IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F' : NEW DELHI)

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.4985/Del./2017
(ASSESSMENT YEAR : 2012-13)

DCIT, Circle 19(1) & (2), New Delhi.	vs.	PTC India Financial Services Ltd., 2nd Floor, NBCC Tower, 15, Bhikaji Cama Place, New Delhi – 110 066. **(PAN : AAECP0501C)**

ITA No.5051/Del./2017
(ASSESSMENT YEAR : 2012-13)

PTC India Financial Services Ltd., 2nd Floor, NBCC Tower, 15, Bhikaji Cama Place, New Delhi – 110 066. **(PAN : AAECP0501C)**	vs.	DCIT, Circle 19(1) & (2), New Delhi.
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Salil Kapoor, Advocate
Shri Tarun Chanana, Advocate
REVENUE BY : Shri T. Kipgen, CIT DR

Date of Hearing : 02.05.2023
Date of Order : 09.05.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

These are cross appeals by the Revenue and assessee arising out of the order of ld. CIT (Appeals)-36, New Delhi dated 18.05.2017 pertaining to AY 2012-13.

2. The grounds of appeal taken by the Revenue read as under :-

"(i) In the facts and circumstances of the case, the ld. CIT(A) erred in deleting the addition made of disallowance of depreciation of Rs.2,85,28,829/- ignoring the fact that the assessee company has made investment in windmill.

(ii) In the facts and circumstances of the case, the ld. CIT(A) erred in deleting the addition made on account of short deduction of TDS of Rs.53,99,200/-.

(iii) In the facts and circumstances of the case, the ld. CIT(A) erred in deleting the addition made on account of disallowance u/s 14A of Rs.16,77,36,896/-."

3. The grounds of appeal taken by the assessee read as under :-

"1. That the order passed by the CIT(A) upholding the additions made by the AO is illegal and bad in law and the additions sustained should be deleted.

2. That the AO and CIT(A) have erred in law and on facts in not providing a reasonable and adequate opportunity to the appellant to be heard. The orders are passed in gross violations of principles of natural justice.

3. That the CIT(A) has grossly erred on facts and in law in upholding addition of Rs.9,81,86,182/- made by the AO on account of foreign exchange. loss. The addition is illegal and bad in law and should be deleted.

4. That the CIT(A) has grossly erred in ignoring the important aspects of the case while upholding the addition of Rs.9,81,86,182/- on account of foreign exchange loss.

5. That the CIT(A) has grossly erred on facts and in law in sustaining the addition of Rs.57,66,026/- under See 14A. The addition of Rs.57,66,026/- sustained by the CIT(A) is illegal and bad in law and should be deleted.

6. That the AO and CIT(A) have grossly erred on facts and in law in invoking Sec 14A and Rule 8D against the appellant and have erred in ignoring the important aspects of the case.

7. That without prejudice the calculations done under Rule 8D are highly excessive and should be reduced substantially in view of various judicial pronouncements.

8. That without prejudice the voluntary disallowance of Rs.23.06 lakhs made by the assessee itself should be included in the final amount of disallowance computed.

9. That the documents, explanations filed by the Assessee and the material available on record has not been properly considered and judicially interpreted and have been wrongly ignored."

4. Brief facts of the case are that the assessee is a Non-Banking Financial Company (NBFC). It is promoted by PTC India Ltd. It is engaged in the business of making principal investment in, and providing financial solutions for companies with projects across the energy value chain, generation and distribution of electricity. For AY 2011-12, it filed its return on 30.09.2011 declaring income of Rs. 39,86,60,290/-. The return was processed under section 143(1) of the Income-tax Act, 1961 (for short 'the Act'). Thereafter, the case was selected for scrutiny under CASS. During the assessment proceedings, assessee filed details which the Assessing Officer considered and examined. He completed the assessment at a total income of Rs.2,09,87,25,890/- The disallowances made by the AO are as under :-

(i)	Disallowance of depreciation on investment made in wind mills	Rs.2,85,28,829
(ii)	Disallowance of notional loss (mark To mark loss) booked under head Foreign Exchange loss	Rs.9,81,86,182
(iii)	Disallowance for non-deduction of TDS	Rs. 53,99,200
(iv)	Disallowance u/s 14A	Rs.17,11,94,055

5. Aggrieved by the above order, assessee appealed before the ld. CIT(A) who deleted the disallowances on account of depreciation on investment made in wind mills, disallowance on account of non-deduction of TDS and partly addition made on account of disallowances u/s 14A of the Income-tax Act, 1961 (for short 'the Act'). But ld. CIT (A) sustained the addition of Rs.9,81,86,182/- made by the AO on account of foreign exchange loss and also partly sustained the disallowance made under section 14A.

6. Against this order of ld. CIT (A), Revenue and assessee are in cross appeals. We have heard both the parties and perused the records.

7. Apropos the issue of disallowances of depreciation on investment made in wind mills : At the outset, ld. Counsel of the assessee submitted that the same issue has been decided in favour of the assessee by this Tribunal in assessee's own case in ITA No.1268/Del/2015 for AY 2011-

12 vide order dated 14.03.2023. He submitted that facts are identical. Ld. DR for the Revenue could not dispute that the facts are not identical.

8. We find that this Tribunal has decided the identical issue in assessee's own case in AY 2011-12 vide order dated 14.03.2023 (supra). We may gainfully refer to the order of the ITAT in that case as under:-

> 7. We have considered the submission of the parties and perused the records. During the course of assessment proceedings, the Ld. AO raised a query and required the assessee to explain why the activity of power generation be not regarded as other than business activity of the assessee and depreciation etc. be disallowed. The assessee submitted a detailed reply dated 10.01.2014 which has been incorporated by the Ld. AO at pages 2-4 of his assessment order. It is observed that the assessee cited clause 24 of the objects incidental or ancillary to the attainment of the main object of the Memorandum of Association to explain that it covers the activity of power generation and sale of such power to consumer by the company. It was also submitted that as per the main object clause the company invests or provides finance to companies engaged in generating power and that investment in own power generation unit (i.e. windmill) should also get covered within such object clause. It was also submitted that the assessee had acquired the windmill in the financial year 2009-10 relevant to AY 2010-11 and income from generation of power and sale of such power was offered to tax as business income which has been accepted by the predecessor Ld. AO in the preceding year. However, the successor Ld. AO rejected the explanation of the assessee by saying that the principle of resjudicata does not apply to income tax proceedings. No doubt the principle of res-judicata does not apply to tax proceedings but this rule is subject to the expectation of consistency where there are no fresh facts as held in several judgements including the judgment of the Hon'ble Supreme Court in CIT vs. Durga Prasad More 82 ITR 540 (SC). The Ld. AO has overlooked the rule of consistency despite there being no fresh facts. We, therefore, do not find any substance in the argument advanced

by the Ld. DR as all the relevant facts were already on records for perusal and consideration of the Ld. CIT(A).

8. We find that similar disallowance under section 32 and under section 14A of the Act were made by the Ld. AO in AY 2010-11 which were deleted by the Ld. CIT(A) whose order was upheld by the Tribunal by observing in para 7 of its order dated 19.02.2021 in ITA No. 1267/Del/2015 as under:-

> "7. We have heard both the parties and perused the material available on record. As regards Ground No. 1 of the Revenue's appeal, the assessee made a suo moto disallowance of Rs. 16,05,000/-. The investments were out of assessee's own funds and no borrowed funds were used to acquire investments. There was no interest expenditure which could be directly or indirectly attributable to the exempt income. The CIT(A) further observed that the investments were strategic investment as per the assessee and the same should be excluded for calculating disallowance under Rule 8D. As per Rule 8D(2)(i), the assessee made disallowance of Rs. 16,05,000/- under the head strategic investment and has taken 20% of employee cost and 5% of administrative cost. Thus, the findings given by the CIT (A) is just and proper. Therefore, Ground No. 1 is dismissed. As regards Ground No. 2, the details were submitted by the assessee during the assessment proceedings as per the reply/submissions dated 11.12.2012 which is mentioned on page 1 of the Assessment Order itself. There was no new evidence brought on record by the assessee and after the verification of the evidence the CIT(A) has rightly deleted the addition. In fact, the Assessing Officer has totally ignored the reply dated 11.12.2012 submitted by the Assessee. Thus, CIT(A) has given a categorical finding that the assets were owned by the assessee and were put to use for the purposes of its business during the year. Hence, there is no need to interfere with the detailed findings of the CIT(A). Hence, Ground No. 2 is dismissed. As regards Ground No.3, the assessee had borrowed funds which was used for business purposes and was paying interest on these funds and this fact was not controverted through any of the documents on the

record by the Assessing Officer as well as by the Revenue at the time of hearing before us, Hence, the findings given by the CIT(A) is proper and there is no need to interfere with the findings of the CIT(A). Ground No. 3 is dismissed.

9. When the Revenue went up in appeal before the Hon'ble Delhi High Court, the Hon'ble Court vide judgment dated 22.09.2022 in ITA No. 349/2022 sustained the order (supra) of the Tribunal by observing on both the issues in para 4, 5, 6 and 7 as under:-

> "4. A perusal of the paper book reveals that the AO rejected the assessee company's computation on the ground that the "assessee company had raised substantial amount of loans for investment in new ventures on which substantial amount of interest was paid". However, the Appellate Authorities below held that the investments were made out of assessee's own funds and no borrowed funds were used to acquire investments. Consequently, there was no interest expenditure which could be directly or indirectly attributed to the exempt income. Therefore, the Appellate Authorities upheld the suo moto disallowance of Rs. 16,05,000/- made by the assessee after taking 20% of employee cost and 5% of the administrative cost.
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> 5. The Supreme Court in South India Bank Ltd. v. Commissioner of Income Tax, [2021] 10 SCC 153 has held that where the assessee has mixed funds (made up partly of interest free funds and partly of interest bearing funds) and the payment is made out of mixed fund, the investment must be considered to have been made out of the interest free fund. The Supreme Court in the said judgment held "...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... "

> 6. Further, the Commissioner of Income Tax (Appeals) ['CIT(A)'] deleted the additions under Section 32 based on documents which were duly submitted to the AO as well as CIT(A). The CIT (A) duly considered the documents on record and after the verification of the evidence, rightly deleted the addition. The IT AT has even recorded that the details were submitted by the assessee during the assessment proceedings as per the reply/submissions dated 11th December, 2012 which is mentioned at page 1 of the assessment order itself. The ITAT has also recorded that there was no new evidence brought on record by the assessee and in fact, the AO has totally ignored the reply dated 11th December, 2012, filed by the Assessee.
>
> 7. Consequently, both the appellate authorities below have recorded concurrent findings of fact on both the issues. Accordingly, this Court is of the view that no substantial question of law arises for consideration in the present appeal and the same is dismissed."

> 10. Following the order (supra) of the Tribunal and the judgment (supra) of the Hon'ble Delhi High Court in assessee's own case for AY 2010-11 on ITA No. 1268/Del/2015 6 both the issues involved in the present appeal of the Revenue, the facts and circumstances remaining the same, we reject both the grounds of the Revenue."

9. Following the precedent as above, we confirm the order of ld. CIT (A) regarding deletion of disallowance of depreciation on investment made on wind mills.

10. Apropos the issue of addition made on account of short deduction of TDS : The AO noted that the assessee had made payment for the services provided by Suzlon Energy Ltd. According to the AO, the services provided by Suzlon Energy Ltd. were in the nature of technical

and professional services liable for deduction u/s 194J of the Act @ 10% whereas the assessee had incorrectly treated the impugned payment as payment for work as per contract within the section 194C @ 2%.

11. Before the ld. CIT (A), assessee stated that section 40(a)(i) is attracted where tax has not been deducted at soruce or after deduction the same has not been paid as per provisions of the subject section. Considering the above, ld. CIT (A) held that it is not the case of the AO that TDS has not been made on the aforesaid payment by the assessee. Only the issue is that as per AO, it should be 10% and as per assessee, it should be 2%. Ld. CIT (A) held that AO was not justified and the section does not cover short deduction. Accordingly ld. CIT (A) directed that the addition be deleted.

12. Against this order, Revenue is in appeal before us. We have heard both the parties and perused the records.

13. Ld. DR of the Revenue relied upon the order of AO. Per contra, ld. Counsel of the assessee supported the order of ld. CIT (A) and contended that the said issue is covered in favour of the assessee by several decisions of Higher Courts.

14. Upon careful consideration, we find that the ld. CIT (A) has taken correct decision which is supported by the case laws as above. Hence, this deletion of disallowance by the ld. CIT (A) is held to be correct.

15. Apropos the issue of disallowance u/s 14A of the Act : On this issue, AO noted that assessee had computed some disallowance by some internal method of its own. AO held that the method cannot be altered as per the convenience of the assessee and AO held that proper method is prescribed under Rule 8D if section 14A is applicable, therefore, AO recorded his dissatisfaction with disallowance made by the assessee. He made his own disallowance as per Rule 8D.

16. On assessee's appeal, ld. CIT (A) noted that AO has mechanically applied the formula given in Rule 8D, hence he found that AO has computed the disallowance which is far in excess of the exempt income disclosed by the assessee. In this regard, he referred to Hon'ble Delhi High Court decision in the case of Joint Investment (P) Ltd. vs. CIT and held that disallowance u/s 14A cannot exceed the exempt income. Hence, he directed that assessee has dividend income of RS.57,66,026/- whereas AO disallowed an amount of Rs.17,35,02,922/- which is not logically or prudently possible. Therefore, following the aforesaid decision of Hon'ble Delhi High Court, ld. CIT (A) directed the AO to limit the disallowance to RS.57.66 lakhs.

17. Against this order, Revenue and assessee are in cross appeals before us. We have heard both the parties and perused the records.

18. We find that ld.CIT (A)'s opinion is that Hon'ble Delhi High Court decision in the case of Joint Investment (P) Ltd. needs to be followed and disallowance be limited to exempt income which is correct. We do not find any infirmity in this. Hence, we affirm the decision of the ld. CIT (A) to the aforesaid extent.

19. As regards assessee's appeal on the same issue, ld. Counsel of the assessee submitted that

- No satisfaction was recorded by the Ld. DCIT under section 14A (2) of the Act to reject the amount suo-moto computed and disallowed by the Appellant under section 14A of the Act. Reliance placed upon:

  i. Maxopp Investment Ltd (347 ITR 272) Delhi HC [Refer Para 42 on Page 20 of case law compilation binder].

  ii. Consolidated Photo & Finvest Ltd. [2012] 25 taxmann.com 371 Delhi HC [Refer Page 24 of case law compilation binder]

  iii. Godrej and Boyce Mfg. co. ltd. Vs. DCIT [2010] 194 taxman 203 Bombay HC [Refer Page 28 of case law compilation binder]

- The Appellant has sufficient shareholder funds/owned funds for making investments i.e. the shareholders funds available with the Company as on March 31, 20 II was INR 117,196.28 lacs viz-a-viz the investment of INR 42, 110.14 lacs [Refer Page. 1 of PB}. Reliance is placed upon the SC judgment passed in the case- South India Bank [2021] 438 ITR 1 (SC), wherein SC held that if investments is made out of common funds and the assessee has available, non-interest-bearing funds larger than the investments made in tax-free securities then in such cases, disallowance under section 14A cannot be

made [Refer Para 17 and 20 on Page 77c and 77d, respectively of case law compilation binder].

- Without prejudice, all borrowed funds were utilized for the purpose of the business of the Appellant i.e., for onward lending activities. Reference is invited to Form 83 pertaining to loan agreement submitted to RBI, stating that loan borrowed under ECB route would be utilized for the purpose of onward lending only. [Refer Page. 60 of PB]

- Only dividend yielding investments should be considered for computing amount of disallowance under Rule 8D(iii). Reliance placed upon the judgment passed by the jurisdictional HC in the case of - ACB India Ltd (2015) (374 ITR 108) Delhi He [Refer Para 8 on Page 90 of case law compilation binder, and by Special bench in the case of Vireet Investment (P.) Ltd [2017] 58 ITR(T) 313 (Delhi - Trib.) (SB)."

20. Per contra, ld. DR for the Revenue relied upon the order of the ld. CIT (A).

21. Upon careful consideration, we accept the proposition that assessee's own fund are more than the investment made, hence no disallowance should be made for interest. This aspect may be verified by the AO. Another plea of the assessee is that only dividend yielding investments should be considered for computing amount of disallowance under Rule 8D (iii). We agree with this proposition also as it has the mandate of Hon'ble Delhi High Court (supra) and the Special Bench decision in the case of Vireet Investment (P) Ltd. (supra).

22. Apropos addition of Rs.9,81,86,182/- made by the AO on account of foreign exchange loss : During the year, the assessee incurred loss of Rs.10.22 crore on ECB liability and earned gain ofRs.40.07 lac on derivative contracts. According to the assessee, the case of Woodward Governor India (P) Ltd. (supra) should be taken to be the authority for the general proposition that loss due to exchange rate fluctuation in respect of the value of ECBs is, as a rule, revenue expenditure to be allowed as deduction u/s. 37 (1) of the Act.

23. Upon assessee's appeal, ld. CIT (A) affirmed the order of AO. Ld. CIT (A)'s conclusion in this regard is as under :-

> " After going through the order of CIT (A) for AY 2013-14, it is seen that it discusses all aspects along with the decision of Hon'ble Supreme Court in case of Indian Molasses Co. Pvt. Ltd. & in case of Woodward Governor (relied upon by the assessee). The facts being the same, in my opinion the ld. CIT (A) has rightly disallowed the notional loss on ECB liability and I follow the same. The disallowance of Rs.10.2194 crore is upheld.
>
> (vi) Further, there is income of Rs.40.07 lac offered by the assessee on derivative contracts. As held by Hon'ble Supreme Court, the same treatment as in loss should apply in case of gain also. It is therefore held that the loss/gain may be computed in year of final settlement. In case the transaction matured in FY 2011-12, the amount may be treated as speculation profit (following the order of Ld. CIT (A)-7 as to nature of transaction). If no final settlement is made in FY 2011-12, it may not be treated as income for AY 2012-13 (same lines as that of loss). The AO has also netted off the loss with profit. So there remains no cause of appeal by the assessee."

24. Against this order, assessee has filed appeal before us. We have heard both the parties and perused the records.

25. Arguments of the ld. Counsel for the assessee in this regard are as under :-

> "Appellant is an NBFC and engaged in the business of providing long term loans to infrastructure/power projects and the proceeds of ECBs were utilized by the Company for its business objective of onward lending. These loans were not utilized by the Company for the acquisition of any capital assets. Accordingly, foreign exchange loss in relation to the reinstatement of ECBs liability is an allowable deduction under Section 37(1) of the Act. Reliance placed on the following SC judgments:
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> i. Woodward Governor India (P) Ltd (179 taxman 326) (SC) [Para 13,15,18,21 on Page 226 to 229 of PB];
>
> ii. Oil & Natural Gas Corpn. Ltd (189 taxman 292) [Para 9-11 on page. 237 and 238 of PB]
>
> - Appellant also rebutted the judgment referred by the CIT(A) while upholding the order of Ld. DCIT. Indian Molasses Co. P. Ltd. (supra) and Southern Technologies (supra) judgments deals with the allowability of different nature of expense and Woodward Governor India (P) Ltd (supra) covers allowability of forex gain! loss both in the nature of revenue and capital extensively and directly covers the claim of the Appellant.
>
> - Woodward Governor India (P) Ltd (supra) extensively discussed the judgement of Indian Molasses and duly distinguished the same [Refer para 13 on page. 226 of PB].
>
> - Moreover, it is highlighted that during A Y 2017-18 and A Y 2018-19, the Appellant earned income on reinstatement of ECB, and the same was duly offered to tax and was also accepted by the jurisdictional officer during the assessment proceedings.

26. Per contra, ld. DR for the Revenue relied upon the order of the ld. CIT (A).

27. Upon careful consideration, we agree with the submissions of the ld. Counsel for the assessee that the decision of Hon'ble Supreme Court in the case of Woodward Governor India (P) Ltd. (supra) is applicable. Facts highlighted by the ld. Counsel of the assessee also show that Woodward Governor India (P) Ltd. (supra) extensively discussed the judgment of Indian Molasses Co. P. Ltd. and duly distinguished the same. Another factor in favour of the assessee is that during AYs 2017-18 & 2018-19, assessee earned income on reinstatement of ECB and the same was duly offered to tax and the same was accepted by the assessing officer during the assessment proceedings. So, when the Revenue is accepting the gains, the same treatment should be given to the loss and we are convinced by the submissions of the ld. Counsel for the assessee. Hence, we set aside the orders of the authorities below and delete the addition.

28. In the result, the appeal filed by the assessee is allowed and the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on this day of 9th May, 2023.

Sd/-	**sd/-**
(ANUBHAV SHARMA)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 9th day of May, 2023
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT (A)-36, New Delhi.
5.CIT(ITAT), New Delhi.

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