IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1015/Mum./2019
(Assessment Year : 2012–13)

Citrus Check Inns Limited 203–B, Parvati Industrial Estate Sunmill Compound, Lower Parel (West) Mumbai 400 013 PAN – AAECC5606P	……………. Appellant

v/s

Dy. Commissioner of Income Tax Central Circle–2(1), Mumbai	……………. Respondent

ITA no.1016/Mum./2019
(Assessment Year : 2013–14)

Citrus Check Inns Limited 203–B, Parvati Industrial Estate Sunmill Compound, Lower Parel (West) Mumbai 400 013 PAN – AAECC5606P	……………. Appellant

v/s

Dy. Commissioner of Income Tax Central Circle–2(1), Mumbai	……………. Respondent

ITA no.1017/Mum./2019
(Assessment Year : 2014–15)

Citrus Check Inns Limited 203–B, Parvati Industrial Estate Sunmill Compound, Lower Parel (West) Mumbai 400 013 PAN – AAECC5606P	……………. Appellant

v/s

Dy. Commissioner of Income Tax Central Circle–2(1), Mumbai	……………. Respondent

ITA no.1018/Mum./2019
(Assessment Year : 2015–16)

Citrus Check Inns Limited
203–B, Parvati Industrial Estate
Sunmill Compound, Lower Parel (West)
Mumbai 400 013 PAN – AAECC5606P .... Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–2(1), Mumbai .... Respondent

Assessee by : Shri Hiro Rai a/w Ms. Ritu Punjabi
Revenue by : Shri Manish Sareen

Date of Hearing – 24/08/2023 | Date of Order – 06/09/2023

O R D E R

PER BENCH

The present batch of four appeals have been filed by the assessee challenging the separate impugned orders of even date 26/11/2018, passed under section 250 of the Income Tax Act, 1961 (for short *"the Act"*) by the learned Commissioner of Income Tax (Appeals)–48, Mumbai ["*learned CIT(A)*"], for the assessment years 2012–13, 2013–14, 2014–15 and 2015–16.

2. Since the appeals pertain to the same assessee and issues involved are also similar, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order. Further, as the basic facts in all the appeals are the same, we have elaborately mentioned only the facts of the appeal for the first assessment year (i.e. 2012–13) before us for the sake of brevity. However, if any issue

arises in any assessment year for the first time, the facts pertaining to the same will be discussed accordingly.

3. Before dealing with the issues on merits, it is pertinent to note certain factual background which is peculiar to the present case. The assessee was involved in the business of selling holiday membership plans to its members. The assessee had an affiliation with certain hotels, which provided accommodation to its members, whenever they utilise the eligible holidays. The members of various schemes were entitled to utilise the eligible holidays on the basis of predetermined entitlements as prescribed in each scheme. The members were also given the option to encash their entitlements for non-availing the eligible holidays. In addition to that, the members, at their absolute discretion, may exercise another option to go for premature encashment, termination of the membership right, and claim a refund of the amount, which is refundable to them in case of premature termination as prescribed in each scheme. The Security and Exchange Board of India (*"SEBI"*), vide interim order dated 03/06/2015 and order 24/08/2015, held that the schemes floated and operated by the assessee constituted Collective Investments Schemes (*"CIS"*) and operating such schemes without seeking registration, is in violation of CIS regulations. The SEBI, inter–alia, further directed the assessee not to collect any funds from the investors under the existing schemes / existing company within the group and not to launch any new schemes or plans. The SEBI also directed the assessee not to dispose off or alienate any of the properties/assets obtained directly or indirectly through the money raised and not to divert the funds raised from the public.

4. In an appeal against the aforesaid orders passed by the SEBI, the Hon'ble Securities Appellate Tribunal (*"Hon'ble SAT"*), vide order dated 03/02/2016, upheld the prima–facie view of the SEBI that the business carried on by the assessee constitutes CIS. The Hon'ble SAT, however, directed the SEBI to grant a provisional certificate as provided under the CIS regulations forthwith and eventually on receipt of the final investigation report and if found appropriate, grant final registration as per law so that the schemes operated by the assessee are henceforth regulated so that interest of investors are effectively and properly protected by SEBI. The Hon'ble SAT also allowed the assessee to continue to receive subscription amounts from the investors under the existing schemes till the date of granting provisional registration. In further appeal by the SEBI, the Hon'ble Supreme Court, vide order dated 18/07/2016, stayed the directions issued by the Hon'ble SAT to grant a provisional certificate of registration and also stayed the permissions granted by the Hon'ble SAT to the assessee to continue to receive the subscription from the investors under the existing schemes.

5. Subsequently, some of the operational creditors approached the Hon'ble National Company Law Tribunal ("*Hon'ble NCLT*") to initiate Corporate Insolvency Resolution Process in respect of the assessee. On 02/05/2017, Hon'ble NCLT appointed an Insolvency Resolution Professional under the provisions of the Insolvency and Bankruptcy Code, 2016 ("*IBC, 2016*") and a moratorium as per section 14 of the IBC, 2016 was initiated. Subsequently, some of the investors filed an appeal before the Hon'ble National Company

Law Appellate Tribunal against the aforesaid order passed by the Hon'ble NCLT, which was dismissed vide order dated 30/11/2017. The Hon'ble Supreme Court vide order dated 08/01/2018, in appeal by the said investors, stayed the proceedings under IBC, 2016. Vide order dated 10/05/2018, the Hon'ble Supreme Court constituted a Sale-cum-Monitoring Committee for the purpose of valuation of the properties that have been unearthed during the insolvency process. The Hon'ble Supreme Court further directed the attachment of all the properties of the assessee as well as assets and other properties of the associates/sister concerns. Vide another order dated 12/02/2019, the Hon'ble Supreme Court clarified that in selling the properties under its aegis, the Sale-cum-Monitoring Committee is to follow the procedure laid down by the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Vide order dated 06/05/2019, the Hon'ble Supreme Court appointed Justice (Retd.) J.P. Devadhar to head the Sale-cum-Monitoring Committee so that the process of the sale of properties is expedited.

6. In this regard, the learned Authorised Representative for the assessee (*"learned A.R"*) also filed a letter dated 20/07/2022, by the Sale-cum-Monitoring Committee along with the copy of the aforesaid orders. Therefore, from the aforesaid events, it cannot be disputed that the present case is not covered under the moratorium period, as pursuant to the order of the Hon'ble Supreme Court, Sale-cum-Monitoring Committee has been constituted and properties of the assessee are sold under the aegis of the Hon'ble Supreme Court. During the hearing, pursuant to the directions of the Bench, the

learned A.R. filed another letter dated 16/08/2023, by the Sale-cum-Monitoring Committee wherein it is submitted that the Income Tax Department has filed its claim, vide Form–C [Proof of Claim by operational creditors under the Regulation–7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016] on 31/12/2021 (received by the Sale–cum–Monitoring Committee on 10/01/2022) which include outstanding income tax demand of Rs.199 crore covered under present appeals. Thus, it was submitted that the demand of the Income Tax Department has been admitted by the Sale-cum-Monitoring Committee and the same is subject to the outcome of the present appeals.

ITA no.1015/Mum./2019
Assessee's Appeal – A.Y. 2012–13

7. In its appeal, the assessee has raised the following grounds:–

"1. The Ld. C.I.T. (Appeals) erred in confirming the action of the Ld. D.C.I.T. of re-opening of assessment U/S 147/148 of the Income Tax Act, 1961 without a valid reason for re-opening the assessment.

2.a The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T. not to make applicable the provisions of section 194A to non availing compensation (NAC).

2.b The Ld. CIT(Appeals) erred in confirming the addition made by the Ld. D.C.I.T. of Rs.22,77,046/– u/s 40(a)(ia) of the Income Tax Act, 1961, by treating the sale proceeds as deposits and further erred in confirming the treatment of part of non availing compensation (NAC) as interest.

2.c The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which can not be treated as income if treated as deposit and can not be taxed.

2.d Without prejudice, Hon'ble CIT (Appeals) erred in confirming the which was amount wrongly considered by Ld. D.C.I.T. as additional amount of Non availing original excluding membership amount received of Rs.22,77,046/- as

alleged interest instead of considering the correct of amount Rs.NII./- as claimed by the Appellant.

2.e The Ld. CIT(Appeals) erred in not directing the Ld. D.C.I.T. to follow the Mercantile system of accounting while treating part of the NAC as interest and tax interest on accrual basis.

3. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeals."

8. During the hearing, at the outset, the learned A.R. wishes to argue ground no.2.c, and submitted that once the relief is granted in respect of this ground, the other grounds raised in the appeal need not be gone into and can be kept open. The issue arising in ground no.2.c, raised in assessee's appeal, is pertaining to treating the deposits received from its members as non-taxable consistent with the Revenue's approach of treating the Non-Availing Compensation ("*NAC*") paid by the assessee to its members as interest, which was disallowed under section 40(a)(ia) for non-deduction of tax under section 194A of the Act.

9. The brief facts of the case pertaining to the issue, as emanating from the record, are: For the year under consideration, the assessee filed its return of income on 30/09/2012, declaring a total income of Rs.11,35,250, under the normal provisions of the Act. The return of income filed by the assessee was selected for the scrutiny and vide order dated 10/03/2015, the scrutiny assessment under section 143(3) of the Act was concluded accepting the returned income. Subsequently, on the basis of a survey under section 133 of the Act conducted in the case of M/s. Royal Twinkle Star Club Pvt. Ltd., and the order passed by the SEBI in the aforesaid case, re–assessment

proceedings under section 147 of the Act were initiated in the case of the assessee, and notice under section 148 of the Act was issued on 31/03/2017. In the reasons recorded while re–opening the assessment, it was alleged that the Directors of M/s. Royal Twinkle Star Club Pvt. Ltd. are running the schemes through the assessee in which they are paying Non-Availing Compensation (*"NAC"*) which is nothing but interest under the garb of the Schemes. Thus, it was alleged that the funds invested with the assessee by various customers are actually in the nature of unsecured loans/deposits and the returns awarded in the case of redemption as interest of such unsecured loans/deposits. Accordingly, it was alleged that the scheme has been disguised as a time share scheme, and it is actually a borrowing activity. Thus, in the reasons for re-opening the assessment, it was concluded that the assessee has booked NAC in the form of repayment of unsecured loan/deposits, and interest to the tune of Rs.77,45,383, is not allowable under section 40(a)(ia) of the Act due to non–deduction of TDS.

10. In response to the notice issued under section 148 of the Act, the assessee filed a letter stating that the return of income originally filed on 30/09/2012, be treated as a return of income filed in response to the notice issued under section 148 of the Act. The AO, vide order dated 07/12/2017, passed under section 147 of the Act r/w 143(3) of the Act did not agree with the submissions of the assessee and disallowed NAC paid by the assessee under section 40(a)(ia) of the Act for non–deduction of TDS as stipulated under section 194A of the Act.

11. The learned CIT(A), vide impugned order, upheld the findings of the AO in treating the NAC as interest and accordingly affirmed the disallowance made under section 40(a)(ia) of the Act. Being aggrieved, the assessee is in appeal before us.

12. We have considered the submissions of both sides and perused the material available on record. We find that a similar issue came up for consideration before the Co–ordinate Bench of the Tribunal in the case of sister concern in M/s. Royal Twinkle Star Club Pvt. Ltd. v/s DCIT, in ITA no.1425/Mum./2018, etc., for the assessment years 2009–10 to 2015–16. In the aforesaid decision, the Co–ordinate Bench, vide order dated 11/05/2023, directed the amount received by the taxpayer from its members, to the extent the same was treated as income in its books of account, to be reduced while calculating the total income of the taxpayer, as the Revenue has treated the NAC paid by the taxpayer to its members as interest. The relevant findings of the Co–ordinate Bench, in the aforesaid decision, are reproduced below:–

> *"11. We have considered the rival submissions and perused the material available on record. In the present case, the assessee is engaged in the business of selling holiday membership plans to its customers/members. The amount received from the members was apportioned over the tenure of the membership, which differs from scheme to scheme offered by the assessee. Out of the apportioned receipts, the amount pertaining to the year was considered as "sales" and the balance amount was considered as "advances sales" over the tenure of the membership. Once the membership is accepted and confirmed, a member is entitled to avail of facilities as per terms and conditions related to the entitlement certificate. If the members do not avail entitlements fully or partially during the membership tenure, then the assessee reimburses for the non-utilisation portion of the entitlements, which is called NAC, and the same is charged to the profit and loss account under the same head. The members are also entitled to exercise the option of premature termination/encashment of membership at any point in time. The assessee, in case where the scheme has reached maturity (or completed its*

term), also repays the initial deposit along with compensation and the whole amount is booked as revenue expenditure. There is no dispute regarding these basic facts. The AO vide assessment order, inter-alia, on the basis of an order dated 21/08/2015 passed by the SEBI, wherein the business conducted by the assessee was held to be in the nature of CIS, treated the NAC paid by the assessee to its customers/members as interest on deposits and since the assessee did not deduct tax under section 194A of the Act while making the aforesaid payment, disallowed the expenditure under section 40(a)(ia) of the Act after excluding the principal amount returned and the interest payment below Rs.5000. It is the plea of the assessee that since the business of the assessee is considered to be in the nature of CIS and the NAC paid by the assessee is treated as interest on deposits by members, therefore the amount received from the members cannot now be treated to be in the nature of income, since the same qualifies as capital receipt, and therefore, should accordingly be reduced while calculating the total income of the assessee.

12. During the hearing, the learned AR placed reliance upon the decision of the Hon'ble Supreme Court in Peerless General Finance and Investment Company Limited vs CIT, [2019] 416 ITR 1(SC), wherein it was held that the subscription received from the public at large under a collective investment scheme is in the nature of capital receipt and not income. It is pertinent to note that in the facts of this case, the taxpayer had floated various schemes which require subscribers to deposit certain amounts by way of subscriptions in its hands, and, depending upon the scheme in question, these subscribed amounts at the end of the scheme are ultimately repaid with interest. Further, the taxpayer, in this case, has also shown the sum as income in its books of accounts. However, the Hon'ble Supreme Court by referring to the various judicial pronouncements agreed with the submission of the taxpayer that it would not be possible to go only by the treatment of such subscriptions in the accounts of the assessee itself.

13. In the present case, it is no doubt true that the amount received from members and apportioned to the year is considered as "sales" by the assessee in its books of account, however, in view of the fact that subsequently the schemes floated by the assessee were held to be in the nature of CIS and therefore, the NAC paid by the assessee to its members was considered as interest on deposits, such deposits by the members cannot be treated as revenue in the hands of the assessee. It is pertinent to note that the NAC was paid in relation to the holiday membership schemes sold by the assessee when the members did not avail of the holiday facilities as per the entitlement under the scheme. Thus, we are of the considered opinion that the approach of the Revenue, on one hand treating the NAC paid by the assessee to its members as interest and on the other hand treating the amount received from the members as the income of the assessee is self-contradictory since only when the deposits are considered as a loan, which was one of the allegations in the reasons recorded while reopening the assessment, the interest can be charged on it. Thus, when the assessee's business was considered to be in the nature of CIS, all the consequences in relation thereto must follow. Further, as noted above, it is trite law that entries in the books of account are not decisive or determinative of the true nature of the entries. Therefore, the amount received by the assessee from its members, to the extent the same is treated as income in its books of account, is directed to be reduced while calculating the total income of the assessee, since the same is in the nature of capital

receipt. We find that in the present case, the NAC paid to the members also includes the repayment of membership amount collected from the members and the same has been claimed as a deduction by the assessee. Since the said repayment has already been claimed as a deduction, therefore the said amount need not be again reduced while calculating the total income of the assessee for the year under consideration. Accordingly, ground No. 4 raised in assessee's appeal is allowed."

13. During the hearing, the learned Departmental Representative ("*learned D.R."*) could not show us any reason to deviate from the conclusion so reached by the Co–ordinate Bench in the aforesaid decision. Accordingly, ground no.2.c, raised in assessee's appeal is allowed with similar directions, as rendered by the Co–ordinate Bench in the aforesaid decision. As a result, Ground no.2.c, is allowed in terms indicated above.

14. Ground no.1, raised in assessee's appeal was not pressed during the hearing. Accordingly, the same is dismissed as not pressed.

15. Since the relief has been granted to the assessee in respect of ground no.2.c, the remaining grounds raised in the present appeal are kept open.

16. In the result, assessee's appeal for the A.Y. 2012–13 is partly allowed.

ITA no.1016/Mum./2019
Assessee's Appeal – A.Y. 2013–14

17. In its appeal, the Revenue has raised the following grounds:–

"1. The Ld. C.I.T. erred (Appeals) in confirming the action of the Ld. D.C.I.T. of re-opening of assessment U/S 147/148 of the Income Tax Act, 1961 without a valid reason for re-opening the assessment.

2.a The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T not to make applicable the provision of section 194A to non availing compensation (NAC).

2.b The Ld. CIT (Appeals) erred in confirming the addition made by the Ld. D.C.I.T. of Rs.18,64,02,834/- U/s 40(a)(ia) of the Income Tax Act, 1961, by treating the sale proceeds as deposits and further erred in confirming the treatment of part of non–availing compensation (NAC) as interest.

2.c The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which can not be treated as income if treated as deposit and can not be taxed.

2.d Without prejudice, Hon'ble CIT (Appeals) erred in confirming the which was amount wrongly considered by Ld. D.C.I.T. as additional amount of Non availing original amount excluding membership received Rs.18,64,02,834/- as alleged interest instead of considering the correct amount of Rs.1,95,08,766/– as claimed by the Appellant.

2.e The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to follow Mercantile system the of accounting while treating part of the NAC as interest and Tax interest on accrual basis.

3. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

18. Ground no.1, raised in assessee's appeal was not pressed by the learned A.R. during the hearing. Accordingly, the same is dismissed as not pressed.

19. In respect of ground no.2.c, the Learned A.R. adopted his arguments as were made in the appeal for the assessment year 2012–13. The issue arising in ground no.2.c, is similar to the issue already decided in assessee's appeal for the assessment year 2012-13. Therefore, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.2.c, raised in assessee's appeal is allowed.

20. As regards ground no.2.d, it is the plea of the assessee that the AO has considered the incorrect amount while making the addition and principal amount repaid, and interest payment less than Rs.5,000, has not been

excluded. Since the issue requires verification, therefore we deem it appropriate to remand the same to the file of AO for *de novo* adjudication after necessary verification and to consider the correct amount. As a result, ground no.2.d, is allowed for statistical purposes.

21. Since the relief has been granted to the assessee in respect of ground no.2.c, in view of the submission of the learned A.R., the remaining grounds raised in the present appeal are kept open.

22. In the result, the appeal by the assessee for A.Y. 2013–14 is partly allowed for statistical purposes.

ITA no.1017/Mum./2019
Assessee's Appeal – A.Y. 2014–15

23. In its appeal, the Revenue has raised the following grounds:–

"1. The Ld. C.I.T. erred (Appeals) in confirming the action of the Ld. D.C.I.T. of re-opening of assessment U/S 147/148 of the Income Tax Act, 1961 without a valid reason for re-opening the assessment.

2.a The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T not to make applicable the provision of section 194A to non availing compensation (NAC).

2.b The Ld. CIT (Appeals) erred in confirming the addition made by the Ld. D.C.I.T. of Rs. 132,57,12,340/- U/s 40(a)(ia) of the Income Tax Act, 1961 by treating the sale proceeds as deposits and further erred in confirming the treatment of part of non availing compensation (NAC) as interest.

2.c The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which cannot be treated as income if treated as deposit and can not be taxed.

2.d Without prejudice, Hon'ble CIT (Appeals) erred in confirming the which was amount wrongly considered by Ld. D.C.I.T. as additional amount of Non availing original excluding membership amount received of Rs.

132,57,12,340/- as alleged interest instead considering the of correct amount of Rs.25,74,63,240/– as claimed by the Appellant.

2.e The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to Mercantile follow system the of accounting while treating part of the NAC as interest and Tax interest on accrual basis.

3. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

24. Ground no.1, raised in assessee's appeal was not pressed by the learned A.R. during the hearing. Accordingly, the same is dismissed as not pressed.

25. In respect of ground no.2.c, the Learned A.R. adopted his arguments as were made in the appeal for the assessment year 2012–13. The issue arising in ground no.2.c, is similar to the issue already decided in assessee's appeal for the assessment year 2012-13. Therefore, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.2.c, raised in assessee's appeal is allowed.

26. As regards ground no.2.d, it is the plea of the assessee that the AO has considered the incorrect amount while making the addition and principal amount repaid, and interest payment less than Rs.5,000, has not been excluded. Since the issue requires verification, therefore we deem it appropriate to remand the same to the file of AO for *de novo* adjudication after necessary verification and to consider the correct amount. As a result, ground no.2.d, is allowed for statistical purposes.

27. Since the relief has been granted to the assessee in respect of ground no.2.c, in view of the submission of the learned A.R., the remaining grounds raised in the present appeal are kept open.

28. In the result, the appeal by the assessee for A.Y. 2014–15 is partly allowed for statistical purposes.

ITA no.1018/Mum./2019
Assessee's Appeal – A.Y. 2015–16

29. In its appeal, the assessee has raised the following grounds:–

"1.a The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T not to make applicable the provision of section 194A to non availing compensation (NAC).

1.b The Ld. CIT (Appeals) erred in confirming the addition made by the Ld. D.C.I.T. of Rs. 252,96,12,895/- U/s 40(a)(ia) of the Income Tax Act, 1961 by treating the sale proceeds as deposits and further erred in confirming the treatment of part of non availing compensation (NAC) as interest.

1.c The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which can not be treated as income if treated as deposit and can not be taxed.

1.d Without prejudice, Hon'ble CIT (Appeals) erred in confirming the amount which was wrongly considered by Ld. D.C.I.T. as additional amount of Non availing excluding original membership amount received of Rs. 252,96,12,895/- of as alleged interest instead of considering the correct amount of Rs.18,81,76,099/– claimed by the Appellant.

1.e The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to follow the Mercantile system of accounting while treating part of the NCA as interest and tax interest on accrual basis.

1.f The Ld. CIT (A) also erred in confirming the entire addition of Rs.252,96,12,895/- for the purpose of disallowance U/s 40(a)(ia) of the Income Tax Act instead of considering only 30% of the total alleged interest i.e. additional amount of NAC as applicable for the assessment year under consideration.

2.a The Ld. CIT(Appeals) erred in confirming the addition made by Ld. D.C.I.T. on account of disallowance of Rs.2,30,38,866/- U/s 14A r.w. Rule 8D.

2.b The Ld. CIT (Appeals) erred in holding that expenses attributed towards earning exempt income even when there were no nexus.

2.c The Ld. CIT (Appeals) erred in considering the facts that the major investments were made for acquiring strategic business stake.

2.d Without prejudice, Hon'ble CIT (Appeals) erred in confirming disallowance U/s14A r.w. Rule 8D in excess of exempted income earned by the Appellant.

3. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

30. In respect of ground no.1.c, the Learned A.R. adopted his arguments as were made in the appeal for the assessment year 2012–13. The issue arising in ground no.2.c is similar to the issue already decided in assessee's appeal for the assessment year 2012–13. Therefore, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.1.c raised in assessee's appeal is allowed.

31. As regards ground no.1.d, it is the plea of the assessee that the AO has considered the incorrect amount while making the addition and principal amount repaid, and interest payment less than Rs.5000 has not been excluded. Since the issue requires verification, therefore we deem it appropriate to remand the same to the file of AO for *de novo* adjudication after necessary verification and to consider the correct amount. As a result, ground no.1.d, is allowed for statistical purposes.

32. The issue arising in ground no.1.f, raised in assessee's appeal, is pertaining to considering 30% of NAC for the purpose of disallowance under section 40(a)(ia) of the Act instead of the entire amount.

33. The learned CIT(A), vide impugned order, held that the amendment to section 40(a)(ia) of the Act by Finance (No.2) Act, 2014 is with effect from 01/04/2015, and since this is the substantive provision, therefore the amendment will come into force from the previous year starting on 01/04/2015, i.e. previous year 2015-16 and assessment year 2016-17. Accordingly, the learned CIT(A) dismissed the appeal filed by the assessee on this issue and held that the benefit of bringing to tax only 30% of the amount violated as per section 40(a)(ia) of the Act is not available to the assessee for the assessment year 2015-16, i.e. the year under consideration.

34. We find that the Finance (No.2) Act, 2014 substituted the provisions of section 40(a)(ia) of the Act as under:-

> *"(ia) thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 :"*

35. CBDT, while explaining the provisions of the Finance (No.2) Act, 2014, vide Circular No.1 of 2015, dated 21/01/2015, clarified that the amendment by the Finance (No.2) Act, 2014 to the provisions of section 40(a)(ia) of the Act takes effect from 1st April 2015 and will, accordingly, apply in relation to the assessment year 2015-16 and subsequent years. We further find that the Hon'ble Supreme Court in Shree Choudhary Transport Company vs ITO, [2020] 426 ITR 289 (SC) held that the amendment by the Finance (No.2) Act, 2014 is with effect from 01/04/2015, and shall be applicable from the assessment year 2015-16. Since it is settled that the amendment to section

40(a)(ia) of the Act by the Finance (No.2) Act, 2014 is with effect from the assessment year 2015-16, the AO is directed to apply the said amended provision while computing disallowance under section 40(a)(ia) of the Act. As a result, ground no.1.f, raised in assessee's appeal is allowed.

36. Since the relief has been granted to the assessee in respect of ground no.1.c, in view of the submission of the learned A.R., the issues raised in grounds no.1.a, 1.b, and 1.e are kept open.

37. The issue arising in grounds no.2.a to 2.d, raised in assessee's appeal is pertaining to disallowance under section 14A r/w rule 8D.

38. The brief facts of the case pertaining to the issue, as emanating from the record, are; During the scrutiny proceedings, it was observed that the assessee has made the investment in unquoted shares. It was further observed that the nature of investment made by the assessee is such that they can yield income in the nature of dividend which is exempt under section 10(34) of the Act. Accordingly, the AO, vide order dated 07/12/2017, passed under section 143 of the Act computed disallowance of Rs.2,30,38,866, under section 14A r/w rule 8D.

39. The learned CIT(A), vide impugned order, upheld the disallowance made by the AO. Being aggrieved, the assessee is in appeal before us.

40. It is evident from the record that during the year, no dividend income was received from the investments made by the assessee and thus, no exemption was claimed under section 10(34) of the Act while filing the return

of income. The aforesaid fact has also not been disputed by the Revenue. We find that the Hon'ble Delhi High Court in Cheminvest Ltd. v. CIT: [2015] 378 ITR 33 (Delhi) held that section 14A will not apply if no exempt income is received or receivable during the relevant previous year. We further find that the Hon'ble jurisdictional High Court in Pr.CIT v/s Kohinoor Project (P) Ltd., [2020] 121 taxmann.com 177 (Bom.), rendered similar findings and dismissed the Revenue's appeal on a similar issue. Since, in the present case, the assessee has not earned any dividend income, therefore, respectfully following the aforesaid judicial pronouncements, disallowance of expenditure under section 14A read with Rule 8D is not sustainable.

41. We further find that, vide amendment by the Finance Act, 2022, the non–obstante clause and explanation were inserted in section 14A of the Act to the effect that the section shall apply even if no exempt income has accrued or arisen or has been received during the year. We find that while dealing with the issue of whether the aforesaid amendment by the Finance Act, 2022 is prospective or retrospective in operation, Hon'ble Delhi High Court in PCIT vs M/s Era infrastructure (India) Ltd, [2022] 288 Taxman 384 (Delhi) held that the amendment by Finance Act, 2022, in section 14A is prospective and will apply in relation to the assessment year 2022-23 and subsequent assessment years. Thus, even in view of the aforesaid amendment also, the disallowance under section 14A r/w rule 8D is not permissible in the present case. Accordingly, the same is directed to be deleted. As a result, grounds no.2.a to 2.d raised in assessee’s appeal are allowed.

42. In the result, the appeal by the assessee for A.Y. 2015–16 is allowed for statistical purposes.

Order pronounced in the open Court on 06/09/2023

Sd/–
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/–
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 06/09/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai