IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI

BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)

ITA No.1394/MUM/2015
(Assessment Year: 2010-11)

ACIT-14(2)(1), Room No. 432, 4th Floor Aayakar Bhavan, Mumbai – 400 020	Vs.	M/s Maharashtra State Power Generation Company Ltd. Plot No. G-9, Prakashgad, 2nd Floor, Anant Kanekar Marg, Station Road, Bandra (East), Mumbai – 400 051

PAN No. AAECM2935R

(Revenue) **(Assessee)**

Assessee by : Shri Ketan Ved, A.R
Revenue by : Shri Rahul Raman, D.R

Date of Hearing : 28/07/2021
Date of pronouncement : 20/09/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-22, dated 09.12.2014, which in turn arises from the assessment order passed by the A.O u/s 143(3)(ii) of the Income Tax Act, 1961 (for short 'Act'), dated 18.03.2013 for A.Y. 2010-11. The revenue has assailed the impugned order on the following grounds before us:

"1.1 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.82,65,57,704/- u/s. 40(a)(ia) without appreciating the fact that the assessee had actually not deducted tax at source on payment to RTGIL.

1.2 Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.82,56,57,704/- u/s. 40(1)(ia) without appreciating the fact that the law laid down by the Hon'ble Supreme Court was rendered in context of section 201(1) and not for disallowance u/s. 40(a)(ia).

2. Whether on the facts and In the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the addition of Rs.19,15,87,803/- on account of prior period expenditure which was not in accordance with the method of accounting stipulated in section 145 of the Act."

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred m deleting the disallowance made u/s. 14A r.w. Rule 8D of the IT Rules.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of purchases made from hawala operators amounting to Rs.4,97,432/-.

5. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal.

6. The appellant prays that the order of CIT(A) on the above ground be set-aside and that of the assessing officer be restored."

2. Briefly stated, the assessee company which is engaged in the business of electricity generation in the State of Maharashtra had filed its return of income for A.Y 2010-11 on 14.10.2010, declaring an income of Rs.nil under the normal provisions of the Act and 'book profit' of Rs.394,34,16,857/- u/s 115JB of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. Assessment was framed by the A.O vide his order passed u/s 143(3)(ii) dated18.03.2013 wherein after inter alia making following additions/ disallowances :

Sr. No.	Particulars	Amount
1.	Disallowance of cash transportation expenses u/s 40(a)(ia) of the Act.	Rs.82,65,57,704/-
2.	Disallowance of the prior period expenditure.	Rs.19,15,87,803/-
3.	Disallowance u/s 14A r.w.Rule 8D.	Rs. 11,196/-
4.	Disallowance of purchases made from hawala operators.	Rs. 4,97,432/-

, the income of the assessee was assessed under the normal provisions at Rs.nil while for the 'book profit' u/s 115JB was determined at the returned amount of Rs. 394,34,28,053/- :

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Insofar the aforesaid additions/disallowances made by the A.O were concerned, the CIT(A) finding favour with the contentions advanced by the assessee qua the said respective additions/disallowances vacated the same.

5. The revenue being aggrieved with the order passed by the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset placed on record a 'Chart' a/w the copies of the orders of the Hon'ble High Court of jurisdiction and that of the coordinate benches of the Tribunal. Adverting to the disallowance of a sum of Rs.82,65,57,704/- that was made by the A.O u/s 40(a)(ia) of the Act, it was submitted by the ld. A.R that the said amount paid by the assessee company towards transportation charges to Reliance Gas Transportation Infrastructure Ltd. (RGTIL) was disallowed by the A.O, for the reason, that the assessee had failed to deduct tax at source on the said amount. Before the CIT(A) the assessee had furnished a letter obtained from RGTIL wherein it was stated by the latter that the aforesaid amount of Rs.82,65,57,704/- was offered in its return of income and the corresponding tax was duly paid on the same. Backed by the aforesaid facts, the CIT(A) relying on the judgment of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages (P) Ld. (2007) 293 ITR 226 (SC) observed that now when RGTIL i.e the deductee/payee had already paid the taxes on the amounts so received from the assessee company, therefore, the latter could not be held as an assessee in default qua the said amount. The CIT(A) while concluding as hereinabove had held as under:

> "3.3 I have carefully considered appellant's submissions. The appellant had paid Rs.82,65,57,704/- on account of transportation charges to Reliance Gas Transportation Infrastructure Ltd. (RGTIL). The A.O. had disallowed this amount on the ground that the appellant had failed to deduct tax. The appellant had furnished letter during appellate proceedings from RGTIL that they have offered amount of Rs.82,65,57,704/- in the return of income and tax was duly paid on it. As the deductee had paid the tax on the payment made by the appellant for Rs.82,65,57,704/- in view of Supreme Court decision in the case of Hindustan Coco Cola Beverage (P) Ltd. vs. CIT (2007) 293 ITR 226 wherein it has been held that "where deductee, recipient of income, has already paid taxes on amount received from deductor, department once again cannot recover tax from deductor on same income by treating deductor to be assessee-in-default for shortfall in its amount of tax deducted at source". It is clear from the above Supreme Court decision that if a deductee is recipient of income, had already paid taxes on the amount received by the deductor, here in this case the deductor is Maharashtra State Power Generation Co. Ltd., so Supreme Court clearly held that in such a situation deductor i.e. Maharashtra State Power Generation Co. Ltd., cannot be considered as assessee in default. In the present case appellant paid transportation charges of Rs.82,65,57,704/- on the transportation charges recipient of the payment i.e Reliance Gas Transportation Infrastrcuture Ltd., which had paid taxes on the above amount, hence, appellant cannot be treated as assessee in default for not deducting the taxes. In view of the above decision of Supreme Court; A.Os disallowance of Rs.82,65,57,704/- is deleted. This ground of appeal is allowed."

6. Before us, it is submitted by the ld. A.R that the assessee company had obtained the declaration from RGTIL in 'Form 26A', wherein the latter had stated that it had recognized the aforesaid sum of Rs.82,65,57,704/- as a part of its turnover and had duly considered/offered the same for tax while preparing its return of income for the year under consideration i.e A.Y. 2010-11. It is the claim of the ld. A.R that when RGTIL had paid taxes on the amount received by it from the assessee company, then, in terms of the "2nd proviso" to Sec. 40(a)(ia) of the Act as had been made available on the statute vide the Finance Act, 2012, the assessee could not be held as being in default qua the said amount. It was further submitted by the ld. A.R that though the aforesaid amendment to Sec. 40(a)(ia) had been inserted vide the Finance Act, 2012 w.e.f 01.04.2013, however, the same being curative in nature would be applicable to the case of the assessee for the year under consideration i.e A.Y. 2010-11.

7. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities.

8. We have heard the ld. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. Admittedly, it is a matter of fact borne from the record that RGTIL had recognized the sum of Rs.82.65 crores that was received by it towards transportation charges from the assessee company as part of its turnover for the year under consideration i.e A.Y.2010-11, and had duly considered/offered the same for tax in its return of income for the year in question. As observed by the CIT(A), and rightly so, as held by the Hon'ble Supreme Court in case of Hindustan Coca Cola Beverages (P) Ld. Vs. CIT (2007) 293 ITR 226 (SC) where the deductee/recipient of income had already paid taxes on the amounts received from the deductor, then, the department once again cannot recover the tax from the deductor by treating the latter as an assessee in default for shortfall in the amount of tax deducted at source. As per the "2nd proviso" as had been made available on the statute vide the Finance Act, 2012 w.e.f 01.04.2013, where an assessee fails to deduct the whole or any part of the taxes in accordance with the provisions of Chapter XVII-B of the Act on any such sum, but is not deemed to be an assessee in default under the 'first proviso' to sub-section (1) of Sec. 201, then, for the purpose of Sec. 40(a)(ia) it shall be deemed that the assessee had deducted and paid the tax on such sum on the date of furnishing of the return of income by the resident therein referred to in the said proviso. On a perusal of Sec. 201(1) of the Act, we find that the 'first proviso' therein contemplates that where any person fails to deduct the whole or any part of the tax in accordance with provision of Chapter XVII on a sum paid to a resident or on the sum credited to the account of a resident, then, it shall not be deemed to be an assessee in default in respect of such tax if such resident, viz. (i) has furnished his return of income u/s 139 of the Act; (ii) had taken into account such sum for computing income in such return of

income; and (iii) had paid the tax due on the income declared by him in such return of income; and the assessee furnishes a certificate to this effect from an accountant in the prescribed form i.e 'Form No. 26A'. Now, in the case before us, it is an undisputed fact that the RGTIL had taken into account the aforesaid sum of Rs.82.65 crores (supra) in its return of income for the year under consideration i.e A.Y. 2010-11, and had considered /offered the same to tax. Also, the requisite declaration in Form No. 26A r.w Rule 31ACB is stated to have been obtained by the assessee from an accountant. At this stage, we may herein observe that though the "2nd proviso" to Sec. 40(a)(ia) had been made available on the statute vide the Finance Act, 2012 w.e.f 01.07.2012, however, the same being curative in nature would thus be applicable to the case of the assessee for the year under consideration i.e A.Y. 2010-11. Our aforesaid view is duly supported by the judgment of the Hon'ble High Court of Bombay in the case of Pr. CIT Vs. Perfect Circle India Pvt. Ltd. (2019) 104 CCH 8 (Bom). In its aforesaid order it was observed by the Hon'ble High Court that as Sec. 40(a)(ia) is not a penalty and insertion of the "2nd Proviso" is declaratory and curative in nature, therefore, the same would have a retrospective effect from 01.04.2005. The Hon'ble High Court while concluding as hereinabove had held as under :

> **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,** [2015] 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 form 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,** [2007] 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."

Backed by the aforesaid settled position of law, we are of the considered view that now when the deductee/payee i.e RGTIL had duly considered the transportation charges of Rs.82.65 crores as part of its turnover for the year under consideration, and had duly considered/offered the said amount for tax while compiling its return of income for the year under consideration i.e A.Y. 2010-11, therefore, it could not be held to be an assessee in default qua the said amount. Accordingly, finding no infirmity in the view taken by the CIT(A) who had rightly vacated the disallowance u/s 40(a)(ia) of Rs.82.56 crores made by the A.O, we uphold his order to the said extent. The **Grounds of appeal Nos. 1.1 & 1.2** are dismissed.

9. We shall now take up the claim of the revenue that the CIT(A) had erred in allowing the assessee's claim for deduction of Rs.19,15,87,803/- which was disallowed by the A.O for the reason that the same was in the nature of prior period expenditure. On a perusal of the assessment order, we find that the A.O had debited prior period expenses of Rs.19,15,87,803/- and had claimed the same as a deduction. Observing, that the aforesaid prior period expenses pertained to the prior period and not to the year under consideration, the A.O had disallowed the same. On appeal, it was submitted by the assessee that though it had in its return of income on a suo motto basis already disallowed depreciation amounting to Rs.7,18,55,412/- (forming part of the prior period expenses), therefore, the disallowance of the entire amount of Rs.19,15,87,803/- by the A.O had resulted to a double disallowance of the aforesaid amount. Backed by the

aforesaid fact, the CIT(A) relying on the order passed by his predecessor in the assessee's own case for the preceding years i.e A.Ys. 2001-02 to 2005- 06 wherein involving identical facts the double disallowance made by the A.O was vacated by his predecessor, had on the same terms directed the A.O to vacate the disallowance of Rs.7,18,55,412/- that was already offered by the assessee, and restrict the disallowance to an amount of Rs.11,97,32,391/-. The CIT(A) while concluding as hereinabove had held as under :

> "4.1 The facts of the case were that the A.O had disallowed prior period expense of Rs.19,15,87,803/-.
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> 4.2 During the appellate proceedings the appellant states that appellant had suo motto disallowed Rs.7,18,55,412/-. The A.O had again disallowed the same amount in the assessmet order. As appellant had already disallowed Rs.7,18,55,412/- the net amount to be disallowed is Rs.11,97,32,391/-.
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> 4.3 This issue had come into consideration of CIT(A)-2. Mumbai from A.Yrs. 2001-02 to 2005-06. The CIT(A) in A.Y.2005-06 in para no.3 held as under:
>
> > "3. The second ground of appeal is against disallowance of prior period expenses amounting to Rs.4,50,77,60,167/-. In the course of appellate proceedings appellant has also preferred an additional ground of appeal on this issue ushers it has -been contended that out of the total amount disallowed by Assessing Officer mentioned above, an amount of Rs.50,96,59,163/- being depreciation for earlier years had already been disallowed by appellant at the time, of fifing the return of income. Since this fact has not been taken into account by Assessing Officer, there is a double disallowance of this amount which needs to be taken care of. The additional ground of appeal is admitted. Verification of facts reveals that the contention raised in the additional ground of appeal is correct Therefore, to the extent of the amount of Rs. 50,96,59,163/- there has been a double disallowance to be considered under the first regular ground of appeal is reduced to the above extent. Consequently the quantum, to be considered under the normal second ground of appeal on account of prior period expenses shall be Rs.3,98,81,01,004/-."
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> Following the above order the A.O is directed to allow Rs.11,97,32,391/- on account of prior period expenses as appellant had already disallowed Rs.7,18,55,412/- from Rs.19,15,87,803/- which A O. had disavowed. Hence, the A.O. is directed to allow Rs.11,97,32,391/-. This ground of appeal is allowed."

10. Before us it was submitted by the ld. A.R that the Tribunal in the assessee's own case for A.Y. 2001-02 to A.Y. 2005-06 had decided the issue vis-a-vis disallowance of prior period expenditure in favour of the assessee, viz.

(i). ITA No. 3813/Mum/2019, ITA No. 1647/Mum/2010 and ITA No.1648/Mum /2010, dated 11.02.2021 for A.Y. 2001-02 to A.Y.2003-04 AND ITA No. 1649/Mum/2010 and ITA No. 945/Mum/2010, dated 21.04.2021 for A.Y. 2004-05 and A.Y. 2005-06. In the backdrop of the aforesaid facts, we find that no infirmity arises from the order of the CIT(A), who in our considered view had rightly directed the A.O to restrict the disallowance of the prior period expenditure to an amount of Rs.11.97 crores. Accordingly, finding no infirmity in the view taken by the CIT(A) qua the aforesaid issue in question, we uphold his order to the said extent. The **Ground of appeal No. 2** is dismissed.

11. We shall now take up the grievance of the revenue that the CIT(A) had erred in vacating the disallowance made by the A.O u/s 14A r.w Rule 8D of Rs.11,196/-. Before us, it is the claim of the ld. A.R that as the assessee during the year under consideration had not received any exempt income, therefore, no disallowance u/s 14A was called for in its hands.

12. Per contra, the ld. D.R relied on the orders of the lower authorities.

13. We have heard the ld. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them in respect of the aforesaid issue in hand. As is discernible from the order of the CIT(A), it is a matter of fact borne from the record that the assessee company had not received any exempt income during the year under consideration. Backed by the aforesaid facts, we concur with the claim of the ld. A.R that now when the assessee had not received any exempt income during the year under consideration, therefore, no disallowance u/s 14A could have been made in its hands. Our aforesaid view is fortified by a host of judicial pronouncements as under:

"i. CIT Vs. Delite Enterprises, ITA No.110 of 2009 (Bom).
ii. CIT Vs. Sivam Motors , ITA No. 88 of 2014 (All).

iii. CIT Vs Corrtech Energy Pvt. Ltd .reported (2014) 223 Taxman 130 (Guj)
iv. DCIT Vs. JSW, 116 taxmann.com 565
v. Inox Leisure Ltd vs. DCIT, ITA No. 3475/Ahd/2016 (Ahd)
vi. CIT Vs. Chettinad Logistics (P) Ltd. reported in [2017] 80 taxmann.com 221 (Mad HC) – [SLP dismissed in [2018] 95 taxmann.com 250 (SC)].
vii. Cheminvest Ltd. Vs. CIT (2015) 378 ITR 33 (Del HC) – [SLP dismissed by Hon'ble Supreme Court].
viii. PCIT Vs. Oil Industries Development Board (2019) 262 Taxman 102 (SC)
ix. CIT Vs. Celebrity Fashion Ltd. (Tax case Appeal No. 26 of 2018) (Mad HC)
x. PCIT vs. Caraf Builders and Constructions Pvt. Ltd. (2019) 414 ITR 122/ 261 Taxman 47 (Delhi) (HC)
xi. PCIT vs. Ballapur Industries Ltd. (ITA No. 51 of 2016, dat. 13.10.2016) (Bom)

Accordingly, finding no infirmity with the view taken by the CIT(A) who had rightly vacated the disallowance of Rs. 11,196/- made by the A.O u/s 14A of the Act, we uphold the same. The **Ground of appeal No. 3** is dismissed.

14. We shall now take up the grievance of the revenue that the CIT(A) had erred in deleting the disallowance of purchases of Rs. 4,97,432/- that were claimed by the assessee to have been made from certain hawala operators. As is discernible from the orders of the lower authorities, the A.O was in receipt of information from the Sales Tax Department that the assessee had made bogus purchases aggregating to Rs. 4,97,432/- from two parties viz. (i) M/s Forum Traders; and (ii) M/s Apple Index Manufacturing Company Ltd. As the assessee failed to substantiate the authenticity of the impugned purchase transactions, the A.O held the entire amount of the aforesaid purchases of Rs.4,97,432/- as bogus. On appeal, the assessee in order to substantiate the genuineness of the impugned purchases that were claimed to have made from the aforementioned parties, therein, placed on record supporting documentary evidence i.e transportation details, details of goods received, copy of the bank statement evidencing payments in respect of the purchases that were claimed to have been made from one of the party, viz. M/s Forum Traders. However, the assessee failed to lead any evidence in respect of the purchases that were claimed to have been made from the other party, viz. M/s Apple Index Company Ltd. Observing, that the assessee had substantiated the purchases that were claimed to have

been made from M/s Forum Traders, the CIT(A) vacated the disallowance made by the A.O to the said extent. However, as the assessee had failed to lead any supporting documentary evidence to substantiate the purchases which were claimed to have been made from the other party, viz. M/s Apple Index Manufacturing Company Ltd., therefore, the CIT(A) upheld the stamping of the purchases claimed by the assessee to have been made from the said party as bogus by the A.O.

15. The revenue being aggrieved with the order of the CIT(A) to the extent he had vacated the disallowance of the purchases made by the assessee from M/s Forum Traders, had carried the matter in appeal before us. On a perusal of the orders of the lower authorities, we find that the assessee in the course of the proceedings before the CIT(A) had duly substantiated the genuineness and veracity of the purchases that were claimed to have been made from one of the supplier party, viz. M/s Forum Traders. As the assessee had submitted the purchase bills, documents relating to the transportation and receipt of goods, copy of the bank statements evidencing the payments made to the aforementioned party, therefore, we find no infirmity in the view taken by the CIT(A), who had rightly held that the assessee had made genuine purchases from the aforementioned party. Neither is anything discernible from the records nor has been placed on our record which would point out any perversity in the aforesaid view so taken by the CIT(A). Backed by the aforesaid facts, we are of the considered view that the CIT(A) had rightly observed that the assessee had made genuine purchases from M/s Forum Traders. Accordingly, finding no infirmity in the view taken by the CIT(A) we uphold his order to the said extent. The **Ground of appeal No. 4** is dismissed.

16. The **Grounds of appeal Nos. 5 & 6** being general are dismissed as not pressed.

17. The appeal filed by the revenue is dismissed.

Order pronounced in the open court on 20.09.2021

Sd/-	Sd/-
(Rajesh Kumar)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai;
Dated: 20.09.2021
*PS: Rohit

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai