

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4818/MUM/2018
Assessment Year: 2008-09**

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**ITA No. 4819/MUM/2018
Assessment Year: 2009-10**

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**ITA No. 4820/MUM/2018
Assessment Year: 2011-12**

&

**ITA No. 4821/MUM/2018
Assessment Year: 2012-13**

&

**ITA No. 4822/MUM/2018
Assessment Year: 2013-14**

M/s Kotak Mahindra Capital
Company Limited,
C-27, G Block, BKC,
Bandra Kurla Complex
Bandra East,
Mumbai-400051.

PAN No. AAACL5577D

Appellant

The Asst. Commissioner of
Vs. Income Tax Range 14(2)(1),
Mumbai-400020.

Respondent

Assessee by : Mr. Farrokh Irani &
Mr. ChetanKakka, ARs
Revenue by : Mr.V. Justin

Date of Hearing : 15/10/2019
Date of pronouncement: 22/10/2019

ORDER

PER BENCH

The captioned appeals filed by the assessee are directed against the order passed by the Commissioner of Income Tax-(Appeals)-22, Mumbai [in short the 'CIT(A)'] and arise out of assessment completed u/s 143(3) r.w.s 254 of the Income Tax Act 1961, (the 'Act'). Facts being identical, we begin with the AY 2008-09.

2. The grounds of appeal filed by the assessee read as under :

1. The CIT(A) erred in confirming the addition made by the Assessing Officer at Rs.1,00,21,250 u/s, 14A by invoking and applying the provisions of Rule 8D summarily and mechanically.
2. He erred in disregarding the accounts of the Appellant and ignoring the detailed submissions made regarding the correctness of the Appellant's claim.
3. He further erred in confirming the invocation of section 14A and Rule 8D by AO without being recording any satisfaction regarding incorrectness of the Appellant's claim.
4. He failed to appreciate and ought to have held that:
 - a under section 14A, it is very much clear that only the expenditure which has been proved to be incurred in relation to earning of tax free income can be disallowed and, the section cannot be extended to disallow even the expenditure which is assumed to have been incurred for earning tax free income.
 - b having regard to the accounts, there was no basis for making a disallowance in accordance with Rule 8D to Section 14A, without first establishing that such expenditure was indeed incurred for earning exempt dividend income.

- c the Appellant has not incurred any expenditure which was attributable towards earning of tax free dividend income and such disallowance cannot be made on the basis of presumptions and by applying rules mechanically;
 - d expenditure incurred refers to actual expenditure, if no expenditure is incurred in relation to exempt income, no disallowance can be made.
 - e the Appellant has made substantial investments in its own Group companies in the past which are Strategic in nature and which does not require day-today monitoring;
 - f application of formula as per Rule 8D totally inequitable and this disallowance has no relation to either the exempt income or to the expenditure claimed by the Appellant;
5. The Appellant prays that the AO be directed to delete the disallowance of Rs.1,00,21,250.
 6. Without Prejudice to the above, the Appellant prays that the AO be directed to restrict the disallowance, if any, made under section 14A to Rs.89,000/- as submitted by the appellant in the 143(3) assessment proceedings.
 7. Without Prejudice to the above, the Appellant prays that the AO be directed to restrict the disallowance made under section 14A to Rs.8,88,900 being 10% of expenditure of Investment Division.
3. During the course of hearing, the Ld. counsel for the assessee submits that he would not like to press the 3rd ground of appeal. Having considered the submission, the 3rd ground of appeal is dismissed as not pressed.
4. In the instant case, the appeal has been filed by the assessee against the order of the Ld. CIT(A) dated 02.05.2018 and it arises out of the assessment dated 31.03.2016 passed by the AO u/s 143(3) r.w.s 254

of the Act. The said order was passed by the AO as per the direction of the ITAT *vide* order dated 21.01.2005, setting aside the issue of disallowance u/s 14A r.w. Rule 8D to the file of the AO for fresh adjudication and in accordance with law after giving the assessee a reasonable opportunity of being heard.

Accordingly, the AO gave an opportunity to the assessee *vide* notice u/s 142(1) dated 22.02.2016 to file its submissions in respect of disallowance made u/s 14A r.w. Rule 8D. In response to it, the assessee filed a reply dated 01.01.2016. However, the AO was not convinced with the said reply of the assessee and made a disallowance of Rs.1,43,68,345/- u/s 14A r.w. Rule 8D after giving detailed reasons at para 5 to 7 of the assessment order dated 31.03.2016. Therefore, we do not find merit in the 2nd ground of appeal of the assessee that the AO, disregarding the accounts of the assessee and ignoring the detailed submissions made regarding the correctness of the assessee's claim has made the assessment.

5. In appeal, the Ld. CIT(A) dealt with the disallowance of interest expenses of Rs.46,17,095/- under Rule 8D(2)(ii) and deleted the proportionate disallowance as the appellant's own interest-free funds were more than the investments yielding tax-free income.

However, he sustained the order of the AO in including strategic investments in subsidiaries for computing disallowance u/s 14A r.w. Rule 8D(2)(iii) by following the decision in *Maxopp Investment Ltd. v. CIT* (2018) 91 taxmann.com 154 (SC). However, he directed the AO to

recompute the disallowance under Rule 8D(2)(iii) by excluding the investments made in its foreign subsidiary companies as the dividend income earned therefrom would be taxable.

6. Before us, the Ld. counsel for the assessee submits that only those investments are to be considered for computing average value of investment which yielded exempt income during the year, as per the order of the Special Bench of the Tribunal in *ACIT v. Vireet Investment (P.) Ltd.* (2017) 82taxmann.com 415 (Delhi-Trib) (SB).

The Ld. counsel further submits that as laid down in *Pr. CIT v. HSBC Investment Direct (India) Ltd.* (ITA No. 1672 of 2016) (Bombay HC) ; *Pr. CIT v. M/s Empire Package Pvt. Ltd.* (ITA No. 415 of 2015) (P&H HC), the disallowance cannot exceed the exempt income earned by the assessee during the year under consideration.

The Ld. counsel thus submits that the ratio laid down in the above decisions are relevant to the instant case and it should be followed.

7. On the other hand, the Ld. Departmental Representative (DR) submits that the order passed by the CIT(A) be sustained.

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

In *Maxopp Investment Ltd.* (supra), the Hon'ble Supreme Court held :

“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 assesseees to have controlling interest in the investee companies have to fail and are, therefore, dismissed.”

8.1 In view of the above decision of the Hon'ble Supreme Court, the Ld. CIT(A) has rightly sustained the order of the AO in including strategic investments in subsidiaries for computing disallowance u/s 14A r.w. Rule 8D(2)(iii). Therefore, the ground of appeal No. 4(e) is dismissed. Also similar grounds of appeal pleading for excluding investment in group companies stating those being strategic in nature are dismissed.

8.2 In respect of the other grounds of appeal, we are of the considered view that the ratio laid down in *Vireet Investment (P.) Ltd.* (supra) that only those investments are to be considered for computing average value of investment which yielded exempt income during the year has relevance in the instant case.

Also we are of the considered view that the disallowance u/s 14A r.w. Rule 8D cannot exceed the exempt income earned by the assessee during the year under consideration as laid down in *HSBC Investment Direct (India) Ltd.* (supra), *M/s Empire Package Pvt. Ltd.* (supra).

Consequently, we set aside the order of the Ld. CIT(A) on issues excepting the ground of appeal No.2, 3 & 4(e) and restore the matter to the file of the AO to make an order afresh in the light of the ratio laid down in the decisions mentioned hereinabove and after giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the AO.

Facts being identical, our decision for the AY 2008-09 applies *mutatis mutandis* to corresponding grounds of appeal in AYs 2009-10, 2011-12, 2012-13 and 2013-14.

9. In the result, the appeals are partly allowed for statistical purposes.

Order pronounced in the open Court on 22/10/2019.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 22/10/2019

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.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai