**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'C' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Vice-President (KZ)
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. Nos. 2000/KOL/2016
Assessment Year: 2010-2011**

Assistant Commissioner of Income Tax,……Appellant
Circle-8(2), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700 069

-Vs.-

M/s. Oberoi Hotels (P) Limited,……Respondent
4, Mangoe Lane, Kolkata-700 001
[PAN: AAACO 3408 K]

Appearances by:
Dr. P.K. Srihari, CIT (D.R.), for the Appellant
Shri A.K. Gupta, FCA, for the Respondent

Date of concluding the hearing : January 24, 2019
Date of pronouncing the order : April 12, 2019

O R D E R

Per Shri P.M. Jagtap, Vice-President (Kolkata Zone):-

This appeal is preferred by the Revenue against the order passed by the ld. Commissioner of Income Tax (Appeals)-12, Kolkata dated 30.08.2016.

2. In Ground No. 1, the Revenue has challenged the action of the ld. CIT(Appeals) in holding that Rule 8D is not applicable in the case of the assessee and thereby deleting the disallowance made by the Assessing Officer under section 14A of the Act.

3. The assessee in the present case is a Company, which is engaged in the business of running Hotels and providing technical services for operating Hotels. The return of income for the year under consideration

was filed by the assessee on 09.10.2010 declaring total income of Rs.5,42,98,180/-. Subsequently a revised return was filed by the assessee on 15.02.2012 declaring total income of Rs.5,43,63,946/-. During the year under consideration, the assesee-company had earned dividend income of Rs.10,88,37,814/- on the investment made in Shares and Units of Mutual Funds and the same was claimed to be exempt from tax. As noticed by the Assessing Officer, the assessee-company had disallowed only the direct expenses and indirect expenses as per Rule 8D read with Section 14A of the Act and no disallowance under Rule 8D(2)(iii) calculated at the rate of 0.5% of the average of the value of investment was made by the assessee. He accordingly worked out such disallowance on account of common administrative and managerial expenses, which the assessee might have incurred for earning exempt income as per Rule 8D(2)(iii) at Rs.82,81,539/- and made addition to the extent to the total income of the assessee in the assessment completed under section 143(3) vide an order dated 23.03.2013.

4. The disallowance made by the Assessing Officer under section 14A read with Rule 8D(2)(iii) was challenged by the assessee in the appeal filed before the ld. CIT(Appeals) and after considering the submissions made by the assessee as well as the material available on record, the ld. CIT(Appeals) deleted the same for the following reasons given in paragraph no. 2.3 of his impugned order:-

> *"2.3. The submission of the appellant along with the supporting details/ evidences have been carefully considered and the facts of the case perused. The common issue involved these grounds of appeal is the application of Rule 8D of Income Tax Rules, 1962 ("Rules") for disallowance u/s 14A of the Income Tax Act, 1961 ("the Act"). In the return of income, the appellant treated interest and DEMAT charges are the only expenses relatable to tax free dividend income and offered Rs.10,90,01,363/- as expenditure disallowable u/s 14A of the Act. Further, during the appellate proceedings, the appellant submitted that interest income on bank deposit amounting to Rs.15,49,776/- should be netted off from the interest already offered u/s 14A of the Act in computation. The AO did not consider this submission of the appellant. In this regard, the appellant placed reliance on the decision of the jurisdictional*

ITAT, Kolkata in the case of DCIT Vs M/s. Trade Apartment Ltd (ITA No.1277/Kol/2011).

Now the issues are dealt herein below one by one:
1. So far as the applicability of Rule 8D is concerned, this issued has been dealt by the ITAT, Kolkata in the case of the appellant itself in ITA No.1030/Kol/2012 for AY 2008-09. The relevant portion of the ITAT order is reproduced as follows:

''''We are also of the view that the primary object of investment of assessee is for holding controlling stake in group concerns and not for earning of income out of that investment, In both the eventualities, no disallowance can be made u/s 14A of the Act read with Rules 8D of the Rules. Accordingly, this issue of assessee's appeal is allowed. "

Considering the decision of ITAT Kolkata as mentioned above, I hold that Rule 8D is not applicable in the case of the appellant.

2. Once it is decided that Rule 8D is not applicable, the other claim of the appellant with regard to computation of expense u/s 14A of the Act needs to be discussed. First claim of the appellant is netting off of interest earned with interest incurred. This is additional claim of the appellant made during the assessment proceedings. In earlier years, the respective CIT(A) has already held that net interest (reducing interest earned from gross interest paid) needs to be considered for the purpose of section 14A of the Act. Accordingly, I direct the AO to consider Rs.10,72,88,038/- as interest disallowable u/s 14A of the Act instead ofRs.10,88,37,814/- as interest paid.

3. The same issue arose for my consideration as whether foreign investment should be considered or not for the purpose of calculation of average investment as mentioned in Rule 8D of the Income tax Rules 1962. Under the identical set of facts, as held in my previous order, I agree with the appellant that the investments in foreign company should not be considered while computing the average investment for the purpose of Rule SD. The appellant has taken this ground as without prejudice. Since in the preceding paragraphs, following the tribunal's order in the case of the appellant itself, I have hold that Rule 8D is not applicable, this ground is allowed for statistical purpose.

Vide ground 15 the appellant has challenged the applicability of Rule 8D for the purpose of computation of book profit under the MAT provisions. In this regard, the appellant relied on the judgment of Jurisdictional High Court in the case of CIT -vs.- Jayshree Tea & Industries Ltd. [G.A. No. 1501 of 2014 dated 19-11-2014] wherein it has been held that provision of Section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to Section 14A of the Act.

Under the similar facts and discussions in the preceding paragraphs, I held that Rule 8D is not applicable for the purpose of computation of book profit".

5. We have heard the arguments of both the sides and also perused the relevant material available on record. Although the ld. D.R. had challenged the action of the ld. CIT(Appeals) in holding that Rule 8D is not applicable in the assessee's case, the ld. Counsel for the assessee has contended that total disallowance of Rs.10,90,01,363/- was suo motu offered by the assessee under section 14A and the same being more than the exempt dividend income of Rs.10,88,37,814/- received by the assessee during the year under consideration, a further disallowance made by the Assessing Officer which exceeded even the exempt dividend income is not sustainable. Since this contention raised by the ld. Counsel for the assessee is duly supported by the decision of the Hon'ble Delhi High Court in the case of Joint Investments Pvt. Limited –vs.- CIT (372 ITR 694), we uphold the impugned order of the ld. CIT(Appeals) deleting the disallowance made by the Assessing Officer under section 14A as the said disallowance resulted into a total disallowance under section 14A, which was more than the exempt dividend income actually earned by the assessee during the year under consideration. Ground No. 1 is accordingly dismissed.

6. In Ground No. 2, the Revenue has challenged the action of the ld. CIT(Appeals) in accepting the ALV of the assessee's house property at Rs.3,60,000/- thereby rejecting the fair market rent of Rs.1,20,00,000/-.

7. The building at Bijwasan, New Delhi owned by the assessee was let out during the year under consideration on rent to M/s. EIH Limited on a monthly rent of Rs.30,000/-. The rental income received in respect of the said property amounting to Rs.3,60,000/- was offered to tax by the assessee under the head "income from house property" after claiming standard deduction under section 24(a). In the earlier years relevant to

A.Ys. 2007-08, 2008-09 and 2009-10, the annual value of the said property was taken by the AO at Rs.1,20,00,000/- being the fair market rent for which the property was expected to let from year to year. Keeping in view that there was no change in the factual position, the Assessing Officer adopted the annual value of the property at Rs.1.20 crores by following the stand taken in the earlier years and computed the income of the assessee under the head "income from house property" after allowing deduction under section 24(a) at Rs.84 lakhs as against the income of Rs.2,52,000/- offered by the assessee, which resulted in the addition of Rs.81,48,000/-.

8. The addition of Rs.81,48,000/- made by the Assessing Officer under the head "income from house property" was challenged by the assessee in the appeal filed before the ld. CIT(Appeals) and after considering the submissions made by the assessee as well as the material available on record, the ld. CIT(Appeals) deleted the said addition for the following reasons given in paragraph no. 3.2 of his impugned order:-

> *"3.2. I have carefully considered the submissions of the appellant along with the supporting evidences furnished and perused the facts of the case. It is seen that the appellant company owns a property at Bijwasan, Kapasera, a suburb of New Delhi. Vide an Agreement dated 28-06-2007 with an associated company, the appellant had let out the property on rent at an agreed consideration of Rs.30,000/- p.m. However, following the earlier years, the A.O. while computing the income of the appellant, had considered the rent at Rs. 10 Lakh p.m. Accordingly, the A.O. rejected the annual rent received by the appellant as per the agreement, i.e. Rs.3,60,000/- and substituted it by a sum of Rs.1,20,00,000/-.*
>
> *I find that this issue is squarely covered in appellant's own case for earlier assessment years i.e. 2006-07, 2007-08 and 2008-89. In the earlier order in Appeal No. 246/CIT(A)-VIII/Kol/10-11 and 187/CIT(A)-VIII/Kol/11-12 for Assessment Years 2008-09 and 2009-10 respectively, it has been held that the A.O. can not deviate from his position merely based on*

assumption, surmise and conjecture and that the allegation that the appellant must have fetched more rental value from the subject property has not been proved by the A.O. The A.O. could not establish that the appellant had actually received anything extra over and above the sum as agreed under the agreement. In this regard, it is worthwhile to mention here that the issued is covered by the decision of IT AT Kolkata in case of the appellant itself in A. y. 2007-08, 2008-09 and 2009-10. The Hon'ble Kolkata Tribunal in case of the assessee itself in ITA No.1041/Kol/2012 for A.Y.2008-09 (departmental appeal) allowed the appeal in the favour of the assessee. The relevant extract as mentioned in the point no.23 of the order is reproduced as below:

> *"We find that the AO erred in determining an arbitrary annual value of property by holding that Section 23 is a deeming provision and determination of annual value does not depend on actual realization of rent. The AO while applying clause (a) of Section 1 to section 23 in the assessee case failed to appreciate that in present case actually let out property being a farm house is on rent to EIH Limited and if a property is actually let out, then the expectation of its letting out becomes an actual reality and such property cannot be expected to let from year to year at any figure higher than the rent which is being produced actually by the property in question. Hence, even as per the deeming provision of Section 23(1)(a), in the case of let out property, only the actual rent received was required to be considered as annual value of property. The AO failed to appreciate such estimation of annual letable value as per provision of section 23(1)(a) was called for only in case of vacant property and not where the property was actually let out since in the case of let out property, the assessee was not entitled to anything over and above the agreed rent. The said action of the AO has resulted in taxing notional income in the hands of the assessee, which never accrued and hence cannot be brought to tax. Accordingly, we are of the view that the CIT(A) has rightly deleted the addition and hence we confirm the order of the CIT(A) on this issue.*

I once again hold that the A.O. cannot ignore the actual rent received by the appellant i.e. Rs.30,000/- p.m. and under the facts of the present case, he cannot substitute the said actual rent by any other notional figure. Accordingly, the A.O. is directed to compute the income of the appellant by considering the rental income at Rs. 30,000/- p.m. i.e Rs.3,60,000/- for the immediate previous year. Thus, this

ground of appeal of the appellant is allowed in favour of the appellant".

9. We have heard the arguments of both the sides and also perused the relevant material available on record. Although the ld. D.R. has relied on the order of the Assessing Officer in support of the revenue's case on this issue, it is observed that the addition on this issue was made by the Assessing Officer by following the stand taken in assessee's own case for the earlier years and the ld. CIT(Appeals) has deleted the said addition by relying on the decision of the Tribunal in assessee's own case on a similar issue for the earlier years, i.e. A.Ys. 2007-08, 2008-09 and 2009-10. The ld. CIT(Appeals) thus has followed the decision of the Tribunal on the similar issue rendered in assessee's own case for the earlier years and as submitted by the ld. Counsel for the assessee, the said decision of the Tribunal has been upheld by the Hon'ble Calcutta High Court. This issue thus is squarely covered in favour of the assessee by the decision of this Tribunal rendered in assessee's own case for the earlier years, which has been upheld by the Hon'ble Calcutta High Court and respectfully following the same, we uphold the impugned order of the ld. CIT(Appeals) giving relief to the assessee on this issue. Ground No. 2 is accordingly dismissed.

10. In Ground No. 3, the Revenue has challenged the action of the ld. CIT(Appeals) in deleting the addition of Rs.5,12,71,228/- made by the Assessing Officer on account of excess expenditure allegedly claimed by the assessee.

11. As noted by the Assessing Officer during the course of assessment proceedings, the assessee-company had earned its income from the following four heads:-

Guest, Accommodation, Restaurants, Bars & Banquets	Rs.3,57,60,056/-

Fees for technical services rendered	Rs.4,27,39,076/-
Royalty and Membership fees	Rs.10,84,95,779/-
Other income (dividend, interest, rent etc.)	Rs.12,22,99,497/-
TOTAL	Rs.30,92,94,408/-

During the course of assessment proceedings, the assessee was required by the Assessing Officer to allocate the expenditure against each of the above four heads of income. In reply, a detailed working was filed by the assessee and from the perusal of the same, it was noted by the Assessing Officer that no expenditure was allocated by the assessee against the head "Royalty and Membership fees". He also noted that total expenditure was Rs.21,37,58,604/- out of which expenditure only to the extent of Rs.14,01,83,6-7/- was allocated against the different heads of income other than "royalty and membership fees". According to the Assessing Officer, the balance expenditure of Rs.7,35,74,997/- thus was claimed to be incurred by the assessee against the income earned from royalty and membership fees. He, therefore, asked the assessee to establish that the expenditure to that extent was incurred for earning the income from royalty and membership fees. In reply, it was submitted on behalf of the assessee that actual expenditure to the extent of Rs.49,78,823/- was incurred relating to the royalty income. According to the Assessing Officer, the assessee-company thus had claimed an excess expenditure of Rs.6,85,96,174/- (Rs.7,35,74,997/- minus Rs.49,78,823/-). He noted that the assessee-company on its own had disallowed an expenditure of Rs.1,05,14,908/- in the computation of total income. He also noted that there was a difference of Rs.14,71,501/- in the disallowance offered by the assessee in the computation of total income on account of pro-rata expenditure for Management fees from Mena House Oberoi, Egypt. After making adjustment of these two amounts against the alleged excess expenditure of Rs.6,85,96,174/-, the Assessing Officer worked out the disallowance of expenditure to be made at Rs.5,95,52,767/- and since he

had already disallowed expenditure of Rs.82,81,539/- under section 14A, the balance amount of Rs.5,12,71,228/- was disallowed by him.

12. The disallowance of Rs.512,71,228/- made by the Assessing Officer on account of the alleged excess expenditure was challenged by the assessee in the appeal filed before the ld. CIT (Appeals) and after considering the submissions made by the assessee as well as the material available on record, the ld. CIT(Appeals) deleted the same for the following reasons given in paragraph no. 5.2 of his impugned order:-

> *"5.2. I have carefully considered the submission of the appellant along with the supporting evidences furnished and perused the facts of the case. It is well settled law that any expenses incurred for the purpose of earning exempt income has to be disallowed in computation of income. It is seen that the appellant has claimed dividend income as exempt income under section 10(34) of the Income tax Act and fees for technical services received from UAR as exempt under DTAA. So far as expenditure for dividend income is concerned I have already discussed and decided the issue. Regarding expenses for earning management fees, there is no dispute.*
> *During the assessment proceedings, the appellant submitted the allocation of expenses vide letter dated March 11, 2013 on specific query raised by the AO. During the appellate proceedings also, the appellant filed the said letter along with calculation with its submission on 23rd November 2015. The allocation chart as produced during assessment proceedings is reproduced below:-*

Particulars	*Amount*	*Amount*	*Amount*
Total expenditure as per Profit & Loss Account			*213,758.604*
Less: Expenditure of Clarkes Hotel as per unit accounts claimed against income from hotel business	*28,460,360*		
Expenditure allocated against foreign management fees	*3,699,403*		

Expenditure claimed against rental income	*169,801*		
Expenditure U/s.14A relatable to exempt income	*107,854,043*	*140,183,607*	
Expenses/Items added back in return Rent	*508,200*		
Provision for diminution in value of investments	*380,362*		
Guest house maintenance expenses	*4,101,408*		
Contribution to Staff Welfare Fund	*1,100*		
Depreciation as per books of account	*5,456,929*		
Loss in partnership firm	*66,899*	*10,514,908*	*150,698,515*
			63,060,089
Less: Legal, Professional & Consultancy Fees as per accounts			*48,505,475*
Share of common business expenses allocable against royalty		*(A)*	*14,554,614*

*Add: Legal expenses incurred for protecting royalty income (*being part of Rs.48,505,475/-*		*(B)*	*4,978,823*
Total expenses allocable against royalty income		*(A + B)*	*19,533,437*
Total earnings from royalty			*108,495,779*
Percentage expenses to revenue			*18.00*

Note: Items of common expenses considered for allocation against royalty income-
Employees remuneration, rent, advertisement, travelling, postage & telephone, printing & stationery, statutory payments and other expenses as reflected in the annual accounts (Refer schedules 17 & 19)

From the perusal of the assessment order it is noticed that the AO at para no.4.1 calculated the expenses against each source of income other than royalty and membership fees earned at Rs.14,01,83,607/- based on the allocation submitted by the appellant vide letter dated 11.03.2013. The detail is as follows:

Head of income	*Income amount*	*Expenditure allocated by the assessee*
Guest, Accommodation, restaurants, bars and banquets	*3,57,60,056*	*2,84,60,360*
Fees for technical service	*4,27,39,076*	*36,99,403*
Rental income	*6,33,896*	*1,69,801*
Interest income	*59,19,787*	*NIL*
Dividend	*11,57,45,814*	*10,78,54,043*
Total	*20,07,98,629*	*14,01,83,607*

The above numbers mentioned by the AO at para 4.1 is in agreement with the allocation submitted by the appellant during the assessment proceedings which has been reproduced for the sake of convenience.

The total expenditure during the relevant financial year as per the profit & loss account is Rs.21,37,58,604/- out of which specific expenditure against the sources as mentioned above is Rs.14,01,83,607/- Further, the appellant disallowed Rs. 1,05,14,908/- in the computation of income as per the provision of law. Accordingly, the residual expenditure comes at Rs.6,30,60,089/- (21,37,58,604-14,01,83,607-

1,05,14,908). Out of this amount the appellant calculated common expenses for royalty income at Rs.49,78,823+Rs.l,45,54,614 totalling to Rs.l,95,33,437/- but on overall perusal of records it seems that the AO missed out to. consider Rs.l,45,54,614/- and he considered only Rs.49,78,823/- since no comment has been mentioned by AO for non considering of Rs.1,45,54,614/- .

From the details of allocation made by the appellant during assessment stage, it is crystal dear that the ratio of common expenses has been calculated for the purpose of royalty only as mentioned in the note to the calculation sheet submitted during assessment stage and re submitted before me. The appellant has already considered the disallowable expenses i.e. Rs.1,05,14,908/- in the computation of total income which is also mentioned by the AO at para 4.5. Further disallowance made by the AO has been discussed separately in the respective grounds taken by the appellant. The AO calculated the residual amount at Rs.5,12,71,228/-. The calculation is as follows:

Total expenditure debited to PIL Account	*213,758,604*
Less: Specific Expenditure against other source other than royalty and Less membership fees	*140,183,607*
	73,574,997
Less: Specific Expenditure against royalty income	*4,978,823*
	68,596,174
Less: Expenditure disallowed further in computation of income	*10,514,908*
	58,081,266
Add: Expenditure further disallowed by the assessee at assessment stage against fee for technical service	*1,471,501*
	59,552,767
Less: Disallowed in assessment order u/s 14A	*8,281,539*
	51,271,228

From the above mentioned table it is transparent that the AO did not consider the common expenses allcoated by the appellant i.e. Rs.1,45,54,614. During the appellate proceedings, the appellant submitted that the allocation of common expenses was done only with respect to royalty income as required by the AO. For other sources, only specific expenses with respect to that source are considered. For example, the expenses against hotel operation have been taken from audited *unit accounts only which is specifically mentioned by the*

appellant in the calculation submitted before the AO. It is quite common in a corporate like assessee that some expenses like financing, legal matters, audit fees under various statutes at HO level. Therefore, there is no reason to disallow further Rs.5,12,71,228/- treating the same as excess expenditure claimed by the appellant more so when the AO could not bring any material to this effect.

Balance expenses has to be considered for earning taxable source of income i.e. Hotel business and royalty income. The AO has also mentioned the same thing at para 4.3. The AO has disallowed Rs.5,12,71,228/- on the whimsical ground that the appellant has incurred excess expenditure. Neither he disputed the allocation made by the appellant nor he could bring any material on record to prove that expenses is excessively claimed by the appellant. Accordingly, I direct the AO to delete the addition on this account".

13. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. The ld. D.R. has relied on the order of the Assessing Officer in support of the revenue's case on this issue. The ld. Counsel for the assessee, on the other hand, has submitted that as per the working furnished by the assessee before the Assessing Officer, only specific expenses with respect to the corresponding source of income were considered and a separate working was furnished in respect of expenses claimed against royalty income. He has invited our attention to the said working furnished at page no. 9 of the paper book and explained that out of the total expenditure of Rs.21,37,58,604/- incurred by the assessee, specific expenses against different heads of income other than royalty income as well as specific expenses incurred in respect of other income in the form of dividend income were to the tune of Rs.14,01,83,607/- and out of remaining expenditure of Rs.7,35,74,997/-, a sum of Rs.4,85,05,475/- was incurred on account of common expenses which are required to be incurred by the Corporate entity like assessee at HO level such as financing, legal matters, audit fees, etc. He has submitted that such common expenses were not allocated by the assessee against different heads of income except royalty income for which a separate working was furnished. He has submitted the share of common business expenses allocable against royalty income as shown in the said working was Rs.1,45,54,614/- leaving the balance

amount of expenditure at Rs.1,05,14,908/- and since the same was disallowed by the assessee-company suo motu in the computation of total income, there was no excess expenditure claimed by the assessee as alleged by the Assessing Officer. As rightly contended by the ld. Counsel for the assessee, it appears that this working prepared and furnished by the assessee during the course of assessment proceedings was not properly understood and appreciated by the Assessing Officer and he made a huge disallowance without recording any adverse finding about the genuineness or the business expediency of the said expenditure. The ld. CIT(Appeals), on the other hand, appreciated the working furnished by the assessee in the right perspective and deleted the disallowance made by the Assessing Officer, which was unsustainable and unfounded in the facts and circumstances of the case. We, therefore, find no infirmity in the impugned order of the ld. CIT(Appeals) giving relief to the assessee on this issue and upholding the same, we dismiss Ground No. 3 of the Revenue's appeal.

14. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on April 12th , 2019.

Sd/-	**Sd/-**
(S.S. Viswanethra Ravi)	**(P.M. Jagtap)**
Judicial Member	**Vice-President (KZ)**

Kolkata, the 12th day of April, 2019

Copies to : *(1)* ***Assistant Commissioner of Income Tax, Circle-8(2), Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700 069***

(2) ***M/s. Oberoi Hotels (P) Limited, 4, Mangoe Lane, Kolkata-700 001***

(3) *Commissioner of Income Tax (Appeals)-12, Kolkata,*

(4) *Commissioner of Income Tax- ,*

(5) *The Departmental Representative*

(6) *Guard File*

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.