

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "H" (SPECIAL BENCH), NEW DELHI

BEFORE SHRI S.V. MEHROTRA: VICE PRESIDENT
AND

SHRI I.C. SUDHIR: JUDICIAL MEMBER

AND

SHRI AMIT SHUKLA: JUDICIAL MEMBER

ITA No.502/Del/2012

Asstt. Yr.: 2008-09

ACIT, Circle 17(1),
New Delhi.

Vs. Vireet Investment Pvt. Ltd.,
12, A/3, Friends Colony (W),
New Delhi.
PAN: AAACV 2033 M

AND

C.O. No. 68/Del/2014
(In ITA No. 502/Del/2012)

Asstt. Yr.: 2008-09

Vireet Investment Pvt. Ltd.,
Friends Colony (W),
New Delhi.

Vs. ACIT, Circle 17(1), 12, A/3,
New Delhi.

(Appellant)

(Respondent)

Department by : Sh. S.D. Srivastava Principal CIT(DR)
Assessee by : Shri Ajay Vohra Sr. Advocate
Mr. Deepesh Jain, CA

Date of hearing : 20/04/2017.
Date of order : 16/06/2017.



ORDER**PER S.V. MEHROTRA VP:**

The captioned departmental appeal and the assessee's cross-objections have been preferred against the order dated 01-11-2011 passed by the Id. Commissioner of Income-tax (Appeals)-XIX, New Delhi in appeal no. 131/2010-11 relating to assessment year 2008-09.

2. The Hon'ble President, Income-tax Appellate Tribunal, has constituted this Special Bench to adjudicate the following question:

"Whether the expenditure incurred to earn exempt income computed u/s 14A could not be added while computing book profit u/s 115JB of the Act."

3. Brief facts of the case are that the assessee company was carrying on the business as finance and investment company, making investment in shares and securities and advancing moneys and borrowing moneys to/ from industrial enterprises. The assessee had filed its return of income showing income of Rs. 6,17,39,487/-. However, the tax was paid u/s 115JB at an income of Rs. 32,18,30,990/-.

3.1. The AO noticed that the assessee had shown income from operation at Rs. 43,98,75,523/- which included the following incomes under various heads, as follows:

i.	Speculation profit (profit/loss) on F&O	Rs. -185/-
ii.	Interest Income	Rs. 44,44,186/-
iii.	Short term gain on sale of investments	Rs. 7,10,20,860/-
iv.	Winning from Race Horses	Rs. 486/-
		<u>Rs. 7,54,65,532/-</u>



3.2. He further noted that as per Schedule 13 & 14 of the P&L A/c, the assessee had claimed expenses at a total amount of Rs. 3,42,11,767/- [under the head "salary & other benefits" at Rs. 2,00,035/- and "administration and other expenses" at Rs. 3,40,11,732/-]. This included the amount of Rs. 1,19,257/- towards horse race expenses. The AO, accordingly, concluded that apart from the horse race expenses, in respect of which an income of Rs. 486/- had been shown by the assessee, the expenses claimed by the assessee were at Rs. 3,40,92,510/-. He, accordingly, pointed out that if the amount of Rs. 1,19,257/- (sic – correct figure Rs. 486/-), was considered separately, the amount of Rs. 7,53,45,789/- (sic – correct figure Rs. 7,54,65,046), [i.e. 7,54,65,532-1,19,257/- (sic correct figure Rs. 486/-)], was the income from its operations. Apart from this, amount of Rs. 7,54,65,532/-, which had been offered for tax, the remaining amount of Rs. 36,44,09,991/- (i.e. 43,98,75,523-7,54,65,532) had been claimed by the assessee company as exempt income. This amount comprised of exempt dividends, tax free interest income and long term capital gains.

3.3. The AO noticed that assessee had offered disallowance of Rs. 33,95,401/- u/s 14A as per Rule 8D, which, as per assessee, was worked out @ .5% of average value of its investment on the basis of their value as at opening and closing of the relevant financial year. As per assessee's working, disallowance u/s 14A amounting to Rs. 14,73,715/- was in respect of exempt dividend income and Rs. 19,21,687/- was in respect of long term capital gain, claimed exempt u/s 10(38) of the I.T. Act.

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3.4. However, AO did not accept the assessee's contention as the main source of assessee's income was from dividend and other tax free incomes. Keeping in view the exempt income, claimed by the assessee, being Rs. 36,44,09,991/-, the AO computed the proportionate expenses u/s 14A as under:

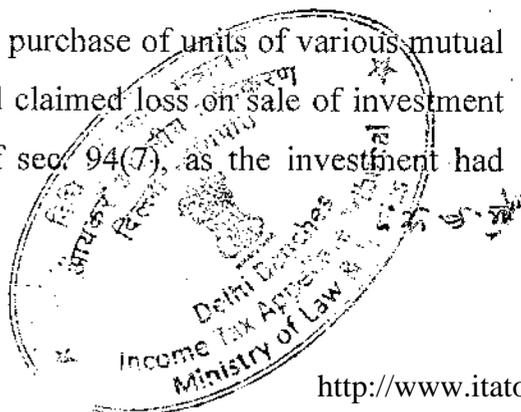
$$3,40,92,510 \times 7,53,45,789 / 43,97,56,266 \text{ (i.e. } 43,98,75,523 - 1,19,257) = 58,41,251 \text{ (relating to regular operations).}$$

3.5. The proportionate expense for net disallowance u/s 14A in respect of earning of the assessee related to non taxable income comes to Rs. 2,82,51,259/- (Rs. 3,40,92,510-58,41,251). He, accordingly, made addition of Rs. 2,82,51,259/-

3.6. The AO, while computing the book profits u/s 115JB, made the addition of Rs. 2,82,51,260/- on account of disallowance u/s 14A as per P&L A/c.

3.7. In course of assessment proceedings the AO further noticed that in respect of dividend income from mutual funds, claimed exempt by the assessee, subsequent capital losses (short term and long term) were incurred on account of sale/ transfer of such mutual fund units. From the detail furnished by assessee it was noticed that an amount of Rs. 64,000/- had been taken as the amount disallowable u/s 94(7) in respect of short term capital gains without security transaction tax. Similarly, an amount of Rs. 25,686/- had been taken as the amount disallowable u/s 94(7) in respect of short term capital gain.

3.8. On perusal of the details, the AO noticed that the amount of Rs. 64,000/- was the net loss on sale/ purchase of units of various mutual funds. He found that assessee had claimed loss on sale of investment in contravention of provisions of sec. 94(7), as the investment had



been cleared by the assessee within a period of 3 months prior to the record date for dividend and were within a period of 3 months after such record date. He, accordingly, made an addition of Rs. 64,000/- and Rs. 25,686/-.

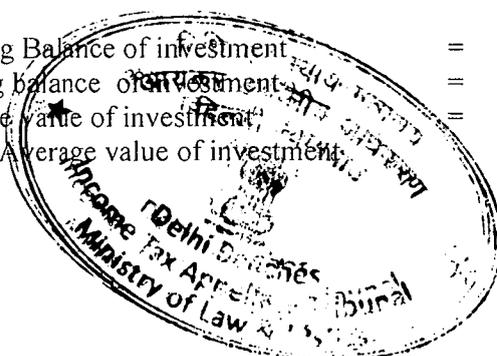
3.9. The AO further noticed that assessee company had given loans to various persons and entities as noted at page 8 para IV.3 of his order. From the details furnished, the AO found that except in the case of SNAM Investment Pvt. Ltd., to which interest @ 6% had been charged, no interest had been charged/ received by the assessee in respect of loans/ advances given to the other parties.

3.10. After considering the assessee's reply, he made addition to assessee's total income on account of interest income computed @ 12% as per details given from pages 11 to 12 of his order and made addition of Rs. 4,02,58,032/-.

3.11. Before Id. CIT(A), the assessee's representative objected to the method of working out disallowance u/s 14A by AO and pointed out that the assessee, while working out the disallowance, had taken only the value of investment yielding tax exempt income instead of total value of investments. . However Id. CIT(A), in view of the decision of Special Bench of the ITAT in the case of Cheminvest Ltd. Vs. ITO 121 ITD 318 (Del)(SB), did not agree with this contention of assessee and required it to work out disallowance by taking the value of investment as per books of a/c, which was worked out at Rs. 91,95,698/- as under:

Opening Balance of investment	=	Rs. 1,81,95,07,318/-
Closing balance of investment	=	Rs. 1,85,87,71,986/-
Average value of investment	=	Rs. 1,83,91,39,652/-
½% of Average value of investment		

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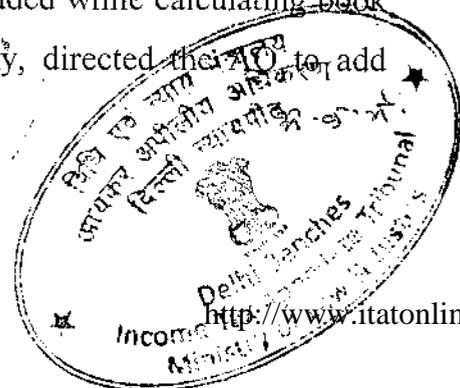
u/r 8D(2)(iii) = Rs. 91,95,698/-

3.12. Thus, the Id. CIT(A) computed the disallowance under Rule 8D(2)(iii) and no disallowance was made under Rule 8D(2)(i) and Rule 8D(2)(ii). The assessee has filed cross objection against the findings of Id. CIT(Appeals) in considering the value of investments as per books of account instead of only those investments which yielded tax free income for computing disallowance under Rule 8D(2)(iii) and Revenue is aggrieved as no disallowance was made under Rule 8D(2)(i) and Rule 8D(2)(ii).

3.13. In regard to the computation of book profit u/s 115JB, it was submitted before Id. CIT(A) that only expenditure related to the tax free income other than income u/s 10(38) could be added in accordance with the provisions of section 115JB. It was further argued that only 24.9% of expenses, related to income declared u/s 10(34) and 10(35), is to be added in view of following break up of expenditure on proportionate basis:

Particulars	Amount	Percentage to Total
Income exempt under sub-section (38) of section 10	24,22,20,566/-	75.6%
Dividend Income exempt under sub-section (34) of section 10	7,88,64,220/-	24.44%
Interest income on unit scheme 1964 exempt under sub-section (35) of section 10	16,32,987/-	0.50%
Total	32,27,17,773/-	100%

3.14. Ld. CIT(A) observed that as per clause (f) of Explanation 1 to Sec. 115JB(2), only the expenditure relating to income other than income assessable u/s 10(38) was to be added while calculating book profits u/s 115JB profits. He, accordingly, directed the AO to add



only Rs. 22,93,407/- (being 24.9% of Rs. 91,95,698/-) of the disallowance of expenditure upheld by him. Revenue is aggrieved by the finding of Id. CIT(Appeals) in considering only Rs. 22,93,407/- instead of Rs.91,95,698/- for making adjustment of disallowance computed under section 14A, read with Rule 8D, while computing 'book profit' under section 115JB of the Act.

3.15. As regards the disallowance of sum of Rs. 89,686/- u/s 94(7) by AO, the assessee pointed out before Id. CIT(A) that there has been an arithmetical error in computation of disallowance u/s 94(7). The computation was done with respect to date of receipt of dividend while section 94(7) specifies the reference date as the record date. He, accordingly, revised computation u/s 94(7) with reference to record date, which was submitted before Id. CIT(A), according to which disallowance worked out to Rs. 2,884/- only, which, Id. CIT(A) referred to the AO for verification.

3.16. As regards the addition of Rs. 4,02,58,032/- as notional interest income on interest free loans and advances given by the assessee, Id. CIT(A) deleted the addition, inter alia, observing that assessee had not claimed any interest expenditure and the AO could not charge interest on amounts advanced on notional basis disregarding the fact that there was no finding by the AO that the assessee actually received interest amount.

3.17. Being aggrieved with the order of Id. CIT(A) the department has filed appeal before the ITAT in which following grounds were raised:

1. " On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs. 1,90,55,561/- made u/s/14A of the I.T. act 1961 by



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holding that the AO failed to give a finding that some expenses were incurred for earning exempt income and that there was no interest payment and hence disallowance under Rule 8D(i) and 8D(ii) was not called for."

2. "On the facts and in the circumstances of the case and in law the learned CIT(A) erred in directing that the sum of Rs.1,90,55,561/- be not treated as income of the assessee company while computing book profits u/s 115JB of the Income Tax Act, 1961."

3. "On the facts and in the circumstances of the case and in law the learned CIT(A) erred in giving directions to the AO to verify the calculations u/s 94(7) of the Income Tax Act, 1961 without there being no basis for that."

"4. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in deleting an addition of Rs.4,02,58,032/- on account of interest income without appreciating the facts that the assessee had failed to justify and explain non-charging of interest from various parties without any basis."

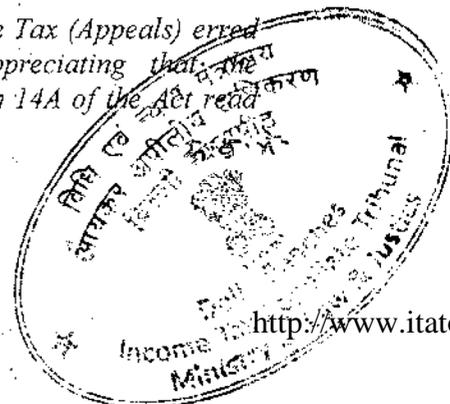
5. "The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground (s) of appeal at any time before or during the hearing of appeal."

3.18. Thereafter on 25-2-2014 the assessee filed cross-objections, taking following grounds:

"1. That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the disallowance made by the assessing officer under section 14A of the Income Tax Act, 1961 ("the Act") to the extent of Rs. 91,95,698 by observing that for the purpose of computing disallowance under Rule 8D of the Income Tax Rules, 1962 ('the Rules'), total investments as appearing in the balance sheet needs to be considered as against those investments which are capable of earning exempt income.

2. That the Commissioner of Income Tax (Appeals) erred on facts and in law in upholding the action of the assessing officer in making upward adjustment of disallowance computed under section 14A, read with Rule 8D, while computing 'book profit' under section 115JB of the Act.

2.1 That the Commissioner of Income Tax (Appeals) erred on facts and in law in not appreciating that the disallowance computed under section 14A of the Act read



with Rule 8D of the Rules does not represent actual expenditure incurred for earning exempt income and the same, therefore, need not to be added back while computing 'book profit' under section 115JB of the Act."

3.19. The assessee has filed application for condonation of delay in filing the memorandum of cross objections. It is stated in the petition that there is a delay of approximately 686 days in filing the cross objection is because when the appeal was decided by Id. CIT(Appeals), the then counsel advised for not filing the appeal/cross objection. However, the cross-objection has been filed on legal advice of new counsel, engaged by assessee. Further, from the facts narrated in the petition, it is evident that since no effective hearing took place between 4-4-2012 to 10-2-2014, the assessee was prevented by reasonable cause from raising the various issues before Tribunal by invoking Rule 27. Considering these facts in order to impart substantial justice to assessee, we are of the opinion that the delay in filing the cross-objection deserves to be condoned because assessee is primarily raising a legal issue and was under a bona fide belief that there was no pressing need for filing separate appeal or filing cross-objection as per the advice of its earlier counsel. It is well settled law that if assessee is acting under a legal advice then, if, prejudice is likely to be caused on account of such legal advice, then the delay in preferring appeal should be condoned. We, accordingly, condone the delay in filing the cross-objection.

3.20. Thereafter, vide further order dated 10-9-2014 the cross objection, filed by assessee, was also directed to be listed along with the appeal before the Special Bench for disposal in accordance with law. Accordingly, we first proceed to decide the main question referred for decision of Special Bench.



First we will take up the Departmental Appeal

As far as Ground no. 1 is concerned, the contention of assessee before Assessing Officer as well as before Id. CIT(Appeals) was that assessee had no interest bearing loans and hence there was no liability to pay interest. Further, no interest expenditure had been incurred or claimed in the P/L Account. Therefore, no disallowance was made by Id. CIT(Appeals) invoking Rule 8D(2)(i) and Rule 8D(2)(ii). Nothing has been brought on record to controvert the findings of Id. CIT(appeals) by Revenue. We, therefore, do not find any reason to interfere with the findings of Id. CIT(Appeals). In the result this ground is dismissed.

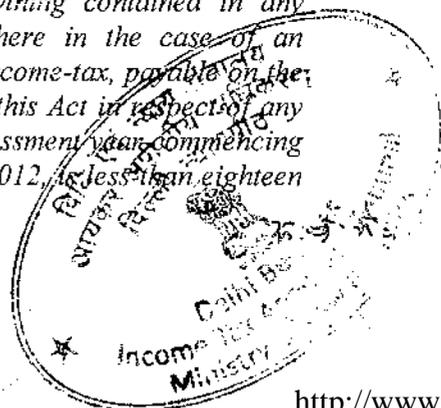
4. At the outset Id. counsel submitted that keeping in view the various grounds raised by the department and in cross objection, the question referred for adjudication before Special Bench may be reframed as under:

"Whether in terms of clause (f) of Explanation 1 to section 115JB, any adjustment is required to be made for the disallowance made under section 14A of the Act read with Rule 8D of the Income Tax rules, 1962 while computing 'book profit' of the appellant on the ground that the same represents the actual expenditure incurred for earning of the exempt income"

4.1. Id. counsel referred to relevant provisions of clause (f) to Explanation 1 to section 115JB which are reproduced hereunder:

"Special provision for payment of tax by certain companies.

115JB. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2012, is less than eighteen



and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent.

(2) Every assessee,-

(a) being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Part II of Schedule VI to the Companies Act, 1956 (1 of 1956); or

.....
Explanation 1 - For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by-

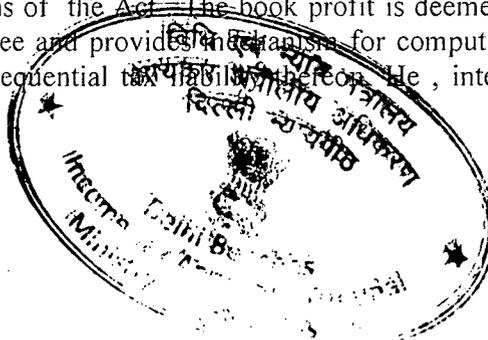
(f) the amount or amounts of expenditure relatable to any income to which section 10 (other than provisions contained in clause (38) thereof) or section 11 or section 12 apply;

if any amount referred to in clauses (a) to (i) is debited to the profit and loss account, and as reduced by-

(i) the amount of income to which any of the provisions of [section 10 (other than the provisions contained in clause (38) thereof)] or section 11 or section 12 apply, if any such amount is credited to the profit and loss account; or

4.2. Ld. counsel has filed detailed submissions by way of broad propositions, which are placed on record, in which, on this aspect, it has been pointed out that section 14A cannot be read into in section 115JB for the following reasons:

- i. Section 115JB is a complete code in itself and it overrides all other provisions of the Act. The book profit is deemed to be total income of assessee and provides mechanism for computing such book profit and consequential tax liability thereon. He, inter-alia, relied on the



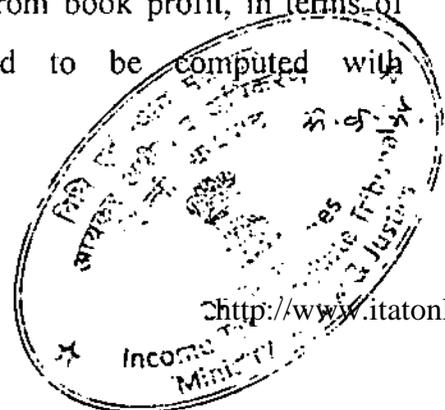
decision of Hon'ble Supreme Court in the case of Ajanta Pharma Ltd. v. CIT 327 ITR 305

- ii. Section 115JB by a deeming fiction deems book profit as the total income of the assessee, at variance with the income computed under normal provisions of the Act. He relied on the decision in the case of Ajanta Pharma Ltd. (supra) and also on CIT v. Nalwa Sons Investments Ltd. 327 ITR 543 (Delhi)
- iii. Section 115JB of the Act does not authorize the AO to go beyond the audited financial statement of the assessee. He, inter-alia, relied on the decision in the case of Apollo Tyres 255 ITR 273(SC)

4.3. He, accordingly, submitted that there could not be any room for making adjustment in accordance with any other provision of the Act, except to the extent specified under Explanation 1 to that section.

4.4. Ld. counsel submitted that tax liability u/s 115JB of the Act is to be worked out only on the basis of adjusted book profit and not on the basis of income/ profit computed under regular provisions of the Act.

4.5. To buttress his submission ld. counsel pointed out that clause (iv) of Explanation 1 to Section 115JB (as applicable up to assessment year 2005-06) provided that book profit had to be reduced by the amount of profits eligible for deduction u/s 80HHC, computed under clause (a) or clause (b) or clause (c) of sub-section (3) or sub-section (3A), as the case may be, of that section. He pointed out that, as per the assessee, the book profit had to be reduced by the amount of deduction admissible, computed with reference to book profit. The Revenue, on the other hand, contended that deduction u/s 80HHC admissible under the normal provisions of the Act, had only to be reduced from the book profit. He pointed out that it was held that section 115J/ 115JA/ 115JB being complete code, deduction admissible u/s 80HHC, to be reduced from book profit, in terms of clause (iv) of the Explanation had to be computed with



reference to book profit. He has relied on various decisions in support of his contention.

4.6. Ld. counsel further pointed out that in certain decisions, in context of provisions of clause (iii) of Explanation 1 to Section 115JB of the Act, it has been held that lower of loss or unabsorbed depreciation had to be determined in accordance with the figures appearing in the books of a/c and not on the basis of normal provisions.

4.7. Ld. counsel has submitted that clause (f) and clause (ii) of section 115JB are based on matching principles of accounting. The written submissions are reproduced hereunder:

4. Clause (f) and clause (ii) of section 115JB based on Matching Principle of accountancy.

MAT regime was first introduced by insertion of section 115J vide Finance Act, 1987 w.e.f. 01.04.1988, and later substituted by section 115JA of the Act w.e.f. 01.04.1997. Under both these sections, the above clauses (ii) and clause (f) of section 115JB of the Act did find mention in the Explanation to that sections inasmuch as while computing adjusted book profit, exempt income credited to the profit and loss account was required to be excluded and simultaneously, upward adjustment was to be made on account of corresponding actual expenditure debited to the profit and loss account relatable thereto. This treatment is, in our respectful submission, based on the Matching Principle of accountancy which provides that expenses are recognized in the profit and loss account only to the extent relatable to the accrual of the corresponding income.

The matching principle finds mention under the accrual concept, which is one of the fundamental accounting assumptions, outlined in Accounting Standard-1 'Disclosure of Accounting Policies' issued by the Institute of Chartered Accountants of India ('ICAI').

Reference, in this regard, may also be made to the Framework issued by the Institute of Chartered Accountants of India ('ICAI') [see pages 498-503 @501 of the paper book], wherein it has been mentioned as under:

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"93. Expenses are recognized in the statement of profit and loss when a decrease in future economic benefits related to a decrease in an asset or an increase of a liability has arisen that can be measured reliably. This means, in effect, that recognition of expenses occurs simultaneously with the recognition of an increase of liabilities or a decrease in assets (for example; the accrual of employees' salaries or the depreciation of plant and machinery).

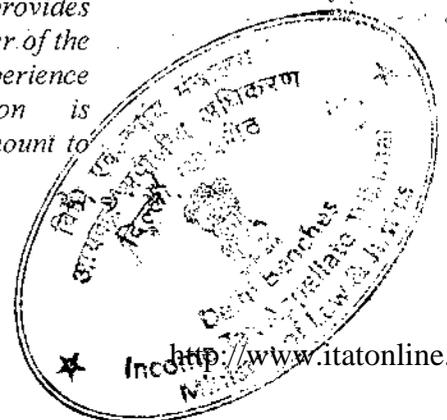
94. *Man v* expenses are recognised in the statement of profit and loss on the basis of a direct association between the costs incurred and the earning of specific items of income.

This process, commonly referred to as the matching of costs with revenues, involves the simultaneous or combined recognition of revenues and expenses that result directly and jointly from the same transactions or other events; for example, the various components of expense making up the cost of goods sold are recognised at the same time as the income derived from the sale of the goods. However, the application of the matching concept under this Framework does not allow the recognition of items in the balance sheet which do not meet the definition of assets or liabilities." (emphasis supplied)

On perusal of the above extracts of the Framework, it will be appreciated that under the matching principle, only those costs are recognized in the profit and loss account which have direct association with the earning of income.

The above matching principle has also been discussed by the Supreme Court in the case of *Rotork Controls India Pvt. Ltd. v. CIT*: 314 ITR 62 @ 73, while upholding deduction of warranty liability provided in the books, as under:

"13. In this case' we are concerned with Product Warranties. To give an example of Product Warranties, a company dealing in computers gives warranty for a period of 36 months from the date of supply. The said company considers following options: (a) account for warranty expense in the year in which it is incurred; (b) it makes a provision for warranty only when the customer makes a claim; and (c) it provides for warranty at 2 per cent of turnover of the company based on past experience {historical trend}. The first option is unsustainable since it would tantamount to



accounting for warranty expenses on cash basis, which is prohibited both under the Companies Act. as well as by the Accounting Standards which require accrual concept to be followed. In the present case, the Department is insisting on the first option which, as stated above, is erroneous as it rules out the accrual concept. The second option is also inappropriate since it does not reflect the expected warranty costs in respect of revenue already recognized (accrued). In other words, it is not based on matching concept. Under the matching concept, if revenue is recognized the cost incurred to earn that revenue including warranty costs has to be fully provided (or. When Valve Actuators are sold and the warranty costs are an integral part of that sale price then the appellant has to provide (or such warranty costs in its account (or the relevant year, otherwise the matching concept fails. In such a case the second option is also inappropriate. Under the circumstances, the third option is most appropriate because it fulfils accrual concept as well as the matching concept. For determining an appropriate historical trend, it is important that the company has a proper accounting system for capturing relationship between the nature of the sales, the warranty provisions made and the actual expenses incurred against it subsequently. Thus, the decision on the warranty provision should be based on past experience of the company. A detailed assessment of the warranty provisioning policy is required particularly if the experience suggests that warranty provisions are generally reversed if they remained unutilized at the end of the period prescribed in the warranty. Therefore, the company should scrutinize the historical trend of warranty provisions made and the actual expenses incurred against it. On this basis a sensible estimate should be made. The warranty provision for the products should be based on the estimate at year end of future warranty expenses. Such estimates

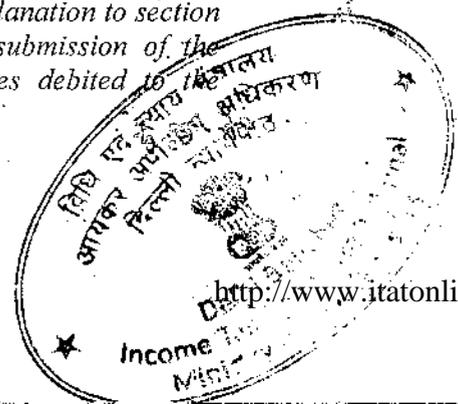
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need reassessment every year. As one reaches close to the end of the warranty period, the probability that the warranty expenses will be incurred is considerably reduced and that should be reflected in the estimation amount. Whether this should be done through a pro - rata reversal or otherwise would require assessment of historical trend. If warranty provisions are based on experience and historical trend(s) and if the working is robust then the question of reversal in the subsequent two years, in the above example, may not arise in a significant way. In our view, on the facts and circumstances of this case, provision for warranty is rightly made by the appellant-enterprise because it has incurred a present obligation as a result of past events. There is also an outflow of resources. A reliable estimate of the obligation was also possible. Therefore, the appellant has incurred a liability, on the facts and circumstances of this case, during the relevant assessment year which was entitled to deduction under section 37 of the 1961 Act. Therefore, all the three conditions for recognizing a liability for the purposes of provisioning stands satisfied in this case. It is important to note that there are four important aspects of provisioning. They are - provisioning which relates to present obligation, it arises out of obligating events, it involves outflow of resources and lastly it involves reliable estimation of obligation. Keeping in mind all the four aspects, we are of the view that the High Court should not to have interfered with the decision of the Tribunal in this case. " (emphasis supplied)

In view of the above, it will be noticed that matching principle of accountancy is clearly embedded under the MAT regime inasmuch as while excluding exempt income credited to the Profit & Loss Account in terms of clause (ii), profits are consequently adjusted by adding back expenditure actually relatable thereto which is debited to the profit and loss account.

Reading clause (i) and clause (ii) of Explanation to section 115JB of the Act together, it is the submission of the assessee Respondent that only expenses debited to

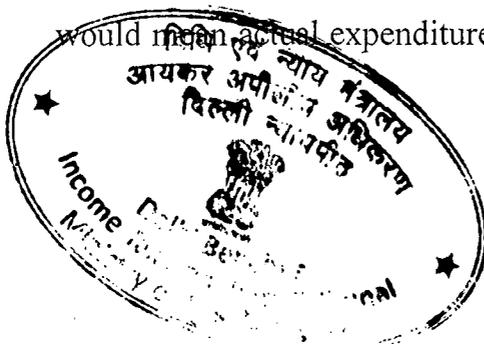


profit and loss account which have direct and proximate nexus with the exempt income credited to the profit and loss account, which is excluded in terms of clause (ii), have to be added back.

4.8. Ld. counsel submitted that Section 14A contemplates disallowance of both direct and indirect expenditure having proximate connection with the exempt income. He submitted that in terms of sub-section (1) of Section 14A of the act, any expenditure incurred **in relation to** exempt income is not an allowable deduction. Thus, the pre-requisite condition for applying the provisions of section 14A of the Act is that some expenditure must be incurred "in relation to" the earning of exempt income. The said expression "in relation to" has been judiciously explained to mean some real and dominant relationship.

4.9. In this regard ld. counsel has relied on the decision of Hon'ble Supreme Court in the case of CIT Vs. Walford Share & Stock Brokers 326 ITR 1, wherein it has been held by the Apex Court that there must be proximate relationship of expenditure with the exempt income for the purpose of making disallowance u/s 14A of the Act. This decision was followed by the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. CIT 328 ITR 81.

4.10. He further referred to the decision of Hon'ble Delhi High Court in the case of Maxopp Investment Ltd. 347 ITR 272, wherein it has been held that no disallowance could be made under the said section where no expenditure had 'actually' been incurred by the assessee in relation to earning of the exempt income. The Hon'ble Delhi High Court approved the contention raised by the assessee that the term 'expenditure incurred' appearing in Sec. 14A(1) of the Act would mean actual expenditure incurred. Thus, the provisions of sec.



14A of the Act would be applicable only when the assessee had actually incurred certain expenditure which had proximate nexus with earning of exempt income.

4.11. Ld. counsel pointed out that the contention of Revenue that disallowance calculated u/s 14A read with Rule 8D of the I.T. Rules should be ipso facto incorporated in clause (f) of Explanation 1 of section 115JB of the Act on the ground that the scope of both the provisions are similar is not correct inasmuch as while u/s 14A the expression used is 'in relation', u/s 115JB of the Act, the term used is 'relatable to'.

4.12. Ld. counsel submitted that this reasoning is legally untenable because sec. 14A contained in Chapter IV of the Act begins with the phrase "for the purposes of computing the total income under this Chapter". It was pointed out that income under the normal provisions of the Act is computed under the five heads specified in section 14. Provisions relating to computation of income under different heads are contained in sections 14 to 59, forming part of Chapter IV of the Act. In other words, the said Chapter provides for computation of income of an assessee under the normal provisions of the Act. As a necessary corollary, provisions of section 14A cannot be extended to any Chapter, other than Chapter IV of the Act.

4.13. Section 115JB finds place under Chapter XII-B of the Act. Being so, provisions of sec. 14A contained in Chapter IV cannot be imported and incorporated u/s 115JB more so when clause (f) to Explanation 1 to the said section contains no reference to section 14A of the Act.



4.14. Ld. counsel submitted that if provisions of Sec. 14A are to be imported into section 115JB of the Act, the same would tantamount to reading additional words into the statute which is not permissible and would be against the cardinal rule of 'literal interpretation'. In this regard ld. counsel has relied on following decisions:

- Jugal Kishore Saraf v. Raw Cotton Co. Ltd. AIR 1955 SC 376, wherein it has been observed as under:

" The cardinal rule of construction of statutes is to read the statutes literally, that is, by giving to the words their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation. In the present case, the literal construction leads to no apparent absurdity and therefore, there can be no compelling reason for departing from that golden rule of construction. "

4.15. He also relied on various other Supreme Court decisions as mentioned in the Broad Proposition advanced by the ld. counsel. Ld. counsel also referred to the Jurisdictional High Court in the case of Great Eastern Exports v. CIT 332 ITR 14, wherein also it has been held that if the language of the statute is plain and capable of one and only one meaning, that obvious meaning is to be given to the said provision.

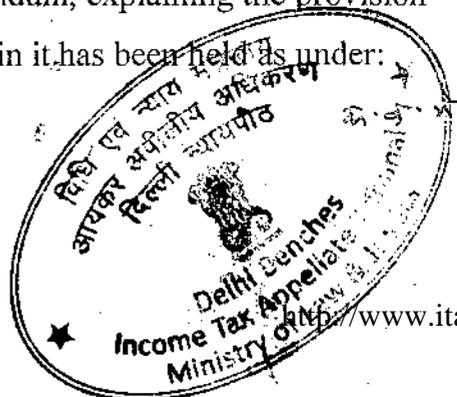
4.17. Accordingly, ld. counsel submitted that applicability of provisions of sec. 14A is confined to computation of tax liability under the five heads of income enumerated in sec. 14 under normal provisions contained in Chapter IV of the act. The said section 14A cannot be extended and read into section 115JB, falling under Chapter XII-B of the Act.



4.18. Ld. counsel further submitted that scope of section 14A and section 115JB of the act are entirely different. He submitted that u/s 14A of the Act disallowance is made of expenditure in relation to the earning of income not forming part of the total income. Thus, section 14A takes within its sweep both direct and indirect expenditure having proximate connection with earning of exempt income. However, under clause (f) of Explanation 1 to section 115JB of the Act, only those expenditure debited to the profit and loss amount, which are relatable to earning of income exempt u/s 10 (excluding section 10(38) or section 11 or section 12 are added back while computing adjusted book profit. Thus, only direct expenditure associated with the earning of said income would be added back.

4.19. Ld. Senior Counsel vide his petition dt. October 8, 2016, pointed out that Hon'ble Delhi High Court in the case of Pr. CIT V. Bhushan Steel Ltd.:ITA No.593/2015 has upheld the decision of the Tribunal in holding that disallowance under section 14A read with Rule 8D cannot be added while computing book profits as per section 115JB as Explanation to that section does not specifically mentions section 14A of the Income Tax Act, 1961. He further pointed out that Review Petition filed by Revenue has been dismissed by hon,ble High Court vide order dt. 3-3-17. He, therefore, submitted that now this decision holds the field.

5. Ld. Principal CIT(DR), Shri S.D. Srivastava, at the outset submitted that in order to appreciate the real controversy, it is necessary to find out the intention behind the insertion of section 14A. In this regard he referred to memorandum, explaining the provision --- 248 ITR (Stat.) 162 page 195, wherein it has been held as under:



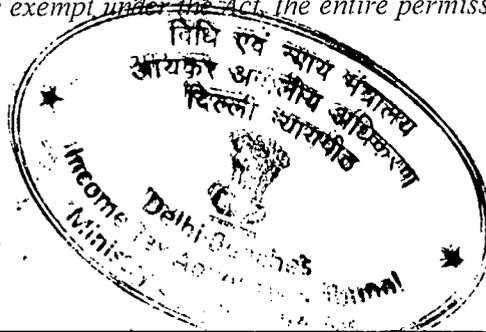
"No deduction for expenditure incurred in respect of exempt income against taxable income. Certain incomes are not includible while computing the total income as these are exempt under various provisions of the Act. There have been cases where deductions have been claimed in respect of such exempt income. This in effect means that the tax incentive given by way of exemptions to certain categories of income is being used to reduce also the tax payable on the non-exempt income by debiting the expenses incurred to earn the exempt income against taxable income. This is against the basic principles of taxation whereby only the net income, i.e., gross income minus the expenditure, is taxed. On the same analogy, the exemption is also in respect of the net income. Expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income.

It is proposed to insert a new section 14A so as to clarify the intention of the Legislature since the inception of the Income-tax Act, 1961, that no deduction shall be made in respect of any expenditure incurred by the assessee in relation to income which does not form part of the total income under the Income-tax Act.

The proposed amendment will take effect retrospectively from April 1, 1962, and will accordingly, apply in relation to the assessment year 1962-63 and subsequent assessment years."

5.1. Ld. Principal CIT(DR) pointed out that in pursuance of this amendment, Circular no. 14 was issued. He pointed out that this amendment was a fall out of the decision of Hon'ble Supreme Court in the case of Rajasthan State Warehousing Corporation Vs. CIT 242 ITR 450, rendered on 23-2-2000 and other judgments laying down the same ratio decidendi, as under:

"The following principles may be laid down: (i) if the income of an assessee is derived from various heads of income, he is entitled to claim deduction permissible under the respective head, whether or not computation under each head results in taxable income; (ii) if the income of an assessee arises under any of the heads of income but from different items, e.g., different house properties or different securities, etc., and income from one or more items alone is taxable whereas income from the other item is exempt under the Act, the entire permissible expenditure



in earning the income from that head is deductible; and (iii) in computing the "profits and gains of business or profession when an assessee is carrying on business in various ventures and some among them yield taxable income and the others do not, the question of allowability of the expenditure under section 37 of the Income-tax Act, 1961, will depend on : (a) fulfillment of requirements of that provision, namely, that (i) the expenditure should not be in the nature of capital expenditure or personal expenses of the assessee; (ii) it should have been laid out or expended wholly and exclusively for the purposes of the business or profession; and (iii) it should have been expended in the previous year; and (b) on the fact whether all the ventures carried on by him constituted one indivisible business or not; if they do the entire expenditure will be permissible deduction, but if they do not, the principle of apportionment of the expenditure will apply, because there will be no nexus between the expenditure attributable to the venture not forming an integral part of the business and the expenditure sought to be deducted as the business expenditure of the assessee."

5.2. Thus, the legislative intent was that no deduction was to be allowed in respect of any expenditure incurred by the assessee in relation to income, which does not form part of the total income under the Income-tax Act. It has further been made clear that the purpose of insertion of section 14A was not to make any disallowance of expenditure in relation to the exempt income for the first time, but it was always the intention of the Act for not allowing such deduction and this insertion was made only to clarify the intention of the legislature as it was since inception. He pointed out that since section 14A did not provide the method of computing the expenditure, therefore, by Finance Bill 2006, sub-section (2) to section 14A was inserted so as to provide that it would be mandatory for the AO to determine the amount of expenditure incurred in relation to such income which does not form part of the total income in accordance with such method as may be prescribed.



5.3. Ld. Principal CIT(DR) further submitted that provisions of section 14A only reiterate the settled law as regarding matching principles of accountancy as per which against the current income only current expenditure is to be allowed and against the exempt income no expenditure is to be allowed, whether direct or indirect, otherwise matching principle gets disturbed because assessee who debited only direct expenditure against exempt income derives a double benefit by taking the benefit of indirect expenditure against taxable income though part of which is relatable to exempt income. In this regard Id. CIT(DR) referred to the decision of Hon'ble Supreme Court in the case of Escorts Ltd. & another vs. Union of India & others 199 ITR 43, wherein it has been held as under:

“There is a fundamental, though unwritten, axiom that no Legislature could have at all intended a double deduction in regard to the same business outgoing; and if it is intended, it will be clearly expressed. In other words, in the absence of clear statutory indication to the contrary, the statute should not be read so as to permit an assessee two deductions – both under section 10(2)(vi) and section 10(2)(xiv) of the 1922 Act or both under section 32(1)(ii) and section 35(1)(iv) of the 1961 Act.”

5.4. Ld. Principal CIT(DR), therefore, submitted that the contention of Id. counsel for the assessee that under clause (f) to Explanation 1 to section 115JB only direct expenditure are contemplated is against the basic principle of taxation. He submitted that ‘proximate’ will mean direct as well as indirect expenditure and depends on facts of each case. Ld. CIT(DR) submitted that the expression ‘in relation to’ used in section 14A and the expression ‘expenditure relatable to any income’ as used in clause (f) of explanation 1 to section 115JB are in the same context and will, therefore, have to be understood in the same sense. He submitted that the expression used in clause (f) to



Explanation 1 of Section 115JB(2) will take colour from the expression in relation to as used in section 14A.

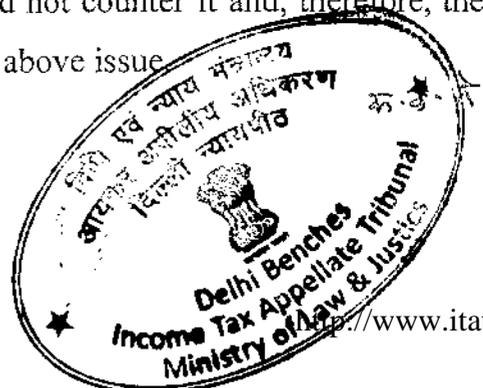
5.5. Ld. Principal CIT(DR) further pointed out that in the case of CIT Vs. Walfort Share & Stock Brokers 326 ITR 1 (SC); and in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. CIT 328 ITR 81 (Bom), it has been held that all the expenses having proximate connection to the earning of exempt income have to be disallowed which will include indirect expenses also.

5.6. Ld. Principal CIT(DR) submitted that section 14A(2)/(3) and Rule 8D incorporated in the statute only apply this principle of law and accountancy. This principle will apply both to the normal profits as well as book profits, otherwise the matching principle of accountancy will get disturbed and assessee will get a double benefit which is not permissible both in law and accounts.

5.7. Ld. Principal CIT(DR) further referred to the decision of Hon'ble Delhi High Court in the case of Goetze India Ltd. 361 ITR 505 wherein at page 530 of the report it has been observed as under:

"Ld. counsel for the respondent-assessee, during the course of hearing, has fairly conceded that the first question has to be answered in favour of the revenue and against the assessee –in view of the specific provisions in the explanation 1 below section 115JB(2) clause (f)....".

5.8. Ld. Principal CIT(DR) submitted that when ld. counsel was confronted with the specific provisions of clause (f) to Explanation 1 below section 115JB, ld. counsel fairly conceded. He pointed out that this was not a concession on any fact, but when faced with the clear provisions of law, the counsel could not counter it and, therefore, the court gave this verdict based on the above issue.

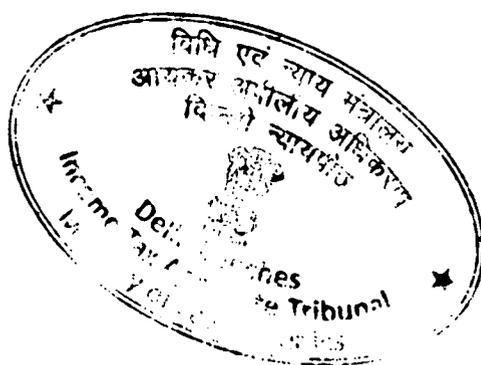


5.9. Ld. Principal CIT(DR) referred to the decision of Hon'ble Supreme Court in the case of CIT Vs. K.Y. Pilliah & Sons 1967 63 ITR 411 (SC), wherein in para 10 it has been observed as under:

"..... "The ITAT is the final fact finding authority and normally it should record its conclusion on every disputed question raised before it, setting out its reasons in support of its conclusion. But, in failing to record reasons, when the Appellate Tribunal fully agrees with the view expressed by the Appellate Assistant Commissioner and has no other ground to record in support of its conclusion, it does not act illegally or irregularly, merely because it does not repeat the grounds of the Appellate Assistant Commissioner on which the decision was given against the assessee or the department "

5.10. He pointed out that when the counsel fairly conceded the matter in the Hon'ble Delhi High Court, the Hon'ble Delhi High Court was not required to repeat the reasons as stated in the court by the ld. counsel for the assessee for conceding the same. Rather it agreed with it and gave its decision. Ld. CIT(DR), therefore, submitted that AO is empowered to adopt the disallowance u/s 14A while making the addition as contemplated under clause (f) of Explanation 1 to sec. 115JB(2). Ld. CIT(DR), therefore, submitted that this issue is, therefore, no longer res integra and, therefore the question referred to by Hon'ble President for answer is squarely covered by the decision of Hon'ble Delhi High Court.

5.11. As regards reliance placed by ld. Senior Counsel on the decision of Hon'ble Delhi High Court in the case of Bhushan Steel (supra), ld. CIT(DR) submitted that the said decision has been rendered without considering the binding decision of co-ordinate bench of equal strength and, therefore, cannot hold the field.



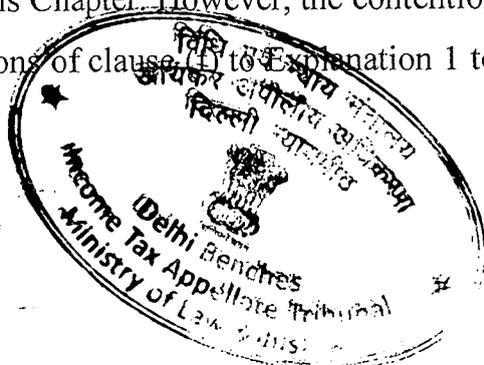
6. We have considered the submissions of both the parties and have perused the record of the case.

There cannot be any quarrel with the submissions of Id. Sr. counsel for the assessee that section 115JB is a complete code in itself. Chapter XII-B provides alternate scheme for computing tax liability of certain companies, whose total income under normal provisions is below the threshold book profit as prescribed under Chapter XII-B. Under section 115JB this threshold limit is 18.5%. Thus, total income as computed under the normal provisions of the Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April 2012, is less than 18.5% of its book profit, such book profit shall be deemed to be the total income of the assessee and tax shall be payable on such total income @18.5%. Thus, the scheme of the Act is that the computation is first made under the normal provisions of Income-tax Act and, thereafter, under an alternate scheme provided u/s 115JB for computing total income as per the prescribed method. If the tax liability on the basis of total income as per MAT provisions is more than the tax computed under the normal provisions of the Act, then the former becomes the final tax liability of the assessee. The mode of computation of book profit has been prescribed under MAT provisions. The issue posed for our consideration is whether computation provisions prescribed for computation of total income under normal provisions with reference to section 14A can or cannot be taken into consideration while computing book profits under MAT provisions.



6.1. Section 14A has been inserted by the Finance Act, 2001 with retrospective effect from 1-4-1962. The object for inserting section 14A, was to deny the expenditure relatable to the earning of exempt income being allowed as deduction against the taxable income. The purpose was to deny double deduction to assessee – firstly by claiming the entire income as exempt income and then again claiming the expenses incurred relatable to the exempt income against the taxable income. This would have resulted in reduction of the taxable income to the extent of the expenses relatable to exempt income. In order to overcome this anomaly, section 14A was inserted.

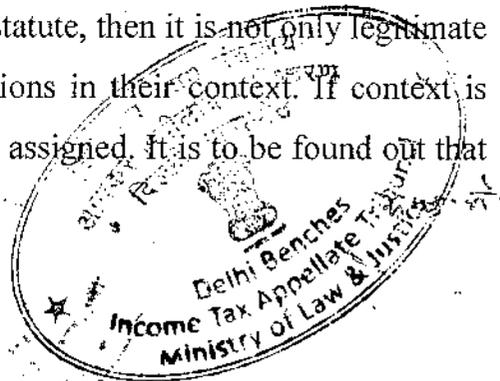
Chapter XIIB has been inserted by the Finance Act, 1987 w.e.f. 1-4-1988 and the object was to make the companies which were not at all paying any taxes to pay the tax on the basis of book profits as per the deeming provisions contained in the Chapter. The computation of book profit has been specifically prescribed in the section itself and the starting point of the same is the net profit as shown in the P&L a/c prepared in accordance with Schedule VI to the Companies Act, which is to be increased by various items contemplated in the explanation and also to be reduced by various items, mentioned in the explanation itself. The adjustments contemplated in the explanation are broadly the same as are being made while computing profits of business in case of companies under normal provisions of Act. Under this Chapter specific items have been prescribed for computation of book profit. The same have to be followed and the computation as contemplated under Chapter IV of the Income-tax Act for computation of business income cannot be imported in whole sum per se under this Chapter. However, the contention of Ld.CIT (DR) is that the provisions of clause (E) to Explanation 1 to section 115JB requires



the net profit as shown in the P&L A/c to be increased by the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause (38) thereof) or section 11 or section 12 apply and as per clause (ii) of the explanation, the net profit is to be reduced by the amount of income to which any of the provisions of section 10 (other than the provisions contained in clause (38) thereof), or section 11 or section 12 apply, if any such amount is credited in the P&L A/c. Thus, the submission is that the provisions of clause (f) to Explanation 1 of Section 115JB(2) are akin to section 14A.

6.2. Now the question before us is, whether the amount or amounts of expenditure relatable to exempt income as contemplated in clause (f) to Explanation 1 to section 115JB(2) could be arrived at by resorting to provisions of section 14A or not. The submission of Ld. Principal CIT (DR) is that it cannot be disputed that the object of section 14A was only to determine the expenditure in relation to exempt income as noted earlier. His contention, therefore, is that the object of sec. 14A and clause (f) to Explanation 1 to Section 115JB(2) is same and, therefore, it cannot be disputed that section 14A can be resorted to for finding out the expenditure relatable to any income which is exempt. In this regard Ld. Principal CIT(DR) has referred to some of the well settled principles of statutory interpretation which are discussed hereunder.

6.3. When the question arises as to the applicability of similar provisions in different parts of the statute, then it is not only legitimate but proper to read both the provisions in their context. If context is same, different meaning cannot be assigned. It is to be found out that



what mischief was intended to be remedied by inserting a particular section. The intention of the legislature once is manifested in a particular section in the statute then said intention cannot be given a different meaning, if a similar provision has been incorporated in a different section in the statute. The intention of the legislature must be found out by reading the statute as a whole.

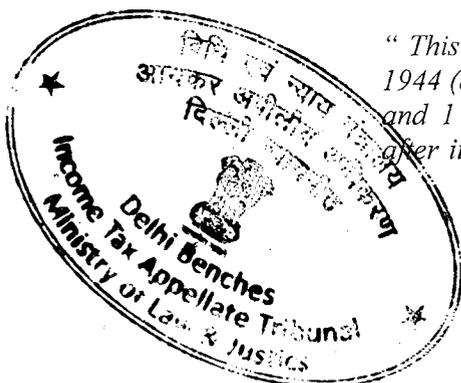
6.4. Literal meaning cannot always be followed logically, because sometimes it tends to defeat the obvious intention of the legislature and results in producing a wholly unreasonable result. To achieve the obvious intention and to produce a reasonable result.

6.5. The Hon'ble Supreme Court in the case of N.B. Sanjana v. Elphinstone Spinning & Weaving Mills Ltd. AIR 1971 SC 2039, examined Rule 10 under the Central Excise Act, 1944 observing, inter alia, as under:

"This rule relates to raising of demand for short-levy within a e limit in cases where lesser amounts have been paid. The petitioners argued that where no payments had been made and where nil assessments e been made, there would be no application of this rule and no demand could be raised. The Supreme Court observed that we cannot take a literal interpretation in such a case. It should be an interpretation in the context which I mean appropriately that the word "paid" would include "ought to have been paid" and assessments would cover 'nil' assessment. The machinery of the tax - s stem should be made workable and the clear intention should not be prevented."

6.6. In the case of Asstt. Collector of Central Excise v. National Tobacco Company Ltd. AIR 1972 SC 2563, the Hon'ble Supreme Court has observed as under:

" This is a case under the Central Excises Act and Rules, 1944 (as they '7 stood before 1-8-1959) where the Rules 10 and 1 OA have again come for further discussion even after it was settled in Sanjana's case (AIR 1971 SC 2039)



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that while Rule 10 was for short-levy (for specified reasons), Rule 10A was for non-levy or short-levy or for reasons other than in Rule 10. Rule 10 covered cases of inadvertence, error, collusion, misconstruction and misstatement. In Sanjana's case the Supreme Court harmonised the two rules by indicating that Rule 10A which was residuary in character would be inapplicable if a case fell within a specified category of cases mentioned in Rule 10. Rule 10 is confined to cases where the demand is to be made for short-levy caused by the reasons in that Rule 10 itself so that an assessment has to be reopened. The High Court of Calcutta in this case had decided that the demand could not be raised under Rule 10 because it is a case of inadvertence. But the Supreme Court observed in this case that the High Court has called it a case of no assessment at all and in that case it falls under Rule 10A (which is for cases where there is no assessment, that is non-levy). Moreover, there are other circumstances such as insufficient information given by the petitioners which is not covered by Rule 10. That makes the demand valid under Rule 10A. If Rule 10 is interpreted very broadly as done by the Calcutta High Court then the Rule 10A would become useless. The Supreme Court, therefore, held the demand valid under Rule 10A which is where there has been no assessment or where there is short-levy due to reasons other than specified in Rule 10. Though Rule 10A was not mentioned in the demand, quoting a wrong rule does not make it invalid. The Supreme Court has elaborated the application of some fundamental principles of interpretation while setting aside the judgment of the Calcutta High Court.

First, the High Court considered the applicability of Rule 10 alone and not of Rule 10A since only Rule 10 was mentioned. The shutting out of the other Rule 10A, under which also demand could be valid, has been wrong. What the High Court followed was the maxim: Expressio unius est exclusio alteris. But this principle, observed the Supreme Court, is a valuable servant but a dangerous master. "The rule is subservient to the basic principle that Courts must endeavour to ascertain the legislative intent and purpose and adopt a rule of construction which effectuates rather than on that which may defeat these." The High Court ignored in this case the legislative intent in having Rule 10A. Rule 10A was for "special circumstances not foreseen by the framers of the Act or the Rules". The High Court did not consider at all whether the demand would fall under Rule 10A but merely interpreted broadly Rule 10 to conclude that the demand did not fall under that rule. That clearly goes against the legislative intent.



The Supreme Court therefore set aside the High Court order and upheld the demand under Rule 10A though that rule was not quoted in the demand doing so the Supreme Court upheld the basic principle of legislative intent and purpose."

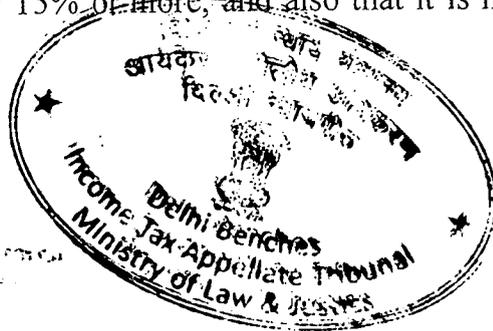
6.7. Again in the case of K.P. Varghese v. ITO AIR 1981 SC 1922, while examining the true meaning of section 52(2), which enabled the revenue to charge tax on the capital gains deemed to accrue, wherever the declared value for transfer of property was less by 15% or more compared to the fair market value, the Hon'ble Supreme Court refused to accept the strict literal meaning, calling it absurd. The Hon'ble Court gave some examples on the basis of strict interpretation and pointed out that it would be absurd and unreasonable to apply sec. 52(2) according to its strict literal construction. The Hon'ble Court further observed that –

"We must, therefore, give up literalness in the interpretation of sec. 52(2) and try to arrive at an interpretation which avoids this absurdity and mischief and makes the provision rational and sensible, unless, of course, our hands are tied and we cannot find any escape from the tyranny of the literal interpretation.

It was further observed that –

"It is now a well settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the Court may modify the language used by the legislature or even "do some violence" to it so as to achieve the obvious intention of the legislature and produce a rational construction".

6.8. Accordingly, Hon'ble Supreme Court held that a fair and reasonable construction would be that the revenue must show not only that the fair market value of the capital asset exceeds the declared value by 15% or more, and also that it is not a bona fide declaration



and the assessee has actually received underhand payment apart from what has been actually declared by him.

6.9. In the case of Canada Sugar Refinery Co. Vs. R (1898) AC 735 at page 742, it was observed that every clause of a statute is to be construed with reference to the context and other clauses of the Act as far as possible to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

6.10. Thus, the submission of Id. CIT(DR) IS that when basic object and purpose of section 14A and clause (f) to Explanation 1 to section 115JB(2) is same, then it cannot be said that merely because section 14A has not been mentioned in clause (f), therefore, it has no application. The mode of computation with same purpose cannot be differently made merely because section 115JB creates a deeming section. The object of deeming provisions is to substitute the total income computed under normal provisions by that computed under MAT provisions. Submission of Id. CIT(DR) is that this cannot be extended to computation for same items under normal as well as MAT provisions. Under the provisions of section 14A, both direct and indirect expenses in relation to earning of exempt income are to be reduced. Therefore, different meaning cannot be ascribed in clause (f) and, therefore, the submission of Id. counsel for the assessee that only directly relatable expenditure is to be reduced, cannot be accepted.

6.11. Ld. CIT(DR) further submitted that the term "relatable to" used in clause (f) cannot be ascribed a restrictive meaning as compared to the term used "in relation to" in section 14A. Both terms are with the same purport and object.



6.12. Ld. counsel has submitted that the AO cannot go beyond audited financial statements of the assessee while computing book profits u/s 115JB. However, the submission of ld. CIT(DR) is that this argument is fallacious, because here the AO is not going beyond the audited accounts but is computing the expenditure debited in the P&L A/c, which is relatable to earning of exempt income. This is as per clause (f) itself.

6.13. Further reasoning advanced by ld. CIT(DR) is that section 14A has been incorporated much after the incorporation of Chapter XIIB in 1987. Section 14A was incorporated just after section 14, which classifies the head of income for computation of total income. This section was made applicable with respect to determination of total income. The MAT provisions are for computation of income from business in case of specific companies. Therefore, it cannot be said that section 14A had no applicability to MAT provisions, which were existing when section 14A was introduced for the first time. Therefore, section 14A is applicable for all kinds of incomes, which are claimed as exempt by assessee in the Income-tax Act.

6.14. There cannot be any quarrel with the proposition that clause (f) of Explanation 1 to section 115JB(2) is in conformity to matching principles of accounting. Ld. counsel has submitted that matching principle of accountancy provides that expenses are debited in the P&L A/c only to the extent relatable to the accrual of the corresponding income and, therefore, only expenses debited to the P&L A/c which have direct and proximate nexus with the exempt income credited to the P&L A/c are to be added back.



6.15. Ld. CIT(DR), however, submits that this argument cannot be accepted because if assessee has made provision in respect of expenditure accrued, a part of which is relatable to exempt income, then it does not imply that to that extent the expenditure should not be added back.

6.16. The submission of ld. CIT(DR) is, thus, that the phrase "in relation to" as used in section 14A and the expression "expenditure relatable to", as used in clause (f) of Explanation 1 to section 115JB(2), are in the same context and, therefore, have to be understood in the same sense.

6.17. Ld. Principal CIT(DR) has pointed out that the phrase "expenditure relatable to" as used in clause (f) of Explanation 1 to section 115JB(2) will take its color from the phrase in "in relation to", used in section 14A. The contention of ld. CIT(DR) is that if we apply principles of literal interpretation, then that would lead to an anomalous situation, in which higher expenditure, to the extent of indirect expenses, will be charged towards the earning of exempt income u/s 14A, thereby reducing the exempt income as compared to expenditure charge while computing book profits u/s 115JB because no indirect expenditure will be allocated towards earning of exempt income. The submission is that obviously, this cannot be the intention of legislature. As per the provisions of section 115JB(1), a comparison of the total income computed under the normal provisions of the Income-tax Act is to be made with the book profits as computed u/s 115JB. This makes it clear that total income as contemplated under normal provisions is inextricably linked to book profits under MAT provisions and it is wrong to suggest that both operate in entirely



different fields. This interpretation overlooks the very object of insertion of MAT provisions. Therefore, the submission is that when we resort to comparison between computation under normal provisions of the Income-tax Act and MAT provisions, the comparison will not be on same footing. Submission of Id. CIT(DR) is that it cannot be denied that the legislative intent regarding disallowance of expenditure relating to earning of exempt income was same, whether under normal provisions or under the MAT provisions. Hence, the whole object of comparison between the total income under normal provisions and MAT provisions will get frustrated.

6.18. Ld. CIT(DR) submitted that the above interpretation, will ensure in arriving at the same figure of expenditure relatable to exempt income under normal provisions and also while computing the book profits u/s 115JB. If different modes of computation are followed u/s 14A and in clause (f) of Explanation 1 to section 115JB(2), then the comparison will not be on same footing and will produce absurd results. He further clarified that even if we resort to plain meaning rule, the phrase "in relation to" used in section 14A and the phrase "expenditure relatable to earning of exempt income", under clause (f) of Explanation 1 to section 115JB(2), the word "relatable to" has wider connotation than the words "in relation to", where the proximate relationship is required and, therefore, the contention of Id. counsel for the assessee that, while computing book profit u/s 115JB, only those expenses which have direct nexus to the earning of exempt income have to be considered under clause (f) of Explanation 1 to section 115JB(2), cannot be accepted.

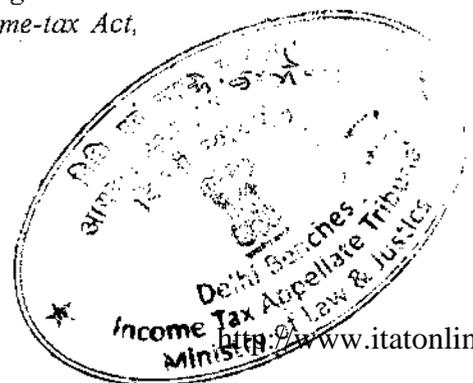


6.19 Ld. CIT(DR)'s aforementioned submissions are fortified by the decision of Hon'ble Delhi High court in the case of Goetze (india) Ltd.(supra). Admittedly the decision is on the point in issue under consideration. The submission of Id. Senior Counsel is that the decision of Hon'ble Delhi High Court is by way of concession by assessee as they have recorded the statement of assessee's counsel to answer the question of law. Per contra the submission of Id. Principal CIT(DR) is that the decision is after due consideration of provisions of law. We find considerable force in the submission of Id. CIT(DR) that the decision cannot be said to be by way of concession more particularly when a substantial question of law and not question of fact was under consideration of Hon'ble High Court. In that case proceedings u/s 263 were initiated, inter alia, on the ground that the expenditure of Rs. 183.63 lacs, incurred for earning of exempt dividend income u/s 14A of the Act was not disallowed, though the assessee had earned dividend income of Rs. 157.85 lacs, which was exempt u/s 10(33) of the Act. The computation of income was made u/s 115JA and in that context the Hon'ble High Court, inter alia, observed as under:

"By order dated May 16, 2012, the following substantial questions of law were framed in the present appeals.

"(i) Whether the Income-tax Appellate Tribunal was right in holding that while computing the book profit under section 115JA (sic. Section 115JB) of the Income-tax Act, 1961, no disallowance under section 14A was required to be made?

(ii) Whether the Income-tax Appellate Tribunal was right in deleting interest under section 234D of the Income-tax Act, 1961?

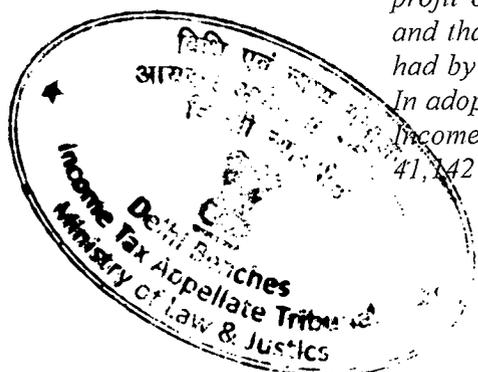


Learned counsel for the respondent-assessee, during the course of hearing, has fairly conceded that the first question has to be answered in favour of the Revenue and against the assessee in view of the specific provisions in the Explanation 1 below section 115JB(2) clause (f). The Assessing Officer it is stated had made an addition of Rs. 88,292 to the book profits towards expenditure incurred having nexus with dividend income, which were exempt under section 10(33). Recording the said statement, the first question is answered in favour of the appellant-Revenue and against the respondent-assessee."

6.20. Thus, it cannot be said that Hon'ble Delhi High Court has not considered this issue and merely allowed the revenue's appeal on concession. The substantial question of law framed by Hon'ble Delhi High Court clearly shows that the specific issue was whether disallowance u/s 14A was required to be made while computing book profit u/s 115JA/ 115JB. The Hon'ble Delhi High Court has not only recorded assessee's plea of merely not contesting the issue in view of specific provisions but has recorded that the counsel fairly conceded. The expression "fairly" implies that Hon'ble High Court was also of the view that the provisions of section 14A were applicable with full force to the corresponding provisions u/s 115J.

6.21. Ld. Principal CIT(DR) has, in this regard, referred to the decision of Hon'ble Supreme Court in the case of CIT Vs. K.Y. Pilliah & Sons (1967) 63 ITR 411 (SC), wherein in para 10, it has been observed as under:

10. The form of the second question needs some explanation. The Income-tax Officer worked out the gross profit on the estimated turnover of Rs. 12 lakhs at 6.5% and that the profit amounted to Rs. 78,000. The assessee had by their return disclosed a gross profit of Rs. 36,858. In adopting the rate of 6.5% on the estimated turnover, the Income-tax Officer added to the income returned Rs. 41,142 being the additional profit, and levied tax thereon.



It was not suggested that there were any other admissible outgoings which could not be debited against that amount. The question whether Rs. 41,142 were liable to be taxed falls to be determined under the first question. The second question only relates to the amount of Rs. 7,000 which was the cash credit item which represented an unexplained entry in the books of account of the assessee. In respect of that amount, the Income-tax Officer held that the explanation of the assessee was untrue and the Appellate Assistant Commissioner and the Tribunal agreed with the view. The Income-tax Appellate Tribunal is the final fact-finding authority and normally should record its conclusion on every disputed question raised before it, setting out its reasons in support of its conclusion. But, in failing to record reasons, when the Appellate Tribunal fully agrees with the view expressed by the Appellate Assistant Commissioner and has no other ground to record in support of its conclusion, it does not act illegally or irregularly, merely because it does not repeat the grounds of the Appellate Assistant Commissioner on which the decision was given against the assessee or the department. The criticism made by the High Court that the Tribunal had "failed to perform its duty merely affirming the conclusion of the Appellate Assistant Commissioner" is apparently unmerited. On the merits of the claim for exclusion of the amount of Rs. 7,000, there is no question of law which could be said to arise out of the order of the Tribunal. The assessee had credited Sampangappa with two sums of Rs. 6,000 and Rs. 1,000 in the months of November and December, 1950, respectively. It was clear that Sampangappa had not advanced at the material time any amount to the assessee. The explanation of the assessee was, therefore, untrue."

Thus, it is evident that in every case it is not necessary that long drawn reasoning should be given before arriving at any conclusion more particularly when both the parties are agreed on certain provision of law. We, therefore, reject the assessee's contention that the decision of Hon'ble jurisdictional High Court in Goetze (India) Ltd. does not constitute a binding precedent more particularly in respect of subordinate courts including Tribunal functioning within its jurisdiction.



However, Ld. Senior Counsel has relied on the decision in the case of Bhushan Steel (supra) wherein it has been held as under:-

ITA 593/2015

PR. CIT

..... Appellant

Through: Mr. N.P. Sahni, Senior Standing
counsel with Mr. Nitin Gulati, Advocate.

versus

BHUSHAN STEEL LTD

..... Respondent

Through: Ms. Kavita Jha, Advocate with
Ms. Roopali Gupta, Advocate.

ORDER

29.09.2015

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.....

7. Question No.6 concerns deletion of addition of Rs.89,00,000 made by the AO for computation of the income for the purposes of Minimum Alternate Tax ('MAT') under Section 115 JB of the Act. This pertained to the expenditure incurred for earning exempt income under Section 14A read with Rule 8D. The ITAT has rightly held that this being in the nature of disallowance, and with Explanation 115JB not specifically mentioning Section 14A of the Act, the addition of Rs.89,00,000 was not justified. The view taken by the ITAT cannot be faulted with. It is consistent with the decision in Apollo Tyres Ltd. v. Commissioner of Income Tax (2002) 255 ITR 273 (SC) which held that "the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115J." The Court declines to frame a question on the above issue.

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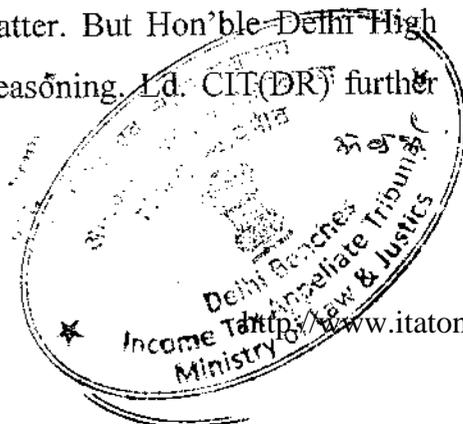


Thus, this decision is also on the same issue taking contrary view. Under such circumstances the issue before us is as to follow which decision.

Ld. CIT(DR) in course of hearing filed the decision of Tribunal in the case of Goetze (India) Ltd. and referred to para 6 of the said decision which is reproduced hereunder:-

"6. Coming to the sustenance of disallowance of Rs.88,290/- u/s 115JB, the Commissioner of Income-tax (Appeals) has upheld the disallowance under clause (f) of Explanation to section 115JB(2) of the Act. Under section 115JB of the Act, the assessee is required to pay tax on its book profit subject to certain conditions. The book profit is to be determined u/s 115JB(2) as per Part II & III of Schedule VI to Company's act, 1956. Explanation (1) to section 115JB(2) defines the expression "book profit" and means the net profit as shown in the P&L A/c for the relevant previous year prepared under sub-section (2) as increased by the amounts specified in clause (a) to (h) of the Explanation 1. Clause (f) of the Explanation 1 refers to the amount or amounts or expenditure relatable to any income to which section 10 (other than provisions contained in clause 38 thereof) or section 11 or section 12 apply. For applying the provisions of clause (f) of Explanation to section 115JB(2), there should be nexus between the amount of expenditure relatable to the income exempt u/s 10 of the Act. The dividend income is exempt u/s 10(33) for assessment year 2001-02. Since the expenditure incurred has not been identified and no nexus has been established with the dividend income, the expenditure could not be disallowed under clause (f) of the Explanation. As per the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd., the Assessing Officer is not entitled to tinker with the book profits as determined as per provisions of Company's Act unless the amount is specified in clauses (a) to (h) of the Explanation. The amount of Rs.88,290/- has not been established to have nexus with the dividend income. The amount of Rs.88,290/- has been estimated at 1% of the income. In our view, no disallowance could be made. Accordingly, we direct the Assessing Officer to delete the amount of Rs.88,290/- from the book profit."

Thus, he submitted that the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. was duly considered by Tribunal before taking contrary view in the matter. But Hon'ble Delhi High Court did not accept the Tribunal's reasoning. Ld. CIT(DR) further



submitted that the decision in the case of Bhushan Steel has been rendered without taking into consideration the decision in the case of Goetze (India) Ltd. (supra) of co-ordinate bench of equal strength as both sides had not, brought to the notice of the Bench the said decision in the case of Goetze (India) Ltd. and, therefore, does not constitute binding precedent. Ld. CIT(DR) vehemently contended that when decision in Bhushan Steel was rendered, the issue was no more res-integra in view of Goetze decision. Ld. CIT(DR) submitted that Revenue had filed Review Petition before Hon'ble High Court in the case of Bhushan Steel which has been dismissed *in-limine* at the threshold on the ground of delay in filing the said Review Petition and, therefore, does not constitute a binding precedent. In support of his contention he has relied on the commentary of Kanga & Palkhivala, vol. I, VIIth Edn., pag 43 which is reproduced hereunder:-

43. *Circumstances that Destroy or Weaken the Binding Force of Precedent.*

A precedent loses all or some of its binding force in the following circumstances:

- (i) *if it is reversed or overruled by a higher court – reversal occurs when the same decision is taken on appeal and is reversed by the higher court, while overruling occurs when the higher court declares in another case that the earlier case was wrong decided;*
- (ii) *when it is affirmed or reversed on a different ground, depending on the circumstances of such affirmation or reversal;*
- (iii) *when the legislature enacts a state that is inconsistent with the precedent;*
- (iv) *when it is inconsistent with the earlier decisions of a higher court or a court of the same rank;*
- (v) *if it is a precedent sub silentio or not fully argued;*
- (vi) *when it is rendered per incuriam, ie, in ignorance of a statutory provision or binding precedent – however, the rule of per incuriam is of limited application, and if the provision of the Act was noticed and considered, then the judgment cannot be ignored as being per incuriam merely on the ground that it has erroneously reached the conclusion; and*
when it is an erroneous decision, ie, a decision conflicting with the fundamental principles of law.

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Ld. Principal CIT(DR) further relied on the decision of Hon'ble Bombay High Court in the case of CIT v. Thana Electricity Supply Ltd. 206 ITR 727 wherein hon'ble court while summarizing the general principles with regard to precedents, inter-alia, observed as under:-

(iii) *Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decisions.*

Ld. Principal CIT(DR) has also relied on following decisions :-

- CIT vs. Pamwi Tissues Limited, 313 ITR 137
- Indian Oil Corporation Ltd. vs. State of Bihar, 167 ITR 897
- Kunhayammed & Ors. vs. State of Kerala & Anr., 245 ITR 360

Ld. Principal CIT(DR) has submitted following written submissions in this regard:-

"The assessee had filed a compilation of case laws on 20/04/2017 and the Deptt. had to reply to the above.

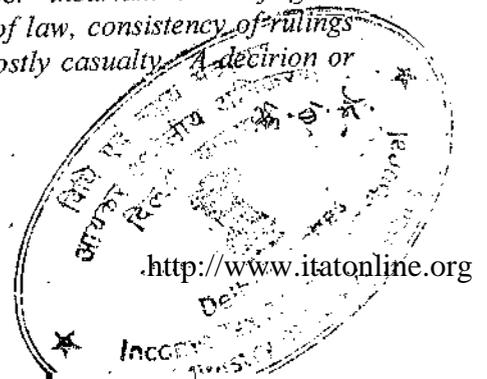
The reply of the Deptt. is as follows :-

1. *The decision of the Hon'ble Supreme Court in the case of Sundeep Kumar Bafna V/s State of Maharashtra and another AIR 2014 SC 1745 has held as follows in para 12 of the judgement :-*

"if the third sentence of para 48 is discordant to Niranjana Singh, the view of the co-ordinate bench of earlier vintage must prevail, and this discipline demands and constrains as also to adhere to Niranjana Singh, ergo, we reiterate....."

Again in para 15 of the judgment it has been stated as follows:-

15. *"It cannot be over – emphasized that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule of great importance, Since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or*



judgement can be *per incuriam* any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgement can also be *per incuriam* if it is not possible to reconcile its ratio with that of a previously pronounced judgement of a co-equal or larger Bench, or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the *per incuriam* rule is strictly and correctly applicable to the 'ratio decidendi' and not to 'obiter dicta'. It is often encountered in High Courts that two are more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of '*per incuriam*'.

Thus, both paras 12 and para 15 cited above, in the Supreme Court judgement in Sandeep Kumar Bafna's case (*supra*) hold very clearly that the earlier decision is to be followed and not the later one of co-equal bench – when given in ignorance of the earlier decision – which in the present case – makes it very clear that the decision rendered in the case of Goetze should be followed and not the later decision given in the case of Bhushan Steel.

Further, the Hon'ble Supreme Court in the case of Mamaleshwar Prasad V/s Kanhaiya Lal (Dead) AIR 1975 SC 907 observed as follows :-

"Certainty of the law, consistency of rulings and comity of Courts all flowering from the same principle converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances where by obvious inadvertence or over sight a judgement fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission."

Although the above observations are not '*ratio*' but then as held in the case of (1) *Kharawala V/s ITO 147 ITR* pages 67, 85 :-

The observation of the Supreme Court on the true interpretation of sub-s. (1) cannot, therefore, be regarded as mere passing observations. At the highest, they may be treated as an *obiter dictum*, that is to say the expression of opinion on a point which it was not necessary for the decision of the case. Even if they are conceivably regarded as *obiter dictum* it is settled that if an opinion is expressed by the supreme court on the interpretation of a section after careful consideration and such opinion is deliberately and advisedly given, the opinion would be binding on the High Court See *Mohandas Issardas V. A.N. Sattanathan* (1955) 56 BLR 1156; AIR 1955 Bom 113. Under these circumstances, we are unable to accede to this submission made on behalf of the Revenue.

(2) *CIT V/s AP Riding Club 168 ITR* pages 393, 404

It is now-settled that even the *obiter dictum* of their Lordships of the Supreme Court is binding on the High Courts under article 141 of Constitution of India.

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The 'obiter dicta' of Supreme Court has to be followed.

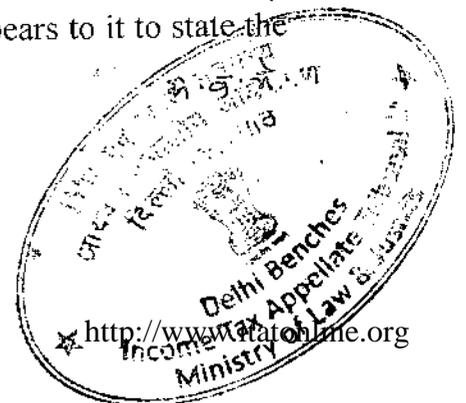
Hence, both the cases of Sandeep Kumar Bafna and Mamalleshwar Prasad V/s Kanhaiya Lal – make it very clear that the earlier decision constitutes the 'binding precedent' and should be followed in preference to the later decision given in ignorance of the earlier decision of co-equal strength.

Hence, it is requested that the Hon'ble Special Bench may kindly follow the earlier decision of Goetze in preference to the later decision of Bhushan Steel."

Per contra, Ld. Senior Counsel, without prejudice to his submission that the decision in the case of Goetze (India) Ltd. on this issue was by of concession, submitted that in case of conflict/divergent view expressed in two separate pronouncements of a Court by a Bench of co-equal strength, the decision being later in point of time is binding on the lower courts. In support of this proposition of law he has relied on following decisions :-

1. Bhika Ram v. UOI : 238 ITR 113 (Del.).
2. Govindanaik G. Kalaghtigi v. West Patent Press Co. Ltd.: AIR 1980 Kar 92 (FB).
3. Vasant Tatoba Hargude v. Dikkaya Muttaya Pujari : AIR 1980 Bombay 341.
4. Peedikkakumbhi Joseph v. Special Tahsildar : 2001 (1) KLT 747 (FB).
5. Datamatics Financial Services Ltd. v. JCIT : 95 ITD 23 (Mum. Trib.)

The second proposition advanced by Ld. Senior Counsel is that in case of conflict/divergent view expressed in two separate pronouncements of a Court by a Bench of co-equal strength, the lower Court shall follow the judgment which appears to it to state the



law more elaborately and accurately. In this regard he has relied on following decisions :-

1. Indo Swiss Time Limited v. Umrao : AIR 1981 P&H 213
2. Amar Singh Yadav v. Shanti Devi : AIR 1987 Pat 191
3. T.P. Naik v. UOI : AIR 1998 MP 83

Third proposition advanced by Ld. Senior Counsel is that a lower authority/Court cannot declare a judgment of a higher Court as per incurium. In this regard he has relied on following decisions:-

1. Cassel & Co. Ltd. vs. Broome [1972] 1 All ER 801 (House of Lords) –
quoted in ITO v. Modern International : ITA No.1253/Kol/2011.
2. CIT v. B.R. Construction : 202 ITR 222 (AP)(FB).

Thus, we are pitted against two decisions of Hon'ble jurisdictional high court taking divergent views and, under such circumstances we have to decide which decision to follow. We find from the decisions relied upon by Ld. Senior Counsel more particularly in the case of Bhika Ram (supra) that later pronouncement by a bench of co-equal strength should be followed even if earlier decision was not considered. We are not convinced with the submission of Id. Senior Counsel that Tribunal can decide which decision state the law more elaborately and accurately. We are of the view that decision in the case of Cassel & Co. Ltd. v. Broome (supra) should guide the course of action wherein it has been observed as under:-

"Though a judgment rendered per incuriam can be ignored even by a lower court, yet it appears that such a course of action was not approved by the House of Lords in Cassell & Co. Ltd. v. Broome [1972] 1 All ER 801, wherein the House of Lords disapproved the judgment of the Court of

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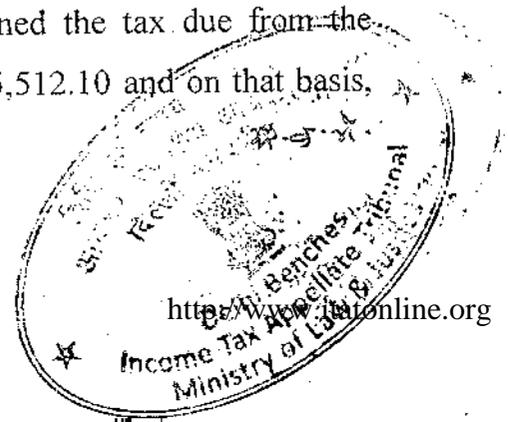


Appeal treating an earlier judgment of the House of Lords as per incurium. Lord Hailsham observed (at page 809) :

'It is not open to the Court of appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way'.

It is recognized that the rule of per incuriam is of limited application and will be applicable only in the rarest of rare cases. Therefore, when a learned single judge or a Division Bench doubts the correctness of an otherwise binding precedent, the appropriate course would be to refer the case to a Division Bench of Full Bench, as the case may be, for an authoritative pronouncement on the question involved as indicated above. The above-said two questions are answered as indicated above."

In such a scenario, in our humble opinion, proper course would be to follow the decision of Hon'ble Supreme Court in the case of CIT v. Vegetable Products Ltd. (S.C.) 88 ITR 192. In this case the facts were like this. The relevant assessment year was 1960-61. In that regard the Income-tax Officer issued a notice under section 22(2) of the Indian Income-tax Act, 1922 on June 1, 1960, served on assessee on June 13, 1960, requiring the assessee to submit its return on or before July 18, 1960. Assessee sought extension of time for submitting its return which was extended by ITO for two months with rider for no further extension. The assessee failed to furnish the Return of Income within the extended time. Thereafter, a notice under section 28(3) of the 1922 Act was served on the assessee on January 16, 1961. On the very next day, viz., January 17, 1961, the assessee filed its return for the assessment year in question. The assessment was completed by ITO on October 31, 1962. Meanwhile, on April 1, 1962, the Income-tax Act, 1962 came into force. As under the provisions of section 297(2)(g) of the Act, the proceedings for the imposition of the penalty had to be initiated and completed under the Act, a fresh notice was served on the assessee. The ITO determined the tax due from the assessee for the assessment year at Rs.1,25,512.10 and on that basis,

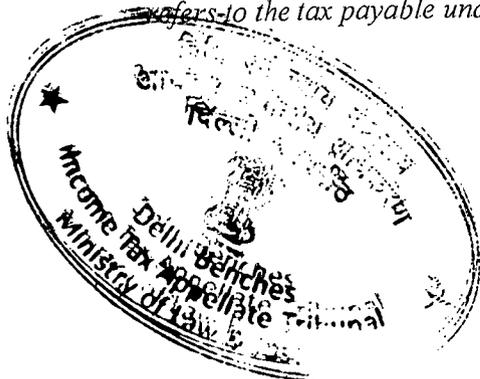


the penalty payable by the assessee was fixed at Rs.12,734.10. It may be pointed out that on February 2, 1961, a provisional assessment was made by the ITO under section 23B of the 1922 Act. Immediately thereafter, the assessee deposited Rs. 92,294.55. In determining the penalty due from the assessee, the ITO took into consideration not the amount demanded under section 156 of the Act but the amount assessed under section 143 of the Act. In the back drop of these facts the controversy before Hon'ble Supreme Court was whether the penalty was to be levied on the tax assessed under section 143 or as demanded under section 156 being tax assessed minus the amount paid under the provisional assessment order. Hon'ble Supreme Court before resorting to the interpretation of term *in addition to the amount of the tax, if any, payable by him* as appearing in section 271(1)(a)(i) observed as under:-

"On the other hand, it two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well-accepted rule of construction recognized by this court in several of its decisions."

Hon' Supreme Court held as under:-

We must first determine what is the meaning of the expression "the amount of the tax, if any, payable by him" in section 271(1)(a)(i). Does it mean the amount of tax assessed under section 143 or the amount of tax payable under section 156. The word "assessed" is a term often used in taxation law. It is used in several provisions in the Act. Quantification of the tax payable is always referred to in the Act as a tax "assessed". A tax payable is not the same thing as tax assessed. The tax payable is that amount for which a demand notice is issued under section 156. In determining the tax payable, the tax already paid has to be deducted. Hence, there can be no doubt that the expression "the amount of the tax, if any, payable by him" referred to in the first part of section 271(1)(a)(i) refers to the tax payable under a demand notice."



We have, therefore, to follow the later decision of Hon'ble Delhi High Court in the case of Bhushan Steel (supra).

6.22. In view of above discussion, we answer the question referred to us in favour of assessee by holding that the computation under clause (f) of Explanation 1 to section 115JB(2), is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8D of the Income-tax Rules, 1962.

7. Now coming to the cross objection filed by assessee, wherein the main issue is in regard to mode of computation under Rule 8D(2)(iii). In order to appreciate the controversy, we reproduce Rule 8D

"[Method for determining amount of expenditure in relation to income not includible in total income.

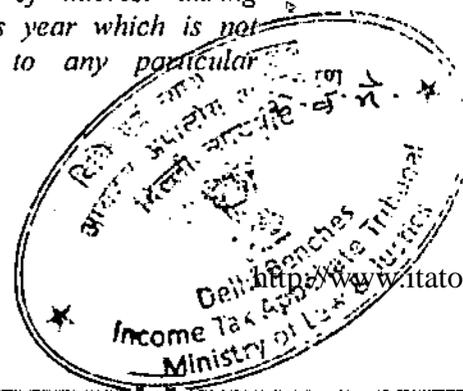
8D. (1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with-

- (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).

(2) The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely:-

- (i) the amount of expenditure directly relating to income which does not form part of total income;*
- (ii) in a case where the assessee has incurred expenditure by way of interest during the previous year which is not directly attributable to any particular*



income or receipt, an amount computed in accordance with the following formula, namely:-

$$A \times B/C$$

Where A = amount of expenditure by way of interest other than the amount of interest included in Clause (i) incurred during the previous year;

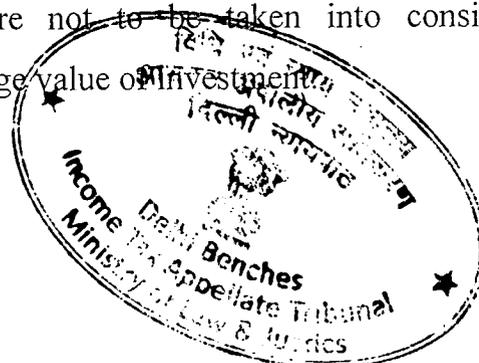
B = the average of value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year;

C = the average of total assets as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year;

(iii) an amount equal to one-half per cent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year.

(3) 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.]"

7.1. In the present case, we are only concerned with clause (iii) to Rule 8D(2), reproduced above. The assessee's first contention is that while considering the average value of investment, only those investments are to be taken into consideration which have yielded exempt income and not those investments, which did not yield any exempt income during the year. The second contention is that phrase "shall not" in clause (iii), refers only to those investments, from which income earned can never be taxable income. The contention is that merely because the income is exempt in a particular year, but can become taxable on account of amendment in subsequent year, then the said investments are not to be taken into consideration while computing the average value of investment.



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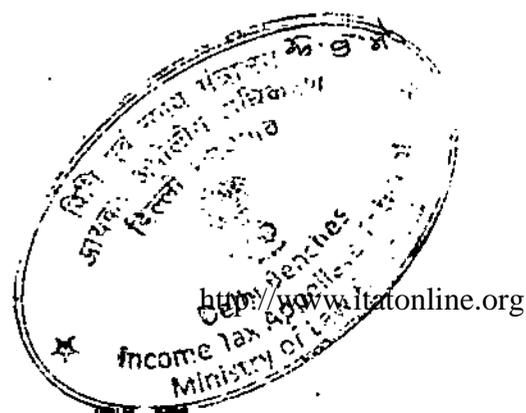
8. Ld. counsel submitted that as regards investments, not yielding exempt income, there can be two types of investments –

- (a) Investment, income wherefrom is taxable;
- (b) Investment, income from which though not earned during the year, if earned, would have been exempt.

8.1. Ld. counsel pointed out that as far as investments mentioned in clause (a) are concerned, the same has to be excluded while computing average value of investment in terms of Rule 8D(2). However, as regards the investment contemplated in clause (b), the case of the department is that irrespective of a particular investment, capable of earning exempt income, actually fetched income during the year or not, the same is to be considered for calculating average investment under Rule 8D of the I.T. Rules.

8.2. Ld. counsel pointed out that mandate of section 14A is that expenditure incurred in relation to income, which does not form part of total income under the Act, shall not be allowed as deduction. This clearly implies that assessee should have earned some income during the relevant previous year, which does not form part of the total income under the provisions of the Act and some expenditure has been incurred by the assessee in relation to the aforesaid income, which is not included in the total income. Unless these two conditions are satisfied, the provision of section 14A cannot be invoked.

8.3. Ld. counsel referred to the Collins Cobuild Student's dictionary, wherein the expression "does" refers to third person singular of the present tense of 'do', which means the act done in

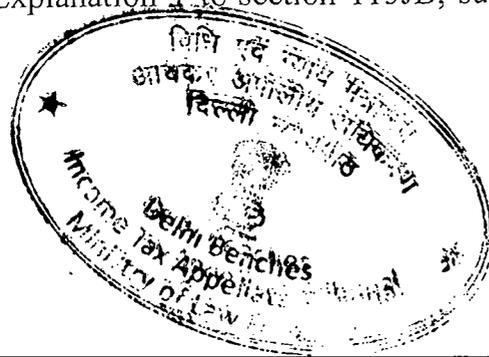


present. Therefore, the word 'does' refers to an act of the present and not the future.

8.4. Ld. counsel submitted that if the department's contention is to be accepted, then it implies that firstly the income from such investment would be earned in future and secondly such income would continue to remain exempt from tax i.e. the law at present would prevail in the subsequent year. He submitted that there is no certainty that the income which is exempt in current year will remain exempt in subsequent year. He pointed out that the term 'shall' in clause (iii) to Rule 8D(2) implies that in the current year one should be sure of income accruing in subsequent year to remain exempt. In support of his contention, he pointed out that dividend was first exempt from tax by insertion of sec. 10(33) by Finance Act, 1997 w.e.f. 1-4-1998 by the Finance Act 2002, the exemption was removed and dividends were made taxable in the AY 2003-04. The exemption was again restored by insertion of section 10(34) by Finance Act 2003. Thus, he submitted that it is not necessary that, if, in any of the year, any item of income is exempt, then the same would continue remain exempt in future also.

8.5. Similarly, he pointed out that with respect to exemption from tax of long term capital gain the legislative history is as under: Section 10(38), providing exemption of LTCG earned on sale of equity shares/ securities on which STT is paid, was inserted by Finance Act, 2004 w.e.f. 1-4-2005. Prior thereto, such LTCG was also chargeable to tax. It is further to be noted that until amendment being made vide Finance Act 2006, w.e.f. 01.04. 2007 in clause (ii) to Explanation 1 to section 115JB, such LTCG remained taxable under

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MAT even though the same was exempt under normal provisions by virtue of section 10(38) of the Act.

8.6. Ld. counsel relied on the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Holcem India Pvt. Ltd. (ITA no. 486/2014 and 299/14),

8.7. He pointed out that one of the assessment years involved in the above appeals before the Hon'ble High Court was assessment year 2008-09 and the Hon'ble Court has specifically considered, in the judgment, the applicability of Rule 8D for the said year.

8.8. Ld. Counsel also relied on following decisions:

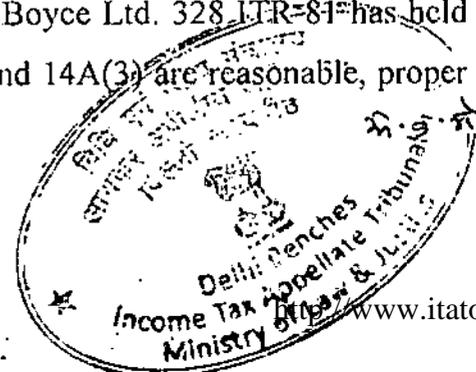
- CIT v. M/s Shivam Motors (P) Ltd. ITA 88 of 2014 (All.);
- CIT v. Winsome Textile Industries Ltd. 319 ITR 204 (P&H)
- CIT Vs. M/s Lakhani Marketing ITA 970 of 2008 (P&H)
- Corrttech Energy Pvt. Ltd. 223 Taxman 130 (Guj.).

8.9. In all these cases it has been held that unless and until the assessee has actually earned income during the relevant year and which does not form part of the total income, section 14A of the Act would have no application.

8.10. Ld. counsel submitted that Rule 8D(2)(iii) has to be read harmoniously with section 14A because rule cannot override the provisions of the Act.

8.11. He also relied on the decision of Kolkata Bench of the ITAT in the case of REJ Agro Ltd. v. DCIT 160 TTJ 107, upholding the aforementioned view.

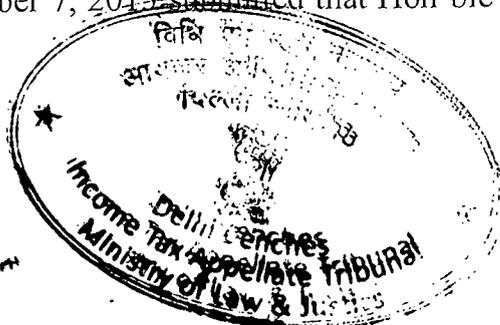
9. Ld. Principal CIT(DR) submitted that the Hon'ble Bombay High Court in the case of Godrej & Boyce Ltd. 328 ITR-81 has held that Rule 8D, section 14A, 14A(2) and 14A(3) are reasonable, proper



and valid and, therefore, the AO has used Rule 8D and has, accordingly, taken all investments, capable of yielding exempt income, whether actually yielded or not. He submitted that the action of AO cannot be struck down by the ITAT because AO has only followed the mandate of Rule 8D(2)(iii). He submitted that none of the decisions relied upon by Id. counsel for the assessee have considered the principles laid down by Hon'ble Supreme Court in the case of Rajendra Prasad Moody 115 ITR 519 (SC), wherein it has been held that an expenditure to be allowable, need not be profitable, meaning thereby that merely because there is no exempt income, expenditure in relation to this unearned exempt income cannot be disallowed. He submitted that since the various decisions relied upon by the Id. counsel for the assessee are against the ratio of the Hon'ble Supreme Court's decision in the case of Rajendra Prasad Moody (supra), it is not binding on the Tribunal.

9.1. Ld. Principal CIT(DR) further referred to the decision of Special Bench of the ITAT in the case of Cheminvest Ltd. (supra), wherein the controversy was that the assessee had not earned or received any dividend in the year under consideration and, therefore, assessee's claim was that no disallowance could be made by invoking the provisions of section 14A and this argument was rejected by Special Bench following the decision of Hon'ble Supreme Court in the case of Rajendra Prasad Moody (supra).

10. In rejoinder Id. counsel reiterated the submissions which were advanced before the Special Bench of the ITAT in the case of Cheminvest Ltd. Vs. ACIT 317 ITR (AT) 86. Ld. Counsel vide his letter dt. September 7, 2015, submitted that Hon'ble Delhi High Court



vide order dt.02.09.2015 in the case of Cheminvest Limited v. CIT in ITA No. 749/2014 reversed the decision of Special Bench and, following the earlier decision of the Hon'ble High Court in the case of CIT v. Holcim India (P) Ltd.: 272 CTR 282, held that where no exempt income has been received by the assessee in the previous year, disallowance under section 14A of the Act is not warranted. The Hon'ble High Court has further held that reliance placed by the Special bench on the decision of the Hon'ble Supreme Court in the case of Rajendra Prasad Moody: 115 ITR 519 was misplaced. It has been observed by the Hon'ble High Court that decision of Hon'ble Supreme Court in the case of Rajendra Prasad Moody (supra) dealt with the interpretation of section 57(iii) of the Act, which is an allowance provision, would not apply with respect to interpretation of section 14A of the Act, which is for computing disallowance of expenditure incurred in relation to earning of exempt income.

Ld. Sr. Counsel further pointed out that no SLP has been filed by Department against the said judgment.

Ld. CIT(DR) submitted that the decision of Hon'ble Delhi High court is contrary to the view taken by Hon'ble Supreme Court in the case of Rajendra Prasad Modi (supra). As regards non-filing of SLP, Ld. CIT(DR) submitted that the same was not filed because of the smallness of amount. In this regard he referred to the letter dt. 18/4/17 of AO in which it is stated tax effect involved was Rs.5,72,107/-, which was below the monetary limit laid down as per the Instruction No.5 of 2014 in F.No. 279/Misc.142/2007-ITJ(Pt.) dated 10.07.2014 for filing of SLP. The case was also not found covered under the exemption clause as per sub para (b) of para 8 of the said Instruction No.5/2014. In view of these facts, filing of SLP was not approved by the Board.

Ld. CIT(DR) referred to para 6 of Circular no 24/2015 which is reproduced hereunder:-



"6. In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Commissioner of Income-tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this instruction". Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits."

Ld. CIT(DR) further referred to Section 268A(4) which reads as under:-

"Filing of appeal or application for reference by income-tax authority.
268A. (1)

.....
(4) The Appellate Tribunal or Court, hearing such appeal or reference, shall have regard to the orders, instructions or directions issued under sub-section (1) and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case."

He, therefore, submitted that the decision in the case of cheminvest of Hon'ble Delhi High Court has no precedent value. In this regard he also filed instructions of CBDT on object of insertion of Section 268A which, inter-alia, reads as under:-

"Where an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, due to abovementioned order/instruction/direction of the Board, such authority shall not be precluded from filing an appeal or application for reference on the same issue in the case of -

- (a) the same assessee for any other assessment year; or
- (b) any other assessee for the same or any other assessment year."

He, therefore, submitted that, in view of statutory provisions, circular should be given due weightage



Ld. CIT(DR) further referred to 378 ITR 22 (JOURNAL SECTION) wherein it is commented by S. Rajaratnam on the decision of Hon'ble Delhi High Court in the case of Cheminvest (supra) as under:-

"Section 14A provides for disallowance of expenditure relating to exempt income. Where the exempt source was intact but there was no income during the year, it was decided that section 14A could have no application, in Cheminvest Ltd. v. CIT [2015] 378 ITR 33 (Delhi). The argument of the Revenue was that there need not be income for every year from a source to merit deduction or expenditure relating to such a source as decided by the Supreme Court in CIT v. Rajendra Prasad Moody [1978] 115 ITR 519 (SC), so that there cannot be a difference view in respect of disallowance of expenditure. The reasoning for non-acceptance of this argument was that the language of section 57(3) under which the decision was rendered is different from the language under section 14A. The decision may need review because the mere accident that for a particular year there was no income as for example in the case of dividend income, cannot mean that the assessee would get entitled to the expenditure relating to investment on shares in the year in which dividend is received but not for a year in which there was no declaration of dividend. It leads to uneven result, so that there was probably no adequate reason for non-application of Rajendra Prasad Moody's case (supra) in respect of this issue before the court."

11. We have considered the submissions of both the parties and have perused the record of the case. The basic issue for consideration is that the investment, which did not yield any exempt income, should enter or not enter into the computation under Rule 8D, while arriving at the average value of investment, income from which does not or shall not form part of the total income.

11.1. In the present case, our decision is restricted only to the extent of interpretation of language employed in Rule 8(2)(iii). The submission of ld. counsel for the assessee is that this issue is now covered by the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Holcin India (P) Ltd. (supra), wherein it has been held that if no dividend income was earned, section 14A could not be invoked.



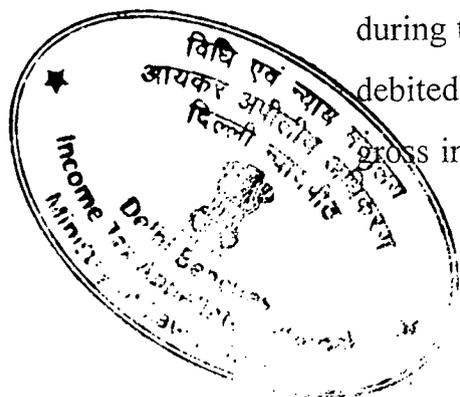
The Hon'ble Delhi High Court has referred to the decisions, which we have noted earlier i.e.:

- CIT v. M/s Shivam Motors (P) Ltd. ITA 88 of 2014 (All.);
- CIT v. Winsome Textile Industries Ltd. 319 ITR 204 (P&H)
- CIT Vs. M/s Lakhani Marketing ITA 970 of 2008 (P&H)
- Corrtch Energy Pvt. Ltd. 223 Taxman 130 (Guj.).
- CIT Vs. Hero Cycles Ltd. 323 ITR 518.

11.2. The submission of Id. Principal CIT(DR) is that ITAT in the case of Delhi Special Bench in the case of Cheminvest Ltd. (supra) has specifically held that even if there is no exempt income, the provisions of section 14A are applicable in view of the decision of Hon'ble Supreme Court in the case of Rajendra Prasad Moody (supra). His submission is that the decision of Hon'ble Delhi Court reversing the decision of Special Bench in Cheminvest should not be followed because that is contrary to the principles laid down in Rajendra Prasad Modi(supra).

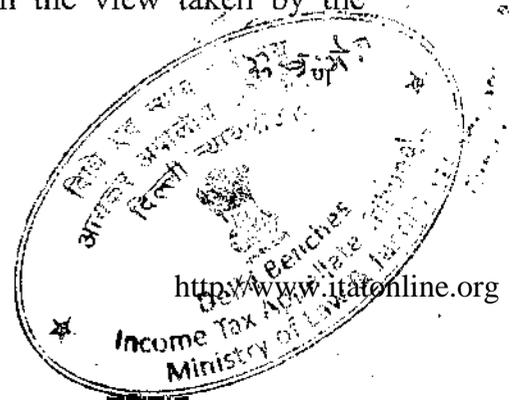
11.3. It is against these submissions, we first refer to the facts as were obtaining in these two decisions.

11.4. In the case of Cheminvest Ltd. (supra), the assessee had borrowed funds of Rs. 8,51,65,000/- and during the previous year relevant to assessment year 2004-05 paid interest of Rs. 1,21,02,367/- thereon. Out of this unsecured loan, the assessee invested a sum in purchase of shares, which was shown as investment for the purpose of long term capital gains. The AO disallowed interest proportionate to the investment in shares, though no exempt income was earned during the year. The CIT(A) affirmed this but held that the net interest debited to the P&L A/c was required to be apportioned and not the gross interest expenditure. The Tribunal held that interest expenditure



incurred by the assessee was for borrowing used for the purposes of investment in shares, both held for trading as well as investment purposes. Irrespective of whether or not there was any yield of dividend on the shares purchased, the interest incurred was relatable to earning of dividend on the shares purchased. The dividend income being exempted from tax by virtue of section 10(34) of the Act, the interest paid on borrowed capital utilized in purchase of shares, being the expenditure incurred in relation to dividend income not forming part of the assessee's total income, was held to be not an allowable deduction. In coming to the conclusion, the Special Bench primarily relied on the ratio laid down by the Hon'ble Supreme Court in the case of Rajendra Prasad Moody (supra).

11.5. In the case of Rajendra Prasad Moody (supra), the facts were that the assesseees were brothers and each of them had borrowed moneys for the purposes of making investment in shares of certain companies. During the relevant assessment year they paid interest on the moneys borrowed but did not receive any dividend on the shares purchased with these moneys. Both of them made a claim for deduction of the amount of interest paid on borrowed moneys but this claim was negated by the ITO and on appeal by the AAC on the ground that during the relevant assessment year the shares did not yield any dividend and, therefore, interest paid on the borrowed moneys could not be regarded as expenditure laid out or expended wholly and exclusively for the purposes of making or earning income chargeable under the head 'income from other sources', so as to be allowable as a permissible deduction u/s 57(iii). The Tribunal, however, on further appeal, disagreed with the view taken by the



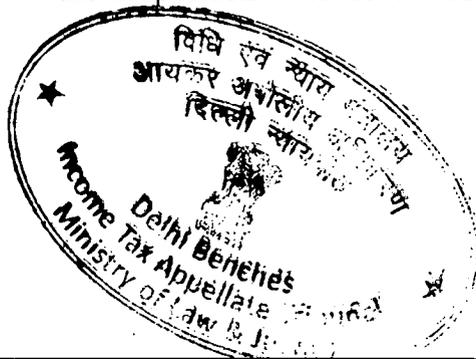
taxing authorities and upheld the claim of each of the two assesseees for deduction u/s 57(iii).

11.6. In the backdrop of these facts the Tribunal's order was upheld by the Hon'ble High Court and Hon'ble Supreme Court. The Hon'ble Supreme Court, inter alia, held that it is the purpose of the expenditure that is relevant in determining the applicability of section 57(iii) and that purpose must be making or earning of income. It was further held that section 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of section 57(iii) to suggest that the purpose, for which the expenditure is made, should fructify into any benefit by way of return in the shape of income.

11.7. Thus, in both the decisions viz. in the case of Cheminvest Ltd. (supra), and in the case of Rajendra Prasad Moody (supra), the issue related to allowability of expenditure which had direct nexus with the earning of income. The borrowing in both the cases has not been disputed being for acquiring shares. Hon'ble Delhi High Court has specifically held in para 21 as under:-

"21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in Rajendra Prasad Moddy (supra) was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is 'for the purpose of making or earning such income'. Section 14A of the Act on the other hand contains the expression 'in relation to income which does not form part of the total income.' The decision in Rajendra Prasad Moody (supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act."

11.8. In the case of Holcin India (P) Ltd. (supra) the facts were that the respondent- assessee was a subsidiary of Holderind Investments



Ltd., Mauritius, which was formed as a holding company for making downstream investments in cement manufacturing ventures in India. In the return of income filed for the Assessment Year 2007-08, the respondent-assessee declared loss of Rs. 8.56 Crores approximately. The respondent-assessee had declared revenue receipts of Rs. 18,02,274/- which included interest of Rs. 726/- from Fixed Deposit Receipts and profit on sale of fixed assets of Rs. 16,52,225/-. As against this, the respondent assessee had claimed administrative and miscellaneous expenditure written off amounting to Rs. 8.75 Crores. For the Assessment Year 2008-09, the assessee had filed return declaring loss of Rs. 6.60 Crores approximately. The assessee had declared revenue receipts in the form of foreign currency fluctuation difference gain of Rs. 12,46,595/-. It had claimed expenses amounting to Rs. 7.02 Crores as personal expenses, operating and other expenses, depreciation and financial expenses.

11.9. In both the assessment orders, the Assessing Officer held that the respondent-assessee had not commenced business activities as they had not undertaken any manufacturing activity or made downstream investments. It was observed that the respondent-assessee, after receiving approval of Foreign Investment Promotion Board (FIPS) dated 20.12.2000 acquired shares capital of Ambuja Cement India Ltd. This, the Assessing Officer felt, was not sufficient to indicate or hold that the respondent-assessee had started their business. He, accordingly, disallowed the entire expenditure of Rs. 8.75 Crores for the Assessment Year 2007-08 and Rs. 7.02 Crores for the Assessment Year 2008-09.

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11.10. Ld. CIT(A) did not agree with the findings of Assessing Officer that the business of the respondent- assessee had not been set up or commenced. The CIT(A) observed that the respondent-assessee had been set up with the business objective of making investment in cement industry after due approval given by the Government of India, Ministry of Commerce and Industry vide letter dated 18.12.2002 and 20.12.2012. It was observed that in fact, the respondent-assessee was not to undertake any manufacturing activity themselves. After considering the FIPS approval and the purchase of shares in the said company of Rs. 1850.91 crores, ld. CIT(A), inter alia, observed that the assessee was engaged in the business of holding of investment and was entitled to claim expenditure provided. There was a direct connection between expenditure incurred and business of the assessee company. However, he pointed out that since the business of the respondent assessee was to act as a holding company for downstream investment and as it was an accepted fact that they had incurred expenses to protect their business and explore new avenues of investment, the provisions of section 14A were applicable.

11.11. The Hon'ble High Court observed that the reasoning given by the CIT(A) was ambiguous and unclear and on clarity being sought from the Revenue it was pointed out that "the stand of the assessee contained a contradiction to the extent that on the issue of setting up of business, it was stated that the assessee had incurred expenditure on acquiring the shares, therefore, the assessee could not now take different stand than the one taken in the first issue".

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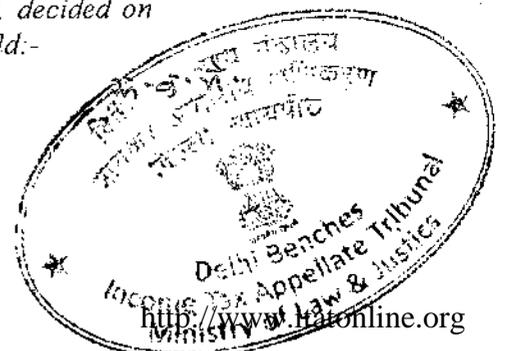


11.12. The Hon'ble High Court, after considering in detail the decision of Id. CIT(A) finally observed in para 13 as under:

13. We are confused about the stand taken by the appellant-Revenue. Thus, we had asked Sr. Standing Counsel for the Revenue, to state in his own words, their stand before us. During the course of hearing, the submission raised was that the shares would have yielded dividend, which would be exempt income and therefore, the CIT(A) had invoked Section 14A to disallow the entire expenditure. The aforesaid submission does not find any specific and clear narration in the reasons or the grounds given by the CIT(A) to make the said addition. Possibly, the CIT(A), though it is not argued before us, had taken the stand that the respondent-assessee had made investment and expenditure was incurred to protect those investments and this expenditure cannot be allowed under Section 14A.

11.13. Thus, Hon'ble Delhi High Court primarily decided the issue regarding applicability of section 14A even if no dividend income was earned. The Hon'ble High court in paras 14 to 16 of its decision observed as under:

14. 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. MIs. Lakhani Marketing Incl., IIA 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. Corrttech 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 (I) Kanpur, vs. MIs. 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 all 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 CIT(A) has positively held that the business was set up and had commenced. The said

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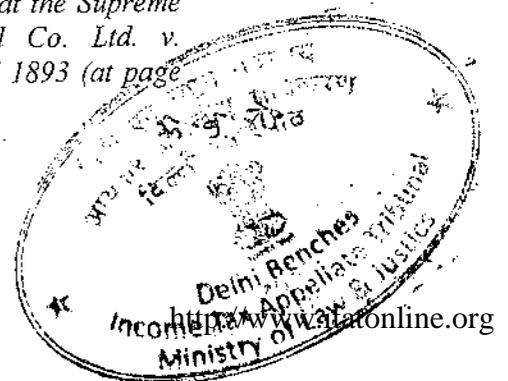
finding is accepted. The respondent-assessee, therefore, had to incur expenditure for the business in the form of investment in shares of cement companies and to further expand and consolidate their business. Expenditure had to be also incurred to protect the investment made. The genuineness of the said 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).

11.14. Now the position of law as stands is that the decision of Hon'ble Jurisdiction High Court is directly on the point in dispute whereas the decision of Hon'ble Supreme court in the case of Rajendra Prasad Moody (supra) has been rendered in the context of section 57(iii), the applicability of which has been ruled out by Hon'ble Delhi High Court in the case of Cheminvest (supra).

11.15. Under Article 227 of the Constitution of India, the courts function under the supervisory jurisdiction of Hon'ble High Court. The decisions rendered by Hon'ble High Court are binding on all subordinate courts working within its jurisdiction. In this regard we may refer to the following decisions:

(i) *CIT V. Thana Electricity Supply Ltd. (1994) 206 ITR 727 (Bom.), wherein on the issue of "whose decision is binding on whom", the Hon'ble Bombay Court considered in detail the hierarchy of the courts and has observed as under:*

"It is also well-settled that though there is no specific provision making the law declared by the High Court binding on subordinate courts, it is implicit in the power of supervision conferred on a superior Tribunal that the Tribunals subject to its supervision would conform to the law laid down by it. It is in that view of the matter that the Supreme Court in East India Commercial Co. Ltd. v. Collector of Customs, AIR 1962 SC 1893 (at page 1905) declared :



"We, therefore, hold that the law declared by the highest court in the State is binding on authorities or Tribunals under its superintendence, and they cannot ignore it. ..."

This position has been summed up by the Supreme Court in Mahadeolal Kanodia v. Administrator General of West Bengal, AIR 1960 SC 936 (at page 941) as follows :

"Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view, the result would be utter confusion. The position would be equally bad where a judge sitting singly in the High Court is of opinion that the previous decision of another single judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench."

The above decision was followed by the Supreme Court in Baradakanta Mishra v. Bhimsen Dixit, AIR 1972 SC 2466, wherein the legal position was reiterated in the following words (at page 2469) :

"It would be anomalous to suggest that a Tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a Tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise there would be



confusion in the administration of law and respect for law would irretrievably suffer."

- (ii) *CIT V. Sunil Kumar (1995) 212 ITR 238 (Raj.), it was observed as under:*

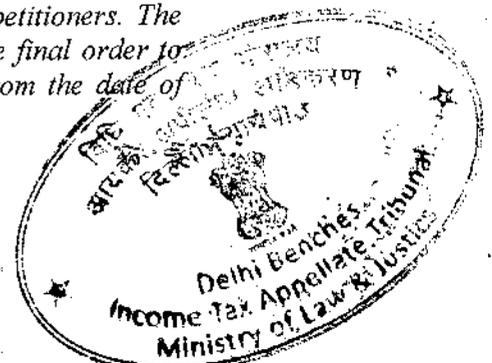
"The point which has been raised could have been considered to be debatable because other High Courts have taken a different view. But since the view taken by this court is binding on the Tribunal and other authorities under the Act in this State, it could not be considered to be a debatable point in view of the decision of this court in the case of CIT v. M.L. Sanghi (1988) 170 ITR 670."

- (iii) *Indian Tube Company Ltd. V. CIT & others (1993) 203 ITR 54 (Cal.)* , it was observed as under:

"In the impugned order, respondent No.1 has rejected the petitioner's contention by stating that, although the Calcutta High Court had held that an assessee was entitled to interest on such refund calculated up to the date of the order passed consequent upon an appeal or revision of the original assessment, this view had not been accepted by the Bombay High Court, the Allahabad High Court and the Kerala High Court. Respondent No.1, accordingly, chose to accept the view of the Bombay, Allahabad and Kerala High Courts in preference to the view of the Calcutta High Court.

In my view, the order of respondent No.1 cannot be sustained on the simple ground that respondent No. 1 is an authority operating within the State of West Bengal and is bound by the decisions of the High Court of this State (see CIT v. Indian Press Exchange Ltd. [1989] 176 ITR 331 (Cal) ; East India Commercial Co. Ltd. v. Collector of Customs AIR 1962 SC 1993, paragraph 29).

In that view of the matter, the impugned order must be set aside and the Commissioner is directed to consider the matter afresh in keeping with the decisions of this court after giving the petitioners an opportunity of being heard. At least 48 hours' clear notice must be given to the petitioners. The Commissioner will communicate the final order to the petitioner within eight weeks from the date of hearing."

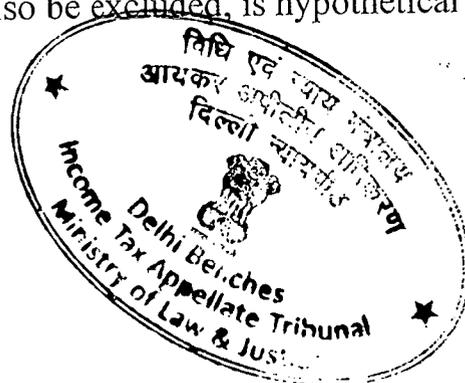


(iv) *CIT. Vs. J.K. Jain (1998) 230 ITR 839 (P&H), observing as under:*

"We have carefully examined the records and have heard learned counsel representing the parties. We are in respectful agreement with the view expressed by the Allahabad High Court in Omega Sports and Radio Works' case [1982] 134 ITR 28, as also the decision of this court in Mohan Lal Kansal's case [1978] 114 ITR 583. Following the decision in the two cases referred to above, we hold that it was not a case of divergence of opinion inasmuch as the opinion expressed by this court was binding upon the Tribunal."

11.16. Therefore, in our considered opinion, no contrary view can be taken under these circumstances. We, accordingly, hold that only those investments are to be considered for computing average value of investment which yielded exempt income during the year.

11.17. As far as argument relating to meaning to be ascribed to the phrase 'shall not' used in Rule 8D(2)(iii) is concerned, the Revenue's contention is that it refers to those investments which did not yield any exempt income during the year but if income would have been yielded it would have remain exempt. There is no dispute that if an investment has yielded exempt income in a particular year then it will enter the computation of average value of investments for the purposes of Rule 8D(2)(iii). The assessee's contention that if there is no certainty that an income, which is exempt in current year, will continue to be so in future years and, therefore, that investment should also be excluded, is hypothetical and cannot be accepted.



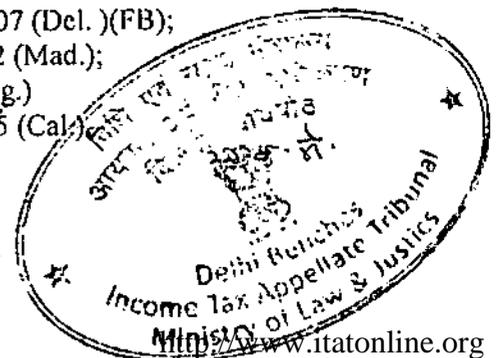
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11.18. In view of above discussion, the matter is restored back to the file of AO for recomputing the disallowance u/s 14A in terms of above observations. Thus, revenue's appeal is dismissed and assessee's cross-objection, on the issue in question, stand allowed for statistical purposes, in terms indicated above.

12. Now we will consider the other two grounds. As far as ground no. 3 is concerned, we do not find any reason to interfere with the order of ld. CIT(A) because ld. CIT(A) has only referred the matter to AO for verifying the revised computation u/s 94(7) with reference to record date and not with respect to date of receipt of dividend. We do not find any infirmity in the order of CIT(A) on this issue.

13. As regards addition of Rs. 4,02,58,032/-, we find that the entire addition had been made because assessee did not charge any interest from loanees. However, admittedly assessee had not claimed any interest expenditure and, therefore, there was no reason for making any addition on the ground of interest being not charged by assessee. Ld. counsel has relied on following decisions for the proposition that only real income can be taxed and not notional income.

- Shoorji Vallabhdas & Co. 46 ITR 144 (SC);
- Godhra Electricity Co. Ltd. . CIT 225 ITR 746 (SC);
- CIT vs. A. Raman & Co. 67 ITR 11(SC);
- UCO Bank v. CIT 237 ITR 889 (SC);
- Airport Authority of India v. CIT 340 ITR 407 (Del.)(FB);
- CIT v. Motor Credit Co. P. Ltd. 127 ITR 572 (Mad.);
- JCIT v. Pankaj Oxygen Ltd. 78 TTJ 119 (Nag.)
- ACIT vs. Manick Chand Damani 72 TTJ 675 (Cal)



13.1. After hearing both the parties, we do not find any reason to interfere in the order of Id. CIT(A), because the issue that only real income and not notional income is taxable, is no more res-intgra in view of aforementioned decisions, particularly when no interest was paid by assessee on its borrowings. We, therefore, confirm the order of Id. CIT(A). This ground is dismissed.

14. In the result, revenue's appeal is partly allowed and the assessee's cross-objection stands allowed for statistical purposes.

Order pronounced in open court on 16 /06/2017.

(AMIT SHUKLA)
JUDICIAL MEMBER

(I.C. SUDHIR)
JUDICIAL MEMBER

(S.V. MEHROTRA)
VICE PRESIDENT

Dated: 16 -06-2017.

Sujeet/DOC

Copy to :

1. Assessee
2. AO
3. CIT(A)
4. CIT
5. DR (ITAT)



Assistant Registrar
ITAT, New Delhi
सहायक पंजीकर
Assistant Registrar
आयकर अपील अदालत
Income Tax Appellate Tribunal

