

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER  
AND  
SHRI SANJAY GARG, JUDICIAL MEMBER.

ITA No. 818 /MUM/2012  
(Assessment Year : 2008-09)

Alok Infrastructure Limited,  
2, Ground Floor, Peninsula Towers,  
Peninsula Corporate Park,  
G.K.Marg, Lower Parel,  
Mumbai – 400013  
PAN:AAGCA 1949P ... Appellant

Vs.

The ACIT, Range 6(1),  
Aaykar Bhavan, MK Road,  
Mumbai 400 020 .... Respondent

ITA No.1651/Mum/2012  
(Assessment Year 2008-09)

The ACIT, Range 6(1),  
Aaykar Bhavan, MK Road,  
Mumbai 400 020 ..... Appellant

Vs.

Alok Infrastructure Limited,  
2, Ground Floor, Peninsula Towers,  
Peninsula Corporate Park,  
G.K.Marg, Lower Parel,  
Mumbai – 400013 ..... Respondent

Assessee by : S/Shri M.P.Lohia & Nikhil Tiwari  
Revenue by : Shri Javed Akhtar

Date of hearing : 22/07/2016  
Date of pronouncement : 29/07/2016

**ORDER****PER G.S.PANNU, A.M:-**

The captioned cross-appeals filed by the assessee and Revenue pertaining to A.Y. 2008-09 are directed against an order passed by Ld. CIT(A)-14, Mumbai dated 27/12/2011, which in turn arises out of an order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') dated 18/03/2010. The Grounds of appeal raised by the assessee as well as the Revenue read as under:-

**Assessee's Grounds of Appeal:**

*"On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals)- 14 (CIT(A)):*

**Disallowance under section 14A of Rs 33,93,829/-**

- 1. erred in confirming disallowance under section 14A of the Income-tax Act, 1961 ('the Act') of Rs 33,93,829/- by invoking provisions of Rule 8D, without appreciating that no expenses have been incurred for earning exempt income and expenses were incurred only in relation to the appellant's business of construction and real estate development;*
- 2. failed to appreciate that the provisions of sub rules (2) and (3) of Rule 8D of the Rules read with section 14A(2) of the Act cannot be invoked, in absence of any satisfaction by the learned Assessing Officer under section 14A(1) of the Act read with Rule 8D(1) of the Rules;*
- 3. without prejudice to the above, should have appreciated that only the investments on which exempt income is earned during the year, should be considered while computing disallowance under rule 8D;*
- 4. without prejudice to the above, should be directed to restrict the disallowance to a nominal amount as no dividend was earned during the year and no further activities were done in respect of investments made.*

**Revenue's Grounds of Appeal:-**

- 1 . " On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 53,07,2601- made u/s. 36(1)(iii) of*

*the Act without appreciating the facts that borrowed funds were utilized for the purpose of investment as admitted by the assessee itself"*

*2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that the borrowed funds were utilized for the purpose of non-business purposes and also the assessee could not prove before the Assessing Officer that the investment was made out of own funds."*

*3 "The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored".*

2. The assessee is a company incorporated under the provisions of the Companies Act, 1956, and is, inter-alia, engaged in the business of construction activity. For assessment year 2008-09, it filed return of income declaring a total income of Rs.3,15,64,466/-, which was subject to scrutiny assessment whereby, the total income has been assessed at Rs.4,24,98,864/-, after making disallowances out of interest/finance charges and under section 14A of the Act. In an appeal preferred by the assessee, the CIT(A) has allowed part relief, therefore, the assessee and the Revenue are in appeal challenging the order of the CIT(A) on respective Grounds of appeal.

3. In so far as the assessee's appeal is concerned, although multiple Grounds have been raised, but the solitary grievance is with regard to the action of the CIT(A) in sustaining the disallowance of Rs.33,93,829/- under section 14A of the Act .

3.1 In this regard, brief facts are that the Assessing Officer noted that assessee had invested in shares, which would yield exempt income and, therefore, according to him the disallowance under section 14A of the Act was merited. Accordingly, he worked out the disallowance under section 14A by applying the formula contained in Rule 8D(2)(iii)

of the Income Tax Rules, 1962 ( in short 'the Rules') on account of indirect expenses amounting to Rs. Rs.33,93,829/-

4. In appeal before the CIT(A), the assessee company made varied submissions, namely, that no part of expenses was incurred in relation to earning of exempt income; that expenses were incurred only in relation to its construction and real estate business; that the investments were in the shares of a Private Limited Company, where of the gain on sale of such shares would result in taxable income; that in any case, investments were in subsidiary concerns, which were strategic investments for business purposes; and, that no exempt income by way of dividends was earned during the year under consideration. All the aforesaid reasons were canvassed by the assessee to support its assertion that disallowance under section 14A was not merited. However, the CIT(A) sustained the disallowance on the ground that application of Rule 8D of the Rules was mandatory w.e.f. assessment year 2008-09. Against such a decision, assessee is in further appeal before us.

5. Before us, Ld. Representative for the assessee has reiterated all the submissions which were canvassed before the CIT(A).

6. On the other hand, the Ld. Departmental Representative has defended the orders of the authorities below by placing reliance on the same.

7. We have carefully considered the rival submissions. Pertinently, in this case, the primary plea of the assessee has been that during the year under consideration, it has not earned any exempt income in

order to invoke the provisions of section 14A of the Act. In this context, the Ld. Representative for the assessee has placed reliance on the judgment of the Hon'ble Bombay High Court in the case of CIT vs. Delite Enterprises, ITA NO.110 of 2009 dated 26/02/2009, wherein non-application of section 14A has been upheld in the absence of any exempt income for the relevant assessment year. The Ld. Representative for the assessee also relied upon the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Holcim India P. Ltd. in ITA No.486/2014 & ITA 299/2014 dated 05/09/2014, wherein also similar proposition has been upheld. On the aforesaid primary point itself, we find no reason to uphold the impugned disallowance made by the income tax authorities by invoking section 14A of the Act. Accordingly, the disallowance of Rs.33,93,829/- sustained by the CIT(A) is hereby directed to be deleted. Thus, on this aspect, assessee succeeds.

8. In the result, appeal of the assessee is allowed.

9. In so far as cross appeal of the Revenue is concerned, the solitary issue relates to action of the CIT(A) in deleting an addition of Rs.53,07,260/-, which was made by the Assessing Officer by invoking the provisions of section 36(1)(iii) of the Act.

9.1 In this context, relevant facts are that the Assessing Officer noticed that assessee company had incurred interest expenditure of Rs.1,66,32,240/- on borrowings of Rs.43.00 crores raised from L&T Infrastructure Finance Company Ltd. The Assessing Officer also noted that during the year under consideration assessee had made investments of Rs.135.00 crores in shares, which was claimed to have

been made out of own non-interest bearing funds. The Assessing Officer has noted in the assessment order that on being asked to furnish any nexus between the funds utilized and investments, the assessee failed to do so. The Assessing Officer further noticed that after raising of borrowed funds from L&T Infrastructure Finance Company Ltd. on 8/01/2008, assessee had made two investments namely, (i) Alspn Infrastructure- Rs.10,60,00,000 on 25,26,27/3/2008; and (ii) Ashford Infotech (P) Ltd.- Rs. 50.00 crores on 25/02/2008. The Assessing Officer worked out proportionate interest on such investments and made a total disallowance of Rs.69,50,569/- out of interest expenditure under section. 36(1)(iii) of the Act. A sum of Rs.6,93,624/- related to investment made in Alspn Infrastructure and Rs.62,56,945/- for investment in Ashford Infotech(P) Ltd. Subsequently, the Assessing Officer, on application filed by the assessee under section 154 of the Act, deleted the addition of Rs.6,93,624/- relating to the investment in Alspn Infrastructure.

11. Before the CIT(A), assessee raised various submissions on facts and in law. The assessee pointed out that a sum of Rs.50.00 crores was given to its subsidiary Ashford Infotech (P) Ltd by way of share application money and such subsidiary was also engaged in the business of construction and development of real estate. For the said reason, it was canvassed that such investment was for furtherance of assessee's business, following the ratio of the decision of the Hon'ble Supreme Court in the case of S.A. Builders Limited vs. CIT, 288 ITR 1(SC). Reliance was also placed on the judgment of the Hon'ble Delhi High Court in the case of Bharti Televentures Ltd , 331 ITR 502 (Del) for the proposition that where interest bearing funds were advanced to

subsidiary company, such advances were to be considered for business consideration as profits of the subsidiary would also ultimately become part of the profits of the holding company. An alternative submission was also made by the assessee, which was to the effect that its total shareholder funds, which were free of interest, were in excess of the impugned investments and, therefore, following the ratio of the judgment of the Hon'ble Bombay High Court in the case of CIT. Vs. Reliance Utilities And Power Limited.,313 ITR 340(Bom), it was to be presumed that such investments are out of non-interest bearing funds, and, thus no interest was disallowable. The CIT(A) accepted both the pleas set up by the assessee and has deleted the addition.

12. Before us, the Ld. Departmental Representative has primarily relied upon the order of the Assessing Officer in support of the case of the Revenue, without controverting any of the factual matrix brought out by the CIT(A). Notably, the CIT(A) in para 3.9 of his order has referred to the fund flow statement furnished by the assessee whereby, assessee had owned interest free funds of Rs.193.70 crores and investment in subsidiary was Rs.135.00 crores. On this basis, the CIT(A) has concluded that assessee had sufficient own funds and , therefore, following the judgment of Hon'ble Bombay High Court in the case Reliance Utilities And Power Limited(supra), it can be presumed that no borrowed funds were used to make such investments. As per Hon'ble Bombay High Court, the principle is that, if there are funds available both interest free and interest bearing, then a presumption can be drawn that investments are made out of interest free funds, so long as such interest free funds are sufficient to meet the investments. In our considered opinion, having regard to the fact position brought out by

the CIT(A), the proposition laid down by the Hon'ble Bombay High Court in the case of Reliance Utilities And Power Limited(supra) is fully attracted in the present case. Such fact-situation has been enumerated by the CIT(A) in Para 3.4 of his order, which depicts the summarized fund flow position of the assessee, and the same has not been controverted by the Revenue before us, rather the same is also borne out of the material placed in the Paper Book filed before us. Therefore, on this count itself, we find no reason to interfere with the ultimate conclusion of the CIT(A) in deleting the addition of Rs.62,56,945/-, which we hereby affirm. Thus, on this aspect also Revenue fails.

13. In the result, whereas the appeal of the assessee is allowed, that of Revenue is dismissed.

Order pronounced in the open court on 29/07/2016

Sd/-

(SANJAY GARG)  
JUDICIAL MEMBER  
Mumbai, Dated 29/07/2016

Sd/-

(G.S. PANNU)  
ACCOUNTANT MEMBER

Vm, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai