IN THE INCOME-TAX APPELLATE TRIBUNAL "E" BENCH MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 6490/Mum/2014 (Assessment Year 2010-11)

ITA No. 6491/Mum/2014 (Assessment Year 2011-12)

SBI Capital Markets Limited 202, Maker Tower E, Cuffe Parade, Mumbai-400005. **PAN: AAACS7914E**	Vs.	ACIT (LTU), 29th Floor, Centre-I, World Trade Centre, Cuffe Parade, Mumbai-400005.
Appellant		Respondent

Appellant by : Shri Rajnikant Chaniyari (AR)

Respondent by : Shri R. Manjunatha Swamy (DR)

Date of Hearing : 01.10.2019

Date of Pronouncement : 09.10.2019

ORDERUNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. These two appeals by assessee are directed against the separate orders of ld. CIT(A)-24, Mumbai dated 23.07.2014 for Assessment Year 2010-11 & 2011-12. In both the appeals, the assessee has raised identical grounds of appeal except variation of figures. Therefore, both the appeals were clubbed, heard and are decided by a common order. For appreciation of fact, the appeal for Assessment Year 2010-11 is treated as lead case. The assessee has raised the following grounds of appeal:

Disallowance under section 14A

1. The learned CIT(A) erred in confirming the additional disallowance of expenses of Rs. 65,99,523 under section 14A of the Income-tax Act, 1961 ("Act").

2. The learned CIT(A) erred in giving direction to the assessing officer to adopt higher amounts in opening (Rs. 2,03,65,24,000) and closing (Rs. 1,83,76,42,000) value of investments as against Rs. 1,42,14,82,760 and Rs. 1,21,83,26,320 respectively considered by the assessing officer while calculating disallowance under section 14A read with rule 8D(iii) of the Income tax Rules, 1962.

3. The learned CIT(A) has also erred in giving direction to the assessing officer to include the value of units and shares held as stock in trade for the purpose of determining average investments while calculating disallowance under section 14A read with rule 8D(iii) of the Income tax Rules, 1962.

4. The learned CIT(A) erred in not appreciating that only actual expenditure that is relatable to earning income can be considered for disallowance and not notional expenditure.

5. The learned CIT(A) erred in not appreciating that the method adopted by the appellant was scientific, systemic and reasonable for determining the expenses attributable for earning the exempt income.

6. The learned CIT(A) erred in directing the assessing officer to rework the book profits under section 115JB of the Act by adopting a higher amount of disallowance under section 14A read with rule 8D of the Income tax Rules, 1962.

7. Without prejudice to the above, the learned CIT(A) erred in directing the assessing officer to enhance the disallowance under section 14A of the Act for the year under consideration, in contravention of the provisions of sub-section(2) of section 251 of the Act.

2. Brief facts of the case are that the assessee is a corporate entity, the assessee company is also registered with Security & Exchange Board of India (SEBI) and engaged in the business of providing services in connection with issue management, private placement of short term debt, investing and trading in securities, leasing and hire purchase finance, project advisory, project appraisal, credit syndication. During

the relevant period under consideration received exempt income of Rs. 35,376,102/- on interest free securities and dividend income of Rs. 157,487,098/-. The assessee made a suo-moto disallowance under section 14A of Rs. 77,41,411/-. The Assessing Officer while framing the assessment order under section 143(3) invoked the provision of Rule 8D and disallowed Rs. 1,43,40,934/-, which consist of Rs. 77,41,411/- (suo moto disallowance) under Rule 8D(2)(i) and Rs. 65,99,523/- under Rule 8D(2)(iii). The Assessing Officer also added the disallowance to the book profit under section 115JB. On appeal before the ld. CIT(A), the action of Assessing Officer was upheld. Thus, further aggrieved, the assessee has filed the present appeal before us.

3. We have heard the submission of ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the revenue and perused the material available on record.

4. Ground No.1 to 5 relates to disallowance under section 14A. The ld. AR of the assessee submits that both the ground raised by assessee are covered in favour of assessee by the decision of Tribunal in assessee's own case for A.Y. 2012-13, wherein the order for A.Ys. 2008-09 & 2009-10 was followed. The ld. AR of the assessee also placed on record the copy of decision of Tribunal in assessee's own case for A.Y. 2008-09 & 2009-10 dated 09.12.2018 in ITA No. 2483/Mum/2012 and 4064/Mum/2013 and the order of Tribunal for A.Y. 2012-13 in ITA No.

2098/Mum/2017 dated 07.09.2018. The ld. AR of the assessee further submits that the Tribunal while passing the order for A.Y. 2012-13 followed the order for A.Ys 2008-09 & 2009-10, wherein the grounds of appeal was restored to the file of Assessing Officer. The ld. AR of the assessee prayed that similar order may be passed for the year under consideration.

5. On the other hand, the ld. DR for the revenue after going through the orders of Tribunal in A.Ys 2008-09, 2009-10 & 2012-13 fairly agreed that the issue may be restored to the file of Assessing Officer.

6. We have considered the rival submissions of the partied and have gone through the orders of the lower authorities. We have seen that on identical grounds of appeal the coordinate bench of tribunal in assessee's own case for AY 2012-13 by following the order of AY 2008-09 and 2009-10 passed the following order:

> "5. We have carefully heard the rival submission and perused relevant material on record. At the outset, we find it convenient to extract the operative portion of the judgment of this Tribunal rendered in assessee's own case for AYs 2008-09 & 2009-10 as follows:-
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> 7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.
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> We begin with the contentions of the Ld. counsel that the AO has not recorded the reasons for dissatisfaction of the correctness of the claim of the appellant.
>
> In the case of Godrej & Boyce Manufacturing Co. Ltd. (supra), the Hon'ble Supreme Court held at para 37 :
>
> "We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-

sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable"

Let us go through the assessment record to see the situation. During the course of assessment proceedings, the AO observed at para 3 (page 2) of the assessment order dated 30.12.2010 that the appellant is engaged in various activities like (i) Broking i.e. buying and selling share on behalf of clients, (ii) Management consultancy & financing i.e. undertaking various project studies and purchase and arranging the finance in respect of the same, (iii) Trading in shares viz., regular purchase and sale of shares as stock-in-trade for the purpose of earning profits and

(iv) Investing in shares with a longer perspective with a view of earning by way of dividends and capital appreciation.

The AO further observed that while the income under (i), (ii) and (iii) categories will be taxable under the head 'Profits and Gains from Business of Profession', the income falling under (iv) category will be taxable under the head 'Capital Gains' and 'Income from Other Sources'.

The AO has mentioned at para 3 (page 2) of his assessment order that on the issue of allowability of expenses on exempt income, the assessee, vide letter dated 15.10.2010 relied upon notes to computation of income wherein it is stated that it had made investment out of its own funds, that no specific borrowings have been made for such purpose and that no substantial expenses have been incurred for such activities.

Having examined the submission of the assessee, the AO noted that in the return of income, while computing the taxable income, the assessee has reduced the income arising on account of capital gains and dividends from the head 'Profits and Gains from Business or Profession', as reflected in the P&L account and offered them for tax separately at the required rates. For this purpose, the long term capital gains and dividends have been claimed as exempt and concessional rate of the taxes has been applied in respect of short term capital gains. The assessee has claimed entire expenditure incurred from the company as a whole against the remaining first three heads of income as mentioned above.

Then the AO observed "An important issue which arises is that where four activities are being carried out by the assessee and expenses are incurred in respect of all activities together, whether the expenses relating to each activity should not be matched with the income earned from that activity as per the matching principle of accounting and further where any part of the income is exempt then whether the corresponding matching expenses should not be disallowed u/s 14A or otherwise, if they are not allowable under the head of the income in which the income is being assessed. The accounting conventions and standards postulate that only the expenses relatable to the earning of income should be matched with it." We find in the instant case that the AO, having regard to the accounts of the assessee, as placed before him, has come to a finding that he is not satisfied with the correctness of the appellant's claim of expenditure. Thereafter, he has invoked Rule 8D. This is evident from the relevant paras of the assessment order we have mentioned hereinbefore. We also find that the same is in conformity with para 37 of the decision in Godrej & Boyce Manufacturing Co. Ltd. (supra). As it conforms to the above decision by the Hon'ble Supreme Court, we are not adverting to the other decisions relied on by the Ld. counsel.

In view of the above, we dismiss the ground raised by the appellant in this appeal that no reason was recorded for dissatisfaction by the AO of the correctness of the claim of the appellant.

7.1 We now turn to the disallowances made by the AO. We find that the appellant had sufficient own funds and non-interest bearing funds to make the said investment in tax-free bonds, share of domestic companies and the same have been used for investing purpose. This is evident from the balance sheet of the appellant company as at March 31, 2008. In HDFC Bank Ltd (supra), the Hon'ble Bombay High Court referring to the decision in CIT vs. HDFC Bank Ltd. [2014] 366 ITR 505 (Bom) and Reliance Utilities & Power Ltd. (supra) held as under :

> "15. It is clear that for the first time in the case of HDFC Bank Ltd. (supra) that this Court took a view that the presumption which has been laid down in Reliance Utilities & Power Ltd. (supra) with regard to investment in tax free securities coming out of assessee's own funds in case the same are in excess of the investments made in the securities (notwithstanding the fact that the assessee concerned may also have taken some funds on interest) applies, when applying Section 14A of the Act. Thus, the decision of this Court in HDFC Bank Ltd. (supra) for the first time on 23rd July, 2014 has settled the issue by holding that the test of presumption as held by this Court in Reliance Utilities and Power Ltd. (supra) while considering Section 36(1)(iii) of the Act would apply while considering the application of Section 14A of the Act. The aforesaid decision of this Court in HDFC Bank Ltd. (supra) on the above issue has also been accepted by the Revenue in as much as even though they have filed an appeal to the Supreme Court against that order on the other issue therein viz. broken period interest, no

appeal has been preferred by the Revenue on the issue of invoking the principles laid down in Reliance Utilities & Power Ltd. (supra) in its application to Section 14A of the Act."

In view of the above position of law, we delete the disallowance of Rs.1,02,810/- made by the AO under Rule 8D(2)(ii).

7.2 We now turn to the disallowance of Rs.48,97,979/- made by the AO under Rule 8D(2)(i) and Rs.73,36,360/- made under Rule 8D(2)(iii). We find merit in the submissions of the Ld. counsel that the expenses allocable to TIG Department are considered by the AO as direct expenditure under Rule 8D(2)(i), whereas the same should have been considered as indirect expenditure under Rule 8D(2)(iii). We are of the considered view that Rule 8D(2)(iii) gives a formula to arrive at the indirect expenditure earned for earning the exempt income.

Thus we delete the disallowance of Rs.48,97,979/- made by the AO under Rule 8D(2)(i).

7.3 Finally we come to the disallowance of Rs.73,36,360/- made by AO under Rule 8D(2)(iii).

We are also of the considered view that strategic investments made by the appellant in its subsidiaries which are capable of yielding exempt income i.e. by way of dividend etc. shall be included while computing disallowance u/s 14A of the Act. The rationale for enactment of section 14A was explained by the Hon'ble Bombay High Court in Godrej and Boyce Mfg. Co. Ltd (supra) as under:

"Section 14A was enacted by the Parliament in order to overcome the judgments of the Supreme Court in the cases of CIT v. Indian Bank Ltd. AIR 1965 SC 1473, CIT v. Maharashtra Sugar Mills Ltd. [1971] 82 ITR 452 and Rajasthan State Warehousing Corpn. v. CIT [2000] 242 ITR 450/109 Taxman 145, in which it was held that in the case of a composite and indivisible business, which results in earning of taxable and non-taxable income, it is impermissible to apportion the expenditure between what was laid out for the earning of taxable income as opposed to non-taxable income. The effect of section 14A is to widen the theory of the apportionment of expenditure. Prior to the enactment of section 14A, where the business of an assessee was not a composite and indivisible business and the assessee earned both taxable and non-taxable income, the expenditure incurred on earning non-taxable income could not be allowed as a deduction as against the taxable income. As a result of the enactment of section 14A, no expenditure can be allowed as a deduction in relation to income which does not form part of the total income under the Act. Hence, even in the case of a composite and indivisible business, which results in the earning of taxable and non-taxable income, it would be necessary to apportion the expenditure incurred by the assessee. Only that part of the

expenditure, which is incurred in relation to income which forms part of the total income, can be allowed. The expenditure incurred in relation to income which does not form part of the total income has to be disallowed. From this, it would follow that section 14A has within it implicit notion of apportionment. The principle of apportionment which prior to the amendment of section 14A would not have applied to expenditure incurred in a composite and indivisible business which results in taxable and non-taxable income, must, after the enactment of the provisions, apply even to such a situation. The expression 'expenditure incurred' in section 14A refers to expenditure on rent, taxes, salaries, interest, etc., in respect of which allowances are provided for."

Also in the same judgment their Lordships explained Rule 8D as under:

"In the affidavit-in-reply that had been filed on behalf of the revenue, an Explanation has been provided of the rationale underlying rule 8D. It had been stated with reference to rule 8D(2)(ii) that it would be difficult to allocate the actual quantum of borrowed funds that have been used for making tax-free investments. It is only the interest on borrowed funds that would be apportioned and the amount of expenditure by way of interest that will be taken excluding any expenditure by way of interest which is directly attributable to any particular income or receipt (for example - any aspect of the assessee's business such as plant/machinery, etc.). As regards rule 8D(2)(iii), it had been submitted that some mechanism or formula had to be adopted for attributing part of the administrative/managerial expenses to tax-exempt investment income. The administrative expenses attributable to tax-free investment income have a fixed component and a variable component. A view was taken that the disallowance should also be linked to the value of the investment rather than the amount of exempt income. Under Portfolio Management Schemes (PMS), the fee charged ranges between 2 and 2.5 per cent of the portfolio value which would be inclusive of a profit element for the portfolio manager. While the fixed administrative expenses were excluded on the ground that in the case of a large corporate taxpayer they would be spread over a large number of voluminous activities, the variable expenses were computed at one-half per cent of the value of the investment. The justification that has been offered in support of the rationale for rule 8D cannot be regarded as being capricious, perverse or arbitrary."

7.3.1 In Godrej & Boyce Manufacturing Company Ltd. (supra), the Hon'ble Supreme Court has held that the literal meaning of Section 14A, far from giving rise to any absurdity, appears to be wholly consistent with the scheme of the Act and the object/purpose of levy of tax on income.

7.3.2 The statute does not grant any exemption to the strategic investments which are capable of yielding exempt income to be

excluded while computing disallowance u/s 14A. Our decision is fortified by the decision of the Hon'ble Karnataka High Court in the case of United Breweries vs. DCIT in ITA No. 419/2009 vide order dated 31.09.2016.

As we have relied on the decision of the Hon'ble High Court, we are not adverting to the order of the Tribunal on the same issue.

In view of the above, we hold that strategic investment made by the appellant are not be excluded while calculating average value of investment. We order accordingly.

7.3.3 Then we turn to the claim of the Ld. counsel that shares of foreign company i.e. ONGC Mittal Energy Ltd. be excluded while calculating the average value of investment as the dividend arising out of it is taxable. In ITO v. Strides Arcolab Ltd. (2012) 24 taxmann.com 89 (Mum-Trib.), it is held that disallowance u/s 14A is conceivable in respect of investment made in the shares of domestic companies and not foreign companies.

As the above details were not examined either by the AO or the Ld. CIT(A), we restore the matter to the file of the AO to make a fresh order on disallowance under Rule 8D(2)(iii) only, after examining the shares of the appellant in the foreign company vis-a-vis its taxability and allowing the same for the purpose of working out the average investment. We direct the appellant to file the details of shares in foreign company before the AO. Needless to say, the AO would give a reasonable opportunity of being heard to the appellant before finalizing the order. Also the AO is directed to allow the benefit of Rs.28,19,646/- suo motu disallowed by the appellant. 7.4 In view of the above, the grounds of appeal in respect of disallowance under Rule 8D(2)(i) and Rule 8D(2)(iii) are allowed, whereas, the appeal under Rule 8D(2)(iii) is allowed for statistical purposes.

We find that similar facts and circumstances exist in the impugned AY except for the fact the no disallowance u/r 8D(2)(ii) has been made by the lower authorities. It is further noted that Hon'ble Supreme Court in a recent judgment, in group of cases titled as Maxopp Investment Ltd. Vs CIT [12/02/2018 91 Taxmann.com 154], has decided vital issues concerning disallowance u/s 14A, the benefit of which was not available to the lower authorities at the time of adjudicating this issue. Therefore, respectfully following the judgment of co-ordinate bench of this Tribunal in earlier years and in the light of recent judgment by Hon'ble Supreme Court, the matter stand remitted back to the file of Ld. AO on similar lines with similar conclusion. Needless to add that adequate opportunity of being heard shall be provided to the assessee, who, in turn, is directed to substantiate his claim, in this regard, with documentary evidences / suitable explanations etc.

7. Considering the aforesaid decision of the Tribunal these grounds of appeal are restored to the file of assessing officer with similar direction as made in AY 2008-09, 2009-10 and followed in AY 2012-13. In the result these grounds of appeals are allowed for statistical purpose.
8. Ground No.6 relates to addition of disallowance to the book profit under section 115JB. The ld. AR of the assessee submits that this ground of appeal is also covered in favour of assessee by the decision of special bench of Delhi Tribunal in ACIT vs. Vireet Investment Pvt. Ltd. [2017] 82 taxmann.com 415 (Delhi Trib), wherein it was held that computation under section 115JB is to be made without resorting to the computation contemplated under section 14A r.w. Rule 8D of the Act.
9. On the other hand, the ld. DR for the revenue submits that since the main ground of appeal relates to under section 14A is being restored back to the file of Assessing Officer. Therefore, this issue may also be restored to the file of Assessing Officer for making computation afresh.
10. We have considered the submission of both the parties and gone through the orders of lower authorities. Considering the fact that we have restored the ground of appeal related to the disallowance under section 14A to the file of Assessing Officer. Accordingly, this ground of appeal is also restored back to the file of Assessing Officer with the direction to compute the book profit under section 115JB by following the decision of special bench of Delhi Tribunal in ACIT vs. Vireet Investment Pvt.

Ltd. (supra). Hence, this ground of appeal is allowed for statistical purpose.

11. In the result, appeal of the assessee is allowed for statistical purpose.

ITA No. 6491/Mum/2014 for A.Y. 2011-12

12. The assessee has raised identical grounds of appeal as raised in appeal for Ay2010-11, which we have allowed for statistical purpose, thus, considering our decision the grounds of appeal raised in the present appeal are also restored to the file of assessing officer with similar directions.

13. In the result, appeal of the assessee is allowed for statistical purpose

Order pronounced in the open court on 09/10/2019.

Sd/-	**Sd/-**
SHAMIM YAHYA	**PAWAN SINGH**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 09.10.2019
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Copy of the Order forwarded to :

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

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai