

आयकर अपीलीय अधिकरण, “सी” खंडपीठ मुंबई

INCOME TAX APPELLATE TRIBUNAL, MUMBAI - 'C' BENCH.

सर्वश्री विजयपाल राव , न्यायिक सदस्य एवं राजेन्द्र, लेखा सदस्य

Before S/Sh. Vijay Pal Rao, Judicial Member & Rajendra, Accountant Member

आयकर अपील सं./ITA No.240/Mum/2012, निर्धारण वर्ष/Assessment Year-2006-07

Piem Hotels Limited, Taj President, 90, Cuffe Parade, Colaba, Mumbai-400005 PAN:AAACP8367M	Vs	DCIT Range 3(2), Mumbai.
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(अपीलार्थी/ Appellant)

(प्रत्यर्थी / Respondent)

आयकर अपील सं./ITA No.241/Mum/2012, निर्धारण वर्ष/Assessment Year-2007-08

Piem Hotels Limited, Taj President, 90, Cuffe Parade, Colaba, Mumbai-400005 PAN:AAACP8367M	Vs	DCIT Range 3(2), Mumbai.
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(अपीलार्थी/ Appellant)

(प्रत्यर्थी / Respondent)

आयकर अपील सं./ITA No.850/Mum/2012, निर्धारण वर्ष/Assessment Year-2008-09

Piem Hotels Limited, Taj President, 90, Cuffe Parade, Colaba, Mumbai-400005 PAN:AAACP8367M	Vs	DCIT Range 3(2), Mumbai.
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निर्धारिती ओर से / Assessee by

**: Shri Sunil M. Lala & Varun
Sankhesara**

राजस्व की ओर से/ Revenue by

: Shri Premanand J.

सुनवाई की तारीख/ Date of Hearing

: 10-03-2015

घोषणा की तारीख / Date of Pronouncement

: 20-03-2015

आयकर अधिनियम 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

Per Rajendra, AM लेखा सदस्य राजेन्द्र के अनुसार:

Challenging the order dated 25.10.2011 of the CIT(A)-4, Mumbai the assessee has raised following grounds of appeal

1. On the facts and circumstances of the case, the learned Commissioner of Income-tax (Appeals) - IV, Mumbai [" CIT (A)"] has legally erred in confirming the action of the Assessing Officer of making disallowance of Rs 6,55,913 under Section 14A of the Income tax Act, 1961 (the Act').

2. The Appellant Company craves leave to add, alter, amend and / or withdraw all or any of the Grounds of Appeal as may be considered necessary either at or before the appeal hearing.

ITA/241/Mum/2012-AY.2007-08:

Grounds of appeal for the AY. 2007-08 read as under:

1. On the facts and circumstances of the case, the learned Commissioner of Income-tax (Appeals) - IV, Mumbai [" CIT (A)"] has legally erred in confirming the action of the Assessing Officer of making disallowance of Rs 6,19,500 under Section 14A of the Income tax Act, 1961 (the Act').

2. The Appellant Company craves leave to add, alter, amend and / or withdraw all or any of the Grounds of Appeal as may be considered necessary either at or before the appeal hearing.

ITA/850/Mum/2012-AY.2008-09:

Grounds of appeal for the AY. 2007-08 read as under:

1. *On the facts and circumstances of the case, the learned Commissioner of Income-tax (Appeals) - IV, Mumbai [" CIT (A)"] has legally erred in confirming the action of the Assessing Officer of making disallowance of Rs 5,99,500 under Section 14A of the Income tax Act, 1961 (the Act').*
2. *The Appellant Company craves leave to add, alter, amend and / or withdraw all or any of the Grounds of Appeal as may be considered necessary either at or before the appeal hearing.*

ITA/240/Mum/2012-AY.2006-07:

Assessee-company, engaged in the business of Hotel Business & Catering Services, filed its return of income on 29.11.2006 declaring total income of Rs.68,99,23,100/-. Assessing officer(AO)finalised the assessment u/s.143(3) of the Act, on 31.12.2008, determining the total income at Rs.71,13,90,040/-.

2. Effective Ground of appeal deals with disallowance made u/s.14A of the Act. During the assessment proceedings the AO found that the assessee had received dividend income of Rs. 69,53,984/- which was claimed exempt u/s.10(33) of the Act, that no disallowance was offered u/s.14A by the assessee. Therefore, he applied Rule 8D and disallowed Rs. 6, 55,913/- u/s. 14A of the Act.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, it was claimed that no expenditure was attributable to dividend income, that no new investment has been made and no expenditure was required for earning of dividend income. In support of its claim the assessee relied on the orders of the FAA for AY.s. 2004-05 and 2005-06.

After considering the submissions of the assessee and the assessment order, the FAA held that no disallowance had been made on account of interest and the only disallowance is on account of administrative expenses allocable to dividend income, that the assessee had claimed that no new investments were made or sold, that in whatever form the investments were maintained it required certain administrative efforts, that every investor always liked to keep in touch with the market and try to maximise its gain at the right opportunity, that it was not correct to say that no administrative efforts were required in maintaining the investment, that realization of dividend also involved certain efforts in whatever form, that amount of expenditure relating to dividend income could be more or less but it had to be allocated out of the total administrative expenses. He further held that Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. (328 ITR 81) had upheld Rule 8D and had observed that it was applicable from AY. 08-09, whereas for earlier years it has been held that a reasonable disallowance is to be made. Finally, he held that the disallowance calculated by the AO was the most reasonable and had to be confirmed.

4. Before us, Authorised Representative (AR) submitted that the FAA had deleted the additions made for the AY.s. 2004-05 and 2005-06, that there was no difference in the facts for the year under appeal and facts of the earlier two AY.s., that the assessee had made strategic investment only during the year under consideration, that following the principle of consistency the AO should not have made any addition, that opening balances and the closing balances of the investment were same as per the balance-sheets containing the details of investments, that no satisfaction was recorded by the AO, that AO had not been pointed the expenditure incurred by the assessee. He relied on case of Magarpatta Township Development and Construction Co. Ltd. (46 Taxmann.com 284) with regard to recording of satisfaction. It was also argued that disallowance u/s 14A required a clear finding of incurring of expenditure, that in absence of same no disallowance could be made, that AO had not rebutted the submission of the assessee that no expenditure had been incurred to earn exempt income, that the disallowance made by the AO and confirmed by the FAA was not sustainable. He further relied on the case of Reliance Industries

Ltd.(339 ITR 632) delivered by the Hon'ble Bombay High Court.It was also argued that in case of strategic investment no disallowance u/s 14A of the Act could be made.In this regard the AR relied upon the case of J.M.Financial Ltd. (ITA/4251/Mum/ 2012)and Garware Wall Ropes Ltd. (46 Taxmann.com 2014) He referred to page nos. 16 and 17 of the Paper Book.Alternatively and without prejudice it was stated that disallowance should be restricted to 1%.

Departmental Representative(DR)contested that satisfaction was recorded by the AO, that he had asked a question to the assessee about invoking of provisions of section 14A of the Act, that after considering the submissions made by the assessee he had taken a decision, that assessee had not proved that how the investments made by it were strategic investments, that principals of res-judicate did not apply to the Income-tax proceedings.

5.We have heard the rival submission and perused the material before us.We find that while deciding the appeal for the AY.2005-06 the FAA had deleted the addition made by the AO following his order for the AY.2004-05,that the then FAA had held that assessee was holding strategic investment,that same was inherent part of overall planning,that there was no change in facts of the case that year as compared to the facts of AY.2004-05.

It is found that assessee had made investment in Taj group of companies only and it is part of Taj Group,that except for one or two companies most of the companies wherein it had made investment are in the same business or in the business related with the hotel industries.It is a fact the AO has not pinpointed as to what was the expenditure that was incurred by the assessee for earning tax free income.Incurring of expenditure by an assessee,is the precondition for making disallowance u/s.14A of the Act.The logic behind introducing the section was that the assessee should not claim or get two deductions-.i.e.offering no tax exempt income on one hand and claiming expenditure on other hand.Incurring of expenditure for earning exempt income has to be proved as a matter of fact.There cannot be any guess work or presumption about incurring of expenditure.If the assessee claims interest expenditure or other expenditure (administrative)for earning exempt income,definitely a disallowance can be made.But,if no claim is made then the AO should not invoke the provisions of section 14A.The assessee must have incurred some expense is a very general and vague phrase and does not indicate the incurring of expenditure.The word may leave the door open.In the case of J.M. Finance (supra),to which one of us was the party,it has been held that if no expenditure was incurred for earning tax free income no disallowance should be made.

It is said that fact of each case are different so,without highlighting the facts of that case no addition should be made on the basis of general presumption.The FAA,in the present case, had held that the every assessee would keep watch over the market to maximise its profit but he had missed one important aspect that the assessee was holding the shares of group concerns for strategic purposes and for selling and buying and selling them frequently.In absence of the finding as to how much was the sum incurred by the assessee under the head administrative expenses,it is not possible for us to uphold the order of the FAA for the year under consideration.

We further find that the FAA had not brought on record as to how the facts of earlier two AY.s.were different from the facts of the year consideration.In the case of Aroni Commerci -als Ltd.(362ITR403)the Hon'ble Bombay High Court has held as under:

Though the principle of res judicata is not applicable to tax matters as each year is separate and distinct,nevertheless where facts are identical from year to year,there has to be uniformity and in treatment.

Hon'ble jurisdictional High Court in the case of Gopal Purohit(336ITR287)has held that that there should be uniformity in treatment and when facts and circumstances for different years were identical particularly in the case of the same assessee.Analysis of the above two judgments lay down that the principle of consistency can be ignored only in certain conditions and without pinpointing the difference of facts for a particular year with the facts of earlier year/s consistency should be maintained.Considering the peculiar facts and circumstances of the case,we are reversing the order of the FAA. Effective ground of appeal raised by the assessee for the year

under consideration, is allowed in its favour.

ITA/850/Mum/2012-AY.2008-9

6. The facts of the case under consideration are similar to the facts of earlier year-the only difference is of disallowance made. The AO had made disallowance of Rs.6.19 Lakhs for the year under appeal as against the disallowance of Rs.6.55 lakhs made for the earlier year. Following our order for the earlier year, we decide the effective ground of appeal in favour of the assessee.

7. The effective ground for the year under appeal is identical to the grounds raised in the two earlier assessment years i.e. disallowance u/s. 14A of the Act. During the year the assessee had received dividend income of Rs. 1.07 Crores and it was claimed exempt u/s. 10(34) of the Act. The assessee itself offered disallowance of Rs. 1.18 Lakhs u/s. 14A of the Act. The disallowance consisted of entire interest expenditure and a portion of administrative expenses. Applying the provisions of Rule 8D of the Income-tax Rules, 1962 the AO made a disallowance of Rs. 7.16 Lakhs. During the appellate proceedings, the FAA after considering the submission of the assessee upheld the order of the AO. We find that the assessee itself had made disallowance of interest expenditure and part of administrative expenses for the year under consideration. As the facts and circumstances of the matter are almost similar to the facts of earlier two assessment years, therefore, following the same we decide the effective ground of appeal in favour of the assessee.

As a result, appeals filed by the assessee for all the three assessment years stand allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपीलें मंजूर की जाती हैं।

Order pronounced in the open court on 20th, March, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 20 मार्च, 2015 को की गई।

Sd/-

Sd/-

(विजयपाल राव/Vijay Pal Rao)

(राजेन्द्र/Rajendra)

न्यायिक सदस्य /JUDICIAL MEMBER

लेखा सदस्य /ACCOUNTANT MEMBER

,मुंबई/Mumbai, दिनांक/Date: 20.03.2015.

SK

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. Assessee /अपीलार्थी
2. Respondent /प्रत्यर्थी
3. The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त,
4. The concerned CIT /संबद्ध आयकर आयुक्त
5. DR "C" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि सी खंडपीठ, आ.अ.न्याया.मुंबई
6. Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai