IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F', NEW DELHI

BEFORE SH. AMIT SHUKLA, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA No.1439/Del/2015
Assessment Year: 2011-12

ACIT, Circle-20(1), New Delhi	**Vs.**	Prabhatam Advertising Pvt. Ltd., 38, Rani Jhansi Road, Jhandewalan, New Delhi
PAN :AAECP0417B		
(Appellant)		**(Respondent)**

Appellant by	Sh. Atiq Ahmed, Sr. DR
Respondent by	Sh. Gautam Jain, Adv.

Date of hearing	24.05.2018
Date of pronouncement	12.06.2018

ORDER

PER O.P. KANT, A.M.:

This appeal by the Revenue is directed against order dated 30/12/2014 passed by the Ld. Commissioner of Income-tax (Appeals)-7, Laxmi Nagar, Delhi [in short 'the Ld. CIT(A)'] for assessment 2011-12, raising following grounds:

1. *In the facts and under the circumstances, the CIT(A) has erred in deleting the disallowance u/s 14A Rs.1,84,960/- made by the AO by ignoring the mandatory prescribed method for determination of amount of expenditure incurred in relation to exempt income by virtue of notification No. 45/2008 dated 24.03.2008 of the CBDT introduced Rule 8D.*
2. *In the facts and under the circumstances, the Ld. CIT(A) has erred in deleting the addition of Rs.96,14,068/- without appreciating the facts that the A.O. treated the deferred revenue expenditure by following clause 2.2 of the*

concession agreement of the assessee with the MDC for five years.

3. *In the facts and under the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.96,14,068/- without appreciating the facts that the Ld. CIT(A)-XXVII, New Delhi vide appeal order no. 415/2013-14 dated 29.08.2014 for the A.Y. 2009-10 in the own case of the assessee decided the appeal on this issue in favour of the department.*
4. *The appellant craves to be allowed to add any fresh grounds of appeal and/or delete or amend any of the grounds of appeal.*

2. Briefly stated facts of the case are that the assessee was engaged in the business of advertising and filed return of income for the year under consideration on 30/09/2011, declaring total income of Rs.4,53,60,290/-. The case was selected scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short the 'Act') was issued and complied with. In the assessment completed under section 143(3) of the Act, the Assessing Officer made disallowance amounting to Rs.1,84,960/- under section 14A of the Act and disallowance of Rs.96,14,068/- under section 37(1) of the Act. Aggrieved with the disallowances, the assessee filed appeal before the Ld. CIT(A), who deleted both the disallowances. Aggrieved, the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

3. In ground No. 1, the Revenue has challenged disallowance of Rs.1,84,960/- deleted by the Ld. CIT(A), which was made by the AO under section 14A of the Act.

3.1 The Ld. DR relied on the order of the Assessing Officer and submitted that disallowance might be sustained.

3.2 On the other hand, the Ld. counsel submitted that in view of no dividend income earned during the year under consideration,

following the decision of the Hon'ble Delhi High Court in the case of Cheminvest Limited vs. Commissioner Of Income Tax, ITA 749/2014, dated 02.09.2015, the decision of the Ld. CIT(A) might be upheld. He further submitted that the investment was made out of own funds and, therefore, no disallowance under Rule 8D(2)(ii) of the Income-tax Rule, 1962 is required.

3.3 We have heard the rival submission and perused the relevant material on record. The Ld. CIT(A) adjudicated the issue observing as under:

"5.2 The appellant stated that it had no dividend income and investment was strategic investment and therefore as per judgment of Hon'ble High Court CIT Vs. Holcim India (P) Ltd. no disallowance should be made. Further no expenditure was incurred and also the AO did not record any satisfaction before proceeding to make the disallowance.
I shall now quote some decisions in respect of section 14A.

5.3. In the case of Godrej A Boyce Mfg Co. Ltd v DCIT & Anr. 328 ITR 81 (2010) the Hon'ble Court observed as under:

"The following principles would emerge from Section 14A and the decision in Watfort:

(a) The mandate of Section 14A is to prevent claims for deduction of expenditure in relation to income which does not form part of the total income of the assessee;

(b) Section 14A(1) is enacted to ensure that only expenses incurred in respect of earning taxable income are allowed;

(c) The principle of apportionment of expenses is widened by Section 14A to include even the apportionment of expenditure between taxable and non-taxable income of an indivisible business;

(d) The basic principle of taxation is to tax net income. This principle applies even for the purposes of Section 14A and expenses towards non-taxable income must be excluded;

(e) Once a proximate cause for disallowance is established - which is the relationship of the expenditure with income which does not form

part of the total income - a disallowance has to be effected. AH expenditure incurred in relation to income which does not form part of the total income under the provisions of the Act has to be disallowed under Section 14A. Income which does not form part of the total income is broadly adverted to as exempt income as an abbreviated appellation. "

5.4. In the case of Maxopp Investment Ltd v CIT (Delhi HC) (2011) 5 Tax Corp (DT) 49842 (DELHI), the Hon'ble court observed:

"30. As we have already noticed, sub-section (2) of Section 14A of the said Act refers to the method of determination of the amount of expenditure incurred in relation to exempt income. The expression used is - "such method as may be prescribed". We have already mentioned above that by virtue of Notification No.45/2008 dated 24/03/2008, the Central Board of Direct Taxes introduced Rule 8D in the said Rules. The said Rule 8D also makes it dear that where the AO, having regard to the accounts of the assessee of a previous year, is not satisfied with (a) the correctness of the claim of expenditure made by the assessee; or (b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act for such previous year, the AO shall determine the amount of the expenditure in relation to such income in accordance with the provisions of sub-rule (2) of Rule 80. We may observe that Rule 80(1) places the provisions of Section 14A(2) and (3) in the correct perspective. As we have already seen, while discussing the provisions of Sub-sections (2) and (3) of Section 14A, the condition precedent for the AO to himself determine the amount of expenditure is that he must record his dissatisfaction with the correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred. It is only when this condition precedent is satisfied that the AO is required to determine the amount of expenditure in relation to income not includable in total income in the manner indicated in sub-rule (2) of Rule 8D of the said Rules.

31. It is, therefore, dear that determination of the amount of expenditure in relation to exempt income under Rule 80 would only come into play when the AO rejects the claim of the assessee in this regard. If one examines sub-rule (2) of Rule 80, we find that the method for determining the expenditure in relation to exempt income has three components. The first component being the amount of expenditure directly relating to income which does not form part of the total income. The second component being computed on the basis of the formula given therein in a case where the assessee incurs expenditure by way of interest which is not directly attributable to any particular income or receipt. The formula essentially apportions

the amount of expenditure by way of interest [other than the amount of interest included in clause (i)] incurred during the previous year in the ratio of the average value of investment, income from which does not or shall not form part of the total income, to the average of the total assets of the assessee. The third component is an artificial figure - one half percent of the average value of the investment, income from which does not or shall not form part of the total income."

5.5.Thus whenever the issue of 14A arises the AO should ascertain the correctness of the claim of the appellant in respect of expenditure incurred or not incurred in relation to income which does not form part of the total income under the Act.

5.6.In case the AO is satisfied with the claim of the appellant, the AO should accept the claim of the appellant so far as the quantum of disallowance is concerned. In case the AO after giving the appellant an opportunity of being heard, is not satisfied with the correctness of the claim of the appellant, he should reject the claim after giving reasons. The AO is to then determine the amount of expenditure incurred in relation to income which does not form part of the total income. The language of sub section 14/4(1) is abundantly clear that relation has to be seen between the exempt income and expenditure incurred in relation to it.

5.7. Reference is also made to the order of the Hon'ble ITAT in the case of Promain Ltd. for A. y. 2009-10. The Hon'ble ITAT observed as under:

"9. In the present case, we find that the assessee had major investments of Rs.14.86 crores in the shares of Hindustan Organic Ltd. which it had been holding since long and which are held as strategic investments and not for earning exempt income and neither these and yielded any dividend. Therefore, the AO was not justified in including the value of this investment for the purpose of making disallowance as per Rule 8b. The A O should have taken the o ther non strategic investments amounting to Rs.60,73,279/- for the purpose of making disallowance and the disallowance in this matter comes out to Rs.30,366/-. Therefore, instead of disallowance of Rs.7,73,743/- the disallowance should have been Rs.30,366/- and in view of the above the assessee gets relief of Rs.7,43,377/-.
10. In view of the above, the appeal filed by the assessee is partly allowed."

5.8. I have perused the order of the Hon'ble Delhi High Court in CIT vs. Holcim India (P) Ltd. The Hon'ble Court observed as under:

> *"1. The following substantial question of law is proposed in these two appeals by the appellant-Revenue which pertain to the Assessment Years 2007-08 and 2008-09:-*
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> > *"Whether the Income Tax Appellate Tribunal was right in deleting the disallowance under Section 14A of the Income Tax Act, 1961 amounting to Rs. 8,61,50,315/- in Assessment Year 2007-08 and Rs. 6,60,93,678/- in assessment year 2008-09 holding that no dividend income was earned by the assessee ignoring the provisions under Section 14A.....*
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> *15. Income exempt under Section 10 in a pcrticular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax. It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not an improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax.*
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> *16. What is also noticeable is that the entire or whole expenditure has been disallowed as if there was no expenditure incurred by the respondent-assessee for conducting business. The CIT(A) has positively held that the business was set up and had commenced. The said finding is accepted. The respondent-assessee, therefore, had to incur expenditure for the business in the form of investment in shares of cement companies and to further expand and consolidate their business. Expenditure had to be also incurred to protect the investment made. The genuineness of the said expenditure and the fact that it was incurred for business activities was not doubted by the Assessing Officer and has also not been doubted by the CIT(A).*
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> *17. In these circumstances, we do not find any merit in the present appeals. The same are dismissed m limine."*

5.9 In view of the above, since the appellant did not have any dividend income and it had strategic investment therefore no disallowance under 14A can be made. The addition of Rs.1,84,960/- is therefore deleted. This ground of appeal is ruled in favour of the appellant."

3.4 The Hon'ble High Court in the case of Cheminvest Limited (supra), has held that if no dividend income is earned during the year, no disallowances u/s 14A of the Act is warranted. In view of the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd. (supra), we do not find any error in the finding of the Ld. CIT(A) on the issue in dispute and accordingly, uphold the same. The ground of the appeal of the Revenue is accordingly dismissed.

4. The ground No. 2 and 3 of the appeal relate to disallowance of Rs.94,14,068/- deleted by the Ld. CIT(A), which was made by the Assessing Officer under section 37(1) of the Act.

4.1 The facts qua the disallowance are that the assessee has shown deferred revenue expenditure of Rs.1,20,17,585/- in the financial statements, however, the same was claimed as revenue expenditure for the purpose of Act. The assessee explained that as per concession agreement for maintaining and operating public urinals in lieu of "OOH" advertisements media display, in MCD zone on operation, maintenance and transfer (OMT) basis, the company is not the owner of those assets and for claiming depreciation as per Income Tax Act, the assessee must be owner of the asset and accordingly, the assessee has claimed the entire expenses of Rs.1,20,17,585/- as revenue expenditure.

4.2 According to the Assessing Officer, the concession period was from 12/01/2011 to 11/01/2016 and in view of the

concession agreement the expenditure has been considered as deferred revenue, and thus, the benefit of those assets was spread over 5 years. The Assessing Officer accordingly allowed 20% of the total expenditure, which was worked out at Rs.24,03,517/- in the year under consideration and disallowed balance amount of Rs.96,14,068/-.

4.3 Before the Ld. CIT(A), the assessee made detailed submission and relied upon the decision of the Hon'ble Delhi High Court in the case of City Financial Consumer Finance Ltd reported in 335 ITR 29 (Del) and others decisions. The Ld. CIT(A) after considering the submission of the assessee, deleted the disallowance of Rs.96,14,068/-.

4.4 Before us, the Ld. DR relied on the order of the Assessing Officer. On the contrary, the Ld. Counsel of the assessee relied on the finding of the Ld. CIT(A) on the issue in dispute.

4.5 We have heard the rival submission and perused the relevant material on record. In the instant case, the assessee entered into an agreement with the "Municipal Corporation of Delhi" (MCD) for maintaining and operating public urinals in lieu of "OOH" advertisement media display on operation maintenance and transfer basis. In pursuance of the said agreement, the assessee incurred an expenditure of Rs.1,20,17,585/-, which has been claimed as revenue expenditure. The contention of the assessee that there is no concept of deferred revenue expenditure in the Income Tax Act and the assessee is entitled to claim the expenditure incurred in the year itself. Before the Ld. CIT(A) the assessee relied on the decision of the Hon'ble Delhi High Court in the case of Citi Financial Consumer Finance Ltd.(supra). For

ready reference, the relevant finding of the Hon'ble Delhi High Court in the said case is reproduced as under:

> *"11. This Court, thus, explained in no uncertain terms that the normal rule accepted bv the Supreme Court in the said judgment was that the expenditure is to be allowed in the year in which it was incurred. Only at the instance of the assessee who wanted to spread over, the court had agreed to allow the assessee the benefit after finding that there was a continuing benefit to the company over the entire period. The ratio of this judgment was thus summarized in the following manner:-*
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> > *"What follows from the above is that normally the ordinary rule is to be applied, namely, revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if the assessee claims that expenditure in that year, the Income Tax department cannot deny the same. However, in those cases where the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of matching concept is satisfied, which upto now has been restricted to the cases of debentures." 12. At this stage, it would be of advantage to discuss the judgment of Supreme Court in Empire Jute (supra) which repelled the theory of expenditure of enduring nature, in a great measure. In that case, the Supreme Court noted that by decided cases, the courts evolved various tests for distinguishing between the capital and revenue expenditure but no test is paramount or conclusive. Every case has to be decided on its facts keeping in mind the broad picture of whole operation in respect of which the expenditure has been incurred. At the same time, few tests formulated by the Courts were taken note of. One such test which was specifically spelled-out and may be relevant for our purpose was "when an expenditure is made not only once and for all, but with a view to bringing into existence of an advantage for which enduring benefit of a trade, the expenditure can be treated as capital in nature and not attributable to revenue". However, cautioned the Court, it would be misleading to suppose that in all cases securing a benefit for business expenditure would be capital expenditure. The Court added the caution in the following words:-*
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> > > *"There may be cases where expenditure, even if incurred for obtaining advantage, of enduring benefit, may, none-the-less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assesses that brings the case within the*

principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably white leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is therefore not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case."

13. Applying the aforesaid principle to the facts of this case, it clearly emerges that the expenditure on publicity and advertisement is to be treated as revenue in nature allowable fully in the year in which it was incurred. Concededly, there is no advantage which has accrued to the assessee in the capital field. The expenditure was incurred to facilitate the assessee's trading operations. No fixed capital was created by this expenditure. We may also add here that in the Income-Tax laws, there is no concept of deferred revenue expenditure. Once the assessee claims the deduction for whole amount of such expenditure, even in the year in which it is incurred, and the expenditure fulfills the test laid down under section 37 of the Act, it has to be allowed. Only in exceptional cases, the nature mentioned in Madras Industrial Corporation (supra), the expenditure can be allowed to be spread over, that too, when the assessee chooses to do so." [Emphasis supplied]"

4.6 The Ld. CIT(A) after considering the decision cited by the assessee, allowed the appeal of the assessee observing as under:

"6.2 The appellant had claimed Rs.1,20,17,585/- as revenue expenditure for the year. The AO not doubted that this expenditure was not genuine or not incurred for the purpose of business. The appellant has submitted that this expenditure may not be treated as deferred revenue expenditure. The appellant has quoted several case laws

to support its contentions and there is no power with the AO to treat an expense as deferred revenue expenditure.

6.3 I find merit in the submissions of the appellant. The appellant is allowed to claim the expenditure in full u/s 37 in the current year. The addition of Rs.96,14,068/- is deleted. The ground of appeal is ruled in favour of the appellant."

4.7 Since in the instant case, the assessee has not claimed for spread of the expenditure over the concession period, the CIT(A) has correctly followed the decision of the Hon'ble Delhi High Court in the case of the City Financial Consumer Finance Ltd. (supra). We do not find any error in the order of the Ld. CIT(A) on this issue and accordingly, we uphold the finding of the Ld. CIT(A) on the issue in dispute. The ground Nos. 2 and 3 of the appeal are accordingly dismissed.

5. The Ground No. 4 of the appeal, being general in nature, we are not required to adjudicate upon.

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

The decision is pronounced in the open court on 12th June, 2018.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 12th June, 2018.
RK/-(D.T.D.)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi