

**आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI  
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.6886/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2007-08)

Alchemie Financial Services Ltd. 2 <sup>nd</sup> Floor, Udyog Kshetra Mulund, Goregoan Link Road, Off LBS Road Mulund (W), Mumbai-400080	<b>बनाम/</b>  v.	DCIT ,Range-10(3), Mumbai
स्थायी लेखा सं./ PAN : AAACA0948C		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )
Assessee by:		Shri. Anuj Kisnadwala
Revenue by :		Shri Rajesh Kumar Yadav,DR

सुनवाई की तारीख /**Date of Hearing** : **31.05.2018**

घोषणा की तारीख /**Date of Pronouncement** : **01.06.2018**

**आदेश / ORDER**

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee, being ITA No. 6886/Mum/2014, is directed against appellate order dated 12.08.2014 passed by learned Commissioner of Income Tax (Appeals)-22, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2007-08 , the appellate proceedings had arisen before learned CIT(A) from assessment order passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) r.w.s. 254 of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2007-08.This is second round of litigation before Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal")

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the tribunal read as under:-

"1. *Re: Disallowance u/s. 14A*

1.1 On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) [hereinafter referred to as 'the learned CIT (A) erred in confirming the action of the Assessing Officer by disallowing interest u/s 14A without appreciating that the Appellant had sufficient own funds for making the investments. The learned CIT(A) ought to have considered that the Assessing Officer has not followed directions of the Honourable ITAT in proper spirit and has carried out disallowance u/s 14A.

1.2 Without prejudice to above, the learned CIT (A) has erred in not rectifying the errors committed in calculating amount of disallowance u/s 14A as per Rule 8D.

1.3 Without prejudice to the above, the disallowance u/s 14A should be substantially reduced.”

3. The brief facts of the case are that assessee is engaged in the business of leasing, finance and manufacturing activity. This is second round of litigation before the tribunal. The sole and short issue in this appeal is with respect to disallowance of expenditure u/s. 14A of the 1961 Act incurred in relation to the earning of an income which does not form part of total income. The assessee has received dividend income of Rs. 4,91,110/- which was claimed as exempt from income-tax during relevant period under consideration. The assessee also earned long term capital gains of Rs. 1,55,15,122/- which was also claimed as an exempt from income-tax u/s 10(38) of the 1961 Act.

In the first round of litigation, the AO invoked provisions of Section 14A of the 1961 Act and applied Rule 8D of the Income-tax Rules, 1962 to make disallowance of expenses to the tune of Rs. 21,04,985/- vide assessment order dated 14.12.2009 passed by the AO u/s. 143(3) of the 1961 Act, detailed as hereunder:-

(1)	Expenditure directly relating to income which does not form part of total income	Rs. 6,12,022
(2)	Working of formula i.e. $A \times B/C$ in case of expenditure by way interest, which is not directly attributable to such exempt income. A. Amount of expenditure by way of interest = Rs.86.17,853 B. Average value of investment on the first and last day of the previous year [i.e. $\{23960163+63648558\}/2= 43804361$ ]	Rs. 12,73,942/-

	C. The average of total assets on the first and last day of the previous year [(i.e. (338764705+253883382)/2] = 296324044 A x B/C = (8617853 X 43_804361) / 296324044 = 12,73,942	
(3)	0.5% of average value of investment on the first and last day of the previous year [i.e. 0.5% of B] = 219022]	Rs. 2,19,022
	Aggregate of 1+2+3	Rs.21,04,985

The matter travelled upto Mumbai-tribunal in the first round of litigation at the behest of the assessee. The tribunal was pleased to set aside the matter to the file of the AO for re-adjudication of the issue of disallowance of expenditure u/s. 14A in the light of the law laid down by Hon'ble Jurisdictional High Court in the case of Godrej & Boyce Manufacture Company Ltd. v. DCIT 328 ITR 81(Bom.) , vide appellate orders dated 17-03-2011 passed by tribunal in ITA no. 3071/Mum/2010 . It was also held by tribunal that Rule 8D of the 1962 Rules is not applicable for the impugned assessment year 2007-08 in light of above decision of Hon'ble Bombay High Court.

In the second round of litigation , the AO framed an assessment u/s. 143(3) r.w.s 254 vide assessment orders dated 08-03-2013 , wherein again the AO confirmed the additions to the tune of Rs. 21,04,985/- by holding that under the circumstances of this case wherein the assessee failed to prove direct nexus of the utilisation of interest free funds being invested in securities capable of yielding exempt income, Rule 8D of the 1962 Rules is appropriate and scientific to form a reasonable basis of disallowance of expenditure u/s 14A. It is pertinent to mention that the assessee did not appear before the AO in assessment proceedings in second round of litigation and it was an ex-parte assessment order. The matter travelled to learned CIT(A) at the behest of the assessee in second round of litigation , wherein learned CIT(A) held that Rule 8D of the 1962 Rules is not applicable for the impugned assessment year 2007-08 , but additions were confirmed by learned CIT(A) to the tune of Rs. 6,12,022/- on account of direct expenses incurred by the assessee as admitted by the assessee towards portfolio management fee (folio

management charges) as well disallowance were confirmed by learned CIT(A) to the tune of Rs. 12,73,942/- towards interest expenditure incurred in relation to the earning of the exempt income because assessee could not demonstrate the nexus of investments with interest-free funds available with the assessee. The assessee however produced its audited financial statements as well chart below showing the availability of interest free funds vis-a-vis investments made by the assessee :

<i>Particulars</i>	<i>As at 01. 04.2006 (Rs. In Lacs)</i>	<i>As at 31. 03.2007 (Rs. In Lacs)</i>
<i>Share capital</i>	137.12	137.12
<i>Reserves- and surplus</i>	1568.30	1869.07
<i>Own funds</i>	1705.42	2006.19
<i>Cost of tax free investments</i>	636.48	239.60

The assessee also , inter-alia , relied upon Hon'ble Bombay High Court decision in the case of CIT v. Reliance Utilities and Power Limited v. CIT reported in (2009) 18 DTR 1 (Bom.)and also decision of Hon'ble Bombay High Court in the case of CIT v. HDFC Bank Limited v. DCIT reported in (2014) 366 ITR 505(Bom.) but learned CIT(A) dismissed the appeal of the assessee because assessee could not demonstrate nexus of investments with interest-free funds available with the assessee..

However ,with respect to the indirect expenses incurred by the assessee in relation to earning of an exempt income, the AO had disallowed expenditure to the tune of Rs. 2,19,022/- , the learned CIT(A) restricted disallowance to 10% of dividend income received by the assessee i.e. 10% of Rs. 4,91,110/- which led to the confirmation of disallowance of expenditure to the tune of Rs. 49,111/- incurred in relation to earning of an income which does not form part of the total income.

4. Aggrieved by the appellate order dated 12-08-2014 passed by learned CIT(A) in second round of litigation, the assessee has come in an appeal before the tribunal . The Ld. Counsel for the assessee submitted at the outset that there is no dispute between rival parties so far as disallowance of

indirect expenses to the tune of Rs. 49,111/- (being 10% of dividend income) incurred in relation to earning of an income which does not form part of total income as upheld by learned CIT(A). It is submitted that Revenue has not come in an appeal against the appellate order passed by learned CIT(A) giving part relief to the assessee and the assessee is also not aggrieved by said disallowance of indirect expenditure to the tune of Rs. 49,111/- incurred in relation to earning of an income which does not form part of total income, as the said disallowance as upheld by learned CIT(A) is not agitated in grounds of appeal filed before the tribunal. It is also submitted that the assessee is also not aggrieved by upholding of disallowance of direct expenditure to the tune of Rs. 6,12,022/- incurred in relation to earning of an income which does not form part of total income as confirmed by learned CIT(A) as the said expenditure is suo-motto voluntarily disallowed by the assessee in the return of income filed with Revenue u/s 14A of the 1961 Act. It is submitted that the assessee is however prejudiced and aggrieved by again disallowance of the said expenditure of Rs.6,12,022/- by AO while framing assessment which was voluntarily disallowed by the assessee, which led to double jeopardy to the assessee. It is submitted by the assessee that application was filed by the assessee with AO u/s. 154 on 13.01.2010 which is not yet disposed of by Revenue till date. It is also brought to the notice of the Bench that the assessee raised this issue of double jeopardy in the grounds of appeal no. 3 to 6 raised before the learned CIT(A) in its appeal but the learned CIT(A) did not adjudicate the same which has led to the prejudice to the assessee as the assessee is doubly taxed for the same income within the provisions of 1961 Act which is not permissible. The relevant extract of Ld. CIT(A) appellate order dated 12-08-2014 is reproduced here under:-

*“Grounds of appeal No. 3 to 6 are reproduced hereunder:*

*"3. Re: Addition of Folio Management charges of Rs.6,82,830/-:*

*3.1. The Assessing Officer grossly erred in adding the portfolio management fees twice without considering that the Appellant has itself already not claimed the said expense for computing profits of the business.*

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*3,1. The above grounds do not emanate from the order passed by the AO u/s 143(3) r.w.s 254 of IT.Act. During the course of hearing, the AR of the appellant conveyed that the CIT(A) while adjudicating the original appeal had given certain directions to the AO which was not carried out till date and hence the appellant had filed rectification petition u/s 154. As mentioned above, the issues do not emanate from the reassessment order. They were already decided by 'the CIT(A) & therefore cannot be adjudicated again. These grounds raised are therefore Dismissed."*

So far as the disallowance of direct expenditure of Rs. 6,12,022/- is concerned which led to double jeopardy to the assessee, Ld. DR fairly stated that the issue can be restored to the file of the AO with directions to dispose of petition filed by the assessee on 13-02-2010 u/s. 154 of the Act.

5. We have considered rival contention and perused the material on record . We are of considered view that the assessee has claimed to have disallowed suo-motto voluntarily direct expenditure of Rs. 6,12,022/- incurred in relation to earning of an income which does not form part of total income within provisions and mandate of Section 14A in the return of income filed with the Revenue and the said disallowance need to be upheld in view of provisions of Section 14A which is also fairly agreed and conceded by learned counsel for the assessee However , we are of the considered view that the assessee cannot be prejudiced with double jeopardy by Revenue by adding the same amount again to the income of the assessee while framing assessment . However truthfulness of this contention of the assessee of double jeopardy need verification by authorities below from the records and thus we are inclined to set aside the matter to the file of the AO for necessary verification . If the contentions of the assessee as to double jeopardy is found to be correct, then we direct the AO to eliminate double jeopardy as assessee could not be prejudiced twice so far as this direct expenses of Rs. 6,12,022/- is concerned as the same expenditure cannot be disallowed twice once at the behest of the assessee voluntarily in return of income filed with Revenue and secondly again by the AO by disallowing the same while framing assessment. We order accordingly

6. The next issue in dispute is with respect to the disallowance of interest expenditure to the tune of Rs. 12,73,942/- on the grounds of use of mixed funds by the assessee for making investments in securities capable of

yielding income which does not form part of total income and the assessee having failed to bring on record direct nexus of the interest free funds used for making investments . The assessee has brought on record its audited financial statements and it is submitted that Ld. CIT(A) was duly apprised that the own interest-free funds available are more than investment made as per the chart below:-

<i>Particulars</i>	<i>As at 01. 04.2006 (Rs. In Lacs)</i>	<i>As at 31. 03.2007 (Rs. In Lacs)</i>
<i>Share capital</i>	<i>137,12</i>	<i>137.12</i>
<i>Reserves- and surplus</i>	<i>1568.30</i>	<i>1869.07</i>
<i>Own funds</i>	<i>1705.42</i>	<i>2006.19</i>
<i>Cost of tax free investments</i>	<i>636.48</i>	<i>239.60</i>

The assessee contended that under these circumstances , presumption will apply that assessee has invested own interest-free funds in investment which are capable of yielding exempt income. The assessee relied upon decision of Hon'ble Bombay High Court in the case of CIT v. HDFC Bank Ltd.(supra) and decision of Hon'ble Bombay High Court in the case of Reliance Utilities and Power Ltd.(Supra). It is submitted that under these circumstances where there is mixed funds used in making investments in securities capable of yielding exempt income, presumption will apply that the assessee invested own funds in investment capable of yielding tax free income. It is also submitted by the assessee that the interest earned by the assessee was to the tune of Rs. 1,67,23,849/- which was more than the interest expenditure of Rs. 86,84,328/- and hence interest earned by the assessee is more than the interest expenditure and no disallowance of interest expenditure is warranted. Our attention was drawn to audited financial statement which is placed in file. The assessee relied upon the decision of Mumbai-Tribunal in the case of DCIT v. Jubilant Enterprises Private Ltd. in ITA no. 6364/Mum/2012 , order dated 12.03.2014, which is upheld by the Hon'ble Bombay High Court in ITA

no. 1512 of 2014 , vide orders dated 28-02-2017. The Ld. DR on the other hand relied upon the appellate order of the CIT(A).

7. We have considered rival contentions and perused the material on record including cited case laws and order of the authorities below . We have observed that the assessee is engaged in the business of leasing , finance and manufacturing activity. The assessee has earned dividend income of Rs. 4,91,110/- which was claimed as an exempt income. The assessee also earned long term capital gain of Rs. 1,55,15,122/- which was also claimed as an exempt income u/s 10(38). The assessee has admittedly used mixed funds wherein both interest bearing borrowed funds and interest free funds were available with the assessee. The perusal of audited financial statement reveals that the assessee has investment of Rs. 239.60 lacs as on 31.03.2007 as against investment of Rs. 636.48 lacs as on 31.03.2006 . The assessee owned funds are to the tune of Rs. 2006.19 lacs as on 31.03.2007 as against Rs. 1705.42 lacs as on 31.03.2006 . The assessee also earned net interest income which is positive whereas interest income earned was to the tune of Rs. 167.23 lacs while the interest expenditure incurred was to the tune of Rs. 86.84 lacs. The Revenue could not show direct nexus between the interest bearing fund raised by the assessee been invested in the investments capable of yielding tax free income , hence admittedly these are mixed funds which were used to make tax-free investments . Under these circumstances, presumption will apply that assessee has invested interest free own funds in making investments capable of yielding exempt income keeping in view ratio of decision of Hon'ble Bombay High Court in the case of Reliance Utilities and Power Ltd (supra) , HDFC Bank Ltd (supra) and also decision of Hon'ble Bombay High Court in the case of HDFC Bank Limited v. DCIT reported in (2016) 383 ITR 529(Bom.) . It is pertinent to submit that Hon'ble Gujarat High Court also held in the case of CIT v. Sintex Industries Limited reported in (2017) 82 taxmann.com 171(Guj) that when interest free own funds available are more than the investments in securities capable of yielding exempt income , the presumption will apply that the assessee invested own funds in tax-free securities. The SLP filed with by Revenue with Hon'ble Supreme Court against the said decision of Hon'ble Gujarat High Court is dismissed by Hon'ble Supreme Court in Pr. CIT v. Sintex Industries Limited reported in (2018) 92 taxmann.com 24(SC). Under these

circumstances we are of the considered view that no disallowances of interest expenditure as was made by the AO u/s 14A which was later confirmed by learned CIT(A) is warranted as the same cannot be sustained in the eyes of law and we order for deletion of an addition to the tune of Rs. 12,73,942/- towards disallowance of interest expenditure incurred in relation to earning of an income which does not form part of total income. We order accordingly.

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

Order pronounced in the open court on 01.06.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 01.06.2018 को की गई ।

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

Sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

Mumbai, dated: 01.06.2018

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER  
DY/ASSTT. REGISTRAR  
ITAT, MUMBAI