

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**  
**AND**  
**MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)**

**ITA No. 1569/MUM/2023**  
**Assessment Year: 2017-18**

Elara Capital (India) Pvt. Ltd.,  
Tower 3, 21<sup>st</sup> Floor, One  
International Center, Senapati  
Bapat Marg, Elphinstone  
Road (West), Mumbai-400013.  
**PAN NO. AABCE 6487 B**  
**Appellant**

**Vs.** The ACIT-Circle 6(2)(2),  
Room No. 506, 5<sup>th</sup> floor,  
Aayakar Bhavan, Maharshi  
Karve Road, Mumbai-  
400020.  
**Respondent**

**Assessee by** : Mr. Milind Dattani  
**Revenue by** : Mr. P.D. Chogule (Addl. CIT)

Date of Hearing : 19/07/2023  
Date of pronouncement : 31/07/2023

**ORDER**

**PER OM PRAKASH KANT, AM**

This appeal by the assessee is directed against order dated 13.03.2023 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2017-18, raising following grounds:

*1. The learned Commissioner (Appeals)/NFAC erred in confirming the disallowance of Rs. 32,90,000 made under section 14A of the Income Tax Act, 1961 ('Act') by the Assessing Officer.*



2. *The learned Commissioner (Appeals)/NFAC failed to appreciate that no disallowance can be made under section 14A when no exempt income is earned during the year.*

3. *The learned Commissioner (Appeals)/NFAC failed to take into account the fact that CBDT Circulars are not binding in nature on the assessee or the appellate authorities.*

4. *The learned Commissioner (Appeals)/NFAC was wrong in holding that the insertion of the Explanation to section 14A by the Finance Act 2022 was retrospective in nature*

5. *The learned Commissioner (Appeals)/ NFAC erred in making disallowance under section 14A in relation to the investments made in the Wholly Owned Subsidiary (WOS), without appreciating that the WOS is an unlisted private company and therefore the gains on sale of shares would not be exempt from tax.*

6. *The learned Commissioner (Appeals)/ NFAC was not justified in not following the ratio of the appellate orders of the earlier years in the case of the appellant itself.*

2. Briefly stated facts of the case are that the assessee company was engaged in the business of providing professional services to its clients for management of any share issue including preparation of issue prospectus, gathering information relating to the issue determining of financial structure underwriting of issue, investment advisor etc. For the year under consideration, the assessee filed return of income on 31.10.2017 declaring total income at Rs. Nil. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. During the course of



assessment proceedings, the Assessing Officer noticed that assessee has made investments which are eligible for yielding exempted income. Though no exempted income was earned during the year under consideration but the assessee did not make any suo moto disallowance in terms of section 14A of the Act. Therefore, the Assessing Officer asked the assessee as to why the Rule 8D of income-tax Rules, 1962 ( In short the Rules) might not be invoked. The Assessing Officer rejected the contention of the assessee and invoking Rule 8D(2)(ii), computed disallowance @ 1% of annual average of monthly average of the investment amounting to Rs.32,90,000/- and assessed total income accordingly in the order passed u/s 143(3) of the Act on 29.11.2019.

3. On further appeal the Ld. CIT(A) upheld the disallowance. Aggrieved, the assessee is in appeal before the Tribunal by way of raising grounds as reproduced above.

4. Before us, the Ld. Counsel of the assessee has filed a Paper Book containing pages 1 to 101 and compilation of case laws relied upon.

5. We have heard rival submission of parties on the issue in dispute and perused the relevant material on record. Before the Ld. CIT(A), it was submitted that no exempt income had been earned during the year under consideration and all expenses incurred and claimed by the company were related to earning of income which



was chargeable to income-tax. Hence no disallowance was required to be made u/s 14A r.w. Rule 8D. The assessee also relied on the finding of the Ld. CIT(A) for assessment year 2011-12 to 2013-14. But the Ld. CIT(A) in instant year referred to the Circular No. 5/2014 dated 11.04.2014 and observed that for the purposes of section 14A of the Act, the expenditure relatable to earning of exempt income have to be considered for disallowance irrespective of whether any such income had been earned during the financial year or not. The Ld. CIT(A) further referred to amendment brought in section 14A of the Act by way of Finance Act 2022 and observed that said amendment was in the nature of the clarification on the issue of disallowance in absence of any exempt income during the assessment year u/s 14A of the Act. The Ld. CIT(A) relying on various decisions mentioned in the impugned order observed that clarification got in by way of amendment of 2022 shall apply retrospectively. The relevant finding of the Ld. CIT(A) is reproduced as under:

*“6.10 In view of the above discussion, the contentions of the appellant that no exempt income has been earned and therefore, provisions of section 14A of the Act cannot be invoked, is hereby, rejected. The appellant company is engaged in the business of providing professional services to client of any issue. The claim of the appellant that appellant is holding investment as the investment having potential to attract LTCG, did not maintain of any record are also not tenable in view of discussion made in aforesaid para and as per IT(14th amendment) Rule, 2016 applicable w.e.f. 02.06.2016, the expenditure in relation to income which does not form part of the total income shall be aggregate of the*



*following amounts, namely, provided such expenditure should not be exceeded the total expenditure claimed by the assessee.....During the AY 2017-18 the disallowance under section 14A r.w.r. 8D was worked out with new methodology prescribed for working of expenses attributable to exempt income as per Rule 8D of the IT Act. Further, the appellant has not maintained books of account separately for trading and investments, therefore, it is not possible to bifurcate expenses over taxable and non exempt income. On the other hand, the disallowance made is strictly as per the parameters of Section 14A r.w.r. 8D.*

*6.11 I would like to mention that in the case of appellant for the AY 2011-12 to 2013-14, CIT (A) decision in favour of the appellant mainly on the ground that the appellant had not earned any exempt income in that year. The above aspects have not been brought on record at that time. Therefore, I am changing my stand on this issue. Further, in the judgments relied upon by the appellant above aspects have also not been considered, therefore, with due respect to the judgments, I follow the above analysis made in this order. In view of the above discussion, the contentions of the appellant that no exempt income has been earned and therefore, provisions of section 14A of the Act cannot be invoked, is hereby, rejected.*

*6.12 In view of the above discussion, the Id. AO was justified in disallowing expenses by invoking provisions of section 14A r.w.r 8D of the Act. Thus, addition made by the AO amounting to Rs. 32,90,000 /- is confirmed. Therefore, appeal on this ground is dismissed.”*

5.1 However, we find that the Hon’ble Delhi High Court in the case of **PCIT Central v. Era Infrastructure (India) Ltd. [2022] 141 taxmann.com 289 (Delhi)** has held the said amendment of 2022 as prospective. The relevant finding of the Hon’ble High Court (supra) is reproduced as under:

*“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).”*

5.2 Further the Coordinate Bench of the Tribunal in the case of **ACIT v. K Raheja Corporate Services Pvt. Ltd. ITA No. 2527/Mum/2021** for AY 2017-18 has discussed the issue of disallowance u/s 14A of the Act in the case of no exempted income in detail and upheld that in such cases no disallowance can be made. The relevant finding of the Tribunal is reproduced as under:

*“36. Ground No. 4 of the appeal is against the Ld. CIT(A)’s action of deleting the disallowance made u/s 14A of the Act read with Rule 8D. Briefly stated, the assessee holds investments in shares of various group/associate companies, none of which yielded any exempt income in the AYs 2012-13 to 2018-19. It was the case of the assessee that, in absence of any exempt income being derived from such investments, the disallowance u/s 14A of the Act was unwarranted. The AO*



*however relying on the CBDT Circular No. 5/2014 rejected this contention of the assessee and made disallowance u/s 14A of the Act by applying Rule 8D. On appeal, the Ld. CIT(A) deleted the disallowance made by the AO. Aggrieved by the same, the Revenue is now in appeal before us.*

37. *At the time of hearing, the Ld. CIT, DR supported the order of the AO by relying on the CBDT Circular No. 5/2014 which states that disallowance u/s 14A of the Act is required to be made, irrespective of whether the investments yielded exempt income during the year or not. The Ld. CIT, DR further contended that a new Explanation has been inserted in Section 14A of the Act by the Finance Act, 2022, which according to him, was applicable retrospectively, and therefore urged that the order of the Ld. CIT(A) be reversed and the order of the AO be restored. Per contra, the Ld. AR of the assessee relied on the order of the Ld. CIT(A). He contended that the Explanation inserted in Section 14A of the Act has been made effective from 01.04.2022 and therefore did not apply in the relevant AYs under consideration. Relying on the judgements of the Hon'ble Supreme Court in the case of M M Aqua Technologies Ltd Vs CIT (436 ITR 582)&CIT Vs Vatika Township Pvt Ltd (367 ITR 466), wherein it has been held that any legislation which imposes new obligation or new duties or a new levy shall have to be necessarily treated as prospective in nature.*

38. *We have heard both the parties. Firstly, we deem it fit to deal with the CBDT Circular No.5/2014 relied upon by the Revenue. It is by now well settled in law that any Rule or Circular issued by the CBDT cannot go beyond the literal language used in the main provision. As a corollary, the computation mechanism as set out in Rule 8D of Income Tax Rules 1962 (herein after the Rules), cannot go beyond the provision contained in Section 14A of the Act itself. Going by the language employed in Section 14A of the Act, the position which emerges is that, where the assessee has not earned any exempt income, there cannot be "disallowance" of expenditure, as it would result in imposing tax on hypothetical*



*income, which is wholly impermissible in law. We find that the Hon'ble Delhi High Court in the decision rendered in the case of Pr. CIT Vs IL&FS Energy Development Pvt Ltd (399 ITR 483) after considering the Board Circular No.5/2014, has upheld the assessee's contention that, in absence of any exempt income earned in the year in question, the disallowance u/s 14A of the Act is unwarranted. The relevant findings of the High Court is as under.*

*“18. The CBDT Circular upon which extensive reliance is placed by Mr. Hossain does not refer to Rule 8D (1) of the Rules at all but only refers to the word "includible" occurring in the title to Rule 8D as well as the title to Section 14A. The Circular concludes that it is not necessary that exempt income should necessarily be included in a particular year's income for the disallowance to be triggered.*

*19. In the considered view of the Court, this will be a truncated reading of Section 14 A and Rule 8D particularly when Rule 8D (1) uses the expression 'such previous year'. Further, it does not account for the concept of 'real income'. It does not note that under Section 5 of the Act, the question of taxation of 'notional income' does not arise. As explained in CIT v. Walfort Share & Stock Brokers (P.) Ltd. [2010] 326 ITR 1/192 Taxman 211 (SC), the mandate of Section 14A of the Act is to curb the practice of claiming deduction of expenses incurred in relation to exempt income being taxable income and at the same time avail of the tax incentives by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. Consequently, the Court is not persuaded that in view of the Circular of the CBDT dated 11th May 2014, the decision of this Court in Cheminvest Ltd. (supra) requires reconsideration.*

*20. In Redington (India) Ltd. v. Addl. CIT [2017] 392 ITR 633/77 taxmann.com 257 (Mad.), a similar contention of the Revenue was negated. The Court there*



*declined to apply the CBDT Circular by explaining that Section 14A is "clearly relatable to the earning of the actual income and not notional income or anticipated income."...*

....

*23. The decisions of the ITAT in Ratan Housing Development Ltd. (supra) and Relaxo Footwears Ltd. (supra), to the extent that they are inconsistent with what has been held hereinbefore do not merit acceptance. Further, the mere fact that in the audit report for the AY in question, the auditors may have suggested that there should be a disallowance cannot be determinative of the legal position. That would not preclude the Assessee from taking a stand that no disallowance under Section 14 A of the Act was called for in the AY in question because no exempt income was earned.*

*24. For all of the aforementioned reasons, this Court is of the view that the CBDT Circular dated 11th May 2014 cannot override the expressed provisions of Section 14A read with Rule 8D."*

*39. We may also gainfully refer to the following observations of the Hon'ble Madras High Court in the case of Marg Ltd. vs CIT (120 taxmann.com 84) wherein also the High Court rejected the proposition set out in the Board Circular No. 5/2014 and held that the disallowance of expenditure u/s 14A can never exceed the amount of exempt income so earned by the assessee. The relevant extracts of the decision are as follows:*

*"5. What seems to have caused this continuous problem is the CBDT Circular No. 5/2014 dated 11-2-2014, referred to in paragraph 5 of the impugned order of the Tribunal dated 6-4-2016 before us in the present case. In that Circular, the CBDT has clarified that Rule 8D read with Section 14A of the Act provides for*



*disallowance of expenditure even where the taxpayer in a particular year has not earned any exempt income. This argument of Revenue, which prevailed with the Tribunal, is not at all tenable.*

...

*12. Another Bench of Madras High Court in the case of CIT v. Chettinad Logistics (P.) Ltd. [2017] 80 taxmann.com 221 248 Taxman 55 wherein the Division Bench of the Court followed another Division Bench judgement in the case of Redington (India) Ltd. v. Addl. CIT [2017] 77 taxmann.com 257 (Mad.) and held that the view of the Central Board of Direct Taxes in Circular No. 5 of 2014 dated 11-2-2014, which has been relied by the Tribunal in the impugned order cannot be upheld and the disallowance under section 14A of the Act cannot go beyond the extent of exempted income itself. Paragraph 12.3 of the said judgement is quoted below for ready reference.*

.....

*13. .... Unfortunately, the Revenue Authority and the Tribunal have read Rule 8D without context and as an independent provision of disallowance, as if it was an island provision of law and the disallowance computed as per Rule 8D of the Rules can go beyond the exempted income itself and can be added as a taxable income in the hands of the Assessee. Such an interpretation put by Revenue Authorities is pathetic, to say the least.*

*14. It is well settled that the Rule cannot go beyond the main parent provision. Therefore, what has been provided as computation method in Rule 8D cannot go beyond the roof limit of section 14A itself under any circumstances. The Courts have time and again reiterated this correct, reasonable and clear position of law. But, merely to somehow make more disallowance and impose tax on the hypothetical income of the*



*Assessee, in contrast to the concept of "real income" to be taxed as per section 5 of the Income-tax Act, the authorities under the Income-tax Act keep on adopting such absurd procedures. The disallowance to this extent, if it was to have its way, will constitute a hypothetical 'income' taxable in the hands of the Assessee, which could never be the intention of section 14A of the Act, providing for a proportionate disallowance of expenditure incurred to earn the exempted income.*

.....

*22. We, therefore, dispose of the present appeal by answering question of law in favour of the Assessee and against the Revenue and by holding that the disallowance under rule 8D of the IT Rules read with Section 14A of the Act can never exceed the exempted income earned by the Assessee during the particular assessment year and further, without recording the satisfaction by the Assessing Authority that the apportionment of such disallowable expenditure made by the Assessee with respect to the exempted income is not acceptable for reasons to be assigned the Assessing Authority, he cannot resort to the computation method under Rule 8D of the Income-tax Rules, 1962.”*

*40. It is also noted that the Hon'ble Supreme Court in its judgement dated 08.02.2019 in the case of CIT vs Oil Industry Development Board (SLP (Civil) No. 2755/2019) has dismissed the SLP filed by the Revenue against the judgement of the Hon'ble Delhi High Court dated 16.02.2018 by relying upon its decision in the case of CIT vs Essar Teleholdings Limited (2018) 3 SCC 253. The Hon'ble Delhi High Court had ruled that, in absence of any exempt income, disallowance u/s 14A of the Act of any amount was not permissible. In arriving at this conclusion, the Hon'ble Delhi High Court had relied upon its earlier decision in the case of Cheminvest Ltd. vs CIT (378 ITR 33). The relevant extracts of the judgement are as under:*



“1. The Revenue's appeal challenges an order of the Income Tax Appellate Tribunal (ITAT) which had set aside the disallowance of Rs. 1,62,49,000/- under Section 14A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Assessing Officer (AO) and later the CIT (A) made the disallowance by taking into account only the investment patterns of the assessee for the concerned assessment.

3. The ITAT relied upon the ruling of this Court in *Cheminvest Ltd. v. CIT* [2015] 378 ITR 33 which ruled in the absence of any exempt income, disallowance under Section 14-A of the Act of any amount was not permissible. Since the decision in *Cheminvest Ltd. (supra)* was followed, there is no substantial question of law that requires consideration.

4. The appeal is therefore dismissed.”

41. The jurisdictional Bombay High Court in the case of *Pr.CIT Vs Kohinoor Project Pvt Ltd* (121 taxmann.com 177) following the above judgement of Hon'ble Delhi High Court has also held that in absence of exempt income, no disallowance is warranted u/s 14A of the Act. The relevant findings of the Hon'ble High Court are as follows:

“6. Aggrieved by the reduction in the quantum of disallowance revenue preferred appeal before the Tribunal. The Tribunal considered the contention of the assessee that no exempt income was claimed by the assessee under section 14A of the Act and, therefore, no disallowance could have been made by the Assessing Officer by invoking section 14A together with Rule 8D(2)(ii) of the Income-tax Rules, 1962. Tribunal relied upon the decision of the Delhi High Court in the case of *Cheminvest Ltd. v. CIT* [2015] 61 taxmann.com 118/234 *Taxman* 761/378 ITR 33 (Delhi); the decision of the Punjab and Haryana High Court in *CIT v. Lakhani*



*Marketing Inc. [2014] 49 taxmann.com 257/226 Taxman 45 (Mag.); and decision of the Allahabad High Court in the case of CIT v. Shivam Motors (P.) Ltd. [2015] 55 taxmann.com 262/230 Taxman 63 (All.) and observed that there is uniformity in the view that in case there is no exempt income claimed by the assessee in the return of income, no disallowance can be made by the revenue. Consequently, vide order dated 18-10-2016 Tribunal dismissed the appeal of the revenue.”*

42. *The above proposition may also be viewed from another angle. It is noted that several judicial forums inter alia including the Hon’ble Supreme Court have held that the disallowance computed u/s 14A read with Rule 8D, cannot exceed the amount of exempt income. In the facts of the present case, admittedly the exempt income earned by the assessee was NIL. As a corollary, therefore, no disallowance could have been made u/s 14A of the Act. The relevant judgements in this regard, are as under:*

*(i) The Hon’ble Supreme Court in the case of Maxopp Investment Ltd Vs CIT(402 ITR 640) which is set out hereunder:*

*“40. We note from the facts in the State Bank of Patiala cases that the AO, while passing the assessment order, had already restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in Rule 8D of the Rules and holding that section 14A of the Act would be applicable. In spite of this exercise of apportionment of expenditure carried out by the AO, CIT(A) disallowed the entire deduction of expenditure. That view of the CIT(A) was clearly untenable and rightly set aside by the ITAT. Therefore, on facts, the Punjab and Haryana High Court has arrived at a correct conclusion by affirming the view of the ITAT though we are not subscribing to the theory of dominant intention applied by the High Court.”*



(ii) *The Hon'ble Delhi High Court in the case of PCIT vs DLF Home Developers Ltd. (114 taxmann.com 97) also restricted the disallowance u/s 14A to the extent of exempt income earned during the year. The relevant extracts of the said decision are as follows:*

*“2. As far as first issue - disallowance under Section 14A is concerned, the Court notices that the exempted income in this case is Rs. 3.17 lakhs. The Assessing Officer had disallowed Rs. 59 crores which was reduced to Rs. 8 crores by the CIT(A). Following the decision of this court in Joint Investments (P.) Ltd. v. CIT [2015] 59 taxmann.com 295/233 Taxman 117/372 ITR 694, the ITAT restricted the disallowance to the income earned i.e. Rs. 3.17 lakhs. So, there is no infirmity in this approach. No question of law arises.”*

43. *The SLP filed by the Revenue against the above judgement has since been dismissed by the Hon'ble Supreme Court vide its order dated 26.08.2019 (114 taxmann.com 98) and therefore the decision of Delhi High Court has attained finality.*

(iii) *The Hon'ble Madras High Court in the case of Chettinad Logistics Pvt Ltd. vs CIT (257 Taxman 2) observed as under:*

*“8. According to us, this exercise, in the given facts which emerge from the record, was clearly unnecessary, as the CIT(A) had returned the finding of fact that no dividend had been earned in the relevant assessment year, with which, we are concerned, in the present appeal.*

*9. In our opinion Section 14 A of the Act, can only be triggered, if, the Assessee seeks to square off expenditure against income which does not form part of the total income under the Act.*



9.1 *The legislature, in order to do away with the pernicious practice adopted by the Assessee, to claim expenditure, against income exempt from tax, introduced the said provision.*

10. *In the instant case, there is no dispute that no income i.e., dividend, which did not form part of total income of the Assessee was earned in the relevant assessment year.*

10.1 *Therefore, to our minds, the addition made by the Assessing Officer by relying upon Section 14 A of the Act, was completely contrary to the provisions of the said Section.*

.....

11. *Furthermore, we may note that a similar argument was sought to be advanced by the Revenue in the matter concerning, Redington (India) Ltd. v. Addl. CIT [2017] 77 taxmann.com 257 (Mad.) which was, subject matter of T.C.A.No.520 of 2016.*

11.1 *A Co-ordinate Bench of this Court, vide judgement dated 23.12.2016, rejected the plea of the Revenue advanced in that behalf.*

11.2 *As a matter of fact, a perusal of the judgement would show that the Revenue had sought to argue that because exempt income could be earned in future years, therefore, recourse could be taken to the provisions of Section 14A of the Act, to disallow expenditure. In other words the stand taken by the Revenue was irrespective of the fact whether or not income was earned in the concerned assessment year expenditure under Section 14A could be disallowed against anticipated income.*

11.3 *Pertinently, the Division Bench in Redington (India)Ltd. (supra) case has repelled this precise argument.*



12. *The Division Bench, in our view, quiet correctly held that, the computation of total income, in terms of Section 5 of the Act, is made qua real income and not, vis-a-vis, notional income.*

12.1 *The Division Bench went on to hold that Section 4 of the Act brings to tax, that income, which is relatable to the assessment year in issue. The Division Bench, thus, held that where no exempt income is earned in the previous year, relevant to the assessment year in issue, provisions of Section 14 A of the Act, read with Rule 8 D could not be invoked.*

12.2 *While coming to this conclusion, the Division Bench also took note of the aforementioned Circular, issued by the Board.*

.....

15. *However, it is, our view, as indicated above, independent of the reasoning given in Redington (India) Ltd. case (supra) that Rule 8D cannot be read in a manner, which takes it beyond the scope and content of the main provision, which is, Section 14 A of the Act.*

15.1 *Therefore, as adverted to above, Rule 8D, cannot come to the rescue of the Revenue.”*

*The SLP filed by the Revenue against the above judgment has since been dismissed by the Hon’ble Supreme Court which is reported in 95 taxmann.com 250.*

44. *In view of the above catena of judgements, it is abundantly clear that in absence of any exempt income, no disallowance u/s 14A of the Act is permissible.*

45. *Having held so, the next question for our consideration is whether the following Explanation inserted by the Finance Act, 2022 in Section 14A of the Act is required to be retrospectively applied and fastened on the assessee or not.*



*“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.”*

46. In this regard, useful reference can be made to the decision of the Hon’ble Supreme Court in the case of *M/s M.M. Aqua Technologies Ltd. vs. CIT (supra)*, in particular Para 22 thereof, wherein the Hon’ble Supreme Court has held that if the retrospectivity of a taxing statute is urged due to the use of the expression “for the removal of doubts” in the Statute, it cannot be presumed to be retrospective, if it alters or changes the law as it stood earlier. The relevant extracts of the decision of the Hon’ble Apex Court is as under:

*"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 Drill. Inc. vs. 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, 598*]. 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".*

*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) 124ITR 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.*

*23. This being the case, Explanation 3C is clarificatory - it explains Section 43B(d) as it originally stood and does not purport to add a new condition retrospectively, as has wrongly been held by the High Court.*

*24. Third, any ambiguity in the language of Explanation 3C shall be resolved in favour of the assessee as per Cape Brandy Syndicate v. Inland Revenue Commissioner (supra) as followed by judgments of this Court - See Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613 at paras 60 to 70 per*



*Kapadia, C.J. and para 333, 334 per Radhakrishnan, J."*

47. According to Ld. AR, therefore the amendment brought in by Finance Act, 2022 cannot be said to be retrospective and for that proposition he cited the Constitution Bench decision of the Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Ltd. (supra) wherein it was held as under:

*"42.1. "Notes on Clauses" appended to the Finance Bill, 2002 while proposing insertion of proviso categorically states that 'this amendment will take effect from 1.6.2002.' These become epigraphic 1 words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospectively depicting clear intention of the legislature. It can be seen from the same notes that a few other amendments in the Income tax Act made by the same Finance Act specifically making those amendments retrospective. For example, clause 40 seeks to amend S. 92-F. Clause (iii-a) of S. 92-F is amended "so as to clarify that the activities mentioned in the said clause include the carrying out of any work in pursuance of a contract". (emphasis supplied). This amendment takes effect retrospectively from 01.04.2002. Various other amendments also take place retrospectively. The Notes on Clauses show that the legislature is fully aware of three concepts:*

*i) prospective amendment with effect from a fixed date;*

*ii) retrospective amendment with effect from a fixed anterior date; and*

*iii) clarificatory amendments which are retrospective in nature."*

48. The above judgement of the Hon'ble Supreme Court was also taken note of by the Hon'ble Supreme Court in the case of M/s Snowtex Investment Ltd. vs. PCIT dated



30.04.2019 [Civil Appeal No(s). 4483 of 2019, Special Leave to appeal (c) No. 20017/2017] wherein the Hon'ble Supreme Court has explained the test to be applied to find out whether the intent of the Legislature/Parliament is to give retrospective operation of law and accordingly held as under:

“The Test to be applied is essentially one of the intent of the legislature.

28. In a more recent decision in Commissioner of Income Tax vs. Vatika Township Pvt. Ltd. (2015) 1 SCC 1, a Constitution Bench of this Court held thus:

29. In M/s. Vijay Industries (supra), decided on 1 March 2019, a three judge Bench of this Court held that the provisions of Section 80AB which were introduced by the Finance (No.

2) Act, 1980 with effect from 1 April 1981 could not be regarded as clarificatory in nature. The Court held that the provision was made with prospective effect and the amendment would not apply to assessment year 1979-1980 and 1980-1981 because the amended provision was brought on the statute book after the assessment years in question.

30. In conclusion, we therefore, hold that the amendment which was brought by Parliament to the Explanation to Section 73 by the Finance (No 2) Act 2014 was with effect from 1 April 2015. In its legislative wisdom, the Parliament amended Section 43(5) with effect from 1 April 2006 in relation to the business of trading in derivatives, Parliament brought about a specific amendment in the Explanation to Section 73, insofar as trading in shares is concerned, with effect from 1 April 2015. The latter amendment was intended to take effect from the date stipulated by Parliament and we see no reason to hold either that it was clarificatory or that the intent of Parliament was to give it retrospective effect.



31. *The consequence is that in A.Y. 2008-2009, the loss which occurred to the assessee as a result of its activity of trading in shares (a loss arising from the business of speculation) was not capable of being set off against the profits which it had earned against the business of futures and options since the latter did not constitute profits and gains of a speculative business.”*

49. *In view of the above therefore, in order to test whether the amendment brought in Section 14A of the Act, is retrospective or not, one has to apply the test as laid by the Hon’ble Supreme Court in the case of M/s Snowtex Investment Ltd. (supra) wherein the Hon’ble Supreme Court took note of the law laid down on this issue by the Constitution Bench in M/s Vatika Township Ltd. (supra) and held that the intent of the Parliament/Legislature needs to be looked into for ascertaining whether the amendment should be retrospective or not. In the case of Vatika Township Ltd. (supra), the Hon’ble Supreme Court held that the notes on clauses appended to the Finance Bill will throw light as to the legislative intent; because it has to be borne in mind that Parliament/Legislature is aware of three concepts before an amendment is brought in, which can be discerned from reading of the “Notes on Clauses” to the Bill which are (i) prospective amendment with effect from a fixed date; (ii) retrospective amendment with effect from a fixed anterior date; and (iii) clarificatory amendments which are retrospective in nature.*

50. *On the above touchstones, we note that the Memorandum explaining the Notes on Clauses of Finance Act, 2022 read as under:*

*“Section 14A of the Act provides that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income that does not form part of the total income as per the provisions of the Act (exempt income).*



2. Over the years, disputes have arisen in respect of the issue whether disallowance under section 14A of the Act can be made in cases where no exempt income has accrued, arisen or received by the assessee during an assessment year.

3. CBDT issued Circular No. 5/2014, dated 11/02/2014, clarifying that Rule 8D read with section 14A of the Act provides for disallowance of the expenditure even where tax payer in a particular year has not earned any exempt income. However, still some courts have taken a view that if there is no exempt income during a year, no disallowance under section 14A of the Act can be made for that year. Such an interpretation is not in line with the intention of the legislature. To illustrate, if during a previous year, an assessee incurs an expense of Rs.1 lakh to earn non-exempt income of Rs.1.5 lakh and also incurs an expense of 20,000/-to earn exempt income which may or may not have accrued/received during the year. By holding that provisions of section 14A of the Act does not apply in this year as the exempt income was not accrued/received during the year, it amounts to holding that Rs.20,000/-would be allowed as deduction against non-exempt income of Rs.1.5 Lakh even though this expense was not incurred wholly and exclusively for the purpose of earning non-exempt income. Such an interpretation defeats the legislative intent of both section 14A as well as section 37 of the Act.

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.”*

*51. It is further noted the Notes of Clauses of Finance Act, 2022, is explicitly clear that the new Explanation will take effect from 1st April, 2022 and therefore will accordingly apply to the Assessment Year 2022-23 and subsequent years. The relevant Notes to Clauses are as under.*

*“Clause 9 seeks to amend section 14A of the Income-tax Act relating to expenditure incurred in relation to income not includible in total income. The said section, inter-alia, provides that no deduction shall be allowed in relation to income which does not form part of the total income under the Income-tax Act. It is proposed to amend sub-section (1) of the said section to provide that notwithstanding anything to the contrary contained in this Act, for the purpose of computing the total income, no deduction shall be allowable in respect of expenditure incurred in relation to income which does not form part of the total income.*

*This amendment will take effect from 1st April, 2022 and will, accordingly, apply in relation to the assessment year 2022-2023 and subsequent assessment years.*



*It is also proposed to insert an Explanation to the said section to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of the said section shall apply and shall be deemed to have been always applied in a case where the income, not forming part of the total 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 income not form part of the total income.*

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

*52. From the above, the legislative intent is clear, the amendment brought in by the Finance Act, 2022 on this issue as discussed, will take effect from First April 2022 and not before as contended by the Ld DR. In our considered view, therefore, the new Explanation inserted in Section 14A of the Act with effect from 01-04-2022 cannot be applied in the assessment years under consideration for the present case as it is for AYs 2016-17 to 2018-19, and therefore according to us, the decisions cited in Paras 33 to 37 above continue to hold good and are binding upon us."*

5.3 Further, the Co-ordinate Bench of the Tribunal in the case of **Dy. CIT v. Lodha Developers Ltd. [2022] 143 taxmann.com 442 (Mumbai-Trib.)** has also held that amendment made by the Finance Act, 2022 to section 14A is to take effect from 01.10.2022 and it would be prospective in nature. Since the assessment year under consideration is AY 2017-18 , which is much prior to introduction amendment to section 14A though Finance Act, 2022 therefore, respectively following the finding in judicial precedents referred above, we set aside the finding of the Ld. CIT(A) on the issue in dispute and delete the disallowance made by the Assessing Officer. The grounds of appeal of the assessee are accordingly allowed.



6. In the result, the appeal of the assessee is allowed.

**Order pronounced in the open Court on 31/07/2023.**

**Sd/-**  
**(KAVITHA RAJAGOPAL)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(OM PRAKASH KANT)**  
**ACCOUNTANT MEMBER**

Mumbai;

Dated: 31/07/2023

Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)  
**ITAT, Mumbai**