

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'C' BENCH, MUMBAI.**

**BEFORE SHRI B.R. BASAKARAN, ACCOUNTANT MEMBER AND
SHRI ABT Y VARKEY, JUDICIAL MEMBER**

ITA No.4755/Mum/2017 (Assessment Year : 2012-13)		
Dy. Commissioner of Income Tax-14(2)(1), 432, Aayakar Bhavan, 4 th Floor, M K Marg, Mumbai-400 020	Vs.	M/s. Instant Holdings Limited, 213, Bezzola Complex 'B' Wing, 71-Sion Trombay Road, Chembur, Mumbai-400 071 PAN AACCK5600M
(Appellant)		(Respondent)
Assessee By :		Mr. Vijay Mehta, C.A.
Revenue By :		Mr. Purushottam Tripuri, CIT-DR
Date of Hearing :		06.10.2022
Date of Pronouncement :		27.12.2022

O R D E R

Per Shri B.R. Baskaran, A.M. :

The revenue has filed this appeal challenging the order dated 25-04-2017 passed by Ld CIT(A)-12, Mumbai and it relates to the assessment year 2012-13. Following two issues are urged by the revenue:-

- (a) Relief granted in respect of addition relating to receipt of share transfer benefits on purchase of certain shares.
- (b) Relief granted in respect of addition made u/s 14A of the Act.

2. The assessee herein is an investment company. The AO completed the assessment of the year under consideration by adding a sum of Rs.37.32 crores towards "Share transfer benefit" obtained by the assessee and also disallowing a sum of Rs.1.55 crores u/s 14A of the Act. The Ld CIT(A) deleted

the first addition mentioned above. In respect of second addition, the Ld CIT(A) deleted the disallowance over and above that made by the assessee. Hence the revenue has filed this appeal.

3. The first issue relates to the addition relating to "Share transfer benefit". The facts relating to the same need little elaboration. A company named "Idea Tracom P Ltd was formed. On 22.5.2010, Shri Kheman Yadav and Mr Yash Agarwal subscribed 5000 shares each of above said company. They sold all the above said shares to two different companies on 31.5.2010. Those two companies, in turn, sold all the 10,000 shares to M/s Universal Industries Fund Ltd on 11.8.2010. Thus M/s Idea Tracom P Ltd became wholly owned subsidiary of M/s Universal Industries Fund Ltd.

4. M/s Universal Industries Ltd sold following shares held by it on 18.8.2010 for a total consideration of Rs.54.21 crores to M/s Idea Tracom P Ltd.

- a) 1,67,350 shares of KEC International ltd
- b) 30,96,800 shares of Zensar Technologies Ltd
- c) 6,30,500 shares of Spencer & Co Ltd
- d) 24,75,000 shares of South Asia Electricity.

In order to mobilize funds for purchasing above said shares, M/s Idea Tracom P Ltd issued Optionally Fully Convertible Debentures (OFCD) on 24.8.2010 for a value of Rs.54.20 crores, which was subscribed by the assessee herein.

5. On 06-09-2010, the assessee herein exercised its option and accordingly the OFCD was converted into equity shares having face value of Rs.10/- each with a premium of Rs.90/- per share in 1 : 1 ratio. On 07-09-2010, M/s Universal Industries Fund Ltd sold 10,000 shares held by it in Idea Tracom P Ltd to the assessee herein. Hence, M/s Idea Tracom P Ltd became subsidiary of assessee herein.

6. Subsequently on 31.3.2012, the assessee amalgamated M/s Idea Tracom P Ltd with itself.

7. The case of the assessing officer is that the above said shares in four companies have been sold by M/s Universal Industries Fund Ltd on 20-08-2010 for a consideration of Rs.54.21 crores, whereas the market value of those shares as on 03-09-2010 stood at Rs.91.53 crores. Thus, there was a benefit of Rs.37.32 crores in this transaction to M/s Idea Tracom P Ltd. Since the assessee company herein has amalgamated itself the above said M/s Idea Tracom P Ltd on 31.3.2012, the AO took the view that the said benefit has been passed on to the assessee and hence it is taxable in its hands. Accordingly, the AO assessed the above said share transfer benefit of Rs.37.32 crores in the hands of the assessee herein in AY 2012-13.

8. The Id CIT(A) deleted this addition and hence the revenue is challenging the said decision.

9. It was brought to our notice that the Ld CIT had initiated revision proceedings u/s 263 of the Act in the hands of M/s Idea Tracom P Ltd in AY 2011-12 on the reasoning that the AO has failed to assess share transfer benefit in the hands of M/s Idea Tracom P Ltd. The Ld CIT initiated revision proceedings in AY 2011-12, since the transaction of purchase has taken place in the Financial year 2010-11 relevant to AY 2011-12. The said revision order has been quashed by the Tribunal, vide its order dated 07-12-2015 passed in ITA No.2433/M/2015 holding that there is no violation of any of the provisions of the Statute in respect of sale of shares of four companies mentioned above. It is pertinent to note that the Tribunal has passed the above said order in the name of assessee herein, as it is the successor to M/s Idea Tracom P Ltd.

10. We notice that the Ld CIT(A) has followed the decision rendered by the Tribunal in AY 2011-12 in deleting this addition in this year. For the sake of convenience, we extract below the order passed by Ld CIT(A):-

“ 13.15 I have considered the submissions of the appellant carefully. I have also perused the assessment order and the material available on record including the copies of the documents submitted by the appellant in the paper

book as well as the order of the CIT in the case of Idea Tracom Pvt. Ltd. for A.Y. 2011-12 dt.17.03.2015 and order of the Hon'ble Mumbai High Court approving Amalgamation Scheme dt.13.4.2012 between M/s. Idea Tracom Pvt. Ltd. and the appellant.

13.16 It is noted that the facts of the issue reveals that M/e Universal Industries Fund Ltd, a company, sold certain shares to its subsidiary company in Idea Tracom Pvt. Ltd. The details of shares sold by Universal Industries Fund Ltd, are given in the submissions and details of which are also recorded in the preceding paras of this order. M/s. Universal Industries Fund Ltd. transferred 1,67,350 equity shares of KEC International, 30,96,800 shares of Zensar Technologies Ltd, 6,30,500 shares of Spencer & Co. Ltd. and 24,75,000 preference shares of South Asia Electricity to Idea Tracom Pvt Ltd. The total transfer value of this equity shares and preference shares was Rs.54,20,93,678/- whereas market value of these equity shares and preference shares was Rs.91.53,34.248/- on 03.09.2010 ie, date of transfer. It looks that the Idea Tracom Pvt. Ltd, the subsidiary of Universal Industries Fund Ltd got benefit of Rs.37,32.40.570/-. It seems that this benefit has been accrued to M/s. Idea Tracom Pvt Ltd, as lesser price has been paid of these equity shares and preference shares than the market price. This share transaction was found genuine and reasonable by the A.O. while completing the assessment in the case of Idea Tracom Pvt Ltd. for A.Y. 2011-12.

13.17 I also notice that subsequent to completion of assessment, an attempt was made by the Department to tax this benefit of Rs.37.32,40,570/- in the hands of Idea Tracom Pvt.Ltd. An order u/s. 263 was passed by the CIT in the case of M/s. Idea Tracom Pvt Ltd, for A.Y. 2011-12 setting aside the assessment to be done afresh. Order u/s 263 was challenged by M/s. Idea Tracom Pvt. Ltd. before Hon'ble ITAT, The Hon'ble ITAT, Mumbai vide order dated 07.12.2015 decided the issue in favour of M/s. Idea Tracom Pvt.Ltd, holding that no error is found in the order of the AO. Order u/s.263 was thus quashed by the Hon'ble ITAT, Mumbai. It is therefore, clear that the said share transaction between Universal Ltd and Idea Tracom Pvt. Ltd. was found genuine and reasonable. Even the benefit accrued to Idea Tracom Pvt Ltd. was found to be not taxable.

13.18 It is therefore seen that the taxability of benefit of the share transaction between M/s. Universal Industries Fund Ltd. and Idea Tracom Pvt. Ltd., a subsidiary was considered by the ITAT, Mumbai and the recipient was not liable to tax of this benefit.

13.19 It is further seen that M/s. Idea Tracom Pvt. Ltd. amalgamated with the appellant in Instant Holdings Ltd. The result of the amalgamation was that all the assets and liabilities of Idea Tracom Pvt. Ltd, becomes the asset and abilities of the appellant. The Act of Amalgamation has been done with the approval of Hon'ble Mumbai High Court decision dated 13.04.2012. The appellant received share transfer benefit, if any, due to amalgamation and not by purchase or buy any other mode. Making an addition to the appellant's income of this benefit to the extent of Rs.37,32,40,570/- to the appellant's income after post amalgamation which needs to be taxed as per AQ's contention is only imagination. When the benefit was not found taxable in the hands of original recipient then how the same can be taxable in the hands of amalgamated company. No real income has been received by the appellant on account of amalgamation. It is only assets and liabilities which have been taken over by the appellant on account of amalgamation. No income or any other benefit is being received by the companies when they amalgamate, Amalgamation recognizes only taking over/ handing over the assets and liabilities) alone. Moreover, even if there is any receipt of this kind than this could be only of capital receipt and not that of revenue which could be brought to tax under 1.T.Act It is also a known fact that every benefit which an entity receives cannot be taxed under the I. T. Act.

13.20 Looking to the facts of the whole case. I find that the whole share transaction between Universal Industries Fund Ltd. and Idea Tracom Pvt Ltd, have been done with the parameters of law and no flaw in the share transaction has been noticed by the Assessing Officer at the time of assessment. The addition of Rs.37,32,40,570 made by the Assessing Officer to the appellant's income post amalgamation is therefore based on imagination, surmises and conjectures and without any evidence. The addition therefore cannot be sustained. Accordingly, the addition of Rs.37,32,40,570 is deleted. Ground No.3 is allowed.”

11. The transaction of sale of shares by M/s Universal Industries Fund Ltd to M/s Idea Tracom P Ltd has taken place on 20-08-2010, i.e. during the financial year relevant to AY 2011-12. We further notice that the AO, in that year, was comparing prices of those shares prevailing on 3rd of September, 2010 with the price agreed on 20-08-2010. In the secondary market, it is in the common knowledge of everyone that the prices fluctuate every day. Hence it is not clear as to why the AO was comparing prices quoted on 3rd September,

2010 with the transaction of sales that happened on 20-08-2010. In any case, the revision order passed by Ld CIT proposing to assess the alleged share transfer benefit in the hands of M/s Idea Tracom P Ltd has been set aside by the Tribunal.

12. During the year under consideration, i.e., in AY 2012-13, the only event that has happened is the amalgamation of M/s Idea Tracom P Ltd with the assessee company. In our view, no cause of action shall arise in the hands of the assessee during the year under consideration on account of amalgamation, that too in respect of a transaction that has happened between the amalgamating company and some other company. In any case the provision relating to assessment of share transfer benefit was brought into the statute only from subsequent assessment year and those provisions will not apply to the year under consideration. We notice that the Ld CIT(A) has passed a reasoned order by taking into consideration the decision rendered by the Tribunal in AY 2011-12 in the hands of M/s Idea Tracom P ltd. Accordingly, we do not find any reason to interfere with the decision rendered by Ld CIT(A) on this issue.

13. The next issue relates to the addition made u/s 14A of the Act. During the year under consideration, the assessee earned exempt dividend income of Rs.3.27 crores. The assessee disallowed a sum of Rs.15.05 lakhs. The AO however, computed the disallowance at Rs.1.55 crores and added the same. The Ld CIT(A) deleted the addition with the following observations:-

“ 14.12 I have considered the submissions of the appellant carefully. I have also gone through the assessment order. During the year the appellant has received a dividend income of Rs.3,27,48,374/- which was claimed as exempt. The appellant suo moto disallowed an amount of Rs.15,05,285/- under section 14A r.w.r. 8D in the computation of income. The working of 14A disallowance by the appellant was submitted before the A.O.

14.13 The AO during the course of assessment proceedings calculated the disallowance u/s.14A r.w.r. 8D to the tune of Rs.1,55,60,470/-, ignoring the suo moto disallowance made by the appellant of Rs.15,05,285/-.

14.14 It is seen that the appellant had calculated the disallowance u/s.14A r.w.r 8D of the IT.Rules suo moto and working of the same was also filed before the AG. It has been held by various Hon'ble Courts that in case AG. is not satisfied with the suo moto disallowance of expenditure incurred for earning exempt income, then the AG. has to record his dissatisfaction in writing as to how and why he is not satisfied with the suo moto disallowance made by the appellant and thereafter, he can invoke Rule 8D and recalculate the disallowance. It is there ore a settled position of law that Rule 8D cannot mechanically be applied. I find that the A.O. has not followed the legal position while while effecting the disallowance u/s.14A r.w.r. 8D of IT Rules. It is also a fact that no notional expenditure can be disallowed under Rule 8D and only the actual expenditure incurred for earning exempt income can be disallowed. It also settled position of law that when no expenditure is incurred, question of disallowance u/s.14A does not arise. The A.O. has also to establish nexus between expenditure incurred and the exempt income and only then such expenditure can be disallowed. I also find that the A.O. has taken into consideration that the disallowance u/s. 14A r.w.r. 8D should be restricted to the extent of expenditure actually debit to the P&L account and which is related to the earning exempt income. The appellant, had itself worked out the disallowance of amount and restricted the expenditure relatable to exempt income. The contention of the appellant that preventive disallowance made u/s.14A cannot exceed amount which was actually debited to P&L A/ c and which relate to earning exempt income is in order and acceptable. The A.O. has also not pinpointed as to how the suo-moto disallowance is insufficient and not as per rule 8D.

14.15 Looking at the facts of the ground, I find that the A.O. has made the disallowance u/s.14A r.w.r. 8D to the tune of Rs.1,55,60,470/- mechanically ignoring the judicial pronouncements made by various Hon'ble Courts in this issue.The working of disallowance by the A.O. is therefore erroneous. Accordingly, the disallowance made by the A.O. of Rs.1,55,60,470/- is deleted. However, disallowance made by the appellant suo moto is retained.

Ground Nos. 4,5 and 6 are therefore partly allowed.”

14. We heard the parties on this issue and perused the record. From the Profit and Loss account, we notice that the assessee has claimed aggregate expenses of Rs.36.43 lakhs only. The above said amount included amalgamation expenses to the tune of Rs.11.43 lakhs and the same has been disallowed voluntarily by the assessee. Hence, the assessee has claimed expenses of Rs.27 lakhs only, which included trading loss of Rs.3.08 lakhs. Hence, the net aggregate expenses claimed by the assessee was only around

Rs.24 lakhs, out of which the assessee has computed disallowance u/s 14A of the Act at Rs.15.05 lakhs. We notice that the AO has mechanically applied the provisions of Rule 8D without considering the above facts, meaning thereby, there was no dissatisfaction recorded by AO with regard to the disallowance computed by the assessee. Accordingly, we are of the view that the Ld CIT(A) was justified in deleting the disallowance made by the AO and restricting the same to the amount of disallowance made by the assessee itself.

15. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 27th Dec., 2022.

Sd/-

(ABT Y VARKEY)
Judicial Member

Sd/-

(B.R. BASAKARAN)
Accountant Member

Mumbai, Dt.27.12.2022.

* Reddy gp

Copy to :

1.	The Assessee
2.	Respondent
3.	C I T, Mumbai.
4.	CIT(Appeals)- 12, Mumbai.
5.	DR, ITAT, Mumbai.
6.	Guard File.

By Order

Asst. Registrar, ITAT, Mumbai