

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

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष  
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 304/JP/2023  
निर्धारण वर्ष / Assessment Years : 2016-17

Sh. Nawal Kishore Dangayach A-34-A, Ram Nagar, Shastri Nagar, Jaipur.	बनाम Vs.	ACIT, Circle-4, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABXPD 6074 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal (C.A.)  
राजस्व की ओर से / Revenue by: Smt. Monisha Choudhary ( Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 12/07/2023  
उदघोषणा की तारीख / Date of Pronouncement : 10 /10/2023

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This appeal filed by the assessee is directed against the order of ld. CIT(A)-  
Udaipur-2 dated 16-03-2023, for the assessment year 2016-17 raising therein  
following grounds of appeal.

“1. The Ld. CIT(A) has erred on facts and in law in confirming the disallowance of Rs. 78,311/- u/s 14A of IT Act, 1961 ignoring that no dividend income has been earned on the investment with reference to which disallowance u/s 14A was made by the AO.

2. The Ld. CIT(A) has erred on facts and in law in confirming the disallowance of Rs. 1,47,299/- u/s 37 of IT Act on account of interest on delayed payment of TDS.

2.1 Apropos Ground No. 1 of the assessee, it is noted from the assessment order wherein the AO observed that assessee has made substantial investment in shares of group companies which as on 31.03.2016 stood at Rs.77,25,464/- whereas as on 01.04.2015 it stood at Rs.79.36,714/-. Accordingly, assessee vide show cause notice dated 15-12-2018 was required the assessee to explain as to why disallowance u/s 14A should not be made. It is also noted that Assessee filed the explanation as reproduced at Pg 2-3 of the assessment order wherein it is stated that investment in shares has reduced during the year. The loan on which interest is paid has been utilized for the purpose of business. It is also noted that the assessee in his reply dated 19-12-2018 had submitted before the AO that owned capital is much more than investment made. Hence, no disallowance u/s 14A is warranted. However, the AO however held that possibility of incurring certain expenditure of administrative nature for earning dividend cannot be ruled out Therefore, applying Rule 8D(ii) he disallowed 1% of the average investment, i.e. Rs.78,311/u/s 14A of

the Act. The relevant narration as made by the AO in para 2.4 of the assessment order is as under:-

*“2.4 Thus, total disallowance u/s 14A is worked out to Rs.78,311/- and the same is treated as expenditure incurred in relation to tax free investment. Hence, the amount of Rs.78,311/- is hereby disallowed u/s 14A of the I.T. Act and added back to the total taxable income of the assessee.”*

2.2 In first appeal, the Ld. CIT(A) by referring to the Explanation inserted by Finance Act, 2022 to section 14A with effect from 01.04.2022 which provides that proviso shall apply whether or not exempt income has accrued, arisen or received and relying on the decision of ITAT Guwahati Bench reported at 140 Taxmann.com 164 held that it has retrospective application and thus confirmed the disallowance. The findings as made by the Id. CIT(A) at page 26 of his order is reproduced as under:-

“The appellant argued that own funds out of capital are applied for investment by the appellant and no nexus is found with regard to investments made. However, it is noted that the Assessing Officer noticed that the appellant has paid interest expenses on investments to earn exempt income, hence, the AO applied section 14A read with rule 8D and disallowed Rs. 78,311/-. The appellant has not established any nexus with the investment and availability of interest free funds. Therefore, the arguments of the appellant are not found to be acceptable.

The appellant has argued that to apply rule 8D satisfaction is to be recorded. It is noted that in para 2.2 and 2.3 the AO has noted his

satisfaction. Therefore, the argument of the appellant is not found to be acceptable.

In view of the above discussion, the disallowance made by the AO is found to be as per provisions of law and upheld accordingly.

This ground of appeal is treated as dismissed.”

2.3 During the course of hearing, the ld. AR of the assessee prayed before the Bench to delete the addition that the ld. CIT(A) has erred in confirming the disallowance of Rs.78,311/- u/s 14A of the Act for which following written submission is placed before the Bench to consider.

“1. There is no dispute as to the fact that assessee has not earned any exempt income by way of dividend on investment in shares during the year under the consideration. Once exempt income is not earned, no disallowance u/s 14A can be made. Reliance in this connection is placed on the following cases-

PCIT Vs. Oil Industry Development Board (2019) 262 Taxman 102 (SC)

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)

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 TTR 33 (Delhi) (HC)

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

## SHRI NAWAL KISHORE DANGAYACH VS ACIT, CIRCLE-4, JAIPUR

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. Era Infrastructure (India) Ltd (2022) 448 ITR 674 (Del.) (HC)

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. 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 tax free income, AO was not justified in making the disallowance by invoking s. 14A r/w rule 81.

2. The Ld. CIT(A) has relied on the explanation inserted by Finance Act, 2022 with effect from 01.04.2022 to hold that it has retrospective application. Hon'ble Delhi High Court in case of PCIT Vs. Oil Industry Development Board (2022) 115 CCH 245 has held that Explanation inserted with effect from 01.04.2022 has prospective application. Relevant extracts of the decision is 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 144 of the Act The relevant portion of the said judgment is reproduced herein below:

"8 Consequently, this Court is of the view that the amendment of Section 144, 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."

Thus, when Hon'ble Delhi High Court has held that Explanation inserted u/s 14A with effect from 01.04.2022 has prospective application, the decision of ITAT Guwahati Bench relied by CIT(A) would not prevail. Hence, the disallowance made u/s 14A of Rs.78,311/- be directed to be deleted.

2.4 On the other hand, the ld. DR supported the order of the lower authorities.

2.5 We have heard both the parties and perused the materials available on record. In this ground of appeal, it is noted that the AO disallowed a sum of Rs.78,311/- u/s 14A of the Act by treating it as expenditure incurred in relation to tax free investment and added the same to the total income of the assessee which has been confirmed by the ld. CIT(A) by holding that the assessee has not established any nexus with the investment and availability of interest free funds and the arguments raised by the assessee did not find tenable. However, we find from the submissions of the assessee that the assessee had not earned any exempt

income by way of dividend or investment in shares during the year under consideration. It is a true fact that once exempt income is not earned then no disallowance u/s 14A can be made in view of the decision of Hon'ble Bombay High Court in the case of PCIT vs Kohinoor Project Pvt. Ltd. (supra) wherein it is mentioned that Section 14A would not apply if no exempt income was received or was receivable during relevant previous year. It is also noteworthy to mention that Section 14A cannot be invoked when no exempt income was earned by the assessee in the relevant year. We also take reference of decision of Hon'ble Bombay High Court in the case of PCIT vs Worckhardt Hospitals Ltd (supra) wherein it is ordered that *Assessee had not earned any exempt income during the assessment year under consideration nor it had claimed any expenditure against any tax free income, AO was not justified in making the disallowance by invoking s. 14A r/w rule 81.* Hence, taking into consideration the above facts and circumstances of the case, we do not concur with the findings of the ld. CIT(A). Thus Ground No. 1 of the assessee is allowed.

3.1 Apropos Ground No. 2 of the assessee, it is noted from the assessment order that the AO on perusal of details of interest paid for the year ending as on 31-03-2016 observed that the assessee had paid an amount of Rs.1,47,299/- on account of

interest to income tax on TDS late payment and it is not allowable expenditure under the provisions of Section 37 of the Act being it violation of the law for which the AO issued show cause notice to the assessee on 15-12-2018 mentioning therein that the amount of Rs.1,47,299/- incurred on account of interest on TDS shall not be disallowed while calculating net profit and consequently added to total taxable income for the F.Y. 2015-16 and to this effect the assessee filed the reply but the AO disallowed the amount of Rs.147,299/- by holding as under:-

“3.2 On perusal of above reply filed by the assessee, this office does not find it tenable because interest on late deposit of TDS is an “Expenditure by way for violation of any law for the time being force” and under no circumstances such expenditure can be held as admissible as expenses incurred for the business expediency. This expenditure is surely due to violation of respective laws for the time being force. Therefore, interest on late deposit of TDS of Rs.1,47,299/- is hereby disallowed and added to the total taxable income of the assessee in the year under consideration.”

3.2 Being aggrieved, the assessee carried the matter before the Id. CIT(A) who has confirmed the action of the AO by observing as under:-

“8.3. I have considered the submission of Ld. A/R and carefully gone through the material available on record. The issue of allowability of interest on TDS was examined by the ITAT Kolkata in the case of [2023] 146 taxmann.com 389 (Kolkata Trib.) Premier Irrigation Adritec (P.) Ltd. v. ACIT and it was held as under-

"Section 37(1), read with section 201, of the Income-tax Act, 1961- Business expenditure - Allowability of (Interest on delayed

payment of TDS)-Assessment year 2014-15 Assessee had claimed a sum as expenses for interest paid on TDS Assessing Officer observed that such payment of interest on delayed deposit of TDS was not an allowable deduction and accordingly disallowed aforesaid expenditure claimed by assessee It was found that TDS by deeming fiction has been made tax liability of deductor to ensure that recipient of payment cannot fade away without paying due taxes on income part of such receipts - Once, deductee pays due taxes, deductor is absolved from said tax liability but not of interest liability on delayed payment - Allowing of such interest payment on delayed deposit of TDS as deduction would defeat very purpose of TDS provisions ensuring deduction of taxes from income of recipient and payment/deposit thereof with Central Government within due time- Whether therefore, interest payment on delayed deposit of Income-tax, whether TDS or otherwise, was not an allowable expenditure - Held, yes [Paras 24 and 25] [In favour of revenue]"

Similar observations were made by the Bangalore bench of ITAT. Hon'ble ITAT held in the case of [2022] 144 taxmann.com 2 (Bangalore - Trib.) Enzen Global Solutions (P.) Ltd. v. Income-tax Officer as under-

"III. Section 37(1) of the Income-tax Act, 1961- Business expenditure - Allowability of (Interest on delayed payment of TDS) Assessment year 2016-17 Assessee- company had debited certain amount towards interest paid on delayed payment of TDS in profit and loss account - It was noted that interest paid took colour from nature of principal amount required to be paid but not paid in time and this principal amount being income tax, interest was also in nature of direct tax and could not be regarded as compensatory payment - Whether, therefore, said amount of interest paid on delayed remittance of TDS by assessee was not allowable as deduction under section 37(1) - Held, yes [Para 26] [In favour of revenue]"

In view of the above discussion it is evident that the interest on TDS is not an allowable expenditure. Therefore, the disallowance made by the AO is upheld.

This ground of appeal is treated as dismissed."

3.3 During the course of hearing, the ld. AR of the assessee prayed that the disallowance confirmed by the ld. CIT(A) should be deleted for which the ld.AR of the assessee filed following written submission.

‘Facts and Submission:-

1. The assessee paid Rs.1,47,299/- on account of interest on late payment of TDS. The AO held that it is an expenditure by way of violation of any law for the time being in force and thus not an admissible expense incurred for business expediency. Accordingly, he disallowed the same.
2. The Ld. CIT(A) by relying on the decision of ITAT, Kolkata Bench in case of Premier Irrigation Adritec (P) Ltd. Vs. ACIT (2023) 146 taxmann.com 389 and ITAT, Bangalore Bench in case of Enzen Global Solutions Pvt. Ltd. (2022) 144 taxmann.com 2 confirmed the disallowance made by AO.
3. The relevant provisions of section 40(a)(ii) & 2(43) where the amount paid towards income tax is disallowed reads as under-

Income Tax (Sec. 40(a)(ii)] any sum paid on account of Income Tax ( Le. any rate or tax levied on the profits or gains of any business or profession) is not deductible Similarly, any interest, penalty, fine for non-payment or late payment of Income tax is not deductible This rule is applicable whether Income-Tax payable in India or outside India.

Explanation I For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.

Explanation 2 For the removal of doubts, it is hereby declared that for the poses of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A

Explanation 3 For the removal of doubts, it is hereby clarified that for the purposes of this sub-clause, the term "tax" shall include and shall be

deemed to have always included any surcharge or cess, by whatever name called on such tax

Section 2(43) in the Income Tax Act, 1961

"tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date:

4. From the plain reading of the above provisions it can be noted that there is no provision in Income Tax Act for disallowance of the interest paid on late deposit of TDS. Hon'ble Supreme Court in case of Bharat Commerce and Industries Ltd Vs. CIT (1988) 230 ITR 733 has held that payment of interest is inextricably connected with the assessee's tax liability. If income tax itself is not a permissible deduction u/s 37, interest payable for default committed in discharging the statutory obligation cannot be allowed as deduction. However, in respect of deduction of tax at source, the assessee act in the capacity of the agent of the government whereby it collects the tax at the prescribed rate from the payment made by him to the recipient of income & deposited in the government treasury. If there is a delay in depositing the amount deducted at source, the assessee is liable to pay interest for using the funds of the Government for business purpose. Therefore, the interest on late deposit of TDS is inextricably connected with using the fund of the Government & hence the same is allowable deduction u/s 37 as it is not disallowable under any provisions of the Act.

5. It is also submitted that tax deducted at source by the assessee is not a tax levied on the profits or gains of the assessee. As the TDS is not a tax on appellant's profits or gains, the interest payable on its late deposit cannot be held to be part of the tax levied on the profits and gains of the appellant's business. For this purpose reliance is placed on the decision of Hon'ble ITAT, Kolkata Bench in case of DCIT Vs. Narayani Ispat Pvt. Ltd. (2018) 61 ITR(Trib.) 371 where it is held that the amount of TDS represents the amount of income tax of the party on whose behalf the payment was deducted & paid to the Government Exchequer. Thus the TDS amount does not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee. Thus any delay in the payment of TDS by the assessee cannot be linked to the income tax of the assessee and consequently the principles laid down by the Hon'ble Apex Court in the case of Bharat Commerce Industries Ltd. Vs. CIT (1998) reported in 230 ITR 733 cannot be applied to the case on hand. Thus, the

interest expenses claimed by the assessee on account of delayed deposit of service tax as well as TDS liability are allowable expenses u/s 37(1) of the Act. Again Hon'ble ITAT, Mumbai Bench in case of Resolve Salvage & Fire India (P) Ltd. Vs. DCIT (2022) 195 ITD 266 has held that interest paid on delayed payment of TDS us 201(1A) would be compensatory in nature and thus, was to be allowed as deduction.

6. Hon'ble Rajasthan High Court in case of M/s Chambal Fertilizers And Chemicals Ltd. Vs. JCIT DBITA No.52/2018 order dt. 31.07.2018 has held that education cess is not part of as accordingly, the same is allowable as a deduction and disallowance as 40(xii) cannot be made. After this decision, section 40(a)(i) was amended by inserting Explanation 3 by FA, 2022 w.r.e.f. 01.04.2005 to clarify that term tax shall include surcharge or cess, by whatever name called, on such tax. However, there is no amendment in section 40(a)(i) to include interest paid on late deposit of TDS within the meaning of tax. Hence in the absence of any specific provision under the Act to disallow interest paid on late deposit of TDS, the same cannot be disallowed

7. The Ld. CIT(A) has relied on the decision of ITAT, Kolkata Bench and ITAT, Bangalore Bench. It is submitted that in both the decisions the effect of insertion of Explanation 3 to section 40(a)(ii) has not been considered. Further Hon'ble Supreme Court in case of Harshad Shantilal Mehta Vs. Custodian (1998) 231 ITR 0871/99 Taxman 216 while answering Q. No.5 at Para 33 held as under-

*Question No. 5. One other connected question remains: Whether "taxes" under s. 11(2)(a) would include interest or penalty as well? We are concerned in the present case with penalty and interest under the IT Act Tax penalty and interest are different concepts under the IT Act. The definition of "tax" under s. 2(43) does not include penalty or interest Similarly, under S. 156, it is provided that when any tax, interest penalty, fine or any of other sum is payable in consequence of any order passed under this Act, the AO shall serve upon the assessee a notice of demand as prescribed. The provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax. The learned Special Court judge, after examining various authorities in paras 51 to 70 of his judgment, has come to the conclusion that neither penalty nor interest can be considered as tax under s 11(2)(a) We agree with the reasoning and conclusion drawn by the Special Court in this connection.*

In this decision Hon'ble Supreme Court is concerned with section 11 of the Special Court (Trial of Offences Relating to Transactions in Securities)

Act, 1992 but it has specifically held that definition of tax u/s 2(43) of IT Act, 1961 does not include penalty or interest Though Hon'ble Supreme Court in case of Bharat Commerce and Industries Ltd Vs. CIT (1988) 230 ITR 733 has held that interest which is inextricably connected with the assessee's tax liability is not allowable expenditure u/s 37 of the Act but neither the Hon'ble Supreme Court nor section 40axi) provides for disallowance of interest paid on delayed deposit of TDS which is not the tax liability of the assessee but a mode of collection of tax at source on the income of recipient. Therefore, this decision of ITAL, Kolkata Bench and ITAT, Bangalore Bench cannot be said to laid down correct position of law particularly considering the insertion of Explanation 3 to section 40(a)(ii).

In view of above, disallowance confirmed by the Id. CIT(A) be directed to be deleted.”

3.4 On the other hand, the Id. DR supported the order of the Id. CIT(A) and also relied upon the decision of ITAT Kolkata Tribunal in the case of Premier Irrigation Adritec (P) Ltd. vs ACIT holding at para 24 and 25 as under:-

“24.....This proposition laid down by the Hon'ble Supreme Court can be well applied in case of delayed deposit of TDS by deeming fiction has been made the tax liability of the deductor to ensure that the recipient of the payment cannot fade away without paying the due taxes on the income part of such receipts. Once, the deductee pays the due taxes, the deductor is absolved from the said tax liability but not of interest from the interest liability on the delayed payment. Allowing of such interest on delayed deposit of TDS as deduction would defect the very purpose of TDS provisions ensuring the deduction of taxes from the income of the recipient and the payment / deposit thereof with the Central Govt. within the due time.

25. In view of the above discussion, we hold that the interest payment on delayed deposit of Income Tax, whether TDS or otherwise, is not an allowable expenditure.

There is no merit in the appeal of the assessee, the same is hereby dismissed.”

3.5 We have heard both the parties and perused the materials available on record. The issue in this ground relate to confirming the disallowance of Rs.1,47,299/- u/s 37 of the Act on account of interest on delay payment of TDS. In this case, the AO while perusing the case of the assessee observed that *“this office does not find it tenable because interest on late deposit of TDS is an ‘Expenditure by way for violation of any law for the time being force’ and under no circumstances, such expenditure can be held as admissible as expense incurred for the business expediency. This expenditure is surely due to violation of respective laws for the tie being force. Therefore, interest on late deposit of TDS of Rs.1,47,299/- is hereby disallowed and added to the total taxable income of the assessee in the year under consideration. We note that in first appeal, the ld. CIT(A) has observed that’.... It is evident that the interest on TDS is not an allowable expenditure. Therefore, the disallowance made by the AO is upheld. The Bench has considered the submissions of both the parties and also gone through the orders of the lower authorities but it is found that the issue raised by the assessee has no merit in view of the decision ITAT Kolkata Tribunal in the case of Premier Irrigation Adritec (P) Ltd. vs ACIT (supra).*

Hence, taking into consideration of the above facts and circumstances of the case, the Ground No. 2 of the assessee is dismissed.

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

Order pronounced in the open Court on 10 /10/2023.

Sd/-

(राठोड कमलेश जयन्तभाई )  
(RATHOD KAMLESH JAYANTBHAI)  
लेखा सदस्य / Accountant Member

Sd/-

(डॉ.एस.सीतालक्ष्मी)  
(Dr. S. Seethalakshmi)  
न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 10/10/2023

\* Mishra

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

अपीलार्थी / The Appellant- Sh. Nawal Kishore Dangayach, Jaipur

1. प्रत्यर्थी / The Respondent- ACIT, Circle-4, Jaipur.
2. 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. 304/JP/2023 }

आदेशानुसार / By order

सहायक पंजीकार / Asst. Registrar

