आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: HON'BLE SHRI SANDEEP GOSAIN, JM &
HON'BLE SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 330/JP/2023
निर्धारण वर्ष/Assessment Year : 2018-19.

Girnar Software Pvt. Ltd., 6th Floor, Jaipur Textile Market, B-2, Near Model Town, Malviya Nagar, Jaipur.	बनाम Vs.	The PCIT-2, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AACCG 7277 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri PC Parwal, CA

राजस्व की ओर से/ Revenue by : Shri Arvind Kumar (CIT)

सुनवाई की तारीख/ Date of Hearing : 19/07/2023
उदघोषणा की तारीख/Date of Pronouncement: 28/08/2023

आदेश/ ORDER

PER: SANDEEP GOSAIN, J.M.

This appeal by the assessee is directed against the order dated 29.03.2023 of ld. PCIT, Jaipur-2 passed under section 263 of the IT Act for the assessment year 2018-19. The assessee has raised the following grounds :-

1. Based on the facts and circumstances of the case and in law, the order passed under section 263 of the Income-tax Act, 1961 by the ld. PCIT-2 is illegal and bad in law.

2. The ld. PCIT-2 has erred on facts and in directing the assessing officer to make addition of Rs. 66,30,268/- under section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 and thereby setting aside the assessment order on this issue to be redone afresh without appreciating that the appellant had not earned any exempt income

during the year under consideration to attract any disallowance under section 14A of the Act.

3. Necessary cost be awarded to the assessee.

Ground No. 1 & 2 raised by the assessee are inter-connected and inter-related against the order passed under section 263 of the IT Act, 1961 and thereby directing the AO to make addition of Rs. 66,30,268/- under section 14A of the Act read with Rule 8D of the IT Rules, 1962.

2. The brief facts of the case are that the appellant filed return of income for the Assessment Year under consideration on 29 November 2018 declaring a loss of Rs 39,71,09,056/-. The assessee is engaged in the business of information technology services through its websites i.e. cardekho.com, zigwheels.com, pricedekho.com. The company is an online service provider which connects automobile dealers and customers. Apart from these it also provides a slew of services – interest marketing and technology solutions. The case of the assessee was selected for complete scrutiny under CASS. Accordingly statutory notice under section 143(2) was issued on 22.09.2019 which was duly served upon the assessee through ITBA portal. Thereafter notice under section 142(1) was also issued calling for the details in support of return of income and calling explanation regarding reason for which case was selected for scrutiny. In compliance, the assessee had submitted party-wise details of investment in subsidiaries as under :-

S No	**Head**	**Opening balance on 1.4.17**	**Addition/ deduction**	**Closing balance on 31.3.18**	**Remarks**
	Non-current asset: Investment in subsidiaries in equity shares				

1	Gaadi Web Private Limited	29,75,16,983	-	29,75,16,983	Strategic investment made in subsidiaries for the purpose of business of the Appellant
2	Girnar Software (SEZ) Private Limited	1,25,00,000	-	1,25,00,000	
3	Girnarsoft Automobilies Private Limited	5,35,13,620	-	5,35,13,620	
4	Girnar Retail Private Limited	99,99,968		1,39,01,095	
5	Carbay PTE Limited	13,63,06,430	-	13,63,06,430	
6	Girnarsoft Education Services Private Limited	6,10,13,000	6,50,05,794	12,60,18,794	
7	Advanced Structures India Private Limited	3,99,99,937	-	3,99,99,937	
	Sub-total	**61,08,49,938**	**6,50,05,794**	**67,97,56,859**	
	Less: Impairment allowances for investment in subsidiaries	**-2,00,000**	**-**	**-1,58,77,277**	
	Sub-total (1)	**61,06,49,938**	**6,50,05,794**	**66,38,79,582**	
	Deemed investment in subsidiaries				
1	Gaddi Web Private Limited	1,89,48,133	18,32,498	2,07,80,631	The Appellant has granted ESOP to employees of these subsidiaries. This has been treated as deemed capital contribution in respective subsidiary as per Ind-AS
2	Girnar Software (SEZ) Private Limited	15,35,524	13,45,411	28,80,935	
3	Girnarsoft Automobilies Private Limited	14,36,187	21,51,720	35,87,907	
4	Girnar Insurance Broking Private Limited	-	23,54,870	23,54,870	
	Sub-total (2)	**2,19,19,844**	**76,84,499**	**2,96,04,343**	
	Total (1+2)	**63,25,69,782**	**7,26,90,293**	**69,34,83,925**	

It was also submitted that no exempt income has been earned during the assessment year under appeal so as to attract any disallowance under section 14A of the Act. The Assessing Officer vide order dated 1st February 2021 after considering the detailed submissions filed in response to notices issued under section 142(1) of

the Act passed an assessment order making an addition of Rs 15,86,71,424/- on account of securities premium under section 56(2)(viib) of the Act, 1961.

2.1 Thereafter, the Learned Principal Commissioner of Income Tax -2 issued notice dated 3rd March 2023 providing an opportunity for hearing under section 263 of the Act proposing to modify the assessment order stating it to be erroneous and prejudicial to the interest of the revenue on account of the following issues:

- Disallowance under section 14A of the Act read with rule 8D of the Income-tax Rules, 1962 ("Rules")
- Deduction of tax at source on matching the expense debited in profit and loss account with the amounts reported in clause 34 of the tax audit report
- Difference in the amount of unabsorbed business loss allowed to be carried forward in the assessment order dated 1 February 2021

In response to the show cause notice, the appellant filed detailed submissions vide submissions dated 9 March 2023, 17 March 2023 and 22 March 2023. Basis the submissions filed, no adverse inference was drawn on the issue of tax at source and unabsorbed business loss. However, the ld. PCIT set aside the assessment order directing the AO to make addition of Rs 66,30,268/- under section 14A of the Act read with rule 8D of the Rules.

Now the assessee is in appeal before us.

3. Before us, the ld. A/R of the assessee submitted his written submissions as under :-

" In the submitted that the case of the Appellant was selected for **Complete Scrutiny** under the E-assessment Scheme 2019 and a notice

dated 22 September 2019 was issued under section 143(2) of the Act (**PB 32-35**) was issued identifying the following issues for selection of the case of complete scrutiny:

> *"1. Depreciation Claim*
> ***2. Investments/Advances/Loans***
> *3. Refund Claim*
> *4. Business Loss"*

As evident above, the complete scrutiny proceedings were initiated due to one of the reasons being 'investments' made by the Appellant. During the course of scrutiny proceedings, the Appellant vide submission dated 7 October 2019 (**PB 36-45**) provided the following information to the assessing officer in relation to 'investments' :

> *"During the financial year 2017-18 (AY 2018-19), Company's investments were primarily in subsidiaries companies as capital contribution and secondly in mutual funds where surplus funds were parked in liquid mutual fund schemes and redeem the same at the time of business needs of the Company. Further, advances/ loans were comprising mainly for lease rentals for premises hired on rent at different cities, loan given to Gaddi Web Private Limited, a wholly owned subsidiary at the bank rate of interest and Powerdrift Studios Private Limited, loans to employees, etc*
>
> *We humbly submit details if investments/ advances/ loans as per Annexure-B, attached with the submission"*

Further, specifically vide notice dated 11 December 2020 issued under section 142(1) of the Act, at question number 5, the assessing officer asked for information on investments in a specified format (**PB 46-50**) as under:

> *"5. Give details of the loan, advances, Investment and deposits given, including the accounts squared up during the year in the following format:*

Name and address	*Purchase of debt/ deposit*	*Opening balance Dr/ Cr*	*Details of transaction Dr/ Cr*	*Closing balance Dr/ Cr*	*Rate of interest*	*Total interest paid/*	*Purpose of which*

of debtor						*payable*	*given*

The Appellant vide submission dated 27 December 2020 (**PB 51-68**) provided the said details to the assessing officer during the course of assessment proceedings. The Appellant also submitted statement of short-term capital gains and complete account statement of mutual fund holding for the period 1 April 2017 to 31 March 2018. Thus, complete details in relation to the investments made by the Appellant in its group concerns and mutual funds were asked and provided to the assessing officer. The assessing officer only after considering the said information, passed the assessment order for the subject year and therefore it cannot be said that the assessment order is erroneous so far as prejudicial to the interest of revenue.

Section 263 of the Act has been reproduced as under:

"Revision of orders prejudicial to revenue.

263. (1) The [Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] ***is erroneous in so far as it is prejudicial to the interests of the revenue****, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, [including,—*

(i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or

(ii) an order modifying the order under section 92CA; or

(iii) an order cancelling the order under section 92CA and directing a fresh order under the said section].

Explanation 1.—…..

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

Explanation 3.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

(emphasis supplied)

As evident above, in order to invoke section 263 of the Act the following conditions are required to be satisfied cumulatively:

a) The order should be erroneous; and

b) The order should be prejudicial to the interest of revenue

The scope of the aforesaid provision has been well explained by the Supreme Court in the case of **Malabar Industrial Co. Ltd. vs. CIT reported in 243 ITR 83 [2000] (SC)** (**PB 69-74**) where in it has been held at page 87 as under:

> *"The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent-if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue- recourse cannot be had to section 263(1) of the Act."*

It has further been held in the same judgment at page 88 as under:

> ***"The Phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue, or where two views are possible and the Income –tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law".***
>
> **(emphasis supplied)**

Similarly, the Jodhpur Bench of the Income Tax Appellate Tribunal ("ITAT") in the case of **Satya Narayan Dhoot vs PCIT (2023) 67 CCH 0159 JodhTrib dated 17 January 2023** (**PB 75-80**) has explained the scope of section 263 of the Act as under:

> *"The principles laid down by the courts are that the Learned CIT cannot invoke his powers of revision under section 263 if the Assessing Officer has conducted enquiries and applied his mind and has taken a possible view of the matter.* ***If there was any enquiry and a possible view is taken, it would not give occasion to the Commissioner to pass orders under section of the Act, merely because he has got a different opinion in the matter.*** *263 The consideration of the Commissioner as to whether an order is erroneous in so far it is prejudicial to the interests of Revenue must be based on materials on record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to start fishing and roving enquiries in matters or orders which are already concluded."*

Similar view has been taken by the Jodhpur Bench of the ITAT in the case of **M/s O S Motors Pvt Ltd vs PCIT (2023) 67 CCH 0430 JodhTrib order dated 16 January 2023** (**PB 81-84**).

It is reiterated that the law is well settled that the PCIT can exercise revisionary powers under section 263 of the Act on existence of twin conditions, viz., (a) order of the assessing officer sought to be revised is erroneous and (b) such order is prejudicial to the interest of Revenue and the said principle has been held in the following decisions as well:

- CIT vs. Max India Limited: 295 ITR 282 (SC)
- CIT vs. Gabriel India Ltd: 203 ITR 108 (Bom)
- CIT vs. Smt. Meenalben S. Parikh: 215 ITR 81 (Guj.)
- CIT vs. Arvind Jewellers: 259 ITR 502 (Guj)
- CIT vs. Mehsana Dist. Co-op. Milk Producers Union Ltd.: 263 ITR 645 (Guj.)

In the instant case, the assessment proceedings were initiated for complete scrutiny and one of the reason was 'investment'. Also, a specific query on 'investment' was raised by the AO under the notice issued under section 142(1) of the Act dated 11 December 2020. The Appellant filed

detailed submission on 'investment' vide submission dated 7 October 2019 and 27 December 2020. In the said submissions, complete party wise details of investment made in equity shares of subsidiaries with opening balance, transaction during the year and closing balance was provided to the AO. Further, computation of income and income tax return of the subject AY was also filed during the course of assessment proceedings wherein the amount of exempt income was reported as Nil.

Thus, due query was made by the AO which was replied by the Appellant and therefore it cannot be said that the AO has not applied its mind. No exempt income was earned by the Appellant which is evident from the details filed during the course of assessment proceedings and therefore the question of applicability of section 14A read with Rule 8D does not arise. The AO had taken the same view and therefore did not make any addition under section 14A of the Act. At para 3.1 of the order dated 29 March 2023 passed by the PCIT, the PCIT has mentioned that the AO did not raise the issue of disallowance under section 14A of the Act and the Appellant has not discussed the same in any of its replies and therefore concluded that the AO had no occasion to apply his mind of the legal issue regarding disallowance under section 14A of the Act.

It is submitted that the need to raise a specific query on section 14A by the AO had not arisen as no exempt income was earned during the subject AY so as to attract section 14A of the Act. The Appellant had already furnished the computation of income and return of income which shows that no exempt income was earned during the subject AY. Further, investment details were called for during the subject AY which were duly provided and examined by the AO. The AO had duly accepted those details and not drawn any adverse inference. Thus, the conclusion of the PCIT that the AO did not raise the issue of disallowance under section 14A of the Act is misconceived and contrary to the evidences on record.

It is submitted that, where the AO has considered explanations and material submitted by the Appellant, it cannot be said that the AO has not applied his mind, so as to clothe the PCIT with necessary jurisdiction to revise the assessment under section 263 of the Act, especially, because the PCIT was of the opinion that some more enquiries were needed to be conducted or a different view on the issue can be taken. Kind attention for the aforesaid proposition is invited to the following cases:

- **Chandigarh Distillers & Bottlers Ltd vs Pr CIT 68 CCH 61 ChdTri dated 25 May 2023:** The relevant extracts of the decision are as under:

  "15. From the above, it is crystal clear that the investments of Rs.28.50 Cr made by the assessee during the year under consideration, in its group companies, were made out of the assessee's own surplus funds, i.e., it is own surplus accumulated profits and not from out of any borrowed funds. ***This position was duly taken into consideration by the AO while passing the assessment order, which is clear from the recital in the assessment order itself, as reproduced herein above and it is not in the hands of the assessee, as to how an assessment order is passed. The above position, however, has remained oblivious to the ld. PCIT and the impugned order has been passed in ignorance thereof.***

  16. From the above discussion, in our considered opinion, the assessment order did not suffer from the vice of either being erroneous, or being prejudicial to the interests of the Revenue. *That being so, the ld. PCIT erred in invoking the provisions of Section 263 of the Act and in passing the impugned order. Accordingly, finding merit in the grievance sought to be raised by the assessee, the same is accepted. The order under appeal is, accordingly, reversed and that passed by the AO is ordered to be revived. Ordered accordingly."*

- CIT vs. Girdharilal: 258 ITR 331 (Raj.)
- Hari Iron Trading Co. vs. CIT: 263 ITR 437 (P&H)
- CIT v. Ratlam Coal Ash Co: 171 ITR 141 (MP)
- CIT vs. Ganpat Ram Bishonoi: 152 Taxman 242 (Raj.) /198 CTR 546 (Raj.)
- CIT vs. Mehrotra Brothers: 270 ITR 157 (MP)
- CIT vs. Associated Food Profits (P) Ltd: 280 ITR 377 (MP)

- Salora International Ltd. vs. Addl. CIT: 2 SOT 705 (Delhi)
- Triveni Engg. Works Ltd. vs. Dy. CIT: 131 Taxman 32 (Delhi) (Mag.)
- Shivam Leasing & Finance Ltd. vs. ITO: 68 Taxman 211 (Delhi) (Mag.)
- Hindustan Marketing & Advertising Co. Ltd. vs. ITO: 28 ITD 231 (Delhi)
- Baljees vs. ACIT: 85 TTJ 543 (Chd.) / 127 Taxman 150 (Chd.) (Mag.)
- Mrs. Katiza S. Oomerbhoy vs. ITO: 100 ITD 173(Mum.)
- Balram Manmani vs. ACIT: [2006] 7 SOT 368 (Lucknow)
- Bagaria Products Ltd. vs. JCIT: 107 TTJ 760 (Pune)(TM)

Section 14A is not applicable as exempt income has not been earned

It is submitted that section 14A of the Act is not applicable if exempt income has not been earned during the year under consideration. Reliance in this regard is placed on the following cases:

- **PCIT Vs Oil Industry Development Board (2019) 262 Taxman 102 (SC) [PB 85-88]:** The High Court upheld Tribunal's order that in absence of any exempt income, disallowance under section 14A of the Act of any amount was not permissible, SLP filed against said decision was dismissed.

- **CIT vs Chettinad Logistics (P.) Ltd. (2018) 257 Taxman 2 (SC) [PB 89-97]:** SLP dismissed against High Court ruling that section 14A cannot be invoked where no exempt income was earned by assessee in relevant assessment year.

- **Cheminvest Limited vs CIT 378 ITR 33 (Delhi) (PB 98-105)**: The High Court held that no disallowance under section 14A can be made in a year in which no exempt income had been earned or received by the Appellant. The expression 'does not form part of the total income' in section 14A envisages that there should be an actual receipt of income, which was not includible in the total income for the purpose of disallowing any expenditure incurred in relation to the said income. Thus, section 14A would not apply if no exempt income was received or receivable during the relevant previous year.

- **PCIT Vs Oil Industry Development Board (2022) 115 CCH 245 DelHC dated 21 November 2022 (PB 106-107):** Relevant extracts of the decision are as under:

  "4. This Court is of the view that the present case is covered by the Division Bench judgment in Cheminvest Ltd. vs. CIT, [2015] 61 Taxmann.com 118 (Delhi), wherein it has been held that the expression 'does not form part of the total income' in Section 14A of the Act means that there should be an actual receipt of income which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year.

  5. Furthermore, this Court in Pr. Commissioner of Income Tax (Central)-2 Vs. M/s Era Infrastructure (India) Ltd., [2022] 141 taxmann.com 289 (Del) has dealt with the issue of amendment made by the Finance Act, 2022 to Section 14A of the Act. The relevant portion of the said judgment is reproduced hereinbelow:

  "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."

  6. Accordingly, this Court is of the view that no substantial question of law arises for consideration in the present appeal. Accordingly, the same is dismissed."

- **PCIT vs Era Infrastructure (India) Ltd (2022) 448 ITR 674 (Del) [PB 108-115]:** Expenditure incurred in relation to income not includible in total income. ITAT relying on decision of Delhi High Court in PCIT vs. IL & FS Energy Development Company Ltd., wherein it has been held that no disallowance under Section 14A can be made if assessee had not earned any exempt income deleted disallowance made by Assessing Officer under Rule 8D read with Section 14A. Further, amendment made by Finance Act 2022 is prospective in nature.

- **PCIT vs. MMTC Ltd. (2022) 6 NYPCTR 1372 (Del HC):** Relevant extracts of the decision are as under:

"7. The short controversy which arose for consideration before the Tribunal was as to ***whether disallowance could be effected under Section 14A of the Income Tax Act, 1961 [in short, "Act"] if the respondent/assessee had not earned income which was exempt from imposition of tax.***

7.1. The Tribunal has taken a view in favour of the respondent/assessee.

8. Mr Ajit Sharma, who appears on behalf of the appellant/revenue, has fairly placed before us a judgment dated 20.07.2022, rendered by a coordinate bench of this Court in ITA No.204/2022, titled Principal Commissioner of Income Tax (Central)-2 v. M/s Era Infrastructure (India) Ltd., which has ruled on the amendment which was brought about in Section 14A of the Act via Finance Act 2022.

8.1. The coordinate bench has ruled that the amendment will not operate retrospectively.

8.2. As far as the merits of the matter are concerned, it appears that the coordinate bench in the aforesaid judgment has referred to judgments passed by other coordinate benches rendered in PCIT v. IL & FS Energy Development Company Ltd. 2017 SCC OnLine Del 9893 and Cheminvest Limited v. Commissioner of Income Tax-VI (2015) 378 ITR 33.

8.3. Mr Sharma informs us that the decision rendered by the Division Bench of this court in PCIT v. IL & FS Energy Development Company Ltd. has been assailed by the appellant/revenue by instituting a special leave petition (SLP), which is pending adjudication.

9. Given these circumstances, since no substantial question of law arises in the present case, at this juncture, the appeal is, accordingly, disposed of. "

- **PCIT vs Kohinoor Project Pvt. Ltd. (2021) 276 Taxman 180 (Bom) (HC):** Section 14A would not apply if no exempt income was received or was receivable during relevant previous year.

- **CIT vs Visual Graphics Computing Services India Pvt. Ltd. (2020) 195 DTR 397 (Mad.) (HC):** Section 14A cannot be invoked when no exempt income was earned by the assessee in the relevant year

- **PCIT vs Wockhardt Hospitals Ltd (2020) 192 DTR 289 (Bom) (HC):** Assessee had not earned any exempt income during the assessment year under consideration nor it had claimed any expenditure against any taxfree income, AO was not justified in making the disallowance by invoking s. 14A r/w rule 8D.

- **M/s O S Motors Pvt Ltd vs PCIT ITA No. 54/Jodh/2022 order dated 16 January 2023 [PB 81-84]:** Relevant extracts of the decision are as under:

> ***"10. We heard the parties on this issue. The undisputed fact is that the assessee did not earn any exempt income during the year under consideration. When there is no exempt income, the question of making any disallowance u/s 14A shall not arise, as held by Hon'ble Delhi High Court in the case of Era Infrastructure (India) Ltd (2022)(141 taxmann.com 289)(Delhi). Hence, the question as to whether any disallowance u/s 14A could be made when there is no exempt income, becomes a debatable issue. It is well settled proposition of law that the revision proceedings u/s 263 could not be initiated on debatable issues. Accordingly, we set aside the order passed by Ld PCIT on this issue."***

- **Graphite India Limited vs PCIT (2023) 68 CCH 0183 Kol.Trib dated 3 July 2023**

Thus, the Hon'ble Supreme Court of India and various High Courts and ITAT have held that no disallowance under section 14A can be made if no exempt income has been earned. In the instant case also, the Appellant has not earned any exempt income and therefore disallowance under section 14A of the Act cannot be made.

Further, Circular No 5 of 2014 issued by the CBDT on 11 February 2014 [**PB 116-117**] is not applicable. The various courts including the Supreme Court of India has clarified the above position that in order to attract disallowance under section 14A of the Act, it is necessary that exempt income is earned by the assessee during the previous year. Thus, the Circular issued by CBDT do not lay out the correct position of law. This has specifically been clarified by the Delhi High Court in the case of **PCIT vs. IL & FS Energy Development**

Company Ltd. (2017) 399 ITR 483 (Delhi) wherein the Delhi High Court held 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 Commissioner of Income Tax v. Walfort Share and Stock Brokers Pvt. Ltd [2010] 326 ITR 1 (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.***
>
> .....
>
> ***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."***
>
> ***(emphasis supplied)***

In view of the above, the Circular No 5 of 2014 issued by the CBDT on 11 February 2014 cannot be relied upon.

<u>Amendment made by Finance Act 2022 is prospective in nature</u>

It is further submitted that the explanation inserted in section 14A of the Act by Finance Act, 2022 w.e.f 1 April 2022 is prospective in nature and cannot be treated as retrospective in nature even though the language used is *"For*

the removal of doubts" or *"deemed to have always applied"*. Reliance in this regard is placed on the following decisions:

- **Sedco Forex International Drill Inc vs CIT (2005) 12 SCC 717**: Relevant extracts of the decision are as under:

  "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".***

  (emphasis supplied)

- PCIT vs Era Infrastructure (India) Ltd (2022) 448 ITR 674 (Del)

- PCIT Vs Oil Industry Development Board (2022) 115 CCH 245 DelHC

- Graphite India Limited vs PCIT (2023) 68 CCH 0183 KolTrib dated 3 July 2023

This is further explained in the Memorandum explaining the Finance Bill, 2022 wherein it has been specifically mentioned that the amendment is applicable from 1 April 2022. The relevant extracts of the memorandum are as under:

> *"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"

Thus, the observation of the Ld. PCIT at para 6.1(iii) of the said order relying upon the aforesaid amendment is misplaced and incorrect.

Owned funds of the Appellant are far more than the borrowed funds and therefore section 14A is not applicable

Also, it is submitted that the owned funds available with the Appellant are far more than the borrowed funds. Rather, the borrowed funds is only for specific purpose and has been utilized only for that purpose. A comparison of the owned funds, borrowed funds and investment in share capital of the subsidiaries is as under:

Particulars	**Amount (In INR crores)**		**Remarks**
	As on 1 April 2017	**As on 31 March 2018**	
Investment in subsidiaries in equity shares	63.25	69.35	
Share Capital	0.17	0.17	
Total other equity (including securities premium, retained earnings)	345.54	314.55	
Term loan	-	0.45	The said loan is a vehicle loan from financial institution repayable over 60 monthly instalments. The loan is secured by way of hypothecation of respective vehicles

As clearly evident, the amount of owned funds are far more than borrowed funds and therefore section 14A of the Act is not applicable to attract any disallowance more so when no exempt income has been earned by the Appellant. Reliance in this regard is placed on the following decision :

- **Satya Narayan Dhoot vs PCIT I.T.A. No. 49/Jodh/2022 order dated 17 January 2023 [PB 75-80]:** Relevant extracts of the decision are as under:

> *"11. With regard to the interest expenses, the Ld A.R submitted that the own funds available with the assessee is far more than the value of investments and hence no portion of interest expenses is liable to be disallowed. A perusal of the Balance sheet would show that the assessee is having capital balance of Rs.229.34 crores, as against the investments of around Rs.130 crores. Hence no part of interest expenses is liable to be disallowed in terms of the decision rendered by Hon'ble Bombay High Court in the case of HDFC Bank Ltd (366 ITR 505)(Bom).*
>
> ***12. The foregoing discussions would show that the AO has made enquiries during the course of assessment proceedings with regard to the disallowance to be made u/s 14A of the Act. Further, since the assessee is having enough own funds, no disallowance out of interest expenses is also called for. On these reasoning, the order passed by Ld PCIT on this issue is also liable to be quashed."***
>
> ***(emphasis supplied)***

Case laws relied upon by the Ld PCIT are not applicable

The Ld PCIT has relied upon the following cases. The case laws relied are not applicable due to the reason explained under:

- **Punjab Tractor Ltd vs CIT [2017] 393 ITR 223 (P&H):** In the said case, the assessee had earned exempt income of Rs 225.72 lacs and therefore the Hon'ble HC held that where the assessing office is not satisfied with correctness of claim of assessee, the is bound by provisions of sub section (2) of section 14A to follow prescribed method which at relevant time was Rule 8D. In the case of the Appellant, no exempt income has been earned and therefore the case law is not applicable.

- **Avon Cycles vs CIT [2015] 228 taxman 368 (P&H):** In the said case, the assessee had utilized mixed funds and therefore the Hon'ble HC held that interest expenditure relatable to investment in tax free funds was to be computed as per Rule 8D(2)(ii). In the case of the Appellant, owned funds of the Appellant are more than borrowed funds and therefore the case law is not applicable.

- **Nahar Spinning Mills Ltd. Vs CIT [2017] 395 ITR 12 (P&H) and Vipin Malik vs ACIT [2016] 45 ITR 589 (Del)**: In both these cases, the assessee had earned exempt exempted dividend and therefore courts held disallowance of expenditure on reasonable basis is justified. As mentioned above, in the case of the Appellant, no exempt income has been earned and therefore the case laws are not applicable.

Thus, it is submitted that the order passed by the ld. PCIT under section 263 of the Act is illegal and bad in law as the conclusion drawn by the PCIT that the assessment order is erroneous in so far as prejudicial to the interest of the revenue is incorrect more so when no exempt income has been earned during the year so as to attract section 14A of the Act. In view of the above, it is submitted that no disallowance of expenditure is warranted under section 14A of the Act read with Rule 8D of the Rules as no exempt income has been earned by the Appellant during the year under consideration."

4. On the other hand, the ld. CIT D/R supported the order of ld. PCIT.

5. We have heard the rival contentions, perused the material available on record and the orders of the revenue authorities and the citations relied on by both the parties. The short issue in this case is whether the ld. Pr. CIT was justified in invoking jurisdiction under section 263 of the I.T. Act, 1961 and thereby directing to make disallowance of Rs 66,30,268/- under section 14A of the Act read with Rule 8D

of IT Rules, 1962 even when the assessee has not earned any exempt income during the year under consideration.

5.1 We note that the case of the Assessee was selected for complete scrutiny where one of the reasons was 'investment'. The assessee, in response to notices issued, furnished providing complete details of investment on 07.10.2019. Again, through notice issued under section 142(1) of the Act dated 11.12.2020, the AO asked the assessee to provide details of investment and income earned to which the assessee furnished detailed tabular details/information vide submission dated 27.12.2020. The assessee also filed computation of income and return of income showing that no exempt income has been earned during the year under consideration. The AO considered the information filed by the assessee and the same is evident from the assessment order wherein the AO has mentioned in para 3 as under :

> *"3. In the present case of the assessee trust in view of E-Assessment Scheme-2019 notices under Section 143(2)/Section 142(1) were issued calling for the details in support of return of income and calling explanation regarding reason for which case was selected for scrutiny. In response to the notice, the assessee trust filed relevant requisite documents through the ITBA portal"*

Thus, the AO has considered the information filed by the assessee and arrived at conclusion that in the absence of exempt income, no disallowance is warranted under section 14A of the Act. The view of the AO is duly supported by the decisions of Hon'ble High Courts and Tribunals relied upon by the assessee. SLP filed by the revenue in this regard against the decisions of Hon'ble High Courts have been

dismissed by the Hon'ble Supreme Court of India in the cases PCIT vs. Oil Industry Development Board (2019) 262 Taxman 102 (SC) and CIT vs. Chettinad Logistics Pvt. Ltd. (2018) 257 Taxman 2 (SC) as relied upon by the A/R of the assessee in the detailed submission. This position was duly taken into consideration by the AO while passing the assessment order, which is evidently clear from the assessment order itself, as reproduced herein above and the order passed by the AO is not warranted revision.

5.3 From the above discussion, in our considered opinion, the assessment order cannot be regarded as erroneous, or being prejudicial to the interests of the Revenue more so when no exempt income has been earned to attract any disallowance u/s 14A of the Act. Thus we are of the view the ld. PCIT has erred in invoking the provisions of Section 263 of the IT Act and in passing the impugned order. Accordingly, we find merit in the grievance raised by the assessee, accordingly we held that the ld. PCIT is not justified in directing the AO to make addition under section 14A of the IT Act, 1961. The impugned order is accordingly quashed.

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

Order pronounced in the open court on 28/08/2023.

Sd/-	Sd/-
(राठौड़ कमलेश जयंतभाई)	(संदीप गोसाई)
(RATHOD KAMLESH JAYANTBHAI)	(SANDEEP GOSAIN)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक/Dated:- 28/08/2023.

Das/

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

1. अपीलार्थी/The Appellant- Girnar Software Pvt. Ltd., Jaipur.
2. प्रत्यर्थी/ The Respondent- The PCIT-2, Jaipur.
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA No. 330/JP/2023}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar