IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 1442/Ahd/2015
(**निर्धारण वर्ष /** Assessment Years : 2008-09)

Simens Healthcare Diagnostics Limited (Through Successor in Interest Siemens Limited) Birla Aurora, Level 21, Plot No. 1080, Dr. Annie Besant Road, Worli, Mumbai - 400030	**बनाम/** Vs.	**The Principal Commissioner of Income Tax** Vadodara-2
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACB8542M		
(Appellant)	..	**(Respondent)**

अपीलार्थी ओर से /**Appellant by :**	Shri Jet Kamar, A.R.
प्रत्यर्थी की ओर से/**Respondent by :**	Dr. Darsi Suman Ratnam, CIT.DR

Date of Hearing	14/03/2024
Date of Pronouncement	03/04/2024

O R D E R

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed by the assessee is directed against the order dated 25.03.2015 passed by the Principal Commissioner of Income Tax, Vadodara-2 ('PCIT'), under Section 263 of the Income Tax Act, 1961 (hereinafter referred as to 'the Act'), whereby and whereunder the assessment order dated 23.10.2012 passed by the ACIT, Circle-4, Baroda (in short 'AO') has been directed to

reassess by the Ld. AO afresh on the issue of escaping assessment of Rs.4,02,68,141/- under Section 40A(i) & Rs.13,23,376/- under Section 14A of the Act for Assessment Year 2008-09.

2. At the time of hearing of the instant appeal, the Ld. Counsel appearing for the appellant vehemently argued against the order passed by the Ld. PCIT on the ground of jurisdictional error to this effect that once the company, namely, Simens Healthcare Diagnostics Ltd. is merged with Simens Ltd. having PAN No. AAACS0764L w.e.f. 1st October, 2009, the order issued in the name of M/s. Simens Healthcare Diagnostics Ltd. is not sustainable in the eye of law since the said company is not in existence at all. On this count, he has relied upon certain judgments including the judgment passed by the ITAT Mumbai in the case of Westlife Development Ltd. vs. PCIT-5, Mumbai, reported in [2017] 88 taxmann.com 439 (Mumbai-Trib.), wherein the assessment framed in hands of non-existing company which had got amalgamated with other company at time of framing assessment held to be non-est in the eyes of law. In that particular case, the appellant in the 263 proceeding only challenged the order passed by the Ld. AO issued in the name of non-existing entities which got amalgamated during the assessment proceeding. The Ld. Tribunal in the appeal arising out of 263 proceeding itself quashed the original assessment order passed under Section 143(3) of the Act holding it null and void in the eyes of law as the same was based upon a non-existing entity. The Ld. representative of the Department before us submitted that this fact was duly

considered by the PCIT while considering the reply dated 19.03.2015 made by the appellant against the show cause notice dated 09.03.2015 by the PCIT as to why the order dated 23.10.2012 under Section 143(3) r.w.s. 92CA r.w.s. 144C of the Act passed by the ACIT, Circle-4, Vadodara should not be cancelled and the Ld. AO would not be directed to make afresh assessment on the ground as already indicated by us hereinabove. The same is reflecting at page 2 of the order impugned before us. It was further contended by the Ld. DR that merely because the PAN number is different though the same is mentioned in the cause title, the validity of the order cannot be questioned. In this regard, he relied upon the judgment passed by the Hon'ble Apex Court in the case of PCIT vs. Mahagun Realtors (P) Ltd., reported in [2022] 137 taxmann.com 91 (SC).

3. We have heard the rival submissions made by the respective parties. We have also perused the relevant orders available on record including the judgment passed by different Forums and as relied upon by both the parties. The judgment passed by ITAT Mumbai was relied upon by the Ld. Counsel appearing for the appellant mostly. However, before us, the issuance of order by the PCIT in the name of M/s. Simens Healthcare Diagnostics Ltd. has been challenged on the ground that the same is not in existence due to merger and/or amalgamation with Simens Ltd. w.e.f. 1st October, 2009. We note that the cause title speaks clearly as follows; "M/s. Simens Healthcare Diagnostics Ltd. (now merged with Simens Ltd.)". Therefore, this particular aspect of merger

and/or amalgamation is found to have been taking into consideration in its proper perspective by the PCIT while issuing orders. In fact, the cause title itself speaks about the change of name of the Company. It is the fact that amalgamation though destroys outer shell of the corporate entity, the Corporate venture continues enfolded within the new or the existing transferee entity. The business and the adventure lives on but within a new corporate residence, i.e., the transferee company. Therefore, at this juncture, it is essential to look beyond the mere concept of destruction of corporate entity which brings to an end or terminates any assessment proceedings. The scheme of amalgamation in which rights and liabilities of one company are transferred or devolved upon another company, the successor-in-interest becomes entitled to the liabilities and assets of the transferor company subject to the terms and conditions of contract of transfer or merger as it were. When two companies amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However, their respective rights and liabilities are determined under the scheme of amalgamation but the corporate identity of the transferor company ceases to exist w.e.f. the date of amalgamation is made effective. Though, such concept is absolutely correct but merely because the issuance of notice in the name of erstwhile company by the PCIT cannot be said to be without jurisdiction or nullity, particularly, when the said fact of amalgamation is mentioned in the cause title itself as in the case before us. We have considered the judgment passed by the Hon’ble Supreme Court on this aspect carefully and we find

that the Hon'ble Apex Court was pleased to explain the status of both the entities in the following manner as a result of amalgamation:

> *"18. Amalgamation, thus, is unlike the winding up of a corporate entity. In the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues – enfolded within the new or the existing transferee entity. In other words, the business and the adventure lives on but within a new corporate residence, i.e., the transferee company. It is, therefore, essential to look beyond the mere concept of destruction of corporate entity which brings to an end or terminates any assessment proceedings. There are analogies in civil law and procedure where upon amalgamation, the cause of action or the complaint does not per se cease – depending of course, upon the structure and objective of enactment. Broadly, the quest of legal systems and courts has been to locate if a successor or representative exists in relation to the particular cause or action, upon whom the assets might have devolved or upon whom the liability in the event it is adjudicated, would fall."*

4. Hon'ble Court was pleased to move steps further by observing as under:

> *"22. The effect of amalgamation in the context of income tax, was again considered in another earlier decision, i.e., Marshall Sons and Co. (India) Ltd. v. Income Tax Officer13 . There, the court held that:*
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>> *"14. Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide viz., January 1, 1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be date of amalgamation/date of transfer. But where the Court does not prescribed any specific date but merely sanctions the scheme presented to it - as has happened in this case - it should follow that the rate of amalgamation/date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the court may take some time; indeed, they are bound to take some time because several steps provided by Sections 391 to 394 and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamation units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the present scheme, Clause 6(b) does expressly provide that with effect from the transfer date, the Transferor Company (Subsidiary Company) shall be deemed to have carried on the business for and on behalf of the*

> *Transferee Company (Holding Company) with all attendant consequences. It is equally relevant to notice that the Courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer/amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income Tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the Transferor Company (Subsidiary Company) should be deemed to have been carried on for and on behalf of the Transferee Company. This is the necessary and the logical consequence of the court sanctioning the scheme of amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of the certified copies of the orders of the court before the Registrar of Companies, the allotment of shares etc. may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. The Bank of Upper India Ltd. A.I.R. 1919 P.C. 9, relied on.*
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> *15. Counsel for the Revenue contended that if the aforesaid view is adopted then several complications will ensue in case the Court refuses to sanction the scheme of amalgamation. We do not see any basis for this apprehension. Firstly, an assessment can always be made and is supposed to be made on the Transferee Company taking into account the income of both the Transferor and Transferee Company. Secondly, and probably the more advisable course from the point of view of the Revenue would be to make one assessment on the Transferee Company taking into account the income of both, of Transferor or Transferee Companies and also to make separate protective assessments on both the Transferor and Transferee Companies separately. There may be a certain practical difficulty in adopting this course inasmuch as separate balance-sheets may not be available for the Transferor and Transferee Companies. But that may not be an insuperable problem inasmuch as assessment can always be made, on the available material, even without a balance-sheet. In certain cases, best-judgment assessment may also be resorted to. Be that as it may, we need not pursue this line of enquiry because it does not arise for consideration in these cases directly."*
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> *(emphasis supplied)*

23. Many High Courts in recent years, had mostly relied upon Saraswati Syndicate which was a case where the transferor entity had claimed a certain relief on the basis of the agreed method of accounting. The corresponding obligation to recognise the demands was sought to be disallowed in the subsequent year, in the case of the then transferee company. The decision of the Delhi High Court, in Spice (supra), after discussing the decision in Saraswati Syndicate, went on to explain why assessing an amalgamating company, without framing the order in the name of the transferee company is fatal:

> *"10. Section 481 of the Companies Act provides for dissolution of the company. The Company Judge in the High Court can order dissolution of a company on the grounds stated therein. The effect of the dissolution is that the company no more survives. The dissolution puts an end to the existence of the company. It is held in M.H. Smith (Plant Hire) Ltd. v. D.L. Mainwaring (T/A Inshore), 1986 BCLC 342 (CA) that "once a company is dissolved it becomes a non-existent party and therefore no action can be brought in its name. Thus an insurance company which*

> *was subrogated to the rights of another insured company was held not to be entitled to maintain an action in the name of the company after the latter had been dissolved".*
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> *11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit w.e.f. 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said 'dead person'. When notice under Section 143(2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of the appellant on record. Instead, the Assessing Officer made the assessment in the name of M/s Spice which was non existing entity on that day. In such proceedings and assessment order passed in the name of M/s Spice would clearly be void. Such a defect cannot be treated as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law.*
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> *12. Once it is found that assessment is framed in the name of nonexisting entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B of the Act."*

5. The fact before us is completely different from the judgment relied upon by the Hon'ble Apex Court in the case of Saraswati Industrial Syndicate vs. CIT, reported in [1990] 53 Taxman 92 (SC). The order itself was issued on the non-existing entity therein but in the case in hand before us the order has been issued clarifying the entire status of the appellant and the factor of amalgamation as it reflects from the cause title itself. We, thus, do not find any lacuna in the order issued by the Ld. PCIT on the issue of maintainability. Therefore, taking into consideration the entire aspect of the matter, we decline to accept the contention made by the Ld. AR. This argument on maintainability of the order impugned is found to be devoid of any merit and, thus, dismissed.

6. Coming to the merit of the matter, we find that the Ld. PCIT issued the show cause to the appellant with the following contents:

"Whereas the assessment records for A.Y. 2008-09 of the above named assessee were called for and examined by the undersigned in exercise of the powers u/s 263 of the Act 1961, and after such examination the assessment order passed u/s 143(3) r.w.s. 92CA r.w.s.144C of the Act on 23.10.2012 by the Assessing Officer in the above mentioned case for A.Y. 2008-09 has been found to be erroneous in so far as it is prejudicial to the interest of the revenue in view of discussion hereinunder wherein, it is proposed to take action u/s 263 of the Income-tax Act, 1951 to cancel the said order.

2. The brief facts are that the assessee filed its original return of Income for A.Y. 2008-09 on declaring total income of 8,74,99,792/-. The case was selected for scrutiny through CASS. The assessment u/s 143(3) r.w.s. 92CA r.w.s.144C was finalized on 23.10.2012 determining the total income at 11,96,93,093/-. However it is observed that the assessee had claimed wrongful expenditure.

i. On going through the records, it was noticed that the assessee paid SAP Implementation charges of Rs. 3,95,45,894/- and Accounting & Reporting Support charges of Rs. 7,22,247/-, totaling to Rs. 4,02,68,141/- to non residents without deducting TDS thereon. Failure to deduct TDS, attracts the provisions of Sec. 40a(i) of I.T. Act under which, any sum payable to a non-resident on which tax is deductible at source under Chapter XVIIB and where tax has not been deducted, the amount on which such tax was not deducted, was required to be disallowed. Accordingly, Rs.4,02,68,141/- has escaped assessment.

ii. It is also observed that the assessee earned exempt income i.e. dividend of Rs. 93,70,986/- and profit on sale of investment of Rs. 34,70,580/- u/s. 10(38), which did not form part of the total Income. As per provisions of Sec, 14A of the IT Act r.w.s. Rule 8D, the expenditure incurred on a/c of earning exempt income is not allowable. The disallowable expenditure as computed in accordance with Rule BD works out to Rs. 13,23,376/-. However, it is observed that the said claim made wrongfully by the assessee. Accordingly, the income to that extent as it get computed has escaped assessment.

3. In the above circumstances, the assessment order passed by the Assessing Officer is considered to be erroneous in so far as prejudicial to the interest of revenue. You are hereby given an opportunity of being heard personally or through an authorized representative on 17.03.2015 at 11.00 A.M. in my office at the above address and to show cause why the assessment order dated 23.10.2012 passed u/s 143(3) by the ACIT, Circle-4, Baroda not be cancelled and a fresh assessment be done after due investigation as said herein above. You may also submit your written submission in the above matter for the consideration on or before the above date. Please note that failure on your part to respond to this notice shall entail appropriate order as per the material available on records."

7. The appellant on 19th March, 2015 while explaining the issue in regard to invocation of provision of Section 40A(i) of the Act for non-deducting TDS of payment made to non-resident submitted the following:

> *"2.00 In respect of payments made to M/s. Siemens AG, Germany towards SAP Implementation charges of Rs. 3,95,45,894/-, we wish to submit that we have deducted tax at source from such payments at applicable rate and paid the same to the credit of the Government For your Honour's reference please find enclosed herewith details of Gross amount, tax deducted therefrom and net amount paid and also copy of TDS paid challans as Annexure-1.*
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> *2.01 Further, in respect of payments made to M/s. Siemens Medical Solutions Diagnostics PTE Ltd., Singapore towards Accounting & Reporting Support charges of Rs. 7,22,247/-, we wish to submit that we have not deducted TDS from such payments. Accordingly, while computing business income we have disallowed the same and offered the same for taxation We request your Honour to kindly refer Appendix VI (Clause-17f)) forming part of Form No. 3CD, Item (A) showing amount disallowable u/s 40(a) amounting to Rs. 13,59,327/ which includes Rs. 7,22,247/- paid towards Accounting & Reporting Support charges.*
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> *2.02 In view of above, we submit that no disallowance should be made u/s 40a(i) of the Act in respect of payments made to non-residents."*

8. So far as the issue raised by the Ld. PCIT escaping assessment of Rs.13,23,376/- under Section 14A r.w. Rule 8D is concerned, the appellant contended as follows:

> *"3.00 In respect of proposed disallowance u/s 14A of the Act r.w.r. 8D of the Income-tax Rules, first of all we wish to submit that we have not claimed profit on sale of investment of Rs. 34,70,580/- as exempt u/s 10(38) of the Act as observed by your Honour. In fact, total gain of Rs 3,470,580/- was first reduced while computing Business Income and then Rs. 24,92,289/- was offered as Short Term Capital Gain under normal tax and Rs. 9,78,291/ was offered as Long Term Capital Gain chargeable to tax u/s 112 of the Act. Please find enclosed herewith Computation of Total Income and Tax for your Honour's ready reference as Annexure-2. We further submit that this fact was also submitted to AO. vide point no. 7 of our submission dated 25th November, 2011.*

3.01 We further submit that during the year under review, we earned exempt dividend income of Rs. 93,70,086/- in respect of investments in units of mutual funds except investment in units of Tata Mutual Fund (Details of fund wise dividend received is enclosed herewith as Annexure-3) We further submit that there was no new investments during the year, On the contrary, we had redeemed investments of Rs 17,05,78,303/- and out of which reinvested Rs. 12,17,56,290/- during the year which is evident from Schedule 5 forming part of balance sheet as at 31 March, 2008.

3.02 So far as applicability of Section 14A of the Act r.w.r. BD of the Income- tax Rules in respect of exempt dividend income, we submit as under:

We were engaged, inter-alia, in the business of Manufacturing and Trading of diagnostics reagent strips and kits and selling and servicing of diagnostics instruments.

We are in business since long and during these years we have huge internal accruals and our's is a cash reach company having free reserves of Rs. 45.94 crores as at 31.03.2008 and having no debt. Even after meeting day to day expenses and meeting with Working Capital requirements, the Company is having huge surplus funds. These funds were parked in various investments, which generated tax- free income and no expenditure was incurred to earn this income since no efforts were made to earn profit out of this investment. They were only excess funds which were not required immediately for business needs. The main activity and motive of the Company is manufacturing and trading and the exempt income is outcome of surplus funds only. No special effort was made to earn this income.

3.03 Section 14A speaks about the disallowance in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income. In the instant case no expenditure is incurred in relation to income which is exempt.

For the purpose, it will not be out of place if we examine the history of the Section

This section has been inserted by the Finance Act 2001 with retrospective effect from 1st April, 962.

Pursuant to Judgments in case of CIT vs Maharashtra Sugar Millis Ltd. (82 ITR 452), Rajasthan State Warehousing Corporation vs. CIT (242 ITR 450) and CIT vs Indian Bank Ltd. (AIR 1905 SC 1473), the legislature inserted Section 14A by the Finance Act, 2001.

Here, main fact of the case was the expenditure namely interest was paid for borrowing funds and the same was invested for earning tax

free income. However, it could be the activity of Company, but in such a scenario, interest paid to borrow funds and invested in earning exempt income was also allowed as expenditure, In order to mitigate this situation, the legislature introduced Section 14A in Finance Act 2001.

The intention of the legislature was that no deduction for expenditure incurred in respect of exempt income against taxable income.

If we reiterate, the intention of the legislature is that no deduction is allowable against the income from taxable business, in respect of any expenditure incurred by the assessee in relation to income, which does not form part of the total income.

In the above context it is very much clear that the legislature wants to tax expenditure incurred in relation to income which is exempt from tax. In the case of your assessee, no such expenditure has been incurred for earning exempt income,

3.04 As can be seen that Section 14A was inserted with a view to clarify the intention of making disallowance in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income Under this section, Sub-Section (2) provides the procedure for determining the amount of expenditure incurred by the assessee in relation to such income which does not form part of the total income if the AO is not satisfied with the correctness of the claim of assesses in respect of such expenditure. Sub-Section (3) further provides that the previsions of Sub-Section (2) shall apply in relation to a case where an assesses claims that the expenditure has been incurred by the assessee and AO is not satisfied with the contention of the assessee.

Further, the procedure for determining the amount of expenditure incurred in relation to exempt income is to be worked out in accordance with Rule BD On going through the above, it is clearly noticed that the purpose of those two Sub-Sections is to determine the amount of expenditure incurred in relation to exempt income These only lay down the procedure and mechanism for working out the expenditure in relation to income which is exempt from tax Rue BD has been enshrined to the Income-tax Rules, 1962 which prescribes the method by which the A.O. has to determine the disallowance of expenditure as relatable to exempt income in terms of Sub-Sections (2) and (3) providing the mechanism to do what is provided in Sub- Section (1), can be construed as substantive and hence prospective expenditure incurred 'in relation to' exempt income.

Hence, it will not be out of place if we refer the judgment of Hon'ble Apex Court in case of H.H.M. Madhav Rao Scindia Vs. Union of India and another (1971)/SCC 85 for contending that the

expression in relation to' as used in Sec. 14A should be considered to mean having a dominant and immediate connection with the subject and any indirect connection was ruled out. In the light of the judgment it was stated that Section 14A contemplated the making of disallowance of only such expenditure, the dominant object of whose spending was to earn exempt income. If the dominant and immediate object of the expenditure is not to earn exempt income, the same would go out of purview of Section 14A Further the onus is on the A.O. to establish the nexus of such expenditure with the exempt income. If the nexus between the direct expenditure and the exempt income cannot be conclusively proved, then the provisions of Section 14A will not apply. Your Honour's notice is silent on this very aspect of Section 14 of the Act

3.05 Section 14A of the Act talks of the relation between the expenditure and the exempt income:-

The contention is that we have to view the items of expenditure first. If these have resulted in exempt income, only then disallowance is to be considered.

In other words, starting point for applying Section 14A is to consider the amount of expenditure and then moving forward for examining if it has resulted in the exempt income or not. Unless there is a direct and proximate connection between the exempt income and expenditure, Section 14A will not apply.

It is very much clear from the foregoing discussion that unless there is a direct and proximate connection between the expenditure and the exempt income, there cannot be any disallowance of the expenditure under this section. This view point is based on the expression in relation to used in section as having only direct and proximate connection between the expenditure and exempt income.

Be that as it may, we would also deal with the contention that there should be a dominant and immediate connection between the expenditure incurred and the exempt income so as to make disallowance U/s 14A.

A great deal of emphasis has been laid on establishing of dominant and immediate connection between the expenditure incurred and the exempt income Dominant and immediate connection refers to first degree of relation between the two things However, it would cease to be dominant if the degree of relationship slips from first to second.

3.06 We further submit that section 14A is a "disallowance" provision and not an "addition" provision. This means before invoking it. the Impugned expenditure must be claimed as deduction in the first place. This is based on simple proposition that what has not been

claimed as deduction cannot be disallowed. A similar view was taken in following cases:

- *CIT v. Hero Cycles Ltd [2010] 323 ITR 518 (P&H) (HC) Where it is found that for earning exempted income no expenditure has been incurred, disallowance u/s 14A cannot stand*

- *Modern Info Technology P. Ltd. v. ITO (Del.) (Trib)*

- *Relaxo Footwears Ltd. v. ACIT [2012] 50 SOT 102 (Del) (Trib.)*

3.07 We further submit that in the following decisions, it was held that there should be a proximate relationship between the expenditure and exempt income:

- *Justice Sam P. Bharucha v. Addtl. CIT [2012] 53 SOT 192 (Mum.) (Trib.);*

- *DCIT v Allied Investments Housing P Ltd. (Chennai) (Trib.)*

3.08 We further submit that during the course of assessment proceedings. vide point no. 11 of our submission dated 15th November, 2011, it was submitted that "there is no disallowance u/s 14A of the Act as there is no expenditure incurred to earn Income which does not forms part of total income." After considering our submission and discussions had during the course of assessment proceedings and after applying his mind and satisfying himself the A.O. had not made any disallowance on this account which your Honour should appreciate and consider."

9. The Ld. PCIT upon considering the above two aspects of the matter observed as follows:

"5.2 With regard to the -payments of SAP implementation charges and Accounting & Reporting Support charges to non residents without deducting TDS, the assessee submitted that it had deducted TDS in respect of SAP implementation charges at applicable rate only and that no TDS was made from Accounting & Reporting Support charges, hence was disallowed and offered for taxation (Refer Appendix VI [(Clause-17f)] forming part of Form No. 3CD, Item (A) showing amount disallowable u/s 40(a) amounting to Rs. 13,59,327/- which includes Rs.7,22,247/- paid towards Accounting & Reporting Support charges), However it is observed that during the course of assessment proceeding no such details was furnished and neither the AO has examined the aforesaid Issue. It is also not ascertainable from the records as to whether the amount of Rs. 13,59,327/- disallowed by the assesses u/s 40(a) includes the aforesaid Accounting & Reporting Support charges of Rs. 7,22,247/-. Thus the order of the AO is erroneous on this issue as non.

5.3 With regard to the expenditure attributable to the exempt dividend income of Rs. 93,70,986/-, claim of the assessee that no new investments was made during the year, no expenditure incurred & that the assessee .company is a cash rich company is not acceptable, Section 14A has been brought into the statute to disallow the expenditure attributable to the exempt income so as to workout correct taxable income by excluding the expenditure that was not attributable to such income. The decision as to whether to invest or not and whether to retain the investments or to liquidate the same are very strategic decisions which management is called upon to take and which is only possible by the direct involvement of top management and hence part of administrative and managerial expenses should be held attributable to the earning of tax free income from such investment. The term expenditure occurring in section 14A would take in its sweep not only direct expenditure but also all forms of expenditure regardless of whether they are fixed, variable, direct indirect, administrative, managerial or financial "since overall infrastructure of the assessee, the management, the office, the fund and other facilities were used for earning the tax free income, However it is observed that the AO has not examined the aforesaid issue in view of the above Fact and also since the assessee had incurred expenditure on account of interest, The expenditure attributable to the exempt income must be Worked out in accordance with Rule 8D which would Include direct as well as indirect expenditure attributable to the exempt income.

5.4 Reliance in this regard is priced on the following judicial pronouncement wherein order u/s 263 was upheld by the Hon'ble Courts

(a) (2012) 139 ITD 154 (Chenn) dated 28/08/2012 had clearly held that claiming by assessee and allowance thereof by AO when there is no mention as to how a particular was applied and computation w.r.t that were correctly made or not, is a case of non application of mind by AO In the order that renders it erroneous in so far as prejudice to interest of revenue.

(b) (2013] 29 taxman.com 70 (Hyd,) dated 19/10/82012 is another decision that is in furtherance of the Issue at hand that lack of investigation by AO on the issues that have been brought up in this order that indicate the order as erroneous and prejudicial to interest of revenue has to be upheld as correct.

(c) (2013) 30 taxman, com 57 (Hyd,). Non-consideration of various issues such as date of acquisition of bonus shares, expenditure incurred on earning exempt income etc., made assessment order erroneous and, thus, Commissioner was justified in setting aside same in exercise of his power under section 263

(d) (2012) 24 Taxman.com 215 (Gau) / 341 ITR 434 (Gau.). The Hon'ble High Court has held that not holding such enquiries as is normal and not applying mind to relevant material would certainly an assessment erroneous to warranting exercise u/s 263 of the Act

(e) (2013) 212 Taxman 190 (Uttarakhand). There, was failure on the part of AO to ascertain whether the revenue would come under a particular head of income or section and thus the order had considered rightly the invocation of power u/s 263 of the IT Act.

(f) (201 1)46 SOT 487 (AHD)
(2006) 152 Taxman 125 (All)

> *There is duty cast upon the AO to enquire / assess revenue disclosed and in failing that duty i.e. to compute correct income and setoff and carry forward without any application of mind is an order that is erroneous and prejudicial to interest of revenue, and that is the case right in here.*
>
> *6. Given the facts of the case as said herein above and circumstances and having called for and examined the record of proceedings u/s 143(3) of the Assessment Year 2008-09 (i.e. the order sought to be revised), having regard to the fact narrated and having considered the above said, the undersigned set aside the assessment order dated 23/10/2012 to that extent as it is erroneous in. so far as prejudicial to the interest of revenue and direct the Assessing Officer to reframe the assessment afresh on the above said issues as it may require having regard to the observation made in the foregoing paras and after giving due opportunity of being heard to the assesses."*

10. It was specifically pointed out by the Ld. PCIT that no details whatsoever was furnished in regard to the issue relating to non-payment of TDS before the Ld. AO, neither the Ld. AO has examined/verified the said issue. The Ld. Counsel appearing for the appellant before us also failed to show any document which could establish that this particular issue was examined by the Ld. AO during assessment period or that the appellant furnished the documents before the said authority below. Similarly, the issue relating to exempt income under Section 14A r.w. Rule 8D has not found to have been examined by the Ld. AO; the expenditure attributable to the exempt income must be worked out in accordance with the Rule 8D which would include direct as well as indirect expenditure attributable to the exempt income. In fact, such duty to examine the issues though cast upon the Ld. AO, that has not been performed by the said Revenue Officer and, therefore, the order passed by the PCIT setting aside the order dated 23.10.2012 passed by the Ld. AO upon considering it erroneous insofar as prejudicial to the interest of the Revenue and further directing the Ld. AO to reframe the assessment afresh is

found to be just and proper without any ambiguity so as to warrant interference. Thus, the appeal filed by the appellant is found to be devoid of any merit and, hence, dismissed.

11. In the result, appeal preferred by the assessee is dismissed.

This Order pronounced on 03/04/2024

Sd/-	Sd/-
(WASEEM AHMED)	(MADHUMITA ROY)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 03/04/2024

S. K. SINHA *True Copy*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad