

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'ए' मुंबई।
IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI

सर्व श्री राजेन्द्र, लेखा सदस्य एवं श्री संजय गर्ग, न्यायिक सदस्य के समक्ष।
BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER

आयकर अपील सं./ITA Nos.8461/M/2010 & 5598/M/2011
(निर्धारण वर्ष / Assessment Years: 2007-08 & 2008-09)

Archway Investment Company Limited, Neville House, J.N. Heredia Marg, Ballard Estate, Mumbai-400 001 PAN: AAACA5507H	बनाम/Vs.	ITO-2(1)(1), Mumbai
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA Nos.948/M/2011, 7215/M/2012 & 6013/M/2011
(निर्धारण वर्ष / Assessment Year: 2007-08, 2007-08 & 2008-09)

ITO-2(1)(1), Aayakar Bhavan, R.No.561, 5 th Floor, M.K. Road, Mumbai-400 020	बनाम/Vs.	Archway Investment Co. Ltd., Neville House, J.N. Heredia Marg, Ballard Estate, Mumbai-400 001 PAN: AAACA5507H
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

Present for:

Assessee by

: Shri Yogesh Thar, A.R.

Revenue by

: Shri Rajesh Kumar Yadav, D.R.

सुनवाई की तारीख/Date of Hearing : 17.01.2017

घोषणा की तारीख /Date of Pronouncement : 10.02.2017

आदेश / ORDER

Per Sanjay Garg, Judicial Member:

The above titled cross appeals for different assessment years relate to the same assessee. The issues involved in all the appeals are identical in nature.

Hence, these appeals were heard together and are being disposed of by this common order. First we take up the appeals relating to assessment year 2007-08 bearing ITA No.8461/M/2010.

ITA No.8461/M/2010

2. This appeal has been preferred by the assessee against the order dated 20.11.2009 of the Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)]. The assessee in this appeal has agitated the confirmation of disallowance which was made by the Assessing Officer (hereinafter referred to as the AO) under section 14A read with rule 8D. The AO noted that the assessee during the year had earned dividend income of Rs.82,29,300/-. However, the assessee had not disallowed any expenditure for earning of this tax exempt income. He accordingly applied rule 8D and computed the disallowance under section 14A at Rs.51,84,673/-, out of which a sum of Rs.24,16,733/- was disallowed as interest expenditure under rule 8D(2)(ii) and the remaining sum of Rs.27,67,940/- was disallowed on account of administrative expenditure under rule 8D(2)(iii). Being aggrieved by the above disallowance, the assessee preferred appeal before the Ld. CIT(A).

3. The Ld. CIT(A) upheld the disallowance so made by the AO. The assessee, thus, has come in appeal before us on this issue.

4. We have considered the rival submissions of the Ld. representatives of the parties. The Ld. A.R. of the assessee has submitted that Rule 8D of the I.T. Rules 1962 is not applicable for the year under consideration. We find force in the above contention of the Ld. A.R.

5. In the case of Godrej & Boyce Manufacturing Co. Ltd. (supra) the Hon'ble Bombay High Court has held that Rule 8D r.w.s. 14A(2) is not arbitrary or unreasonable but can be applied only if the assessee's method is not satisfactory. It has been further held that Rule 8D is not retrospective and

applies from A.Y. 2008-09 onwards. For the years for which Rule 8D is not applicable and in the event of that the AO is not satisfied with the explanation/working given by the assessee, disallowance under section 14A has to be made on a reasonable basis. Almost similar view has been expressed by Hon'ble Delhi High Court in the case of 'Maxopp Investment Ltd. & Others' vs. CIT (247 ITR 162).

6. It may be further observed that it is not a case where no exempt income was received by the assessee despite making investments for earning exempt income. It is also not the case of the Revenue that the exempt income earned by the assessee was very less or not in proportion to the investments made by the assessee for this purpose. Under such circumstances the different coordinate benches of this Tribunal have observed that in such cases certain percentage of exempt income can constitute a reasonable estimate for making disallowance for the years earlier to assessment year 2008-09. The Hon'ble Bombay High Court in the case of CIT vs. 'Godrej Agrovet Ltd.' (ITA No.934/2011) decided on 08.01.13 has upheld the order of the Tribunal directing the AO to restrict the disallowance to the extent of 2% of the total exempt income earned by the assessee.

7. At this stage, the Ld. A.R. has brought our attention to the order of the Tribunal dated 09.03.16 in the own case of the assessee for A.Y. 2006-07 wherein the Tribunal has restricted the disallowance under section 14A in similar circumstances to the extent of 5% of the exempt income earned by the assessee for that assessment year under consideration. Following the same yardstick, we restrict the disallowance under section 14A to the extent of 5% of the exempt income for this year also. The appeal of the assessee is therefore treated as partly allowed.

8. Now coming to the appeal of the Revenue bearing ITA No.948/M/2011 for A.Y. 2007-08.

ITA No.948/M/2011

9. This is a cross appeal by the Revenue for A.Y. 2007-08 itself. The Revenue in this appeal has agitated the action of the Ld. CIT(A) in allowing the interest of Rs.33.39 lakhs as expenditure which was disallowed by the AO holding that the same was not a revenue expenditure. The AO noted that the assessee has been engaged in the business of borrowing and lending of funds on interest apart from its investment activity. He further noted that the amount of interest paid during the year was more than the amount of interest received. He further observed that a company which is engaged in the activity of borrowing and lending of funds was supposed to receive interest at a higher rate than the interest paid. He therefore observed that the borrowed funds must have been used for investment purposes, the income from which has been claimed as short term capital gain/long term capital gain; he therefore held that the excess payment of interest made by the assessee was not an allowable business expenditure and accordingly disallowed a sum of Rs.33,39,258/-. Being aggrieved by the above disallowance made by the AO, the assessee preferred appeal before the Ld. CIT(A).

10. The Ld. CIT(A) noted that the assessee had used the borrowed funds not only for further lending but also for investment in securities which yielded exempt income. He further observed that since the disallowance under section 14A of a sum of Rs.51,84,673/- has already been made by the AO, hence no further disallowance was called for under section 37(1). He accordingly deleted the disallowance made by the AO on this issue. Being aggrieved by the above order of the Ld. CIT(A), the Revenue has come in appeal before us.

11. Admittedly, the assessee is an investment company and is also engaged in borrowing and lending business whereby the assessee company borrows funds at lower rate of interest and lends the same at higher rate of interest. The Ld. AR has brought our attention to the decision of the Hon'ble Bombay High

Court in the case of CIT vs. Srishti Securities (P.) Ltd. (2009) 183 Taxman 159 (Bombay) wherein the Hon'ble Bombay High Court, while relying upon various case laws, has held that if the capital has been borrowed for the purpose of business or profession of the assessee company then the interest paid on the borrowed funds is an allowable expenditure. It has been further held that in case of an investment company, the amount borrowed may be utilised for the purpose of acquisition of stock in trade or for the purpose of acquisition of capital assets. The ratio of the above decision of the Hon'ble Bombay High Court squarely applies in the case of the assessee. Even otherwise as observed above, we have already directed for disallowance under section 14A at the rate of 5% of the dividend income earned. The said disallowance made under section 14A will also take care of the interest expenditure incurred by the assessee on investments relatable to earning of exempt income. Under the circumstances, no further disallowance is attracted in this case.

12. We therefore do not find any merit in the appeal of the Revenue and the same is accordingly dismissed.

13. There is another appeal of the Revenue for A.Y. 2007-08 bearing ITA No.7215/M/2012.

ITA No.7215/M/2012

14. The present appeal has been preferred by the Revenue against the order dated 20.09.2012 of the Ld. CIT(A) in relation to the order passed by the AO under section 154 of the Act. The AO noted that there was a mistake in computation/calculation of the interest expenditure while making disallowance under section 14A read with rule 8D(2)(ii). He accordingly modified the order increasing the amount of disallowance of interest expenditure.

15. In appeal, the Ld. CIT(A) set aside the order of the AO observing that such a course made by the AO under section 154 of the Act was not

maintainable and that there was force in the contention of the assessee that the disallowance of interest should be made with reference to net interest only.

16. The issue involved in this appeal is regarding the computation of disallowance under rule 8D. As observed above while deciding the appeal of the assessee bearing ITA No.8461/M/10, we have already restricted the overall disallowance under section 14A to the extent of 5% of the exempt income which also includes the interest disallowance, if any, that is to be made in the case in hand. Therefore, in view of the above, this appeal of the Revenue has become infructuous and the same is accordingly dismissed.

17. Now coming to the cross appeals for A.Y. 2008-09.

ITA No.6013/M/2011 (Revenue's appeal) & ITA No.5598/M/2011 (Assessee's appeal)

18. The issues raised in the above stated appeals are identical as raised in appeals relating to A.Y. 2007-08. The assessee has agitated the disallowance made by the AO under section 14A of the Act whereas the Revenue has come in appeal agitating the action of the Ld. CIT(A) in allowing the interest expenditure incurred by the assessee on the investments made.

19. As discussed above, the assessee is an investment and finance company. It had made strategic investments. The Ld. A.R. has stated that more than 90% of the investments of the assessee were strategic investments made in subsidiaries and associated companies. He, in this respect, has invited our attention to page 6 of the paper book which is an audit report of the chartered accountant regarding the investments made and in para 5 of the said document it has been stated that the aggregate cost of investments made in group/holding/subsidiary companies was not less than 90% of the cost of the total assets of the company at any point of time throughout the relevant accounting period/year.

20. As discussed above in the light of the decision of the Hon'ble Bombay High Court "CIT vs. Srishti Securities (P.) Ltd." (supra) the Hon'ble Bombay High Court has held that if the capital has been borrowed for the purpose of business or profession of the assessee company then the interest paid on the borrowed funds is an allowable expenditure. It has been further held that in case of an investment company the amount borrowed may be utilised for the purpose of acquisition of stock in trade or for the purpose of acquisition of capital assets. The ratio of the above decision of the Hon'ble Bombay High Court squarely applies in the case of the assessee.

21. Further, the Ld. Counsel for the assessee has brought our attention to the decision of the Hon'ble Bombay High Court in the case of "CIT, Panaji, Goa vs. Phil Corpn. Ltd." (2011) 202 Taxman 368 wherein the Hon'ble Bombay High Court has held that where the investment in shares of sister/subsidiary company is made to have control over that company and further that such an investment was accordingly part of the business of the assessee, in that event the assessee is entitled to deduction of interest paid on the borrowed amount under section 36(1)(iii) of the Act. We, further find that recently the Hon'ble Delhi High Court in the case of "Eicher Goodearth Ltd. vs. CIT" (2015) 60 taxman.com 268 (Del.) has held that if the expenditure is incurred for the purpose of promotion of business-more specifically to retain control or as part of his strategic investment of the assessee company, such expenses by way of interest out go would have to be treated as allowable under section 36(1)(iii) of the Act.

22. In view of the various case laws as discussed above, the interest expenditure incurred by the assessee for the purpose of strategic investment as the investment being the business of the assessee is an allowable expenditure under section 36(1)(iii) of the Income Tax Act.

So far as the disallowance under section 14A is concerned, no doubt the assessment year under consideration is A.Y. 2008-09 and the rule 8D is applicable for the year under consideration. However, in the light of the decisions referred to above, the expenditure incurred by the assessee in relation to strategic investments is held to be an allowable business expenditure. The same therefore cannot be held to be for investment purposes or with the object of earning of dividend/tax exempt income, but the same, in the light of above referred to Judicial decisions can safely be said to be related to the business activity of the assessee and no disallowance, therefore, is attracted on such an income u/s 14A of the Act. Further, the Hon'ble Bombay High Court in the case of "CIT vs. India Advantage Securities Ltd." in ITA No.1131 of 2013 vide order dated 17.03.2015 has upheld the finding of the Tribunal holding that while making the disallowance under rule 8D, the shares held as stock in trade should not be considered, only the shares taken as investment in the account be considered for computation of disallowance of expenditure under rule 8D.

23. So the proposition laid down by the Hon'ble Bombay High Court in the case of "India Advantage Securities Ltd." (supra) is that any expenditure which is held to be relating to the business activities of the assessee and not for the purpose of earning of exempt income and the exempt dividend income, if any, is incidental to such business activity of the assessee, then no disallowance under section 14A in relation to such investment is attracted. Therefore, in the light of above case laws, in our view, no interest disallowance even under section 14A read with rule 8D2(ii) in relation to the investments made by the assessee being relating to its business activity is attracted. Our above decision is in line with the order of the Co-ordinate Bench of the Tribunal in the case of "DCIT vs. M/s. Jayneer Capital Pvt. Ltd." ITA No.7111/M/2014 vide order dated 13.07.2016 wherein the Tribunal has further relied upon the judgment of Hon'ble Delhi High Court in the case of "Oriental Structural Engineers (P) Ltd., 35 Taxmann.com 201; order of Chennai Bench of Tribunal in the case of

EIH Associated Hotels Ltd. (ITA No.1503/Mds/2012 dated 17.7.2013); order of Mumbai Bench of Tribunal in the case of “M/s. JM Financial Ltd.” (ITA No.4521/Mum/2012 dated 26.3.2014); and, order of Delhi Bench of Tribunal in the case of “Interglobe Enterprises Ltd. (ITA Nos.1362 & 1032/Del/2013 dated 4.4.2014). Similar proposition can be applied in case of disallowance of administrative expenditure under Rule 8D2(iii) also. We accordingly direct the AO to exclude the strategic investments made in group/associate companies for the purpose of computation of disallowance under section 14A read with Rule 8D.

24. In view of this, the appeal of the assessee is partly allowed whereas the appeal of the Revenue is dismissed.

Order pronounced in the open court on 10.02.2017.

आदेश की घोषणा खुले न्यायालय में दिनांक: 10.02.2017 को की गई।

Sd/-
(राजेन्द्र / Rajendra)
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(संजय गर्ग / Sanjay Garg)
न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई/Mumbai; दिनांक/Dated 10.02.2017

* Kishore

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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR
Concerned 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