

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.2866/M/2016
Assessment Year: 2011-12**

M/s. Fine Estates Pvt. Ltd., 4 th Floor, Kalpataru Heritage, 127 M.G. Road, Fort, Mumbai - 400 001 PAN: AAACF2738F	Vs.	Commissioner of Income Tax (Appeals)-4, Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Rakesh Mohan, A.R.
Revenue by : Ms. Pooja Swaroop, D.R.

Date of Hearing : 21.02.2018
Date of Pronouncement : 27.04.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 12.01.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

2. The various grounds raised by the assessee are as under:

"Ground No. 1:

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the action of A.O. in concluding that an additional disallowance u/s 14A r.w.r. 8D is attracted for earning exempt income in the appellant's case by overlooking the facts and circumstances. The appellant prays that the said action of the learned AO may kindly be deleted.

Ground No. 2:

Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the action of the learned A.O. in disallowing additional amount of Rs. 30,82,192 u/s 14A by applying Rule 8D(2)(i) on account of the interest expenditure attributable to earning the exempt income under the normal provisions of the Act. The appellant prays that the disallowance of Rs. 30,82,192 may kindly be deleted.

Ground No. 3:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the action of the learned A.O. in adding an additional amount of Rs. 30,82,192 u/s 14A of the Act under the MAT provisions of the Act. The appellant prays that the addition of Rs.30,82,192 may kindly be deleted.

Ground No.4:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the action of the learned A.O. in holding that the balance amount of interest of Rs.1,37,64,648/- was not allowable as deduction u/s 36(1)(iii) of the Income Tax Act. The appellant prays that the disallowance of Rs.1,37,64,648 may kindly be deleted.”

3. The ground No.1 is general in nature and therefore requires no adjudication. The issue raised in ground No.2 is against the confirmation of action of AO in disallowing the additional amount of Rs.30,82,192/- under section 14A read with rule 8D(2)(i) on account of interest expenditure directly relating to earning the exempt income.

4. The brief facts are that the assessee is engaged in the business of renting of premises and providing professional services towards coordination and facilitation of projects. The AO, during the course of assessment proceedings, noted that during the year, the assessee has paid interest to the tune of Rs.1,68,46,840/- on the loans advanced but has not

charged/earned/received any interest on the loans given by it. The AO having observed so asked the assessee to justify the claim of expenditure. The assessee was also asked to substantiate the working of disallowance under section 14A read with rule 8D in its computation of income in which no interest expenditure was considered. In response thereto, the assessee replied vide letter dated 05.02.14 that loan of Rs.5,00,00,000/- taken from M/s. Jhalak Developers Pvt. Ltd. on which interest of Rs.30,82,192/- was paid. The loan was utilised directly for making investment in M/s. Sharyans Resources Ltd. The AO observed that the bank statement showed that Rs.5,00,00,000/- was received on 08.04.10 and investment was made on 21.04.10 to the tune of Rs.14.22 crore. The assessee submitted before the AO that no disallowance towards interest under section 14A read with rule 8D(2)(i) should be made. The assessee submitted before the AO by relying on the decision of Hon'ble Delhi High Court in the case of CIT vs. Oriental Structural Engineers Pvt. Ltd. in which it has been held that investments made in subsidiary companies were attributable to commercial expediency and therefore no disallowance of expenses/interest is attributable to the said investments under section 14A read with rule 8D. Though the assessee admitted that the said expenditure on account of interest to the tune of Rs.30,82,192/- was incurred on making investments in the subsidiary companies and without prejudice to the above submission the assessee submitted that this could only be attributed at the most for earning exempt income under section 14A read with rule

8D(2)(i). However, the AO brushing aside the submission of the assessee added Rs.30,82,192/- under section 14A read with rule 8D(2)(i) to the total income of the assessee.

5. In the appellate proceedings, the Ld. CIT(A) sustained the addition by observing and holding as under:

“3.3 I have considered the findings of the Assessing Officer and rival submissions of the appellant, carefully. It is the fact that an amount of Rs.5 crores taken from M/s. Jhalak Developers Pvt. Ltd. has been invested with M/s. Sharyans Resources Ltd. on which interest of Rs.30,82,192/- has paid. Since investment has been made from interest bearing loan, such expenditure can be disallowed under rule 8D(2)(i) of the I.T. Rules. Appellant has not been able to refute factual finding of the Assessing Officer. When interest bearing funds has been utilized for investment capable of exempt income, such interest expenditure related to such fund has to be disallowed. Ld. Assessing Officer has correctly disallowed the expenditure u/s.14A r.w. rule 8D. The decisions relied upon by the A.R. are not applicable to the facts of this case. I find no reason to interfere with factual finding of the Assessing Officer, hence disallowance so made of Rs.30,82,192/- is sustained.”

6. Ld. A.R. vehemently submitted before us that the Ld. CIT(A) has totally ignored the facts of the case and the applicable law and the ratio laid down by various courts in upholding the disallowance under section 14A read with rule 8D(2)(i) amounting to Rs.30,82,192/-. The Ld. A.R. submitted that M/s. Sharyans Resources Ltd. is a group company in which the group has an exposure to the tune of 60% of the total equity capital whereas the assessee individually holding in the equity capital accounted for 20% of the share holding. The Ld. A.R. submitted that since the investment was made out of commercial and business expediency in order to gain control over the said company and thus constituted a strategic investment on which no

disallowance under section 14A read with rule 8D would be made. The Ld. A.R. reiterated the argument as made before the authorities below and submitted that no disallowance could be made under section 14A read with rule 8D with respect to the expenses incurred in connection with making investment in the subsidiary companies from strategic point of view.

7. The Ld. D.R., on the other hand, relied on the order of the Ld. CIT(A) and submitted that since the investment has been made out of the interest bearing funds and therefore, the disallowance has to be made under rule 8D(2)(i) as the expenses are directly incurred in connection with making said such investments.

8. We have heard the rival submissions and perused the relevant material on record including the impugned order. The undisputed facts are that the assessee borrowed money to the tune of Rs.5 crores from M/s. Jhalak Developers Pvt. Ltd. on which an interest of Rs.30,82,192/- was paid and the said finances were used by the assessee for making investments in M/s. Sharyans Resources Ltd. which is a group company and the group holding 60% of the total equity capital whereas the assessee individually holding in the equity capital to the tune of 20% of the share holding. Thus the investments in the said subsidiary company are out of commercial expediency and made from the strategic point of view in order to gain control over the said subsidiary company and not to earn dividend. The assessee has relied on the decision of the Hon'ble Delhi

High Court in the case of CIT vs. Oriental Structural Engineers Pvt. Ltd but the Hon'ble apex court in the case Max Opp Investments Ltd Vs CIT Appeals Nos. 104-109 of 2015 order dated 12.02.2018 has held that the disallowance has to be made even in case of strategic investments in the associate company. Therefore, following the ratio laid down by the apex court we uphold the order of CIT(A) . The ground raised by the assessee is dismissed.

9. The issue raised in ground No.3 is against the confirmation of disallowance of Rs.30,82,192/- under the MAT provision of the Act. The Ld. A.R., at the outset, brought to the notice of the Bench that issue is covered by the decision of the Special Bench of the Tribunal in the case of ACIT vs. Vireet Investment (P.) Ltd. (2017) 82 taxmann.com 415 (Delhi – Trib.)(SB) wherein 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 under section 14A read with rule 8D of the Income Tax Act, 1962 and submitted that the addition made of Rs.30,82,192/- should not be made following the special bench decision.

10. The Ld. D.R. fairly agreed to the contention of the assessee.

11. We have heard the rival submissions of both the parties and perused the relevant material on record. We find that the addition of Rs.30,82,192/- which has been made under section 14A while computing the profit under MAT provision is

squarely covered by the decision of Special Bench of the Tribunal in the case of ACIT vs. Vireet Investment (P.) Ltd. (supra) wherein 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 under section 14A read with rule 8D of the Act. Accordingly, the ground raised by the assessee is allowed and the AO is directed to delete the addition while computing book profit under MAT. The ground raised by the assessee is allowed.

12. The issue raised in ground No.4 is against the confirmation of Rs.1,37,64,648/- by the Ld. CIT(A) as made by the AO on account of interest not allowable under section 36(1)(iii) of the Act.

13. The brief facts of the case are that upon a query by the AO as to the balance interest expenditure of Rs.1,37,64,648/- the assessee replied vide written submission dated 20.02.14 that Rs.11,65,00,000/- was paid to M/s. Mrignayani Investments Trading Company Pvt. Ltd. for purchase of bonds/debt instruments in the corporate interest of the assessee company which was later merged with the assessee company. Similarly, Rs.11,85,00,000/- was paid to M/s. Smit Capital Services Pvt. Ltd. for purchase of bonds to acquire competitive advantage and consolidate its position in the market and the said amount was later on refunded back during the year. Likewise Rs.2,12,50,000/- was paid to HSB Developers and Builders Pvt. Ltd. which is a 100% subsidiary of the assessee company and the same was given in the

capacity of the assessee as a holding company having interest in its subsidiary business of development of housing and commercial projects. An amount of Rs.2 crores was also advanced to Vajradhar Leasing & Finance Pvt. Ltd. out of commercial expediency for expanding its corporate business and building a strategic advantage in the market. The assessee submitted that since the money was advanced to these entities out of commercial expediency and strategic consideration and therefore no disallowance on account of interest paid by the assessee is attracted. The assessee relied on the decision of Hon'ble Supreme Court in the case of "S.A. Builders vs. CIT" (2007) 288 ITR 1 (SC). However, the reply of the assessee did not find favour with the AO and the AO, ultimately by giving a detailed justification as incorporated in para 7.1 of the assessments order, disallowed Rs.1,37,64,648/- under section 36(1)(iii) as interest expenditure not incurred for the purpose of business.

14. In the appellate proceedings, the Ld. CIT(A) sustained the addition by dismissing the appeal of the assessee after taking into account the detailed submissions and contentions which have been incorporated in para 6.4 by holding that the funds were not advanced for the purpose of business and the Ld. CIT(A) further held that the interest bearing funds were advanced to the subsidiary company is not permissible under section 36(1)(iii) of the Act and also that interest is not deductible where funds were used for non business purposes by relying on various decisions as have been incorporated in

para 6.6 of the appellate order. The Ld. A.R. vehemently submitted before us that the Ld. CIT(A) has completely ignored the facts on record that the assessee advanced/invested money out of business expediency in those entities which were either the subsidiary companies of the assessee or were subsequently merged with the assessee company or for the purchase of business assets. The Ld. A.R. filed a chart of utilisation of borrowed funds which has been incorporated by Ld. CIT(A) in para 6.5 of the appellate order. The Ld. A.R. while referring to the table reproduced by Ld. CIT(A) in para 6.5 of the appellate order submitted that some advances were also transferred to the assessee company upon merger and no borrowed funds were used for the purpose of making such advances. The Ld. AR contended that the finding of both the authorities below were contrary to facts on record. The Ld. Counsel submitted that the name of the entities appearing at sr.no. 1 to 5 of the said table were subsidiary companies of the assessee and were later on merged with assessee and thus the provisions of section 36(1)(iii) are not applicable to the advances made to subsidiary out of business consideration. The Ld. Counsel submitted that advances to companies/entities appearing from sl.nos. 6 to 9 were made out of business consideration as all these were subsidiary companies of the assessee which later on merged with the assessee w.e.f. 01.04.10 and thus were not advances to the outside parties. The entity appearing at sl. no.10 is a subsidiary company and the money was advanced out of purely business and commercial considerations to the

subsidiary and thus no disallowance is called for under section 36(1)(iii). As regards advance to Kalpataru enterprises of Rs.21 lakhs, the Ld. A.R. submitted that the money was paid for the purchase of flat by the assessee and therefore no disallowance under section 36(1)(iii) is called for. As regards the advance to Smit Capital Services Pvt. Ltd. amounting to Rs.11,85,00,000/- the Ld. A.R. submitted that during the year the money was transferred under an MOU which was entered into by the assessee in connection with the business of the assessee. A copy of MOU was also placed before the Bench justifying the said transfer of money to the said entities. The Ld. A.R. finally submitted that since all the money to various entities as stated above are either for business/commercial expediency to the subsidiary which were merged with the assessee company or for the purchase of flat by the assessee or under MOU and therefore no disallowance under section 36(1)(iii) is called for. The Ld. A.R. prayed before the Bench that in view of the ratio laid down by the Hon'ble Supreme Court in the case of "S.A. Builders vs. CIT" (supra) the order of Ld. CIT(A) be set aside on this issue and AO be directed to delete the addition.

15. The Id DR ,per contra, relied on the order of authorities below and submitted that interest bearing money has been transferred to the other business entities though the associate concerns free of interest resulting into claim of higher amount of interest. The Ld. D.R. prayed that the order of CIT(A) be upheld on this issue.

16. We have heard the rival submissions of both the parties and perused the relevant material on record. The undisputed facts are that the assessee paid some money to various entities out of borrowed funds during the year on which an interest of Rs.1,37,64,648/- was paid which was disallowed by the AO under section 36(1)(iii) as being used for the non business purposes. During the course of hearing, the detailed utilisation chart of the borrowed funds was submitted by the Ld. A.R. which is reproduced as under:

Sr. No	Name and Address of Party	Op. Bal as on 01.04.10	Addition	Repayment	Cl. Bal as on 31.03.11	Remarks
1.	Liz Investment Pvt. Ltd.	-	39,09,753	-	39,09,753	Advances transferred from books of Athith Investment & Trading Co. Pvt. Ltd. on account of Merger.
2	Dilip Kumar	-	54,00,000	-	54,00,000	Advances transferred from books of Athith Investment & Trading Co. Pvt. Ltd. on account of Merger.
3	Yusuf Lakdawala	-	32,50,000	-	32,50,000	Advances transferred from books of Athith Investment & Trading Co. Pvt. Ltd. on account of Merger.
4	Pegasus Stocks & Shares Pvt. Ltd.	-	49,00,000	-	49,00,000	Advances transferred from books of Caprilloy Polymers Pvt. Ltd. on account of Merger.
5	Vajradhar Leasing & Finvest Pvt. Ltd.	-	2,00,00,000	-	2,00,00,000	Advances transferred from books of Caprilloy Polymers Pvt. Ltd. on account of Merger.
6	Mrignayani Investments and Trading Company Pvt. Ltd.	1,75,00,000	11,65,00,000	13,40,00,000	-	Loan to wholly owned Subsidiary which subsequently merged with appellant w.e.f.01.04.2010
7	Wahedna Stock & Shares Pvt. Ltd.	-	5,181	5,181	-	Loan to wholly owned Subsidiary which subsequently

						merged with appellant w.e.f. 01.04.2010.
8	Profitech Trade & Investment Pvt. Ltd.	-	21,00,000	21,00,000	-	- Loan to wholly owned Subsidiary which subsequently merged with appellant w.e.f. 01.04.2010
9	Athith Investment & Trading Co. Pvt. Ltd.	-	53,00,000	53,00,000	-	Loan to wholly owned Subsidiary which subsequently merged with appellant w.e.f. 01.04.2010.
10	HJB Developers & Builders Pvt. Ltd.	-	2,12,50,838	838	2,12,50,000	Loan to Subsidiary Company
11		Total (A)	18,26,15,772			
12	Kalapataru Enterprises	-	21,00,000	-	21,00,000	Advance against purchase of Flats
13	Smit Capital Services Pvt. Ltd.	12,50,00,000	11,85,00,000	24,35,00,000	-	Money transferred on account of MOU entered on 20.03.2010
15		Total (B)	12,06,00,000			
		14,25,00,000	30,32,15,772	38,49,06,019	6,08,09,753	

17. As is clear from the above statement, the entities from sl. no.1 to 5 are the entities which merged with the assessee company and all the advances mentioned from sl. no.1 to 5 were received by the assessee company upon merger of the said entities with the assessee company.

18. So far as the advances to entities from sl. no.6 to 9 are concerned, these were the wholly owned subsidiaries of the assessee which were merged with the assessee w.e.f. 01.04.10. Entity at sl. no.10 M/s. HJB Developers & Builders Pvt. Ltd. is a subsidiary of the assessee company and payment to Kalpataru Enterprises of Rs.21,00,000/- was against the purchase of flat whereas the advance given to M/s. Smit Capital Services Pvt. Ltd. at sl. no.13 was given under MOU

entered into on 20.02.10. It is clear from the above that the advances were either transferred to the assessee company from those subsidiary which merged with the assessee w.e.f. 01.04.10 or given to subsidiary out of commercial expediency for purchase of flat are under business commitment under MOU entered into by the assessee with M/s. Smit Capital Services Pvt. Ltd. Looking at the totality of the facts, we observe that all the advances are connected with the business of the assessee and none was given for non business purposes. The case of the assessee is squarely covered by the decision of Hon'ble Supreme Court in the case of "S.A. Builders vs. CIT" (supra). Therefore, we are not in agreement with the findings of Ld. CIT(A) that advances were given for non business purposes and nor out of commercial consideration. Consequently, the disallowance of interest amounting to Rs.1,37,64,648/- affirmed by the Ld. CIT(A) cannot be sustained. Accordingly, we set aside the order of Ld. CIT(A) on this issue and direct the AO to delete the addition.

19. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 27.04.2018.

**Sd/-
(Saktijit Dey)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 27.04.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.