

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 247/Ind/2017
(Assessment Year:2012-13)

Bhatia Global Trading Ltd. Through official Liquidator Old CIA Building, 1 st Floor Opp. G.P.O. Residency Area, Indore	Vs.	DCIT 1(1) Indore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAACB6751 C		
Assessee by	None	
Revenue by	Shri P.K. Mishra, CIT-DR	
Date of Hearing	10.05.2023	
Date of Pronouncement	26 .07.2023	

ORDER

Per Vijay Pal Rao, JM:

This appeal by the Assessee is directed against the assessment order dated 15.02.2017 passed u/s 143(3) r.w. section 144C(13) in pursuant to the directions of DRP dated 26.12.2016 passed u/s 144C(5) of the Act for Assessment Year 2012-13.

2. The assessee has undergone the liquidation process before the NCLT vide order dated 22.10.2020 the liquidator was appointed by NCLT.

3. None has appeared on behalf of the assessee despite the notices issued to the official liquidator of the assessee company under gone the corporate resolution process. Accordingly the Bench proposes to hear and disposed of this appeal filed by the revenue *ex-parte*. The assessee has raised following grounds of appeal:

“1. That on the facts and circumstances of the case Ld. AO has erred in agreeing to make an upward adjustment of Rs. 23,41,09,594 as proposed by the TPO in view of directions of DRP-2, Mumbai towards arm's length adjustment for international transactions of coal purchase and extending corporate guarantee to BIPL Singapore, associated enterprise.

2. That on the facts and circumstances of the case Ld. AO in view of directions of DRP-2, Mumbai has erred in making an addition of Rs. 2,95,23,127/- as disallowance u/s 14A of the Income Tax Act, 1961.

3. That the order so passed is bad in law and wrong.

4. That the assessee craves your honors permission to add alter or delete any grounds of appeal.”

4. Ground 1 is regarding the addition made by the AO on account of TP Adjustment in respect of the International Transaction of coal purchase and extending corporate guarantee to BIPL Singapore, Associated Enterprise(AE's). The assessee company was engaged in Coal and logistic business during the year under consideration. The assessee has reported International transactions with associated Enterprises (AE). The details of the international transactions and benchmarking done by the assessee by adopting TNMM as most appropriate method are given at page no.2 & 3 of the DRP as under:

Sr. No.	Description of international transactions with AEs	Amount (Rs.)	Method	P LI	PLI of assessee	PLI of comparable	Method	adjustment
1	Purchase of coal from Bhatia International	277,57,91,049	TNNM/other method	O P /	1.55 %	0.58%	The price paid by BGTL to AE is compared with Argus	Accepted to be at arm's length

	P.Ltd. (BIPL)			O I			Coal Index	
2	Availing of shipping services from IOF P. ltd. (IOF Pt.)	288,23,19,222	TNMM/other method				The price paid by BGTL to AE is compared with Balte Dry Index	Rs.62,85,08,900
3	Availing procurement agency services from PT Bhatia International (PT Bhatia)	46,80,821	TNMM				The Procurement commission paid by BGTL to AE is compared with commission paid by BGTL to a third party for similar procurement services	Accepted to be at arm's length
4	Provisions of guarantee commission (received) to BIPL	94,87,869	CUP				Corporate guarantee issued by BGTL which does not involve any costs to BTTL, hence the same does not come under the ambit of India transfer pricing regulations	Rs.84,16,641

5. The TPO rejected the TP Study analysis of the assessee and carried out his own search for selecting comparable for determination of arm's length price. The TPO selected three comparable companies for determination of arm's length price against which the assessee has raised objection before the DRP which are reproduced by the DRP at page no.31 to 33 as under:

Sr. No.	Company Name	Reasons as per company's website
1	SIA Engineering Company Ltd.	<p>The company, incorporated in 1982, is one of the leading maintenance, repair and overhaul (MRO) companies in Singapore. It focuses in the provision of line maintenance, airframe maintenance, component overhaul, engine overhaul, as well as aviation-engineering services. Its corporate headquarters is based in Singapore, Singapore. The company's activities include the manufacturing of aircraft cabin equipment and refurbishment of aircraft galleys; the provision of technical and non-technical handling services; as well as repair and overhaul of hydro-mechanical aircraft equipment. The company serves more than 80 international carriers and aerospace equipment manufacturers, as well as air freight operators in South East Asia, North Asia, West Asia, Middle East, Africa, and Europe. Its customers include Brunei Airlines, Cebu Pacific, Malaysia Airlines, Philippines Airlines, Singapore Airlines, Thai Airways International, Cathay Pacific, Japan Airlines, Nippon Cargo Airlines, China Eastern Xibei Airlines, Asiana Airlines, China Southern Airlines, Air Mauritius, Kuwait Airways, Middle East Airlines, Royal Nepal Airlines, Saudi Arabian Airlines, British Airways, Swiss Air, Air France, Air New Zealand, Australian Airlines, Qantas Airways, Air Canada, Atlas Air, Federal Express, Northwest Airlines, and Polar Air Cargo.</p>
2.	Goodpack Ltd.	<p>The company is a Singapore-based publicly traded entity that focuses in the business of renting patented, multi-modal, returnable metal box system, commonly known as Intermediate Bulk Container (IBC). It was established in February of 1980. Its corporate headquarters is based in Singapore City, Singapore. The company, offers IBC, which are used for the packaging, transporting and storage of cargoes including edible oils and fats, fruit juices, natural rubber, processed and frozen food, synthetic rubber, non hazardous chemicals, and</p>

		<p>automotive parts. In addition, it provides a wide range of supply chain and technical support services. The company, through its operating subsidiaries, is active in Africa, Asia, Europe, the Middle East, North America, Oceania, and South America. Moreover, it serves various clients which include tire manufacturers, fast moving consumer goods companies, and chemical companies. Further, the company aims to become the most successful global IBC Supply Chain Solutions provider, offering a complete solution to industries, by consistently delivering the highest levels of performance.</p>
3.	Ramba Energy Limited	<p>The company is also involved in the exploration and production of oil and gas. It's subsidiary is engaged in providing logistic services. Incorporated in February of 2003, it was formerly known as Richland Group Limited. The company has a registered office located in Singapore City, Singapore. Its vision is to be the region's preferred partner in the logistics and energy industries - winning the trust of its stakeholders through consistent delivery of results and the highest standard of financial integrity and corporate governance. Its wholly owned subsidiary - RichLand Logistics Services Pte Ltd - is one of the largest local logistics company and a leading service provider in the air cargo community in Singapore.</p>

6. The Ld. DR has submitted that the DRP has observed that TPO is justified in applying berry ratio profit making indicator to determine the arm's length compensation, where there is no manufacturing activity or value addition to the products but only services are rendered by the AE's. The DRP has upheld the order of the TPO in applying berry ratio by considering the AE's as liaison offices/administrative offices of the assessee and not rendering any independent service. Therefore, the order of the TPO rejecting the TP study of the assessee and re-characterization of the AEs of the assessee as not independent entity but only liaison office/administrative offices of the assessee was upheld by DRP. He has relied upon the directions of the DRP and submitted that the DRP has

considered peculiar facts of the case and relationship between the assessee and alleged AEs.

7. Having considered the submission of the Ld. DR and carefully perusal of the impugned orders we find that the assessee has raised specific objection against functional comparability of the company selected by the TPO. The reasons of functions are also reproduced by the DRP in the impugned order as reproduced above. The plain reading of these facts which are not disputed either by TPO or by DRP it is manifest that the SIA Engineering Company Ltd. is engaged in the business of maintenance, repair and overhaul (MRO) in Singapore. The said company is specifically dedicated in providing maintenance services to the airlines which are not the activity similar to either business activity of the assessee or its AE's which are engaged in the business of Coal and Logistic services. Therefore, it is apparent from the facts on record that the said company SIA Engineering cannot be considered as functionally comparable either to the assessee or its AEs even by taking berry ratio and AE as tested party.

8. Similarly the company Goodpack Ltd. based at Singapore is dealing in the business of renting patented, multi-modal, returnable metal box system, commonly known as Intermediate Bulk Container (IBC) used for the packaging, transporting and storage of cargoes including edible oils, fats, fruit juices, natural rubber, processed & frozen food, synthetic rubber, non-hazardous chemicals and automotive parts. A bare reading of the nature of business activity of the said company makes it clear that the said company is not functionally comparable with the services rendered by the AE to the assessee.

9. Third company was selected by TPO has Ramba Energy Limited which involved in the exploration and production of oil and gas. The subsidiary of the said company is engaged in providing logistic services, therefore, without segregating the date of business owned by the subsidiary and the holding company and without taking only segmental

data of the said company the consolidated business of the said company being exploration and production of oil and gas is not functionally comparable with the services provided by the AE of the assessee.

10. We are further noted that the assessee has though adopted the TNMM as most appropriate method in the TP analysis as first preference however, the assessee has also given an alternative secondary TP analysis by adopting Comparable Uncontrolled Price (CUP). The assessee benchmarked its International Transaction with Baltic Dry Index (BDI Index) which is International rate prevailing on the basis of average of the rate in the shipping services provided by the parties. We find that BDI Index is well recognized and acceptable benchmark representing the prevailing rate for providing shipping services. The assessee has adopted the CUP for benchmarking the international transaction with IOF Pte in respect of purchase of coal and shipping services and therefore, if the international transactions are found at arm's length while comparing with the CUP then there is no requirement to resort to the TNMM for determination of arm's length price. The TPO has completely overlooked the TP report based on the secondary TP study wherein the assessee has taken BDI index as CUP which is international index of prevailing rate for providing shipping services.

11. Further the assessee produce the residence certificate of both AE's to show that AE's of the assessee are independent entities having resident of outside India. Once the residence certificate was produced by the assessee and no question was raised about the genuineness of the residential status of the AE's then reclassification of the AE by the TPO on assuming certain fact is not justified. Accordingly, when the international transactions of the assessee are at arm's length if same are benchmarked with the BDI index and the same was not rejected by the TPO by giving specific reasons then undertaking as separate TP analysis by the TPO and selecting functionally incomparable companies for determining arm's length price was completely unwanted and unjustified.

12. As regard the TP addition in respect of the corporate guarantee provided by the assessee to the BIPL Singapore (AE), the DRP has considered this issue in para 14.20 to 14.23 as under:

“14.20 Therefore, ideally, the rate charged for corporate guarantee should not be less than the rates charged by the banks for giving bank guarantee. However, following the recent decision of Hon'ble Bombay High Court in the case of Everest kanto, and the case of Glenmark Pharmaceuticals Ltd. in ITA No.5031/Mumbai/2012 dated 13.11.2013 (A.Y. 2008-09) = downward adjustment to the naked quotes of the rates of bank Guarantee has been done in this year, while benchmarking the transaction.

14.21 At this point, it is important to understand the differences between Bank Guarantee and Corporate Guarantee, which are summarized as under-

i) A Bank guarantee is given by the bank on behalf of its customer (applicant) to the beneficiary of the bank (third person), that in case of happening of the particular event which is being covered by that particular guarantee, the bank (guarantor) will pay the beneficiary an amount, which is mentioned in the guarantee, provided the beneficiary submit the claim under the guarantee in the agreed format and within agreed time. The claim (compensation) under the bank guarantee will be financial in nature.

ii) A corporate guarantee is a guarantee given by the corporate to cover their own exposure or exposure of some other related entity, to the bank. It will also be financial in nature and banks derive an additional comfort from such guarantees when they do their lending to borrower.

iii) The difference between the bank guarantee and corporate guarantee is that when the bank gives guarantee, it is secured, i.e. the bank will take a counter guarantee, which is a guarantee taken by the bank from the bank's customer which ensures that the bank's customer is liable for any expenses including costs of attorney, any interest on delayed payment, taxes and other levies in case of invocation of the bank guarantee. It is a sort of security for the bank. It is always a good practice for a bank to take counter guarantee from its customer. The cost of risk undertaken is not reflected in this rate because these guarantors secure themselves fully while furnishing the guarantees. These rates are quoted after obtaining adequate security for covering the risk involved in the guarantee. In corporate guarantee the assessee does not take any security from its AE. It just provides a blanket guarantee.

iv) Further the bank is in the business of giving bank guarantee and the assessee has only one of such transactions. In the case of the bank, the risk is dispersed, whereas in the case of an individual, who is not into the business, the risk is not dispersed.

14.22 In this regard, attention is invited to the recent decision of Hon'ble Bombay High Court in the case of Everest kanto, wherein their lordships have held that the consideration for the issue of a bank guarantee and Corporate Guarantee are different. However, their lordships have also held that if the guarantee was obtained from a bank, higher commission would be justified.

Further, in the case of Glenmark Pharmaceuticals Ltd, in ITA No.5031/Mumbai/2012 dated 13.11.2013 (A.Y. 2008-09), the Hon'ble ITAT has held that the naked quote rates applicable to the bank guarantee can be made comparable to the corporate guarantee only after downward adjustments (Para 22). In the present case as discussed above, since the assessee has not discharged its onus and has not provided any comparable to benchmark the transaction, and in the absence of any valid comparable in the public domain, this office is constrained to benchmark this transaction using the rates applicable to bank guarantee.(This line to be incorporated as per the fact of the case) However, following the judicial rulings, a downward adjustment to the naked quotes of the rates of bank Guarantee lins been done in this year, while benchmarking the transaction.

14.23 In view of the detailed discussion above, following the recent decision of Hon'ble Bombay High Court in the case of Everest kanto, and Mumbai ITAT in Glenmark Pharmaceuticals Ltd. in ITA No.5031/Mumbai/2012 dated 13.11.2013 (A.Y. 2008-09), a downward adjustment to the naked quotes of the rates of bank Guarantee has been done in this year, while benchmarking the transaction. It is seen that the bank guarantee rates vary generally between 1% to 3%, thereby giving an average of about 2.0%. Accordingly, the charging of corporate guarantee of 1.75% from the AF by the assessee company is held to be fair and reasonable. Thus, this ground of objection of the assessee company is accepted and the AO is directed to modify the draft assessment order, accordingly.”

13. The assessee has charged bank guarantee commission @ 1.75% from the AE and DRP has taken the arm's length rate of corporate guarantee @ 2% and consequently directed the AO to modify the draft order and restricted the addition only to the extent of 0.25%. It is pertinent to note that there is no slandered rate of bank guarantee or corporate guarantee provided by the banks as well as by the companies to the associated

enterprises. We further note that a series of decisions have analyzing this issue and observed that bank guarantee rates vary from 1% to 3% depending upon various factors and therefore, in one of the case the average of this range of 1% to 3% was taken at 2% as arm's length rate for providing bank guarantee or corporate guarantee. Therefore, the said rate of 2% is not standard rate but the rate of bank guarantee varies from 1% to 3% depending on the facts and circumstances of the case. In the case in hand when the assessee has charged the bank guarantee come @ 1.75% from its AE which in our considered view is very reasonable and within the range of 1% to 3 %. Therefore, having considered facts and circumstances of the case we find that rate charged by the assessee from its AEs for providing corporate guarantee is within the range of rates as charged by the banks and therefore, in absence of any standard rate provided for corporate guarantee this rate of 1.75% charged by assessee is considered at arm's length rate. Accordingly the addition/adjustment made by the AO on account of bank guarantee is deleted.

14. Ground No.2 is regarding the disallowance made u/s 14A of the Act. The AO noted that the assessee has made investment of Rs.184.92 crores and earned dividend income of Rs.16,95,050/- which is exempt u/s 10(34) of the Act. The DRP upheld the disallowance made by the AO.

15. We have heard the Ld. DR and considered the relevant material on record. Ld. DR has relied upon the orders of the authorities below. At the outset, we noted that the particulars of the share capital, reserves & surplus, secured loans and unsecured loans are given at page no.54 & 55 of the DRP as under:

Particulars	A.Y 2012-13	AY.2011-12	AY 2010-11
Share capital	37,97,69,710	37,97,69,710	18,91,46,000
Reserves and surplus	205,73,70,689	204,37,99,315	1,10,23,371

Total	234,71,40,399	242,35,69,025	20,01,69,371
Secured Loan	467,88,15,090	593,26,25,601	0.00
Unsecured Loan	0.00	4,32,04,280	13,35,39,080
Interest paid	29,22,81,020	4,86,26,306	4317
Interest received	36,06,23,972	0.00	28,63,482
Investment as per Audited balance sheet	184,92,18,078	23,85,56,000	-
Add: Amount receivable from Group Company, BCC Enterprises	0.00	160,05,00,000	24,02,01,644
Total	184,92,18,078	183,90,56,000	24,02,01,644
Exempted income-Dividend income	16,95,050	15,35,000	12,28,000
Addition made by the AO	2,95,23,127	TPO order challenge before High Court Indore	Not Assessed

16. It is clear from the above details that the assessee's own interest free fund in the shape of share capital and reserves & surplus is Rs.243.71 cr. Further during the year under consideration there is no unsecured loan and all the loans are secured loans which are taken for specific business purpose and therefore, the secured loans cannot be utilized for the purpose other than it was taken. In any case when the assessee's own interest free fund is more than the amount of investment then the question of disallowance of interest u/s 14A does not arise and that too by applying

the proportionment of the interest expenditure as per Rule 8D of the Rules. The AO has not found any direct expenditure incurred by the assessee in respect of the investment as well as dividend income received by the assessee for the year under consideration. Therefore, the disallowance made by the AO on account of interest expenditure is not warranted when the assessee was having its own funds more than the investment. So far as the disallowance of indirect expenditure is concerned it is now settled law that the disallowance u/s 14A cannot be more than the exempt income.

17. It is pertinent to note that in series of decisions of the Hon'ble High Court of Delhi, Gujarat, Allahabad and jurisdictional High Court have consistently taken a view that where the assessee has not earned exempt income disallowance u/s 14A cannot be made. It is also held that if the assessee has earned exempt income, disallowance u/s 14A can be restricted to such exempt income. So far as the applicability of the amendment in section 14A vide Finance Act 2022 with retrospective effect is concerned this issue has been considered by the Hon'ble Delhi High Court in case of Pr. CIT vs. Era Infrastructure India Ltd. (supra) in para 3 to 10 as under:

"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 (1), 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.]"

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5. However a perusal of the Memorandum of the Finance Bill, 2022 reveals that it explicitly stipulates that the amendment made to [Section 14A](#) will take effect from 1st April, 2022 and will apply in relation to the assessment year 2022-23 and subsequent assessment years. The relevant extract of Clauses 4, 5, 6 & 7 of the Memorandum of Finance Bill, 2022 are reproduced hereinbelow:

"4. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert an Explanation to [section 14A](#) of the Act to clarify 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 exempt income 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 exempt income.

5. This amendment will take effect from 1st April, 2022.

6. It is also proposed to amend sub-section (1) of the said section, so as to include a non-obstante clause in respect of other provisions of the [Income-tax Act](#) and provide that no deduction shall be allowed in relation to exempt income, notwithstanding anything to the contrary contained in this Act.

7. This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years."

(emphasis supplied)

6. Furthermore, the Supreme Court in Sedco Forex International Drill.

[Inc. v. CIT](#), (2005) 12 SCC 717 has held that a retrospective provision in a tax act which is "for the 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. The relevant extract of the said judgment is reproduced herein below:

Signature Not Verified Digitally Signed By:JASWANT SINGH RAWAT Signing Date:21.07.2022 "9. The High Court did not refer to the 1999 Explanation in upholding the inclusion of salary for the field break periods in the assessable income of the employees of the appellant. However, the respondents have urged the point before us.

10. In our view the 1999 Explanation could not apply to assessment years for the simple reason that it had not come into effect then. Prior to

introducing the 1999 Explanation, the decision in [CIT v. S.G. Pgnatale](#) [(1980) 124 ITR 391 (Guj)] was followed in 1989 by a Division Bench of the Gauhati High Court in [CIT v. Goslino Mario](#) [(2000) 241 ITR 314 (Gau)] . It found that the 1983 Explanation had been given effect from 1-4-1979 whereas the year in question in that case was 1976-77 and said: (ITR p. 318) "[I]t is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question has (sic) somehow remained pending on 1-4-1979, cannot be cogent reason to make the Explanation applicable to the cases of the present assesseees. This fortuitous circumstance cannot take away the vested rights of the assesseees at hand."

11. The reasoning of the Gauhati High Court was expressly affirmed by this Court in [CIT v. Goslino Mario](#) [(2000) 10 SCC 165 : (2000) 241 ITR 312] . These decisions are thus authorities for the proposition that the 1983 Explanation expressly introduced with effect from a particular date would not effect the earlier assessment years.

12. In this state of the law, on 27-2-1999 the Finance Bill, 1999 substituted the Explanation to [Section 9\(1\)\(ii\)](#) (or what has been referred to by us as the 1999 Explanation). [Section 5](#) of the Bill expressly stated that with effect from 1-4-2000, the substituted Explanation would read:

"Explanation.--For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for--

(a) service rendered in India; and

(b) the rest period or leave period which is preceded and Signature Not Verified Digitally Signed By:JASWANT SINGH RAWAT Signing Date:21.07.2022 succeeded by services rendered in India and forms part of the service contract of employment, shall be regarded as income earned in India."

[The Finance Act](#), 1999 which followed the Bill incorporated the substituted Explanation to [Section 9\(1\)\(ii\)](#) without any change.

13. The Explanation as introduced in 1983 was construed by the Kerala High Court in [CIT v. S.R. Patton](#) [(1992) 193 ITR 49 (Ker)] while following the Gujarat High Court's decision in [S.G. Pgnatale](#) [(1980) 124 ITR 391 (Guj)] to hold that the Explanation was not declaratory but widened the scope of [Section 9\(1\)\(ii\)](#). It was further held that even if it were assumed to be clarificatory or that it removed whatever ambiguity there was in [Section 9\(1\)\(ii\)](#) of the Act, it did not operate in respect of periods which were prior to 1-4-1979. It was held that since the Explanation came into force from 1-4-1979, it could not be relied on for any purpose for an anterior period.

14. In the appeal preferred from the decision by the Revenue before this Court, the Revenue did not question this reading of the Explanation by the Kerala High Court, but restricted itself to a question of fact viz. whether the Tribunal had correctly found that the salary of the assessee was paid by a

foreign company. This Court dismissed the appeal holding that it was a question of fact. ([CIT v. S.R. Patton](#) [(1998) 8 SCC 608] .)

15. Given this legislative history of [Section 9\(1\)\(ii\)](#), we can only assume that it was deliberately introduced with effect from 1-4- 2000 and therefore intended to apply prospectively [[See CIT v. Patel Bros. & Co. Ltd.](#), (1995) 4 SCC 485, 494 (para 18) : (1995) 215 ITR 165] . It was also understood as such by CBDT which issued Circular No. 779 dated 14-9-1999 containing Explanatory Notes on the provisions of the [Finance Act](#), 1999 insofar as it related to direct taxes. It said in paras 5.2 and 5.3. "5.2 [The Act](#) has expanded the existing Explanation which states that salary paid for services rendered in India shall be regarded as income earned in India, so as to specifically provide that any salary payable for the rest period or leave period which is both preceded and succeeded by service in India and forms part of the service contract of employment will also be regarded as income earned in India.

Signature Not Verified Digitally Signed By:JASWANT SINGH RAWAT Signing Date:21.07.2022 5.3 This amendment will take effect from 1-4-2000, and will accordingly, apply in relation to Assessment Year 2000-2001 and subsequent years."

16. The departmental understanding of the effect of the 1999 Amendment even if it were assumed not to bind the respondents under Section 119 of the Act, nevertheless affords a reasonable construction of it, and there is no reason why we should not adopt it.

17. As was affirmed by this Court in [Goslino Mario](#) [(2000) 10 SCC 165 : (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also [Reliance Jute and Industries Ltd. v. CIT](#) [(1980) 1 SCC 139 : 1980 SCC (Tax) 67] .) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [[See Sonia Bhatia v. State of U.P.](#), (1981) 2 SCC 585, 598 : AIR 1981 SC 1274, 1282 para 24] . If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [[See Shyam Sunder v. Ram Kumar](#), (2001) 8 SCC 24 (para 44); [Brij Mohan Das Laxman Das v. CIT](#), (1997) 1 SCC 352, 354; [CIT v. Podar Cement \(P\) Ltd.](#), (1997) 5 SCC 482, 506] . But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts"." (emphasis supplied)

7. The aforesaid proposition of law has been reiterated by the Supreme Court in [M.M Aqua Technologies Ltd. V. Commissioner of Income Tax, Delhi-III](#), 2021 SCC OnLine SC 575. The relevant portion of the said judgment is reproduced hereinbelow:-

"22. Second, a retrospective provision in a tax act which is "for the 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. This was stated in [Sedco Forex International Signature Not Verified Digitally Signed By:JASWANT SINGH RAWAT Signing Date:21.07.2022 Drill. Inc. v. CIT](#), (2005) 12 SCC 717 as follows:

17. As was affirmed by this Court in [Goslino Mario](#) [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided

expressly or by necessary implication. (See also [Reliance Jute and Industries Ltd. v. CIT](#) [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See [Sonia Bhatia v. State of U.P.](#), (1981) 2 SCC 585]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See [Shyam Sunder v. Ram Kumar](#), (2001) 8 SCC 24; [Brij Mohan Das Laxman Das v. CIT](#), (1997) 1 SCC 352; [CIT v. Podar Cement \(P\) Ltd.](#), (1997) 5 SCC 482]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".

18. There was and is no ambiguity in the main provision of [Section 9\(1\)\(ii\)](#). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in [S.G. Pgnatale](#) [(1980) 124 ITR 391 (Guj)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively."

(emphasis supplied) Signature Not Verified Digitally Signed By:JASWANT SINGH RAWAT Signing Date:21.07.2022

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)."

18. Accordingly by following the judgment of Hon'ble Delhi High Court in case of Pr. CIT vs. Era Infrastructure India ltd. (supra), we hold that the disallowance u/s 14A cannot be more than the exempt income. The disallowance u/s 14A is directed to be restricted to the

amount of dividend income exempt u/s 10(34) of the Act. We may clarify that since the assessee has undergone the liquidation process therefore, the AO shall proceed for recovery if any as per the law and to make the claim before the appropriate authority or NCLT.

19 In the result, appeal of assessee is partly allowed.

Order pronounced in the open court on 26.07.2023.

Sd/-

(B.M. BIYANI)
Accountant Member

Indore, 26 .07.2023

Patel/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

Sd/-

(VIJAY PAL RAO)
Judicial Member

By order

*Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore*