OD-19

ORDER SHEET
ITAT/21/2022
IA NO:GA/1/2022
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION(INCOME TAX)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF I.T.-2, KOL.
-VS-
M/S. WEST BENGAL INFRASTRUCTURE DEVELOPMENT FINANCE CORPORATION LTD.

BEFORE:
HON'BLE JUSTICE T.S. SIVAGNANAM
AND
HON'BLE JUSTICE BIVAS PATTANAYAK

DATE: 4TH JULY 2022.

Ms. S. Das De, Adv., for appellant/petitioner.
Mr. J.P. Khaitan, Sr. Adv.; Mr. A. Sen, Adv., for respondent.

The Court: This appeal by the Revenue, filed under section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act" for the sake of brevity), for a direction against the order dated November 9, 2021, passed by the Income Tax Appellate Tribunal, A-Bench, Kolkata, in ITA No.499/Kol/2020 for the assessment year 2013-14.

The Revenue has raised the following substabtial questions of law for consideration:

(i) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law to confirm the CIT(A)'s action of deleting the addition under section 14A of the Act made by the Assessing Officer on the ground that the assessing officer has failed to give cogent reasons of dissatisfaction regarding the computation of the disallowance?

(ii) Whether on the facts and circumstances of the case the Tribunal was justified in law in not appreciating the fact that the disallowance under section 14A computed by the assessee was not done as per section 14A read with rule 8D of the Income Tax rules, 1962?

(iii) Whether on the facts and circumstances of the case the Tribunal was justified in law in not considering the Circular no.05/2014, dated 11.02.2014, issued by the Board, wherein it clearly postulated that provisions of rule 8D read with section 14A of the Act, have to be invoked for disallowance of expenditure even when no exempt income was earned by the assessee in the relevant assessment year?

We have heard Ms. Smita Das De, learned counsel appearing for the Revenue, and Mr. J.P. Khaitan, learned senior counsel, assisted by Mr. Ananda Sen, learned counsel, appearing for the respondent. The issue raised in this appeal is squarely covered by the various tests of the Hon'ble Supreme Court which were considered in the case of **Kesoram Industries Ltd. –vs- Principal Commissioner of Income-Tax, reported in [2022] 441 itr 648(Cal)**. The operative portion of the said decision reads as follows:

> "The law on the issue is no longer res integra and we are gruided by the decision of the hon'ble Supreme Court in the case of ***Maxopp Investment Ltd. v. CIT*** reported in [2018] 402 ITR 640 (SC). Paragraphs 34 and 41 would be of relevance to the case on hand, which is quoted hereinbelow for better appreciation (page 665 of 402 ITR):
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> > "34. Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessees would apply while interpreting section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Limited may have made the investment in order

to gain control of the investee-company. However, that does not appear to be a relevant factor in determining the issue at hand. The fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind section 14A of the Act in mind, the said provision has to be interpreted, particularly, the words 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in section 14A of the Act. This is so held in ***Walfort Share and stock Brokers P. Ltd.*** [2010] 326 ITR 1(SC), relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom (page 16 of 326 ITR):

'The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A… The theory of

apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14A''….

41. Having regard to the language of section 14A(2) of the Act, read with rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the Assessing Officer needs to record satisfaction that having regard to the kind of the assessee, suo motu disallowance under section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the Assessing Officer was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, the nature of the loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the Assessing Officer."

Two important issues have been pointed out in the aforementioned decision. Firstly that the provisions of section 14A has to be interpreted, particularly, the words that "in relation to the income" that does not form part of total income. Therefore, it was held that the principle of apportionment of expenses comes into play as that is the principle which is incorporated in section 14A of the Act. With regard to as to how the power under section 14A(2) read with rule

8D of the Rules could be invoked it was pointed out that the Assessing Officer needs to record satisfaction that having regard to the kind of the assessee suo motu disallowance under section 14A was not correct and it will be in those cases where the assessee in his return has himself apportioned but the Assessing Officer was not accepting the said apportionment. In any event, the Assessing Officer was not accepting the said apportionment. In any event, the Assessing Officer will have to record its satisfaction to the said effect. As pointed out earlier the Assessing Officer has not recorded satisfaction and when this was pointed out before the Commissioner of Income-tax(Appeals) the same was not decided by the Commissioner of Income-tax(Appeals), the issue was also not decided by the Tribunal when the assessee raised the same, though the grounds have been noted. The Tribunal has not rendered any decision on the said point but granted partial relief to the assessee with regard to the interest alone. We also take note of the decision of this court in the case of ***CIT v. Ashish jhunjhunwala*** reported in [2015] (12) TMI 905(Cal), and the decision in ***Pr. CIT v. Britannia Industries limited*** I.T.A.T/45/2017 dated July 19, 2018. It was pointed out that the assessee has to make a claim (including a claim

that no expenditure was incurred) with regard to the expenditure incurred for earning income which is not chargeable to tax. Such a claim has to be examined by the Assessing Officer and only if an objective satisfaction is arrived at by the Assessing Officer that the claim made by the assessee cannot be accepted, the Assessing Officer can then proceed to apply computation mode as provided in rule 8D(2) of the Rules. we also take into consideration the decision of the hon'ble Supreme Court in ***Godrej and Boyce Manufacturing Co. Ltd. v. Dy. CIT*** [2017] 394 ITR 449 (SC); [2017] 7 SCC 421, wherein it was held that the law postulates the recording of satisfaction as the requirement ot be complied with by the Assessing Officer. The law on the subject as noted has been reiterated in several subsequent decisions as well, and, therefore, the issue has to be decided by the Tribunal, before the Tribunal can remand the matter to the Assessing Officer to do the computation as directed to be done in paragraphs 11 and 12 of the order passed by the Tribunal dated April 26, 2018 in I.T.A.T./373/Kol/2013 etc. However, we make it clear that so far as the relief which was granted to the assessee with regard to the interest portion shall remain intact for all the three assessment years and the matter is remanded to the

Tribunal to consider as to whether the Assessing Officer had followed the mandate in section 14A(2) of the Act and while doing so, the Tribunal shall take note of the decisions which we have referred to above which have laid down the procedure to be adopted by the Assessing Officer."

In the case on hand, we have perused the assessment order and we find that no satisfaction has been recorded by the assessing officer as the assessing officer merely comes to the conclusion that the disallowance made suo moto by the assessee is not convincing. This finding does not satisfy the tests laid down by the Hon'ble Supreme Court in the decision referred to above. Therefore, we find that the Tribunal was right in rejecting the appeal filed by the Revenue.

In the result, the appeal stands dismissed. The substantial questions of law are answered against the Revenue.

The stay application also accordingly stands dismissed.

(T.S. SIVAGNANAM, J.)

(BIVAS PATTANAYAK, J.)

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