

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'F' : NEW DELHI)**

**BEFORE SHRI J.S. REDDY, ACCOUNTANT MEMBER  
and  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.993/Mum./2012  
(ASSESSMENT YEAR : 2008-09)**

M/s. Phenil Sugars Pvt. Ltd., vs. CIT (A) – 19,  
2<sup>nd</sup> Floor, Building No.2, Mumbai.  
Solitaire Corporate Park,  
167, Guru Hargovind Marg,  
Andheri Ghatkopar Link Road,  
Chakala, Andheri,  
Mumbai – 400 069.

**(PAN : AADCP0153H)**

**ITA No.781/Del./2014  
(ASSESSMENT YEAR : 2009-10)**

M/s. Phenil Sugars Pvt. Ltd., vs. ITO, Ward 14 (4),  
207, Essel House, New Delhi.  
10, Asaf Ali Road,  
New Delhi – 110 002.

**(PAN : AADCP0153H)**

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri KVSR Krishna, CA  
REVENUE BY : Shri F.R. Meena, Senior DR

Date of Hearing : 27.07.2016  
Date of Order : 30.08.2016

**ORDER**

**PER KULDIP SINGH, JUDICIAL MEMBER :**

Since identical question of fact and law have been raised in the aforesaid appeals, the same are being disposed off by way of consolidated order to avoid repetition of discussion.

2. The appellant, M/s. Phenil Sugars Pvt. Ltd. (hereinafter referred to as 'the assessee'), by filing the aforesaid appeals, sought to set aside the impugned order dated 28.11.2011 passed by Id. Commissioner of Income-tax (Appeals)-19, Mumbai and dated 21.11.2013 passed by Id. Commissioner of Income-tax (Appeals)-XVII, New Delhi qua the assessment years 2008-09 and 2009-10 respectively on the grounds inter alia that :-

**ITA No.993/Mum./2012 (AY 2008-09)**

"1) In the facts and the circumstances of the case and also in law, the learned Assessing Officer erred in making addition u/s 14A r.w.s Rule 8D amounting to Rs.2,14,34,865/- without recording satisfaction u/s 14A, without observing that no expenditure was incurred by the Appellant and also without considering investment in subsidiary companies amounting to Rs. 24,06,43,104/-.

Without prejudice to above and alternatively,

2) In the facts and circumstances of the case and in law, the learned Assessing Officer erred in wrongly disallowing the interest u/s 36(1)(iii) to the tune of Rs.84.99,516/- on the loan taken for the purpose of business, however to optimize the interest cost of borrowing, a part of the same was parked in Term Deposit of a Bank to achieve the objective of liquidity and therefore no disallowance could have been made.

3) In the facts and circumstances of the case and in law, the learned Assessing Officer erred in wrongly

treating Interest received and paid as "Income from other Sources" instead of "Profits and gains from "Business and Profession" even though the Appellant is not in the business of money lending and interest on bank deposits out of temporary idle funds obtained by the Appellant cannot be termed as "income from other sources"

4) In the facts and circumstances of the case and in law, the learned Assessing Officer erred in disallowing Rs.5,32,200/- on account of share issue expenses by treating the same as capital expenditure by disregarding the fact that the expenses paid was in the nature of fees paid to the ROC for increasing the share capital of the company which is the statutory requirement and allowable as revenue expenditure.

5) In the facts and circumstances of the case and in law, the Commissioner of Income Tax (A) erred in confirming the above additions made by the Assessing Officer.

[B] Relief Prayed:

- 1) To delete the addition of Rs. 2,14,34,865/- u/s 14Act the Act.
- 2) To delete the disallowance of Rs.84,99,516/- u/s 36(1)(iii) or the Act.
- 3) To treat interest as income / expenditure under the head Income from business or profession.
- 4) To delete the disallowance of Rs.5.32,200/- on account of share issue expenses.

(C) General:

- 1) The appellant reserves rights to add alter or delete any portion of this appeal before its conclusion.
- 2) This appeal is filed in time and may please be allowed in full.

3) Detailed paper book with written submissions & case laws will be presented at the time of hearing.”

**ITA No.781/Del/2014 (AY 2009-10)**

“1. The Ld. CIT(A) has erred in law and on facts in confirming disallowance of Rs.47,36,853/- on account of interest alleged as not incurred for business purposes u/s 36(1)(iii). The disallowance made by the AD and upheld by the CIT(A) is wrong and bad in law and deserves to be deleted.

2. The CIT(A) has failed to appreciate that the AD has disallowed some portion of interest which means part of the interest he is considering as for business purposes and partly as for non-business. This is not permissible as there is no provision under sec. 36(1)(iii) for making any proportionate disallowance. Therefore the entire interest expenses, being incurred for business purposes, as claimed should be allowed.

3. The CIT(A) as well as the AD has erred in alleging that the application of loan is towards advancing loans and advances on interest free basis without any evidence to support such assumption of diversion. Therefore the allegation of AO and CIT(A) is wrong and hence disallowance made deserves to be deleted.

4. Without prejudice, the appellant contends that the interest income should be set-off against the interest expenditure completely. Therefore the disallowance made of Rs.47,36,853/- is on assumptions and presumptions and hence deserves to be deleted.

5. The Ld. CIT(A) has erred in law and on facts in confirming the alleged disallowance of estimated expenditure by invoking provisions of section 14A of the Income Tax Act, 1961 read with Rule 8D. The disallowance is on surmises and assumptions, without any nexus to the earning of dividend income of Rs.28,666/-and therefore deserves to be deleted.

6. The appellant contends that it has furnished working of expenditure of Rs.20,064/- based on accounts which was simply brushed aside by the AO as well as CIT(A) without there being any reasons for dissatisfaction against the same. Therefore the disallowance made is wrong and bad in law and hence deserves to be deleted.

7. Without prejudice to the above grounds that no disallowance should be made u/s 14A, the appellant contends that the working under Rule 8D is wrong, excessive and requires to be revised. The disallowance if any should be restricted to Rs.20,064/-.

8. The above grounds are independent and without prejudice to one another.

9. The appellant contends that he may be allowed to add, amend, alter forgo any of the grounds at the time of hearing.”

### **BRIEF FACTS OF ITA NO.993/MUM./2012**

3. Briefly stated the facts of this case are : during the assessment year 2008-09, assessee filed return declaring negative total income of Rs.9,16,452/- while claiming exempt dividend income of Rs.28,666/- under section 10 (34) of the Income-tax Act, 1961 (for short ‘the Act’). The case was subjected to scrutiny and Shri Vipul Sheth, CA/AR put in appearance and filed necessary details. Assessee is into the business of trading in sugar on the commodity exchange. Perusal of the P&L account shows that the total income receipts credited were at Rs.4,67,79,389/- inclusive of

net income from trading at commodity exchange of Rs.82,49,630/-, interest on loans and FDs amounting to Rs.3,84,81,941/-, dividend income of Rs.28,666/- and profit on sale of mutual fund unit of Rs.19,151/-. Assessee claimed total expenditure debited to P&L account at Rs.4,76,67,736/- on account of interest paid and share issue expenses of Rs.5,32,200/-. Assessee has huge investment in the quoted and non-quoted shares of Rs.26,73,81,446/- in the sister/ associate concerns and it was called upon to explain as to why the provisions of section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 (for short 'the Rules') should not be invoked so as to debit proportionate expenses to the P&L account towards earning of dividend income. Finding explanation furnished by the assessee not tenable, AO by invoking the provisions u/s 14A read with Rule 8D worked out the total disallowance at Rs.2,14,34,865/- and made an addition thereof. AO noticed that assessee has received and lent unsecured loan to the tune of Rs.46,19,15,339/- and Rs.46,62,12,735/- respectively. Assessee availed the loan of Rs.1,34,84,19,840/- out of which returned Rs.1,08,70,12,639/- during the year under assessment leaving outstanding balance of Rs.46,19,15,359/-. Assessee has paid interest of Rs.4,69,81,457/- @ 11% or 12% but has failed to

prove the direct nexus of utilization of the loans accepted and the AO found the same having been utilized partly for advancing loans and kept the balance in fixed deposits in bank. Loan granted by the assessee during the year under assessment was at Rs.29,41,09,881/- on which he has charged interest @ 11% or 12% and the closing of deposit figure comes to Rs.34,74,92,451/- on which the assessee has earned interest at 7% only. Assessee was called upon to explain as to why the differential amount of Rs.82,49,630/- should not be disallowed. Finding explanation furnished by the assessee not tenable, AO disallowed the differential interest of Rs.82,49,630/- and assessed the total income at Rs.2,28,83,520/-.

**BRIEF FACTS OF ITA NO.781/DEL./2014**

4. Briefly stated the facts of this case are : during scrutiny proceedings, it was noticed by the AO that assessee, though into the business of trading of sugar, but as per P&L account, it has earned income only from interest and dividend. As per balance sheet, there are unsecured loans received and lent by the assessee to the tune of Rs.4,97,00,000/- and Rs.2,14,86,133/- respectively. At the beginning of the year under assessment, there was outstanding loan of Rs.46,90,10,257/- and the assessee availed loan of Rs.4,22,00,000/- and returned loan of Rs.40,15,10,257/- with

outstanding balance of Rs.4,97,00,000/-. Assessee paid interest @ 12% on these loans amounting to Rs.2,84,17,666/- without showing any direct nexus of the utilization of the loan accepted and the major component of the loan was utilized for advancing “loans and advances” and investing in the fixed deposit/investment out of which most of the money advanced was on interest free basis. Interest from FDR was received at average rate of 10%. AO noticed that during the year under assessment, assessee has not carried out any business activity and claimed that the assessee was preparing for entering the market at opportune time by restructuring its finance. Assessee was called upon to explain as to why proportionate interest be not disallowed as interest bearing funds seem to have been used for non-business purposes like loans & advances and FDRs. Finding explanation furnished by the assessee not tenable, AO disallowed the proportionate amount of interest of Rs.47,36,853/-.

5. During the year under assessment, the assessee has made substantial investment amounting to Rs.26.70 crores on average basis, and has also earned dividend income of Rs.28,666/-. From the computation of income, it is noticed that the assessee has disallowed only a sum of Rs.1,235/- being demat charges as

expenses pertaining to exempt income. He was called upon to explain as to why Rule 8D be not invoked to calculate the disallowance u/s 14A. Assessee filed a working of expenses attributed to the dividend income amounting to Rs.20,064/-. Finding explanation furnished by the assessee not tenable, AO disallowed the expenses to the tune of Rs.28,666/-.

6. Assessee carried the matter before the Id. CIT (A) by challenging assessment orders who have dismissed the appeals vide impugned orders dated 28.11.2011 and 21.11.2013 qua the assessment years 2008-09 and 2009-10 respectively. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeals.

7. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

8. Ld. AR for the assessee challenging the impugned order contended inter alia that since there is no increase in the investment made by the assessee during the years under consideration, disallowance u/s 14A read with Rule 8D cannot be made; that AO has illegally invoked the section 14 read with Rule 8D and relied

upon judgment cited as **Maxopp Investment Ltd. vs. CIT 247 ITR 272 (Del.)**; that at the most disallowance is to be restricted to the dividend income and relied upon the following orders passed by ITAT :-

- (i) DCM Limited vs. DCIT – ITA No.4467/Del/2012 – ITAT ‘B’ Bench, Delhi order dated 01.09.2015 (Relevant page 11);
- (ii) M/s. Daga Global Chemicals vs. ACIT – ITA No.5592/Mum/2012 – ITAT ‘D’ Bench Mumbai order dated 01.01.2015 (Relevant page 4);
- (iii) Joint Investment Pvt. Ltd. vs. CIT – Hon’ble Delhi High Court vide Order dated 25.02.2015 (2015) 372 ITR 0694;

However, on the other hand, ld. DR relied upon the order passed by the ld. CIT(A).

**GROUND NO.1 OF ITA NO.993/MUM./2012 & GROUND NO.5 TO 7 OF ITA NO.781/DEL./2014**

9. Undisputedly, there is no increase in the investment during the years under assessment i.e. 2008-09 and 2009-10; that the assessee has received dividend income of Rs.28,666/- and claimed as exempt u/s 10(34); that the assessee has made investment in the quoted and non-quoted shares of Rs.26,73,81,446/- in the sister/

associate concerns; that the annual accounts, tax audit report and books of account relied upon by the assessee have not been disputed by the AO; that the assessee has not claimed any expenditure incurred to earn the exempt dividend income during the year under assessment.

**GROUND NO.2 & 3 OF APPEAL NO.993/MUM./2012  
(AY 2008-09)**

**GROUND NO.1, 2, 3 & 4 OF APPEAL NO.781/DEL/2014  
(AY 2009-10)**

10. In the backdrop of the facts and circumstances of the case, the sole question arises for determination in this case is :-

**“as to whether section 14A read with Rule 8D is applicable when the assessee company has neither borrowed any money to be invested in shares nor earned any exempt dividend income during the year under assessment?”**

11. So far as, assessment order qua 2008-09 is concerned, the AO proceeded on the premise that assessee has made huge investment in quoted and unquoted shares to the tune of Rs.26,73,81,446/- in the sister/associate concerns and is bound to incur some expenditure to earn the said dividend income or to manage huge investment of Rs.26,73,81,446/- and proceeded to invoke the provisions contained under section 14A read with Rule 8D by making following observations :-

“(i) 8D(2)(ii): The expenditure by way of interest is Rs.4,69,81,457/- (A). The average value of investment is Rs.26,74,31,446/- (B). The average value of the assets comes to Rs.62,51,61,759/- (C). The disallowance as per clause 8D(2)(ii) comes to Rs.2,00,97,708/- (A\*B/C).

(ii) 8D(2)(iii) : The total of the investment at the start and close of the previous year was pegged at Rs.26,74,81,446/- and Rs.26,73,81,446/-. The average of it comes to Rs.26,74,31,446/-. The one half percent of the average investment comes to Rs.13,37,157/-.

Thus, the total disallowance u/s 14A r.w.r. 8D works out to Rs.2,14,34,865/- and the same is being disallowed.”

12. The ratio of the judgment cited as **Maxopp Investments Limited** (supra) passed by the Hon’ble jurisdictional High Court is that *“under section 14A(2,) it is a condition precedent for Assessing Officer to determine amount of expenditure incurred in relation to exempt income; that he must record his dissatisfaction with correctness of claim of expenditure made by the assessee or with correctness of the claim made by the assessee that no expenditure has been incurred and that determination of amount of expenditure in relation to exempt income under Rule 8D only come into play when AO rejects claim of assessee in this regard.”*

13. When the assessee has come up with a categorical plea that there is no increase in investment during the year under assessment and has not incurred any expenditure, the question of resorting to

estimation by the AO does not arise particularly when AO has neither disputed the audited books of account maintained by the assessee in respect of investment and dividend income nor AO has recorded his dis-satisfaction as to how any expenditure has not been incurred by the assessee in maintaining the investment. In the given circumstance, the disallowance u/s 14A cannot exceed the amount of Rs.28,666/- already claimed exempt u/s 10(34).

14. CIT (A) has also failed to appreciate the arguments addressed by the assessee that when no fresh investment has been made by the assessee during the year under assessment nor it has incurred any expenditure the question of invoking provisions contained under section 14A read with Rule 8D does not arise.

15. Now, the next question arises for determination in this case is :-

***“as to whether without prejudice to ground no.1 of appeal no.993/Mum./2012 qua AY 2008-09 and grounds no.1, 2 & 3 raised in appeal no.781/Del./2014 qua AY 2009-10, the assessee is entitled for deduction of interest to the tune of Rs.84,99,516/- qua AY 2008-09 and Rs.47,36,853/- qua AY 2009-10 claimed to have expended for business purposes?”***

16. Ld. CIT (A) while disposing of the appeal qua AY 2008-09 affirmed the finding returned by the AO on the above issue as under :-

“4.6 Coming to the issues at hand, the appellant has not questioned the applicability of Rule 8D but has merely argued that in the computation portion under Rule 8D the net interest expenditure should have been considered. It has been noted that the funds of the appellant are in common pool and no nexus could be established of non interest bearing funds being applied to the investments generating exempt income. I am not in agreement with the view of Ld. A.R. as in second limb of Rule 8 (2) the disallowance of interest is to be computed in accordance with the formula  $A \times B/C$  where A is amount of expenditure by way of interest other than interest directly relatable to exempt income. There is no mention of net interest in the provision and thus the contention raised is rejected.

4.7 No submissions have been made before me in regard to alternate arguments of the A.O. for part disallowance of interest. It is an admitted fact that the appellant is not in the money lending business and the intended purpose of raising loans was to set up a factory but the project having not materialized the funds were invested in interest earning assets and thus the interest income being not relatable to the business of the appellant, is nothing but income from other sources. The interest paid is thus not allowable U/s.36( 1). The alternate plea of the A.O. that the interest expenditure of Rs.84,99,516/- is to be disallowed is in order. Ground 1-3 are dismissed.”

17. Undisputedly, assessee has received unsecured loan at Rs.46,19,15,339/- and at the same time granted Rs.46,62,12,735/- during AY 2008-09. Assessee paid interest at Rs.4,69,81,457/- on these loans @ 11% / 12%. AO as well as CIT (A) have disallowed the interest claimed by the assessee on the ground that the assessee has failed to prove direct nexus between loan lent and accepted and

all these loans were primarily used partly for advancing loans and the balance was kept in fixed deposits in the bank.

18. AO in para 4 of the assessment order has categorically admitted that on the amount of Rs.29,41,09,881/-, the assessee charged interest @ 11% / 12% and also worked out the closing fixed deposit figure at Rs.34,74,92,451/- on which assessee earned 7% only. The assessee set off the short fall in the income at Rs.82,49,630/- earned from sugar trading at commodity exchange.

19. The only ground on which the AO/CIT(A) has disallowed the interest is that the loans were utilized for non-business activities. When undisputedly the loans were kept in FDR, which are in the shape of ready funds available with the assessee to be used for business purpose at the opportune time the assessee being in trading, cannot be treated as non-business purpose in any manner whatsoever, particularly when the funds have not been diverted to any third party. Moreover, the AO has not come up with any material to prove that the borrowed funds have been used for non-business purpose.

20. In the totality of circumstances, we are of the opinion that the complete nexus has been established between the funds borrowed and fund parked in the FDRs to be utilized for business

purpose at the time of opportune time. So, in these circumstances, the revenue authority was not justified in disallowing the interest claimed by the assessee both in AY 2008-09 and AY 2009-10. So, grounds no.2 & 3 of appeal no.993/Mum./2012 qua AY 2008-09 and grounds no.1, 2, 3 & 4 of appeal no.781/Del/2014 qua AY 2009-10 are determined in favour of the assessee.

19. Ground No.4 of appeal no .993/Mum./2012 qua AY 2008-09 has not been pressed by the ld. AR for the assessee during the course of hearing and as such, the same is hereby determined against the revenue.

20. In view of what has been discussed above, the appeal no.993/Mum/2012 qua AY 2008-09 is hereby partly allowed and appeal no.781/Del/2014 qua AY 2009-10 is allowed.

**Order pronounced in open court on this 30<sup>th</sup> day of August, 2016.**

**Sd/-  
(J.S. REDDY)  
ACCOUNTANT MEMBER**

**sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated the 30<sup>th</sup> day of August, 2016**

**TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-XVII, New Delhi
- 5.CIT(ITAT), New Delhi.

**AR, ITAT  
NEW DELHI.**