

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, 'E': NEW DELHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER**

**ITA No.9679/DEL/2019
[Assessment Year: 2016-17]**

M/s Nucleus Software Exports Limited, 33-35, Thyagraj Nagar Market, New Delhi-110003 PAN-AAACN5382P	Vs	Income Tax Officer, Circle-18(2), C.R. Building, New Delhi-110001
Assessee		Revenue

Assessee by	Sh. K. Sampath Adv. & Sh. Rajkumar Adv.
Revenue by	Sh. Jitender Chand, Sr.DR

Date of Hearing	04.01.2023
Date of Pronouncement	09.01.2023

ORDER

PER SHAMIM YAHYA, AM,

This appeal by the assessee is directed against the order of Id. CIT (Appeals), New Delhi, dated 04.11.2019 for the Assessment Year 2016-17.

2. The grounds of appeal reads as under:-

**GROUND I: DISALLOWANCE U/S.14A OF THE ACT
R.W.R. 8D AMOUNTING TO Rs. 54,98,682/-**

1. On the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax Appeals - VI, New Delhi ("the CIT(A)) erred in upholding the action of Asst. Commissioner of Income Tax, Circle 18(2), New Delhi ("the AO") of invoking Rule 8D of the Income Tax Rules, 1962 (the Rules) and making a additional disallowance of Rs. 54,98,682/-.

2. *The Ld. CIT(A) erred in offering the aforesaid disallowance despite of the facts that :-*

a) The Appellant had suo-moto disallowed an amounting to Rs 45,78,619/- u/s 14A of the Act computed based on a detailed scientific working as certified by an independent Chartered Accountant.

b) To invoke Rule 8D, the AO should, after considering the accounts of the Appellant, not be satisfied with the correctness of the claim of the Appellant in respect of such expenditure in relation to income which does not form part of the total income under this Act and such 'non-satisfaction' must be objective. Thus, to invoke Rule 8D the AO should provide a justifiable reason for not being satisfied with the claim of the Appellant that no expenditure has been incurred for earning tax-free income, which in the Appellant's case is absent

3. *The Appellant humbly prays that the aforesaid disallowance of Rs. 54,98,682/- be deleted.*

4. WITHOUT PREJUDICE TO GROUND NO I.

GROUND II:

The Appellant humbly prays that the Ld. AO be directed to compute disallowance u/s. 14A of the Act r.w.r. 8D of the Rules considering only those investments which actually yielded exempt income during the relevant previous year and only the said investments should be included in the computation made under Rule 8D while arriving at the average value of investment.”

2. Brief facts of the case are that in this case are that the original return of income was filed on 22/11/2016 which was revised on 17/02/2017 declaring total income at Rs.22,57,84,570/- and income under section 115JB at Rs. 36,45,71,456/-. The case was selected for scrutiny under CASS and notice under section 143(2) was issued on 05/07/2017 which was duly served upon the assessee. The assessee

company is engaged the business of software development and IT enabled services. During the year, the assessee earned income from business and profession and income from other sources.

2.1. From the return of income it was observed that the assessee had claimed dividend income of Rs. 13,82,10,530/- as exempt and had suo motu disallowed Rs.45,78,619/- under section 14A. The AO noted the details of current and non-current investments as per the balance sheet and also noted from the detailed Note Nos. 2.9 and 2.13 that details of investments were given which would give exempt income and which would be involved in calculation of disallowance under section 14A. The assessee was asked to explain why disallowance under section 14A should not be made. In response it was submitted that an amount of Rs. 45,78,619/- had already been disallowed under section 14A. From the computation submitted the AO noted that the assessee had on its own accepted that expense of Rs. 17,57,748/- had been incurred directly in relation to investments yielding exempt income under rule 8D (2)(i) Income Tax Rules, 1962. The AO further noted that he was not satisfied with the disallowance calculated by the assessee under rule 8D(2) (ii) Income Tax Rules, 1962. The AO noted as under:

"Further, in relation to exempt income, it is observed that the investment decisions are important decisions in the general taken by the top management. Income resulting from investment, as well as investments themselves, is to be properly accounted for in the assessee's books of accounts. All these activities require allotment of the assessee's employees and use of assessee's official machinery. The assessee company has made disallowance of Rs. 45,78,619/- u/s 14A on its own. However, I am not satisfied

with the part of disallowance of expenses us 14A made by the assessee as apportionment of costs has not been correctly done and many indirect costs such as rent etc. have not been taken into account. Moreover, the apportionment of salary expense of top management has been taken on a highly conservative side too not appear to be justified”.

2.2. In view of this the AO computed the disallowance under section 14A by applying the procedure prescribed under rule 8D of the Income Tax Rules, 1962. The total expenditure to be disallowed was computed at Rs.1,00,77,301/-. Since, the appellant had on its own disallowed Rs.45,78,619/-, a further disallowance of Rs.54,98,682/- was made.

3. Against this order the assessee appealed before the Ld. CIT(A).

4. Upon assessee's appeal, the Ld. CIT(A) confirmed the action of the AO.

5. Against the order of the Ld. CIT(A), the assessee is in appeal before us.

6. We have heard both the parties and perused the records. The ld. Counsel for the assessee submitted that the issue involved is squarely covered in favour of the assessee by the decision of this Tribunal in assessee's own case for AY 2015-16 in ITA No.3449/Del/2019, vide order dated 30.08.2019. He submitted that the ITAT duly held that the AO has not recorded proper satisfaction in not accepting suo moto disallowance made by the AO. He submitted that the facts are identical in this year

also. Hence, he submitted that the assessee deserves to succeed on this count itself. Without prejudice to the above submission, the ld. Counsel for the assessee has raised the ground that the Ld. AO be directed to compute disallowance u/s. 14A of the Act r.w.r. 8D of the Rules considering only those investments which has actually earned exempt income then also the assessee to succeed.

7. Per contra, the Ld. DR submitted that the AO has duly recorded the satisfaction and he relied upon the orders of the authorities below. Upon careful consideration, we note that in identical case this ITAT in assessee's own case for AY 2015-16 in ITA No.3449/Del/2019 (Supra) has held as under:-

“9. On perusal of the assessment order we find that the Assessing Officer did not accept indirect expenses allocated by the assessee stating that he is not satisfaction with the part expenses and also observed that the investment activities require involvement of assessee's employees and use of assessee's official machinery the Assessing Officer has not pointed out why the suo moto disallowance made by the assessee is inadequate to cover the expenses attributable for earning exempt income. We observe that the ld. CIT (Appeals) holds that the working submitted by the assessee is general and not specified any name of the employees involving in this activity. It is the observation of the ld. CIT (Appeals) when exact time and energy of employees including middle and top management invested is not ascertainable then the only method left before the Assessing Officer to compute disallowance is under Rule 8D(2)(iii). Here we observe that provisions of section 14A of the Act contemplates recording of satisfaction by the Assessing Officer having regard to the accounts of the assessee if he is not satisfied with the claim of the assessee in respect of expenditure in relation to income which does not form part of total income. On reading of the assessment order, we find that the Assessing Officer having regard to the suo moto disallowance made by the assessee has not recorded any objective satisfaction as to why the allocation of indirect

expenses made by the assessee is not sufficient to meet the expenses attributable for earning exempt dividend income.

10. *In the case of Maxopp Investment Ltd. Vs. CIT [2018 402 ITR 640 the Hon'ble Supreme Court held as under:-*

“ 41) Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO.”

11. Ratio of the decision is applicable to the facts of the case. Following the said decision, we hold that the Assessing Officer has not recorded any objective satisfaction in not accepting suo moto disallowance made by the assessee. Thus, we direct the Assessing Officer to accept the suo moto disallowance made by the Assessing Officer in respect of disallowance under Rule 8D(2)(iii) read with section 14A of the Act”.

8. We note that the facts are identical and no defect has been pointed out in this order. Hence, following the precedent, we hold that the additional disallowance made by the Revenue in this case is not sustainable.

9. On the alternative ground also the assessee succeeds in as much as it has been held by the Special Bench in the case of ACIT Vs Vreet Investments Pvt. Ltd. in ITA No. 502/Del/2012 for the assessment year 2008-09 for disallowance u/s 14A r.w.r.8D, only those investment should be considered which has not yielded exempt income. Accordingly,

we set-aside the order of the authorities below and decide the issue in favour of the assessee.

10. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 09th January, 2023.

Sd/-
[N.K.CHOUDHRY]
JUDICIAL MEMBER

Delhi; Dated: 09.01.2023.

Shekhar,

Copy forwarded to:

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

Sd/-
[SHAMIM YAHYA]
ACCOUNTANT MEMBER

Asst. Registrar,
ITAT, New Delhi