

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

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

**ITA No. 4273/MUM/2015
Assessment Year: 2010-11**

M/s Juniper Hotels P. Ltd.
Off Western Express
Highway, Santacruz (E)
Mumbai-400055.

Vs. Addl. Commissioner
of Income Tax-10(1)
Aayakar Bhavan, M.K.
Road,
Mumbai-400020.

PAN No. AA ECS6336E
Appellant

Respondent

Assessee by : Mr. Sunil Bhandari, AR
Revenue by : Ms. Arju Garodia, DR

Date of Hearing : 12/03/2018
Date of pronouncement : 18/04/2018

ORDER

PER N.K. PRADHAN, AM

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)-22, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143 (3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal raised by the assessee reads as under:
 1. Ld. CIT(A) erred in partly confirming disallowance of Rs.7,800/- being 12% of purchases of Rs.64,985/- alleged to have been made from M/s Riddhi Siddhi Enterprises which were fully disallowed by the AO.

Ld. CIT(A) erred in rejecting submissions of the assessee that as per its books of accounts no transaction of purchases from the said party were made during the year under consideration. Further, Ld. CIT(A) ought to have appreciated that in the course of assessment proceedings neither any query was raised by the AO nor any submissions made by the assessee concerning the said transaction and as such AO exceeded his jurisdiction in making the disallowance.

2. Ld. CIT(A) erred in partly confirming disallowance of Other Expenses u/s 14A read with Rule 8D at 0.50% of average Investments without appreciating the fact that assessee had made only four transactions of purchase and sale of investments in Mutual and as such, incidental expenses could be estimated at Rs.2,000/- (i.e. Rs.500/- per transactions). Consequentially AO made similar addition in computation of book profits u/s 115JB which also deserves to be restricted to Rs.2,000/-.

3. We begin with the 1st ground of appeal. The assessee is engaged in the business of managing and running of hotels. It filed its return of income for the AY 2010-11 on 27.09.2010 declaring total income of Rs.25,79,83,350/-. During the course of assessment proceedings, the Assessing Officer (AO) received information from the Sales Tax Department, Government of Maharashtra that the assessee had made bogus purchases of raw materials worth Rs.64,985/- from Ridhi Sidhi Enterprises. The assessee submitted before the AO that it had made purchases of the materials through the broker and the goods were directly delivered at its site. Otherwise, the assessee would not have been able to complete the job of customers hence the purchases, it is submitted are genuine. The assessee further submitted before the AO

that it had made payments to the said dealers by way of account payee cheque.

However, the AO was not convinced with the above reply as the assessee failed to produce before him documentary evidence such as copy of lorry receipt, weighbridge receipt, inward register. The AO thus relied on the information received from the Sales Tax Department and made a disallowance of Rs.64,985/- towards bogus purchases.

3.1 In appeal, the Ld. CIT(A) restricted the disallowance to 12% of the sales.

3.2 Before us, the Ld. counsel of the assessee submits that during the course of assessment proceedings, the AO did not issue any notice to the assessee. As such paras 4.1 to 4.7 of the assessment order are not based on any submission made by the assessee.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

3.3 We have heard the rival submissions and perused the relevant materials on record. In the instant case the AO could have issued a notice u/s 133(6) to Ridhi Sidhi Enterprises to verify the genuineness of transactions of Rs.64,985/-. The AO has forgotten to at least follow the minimum requirement to verify a transaction. It is the claim of the assessee that the above payment has been made by way of account payee cheque. We find that disallowance of Rs.64,985/- made by the AO as bogus purchases is based on surmises. Therefore, we delete the order

of the Ld. CIT(A) restricting the disallowance to 12% of the sales. Thus the 1st ground of appeal is allowed.

4. Now we turn to the 2nd ground of appeal. During the year under consideration the assessee claimed dividend income of Rs.10,58,712/- as exempt u/s 10(33) of the Act. He noted that as per section 14A, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income. Therefore, he asked the assessee to explain as to why certain portion of the expenses claimed by the assessee should not be disallowed being directly/indirectly attributable to the tax-free income earned. In response to it , the assessee submitted before the AO that no interest is allocable to mutual fund investments in view of substantial own funds as also cash surplus for the year which was parked in mutual funds. However, the AO was not convinced with the above reply of the assessee and made a disallowance of Rs.6,08,600/- under Rule 8D(2)(iii) of the Income Tax Rules, 1962.

4.1 In appeal, the Ld. CIT(A) held that (i) equity shares accrued are to be excluded in view of the decision in *CIT v. Holcim (India) Pvt. Ltd.* in ITA No. 486/2014 and ITA No. 299/2014 wherein it is held that no expenditure be incurred if investment is in own subsidiary, (ii) share application money has to be excluded in view of *Rainy Investments Pvt. Ltd. v. ACIT 56 SOT 61*, (iii) NSC is taxable and hence has to be excluded.

Thus the Ld. CIT(A) held that equity shares, share application money and NSC investment are to be excluded while computing the average investment.

4.2 Before us, the Ld. counsel of the assessee submits that as per sub-section (2) to section 14A, the AO is obliged to first record that, having regard to the accounts of the assessee, he is not satisfied with the correctness of claim of expenditure made. Having failed to do so, the AO could not have proceeded mechanically to apply Rule 8D. Reliance is placed by him on the decision of the ITAT dated 21.09.2016 in the case of the assessee for the AY 2009-10 in ITA No. 100/Mum/2015 and the decision in *CIT v. IP Support Services India (P) Ltd* 378 ITR 240 (Del.).

4.3 On the other hand, the Ld. DR relies on the order passed by the Ld. CIT(A).

4.4 We have heard the rival submissions and perused the relevant materials on record. As mentioned at para 4 hereinbefore, during the course of assessment proceedings, the AO had asked the assessee to explain as to why certain portion of the expenses claimed by the assessee be not disallowed being directly/indirectly attributable to the tax-free income earned. In response to it, the assessee filed a reply before the AO. Having examined the said reply, the AO proceeded to make a disallowance u/s 14A r.w. Rule 8D. Therefore, it is evident that the AO has done the formality of recording reasons before proceeding to disallow the expenses u/s 14A r.w. Rule 8D. In view of the above the case of the assessee is distinguishable from the decisions relied on by the Ld. counsel.

In a recent decision in *Maxopp Investment Ltd. v. CIT* (2018) 91 taxmann.com 154 (SC), the Hon'ble Supreme Court at para 34-35 held:

“34. Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessee would apply while interpreting Section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind Section 14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act. This is so held in *Walfort Share and Stock Brokers P Ltd.*, relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom.

"The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A..

The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14A."

35. The Delhi High Court, therefore, correctly observed that prior to introduction of Section 14A of the Act, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-

taxable income, the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. It is to find a cure to the aforesaid problem that the Legislature has not only inserted Section 14A by the Finance (Amendment) Act, 2001 but also made it retrospective, i.e., 1962 when the Income Tax Act itself came into force. The aforesaid intent was expressed loudly and clearly in the Memorandum explaining the provisions of the Finance Bill, 2001. We, thus, agree with the view taken by the Delhi High Court, and are not inclined to accept the opinion of Punjab & Haryana High Court which went by dominant purpose theory. The aforesaid reasoning would be applicable in cases where shares are held as investment in the investee company, may be for the purpose of having controlling interest therein. On that reasoning, appeals of Maxopp Investment Limited as well as similar cases where shares were purchased by the assesseees to have controlling interest in the investee companies have to fail and are, therefore, dismissed.”

4.4.1 In view of the above position of law, we set aside the order of the Ld. CIT(A) and restore the same to the file of the AO to make a disallowance under Rule 8D(2)(iii) by following the decision in *Maxopp Investment Ltd* (supra). Thus the 2nd ground of appeal is allowed for statistical purposes. As the matter has been restored to file of the AO, we are not advertent to the decisions relied on by the Ld. counsel and Ld. DR.

4.5 In *ACIT v. Vireet Investment (P) Ltd.* (2017) 165 ITD 27 (Delhi-Trib.) (SB), it has been held that computation under clause (f) of *Explanation 1* to section 115JB(2) is to be made without resorting to computation as contemplated u/s 14A r.w. Rule 8D. We follow the above

order and delete the addition of Rs.6,08,600/- made by the AO u/s 14A to the book profit of the assessee computed u/s 115JB.

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

Order pronounced in the open Court on 18/04/2018.

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER

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

Mumbai;

Dated: 18/04/2018

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