

**आयकर अपीलीय अधिकरण “ए” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI**

माननीय श्री सी. एन. प्रसाद, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लष्ठा सदस्य का समक्ष।
**BEFORE HON’BLE SHRI C.N. PRASAD, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ I.T.A. No.2415/Mum/2018

(निर्धारण वर्ष / Assessment Year: 2012-13)

&

आयकर अपील सं./ I.T.A. No.2414/Mum/2018

(निर्धारण वर्ष / Assessment Year: 2014-15)

Ajmera Realty & Infra India Ltd. Citimall, New Link Road Andheri West, Mumbai-400 053	बनाम/ Vs.	DCIT-CC-2(4) Pratishtha Bhavan, Old C.G.O. Annexe, M.K. Road, Mumbai 400 020
स्थायी लष्ठा सं./जीआइआर सं./PAN/GIR No. AAACS-7866-F		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Prakash Jotwani – Ld. AR
Revenue by	:	Shri Satish Chandra Rajore - Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	02/05/2019
घोषणा की तारीख / Date of Pronouncement	:	06/06/2019

आदश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee for Assessment Years [AY] 2012-13 & 2014-15 contest the order of Ld. first appellate authority on common grounds of appeal and hence, disposed-off by way of this common order for the sake of convenience & brevity.



ITA No. 2415/Mum/2018, AY 2012-13

2.1 This appeal contests the order of Ld. Commissioner of Income-Tax (Appeals)-48, Mumbai [CIT(A)], *Appeal No. CIT(A)-48/I.T.-63/DCCC-2(4)/2015-16 dated 21/02/2018* on following grounds of appeal: -

(1)(a) On the facts and circumstances of the case and in law the Ld. CIT Appeals has erred in confirming the disallowance of Rs.40,55,723/- u/s 14A r.w.r. 8D and adding it to the total income of the appellant.

(b) The Ld. CIT Appeals failed to appreciate the fact that the appellant had received dividend from investments made in subsidiary companies, which were for the purpose of business.

(c) The Ld. CIT Appeals failed to consider that the appellant is a Real Estate Company & all expenses claimed in its accounts were incurred for the purpose of business & thus no part of it can be disallowed under Rule 8D(iii).

2) (a) Without prejudice to the above ground even if disallowance is made u/s 14A r.w.r. 8D, the Ld. CIT (Appeals) has erred in confirming the disallowance to be added to the total income of the appellant whereas the same should be reduced from Work in Progress. Reason being all expenses related to the project which is under construction are debited to Work in Progress and not Profit & Loss Account.

(b) The Ld. CIT (Appeals) has failed to appreciate the fact that, the disallowance made of 0.5% of average investment is in the nature of administrative / other general expenses being incurred for the purpose of earning exempt income. Thus, the same should be reduced from Work in Progress and to be considered when the Work in Progress is considered for taxation.

3)(a) The Ld. CIT (Appeals) has erred in adding the amount disallowed of Rs. 40,55,723/- u/s 14A r.w.r. 8D to the Book Profit computed u/s 115JB of the appellant.

(b) The Ld. CIT (Appeals) ought to have appreciated that Sec.115JB envisages only few items which should be added and deleted from the Net Profit as per Profit & Loss Account of the company to arrive at the Book Profit u/s 115JB of the Income Tax Act, 1961.

(c) Nowhere, in Sec.115JB it is envisaged that the amount which is disallowed u/s 14A r.w.r. 8D should be added to the Net Profit as per Profit & Loss Account of the company to arrive at the Book Profit u/s.115JB of the Income Tax Act, 1961.

(d) Ld. CIT Appeals failed to consider Special Bench decision which has decided the issue in favour of the appellant.”

As evident from grounds of appeal, the sole issue involved in the appeal is quantum of disallowance u/s 14A and adjustment thereof while computing Book Profits u/s 115JB.



2.2 Facts in brief are that the assessee being *resident corporate entity* stated to be engaged in *Real Estate Development* was assessed for impugned AY on 05/03/2015 in scrutiny assessment u/s 143(3) by *Ld. Deputy Commissioner of Income Tax Officer-Central Circle 2(4), Mumbai [AO]*. The income under normal provision was determined at Rs.235.84 Lacs after sole disallowance u/s 14A for Rs.40.55 Lacs as against returned income of Rs.195.39 Lacs e-filed by the assessee on 28/09/2012. The Book Profits u/s 115JB was determined at Rs.1044.39 Lacs as against Rs.1003.83 Lacs computed by the assessee. The disallowance of Rs.40.55 Lacs u/s 14A is the sole subject matter of present appeal before us.

2.3 During assessment proceedings, it transpired that the assessee earned exempt dividend income of Rs.663.50 Lacs against investment held by it. The assessee had closing investment of Rs.9199.82 Lacs in the Balance Sheet, which led the Ld.AO to invoke the provisions of Section 14A. The assessee submitted that disallowance u/s 14A was not applicable. Not convinced, applying Rule 8D, Ld. AO computed administrative expense disallowance of Rs.40.55 Lacs u/r 8D(2)(iii), being 0.5% of average investments. The same was added to the income of the assessee while computing income under normal provisions as well as while computing Book Profits u/s 115JB. The stand of Ld. AO, upon confirmation by first appellate authority vide impugned order dated 21/02/2018, is under appeal before us.

ITA No. 2414/Mum/2018, AY 2014-15

3. In this AY, the assessee is before us with similar grounds of appeal which reads as under: -



1.(a) On the facts and circumstances of the case and in law the Ld. CIT Appeals has erred in confirming the disallowance of Rs. 46,00,410/- u/s 14A r.w.r. 8D and adding it to the total income of the appellant.

(b) The Ld. CIT Appeals ought to have appreciated the fact that, the appellant has made no new investments during the year. On the other hand, there has been reduction in investments held by the appellant during the year.

(c) The Ld. CIT Appeals failed to appreciate the fact that the appellant had received dividend on investments made in subsidiary companies, which were for the purpose of business.

(d) The Ld. CIT Appeals failed to consider that the appellant is a Real Estate Company & all expenses claimed in its accounts were incurred for the purpose of business & thus no part of it can be disallowed under Rule 8D(iii).

2.(a) Without prejudice to the above ground even if disallowance is made u/s 14A r.w.r. 8D, the Ld. CIT (Appeals) has erred in directing the Ld. AO to add it to the total income of the appellant instead of reducing it from Work in Progress. Reason being all expenses related to the project which is under construction are debited to Work in Progress and not Profit & Loss Account.

(b) The Ld. CIT (Appeals) has failed to appreciate the fact that, the disallowance made of 0.5% of average investment is in the nature of administrative / other general expenses being incurred for the purpose of earning exempt, income. Thus, the same should be reduced from Work in Progress and to be considered when the Work in Progress is considered for taxation.

The assessee has earned exempt dividend income of Rs.536.47 Lacs.

The assessee had debited interest expenditure of Rs.34.43 Crores in the Profit & Loss Account and therefore, disallowance u/s 14A, in the opinion of Ld. AO was called for. The assessee, in defense, submitted that investments were made out of accumulated reserves and further, no expenditure was incurred to earn the exempt income. It was alternatively submitted that the disallowance was to be restricted to Rs.177.31 Lacs as made in AY 2013-14. However, Ld. AO computed aggregate disallowance u/r 8D(2) for Rs.476.97 Lacs which comprised-off of interest disallowance u/r 8D(2)(ii) for Rs.430.96 Lacs and expense disallowance u/r 8D(2)(iii) for Rs.46 Lacs. Since the assessee was following project completion method of accounting, the amount of disallowance of Rs.476.97 Lacs was reduced from Work-in-Progress Account. Upon further appeal, Ld. first appellate authority deleted



interest disallowance in view of the fact that the assessee's own funds were more than the investments. However, expense disallowance of Rs.46 Lacs was confirmed and Ld. AO was directed to consider the same separately for taxation purposes. Aggrieved, the assessee is in further appeal before us.

4. The Ld. Authorized Representative for Assessee [AR], *Shri Parkash Jotwani*, drawing our attention to the financials of the assessee, submitted that majority of the expenditure incurred by the assessee during impugned AY was directed towards construction activities only and therefore, impugned additions were not warranted. Per Contra, Ld. DR submitted that the disallowance was to be worked out as per formula given in Rule 8D. It was also brought to the notice that similar disallowance made in AYs 2010-11, 2011-12 & 2013-14 has been accepted by the assessee.

5.1 We have carefully heard the rival submissions and perused relevant material on record. In these appeals, we are concerned with expense disallowance u/r 8D(2)(iii) computed @0.5% of average investments. The submissions of Ld.AR are two-fold i.e. majority of the expenditure incurred by the assessee during impugned AY was directed towards construction activities and secondly, no expense has been incurred by the assessee towards earning of exempt income in view of the fact that the investments were old and there was no major shift in the investments. These two aspects, in our opinion, has remained to be examined in proper perspective by Ld. AO during assessment proceedings.



5.2 Proceeding further, we are of the considered opinion, that before proceedings to apply Rule 8D, it was incumbent on the part of Ld.AO in terms of Section 14A(2) to form an opinion as to why the disallowance offered by the assessee, having regards to the accounts of the assessee, was not satisfactory or correct. This would apply even in case wherein the assessee submits that no expenditure has been incurred to earn the exempt income. Therefore, the aforesaid satisfaction of Ld. AO, is sine-qua-non before clothing Ld. AO the power to acquire jurisdiction u/r 8D.

5.3 Proceeding further, we find that Hon'ble Supreme Court in recent judgment titled as **Maxopp Investment Ltd. Vs CIT [12/02/2018 91 Taxmann.com 154]** has laid down certain vital propositions concerning disallowance u/s 14A. In the said decision, the Hon'ble court, has, *inter-alia*, approved the applicability of disallowance u/s 14A to investments irrespective of motive to make such investments. Therefore, the said decision would have certain bearing on the issue under hand. We find that the quantum assessment orders for both the years have been framed prior to the aforesaid decision and both the parties did not have the benefit of the same.

5.4 Keeping in view the entirety of facts and circumstances, we deem it fit to set-aside the finding of Ld. first appellate authority, in this regard, for both AYs. Keeping all the issues open, the matter stand restored back to the file of Ld.AO for reconsideration on above lines. The matter of disallowance u/s 115JB would be considered keeping in view the statutory provisions of Section 115JB as well as the decision of Delhi Tribunal (Special Bench) rendered in **ACIT Vs. Vireet Investment (P.)**



Ltd. [82 Taxmann.com 415] and other binding judicial precedents. Needless to add that adequate opportunity of hearing shall be granted to the assessee to substantiate his stand.

6. Both the appeals stand allowed for statistical purposes.

Order pronounced in the open court on 06th June, 2019.

Sd/-

(C.N.Prasad)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 06/06/2019

Sr. PS : Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**