IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "C", MUMBAI

Before Shri G Manjunatha, Accountant Member
& Shri Ravish Sood, Judicial Member

ITA No.1129/Mum/2017
Assessment Year: 2012-13

D/ACIT 2(1)(1), Mumbai.	Vs.	Central Depository Services (India) Ltd., 17th Floor, P J Towers, Dalal Street, Fort, Mumbai 400 023. PAN AAACC6233A
(Appellant)		(Respondent)

ITA No.918/Mum/2017
Assessment Year: 2012-13

Central Depository Services (India) Ltd., Mumbai 400 023. PAN AAACC6233A	Vs.	ACIT 2(1)(1), Mumbai.
(Appellant)		(Respondent)

For the Revenue : Shri Rajat Mittal
For the assessee : Shri Yash Parmar

Date of Hearing :10.07.2018		Date of Pronouncement : 25.07.2018

O R D E R

Per G Manjunatha, Accountant Member

These cross appeals filed by the assessee as well as the Revenue are directed against the order of CIT(A)-3, Mumbai, dated 10.01.2016 and it pertains to A.Y. 2012-13.

2. We shall first take up assessee's appeal in ITA No. 918/Mum/2017, wherein following Grounds of appeal have been raised:

> *1. The Ld. Commissioner of Income Tax (Appeals) has erred in adding the ALV of the residential property as Income from House Property, without considering the fact that the said property was used for the purpose of business.*
>
> *2. The Ld. Commissioner of Income Tax (Appeal) has erred in disallowing the expenses (i.e. depreciation, electricity, maintenance expenses) pertaining to residential property which was used for the purpose of business."*

3. The brief facts of the case are that the assessee M/s. Central Depository Services (India) Ltd., is a public limited company jointed promoted by BSE Ltd. and other leading financial institutions such as SBI and other nationalized banks. The assessee filed its return of income for A.Y. 2012-13 on 28.09.2012, declaring total income of ₹ 56,81,37,750/-. The case was selected for scrutiny and notices u/s. 143(2) and 142(1) were issued and served on the assessee. During the course of assessment proceedings, the Assessing Officer noticed that as per the Wealth Tax return filed for A.Y. 2012-13, the assessee has shown residential flat at Prabhadevi valuing ₹ 1,73,76,753/- as a taxable asset u/s. 2(ea) of Wealth Tax Act, 1957. However, it had not offered any income from it under the head 'Income from House Property'. Therefore, the assessee was asked to explain as to why the Annual Letting Value (ALV) of this property should not be assessed as per the provisions of section 22 of the Income tax Act, 1961. In response to notice, the assessee vide letter dated 01.12.2014, submitted that the said property is used for the purpose of business in the form of guest house, wherein the outstation Directors can come and stay for the Board meetings held by the assessee as per the statutory requirements for deciding day to day business issues. Since the property is used for business purpose, it was under the bona fide belief that the ALV of the property need not be computed as per the provisions of section 22 of the Income tax Act, 1961. The Assessing Officer after considering the relevant submissions of the assessee observed that the assessee itself contradicted from its submissions, where on one side assessee pleads that residential property is taxable u/s. 2(ea) of the Wealth

Tax Act 1957, and on the other side claims that the said property is used for business purpose and, hence, no income is assessable u/s. 22 of the Income tax Act, 1961. The Assessing Officer further observed that even though the assessee claims to have used the said premises for business purpose in the form of guest house for out station employees, no details have been filed including guest log book to prove its employees were using the guest house for official purpose. Accordingly, the Assessing Officer computed the ALV @ 8% of the cost of the property to determine the 'Income from House Property' assessable at ₹ 9,73,098/-. Similarly, the Assessing Officer has disallowed the expenses claimed on said property being depreciation on the flat & furniture/equipments in the flat, maintenance expenses and electricity expenses and added it to the total income of the assessee. Aggrieved, by the assessment order the assessee preferred appeal before the CIT(A).

4. Before the CIT(A) the assessee reiterated its submissions made before the Assessing Officer to argue that residential property owned by the company has been used as guest house to accommodate outstation Directors, who come for company's Board meetings. Therefore, even though the said asset has been considered as taxable u/s. 2(ea) of the Wealth Tax Act, 1957, income from the said property is not assessable u/s. 22 of the Income Tax Act, 1961. The assessee further claims that alternatively, the ALV of the property may be considered at ₹ 4,776/-. In so far as disallowance of expenses towards said property, it was submitted that the assessee has incurred expenses towards maintenance of guest house wholly and exclusively for its business, which is evident from the fact that the said flat has been used as guest house to accommodate outstation employees of the assessee. Therefore, the question of disallowance of expenses incurred to maintain said guest house does not arise. The learned CIT(A) after considering the relevant submissions of the assessee held that the assessee has admittedly shown residential flat at Prabhadevi in the Wealth Tax return, which is taxable u/s. 2(ea) of the Wealth Tax Act, 1957. Moreover, the assessee has used the said premises for the purpose accommodating their Directors/employees stationed outside and

visiting Mumbai for Board meetings. Even if the assessee used the residential property for commercial purpose, which has been shown as taxable asset u/s 2(ea) of the Wealth Tax Act, attract ALV to be assessed as 'Income from House Property'. The Assessing Officer, considering the location and the area, has taken a conservative estimate of ALV @8% of the cost of the property and, therefore, there is no reason to interfere with the determination of the ALV by the Assessing Officer. The CIT(A) further held that since the Assessing Officer has determined the ALV of the property and computed income after allowing standard deduction as provided u/s. 24 of the Income tax Act, no further expenses/expenditure incurred on the said property is allowable and, therefore, the Assessing Officer has rightly disallowed the expenses claimed on the said property to the extent of ₹ 5,75,550/-. Aggrieved by the order of the CIT(A), the assessee is in appeal before us.

5. The learned AR for the assessee submitted that the CIT(A) erred in confirming the additions made by the Assessing Officer towards determination of ALV of the property, which was used for business without appreciating the fact that except for the reason that the said property is part of the taxable wealth under the Wealth Tax Act, 1957, the Assessing Officer has not brought out any cogent evidence/reasons to determine the ALV of the property u/s. 22 of the Income Tax Act, 1961. The AR further submitted that the assessee has used the said premises for the purpose of maintaining it as guest house to accommodate its outstation employees, who regularly visit Mumbai for official work. Although, the assessee has included the said property in taxable wealth u/s. 2(ea) of the Wealth Tax Act, the fact remains that the said property has been used as guest house therefore, there is no reason to compute ALV of the property to be taxable u/s. 22 of the Income tax Act, 1961. In this regard reliance was placed on the decision of Hon'ble Delhi High Court in the case of CIT vs. Modi Industries Ltd. (210 ITR 1). The learned AR further submitted that the learned CIT(A) erred in disallowing the expenses being depreciation on the building and maintenance expenses, which was used for the purpose of business without appreciating the fact that the said premises was used as guest house to accommodate its outstation employees, who regularly visit

Mumbai for official work. Therefore, the expenses incurred for maintenance of guest house used for business purpose would come within the provisions of section 37(1) and, hence, the assessee has rightly claimed the deductions towards maintenance expenses. He further submitted that the expenses incurred for maintenance of guest house are not personal expenses of the assessee but had been wholly and exclusively incurred for the purpose of business therefore for the reason that the property is residential premises cannot be justification for disallowing genuine expenditure for maintaining property. In this regard, he relied upon the decision of Hon'ble Bombay High Court in the case of Greaves Cotton & Co. Ltd. vs. CIT (2005) [279 ITR 42].

6. On the other hand, learned DR strongly supported the order of the CIT(A) and submitted that the assessee itself had admitted that residential property owned by it is taxable u/s. 2(ea) of the Wealth Tax Act 1957 and, hence, the claim of the assessee that the said property was used as guest house for its staff is not based on any evidence. The Assessing Officer brought out clear facts to the effect that the assessee has not filed any evidence to prove the maintenance of guest house for its business purpose in the said residential property, therefore, he has rightly computed ALV of the property to be taxed under the head 'Income from House Property'. The order of the CIT(A) should therefore, be upheld.

7. We have heard both the parties and perused the material available on record. The fact with regard to ownership of residential property at Prabhadevi, Mumbai, is not disputed by the assessee. It is also an admitted fact that the assessee has included the said flat within the meaning of asset as defined u/s. 2(ea) of the Wealth Tax Act, 1957, which is taxable under the Wealth Tax Act. The Assessing Officer computed ALV of the property @8% of total investment in the property on the ground that the assessee owns a residential property but not computed ALV as per the provisions of section 22 of the Income tax Act, 1961. According to the Assessing Officer, the assessee itself has admitted the fact that residential property is taxable u/s. 2(ea) of the Wealth Tax Act, 1957. If at all the said property has been used as guest house for the business purpose of the assessee as claimed, the

assessee would not have included the same in the taxable wealth u/s. 2(ea) of the Wealth Tax Act, 1957. The Assessing Officer further observed that the assessee has not furnished any evidence to prove that the said property is used as guest house for the purpose of business of the assessee i.e. for its outstation employees. It is the contention of the assessee that though the property has been considered as taxable under the Wealth tax Act, 1957, fact remains that the said property has been used as guest house for the purpose of its employees who come on regular visit to Mumbai on official visit and, hence, the question of computing ALV as per provisions of section 22 of the Income Tax Act does not arise.

8. Having heard both the sides and considering the material on record, we do not find any merit in the arguments of the assessee for the reason that the assessee never disputed the fact that the said property has been included in the taxable wealth u/s. 2(ea) of the Wealth Tax Act, 1957. The assessee has also not filed any evidence to prove that the said property has been used as guest house by its employees for business purpose. If at all the property has been used as guest house for business purpose, the assessee would have incurred certain expenses to maintain the guest house. In this case, except the claim of depreciation on the building, electricity and maintenance expenses, no other expenses have been incurred to maintain guest house. From this it is abundantly clear that there is no merit in the claim of the assessee that the said property has been used as guest house for its business purpose. Although, the assessee has filed log book maintained for the guest house to prove that it has been used by the assessee's directors, the evidence filed by the assessee pertains to subsequent period therefore based on such evidence it cannot be concluded that the said property has been used for the purpose of guest house for the impugned assessment year. Therefore, we are of the considered view that the Assessing Officer was right in computing ALV of the property as per the provisions of section 22 of the Income tax Act.

9. Having said so, let us examine the method of determination of ALV by the Assessing Officer. The Assessing Officer has determined ALV of the property @8% of the cost of the asset. According to him the ALV determined by the assessee of

₹ 4,776/- is not acceptable, therefore, he proceeded on to determine the property on adhoc basis by estimating 8% of the total cost of the asset. It is the contention of the assessee that in case of deemed let out properties, the annual value shall be determined on the basis of some for which the property might reasonably be expected to let from year to year or where the property or any part of the property is let and the actual rent received or receivable by the assessee in respect thereof is in excess of the sum referred to in clause (a), it is the amount so received or receivable. Since the property has not been let out, the ALV of the property should be determined based on the fair rent of the property, whereas the Assessing Officer has determined ALV of the property on adhoc basis, which is incorrect. The Assessing Officer has determined the ALV of the property @ 8% of the cost of the asset without assigning any reasons for not considering fair rent of the property. The Assessing Officer also has not given any reasons as to how the ALV determined @8% reflects the fair rent considering the location and area of the flat. There are several methods for determining the ALV of the flat and one such method is municipal rateable value. Although, municipal rateable value many not be binding on the Assessing Officer, but that is only in cases where he is convinced that the interest free security deposit and monthly compensation do not reflect prevailing rate of property. In this case, the Assessing Officer has not made any effort to ascertain fair rental value of the property considering the location and area. In so far as the case laws relied upon by the assessee of the Hon'ble Delhi High Court in the case of CIT vs. Modi Industries Ltd. (supra), we find that in said case the facts were clear in as much as the property has been used for business purpose of the assessee. In this case, the assessee failed to prove with any evidence that the said property has been used for its business as guest house. Therefore, the case law relied upon by the assessee is not considered. Thus, we are of the view that the issue needs to be reconsidered by the Assessing Officer in the light of the decision of Hon'ble Bombay High Court in the case of Tip Top Typography (2014) [368 ITR 330], wherein it was held that if the premises is controlled by Rent Control Act, then the Assessing Officer must undertake the determination of rent himself in terms of

the said Act or determine it according to the prevailing rate in the locality. Hence, we set aside the issue to the file of Assessing Officer and direct him to re-consider the issue in the light of our discussion herein above.

10. Coming to the disallowance of expenses incurred in relation to residential property. The assessee has claimed expenses being depreciation on building, furniture & equipments, maintenance charges and electricity expenses. The Assessing Officer has disallowed expenses incurred on the ground that once standard deduction as provided u/s. 24 is allowed against rental income/ALV, then no other expenses/expenditure incurred on the said property is allowable. We find that the Assessing Officer has allowed Standard Deduction u/s. 24 of the Income tax Act, 1961, against ALV determined from the property to compute 'Income from House Property'. Once standard deduction is allowed, then no further deductions can be allowed towards any expenditure incurred on said property, whether or not such expenses are incurred in the course of carrying out business of the assessee. The expenses, we are of the considered view that the Assessing Officer was right in disallowing expenses towards property. The learned CIT(A) after considering relevant submissions has upheld the additions made by the Assessing Officer. We do not find any error in the order of the CIT(A), hence we are inclined to affirm the findings of the CIT(A) and reject the ground taken by the assessee.

Thus, the appeal filed by the assessee is partly allowed for statistical purposes.

11. We shall now take up the Revenue's appeal in ITA No. 1129/Mum/2017, wherein, following grounds have been raised:

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the exclusion of investments in 'Mutual Funds Growth Option' while calculation the disallowance u/s 14A r.w.r. 8D - being investment yielding taxable income - without appreciating the fact that the 'Mutual Funds - Growth Option' generate Long Term Capital Gain (STT paid), which is also exempt from tax."*

12. At the time of hearing, the learned AR for the assessee submitted that the issue is squarely covered in favour of the assessee by the decision of the ITAT, 'D' Bench, Mumbai, for A.Y. 2011-12 in ITA No. 1588/Mum/16, wherein on similar set of facts, the Tribunal has directed the Assessing Officer to determine disallowance contemplated u/s. 14A read with Rule 8D(2)(iii) after excluding the investments which are capable of earning taxable income. On the other hand, learned DR submitted that though the issue has been considered by the ITAT in earlier year, the fact remains that the learned CIT(A) erred in allowing the exclusion of investment of Mutual Funds while calculating the disallowance u/s. 14A without appreciating the fact that Mutual Funds Growth Option generate Long term capital gains, which is also exempt from tax.

13. We have heard both the parties and perused the material available on record. The fact with regard to earning exempt income and applicability of provisions of section 14A read with Rule 8D is not disputed by both the parties. In fact, the assessee itself has suo moto disallowed a sum of ₹ 49,80,383/- u/s. 14A of the Act. The AO determined the disallowance of ₹ 1,24,26,845/- @0.5% of average value of investment, which includes investments in Mutual Fund Growth Option. We find that the co-ordinate Bench of ITAT, Mumbai, 'D' Bench, in ITA NO. 1588/Mum/2016 for A.Y. 2011-12 has considered similar issue and after analysing facts of the case held that for the purpose of computing average value of investments, investments in Mutual Fund Growth Option, which are capable of earning taxable income shall be excluded. The relevant portion of the said Tribunal order is extracted below:

> *5. We have carefully considered the submissions of the rival parties and perused the material placed before us including the orders of authorities below and case law Relied upon by the assessee. We find that the issue involved in the current year is whether the investments on which the income is not exempt from tax is to be included or excluded while calculating the disallowance u/s 14A r.w.r.8D. We find that the identical issue (supra) has been decided by the co-ordinate bench of the Tribunal, wherein vide para four of the order, it has been held by the Tribunal as under :*

"4. After considering the rival submissions and on perusal of the impugned orders, we find that the only dispute qua the disallowance under section 14A which has been raised by the Ld. Counsel before us is that, there are certain investments which are generating taxable income and therefore, these investments should be removed from the working of the average investment under formula prescribed under Rule 8D(2)(iii). The details of the investment considered for disallowance and also the investment which are generating taxable income were given in the following manner:-

Particulars	**As on 31.03.2010**	**As on 31.03.2009**
Total Investments	Rs. 2,22, 51,04, 146	Rs. 1,21,57,53,656
Less: Investments generating taxable Income Schedule(l)	Rs. 40,60,85,329	Rs. 25,65,26,626
Investment considered for Sec 14A Disallowance	Rs. 1,81,90,18,817	Rs. 95,92,27,030

Sch. *<u>1: Investment generating taxable income</u>*

Particulars	31.03.2010	31.03.2009
	In Rs.	In Rs.
Investment in Taxable Bonds		
1 1.35% IDBI Omni Bonds 2008 Sr. XV	10,00,00,000	10,00,00,000
NCD Tata Capital Limited (12%)	5,00,00,000	5,00,00,000
9 . 62% L & T Finance	2,81,06,000	-
7.70% REC	4,94,01,550	-
7.90% REC	10,04,62,550	-
Total Investment in Taxable Bonds(A)	32,79,70,100	15,00,00,000
Investment in Mutual Fund (Growth Plans)		
Fortis Flexi Debt Fund -Regular Growth Plan	1,02,38,889	1,02,38,889
Birla Fixed Term Plan-Institutional Series BK- Growth	3,25,00,000	3,25,00,000
HDFC FMP 13M March 2008 (VII}(2)-Wholesale Plan Growth	_	3,10,21,498

HDFC Fixed Term Series 63- Institutional Growth	-	3,23,90,000
ICICI Prudential Institutional Short Term Plan - Cumulative Option	3,76,340	3,76,240
ICICI Prudential Fixed Maturity Plan -Series 51-1 year Plan A - Cumulative	3,50,00,000	_
Total Investment in Mutual Fund (Growth Plans) -(B)	7,81,15,229	10,65,26,627
Total Investments generating Taxable Income - (A) + (B)	40,60,85,329	25,65,26,627

We agree with the contention of Ld. Counsel that, if the investment which are generating taxable income or are capable of earning taxable income, then same should be removed from the working of the average investment under the formula given under Rule 8D(2)(iii), because the said clause itself refers to the working of the average value of the investment, the income from which does not or shall not form part of the total income. This inter alia means that, if the investment which is genera ting income or is capable of earning taxable income, then same should not be the part of the working of average value of the investment. Thus, we direct the Assessing Officer to remove the investments, which are either generating taxable income or capable of earning taxable income. The disallowance under Rule 8D(2)(iii) thus, should be worked out after removing such investments. The grounds raised by the assessee are accordingly treated as allowed"

6. We, therefore, maintaining the consistency with the earlier year order of the Tribunal in assessee's own case, hold that the disallowance made under rule 8D(2)(iii) has to be worked out after excluding the investments which are capable of earning of taxable income. Accordingly, the appeal of the assessee is allowed."

14. Facts remain unchanged. The Revenue fails to bring on record any contrary decision to counter the findings of fact recorded by the ITAT. Therefore, being consistency with the view taken by the co-ordinate bench, we direct the Assessing Officer to exclude investment in Mutual Fund Growth Option for the purpose of determining of average value of investments. Further, the assessee has filed a working of disallowance u/s. 14A as per which suo moto disallowance made by the assessee works out to ₹ 51,05,383/-, whereas as per the assessment order the Assessing Officer has taken the suo moto disallowance at ₹ 49,80,383/-. Therefore, we set aside the issue to the file of the AO for the limited purpose of verification of

fact with regard to the suo moto disallowance made by the assessee to ascertain whether it is ₹ 49,80,383/- or ₹ 51,05,383/-. Hence, we set aside the issue to the file of the Assessing officer and direct him to make necessary enquiries in light of computation filed by the assessee. We ordered accordingly.

Thus, the appeal is partly allowed for statistical purpose.

15 In the result, the appeal filed by the assessee as well as the Revenue are partly allowed for statistical purposes.

Order pronounced in the open court on this day of 25th July 2018.

Sd/-	**Sd/-**
(Ravish Sood)	**(G Manjunatha)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated : 25th July, 2018.
SA

<u>Copy of the Order forwarded to</u> :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'C' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai