

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
and
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

(THROUGH VIDEO CONFERENCE)

**ITA No.8041/Del./2019
(ASSESSMENT YEAR : 2016-17)**

ACIT, Circle 7 (1),
New Delhi.

vs. M/s. DLF Home Developers Ltd.,
9th Floor, DLF Centre, Sansad Marg,
New Delhi – 110 001.

(PAN : AACCD0037H)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Satyajeet Goel, CA
REVENUE BY : Ms. Yagya Saini Kakkar, CIT DR

Date of Hearing : 10.03.2022
Date of Order : 11.04.2022

ORDER

PER AMIT SHUKLA, JM :

Aforesaid appeal has been filed by the assessee against the impugned order dated 23.01.2019 passed by the ld. CIT(A)-3, New Delhi for the quantum of assessment passed under section 143(3) of the Income-tax Act, 1961 (for short 'the Act') for the assessment year 2016-17.

2. The only ground raised by the Revenue is with regard to disallowance of Rs.1,36,00,64,114/- made u/s 14A read with Rule 8D.

3. The facts, in brief, are that AO has noted that assessee had shown huge investments in non-current investments at Rs.2,26,759.15 lacs and has earned exempt income of Rs.167.83 lacs. For the purpose of attribution of earning exempt income, assessee had suo moto disallowed an amount of Rs.14,96,887/-. AO proceeded to make disallowance under Rule 8D and computed the disallowance at Rs.1,36,15,61,000/- after giving credit of suo moto disallowance of Rs.14,96,887/-, and addition Rs.1,36,00,64,113/- was sustained.

4. Before the Id. CIT (A), assessee had submitted that firstly, the assessee had huge interest free funds available which are more than Rs.4,94,048.40 lacs whereas an amount of Rs.1,92,750.91 lacs have been invested in shares. It was categorically submitted that no funds were invested in interest bearing funds. The following chart was also given to provide the availability of interest free funds :-

	<i>Rs. in Lacs</i>
	31.03.16
<i>Share Capital</i>	92,782.79
<i>Share pending allotment</i>	2,511.09
<i>Reserves & Surplus</i>	3,98,754.52
<i>Total interest free funds available</i>	4,94,048.40
<i>Investments :</i>	
<i>- Shares & Mutual Funds etc. on which exempted income is generated</i>	1,92,750.91
<i>Total Investments</i>	1,92,750.91

5. Apart from that, it was submitted that nowhere AO has recorded his satisfaction on why disallowance offered by assessee is incorrect or he has

examined the expenditure having regards to books of account. Apart from that, it was also submitted that the Tribunal in assessee's own case for AY 2011-12 has decided the issue in favour of the assessee on the same facts. The entire finding of the Id. CIT (A) in the impugned order, including the finding of the CIT (A) for AY 2012-13 and the finding of the Tribunal in AY 2011-12 which is reproduced in the impugned order, is reproduced as under :-

"7.3 I have considered the facts of the case and the submission made by the AR. It has been submitted that the appellant had made suo-moto disallowance of Rs.14,96,887/- and the AO has not rejected the computation made by the appellant. It is further submitted that the AO has not recorded his satisfaction before invoking the provisions of section 14A and Rule BD. The AR has also contended that the appellant had sufficient interest free funds available at its disposal for making investment and therefore, the investments were not made out of interest bearing funds. It is also observed that in similar circumstances, the appeal has been allowed in favour of the appellant by my Ld. Predecessor in A Y 2012-13 by stating as under:

6.2 I find that section 14A(2) provides that 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 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 and section 14A(3) provides that, "the provisions of sub section (2) shall 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". While a lot of emphasis is placed by the counsel on wordings of section 14A(2) which refer to the need of Assessing Officer's satisfaction to the effect that the claim made by the assessee is incorrect, it simply overlooks the provisions of section 14A(3) which state that a disallowance u/ s 14A(2) can also be made in a case in which assessee claims that no expenditure has been incurred for earning the tax exempt income. Therefore, a plain reading of the statutory provisions of section 14A(2) and (3) shows that when assessee offers a disallowance u/ s 14A, the provisions of section 14A(2) read with Rule 8D cannot be invoked unless the Assessing Officer is satisfied about incorrectness of the disallowance so offered, but when assessee does not offer any

disallowance u/ s 14A on his own, the provisions of section 14A(2) read with Rule 8D can be invoked without there being any need to express satisfaction about the incorrectness of such a claim.

6.3 In the instant case, the appellant had made a suo-moto disallowance of Rs.3,90,760/- and the Assessing Officer has not recorded the dissatisfaction about the disallowance suo-moto made by the appellant and has not identified any expenditure which can be considered to be expended in connection with the investment activity. The appellant has own funds of Rs.2,48,274.96 lakhs which are far more than the investments of Rs.2,00,706.72 lakhs. The plain reading of the statutory provisions of section 14A(2) and 14A(3) shows that when the assessee offered the disallowance u/ s 14A, the provisions of Section 14A(2) read with Rule 8D cannot be invoked unless the Assessing Officer is dissatisfied about the correctness of the disallowance so offered.

6.4 In view of this, the addition on this account is restricted to Rs.3,90,760/ - under Rules 8D(2)(ii)&(iii) read with section 14A of the Act."

Further, it is seen that the Hon'ble ITAT Delhi has allowed the issue in favour of the appellant in AY 2011-12 in ITA No.2209/Del/2016 vide its order dated 19.06.2018, in which it has been held as under:

"14. It is the case of the assessee that it was having interest free funds available to the tune of Rs.2,95,937/- lacs and has made investment in the shares to the tune of Rs. 2,73,326.57/- lacs which is less than own funds available with the assessee. Undisputedly, the assessee has suo moto disallowed expenses of Rs.8,21,883/- expended to earn the exempt income.

15. In the given circumstances in order to invoke the provisions contained under section 14A read with Rule 8D, the Assessing Officer was required to record his dissatisfaction that the computation made by the assessee u/ s 14A is not correct, however, when we examine the Assessment Order, nowhere dissatisfaction has been recorded by the AO nor any reason been given as to how the computation made by the assessee, making suo moto disallowance of expenses of Rs.8,21,883/-, is not correct nor the AO has disputed the fact that the assessee was having own sufficient interest free funds available with it to make the investment in the year under assessment.

16. When the assessee was having sufficient interest free own funds to the tune of Rs.2,95,937/- lacs no disallowance can be made under Rule 8D(2)(ii) as the assessee has not incurred any expenses on account of payment of interest.

17. Hon'ble High Court of Bombay in case cited as CIT-2, Mumbai vs. HDFC Bank Ltd. – (2014) 49 taxmann.com 335 (Bombay) while dealing with the identical issue held that when the assessee's own funds and other non-interest bearing funds were more than investment in tax free

securities no disallowance on account of interest payment under section 14A can be made.

18. *Furthermore, the AO has not recorded his dissatisfaction as to the computation made by the assessee company that no expenditure has been made by the assessee company during the year under assessment to earn the interest free income rather proceeded mechanically by extracting the bare language of Rule 8D. Hon'ble Apex Court in Godrej & Boyce Manufacture Company Ltd vs. DCIT - 394 ITR 449 (SC) thrashed the issue in controversy as to invoking of the provisions contained under Rule 8D of the Rules by observing 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 BD 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 BD 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."*

.....

21. *Moreover, when the assessee has come up with categoric plea that the entire investment have been made out of its own interest free funds available and the incurred expenses have been suo moto disallowed and the AO has not pointed out any defect in the computation made by the assessee company, provisions contained u/ s 14A read with Rule BD are not attracted which can only be invoked if the AO is not satisfied with the claim of the assessee.*

22. *So far question of sustaining the addition of Rs.1128.93 lacs under Rule BD(2)(iii) by Ld. CIT(A) on account of administrative expenses to earn the exempt income is concerned, again, we are of the considered view that when the AO as well as Ld. CIT(A) have not recorded their dissatisfaction that the computation of expenses disallowed by the assessee are not correct nor has pointed out any specific computation defects, the same cannot be sustained as Rule 8D(2) has only prescribed a formula to determine expenditure incurred to earn the exempt income which does not form part of the total income under the Act, which cannot be invoked unless AO has not come up with specific dissatisfaction with the claim of the assessee. So, in these circumstances addition sustained by Ld. CIT(A) under Rule 8D(2)(iii) is not sustainable, consequently, Ground no. 4 raised*

by Revenue is determined against the Revenue and Ground no. 1 raised by the assessee is determined in favour of assessee.”

7.4 It is observed that the facts of the case are identical to those in earlier years. In the assessment order for the year under consideration also, the AO has not recorded any satisfaction about the incorrectness of the disallowance made by the appellant. In fact, in Para 5.10 on Page 11 of the assessment order, the AO has wrongly stated that the appellant has not made any disallowance u/s 14A of the Act whereas in Para 5.12, the AO has stated that the appellant has already disallowed Rs. 14,96,887/- as expenditure u/s 14A r.w.r. 8D. This shows that the AO has not appreciated the facts correctly. Keeping in view these facts and also following the principle of consistency, the addition made by the AO is deleted and the ground of appeal is allowed.”

6. Before us, ld. CIT DR submitted that AO has recorded satisfaction in the impugned order, therefore, the judgment of **Hon’ble Delhi High Court in the case of Indiabulls Financial Services Ltd. vs. DICT [2016] 76 taxmann.com 268 (Delhi)** is applicable. On the other hand, ld. counsel for the assessee relied upon the order of the Tribunal for AY 2011-12.

7. We have heard the rival submissions and also perused the relevant finding given in the impugned orders. First of all, we find that AO in his entire order except giving his general remarks has nowhere given any categorical satisfaction as to how the working of *suo moto* disallowance made by the assessee for the purpose of attributing the expenditure for earning exempt income is incorrect having regard to the accounts maintained by the assessee. Interestingly the AO has noted that assessee has not made any disallowance u/s 14A, therefore, he is not satisfied with the correctness of the assessee even when *suo moto* disallowance was offered which is evident from the following observations:-

“Assessee has not made any disallowance u/s 14A of the Income Tax Act. The undersigned Assessing Officer 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. Hence, the disallowance u/s 14A needs to be recalculated.”

8. Thus, it clearly shows that AO has not applied his mind even the working of the assessee and has mechanically proceeded to make the disallowance not only under Rule 8D(2)(ii) and under Rule 8D(2)(iii).

9. First of all, it is not in dispute that assessee had huge interest free funds which have also been noted by the CIT (A). Thus, now in view of the judgments of **Hon'ble Supreme Court in the case of South Indian Bank vs. CIT, 438 ITR 1**, wherein it has been held that where assessee had interest free funds available which exceeds the investment made in tax free fund security then no interest expenditure can be disallowed and it has to be presumed that it is out of assessee's own fund and proportionate disallowance could not warrant under section 14A even where no separate accounts were maintained by the assessee and other expenditure made for earning tax free income. Hon'ble Supreme Court clearly held that if assessee had mixed funds, made up partly of interest free funds and partly of interest-bearing funds and payment has been made out of mixed funds, then the investment must be considered to have been made out of interest free funds. 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 would be not permissible for the Revenue to make an estimation of a proportionate figure. Disallowance could be legally

impermissible for the investment made by the assessee in bonds/shares using interest free funds under Section 14A. Thus proportionate disallowance of interest is not warranted under section 14A for investments made in tax-free bonds/ securities which yielded tax free dividend and interest to assessee banks where interest free funds are available exceeded their investments. Thus no disallowance on account of section 14A can be made.

10. Further, we find that AO has not recorded his satisfaction while proceeding to make the disallowance under Rule 8D. The contention of the ld. CIT DR does not find any support from the order of AO that he has recorded his satisfaction albeit he has not even applied his mind on the facts before him which is evident from the fact that he has not even seen the working of disallowance offered by the assessee before him. Therefore, aforesaid finding of the ld. CIT (A) which is based on earlier year order of the Tribunal is confirmed and accordingly, entire disallowance made u/s 14A is deleted. The appeal filed by the Revenue is dismissed.

Order was pronounced on 11th day of April, 2022.

**Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER**

**sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER**

**Dated: 11.04.2022
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-3, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
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