

**IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH
MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JM
&
SHRI M.BALAGANESH, AM**

**ITA No.3192/Mum/2013
(Assessment Year :2008-09)**

M/s. Tata Sons Ltd., Bombay House, Homi Mody Street, Mumbai – 400001	Vs.	ACIT 2(3), Room No.552 Aayakar Bhavan M.K.Road Mumbai – 400 020
PAN/GIR No. AAAC4060A		
(Appellant)	..	(Respondent)

**ITA No.3508/Mum/2013
(Assessment Year :2008-09)**

ACIT 2(3), Room No.552 Aayakar Bhavan M.K.Road Mumbai – 400 020	Vs.	M/s. Tata Sons Ltd., Bombay House, Homi Mody Street, Mumbai – 400001
PAN/GIR No. AAAC4060A		
(Appellant)	..	(Respondent)

Assessee by	Ms. Arati Vissanji
Revenue by	Shri R Manjunatha Swamy
Date of Hearing	19/09/2019
Date of Pronouncement	06/11/2019

आदेश / O R D E R

PER M. BALAGANESH (A.M):

These cross appeals in ITA No.3192/Mum/2013 & ITA No. 3508/Mum/2013 for A.Y.2008-09 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-6, Mumbai in appeal No.CIT(A)-6/IT-231/2010-11 dated 25/02/2013 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961

(hereinafter referred to as Act) dated 24/12/2010 by the Id. Dy.Commissioner of Income Tax 2(3), Mumbai (hereinafter referred to as Id. AO). Since, the issues involved are identical in all these appeals, they are taken up together and disposed off by this common order for the sake of convenience.

2. Set off of Interest on Income Tax Refund with Interest charged on income tax demands

Ground No.1 of Assessee Appeal

The brief facts of this issue is that the assessee received interest from income tax department to the tune of Rs 43.81 crores and also paid interest to income tax department on its tax demands to the tune of Rs 6.57 crores. The assessee sought to set off the interest paid on income tax demands with the interest received from income tax department in the return of income. The Id AO disallowed the interest paid on income tax demands to the tune of Rs 6.57 crores as the same is not allowable in terms of section 40(a)(ii) of the Act and accordingly taxed the gross interest received from income tax department of Rs 43.81 crores under the head income from other sources. The Id CITA by placing reliance on the order passed by his predecessor for the Asst Years 2007-08 and 2005-06 in assessee's own case upheld the action of the Id AO. The Id CITA further directed the Id AO to verify the assessment records of Asst Year 1990-91, 2003-04 and 2005-06 in order to ensure that there is no double addition. Aggrieved, the assessee is in appeal before us.

2.1. We have heard the rival submissions and perused the materials available on record including the judicial pronouncements relied upon by both the sides at the time of hearing. We find that the Id AR placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of DIT (International Taxation) vs Bank of America NT and SA in Income Tax

Appeal No. 177 of 2012 dated 3.7.2014 wherein the Hon'ble High Court approved the action of this tribunal had held as under:-

“3 Even with regard to the question No.2 we do not find that it is a substantial question of law. The Tribunal found that the Assessee Bank received interest on refund of taxes paid. It also paid interest on the taxes which were payable. The Assessee sought to set off the interest paid against the interest received and offered the net interest received to tax. We do not see that such findings of the Tribunal are vitiated in law. All that the Tribunal has done earlier and now is that in the case of this Assessee simply because the exercise carried out by it does not result in loss of revenue and there could not be any prohibition for the same, allowed it. That is how the Assessing Officer's order is set aside. We do not see how any larger controversy or question arises for our consideration.

Mr.Pinto would refer to Section 57 of the Income Tax Act, 1961 in that regard and submit that this course would be adopted by other Assesseees as well and in that event the order passed by this Court would come in the way of the Revenue in investigating and probing such exercise by other Assesseees.

4 We do not see how this order can be cited _as .precedent inasmuch as the Assessee before the Tribunal and before us paid interest to the Income Tax Department amounting to Rs.10,26,906/-. The Assessee claimed that this was business expenditure and this should have been allowed. The Assessee has received the interest of Rs.1,07,57,930/-. It was submitted that the amount of interest paid by the Assessee should have been allowed to be set off against the interest deposited with the Department and taxed in the hands of the Assessee. The argument was that the interest paid to and received from is the same party i.e. Government of India and therefore, both transactions should be taken together.

5. We do not find that the Tribunal has, in permitting this exercise, in any way violated any of the provisions of the Income Tax Act, 1961. It was a peculiar situation between the Assessee and the Department. The Tribunal has followed the similar exercise in the case of very Assessee on the prior occasion as well. In such circumstances we are of the opinion that the second question also does not raise any substantial question of law.”

2.2. Respectfully following the said decision, the ground no. 1 raised by the assessee is allowed.

3. Disallowance under section 14A of the Act read with Rule 8D of the Rules

Ground No. 2 (i) to 2(v) and Ground 2 (vii) including modified Ground No. 2(vi) of assessee appeal

Additional Ground No. 2A of assessee appeal

Ground Nos. 2 & 3 of revenue appeal

The brief facts of this issue are that the assessee earned dividend of Rs 1008.49 crores on long term investments from subsidiary companies and Rs 570.18 crores from others. The assessee claimed the entire dividend of Rs 1578,67,47,807/- as exempt in the return of income. The assessee was showcaused by the Id AO as to why the expenditure should not be disallowed u/s 14A of the Act read with Rule 8D of the Rules. The assessee submitted before the Id AO as under:-

	<u>Rs in crores</u>
Gross interest income earned	354.01
Less: (a) Interest received from 54EC Bonds offered to tax under Income from other sources	59.66
(b) Interest on income tax refunds	43.81
	----- 103.47
Balance Interest earned	----- 250.54 -----

3.1. The assessee gave several justifications for making investments in subsidiaries in order to protect its business interests and for obtaining controlling interest in those subsidiaries and accordingly pleaded that the interest paid on borrowed funds which were also utilized for making investments in various subsidiaries would be squarely allowable as

deduction u/s 36(1)(iii) of the Act. The assessee submitted that it had claimed deduction towards the net interest expenses debited to profit and loss account as under:-

Interest expenses on borrowings	- Rs 478.37 crores
Less: Interest earned	- Rs 250.54 crores

	- Rs 227.83 crores
Less: Interest disallowed u/s 43B	- Rs 17.76 crores

Net Interest Expenditure	Rs 210.07 crores

3.2. The Id AO observed that the claim of the assessee that the deduction of interest as per the provisions of section 36(1)(iii) of the Act is eligible cannot be accepted as the provisions of section 14A of the Act have an overriding effect on the provisions of section 36(1)(iii) of the Act. The Id AO also did not allow the netting of interest received with interest paid in the assessment. Thereafter, the Id AO worked out the disallowance u/s 14A of the Act read with Rule 8D(2) of the Rules as under:-

	<u>Rs</u>
Under Rule 8D(2)(i)	- 152,46,00,000
Under Rule 8D(2)(ii)	- 132,71,03,860
Under Rule 8D(2)(iii)	- 56,21,25,500
	----- 341,38,29,360

3.3. The assessee submitted before the Id CITA that the Id AO erroneously adopted the figures of Asst Year 2007-08 and accordingly had computed the wrong disallowance figure at Rs 341.38 crores supra. The Id CITA observed that the Id AO vide letter dated 28.12.2011 intimated him that enhancement is required to be made to the disallowance made u/s 14A of the Act. Accordingly, vide office letter dated 5.1.2012, the Id AO was directed u/s 250(4) of the Act by the Id CITA to make further

enquiries on the enhancement of addition u/s 14A of the Act. The Id AO sent a remand report dated 15.10.2012 by which the disallowance u/s 14A of the Act read with Rule 8D of the Rules was computed at Rs 601.55 crores after taking the correct figures pertaining to the year under consideration. The said remand report was forwarded to the assessee vide office letter dated 2.11.2012 by the Id CITA. The assessee made detailed submissions vide letter dated 10.12.2012. The Id CITA observed that assessee had submitted that there is a nexus between amounts borrowed during the year which have been deployed in bank fixed deposits. Accordingly, the interest paid on such borrowings which amounted to Rs 89.74 crores should not be considered for disallowance u/s 14A of the Act as the interest earned from bank deposits was offered to tax. The assessee also submitted its objections to the enhancement proposed u/s 14A of the Act.

3.4. The Id CITA directed the Id AO to recompute the disallowance u/s 14A of the Act read with Rule 8D(2) of the Rules as under:-

For-the- purpose of computing the- disallowance under-Rule 8D(2)(i), only direct expenditure-relating to exempt income is to be considered as held at Para 3.3.2 of Page 15 of the Appeal Order for the AY 2007-08 and estimation of direct expenditure is not correct as the direct expenditure must be direct as held at Para 1.6 at Page 8 of the Appeal Order of AY 2006-07 .accordingly, the estimated interest expenditure of ^ 82.07 Crores under Rule 8D(2)(i) as per the Remand Report (the AO in the assessment order at Page 9 Para 5.7.1 has estimated the interest expense at * 76.56 Crores) is not required to be considered for the purpose of Rule 8D(2)(i). However the same is required to be considered for Rule 8D(2)(ii).

(ii) With reference to the Other Expenditure, the appellant submitted that during assessment proceedings, it had vide letter dated 18 October 2010, made submissions pertaining to General Head Office Expenditure other than Direct Expenditure incurred for earning taxable business income, which amounted to ^ 129.13 Crores and the appellant submitted that this was not in any way to be construed as Other Expenditure directly related to earning tax free income and the A.O. has not established any nexus pertaining to this expenditure and the tax free income and has relied on the Assessment Order for the AY 2007-08. In the course of appeal proceedings, the appellant was asked to furnish details of

expenses which was furnished vide letter dated 28.01 .2013 which shows that the expenditure of ^ 138.59 Crores are on account of payment and provision for employees ^ 11.82 Crores, **rent of ^ 2.16 Crores, rate & taxes of ^ 3.01 Crores**, consultancy fee of ^ 7.63 Crores, premium on forward covers in relation to external commercial borrowings of * 40.41 Crores, travel expenses of ^ 2.46 Crores, non-whole time directors commission of ^ 14.83 Crores, legal fees at * 5.58 Crores, credit rating fees of ^ 1 .82 Crores, professional fees of ^ 1 .54 Crores, filing fees of τ 14.86 Crores, arranger fee of ^ 19.79 Crores and less than ^ one crore under certain other heads. Thus, it is clear that the expenditure of * 138.59 has not been directly incurred towards arning of exempt income. The expenditure of ^ 138.59, therefore, is not to be considered as direct penseJor the purpose of Rule 8D(2)(i) on estimate basis.

h^(iii) "As pointed out by the AO in the remand report, **the interest expenditure of * 39.73 Crore are direct interest expenditure on account of investment in shares of Tata Realty and Infrastructure Ltd. The interest of Rs. 39.73 Crores is required to be considered under Rule**

(iv) The appellant submits that for computing the disallowance under Rule 8D(2)(ii), the Interest Expenditure should be considered as under:

	(Rs. In crores)	
Gross Interest Expenditure		478.37
Less: Disallowance u/s.43B (net)	17.29	
As per Para 2.4.1 above	<u>89.74</u>	<u>107.03</u>
		371.34
Less: Disallowed under Rule 8D(2)(i)		39.73
		<hr/>
Interest Expenditure to be considered for disallowance under Rule		331.61
		<hr/>

3.5. Aggrieved, both the assessee as well as the revenue are in appeal before us.

3.6. We have heard the rival submissions and perused the materials available on record including the judicial pronouncements that were cited by both the sides at the time of hearing before us. We find that the elaborate arguments were advanced by both the sides with regard to various grounds raised by both the sides before us. We find that the issues in dispute are practically settled by various decisions of Hon'ble

Supreme Court, Hon'ble High Courts , Special Bench of Tribunal and other co-ordinate benches of tribunal. Considering the totality of facts and circumstances of the case and the settled legal positions with regard to the issue in dispute before us, we direct the Id AO to recompute the disallowance u/s 14A of the Act read with Rule 8D(2) of the Rules as under:-

- a) Consider only those investments which had actually yielded exempt income while computing disallowance under Rule 8D(2) of the Rules.
- b) Netting off Interest received with Interest paid should be permitted while computing disallowance under Rule 8D(2) of the Rules.
- c) Investments in Subsidiaries and other Strategic Investments made by the assessee should also be considered for the purpose of computing disallowance under Rule 8D(2) of the Rules, subject to ensuring that those investments had actually yielded exempt income to the assessee.

3.6.1. Subject to the above directions, the Id AO is directed to recompute the disallowance u/s 14A of the Act afresh under normal provisions of the Act. Accordingly, the grounds raised by the assessee as well as by the revenue in this regard are allowed for statistical purposes subject to directions mentioned hereinabove.

3.7. We find that the assessee had raised an additional ground vide Ground No. 2A in respect of disallowance u/s 14A of the Act while computing the book profits u/s 115JB of the Act. We find that this is a legal issue and goes into the root of the matter and does not involve any verification of facts and hence the same is admitted herein. We find that the Hon'ble Special Bench of Delhi Tribunal in the case of Vireet Investments reported in 165 ITD 27 had categorically held that the

computation mechanism provided in Rule 8D(2) of the Rules cannot be imputed in clause (f) of Explanation 1 to Section 115JB(2) of the Act. We find that the Special Bench further held that only the actual expenses debited to the profit and loss account that are relatable to earning of exempt income should be considered for the said purpose. We direct the Id AO to compute the disallowance in the light of the said Special Bench decision. Accordingly the Additional Ground No.2 A raised by the assessee is allowed for statistical purposes.

4. The Ground Nos. 3(i) ; 3(ii) and 4 were stated to be not pressed by the Id AR at the time of hearing before us for which necessary endorsement has been made in our file. Accordingly, the Grounds 3 and 4 raised by the assessee are dismissed as not pressed.

5. The Ground Nos. 1 & 6 raised by the revenue are general in nature and does not require any specific adjudication.

6. The Ground No. 4 raised by the revenue is challenging the action of the Id CITA in treating sale of 2% shares of Tata Consultancy Services Ltd (TCS) as Long Term Capital Gains as against business income taxed by the Id AO.

6.1. During the year under consideration, the assessee sold 2% shares of TCS and arrived at long term capital gains. Since TCS shares were listed in stock exchange and the said shares were sold in the open market after suffering due securities transaction tax (STT), the long term capital gains derived by the assessee thereon was claimed as exempt u/s 10(38) of the Act by the assessee in the return of income in the sum of Rs 2749.84 crores. The Id AO observed that assessee company is an investment

holding company of TATA group of companies, which is one of the biggest industrial houses of the country. M/s Tata Sons is the holding company from where investments were made in the businesses of various group companies. The Id AO observed that Tata Sons either directly makes the investment in the business by promoting as a division unit or through Special Purpose Vehicle (SPVs) which could be a joint venture, a private limited or a company listed on stock exchange. He observed that the group conceives the ideas, promotes them, foresee business opportunities, nurtures them, develops them, provides them with infrastructural , financial, branch support and makes them viable and profitable business models. Over a period of time, the group has ventured into various businesses and has also exited many businesses where operations were found to be or likely to unviable. The investment in shares made by the assessee in TCS Ltd is reflected as "Investments" in the balance sheet of the assessee. The assessee had declared similar long term capital gains whenever certain shares of group companies were sold by it in earlier years and the same were accepted as such by the Id AO. But during this year, the Id AO sought to treat the gains received on sale of shares of TCS as business income by holding that the sole purpose of holding these shares was to acquire control of the business and to take active part in the businesses of these companies and hence he observed that the income arising from transfer of such stake has necessarily to be treated only as business income only. Since the assessee company has got huge borrowings in its balance sheet, which would normally be done only by a trader in shares and not investor in shares. The Id AO placed reliance on the Circular No. 4/2007 and held that the motive of the assessee in holding these shares were only to make profit and hence assessee is to be treated only as a trader eventhough the said investment is shown in the balance sheet under the head 'Investments'. Accordingly,

the Id AO denied the claim of exemption for long term capital gains u/s 10(38) of the Act and treated the sum of Rs 2749,84,38,894/- as business income of the assessee.

6.2. The Id CITA by placing reliance on the order passed by his predecessor for Asst Year 2007-08 on similar issue allowed the ground of the assessee and accordingly held that gains on sale of 2% of TCS shares should be treated as long term capital gains only eligible for exemption u/s 10(38) of the Act. Aggrieved, the revenue is in appeal before us.

6.3. We have heard the rival submissions. We find that the revenue appeal for the Asst Year 2007-08 was dismissed by this tribunal on technical aspect and no finding was given thereon on merits of the addition. Hence it would be imperative on our part to adjudicate the impugned issue in dispute before us on merits. It is not in dispute that the assessee has been reflecting the investments made in TCS Ltd together with other group companies under the head 'Investments' in its balance sheet. It is not in dispute that the assessee in the past had been selling certain shares held by it in the group companies and the gains received therefrom were offered to tax as long term capital gains and the same was accepted by the revenue as such. The Id AR even stated that the claim of long term capital gains were accepted by the revenue in earlier years even earlier to the STT regime. Hence the introduction of STT had not made the assessee to change the character of acquisition of shares from investment to stock in trade or vice versa. We find that there is no allegation that the assessee had transferred some of the shares from stock in trade to investment for the purpose of claiming any benefit of exemption u/s 10(38) of the Act. We find from Asst Years 2001-02 to 2006-07, the revenue has accepted the gains received on sale of shares

as capital gains and assessed as such. When a particular method has been followed consistently by the assessee in its books as well as for tax purposes, then there is no reason to take a divergent stand when there is no material change in the facts and circumstances. Reliance in this regard is placed on the decision of Hon'ble Jurisdictional High Court in the case of Gopal Purohit reported in 336 ITR 287 (Bom). We also find that the Central Board of Direct Taxes (CBDT) vide its Circular No. 6/2016 dated 29.2.2016 had categorically held in para 3(b) as under:-

(b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;

6.3.1. Hence in view of the aforesaid CBDT circular which is binding on the revenue authorities, we do not find any infirmity in the action of the Id CITA in directing the Id AO to treat the gains on sale of shares to be treated as long term capital gains and consequently grant exemption u/s 10(38) of the Act since STT was duly suffered thereon. Accordingly, the Ground No. 4 raised by the revenue is dismissed.

7. The Ground No. 5 raised by the revenue is challenging the action of the Id CITA in deleting the disallowance of Rs 15.65 lakhs being the amount of taxes withheld on foreign dividend.

7.1. We have heard the rival submissions. We find that the issue in dispute before us is that the assessee should be given tax credit for foreign dividend which is taxed in both the countries. We find that the assessee had submitted that the overseas tax of Rs 15,65,430/- pertains

to the net dividend received from Tata International AG Switzerland of Rs 1,40,88,871/- . We find that the assessee had submitted that the net foreign dividend of RS 1,40,88,871/- has been subjected to tax both in India as well as in Switzerland. This fact is not in dispute before us. Since the Indian tax applicable to the net foreign dividend amounts to Rs 47,88,807/- which is in excess of Rs 15,65,430/-, the assessee should be granted credit for double income tax of Rs 15,65,430/-. We find that the Id AR had argued that this issue is settled in favour of the assessee in its own case for Asst Year 1995-96 in ITA No. 629 / Mum/ 2003 dated 13.1.2006 and also by the decision of Hon'ble Jurisdictional High Court in the case of CIT vs Ambalal Kilachand reported in 210 ITR 844 (Bom). Per Contra, the Id DR submitted that for Asst Year 2000-01, the tribunal had decided the same issue against the assessee. But the Id DR did not file the copy of the said tribunal order relied upon by him in the grounds. In the absence of the said order, we do not have any option but to direct the Id AO to decide the impugned issue in the light of tribunal order passed for Asst Year 1995-96 and in the light of Hon'ble Jurisdictional High Court supra. Accordingly, the Ground No. 5 raised by the revenue is allowed for statistical purposes as per direction contained hereinabove.

8. In the result , both the appeals of the assessee as well as the revenue are partly allowed for statistical purposes.

Order pronounced in the open court on this 06/11/2019

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 06/11/2019
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai