IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, PRESIDENT, AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1425/Mum./2018
(Assessment Year : 2009–10)

Royal Twinkle Star Club Pvt. Ltd.
203B, Parvati Industrial Estate
Sunmill Compound, Lower Parel (West)
Mumbai 400 013 PAN – AAECR0618L ……. Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–2(4), Mumbai .....Respondent

ITA no.1426/Mum./2018
(Assessment Year : 2010–11)

Royal Twinkle Star Club Pvt. Ltd.
203B, Parvati Industrial Estate
Sunmill Compound, Lower Parel (West)
Mumbai 400 013 PAN – AAECR0618L ……. Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–2(4), Mumbai .....Respondent

ITA no.1427/Mum./2018
(Assessment Year : 2011–12)

Royal Twinkle Star Club Pvt. Ltd.
203B, Parvati Industrial Estate
Sunmill Compound, Lower Parel (West)
Mumbai 400 013 PAN – AAECR0618L ……. Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–2(4), Mumbai .....Respondent

ITA no.1012/Mum./2019
(Assessment Year : 2012–13)

Royal Twinkle Star Club Pvt. Ltd.
203B, Parvati Industrial Estate
Sunmill Compound, Lower Parel (West)
Mumbai 400 013 PAN – AAECR0618L ……. Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–2(1), Mumbai .....Respondent

ITA no.1013/Mum./2019
(Assessment Year : 2013–14)

Royal Twinkle Star Club Pvt. Ltd.
203B, Parvati Industrial Estate
Sunmill Compound, Lower Parel (West)
Mumbai 400 013 PAN – AAECR0618L ……. Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–2(1), Mumbai .....Respondent

ITA no.1428/Mum./2018
(Assessment Year : 2013–14)

Royal Twinkle Star Club Pvt. Ltd.
203B, Parvati Industrial Estate
Sunmill Compound, Lower Parel (West)
Mumbai 400 013 PAN – AAECR0618L ……. Appellant

v/s

Asstt. Commissioner of Income Tax
Central Circle–2(4), Mumbai .....Respondent

ITA no.1429/Mum./2018
(Assessment Year : 2014–15)

Royal Twinkle Star Club Pvt. Ltd.
203B, Parvati Industrial Estate
Sunmill Compound, Lower Parel (West)
Mumbai 400 013 PAN – AAECR0618L ……. Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–2(4), Mumbai .....Respondent

ITA no.1014/Mum./2019
(Assessment Year : 2015–16)

Royal Twinkle Star Club Pvt. Ltd.
203B, Parvati Industrial Estate
Sunmill Compound, Lower Parel (West)
Mumbai 400 013 PAN – AAECR0618L ……. Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–2(1), Mumbai .....Respondent

Assessee by : Shri Hiro Rai
Revenue by : Smt. Riddhi Mishra a/w Smt. Mahita Nair

Date of Hearing –20/03/2023	Date of Order – 11/05/2023

O R D E R

The present batch of 8 appeals has been filed by the assessee challenging the separate impugned orders passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals)-48, Mumbai ["*learned CIT(A)*"], for the assessment years 2009-10 to 2015-16.

2. Since the appeals pertain to the same assessee and the issues involved are also similar, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order. Further, as the basic facts in all the appeals are the same, we have elaborately mentioned only the facts for the first assessment year (i.e., 2009-10) before us for the sake of brevity. However, if any particular issue is arising in any assessment year for the first time, facts pertaining to the same are discussed accordingly.

3. The assessee's appeals being ITAs No. 1425 to 1429/Mum./2018 are delayed by 2 days. In the affidavits sworn by the former Director of the assessee, it has been submitted that since the FIR was lodged against the company and its directors, the same resulted in a complete disruption of affairs for a few days and therefore the appeals could not be filed within the limitation period, resulting in a delay of 2 days. In the larger interest of justice as well as in view of the reasons stated in the affidavit, the slight delay of 2 days in filing the aforesaid appeals by the assessee is condoned and we proceed to decide these appeals on merits.

ITA no.1425/Mum./2018
Assessee's Appeal - A.Y. 2009–10

4. In its appeal, the assessee has raised the following grounds:–

"1. The Ld. CIT (Appeals) erred in confirming the action of the Ld. D.C.I.T. of re-opening of assessment U/S 147/148 of Income Tax Act, 1961 without a valid reason for re-opening the assessment.

2. The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T not to make provision of section 194A applicable to non availing compensation.

3. The Ld. CIT (Appeals) erred in confirming the addition made by the Ld. D.C.I.T. Rs. 1,48,41,755/- U/s 40(a)(ia) of the Income Tax Act, 1961 by treating the sale proceeds as deposits and further erred in confirming the treatment of the part of non availing compensation as interest.

4. The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which cannot be treated as income if treated as deposit and cannot be taxed.

5. The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to follow the Mercantile system of accounting while treating part of the NAC as interest and Tax interest on accrual basis.

6. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

5. Before dealing with the issues on merits, it is pertinent to note certain factual background which is peculiar to the present case. The assessee was involved in the business of selling holiday membership plans to its members. The assessee had an affiliation with certain hotels, which provided accommodation to its members, whenever they utilise the eligible holidays. The members of various schemes were entitled to utilise the eligible holidays on the basis of predetermined entitlements as prescribed in each scheme. The members were also given the option to encash their entitlements for non-availing the eligible holidays. In addition to that, the members, at their absolute discretion, may exercise another option to go for premature encashment, termination of the membership right, and claim a refund of the amount, which is refundable to them in case of premature termination as prescribed in each scheme. The Securities and Exchange Board of India ("*SEBI*") vide order dated 21/08/2015 held that schemes floated and operated by the assessee constitute Collective Investment Schemes ("*CIS*") and operating such schemes without seeking registration is in violation of CIS Regulations. The SEBI, inter-alia, further directed the assessee to wind up the existing CIS and refund the money collected under the scheme to its investors within a period of 3 months from the date of the order. In an appeal against the aforesaid order passed by the SEBI, the Hon'ble Securities Appellate Tribunal vide order dated 03/02/2016 dismissed the appeal filed by the assessee, however, granted 2 years to the assessee to refund the balance amount to its investors. In further appeal by the SEBI, the Hon'ble Supreme Court vide order dated 18/07/2016 dismissed the appeal and clarified that the assessee shall not collect further amount from the investors until it is

registered as CIS and shall also give details to the SEBI with regard to the amount disbursed by it at the end of every quarter.

6. Subsequently, some of the operational creditors approached the Hon'ble National Company Law Tribunal ("*Hon'ble NCLT*") to initiate Corporate Insolvency Resolution Process in respect of the assessee. On 02/05/2017, Hon'ble NCLT appointed an Insolvency Resolution Professional under the provisions of the Insolvency and Bankruptcy Code, 2016 ("*IBC, 2016*") and a moratorium as per section 14 of the IBC, 2016 was initiated. Subsequently, some of the investors filed an appeal before the Hon'ble National Company Law Appellate Tribunal against the aforesaid order passed by the Hon'ble NCLT, which was dismissed vide order dated 30/11/2017. The Hon'ble Supreme Court vide order dated 08/01/2018, in appeal by the said investors, stayed the proceedings under IBC, 2016. Vide order dated 10/05/2018, the Hon'ble Supreme Court constituted a Sale-cum-Monitoring Committee for the purpose of valuation of the properties that have been unearthed during the insolvency process. The Hon'ble Supreme Court further directed the attachment of all the properties of the assessee as well as assets and other properties of the associates/sister concerns. Vide another order dated 12/02/2019, the Hon'ble Supreme Court clarified that in selling the properties under its aegis, the Sale-cum-Monitoring Committee is to follow the procedure laid down by the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Vide order dated 06/05/2019, the Hon'ble Supreme Court appointed Justice (Retd.) J.P.Devadhar as the head of the

Sale-cum-Monitoring Committee so that the process of the sale of properties is expedited.

7. In this regard, the learned Authorised Representative ("*learned AR*") also filed a letter dated 15/07/2022 by the Sale-cum-Monitoring Committee along with copy of all the aforesaid orders. Therefore, from the aforesaid events, it is evident that the assessee is under liquidation and the Sale-cum-Monitoring Committee, as constituted by the Hon'ble Supreme Court, is looking after its affairs. Since the Hon'ble Supreme Court vide order dated 08/01/2018 has already stayed the proceedings under the IBC, 2016 and constituted the Sale-cum-Monitoring Committee vide order dated 10/05/2018, and properties of the assessee are also sold under the aegis of the Hon'ble Supreme Court, therefore, there cannot be any dispute that the present case is not covered under the moratorium period, which commenced as per section 14 of the IBC, 2016 pursuant to the order passed by the Hon'ble NCLT.

8. During the hearing, at the outset, the learned AR wishes to argue ground no.4 and submitted that once the relief is granted in respect of this ground, the other grounds raised in the appeal need not be gone into and can be kept open. The issue arising in ground no.4, raised in assessee's appeal, is pertaining to treating the deposits received from its members as non-taxable consistent with the Revenue's approach of treating the Non-Availing Compensation ("*NAC*") paid by the assessee to its members as interest, which was disallowed under section 40(a)(ia) for non-deduction of tax under section 194A of the Act.

9. The brief facts of the case pertaining to this issue are: For the year under consideration, the assessee filed its return of income on 29/12/2010 declaring a total income of Rs.44,34,122. Pursuant to the search and seizure action conducted under section 132 of the Act in the case of the assessee along with the other associated persons and companies, the assessment in the case of the assessee was concluded under section 143(3) r/w section 153A of the Act assessing the total income at Rs.69,13,670 after making certain disallowances. Subsequently, on the basis of the order dated 21/08/2015 passed by the SEBI and the information received from the office of DCIT(TDS)-2(1), Mumbai, the Assessing Officer ("*AO*") initiated reassessment proceedings under section 147 in the case of the assessee and issued notice dated 30/03/2016 under section 148 of the Act. In the reasons recorded while reopening the assessment, it was mentioned that the SEBI has concluded that the assessee is operating a CIS through its various plans and schemes involving holiday points and their accrual as well as redemption. Since the scheme has been devised so as to provide an investment avenue with assured returns, therefore the assessee has concealed the true nature of its operation. Accordingly, it was alleged that the funds invested with the assessee by various customers are actually in the nature of unsecured loans and the return awarded in case of redemption by the customers is in the nature of interest on such unsecured loans. It was also mentioned that only 2% of the members/investors have availed of the holiday facilities offered in the various plans by the assessee and an overwhelming 98% of the members are investors who had invested the money with the sole motive of receiving assured returns in the form of interest. Since the assessee did not deduct TDS

under section 194A of the Act, therefore, it was alleged that income chargeable to tax within section 40(a)(ia) had escaped assessment within the meaning of provisions of section 147 of the Act. In response to the notice issued under section 148 of the Act, the assessee submitted that the return original filed may be treated as filed in response to the aforesaid notice. During the reassessment proceedings, the assessee explained its modus operandi and submitted that the deposits received from its members/customers are accounted as "*sales*" in its books of accounts and the NAC paid to the members was booked as revenue expenses. The AO vide order dated 26/12/2016 passed under section 143(3) r/w section 147 of the Act did not agree with the submissions of the assessee and by placing reliance on the aforesaid order passed by the SEBI held that the assessee is engaged in the business of banking activity, wherein it is taking deposit from its clients and paying them the interest in the garb of various schemes of availing Hotel facilities or discounting the same. The AO further held that the amount paid or incurred by the assessee by way of entitlement for scheme benefits and facilities or discounts to the members, who are not availing of the hotelling facilities provided by the assessee, is in the nature of interest. Since the assessee did not deduct the TDS under section 194A on the said interest, the AO disallowed an amount of Rs.1,48,41,755 under section 40(a)(ia) of the Act. The AO excluded the return of the principal amount and interest amount below Rs.5000, while calculating the aforesaid disallowance. As regards the submission of the assessee that since part of deposits have been offered as income in the profit and loss account, therefore the same should be excluded from the income, the AO rejected the same on the basis that the assessee is

simultaneously claiming the deduction on account of repayment of principal amount by debiting it under the head Non-Availing Compensation.

10. The learned CIT(A) vide impugned order dated 28/11/2017 upheld the findings of the AO in treating NAC as interest and accordingly, affirmed the disallowance of Rs.1,48,41,755 under section 40(a)(ia) of the Act. Further, as regards the alternative plea of the assessee regarding the removal of such deposits from sale proceeds, the learned CIT(A) held that the entire amount collected by the assessee has been diverted to the associate, subsidiary companies, and concerns owned by directors and other family concerns in the form of investments and long-term advances and loans, therefore the character of deposits from the members and its utilisation gives it a character of assessee's own income. Being aggrieved, the assessee is in appeal before us.

11. We have considered the rival submissions and perused the material available on record. In the present case, the assessee is engaged in the business of selling holiday membership plans to its customers/members. The amount received from the members was apportioned over the tenure of the membership, which differs from scheme to scheme offered by the assessee. Out of the apportioned receipts, the amount pertaining to the year was considered as "*sales*" and the balance amount was considered as "*advances sales*" over the tenure of the membership. Once the membership is accepted and confirmed, a member is entitled to avail of facilities as per terms and conditions related to the entitlement certificate. If the members do not avail entitlements fully or partially during the membership tenure, then the

assessee reimburses for the non-utilisation portion of the entitlements, which is called NAC, and the same is charged to the profit and loss account under the same head. The members are also entitled to exercise the option of premature termination/encashment of membership at any point in time. The assessee, in case where the scheme has reached maturity (or completed its term), also repays the initial deposit along with compensation and the whole amount is booked as revenue expenditure. There is no dispute regarding these basic facts. The AO vide assessment order, inter-alia, on the basis of an order dated 21/08/2015 passed by the SEBI, wherein the business conducted by the assessee was held to be in the nature of CIS, treated the NAC paid by the assessee to its customers/members as interest on deposits and since the assessee did not deduct tax under section 194A of the Act while making the aforesaid payment, disallowed the expenditure under section 40(a)(ia) of the Act after excluding the principal amount returned and the interest payment below Rs.5000. It is the plea of the assessee that since the business of the assessee is considered to be in the nature of CIS and the NAC paid by the assessee is treated as interest on deposits by members, therefore the amount received from the members cannot now be treated to be in the nature of income, since the same qualifies as capital receipt, and therefore, should accordingly be reduced while calculating the total income of the assessee.

12. During the hearing, the learned AR placed reliance upon the decision of the Hon'ble Supreme Court in Peerless General Finance and Investment Company Limited vs CIT, [2019] 416 ITR 1(SC), wherein it was held that the subscription received from the public at large under a collective investment

scheme is in the nature of capital receipt and not income. It is pertinent to note that in the facts of this case, the taxpayer had floated various schemes which require subscribers to deposit certain amounts by way of subscriptions in its hands, and, depending upon the scheme in question, these subscribed amounts at the end of the scheme are ultimately repaid with interest. Further, the taxpayer, in this case, has also shown the sum as income in its books of accounts. However, the Hon'ble Supreme Court by referring to the various judicial pronouncements agreed with the submission of the taxpayer that it would not be possible to go only by the treatment of such subscriptions in the accounts of the assessee itself.

13. In the present case, it is no doubt true that the amount received from members and apportioned to the year is considered as "*sales*" by the assessee in its books of account, however, in view of the fact that subsequently the schemes floated by the assessee were held to be in the nature of CIS and therefore, the NAC paid by the assessee to its members was considered as interest on deposits, such deposits by the members cannot be treated as revenue in the hands of the assessee. It is pertinent to note that the NAC was paid in relation to the holiday membership schemes sold by the assessee when the members did not avail of the holiday facilities as per the entitlement under the scheme. Thus, we are of the considered opinion that the approach of the Revenue, on one hand treating the NAC paid by the assessee to its members as interest and on the other hand treating the amount received from the members as the income of the assessee is self-contradictory since only when the deposits are considered as a loan, which was one of the allegations in the

reasons recorded while reopening the assessment, the interest can be charged on it. Thus, when the assessee's business was considered to be in the nature of CIS, all the consequences in relation thereto must follow. Further, as noted above, it is trite law that entries in the books of account are not decisive or determinative of the true nature of the entries. Therefore, the amount received by the assessee from its members, to the extent the same is treated as income in its books of account, is directed to be reduced while calculating the total income of the assessee, since the same is in the nature of capital receipt. We find that in the present case, the NAC paid to the members also includes the repayment of membership amount collected from the members and the same has been claimed as a deduction by the assessee. Since the said repayment has already been claimed as a deduction, therefore the said amount need not be again reduced while calculating the total income of the assessee for the year under consideration. Accordingly, ground No. 4 raised in assessee's appeal is allowed.

14. Since the relief has been granted to the assessee in respect of ground no.4, in view of the submission of the learned AR, the other grounds raised in the present appeal are kept open.

15. In the result, the appeal by the assessee is allowed.

ITA no.1426/Mum./2018
Assessee's Appeal - A.Y. 2010–11

16. In its appeal, the assessee has raised the following grounds:–

"1. The Ld. CIT (Appeals) erred in confirming the action of the Ld. D.C.1.T. of re-opening of assessment U/S 147/148 of Income Tax Act, 1961 without a valid reason for re- opening the assessment.

2. The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T not to make provision of section 194A to non availing compensation.

3. The Ld. CIT (Appeals) erred in confirming the addition made by the Ld. D.C.I.T. Rs 18,74,87,000/- U/s 40(a)(ia) of the Income Tax Act, 1961 by treating the sale proceeds as deposits and further erred in confirming the treatment of the part of non availing compensation as interest.

4. The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which cannot be treated as income if treated as deposit and cannot be taxed.

5. The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to follow the Mercantile system of accounting while treating part of the NAC as interest and Tax interest on accrual basis.

6. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

17. In this appeal also, the learned AR, at the outset, wishes to argue ground no.4 and submitted that once the relief is granted in respect of this ground, the other grounds raised in the appeal need not be gone into and can be kept open. In respect of ground no.4, the Learned AR adopted his arguments as were made in the appeal for the assessment year 2009-10. Since a similar issue has been decided in assessee's appeal for the assessment year 2009-10, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds no.4 raised in assessee's appeal is allowed.

18. Since the relief has been granted to the assessee in respect of ground no.4, in view of the submission of the learned AR, the other grounds raised in the present appeal are kept open.

19. In the result, the appeal by the assessee is allowed.

ITA no.1427/Mum./2018
Assessee's Appeal - A.Y. 2011–12

20. In its appeal, the assessee has raised the following grounds:–

"1. The Ld. CIT (Appeals) erred in confirming the action of the Ld. D.C.I.T. of re-opening of assessment U/S 147/148 of Income Tax Act, 1961 without a valid reason for re- opening the assessment.

2. The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T not to make provision of section 194A to non availing compensation.

3. The Ld. CIT (Appeals) erred in confirming the addition made by the Ld. D.C.I.T. Rs. 50,80,41,621/- U/s 40(a)(ia) of the Income Tax Act, 1961 by treating the sale proceeds as deposits and further erred in confirming the treatment of the part of non availing compensation as interest.

4. The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which can not be treated as income if treated as deposit and can not be taxed.

5. The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to follow the Mercantile system of accounting while treating part of the NAC as interest and Tax interest on accrual basis. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

21. In this appeal also, the learned AR, at the outset, wishes to argue ground no.4 and submitted that once the relief is granted in respect of this ground, the other grounds raised in the appeal need not be gone into and can be kept open. In respect of ground no.4, the Learned AR adopted his arguments as were made in the appeal for the assessment year 2009-10. Since a similar issue has been decided in assessee's appeal for the assessment year 2009-10, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds no.4 raised in assessee's appeal is allowed.

22. Since the relief has been granted to the assessee in respect of ground no.4, in view of the submission of the learned AR, the other grounds raised in the present appeal are kept open.

23. In the result, the appeal by the assessee is allowed.

ITA no.1012/Mum./2019
Assessee's Appeal - A.Y. 2012–13

24. In its appeal, the assessee has raised the following grounds:–

"1. The Ld. C.I.T. (Appeals) erred in confirming the action of the Ld. D.C.I.T. of re-opening of assessment U/S 147/148 of the Income Tax Act, 1961 without a valid reason for re-opening the assessment.

2.a The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T not to make applicable the provision of section availing (NAC).

2.b The Ld. CIT (Appeals) erred in confirming the addition made by the Ld. D.C.I.T. of Rs.430,71,32,000/- U/s 40(a)(ia) of the Income Tax Act, 1961 by treating the sale proceeds as deposits and further erred in confirming the treatment of part of non availing compensation (NAC) as interest.

2.c The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which cannot be treated as income if treated as deposit and cannot be taxed.

2.d Without prejudice, Hon'ble CIT (Appeals) erred in confirming the which was amount wrongly considered by Ld. D.C.I.T. as additional amount of Non availing original amount excluding membership received Rs.430,71,32,000/- of as alleged interest instead of considering the amount correct Rs. 140,19,22,814/- of as claimed by the Appellant.

2.e The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to Mercantile follow system the of accounting while treating part of the NAC as interest and Tax interest on accrual basis.

3. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

25. In respect of ground no.2.c, the Learned AR adopted his arguments as were made in the appeal for the assessment year 2009-10. The issue arising in

ground no.2.c is similar to the issue already decided in assessee's appeal for the assessment year 2009-10. Therefore, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.2.c raised in assessee's appeal is allowed.

26. As regards ground no.2.d, it is the plea of the assessee that the AO has considered the incorrect amount while making the addition and principal amount repaid, and interest payment less than Rs.5000 has not been excluded. Since the issue requires verification, therefore we deem it appropriate to remand the same to the file of AO for *de novo* adjudication after necessary verification and to consider the correct amount. As a result, ground no.2.d is allowed for statistical purposes.

27. Since the relief has been granted to the assessee in respect of ground no.2.c, in view of the submission of the learned AR, the remaining grounds raised in the present appeal are kept open.

28. In the result, the appeal by the assessee is allowed for statistical purposes.

ITA no.1013/Mum./2019
Assessee's Appeal - A.Y. 2013–14

29. In its appeal, the assessee has raised the following grounds:–

"1. The Ld. C.I.T. erred (Appeals) in confirming the action of the Ld. D.C.I.T. of re-opening of assessment U/S 147/148 of the Income Tax Act, 1961 without a valid reason for re-opening the assessment.

2.a The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T not to make applicable the provision of section availing (NAC).

2.b The Ld. CIT (Appeals) erred in confirming the addition made by the Ld. D.C.I.T. of Rs. 497,13,57,000/- U/s 40 (a) (ia) of the Income Tax Act, 1961 by treating the sale proceeds as deposits and further erred in confirming the treatment of part of non availing compensation (NAC) as interest.

2.c The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which can not be treated as income if treated as deposit and can not be taxed.

2.d Without prejudice, Hon'ble CIT (Appeals) erred in confirming the amount which was wrongly considered by Ld. D.C.I.T. as additional amount of Non availing original amount excluding membership received Rs.497,13,57,000/- of as alleged interest instead of considering the correct amount of Rs. 164,29,73,843/- as claimed by the Appellant.

2.e The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to Mercantile follow system the of accounting while treating part of the NAC as interest and Tax interest on accrual basis.

3. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

30. In respect of ground no.2.c, the Learned AR adopted his arguments as were made in the appeal for the assessment year 2009-10. The issue arising in ground no.2.c is similar to the issue already decided in assessee's appeal for the assessment year 2009-10. Therefore, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.2.c raised in assessee's appeal is allowed.

31. As regards ground no.2.d, it is the plea of the assessee that the AO has considered the incorrect amount while making the addition and principal amount repaid, and interest payment less than Rs.5000 has not been excluded. Since the issue requires verification, therefore we deem it appropriate to remand the same to the file of AO for *de novo* adjudication after necessary verification and to consider the correct amount. As a result, ground no.2.d is allowed for statistical purposes.

32. Since the relief has been granted to the assessee in respect of ground no.2.c, in view of the submission of the learned AR, the remaining grounds raised in the present appeal are kept open.

33. In the result, the appeal by the assessee is allowed for statistical purposes.

ITA no.1428/Mum./2018
Assessee's Appeal - A.Y. 2013–14

34. In its appeal, the assessee has raised following grounds:–

"1. The Ld. CIT(Appeals) erred in confirming the addition made by Ld. A.C.I.T. on account of disallowance of Rs. 2,59,40,898/- U/s14A r.w. Rule 8D.

2. The Ld. CIT (Appeals) erred in holding that expenses attributed towards earning exempt income even when there were no nexus.

3. The Ld. CIT (Appeals) erred in considering the facts that the major investments were made for acquiring strategic business stake.

4. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

35. The only grievance of the assessee, in the present appeal, is pertaining to disallowance made under section 14A r/w Rule 8D of the Income Tax Rules, 1962.

36. The brief facts of the case pertaining to this issue are: For the year under consideration, the assessee filed its return of income on 03/04/2014 declaring a total income of Rs.6,83,32,200. During the assessment proceedings, it was observed that the assessee has earned a dividend income of Rs.5,25,985, which was claimed as exempt. It was also observed that the

assessee in its profit and loss account has debited an amount of Rs.2,59,55,000 as interest on loan, forming part of its financial cost. Further, the assessee in its balance sheet has shown a total investment of Rs.660,23,99,000. Accordingly, the assessee was asked to show cause as to why the disallowance under section 14A should not be made for the exempt income shown. In response thereto, the assessee submitted that it has not made any investment with a view to earning exempt income, and the assessee, as part of its business activity, has acquired a strategic stake in other companies to hold business interest with a view to earn profit. Thus, it was submitted that the provisions of section 14A of the Act are not applicable because no investment was made with a view to earn exempt income. The AO vide order dated 01/03/2016 passed under section 143(3) of the Act did not agree with the submissions of the assessee and computed the disallowance of Rs.2,59,40,898 under section 14A r/w Rule 8D. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

37. During the hearing, the learned AR by placing reliance upon the decisions forming part of the legal paper book submitted that the disallowance under section 14A of the Act cannot exceed the quantum of exempt income. On the other hand, the learned Departmental Representative vehemently relied upon the orders passed by the lower authorities.

38. We have considered the rival submissions and perused the material available on record. We find that Hon'ble jurisdictional High Court in Nirved Traders (P.) Ltd. v/s Dy. CIT, I.T. Appeal No.149 of 2017, vide judgement

dated 23.04.2019, has held that disallowance under section 14A of the Act cannot be more than exempt income. Thus, respectfully following the aforesaid decision of the Hon'ble jurisdictional High Court, we direct the AO to restrict the disallowance made under section 14A of the Act to the extent of exempt income earned by the assessee, during the year under consideration. As a result, grounds raised in assessee's appeal are partly allowed.

39. In the result, the appeal by the assessee is partly allowed.

ITA no.1429/Mum./2018
Assessee's Appeal - A.Y. 2014–15

40. In its appeal, the assessee has raised the following grounds:–

"1. The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T not to make provision of section 194A to non availing compensation.

2. The Ld. CIT (Appeals) erred in confirming the addition made by the Ld. D.C.I.T. Rs.148,01,76,202/- U/s 40(a)(ia) of the Income Tax Act, 1961 by treating the sale proceeds as deposits and further erred in confirming the treatment of the part of non availing compensation as interest.

3. The Ld. CIT (Appeals) erred in not directing the Ld. D.C.1.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which cannot be treated as income if treated as deposit and can not be taxed.

4. The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to follow the Mercantile system of accounting while treating part of the NAC as interest and Tax interest on accrual basis.

5. The Ld. CIT(Appeals) erred in confirming the addition made by Ld. D.C.I.T. on account of disallowance of Rs. 5,90,62.655/- U/s. 14A r.w. Rule 8D.

6. The Ld. CIT (Appeals) erred in holding that expenses attributed towards earning exempt income even when there were no nexus.

7. The Ld. CIT (Appeals) erred in considering the facts that the major investments were made for acquiring strategic business stake.

8. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

41. The issue arising in grounds no.5-7, raised in assessee's appeal, is pertaining to disallowance made under section 14A r/w Rule 8D. Since a similar issue has been decided in assessee's appeal being ITA no.1428/Mum./2018 for the assessment year 2013-14, therefore, the decision rendered therein shall apply *mutatis mutandis*. Accordingly, we direct the AO to restrict the disallowance made under section 14A of the Act to the extent of exempt income earned by the assessee, during the year under consideration. As a result, grounds no.5-7 raised in assessee's appeal are partly allowed.

42. In respect of ground no.3, the Learned AR adopted his arguments as were made in the appeal for the assessment year 2009-10. The issue arising in ground no.3 is similar to the issue already decided in assessee's appeal for the assessment year 2009-10. Therefore, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.3 raised in assessee's appeal is allowed.

43. Since the relief has been granted to the assessee in respect of ground no.3, in view of the submission of the learned AR, the remaining grounds raised in the present appeal are kept open.

44. In the result, the appeal by the assessee is partly allowed.

ITA no.1014/Mum./2019
Assessee's Appeal - A.Y. 2015–16

45. In its appeal, the assessee has raised the following grounds:–

"1.a The Ld. C.I.T. (Appeals) erred in not directing to the Ld. D.C.I.T not to make applicable the provision of section 194A to non availing compensation availing (NAC).

1.b The Ld. CIT (Appeals) erred in confirming the addition made by the Ld. D.C.I.T. of Rs.477,37,39,847/- U/s 40(a)(ia) of the Income Tax Act, 1961 by treating the sale proceeds as deposits and further erred in confirming the treatment of part of non availing compensation (NAC) as interest.

1.c The Ld. CIT (Appeals) erred in not directing the Ld. D.C.I.T. to remove such deemed deposits from sale proceeds and accordingly also erred in not directing the Ld. D.C.I.T. to reduce the income by the amount treated as Deposits which can not be treated as income if treated as deposit and can not be taxed.

1.d Without prejudice, Hon'ble CIT (Appeals) erred in confirming the which was amount wrongly considered by Ld. D.C.I.T. as additional amount of Non availing original amount excluding membership received Rs.477,37,39,847/- of as alleged interest instead of considering the amount Rs. 246,26,18,614/- correct of as claimed by the Appellant.

1.e The Ld. CIT (Appeals) erred in not directing the Ld. D.C.J.T. to Mercantile follow system the of accounting while treating part of the NAC as interest and Tax interest on accrual basis.

1.f The Ld. CIT (A) also erred in confirming the entire addition of Rs. 477,37,39,847/- for the purpose of disallowance U/s 40(a)(ia) of the Income Tax Act instead of considering only 30% of the total alleged interest (i.e. additional amount of NAC) as applicable for the assessment consideration.

2.a The Ld. CIT(Appeals) erred in confirming the addition made by Ld. D.C.I.T. on account of disallowance of Rs. 3,35,47,391/- U/s 14A r.w. Rule 8D.

2.b The Ld. CIT (Appeals) erred in holding that expenses attributed towards earning exempt income even when there were no nexus.

2.c The Ld. CIT (Appeals) erred in considering the facts that the major investments were made for acquiring strategic business stake.

2.d Without prejudice, Hon'ble CIT (Appeals) erred in confirming disallowance U/s 14A r.w. Rule 8D in excess of exempted income earned by the Appellant.

2.e The Hon'ble CIT (Appeals) erred in addition confirming the made by Ld. D.C.I.T Rs. 335,47,391/- u/s.14A read with Rule 8D of the Income Tax Act in the book profit calculated u/s 115JB of the Appellant.

4. The Appellant reserves the right to add, to alter and to amplify the Grounds of Appeal."

46. The issue arising in grounds no.2.a – 2.d, raised in assessee's appeal, is pertaining to disallowance made under section 14A r/w Rule 8D. Since a

similar issue has been decided in assessee's appeal being ITA no.1428/Mum./2018 for the assessment year 2013-14, therefore, the decision rendered therein shall apply *mutatis mutandis*. Accordingly, we direct the AO to restrict the disallowance made under section 14A of the Act to the extent of exempt income earned by the assessee, during the year under consideration. As a result, grounds no.2.a – 2.d raised in assessee's appeal are partly allowed.

47. The issue arising in ground no.2.e, raised in assessee's appeal, is pertaining to disallowance under section 14A for the purpose of computing the book profit under section 115 JB of the Act.

48. Having heard the submissions of both sides and perused the material available on record, we find that Special Bench of Tribunal in ACIT vs Vireet Investment (P) Ltd.: [2017] 58 ITR(T) 313 (Delhi - Trib.) (SB) held that computation under clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8D of the Income-tax Rules, 1962. Thus, respectfully following the aforesaid decision of the Special Bench of Tribunal cited supra, we direct the AO to compute the book profit under section 115 JB of the Act, without resorting to computation under section 14A read with Rule 8D. Ground no.2.e is decided accordingly.

49. In respect of ground no.1.c, the Learned AR adopted his arguments as were made in the appeal for the assessment year 2009-10. The issue arising in ground no.1.c is similar to the issue already decided in assessee's appeal for

the assessment year 2009-10. Therefore, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.1.c raised in assessee's appeal is allowed.

50. As regards ground no.1.d, it is the plea of the assessee that the AO has considered the incorrect amount while making the addition and principal amount repaid, and interest payment less than Rs.5000 has not been excluded. Since the issue requires verification, therefore we deem it appropriate to remand the same to the file of AO for *de novo* adjudication after necessary verification and to consider the correct amount. As a result, ground no.1.d is allowed for statistical purposes.

51. The issue arising in ground no.1.f, raised in assessee's appeal, is pertaining to considering 30% of NAC for the purpose of disallowance under section 40(a)(ia) of the Act instead of the entire amount.

52. The learned CIT(A), vide impugned order, held that the amendment to section 40(a)(ia) of the Act by Finance (No.2) Act, 2014 is with effect from 01/04/2015 and since this is the substantive provision, therefore the amendment will come into force from the previous year starting on 01/04/2015 i.e. previous year 2015-16 and assessment year 2016-17. Accordingly, the learned CIT(A) dismissed the appeal filed by the assessee on this issue and held that the benefit of bringing to tax only 30% of the amount violated as per section 40(a)(ia) of the Act is not available to the assessee for the assessment year 2015-16, i.e. the year under consideration.

53. We find that the Finance (No.2) Act, 2014 substituted the provisions of section 40(a)(ia) of the Act as under:-

> *"(ia) thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 :"*

54. CBDT, while explaining the provisions of the Finance (No.2) Act, 2014, vide Circular No.1 of 2015 dated 21/01/2015 clarified that the amendment by the Finance (No.2) Act, 2014 to the provisions of section 40(a)(ia) of the Act takes effect from 1st April 2015 and will, accordingly, apply in relation to the assessment year 2015-16 and subsequent years. We further find that the Hon'ble Supreme Court in Shree Choudhary Transport Company vs ITO, [2020] 426 ITR 289 (SC) held that the amendment by the Finance (No.2) Act, 2014 is with effect from 01/04/2015 and shall be applicable from the assessment year 2015-16. Since it is settled that the amendment to section 40(a)(ia) of the Act by the Finance (No.2) Act, 2014 is with effect from the assessment year 2015-16, the AO is directed to apply the said amended provision while computing disallowance under section 40(a)(ia) of the Act. As a result, ground no.1.f raised in assessee's appeal is allowed.

55. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 11/05/2023

Sd/-	**Sd/-**
G.S. PANNU	**SANDEEP SINGH KARHAIL**
PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 11/05/2023

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai