

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

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3210/MUM/2013
Assessment Year: 2008-09.**

Godavati Corporation P.Ltd., Industry House, 159, Churchgate Reclamation, Mumbai-400 020. PAN AAACG1850D.	Vs.	D.C.I.T.-1(1), Mumbai 5 th Floor, Aayakar Bhavan M.K.Road, Mumbai-400020
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Appellant.

Respondent.

Assessee by	:	Ms. Arati Vissanji, AR
Revenue by	:	Shri V.Vinod Kumar, DR

Date of Hearing	:	06.03.2020
Date of pronouncement	:	16.03.2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2008-09. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-1, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

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

1. The learned authorities below erred in determining and disallowing expenditure incurred in relation to earning of exempt income under section 14A by applying the formulae prescribed under Rule 8D(2) without appreciating and considering all the material facts and circumstances of the case.
2. The learned authorities below erred in not excluding expenditure by way of interest which is directly attributable to any particular income or receipt while working out the disallowance under Rule 8D(2)(ii) without

appreciating and considering all the material facts and circumstances of the case.

3. The assessee further filed an application for admission of additional ground of appeal which is produced below:

“The amount disallowed u/s 14A cannot be considered for working out the taxable book profit u/s 115JB”.

As the additional ground filed by the assessee is closely linked with the original grounds of appeal, we admit it for adjudication.

4. Briefly stated the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2008-09 on 24.09.2008 declaring total income at Rs. Nil. The assessee is a non banking finance company and also engaged in power generation. It had shown income of Rs.3,05,25,201/- u/s 115JB of the Act.

The dispute here is the disallowance of Rs.1,17,78,060/- made by the AO u/s 14A read with Rule 8D of the Income Tax Rules, 1962 (the Rules). During the year under consideration, the assessee had earned tax-free dividend income of Rs.39,28,937/- and long term capital gains (LTCG) of Rs.1,36,83,235/- and claimed it as exempt. In response to queries raised by the AO during the course of assessment proceedings to explain the implications of section 14A, the assessee filed a reply dated 16.09.2010 stating that they had determined the total expenditure, which has been incurred in relation to the above dividend income of Rs.39,28,937/- at Rs.1,17,187/-. However, the AO was not convinced with the said explanation of the assessee and by following the judgement of the Hon'ble Bombay High Court in *Godrej and Boyce Mfg. Co. Ltd.* made a disallowance of Rs.1,17,78,060/-.

5. Aggrieved by the order of the AO the assessee filed an appeal before the learned CIT(A). We find that *vide* order dated 01.02.2013, the learned CIT(A) directed the AO to calculate the disallowance strictly in accordance with Rule 8D.

6. Before us the learned counsel for the assessee submits that if interest earned exceeds interest paid, no interest can be disallowed. It is stated that in the present case, the interest received was Rs.2.63 crores and interest paid was Rs.83.96 lakhs and, therefore, no interest can be disallowed. In this regard reliance is placed by her on the decision in *Dy.CIT vs. Trade Apartment Ltd.* ITA No. 1227/Kol/2011-A.Y. 2008-09; *ITO vs. Karnavati Petrochem Pvt. Ltd.* ITA No.2228/Ahd/2012- A.Y. 2008-09; *Tata Sons Ltd.* ITA No.3192/M/13 & 3508/M/2013- A.Y. 2008-09; *CIT vs. Jubilant Enterprises Pvt. Ltd.* (Bom.HC).

Also it is stated that if own funds exceeds the investment made, then no disallowance of interest u/s 14A read with Rule 8D(2) be made. In this regard reliance is placed by the learned counsel on the decision in *HDFC Bank Ltd.* 383 ITR 529 at 542 (Bom. HC) ; *CIT vs. Edelweiss Securities Pvt. Ltd.* (Bom.HC); *Pr. CIT vs. Premier Finance & Trading Co. Ltd.* (2019) 104 taxmann.com 97 (Bom.HC); *Pr. CIT vs. Ashok apparels (P) Ltd.* (2019) 106 taxmann.com 63 (Bom.HC)

Further it is stated that share application moneys not capable of yielding exempt income and thus are to be excluded from the working of average value of investments. In this regard reliance is placed on the decision in the case of *Rainy Investments (P) Ltd. vs. ACIT* (2013) 30 taxmann.com 169 (Mum-Trib).

Finally it is stated that investments that have not yielded exempt income during the year are to be excluded from working out disallowance

under Rule 8D(2)(iii) in view of the decision in *ACIT vs. J.B. Chemicals and Pharmaceutical Ltd.* 199 TTJ 600 (Mum).

7. On the other hand, the learned DR supports the order passed by the learned CIT(A) in view of the decision of the Hon'ble Bombay High Court in *Godrej & Boyce* and explains that even if the assessee had own funds out of which the investments were made which yielded tax-free income, still disallowance would have to be made.

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

In *Trade Apartment Ltd.* (supra), it is held that once there is no net interest expenditure, upon setting off interest credited to profit and loss account, no part of interest debited can be disallowed as attributable to earning tax free dividend.

In *Jubilant Enterprises P. Ltd.* (supra), one of the questions of law before the Hon'ble High Court was the following :

“Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the disallowance made under Section 14A read with Rule 8D on the basis of the netting of interest relying upon the decision of its Coordinate benches in Paresh K. Shah (ITA No.8214/M/2011) and M/s Trade Apartments Ltd.?”

The Hon'ble High Court held that:

“(a) The impugned order of the Tribunal dismissed the Revenue's appeal holding that the disallowance of interest under Section 14A of the Act should be made with reference to net interest loan This was by following the decision of its Coordinate bench at Mumbai in the case of Paresh K. Shah (ITA no.8214/M/2011) and the decision of its Calcutta Bench in Trade Apartments Ltd. (ITA no. 1277/Kol/2011). Mr. Kotangale, the learned counsel appearing for the Revenue is unable to point out whether the decision of the Tribunal in Paresh K. Shah (supra) has been challenged in appeal. This in view of absence of any instructions from the officers of the Revenue. In the above view, one has to proceed on the basis that the decision of the Mumbai Bench of the Tribunal in Paresh K. Shah (supra) has been accepted by the Revenue. In any case, no distinguishing features in facts or law has been pointed to us from those in the

case of Paresh K. Shah (supra) which would justify the disallowance on the gross interest paid and not on net interest.

(b) In the above view, question no.(i) as proposed does not give rise to any substantial question of law. Thus not entertained.”

8.1 In *HDFC Bank Ltd.* (supra), the decision in the case of *CIT vs. Reliance Utilities and Power Ltd.* (2009) 313 ITR 340 (Bom) was followed, wherein it was held that where both interest free funds and interest bearing funds are available and the interest free funds are more than the investments made, the presumption is that the investment in the tax-free securities would have been made out of the interest-free funds available with the assessee. Though the decision in *Reliance Utilities and Power Ltd.* (supra) was rendered in the context of section 36(1)(iii) of the Act, it was consciously applied by the Hon'ble Bombay High Court while interpreting section 14A of the Act in *HDFC Bank Ltd.* (2014) 366 ITR 505 (Bom).

8.2 In *Rainy Investments (P) Ltd.* (supra) it is clarified that share application money being incapable of yielding any tax free income, same would have to be excluded in working out disallowance under Rule 8D.

In *ACIT vs. Vireet Investment (P) Ltd.* (2017) 82 taxmann.com 415 (Delhi Trib) (SB), it is held that only those investments are to be considered for computing average value of investment which yielded exempt income during the year.

9. We are of the considered view that the ratio laid down in the decisions mentioned at para 8, 8.1 and 8.2 herein before is squarely applicable to the facts of the case. Therefore, we set aside the order of the learned CIT(A) on the above issues and restore the matter to the file of the AO to make a *denovo* order by following the ratio laid down in the decisions mentioned at para 8, 8.1 and 8.2 hereinabove. We direct the assessee to file the relevant documents/evidence before the AO. Needless

to say, the AO would give reasonable opportunity of being heard to the assessee before finalising the order. Thus the first and second ground of appeal are allowed for statistical purposes.

10. Now we turn to the additional ground of appeal filed by the assessee. In *Vireet Investment (P) Ltd.*(supra) it is held that computation under clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to computation as contemplated u/s 14A read with Rule 8D.

Following the ratio laid down in the above decision of the Special Bench of the Tribunal, we delete the addition of Rs.1,17,78,060/- made by the AO to book profit u/s 14A read with Rule 8D and allow the additional ground of appeal.

11. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open Court on 16/03/2020.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER.

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

Mumbai;
Dated: 16/03/2020
Wakode, 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,

(Dy./Asstt. Registrar)
ITAT, Mumbai