

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri George Mathan, JM & Shri Ramit Kochar, AM

ITA No.	A.Y.	Appellant	Respondent
400/Coch/2020	2010-11	Deputy Commissioner of Income Tax, Corporate Circle-2(1), 3 rd Floor, C R Building I.S. Press Road, Kochi- 682018	M/s.SFO Technologies Pvt. Ltd., XIX/346, Stone House, Aluva, Ernakulam-683101 [PAN: AADCS3318K]
401/Coch/2020	2012-13		
402/Coch/2020	2013-14		
403/Coch/2020	2014-15		
404/Coch/2020	2016-17		

Appellant by: Smt. Jamunna Devi, Sr.DR
Respondent by: Shri Anil D. Nair & Smt. Telma

Date of Hearing: 22.02.2022 & 24.02.2022
Date of Pronouncement: 24.02.2022

ORDER

Per Shri Ramit Kochar, AM :

These five appeals, filed by Revenue being ITA Nos.400 to 404/Coch/2020 are directed against separate appellate order(s) all dated 18.09.2020, in Appeal No. CIT(A), Kochi-1/10288/2014-15 for assessment year (ay) 2010-11, Appeal No. CIT(A), Kochi 1/10171/2016-17 for ay: 2012-13, Appeal No. CIT(A), Kochi-1/10169/2016-17 for ay: 2013-14, Appeal No. CIT(A), Kochi-1/10558/2016-17 for ay: 2014-15 and Appeal No. CIT(A), Kochi-1/10200/2018-19 for ay: 2016-17, all passed by learned Commissioner of Income Tax (Appeals), Kochi-1 (hereinafter called "the CIT(A)"), the appellate proceedings had arisen before learned CIT(A) from separate assessment orders, being assessment order dated 26.03.2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for ay: 2010-11, being Assessment Order dated 31.03.2016 passed by AO u/s 143(3) read with Section 92CA of the 1961 Act for ay: 2012-13, being Assessment Order dated 31.03.2016 passed by AO u/s 143(3) of the 1961

Act for ay: 2013-14, being Assessment Order dated 31.12.2016 passed by AO u/s 143(3) of the 1961 Act for ay: 2014-15 and being Assessment Order dated 27.12.2018 passed by AO u/s 143(3) of the 1961 Act for ay: 2016-17. Since the facts and issues involved in all these five appeals filed by Revenue are common and identical, and grievance of Revenue is similar in all these five Revenue appeals, except for the amounts mentioned therein, all these five appeals filed by Revenue were heard together and are being disposed-off by this common order. These appeals were heard on 22.02.2022. While discussing draft order amongst us on 23.02.2022, it was observed that in these cases certain additional facts have emerged while studying these files which warrant additions to be made by invoking provisions of Section 14A of the 1961 Act read with Rule 8D(2)(iii) of the Income-tax Rules, 1962, while in open court proceedings held on 22.02.2022, it was pronounced that these five Revenue appeals stood dismissed, and now based on these additional facts which emerged after reading these five appeal files, these five appeals filed by Revenue are to be partly allowed for statistical purposes. Thus, keeping in view principles of fair and transparent hearing and to meet principles of natural justice, it was considered proper and appropriate in public interest to re-fix these five appeals for clarification, so that these additional facts which had emerged from studying these appeal files post hearing on 22.02.2022 can be confronted to both the parties and they be heard on these additional facts which had emerged after studying these five appeal files post hearing on 22.02.2022. Thus, these five appeals were posted for clarification for 24.02.2022. Both the parties were confronted with these additional facts emerging from the records, and they were finally heard on 24.02.2022.

2. For the sake of convenience, first we will take up Revenue's appeal in ITA No.400/Coch/2020, for ay: 2010-11. The Revenue has raised the following grounds of appeal in memo of appeal filed with Income Tax Appellate Tribunal, Cochin Bench, in ITA No. 400/Coch/2020 for ay: 2010-11, as under:

1. *The orders of the Commissioner of Income Tax (Appeals)-1, Kochi are*

opposed to the facts and circumstances of the case.

2. *The Learned Commissioner of Income Tax (Appeals)-1, Kochi is not justified in deleting the disallowance u/s. 14A read with Rule 8D of Rs.1,83,55,106/-.*

3 *The learned CIT(A) erred in not appreciating the fact that the assessee had huge value of investments capable of earning exempt income and disallowed no expenditure attributable to such investments, thereby attracting the provisions of 14A read with rule 8D.*

4. *The learned CIT(A) ought to have considered the decision of the Hon'ble Mumbai Bench of the Tribunal in the case of M/s. Daga Capital Management Private Limited (117 ITR 169), wherein Hon'ble Tribunal held that Rule 8D is applicable in all cases wherein even there is no exempt income is earned.*

5. *The learned CIT(A) ought to have considered the Judgment of Hon'ble Bombay High Court in the case of PCIT Vs. M/s. Provogue (India) Ltd. in ITA No. 1275/2015 to the effect that strategic investments are not excluded from the purview of section 14A read with Rule 8D.*

6. *The learned CIT(A) has failed to note that the Board vide Circular No.5 of 2014, has clarified that the disallowance is applicable, even in cases where no exempt income was earned during the year, but there is a possibility of earning the exempt income and the circular is not overriding the express provisions of Section 14A read with Rule 8D.*

7. *Learned CIT(A) ought to have considered that in the case of CIT v. Walfort Share &Stock Brokers (P.) Ltd. [2010] 192 Taxman 211/326 ITR 1 (SC), followed in Godrej &Boyce Mfg, Co. Ltd. v. Dy. CIT [2017] 81 taxmann.com 111 (SC), the Hon'ble Supreme Court, while noticing the objects and reasons behind introduction of Section 14A of the Income Tax Act 1961, held that "Expenses allowed can only be in respect of earning of taxable income."*

8. *Learned CIT(A) erred in not considering the recent Judgement of Hon'ble Karnataka High Court in the Case of M/s. Kingfisher Finvest India Ltd [ITA No. 100 of 2015 dated 29/09/2020] wherein Hon'ble High Court held that disallowance under section 14A of the Act RWR 8D has to be made even when the tax paid for a particular year is not earned in exempt income.*

9. For these and other grounds that may be urged to the time of hearing, it is prayed that the order of Commissioner of Income Tax(Appeals) may be set aside."

3. First, we are taking up Revenue's appeal for ay: 2010-11, in ITA No. 400/Coch/2020, for ay: 2010-11. The brief facts of the case are that the assessee is a company, engaged in the business of manufacturing, assembling and developing of electronic components and devices. The main grievance of Revenue is with respect to the deletion by Id. CIT(A) of disallowance to the tune of Rs. 1,83,55,106/- , vide appellate order dated 18.09.2020 , which addition to the income by way of disallowance of expenditure was earlier made by the AO vide assessment order dated 26.03.2014 for ay: 2010-11, by invoking provisions of Section 14A of the 1961 Act read with Rule 8D of Income Tax Rules, 1962(hereinafter called " the Rules") . The AO had observed that the assessee had made investments yielding exempt income , aggregating to Rs.69,54,80,865/- and the return in the form of dividend from such investment would be exempt from tax u/s.10(34) of the Act. The AO invoked provisions of Section 14A r.w.Rule 8D and made disallowance of expenditure to the tune of Rs.1,83,55,106/- which stood added to the income of the assessee vide assessment order dated 26.03.2014 passed by AO u/s 143(3) of the 1961 Act for ay: 2010-11, the working of which is as hereunder:

"4.3 Accordingly, the disallowance u/s 14A read with Rule 8D is worked out as under:

(i)	Direct expenditure relating to exempt income	Nil
(ii)	Interest relating to exempt income 133,241,840* 53,27,64,608/452,39,47,302	1,56,91,283/-
(iii)	½% of investments yielding exempt income (1/2% of 53,27,64,608/-)	26,63,823/- -----
	Total disallowance u/s 14A	Rs.1,83,55,106/- =====

Interest debited to P&L A/c not directly related to a particular income or receipt Rs.133,241,840/-

Total Assets as per Balance Sheet

As on 31.03.2009	437,87,00,941/-
As on 31.03.2010	466,91,93,662/-

Average	452,39,47,302/-
<i>Investment yielding exempt income</i>	
As on 31.03.2009	37,00,48,350/-
As on 31.03.2010	69,54,80,865/-
Average	53,27,64,608/-

4. The assessee being aggrieved by assessment framed by AO vide assessment order dated 26.03.2014 passed u/s 143(3) of the 1961 Act for ay: 2010-11, filed first appeal with learned CIT(A) and made detailed submissions, wherein, inter-alia, the assessee submitted that it had made total investments of Rs.69,54,80,865/-, the break-up of which is as under:

Category	Investment in	2009-2010	2008-2009
Foreign Investments	<i>Opterna Inc., USA</i>	112,928,769	112,928,769
	<i>SFO Technologies Inc., USA</i>	202,000	202,000
	<i>Nest Europe Limited, United Kingdom</i>	144,015,560	144,015,560
	<i>Nihon Nest Corporation, Japan</i>	1,248,200	1,248,200
	Total Foreign Investment	258,394,529	258,394,529
Indian Investments	<i>Nest Power Electronics Private Limited</i>	10,000,000	10,000,000
	<i>SFO Technologies Digital Private Limited</i>	324,600,000	100,000
	<i>Nest Hi-Tek Park Private Limited</i>	99,910,000	99,910,000
	<i>Network Systems and Technologies Ltd.</i>	1,000	1,000
	<i>Indian Bank</i>	63,336	63,336
	<i>State Bank of Travancore</i>	12,000	12,000
	<i>HDFC Bank Limited</i>	500,000	500,000
	<i>Birla Sun life Midcap Fund</i>	1,000,000	456,723
	<i>ICICI Prudential Infrastructure Mutual Fund</i>	1,000,000	610,762
	Total Indian Investment	437,086,336	111,653,821
Total Investments	695,480,865	370,048,350	

4.2 The assessee also submitted before Ld.CIT(A) that it has share capital and reserves and surplus, to the tune of Rs.183.87 Crores as at 31.03.2010, which are far in excess of investment made by the assessee to the tune of Rs. 69.55 crores as at 31.03.2010, and it was prayed that no disallowance u/s 14A read with Rule 8D of the 1962 Rules is warranted, as the interest free owned funds by way of share capital and reserves and

surplus are much higher than the investments made by the assessee. The details of share capital and reserves and surplus were submitted by assessee before Ld.CIT(A), as under:

<i>Investment in</i>	<i>2009-2010</i>	<i>2008-2009</i>
<i>Share Capital</i>	<i>70,010,000</i>	<i>70,010,000</i>
<i>Share Application Money</i>	<i>250,003,322</i>	<i>250,003,322</i>
<i>Reserves and Surpluses</i>	<i>1,518,730,029</i>	<i>1,408,898,833</i>
<i>Total</i>	<i>1,838,743,351</i>	<i>1,728,912,155</i>

4.3 Further, the assessee also submitted before Id. CIT(A) that it had made investments in companies outside India in foreign subsidiaries, to the tune of Rs.25.83 Crores as detailed in the chart above, and dividend income from such investments made in these foreign companies will be chargeable to income-tax under the provisions of the 1961 Act in the hands of the assessee, as the said income is not exempt from income-tax under the provisions of the 1961 Act, and hence Section 14A of the 1961 Act cannot be invoked on these foreign investment to the tune of Rs.25.83 Crores made by the assessee as dividend income from these investments are chargeable to income-tax, because Section 14A of the 1961 Act can only get triggered when exempt income is earned by tax-payer.

4.4 Further, it was also claimed by assessee before Id. CIT(A) that the assessee has made investments in subsidiary companies in India which are extended arm(s) of the business of the assessee, keeping in view commercial expediency, and as these are strategic investments to the tune of Rs.43.45 crores (as detailed in chart above) out of total investments of Rs. 69.54 crores, the provisions of Section 14A of the 1961 Act has no applicability to these strategic investments.

4.5 The Ld.CIT(A), after considering the submissions of the assessee, was pleased to delete the additions as were made by the AO to the tune of Rs.1,83,55,106/-, vide appellate order dated 18.09.2020 for ay:2010-11, by holding as under:

"The Appellant in the course of hearing and submissions has segregated the explanation into three segments:

- a. Applicability of Section 14A disallowance on Foreign Investments*
- b. Applicability of Section 14A disallowance for investments made in subsidiary companies as an extended arm of the business of the assessee.*
- c. Applicability of Section 14A disallowance on other investments made in India*

Section 14A of the Act applies to expenditure incurred in connection with earning an exempt income. Income from Foreign Investments are not exempted from tax and accordingly application of Section 14A does not apply on such investments.

*With respect to the investments in subsidiary companies, the appellant has explained the nature of business and the fact that it is just an extended arm of the business. Further, the appellant has also got huge reserves and surplus and unsecured loans which are non-interest bearing funds which is much times higher than the actual investment made by the appellant. Further, the agreement from the investors also clearly stipulate the purpose for which the fund shall be utilized which is for making such investments which clearly evidence the fact that there was adequate non-interest bearing funds for making such investments. **Further, the actual exempt income received by the Appellant is only Rs.23,508/-.***

The mandate of Section 14A is clear. It desires to curb the practice to claim deduction of expenses incurred in relation to exempt income. It clearly relates to earning of actual income and not notional or anticipated income. Therefore no disallowance can be made on investments where the assessee has not earned any exempt income. However, CBDT Circular No.5/2014 dated 11th February 2014 stated that disallowance under Section 14A is warranted even when the assessee in a particular year has not earned any exempt income.

The above aspect has been settled by the Honorable High Court of Delhi in the case of Cheminvest Ltd. V CIT (378 ITT 33) which has overruled the Special Bench decision of the Tribunal in the case of CheminvestLtd. V ITO (121 ITD 318). Further, the Delhi High Court in the case of PCIT Vs IL & FS Energy Development Co Ltd (399 ITR 483) held that CBDT Circular 5/2014 cannot override the express provisions of Section 14A read with Rule 8D.

The Apex Court confirmed the decision of Madras High Court in the case of CIT VsChettinad Logistics (P) Ltd., (80 taxmann 221) also held that Section. 14A cannot be invoked when no exempt income was earned by the assessee.

Further, the decision of the Apex Court in the matter of Maxopp Investment Ltd Vs CIT, New Delhi with others[2018] 91 taxmann.com 154 (SC) is not applicable as the grounds of appeal as discussed by the appellant is not in line with the grounds discussed in the said case which relies on the dominant purpose test.

The Honorable High Court of Gujarat in the case of PCIT Vs. Sintex Industries Ltd. (82 taxmann 171) held that if assessee had its own surplus fund against which small investments were made, disallowance of interest and administrative expenses under Section 14A is not warranted. The Special Leave Petition filed by the Revenue authorities before the Apex Court was also dismissed.

The company has huge net-worth which is much times higher than the total investment made by the company. Further, the investment agreement entered into the company against which the also clearly stipulates that the said fund shall be utilized for making the investments

and for inorganic expansion through such investments which clearly evidences the fact that investments were made through non-interest bearing funds.

Moreover the issue is decided in favor of the Appellant by the Honorable ITAT in ITA Nos. 477 & 478/Coch/07 dated 16.10.2009 and the Honorable High Court of Kerala in ITA No.134 & 152 of 2010 dated 01.07.2010 by holding that the Department has not been able to establish that borrowed funds have been diverted for investment purpose. The case has also been decided in favour of the Appellant in the earlier years from the same office.

The disallowance u/s 14A of the Act of Rs.1,83,55,106/- is deleted. The Grounds of Appeal is Allowed."

5.Now, It is the turn of the Revenue to be aggrieved by the decision of Id. CIT(A) , and Revenue has now come in appeal before the tribunal.

6.We have heard both the parties in open court hearings.

6.2 The Id. Sr. DR relied upon the appellate order passed by Id. CIT(A).

6.3 On the other hand, the learned Counsel for the assessee has submitted that the assessee has made investment in foreign companies to the tune of Rs.25.83 Crores, wherein dividend income which is to be earned from these investments in foreign companies are chargeable to tax under the provisions of the 1961 Act, and are not exempt from income-tax u/s.10(34) of the Act , and hence Section 14A has no applicability to investments made in foreign companies, as Section 14A can only be applied to disallow expenditure incurred in relation to earning of an exempt income. It was submitted by Id. Counsel for the assessee that the Ld.CIT(A) rightly deleted the disallowance to the tune of Rs. 1,83,55,106 as was earlier made by the AO by invoking provisions of Section 14A of the 1961 Act read with Rule 8D of the 1962 Rules. Further it is the contention of the learned counsel for the assessee that the share capital and reserves and surplus of the assessee, were to the tune of Rs.183.87 Crores as at 31.03.2010 , and the total investments as was made by the assessee at 31.03.2010, were to the tune of Rs.69.54 Crores, and since interest free owned funds comprising of share capital and reserves far exceeded the investment made, the presumptions will apply that the

assessee invested its own interest free funds in making investments in shares and securities, and hence no disallowance of expenditure by invoking provisions of Section 14A read with Rule 8D are warranted. Further it is claimed that total dividend income of Rs.23,508/- was earned during the year under consideration which was claimed as an exempt income, disallowance of expenditure u/s 14A rule 8D cannot exceed the amount of exempt dividend income received by the assessee during the year under consideration. The Id. Counsel for the assessee relied upon decision of Chennai-tribunal in the case of DCIT v. Repco Home Finance Private Limited reported in (2020) 117 taxmann.com 223(Chennai-trib.), in which both of us were part of the Division Bench who pronounced the said order, where in it was held that when no exempt income was received/earned during the relevant previous year, then no disallowance can be made by invoking provisions of Section 14A of the 1961 Act.

7. We have heard contentions of both the parties in open court hearing and perused the material on record including cited case laws. The assessee is engaged in the business of manufacturing, assembling and developing of electronic components and devices. The short question which arise in this appeal is with respect to disallowance of expenditure to the tune of Rs. 1,83,55,106/- by the AO by invoking provisions of Section 14A read with Rule 8D of the 1962 Rules, being Rule 8D(2)(ii) and 8D(2)(iii) of the 1962 Rules, which disallowance was later stood deleted by Id. CIT(A). The working of the disallowance of expenditure incurred in relation to earning of an income which does not form part of total income chargeable to tax, by invoking provisions of Section 14A of the 1961 Act read with Rule 8D(2)(ii) and 8D(2)(iii) of the 1962 Rules, as was made by the AO is reproduced as hereunder:

"4.3 Accordingly, the disallowance u/s 14A read with Rule 8D is worked out as under:

(i)	<i>Direct expenditure relating to exempt income</i>	<i>Nil</i>
(ii)	<i>Interest relating to exempt income</i> <i>133,241,840* 53,27,64,608/452,39,47,302</i>	<i>1,56,91,283/-</i>
(iii)	<i>½% of investments yielding exempt income</i>	<i>26,63,823/-</i>

(1/2% of 53,27,64,608/-)

Total disallowance u/s 14A

Rs.1,83,55,106/-

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Interest debited to P&L A/c not directly related to
a particular income or receipt Rs.133,241,840/-Total Assets as per Balance Sheet

As on 31.03.2009	437,87,00,941/-
As on 31.03.2010	466,91,93,662/-
Average	452,39,47,302/-

Investment yielding exempt income

As on 31.03.2009	37,00,48,350/-
As on 31.03.2010	69,54,80,865/-
Average	53,27,64,608/-

7.2 Before proceeding further, it is pertinent to refer to the facts which are emerging from record and not controverted by Id. Sr. DR is that **the assessee has earned dividend income of Rs. 23,508/-** during the year under consideration, which was claimed as an **exempt income** under the provisions of the 1961 Act. The assessee admittedly did not made any suo-motu disallowance of expenditure under the provisions of Section 14A of the 1961 Act, being incurred in relation to earning of an income which does not form part of total income chargeable to tax, while filing its return of income with the Revenue or even during the proceedings conducted against the assessee during assessment as well appellate stage. Further, that the assessee has its own **share capital and reserves and surplus, to the tune of Rs.183.87 Crores as at 31.03.2010** (Rs. 172.89 Crores as at 31.03.2009), detailed as hereunder:

Investment in	2009-2010	2008-2009
Share Capital	70,010,000	70,010,000
Share Application Money	250,003,322	250,003,322
Reserves and Surpluses	1,518,730,029	1,408,898,833
Total	1,838,743,351	1,728,912,155

Further, it is observed that the assessee had made **total investments of Rs.69.54 Crores as at 31st March, 2010** (which were to the tune of Rs.37 Crores as at 31-03-2009). Further, out of investment made by

assessee to the tune of Rs.69.54 Crores as at 31.03.2010 , the assessee has **invested Rs.25.83 Crores in foreign companies viz. investments made in its foreign subsidiaries.** During the relevant year under consideration, the dividend income from these investments in foreign companies is chargeable to income-tax under the provisions of the 1961 Act, as no dividend distribution tax is payable by these foreign companies at the time of distribution of dividend, exemption in the hands of recipient was restricted only when the dividend is subjected to dividend distribution tax paid by company while declaring/distributing dividend. Reference is drawn to provisions of Section 10(34) of the 1961 Act. Thus, so far as these foreign investments are concerned being investment made by assessee in foreign companies, the income by way of dividend received by assessee being chargeable to income-tax under the provisions of the 1961 Act, the Id. CIT(A) has rightly held that Section 14A cannot be invoked w.r.t. these foreign investments, as Section 14A only get triggered to disallow expenditure incurred in relation to earning of an income which does not form part of total income chargeable to income-tax, while dividend from foreign investments are subject to income-tax in India in the hands of recipient . Reference is drawn to decision of Chennai-tribunal in the case of **Pentamedia Graphics Limited v. DCIT reported in (2020) 116 taxmann.com 564(Chennai-trib)**, where tribunal held that dividend from companies are chargeable to tax in India and are not exempt from tax, and hence there is no applicability of Section 14A, by holding as under:

“ 9. The second effective issue raised by assessee in its appeal for ay: 2009-10 concerns with disallowance of expenses incurred by assessee in relation to earning of an exempt income by the AO by invoking provisions of section 14A of the 1961 Act read with Rule 8D(2)(iii) of the 1962 Rules. The AO has disallowed the expenses by invoking Rule 8D(2)(iii) of the 1962 Rules by applying 0.5% of the average investments. The learned CIT(A) has affirmed the decision of the AO. It is no more res-integra that Rule 8D of the 1962 Rule shall be applicable for the impugned assessment year. The only grievance raised by assessee before us is that the assessee has made investments in foreign companies from which dividend income was received during the year under consideration on which the assessee has paid due taxes to the government as the said dividend income was not exempt from tax and was infact chargeable to tax. It is prayed that the said investments in foreign companies be excluded while applying section 14A of the 1961 Act read with Rule 8D of the 1962 Rules. We find merit in the contention of the assessee that once the income is chargeable to income-tax, section 14A shall have no applicability. We are restoring the matter back to the file of the AO for verification

of the contention of the assessee and re-adjudicate on merits in accordance with law after due verifications and all such foreign investments on which dividend income has suffered taxation in India shall stand excluded.....”

No contrary decision of Hon’ble Supreme Court or Hon’ble High Court including Hon’ble Jurisdictional High Court is brought to our knowledge by Id.Sr. DR..We order accordingly.

7.3 It is also observed that the assessee has made investments to the tune of Rs.43.45 Crores in its subsidiary companies situated in India. The Id. Counsel for the assessee has pleaded for exclusion of these strategic investments being investments made in subsidiary companies based in India claimed to be owing to commercial expediency, from application of provisions of Section 14A. We are afraid this contention of Id. Counsel for the assessee cannot be accepted, in view of judgment and order of Hon’ble Supreme Court in the case of **Maxopp Investment Limited v. CIT, reported in (2018) 91 taxmann.com 154(SC)**, wherein Hon’ble Supreme Court has rejected the theory of dominant purpose of investment for non application of provisions of Section 14A of the 1961 Act, by holding as under:

“34. Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessee would apply while interpreting Section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this 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. Keeping this objective behind Section 14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act.”

7.4 It is also observed that the assessee has made investments to the tune of Rs.25,75,336 in listed securities/mutual funds. It is an admitted position that the total **dividend received by the assessee during the year under consideration was to the tune of Rs.23,508/-**, which was

claimed as an exempt income u/s.10(34) of the Act. The assessee has claimed that it received dividend income from only one investee entity. These facts are not disputed by the Id. Sr. DR. We have observed that the AO has made disallowance by invoking two limbs of Rule 8D namely Rule 8D(2)(ii) and 8D(2)(iii) of the 1962 Rules. The first disallowance being made by AO was with respect to the disallowance of proportionate interest expenses in relation to earning of an exempt income, to the tune of Rs.1,56,91,283/-, by invoking provisions of Section 14A read with Rule 8D(2)(ii) of the 1962 Rules. We have observed that the assessee has demonstrated that the interest free funds available with it by way of share capital and reserves and surplus were available to the tune of Rs.183.87 Crores as at 31.03.2020 (Rs. 172.89 crores as at 31.03.2009), while the total investments were made by the assessee to the tune of Rs.69.54 Crores as at 31.03.2010 (Rs. 37.00 crores as at 31.03.2009). If, we exclude foreign investments (in which dividend income is chargeable to income-tax under the provisions of the 1961 Act) to the tune of Rs. 25.84 crores as at 31.03.2010, the remaining investments were to the tune of Rs.43.71 crores as at 31.03.2010, while the assessee has demonstrated that it had interest free funds available to the tune of Rs. 183.87 crores as at 31.03.2010 which were far in excess of investments made by the assessee. Further, the Revenue is not able to demonstrate that the assessee has invested in these shares/securities out of the interest bearing funds, rather on the contrary finding is emerging from record that investments had been made by the assessee out of interest free funds available with it. Under these facts and circumstances of the case, the addition of Rs. 1,56,91,283/- as was made by AO by invoking provision of Section 14A of the 1961 Act read with Rule 8D(2)(ii) of the 1962 Rules, on account of proportionate disallowance of interest expenses is not sustainable in the eyes of law, keeping in view judgment and order of Hon'ble Supreme Court in the case of **South India Bank Limited v. CIT**, reported in (2021) 130 **taxmann.com 178(SC)**, wherein Hon'ble Supreme Court held that wherein interest free funds available with tax-payer exceeded the investment made in tax-free securities, no proportionate disallowance of interest expenditure

can be made by invoking provisions of Section 14A read with Rule 8D, by holding as under:

“27. The aforesaid discussion and the cited judgments advise this Court to conclude that the proportionate disallowance of interest is not warranted, under section 14A of Income Tax Act for investments made in tax-free bonds/securities which yield tax-free dividend and interest to Assessee Banks in those situations where, interest free own funds available with the Assessee, exceeded their investments. With this conclusion, we unhesitatingly agree with the view taken by the learned ITAT favouring the assessees.”

Reference is also drawn to the judgment and order of **Hon'ble Gujarat High Court in the case of CIT v. Sintex Industries Limited (2017) 82 taxmann.com 171(Guj. HC)** .The **SLP filed by Revenue** against the said judgment and order of Hon'ble Gujarat High Court , stood **dismissed** by Hon'ble Supreme Court in SLP(Civil)(Diary) No.39602 of 2017, vide orders dated 23.03.2018(reported in(2018) 93 taxmann.com 24(SC)). Thus, we hold that the proportionate disallowance of interest to the tune of Rs.1,56,91,283/- as was made by AO by invoking provisions of Section 14A read with Rule 8D(2)(ii) of the 1962 Rules is not sustainable in the eyes of the law and we confirm the decision of Id. CIT(A) on this issue deleting the aforesaid addition . No contrary decision of Hon'ble Supreme Court or Hon'ble Jurisdictional High Court is brought to our knowledge by Id.Sr. DR. We order accordingly.

7.5 So far as disallowance of administrative expenses to the tune of Rs.26,63,823/- as was made by the AO by invoking provisions of Section 14A of the 1961 Act read with Rule 8D(2)(iii) of the 1962 Rules , being 0.5% of the average investments. We are of the considered view that for making such disallowance , only those investments which has actually yielded dividend income during the year under consideration can be considered for making disallowance by invoking provisions of Section 14A read with Rule 8D(2)(iii) of 1962 Income Tax Rules. Reference is drawn to decision of Chennai-tribunal decision in the case of **Unifi Capital Private Limited v. ITO , reported in (2021) 129 taxmann.com 115(Chennai-trib.)**, wherein Chennai tribunal after considering the decision of **Special Bench of Delhi-tribunal** in the case of **Vireet Investment Private**

Limited reported in (2017) 82 taxmann.com 415(SB), held that only those investments which yielded dividend income during the previous year are to be considered for making disallowance u/s 14A read with Rule 8D(2)(iii). Reference is also drawn to decision of Chennai-tribunal in the case of **Pentamedia Graphics Limited(supra)**, wherein similar view was taken by Chennai-tribunal, by holding as under:

“9. Second contention of the assessee before us is that the assessee has made investments in certain Indian companies from which no dividend income was received during the year and hence no exemption was claimed. It is prayed that such investments in Indian companies from which no dividend income was received during the year be excluded while computing disallowance of expenditure u/s 14A of the 1961 Act. We find merit in contentions of the assessee that the investments in Indian companies which did not yielded exempt income during the year cannot be included for computing disallowance of expenditure u/s 14A read with Rule 8D of the 1962 Rules and we are restoring the matter back to the file of the AO for verification of the contentions of the assessee and to re-adjudicate the matter on merits in accordance with law. Thus, all those investments in indian companies which did not yielded exempt dividend income during the year shall be excluded while computing disallowance of expenditure u/s 14A read with rule 8D(2)(iii) of the 1962 Rules. The decision of Special Bench of ITAT, Delhi in the case of Asstt.CIT v. Vireet Investment (P.) Ltd. [2017] 82 taxmann.com 415/165 ITD 27 is relevant. This ground number 9-11 are partly allowed for statistical purposes as indicated above. We order accordingly”.

We are also of the considered view that the disallowance u/s 14A of the 1961 Act read with Rule 8D(2)(iii) of the 1962 Rules cannot exceed the amount of dividend income (claimed exempt) of Rs.23,508/- of the assessee during the year under consideration. Reference is drawn to the judgment and order of **Hon'ble Delhi High Court in the case of PCIT v. Caraf Builders and Constructions Private Limited**, reported in **(2019) 101 taxmann. Com 167(Delhi)**, wherein Hon'ble Delhi High Court held that disallowance u/s 14A cannot exceed exempt income, by holding as under:

“25. Total exempt income earned by the respondent-assessee in this year was Rs. 19 lakhs. In these circumstances, we are not required to consider the case of the Revenue that the disallowance should be enhanced from Rs. 75.89 crores to Rs. 144.52 crores. Upper disallowance as held in Pr. CIT v. McDonalds India (P.) Ltd. ITA 725/2018 decided on 22nd October, 2018 cannot exceed the exempt income of that year. This decision follows the ratio and judgment of the Supreme Court in the case of Maxopp Investments Ltd. v. CI T[2018] 402 ITR 640/254 Taxman 325/91 taxmann.com 154 and the earlier judgments of the Delhi High Court in Cheminvest v. CIT [2015] 378 ITR 33/234 Taxman 761/61 taxmann.com 118 and CIT v. Holcim (P.) Ltd. [2015] 57 taxmann.com 28 (Delhi).....”

The **SLP filed by Revenue** against the aforesaid judgment and order of Hon'ble Delhi High Court in the case of Caraf Builder and Constructions Private Limited(supra) in SLP (Civil) Diary No. 25130 of 2019 stood **dismissed** by Hon'ble Supreme Court , vide orders dated 30.08.2019, reported in (2019) 112 taxmann.com 322(SC). Reference is also drawn to the judgment and order of **Hon'ble Delhi High Court** in the case of **Cheminvest v. CIT** , reported in (2015) 61 taxmann.com 118(Delhi), wherein Hon'ble Delhi High Court held that Section 14A will not apply if no exempt income is received or receivable during the relevant previous year. Similar view is held by **Hon'ble Madras High Court in CIT v. Chettinad Logistics Private Limited, reported in (2017) 80 taxmann.com 221 (Mad.)**, wherein Hon'ble Madras High Court approved its earlier judgment and order in the case of **Redington India Limited v. Addl. CIT (2017) 77 taxmann.com 257(Mad.)**. The **SLP filed by Revenue** against the judgment and order of Hon'ble Madras High Court in the case of Chettinad Logistics Private Limited(supra) was **dismissed** by Hon'ble Supreme Court in **CIT v. Chettinad Logistics Private Limited** , reported in **(2018) 95 taxmann.com 250(SC)**. The decision as is referred by Id. Counsel for the assessee in the case of Repco Home Finance Limited(supra) (in which both of us were part of Division Bench which pronounced the order) was the case where the Chennai-tribunal held that Section 14A shall not have applicability when no exempt income was received/ earned during the relevant previous year, by following the judgment and order of Hon'ble Madras High Court in the case of Chettinad Logistic(supra) and judgment and order of Hon'ble Delhi High Court in the case of Cheminvest Limited v. CIT, reported in (2015) 378 ITR 33(Delhi). No contrary decision of Hon'ble Supreme Court or Hon'ble Jurisdictional High Court is brought to our knowledge by Id.Sr. Dr..Thus, we are remitting the matter back to the file of the AO for computation of disallowance u/s 14A of the 1961 Act read with Rule 8D(2)(iii) in accordance with our aforesaid directions. We order accordingly.

7.6 Thus, we are setting aside and remitting the matter back to the file of AO to give effect to our directions as are contained in this order, while computing disallowance u/s 14A of the 1961 Act.

8. In the result, this appeal filed by Revenue in ITA No.400/Coch/2020 for ay:2010-11 is partly allowed for statistical purposes.

ITA No. 401-404/Coch/2020 for ay(s): 2012-13, 2013-14, 2014-15 and 2016-17 respectively

9. Since the facts of the appeal in ITA no. 400/Coch/2020 for ay: 2010-11 are similar to the facts of the remaining appeals of Revenue i.e., ITA Nos.401, 402, 403 and 404/Coch/2020 for ay: 2012-13, 2013-14, 2014-15 and 2016-17 respectively, our findings in the said appeal for ay:2010-11, *mutatis mutandis*, would apply to these appeals filed by Revenue for ay: 2012-13, 2013-14, 2014-15 and 2016-17 respectively as well. Hence, these appeals of Revenue are also treated as partly allowed for statistical purposes as we are setting aside and remitting the matter back to the file of AO to give effect to our directions as are contained in this composite order, in all these four appeals filed by Revenue.

10. To sum-up, all these five appeals filed by Revenue are treated as partly allowed for statistical purposes.

Order pronounced in the open Court on 24th February, 2022

Sd/-
(George Mathan)
Judicial Member

Sd/-
(Ramit Kochar)
Accountant Member

Cochin, Dated: 24th February, 2022

Copy to:

1. *The Appellant- The Deputy Commissioner of Income-tax, Corporate Circle 2(1), Kochi, Kerala*
2. *The Respondent- M/s SFO Technologies Private Limited, XIX/346, Stone House, Aluva, Ernakulam-683101*
3. *The CIT(A) –Kochi*
4. *The Pr. CIT, Kochi*
5. *The Sr. DR, ITAT, Cochin*
6. *Guard File*

By Order

//True Copy//

*Assistant Registrar
ITAT, Cochin*

TNMM