IN THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH DELHI

BEFORE: SHRI C.M GARG, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.850/Del/2014
ITA No. 1083/Del/2013
(**Assessment Years: 2009-10 & 2010-11**)

Frick India Limited, 809, Surya Kiran Building, 19, Kasturba Gandhi Marg, New Delhi 110001	Vs.	Deputy Commissioner of Income Tax-11(1) New Delhi
PAN/GIR No. AACC 7171 K		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Tarandeep Singh, Adv. Shri Sandeep Yadav, Adv.
Revenue by	Shri Vipul Kashyap, Sr.DR
Date of Hearing	**19/04/2023**
Date of Pronouncement	**25/04/2023**

O R D E R

***PER M. BALAGANESH (A.M)*:**

These appeals in ITA No.850/Del/2014 and ITA No. 1083/Del/2013 for A.Ys. 2009-10 & 2010-11 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-XIII, Delhi in appeal No.125/2012-13 & 15-/11-12 dated 13.12.2013 (hereinafter referred to as ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30.10.2012 & 30.11.2011 by the ld. DCIT Circle 11(1), New Delhi (hereinafter referred to as ld. AO).

2. Identical issues are involved in both these appeals, and hence there are taken up together and disposed of by this common order for the sake of connivance.

3. The first identical issue to be decided in this appeal is challenging the disallowance made u/s. 14A of the Act.

3.1. We have heard rival submissions and perused the materials available on record. The assessee is a company engaged in the business of manufacturing of air-conditioning and refrigeration equipments. For the assessment year 2009-10, the assessee company earned dividend income of Rs. 34,99,371/- and tax free interest income of Rs. 19,81,310/- totalling to Rs. 54,80,681/- and claimed the same as exempt u/s. 10(34) & 10(35) of the Act. The assessee had made *suo-moto* disallowance of expenses of Rs. 67,885/- in the return of income u/s. 14A of the Act as expenses incurred for the purpose of earning exempt income. The assessee also furnished the list of expenses that were considered for the purpose of making *suo-moto* disallowance before the ld. AO. In other words, the basis of *suo-moto* disallowance u/s. 14A of the Act made by the assessee in sum of Rs. 67,885/- was duly furnished by the assessee before the ld. AO. The ld. AO did not record any objective satisfaction with cogent reasons as to why the *suo-moto* disallowance made by the assessee in the return of income is incorrect. Without doing the same, he directly proceeded to apply the computation mechanism provided in Rule 8D(2)(ii) of the Rules as under:-

Disallowance under Rule 8D2(i) – Rs. 67,885/-

Disallowance under Rule 8D2(ii) – Rs. 32.1372 lakhs

Disallowance under Rule 8D2(iii) – Rs. 6.671625 lakhs

Total	- Rs. 39,48,767/-
Less: Disallowance already made by the assessee	-Rs 67,885/-
Balance disallowable u/s. 14A	- Rs 38,80,882/-

3.2. Before the ld. CIT(A), the assessee stated that it had sufficient own funds in its kitty to make the investments and gave the details of the same with corresponding reference to the financial statements of the assessee. The ld. CIT(A), however, did not heed to the contention of the assessee and confirmed the disallowance of interest made under Rule 8D(2)(ii) of the Rules by rejecting the presumption of own funds availability theory. The Ld. CIT(A) reworked the disallowance of interest at Rs. 20,97,000/- by considering only those investments which had yielded exempt income under Rule 8D(2)(ii) of the Rules. The ld. CIT(A) also stated that the ld. AO had not recorded proper satisfaction with regard to the fact as to whether there is any direct and indirect expenditure that could be linked with investment activity of the assessee company. Having stated so, the Ld. CIT(A) proceeded to uphold the disallowance by stating that he was having co-terminus powers with that of the ld. AO and proceeded to record his satisfaction by stating that both direct and indirect expenses should be subject matter of disallowance u/s. 14A of the Act as attributable to investment activity. Since direct expenses have already been identified by the assessee himself, the ld. CIT(A) upheld the disallowance under Rule 8D(2)(i) of the Rules at Rs. 67,885/-. With regard to disallowance of indirect expenses, the ld. CIT(A) observed that the ld. AO was justified in applying the third limb of Rule 8D(2) of the Rules.

3.3. We have gone through the balance sheet of the assessee and we find that assessee is having sufficient interest free funds in its kitty, which would meet the investments that yield exempt income. Hence the presumption of availability of own funds theory would certainly come to the rescue of the assessee. This view of ours is further fortified by the recent decision of Hon'ble Supreme Court in the case of ***South Indian Bank Ltd reported in 438 ITR 1***, wherein it was observed as under:-

> ***17.*** *In a situation where the assessee has mixed fund (made up partly of interest free funds and partly of interest-bearing funds) and payment is made out of that mixed fund, the investment must be considered to have been made out of the interest free fund. To put it another way, in respect of payment made out of mixed fund, it is the assessee who has such right of appropriation and also the right to assert from what part of the fund a particular investment is made and it may not be permissible for the Revenue to make an estimation of a proportionate figure. For accepting such a proposition, it would be helpful to refer to the decision of the Bombay High Court in Pr. CIT v. Bombay Dyeing & Mfg. Co. Ltd. [IT Appeal No. 1225 of 2015, dated 28-11-2017], where the answer was in favour of the assessee on the question, whether the Tribunal was justified in deleting the disallowance under section 80M of the Act on the presumption that when the funds available to the assessee were both interest free and loans, the investments made would be out of the interest free funds available with the assessee, provided the interest free funds were sufficient to meet the investments. The resultant SLP of the Revenue challenging the Bombay High Court judgment was dismissed both on merit and on delay by this Court. The merit of the above proposition of law of the Bombay High Court would now be appreciated in the following discussion.*
>
> *18 to 26.....*
>
> ***27.*** *The aforesaid discussion and the cited judgments advise this Court to conclude that the proportionate disallowance of interest is not warranted, under section 14A of Income Tax Act for investments made in tax-free bonds/securities which yield tax-free dividend and interest to Assessee Banks in those situations where, interest free own funds available with the Assessee, exceeded their investments. With this conclusion, we unhesitatingly agree with the view taken by the learned ITAT favouring the assessees.*

3.4. Hence there cannot be any disallowance of interest in terms of Rule 8D2(ii) of the Rules. The ld. AO is directed to delete the same.

3.5. We find that the assessee had duly given the basis of making *suo-moto* disallowance of expenses in the sum of Rs. 67,885/-. The same are enclosed in pages no. 5 to 9 of the paper book. It is not in dispute that the very same workings were also placed before ld. AO and ld. CIT(A). From the said workings, we find that the assessee had duly taken into account the salaries of concerned employees who were related to investment activity, bonus, provident fund, ESI, employee welfare expenses, insurance expenses, electricity & water, repairs to furniture fixtures, electrical fittings etc., conveyance charges, telephone expenses, stationery and the newspapers/periodicals with complete basis thereon mentioning the name of the employee and directors of the company, the role performed by them, approximate time spent by them towards the investment activity etc. When all these details were placed before the ld. AO , it is bounden duty of the ld. AO to go through the same having regard to the accounts of the assessee and record objective satisfaction with cogent reasons as to why the *suo-moto* disallowance made by the assessee is incorrect. This is the clear mandate of the statute has provided in section 14A(2) of the Act r.w.r 8D(1) of the Rules. Without recording such satisfaction, the ld. AO is prohibited from directly applying the computation mechanism provided in Rule 8D(2) of the Rules and make disallowance 14A of the Act. This view of oura is fortified by the decision of Hon'ble Supreme Court in the case of Maxopp Investment (I) Ltd. reported in 402 ITR 640. In the instant case, the ld. CIT(A) had even categorically stated that the ld. AO had not recorded any satisfaction before implementing the computation mechanism provided in Rule 8D(2) of the Rules. The ld. CIT(A) however goes to record his satisfaction, which is also ignoring the books of accounts of the assessee. First of all, the statute mandates the ld. AO to record his satisfaction in terms of section 14A(2) of the Act read with Rule 8D(1) of the Rules and the same

cannot be supplemented by the action of the ld. CIT(A) in recording satisfaction on behalf of the ld. AO. Against the aforesaid finding of ld. CIT(A), the revenue is not in appeal before us. Hence it could be safely concluded that in the instant case, there is a clear violation of provisions of section 14A(2) of the Act read with Rule 8D(1) of the Rules. Hence we have no hesitation in deleting the entire disallowance made by the Ld. AO u/s. 14A of the Act, in the facts and circumstances of the instant case.

3.6. We further find the similar disallowance was in assessee's own case for A.Y. 2011-12 to 2016-17 by the Ld. AO and Ld. CIT(A) had deleted the disallowance on the ground that no objective satisfaction was recorded by the Ld. AO for rejecting the plea of the assessee and Ld. CIT(A) had also accepted the availability of own funds theory together with the presumption thereon. It is pertinent to note that against these orders of Ld. CIT(A), no further appeal has been preferred by the revenue before this tribunal.

3.7. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, the grounds no. 1, 1.1, 1.2, 1.3, 2 and 2.1 raised by the assessee for A.Y. 2009-10 are allowed.

4. The ground no. 3 and 3.1 raised by the assessee are challenging the action of the lower authorities in not considering the revised computation of income filed during the course of assessment proceedings.

4.1. We have heard rival submissions and perused the materials available on record. We find that assessee had filed revised computation of income before the ld. A.O. on 30.08.2011 and had made further submissions on

09.11.2011. It is not in dispute that assessee had also a filed revised return on 29.03.2011. As per the provisions of section 139(5) of the Act, this revised return was well within the time prescribed and hence the ld. AO ought to have taken cognizance of the same while framing the assessment. Admittedly, the assessee had made fresh claims in the revised return of income filed on 29.03.2011, in the revised computation of income filed during on 30.08.2011 and 09.11.2011. These claims were merely rejected by the lower authorities by appling the decision of Hon'ble Supreme Court in the case of ***Goetze (India) Ltd. reported in 284 ITR 323***.

4.2. We find that in the recent Supreme Court decision rendered in the case of ***Wipro Finance Ltd. vs. CIT reported in 443 ITR 250***, the Hon'ble Supreme Court after considering the decision rendered in the case of Goetze (India) Ltd. had reiterated that the decision in Goetze (India) Ltd. make it very clear that limitation period for considering any fresh claim of an assessee would apply only to the assessing authority and does not impinge upon the preliminary powers of the Tribunal bestowed u/s. 254 of the Act. The relevant observations made in this regard by the Hon'ble Supreme Court or reproduced here under:-

> *11. Learned ASG had placed reliance on the decision of this Court in Goetze (India) Ltd. v. CIT[2006] 157 Taxman 1/284 ITR 323 in support of the objection pressed before us that it is not open to entertain fresh claim before the ITAT. According to him, the decision in National Thermal Power Co. Ltd. (supra) merely permits raising of a new ground concerning the claim already mentioned in the returns and not an inconsistent or contrary plea or a new claim. We are not impressed by this argument. For, the observations in the decision in Goetze (India) Ltd. (supra) itself make it amply clear that such limitation would apply to the "assessing authority", but not impinge upon the plenary powers of the ITAT bestowed under*

section 254 of the Act. In other words, this decision is of no avail to the department.

4.3. In view of the same, we deem it fit and appropriate, in the interest of justice and fair play, to restore this issue raised in ground no. 3 and 3.1 to the file of Ld. CIT(A) for *denovo* adjudication on merits, in accordance with law. Accordingly, the ground 3 and 3.1 raised by the assessee are allowed for statistical purposes.

5. The ground no. 4 raised by the assessee is challenging the chargeability of interest u/s. 234B of the Act, which would be consequential of nature.

6. The ground no. 5 and 6 are general in nature and does not require any specific adjudication.

7. In the result, the appeal of the assessee for A.Y. 2009-10 is allowed for statistical purposes.

8. The only issue to be decided in the appeal filed by the assessee for A.Y. 2010-11 is challenging the disallowance of expenses made u/s. 14A of the Act. Both the parties mutually agreed that the facts prevailing in A.Y. 2010-11 are exactly identical with the facts prevailing in A.Y. 2009-10. Hence the decision rendered by us for AY 2009-10 with regard to the issue of disallowance u/s. 14A of the Act, hereinabove, shall apply *mutatis mutandis* to A.Y. 2010-11 also, except with variance in figures. Accordingly, the grounds raised by the assessee for A.Y. 2010-11 are allowed.

9. To sum up the appeal of the assessee for A.Y. 2009-10 is allowed for statistical purposes and appeal of the assessee for A.Y. 2010-11 is allowed.

Order pronounced in the open court on 25/04/2023.

Sd/-	**Sd/-**
(C.M GARG)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Delhi; Dated 25/04/2023

NV, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Delhi.
4. CIT
5. DR, ITAT, Delhi
6. Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar)
ITAT,Delhi