

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

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 2324/Mum/2015
Assessment Year: 2009-10**

M/s PN NJ Industries Pvt.
Ltd.
Plot No. A-470, TTC
Industries Area, MIDC,
Mahape, P.O. Ghansoi,
Navi Mumbai-400701

ACIT, Circle-10(3) (Old)
DCIT, Circle-15(2)(2)
(New)
4th floor,
AayakarBhavan, M.K.
Road,
Mumbai-400020

**PAN No. AACCS1519B
(Appellant)**

(Respondent)

Assessee by: Mr. Govind Javeri, AR
Revenue by: Mr. Saurabh Kumar Rai, DR

Date of Hearing : 15/06/2017
Date of pronouncement: 12/09/2017

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2009-10. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-22, Mumbai and arises out of the order u/s 143(3) of the Income Tax Act 1961, (the 'Act').

There has been a delay of 102 days on the part of the assessee to file the appeal before the Tribunal. An affidavit has been filed by the assessee-company to condone the above delay in filing the appeal. Having

gone through the said affidavit, we find that the reason cited for not filing the appeal in time is genuine. Therefore, we condone the delay in filing the appeal.

2. Before us, the Ld. counsel of the assessee submits that the 2nd ground of appeal is not pressed. Hence we deal with the 1st ground of appeal which reads as under:

The Ld. CIT(A)-22 erred in law & on facts in confirming the disallowance of Rs.13,90,937/- u/s 14A r.w. Rule 8D of the Income Tax Act, 1961. The same has to be restricted to Rs.6,70,927/-.

3. Briefly stated, the facts of the case are that the assessee-company claimed exemption of dividend income of Rs.2,69,253/- during the year under consideration. In response to a query raised by the AO to explain why disallowance u/s 14A r.w.r 8D should not be made considering the claim of exempt income, the assessee-company submitted that except for demat charges of Rs.8,668/-, there was no expenditure incurred in earning the said dividend income. It also submitted before the AO a working of disallowance u/s 14A r.w.r 8D at Rs.6,70,927/-.

However, the AO was not convinced with the above explanation of the assessee and computed the disallowance under Rule 8D at Rs.13,90,937/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) followed the decision in the case of *Godrej and Boyce Mfg. Co. Ltd. vs. DCIT* (2010) 194 Taxman 203 (Bom.) and confirmed the disallowance of Rs.13,90,937/- made by the AO.

5. Before us, the Ld. counsel of the assessee submits that the disallowance u/s 14A be restricted to the amount of exempt income earned by the assessee during the year. He filed a copy of the order of the Tribunal in the case of *M/s Kamvan Construction P. Ltd. vs. ITO* (ITA No. 3084/Mum/2013) and *Essar Properties Ltd. vs. DCIT* (ITA No. 423/Mum/2015). Also the Ld. counsel referred to the decision in (i) *Joint Investments vs. CIT* [372 ITR 694 (Del)], (ii) *ACIT vs. Tapi Energy Projects Ltd.* being ITA No. 56/Mum/2014 dated 29.07.2016, (iii) *Indus Valley Investment vs. DCIT* being ITA No. 3763/Del/2013 for AY 2009-10 dated 29.04.2015, (iv) *M/s Daga Global Chemicals vs. ACIT* being ITA No. 5592/Mum/2012 dated 01.01.2015, (v) *M/s Slyvex Cable Co. Pvt. Ltd. vs. DCIT* being ITA No. 8581/Mum/2011 for AY 2008-09 dated 24.02.2016, (vi) *M/s Global Capital Ltd. vs. ACIT* being ITA No. 6586/Del/2013 for AY 2009-10 dated 27.11.2015 and (vii) *DCIT vs. DCM Ltd.* being ITA No. 4467/Del/2012 for AY 2009-10 dated 01.09.2015.

6. On the other hand, the Ld. DR relies on the decision in *Godrej and Boyce Mfg. Co. Ltd (supra)* and supports the order passed by the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. We give below the reasons for our decision.

The rationale for enactment of section 14A was explained by the Hon'ble Bombay High Court in *Godrej and Boyce Mfg. Co. Ltd (supra)* as under:

“Section 14A was enacted by the Parliament in order to overcome the judgments of the Supreme Court in the cases of CIT v. Indian Bank Ltd. AIR 1965 SC 1473, CIT v. Maharashtra Sugar Mills Ltd. [1971] 82 ITR 452 and Rajasthan State Warehousing Corpn. v. CIT [2000] 242 ITR 450/109 Taxman 145, in which it was held that in the case of a composite and indivisible business, which results in earning of taxable and non-taxable income, it is impermissible to apportion the expenditure between what was laid out for the earning of taxable income as opposed to non-taxable income. The effect of section 14A is to widen the theory of the apportionment of expenditure. Prior to the enactment of section 14A, where the business of an assessee was not a composite and indivisible business and the assessee earned both taxable and non-taxable income, the expenditure incurred on earning non-taxable income could not be allowed as a deduction as against the taxable income. As a result of the enactment of section 14A, no expenditure can be allowed as a deduction in relation to income which does not form part of the total income under the Act. Hence, even in the case of a composite and indivisible business, which results in the earning of taxable and non-taxable income, it would be necessary to apportion the expenditure incurred by the assessee. Only that part of the expenditure, which is incurred in relation to income which forms part of the total income, can be allowed. The expenditure incurred in relation to income which does not form part of the total income has to be disallowed. From this, it would follow that section 14A has within it implicit notion of apportionment. The principle of apportionment which prior to the amendment of section 14A would not have applied to expenditure incurred in a composite and indivisible business which results in taxable and non-taxable income, must, after the enactment of the provisions, apply even to such a situation. The expression 'expenditure incurred' in section 14A refers to expenditure on rent, taxes, salaries, interest, etc., in respect of which allowances are provided for.”

Also in the same judgment their Lordships explained Rule 8D as under:

“In the affidavit-in-reply that had been filed on behalf of the revenue, an Explanation has been provided of the rationale underlying rule 8D. It had been stated with reference to rule 8D(2)(ii) that it would be difficult to allocate the actual quantum of borrowed funds that have been used for making tax-free investments. It is only the interest on borrowed funds that would be apportioned and the amount of expenditure by way of interest that will be taken excluding any expenditure by way of interest which is directly attributable to any particular income or receipt (for example - any aspect of the assessee's business such as plant/machinery, etc.). As regards 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. The justification that has been offered in support of the rationale for rule 8D cannot be regarded as being capricious, perverse or arbitrary.”

7.1 In *Godrej & Boyce Manufacturing Company Ltd. v. DCIT* [2017] 81 taxmann.com111 (SC), it is held that the literal meaning of Section 14A, far from giving rise to any absurdity, appears to be

wholly consistent with the scheme of the Act and the object/purpose of levy of tax on income.

7.2 In *HDFC Bank Ltd. vs. DCIT* [2016] 67 taxmann.com 42 (Bom), the Hon'ble Bombay High Court referring to the decision in *CIT vs. HDFC Bank Ltd.* [2014] 366 ITR 505 (Bom) 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.”

7.3 The Ld. counsel has not filed a copy of the audited accounts of the assessee-company before the Tribunal. So we are not in a position to verify its own funds *vis-a-vis* investments. Neither the AO nor the Ld. CIT(A) has done so.

7.4 We are of the considered view that the present contentious issue could be solved by applying the ratio laid down by Hon'ble Supreme Court and Hon'ble Bombay High Court in the decisions mentioned above. Therefore, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a fresh assessment keeping in mind the ratio laid down in decisions at para 7;7.1; and 7.2 hereinbefore and after giving a reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant details before the AO.

8. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the open Court on 12/09/2017.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

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

Mumbai;

Dated: 12/09/2017

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.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai