

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

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No.55/M/2018
Assessment Year: 2013-14**

DCIT 1(3)(1), R. No.540, Aayakar Bhavan, Mumbai - 400020	Vs.	M/s. Subhkam Ventures (I) Pvt. Ltd., 4 th Floor, International House, New Marine Lines Cross Road, No.1, M.K. Road, Mumbai - 400 020 PAN: AAACW1642M
(Appellant)		(Respondent)

**ITA No.5682/M/2018
Assessment Year: 2014-15**

M/s. Subhkam Ventures (I) Pvt. Ltd., 14 th Floor, Maker Chambers, IV, 222, Nariman Point, Mumbai - 400 020 PAN: AAACW1642M	Vs.	DCIT 1(3)(1), Room No.540, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Sanjay Parikh, A.R.
Revenue by : Shri T.S. Khalsa, D.R.

Date of Hearing : 12.08.2021

Date of Pronouncement : 23.09.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled cross appeals have been preferred against the order dated 11.10.2017 & 01.08.2018 of the Commissioner

of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2013-14 & 2014-15 respectively.

2. We would like to first adjudicate ITA No.5682/M/2018 A.Y. 2014-15. The grounds raised by the assessee are as under:

“1. For that the Ld. CIT(A) erred in law and facts in not devising the methodology or basis of apportionment with respect to an investment which yield both taxable as well as exempt income, i.e. in not providing the basis for bifurcating the amount of such investment, for the purpose of averaging under Rule 8D, pertaining to taxable portion of income and exempt portion of income, while holding that "the AO is directed to re-work the disallowance under Rule 8(2)(ii) and Rule 8(2)(iii) by considering all investments other than the investments which yield taxable income while working out the average of investments for the application of the said rules", as the Honb'le Supreme Court in Maxopp Investment Ltd., vs. CIT, New Delhi, 91 Tamann.com 154 has only held that "expenditure attributable to exempt income has to be apportioned to be disallowed under section 14A, with respect to an investment which yield both taxable as well as exempt income, without specifying the basis as to how such apportionment would be made.

2. For that holding by CIT(A) that contention of the assessee that "the investments made in subsidiary and associated companies and other strategic investments should not be considered while working out the average investments under Rule 8D (2)(ii) and Rule 8D(2)(iii) of the Rules is not acceptable" is arbitrary, bad in law and perverse inasmuch as the Honb'le Supreme court in aforesaid Maxopp Investment Ltd., vs. CIT (supra) has nowhere held so. Moreover, Apex Court dismissed the SLP in CIT (Central) 1 v. Chettinad Logistics (P) Ltd [2018] 95 taxmann.com 250(SC) on the ground that where no exempt income is earned Section 14A could not be invoked.

3. The appellant craves leave to add, amend, alter, vary and / or withdraw any or all the above grounds of appeal.”

3. The common issue raised in both the grounds by the assessee is against the confirmation of disallowance of Rs.1,24,67,062/- by Ld. CIT(A) as made by the AO under rule 8D2(ii) in respect of interest expenditure.

4. The facts in brief are that the assessee filed return of income on 29.09.2014 declaring total income at nil. The case of the assessee has been selected for scrutiny under CASS and statutory notices were duly issued and served upon the assessee. During the course of assessment proceedings the AO

noted that assessee has earned dividend income of Rs.2,82,25,712/- whereas disallowance under section 14A of the Act was made to the extent of Rs.2,90,746/- and accordingly assessee was called upon vide order sheet noting dated 18.12.2017 to explain the disallowance under section 14A read with rule 8D2(ii). The assessee replied the said show cause notice vide letter dated 07.12.2016. The assessee submitted before the AO the working of the disallowance under section 14A read with rule 8D which worked out to Rs.15,454,633/- and submitted that the same was wrongly and inadvertently taken as Rs.2,90,746/-. Thus the assessee requested the AO to disallow the remaining difference of Rs.12,54,887/-. The assessee submitted before the AO that during the instant assessment year, the assessee has incurred a sum of Rs.6,34,34,328/- as interest wholly and exclusively for the purpose of business of trading in shares and securities and no part of it can be attributed to assessee's investment activities. The assessee furnished the details of investments at the year end of two years 31.3.2013 and 31.3.2014 and average investments also. The assessee submitted before the AO that average assessee's own funds were sufficient to cover the average investments in shares and securities which yielded exempt income. The also informed the AO that the similar issue has been decided in A.Y. 2013-14 by Ld. CIT(A) in favour of the assessee deleting the disallowance under section 14A read with rule 8D2(ii). The submissions of the assessee did not find favour with the AO and he recalculated the disallowance under section 14A read with rule 8D(2) by computing total disallowance at Rs.1,40,44,074/- comprising direct expenses of Rs.31,379/-

under rule 8D2(i), Rs. 1,24,67,062/- under rule 8D2(ii) and Rs.15,45,633/- under rule 8D(2)(iii) and after allowing the deduction for suo-moto disallowance made an addition of Rs.1,37,53,328/-.

5. So far as the disallowance under rule 8D2(i) and rule 8D2(iii) is concerned, there is no dispute and the assessee has disputed only the disallowance of Rs.1,24,67,062/- as made by the AO under rule 8D2(ii).

6. In the appellate proceedings, the Ld. CIT(A) partly allowed the appeal of the assessee on this issue by directing the AO to work out the disallowance under rule 8D2(ii) and rule 8D2(iii) by considering the investments other than those investments which did not yield any exempt income during the year while calculating the average investments and thus partly allowed the appeal for statistical purposes by observing and holding as under:

“6.3 I have carefully considered the facts of the case, discussion of the AO in the impugned order as well as oral contentions and written submissions of the appellant. The appellant has relied on the decision of my learned predecessor CIT(A) for A.Y.2012-13 and on my decision in its own case for A.Y.2013-14. The appellant has voluntarily disallowed Rs.2,90,746/- whereas AO has further disallowed Rs.1,37,53,328/-. Once the AO is not satisfied with the suo moto disallowance of the assessee, he can proceed with the application of rule 8D. Let us now consider the disallowance needed under rule 8D. Appellant has initially offered total disallowance of Rs.2,90,746/-. This was revised to Rs.15,77,012/- by assessee's letter dated 07.12.2016 to the AO. The disallowances under rule 8D(2)(i), 8D(2)(ii) and 8D(2)(iii) are Rs.31,379/-, Rs.Nil and Rs.15,45,633/- respectively. On the other hand, AO has disallowed Rs.31,379/-, Rs.1,24,67,062/- and Rs.15,45,633/- respectively. There is no dispute regarding disallowance under rule 8D(2)(i). As regards the disallowances under rule 8D(2)(ii) and 8D(2)(iii), the appellant has taken investment in quoted shares only whereas, the AO has taken the total investments. In this connection, the appellant has stated that strategic investment and investment which give rise to taxable income should be excluded from the average value of investment. As per provisions of rule 8D(2)(ii), the average value of investment is the investment, the income from which does not or shall not form part of total income. Therefore, the investments which result into taxable income

such as Venture Capital Funds are to be excluded while determining average value of investments. While deciding the case of the assessee for A.Y.2012-13 and 2013-14, placing reliance on the decisions of Garware Wall Ropes Ltd. (supra), J. M. Financial Ltd. (supra), Piem Hotels Ltd. (supra) and Selves Advertising (P.) Ltd. (supra), it was held that the investments in group concerns and strategic investments are to be excluded and should not be taken into account while working out the disallowance under Rule 8D(2) of the Rules. However, subsequently, the Hon'ble Supreme Court, in their decision in the case of Maxopp Investment Ltd. vs. CIT, New Delhi, 91 Taxmann.com 154, have held that the dominant purpose for which the investments into shares is made by an assessee may not be relevant and the same is not a relevant factor in determining the issue of disallowance u/s.14A. Their Lordships have also observed that the fact remains that the consequent dividend income earned is non-taxable and in that scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Their Lordships have further observed that keeping this objective behind section 14A of the Act in mind, the said provision has to be interpreted particularly the word "in relation to income" that does not form part of the total income. It has further been observed that considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engraved in section 14A of the Act. In view of such observations of Hon'ble Apex Court in the case of Maxopp Investments Ltd. vs. CIT (supra), the contentions and submissions of the assessee that the investments in stock which are held as stock-in-trade or such investments in stock which are made in subsidiary and associated companies and other strategic investments should be excluded while working out the average investments under Rule 8D(2)(ii) and Rule 8D(2)(iii), are not found to be acceptable. The appellant, in their submission, by reproducing para 34, 41 and 42 of the said decision of Hon'ble Supreme Court, have contended that once the decision to apply the provisions of Rule 8D has been taken by the AO, it cannot be said that the principles laid down by the Hon'ble Supreme Court in Maxopp case (supra) has not been followed. In this regard, it is stated that in the instant case, there is no dispute regarding application of Rule 8D(2) of the Rules. The only dispute raised is in respect of the computation done under Rule 8D(2)(ii) and Rule 8D(2)(iii) of the Rules. The contention of the assessee has been that the investments made in subsidiary and associated companies and other strategic investments should not be considered while working out the average investments under Rule 8D(2)(ii) and Rule 8D(2)(iii) of the Rules. In respect of the same, it is stated that in view of the decision of Hon'ble Supreme Court in the case of Maxopp Investments Ltd. vs. CIT (supra), such contentions and submissions of the assessee are not found to be acceptable. Further, the contention of the assessee regarding section 14A being deeming provision and therefore, nothing further could be deemed is found to be irrelevant as what is the issue under dispute is only the methodology adopted by the AO for computation of disallowance by invoking Rule 8D(2) vis-a-vis what assessee deems fit. In view of the facts and circumstances of the case and discussion hereinabove, the AO is directed to re-work the disallowance under Rule 8D(2)(ii) and Rule 8D(2)(iii) by considering all investments other than the investments which yield taxable income, while working out the average investments for the application of the said rules. Subject to such directions,

these grounds are disposed off and for statistical purposes, they are treated as partly allowed.

7. Ground No.5: This ground is general in nature and as such does not require any separate or specific adjudication. Accordingly, the same is disposed off.

8. In the result, the appeal is partly allowed.”

7. The Ld. A.R. vehemently submitted before the Bench that the order passed by Ld. CIT(A) is wrong and untenable in the eyes of law as the Ld. CIT(A) has ignored the several factual aspects which proved that no disallowance under rule 8D2(ii) could be made under the law. The Ld. A.R. submitted 3-4 propositions before the Bench. The Ld. A.R. submitted that assessee's average investments yielding exempt income are less than the average own funds and therefore no disallowance could be made under rule 8D2(ii). The Ld. A.R. submitted that the issue is squarely covered by the decision of Jurisdictional High Court in the case of CIT vs. HDFC Bank (2014) 366 ITR 505 (Bom.), CIT vs. SBI, DHFL Ltd. (2014) 376 ITR 296 (Bom.) and HDFC Bank vs. CIT (2016) 383 ITR 529 (Bom.). The Ld. A.R. therefore prayed that since the assessee's average investments in the securities yielding exempt income being less than the average own funds, therefore, no disallowance can be made under rule 8D2(ii). The second without prejudice propositions made by the Ld. A.R. is that these investments which held by the assessee as stock in trade which yielded both exempt as well as taxable income the Ld. A.R. submitted that the Ld. CIT(A) has grossly erred in applying the decision of Hon'ble Supreme Court in the case of Maxopp Investments Ltd. vs. CIT New Delhi 91 taxmann.com 154 and holding that dominant purpose for which the investments in all the shares is made by the assessee is not

relevant in determining the issue of disallowance under section 14A of the Act. The Ld. A.R. took us through the decision of Maxopp Investments Ltd. vs. CIT (supra) and tried to explain that Hon'ble Supreme Court has never given any finding that the provision of section 14A is to be invoked even where the investments are made by way of stock in trade by the assessee. The Ld. A.R. submitted that the investments made by the assessee in securities which are held as stock in trade yielded both exempt as well as non exempt income and both are taxable as business income. The Ld. A.R. submitted that it is a separate issue that such exempt income which constitute part of the income can not be brought to tax under the Act as the same is exempt from tax. The Ld. A.R. took us through para Nos.19, 20, 31, 37, 38, 39 & 40 and submitted that the Ld. CIT(A) has wrongly interpreted and applied the decision of Hon'ble Apex Court. The Ld. A.R. also relied on the decision of Delhi Tribunal in the case of Nice Bombay Transport Pvt. Ltd. vs. ACIT (OSD) ITA No.1331/Del/2001 order dated 19.11.2018 wherein the Ld. Counsel submitted that it has been held that where the assessee is engaged in trading in shares and thus shares are held as stock in trade and not an investment, no disallowance under section 14A of the Act read with rule 8D can be made. The Ld. A.R. submitted that the Tribunal has considered and followed the decision of Hon'ble Supreme Court in the case of Maxopp Investments Ltd. vs. CIT (supra) and decided the issue in favour of the assessee. Therefore, Ld. A.R. submitted that on the second proposition also the disallowance under rule 8D2(ii) deserved to be deleted. On the third proposition, the Ld. A.R. submitted that while computing the disallowance under rule

8D2(ii) only those investments need to be taken into account which has yielded exempt income and not all the investments. In view of these propositions the Ld. A.R. submitted that the order of Ld. CIT(A) may kindly be reversed and disallowance as sustained may kindly be deleted.

8. The Ld. D.R., on the other hand, strongly relied on the order of Ld. CIT(A) by submitting that in A.Y. 2013-14 in ITA No.55/M/2018 which is appeal of the Revenue before this Bench and the Ld. CIT(A) had allowed the appeal of the assessee as the decision of the Hon'ble Supreme Court in the case of Maxopp Investments Ltd. vs. CIT (supra) was not available whereas while deciding the assessment year 2014-15 this decision was very much there and therefore the Ld. CIT(A) has confirmed the addition by giving certain directions. The Ld. D.R., therefore, prayed that the order passed by Ld. CIT(A) is very reasoned order by following the decision of the Hon'ble Supreme Court in the case of Maxopp Investments Ltd. vs. CIT (supra) and therefore may kindly be affirmed.

9. We have heard the rival contentions of both the parties and perused the material on record. The Ld. A.R. has filed before us the working of average investments and average own funds which were also filed before the authorities below, which are extracted below are for the sake of ready reference and convenience.

Particulars	31st March, 2014	31 st March, 2013	Page No. of paper book
Total Investments as per Note No.10	775,386,357.00	1,105,781,079.00	11, 16 & 17
Less : Investment in	<u>75,085,700.00</u>	101,800,000.00	17

Growth Funds -	700,300,657.00	1,003,981,079.00	
Subhkam Growth Fund	26,225,910.00	52,451,820.00	
Less : Investment in foreign companies -	<u>647,848,837.00</u>	951,529,259.00	17
Subhkam Overseas	<u>647,848,837.00</u>	17,000,000.00	
Less: Investment in properties - Panyam Cements & Mineral		934,529,259.00	17
Inventories as per Note No. 13	757,488,040.00	372,915,849.00	9
Total investments to be considered for disallowance u/s. 14A	<u>1,405,336,877.00</u>	<u>1,307,445,108.00</u>	
Average Value of Investments		<u>1,356,390,992.50</u>	
Own Funds			
Share Capital	19,910,370.00	19,710,370.00	9
Reserves and Surplus	1,277,813,184.00	1,265,316,966.00	9
Trade Payables	22,443,548.00	18,713,281.00	14
Unsecured Loan from Directors	90,600,000.00	7,500,000.00	14
Average Own Funds	<u>1,410,767,102.00</u>	<u>1,311,240,617.00</u>	
		<u>1,361,003,859.50</u>	

10. We find from the above that the total investments as per note No.9 were Rs.77,53,86,357/- which comprised of investments in growth funds Rs.7,50,85,700/-, investments in foreign companies Rs.2,62,25,910/- and investment in properties Rs.64,78,48,837/- and remaining represented the investments in share and securities of Rs.64,78,48,837/-. We further note that inventories as per note No.12 is Rs.75,74,88,040/-. We find merit in the contentions of the Ld. A.R. that investments in growth funds are not includible while computing the average investments for calculating the disallowance under section 14A as no dividend is declared in case of growth funds and whatever gain is made that is taxable

under the Act. Similarly, the dividend received from foreign companies is liable to tax and consequently these investments have to be excluded. Lastly, the investments in properties also did not form part of the investments for the purpose of calculation of section 14A disallowance as there is no dividend declared on the investment in properties but appreciation realized upon sale is offered to tax. Therefore, all these three investments in growth funds, in foreign companies and in properties have to be excluded while calculating the average investments. Similar adjustments are required to be made in the figures of investments in the corresponding previous year ended on 31.03.2013 as stated hereinabove. We note that the average investments come to Rs.135,63,19,992.50. Similarly, the average own funds the calculation whereof is extracted above are Rs.136,10,03,859/-. It is apparent from the above calculation that assessee's average own funds are more than the average value of investments and in our considered opinion, no disallowance is called for under rule 8D2(ii) of the Act. The case of the assessee is squarely covered by the decisions as referred to above by the Ld. A.R. in support of his arguments. In the case of CIT vs. HDFC Bank Ltd. (supra) and it has been held that where the interest free funds as well as own funds employed in the business are more than the investments in the shares and securities yielding exempt income, in that case no disallowance is to be made. Similar ratio has been laid in another decision in the subsequent decision in the case of HDFC Bank vs. CIT (2016) 383 ITR 529 by the Hon'ble Jurisdictional High Court that where assessee's own funds are more than the investments made in shares and securities no disallowance is to

be made under section 14A. In view of the facts of the instant case and the ratio laid down by the Jurisdictional High Court we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the disallowance of Rs.1,24,67,062/- as made under rule 8D2(ii).

11. Since we have allowed the appeal of the assessee on the first proposition, the other two without prejudice propositions made by the assessee are not being adjudicated.

12. The assessee's appeal is allowed.

ITA No.55/M/2018 (Revenue's appeal)

13. The issue raised in this appeal by the Revenue is against the deletion of disallowance of Rs.3,89,99,890/- under rule 8D2(iii) of the Act by ld CIT(A).

14. The facts of the instant appeal by the Revenue are similar to one as decided by us in ITA No.5682/M/2018 A.Y. 2014-15. We find that the Ld. CIT(A) allowed the appeal of the assessee in this year by directing the AO to exclude from the average value of the investments in subsidiary and associate companies and other strategic investments as well as investing yielding taxable income for calculating the disallowance under section 14A of the Act. The Ld. D.R. submitted before the Bench that at the time of passing the order the decision of the Apex Court in the case of Maxopp Investments Ltd. vs. CIT New Delhi 91 taxmann.com 154 was not available and therefore the relief was allowed to the assessee by Ld. CIT(A). However, in the subsequent year the decision of the Hon'ble Supreme Court as referred to above was available and therefore Ld. CIT(A) dismissed the appeal of the

assessee, while fairly conceded that facts in both the years being same. The Ld. A.R. reiterated his submissions before the Bench as made in ITA No.5682/M/2018 A.Y. 2014-15. Since the facts being similar to ITA No.5682/M/2018 A.Y. 2014-15, our decision in ITA No.5682/M/2018 A.Y. 2014-15 would, mutatis mutandis, apply to this appeal as well. Consequently, the appeal of the Revenue is dismissed.

15. In the result, the appeal of the assessee is allowed and appeal of the Revenue is dismissed.

Order pronounced in the open court on 23.09.2021.

Sd/-
(Pavan Kumar Gadale)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 23.09.2021.

* Kishore, Sr. P.S.

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.