

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “G”, MUMBAI
BEFORE MS. PADMAVATHY S., ACCOUNTANT MEMBER
AND
SHRI. RAJ KUMAR CHAUHAN, JUDICIAL MEMBER**

ITA NO. 3895/MUM/2023 (A.Y: 2017-18)

AND

ITA NO. 3896/MUM/2023 (A.Y: 2018-19)

DCIT 3(3)1
Room No. 522, Aaykar Bhavan, M.
K. Road, Churchgate, Mumbai –
400 020.

PAN: AAXCS6219B

(Appellant)

Vs. SP Port Maintenance Private
Limited
41/44, Shapoorji Pallonji
Centre Mumbai, Colaba S.O,
Mumbai – 400 005.

(Respondent)

Assessee Represented by	:	Shri. Dharan V. Gandhi
Department Represented by	:	Shri. G. Santosh Kumar
Date of conclusion of Hearing	:	13.06.2024
Date of Pronouncement	:	25.06.2024

ORDER

PER RAJ KUMAR CHAUHAN (J.M.):

1. The appeal pertaining to A.Y. 2017-18 is taken as lead case.
2. These two appeals are filed by the department against the order dated 27.09.2023 of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as the



“CIT(A)”], passed under section 250 of the Income Tax Act, 1961 [hereinafter referred to as “the Act”] for the A.Y. 2017-18 and A.Y. 2018-19, respectively.

3. The department/revenue has raised following grounds in its appeal: -

a. *“Whether on the facts and under the circumstances of the case, and in law, the Ld. CIT(A) was justified in holding that the disallowance u/s. 14A of the Act will not apply as the assessee has not earned exempt income during the year under consideration ignoring the fact that the assessee had investments which has potential to earn exempt income.*

b. *Whether on the facts and under the circumstances of the case, and in law, the Ld. CIT(A) was justified in deleting the disallowance on account of expenditure u/s. 14A of the Act read with rule 8D of the IT Rules, 1962, covered under clause (f) of explanation 1 to section 115JB(2) of Income Tax Act, 1961?cts culled out form the proceedings before the lower authority regarding the filing of returns. The return of income was selected for Limited scrutiny and accordingly a notice u/s. 143(2) of the Act was issued to the assessee company on 10.08.2018 and the same has been duly served on the assessee. Subsequently, notices u/s.142(1) of “the Act” have been issued to the assessee through ITBA e-assessment portal from time to time, calling for certain details/ information.”*

4. Both the appeals are taken together as they belong to the same party on identical facts and the grounds of appeal are also same.

5. The appellant is a private limited company and engaged in port related activities and provided management consultancy, has e-filed return of income for A.Y. 2017-18 on 31.10.2018 and declaring returned income of



Rs. (-) 1,27,79,381/- under the normal provisions of the Act and Book profit u/s. 115JB (MAT) of Rs. (-) 82,98,088/- and for A.Y. 2018-19 the appellant has e-filed its return of income declaring loss of Rs. 3,02,33,301/- for the year under consideration on 31.10.2018.

6. The assessee has shown Non-Current Investments in Equity Shares of Rs. 65,00,01,000/- and current investments in Mutual Funds of Rs. 546,91,52,000/- aggregating to Rs. 611,91,53,000/- as on 31.03.2017 in its accounts. This being the first year of operation therefore there is only closing balances of the investments. Accordingly, the assessee was asked to explain why disallowance u/s. 14A should not be computed by applying Rule 8D since the assessee company was maintaining composite accounts for its investment and business activity.
7. The assessee company submitted its reply vide letter dated 21.11.2019 inter alia stating that *“Disallowance u/s. 14A is applicable to any assessee when exempt income is earned with the objective that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act. That the company had not earned any exempt income during the year under consideration and hence, disallowance u/s. 14A is not applicable*



to the assessee. No dividend income or long-term capital on sale or redemption is earned either on the investment or on unquoted equity shares or subsidiary non unquoted growth mutual funds that the investments were made by the company from its own funds raised by issuing of Optional Convertible Debentures (considered entirely equity in nature) and subscribed by holding company. The company had earned short term capital gains on redemption of mutual funds and the same are correctly accounted and offered for tax. Further, the assessee has not debited any expenditure pertaining to the interest expenses or similar expenses incurred in order to earn any income from such investments.”

8. The Ld. AO while relying on CBDT circular no. 5/2014 dated 11.02.2014 has disallowed a sum of Rs. 2,77,00,000/- u/s. 14A r.w.r. 8D on the ground that the above circular makes it clear that the disallowance of expenditure for earning exempt income u/s 14A r.w.r. 8D would be attracted even if the corresponding exempt income has not been earned during the financial year. It is further observed that the Hon'ble Supreme Court of India in case of *M/s. Maxopp Investment Ltd.* 91 *Taxman* 154 was pleased to hold that if expenditure incurred on earning dividend income, which is attributable to dividend income, has to be disallowed



and cannot be treated as business expenditure in respect of the issues of strategic investment and stock in trade. Therefore, the strategic investments are not exempted from the definition of investment for applicability of Section 14A r.w.r. 8D of the Income Tax Rules, 1962. The following portion of the Ld. AO's order is relevant for appreciation of facts, is reproduced as under:

- 4.6. Further, clause (f) of Explanation 1 to section 115JB of the Act provides that the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause (38) thereof) or section or section 12 apply has to be added to the net profit for the purpose of computation of Book Profit u/s.115JB of the Act. Having regard to the above provisions of the Act, the amount of Rs.2,77,00,000/- is hereby added back to the book profit u/s.115JB of the Act. Reliance in this regard is placed on the decision of the Mumbai ITAT F Bench decision in the case of Dy. CIT Cen. Cir. 18 & 19, Mumbai Vs. Viraj Profiles Ltd., [2015] 64 taxmann.com 52 (Mumbai - Trib.)/[2016] 156 ITD 72 (Mumbai - Trib.), wherein the Tribunal had held that in terms of clause (f) to Explanation 1 to section 115JB(2), disallowance made by Assessing Officer under section 14A, read with rule 8D of Income-tax Rules 1962, has to be added back for purpose of arriving at figure of book profit.
5. Subject to the above discussion, the total income of the assessee company is computed as under:

		Rs.
I	Business Income (as per return)	(1,77,07,379)
Add:	Disallowance u/s.14A	2,77,00,000
		99,92,621
II	Capital Gains STCG	49,27,998
	Total Income	1,49,20,619



	<i>Rounded off</i>	1,49,20,620
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<u>MAT Calculation U/s.115JB of the Act</u>	Rs
<i>Book Profit (As per Return)</i>	<i>(82,98,088)</i>
<i>Add: Disallowance u/s.14A</i>	<i>2,77,00,000</i>
Total	1,94,01,912
	Tax @18.5% 35,89,354

Since tax liability on the income computed under normal provisions of the Act is more than MAT liability, provisions of section 115JB of the Act are not applicable in the case of the assessee.

6. *Assessed u/s. 143(3) of the Income tax Act, 1961. Credit the prepaid taxes is allowed, after due verification. Interest u/s. 234A, 234B, 234C and 234C is charged as per law, as applicable in assessee's case. MAT credit available if any, is allowed. Tax Computation Sheet in ITNS-150A is enclosed herewith, which forms part of this order. Demand Notice and Challan is issued accordingly."*
9. Being dissatisfied with the order of the Ld. AO the assessee filed an appeal u/s. 250 of "the Act", wherein the Ld. CIT(A) has set aside the order of the Ld. AO holding that the disallowance made by Ld. AO is not sustainable. The following observations contained in para 4.6 onward of impugned order is relevant and reproduced as under: -

"4.6. The appellant had also filed an Application for Rectification u/s 154 filed with the Learned Assessing Officer requesting to



consider the Submissions and not to make Ad-hoc Disallowance whereby creating and unjust demand of Tax on the Assessee.

- 4.7. *All the grounds of appeal are related to the addition made by the Assessing Officer (AO) u/s 14A of the Income Tax Act, 1961 for an amount of Rs.2,77,00,000/-. The assessee did not disallow any expenditure related to the exempt income u/s 14A of the Act. Therefore, the AO invoked the provisions of section 14A and made the disallowance of Rs. 2,77,00,000/- under Rule 8D of Income Tax Rules.*
- 4.8 *I have perused the material placed on record. In the impugned assessment years, the assessee submitted that No Dividend Income or Long-Term Capital gains on sale or Redemption is earned either on the Investment in Unquoted Equity Shares of Subsidiary nor Unquoted Growth Mutual Funds has been earned by the appellant, the income which is exempt u/s 14A of the Act. The above facts were not disputed by the AO. The AO made the addition placing reliance on the Circular No.5/2014 of the CBDT dated 11.02.2014. Hon'ble High Court of Delhi in the case of Pr. Commissioner of Income Tax Vs. IL &FS Energy Development Company Ltd. reported in 250 Taxman 0174 considered the Board Circular and held that the Circular cannot override the express provisions of section 14A r.w. Rule 8D of I.T. Rules. After considering various decisions, Hon'ble High Court of Delhi held that no disallowance u/s 14A of the Act was called for in case of no exempt income earned by the assessee, in the relevant assessment years.*
- 4.9 *In the Explanatory Memorandum to the Finance Act 2001, by which Section 14A was inserted with effect from 1st April 1962, it was clarified that "expenses incurred can be allowed only to the extent they are relatable to the earned income of taxable income" The object behind Section 14A was to provide that "no deduct/on shall be made in respect of any expenditure incurred by the Assessee in relation to income which does not form part of the total income under the Income Tax Act". What is taxable under Section 5 of the Act is the "total income" which is neither notional nor speculative. It has to be 'real income.*



4.10 Further, in the case of *PCIT Vs Delhi International Airport Pvt. Ltd. (Delhi High Court)* Appeal Number : ITA 380/2022 Date of Judgement/Order : 06/10/2022 Related Assessment Year : 2010-11. The Hon'ble (Delhi High Court) observed, present case is covered by the Division Bench judgment in *Cheminvest Ltd. vs. CIT, [2015] 61 com 118 (Delhi)*, wherein this Court has 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. In view of the above and on the basis of submissions made by appellant during the course of appellate proceedings, in the instant case disallowance does not seem applicable.

4.11 During the assessment proceedings monthly average was not provided to AO by assessee but the nature of investment has been explained by assessee, which does not show any exempt income. As there is no exempt income earned in the present Assessment Year. Disallowance made u/s 14A is not sustainable.

5. Hence ground of appeal taken by the appellant is *ALLOWED.*"

10. We have heard the Ld. AR for assessee and the Ld. DR for revenue, the Ld. DR on behalf of the revenue has argued that the order of the Ld. AO is perfectly correct and legally sustainable and the findings recorded by the Ld. CIT(A) needs to be set aside as the Ld. CIT(A) has not considered the settled law correctly. The Ld. AR on behalf of the appellant has argued that the order the Ld. AO was perverse and against the settled principle of law by various Hon'ble High Courts as no exempt income was earned or



received for the relevant Previous year. Therefore, the provisions of section 14A r.w.r. 8D was not attracted for both the relevant years of these appeals. The Ld. AR has referred and relied upon the following cases in support of his arguments.

- **Case No. 1: Principal Commissioner of Income Tax Vs. Era Infrastructure India Ltd. [2022] 141 taxmann.com 288 (Delhi), Order dated 20.07.2022**, wherein the Hon'ble High Court was pleased to hold that the amendment of Section 14A by inserting an explanation would take effect from 01.04.2022 and will accordingly applied in relation to the A.Y. 2022-23 and subsequent years. The Hon'ble High Court while referring and relying upon the Hon'ble Supreme Court in Sedco Forex International Drill Inc. Vs. CIT [2005] 149 Taxmann 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 changed the law as it earlier stood. The Hon'ble High Court concluded in para 8 as under:

“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.”

- **Case No. 2: - [2020] 121 taxmann.com 177 (Bombay), Principal Commissioner of Income Tax – 6, Hon’ble High Court of Bombay Order dated 27.01.2020: -**

“8. *Section 14A of the Act deals with expenditure purpose of relation to income not includible in total income As per sub-section (1) of section 14A, for the purpose of computing the total income, no deduction shall be As per din respect of expenditure incurred by the assessee in relation to income which does not form part of alle total income. In Cheminvest Ltd. (supra) Delhi High Court examined the expression "does not form of the total income" as appearing in sub-section (1) of section 14A of the Act. Delhi High Court held that the of the expression envisages 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 10 the said income. It was clarified that section 14A will not apply if no exempt income is received of receivable during the relevant previous year.”*

- **Case No. 3: - Income Tax Appeal No. 337 of 2013, Commissioner of Income Tax – 8 Vs. M/s. Bengal Finance Investment Pvt. Ltd. Hon’ble High Court of Bombay order dated 10.02.2015, the Hon'ble High Court was pleased to hold as under: -**



“This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 3rd July, 2012 passed by the Income Tax Appellate Tribunal (the Tribunal) for the Assessment Year 2007-08.

2. *The Revenue press the following questions of law for our consideration:*

“(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in restoring the issue of disallowance u/s. 14A to the file of the Assessing to decide afresh in view of the decision of the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. [328 ITR 81] without appreciating the fact that the issue of disallowance u/s. 14A read with Rule 8D, has not reached its finality as the Department has agitated the matter before the Hon'ble Supreme Court, which is pending for final decision.?”

(b) Whether on the facts and in the circumstances of the case, and in law, the ITAT is justified in deleting the addition of Rs.78,84,387/- under clause (f) of Explanation 1 to Section 115JB relying upon the decision in the case of Goetze (India) Ltd. v/s. CIT (2009) 32 SOT 101 (Del.), which has been followed by ITAT, Mumbai in the cases referred to in para 5 of the impugned order without appreciating that the above decision in the case of Goetze (India) Ltd. was rendered by the ITAT, Delhi Bench on completely distinguishable set of facts, peculiar to the said case?”

3. *So far as Question (a) is concerned, we find that the Tribunal*



*has merely followed the decision of this Court in **Godrej & Boyce Manufacturing Co. Ltd. v/s. DCIT 328 ITR 81**, directing the Assessing Officer to work out the disallowance on a reasonable basis and not under Rule 8D under the Income Tax Rules for the Assessment Year 2007-08. The Tribunal has merely followed the decision of the jurisdictional High Court and no fault can be found with the same. Accordingly, no substantial question of law arises in Question (a). Hence dismissed.*

4. *So far as Question (b) is concerned, the impugned order of the Tribunal followed its decision in **M/s. Essar Teleholdings Ltd. v/s. DCIT in ITA No. 3850/Mum/2010** to held that an amount disallowed under Section 14-A of the Act cannot be added to arrive at book profit for purposes of Section 115JB of the Act. The Revenue's Appeal against the order of the Tribunal in *M/s. Essar Teleholdings (supra)* was dismissed by this Court in *Income Tax Appeal No.438 of 2012* rendered on 7th August, 2014. In view of the above, question (b) does not raise any substantial question of law.*

5. *Accordingly, **appeal dismissed.** No order as to costs."*

11. We have considered the rival submissions, case referred and relied by the Ld. AR. As it is evident from the grounds of appeal that the revenue was aggrieved because the Ld. CIT(A) in the impugned order has held that the disallowance u/s. 14A of the Act will not apply as the assessee has not earned exempt income during the relevant previous year under consideration, despite that the assessee had made investments which are potential to earn exempt income. The further grievances as per ground no. 2 in the appeal is that the Ld. CIT(A) was not justified in deleting the



disallowances on account of expenditure u/s. 14A of “the Act” r.w.r 8D of the IT Rules, 1962 because the case was covered under clause (f) of explanation 1 to Section 115JB (2) of “the Act”.

12.The following facts has merged from the discussions and the material on record: -

- “1. *During the year under consideration, The Appellant had not earned any Exempt Income and hence, the basis of Disallowance does not arise in absence of any exempt income earned.*
2. *The assessee has invested in Unquoted Equity Shares of Subsidiary and Unquoted Growth Mutual Funds. No Dividend Income or Long-Term Capital gains on sale or Redemption is earned either on the Investment in Unquoted Equity Shares of Subsidiary nor Unquoted Growth Mutual Funds.*
3. *The above Investments were made as per claim of assessee from their own funds raised by Issuing of Optional Convertible Debentures (Considered entirely Equity in Nature) and Subscribed by Holding Company.*
4. *The Appellant has not debited any Interest Expenses or any similar expenses incurred to earn any Income from investments made by The Appellant.”*

13.It is evident from the Assessment Order that the Ld. AO has highly relied upon the CBDT circular no. 5/2014 dated 11.02.2014 for disallowance of expenditure for earning exempt income u/s. 14A read with Rule 8D. the Ld. CIT(A) has dealt with the said circular in para no. 4.8 as under: -



“4.8. ...The AO made the addition placing reliance on the Circular No.5/2014 of the CBDT dated 11.02.2014. Hon'ble High Court of Delhi in the case of Pr. Commissioner of Income Tax Vs. IL &FS Energy Development Company Ltd. reported in 250 Taxman 0174 considered the Board Circular and held that the Circular cannot override the express provisions of section 14A r.w Rule 8D of I.T. Rules. After considering various decisions, Hon'ble High Court of Delhi held that no disallowance u/s 14A of the Act was called for in case of no exempt income earned by the assessee, in the relevant assessment years.”

14. Further in para 4.10 and 4.11 in the order, of the Ld. CIT(A) has observed as under:

“4.10 Further, in the case of PCIT Vs Delhi International Airport Pvt. Ltd. (Delhi High Court) Appeal Number: ITA 380/2022 Date of Judgement/Order: 06/10/2022 Related Assessment Year: 2010-11. The Hon'ble (Delhi High Court) observed, present case is covered by the Division Bench judgment in Cheminvest Ltd. vs. CIT, [2015] 61 com 118 (Delhi), wherein this Court has 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. In view of the above and on the basis of submissions made by appellant during the course of appellate proceedings, in the instant case disallowance does not seem applicable.

4.11 During the assessment proceedings monthly average was not provided to AO by assessee but the nature of investment has been explained by assessee, which does not show any exempt income. As there is no exempt income earned in the present Assessment Year. Disallowance made u/s 14A is not sustainable.”



15. We have noticed that the above findings of the Ld. CIT(A) is apt and accurate and legally sustainable as being duly supported by settled principles of law by the Hon'ble High Court and Hon'ble Supreme Court and we find no illegality and perversity in the same. Regarding the reliance by the Ld. AO on the case of Hon'ble Supreme Court in M/s. Maxopp Investment Ltd. referred (supra), we have noticed that the appellant has unequivocally asserted that they have made the investment from their own funds raised by the issuing of Optional Convertible Debentures (considered entirely equity in nature) and subscribed by holding company. Further, the assessee has unequivocally asserted that they have not debited any interest expenses or similar expenses incurred to any income from investment made by the appellant. Nothing contrary has been brought on record by the revenue/appellant which may controvert the said assertions of the assessee in this case. Therefore, the facts of case of the assessee are distinguishable from the facts of case of M/s. Maxopp Investment Ltd. referred (supra).

16. Regarding the observation of the Ld. AO with respect to the applicability of clause F of explanation 1 to Section 115JB of "the Act", wherein it was observed that the disallowance amount has to be added back for the purpose of arriving at figure of book profit. The finding of the Hon'ble



jurisdictional High Court in **M/s. Bengal Finance Investment Pvt. Ltd.** case referred (supra), the amount of disallowance u/s. 14A of "the Act" cannot be added for arriving at book profit for the purpose of Section 115JB of "the Act". Para 4 of the judgment can be quoted and relied with profit which is as under: -

4. *“So far as Question (b) is concerned, the impugned order of the Tribunal followed its decision in **M/s. Essar Teleholdings Ltd. v/s. DCIT in ITA No. 3850/Mum/2010** to held that an amount disallowed under Section 14-A of the Act cannot be added to arrive at book profit for purposes of Section 115JB of the Act. The Revenue's Appeal against the order of the Tribunal in M/s. Essar Teleholdings (supra) was dismissed by this Court in Income Tax Appeal No.438 of 2012 rendered on 7th August, 2014. In view of the above, question (b) does not raise any substantial question of law.”*
5. For the above discussions, we are of the considered view that there is no illegality in the impugned order passed by the Ld. CIT(A) wherein the order of the Ld. AO was set aside and disallowances made by the Ld. AO were deleted. The finding recorded herein with respect to the A.Y. 2017-18 will be applicable *mutatis mutandis* for the A.Y. 2018-19 also.
6. We do not find any merit in appeal and both the grounds of appeal are accordingly decided against the revenue and in favour of the respondent/assessee.



7. Both the appeals are dismissed accordingly in the above terms.
8. Copy of this order be placed in ITA No. 3846/Mum/2023 for A.Y. 2018-19.
9. In the result, appeal filed by the revenue are dismissed in the above terms.

Order pronounced in the open court on 25.06.2024

Sd/-
(PADMAVATHY S.)
(ACCOUNTANT MEMBER)

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

Mumbai / Dated 25.06.2024
Karishma J. Pawar, (Stenographer)

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

(Asstt. Registrar)
ITAT, Mumbai