

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA**

Before **Shri Mahavir Singh, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.847/Kol/2013
Assessment Year :2009-10

Usha Martin Ventures Ltd., 24, R.N.Mukherjee Road, 2 nd Floor, Kolkata-700 001 [PAN No.AAACU 3843 J]	V/s.	DCIT, Circle-6 Aaykar Bhawan, P-7, Chowringhee Squire, Kolkata-700 069
अपीलार्थी /Appellant .. प्रत्यर्थी/Respondent		

अपीलार्थी की ओर से/By Appellant	Shri A.K.Tibrewal, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri Sandeep Choube, CIT-DR
सुनवाई की तारीख/Date of Hearing	21-01-2016
घोषणा की तारीख/Date of Pronouncement	29-02-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Appeals)-VI, Kolkata in appeal No.218/CIT(A)-VI/Cir-6/11-12/Kol dated 27.02.2013. Assessment was framed by DCIT, Circle-6, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 30.12.2011 for assessment year 2009-10. Grounds raised by assessee are as below:-

"1) That the learned Commissioner of Income Tax (Appeals) erred in disallowing the Long Term Capital Loss of Rs.56,76,211 incurred by the Assessee Company on sale of 3,49,658 equity shares of Usha Breco Ltd. on the alleged ground that the aforesaid Long Term Capital Loss was not genuine as the said shares of Usha Breco Ltd. had been sold at a price lower than its breakup value.

2) That the learned Commissioner of Income Tax (Appeals) erred in arbitrarily determining the Long Term Capital Gain at Rs.1,03,636 on the sale of

349,658 equity shares of Usha Breco Ltd as against the Long Term Capital Loss of Rs.56,76,211 declared by the Assessee Company.

3) That the learned Commissioner of Income Tax (Appeals) erred in arbitrarily holding that the profit in respect of the sale of Land and Building situated at Village Chandweparganna, Ranchi, has to be assessed as Short Term Capital Gain under section 50(2) of the Income Tax Act, 1961.

4) That the learned Commissioner of Income Tax (Appeals) erred in arbitrarily determining the Short term Capital Gain, on the sale of Land and Building situated at Village Chandweparganna, Ranchi, at Rs.3,09,90,729 as against the Long Term Capital Gain of Rs.2,23,19,195 declared by the Assessee Company.

5) That the learned Commissioner of Income Tax (Appeals) erred in arbitrarily holding that the whole amount of consideration being sum of Rs.16,50,000 in respect of sale of two properties situated at Rajkot are liable to be taxed under the head "**Capital Gains**" as against the claim of the Assessee Appellant that no amount was chargeable to tax, inasmuch as the Appellant did not incur any cost for acquiring the said property.

6) That the learned Commissioner of Income Tax (Appeals) erred in disallowing a sum of Rs.6,41,09,892 under section 14A of the Income Tax Act, 1961 as against the sum of Rs.40,73,686 disallowed by the Assessee Company in its return of income.

7) That the learned Commissioner of Income Tax (Appeals) was not justified in adding a sum of Rs.6,41,09,892 to the net profit as per Profit & Loss Account, which sum represented the amount disallowed under section 14A of the Income Tax Act, 1961 while determining the amount of "**Book Profit**" for charging Minimum Alternate Tax under section 115JB although such sum was neither debited to the Profit & Loss A/c. nor relatable to income not chargeable to tax."

Shri A.K.Tibrewal, Ld. Authorized Representative appearing on behalf of assessee and Shri Sandeep Choube, Ld. Departmental Representative appearing on behalf of Revenue.

2. At the time of hearing Ld. AR fairly stated that he has been instructed by assessee not to press grounds No. 3 to 5 and Ld. DR has not objected on the same. Hence, we dismiss the grounds No. 3 to 5 as not pressed.

3. The common issue in ground No. 1 and 2 raised by assessee are that Ld. CIT(A) erred in treating the Long Term Capital Gain (LTCG for short) at ₹

(56,76,211/-) as not genuine and determining the LTCG at ₹ 1,03,636/- instead of loss claimed by the assessee for Rs. 56,76,211.00

3.1 Facts of the case are that assessee is a Limited Company engaged in the business of trading/finance/investment business. During the year under consideration, assessee has sold 349658 unquoted shares of M/s Usha Breco Ltd. to M/s Anupriya Real Estate Pvt. Ltd. As a result of sale the assessee declared LTCG loss of ₹56,76,211/-after claiming the indexation benefit as per the provisions of section 48 of the Act. The AO during the assessment proceedings observed that the assessee has generated LTCG from sale of the immovable properties. The AO also observed that the company to whom the shares were sold was part of the group company of the assessee as the address of the buyer company was also the same as of the assessee. From the above facts, the AO opined that transaction of selling of shares is the colorable device to escape from the burden of tax. Accordingly, AO disallowed the loss by relying in the decision of Hon'ble Supreme Court in the case of *McDowell And Co. Ltd. v. CIT* (1985) 154 ITR 148 (SC), where the Hon'ble Supreme Court has clearly stated that colorable device cannot be part of tax planning. The Hon'ble Delhi High Court in the case of *CIT Vs Gillette Diversifies operations (p) ltd.* (appeal no. 434/2009) has also held that these factors could have been relevant had the tribunal found the transactions undertaken by the assessee company were a colorable device with a view to cause a loss to the Revenue.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The Ld. AR submitted that Assessing Officer has not appreciated the facts of the case and has wrongly relied upon the aforesaid two decisions to disallow the loss of ₹ 56,76,211/-. The transaction for sale of shares was within the ambit of law and it was between the genuine parties. The sale proceeds were utilized in the repayment of debts in order to reduce the burden of the interest. There is no prohibition under any law to prevent transactions of sale and purchase of

shares in group companies. Ld. AR further stated that only reason for disallowance of loss was alleged “colorable device to reduce the burden of tax”. Now, the question that has to be considered is as to whether the genuine and legal transactions resulting in reduction of taxes could be considered as colorable transaction. In the aforesaid decision of the Hon’ble Supreme Court in the case of *McDowell And Co. Ltd.*(supra) held that tax planning was allowed if it is within the frame work of law. The planning of the tax can be held as colorable if it is resorted to dubious methods which are not allowed by the law. However, Ld. CIT(A) found that the book value of the share is much higher than the sale price. As per the calculation considering the book value of the share there is a profit of Rs. 103636.00 after indexation. Besides the buyer company is a Member of the Group Company therefore the ownership of the share is lying within the group only. Accordingly, Ld. CIT(A) disregarded the claim of assessee for the loss of Rs. 56,76,211.00 and worked out the LTCG of ₹1,03636/-.

Being aggrieved by this order of Ld CIT(A) assessee preferred second appeal before us.

5. We have heard both the parties and perused the materials available on record. Ld. AR submitted paper book which is running at pages 1 to 71 and index of case laws which is running at pages 1 to 43. On analyzing the case decision of Hon'ble Supreme Court in the case of *McDowell & Co Ltd.* (supra) it would be found that “tax planning may be legitimate provided it is within the framework of law”. In the case on hand, the genuineness of the transactions is not doubted. There is no allegation that the losses incurred on sale of shares are not authorized or illegal. Ld. AR submitted that when the transactions are genuine and within the ambit of legal provisions, the same could not be termed as colorable devise on the ground that the said transaction resulted in reduction of taxes. The assessee submits that if the decision of Hon'ble Supreme Court in the case of *McDowell And Co Ltd.* (supra) is understood in

that sense then every transaction resulting in losses or where there exists provisions relation to exemption of income from tax would be considered as colorable devise. In such cases, even the transactions of LTCG on sale of STT paid shares & securities resulting in exempt capital gains would be treated as “colorable devise” since the LTCG would result in reduction / avoidance of taxes. The assessee submits that the AO was not justified in alleging that the sale of shares resulting in losses was “colorable devise” to disallow the same following the two decision relied by Ld. CIT(A). Ld. AR further submitted that the decision of Hon'ble Supreme Court in the case of *McDowell And Co Ltd.* (supra) was not correctly understood by AO. There it was found that the assessee resorted to dubious methods which are not authorized by law to avoid excise duty chargeable on manufacturer of liquor by the Department and transactions, itself were found to be illegal. In these facts of the case, Hon'ble Supreme Court held that avoiding taxes by means of illegal transactions adopting dubious method giving them the shape of legality would be colorable device. Further, Ld. AR submitted that it is for the assessee to arrange its affairs in a manner which reduces its tax liability. So far the assessee does not violate the provisions of any statute, the transactions resulting in reduction of taxes could not be termed as “colorable devise” as envisaged in the case of *McDowell And Co Ltd.* (supra).

6. On the other hand, Ld. DR vehemently relied on the orders of authorities below.

7. From the aforesaid discussion, we find that assessee has sold shares to its group company and booked a loss of ₹56,76,211/- under the head “capital gains”. The Assessing Officer found that the purpose of selling share at a price less than market value/ book value was to escape from the tax liability therefore, it was disallowed by AO. However, from the above facts, we understand that genuineness of the transaction of sale and purchase of share with assessee and buyer-company has not been doubted by AO. The Id. DR

could not bring anything on record that the transaction was a colorable device to reduce the tax liability. There has to be cogent reasons for holding a transaction as colorable device to reduce the tax liability. In the instant case the transaction was with the group company and at the price less than the book value. In our view this observation of the AO does not make the transaction as colorable device to reduce the tax burden. We are also relying in the decision of jurisdictional High Court in the case of *CIT v. Smt. Nandini Nopany* (1998) 230 ITR 679 (Cal), where the Hon'ble jurisdictional High Court has held:-

“Upon consideration of all the above facts and also the question that the market value of the shares transferred by the assessee was Rs.20,67,876, the Assessing Officer rejected the contention of the assessee regarding the transfer of shares and added the difference between the amount of Rs.13,34,392 and Rs.20,67,876 and thus held that the assessee had earned an income of Rs.7,57,382.

Being aggrieved, the assessee filed an appeal before the Commissioner of Income-tax (Appeals) who after considering the facts and circumstances of the case reversed the order of the Assessing Officer being of the opinion that there was no case for substituting the disclosed value of consideration on transfer by the shares and he accordingly deleted the addition made on that account in the income of the assessee by the Assessing Officer.

Being aggrieved, the Revenue filed an appeal before the Tribunal. The Tribunal upheld the finding of the Commissioner of Income-tax (Appeals) by agreeing with the contentions. Thus, under those circumstances, the aforesaid question of law has been referred to us for our opinion.

The genuineness of the transaction of the sale and purchase of the shares between the assessee and Vishwa Mangal Trading Co. Pvt. Ltd., has not been doubted by the Assessing Officer. This has not even been questioned by the Department. It is not disputed that the assessee had transferred those shares at the book value cost maintained by her. It is also not disputed that the book value cost was lower than the market value of the shares. In fact it is admitted that the market value of those shares was to the tune of Rs.20,67,876

Under those circumstances, holding that the assessee had derived any income, being the difference between the market value and the price on which the shares were sold by the assessee, in our opinion, was not correct. We are of the view that the Tribunal rightly upheld the finding of the Commissioner of Income-tax (Appeals). It is not a case where any understatement of value or misstatement of value of the shares sold was made by the assessee. This is a case where the assessee had sold the shares at a value admittedly lower

than the market price. Yet the shares could not be assessed on the difference amount being her income because no inference can be drawn in the facts and circumstances of the case that the design of the assessee was such that she concealed certain facts and she received the difference of the value by fraudulent means There was no evidence direct or inferential, nor was there any finding by any income-tax authority that the assessee indulged in such a practice. We are fortified in our view by a judgment of the Supreme Court in the case of CTT v. Shivakami Co. Pvt. Ltd. [1986] 159 ITR 71 (SC). We also find support in our view from a Division bench judgment of the Bombay High Court in the case of India Finance and Construction Co. Pvt. Ltd. v. B.N.Panda, Dy. CTT [1993] 200 ITR 710."

Taking a consistent view of Hon'ble Supreme Court in the case of *McDowell And Co Ltd.* (supra) and in terms of the decision of Hon'ble jurisdictional High Court in the case of *Smt. Nandini Nopany* (supra), we reverse the orders of authorities below and hold accordingly. These common grounds of assessee are allowed.

8. The next issue raised by the assessee in ground no. 6 is that the Id. CIT(A) confirmed the order of AO by sustaining the disallowance under section 14A of the Act.

8.1 The assessee has earned dividend income amounting to ₹2,55,97,302/- during the assessment year 2009-10. The investment was made in various companies but all the investments have not generated the dividend income in the year of assessment. The assessee has voluntarily disallowed the following expenses in terms of Sec. 14A of the Act:-

(1) Direct expense	₹3,45,670/-
(Demat charges ₹344932+share transfer charges 738).	
(2) Interest expense u/s 14A of the Act of	₹ 34,29,673/-
(3) 5% of administrative expense	₹ <u>2,98,343/-</u>
	40,73,586.00

The Assessing Officer has disregarded and ignored this disallowance without adducing any reason. The AO also not recorded any dissatisfaction with regard to disallowance made by assessee in terms of Sec. 14A of the Act. The AO directly invoked the provision of Sec. 14A of the Act and applied Rule 8D

of the I.T. Rules, 1962. The relevant extract of the AO's order is extracted below for the sake of clarity :-

"It is noted that during the year the assessee earned tax free income by way of dividend, rent and interest form bond of Rs.2,55,97,302/- against which the assessee has adjusted a sum of Rs.40,73,686 u/s. 14A of Income-Tax Act. Here interest disallowance is calculated at 34,29,673/-, other expenses is on the basis of 5% of administrative expenses and demat charges of Rs.3,44,932/-

All the above calculation is undoubtedly an approximation, when Section 14A read with rule 8D has prescribed computation for such disallowance any other approximation is not acceptable. Moreover, the assessee has also given an another complex calculation on a number of basis viz loan found used on closing balance basis as on 31.03.09, Loan found used on average basis as on 31.03.09 and on direct loan used for investment purpose. On 5th December the assessee has given another submission of the core contention of which is borrowed fund used and whole lot of other calculation.

The above submission of the assessee is perused but the assessee is itself confused as to the method to be used for disallowing expenditure which is used to earn income which does not form part of the total income. It is not understandable as to why the assessee has submitted different method for calculation of disallowance u/s. 14A when the statute has given a simple method for calculation of such expenditure. On perusal of the Balance sheet and P & L account and Tax audit report as well as submission during scrutiny proceedings the following was noted."

The AO further observed that own fund of assessee is ₹51.43 crores and loan fund of ₹ 48.99 crores. The assessee made investment in securities at ₹ 69.46 crores besides the money invested in fixed assets and current assets. Therefore, AO opined that substantial portion of the borrowed fund has been invested in share (quoted share and unquoted share) and mutual fund. Accordingly, AO invoked the provision of Sec. 14A of the Act and made the disallowance as under :-

8(D) (i) Direct charge = 3,44,932 + 738 = 3,45,670/- -----A				
a	In case where assessee has incurred expenditure by way of interest during the previous which are not directly attributable to any particular income or receipt	Interest paid	15,25,10,586/-	
b	The average of the value of investment income from which does not or shall not	As on 01.04.08: Rs.67,72,23,027/-	67,72,23,027/-	68,59,34,578

	form part of the total income as appearing in the balance sheet of the assessee on the first day and last day of the previous year.	As on 31.03.09 : Rs.69,46,46,129/-	69,46,46,129/-	
c	Average of the total assets as appearing in the balance sheet on the first day and last day of previous year	As on 01.04.08: Fixed assets; 3,60,73,135/- Investments: 67,72,23,027 Current Assets: 84,56,52,316	155,89,48,478	128,15,85,573
		As on 31.03.09: Fixed Assets; 64,96,447 Investments: 69,46,46,129/- Current Assets: 30,30,80,091	100,42,22,667/-	
8(D) (ii) = a x b/c = $\frac{15,25,10,586 \times 68,59,34,578}{128,15,85,573} = 8,16,27,233/-$ -----C				
8(D) (iii): An amount equal to 0.5% of the average value of investment, income from which does not or shall not form part of the total income	As on 01.04.08: Rs.67,72,23,027/-	67,72,23,027/-	68.59.3457 x 0.5%	
	As on 31.03.09 : Rs.69,46,46,129/-	69,46,46,129/-		
8(D) (iii) = 34,29,673/- -----B				
Total =A + B + C = 3,45,670 + 8,16,27,133 + 34,29,673 + = 8,54,02,576/-				

9. Aggrieved assessee preferred an appeal before Ld. CIT(A) who observed that the AO had recorded his dissatisfaction by mentioning that the assessee has not been able to establish with sufficient material that the manner of calculating the amount disallowable for earning the exempted income was correct method. Once assessee fails to establish its explanation regarding the disallowance under section 14A of the Act then the only course available for working out the amount disallowable is the application of Rule 8D of the IT Rules. Before the Ld. CIT(A) the assessee submitted that the AO has without recording his satisfaction regarding the working of the assessee has directly invoked the provisions of rule 8D which is not correct. The assessee submitted that .5% of the average value of investment should be considered as reasonable for the working of disallowable interest. The assessee also submitted that the amount of disallowance, in any case, should be calculated

with reference to the amount of borrowed funds used for acquiring investments. The quantum of borrowed funds used for such investments could be arrived at by reference to the following decisions:

- i) *CIT vs Reliance Utilities & Power Ltd. (2009) 178 Taxman 135 (Bom)*
- ii) *CIT vs. Dhampur Sugar Mills Ltd. 274 ITR 370 (All)*
- iii) *Britannia Industries Ltd. vs. JCIT 271 ITR 123 (Cal)*
- iv) *Bunge Agribusiness (India) (P) Ltd. v. Dy. CIT (2011) 64 DTR 201 (Mum.) (Trib.)*

In the above cases it was held that the available funds of the company should be treated as invested in tax free securities. Thus only balance amount of investment may be treated as having been made out of borrowed funds. Accordingly, interest on such amount only could be considered as disallowable u/s. 14A of the Act. The assessee further submitted without the prejudice of above that the disallowance u/s. 14A could not exceed the amount of tax free income earned during the year. No disallowance u/s 14A could be made u/s. 14A unless the Revenue establishes the fact of incurring of the expenditure in relation to earning of tax free income. The onus is on Revenue which has not been discharged in this case. In the absence of satisfaction recorded by the Assessing Officer about the assessee's claim of expenses relatable to exempt income, Rule 8D cannot be applied to disallow expenses. Reliance is placed to the decision of the Honble Delhi High Court in the case of *Maxopp Investment Ltd. vs. CIT* in [(2011) 203 Taxman 364 (Del)]. The assessee further added that the disallowance of Interest u/s. 14A should be recalculated. While making calculation of average of investments as on the beginning of year and at the end of year should be those shares and securities on which the company has received exempt dividend during the year. The value of those shares on which no dividend has been received during the relevant year should be excluded in as much as there could be a case of earning income there from which is chargeable to short term capital gains and/or Long Term capital gains (without STT). This situation is there in the impugned assessment order also. This explanation was accepted by the

Assessing Officer in our case only in the Assessment year 2007-08. The copy of the Assessment Order is enclosed at pages **396-400** of the Paper Book. Once the issue is settled in an earlier year then that should not be disturbed in the subsequent year as held by Hon'ble Calcutta High Court in the case of Mukti Properties Pvt. Ltd. vs. CIT in ITA No. 95 of 2009.

However the Id. CIT(A) observed that there are numerous kind of expenses which are incurred in an organization. The provisions of section 14A cover all those expenses provided they have the connection with the exempted income. The organization requires lot of management expertise as the decision for making the investments are very complex in nature. There is lot of fund involvement. Many board meetings of the directors are required to be conducted in which lot of administrative expenses are incurred. The Id. CIT(A) relied on the following decisions in support of his contentions :

- (a) ACIT vs. Champion Commercial Co. Ltd. ITAT Kolkata Bench in ITA No. 644/Kol/2012 for A.Y 2008-09
- (b) ISG Traders Ltd. v. CIT in 2011-TOIL-621-HC-KOL-IT dated 29.05.2002
- (c) Dhanuka & Sons v. CIT (2011) 339 ITR 319 (Cal)
- (d) Technopak Advisors (P) Ltd. v. ACIT ITAT Delhi Bench
- (e) Cheminvest Ltd. v. ITO 121 ITD 318 (Del) (SB)
- (f) Sonata Information Technology Ltd. v. DCIT ITA No.1507/Mum/2012 dated 07.09.2012
- (g) Hindustan Construction Co. Ltd. v. DCIT ITA No. 6438 to 6441/Mum/2008 dated 28.09.2012
- (h) DCIT v. M/s Trade Apartment Ltd. ITA No. 1277/Kol/2011 dated 31.03.2012 ITAT Kolkata Bench
- (i) M/s Gillette Group India Pvt. Ltd. v. ACIT ITA No. 267/Del/2012 dated 23.03.2012
- (j) M/s Search Enviro Ltd. v. ACIT ITA No. 3464/Mum/2011 dated 02.03.2012.

Finally the Id. CIT(A) has worked out the disallowance under section 14A read with rule 8D by observing as under :

"51. The Assessing Officer has calculated the interest under Rule 8D(2)(ii) by taking the value of the net assets rather than the gross assets. The appellant has submitted that total assets are to be taken as denominator rather than the net assets for calculation of disallowance under Rule 8D(2)(ii). The plea of the appellant is held to be correct since the Rule 8D(3) provides that for the purposes of this rule, the 'total assets' shall mean, total assets as appearing in the balance sheet excluding the increase on account of revaluation of assets but including the decrease on account of revaluation of assets. It does not provide that only current asserts, loans and advances are to be taken but it provides that 'total assets' as appearing in the balance sheet are to be taken for the purposes of calculation in Rule 8D. The Assessing Officer is directed to take the total assets as appearing in the balance sheet excluding only the increase eon account of revaluation of assets but including the decrease on account of revaluation of assets while calculating disallowance of expenses as per Rule 8D(2)(ii)."

Accordingly, Ld. CIT(A) worked out the disallowance as under:-

8(D) (i) Direct Expenses : (a) Demat charge Rs.3,44,932 + (b) Share Transfer Expenses Rs.738/- = Total expenditure Rs.3,45,670/- -----A				
a	In case where the assessee has incurred expenditure by way of interest	Net interest paid (net)	14,38,16,937/-	
b	The average of the value of investment	As on 01.04.08 : Rs.67,72,23,027/-	As on 31.03.09: Rs.69,46,46,129/-	Average Value of investments Rs.68,59,34,578/-
c	Average of the total assets as appearing in the balance sheet on the first day and last day of previous year	As on 01.04.08: Fixed assets. 3,60,73,135/- Investment: 67,72,23,027/- Current Assets: 1,52,43,31,249/- Total Assets= Rs.2,23,76,27,411/-	As on 31.03.09: Fixed Assets: 64,96,447 Investments: 69,46,46,129/- Current Assets: 33,12,97,078/- Total assets= Rs.1,03,24,39,654/-	
8(D) (ii) = a x b/c = $\frac{14,38,16,937 \times 68,59,34,578}{1,63,50,33,532}$ = Rs.6,03,34,549/-----C				
8(D) (iii):	An amount equal to 0.5% of the average value of investment, income from which does not or shall not form part of the total income	As on 01.04.08: Rs.67,72,23,027/-	As on 31.03.09 Rs.69,46,46,129/-	Average value of investments Rs.68,59,34,578 x 0.5% = Rs.34,29,673/-

8(D) (iii) = Rs.34,29,673/-----B

Total= A=B=C = 3,46,670 + 6,03,34,549 + 34,29,673+ = Rs.66,41,09,892/-
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Ld. CIT(A) has sustained the disallowance of ₹ 6,41,09,892/- under the provisions of section 14A of the Act.

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us.

10. Before us Ld. AR submitted that the finding given by the Ld. CIT(A) that the AO had recorded his satisfaction in terms of Rule 8D(1) of the IT Rules is based on incorrect facts. Ld. AR further argued that the recording of satisfaction in terms of Sec. 14A of the Act read with Rule 8D(1) of the IT Rules is mandatory for the AO before resorting to Rule 8D(2). In this connection, Ld AR relied on the following decisions with regard to his contentions:-

- CIT vs Ashish Jhunjhunwala in GA No. 2990 of 2013 in ITAT No. 157 of 2013 dated 08.01.2014 rendered by Hon'ble jurisdictional High Court
- CIT vs. R.E.I. Agro Ltd in GA 3022 of 2013 in ITAT 161 of 2013 dated 23.12.2013 rendered by Hon'ble jurisdictional High Court

Ld. AR further argued that investments which have not given any yield in the form of dividend income during the year needs to be excluded for the purpose of disallowance u/s 14A of the Act. The investment made in group companies should be constituted as strategic investment, hence, the provision of Sec. 14A of the Act should not be applied.

11. On the other hand Ld. DR simply relied on the orders of authorities below.

12. We have heard rival contentions and perused the materials available on record. From the above discussion, we find that the assessee has declared

the dividend income and has also disallowed the expenses in terms of the provisions of section 14A of the Act. But the AO disregarded the claim of the assessee and in invoked Rule 8D of the IT Rules without recording the satisfaction by virtue of the provision of Sec. 14A of the Act and examining the accounts of the assessee. We understand that while rejecting the claim of assessee with regard to expenditure in relation to exempt income, AO has to indicate cogent reasons for the same. We find that the AO had straight away computed disallowance under Rule 8D(2) of the IT Rules. We find that the case laws relied upon by Ld AR on the decision of the jurisdictional High Court are directly on this point and is in favour of assessee:-

CIT v. Ashish Jhunjunwala in **G.A. No.2990 of 2013** in ITAT No. 157 of 2013 dated 08.01.2014 rendered by Hon'ble Calcutta High Court, where Hon'ble court has held:-

“While rejecting the claim of the assessee with regard to expenditure or no expenditure, as the case may be, in relation to exempted income, the AO has to indicate cogent reasons for the same. From the facts of the present case, it is noticed that the Assessing Officer has not considered the claim of the assessee and straight away embarked upon computing disallowance under Rule 8D of the Rules on presuming the average value of investment at ½ % of the total value. In view of the above and respectfully following the coordinate bench decision in the case of J.K. Investors (Bombay) Ltd., supra, we uphold the order of CIT(A).”

CIT vs. R.E.I. Agro Ltd in **GA 3022 of 2013** in ITAT 161 of 2013 dated 23.12.2013 rendered by Calcutta High Court.

“The Assessing Officer also disallowed the expenditure under section 14A of the Income Tax Act, 1961 without first recording that he was not satisfied with the correctness of the claim as regards the claim that ‘no expenditure’ was made by the assessee.

Challenging the order of the tribunal, the present appeal has been filed.

We have heard Mr. Bhowmik and are of the opinion that no point of law has been raised. Therefore, this appeal is dismissed.”

The aforesaid two decisions by the Hon'ble jurisdictional High Court are binding on this Tribunal. We find that the facts in the above-stated case of law are totally different from the facts of the instant case and moreover, when

there are two conflicting decisions of the same court or different courts on the same issue, then the decision favorable to the assessee has to be followed. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of *CIT v. Vegetable Products* (1973) 88 ITR 172 (SC) hence, we hold that the action of the AO in directly embarking on Rule 8D(2) of the IT rules is not appreciated and hence no disallowance under section 14A of the Act could be made in the facts of the case. We also find that the investments made in the group companies by the assessee are only strategic investments and were made with a primary object to acquire controlling interest in group concerns and not for earning any income out of that investment and reliance in this regard is placed on the decision of co-ordinate Bench of this Tribunal in the case of *DCIT vs. Selvel Advertising Pvt. Ltd.* (2015)58 taxmann.con 196 (Kol) (Trib.). We hold that even on this count, no disallowance u/s. 14A of the Act could be made by the AO. We also find that the investments which did not yield any dividend income needs to be excluded from the computation of disallowance, if any, u/s. 14A of the Act read with Rule 8D of the IT Rules as the basic intention behind introduction of section 14A of the Act itself is only to disallow the expenditure incurred for earning an income which does not form part of the total income. When there is no income which is claimed as exempt, then there is no scope for provisions of Sec. 14A of the Act operate. We agree with the arguments of Ld. AR in this regard and reliance in this regard is placed on the following decisions:

- Alliance Infrastructure Projects Pvt Ltd. vs. DCIT in ITA No. 220 & 1043 (Bng.)/2013 for AY 2009-10 & 2010-11 dated 1209.2014 Bangalore Tribunal)
- CIT v. Correch Energy Pvt Ltd reported in 352 ITR 97 (Guj)
- CIT vs. Shivam Motor in ITA No. 88 of 2014 dated 05.05.2014 rendered by Allahabad High Court.
- CIT vs Lakhani Marketing in ITA No. 970 of 2008 rendered by Punjab & Haryana High Court.

- CIT vs. Delite Enterprises in ITA No. 110 of 2009 rendered by Bombay High Court.

We find that the decision of special Bench of the Tribunal in the case of *Cheminveste Ltd. v. CIT* reported in 121 ITD 318 had held that disallowance u/s 14A could be made even in a year in which no exempt income was earned or received by the assessee. But this decision has been overruled by Bangalore Tribunal, Hon'ble Gujarat High Court and Hon'ble Allahabad High Court as stated supra. Moreover, we also find that the Special Bench decision in *Cheminvest Ltd.* (supra) has been overruled by the recent decision of the Hon'ble Delhi High Court in *Cheminvest Ltd.* (supra) case itself and hence it is no longer good law. Hence, we hold in favour of the assessee the alternative argument of the Ld. AR that only investments yielding dividend income during the year should be considered for disallowance u/s. 14A of the Act.

Respectfully following the aforesaid judicial precedents, we have no hesitation in directing the AO to delete the addition made u/s. 14A of the Act. Accordingly, this ground raised by assessee is allowed.

13. Coming to last ground raised by assessee is that whether the disallowance u/s. 14A of the Act should be made to book profit computed u/s.115JB of the Act.

14. We have heard rival submissions and perused the materials available on record. Before us, Ld. DR vehemently relied on the orders of authorities below. Ld. AR submitted that Rule 8D of the IT Rules is meant only for computation of income under normal provisions of the Act and not for book profit u/s. 115JB of the Act. On the contrary, Ld. DR argued that the disallowance u/s 14A of the Act would automatically fall in clause (f) of Explanation to Sec. 115JB of the Act and hence needs to be added back for computation of book profits u/s. 115JB of the Act. We find lot of force in the argument of the Ld AR that computation of disallowance under Rule 8D of the

IT Rules can be used only for computation of income under normal provisions of the Act and not for book profits u/s. 115JB of the Act. Unless an item is debited in the profit and loss account, the same cannot be the subject-matter of addition to book profits under clause (f) of explanation to Sec. 115JB of the Act. The disallowance made u/s 14A of the Act read with Rule 8D of the IT Rules is only artificial disallowance and obviously the same is not debited in the profit and loss account of the assessee and same cannot be imported into clause (f) of Explanation to Sec. 115JB of the Act. We have already held that no disallowance u/s. 14A of the Act would operate in the facts and circumstances of the case. Accordingly, we reverse the orders of authorities below and allow ground raised by assessee.

15. In the result, assessee's appeal is allowed.

Order pronounced in the open court 29/02/2016

Sd/-
(Mahavir Singh)
(Judicial Member)
Kolkata,
*Dkp

Sd/-
(Waseem Ahmed)
(Accountant Member)

दिनांक:- 29/02/2016 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Usha Martin Ventures Ltd., 24, R.N.Mukherjee Road, 2nd Floor Kol-01
2. प्रत्यर्थी/Respondent-DCIT, Circle-6, Aaykar Bhawan, P7, Chowringhee Square, Kol-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।