

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

**BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 1079/MUM/2014  
Assessment Year: 2010-11**

Lakshmiwadi Mines &  
Minerals Pvt. Ltd.  
20, Yusuf Building 43  
M.G. Road, Fort  
Mumbai-400023.

Vs.

ITO-2(2)(2)  
Room No. 548, 5<sup>th</sup>  
floor  
AayakarBhavan  
M.K. Road  
Mumbai-400020.

**PAN No. AAACL1756F  
Appellant**

**Respondent**

Assessee by: Ms. Dinkle Hariya, AR  
Revenue by : Mr. Purushottam Kashyap, DR

Date of Hearing : 06/06/2017  
Date of pronouncement : 31/08/2017

**ORDER**

**PER N.K. PRADHAN, A.M.**

This is an appeal filed by the assessee. The relevant assessment year is 2010-11. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-5, Mumbai and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under: -

1. The learned Commissioner of Income-tax (Appeals) erred in mentioning section 271(1)(c) as the section of the order appealed against and also stating that the appeal is filed against section 271(1)(c) of the Income Tax Act, 1961.
2. The learned Commissioner of Income-tax (Appeals) erred in confirming the disallowance of Rs.50,02,048/- u/s 14A of the Income Tax Act, 1961. Your appellants submit that the disallowance ought to have been restricted to Rs.98,210/- as worked out by your appellants and added while computing income of your appellant. Your appellants submit that the additional disallowance of Rs.49,05,541/- is not warranted and the same be deleted.
3. Without prejudice, your appellants submit that in any event while computing disallowance u/s 14A r.w.r. 8D value of opening investments and closing investments ought to have been taken at Rs.10,51,80,071/- and Rs.11,22,88,821/- respectively i.e. after deducting the amount of revaluation reserve of Rs.1,07,49,599/- from the investment figures appearing in the Balance Sheet. Further the Assessing Officer has also included an amount of Rs.68,688/- and Rs.15,33,963/- in opening and closing balance of investments respectively which are investments earning taxable interest income. Thus the same should be excluded while working out average investments.
4. The learned Commissioner of Income-tax (Appeals) erred in confirming the addition of Rs.2,75,000/- as deemed dividend u/s 2(22)(e). Your appellants submit that the said disallowance is not warranted and the same ought to be deleted.

3. We begin with the 1<sup>st</sup> ground of appeal. We agree that the appeal is not filed against order u/s 271(1) (c). Rather it is against order u/s 143(3) of the Act

4. Then we move to the 2<sup>nd</sup> ground of appeal. Briefly stated, the facts of the case are that the assessee during the impugned assessment year had claimed dividend income of Rs.1,43,28,216/- as exempt from tax. The assessee had made a disallowance of Rs.96,507/- u/s 14A. In response to a query raised by the AO, the assessee submitted that the investment was made out of its own funds. It was the contention of the assessee that the balance sheet shows reserve and surplus of Rs.2177.74 lacs as on 31.03.2010 as against the investment of Rs.1174.63 lacs. However, the Assessing Officer (AO) was not convinced with the above explanation of the assessee and made a disallowance u/s 14A r.w. Rule 8D. He disallowed Rs.49,05,541/- after giving benefit to the assessee of Rs.96,507/-.

4.1 Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). In respect of disallowance under Rule 8D (2)(ii) , the Ld. CIT(A) has found that (i) the source and application of fund taken separately for Gandhidham Unit and Head Office in AY 2006-07 does not balance/tally each other, though the total fund and application thereof (taken for Gandhidham Unit and Head Office together) does balance each other and (ii) similarly, the source of fund and its application does not tally each other in the balance sheet of Gandhidham Unit and Head Office taken together in AY 2007-08 and onwards.

Therefore, the Ld. CIT(A) found that there was intermingle of funds between Gandhidham Unit and Head Office and therefore, the plea of the assessee that borrowed fund was used only for manufacturing activity in Ghandhidham Unit and not for investment in equity share was misplaced. Therefore, he upheld the computation made by the AO.

4.2 Regarding disallowance under Rule 8D (2)(iii), the Ld. CIT(A) has found that the AO correctly adopted the figure of investment and therefore, he upheld the calculation made by the AO.

5. Before us, the Ld. counsel of the assessee submits that the assessee-company had its own funds of Rs.2226.25 lacs as on 31.03.2010 whereas the investment made was Rs.1174.63 lacs. Therefore, she submits that the disallowance under Rule 8D (2)(ii) amounting to Rs.43,98,918/- made by the AO and upheld by the Ld. CIT(A) is not called for. The Ld. counsel relies on the decision in *CIT vs. HDFC Bank Ltd.* [2014] 366 ITR 505 (Bom)

5.1 Regarding the disallowance made by the AO under Rule 8D(2)(iii), the Ld. counsel submits that the figure of both closing investment as on 31.03.2009 and 31.03.2010 includes an amount of Rs.1,07,49,599/- credited on account of revaluation of investment and therefore, the above should have been considered by the AO.

6. *Per contra*, the Ld. DR supports the order of the Ld. CIT(A) and submits that there was intermingling of funds between Gandhidham Unit and Head Office. Therefore, the AO has rightly disallowed Rs.43,98,918/- under Rule 8D(2)(ii).

The Ld. DR also submits that the Ld. CIT(A) has rightly referred to schedule 5 of the balance sheet and confirmed the disallowance under Rule 8D(2)(iii) made by the AO.

7. We have heard the rival submissions and perused the relevant materials on record. We find that though the Ld. CIT(A) has mentioned that there was intermingling of funds between Gandhidham Unit and Head Office, he has not arrived at the amount involved. On the other hand, we find that as per the balance sheet of the assessee as on 31.03.2010 its own funds was Rs.2226.25 lacs as against investment of Rs.1174.63 lacs.

In *HDFC Bank Ltd. vs. DCIT* [2016] 67 taxmann.com 42 (Bom), the Hon'ble Bombay High Court referring to the decision in *HDFC Bank Ltd. (supra)* and *CIT v. Reliance Utilities & Power Ltd.* [2009] 313 ITR 340 (Bom) held as under :

“15. It is clear that for the first time in the case of *HDFC Bank Ltd. (supra)* that this Court took a view that the presumption which has been laid down in *Reliance Utilities & Power Ltd. (supra)* with regard to investment in tax free securities coming out of assessee's own funds in case the same are in excess of the investments made in the securities (notwithstanding the fact that the assessee concerned may also have taken some funds on interest) applies, when applying Section 14A of the Act. Thus, the decision of this Court in *HDFC Bank Ltd. (supra)* for the first time on 23rd July, 2014 has settled the issue by holding that the test of presumption as held by this Court in *Reliance Utilities and Power Ltd. (supra)* while considering Section 36(1)(iii) of the Act would apply while considering the application of Section 14A of the Act. The aforesaid decision of this Court in *HDFC Bank Ltd. (supra)* on the above issue

has also been accepted by the Revenue in as much as even though they have filed an appeal to the Supreme Court against that order on the other issue therein viz. broken period interest, no appeal has been preferred by the Revenue on the issue of invoking the principles laid down in *Reliance Utilities & Power Ltd.* (supra) in its application to Section 14A of the Act.”

Respectfully following the above decision, we delete the disallowance of Rs.43,98,918/- made by the AO under Rule 8D(2)(ii).

7.1 We now consider the disallowance of Rs.6,01,427/- made by the AO under Rule 8D(2)(iii). We find that the Ld. CIT(A) has correctly arrived, by examining the relevant schedule to the balance sheet, the amount of investment. In *Godrej & Boyce Mfg. Co. Ltd. vs. Dy. CIT* (2010) 194 Taxman 203 (Bom.), the Hon'ble Bombay High Court has explained Rule 8D as under :

“As regard Rule 8D(2)(iii), it had been submitted that some mechanism or formula had to be adopted for attributing part of the administrative / managerial expenses to tax-exempt investment income. The administrative expenses attributable to tax-free investment income have a fixed component and a variable component. A view was taken that the disallowance should also be linked to the value of the investment rather than the amount of exempt income. Under Portfolio Management Schemes (PMS), the fee charged ranges between 2 and 2.5 per cent of the portfolio value which would be inclusive of a profit element for the portfolio manager.

While the fixed administrative expenses were excluded on the ground that in the case of a large corporate taxpayer they would be spread over a large number of voluminous activities, the variable expenses were computed at one-half per cent of the value of the investment.”

We follow the above decision and confirm the disallowance of Rs.6,01,427/- made by the AO under Rule 8D(2)(iii).

7.2 As the assessee has disallowed Rs.96,507/-, we restrict the disallowance u/s 14A r.w. Rule 8D to Rs.5,04,920/- in place of Rs.49,05,541/- made by the AO. Thus the 2<sup>nd</sup> ground of appeal is partly allowed.

8. Finally we move to the 3<sup>rd</sup> ground of appeal. The AO during the course of assessment proceedings found that the assessee-company had received loans and advances of Rs.2,75,000/- from Sakarwadi Trading Co. Pvt. Ltd. He analysed the share holding pattern of the assessee-company as well as Sakarwadi Trading Co. Pvt. Ltd. and found that Mr. Sameer Shantilal Somaiya was the common director in both the company and he had a shareholding of 37.31% in the assessee-company and 33.63% in Sakarwadi Trading Co. Pvt. Ltd. The payment of Rs.2,75,000/- had been made by Sakarwadi Trading Co. Pvt. Ltd. having accumulated profit of Rs.3,22,96,527/- as on 31.03.2009 to the assessee-company. As Mr. Sameer Shantilal Somaiya, the share holder of the assessee-company having beneficial ownership over 10% also had substantial interest in Sakarwadi Trading Co. Pvt. Ltd., the AO treated the above sum as deemed dividend u/s 2(22)(e) and made an addition to the total income of the assessee-company.

In appeal, the Ld. CIT(A) agreed with the finding of the AO and confirmed the addition of Rs.2,75,000/- made as deemed dividend.

8.1 Before us, the Ld. counsel of the assessee relies on the decision in the case of *CIT vs. Impact Containers Pvt. Ltd.* (2014) 367 ITR 346 (Bom). On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

8.2 We have heard the rival submissions and perused the relevant materials on record. We find that in the case of *Impact Containers Pvt. Ltd. (supra)*, the Hon'ble Bombay High Court has held that deemed dividend can be assessed only in case of a person who is a share holder of lender company and not in the hands of the person other than the share holder. In the instant case the AO has not pointed out that the assessee-company was a share holder during the relevant period of Sakarwadi Trading Co. Pvt. Ltd.

We follow the decision in the case of *Impact Containers Pvt. Ltd. (supra)* and delete the addition of Rs.2,75,000/- made by the AO as deemed dividend u/s 2(22)(e) of the Act. Thus the 3<sup>rd</sup> ground of appeal is allowed.

9. In the result, the appeal is partly allowed.

**Order pronounced in the open Court on 31/08/2017.**

Sd/-  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 31/08/2017

*Rahul Sharma, Sr. P.S.*

**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**