IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H', NEW DELHI

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.5178/Del/2019
(Assessment Year : 2014-15)

DCIT Circle – 25(2) New Delhi - 110002 **PAN No. AACCT 7115 Q**	Vs.	Transcend Infrastructure Pvt. Ltd. Plot No. B-15, FF, Sec-32, Gurgaon-122 001
(APPELLANT)		**(RESPONDENT)**

Assessee by	--None--
Revenue by	Shri Surender Pal, CIT-D.R.

Date of hearing:	29.06.2022
Date of Pronouncement:	29.06.2022

ORDER

PER ANIL CHATURVEDI, AM :

The present appeal filed by the Revenue is directed against the order dated 29.03.2019 of the Commissioner of Income Tax (Appeals)-28, New Delhi relating to Assessment Year 2014-15.

2. The relevant facts as culled from the material on records are as under :

3. The assessee is a company stated to be engaged in the business of wireless communications site leasing business.

Assessee electronically filed its return of income for A.Y. 2014-15 on 29.11.2014 declaring Nil taxable income. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) of the Act vide order dated 31.12.2016 and the total taxable income was determined at Rs.8,83,89,435/- and Rs.12,39,27,096/- as Book Profit u/s 115JB of the Act. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dated 29.03.2019 granted substantial relief to the assessee. Aggrieved by the order of CIT(A), Revenue is now in appeal and has raised the following grounds:

> *"1. On the facts and in the circumstances of the case and in law the Ld CIT(A) has erred in deleting the addition of Rs.11,37,85,368/- u/s 14A of the Act.*
> *2. The appellant craves, leave or reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of appeal."*

4. On the date of hearing, none appeared on behalf of the assessee nor any adjournment application was filed. The case file further reveal that the notice of hearing was sent to the assessee at the address stated in Form No.36 but the same was returned undelivered by the postal authorities with remark "Left". Assessee has not placed on record its current address. Considering the aforesaid facts and the fact that the issue has been decided by CIT(A) after considering the various decisions cited therein including the decision of Jurisdictional High Court, we proceed to dispose of the appeal *ex parte qua* the assessee and after considering the submissions made by the Learned DR.

5. During the course of assessment proceedings, AO noticed that assessee had made investment of Rs.2275,70,73,582/- in the equity shares of M/s. ATC Telecom Tower Corporation Private Ltd. The assessee was asked to justify about the applicability of the provision u/s 14A of the Act to which assessee made its submissions and *inter alia* stated that the investment have been made from non interest bearing funds and no exempt income has been earned by the assessee. The submissions of the assessee was not found acceptable to AO. AO thereafter by applying the provision of Rule 8D r.w.s 14A worked out the disallowance u/s 14A of the Act at Rs.11,37,85,368/-.

6. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who by following the various decisions cited in his order including the decision of Hon'ble Jurisdictional High Court noted that since the assessee has not earned any exempt income and therefore no disallowance u/s 14A of the Act is called for. He further noted that the legal requirements of Section 14A of the Act have not been fulfilled by the AO and he therefore deleted the disallowance made by AO. The relevant findings of CIT(A) reads as under:

> *3.2 I have considered the facts of the case, basis of disallowance made by the AO and submissions of appellant. As it is clear from the assessment order as well as submissions of appellant that the assessee has not earned any exempt income nor any expenditure against it has been claimed by it which can be made subject matter of Section 14A of the Act. However, AO has taken into consideration the investment by appellant during the year as well as the preceding year and by applying the provisions of Section 14A of the Act r.w. Rule 8D and mechanically worked out the disallowance at Rs. 11,37,85,368/-. During the*

appellate proceedings, for not disallowing any expenditure, appellant has given its submissions. In such situation, when the issue has been decided by various Courts, firstly we have to go through the ratios of decisions of jurisdictional High Court which are binding on us. In the case CIT vs I.P. Support Services India (P) Ltd. reported in 378 ITR 240, while dealing this issue, Hon'ble jurisdictional High Court has held that it is erroneous premise that the invocation of Section 14A is automatic and comes into operation as soon as the dividend income is claimed as exempt. It is further held that for making disallowance u/s 14A, the pre-condition is satisfaction of assessing officer that voluntary disallowance made by assessee is unreasonable and unsatisfactory and in absence of such satisfaction, disallowance is not justified. It is further held by Hon'ble Court in another case namely CIT Vs Om Prakash Khaitan 376 ITR 390 that even if satisfaction is recorded, no disallowance can be made if no nexus between expenditure incurred and income not forming part of total income has been established by AO. In the case Cheminvest Ltd. vs. CIT 378 ITR 33, Hon'ble Court, after reversing the decision of Spl. Bench, opined that if no exempt income was earned by the assessee in the relevant assessment year and since the genuineness of expenditure incurred was not in doubt, no disallowance could be made u/s 14A of the Act. In a decision dated 16.08.2017 in the case of II & FS Energy Development Vs. Pr. CIT-04 ITA No. 520/2017, Jurisdictional High Court has again deliberated on the issue and after discussing the decision of CIT Vs. Rajendra Prasad Moody of Hon'ble Supreme Court & CBDT Circular No. 5/2014 dated 11.02.2014, along with the other decisions, has affirmed the findings of its earlier decision in the case of Cheminvest Vs. CIT 378 ITR 33 and held that no disallowance u/s 14A of the Act is called for in the year in which assessee has not earned income which was exempt. It is further held by Hon'ble Court that the CBDT Circular dated 11.02.2014 cannot override the express provision of Section 14A r.w. Rule 8D of the IT Act. There are several other decisions of different Courts and Tribunals, wherein it has been held that if there is no exempt income claimed by assessee, no disallowance of any expenditure can be made u/s 14A of the Act. Now, in the light of these decisions, the case of appellant has to be examined. First and foremost, the AO should have a given the details of any exempt income earned by appellant and expenditure incurred against it with cogent reasons by rejecting the claim of assessee before computing the disallowance u/s 14A of the Act. However, the same has not been done. He has given only a general observation

about the applicability of provisions of section 14A in the assessment order in the case of appellant and mechanically computed the disallowance on the basis of investment made by appellant in the shares during and preceding year. The AO has also not been able to establish any nexus between the exempt income, if any earned by appellant and any expenditure incurred to earn this income. He has simply computed the disallowance only on the ground that no expenditure had been disallowed by appellant in its computation against the receipts not forming part of total income whereas there are no such receipts which are part of total income. In such situation, the legal requirements of Section 14A of the Act are not fulfilled by the AO for making any disallowance as per this Section as held by Hon'ble Jurisdictional High Court in different cases, as mentioned above. Hence, the action of AO is not justified and sustainable. In view of this discussion, the disallowance of Rs. 11,37,85,368/- made by AO is hereby deleted and grounds taken by appellant are allowed."

7. Aggrieved by the order of CIT(A), Revenue is now in appeal before us.

8. Before us, Learned DR supported the order of AO and further made following written submissions :

"Submission in respect of Section 14A of the Income tax:-

Section 14A of the Income-tax Act, 1961 ('Act') was inserted into the Income Tax Act, 1961 vide Finance Act 2001, with retrospective application from 1.4.1962. It provides for disallowance of expenditure in relation to income not "includible" in total income. Over a period of time, there have been several cases decided <on this issue by various High Courts and the Hon. Supreme Court along with clarifications by the CBDT.

CBDT issued a Circular No. 5/2014 on 11th February 2014, clarifying, inter alia, as follows:-

"A controversy has arisen in certain cases as to whether disallowance can be made by invoking section 14A of the Act even in those cases where no income has been earned by an assessee which has been claimed as exempt during the financial-year.

2. It is pertinent to mention that section 14A of the Act was introduced by

the Finance Act, 2001 with retrospective effect from 01.04.1962. The purpose for introduction of section 14A , with retrospective effect since inception of the Act was clarified vide Circular No. 14 of2001 as under:

"Certain incomes are not includible while computing the total income, as these are exempt under various provisions of the Act. There have been cases where deductions have been claimed in respect of such exempt income. This in effect means that the tax incentive given by way of exemptions to certain categories of income is being used to reduce also the tax payable on the non-exempt income by debiting the expenses incurred to earn the exempt income against taxable income. This is against the basic principles of taxation whereby only the net income, i.e., gross income minus the expenditure, is taxed. On the same analogy, the exemption is also in respect of the net income. Expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income. "

Thus, legislative intent is to allow only that expenditure which is relatable to earning of income and it therefore follows that the expenses which are relatable to earning of exempt income have to be considered for disallowance, irrespective' of the fact whether any such income has been earned during the financial-year or not.

3. The above position is further clarified by the usage of term 'includible ' in the Heading to section 14A of the Act and also the Heading to Rule 8D of I. T. Rides, 1962 which indicates that it is not necessary that exempt income should necessarily be included in a particular year's income, for disallowance to be triggered. Also, section 14A of the Act does not use the word "income of the year" but "income under the Act". This also indicates that for invoking disallowance under section 14A, it is not material that assessee should have earned such exempt income during the financial year under consideration

4. The above position is further substantiated by the language used in Rule 8D(2(ii) & 8D(2)(iii) of IT. Rules. Thus, in light of above, Central Board of Direct Taxes, in exercise of its powers under section 119 of the Act hereby clarifies that Rule 8D read with section 14A of the Act provides for disallowance of the expenditure even where taxpayer in a particular year has not earned any exempt income. "

2. The Hon'ble Supreme Court, in the judgment in the case of Maxopp Investment Ltd., reported in [2018] 91 taxmann.com 154, vide order dated 12.02.2018, laid down various legal principles in this regard. These may be summarized as follows:-

(i) Only that expenditure which is in relation to earning dividends can be disallowed under section 14A and rule 8D.

(ii) The dominant purpose for which investment into shares is

made by assessee, may not be relevant as section 14A applies irrespective of whether shares are held to gain control or as stock-in-trade. However, where shares are held as stock-in-trade, main purpose is to trade in those shares and earn profits there from and, in process, certain dividend is also earned which is tax exempt under section 10(34); expenditure attributable to exempt dividend income will have to be apportioned to be disallowed under section 14A.

(iii) Rule 8D is prospective in nature and could not have been made applicable in respect of assessment years prior to 2007 when this rule was inserted.

(iv) Theory of Apportionment of Expenditure between taxable and non taxable income has in principle, which was widened by the SC in the case of Walfort Share & Stock Brokers Pvt Ltd. (2010)(326 ITR 1), has now been upheld by the SC in the above case of Maxopp.

3. Crux of the issue - Section 14A (1) says that no deduction shall be allowed in respect of expenditure incurred in relation to income which does not form part of total income. Following main points need to be considered:-

(i) Whether section 14A (1) would stand attracted even if such income, i.e., income not includible in the total income, is not actually earned, subject to expenditure relatable to such income having been incurred. The CBDT Circular 5/2014, after explaining the rationale of the provision of section 14A (with reference to Circular 14 of 2001), i.e., to curb the practice of reducing the tax liability on taxable income (i.e., income forming part of the total income) by claiming expenditure incurred in earning tax-exempt income against taxable income, goes on to state that the legislative intent is that the expenditure relatable to earning such income shall have to be considered for disallowance. In that event i.e., expenditure relating to earning tax- exempt income having been incurred, it would become irrelevant if the exempt income has actually materialized or not, so that the disallowance of the said expenditure u/s. 14A would follow. The same therefore is only a continuation of Circular 14 of 2001, taking the premise of section 14A to its logical conclusion. The purpose of these Circulars and the legislative intent is to apply the basic principle of taxation, i.e., that it is only the net income - taxable or non-taxable, i.e., net of all expenditure incurred for earning the same, that could be subject to tax or, as the case may be, exempt from tax. The latter

Circular, which is in consonance with the Memorandum explaining the provisions of Finance Bill, 2001 (introducing section 14A) as well as the Notes to the Clauses presented along with the said Bill, has been noted with approval by the Hon'ble Supreme Court in CIT v. Walfort Share & Stock Brokers (P.) Ltd. [2010] 192 Taxman 211/326 ITR 1 (SC), holding as under:

"The insertion of section 14A with retrospective effect is the serious attempt on the part of Parliament not to allow' deduction in respect of any expenditure incurred by the assessee in relation to income, which does not form part of the total income under the Act against the taxable income (see Circular No. 14 of2001 dated November 22, 2001). In other words, section 14A clarifies that expenses incurred can be allowed only to the extent they are rdatable to the earning of taxable income. In many cases the nature of expenses incurred by the assessee may be relatable partly to the exempt income and partly to the taxable income. In the absence of section 14A, the expenditure incurred in respect of exempt income was being claimed against taxable income.

"The mandate of section 14A is clear. It desires to curb the practice to claim deduction of expenses incurred in relation to exempt income against taxable income and at the same time avail of the tax incentive by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. The basic reason for insertion of section 14A is that certain incomes are not includible while computing total income as these are exempt under certain provisions of the Act. "

(ii) The issue, thus, considered in perspective, is not if the income not forming the part of the total income (the tax-exempt income) is earned or not, but if expenditure relatable to such income has been incurred. If such expenditure stands incurred, section 14A(1) becomes applicable.

(iii)The decision by the Apex Court in the case of CIT v. Walfort Share & Stock Brokers (P.) Ltd. (supra) stands followed in Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT [2017] 81 taxmann.com 111 (SC), where the Hon'ble Supreme Court, while considering whether deduction of expenditure incurred in earning dividend income which is not includible in the total income of the Assessee, by virtue of the provisions of Section 10(33) of the Income Tax Act, 1961, as in force during the Assessment Year i.e. 2002-2003, was admissible or otherwise, made the following observations:

"32. A brief reference to the decision of this Court in Walfort Share and Stock Brokers (P.) Ltd. (supra) may now be made, if only, to make the discussion complete. In Walfort Share and Stock Brokers (P.) Ltd. (s.upra) the issue involved was: "whether in a dividend stripping transaction the loss on sale of units could be considered as expenditure in relation to earning of dividend income exempt under Section 10(33), disallowable under Section 14A of the Act?"

"33. While answering the said question this Court considered the object of insertion of Section 14A in the Income Tax Act by Finance Act, 2001, details of which have already been noticed. Noticing the objects and reasons behind introduction of Section 14A of the Act this Court held that:

"Expenses allowed can only be in respect of earning of taxable income."

"In paragraph 17, this Court went on to obseiwe that:

"Therefore, one needs to read the words "expenditure incurred" in section 14A in the context of the scheme of the Act and, if so read, it is clear that it disallows certain expenditure incurred to earn exempt income from being deducted from other income which is includible in the "total income"for the purpose of chargeability to tax."

"The views expressed in Walfort Share and Stock Brokers (P.) Ltd. (supra), in our considered opinion, yet again militate against the plea urged on behalf of the Assessee. "

(iv) The expenditure is incurred to produce or generate or in anticipation of, income, whether taxable or non-taxable. In fact, the classification as to tax status (i.e., taxable or non-taxable) has nothing to do with the income generating process; an income being, as a matter of fiscal incentive, being granted tax-exempt status under the Act, for the time being. The fact of having incurred expenditure for earning income - tax-exempt (or non-exempt), which is largely a question of fact, would thus remain, and not undergo any change, irrespective of whether it has resulted in any income (whether tax-exempt or non-exempt). The principle is well-settled, representing a fundamental concept of taxation, i.e., the allowability (or otherwise) of an expenditure would not depend upon whether it has in fact resulted in an

income, i.e., positive income, which is in any case a matter subsequent, and that the mere fact that expenditure stands incurred for the purpose is sufficient for its admissibility, as explained by the Apex Court in CIT vs. Rajendra Prasad Moody [1978] 115 ITR 519 (SC).

4. The Apex Court was in that case examining the true interpretation of section 57(iii), which employed the words 'any expenditure (not being in the nature of capital expenditure) laid out or expended for the purpose of making or earning such income', the question of law raised before it reading as under:-

> *"Whether, on the facts and in the circumstances of the case, interest on money borrowed for investment in shares which had not yielded any dividend is admissible under s. 57(Hi)?"*

5. The revenue's contention in the above case was that the making or earning of income was a sine qua non to the admissibility of the expenditure u/s. 57(iii). And, therefore, where no income resulted, no expenditure would be deductible. The Apex Court rejected the revenue's contention, and held that to bring a case within the section, it is not necessary that any income should in fact have been earned as a result of the expenditure and therefore, the interest paid on money borrowed for investment in shares, which had not yielded any dividend, was admissible under section 57(iii). The ratio decidendi of the judgment of Hon'ble Supreme Court in CIT v. Rajendra Prasad Moody (supra) can be applied to say, by the same analogy, that the expenditure incurred to earn an exempt income is subject to its admissibility in accordance with the provisions of the Income Tax Act, 1961 including those of section 14A irrespective of whether there is a receipt or income or not during the year under consideration.

6. In the case of Maxopp Investment Ltd. reported in [2018] 91 taxmann.com 154 held vide order dated 12.02.2018 Hon'ble Supreme Court has observed in para 3 of its order, as follows:-

"3. Though, it is clear from the plain language of the aforesaid provision that no deduction is to be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act, the effect whereof is that if certain income is earned which is not to be included while computing total income, any expenditure incurred to earn that income is also not

allowed as a deduction. It is well known that tax is leviable on the net income. Net income is arrived at after deducting the expenditure incurred in earning that income. Therefore, from the gross income, expenditure incurred to earn that income is allowed as a deduction and thereafter tax is levied on the net income. The purpose behind Section 14A of the Act, by not permitting deduction of the expenditure incurred in relation to income, which does not form part of total income, is to ensure that the assessee does not get double benefit. Once a particular income itself is not to be included in the total income and is exempted from tax, there is no reasonable basis for giving benefit of deduction of the expenditure incurred in earning such an income. For example, income in the form of dividend earned on shares held in a company is not taxable. If a person takes interest bearing loan from the Bank and invests that loan in shares/stocks, dividend earned there from is not taxable. Normally, interest paid on the loan would be expenditure incurred for earning dividend income. Such an interest would not be allowed as deduction as it is an expenditure incurred in relation to dividend income which itself is spared from tax net. There is no quarrel up to this extent. "

7. The Hon'ble Supreme Court, in the judgment in the case of Maxopp Investment Ltd. reported in [2018] 91 taxmann.com 154 (SC), has also affirmed the view that the dominant purpose for which investment into shares is made by assessee may not be relevant as section 14A applies irrespective of whether shares are held to gain control or as stock-in-trade.

8. In sum, the principle that it is the net income, i.e., net of expenditure relatable thereto, which is subject to tax and, correspondingly, not liable to tax, i.e., where it does not form part of the total income, is well established. It follows, therefore, that once an income is liable (or not liable) to tax, all expenditure relatable thereto is to be reckoned, and it matters little that the said expenditure has indeed resulted in a positive income. This principle, i.e., to exclude all expenditure relatable to the earning of income not forming part of the total income, irrespective of its quantum, has also been noted with further approval by the Hon'ble Apex Court in Maxopp Investment Ltd. 's case (supra), in para 32 of its order, as under:

> *"..32. In the first instance, it needs to be recognized that as per section 14A(1) of the Act, deduction of that expenditure is not to be allowed which has been incurred by the assessee "in relation to income which does not form part of the total income under this*

Act". Axiomatically, it is that expenditure alone which has been incurred in relation to the income w'hich is (not) includible in total income that has to be disallowed. If an expenditure incurred has no causal connection with the exempted income, then such an expenditure would obviously be treated as not related to the income that is exempted from tax, and such expenditure would be allowed as business expenditure. To put it differently, such expenditure would then be considered as incurred in respect of other income which is to be treated as part of the total income. "

9. The Hon'ble Supreme Court, in the case of Maxopp Investment Ltd. v. Commissioner of Income Tax, New Delhi [2018] 91 taxmann.com 154 (SC), while defining the scope of the term 'in relation to' as used in section 14A, further interpreted the dominant purpose test and upheld the theory of apportionment, in following words:

"33 ……Theentire dispute is as to what interpretation is to be given to the words 'in relation to' in the given scenario, viz. where the dividend income on the shares is earned, though the dominant purpose for subscribing in those shares of the investee company was not to earn dividend. We have two scenarios in these sets of appeals. In one group of cases the main purpose for investing in shares was to gain control over the investee company. Other cases are those where the shares of investee company were held by the assessees as stock-in-trade (i.e. as a business activity) and not as investment to earn dividends. In this context, it is to be examined as to whether the expenditure was incurred, in respective scenarios, in relation to the dividend income or not.

"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 assessees 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. This is so held in Walfort Share & Stock Brokers (P.) Ltd., relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom.

"The next phrase is, ",in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A..

The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14A."

The Apex Court, in the above judgment, thus upheld the theory of Apportionment, disregarding the theory of pre-dominant object. The uncertainty of earning the dividend income, or of it being earned incidentally, was also noted by it. It was, therefore, immaterial if dividend income was actually earned or not. The relevant paras, are as under:

"35. The Delhi High Court, therefore, correctly observed that prior to introduction of Section 14A of the Act, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-taxable income, the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. It is to find a cure to the aforesaid problem that the Legislature has not only inserted Section 14A by the Finance (Amendment) Act, 2001 but also made it retrospective, i.e., 1962 when the Income Tax Act itself came into force. The aforesaid intent was expressed loudly and clearly in the Memorandum explaining the provisions of the Finance Bill, 2001. We, thus, agree with the view taken by the Delhi High Court, and are not inclined to accept the opinion of Punjab & Haiyana High Court which went by dominant purpose theory. The aforesaid reasoning would be applicable in cases where shares are held as investment in the investee company, may be for the purpose of having controlling interest therein. On that reasoning, appeals of Maxopp Investment Limited as well as similar cases where shares were purchased by the

assessees to have controlling interest in the investee companies have to fail and are, therefore, dismissed.

36. There is yet another aspect which still needs to be looked into. What happens when the shares are held as 'stock-in-trade' and not as 'investment', particularly, by the banks? On this specific aspect, CBDT has issued circular No. 18/2015 dated November 02, 2015.

36. This Circular has already been reproduced in Para 19 above. This Circular takes note of the judgment of this Court in Nawanshahar case wherein it is held that investments made by a banking concern are part of the business or banking. Therefore, the income arises from such investments is attributable to business of banking falling under the head 'profits and gains of business and profession'. On that basis, the Circular contains the decision of the Board that no appeal would be filed on this ground by the officers of the Department and if the appeals are already filed, they should be withdrawn. A reading of this circular would make it clear that the issue was as to whether income by way of interest on securities shall be chargeable to income tax under the head 'income from other sources' or it is to fall under the head 'profits and gains of business and profession'. The Board, going by the decision of this Court in Nawanshahar case, clarified that it has to be treated as income falling under the head 'profits and gains of business and profession'. The Board also went to the extent of saying that this would not be limited only to co-operative societies/Banks claiming deduction under Section 80P(2)(a)(i) of the Act but would also be applicable to all banks/commercial banks, to which Banking Regulation Act, 1949 applies.

38. From this, Punjab and Haryana High Court pointed out that this circular carves out a distinction between 'stock-in-trade' and 'investment' and provides that if the motive behind purchase and sale of shares is to earn profit, then the same would be treated as trading profit and if the object is to derive income by way of dividend then the profit would be said to have accrued from investment. To this extent, the High Court may be correct. At the same time, we do not agree with the test of dominant intention applied by the Punjab and Haryana High Court, which we have already discarded. In that event, the question is as to on what basis those cases are to be decided where the shares of other companies are purchased by the assessees as 'stock- in-trade' and not as 'investment'. We proceed to discuss this aspect hereinafter.

39. In those cases, where shares are held as stock-in-trade, the main purpose is to trade in those shares and earn profits therefrom. However, we are not concerned with those profits which would naturally be treated as 'income' under the head 'profits and gains from business and profession'. What happens is that, in the process, when the shares are held as 'stock-in-trade', certain dividend is also earned, though incidentally, which is also an income. However, by virtue of Section 10 (34) of the Act, this dividend income is not to be included in the total income and is exempt from tax. This triggers the applicability of Section 14A of the Act which is based on the theory of apportionment of expenditure between taxable and non-taxable income as held in Walfort Share & Stock Brokers (P.) Ltd. case. Therefore, to that extent, depending upon the facts of each case, the expenditure incurred in acquiring those shares will have to be apportioned ''

10. The above judgement of Hon'ble SC in Maxopp Investment Ltd. {2018} (402 ITR 640) settles many issues in favour of Revenue. Once the AO has done the ground work of recording the reasons/satisfaction, for rejecting the computation of expenses relating to exempt income by the assessee, the ground is open for the AO to use Rule 8D. Therefore, in view of the above judgements of Hon. Supreme Court, the disallowance made by the AO , after applying provisions of Section 14A read with Rule 8D(2)(iii), is appropriate and therefore may kindly be upheld.

Submitted for kind consideration."

9. Learned DR thus supported the order of AO.

10. We have heard the Learned DR and perused the material available on record. The issue in the present ground is with respect to the disallowance u/s 14A r.w.r 8D of the IT Rules that was made by AO and deleted by CIT(A). We find that CIT(A) while deleting the addition made by the AO has noted that assessee has not earned any exempt income during the year under consideration. Before us, Revenue has not placed any material on record to demonstrate that the findings of the CIT(A) that

assessee has not earned any exempt income is factually incorrect. We further find that CIT(A) while deleting the addition had relied on the decision of Jurisdictional High Court in the case of Cheminvest Ltd vs. CIT reported in 378 ITR 33, IL & FS Energy Development vs. PCIT and other decisions. Before us, Revenue has not placed any contrary binding decision in its support but however has placed reliance on the CBDT Circular No.5/2014 dated 11.02.2014, for the proposition that even there is no exempt income earned by the assessee, disallowance u/s 14A can be made. We find that Hon'ble Delhi High Court in the case of Cheminvest Ltd. (supra) has held that the expression "does not form part of the total income" in Section 14A of the envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year. As far as reliance placed by Revenue on CBDT Circular dated 11.02.2014 is concerned, we find that Hon'ble Delhi High Court in the case of IL & FS Energy Development Co. Ltd. (2017) 399 ITR 483 (Delhi) has held that the CBDT Circular dated 11th May 2014 cannot override the expressed provisions of Section 14A read with Rule 8D. Further the decisions relied upon in written submissions made by Learned DR are not applicable to the present facts. Considering the totality of the aforesaid facts, we find no reason to interfere

with the order of CIT(A) and **thus the ground of Revenue is dismissed.**

11. **In the result, appeal of the Revenue is dismissed.**

Order pronounced in the open court on 29.06.2022

Sd/-	**Sd/-**
(ANUBHAV SHARMA) **JUDICIAL MEMBER**	**(ANIL CHATURVEDI)** **ACCOUNTANT MEMBER**

Date:- 29.06.2022

PY*

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	29.06.2022
Date on which the typed draft is placed before the dictating Member	29.06.2022
Date on which the approved draft comes to the Sr.PS/PS	29.06.2022
Date on which the fair order is placed before the Dictating Member for Pronouncement	29.06.2022
Date on which the fair order comes back to the Sr. PS/ PS	29.06.2022
Date on which the final order is uploaded on the website of ITAT	29.06.2022
Date on which the file goes to the Bench Clerk	29.06.2022
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	