

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

**BEFORE
SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA Nos. 4236 & 4237/Del/2018
Assessment Years: 2013-14 & 2014-15

ACIT, Circle-5(1), New Delhi	Vs.	M/s. Biomerieux India Pvt. Ltd., 43A, Okhla Industrial Estate, Phase-3, New Delhi-1100 20 PAN AAACB4984F
PAN :AAACB4984F		
(Appellant)		(Respondent)

Department by	Shri Kanav Bali, Sr. DR
Assessee by	Ms. Snigdha Gautam, Adv.

Date of hearing	02.12.2022
Date of pronouncement	20.01.2023

ORDER

PER ASTHA CHANDRA, J.M:

The two appeals by the Revenue are directed against common order dated 31.01.2018 of the Ld. Commissioner of Income Tax (Appeals)-2, New Delhi ("**CIT(A)**") pertaining to assessment year ("**AY**") 2013-14 and 2014-15. These were heard together and are being disposed of by this common order.

2. The Revenue has taken common grounds of appeal for both the AYs as under:

AY: 2013-14:

- "1. Whether on the facts and the circumstances of the case and in law, the Ld. CIT(A) is legally justified in deleting the disallowance of depreciation amounting to Rs.3,20,30,214/- for A.Y. 2013-14

disallowed by the AO on account of depreciation claimed as the assessee was not using the assets for the purpose of its own business.

2.

- a) *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is legally justified in deleting the disallowance of Rs.12,05,058/- for A.Y. 2013-14 u/s 14A of the Income-Tax Act, 1961 by not considering the provisions of Section 14A of the Income-Tax Act, 1961 mandatorily under Rule 8D(2) of the Income-Tax Rules, 1962.*
- b) *Whether on the facts and the circumstances of the case, the Ld. CIT(A) is legally justified in deleting the disallowance u/s 14A of the Income-Tax Act, 1961 without considering the legal principle that allowability or disallowability of expenditure under the Income-Tax Act, 1961 is not conditional upon the earning of the income as upheld by Hon'ble Supreme Court in the case of CIT vs. Rajendra Prasad Moody [1978] 115 ITR 519.“*

AY: 2014-15:

- “4. *Whether on the facts and the circumstances of the case and in law, the Ld. CIT(A) is legally justified in deleting the disallowance of depreciation amounting to Rs.4,12,93,740/- for A.Y. 2014-15 disallowed by the AO on account of depreciation claimed as the assessee was not using the assets for the purpose of its own business.*

5.

- a) *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is legally justified in deleting the disallowance of Rs.4,50,000/- for A.Y. 2014-15 u/s 14A of the Income-Tax Act, 1961 by not considering the provisions of Section 14A of the Income-Tax Act, 1961 mandatorily under Rule 8D(2) of the Income-Tax Rules, 1962.*
- b) *Whether on the facts and the circumstances of the case, the Ld. CIT(A) is legally justified in deleting the disallowance u/s 14A of the Income-Tax Act, 1961 without considering the legal principle that allowability or disallowability of expenditure under the Income-Tax Act, 1961 is not conditional upon the earning of the income as upheld by Hon'ble Supreme Court in the case of CIT vs. Rajendra Prasad Moody [1978] 115 ITR 519.*
- c) *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any grounds(s) of appeal at any time before or during the hearing of this appeal.”*

3. Briefly stated, the facts are that the assessee company is engaged in the business of marketing of diagnostic systems (reagents, instruments and software) for medical or industrial applications and provided diagnostic solution for hospitals, medical laboratories and blood banks. It filed its return digitally on 30.11.2013 for AY 2013-14 and on 29.11.2014 for A.Y 2014-15 declaring income of Rs. 13,63,10,560 and Rs. 27,65,94,200 respectively. The case was selected for scrutiny through CASS.

4. During the assessment proceedings, the learned Assessing Officer (**“AO”**) noticed that the assessee claimed depreciation of Rs. 3,20,30,214 and Rs. 4,12,93,740 on equipment on rentals in AYs 2013-14 and 2014-15 respectively. Vide questionnaire issued under section 142(1) of the Income-Tax Act, 1961 (**the “Act”**) dated 04.11.2016, the assessee was asked to give justification as to why depreciation so claimed be not disallowed. The assessee vide submission dated 01.12.2016 stated that it is a wholly owned subsidiary of Biomericeus SA, France from which it imports diagnostic equipment for the purpose of selling the same in India. However, if any customer requires the diagnostic equipment on lease for a fixed period, the assessee places the same at customers location and generates revenue by selling the reagents used to operate the diagnostic equipment. Hence, the consideration for such operating lease arrangement is that the lessee shall purchase a minimum agreed amount of reagents, exclusively from the assessee (lessor) during the tenure of lease, instead of monthly rental income. There is very clear stipulation that the equipment shall on termination of lease, be returned to the lessor in the same condition in which they are taken, except normal wear and tear. Accordingly, the complete arrangement is that of an equipment (machinery) being let out with the financial stipulation that instead of receiving direct rent from the customer, the assessee shall recover the same by selling a minimum stipulated quantity of other product (reagents) for the exclusive use in the machinery thereby increasing the sale of its reagents on account of usage of its placed equipments.

4.1 It was submitted that the equipments are being used for the purpose of the business of the assessee. The equipment sent to customer's location is transferred by the assessee from its inventory to fixed assets account and accordingly the assessee claims depreciation for the same as the equipments are used by the assessee for generating income for the business.

4.2 According to the assessee, the conditions prescribed under section 32(1) of the Act were satisfied and, therefore, it was entitled to claim depreciation. Support was derived from the judgment of the Hon'ble Supreme Court in the case of CIT vs. ICDS Ltd. (2013) 212 Taxman 550 (SC).

5. The submission of the assessee was not acceptable to the Ld. A.O. According to him, the transactions carried out by the company are in the nature of hire purchase transactions on which depreciation is not admissible as held by the Delhi Tribunal in M/s. VLS Finance Ltd. vs. DCIT in ITA Nos. 1754, 1755 and 1948. He further observed that the assessee is not using the assets for self use. Since, the assessee is not the actual user of the machinery/equipments which were hired out, depreciation cannot be allowed to the assessee. He, therefore, negated the assessee's claim of depreciation in both the AYs 2013-14 and 2014-15.

6. Aggrieved, the assessee filed appeal for both the AYs before the Ld. CIT(A). It was contended that the transaction is not at all in the nature of hire purchase rather the transaction was actually akin to that of Operating Lease. Distinction between hire purchase i.e. (Finance Lease) and Operating Lease was explained along with accounting treatment given to them as per Accounting Standard (AS) 19 issued by the Institute of Chartered Accountants of India (ICAI). Copies of 'Equipment Placement & Reagents Sale Agreement' entered into by the Company with each lessee was brought on record. The assessee refuted the view of the Ld. AO and submitted that section 32(1) of the Act does not mandate usage of the asset by the assessee itself. What section 32(1) of the Act requires is that the assessee must use the asset for the purpose of business and if that is so, the requirement of

section 32(1) of the Act gets satisfied notwithstanding non-usage of the asset itself by the assessee. Points of difference of the assessee's case vis-à-vis those of VLS Finance Ltd.'s case (supra) relied upon by the Ld. AO were explained. The assessee derived support from several decisions for its claim of depreciation including the decision of Delhi Tribunal in DCIT vs. Bio Rad Laboratories (India) (P) Ltd. (2016) 75 taxmann.com 221 and the decision of Hon'ble Supreme Court in the case of ICDS Ltd. (supra).

7. The contentions of the assessee were acceptable to the Ld. CIT(A) who held that the assessee was entitled to claim depreciation in both the AYs observing as under:-

“11.1 I have considered the facts of the case and submissions of appellant It s been submitted to me that the assessee imports diagnostic equipment from BioMerieux S. A for the purpose of selling the same in India. However if any customer requires the diagnostic equipments on lease for a fixed period the assessee places the same at the customer's location and generates revenue by selling the reagents used to operate die diagnostic equipment The consideration for such arrangement is that the lessee shall purchase a minimum agreed amount of reagents, exclusively from the assessee (lessor) during the tenure of lease, instead of monthly rental income.

11.2 The provision on depreciation in the Act reads that the asset must be “owned, wholly or partly, by the assessee and used for the purposes of the business”. Therefore, it imposes a twin requirement of ‘ownership’ and ‘usage for businesses for a successful claim under Section 32 of the Act.

11.3 The AO has not disputed the ownership of the assets and the appellant has not parted with the assets to the customers and the assets have been placed at the customer's location and the title of the assets has not been transferred.

11.4 The second condition is whether the assets have been used for the purpose of business. In this case the assets have been used by the customers during the course of business as such the issue which requires examination is whether the assets should be used by the appellant himself.

11..5 The Section requires that the assessee must use the asset for the “purposes of business”. It does not mandate usage of the asset by the assessee itself. As long as the asset is utilized for the purpose of

business of the assessee, the requirement of Section 32 will stand satisfied, notwithstanding non-usage of the asset itself by the assessee.

11.6 In the case of Commissioner of Income Tax Karnataka Vs Shaan Finance (P) Ltd while interpreting the words “used for the purposes of business” in case of analogous provisions of Section 32A(2) and Section 33 of the Act, dealing with Investment Allowance and Development Rebate respectively, held thus:

“9 Sub-section (2) of Section 32-A, however, requires to be examined to see whether there is any provision in that sub-section which requires that the assessee should not merely use the machinery for the purposes of his business, but should himself use the machinery for the purpose of manufacture or for whatever other purpose the machinery is designed. Sub-section (2) covers all items in respect of which investment allowance can be granted. These items are, ship, aircraft or machinery or plant of certain kinds specified in that sub-section. In respect of a new ship or a new aircraft, Section 32-A(2)(a) expressly prescribes that the new ship or the new aircraft should be acquired by an assessee which is itself engaged in the business of operation of ships or aircraft. Under sub-section (2)(b), however, any such express requirement that the assessee must himself use the plant or machinery is absent.”

11.7 Further with regard to uses of the assets it has been held in the case of Mysore Minerals Ltd., M.G. Road, Bangalore Vs. Commissioners of Income Tax, Karnataka, Bangalore that:

“...the very concept of the depreciation suggests that the tax benefit on account of depreciation legitimately belongs to one who has invested in the capital asset is utilizing the capital asset and thereby losing gradually investment caused by wear and tear, and would need to replace the same by having lost its value fully over a period of time.”

11.8 As such as per section 32(1) it is not the condition that the assets should be used for the purposes of business. Further it is the appellant which has invested in the equipment.

11.9 As such I agree with the contention of the appellant that the depreciation is allowable to the assessee.

11.10 In view of the above facts and in the circumstances ground no. 2 of both the appeals are allowed.”

8. The Revenue is not satisfied and is in appeal before the Tribunal and ground no.1 in both the AYs relate thereto.

9. The Ld. DR relied strongly on the order of the Ld. AO. He submitted that, though, ownership of the machinery/equipments is with the assessee, its usage is not in the premises of the assessee. Therefore, one of the condition precedent for claim of depreciation under section 32(1) of the Act is not satisfied which disentitles the assessee from claiming the impugned depreciation. The Ld AR supported the order of the Ld. CIT(A) and reiterated the same arguments which were advanced before the Ld. AO/CIT(A).

10. We have given our careful thought to the rival submissions and perused the material available in the records. The facts are not in dispute and there is no controversy as to the ownership of the machinery/equipments in respect of which the assessee has claimed depreciation in both the AYs. They are undoubtedly owned by the assessee. In this regard, the Ld. CIT(A) has recorded significant findings that it is the assessee who has invested in the machinery/equipment; that it has not parted with the assets to the customers and the assets have been placed at the customer's location; that the title of the assets has not been transferred. These indicators amply prove that the assessee is the owner of the assets and that the agreements entered into by the assessee with the lessees go on to establish that the transactions are not at all in the nature of hire purchase but are akin to Operating Lease in respect of which AS-19 has scrupulously been followed.

11. The reason given by the Ld. AO for denial of assessee's claim of depreciation is that the assessee is not using the asset for self use. This is not a valid reason attributable to denial of depreciation as Hon'ble Supreme Court has held in ICDS Ltd.'s case (supra) that usage of asset by assessee himself is not required to claim depreciation. The Hon'ble Supreme Court observed in the decision (supra) that section 32 requires that the assessee must use the asset for the 'purposes of business'. It does not mandate usage

of the asset by the assessee itself. As long as the asset is utilized for the purpose of the business of the assessee, the requirement of section 32 will stand satisfied, notwithstanding non-usage of the asset itself by the assessee.

12. Following the decision of the Hon'ble Supreme Court in ICDS Ltd.'s case (supra), we endorse the findings of the Ld. CIT(A) and reject ground no.1 of the Revenue in both the AYs. involved.

13. Ground no. 2(a) and (b) relate to disallowance of Rs.12,05,058 and Rs.4,50,000 under section 14A of the Act by the Ld. AO in AY 2013-14 and 2014-15 respectively which has been deleted by the Ld. CIT(A). In para 17.1 of his appellate order, the Ld. CIT(A) has stated in brief the related facts as under:

“17.1 In the assessment orders for Assessment Years 2013-14 & 2014-15, the Assessing Officer noticed that investment in equity shares were made by the assessee company. The Assessing Officer observed that the investments are eligible to earn dividend income. Therefore, disallowance u/s 14A of the IT Act read with Rule 8D is called for. The Assessing Officer referred to the CBDT Circular No. 5/2014, dt. 11.02.2014 to the effect that “The legislative intent is to allow only that expenditure which is relatable to earning of income and it therefore follows that the expenses which are relatable to earning of exempt income have to be considered for disallowance, irrespective of the fact whether any such income has earned during the financial year or not.” The above circular also mentioned that Section 14A does not use the word ‘income of the year’ but ‘income under the Act’. On the basis of the above discussion the assessing officer disallowed expenses to the extent of Rs.12,05,058/- and Rs. 4,50,000/- for A.Ys. 2013-14 & 2014-15 respectively.”

14. During assessment and appellate proceedings, the assessee made exhaustive submissions elaborating the reasons which do not justify the impugned disallowance in both the AYs. These have been extracted by the Ld. CIT(A) in paras 15 and 16 of his appellate order.

15. The Ld. CIT(A) came to the conclusion that the impugned disallowances are not warranted and recorded his findings in paras 17.2 and 17.3 of his appellate order as under:

“17.2 I have given due consideration to the facts of the case and have also gone through the decision of the Courts. The appellant has submitted that the investments were strategic in nature and no exempt income was earned from the investments in both the financial years under consideration relevant for assessment years 2013-14 & 2014-15 respectively. The appellant has further relied on the decision of Hon’ble High Court of Delhi in the case of Pr. Commissioner of Income Tax vs. IL & FS Energy Development Co. Ltd. [2017] 84 Taxmann.com 186 (Delhi) where it was held that if there is no exempt income earned in the AY in question, the question of disallowance of the expenditure incurred to earn exempt income in terms of Section 14A read with Rule 8D would not arise. The appellant has further referred to the decision of the Hon’ble Supreme Court in CIT v. Hero Cycles Pvt. Ltd. [1997] 94 Taxman 271 wherein it was held, “it is well settled that circulars can bind the ITO but will not bind the appellate authority or the Tribunal or the Court or even the assessee. The appellant further relied upon the following decisions:

- i. Ms. Amita Verma v. ACIT [2016] (Delhi-Trib.) 71 taxmann.com 91*
- ii. Cheminvest Ltd. v. CIT [2015] (Delhi) 61 taxmann.com 18*
- iii. CIT v. Holcim India Pvt. Ltd. [2015] (Delhi) 57 taxmann.com 28*

17.3 In view of the above facts and keeping in view the decision of the jurisdictional High Court, I delete the disallowance made by the Assessing Officer.”

16. The Revenue being dissatisfied is in appeal before the Tribunal.

17. We have heard the Ld. representative of the parties. On considering their arguments and perusal of the material on records, we came to the conclusion that there is no justification at all for the impugned disallowance under section 14A of the Act read with Rule 8D of the Income-Tax Rules, 1962. Reference of the decision of the Hon'ble Supreme Court in CIT Vs. Rajinder Prasad Moody – 115 ITR 519 (S.C) by the Revenue is misplaced in the context of facts and circumstances of the case at hand. The Ld. CIT(A) has followed the decisions of Hon'ble Delhi High Court in Cheminvest Ltd. and Holcim India Pvt. Ltd. (supra). The assessee’s case also finds support from the recent decision of the Hon'ble Delhi High Court in PCIT vs. Era Infrastructure India Ltd. (ITA No. 204/2022).

18. In view of the above, we are of the considered view that there is no substance in this ground of the Revenue. No interference on our part is called for. Ground no.2 (a) and (b) is rejected.

19. In the result, the appeals of the Revenue for both the AYs 2013-14 and 2014-15 are dismissed.

Order pronounced in the open court on 20th January, 2023.

sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER

Dated: 20th January, 2023

Mohan Lal

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi

Sl. No.	Particulars	Date
1.	Date of dictation (Order drafted through Dragon software):	
2.	Date on which the draft of order is placed before the Dictating Member:	
3.	Date on which the draft of order is placed before the other Member:	
4.	Date on which the approved draft of order comes to the Sr. PS/PS:	
5.	Date of which the fair order is placed before the Dictating Member for pronouncement:	
6.	Date on which the final order received after having been signed/pronounced by the Members:	
7.	Date on which the final order is uploaded on the website of ITAT:	
8.	Date on which the file goes to the Bench Clerk	
9.	Date on which files goes to the Head Clerk:	
10.	Date on which file goes to the Assistant Registrar for signature on the order:	
11.	Date of dispatch of order:	