INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "E": NEW DELHI]
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
A N D
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)
ITA No. 3713/Del/2017
(Assessment Year: 2012-13)

DCIT, Circle-16(1)m New Delhi	Vs.	Malana Power Co. ltd, Bhilwara Bhawan, 40-41, Community Centre, New Friends Colony, New Delhi PAN: AABCM1108R
(Appellant)		(Respondent)

ITA No. 2464/Del/2017
(Assessment Year: 2012-13)

Malana Power Co. ltd, Bhilwara Bhawan, 40-41, Community Centre, New Friends Colony, New Delhi PAN: AABCM1108R	Vs.	Addl. DCIT, Range-6, New Delhi
(Appellant)		(Respondent)

Revenue by :	Shri Sohil Malik, Sr. DR
Assessee by:	Shri P. K. Jain, CA
Date of Hearing	27/01/2021
Date of pronouncement	23/03/2021

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the cross appeals filed by the assessee as well as the ld. AO against the order of ld. CIT (Appeals)–38, New Delhi, dated 20.02.2017 for Assessment Year 2012-13.

2. ITA 3713/Del/2017 is filed by the ld. AO raising the following grounds of appeal:-

"1. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of Rs. 2,46,47,780/- u/s 14A of the Income Tax Act, 1961 (the Act) r.w. R 8D of the Income Tax Rules (the Rule) without considering legislative intent of introducing section 14A by the Finance Act 2001 as clarified by the CBDT Circular No.5/2014 dated 10.02.2014?

2. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in not upholding the disallowance u/s 14A of the Act amounting to Rs. 2,46,47,780/- even when section 14A of the Act stipulates mandatory computation of direct and indirect expenses relating to the income not forming part of total income under all the clauses (i), (ii) and (iii) of Rule 8D(2) of the Rule?

3. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in not upholding the disallowance u/s 14 A of the Act r.w R 8 D of the Rule amounting to Rs. 2,46,47,780/- without considering legal principles that allowability

/disallowability of expenditure under the Act is not conditional upon the earning of the income as upheld by Hon'ble Supreme Court in case of CIT Vs Rajendra Prasad Moody (1978) 115 ITR 519?

4. *Whether on facts and in circumstances of the case, the Ld. CIT (A) is legally justified in not upholding the disallowance u/s 14 A of the Act r.w. R 8D of the Rule of Rs. 2,46,47,780/- without considering ratio decidendi as upheld in cases of CIT Vs Walfort Share and Stock Brokers P Ltd. [2010] 326 ITR 1 (SC) and Maxopp Investment Vs CIT [2012] 347 ITR 272 (Delhi) on application of provisions of section 14 A of the Act?*

5. *Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in allowing deduction u/s 80IA of the Act on amount of Rs. 5,07,000/- which include 'income from other sources' including rental income?*

6. *Whether on facts and in circumstances of the case, the Ld. CIT (A) is legally justified in holding that VER (carbon credit) earned by the assessee is a capital receipt not subject to tax and even when the VER cannot be treated as an asset within the meaning of section 2(14) of the Act and by ignoring a fact that there was conflicting decision of benches of the ITAT on this issue?"*

3. ITA 2464/Del/2017 is filed by the assessee raising the following two grounds of appeal:-

"1. That on the facts and circumstances of the case and in law, net income of Rs. 1,29,16,998/-(i.e. Gross receipt of Rs.1,70,66,816/- minus Rs. 41,49,818/-) realized from the sale of Carbon Credits should held to be excluded from book profit under section 115JB of the Income Tax Act, 1961. The assessee company has also filed revise computation of MAT u/s 115JB excluding carbon credit income being capital in nature which has been rejected by AO.

2. That having regard to the facts and circumstances of the case Ld. CIT (Appeals) has erred in law and on facts in upholding the disallowance of claim of deduction u/s 80IA on interest earned on bank deposit of Rs. 1,41,80,000/- considering the same as not derived from business."

4. Brief facts of the case shows that assessee is a Public Limited Company engaged in generation of hydroelectric power. It has set up 86MW Hydro Electric Project at Himachal Pradesh. On 29.09.2012 assessee filed its return of income for Assessment Year 2012-13 declaring 'NIL' income after claiming deduction under Section 80IA of the Act of Rs. 42,93,35,930/-. The book profit under Section 115JB of the Act was also shown at Rs. 29,90,04,927/-. Subsequently the return of income was revised without any change in the returned income. The ld. Assessing Officer noted that assessee has made an investment in one company of Rs. 492,95,56,000/-. The dividend income therein would be exempt. Assessee did not make any voluntary disallowance under Section 14A. Assessee stated that there is no expenditure incurred with respect to interest expenditure as its investment is out of own funds. The ld. AO stated that even if the investment in shares did not yield any exempt income in the form of dividend during the year then also disallowance as per provisions of Section 14A is required to be made. In response to the submission of the assessee identical issue has been dealt with and decided in favour of the assessee for Assessment Years 2008-09 and 2009-10 by the CIT (Appeals), He rejected the explanation

of the assessee. Thereafter he disallowed a sum of Rs. 2,46,47,780/- under Section 14A only on account of the provisions of Rule 8D(2)(ii) being 0.5% of the average value of investment.

5. The Assessing Officer further examined the claim of the assessee under Section 80IA of the Act. He raised a query that assessee has credited

   a. Rs. 1,29,16,998/- being net figure after considering the expenses of Rs. 41,49,880/- with respect to sale of voluntary Emission reduction claim,
   b. interest income received on bank deposits of Rs. 1,48,80,000/- and
   c. Miscellaneous income of Rs. 5,07,000/-.

   He held that the above three income are not derived from the industrial undertaking and, therefore, considering the decision of the Hon'ble Supreme Court in the case of Liberty India Vs. CIT 183 Taxman 349 he did not grant deduction under Section 80IA of the Act on these three items. Therefore, against the total claim of the deduction of Rs. 42,93,35,930/- he restricted it to Rs. 40,10,31,932/-. Therefore, he disallowed the above deduction of Rs. 2,83,03,998/-. Thus he computed the total income of the assessee at Rs. 5,29,51,779/- under the normal computation. With respect to the computation of book profit under Section 115JB of the Act he added back disallowance made under Section 14A of the Act of Rs. 2,46,47,780/- and thus the book profit was computed at Rs. 32,36,52,707/-. Thus, assessment order was passed by the Dy. Commissioner of Income Tax, Circle 16 (1), New Delhi, under Section 143(3) of the Income Tax Act, on 5.12.2015.

6. The assessee preferred an appeal before the ld. CIT (Appeals). With respect to the disallowance under Section 14A of the Act, he deleted the same as assessee did not have any exempt income in this assessment year. With respect to the claim of the assessee for allowing deduction under Section 80IA of Misc. income of Rs. 5,07,000/-, he allowed the claim of the assessee stating that out of above sum, refund received from Power Finance for excess amount charged in earlier years of Rs.3.81 lakhs, liability no longer required of Rs. 18,000/- and rent recovery of Rs. 1.08 lakhs. He held that the above sum is part of the income derived from industrial undertaking as this expenditure are related to the industrial undertaking in earlier years and now written back. With respect to the interest income of Rs. 1,48,80,000/- he held that the actual amount is Rs. 1,41,80,000/- and same is not income derived from industrial undertaking, hence he held that on interest income deduction under Section 80IA of the Act is not available.

7. During the course of appeal before him the assessee pointed out a fact that before the AO, assessee has raised an issue that income of carbon credit is not in the nature of income, but a capital receipt and, therefore, same may be allowed as exempt receipt not subjected to tax. The ld. AO held that same is not a capital receipt and is also not income derived from

industrial undertaking. The ld. CIT (Appeals) following the decision of Hon'ble Andhra Pradesh High Court in My Home Power Ltd. held that net income of carbon credit of Rs. 1,29,16,998/- is a capital receipt and not of business income and, therefore, corresponding deduction under Section 80IA should be reduced. With respect to the adjustment of carbon credit received from the computation of book profit, he rejected the same holding that since Profit * Los account of the assessee prepared in accordance with the provisions of Schedule VI to the Companies Act, certified by the auditor includes profit on sale of carbon credit as per the prescribed accounting standard issued by ICAI. He thus rejected the claim of the assessee for reduction of the carbon credit income from the computation of book profit. Thus, the order of the ld. CIT (Appeals) is a matter of challenge before us by both the parties under respective grounds of appeal raised as above.

8. We first come to the IT Appeal No. 2464 (Del) of 2017 filed by the assessee.

9. The first ground of appeal is with respect to the computation of book profit under the provisions of Section 115JB of the Income Tax Act wherein assessee has claimed that net income realized from the sale of carbon credit of Rs. 1,29,16,998/- is a capital receipt and should be excluded from the book profit. The ld. AR submitted detailed arguments on this issue and submitted that ITAT in its own case for Assessment Years 2009-10, 2010-11 and 2011-12, has already allowed the appeal of the assessee regarding treatment of carbon credit being capital receipt not chargeable to tax under Section 115JB of the Act under minimum alternate tax and, therefore, the issue is squarely covered in favour of the assessee. The ld. AR placed on record the order of the co-ordinate bench dated 27.04.2018 before us and drew our attention to para No. 6.2 of that order.

10. The ld. DR vehemently supported the order of the ld. CIT (Appeals) and submitted that the assessee cannot ask for reduction of the book profit when the accounts are prepared in accordance with Schedule VI of the Companies Act and neither there is a qualification by auditor and nor there is a mention in the notes of accounts.

11. We have carefully considered the rival contentions. We have also perused the order of the co-ordinate bench in the case of the assessee for Assessment Years 2009-10 to 2011-12. As per para No. 3 of that order the assessee has specifically has raised an additional ground with respect to the exclusion of profit realized from sale of carbon credit to form the book profit. The co-ordinate bench in para No. 6.2 held that income from sale of the carbon credit is capital in nature. Further in para No. 14 it has held that since the income from the sale of carbon credit is essentially in the nature of capital receipt, by no stretch of imagination can be brought to tax under the provisions of minimum alternate tax and thus the ground of appeal of the assessee for Assessment Years 2010-11 and 2011-12 were allowed. In view of the above facts, as the co-ordinate bench has already decided the issue

in favour of the assessee, respectfully following the same, we allow first ground of appeal of the assessee.

12. The second ground of appeal is with respect to claim of the interest income earned on bank deposit of Rs. 1,41,80,000/- claimed as interest income eligible for deduction under Section 80IA of the Act. The ld. AR submitted that these are the bank interest from short term FDR out of the business funds and, therefore, deduction under Section 80IA should be allowable on this sum. He specifically relied upon the decision of the Hon'ble Rajasthan High Court in the case of CIT Vs. Chambal Fertilizers & Chemicals Ltd. 95 taxman.com 313 against which the Special Leave Petition has been dismissed by the Hon'ble Supreme Court. He also referred to the decision of the Hon'ble Delhi High Court in 300 ITR 6 and ITA 1441/2006. He further submitted that such interest income cannot be assessed under the head 'Income from Other Sources'.

13. The ld. DR vehemently relied upon the order of the ld. Assessing Officer as well as the decision of the Hon'ble Supreme Court in Liberty India (supra).

14. We have carefully considered the rival contentions and perused the orders of the lower authorities. Assessee has earned interest income from the fixed deposit receipts. Assessee has submitted that the interest income from short term FDR is only a temporary arrangement for making timely re-payment of loan installments on respective due dates out of the proceeds of the FDR. Therefore, the interest income has direct link with the industrial undertaking. He further submitted that assessee has borrowed from banks and financial institutions a sum of Rs. 329 crores and, therefore, the assessee is required to keep funds in fixed deposit receipts for short term for honouring the installments of the loan. Therefore, it is an eligible income derived from industrial undertaking for the purpose of deduction under Section 80IA of the Act. Coming to the decision cited before us of Hon'ble Rajasthan High Court in CIT Vs. Chambal Fertilizers & Chemicals Ltd. (supra) on reading of para No. 8.1 of that decision the Hon'ble Rajasthan High Court, it was held that placing of fixed deposit receipts was a mandatory condition on the assessee. Further the decision of Honourable Rajasthan High court was delivered relying on the decision of Honourable Delhi High court where in the interest was received from trade debtors and Overdue payment from debtors. That is not the fact here. In our opinion the issue is squarely covered in favour of revenue by decision of Honorable Supreme court in case of *Liberty India* v. *CIT* [2009] 317 ITR 218 (SC) with respect to interest on FDR as it is not derived from the industrial undertaking. Thus, Ground no 2 of appeal is dismissed.

15. Thus, appeal of the assessee I partly allowed.

16. Coming to the appeal of the ld AO , ground number 1/4 are with respect to the disallowance u/s 14 A of the income tax act. The brief facts of that the learned assessing officer has noted that the assessee has made investment in a limited company amounting to ₹ 492

crores income from which is exempt u/s 10 (34) of the income tax act. Assessee has not made any disallowance u/s 14 A of the act and therefore the assessing officer asked the assessee that why disallowance should not be made. The assessee submitted a detailed reply which was rejected by the learned assessing officer recording of satisfaction that assessee has claimed expenditure management and acquisition of shares which the assessee has held as investment and not as stock in trade hence the disallowance of expenditure incurred on assets, the income from which is exempt is computed as per the provisions of rule 8D of the income tax rules. Thereafter he worked out the disallowance according to rule 8D of the income tax rules 1962 of ₹ 24,647,780/–. The disallowance under rule 8D (i) and (ii) was nil however he disallowed 2,46,47,780 Under rule 8D (iii) of the act. The assessee preferred an appeal before the learned CIT – A on this issue wherein in para number 3.2.1 the learned and CIT noted that there is no dividend income received by the assessee on the above investment and there cannot be any disallowance Under Section 14 A read with rule 8D of the income tax act he further noted that ITAT in the case of the assessee for assessment year 2008 – 09 has upheld the relief granted by the learned CIT – A wherein the disallowance u/s 14A was deleted. The learned assessing officer aggrieved with the above order has preferred this appeal before us.

17. On hearing the rival contentions, we found that assessee has not on any exempt income during the year from the above investment and therefore there cannot be any disallowance u/s 14 A of the income tax act. This is an accepted position in the case of the assessee as per the order of the coordinate bench in assessee's own case for assessment year 2008 – 09. Such is also the mandate of the honourable Delhi High Court in case of Cheminvest Ltd versus CIT [2015] 61 taxmann.com 118 (Delhi)/[2015] 234 Taxman 761 (Delhi)/[2015] 378 ITR 33 (Delhi)/[2015] 281 CTR 447 (Delhi) wherein it has been held that if there is no exempt income received or receivable during the year there cannot be any disallowance u/s 14 A of the income tax act. Therefore respectfully following the decision of the coordinate bench as well as the decision of the honourable Delhi High Court we do not find any merit in the ground number 1 – 4 of the appeal hence, those grounds are dismissed.

18. Coming to ground number five of the appeal wherein the assessing officer is aggrieved with the action of the learned assessing officer in allowing deduction u/s 80 IA of the act on ₹ 507,000 which is a rental income. The brief facts of the case shows that that assessee has credited miscellaneous income of ₹ 507,000 which is rent recovery of ₹ 1.08 lakhs, liability no longer required of 0.18 lakhs and refund received from Power Finance Corporation which was excess charge in earlier years of ₹ 3 81,000. The above sum was credited miscellaneous income on which the deduction u/s 80 a of the income tax act was denied by the learned assessing officer holding that same is not income derived from the industrial undertaking. However the learned CIT appeal held that these are the incomes which are

formed forming part of the business income arising on account of the) of expenditure incurred in earlier years and petty rent is recovered from the users of the premises at the plant site. Therefore, he considered that the sum of ₹ 507,000 is an income incidental to the business and is derived from the industrial undertaking and therefore the deduction u/s 80 IA was allowed on the above sum. The learned assessing officer is aggrieved by the action of the learned CIT – A.

19. On hearing of the rival parties on the issue, we do not find any merit in the appeal of the learned assessing officer on this ground because the refund received from Power Finance Corporation for the excess charges made in the earlier years which has now been returned back of ₹ 3.81 lakhs, liability which were arising out of the business which are now no longer required have been written back by the assessee of ₹ 18,000 and the rent is recovered from the plant site used by the other parties on which the rent is recovered of ₹ 108,000 are necessarily the income derived from the industrial undertaking and therefore they go on to reduce the respective expenditure and hence the deduction u/s 80 IA of the income tax act on them has rightly been allowed by the learned CIT – A. Accordingly the ground number five of the appeal of the learned assessing officer is dismissed.

20. The ground number six is with respect to CIT A holding that carbon credit earned by the assessee is a capital receipt and not subject to tax.

21. On careful consideration of the rival arguments of the learned authorised representative and the learned departmental representative we find that the above issue is squarely covered in the favour of the assessee by the decision of the honourable Andhra Pradesh High Court in case of CIT versus my home power Ltd [2014] 46 taxmann.com 314 (Andhra Pradesh)/[2014] 225 Taxman 8 (Andhra Pradesh)(MAG.)/[2014] 365 ITR 82 (Andhra Pradesh)/[2015] 276 CTR 92 (Andhra Pradesh), by the decision of the honourable Karnataka High Court in case of CIT versus Subhash Kabini Power Corporation Ltd[2016] 69 taxmann.com 394 (Karnataka)/[2016] 240 Taxman 514 (Karnataka)/[2016] 385 ITR 592 (Karnataka)/[2016] 287 CTR 147 (Karnataka) and honourable madras High Court in CIT versus Ambika Cotton Mills Ltd [2021] 125 taxmann.com 206 (Madras). In view of this, the ground number six of the appeal of the learned assessing officer is dismissed.

22. In the result, appeal filed by the learned assessing officer in ITA number 3713/del/2017 for assessment year 2012 – 13 is dismissed.

23. Accordingly, appeal of the assessee for assessment year 2012 – 13 is partly allowed and appeal of the revenue is dismissed.

Order pronounced in the open court on 23/03/2021.

Sd/-	Sd/-
(AMIT SHUKLA)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated : 23/03/2021

MEHTA

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1. Appellants
2. Respondents
   CIT
3. CIT (Appeals)
4. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	16.02.2021
Date on which the typed draft is placed before the dictating member	16.02.2021
Date on which the typed draft is placed before the other member	23.03.2021
Date on which the approved draft comes to the Sr. PS/ PS	23.03.2021
Date on which the fair order is placed before the dictating member for pronouncement	23.03.2021
Date on which the fair order comes back to the Sr. PS/ PS	23.03.2021
Date on which the final order is uploaded on the website of ITAT	23.03.2021
date on which the file goes to the Bench Clerk	23.03.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	