

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri N. V. Vasudevan, JM & Shri M. Balaganesh, AM]

I.T.A No.2278/Kol/2013
Assessment Year: 2008-09

GVN Fuels Ltd.
(PAN: AAACG9200D)
(Appellant)

Vs. Deputy Commissioner of Income-tax,
Cir-1, Kolkata
(Respondent)

Date of hearing: 17.05.2016
Date of pronouncement: 25.05.2016

For the Appellant: Shri Sunil Surana, FCA
For the respondent: Md. Ghayas Uddin Ansari, JCIT, Sr. DR

ORDER

Per Shri M. Balaganesh, AM:

This appeal by assessee is arising out of order of CIT(A)-XXIV, Kolkata vide Appeal No. 1139/CIT(A)-XXIV/C-1/12-13 dated 20.05.2013. Assessment was framed by DCIT, Circle-1, Kolkata u/s. 143(1) of the Income tax Act, 1961 (hereinafter referred to as the “Act”) for AY 2008-09 vide his order dated 06.12.2010.

2. The only issue to be decided in this appeal is as to whether disallowance u/s. 14A of the Act could be made in the facts and circumstances of the case.

3. Brief facts of this issue are that the AO observed that assessee had earned dividend income to the tune of Rs.13,83,515/-. The position of own capital, unsecured loans and investments as on 31.03.2008 as under:

	31.03.2008 (Rs. In crore)
Own fund (capital & Reserve)	19.20
Unsecured Loans	31.26
Investments	68.71

It is, therefore, apparent that the unsecured loans have been utilized for investment in shares. Accordingly, Sec. 14A of the Act is attracted in the instant case and the expense relatable to exempt income is liable to be disallowed.

The assessee company in its computation of taxable income has arrived at a figure of Rs.14,62,379/- as relatable to exempt dividend income based on scrip wise allocation of

expenses on account of interest, which resulted in long term Profit/Loss and dividend income during the relevant financial year.

Following calculation was shown by the assessee company in its computation:

D. P. Charges (100%)		14123/-
Interest *		1360459/-
Employees remuneration (10%)		82275/-
Other Admissible Expenses (10%)		
Printing & Stationery	524/-	
Telephone	6200/-	
Travelling	48388/-	
Miscellaneous	109/-	
	<u>55221/-</u>	<u>55221</u>
		<u>1462379/-</u>

* For interest calculated at Rs.13,60,459/- above, the assessee submitted the following calculation sheet.

Particulars	Dt. Of purchase	Dt. Of sale	Amount	Days	Total Interest thereon
Haryana Capfin	01.04.2007	06.09.2007	10076160	158	479791/-

Composition of fund (Liability side as on 01.04.07)

		Ratio		
Own Capital on 01.04.2007	193132005	63.40%		
Current Liabilities	11242607	3.69%		
Loan on 01.04.2007	100249343	32.91%		
	<u>304623955</u>	<u>100.00%</u>		

Basis of calculation

1. Haryana Scrip was sold after 158 days from 01.04.2007, cost was 10076160/-.
2. As per audited Accounts, Loan Capital on 01.04.2007 was Rs.100249343/- (32.91%).
3. Total interest on 10076160/- @ 11% for 158 days during 31.03.2007 amounted to 479291/-.

Interest on LTCG of Haryana to be Disallowed:

$$279291 \times 32.91\% = 157895/- \dots\dots\dots (A)$$

INTEREST RELATABLE TO EXEMPT DIVIDEND INCOME

Total interest (Dr.) as per Profit & Loss Account - Rs.93,26,183/-

Allocation of interest on different source of income

Income	Amount in (Rs.)	Ratio	Interest Allocation	
Dividend	13,83,515/-	13.12%	12,02,564/-	(9168288x13.12%)
Other Taxable Income	91,64,335/-	86.88%	79,65,724/-	

Total	1,05,47,850/-	100.00%	91,68,288/-	
		Interest on LTCG as above	1,57,895/-	
		Total	93,26,183/-	

Interest Relatable to Dividend Income to be disallowed u/s. 14A = Rs.12,02,564/-(B)

Total interest disallowance u/s. 14A

(A) Rs. 1,57,895/-

(B) Rs. 12,02,564/-

Total Rs. 13,60,459/-

The Ld. AO observed that the disallowance worked out by the assessee is not in accordance with Rule 8D of the Rules. The Ld. AO adopted Rule 8D(2)(ii) of the Rules and disallowed Rs.91,50,478/- and substituted the disallowance figure of assessee by Rs.93,54,318/- in the place of Rs.14,62,379/- offered by assessee. On first appeal, the Ld. CIT(A) observed that the Ld. AO erred in not adopting Rule 8D(2)(iii) of the Rules and the said Rule is to be applied in full and accordingly, enhanced the addition by Rs.24,53,163/-. Aggrieved, the assessee is in appeal before us on the following grounds:

“1) For that under the facts and circumstances of the case, the C.LT.(A) erred in confirming the calculation of expenses disallowed u/s. 14A of the Act made by the Ld. A.O. at Rs. 92,52,398/- rejecting the calculation shown by the assessee company at Rs.14,62,379/- while no cogent or palpable reason for such rejection was assigned by the Id. A.O. in the assessment order.

2) For that under the facts and circumstances of the case the Ld. C.LT.(A) erred in law as well as in facts while enhancing the assessment by applying wrongfully the provisions of rule 8D(2)(iii) read with sec 14A of the LT. Act under a misinterpretation of ratio laid down by the Hon'ble IT AT Kolkata in the case of A.C.I.T. V. Champion Commercial Co. Ltd. 139 ITD 108 (Kol).”

4. The Ld. AR argued that no satisfaction was recorded by the Ld. AO having regard to the accounts of the assessee in terms of Rule 8D(1) of the Rules and accordingly, objected to invoking the provision of Rule 8D(2) of the rules. In support of his contention, he placed reliance on the decision of the Coordinate Bench of this Tribunal in the case of Luccas Estates Pvt. Ltd. in CO No. 65/Kol/2014 in ITA No. 721/Kol/2014 dated 11.05.2016. He also placed reliance on the decision of this Tribunal in the case of REI Agro ltd. Vs. DCIT in ITA No. 1331/Kol/2011 dated 19.06.2013, which was approved by Hon'ble Calcutta High Court. He also placed reliance on the decision of Bangalore ITAT in the case of John distilleries Ltd. Vs. DCIT in ITA No. 1429/Bang/2014 dated 24.02.2016. Without prejudice to the aforesaid arguments, he argued that even assuming Rule 8D(2) of the Rules are to be invoked for the purpose of

making disallowance u/s. 14A of the Act, the investments yielding dividend income alone are to be reckoned for the same. In support of this, he placed reliance on the aforesaid decisions. He further argued that disallowance in any case cannot exceed the income which does not form part of the total income. In support of this proposition, he placed reliance on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Holim India Pvt. Ltd. in ITA No. 486/2014 and 299/2014 dated 05.09.2014 which was followed by the decision of this Tribunal in the case of PDGD Investments & Trading Pvt. Ltd. Vs. ITO in ITA No. 1881/Kol/2014 dated 27.08.2015.

5. In response to this, the Ld. DR argued that no specific ground was raised by the assessee in respect of non-recording of satisfaction in terms of Rule 8D(1) of the Rules and hence the entire argument and the case laws relied on by the Ld. AR in that regard requires to be rejected. He argued that the Ld. AO having applied the provisions of Rule 8D of the rules sought to invoke only rule 8D(2)(ii) of the Rules. The Ld. CIT(A) observed that rule 8D of the Rules has to be applied in full and hence, he invoked the provisions of Rule 8D(2)(iii) of the rules by making an enhancement in the assessment. He placed reliance on the Special Bench decision of Delhi Tribunal in the case of Cheminvest reported in 121 ITD 318.

6. The Ld. AR in defence argued that the decision relied on by the ld. DR in the case of Chem Invest of Delhi Special Bench has been reversed by Hon'ble Delhi High court in the same case reported in 378 ITR 33.

7. We have heard rival submissions and perused the material available on record and the case laws cited by both the parties. We find that the issue on the argument of non-recording of satisfaction deserves to be dismissed as from the perusal of the assessment order it could be seen that the Ld. AO had clearly recorded his satisfaction that interest relatable to all investment income from which does not or shall not form part of total income is to be considered and no scrip wise investment as considered by the assessee. Accordingly, he proceeded to adopt Rule 8D(2) of the Rules but it is well settled in various case laws relied on by the Ld. AR supra, that only investment yielding exempt income are to be considered for the purpose of Rule 8D(2)(ii) and (iii) of the Rules. Accordingly, we direct the Ld. AO to restrict the disallowance u/s. 14A of the Act

read with Rule 8D of the Rules after considering only investments yielding dividend income. In any case, we direct that the disallowance to be worked out thereon shall not exceed the income which does not form part of the total income. We place reliance in this regard on the decision of Coordinate bench of this Tribunal in the case of PDGD Investments & Trading Pvt. Ltd., supra, wherein it was held as under:

"3. After hearing the rival contentions, I am applying the decision of the Hon'ble Delhi High Court in the case of CIT vs Holim India (P) Ltd. In ITA Nos.486/2014 and 299/2014 judgment dated 5th September, 2014. The relevant portion of the judgment is reproduced herein below :-

"On the issue whether the respondent-assessee could have earned dividend income and even if no dividend income was earned, yet Section 14A can be invoked and disallowance of expenditure can be made, there are three decisions of the different High Courts directly on the issue and against the appellant-Revenue. No contrary decision of a High Court has been shown to us. The Punjab and Haryana High Court in Commissioner of Income Tax, Faridabad Vs. M/s. Lakhani Marketing Incl., ITA No. 970/2008, decided on 02.04.2014, made reference to two earlier decisions of the same Court in CIT Vs. Hero Cycles Limited, [2010] 323 ITR 518 and CIT Vs. Winsome Textile Industries Limited, [2009] 319 ITR 204 to hold that Section 14A cannot be invoked when no exempt income was earned. The second decision is of the Gujarat High Court in Commissioner of Income Tax-I Vs. Corrtect Energy (P.) Ltd. [2014] 223 Taxmann 130 (Guj .). The third decision is of the Allahabad High Court in Income Tax Appeal No. 88 of 2014, Commissioner of Income Tax (Ii) Kanpur, Vs. M/s. Shivam Motors (P) Ltd. decided on 05.05.2014. In the said decision it has been held:

"As regards the second question, Section 14A of the Act provides that for the purposes of computing the total income under the Chapter, 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. Hence, what Section 14A provides is that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for earning the income is not an allowable deduction. For the year in question, the finding of fact is that the assessee had not earned any tax free income. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. The view of the CIT(A), which has been affirmed by the Tribunal, hence does not give rise to any substantial question of law. Hence, the deletion of the disallowance of Rs.2, 03,752/- made by the Assessing Officer was in order" .

15. Income exempt under Section 10 in a particular assessment year,, may not have been exempt earlier and can become taxable in future years. Further, whether income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax. It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not an improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax.

16. What is also noticeable is that the entire or whole expenditure has been disallowed as if there was no expenditure incurred by the respondent-assessee for conducting business. The CTT(A) has positively held that the business was set up and had commenced. The said finding is accepted. The respondent-assessee, therefore, had to incur expenditure for the business in the form of investment in shares of cement companies and to further expand and consolidate their business. Expenditure had to be also incurred to protect the investment made. The genuineness of the said expenditure and the fact that it was incurred for business activities was not doubted by the Assessing Officer and has also not been doubted by the CIT(A)."

By applying the proposition laid down in the facts of the case, I hold that the maximum disallowance in this case cannot exceed the amount of exempt income received by the assessee i.e. Rs.34,445/-. Hence, I restrict the disallowance to Rs.34,445/- and allow the balance in favour of the assessee."

8. In the result, the grounds of appeal of assessee are partly allowed for statistical purposes.

9. Order is pronounced in the open court on 25.05.2016

Sd/-
(N. V. Vasudevan)
Judicial Member

Sd/-
(M. Balaganesh)
Accountant Member

Dated :25th May, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – GVN Fuels Ltd., 109/1, Ggirish Ghosh Road, Belurmath, Howrah-711202
2. Respondent –DCIT, Cir-1, Kolkata.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.