IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Abraham P.George, AM & Shri George George K, JM

ITA No.30/Coch/2016 : Asst.Year 2009-2010
ITA No.31/Coch/2016 : Asst.Year 2010-2011
ITA No.32/Coch/2016 : Asst.Year 2011-2012

M/s.HLL Lifecare Limited (Previously known as Hindustan Latex Limited) C/o.K.Venkatachalam Aiyer & Co., CAs, PB No.12 Trivandrum 695 001. **PAN : AAACH5598K.**	Vs.	The Assistant Commissioner of Income-tax, Circle 1(1) Trivandrum.
(Appellant)		(Respondent)

Appellant by : Sri. Govind Shastri
Respondent by : Sri. A.Dhanaraj, Sr.DR

Date of Hearing : 20.11.2017		**Date of Pronouncement : 23.11..2017**

O R D E R

Per Abraham P. George, AM

These are appeals filed by the assessee directed against orders dated 15.12.2015 of CIT(A), Trivandrum for the impugned assessment years.

2. Appeal for assessment year 2009-2010 is taken at first for disposal.

3. Only ground raised by the assessee is on a claim of deduction of excess provision write back of Rs.53,77,592, which was not allowed by the Assessing Officer.

4. Facts apropos are that assessee, a Government of India Undertaking, engaged in manufacturing and trading of condoms, blood bags, gloves, contraceptives, etc., had filed its return of the impugned assessment year declaring income of Rs.14,27,13,162. In the computation filed along with return of income, assessee had claimed deduction for excess provision write back of Rs.53,77,592. The said amount appeared as credit in its profit and loss account. Explanation of the assessee was sought as to why it should not be disallowed. Reply was that consolidated provision relating to various accounts were made on year to year basis in P&L accounts, but such provisions were added back in the respective computation. Thus, as per the assessee, when an excess provision was credited back to the profit and loss account, it had to be reduced since these formed part of the provisions earlier made but not claimed while computing total income.

5. Assessing Officer was however not impressed by the above argument. According to him, assessee could not prove that the provisions which were written back were offered for tax in any of the earlier years. When the matter reached the learned CIT(A), he did not take a different view. As per the learned CIT(A), unless assessee could establish that corresponding income was already brought to tax, it could not claim that a credit due to write back of provision will not result in any income. Further, as per the CIT(A), assessee's

response that documentary evidence for provisions written back could not be furnished due to lapse of time, was not acceptable.

6. Now before us, learned AR reiterated the same contentions as were taken before the lower authorities. According to him, computation of total income for various assessment years starting from assessment year 2000-2001 onwards (placed at paper page No.4 to 15) clearly showed that assessee had added back provisions for items like non-moving stock, stores / finished goods / WIP written off, while computing its income. As per the learned AR, once such provisions, which were debited in the profit and loss accounts, were added suo motu by the assessee while computing its total income, then any credit coming out of such provisions, appearing in the profit and loss account had to be deducted while computing the total income. To a question from the bench whether such write back of provision could be linked with the earlier provisions which were suo motu added back by the assessee, reply of the learned Counsel was that assessee would be able to show such linkage if an opportunity was given.

7. Learned Departmental Representative on the other hand submitted that the matter could go back to the Assessing Officer for fresh verification.

8. We have perused the orders and heard rival contentions. Claim of the assessee is that provision written back in its

profit and loss account had to be deducted while computing its total income for tax purposes, for the reason that such write backs were out of earlier provisions debited to the profit and loss account for earlier years, which were added back in its computation of income for the respective years. In our opinion, for making this claim, it is necessary for the assessee to show what were the provisions earlier debited in the profit and loss account, which were not claimed as deduction for tax purpose and the link it has with the amounts written back as income. Contention of the learned AR is that assessee would able to show such linkages if given another opportunity. However, perusal of the computation statements of earlier years placed at paper book pages 4 to 15 does not show up any clear links. Considering the facts and circumstances of the case, we are of the opinion that it will be just and proper if assessee is given one more opportunity to show that provision written back by it during the relevant previous year were out of provisions earlier debited to the profit and loss account, which were never claimed by it while computing its total income. We, therefore, set aside the orders of the authorities below on this issue and remit it back to the Assessing Officer for consideration afresh in accordance with law.

9. Now we take up appeal of the assessee for assessment year 2010-2011.

10. There are two effective grounds raised by the assessee for assessment year 2010-2011, of which ground No.1 is similar to the ground raised by it in its appeal for assessment year 2009-2010. We have already remitted the issue regarding write back of provision, to the file of Assessing Officer for considering it afresh for that year. Similar directions are given here also. Accordingly ground No.1 is allowed for statistical purposes.

11. This leaves us with ground No.2, which assails disallowance made by the Assessing Officer u/s 14A of the Act, which was confirmed by the learned CIT(A).

12. Learned Counsel of the assessee submitted that disallowance u/s 14A of the Act, was made despite assessee having claimed no exempt income. Relying on the judgment of the Hon'ble Delhi High Court in the case of *Pr.CIT v. IL&FS Energy Development Corporation Ltd. 297 CTR 452* and that of the Madras High Court in the case of *Redington (India) Pvt. Ltd. V. CIT (2016) 97 CCH 219*, learned AR submitted that there could not be a disallowance u/s 14A of the Act, when there was no exempt income claimed by an assessee. Per contra, learned Departmental Representative relying on CBDT Circular No.5/2014 dated 11th February, 2014, submitted that there could be disallowance u/s 14A of the Act, even when there was no exempt income.

13. We have heard the rival contentions. Claim of the assessee is that it had no exempt income during the year.

Assessee had specifically mentioned this in the grounds taken by it before the CIT(A) as ground No.3(a). Learned DR has not rebutted the claim of the assessee that there was no exempt income. Learned CIT(A) had relied on the decision of the Special Bench of the Tribunal in the case of *Cheminvest Ltd. v. ITO (121 ITD 318)* while holding that the disallowance us/ 14A could be made even in an year where there was no exempt income. Learned CIT(A) had also relied on the judgments of Hon'ble jurisdictional High Court in the case of *CIT v. Catholic Syrian Bank (344 ITR 25).* What we find is that in the case before the Hon'ble jurisdictional High Court there was a claim of exempt income. As against this, here assessee had not claimed any exempt income. Hon'ble Delhi High Court in the case of *IL&FS Energy Development Corporation Ltd. (supra)*, held as under:-

> *"11. At the outset, it requires to be noticed that we are concerned with the A.Y. 2011-12 and, therefore, the question of the applicability of Rule 8D, which was inserted with effect from 24th March 2008, is not in doubt.*
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> *12. Section 14A of the Act, which was inserted with retrospective effect from 1st April 1962, provided for disallowance of the expenditure incurred in relation to income exempted from tax. From 11th May 2001, a proviso was inserted in Section 14A to clarify that it could not be used to reopen or rectify a completed assessment. Sub-section (2) and (3) of Section 14A were inserted with effect from 1st April, 2007 to provide for methodology for computing of disallowance u/s. 14A. However, the actual methodology was provided in terms of Rule 8D only from 24th March 2008. There was a further*

amendment to Rule 8D with effect from 2nd June 2016 limiting the disallowance the aggregate of the amount of expenditure directly relating to income which does not form part of total income and an amount equal to one per cent of the annual average of the monthly average of the opening and closing balances of the value of investment, income from which does not form part of the total income. It is also provided that the amount shall not exceed the total expenditure claimed by the Assessee.

13. In the above background, the key question in the present case is whether the disallowance of the expenditure will be made even where the investment has not resulted in any exempt income during the A.Y. in question but where potential exists for exempt income being earned in later A.Y.s.

14. In the Explanatory Memorandum to the Finance Act 2001, by which Section 14A was inserted with effect from 1st April 1962, it was clarified that "expenses incurred can be allowed only to the extent they are relatable to the earned income of taxable income". The object behind Section 14A was to provide that "no deduction shall be made in respect of any expenditure incurred by the Assessee in relation to income which does not form part of the total income under the Income Tax Act."

15. What is taxable u/s. 5 of the Act is the "total income" which is neither notional nor speculative. It has to be 'real income'. The subsequent amendment to Section 14A does not particularly clarify whether the disallowance of the expenditure would apply even where no exempt income is earned in the A.Y. in question from investments made, not in that A.Y., but earlier A.Y.s.

16. Rule 8D(1) of the Rules is helpful, to some extent, in understanding the above issue. It reads as under:

> *"8D(1) Where the Assessing Officer 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 Act for such previous year,*

he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2)."

17. The words "in relation to income which does not form part of the total income under the Act for such previous year" in the above Rule 8D(1) indicates a correlation between the exempt income earned in the A.Y. and the expenditure incurred to earn it. In other words, the expenditure as claimed by the Assessee has to be in relation to the income earned in 'such previous year'. This implies that if there is no exempt income earned in the A.Y. in question, the question of disallowance of the expenditure incurred to earn exempt income in terms of Section 14A read with Rule 8D would not arise.

18. The CBDT Circular upon which extensive reliance is placed by Mr. Hossain does not refer to Rule 8D(1) of the Rules at all but only refers to the word "includable" occurring in the title to Rule 8D as well as the title to Section 14A. The Circular concludes that it is not necessary that exempt income should necessarily be included in a particular year's income for the disallowance to be triggered.

19. In the considered view of the Court, this will be a truncated reading of Section 14A 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 u/s. 5 of the Act, the question of taxation of 'notional income' does not arise. As explained in CIT v. Walfort Share & Stock Brokers (P) Ltd. (2010) 326 ITR 1/192 Taxman 211 (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 14th May, the decision of this Court in Cheminvest Ltd. (supra) requires reconsideration.

20. In Redington (India) Ltd. v. Addl. CIT (2017) 392 ITR 633/77 taxmann.com 257 (Mad.), 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 this would be carrying the artifice too far".

21. The decision in CIT v. Lakhani Marketing Inc. (2014) 49 taxmann.com 257/226 Taxman 45 (Mag.), CIT v. Winsome Textile Industries Ltd. (2009) 319 ITR 204, CIT v. Shivam Motors (P) Ltd. (2015) 230 Taxman 63/55 taxmann.com 262 (All.) have all taken a similar view. The decision in Taikisha Engineering India (P) 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 CIT v. Rajendra Prasad Moody (1978) 115 ITR 519 explained that deduction is allowable even where income was not actually earned in the A.Y. in question. This aspect of the matter was dealt with by this Court in 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:*
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> *"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." Section14A 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 decision of the ITAT in Ratan Housing Development Ltd. (supra) and Relaxo Footwears Ltd. (supra), to the extent that they are inconsistent with what has been held hereinbefore do not merit acceptance. Further, the mere that in the audit report for the A.Y. 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 14A of the Act was called for in the A.Y. in question because no exempt income was earned."

Hon'ble Madras High Court in the case of *Redington (India) Pvt. Ltd. (supra)* had also held similar view after

considering Circular No.5/2014 dated 11.02.2014. In the result, the Special Bench decision in the case of Cheminvest Ltd. (supra) pales into insignificance. Therefore, we are of the opinion that there could be no disallowance u/s 14A of the Act, when there was no exempt income claimed by the assessee. Such disallowance stands deleted. Ground No.2 of the assessee stands allowed.

14. This leaves us with appeal of the assessee for assessment year 2011-2012.

15. Ground No.1 and 2 of the assessee are similar to ground No.1 and 2 raised in its appeal for assessment year 2010-2011. With regard to ground No.2, we have set aside the issue regarding claim of write back of excess provision back to the file of Assessing Officer for consideration afresh in the earlier years. Similar directions are given here also. Vis-à-vis ground No.2, it is an admitted position that assessee had not claimed any exempt income. Accordingly, for reasons given at para 13 above, we delete the disallowance made u/s 14A of the Act.

16. Only remaining ground is ground No.3 which assails disallowance of deduction claimed by the assessee for research and development.

17. There was no claim for any deduction u/s 35D of the Act made by the assessee in the computation of statement or in the return filed by it. During the course of appellate

proceedings before the CIT(A), a fresh claim was made by the assessee in this regard. As per the assessee, it had during the relevant year incurred capital expenditure of Rs.3,12,89,002 for research and development representing work in progress of a building. As per the assessee, work had only started in the relevant previous year. Contention of the assessee was that by virtue of section 35(1)(iv) read with section 35(2)(ia) of the Act, such claim had to be preferred in the previous year in which capital expenditure was incurred. As per the assessee, during the course of assessment proceedings it had requested the Assessing Officer to allow such deduction, but this was not accepted.

18. Learned CIT(A), after considering the arguments of the assessee, held that there was nothing on record to show that the assessee had actually brought this claim before the Assessing Officer. As per the learned CIT(A), there was no details with regard to the building being constructed on which such claim was being preferred by the assessee. Further as per the learned CIT(A), land value had to be excluded in accordance with the proviso to section 35(2)(ia) of the Act and was also not known whether assessee had excluded such land value. Again as per the learned CIT(A), assessee could not clarify whether the assets had claimed depreciation on such building. He thus held that sufficient details and clarifications on the claim were not available. With these observation he dismissed the claim.

19. Now before us learned AR strongly assailing the order of the authorities below submitted that assessee had made a claim during the course of assessment proceedings though it was not in the return of income. As per the learned AR, by virtue of the judgment of the Hon'ble Apex Court in the case of *Goetze (India) Ltd. (284 ITR 323)* the claim ought to have been considered by the learned CIT(A). Contention of the learned AR was that if an opportunity was given, assessee would be able to satisfy the learned A.O. on its eligibility for such claim. Per contra, the learned DR submitted that the assessee having not preferred its claim through a revised return, it could not press for such claim before the learned CIT(A) or before the Tribunal.

20. We have perused the orders and heard rival contentions. As per the assessee it was eligible for claiming deduction u/s 35D of the Act on investment in a building for research and development. It is admitted by the assessee that such claim was never made in the return of income but only preferred during the course of assessment proceedings. To a query from the bench as to why assessee did not file a revise return for preferring such claim, the learned AR stated that amount on which such claim could be preferred, crystallized only after the time permitted under the Act for filing a revised return. No doubt, by virtue of the judgment of the Hon'ble Apex Court in *Goetze (India) Ltd. (supra),* appellate authorities are having the power to consider a fresh claim of the assessee if it is within four corners of law. But nevertheless unless and until there

are circumstances to show that such claim could not have been preferred by the assessee through filing of a revised return, in our considered opinion, a fresh claim cannot be accepted. The question of appellate authorities considering a fresh claim can arise only when there were factors which could demonstrate that assessee was unable to make such a claim, through a revised return, due to factors beyond its control. In the facts and circumstances of the case, we are of the opinion that this issue needs to have a fresh look by the Assessing Officer. The Assessing Officer has to verify whether the assessee was disabled in making its claim through a revised return within the time allowed u/s 139(5) of the Act due to factors beyond its control and thereafter he has to proceed in accordance with law. Ground No.3 of the assessee is allowed for statistical purposes.

21. To sum-up the result, assessee's appeal for assessment year 2009-2010 is allowed for statistical purposes; appeal for assessment year 2010-2011 is allowed *pro tanto;* and appeal for assessment year 2011-2012 is partly allowed for statistical purposes.

Order pronounced on this 23rd day of November, 2017.

Sd/-	Sd/-
(George George K.)	**(Abraham P.George)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Cochin ; Dated : 23rd November, 2017.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT, Thiruvanandapuram.
4. CIT(A), Thiruvanandapuram**.**
5. DR, ITAT, Cochin
6. Guard file.

True copy

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin