IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F', NEW DELHI

Before Sh. Kul Bharat, Judicial Member
Dr. B. R. R. Kumar, Accountant Member

ITA No. 1884/Del/2018 : Asstt. Year: 2014-15

ACIT, Circle-26(1), New Delhi-110002	Vs	V C Solutions Pvt. Ltd., 85, GF, World Trade Centre, Barakhamba Lane, Central Delhi, New Delhi-110001
(APPELLANT)		(RESPONDENT)
PAN No. AABCV4416B		

CO No. 41/Del/2021 : Asstt. Year: 2014-15

V C Solutions Pvt. Ltd., 301-A, World Trade Centre, Barakhamba Lane, Connaught Place, New Delhi-110001	Vs	ACIT, Central Circle-15, New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AABCV4416B		

Assessee by : Sh. V. K. Agarwal, AR
Ms. Shweta Bansal, CA
Revenue by : Sh. P. Barnwal, CIT DR

Date of Hearing: 03.08.2023		Date of Pronouncement: 30.08.2023

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal and Cross Objection have been filed by Revenue and the assessee against the order of ld. CIT(A)-XXVI, New Delhi dated 29.11.2017.

2. Following grounds have been raised by the Revenue:

"i) On the facts and in the circumstances of the case, the ld. CIT(A) erred in deleting the addition of

Rs.52,57,829/- made on account of interest on loans & advances ignoring the facts that the assessee is paying interest on loan, whereas on other hand, the assessee is diverting his money for loans and advances to others.

ii) On the facts and in the circumstances of the case, the ld. CIT(A) has erred in deleting the addition of Rs.26,13,97,349/- made on account of write off of share application money amounting to Rs.26,13,97,349/- ignoring the facts that the assessee has not provided any details to furnish the identity, creditworthiness and genuineness, has failed to shift the onus and it remains unexplained expenditure."

3. The Revenue has also filed the revised grounds of appeal which are as under:

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs. 52,57,829/- made on account of Interest on Loans & Advances ignoring the facts that the assessee is paying interest on loan, whereas on other hand, the assessee is diverting his money for loans and advances to others.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 26,13,97,349/- made on account of write off of Share Application Money, ignoring the facts that the assessee has failed to provide any supporting documents like entire chain of share application money applied for allotment of shares to justify the genuineness of the such transactions."

4. In CO, the assessee has taken up following grounds of appeal:

"1. The ld. CIT(A) has grossly erred in law as well as on facts in not allowing relief of Rs.42,85,983/- u/s 14A read with rule 8D wrongly disallowed by the

appellant itself at the time of filing of income tax return inspite of the fact that the appellant did not derive any income which does not form part of total income."

5. The assessee company is a civil contractor. The assessee filed return of income on 30.11.2014 declaring an income of Rs.1,87,86,370/-.

Disallowance of Interest:

6. During the year under consideration, the assessee company has received loan & advances of Rs.91,06,12,956/- and paid an interest of Rs.1,52,05,890/-. The AO held that the assessee has given loans & advances to other related parties but not charged interest while the entire interest has been debited in the P&L account. The AO found that the assessee has given interest free loans to the tune of Rs.31,48,67,900/-. Placing reliance on the judgment of CIT Vs. Orissa Cements Ltd. 258 ITR 365 (Del.) and CIT Vs. Abhishek Industries 156 Taxman 257, the AO disallowed the proportionate interest of Rs.52,57,829/- taking into consideration, the interest free loan given by the assessee. The gist of the decisions relied upon by the AO is as under:

"1. CIT vs. Orissa Cements Ltd. - DELHI HC [2002] 258 ITR 365 (Delhi).

"the part of the capital borrowed by the assessee and advanced by it to its subsidiaries free of interest was not, borrowed for purposes of its own business and the interest on such borrowing was not an admissible deduction under section 36(l)(iii)."

2. CIT vs. Abhishek Industries Ltd. [2006] 156 Taxman 257 (Punjab & Haryana).

"As far as the issue of establishment of nexus of the funds borrowed vis-a- vis the funds diverted towards sister concern on interest free basis is concerned, in our view, the stand of the assessee that the onus of proving the nexus of funds available with the assessee with the funds advanced to the sister concerns without interest is on the Revenue is not correct. Section 36(1) (iii) of the Act provides for deductions of interest on the loans raised for business purposes. Once the assessee claims any such deduction in the books of account, the onus will be on the assessee to satisfy the Assessing Officer that whatever loans were raised by the assessee, the same were used for business purposes. If in the process of examination of genuineness of such a deduction, it transpires that the assessee had advanced certain funds to sister concerns or any other person without any interest, there would be very heavy onus on the assessee to be discharged before the Assessing Officer to the effect that in spite of pending term loans and working capital loans on which the assessee is incurring liability to pay interest, still there was justification to advance loans to sister concerns for non-business purposes without any interest and, accordingly, the assessee should be allowed deduction of interest being paid on the loans raised by it to that extent. In our view, even, the plea, of nexus of loans raised by the assessee with the funds advanced to the sister concerns on interest free basis, maybe it is pleaded to be out of sale proceeds or share capital or different account cannot be accepted."

7. The ld. CIT(A) deleted the addition on the grounds that the assessee had sufficient interest free funds in their possession to provide interest free loans. It is an undisputed fact that the

availability of interest free funds were to the tune of Rs.109,90,64,200/-. Hence, the assessee had interest free funds at their disposal to provide interest free loans. Hence, placing reliance on the judgment of Hon'ble Jurisdictional High Court in the case of CIT Vs. Mahavir Concast Ltd., 2015-TIOL-700-HC-Del, CIT Vs. Rakesh Gupta, 2015-TIOL-1586-HC-P&H and of the judgment of Hon'ble Supreme Court in the case of Munjal Sales Corporation Vs. CIT, 2008-TIOL-26-SC-IT, we decline to interfere with the order of the ld. CIT(A). In the result, appeal of the revenue on this ground is dismissed.

<u>Share Application Money - Write off:</u>

8. The Assessing Officer has treated the forfeiture of share application money as "Revenue" in nature. The Assessing Officer relied on the judgment in the case of CIT Vs. T.V. Sundaiam Iyengar & Sons Ltd. (222 ITR 344) (SC), CIT Vs. Ramaniyam Homes (P.) Ltd. (384 ITR 530), Rollatainers Ltd. Vs. CIT (339 ITR 54) (Del.), CIT Vs. Ravindra C. Gajiwala (204 ITR 157) (Guj.) and International Imex (Agents) P. Ltd. Vs. CIT (79 ITR 11) (Del.). The gist of the decisions relied upon by the AO is as under:

"1. CIT vs. T.V. Sundaiam Iyengar & Sons Ltd. [1996] 222 ITR 344 (SC)

" ....Assessee received certain deposits from customers in course of its business which were originally treated as capital receipt - Unclaimed credit balances which were time barred were written back by assessee to its profit and loss account - Assessing Officer treated such amount as its trading receipt and made addition - Whether if an

amount is received in course of trading transaction, even though it is not taxable in year of receipt as being of capital character, amount changes its character when amount becomes assessee's own money because of limitation or by any other statutory or contractual right and such amount should be treated as income of assessee - Held, yes - Whether therefore amount representing unclaimed credit balances written back to profit and loss account by assessee during assessment year under consideration, could be treated as assessee's income and liable to be taxed - Held, yes.

2. CIT vs. Ramaniyam Homes (P.) Ltd. [2016] 384 ITR 530

"Therefore, it is clear that the moment the asset is put to use, then the interest paid in respect of the capital borrowed for acquiring the asset, could be allowed as deduction. When the loan amount borrowed for acquiring an asset gets wiped off by repayment, two entries are made in the books of account, one in the profit and loss account where payments are entered and another in the balance sheet where the amount of un repaid loan is reflected on the side of the liability. But, when a portion of the loan is reduced, not by repayment, but by the lender writing it off (either under a onetime settlement scheme or otherwise), only one entry gets into the books, as a natural entry. A double entry system of accounting will not permit of one entry. In view' of the above, the waiver of principal amount would constitute income, falling under section 28(iv), being benefit arising for the business."

3. Rollatainers Ltd. vs. CIT [2011] 339 ITR 54 (Delhi)

"Section 41(1) read with Section 59 of the Act would become relevant and these provisions have been brought within the sweep of taxation even the remission of debt / liability as income of the order

in remission or such waiver amounts to provide or gains of business or provision liable to be taxed under Section 28 of the Act."

4. CIT vs. Ravindra C. Gajiwala [1993] 204 ITR 157 (Gujarat)

"Remission or cessation of liability' kasar amount could be taken into consideration while computing business income under section 28."

5. International Imex (Agents) P. Ltd. vs. CIT [1971] 79 ITR 11 (DELHI)

"Where assessee took loan from bank, part of which was waived by bank by way of compromise, remission of such balance amount amounted to remission of trading liability within meaning of section 10(2A) of 1922 Act which was liable to tax".

9. The ld. CIT(A) deleted the addition holding that the forfeiture of share application money as capital in nature. The details of the case laws relied upon by the ld. CIT(A) are as under:

"DCIT Vs. M/s Nalwa Chrome Pvt. Ltd. 2017-TIOL-434-ITAT-MUM

"as far as merits of this issue are concerned, it is noted that the facts are undisputed that the assessee had received the impugned amount on account of share application money which has been written back as the shares were not allotted. Now question arises, whether this amount could be treated as part of income of the assessee and that too, of the year under consideration. It is brought to our notice that this issue is no more res-integra as Bombay High Court has already decided this issue in many judgments. The Counsel of assessee has placed reliance upon the judgment of Bombay High Court in the cases of Softworks Computers Pvt. Ltd. and Xylon Holdings Pvt. Ltd., wherein it is held that the amount received on

account of share capital can neither be treated as taxable either u/s 41(1) or u/s 28(iv) if the same is written-back in the books of account. It is further noted that similar view has been taken by Madras High Court in the case of Skraemeco Regent Ltd., wherein detailed discussion was made on section 28(iv) as well as section 41(1) and it was held that amount received for the purpose of acquiring capital asset did not constitute trading liability, and therefore, the same was not taxable u/s 41(1) or section 28(iv) of the Act. Thus, we find that the order passed by CIT(A) is well reasoned and based on correct legal position and, therefore, no interference is called for in his order."

Bhavani Urban Co-Op Bank Ltd vs. ACIT, ITA No. 610/PN/2011 on 30 July, 2013 (ITAT- Pune)

"4.4 Respectfully following the above decisions we hold that the Ld.CIT(A) was not justified in confirming the addition of Rs. 5,73,100/- on account of forfeited share money as taxable. The various decisions relied on by Ld. CIT(A) are distinguishable and not applicable to the facts of the present case. We, therefore, set aside the order of the Ld. CIT(A) and direct the Assessing Officer to delete the addition. The first ground by the assessee is accordingly allowed."

c) Further, it is also judicially settled that share application money is different from loan and also it cannot be converted into loan.
Mylan Laboratories Limited Vs. ACIT, TS-399-ITAT-2015 (HYD)-TP

"6. The facts leading the above ground are that assessee as part of business expansion plans incorporated 100% subsidiary Matrix Laboratories BV, Netherlands and subscribed to further equity to the tune of Rs. 4.60 Crores i.e., EURO 8 Lakhs. The moneys were remitted on 13-02-2006 and allotment was made on 12-06-2006. The

TPO, however, treated the share application money pending allotment as loan advanced and interest to be charged thereon."

6.2…….Since in this case, the investments are in the nature of equity and shares have been allotted after a period of four months, we are of the opinion that TPO cannot re-classify the amount as 'loans and advances'…………..."

Aditya Birla Minacs Worldwide Ltd. Vs. DCIT, TS-114-2015(MUM)-IP

"4.1 During the year, the assessee has advanced a sum of Rs.4,48,01,190/- to its subsidiary, Transworks BPO Phillipines Ltd. in the form of share application money. The TPO was of the view that although the said amount given by the assessee in the garb of share application money, however, this amount was actually in the nature of loan as the shares were not allotted till 2 subsequent years and AE continued to use these funds……..'

4.6 We further note that a similar view has been taken by the Tribunal in a series of decisions as relied upon by the assessee. Accordingly, subject to verification of the share certificate by the AO, the share application money cannot be treated as loan amount merely because there is a delay in issuance of shares by the subsidiary in the name of the assessee, which was duly explained by the assessee. Accordingly, this ground of the assessee's appeal is allowed in above terms."

10. We find that the ld. CIT(A) has rightly followed the decisions of the various Tribunals and rightly held that the quantum so forfeited takes the character of capital receipt being forfeiture of a kind of deposits. Hence, it cannot be treated as revenue receipt. The order of the ld. CIT(A) is affirmed on this ground.

CO No. 41/Del/2021

<u>Disallowance u/s 14A:</u>

11. Relevant facts for adjudication of the issue are that the assessee has disallowed Rs. 42,85,983/- u/s 14A read with rule 8D at the time of filing of its income tax return for the AY 2014-15 whereas it is clear from the profit & loss account, the assessee has not derived any tax exempt income. The assessee claimed that the disallowance has been inadvertently made by the assessee and pleaded before the ld. CIT(A) for right back of the disallowances. The ld. CIT(A) declined the grounds of the assessee holding that the assessee themselves have disallowed voluntarily and no relief can be claimed subsequently.

12. Aggrieved, the assessee filed Cross Objection before us.

13. Before us, it was argued that the Ld. CIT(A) also did not correct the mistake of the assessee of wrongly offering the income to tax on the ground that once the appellant admitted the disallowance voluntarily in the income tax return itself, no relief can be allowed. It was argued that it is judicially accepted proposition that where the assessee inadvertently disallowed an amount u/s 14A, the revenue is obliged to assess the correct income. There is no dispute that the assessee has not earned exempt income during the year. The ld. AR relied on the judgment of Co-ordinate Bench of ITAT Chandigarh in the case M/s Anand Concast Ltd Vs DCIT; 2018-TIOL-461-ITAT-CHD wherein it was held that when assessee is able to show that the suo moto disallowance u/s 14A made by it was mistaken, then he has a legal right to reconcile from its return in accordance

with law and claim correct figure. The ld. AR further relied on the judgment in the case of Smt. Aishwarya K. Rai vs. DCIT, 2009-TIOL-175-ITAT-MUM wherein it was held as under:

"Officers of the Department must not take advantage of ignorance of an assessee as to his rights - IT AT: Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department for it would inspire confidence in him that he may be sure of getting a square deal from the departments.

26. It has been clarified at point No. (3) in Circular No. 14(XI-35) dated 11.04.1955 by way of administrative instructions for guidance of Income Tax officers on matters pertaining to assessment.

(3) Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before xxxx that some refund or relief is due to him. This attitude would, in the long run benefit the department for it would inspire confidence in him that he may be sure of getting- a square deal from the departments. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessee on whom it is imposed by law, officers should.

(a) draw their attention, to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other:

(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs."

14. The ld. DR argued that the amendment made by the Finance Act, 2022 of Section 14A clearly denotes that the disallowance do not depend upon earning of exempt income and hence in view of the change in the provisions of the Act, the grounds of the assessee cannot be allowed. We find that the Hon'ble Jurisdictional High Court in the case of PCIT vs. M/s. ERA Infrastructure (India) Ltd. in ITA No.204/2022 and CM APPL.31445/2022 judgment and order dated 20th July, 2022 had the occasion to examine the law on applicability of Section 14A having regard to the newly inserted Explanation to Section 14A as codified by Finance Act, 2022. The Hon'ble High Court held that the aforesaid Explanation cannot be presumed to be retrospective in operation. As a corollary, the law prevailing prior to the insertion of Explanation would continue to apply and shall not be guided by the Explanation being prospective. Hence, the arguments of the ld. DR cannot be acceded to.

15. As the old adage says that "*give to king what is king's and to God what is God's" i.e.* what belongs to national exchequer belongs to national exchequer to and what belongs to the citizen belongs to the citizen. The assessee cannot be disadvantaged by offering the amount to tax which was not taxable. To make it unambiguous, since the assessee has no exempt income, we

hold that no disallowance is called for. The appeal of the assessee on this ground is allowed.

16. In the result, the appeal of the Revenue is dismissed and the Cross Objection of the assessee is allowed.

Order Pronounced in the Open Court on 30/08/2023.

Sd/-	Sd/-
(Kul Bharat)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 30/08/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR