आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'D' अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.560/Ahd/2020
Assessment Year : 2013-14

DICT, CIR.1(1)(1) Vadodara.	Vs	Ms.Alembic Ltd. Alembic Road Vadodara-3. PAN : AABCA 7950 P

(Applicant)		(Responent)

Revenue by :	Shri Mohd Usman, CIT-DR
Assessee by :	Shri S.N. Soparkar, Sr.Adv. and Shri Parin Shah, AR

सुनवाई की तारीख/**Date of Hearing : 13/04/2022**
घोषणा की तारीख /**Date of Pronouncement: 03/06/2022**

आदेश/O R D E R

PER T.R. SENTHIL KUMAR, JUDICIAL MEMBER

This appeal is filed by the Revenue against order dated 17.8.2021 passed by the Commissioner of Income-tax (Appeals)-1), Vadodara relating to the Asst.Year 2013-14.

2. Registry has pointed out that the appeal filed by the Revenue is time barred by 115 days. At the time of hearing of the case, when the same was put to the notice of the ld.DR, he submitted that the Department could present its appeal before the Tribunal only on 18.11.2020 in amidst of COVID-19 restrictions. During this period, considering the circumstances prevalent due to the pandemic and staff constrain, the Department could not file the appeal in time, and

therefore, delay of 115 days has been caused, which is beyond the control of the Department. Therefore, impugned delay in filing of the appeal before the Tribunal requires to be condoned, and the appeal of the Revenue may be adjudicated on merit. For support of his submission, the ld.DR relied on the judgment of Hon'ble Supreme Court in *suo motto* Writ Petition (C) No.3 of 2020 in MA No.29 of 2022 dated 10.01.2022 by which the Hon'ble Supreme Court taking into consideration prevailing circumstances due to COVID-19 pandemic extended period of limitation from 15.3.2020 till 28.02.22 and the present appeal is filed on1 8.11.2020 which is within the extended period only. On the other hand, the ld.Sr.Advocate, Shri S.N.Soparkar has no objection if the delay is condoned.

3. In view of the above submissions of the ld.DR, more so when the Hon'ble Supreme Court took *suo-moto* cognizance of the difficulties faced by litigants in filing petitions/applications/ suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation prescribed under the general law of limitation or under any special laws (both Central or State) during the outbreak of COVID-19, and in the *suo moto* Writ Petition cited (supra) extended period of limitation from 15.3.2020 till 20.02.2022. Therefore, we condone the delay in filing appeal before the Tribunal, and take up appeal of the Revenue for adjudication on merit.

4. In the appeal filed by the Revenue the following grounds are raised:

> *"1. Whether on facts and circumstances of the case and in law, the Id. CIT(A) is justified, in allowing the appeal on disallowance u/s 14A of the Income-tax Act, 1961, without appreciating the fact that*

the disallowance is rightly made as per provisions of Rule 8D by the AO."

2. Whether on the facts and in the circumstances of the case the Ld. CIT(A) is right in law in allowing the assessee's claim of deduction u/s 80IA(4) of the Act, at the rate on which the GEB supplied power to its customers ignoring the rate on which GSECL (a power generating company) supplied its power to GEB and not considering rate other than the selling price charged by the assessee?"

5. As far as first ground is concerned viz. disallowance under section 14A of the Act, from the reading of the assessment order it could be seen that during the assessment proceedings, the AO noticed that the assessee made *suo moto* disallowance of Rs.77,649/- on account of disallowance under section 14A of the Act, as against the exempt income of Rs.9,19,64,038/-. The AO noticed from the profit & loss account and balance sheet of the assessee that there was an investment of Rs.23.42 crores in assets and equity shares, and there was no fresh investment during this assessment year 2013-14. The assessee has made detailed explanation about the outstanding investment, and its source of funds utilized in previous year. Further, the AO held that the assessee has not considered any proportionate interest expenses and financial charges, administrative expenses, common facility, utilization of assets of business for the investment activities. The assessee has huge investment on which dividend was earned and also borrowed funds on which interest was paid. Therefore, the expenses required to be computed as per the Rule 8D r.w.s. 14A of the Act, and accordingly the same was computed at Rs.43,70,500/- and added to the income of the assessee. Aggrieved against the same, the assessee filed appeal before the ld.CIT(A) who has passed a speaking order as follows:

"

Particulars	*As on 31.03.2013*	*As on 31.03.2012*
Interest expenses	*Rs.5.143 Crore*	
Revenue & Surplus	*Rs.179.13 Crore*	*Rs. 197.16 Crore*
Share capital	*Rs.26.70 Crore*	*Rs.26.70 Crore*
Interest bearing fund	*Rs.25.09 Crore*	*Rs.103.32 Crore*
Net assets	*Rs.188.39 Crore*	*Rs. 195. 87 Crore*
Investment	*Rs.23.42 Crore*	

According to the Ld. AR, investment of Rs.23.42 Crore consists of followings:

Sr. No.	*Particulars*	*Amount [Rs. In lakhs]*	*Financial Year*
. 1.	*12% IFCI bonds [1000 bonds of Rs.1000 each]*	*10*	*2010-11*
2. «	*Alembic Pharmaceutical Ltd. (5,50,00,000 equity shares of Rs.2 each)*	*1100*	*2010-11*
3.	*IMarayu Pvt. Ltd. (5,00,000 pref shares of Rs. 100 each)*	*501.25*	*2011-12*
.4. '	*Sierra Investments Ltd. (3,00,000 pref shares of Rs. 100 -each)*	*240.60-*	*2011-12*

The above data shows there was no fresh investment made during the year. Further, the appellant has made a detailed explanation about outstanding investment and its sources of fund utilized in previous years. The AO has no where pointed out that the interest bearing funds were utilized for making investment in FY 2010-11 and FY 2011-12. The AO's only allegation is that funds utilized for investment was a mixed one. This allegation fail's to survive In case of direct judgement in favour of the assessee in the case of Reliance Utility Power, wherein the Hon'ble Supreme Court held that when mixed funds were used for investment yielding exempt income and if own reserve & surplus fund is more than such investment then

presumption would arise that investment was made from own surplus & reserve fund. Thus, Rule 8D(i) and 8D(ii) are not applicable.

So far as administrative expenses are concerned, this issue is also by the decision in favour of the assessee in the case of CIT vs. Industries Ltd., wherein, the Hon'ble Gujarat High Court held that no disallowance u/s 14A of the Act in respect of interest and administrative expenses ought to be made where there are sufficient own funds. The High Court ruling was confirmed by the Hon'ble Supreme Court by dismissing SLP filed by the Revenue. Since, the reserve & surplus fund are more than the investment made yielding exempt income, hence, following the ratio laid down by the Hon'ble Supreme Court in both the cases cited above, I am of considered view that further disallowance u/s. 14A of the Act i.e. more than that of the appellant was not required. In other words, the AO is directed to restrict disallowance u/s 14A of the Act of Rs.77,649/- to the extent of disallowance-suo motu made by the appellant. Ground No.2 is allowed.:

6. Second ground raised by the Revenue is that the ld.CIT(A) has erred in allowing the assessee claim of deduction under section 80IA(4) of the Act.

7. The AO noticed that the assessee has claimed deduction under section 80IA(4) of the Act at Rs.4,07,76,334/- in the original return of income from its captive power plant at Baroda. The assessee was asked to explain the sale or profit of COGENs/windmills, the rate taken for computation of profit for deduction under section 80IA of the Act. On examination of the assessee's submission, the AO observed that the assessee has applied the rate levied by MGVCL (trading company of Gujarat Electricity, Baroda) and the assessee has taken rate of Rs.6.20 per unit for captive power plant and Rs.7.20 for wind mill units. The AO noted that GEB purchased wind mill units at rate of around Rs.3.62 per unit and therefore, the rate of 7.02 per unit taken by the assessee were without basis. The AO also noted that the assessee sold electricity at Rs.3.70 per unit to its group associate company i.e M/s.Shreno Ltd., which was more

than GSECL at R.3.62 per unit (average rate). The AO further noted that the assessee has taken rate of Rs.4.70 per unit in the computation of power for R&D electricity use. Thus, finally referring to sub-section (8) of section 80IA and sub-section (10) of section 80IA, the AO rejected entire deduction under section 80IA(4) being excessive and unreasonable, and added the same to the income of the assessee. Aggrieved against the same, the assessee was in appeal before the ld.CIT(A). The ld.CIT(A) has followed the decision of the Tribunal in assessee's own case for the Asst.Year 2009-10 vide ITA No.1912, 1913 & 1939/Ahd/2012 for Asst.Year 2009-10; in ITA No.2928 & 285/Ahd/2013 for Asst.Year 2010-11; ITA No.622 & 550/Ahd/2016 for Asst.Year 2011-12 and ITA No.2229 & 2317/Ahd/216 for Asst.Year 2012-13, and decided the issue in favour of the assessee. Aggrieved against the same, the Revenue is in appeal before the Tribunal raising the grounds mentioned above.

8. At the outset, the ld.Sr.Advocate placed before us copy of common order dated 15.9.2017 passed by the Coordinate Bench of the Tribunal in the assesse's own case cited (supra) wherein both the issues are covered in faovur of the assessee.

9. Regarding the issue of disallowance under section 14A of the Act is concerned, the Co-ordinate Bench decided the issue in favour of the assessee as follows:

> *"We have carefully considered/the orders of the authorities below. There is no dispute that the share capital and reserve and surplus of the appellant company stands at Rs.31573.31 lacs whereas the cost of investment is Rs.798.80 lacs. Thus, it can be seen that the interest free funds are far more in excess of the cost of the investment. We find that on identical set of facts, the Co-ordinate Bench in assessee's own case in A.Y. 2009-10 (supra) has held as under-*

8. We have heard the rival contentions, perused the material available on record and gone through the orders of the authorities below. As the facts emerge, we find that the assessee's own funds, /,e., equity, reserve and surplus funds amounting to Rs.32,699.06 lakhs far exceed the tax free investments. The Impugned investments are old and out of own funds have not been rebutted. Relying on the Hon'ble Gujarat High Court judgments in the case of Hitachi Home and Life Solutions (I) Ltd (supra), Torrent Power Ltd (supra)'and other judgments mentioned above, we are of the view that when the assessee possesses own ' funds much more than the tax free investments, the disallowance u/s 14A read with Rule 8D cannot be made. There is also merit in the plea of ld. Counsel on the count that the burden of establishing the nexus has been wrongly attributed to the assesses and it was for the Assessing Officer to rebut the assessee's contention and demonstrate that the tax free investments were not from own funds but from borrowed funds. In the absence of such rebuttal, it cannot be assumed that the assesses made tax free investments out of borrowed funds. The assessee has suo moto offered Rs. 2 lakhs out of income of Rs.3,18,472/- as disallowed u/s 14A of the Act. In view of our foregoing observations and relying on Hon'ble Gujarat High Court judgments, we are of the view that no disallowance beyond what has been suo moto disallowed by the assessee can be made. In the result, the assessee's ground in this behalf is allowed and that of Revenue is dismissed.

10. The above view of the Co-ordinate Bench is further fortified by the decision of the Hon'ble High Court of Bombay in the case of Reliance Utilities and Power I1H 340 followed in HDEC Ltd. 366 ITR 505.

11. Drawing support from the decision of the Co-ordinate Bench (supra) and the ratio laid down by the Hon'ble High Court (supra), in our considered opinion, the suo motu disallowance of Rs. 2 lacs should meet the ends of justice. We, .accordingly direct the A.O. to delete the disallowance made u/s. 14A of the Act Ground no. 1 is allowed and accordingly ground no. 1 in revenue's appeal in ITA No. 2855/Ahd/201 3 is dismissed."

10. The ld.DR appearing for the Revenue neither controvert this position and nor brought any decision in favour of the Revenue. Therefore, respectfully following the Co-ordinate Bench decisions in

the assessee's own case cited (supra), we dismiss this ground of appeal of the Revenue.

11. So far as second issue is concerned, the ld.Senior Advocate for the assessee submitted that, the issue of disallowance under section 80IA(4) of the Act, the Revenue's appeal in Tax appeal No.1249 of 2014 dated 20.7.2016, the Revenue has raised the following two question of law:

> *"(i) Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in upholding the decision of CIT(A) that deduction u/s. 80-IA(4) is allowable to the assessee for generation of power for captive consumption?*
>
> *(ii) Whether the Tribunal was right in law in allowing the assessee's claim of deduction of Rs. 1954 crores u/s 80-IA(4) of the I.T. Act, 1961, when the assessee had adopted rate of power generation at Rs. 4.73 per unit, rate on which the GEB supplied power to its consumers, ignoring the rate of Rs. 2.36 per unit, the rate on which power generating company supplied its power to GEB?*

12. On these questions of law, the Hon'ble High Court held as follows:

> *"6. We have heard learned counsel for the parties. We have perused the order of the Tribunal. So far as issue Nos. (i) and (ii) are concerned, for the detailed reasons given in Tax Appeal No. 471 of 2009 in ground (C) and (D) where after considering the decisions of the Madras High Court in the case of Tamilnadu Petro Products Ltd. v. Assistant Commissioner of Income-tax reported in 338 ITR 643 and Commissioner of Income-tax v. Cethar Ltd., reported in 228 Taxman 139 (Madras) (Mag.) and other decisions cited by learned counsel for the assessee, we have held the issues in favour of the assessee, the issues in the present appeal require to be answered in favour of the assessee and against the revenue. In that view of the matter, we answer the issue Nos. (i) and (ii) in favour of the assessee and against the revenue."*

13. Per contra, the ld.DR could not dispute about the above judgment of the Hon'ble Gujarat High Court passed in the assessee's own case.

14. Respectfully following judgment of jurisdictional High Court in the assessee's own case dated 20.7.2016 (supra), we reject the grounds of appeal of the Revenue.

15. In the result, appeal of the Revenue is hereby dismissed.

Order pronounced in the Court on 3rd June, 2022 at Ahmedabad.

Sd/-	**Sd/-**
(ANNAPURNA GUPTA)	**(T.R. SENTHIL KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad, dated 3/06/2022