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

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER
SHRI RAM LAL NEGI, JUDICIAL MEMBER AND

ITA No.2223/Mum/2014
Assessment Year: 2010-11

TATA CAPITAL LTD. One Forbes, Dr. B.V. Gandhi Marg, Fort, Mumbai, Maharashtra, 400001. **PAN: AADCP9147P**	Vs.	ACIT-2(3), Mumbai R.NO.552, 5th Floor, Aayakar Bhavan, Mumbai-400020.
(Assessee)		(Revenue)

&

ITA No.2178/Mum/2014
Assessment Year: 2010-11

DCIT-2(3), Mumbai	Vs.	TATA CAPITAL LTD. One Forbes, Dr. B.V. Gandhi Marg, Fort, Mumbai, Maharashtra, 400001. **PAN: AADCP9147P**
(Revenue)		(Assessee)

&

CO No.122/Mum/2015
(ITA No.2178/Mum/2014)
Assessment Year: 2010-11

TATA CAPITAL LTD. One Forbes, Dr. B.V. Gandhi Marg, Fort, Mumbai, Maharashtra, 400001. **PAN: AADCP9147P**	Vs.	DCIT-2(3), Mumbai
(Cross-Objector)		(Revenue)

&

ITA No.5615/Mum/2015
Assessment Year: 2011-12

TATA CAPITAL LTD. One Forbes, Dr. B.V. Gandhi Marg, Fort, Mumbai, Maharashtra, 400001. **PAN: AADCP9147P**	Vs.	ACIT-2(3), Mumbai R.NO.552, 5th Floor, Aayakar Bhavan, Mumbai-400020.
(Assessee)		(Revenue)

&

ITA No.5689/Mum/2015
Assessment Year: 2011-12

DCIT-2(3)(1), Mumbai	Vs.	TATA CAPITAL LTD. One Forbes, Dr. B.V. Gandhi Marg, Fort, Mumbai, Maharashtra, 400001. **PAN: AADCP9147P**
(Revenue)		(Assessee)

Present for:
Assessee by : Shri Niraj Sheth and Shri Jayesh Desai, ARs
Revenue by : Shri R. Manjunathan Swami, CIT-DR

Date of Hearing : 29.01.2020
Date of Pronouncement : 30.01.2020

O R D E R

Per Rajesh Kumar, Accountant Member:

The captioned four cross appeals have been preferred by the assessee and Revenue against the order dated 17.12.2013 relevant to assessment years 2010-11 and the order dated 29.09.2015 relevant to assessment years 2011-12 of the Commissioner of Income

Tax (Appeals) [hereinafter referred to as the CIT(A)] and CO in Assessment year 2010-11 by the assessee.

2. First we adjudicate ITA No.2223/Mum/2014 filed by the assessee. The Ground no.1 raised by the assessee is as under:

> *"(a) On the facts and the circumstances of case and in law, the Commissioner of Income Tax(Appeals)-6 ("CIT(A)") erred in upholding the action of the AO in disallowing an amount of Rs.4.91 crores u/s 14A of the Income Tax Act, 1961 ("the Act") r.w.r. 8D(iii) of the Income Tax Rules, 1962 ("the Rules") as expenditure incurred for earning tax free income of Rs.9.26 crores."*
>
> *b.*

3 The issue raised by the assessee in Ground No.1 is against the confirmation of disallowance of Rs.4.91 crores by the CIT(A) as made by the AO u/s 14A of the Act r.w.r. 8D(2)(iii) of the Income Tax Rules, 1962 by ignoring the fact that the assessee has suo motto disallowed a sum of Rs.61.57 lacs which was calculated at 20% of the salary of six specified employees associated with investment activities and equal percentage on overhead expenses. During the year, the assessee has earned exempt income by way of dividend of Rs.9,26,19,245/- and has also made suo motto disallowance of Rs.61,97,540/- towards expenses pertaining to earning of exempt income. Accordingly, the AO issued show-cause notice to the assessee as to why disallowance u/s 14A of the Act r.w.r. 8D of Rules should not be calculated as per the said Rule 8D. The assessee submitted before the AO that tax free investments were funded out of company's own funds and therefore disallowance of interest u/s 14A is not required to be made. The assessee also submitted that borrowings were used for giving loans and earning interest thereon. The assessee submitted that it had disallowed a reasonable amount

calculated as 20% of the salary and other overheads by placing reliance on the decision in the case of Reliance Utility & Power 313 ITR 340 (Bom-HC), CIT vs. Hero Cycle 323 ITR 158 (P&H), CIT vs. Gujarat Power Corporation Ltd. (ITA No.1587 of 2009) [Guj HC]. The reply of the assessee did not find favour with the AO and he calculated the disallowance u/s14A of the Act r.w. Rule 8D at Rs.72,63,00,000/- and after allowing the deduction of suo motto disallowance of Rs.61,97,540/-, disallowed Rs.72,01,02,460/- and added to the total income of the assessee. The disallowance as calculated by the AO comprised of Rs.67.72 Cr. on account of interest disallowance under Rule 8D(2)(ii) and Rs.4.91 Cr on account of administrative expenses under Rule 8D(2)(iii).

4. In the appellate proceedings, the Ld. CIT(A) partly allowed the appeal of the assessee deleting the disallowance made by the AO under Rule 8D(2)(ii) on the ground that the interest income of the assessee exceeds interest expenditure thus the assessee has no net interest expenditure and therefore no interest expenditure can be disallowed under Rule 8D(2)(ii) and also recording a finding of facts that borrowed funds were used for the purpose of earning taxable interest income and thus deleted the disallowance of Rs.67.72 Cr by following the decision of Morgan Stanley India Securities Pvt. Ltd. ITA No.5072/M/2005 and 6774/M/2008, Trade Apartment Ltd. ITA No.1277/Kol/2011, Karnavati Petrochem Pvt. Ltd. ITA No.2228/Ahd/2012 and Four Dimensions Securities(India) Ltd. vs. ACIT ITA No.6935/M/2011). However the disallowance made under Rule 8D(2)(iii) of Rs.4.91 Cr was sustained by observing that the suo motto disallowance of Rs.61.57 lacs is not sufficient in relation to

earning of exempt income so far as administrative expenses are concerned.

5. The assessee is in appeal challenging the sustaining of the disallowance made by the AO under Rule 8D(2)(iii) whereas the Revenue is in appeal against the deletion of disallowance under Rule 8D(2)(ii).

6. The Ld. AR vehemently submitted before us that the AO before applying section 14A of the Act r.w.r 8D(2)(iii) has not recorded the satisfaction as to how the suo motto disallowance of Rs.61,97,540/- is wrong having regard to the books of accounts maintained by the assessee. The Ld. AR by referring to para 3.3 of the assessment order submitted that the AO has made general observation only as regards the various expenses to be disallowed and no objective satisfaction has been recorded, therefore, provisions of section 14A r.w.r. 8D(2)(iii) of the Rules have wrongly been invoked. The ld. AR submitted that general satisfaction is not valid sufficient and the AO is required to be record objective satisfaction after having seen the books of accounts of the assessee. The ld. AR in defence of his argument referred to the decision of Hon'ble Delhi High Court in the case of H.T. Media Ltd. v. PCIT [2017] 85 taxmann.com 113 (Delhi) and therefore prayed that the addition as confirmed by the ld CIT(A) as made by the AO under Rule 8D(2)(iii) may be deleted..

7. The ld. DR on the other hand relied on the order of AO and CIT(A) by submitting that disallowance under Rule 8D(2)(iii) was rightly made by the AO and may kindly be confirmed.

8. After hearing both the parties and perusing the materials available on record, we observe that in this case undisputedly the AO has recorded general satisfaction as is apparent from the perusal of the assessment order particularly para 3.3 and thus AO has failed to record any objective satisfaction after having considered the books of accounts and also point out as to how the suo motto disallowance made by the assessee is wrong by referring to the books of accounts of the assessee. Therefore, in our opinion, the AO has failed to meet the conditions precedent for invocation of provisions u/s 14A r.w. Rule 8D. The case is squarely covered by the decision of Hon'ble Delhi High Court in the case of H.T. Media Ltd. (supra) wherein the relevant paragraphs are reproduced below:

> *"30. Rule 8 D (1) states more or less what Section 14 A (2) of the Act states. It requires the AO to first examine the accounts of the Assessee and then record that he is not satisfied with (a) the correctness of the Assessee's claim of expenditure or (b) the claim made by the assessee that no expenditure has been incurred. Unless this stage is crossed i.e. the stage of the AO recording that he is not satisfied with the clam of the Assessee in the manner indicated i.e. after examining the Assessee's accounts, the question of applying the formula under Rule 8D (2) does not arise. That this is a mandatory pre-requisite for applying Rule 8D (2) is fairly well-settled.*
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> *31.....*
>
> *32. The question regarding the failure of the AO to record his dissatisfaction with the correctness of the Assessee's claim regarding administrative expenses of Rs. 3 lakhs arises in ITA 349 of 2015. Mr Raghvendra Singh is not entirely right in his submission that there is no question framed about the failure by the AO to record his satisfaction. In ITA 349 of 2015, the question framed by this Court by the order dated 15th October 2015 is in fact in two parts: viz., (i) Whether the AO recorded a proper satisfaction in terms of Section 14A (2) and Rule 8 (D) of the Rules and (ii) in calculating the disallowance at 0.5% of average value of investments as per clause (iii) of Rule 8 D (2) of the Rules?*
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> *33. The contention of Mr. Singh is that if there was a valid recording of satisfaction by the AO as required by Rule 8D (1), then there was no option available to the AO other than to apply Rule 8D (2) of the Rules. Therefore, even according to the Revenue, the applicability of Rule 8D (2) hinges on the*

recording of the AO in terms of Rule 8D (1) that he was not satisfied with the Assessee's claim regarding expenditure incurred to earn the exempt income.

34. The Assessee had explained that Rs. 3 lakhs was being disallowed voluntarily as an "expenditure which could be attributable for earning the said income." The Assessee explained that the disallowance had been determined on the basis of cost of finance department in the ratio of exempt income to total turnover. On that basis the disallowance in AY 2005-06 was upheld by CIT (A) at Rs. 1 lakh. The disallowance for this AY was worked out as Rs. 1,42,404/- and since the Assessee had already made a disallowance of Rs. 3 Lacs, no further disallowance was called for.

35. In order to disallow this expense the AO had to first record, on examining the accounts, that he was not satisfied with the correctness of the Assessee's claim of Rs. 3 lakhs being the administrative expenses. This was mandatorily necessitated by Section 14 A (2) of the Act read with Rule 8D (1) (a) of the Rules."

7. It is thus clear by the decision of Hon'ble Delhi High Court that AO is required to examine the books of accounts first and record his satisfaction as to how the disallowance made by the assessee, is wrong as per the mandate of section of 14A(2) of the Act r.w. Rule 8D(1)(a) of the Rules. Accordingly, we are not in agreement that the conclusion made by the ld. CIT(A) and the order of ld. CIT(A) on this issue cannot be sustained. We therefore set aside the order of CIT(A) and direct the AO to delete the disallowance made under Rule 8D(2)(iii).

8. In the result, the appeal of the assessee is allowed.

9. Next comes to ITA No.2178/Mum/2014 filed by the Revenue. The issue raised in Ground No.1 is against the deletion of disallowance by CIT(A) made by the AO under Rule 8D(2)(ii) of the Rules.

10. We have already discussed the facts qua this ground in the appeal of the assessee (supra). In this case, we find that ld. CIT(A)

has recorded the findings of the fact that the assessee's interest after setting off the interest expenditure with interest income therefore no interest expenditure is called for disallowance. Besides the ld. CIT(A) has recorded a finding of fact that borrowed funds were raised for advancing loans and earning taxable interest income. Moreover we have decided that AO has not recorded any objective satisfaction before invoking provisions of section 14A r.w.r. 8D and on this count of also the addition will not survive. Accordingly we dismiss the Ground No.1 of the Revenue.

11. The issue in Ground No.2 by the Revenue is against the order of ld. CIT(A) allowing the professional fees paid to Mr. Arata Nambu without appreciating the fact that the assessee could not furnish relevant documents in support of his claim before the AO.

12. At the outset, the ld. counsel for the assessee submitted that the similar payments were made to Mr. Arata Nambu in F.Y 2008-09 relevant to A.Y 2009-10 and Coordinate Bench of the Tribunal in ITA No.1098/Mum/2013 by order dated 20.09.2019 has dismissed the appeal of the Revenue by upholding the order of ld. CIT(A) wherein the ld. CIT(A) has deleted the similar disallowance. The ld. AR therefore prayed that the ground raised by the Revenue may kindly be dismissed in the view of the issue being identical and covered by the decision of the Coordinate Bench as stated above in assessee's own case. The ld. DR on the other hand relied on the ground sof appeal.

13. After hearing both the parties and perusing the materials available on record, we observe that the identical payment was made

by the assessee in the F.Y 2008-09 which was disallowed by the AO. In the appellate proceedings, the ld. CIT(A) allowed the appeal of the assessee and Revenue came in appeal before the Tribunal against the deletion of the said payment to Mr. Arata Nambu by ld. CIT(A). The Hon'ble Coordinate Bench dismissed the appeal of the Revenue in ITA No.1098/Mum/2013 A.Y 2009-10. The relevant extracted portion is reproduced as under:

> *"15. We have given a thoughtful consideration to the issue before us in the backdrop of the contentions advanced by the authorized representatives for both the parties. As regards the disallowance of the professional fees of Rs.43 lacs claimed by the assessee to have aid Mr. Arata Nambu, an unrelated Japanese citizen, is concerned, we find substantial force in the claim of the Id. A.R that the said payments were made to him for the services which were rendered by him as a business advisor. As is discernible from the documentary evidence to which our attention was drawn by the Id. AR, it can safely be gathered, that the aforesaid person had rendered his services as an overseas advisor in Japan, and had explored opportunities in the overseas market for the assessee. We find substantial force in the claim of the Id. AR that the payments made to the said person were for the services which were rendered by him viz. creating awareness about the assessee company and its products amongst the foreign parties, supporting it in its marketing efforts, arranging meetings with Japanese business contacts, and also assisting in translation and supplying of information. We find that the aforesaid documentary evidence which had been relied upon by the ld. AR to support the aforesaid claim of expenses debited by the assessee in its profit and loss account for the year under consideration, had neither been dislodged by the lower authorities, nor anything proving to the contrary had been placed on our record by the ld. LD.DR in the course of the hearing of the appeal. Accordingly, finding no force in the claim of the Revenue that the CIT(A) was in error in deleting the disallowance of the consultancy charges of Rs.43 lacs that was paid by the assessee company to Mr. Arata Nambu, we uphold his order to the said extent."*

14. We therefore respectfully following the order of Coordinate Bench uphold the order of ld. CIT(A) on this issue by dismissing the Ground No.2 of the Revenue.

15. Ground No.3 is against the order of ld. CIT(A) setting aside the issue qua the payment of commission of Rs.7,61,000/-.

16. The facts in brief are that the assessee has made payment of Rs.7,61,000/- to Galaxy Automobiles P. Ltd. on account of commission. We notice that the similar issue has decided by the CIT(A) in A.Y 2009-10 in favour of the assessee. We further note that ld. CIT(A) has only concluded that the issue is similar to the facts as in A.Y 2009-10, therefore deduction was allowable. The ld CIT(A) directed the assessee to produce relevant supporting evidences before the AO and the AO to allow the claim after verifying the evidences produced by the assessee.

17. After hearing both the parties and perusing the materials available on record, we note that this is not a case of set aside as has been contended by the Revenue as the ld. CIT(A) has recorded finding of facts that the issue in hand is identical to one as decided by CIT(A) in A.Y 2009-10 and is allowable during the year also but directed the AO to verify the evidences which the assessee may produce and allow the claim. Therefore we do not find any merit in the ground of the Revenue. Moreover, the issue has been already decided by the Coordinate Bench of this Tribunal in ITA No.1098/Mum/2013 in A.Y 2009-10 by dismissing the ground raised by the Revenue and upholding the order of CIT(A). The relevant para is reproduced below:

> *"16. We shall now advert to the contention advanced by the Id. AR, that the CIT(A) was in error in setting aside the issue pertaining to the disallowance of commission to Galaxy Automobile Pvt. Ltd. and IKON Solutions to the file of the A.O, failing to appreciate that the power to 'set aside' a matter as was vested with him under Sec.251 of the Act, were no more available w.e.f 01.06.2001. We have given a thoughtful consideration to the aforesaid contention advanced by*

the Id. D.R, and are unable to persuade ourselves to subscribe to his aforesaid claim in the backdrop of the facts involved in the case before us. Admittedly, the CIT(A) up to 31.05.2001 was inter alia vested with the power to 'set aside' the matter to the file of the AO. However, the legislature in all its wisdom, in order to avoid prolonged litigations, had vide the Finance Act, 2001, w.e.f 01.06.2001 withdrawn the power of the CIT(A) to 'set aside' the matter to the file of the AO for the purpose of framing of a fresh assessment. As is discernible from the facts involved in the case before us, we find, that the CIT(A) had after perusing the documentary evidence which were placed on his record by the assessee in the course of the appellate proceedings viz. copy of agreement, form 16A, copy of ledger account of the aforesaid parties, copy of letter received from M/s Galaxy Toyota, New Delhi dated 26.10.2011 in response to notice that was issued by the AO under Sec.133(6) of the Act, along with the copy of the certificate incorporation of the said company viz. Galaxy Toyota, and also the copy of passport, driving licence, PAN Card, etc. of its directors, had after considering the contention of the assessee that sufficient opportunity was not provided by the AO to furnish the aforesaid documents, had thus, for the limited purpose for verifying the said documents restored the matter to the file of the AO, with a specific direction that the claim of the assessee be allowed in case the same was found to be in order. In our considered view, the aforesaid restoring of the matter by the CIT(A) to the file of the AO for a limited purpose of allowing the claim of deduction raised by the assessee after verifying the documents, cannot be placed at par with 'setting aside' of the matter for framing a fresh assessment to the file of the AO. Accordingly, we are unable to persuade ourselves to subscribe to the aforesaid claim of the revenue, which is thus rejected. The ***Ground of appeal No. 3*** *is dismissed.*

18. We therefore respectfully following the decision of the Coordinate Bench dismiss the ground no.3 of the Revenue.

19. Now, we come to C.O No.122/Mum/2015 filed by the assessee which is in support of the order of CIT(A). Since we have dismissed the appeal of the Revenue on this identical issue, the C.O filed by the assessee becomes infructuous and hence dismiss.

20. Now coming to ITA No.5615/Mum/2015 filed by the assessee. The issue involved in this appeal is identical as decided by us above in ITA No.2223/Mum/2014 wherein we have allowed the appeal of

the assessee. Therefore, our finding in ITA No.2223/Mum/2014 will, mutatis mutandis, apply to this appeal as well. Accordingly, we set aside the order of CIT(A) and allow the appeal of the assessee.

21. Now we come to ITA No.5689/Mum/2015 filed by the Revenue. The issue involved in this appeal is identical to issue raised in ground no.1 in ITA No.2178/Mum/2014 which is dismissed by us . Therefore, our finding in ITA No.2178/Mum/2014 will, mutatis mutandis, apply to this appeal as well. Accordingly, we dismiss the appeal of the Revenue.

22. In the result, appeals filed by the assessee are allowed and C.O and appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 30.01.2020.

Sd/-	**Sd/-**
(Ram Lal Negi)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 30.01.2020.

RS, Sr. PS

Copy to: The Appellant
The Respondent

The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.