

आयकर अपीलीय अधिकरण “जे” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “J” BENCH, MUMBAI

BEFORE SHRI R. C. SHARMA, ACCOUNTANT MEMBER
AND SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 462/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2007-08)

JSW Energy Limited JSW Centre, Bandra Kurla Complex, Bandra (E), Mumabi-400 051	बनाम/ Vs.	ACIT, Central Circle-46, Aayakar Bhavan, M. K. Road, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACJ 8109 N		
(Assessee)	:	(Revenue)

आयकर अपील सं./I.T.A. No. 981/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2007-08)

ACIT, Central Circle-46, Aayakar Bhavan, M. K. Road, Mumbai	बनाम/ Vs.	JSW Energy Limited JSW Centre, Bandra Kurla Complex, Bandra (E), Mumabi-400 051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACJ 8109 N		
(Revenue)	:	(Assessee)

Assessee by	:	Shri Rakesh Joshi
Revenue by	:	Shri K. Ravi Kiran

सुनवाई की तारीख / Date of Hearing	:	12.7.2016
घोषणा की तारीख / Date of Pronouncement	:	07.10.2016

आदेश / ORDER

Per R. C. Sharma, A. M.:

These are the cross appeals filed by the assessee and the Revenue against the order by the Id. CIT(A) for the assessment year (A.Y.) 2007-08.

2. Rival contentions have been heard and record perused. Facts in brief are that the assessee is engaged in generation of power and operation and maintenance of power plants and project management services. During the course of scrutiny assessment, the A.O. disallowed the assessee's claim of deduction u/s. 80-IA in respect of interest income. Disallowance was also made u/s. 14A. A.O. also recalculated book profit u/s. 115JB after making additions u/s. 14A. By the impugned order, the CIT(A) given a relief with regard to administrative expenses to the tune of Rs.3 lacs, thus the disallowance u/s. 14A was partly deleted by the Id. CIT(A). Against this order of the CIT(A), both the assessee and the Revenue are in appeal before us.

3. We have considered rival contentions and found from record that the A.O. has treated the interest income of Rs.2,35,87,315/- as 'income from other sources' in place of 'business income'. Accordingly, no deduction was allowed with respect to this income u/s. 80IA. The CIT(A) confirmed the action of AO by following decision of Hon'ble Supreme Court in case of Pandian Chemicals 129 Taxman 539. Assessee is in further appeal before us.

4. From the record we found that the interest income is earned on the amount kept as Debt Service Reserve under the loan agreement for 2X130MW power project, income from which is eligible for deduction under Section 80IA of the Act. The amount was kept as Debt Service Reserve for smooth functioning of Power Project and thus, it was contended that the interest earned on such amount is directly related to the power undertaking.

5. The Id. AR relied on the decision of Hon'ble Supreme Court in the case of *ACG Associated Capsules Pvt. Ltd v. CIT* 343 ITR 89 (SC), and contended that only net interest should be excluded from eligible profit and not the gross interest income. We

have carefully gone through the decision of Hon'ble Supreme Court in the case of ACG Associated Capsules Pvt. Ltd., (supra) wherein it was held that while computing deduction u/s.80HHC, net interest income which has been included in the profit of the business of assessee as computed under the head "profits and gains of business and profession" is to be excluded and not the gross interest income. Respectfully following the proposition laid down by the Hon'ble Supreme Court, we direct the A.O. to examine the nature of interest income so received by the assessee, whether it is "income from business and profession" or "income from other sources". The proposition laid down by the Hon'ble Supreme Court in case of ACG Associated Capsules (supra) is applicable only where interest income is assessed as 'business income'. However, where interest income is assessed as 'income from other sources', the benefit of netting can be given only with respect to the interest expenditure which has been incurred for earning the interest income which has been included in the profit of business of assessee. Accordingly, we restore the matter back to the file of the AO for deciding afresh in terms of our above discussion. We direct accordingly.

6. With regard to disallowance u/s. 14A, we found that in the return of income for the year under appeal, the assessee had made a disallowance of Rs.5,28,211/- under section 14A of the Act, being expenditure incurred for the purpose of earning exempt dividend income amounting to Rs.28.18 crores. The assessing officer however, in the impugned assessment order has made further disallowance of expenses of Rs.9,14,54,978/- under section 14A of the Act treating the same as expenses incurred in relation to earning of exempt income. As per the rectification order dated December 8, 2010, the disallowance made under Section 14A of the Act in the assessment order has been rectified to Rs.9,04,80,767/-. Break-up of the disallowance made under Section 14A of the Act is as under:

Particulars	Amount in Rs.
Direct Expenses	6,37,23,291
Proportionate Expenses	Nil
Indirect Expenses (0.5% of Average value of Investments)	2,67,57,476
Total disallowance	9,04,80,767

7. Before the Id. CIT(A), it was contended by the assessee that the investment are in the nature of business assets. Accordingly interest on borrowing used for such investment is deductible u/s.36(1)(iii), and no disallowance is warranted u/s. 14A. The Id. CIT(A) did not agree with the assessee's contention, however, disallowance made under Rule 8D(iii) was reduced by the Id. CIT(A) to Rs.40,18,773/- as against disallowance of Rs.2,72,03,476 proposed by AO by observing that even though in the year under consideration Rule 8D is not applicable, but reasonable disallowance is to be made. Accordingly, he estimated the disallowance at Rs.3 lacs per month on account of administrative expenses as against disallowance of Rs.2,72,03,476/- made by AO. Both the assessee and the Revenue are in appeal before us.

8. It was argued by the Id. AR that Rule 8D is not applicable for the year under consideration, i.e., for A.Y. 2007-08. He further contended that no disallowance can be made with regard to the fund invested for strategic investment. He further invited our attention to the fact that interest expenditure has already been reversed from income while computing deduction u/s. 80IA. Reliance was placed on the decision of Hon'ble Delhi High Court in the case of Oriental Structure Engineers P. Ltd. in support of the proposition that no disallowance of interest could be made in respect of investment made in subsidiary group companies for controlling interest. Our attention was also invited to the fact that the assessee was earning taxable income from subsidiaries. As per the Id. AR, sufficient interest free funds were available with the assessee, therefore in view of the decision of Hon'ble jurisdictional High Court in the

case of *CIT vs. HDFC Bank Ltd.* [2014] 366 ITR 505 (Bom), no disallowance on account of interest expenditure is warranted.

9. We have considered the rival contentions and also deliberated on the judicial pronouncement referred by the lower authorities in their respective orders as well as cited by the Id. AR and Id. DR during the course of hearing before us. From the record we find that the A.O. has disallowed direct expenditure of Rs.6,37,23,291/- mainly on account of interest on funds invested in tax free securities. However, major investment was strategic. In view of the decision of Hon'ble Delhi High Court in the case of *Oriental Structure Engineers P. Ltd.* (supra) and Mumbai Bench Tribunal in the case of *Garware Wall Ropes Limited* (ITA No. 5408/Mum/2012 dated 15.01.2014) and *J. M. Financial Ltd.* (in ITA No. 4521/Mum/2012), no disallowance of interest could be made in respect of investment made in group concerns. Accordingly, we direct the A.O. to exclude the investment made in group concerns while computing the disallowance of interest. We further direct the A.O. to verify the interest free funds available with the assessee for making investment. As per the verdict of Hon'ble jurisdictional High Court in the case of *CIT vs. Reliance Utilities and Power Ltd.* [2009] 313 ITR 340 (Bom), *CIT vs. HDFC Bank* 366 ITR 505 (Bom) and decision of Mumbai Tribunal in the case of *ACIT Vs Prakash I Shah* (ITA No. 6349/Mum/2011), no disallowance of interest is warranted when assessee is having sufficient own funds for making investment. The A.O. is directed to verify the availability of interest free funds with the assessee for investment.

10. In view of the above, the disallowance made u/s.14A is restored back to the file of the A.O. for re-computing the disallowance of interest in terms of the above discussions. Further in view of the decision of Hon'ble Delhi High Court in the case of *ACB India Ltd. vs. ACIT* 374 ITR 108, we direct the A.O. to consider only those investment on which dividend is received while computing disallowance u/s.14A.

Similar view has been taken by Hon'ble Gujarat High Court in the case of *CIT vs. Corrtch Energy (P) Ltd.* 272 CTR 262 (Guj) and by Hon'ble Punjab & Haryana High Court in the case of *CIT v. Lakhani Marketing Incl.* [2014] 272 CTR 265(P&H). The A.O. is accordingly directed to consider these judicial pronouncements while working out disallowance u/s. 14A.

11. On the other hand, the ld. DR invited our attention to the order of the tribunal in the assessee's own case for A.Y. 2006-07, wherein issue with regard to disallowance u/s. 14A was restored back to the file of the A.O.

12. Learned DR also objected to the disallowance deleted by CIT(A) by estimating administrative expenditure at Rs. 3.00 lacs per month and contended that without giving any cogent reason, the CIT(A) had reduced disallowance of Rs.2,67,57,476/- to Rs.36.00 lacs. As per learned DR, looking to the dividend income of assessee amounting to Rs. 28.18 crores, the disallowance made by the AO was perfectly justified and the CIT(A) has reduced the same considerably without giving any justification.

13. We have considered rival contentions and also gone through the order of the Tribunal, in assessee's own case for the assessment year 2006-07 wherein Tribunal held that Rule 8D is not applicable prior to the assessment year 2008-2009. Accordingly, the matter was restored back to the file of AO for deciding afresh as per the directions given therein. The relevant assessment year under consideration is 2007-08, Rule 8D is also not applicable to this assessment year in terms of the decision of Bombay High Court in case of *Godrej & Boyce Manufacturing Company* 328 ITR 81. Respectfully following the decision of the tribunal in assessee's own

case, having similar facts, we restore the matter back to the file of the AO for computing afresh disallowance warranted under Section 14A keeping in view our above observation. We direct accordingly.

14. Assessee has also taken ground for addition of disallowance made under Section 14A while computing book profit under Section 115JB. As we have already restored a ground with regard to computation of disallowance / addition made under Section 14A to the file of AO, in the interest of justice, this ground of assessee's appeal is also restored back to the file of the AO for deciding afresh after re-computing the disallowance to be made under Section 14A. We direct accordingly.

15. In the result, both the appeals of the Revenue and the assessee are allowed in part in terms indicated hereinabove.

Order pronounced in the open court on 07/10/2016

Sd/-
(SANDEEP GOSAIN)

sd/-
(R. C. SHARMA)

न्यायिक सदस्य / JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई/Mumbai; दिनांक/Dated : 07/10/2016

व.नि.स./Roshani, 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)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai

6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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