the CBDT Circular No. 5/2014 dated 11th February 2014 which clarified that Section 14A would apply even when exempt income was not earned in a particular AY. According to him, the other decisions of this Court in CIT-IV v. Taikisha Engineering India Pvt. Ltd. [2015] 370 ITR 338 (Del) and CIT-IV v. Holcim India Pvt. Ltd. (2014) 272 CTR (Del) 282 did not actually discuss the above Circular of the CBDT and, therefore, would be distinguishable.

10. Mr. Hossain further submitted that there was nothing in Section 14A of the Act which suggested that exempt income had to necessarily be earned in the AY in question for the applicability of the said provision. He submitted that if the interpretation placed on Section 14 A of the Act by the above CBDT Circular was not accepted, the very purpose of Section 14A would be defeated. He referred to the decisions of the ITAT in ACIT v. Ratan Housing Development Ltd. (order dated 23rd May 2008 of ITAT Lucknow) Relaxo Footwear Ltd. v. Addl. CIT [2012] 50 SOT 102 (Del).

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19. In the considered view of the Court, this will be a truncated reading of Section 14 A and Rule 8D particularly when Rule 8D (1) uses the expression 'such previous year'. Further, it does not account for the concept of 'real income'. It does not note that under Section 5 of the Act, the question of taxation of 'notional income' does not arise. As explained in Commissioner of Income Tax v. Walfort Share and Stock Brokers Pvt. Ltd [2010] 326 ITR 1 (SC), the mandate of Section 14A of the Act is to curb the practice of claiming deduction of expenses incurred in relation to exempt income being taxable income and at the same time avail of the tax incentives by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. Consequently, the Court is not persuaded that in view of the Circular of the CBDT dated 11th May 2014, the decision of this Court in Cheminvest Ltd. (supra) requires reconsideration.

20. In M/s. Redington (India) Ltd. v. The Additional Commissioner of Income Tax, Company Range – V, Chennai (order dated 23rd December, 2016 of the High Court of Madras in TCA No. 520 of 2016), a similar contention of the Revenue was negated. The Court there

declined to apply the CBDT Circular by explaining that Section 14A is "clearly relatable to the earning of the actual income and not notional income or anticipated income." It was further explained that,

> *"The computation of total income in terms of Rule 8D is by way of a determination involving direct as well as indirect attribution. Thus, accepting the submission of the Revenue would result in the imposition of an artificial method of computation on notional and assumed income. We believe thus would be carrying the artifice too far."*

21. The decisions in CIT v. M/s Lakhani Marketing Inc. 2014 SCC Online P&H 20357, CIT v. Winsome Textile Industries Limited [2009] 319 ITR 204 (P&H), CIT v. Shivam Motors (P) Ltd. (2014) 272 CTR (All) 277 have all taken a similar view. The decision in Taikisha Engineering India Pvt. Ltd. (supra) does not specifically deal with this issue.

22. It was suggested by Mr. Hossain that, in the context of Section 57(iii), the Supreme Court in Commissioner Of Income Tax, West v. Rajendra Prasad Moody [1978] 115 ITR 519 (SC) explained that deduction is allowable even where income was not actually earned in the AY in question. This aspect of the matter was dealt with by this Court in M/s Cheminvest Ltd. (supra) where it reversed the decision of the Special Bench of the ITAT by observing as under:

> *"20. Since the Special Bench has relied upon the decision of the Supreme Court in Rajendra Prasad Moody (supra), it is considered necessary to discuss the true purport of the said decision. It is noticed to begin with that the issue before the Supreme Court in the said case was whether the expenditure under Section 57 (iii) of the Act could be allowed as a deduction against dividend income assessable under the head "income from other sources". Under Section 57 (iii) of the Act deduction is allowed in respect of any expenditure laid out or expended wholly or exclusively for the purpose of making or earning such income. The Supreme Court explained that the expression "incurred for making or earning such income?, did not mean that any income should in fact have been earned as a condition precedent for claiming the expenditure. The Court explained:*
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> *"What s. 57(iii) requires is that the expenditure must be laid out or expended wholly and exclusively for the purpose of making or earning income. It is the purpose of the expenditure that is relevant in determining the applicability of s. 57(iii) and that purpose must be making or earning of income. s. 57(iii) does not require that this purpose must be fulfilled in order to qualify*

> *the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of s. 57(iii) to suggest that the purpose for which the expenditure is made should fructify into any benefit by way of return in the shape of income. The plain natural construction of the language of s. 57(iii) irresistibly leads to the conclusion that to bring a case within the section, it is not necessary that any income should in fact have been earned as a result of the expenditure."*
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> *21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in Rajendra Prasad Moody (supra) was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is "for the purpose of making or earning such income." Section 14A of the Act on the other hand contains the expression "in relation to income which does not form part of the total income." The decision in Rajendra Prasad Moody (supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act."*
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> *23. The decisions of the ITAT in ACIT v. Ratan Housing Development Ltd. (supra) and Relaxo Footwear Ltd. v. Addl. CIT (supra), to the extent that they are inconsistent with what has been held hereinbefore do not merit acceptance. Further, the mere fact that in the audit report for the AY in question, the auditors may have suggested that there should be a disallowance cannot be determinative of the legal position. That would not preclude the Assessee from taking a stand that no disallowance under Section 14 A of the Act was called for in the AY in question because no exempt income was earned.*

8. Further, the Special Bench of the Tribunal in the case of Vireet investment (supra) held that while calculating Minimum Alternative Tax (MAT), the provisions of section 14A of the Act read with Rule 8D of the Rules are not applicable and that the computation of matter underclass (f) of explanation 1 to section 115 JB (2) is to be made without resorting to competitions as contemplated under section 14A of the Act read with Rule 8D of the Rules, and therefore the question of increasing the profit due to disallowance under section 14A of the Act read with Rule

8D of the Rules will not arise. In view of the above position of law, we are of the considered opinion that where there is no dispute of fact that no dividend income was earned by the assessee during the year, no disallowance is called for under section 14 A of the Act. For these reasons, we uphold the findings of the Ld. CIT(A) and dismiss the grounds of appeal of the Revenue.

9. In the result, appeal of the Revenue is dismissed.

Above decision was pronounced on conclusion of Virtual Hearing on 10.03.2021.

Sd/-	**Sd/-**
(PRASHANT MAHARISHI)	**(K. NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

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Copy forwarded to: -

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

By Order

Assistant Registrar