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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 459/2024

PRINCIPAL COMMISSIONER OF INCOME

TAX - 4 DELHI

.....Appellant

Through: Mr. Abhishek Maratha, SSC
with Mr. Parth Semwal, Mr.
Apoorv Agarwal, JSCs, Ms.
Nupur Sharma, Mr. Gaurav
Singh, Mr. Bhanu Karan Singh,
Ms. Jodha, Ms. Muskaan Goel
& Ms. Paridhi Kohli, Advs.

versus

HERO FUTURE ENERGIES PVT LTDRespondent

Through: Dr. Rakesh Gupta, Mr. Somil
Agarwal & Mr. Dushyant
Agrawal, Advs.

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+ ITA 460/2024

PRINCIPAL COMMISSIONER OF INCOME

TAX-4 DELHI

.....Appellant

Through: Mr. Abhishek Maratha, SSC
with Mr. Parth Semwal, Mr.
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Nupur Sharma, Mr. Gaurav
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& Ms. Paridhi Kohli, Advs..

versus

HERO WIND ENERGY PVT LTDRespondent

Through: Dr. Rakesh Gupta, Mr. Somil
Agarwal & Mr. Dushyant
Agrawal, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA



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ORDER
29.08.2024

CM 48420/2024 (497 Days Delay in Refiling) in ITA 459/2024

Bearing in mind the disclosures made, the delay of 497 days in refiling the appeal is condoned.

Application stands disposed of.

CM APPL. 48429/2024 (51 Days Delay in filing) & 48430/2024 (219 Days Delay in Refiling) in ITA 460/2024

Bearing in mind the disclosures made, the delay of 51 days in filing and 219 days in refiling the appeal is condoned.

Applications stand disposed of.

ITA 459/2024 & 460/2024

1. Mr. Maratha, learned counsel appearing for the appellants, fairly concedes that the questions which were sought to be canvassed in these appeals stand concluded and answered against the appellant in terms of the judgment rendered in **Principal Commissioner of Income Tax Central-3, New Delhi vs Alchemist Ltd.**¹.

2. In *Alchemist*, while dealing with the interplay between Section 14A of the **Income Tax Act, 1961**² and Rule 8D of the **Income Tax Rules, 1962**³, we had held as follows:

“22. As would be evident from the aforesaid conclusions rendered in *Maxopp*, it was found that Section 14A is clearly concerned with an identification and attribution of expenditure with reference to exempt income which otherwise would not form part of total income. It was thus explained that where the income of an assessee has both taxable and non-taxable elements, it would be the principle of apportionment of expenditure relating to non-taxable income which would have to be identified. The view expressed by this High Court was ultimately affirmed.

¹ 2024:DHC:6439-DB

² Act

³ Rules



23. It is the aforementioned fundamental precepts underlying Section 14A as propounded by the Supreme Court in the decisions noticed hereinabove which find resonance in *Caraf Builders*. The said decision correctly identifies the fundamental principle being of ensuring that expenditure incurred in the course of earning exempt income is not set off against income which is otherwise taxable. It is this basic tenet which constrains one to bifurcate and apportion the expenditure which may be claimed by an assessee. Right from *Walfort*, all judgments rendered in the context of Section 14A and noticed hereinabove, have consistently spoken of apportionment of expenditure and the imperatives of an enquiry to identify whether the expenditure which is claimed is not in relation to exempt income. The expenditure which can be legitimately claimed by an assessee as deductible can only be that which has been expended to earn taxable income. The assessee is not permitted to avail of a dual benefit of firstly claiming the income as being exempt and thereafter seeking to set off the expenditure incurred in connection therewith against income which is taxable. This if countenanced would clearly lead to the taxable income and which is exigible to the levy of tax under the Act being further reduced.

24. Once the requirement of bifurcation and apportionment of expenditure is found to have been accorded a judicial imprimatur by the Supreme Court in *Maxopp* and the various decisions noticed hereinabove, there would exist no justification or leeway to even consider the contentions which were advanced by Mr. Kumar and Mr. Maratha. As we read Section 14A, it becomes apparent expenditure is liable to be excluded from consideration only if the assessee is found to have earned exempt income and the expenditure pertains to that income. Absent any income which is exempt or claimed as such in the relevant year, the statutory exclusion would not apply. The existence of exempt income is thus a sin qua non for the invocation of Section 14A. It is pertinent to note that the Act is not concerned with notional or illusory income. Thus, unless there be non-taxable income which arises or accrues, the expenditure would not suffer disqualification under Section 14A.

25. We are conscious of the Explanation which has come to be inserted in Section 14A and which now seeks to assert that the provision would apply irrespective of whether exempt income had arisen, accrued or had been received in the previous year. However, the extent to which the said statutory amendment would apply to the assessment years in questions is an issue which we propose to dwell upon in the subsequent parts of this decision.

26. Our view on the imperatives of apportionment and the identification of expenditure with reference to exempt income is further fortified not only from a plain reading of Section 14A(2) which alludes to income which does not form part of total income,



but also Rule 8D and which is the machinery provision for determination of the amount of expenditure incurred in relation to exempt income.

27. Rule 8D again speaks of expenditure incurred in relation to exempt income. This becomes evident from a reading of that provision which is reproduced hereinbelow:-

“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).

[(2) The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely:—

(i) the amount of expenditure directly relating to income which does not form part of total income; and

(ii) 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 or shall not form part of total income;

Provided that the amount referred to in clause (i) and clause (ii) shall not exceed the total expenditure claimed by the assessee.]

(3) [***]”

28. As is evident from a reading of the aforesaid Rule, the determination of expenditure is indelibly linked to income which does not form part of total income and the expenditure being directly relatable to such income.

29. While concluding, we also deem it appropriate to deal with a contention which was advanced by Mr. Maratha and proceeded on the basis of the Explanation appended to Section 14A.

30. It must at the outset be noted that the aforesaid Explanation came to be inserted by virtue of the 2022 Act with effect from 01 April 2022. It was, however, sought to be contended by learned counsels for the appellants that since the aforementioned statutory amendment is explanatory, aimed at removing doubts and specifically asserted to be clarificatory, it would clearly apply to



the present appeals. Based on the aforesaid premise, it was argued that the Explanation thus clearly provides for expenditure being taken into account irrespective of whether exempt income had accrued, arisen or been received. It was thus suggested that the Explanation fundamentally alters the position which otherwise prevailed prior to the amendment and being clarificatory would apply even to past assessment years including those with which we are concerned in these two appeals.

31. However, we find that the extent to which the said Explanation could apply and whether it could even be considered to be a clarificatory provision is one which stands answered against the appellants in light of the judgment of the Court rendered in **Principal Commissioner of Income Tax vs. Era infrastructure (India) Ltd.**

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33. As is manifest from the above, the Court in *Era Infrastructure* had clearly held that the mere usage of the expressions “*for the removal of doubts*”, “*clarified*” or titling a provision as an explanation would not be determinative of whether it is to apply retrospectively. It was thus held that where it be found that the amendment fundamentally alters the statutory position which prevailed, it clearly ceases to be explanatory or one which is aimed at removing an ambiguity. However, any debate that could have possibly ensued in the aforesaid context stands laid to rest by virtue of the Memorandum explaining the provisions of the Finance Bill, 2022 and which unequivocally declares that “*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*”. We thus find ourselves unable to discern any justifiable reason to take a view contrary to what was expressed in *Era Infrastructure*.”

3. Following the aforesaid, we find no merit in the instant appeals.

The same shall, accordingly, stand dismissed.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

AUGUST 29, 2024/kk