

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

**ITA No.2176/Kol/2013 &
ITA No.2199/Kol/2013
Assessment Year:2010-11**

Binni Industries Ltd. 601, Axis Mall, 6 th Floor, Block C, Action Area-I, New Town Rajarhat, Kolkata-700 156 [PAN No. A ABCB 0979 C]	बनाम / V/s.	DCIT, Central Circle- XXVIII, Aayakar Bhawan Poorva, 110 Shanti Palli, Kolkata- 700 107
DCIT, Central Circle- XXVIII, 4 th Floor, Aayakar Poorva, EM-Bye Pass, 110, Shanti palli, Kolkata-700 107	बनाम / V/s.	M/s Binani Industries Ltd., 601, Axis Mall, 6 th Floor, Block-C, Action Area-I, New Town Rajarhat, Kolkata-156
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri K.V. Beswal, FCA
राजस्व की ओर से/By Respondent	Shri Huidrom Robindro Singh, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	04-08-2016
घोषणा की तारीख/Date of Pronouncement	09-09-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

The cross-appeals by the assessee and Revenue are against the order of Commissioner of Income Tax (Appeals)-Central-I, Kolkata dated 28.06.2013. Assessment was framed by DCIT, Central Circle-XXVIII, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 06.03.2013 for assessment year 2010-11.

Shri K.V.Beswal, Ld. Authorized Representative appeared on behalf of assessee and Shri Huidrom Robindra Singh, Ld. Departmental Representative appeared on behalf of Revenue.

2. The cross-appeals are heard together and disposed of by this common order.

First we take up assessee's Appeal in ITA No.2176/Kol/2013.

3. The grounds raised by the assessee per its appeal are as under:-

"1. On the facts and circumstances of the case and in law, the CIT erred in confirming the disallowance u/s. 14A r.w.r 8D(iii) of the Act at Rs.1,37,20,788/-

2. On the fact and circumstances of the case and in law, the CIT(A) erred in confirming addition of Rs1,37,20,788/- u/s 14A r.w.r 8D(iii) to the book profit computed u/s. 115JB of the Act.

3. Your appellant craves leave to alter, modify, amend or delete any of the above grounds of appeals, or to add one or more additional ground(s), at or before the hearing of the appeal, as may be necessary."

4. First issue raised by assessee in its appeal is that Ld. CIT(A) erred in confirming the action of Assessing Officer by sustaining the disallowance u/s. 14A r.w.s Rule 8D(iii) of the IT Rules, 1962 ('the Rule' for short) for ₹1,37,20,788/-.

5. Briefly stated facts in the present case are that assessee is a Limited Company and engaged in the business of consultancy and financial services. The assessee for the year under consideration, filed its return of income at loss of ₹10,21,13,088/-. Thereafter the case was selected for scrutiny assessment. Subsequently notice u/s 143(2) of the Act was issued. The assessee, for the year, under consideration has derived dividend income for an amount of ₹27,78,32,126/- which was claimed exempted from tax u/s. 10(34) of the Act. During the course of assessment proceedings, AO observed that no expenditure in connection with dividend income has been disallowed as per the provision of Sec. 14A of the Act. Accordingly, AO sought clarification from assessee by issuing notice. In compliance to said notice, assessee submitted that major dividend income was received from M/s Binani Cement Ltd. (BCL for short), subsidiary company of assessee, through ECS. The investment was not made in BCL by way of cash / bank but this investment is the result of hive off the business of cement division towards separate company. All the investments

were made in the subsidiary company out of share capital, reserve & surplus and internal accruals and promoter's contribution. In none of the case, borrowed fund was used in making such investment. These are very old investment of assessee and no managerial services were involved to maintain such investment. However, the AO disregarded the claim of assessee and invoked the provision of Sec. 14A r.w.s. Rule 8D of the IT Rule, 1962. Accordingly, the following disallowances were made by Assessing Officer:-

- i) Direct expenditure NIL
- ii) Disallowance of interest of ₹4,08,49,271/-
- iii) .5% of average investment of ₹1,37,20,788/-

6. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who deleted the addition made under Rule 8D(ii) for an amount of ₹4,08,49,271/-. However, Ld. CIT(A) confirmed the addition made by AO under Rule 8D(iii) of the IT Rule for an amount of ₹1,37,20,788/-.

Now, against the order of Ld. CIT(A) for deleting the addition for the disallowance of interest under Rule 8D(ii) of the IT Rule, Revenue is in appeal before us. Similarly, for the addition made by AO under Rule 8D(iii) of the IT Rule, assessee is in appeal before us.

7. Aggrieved, both Revenue and assessee came in appeal before us.

First we take the Assessee's appeal ITA 2176/kol/2013

8. Before us Ld. AR has submitted paper book which is running from pages 1 to 7 and prayed for deletion of the disallowance made under Rule 8D(iii) of the IT Rule for ₹1,37,20,788/-. Ld. AR before us submitted that investment has been made by assessee in its subsidiary company which is nothing but the strategic investment therefore no disallowance should be made. On the other hand, Ld. DR submitted that similar disallowance was made in the earlier year under Rule 8D(iii) of the IT Rule by assessee in its own case. However, no such disallowance was made for the year under consideration. Therefore, Ld. DR submitted that the consistency should be maintained for disallowing the aforesaid expenses and he prayed before the Bench to confirm the action of AO.

9. We have heard rival contentions and perused the materials available on record. At the outset we find that this issue is squarely covered in favour of assessee in its own case for A.Y 2009-10 in ITA No.144/Kol/2013. The relevant operative portion of the said order is reproduced below:-

“However, we find that the calculation of disallowance under Rule 8D(iii) made by the Assessing Officer and upheld by Ld CIT(A) is not correct In view of the fact that Assessing Officer had included the value of total investments for calculation of disallowance whereas in our opinion the value of those investments should have been included which were made for the purpose of earning exempt income. The assessee had made significant investments in the shares of subsidiary companies which are definitely not for the purpose of earning exempt income. The Hon 'ble Tribunal in I.T.A No.3349/Del/2011 in the case of Promain Ltd., after relying upon a Kolkata judgment of Tribunal in I.T.A No.1331 has held that strategic investment has to be excluded for the purpose of arriving at disallowance under Rule 8D(iii). The Tribunal had relied upon the findings of Kolkata Tribunal in the case of Rei Agro Ltd. v. DCIT in I.T.A No.1331/Del/2011 dated 29.7.2011. The relevant portion of Tribunal findings as contained in the Kolkata Tribunal are reproduced below:-

“(iii) Further in Rule BD(2)(ii), the words used in numerator B are "the average value of the investment, income from which does not form or shall not form part of the total income as appearing in the balance sheet as on the first day and in the last day of the previous year". The Assessing Officer was wrong in taking into consideration the investment of Rs.103 crores made during the year which has not earned any dividend or exempt income. It is only the average of the value of the investment from which the income has been earned which is not falling within the part of the total income that is to be considered. Thus; It is not the total investment at all beginning of the year and at the end of the year, which is to be considered but it is the average of the value of investments which has given rise to the income which does not form part of the total income which is to be considered. The term "average of the value of investment" is used to take care of cases where there is the issue of dividend stripping.

iv) Under Rule 8D(2)(iii), what is disallowable is an amount equal to ½ percentage of the average value of investment the income from which does not or shall not form part of the total income/. Thus, under sub clause (iii), what is disallowed is ½ percentage of the numerator B in Rule 8D(2)(ii). This has to be calculated on the same lines as mentioned earlier in respect of Numerator B in the Rule 8D(2)(ii). Thus, not all investments become the subject matter of consideration when computing disallowance U/S 14A read with Rule 8D. The disallowance U/S 14A read with Rule BD is to be in relation to the income which does not form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income. (AY.) (I.T.A No.1331/Kol/2011 dated 29.7.2011."

In view of the aforesaid facts and respectfully following the various judicial precedents relied upon hereinabove, we find no infirmity in the order passed by Ld. CIT(A) in this regard and accordingly, the ground raised by assessee is allowed and that of Revenue is dismissed.

Now coming to the appeal of Revenue in ITA 2199/Kol/2013

10. The grounds of appeal, raised by the Revenue are reproduced as under:-

“1. That the Ld. CIT(A) has failed to appreciate:

- (a) That the shares were acquired in lieu of assets of the assessee-company transferred to its subsidiary company,*
- (b) That the assessee had loan as on the date of transfer of assets,*
- (c) That therefore, the possibility of interest-bearing loan having been utilized in acquisition of the said assets cannot be ruled out,*
- (d) That as per the ratio laid down by the jurisdictional High Court in the case of Dhanuka & Sons v. Commissioner of Income-tax, (Central) 1[2011] [12 taxmann.com 227 (Cal.) it is for the assessee to show the source of acquisition of those shares by production of materials that those were acquired from the funds available in the hands of the assessee at the relevant point of time without taking benefit of any loan.*

2. That the Ld. CIT(A) has erred in not distinguishing the facts of the assessee's case from the facts of the case of Dhanuka & Sons (supra)

3. That the Ld. CIT(A) has erred in placing reliance on his decision in the case of the assessee itself for the assessment year 2009-10, as the same has been agitated by the Department in appeal before the Hon'ble ITAT (ITA No.144/Kol/2013),

4. That accordingly, the Ld. CIT(A) has erred in law as well as in facts and circumstances of the case in deleting the disallowance of Rs.4,08,49,271/- made u/s. 14A of the Income-tax act, 1961 read with Rule 8D(ii) of the Income-tax Rules, 1962; and

5. That the Department craves the right to add, delete, modify or abrogate the grounds of appeal during the course of hearing of the case.”

The common issue raised by Revenue in this ground of appeal is that Ld. CIT(A) erred in deleting the addition made by the AO under section 14A r.w.r. 8D(2)(ii) for Rs. 4,08,49,271.00 on account of interest.

The facts as emerging from the order of the lower authorities have already been explained in Para 5 & 6 of this order.

Being aggrieved by the order of the Id. CIT(A), Revenue is in appeal before us. The Id. DR before us vehemently supported the order of the AO and the Id. AR relied on the order of Id. CIT(A).

11. We have heard the rival submissions and perused the materials available on record. We find that the entire investments were made long back by the assessee. We hold that the assessee was having sufficient own funds to make those investments in the earlier years. We hold that the Learned AO had not brought on record any nexus between the borrowed funds and the investment in shares of various companies. We find that the following case laws relied upon by the Learned CIT(A) in his order are well placed and are squarely applicable to the facts of the instant case :-

• CIT vs Reliance Utilities & Power Ltd (313 ITR 340) (Bom)

Interest on borrowed capital - investments by assessee - finding that investments were from interest free funds available with assessee - borrowed capital used for purposes of business - interest deductible under Income Tax Act, s. 36(1)(iii).

• G.D.Metsteel Pvt Ltd vs ACIT reported in 142 IT] 641 (Mum ITAT)

Held that the investments are made by the assessee's own funds and have been made in the earlier years, no disallowance u/s 14A is required to be made. The Head Note reads as under:-

"Business expenditure - Disallowance under section 14A - Apportionment of expenditure - When investments are made from own funds, merely because the assessee had to subsequently borrow the funds for business use, it cannot be said that the borrowed funds have been used for the purposes of investments."

12. We also hold that the investments made in subsidiary companies are to be treated as strategic investments and hence the disallowance u/s 14A of the Act would not operate at all as the investment made thereon is not with an intention to earn any exempt income in the form of dividend but only for obtaining controlling interest in the said companies and to further the business interests of the assessee in the said company. Reliance in this regard is placed on the decision of the co-ordinate bench of Delhi Tribunal in the case of *Inter globe Enterprises Ltd vs DCIT* reported in (2014) 40 CCH 0022 Del. Trib in ITA No. 1362 & 1032 /Del/ 2013 , ITA No. 1580/Del/2013 dated 4.4.2014 for Asst Years 2008-09 & 2009-10, wherein it was held that:

"7. We have heard the rival submissions of both the parties and have gone through the material available on record. First, we take up the appeal for

assessment year 2008-09. In this year, the assessee had three type of investments one relating to investment in subsidiary companies the amount of which is Rs.101.74 crores. The second category relates to long term unquoted shares the amount of which is Rs.31.53 crores. The third category is of equity shares the value of which is Rs.14.88 lakhs and the last category is investment in units of mutual funds amounting to Rs.10.15 crores. These facts and figures are verifiable from paper book page 204A. As regards the first category of shares in the form of investment into subsidiary companies we find that investment into this category of shares had increased from Rs.78.17 lakhs to Rs.101.74 crores which is due to increase in investment in preference shares and other equity shares. During this period, the interest bearing funds had decreased from Rs.1.49 crores to Rs.87,30 lakhs as is apparent from paper book page 203 and further most of the interest bearing loans are for vehicle loans as mentioned in paper book page 203. During this year under consideration, the assessee has earned a cash profit of Rs.11 crores. The cash flow statement at paper book page 200 reflects cash from operating activities including cash profits of Rs.49.28 crores. The assessee has also raised an amount of Rs.50.00 crores by issue of fresh preference shares as is apparent from paper book page 200. In view of the above facts and figures it is apparent that assessee had utilized interest free funds for making fresh investments and that too into its subsidiaries which is not for the purpose of earning exempt income and which are for strategic purposes only.”

In view of the above facts, we hold that no disallowance of interest is required to be made under rule 8D(i) & 8D (ii) as no direct or indirect interest expenditure has incurred for making investments. Hence this ground of appeal of the Revenue is dismissed.

13. The 2nd issue raised by the assessee in this appeal is that ld. CIT(A) erred in confirming addition of Rs. 1,37,20,788.00 under section 14A r.w.r. 8D(iii) to the book profit computed under section 115JB of the Act.

The AO while computing the book profit under section 115JB of the Act has added the amount disallowed under section 14A r.w.r. 8D of Income Tax Rules and accordingly charged MAT on the book profit. The act of the AO was also confirmed by the ld. CIT(A).

However, on perusing the Explanation-1(f) of Section-115JB(2) of the Act, we do not find merit in the contention of the Ld. CIT (A). The relevant provision of the Act is extracted herein below for reference:—

"Section. 115JB

Explanation-[1] - For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section(2), as increased by —

(a) To (e)

(f) the amount or amounts of expenditure relatable to any income to which [Section-10 (other than the provisions contained in clause (38) thereof] or section 11 or section 12 apply;

(g) To (j)"

From the above it is apparent that the aforesaid provision of the Act does not refer to any disallowance made U/s. 14A of the Act while arriving at the Book Profit for the purpose of Section-115JB(2) of the Act. Further Section 14A of the Act is a provision with fiction disallowing the deemed expenditure attributable to exempt income viz., dividend income U/s. 10 of the Act and Section 115JB of the Act is also a provision with fiction for payment of tax in respect of deemed income. Therefore while computing the profit for the purpose of Section 115JB of the Act another provision with fiction cannot be superimposed. Hence the question of increasing the 'Book Profit' due to the disallowance U/s. 14A of the Act will not arise. However, in the instant case of the assessee, since we have already deleted the addition made U/s. 14A, the question of increasing the book profit will not arise. Further the decision of Hon'ble Apex Court cited by the assessee in the case *Apollo Tyres Ltd. v. CIT* [2002] 255 ITR 273/122 Taxman 562 is also squarely applicable to the case of the assessee.

The gist of the same is reproduced herein below for reference:—

"The Assessing Officer, while computing the book profits of a company under section 115J of the Income-tax Act, 1961, has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer, thereafter, has the limited power of making increases and reductions as provided for in the Explanation to section 115J . The Assessing Officer does not have the jurisdiction to go behind the net profits shown in the profit and loss account except to the extent provided in the Explanation. The use of the words "in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act" in section 115J was made for the limited purpose of empowering the Assessing Officer to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company, the Assessing Officer has to accept the authenticity of the accounts with reference to the provisions of the Companies Act, which obligate the company to maintain its accounts in a

manner provided by that Act and the same to be scrutinised and certified by statutory auditors and approved by the company in general meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act. Sub-section (1A) of section 115J does not empower the Assessing Officer to embark upon a fresh enquiry in regard to the entries made in the books of account of the company."

14. From the above decision it is clear that while computing the "Book Profit" of the company under the provisions of section 115JB of the Act, any disallowance made under the normal provisions of the Act also cannot be given effect to for arriving at the "Book Profit" for the purpose of Section 115JB of the Act. Accordingly, this ground raised by the assessee is allowed in its favour.

In the result, the appeal of the assessee is allowed and the appeal of the revenue is dismissed.

Order pronounced in open court on 09 /09/2016

Sd/-
(S.S.Viswanethra Ravi)
Judicial Member
*Dkp

Sd/-
(Waseem Ahmed)
Accountant Member

दिनांक:- 09 /09/2016 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Binani Industries Ltd. 601, AxisMall, 6th Floor, Block-C
Action Area-I, New Town Rajarhat, Kolkata-156
2. राजस्व/Revenue-DCIT, C.C-XXVIII, Aayakr Bhawan poorva, 110 Shanti Palli
Kolkata-107
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता