IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHE "C", NEW DELHI

Before Sh. M. Balaganesh, Accountant Member
&
Sh. Anubhav Sharma, Judicial Member

ITA No. 1051/Del/2023 : Asstt. Year: 2017-18
&
SA No. 386/Del/2023 : Asstt. Year: 2017-18

M/s Indus Towers Ltd., 4th Floor, DLF Cybercity, Building No. 10, Tower-A, DLF QE S.O., Gurugram, Haryana-122002	Vs	DCIT, Circle-4(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AADCB0274F		

Assessee by : Sh. Ajay Vohra, Sr. Adv.,
Sh. Rohit Jain, Adv. &
Sh. Deepesh Jain, Adv.
Revenue by : Mr. Waseem Arshad, CIT-DR

Date of Hearing: 02.11.2023		**Date of Pronouncement: 30.11.2023**

ORDER

Per M. Balaganesh, Accountant Member:

The present appeal and Stay Application has been filed by assessee against the order of National Faceless Appeal Centre (NFAC), Delhi dated 15.02.2023.

2. The assessee has raised the following grounds of appeal:

"1. That the Commissioner of Income Tax (Appeals) erred on facts and in law in upholding disallowance of Rs. 62,28,97,678 under section 14A of the Income Tax Act, 1961 ("the Act') read with Rule 8D of the Income Tax Rules, 1962 (the Rules') in addition to sum of Rs.14,20,000 suo-motu disallowed by the appellant company in the return of income.

1.1 That the CIT(A) assessing officer erred in upholding/ making disallowance under section 14A without appreciating that pre-conditions for making the disallowance prescribed under sub-sections (2)/(3) of section 14A of the Act were not satisfied.

1.2 That the CIT(A) assessing officer erred on facts and in law in referring to provisions of Rule 8D(2) of the Rules without appreciating that jurisdictional conditions for invoking the said rule are not satisfied.

1.3 That the CIT(A) erred on the facts and in law in confirming the disallowance without appreciating that no valid satisfaction qua incorrectness of suo-motu disallowance made by the appellant, or proximate nexus of any expenditure with earning of exempt income, was recorded by the assessing officer.

2. That the CIT(A) erred on facts and in law in enhancing the disallowance under section 14A of the Act by Rs.2,84,000 being 20% of employee(s) cost suo-motu disallowed by the appellant, alleging the same to be attributable to indirect expenses to be considered under Rule 8D(2)(1) of the Rules.

2.1 That the CIT(A) erred on facts and in law in making aforesaid enhancement without providing any opportunity to the assessee in gross violation of section 251(2) of the Act and principles of natural justice.

3. That the CIT(A) erred on facts and in law in not admitting/ allowing certain additional grounds/ claims/ deductions raised/ made by the appellant merely on the ground that the same were not made in the return of income but only during first appellate proceedings.

4. That the CIT(A) erred on facts and in law in not allowing additional claim/ deduction of Rs. 1,58,25,191 made by the appellant on account of write off of expenditure qua work in progress on abandoned tower sites, incurred during the course of regular business of the appellant.

4.1 That the CIT(A) erred on facts and in law in not appreciating that the aforesaid write off was duly allowable as business expenditure/ loss in terms of

sections 37(1)/28(i) of the Act during the year under consideration.

5. That the CIT(A) erred on the facts and in law not directing the assessing officer to restrict the levy of the dividend distribution tax (DDT) on the dividend distributed/ paid to non-resident shareholder(s) to lower rate(s) of tax on dividend given in respective Double Taxation Avoidance Agreements as against effective rate 20.35765 % charged under section 115-O of the Act.

6. The appellant craves leave to add, to alter, amend or vary the above grounds of appeal at or before the time of hearing."

3. We have heard the rival submissions and perused the material available on record. The assessee is a public limited company incorporated on 30.11.2006 engaged in providing Passive Infrastructure Support Services on a shared basis to telecommunication companies providing mobile services in India. For the Assessment Year 2017-18, the assessee filed its original return of income on 30.10.2017 declaring total income of Rs.2605,28,90,290. The assessee was earlier known as Bharti Infratel Ltd. A Joint Venture company namely Indus Towers Ltd. ('e-Indus' bearing PAN AABCI7776B) amalgamated with assessee (Bharti Infratel Limited) w.e.f. 19.11.2020 pursuant to scheme of amalgamation and arrangement approved by Hon'ble National Company Law Tribunal at Chandigarh vide its order dated 31.05.2019 read with order dated 22.10.2020.

4. During the year under consideration, the assessee earned following exempt incomes:

a. Dividend income aggregating to Rs.950,95,76,000 on its strategic investment in shares of Joint Venture company (e-Indus) claimed as exempt u/s 10(34) of the Act;

b. Interest income of Rs.14,52,00,002 on investment made in tax free bonds, which was claimed as exempt u/s 10(15) of the Act.

5. The assessee made *suo-motu* disallowance of expenses of Rs.14,20,000/- u/s 14A of the Act for the purpose of earning the aforesaid exempt income. The basis of the assessee arriving at the aforesaid disallowance was by considering total cost of the company of 2 employees in the treasury team looking after investment in Joint Venture company (e-Indus) under tax free bonds based upon estimated time spent by them for those activities. For the sake of convenience, the working for *suo-motu* disallowance made by the assessee u/s 14A of the Act are reproduced hereunder:

Details of expenditure incurred on employees in the finance department in relation to monitoring investments			
Name of the Employee	Designation	Annual CTC	Disallowed u/s 14A
Mr. Jitendra Kumar	Executive-Banking	461,000	368,800
Mr. Mamchand Verma	Manager-Banking	1,314,000	1,051,200
	Total	1,775,000	1,420,000

6. The ld. AO without recording any satisfaction as to why the *suo-motu* disallowance made by the assessee is incorrect having regard to the accounts of the assessee, directly proceeded to apply the computation mechanism provided in 3rd limb of Rule 8D(2) of the Income Tax Rules by considering 1% of average value of investments and disallowed a sum of Rs.62,28,97,678/- in the assessment.

7. The ld. CIT(A) upheld the action of the ld. AO by stating that the assessee had considered only the direct expenses by taking the cost of the company of 2 employees and had not considered any indirect expenses while making the *suo-motu* disallowance. The ld. CIT(A) accordingly attributed 20% of such expenses towards indirect expenses and made further enhancement of Rs.2,84,000/- (Rs.14,20,000 × 20%) and upheld the action of the ld. AO. In this regard, we find that the assessee vide ground no. 2.1 raised before us had stated that the ld. CIT(A) before resorting to enhance the income of the assessee had not issued mandatory enhancement notice in terms of Section 251(2) of the Act and hence enhancement of sum of Rs.2,84,000/- would have no legs to stand.

8. We have gone through the order of the ld. CIT(A) and nowhere there is even a whisper as to the issuance of any enhancement notice in terms of Section 251(2) of the Act by the ld. CIT(A). As per the Act, the ld. CIT(A) is having co-terminus powers and has got power of enhancement of income. But before resorting to do so, the ld. CIT(A) is duty bound to issue enhancement notice to the assessee in terms of Section 251(2) of the Act, give adequate opportunity of hearing to the assessee and then pass a reasoned order after duly considering the submissions thereon. Since, no enhancement notice was issued by the ld. CIT(A), the assessee did not have any occasion to address the purported query of the ld. CIT(A) and accordingly, we hold that the enhancement made by the ld. CIT(A) in the sum of Rs.2,84,000/- is liable to be deleted and is accordingly deleted.

9. With regard to upholding of the disallowance of expenses u/s 14A of the Act. r.w.r. 8D(2) of the Income Tax Rules, we find that there is absolutely no recording of objective satisfaction with cogent reasons by the ld. AO or by the ld. CIT(A) as to why the *suo-motu* disallowance made by the assessee is incorrect. When this fact was put to ld. DR., the ld. DR vehemently argued that there is no manner provided in the statute for recording satisfaction. The mere fact that ld. AO had resorted to the computation mechanism provided in Rule 8D(2) of the Rules itself indicates the satisfaction of the ld. AO that he has not agreed with the workings given by the assessee. The ld. DR also filed his written submission in this regard. The essence of such written submission is that in the opinion of the ld. DR, it is enough that the ld. AO's inherent satisfaction could be inferred and that the ld. AO should have only *prima facie* satisfaction that assessee's workings are incorrect. Once such satisfaction is arrived at, the only recourse available to the ld. AO is to apply computation mechanism provided in Rule 8D(2) of the Rules. We are unable to comprehend ourselves to accept the proposition of the ld. DR as apparently the same is in gross violation of provisions of Section 14A(2) of the Act r.w. Rule 8D(1) of the Income Tax Rules. For the sake of convenience, the same are hereby reproduced:-

Section 14A(2)

"14A. (1) ……..

(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may

be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act."

Rule 8D(1)

"8D. (1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with—

(a) the correctness of the claim of expenditure made by the assessee; or
(b) the claim made by the assessee that no expenditure has been incurred,

in relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2)."

10. Further, non-recording of objective satisfaction with cogent reasons having regard to the accounts of the assessee as mandated in the Act referred (supra) was also subject matter of deliberation before the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. Vs. CIT reported in 402 ITR 640 (SC) wherein the Hon'ble Apex Court categorically held that recording of such satisfaction is mandatory on the part of the ld. AO before resorting to the computation mechanism provided in Rule 8D(2) of the Rules. The same view has also been reiterated in the decision of Hon'ble Jurisdictional High Court in the case of H. T. Media Ltd. Vs. PCIT reported in 399 ITR 576 and Coforge Ltd. Vs. ACIT reported in 436 ITR 546.

11. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we hold that the disallowance made by the ld. AO u/s 14A of the Act in the sum of Rs.62,28,97,678/- is bad in law. We have already held that the enhancement made by the ld. CIT(A) in the sum of Rs.2,84,000/- is liable to be deleted. Accordingly, the disallowance u/s 14A of the Act would only be Rs.14,20,000/- which was the *suo motu* disallowance made by the assessee in the return of income. Accordingly, the ground nos. 1 to 2.1 raised by the assessee are allowed.

13. During the course of First Appellate proceedings, the assessee made certain additional claims by seeking deduction of Rs.1,58,25,191/- towards capital work-in-progress written off and refund of excess Dividend Distribution Tax paid on dividend to non-resident shareholders applying tax rates provided under respective DTAA for dividend. These issues were not even adjudicated by the ld. CIT(A) by applying the decision of Hon'ble Supreme Court in the case of Goetze India Ltd reported in 284 ITR 323 (SC). This action of the ld. CIT(A) is grossly illegal in view of the decision of Hon'ble Apex Court in the case of Goetze India Ltd itself wherein it was very clearly mentioned in the said decision that the decision was restricted to the power of the Assessing Authority to entertain a claim for deduction otherwise than by a revised return and the same did not impinge on the power of the Appellate Authority to permit a new claim. Hence, we hold that the ld. CIT(A) ought to have adjudicated these additional claims made by the assessee before him on merits. Since, the same was not done by him, we deem it appropriate to restore the grounds raised by the

assessee in ground nos. 3 to 5 to the file of the ld. CIT(A) for *de novo* adjudication therein in accordance with law. Accordingly, the ground nos. 3 to 5 raised by the assessee are allowed for statistical purpose.

14. Ground no. 6 raised by the assessee is general in nature and does not require any specific adjudication.

15. Since, the appeal is disposed off herein, the adjudication of Stay Petition of the assessee becomes infructuous.

16. In the result, the appeal of the assessee is allowed for statistical purposes and the Stay Petition of the assessee is hereby dismissed as infructuous.

Order Pronounced in the Open Court on 30/11/2023.

Sd/-	Sd/-
(Anubhav Sharma)	**(M. Balaganesh)**
Judicial Member	**Accountant Member**

Dated: 30/11/2023
Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR