

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" DELHI**

**BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.As. No.5935, 5936, 5937, 5938/DEL/2019
Assessment Years 2014-15, 2015-16, 2016-17 & 2017-18

Deputy Commissioner of Income Tax, Central Circle-31, New Delhi.	Vs.	M/s. Bhilwara Energy Ltd., 40-41, Bhilwara Bhawan, Community Centre, New Friends Colony, New Delhi.
TAN/PAN: AACCB9081B		
(Appellant)		(Respondent)

Appellant by:	Shri P.K. Jain, CA		
Respondent by:	Shri Amaresh Singh, CIT-DR		
Date of hearing:	21	06	2022
Date of pronouncement:	02	08	2022

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeals have been filed by the Assessee against the consolidated order of the Commissioner of Income Tax (Appeals)-XXX, New Delhi ('CIT(A)' in short) dated 30.04.2019 arising from the common assessment order dated 29.12.2008 passed by the Assessing Officer under Section 153A/143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2014-15, 2015-16, 2016-17 and 2017-18.

2. As per its grounds of appeal, the assessee has challenged the disallowances made under Section 14A of different amounts which is tabulated year-wise hereunder:

Assessment Year	Disallowances made u/s 14A in Rs.	Total Investment	Investment other than subsidiaries i.e. share of Punjab & Sind Bank	Total Exempt income in Rs.
2014-15	9,90,90,229	473,49,30,273	58,680	2093
2015-16	9,86,94,172	476,81,80,229	58,680	293
2016-17	10,11,01,788	476,81,80,229	58,680	293
2017-18	8,51,38,444	476,81,21,549	58,680	Nil

3. The CIT(A) by its combined and consolidated order for all the assessment years in question has disposed of all the issues in favour of the assessee. The submission made by assessee and conclusion drawn thereon by CIT(A) is reproduced hereunder:

In reference to the allowance of Rs.9,90,90,229/- the following is submitted:

1. Whereas the facts of the case do exhibit the nature of transaction is of investment in the subsidiary companies which were formed part of the business of the holding company i.e. the assessee company. In such circumstances when the holding company is making investment in subsidiary companies for achievement of its objects and to enhance the same business by diversification of its investment through separate special purpose vehicles, it cannot be said to have made investment to earn tax free income even if the investment is made in equity shares of these companies. The said matter has been decided by the Hon'ble Jurisdictional High Court in the case of CIT Vs. Holcim India P. Ltd IT A No.486/2014.

2. Now the question arises as to whether the interest paid on the funds borrowed by the company or such expenditure incurred by

the assessee company was incurred for its business commercial expediency or not. It is also brought to your kind consideration that the assessee company is a holding company of several companies namely;

<i>S No.</i>	<i>Name of the subsidiary company</i>	<i>% of Investment</i>
1.	<i>AD Hydro Power Ltd</i>	<i>Sub. of MPCL by 88%</i>
2.	<i>Malana Power Co. Ltd</i>	<i>51%</i>
3.	<i>Indo Canadian Consultancy Ser. Ltd</i>	<i>51%</i>
4.	<i>NJC Hydro Power Ltd</i>	<i>100%</i>
5.	<i>Bhilwara Green Energy Ltd</i>	<i>100%</i>
6.	<i>Chango Yangthang Hydro Power ltd</i>	<i>100%</i>
7.	<i>LNJ Power Ventures Ltd.</i>	<i>74%</i>
8.	<i>Green Ventures Private Ltd</i>	<i>83.86%</i>
9.	<i>Balephi Jalvidyut Co. Ltd</i>	<i>95.86%</i>

2.1 The assessee company's main business is to carry on the business of power which is evident with the copy of Main objects of the company annexed herewith. The main objects consist of power generation and related business and ancillary objects consists of all such activity which are incidental to the main objects of the company. As per para 24 of the ancillary objects which is reproduced as below:

"24. To form, incorporate, promote any company or companies whether in India or elsewhere, having amongst its or their objects the acquisition of all or any of the assets or control management or development of the company or any other object or objects which in the opinion of the Company could or might assist the company in the management of its business or the development of its properties or otherwise prove advantageous to the Company and to pay all or any of the costs and expenses incurred in connection with any such

promoter or incorporation and to remunerate any person or company in any manner it shall think fit for services rendered or to be rendered, in obtaining subscription for or placing or assisting to place or to obtain subscription for or for guaranteeing the subscription of or the placing of any shares in the capital of the Company or any bonds, debentures, obligations or securities of any other such Company held or owned by the company or in which the Company has any interest in or about the formation or promotion of any other such company in which the Company may have an interest."

2.2 *Accordingly the company is borrowing the funds for achievement of its main objective and the funds have been utilized for the purpose of the business.*

2.3 *Under the scheme of the Act, interest incurred by an assessee is allowable business expenditure under section 36(1)(iii) of the Act, subject to the following conditions:*

- *money should be borrowed by the assessee;*
- *the same must be borrowed for the purpose(s) of the business; and*
- *the assessee must have paid interest on the borrowed amount.*

2.4 *Once the aforesaid three conditions are satisfied,- interest paid on capital borrowed is to be allowed as deduction under section 36(1)(iii) of the Act.*

2.5 *On perusal of the aforesaid, it will be noticed that one of the pre-conditions for allowability of interest expenditure under section 36(1)(iii) of the Act is that the funds must be borrowed for the purpose(s) of the business. It is therefore, necessary to establish, on facts, that the funds, on which interest has been*

paid and claimed as deduction, were not only borrowed but were also actually utilized for the purpose(s) of the business.

2.6 *The Supreme Court in the case of CIT vs. Malayalam Plantations Limited: 53 ITR 140 at page 150 of the judgment explained the expression "for the purpose of the business".*

2.7 *The aforesaid view has been reiterated in the following cases:*

- *CIT v, Birla Cotton Spg. And Wvg. Mills Ltd.: 82ITR166 (SC)*
- *Madhav Prasad jatia v. CIT U.P.: 118 ITR 200 (SC)*

2.8 *In other words, as per section 36(l)(iii), the amount of interest paid in respect of capital borrowed for the purpose(s) of the business is allowed as business deduction in computing the income of the assessee under the head "profits and gains of business or profession " in terms of section 28 of the Act.*

2.9 *The above view is supported by the decision of the Supreme Court in the case of SA Builders v. CIT: 288ITR1 wherein the apex Court held that in case an assessee has made interest free advances to its sister concern out of the funds borrowed for business purposes on which interest is payable, the real test to determine whether the interest is allowable or not is to iudae whether this was done as a measure of commercial expediency or not.*

2.10 *The apex Court affirmed the decision of the Delhi High Court in CIT Vs. Dalmia Cement: 254 ITR 377, and held that once nexus has been established between the interest paid and the purpose of the business, the Revenue cannot sit in judgment over the reasonableness of the expenditure and the interest paid by the assessee on the borrowed funds advanced to sister*

concerns is allowable deduction.

2.11 . Therefore it is concluded that the assessee company being a holding company which has developed other companies in fulfillment of its main objectives, have raised certain loans, on which interest has been paid. To substantiate the claim of the company, it is also evident that company had valued its shares and issued shares at a premium to outside investors including IFC Washington, a venture of World Bank. Had the company's business would not have to create subsidiaries, IFC and other companies would not invested money in the company. The valuation of the company is based on the valuation of each such company in the fold of the holding company that is why the holding company could fetch the valuation at a premium. Therefore, it is surely the business purpose for which the funds have been borrowed and invested in the subsidiaries.

1. Further, the application of section of 14A are tested as to why these are not applicable to the case of the assessee company.

1.1 In the case of CIT Vs. HOLCIM INDIA P LTD (ITA No. 486/2014 & ITA No. 299/2014J the following is held:

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.

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 Vs. M/s. Lakhani Marketing Incl, IT A No. 970/2008, decided on 02.04.2014, made reference to two earlier decisions of the same Court in CIT Vs. 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 Vs. Corrtch 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, Vs. 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 an 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).

17. In these circumstances, we do not find any merit in the present appeals. The same are dismissed in limine

Your honour, In the case of Cheminvest Ltd, ITA No.749/2014, Hon'ble Delhi high court has allowed the relief to the assessee company being having no exempt income, section 14 A cannot be invoked. Similarly the Hon'ble Madras High Court have decided in the case of Chettinad Logistics Pvt. Ltd TCA No.24/2017 dated 13/3/2017'that the rule 8D read with Sec 14 A cannot come to the rescue for the department where there is no exempt income, and the judgment has been upheld by the Hon'ble Supreme Court vide SLP No 15631/2018. Copy of order enclosed.

The Abstracts of section 14 A is reproduced:

Expenditure incurred in relation to income not includible in total income.

14A. (1) For the purposes of computing the total income under this 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 this Act.

(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of

such expenditure in relation to income which does not form part of the total income under this Act.

(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act.

Firstly with reference to subsection of section 14A it is evidently clear that for the said section to apply, the precondition is that there should be an income which does not form part of total income under the income tax act, but in this case the appellant company does not have any income which is exempt under the Act. Thus it becomes very clear that section 14 will not apply in this case. Secondly with reference to sub-section 2 & 3, the AO has to determine the expenditure incurred in relation to such exempt income if he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to such income. Since the exempt income is nil, 14A (2) & (3) is also not applicable. It is further submitted that once the requirements of 14A do not fulfill in the case of the assessee, therefore the application of Rule 8D shall also be not applicable.

*Your honour, it is humbly submitted that the assessee had dividend income of Rs.2,093/ only against an investment of Rs. 58,680/- in shares of Punjab and Sind Bank, which is a petty investment and this is not related to investment in subsidiary companies. Investment in subsidiaries which has been considered for disallowance is Rs. 473.48 Crores. Therefore you are humbly requested to restrict the disallowance upto Rs.2093/- only and not for the whole investments where the assessee company has not earned any exempt income. The said proposition was upheld by the Hon'ble Delhi High Court in the case of **Joint Investment***

Pvt. Ltd. vs. CIT ITA No.117/2015 in their order dated 25.02.2015. Copy Enclosed.

The same matter was upheld in favour of the assessee by Honble Delhi High Court in the case of Cheminvest Ltd and in Oil Industries Development Board ITA No.197/2018 and the same has been upheld by the Hon'ble Supreme Court by dismissing the SLP of the department vide their order dated 8/02/2019 in SLP Diary No.2755/2019.

Following the judgment of Hon'ble Supreme Court and Hon'ble High Courts, the claim of the assessee should be accepted and addition be restricted to Rs.2093/- on account of 14A be made and balance addition of Rs.9,90,88,136/- may please be deleted."

I have examined the facts at hand. The only exempt income received by the appellant was Rs. 2,093/-. Accordingly, in view of submission of the appellant and in view of position of law, the addition is restricted to Rs. 2,093/- only.

5. In final analysis, the appellant succeeds in appeal for A.Y. 2014-15.

4. The judgment rendered by the Hon'ble Delhi High Court in *Joint Investment Pvt. Ltd. vs. CIT in ITA No.117/2015 order dated 25.02.2015*, clinches the issue in favour of assessee. Thus, the CIT(A) has rightly restricted the disallowance to the extent of the exempt income. Significantly, the Hon'ble Delhi High Court in the case of *PCIT vs. M/s. ERA Infrastructure (India) Ltd. in ITA No.204/2022 and CM APPL.31445/2022 judgment and order dated 20th July, 2022* had the occasion to examine the law on applicability of Section 14A having regard to the newly inserted *Explanation* to Section 14A as codified by Finance Act, 2022. The Hon'ble High Court held that the aforesaid *Explanation* cannot be

presumed to be retrospective in operation. As a corollary, the law prevailing prior to the insertion of *Explanation* would continue to apply and shall not be guided by the *Explanation* being prospective. We therefore see no reason to interfere with the order of the CIT(A) which is in sync with extant law as expounded by judicial precedents.

5. In the result, all the above captioned appeals of the Revenue are dismissed.

Order pronounced in the open Court on 02/08/2022.

Sd/-
[CHALLA NAGENDRA PRASAD]
JUDICIAL MEMBER

DATED: **02/08/2022**

Prabhat

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER