

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)
AND
S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)

I.T.A No.4515/Mum/2017
(Assessment year 2012-13)

DCIT-14(2)(1), Mumbai 432, 4 th Floor, Aaykar Bhavan Mumbai-400 020	vs	M/s Infrastructure Leasing & Financial Services Ltd, Plot No.C-22, G-Block, Bandra Kurla Complex, Bandra (E), Mumbai-400 051 PAN : AAACI0989F
APPELLANT		RESPONDENT

I.T.A No.4448/Mum/2017
(Assessment year 2012-13)

M/s Infrastructure Leasing & Financial Services Ltd, Plot No.C- 22, G-Block, Bandra Kurla Complex, Bandra (E), Mumbai-400 051 PAN : AAACI0989F	vs	DCIT-14(2)(1), Mumbai 432, 4 th Floor, Aaykar Bhavan Mumbai-400 020
APPELLANT		RESPONDENT

Assessee represented by	Shri Niranjan Govindekar, CA & Bhupal Rapelli, CA
Department represented by	Shri R.A. Dhyani, Sr.AR.

Date of hearing	02/03/2022
Date of pronouncement	19/04/2022

O R D E R

Per: S. Rifaur Rahman (JM):

These cross appeals filed by the Revenue and the assessee are directed against the order passed by the Commissioner of Income-tax (Appeals) [hereinafter referred to as 'CIT(A)] dated 22/03/2017 for the assessment year 2012-13.

2. The assessee, a company is engaged in the business of commercialization of infrastructure projects, providing financial services including investment in and lending to group entities and managing of reality assets. The assessee e-filed its return for the assessment year under consideration on 28-09-2012 and a revised return of income was e-filed on 31-03-2014 declaring total income of Rs.1,61,80,95,820/- which was processed under section 143(1) of the Act. Later, the case was selected for scrutiny and an assessment under section 143(3) determining total income at Rs.66,13,60,973/- was made on 31/03/2015 interalia making several additions. On appeal, the Ld.CIT(A) decided some of the issues in favour of the assessee and some in favour of the Revenue. Aggrieved by the order of the Ld.CIT(A), both, assessee and the Revenue have filed appeals, raising the following grounds in their respective appeal:-

Revenue – ITA No.4515/Mum/2017

1. *"On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the Disallowance of Rs 1,63,15,111/- being the expenditure on software treated as capital expenditure merely relying on the decision of his Id. Predecessors without considering the genuine fact of the case".*

2. *"On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition Rs. 1,50,00,000/- being income from toll road, merely relying on the decision of his Id. Predecessors without considering the genuine fact of the case."*

3. "On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the Disallowance of Rs. 47,19,084/- being the payments made to clubs expenditure merely relying on the decision of his Id. Predecessors without considering the genuine fact of the case."

Assessee – ITA 4447/Mum/2017

"1. On the facts & circumstances of the case the Learned Commr. of Income Tax (Appeals) has erred in confirming the disallowance of the claim of the depreciation of Rs. 6,56,258/- in respect of residential properties. On the facts and circumstances of the case the appellant prays that the disallowance of depreciation of Rs. 6,56,258/- is not justified and the said disallowance may be deleted.

2. The Learned Commr. of Income Tax (Appeals) has erred in confirming the disallowance of depreciation of Rs. 1,65,322/- on toll road. Based on the facts & circumstances of the case the appellant prays that the claim of depreciation of Rs. 1,65,322/- be allowed.

3. On the facts and circumstances of the case and without prejudice to Ground No. 2 the learned Commissioner of Income Tax (A) has erred in rejecting the claim of the appellant that if the road is not treated as plant and machinery for purpose of granting depreciation then the depreciation may be granted treating the said road under the category of Intangible asset. The appellant prays that the depreciation may be allowed at the rate of 25%.

4. On the facts and circumstances of the case the Learned Commr. Of Income Tax (Appeals) has erred in not deleting the interest amounting to Rs. 2,40,00,000/- disallowed by the Learned Assessing Officer while computing disallowance u/s. 14A r.w.r 8D(2)(ii) of Income Tax Act, 1961. The appellant prays that total interest disallowed by the Learned Assessing Officer amounting to Rs. 1,66,88,29,426/- may be deleted.

5. On the facts and circumstances of the case the Learned Commr. of Income Tax (A) has erred in directing that the interest free funds should be considered while calculating the disallowance u/s. 14A r.w.r 8D(2)(ii) ignoring the other grounds of the appellant regarding the deletion of the addition made by the Learned Assessing Officer.

6. On the facts and circumstances of the case the appellant prays that no interest should be considered while computing the disallowance u/s. 14A r.w.r

7. The Learned Commr. of Income Tax (Appeals) has erred in confirming the disallowance to the extent of Rs. 14,40,67,000/- being the administrative / establishment expenses attributable to earning exempt income u/s 10 of Income Tax Act, 1961. On the facts & circumstances of the case the appellant submit that the disallowance of Rs. 14,40,67,000/- being the administrative & establishment expenses is not justified and the said disallowance may be deleted."

3. At the time of hearing both the parties have agreed that the grounds raised in both the appeals are covered by earlier decisions of this Tribunal. Therefore, keeping this in mind, we proceed further to dispose of the appeals:-

Revenue's appeal:

4. Starting with the appeal filed by the Revenue, the first issue in the appeal pertains to disallowance of software expenses. The Assessing Officer, based on the addition made by the him for the assessment years 2004-05, 2006-07, 2007-08, 2008-09, 2009-10 & 2010-11 has held the software development expenses of Rs.1,63,15,111/- incurred in respect of the following, as capital expenditure :-

i.	Software purchase	Rs. 78,77,490/-
ii.	Software upgradation charges	Rs. 84,37,621/-
	Total	Rs.1,63,15,111/-

On appeal, the Ld. CIT(A), following his predecessor's orders for AYs 2004-05 to 2011-12 , decided the issue in favour of the assessee. Aggrieved, the Revenue is in appeal before the Tribunal, on this issue.

5. Upon hearing the parties, we find that this is a recurring issue since assessment year 2004-05 to 2011-12. In all these years, the Tribunal took a view in favour of the assessee, as has been agreed by the Ld.DR. It is also brought to our notice that notice further appeal has been preferred by the Revenue against the decision of the Tribunal. This being the factual matrix, consistent with the earlier decisions of the Tribunal, we uphold the order of the Ld.CIT(A) and reject the ground raised by the Revenue. This ground of appeal of the Revenue fails.

6. Ground 2 in Revenue's appeal pertains to addition of notional interest income in respect of toll road from Madhya Pradesh State Industrial Development Corporation. Before us, the counsels representing the parties submitted that this issue has been restored to the file of the Assessing Officer for the assessment

years 2004-05 to 2011-12. Therefore, consistent with the earlier decisions of the Tribunal for the above assessment years, the issue in ground 2 raised by the Revenue is restored to the file of the Assessing Officer for de novo consideration in line with the directions issued for the assessment years 2004-05 to 2011-12. This ground is treated as allowed for statistical purpose.

7. Ground 3 in revenue's appeal pertains to disallowance of payments made to clubs. Upon hearing the parties, we find that this issue is covered in favour of the assessee by the earlier orders of the Tribunal for the assessment years 2005-06 to 2011-12. Therefore, consistent with the earlier decisions of the Tribunal for the assessment years 2005-06 to 2011-12, we uphold the order of the Ld.CIT(A) on this issue. Ground 3 of the Revenue is dismissed.

8. In the result, appeal of the Revenue is partly allowed for statistical purpose.

Assessee's appeal:

9. Ground 1 in assessee's appeal pertains to depreciation on residential properties. The brief facts are that following the assessment orders for A.Ys 2006-07 to 2011-12, the Assessing Officer held that depreciation claimed in respect of house properties, income from which were chargeable as 'Income from house property', was not allowable. The depreciation claimed of Rs.6,56,258/- in respect of residential properties was thus, disallowed. On appeal, following his predecessor's orders for A.Ys. 2004-05 to 2011-12, the Ld.CIT(A) upheld the addition. Aggrieved, the assessee is in appeal before this Tribunal.

10. Upon hearing the parties, we note that this issue has been decided by the Tribunal in favour of the assessee for earlier years, i.e. A.Ys. 2004-05 to 2011-12.

There is no change in the facts and circumstances of the issue. Therefore, being consistent with earlier orders of the co-ordinates benches, we allow this ground raised by the assessee. Ground 1 of the appeal is allowed.

11. With regarding to grounds. 2 & 3 which pertain to depreciation on toll road, the facts in brief are that the Assessing Officer disallowed the depreciation claimed on toll road on the ground that the ownership of the toll road vests with the government and, therefore, the assessee is not the owner of the same. On appeal, the Ld.CIT(A) confirmed the disallowance in view of the judgement of the Hon'ble jurisdictional High Court in the case of North Karnataka Expressway Ltd vs CIT (2015) 372 ITR 145 (Bom), wherein it was held that the toll roads are built on land owned by the Government and that this decision was followed in the case of CIT vs West Gujarat Expressway Ltd (2017) 390 ITR 400 (Bom). The Ld.CIT(A) also found support from the decision of this Tribunal in the case of DCIT 14(3)(1) vs West Gujarat Expressway Ltd in ITA No.2118/Mum/2015 order dated 15/02/2107, wherein it was held as under:-

"6. We have gone through the orders passed by the lower authorities as well as orders passed by Hon'ble High Court. It is noted that since in the appeal filed against the original assessment order, Hon'ble High Court has held vide its judgement dated 05-04-2016 that claim of depreciation is not allowable to the assessee, the same decision would be applicable upon the issue raised by the Revenue before us. Once Hon'ble High Court has taken a view that depreciation is not allowable, the issue before us stands covered against the assessee for the reasoning given by the Hon'ble High Court in its order read along with the judgement relied upon by the Hon'ble High Court in its order. Thus, respectfully following the order of the Hon'ble High Court, we allow the appeal filed by the Revenue."

12. Heard rival submissions. The Ld.AR of the assessee submitted that the issue stands squarely covered by the decision of the Tribunal for the assessment

years 2010-11 and 2011-12 in ITA Nos. 7092 & 7091/Mum/2014, wherein the "C" Bench of this Tribunal by following the decisions of the Tribunal for assessment years 2008-09 and 2009-10 has restored the issue to the file of the Assessing Officer with direction to the Assessing Officer to decide the issue keeping in view the directions of the Tribunal for the A.Ys. 2004-05 to 2007-08. It may be noted that for the AYs 2008-09 & 2009-10, the Tribunal in ITA No.3786/Mum/2013, has observed as under :-

"25. It is submitted that by the Ld. Counsel for the assessee that this issue was also decided by the Tribunal in Para No. 11.10 for the A.Y.2004-05 and Para Nos. 32 for the A.Y. 2005-06 to 2007-08 and the Assessing Officer passed consequential order dated 31.12.2018 for the A. Y. 2004-05 restricting addition only to the amount awarded by arbitrator of Arbitration Tribunal and granted relief for the balance amount.

26. On a perusal of the order of the Tribunal we find that this issue was also considered by the Tribunal in Para No. 11.11 for the A.Y. 2004-05 and for the A.Y. 2005-06 to A.Y. 2007-08 and restored to the file of the Assessing Officer as extracted above. Thus, respectfully following the said decision, we restore this issue to the file of the Assessing Officer with a direction to follow the order the Tribunal for the A. Y. 2004-05 and for the A. Y. 2005-06 to A. Y. 2007-08 and decide accordingly. This ground is allowed for statistical purpose."

There is no change in the facts and circumstances of the case on this issue. Therefore, consistent with the earlier decisions of the Tribunal, we restore the issue to the file of the Assessing Officer to decide the same anew in line with the earlier directions of the Tribunal. This ground is allowed, for statistical purpose.

13. Grounds 4 to 7 pertain to disallowance under section 14A read with rule 8D of I.T. Rules, 1962.

14. Heard rival submissions. The Ld.AR of the assessee submitted that this Tribunal, for the assessment years 2004-05 to 2011-12, has restored the issue back to the file of the Assessing officer for decision afresh. The Ld.DR agreed to the proposition. We find that the Tribunal, for the assessment years 2010-11 and

2011-12 has restored the issue to the file of the Assessing Officer to follow the following directions issued by the Tribunal for the assessment years 2004-05 and 2005-06 to 2007-08:

"11. Ld. Counsel for the assessee submitted that Ground No.3 of grounds of appeal is relating to disallowance U/s. 14A r.w.s 8D(2)(iii) of I.T. Rules in respect of interest and the Tribunal for the A. Y. 2004-05 in ITA No. 3203/Mum/2008 and ITA.No. 3156/Mum/2008 dated 28.06.2017 set-aside the matter to the file of the Assessing Officer. It is also submitted that for the A. Y. 2005-06 to A. Y. 2007-08 the Tribunal restored this matter to the file of the Assessing Officer.

12 On the other hand, Ld. DR strongly supported the orders of the authorities below.

13. We have heard the rival submissions and perused the orders of the authorities below and the decision of the Tribunal in assessee's own cases. For the A. Y. 2004-05 the Tribunal at Para No. 6.2 held as under:

"6.2. We have heard the rival contentions. We find it is fairly settled legal position that strategic investments not capable of yielding exempt incomes and investments held as stock in trade are not to be considered for computation of Section 14A disallowance. Further, if the net-worth of the assessee is quite sufficient so as to cover the investments held by the assessee, a presumption has to be drawn that investments are out of own funds unless the nexus of borrowed funds with investments is established by the revenue. A perusal of Balance Sheet, at a glance, reveals that the assessee¹ Share Capital and Reserves & surplus stood at Rs.725.23 crores as against investment of Rs. 1394.44 crores, which prima-facie weakens the argument advanced by Ld. AR. However, the Ld. AR has contended that investment includes strategic investments, investment not capable of earning exempt incomes and investment held as stock in trade, which are not includible in the value of investments for the purpose of Section 14A disallowance. The Ld. AR has provided before us detailed working of adjusted investments in the light of his contentions. Also, we note that in the preceding paragraph, we have already restored the matter back to the file of AO to find out the closing stock valuation of the securities held as stock in trade and the income of which has been offered under the head business income. Therefore, in the light of these facts / observations, we remit the matter back to the file of AO to re-compute the said disallowance qua interest and administrative expenses after properly appreciating the capital structure of the assessee. The assessee is also directed to substantiate its claim forthwith in the light of our observations before the lower authorities, failing which the authorities shall be at liberty to decide the same on the basis of available material on record. The assessee's grounds of appeals stand allowed for statistical purposes."

14. Similarly, the Tribunal for the A.Y. 2005-06 to A.Y. 2007-08 in ITA.Nos. 3339/Mum/2011, ITA.No. 3340/Mum/2011 and 3341/Mum/2011 dated 30.04.2019 at Para No. 19 held as under: -

"19. We have heard both the parties, perused materials available on record and gone through the orders of authorities below. The facts with regard to applicability of provisions of section 14A was not disputed by the assessee. The only dispute is with regard to quantification of average value of investment considering the investment made in group/associate concerns for strategic investment purpose and also the element of commercial expediency in making investment. We find that the Hon'ble Supreme Court in the case of Maopp Investment Ltd. vs CIT (supra) had considered the issue of disallowance of expenses incurred in relation to exempt income including interest in light of arguments of the assessee that strategic investments made in group/associate concerns for the purpose of holding controlling interest cannot be considered for determination of average value of investments and held that even though investment are made in group/associate concerns for the purpose of holding strategic investment disallowances contemplated u/s 14A of the Act triggers the moment the assessee earned exempt income. However, the Hon'ble Court has not touched the concept of commercial expediency and consideration of disallowance on actual dividend yielding investment. Further, various Hon'ble Court including the High Court of Bombay in number of cases had held that only investment which yield exempt income needs to be included in average value of investment for the purpose of determination of interest expenditure and other expenditure. Therefore, we are of the considered view that the issue needs to be go back to the file of the AO for the purpose of determination of average value of investment and also quantum of disallowance of interest expenditure and other expenditure keeping in view that of the decision of the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. vs CIT (supra), hence, we set-aside the issue to the file of the AO and direct him to reconsider the issue in light of our discussion hereinabove."

15. Following the above said orders of the Tribunal we restore this issue to the file of the Assessing Officer to follow the directions of the Tribunal for the A. Y. 2004-05 to 2007-08 and recompute the disallowance in accordance with the directions therein. We also direct the Assessing Officer to recompute the disallowance keeping in view the decision of the special bench of Delhi in the case of ACIT vs Vireet Investments Private Limited (165 ITD 121). This ground is allowed for statistical purpose."

There is no change in facts and circumstances governing the issue. Therefore, consistent with the earlier decisions of this Tribunal, we restore this issue to the file of the Assessing Officer to follow the directions of the Tribunal for the A.Ys

2004-05 to 2007-08 and 2007-08, 2009-10, 2010-11 & 2011-12. Grounds 4 to 7 of the assessee are allowed for statistical purpose.

15. Assessee's appeal is partly allowed, for statistical purpose.

16. In the result, both, assessee's appeal and revenue's appeal are partly allowed for statistical purpose.

Order pronounced in the open court on 19th April, 2022.

Sd/-

(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, Dt : 19th April, 2022

Pavanan

sd/-

(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR,
ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai