IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCH "G", MUMBAI

BEFORE MS. PADMAVATHY S, ACCOUNTANT MEMBER

AND

SHRI. RAJ KUMAR CHAUHAN, JUDICIAL MEMBER

ITA NO. 4754/MUM/2023(A.Y: 2016-17)

Zodiac Ventures Ltd. 404, Dev Plaza, 68, S.V. Road, Andheri West, Mumbai – 400058. **PAN: AAFPS7328J** **(Appellant)**	*Vs.*	Income Tax Officer Ward 11(3)(4) Aayakar Bhawan, Maharshi Karve Road, Mumbai-400020. **(Respondent)**

Assessee Represented by	**:**	**Shri. S. C. Tiwari**
Department Represented by	**:**	**Shri. Mahesh Parwani Sr.AR**
Date of conclusion of Hearing	**:**	**03.06.2024**
Date of Pronouncement	**:**	**18.06.2024**

O R D E R

PER RAJ KUMAR CHAUHAN (J.M.):

1. This present appeal is directed against the order dated 06.11.2023 passed by Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as the "*CIT(A)*"], under section 250 of the Income Tax Act, 1961 [hereinafter referred to as "*the Act*"] for the A.Y. 2016-17, wherein the order of the Learned Assessing Officer, Ward 119(3)(4), Mumbai (hereinafter

referred to as the *"AO"*) dated 13.12.2018 was upheld and the appeal of the assessee was dismissed.

2. Assessee has raised following grounds in its appeal: -

"1. That on the facts and in the circumstances of the case of the appellant and in law, Id. CIT(A) has erred in upholding the addition of Rs. 50,81,159 made by the Assessing Officer by way of disallowance u/s. 14A read with Rule 8D.

2. That, without prejudice to the generality of ground of appeal no. 1, Ld. CIT(A) erred in: -

a) Not appreciating that the petitioner had not received any dividend income or any other exempt income and in the absence of exemption of an income from the charge of tax the provisions of Section 14A could not be applied;

b) Not appreciating that learned Assessing Officer had made disallowance of huge interest expenditure without arriving at a finding that the petitioner had employed borrowed funds for the acquisition of the shares in question;

c) Not appreciating that the disallowance under Rule 8D was not automatic and it was incumbent upon learned Assessing Officer to record proper satisfaction on actual facts of the case that disallowance under Rule 8D was called and

d) Erroneously applying the provisions of Explanation inserted by Finance Act 2022 to Section 14A whereas the Assessment Year under consideration is 2016-17.

3. That the appellant craves leave to reserve to himself the right to add to, alter or amend any of the aforesaid grounds of appeal before or at the time of hearing and to produce such further evidence, documents and papers as may be necessary.

4. That the impugned order being contrary to law, evidence and facts of the case may kindly be set aside, amended or

modified in the light of the grounds of appeal enumerated above.

5. That each of the grounds of appeal enumerated above is without prejudice to and independent of one another."

3. The brief facts of the case as culled out from the proceedings of Lower Authorities are as under:

The appellant filed return of income for assessment year 2016-17 on 10.09.2016 declaring total income of Rs 20,94,130/- The case of the appellant was selected for limited scrutiny under CASS. During the course of assessment proceedings, on a perusal of the balance sheet of the appellant the AO observed that the appellant had Non-Current Investment of Rs.15,60,00,000/- as on 31.03.2016 and 31.03.2015 in the Equity Shares, out of the total of the assets side of Rs.15,94,58,744/- as on 31.3.2016 and Rs. 15,72,01,787/- as on 31.03.2015. The appellant had Short-Term borrowing of Rs.3,06,01,355/- as on 31.03.2016 and Rs.3,31,20,033 as on 31.03.2015. The appellant had debited Finance Cost of Rs.43,65,629/- to the profit & loss account and other expenses of Rs.27,82,092/-, Revenue of the appellant for the F.Y. 2015-16 consisted of Sale of Services (Architect and Liaisoning fee) and Interest Income. In view of the above fact, the AO observed that the interest-bearing funds were used to made investment in equity shares. Therefore, not satisfied with the reply of the appellant the AO calculated Rs 50,81,159/- as disallowance u/s 14A and added back the same to the income of the appellant.

During the course of appellate proceedings the appellant has stated is a public limited company incorporated under the Companies Act on 19th February 1981. It is engaged in the business of Real Estate, Architectural Services and Estate Agent. The appellant acquired 520000 shares equivalent to 50.98% of the total capital in Zodiac Developers Private Ltd. thereby making it a subsidiary. It was submitted that it purchased shares of Zodiac Developers Pvt Ltd. to acquire controlling interest therein. The investment was made with a view to carry on the

business of subsidiary and not for earning dividend. In its reply the appellant also submitted that it had not received any dividend and therefore there was no question of application of Section 14A. The appellant has also cited case laws in support of its contention."

4. In order to proceed further and understand the matter in controversy para 5 of the Assessment Order is relevant and is reproduced as under:

*"5. **Disallowance u/s 14A:***

5.1 The assessee company Vide Notice u/s 142(1) issued on 19.08.2018 was asked to explain why provision of Sec 14A r.w.r. 8D are not applicable to you and why disallowance may not be made u/s 14A r.w.r. 8D of the LT.Rules. Further a show-cause notice were also issued on 07/12/2018, requesting the assessee to show cause as to why disallowance u/s 14A r.w.r 8D as worked out at amounting to Rs.50,81,159/- shall not be made in your case.

In response to the same the A R of the assessee filed its reply as follows:

"We have not received any exempt income, hence provisions of Section 14A r.w.r. 8D of the IT Rules are not applicable to us.

Without prejudice to the above, we further submit that we have purchased shares of Zodiac Developers Private Limited to acquired controlling interest in the subsidiary company viz. Zodiac Developers Pvt Ltd.

Shares purchased by person as promoter, manager, or controller of companies is acquisition of shares for the purpose of business and profession of promoting, managing or controlling companies. Therefore. interest payable on capital borrowed for purchasing shares by such persons will be allowable

and section 14A cannot be applied through dividend received may not be taxable.

On a long-term analysis of price earnings ratio of the overall share market capitalization, we find that earning by way of dividend is hereby 1.5% to 2%. There are large number of companies which do not declare any dividend. If we consider average market capitalization at BSE and total amount of dividend declared by all companies, the yield by way dividend will not be more than 1%. Therefore, it is clear that shares are not purchased merely to earn the dividend, rather, the purpose of earning dividend though implicit, comes much after in priority. Therefore, even purchase of share by investors is basically to earn capital gains mostly, within short term which is taxable and in case of long- term capital gain also there is tax by way of STT or if the shares are not sold through stock exchange, then also long-term capital gain tax will be payable. In case of unquoted shares, the sale through stock exchange and the levy of STT is out of question and therefore, in that case long term capital gain will be taxable.

In our case the shares are unquoted, hence capital gain (long-term at well as short-term) is always taxable.

Therefore, for whatever purpose share may be purchases it cannot be said that shares were purchases to earn tax-free income. No wise man will purchase shares to earn 1-2% of investment by way of dividend. If the capital is borrowed to purchase shares, it cannot be said that interest is an expenditure incurred to earn income by way of dividend, which is not included in total income under the Act and which has not suffered tax. The commitment of interest begun at the time of borrowing and not when a dividend is earned. Similarly, the opportunity to earn by deploying funds in other manner is lost once money is invested in shares. Payment of interest or loss of other earnings take place even when on dividend is

earned. Therefore, it cannot be said that interest is expenditure to earn dividend.

In case of unquoted shares of companies, the probability of earning taxable income being many times higher than probability of earning dividend income, hence it is wrong to say that investment is made, and expenses in form of carrying costs, are incurred only to earn Dividend income.

5.2 Assessee's submission is considered but not found acceptable as the assessee submitted a general statement, without corroborating the facts with the financial statements of the assessee. The following facts were drawn from the Financial Statement of the assessee:

(i) on perusal of the balance sheet of the assessee it was observe that the assessee had Non-Current Investment of Rs.15,60,00,000/- as on 31/03/2016 and 31/03/2015 in the Equity Shares, out of the total of the assets side of Rs.15,94,58,744/- as on 31.3.2016 and Rs.15,72,01,787/- as on 31.03.2015. The income from the above investment may result into Dividend income which is exempt income

(ii) The assessee had Short-term borrowing of Rs.3,06,01,355 as on 31.03.2016 and Rs.3,31,20,033 as on 31.03.2015.

(iii) The assessee had Finance Cost of Rs.43,65,629/- debited to the profit & loss account and other expense of Rs. 27,82,092/-.

(iv) Revenue of the Assessee for the F.Y. 2015-16 consist of Sale of Services (Architect and Liaisoning fee) and Interest Income.

(v) In view of the above fact, it is clearly shown that the interest bearing fund were used to made investment in equity shares.

5.3 Further It has been held in the case of Godrej & Royce vs. DCTT (Bombay High Court) that Rule 8D r.w.s. 14A (2) is not arbitrary or unreasonable.

Also, the CBDT vide its circular dated 5/2014 has clarified that Rule 8D read with section 14A of the Act provides for disallowance of expenditure even where taxpayer in a particular year has not earned any exempt income.

In the case of ITO vs. Daga Capital (ITAT Mumbai - Special Bench), it was held that Section 14A has an overriding effect and applies to all expenditure in relation to exempt income even though such expenditure would have been allowable under other provisions such as 36 (1) (iii).

5.4 Therefore, it is evident that expenses claimed in profit & loss account and the assessee has made substantial investment. These expenses have to be disallowed under section 14A r.w.r. 8D of the IT Rules regardless of whether they are direct or indirect, fixed or variable and managerial or financial in accordance with law. Accordingly, taxable income has to be determined as per mechanism laid down in sub-section (3) of section 14A in accordance with the method as prescribed under Rule 8D and there is no exception for not considering anyincome, which is exempt from tax.

5.5 In view of the above facts, amount of expenditure in relation to income not includible in the total income from the investment made in shares of private limited company has to be worked out as per mechanism laid down in sub-section (3) of section 14A in accordance with the method as prescribed under Rule 8D. Hence, the disallowance u/s 14A is computed in accordance with the method prescribed in Rule 8D of the I.T.Rules, 1962 as under:

i.	*The amount of expenditure directly relating to income which does not form part of total income.*		*Nil*

ii.	*Proportionate of interest expenditure computed in accordance with the formula given in Rule 8D(2)(ii).*	*(A X B /C)*	*Rs. 43,01,159/-*
iii.	*Amount equal to one half percent of the average of the value of investment, income from which does not or shall not form part of the total income as appearing in the Balance Sheet of the assessee, on the first day and the last day of the previous year.*	*0.5% of Rs. 15,60,00,000/-*	*Rs. 7,80,000/-*
Total Expenditure disallowed u/s. 14A			***Rs. 50,81,159/-***

Note	
i.	*A = Amount of Expenditure by way of Interest = Rs. 43,65,629/-.*
ii.	*B = Average of exempt income yielding investments = Rs. 15,60,00,000/-*
iii.	*C = Average of total assets as appearing in the balance sheet of the assessee = Rs. 15,83,30,265/-*

B. Average Value of Investments –

= Opening balance of investments + Closing Bal. of investments

= 15,60,00,000 + 15,60,00,000 = Rs. 15,60,00,000/-

2

C. Average value of Total assets

= Opening balance of Total Assets + Closing Balance of Total Assets

2

5.6. In view of the above facts, Rs. 50,81,159/- is disallowed u/s. 14A and added to the total income of the assessee. This is the fit case for initiated of penalty u/s. 271(1)(c) of the Income Tax Act, 1961, as the assessee has furnished inaccurate particulars of its income. Therefore, penalty notice u/s. 271 (1)(c) of the I.T. Act, 1961 is issued for furnishing inaccurate particulars of income."

5. The Ld. CIT(A) had confirmed the order of the Ld. AO for the reasons mentioned in para 5.7 of Ld. CIT(A)order and is reproduced as under:

"5.7 It would not be outer place to mention here that the Finance Act 2022 had amended section 14A. Most importantly the amendment has been made operational retrospectively to hold that even if no exempt income is earned yet provisions of section 14A would apply. An explanation to section 14A of the Act has been inserted by Finance Act 2022 to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income. The relevant extract of Finance Act 2022 is reproduced below:

10.3 CBDT issued Circular No. 5/2014, dated 11/02/2014, clarifying that Rule 8D read with section 14A of the Act provides for disallowance of the expenditure even where tax payer in a particular year has not earned

any exempt income. However, still some courts have taken a view that if there is no exempt income during a year, no disallowance under section 14A of the Act can be made for that year. Such an interpretation is not in line with the intention of the legislature. To illustrate, if during a previous year, an assessee incurs an expense of 1 lakh to earn non-exempt income of 1.5 lakh and also incurs an expense of 20,000/- to earn exempt income which may or may not have accrued/received during the year. By holding that provisions of section 14A of the Act does not apply in this year as the exempt Income was not accrued/received during the year, it amounts to holding that 20,000/- would be allowed as deduction against non-exempt income of 11.5 Lakh even though this expense was not incurred wholly and exclusively for the purpose of earning non-exempt income. Such an interpretation defeats the legislative intent of both section 14A as well as section 37 of the Act. 10.4 In order to make the intention of the legislation clear and to make it free from any misinterpretation, FA 2022 has inserted an Explanation to section 14A of the Act to clarify that notwithstanding anything to the contrary contained in the Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income."

6. If we summarize the grounds of appeal, two questions arises for determination by this Tribunal as under:

   a. Whether disallowance can be made u/s. 14A r.w.r. 8D of the I.T. Rules, 1962 in the absence of exempt income for the relevant A.Y. 2016-17?

b. Whether disallowance can be made under Rule 8D without satisfaction of the Ld. AO u/s. 14A or whether the explanation to section 14A inserted by Finance Act, 2022 can be made applicable retrospectively?

7. We have heard the Ld. AR on behalf of the assessee and Ld. DR on behalf of the revenue and also considered the facts and circumstances and the case referred and relied on behalf of appellant/assessee. The Ld. AR on behalf of the appellant/assessee has argued that:

   i. When no exempt income was earned in the financial year 2016, the addition u/s. 14A was not permissible.

   ii. The explanation inserted by Finance Act, 2022 in Section 14A cannot be applied retrospectively.

   iii. The Ld. AO has not specified any income therefore anticipated income cannot be called as taxable income.

   iv. The observation of the Ld. CIT(A) at page 13, para 5.7 of his ordershows that the Ld. CIT(A) has held that the amendment to Section 14A is applicable retrospectively for doing disallowance u/s. 14A r.w.r. 8D of the IT Rules,

1962, notwithstanding that no exempt income has been earned for the relevant A.Y. 2016-17.

8. In support of his arguments, the Ld. AR on behalf of the assessee referred and relied upon the following cases:

- Case No. 1: Civil Appeal No. 7020 of 2011, Godrej & Brave Manufacturing Company Limited Vs. Dy. Commissioner of Income Tax &Anr., Hon'ble Supreme Court Order dated 08.05.2017:

"36 .... Nevertheless,irrespective of the aforesaid question, what cannot be denied is that the requirement for attracting the provisions of Section 14A(1) of the Act is proof of the fact that the expenditure sought to be disallowed/deducted had actually been incurred in earning the dividend income....

37. .... Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best

judgment determination, as earlier prevailing, would become applicable."

- Case No. 2: Civil Appeal Nos. 35, 37, 38, & 39 of 2019, Commissioner of Income Tax Vs. Reliance Industries Ltd., [2019] 102 taxmann.com 52 (SC), order dated 02.01.2019:

"6.1. Whether the High Court is correct in holding that interest amount being interest referable to funds given to subsidiaries is allowable as deduction under Section 36(1)(iii) of the Income Tax Act, 1961 (for short 'the Act') when the interest would not have been payable to banks, if funds were not provided to subsidiaries:

7. Insofar as the first question is concerned, the issue raises a pure question of fact. The High Court has noted the finding of the Tribunal that the interest free funds available to the assessee were sufficient to meet its investment. Hence, it could be presumed that the investments were made from the interest free funds available with the assessee. The Tribunal has also followed its own order for Assessment Year 2002-03."

- Case No. 3: SLP (Civil) Diary No(S). 13507 of 2019, Principal Commissioner of Income Tax Vs. GVK Project and Technical Services Ltd., [2019] 106 taxmann.com 181 (SC), dated 03.05.2019:

"1. The Revenue's appeal is with respect to the disallowance made by the Assessing Officer ('AO') under Section 14A of the Income-tax Act, 1961 (hereinafter 'the Act'). The AO had proceeded to calculate the disallowances based upon the investments made by the assessee. The CIT(A) and the Income Tax Appellate Tribunal (ITAT) allowed the

assessee's appeals by following the ruling in 'Cheminvest Ltd. vs. CIT [2015] 61 taxmann.com 118/234 Taxman 761/378 ITR 33 (Delhi): the Court had then held that in the absence of any exempt income disallowance was impermissible. For the relevant Assessment Year (2013-14), concededly, the assessee did not report any exempt income. Consequently, no substantial question of law arises; the appeal is therefore dismissed alongwith the pending application."

- Case No. 4: Civil Appeal No.351-355 of 2005, Sedco Forex International Drill. Inc. &Ors. Vs. Commissioner of Income Tax, Dehradun &Anr., Hon'ble Supreme Court order dated 17.11.2005:

"In our view the 1999 Explanation could not apply to assessment years for the simple reasons that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in CIT Vs. S. G. Pgnatale (supra) was followed in 1989 by a Division Bench of the Gauhati High Court in Commissioner of Income Tax 1983 Explanation had been given effect from 1.4.1979 whereas the year in question in that case was 1976-77 and said: "/005. it is settled law that assessment has to be made with time. The mere fact that the assessments in question has (sic) somehow remained pending on April 1, 1979, cannot be congent reason to make the Explanation applicable to the cases of the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessees at the hand.

The reason of the Gauhati High Court was expressly affirmed by this Court in Commissioner of Income Tax Vs. Goslino Mario [2000] 241 ITR 312 at 314]. These decisions are thus authorities for the proposition that the 1983 Explanation expressly introduced with effect from a particular date would not effect earlier Assessment years."

- Case No. 5: Civil Appeal Nos. 4742-4743 of 2021, M. M. Aqua Technologies Ltd. Vs. Commissioner of Income Tax, Delhi-III, dated 11.08.2021:

> *"22. Second, a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in Sedco Forex International Drill. Inc. v. CIT, (2005) 12 SCC 717 as follows:*
>
> > *17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585, 598]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".*
>
> > *18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an*

Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively.

23. This being the case, Explanation 3C is clarificatory – it explains Section 43B(d) as it originally stood and does not purport to add a new condition retrospectively, as has wrongly been held by the High Court."

- Case No. 6: ITA No. 204/2022 & CM Appl. No. 31445/2022, PR. Commissioner of Income Tax (Central)-2 Vs. M/s. Era Infrastructure (India) Ltd., Delhi High Court order dated 20.07.2022:

"Manmohan, J. Present Income-tax Appeal has been filed challenging the Order passed by the Income-taxAppellate Tribunal (ITAT') in ACIT v. Era Infrastructure (India) Ltd. [ITA No. 798/Del/2018, dated 10thMarch, 2021] for the Assessment Year 2013-14.

2. Learned Counsel for the Appellant states that ITAT has erred in law in deleting the disallowance of Rs. 3,61,53,268/-made by the Assessing Officer under Rule 8D of Income-tax Rules, 1962 read with section 14A of the Income-tax Act, 1961 ('the Act').

3. He submits that the ITAT erred in relying on the decision of this Court in Pr. CIT v. IL&FS Energy Development Company Ltd. [2017] 84 taxmann.com

186/250 Taxman 174/399 ITR 483 (wherein it has been held that no disallowance under section 14A of the Act can be made if the assessee had not earned any exempt income), as the revenue has not been accepted the said decision and has preferred an SLP against the said decision.

4. *Learned counsel for the petitioner also submits that in view of the amendment made by the Finance Act, 2022 to section 14A of the Act by inserting a non obstante clause and an explanation after the proviso, a change in law has been brought about and consequently, the judgments relied upon by the authorities below including IL&FS Energy Development Co. Ltd. (supra) are no longer good law. The amendment to Section 14A of the Act is reproduced hereinbelow:*

> *'Amendment of section 14A.*
>
> *In section 14A of the Income-tax Act,*
>
> *(a) in sub-section (1), for the words "For the purposes of, the words "Notwithstanding anything to the contrary contained in this Act, for the purposes of shall be substituted;*
>
> *(b) after the proviso, the following Explanation shall be inserted, namely:-*

"[Explanation.-For the removal of doubts, it is hereby clarified that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income.]"

5. *However, a perusal of the Memorandum of the Finance Bill, 2022 reveals that it explicitly stipulates that the amendment made to section 14A will take effect from 1st April, 2022 and will apply in relation to the assessment year 2022-23 and subsequent assessment years. The relevant extract of Clauses 4, 5, 6 & 7 of the Memorandum of Finance Bill, 2022 are reproduced hereinbelow:*

> *"4. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert an Explanation to section 14A of the Act to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income.*
>
> *5. This amendment will take effect from 1st April, 2022.*
>
> *6. It is also proposed to amend sub-section (1) of the said section, so as to include a non-obstante clause in respect of other provisions of the Income-tax Act and provide that no deduction shall be allowed in relation to exempt income, notwithstanding anything to the contrary contained in this Act.*
>
> *7. This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years." (Emphasis supplied).*

8. *Consequently, this Court is of the view that the amendment of Section 14A, which is "for removal of doubts" cannot be*

presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood."

9. With regard to the question no. 1 for the determination as enumerated in para 6 of this order, we have meticulously examined the assessment order.

10. It is thus evident from the assessment order that in total expenditure disallowed u/s. 14A is Rs. 50,81,159/- which comprises a some of Rs. 43,01,159/- as proportionate of interest expenditure computed in accordance with the formula given in Rule 8D(2)(ii) of Income Tax Rules, 1962alongwith 0.5% of Rs. 15,60,00,000/- i.e., 7,80,000/- which is amount equal to one half percent of the average of the value of investment, income from which does not or shall not form part of the total income as appearing in the Balance Sheet of the assessee.

11. The Ld. AO has reached to the said conclusion on the basis of the fact that on perusal of the balance sheet of the assessee, it was noticed that,the appellant had Non-Current Investment of Rs.15,60,00,000/- as on 31.03.2016 and 31.03.2015 in the Equity Shares. Therefore, the income from the above investment may result into Dividend income which is exempt income. Further, the interest-bearing dividend fund were used to make investment in equity shares.

12. On examining the Ld. CIT(A) order, it is to be noticed that the Ld. CIT(A) has based his finding while upholding the disallowance made by the Ld. AO on the ground that the Finance Act, 2020has amended Section 14A by adding explanation to section 14A of *"the Act"* to clarify that notwithstanding anything to contrary contained in this Act, the provisions of this Section shall apply and shall be deemed to have always applied in a case where the exempt income has not accrued or arisen or has not been received during the previous year relevant to an A.Y. and the expenditure has been incurred during the said previous year in relation to such exempt income. The Ld. CIT(A) has concluded in para no. 5.7 that the amendment has been made operational retrospectively to hold that even if no exempt income is earned, yet provision of Section 14A is appliable.

13. The Ld. AR on behalf of the assessee/appellant has vehemently argued that as noticed earlier that the said amendment in Section 14A is not applicable retrospectively and further that the assessee has sufficient funds apart from the borrowed amount carrying interest for investment in shares and as such the disallowances u/s. 14A was not warranted because no exempt income was earned in the previous year relevant for the concerned A.Y. 2016-17.

14. The Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Reliance Industries Ltd., (case no. 2 referred "*supra*") was pleased to hold that the Hon'ble High Court had noted the finding of the Tribunal that the interestfree funds available to the assessee were sufficient to makes its investment.Hence, it could be presumed that the investments were made from the interest free funds available with the assessee.

15. Further, the Hon'ble Supreme Court in Principal Commissioner of Income Tax Vs. GVK Project and Technical Services Ltd., (case no. 3 referred *"supra"*) was pleased to hold that in the absence of any exempt income,disallowances were impermissible because for the relevant A.Y. 2013-14, concededly, the assessee did not report any exempt income.

16. Regarding the alleged retrospective effect given to the amendment in Section 14A by the Ld. AO as well as Ld. CIT(A), Ld. AR on behalf of the assessee/appellant referred the case of Hon'ble Delhi High Court of Principal Commissioner of Income Tax (Central)-2 Vs. M/s. Era Infrastructure (India) Ltd., order dated 20.07.2022 (supra), is squarely applicable to the present case because the Hon'ble High Court was pleased hold after detailed discussion of various settled

legal principles and while relying the Hon'ble Supreme Court judgment in Sedco Forex International Drill. Inc. &Ors. Vs. Commissioner of Income Tax, Dehradun &Anr., (2005) 12 SCC 717 and held that a retrospective provision in a Tax Act which is for the removal of doubts cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood.

17. From the above discussions and the law discussed, it became crystal clear that the Ld. AO has proceeded for disallowance made in this case on the basis of presumptions that the investment was made from the borrowed funds bearing interest expenditure which may earn dividend income in future and further that such disallowances and additions are permissible u/s. 14A r.w.r. 8D of the I. T. Rules,1962.

18. In view of the discussions made and the relevant law laid down by the Hon'ble Supreme Court as well as Hon'ble High Court, the said finding and observation of the Ld. AO are neither tenable nor legally sustainable in the eyes of law. While upholding the finding of the Ld. AO and permitting the disallowances made therein in the Assessment Order, the Ld. CIT(A) has committed illegality and perversity by relying the explanation to Section 14A brought into existence by the

Finance Amendment Act, 2022 while giving retrospective effect to the said amendment which as has been held by the Hon'ble High Court of Delhi in M/s. Era Infrastructure (India) Ltd., (supra), to be not permissible.

19. In other words, the amendment in Section 14A is not applicable retrospectively to the previous A.Y. 2016-17.For the above reasons, the finding recorded by the Ld. CIT(A) while upholding the assessment order of Ld. AO are found to be perverse,not legally sustainable in the eyes of law and accordingly set aside.

20. Since the satisfaction of the Ld. AO for making disallowance u/s. 14A r.w.r. 8D was based on presumptions of earning dividend income in future, therefore, cannot be said to be based on the legally sustainable satisfaction. We therefore conclude that both the question no. 1 and 2 enumerated for consideration before this Tribunal are decided against the revenue and in favour of the assessee/appellant,the ground no. 1 and 2 of appeal are decided in favour of assessee. In view of decision on ground no. 1 and 2 in favour of assessee. The decision on other grounds which are of general nature becomes infructuous. We accordingly delete the disallowances made by the Ld. AO.

21. The appeal is accordingly disposed off in above terms in favour of the assessee/appellant.

22. In the result, appeal filed by the assessee is allowed in the above terms.

Order pronounced in the open court on 18.06.2024

Sd/-	Sd/-
(MS. PADMAVATHY S)	**(RAJ KUMAR CHAUHAN)**
(ACCOUNTANT MEMBER)	**(JUDICIAL MEMBER)**

Mumbai / Dated 18.06.2024
Karishma J. Pawar (Stenographer)

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mumbai