

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAJ KUMAR CHAUHAN (JUDICIAL MEMBER)**

**ITA No. 9/MUM/2024
Assessment Year: 2016-17**

DCIT-2(3)(1),
552, Aayakar Bhavan,
M.K. Road, Churchgate,
Mumbai-400020.

Appellant

Vs. Navin Fluorine International Ltd.,
Office No. 602, Natraj by
Rustomjee, Sir Mathuradas
Vansanji Road, Andheri East,
Mumbai-400069.
PAN NO. AABCP 0464 B
Respondent

Assessee by : Ms. Arati Vissanji,
Mr. Aamod Prabhudesai
Revenue by : Mr. Ashok Kumar Ambastha, Sr. DR

Date of Hearing : 30/05/2024
Date of pronouncement : 04/06/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 19.09.2023 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)'] for assessment year 2016-17, raising following ground:



1. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that assessee failed to establish that the interest cost and other expenses have no co-relation with the tax free investment?"*
2. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) failed to appreciate that preference shares would be capable of earning dividend income electing from year 31.03.2014 which will yield tax free income hence preference shares arc also to be included in working out average value of investment for the purpose of computing disallowance u/s.14A?"*
3. *"Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) was right in presuming investments are made out of own funds for the purpose of calculations of disallowance u/s. 14A r.w.Rule 8d(2)(fi) when the issue of mixed funds is pending before the Larger Bench of the Supreme Court in the case of S.A. Builders and Tulip Star Hotel Ltd. and more so when no nexus is established by the assessee to prove that own funds were utilised to made the investment?"*
4. *"Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) was justified in holding that disallowance u/s. 14A is to be restricted to the exempt income, whereas in Finance Act 2022. explanation to Section 14A has been inserted which provides for applicability of the said section even in the absence of exempt income, which being clarificatory in nature has retrospective effect."*
5. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition u/s. 8D(2)(iii) where the AO suo-moto had considered only Dividend yielding investments for computing the disallowance of Rs. 37,09,000/-, In view of the above fact that the assessee earned exempt income of Rs. 1,99,12,077/- the disallowance by AO should have been confirmed by the Ld. CIT(A)."*
6. *"The Ld. CIT(A) has erred in deleting the addition made on account of ESOP deduction without appreciating the fact that the company has chosen to issue share under ESOP in less than the market value, hence, even if it is treated as expenditure, then it is capital in nature"*
7. *"The Ld. CIT(A) erred in allowing deduction u/s. 35(2AB) of scientific research expenditure on Form 3CL wherein fact the actual expenses incurred on scientific research byassessee is less than Form 3CL."*

2. Briefly stated facts of the case are that during the year under consideration, the assessee company was engaged in the business of manufacturing and trading of chemicals mainly, Refrigerant Gases, Hydro Fluorine Acid and Fluoro Chemicals. For the year



under consideration, the assessee filed return of income on 28.11.2016 declaring total income of Rs.81,07,65,030/-. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the assessment completed u/s 143(3) of the Act on 21.12.2018, the Assessing Officer made various additions and assessed total income at Rs.82,13,36,180/-. The book profit for the purpose of section 115JB of the Act was computed at Rs.1,15,99,97,311/-. Since, the tax payable as per normal provisions of the Act was being more than the tax computed u/s 115JB of the Act, the tax liability of the assessee was finally computed under the normal provisions of the Act.

3. On further appeal, the Ld. CIT(A) allowed part relief to the assessee. Aggrieved, the Revenue is in appeal before the Tribunal by way of raising grounds as reproduced above.

4. We have heard rival submission of the parties and perused the relevant material on record.

4.1 The ground Nos. 1 to 5 of the appeal are related to disallowance u/s 14A r.w.r. 8D of the Income-tax Rules, 1962 (in short 'the Rules'). Facts in brief qua the issue in dispute are that during the year under consideration, the assessee company earned total dividend income of Rs.5,07,43,917/-, out of which



Rs.1,99,12,077/- was claimed as exempt dividend income. But no *suo-motu* disallowance was made by the assessee. The Assessing Officer issued show cause to the assessee as why the disallowance u/s 14A of the Act should not be made in accordance with provisions of Rule 8D. After considering the submission of the assessee, the Assessing Officer made disallowance under Rule 8D(2)(ii) at Rs.25,17,000/- and disallowance under Rule 8D(2)(iii) at Rs.37,09,000/-, thus, the total disallowance u/s 14A was made at Rs.62,84,000/-. The Assessing Officer made corresponding increase in the book profit also for said disallowance u/s 14A of the Act.

4.2 On further appeal, regarding the disallowance of Rs.25,17,000/- under Rule 8D(2)(ii), the assessee submitted that assessee's own fund exceeded the value of investment in shares, and hence following the decision Hon'ble Supreme Court in the case of South India Bank Ltd. v. CIT [2021] 130 tamann.com 178, there is assumption that investment are made from the own funds if the own funds exceed the value of the investment and hence no disallowance could be made in respect of expenditure u/s 14A of the Act. The assessee also submitted that in its own case the Co-ordinate Bench of the Tribunal has decided the matter in favour of the assessee for assessment years 2007-08 to 2011-12.

4.3 Similarly, regarding the disallowance of Rs.37,09,000/- under Rule 8D(2)(iii), the assessee submitted that for quantifying



investment only those investments should be considered on which dividend (exempt) income is earned during the year. Accordingly, the assessee submitted that disallowance should be restricted to Rs.20,44,000/- instead of Rs.37,09,000/-. The assessee submitted that the Co-ordinate Bench of the Tribunal for assessment years 2009-10 to 2012-13 has decided the matter in favour of the assessee. After considering the submission of the assessee, the Ld. CIT(A) deleted the additions observing as under:

“Ground No 1:- Pertains to addition of Rs.25,17,000/- and Rs.37,09,000/- made by Ld. A.O. u/s 14A read with rules 8D(2)(ii)&(iii) of the Act.

From the submission of the appellant, it is construed that the matter has already been decided in his favour on similar facts for assessment years 2010-11 and 2011-12 by Hon'ble ITAT. The orders of the higher judicial authority are being herewith followed.

The appellant has sought relief in computing book profit u/s 115JB wherein disallowance u/s 14A quantified by invoking rule 8D(2)(iii) was not considered by Ld. AO. The appellant has relied on the decision of Special Bench the Delhi ITAT in the matter of ACIT vs. Vireet Investment Pvt. Ltd. (2017) 82 taxmann.com 415. The Ld. AO is directed to allow adding back of only such amount as debited the P&L account which is directly related to earning of exempt income keeping in view the above judicial precedent.

The additions made by the. Ld. AO are directed to be deleted. Ground no.1 is allowed.”

4.4 We have heard rival submission of the parties and perused the relevant material on record. As far as ground No. 1 of the appeal is concerned, it is general in nature. As far as the ground No. 2 of the appeal is concerned, the Ld. counsel for the assessee submitted that the assessee has made no investment in the preference shares



and therefore, the issue of considering dividend income in the preference share for the purpose of working out the average investment u/s 14A of the Act does not arise. The Ld. DR could not controvert the factual submission of the assessee that no preference shares have been invested by the assessee. In view of the above, the ground No.2c raised by the Revenue is dismissed as infructuous.

4.5 As far as the ground No. 3 raised on the issue in dispute is concerned, the Ld. CIT(A) has followed binding precedent on the issue in dispute and mere pendency of the appeal filed by the Revenue before larger bench, the issue cannot be decided in favour of the Revenue. Accordingly, said ground of appeal of the Revenue is dismissed.

In ground No. 4 of the appeal, the Revenue has submitted that amendment made to section 14A of the Act for disallowance not to be restricted to the extent of the exempt income, is retrospective in nature. Whereas, we find that Hon'ble Delhi High Court in the case of Pr. CIT (Central) v. Era Infrastructure (India) Ltd. 448 ITR 674 held that amendment to section 14A of the Act by Finance Act, 2022 by way of insertion of Explanation providing for applicability of the provisions of even in absence of the exempted income, is prospective in nature. Accordingly, said ground of the Revenue is dismissed.



4.6 In ground No. 5, the Revenue has raised the issue that Assessing Officer himself has only considered the dividend yielding assets for computing disallowance of Rs.37,09,000/- under Rule 8D(2)(iii) of Rules. Before the Ld. CIT(A), the assessee submitted that while computing disallowance under rule 8D(2)(iii) , only dividend yielding assets should be taken. The assessee computed disallowance accordingly and requested for restricting the disallowance to the extent of Rs.20,44,000/- under Rule 8D(2)(iii) of the Act. We are of opinion that in principle both parties are at same page and thus dispute only is of verification of computation, Accordingly, this matter need verification at the end of the AO.

4.7 We find that the Ld. CIT(A) has followed the finding of the Co-ordinate Bench of the Tribunal in the case of the assessee for earlier years, the grounds of the appeal of the Revenue are adjudicated subject to the disallowance under Rule 8D(2)(iii) of the Rules, is restored back to the file of the Assessing Officer for verification of the quantification of the average value of the investment from which exempted dividend income was earned during the year under consideration and with the direction to examine the claim of the assessee of restricting the disallowance to Rs.24,44,000/-. The ground No. 5 of the appeal of the Revenue is accordingly allowed partly for statistical purposes.



4.8 The ground No. 6 of the appeal of the Revenue relates to ESOP deduction. According to the Revenue, the expenditure is in the nature of capital expenditure. We find that this claim has been raised before the Ld. CIT(A) for the first time and the Ld. CIT(A) has not provided any opportunity of being heard to the Assessing Officer. The Ld. CIT(A) decided the claim of deduction of the assessee observing as under:

“Ground No.4:- The appellant has contended that deduction u/s 37(1) of the Act may be allowed in respect of ESOP expenses of Rs. 1,93,63,067/-.

The above ground was not allowed by the Ld. AO since no such claim was filed in the revised return of income as per the decision of Hon'ble Supreme court in the matter of Goetz (India) Ltd. Vs. CIT (2006) 284 ITR 323 (SC). The appellant has taken this additional ground in his appeal citing the decision of Jurisdictional High Court in CIT vs. Pruthvi Brokers & Shareholders Pvt. Ltd. (2012) 349 ITR 336 (Bom). In view of the Judicial precedent cited by the appellant, legal nature of the ground and to meet end of justice, the additional ground is hereby admitted.”

4.9 We have heard rival submission of the parties and perused the relevant material on record. Since, the Ld. CIT(A) has allowed the claim of the assessee merely following the legal precedents, without providing opportunity of being heard to the Assessing Officer and without verification of the claim of the assessee. Therefore, in the interest of substantial justice, we restore this issue back to the file of the Assessing Officer for deciding in accordance with law after factual verification of the claim of the assessee. The ground No. 6 of the appeal of the Revenue is accordingly allowed for statistical purposes.



4.10 As far as ground No. 7 of the appeal of the Revenue related to deduction u/s 35(2AB) of the Act of scientific research expenditure is concerned, the Ld. CIT(A) admitted this additional ground and allowed the relief observing as under:

“Ground No.3:- The appellant has contended that deduction u/s 35(2AB) should be at gross expenditure and not at net expenditure thereby seeking an additional deduction of Rs.82,86,246/-.

The above ground was not allowed by the Ld. AO since no such claim was filed in the revised return of income as per the decision of Hon'ble Supreme court in the matter of Goetz (India) Ltd. Vs. CIT (2006) 284 ITR 323 (SC). The appellant has taken this additional ground in his appeal citing the decision of Jurisdictional High Court in CIT vs. Pruthvi Brokers & Shareholders Pvt. Ltd. (2012) 349 ITR 336 (Bom). In view of the Judicial precedent cited by the appellant, legal nature of the ground and to meet end of justice, the additional ground is hereby admitted.

The appellant had claimed gross revenue expenditure of Rs. 1060.50 lakhs before the DSIR. However, it was granted net revenue expenditure at Rs. 1019.07 lakhs as the amount eligible for weighted deduction u/s 35(2AB) of the Act. The appellant has contended that the expression "any expenditure" on scientific research on in house Kal as approved by the prescribed authority should only relate to the expenditure which has been incurred and not the net expenditure after reducing income earned. The appellant has cited the case of CIT vs. Micro Lab Ltd. (2016) 383 ITR 490 (Kar) to support his contentions.

Since, the legal issue on similar facts has been decided by higher judicial authorities, the ground of appeal no.3 is allowed.”

4.11 In the case, the Assessing Officer has originally restricted the claim of deduction u/s 35(2AB) of the Act to the extent of Rs.495.36 lakhs i.e. the amount which was approved by the Department of Scientific and Industrial Research (DSIR) in Form No. 3CL, as against claim of Rs.506.82 lakhs made by the assessee and accordingly, the Assessing Officer made disallowance of Rs.11,45,000/-. However, before the Ld. CIT(A) the assessee made



claim for allowing deduction on the gross expenditure of Rs.1060.50 lakhs instead of net expenditure of Rs. 1019.07 lakhs. The Ld. CIT(A) allowed the claim following the judicial decision in the case of CIT v. Microlabs Ltd. [2017] 383 ITR 490. We find that in the said decision the Hon'ble Karnataka High Court has restored the matter to the lower authorities for verification. The relevant finding of the Hon'ble Court is reproduced as under:

"18. As we have already seen, these receipts are credited to profit and loss accounts are part of normal sales. They are, therefore, not to be reduced from the expenditure incurred by the assessee on carrying out scientific research on which deduction under section 35(2AB) has to be allowed. We are, therefore, of the view that there is no merit in ground No. 2 raised by the Revenue and that the order passed by the Commissioner of Income-tax (Appeals) dated April 9, 2014 under section 154 of the Act cannot be sustained and the same is hereby reversed. Thus, I.T.A. No. 764/B/14 by the assessee is allowed, while ground No. 2 raised by the Revenue is dismissed."

Therefore it is settled proposition as per the precedence of this Tribunal that the income earned by the assessee from the R&D centre cannot be reduced from the expenditure for the purpose of allowing the deduction under Section 35(2AB) because the said income is part of the total income of the assessee. Accordingly, in principle, we decide this issue in favour of the assessee that the income earned by the assessee from the R&D centre is not required to be reduced from the expenditure for the purpose of deduction under Section 35(2AB) of the Act.

However, the nature of the receipt as claimed by the assessee being income from the R&D centre has not been verified by the authorities below and therefore to that extent this aspect requires a proper verification and examination. Accordingly, we set aside this issue to the file of Assessing Officer for limited purpose of verification of the said amount received by the assessee and claimed as income of the R&D centre and then allow the claim of the assessee in view of the above observations and findings."

4.12 Accordingly, following the finding of the Hon'ble Court(supra), the matter in the instant case is also restored to the file of the Assessing Officer for proper verification of the contract income and



expenditure incurred and thereafter, allow the deduction in accordance with law. The ground No. 7 of the appeal is accordingly allowed for statistical purposes.

5. In the result, the appeal of the Revenue is allowed partly for statistical purposes.

Order pronounced in the open Court on 04/06/2024.

**Sd/-
(RAJ KUMAR CHAUHAN)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;
Dated: 04/06/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai