आयकर अपीलीय अधिकरण
कोलकाता 'एसएमसी' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA

श्री संजय शर्मा, न्यायिक सदस्य
एवं
श्री संजय अवस्थी, लेखा सदस्य
के समक्ष

Before

SRI SONJOY SARMA, JUDICIAL MEMBER
&
SRI SANJAY AWASTHI, ACCOUNTANT MEMBER

I.T.A. No.: 1285/KOL/2024
Assessment Year: 2018-19

New India Retailing & Investment Ltd.....................................Appellant
[PAN: AAACN 9970 F]

Vs.

DCIT, Circle-5(1), Kolkata..Respondent

Appearances:

Assessee represented by: *Kinjal Buaria, CA and Aritra Nag, Adv.*

Department represented by: *A.K. Dutta, Addl. CIT.*

Date of concluding the hearing : September 3rd, 2024
Date of pronouncing the order : September 11th, 2024

ORDER

Per Sanjay Awasthi, Accountant Member:

In this case the appellant filed its return of income on 28.09.2018 declaring total loss of Rs. 1,60,666/-. This return was picked up for scrutiny and there the Assessing Officer (hereinafter referred to as ld. 'AO') found that the appellant had earned total dividend income of Rs. 2,85,14,679/- which did not form part of total income. The ld. AO also noticed that the assessee had on its own disallowed expenses amounting to Rs. 19,03,542/- u/s 14A of the Income Tax Act, 1961 (in short the 'Act') read with Rule 8D of the Income Tax Rules, 1962. It was further noticed by the ld. AO that this *suo moto* disallowance was only in respect of those investments in which dividend

income had been received during the year. Thus, it was noticed that investments from which no dividend was received were not subjected to any disallowance u/s 14A of the Act read with Rule 8D of the Rules. Thereafter, the ld. AO proceeded to rely on CBDT Circular No. 5/2014 dated 11.02.2014 and computed total disallowance at Rs. 34,31,931/- and gave benefit of Rs. 19,03,542/- already disallowed by the appellant himself. The total addition was worked out to the tune of Rs. 15,28,389/-.

1.1. Aggrieved with this action of ld. AO, the appellant approached the Commissioner of Income Tax (Appeals), NFAC, Delhi [hereinafter referred to as ld. 'CIT(A)'] who confirmed the action of ld. AO by not only relying on CBDT Circular *(supra)* but also interpreted the explanation inserted into Section u/s 14A of the Act through the Finance Act, 2002 (The amendment would take effect from 01.04.2022) to mean that such explanation was merely clarificatory in nature and therefore, it would apply to earlier years also and not only from 01.04.2022. To arrive at this conclusion, the ld. CIT(A) has extracted portions from memorandum explaining the rationale to the proposed amendment and also is seen to have heavily relied on the phrase *"for the removal of doubts"* to understand that such an amendment would impact the computation of tax u/s 14A of the Act even for AY 2018-19, being the year under consideration for this assessee. Apart from this, the ld. CIT(A) relied on some authorities also to confirm the addition made by the ld. AO.

1.2. Aggrieved with this action, the appellant has approached the ITAT with as many as ten grounds of appeal as under:

> *"(1) For that the National Faceless Appeal Centre, Delhi ("Ld. CIT(A)/NFAC") erred in confirming the addition of Rs. 15,28,389 made by the National Faceless Assessment Centre ("Ld. AO") under section 14A of the Income Tax Act, 1961 ("the Act") read with Rule 8D of the Income Tax Rules, 1962 ("the Rules").*
>
> *(2) For that on the facts, and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition made by the Ld. AO on the ground that the amendments made in section 14A by the Finance Act, 2022 are applicable retrospectively whereas the said amendment is applicable from assessment year 2022-2023 and subsequent assessment years as*

categorically mentioned in the Memorandum explaining the provisions of Finance Bill, 2022 and also in Notes to Clauses of Finance Bill, 2022.

(3) For that the Ld. CIT(A) erred in not appreciating that in the Memorandum explaining the provisions of the Finance Bill, 2022, it is explicitly stipulated that the amendment made to Section 14A will take effect from 1st April 2022 and will apply in relation to the assessment year 2022-2023 and subsequent years.

(4) For that on the facts, and in the circumstances of the case and in law, Ld. CIT(A) erred in holding that the expressions "for the removal of doubts" and "it is hereby clarified" makes the amendment in the Act applicable retrospectively.

(5) For that on the facts, and in the circumstances of the case and in law, the Ld. CIT(A) erred in assuming and holding that the amendments in section 14A of the Act are clarificatory in nature and hence are applicable retrospectively.

(6) For that on the facts, and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that retrospective provision in a tax Act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood.

(7) For that on the facts, and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the disallowance made by the AO under section 14A of the Act read with Rule 8D of the Rules contending that such disallowance was to be made even where exempt income has not been earned relying on the Circular No. 5/2004 dated 11 February 2014.

(8) For that on the facts, and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the computation of disallowance by the Ld. AO under section 14A of the Act read with Rule 8D of the Rules after taking into account all investments instead of only those investment from which exempt income is earned.

(9) For that on the facts, and in the circumstances of the case and in law, the Ld. CIT(A) erred in not taking into consideration various judicial precedents relied upon by the appellant wherein it has been held that in absence of any exempt income, disallowance could not be made under section 14A of the Act read with Rule 8D of the Rules.

(10) For that the appellant craves leave to amend, add, delete, replace, alter, vary or withdraw any or all the grounds of appeal either during the course of hearing or at any time before hearing of this appeal."

It is seen that all the grounds of appeal challenge the action of the authorities below though they contain nuanced differences for averring that the action of authorities below was not in consonance with law.

2. Before us, the ld. A/R has filed a detailed paper book comprising of audited accounts, responses to notices issued by the authorities below etc. and also a compendium of case laws on the subject. The ld. A/R forcefully argued that the appellant had duly added back a substantial amount of Rs. 19,03,542/- u/s 14A of the Act read with Rule 8D of the Rules and argued that no other disallowance was possible within the extant provisions. The ld. A/R also relied on a number of authorities, copies of which have been placed on record, to canvas the point of there being no possibility of addition beyond whatever was already done by the assessee since such disallowance was made on the entire quantum of exempt income earned by the appellant.

2.1. The ld. D/R relied on the language and intent of CBDT Circular *(supra)*, and argued that even those investments which did not yield any exempt during the year under consideration, would be subjected to Rule 8D of the Rules. He also supported the action of ld. CIT(A) in interpreting the explanation inserted in section 14A of the Act as having a retrospective effect.

3. We have carefully considered the rival submissions, the documents placed before us and the orders of the authorities below. Right at the outset, it needs to be mentioned that this case has to be decided in favour of the assessee as there are considerable number of authorities on the issue whether there can be application of Section 14A of the Act read with Rule 8D of the Rules even when no income is earned from investments. In a Coordinate Bench case of *Elegant Dealmark Pvt. Ltd. vs.* ITO in *ITA No. 51/KOL/2024* order dated 21.08.2024 this issue has been decided in favour of the assessee and relevant portions deserve to be extracted as under:

> *"3. Regarding the addition of Rs. 9,647/- made u/s 14A of the Act read with Rule 8D of the Rules, it is evident that the appellant has not earned any exempt income this year and thus, relying on the findings in the case of (i) Eveready Industries India Ltd. vs. PCIT reported in [2020] 114 taxmann.com 610 (Kolkata - Trib.), (ii) PCIT vs. Vardhman Chemtech (P.) Ltd. reported in [2020] 423 ITR 241 (Punjab & Haryana) and in the case of (iii) ERA Infrastructure (India) Ltd. reported in 448 ITR 674 (Delhi)[20-07-2022], the appellant deserves relief. The relevant extracts from the three authorities are as under:*
>
> *(i) Eveready Industries India Ltd.:*

"33. From the assessment order as also from the facts on record it appeared that during the relevant year the appellant did not earn any dividend from its investments made in shares of other bodies corporate. We also note that barring investment of about Rs.5 lacs, the investments held by the appellant were in foreign subsidiaries from which no exempt dividend could have been earned. We also note that in the course of assessment the AO had specifically required the assessee to explain why disallowance u/s 14A of the Act should not be made. The assessee vide its letter dated 14.12.2016 had explained before the AO that no disallowance u/s 14A was warranted since during the relevant year it did not earn any tax free dividend. The relevant letter is available at Page 23 of the paper book. After considering the submissions of the assessee, the assessment order was passed u/s 143(3) of the Act in which no disallowance u/s 14A was made. We thus find that it was not a case where the aspect of disallowance u/s 14A was not enquired into by the AO prior to completion of assessment. We also find that the view entertained by the AO for not making disallowance u/s 14Aof the Act, in absence of earning of tax free dividend, was in consonance with the judicial view expressed by the High Courts at Calcutta, Delhi, Gujarat, Madras& Allahabad. The relevant citations are as follows:

- CIT v. Ashika Global Securities Ltd. [GA No. 2122 of 2014, dated 11-6-2018]

- Cheminvest Ltd. v. CIT [2015] 61 taxmann.com 118/234 Taxman 761/378 ITR 33 (Delhi)

- Pr. CIT v. IL & FS Energy Development Co. (P.) Ltd. [2017] 84 taxmann.com 186/250 Taxman 174/399 ITR 483 (Delhi)

- CIT v. Corrtech Energy (P.) Ltd. [2014] 45 taxmann.com 116/223 Taxman 130/[2015] 372 ITR 97 (Guj.)

- CIT v. Shivam Motors (P.) Ltd. [2015] 55 taxmann.com 262/230 Taxman 63 (All.)

- Redington India Ltd. v. Addl. CIT [2017] 77 taxmann.com 257/392 ITR 633 (Mad.)

34. For the reasons set out above we therefore hold that the assessment order passed by the AO in which no disallowance u/s 14Aof the Act was made, could not said to be unsustainable in law because the course adopted by the AO while passing the order u/s 143(3) of the Act was not only permissible in law but the said course was in conformity with the view expressed by the jurisdictional high court. Accordingly the impugned order of the Ld. Pr. CIT with reference to the reasons set out in clause (c) of the SCN is held to be unsustainable and accordingly set aside. Ground Nos. 8 & 9 are therefore allowed."

(ii) Vardhman Chemtech (P.) Ltd.:

"■ Section 14A provides for disallowance of expenditure in relation to income not 'includible' in total income. [Para 7]

■ The Tribunal while relying upon the judgment of this Court in CIT v. Lakhani Marketing Inc. [2014] 49 taxmann.com 257/226 Taxman 48 (Punj. & Har.) (Mag.) had held that section 14A cannot be restored to in the year in which no exempt income had been earned. However, the revenue relied upon the CBDT Circular dated 11-2-2014 to contend that section 14A can be invoked even in the year in which no exempt income had been earned. Accordingly, the Tribunal had dismissed the appeal of the revenue holding that unless and until there is receipt of exempted income for the concerned assessment year, section 14A is not attracted. [Para 11]

■ The Tribunal had, regarding the ground of deletion of disallowance amounting to Rs. 40.29 lakhs under section 14A, recorded that there was no infirmity in the order of the Commissioner (Appeals), who deleted the disallowance made following the decision of the jurisdictional High Court in the case of Lakhani Marketing Inc. (supra). The argument of the revenue that the CBDT Circular No. 5/2014, dated 11-2-2014 stating that even in the absence of any exempt income disallowance under section 14A had to be made, is binding on the revenue authority, had no merit. [Para 12]

■ No illegality or perversity could be demonstrated by the Revenue in the aforesaid findings recorded by the Tribunal. [Para 13]

■ Thus, the substantial question of law as claimed is to be answered accordingly and the appeal is to be dismissed. [Para 15]"

(iii) ERA Infrastructure (India) Ltd.:

Section 14A of the Income-tax Act, 1961, read with rule 8D of the Income-tax Rules, 1962 - Expenditure incurred in relation to income not includible in total income (Computation of disallowance) - Assessment year 2013-14 - Whether in relevant assessment year, no disallowance could be made under section 14A if no exempt income was earned by assessee - Held, yes [Paras 9 and 10] [The Hon'ble High Court relied on the order in the case of IL & FS Energy Development Co. Ltd. and Cheminvest Ltd. v. CIT [2015] 378 ITR 33 (Delhi).]

3.1. Accordingly, the appellant gets relief on this point and the addition of Rs. 9,647/- is directed to be deleted."

It also deserves to be mentioned that in the case of *Era Infrastructure (supra)* it has been held that the insertion of Explanation to Section 14A of the Act shall not apply retrospectively. Apart from this, a recent judgment by the Hon'ble Jurisdictional High Court in the case of *Pr. CIT vs. Avantha Realty Ltd.* reported in *[2024] 164 taxmann.com 376 (Calcutta)* also deserves to be considered. Some portions from the head notes may be reproduced to

conclusively decide this issue in favour of the assessee. The relevant extract is as under:

> *"FACTS III*
>
> ■ *In the assessment year 2004-05 the AO made disallowance under section 14A in terms of amended provisions of section 14A.*
>
> ■ *The Tribunal deleted said disallowance.*
>
> ■ *On revenue's appeal:*
>
> *HELD III*
>
> ■ *The Tribunal took note of the decision of the High Court of Delhi in Pr. CIT (Central) v. Era Infrastructure (India) Ltd. [2022] 141 taxmann.com 289/288 Taxman 384/448 ITR 674, which had taken note of the decision in the case of Cheminvest Ltd. v. CIT-IV [2015] 61 taxmann.com 118/234 Taxman 761/378 ITR 33 (Delhi), wherein it was held that amendment by the Finance Act, 2022 of Section 14A by inserting a non-obstante clause and explanation would take effect from 01.04.22 and could not be presumed to have retrospective effect and, therefore, on facts the amendment could not be applied to the assessment year under consideration. There was find no error in such conclusion arrived at by the Tribunal. [Para 9]*
>
> ■ *Accordingly, the appeal is decided against the revenue. [Para 10]"*

3.1. Considering the discussions above, the grounds raised by the assessee are allowed.

4. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 11th September, 2024.

Sd/-	*Sd/-*
[**Sonjoy Sarma**]	[**Sanjay Awasthi**]
Judicial Member	Accountant Member

Dated: 11.09.2024

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***New India Retailing & Investment Ltd., Birla Building, 5th Floor, 9/1, R.N. Mukherjee Road, Kolkata, West Bengal, 700001.***
2. ***DCIT, Circle-5(1), Kolkata.***
3. CIT(A)-NFAC, Delhi.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata