

IN THE INCOME-TAX APPELLATE TRIBUNAL "H" BENCH MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 3976/Mum/2016 (Assessment Year 2012-13)

ITA No. 2975/Mum/2016 (Assessment Year 2011-12)

M/s Bengal Finance & Investment Pvt. Ltd., Building 2B, Unit No.10, Mittal Industrial Estate, Andheri (E), Mumbai 400059 PAN – AABCB7225Q	Vs.	Dy. CIT, Circle-8(1) Mumbai.
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Appellant

Respondent

ITA No. 2580/Mum/2016 (Assessment Year 2011-12)

ACIT-9(2)(1) Room No. 665,A, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	M/s Bengal Finance & Investment Pvt. Ltd., Building 2B, Unit No.10, Mittal Industrial Estate, Andheri (E), Mumbai 400059 PAN – AABCB7225Q
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Appellant

Respondent

Appellant by : Shri Harsh M. Kapadia (AR)

Respondent by : Shri Manoj Kumar Singh (DR)

Date of Hearing : 07.08.2019

Date of Pronouncement : 25.09.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This set of three appeals, out of which two cross appeals for Assessment Year 2011-12 and third appeal by assessee for Assessment Year 2012-13 are directed against the order ld. Commissioner of Income Tax (Appeals)-16 [the ld. CIT(A), Mumbai dated 13.01.2016 &

31.03.2016 for Assessment Year 2011-12 & 2012-13 respectively. The parties have raised common grounds of appeal. Thus, all appeals were clubbed and heard together and decided by a consolidated order to avoid the conflicting decisions. With the consent of parties, ITA No. 3976/Mum/2016 for Assessment Year 2012-13 was treated as lead case.

The assessee has raised the following grounds of appeal:

1. The Hon'ble Commissioner of Income Tax (Appeal) has erred in confirming the Order of Assessing Officer by considering the value of ' Current Account' balance of Rs.48,90,00,000/- with partnership firm while working out the ' Average Value of Investments' while calculating the amount of disallowance U / s. 14A of the Income Tax Act, 1961 read with Rule 8D.
2. The Hon'ble Commissioner of Income Tax (Appeal) has erred in confirming the Order of Assessing Officer while calculating the 'Average Value of Investments', erred in taking the opening and closing value of Investments of Rs.1,37,34,68,089/- and Rs.2,94,62,54,452/ - respectively instead of the opening and closing value of Investments of Rs. 88,26,79,313/- and Rs. 1,66,22,60,632/- respectively as per the working of the appellant. It is submitted that the appellant has considered only those. Investments on which any exempt income is earned during the year under consideration. Further, it is submitted that the appellant has been consistently following this method which has been accepted in the earlier assessment years.
3. The Hon'ble Commissioner of Income Tax (Appeal) has erred in confirming the Order of Assessing Officer by disallowing the demat charges of Rs. 9,38,703/- as direct expenses incurred for the purpose of disallowance U/s 14A of the Income Tax Act, 1961. It is submitted that demat charges is incurred in relation to sale / purchase of the Gold / Silver and not related to any exempt Income. It is submitted that the hon'ble CIT (A) failed to consider the submission of the appellant and erred in stating that the appellant has not furnished any documentary evidence in support

of its claim. It is submitted that due to such act this has resulted in double taxation of the same amount as the amount of Rs. 9,38,703/- is already disallowed in the computation of total income. In view of the above facts, necessary direction should be given in this regard.

4. The Hon'ble Commissioner of Income Tax (Appeal) has erred in confirming the Order of Assessing Officer by disallowing the expenses by invoking U/s 14A of the Income Tax Act, 1961 while calculating book profit U/s 115jb of the Income Tax Act, 1961 without considering the facts and circumstances of the case. In view of the above facts, necessary direction should be given in this regard.

5. The Hon'ble Commissioner of Income Tax (Appeal) has erred in confirming the Order of Assessing Officer of disallowance at Rs. 1,08,14,461/- (u/s 14A of the Income Tax Act, 1961 r.w.r. 8D(2)(iii) without considering the fact that actual expense claimed by the Appellant being Rs. 71,43,784/- during the year under consideration.

2. The assessee further vide application dated 06.08.2019 raised the following additional grounds of appeal:

1. The learned Commissioner of Income Tax (Appeals) erred in confirming the addition made by the assessing officer under section 14A of the Income-tax Act, 1961('Act') read with rule 8D of the Income Tax Rules, 1962. The Appellant therefore, submits that the addition made by the assessing officer be deleted.

2. The learned Commissioner of Income Tax (Appeals) erred in confirming the addition made by the assessing officer by invoking section 14A read with rule 8D(2)(ii) without appreciating the fact that the Appellant had sufficient own funds and no part of the borrowed funds were utilized in making investments from which exempt income has been earned by the Appellant. Therefore, the Appellant submits that rule 8D(ii) cannot be invoked in its hands and hence, the addition made by the assessing officer be deleted.

3. Brief facts of the case are that the assessee-company is engaged in the business of investment in shares and securities and finance, filed its return of income for Assessment Year 2012-13 on 31.08.2012 declaring income of Rs. 10,75,08,488/-. The assessee declared book profit under section 115JB at Rs. 11,18,41,287/-. The case was selected for scrutiny. During the assessment, the Assessing Officer noted that assessee-company is holding investment in various scrip/fund and in partnership firm, income from which is not includable in total income. The Assessing Officer further recorded that the assessee held investment in equity shares worth Rs. 83.34 crore at the end of year, it held the said equity shares investment worth Rs. 294.62 crore. In addition, the assessee also held a capital of Rs. 49 crore in a partnership firm. The assessee earned tax free exempt income of Rs. 3.05 crore, which consist of dividend of Rs. 2.94 crore and Long Term Capital Gain of Rs. 10.56 lakhs. The assessee made a suo-motu disallowance under section 14A of Rs. 86,67,731/-. The Assessing Officer on perusal of Audit Report in Form 3CD noted that Auditor has worked out the disallowance under section 14A at Rs. 77.29 lakhs which consists proportionate interest component of Rs. 13.66 lakhs as per Rule 8D(2)(ii) and as per Rule 8D(2)(iii) Rs. 63.62 lakhs being .5% of average value of investment of Rs. 127.24 crore. Thus, the Assessing Officer noted the different working of assessee vis-à-vis the Tax Audit Report. The assessee was

issued show-cause notice why disallowance should not be made in accordance with Rule 8D. The assessee filed its reply dated 01.09.2014 and stated that only those investments need to be taken into consideration on which the assessee earned exempt income during the year. The assessee claimed that the disallowance under section 14A needs to be restricted to Rs. 13.57 lakhs only.

4. The contention of assessee was not accepted by Assessing Officer. The Assessing Officer recorded its dissatisfaction about the correctness of claim of assessee under section 14A and accordingly worked out further disallowance of Rs. 53.9 lakhs in addition of voluntary disallowance.

The relevant part of order of Assessing Officer is reproduced below:

“3.4 Thus, having regard to the accounts of the assessee company of the previous year relevant to A.Y. 2012-13, the undersigned is not satisfied with the correctness of the assessee’s claim. Accordingly, the amount of expenditure disallowance u/s. 14A of the Act in relation to such income is hereby determined in accordance with the provisions of Rule 8D of the Income Tax Rules, 1962 as under:

(i)	The amount of expenditure directly relating to income which does not form part of total income	Demat charges	Rs. 9,38,703/-
(ii)	Proportionate of interest expenditure computed in accordance with the formula given in Rule 8D(2)(ii)	(AXB/C)	Rs.23,19,768/-
(iii)	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	0.5% of Rs.215,98,61,271	Rs.1,07,99,306/-

	the last day of the previous year.	
Total Expenditure disallowed u/s. 14A		Rs.1,40,57,777/-
Note		
(i)	A= Interest (finance cost) = Rs. 43,68,256/-	
(ii)	B = Average of exempt income bearing investments = Rs. 215,98,61,271/-	
(iii)	C = Average of total assets appearing in the Balance Sheet on the first and last day of the previous year = Rs. 406,71,779/-	

B **Average value of investments** – [figures taken from Note No.9 annexed to the financial statements]

= $\frac{\text{Opening balance of investments} + \text{Closing balance of investments}}{2}$

$$\frac{[883468089 + 490000000] + [2946254452 + 1]}{2}$$

= Rs. 215,98,61,271/-

3.5 Thus, the amount of expenditure attributable to the activity of investments, income from which is not includible in total income of the assessee-company, is hereby determined in accordance with Rule 8D of the Income Tax Rules, 1962 at **Rs. 1,40,57,777/-**. Thus, considering the voluntary disallowance to the tune of Rs. 86,67,731/- [988703 + 1357738 + 6371290], the balance sum of **Rs. 53,90,046/-** is hereby disallowed u/s. 14A and the same is added to the income of the assessee-company.

5. The Assessing Officer also increased the books profit under section 115JB on disallowance made under section 14A. Aggrieved by the action of Assessing Officer, the assessee filed appeal before the Id. CIT(A). The Id. CIT(A) given partial relief of interest expenditure of Rs. 28,537/- under the disallowance of Rule 8D(2)(ii). Thus, further aggrieved by the order of Id. CIT(A), the assessee filed the present appeal before us.
6. We have heard the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and perused the material available on record. The Id. AR of the assessee submits that the assessee has filed additional grounds of appeal. It was further submitted that no additional facts are required to be brought on

record for considering the additional grounds of appeal. All facts relating to adjudication of additional grounds of appeal which relates to addition/disallowance under Rule 8D(2)(ii) are already available on record of the lower authorities. In support of his submission, the ld. AR of the assessee relied upon the decisions of Hon'ble Supreme Court in Jute Corporation of India [187 ITR 688 (SC)] and National Thermal Power Corporation vs. CIT [229 ITR 383].

7. On the other hand, the ld. DR for the revenue submits that the assessee for the first time has raised the grounds of appeal and raised the plea that they have sufficient funds to make the investments and no part of borrowed funds were utilized in making investment from which exempt income has been earned by the assessee. The ld DR submits that in case the additional grounds of appeal are admitted the grounds may be restored to the file of assessing officer for verifications of facts and adjudication of the issues raised by way of additional grounds of appeal.
8. We have considered the submission of both the parties and find that the main ground of appeal raised by assessee relates to disallowance under section 14A. The additional ground of appeal raised by assessee also relates to one of the components of disallowance under section 14A r.w.r 8D. Considering the contention of both the parties, we are of the view that no additional facts or evidence is required to be brought on

record for adjudication of additional ground. Therefore, we admit the additional ground of appeal raised by assessee.

9. On merits, the Id. AR of the assessee submits that ground no.1, 2 & 5 are interconnected grounds of appeal, if the assessee is granted relief on ground no.2, the ground no. 1 & 5 will become academic. The Id. AR of the assessee submits that the lower authorities erred in considering the average value of investment by taking opening and closing value of investment of Rs. 137.34 crore and Rs. 294.62 crore, instead of opening and closing value of investment of Rs. 88.26 crore and Rs. 166.22 crore respectively as per the working of assessee on which the assessee earned the exempt income. The Id. AR of the assessee submits that assessee considered only those investments on which exempt income is earned during the period under consideration. The assessee has been consistently following this method which has been accepted in all earlier Assessment Years. In support of his submission, the Id. AR of the assessee relied upon the decision Special Bench of Delhi Tribunal in CIT vs. Vireet Investments Pvt. Ltd. [(2017) 82 taxmann.com 415 (Del. Trib.) (SB)].

10. On the other hand, the Id. DR for the revenue supported the order of lower authorities.

11. We have considered the rival submission of the parties and perused the order of lower authorities. The bone of contention between the parties

with regard to the average value of investment. The lower authorities have considered the average value of opening and closing of investment as per the figures in books of account of the assessee. The assessee claimed that only opening and closing value of the investment which yielded exempt income under consideration should be considered for making disallowance under Rule 8D(2)(iii). The Special Bench of Delhi Tribunal in Vireet Investment Pvt. Ltd. (supra) held that only those investments which yield exempt income has to be considered for computing the average value of investment. Therefore, respectfully following the same, we direct the Assessing Officer to consider only those investment which yielded exempt income and made the computation of disallowance under Rule 8D(2)(iii) afresh.

12. In the result, this ground of appeal is allowed for statistical purpose.

13. Since we have granted relief to the assessee on ground no. 2, therefore, as per the contention of Id. AR of the assessee, the adjudication on ground no. 1 & 5 have become academic.

14. Ground No.3 relates to disallowance of DMAT charges. The Id. AR of the assessee submits that he is not pressing this ground of appeal. Considering the submission of Id. AR of the assessee, this ground of appeal is dismissed.

15. Ground no.4 relates to adjustment of book profit on disallowance of section 14A. The Id. AR of the assessee submits that this ground of

appeal is covered in favour of assessee by the decision of Special Bench of Delhi Tribunal in Vireet Investment Pvt. Ltd. (supra), wherein it was held that computation under clause-(f) of Explanation-1 to section 115JB is to be made without resorting to computation as contemplated under section 14A r.w.r 8D.

16. On the other hand, the Id. DR for the revenue supported the order of lower authorities.

17. We have considered the submission of both the parties and found that this ground of appeal is squarely covered in favour of assessee by the decision of Special Bench of Delhi Tribunal in Vireet Investment Pvt. Ltd. (supra), wherein it was held that only those investments are to be considered for computing average value of investment which yielded exempt income during the year. Therefore, the Assessing Officer is directed to make the computation of book profit under section 115JB afresh by following the decision of Special Bench of Delhi Tribunal in Vireet Investment Pvt. Ltd. (supra).

18. In the result, ground no.4 is allowed.

19. The additional ground of appeal relates to disallowance under Rule 8D(2)(ii). The Id. AR of the assessee submits that assessee had sufficient interest free funds available and that no interest bearing fund was invested for making investment for earning exempt income. The Id. AR of the assessee submits that the assessee under Reserve and Surplus of

more than Rs. 400 crore as on 31.03.2012, which are more than the investment made during the relevant period and therefore, no interest disallowance under Rule 8D(2)(ii) is warranted.

20. On the other hand, the Id. DR for the revenue submits that the assessee has raised the additional ground of appeal for the first time; hence, this ground of appeal may be restored to the file of Assessing Officer to examine and verify the facts and to decide it afresh.

21. We have considered the submission of both the parties and gone through the orders of authorities below. We have noted that the assessee has raised this plea before the Tribunal for the first time while raising the additional ground of appeal. Therefore, in all fairness, we deem it appropriate to restore the plea/issue to the file of Assessing Officer to examine the facts and records and to pass the order /disallowance under Rule 8D(2)(ii) in accordance with law after considering the submissions of the assessee made hereinabove. Needless to order that before passing the order the assessing officer shall grant opportunity of hearing to the assessee. Hence, this ground of appeal is allowed for statistical purpose.

22. In the result, appeal of the assessee is partly allowed.

ITA No. 2975/Mum/2016 for A.Y. 2011-12

23. The assessee has raised the following grounds of appeal:

1. The Hon'ble Commissioner of Income Tax (Appeal) has erred in confirming the Order of Assessing Officer by considering the value of 'Current Account' balance of Rs.48,90,00,000/- with partnership firm

while working out the 'Average Value of Investments' while calculating the amount of disallowance U/s. 14A of the Income Tax Act, 1961 read with Rule 8D.

2. The Hon'ble Commissioner of Income Tax (Appeal) has erred in confirming the Order of Assessing Officer of disallowance at Rs. 92,98,995/- u/s 14A of the Income Tax Act, 1961 r.w.r. 8D(2)(iii) without considering the fact that actual expense claimed by the Appellant being Rs.45,14,435/- during the year under consideration.

3. The Hon'ble Commissioner of Income Tax (Appeal) has erred in confirming the Order of Assessing Officer while calculating the 'Average Value of Investments', erred in taking the opening and closing value of Investments of Rs.2,34,61,30,240/- and Rs.1,37,34,68,089/- respectively instead of the opening and closing value of Investments of Rs.3,90,82,818/- and Rs.1,40,56,76,529/- respectively as per the working of the appellant. It is submitted that the appellant has considered only those Investments on which any exempt income is earned during the year under consideration. Further, it is submitted that the appellant has been consistently following this method which has been accepted in the earlier assessment years

24. Further, the assessee has raised the following grounds of appeal:

1. The learned Commissioner of Income Tax (Appeals) erred in confirming the addition made by the assessing officer under section 14A of the Income-tax Act, 1961('Act') read with rule 8D of the Income Tax Rules, 1962. The Appellant therefore, submits that the addition made by the assessing officer be deleted.

2. The learned Commissioner of Income Tax (Appeals) erred in confirming the addition made by the assessing officer by invoking section 14A read with rule 8D(2)(ii) without appreciating the fact that the Appellant had sufficient own funds and no part of the borrowed funds were utilized in making investments from which exempt income has been earned by the Appellant. Therefore, the Appellant submits that rule 8D(ii) cannot be invoked in its hands and hence, the addition made by the assessing officer be deleted.

3. The learned Commissioner of Income Tax (Appeals) erred in confirming the order of the assessing officer by making an addition of Rs. 2,08,84,099/- by invoking provisions of section 14A of the Act while calculating 'book profits' under section 115JB of the Act. the Appellant thus, submits that the action of the assessing officer is bad in law and deserves to be reversed.

25. We have noted that Ground No.2 of this appeal is identical to the Ground No.2 of appeal for A.Y. 2012-13 which we have allowed for statistical purpose by following the decision of Vireet Investment Pvt. Ltd. (supra). Therefore, following the principle of consistency, this ground of appeal is also allowed with similar direction.

26. Ground No. 1 & 3 are identical to the Ground No. 1 & 5 in appeal for A.Y. 2012-13. Since we have allowed the Ground No.2 in the present appeal by following the order in A.Y. 2012-13, wherein the Ground No. 1 & 5 was rendered academic. Therefore, these Grounds of appeal are also treated as academic with similar observations.

27. In the result, appeal of the assessee is partly allowed.

28. We have noted that the additional ground of appeal is identical to the additional ground of appeal as raised in A.Y. 2012-13, which we have restored to the file of Assessing Officer. Therefore, following the principle of consistency, this ground of appeal is also restored to the file of Assessing Officer with similar directions.

ITA No. 2580/Mum/2016 for A.Y. 2011-12

29. The revenue has raised the following grounds of appeal:

(a) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in considering the interest expenses at Rs. 11,97,061/- while computing the disallowance u/s 14A of the Act, thereby ignoring the fact that the assessee itself computed the disallowance on its own by taking interest expenses of Rs. 2,89,27,097/- in the return of income."

(b) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in considering the interest expenses at Rs. 11,97,061/- instead of Rs. 2,89,27,097/- ignoring the fact that the term "expenditure" occurring in Section 14A would take in its sweep not only direct expenditure but also all forms of expenditure regardless of whether they are fixed, variable, direct, indirect, administrative, managerial or financial."

30. Considering the fact that we have restored the Ground No.2 in appeal of assessee and additional ground of appeal to the file of Assessing Officer. Therefore, adjudication on the grounds of appeal raised by revenue has become infructuous.

31. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 25/09/2019.

Sd/-
SHAMIM YAHYA
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 25.09.2019

SK

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "H" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai