

IN THE INCOME TAX APPELLATE TRIBUNAL, "E" BENCH
MUMBAI
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SMT RENU JAUHRI, ACCOUNTANT MEMBER

ITA No. 677/MUM/2024
(A.Y.2013-14)

ITO(IT)-12(2)(1), Room No. 145, 1 st Floor, Aayakar Bhawan, Churchgate, Mumbai – 400020.	Vs.	Elder Project Ltd 301-302, Kunthu Commercial Centre, 3 rd Floor, Plot No. 174, Near Ayyappa Temple, Bangur N, Goregaon (W), Mumbai-400090.
PAN/GIR No. AAACE7387B		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

Appellant by	Shri P.D.Chougule.Sr.DR
Respondent by	Shri Mani Jain.AR

सुनवाई की तारीख/Date of Hearing	27.06.2024
घोषणा की तारीख/Date of Pronouncement	30.07.2024

ORDER

PER PAVAN KUMAR GADALE, JM:

The assessee has filed the appeal against the order of the National Faceless Appeal Centre, Delhi /CIT (A) passed u/sec 143(3) and u/sec 250 of the Act. The revenue has raised the following grounds of appeal:

"1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee by deleting the addition of Rs.54,81,916/, without appreciating the fact that the assessee failed to

furnish necessary documentary evidences of brought forward losses set off of Rs. 54,81,916/-."

2. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee by deleting the addition of Rs. 83,80,614/-, without appreciating the fact that the assessee in his P&L account has a credit of Rs. 17,59,000/- as dividend income and has not furnished any explanation with this regard?"*

3 *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee by deleting the addition of Rs.2,00,00,000/, without appreciating the fact that no confirmations, creditworthiness and genuineness was furnished by the assessee and the assessee failed to explain for what business purposes the assessee has borrowed such a huge unsecured loan of Rs. 2,00,00,000/-."*

4 *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee by deleting the addition of Rs.25,88,900/, without appreciating the fact that no details like bills, voucher and supporting documents has been furnished by the assessee. In spite of reasonable and sufficient opportunity assessee has failed to furnish the details and documents relating to the above expenses?"*

5. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee by deleting the addition of Rs. 83,80,614/- from the computation of 115JB of the Act, without appreciating the fact that the assessee in his P&L account has a credit of Rs. 17,59,000/- as dividend income and has not furnished any explanation with this regard?"*

6. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee by allowing the extra TDS credit which was not claimed by the assessee in its ITR amounting to Rs. 4,24,725/, without appreciating the fact that the AO has correctly given the claim of TDS claimed by the assessee in its ITR and no other TDS claim can be given as assessee has not claimed in its ITR. The AO has added income of Rs. 3,94,520/-*

which was accrued but not offered by the assessee in this year. Therefore, claim of TDS of Rs. 4,24,725/- on income of Rs. 3,94,520/- cannot be given?"

7. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee by deleting the addition of Rs.5,06,768/-, without appreciating the fact that the assessee failed to pay the outstanding amount of Rs. 5,58,981/- (provision for leave enchashment) before the due date of filing ITR. This issue is settled in light of the Supreme Court in the case of Union of India &Ors v Exide Industries &Anr (Civil Appeal No 3545/2009) dated 24 April 2020 which has upheld the constitutional validity of Section 43B(f) of the Act.?"

8) "The appellant craves leave to amend or alter any ground or add new ground which may be necessary.

2. The brief of the case are that, the assessee is engaged in the business of manufacturing pharmaceutical injectibles . The assessee has filed the return of income for the A.Y 2013-14 on 25.09.2013 disclosing a total income of Rs.Nil after setting off brought forward losses of Rs. 54,81,916/- under the normal provisions and the Book profit computed u/sec 115JB of the Act at Rs. 42,37,072/- and the return of income was processed u/sec 143(1) of the Act. Subsequently, the case was selected for scrutiny under CASS and notice u/sec 143(2) and u/sec 142(1) of the Act along with the questionnaire are issued. In compliance to the notice, the Ld. AR of the assessee appeared from time to time and submitted the details, financial statements and all the documents supporting the return of income filed. The Assessing Officer(A.O) dealt on the audited financial statements and the

information and found that (i) the assessee has claimed the set off of business losses of Rs.54,81,916/- against the current year income and the notice u/sec 142(1) of the Act was issued to submit the details of brought forward losses claimed along with the copies of returned income and the assessment orders and on 9-03-2015 the assessee has submitted the details of brought forward losses as mentioned in the computation of income pertaining to earlier years. Whereas the AO was not satisfied with the explanations and observed that even though reasonable opportunity was provided, the assessee could not explain the basis and source of carry forward of losses and since the assessee has failed to furnish the necessary documents and evidence in respect of brought forward losses, the AO has treated the brought forward loss of Rs. 54,81,916/- as not verified and has denied the set off of brought forward loss with the current year income and made disallowance of Rs. 54,81,916/-.

3. (ii) the AO on perusal of the audited financial statements found that the assessee has disclosed the dividend income of Rs.17,59,000/- and the assessee was asked to produce the working of disallowance made u/sec 14A r.w.r 8D. Whereas the assessee has filed a letter with details of dividend income received and there are no explanations filed on the disallowance. The AO has considered the facts and has invoked the provisions of Sec. 14A r.w.r 8D dealt at Para 6.3 to 6.4 of the order and

computed disallowance u/sec 14A r.w.r. 8D of Rs. 83,80,614/-.(iii) the AO on perusal of the tax audit report found that in the Annexure F of clause 21- the leave encashment of Rs. 5,58,981/- was mentioned and it was remain unpaid. Since the assessee has not paid the amount before due date of filing the return of income u/sec139(1) of the Act, the AO made disallowance of Rs. 5,06,768/- u/sec 43B of the Act.(iv) The fourth disputed issue, the AO on perusal of the audited balance sheet found that the assessee has obtained unsecured loans of Rs. 3 crores during the F.Y 2012-13 and the AO has issued notice u/s 142(1) of the Act along with questionnaire to explain the source of unsecured loans along with confirmations, address, PAN number, and income tax returns filed by the unsecured loan creditors. Whereas the AO after considering the facts and information is of the opinion that the assessee has not proved the identity, genuineness and creditworthiness required u/sec 68 of the Act and therefore made addition of Rs.2 crores as unexplained credits u/sec 68 of the Act. (v) The fifth disputed issue, the AO on perusal of the audited financial statements found that the assessee has claimed aggregate of expenditure of Rs.258.89 lakhs under different heads of expenditure account and the AO has issued notice to furnish the supporting evidences, ledger accounts, bills, and vouchers in respect of claim of expenditure since the assessee has failed to furnish the complete information,

the AO made disallowance of expenditure @10% of total claim , which works out to Rs.26,88,900/- treating such expenses are not incurred wholly and exclusively for the purpose of business.(vi) The AO find that the TDS disclosed in ITR is Rs. 11,03,150/- and whereas total TDS as per Form.no. 26AS is Rs.15,27,875/- and the A.O has issued a show cause to explain why income on account of undisclosed TDS should not be added in total income of the assessee. In compliance, the assessee has furnished the details on 09.03.2016 dealt at Para10.2 of the order read as under:

“10.2”Sir in AIR the main transaction shown is of TDS amount deducted by third parties. In this respect we would like to state that we have claimed TDS In our return of Income only on the basis of TDS certificates received by us in physical form. We have reconciled the 26AS information given in AIR with the credit of TDS claimed by us in return of income. We found that in two cases there is a mismatch one is case of M/s Eternia Enterprises (Proprietor Deepak Ramaswamy) of Rs. 16,50,000/- and second in the case of Semit Pharma & Chem P. Ltd. of Rs. 25,97,260/-. In both the cases the TDS Is deducted on interest amount. In the case of Deepak Ramaswamy we have shown interest income of Rs. 16,50,000/- in our books and offered the same for lax and in case of Semit Pharma & Chem P. Ltd. we have shown interest income of Rs. 22,02,740/- instead of Rs. 25,97,260/- there is a short interest Income booked by us of Rs. 3,94,520/-. This was due the reasons that there was a dispute of rate of Interest to e charges by the party. This difference of Rs. 3,94,520/- may be added and deposited by third party of Rs. 1,65,000/- and 2,59,725/- which could not be claimed by us because the TDS certificate we not received by in physical form however the income has been offered for tax while compiling total income

4. Whereas the AO considered the facts and submissions and was not satisfied with the explanations and made addition of Interest income of Rs.3,94,520/-(vii) on the last disputed issue, the A.O considered the disallowance u/sec 14A r.w.r 8D in computing the book profits u/sec 115JB of the Act. Finally the AO has assessed the total income of Rs.3,73,52,450/- and passed the order u/sec143(3) of the Act dated 10.03.2018.

5. Aggrieved by the order, the assessee has filed an appeal before the CIT(A), whereas the CIT(A) considered the grounds of appeal, statement of facts, submissions of the assessee and findings of the AO and dealt elaborately on the facts and information and granted relief and partly allowed the assessee appeal. Aggrieved by the CIT(A) order, the revenue has filed an appeal before the Hon'ble Tribunal.

6. At the time of hearing, the Ld. DR submitted that the CIT(A) has erred in granting relief to the assessee in respect of allowing the set off of brought forward losses with the current year income (ii) CIT(A) erred in restricting the disallowance u/sec 14A r.w.r 8D of the Act to the extent of exempted income earned(iii) the CIT(A) erred in deleting the addition u/sec 68 of the Act though the assessee has not furnished the details of business transactions with the unsecured loan creditor (iv) the assessee has not submitted the bills and vouchers with

respect to the expenditure claimed and therefore the AO was correct in making addition to the extent of 10% of the claim , which was deleted by the CIT(A). (v) Further the CIT(A) erred in deleting the disallowance made by the A.O u/sec 14A r.w.r 8D in computing the book profits u/s 115JB of the Act. (vi) The CIT(A) has erred in directing the AO to grant credit of TDS as per Form.no.26AS though the assessee has not offered the corresponding income to tax. (vii) the CIT(A) has erred in directing the AO to restrict the disallowance of leave encashment to the extent of provision made in the current year. And The Ld. DR has relied on the order of the AO and prayed for allowing the revenue appeal. Per Contra, the Ld.AR relied on the order of the CIT(A).

7. We heard the rival submissions and perused the material on record. The Ld. DR on the first disputed issued submitted that the CIT(A) has erred in directing the AO to allow setoff of brought forward loss which was available to the assessee overlooking the facts and documentary evidence that the assessee could not explain the basis and source of carry forward of losses and the necessary documents and evidence in the assessment proceedings. Whereas the CIT(A) has considered the submissions of the assessee on the issue and directed the AO to allow the setoff and dealt at Page 6 Para 8 & 9 of the order as under:

"8. The appellant in its submission has stated that the losses so disallowed in AY 2012-13 has been allowed by the CIT(A) and has been further confirmed by Hon'ble ITAT. In its support, the appellant has also submitted copies of said appellate order and the assessment order for AY 2012-13.

9. On verification of assessee submission and its supporting document, it is observed that AO had disallowed carry forward of set-off of unabsorbed depreciation of AY 1996-97 to 1998-99 amounting to Rs. 1,81,56,680/- in the assessment order for AY 2012-13. In the appellate proceedings, Id. CIT(A) has allowed the carry forward of Rs. 1,81,56,680/- to subsequent years and the same has been upheld by the Hon'ble ITAT vide its order dated 12.09.2018 for AY 2012-13. The relevant portion of ITAT's order is as under:-

"We have heard the rival submissions, perused the orders of the authorities below. The only issue to be decided is whether the assessee is eligible to be set off of brought forward unabsorbed depreciation pertaining to Assessment Years 1996-97 to 1998-99. Ld.CIT(A) following the decision of the Hon'ble Gujarat High Court in the Ltd. v. DCIT (supra) allowed the claim of the case of General Motors India Pvt Ltd. V. DCIT (st assessee observing as under: -

5. We have heard the rival submissions, perused the orders of the authorities below. The only issue to be decided is whether the assessee is eligible to be set off of brought forward unabsorbed depreciation pertaining to Assessment Years 1996-97 to 1998-99. Ld.CIT(A) following the decision of the Hon'ble Gujarat High Court in the case of General Motors India Pvt Ltd. v. DCIT (supra) allowed the claim of the assessee observing as under: -

"6.4.2 From the above referred decisions it is observed that the Hon'ble Gujarat High Court in the case of General Motors India P Ltd (supra) has held that restriction of 8 years for carry forward and set off of unabsorbed depreciation from A.Y. 1997-98 up to the A.Y. 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against the profits and gains of subsequent years,

without any limit whatsoever. Further the Hon'ble ITAT, Mumbai in the case of Hindustan Unilever Limited (supra) after considering the decision of the Hon'ble ITAT Mumbai Special Bench in the case of Times Guaranty Ltd has held that since the decision of Hon'ble Gujarat High Court in the case of General Motors India P Ltd, is in favour of assessee and from higher judicial authority, we are bound by the decision of the Gujarat High Court in preference to the Special Bench decision of the ITAT and following the same had allowed the appeal of the assessee. In view of the facts and circumstances of the case and law discussed, respectfully following the decision of the Hon'ble Gujarat High Court in the case of General Motors India P Ltd (supra) and Hon'ble ITAT, Mumbai in the case of Hindustan Unilever Ltd the Ld. AO is directed to verify the records and allow set off of unabsorbed depreciation pertaining to A. Ys. 1996-97 to 1998-99 carried forward and as available as per records, against the profit of current year. Accordingly, the Ground No.1 raised in appeal is ALLOWED, subject to above directions."

6. Respectfully following the decision of the Hon'ble Gujarat High Court in the case of General Motors India Pvt Ltd. v. DCIT (supra) we sustain the TAOME TAX DEPARTN order of the Ld. CIT(A).

Thus, once the above loss is allowed to be carried forward, the consequential set off needs to be allowed in the current year. Accordingly, AO is directed to allow set off of brought forward depreciation loss of Rs.1,81,56,680/- against the assessed income. Ground No. 1 is allowed subject to above direction"

8. On the second disputed issue, the Ld.DR submitted that the CIT(A) has erred in directing the AO to restrict the disallowance u/sec 14A r.w.r 8D to the extent of dividend income/ exempted income earned. Whereas the Ld.AR submitted that the CIT(A) was correct in following the Hon"ble Tribunal decisions, where it was decided that the disallowance cannot be exceed the exempted income earned by the assessee. The Ld. AR has referred to the

submissions made before the appellate authority at Page 8 Para 12 of the CIT(A) order. Whereas the CIT(A) has dealt on the disputed issue and relied on the judicial decisions and directed the AO to restrict disallowance to the extent of dividend income earned Page 9 Para 14 of order read as under:

"14. I have gone through the submission of the appellant and has found that similar issue has been dealt by the Tribunal in the assessee's own case of immediate previous year AY 2012-13 wherein the Tribunal has restricted the disallowance to the extent of dividend income. The relevant portion of the order is reproduced hereunder:-

"9. We have heard the rival submissions, perused the orders of the Authorities below. In so far as ground No.2 is concerned, it is an undisputed fact that the assessee disallowed entire exempt income therefore, no further disallowance is required to be made. It has been held in various cases that the disallowance u/s. 14A r.w. Rule 8D cannot exceed the exempt income. The Hon'ble Punjab and Haryana High Court in the case of Principal Commissioner of Income Tax- I v. M/s Empire Package Pvt. Ltd in ITA.No. 415 of 2015 dated 12.01.2016, dismissed the appeal of the Revenue holding that there is no substantial question of law arise in the appeal on the following question raised by the

Revenue: -

"Whether in the facts and circumstances of the case, the Hon'ble ITAT is justified in law to hold that the disallowance made under section 14A read with Rule 8D cannot exceed the exempt income, in the absence of any such restriction being there in the relevant section or rule?"

The Hon'ble High Court affirmed the order of the ITAT in holding that the disallowance u/s. 14A r.w.r 8D as worked out by the Assessing Officer is not in accordance with law for the reason that Assessing Officer has disallowed entire tax

exempt income and this is not permissible in view of the judgment of the Hon'ble Delhi High Court.

10. ah Court, Court in the case of Joint 1 The Hon'ble Delhi hi High C Private Limited in ITA.No. 117/15 dated 25.02.2015 held that by no stretch of imagination can section 14A or Rule 8D be interpreted so as to mean that entire tax exempt income is to be disallowed.

11. Further, we find that considering the above two decisions the Coordinate Bench in the case of Sanghavi Exports International P. Ltd v. ACIT in ITA.No.3405/Mum/2015 dated 10.07.2017 held that disallowance should not be more than the dividend income by observing as under: -

"4. We have perused the Assessment Order and find that the assessee earned exempt income of Rs. 1,70,000/- only during this Assessment Year and the Assessing Officer by invoking the provision of Section 14A made disallowance at 5 ITA NO.815/MUM/2017 (A.Y: 2012-13) M/s. Elder Projects Ltd., Rs.54,66,813/-. The Hon'ble Delhi High Court in the case of Joint Investment Private Limited in ITA.No. 117/15 dated 25.02.2015 held that by no stretch of imagination can section 14A or Rule 8D be interpreted so as to mean that entire tax exempt income is to be disallowed. Similarly, Punjab and Haryana High court in the case of PCIT v. Empire Package Private Limited in ITA.No. 415/2015 held that disallowance should not exceed exempt income. In the case on hand since the assessee received dividend income of Rs. 1,70,000/- as recorded in the Assessment Order the disallowance should not be more than Rs. 1,70,000/-. Thus we direct the Assessing Officer to restrict the disallowance to the extent of dividend income i.e. Rs. 1,70,000/- and delete the balance amount and compute the incomes accordingly."

12. Thus, respectively following the said decisions, we direct the Assessing Officer to delete the disallowance made u/s. 14A of the Act for the Assessment Year under consideration.

15. The above view is also supported by the Hon'ble Bombay High Court in the case of M/s. Nirved Traders Pvt. Ltd. (ITA No. 149 of 2017) in their decision dated 23.04.2019 approved the claim that the disallowance under section14A was to be

restricted to the tax-exempt income earned during the year. The High Court observed that:

3. This Appeal is filed by the Assessee to challenge the Judgment of the Income Tax Appellate Tribunal ('the Tribunal', for URS 1 of 7 2 3-ITXA 149-17.odt short). The Appellant - Assessee is a private limited company and a non-banking financial company. In the Assessment Year 2008-2009, the Assessee had claimed interest expenditure of Rs.6,87,57,951.

During the same period relevant to the Assessment Year in question, the Assessee had earned dividend income of Rs.1,13,72,545/- which was exempt from tax. The Assessing Officer disallowed the interest expenditure of Rs.3,79,83,539/-. He further disallowed administrative expenditure and made a total disallowance of Rs.4,22,72,425/- under Section 14A of the Income Tax Act, 1961 ('the Act', for short) read with Rule 8D of the Rules. The Tribunal, by the impugned Judgment, confirmed such disallowance upon which, the Assessee has filed this Appeal.

4. At the outset, learned Counsel for the Appellant - Assessee submitted that several High Courts have held that disallowance under Section 14A of the Act read with Rule 8D of the Rules, cannot exceed the exempt income earned by the Assessee during the relevant year. She submitted that if such disallowance, therefore, is restricted to Rs.1,13,72,545/- which is exempt income earned by the Assessee, the Assessee would accept the same

5. Having heard the learned Counsel for the parties and having perused the documents on record, consistently different High Courts in the country have taken a view that the disallowance under Section 14A of the Act read with Rule 8D of the Rules cannot exceed the Assessee's exempt income. The Delhi High Court, in the case of Cheminvest Ltd. Vs.

Commissioner of Income Tax 1, has held that when the Assessee has not earned any income which was exempt from tax, disallowance of the expenditure under Section 14A read with 8D of the Rules would not be permissible.

6. Karnataka High Court, in the case of Pragati Krishna Gramin Bank Vs. Joint Commissioner of Income-tax², has held that expenditure in relation to income not includable in the total income cannot exceed such income. It was observed as under.

"14. We make it clear that the expenditure for earning exempted income has to have a reasonable proportion to the income, so earned, going by the common financial prudence

Therefore, even if the Assessing Authority has to make an estimate of such an expenditure incurred to earn exempted income, it has to have a rational nexus with the amount of income earned itself. Disallowance under Section 14A of Rs.2,48,85,000/- as expenses to earn exempted Dividend income of Rs. 1,80,30,965/- is per se absurd and 1 378 ITR 33 2 [2018] 256 Taxman 349 (Kamatama) URS 3 of 74 3-ITXA 149-17.odt hypothetical. The disallowance under Section 8D cannot exceed the expenses claimed by assessee under the Proviso to Rule 8D. Therefore, where the assessee claimed that assessee did not incur any such expenditure during the year in question to earn Dividends of Rs. 1,80,30,965/-, the burden was upon the assessing authority to compute the interest on such borrowed funds which were dedicatedly used for investment in securities to earn such exempted Dividend income. The disallowance under Section 14A cannot be wild guesswork bereft of ground realities. It has to have a reasonable and close nexus with the factually incurred expenses. It is not deemed disallowance under Section 14A of the act but an enabling provision for assessing authority to compute the same on the given facts and figures in the regularly maintained Books of Accounts. The assessing

authority also could not have called upon the Assessee himself to undertake the exercise of computing the disallowance under Section 8D of the Rules. Such abdication of duty is not permissible in law. Since no such exercise has been undertaken by the assessing authority, the case calls for a remand."

7. Gujarat High Court, in the case of Commissioner of Income-tax-I Vs Corrtech Energy (P.) Ltd.³, has held and observed as under:

"4. Counsel for the Revenue submitted that the Assessing Officer as well as CIT (Appeals) had applied formula of rule 8D of the Income Tax Rules, since this case arose after the assessment year 2009-2010. Since in the present case, we are concerned with the assessment year 2009-2010, such formula was correctly applied by the Revenue. We however, notice that sub-section (1) of section 14A provides that for the purpose of computing total income under chapter IV of 3 [2015] 372 ITR 97 URS 4 of 75 3-ITXA 149-17.odt the Act, 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 the Act. In the present case, the tribunal has recorded the finding of fact that the assessee did not make any claim for exemption of any income from payment of tax. It was on this basis that the tribunal held that disallowance under section 14A of the Act could not be made. In the process tribunal relied on the decision of Division Bench of Punjab and Haryana High Court in case of CIT v Winsome Textile Industries Ltd. [2009] 319 ITR 204 in which also the Court had observed as under:

"7. We do not find any merit in this submission. The judgement of this court in Abhishek Industries Ltd. (2006) 286 ITR 1 was on the issue of allowability of interest paid on loans given to sister concerns, without interest. It was held that deduction for interest was permissible when loan was taken for business purpose and not for diverting the same to sister concern without having nexus with the business. The observations made therein have to be read in that context. In the present case, admittedly the assessee did not make any claim for

exemption. In such a situation section 14A could have no application."

5. We do not find any question of law arising Appeal is therefore dismissed."

8. Recently, this Court, in a decision dated 4th February, 2019, in the case of The Pr. Commissioner of Income Tax-10 Vs. HSBC Invest Direct (India) Ltd. had observed as under.

"4. Having heard learned Counsel for the parties and perused documents on record, we notice that in Cheminvest Ltd. (supra) Delhi High Court had referred to and relied upon its earlier decision in the case of CIT Vs. Holcim India (P) Ltd. (I.T.A. No.486 of 2014, decided on 5 th September 2014). we further notice that this Court in Income Tax Appeal No.693 of 2015 by an order dated 21 st November, 2017 while dismissing the Revenue's appeal on similar issue had noted that the decision of Delhi High Court in case of Holcim India)P) Ltd. (supra) had adopted the same principles. In the present case, Counsel for the Revenue however, points out that this is not a case where the assessee had earned no income which was exempt from tax. However, in our opinion, the ratio of the above noted decisions in the cases of Cheminvest Ltd. and Holcim India (P) Ltd. (supra) would include a facet where the assessee's income exempt from tax is not NIL but has earned exempt income which is larger than the expenditure incurred by the assessee in order to earn such income. In such a situation that disallowance cannot exceed the exempt income so earned by the assessee during the year under consideration. We do not find any error in the view of the Tribunal. We record that the assessee had offered voluntary disallowance of expenditure of Rs. 1.30 crores, which is not been disturbed by the Tribunal.

5. The tax appeal is dismissed

9. In view of such consistent trend of the High Courts, we answer the question in favour of the Assessee. We reverse the decision of the Tribunal to the extent of limiting the disallowance under Section 14A of the Act to a sum of Rs. 1,13,72,545/ "

16. Therefore, after considering the above decision of the Hon'ble Bombay High Court, the disallowance u/s 14A cannot exceed the tax exempt income. Since in this case the appellant has already made disallowance to the extent of dividend income by not claiming the same in the computation of income, the disallowance made by AO directed to be deleted. In view of the above, this ground no. 2 is allowed”

9. On the third disputed issue, the Ld. DR contentions are that the CIT(A) has erred in deleting the addition u/sec 68 of the Act though the assessee has not furnished the documentary evidence and details of business transactions with the unsecured loan creditor. Whereas the Ld. AR submitted that the assessee has obtained the unsecured loans from M/s SICOM limited established NBFC floated by the Government Of Maharashtra and the Ld.AR demonstrated details of loan obtained and repaid along with the bank statement and ledger account of unsecured loan placed at Page 13 to 27 of the paper book. Further the assessee has made substantial submissions before appellate authorities referred at Page 14 Para 19 of the order. And the CIT(A) has considered the submissions and dealt on the provisions of section 68 of the Act and has deleted the addition observing at Page 16 Para 20 to 22 of the order read as under:

“20. I have considered the order of the AO and submission made by the assessee. I find that the assessee has taken loan from M/s. SICOM Limited which was reflected in the Tax audit report furnished. The said tax audit contained the details of the party along with its address. Further, during the assessment proceedings, the assessee had also submitted the details of the party such PAN, address and transactions

entered into by the party during the year vide submission dated 08.03.2016. However, due to paucity of time, AO made the addition. The assessee has explained that M/s. SICOM Ltd. is an entity formed by the Government of Maharashtra to assist the industries and is a registered NBFC. Further, the necessary details were duly filed by the assessee during the assessment proceedings; however, the addition has been made without making any independent enquiry. The assessee has stressed that the loan being received from the Government entity, the question of genuineness and credit worthiness cannot arise. Also, to support the same, the assessee has also submitted the loan statement and financials of M/s. SICOM Ltd.

21. It is a settled law that for discharging the initial onus cast by section 68 of the Act, the assessee has to establish identity, credit worthiness and genuineness of the transaction. Once the assessee proves all these three conditions, his onus is discharged. In the given case, the assessee has duly provided the identity by submitting the PAN of the said party. The identity has not been doubted by the AO.

Further, the genuineness of the transaction cannot be doubted since the transaction has been entered into with a registered government NBFC. In any case, the assessee has submitted the requisite loan statement which proves the same. Similarly, the credit worthiness of the government NBFC cannot be doubted. In any case, the assessee has submitted the financials of the party which shows that it has huge own funds of more than Rs.1125.51 Crs. to advance loan to the assessee. Further, I also find that the AO has summarily made the addition even when the details of the party were submitted on 8.03.2016 and no independent enquiry has been made in this regard. It is also noted that the time limit for completion of the assessment proceedings were 31.3.2016 and therefore, plea of lack of paucity of time by the AO cannot be accepted. Further, it is also noted that the details of M/s. SICOM Ltd. were readily available on the internet and the same could be easily obtained from the RBI or the party. However, no such exercise has been done by the AO. In view of the above details and facts, I hold that the transaction of loan from M/s. SICOM Ltd. is duly explained.

22. In light of the above, the addition of Rs.2,00,00,000/- u/s 68 of the Act is directed to be deleted”

10. On The fourth ground of appeal, the Ld.DR submitted that the CIT(A) has erred in deleting the disallowance, though the assessee has not submitted the bills and vouchers with respect to the expenditure claimed and therefore the AO was correct in making addition to the extent of 10% of the claim. Whereas the Ld. AR submitted that the AO has not identified any specific item or bill in respect of expenditure and made an adhoc addition. The CIT(A) has considered the submissions, and judicial decisions relied by the assessee at Para 25 of the order and directed the assessing officer to delete the adhoc disallowance observing at page 19 Para 26 to 29 of the order read as under:

“26. The appellant in its submission Estate the AO has made an ad-hoc disallowance @10% without pointing out any discrepancy in the same. Further, the assessee has relied on various case laws in support of its contention.

27. I have considered the submission of the assessee and the contention of the AO. It is observed that in the assessment order, the AO has doubted whether the expense so claimed has been incurred wholly for business purpose and thereby made a disallowance @10%. However, it is observed that while making such disallowance the AO has not provided with any logical reasoning or basis for arriving at such percentage. It is also noted that the AO has not rejected assessee's books of account. Further, as mentioned in the assessment order the assessee did submit supporting in respect of few expenses; however, the AO has even failed to discuss the same in its findings. Also, I find that the expenses under dispute relate to power & fuel, manufacturing charges, repair & maintenance, etc. which are

necessary for the overall business of the assessee which has not been doubted by the AO.

28. Here, reference is made to the judgement of Hon'ble Rajkot Tribunal in case of M/S. Mokshstar International vs. The ACIT in ITA No. 397/RJT/2017, wherein the Hon'ble Tribunal has held that the issue of disallowability of expenses on purely ad-hoc basis, without the AO having rejected books of accounts is not sustainable, and thereby the assessee's appeal has been allowed in respect of the ad-hoc disallowance.

5. We have heard the rival contentions and perused the material on record. We observe that the AO has not disputed that the accounts and records the assessee are audited under the provisions of section 44AB of the Act. The AO has not rejected the books of the assessee. In the case of Katira Construction Ltd. v. ACIT [2020] 119 taxmann.com 489 (Rajkot-Trib.), ITAT held that where books of account of assessee have not been rejected, onus is on Assessing Officer to point out specific expenses which were not incurred in connection with business and thereafter he can make disallowance under provisions of section 37 and as such there is no provision provided under Act empowering Assessing Officer to make disallowance on ad-hoc basis despite fact that assessee consents for such disallowance during assessment proceedings. In the case of M.V.A. Seetharama Raju v. DCIT [2022] 137 taxmann.com 147 (Chennai - Trib.), the ITAT held that in respect of foreign travelling expenses unless Assessing Officer points out specific defects in expenditure claimed by assessee, no ad-hoc disallowance can be made for reason that assessee has not filed any evidence to justify said expenses. In the case of Kailas Chand Agrawal [2022] 139 taxmann.com 462(Raipur-Trib.), AO disallowed portion of expenditure applying ad-hoc percentile on ground that some of expenditures were in cash and were supported only by self- made vouchers. It was noted that there had been no clear finding as to number of M/s. Mokshstar International vs. ACIT vouchers requiring denial of allowances with amount of expenditure and nature of defects therein or therewith. The ITAT held that since it was not case of revenue that any part of expenditure in question was either bogus or fictitious or same was not incurred by assessee wholly and exclusively for purpose of his business, ad-hoc

disallowance in its entirety deserved to be vacated. In the case of Seal For Life India (P.) Ltd. v. DCIT [2018] 96 taxmann.com 645 (Ahmedabad - Trib.), ITAT held that ad-hoc disallowance could not be made from total travel and conveyance expenses incurred by assessee company on ground that expenses were in respect of use of vehicles by directors of assessee company was personal in nature. In the case of Kushal Virendra Tandon v. ACIT [2022] 134 taxmann.com 268 (Mumbai - Trib), the ITAT held that in absence of specific finding by lower authorities regarding documentary evidence which pointed out that expenditure were not incurred wholly and exclusively for purpose of business or profession, disallowance of expenses in arbitrary manner on an ad-hoc basis has to be set aside. In the case of ACIT v. Vanesa Cosmetics Adhoc [2021] 127 taxmann.com 499 (Delhi - Trib.) additions made by Assessing Officer on account of interest expenses on car having element of personal use, tour and travelling expenses and conveyance expenses respectively, without assigning any reason would not be sustainable in eyes of law. In view of the consistent position taken by various Tribunals on the issue of disallowability of expenses on purely ad- hoc basis, without the AO having rejected books of accounts, including the jurisdictional Rajkot ITAT, we are hereby allowing the assessee's appeal in respect of the ad-hoc disallowance.

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

29. Thus, in view of the facts of the assessee's case and the judicial pronouncements referred above, I am of the opinion that the disallowance made by the AO @10% of the expenses is ad-hoc in nature and the AO has not provided with a logically reasoning for making such estimation. Thus, the AO is directed to deleted the disallowance of expenses of Rs.25,89,900/-. Accordingly, Ground No.4 is allowed”

11. On the fifth ground of appeal, the Ld.DR submitted that CIT(A) has erred in deleting the disallowance made by the A.O u/sec 14A r.w.r 8D in computing the book profits u/s 115JB of the Act. Whereas the Ld.AR contentions are that the CIT(A) has dealt on the facts,

provisions of the Act and special bench decision in the case of ACIT v. Vireet Investments Private Limited [165 ITD 27] and deleted the disallowance observing at Page 22 Para 33 & 34 of the CIT(A) order as under:

“33. I have considered the submission of the assessee. I find the above issue is academic in nature since the disallowance u/s 14A has been deleted by me in ground no. 2 above. In any case, I find that the above issue is also covered in the favour of the assessee by its own case for AY 2012-13 which has been passed by the ITAT and the same is reproduced hereunder:-

5. Coming to Ground No.3, Ld. Counsel for the assessee submitted that the Assessing Officer while computing the book profits made disallowance U/s. 14A r.w. Rule 8D of the Act. Ld. Counsel for the assessee submitted that in view of the decision of the Special Bench in the case of ACIT v. Vireet Investments Private Limited [165 ITD 27] the matter may be decided.

34. Accordingly, the addition made by the AO of the disallowance u/s 14A while computing the book profits u/s 115JB, is deleted. Accordingly, this ground of appeal is allowed.”

12. On the sixth ground of appeal, the Ld.DR submitted that the CIT(A) has erred in directing the AO to grant credit of TDS as per Form.no.26AS though the assessee has not offered the corresponding income to tax. Whereas the CIT(A) has considered the facts and information and found that the assessee has claimed the TDS and also income was subject tax and accordingly directed the AO to allow TDS credit and the observations are at Page 23 Para 36 & 37 of the order read as under:

“36. The AO observed that in ITR the assessee had claimed TDS amounting to Rs. 11,03,150/- as against Rs. 15,27,875/- as reflected in Form 26AS of the assessee. On verification from the assessee, it was learned that income of Rs.3,94,520/- was not offered by the assessee in its ITR and the same was accepted by the assessee in its response to the notice issued by the AO during assessment proceedings. However, the assessee has raised additional ground stating that though the income has been considered by the AO on the basis of Form 26AS; however TDS credit for the same has not been provided. The relevant submission made by the assessee is as under.-

31. In the assessment proceedings, AO observed that against the TDS credit of Rs.15,27,875/- as appearing in Form 26AS, appellant has claimed TDS credit only amounting to Rs.11,03,150/-. He further observed that corresponding income to the extent of Rs.3,94,520/- has not been offered by the appellant. Accordingly, AO made addition of Rs.3,94,520/- on account of differential income not offered by the appellant. No appeal has been filed against the said addition.

32. However, while making the addition of income corresponding to the income reflected to the tune of income reflected in form 26AS, AO failed to also grant TDS credit which is duly reflected in Form 26AS.

33. During the course of assessment proceedings, it was duly explained before AO that the appellant has claimed TDS credit only on the basis of TDS certificates physically available with the appellant at the time of return filing. Due to unavailability of TDS credit to the tune of Rs.4,24,725/-, the same could be claimed in the return of income filed. However, it is important to note that the corresponding income of the said TDS credit has been duly offered to tax or added by the AO in the assessment order.

34. Thus, once the income has been taxed, corresponding TDS credit is duly allowable to the appellant. It is therefore,

submitted that TDS credit of Rs. 4,24,725/- may kindly be allowed to the appellant.

37. In this regard, it is stated that this is a consequential issue since once the income has been taxed by the AO, the credit of TDS needs to be allowed. Accordingly, AO is directed to allow the TDS credit as per Form 26AS since the corresponding income has been accepted by the assessee. Thus, the said ground is allowed.”

13. The last ground of appeal envisaged by the Ld. DR that the CIT(A) has erred in restricting the disallowance to the extent of Rs.91,798/- as against Rs.5,06,768/-, though the leave encashment provision is not paid till the due date of return of income u/sec 139(1) of the Act by the assessee. The Ld.AR submitted that the disallowance is restricted to the current year provision as per the books of account and referred to breakup of provision made for leave encashment placed at Page 19 of the paper book. At this juncture, we consider it appropriate to refer to the submissions before the appellate authorities dealt at Page 23 Para 38 to 39 of the order read as under:

“38. Additional Ground No. 3 relates to disallowance u/s 43B amounting to Rs. 5,06,768/- on account of non-payment 5.06.768/- of leave encashment provision till date of of return. The assessee has made submission which is as under:- filing

35. During the course of assessment proceedings, AO observed that the appellant had unpaid leave encashment provisions as per Form 3CD. Accordingly, AO proceeded to make disallowance of Rs. 5,06,768/- u/s 43B of the Act.

36. At the outset, it is submitted that the amount of Rs.5,06,768/- disallowed by AO is incorrect. It is submitted that the opening balance of unpaid leave encashment was

Rs.4,68,665/-. During the year under consideration, the appellant has further leave encashment provision of Rs.91,798/- and against the same, an amount of Rs.1,482/- has been paid by the appellant, leaving a closing balance of Rs.5,58,981/-. The breakup of the same is placed at page nos.60 of the paper book.

37. However, without appreciating the above facts, AO proceeded to make the disallowance of Rs.5,06,768/- (instead of Rs.5,58,981/-) which is apparently the closing balance of leave encashment provision.

38. In this respect, it is submitted that the only amount which can be added in the year under consideration, is the amount of provision of leave encashment which has been debited in the current year. Therefore, the amount of leave encashment provision debited is Rs.91,798/-. Therefore, the differential amount of Rs.4, 15,000/- (5,06,768-91,798) is liable to be deleted out-rightly.

39. Now coming to the applicability of provisions of section 43B on leave encashment is concerned, it is submitted that the said issue has been dealt by the Hon'ble ITAT vide its order no. 815/Mum/2017 dated 14.11.2018 for AY 2012-13 wherein the 14 appeal of the appellant has been allowed and appropriate direction has been issued to the AO.

40. We, accordingly, request your Honour to issue similar directions to the AO.

39. I have considered the submission of the assessee. The assessee has explained that only a provision of Rs. 91,798/- has been made by the assessee and not Rs.5,06,768/- as stated by AO. On perusal of the tax audit report, no disallowance u/s 43B has been quantified by the auditor. Therefore, the disallowance is restricted to Rs.91,798/- as quantified by the assessee in the submission. Further, regarding reliance on the decision of Tribunal, I find that the issue is settled in light of the Supreme Court in the case of Union of India &Ors v Exide Industries &Anr (Civil Appeal No 3545/2009) dated 24 April 2020 which has upheld the constitutional validity of Section 43B(f) of the Act. Accordingly, the ground of the assessee is partly allowed”

14. We find the CIT(A) has dealt on the facts, provisions of law, notes and judicial decisions. The Ld. DR could not controvert the findings of the CIT(A) with any new cogent material or information on the disputed issues to take different view. We considered the facts, circumstances, submissions and ratio of judicial decisions as discussed above are of the view that the CIT(A) has passed a reasoned and conclusive order. Accordingly, we do not find any infirmity in the order of the CIT(A) and uphold the same and dismiss the grounds of appeal of the revenue.

15. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 30.07.2024.

Sd/-
(RENU JAUHRI)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated: 30.07.2024

KRK

Copy of the Order forwarded to:

1. The Appellant,
2. The Respondent
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//