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

BEFORE SHRI S. RIFAUR RAHMAN (AM) AND SHRI RAM LAL NEGI (JM)

ITA No. 3641/MUM/2018
Assessment Year: 2014-15

M/s Oricon Enterprises Limited, 1076, Dr E Moses Road, Worli, Mumbai - 400018 PAN: AAACOO480F	**Vs.**	The Dy. Commissioner of Income Tax CC- 3(3), Air India Building, Mumbai - 400020
(Appellant)		**(Respondent)**

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ITA No. 3879/MUM/2018
Assessment Year: 2014-15

The Dy. Commissioner of Income Tax Central Circle - 3(3), Room No. 1923, Air India Building, 19th Floor, Nariman Point, Mumbai - 400021	**Vs.**	M/s Oricon Enterprises Limited, 1076, Dr E Moses Road, Worli, Mumbai - 400018 PAN: AAACOO480F
(Appellant)		**(Respondent)**

Assessee by : Shri Sunil Mahata (AR)

Revenue by : Shri Abdul Hakeem M. (DR)

Date of Hearing: 18/09/2019
Date of Pronouncement: 29/10/2019

O R D E R

PER RAM LAL NEGI, JM

These are the cross appeals filed by the assessee and the revenue against the order dated 09.03.2018 passed by the Commissioner of Income Tax (Appeals)-51 (for short 'the CIT (A)'), Mumbai, for the assessment year 2014-15, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

ITA No. 3641/MUM/2018 (Assessment Year: 2014-15)

Brief facts of the case are that the assessee company engaged in the business of manufacturing and sale of Petrochemicals, liquid colorants , Pet bottles and trading in various items including chemicals, printing papers and shares etc., filed its return of income for the assessment year under consideration declaring the total income of Rs. 7,80,61,510/-. Since, the case was selected for scrutiny, the AO issued notice u/s 143 (2) and 142 (1) of the Act. In response thereof the authorized representative (AR) of the assessee appeared and filed the details called for. It was noticed that the assessee had made *suo moto* disallowance of Rs. 4,67,522/- u/s 14A of the Act. Accordingly, the AO asked the assessee to explain as to why the disallowance should not be made u/s 14A r.w.r. 8D of the Act. The AR submitted that the disallowance made by the assessee is based on the order of the CIT (A) and the Tribunal in assessee's own case. It was further submitted that there is net interest income of Rs. 85,53,397/- during the year and hence the disallowance u/s 14A r.w.r. 8D(2)(ii) is not applicable in assessee's case. The AO rejecting the contention of the assessee computed the disallowance under rule 8D(2)(iii) at Rs. 1,95,89,727/-. It was further noticed that the assessee received total rental income of Rs. 8,95,50,107/-, whereas in the P & L account the assessee had shown the rental income at Rs. 8,65,50,107/-. The AO asked the AR to explain as to why there is reduction of rental income to the extent of Rs. 30,00,000/-. The AR submitted that the company has already offered the said excess income to tax in the assessment year 2005-06 , however, the said amount is not received till date, therefore, the same is reversed/ written off and reduced from the rental income during the assessment year under consideration. The AO rejecting the contention of the assessee made addition of the said amount to the income of the assessee. Accordingly, the AO inter alia making the aforesaid additions determined the total income of the assessee at Rs. 10,02,58,715/-. The assessee challenged the assessment order before the Ld.CIT (A). The Ld.CIT (A) partly allowed the appeal of the assessee. Against the said findings of the Ld.CIT (A), the assessee is in appeal before the Tribunal.

2. The assessee has challenged the impugned order passed by the Ld.CIT (A) by raising the following effective grounds:

> *1 (a). On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeals) erred in directing the Ld.AO for making disallowance u/s 14A r.w.r. 8D(2)(iii) of the Income ETax Act, 1961(the 'Act) by considering the investments in subsidiary company from whom dividend income was earned without appreciating that these shares were acquired as a result of amalgamation/merger wich does not require any outflow of cash and therefore required to be excluded while computing disallowance u/s 14A r.w.r. 8D(20(iii) and reasons assigned for doing so are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.*
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> *1 (b). On the facts and in the circumstances of the case and in law, the ld. Commissioner of Income Tax (Appeals) erred in not following the decision of the Hon'ble ITAT in appellants own case for the AY 2008-09, 2009-10 and 2011-12 whereby Hon'ble ITAT have held not to consider investments acquired other than cash for the purpose of computing disallowance u/r 8D(2)(iii) which is wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.*
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> *1 (c) On the facts and in the circumstances of the case and in law, the ld. Commissioner of Income Tax (Appeals) erred in not following the decisions of his ld. Predecessors in appellants own case of earlier years in A.Y. 2009-10, 2010-11, 2011-12 and 2012-13 and in his own decision for 2013-14, where the shares acquired/allotted as a result of mergers/demergers, which does not require any cash outflow, were excluded while computing the disallowances u/s 14A r.w.r. 8D(2) (iii) and not doing so is contrary to the principles of uniformity and consistency.*
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> *2. On the facts and in the circumstances of the case and in law, the ld. Commissioner of Income Tax (Appeals) erred in upholding the action of Ld. AO in disallowing Rs. 30,00,000/- being appellants claim as bad debts written off u/s 36(1) (vii) of the Act and reasons assigned for doing so are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under."*

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On the other hand, the revenue has preferred the present appeal by raising the following effective grounds:

1. *"On the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in directing that amounts to be taken for calculating the disallowance u/s 14A should be restricted to fresh investments made during the year for the purpose of computation as per Rule 8D(2)(iii) ignoring the fact that the CBDT circular no. 5/2014 dated 11.02.2014 does not mention that the disallowance u/s 14A of the IT Act should be restricted to fresh investments during the year for the purpose of computation as per Rule 8D(2)(iii).*
2. *On the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in directing that the amounts to be taken for calculating the disallowance u/s 14A should be restricted to investment in subsidiaries on which dividend income has been earned during the year for the purpose of computation as per Rule 8D(2) (iii) ignoring the fact that the CBDT circular no. 5/2014 dated 11.02.2014 does not mention that the disallowance u/s 14A of the IT Act should be restricted to investment in subsidiaries on which dividend income has been earned during the year for the purpose of computation as per Rule 8D(20(iii)."*

2. Ground No. 1(a) to 1(c) of the assessee's appeal and Ground No. 1 and 2 of the revenue's appeal pertain to the common issue regarding disallowance u/s 14A r.w.r. 8D(2)(iii) of the Income Tax Rules (Rules). Hence we deal with these grounds together for the sake of convenience. The Ld. counsel for the assessee submitted before us that the Ld. CIT(A) has wrongly directed the AO to determine the disallowance by taking into account the investments made in subsidiaries from where the assessee earned dividend/tax free income without appreciating that these shares were acquired as a result of amalgamation/merger which does not require any outflow of cash and therefore required to be excluded while computing disallowance u/s 14A read with rule 8D (2)(iii) of the Rules. The Ld. counsel further contended that the findings of the Ld.CIT (A) is contrary to the decision of the ITAT in assessee's

own case for the AY 2008-09, 2009-10 and 2011-12, whereby the Tribunal has directed the AO to exclude the shares acquired/allotted as a result of merger /demerger which does not require any cash outflow.

3. On the other hand, the contention of the revenue is that the Ld. CIT (A) has wrongly directed the AO to take the fresh investments made during the year for the purpose of computing disallowance as per Rule 8D (2)(iii) of the Rules. The Ld. DR submitted that the action of the Ld. CIT (A) is contrary to the CBDT Circular No. 5/2014, which does not mention that the disallowance u/s 14A of the Act should be restricted to fresh investments during the year for the purpose of computation as per rule 8D(2)(iii). The Ld. DR further contended that the Ld.CIT (A) has wrongly directed the AO to take the amounts for calculating the disallowance which generated exempt income.

4. We have heard the rival submissions and also perused the material on record in the light of the contentions of the parties. The Ld.CIT (A) has directed the AO to re-compute the disallowance u/s 14A r.w.r. 8D(2)(iii) of the Rules holding as under:-

> *"5.8 From the above, it can be concluded that even for strategic investments, if there are new acquisitions/disposals during the year, appropriate disallowance is required to be made u/s 14A. In the instant case, it is observed that the investments in Claridge Energy LLP has gone up to Rs. 80,96,044/- as against Rs. 52,30,880/- in the preceding year. Clearly in respect of this investment in Claridge Energy LLP, the assessee has incurred indirect expenss in the form of time and resources expended by the top management. The disallowance of indirect expenses in respect of this investment can be computed by including the average value of this investment while applying Rule 8D(2)(ii) which provides the formula for computation of indirect expenditure other than interest related to exempt income @ 0.5% of the average value of investments. Moreover, those investments in subsidiaries which have yielded exempt income of Rs. 4,45,280/- during the year are also required to be included while computing the disallowance u/s 14A r.w.r. 8D(2)(iii) as per the ratio of the decision of Hon'ble ITAT, Spl. Bench, Delhi in the case of Vireet Investments (82*

> *taxmann.com 415). The AO is directed to include these investments in subsidiaries also which have resulted in dividend income of Rs. 4,45,43,280/- while computing the disallowance u/s 14A r.w.r. 8D(2)(iii). The AO is directed to accordingly re-compute the disallowance u/s 14A r.w.r. 8D(2)(iii). Accordingly ground Nos 1 to 4 of the appeal are partly allowed."*

5. We find that the Ld. CIT (A) has directed the AO to include the investment made by the assessee in the subsidiaries which have yielded exempt income during the year relevant to the assessment year under consideration. The findings of the Ld. CIT (A) are in accordance with the ratio laid down by the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. v. Commissioner of Income Tax, New Delhi 402 ITR 640 (SC) in which the Hon'ble Court has held that dominant purpose for which investment into shares is made by assessee may not be relevant as section 14A applies irrespective of whether shares are held to gain control or as stock-in-trade and where shares are held as stock-in-trade, main purpose is to trade in those shares and earn profits there from and in process certain dividend is also earned which is tax exempt under section 10(34), the expenditure attributable to exempt dividend income will have to be apportioned to be disallowed under section 14A read with Rule 8D(2) of the Rules.

6. Since, the findings of the Ld. CIT (A) is in accordance with the law laid down by the Hon'ble Supreme Court in the case of Maxopp Investment (supra), we do not find any reason to interfere with the findings of the Ld. CIT (A). Hence, we uphold the findings of the Ld. CIT (A) and dismiss ground No. 1(a) to 1 (c) of appeal of the assessee. So far as the revenue's appeal is concerned, since we have upheld the findings of the Ld. CIT (A), we do not find merit in the contention of the revenue. Hence, we dismiss the revenue's appeal and direct the AO to compute the disallowance u/s 14A read with Rule 8D(2)(iii) of the Rules taking into consideration the entire investments made by the assessee during the previous year, including the investments made in subsidiary, which generate the exempt income. Therefore, we direct the AO to consider only those

investments which generated exempt income to calculate the disallowance u/s 14A read with Rule 8D(2)(iii).

7. Vide Ground No. 2 the assessee has challenged the action of the Ld.CIT (A) in upholding the action of AO in disallowing assessee's claim of bad debts written off u/s 36 (1) (vii) of the Act amounting to Rs. 30,00,000/-. The Ld. counsel submitted before us that the assessee rented out its property to M/s Shinrai Auto Services Ltd. from May 2004 onwards @ 15 lacs per month. However, since the actual possession was taken by M/s Sinarai Auto Services Pvt. Ltd. in July 2004, the lessee did not pay the lease rent for two months. However, in its return of income for the AY 2005-06 the assessee offered the lease rent for the said two months also. Since, the lessee did not pay the said amount, the assessee decided to write off the said amount bad debt. The assessee relying on the decision of the Hon'ble Supreme Court in the case of *TRF Ltd. 323 ITR 397* and CBDT Circular No. 12/2016 dated 30.05.2016 submitted that the action of the authorities below are contrary to the ratio of law laid down by the Hon'ble Supreme Court in the said case.

8. On the other hand, the Ld. DR relying on the findings of the authorities below submitted that the contention of the assessee that lease rent for the month of May and June is not recoverable is not plausible, therefore, there is no merit in the contention of the assessee.

9. We have gone through the relevant material on record in the light of the rival submissions of the parties. We notice that the lessee M/s Shinrai Auto Services has disputed the payment of lease rent for the said two months on the ground that it had taken possession only from July 2004 and not from May 2004 as per the agreement. Therefore, the assessee has decided to write off the said amount as bad debt. We further notice that the revenue has not challenged the contention of the assessee that the assessee had offered the lease rent for the disputed two months i.e. May and June 2004 in its return of income for the AY 2005-06. Under these circumstances, we find merit in the contention of the assessee. Hence, in our considered view, the case of the assessee is covered by the ratio laid down by the Hon'ble Supreme Court in the

case of TRF Ltd. (supra). Since, the findings of the Ld. CIT (A) are not in accordance with the settled principles of law laid down by the Hon'ble Supreme Court, allow ground No 2 of the assessee's appeal and we set aside the findings of the Ld. CIT(A). Accordingly, we direct the AO to allow the claim of the assessee.

In the result, appeal filed by the assessee is partly allowed and the revenue's appeal is dismissed.

Order pronounced in the open court on 29th October, 2019.

Sd/-	*Sd/-*
(S. RIFAUR RAHMAN)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 29/10/2019

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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,

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