

आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर
IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR
श्री रविश सूद, न्यायिक सदस्य एवं श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।
BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM
आयकर अपील सं./ITA No.06/RPR/2017

AND

आयकर अपील सं./ITA No.162/RPR/2019

(निर्धारण वर्ष / Assessment Year :2013-2014 & 2015-2016)

M/s Nava Bharat Press, Press Complex, G.E.Road, Raipur (C.G.)	Vs	ACIT, Circle-3(1), Raipur
PAN No. : AADFN 0350 R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारित की ओर से /Assessee by	:	Shri Mahavir Atal & Shri Sudhir Baheti, CAs
राजस्व की ओर से /Revenue by	:	Shri G.N.Singh, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	26/07/2022
घोषणा की तारीख/Date of Pronouncement	:	31/10/2022

आदेश / ORDER

Per Arun Khodpia, AM :

These two appeals are filed by the assessee against the separate orders passed by the CIT(A)-I, Raipur, dated 15.09.2016 & 28.03.2019 for the assessment years 2013-2014 & 2015-2016.

2. Grounds raised by the assessee in its appeal for A.Y.2013-2014 are as under :-

1. *On the facts and circumstances of the case the learned CIT (A) erred in endorsing view of Assessing Officer by not deleting the disallowance of interest u/s 36(i)(iii) of Income Tax Act, 1961.*
2. *On the facts and circumstances of the case the Learned CIT(A) erred in endorsing view of Assessing Officer by not deleting the disallowance of interest u/s 14A of Income Tax Act, 1961.*
3. *On the facts and circumstances of the case the Learned CIT(A) erred in not following the Judicial discipline & thereby taking a different stand for the current year completely opposite to the one taken in earlier year by Preceding CIT(A) without distinguishing facts of the case.*

4. *On the facts and circumstances of the case the Learned' CIT (A) erred in not considering & following the judgment of Delhi High Court in case of Regal Theatre Vs CIT (Delhi).*
 5. *On the facts and circumstances of the case the Learned CIT (A) erred in not considering & following the guiding principles laid down by the Raipur Bench of Income Tax Appellate Tribunal on the issue of binding Precedence in case of RKP Company Vs ITO (ITAT Raipur).*
 6. *Assessee craves leave to add or alter any other ground that may be taken at the time of hearing.*
3. Grounds of appeal of the assessee for AY 2015-16 are as under:-
1. *On the facts & circumstances of the case whether CIT(A) was justified in passing an appellate order disregarding binding precedent of Hon'ble ITAT, in appellant's own case for preceding year.*
 2. *On the facts & Circumstances of the case whether CIT(A) was justified in not following the order of his predecessor on similar issue for preceding year, without highlighting the reasons as to why he was departing from the view taken by his predecessor, specifically in the light of the fact that the order of his predecessor was also upheld by the Hon'ble ITAT.*
 3. *On the facts & circumstance of the case whether CIT(A) was justified in endorsing the disallowances made by the Assessing Officer under section 36(1)(iii).*
 4. *On the facts & circumstance of the case whether CIT(A) was justified in endorsing the disallowances made by the Assessing Officer under section 36(1)(va).*
 5. *Appellant craves leave to add or alter any other ground that may be taken at the time of hearing.*
4. Since these two appeals are consisting of similar grounds under identical facts and circumstances, thus for the sake of brevity, we are dealing with the issues raised under these appeals with this common order.

5. Disallowance of interest u/s 36(i)(iii) issue raised in both the appeals 06/RPR/17 and 162/RPR/2019, we are taking facts of the appeal no 06/RPR/17 as the lead case:-

6. On this issue Ld AR drew our attention to page 2 para 2 of the assessment order, wherein Ld AO had raised a query that one of the partner of the assessee firm Shri Sameer Maheshwari has a debit opening as well as closing balance of Rs. 2.98 Crore and Rs. 4.39 Crore respectively in the balance sheet of the assessee firm. It was also observed by the Ld AO that the assessee firm has debited an amount of Rs. 1,77,73,545/- on account of interest and other financial expenses in the profit and loss account of the firm. Therefore, Ld AO proposed and ask to explain the assessee that why not the interest @12% per annum shall not be disallowed on the debit balance in capital account. Assessee submitted before the AO that the firm has sufficient funds considering the depreciation allowance which is always available to the partners for withdrawal and thus the withdrawal was not from the borrowed funds, therefore disallowance under section 36(i)(iii) cannot be made. However, the contentions of the assessee were not accepted by the Ld AO and the disallowance of Rs. 55,14,591/- was made.

7. Ld AR further drew our attention to the working of cash funds/ cash profit generated year wise available at page 40 of the paper book, extracted as under:-

NAVABHARAT PRESS A.Y. 2015-16
Workings of cash funds/ cash profit generated year wise
Working to illustrate that sufficient cash/funds were available every year even after withdrawal by Partners and deduction of their share in firms income tax

Particulars	F.Y. 2005-06	F.Y. 2006-07	F.Y. 2007-08	F.Y. 2008-09	F.Y. 2009-10	F.Y. 2010-11	F.Y. 2011-12	F.Y. 2012-13	F.Y. 2013-14	F.Y. 2014-15	Total
Net Profit of firm after depreciation	1,76,28,941	31,09,242	1,07,74,491	1,21,92,244	1,92,35,263	1,58,76,492	1,41,30,213	1,52,59,629	1,36,13,064	2,14,26,199	14,32,45,776
Depreciation	66,06,699	71,91,149	83,06,937	1,01,57,553	1,15,24,592	1,14,09,430	1,25,64,205	1,27,25,015	1,10,56,100	91,53,134	10,06,94,813
Cash Profit Generated	2,42,35,640	1,03,00,391	1,90,81,428	2,23,49,797	3,07,59,855	2,72,85,921	2,66,94,417	2,79,84,644	2,46,69,164	3,05,79,333	24,39,40,589
Withdrawals by Sameer Maheshwar	2,00,02,231	(24,603)	1,13,14,022	(8,88,701)	1,94,02,650	2,14,74,380	82,12,186	2,24,18,032	68,65,498	1,77,34,681	12,65,10,376
Withdrawals by Nava Bharat Press (Raipur) Pvt Ltd	2,01,600	4,81,230	6,00,000	25,000	15,00,000	(1,60,000)	-	65,000	1,75,000	25,000	29,12,830
Sameer Maheshwari Share in Income Tax of firm	79,05,297	24,89,404	1,83,657	55,08,082	13,03,922	35,72,544	36,92,026	38,54,247	39,75,696	58,26,213	3,83,11,088
Navabharat Press, Share in firm Income Tax	19,76,324	6,22,351	45,914	13,77,021	3,25,980	8,93,136	9,23,007	9,63,562	9,93,924	14,56,553	95,77,772
Cash Generated by firm year wise	(58,49,812)	67,32,009	69,37,838	1,63,28,395	82,27,303	15,05,861	1,38,67,198	6,83,803	1,26,59,046	55,36,886	6,66,28,524

8. Ld AR drew our attention to the judgment of Hon'ble Delhi High Court in the case of Regal Theatre V CIT, reported in (1998) 100 Taxman 116 (Delhi), wherein it was held that:-

6. In this reference, it has been contended for the assessee that the view taken by the Tribunal was not sustainable in law. The counsel contended that there could be no dispute that correct profits could be computed only after the debit of depreciation was made. But merely because the amount of profit was to be determined by reducing the amount of depreciation, it could not be said that the monies borrowed had not been borrowed for the purpose of business or were diverted to the partners for non-business purposes. The Tribunal was wrong when it said that the monies borrowed could be regarded in law to have been diverted for non-business purposes where, as a result of debit of depreciation on a notional basis, the debits of the partners increased.

7. The learned counsel for the assessee gave a simple example for the purpose of understanding the real issue involved in this case, which according to us, is very apt in the circumstances.

8. Let us assume that 'A', an Advocate, in the course of his profession borrowed Rs. 500 and invested the same in the purchase of his office equipments and on such investment, the depreciation he would get is Rs. 15 in a year. On the above amount borrowed, let us assume he is paying interest of Rs. 20 per year. If his annual income is Rs. 100, then income after depreciation would be Rs. 85. If he withdrew the entire available cash amount of Rs. 100 as profit in that year, could it be said that the interest paid on the monies borrowed became not allowable only for the reason that the net income after depreciation was Rs. 85, whereas the withdrawal was Rs. 100? If it is admitted that the borrowal of Rs. 500 was invested in the business for the purpose of profession, and the income before depreciation was Rs. 100, then if he had not drawn any amount above Rs. 100, the interest amount of

Rs. 20 accruing on the borrowing of Rs. 500 invested in business, should be allowed as a deduction.

9. In our view, the above illustration is very apt. It will be noticed that the assessee borrowed Rs. 500 and claimed deduction for interest on the said borrowal at the rate of Rs. 20 per year. For the purpose of deciding the said question, the consideration would be whether there was a borrowal of Rs. 500 and whether the said amount was invested for purposes of business, and interest on borrowal was repaid in the financial year and claimed as a deduction. If his net income before depreciation was Rs. 100, he could as a matter of fact withdraw the entire available amount of Rs. 100, and not merely Rs. 85. Withdrawal above Rs. 85 and up to Rs. 100 cannot be treated a diversion of capital. It cannot be said that out of withdrawal of Rs. 100 available in that year towards profit, Rs. 15 was to be treated as a diversion for non-business purposes. That, in our view, is the correct position in law.

9. Ld AR also relied on the order of coordinate bench of ITAT Raipur in ITA 160/RPR/2014 in assessee's own case for AY 2010-11, wherein it has been held that:-

6. We find that the DR relied on the order of AO. He could not point out any specific error in the order of CIT(A). The finding of CIT(A) that the assessee had sufficient non-interest bearing funds available with it for partners withdrawals, was not controverted by the DR by bringing any cogent and positive material on record. Further, the finding of CIT(A) that the payment of interest was commercially expedient was examined by the AO in the current and prior years. Therefore, the contentions of AO for diversion of interest bearing borrowed funds to the partners of the sister concern of the assessee cannot be sustained, was also not controverted by the DR by bringing any cogent and positive materials on record. Hence, we do not find any good and justifiable reason to interfere with the order of CIT(A), which is confirmed and the ground of appeal of the Revenue is dismissed.

10. Based on above submissions and written submissions made by the Ld AR, it was the contentions that assessee has not diverted the borrowed funds to the partners, amount withdrawn by the partners were out of the own funds generated from the business, debit balance in the partners account is an admitted fact, due to high claim of depreciation which is a non cash cost cash profit of the firms are high, it was sum up that the assessee firm had surplus cash funds during this period and

funds withdrawn by the partners were of the cash profits and not out of the borrowed funds.

11. Ld AR also shown us the details of funds borrowed, capital expenditure made and position of the funds since FY 2005-06, the year of joining of Mr. Sameer Maheshwari as a partner of the assessee firm, till FY 2012-13 i.e. AY 2013-14, the said details extracted from the paper book of the assessee are as under:-

Without prejudice to the above submission, even on merits the addition done by the Assessing Officer is not sustainable.

25. *The Closing Balance of capital account as on 31/03/2013 is Rs 4,38,54,187/-. The Assessing Officer disallowed proportionate interest to the tune of Rs 55,14,591/-. Sameer Maheshwari was introduced as a Partner in F.Y. 2005-06. The closing balance of secured loan and unsecured loan as on 31/03/2005 (i.e.) before joining of Sameer Maheshwari as a partner is Rs 8,98,90,476/-.*
26. *Therefore, the loan of approximately Rs 8.98 crores was already borrowed by the firm before Sameer Maheshwari was introduced as a partner of the firm. Therefore, there is no question of diversion of funds to Sameer Maheshwari out of the old borrowings.*
27. *In F.Y. 2005-06 :- No new loans were borrowed by the Firm. However, firm invested an amount of Rs 9,93,1101- in fixed assets out of own funds generated. As no borrowing in this year, no question of diversion of funds.*
28. *In F.Y. 2006-07 :- Two loans of Rs 40,00,0001- from Corporation Bank and Rs.1,45,00,0001- from ICICI House Financing Pvt Ltd, totaling to Rs.1,85,00,0001- were borrowed. During the year investment in the fixed assets is to the tune of Rs 1,89,12,037/- . As investment in fixed assets is more than the loan borrowed there is no question of diversion of funds.*
29. *In F.Y. 2007-08 :- An unsecured Business loan of Rs 20,00,000/- was borrowed from HDFC Bank. During the year an amount of Rs 1,13,26,475/- is invested in fixed assets. As investment in fixed assets is more than the loan borrowed there is no question of diversion of funds.*
30. *In F.Y. 2008-09 :- No new loans were borrowed an investment of Rs 2,09,52,841/- was made in fixed assets out of own funds.*
31. *In F.Y. 2009-10 :- A Loan of Rs 1.55 crores was borrowed from IDBI Bank to repay and close to unsecured loan of ICICI Home finance*

approx 1.4 crores. During this year the assessee has made investment in fixed assets to the tune of Rs 1,49,68,441/-. As said investment is made totally out of own funds, there is no question of diversion of funds.

32. In F. Y. 2010-11 : - A New secured loan of Rs 11.98 crores was borrowed by the assessee against the mortgage of Property from HDFC Bank. Said loan was borrowed with an intent to close all small loans and maintain only one loan account. Out of 11.98 crores borrowed an amount of Rs 8.51 crores were spend to close all existing secured and unsecured loans. An Amount of Rs 2.99 crores was spend on the purchase of the new offset printing Machineries. An amount of Rs 0.46 crores was spend on the office renovation and other sundry expenses. Perusal of the Balance Sheet will cull out the picture that during the year under consideration assessee has spend an amount of Rs 3.94 crores on the acquisition of fixed assets. As the entire fund as can be seen has been used for business purpose there is no question of diversion of funds.

33. In F.Y. 2011-12 :- A loan of Rs 50 lacs was borrowed from Reliance capital for payment of software installation. and the investment in fixed asset out of own funds is Rs 94,94,971/- . As the investment is more than the loan borrowed, there is no question of diversion of funds.

34. In F.Y. 2012-13 :- No new secured loans were borrowed and the investment in fixed asset out of own funds is Rs 88,85,768. As there is no new borrowings there is no question of diversion of funds.

Therefore, even if we analyze a year on year data, it can be appreciated that there is no case of diversion of funds. Accordingly, even on merits there is no question of diversion of funds. I humbly request your kindness to kindly delete the additions made by the Assessing Officer.

12. On the other hand Ld Sr DR from the revenue has place his reliance on the order of the revenue authorities.

13. We have considered the rival submissions, perused the material brought to our knowledge and the case laws relied upon.

14. Admittedly, a debit balance in partners capital account for Rs. 4.39 Crore was found in the balance sheet of the company. It is also observed that the entire asset side of the company was showing an amount of Rs. 12.16 Crore as against secured and unsecured loan alone of Rs. 13.79

Crore, thus the contention of the assessee that non cash expenditure i.e. depreciation allowance was accumulated and available with the assessee firm to allow withdrawal by the partner is not substantiated by the facts in audited accounts, thus, no such funds were available with the firm in any form in the balance sheet for distribution. For ready reference audited balance sheet of the assessee for AY 2013-14 is extracted as under:-

NAVA BHARAT PRESS (RAIPUR) BALANCE SHEET AS AT 31st March, 2013					
LIABILITIES	AMOUNT	AMOUNT	ASSETS	AMOUNT	AMOUNT
PARTNERS' CAPITAL ACCOUNTS			FIXED ASSETS (As per Schedule - I)		91564584.79
1. NAVA BHARAT PRESS (RAIPUR) PVT. LTD.			INVESTMENTS		11480137.31
Balance as per last Balance Sheet	7194636.82				
Add: Share in Profit	3051925.86				
	10246562.68				
Less: Net Withdrawal during the Year	65000.00				
	10181562.68				
Less: Share in Firm Income Tax	963561.80	9218000.88	CURRENT ASSETS, LOANS & ADVANCES		
			Cash & Bank Balances	2555287.65	
2. SAMEER MAHESHWARI			Deposits	1729374.00	
Balance as per last Balance Sheet	-29789612.14		Advances & Others Debit Balance	273787.00	4558448.65
Add: Share in Profit	12207703.44				
	-17581908.70				
Less: Net Withdrawal during the Year	22418032.00		INCOME TAX		14035339.00
	-39999940.70				
Less: Share in Firm Income Tax	3854247.20	-43854187.90			
SECURED LOANS FROM BANKS	116252449.92				
UNSECURED LOAN	21707286.00	137959735.92			
CURRENT LIABILITIES & ADVANCES					
Advertisement & Circulation Agency Deposits	13131268.31				
Other Credit Balances & Deposits	5183692.54	18314960.85			
TOTAL		121638509.75	TOTAL		121638509.75

FOR NAVA BHARAT PRESS (RAIPUR)

(SAMEER MAHESHWARI)
PARTNER

PLACE : NAGPUR
DATED : 30.08.2013

ACCOUNTING POLICIES - SCHEDULE-II
AS PER OUR REPORT OF EVEN DATE
FOR RATAN CHANDAK & CO.
CHARTERED ACCOUNTANTS

(S. K. BAHETI)
PARTNER
M. No. 42711
FRN : 108696W

15. Findings of the ITAT in assessee's own case for AY 2010-11 in ITA 160/RPR/2014 Dt 15/01/2018, which we have thoroughly considered are under different set of financial facts and was on the basis that department could not point out any specific error in the order of CIT(A), thus the findings of the same cannot be applied in the present case being for a different year having different set of facts. Ld AR's reliance on the order of Hon'ble Delhi High Court in the case of "Regal Theatre" (supra) was based on the proposition that funds before adjustment of depreciation allowance are available for the partners to be withdrawn by the partners, but such funds should be available as per the books of accounts of the assessee against such accumulated depreciation allowance, which could not be demonstrated by the assessee in the present case, thus distinguishable and have no bearing on the present case. Coming to another argument of the assessee that the borrowings of the assessee firm since FY 2005-06 till FY 2012-13 were entirely utilised for the business purpose of the assessee firm and non of such funds were diverted to the partners of the firm by way of distributing the same as withdrawal to partners, this contention of the assessee has substance and could have find some favour for the assessee, but as apparent from the records such information was not furnished by the assessee before the revenue authorities, therefore the same cannot be admitted at this stage, as the same was not furnished by way of an application as prescribed u/r 29 of the ITAT rules. Consequently, this ground of the assessee stands dismissed.

16. Having similar facts and circumstance, our finding on this issue will mutatis mutandis apply on the same issue for the AY 2015-16 in ITA no 162/RPR/2019 also.

17. Next Ground: Disallowance u/s 14A in appeal no 06/RPR/2017

18. Written submissions of the Ld AR on this issue for AY 2013-14 explaining its contentions are as under:-

Issue 2: Disallowance under section 14A

View of Assessing Officer :-

The assessing officer has contended that the assessee has made investment in various mutual funds out of the borrowed funds which is not related to the business of the assessee. Based on the same, the assessing officer has disallowed the proportionate amount of interest to the extent of the investment made in mutual funds citing that the income arising out of mutual funds is exempt. Hence, a disallowance was made by the assessing officer u/s 14A read with Rule 8D.

Explanation of Assessee :-

35. The assessee wishes to bring to your kindness' notice that there is investment of Rs 1,14,80,137 reflecting in the books of assessee as on 31 March 2013. The break-up of the same is provided below.

Sl.No.	Particulars	Amount (Rs.)
1	Fixed deposit with State bank	70,04,492
2	Debt mutual funds	26,57,645
3	Equity mutual funds	18,18,000
Total		1,14,80,137

36. Out of this, there is investment in fixed deposit of Rs. 70,04,492. The fixed deposit has no connection with the investment in mutual funds or any exempt income. The ledger for the fixed deposit is attached herewith as annexure IV for your kind perusal.

37. The interest earned by the assessee from aforementioned fixed deposit has been duly offered to tax. Since, there is no exempt income the question of exemption under section 14A does not arise. Thus, the assessing officer's contention that assessee has enjoyed the benefit of exemption under section 14A ought to be quashed.

38. Further, the assessee has invested in debt mutual funds to the tune of Rs. 26,57,645. The assessee has offered the gain of Rs. 2,09,557 on the redemption of debt mutual funds to tax. These gains have been included in the miscellaneous income in the Profit and loss statement of the assessee. Since, there is no exempt income and taxes have been duly paid the assessee humbly requests your kindness to revoke the addition made by the assessing officer.

39. For the remaining investments of Rs. 18,18,000, the assessee has invested in various equity mutual funds earlier as well as during the year. During the year under consideration the assessee has earned dividend of Rs 1,88,212/-. Therefore, disallowance if any should be restricted to this extent.

40. For this proposition, the assessee wishes to place reliance on the latest judgment of Hon'ble Mumbai Tribunal in the case of Doha Bank QSC v. DCIT, International taxation, 2(2)(2), Mumbai, 182 ITD 125 (Mum)(2021), 209 TTJ 716(2021). In this case, it was held that the disallowance under section 14A, should be restricted to the extent of the exempt income claimed by the assessee for the year under consideration. The relevant extract of the order is reproduced below for your quick perusal.

"We have given a thoughtful consideration to the aforesaid issue before us, and find substantial force in the claim of the Id. A.R that the amount of the disallowance under Sec. 14A is liable to be restricted to the extent of the exempt interest income. Our aforesaid view is fortified by the judgments of the Hon'ble High Court of Delhi in the case of JCIT Vs. Joint Investments Pvt.ltd. (2015) 372 ITR 694 (Del) and Cheminvest Ld. Vs. CIT 378ITR 33 (Del). Accordingly, in terms of our aforesaid observations, the A.O is directed to restrict the disallowance under Sec.14A to the extent of the amount of the exempt income of the assessee for the year under consideration. Before parting, we may herein observe that the concession on the part of the assessee for not pressing the other grounds of appeal is solely on the basis of the miniscule amount of the exempt interest income received by the assessee from its H.O during the year under consideration, which thus, shall in no way prejudice its alternative claims which are not being adverted to and therein being adjudicated upon in pursuance to the aforesaid concession of the Id. A.R. "

The assessee humbly request your kindness to consider the above submission and revoke the impugned disallowance. For this act of kindness, assessee shall always remain obliged.

19. Ld Sr DR in the contrary has vehemently supported the order of revenue authorities on this issue.

20. We have heard the rival contentions, perused the material available on records.

21. To decide this issue we have to follow various recent judgments of the Hon'ble Apex Court and Hon'ble High Courts, findings from such judgments are produced here under for better adjudication:-

1. *Hon'ble Madras High Court in the case of CIT Vs. Chettinad Logistics Pvt Ltd [2017] 80 Taxmann.com / 248 Taxmann 55 has laid down a proposition that 14A cannot be invoked where no exempt income was earned by the Assessee in relevant assessment year.*
2. *Delhi High Court in the case of CIT Vs. Oil Industry Development Board [2019] 103 Taxmann.com 325 (Delhi) has held that in the absence of any exempt income , disallowance under section 14A of any amount was not permissible. The departmental SLP filed against such judgment has been rejected on 8th Feb, 2019 by Hon. Apex Court as reported as Principle CIT Vs. Oil Industry Development Board [2019] 103 Taxmann.com 326 (SC)/ [2019] 262 Taxmann.com 102 (SC).*
3. *Delhi High Court in the case of CIT Vs. GVK Projects & Technical Services Ltd [2019] 106 Taxmann.com 180 (Delhi) has noted that Assessing officer proceeded to calculate disallowance under section 14A on the basis of investment made by Assessee. Hon. ITAT opined that in the absence of any exempt income reported by the Assessee, disallowance could not be made by the Assessing Officer. High Court on appeal upheld the ITAT order. The departmental SLP filed against the said order has been rejected by Hon. Apex Court on 3rd May, 2019 as reported in PCIT Vs. GVK Projects & Technical Services Ltd [2019] 106 Taxmann.com 180 (Delhi)/ [2019] 264 Taxmann 76 (SC).*
4. *The Hon'ble Delhi High Court in the case of Joint Investments P Ltd vs CIT (2015) 372 ITR 694 (Delhi) held that the window for disallowance is indicated in section 14A and is only to the extent of disallowing expenditure incurred by the assessee in relation to tax exempt income. This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case. We further notice that the Hon'ble Delhi High Court in the case of CIT vs Holcim India Pvt Ltd (2014) 272 CTR 282 (Del) has held that there can be no disallowance u/s 14A in the absence of exempt income. The rationale behind these judgments is that the amount of disallowance cannot exceed exempt income. In this case, on*

perusal of the facts, we find that the assessee has earned exempt income of Rs.25,000, whereas the AO disallowed an amount of Rs Rs.1,09,00,000. Therefore, considering the facts and circumstances of the case and also following the ratios of the case laws discussed above, we are of the view that disallowance u/s 14A cannot exceed the exempt income.

22. From the findings of the Hon'ble courts it is explicitly clear that disallowance under section 14A cannot be made if there is no exempt income, however if there is an exempt income earned by the assessee in the relevant assessment year than the disallowance u/s 14A should be made but the same cannot exceed the amount of actual exempt income earned by the assessee.

23. In the present case exempt dividend income on mutual fund was very much available before the revenue authorities which is discernible from the computation of total income as produced by the assessee during the course of assessment proceedings, but an addition was made based on finding that the assessee was failed to furnish necessary details/ documents to substantiate that the investment in the company were made out of the own funds and not from interest bearing funds. This finding of the Ld AO was subsequently affirmed by the Ld CIT(A) is not sustainable in view of the principle of law laid down by the Hon'ble Courts referred to supra. Thus, we direct the Ld AO to restrict the amount of disallowance to Rs. 1,82,212/-, the amount of dividend earned by the assessee during the relevant AY. Thus this ground of assessee is partly allowed.

24. Next Ground: Disallowance u/s.36(1)(va) of the Act in ITA 162/RPR/2019 for AY 2015-16.

25. Disallowance of PF paid beyond the due date under the respective Act but within the due date of filing the return along with the disallowance of interest u/s.36(1)(iii) of the Act made by Ld AO and confirmed by the CIT(A).

26. Ld. AR before us submitted that during the year under consideration on few instances there was delay of few days in depositing employees contribution in their respective PF account, but the same were deposited before filing of income tax returns. The AO relying on Sec. 36(1)(va) & 2(24)(x) disallowed all these payment which were deposited after due date. For the year under consideration the assessee deposited contribution towards provident fund on 31-03-2015 and the Income Tax return was filed on 30/09/2015. Thus, the assessee has deposited the contributions towards provident fund well before filing the Income tax return. Ld. AR drew our attention to the order passed by the coordinate bench of the Tribunal in assessee's own case for A.Y.2010-2011 passed in ITA No.160/RPR/2014, order dated 15.01.2018 and submitted that in the said order the issue has been decided by the Tribunal in favour of the assessee thereby dismissing the appeal of the revenue. Therefore, the Id. AR submitted that the appeal of the assessee deserves to be allowed.

27. On the other hand, Id. Sr. DR vehemently supported the orders of the authorities below.

28. We have heard rival submissions and perused the material available on record. On perusal of the orders of the authorities below as well as the relevant documents filed before, we found that the payments

of the employees contribution to PF & ESI having been made before the due date of filing of the return but after the due date as prescribed under the relevant statute. This issue has now been settled by the Hon'ble Supreme Court in the case of Checkmate Services (P). Ltd. Vs. CIT, reported in [2022] 143 taxmann.com 178 (SC), wherein the Hon'ble Supreme Court has held as under :-

51. The analysis of the various judgments cited on behalf of the assessee i.e., Commissioner of Income-Tax v. Aimil Ltd.²⁴; Commissioner of Income-Tax and another v. Sabari Enterprises²⁵; Commissioner of Income Tax v. Pamwi Tissues Ltd.²⁶; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd.²⁷ and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrusions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.

52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on

the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessee's liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessee is following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the latter retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessee is given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which

are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

29. In view of the above decision of the Hon'ble Supreme Court, we dismiss this ground of assessee regarding disallowance made u/s.36(1)(va) of the Act for the assessment year 2015-2016.

30. In the result, appeal of the assessee in ITA No.06/RPR/2017 and ITA No.162/RPRT/2019 are partly allowed.

Order pronounced in pursuance with Rule 34(4) of ITAT Rules, 1963 on 31/10/ 2022.

**Sd/-
(RAVISH SOOD)**

न्यायिक सदस्य / JUDICIAL MEMBER

**Sd/-
(ARUN KHODPIA)**

लेखा सदस्य / ACCOUNTANT MEMBER

रायपुर/Raipur; दिनांक Dated 31/10/2022

Prakash Kumar Mishra, Sr.P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर/ DR, ITAT, Raipur
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, रायपुर/ITAT, Raipur