

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI**

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जगदीश, लेखा सदस्य के समक्ष
**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI JAGADISH, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.: **934 & 935/CHNY/2022**
निर्धारण वर्ष/Assessment Year: 2018-19

**Asianet Star Communications
Pvt. Ltd.,**
Plot No.22, Kochar Jade,
Thiru-vi-ka Industrial Estate,
Guindy, Chennai – 600 032.

**The Assistant Commissioner
of Income Tax,**
Non-Corporate Circle 10(1),
Chennai.

PAN: AAACV 4918P

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Porus F Kaka, Senior Advocate
Shri Divesh Chawla, Advocate
प्रत्यर्थी की ओर से/Respondent by : Ms. R. Anita, Addl.CIT
सुनवाई की तारीख/Date of Hearing : 16.10.2024
घोषणा की तारीख/Date of Pronouncement : 18.10.2024

आदेश / O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

These appeals by the assessee are arising out of two different orders of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi in Order No.ITBA/NFAC/S/250/2022-23/1045220218 (1) & 1045219605(1) both dated 06.09.2022. The assessment was framed by the Assessing Officer, National Faceless Assessment Centre, Delhi for the

assessment year 2018-19 u/s.143(3) r.w.s.144B of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 30.06.2021. The rectification order u/s.154 of the Act was framed by the ACIT, Non-Corporate Circle 10(1), Chennai vide dated 30.11.2021.

ITA No.935/CHNY/2022

2. The first issue in this appeal of assessee is as regards to order of CIT(A)-NFAC confirming the disallowance made by AO in relation to expenses relatable to exempt income by invoking the provisions of section 14A of the Act read with Rule 8D of the Rules without recording satisfaction. For this, assessee has raised various grounds which need not be reproduced because those are argumentative and exhaustive.

3. Brief facts of the case are that the AO during the course of assessment proceedings noticed that the assessee has earned exempt income u/s.10 of the Act being dividend income of Rs.86,86,26,570/-. The AO noted that the assessee has not incurred any expenditure in relation to earning of exempt income but assessee suo-moto disallowed an amount of Rs.10,37,271/- u/s.14A of the Act that was incurred in relation to earning of exempt income. The AO noted that the suo-moto disallowance of expenditure is found not satisfactory as the disallowance of expenditure was not

determined in accordance with the prescribed method as provided in Rule 8D(2)(ii) of the Rules and made disallowance of Rs.5,38,25,729/- after deducting suo-moto disallowance made by AO of Rs.10,37,271/-. Aggrieved against disallowance, assessee preferred appeal before CIT(A). The CIT(A) also confirmed the action of the AO. Aggrieved, now assessee is in appeal before the Tribunal.

4. We have heard rival contentions and gone through facts and circumstances of the case. Admittedly, the assessee has earned dividend income of Rs.86,86,26,570/- from its subsidiary Asianet Communications Pvt. Ltd., by way of dividend income which is exempt u/s.10(38) of the Act. The assessee has also made suo-moto disallowance for an amount of Rs.10,37,271/- as expenses that were incurred in relation to earning of this exempt income. The assessee's counsel Shri Porus F Kaka now argued that the assessee before AO filed books of accounts and also filed the details of expenses relatable to exempt income which was disallowed suo-moto, the details of which are enclosed at page 143 of assessee's paper-book. The Id.counsel for the assessee submitted that the assessee has received dividend income only from its subsidiary Asianet Communications Pvt. Ltd., and that also through RTGS. He gave justification for suo-moto disallowance of Rs.10,37,271/- and

the AO has nowhere find fault in the suo-moto disallowance made by the assessee and even the AO has not gone into the details of expenses incurred by assessee and disclosed in its books of accounts which has correlation with the exempt income. In the absence of such finding that any expenditure claimed by assessee has any relation with the exempt income and without recording satisfaction, the disallowance is bad in law. For this, he relied on the decision of Hon'ble Madras High Court in the case of CIT vs. Celebrity Fashion Limited reported in 119 taxmann.com 426. When it was pointed out that before Hon'ble Madras High Court, the issue was only that there is no exempt income, he referred to the decision of Co-ordinate Bench of this Tribunal in the case of BNY Mellon Technology Pvt. Ltd., vs. DCIT in ITA No.712/CHNY/2018, order dated 27.10.2022 and stated that the Co-ordinate Bench has considered exactly the same issue of non-recording of satisfaction and has dealt with the issue and held that once the suo-moto disallowance remained undisturbed and which has been estimated on a scientific basis, for further disallowance the AO has to record satisfaction qua the assessee's accounts that assessee has incurred more expenditure. For this, the Id.counsel also relied on the decision of Hon'ble Supreme Court in the case of Maxopp Investment Ltd., vs. CIT reported in 402 ITR 640.

5. In reply, the Id. Senior DR stated that the AO has specifically recorded satisfaction and she drew our attention to para 4.1 and further took us through paras 4.6.2, 4.6.3 and 4.6.4 as under:-

“4.6.2 On careful consideration of the facts and circumstances of the case, and taking into consideration the fact that some indirect expenses which got proximate nexus with earning of exempt income ought to have been incurred necessarily by the assessee in respect of exempt income yielding investments, the assessing officer thought it fit to invoke the provisions of section 14A of the Act.

4.6.3 Necessary satisfaction as envisaged by the Supreme Court in the case of Godrej & Boyce Manufacturing Company Limited reported in 394 ITR at Pp.449 was recorded by the assessing officer at preceding paras of the order keeping in view the fact that the suo-moto disallowance made by the assessee is not in accordance with the method prescribed in amended Rule 8D(2) (w.e.f. 02.06.2016). Further, the assessee while doing so, ignored Rule 8D(ii). Thus, the assessee did not address the issue of computation of the second limb (i.e. ii) of amended Rule 8D.

4.6.4 The ratio of the case laws cited by the assessee are distinguishable on two counts namely non recording of satisfaction by the assessing officer and the suo-moto working of disallowance by the assessee. In the instant case of the assessee, the assessee neither disallowed expenses u/s 14A of the Act in accordance with the method prescribed in amended Rule 8D(2) (w.e.f. 02.06.2016) nor provided any scientific and reasonable basis for non application of the provisions of section 14A of the Act.”

In view of the above, the Id.Senior DR stated that the AO has categorically recorded satisfaction that the assessee has incurred some indirect expenses which got proximate in connection with earning of exempt income, have necessarily been incurred by the assessee in respect of exempt income yielding investment and

therefore, it is a fit case for invoking the provisions of section 14A r.w.Rule 8D(2) of the Rules.

6. We have gone through the assessment order, the order of CIT(A) and the arguments of both the sides. From the assessment order, we could not make out that the AO has recorded the fact that any expenditure booked by assessee in P&L account has any nexus with the earning of exempt income. Moreover, the assessee has filed the basis of disallowance u/s.14A of the Act, which is enclosed in assessee's paper book at page 143 and the relevant reads as under:-

Basis for disallowance under section 14A for AY 2018-19

Amount in INR

<i>Particulars</i>	<i>FY 2017-18</i>	<i>% of disallowance</i>	<i>Amount disallowed</i>
<i>Demat charges</i>	<i>65,550</i>	<i>100%</i>	<i>65,550</i>
<i>Company Secretarial fees</i>	<i>54,100</i>	<i>2%</i>	<i>1,082</i>
<i>Salary cost of Finance team / Legal team</i>	<i>4,85,31,962</i>	<i>2%</i>	<i>9,70,639</i>
<i>Total</i>	<i>2,26,59,677</i>		<i>10,37,271</i>

We noted that the AO has nowhere negated the suo-moto disallowance made by assessee and he has not examined the expenditure incurred by the assessee and claimed in the profit & loss account or in the books of accounts and reached to a satisfaction that any amount is disallowable. Simpliciter the AO cannot give a finding that the assessee might have incurred some expenditure and

he has to make disallowance under the prescribed Rule 8D(2) of the Rules. We noted that the Hon'ble Supreme Court in the case of Maxopp Investment Ltd., *supra*, has considered this issue and finally held as under:-

41) Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO.

Further, we noted that the Tribunal in the case of BNY Mellon Technology Pvt. Ltd., *supra* has considered exactly identical issue and held in para 4 & 5 as under:-

“4. It could be seen that Ld.AO has merely estimated indirect expenditure u/r 8D(2)(iii) @ 0.5% of average investments and has not made assessment year interest disallowance u/r 8D(2)(ii). Clearly, Ld.DRP has gone on wrong presumption of facts. Further, it could also be seen that the assessee has not offered any suo-moto disallowance and therefore, the plea of non-recording of objective satisfaction would lose relevant on the facts of the case.

5. Proceeding further, we find that the assessee has made an estimate on a scientific basis and compute disallowance of Rs.8,62,650/- which has remained undisturbed. The application of Rule 8D is not mechanical. Therefore, in our considered opinion, the working of the assessee is to be accepted and the disallowance is to be restricted to the extent of Rs.8,62,650/- while computing income under normal provisions. We order so.”

6.1 In view of the above facts, the case law cited and the fact that the AO has not examined the books of accounts for recording of satisfaction that which expenditure is relatable to exempt income, without reaching to a satisfaction, the AO cannot invoke the provision of section 14A r.w.Rule 8D of the Rules because the provision of section 14A(2) of the Act prescribes as under:-

14A....

(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.

6.2 The Id.counsel also drew our attention to Rule 8D(1) which empower the AO for invoking the prescribed formula but this Rule 8D(1) categorically stated that the AO having regard to the accounts of the assessee has to satisfy with the correctness of the claim of expenditure made by the assessee or the claim made by assessee that no expenditure has been incurred is correct or not. In case, he is not satisfied he can invoke the prescribed formula under Rule 8D(2) for making disallowance u/s.14A of the Act i.e., expenses relatable to exempt income. The relevant Rule reads as under:-

8D (1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with-

- (a) the correctness of the claim of expenditure made by the assessee; or*
- (b) the claim made by the assessee that no expenditure has been incurred,*

in relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).

6.3 In view of the combined reading of provisions of section 14A(2) r.w.Rule 8D(1) makes it clear that before applying formula under Rule 8D(2), the AO has to record a satisfaction as to the fact that suo-moto disallowance made by assessee is not correct or having regard to accounts of the assessee, the accounts of the assessee shows that there is some expenditure relatable to exempt income. In term of the above, we find that in the present case, the AO has not recorded such satisfaction and hence, the invocation of provisions of section 14A r.w.rule 8D(2) of the Rules, is bad in law. Hence, we delete the disallowance and allow this issue of assessee's appeal.

7. The second issue in this appeal of assessee is as regards to the order of CIT(A)-NFAC confirming the action of AO in failing to consider the appointed date of merger of Asianet Communications Pvt. Ltd., with Asianet Star Communications Pvt. Ltd., which has been determined by National Company Law Tribunal (NCLT) and therefore, not allowing appropriate claim of credit of taxes deducted at source or taxes paid in advance. For this, assessee has raised

various grounds which are argumentative and hence, need not be reproduced.

8. We have heard rival contentions and gone through facts and circumstances of the case. Before us, the Id.counsel for the assessee stated that the assessee's subsidiary Asianet Communications Pvt. Ltd., merged with the assessee in term of NCLT order dated 30.07.2018 approving the scheme of amalgamation. The Id.counsel stated that the order of NCLT is enclosed at pages 301 to 309 of assessee's paper-book and the scheme of amalgamation is also enclosed at pages 277 to 299 of assessee's paper-book. The Id.counsel for the assessee stated that the assessee has included the profits earned by Asianet Communications Pvt. Ltd., while filing its return of income for the relevant assessment year 2018-19 from 01.10.2017 in its return of income and also claimed credit of proportionate advance tax and taxes deducted at source by Asianet Communications Pvt. Ltd., for the reason that the assessee has offered the profit before tax in the ratio in the return of income of the assessee and Asianet Communication s Pvt. Ltd. The Id.counsel for the assessee stated that the AO and the CIT(A) has only allowed the claim of assessee from the effective date whereas the assessee has claimed from the appointed date of scheme. The Id.counsel for the assessee drew our

attention to the NCLT order para 7 clause (m), which is approved by NCLT vide order dated 30.07.2018 and the same reads as under:-

“(m) The Scheme is sanctioned hereby, and the appointed date of the Scheme is fixed as 1st October, 2017.”

The Id.counsel for the assessee also drew our attention to clarification issued by NCLT vide para 7 clause (p) and the same reads as under:-

“(p) It is further clarified that for the period between the Appointed Date and Effective Date the business of the Transferor Company shall be carried out by the Transferor Company in trust and for and on behalf of the Transferred Company.”

He stated that the NCLT had clarified that the period between appointed date and effective date, the business of Transferor Company shall be carried out by the Transferor Company in trust and for and on behalf of the Transferee Company. It means that the merger or amalgamation is with effect from the appointed date i.e., 01.10.2017. The Id.counsel for the assessee for this relied on the decision of Hon'ble Supreme Court in the case of Marshall Sons & Co. (India) Ltd., vs. ITO reported in [1997] 223 ITR 809.

9. On the other hand, the Id. Senior DR stated that the effective date is to be taken and the AO and CIT(A) has rightly taken the effective date and this has been clarified in the Circular issued by the

Ministry of Corporate Affairs in F.No.7/12/2019/CL-I dated 21st August, 2019, wherein the decision of Marshall Sons & Co. (India) Ltd., *supra* has been considered. She relied on the relevant circular.

10. We noted that the Hon'ble Supreme Court in the case of Marshall Sons & Co. (India) Ltd., *supra*, has considered this issue and considered that the appointed date is the deciding factor unless and until changed by High Court or Company Court like NCLT. This issue has been dealt by Hon'ble Supreme Court in para 12 as under:-

"12. Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide viz., January 1, 1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it - as has happened in this case - it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the court may take some time; indeed, they are bound to take some time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with affect from the transfer date, the Transferor Company (Subsidiary Company) shall be deemed to have carried on the

business for and on behalf of the Transferee Company (Holding Company) with all attendant consequences. It is equally relevant to notice that the Courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income Tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the Transferor Company (Subsidiary Company) should be deemed to have been carried on for and on behalf of the Transferee Company. This is the necessary and the logical consequence of the court sanctioning the scheme of amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of the certified copies of the orders of the court before the Registrar of Companies, the allotment or shares etc. may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. The Bank of Upper India Ltd. A.I.R.1919 P.C.9.”

We also noted that the NCLT has considered this issue and the scheme is sanctioned and the appointed date of scheme is fixed as on 01.10.2017 and that date is effective date. The NCLT has further clarified the rights of Transferee Company and that is effective from 01.10.2017 i.e., the appointed date. We, going by the facts of the case are of the view that the appointed date i.e., 01.10.2017 is the crucial date for deciding the same and assessee has only claimed the proportionate credit of taxed deducted at source and advance tax paid because the assessee has included the profit earned by Asianet Communications Pvt. Ltd., from 01.10.2017 in its return of income. Hence, we direct the AO to allow the credit for proportionate

advance tax and taxes deducted at source by Asianet Communications Pvt. Ltd. Hence, this issue of assessee's appeal is also allowed. Accordingly, the appeal of the assessee is allowed.

11. As regards to **ITA No.934/CHNY/2022**, at the outset, the Id.counsel for the assessee stated that this appeal is filed against the rejection of application of the assessee u/s.154 of the Act by the AO and confirmed by the CIT(A). Since the main appeal in ITA No.935/CHNY/2022 against the order u/s.143(3) of the Act is decided, this has become infructuous and hence, dismissed as infructuous.

12. In the result, the appeals filed by the assessee in ITA No.934/CHNY/2022 is dismissed and ITA No.935/CHNY/2022 is allowed.

Order pronounced in the open court on 18th October, 2024 at Chennai.

Sd/-

(जगदीश)

(JAGADISH)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai,

दिनांक/Dated, the 18th October, 2024

RSR

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त /CIT, Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF.