

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, MUMBAI**

**BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA Nos. 2762 & 2763/Mum/2022
(A.Ys.2014-15 & 2015-16)**

The DCIT-4(1)(1) Room No. 640, 6 th Floor, Aaykar Bhavan, M.K. Road, Mumbai 400 020	Vs.	M/s Carnoustie Management India Pvt Ltd, Carnoustie 326, Master Mind-1, Royal Palm Aarey Colony, Goregaon (East) Mumbai – 400090
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AACCC9741R		
Appellant	..	Respondent

Appellant by :	Devendra Jain
Respondent by :	Shreekala Pardesi

Date of Hearing	11.04.2023
Date of Pronouncement	13.04.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

These two appeals filed by the revenue are directed against two different orders of NFAC, Delhi, dated 30.08.2022. Since common issue on identical facts are involved in these two appeals filed by the revenue, therefore, these appeals are adjudicated together by taking ITA No. 2763/Mum/2022 as lead case and its finding will be applied to ITA No. 2762/Mum/2022 mutatis mutandis.

ITA No.2763/Mum/2022

- “1. On the facts and circumstances of the case and in law the CIT(A) erred in deleting the disallowance made of Rs. 5,67,00,404/- without establishing the nexus between the expenditure incurred in the current year with the income generated in the subsequent years.

2. *On the facts and circumstances of the case and in law the CIT(A) erred in deleting the disallowance of expenses. of Rs. 5,67,00,404/- without appreciating that the assessee company has not earned any business income during the year.*
3. *On the facts and circumstances of the case and in law the CIT(A) erred in deleting the disallowance u/s. 14A r.w. Rule 8D on the ground that the assessee has not earned any exempt income during the year.*
4. *On the facts and circumstances of the case and in law the CIT(A) erred in deleting the disallowance u/s. 14A r.w. Rule 8D without appreciating the explanation to section 14A introduced by Finance Act, 2022 which is clarificatory in nature and as per which the provisions of section 14A 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.”*

2. Fact in brief is that return of income declaring total loss of Rs.5,67,00,404/- was filed on 30.09.2015. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 29.09.2016. The further facts of the case are discussed while adjudicating ground of appeal filed by the revenue as under:

Ground No. 1 & 2:

3. During the course of assessment the A.O noticed that assessee has shown capital work in progress, but, not shown any revenue from the business activity. On query, the assessee explained that no income had been earned by the assessee from the business activity which pertained to real estate development and construction, however, it had continued its business activity. The AO did not agree with the submission of the assessee and stated that assessee had not carried out any business activity therefore claim of expenses of Rs.6,51,38,446/- for business purpose was disallowed u/s 37 of the Act. Accordingly, the claim of assessee of loss of Rs.5,67,00,404/- was disallowed.

4. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee. The relevant part of the decision of ld. CIT(A) is reproduced as under:

- “5.2.2 Brief facts of the case are that the appellant filed its return declaring loss of Rs. 5,67,00,404/-. During the scrutiny assessment, the AO observed that the income from operations had been shown at Nil and other income of Rs.21,51,287/- and Long Term Capital Gain of Rs.3,72,000/- had been shown Further, the AO noted that in the preceding assessment year also revenue from operations had been shown at Nil. The AO asked the appellant to explain as to why expenses deleted in the P & L account showed not be disallowed in the absence of any business activity during the year under consideration. The explanation given by the appellant was not found acceptable and the proceeded to complete the assessment by disallowing the expenses claimed amounting to Rs.6,51,38,446/-*
- 5.2.3 The appellant has filed written submission in support of the ground raised claiming that the expenditure was allowable. During the appellate proceeding. personal hearing was given by video conferencing on the request of the appellant. During the VC, the arguments put forth in the written submission were reiterated.*
- 5.2.4 The appellant has claimed that during the relevant year, no income had been earned by the Appellant from the business activity which pertained to real estate development and construction activity. However, the appellant had continued its business activity Further, it was stated that the appellant has earned rental income and maintenance charges from Business Centre given on lease which was declared under Profit & Gains from Business or profession. The work-in-progress has increased during the year. The Appellant follows project completion method. The Direct cost has been added in the WIP and indirect expenditure is not added to WIP but claimed as expenditure in the profit & loss account.*
- 5.2.5 The Appellant has stated that from AY-2016-17 income has been shown under profit and gains from Business or profession. It was also stated that in earlier years also the appellant had shown business income, which has been assessed as such.*
- 5.2.6 The Appellant has relied upon various judicial decisions to support the claim that although no business income had been earned by it during the relevant year, the business activity was going on and hence the expenses claimed in the Profit and loss account were allowable.*
- 5.2.7 I have carefully considered the written submission filed, arguments put forth during the hearing by video conferencing and the judicial decisions relied upon by the appellant. From the facts of the case, it is clear that although no revenue had been earned by the appellant during the year, its business activity was going on, which is evident from the opening and closing work-in-progress. The business activity was going on in the preceding year as well as subsequent years, although apparently, no business income from real estate business had been shown in AY. 2013-14, AY 2014-15 and 2015-16. I am of the considered view that when*

there is business activity, the expenses incurred by the appellant are to be allowed, even if no revenue has been generated in this particular year. The fact that in subsequent years income has been earned by the appellant from operations proves that the work of the expenses ongoing Hence, the disallowance deleted. This ground is allowed.”

5. Heard both the sides and perused the material on record. The A.O disallowed the claim of business loss of Rs.5,67,00,404/- on the ground that assessee had not disclosed any income under the head profit and gain from business and profession. In this regard, the assessee explained that it was engaged in the Real Estate Development and also operated business centers activity during the year under consideration. The assessee company was incorporated in the financial year 2006-07 and since then the assessee company was engaged in the business activity. The assessee also explained that it has incurred expenses for the past several years in connection with the construction of two buildings at Noida Uttar Pradesh and these expenses were accumulated and were appearing in the balance sheet as such till the completion of the projects. As per accounting standard 7 the cost incurred is accumulated till the time the project is completed. The assessee further explained that the revenue is recognized as per project completion method. The assessee also explained that it has started earning income from the activity of running business center and reported rental income under the head business of Rs.15,28,560/- in assessment year 2015-16, Rs.92,69,360/- in assessment year 2016-17 and Rs.92,55,360/- in assessment year 2017-18. The revenue has not brought any material on record to controvert the undisputed fact that assessee has followed project completion method and the direct cost has been added in the work-in-progress and its business activity was going on as per the opening and closing work-in-progress shown at page no. 7 of the order of CIT(A).

Looking to the above facts and circumstances we don't find any infirmity in the decision of Id. CIT(A), therefore, these grounds of appeal of the revenue stand dismissed.

Ground No. 3 & 4: Disallowance u/s 14A r.w.rule 8D:

6. During the course of assessment the A.O noticed from the balance sheet of the assessee company that it has made investment in various scrips, partnership firm and joint ventures, income from the which was not includible in total income of the assessee company. The A.O has computed disallowance u/s 14A r.w.rule 8D of the I.T. Rule at Rs.33,95,486/- and added to the total income of the assessee.

7. The assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has deleted the disallowance made u/s 14A of the Act holding that assessee has not earned any exempt income. The relevant part of the decision of CIT(A) is reproduced as under:

“5.3.1 Ground NO. 3 of the appeal pertains to disallowance made u/s 14A of the Act. The AO noted that the appellant held investment in shares, but no disallowance had been made u/s 14A of the Act, read with Rule 8D. So, he proposed to invoke section 14A to make disallowance. The appellant claimed that it had not earned any exempt income, hence no disallowance was called for. The AO noted that Rule 8D prescribes the method in relation to income not includible' in total income and not 'income not included in total income, meaning thereby disallowance u/s 14A is justified even where there is no receipt of exempt income in the relevant year. The AO held that as per section 14A, actual earning of exempt income was not sine qua non for deciding the expenditure laid out or expended for the purpose of such income. The AO relied upon the decision of Special Bench ITAT, Delhi, in the case of Cheminvest Ltd. vs. ITO, which had held that disallowance u/s 14A can be made even if no exempt income is actually earned. The AO recorded his satisfaction with regard to the correctness of the appellant's stand and proceeded to determine the disallowance in accordance with Rule 8D of IT Rules and disallowed on amount of Rs. 33,95,486/- u/s 14A of the Act.

5.3.2 The appellant has claimed that the AO has not recorded proper satisfaction. It is seen that the AO had duly recorded his satisfaction for making the disallowance He has made the disallowance even when no exempt income was earned. It is pertinent to note that disallowance of expenditure in a year when no exempt income is earned is logically correct, as in a subsequent year when the exempt income is earned, an assessee may not have incurred corresponding expenditure, resulting in non-disallowance of such expense at

all. The AO had relied on special Bench ITAT decision in the case of M/s Cheminvest Ltd and proceeded to make the disallowance accordingly.

5.3.3 The appellant has claimed that in the absence of any exempt income, no disallowance can be made u/s 14A of the Act. In particular, the Hon'ble Delhi High Court has reversed the decision of the Special bench, ITAT in Cheminvest Ltd. and has held that no disallowance can be made if no exempt income is there. The Hon'ble Delhi High Court in the case of PCIT vs IL & FS Energy Development Co. Ltd has held that CBDT Circular 5/2014 cannot override the express provision of section 14A read with Rule 8D The appellant has also claimed that the investments made are in subsidiaries and are strategic investments and hence disallowance u/s 14A was not called for, which is supported by various judicial decisions

5.3.5 This controversy regarding disallowance of 14A of the Act, particularly in a case where there is no exempt income, has been put to rest by the amendment made by Finance Act, 2022. However, the question whether the amendment will have retrospective application or not was under debate. The Hon'ble ITAT Guwahati, in the case of ACIT vs Williamson Financial Services Ltd. held that the amendment brought in 2022 will have retrospective application, as the same was clarificatory in nature. However, subsequently, in a subsequent decision, the Hon'ble Delhi High Court, in the case of PCIT (Central)-2 vs Era Infrastructure (India) Ltd., dated 20th July 2022 has held that the amendment to 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. Respectfully following the decision, it is held that the issue needs to be decided as the law stood prior to the amendment. Following the Judicial decisions relied upon by the appellant, the disallowance made by the AO u/s 14A of the Act is deleted, as the appellant did not have any exempt income. The ground raised is allowed.”

8. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above it is settled position of law as held in the various judicial pronouncements that no disallowance u/s 14A is to be made when no exempt income is earned. In this regard, we have also perused the judicial pronouncements in the case of Cheminvest Ltd. Vs. CIT (ITA No. 749 of 2014)(Delhi HC), ACIT Vs. Ballampur Industry Ltd. (ITA No. 51 of 2016) (Bom HC), ACIT Vs. M/s Tata Realty and Infrastructure Ltd. (ITA No. 713/Mum/2018, ITAT Mumbai. Following the judicial decision as supra and referred in the finding of ld. CIT(A) we don't any reason to interfere in the decision of ld. CIT(A). Therefore, these grounds of appeal of the revenue are also dismissed.

ITA No. 2762/Mum/2022

Ground No. 1 & 2:

9. As the facts and issues involved in this appeal are same as in ITA No. 2763/Mum/2022 as supra, therefore, applying the same findings mutatis mutandis these grounds of appeal are dismissed.

Ground 3 & 4:

10. As the facts and issues involved in this appeal are same as in ITA No. 2763/Mum/2022 as supra, therefore, applying the same findings mutatis mutandis these grounds of appeal are also dismissed.

11. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open court on 13.04.2023

Sd/-
(Vikas Awasthy)
Judicial Member

Sd/-
(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 13.04.2023

Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.