

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER****ITA No.583/Kol/2022
Assessment Year: 2017-18**

Manish Company Pvt. Ltd. 130, Cotton Street, Bura Bazar, Kolkata-700007. (PAN: AABCM8092J)	Vs.	Income Tax Officer, Ward- 9(1), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri N. S. Saini, AR & Priyanka Salarpuria, AR
Respondent by : Shri P. P. Barman, Addl. CIT

Date of Hearing : 28.12.2022
Date of Pronouncement : 13.03.2023

ORDER**PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:**

This appeal filed by the assessee is against the order of Ld. CIT(A), Income Tax Department, National Faceless Appeal Centre (NFAC), Delhi vide Order No. ITBA.NFAC/S/250/2022-23/1046238343(1) dated 11.10.2022 passed against the order of assessment by ITO, Ward-9(1), Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 23.12.2019.

2. Assessee has taken four grounds of appeal, all of which relate to disallowance of ₹5,49,842/- made under section 14A of the Act read with rule 8D(iii) of the Income-tax Rule, 1962 (hereinafter referred to as 'the Rules').

3. Brief facts of the case are that assessee filed its return of income on 30.10.2017, reporting loss of ₹10,68,128/- and a book profit of ₹7,66,234/-. Case of the assessee was selected for complete scrutiny which, *inter alia*, included the point relating to expenses incurred for earning exempt income. Ld. AO completed the assessment by making a disallowance of ₹5,49,842/- under section 14A of the Act while computing the total income by alleging that assessee has claimed long-term capital gains of ₹5,49,842/- as exempt income. Ld. AO invoked the provisions of section 14A read with rule 8D and computed the disallowable expenditure incurred in relation to income not includible in the total income of ₹19,04,428/-. The disallowance of ₹5,49,842/- was made after restricting the same to the extent of long-term capital gains and added to the income of the assessee which resulted in lowering the carry forward of business loss to subsequent years. Aggrieved, assessee went in appeal before the Ld. CIT(A) who confirmed the action of the Ld. AO. Aggrieved, assessee is in appeal before the Tribunal.

4. Before us, Ld. Counsel for the assessee placed on record a paper book containing 11 pages. From the relevant pages of the income tax return form of the assessee for the year under consideration placed in the paper book, he demonstrated that long-term capital gains on sale of asset amounting to ₹5,49,842/- was reported as long-term capital gains, taxable at the rate of 20%. According to him, this taxable long-term capital gains was set off against the business loss of the current year of ₹16,17,970/-, leaving business loss remaining after set off at ₹10,68,128/-. Assessee had filed its return of income, claiming this amount of ₹10,68,128/- as the current year's business loss for carry

forward and set off in the subsequent years. Ld. Counsel thus asserted that assessee had not claimed any exempt income in the return form and is therefore not exigible to any disallowance under section 14A of the Act read with rule 8D. He further submitted that assessee had not earned any income which is exempt and not includible in the total income of the assessee for the year.

5. In respect of various judgements relied upon by the Ld. CIT(A),ld. Counsel submitted that these are not applicable to the facts of the present case as in all those decisions, the issue was related to the assessee having made investments which yielded tax-free dividend income and the disallowance was made towards earning of such exempt income. It is strongly contended by the Ld. Counsel that assessee has not earned any exempt income during the year and therefore no disallowance is warranted under section 14A of the Act read with rule 8D.

6. Per contra, Ld. Senior DR referred to the amendment made by the Finance Act, 2022 in section 14A to submit that it is retrospective in nature and, therefore, even if no tax-free income has resulted to the assessee, then also, disallowance can be made under section 14A on the Act.

7. We have heard the rival contentions and perused the material on record. Admittedly, it is a fact on record that assessee had reported long-term capital gains as taxable income in the return form, taxable at the rate of 20% which was set off against the business loss of the current year. It is also a fact as noted from the return form, that assessee had not earned any income, exempt from tax and not

includible in the total income for the year. We also take note that Ld. AO has computed the disallowance under section 14A of the Act read with rule 8D(iii) on a misconceived fact that assessee has earned long-term capital gains which is exempt under the Act. We find that on this misconceived fact of assessee having earned exempt income, disallowance made by the Ld. AO under section 14A read with rule 8D(iii) is not warranted since the correct fact in the matter is that assessee has not earned any exempt income during the year.

8. On the contention raised by the Ld. Senior DR with respect to amendment brought in by the Finance Act, 2022 that even if no tax-free income has resulted to the assessee, then also disallowance can be made under section 14A of the Act, we find that this aspect has been considered by the Hon'ble Delhi High Court in its decision dated 20.07.2022 in the case of *PCIT v. Era Infrastructure (India) Limited* [ITA No. 204/2022 & CM Application No. 31445/2022]. This decision by the Hon'ble Delhi High Court has been dealt and considered by the Coordinate Bench of ITAT Kolkata in the case of *Babul Fiscal Services (P) Ltd v. ACIT in ITA No. 318/Kol/2022 dated 02.08.2022* holding that no disallowance is required to be made in the case of the assessee because it has not earned any tax-free income and allowed the appeal of the assessee by deleting the addition so made.

9. Relevant extracts from the decision of Hon'ble Delhi High Court in the case of *Era Infrastructure (supra)* are reproduced hereunder for ease of reference.

"3. He submits that the ITAT erred in relying on the decision of this Court in PCIT VS. IL & FS Energy Development Company Ltd., 2017 SCC Online Del 9893 (wherein it has been held that no disallowance under Section 14A of the Act can be made if the assessee had not earned any exempt income), as the revenue has not been accepted the said decision and has preferred an SLP against the said decision.

4. Learned counsel for the petitioner also submits that in view of the amendment made by the Finance Act, 2022 to Section 14A of the Act by inserting a non obstante clause and an explanation after the proviso, a change in law has been brought about and consequently, the judgments relied upon by the authorities below including *PCIT vs. IL & FS Energy Development Company Ltd. (supra)* are no longer good law. The amendment to Section 14A of the Act is reproduced hereinbelow:-
"Amendment of section 14A.

In section 14A of the Income-tax Act, -

(a) in sub-section (l), for the words "For the purposes of", the words "Notwithstanding anything to the contrary contained in this Act, for the purposes of" shall be substituted;

(b) after the proviso, the following Explanation shall be inserted, namely:-

"[Explanation.-For the removal of doubts, it is hereby clarified that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income.]"

8. Consequently, this Court is of the view that the amendment of Section 14A, which is "for removal of doubts" cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood.

9. Though the judgment of this Court has been challenged and is pending adjudication before the Supreme Court, yet there is no stay of the said judgment till date. Consequently, in view of the judgments passed by the Supreme Court in *Kunhayammed and Others vs. State of Kerala and Another*, (2000) 6 SCC 359 and *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras* (1992) 3 SCC 1, the present appeal is dismissed being covered by the judgment passed by the learned predecessor Division Bench in *PCIT vs. IL & FS Energy Development Company Ltd. (supra)* and *Cheminvest Limited vs. Commissioner of Income Tax- VI*, (2015) 378 ITR 33.

10. Accordingly, the appeal and application are dismissed. However, it is clarified that the order passed in the present appeal shall abide by the final decision of the Supreme Court in the SLP filed in the case of *PCIT vs. IL & FS Energy Development Company Ltd (supra)*."

10. Considering the undisputed facts on record as stated above, duly corroborated by the income tax return form and computation of income placed in the paper book as well as respectfully following the

decision of the Hon'ble Delhi High Court referred above, we are of the view that no disallowance under section 14A is required to be made in the case of the assessee in terms of our observations made hereinabove. Grounds taken by the assessee in this respect are allowed and the disallowance so made by the Ld. AO is deleted.

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

Order pronounced in the open court on 13th March, 2023.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 13th March, 2023

JD, Sr. P.S.

Copy to:

The Appellant:

1. The Respondent:
 2. CIT(A), NFAC, Delhi
 3. CIT,
 4. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata