IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI

BEFORE SHRI MAHAVIR PRASAD (JM) AND
SHRI S. RIFAUR RAHMAN (AM)

ITA No. 5673/MUM/2018
Assessment Year: 2011-12

Ambit Capital Pvt. Ltd. Ambit House, 449, Senapati Bapat Marg, Lower Parel, Mumbai- 400013 PAN: AAB CP6 621 N	**Vs.**	The Additional Commissioner of Income Tax Circle-4(1), Aaykar Bhavan, M. K. Road, Mumbai- 400013
(Appellant)		**(Respondent)**

Assessee by : Shri Nitesh Joshi
Revenue by : Shri S. Michael Jerald (DR)

Date of Hearing: 04/11/2019
Date of Pronouncement: 07/11/2019

O R D E R

PER MAHAVIR PRASAD, JM

This appeal has been preferred by the assessee against the order of Ld. CIT(A)-9/Cir.4/193/2014-15 dated 16.07.2018 arising out of assessment order dated 24.03.2014 and assessee has taken following grounds of appeal:-

"1. (a) The learned Commissioner of Income-tax (Appeals) erred in law in upholding the action of the Additional Commissioner of Income Tax, Range 4(1). Mumbai (hereinafter referred as "the Assessing Officer) of disallowing a sum of Rs,23,08,920/- as against to suo-moto disallowance made by the appellant of a sum of Rs.2,58,264/- by applying provision of section 14A of the income Tax Act, 1961 (the Act) read with Rule 8D(2)(iii) of The Income Tax Rules, 1962 (the Rules).

(b) The appellant submits that the action of the Assessing Officer in invoking the provisions of Rule 8D(2)(ii) to compute the disallowance under section 14A is void ab initio as the Assessing Officer has failed lo record any dissatisfaction with regard to the claim made by the appellant that no

expenditure has been incurred in relation to exempt income which is a condition precedent to invoke the provisions of Rule 8D of the Rules as per the provisions of section 14A(2) and 14A(3) of the Act.

2. (a) Without prejudice to what is stated in Ground No. 1 above, the learned Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer in rejecting the scientific working of disallowance under section 14A of the Act submitted by the appellant during the course of assessment proceedings on the ground that the said working is cryptic and not self-explanatory and no proper explanation is given from appellant's side.

3. Without prejudice to what is stated in Ground No. 1 and 2 above, the learned Commissioner of Income-tax (Appeals) erred in rejecting the claim of the appellant that the stock-in-trade should not be considered for making disallowance under Rule 8D of the Rules.

4. Without prejudice to what is stated in Ground No, 1, 2 and 3 above, the appellant submit that the Assessing Officer erred in considering the investment not generating exempt income while computing disallowance under Rule 8D(2)(iii) of the Rules.

5. (a) The learned Commissioner of Income-tax (Appeals) erred in rejecting additional ground of the appellant and upholding action of the Assessing Officer of adding the disallowance made under section 14A read with Rule 8D of the Rules while computing hook profit under section 115JB of the Act.

(b) The appellant submits that section 14A of the Act could not be read in section 115JB, as section 115JB is a complete code in itself and overrides all other provisions of the Act. Tax Liability under section 115JB of the Act was to be worked out only on the basis of adjusted book profit and not on the basis of income computed under normal provisions of the Act.

6. The appellant submits that the learned Assessing Officer be directed:

- *(i) to delete disallowance of Rs.23,08,920/- under section 14A of the Act;*
- *(ii) Without prejudice to what is stated in (i) above, to restrict the disallowance to Rs,2,58,264/- under section 14A of the Act;*
- *(iii) Without prejudice to what is stated in (i) and (ii) above, to not to consider the stock-in-trade while computing disallowance under Rule 8D of the Rules;*

(iv) Without prejudice to what is stated in (i), (ii) and (iii) above, to consider investment generating exempt income only while computing disallowance under Rule 8D(2)(iii) of the Rules;

(v) to not consider the disallowance made under section 14A of the Act read with Rule 8D of the Rules, while computing book profit under section 115JB of the Act.

and to modify the assessment in accordance with the provisions of the Act.

7. Each of the above grounds of appeal ate independent and without prejudice to each other.

8. The appellant craves liberty to add, to alter and /or amend the grounds of appeal as and when given."

2. Assessee has taken multiple grounds with alternative plea but the crux of the ground is that lower authorities had disallowed sum of Rs. 23,08,920/- as against to suo-mto disallowance made by the appellant of a sum of Rs. 2,58,264/- by applied provision of Sec. 14A of the Income Tax Act.

3. Facts of the case are that assessee is engaged in Broking, Advisory services and trading in securities and derivatives. During the year under consideration the assessee has erred tax free dividend income of Rs. 2,11,64,953/- and the sum has been claimed as exempt income. The assessee company has suo-moto disallowed Rs. 2,58,264/- under section 14A of the Income Tax Act. But Ld. AO was not agree with the contention of the assessee and applied Sec. 14A r.w.r. 8D and made gross disallowance of Rs. 26,05,735/-.

4. Thereafter, the assessee preferred first statutory appeal before the Ld. CIT(A) who revisited the various submission made

on behalf of the assessee but, however, found no merit therein and held that Ld. AO was justified in making notice disallowance of Rs. 23,47,471/-.

5. We have gone through the relevant record and impugned order and heard both the parties it is clear that books of accounts were produced before the Ld. AO and he could not point out any nexus with the exempt income and that of the expenditure relatable to the exempt income. In several judicial proceedings Hon'ble Courts have held that there has to be some basis for making disallowance in support of its contention Ld. AR cited an order of Co-ordinate Bench wherein in similar facts and circumstances of the case relief was granted by the Co-ordinate Bench in assessee's own case for A.Ys. 2008-09, 2009-10, 2010-11 and 2011-12 wherein in facts and circumstances of the case relief was granted to the assessee relying on the earlier years ITAT orders in assessee's own case:-

> *"8. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that in the present case also the facts are not in dispute that the assessee has incurred this expenditure mainly on brand promotion during the year including advertising in Media/ Magazine. It is also not disputed by Revenue. Now before us, that this expenditure is not a corporate advertising films, is in respect of ongoing business. Once, this is for the business and expenditure incurred on brand advertisement, the same is to be allowed as Revenue in nature. Respectively, following Hon'ble Bombay High Court in the case of Asian Paints India Limited (supra), we confirm the order of CIT(A) allowing the claim of the assessee and dismiss this issue of Revenue's appeal. Revenue's appeal is dismissed.*
>
> *9. Coming to assessee's appeals in ITA No. ITA Nos. 6249/Mum/2012,6250/Mum/2012,1794/Mum/2014,1096/Mum/2015 for A.Y. 2008-09, 2009-10, 2010-11,2011-12. The only common issue in all these four years is as regards to the disallowance of expenses*

relatable to exempt income by the AO and confirmed by CIT(A) by invoking the provisions of section 14A of the Act read with rule 8D of the Income Tax Rules, 1962 (the rules). Briefly stated facts are that the AO noted, the assessee has received dividend income of ₹ 43,26,298/- in AY 2008-09, ₹ 45,55,366/- in AY 2009-10, ₹ 47,70,620/- in AY 2010-11 and ₹ 1,47,57,441/- in AY 2011-12. The assessee claimed these dividend incomes has exempt under section 10(34) of the Act in all the years. The assessee suo moto disallowed a sum of ₹ 6,48,945/- (which was revised before CIT(A) vide computation at ₹ 3,81,528/-) for AY 2008-09, a sum of ₹ 3,29,296/- for AY 2009-10, a sum of ₹ 3,24,441/- for AY 2010-11, and a sum of ₹ 1,80,077/- for AY 2011-12.

10. The facts and circumstances are exactly identical in all the years and hence, we will take the facts from AY 2008-09 and will decide the issue. We find that in all the years, the AO has simply applied Rule 8D and made disallowance under Rule 8D (2)(iii) of the Rules except in AY 2010-11 Rule 8D (2)(ii) was also applied. The AO made disallowance of ₹ 14,07,045/- in AY 2008-09, a sum of ₹ 21,36,632/- in AY 2009-10, a sum of ₹ 69,53,073/- (including disallowance under Rule 8D(2)(ii) of interest amounting to ₹ 2,37,604/- for AY 2010-11 and a sum of ₹ 1,01,58,963/- for AY 2011-12. The CIT(A) also confirmed the disallowance made by AO for all the AYs.

11. Before us, the learned Counsel for the assessee stated that in any of the years, AO has not recorded any satisfaction as can be seen from the assessment order. The learned Counsel took us through the assessment order whereby the AO has relied on the decision of ITAT special Bench, Mumbai, in the case of ITO Vs. Daga Capital Management P. Ltd. 117 ITD 169 (SB) wherein it is held that Rule 8D is retrospective. The relevant Para 6.6 and 6.7 of the AO's order reads as under: -

"6.6 The insertion of section 14A with retrospective effect, from 1.4.1962, is a serious attempt on the part of the Legislature not to allow deduction in respect of any expenditure incurred by the assessee in relation to income, which does not form part of the total Income under the Act, against the taxable income. The Legislature has further clarified its intention that the expenses incurred can be allowed only to the extent they arc relatable to the earning of the taxable income. The language has, therefore, made an attempt to curb the practice used to reduce the tax payable on the exempt Income by debiting the expenses incurred to earn the exempt income against the taxable income The language used by the legislature in the statute makes it amply clear that the legislature was well aware that the deduction of expenses in respect of exempt income were being claimed in full, against the taxable income was therefore clarified that expenses incurred can be allowed only to the extent they are relatable to earning of the taxable income. Nature of the expenses incurred may, therefore, be related partly to the exempt income,

and partly to the taxable income, but the intention of the legislature to allow the expenses only to the extent they are relatable to the earning of taxable income. It has been clarified unambiguously that in computing the total income, no deduction shall be allowed in respect of expenditure incurred by the assessee against the income which is claimed as exempt from tax. Circular No.14 of 2001 dated 22.11.2001, and Circular No.8 of 2002 dated 27.8.2002 have also explained the provisions wherein it has been clarified that no expenses relatable to an income exempt from tax would be allowed as a deduction.

6.7 The explanation filed by the assessee is carefully perused and the same is not acceptable, in view of the above referred decisions, and decision of the i1on'ble ITA'F. Special Bench. Mumbai in the case of Daga Capital Management Pvt. Ltd. The assessee has incurred expenses for earning dividend income which is evident from the fact that the assessee itself has disallowed a sum of lts.6,48945/ on estimated basis. Since the expenses related to earning exempt income have been incurred, the same arc disallowed as per provisions of Section MA read with Rule 8D of the of the IT Rule. As per the provisions of See.14A, the disallowance u/s.14A has to be made in accordance with the Rule 81.) of the IT Rules 1962, which is computed as under:……"

12. The learned Counsel for the assessee stated that this decision of the special bench of ITAT in the case of ITO Vs. Daga Capital Management P. Ltd. (supra), is reversed by the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT [2017] 394 ITR 449 (SC) and held the provisions of Rule 8D of the Rules as prospective and will apply for and from AY 2008-09 and thereafter the relevant assessment years falls wherein Rule 8D of the Rules will apply. The learned Counsel for the assessee drew our attention to Supreme Court decision in the case of Godrej & Boyce Mfg. Co. Ltd. (supra) and he referred to the relevant page 471, Para 37 & 38, wherein Hon'ble Supreme Court has clearly stated that it is mandatory for the AO with regard to subjective satisfaction on the issue. The relevant observations of the Hon'ble Supreme Court read as under: -

"37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Subsections (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.

38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-2003, to hold that the claims of the Assessee that no expenditure was incurred to earn the dividend income cannot be accepted and why the orders of the Tribunal for the earlier Assessment Years were not acceptable to the Assessing Officer, particularly, in the absence of any new fact or change of circumstances. Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received. That any part of the borrowings of the assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (Rs. 270.51 crores as on 1.4.2001 and Rs. 280.64 crores as on 31.3.2002) remains unproved by any material whatsoever. While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. In this regard we may remind ourselves of what has been observed by this Court in Radhasoami Satsang v. CIT [1992] 193 ITR 321/60 Taxman 248 (SC).”

13. From the facts of the present case, it is clear that the AO despite the fact that all the books of accounts were produced before him, he could not point out any nexus with the exempt income and that of the expenditure relatable to this exempt income. Even the Hon’ble Supreme Court in the case of Godrej & Boyce Mfg. Co. Ltd. (supra), has clearly laid down the principle that the satisfaction of the AO must be there for making disallowance under section 14A of the Act read with Rule 8D of the Rules. In the present case, the satisfaction is missing in all the years. Accordingly, we allow the appeals of the assessee on this issue except suo moto disallowance of a sum of ₹ 3,81,528/-in AY 2008-09 be enhanced to as sum of ₹ 6,48,945/- as it has revised the disallowance. The AO will recompute the income accordingly in all these years.

14. In the result, the appeal of Revenue is dismissed and that of the assessees’ appeals are allowed except ITA No. 6249/Mum/2012 for AY 2008-09, which is partly allowed.”

Thus, in parity with the above said order we allow this ground of appeal.

6. Now, we come to ground relating to the disallowances made while determining the income under section 115JB of the Act. It is settled law that disallowance made under section 14A r.w.r. 8D cannot be applied while determining the book profit under section 115JB of the Act, in this regard we place our reliance on the order of Hon'ble Jurisdictional High Court in the matter of CIT vs, M/s. Bengal Finance & Investments Pvt. Ltd. in Income Tax Appeal No. 337 of 2013 wherein it he held:-

> *"4. So far as Question (b) is concerned, the impugned order of the Tribunal followed its decision in M/s. Essar Teleholdings Ltd. v/s. under section 14-A of the Act cannot be added to arrive at book profit for purposes of Section 115JB of the Act. The Revenue's Appeal against the order of the Tribunal in M/s. Essar Teleholdings (Supra) was dismissed by this Court in Income Tax Appeal No. 438 of 2012 rendered on 7th August, 2014. In view of the above, question (b) does not raise any substantial question of law."*

Respectfully following the aforesaid Bombay High Court judgment we allow reverse the order of authority below. Hence, ground of assessee is allowed.

7. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 07/11/2019.

Sd/-	Sd/-
(S. RIFAUR. RAHMAN)	(MAHAVIR PRASAD)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 07/11/2019

TANMAY, SR. PS

<u>आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**