

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.N. CHARY, JUDICIAL MEMBER**

**ITA No.-4541/Del/2017
(Assessment Year:2012-13)**

DCIT
Circle 16(2)
New Delhi.

Vs. Meyer Apparel Ltd.
D-219, Sushil Bhawan,
Vivek Vihar-1,
New Dlehi.

Appellant

**PAN No. AAACG3928L
Respondent**

Revenue by Sh. Jagdish Singh Dahiya, Sr. DR
Assessee by Sh. Vinod Kumar Bindal, CA
Ms. Rinky Sharma, CA

Date of hearing: 30.12.2020
Date of Pronouncement : 30.12.2020

ORDER

PER K. NARASIMHA CHARY, JM

Aggrieved by the order dated 6/4/2017 in appeal No. 122/16-17 passed by the learned Commissioner of Income Tax (Appeals)-18, New Delhi ("Ld. CIT(A)") for the assessment year 2012-13 in the case of M/s Meyer Apparel Ltd (earlier known as M/s Givo Ltd), Revenue preferred this appeal challenging the deletion of the addition of Rs. 8, 44, 0 22/-made by the assessing officer by invoking 14A of the Income Tax Act, 1961 (for short "the Act") read with Rule 8D of the Income Tax Rules1962 ("the Rules") and also

reducing the book profit under section 115 JB of the Act; deleting the addition of Rs. 6, 77, 24, 250/-made by the assessing officer on account of undisclosed sources in the form of trade creditors.

2. Brief facts of the case are that the assessee is engaged in business of manufacturing, trading and job work of men's suits, jackets and trousers and trading of shirts. For the assessment year 2012-13 they have filed their return of income on 24/9/2012 declaring a nil income after setting of losses brought forward to the tune of Rs. 88, 36, 327/-from the earlier years but computed the book profits under section 115 JB of the Act at Rs. 72, 42, 919/-and pay taxes of Rs. 13, 80, 138/-under section 115 JB of the Act. During the course of assessment proceedings, learned Assessing Officer found that the assessee company had invested in shares for the purpose of long term capital gains and therefore invoking the provisions under 14A of the Act read with Rule 8D of the Rules made an addition of Rs. 8, 44, 0 22/-. Further on a perusal of the details of creditors, the learned Assessing Officer found that the assessee has been showing static creditors in the name of 4 parties since 2008, but in view of the fact that more than 5 years elapsed, learned Assessing Officer opined that the same is a fictitious liability and added a sum of Rs. 6, 77, 24, 250/-to the income of the assessee.

3. Aggrieved by such additions assessee preferred appeal before the Ld. CIT(A) and argued that any addition invoking the provisions under section 14A of the Act read with Rule 8D of the Rules is not justified when the assessee pleads that they earned no exempted income during the year. Assessee further pleaded that the assessing officer himself referred to the confirmation letters issued by the creditors who have been there in the books of accounts of the assessee for the last more than 5 years and the

identity of the credit worthiness cannot be suspected and genuineness of the transaction is also beyond doubt. Ld. CIT(A) followed the decision of the Hon'ble jurisdictional High Court in the case of Cheminvest Ltd vs. CIT (2015) 94 CCH 0002 (del) and other editions of the Hon'ble jurisdictional High Court and deleted the addition made in view of the fact that no exempt income was earned by the assessee during the year. So also, Ld. CIT(A) considered the copy of the application furnished by the assessee before the BIFR dated 19 for 2016 where the latest status of the impugned foreign advances were declared and specific reference was made to serial number 26 (ii) where a sum of Rs. 7 89.14 Lacs was shown due to the pressing creditors of the company which include advance payment against the order received from trust export to the tune of Rs. 3 32.65 Lacs, around point Ltd to the tune of Rs. 79.80 Lacs and Thakral investment Holdings Pvt. Ltd to the tune of Rs. 79.8 Lacs and also the note in respect of each of the foreign advances and other documents produced by the assessee in respect of all the 4 entities and their liability towards them, reached a conclusion that in view of the fact that the genuineness of the creditors or the creditworthiness is not under any suspicion and the genuineness of the transaction also stands proved. He accordingly deleted such an addition also. Hence this appeal by the Revenue.

4. Insofar as the issue relating to the location of the provisions under section 14A of the Act read with Rule 8D of the Rules is concerned, Ld. DR argued that the Ld. CIT(A) failed to consider the legislative intent of introducing the provisions under section 14 A by finance act 2001 as clarified by the CBDT circular No. 5/2014, dated 10/2/2014; that the Ld. CIT(A) failed to consider the legal principles that allowability/disability of

expenditure under the Act is not conditional upon the earning of the income in view of the decision of the Hon'ble Apex Court in the case of Rajendra Prasad Moody. Per contra, it is the submission of the Ld. AR that when once the Revenue does not dispute that the assessee did not earn any exempt income during the particular year, the provisions under section 14A of the Act read with Rule 8D of the Rules cannot be invoked in view of the decision of the Hon'ble jurisdictional High Court in the case of Cheminvest Ltd (supra) and other decisions.

5. In the assessment order itself, learned Assessing Officer recorded that the assessee has been pleading that no exempt dividend income was earned by the assessee during the year and therefore the provisions under section 14A of the Act read with Rule 8D of the Rules cannot be invoked. Reliance is based on the decision reported in CIT vs. Holcim India Pvt. Ltd. 90 CCH 81 (Del) (HC), wherein it was held that Section 14A cannot be invoked when no exempt income was earned. Further, Hon'ble Jurisdictional High Court in PCIT vs. IL & FS Energy Development Company Ltd. (2017) 99 CCH 0190 DelHC, (2017) 297 CTR 0452 (Del) decided on 16th August, 2017

9. Mr. Zoheb Hossain, learned Senior Standing Counsel for the Revenue, submitted that, in Cheminvest Ltd. (supra), this Court had no occasion to consider the CBDT Circular No. 5/2014 dated 11th February 2014 which clarified that Section 14A would apply even when exempt income was not earned in a particular AY. According to him, the other decisions of this Court in CIT-IV v. Taikisha Engineering India Pvt. Ltd. [2015] 370 ITR 338 (Del) and CIT-IV v. Holcim India Pvt. Ltd. (2014) 272 CTR (Del) 282 did not actually discuss the above Circular of the CBDT and, therefore, would be distinguishable.

10. Mr. Hossain further submitted that there was nothing in Section 14A of the Act which suggested that exempt income had to necessarily be earned in the AY in question for the applicability of the said provision. He submitted that if the interpretation placed on Section 14 A of the Act by the above

CBDT Circular was not accepted, the very purpose of Section 14A would be defeated. He referred to the decisions of the ITAT in ACIT v. Ratan Housing Development Ltd. (order dated 23rd May 2008 of ITAT Lucknow) Relaxo Footwear Ltd. v. Addl. CIT [2012] 50 SOT 102 (Del).

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19. In the considered view of the Court, this will be a truncated reading of Section 14 A and Rule 8D particularly when Rule 8D (1) uses the expression 'such previous year'. Further, it does not account for the concept of 'real income'. It does not note that under Section 5 of the Act, the question of taxation of 'notional income' does not arise. As explained in Commissioner of Income Tax v. Walfort Share and Stock Brokers Pvt. Ltd [2010] 326 ITR 1 (SC), the mandate of Section 14A of the Act is to curb the practice of claiming deduction of expenses incurred in relation to exempt income being taxable income and at the same time avail of the tax incentives by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. Consequently, the Court is not persuaded that in view of the Circular of the CBDT dated 11th May 2014, the decision of this Court in Cheminvest Ltd. (supra) requires reconsideration.

20. In M/s. Redington (India) Ltd. v. The Additional Commissioner of Income Tax, Company Range – V, Chennai (order dated 23rd December, 2016 of the High Court of Madras in TCA No. 520 of 2016), a similar contention of the Revenue was negated. The Court there declined to apply the CBDT Circular by explaining that Section 14A is "clearly relatable to the earning of the actual income and not notional income or anticipated income." It was further explained that,

"The computation of total income in terms of Rule 8D is by way of a determination involving direct as well as indirect attribution. Thus, accepting the submission of the Revenue would result in the imposition of an artificial method of computation on notional and assumed income. We believe thus would be carrying the artifice too far."

21. The decisions in CIT v. M/s Lakhani Marketing Inc. 2014 SCC Online P&H 20357, CIT v. Winsome Textile Industries Limited [2009] 319 ITR 204 (P&H), CIT v. Shivam Motors (P) Ltd. (2014) 272 CTR (All) 277 have all taken a similar view. The decision in Taikisha Engineering India Pvt. Ltd. (supra) does not specifically deal with this issue.

22. It was suggested by Mr. Hossain that, in the context of Section 57(iii), the Supreme Court in *Commissioner Of Income Tax, West v. Rajendra Prasad Moody* [1978] 115 ITR 519 (SC) explained that deduction is allowable even where income was not actually earned in the AY in question. This aspect of the matter was dealt with by this Court in *M/s Cheminvest Ltd. (supra)* where it reversed the decision of the Special Bench of the ITAT by observing as under:

"20. Since the Special Bench has relied upon the decision of the Supreme Court in Rajendra Prasad Moody (supra), it is considered necessary to discuss the true purport of the said decision. It is noticed to begin with that the issue before the Supreme Court in the said case was whether the expenditure under Section 57 (iii) of the Act could be allowed as a deduction against dividend income assessable under the head "income from other sources". Under Section 57 (iii) of the Act deduction is allowed in respect of any expenditure laid out or expended wholly or exclusively for the purpose of making or earning such income. The Supreme Court explained that the expression "incurred for making or earning such income", did not mean that any income should in fact have been earned as a condition precedent for claiming the expenditure. The Court explained:

"What s. 57(iii) requires is that the expenditure must be laid out or expended wholly and exclusively for the purpose of making or earning income. It is the purpose of the expenditure that is relevant in determining the applicability of s. 57(iii) and that purpose must be making or earning of income. s. 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of s. 57(iii) to suggest that the purpose for which the expenditure is made should fructify into any benefit by way of return in the shape of income. The plain natural construction of the language of s. 57(iii) irresistibly leads to the conclusion that to bring a case within the section, it is not necessary that any income should in fact have been earned as a result of the expenditure."

21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in *Rajendra Prasad Moody (supra)* was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is "for the purpose of making or earning such income." Section 14A of the Act on the other hand contains the expression "in relation to income which does not form part of the total income." The decision in *Rajendra Prasad Moody (supra)* cannot be used in the reverse to

contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act.”

23. The decisions of the ITAT in ACIT v. Ratan Housing Development Ltd. (supra) and Relaxo Footwear Ltd. v. Addl. CIT (supra), to the extent that they are inconsistent with what has been held hereinbefore do not merit acceptance. Further, the mere fact that in the audit report for the AY in question, the auditors may have suggested that there should be a disallowance cannot be determinative of the legal position. That would not preclude the Assessee from taking a stand that no disallowance under Section 14 A of the Act was called for in the AY in question because no exempt income was earned.

6. In view of the above position of law, we are of the considered opinion that the Ld. CIT(A) is justified in his findings that in view of the undisputed position that no dividend has been earned during the year, no disallowance is called for under section 14 A of the Act and the same does not warrant any interference. We accordingly holding so, dismiss ground numbers 1 to 4.

7. Now coming to the addition of Rs. 6,77,24,250/-added by the assessing officer on account of undisclosed sources in the form of trade creditors, learned Assessing Officer in the assessment order recorded that the static creditors in the name of 4 parties are standing since the year 2008. In respect of M/s Trust Exports Pvt Ltd, Singapore the assessee company had supplied certain garments to this entity against part payment of the advance receipts, but it due to quality problem and higher cost of products, the assessee company Osgood the overseas buyer to revise the price supports which the customer did not accept and the export order was cancelled, in respect of which the advance is with the assessee. In respect of M/s Right Point Ltd, Singapore and M/s Thakral investment holding Pvt. Ltd, Singapore the export orders were cancelled by the buyers and had

repeatedly been asking for a refund of its advance amount which the assessee company could not do so due to its financial crunch. In respect of M/s Kanwaljeet Singh Dhillon, Singapore the assessee is duty bound to refund the advance amount for a just the same against the future supplies to such party. All these parties filed the confirmation letters confirming the receivables.

8. Ld. CIT(A) considered all these aspects in detail. Since the learned Assessing Officer took the view that not only the credits have been continued for long span of time without being repaid, but the crystallisation of foreign currency to rupee times was made without any approval of the RBI, Ld. CIT(A) sought clarification from the assessee and obtaining the copy of application before the BIFR dated 19 for 2016 where the latest status of the impugned far and advances were declared with a specific reference to serial No. 26 (ii) where a sum of Rs. 7 89.14 Lacs was shown due to the pressing the creditors of the company which include advance payment against the order received from trust exports, right point Ltd and Thakral investment Holdings Pvt. Ltd.

9. Ld. CIT(A) also verified various documents relating to these entities and made an observation that if the loan amount was not received in the course of trading transactions, but was treated as unsecured loans and duly return of, it could not be brought to tax under section 41 as has been held by the Hon'ble jurisdictional High Court in the case of CIT vs. Velocient technologies Ltd (2015) 60 taxman.com 353 (Delhi) wherein it was held that the basic and primary requirement under section 41 (1) of the Act is that loan amount should have been received in the course of trading transactions or it had arisen out of ordinary transactions; that when the

amounts in question were never retreated as a trading receipts but as unsecured loans, provisions of section 41 (1) of the Act would not apply.

10. Ld. CIT(A) further observed that remission or cessation of trading liability is governed by section 41 (1) of the Act and not by section 28 (iv) as held in CIT vs. Sh. Vardhaman overseas (2011) 16 taxman.com 350 wherein it was held that while section 28 (iv) would apply generally to all benefits are perquisites which arise to assessee from business carried on by him, benefit which he obtains by way of remission or cessation of trading liability in a later year, in respect of which he has obtained a deduction in an earlier year in computing business income, has to be governed by section 41 (1) of the Act which is a specific provision governing factual situation and not by section 28 (iv). Ld. CIT(A) further observed that it is well settled by majority decisions that in order to attract the provisions of section 41 (1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived and in Vardhaman's (supra) it was held that unpaid liability cannot be added as the assessee's income under section 41 (1) of the Act merely because they remained unpaid for a sufficiently long time and that it is required of the Revenue authorities to show that the liability to pay the creditors has a solicitor or has been remitted by the creditors.

11. Since the Ld. CIT(A) correctly applied the law to the facts on the case in the light of the decisions referred to by him in his order, we do not find any legal infirmity in such findings and, therefore, uphold his conclusion that unless and until there is an irrevocable cessation of liability without any possibility of the same being revived, merely because the amounts remained unpaid for a sufficiently long time is not a ground to invoke the

provisions under section 41 (1) of the Act. The fact remains that so long as the assessee is acknowledging the debt, the law of limitation does not run against the assessee to conclude that there is an irrevocable cessation of the liability of the assessee. We do not find any reason to interfere with the findings of the Ld. CIT(A). We accordingly, dismissed grounds No. 5 to 7.

12. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court immediately after the conclusion of the hearing in the Virtual Court on 30/12/2020.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:30/12/2020

*Kavita Arora, Sr. PS

Sd/-
(K. NARSIMHA CHARY)
JUDICIAL MEMBER

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