

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH: CHENNAI

श्री वी दुर्गा राव, न्यायिक सदस्य एवं श्री जी मंजूनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A No.710/Chny/2018
Assessment Year: 2013 - 2014

The Deputy Commissioner of
Income-Tax,
Corporate Circle – 2 (1),
Room No.511, 5th Floor,
Wanaparthy Block,
121, M.G. Road, Chennai – 600 034.

(अपीलार्थी/Appellant)

M/s. Express News Paper
Private Limited,
Vs. No.2, Express Estates,
Club House Road,
Mount Road, Chennai – 600 002.

[PAN: AAACE 1702G]
(प्रत्यर्थी/Respondent)

Cross Objection No.65/Chny/2018
Assessment Year: 2013 - 2014

M/s. Express News Paper Private
Limited,
No.2, Express Estates,
Club House Road,
Mount Road,
Chennai – 600 002

[PAN: AAACE 1702G]

(अपीलार्थी/Appellant)

The Deputy Commissioner of
Income-Tax,
Vs. Corporate Circle – 2 (1),
Room No.511, 5th Floor,
Wanaparthy Block,
121, M.G. Road,
Chennai – 600 034

(प्रत्यर्थी/Respondent)

Department by
Assessee by

: Mr. G. Johnson, Addl. CIT
: Mr. G. Baskar, Advocate

सुनवाई की तारीख/Date of Hearing : 14.07.2021
घोषणा की तारीख /Date of Pronouncement : 23.07.2021

आदेश / ORDER

PER V. DURGA RAO, JUDICIAL MEMBER:

This appeal emanates from the directions given by the Hon'ble Madras High Court vide its order dated 04.08.2020 in Tax Case Appeal No.780 of 2018.

2. The sole issue involved in this appeal relates to disallowance u/s.14A r.w.r.8D of the Income Tax Act, 1961. In the Assessment Order, the Assessing Office has invoked the Section 14A r.w.r.8D of the Income Tax Act, 1961 and disallowed an amount of Rs.250,06,75,160/-.

3. On appeal, before the learned Commissioner of Income Tax (Appeals), the learned CIT(A) by following to the Assessment Year 2010 – 2011 and 2012 – 2013 and also by following the decision of the Hon'ble Jurisdictional High Court in the case of Commissioner of Income Tax Vs. Chettinad Logistics Private Limited [2017] deleted the addition made by the Assessing Officer.

4. The Department carried the matter before the Hon'ble Income Tax Appellate Tribunal. The Hon'ble Income Tax Appellate Tribunal [I.T.A.T] by order dated 1st August, 2018 has reversed the order passed by the learned Commissioner of Income Tax (Appeals) vide its order dated 30.11.2017 which is held as under:

4. We have heard the rival contentions and perused the orders of the authorities below. The question is whether strategic investments are to be excluded while computing disallowance u/s.14A of the Act, has been clearly addressed by the Hon'ble Apex Court in the case of M/s. Maxopp Investment Limited (supra). What was held by their Lordships at paragraphs no.31 to 41 of the judgment is reproduced hereunder:

31) We have given our thoughtful consideration to the argument of counsel for the parties on both sides, in the light of various judgments which have been cited before us, some of which have already been taken note of above.

32) In the first instance, it needs to be recognised that as per section 14A(1) of the Act, deduction of that expenditure is not to be allowed which has been incurred by the assessee "in relation to income which does not form part of the total income under this Act". Axiomatically, it is that expenditure alone which has been incurred in relation to the income which is includible in total income that has to be disallowed. If an expenditure incurred has no causal connection with the exempted income, then such an expenditure would obviously be treated as not related to the income that is exempted from tax, and such expenditure would be allowed as business expenditure. To put it differently, such expenditure would then be considered as incurred in respect of other income which is to be treated as part of the total income.

33) There is no quarrel in assigning this meaning to section 14A of the Act. In fact, all the High Courts, whether it is the Delhi High Court on the one hand or the Punjab and Haryana High Court on the other hand, have agreed in providing this interpretation to section 14A of the Act. The entire dispute is as to what interpretation is to be given to the words 'in relation to' in the given scenario, viz. where the dividend income on the shares is earned, though the dominant purpose for subscribing in those shares of the investee company was not to earn dividend. We have two scenarios in these sets of appeals. In one group of cases the main purpose for investing in shares was to gain control over the investee company. Other cases are those where the shares of investee company were held by the assessees as stock-in-trade (i.e. as a business activity) and not as investment to earn dividends. In this context, it is to be examined as to whether the expenditure was incurred, in respective scenarios, in relation to the dividend income or not.

34) Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessees would apply while interpreting Section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is

incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind Section 14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act. This is so held in Walfort Share and Stock Brokers P Ltd., relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom. The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A.. xxx xxx xxx The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14 A."

35) The Delhi High Court, therefore, correctly observed that prior to introduction of Section 14A of the Act, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-taxable income, the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. It is to find a cure to the aforesaid problem that the Legislature has not only inserted Section 14A by the Finance (Amendment) Act, 2001 but also made it retrospective, i.e., 1962 when the Income Tax Act itself came into force. The aforesaid intent was expressed loudly and clearly in the Memorandum explaining the provisions of the Finance Bill, 2001. We, thus, agree with the view taken by the Delhi High Court, and are not inclined to accept the opinion of Punjab & Haryana High Court which went by dominant purpose theory. The aforesaid reasoning would be applicable in cases where shares are held as investment in the investee company, may be for the purpose of having controlling interest therein. On that reasoning, appeals of Maxopp Investment Limited as well as similar cases where shares were purchased by the assesseees to have controlling interest in the investee companies have to fail and are, therefore, dismissed.

36) There is yet another aspect which still needs to be looked into. What happens when the shares are held as 'stock-in-trade' and not as 'investment', particularly, by the banks? On this specific aspect, CBDT has issued circular No. 18/2015 dated November 02, 2015.

37) This Circular has already been reproduced in Para 19 above. This Circular takes note of the judgment of this Court in Nawanshahar case wherein it is held that investments made by a banking concern are part of the business or banking. Therefore, the income arises from such investments is attributable to business of banking falling under the head 'profits

and gains of business and profession'. On that basis, the Circular contains the decision of the Board that no appeal would be filed on this ground by the officers of the Department and if the appeals are already filed, they should be withdrawn. A reading of this circular would make it clear that the issue was as to whether income by way of interest on securities shall be chargeable to income tax under the head 'income from other sources' or it is to fall under the head 'profits and gains of business and profession'. The Board, going by the decision of this Court in Nawanshahar case, clarified that it has to be treated as income falling under the head 'profits and gains of business and profession'. The Board also went to the extent of saying that this would not be limited only to co-operative societies/Banks claiming deduction under Section 80P(2)(a)(i) of the Act but would also be applicable to all banks/commercial banks, to which Banking Regulation Act, 1949 applies.

38) From this, Punjab and Haryana High Court pointed out that this circular carves out a distinction between 'stock-in-trade' and 'investment' and provides that if the motive behind purchase and sale of shares is to earn profit, then the same would be treated as trading profit and if the object is to derive income by way of dividend then the profit would be said to have accrued from investment. To this extent, the High Court may be correct. At the same time, we do not agree with the test of dominant intention applied by the Punjab and Haryana High Court, which we have already discarded. In that event, the question is as to on what basis those cases are to be decided where the shares of other companies are purchased by the assesseees as 'stock-in-trade' and not as 'investment'. We proceed to discuss this aspect hereinafter.

39) In those cases, where shares are held as stock-in-trade, the main purpose is to trade in those shares and earn profits therefrom. However, we are not concerned with those profits which would naturally be treated as 'income' under the head 'profits and gains from business and profession'. What happens is that, in the process, when the shares are held as 'stock-in-trade', certain dividend is also earned, though incidentally, which is also an income. However, by virtue of Section 10 (34) of the Act, this dividend income is not to be included in the total income and is exempt from tax. This triggers the applicability of Section 14A of the Act which is based on the theory of apportionment of expenditure between taxable and non-taxable income as held in Walfort Share and Stock Brokers P Ltd. case. Therefore, to that extent, depending upon the facts of each case, the expenditure incurred in acquiring those shares will have to be apportioned.

40) We note from the facts in the State Bank of Patiala cases that the AO, while passing the assessment order, had already restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in Rule 8D of the Rules and holding that section 14A of the Act would be applicable. In spite of this exercise of apportionment of expenditure carried out by the AO, CIT(A) disallowed the entire deduction of expenditure. That view of the CIT(A) was clearly

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untenable and rightly set aside by the ITAT. Therefore, on facts, the Punjab and Haryana High Court has arrived at a correct conclusion by affirming the view of the ITAT, though we are not subscribing to the theory of dominant intention applied by the High Court. It is to be kept in mind that in those cases where shares are held as 'stock-in-trade', it becomes a business activity of the assessee to deal in those shares as a business proposition. Whether dividend is earned or not becomes immaterial. In fact, it would be a quirk of fate that when the investee company declared dividend, those shares are held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits. The situation here is, therefore, different from the case like Maxopp Investment Ltd. where the assessee would continue to hold those shares as it wants to retain control over the investee company. In that case, whenever dividend is declared by the investee company that would necessarily be earned by the assessee and the assessee alone. Therefore, even at the time of investing into those shares, the assessee knows that it may generate dividend income as well and as and when such dividend income is generated that would be earned by the assessee. In contrast, where the shares are held as stock-in-trade, this may not be necessarily a situation. The main purpose is to liquidate those shares whenever the share price goes up in order to earn profits. In the result, the appeals filed by the Revenue challenging the judgment of the Punjab and Haryana High Court in State Bank of Patiala also fail, though law in this respect has been clarified hereinabove.

41) Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO.

5. In our opinion, the decisions of the Tribunal relied on by the Ld.AR were either rendered prior to the judgment of the Hon'ble Apex Court in the case of M/s.Maxopp Investment Ltd., or rendered without considering this judgment of the Hon'ble Apex Court. Hence, these decisions cannot further the assessee's case. We are therefore, of the opinion that the Ld.CIT(A) fell in error in directing the AO to exclude the investments of Rs.250,06,75,100/- made by the assessee in M/s.Express Infrastructure Pvt. Ltd., for the purpose of computing disallowance u/s.14A of the Act. The order of the Ld.CIT(A) is set-aside and the disallowance made by the AO is reinstated.

5. The Assessee carried the matter before the Hon'ble Madras High Court, wherein he has submitted that one of the cross-objections raised

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by the Assessee is that the investment made in the subsidiary company did not fetch any exempt income this year which is to be excluded from the computing disallowance u/s.14A which was not adjudicated by the Hon'ble Income Tax Appellate Tribunal.

6. The Hon'ble Madras High Court vide its order dated 04.08.2020 in Tax Case Appeal No.780 of 2018 remitted the matter back to the Hon'ble ITAT to consider the effect of the Special Bench of the Delhi Tribunal in the case of ACIT Vs. Vireet Investment Private Limited., post the decision of the Hon'ble Supreme Court in the case of Maxopp Investment Limited.

7. Before us, the learned Counsel for the Assessee has submitted that the investments made by the Assessee has not yielded exempt income for computing disallowance u/s.14A of the Income Tax Act, 1961 and that has to be considered by the Assessing Officer keeping in view the decision of the Special Bench of the Tribunal at Delhi in the case of ACIT Vs. Vireet Investment Private Limited and as directed by the Hon'ble High Court.

He also submitted that for the Assessment Year 2014 – 2015 in the Assessee's own case vide I.T.A. No.1483/Chny/2019 by order dated 29.11.2019 by following the decision of the Delhi Special Bench of this

Tribunal and in the case of ACIT Vs Vireet Investment Private Limited [2017] reported in 165 ITD 27 directed the Assessing Officer to find out the investment which yielded exempt income during the year under consideration and directed the Assessing Officer to decide the issue afresh in accordance with law.

8. He also relied upon the decision of the Hon'ble Jurisdictional High Court in the case of Commissioner of Income Tax Vs. Shriram Ownership Trust [2020] reported in 122 Taxmann.com 155 (Madras) and submitted that the Hon'ble Jurisdictional High Court has approved the decision in the case of ACIT Vs. Vireet Investment Private Limited (supra) and submitted that the issue may be remitted back to the Assessing Officer to examine whether the investments made by the Assessee yields exempt income or not and that the investments that only yield exempt income has to be taxed u/s.14A r.w.r.8D of the Income Tax Act, 1961.

9. On the other hand, the learned Departmental Representative has not raised any objection.

10. We have heard both the sides, perused the materials available on record and gone through the orders of the authorities below.

11. The issue involved in this appeal is that the investment does not yield exempt income whether Section 14A r.w.r.8D of the Income Tax Act, 1961 applies or not?

The Hon'ble Madras High Court has directed the Tribunal to adjudicate the issue afresh by considering the effect of the Special Bench of the Tribunal in the case of ACIT Vs. Vireet Investment Private Limited (supra). The very same issue in respect of application of Section 14A r.w.r.8D of the Act has been considered by the Co-ordinate Bench of this Tribunal in the Assessee's own case in I.T.A. No.1483/Chny/2019 dated 22.11.2019 to find out the investment which yield exempt income during the year under consideration and to decide the issue in view of the decision of the Special Bench of the Tribunal in the case of ACIT Vs. Vireet Investment Private Limited (supra). We find that the Special Bench of the Tribunal in the case of ACIT Vs. Vireet Investment Private Limited (supra) has considered the application of Section 14A r.w.Rule.8D(2)(iii) of the Income Tax Rules, 1962 and observed that what is to be considered is only the investment which result in exempted income during the year under consideration.

12. We therefore, respectfully following the directions of the Hon'ble Madras High Court and by considering the facts and circumstances of the case are fully in agreement with the order passed by the Tribunal for

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the Assessment Year 2014 -2015. We direct the Assessing Officer to examine, whether investment made by the Assessee does yield exempt income or not and to decide the issue keeping in view the decision of the Special Bench of the Tribunal in the case of ACIT Vs. Vireet Investment Private Limited (supra).

In view of the above, the Cross Objection filed by the Assessee in C.O.No.65/Chny/2018 and the appeal filed by the Revenue in I.T.A No.710/Chny/2018, both are allowed for statistical purpose.

Order pronounced on 23rd July, 2021 in Chennai.

Sd/-

(श्री जी मंजूनाथा)

(G. MANJUNATHA)

लेखा सदस्य/**ACCOUNTANT MEMBER**

Sd/-

(वी दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 23rd July, 2021

IA, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/**Copy to:** 1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF