

आयकर अपीलीय अधीकरण, न्यायपीठ – “C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
(समक्ष श्री ए.टी. वर्की, न्यायिक सदस्य एवं डॉ ए.एल. सैनी, लेखा सदस्य)
[Before Shri A. T. Varkey, JM & Dr. A.L. Saini, AM]

I.T.(SS)A. Nos. 104 to 106/Kol/2018
Assessment Years: 2013-14, 2014-15 & 2016-17

M?s. Bindyavasini Projects Pvt. Ltd. (PAN: AACCB5764H)	Vs.	Deputy Commissioner of Income-tax, Central Circle-4(3), Kolkata
Appellant		Respondent

For the Appellant	Shri Somnath Ghosh, Advocate
For the Respondent	Shri Vijay Shankar, CIT, DR

Date of Hearing	06.02.2020
Date of Pronouncement	18.03.2020

ORDER

Per Shri A.T.Varkey, JM:

All these appeals preferred by the assessee are against the separate orders of Ld. CIT(A)-21, Kolkata dated 27.07.2018 for AYs. 2013-14, 2014-15 and 2016-17. Since ground are identical and facts are common and all these appeals have been heard together, we dispose of all these appeals by this consolidated order for the sake of convenience by taking the IT(SS) A No. 104/Kol/2018 as the lead case for AY 2013-14 and AY 2014-15 and the result of which will be applied for these two appeals.

2. The sole ground of appeal of the assessee is against the action of Ld. CIT(A) in upholding the disallowance made by the AO u/s. 14A of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) for all the assessment years before us. However, it was brought to our notice by the Ld. AR that AY 2013-14 and AY 2014-15 was not pending before the AO on the date of search i.e. on 01.12.2015 and, therefore, these two assessment years are unabated assessment years and further he contended that it is trite law that in the case of unabated assessments, the addition/disallowance can be resorted to by the AO u/s. 153A of the Act only on the basis of incriminating materials and since there is no whisper in the assessment order about any incriminating material warranting any disallowance u/s. 14A read with Rule 8D, according to him, no

disallowance u/s. 14A can be legally fastened on the assessee. In the light of this contention, first of all we take up both AYs. 2013-14 and 2014-15. Since facts are same, we take up AY 2013-14 as lead case and its result will follow for AY 2014-15.

3. Briefly stated facts are that the assessee carries on the business of transportation. Assessee had filed its return of income u/s. 139(1) of the Act on 30.09.2013 declaring income at Rs.10,85,470/-. A search operation u/s. 132 of the Act was conducted on 01.12.2015 at the assessee's residential as well as office premises belonging to the Bhalotia Group. In some of the business premises of the Bhalotia Group of assessee's survey operations were also carried out u/s. 133A of the Act. Since warrant of search u/s. 132(1) of the Act was executed against the assessee, a notice dated 09.01.2017 was issued u/s. 153A of the Act by the DCIT. According to AO, during the relevant previous year the assessee got investment in shares from which he had derived exempt income in form of dividend of Rs.8,10,813/- but disallowance u/s. 14A of the Act has been made only of Rs.95,496/-. The assessee was asked to explain the reasons for non disallowance as per Rule 8D. But according to AO the assessee had not furnished any explanation in this regard. Since no explanation has been filed by the assessee, the disallowance u/s. 14A was resorted to by AO which comes to Rs.3,19,768/-. Aggrieved, assessee preferred an appeal before the Ld. CIT(A), who confirmed the action of AO by observing as under:

“Be that the case, I find that the appellant has earned exempt income in form of dividend for Rs.8,10,813/- but no disallowance u/s 14A of the I.T. Act'61 was made suo-motto by the assessee in computation of income as per parameters laid down in Rule 8D. As has been recorded by the Ld. AO, the assessee was asked to explain the reasons for non-disallowance, which however the assessee was unable to do. Accordingly, the Ld. AO invoked Rule 8D(2)(ii) & 8D(2)(iii), and worked out a disallowance of Rs.3,19,768/-. In appeal, it has been argued by the appellant that only dividend yielding instruments ought to be taken for calculation, which is not being disputed. However, the appellant, who has full knowledge of these matters and not given any working solution to help arrive at the amount of disallowance to be made in its case. Therefore, I hold the view that the method applied by the Ld. AO does not warrant any interference, and the disallowance of Rs.3,19,769/- stands confirmed. The ground is therefore dismissed.”

Aggrieved, the assessee is before us.

4. At the time of hearing the Ld. AR submitted that the time limit to issue notice u/s. 143(2) of the Act had expired for both AY 2013-14 and AY 2014-15, so according to Ld AR, these two assessment years were not pending before the AO on the date of search on 01.12.2015, so these years were unabated assessments. After search operation, in compliance to the notice dated 09.01.2017 u/s. 153A of the Act the assessee had filed a return u/s. 153A of the Act on 16.02.2017 disclosing the same income returned originally at Rs.10,85,470/-. According to Ld. R, the disallowance of Rs.3,19,768/- was computed by the AO by invoking the provisions of section 14A of the Act read with Rule 8D(i) and (iii) of the Income Tax Rules, 1962 (hereinafter as the "Rules") from the investments duly disclosed in the original return filed for the relevant assessment year which did not abate and further, there is no recitals in the assessment order that this disallowance was fall out of any incriminating materials unearthed during search u/s. 132 of the Act. So according to Ld AR, since the assessment was not pending before the AO on the date of search, no addition could have been saddled on the assessee without the aid of incriminating materials while assessment is framed under the provisions of section 153A of the Act. According to Ld. AR, it is settled law that unabated assessments can be interfered by AO while making assessment u/s. 153A only on the basis of some incriminating material unearthed during the course of search which was not produced or not already disclosed or made known in course of original assessment. He also relied on the decision in the case of CIT Vs. Kabul Chawla (2016) 380 ITR 573 (Del.), DCIT Vs. Rekha Jhunjhunwala (ITA No. 3824/Mum/2016 dated 17.01.2018 and DCIT Vs. Ashok Jasraj Jain (ITA No. 5718/Mum/2016 dated 23.05.2018. Per contra, the Ld. DR vehemently relied on the orders of the lower authorities and urged before the bench not to interfere with the order of the authorities below.

5. After hearing both the parties and after perusal of the records, we note that both AYs i.e. AYs. 2013-14 and 2014-15 were not pending before the AO on the date of search on 01.12.2015 and, therefore, both assessment years are unabated assessment and, therefore, as per the settled position of law, no addition/disallowance is permissible in AYs. 2013-14 and 2014-15 without the aid of incriminating materials

unearthed qua the issue, and the year under consideration u/s. 153A of the Act. Since there is no whisper by the AO/Ld. CIT(A) about any incriminating material to show that assessee had in fact had incurred expenditure for earning the exempt income in these two assessment years, no disallowance could have been resorted to by the AO u/s. 153A of the Act. Therefore, we find merit in the contention of the Ld. AR for assessee and allow the appeal by directing deletion of addition made u/s. 14A read with Rule 8D of the Rules.

6. Coming to AY 2016-17, the Ld. AR fairly conceded that this year was abated assessment year. We note that in this assessment year assessee received exempt income of Rs.2,10,000/- and the AO has made disallowance of Rs.1,06,773/- by applying Rule 8D(2)(i) i.e. direct expenditure of Rs.2,132/- and rule 8D(2)(iii) – ½% of average investment – Rs.1,03,641/-. We note that no disallowance was made by AO under Rule 8D(2)(ii). The limited prayer of the Ld. AR of the assessee is that the disallowance made u/s. 14A read with Rule 8D(2)(iii) may be restricted to .5% of the investment made in the dividend yielding scrips. We find force in the contention of the Ld. AR and this Tribunal have been consistently taking such a view after the decision in REI Agro Ltd. vs. DCIT (144 ITD 141). So, we direct the AO to restrict the disallowance under Rule 8D(2)(iii) at .5% of the investment in dividend yielding scrips. With this direction, we dispose of this appeal of the assessee for AY 2016-17.

7. In the result, the appeal of assessee for AYs. 2013-14 and 2014-15 are allowed and the appeal of assessee for AY 2016-17 is partly allowed.

Order is pronounced in the open court on 18th March, 2020.

Sd/-
(A.L. Saini)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 18th March, 2020

Copy of the order forwarded to:

1. Appellant – M/s. Bndyavasini Projects Pvt. Ltd., 21, Centre Point, Hemant Basu Sarani, Kolkata-700 001.
2. Respondent – DCIT, Central Circle-4(3), Kolkata.
3. CIT(A)-21, Kolkata. (sent through e-mail)
4. CIT , Kolkata.
5. DR, Kolkata Benches, Kolkata. (sent through e-mail)

True Copy,

By order,

Assistant Registrar
ITAT, Kolkata Benches

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