IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE 'A' BENCH, BANGALORE

BEFORE SMT P.MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER

ITA Nos.220 & 1043(BNG.)/2013
(Assessment year : 2009-2010 & 2010-11)

M/s Alliance Infrastructure Projects Pvt.Ltd.,
No.85, Karthik Nagar,
Marathahalli, KR Puram, Outer Ring Road,
Bangalore -560 037 Appellant
PAN No.AAFCA0404J

Vs

The Deputy Commissioner of Income-tax,
Circle-11(1),
Bangalore Respondent

And
ITA Nos.1217 & 234(BNG)/2013
(Assessment years : 2009-10 & 2010-11)
By Revenue

Assessee by : Shri H.N.Khincha, CA
Respondent by : Shri B.K.Panda, Addl.CIT
Shri C.H.Sundar Rao, CIT-I

Date of hearing : 03-09-2014
Date of pronouncement : 12-09-014

O R D E R

PER BENCH:

In these appeals filed by the assessee and the revenue issue is an addition made u/s14A of the IT Act, 1961 ('The Act'), which has been pegged down by the CIT(A), on assessee's appeal. Revenue is aggrieved that the CIT(A) deleted the disallowance made by the AO under rule-

8(2)(iii) of the IT Rules,1962, whereas the assessee is aggrieved that the CIT(A) sustained the disallowance made under rule-8(2)(ii). The grounds are similar for both the years.

2. Assessee engaged in the business of real estate and construction had filed its return for AY; 2009-10 declaring an income of Rs.55,45,092/-and for AY: 2010-11 and an income of Rs.8,07,253/-. During the course of assessment proceedings, it was noted by the AO that the assessee had investments worth Rs.77,57,63,341/-in the form of shares in various companies and investment of Rs.12,07,42,035/- in a partnership firm. These investments which were made during the previous year relevant to AY: 2009-10 continued without change for AY : 2010-11 also. AO sought explanation from the assessee why a disallowance u/s 14A of the Act should not be made. For AY: 2009-10, the assessment proceedings were selected for monitoring by Addl.CIT, Range-II, Bangalore under powers vested on him u/s 144A of the Act. The Addl.CIT, also had issued a notice on 31-05-2011, proposing a disallowance u/s 14A of the Act. Reply of the assessee was that the interest expenditure incurred by it was on loans raised from M/s India Bulls which were used for its day today working. As per the assessee it was the holding company of about ten number of companies and as a

part of its regular business was taking advance from group companies and giving advances to other group companies, as per the availability and requirement of funds. Argument of the assessee was that nothing out of the loan amount was used for making any investments which attracted Sec.14A of the Act. Assessee also pointed out that it was not having any exempt income at all.

3. Based on the above reply given by the assessee, the Addl. CIT directed the AO to carry out necessary examination and make required disallowances and additions. AO was of the opinion that the assessee could not prove any of the investment to have been made out of its own funds. He held that a disallowance u/s 14A was called for. Against total interest of Rs.4,63,74,823/- paid for AY: 2009-10 and Rs.5,69,27,765/- paid for AY: 2010-11, the AO applied the formula prescribed in Rule 8D(2)(ii) and made a disallowance of Rs.1,91,63,080/- and Rs.2,77,65,949/- respectively. Disallowance of indirect expenditure was worked out as per the formula given in Rule 8D(2)(iii), taking average value of investment and applying 0.5% thereon. Such disallowance came to Rs.31,47,183/- and Rs.44,82,527/- respectively. The total disallowance u/s 14A of the Act were Rs.2,23,10,263 and

Rs.3,22,48,476/- respectively. No disallowance for any direct expenditure as prescribed in Rule 8D(2)(i`) was made.

3. Against the above disallowances the assessee moved in appeal before the CIT(A) for both the assessment years. Argument of the assessee was that it had not earned any exempt income from the investments in either of the years. Therefore, according to it, application of Sec.14A was not warranted. Further, as per the assessee it had own funds of Rs.61,22,85,678/- which more than covered the investments made by it. Again as per the assessee there were no additional investments during the FY: 2009-10. Assessee also pointed out to the learned CIT(A), that total investment which could give rise to tax free income was Rs.53,41,37,341/- only. Therefore, as per the assessee its own funds were morethan sufficient to meet such investments. Further, as per the assessee AO had not expressed his dissatisfaction on the claim of it having not incurred any expenditure for the investments.

4. The learned CIT(A) was agreeable to the contentions of the assessee though, not in full. According to him, argument of the assessee that no disallowance u/s 14A could be made when there was no tax exempt income, could not be accepted in view of the decision of the Hon' Delhi High Court in the case of M/s Technopak Advisors Pvt.Ltd., 18

Taxman.com.146. However, according to him, assessee had interest free funds in excess of the investments made by it and when there was mixed pool of funds available, the presumption was that investments were made out of interest free funds. Relying on the decision of the Hon'ble Bombay High Court in the case of CIT Vs Reliance Utilities & Power Ltd., 313 ITR 340(Bom.), he deleted the disallowance made by the AO under rule 8D(2)(ii) of the Act. However, insofar as the disallowance made under rule 8D(2)(iii) was concerned, learned CIT(A) had it be correctly made. As per the learned CIT(A) the rule only provided a formula for estimating indirect expenditure and the AO had no discretion but to apply such rule.

5. Now before us, learned DR strongly assailing the order of the learned CITA) insofar as it relate to deletion of the disallowance made under rule 8D(2)(ii) of the Act, submitted that the CIT(A) had considered certain additional particulars filed by the assessee. As per the learned DR an additional ground has also been raised by the revenue citing violation of Rule 46A of the IT Rules. As per the learned DR the workout of own funds given by the assessee was accepted as such by the learned CIT(A),without putting it to the AO. According to him, assessee was unable to show from where the own funds were derived from. According to him, there was a clear violation of Rule 46A of the IT Rules. Further,

according to learned DR, the disallowance under section 14A of the Act, and Rule 8D of the rules were to be made irrespective of the fact whether the assessee had exempt income. For this, reliance was placed on the decision of the Special Bench in the case of M/s Cheminvest Ltd., Vs ITO 121 ITD 380. As per the disallowance under rule 8D(2)(iii), was concerned that learned DR submitted that such disallowance was correctly made by the AO and sustained by the CIT(A).

6. Per contra, and in support of assessee's appeal learned AR submitted that when there was no exempt income, there could be no disallowance under section 14A of the Act. Placing reliance on the Balance sheet of the assessee for the previous year ending 31-03-2009 learned AR submitted that each of the figure in the submissions made before the CIT(A), were taken from such balance sheet and schedules thereto. According to him, workout of own funds furnished before the learned CIT(A) was not any new evidence. As per the learned AR decision of the Special Bench in the case of M/s Cheminvest Ltd., (supra), stood overruled by a number of High Court decisions including that of Hon'ble Gujarat High Court in the case of CIT Vs Corrtech Energy (P) Ltd., in T.A No.239 of 2014 dated 24-03-2014. Further, according to him, the CIT(A) fell in error in not appreciating the specific plea taken by the assessee in

this regard and sustaining the disallowance made under rule 8D(2)(ii) of the Act.

7. We have perused the orders and heard the rival contentions. There is no dispute that the assessee had no exempt income during both the years involved. No doubt as mentioned by the Learned DR, the Special Bench of this Tribunal in the case of Cheminvest Ltd. Vs. ITO 121 ITD 318, had held that disallowance under section 14A could be made even in an year in which no exempt income was earned or received by the assessee. This decision of Special Bench of the Tribunal has been, in our opinion, impliedly overruled by various decisions of different High Courts as elaborated by us in the succeeding paragraphs.

8. In the case of CIT Vs M/s. Shivam Motors P.Ltd. (ITA number 88 of 2014 judgment dated 5-5-2014 for AY 2008-09) the question of law raised by the Revenue before the Hon Allahabad High Court was as under:

"Whether on the facts and in the circumstances of the case and in law, the Income Tax AppellateTribunal was justified in upholding the decision of CIT(A) in deleting the disallowance of Rs 2,03,752/- u/s.14A ignoring the fact that there is difference of opinion of various courts on

the view taken by the ITAT that in the absence of tax free income, no disallowance u/s.14A is permissible."

9. The High Court while answering the above question held as under:-

"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."

10. The Gujarat High Court in the case of CIT Vs. Corrtech Energy Pvt. Ltd.(Tax Appeal 239 0f 2014 dated 24-3-2014) held as under:-

"We have given our thoughtful consideration to the facts and the decision relied upon by the Id AR. The Hon'ble Punjab & Haryana High Court in the case of CIT vs. Winsome Textile Industries Ltd. reported at (2009) 3191TR 204(P&H) has held that in the present case, admittedly, the assessee did not make any claim for exemption. In such a situation, section 14A could have no application. In thiscase also, the assessee has not claimed any exempt income in this year. Therefore, respectfully following the judgement of Hon'ble High Court of Punjab & Haryana in the case of CIT vs. Winsome Textile Industries Ltd. (supra), we hereby allow this ground and direct the AO to delete the addition. Therefore, ground Nos 1 to 1.2 raised by the assessee in its cross objection are allowed."

11. The Division Bench of Hon Punjab and Haryana High Court in case of Commissioner of Income Tax v Winsome Textile Industries Ltd reported in (2009) 319 ITR 204 had observed as under:

"7. We do not find any merit in this submission. The judgment of this court in Abhishek Industries Ltd (2006) 286 ITR 1 was on the issue of allowability of interest paid on loans given to sister concerns, without

interest. It was held that deduction for interest was permissible when loan was taken for business purpose and not for diverting the same to sister concern without having nexus with the business. The observations made therein have to be read in that context. In the present case, admittedly the assesse did not make any claim for exemption. In such a situation section 14Acould have no application."

12. The Hon'ble Bombay High Court in the case of CIT Vs.Delite Enterprises(Tax Appeal 110 of 2009 dated 26-2-2009) held as under:-

"The Revenue is in appeal on the following questions ;

"A-Whether on the facts and in the circumstance of the case and in law the Hon'ble Tribunal was right in deleting the disallowance made by the Assessing Officer of interest paid by the Assessee Company on borrowed funds amounting to Rs.241.10 lakhs overlooking the fact that the borrowed funds were used by the Assessee Company to invest in the Capital of another Partnership Firm and since profits derived by the Assessee Company from a Partnership firm were exempt from tax u/s.10(2A) of the Income-tax Act, the interest expense related to such tax free profits is to be disallowed u/s.14A of the Income Tax Act?

In so far as Question (A) is concerned, on facts we find that there is no profit for the relevant assessment year. Hence the question as framed would not arise."

13. Similar view has been taken by the Hon'be Punjab & Haryana High Court in the case of CIT Vs. M/s. Lakhani Marketing Incl. in ITA No.970 of 2008 dated 2.4.2014. The Hon'ble High Court while affirming the decisions of CIT(A) as well as the Tribunal in deleting the disallowance made under section 14A observed as under:-

"7. After hearing learned counsel for the parties, we do not find any merit in the appeals. The primary issue that arises for consideration in these appeals is whether the CIT(A) as well as the Tribunal were right in allowing deduction of interest liability out of other income and the claim of the revenue to disallow the same under section 14A of the Act was justified.9. The CIT(A) vide order dated 24.6.2004 annexure A.II, recorded as under:-

"7.2 Keeping in view the above facts and circumstances of the case it is held that the AO was not correct in applying section 14A of the IT Act in disallowing the expenditure on account of interest amounting to ` 46,91,684/-. It was incumbent on the AO to establish a nexus between

the expenditure incurred and the income which was exempt under the Act. Facts clearly do not support the action of the AO. Disallowance is accordingly deleted. The AO is directed to recompute the income accordingly."

8. Vide order dated 16.5.2008, Annexure A.III, the Tribunal on appeal by the revenue while upholding the finding recorded by the CIT(A) noticed as under:-

"We have heard rival submissions and have perused the material on record. From the reading of section 14A of the Act, it is clear that before making any disallowance the following conditions are to exist:-

a) That there must be income taxable under the Act, and

b) That this income must not form part of the total income under the Act, and

c) That there must be an expenditure incurred by the assessee, and

d) That the expenditure must have a relation to the income which does not form part of the total

income under the Act."

14. Therefore, unless and until, there is receipt of exempted income for the concerned assessment years, we are of the view, Section 14A of the Act cannot be invoked. In this appeal, the revenue has not dispelled the contention of the assessee before AO that it was not in receipt of any exempt income. Learned CIT(A), has misconstrued the decision of Delhi Bench of this Tribunal in the case of M/s Technopak Advisors(P)Ltd.,, as that of the Hon' Delhi High Court, without recognizing that after the said decision, there has been a catena of judgments from various High Courts, going in favour of the assessee. Hence according to us, the Assessing Officer has erred in invoking Section 14A of the Act.

15. In the result, we have no hesitation to dismiss the appeals filed by the revenue, while allowing the appeals filed by the assessee.

Sd/-
(P. MADHAVI DEVI)
JUDCIAL MEMER

Sd/-
(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER

Bangalore:
D a t e d : 12-09-2014
am*

Copy to :

Appellant
Respondent
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CIT
DR, ITAT, Bangalore.
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Asst. Registrar

ITAT, Bangalore