

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" NEW DELHI

BEFORE SHRI R.K. GUPTA: JUDICIAL MEMBER
AND
SHRI T.S. KAPOOR : ACCOUNTANT MEMBER

ITA Nos. 5123 & 5124/Del/2012

Asstt. Yrs: 2008-09 & 2007-08 respectively

Holcim (India) Pvt. Ltd.,
Suite 304, 3rd floor, DLF Saket,
A-1, Saket, New Delhi-110002.

Vs. DCIT (OSD) Cir. 12(1),
New Delhi.

PAN: AABCH 3635 C

(Appellant)

(Respondent)

Appellant by : Shri R.S. Singhvi CA

Respondent by : Shri Satpal Singh Sr. DR

ORDER

PER R.K. GUPTA, J.M :

These are assessee's appeals against CIT(A)-XV, New Delhi's separate orders dated 1-8-2012 for A.Y. 2007-08 and dated 2-8-2012 for A.Y. 2008-09. Both these appeals are heard together and disposed of by a common order for the sake of convenience.

2. Similar issues are involved in both appeals of the assessee i.e. against framing the disallowance of total business expenditure incurred during these two years u/s 14A. For AY 2007-08 the disallowance u/s 14A has been

made at Rs. 8,61,50,315/- and for AY 2008-09 the disallowance u/s 14A has been made at Rs. 6,60,93,678/- by the CIT(A).

3. Brief facts of the case are that assessing officer found that business of the assessee has not been started, therefore, he held that business is not set up. Accordingly he disallowed various expenses claimed by the assessee in its P&L A/c. while disallowing expenses the assessing officer has observed in last para of the order for AY 2007-08 that mere incorporation and receipt of share application money cannot be said to be commencement of the business. Neither any interest income has been earned from these advances nor any goods or services been obtained against them. Moreover, the assessee has also not disclosed any dividend income from its investment amounting to Rs. 18509150756/- with M/s Ambuja Cements Ltd., as appearing in the balance sheet. Therefore, he disallowed the expenses amounting to Rs. 8,75,35,452/- claimed in the P&L A/c.

4. Similarly, the disallowance was made for AY 2008-09 at Rs. 7,02,54,564/-.

5. Assessee preferred appeal before the CIT(A) for both the years. CIT(A) after considering the submissions and perusing the material on record held that business of the assessee has been set up, therefore, disallowance of the expenses at the end of the assessing officer was not

justified. These findings have been recorded by CIT(A) in para 5 of its order for AY 2007-08. Final finding has been recorded by the CIT(A) in para 5.6, wherein it has been held that the assessee is engaged in the business of holding of investment, is entitled to claim expenditure provided there is a direct connection between expenditure incurred and business of the assessee company. In the instant case, the expenditure incurred is on salaries of employees of the assessee company and other operating expenses of the company. The assessee has also admitted that the said expenses have been incurred in order to protect their investment as well as for exploration of new investments. These findings of CIT(A) have not been challenged by the department as no appeal has been filed by the department for both of the years.

6. However, while allowing the ground of the assessee, the CIT(A) found that the expenses claimed by the assessee are to be disallowed u/s 14A. Accordingly, a show cause notice was given to the assessee that as to why the expenditure claimed in its P&L A/c should not be disallowed u/s 14A. Detail reply was filed before the CIT(A). However, CIT(A) held that even if there is no actual exempt income, once an expenditure has been incurred for earning exempt income section 14A of the Act applies. Final finding has been given in para 5.15 by which it has been held that,

“therefore, by applying the above judicial decision to the facts of the instant case, I find admittedly and undisputedly, entire expenditure incurred to the tune of Rs. 8,75,35,452/- has been incurred for investment and hence in the light of the above factual position, the entire expenditure is not allowable in view of Section 14A of the Act. Thus, disallowance made by the Assessing officer is confirmed though on a different ground and as such, the appeal preferred by the appellant is dismissed”.

7. Similar finding has been recorded by CIT(A) for A.Y. 2008-09.
8. Now the assessee is in appeal herein before the Tribunal against the finding of CIT(A) for both of the years.
9. Ld. Counsel for the assessee vehemently argued that the Id. CIT(A) has no jurisdiction to enhance the income on an issue which was not considered by the assessing officer. For this purpose reliance is placed on the decision of the Hon'ble Delhi High Court in the case of Gurinder Mohan Singh Nindrajog v. CIT (2012) 18 Taxmann.com 176 (Del.). Reliance was also placed on various other case laws, copies of these judgments are also placed on record. It was further submitted that even on merits no disallowance is warranted u/s 14A as assessee has not made any investment for earning the dividend. The assessee has made huge investment with the approval of the appellate authority to acquire the controlling interest in the

companies of whom the assessee had purchased shares. It was further stated that till date the assessee has not earned any dividend but doing its business in those companies of which the shares have been purchased by the assessee. It was further explained that these shares were purchased for acquiring the controlling interest of those companies. It was further submitted that even for A.Y. 2007-08 Rule 8D is not applicable and therefore the disallowance, if any, is to be made, then it is to be seen as to how much disallowance can be made which related to earning of dividend income. No interest has been paid by the assessee as entire expenditure is made on account of salary, other administrative expenses etc. etc. which have no connection for earning of dividend as all these expenses are incurred for business purposes and as assessee has controlling interest in these companies. For this purpose reliance was placed on the decision of Hon'ble Delhi High Court in the case of Maxopp Investment Ltd. 15 Taxmann.com 390 (Del.). Further reliance was placed on the decision of Chandigarh Bench of the ITAT in the case of M/s Spray Engineering Devices Ltd. rendered in ITA no. 701/Chd/2009 vide order dated 22-6-2012, where identical issue was involved. Relevant finding given by the Tribunal were also read, which are incorporated in para 39 to 42.

10. On the other hand ld. DR placed reliance on the orders of assessing officer and CIT(A). It was further submitted by ld. DR that CIT(A) has power to enter into the shoes of assessing officer and therefore disallowance u/s 14A was correctly made.

11. In reply it was submitted by ld. AR that ld. CIT(A) has not given any finding that assessee has not made investment for the purpose of doing business or acquiring the controlling interest in those companies of which shares were purchased. No body will invest such a huge amount i.e. two thousand crores of rupees just for earning of dividend. As against, assessee is doing the business in those companies. Neither any dividend has been earned by the assessee nor those companies have declared any dividend till date. Therefore, this is not a case of earning the exempt income but this is a case of doing business.

12. We have heard rival submissions and considered them carefully. We have also perused the material on record along with various case laws, relied upon by ld. AR. We find that the decision in the case of Gurinder Mohan Singh Nindrajog (supra) is squarely applicable on the facts of the present case. In this case the Hon'ble High Court has held that, *“there is no doubt about the fact that while framing the assessment even u/s 143(3), the Assessing officer may omit to make certain additions of income or omit to*

disallow certain claims which are not admissible under the provisions of the Act thereby leading to escapement of income. The Act provides for remedial measures which can be taken under these circumstances”.

13. Thereafter, the Hon’ble High Court has held that CIT(A) has no power to make the disallowance or addition where assessing officer has not applied his mind. It was further held by the Hon’ble High Court that if any disallowance escaped attention of the assessing officer, then remedial action can be taken either by issuing notice u/s 148 or initiating proceedings u/s 263 of the Act, but ld. CIT(A) has no power to make such disallowance which assessing officer has not made. The facts are identical herein before us as the assessing officer has not made any disallowance u/s 14A, as he disallowed the entire expenditure by holding that business of the company has not set up.

14. Ld. CIT(A) has accepted the ground of the assessee that business was set up and expenditure claimed in the P&L A/c cannot be disallowed. However, he disallowed the entire expenditure u/s 14A which was not disallowed by the assessing officer. In view of the decision of the Hon’ble Delhi High Court in the case of Gurinder Mohan Singh Nindrajog (supra), no such disallowance can be made by ld. CIT(A) , therefore, respectfully

following the decision of the Hon'ble High Court we hold that CIT(A) has assumed jurisdiction wrongly for making disallowance u/s 14A of the Act.

15. Even on merits, we note that disallowances made u/s 14A were unwarranted as assessee has not invested in shares for earning of dividend but acquired the controlling interest in the respective companies for doing the business. Ld. CIT(A) himself has admitted that assessee is doing the business and the business of the assessee company has been set up, therefore, there is no question that assessee has invested the funds for earning of dividend.

16. Similar issue came up before the Chandigarh Bench of the Tribunal in the case of M/s Spray Engineering Devices Ltd. (*supra). In this case also the disallowances were made u/s 14A by the assessing officer by observing that assessee has purchased shares of Rs. 3.01 crores of M/s Shri Sai Baba Sugar Mills Ltd. for earning exempt income. This action of the assessing officer was confirmed by CIT(A). On second appeal before the Tribunal, the Tribunal held that, *“we find merit in the plea of the assessee that where a business strategy had been adopted by the assessee by way of investment in shares of sick company in order to make over the said company for widening its operation of business, cannot be held to be investment per se. The decision making of a business man by way of strategy planning in allied line*

of business is a decision made in the course of carrying on the business and the Assessing officer cannot sit in judgment seat to comment upon the same. One the assessee has been found to have made a business investment by way of shares in related line of business, the said investment though held by way of shares in the said company cannot be subjected to disallowance under section 14A of the Act, which in any case is relatable to disallowance of the expenditure out of the exempt income earned by the assessee, by way of its investment in shares of other company. In the facts of the present case the investment was purely of business nature as the company in which the amount was invested was a loss making company and there was no question of earning any dividend income from such investment. In the totality of the facts and circumstances of the case we find no merit in the order of the authorities below in disallowing any expenditure under the garb of section 14A of the Act”.

17. Identical facts are involved in the present case in hand, as in this case also the assessee has invested in the companies which were not showing any profits. The assessee acquired controlling interest in those companies just to run these companies properly. Ld. AR has stated that till date no dividend has been earned by the assessee as assessee is doing the business in these companies from the amounts invested through shares. Therefore, in our

considered view this is not a case of disallowance u/s 14A of the Act. Accordingly, we delete the disallowance made by Id. CIT(A) U/s 14A of the for both the years in question.

18. In the result, the appeals of the assessee are allowed.

Order pronounced in open court on 27-09-2013.

Sd/-
(T.S. KAPOOR)
ACCOUNTANT MEMBER
Dated: 27th Sept. 2013.

Sd/-
(R.K. GUPTA)
JUDICIAL MEMBER

MP

Copy to :

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