

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.76 & 77/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2011-12& 2012-13)

Suresh A Shroff & Co.(Now known as 'Bohimia Realty the Firm') 41/42, Lloyds Centre Point, Appa Saheb Marathe Marg, Prabhadevi , Mumbai- 400025	बनाम/ v.	ACIT CIR 11(3) Mumbai
स्थायी लेखा सं./PAN : AABFS1859A		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:		Shri. Amit Singhania
Revenue by :		Shri. V. Justin

सुनवाई की तारीख /**Date of Hearing** : **12-07-2018**

घोषणा की तारीख /**Date of Pronouncement** : **27-07-2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

These two appeals, filed by the assessee, being ITA No. 76/Mum/2016 & ITA no. 77/Mum/2016 respectively for assessment year 2011-12 & 2012-13 are directed against composite appellate order dated 30.10.2015 passed by learned Commissioner of Income-tax (Appeals)-7, Mumbai (hereinafter called "the CIT(A)") for assessment year 2011-12 & 2012-13 respectively, the appellate proceedings had arisen before learned CIT(A) from separate assessment order(s) dated 28.02.2014 and 12-01-2015 respectively 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 and 2012-13 respectively.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") in ITA no. 76/Mum/2016 for AY 2011-12, read as under:-

“ 1. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the assessment order dated February 28, 2014,, passed by the Assessing Officer ("AO"), concluding the assessment for assessment year 2011-12 at Rs. 2,20,22,073 , as against returned income of Rs. 2,15,32,490.

2. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the addition made by the AO under section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 ("the Rules") amounting to Rs. 4,89,583, without appreciating that the Appellant has not incurred any expenditure, directly or indirectly, for earning the exempt income.

3. Without prejudice to the above, that on the facts and circumstances of the case and in law, the CIT(A) ought to have allowed the claim of the Appellant that the disallowance under section 14A of the Act should be such amount out of the total administrative expenditure of Rs.4,51,548 which is in the same proportion which dividend income of Rs. 45,08,883 bears to the total receipts (professional fees and income from mutual funds) of Rs. 5,60,77,202, but not exceeding the amount of administrative expenditure.

Each of the above ground is independent and without prejudice to the other grounds of appeal preferred by the Appellant .

The Appellant prays for leave to add, alter , vary , omit , substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal.”

3. The grounds of appeal raised by the assessee in the memo of appeal filed with the tribunal in ITA no. 77/Mum/2016 for AY 2012-13, read as under:-

“1. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the assessment order dated January 12, 2015, passed by the Assessing Officer ("AO"), concluding the assessment for assessment year 2012-13 at Rs. 2,79,26,470, as against returned income of Rs. 2,71,36,570.

2. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the addition made by the AO under section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 ("the Rules") amounting to Rs. 7,89,898, without appreciating that the Appellant has not incurred any expenditure, directly or indirectly, for earning the exempt income.

3. Without prejudice to the above, that on the facts and circumstances of the case and in law, the CIT(A) ought to have allowed the claim of the Appellant that the disallowance under section 14A of the Act should be such amount out of the total administrative expenditure of Rs. 6,14,000, which is in the same proportion which

dividend income of Rs. 54,77,080 bears to the total receipts (professional fees and income from mutual funds) of Rs. 6,63,51,380, but not exceeding the amount of administrative expenditure.

4. *That on the facts and circumstances of the case and in law, the AO/CIT(A), while determining the final tax liability of the Appellant, erred in granting TDS credit of Rs. 44,26,076, instead of Rs. 57,51,332, as claimed by the Appellant, resulting in short TDS credit to the extent of Rs. 13,25,258.*

5. *That on the facts and circumstances of the case and in law, the AO/CIT(A) erred in levying interest under section 234B/234C of the Act.*

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

The Appellant prays for leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal.”

4. The brief facts of the case are that the assessee is a firm of advocates. First we will take up appeal of the assessee for AY 2011-12 in ITA no. 76/Mum/2016 . The assessee earned dividend income which was claimed as an exempt income to the tune of Rs. 45,08,883/- which was earned from various investments held by the assessee firm. The AO asked assessee during the course of assessment proceedings conducted u/s 143(3) r.w.s. 143(2) of the 1961 Act to explain as to why disallowance should not be made u/s. 14A of the Act, r.w.r. 8D of Income-tax Rules, 1962. The assessee submitted that no expenditure was incurred to earn an exempt income . The aforesaid contention of the assessee was rejected by the AO who held that for earning an exempt income and for management of investments requires expenses to be incurred while the assessee has claimed entire expenses against non-exempt income while no expenses were claimed/allocated to have been incurred for earning an exempt income. The AO after relying on decision of Hon'ble Bombay High Court in the case of Godrej and Boyce Mfg. Co. Limited v. CIT (ITA No. 616 of 2010) invoked Rule 8D2(iii) of the 1962 Rules after holding that provisions of Section 14A of the 1961 Act are clearly applicable and disallowance of expenses incurred in relation to earning of an exempt income were made as under in accordance with Section 14A of the 1961 Act read with Rule 8D of the 1962 Rules:-

i	The amount of expenditure directly relating to income which does not form part of total income	NIL
ii	In a case where the assessee has incurred expenditure by way of interest during the previous year which is not directly attributable to any particular income or receipt, an amount computed in accordance with the following formula, namely:-	NIL
iii	An amount equal to one-half percent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance Sheet of the assessee, on the first day and the last day of the previous year.	
	Opening Investment	Rs. 6,80,72,553/-
	Closing Investment	Rs.12,77,60,729/-
	Total	Rs. 19,58,33,282/-
	Avg.	Rs. 97,91,664/-
	0.5% of above	Rs. 4,89,583/-

Thus, the amount disallowed by the AO u/s 14A of the 1961 Act read with Rule 8D of the 1962 Rules was made at Rs. 4,89,583/- which was added back to the total income of the assessee by the AO vide assessment order dated 28-02-2014 passed u/s 143(3) of the 1961 Act for AY 2011-12.

5. Aggrieved by the assessment order dated 28-02-2014 passed by the AO u/s 143(3) of the 1961 Act for AY 2011-12, the assessee filed first appeal with the Ld. CIT(A) who dismissed the appeal of the assessee vide appellate order dated 30.10.2015, by holding as under:-

“5. I have carefully considered the facts of the case and the submission of the AR. I have also gone through the decisions relied on by the Ld.AR. The appellant has stated that the AO has not given any finding that any particular expenses was incurred to earn the dividend. The expenses were incurred for earning the professional fees and not for earning the dividend. It is seen from the assessment order that the AO has obtained explanation of the appellant as to why disallowances should not be made u/s 14A r.w. Rule 8D. The appellant has stated that no expenses were incurred to earn the exempt income. The claim of the appellant was not found satisfactory because management of investments requires monitoring which necessitates expenditure in terms of man-hours and administrative expenditures such as telephone, postage, office expenses etc. The upkeep and maintenance of any

investment portfolio for earning of income necessitates expenditure on supportive office and other infrastructure facilities apart from financial cost on the funds deployed. This, in my opinion, is a proper reason given by the AO for his not being satisfied with correctness of claim of the appellant before applying Rule 8D. I also find that the investments of the appellant giving rise to tax free income has gone up from Rs. 6,80,72,553/- to Rs. 12,77,60,729/-. It is also seen from the details of investment as on 31.03.2010 and 31.03.2011 that many of the old investment has been liquidated partly and new investments have been made. The investment in HDFC Mutual Fund was Rs. 1,25,84,059/- on 31.03.2010. The same was Rs. 2,98,07,682/- on 31.03.2011. Similarly, the investment in DWS Mutual Fund has gone up from Rs.3,01,26,005/- to Rs. 4,10,19,813/-. In addition to the increase in these investments, the appellant has made fresh investments in HDFC EMP 370D of Rs. 1,00,00,000/-, DWS Fixed term fund of Rs. 51,79,292/-, Reliance Fixed Horizan fund of Rs. 50,00,000/-, Tata FMP Rs. 50,00,000/- and IDFC FMP Rs. 50,00,000/-. The appellant has also encashed FD with ICICI Bank of Rs. 2,42,81,843/- and made other investments. Such huge investments cannot be made without any expenditure. It requires financial analysis and research and constant vigil on the market trend to make investment of this magnitude, All these activities need financial support which entails expenditure. Therefore, it cannot be said that no reason the expenditure was incurred to earn the dividend.

5.1. The Ld.AR has relied on the decision in the cases of Daga Global Chemicals P.Ltd. (supra), Joint Investments P.Ltd. (supra), Taikisha Engineering India Ltd. (supra) & Metalman Auto P.Ltd.(supra). The facts of the cases relied on by the Ld.AR are not similar. In the case of Daga Global Chemicals P.Ltd., the Hon'ble Tribunal has held that disallowance u/s 14A r.w.Rule 8D cannot exceed exempt income. In that case, the assessee had received dividend of Rs. 1,82,362/- only whereas the disallowance was Rs. 14,58,112/-. In the case of Joint Investments P.Ltd. (supra), the assessee had received exempt income in the form of dividend to the tune of Rs. 48,90,000/-. The assessee had volunteered Rs. 2,97,440/- as disallowance u/s 14A. The AO, however, disallowed Rs. 52,56,197/- which was higher than the entire exempt income of Rs. 48,90,000/-. In that case, the AO has not disclosed why the appellant's claim of Rs.2,97,440/-had to be rejected. The Hon'ble Court stated that the proportion of expenditure cannot be more than the exempt income. In the case of Taikisha engineering India Ltd., the AO disallowed the expenditure of Rs. 42,59,540/~ as against the suo moto expenses of Rs. 1,15,000/- by the assessee. The Hon'ble Court held that the AO should verify the disallowance made by the assessee and if he is not satisfied on this account, then he can adopt Rule 8D after making reference to the accounts. It is not clear as to how the ratio of this decisions are applicable to the facts of the assessee. The appellant earned exempt dividend of Rs. 45,08,883/- but has not disallowed any sum towards this. As discussed earlier, the investment of the assessee has gone up by nearly Rs. 6,00,00,000/- during the year which is in addition to the changes made in several old investments. Therefore, I am of the considered opinion that the AO has rightly applied Rule 8D and made the disallowances. It may be stated that the AO himself has not made any addition under Rule 8D(2)(i) or 8D(2)(ii) and only ½ per

cent of the average value of the investment the income from which does not or shall not form part of the total income was considered to make the disallowance of Rs.4,89,583/- under rule 8D(2)(iii). It may be stated that the exempt income shown by the assessee is quite very high at Rs. 45,08,883/-and the average value of investment was also very high at Rs. 9,79,16,641/-. The AO has properly recorded satisfaction for applying Rule 8D which, as held by the Hon'ble jurisdictional High Court in Godrej & Boyce Mfg. Co. Ltd. (supra), is applicable from A.Y.2008-09 onwards. If any hardship is caused due to operation law, the remedy does not lie with any appellate authority. Equity and hardship cannot be the ground for interpretation of law. Useful reference may be made to decisions of Hon'ble Supreme Court in Karmachari Union v.UOI (243 ITR 143) and Tarulata Syarn v.CIT (108 ITR 345). In view of the above factual and legal positions, the disallowance made by the AO is sustained and the grounds are dismissed”.

6. Aggrieved by the appellate order dated 30.10.2015 passed by learned CIT(A) for AY 2011-12, the assessee has come in an appeal before the tribunal and the main bone of contention of Ld. Counsel for the assessee is that the assessee is in the profession of advocates . It is stated that the assessee firm is Advocate on Record(AOR) with Hon'ble Supreme Court and the major practice of the assessee advocate's are to appear before Hon'ble Supreme Court. The Ld. Counsel for the assessee had contended before the Bench that the AO has not recorded satisfaction which is mandatorily required under provisions of Section 14A(2) of the Income-tax Act, 1961 having regards to the accounts of the assessee before making any disallowance of expenditure incurred in relation to earning of an exempt income as is contemplated u/s 14A of the 1961 Act. It is strenuously argued that assessee has invested in mutual funds and no cost has been incurred for managing of investments as well for earning of an exempt income which could be disallowed u/s 14A of the 1961 Act. It is submitted by learned counsel for the assessee that portfolio managers are looking after and managing the portfolio of the assessee and their costs/fees are recovered vide purchases and sales of securities while no separate costs/fees are being charged by portfolio managers to the assessee towards management of portfolio of assessee's investments . On being directed by the Bench ,the Ld. Counsel for the assessee submitted audited financial statements of the assessee firm. The Ld. Counsel for the assessee also submitted replies dated 27.01.2014 and 19.02.2014 filed by the assessee before the AO. The learned counsel for the assessee relied upon the decision of Hon'ble Punjab &

Haryana High Court in the case of CIT v. Abhishek Industries Ltd. reported in (2015) 56 Taxmann.com 391(P&H HC) and submitted where there is no satisfaction recorded by the AO, the additions u/s. 14A cannot be sustained based on conjectures . It was submitted that AO cannot record satisfaction by making general observation which would not satisfy the mandate of Section 14A. Thus, it was prayed to delete the entire additions as were made by the AO u/s 14A of the 1961 Act read with Rule 8D of the 1962 Rules which was later confirmed by learned CIT(A). On the other hand, the learned DR would rely on orders of authorities below and contention is made that disallowance of indirect expenses were made under Rule 8D(2)(iii) of the 1962 Rules r.w.s. 14A of the 1961 Act and hence decision relied upon by the assessee in the case of Abhishek Industries Ltd.(supra) has no applicability to the facts of this appeal as the case law relied upon by the assessee deals with disallowance of interest expenses .

7. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the assessee is a firm of advocates and are Advocate on Record with Hon'ble Supreme Court. The assessee has made investments in mutual funds and other securities. The assessee firm received exempt dividend income of Rs.45,08,883/- during the previous year relevant to impugned assessment year 2011-12 under consideration. The assessee has invested large sum of money in mutual funds and other securities and average value of investment was to the tune of Rs. 9,79,16,641/- . The investments have been switched from one securities to another during the year under consideration as also fresh investments were made keeping in view commercial prudence as decided by the assessee and it is claimed that portfolio managers are managing these investments . On being asked by the AO the assessee had claimed that the assessee firm has not incurred any expenses for earning of an exempt income. The learned counsel for the assessee has also submitted before the Bench that even portfolio managers are not charging any fee for managing the portfolio of the assessee and they are recovering their fee from the transaction of purchase and sales conducted for the assessee but per-se no separate fees/costs are recovered by these portfolio managers from the assessee for managing the portfolio of the assessee. The AO invoked Rule 8D(2)(iii) of the 1962 Rules r.w.s. 14A of the 1961 Act to make disallowance

of Rs. 4,89,583/- , however, we have observed that the AO has not gone into details of expenses incurred by the assessee in relation to earning of an exempt income having regards to the accounts of the assessee to identify expenses incurred in relation to earning of an exempt income which could be disallowed u/s 14A , before proceeding to invoke Rule 8D of the 1961 Act. In our considered view the requirements of section 14A requires assessee to explain and bring on record complete modus operandi of the operations carried out by it with respect to its investments activities and the persons/cost associated with same which in the instant case are not brought on record by the assessee. Thus in view of submission of the assessee that there are no expenses incurred in connection with the investment activity and earning of an exempt income prompted the AO to trigger the invocation of Rule 8D of the 1962 Rules but the AO was required to record satisfaction having regard to the accounts of the assessee which in the instant case was not recorded by the AO . In all fairness to both the parties , the matter need to be restored to the file of the AO for fresh adjudication and the assessee is directed to furnish complete details of its modus-operandi and operational details such as persons/costs associated with its investment activities and also to explain the same in context with having regards to the accounts of the assessee . We are in agreement with the learned counsel for the assessee that disallowance of expenditure incurred in relation to earning of an exempt income cannot exceed the expenses claimed by the assessee as deduction from the income declared in the return of income filed with the Revenue. We have also noted that the assessee has claimed expenses towards partners salary which also stood debited to Profit and Loss Account and claimed as deduction from the income. With these observations and without commenting on merits of the case, we are restoring the matter back to the file of the AO for fresh adjudication in accordance with law and after recording satisfaction as is contemplated u/s 14A(2) of the 1961 Act having regards to accounts of the assessee. The assessee is directed to produce all necessary evidences/details in support of its contentions/defence before the AO in denovo assessment proceedings which shall be dealt with by the AO on merits in accordance with law. The AO shall provide proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law before adjudication the issue on merits in denovo proceedings. We order accordingly.

8. In the Result appeal of the assessee in ITA no. 76/Mum/2016 for AY 2011-12 is allowed for statistical purposes.

9. Our above decision in ITA no.76/Mum/2016 for AY 2011-12 shall apply mutatis mutandis to the assessee appeal for AY 2012-13 in ITA no. 77/Mum/2016 as issues are common. However, there is one more issue in the appeal filed by the assessee for AY 2012-13 wherein it is claimed that the Revenue authorities have not allowed credit of prepaid taxes by way of income-tax deducted at source (TDS) to the tune of Rs.13,25,258/- , we are inclined to restore this issue to the file of AO for verification of the claim of the assessee and if the claim of the assessee is found to be genuine and bonafide, the appropriate credits be granted to the assessee. We order accordingly.

10. In the Result appeal of the assessee in ITA no. 77/Mum/2016 for AY 2012-13 is allowed for statistical purposes.

11. In the result both the appeals of the assessee for AY 2011-12 and 2012-13 respectively are allowed for statistical purposes.

Order pronounced in the open court on 27.07.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 27.07.2018 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 27.07.2018

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/ASST. REGISTRAR
ITAT, MUMBAI