IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai

Before Shri Rajesh Kumar, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.5454/Mum/2019
(Assessment Year: 2016-17)

M/s Oricon Enterprises Limited 1076, Dr. E Moses Road, Worli, Mumbai – 400 018 PAN – AAACO0480F	Vs.	Dy. Commissioner Of Income-tax – CC-3(3),Mumbai Air India Building, 19th Floor, Mumbai - 400 020
(Appellant)		(Respondent)

ITA No.6094/Mum/2019
(Assessment Year: 2016-17)

Dy. Commissioner Of Income-tax – CC-3(3),Mumbai Air India Building, 19th Floor, Mumbai - 400 020	Vs.	M/s Oricon Enterprises Limited 1076, Dr. E Moses Road, Worli, Mumbai – 400 018 PAN – AAACO0480F
(Appellant)		(Respondent)

Assessee by : Shri Sunil Nahta, A.R
Revenue by : Ms. Shreekala Pardeshi, D.R

Date of Hearing : 29/07/2021
Date of pronouncement : 26/10/2021

O R D E R

PER RAVISH SOOD, JM

The present cross-appeals are directed against the order passed by the CIT(A)-51, Mumbai, dated 20.06.2019, which in turn arises from the assessment order passed by the A.O under Sec.143(3) of the

Income Tax Act, 1961 (for short 'Act'), dated 21.12.2018 for A.Y 2016-17. We shall first take up the appeal filed by the assessee company. The assessee has assailed the impugned order passed by the CIT(A) on the following effective grounds raised before us :

"1. On the fact and the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeal) (the "CIT(A)") ought to have accepted the revised working of disallowance made u/s 14A of the Income-tax Act, 1961 (the "Act") of Rs. 1,01,751/- and not doing so is wrong and contrary to the provisions of the Act, and the Rules made there under.

2. The ld. CIT(A) ought to have restricted the disallowance u/s 14A to Rs. 1,01,751/- as re-computed by the appellant being fair and reasonable having regards to the accounts of the appellant company and not doing so is wrong and contrary to the provisions of the Act, and the Rules made there under.

3. Without prejudice to above ground of appeal, on the facts and in the circumstances of the case and in law, the ld. CIT(A) ought to have not reckoned the investment of Rs. 1,08,52,67,828/- in equity shares of subsidiary company, being Oriental Containers Limited, though dividend income have been earned during the year, without appreciating the fact that investment made in said subsidiary company was old strategic investment held as such without incurring any expenditure to earn dividend income there from and subsequently merged with appellant company and hence the Ld. CIT(A) ought to have given direction to Ld. A.O to exclude the said investments for the purpose of disallowances under section 14A r.w.r. 8D(2)(iii) and not doing so is wrong any contrary to the facts and circumstances of the case, provisions of Income-tax Act, 1961 and Rules made thereunder.

4. On the facts and in circumstances of the case and in law, the ld. CIT(a) erred in confirming the action of Ld. A.O of disallowing a sum of Rs. 2,82,472/- being delayed payment of employees contribution to provident fund/Employee State Insurance Corporation/other welfare funds by invoking the provisions of section 36(1)(va) r.w.s 2(24)(x) of the Act and circumstances of the case, provisions of Income-tax Act, 1961 and Rules made thereunder.

5. The ld. CIT(A) ought to have allowed deduction of Rs. 2,82,472/- u/s 43B of the Act on account of delayed payment of employees contribution yo provident fund/Enployees State Insurance Corporation/other welfare funds being paid before the due date for furnishing return of income as per section 139(1) of the Act."

2. Briefly stated, the assessee company which is engaged in the business of manufacturing and sale of petrochemicals, liquid colorants, pet bottles a/w trading in various other items had filed its return of income for A.Y 2016-17 on 17.10.2016, declaring an income of Rs. 1,58,18,050/-. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee had in its return of income offered a suo-motto disallowance under Sec. 14A of Rs. 11,181/- w.r.t the exempt dividend income of Rs. 14,83,00,355/- earned by it on its investment in exempt income yielding investments of Rs. 498,83,34,702/-. On being queried as to why the disallowance may not be determined under Sec. 14A r.w Rule 8D, the assessee came forth with a revised working of disallowance and offered an ad hoc disallowance u/s 14A of Rs. 1,01,751/-, as under :

Sr. No.	Particulars	Amount (Rs.)	
1.	Salary		
	Managing Director	Rs. 60,000/-	
	Mr. Sanjay Jain (Company Secretary)	Rs. 22,79,300/-	
	Mr. R.K Sharma (Accountant)	Rs. 3,25,830/-	
	Directors Sitting fees	Rs. 3,70,000/-	
	Total	Rs. 89,75,130/-	
	1% of Salary		Rs. 89,751/-
2.	Sundry Expense @ Rs. 1,000/- p.m * 12		Rs. 12,000/-
	Disallowance u/s 14A r.w Rule 8D(2)(iii)		Rs. 1,01,751/-

It was the claim of the assessee that as major investments of the company were long term investments made in its subsidiaries and Associate

companies, therefore, much efforts were not required to handle the investment related activities. Elaborating on his said contention, it was submitted by the assessee that though the Managing director, company secretary and accountant were responsible for the day to day administrative duties of the company, however, 1% of their salary was considered towards its investment related activities. It was the claim of the assessee, that though no specific cost was incurred in relation to earning of exempt income, however, it had most reasonably as per its revised working offered a disallowance u/s 14A out of employee costs and other expenses of Rs. 1,01,751/-. However, the A.O neither found favour with the disallowance made by the assessee u/s 14A in its return of income, nor with that that offered by him by way of a revised working in the course of the assessment proceedings. It was observed by the A.O, that the disallowance offered by the assessee was not as per the provisions of the Income-tax Act, 1961. Also, it was noticed by him that similar disallowance made by the department in the earlier years was though vacated in appeal, however, the same had been subjected to further appeal. Qua the books of accounts of the asseessee, it was observed by the A.O that as the assessee was maintaining consolidated accounts and was not maintaining separate accounts for its exempt income yielding investments and the other business activities, therefore, he was precluded from establishing one-to-one nexus between the expenses and the exempt income yielding investments. Further, the A.O drawing support from the judgment of the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640 (SC), rejected the claim of the assessee that no disallowance u/s 14A was called for w.r.t its strategic investments. Observing, that as the dividend earned by the assessee company on the shares was exempt from tax, the A.O was of the view that the applicability of Sec. 14A would stand triggered and the expenditure attributable to earning of the dividend income would be

disallowed. It was further observed by the A.O that the term 'expenditure' occurring in Sec. 14A would take in its sweep not only direct expenditure, but also all forms of expenditure, regardless of whether they are fixed, variable, direct, indirect, administrative, managerial or financial. Backed by his aforesaid observations the A.O worked out the disallowance u/s 14A r.w Rule 8D at an amount of Rs. 2,49,43,005/-, as under :

Direct Expenses		Nil
Indirect Expenses		Nil
Opening Value of Investments	Rs. 4,98,88,67,417	
Closing Value of Investments	Rs. 4,98,83,34,702	
Total	Rs. 9,97,72,02,119	
Average Value of Investments (i.e Rs. 9,97,72,02,119/2)	Rs. 4,98,86,01,060	
Disallowance U/rule 8D(2)(iii) i.e @ 0.5% of the Average Value of Investments		Rs. 2,49,43,005/-

As the assessee had suo-motto offered a disallowance u/s 14A of Rs. 11,181/- in its return of income, therefore, the A.O restricted the additional disallowance to an amount of Rs. 2,49,31,824/-. Further, the A.O under Sec. 36(1)(va) r.w Sec. 2(24)(x) disallowed the assessee's claim for deduction of employees contribution to Provident Fund and Employees State Insurance Corporation as the assessee had failed to deposit the same within the stipulated time period. Accordingly, the A.O vide his order passed u/s 143(3), dated 21.12.2018 assessed the income of the assessee company at Rs. 4,10,69,169/-.

4. Aggrieved, the assessee assailed the assessment order before the CIT(A). Insofar the disallowance worked out by the A.O u/s 14A r.w Rule 8D(2)(iii) at Rs. 2,49,43,005/- was concerned, the CIT(A) after considering the multiple contentions of the assessee directed the A.O that the

investments which were acquired by the assessee on account of merger /demergers be excluded while computing the said disallowance. In respect of the balance investments, the CIT(A) directed the A.O to re-compute the disallowance u/s 14A r.w Rule 8D(2)(iii) after considering, viz. (i). those investments wherein during the year there have been acquisitions/disposals; (ii). those investments wherein dividend income has been earned during the year; and (iii). investments in quoted shares. As regards the disallowance made by the A.O under Sec. 36(1)(va) r.w Sec. 2(24)(x), the CIT(A) being of the view that as the judicial pronouncements that had been pressed into service by the assessee were in respect of the deposit of the employers contribution in the employee welfare funds, thus, the same would not come to the rescue of the assessee, and accordingly upheld the disallowance of Rs. 2,84,472/- made by the A.O.

5. Both the assessee and the revenue being aggrieved with the order of the CIT(A) have carried the matter in appeal before us. Insofar the assessee is concerned, it is aggrieved with the order of the CIT(A), for the reason, that he had erred in not restricting the disallowance u/s 14A to Rs. 1,01,751/- i.e as per the revised working of disallowance that was furnished with him in the course of the assessment proceedings. It is further the claim of the assessee that the CIT(A) had failed to appreciate that the A.O had erred in law and the facts of the case in not restricting the disallowance u/s 14A to Rs. 1,01,751/- (supra), as the same was fair and reasonable having regard to its accounts. Also, the assessee has assailed the sustaining of the disallowance under Sec. 2(24)(x) r.w.s 36(1)(va) of Rs.2,84,472/- by the CIT(A). On the other hand, the revenue is aggrieved with the order of the CIT(A), for the reason, viz. (i). that he had erred in law and the facts of the case in directing that the disallowance u/s 14A r/w Rule 8D(2)(iii) be restricted qua the fresh investments only; and (ii). that the disallowance u/s 14A r.w Rule 8D(2)(iii) be restricted to the investments in the subsidiaries

on which dividend income had been earned by the assessee during the year under consideration.

6. We have heard the ld. Authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. We shall first deal with the contention of the ld. A.R that the A.O had invalidly assumed jurisdiction and dislodged the disallowance that was on a suo-motto basis offered by the assessee u/s 14A of the Act, and substituted the same by that as was computed by him by triggering the mechanism provided in Rule 8D. It is submitted by the ld. A.R that before the provisions of Section 14A(2) and (3) r.w Rule 8D are triggered by the A.O, the law postulates the requirement of a satisfaction on his part, that having regard to the accounts of the assessee, as placed before him, it is not possible for him to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is the claim of the ld. A.R, that as the A.O had dispensed with the aforesaid statutory obligation that was cast upon him and had mechanically worked out the disallowance u/s 14A by resorting to the methodology contemplated u/Rule 8D(2)(iii), therefore, the same cannot be sustained and is liable to be struck down on the count of invalid assumption of jurisdiction by the A.O.

7. Before adverting to the issue in question i.e as to whether or not the A.O had rightly assumed jurisdiction and dislodged the assessee's claim of disallowance u/s 14A of the Act, we think it apt to first cull out the position of law as regards the same. The **Hon'ble Supreme Court** in the case of **Godrej & Boyce Manufacturing Company Ltd. Vs. DCIT & Anr. (2017) 394 ITR 449 (SC)** had, inter alia, held, that the A.O is obligated to mention the reasons while concluding that the assessee's claim of disallowance of

expenditure incurred to earn the exempt dividend income was not to be accepted. It was observed by the Hon'ble Apex court that sub-section (2) and (3) of Sec. 14A of the Act r.w Rule 8D merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the assessing officer is not satisfied with the claim of the assessee. It was further observed, that where such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the A.O, what the law postulates is the requirement of a satisfaction in the A.O that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. Backed by its aforesaid observations, the Hon'ble Court had concluded that it was only after recording the requisite satisfaction that the provisions of Sec. 14A(2) and (3) r.w Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable. The Hon'ble Apex Court while concluding as hereinabove had held as under:

> "37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable.
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> 38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-2003, to hold that the claims of the Assessee that no expenditure was incurred to earn the dividend income cannot be accepted and why the orders of the Tribunal for the earlier Assessment Years were not acceptable to the

> Assessing Officer, particularly, in the absence of any new fact or change of circumstances. Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received. That any part of the borrowings of the assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (Rs. 270.51 crores as on 1.4.2001 and Rs. 280.64 crores as on 31.3.2002) remains unproved by any material whatsoever. While It is true that the principle of *res judicata* would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case."

Also, the aforesaid view was once again reiterated by the Hon'ble Apex Court in the case of **Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640 (SC)**. In its aforesaid order, it was, inter alia, observed by the Hon'ble Court that before taking recourse to the theory of apportionment and computing the disallowance under Sec. 14A(2) r.w. Rule 8D the A.O remains under a statutory obligation to record his satisfaction that the suo-motto disallowance offered by the assessee under Sec. 14A was not correct. The Hon'ble Apex Court while concluding as hereinabove had observed as under:

> "41. Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, *suo moto* disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO."

As regards the nature of satisfaction that is required to be recorded by the A.O before taking recourse to the mechanism provided in Rule 8D of Income Tax Rules, 1962 for computing the disallowance u/s 14A of the Act, we find that the **Hon'ble High Court of Bombay** in its recent order in the case of **CIT Vs. Sociedade De Fomento Industrial Pvt. Ltd. (2020) 429 ITR 358 (Bom)**, had observed, that the A.O must give a clear finding with reference to the assessee's accounts as to how the other expenditure

claimed by it in respect of its non-exempt income is related to its exempt income. It was observed by the Hon'ble High Court that the onus was on the revenue to establish that there is a proximate relationship between the expenditure and the exempt income. It was, observed, that the application of Sec. 14A and Rule 8D is not automatic in each and every case where there is income not forming part of the assessee's total income. Also, it was categorically observed by the Hon'ble High Court that the A.O is obligated to give a clear finding as to how the expenditure incurred by the assessee during the relevant year related to the income not forming part of its total income and, the same cannot be justified merely on the basis of surmises or conjectures. The observations of the Hon'ble High Court qua the aforesaid issue for the sake of clarity are being reproduced as under:

> "11. As the record reveals, the Assessee received dividend income of Rs.13,85,03,376/-. It was exempted under the IT Act. The Assessee claimed that he did not incur any expenditure to earn that dividend. It is said to have invested surplus funds through the bankers and other financial institutions. The mutual fund officials used to come to the Assessee's doorstep to fill up the forms and to do all other things necessary in that regard. The Assessee only issued the cheques. The AO disagreed. He reckoned that without devoting time and without analysing the nature of the investment, the Assessee could not have invested in the mutual funds. The AO took the view that section 14A clearly applied to the Assessee's case. The AO accordingly invoked Rule 8D and computed the disallowance at 0.5% of Rs. 381,67,09,7317-, the average investment. Then, he disallowed Rs.1,90,83,548/-. The Assessee appealed to the CIT(A). Indeed, the appellate authority confirmed the AO's disallowance. Of course, the Tribunal reversed it. Let us see whether the Tribunal's view is sustainable.
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> 12. Section 14A, inserted by the Finance Act 2001 with retrospective effect from 1 April 1962, aims to disallow expenditure incurred in relation to income which did not form part of the total income under the IT Act. This section has to be read with Rule 8D, which provides the method of calculation of disallowance. Section 14A statutorily recognises the principle that tax is leviable only on the net income. That is, the profits and gains of business or profession are taxed after deducting expenditure from income In that regard, there is no need for the Assessee to establish a one-to-one correlation between income and expenditure. The provision reads:

Section 14A. Expenditure incurred in relation to income not includible in total income.—

(1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.

(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act, in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.

(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act:

Provided that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001.

13. Rule 8D of the Income Tax Rules provides the methods for determining the amount of expenditure in relation to income not includible in the total income. But this Rule comes into play once an expenditure falls within the mischief of section 14A of the IT Act. We need not elaborate on that Rule.

14. In Kanga & Palkhiwala: Law & Practice of Income Tax, (Lexis Nexis, New Delhi, 11 ed. Online edition), the learned revising author Arvind P. Datar has an interesting word about this 'inequitable and unfair[1] provision. According to Kanga & Palkhiwala, on a cursory reading, section 14A seeks to prevent a deduction that may result when income does not form part of the taxable income. But the expenditure incurred to earn that income is allowable as a deduction. However, this section and Rule 8D have been amended several times. Those amendments have resulted in highly unfair consequences for Assessees who earn dividend income. The object of exempting dividend income under section 10(34) and income from mutual funds under section 10(33) was to encourage investments in shares and promote savings.

15. Dividends are not taxed in the hands of the shareholder, but it would be incorrect and anomalous, according to the revising author, to state that dividends are a category of income which does not suffer any tax. The object of section 14A is to disallow expenditure on income which has not suffered tax. That said, under section 115-O, the dividend is taxed at the time of distribution at the prescribed rate. That means, tax is paid by the

company irrespective of whether an Assessee has income below the taxable limit. Had the dividend been paid directly to him, it would not have suffered tax. There is no provision to file any form seeking an exemption or to claim a refund of the dividend distribution tax for such Assessees. So, to disallow the expenditure in the case of dividend is not correct, Ibid.

16. Section 14A refers to 'income which does not form part of total income under the Act'; it Joes not refer to 'income which does not form part of the total income in the hands of the sssessee[1]. Then, Kanga & Palkhiwala takes note of the latest amendment under the Finance Act, 2020: that dividend distribution tax has been deleted, As long as the income is taxed, it should not attract section 14A, opines Kanga & Palkhiwala.

17. Recently, this Bench disposed of a batch of Tax Appeals in CIT, Goa v. M/s. Sociedade De Fomento Industrial Pvt. Ltd, (High Court of Bombay, at Goa**,** Judgment, dated 22 Dctober 2020). One of the substantial questions of law there was identical to the one before us. Rejecting the Revenue's contention, this Court has noted that the respondent invested certain funds in exempted categories such as mutual funds; it earned income. During the assessment year, income from such sources stood exempted under section 10(35) of the IT Act. The only issue was whether the respondent incurred any expenditure while earning that exempted income and whether it included that expenditure in the common indirect expenditure of its own. First, the appellant noted, rather guessed, that the respondent borrowed funds to invest and that there ought to be an interest element. But the respondent asserted that it utilised its surplus funds. This Court, then, found that there was no material for the appellant to conclude that the respondent borrowed the funds. Second, given the volume of investment, the respondent is said to have received charge-free services from the managers of the banks and other financial institutions with whom they have invested. So there is said to be no expenditure.

18. This Court rejected the appellant's contentions and affirmed the Tribunal's findings. Here, too, we face an identical problem, similar assertions and counter assertions, and the same result: the Tribunal reversed CIT(A)'s findings. Can our response be different here?

19. Here, on facts, the Tribunal noted that the AO only discussed the provisions of section 14A(I) but has not justified how the expenditure the Assessee incurred during the relevant year related to the income not forming part of its total income. The AO, according to the Tribunal, straightaway applied Rule 8D. Indeed, there must be a proximate relationship between the expenditure and the tax-exempt income. Only then would a disallowance have to be effected. This Court, we may note, on more than one occasion, has held that the onus is on the Revenue to establish that there is a proximate relationship between the expenditure and the exempt income. That is, the application of section I4A and rule 8D is not automatic in each and every case, where there is income not forming part of the total income. No doubt, the expenditure under section

14A includes both direct and indirect expenditure, but that expenditure must have a proximate relationship with the exempted income. Surmise or conjecture is no answer.

20. We may further reiterate that before rejecting the disallowance computed by the Assessee, the Assessing Officer must give a clear finding with reference to the Assessee's accounts as to how the other expenditure claimed by the Assessee out of the non-exempt income is related to the exempt income.

21. So, we see no valid reasons to upset the Tribunal's well- reasoned judgment on this substantial question of law."

In the backdrop of the aforesaid position of law, we are of the considered view, that the issue that an A.O before taking recourse to the provisions of Sec. 14A(2) and (3) r.w Rule 8D of the Income Tax Rules 1962, is statutorily obligated to give a clear finding, with reference to the assessee's accounts, as to how the expenditure claimed by the assessee in respect of its non-exempt income were related to the exempt income; is no more res-integra pursuant to the aforesaid judgments of the Hon'ble Apex Court.

8. On a perusal of the assessment order, we find, that as stated by the ld. A.R, and rightly so, the A.O while dislodging the suo-motto disallowance that was offered by the assessee u/s 14A in its return of income, had failed to record his satisfaction that having regard to the accounts of the assessee, as placed before him, it was not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. As is discernible from the assessment order, the A.O had shirked from his aforesaid statutory obligation by simply stating that as the assessee was maintaining consolidated accounts and there were no separate accounts for exempt income yielding investments and its other business activities, therefore, he was precluded from establishing one-to-one nexus between the expenses and the exempt income yielding investments. We are afraid, that the aforesaid approach adopted by the A.O can by no means satisfy the statutory obligation that was cast upon him as regards giving a clear finding with reference to the assessee's accounts that the other expenditure claimed

by the assessee out of the non-exempt income were related to its exempt income. By merely stating, that as the assessee was maintaining consolidated accounts, therefore, in the absence of separate accounts for exempt income yielding investments and its other business activities he was precluded from establishing a one-to-one nexus between the expenses and such exempt income yielding investments, in our considered view, by no means can be taken as discharge of the statutory obligation that was cast upon the A.O of recording a satisfaction that as to why the disallowance u/s 14A offered by the assessee was not to be accepted. In our considered view, the A.O by referring to the accounts of the assessee, as were there before him, ought to have pointed out the expenditure which were claimed by the assessee as a deduction against its non-exempt income, but the same as per him were attributable to earning of the exempt income. As held by the Hon'ble High Court of Bombay in the case of **Sociedade De Fomento Industrial Pvt. Ltd. (2020) 429 ITR 358 (Bom)**, the A.O before triggering the determination of disallowance u/s 14A as per the mechanism provided in Rule 8D, remained under an obligation to have given a clear finding with reference to the assessee's accounts as to how the other expenditure claimed by it in respect of its non-exempt income was related to its exempt income. However, as observed by us hereinabove, the A.O had most casually dispensed with his aforesaid statutory obligation, and by merely drawing support from the fact that the assessee had not maintained separate accounts for exempt income yielding investments, had summarily, taken recourse to working of the disallowance u/s 14A r.w Rule 8D(2)(iii). After deliberating at length on the manner in which the disallowance offered by the assessee u/s 14A had been dislodged by the A.O, we, in the backdrop of the aforesaid settled position of law are unable to persuade ourselves to accept the same. In our considered view, as the A.O before taking recourse to the theory of apportionment and computing of the disallowance under

Sec. 14A r.w. Rule 8D(2)(iii) had neither recorded his satisfaction that the suo-motto disallowance offered by the assessee under Sec. 14A was not correct, nor referring to the assessee's accounts whispered a word as to how the other expenditure claimed by the assessee with respect to its non-exempt income were related to its exempt income, therefore, had clearly exceeded his jurisdiction for re-computing the said disallowance in the hands of the assessee. We, thus, in the backdrop of the aforesaid invalid assumption of jurisdiction by the A.O, are unable to uphold the disallowance determined by him u/s 14A r.w Rule 8D. Accordingly, we herein set-aside the order of the CIT(A) and direct the A.O to restrict the disallowance to the extent suo-motto offered by the assessee in its return of income.

9. As we have set-aside the order of the CIT(A), which finds its genesis in the determination of the disallowance by the A.O u/s 14A r.w Rule 8D, therefore, the remaining grounds raised by the assessee, wherein it has assailed the said disallowance to the extent sustained by the CIT(A) are rendered as academic in nature, and thus, are not being adverted to and adjudicated upon by us. The **Ground of appeal No. 1** is allowed in terms of our aforesaid observations.

10. We shall now advert to the grievance of the assessee that the A.O had erred in making a disallowance under Sec. 2(24)(x) r.w.s 36(1)(va) of Rs.2,84,472/-.Observing, that the assessee had failed to deposit the employees contributions to Provident Fund and Employee State Insurance Corporation of Rs.2,82,472 within the due dates (including the grace period), the A.O was of the view that the assessee was not eligible for deduction of the said amount under Sec. 36(1)(va) r.w.s 2(24)(x) of the Act. On appeal, the CIT(A) finding no infirmity in the view taken by the A.O upheld the aforesaid disallowance.

11. Before us, the ld. A.R submitted that both the lower authorities had erred in making/confirming the aforesaid disallowance of Rs. 2,84,472/- under Sec. 36(1)(va) r.w.s 2(24)(x) of the Act. In support of his aforesaid contention the ld. A.R had relied on the judgments of the Hon'ble High Court of Bombay in the case of CIT Vs. Ghatge Patil Transports Limited (2015) 53 taxman.com 141 (Bom) and Geekay Security Services (P) Ltd. Vs. DCIT (2019) 101 taxman.com 192 (Bom). It was submitted by the ld. A.R, that as the assessee had deposited the employees contributions to Provident Fund & Employee State Insurance Corporation before 17.10.2016 i.e the 'due date' of filing of its return of income for the year in question, thus, no disallowance under Sec.2(24)(x) r.w.s 36(1)(va) was called for in its hands.

12. Per contra, the ld. D.R relied on the orders of the lower authorities.

13. Before us, it is the claim of the ld. A.R that as the employees contribution to Provident Fund and Employee State Insurance Corporation of Rs. 2,84,472/- were deposited by the assessee before the 'due date' of filing of its return of income for the assessment year under consideration i.e A.Y 2016-17, therefore, no disallowance was therein liable to be made. We have given a thoughtful consideration to the aforesaid contention of the ld. A.R and find substantial force in the same. On a perusal of the judgment of the **Hon'ble High Court of Bombay** in the case of **CIT (Central), Pune Vs. Ghatge Patil Transport Limited (2015) 368 ITR 749 (Bom)**, we find that both the employers and the employees contributions to the various employees welfare funds are covered under Sec. 43B of the Act. In our considered view, as the employees contribution towards Provident Fund and Employees State Insurance of Rs. 2,84,472/- were deposited by the assessee prior to the 'due date' of filing of its return of income hence, the same was not liable to be disallowed under Sec. 36(1)(va) r.w.s 2(24)(x) of the Act. Our aforesaid view is further supported by a subsequent order of

Hon'ble High Court of Bombay in the case of **Geekay Security Services (P) Ltd. Vs. DCIT (2019) 101 taxman.com 192 (Bom)**. We, thus, in terms of our aforesaid observations vacate the disallowance of Rs.2,84,472/- made by the A.O under Sec. 36(1)(va) r.w.s 2(24)(x) of the Act. The **Ground of appeal No. 2** is allowed in terms of our aforesaid observations.

14. The appeal of the assessee is allowed in terms of our aforesaid observations.

ITA No. 6094/Mum/2019
(Revenue's appeal)

15. We shall now advert to the appeal filed by the revenue. The revenue has assailed the order of the CIT(A) on the following grounds before us :

> "1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing that amounts to be taken for calculating the disallowance u/s 14A should be restricted to fresh investments made during the year for the purpose of computation as per Rule 8D(2)(iii), ignoring the fact that the CBDT Circular No. 5/2014, dated 11.02.2014 does not mention that the disallowance u/s 14A of the IT Act should be restricted to fresh investments during the year for the purpose of computation as per Rule 8D(2)(iii).
>
> 2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing that amounts to be taken for calculating the disallowance u/s 14A should be restricted to investments in subsidiaries on which dividend income has been earned during the year for the purpose of computation as per Rule 8D(2)(iii) ignoring the fact that the CBDT Circular No. 5/2014, dated 11.02.2014 does not mention that the disallowance u/s 14A of the IT Act should be restricted to investments in subsidiaries on which dividend has been earned during the year for the purpose of computation as per Rule 8D(2)(iii)."

16. As we have while disposing off the assessee's appeal for the year under consideration i.e A.Y 2016-17 in ITA 5454/Mum/2019 concluded that the disallowance worked out by the A.O u/s 14A r.w Rule 8D(2)(iii) cannot be sustained for want of jurisdiction on his part, therefore, the aforesaid grievances of the revenue are subsumed in our aforesaid adjudication.

Accordingly, as the aforesaid grounds on the basis of which the order of the CIT(A) has been assailed by the revenue before us are rendered as merely academic in nature, therefore, we refrain from adverting to and adjudicating the same. The **Grounds of appeal Nos. 1 & 2** are disposed off in terms of our aforesaid observations.

17. The appeal of the revenue is dismissed in terms of our aforesaid observations.

18. Resultantly, the appeal filed by the assessee is allowed, while for that filed by the revenue is dismissed in terms of our aforesaid observations.

Order pronounced in the open court on 26/10/2021.

Sd/-	Sd/-
(Rajesh Kumar)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai;
Dated: 26.10.2021

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.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai