

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

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

आयकर अपील सं./I.T.A. No.1289/Mum/2017

(निर्धारण वर्ष / Assessment Year : 2011-12)

ACIT Circle- 1, Ashar IT Park 6 th Floor, 'B' Wing, RoomNo. 22, Road No. 16 Z Wagle Indl Estate Thane (W) -400604	बनाम/ v.	Emco Ltd. Plot No. F-5, Wagle Industrial Estate Road no. 28, Thane West- 400604
स्थायी लेखा सं./ PAN : AAACE2764Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by :		Shri Ram Tiwari
Assessee by:		None

सुनवाई की तारीख /**Date of Hearing** : **02.07.2018**

घोषणा की तारीख /**Date of Pronouncement** : **06.07.2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 1289/Mum/2017, is directed against appellate order dated 23.11.2016 passed by learned Commissioner of Income Tax (Appeals)-1, Thane (hereinafter called "the CIT(A)"), for assessment year 2011-12, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 20.03.2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2011-12.

2. The grounds of appeal raised by Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance made of Rs. 33,20,476/- made by the A.O. u/s 14A r.w. rule 8D(ii) of the I.T. Act, 1961*
2. *The order of the CIT(A) may be vacated and that of the Assessing Officer may be restored.*
3. *The assessee craves leave to add, amend, alter or delete any ground of appeal.*

3. The brief facts of the case are that the assessee filed return of income showing current loss of Rs. 68,93,36,051/- which loss was revised by the assessee by filing revised return of income on 19.10.2011 showing current loss of Rs. 68,53,14,666/- for impugned assessment year. The assessee is engaged in the business of manufacturing of transformers, electronic energy meters and turn key projects. The assessee received dividend income Rs. 3,92,298/- which was claimed as an exempt income u/s. 10(34) of the Act.

4. The AO invoked provisions of Section 14A r.w.r. 8D(2)(ii) and 8D(2)(iii) of Income-tax Rules, 1962 which led to the disallowance of Rs. 38,14,044/- u/s 14A r.w.r. 8D(2)(ii) and 8D(2)(iii) of the 1962 Rules (32,20,476/- on account of Rule 8D2(ii) and Rs. 4,93,568/- under Rule 8D2(iii) both read with Section 14A), as under:-

“ 5.4 To determine the amount of disallowance under the provision of Rule 8D the following facts have been considered-

1. *The assessee has incurred expenditure by way of interest amounting to Rs. 44,11,84,382/- during the concerned previous year (A)*
2. *The average of value of investment which is resulting into payment of dividend to the assessee company during the concerned previous year is Rs.9,87,13,571/-(B)*
3. *The average of the total assets as appearing in the Balance sheet of the assessee on the first day and the last day of the previous year is Rs. 13,11,58,72,103/-(C)*

On the basis of above discussion a disallowance of Rs. 32,20,476/- is made which is computed as the formula suggested in rule 8D sub-clause 2(ii) i.e. AxB/C . Here A is Rs.44,11,84,882/- as mentioned in (1) above. Similarly, B is Rs. 9,87,13,571/- and C is Rs. 13,11,58,72,103/- as mentioned in (2) & (3) above respectively. The calculation is as given below.

441 184882/- x 9,87,13.571/ 13,11, 58,72,103= Rs 32,20,476/-.

5.5 Further a disallowance of Rs. 4,93,568/- is made one half percent of the overage value of investment which is resulting into payment of dividend to the Assessee Company as per sub clause 2(iii)of the rule 8D.

The assessee had contended before the AO that it has its own funds which were more than the investment made in the securities capable of yielding exempt income and hence Rule 8D2(ii) of the 1962 Rules r.w.s. 14A could not be applied as own funds are more than the investments made in the said securities. The assessee also pleaded that no borrowed funds were used by the assessee for making investments in securities capable of yielding exempt income. The assessee mainly contended that in the year in which investments were made in securities capable of yielding exempt income, the own funds were more than the investments made and no borrowed funds were used by the assessee in making such investments in the year of making investments. The AO rejected the contentions of the assessee which led to framing of an assessment order dated 20-03-2014 passed u/s 143(3) wherein additions in aggregate to the tune of Rs. 38,14,044/- were made u/s 14A r.w.r. 8D(2)(ii) and 8D(2)(iii) of the 1962 Rules.

5. The assessee being aggrieved by assessment order dated 20-03-2014 passed by the AO u/s 143(3) filed first appeal before learned CIT(A) which was decided against the assessee by learned CIT(A) by so far as additions to the tune of Rs. 4,93,568/- as were made by the AO by invoking Rule 8D(2)(iii) r.w.s. 14A. However so far as additions to the tune of Rs. 32,20,476/- as were made by the AO by invoking Rule 8D2(ii) of the 1962 Rules r.w.s. 14A is concerned, the same was decided against the revenue by learned CIT(A) vide appellate order dated 23.11.2016, by holding as under:-

"I have carefully considered the appellant's submissions, the observations of the AO in the assessment and the facts of the case. I have also gone through the decisions relied upon by the appellant. As far as the interest expenditure on borrowed loans is concerned, it is seen that the appellant has made investments in equity shares in the earlier years and has shown availability of funds from internal accruals to cover the investment in equity shares as can be seen from the above table reproduced in the appellant's submissions. Therefore clause (i) &(ii) of Rule 8D of the I.T. Rules were not applicable in the appellant's case. However, certain administrative expenditure is required for making and maintaining investment in equity shares. The decision making personal of the company have to devote time and efforts to decide whether the investment is to be made or not and if already made whether to be continued or not. The various requirements are to be fulfilled like maintaining D'mat account and bank account for safe custody of the shares and entering into transactions of the purchase and sale and receiving dividends. Therefore in respect of such administrative expenditure the disallowance made by the AO under

clause (iii) of rule 8D being 0.5% of the average investment resulting in exempt income to the extent of Rs.4,93,568/- is upheld. Therefore, the disallowance to the extent of Rs. 4,93,568- is upheld as compared to the disallowance made by the AO at Rs. 38,14,044/-. The AO is directed accordingly.”

6. Aggrieved by the appellate order dated 23.11.2016 passed by learned CIT(A), the Revenue has come in an appeal before the tribunal. None appeared for the assessee although application for adjournment was moved. The assessee has not filed any power of attorney/authorisation for appointment of counsel before the tribunal while in the adjournment application moved , the assessee without mentioning the name of authorised representative has just stated that the AR is hospitalised but no medical / hospitalisation record was also filed before the Bench. Under these circumstances, the bench rejected the adjournment application filed by the assessee. The Ld. DR on the other hand has relied upon the assessment order of the AO .

7. We have considered the contentions of learned DR and perused the material on record . The assessee filed return of income showing current loss of Rs. 68,93,36,051/- which loss was revised by the assessee by filing revised return of income on 19.10.2011 showing current loss of Rs. 68,53,14,666/- for the impugned assessment year. The assessee is engaged in the business of manufacturing of transformers, electronic energy meters and turn key projects. The assessee received dividend income Rs. 3,92,298/- which was claimed as an exempt income u/s. 10(34) of the Act. The whole controversy in this appeal before the tribunal revolves around disallowance u/s. 14A r.w.r 8D(2)(ii) of the 1962 Rules wherein Rule 8D(2)(ii) of the 1962 Rules was invoked by the AO to disallow interest expenditure to the tune of Rs. 32,20,476/- on the pretext mainly of use of mixed fund used by the assessee for making investments in securities capable of yielding exempt income. The assessee has mainly contended before the authorities below that it has its own funds which are more than investments made in the securities capable of yielding exempt income and hence no disallowance u/s 14A of the 1961 Act can be made. The assessee in its contentions before the authorities below has stressed upon that own funds were more the investments made in the year in the securities capable of yielding exempt income as is emerging from material on record . However. No details of own

funds including share capital plus Reserve and Surplus minus accumulated loss figures for the relevant year under consideration corresponding to previous year 2010-11 i.e. opening figure as at 01-04-2010 and also closing figures as on 31-03-2011 are available from records which is placed before us. The assessee has incurred losses of more than Rs. 68 cores in the impugned assessment year and the financial position vis-a-vis books of accounts as well audited financial statements for previous year 2010-11 (AY 2011-12) are not available on record. We are agreeable with the basic principle as canvassed by the assessee before the authorities below that if own funds are more than investments made in securities capable of yielding exempt income, no disallowance u/s. 14A r.w.r. 8D2(ii) can be made as presumption will be that assessee has invested its own funds in investment capable of yielding exempt income unless said presumption is rebutted with cogent evidences. The reliance is placed on decision of Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities and Power Ltd. (2009) 313 ITR 340 (Bom. HC) as well as decision of Hon'ble Bombay High Court in the case of HDFC Bank Ltd. v. DCIT reported in (2016) 383 ITR 529 (Bom). Thus under these circumstances, we are of the considered view that no disallowance u/s. 14A r.w.r. 8D2(ii) can be made of the interest expenditure as is contemplated by the AO. However the facts available on records does not reflect the availability of own funds as at the beginning of the previous year as at 01-04-2010 as also at the end of the previous year as on 31-03-2011. The assessee has stressed on the availability of own funds being higher than the investments made in the year of making investments in securities capable of yielding exempt income but no reference or reliance is placed on the availability of own funds in the year under consideration. For limited verification by the AO as to the availability of own interest free funds during the year under consideration vis-a-vis investments made by the assessee in the securities capable of yielding exempt income in context with books of accounts and audited financial statements of the assessee for the year under consideration, we are restoring the issue to file of the AO for necessary verifications. Needless to say that the AO shall provide the assessee reasonable opportunity of being heard in accordance with principles of natural justice in accordance with law. The assessee is directed to produce before the AO all necessary evidences to support its contentions. We order accordingly.

8. The appeal of the Revenue is allowed for statistical purposes as indicated above.

order pronounced in the open court on 06.07.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 06.07.2018 को की गई ।

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 06.07.2018

Nishant Verma
Sr. Private Secretary

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

