

**IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI
BEFORE SHRI R.C.SHARMA, AM AND SHRI RAVISH SOOD, JM**

ITA No. 180/Mum/2015
(निर्धारण वर्ष / Assessment Year:2010-11)

Shri Mulchand S. Chheda 21, 2 nd Floor, Kalpataru Point Kamani Marg, Sion (East) Mumbai-400 021	बनाम/ Vs.	JCIT-21(2), Bandra Kurla Complex, C-10, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN No.		AABPC3276F
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Mrugakshi Joshi, A.R
प्रत्यर्थी की ओर से / Respondent by	:	Shri Saurabh Kumar, D.R

सुनवाई की तारीख / Date of Hearing	:	24.11.2017
घोषणा की तारीख / Date of Pronouncement	:	27.11.2017

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-32, Mumbai, dated 22.10.2014 which in itself arises from the order passed by the A.O under Sec. 143(3) of the Act, 1961 (for short 'Act'), dated 28.03.2013. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:-

“On the facts and circumstances of the case and in law:

Ground No. 1 : Disallowance of Rs. 32,31,089/- being charges paid to CIDCO.

- (a) *The learned CIT(A) erred in confirming the disallowance made by the A.O, thereby denying deduction of Rs. 32,31,089/- u/s. 48/49 of the I. Tax Act, 1961, which is in respect to the payments made to CIDCO, in the form of Development charges.*
- (b) *The learned CIT(A), erred in holding that the payments made to CIDCO were towards procurement of additional FSI/TDR, without any basis.*
- (c) *The learned CIT(A) failed to take into consideration the various clauses of the Development Agreement dated 15.06.2010, which clearly indicates that the payments made to any government authority shall be paid by the Developers for and on behalf of the Appellant and the same shall be adjusted against the consideration paid/payable to the Appellant.*
- (d) *Without prejudice, the CIT(A) erred in not allowing the payments to CIDCO (whether for additional FSI or for development charges) as cost of acquisition or cost of improvement or/expenses incurred wholly and exclusively for transfer of capital asset.*

Ground No.2 : Disallowance u/s. 40A(2)(b)

- (a) *The learned CIT(A) erred in partially confirming the Interest disallowance u/s. 40A(2)(b) and erred in directing the AO to re-compute the same, by considering the reasonable rate of interest at 11.4%, although the Appellant has borrowed the following loans at fair market rates (average rate of interest being 11.25%).*

- Arena Realty Pvt. Ltd.	: 12.5%
- Mulchand Chheda HUF	: 10%

- (b) *The learned CIT(A) failed to take into consideration that the assessee has voluntarily disallowed a sum of Rs. 2,14,047/-, being the difference between Rs, 1,08,55,537/- (interest paid) and Rs. 1,06,04,182/- (interest received) and therefore the appellant has not claimed excessive expenditure and consequently no further disallowance is required to be made.*
- (c) *The learned CIT(A) failed to take into consideration, that the difference in the average rate of interest on loans taken (i.e. 11.25%) and loans given (i.e. 11.40%) is very small and insignificant.*

Ground No. 3 : Disallowance u/ 14A - Rs. 14,13,374/-

- a. *The learned CIT(A) erred in confirming the disallowance u/s. 14A r.w. Rule 8D of Rs. 14,13,374/- although no expenses have been incurred on earning tax free income and A.O failed to establish any nexus between the expenditure incurred and the exempt income earned.*
- b. *The learned CIT(A) failed to take into consideration that the A.O cannot ipso facto apply Rule 8D unless he records satisfaction on an objective basis that the assessee is unable to establish the correctness of its claim.*

c. The learned CIT(A) failed to take into consideration that no disallowance u/s. 14A is called for when the Appellant has not incurred and claimed any expenditure for earning the exempt income.

(d) Alternative 1 : Disallowance cannot exceed Rs. 15,108/-

Without prejudice the amount of disallowance u/s. 14A should be restricted to Rs, 15,108/-, being the entire expenditure that has been claimed in the P/L a/c., as the amount of disallowance cannot be more than the expenditure which has been incurred and claimed.

(d) Alternative 2 Disallowance as per RULE 8D cannot exceed Rs. 1,25,885/-

Without prejudice the learned CIT(A) erred in confirming the computation of the disallowance under Rule 8D (made by the A.O) without having considered that Rule 8D2(i) and (ii) are not applicable to the facts and circumstances of the case and therefore the amount of disallowance should be restricted to Rs. 1,23,885/- (i.e. 0.5% of the average investment).

The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal.

2. Briefly stated, the facts of the case are that the assessee who is engaged in the business of trading in shares and securities and also a partner in M/s Arena Developers and M/s Ellora Chemical Works had e-filed his return of income on 30.09.2010, declaring total income at Rs.4,13,45,580/-. The return of income filed by the assessee was processed as such under Sec.143(1) of the 'Act'. The case of the assessee was thereafter selected for scrutiny assessment under Sec. 143(2).

3. That during the course of the assessment proceedings the A.O observed that the assessee along with other co-owners had entered into a registered development agreement with M/s Rashmi Housing Pvt. Ltd. for sale of land at Juchandrra for a refundable interest free security deposit of Rs.11,80,231/- and 29% in the gross realization of all the constructed premises. That the aforesaid agreement was followed by a supplementary agreement dated 21.08.2010, as per which the entitlement of the assessee along with the other co-owners was revised to Rs.21,10,50,000/- and the share of the assessee

worked out to Rs.4,44,44,148/-. The A.O observed that the assessee while computing his income under the head long term capital gain (for short 'LTCG') had claimed cost of improvement in the form of development fees paid in financial year 2008-09 and 2009-10 of Rs.16,48,486/- and Rs.15,85,603/-, respectively, which therein aggregated to Rs.32,31,089/-. The A.O in the course of the assessment proceedings called upon the assessee to justify the allowability of the aforesaid expenses which were claimed by him in the form of development fees. The assessee in his reply submitted before the A.O that the development fee of Rs.32,31,089/- (supra) were the charges which were paid to CIDCO for sanction of road, building plan, staircase premium, fire cess etc. It was averred by the assessee that as the payment of development fees enhanced the value of the property under consideration, therefore, the same was clearly in the nature of cost of improvement within the meaning of Sec. 48 of the 'Act'. The explanation of the assessee did not find favour with the A.O, who being of the view that the development fee could not be treated as cost of improvement for the purpose of computation of capital gain, thus, declined to accept the aforesaid contention of the assessee. The A.O while arriving at the aforesaid view observed that the payment of development fee did not increase the cost acquisition, as the same had not led to any value addition to the property under consideration. It was further observed by the A.O that the benefit, if any, from making of the aforesaid payment towards development fees was to be derived by the purchaser of the land and not the assessee. The A.O further fortified his aforesaid conviction by observing that as the payment of the development fee to CIDCO was made after the development agreement had already been entered by the assessee and others on 15.06.2009, therefore, the plea of the assessee that the making of the said payment would lead to value addition to the property under

consideration was devoid of any force and could not be accepted. It was further observed by the A.O that as per Para 27(d) of the development agreement dated 15.06.2010 the deposit fees, development costs etc. to be paid to CIDCO, Government of Maharashtra or any other authority, whether refundable or otherwise, were to be paid and provided by the developer and the refund of any refundable deposits received by the developer was to be paid over to the owners. The A.O further was of the view that the cost of improvement, even otherwise, was in the nature of a capital expenditure which was incurred by the assessee for making an addition or improvement in the capital asset, as well as protecting or caring the title of the same. The A.O further observed that as the development charges were in the nature of a fee charged by the local civic authority (CIDCO/BMC) from builder/developer when a proposal was submitted for new projects or to make a change in existing projects, therefore, the development fee paid could not be treated as cost of improvement and that too in the hands of the assessee being the owner of the property. The A.O on the basis of his aforesaid observations concluded that as the payment of the development fee was not in the nature of an expenditure incurred wholly and exclusively in connection with the sale of property, therefore, the same could not be allowed as a cost of improvement while computing the LTCG in the hands of the assessee. Thus, the A.O on the basis of his aforesaid observations disallowed the development fee claimed by the assessee as cost of improvement while computing the LTCG in his return of income.

4. The A.O further during the course of the assessment proceedings observed that the assessee had set off interest received amounting to Rs.1,06,41,491/- as against the interest paid of Rs.1,08,55,537/-,

which thus resulted to nil income from other sources. The A.O observed that a perusal of the details revealed that the assessee had paid interest to two concerns in which he had substantial interest, viz. M/s Arena Realty Pvt. Ltd. and M/s Mulchand S. Chheda, HUF. The A.O while deliberating on the aforesaid interest payments which were made by the assessee to concerns which were undisputedly covered by the provisions of Sec. 40A(2)(b), therein observed that the assessee had paid interest @ 10% to Mulchand S. Chheda HUF and @ 12.5% to M/s Arena Realty Pvt. Ltd. The A.O further observed that though it was the claim of the assessee that it was in receipt of interest varying from 9% to 18% p.a. from third parties, however, the fact was that the assessee had received interest @ 18% only from one party. The A.O being of the view that there was a clear disparity in the payment of interest by the assessee to the aforementioned parties, viz. Mulchand S. Chheda, HUF and M/s Arena Realty Pvt. Ltd, therefore, restricted the rate of interest payment in the case of M/s Arena Realty Pvt. Ltd. to 10% and disallowed the balance interest of 2.5% [(12.5% (-) 10%)]. Thus, the A.O on the basis of his aforesaid observations made a consequential addition of Rs. 18,99,799/- in the hands of the assessee.

5. The A.O further observed that the assessee during the year under consideration had earned dividend income of Rs.1,18,672/-from shares and securities, which was claimed as exempt under Sec. 10(34) of the 'Act'. The assessee on being called upon by the A.O to explain as to why no disallowance under Sec. 14A r.w.r. 8D as regards the corresponding expenses had not been made, therein submitted that no expenditure which had been debited by the assessee in its profit and loss account pertained to the aforesaid exempt income. However, the explanation of the assessee did not find favour with the A.O, who

being of the view that as the resources of the business of trading in shares were also used for earning exempt income of dividend from shares held a stock in trade and shares held as investment, coupled with the fact that it was not possible to bifurcate the expenses by specifically correlating them to the exempt and taxable income, therefore, proceeded with and worked out the disallowance under Sec. 14A(2) r.w.r. 8D in the hands of the assessee. The A.O while making the aforesaid disallowance was also not impressed by the claim of the assessee that as the entire expenditure was exclusively incurred for the trading activities and no part of the same was incurred for the purpose of earning of dividend income, therefore, the expenditure relatable to exempt income would even on the said count work out to nil. The A.O on the basis of his aforesaid observations computed the disallowance under Sec. 14A in the hands of the assessee at Rs.14,13,374/-.

7. Aggrieved, the assessee assailing the aforesaid additions/disallowances made by the A.O, carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions of the assessee in the backdrop of the facts available on record, therein observed that Clause 12(b) of the development agreement executed on 15.06.2009 between the assessee along with others co-owners AND M/s Rashmi Housing Pvt. Ltd., specifically provided that the developer was to pay the development charges on behalf of the owners, viz. the assessee and the other co-owners. The CIT(A) further referring to Clause 14 of the development agreement observed that the cost of procuring additional FSI including TDR was to be borne by the owners. It was further observed by the CIT(A) that though the expenses for procuring additional FSI including TDR in the first instance were to be incurred by the developers, but however, the

same thereafter were to be adjusted from the owners share of the sale proceeds. The CIT(A) observed that a perusal of the development agreement revealed that the payments which were to be made to CIDCO towards the development fee etc. were to be borne by the developer and not by the owner. The CIT(A) deliberating on Clause 12(b) of the development agreement, which was stressed upon by the assessee before him to drive home his contention that the payment of the development fee to CIDCO by the developer was made on behalf of the owner, which thus ultimately shifted the burden of the said expense on the owners, therein observed that the interpretation of the clause by the assessee was absolutely misconceived. The CIT(A) after perusing the development agreement concluded that making of the payment of the development fee by the developer on the behalf of the owner was only with the purpose to facilitate making of payment of the aforesaid charges to the government authority by the developer, which otherwise could only be made by the owners with whom the title of the property was vested. Thus, on the basis of the aforesaid observations the CIT(A) held that Clause 12(b) did not cast any obligation on the assessee to make the payment of the development charges. The CIT(A) further taking cognizance of Clause 14 of the development agreement, observed, that the charges paid for procuring additional FSI including TDR was to be borne by the owners. That in the backdrop of the aforesaid observations the CIT(A) concluded that as the payment of development charges to CIDCO and cost incurred for procuring additional FSI including TDR were two different things, which could not be taken as one and the same, therefore, it could safely be concluded that no obligation or burden was cast upon the assessee in respect of the payment of the development fee. It was further observed by the CIT(A) that the amount of Rs.75,15,240/- which was paid by the developer prior to the execution of the supplementary agreement

was towards the procurement of the additional TDR/FSI and fees to the architect, and no portion of the said payment was in respect of any development charges/development fees paid to CIDCO. The CIT(A) deliberating on the development agreement, therein observed that though the cost of procuring additional FSI/TDR was to borne by the owners, however, the payment of the development charges/development fees as per Clause 27(d) of the agreement dated 15.06.2009 was the liability of the developer. Thus, on the basis of the aforesaid observations the CIT(A) concluded that neither the developer had made any payment towards the development fee/development charges of Rs.32,31,089/- on behalf of the assessee to CIDCO, nor any such amount was paid by the assessee. The CIT(A) finally concluded that the amount of Rs.32,31,089/- paid to CIDCO was towards procurement of additional FSI/TDR, which was neither related to the development fee/development charges, nor could be considered as cost of improvement or expenditure incurred in relation to the transfer of the property by the assessee. The CIT(A) on the basis of his aforesaid observations rejected the claim of the assessee as regards the allowability of Rs.32,31,089/- as cost of acquisition/expenses incurred in relation to transfer of the property for the purpose of computing the LTCG in his hands.

8. The CIT(A) further deliberating on the contentions of the assessee in relation to the disallowance of interest of Rs.18,99,799/- under Sec. 40A(2)(b) by the A.O, therein observed that the assessee had paid interest @ 10% to Mulchand S. Chheda, HUF and @ 12.5% to M/s Arena Realty Pvt. Ltd. The CIT(A) observed that though the assessee had duly accepted that both of the aforementioned parties were covered by the provisions of Sec. 40A(2)(b), however, the only issue which was being agitated before him was the restriction by the

A.O of the allowability of interest paid by the assessee to M/s Arena Realty Pvt. Ltd. @ 12.5% to 10%. The assessee submitted before the CIT(A) that he had during the year under consideration given interest bearing loans to 7 parties totalling to Rs.9,57,30,350/- at different rates of interest and the average rate of interest earned therefrom worked out to 11.4%. It was thus the contention of the assessee before the CIT(A) that the rate of interest could fairly be taken at 11.4%, as the same clearly revealed the interest rate which was prevailing in the open market. The CIT(A) giving a thoughtful consideration to the issue before him, therein observed that as the assessee himself was earning an average rate of interest of 11.4% from unrelated parties, therefore, the same could safely be considered to be fair and reasonable rate of interest chargeable/payable during the year under consideration. The CIT(A) on the basis of his aforesaid observations directed the A.O to recompute the disallowance under Sec.40A(2)(b) by adopting the rate of interest at 11.4% and restricted the consequential disallowance of interest to 1.1% [i.e. 12.5% paid to M/s Arena Realty Pvt. Ltd, (minus) 11.4% which was the average rate of interest earned by the assessee on interest bearing loans given to 7 parties].

9. The CIT(A) further adverted to the disallowance of Rs.14,13,374/- which was made by the A.O under Sec. 14A r.w.r. 8D in respect of dividend income of Rs. 1,18,672/- earned by the assessee from shares and securities, which was claimed as exempt under Sec. 10(34) of the 'Act'. The assessee submitted before the CIT(A) that he had during the year under consideration earned dividend income from share trading activity of Rs.1,18,672/- and dividend from investment in shares of Rs.483/-. Thus, it was submitted by the assessee that the total dividend of Rs.1,19,155/- earned during the year under consideration was claimed by him as exempt under Sec. 10(34) of the

'Act'. The assessee submitted before the CIT(A) that he had maintained separate books of accounts in respect of his personal investment in shares and those held by him for share trading business. The assessee submitted that as no expenditure in respect of the shares held by him as personal investment was debited in the books of accounts, therefore, no disallowance under Sec. 14A was called for in his case. The assessee further submitted that in respect of the shares which were held as investment by him, he had received a dividend of only Rs.482/-. The assessee further averred that as he had substantial self owned interest free funds of Rs.8,32,22,017/- available in his capital account during the year under consideration, therefore, no disallowance of any part of the interest expenditure was called for in his hands. It was further submitted by the assessee that in the absence of any nexus having been established between the interest bearing funds and the earning of the dividend income, no part of the interest expenditure could be disallowed. The assessee submitted that the A.O without recording any satisfaction on an objective basis as to why the assessee was liable for disallowance under the aforesaid statutory provision, had thus, gravely erred in applying Rule 8D for making the adhoc disallowance under Sec. 14A. However, the aforesaid contentions of the assessee did not find favour with the CIT(A) who upheld the disallowance made by the A.O under Sec. 14A. r.w.r. 8D.

8. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The authorized representative (for short A.R) took us to the relevant pages of his paper book (for short 'APB'). The ld. A.R drew our attention to certain documents which had a bearing on the issue as regards allowability of Rs.32,31,089/- as cost of improvement for the purpose of computing

of capital gain, viz. copy of receipt of amount paid by M/s Rashmi Housing Pvt. Ltd. (Page 12 of 'APB'), copy of development agreement between the assessee and the other co-owners AND M/s Rashmi Housing Pvt. Ltd. (Page 13 to 38 of 'APB'), copy of receipt of Rs.11,80,231/- received by the assessee and the other co-owners from M/s Rashmi Housing Pvt. Ltd. on account of deposit of refundable security by them as owners of the property (Page 39-40 of 'APB'), copy of letter dated 24.01.2008 of the architect addressed to one of the co-owners pertaining to details of construction of proposed building (Page 42-44 of 'APB'), copy of the resolution passed at the meeting of the Board of Directors of company, dated 02.06.2009 (Page 45 of 'APB') and copy of supplementary agreement dated 31.08.2010 executed between the assessee and other co-owners with M/s Rashmi Housing Pvt. Ltd. The ld. A.R took us through the relevant extract of the 'development agreement' dated 15.06.2009, and drawing our attention to Page 23-Para 4 of the 'APB' therein submitted that it was the obligation of the owners to obtain an approval from CIDCO for development of the land under consideration. The ld. A.R further took us through Para 8 of the development agreement (Page 25 of 'APB'), which therein provided that the owner was under obligation to get the plans renewed at their own cost. That still further the ld. A.R took us through Para 12(B) of the annexure marked as Phase-III of the 'development agreement' (Page 26 of the 'APB') which provided that the development charges were to be paid by the developer on behalf of the owners. The ld. A.R further took us through Para 14 of the development agreement which provided that the cost of procuring additional FSI including TDR, FSI was to be borne by the owners, and the same having been incurred by the developers on their behalf was thereafter to be adjusted from their share of sale proceeds of the constructed premises. The ld. A.R further took us through Para 16(iii)

of the development agreement, as per which the expenses in procuring of FSI/TDR were to be deducted from the gross realizations pertaining to the owners share. The ld. A.R in order to drive home his aforesaid contention that the development charges paid to CIDCO were rightly claimed as cost of improvement while computing the income under the head capital gain, therein submitted that as per Para 27(d) of the development agreement all the charges to be paid to CIDCO, Government of Maharashtra and/or other concerned authorities for sale, zone conversion etc., and for carrying out the development work on the said property were to be paid and provided by the developer and the refund of any refundable deposit fee received by the said developer was to be paid over by the developers to the owners. Thus, on the basis of the aforesaid terms of the development agreement the ld. A.R tried to impress upon us that from a perusal of the same it could safely be gathered that as the obligation to pay the development fee to CIDCO was cast upon the assessee, therefore, the same had rightly been claimed as a deduction while computing the income under the head 'LTCG'. The ld. A.R further took us through the copy of the challans evidencing the receipt of the amount by CIDCO from one of the co-owner, viz. Shri Arvind S. Chheda (Page 143 to 148 of 'APB') pertaining to the year under consideration, viz. AY: 2010-11. The ld. A.R in order to buttress his contention that payments to CIDCO Ltd were made by the developers M/s Rashmi Housing Pvt. Ltd., for and on behalf of the assessee and the other co-owners, therein referred to a letter dated 03.08.2010 (Page 165 of 'APB') of the aforesaid developer, viz. Rashmi Housing Pvt. Ltd, which was addressed to one of the co-owner, viz. Shri Arvindbhai S. Chheda, wherein the latter was informed by the developer, that the payments to CIDCO limited had been made on his behalf and the copies of the original payment receipts were also enclosed. That as regards the disallowance of the

interest expenditure by the A.O under Sec. 40A(2)(b), which thereafter had been restricted by the CIT(A) to 11.4% as against 12.5% claimed by the assessee, it was submitted by the ld. A.R that as the assessee had both raised and advanced the loans at the same rate of interest, therefore, no disallowance under the aforesaid statutory provision was called for in the hands of the assessee. That as regards the disallowance made by the A.O under Sec. 14A r.w.Rule 8D, which thereafter had been upheld by the CIT(A), it was submitted by the ld. A.R that as no expenditure was incurred for earning of the dividend income, therefore, no disallowance was liable to be made. Per contra, the ld. D.R supported the order of the CIT(A) and drew our attention to Page 8 – Para 3.4(iv) of the order passed by the CIT(A). The ld. D.R submitted that as the payments to CIDCO towards development fees etc were borne by the developer and not by the owner, therefore, the assessee had on the basis of self suiting inferences wrongly claimed that Clause 12(b) made it obligatory on the part of the owners to make payment of the development charges. It was submitted by the ld. D.R that as the appeal of the assessee was devoid of any force, therefore, the same did not merit acceptance and was liable to be dismissed.

9. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present appeal is sought for adjudicating three issues, viz. (i) allowability of the amount of Rs.32,31,089/- claimed by the assessee as cost of improvement in computing income under the head LTCG; (ii) the validity of disallowance made by the A.O under Sec. 40A(2)(b), to the extent the same had been sustained by the CIT(A); and (iii) the validity of the disallowance made by the A.O under Sec. 14A, which had been sustained by the CIT(A). We first advert to the disallowance by the A.O

of the development fees, which as per the assessee was paid to CIDCO and was claimed as cost of acquisition/expenses in relation to the transfer of the property under consideration while computing his income under the head LTCG in his return of income. We have given a thoughtful consideration to the issue before us. We have perused the development agreement and find that Clause 14 specifically provides that the cost of procuring additional FSI including TDR, FSI was to be borne by the owners. The said expenses in the first instance were to be incurred by the developers and thereafter the same was to be adjusted from the owners share of sale proceeds. That in respect of the development charges no similar condition was agreed upon between the parties. We after perusing the relevant clauses of the development agreement, at the first blush were *prima facie* convinced with the view of the lower authorities that the payments to CIDCO towards the development fees etc, were to be borne by the developer and not by the owner. However, after deliberating at length on the material made available on record by the assessee, we are unable to persuade ourselves to accept the observations of the lower authorities that no obligation was cast upon the assessee to make the payments to CIDCO towards the development fees etc, as the same were exclusively to be borne by the developer and not by the owner. We had perused the copy of the receipts and a similar claim raised by one of the co-owner, viz. Arvind Shamji Chheda in his return of income for the year under consideration, viz. AY 2010-11, which we find had been assessed and accepted by the department in the regular assessment framed under Sec. 143(3) in the case of the said person. We thus, in the backdrop of the aforesaid facts are thus of a strong conviction that a perusal of the aforesaid material to which our attention has been drawn by the ld. A.R, raises certain doubts as regards the aforesaid observations of the lower authorities that neither any obligation was

cast on the assessee for making of payments to CIDCO towards development charges, nor any such payment had been borne by the owners. We are of the considered view that in the backdrop of the aforesaid facts as had been brought to our notice, the observations of the lower authorities does not inspire much of confidence. We thus being of the considered view that in all fairness the issue as regards the allowability of Rs.32,31,089/- as cost of acquisition/expenses as claimed by the assessee while computing the income under the head LTCG would require further verification in the backdrop of the material that had been produced by the assessee during the course of the appellate proceedings before us, therefore, in all fairness restore the issue to the file of the assessing officer for the purpose of fresh adjudication. The A.O shall during the course of the fresh adjudication proceedings afford sufficient opportunity of being heard to the assessee, who shall remain at a liberty to substantiate his claim as regards the allowability of Rs.32,31,089/- as cost of acquisition/expense while computing the income under the head LTCG, as claimed by him in his return of income. We thus restore the issue to the file of the A.O in terms of our aforesaid observations. The **Ground of appeal No. 1** is allowed for statistical purposes in terms of our aforesaid observations.

10. We now take up the disallowance of interest under Sec. 40A(2)(b) by the A.O, to the extent the same had been sustained by the CIT(A). We find that interest was paid by the assessee @ 12.5% to M/s Arena Realty Pvt. Ltd, a concern in which the assessee was substantially interested. The A.O keeping in view the fact that the assessee was paying interest @ 10% to his HUF, viz. Mulchand S. Chheda, HUF, therefore, on the said basis restricted the interest allowable in the case of M/s Arena Realty Pvt. Ltd. also to 10%, and disallowed the balance

2.5% [(i.e. 12.5% (-) 10%)], therein leading to a consequential disallowance of Rs.18,99,799/-. We find that on appeal the CIT(A) not being persuaded to subscribe to the basis on which the disallowance under Sec.40A(2)(b) was made by the A.O, thus, taking cognizance of the fact that the assessee had given interest bearing loans to 7 unrelated parties at different rate of interest, wherein the average rate worked out to 11.4%, therefore, held a conviction that 11.4% was a fair and reasonable rate which was prevailing in the open market. We find that the CIT(A) adopting the rate of interest of 11.4% as a yardstick, had therein restricted the disallowance in the hands of the assessee to 1.1% [(i.e. 12.5% (-) 11.4%)]. The assessee aggrieved with the part sustaining of the disallowance of interest by the CIT(A) had therein carried the matter in appeal before us. We have deliberated on the issue and are of the considered view that the CIT(A) had rightly keeping in view the average rate of interest at which the interest was being received by the assessee from third parties, had thus, restricted the allowability of interest paid by the assessee to M/s Arena Realty Pvt. Ltd. to 11.4%, which to our considered view could fairly be held to be the rate of interest which the assessee could fetch by lending money in the open market. We do not find any infirmity in the adoption of the rate of interest of 11.4% by the CIT(A), and thus, are unable to persuade ourselves to accept the contention so raised by the assessee before us. However, we find that as the assessee had voluntarily disallowed a sum of Rs.2,14,047/-, i.e. the difference between Rs.1,08,55,537/- (interest paid) and Rs.1,06,04,182/- (interest received), therefore, while upholding the order of the CIT(A), therein direct that the A.O that while recomputing the disallowance of interest u/s. 40A(2)(b) shall keep in view the *suo motto* disallowance of Rs.2,14,047/- that had already been made by the assessee. The

Ground of appeal No. 2 raised by the assessee before us is partly allowed in terms of our aforesaid observations.

11. We now take up the issue pertaining to the disallowance of Rs.14,13,374/- by the A.O under Sec. 14A, which we find had thereafter been upheld by the CIT(A). We find that it was the contention of the assessee before the lower authorities that he had earned dividend income from investments in share of Rs.483/-, while for dividend income on the shares held as stock in trade was to the extent of Rs.1,18,672/-. The assessee had further submitted before the lower authorities that he had maintained separate books of accounts in respect of the share trading business and those for the personal investment made by him in shares. The assessee had further submitted that he had self owned funds of Rs.8,32,22,017/- in his capital account, which were sufficient enough to explain the investment of Rs.2,47,76,954/- made in the shares from which the exempt income in the form of dividend was being received. It was thus the contention of the assessee before the lower authorities that pursuant to availability of sufficient self owned funds, no part of the interest bearing funds could be related to the investments made in the shares.

12. We have given a thoughtful consideration to the issue pertaining to the disallowance of Rs.14,13,374/- made by the A.O under Sec. 14A r.w. Rule 8D. We are of the considered view that the contention of the assessee that no disallowance in respect of shares which were held as stock in trade of his share trading business was called for in his hands, merits acceptance. We find that the issue under consideration that no disallowance under Sec. 14A would be called for in respect of shares held by an assessee by way of stock in trade, had been deliberated upon by the **Hon'ble High Court of Punjab & Haryana** in

the case of **Pr. CIT Vs. State Bank of Patiala (2017) 98 CCH 35 (P & H)** Still further the coordinate bench of the Tribunal in the case of **DCIT Vs. India Advantage Securities Ltd., (ITA No. 6711/Mum/2011; dated 14.09.2012)** had also taken a similar view and has held that no disallowance under Sec.14A in respect of the shares held by the assessee by way of stock in trade is liable to be made. We find ourselves to be in agreement with the aforesaid view, and thus are of the considered view that no disallowance under Sec. 14A was called for in respect of shares which were held by the assessee by way of stock in trade. We further find that the assessee had averred that he had substantial self owned interest free funds of Rs.8,32,22,107/- available in his capital account, which were sufficient to explain the investment in shares of Rs.2,47,76,954/- which were held by him by way of an investment. We are of the considered view that on principle the issue that where an assessee is having substantial interest free funds, then it could safely be concluded that no interest bearing funds had been utilized for making of the investment in the tax free income yielding asset, is no more *res-integra* in light of the judgement of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. HDFC Bank (2014) 366 ITR 505 (Bom) Ltd.** We thus keeping in view the aforesaid settled position of law restore the issue to the file of the A.O, with a direction to verify the factual contention as regards the availability of sufficient interest free funds with the assessee, and therein adjudicate the issue keeping in view judgment of the **Hon'ble High Court of Bombay** in the case of **HDFC Bank Ltd. (supra)**. We are further of the considered view that without prejudice to our aforesaid observations, even otherwise the disallowance under Sec. 14A cannot exceed the amount of the exempt dividend income which had been received by the assessee. That our aforesaid observations find support from the judgments of the **Hon'ble**

High Court of Delhi in the case of **Cheminvest Ltd., Vs. CIT (2015) 378 ITR 33 (Delhi)** and **Joint Investment Pvt. Ltd. Vs. CIT (2015) 372 ITR 694 (Delhi)**. We thus further direct the A.O to restrict the disallowances under Sec. 14A to the amount of the dividend income which was earned by the assessee on the shares held by him as investment. We thus restore the issue to the file of the A.O for the purpose of fresh adjudication in terms of our aforesaid observations.

13. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 27.11.2017

Sd/

Sd/-

(R.C. Sharma)

(Ravish Sood)

ACCOUNTANT MEMBER

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 27.11.2017

Ps. Rohit Kumar

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 /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT,**
Mumbai

