IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "C", MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No. 4172/MUM/2019
Assessment Year: 2013-14

Dy. Commissioner of Income Tax, Circle – 14(1)(2), Room No. 475, 4th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	**Vs.**	M/s Citicorp Finance (India) Limited, First International Financial Centre (FIFC), 8th Floor, Plot C-54 & 55, G-Block, Bandra-Kurla Complex, Bandra (East), Mumbai – 400051 PAN: AABCA4881F
(Appellant)		**(Respondent)**

CO No. 74/MUM/2021
(Arising out of ITA No. 4172/MUM/2019)
Assessment Year: 2013-14

M/s Citicorp Finance (India) Limited, First International Financial Centre (FIFC), 8th Floor, Plot C-54 & 55, G-Block, Bandra-Kurla Complex, Bandra (East), Mumbai – 400051 PAN: AABCA4881F	**Vs.**	Dy. Commissioner of Income Tax, Circle – 14(1)(2), Room No. 475, 4th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Cross objector)		**(Respondent)**

Revenue by : Shri R.K. Shah (DR)

Assessee by : Shri Madhur Agarwal (AR)

Date of Hearing : 16/09/2021
Date of Pronouncement: 22/10/2021

O R D E R

PER SAKTIJIT DEY, JM

Captioned appeal by the revenue and cross objection by the assessee arise out of order dated 28.02.2019 of learned Commissioner of Income Tax (Appeals)-22, Mumbai for the assessment year 2013-14.

2. The main grounds raised by the revenue in its appeal and the assessee in its cross objection relate to disallowance made/sustained under section 14A of the Income Tax Act, 1961 read with rule 8D of the Income Tax Rules, 1962.

3. Registry has notified delay of four days in filing the cross objection. At the time of hearing, learned counsel for the assessee submitted that in view of the prevailing pandemic situation, the Hon'ble Supreme Court has extended the time limit for filing appeals etc. Therefore, there is no delay. In this context, he relied upon order dated 27.04.2021 of Hon'ble Supreme Court in Miscellaneous Application No. 665/Mum/2021. Having considered the submissions of the parties, we are of the view that there is no delay in filing the cross objection. Accordingly, we admit the cross objection for adjudication on merits.

4. Briefly the facts are, the assessee is a resident company and is engaged in the business of lending, hire purchases, lease finance and investment. For the assessment year under dispute, assessee filed its return of income on 09.01.2014 declaring total income of Rs. 197,75,01,410/-. In course of assessment proceedings, the assessing officer (AO), on verifying the facts and materials on record noticed that the assessee had earned exempt income by way of dividend amounting to Rs. 125,94,50,000/-. Whereas, the assessee has

investment in equity shares worth Rs. 278,80,00,000/- which would yield exempt income. Further, the AO noticed that the assessee has not disallowed any expenditure for earning the exempt income. Therefore, he called upon the assessee to explain why disallowance of expenditure attributable to earning of exempt income should not be made under section 14A of the Act r.w.r. 8D. In reply, the assessee submitted that no expenditure can be disallowed under section 14A r.w.r. 8D. Without prejudice, assessee furnished computation working out the disallowance under rule 8D(2)(iii) at Rs. 31,42,073/-. The AO however, did not accept the submissions of the assessee. Accordingly, he proceeded to compute disallowance as under:-

Sr. No.	*Particulars*	*Amount (Rs.)*
1	*Interest expenses under rule 8D(2)(ii)*	*14,56,06,348/-*
2	*Administrative expenses under rule 8D(2)(iii)*	*1,34,57,250/-*
	Total	*15,90,63,598/-*

5. Assessee contested the aforesaid disallowance before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record and the judicial precedents cited before him, learned Commissioner (Appeals) deleted the disallowance of interest expenditure made under rule 8D)2)(ii). Since, the assessee had sufficient interest free funds available with it. As regards, disallowance of administrative expenditure under rule 8D(2)(ii). Further, learned Commissioner (Appeals) directed the AO to re-compute disallowance under rule 8D(2)(iii) after excluding the investment of Rs. 74,00,00,000/- in the equity shares of CMFL a subsidiary of the assessee. Being aggrieved with the aforesaid decision of

learned Commissioner (Appeals), both, the revenue as well as the assessee are before us.

6. Learned Departmental Representative submitted, learned Commissioner (Appeals) has wrongly deleted the disallowance of interest expenditure made under rule 8D(2)(ii). He submitted, when the assessee has mixed funds and no separate accounts have been maintained for borrowed funds and interest free funds, a part of the interest expenditure has to be apportioned towards earning of exempt income. In support of such contention learned Departmental Representative relied upon the decision of the ITAT, Chandigarh Bench in case of ACIT vs. Avon Cycle Ltd., ITA No. 1143/CHD/2011 dated 17101.2013. Further, he submitted, in case of Maxopp Investment Ltd. vs. CIT (2018) 91 taxmann.com 154, the Hon'ble Supreme court has held that apportionment of expenditure has to be made between taxable income and tax free income.

7. Per contra, the learned Counsel for the assessee submitted, if the assessee has interest free funds exceeding the investment made, disallowance of interest expenses under rule 8D(2)(ii) cannot be made. He submitted, this legal principle has not only been propounded by the Hon'ble jurisdictional High Court but also by the Hon'ble Supreme Court. In support, he relied upon the decision of the Hon'ble Supreme Court in case of South India Bank Ltd. vs. CIT, Civil Appeal No. 9606 of 2011 and others, judgment dated 09.09.2021. Further, he submitted, in assessee's own case in assessment year 2012-13, the Tribunal in ITA No. 4471/Mum/2018 and CO No. 172/Mum/2019 dated 30.09.2020 has held that disallowance of interest expenditure cannot be made, if interest free fund available with the assessee is more than the investment

made. Thus, he submitted, learned Commissioner (Appeals) has rightly deleted the disallowance made under rule 8D(2)(ii).

8. Proceeding further, he submitted, disallowance of administrative expenditure under rule 8D(2)(iii) has to be made by considering only those investments which have yielded exempt income during the year. In support, he relied upon ITAT Delhi Special Bench decision in case of ACIT vs. Vireet Investments Pvt. Ltd. 165 ITD 27 as well as the order passed by the Tribunal in assessee's own case in assessment year 2012-13 (supra).

9. We have considered rival submissions in the light of decision relied upon and perused the materials on record. As discussed earlier, the major part of disallowance made under section 14A is interest expenses disallowed under rule 8D(2)(ii). Undisputedly, learned Commissioner (Appeals) having factually found that interest free fund available with the assessee is more than the investment made has deleted the disallowance. The revenue has not disputed the fact the assessee has interest free fund exceeding the investments made in exempt income yielding assets. The grievance of the revenue is, since the assessee has mixed funds and has not maintained separate accounts for interest bearing funds and interest free funds, proportionate interest expenses has to be attributed to the activity of earning exempt income. In our view, the aforesaid contention of the revenue is unacceptable. Now, it is fairly well settled by a plethora judicial precedents rendered both by Courts and that even if the assessee is having mixed funds, still, if it has interest free funds available exceeding the investment made in exempt income yielding assets, no disallowance under rules 8D(2)(ii) can be made. This is because, the

presumption would be, the investments have been made out of interest free fund. Recently, the Hon'ble Apex Court while examining the aforesaid legal proposition in case of South India Bank Ltd. vs. CIT (supra) has held as under:-

"17. In a situation where the assessee has mixed fund (made up partly of interest free funds and partly of interest bearing funds) and payment is made out of that mixed fund, the investment must be considered to have been made out of the interest free fund. To put it another way, in respect of payment made out of mixed fund, it is the assessee who has such right of appropriation and also the right to assert from what part of the fund a particular investment is made and it may not be permissible for the Revenue to make an estimation of a proportionate figure. For accepting such a proposition, it would be helpful to refer to the decision of the Bombay High Court in Pr. CIT v. Bombay Dyeing and Mfg. Co. Ltd2 where the answer was in favour of the assessee on the question, whether the Tribunal was justified in deleting the disallowance under Section 80M of the Act on the presumption that when the funds available to the assessee were both interest free and loans, the investments made would be out of the interest free funds available with the assessee, provided the interest free funds were sufficient to meet the investments. The resultant SLP of the Revenue challenging the Bombay High Court judgment was dismissed both on merit and on delay by this Court. The merit of the above proposition of law of the Bombay High Court would now be appreciated in the following discussion.

18. In the above context, it would be apposite to refer to a similar decision in Commissioner of Income Tax (Large Tax Payer Unit) Vs. Reliance Industries Ltd3 where a Division Bench of this Court expressly held that where there is finding of fact that interest free funds available

to assessee were sufficient to meet its investment it will be presumed that investments were made from such interest free funds.

19. In HDFC Bank Ltd. Vs. Deputy Commissioner of Income Tax4, the assessee was a Scheduled Bank and the issue therein also pertained to disallowance under Section 14A. In this case, the Bombay High Court even while remanding the case back to Tribunal for adjudicating afresh observed (relying on its own previous judgment in same assessee's case for a different Assessment Year) that, if assessee possesses sufficient interest free funds as against investment in tax free securities then, there is a presumption that investment which has been made in tax free securities, has come out of interest free funds available with assessee. In such situation Section 14A of the Act would not be applicable. Similar views have been expressed by other High Courts in CIT Vs. Suzlon Energy Ltd.5, CIT Vs. Microlabs Ltd.6 and CIT Vs. Max India Ltd.7 Mr. S Ganesh the learned Senior Counsel while citing these cases from the High Courts have further pointed out that those judgments have attained finality. On reading of these judgments, we are of the considered opinion that the High Courts have correctly interpreted the scope of Section 14A of the Act in their decisions favouring the assessees.

20. Applying the same logic, the disallowance would be legally impermissible for the investment made by the assessees in bonds/shares using interest free funds, under Section 14A of the Act. In other words, if investments in securities is made out of common funds and the assessee has available, non-interest-bearing funds larger than the investments made in tax- free securities then in such cases, disallowance under Section 14A cannot be made.

21. On behalf of Revenue Mr. Arijit Prasad, the learned Senior Advocate refers to SA Builders v. CIT 8 where this Court ruled on issue of disallowance in relation to funds lent to sister concern out of mixed

funds. The issue in SA Builders is pending consideration before the larger bench of this Court in SLP (C) No. 14729 of 2012 titled as Addl. CIT v. Tulip Star Hotels Ltd. The counsel therefore, argues that there is no finality on the issue of disallowance, when mixed funds are used. On this aspect, since the issue is pending before a larger Bench, comments from this Bench may not be appropriate. However, at the same time it is necessary to distinguish the facts of present appeals from those in SA Builders/Tulip Star Hotels Ltd. In that case, loans were extended to sister concern while here the Assessee- Banks have invested in bonds/securities. The factual scenario is different and distinguishable and therefore the issue pending before the larger Bench should have no bearing at this stage for the present matters.

22. The High Court herein endorsed the proportionate disallowance made by the Assessing Officer under Section 14A of the Income Tax Act to the extent of investments made in tax-free bonds/securities primarily because, separate account was not maintained by assessee. On this aspect we wanted to know about the law which obligates the assessee to maintain separate accounts. However, the learned ASG could not provide a satisfactory answer and instead relied upon Honda Siel Power Products Ltd. v. DCIT 9 to argue that it is the responsibility of the assessee to fully disclose all material facts. The cited judgment, as can be seen, mainly dealt with re-opening of assessment in view of escapement of income. The contention of department for re-opening was that the assessee had earned tax-free dividend and had claimed various administrative expenses for earning such dividend income and those (though not allowable) was allowed as expenditure and therefore the income had escaped assessment. On this, suffice would be to observe that the action in Honda Siel (supra) related to re-opening of assessment where full disclosure was not made. An assessee definitely has the obligation to provide full material disclosures at the time of filing of

Income Tax Return but there is no corresponding legal obligation upon the assessee to maintain separate accounts for different types of funds held by it. In absence of any statutory provision which compels the assessee to maintain separate accounts for different types of funds, the judgment cited by the learned ASG will have no application to support the Revenue's contention against the assessee."

10. The ratio laid down by the Hon'ble Apex Court, as aforesaid, clearly clinches the issue in favour of the assessee. For the very same reason, reliance placed by learned Departmental Representative in case of ACIT vs. Avon Cycle Ltd. (supra) would be of no help to the revenue. Thus, we uphold the decision of learned Commissioner (Appeals) in deleting the disallowance of interest expenses made under rule 8D(2)(ii).

11. As regards, disallowance of administrative expenses under rule 8D(2)(iii), we find substantial merit in the submissions of the assessee. In case of ACIT vs. Vireet Investment Pvt. Ltd. (supra) the Special Bench of the Tribunal has held, while computing disallowance under rule 8D(2)(iii) only those investments which have yielded exempt income during the year can be included in the average value of investment. Following the aforesaid Special Bench decision, the Tribunal in assessee's own case in assessment year 2012-13 has expressed similar view. In view of the aforesaid, we direct the AO to recompute the disallowance under rule 8D(2)(iii) by including those investments which have yielded exempt income during the year under consideration.

12. As regards, disallowance of expenses under section 14A r.w.r. 8D while computing book profit under section 115JB of the Act, in view of the decision of the ITAT Special Bench in case of ACIT vs. Vireet Investments Pvt. Ltd. (supra)

as well as the Tribunal's decision in assessee's own case in assessment year 2012-13, we do not find any infirmity in the decision of learned Commissioner (Appeals). Accordingly, grounds raised in revenue's appeal are dismissed and ground no. 2 in the CO is partly allowed.

13. Ground no. 1 of the CO having not been pressed is dismissed.

14. It will be relevant to observe, by letter dated 27.07.2021, the assessee has raised the following additional grounds to the cross objection.

> *"1. That on the facts and circumstances of the case and in law, the Company placing reliance on the decision of Bombay High Court in the case of Sesa Goa Ltd. vs. Joint Commissioner of Income Tax prays that it be granted allowance for secondary and higher education cess under section 37(1) of the Act r.w.s. 438 of the Act.*
>
> *2. That on the facts and circumstances of the case and in law, the learned assessing officer may be directed to allow deduction for education cess of Rs. 1,86,87,388/-, while computing the taxable income of the Appellant."*

14. The additional grounds raised by the assessee being a legal issue which can be decided based on facts and materials available on record, we are inclined to admit them for adjudication.

15. Having considered rival submissions and following the decision of the Hon'ble jurisdictional High Court in case of Sesa Goa Ltd. vs. JCIT (2020) 117 taxmann.com 96 (Bombay), we direct the AO to allow deduction of education cess while computing the income of the assessee.

16. In the result, revenues appeal is dismissed and cross objection is partly allowed.

Order pronounced in the open court on 22 October, 2021.

Sd/-	sd/-
(RAJESH KUMAR)	(SAKTIJIT DEY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 22/10/2021
Alindra, PS

आदेश प्रतिलिपि ग्रेषित/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)
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