

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT),
'D' BENCH MUMBAI**

BEFORE: HON'BLE JUSTICE P.P. BHATT, PRESIDENT

&

SHRI M.BALAGANESH, AM

**ITA No.2337/Mum/2019
(Assessment Year :2011-12)**

Dy.CIT, Circle-7(2)(1) Room No.126A, 1 st Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	M/s. Mahindra Lifespace Developers Ltd., 5 th Floor, Mahindra Tower Dr. G.M.Bhosale Marg Worli, Mumbai-400018
PAN/GIR No.AAACG8904C		
(Appellant)	..	(Respondent)

**CO No.65/Mum/2020
(Arising out of ITA No.2337/Mum/2019
(Assessment Year :2011-12)**

Dy.CIT, Circle-7(2)(1) Room No.126A, 1 st Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	M/s. Mahindra Lifespace Developers Ltd., 5 th Floor, Mahindra Tower Dr. G.M.Bhosale Marg Worli, Mumbai-400018
PAN/GIR No.AAACG8904C		
(Appellant)	..	(Respondent)

Revenue by	Shri Sanjay Sethi
Assessee by	Ms. Hetal Vora
Date of Hearing	09/02/2021
Date of Pronouncement	23/02/2021

आदेश / ORDER

PER M. BALAGANESH (A.M):

This appeal in ITA No.2337/Mum/2019 and Cross Objection No.65/Mum/2020 for A.Y.2011-12 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-13, Mumbai in appeal No.CIT(A)-13/ACIT-7(2)(1)/368/2015-16 dated 28/11/2018 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 05/03/2014 by the Id. Addl. Commissioner of Income Tax, Range-6(3), Mumbai (hereinafter referred to as Id. AO).

2. At the outset, we find that there is a delay in filing of cross objections by the assessee before us. We find that assessee had explained that the Form No.36 filed by the Revenue in Revenue appeal was received by it on 25/02/2020 and in view of the huge spread of Covid-19 cases in the nation, lockdown was announced and accordingly, the assessee's offices were closed, ultimately cross objection was filed through e-mail on 22/06/2020 by the assessee and hard copy was again filed on 01/12/2020. Hence, it was pleaded that there was no delay of 250 days as pointed out by the Registry and that the delay was effectively only for 58 days from 26/04/2020 to 22/06/2020 which had ultimately happened due to lockdown announced by the nation. We find this explanation to be reasonable and hold that assessee was prevented by a reasonable cause in not filing the cross objections in time. In these circumstances, we are inclined to condone the delay and admit the cross objections preferred by the assessee for adjudication.

3. The ground Nos. 1-4 raised by the Revenue and the grounds raised by the assessee in the cross objections are with regard to disallowance made u/s.14A of the Act r.w.Rule 8D(2) of the Rules both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act.

3.1. We have heard rival submissions and perused the materials available on record. We find that assessee is engaged in the business of construction, developing, sale, leasing, dealing in and operate commercial complexes, business centres, properties and also providing project and constructions management services, property related services and execute turn key projects, financial operations etc., The turnover declared by the assessee is 470,56,17,409/- during the year and net profit declared before tax is Rs.149,36,61,008/-. We find that the Id. AO had observed that assessee had declared dividend income of Rs.10,71,92,846/- and claimed the same as exempt in the return of income. The assessee claimed that no expenditure relatable to exempt income was incurred by the assessee. The assessee also pleaded that all the investments were made in the mutual funds, shares and the purpose of the investment was expansion of business through subsidiaries and joint ventures. Investments made in mutual funds are current investments and made out of proceeds of shares issued under QIP model in F.Y.2006-07. The borrowings made by the assessee were used only for the purpose of the business of the assessee and not for the purpose of making any investment and hence, the interest expenditure thereon cannot be attributed for the purpose of earning any exempt income from investments.

3.2. The Id. AO however, did not agree to these contentions of the assessee and proceeded to make disallowance under second and third limb of the assessee as under:-

i) Under Rule 8D(2)(ii)	-	Rs.36.58 lakhs
ii) Under Rule 8D(2)(iii)	-	Rs.192.92 lakhs
		=====
Total		Rs.229.51 lakhs
		=====

3.3. This sum of Rs.2,29,50,797/- was added by the Id. AO both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act. We find that the Id. CIT(A) held that the assessee had sufficient own funds to the tune of Rs.958.78 Crores as of 31/03/2010 and Rs.1028.27 Crores as on 31/03/2011 as against investments of Rs.220.02 Crores as of 31/03/2010 and Rs.170.30 Crores as of 31/03/2011. Hence, respectively following the ratio laid down by the Hon'ble Jurisdictional High Court in the case of Reliance Utilities and Power Ltd., reported in 313 ITR 340 and HDFC Bank Ltd., reported in 366 ITR 505, the Id. CIT(A) held that no disallowance of interest could be made under second limb of the Rule 8D(2) of the Rules.

3.4. With regard to disallowance of administrative expenses made under third limb of Rule 8D(2) of the Rules, he restricted the disallowance to Rs.97.65 lakhs under normal provisions of the Act. The Id. CIT(A) also directed the Id. AO to add 10% of dividend income as amount to be disallowed under Clause-f of Section 115JB of the Act towards expenses incurred for earning exempt income.

3.5. Aggrieved by this action, the Revenue is in appeal before us only on the restriction of disallowance to Rs. 97.65 lakhs under third limb of Rule 8D(2) of the Rules and assessee has preferred cross objections stating that no disallowance of administrative expenses should be made under the third limb of Rule 8D(2) of the Rules. The assessee is also in cross objection before us against the disallowance of expenses made @10% of exempt income under Clause- f of Section 115JB while computing the book profits. There is no dispute regarding the applicability of computation mechanism provided in Rule 8D(2) of the Rules in the instant case.

3.6. We find that the law now is very well settled that as far as the disallowance of indirect expenses under third limb of Rule 8D(2) of the Rules, the only those investments which had actually yielded exempt income need to be considered for working out the disallowance thereon. This has been held by the Special Bench of Delhi Tribunal in the case of Vireet Investments reported in 165 ITD 27. However, if adoption of such computation mechanism results in absurdity, then the proportionate income theory is to be adopted for working out the disallowance as we hold that Rule 8D computation mechanism should be considered as the last resort and is not automatic in its application. In this regard, the Id. AR placed reliance in the case of Future Retail Ltd., vs. ACIT in ITA No.5959/Mum/2016 and ITA No.867/Mum/2017 for A.Y.2012-13 dated 11/08/2020 wherein under similar facts and circumstances, where investments were made only within the group companies predominantly vis a vis incurring of expenses for the purpose of earning dividend income, this Tribunal had held as under:-

“12. With regard to ground no. 1 raised by the assessee, we notice that Ld. CIT(A) remitted the issue back to AO by following the direction of Ld.CIT(A) in earlier assessment years. On careful verification of facts, we are inclined to accept the direction of Ld. CIT(A) that assessee has incurred administrative expenses purely for administration of its affairs. We do not agree with the submission of Ld. AR that assessee has not incurred any expenditure and not warranted to remit this issue back to AO. The investment does require constant monitoring even though it is made within the group concern. Sometimes, the method applied as per rule 8D(2)(iii) gives absurd result, like the disallowance is more than the actual administrative expenses. Therefore, we are directing AO to determine the total administrative expenses and also determine the total income earned by assessee including taxable and exempt income, apply the ratio of income to determine the administrative expenses and can be apportioned to exempt income. Simultaneously, calculate 0.5% of the investment as per rule 8D(2)(iii) of the rule, in applying the rules, he should consider only those investments which has actually earned dividend /exempt income. Then compare the both method of calculation and in order to apply provision of section 14A, he should consider the amount calculated above said two methods whichever is less, Accordingly, ground no. 1 raised by assessee is allowed for statistical purposes.”

3.7. Respectfully following the said decision, we direct the Id. AO to compute the disallowance in accordance with the ratio laid in para 12 of the aforesaid order u/s.14A of the Act for the purpose of computing income under normal provisions of the Act. The same figure shall be utilized for making disallowance under clause –f of Explanation to section 115JB of the Act while computing the book profits as they are actual expenses incurred on proportionate basis for the purpose of earning exempt income.

3.8. Accordingly, the grounds raised by the assessee in cross objections and ground Nos.1-4 raised by the Revenue are disposed off in the aforesaid manner.

4. The ground Nos. 5-8 raised by the Revenue are with regard to action of the Id. CIT(A) in allowing ESOP discount of Rs.20,32,000/- as a deduction.

4.1. We have heard rival submissions and we find that during the year, the assessee claimed ESOP expenses of Rs.20,32,000/- as deduction. The assessee company had granted Employee Stock Option Scheme (ESOP) in the Financial Year 2008-09. The assessee company, being a listed company, is mandated to follow the accounting system of Employees Stock Purchase Scheme as per SEBI (Employees Stock Option Scheme and Employees Stock Purchase Scheme) guidelines, 1999 and also the Guidance Note on accounting for share based payment issued by the Institute of Chartered Accountants of India (ICAI). As per SEBI guidelines and the Guidance Note, difference between exercise price and market price on the date of grant is treated as employee compensation cost, which is amortized over the period of vesting. During the year, the assessee granted stock option of 158997 shares to its employees. The shares are to be issued at Rs.428/- per share (as against face value of Rs.10 per share) and the relevant market price on the date of grant was Rs.443.79 per share. The difference of Rs.15.79 per share was treated as employee compensation in the books of accounts and charged to profit and loss account over the vesting period which is five years. Thus, prorata account of such amount was charged as deferred employees compensation and claimed as expenses amounting to Rs.20,32,000/- during the year. The assessee pleaded that the said expenditure is incurred wholly and exclusively for the purpose of business and hence, allowable as deduction u/s.37(1) of the Act. The Id. AO however, ignored the aforesaid treatment of the assessee and observed that the said

expenditure is only incurred on a contingent basis and the same has not been incurred by the assessee and accordingly disallowed the same while completing the assessment.

4.2. We find that the Id. CIT(A) had placed reliance on the Special Bench of Bangalore Tribunal in the case of Biocon Ltd., vs. Dy.CIT reported in 155 TTJ 649 which was also subsequently followed by Mumbai Tribunal in the case of DCIT vs. Kotak Mahindra Bank Ltd., reported in 89 Taxmann.com 223 and also by placing reliance on the decision of the Hon'ble Madras High Court in the case of CIT vs. PVP Ventures Ltd. In TCS No.1023 of 2005 dated 19/06/2012, deleted the disallowance of ESOP expenses of Rs.20,32,000/-. We find that the Special Bench of Bangalore Tribunal in the case of Biocon Ltd., has been subsequently approved by the Hon'ble Karnataka High Court in the case of CIT vs. Biocon Ltd., reported in 121 Taxmann.com 351 dated 11/11/2020 wherein it was held that discount on issue of ESOP was allowable as deduction u/s.37(1) of the Act as primary object was not to vest capital but to earn profits by securing consistent services of employees. Respectfully following the said decision, we hold no infirmity in the order of Id. CIT(A) granting relief to the assessee. Accordingly, the ground Nos.5-8 raised by the Revenue are dismissed.

5. We find that assessee has raised an additional ground of appeal for claiming deduction towards education cess and secondary higher education cess paid by it.

5.1. We find that this issue is covered in favour of the assessee by the decision of the Hon'ble Jurisdictional High Court in the case of Sesa Goa

Ltd., vs. JCIT in Income Tax Appeal No.17 and 18 of 2013 dated 28/02/2020 wherein the Hon'ble Jurisdictional High Court categorically held that education cess paid by the assessee is entitled for deduction. We find that the additional ground raised by the assessee goes to the root of the matter and does not involve any verification of facts and hence, we are inclined to admit the same and allow the same by respectfully following the decision of the Hon'ble Jurisdictional High Court referred to supra.

6. In the result, appeal of the Revenue as well as the Cross Objections of the assessee are partly allowed.

Order pronounced on 23/02/2021 by way of proper mentioning in the notice board.

Sd/-
(JUSTICE P P BHATT)
PRESIDENT

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 23/02/2021
KARUNA, *sr.ps*

*ITA No.2337/Mum/2019 & CO No.65/Mum/2020
M/s. Mahindra Lifespace Developers Ltd.,*

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.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai