INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "F": NEW DELHI

BEFORE
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No.1268/Del/2015
Asstt. Year: 2011-12

DCIT, Circle 19(2), New Delhi.	Vs.	M/s. PTC India Financial Services Ltd. 2nd Floor, NBCC Tower, 15, Bhikaji Cama Place, New Delhi – 1100 066 PAN AAECP0501C
(Appellant)		(Respondent)

Assessee by:	Shri Salil Kapoor, Adv. Shri Sumit Lalchandani, Adv. Shri Amarbir Singh, CA
Department by :	Shri T Kipgen, CIT(DR)
Date of Hearing	14.02.2023
Date of pronouncement	14.03.2023

O R D E R

PER ASTHA CHANDRA, JM

The appeal filed by the Revenue is directed against the order dated 29.12.2014 of the Ld. Commissioner of Income Tax (Appeals)-7, Delhi **("CIT(A)")** pertaining to Assessment Year **("AY")** 2011-12.

2. The Revenue has taken the following grounds of appeal:

"1.(i) In the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the additions of Rs. 14,26,44,143/- made disallowing depreciation on the ground that the investment made by the assessee in Wing Turbine Generation (WTG) cannot be equated with activities in the nature of trade or business or adventure.

(ii) In the facts and circumstances of the case, the Ld. CIT(A) has erred in not adjudicating the reason given by the AO for making the disallowance of depreciation as the CIT(A) has allowed the

relief on the ground that the assets have been put to use for the purpose of assessee's business, which was not the ground taken by the AO for making the disallowance.

2. In the facts and circumstances of the case, the Ld. CIT(A) has erred in restricting the disallowance to Rs. 14,26,414/- as against Rs. 23,80,59,197/- made by AO u/s 14A read with Rule 8D."

3. The assessee is a Non-Banking Financial Company (NBFC). It is promoted by PTC India Ltd. and currently, 60% of its share capital is held by PTC India Ltd.. It is engaged in the business of making principal investment in, and providing financial solutions for companies with projects across the energy value chain, generation and distribution of electricity. For AY 2011-12, it filed its return on 30.09.2011 declaring income of Rs. 39,86,60,290/-. The return was processed under section 143(1) of the Income Tax Act, 1961 **(the "Act")**. Thereafter, the case was selected for scrutiny under CASS. During assessment proceedings, the assessee filed details which the Ld. Assessing Officer **("AO")** considered and examined. He completed the assessment on 13.01.2014 on total income of Rs. 77,93,63,630/- including therein disallowance of depreciation of Rs. 14,26,44,143/- on investment made in windmills and disallowance of Rs. 23,80,59,197/- under section 14A of the Act.

4. Aggrieved, the assessee filed appeal before the Ld. CIT(A) who deleted both the disallowances made by the Ld. AO. Dissatisfied, the Revenue is in appeal before the Tribunal and both the grounds of appeal relate thereto.

5. On the issue of disallowance of depreciation, the Ld. DR submitted that the impugned disallowance was made by the Ld. AO on the ground that the investment made by the assessee in Wing Turbine Generation (WTG) cannot be equated with activity in the nature of business. The Ld. CIT(A) did not consider this aspect while allowing relief to the assessee. On the issue of disallowance under section 14A the Ld. DR submitted that it is a covered matter in favour of the assessee.

6. The Ld. AR submitted that both the issues are covered by the order of the Tribunal in assessee's own case for AY 2010-11, the immediately preceding year. He further submitted that the Revenue filed appeal before the Hon'ble Delhi High Court challenging the order dated 19th February, 2021 of the Tribunal in ITA No. 1267/Del/2015 for AY 2010-11 involving both the identical disallowances made by the Ld. AO which were deleted by the Ld. CIT(A) as also by the Tribunal. The Hon'ble High Court of Delhi vide judgment dated 22nd September, 2022 dismissed the appeal of the Revenue on both the counts.

7. We have considered the submission of the parties and perused the records. During the course of assessment proceedings, the Ld. AO raised a query and required the assessee to explain why the activity of power generation be not regarded as other than business activity of the assessee and depreciation etc. be disallowed. The assessee submitted a detailed reply dated 10.01.2014 which has been incorporated by the Ld. AO at pages 2-4 of his assessment order. It is observed that the assessee cited clause 24 of the objects incidental or ancillary to the attainment of the main object of the Memorandum of Association to explain that it covers the activity of power generation and sale of such power to consumer by the company. It was also submitted that as per the main object clause the company invests or provides finance to companies engaged in generating power and that investment in own power generation unit (i.e. windmill) should also get covered within such object clause. It was also submitted that the assessee had acquired the windmill in the financial year 2009-10 relevant to AY 2010-11 and income from generation of power and sale of such power was offered to tax as business income which has been accepted by the predecessor Ld. AO in the preceding year. However, the successor Ld. AO rejected the explanation of the assessee by saying that the principle of res-judicata does not apply to income tax proceedings. No doubt the principle of res-judicata does not apply to tax proceedings but this rule is subject to the expectation of consistency where there are no fresh facts as held in several judgements including the judgment of the Hon'ble Supreme Court in CIT vs.

Durga Prasad More 82 ITR 540 (SC). The Ld. AO has overlooked the rule of consistency despite there being no fresh facts. We, therefore, do not find any substance in the argument advanced by the Ld. DR as all the relevant facts were already on records for perusal and consideration of the Ld. CIT(A).

8. We find that similar disallowance under section 32 and under section 14A of the Act were made by the Ld. AO in AY 2010-11 which were deleted by the Ld. CIT(A) whose order was upheld by the Tribunal by observing in para 7 of its order dated 19.02.2021 in ITA No. 1267/Del/2015 as under:-

"7. We have heard both the parties and perused the material available on record. As regards Ground No. 1 of the Revenue's appeal, the assessee made a suo moto disallowance of Rs. 16,05,000/-. The investments were out of assessee's own funds and no borrowed funds were used to acquire investments. There was no interest expenditure which could be directly or indirectly attributable to the exempt income. The CIT(A) further observed that the investments were strategic investment as per the assessee and the same should be excluded for calculating disallowance under Rule 8D. As per Rule 8D(2)(i), the assessee made disallowance of Rs. 16,05,000/- under the head strategic investment and has taken 20% of employee cost and 5% of administrative cost. Thus, the findings given by the CIT (A) is just and proper. Therefore, Ground No. 1 is dismissed. As regards Ground No. 2, the details were submitted by the assessee during the assessment proceedings as per the reply/submissions dated 11.12.2012 which is mentioned on page 1 of the Assessment Order itself. There was no new evidence brought on record by the assessee and after the verification of the evidence the CIT(A) has rightly deleted the addition. In fact, the Assessing Officer has totally ignored the reply dated 11.12.2012 submitted by the Assessee. Thus, CIT(A) has given a categorical finding that the assets were owned by the assessee and were put to use for the purposes of its business during the year. Hence, there is no need to interfere with the detailed findings of the CIT(A). Hence, Ground No. 2 is dismissed. As regards Ground No.3, the assessee had borrowed funds which was used for business purposes and was paying interest on these funds and this fact was not controverted through any of the documents on the record by the Assessing Officer as well as by the Revenue at the time of hearing before us, Hence, the findings given by the CIT(A) is proper and there is no need to interfere with the findings of the CIT(A). Ground No. 3 is dismissed. "

9. When the Revenue went up in appeal before the Hon'ble Delhi High Court, the Hon'ble Court vide judgment dated 22.09.2022 in ITA No. 349/2022 sustained the order (supra) of the Tribunal by observing on both the issues in para 4, 5, 6 and 7 as under:-

"4. A perusal of the paper book reveals that the AO rejected the assessee company's computation on the ground that the "assessee company had raised substantial amount of loans for investment in new ventures on which substantial amount of interest was paid". However, the Appellate Authorities below held that the investments were made out of assessee's own funds and no borrowed funds were used to acquire investments. Consequently, there was no interest expenditure which could be directly or indirectly attributed to the exempt income. Therefore, the Appellate Authorities upheld the suo moto disallowance of Rs. 16,05,000/- made by the assessee after taking 20% of employee cost and 5% of the administrative cost.

5. The Supreme Court in South India Bank Ltd. v. Commissioner of Income Tax, [2021] 10 SCC 153 has held that where the assessee has mixed funds (made up partly of interest free funds and partly of interest bearing funds) and the payment is made out of mixed fund, the investment must be considered to have been made out of the interest free fund. The Supreme Court in the said judgment held "...in respect of payment made out of mixed fund, it is the assessee who has such right of appropriation and also the right to assert from what part of the fund a particular investment is made and it may not be permissible for the Revenue to make an estimation of a proportionate figure... "

6. Further, the Commissioner of Income Tax (Appeals) ['CIT(A)'] deleted the additions under Section 32 based on documents which were duly submitted to the AO as well as CIT(A). The CIT (A) duly considered the documents on record and after the verification of the evidence, rightly deleted the addition. The IT AT has even recorded that the details were submitted by the assessee during the assessment proceedings as per the reply/submissions dated 11th December, 2012 which is mentioned at page 1 of the assessment order itself. The ITAT has also recorded that there was no new evidence brought on record by the assessee and in fact, the AO has totally ignored the reply dated 11th December, 2012, filed by the Assessee.

7. Consequently, both the appellate authorities below have recorded concurrent findings of fact on both the issues. Accordingly, this Court is of the view that no substantial question of law arises for consideration in the present appeal and the same is dismissed."

10. Following the order (supra) of the Tribunal and the judgment (supra) of the Hon'ble Delhi High Court in assessee's own case for AY 2010-11 on

both the issues involved in the present appeal of the Revenue, the facts and circumstances remaining the same, we reject both the grounds of the Revenue.

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

Order pronounced in the open court on 14th March, 2023.

sd/-	sd/-
(SHAMIM YAHYA)	**(ASTHA CHANDRA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 14/03/2023

Veena

Copy forwarded to -
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	