

INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "E": NEW DELHI]

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
A N D
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.A. No. 4287/Del/2017
(Assessment Year: 2012-13)
(THROUGH VIDEO CONFERENCING)

National Building Construction Corporation Limited, Lodhi Road, New Delhi – 110 003. PAN : AAACN3053B	Vs.	DCIT, Circle : 18 (1) New Delhi.
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A N D

I.T.A. No. 4165/Del/2017
(Assessment Year: 2012-13)

Addl. CIT, Special Range : 6, New Delhi.	Vs.	National Building Construction Corpn. Ltd., C/o. M/s. S.B. Garg & Co. Chartered Accountants, 20/17, Shakti Nagar, Delhi – 110 007. PAN : AAACN3053B
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(Appellants)		(Respondents)
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Assessee by :	Shri Sachin Kumar, C.A.;
Department by:	Shri Gaurav Pundir, Sr. D. R;
Date of Hearing	26.07.2021
Date of pronouncement	26.07.2021

ORDER

PER PRASHANT MAHARISHI, A. M.

01. These are the cross appeals filed by the assessee as well as the Id. Assessing Officer against the order of the Id. Commissioner of Income Tax (Appeals)-39, New Delhi, dated 7.03.2017 for Assessment Year 2012-13.
02. Assessee has raised following grounds of appeal and the Revenue has raised following grounds of appeal:

I.T.A. No. 4287/Del/2017 - (By the assessee)

Selection of case for scrutiny under CASS is bad in law

“ 1. The Id. Commissioner of Income Tax (Appeals) - 39, New Delhi [hereafter the CIT (A)] failed to appreciate the fact that the submissions, of the Assessee that the case of the Assessee was selected for scrutiny under CASS, have not been disputed by the Id. AO as well the CIT(A);

2. The Id. CIT (A) erred in holding that even under CASS the AO selects the case after keying in the criteria, particularly without any supporting evidence;

3. The Id. CIT (A) erred in holding that even under CASS the independence of the AO to select case for scrutiny remains;

4. The Id. CIT (A) erred in holding that the is not in agreement with the contentions of the Assessee and dismissing the ground.

Disallowance of Corporate Social Responsibility expenses

5. The Id. CIT (A) erred in upholding the disallowance of Corporate Social Responsibility expenses of Rs. 1,65,84,000 out of total expenses of Rs. 2,20,84,000; and without prejudice and alternatively, the Id. CIT (A) having held major expenditure to be capital expenditure, ought to have allowed depreciation thereon.

Interest u/s 244A

6. Interest under section 244A has not been allowed particularly on refund of tax paid under section 140A of the Act. “

03. The Id AO has raised following grounds of appeal:

I.T.A. No. 4165/Del/2017 - (By the Department)

“ 1. Whether in facts and circumstances of the case, Ld. CIT(A) is legally justified in deleting disallowance of Rs. 72,72,713/- u/s 14A of Income Tax Act 1961 (the Act) without considering legislative intend of introducing section 14A by the Finance Act 2001 as clarified by the CBDT Circular No. 5/2014 dated 10.02.2014?

2. Whether in facts and circumstances of the case, Ld. CIT (A) is legally Justified in deleting disallowance of Rs.72,72,713/- u/s 14A of the Act without considering a legal principle that allowability or disallowability of expenditure under the Act is not conditional upon the earning of the income as upheld by Hon'ble Supreme Court in case of CIT Vs. Rajendra Prasad Moody[1978] 115 ITR 519?

3, Whether in facts and circumstances of the case, Ld. CIT(A) is legally Justified in deleting disallowance u/s 14A of the Act without considering ratio

decidendi as upheld in cases of CIT Vs. Walfort Share and Stock Brokers P. Ltdd [2010] 326 ITR 1 (SC) and Maxopp Investment Vs CIT [2012] 347 ITR 272 (Delhi) on application of provision of section 14A of the Act?

4. Whether in facts and on circumstances of the case, the Ld. CIT (A) is legally justified in deleting disallowance of Rs. 1,92,30,000/- u/s 40(a)(ia) of the Act on account of non-deduction of TDS on 'Bank Guarantee Expenses' by ignoring the contents of Notification No. 56/2012 of the CBDT in this regard issued vide F.No. 275/53/2012-IT (B)/SO 3069(E) dated 31.12.2012 and also by ignoring the fact that the said notification had come into force w.e.f. 1st January, 2013?

5. Whether in facts and on circumstances of the case, the Id. CIT(A) is legally justified in deleting disallowance of Rs.25,00,000/- claimed by the assessee as Corporate Social Responsibility (CSR) expenditure incurred on awareness campaign ignoring the contents of Explanation 2 to section 37(1) of the Act? "

04. The brief facts of the case shows that assessee is a Government of India Undertaking working under the Ministry of Urban Development executing various types of civil and electrical projects all over India and abroad.

05. The assessee filed its return of income on 19.09.2012 at Rs.316,99,33,720/- which was revised to Rs.298,60,80,260/-. The assessment under Section 143(3) of the Income Tax Act, 1961 (the Act) was made on 31.03.2015 wherein following three disallowances were made:

- a. Disallowance under Section 14A of the Act of Rs.72,72,713/-;
- b. Disallowance of Rs.1,92,30,000/- on account of non-deduction of tax on bank guarantee charges paid to various banks;
- c. Disallowance of CSR expenditure of Rs.2,20,84,000/-.

06. Assessee preferred an appeal before the Id. CIT (Appeals). The Id. CIT (Appeals) after considering the remand report filed by the Id. Assessing Officer deleted the disallowance under Section 14A of the Act. The disallowance of the bank guarantees commission paid by the assessee to the various banks on which no tax deduction at source has been made. The Id. CIT (Appeals) deleted the same holding that the Notification issued on 31st December, 2012 is for reduction in hardship and compliance and, therefore, as bank guarantee charges are paid to the banks, no tax was required to be deducted, he deleted the addition. With

respect to the CSR expenditure of Rs.2,20,84,000/- he held that Explanation (2) of Section 37(1) of the Act providing for non-deduction of CSR expenditure is applicable from assessment year 2015-16 and the present assessment year is 2012-13 and, therefore, the CSR expenditure is allowable to the assessee under Section 37(1) of the Act provided the same are neither capital expenditure and are incurred wholly and exclusively for the purpose of the business. The ld. CIT (Appeals) held that expenditure incurred for building of training institute for workers is a capital expenditure and further construction of the school building at various places are also capital expenditure and not incurred wholly and exclusively for the purposes of the business. These are not allowable under Section 37(1) of the Act. He further held that the donation paid by the assessee would be allowable not under Section 37(1) of the Act, but under Section 80G of the Act. He also allowed the weighted deduction to the assessee on certain donations.

07. Therefore, the Assessing Officer and assessee both are aggrieved by this order and are in appeal before us.
08. Now we deal with the appeal of assessee.
09. Ground of appeal Nos. 1 – 4 of the appeal of the assessee are challenging selection of the case of the assessee in scrutiny. No specific arguments were advanced and, therefore, same are dismissed.
10. Ground No. 5 of the appeal of the assessee shows that it is aggrieved with the disallowance of Corporate Social Responsibility (CSR) expenditure of Rs.1,65,84,000/- out of the total expenditure of Rs.2,20,84,000/- held to be capital expenditure by the ld CIT (A). The claim of the assessee is that the ld. CIT (Appeals) then should have directed the ld. Assessing Officer to grant depreciation on these assets. The assessee submitted that this issue is covered in the case of the assessee by the order of the coordinate bench for assessment year 2011-12. However, with respect to the items of CSR expenditure held by the ld. CIT (Appeals) the claim of the assessee is that these are Revenue in nature and even otherwise if held to be capital expenditure the ld. CIT (Appeals) should have allowed depreciation to the assessee. The assessee submitted that the training expenses of Rs.1,42,29,282/- the same was

paid for construction of temporary structure for training institute and, therefore, same was to be allowed as Revenue expenditure or depreciation should have been allowed. Further with respect to the expenditure of Rs.7,90,583/- on up-gradation of complex in Agartala and a sum of Rs.7,77,923/- incurred on repair of school buildings at Rajkot also cannot be said to be an expenditure for business purposes. The claim of the assessee is that this expenditure were incurred to maintain good relationship with the Govt. and to get the new business and on the school sign-board of the assessee is shown. All these expenditure should have been allowed to the assessee.

11. The ld. AR submitted that these expenditure should have been allowed to the assessee as deduction. He submitted a written note. The ld. CIT (Appeals) vehemently supported the order of the ld. CIT (Appeals).
12. We have carefully considered the rival contentions and perused the orders of the ld. CIT (Appeals). The assessee has incurred CSR expenditure amounting to Rs.1,42,29,282/- for construction of training institute for workers at NBCC Complex, Ghitorni, New Delhi. Assessee has submitted that this expenditure should have been allowed to the assessee as deduction. We find that this expenditure have been incurred by the assessee under the head of CSR expenditure. Assessee has paid premium of land for this facility. The building is constructed of pre-fabricated steel structure and cannot be held to be a temporary structure. Therefore, this expenditure cannot be allowed to the assessee as Revenue expenditure under Section 37(1) of the Act. Naturally these expenditure are capital in nature and also involve substantial payment for the land premium. However, there are certain expenditure for the construction of the training institute with pre-fabricated steel at Ghitorni, New Delhi. To claim the depreciation on this the assessee should have submitted the details of the actual cost of the asset, ownership of the asset and actual use of the asset. No such details are provided before us. In view of this, we send the issue back to the file of the ld. Assessing Officer directing the AO to examine the claim of the assessee for depreciation on this asset to the extent of cost of building.

Assessee is directed to submit the relevant details before the Assessing Officer.

13. With respect to the up-gradation of complex in Agartala and school construction in Rajkot, we find that both these expenditure are not for the purposes of business and, therefore, neither they can be allowed under Section 37(1) of the Act nor any depreciation can be allowed on these assets as they are not used for the purpose of the business of the assessee. Accordingly, ground No. 5 of the appeal of the assessee is partly allowed with above direction.
14. No arguments were advanced on Ground No. 6 of the appeal. Accordingly, the same is dismissed.
15. Thus appeal of the assessee is partly allowed.
16. Coming to the appeal of the Revenue where grounds Nos. 1 – 3 are with respect to the disallowance under Section 14A of the Act. We find that in case of the assessee, the ld. Assessing Officer has noted that assessee has claimed exemption of dividend income of Rs.8,39,21,124/-. The assessee has disallowed suo moto a sum of Rs.68,67,942/-. Assessing Officer held that this is not the correct application of method in accordance with Rule 8D. Therefore, he worked out the total disallowance of Rs.1,41,40,655/- applying provision of Rule 8D and computing disallowance u/s 8d (2) (i), (ii), and (iii) and made the net addition / disallowance of Rs.72,72,713/-. The ld. CIT (Appeals)deleted the disallowance.
17. The ld. CIT – DR supported the order of the Assessing Officer and the ld. AR submitted a detailed note stating that the disallowance made by the ld. AO is incorrect. He submitted that investment in joint venture and tax free income generating securities is less than the amount of share capital and free reserve owned by the assessee. He submitted that total investment made by the assessee is Rs.22,359/- lakhs whereas the total own funds are Rs.79,549 lakhs .Thus, no disallowance of interest can be made under 8D(2)(i) and (ii). With respect to administrative expenditure under Section 8D(2)(iii), he submitted that the Assessing Officer has computed 0.5% of all investments of the assessee whether exempt income earned/ received during the year or not. He submitted

that assessee has worked out the average value of investment from which the exempt income are received and 0.5% of such disallowances thereon is worked out at Rs. 68,00,000/, same is made in the computation of total income. He submitted that suo moto allowance is disallowance as envisaged under Rule 8D (2) (iii) only. He submitted that, therefore, the disallowance made by the Id. Assessing Officer is incorrect and the Id. CIT (Appeals) correctly deleted the disallowance.

18. We have carefully considered the rival contentions and perused the orders of the lower authorities. In the present case the assessee has earned an exempt income of Rs.8.39 crores being dividend of liquid mutual fund. The assessee has disallowed on its own a sum of Rs.68,67,942/- as administrative expenditure being 0.5% of the average value of the investment on which exempt income is received during the year. The Id. Assessing Officer rejected the contentions of the assessee and applied the provisions of Rule 8D and computed the total disallowance of Rs.1,41,40,655/-. The CIT (Appeals) deleted the same. We find that assessee has investment in joint ventures and liquid funds amounting to in all to Rs.22,359 lakhs. From the joint ventures no exempt income is received during the year. Total dividend is from liquid funds. The assessee has share capital and pre-reserve to the extent of Rs.79,550 lakhs which is higher than the amount of investment and, therefore, no disallowance under Section 14A read with Rule 8D(2)(i) and (ii) can be made. Further for working out disallowance under 8D(2)(iii) clearly the average of investment with exempt income should be taken. Such is the mandate of Hon'ble Delhi High Court in the case of ACB India Ltd. 374 ITR 108. Based on this the disallowance comes to Rs.68,68 lakhs, which is the suo moto disallowance made by the assessee. In view of this Ground No. 1 – 3 of the appeal of the Assessing Officer does not merit any consideration and hence dismissed.

19. The disallowance of Rs.1,92,30,000/- deleted by the Id. CIT (Appeals) is challenged by Ground No. 4 holding that the Notification No. 56 of 2012 issued by the CBDT has come into force with effect from 01st January, 2013 and, therefore, same do not apply for this period and as assessee has failed to deduct any tax at source on bank guarantee commission

paid to banks , the disallowance has been correctly made by the ld AO . The ld. CIT (Appeals) has incorrectly held that the Notification applies to the assessee during this year also.

20. The ld. CIT – DR supported the order of the Assessing Officer and the ld. AR submitted that the bank guarantee commission is paid to the bank is part of the interest, covered by the Notification of the CBDT and, therefore, no tax is required to be deducted on such bank guarantee charges. He, therefore, supported the order of the ld. CIT (Appeals).
21. We have carefully considered the rival contentions and perused the orders of the lower authorities. We find that the issue is squarely covered in favour of the assessee in assessee's own case for assessment year 2011-12 in ITA. No. 756 (Del) of 2015 and 1598 (Del) of 2015 dated 14.05.2018 wherein the co-ordinate bench has clearly held that the Notification issued by the CBDT was to remove the rigorous of TDS and for unnecessary hardship. Therefore, it was held that the Notification issued also applies to assessment year 2011-12 though it is stated to be applicable with effect from 1.01.2013. There is no change in the facts and circumstances of the case. Therefore, respectfully following the decision of the co-ordinate bench in assessee's own case, we confirm the order of the ld. CIT (Appeals). Ground No. 4 of the appeal of the ld. Assessing Officer is dismissed.
22. Ground No. 5 of the appeal of the ld. Assessing Officer is with respect to the allowance of Rs.25 lakhs of the Corporate Social Responsibility expenditure incurred by the assessee on awareness campaign ignoring the content of Explanation (2) of Section 37(1) of the Act. Briefly stated the fact shows that the ld. CIT (Appeals) has considered that assessee has incurred an advertisement expenditure of Rs.25,00,000/- on awareness campaign in respect of Rashtriya Swasthya BimaYojna in NCT of Delhi by putting an advertisement. The ld. CIT (Appeals) has allowed this expenditure holding that these are the advertisement expenditure and assessee was the sponsor displaying its logo. We do not find any infirmity in holding that the above expenditure is an advertisement expenditure incurred by the assessee. With respect to the applicability of Explanation (2) to Section 37(1) of the Act, same applies

with effect from 1.04.2015 i.e. assessment year 2015-16 and not to this year. In view of this, ground No. 5 of the appeal of the ld. Assessing Officer is dismissed.

23. Accordingly, appeal of the ld. Assessing Officer is dismissed.

24. Both these appeals are disposed of by this common order.

Order pronounced in the open court at the conclusion of hearing on 26.07.2021.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 26/07/2021

MEHTA

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	26.07.2021
Date on which the typed draft is placed before the dictating member	26.07.2021
Date on which the typed draft is placed before the other member	26.07.2021
Date on which the approved draft comes to the Sr. PS/ PS	26.07.2021
Date on which the fair order is placed before the dictating member for pronouncement	26.07.2021
Date on which the fair order comes back to the Sr. PS/ PS	26.07.2021

Date on which the final order is uploaded on the website of ITAT	26.07.2021
date on which the file goes to the Bench Clerk	26.07.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	