

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESEIDENT
AND
SHRI PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.2475/Bang/2019
Assessment year : 2011-12

Atria Convergence Technologies Ltd., No.1, 2 nd & 3 rd Floor, Indian Express Building, Queens Road, Bangalore – 560 001. PAN : AACCA 8907B	Vs.	The Assistant Commissioner of Income Tax, Special Range 1, Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Aliasger Rampurwala, CA
Respondent by	:	Shri T. Roumuan Paite, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	27.06.2022
Date of Pronouncement	:	18.07.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal is against the order of the CIT(Appeals)-1, Bengaluru dated 30.9.2019 for the AY 2011-12.

2. Ground Nos.1 is general in nature, Ground no.6 is consequential and these grounds do not warrant separate adjudication. During the

course of hearing, the Id. AR did not press for ground No.5 and the same is dismissed as not pressed. The rest of the grounds as reproduced below are adjudicated in the ensuing paragraphs.

2.a) That the Ld. CIT(A) has erred in dismissing the claim of the Appellant towards revenue share payments of INR 32,440,761 in spite of concluding that the same is not in the nature of non-compete.

b) That the Ld. CIT(A) has erred in concluding that revenue share payments of INR 32,440,761 be not allowed as a deduction on account of inability of the Appellant to produce requisite documentation from the Local Cable Operators (LCOs).

c) That the Ld. CIT(A) has erred in failing to appreciate the fact that the payments to LCOs were duly substantiated by the financials and documentation submitted to the Assessing Officer and Ld. CIT(A).

3.a) That the CIT(A) has erred in confirming the disallowance to the extent of INR 5,269,856 made by the AO of the amount of sundry creditors as cessation of liability under section 40) of the Act.

b) That the CIT(A) has erred in failing to appreciate the fact that the liability existed in AY 2011-12 and such liabilities ceased to exist only in subsequent assessment years.

c) That the CIT(A) has erred in disallowing the outstanding sundry creditors of INR 5,269,856 in AY 2011-12 vis-à-vis the year in which such creditors ceased to exit.

4.a) That the CIT(A) erred in confirming the disallowance under section 14A read with Rule 8D.

b) That the Commissioner of Income Tax (Appeals) failed to appreciate that the provisions of section 14A read with Rule 8D are not invocable in the facts and circumstances of the case.

c) That the CIT(A) failed to appreciate the fact that no expenditure was incurred for earning the impugned exempt income.

d) That the CIT(A) erred in the disallowing expenditure amounting to INR 3,082,326 under section 14A read with Rule 8D (2)(iii).

3. The assessee is a private limited company engaged in the business of Cable TV, Internet and other broadband services across various cities in India. It filed return of income for AY 2011-12 on 30.9.2011 declaring a loss of Rs.33,25,10,204 and later filed a revised return on 20.2.2012 declaring a loss of Rs.33,32,12,461. The case was selected for scrutiny and notice u/s. 143(2) served on the assessee. The AO called for various details from time to time and concluded the assessment by making the following additions/disallowances:-

Particulars		Amount (INR)
Total income as per the return	A	(33,32,13,461)
Add:		
1) Disallowance under section 40(a)(ia) – Payment to LCOs without TDS		3,24,40,761
2) Disallowance of interest claimed under section 36(1)(iii)		65,54,079
3) Addition under section 41(1) for unconfirmed creditors		56,69,918
4) Disallowance under section 14A		47,67,489
5) Undisclosed receipts as per 26AS		31,91,097
6) Excess claim of depreciation on Non-compete fees		63,75,000
7) Borderline Depreciation on assets		15,01,628
8) Disallowance of claim of depreciation on network acquisition		13,87,006
9) Disallowance of belated remittance of employees' contribution to ESI		38,270
Total Additions	B	6,19,25,248
Total income assessed under section 143(3) of the Act	C=A+B	(27,12,88,213)

4. On appeal, the CIT(Appeals) gave partial relief and upheld the addition/disallowance pertaining to items (1), (3), (4) & (8) listed above. Aggrieved by the order of the CIT(Appeals), the assessee is in appeal before us.

Disallowance of payments to local cable operator towards revenue share (Ground 2)

5. The assessee during the year under consideration has debited a sum of Rs.3,24,40,761 under the head 'other expenses' towards 'revenue share payments'. The assessee submitted before the AO that these amounts are paid to the local cable operators (LCO) as a share in the revenue as these income pertain to the LCOs by overriding title as per the terms agreed with the LCOs. Accordingly, 60% of the gross revenue collected on account of Cable TV subscription and the remaining 40% belongs to the LCOs based on customer points agreed. The assessee therefore submitted that the 40% of the revenue is collected on behalf of the LCO to be passed on to them and hence there is no requirement to deduct tax at source.

6. The AO did not accept the contentions of the assessee and stating that the payments are chargeable in the hands of the LCOs as business income and provisions of section 194J r.w.s. 28(va) of the Income-tax Act, 1961 [the Act] clearly applies to the assessee. He therefore disallowed the amount paid by the assessee as revenue share u/s. 40(a)(i) by treating it as a non-compete fees.

7. On further appeal, the CIT(Appeals) accepted the contention of the assessee that the amount paid as revenue share is not a non-compete fee to attract TDS provisions. He analysed the various clauses of MoU to come to the conclusion that the said payment is in the nature of revenue share parted by the assessee to the LCOs for having shared their existing running business of cable-television network for common good and the same cannot be considered as non-compete fee. However, the CIT(Appeals) required the assessee to produce the Income-tax returns of the LCOs to verify whether the LCOs had accounted the revenue share as their income. Since the assessee expressed its inability to furnish the same, the CIT(Appeals) confirmed the disallowance of the entire amount by stating that the same cannot be allowed unless the genuineness and character of the same is established. Aggrieved, the assessee is in appeal before the Tribunal.

8. The ld. AR submitted that the complete list of payments made to LCOs towards revenue share with party-wise details was furnished before the CIT(Appeals). He also submitted that the ledger copies substantiating the accounting and payments made through banking channel was also furnished before the CIT(A). He submitted that it would not be possible for the assessee to ask for the ITRs of the LCOs as no third party would be willing to share such information.

9. The ld. DR supported the order of the CIT(Appeals).

10. We have considered the rival submissions and perused the material on record. The assessee has an agreement with LCOs whereby 40% of revenue collected would be passed on to the LCOs. The assessee has shown the amount as an expense under the head 'Other expenses'. We notice that the assessee had submitted the party-wise details along with ledger copy before the CIT(A). The CIT(A) had gone through the various clauses of MoU between the assessee and the LCOs to come to the conclusion that 40% of the revenue shared by the assessee with the LCOs is not a non-compete fee as held by the AO. However, the CIT(Appeals) questioned the genuineness of the payment and confirmed the disallowance merely on the reason that ITRs of the LCOs were not produced. This, in our view, is not the correct approach to conclude that an expenditure is not genuine. The CIT(Appeals) is bound to scrutinize the documents submitted before him to decide the eligibility of the deduction, more so when the assessee claims that the payments are made through proper banking channels. If the CIT(A) had any doubt with regard to the genuineness of the payment, he could have drawn sample transactions from the list produced by the assessee and summoned the parties to verify the genuineness. Without proper scrutiny of the details submitted and without calling for any additional information from the assessee to substantiate the claim, the CIT(Appeals) rejected the claim of the assessee merely on the ground on non-submission of ITRs of the LCOs. This, in our considered view, is not legally tenable and we therefore remit the issue back to the CIT(Appeals) to verify the details

submitted by the assessee to get into the root of the transactions and decide the allowability of the claim in accordance with law. Needless to say that the assessee should be afforded reasonable opportunity of being heard.

Addition u/s. 41(1) of the Act for unconfirmed creditors (Ground 3)

11. During the course of assessment, the AO noticed that the assessee has shown certain amounts as sundry creditors in the balance sheet and called for further details from the assessee. On verification of the details furnished, the AO noticed that some of the amounts payable is outstanding for more than 3 financial years and that there has not been any transactions in these accounts for 3 years. The AO asked for the details of subsequent repayments to the sundry creditors, which the assessee could not substantiate. He therefore relying on various judicial pronouncements concluded the assessment by holding that the assessee could not prove the genuineness and treated it as non-existent to bring it to tax u/s. 41(1) of the Act.

12. Before the CIT(Appeals) the assessee submitted that the liabilities towards sundry creditors existed during the year, however, due to various operational reasons, the confirmation letter could not be obtained. The subsequent transactions in the sundry creditors account was furnished before the CIT(Appeals). The CIT(Appeals) was of the view that the failure on the part of the assessee to produce confirmation letters and the fact that some of the sundry creditors are written off in

the subsequent years is enough proof for cessation of liability and he upheld the order of the AO.

13. Before us, the Id. AR reiterated the submissions made before the lower authorities. He drew our attention to the decision of the Hon'ble Karnataka High Court in the case of *PCIT v. B.T. Nagaraj Reddy [2019] 106 taxmann.com 308* where a similar issue was held in favour of the assessee.

14. The Id. DR supported the orders of the lower authorities and submitted that there has not been any movement in the balances as held by the AO which proves that there is cessation of liability.

15. We have considered the rival submissions and perused the material on record. The assessee has produced the details of balances in the sundry creditors account [page 209 PB] along with the ledger extract before the lower authorities which is reproduced below:-

Creditor Name	Amount (INR)	Relief by CIT(A)	Balance Amount	Adjustment made	Page No. of
Royalty Cable Video	2,758,313	400,000	2,358,313	Written back in books in AY 2013-14	73
Mantralaya Network	4,600		4,600	Liability transferred to ABS in AY 2014-15	74
Advent Entertainment Dollars Colony	22,220		22,220	Liability transferred to ABS in AY 2015-16	
Arjun Cables	38,931		38,931	Liability transferred to ABS in AY 2015-16	
Galaxy Satellite Network	40,000		40,000	Liability transferred to ABS in AY 2015-16	
Radhamma Cable Network	46,246		46,246	Liability transferred to ABS in AY 2015-16	
Rakesh Cable Video	32,000		32,000	Liability transferred to ABS in AY 2015-16	
Sree Sat Vision — Doddekunts	1,804		1,804	Liability transferred to ABS in AY 2015-16	

A E Logistics (P) Ltd	22,058		22,058	Written back in books in AY 2012-13	72
Avaya Global Connect	1,032,557		1,032,557	Written back in books in AY 2014-15	71
QUIQOM	283,536		283,536	Written back in books in AY 2014-15	7 ¹
Link / Feed Charges - Siti Cable	1,387,591		1,387,591	Written back in books in AY 2017-18	70
Total	5,669,856	400,000	5,269,856		

16. We notice that the Hon'ble High Court of Karnataka in the case of *B.T. Nagaraja Reddy (supra)* has considered a similar issue and held as follows:-

“5. Having heard the learned counsel for the appellants and on perusal of the appeal papers, we are of the view that no substantial question of law would arise for consideration in this appeal. Under Section 260A of the Act, the appeal from the order of the ITAT could be entertained by the High Court if it is satisfied that the appeal involves a substantial question of law. In the case on hand, the assessee filed returns for the assessment year 2011-12. The case of the assessee was selected for scrutiny and notice was issued under Section 143(2) of the Act on 06.08.2013. Subsequently, notice dated 24.02.2014 was issued asking the assessee to explain sundry creditors which have been continued in the books of accounts without any change. He was also asked to explain why the unclaimed credit balances should not be brought to tax invoking Section 41(1) of the Act. The assessee submitted his explanation with regard to sundry creditors. The Assessing Authority on the ground that the assessee has not furnished PAN numbers or address of the creditors brought to tax an amount of Rs.2,52,71,577/-. The assessee filed appeal against the assessment order. The Appellate Authority allowed the appeal and deleted addition of Rs.2,52,71,577/- for the purpose of taxation holding that the Assessing Officer has failed to make any cross-verification as to remission or cessation of liability before invoking the provision of Section 41(1) of the Act. The revenue filed

appeal against the appellate order before the ITAT. The ITAT also rejected the appeal of the revenue holding that the Appellate Authority has rightly deleted the addition noting that there is no evidence to show remission of liability or cessation of liability.

6. Section 41(1) of the Act reads as follows:

'(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year;-

(a)	the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or
(b)	the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

Explanation 1:- For the purposes of this sub-section, the expression "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof" shall include the remission or cessation of any liability by a unilateral act by the first-mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts.

Explanation 2:- For the purposes of this sub-section, "successor in business" means, -

(i)	where there has been an amalgamation of a company with another company, the amalgamated company;
(ii)	where the first-mentioned person is succeeded by any other person in that business or profession, the other person;
(iii)	where a firm carrying on a business or profession is succeeded by another firm, the other firm;
(iv)	where there has been a demerger, the resulting company.'

To attract the above provision, the Assessing Officer, based on available material ought to have verified as to whether there is any remission or cessation of liability. In the absence of any such verification, the Assessing Officer could not have added such amount of credit for taxation. Therefore, the Tribunal has rightly held that in the absence of any material evidence, the assessing authority could not have invoked Section 41(1) of the Act. We see no error or illegality in the order passed by the ITAT.

7. As stated above, no substantial question of law would arise for consideration in the appeal. Accordingly, the appeal is dismissed.”

17. The Hon’ble High Court in the above case has clearly laid down the principle that without proper verification of the amount standing to

the credit of the provision account, it cannot be concluded as a remission or cessation of liability. In the present case, the assessee has produced the list of creditors and ledger accounts before the revenue authorities and submitted that the confirmation letters could not be produced due to business/operational reasons. The lower authorities came to the conclusion that there is a cessation of liability merely because confirmation letters were not produced without looking into the documents submitted by the assessee. This, in our view, is not a fair approach for making the disallowance. Considering the facts of the case and following the ratio laid down by the jurisdictional High Court in the case cited *supra*, we delete the addition made on this count. This ground of the assessee is allowed.

Disallowance of expenditure u/s. 14A r.w.s. Rule 8D (Ground 4)

18. The AO noticed that the assessee has made investments and earned certain tax free income and not disallowed any expenditure towards earning the exempt income. Therefore, the AO invoking the provisions of section 14A r.w. R.8D computed the amount of disallowance as under:-

(i)	The amount of expenditure directly relating to income which does not form part of total income	NIL
(ii)	Interest expenses not directly attributable to any particular income or receipt then $A \times B / C$	Rs.16,85,163
(iii)	$\frac{1}{2}$ % of the average of the value of investments, income from which does not or shall not form part of the total income	Rs.30,82,326
	Disallowance as per Rule 8D	Rs.47,67,489

19. The CIT(Appeals) deleted the addition under Rule 8D(2)(ii) on the ground that the assessee is having interest free own funds sufficient to explain the investments yielding exempt income. He, however, confirmed the disallowance under Rule 8D(2)(iii) on the basis that the assessee is deemed to have incurred general administrative expenses to manage the investments. Aggrieved, the assessee is in appeal before the Tribunal.

20. Before us, the Id. AR submitted that while considering the average investment, the AO has taken the whole of the investments at the beginning and at the end of the year, whereas only those investments which yield tax free income ought to be considered for the purpose of computing the disallowance under Rule 8D(2)(iii). In this regard, he relied on the decision of the ITAT Delhi Bench in the case of *ACIT v. Vireet Investment (P.) Ltd.*, [2017] 82 taxmann.com 415 (Del Trib.)(SB) wherein it was held as under:-

“11. We have considered the submissions of both the parties and have perused the record of the case. The basic issue for consideration is that the investment, which did not yield any exempt income, should enter or not enter into the computation under Rule 8D, while arriving at the average value of investment, income from which does not or shall not form part of the total income.

11.1 In the present case, our decision is restricted only to the extent of interpretation of language employed in Rule 8(2)(iii). The submission of Id. counsel for the assessee is that this issue is now covered by the decision of the Hon'ble

Delhi High Court in the case of CIT v. Hofcin India (P.) Ltd. (supra), wherein it has been held that if no dividend income was earned, section 14A could not be invoked.

The Hon'ble Delhi High Court has referred to the decisions, which we have noted earlier i.e.:

- Shivam Motors (P) Ltd's. case (supra)
- Winsome Textile Industries Ltd's. case (supra)
- Lakhani Marketing Inc. case (supra)
- Corrtch Energy (P.) Ltd's. case (supra).
- CIT v. Hero Cycles Ltd. [2010] 323 ITR 518/189 Taxman 50 (Punj. & Har.).

11.2 The submission of Id. Principal CIT(DR) is that ITAT in the case of Delhi Special Bench in the case of Cheminvest Ltd. (supra) has specifically held that even if there is no exempt income, the provisions of section 14A are applicable in view of the decision of Hon'ble Supreme Court in the case of Rajendra Prasad Moody (supra). His submission is that the decision of Hon'ble Delhi Court reversing the decision of Special Bench in Cheminvest should not be followed because that is contrary to the principles laid down in Rajendra Prasad Moody's case (supra).

11.3 It is against these submissions, we first refer to the facts as were obtaining in these two decisions.

11.4 In the case of Cheminvest Ltd. (supra), the assessee had borrowed funds of Rs. 8,51,65,000/- and during the previous year relevant to assessment year 2004-05 paid interest of Rs. 1,21,02,367/-thereon. Out of this unsecured loan, the assessee invested a sum in purchase of shares, which was shown as investment for the purpose of long term capital gains. The AO disallowed interest proportionate to the investment in shares, though no exempt income was earned during the year. The CIT(A) affirmed this but held that the net interest debited to the P&L A/c was required to be apportioned and not the interest expenditure. The Tribunal held that interest expenditure incurred by the assessee was

for borrowing used for the purposes of investment in shares, both held for trading as well as investment purposes. Irrespective of whether or not there was any yield of dividend on the shares purchased, the interest incurred was relatable to earning of dividend on the shares purchased. The dividend income being exempted from tax by virtue of section 10(34) of the Act, the interest paid on borrowed capital utilized in purchase of shares, being the expenditure incurred in relation to dividend income not forming part of the assessee's total income, was held to be not an allowable deduction. In coming to the conclusion, the Special Bench primarily relied on the ratio laid down by the Hon'ble Supreme Court in the case of Rajendra Prasad Moody (supra).

11.5 In the case of Rajendra Prasad Moody (supra), the facts were that the assesseees were brothers and each of them had borrowed moneys for the purposes of making investment in shares of certain companies. During the relevant assessment year they paid interest on the moneys borrowed but did not receive any dividend on the shares purchased with these moneys. Both of them made a claim for deduction of the amount of interest paid on borrowed moneys but this claim was negated by the ITO and on appeal by the AAC on the ground that during the relevant assessment year the shares did not yield any dividend and, therefore, interest paid on the borrowed moneys could not be regarded as expenditure laid out or expended wholly and exclusively for the purposes of making or earning income chargeable under the head 'income from other sources', so as to be allowable as a permissible deduction u/s 57(iii). The Tribunal, however, on further appeal, disagreed with the view taken by the taxing authorities and upheld the claim of each of the two assesseees for deduction u/s 57(iii).

11.6 In the backdrop of these facts the Tribunal's order was upheld by the Hon'ble High Court and Hon'ble Supreme Court. The Hon'ble Supreme Court, inter alia, held that it is

the purpose of the expenditure that is relevant in determining the applicability of section 57(iii) and that purpose must be making or earning of income. It was further held that section 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of section 57(iii) to suggest that the purpose, for which the expenditure is made, should fructify into any benefit by way of return in the shape of income.

11.7 Thus, in both the decisions viz. in the case of Cheminvest Ltd. (supra), and in the case of Rajendra Prasad Moody (supra), the issue related to allowability of expenditure which had direct nexus with the earning of income. The borrowing in both the cases has not been disputed being for acquiring shares. Hon'ble Delhi High Court has specifically held in para 21 as under:—

"21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in Rajendra Prasad Moddy (supra) was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is for the purpose of making or earning such income'. Section 14A of the Act on the other hand contains the expression 'in relation to income which does not form part of the total income.' The decision in Rajendra Prasad Moody (supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act. "

11.8 In the case of Holcin India (P) Ltd. (supra) the facts were that the respondent- assessee was a subsidiary of Holderind Investments Ltd., Mauritius, which was formed as a holding company for 'making downstream investments in cement manufacturing ventures in India. In the return of income filed for the Assessment Year 2007-08, the

respondent-assessee declared loss of Rs. 8.56 Crores approximately. The respondent-assessee had declared revenue receipts of Rs. 18,02,274/- which included interest of Rs. 726/- from Fixed Deposit Receipts and profit on sale of fixed assets of Rs. 16,52,225/-. As against this, the respondent assessee had claimed administrative and miscellaneous expenditure written off amounting to Rs. 8.75 Crores. For the Assessment Year 2008-09, the assessee had filed return declaring loss of Rs. 6.60 Crores approximately. The assessee had declared revenue receipts in the form of foreign currency fluctuation difference gain of Rs. 12,46,595/-. It had claimed expenses amounting to Rs. 7.02 Crores as personal expenses, operating and other expenses, depreciation and financial expenses.

11.9 In both the assessment orders, the Assessing Officer held that the respondent-assessee had not commenced business activities as they had not undertaken any manufacturing activity or made downstream investments. It was observed that the respondent-assessee, after receiving approval of Foreign Investment Promotion Board (FIPB) dated 20.12.2000 acquired shares capital of Ambuja Cement India Ltd. This, the Assessing Officer felt, was not sufficient to indicate or hold that the respondent-assessee had started their business. He, accordingly, disallowed the entire expenditure of Rs. 8.75 Crores for the Assessment Year 2007-08 and Rs. 7.02 Crores for the Assessment Year 2008-09.

11.10 Ld. CIT(A) did not agree with the findings of Assessing Officer that the business of the respondent-assessee had not been set up or commenced. The CIT(A) observed that the respondent-assessee had been set up with the business objective of making investment in cement industry after due approval given by the Government of India, Ministry of Commerce and Industry vide letter dated 18.12.2002 and 20.12.2012. It was observed that in fact, the respondent-assessee was not to undertake any manufacturing

activity themselves. After considering the FIPS approval and the purchase of shares in the said company of Rs. 1850.91 crores, Id. CIT(A), inter alia, observed that the assessee was engaged in the business of holding of investment and was entitled to claim expenditure provided. There was a direct connection between expenditure incurred and business of the assessee company. However, he pointed out that since the business of the respondent-assessee was to act as a holding company for downstream investment and as it was an accepted fact that they had incurred expenses to protect their business and explore new avenues of investment, the provisions of section 14A were applicable.

11.11 The Hon'ble High Court observed that the reasoning given by the CIT(A) was ambiguous and unclear and on clarity being sought from the Revenue it was pointed out that "the stand of the assessee contained a contradiction to the extent that on the issue of setting up of business, it was stated that the assessee had incurred expenditure on acquiring the shares, therefore, the assessee could not now take different stand than the one taken in the first issue".

11.12 The Hon'ble High Court, after considering in detail the decision of Id. CIT(A) finally observed in para 13 as under:

"13. We. are confused about the stand taken by the appellant-Revenue. Thus, we had asked Sr. Standing Counsel for the-Revenue, to state in his own words, their stand before us. During the course of hearing, the submission raised was that the shares would have yielded dividend, which would be exempt income and therefore, the CIT(A) had invoked Section 14A to disallow the entire expenditure. The aforesaid submission does not find any specific and clear narration in the reasons or the grounds given by the CIT(A) to make the said addition. Possibly, the CIT(A), though it is not argued before us, had taken the stand that the respondent-assessee had made investment and expenditure was incurred to protect

those investments and this expenditure cannot be allowed under Section 14A."

11.13 Thus, Hon'ble Delhi High Court primarily decided the issue regarding applicability of section 14A even if no dividend income was earned. The Hon'ble High court in paras 14 to 16 of its decision observed as under:

'14. On the issue whether the respondent-assessee could have earned dividend income and even if no dividend income was earned, yet Section 14A can be invoked and disallowance of expenditure can be made, there are three decisions of the different High Courts directly on the issue and against the appellant-Revenue. No contrary decision of a High Court has been shown to us. The Punjab and Haryana High Court in Commissioner of Income Tax, Faridabad v. M/s. Lakhani Marketing Incl, ITA No. 970/2008, decided on 02.04.2014, made reference to two ' earlier decisions of the same Court in CIT v. Hero Cycles Limited, [2010] 323 ITR 518 and CIT vs. Winsome Textile Industries Limited, [2009] 319 ITR 204 to hold that Section 14A cannot be invoked when no exempt income was earned. The second decision is of the Gujarat High Court in Commissioner of Income Tax-I v. Corrttech Energy (P.) Ltd. [2014] 223 Taxmann 130 (Guj.). The third decision is Of the Allahabad High Court in Income Tax Appeal No. 88 of 2014, Commissioner of Income Tax II Kanpur, v. M/s. Shivam Motors (P) Ltd. decided on 05.05.2014. In the said decision it has been held:-

"As regards the second question, Section 14A of the Act provides that for the purposes of computing the total income under the Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. Hence,

what Section 14A provides is that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for earning the income is not an allowable deduction. For the year in question, the finding of fact is that the assessee had not earned any tax free income. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. The view of the CIT(A), which has been affirmed by the Tribunal, hence does not give rise to any substantial question of law. Hence, the deletion of the disallowance of Rs. 2,03,752/- made by the Assessing Officer was in order"

15. Income exempt under Section 10 in a particular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether Income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term, capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax: It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not all improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax.

16. what is also noticeable is that the entire or whole expenditure has been disallowed as if there was no expenditure incurred by the respondent-assessee for conducting business. The CIT(A) has positively held that the business was set up and had commenced. The said finding is accepted. The respondent-assessee, therefore, had to incur expenditure for the business in the form of investment in shares of cement companies and to further expand and consolidate their business. Expenditure had to be also incurred to protect the investment made. The genuineness of the said expenditure and the fact that it was incurred for business activities was not doubted by the Assessing Officer and has also not been doubted by the CIT(A).'

11.14 Now the position of law as stands is that the decision of Hon'ble Jurisdiction High Court is directly on the point in dispute whereas the decision of Hon'ble Supreme court in the case of Rajendra Prasad Moody (supra) has been rendered in the context of section 57(iii), the applicability of which has been ruled out by Hon'ble Delhi High Court in the case of Cheminvest (supra).

11.15 Under Article 227 of the Constitution of India, the courts function under the supervisory jurisdiction of Hon'ble High Court. The decisions rendered by Hon'ble High Court are binding on all subordinate courts working within its jurisdiction. In this regard we may refer to the following decisions:—

'(i) CIT v. Thana Electricity Supply Ltd. (1994) 206 ITR 727 (Bom.), wherein on the issue of "whose decision is binding on whom", the Hon'ble Bombay Court considered in detail the hierarchy of the courts and has observed as under:

"It is also well-settled that though there is no specific provision making the law declared by the High Court binding on subordinate courts, it is implicit in the power of supervision conferred on a superior

Tribunal that the Tribunals subject to its supervision would conform to the law laid down by it. It is in that view of the matter that the Supreme Court in *East India Commercial Co. Ltd. v. Collector of Customs* AIR 1962 SC 1893 (at page 1905) declared:

"We, therefore', hold that the law declared by the highest court in the State is binding on authorities or Tribunals under its superintendence, and they cannot ignore it."

This position has been summed up by the Supreme Court in *Mahadeolal Kanodia v. Administrator General of West Bengal* AIR 1960 SC 936 (at page 941) as follows:

"Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view, the result would be utter confusion. The position would be equally bad where a judge sitting singly in the High Court is of opinion that the previous decision of another single judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench."

The above decision was followed by the Supreme Court in *Baradakanta Mishra v. Bhimsen Dixit*, AIR

1972 SC 2466, wherein the legal position was reiterated in the following words (at page 2469) :

"It would be anomalous to suggest that a Tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a Tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer,"

(ii) CIT v. Sunil Kumar (1995) 212 ITR 238 (Raj.), it was observed as under:

"The point which has been raised could have been considered to be debatable because other High Courts have taken a different view. But since the view taken by this court is binding on the Tribunal and other authorities under the Act in this State, it could not be considered to be a debatable point in view of the decision of this court in the case of CIT v. M.L., Sanghi [1988] 170 ITR 670."

(iii) Indian Tube Company Ltd. v. CIT & others (1993) 203 ITR 54 (Col.) , it was observed as under:

"In the impugned order, respondent No.1 has rejected the petitioner's contention by stating that, although the Calcutta High Court had held that an

assessee was entitled to interest on such refund calculated up to the date of the order passed consequent upon an appeal or revision of the original assessment, this view had not been accepted by the Bombay High Court, the Allahabad High Court and the Kerala High Court. Respondent No.1, accordingly, chose to accept the view of the Bombay, Allahabad and Kerala High Courts in preference to the view of the Calcutta High Court.

In my view, the order of respondent No. 1 cannot be sustained on the simple ground that respondent No. 1 is an authority operating within the State of West Bengal and is bound by the decisions of the High Court of this State (see CIT v. Indian Press Exchange Ltd. [1989] 176 ITR 331 (Cal) ; East India Commercial Co. Ltd. v. Collector of Customs AIR 1962 SC 1993, paragraph 29).

In that view of the matter, the impugned order must be set aside and the Commissioner is directed to consider the matter afresh in keeping with the decisions of this court after giving the petitioners an opportunity of being heard. At least 48 hours clear notice must be given to the petitioners. The Commissioner will communicate the final order to the petitioner within eight weeks from the date of hearing.

(iv) CIT v. J.K. Jain [1998] 230 ITR 839 (P&H), observing as under:

"We have carefully examined the records and have heard learned counsel representing the parties. We are in respectful agreement with the view expressed by the Allahabad High Court in Omega Sports and Radio Works' case [1982] 134 ITR 28, as also the decision of this court in Mohan Lal Kansal's case [1978] 114 ITR 583. Following the decision in the two cases referred to above, we hold that it was not a case of divergence

of opinion inasmuch as the opinion expressed by this court was binding upon the Tribunal."

11.16 Therefore, in our considered opinion, no contrary view can be taken under these circumstances. We, accordingly, hold that only those investments are to be considered for computing average value of investment which yielded exempt income during the year.

11.17 As far as argument relating to meaning to be ascribed to the phrase 'shall not' used in Rule 8D(2)(iii) is concerned, the Revenue's contention is that it refers to those investments which did not yield any exempt income during the year but if income would have been yielded it would have remain exempt. There is no dispute that if an investment has yielded exempt income in a particular year then it will enter the computation of average value of investments for the purposes of Rule 8D(2)(iii). The assessee's contention that if there is no certainty that an income, which is exempt in current year, will continue to be so in future years and, therefore, that investment should also be excluded, is hypothetical and cannot be accepted.

11.18 In view of above discussion, the matter is restored back to the file of AO for recomputing the disallowance u/s 14A in terms of above observations. Thus, revenue's appeal is dismissed and assessee's cross-objection, on the issue in question, stand allowed for statistical purposes, in terms indicated above."

21. In the instant case, the AO has considered the entire investments for the purpose of arriving at the average investments, which is not in conformity with the ratio laid down by the decision of the Delhi Special Bench (*supra*). Respectfully following this decision of the Special Bench, we remit the issue back to the AO to recompute the disallowance u/s. 14A r.w. R.8D(2)(iii) taking into account only those

investments for computing average value of investment which yielded exempt income during the year.

22. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 18th day of July, 2022..

Sd/-
(N V VASUDEVAN)
VICE PRESIDENT

Sd/-
(PADMAVATHY S)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 18th July, 2022.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.