

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI "E" BENCH: NEW DELHI**

**(THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER &  
SHRI P.K.KEDIA, ACCOUNTANT MEMBER**

**ITA No.1450/Del/2018  
[Assessment Year : 2014-15]**

ACIT, Circle-15(1), New Delhi.	vs	Lemon Tree Hotels Ltd., B-6/17, Safderjung Enclave, New Delhi-110029. PAN-AACCK1698R
<b>APPELLANT</b>		<b>RESPONDENT</b>
<b>Appellant by</b>		Ms. Princy Singhla, Sr.DR
<b>Respondent by</b>		Shri Mukal Baga, Adv. & Shri Vikas Singh, CA
<b>Date of Hearing</b>		29.11.2021
<b>Date of Pronouncement</b>		04.01.2022

**ORDER**

**PER KUL BHARAT, JM :**

The present appeal filed by the Revenue for the assessment year 2014-15 is directed against the order of Ld. CIT(A)-5, Delhi dated 28.12.2017. The Revenue has raised following grounds of appeal:-

1. *“Whether the Ld. CIT(A) is justified in law in deleting the disallowance made u/s 14A r.w.r. 8D especially in the light of the CBDT circular no. 5/2014 dated 11.02.2014?”*
2. *Whether the Ld. CIT(A) is justified in deleting addition made u/s 14A r. w.r 8D while calculating the MAT liabilities u/s 115JB of the Act?*
3. *Whether the Ld. CIT(A) is justified in deleting the addition of expenses related to "Employee Stock Option Cost" in view of the fact the assessee allotted shares from the share capital of the company?*
4. *Whether the Ld. CIT(A) is allowed in deleting the disallowance in deleting the disallowance in respect of late deposit of ESI/EPF*

*charges, in view of the CBDT circular no. 22/2015 dated 17.12.2015?*

5. *That the order of the Ld. CIT(A) is erroneous and is not tenable on facts and in law.*
6. *That the grounds of appeal are without prejudice to each other.*
7. *That the appellant craves leave to add, alter, amend or forego any grounds(s) of the appeal raised above at the time of hearing.”*

2. Facts in brief are that the case of assessee filed its return of income declaring loss of Rs.10,91,00,761/- through electronic mode on 25.05.2015. Return was processed u/s 143(1) of the Income tax Act, 1961 (“the Act”). Thereafter, the case was selected for scrutiny under CASS and the assessment was framed u/s 143(3) of the Act vide order dated 31.12.2016. The Assessing Officer while framing the assessment made disallowance u/s 14A r.w.Rule 8D of the Income Tax Rules, 1962 (“the Rules”) of Rs.1.96,51,975/-. The Assessing Officer (“AO”) further made disallowances of Employees Stock Option Cost of Rs.2,79,032/- and late payment of employees contributions to ESI & EPF of Rs.8,30,038/-. Thus, the Assessing Officer made addition of Rs.2,07,61,045/- and assessed the loss of Rs.8,83,39,716/- against the total loss as per return of income of Rs.10,91,00,761/-.

3. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A), who after considering the submissions, allowed the appeal of the assessee. Thereby, the disallowance made by the AO regarding disallowance u/s 14A of the Act and also addition to the book profit of Rs.1,96,51,975/- was held to be not warranted. The Ld.CIT(A) further deleted the additions made on account of

ESOP expenses of Rs. 2,79,032/- and disallowance of Rs.8,30,038/- made on account of late deposit of employees contribution to ESI & EPF.

4. Aggrieved against this, the Revenue is in appeal before this Tribunal.

5. At the outset, Ld. Counsel for the assessee submitted that the issues are squarely covered in favour of the assessee by the decision of the Co-ordinate Bench of the Tribunal and the judgement of the Hon'ble Jurisdictional High Court.

6. Ground No.1 raised by the Revenue is against the deletion of addition made by Ld.CIT(A) in respect of disallowance of expenses u/s 14A of the Act r.w. Rule 8D of the Rules.

7. Ld. Sr.DR supported the assessment order and submitted the Ld.CIT(A) was not justified in deleting the addition.

8. Per contra, Ld. Counsel for the assessee submitted that the issue is covered in favour of the assessee by the decision of the Tribunal and the Hon'ble Delhi High Court.

9. We have heard the rival submissions and perused the material available on record and gone through the orders of the authorities below. We find that Ld. CIT(A) has decided the issue by observing as under:-

#### **4. Findings and determination**

*4.1. Ground No. 1 and 2 relates to the disallowance on account of application of Rule 8D r.w.s. 14A of the Income Tax Act wherein an addition of Rs.1,96,51,975/- has been made.*

*4.1.1 The assessee in his submission has clearly submitted that the assessee company has not -earned any dividend income in the*

current/financial year. It has also-relied on jurisdiction decision of the Delhi High Court in the case of Cheminvest Ltd. 378 ITR 33 and stated that no disallowance u/s 14A can be made as there is no tax free income. The appellant has also furnished a number of decisions which it has claimed to be in its favor. The Assessing Officer simply rejected the contention of the appellant and stated that the invocation of Rule 80 was mandatory and the computation for the purposes of deduction 14A was in accordance with the provisions therein.

4.1.2 The aforesaid decisions quoted by the appellant namely Cheminvest Ltd. and also Redington (India) Ltd. 392 ITR 633 have been perused. It is also seen that the recent Delhi Tribunal decision on a same issue has also held clearly that where the assessee is not earning any exempt income, no disallowance can be made. These are Hon'ble ITAT Delhi Bench in the case of Sunrays Properties & Investment Co. Pvt. Ltd. Vs. JCIT ITA No. 353/De1/2014 Dt. 17.02.2017 and in the case of Global Capital Ltd. vs. ACIT ITA No. 6586/De1/2013 Dt. 27.11.2015 where in it has been held that if there is no exempt income no disallowance u/s 14A can be made. It has also been further held in almost all judicial precedents that the extent of disallowance under section 14A read with Rule 80 can only be to an extent of the exempt income. The relevant extract from the decision Global Capital Ltd. vs. ACIT ITA No. 6586/De1/2013 is quoted hereunder:

*"The grounds raised by the assessee read as under:-*

*"1. That the learned Commissioner of Income Tax (Appeal), erred in rejecting assessee's contention that the disallowance under section 14A cannot exceed Rs. 13,35,040/- being the amount of dividend income received by the assessee company, thereby confirming the addition of Rs.21,87,713/- made by the I.T.A.No. 6586/Del/2013 Assessment year:*

*2009-10 assessing officer u/s 14A of the Income Tax Act, resulting in addition to returned Income to that extent.*

*2. That the learned Commissioner of Income Tax (Appeals) erred in holding that disallowance under Rule 80 has been correctly worked out in accordance with the provisions of Rule 80. "*

*3. We have heard the rival submissions and carefully perused the relevant material placed on record. At the very outset, learned counsel of the assessee submitted a copy of the order of the ITAT Delhi 'C' Bench in I.T.A. No. 3763/Del/2013 for assessment year 2009-10 dated 29.4.15 in the case of Indus Valley Investment & Finance (P) Ltd. vs DCIT and submitted that in the similar set of facts and circumstances, the Tribunal in the case of assessee's group company has directed that the disallowance u/s 14A should not exceed the exempt income and therefore, the disallowance was restricted to the exempt income. Learned counsel of the assessee has drawn our attention towards para 4 of the Tribunal order (supra).*

*4. Learned Departmental Representative strongly supported the orders of the authorities below, however, he fairly accepted that in the similar set of facts and circumstances, the amount of disallowance has been restricted to the exempt income.*

*I.T.A.No. 6586/Del/2013 Assessment year: 2009-10*

*5. Firstly, it would be appropriate to reproduce the relevant part of the order of the Tribunal (supra) which has been relied by the learned counsel of the assessee which reads as follows:-*

*"4. We have heard the rival submissions and perused the relevant material on record. It is observed that the total exempt income earned by the assessee is to the tune of*

*Rs.25.38 lac, against which an addition of Rs.1.05 crore has been made. The Hon'ble Delhi High Court in Joint Investment Pvt. Ltd. Vs. CIT, vide its judgment dated 25.2.2015, has held that the disallowance u/s 14A cannot exceed the amount of exempt income. The Hon'ble Delhi High Court in the case of CIT vs. Holcim India Pvt Ltd. (2014) 90 CCH 081-DEL-Hon'ble High Court, has held that there can be no disallowance u/s 14A in the absence of any exempt income. The rationale behind these judgments is that the amount of disallowance u/s 14A should not exceed the exempt income. Since the total exempt income in the instant case is Rs.25,38,020/-, we direct that the disallowance u/s 14A be restricted to Rs.18,01,968/- (Rs.25,38,020-Rs.7,36,052/-). The remaining amount of disallowance is directed to be deleted."*

*6. In view of above, it is observed that in the similar set of facts and circumstances, the total exempt income earned by the present assessee is Rs.13,35,040 against which an addition of Rs.21,87,713 has been made by the Assessing Officer u/s 14A of the Act. As noted by the Coordinate Bench of this Tribunal that in the case of Joint Investment (P) Ltd. vs CIT (supra), the Hon'ble Delhi High Court has held that the disallowance u/s 14A of the Act should not exceed the exempt income. The Tribunal also noted that the Hon'ble Delhi high Court in the case of CIT vs Holcim India Pvt. Ltd. (supra) held that there can be no disallowance u/s 14A in the absence of any exempt income. I.T.A.No. 6586/Del/2013 Assessment year: 2009-10. Finally, the ratio laid down by the Jurisdictional High Court noted that the disallowance should not exceed the exempt income during the relevant financial period. In the present case, since the total exempt income of the assessee is Rs.13,35,040 and the assessee had suo moto offered disallowance of Rs.1,81,388 under Rule 8D(2)(iii) of*

*the Income Tax Rules, 1962 being 0.5% of the average value of the investment in the shares of Apollo Tyres Ltd. on which such dividend income was earned. Hence, we direct the Assessing Officer that the disallowance u/s 14A be restricted to Rs.11,53,752 (Rs.13,35,040 - Rs.1,81,388) and the remaining amount of disallowance is directed to be deleted. "*

10. We find that Ld.CIT(A) has followed the judgements of Hon'ble Delhi High Court rendered in the case of *CIT vs Holcim India Ltd. [2014] 19 CCH 081 (Del.)* and *CIT vs Cheminvest Ltd. 378 ITR 33*. The Revenue has not brought to our notice any other binding precedents by the Hon'ble High Court and Hon'ble Supreme Court and therefore, we do not see any reason to interfere in the finding of Ld.CIT(A), the same is hereby affirmed. Thus, Ground No.1 raised by the Revenue is dismissed.

11. Ground No.2 is against the deleting the addition made u/s 14A r.w.Rule 8D of the Rules while calculating MAT liabilities u/s 115JB of the Act.

12. Ld. Sr. DR supported the assessment order and submitted that Ld.CIT(A) was not justified in deleting the addition.

13. Per contra, Ld. Counsel for the assessee submitted that the issue is covered in favour of the assessee in the case of *CIT vs Bhushan Steel Ltd. in ITA No.593/2015 dated 29.09.2015* of the Tribunal in Assessment Year 2008-09.

14. We have heard the rival submissions and perused the material available on record and gone through the orders of the authorities below. We find that Ld.CIT(A) has decided this issue by observing as under:-

4.2 "Ground No.3 relates to addition on account of expenditure related to exempted income u/s 14A. This addition specifically has been made by

*the AO in computing the MAT liability u/s 115JB of the assessee. In this regard, it is seen that there is a direct judicial High Court decision in the case PR. CIT vs. Bhushan Steel Ltd. in ITA No. 593/2015 dated 29.09.2015 wherein held as under:-*

*"7. Question No.6 concerns deletion of addition of Rs.89,00,000 made by the AO for computation of the income for the purposes of Minimum Alternate Tax ("MAT") under Section 115 JB of the Act. This pertained to the expenditure incurred for earning exempt income under Section 14A read with Rule 80. The ITAT has rightly held that this being in the nature of disallowance, and with Explanation 115JB not specifically mentioning Section 14A of the Act, the addition of Rs.89,00,000 was not justified. The view taken by the ITAT cannot be faulted with. It is consistent with the decision in Apollo Tyres Ltd. v. Commissioner of Income Tax (2002) 255 ITR 273 (SC) which held that "the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115J. The Court declines to frame a question on the above issue. "*

*Based on the above decision the addition to the book profit of Rs.1,96,51,975/- is not warranted. This ground of Appeal is allowed."*

15. Ld.CIT(A) has decided the issue by following the judgement of Hon'ble Delhi High Court rendered in the case of *CIT vs Bhushan Steel Ltd.* (supra). We do not see any infirmity in the finding of Ld. CIT(A), the same is hereby affirmed.

16. Ground No.3 is against the deletion of expenditure related to employees stock option cost.

17. Ld.Sr.DR supported the assessment order.

18. Per contra, Ld. Counsel for the assessee submitted that this issue is covered in favour of the assessee by the decision of Co-ordinate Bench for Assessment Year 2008-09. We find that Ld.CIT(A) has decided the issue by observing as under:-

4.3. *“Ground No. 4 and 5 relates to disallowance on account of ESOP expenses of Rs. 2,79,032/- on ESOP, which have been debited to the assessee's P&L A/c on the grounds that no expenditure has been incurred by the appellant company. The assessee has submitted in his submission which is quoted above. Then, this specific issue was a subject matter with appeal for assessment years 2008-09, 2009-10 and 2010-11. For the AY 2008-09, the Hon'ble Delhi High Court in the assessee's own case has held that the expenses on account of Employees Stock Option is allowable to the assessee.*

*“The allowability of ESOP Expenses stands covered by the order of Hon'ble Delhi High Court and Delhi ITAT in assessee's own case for AY 2008-09. The Hon'ble Delhi High Court vide order dated 18.08.2015 in ITA No. 107/2015 has held as under:-*

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*2. The question sought to be projected by the Revenue is whether the ITAT erred in deleting the addition of Rs.1,28,19,169/- made by the Assessing Officer ('AO') by way of disallowance of the expenses debited as cost of Employees Stock Option ('ESOP') in profit and loss account?*

*3. The Court has been shown a copy of the decision dated 19th June 2012 passed by the Division Bench of Madras High Court in CIT-III Chennai v. PVP Venture Ltd. (TC(A) No. 1023 of 2005) where a similar question was answered in favour of the Assessee by holding that the cost of ESOP could be debited to the profit and loss account of the Assessee. This Court has also in its decision dated 4th August 2015 in ITA No. 2 of 2002 (CIT v. Oswal Agro Mills Ltd.) held that the*

*expenditure incurred in connection with issue of debentures or obtaining loan should be considered as revenue expenditure."*

*It was further submitted that a recent ITAT judgment on the Bench, New Delhi in the appellant's own case vide order dated 10.10.2017 has also allowed aforesaid deduction.*

*"5. Now, turning to Ground No.2, the AO made an addition of Rs.91,89,791/- in respect of ESOP alleging the outgoing expenses are only notional and the expenditure is allowable only when the shares are purchased by the employer. However, in view of the fact that this issue was covered in assessee's own case in respect of the AYs 2008-09 & 2009-10 in ITA No. 4588/Del/2013 in Lemon Tree Hotels Ltd. vs. Addl. CIT vide order dated 23.06.2014 and ITA No. 209/Del/2014 in DCIT vs M/s. Lemon Tree Hotels Pvt. Ltd. vide order dated 18.01.2016 in assessee's favour, Ld. CIT(A) took note of the same and followed the decision of the Tribunal for those two years. It is brought to our notice by the Ld. AR that these two decisions of the Co-ordinate Bench of this Tribunal are upheld by the Hon'ble Jurisdictional High Court in ITA No. 107/Del/2015 decided on 18.08.2015 and ITA No. 862/Del/2016 decided on 02.12.2016. In view of these binding decisions of the Hon'ble High Court, we cannot interfere with the findings of the Ld. CIT(A) on this aspect, as such upholding the same, we dismiss this ground of appeal. "*

*Keeping in view clear judicial decisions of higher Courts in the appellant's case only wherein the same issue has been decided in the assessee's favour, the disallowance made by the AO of expenses on account of ESOP of Rs. 2,78,032/- are deleted and the ground No. 4 & 5 of appeal are allowed."*

19. From the finding of Ld.CIT(A), it is clear that he has followed the judgement of Hon'ble Delhi High Court in assessee's own case for Assessment Year 2008-09. Therefore, we do not see any infirmity in the finding of Ld.CIT(A), the same is hereby affirmed.

20. Ground No.4 is against the deletion of disallowance in respect of late deposit of ESI/EPF contribution.

21. Ld.Sr.DR supported the assessment order and submitted that the decision of Ld.CIT(A) is contrary to the CBDT Circular dated 17.12.2015.

22. On the contrary, Ld. Counsel for the assessee submitted that this issue has been decided by the Hon'ble Jurisdictional High Court in favour of the assessee in the cases of *PCIT vs Pro Interactive Service (India) Pvt.Ltd.* in ITA No.983/2018 [Del.] order dated 10.09.2018 and in the case of *CIT vs AIMIL Ltd.* 321 ITR 508.

23. We have heard the rival contentions and perused the material available on record. We find that this issue is covered in favour of the assessee in one of the cases as examined the case laws and held as under:-

[a] Hon'ble Delhi High Court rendered in the case of *CIT vs AIMIL Ltd.* 321 ITR 508 wherein it has been held:-

*17. "We may only add that if the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income Tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement (supra)."*

[b] Hon'ble Delhi High Court in the case of *PCIT vs Pro Interactive Service (India) Pvt.Ltd. in ITA No.983/2018 [Del.]* order dated 10.09.2018 held as under:-

*“In view of the judgement of the Division Bench of Delhi High Court in Commissioner of Income Tax versus AIMIL Limited, (2010) 321 ITR 508 (Del.) the issue is covered against the Revenue and, therefore, no substantial question of law arises for consideration in this appeal.*

*The legislative intent was/is to ensure that the amount paid is allowed as an expenditure only when payment is actually made. We do not think that the legislative intent and objective is to treat belated payment of Employee's Provident Fund (EPF) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under section 2(23)(x) of the Act.”*

Respectfully following the same, we do not find any infirmity in the finding of Ld.CIT(A), the same is hereby affirmed.

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

Order pronounced in the open Court on 04<sup>th</sup> January, 2022.

**Sd/-**  
**(P.K.KEDIA)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(KUL BHARAT)**  
**JUDICIAL MEMBER**

\* Amit Kumar \*

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4. CIT(Appeals)
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