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

BEFORE SHRI PRAMOD KUMAR, VP AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.518/Mum/2019
(**निर्धारण वर्ष** / Assessment Year: 2013-14)

DCIT 5(2)(1) R. No.525, Aayakar Bhawan, M.K. Rd, Mumbai-400020.	**बनाम**/ Vs.	JSW Power Trading Co. Ltd. 5A, Jindal Mansion, Dr. G. Deshmukh Marg, Peddar Road, Mumbai-400026
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCJ5740L		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Shri Padma Ram Mirdha (DR)
Assessee by:	Shri Gaurav Kabra (AR)

सुनवाई की तारीख / Date of Hearing: 06/02/2020
घोषणा की तारीख /Date of Pronouncement: 06/07/2020

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 03.10.2018 passed by the Commissioner of Income Tax (Appeals) -10, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2013-14.

2. The revenue has raised the following grounds: -

> *" 1. "On the facts and in the circumstances of the case and in law, the CIT(A) was erred in deleting the disallowance u/s 14A r.w. Rule 8D(2)(ii) without appreciating that the assessee failed to establish the nexus between that interest free funds with the investment resulting in exempt income and therefore the*

assessing officer correctly made the disallowance u/s 14A r. w. Rule 8D(2) (iii) Act 1961"

2. *"On the facts and in the circumstances of the case and in law, the CIT(A) was erred in restricting the disallowance u/s 14A r. w. Rule 8D(2)(iii) to 5% of the dividend income without appreciating that the assessee could not justify the disallowance made by it suo moto in computation of income and therefore the assessing officer correctly made the disallowance u/s 14A r. w. Rule 8D (2)(iii) of the I.T Act 1961"*

3. *"On the facts and in the circumstances of the case and in law, the CIT('A) was erred in deleting the disallowance u/s 14A r.w. Rule 8D (2)(ii) without appreciating that as per clause 9 to Explain I to section 2 15J8, the assessing officer was required to disallow the expenses related to earning of exempt income and therefore the assessing officer correctly made the disallowance u/s 14A r.w. Rule 8D(2)(iii) of the I T Act 1961"*

4. *The appellant prays that the order of the Ld. CIT (A) he set aside and the order of the AO be restored.*

5. *The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary."*

3. The brief facts of the case are that the assessee filed its return of income on 27.11.2013 declaring total income to the tune of Rs.17,19,57,570/- for the A.Y.2013-14. The case was selected for scrutiny under CASS. Notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee company was engaged in the business of Infrastructure and Port Services. During the year under consideration, the assessee earned the dividend income in sum of Rs.7,20,60,369/- against which assessee company had disallowed a sum of Rs.1,27,335/ u/s 14A r.w. Rule 8D. The assessee has also disallowed the Demat charges at Rs.5,618/- which was directly related to the share investment. The assessee company has submitted that 1% of expenses were treated as income but the AO has applied the provisions of Section 14A

r.w. Rule 8D(2)(iii) and assessed the expenditure to earn the exempt income in sum of Rs.6,22,09,078/-. After deducting the expenses shown by the assessee in sum of Rs.127335/-, the total expenditure to earn the exempt income was assessed in sum of Rs.6,20,81,743/-. The AO also disallowed the said amount while computing of books of profit u/s 115JB of the Act. The income of the assessee was assessed in sum of Rs.70211794/-. The book profit was assessed to the tune of Rs.4,31,98,891/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who partly allowed the claim of the assessee, therefore, the revenue has filed the present appeal before us.

ISSUE Nos. 1 & 2

4. Under these issues the revenue has challenged the partly allowance of the claim in view of the provisions of Section 14A r.w. Rule 8D(2) and Rule 8D(2)(iii). The Ld. Representative of the revenue has argued that the CIT(A) has wrongly allowed the claim of the assessee, therefore, the finding of the CIT(A) is not justifiable and is liable to be set aside. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. Before going further, we deem it necessary to advert the finding of the CIT(A) on record.:-

> *''6.3.1 I have considered the submission of the appellant, carefully gone through the order of the AO, perused the material on record, and referred to the case laws relied upon by the appellant and the AO.*
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> *6.3.2 it is beyond any doubt that the provisions of section 14A intend to disallow expenditure incurred in relation to income not includible in the total income of the appellant company, which is based on matching principle of accounting. The provision in this regard is very clear that the expenditure incurred in relation to an income which is otherwise exempt*

should not be allowed to be claimed against taxable income. Therefore, the expenditure incurred in relation to an income which is otherwise exempt, are required to be deducted while computing the dividend income and the total income. The appellant has not provided any justification for allocating 1% of the expenses involving the main heads of expenses stated to be treated as incurred for the purposes of maintaining the said investments and disallowed in the computation of total income. No details were furnished before me in this respect. Hence, under the circumstances, the amount disallowed by the appellant on account of administrative expenses towards earning of exempt income cannot be accepted as correct. Further, it is AR's own admission that the Hon'ble Tribunal while determining the 14A disallowance for the AY 09-10 and AY 10-11 in appellant's own case has found that administrative expenses disallowed by the appellant at the rate of 1% of total administrative expenditure are towards lower side. Apparently, the appellant has failed to offer any justification for disallowance of the administrative expenditure at the rate of 1%. Hence, the plea of the AR that in the absence of any cogent dissatisfaction with regard to the appellants 14A working, any further disallowance u/s 14A invoking rule 8D is not justifiable, cannot be accepted.

6.3.3 Further, as regards the plea of the AR that since during the year under consideration. there has been no change in investment amount and it has stood at Rs.151,70,22,619/- since 31.03.2010 hence no further disallowance should be made, it would be pertinent to refer to the decision of the Hon'ble ITAT, Chennai 'C' Bench in the case of Southern Petro Chemical Industries Vs. Deputy Commissioner Of Income Tax (2005) 93 TTJ 0161 : (2005) 3 SOT 0157, in this context, wherein it has been held that -Whether to invest or not to invest and whether to retain the investments or to liquidate the same are very strategic decisions which the management is called upon to take. These are mind-boggling decisions and top management is involved in taking these decisions. This decision-making process is very complicated and requires very careful analysis. Moreover, the assessee has to keep track of various dividend incomes declared by the investee companies and also to keep track of the dividend income having been regularly received by the assessee. This activity itself calls for considerable management attention and cannot be left to a junior clerk. Thus. proportionate management expenses are required to be deducted while computing the dividend income." It is apparent from the above decision that whether to retain the investments or to liquidate the same are also very strategic decisions which the management is called upon to take Therefore the claim of the AR that since during the year under consideration, there has been no

change in investment amount and it has stood at Rs.151,70,22,619/- since 31.03.2010 hence no further disallowance should be made cannot be accepted. Further, under similar facts, the Hon'ble ITAT has upheld disallowance 5% of the dividend income earned by the appellant for AY 2011-12 when there was no change in investment. Therefore, the expenditure incurred in relation to an income which is otherwise exempt, needs to be worked years under consideration also.

6.3.4 As observed earlier, there was no change in investments in the years under consideration vis-à-vis investments in the AY 11-12 and it has stood at Rs.151,70,22,619/- since 31.03.2010. No fresh investments were made by the appellant during these years and all investments outstanding in the current year were investments made in earlier years.

6.3.5 It is also observed that similar disallowance was made in earlier years as well and the same was decided by the Hon'ble ITAT for AY 09-10 to AY 11-12. While deciding this issue in AY 11-12, the Hon'ble ITAT has given a finding vide it's order dated 15.12.2017 that all the investments made were made out of own funds and therefore no disallowance was required to be made under Rule 80(2)(ii) of the Act. The relevant part of the Order is as follows:

However, it is relevant to note, in assessee's own case for AY 2009-10 and 2010-11 in ITA no.964/Mum/2013 dated 15/01/2015 and ITA no.5506/Mum/2014 dated 29/0312016 respectively, the Tribunal has restricted the disallowance of administrative expenses to 5% of the dividend income earned. While doing so. the Tribunal has observed that the assessee had sufficient interest free fund to make the investment. Facts are more or less identical in the impugned assessment year. The balance sheet of the assessee reveals that it has sufficient interest free funds available to take care of the investment

6.3.6 Therefore respectfully following the decision of the Hon'ble ITAT for AY 11-12 and also in view of the fact that the same investments are outstanding in the current year as well, it is held that no disallowance can be made under Rule 8D(2)(ii) of the Act.

6.3.7 Further, with regards to the 8D(2)(iii) disallowance, at the rate of 0.5% of the Average investments, it is seen that the same has been reduced to 5% of the dividend income earned by the appellant, in the earlier years from AY 09-10 to AY 11-12 by Hon'ble ITAT. Further, this issue was the subject matter of appeal before the Hon'ble Bombay High Court for AY 2009-10 as well who confirmed the disallowance of expenditure to the extent of 5% of dividend income earned as

reasonable. Therefore. Respectfully following the decisions of the Hon'ble ITAT for AY 09- 10la-11-12 and of the Hon'ble Bombay HC for AY 09-10 and in order to maintain judicial consistency, the disallowance made under Rule 8D(2)(iii) of the Act is restricted to 5% of the dividend income earned by the appellant."

5. On appraisal of the above mentioned finding, we find that the CIT(A) has allowed the claim of the assessee on the basis of the decision of Hon'ble ITAT in the assessee's own case for the A.Y.2009-10 to 2011-12. The finding of the Hon'ble ITAT has been confirmed by Hon'ble Bombay High Court. Taking into account all the facts and circumstances and also considering this fact that the issue has duly been covered by the assessee's own case decided by Hon'ble ITAT for the A.Y. 2009-10 to 2011-12, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, we decide these issue in favour of the assessee against the revenue.

ISSUE NO. 3

6. Issue no.3 is in connection with the deletion of disallowance u/s 14A r.w. Rule 8D(2)(ii) in view of the Clause (f) to Explanation-1 to Section 115JB of the Act. The Ld. Representative of the revenue has argued that the CIT(A) has decided the matter of controversy wrongly and illegally, therefore, the finding of the CIT(A) is not justifiable and is liable to be set aside. On the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. Before going further, we deem it necessary to advert the finding of the CIT(A) on record.:-

"8.1.1 I have carefully considered the assessment order and the written submissions of the appellant. The appellant has relied on the ratio laid down by the Hon'ble High Court of Bombay in the case of CIT vs. Bengal Finance & Investments Pvt. Ltd in ITA Nol337 of 201 3wherein it was held as under:-

"So far as Question (b) is concerned, the impugned order of the Tribunal followed its decision in MIs. Essar Teleholdings Ltd. v/s. DCIT in ITA No. 3850/Mum/2010 to held that an amount disallowed under Section 14A of the Act cannot be added to arrive at book profit for purposes of Section 1I5JB of the Act. The Revenues 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."

3.1.2 Further the appellant has also relied on the decision of the Special Bench of the Delhi Tribunal in the case of ACIT vs. Vireet Investment (P.) Ltd. 82 taxrnann.com 415 in support of $contention that the amount of disallowance computed u/s. 14A cannot be imported into the computation of book profit u/s. 115JB. In the said decision, the Hon'ble Special Bench held that the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115JB and that the amount of disallowance computed u/s. 14A cannot be added to the book profit in the absence of specific mention to that effect in the Explanation to Section 115JB. As the ratio of the said decisions is squarely applicable to the facts of the appellant's case, adjustments made on account disallowance u/s 14A of the Act for the respective years. while computing book profits u/s 115J8 of the Act for the respective years, are hereby deleted."

7. On appraisal of the above mentioned finding, we find that the issue has been decided on the basis of decision of Hon'ble Bombay High Court in the case of **CIT Vs. Bengal Finance & Investments Pvt. Ltd. in ITA. No.337 of 2013 and also in view of the decision of Special Bench of Delhi Tribunal in the case of ACIT vs. Vireet Investment (P.) Ltd. 82 taxmann.com 415.** Accordingly, it has been specifically held that the ground of disallowance computed u/s 14A cannot be imported to the computation of books of profit u/s 115JB of the Act. The facts are not

distinguishable at this stage and no law contrary to the law relied upon the CIT(A) has been produced before us. Taking into account all the facts and circumstances, we are of the view that the CIT(A) has decided the matter of the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, we decide this issue in favour of the assessee against the revenue.

Reasons for delay in pronouncement of order

6.1 Before parting, we would like to enumerate the circumstances which have led to delay in pronouncement of this order. The hearing of the matter was concluded on 07/02/2020 and in terms of Rule 34(5) of Income Tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of Rule 34(5), every endeavor was to be made to pronounce the order within 60 days after conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the bench could fix a future date of pronouncement of the order which shall not ordinarily be a day beyond a further period of 30 days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the order. This period could be extended by the bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not ***ordinarily*** exceed a period of 30 days.

6.2 Although the order was well drafted as well as approved before the expiry of 90 days, however, unfortunately, on 24/03/2020, a nationwide lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic covid-19 in the country. The lockdown

was extended from time to time which crippled the functioning of most of the government departments including Income Tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the order could not be pronounced despite lapse of considerable period of time. The situation created by pandemic covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of aforesaid rule governing the pronouncement of the order. Accordingly, the order is being pronounced now after the re-opening of the offices.

6.3 Faced with similar facts and circumstances, the co-ordinate bench of this Tribunal comprising-off of Hon'ble President and Hon'ble Vice President, in its recent decision titled as **DCIT V/s JSW Limited (ITA Nos. 6264 & 6103/Mum/2018)** order dated 14/05/2020 held as under: -

> *7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:*
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> *(5)The pronouncement may be in any of the following manners: —*
>
> *(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.*
>
> *(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.*

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of ***Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]*** *wherein Their Lordships had, inter alia, directed that* ***"We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile****(emphasis, by underlining, supplied by us now),* ***all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment".*** *In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.*

9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the

functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that ***"In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown".*** *Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that,* ***"It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly"****, and also observed that* ***"arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020".*** *It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e.* ***force majeure*** *clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term* ***'force majeure'*** *has been defined in Black's Law Dictionary, as* ***'an event or effect that can be neither anticipated nor controlled'*** *When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.*

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excludingat least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of ***Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)],*** *Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed* ***"while calculating the time for disposal of matters made timebound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly".*** *The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.*

Driving strength from the ratio of aforesaid decision, we exclude the period of lockdown while computing the limitation provided under Rule 34(5) and proceed with pronouncement of the order.

8. In the result, the appeal filed by the **revenue is hereby ordered to be dismissed.**

Order pronounced in the open court on 06/07/2020

Sd/-	Sd/-
(PRAMOD KUMAR)	**(AMARJIT SINGH)**
VICE PRESIDENT	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 06/07/2020
Vijay Pal Singh/Sr. PS
आदेश की 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,

सत्यापित प्रति //True Copy//

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