IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. Nos. 277 to 279/Coch/2019
Assessment Years: 2010-11 to 2012-13

M/s. Muthoottu Mini Financiers Ltd., Muthoottu Building, Kozhencherry-689 641. PAN: AABCM 5994M]	**Vs.**	The Deputy Commissioner of Income-tax, Central Circle-2, Kochi.
(Assessee -Appellant)		**(Revenue-Respondent)**

Assessee by	Shri Thomas Cherian, FCA
Revenue by	Shri Mritunjaya Sharma, Sr. DR

Date of hearing	12/03/2020
Date of pronouncement	19/05/2020

O R D E R

Per CHANDRA POOJARI, AM:

These three appeals filed by the assessee are directed against the common order of the CIT(A)-III, Kochi dated 13/02/2019 and pertain to the assessment years 2010-11 to 2012-13.

1.1 Since the issues involved in these appeals are common in nature, they were heard together and are being disposed off by this common order.

2. The assessee has raised the following common grounds of appeals except for variation in figures:

> 1. The Assessment order passed is wrong in law and without considering the facts and specific circumstances applicable to the appellant and is prejudicial to the interest of the Appellant.
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> 2. The Assessing Officer has gone wrong on facts in identifying that the property was not used for business purpose as provided u/s 32 of the Income Tax Act 1961 since it was used previously for business purposes and intention to future use is still under consideration. The Assessing Officer has failed to appreciate the fact that the Appellants intention to use such prime area in SA Road Pallimukku, Ernakulam is only for its intended business purpose and the present temporary letting out of commercial space does not alter its intention.
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> 3. The learned Assessing Officer has erred in law and on facts in applying section 14A r.w Rule 8D.
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> The Assessing Officer has erred in law and on facts in finding that disallowance computed under Rule 8D(2)(ii) is not applicable to the Appellant's case since it had incurred interest expenditure which is directly attributable to its financing business and the disallowance arise only if it is not attributable to any particular income or receipt. Further ail the investments were made prior to AY 2010-11 and fresh investment made during the years.
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> Also, the Assessing Officer has ignored the submission by the appellant that it had enough non-Interest bearing funds to make the investment of Rs.13.82 crores and hence no disallowance is warranted under Sec 14A r.w Rule 8D in the case.
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> The assessment was completed without considering the facts and guidelines prescribed in law and may be rejected.
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> On the basis of above, and other grounds and arguments that may be presented at the time of hearing, we request that the additions made by the Assessing Officer may be deleted and the original return be accepted.
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> We request that the explanations and documents submitted before Assessing Authority also may be considered.

2.1 The assessee has also raised additional ground for the assessment year 2012-13 which reads as follows:

> "The calculation made in the assessment for the AY 2012-13 under section 14A is totally wrong. While applying the rule 8D, Assessing Officer has violated the principles and procedures he himself had adopted previously in the assessment in respect of previous year. According to rule 8D, the expenditure in relation to the exempt income would be aggregate of the following: ……………………….."

2.2 At the time of hearing, the Ld. AR submitted that he did not wish to press the above additional ground and accordingly, made an endorsement to this effect. Acceding to the request of the Ld. AR, the additional ground of the assessee is dismissed as not pressed.

3. The first common ground is with regard to depreciation on letting out of building for business purposes.

3.1 The facts of the case as narrated in ITA No. 277/Coch/2019 for the assessment year 2010-11 are that the assessee declared income from letting out property as income from business. For the assessment year 2012-13, the assessee declared income from letting out property under the head income from house property. However, in all these years, the Assessing Officer disallowed depreciation on the building for the reason that the basic criterion for allowing depreciation on an asset is whether the same is put to use for purpose of business during the previous year under consideration. The Assessing Officer stated that the income tax inspector was deputed to ascertain the extent to which the said building was put to use for the business of the assessee. The inspector visited the site on 25/02/2013 and submitted a detailed inspection report as per which almost 75% of the area owned by the assessee was lying vacant and remaining portion was rented out. According to the Assessing Officer the assessee was not put to use for the purpose of business by the assessee. Hence, the Assessing Officer made the disallowance of depreciation on the said building.

3.2 On appeal, the CIT(A) observed that the assessee had shown the building in question as a business asset during 2010-11 and 2011-12 and hence, shown the rental amount as business income and claimed depreciation on the building. However, for AY 2012-13, the assessee had shown the rental receipts from the building as income from house property. In view of the repeated reports of the inspector of income tax that most of the building was not being put to any business use and the subsequent disclosure of rental receipts as house property income by the assessee for the assessment year 2012-13, the CIT(A) directed the Assessing Officer to disallow the total depreciation claim of the building by the assessee and assess the building space including the vacant area as the income from house property.

3.3 Against this, the assessee is in appeal before us. The ld. AR relied on the order of the Tribunal in assessee's own case in ITA No.99/Coch/2016 dated 17/11/2016.

3.4 The Ld. DR relied on the order of the Assessing Officer.

3.5 We have heard the rival submissions and perused the record. The assessee has declared income from letting out building as income from business for the assessment year 2010-11 and 2011-12. It is an admitted fact that the assessee had let out 25% of the building in the assessment years under consideration. It cannot be said that the portion of the building is not entitled for depreciation. In our opinion, the order of the Tribunal in assessee's own case in ITA No.99/Coch/2016 dated 17/11/2016 is applicable to the facts of the present case wherein it was held as follows:

> *"7. We have heard the rival submissions and perused the facts of the case. As regards the facts of the case as on record and argued by the Ld. AR, it is found to be convincing because the Inspector who visited the site on 04/12/2009, submitted the report on 04/12/2009 only and also visited the portion which is not even occupied and owned by the assessee, i.e., basement. As regards 5th and 6th Floors, they have been rented out which is a matter of record which has also been the matter of report of the Inspector and therefore, should not have been in any dispute.*
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> *8. As regards 1st to 4th floors, the assessee submitted the explanation that the floors have been used for occupation of the staff and also used as training centre of the staff and no defect has been pointed out by any of the authorities below.*
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> *9. No report or verification or counter verification or cross examination has been done from any neighbour or occupants inside the building or nearby buildings, etc. Moreover, once the building has been occupied and even if the building is lying vacant for some period for renting out which even, according to the Ld. CIT(A), has been rented out during the assessment year 2010-11, depreciation cannot be denied. Once the building has been ready for use for the purpose of business, many Courts have taken views that in such cases depreciation has to be allowed. The case laws cited by the Ld. AR before both the authorities below and before us in support of his claim are as follows:*

(1) CIT vs. Chennai Petroleum Corporation Ltd. (2013) 358 ITR 314
(2) CIT (9)(1) Mumbai vs. Broskalis Dredging India (P) Ltd. (2012) (8) TM 11447-Mumbai ITAT.

(3) National Thermal Power Corporation Ltd. vs. CIT – Delhi High Court (2013) 357 ITR 253.

(4) CIT vs. Geo Tech Construction Corporation (244 ITR 452 (Ker.)

10. In any case, in our view, the assessee has submitted the explanation that during the impugned year, all the floors were used for the purpose of the business of the assessee in one form or the other and therefore, the twin conditions for allowing depreciation, i..e, ownership of the building and the building has been put to use for the purpose of business, has been satisfied and therefore, depreciation cannot be denied. In the circumstances and facts of the case, we direct the Assessing Officer to allow the depreciation as claimed by the assessee and reverse the order of the Ld. CIT(A).

11. In the result, the appeal of the assessee in I.T.A. No. 99/Coch/2016 is allowed."

3.6 In view of the above order of the Tribunal, we direct the Assessing Officer to assess the income from letting out building under the head income from business and to grant depreciation for the assessment years 2010-11 and 2011-12. This ground of appeals of the assessee in ITA Nos. 277 & 278/Coch/2019 is allowed.

3.7 However, for the assessment year 2012-13, the assessee itself has offered income from letting out property as income from house property. As such, the assessee cannot have any grievance and is entitled to only deduction u/s. 24 of the I.T. Act. Thus, this ground of appeal of the assessee in ITA No.279/Coch/2019 for the assessment year 2012-13 is dismissed. Thus, the appeals of the assessee in ITA

Nos.277 & 278/Coch/2019 for the assessment year 2010-11 and 2011-12 are allowed and the appeal of the assessee in ITA No.279/Coch/2019 is dismissed.

4. The next common ground is with regard to disallowance made u/s. 14A r.w.s. 8D of the I.T. Act.

4.1 The facts of the case are that the assessee had made investments in equity shares of following companies to the tune of Rs.13,81,88,297/- which remained intact during the block of assessment years:

1) India Vision Satellite Communications Ltd. Rs.7,10,00,000/-
2) Yes Communications Rs.3,04,27,328/-
3) Kapico Kerala Resorts (P) Ltd. Rs.3,67,60,969/-

The Assessing Officer made additions by applying Rule 8D r.w.s.14A by holding that the assessee had diverted the interest bearing funds to non income generative investments as follows:

Assessment Year	Section 14A Disallowance
2010-11	Rs. 81,47,388/-
2011-12	Rs. 1,06,48,910/-
2012-13	Rs. 4,66,92,824/-

4.2 Before the CIT(A), the assessee submitted that the investment being treated as exempt income bearing investment were actually interest free loans which were converted to equity during AY 2009-2010. The CIT(A) called for banks account copies in support of the interest free loan advanced which were subsequently converted into exempt income bearing equity shares. The CIT(A) observed that inspite of repeated opportunity the assessee was unable to produce bank account details which could have proved that interest bearing funds have not been utilized for the aforesaid equity investment. Before the CIT(A), the assessee expressed its inability to substantiate or produce any other evidence in support of not utilizing interest bearing funds for making investments in exempt income instruments. According to the CIT(A), the assessee submitted that since no fresh addition in AY 2010-11, 2011-12 & 2012-13 have been made, disallowance under Rule 8D should be restricted to the amount of disallowance for AY 2010-11. The CIT(A) noted that once the decision to invoke provision of section 14A was undertaken by the AO then the amount of disallowance has to be determined as per the method prescribed which in this case was as per Rule 8D of the I.T. Rules. The CIT(A) justified the method adopted by the Assessing Officer in determining the disallowance under Rule 8D of the I.T. Rules and rejected the above ground raised by the assessee.

4.3 Against this, the assessee is in appeal before us. The Ld. AR submitted that the assessee is having enough own funds in the form of loans from Directors and Group companies and the assessee does not have interest bearing funds. According to the

Ld. AR, the amounts invested in the above companies are yielding exempt income and hence, section 14A r.w. Rule 8D of Income Tax Rules cannot be applied.

4.4 The Ld. DR submitted that the assessee had availed interest bearing gold loans and bank loans so that section 14A r.w. Rule 8D of I.T. Rules is applicable.

4.5 We have heard the rival submissions and perused the record. The assessee has filed cash flow statement for the period 01/04/2008 to 28/10/2008, 01/04/2008 to 10/12/2008, 01/04/2008 to 18/02/2009, 01/04/2009 to 22/09/2009 and 01/04/2009 to 28/01/2010 to demonstrate that the assessee had sufficient interest free own funds available to make the above investments. However, we find that the assessee has not established in the cash flow statements about the availability of enough own funds at the time of making investments in the exempted income yielding assets before the lower authorities. Hence, it is appropriate to verify the fact whether enough own funds are available with the assessee as on the date of making investments in the exempted income yielding assets. Being so, the assessee is directed to produce cash flow statements showing availability of enough own funds for making such investments with supporting documents which have to be examined by the Assessing Officer before making disallowance u/s. 14A read with Rule 8D of the I.T. Rules. Accordingly, we remit this entire issue in dispute to the file of the Assessing Officer for fresh consideration with a direction to the assessee to produce relevant cash flow statements to show that interest free funds were available with the assessee to make such investments. With this observation, this ground of appeals of the assessee is partly allowed for statistical purposes for all the assessment years.

5. In the result, the appeals filed by the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on 19th May, 2020.

sd/-	sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 19th May, 2020
GJ
Copy to:
1. M/s. Muthoottu Mini Financiers Ltd., Muthoottu Building, Kozhencherry-689 641.
2. The Deputy Commissioner of Income-tax, Central Circle-2, Kochi.
3. The Commissioner of Income-tax (Appeals)-III, Kochi.
4. The Pr. Commissioner of Income-tax, Central, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin