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

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER AND SH. NARENDER KUMAR CHOUDHARY, JUDICIAL MEMBER

ITA Nos.4533, 4534 & 6295/Del/2019
(Assessment Years : 2014-15, 2015-16 & 2016-17)

Living Media India Ltd. 9, K-Block Connaught Place, New Delhi-110 001 **PAN : AAACL 0087 H**	Vs.	ACIT Circle – 15(2) New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Madhur Aggarwal, Adv. Shri Uma Shankar, Adv.
Revenue by	Shri Arvind Bansal, Sr. D.R.

And

ITA No.4532/Del/2019
(Assessment Year : 2012-13)

Living Media India Ltd. 9, K-Block Connaught Circus, New Delhi-110 001 **PAN : AAACL 0087 H**	Vs.	ACIT Circle – 15(2) New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Madhur Aggarwal, Adv. Shri Uma Shankar, Adv.
Revenue by	Ms. Sarita Kumari, CIT-D.R.

Date of hearing:	16.03.2023
Date of Pronouncement:	31.03.2023

ORDER

PER ANIL CHATURVEDI, AM :

These four appeals filed by the assessee are directed against the order dated 27.02.2019 & 16.05.2019 of the Commissioner of

Income Tax (Appeals) - 5, New Delhi relating to Assessment Years 2012-13, 2014-15, 2015-16 & 2016-17.

2. Before us, at the outset, Learned AR submitted that as far as the appeal for A.Y. 2012-13 is concerned the only issue which requires adjudication is with respect to disallowance u/s 14A of the Act. As far as the appeals for A.Y. 2014-15, 2015-16 & 2016-17 is concerned, the grounds raised by assessee in those appeals are identical and on same issue except for the change in the assessment year and the amount involved and therefore, the submissions made by him while arguing the grounds in one year would be applicable to other years also. He further submitted that in all these appeals assessee is challenging the disallowance made u/s 43B(f) of the Act and the other grounds raised in the appeals under Section 14A of the Act are being not pressed on account of smallness of amount. Learned DR did not controvert the aforesaid submissions made by Learned AR. In view of the aforesaid facts, we proceed to dispose of the appeals for A.Ys. 2014-15, 2015-16 & 2016-17 together but however refers to the facts for A.Y. 2014-15.

3. The relevant facts as culled from the material on records are as under :

4. Assessee is a company stated to be engaged in the business of publishing and trading of books, magazines etc. Assessee electronically filed its original return of income for A.Y. 2014-15 on 30.11.2014 declaring loss of Rs.26,97,44,787/- under normal provision and loss of Rs.21,15,30,908/- u/s 115JB of the Act. The

case of the assessee was selected for scrutiny and thereafter the assessment was framed u/s 143(3) r.w.s 144C of the Act vide order dated 30.12.2017 and the total loss was determining at Rs.22,86,56,300/-.

5. Aggrieved by the order of AO, Assessee carried the matter before CIT(A) who vide order dated 27.02.2019 in Appeal No.Del/CIT(A)-5/0271/2017-18 granted partial relief to the assessee. Aggrieved by the order of CIT(A), assessee is now in appeal and has raised the following grounds:

1. *"That the learned CIT (Appeals) has grossly erred in law and on facts in sustaining a disallowance of a sum of Rs.42,44,760/- on account of leave encashment in light of provisions of section 43B (1) of the Act and the said disallowance has been sustained on misappreciation of the statutory provisions and thus, should be deleted, as such.*

1.1 *That the learned CIT (Appeals) has erred in sustaining the said disallowance by failing to appreciate the replies/ evidences furnished by the assessee-appellant and the disallowance so sustained is based on irrelevant and extraneous considerations and purely on surmises and conjectures, as such, disallowance so sustained is wholly untenable on facts and in law*

2. *That the learned CIT (Appeals) has further erred in law and on facts in sustaining a disallowance of a sum of Rs.13,78,802/- under section 14A of the Act, whereas, as per the revised working furnished by the assessee- appellant relying on latest judicial pronouncements of jurisdictional high court, the disallowance should have been Rs.13,03,209/- and thus, the disallowance so sustained is unjustified and untenable in law and thus, should be deleted, as such.*

2.1 *That in doing so, the learned CIT (Appeals) has failed to appreciate the basic fact that the disallowance so made is without pointing out any deficiency or discrepancy in the explanation/ claim of the assessee - appellant, more over the learned CIT (Appeals) has failed to appreciate the fact that*

learned AO has failed in recording any objective cogent satisfaction while working out the said disallowance under section 14A of the Act and as such, the disallowance so made should be deleted.

2.2 That further, the said disallowance so sustained by learned CIT(Appeals) is against various judicial pronouncements of Hon'ble High Court of Delhi (i.e. jurisdictional high court), and as such, disallowance so sustained is misconceived and misplaced in law and should be deleted, as such."

6. Ground No.1 and the sub ground is with respect to the disallowance made u/s 43B(f) of the Act.

7. During the course of assessment proceedings, assessee was asked to furnish the details of leave encashment payable and paid with regard to disallowance u/s 43B of the Act. On perusing Form 3CD, AO noticed that assessee has shown leave encashment payable of Rs.42,44,760/- but had not disallowed the same in its computation of income. When the assessee was asked to show-cause as to why the provision for leave encashment not be disallowed, assessee *inter alia* relying on the decision of Hon'ble Calcutta High Court in the case of CIT vs. Exide Industries Ltd. 292 ITR 470 submitted that it had claimed leave encashment/compensated absence on accrual basis and therefore since it was out of the purview of provisions of Section 43B, no disallowance was warranted. The submissions made by assessee was not found acceptable to AO. AO noted that s. 43B(f) was inserted by the Finance Act, 2001 w.e.f 01.04.2022 to provide that any sum payable by the assessee as employer in lieu of any leave at the credit of his employee shall be allowed as a deduction only

in year of actual payment. AO further noted that though Hon'ble Calcutta High Court in the case of Exide Industries Ltd. (supra) has struck down the provision as being unconstitutional but however, the judgment of Hon'ble Calcutta High Court was stayed by Hon'ble Supreme Court and it had clarified that assessee must pay tax as if Section 43B(f) was still in place though it was entitled to make a claim in its return. AO accordingly disallowed Rs.42,44,760/- being unpaid leave encashment amount u/s 43B of the Act and made its addition.

8. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who upheld the order of AO. Aggrieved by the order of CIT(A), assessee is now before Tribunal.

9. Before us, Learned AR reiterated the submissions made before AO and CIT(A) and submitted that the payment of leave encashment have been made in subsequent years and in support of his aforesaid contentions, he pointed to the chart containing the details of provision and payment of leave encashment which is placed at page 134 of the paper book. He further submitted that identical issue arose before the Tribunal in the group concern of the assessee and the Co-ordinate Bench of Tribunal in those cases had restored the issue back to the file of AO and directed the AO to allow the deduction u/s 43B of the Act on payment basis. In support of his aforesaid contention, he pointed to the order of Tribunal in the case of TV Today Network Ltd vs. ACIT in ITA No.3356/Del/2017 for A.Y. 2012-13 order dated 05.10.2021 and TV Today Network Ltd. in ITA Nos. 7277 & 7287/Del/2018 for A.Y.

2013-14 order dated 03.12.2021 and pointed to the relevant findings at pages 60 to 75 of the paper book. He therefore submitted that since the payment of leave encashment have been made in subsequent years, suitable directions may be issued to AO to verify the contention of the assessee and thereafter allow the deduction u/s 43B of the Act on actual payment basis.

10. Learned DR did not factually controvert the submissions made by Learned AR but however strongly supported the orders of lower authorities.

11. We have heard the rival submissions and perused the material available on record. The present ground is with respect to the disallowance made u/s 43B(f) of the Act being the provision made for leave encashment. It is the contention of the assessee that during the year under consideration, assessee had make provision for leave encashment but the payments have been made in subsequent years and therefore if the payment is disallowed in the year under consideration, it be allowed as deduction in the year of payment. We find that identical issue arose in the case of group concern of the assessee in the case of TV Today Network Ltd. (supra) for A.Y. 2012-13 before the Co-ordinate Bench of Tribunal. The Co-ordinate Bench of Tribunal by following the order of Co-ordinate Bench in ITA No.7287/Del/2018 decided the issue by observing as under:

> *"19. We have carefully perused the orders of this Tribunal in ITA No. 3356/DEL/2017 for A.Y 2012 –13. The relevant findings of the co-ordinate bench read as under:*

> *"7. We have heard both the parties and perused the material available on record. As regards Ground No. 1, 1.1 & 1.2, the same is covered against the assessee, hence, dismissed. As regards Ground No.2, 2.1, 2.2 & 2.3 relating to disallowance towards leave encashment in lieu of provisions of Section 43B (f) of the Income Tax Act, 1961, the Hon'ble Apex Court in case of Exide Industries (Supra) held that the claim with regard to leave encashment has to be allowed on cash basis i.e. actual payment basis and not on accrual basis. It 6 ITA No. 3356/Del/2017 is pertinent to note that the payments with regards to the leave encashment have been made in subsequent assessment year i.e. 2013-14 and thus, we direct the Assessing Officer to verify and allow the deduction u/s 43B on actual payment basis as held in the decision of the Hon'ble Apex Court. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Hence, Ground No. 2, 2.1 2.2 & 2.3 are partly allowed."*

12. Since the issue raised in the present appeal is identical to the issue raised in group concern, and in view of the contentions of the assessee that the payments of leave encashment has been made in subsequent years, we direct the AO to verify and allow the deduction u/s 43B of the Act being the provision made for leave encashment on actual payment basis in the year of its payment as held by Hon'ble Apex Court in the case of Exide Industries Ltd. (supra). Needless to state that AO shall grant adequate opportunity of hearing to the assessee and assessee shall also promptly furnish the required details called for by the AO. **Thus the ground of assessee is allowed for statistical purposes.**

13. **Ground No.2 to 2.1 :** In view of the submissions made by Learned AR that assessee does not wish to press these grounds, **the grounds are dismissed as not pressed.**

14. **In the result, the appeal of assessee is partly allowed.**

15. **As far as ITA Nos. 4534 & 6295/Del/2019 for A.Ys. 2015-16 & 2016-17** are concerned, before us, Learned AR has submitted that the issue raised in the appeals for A.Ys. 2015-16 & 2016-17 are identical to that of A.Y. 2014-15. We have hereinabove while deciding the assessee's appeal for A.Y. 2014-15 have restored the issue back to the file of AO with necessary directions. We for similar reasons also direct the AO to examine the claim of the assessee and thereafter decide the issue in accordance with law. **Thus both the appeals of assessee are partly allowed for statistical purposes.**

16. **In the combined result, all the three appeals of the assessee are partly allowed.**

Now we take ITA No.4532/Del/2019 for A.Y. 2012-13 :

17. Assessee electronically filed its return of income for A.Y. 2012-13 declaring loss of Rs.12,37,56,828/- on 12.03.2014. The case was selected for scrutiny and thereafter in the assessment framed u/s 143(3) (order dated 28.03.2015) the total loss was determined at Rs.1,62,43,615/-.

18. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dated 27.02.2019 in Appeal No.Del/CIT(A)-5/0022/2015-16 granted partial relief to the

assessee. Aggrieved by the order of CIT(A), assessee is now before the Tribunal and has raised the following grounds:

> *1. That the learned CIT (Appeals) has erred in law and on facts in sustaining a disallowance of a sum of Rs. 55, 87, 882/- under section 14A of the Act, whereas, as per the revised working furnished by the assessee - appellant relying on latest judicial pronouncements of jurisdictional high court, the disallowance should have been Rs. 13, 03, 214- and thus, the disallowance so sustained is unjustified and untenable in law and thus, should be deleted. as such.*
>
> *1.1 That in doing so, the learned CIT (Appeals) has failed to appreciate the basic fact that the disallowance so made is without pointing out any deficiency or discrepancy in the explanation/ claim of the assessee - appellant, more over the learned CIT (Appeals) has failed to appreciate the fact that learned AO has failed in recording any objective/ cogent satisfaction while working out the said disallowance under section 14A of the Act and as such, the disallowance so made should be deleted.*
>
> *1.2 That further, the said disallowance so sustained by learned CIT(Appeals) is against various judicial pronouncements of Hon'ble High Court of Delhi (ie jurisdictional high court), and as such, disallowance so sustained is misconceived and misplaced in law and should be deleted, as such.*

19. Before us, at the outset, Learned AR submitted that though the assessee has raised various grounds but the sole controversy is with respect to the disallowance u/s 14A of the Act.

20. During the course of assessment proceedings, AO noticed that the assessee had investments in equity shares amounting to Rs.104,31,09,952/-, income from which does not and shall not form part of total income. AO was of the view that provision under Section 14A r.w. Rule 8D would be applicable. He thereafter, by following the methodology prescribed under Rule 8D of the Income

Tax Rules worked out the disallowance u/s 14A of Rs.10,75,13,213/- and made its addition.

21. Aggrieved by the order of AO, assessee carried the matter before CIT(A). Before CIT(A), it was *inter alia* submitted that while working out the disallowance u/s 14A, AO had not given effect from the *suo moto* disallowance of Rs.55,87,881/- made by the assessee. It was further submitted that AO had considered the full value of investment as appearing in the Balance Sheet which included various investments on which the company had not received any dividend during the year under consideration. It was also submitted that while working out the disallowance, AO had considered the investment in debentures amounting to Rs.1,80,60,930/- on which the interest received is taxable and the capital gains arising on the sale of debentures also do not qualify for exemption. It was further submitted that disallowance under Rule 8D (2)(ii) of the Act was not called for as all the investments made by the assessee are out of interest free funds and not borrowed funds. Before CIT(A), the assessee stated that if at all disallowance is to be worked out it should be restricted to Rs.13,03,214/- only as against the *suo moto* disallowance of Rs.55,87,882/- made by assessee. CIT(A) did not fully agree with the contentions of the assessee. He by following the decision of his predecessor for A.Y. 2011-12 granted partial relief to the assessee by directing that the disallowance be restricted to Rs.55,87,882/-, being the suo moto disallowance made by assessee. Aggrieved by the order of CIT(A), Assessee is now before us.

22. Before us, Learned AR reiterated the submissions made before lower authorities and further submitted that where the assessee has own funds as well as borrowed funds, a presumption can be made that the advances for non-business purposes have been made out of the own funds and that the borrowed funds have not been used for this purpose and accordingly, the disallowance of interest on the borrowed funds under Rule 8D(2)(ii) is not called for. He submitted that in the computation of income filed along with the return of income, assessee had worked out the disallowance at Rs.55,87,882/- u/s 14A of the Act and while calculating the disallowance, assessee had considered the entire investment. After the filing of the return of income, assessee came across various decisions of Hon'ble High Court wherein it was held that only those investments on which exempt income has been received during the year should be considered for the purpose of calculating disallowance under section 14A of the Act. Accordingly the assessee before CIT(A) worked out the revised disallowance u/s 14A after considering only those investments on which dividend was received during the year at Rs.13,03,214/-. He pointed to the revised working of the disallowance which is placed at page 46 of the paper book. He submitted that CIT(A) did not accept the contentions of the assessee and by following the order of his predecessor for A.Y. 2011-12 restricted the disallowance to Rs.55,87,882/- that was *suo moto* disallowed by assessee. He also placed reliance on the decision of Delhi High Court in the case of ACB India Ltd. vs. ACIT 374 ITR 108.

23. Learned DR on the other hand supported the order of AO.

24. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to the disallowance made u/s 14A r.w. Rule 8D of the Income Tax Rules. It is an undisputed fact that in the computation of income filed by the assessee, it had worked out the *suo moto* disallowance u/s 14A r.w.r 8D at Rs.55,87,882/- which comprised the disallowance under Rule 8D(2)(ii) on account of interest at Rs.4,19,575/- and under Rule 8D(2)(iii) on account of administrative expenses at 0.5% of the average value of investments at Rs.49,18,306/- thus aggregating the disallowance at Rs.55,87,882/-. Before us, with respect to the disallowance under Rule 8D(2)(ii), it is the contention of the Ld AR that where availability of profit, Share Capital and Reserves and Surplus was much more than investments made by assessee which could yield tax-free income, no disallowance of interest expenditure under section 14A could be made and for this proposition he relied on various decisions. We have no quarrel with the aforesaid settled law cited by Ld AR but however, when the facts of the present case are seen in the light of the factual position, we are of the view that the aforesaid proposition would not be applicable to the present facts and the basis of saying so is that the perusal of the audited Balance Sheet of the assessee as on 31st March 2012, which is placed at page 9 of the paper book, reveals that the aggregate shareholders funds comprising of Share Capital and Reserves and Surplus is Rs. 36.20 crores (rounded off) and the aggregate investments are Rs. 104.31 crores (rounded off) comprising of non-current investments of Rs. 69.01 crores (rounded off) and current investments of Rs. 35.29 Crores (rounded off). Thus the total

investments as on 31st March 2012 is Rs. 104.31 crores as against the aggregate interest free shareholders fund of Rs. 36.20 crores. In such a situation the proposition that the investments are presumed to have been made out of interest free funds and not borrowed funds would not be applicable and therefore we find no reason to interfere with the order of CIT(A) wherein he has upheld the disallowance u/s 14A r.w.r 8D(2)(ii) made by AO.

25. As far as the disallowance u/s 14A r.w.r 8D(2)(iii) of the administrative expenses is concerned, it is the contention of the Ld. AR that for working out the average investments on which the disallowance of 0.5% is made, Assessee had considered the total investments (which included the investments which yielded tax free income and also investments which did not yield tax free income). The aforesaid contention of the Ld. AR has not been controverted by Ld. DR.

26. We find that Hon'ble Delhi High Court in the case of Cargo Motors (P.) Ltd vs. DCIT [2022] 145 taxmann.com 641 (Delhi) has held that for purpose of making disallowance of expenses under section 14A as per Rule 8D, only those investments were to be considered for computing average value of investments which yielded exempt income during relevant year. Relying of the aforesaid decision of Hon'ble Delhi High Court, we are of the view that the AO was not justified in working out the disallowance on account of administrative expenses u/s 14A r.w. Rule 8D(2)(iii) by computing the average value of investments on the basis of entire

investment. We therefore direct the AO and direct him to work out the disallowance u/s 14A r.w. Rule 8D(2)(iii) on considering the investments which have yielded tax free income. We accordingly restore the issue back to the file of AO to rework the disallowance u/s 14A r.w. Rule 8D in accordance with law. Needless to state that AO shall grant adequate opportunity of hearing to the Assessee. Assessee shall be free to file such documents, explanations, submissions as it deems fit in respect of the claim and AO shall also be free to call for such information and explanations as he deems fit to adjudicate the claim of the Assessee. Assessee is also directed to promptly furnish the required details called for by the authorities. **Thus this ground of the assessee is partly allowed for statistical purposes.**

27. Thus this appeal of the assessee is partly allowed.

28. In the combined result, all the appeals of assessee are partly allowed.

Order pronounced in the open court on 31.03.2023

Sd/-	**Sd/-**
(NARENDER KUMAR CHOUDHARY)	**(ANIL CHATURVEDI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 31.03.2023

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Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI