INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI
BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SMT BEENA A PILLAI, JUDICIAL MEMBER

ITA No.3108/Del/2011
(Assessment Year: 2008-09)

ACIT Circle-15(1) C.R.Building, I.P.Estate New Delhi	Vs.	M/s Ranbaxy Health Care P Ltd. (Now M/s Fern Healthcare P Ltd.) S-137, 2nd Floor Greater Kailash II New Delhi
(Appellant)		**(Respondent)**

ITA No.3682/Del/2013
(Assessment Year: 2009-10)

DCIT Circle-15(1) C.R.Building, I.P.Estate New Delhi	Vs.	M/s Fern Healthcare P Ltd. S-137, 2nd Floor Greater Kailash II New Delhi PAN: AACCR3509E
(Appellant)		**(Respondent)**

Revenue by :	Ms.Deepali Chandra, CIT, D.R.
Assessee by:	Sh. Tarandeep Singh, Adv.
Date of Hearing	02nd August, 2018
Date of pronouncement	23rd August, 2018

ORDER

PER BEENA A PILLAI, J. M.

Present appeals have been filed by revenue against order dated 10/03/11 and 28/03/13 passed by Ld. CIT (A)-18 for

Assessment Year 2008-09 and 2009-10 on the following grounds of appeal:

ITA No. 3108/Del/2011(Assessment Year 2008-09)

"1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.20,60,17,469/- made u/s 14A read with rule_8D by wrongly following direct nexus method in accordance with clause (i) of Sub rule (2) of rule 8D for the purpose of computation of disallowance of interest under section 14A.
2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing to reduce the interest cost of Rs.55.69 crores, by holding it directly attributable to earning "Interest Income", in the computation of disallowance made u/s 14A read with clause (ii) of sub rule (2) of Rule 8D.
3. The appellant craves to be allowed to add any fresh grounds of appeal and/or delete or amend any of the grounds of appeal."

ITA No. 3682/Del/2013(Assessment Year 2009-10)

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 2,17,84,711/- made on account of difference of disallowance calculated u/s 14A r.vv.R 8D of the Income Tax Act 1961.
2. On the facts & in the circumstances of the case, the Ld. CIT(A) has erred in not appreciating that the provision under Rule -8D of Income Tax Rules for calculation of disallowance of expenditure on exempt income as per section 14A of the Income Tax Act 1961 is applicable to the facts of the case of the assessee.
3. The Ld. CIT(A) erred in law and on facts in deleting the above disallowance relying upon the decision of his predecessor in earlier year on the similar issue ignoring the fact that the matter is sub-judice betore the Hon'ble ITAT and has not come to its finality.
4. The appellant craves to be allowed to add any fresh grounds of appeal and/or delete or amend any of the grounds of appeal."

It has been submitted by Ld.Counsel that facts for Assessment Years under consideration are identical. He submitted that Fern Healthcare Pvt.Ltd., was formerly known as Ranbaxy Healthcare Pvt.Ltd.

2. Brief facts of the case are as under:

Ld.AO observed that assessee was engaged in the business of financing activity and investments in shares and securities.

During the course of assessment proceedings for years under consideration, it was observed that assessee had investment income, from which income was claimed to be exempt under section 10 (34) of the Income Tax Act, 1961 (the Act). Ld.AO observed that assessee had made *suo-moto* disallowance under section 14 A of the Act. Ld. AO issued show cause notice calling upon assessee to explain disallowance computed by assessee under section 14 A of the Act.

2.1. Dissatisfied with explanation provided by assessee, Ld.AO recomputed disallowance under section 14 A, and worked out addition in the hands of assessee being difference between disallowance computed by assessee and Ld.AO.

2.2. Aggrieved by reworking of disallowance under section 14 A by Ld.AO, assessee preferred appeal before Ld.CIT (A). Ld.CIT (A) observed that Assessing Officer recomputed disallowance;

- as assessee had not maintained separate accounts for the loans/advances given by the assessee during the year and the loans taken by assessee.

2.3. While deciding the issue, for Assessment Year 2008-09, Ld. CIT(A) observed that disallowance of interest cost could not exceeded Rs.2.23 crores, whereas assessee in its *suo-moto* disallowance considered interest cost at 2.27 crores which was any way higher. For this reason Ld.CIT(A) upheld the computation of disallowance under section 14 to be correct.

In respect of Assessment Year 2009-10 Ld.CIT (A) observed that Assessing Officer could not prove the computation of disallowance under section 14 A adopted by the assessee to be incorrect. Ld.CIT(A) also observed that for Assessment Year 2009-

10, assessee had demonstrated that interest bearing funds were not used for purposes of investments. Ld.CIT (A) therefore restored to disallowance computed by assessee correct.

3. Aggrieved by orders of Ld.CIT(A), revenue is in appeal for Assessment Year 2008-09 and 2009-10.

4. It has been submitted by Ld.Sr.DR that appeals have been filed contesting addition that is deleted by Ld.CIT(A), made on account of disallowance of expenditure under section 14 A read with Rule 8D and upholding, disallowance as computed by assessee at Rs.21,78,40,711/-for Assessment Year 2009-10 and Rs.84,362,476/- for Assessment Year 2009-10.

5. During the course of arguments, Ld.Counsel raised a defensive plea that disallowance, as per law, cannot exceed the amount of exempt income earned by assessee, considering decision passed by *Hon'ble Delhi High Court* in case of *Joint Investments Pvt. Ltd vs. CIT* reported in *(2015) 59 Taxmann.com 295* wherein *Hon'ble court* has observed that;

"The third, and in the opinion of this Court, important anomaly which we cannot be unmindful is that whereas the entire tax exempt income is Rs. 48,90,000, the disallowance ultimately directed works out to nearly 110 per cent of that sum, i.e., Rs. 52,56,197. By no stretch of imagination can s. 14A or r. 8D be interpreted so as to mean that the entire tax exempt income is to be disallowed. The window for disallowance is indicated in s. 14A, and is only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case."

6. Countering the argument, Ld.Sr.DR submitted that assessee now cannot raise this argument as *suo moto* disallowance by assessee itself exceeds exempt income earned during years under consideration. He submitted that Assessing Officer after giving full opportunity to assessee has noted his dissatisfaction with claims of expenditure in relation to exempt income. It has been very categorically observed by Ld.AO that assessee had neither maintained separate bank accounts for investment purposes, nor any cash flow chart was prepared, to match entry by entry *viz-a-viz* exempt income related expenditure. Ld.Sr.DR placed reliance upon decision of *Hon'ble Supreme Court* in the case of *Maxopp Investments Ltd versus CIT reported in (2018) 91 taxman.com 154*.

7. In the rejoinder, Ld.Counsel submitted that there is no *estoppel* against statute, by placing reliance upon decision of *Hon'ble Delhi High Court* in the case of *Mrs V Chandra* reported in *245 ITR 610(Del,* he submitted that above defensive argument has been raised at this juncture, at the outset to maintain *status quo* and not to seek any additional relief. Ld.Counsel placed reliance upon decision of *Hon'ble Bombay High Court* in case of *B.R Bamsi vs. CIT* reported in *83 ITR 223*, wherein a similar situation arose before *Hon'ble Court*.

8. We have perused the submissions advanced by both sides in the light of records placed before us.

9. The issue that needs adjudication is an interesting one. This is a case where assessee missed the bus to file a cross objection or a cross appeal. The situation is a peculiar one, where assessee cannot raise a belated plea under Rule 29 of ITAT Rules. This is

why Ld.Counsel defensive plea before this Tribunal, of maintaining *status quo* of no further addition in the light of decisions passed by *Hon'ble Bombay High Court* in case of B.R.Bamsi *vs.CIT (supra).*

9.1. On perusal of decision of *Hon'ble Bombay High Court* in case of *B.R Bansi vs. CIT (supra*), it is observed that *Hon'ble Court* relying upon view taken by various *High Courts* observed as under:

"The only question is whether the Tribunal was entitled in law to refuse to allow the assessee to urge that ground in the appeal before it. Now a Division Bench of this High Court in Commissioner of Income-tax v. Hazarimal Nagji & Co. [1962] 46 ITR 1168 (Bom.), after considering the relevant sections of the Income-tax Act and the relevant Rules made thereunder, held that the powers of the Appellate Tribunal are similar to the powers of an appellate court under the Civil Procedure Code. It has further held that the respondent in an appeal is undoubtedly entitled to support the decree which is in his favour on any grounds which are available to him, even though the decision of the lower court in his favour may not have been based on those grounds. It has further held that if the appellant in his challenge to the decree of the lower court is entitled to take a new ground not agitated in the court below by leave of the court, there appears to be no reason why a respondent in support of the decree in his favour passed by the lower court should not be entitled to agitate a new ground and subject to the same limitation. A Division Bench of the Allahabad High Court has taken a similar view in Kanpur Industrial Works v. Commissioner of Income-tax [1966] 59 ITR 407 (All.). That judgment has considered the position of an appeal under section 33 of the Income-tax Act along with the relevant Rules and that of an appeal under the Code of Civil Procedure and the provisions of Order XLI, rule 22. The judgment holds that when the department files an appeal for an increase in the assessed income, the subject-matter of the appeal is the increase claimed by the department and

the assessee can urge any ground of defence even though it might have been rejected by the Appellate Assistant Commissioner for showing that there should be no increase. It has further held that that the assessee is not liable to be assessed at all is a ground for showing that there should be no further assessment and the department's appeal can therefore be resisted on that ground and that there is no incongruity in maintaining the assessment order passed against the assessee and yet refusing to increase it on the ground that he was not liable to be assessed at all. The judgment points out however that if the Tribunal accepts the ground of defence that the assessee was not liable to be assessed, it can only refuse to increase the assessed income as only such an order would be within the scope of the appeal filed by the department and any other order such as annulling the assessment would be outside the scope of the appeal. That judgment holds that the position of an appeal under section 33 of the Income-tax Act and an appeal under the Code of Civil Procedure is identical. A Full Bench of the Madras High Court has in Venkata Rao v. Satyanarayanamurthy ILR 1944 Mad. 147; AIR 1943 Mad. 698 [FB], held that it was open to a respondent in appeal who had not filed cross-objection with regard to the portion of the decree which had gone against him to urge in opposition to the appeal of the plaintiff a contention which if accepted by the trial court would have necessitated the total dismissal of the suit, but the decree in so far as it was against him would stand."

9.2. In facts before us for both assessment years under consideration, it is observed that similar situation has been dealt with by Hon'ble Bombay High Court wherein defensive plea has been raised by assessee therein, without filing Cross Objection/Cross Appeal, without seeking any additional relief over and above what has been allowed by Ld. CIT (A).

9.3. We observe that ratio laid down by *Hon'ble Bombay High Court* in case of *B.R Bansi vs. CIT (supra*), supports plea of Ld. Counsel, of maintaining *status quo.* It is observed that Ld.CIT (A)

upheld disallowances computed by assessee, having regard to accounts maintained by assessee for Assessment Year 2008-09 and 2009-10. In the absence of Cross Objection/appeal, it is not possible to set aside the computation of disallowance, as then it would lead to annulment of order passed by Ld.CIT(A), which is not permissible.

10. We therefore respectfully following the ratio laid down by *Hon'ble Bombay High Court* in case of *B.R Bamsi vs. CIT (supra*), do not find any infirmity in order passed by Ld. CIT (A) for Assessment Year 2008-09 and 2009-10.

11. Accordingly, grounds filed by revenue for Assessment Year 2008-09 and 2009-10 stands dismissed.

12. In the result appeals filed by revenue for Assessment Year 2008-09 and 2009-10 stands dismissed.

Order pronounced in the Open Court on 23/08/2018.

Sd/-	Sd/-
(RK PANDA)	**(BEENA A PILLAI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: the 23rd August, 2018

- Gmv

Copy forwarded to :

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

// true copy //

BY ORDER

ASSISTANT REGISTRAR
ITAT, New Delhi

		Date	
1.	Draft dictated on Dragon	14.08.18	PS
2.	Draft placed before author	14.08.18 16.08.18	PS
3.	Draft proposed & placed before the second member		JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS		PS/PS
6.	Kept for pronouncement on Order uploaded On:	23.8.18	PS
7.	File sent to the Bench Clerk		PS
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9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		