IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI SANDEEP GOSAIN (JUDICIAL MEMBER) AND SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 2771/MUM/2017
Assessment Year: 2012-13

Oberoi Realty Limited, Commerz, 3rd floor, International Business Park, Oberoi Garden City, Off Western Express Highway, Goregaon (East), Mumbai-400063. **PAN No. AABCK0235H**	Vs.	The Deputy Commissioner of Income Tax, Central Circle-4(1), Room No. 1916, Air India Building, Nariman Point, Mumbai-400021.
Appellant		**Respondent**

ITA No. 3258/MUM/2017
Assessment Year: 2012-13

The Deputy Commissioner of Income Tax, Central Circle-4(1), Room No. 1916, Air India Building, Nariman Point, Mumbai-400021.	Vs.	Oberoi Realty Limited, Commerz, 3rd floor, International Business Park, Oberoi Garden City, Off Western Express Highway, Goregaon (East), Mumbai-400063. **PAN No. AABCK0235H**
Appellant		**Respondent**

ITA No. 2793/MUM/2017
Assessment Year: 2013-14

Oberoi Realty Limited, Commerz, 3rd floor, International Business Park, Oberoi Garden City, Off Western Express Highway, Goregaon (East), Mumbai-400063.	Vs.	The Deputy Commissioner of Income Tax, Central Circle-4(1), Room No. 1916, Air India Building, Nariman Point, Mumbai-400021.

PAN No. AABCK0235H
Appellant **Respondent**

ITA No. 2850/MUM/2017
Assessment Year: 2013-14

The Deputy Commissioner of Income Tax, Central Circle-4(1), Room No. 1916, Air India Building, Nariman Point, Mumbai-400021.	Vs.	Oberoi Realty Limited, Commerz, 3rd floor, International Business Park, Oberoi Garden City, Off Western Express Highway, Goregaon (East), Mumbai-400063. **PAN No. AABCK0235H**
Appellant		**Respondent**

Assessee by : Mr. R. Muralidhar, AR
Revenue by : Mr.Abhirama Karthikeyen, DR

Date of Hearing : 11/02/2019
Date of pronouncement: 25/02/2019

ORDER

Per Bench

The captioned cross appeals- one by the assessee and the other by the revenue for AYs 2012-13 & 2013-14 – are directed against the order of the Commissioner of Income Tax (Appeals)-52, Mumbai [in short 'CIT(A)] and arise out of the assessment completed u/s 143(3) of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience. We begin with the AY 2012-13.

ITA No. 2771/MUM/2017
Assessment Year: 2012-13

2. The 1st ground of appeal

1(a). The AO has erred in law and facts by making addition of Rs.1,02,75,673/- to the total income of the appellant by disallowing expenditure u/s 14A of the Act read with rule 8D of the Income-tax Rules, 1962 without establishing any nexus between the expenditure incurred and income earned which does nor form part of the total income and the Commissioner of Income-lax (Appeals) has erred in partly confirming the above action of AO by upholding the addition of Rs.12,00,000/- out of addition of Rs.1,02,75,673/-made by the AO.

(b) Without prejudice to the appellant's contention on application of section 14A read with rule 8D of the Rules, the AO has erred in law and facts by including the amount of investments in Subsidiary Companies and Joint Ventures while calculating average investments as per the formulae of rule 8D and the Commissioner of Income-tax [Appeals] has erred in not giving effect to the above facts while confirming the addition of Rs.12,00,000/-out of addition of Rs.1,02,75,673/- made by the AO.

3. During the course of assessment proceedings, the Assessing Officer (AO) observed that though the assessee has claimed dividend as exempt income, it has not quantified any amount for disallowance u/s 14A of the Act. In response to a query raised by the AO *vide* order sheet entry dated 18.09.2014 to show cause as to why provisions of section 14A may not be applied in respect of exempt income earned by it during the year under consideration, the assessee filed a reply which has been extracted by the AO at para 3 (page-2-5) of the assessment order dated - 04.03.2015. However, the AO was not convinced with the above

explanation of the assessee and relying on the decision in *Godrej & Boyce Mfg. Co. Ltd. v. DCIT* (2010) 328 ITR 81 (Bom), made a disallowance of Rs.1,02,75,673/- under Rule 8D(2)(iii) of the IT Rules, 1962 (the Rules).

4. In appeal, the CIT(A) observed that the assessee has earned dividend income of Rs.52.91 crore which consists of dividend income of Rs.32.83 crore from subsidiaries and Rs.20.09 crore from investment in mutual funds, which was claimed as exempt u/s 10(34) and 10(35) of the Act respectively.

The CIT(A) relying on the decision in *CIT v. RPG Transmissions Ltd.* [2014] 48 taxmann.com 57, *ITO v. Pioneer Radio Training Services P. Ltd*., *Interglobe Enterprises Ltd. v. DCIT* and *Oriental Structures Engineers (P) Ltd*., held that investment made by the assessee in subsidiaries was not with a view to earning dividend income but with a view to have controlling stake and with an intention to facilitate and promote business interest and therefore, the investment to that extent should not be considered for disallowance u/s 14A. Accordingly, the CIT(A) upheld an addition of Rs.12,00,000/- out of Rs.1,02,75,673/- and deleted the balance amount.

5. Before us, the Ld. counsel of the assessee submits that in the present case the AO has not recorded reasons that he is not satisfied with the correctness of the claim of the assessee before making the disallowance u/s 14A.

Further, the Ld. counsel files a copy of the order of the Tribunal in assessee's own case for AY 2009-10 (ITA No. 1050/Mum/2013) and AY 2011-12 (ITA No. 4989/Mum/2015). Referring to the above orders, it is

stated by him that for the AY 2009-10, the Tribunal *vide* order dated 19.05.2017 has held as under:

> "We have considered the rival contention of the parties and have gone through the orders of the authorities below. The assessee has earned exempt income of Rs.2,69,12,453/-. The AO made the disallowance of Rs.33,78,666/- u/s 14A of the Act. On appeal before Ld. CIT(A) the disallowance was sustained. Considering the contention of Ld. representative of the parties as we have restricted the disallowance u/s 14A at Rs.5,00,000/- on exempt income of Rs.5,92,90,214/-. Thus keeping in view the disallowance in ITA No. 1050/Mum/2013 wherein the identical disallowance was restricted to Rs.5,00,000/-. In the case under consideration, the assessee has earned dividend income of Rs.2,69,12,543/-. Thus, following the principle of consistency as we have restricted the disallowance u/s 14A is restricted to Rs.2,00,000/- (Rupees two lakhs). The AO is directed accordingly. Hence, ground of appeal raised by assessee is partly allowed."

Also referring to the order of the Tribunal for the AY 2011-12 in assessee's own case, the Ld. counsel submits that a disallowance of Rs.5,00,000/- only has been upheld.

6. On the other hand, the Ld. DR submits that the AO has recorded that the assessee has not quantified any amount for disallowance u/s 14A. It is argued by him that after having examined the reply filed by the assessee in response to a query raised during the course of assessment proceedings to show cause as to why provisions of section 14A may not be applied, the AO relying on the decision in *Godrej & Boyce Mfg. Co. Ltd*. (supra) has made a disallowance of Rs.1,02,75,673/- under Rule 8D(2)(iii).

The Ld. DR further submits that as per the recent judgment of the Hon'ble Supreme Court in *Maxopp Investment Ltd. v. CIT* (2018) 402 ITR 640 (SC), dominant purpose in making investment in shares is not attracted. Further, whether shares are held as stock-in-trade or to maintain controlling interest in company, disallowance by apportionment of expenditure is attracted.

Referring to the order of the Ld. CIT(A), it is stated by him that there is no concept of ad-hoc disallowance u/s 14A r.w. Rule 8D of Rs.12,00,000/- as done by the first appellate authority.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

As mentioned earlier, the AO has recorded in para 3 of his assessment order dated 04.03.2015 that though the assessee has claimed dividend income as exempt, it has not quantified any amount of disallowance u/s 14A. The AO *vide* order sheet entry dated 18.09.2014 asked the assessee to show cause as to why provisions of section 14A may not be applied with respect to the exempt income earned by it during the year under consideration. In response to it, the assessee filed a written submission which has been extracted by the AO at para 3 (page 2-5) of the said order. After examining the reply and relying on the decision in *Godrej & Boyce Mfg. Co. Ltd*. (supra), the AO made a disallowance of Rs.1,02,75,673/- under Rule 8D(2)(iii). Thus, there is no merit in the argument of the Ld. counsel that the AO has not recorded reasons before resorting to disallowance u/s 14A r.w. Rule 8D.

In *Maxopp Investment Ltd.* (supra), the Hon'ble Supreme Court at para 34-35 held:

> **"34.** Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessees would apply while interpreting Section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind Section14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act. This is so held in *Walfort Share and Stock Brokers P Ltd.*, relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom.
>
> > "The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A… The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14A."

> **35.** The Delhi High Court, therefore, correctly observed that prior to introduction of Section 14A of the Act, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-taxable income, the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. It is to find a cure to the aforesaid problem that the Legislature has not only inserted Section 14A by the Finance (Amendment) Act, 2001 but also made it retrospective, i.e., 1962 when the Income Tax Act itself came into force. The aforesaid intent was expressed loudly and clearly in the Memorandum explaining the provisions of the Finance Bill, 2001. We, thus, agree with the view taken by the Delhi High Court, and are not inclined to accept the opinion of Punjab & Haryana High Court which went by dominant purpose theory. The aforesaid reasoning would be applicable in cases where shares are held as investment in the investee company, may be for the purpose of having controlling interest therein. On that reasoning, appeals of Maxopp Investment Limited as well as similar cases where shares were purchased by the assessees to have controlling interest in the investee companies have to fail and are, therefore, dismissed."

Thus dominant purpose in making investment in shares is not relevant. Further, whether shares are held as stock-in-trade or to maintain controlling interest in company, disallowance by apportionment of expenditure is attracted.

Also we may refer to para 11.16 of the order of the Special Bench in *ACIT v. Vireet Investment Pvt. Ltd*. (2017) 58 ITR (Trib) 313 (Delhi) (SB), wherein it is held only those investments are to be considered for

computing the average value of investment which yielded exempt income during the year.

We find that the above two decisions have relevance in the instant case. Therefore, we set aside the order of the CIT(A) on the above issue and restore the matter to the file of the AO to make an order afresh after following the decision in *Maxopp Investment Ltd*. (supra) and *Vireet Investment Pvt. Ltd.* (supra), after giving reasonable opportunity of being heard to the assessee. We also direct the assessee to file the relevant documents/evidence before the AO. Thus the 1st ground of appeal is allowed for statistical purposes.

8. <u>The 2nd ground of appeal</u>

> 2. The AO has erred in law and facts in adding annual let out value of Rs.44,76,011/-under the head "Income from House Property" under the provisions of section 22 of the Act by estimating deemed rent at Ps.63,94,301/- on unsold property of the Project developed and constructed by the appellant held as stock in trade for sale and, the Commissioner of Income-tax (Appeals) has erred in confirming the above actions of the learned A.O.

9. The above ground relates to the addition of Rs.44,76,011/- by estimating deemed rent at Rs.63,94,301/- by the AO under the head “income from house property” as per provisions of section 22 of the Act. In the balance sheet under the head “inventories” the assessee has shown finished goods in the nature of apartments/flats of Rs.9,13,47,158/-. The AO following the decision in *Ansal Housing Finance & Leasing Co. Ltd*. (2013)354 ITR 180 (Del) computed the income from house property assessable in the hands of the assessee for

the year in respect of such property at Rs.44,76,011/-, after allowing deduction of Rs.19,18,290/- u/s 24(a) of the Act.

In appeal, the CIT(A) also following the above decisions confirmed the disallowance made by the AO.

10. Before us, the Ld. counsel of the assessee relies on the order dated 16.05.2018 of the ITAT in the case of *Progressive Homes v. ACIT* (ITA No. 5082/Mum/2016 for AY 2012-13) and *ACIT v. M/s Haware Construction Pvt. Ltd.* (ITA No. 3321/Mum/2016 for AY 2009-10 and ITA No. 3172/Mum/2016 for AY 2011-12). Also reference is made by him to the decision in *CIT v. Neha Builders Pvt. Ltd*. 296 ITR 661 (Guj).

On the other hand, the Ld. DR relies on the decision in *Ansal Housing Finance & Leasing Co. Ltd* (supra) and thus supports the order of the CIT(A).

11. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

The same issue arose in the orders of the Tribunal referred by the Ld. counsel. In the case of *M/s Haware Construction Pvt. Ltd.* (supra), the Tribunal vide order dated 31.08.2018 held :

> "4.5 We have heard the rival submissions and perused the relevant materials on record. On the above issue, we come across one decision for the assessee and another decision for the revenue. The decision in Neha Builders Pvt.Ltd.(supra) is for the assessee, whereas the decision in Ansal Hsg. Finance & Leasing Co. Ltd., (supra) is for the Revenue. The Hon'ble Supreme Court in the case of CIT vs. Vegetable Products 88 ITR 192 (SC) has held that "if two

reasonable constructions of a taxing provisions are possible, that construction which favours the tax payer must be adopted."

In view of the above facts, we will follow the decision in Neha Builders Pvt.Ltd.(supra).

4.5.1. We now come to the relevant provisions in the Act. The following sub-section (5) has been inserted after sub-section (4) of section 23 by the Finance Act, 2017, w.e.f. 01.04.2018:

"(5) Where the property consisting any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to nil."

Thus, in order to give relief to Real Estate Developers, section 23 has been amended w.e.f. AY 2018-19 (FY 2017-18). By this amendment, it is provided that if the assessee is holding any house property as his stock-in-trade which is not let out for the whole or part of the year, the annual value of such property will be considered as Nil for a period up to one year from the end of the financial year in which a completion certificate is obtained from the competent authority.

In view of the above amendment to section 23, we are not adverting to the other case laws relied on by the Ld. counsel.

In the instant case, the assessee is a builder and developer. The issue of taxability is with regard to unsold flats. The AY is 2011-12. In view of the insertion of sub-section (5) in section 23 by the Finance Act, 2017, w.e.f. 01.04.2018 narrated hereinbefore, we uphold the order of the Ld. CIT(A) and dismiss the second Ground of appeal filed by the revenue."

In the instant case, the assessment year is 2012-13. Facts being identical, we follow the above order of the Co-ordinate Bench and allow the 2nd ground of appeal.

12. The 3rd ground of appeal

> 3. The AO has erred in law and facts in disallowing payment of late filing fees for Quarterly Service Tax Returns which was erroneously classified by the appellant as BMC Penalty in its books of accounts, by treating it as penal in nature as per Explanation to section 37(1) of the Act and not allowing the same u/s 37(1) of the Act by ignoring the fact that the same were compensatory in nature and laid out wholly and exclusively for the purpose of business and not for any purpose which is an offence or which is prohibited by law and the Commissioner of Income-lax (Appeals) has erred in confirming the above actions of the learned A.O.

13. We find that similar disallowance made by the AO was deleted by the Tribunal in assessee's own case for the AY 2009-10 & AY 2011-12. Facts being identical, we follow the above order of the Co-ordinate Bench and allow the 3rd ground of appeal.

14. In the result, the appeal is partly allowed.

ITA No. 3258/MUM/2017
Assessment Year: 2012-13

15. The ground of appeal filed by the Revenue reads as under:

> On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that investment in sister concerns/subsidiary companies should not be considered for disallowance u/s 14A r.w.r. 8D of the IT Act, 1961.

16. The decision at para 7 applies equally to this above ground of appeal and therefore, it is allowed for statistical purposes.

ITA No. 2793/MUM/2017
Assessment Year: 2013-14

17. The 1st & 2nd ground of appeal for AY 2013-14 are similar to the 1st & 2nd ground of appeal for AY 2012-13. Facts being identical, our decision for the AY 2012-13 applies *mutatis mutandis* to AY 2013-14.

ITA No. 2850/MUM/2017
Assessment Year: 2013-14

18. The 1st ground of appeal filed by the revenue reads as under:

> 1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that investment in sister concerns/subsidiary companies should not be considered for disallowance u/s 14A r.w.r. 8D of the IT Act, 1961 without appreciating the fact that income from such investment will not form part of total income.

19. The decision at para 7 applies equally to this above ground of appeal and therefore, it is allowed for statistical purposes.

20. <u>The 2nd ground of appeal</u>

> 2. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the assessee's claim for deduction of payment of Custom Duty redemption fine and penalty charges, without considering the fact that the said payment was penal in nature and hence not allowable as per Explanation to section 37(1) of the Income Tax Act, 1961.

21. The above issue arose before the ITAT 'C' Bench Mumbai in assessee's own case for AY 2009-10 (ITA No. 1050/Mum/2013). The Tribunal considering the facts of the case deleted the custom charges treated by the AO as penal in nature. Issue being same, we follow the

above order of the Co-ordinate Bench and dismiss the 2nd ground of appeal of the Revenue.

22. To sum up, the appeal filed by the assessee for the AY 2012-13 and AY 2013-14 are partly allowed, whereas the appeal filed by the Revenue for the AY 2012-13 is allowed for statistical purposes and for AY 2013-14 is partly allowed.

Order pronounced in the open Court 25/02/2019.

Sd/-	Sd/-
(SANDEEP GOSAIN)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;

Dated: 25/02/2019
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai