IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. MADHUMITA ROY, JUDICIAL MEMBER

ITA No.774/Bang/2023
Assessment Year: 2017-18

M/s. Deccan Mining Syndicate Pvt. Ltd. S-7, 2nd Floor, Esteem Arcade Race Course Road Bengaluru 560 001 **PAN NO : AAACD7081R**	**Vs.**	DCIT Circle-2(1)(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Smt. Suman Lunkar, A.R.
Respondent by	:	Shri Nischal B., D.R.

Date of Hearing	:	07.12.2023
Date of Pronouncement	:	07.12.2023

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against order of NFAC for the assessment year 2017-18 dated 12.9.2023 passed u/s 250 of the Act. The assessee has raised following grounds of appeal:

1. *"The learned Commissioner of Income Tax (Appeals), NFAC, Delhi has erred in confirming the assessment order passed by the Assessing officer. The order passed by CIT(A), confirming the assessment order, being bad in law is required to be quashed.*
2. *In any case; the learned CIT(A) has erred in confirming the disallowance made by the Assessing officer to the extent of Rs. 1,74,02,0157- u/s 14A read with rule 8D(2)(iii) of the Act. On the facts and circumstances of the case and the law applicable, no disallowance u/s 14A read with rule 8D(2)(iii) is called for and the disallowance as made /confirmed being wholly erroneous is to be deleted.*

3.1 In any case, the learned CIT(A) has erred in holding the disallowance u/s 14A cannot be restricted to exempt income as the amendment made to section

14A with effect from 01/04/2022 is clarificatory and therefore retrospective in nature. On proper appreciation of facts and law applicable, the conclusion drawn by the CIT(A) being wholly erroneous is to be rejected.

3.2 In any case, the disallowance u/s 14A r.w.rule 8D(2)(iii) of the Act cannot exceed Exempt income and such proposition of law being covered by the decision of jurisdictional High Court is to be upheld and the disallowance as made/confirmed is to be deleted.

4. The appellant denies the liability to pay interest u/s 234A, 234B and 234C of the Act. The interest having been levied erroneously is to be deleted.

5. In view of the above and on other grounds to be adduced at the time of hearing, it is requested that the impugned orders confirmed be quashed or at least the disallowance u/s 14A of the Act as made and confirmed be deleted and in any case be restricted to the exempt income earned and interest levied be also deleted."

2. After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessee's own case in ITA Nos.786 & 787/Bang/2019 & CO Nos.46 & 47/Bang/2017 wherein the Tribunal vide order dated 26.7.2019 held on this as follows:

"5. We heard the parties on this issue and perused the record. Though the Ld D.R strongly supported the order of the assessing officer, yet we notice that the Ld CIT(A) has followed the decision rendered by the co-ordinate bench in the case of Tranquil Realty Private Limited (supra) and the decision rendered by Hon'ble Delhi High Court in the case of Joint Investments Ltd (supra) in order to hold that the disallowance cannot exceed the amount of exempted income. Accordingly, we do not find any infirmity in the order passed by Ld CIT(A) on this issue.

6. We shall now take up the appeal filed by the revenue for AY 2014-15. In this year, the assessee had disallowed a sum of Rs.6,29,283/- u/a 14A of the Act. The AO, however, computed the disallowance at Rs.204.08 lakhs u/r 8D(2)(iii) of I.T Rules and accordingly disallowed a sum of Rs.197.78 lakhs after giving set off of amount disallowed by the assessee.

7. Before Ld CIT(A), the assessee contended that, for the purpose of computing average value of investments under Rule 8D, only those investments which have yielded dividend income should be taken into

account. In support of this proposition, the assessee placed its reliance on the decision rendered by Special bench of Delhi ITAT in the case of Vireet Investments (P) Ltd (2017)(82 taxmann.com 415)(SB). The Ld CIT(A) accepted the contentions of the assessee and accordingly directed the AO to disallowance by considering only those investments which have yielded dividend income.

8. We heard the parties on this issue and perused the record. We notice that the Ld CIT(A) has followed the decision rendered by Special bench of ITAT, Delhi in deciding this issue. Accordingly, we do not find any reason to interfere with his decision rendered on this issue."

2.1 Being so, we hold that the disallowance u/s 14A read with Rule 8D of the I.T. Rules, 1962 cannot exceed the exempted income earned by the assessee in the assessment year under consideration to be limited to that extent. The lower authorities have made an observation that amendment to the section 14A of the Act, which was made w.e.f. 1.4.2022 is only clarificatory in nature and to be applied retrospectively in the assessment year 2017-18 also. In this regard, we are of the opinion that this issue also was considered by the Hon'ble Delhi High Court in the case of PCIT Vs. Era Infrastructure India Ltd. (141 Taxmann.com 289) (2022) wherein considered the amendment to section 14A of the Act by Finance Act, 2022 and observed as under:

"22. The Hon'ble Delhi Court in the above has also considered the amendment to section 14A and has held that the explanation inserted to section 14A vide Finance Act 2022 is prospective in nature. The relevant observations are reproduced here under –

"5. However a perusal of the Memorandum of the Finance Bill, 2022 reveals that it explicitly stipulates that the amendment made to section 14A will take effect from 1st April, 2022 and will apply in relation to the assessment year 2022-23 and subsequent assessment years. The relevant extract of Clauses 4, 5, 6 & 7 of the Memorandum of Finance Bill, 2022 are reproduced hereinbelow:

"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.*

6. *It is also proposed to amend sub-section (1) of the said section, so as to include a non-obstante clause in respect of other provisions of the Income-tax Act and provide that no deduction shall be allowed in relation to exempt income, notwithstanding anything to the contrary contained in this Act.*

7. *This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years."*

(emphasis supplied)

6. Furthermore, the Supreme Court in Sedco Forex International Drill. Inc. v. CIT [2005] 149 Taxman 352/279 ITR 310 has held that a retrospective provision in a tax act which is "for the 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. The relevant extract of the said judgment is reproduced hereinbelow:

'9. The High Court did not refer to the 1999 Explanation in upholding the inclusion of salary for the field break periods in the assessable income of the employees of the appellant. However, the respondents have urged the point before us.

10. *In our view the 1999 Explanation could not apply to assessment years for the simple reason that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in CIT v. S.G. Pgnatale [(1980) 124 ITR 391 (Guj.)] was followed in 1989 by a Division Bench of the Gauhati High Court in CIT v. Goslino Mario [(2000) 241 ITR 314 (Gau.)]. It found that the 1983 Explanation had been given effect from 1-4-1979 whereas the year in question in that case was 1976-77 and said: (ITR p. 318)*
"[I]t is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question has (sic) somehow remained pending on 1-41979, cannot be cogent reason to make the Explanation applicable to the cases of the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessees at hand. "

11. *The reasoning of the Gauhati High Court was expressly affirmed by this Court in CIT v. Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] . These decisions are thus authorities for the proposition that the 1983*

Explanation expressly introduced with effect from a particular date would not effect the earlier assessment years.

12. *In this state of the law, on 27-2-1999 the Finance Bill, 1999 substituted the Explanation to Section 9(1)(ii) (or what has been referred to by us as the 1999 Explanation). Section 5 of the Bill expressly stated that with effect from 1-4-2000, the substituted Explanation would read:*

"Explanation.-For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for— (a) service rendered in India; and
(b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment, shall be regarded as income earned in India." The Finance Act, 1999 which followed the Bill incorporated the substituted Explanation to Section 9(1)(ii) without any change.

13. *The Explanation as introduced in 1983 was construed by the Kerala High Court in CIT v. S.R. Patton [(1992) 193 ITR 49 (Ker.)] while following the Gujarat High Court's decision in S.G. Pgnatale [(1980) 124 ITR 391 (Guj.)] to hold that the Explanation was not declaratory but widened the scope of Section 9(1)(ii). It was further held that even if it were assumed to be clarificatory or that it removed whatever ambiguity there was in Section 9(1)(ii) of the Act, it did not operate in respect of periods which were prior to 1-4-1979. It was held that since the Explanation came into force from 1-4-1979, it could not be relied on for any purpose for an anterior period.*

14. *In the appeal preferred from the decision by the Revenue before this Court, the Revenue did not question this reading of the Explanation by the Kerala High Court, but restricted itself to a question of fact viz. whether the Tribunal had correctly found that the salary of the assessee was paid by a foreign company. This Court dismissed the appeal holding that it was a question of fact. (CIT v. SR Patton [(1998)*
8 SCC 608] .)

15. *Given this legislative history of Section 9(1)(ii), we can only assume that it was deliberately introduced with effect from 1-4-2000 and therefore intended to apply prospectively [See CIT v. Patel Bros. & Co. Ltd., (1995) 4 SCC 485, 494 (para 18) : (1995) 215 ITR 165]. It was also understood as such by CBDT which issued Circular No. 779 dated 14-9-1999 containing Explanatory Notes on the provisions of the Finance Act, 1999 insofar as it related to direct taxes. It said in paras 5.2 and 5.3.*

"5.2 The Act has expanded the existing Explanation which states that salary paid for services rendered in India shall be regarded as income earned in India, so as to specifically provide that any salary payable for the rest period or leave period which is both preceded and succeeded by service in India and

forms part of the service contract of employment will also be regarded as income earned in India. 5.3 This amendment will take effect from 1-4-2000, and will accordingly, apply in relation to Assessment Year 2000-2001 and subsequent years".

16. *The departmental understanding of the effect of the 1999 Amendment even if it were assumed not to bind the respondents under section 119 of the Act, nevertheless affords a reasonable construction of it, and there is no reason why we should not adopt it.*

17. *As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] 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 : 1980 SCC (Tax) 67].) 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 UP., (1981) 2 SCC 585, 598 : AIR 1981 SC 1274, 1282 para 24]. 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 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P.) Ltd., (1997) 5 SCC 482, 506]. 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)*

7. *The aforesaid proposition of law has been reiterated by the Supreme Court in M.M. Aqua Technologies Ltd. v. CIT [2021] 129 taxmann.com 145/282 Taxman 281/436 ITR 582. The relevant portion of the said judgment is reproduced hereinbelow:—*
"22. Second, a retrospective provision in a tax act which is "for the 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. This was stated in Sedco Forex International Drill Inc. v. CIT, (2005) 12 SCC 717 as follows :

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 UP., (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".

18. *There was and is no ambiguity in the main provision of section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in SG. Pgnatale [(1980) 124 ITR 391 (Guj.)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".*

19. *When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively." (emphasis supplied)*

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."*

2.2 This judgement of Hon'ble Delhi High Court has been followed by the coordinate bench in the case of Toyota Tsusho India Pvt. Ltd. in IT (TP)A No.175/Bang/2022 for the assessment year 2017-18 dated 9.9.2022. In view of the above, we find merit in the argument of assessee's counsel that the amendment to section 14A of the Act by Finance Act, 2022 is not applicable to the assessment year 2017-18 as that amendment is only prospective in nature.

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

Order pronounced in the open court on 7th Dec, 2023

Sd/-	**Sd/-**
(Madhumita Roy)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 7th Dec, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.