

IN THE INCOME TAX APPELLATE TRIBUNAL "A" Bench, Mumbai
Before Ms Suchitra Raghunath Kamble (JM)
&
Shri Prashant Maharishi (AM)

I.T.A. No.861 /Mum/2021
(Assessment Year 2018-19)

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| Shri Avinash Nivrutti Bhosale 2, ABIL House, Ganesh Khind Road Raga Hill Corer, Pue-41 1007 PAN : ABTPB8151F | Vs. | DCIT, Cent. Cir. 2(3), Mumbai |
| (Appellant) | | (Respondent) |

| | |
|-----------------------|------------------------------|
| Assessee by | Shri Anuj Kisnadwala |
| Department by | Smt. Surabhi Sharma (CIT DR) |
| Date of Hearing | 16.12.2021 |
| Date of Pronouncement | 23.12.2021 |

ORDER

Per Prashant Maharishi (AM) :

- 01 This appeal is filed by Shri Avinash Nivrutti Bhosale [Assessee/ Appellant] for assessment year 2018-19 against the order passed by the learned Commissioner of Income-tax (Appeals)-48, Mumbai [The Id CIT (A)] dated 29/01/2021 wherein the disallowance of Rs.2,97,991 76/- by applying the provisions of section 14A read with rule 8D(2) made by the learned assessing officer vide order dated 29/05/2019 passed under section 153A read with section 143(3) of the Income-tax Act, 1961 was confirmed. This is the only grievance in this appeal.
- 02 According to the facts, the assessee is a proprietor in three different concerns engaged in the business of civil contractors and builders. Assessee also owns a windmill farm for generation of wind power. He is also partner in other partnership firms and limited liability partnership. He is also a director in other companies. Thus, he earns income from salary, business profits, capital gains, and income from other sources. He filed his return of income on 31/10/2018 declaring income of Rs. 1,55,48,930/- Assessee has earned

exempt income of Rs. 5.85.48,270/-. Assessee was asked to furnish the details of exempt income. The assessee submitted his reply on 17/05/2019 stating that books of account and financial statements are drawn up separately with respect to the various proprietary concerns. It was stated that books of account of this business do not reflect investment income, which is exempt from tax. All such investments are reflected in his individual set of books maintained on consolidated basis and, therefore, there is no question of making any disallowance under section 14A of the Act. The learned assessing officer considered the explanation of the assessee and worked out disallowance for the reason that assessee has earned tax free income out of investments made in partnership firms as well as dividend income. He rejected the contentions of the assessee that all expenditure has been incurred for business only and separate books of account are maintained. Accordingly, he determined the annual average of monthly averages as per sub rule (2) of rule 8D as amended with effect from 01/06/2016 and worked out disallowance of Rs.3,55,95,857/- but restricted it to total expenses incurred by assessee of Rs. 2,97,99,176/- . Consequently, the assessment order was passed on 29/05/2019 determining total income of Rs.4,53,48,100/-

- 03 Assessee, aggrieved with the above disallowance under section 14A, preferred appeal before the learned CIT(A), who confirmed the above disallowance vide order dated 29/01/2021.
- 04 At the time of hearing, it was found that the appeal of the assessee was delayed by 18 days and assessee has filed an application for condonation of above delay vide letter dated 19th May, 2021 stating that due to Covid-19 lockdown, the information could not be collected and therefore, though the appeal should have been filed on or before 02/0/2021, but has filed appeal delayed by 18 days. Therefore, the delay is because of sufficient cause and hence, it needs to be condoned.
- 05 The learned departmental representative vehemently opposed the same.

- 06 We have carefully considered the rival submissions and find that the delay has occurred for the reasons of Covid-19 lockdown. Therefore, we find sufficient reasons for a nominal delay of 18 days in filing of the appeal. Therefore, it is condoned and appeal is admitted.
- 07 On the merits of the case, the learned authorized representative submitted that assessee has claimed before the assessing officer that he has not incurred any expenditure for earning of the exempt income and the learned assessing officer, without recording the satisfaction as to how the claim of the assessee is incorrect, proceeded to quantify the disallowance under rule 8D(2) of the Income-tax Rules. He submitted that the recording of satisfaction about the correctness of the claim of the assessee is mandatory before jumping into quantify the disallowance under rule 8D (2). He, even otherwise submitted that the average value of investment should also be considered by only taking the amount of investments from which tax free income is earned. He submitted that the learned assessing officer has incorrectly worked out the average value after considering all the investments whether exempt income is earned from it during the year or not? He, therefore, submitted that the disallowance worked out by the learned assessing officer is incorrect. He further stated that the order of the learned CIT (A) has confirmed the above disallowance without assigning any reason and upholding the action of the assessing officer. He further stated that there is no change in the phraseology of rule 8D (2) applicable with effect from 02/06/2016 and earlier provisions. The earlier provisions have been interpreted that only those investments from which exempt income is earned are taken into consideration for working out disallowance. He, therefore, submitted that the order of the learned CIT (A) is also not correct.
- 08 The learned departmental representative vehemently supported the orders of the lower authorities. It was submitted that the interpretation that has been claimed by the learned AR are in relation to old rule 8D and not new rules amended with effect from 2006.
- 09 We have carefully considered the rival contentions and perused the orders of the lower authorities. The undisputed facts was that during the year, the assessee has earned exempt income of Rs 5,85,48,270/- out of investments in partnership firms and dividend. During the course of assessment proceedings, the assessee submitted that he has maintained

separate accounts and all the expenditure have been incurred for business only. Such submission was recorded by the learned assessing officer at paragraph 4.3 of his order. To reject the above argument, the learned assessing officer in that paragraph has stated that assessee has incurred heavy administrative expenditure. The assessee has produced before us the audited accounts which show that assessee has incurred total expenditure as per its profit & loss account of Rs. 2,97,99,176/- out of which Rs.30,20,194/- is a depreciation allowance. A sum of Rs. 2,04,93,391/- is repairs and maintenance expenditure of the windmill. Accordingly, out of the above expenditure of Rs.2,97,99,176/- only expenditure of Rs.62,85,591/- could have been considered for the disallowance under section 14A r.w.r. 8D(2). Therefore, the finding of the learned assessing officer that assessee has incurred huge expenditure and, therefore, he made the disallowance of Rs.2,97,99,176/- is devoid of merit. This shows that the learned assessing officer has not recorded his satisfaction with respect to the claim of the assessee that no expenditure has been incurred for earning the exempt income. It is also clear that he has not referred to the accounts of the assessee which is mandatory as per provisions of section 14A (2) of the Act. In the present case, in absence of any satisfaction of the learned assessing officer with respect to the correctness of the claim of the assessee that he has not incurred any expenditure for earning exempt income, the disallowance under section 14A cannot be upheld. Further, even otherwise, the assessing officer should have considered for working out disallowance under rule 8D (2) of the I.T. Rules, Only those investments from which exempt income are earned during the year. This was because; there is no difference between the phraseology of rule 8D (2) as amended with effect from 01/06/2016. Section 14A(2), read with rule 8D of the Rules provides that before applying the theory of apportionment in form of Rule 8D. Ld Assessing Officer needs to record his satisfaction that having regard to the kind of the assessee, it is incorrect that assessee has not incurred any expenditure in relation to exempt income. Unless that satisfaction is shown from the assessment order, the Id AO cannot jump to the stage of apportionment by applying Rule 8 D. Further in present case Id AO has considered all the expenses debited in the profit and loss account including depreciation allowance for disallowance u/s 14A of the Act. In view of our finding that the learned assessing officer has failed to record any satisfaction about the correctness of the claim of the assessee,

orders of lower authorities are reversed. Therefore, we direct the learned assessing officer to delete the disallowance of Rs.2.97,99,176/- made under section 14A of the Act. Accordingly, we reverse the order of the lower authorities and allow the appeal of the assessee.

10. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 23.12.2021

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER
Mumbai, Dated : 23/12/2021
Pavanan, Sr.PS (on contract)

sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

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

//True copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai