

**IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI**

**BEFORE MS. KAVITHA RAJAGOPAL, JM AND  
SHRI GIRISH AGRAWAL, AM**

ITA No. 582/Mum/2024  
(Assessment Year:2017-18)

Dy. CIT-8(3) Room No. 656, 6 <sup>th</sup> Floor, Aayakar Bhavan, Mumbai-400 020	Vs.	Rosy Blue (India) Private Limited 1608/09, Prasad Chambers, Tata Road No.2, Opera House, Mumbai-400 004
PAN/GIR No.AACCR 2413 B		
(Assessee)	:	(Respondent)
Assesseeby	:	ShriNitesh Joshi, Ashwin Kasinath
Respondent by	:	Smt. Mahita Nair
Date of Hearing	:	18.06.2024
Date of Pronouncement	:	16.09.2024

**ORDER**

**Per Kavitha Rajagopal, J M:**

This appeal has been filed by the Revenue, against the order of the learned Commissioner of Income Tax (Appeals)(‘Id.CIT(A) for short),National Faceless Appeal Centre (‘NFAC’ for short) passed u/s.250 of the Income Tax Act, 1961 (‘the Act’), pertaining to the Assessment Year (‘A.Y.’ for short) 2017-18.

2. The Revenue has raised the following grounds of appeal:

1. *"Whether in the facts and the circumstances of the case and in law, the Ld.CIT(A) is justified in deleting the disallowance of Rs.43,80,316/- on account of depreciation on Factory premises when the said premises along with all its fixtures is being used by agencies to whom job work is outsourced by the assessee?"*

(Tax Effect: Rs. 14,88,869/-1

2. *"Whether in the facts and the circumstances of the case and in law, the Ld.CIT(A) is justified in restricting the disallowance u/s 14A r.w.r Rule BD made by the Assessing Officer to Rs.8,17,171/- without appreciating the fact that the disallowance u/s 14A of the Income-tax Act, 1961 has been carried out as per the formula laid down in Rule BD of the Income tax Rules and by following the CBDT Circular No. 5/2014 dated 11/02/2014 wherein it had been held that*

*disallowance u/s 14A r.w.r 8D can be even made when the assessee had not earned any exempt income during the year."*

3. *"Whether in the facts and the circumstances of the case and in law, the Ld. CIT(A) is justified in holding that the disallowance u/s 14A r.w.r Rule 8D should be restricted to the extent of the exempt income earned during the year and failing to appreciate that the provisions of section 14A clearly stipulates that expenditure incurred in relation to income "not includible in total income has to be considered for computing the disallowance u/s 14A?"*

4. *"Whether in the facts and the circumstances of the case and in law, the Ld.CIT(A) is justified in holding that the disallowance u/s 14A r.w.r Rule SD should be restricted to the extent of the exempt income earned during the year, whereas in Finance Act 2022, explanation to section to 14A has been inserted which provides that of the applicability of the said section even in the absence of exempt income, and which being clarificatory in nature has retrospective effect".*

*(Tax Effect: Rs.49,44,650/-)*

3. Brief facts of the case are that the assessee company is engaged in the business of manufacturing of cut and polished diamonds on job work basis and had filed its return of income for the year under consideration on 30.11.2017, declaring total income at Rs.38,04,98,380/- under the normal provisions and book profit u/s. 115JB at Rs.39,18,31,464/-. The return was processed u/s. 143(1) and the assessee's case was selected for scrutiny under CASS and notices u/s. 143(2) and 142(1) of the Act were duly issued and served upon the assessee.

4. The learned Assessing Officer (ld. A.O. for short) then passed the assessment order u/s. 143(3) of the Act dated 26.12.2019, determining the total income at Rs.39,94,26,059/-, after making an addition/disallowance on the depreciation claimed by the assessee amounting to Rs.43,80,316/- and disallowance u/s. 14A amounting to Rs.1,45,47,364/-.

5. Aggrieved the assessee was in appeal before the first appellate authority who vide order dated 28.11.2023 had allowed the appeal filed by the assessee, thereby deleting the impugned additions made by the ld. A.O.

6. The Revenue aggrieved by the said order, is in appeal before us, challenging the order of the Id. CIT(A).

7. Ground no.1 of the Revenue's appeal is on the depreciation claimed by the assessee on the factory premises owned by the assessee situated at Kandiwali (E), which was used for diamond cutting and polishing activities through job contractors. The assessee contends that the said premise is used by the assessee for its own business for which the assessee claims depreciation @ 10% on the block of assets, comprising of immovable assets, including the said premises. The assessee further contended that the job work done by the contractors by utilizing the place, machinery and other utilities by providing man power and carrying manufacturing activities is done exclusively for the assessee for past several years. The Id. A.O. by following the earlier orders disallowed Rs.43,80,316/-out of the depreciation claimed by the assessee on the ground that it was a leased premises for which the assessee is not the owner and hence, cannot claim depreciation on the same.

8. The Id. CIT(A), on the other hand, allowed the assessee's claim by following the co-ordinate bench decision in the earlier years for A.Ys. 2010-11 and 2012-13 which has held that the assessee to be the owner and the said premises is used for manufacture of rough diamonds for the assessee's captive consumption and was, therefore, entitled to the depreciation claimed by it.

9. In the above factual matrix of the case, it is observed that the co-ordinate bench in assessee's case for A.Ys. 2010-11 to 2012-13 has decided this issue in favour of the assessee by holding that the factory premises is owned by the assessee and was utilized

for the business activity of the assessee, i.e., cutting and polishing of diamonds which was done by outsourcing the said activities by way of job work from various contractors. The Tribunal further held that the contractors did not have any right or control over the premises and that the entire activity was carried out under the supervision and control of the assessee. The relevant extract of the said decision is cited herein under for ease of reference:

*11. After hearing both the parties and on perusal of the material on record, we find that it is an undisputed fact that the factory premises belong to the assessee, for its own business activity of manufacturing, i.e., cutting and polishing of diamonds, assessee has outsourced the said activity to two entities who have carried out the job work from the said premises. Not only that, the plant and machinery installed therein also belongs to the assessee company on which depreciation has already been allowed by the Assessing Officer for which there is no dispute. Nowhere the job workers or contractors had any right or control over the premises albeit the entire activity carried out by them was under superintendence and control of the assessee company. Thus, it cannot be held that the agreement between the said party and assessee company is tenancy agreement Rs.24,000/- annually for such a huge premises of 58905 sq. ft. in such a prime location cannot be said to be rental value and same cannot be equated with tenancy. We do not find any infirmity in the order of the ld. CIT(A) that if the assessee is owner of the premises and the said premises is used for manufacturing of rough diamonds and cutting and polishing for its own captive consumption, depreciation of said factory premises cannot be disallowed. Accordingly, the order of ld. CIT(A) is confirmed and ground nos. 1 & 2 raised by the Revenue is dismissed.*

10. As this issue has already been dealt with by the Tribunal and has been followed consistently in the other years and with no change in facts and circumstances of the case, we find no infirmity in the order of the ld. CIT(A). We, therefore, dismiss ground no. 1 raised by the Revenue.

11. Ground nos. 2 to 4 pertains to the disallowance made u/s. 14A where the ld. A.O. has disallowed Rs.1,45,47,364/- u/s. 14A r.w.r 8D after considering the *suo moto* disallowance of Rs.8,17,171/- made by the assessee. It is observed that the assessee had earned dividend income of Rs.3 lacs and had earned share of profit from investment amounting to Rs.5,17,171/- which was claimed as exempt income by the assessee. The

assessee had made *suo moto* disallowance of Rs.8,17,171/-u/s. 14A of the Act and contended that the assessee being not in the business of investment did not incur any expenditure which was attributable to earning of any exempt income. The Id. A.O. not satisfied with the computation of the assessee invoked section 14A r.w.s. 8D and made the impugned disallowance. The Id. CIT(A), on the other hand, restricted the disallowance to Rs.81,7,171/- to the extent of earning of the exempt income by relying on the decision of the co-ordinate bench in assessee's case for A.Ys. 2010-11 to 2012-13 and had also considered the decision of the Hon'ble Delhi High Court in the case of *Pr. CIT (Central) vs. Era Infrastructure Ltd.* 141 taxmann.com 879 (Delhi).

12. The Revenue is in appeal before us, challenging the order of the Id. CIT(A) in restricting the disallowance to Rs.8,17,171/-.

13. Having heard both the rival contentions, it is observed that the assessee had made total investment of Rs.153,64,53,488/- during the year under consideration where the Id. A.O. had disallowed 1% on the annual average of monthly averages of the opening and closing balances of the value of the investment as per Rule 8D(2)(ii) of the I. T. Rules and computed a disallowance of Rs.1,53,64,535/- and after considering the *suo moto* disallowance of Rs.8,17,171/- determined the total disallowance at Rs.1,45,47,364/-. The Id. CIT(A) had restricted the disallowance to the exempt income. The Revenue had relied on the amendment brought about by the Memorandum of Finance Bill 2022 to section 14A where the *Explanation* to the said provision reads as under:

*Expenditure incurred in relation to income not includible in total income.*

14A. ....

*Explanation.—For the removal of doubts, it is hereby clarified that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed*

*to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income.*

14. From the above, it is evident that the amendment brought about to section 14A vide Finance Act, 2022 clarifies that the said provision shall apply and shall be deemed to have always applied in cases where the exempt income whether or not have accrued or arisen or has not been received during the previous year and where the expenditure has been incurred pertaining to such exempt income. It is pertinent to point out that the said amendment is applicable w.e.f. 01.04.2022 which relates to A.Y. 2022-23 onwards and not to the prior assessment years. The Hon'ble High Court of Delhi has also given a categorical finding that the said provision will not have a retrospective effect. As the year under consideration in the present case is A.Y. 2017-18, the same does not apply in case of the assessee and the present position where the disallowance is to be restricted only to the extent of the exempt income holds good in the present case. The relevant extract of the said decision is cited herein under for ease of reference:

5. *However a perusal of the Memorandum of the Finance Bill, 2022 reveals that it explicitly stipulates that the amendment made to section 14A will take effect from 1st April, 2022 and will apply in relation to the assessment year 2022-23 and subsequent assessment years. The relevant extract of Clauses 4, 5, 6 & 7 of the Memorandum of Finance Bill, 2022 are reproduced hereinbelow:*

*"4. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert an Explanation to section 14A of the Act to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income.*

*5. This amendment will take effect from 1st April, 2022.*

*6. It is also proposed to amend sub-section (1) of the said section, so as to include a non-obstante clause in respect of other provisions of the Income-tax Act and provide that no deduction shall be allowed in relation to exempt income, notwithstanding anything to the contrary contained in this Act.*

7. This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years." (emphasis supplied)

6. Furthermore, the Supreme Court in *Sedco Forex International Drill. Inc. v. CIT*[2005] 149 Taxman 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 changes the law as it earlier stood.

15. From the above, it is inferred that this issue is no longer *resintegra* and has been decided in favour of the assessee in assessee's own case for earlier years and also in various other decisions. We, therefore, find no infirmity in the order of the Id. CIT(A) and, hence, deem it fit to dismiss the ground nos. 2 to 4 raised by the Revenue.

16. In the result, the appeal by the Revenue is dismissed.

*Order pronounced in the open court on 16.09.2024*

Sd/-

Sd/-

(Girish Agrawal)

(Kavitha Rajagopal)

Accountant Member/Judicial Member

Mumbai; Dated : 16.09.2024

Roshani, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. CIT- concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)

ITAT, Mumbai