

IN THE INCOME TAX APPELLATE TRIBUNAL "K", BENCH MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
&
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
IT(TP)A No.3210/Mum/2017
(Assessment Year: 2011-12)

Doha Bank QSC, India branches (Successors to HSBC Bank Oman S.A.O.G., India branches)	Vs.	DCIT(International Transaction)-2(2)(2) 17 th Floor, Air India Building, Nariman Point Mumbai-400 021
Sakhar Bhavan, Ground Floor, Plot No-230 Block NO III, Backbay Reclamation, Nariman Point Mumbai-400 021		
PAN/GIR No.AAFCD3506L		
Appellant)	..	Respondent)

Assessee by	Shri Niraj Sheth, AR
Revenue by	Shri Anand Mohan, CIT-DR
Date of Hearing	30/07/2020
Date of Pronouncement	05/08/2020

आदेश / ORDER

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against the order of the Ld. Commissioner of Income Tax (Appeals)-56, Mumbai, dated 31/01/2017 and it pertains to Assessment Year 2011-12.

2. The assessee has raised the following grounds of appeal:-

Re. Relief No. 1

The Commissioner of Income-tax (Appeals)-56, Mumbai [hereinafter referred to as "the CIT(A)"] erred in holding that provisions of section 14A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") are applicable with respect to interest received by the branch of the

appellants from its HO having failed to appreciate that interest received from HO is not exempt income.

2. Without prejudice to (1) above, the CIT(A) erred in not appreciating that since the bank had not incurred any expenditure for the purpose of earning the interest amount, provisions of section 14A are not applicable.

3. Without prejudice to ground nos. 1 and 2, the CIT(A) erred in upholding the action of AO of applying the provisions of section 14A r.w. Rule 8D of the Act not appreciating that the said provisions can be invoked only if the AO is not satisfied with the correctness of the claim of the appellants in respect of such expenditure in relation to such income.

Re. Relief No. 2

4. The CIT(A) erred in upholding the action of the AO that transfer pricing provisions are applicable for transactions between the branch and its HO overseas branches having failed to appreciate that Indian branch and the head office are one and the same persons and not separate independent enterprises.

Re. Relief No. 3

5. The CIT(A) erred in upholding the action of the AO in accepting the adjustment of Rs.26,65,783 made by the TPO on interest paid by the Indian branch to its HO having failed to appreciate the fact that transaction entered into by the appellants with its HO are at arm's length.

3. The brief facts of the case are that the assessee is an Indian branch of M/s. HSBC Bank Oman S.A.O.G (earlier known as Oman International Bank S.A.O.G) registered in Oman. It is engaged in banking activities. The assessee is operating in India through its PE (Permanent Establishment) and thus, the Head Office (HO) becomes the AE of the branch offices in India. In this case, a draft assessment order u/s 144C(1) r.w.s 143(3) of the Act, 1961 was passed on 25/03/2015. In the draft assessment order, the Ld. AO has proposed adjustment of Rs.26,65,783/- towards Arm's Length Price (ALP) of interest on borrowing from head office. It is seen from the records that the assessee has neither, filed any objections before the Ld. DRP, nor has intimated the Ld. AO about the

acceptance of variation in draft assessment order, within the period specified in sub-section (2) of section 144C of the I.T.Act, 1961. Therefore, the Ld. AO has passed final assessment order on 29/05/2015 u/s 143(3) r.w.s. 144C(3) of the I.T.Act, 1961 and determined total income at Rs. 'Nil' after making additions towards TP adjustment as suggested by the Ld.TPO and additions towards disallowances u/s 14A r.w.Rule 8D of I.T.Rules, 1962 amounting to Rs.88,551/-.

4. Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has challenged additions made by the Ld. AO towards TP Adjustment of Rs.26,65,783/- made on interest paid by the Indian branch to its head office and disallowance of expenditure u/s 14A of the I.T.Act, 1961. The Ld.CIT(A) for the reasons recorded in its appellate order dated 31/01/2017, upheld additions made by the Ld. AO towards TP Adjustment on interest payment to head office and also, disallowances u/s 14A r.w.Rule 8D of I.T.Rules, 1962. Aggrieved by the Ld.CIT (A) order, the assessee is in appeal before us.

5. At the time of hearing, the Ld. AR for the assessee submitted that ground No.1 taken by the assessee challenging applicability of provisions of section 14A of the I.T.Act, 1961 towards interest received by the branch office from its head office is not exempt income, consequently, provisions of section 14A has no application is decided against the assessee by the ITAT for earlier years and hence, he do not want to press the ground. Therefore, the ground taken by the assessee challenging applicability of provisions of

section 14A on interest received from head office is decided against the assessee by following the order of the ITAT in assessee own case for AY 2004-05 & 2005-06. Further, the Ld. AR for the assessee, at the time of hearing submitted that he do not wish to press ground No.4 & 5 challenging upward adjustment made by the TPO, an interest paid by the Indian branch to its head office and therefore, ground NO.4 and 5 of the assessee are dismissed as not pressed.

6. The next and final issue that came up for our consideration from ground No.2 & 3 of assessee appeal is disallowances u/s 14A of the Act, r.w.Rule 8D(2) of I.T. Rules, 1962. The Ld. AO has disallowed an amount of Rs.88,551/- towards interest expenditure under Rule 8D(2)(ii) and other expenses @0.5% of average value of investments under Rule 8D(2)(iii) of I.T.Rules, 1962.

7. The Ld. AR for the assessee submitted that the Ld.CIT(A) has erred in not appreciating that since, the bank had not incurred any expenditure for the purpose of earning interest amount, provisions of section 14A are not applicable. The Ld. AR, further submitted that if at all provisions of section 14A is applicable, even otherwise, there could not be any disallowances under Rule 8D(2)(ii) towards interest expenditure, because the assessee has sufficient own funds, which is in excess of investments considered by the Ld. AO for disallowance of interest expenditure. The Ld. AR, further submitted that as regards disallowances of other expenses under Rule 8D(2)(iii) of I.T.Rules, 1962, a reasonable amount of 1% to 2% of total exempt income may be disallowed. He, further, submitted that in any case total disallowances worked out by the Ld. AO shall not exceed exempt income earned by the assessee and in this

regard, he relied upon various judicial precedents. The Ld. AR for the assessee has also challenged the disallowances worked out by the Ld. AO, on the ground that the Ld. AO has invoked provisions of section 14A without recording any satisfaction as required under section 14A(2) and hence, in absence of any satisfaction, the disallowances worked out by the Ld. AO cannot survive in the eyes of law.

8. The Ld. DR, on the other hand strongly supporting order of the Ld.CIT(A) submitted that from AY 2008-09 onwards, application of provisions of section 14A is mandatory, in the case, where the assessee earned exempt income and hence, there is no merit in arguments of the assessee that adhoc disallowances of 1% to 2% of total exempt income may be disallowed and is opposed to the settled position of law.

9. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. As regards, satisfaction issue, we find that the question of recording satisfaction comes into play only, when the assessee has made suo-moto disallowance u/s 14A, but such disallowances has not been accepted by the Ld. AO. In such eventuality, the Ld. AO has to record clear satisfaction as required u/s 14A(2) of the Act, having regard to books of accounts of the assessee that suo-moto disallowances computed by the assessee is incorrect. In case, there is no suo-moto disallowances from the assessee, then the requirement of recording satisfaction as required under law does not arise and the Ld. AO can invoke provisions of section 14A of the Act, with reference to Rule 8D of I.T. Rules, 1962 to compute

disallowances of expenditure in relation to exempt income. This legal position is supported by the ratio laid down by Hon'ble Supreme Court in case of Maxopp Investments Ltd vs. CIT(2018) 402 ITR 640(SC). In this case, it is very clear from the assessment order that there are no suo- moto disallowances from the assessee and when, this was brought to the notice of the Id. AR for the assessee, the assessee stated that there is no application of section 14A of the Act, for interest income earned from head office, but not explained how provisions of Rule 8D are not applicable. The Ld. AO, on the basis of information furnished by the assessee has noted that the explanation furnished by the assessee is not acceptable. From the above, it is very clear that the findings recorded by the Ld. AO is sufficient and a clear indication of his compliance of the procedure prescribed u/s 14A(2) and hence, we are of the considered view that there is no merit in argument taken by the Ld. AR for the assessee regarding satisfaction as required u/s 14A(2) of the I.T.Act, 1961. Hence, an argument of Id. AR for the assessee is rejected.

10. Coming back to disallowances quantified by the Ld. AO u/s 14A of the I.T.Act, 1961. As regards interest disallowances, it is a settled position of law that only net interest expenditure needs to be considered for computing disallowances u/s 14A. This principle is supported by the decision of Hon'ble Bombay High court, in the case of CIT vs Jubilant Enterprises Pvt.Ltd in ITA No.1512/2014. Therefore, we direct the Ld. AO to consider net interest expenditure for the purpose of working out disallowances of interest under Rule 8D(2)(ii) of I.T.Rules, 1962. As regards other expenditure, although the assessee has requested for disallowances of 1% to 2% of exempt income, but from AY 2008-09 onwards disallowances contemplated

u/s 14A shall be computed in accordance with Rule 8D, where the procedure has been laid down for determination of disallowances of expenditure and this principle is supported by the decision of Hon'ble Bombay High court in the case of CIT vs Godrej and Boyce Manufacturing Co.Ltd. (2010) 328 ITR 81(Bombay). Therefore, we are of the considered view that there is no merit in arguments taken by the assessee and hence, we are inclined to uphold the computation of other expenses as per Rule 8D(2)(iii) of I.T.Rules, 1962. However, we further noted that although, the assessee exempt income is at Rs.9,051/-, but the Id. AO has determined the disallowances of Rs.88,551/-, which is more than amount of exempt income, which cannot be the case. It is a settled principle of law that disallowances of expenditure u/s 14A shall not shallow entire exempt income of the assessee. In other words, the disallowances computed u/s 14A cannot exceed exempt income earned for the year under consideration as held by the Hon'ble Delhi High court, in the case of JCIT vs Joint Investments Pvt.Ltd (2015) 372 ITR 694 and Cheminvest Ltd. Vs CIT (378 ITR 33 (Del). Therefore, considering the facts and circumstances of this case and by following the case laws discussed herein above, we direct the Ld. AO to restrict disallowances of expenditure computed u/s 14A of the Act, to the extent of exempt income of the assessee for the year under consideration.

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

Order pronounced in the open court on this: 05/08/2020

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated: 05/08/2020
Thirumalesh 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.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai