

आयकर अपीलिय अधिकरण "I" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.538/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2007-08)

आयकर अपील सं./I.T.A. No.539/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2008-09)

Investrick Securities (India) Pvt. Ltd., 608, Dalamal House, Nariman Point, Mumbai - 400 021.	<b>बनाम/</b> v.	Dy. Commissioner of Income Tax 2(2), Aayakar Bhavan, M.K. Marg, Mumbai - 400020.
स्थायी लेखा सं./PAN : AAACI5005J		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Assessee by :	None
Revenue by :	Mr. SaurabhKumar Rai, DR

सुनवाई की तारीख / **Date of Hearing** : 04-01-2017

घोषणा की तारीख / **Date of Pronouncement** : 24-02-2017

आदेश / ORDER

**PER BENCH :**

These two appeals, filed by the assessee, being ITA No. 538/Mum/2013 and ITA No. 539/Mum/2013, are directed against two separate appellate orders dated 23-11-2012 and 24-11-2012 both passed by the learned Commissioner of Income Tax (Appeals)- 5, Mumbai (hereinafter called "the CIT(A)"), for the assessment years 2007-08 & 2008-09 respectively, the appellate proceedings before the learned CIT(A) arising from two separate assessment orders dated 27<sup>th</sup> October, 2009 and 29<sup>th</sup> December, 2010 respectively passed by the learned Assessing Officer (hereinafter called "the

AO”) u/s 143(3) of the Income-tax Act, 1961 (Hereinafter called “the Act”) for the assessment years 2007-08 & 2008-09.

2. The grounds of appeal raised in ITA No. 538/Mum/2013 for assessment year 2007-08 by the assessee in memo of the appeals filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called “the tribunal”) read as under:-

“1. The Commissioner of Income-tax (Appeals) - 5, Mumbai (hereinafter referred to as the CIT(A)) erred in upholding the action of the Deputy Commissioner of Income-tax - 2(2), Mumbai (hereinafter referred to as the Assessing Officer) in disallowing a sum of Rs 2,94,880 on account of expenses incurred for earning dividend income by invoking the provisions of section 14A of the Act.

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in disallowing the aforesaid amount of Rs 2,94,880 as there is no expenditure incurred in relation to earning dividend income and as such, no disallowance can be made under section 14A.

Without prejudice, the appellants contend that the calculation of proportionate expenses allocated to the earning of exempt income is not in consonance with the provisions of Rule 8D and hence, needs to be calculated as per law.

2. The CIT(A) erred in upholding the action of the Assessing Officer in disallowing a sum of Rs 15,71,714 on account of provision for loss - ESF Account.

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned disallowance of Rs 15,71,714 inasmuch as such disallowance is not in accordance with law.”

3. Brief facts of the case are that the assessee is in business of trading in shares and securities. It was observed by the A.O. from the return of income filed by the assessee with the Revenue that the assessee had not made any disallowance u/s 14A of the Act r.w. Rule 8D of Income-tax Rules, 1962

though there was dividend income of Rs. 5,35,539/- earned by the assessee and claimed by the assessee to be exempt u/s 10(34) of the Act. The assessee was asked to explain as to why disallowance out of expenditure should not be made u/s 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 with respect to expenditure incurred in relation to the earning of income which does not form part of total income. In reply, the assessee furnished the details and working and disallowance u/s 14A of the Act conceding in principle that the disallowance has to be made . The disallowance was worked out by the AO at Rs. 2,94,880/- keeping in view provisions of Section 14A of the Act read with Rule 8D of Income-tax Rules, 1962, vide assessment order dated 27.12.2009 passed by the AO u/s 143(3) of the Act.

The A.O. further observed that the business of the assessee consists of purchase and sale of shares. It was observed by the AO that while computing business profit the assessee had debited an amount of Rs. 15,71,714/- as provision for loss-ESF account which as per AO is patently in-admissible, these amounts were reduced from the business loss computed , vide assessment order dated 27-10-2009 passed by the AO u/s 143(3) of the Act.

4. Aggrieved by the assessment order dated 27-10-2009 passed by the A.O., the assessee carried the matter in appeal before the Id. CIT(A) wherein the assessee contended before learned CIT(A) that first issue is regarding disallowance of expenditure incurred in relation to earning of income which does not form part of total income as mandated u/s 14A of the Act read with Rule 8D(2)(iii) of the Income-tax Rules, 1962 that no expenditure was incurred in relation to earning of dividend income by the assessee and hence, no disallowance can be made u/s 14A of the Act. The Id. CIT(A) observed that the A.O. has made disallowance u/s 14A of the Act by invoking the provisions of Rule 8D(2)(iii) of Income-tax Rules, 1962 , the disallowance was upheld by Id. CIT(A). The Id. CIT(A) relied on the following case laws while upholding



1	Gujarat Ambuja	2062	245	23.03.07	110.28			
	Gujarat Ambuja	2062	243	29.03.07	104.07			
	Total		488		107.19	105.65	(1.54)	(1,547,098)
2	Reliance	150	160	29.03.07	1369.13	1368.1	(1.03)	(24,616)

The Id. CIT(A) relied upon CBDT Instruction No. 3 of 23.03.2010 and observed that since the provision is a mere notional loss, the same is not allowable, hence learned CIT(A) dismissed the appeal of the assessee by affirming the addition made in the assessment order dated 27.10.2009 passed by the AO u/s 143(3) of the Act, vide appellate order dated 23.11.2012 passed by learned CIT(A).

5. Aggrieved by the appellate order dated 23.11.2012 passed by the Id. CIT(A), the assessee is in appeal before the tribunal.

6. None appeared on behalf of the assessee, hence, we proceed to dispose of the appeal after hearing Id. D.R. .

We have observed that this appeal has been fixed from time to time since April 2014. The counsels who were appointed by the assessee to argue this appeal are all qualified Chartered Accountants namely CA Rajiv Khandelwal, CA Neelkanth Khandelwal and CA. Hetal Panchal . The said Chartered Accountants were appointed by the assessee company vide Power of Attorney dated 18<sup>th</sup> March, 2014 executed in favour of these Chartered Accountants, which is placed in file . The said Chartered Accountants duly accepted the appointment on 18-03-2014 itself to attend to this appeal before the tribunal. We have observed that said counsels have sought adjournments on one pretext or another from time to time or they have not attended the hearing on the dates fixed for hearing by the tribunal, which we will explain in details hereinafter. We have observed that on 01-12-2014, the adjournment was

sought on the ground that CA Neelkanth Khandelwal, who is briefed in the matter has to attend marriage in family on 01-12-2014 (letter of adjournment dated 01-12-2014 placed in file). The adjournment was granted by tribunal and matter was fixed for hearing on 07-01-2015. Then , again on 16-09-2015, letter of adjournment dated 16-09-2105 was filed on the pretext that CA Rajiv Khandelwal, who is briefed in the matter has twisted his ankle and has been advised rest for a day, letter of adjournment is placed in file. The tribunal again acceded to the request for adjournment of the counsel of the assessee and adjournment was granted by the tribunal and matter was fixed for hearing for 18.11.2015. Thereafter, again on 4-01-2016, letter of adjournment dated 04-01-2016 was filed on the ground that CA Rajiv Khandelwal who is briefed on the matter is on vacation, letter of adjournment is placed in file. The tribunal again acceded to the request for adjournment of the assessee's counsel and matter was fixed for hearing on 15-02-2016. Again on 15-02-2016 when the matter was called for hearing, letter of adjournment dated 11-2-2016 was already filed with Registry on 11-02-2016 by assessee's counsel seeking adjournment on the pretext that CA Neelkanth Khandelwal who is briefed in the matter is on vacation, letter of adjournment is placed in file. The tribunal again acceded to their request of adjournment and the matter was fixed for hearing on 09-05-2016, letter of adjournment is placed in file. Similarly, we have also painfully observed and noted from order sheet entries in file that there was non-compliances and non appearances by respective counsels on the dates of hearing held on 08-06-2015, 12-08-2015, 25-05-2016, 22-06-2016, 21-07-2016, 19-09-2016 and 13-12-2016, wherein none attended on behalf of assessee's counsel nor any application for adjournment was moved before the tribunal. Thus, from the above, it is evidently clear that the counsels of the assessee have accepted the engagements/appointment to represent assessee before the tribunal vide Power of Attorney dated 18<sup>th</sup> March, 2014 but they have conducted the appearances and compliances before the tribunal in a very lax and casual

manner which is not expected from the Senior counsels who are qualified professionals. We are pained to write these lax and casual approach on the part of the counsel of the assessee but at the same time we sincerely hope and believe that the assessee as well as the counsels will take this matter of non-appearances before the tribunal in a true and right spirit so that there could be early and quick dispensation of justice which is mandate of the tribunal. The said frequent adjournments on frivolous grounds or non-appearances of the assessee or its counsels cost time and resources of the country. If counsels after accepting appointment does not want to represent the assessee before the tribunal due to any reason whatsoever, then as per established standards and procedures, they should make a request before the tribunal to withdraw their Power of Attorney with copy to assessee instead of continuing with such appeals . We hope that our comments will be taken in true spirit by learned counsels and they will ensure due compliance at the time of hearing before the tribunal and help in quick disposal of the appeals by the tribunal.

7. The ld. D.R. submitted that the assessee has earned dividend amount of Rs. 5,35,539/- which has been claimed to be exempt u/s 10(34) of the Act. The A.O. disallowed an amount of Rs. 2,94,880/- by invoking provisions of section 14A of the Act r.w.r. 8D(iii) of Income-tax Rules, 1962 which has been later upheld by the ld. CIT(A).

8. We have heard ld. D.R. and perused the material placed on record. We have observed that the impugned assessment year is assessment year 2007-08. The AO has invoked Section 14A read with Rule 8D of Income-tax Rules, 1962 for making disallowance of expenditure incurred towards earning of exempt income. The Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. v. DCIT, (2010) 328 ITR 81(Bom.) has held that Rule 8D of Income-tax Rules, 1962 can be invoked for assessment year 2008-09 and

onwards and hence Rule 8D of Rules of 1962 cannot be invoked for assessment year 2007-08 for making disallowance of expenditure incurred towards earning of exempt income . Reasonable disallowance has to be made for assessment year 2007-08 keeping in view provisions of Section 14A of the Act in accordance with mandate of Section 14A(2) of the Act to disallow expenditure incurred in relation to earning of exempt income having regard to the accounts of the assessee. We have observed that the assessee has earned dividend income of Rs. 5,35,539/- which was claimed as exempt income u/s. 10(34) of the Act. The assessee as well A.O. has not undertaken any exercise to work out the disallowance having regard to the accounts of the assessee and the AO merely applied Rule 8D of Income-tax Rules, 1962 in an mechanical manner which Rule 8D of Rules of 1962 cannot be applied for the assessment year 2007-08 and earlier years in view of Hon'ble Bombay High Court decision in the case of Godrej and Boyce Manufacturing Company Limited(supra). The assessee has not submitted any details of the expenses incurred in relation to earning of dividend income , and instead claimed that no expenditure has been incurred which could be attributable to the earning of exempt income. In our considered view keeping in view facts and circumstances of the case, the matter needs to be set aside and restored to the file of the A.O. for deciding this issue de-novo on merits in accordance with mandate of Section 14A of the Act. The assessee is directed to produce all necessary details of expenses incurred for earning dividend income u/s 10(34) of the Act and other evidences/explanations in its defense and also to enable A.O. to make the disallowance of expenditure incurred in relation to earning of exempt income in accordance with mandate of Section 14A of the Act . The assessee is engaged in business of dealing in shares and stocks. We shall also clarify that the investment will not include stock-in-trade, while computing disallowance of expenditure u/s 14A of the Act.We order accordingly.

9. With respect to the second issue, the ld. D.R. submitted that the assessee has claimed loss on open position in futures and options to the tune of Rs. 15,71,714/- being marked to market loss. It is submitted that these are notional losses which cannot be allowed. It was also stated that apart from business losses, the assessee also had earned speculation profits to the tune of Rs. 18.68 lacs. The ld. D.R. further relied upon the order of the ld. CIT(A).

10. We have heard ld. D.R. and perused the orders of authorities below and material on record. We have observed that the assessee has entered into futures and options transactions in the shares whereby contracts have been taken w.r.t. Gujarat Ambuja Cement Limited and Reliance Industries Limited wherein marked to market losses amounting to Rs. 15,71,714/- has been claimed as business loss by the assessee. In our considered view, section 43(5) of the Act has been amended by Finance Act, 2005 w.e.f. 1.4.2006 wherein clause (d) is inserted to Section 43(5) of the Act wherein eligible transactions in respect of trading in derivatives referred to in clause (ac) of Section 2 of the Securities Contract (Regulation) Act, 1956 carried out in a recognized stock exchange is carved out of speculative transactions. Explanation 1 to Section 43(5) of the Act is also added wherein eligible transaction is defined. The said Section 43(5)(d) of the Act read with explanation 1 as applicable for relevant assessment year is reproduced hereunder:

**“Definitions of certain terms relevant to income from profits and gains of business or profession.**

43. In sections 28 to 41 and in this section, unless the context otherwise requires—

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[(d) an eligible transaction in respect of trading in derivatives referred to in clause <sup>a</sup>[(ac)] of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange;]  
shall not be deemed to be a speculative transaction;

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[Explanation.—For the purposes of this clause, the expressions—

- (i) “eligible transaction” means any transaction,—
- (A) carried out electronically on screen-based systems through a stock broker or sub-broker or such other intermediary registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) and the rules, regulations or bye-laws made or directions issued under those Acts or by banks or mutual funds on a recognised stock exchange; and
- (B) which is supported by a time stamped contract note issued by such stock broker or sub-broker or such other intermediary to every client indicating in the contract note the unique client identity number allotted under any Act referred to in sub-clause (A) and permanent account number allotted under this Act;
- (ii) “recognised stock exchange” means a recognised stock exchange as referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and which fulfils such conditions as may be prescribed and notified by the Central Government for this purpose;]”

Thus, the eligible transactions are carved out of speculative transactions vide insertion of clause (d) to Section 43(5) of the Act by Finance Act, 2005 w.e.f. 01-04-2006. Hence, the matter needs to be set aside to the file of the A.O. for the denovo determination of the issue on merits for verifying whether the said transactions carried out by the assessee falls within the mandate of Section 43(5)(d) of the Act read with explanation 1 to be covered as business loss vis-à-vis speculative loss and the assessee is directed to produce all

relevant cogent evidences and explanations to support its contention. The assessee is in business of trading in shares and stocks. The marked to market loss arising out of derivative contract entered into by the assessee shall be allowed arising due to adverse movement of share prices on the last date of previous year. Reference may be drawn to the decision of the Mumbai benches of the tribunal in the case of Inventurus Knowledge Services (P.) Ltd. v. ITO (2016)156 ITD 727(Mum.-trib), wherein the tribunal allowed marked to market losses by holding as under:

*“9. Thus in view of our above foregoing discussions, we allow the appeal of the assessee company on following reasons:—*

- 1. That the assessee company has entered into derivative transactions in foreign currency through recognised stock exchange and has complied with the other conditions as stipulated in Section 43(5) read with proviso(d) and Explanation 1 to the said Section 43(5) of the Act for which cogent material is brought on record.*
- 2. That the contract for derivatives in foreign currency are commodity as defined u/s 43(5) of the Act, the underlying asset being foreign currency and are hence entitled for exemption from being treated as speculative provided all other conditions as stipulated u/s 43(5) are complied with.*
- 3. A binding obligation accrued against the assessee the minute it entered into contract for derivative in foreign currency*
- 4. A liability is said to have crystallized when a pending obligation on the balance sheet date is determinable with reasonable certainty. The considerations for accounting the income are entirely on different footing.*
- 5. As per AS-11, when the transaction is not settled in the same accounting period as that in which it occurred, the exchange difference arises over more than one accounting period.*
- 6. The contract for derivative in foreign currency have all the trappings of stock-in-trade.*
- 7. In the ultimate analysis, there is no revenue effect and it is only the timing of taxation of loss/profit and in case the derivative contract is squared off/settled in the succeeding year, the difference in loss/profit will be brought to tax in the succeeding assessment year and hence its allowability in the current year is tax neutral.*

*Hence, We order that loss of Rs. 1,09,98,560/- incurred by the assessee company on the contract for transaction in un-expired contracts as on the date of Balance Sheet as at 31st March 2009 in derivatives in foreign currency*

*complies with the provisions of Section 43(5) of the Act read with proviso (d) and Explanation 1 of the Section 43(5) of the Act and is exempt to be categorised as speculation loss and further hold that the said loss as at the date of financial statement as at 31st March 2009 arising due to adverse movement in exchange rate between United States Dollars vis-a-vis in relation to Indian Rupee as on the date of Balance Sheet as at 31st March 2009 is not a notional or contingent loss rather it is a ascertained liability which has crystallized on the date of Balance Sheet as at 31st March 2009 and can be computed with reasonable certainty and accuracy, hence allowable as non-speculation loss. We order accordingly”.*

The AO is also directed to verify that the said marked to market losses so allowed to the assessee are duly factored / reflected by way of reduction in the opening stock of derivative contract valuation for the succeeding year so that there is no duplicity in claiming the said loss by the assessee in the immediately succeeding year when the said derivative contracts are finally concluded/completed. In the result, appeal of the assessee is allowed for statistical purposes. We order accordingly.

11. In the result, appeals of the assessee in ITA No. 538/Mum/2013 for assessment year 2008-09 is allowed for statistical purposes as indicated above.

**Now, we shall take up assessee’s appeal in ITA No. 539/Mum/2013 for assessment year 2008-09.**

12. The following grounds of appeal have been raised by the assessee in this appeal:-

“1. The Commissioner of Income-tax (Appeals) - 5, Mumbai (hereinafter referred to as the CIT(A)) erred in upholding the action of the Income-tax Officer - 2(2)(1), Mumbai (hereinafter referred to as the Assessing Officer) in disallowing a sum of

87,56,848 on account of expenses incurred for earning dividend income by invoking the provisions of section 14A read with rule 8D of the Act.

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in disallowing the aforesaid amount of Rs. 87,56,848 inasmuch as the same is not in accordance with the prescription of section 14A read with rule 8D of the Act.

Without prejudice, the appellants contend that the calculation of proportionate expenses allocated to the earning of exempt income is not in consonance with the provisions of Rule 8D and hence, needs to be calculated as per law.

2. The CIT(A) erred in upholding the observation of the Assessing Officer that short-term capital gains of Rs. 67,27,044 is business income.

The appellants contend that on the facts and in the circumstances of the case and in law, the action of the CIT(A) in upholding the observation of the Assessing Officer in holding the impugned capital gains arising on sale of short-term capital assets as business income is not tenable in law.

3. The CIT(A) erred in upholding the action of the Assessing Officer in disallowing a sum of Rs. 56,916 on account of provision for loss - ESF Account.

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned disallowance of Rs. 56,916 inasmuch as such disallowance is not in accordance with law and generally accepted accounting principles.

4. The CIT(A) erred in upholding the action of the Assessing Officer in charging interest of Rs. 63,769 and Rs.7,01,460 under sections 234A and 234B of the Act.

The appellants contend that the CIT(A) ought not to have upheld the action of the Assessing Officer in charging interest under section 234A inasmuch as the return of income has been filed within the time prescribed by section 139(1) of the Act.

The appellants further, contend that the CIT(A) ought not to have upheld the action of the Assessing Officer in charging interest under sections 234A and 234B inasmuch as -

(a) the Assessing Officer has not given an opportunity to the appellants before charging the said interest as required by the principles of nature justice,

(b) the charging of interest is not in accordance with law.”

13. It was observed by the A.O. that the assessee has earned dividend income of Rs. 16,07,123/- which was claimed exempt u/s 10(34) of the Act. The assessee did not disallowed any amount of expenses for earning of the dividend income as contemplated u/s 14A of the Act. The assessee was asked by the AO to furnish working of the disallowance u/s 14A of the Act read with Rule 8D of Rules of 1962. In reply, the assessee submitted detailed explanation stating that there were no direct or indirect or common expenses debited to the P&L account related to earning of dividend income. It was also submitted by the assessee that for the purpose of calculation of disallowance under Rule 8D(2) of Rules of 1962, the investment will not include stock-in-trade. However, the A.O. did not agree with the contentions of the assessee and worked out the disallowance u/s 14A of the Act r.w.r. 8D of Rules of 1962 as under:-

Particulars	Amount Rs)	Amount (Rs)
i) Direct expenditure relating to exempt income		46,491
ii) Amount computed as per Rule 8D(2) [A X B/C] A = Interest expenses B = Average investment	5,37,73,185 9,35,64,244	

C = Average total asset	61,04,00,400	82,42,546
iii) 0.5% of average investment		4,67,821
Total disallowance u/s 14A as per Rule 8D(2)		87,56,848

The disallowance u/s 14A of the Act of 1961 was worked out by the AO at Rs. 87,56,848/- and added back to the total income of the assessee, vide assessment order dated 29-12-2010 passed by the AO u/s 143(3) of the Act.

14. The A.O. further observed that assessee has ,inter-alia, shown short term capital gain of Rs. 67,27,044/- taxable at special rate i.e. 10%. It was held by the A.O. that these transactions are considered to be business income by AO while framing assessment u/s 143(3) of the Act for assessment year 2006-07 and 2007-08, vide assessment order dated 29-12-2010 passed by the AO for assessment year 2008-09.

15. The assessee carried the matter in appeal before the Id. CIT(A) with respect to aforesaid two issues , who upheld the disallowance of expenditure incurred for earning exempt income u/s 14A of the Act as made by the A.O. by holding as under:-

**“Ground No. 2 : Disallowance u/s 14A r.w.r. 8D(2)(i)(ii) & (iii) – Rs. 46491/- /Rs. 8242536/- / Rs. 4,67,821/- respectively**

The AO had disallowed an amount of Rs. 8756848/- u/s 14A r.w.r. 8D (i)(ii)&(iii) - Rs. 46491/-, Rs. 82,42,536/- and Rs.4,67,821/- respectively.

(a) Amount directly relatable to earning exempt dividend income amounting to Rs. 46,491/- is clearly disallowable u/s 14A r.w.r. 8D(2)(i). The disallowance of Rs. 46,491/- is therefore upheld.

(b) In r/o of disallowance of Rs. 82,42,536/- u/s 14A r.w.r. 8D(ii)

- The financial results are as under:

	31-03-2008	31-03-2007
Unsecured loans	821,088,103	214,862,723
Investment	170,838,962	16,289,526
Total share holder funds	77,232,291	85,3057,709

The details of unsecured loans on which interest is paid is as under:

Indiabulls Services Ltd. Rs.492,551,415

Esquire Pvt. Ltd., Rs. 27,730,413

- A perusal of the aforesaid facts clearly reveals that though the investment have increased from Rs. 1.62 crs to Rs. 17.08 crs, the share holders funds have decreased from Rs. 8.5 crs to Rs. 7.72 crs. On the other hand, unsecured loans carrying interest have increased.

- The appellant was asked that since there were no surplus funds for investments in securities income from which is exempt - why the disallowance u/s 14A r.w.r. 8D(2)(ii) should not be made? The appellant could not produce the bank statement to show that on the date of investments in securities having tax free income - the appellant was having surplus funds.

- Under the overall facts and circumstances of the case, the appellant has failed to discharge its onus that interest free funds have not been used for investments in securities income from which is exempt.

- The disallowance made by the AO as per Sec.14A r.w.r. 8D(2)(ii) is therefore called for.

- The disallowance of Rs. 82,42,536/- made by the AO is therefore upheld.

(c) Disallowance u/s 14A r.w.r. 8D(2)(iii) - Rs. 4,67,821/-

- The appellant has substantial amount of investments in securities income from which is exempt. Besides, the appellant is also having purchases and sales of securities, dividend income from which is exempt, which is being shown by the appellant as stock in trade. The same is also covered u/s 14A r.w.r. 8D(2)(iii).

- Under these facts and circumstances the disallowance made by the AO u/s 14A r.w.r. 8D(2)(iii) is called for. This view has also been upheld in various case laws.

i) Southern Petro Chemical Industries Vs. DCIT (2005) 93 TTJ (Chennai) 161- Held, Expenditure attributable to earning of dividends which are exempt under s.10(33)-Whether to invest or not to invest and whether to retain the investments or to liquidate the same are very strategic decisions in which top management is involved-Said decision -making process is very complicated and requires very careful analysis- Thus, proportionate management expenses are required to be deducted while computing the dividend income-

ii) DCIT V. S. G. Investments and Industries Ltd (2004) 89 ITD 44 (Cal), Held, "expenditure incurred by the assessee in relation to income which does not form part of the total income" as mentioned in Sec.14A has to be given a wider meaning and would include both direct and indirect relationship between the expenditure and exempt income.

iii) ACIT V. Premier Consolidated Capital Trust (I) Ltd,(2004) 83 TTJ (Mumbai) 843-(Held, It is justifiable to attribute a part of the financial and administrative expenses as expenditure incurred in relation to exempted income and disallowing the same in view of the provisions of Sec.14A of Income-tax Act,1961 ). .

iv) ITO Vs. Daga Capital Management (P) Ltd 119 TTJ (Mum) SB:- Held, there is no iota of doubt that the intention behind with the expression 'in relation to' in S.14A is to encompass not only the direct but also indirect expenditure which has any relation to the exempt income. The relation has to be seen between the exempt-income and the expenditure incurred in relation to it and not vice - versa. In order to escape tax applicability of S.14A, onus is on the assessee to prove that expenditure was incurred for earning taxable income.

3.2 In the light of the ratio laid down in aforesaid cases, the disallowance of expenses of Rs. 4,67,821/- is as per sec. 14A r.w. Rule 8D(2)(iii). The disallowance made by the A.O. is upheld.

3.3 This ground of appeal is therefore dismissed.”

16. With respect to second issue as to the treatment of short term capital gains of Rs. 67,27,044/- as business income, the learned CIT(A) observed that the total amount of scrips sold are of value Rs. 13,38,36,535.62 while scrip bought are to the tune of Rs. 12,71,09,491.62 resulting in a profit of Rs. 67,27,044/- during the year. It was observed by learned CIT(A) that holding period is not very large which in many cases varied from 28 to 84 days. It was observed that substantial amount of interest bearing loans were raised which increased from 21 crores to 82 crores and hence facts in the instant year are different from preceding year as there are substantial interest bearing funds which were raised by the assessee for business purposes. Thus, learned CIT(A) vide appellate order dated 24.11.2012 confirmed the treatment of short term capital gains as business income of the assessee.

17. Aggrieved by the appellate order dated 24.11.2012 passed by the ld. CIT(A), the assessee is in appeal before the tribunal.

18. The ld. D.R. submitted that the assessee has earned dividend income of Rs. 16,07,123/- which is claimed as exempt u/s 10(34) of the Act. The learned DR submitted that the impugned assessment year is 2008-09 and the authorities below have rightly invoked Section 14A r.w.r. 8D of Rules of 1962 to disallow expenditure to the tune of Rs. 87,56,848/- incurred in relation to earning of income which does not form part of the total income. The ld. D.R. relied upon the order of the ld. CIT(A).

With respect to the second issue of treating short term capital gains as business income , the learned DR submitted that facts in the instant year are distinguishable vis-à-vis facts of immediately preceding year as substantial interest bearing funds are raised by the assessee during the previous year relevant to the assessment year. The learned DR submitted that the assessee itself is claiming the shares as stock-in-trade , and hence the profits arising from sale of shares were rightly treated by Revenue as business income. The ld. D.R. supported the orders of the ld. CIT(A).

19. We have heard the ld. D.R. and also perused the material on record including the orders of authorities below. We have observed that the authorities below have invoked Section 14A of the Act r.w.r. 8D of Rules of 1962 in an mechanical manner, albeit impugned assessment year under appeal is assessment year 2008-09 wherein, no-doubt, Rule 8D of Rules of 1962 are applicable vide judgment of Hon'ble Bombay High Court in the case of Godrej and Boyce Manufacturing Company Limited(supra) but Rule 8D of rules of 1962 cannot be invoked in an mechanical manner without having regard to the accounts of the assessee as mandated u/s 14A(2) of the Act of 1961. The assessee has also not come forward with the details of expenditure incurred in relation to earning of income which does not form part of the total income . Thus, in our considered view , the first issue concerning disallowance u/s 14A of the Act of expenditure of Rs. 87,56,848/- being incurred in relation to earning of income which does not form part of total income as disallowed by AO by invoking Rule 8D of rules of 1962 need to be set aside to the file of the AO for de-novo determination of the issue on merits in accordance with law as per mandate of Section 14A of the Act having regards to the accounts of the assessee as stipulated u/s 14A(2) of the Act. We would like to clarify that shares and securities held as stock-in-trade and shall not be included for making disallowance of expenditure u/s 14A of the

Act. Needless to say that the AO shall grant sufficient and reasonable opportunity of being heard to the assessee in accordance with principle of natural justice in accordance with law and the assessee shall be allowed to submit relevant evidences/explanations in its defense by the AO. We order accordingly.

With respect to the next disallowance of treating short term capital gains of Rs. 67,27,044/- as business income . It is observed that the assessee is in business of trading in shares. The assessee has sold shares of Rs. 13,38,36,535.62 against scrips bought of Rs. 12,71,09,491.62 , the ld. CIT(A) held that the holding period was not very large and in many cases it varies from 28 to 84 days. It was also observed by the authorities below that huge amount of interest bearing funds were raised by the assessee which increased from Rs. 21 crores to Rs. 82 crores during instant assessment year. We do not find any infirmity in the well reasoned order of the ld. CIT(A) treating the profit of Rs. 67,27,044 /- shown by the assessee as business income and not short term capital gain keeping in view the factual matrix of the case and more-so the assessee is engaged in the business of trading in shares and stocks. Thus, we are not inclined to interfere with the well reasoned order of learned CIT(A) which we confirms/sustain. We order accordingly.

20. Ground No. 3 is with respect to the disallowance of Rs. 56,916/- on account of provision for loss-ESF Account which is similar to ground No. 2 in assessee's appeal in ITA No. 538/Mum/2013 for assessment year 2007-08 which we have already adjudicated in this order vide para No. 9 and 10 of this order and our decision in ITA No. 538/Mum/2013 shall apply mutatis mutandis to this issue in ITA No. 539/Mum/2013 for the assessment year 2008-09 .

21 Ground No 4 is with respect to levability of interest u/s 234A and 234B of the Act by the AO which has been stated to be upheld by learned CIT(A) as per the contentions of the assessee in ground no 4 filed with appeal memo. The levability of interest u/s 234A and 234B is consequential in nature. We have observed that this ground was not adjudicated by learned CIT(A) albeit the assessee did raised this ground before learned CIT(A) vide ground no. 7 in appeal memo filed with learned CIT(A). In our considered view, this matter also need to be restored to the file of the AO for de-novo determination of the issue on merits . Needless to say that the AO shall grant sufficient and reasonable opportunity of being heard to the assessee in accordance with principle of natural justice in accordance with law and the assessee shall be allowed to submit relevant evidences/explanations in its defense by the AO. We order accordingly.

22. In the result, appeals of the assessee in ITA No. 539/Mum/2013 for assessment year 2008-09 is partly allowed for statistical purposes.

23. In the result, appeals of the assessee in ITA No. 538/Mum/2013 for assessment year 2007-08 is allowed for statistical purposes and appeals of the assessee in ITA No. 539/Mum/2013 for assessment year 2008-09 is partly allowed for statistical purposes.

Order pronounced in the open court on 24<sup>th</sup> February, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक: 24-02-2017 को की गई ।

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 24-02-2017<sub>1</sub>

व.नि.स./ ए.के., Ex. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "I" Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई/ ITAT, Mumbai