

**IN THE INCOME TAX APPELLATE TRIBUNAL,
“A” BENCH
MUMBAI**

**BEFORE SHRI BASKARAN BR, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No.1880/MUM/2022
(A. Y.:2016-17)**

Ambit Capital Private Ltd. Ambit House, 449 Senapati bapat marg, Lower Parel Mumbai-400013	Vs.	Assistant Commissioner of Income Tax, Circle 4(1) (1) Mumbai-400020
Pan No. AABCP6621N		
Appellant		Respondent

Appellant by	Shri.MadhurAgrawal.AR
Respondent by	Shri.Manoj Sinha.DR

Date of Hearing	19.09.2022
Date of Pronouncement	27.09.2022

ORDER

PER PAVAN KUMAR GADALE, JM:

The assessee has filed the appeal against the order of the Commissioner of Income Tax Appeals (hereinafter in short “CIT(A))-National Faceless Appeal Centre, Delhi passed under 250 of the Income Tax Act, 1961 (hereinafter in short “the Act”).

The assessee has raised following grounds of appeal.

1. (a) *The learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre (NFAC), New Delhi [hereinafter referred as "Commissioner of Income-tax (Appeals)"] erred in law in upholding the action of the Assistant Commissioner of Income Tax, Circle 4(1)(1), Mumbai (hereinafter referred as "the Assessing Officer") of additionally disallowing a sum of Rs.34,43,533/- as against a suo-moto disallowance made by the appellant of a sum of Rs.15,41,4347- under section 14A of the income Tax Act, 1961 (the Act) read with Rule 8D of The Income Tax Rules, 1962 (the Rules).*

(b) The appellant submits that the action of the Assessing Officer in invoking the provisions of Rule 8D(2) to compute the disallowance under section 14A is void ab initio as the Assessing Officer has failed to record any dissatisfaction with regard to the manner of computation of disallowance under section 14A by the appellant which is a condition precedent to invoke the provisions of Rule 8D of the Rules as per the provisions of section 14A(2) and 14A(3) of the Act.

2. *Without prejudice to what is stated in ground No. 1 above, the learned Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer of rejecting the suo-moto disallowance made under section 14A of the Act by the appellant based on scientific working without giving any cogent reason.*

3. *Without prejudice to what is stated in Ground No. 1 and 2 above, the learned Commissioner of Income-tax (Appeals) erred in disallowing interest expenses while working out the disallowance under section 14A of the Act read with Rule 8D(2)(ii) of the Rules.*

4. *Without prejudice to what is stated in Ground No. 1, 2 and 3 above, the learned Commissioner of Income-tax (Appeals) erred in considering investment not generating exempt income while working out the disallowance under*

section 14A of the Act read with Rule 8D(2)(ii) and (iii) of the Rules.

5. *The appellant submits that the learned Assessing Officer be directed :*

(i) to delete additional disallowance of Rs.34,43,533/- under section 14A of the Act and to restrict the disallowance to Rs.15,41,4347-;

(ii) without prejudice to what is stated in (i) above, to delete disallowance in .respect of interest expenses under Rule 8D(2)(ii) of the Rules.

(iii) without prejudice to what is stated in (i) and (ii) above, to consider investment generating exempt income while making disallowance under Rule 8D(2)(iii) of the Rules and restrict disallowance to Rs.17,87,888/-; and to modify the assessment in accordance with the provisions of the Act.

2. The brief facts of the case are that, the assessee company is a member of BSE and NSE engaged in the business of providing equity broking services. The assessee has filed the return of income for the assessment year 2016-17 on 28.11.2016 disclosing a Total loss of Rs.6,02,78,033/- and the return of income was processed under Section 143(1) of the Act. Subsequently, the case was selected for scrutiny and notice under Section 143(2) and 142(1) of the Act along with the questionnaire was issued. The AO on perusal of the information found that the assessee has earned dividend income of Rs.15,15,673/- and claimed as exempt u/sec10(34) of the Act. Whereas, the assessee has made disallowance under Section 14A of the Act Rs.15,41,434/- in the computation of income. The assessee was called to explain the reasons and the

working of disallowance under Section 14A of the Act and the information was filed. The A.O without recording dissatisfaction on the working of assessee has relied on the judicial decisions and workout the disallowance under Section 14A r.w.s. 8D of Rs.34,43,533/- and assessed the total loss of Rs.5,68,34,488/- and passed the order under Section 143(3) of the Act dated 23.12.2019.

3. Aggrieved by the order, the assessee has filed an appeal with the CIT(A). Whereas, the CIT(A) considered the grounds of appeal, submissions of the assessee and findings of the scrutiny assessment, whereas, in respect of disallowance under Section 14A of the Act, the CIT(A) has confirmed the action of the AO and granted relief in other grounds of appeal and partly allowed the assessee appeal. Aggrieved by the order of the CIT(A) the assessee has filed an appeal before the Honble Tribunal.

4. At the time of hearing, the Ld.AR submitted that the CIT(A) has erred in confirming the action of the AO irrespective of the fact that the assessee has suo-motu made disallowance under Section 14A of the Act. The Ld.AR reiterated that the A.O. has not recorded dissatisfaction on the workings of the assessee and the Ld.AR further relied on the assessee own case wherein identical addition made by the A.O was deleted for the reason that the A.O. has not recorded dissatisfaction on the working of the disallowance by the assessee and prayed for allowing the appeal. Contra, the Ld.DR

submitted that the AO and CIT(A) has considered all these factual aspects and supported the order of CIT(A).

5. We heard the rival submissions and perused the material on record. The sole grievance of the Ld. AR that the CIT(A) has erred in confirming the disallowance under Section 14A of the Act irrespective of the facts that assessee had earned a dividend income and made suo motto disallowance and there is no satisfaction recorded by the A.O. The Ld. AR contentions are that on the similar issue the Hon'ble Tribunal in the assessee's own case has granted the relief wherein identical addition made by the A.O was deleted for the reason that the A.O. has not recorded dissatisfaction on the working of the disallowance by the assessee. Further, the assessee's books of accounts were produced and the facts were communicated supporting the calculation of disallowance. At this juncture, we considered it appropriate to refer to the findings of the Hon'ble Tribunal in the assessee's own case in ITA No. 5673/M/2018 A.Y. 2011-12 dated 07.11.2019 observed at page 4 Para 5 read as under:

5. We have gone through the relevant record and impugned order and heard both the parties it is clear that books of accounts were produced before the Ld. AO and he could not point out any nexus with the exempt income and that of the expenditure relatable to the exempt income. In several judicial proceedings Hon'ble Courts have held that there has to be some basis for making disallowance in support of its contention Ld. AR cited an order of Co-ordinate Bench wherein in similar facts and circumstances of the case relief was granted by the Co-ordinate Bench in assessee's own case for

A.Ys. 2008-09, 2009-10, 2010- 11 and 2011-12 wherein in facts and circumstances of the case relief was granted to the assessee relying on the earlier years ITAT orders in assessee's own case:- "

8. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that in the present case also the facts are not in dispute that the assessee has incurred this expenditure mainly on brand promotion during the year including advertising in Media/ Magazine. It is also not disputed by Revenue. Now before us, that this expenditure is not a corporate advertising films, is in respect of ongoing business. Once, this is for the business and expenditure incurred on brand advertisement, the same is to be allowed as Revenue in nature. Respectively, following Hon'ble Bombay High Court in the case of Asian Paints India Limited (supra), we confirm the order of CIT(A) allowing the claim of the assessee and dismiss this issue of Revenue's appeal. Revenue's appeal is dismissed.

9. Coming to assessee's appeals in ITA No. ITA Nos. 6249/Mum/2012,6250/Mum/2012,1794/Mum/2014,1096/Mum/2015 for A.Y. 2008-09, 2009-10, 2010-11,2011-12. The only common issue in all these four years is as regards to the disallowance of expenses 5 ITA No. 5673/ MUM/2018 Assessment Year: 2011-12 relating to exempt income by the AO and confirmed by CIT(A) by invoking the provisions of section 14A of the Act read with rule 8D of the Income Tax Rules, 1962 (the rules). Briefly stated facts are that the AO noted, the assessee has received dividend income of ₹ 43,26,298/- in AY 2008-09, ₹ 45,55,366/- in AY 2009-10, ₹ 47,70,620/- in AY 2010-11 and ₹ 1,47,57,441/- in AY 2011-12. The assessee claimed these dividend incomes has exempt under section 10(34) of the Act in all the years. The assessee suo moto disallowed a sum of ₹ 6,48,945/- (which was revised before CIT(A) vide computation at ₹ 3,81,528/-) for AY 2008-09, a sum of ₹ 3,29,296/-

for AY 2009-10, a sum of ₹ 3,24,441/- for AY 2010-11, and a sum of ₹ 1,80,077/- for AY 2011-12.

10. The facts and circumstances are exactly identical in all the years and hence, we will take the facts from AY 2008-09 and will decide the issue. We find that in all the years, the AO has simply applied Rule 8D and made disallowance under Rule 8D (2)(iii) of the Rules except in AY 2010- 11 Rule 8D (2)(ii) was also applied. The AO made disallowance of ₹ 14,07,045/- in AY 2008-09, a sum of ₹ 21,36,632/- in AY 2009-10, a sum of ₹ 69,53,073/- (including disallowance under Rule 8D(2)(ii) of interest amounting to ₹ 2,37,604/- for AY 2010-11 and a sum of ₹ 1,01,58,963/- for AY 2011-12. The CIT(A) also confirmed the disallowance made by AO for all the AYs.

11. Before us, the learned Counsel for the assessee stated that in any of the years, AO has not recorded any satisfaction as can be seen from the assessment order. The learned Counsel took us through the assessment order whereby the AO has relied on the decision of ITAT special Bench, Mumbai, in the case of ITO Vs. Daga Capital Management P. Ltd. 117 ITD 169 (SB) wherein it is held that Rule 8D is retrospective. The relevant Para 6.6 and 6.7 of the AO's order reads as under: -

6.6 The insertion of section 14A with retrospective effect, from 1.4.1962, is a serious attempt on the part of the Legislature 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. The Legislature has further clarified its intention that the expenses incurred can be allowed only to the extent they are relatable to the earning of the taxable income. The language has, therefore, made

an attempt to curb the practice used to reduce the tax payable on the exempt Income by debiting the expenses incurred to earn the exempt income against the taxable income The language used by the legislature in the statute makes it amply clear that the legislature was well aware that the deduction of expenses in respect of exempt income were being claimed in full, against the taxable income was therefore clarified that expenses incurred can be allowed only to the extent they are relatable to earning of the taxable income. Nature of the expenses incurred may, therefore, be related partly to the exempt income, 6 ITA No. 5673/ MUM/2018 Assessment Year: 2011-12 and partly to the taxable income, but the intention of the legislature to allow the expenses only to the extent they are relatable to the earning of taxable income. It has been clarified unambiguously that in computing the total income, no deduction shall be allowed in respect of expenditure incurred by the assessee against the income which is claimed as exempt from tax. Circular No.14 of 2001 dated 22.11.2001, and Circular No.8 of 2002 dated 27.8.2002 have also explained the provisions wherein it has been clarified that no expenses relatable to an income exempt from tax would be allowed as a deduction.

6.7 The explanation filed by the assessee is carefully perused and the same is not acceptable, in view of the above referred decisions, and decision of the Hon'ble ITA/F. Special Bench. Mumbai in the case of Daga Capital Management Pvt. Ltd. The assessee has incurred expenses for earning dividend income which is evident from the fact that the assessee itself has disallowed a sum of Rs.6,48,945/- on estimated basis. Since the expenses related to earning exempt income have been incurred, the same are disallowed as per provisions of Section 14A read with Rule 8D of the IT Act. As per the provisions of Section 14A, the disallowance u/s.14A has to be made in accordance with the Rule 81.) of the IT Rules 1962, which is computed as under:.....”

12. *The learned Counsel for the assessee stated that this decision of the special bench of ITAT in the case of ITO Vs. Daga Capital Management P. Ltd. (supra), is reversed by the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT [2017] 394 ITR 449 (SC) and held the provisions of Rule 8D of the Rules as prospective and will apply for and from AY 2008-09 and thereafter the relevant assessment years falls wherein Rule 8D of the Rules will apply. The learned Counsel for the assessee drew our attention to Supreme Court decision in the case of Godrej & Boyce Mfg. Co. Ltd. (supra) and he referred to the relevant page 471, Para 37 & 38, wherein Hon'ble Supreme Court has clearly stated that it is mandatory for the AO with regard to subjective satisfaction on the issue. The relevant observations of the Hon'ble Supreme Court read 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. Subsections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to 7 ITA No. 5673/MUM/2018 Assessment Year: 2011-12 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.*

38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-2003, to hold that the claims of the Assessee that no expenditure was incurred to earn the dividend income cannot be accepted and why the orders of the Tribunal for the earlier Assessment Years were not acceptable to the Assessing Officer, particularly, in the absence of any new fact or change of circumstances. Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received. That any part of the borrowings of the assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (Rs. 270.51 crores as on 1.4.2001 and Rs. 280.64 crores as on 31.3.2002) remains unproved by any material whatsoever. While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. In this regard we may remind ourselves of what has been observed by this Court in Radhasoami Satsang v. CIT [1992] 193 ITR 321/60 Taxman 248 (SC)."

13. From the facts of the present case, it is clear that the AO despite the fact that all the books of accounts were produced before him, he could not point out any nexus with the exempt income and that of the expenditure relatable to this exempt income. Even the Hon'ble Supreme Court in the case of Godrej & Boyce Mfg. Co. Ltd. (supra), has clearly laid down the principle that the satisfaction of the AO must be there for making disallowance under section 14A of the Act read with Rule 8D of the Rules. In the present case, the satisfaction is missing in all the years. Accordingly, we allow the appeals of the assessee on this issue except suo moto disallowance

of a sum of ₹ 3,81,528/-in AY 2008-09 be enhanced to as sum of ₹ 6,48,945/- as it has revised the disallowance. The AO will recompute the income accordingly in all these years.

14. In the result, the appeal of Revenue is dismissed and that of the assesseees' appeals are allowed except ITA No. 6249/Mum/2012 for AY 2008-09, which is partly allowed." Thus, in parity with the above said order we allow this ground of appeal.

6. In this year also, we notice that the A.O. has not recorded dissatisfaction on the working of disallowance by the assessee. We considering the facts, circumstances, judicial decision and the nature of exempt income and the suo-motto disallowance made by the assessee u/sec14A of the Act, set-aside the order of the CIT(A) and direct the assessing officer to delete the disallowance made by the A.O. and sustain the disallowance of Rs.15,41,434/- made by the Assessee in the computation of income and allow the grounds of appeal of the assessee.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 27th day of September 2022.

Sd/-

(BASKARAN BR)

ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)

JUDICIAL MEMBER

Mumbai, Dated: 27/09/2022

M. Sonavane

Copy of the Order forwarded to:

1. The Appellant,
2. The Respondent
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,
(Dy./Asstt.Registrar)ITAT,
Mumbai