IN THE INCOME TAX APPELLATE TRIBUNAL

COCHIN BENCH : COCHIN

Virtual Hearing

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT
AND MS. S. PADMAVATHY, ACCOUNTANT MEMBER

ITA Nos. 745 to 747/Coch/2019 AY 2008-09 to 2010-11 & ITA Nos. 272 to 275/Coch/2020 AY 2011-12 to 2014-15

The Federal Bank Ltd., Federal Bank Towers, Palace Junction, Aluva, Ernakulam 683 101 **PAN : AABCT0026H**	Vs.	The Asst.Commissioner of Income Tax Corporate Cr 2(1) Kochi
APPELLANT		RESPONDENT

ITA No.33 to 35 /Coch/2020 AY 2008-09 to 2010-11 & ITA No.309 to 311/Coch/2020 AY 2012-13 and 2014-15

The Asst. Commissioner of Income Tax, Corporate Cr 2(1), Kochi.	Vs.	The Federal Bank Ltd., Federal Bank Towers, Palace Junction, Aluva, Ernakulam 683 101 **PAN : AABCT 0026 H**
APPELLANT		RESPONDENT

Assessee by	:	Shri Rajesekharan, CA and Shri K.Gopi, CA
Respondent by	:	Smt. J. M. Jamuna Devi, Sr. DR, Cochin

Date of hearing	:	7 & 8.12.2022
Date of Pronouncement	:	12.12.2022

O R D E R

Per N. V. VASUDEVAN, VICE-PRESIDENT:

ITA Nos. 745 to 747/Coch/2019 & ITA Nos.33 to 36/Coch/2020 are cross appeals by the Assessee and Revenue against a common order dated 22.10.2019 of CIT(A), Kochi, relating to AY 2008-09 and 2010-11.

2. In so far as these cross appeals are concerned, the common issue in the appeals by the Assessee and Revenue is with regard to disallowance of expenses in earning exempt income u/s.14A of the Income Tax Act, 1961 (Act) read with Rule 8D of the Income Tax Rules, 1962 (Rules).

3. The Assessing Officer disallowed the following expenses in AY 2008-09 to 2010-11 u/s.14A of the Act.

	AY 2008-09	**AY 2009-10**	**AY 2011-12**
Exempt Income	Rs.6,23,75,372	Rs.4,79,33,244	Rs.4,68,60,335
Disallowed u/s.14A being 0.5% of the average tax free investments	-	Rs.97,00,000	Rs.83,34,000

Amount disallowed by AO invoking Rule 8D	Rs.12,37,89,000	Rs.11,80,57,000	Rs.4,68,60,335

4. On appeal by the Assessee, the CIT(A) by orders all dated 23.1.2014, followed decision of the Hon'ble Kerala High Court in the case of CIT Vs. Catholic Syrian Bank (2011) 9 taxmann.com 148(ker) and directed disallowance to be made u/s.14A of the Act as per the aforesaid decision. In the aforesaid decision of the Hon'ble Kerala High Court, the issue that was considered by the Hon'ble Kerala High Court was whether proportionate disallowance of interest paid by the Bank is called for under section 14A of the Income-tax Act ('the Act') for the investments made in U.T.I. shares, tax free bonds/securities etc. which yielded tax free dividend and interest. ITA No.1324 of 2009 being appeal in the case of Dhanalakshmi Bank was also one of the appeals before the Hon'ble Kerala High Court and was part of the aforesaid decision dealing with group of appeals involving similar issue. The Hon'ble Court after explaining the provisions of Sec.14A of the Act and Rule 8D of the Rules, observed that Section 14A was introduced to the Income-tax Act by Finance Act, 2001 with retrospective effect from 1-4-1962. This provision provides for disallowance of expenditure incurred by the assessee in relation to income which does not form part of the total income. In other words, if the assessee incurs any expenditure for earning tax free income such as interest paid for funds borrowed, for investment in any business which earns income that is free from tax, assessee is not entitled to deduction of such interest or other expenditure. The Hon'ble Court extracted provisions of section 14A, with sub-clauses (2) and (3) and the proviso:

> "Section 14A. (1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.
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> (2) 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 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.
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> (3) The provisions of sub-section (2) shall also 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:
>
> **Provided** that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment J year beginning on or before the 1st day of April, 2001."

The Hon’ble Court observed that sub-sections (2) and (3) were introduced to the main section by Finance Act, 2006 with effect from 1-4-2007. Subsequently Rule 8D was prescribed by the Government for the purpose of sub-section (2) of Section 14A from 2007-08 onwards. The Hon’ble Court observed that by virtue of the subsequent legislation, there was a precise formula for working out the disallowance to be made under section 14A even if assessees do not have separate account showing the expenditure incurred on investments made for earning tax free income. The Court then observed that whether section 14A of the Act prior to the introduction of sub-sections (2) and (3) entitles the department to make disallowance of expenditure incurred for earning tax free income in cases where

assessee do not maintain separate accounts for the investments and other expenditure incurred for earning tax free income. The Hon'ble Court was therefore dealing with cases prior to AY 2007-08 and the methodology to be adopted in those prior years when Sec.14A(2) of the Act and Rule 8D of the Rules. The Hon'ble Court while concluding the said judgment suggested a formula to be followed by AO's for AY prior to AY 2007-08 and concluded as follows:

> **"5.** What we have stated above is only a reasonable suggestion for the Assessing Officer to adopt which arises only if assessee is not able to establish more accurately the interest spent on earning tax free income. We, therefore, leave this matter to be decided by the Assessing Officer with reference to the accounts of the assessee-Banks for each year. Since we find that the rational adopted by the Assessing Officer to estimate the expenditure for the purpose of disallowance under section 14A is not tenable, we feel the matter should be restored to the Assessing Officer for making disallowance under section 14A by reasonably estimating as nearly as possible the expenditure incurred for earning the tax free income. This should be done after giving opportunity to the assessee-Banks to suggest their own formula with reference to accounts for the purpose of arriving at the actual amount or near actual amount. **The disallowance on estimated basis has to be done as above until rule 8D was framed and thereafter it is for the Assessing Officer to make disallowance by following sub-section (2) of section 14A and rule 8D of the Income-tax Rules.**
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> **6.** So far as the disallowance of administrative expenditure is concerned, we feel considering the fact that there is no precise formula for proportionate disallowance, no disallowance is called for, for proportionate administrative cost attributable to earning of tax free income until rule 8D came into force. We, therefore, dispose of the appeals by setting aside the orders of the Tribunal and that of the first appellate authority on this issue and remand all the assessments back to the Assessing Officer for reworking disallowance under section 14A in the case of each assessee for each assessment year. **The proportionate disallowance under section 14A should be limited to only interest liability and not overheads or administrative expenditure; which should be considered for disallowance under rule 8D from 2007-08 onwards.**"

The conclusion of the Hon'ble Court was therefore that prior to 2007-08 no overhead or administrative expenditure could be disallowed and only interest expenditure could be disallowed. For AY after 2007-08 overhead or administrative expenditure can be disallowed in accordance with Sec.14A(2) read with Rule 8D. Therefore the AO can resort to Rule 8D of the Rules, only, if he in terms of Sec.14A(2) of the Act, arrives at a satisfaction that having regard to the accounts of the assessee, that the claim of the assessee in respect of expenditure in relation to income which does not form part of the total income under the Act is incorrect. Therefore the AO cannot blindly apply Rule 8D of the Rules without first complying with the requirements of Sec.14A(2) of the Act. This is the spirit of the judgment of the Hon'ble Kerala High Court.

5. In the orders passed by the CIT(A) she followed the decision of Hon'ble Kerala High Court which suggested a particular formulae for making disallowance u/s.14A of the Act with reference to AYs prior to AY 2007-08 when Sec.14A(2) of the Act and Rule 8D of the Rules, were not in the statute book. Without realizing that he was dealing with AY 2008-09 to 2010-11, the CIT(A) applied the formulae given by Hon'ble High Court which was applicable only for AYs prior to 2007-08. The decision of Hon'ble Kerala High Court in so far as AY 2007-08 and subsequent AYs is concerned is very clear and it lays down that the mandate of Sec.14A(2) of the Act and Rule 8D of the Rules has to be followed. By doing so, the addition made by the AO stood reduced to some in extent in all the AYs. Viz., For AY 2008-09 it stood reduced from Rs.8,84,81,948 from Rs. 12,37,89,000. For AY 2009-10 it stood reduced from Rs.11,80,57,000 to Rs.9,30,35,062. For AY 2010-11 it stood reduced from RS.4,68,60,335 to Rs. 2,16,43,082/-.

6. The Assessee filed appeal against the orders of the CIT(A) before the Tribunal in ITA No.231 to 283/Coch/2014 contending that proportionate disallowance of interest expenses was not justified because the Assessee had sufficient own interest free funds which were used to make investments that yielded tax free income. The Tribunal by a common order dated 5.9.2014 set aside the order of the CIT(A) and remanded the issue of disallowance of interest and other expenses to the AO to be done in accordance with the judgment of the Kerala High Court in the case of Dhanalakshmi Bank i.e., ITA No.1324 of 2009 dated 21.10.2010 which is the same decision discussed in the earlier paragraph of this order.

7. In the set aside the proceedings, the AO by his orders dated 31.3.2017 in all the three AY 2008-2009 to 2010-11, quoted the last sentence in paragraph-5 of the Judgment of the Hon'ble Kerala High Court referred to paragraph-4 of this order and retained the same disallowance that survived pursuant to the order of the CIT(A) by which he directed proportionate disallowance of interest expenses to be made. These orders of CIT(A) for AY 2008-09 to 2010-11 as we have already seen had been set aside by the Tribunal in the order dated 5.9.2014 referred in the earlier paragraph of this order.

8. Against the orders dated 31.3.2017, the Assessee filed appeals before the CIT(A). Before CIT(A), the Assessee contended that as per the order of Tribunal dated 5.9.2014 remanding the issue of disallowance to be made u/s.14A of the Act, the AO was directed to follow the decision of the Hon'ble Kerala High Court in the case of CIT Vs. Catholic Syrian Bank (2011) 9 taxmann.com 148(ker) and ITA

No.1324 of 2009 being appeal in the case of Dhanalakshmi Bank was also one of the appeals before the Hon'ble Kerala High Court and was part of the aforesaid decision dealing with group of appeals involving similar issue. It was contended that the conclusion of the Hon'ble Court was therefore that prior to 2007-08 no overhead or administrative expenditure could be disallowed and only interest expenditure could be disallowed. For AY after 2007-08 overhead or administrative expenditure can be disallowed in accordance with Sec.14A(2) read with Rule 8D. Therefore the AO can resort to Rule 8D of the Rules, only, if he in terms of Sec.14A(2) of the Act, arrives at a satisfaction that having regard to the accounts of the assessee, that the claim of the assessee in respect of expenditure in relation to income which does not form part of the total income under the Act is incorrect. Therefore the AO cannot blindly apply Rule 8D of the Rules without first complying with the requirements of Sec.14A(2) of the Act. This is the spirit of the judgment of the Hon'ble Kerala High Court but in the set aside proceedings the AO applied the formulae suggested by the Hon'ble Kerala High Court for AYs prior to AY 2007-08 without realizing that in so far as AY 2007-08 and subsequent AYs is concerned the said decision of High Court clearly lays down that the mandate of Sec.14A(2) of the Act and Rule 8D of the Rules has to be followed.

9. It was further contended that in so far as Banks are concerned, the securities held by banks which yield exempt dividend income, though classified as Investments in the books of accounts as per the format of Balance Sheet given in the Banking Regulation Act, 1949 are in fact stock-in-trade of the Assessee. It was contended that the investments were made not with a view to earn tax free exempt dividend income and therefore no disallowance can be made u/s.14A of the Act.

10. The CIT(A) agreed that the AO while passing order on remand by ITAT failed to follow the order of the ITAT. He held that the scope of the proceedings before him was to examine whether the AO followed the directions of the ITAT while remanding the issue to the AO for fresh consideration. Therefore, he was precluded from going into the question with regard to the quantum of disallowance or whether any disallowance could at all be made. He therefore deleted the addition made by the AO while giving effect to the directions of the ITAT and directed the AO to follow the directions of the ITAT and pass an order as per the mandate of the order of the ITAT.

11. Aggrieved by the orders of the CIT(A) both the Assessee and the Revenue have preferred the present appeal before the Tribunal. The learned DR submitted that the CIT(A) ought not to have deleted the disallowance sustained by the AO and ought to have substituted the correct disallowance as mandated by the ITAT in it's order while remanding the issue to the AO for fresh consideration. The learned counsel for the Assessee reiterated contentions as were put forth before the CIT(A). In particular the following contentions were reiterated:

(i) The law laid down by the Hon'ble Supreme Court is that the AO before proceeding to making disallowance u/s.14A of the Act has to record his dissatisfaction regarding the correctness of the claim of the Assessee regarding disallowance to be made u/s.14A of the Act with reference to books of accounts of the Assessee and record his reasons as to why the claim of the Assessee qua the disallowance so offered by the Assessee is not being accepted. Reference in this regard was made to the following judicial pronouncements:

- Maxopp Investments Ltd. Vs. CIT 402 ITR 640 (SC)
- Godrej & Boyce Manufacturing Co.Ltd. 394 ITR 449(SC)
- Hindustan Aeronautics Ltd. 143 Taxmann.com 357(Karn.)
- West Bengal Infrastructure Development Finance Corporation Ltd. 143 Taxmann.com 135(Cal.)
- Sociedade De Fomento Industrial Pvt.Ltd. 123 Taxmann.com 38 (Bom)
- Marg Ltd. 120 Taxmann.com 84 (Mad)
- Esillor India (P) Ltd. 137 Taxmann.com 60 (Karn.)
- CIT Vs. Hero Management Services Ltd. 360 ITR 68 (Del)
- Infrastructure Logistics P Ltd. 141 Taxmann.com 24 (Panaji)(ITAT)

(ii) It was further submitted that interest expenditure cannot be disallowed when sufficient interest free funds are available with the Assessee. It was submitted that the Assessee had sufficient interest funds. It was submitted that even where the Assessee had mixed funds made up of own interest free funds and interest bearing funds, payment, if made out of such mixed funds, the investment that yield tax free investments should be presumed to have been made out of interest free funds only. Reference in this regard was made to decision of Hon'ble Supreme Court in the case of South Indian Bank and other Banks 130 Taxmann.com 178 (SC) and UTI bank Ltd. 142 Taxmann.com 136(SC).

(iii) It was submitted that the Hon'ble Punjab and Haryana High Court in the case of PCIT v. State Bank of Patiala [2017] 391 ITR 218 where exempt income in the form of dividend was earned by the Bank from securities held by it as its stock in trade, held that the assessee was engaged in the purchase and sale of shares/ securities as a trader with the object of earning profit and not with a view to earn

interest or dividend. The assessee did not have an investment portfolio and the dividend and interest earned was from the securities that constituted the assessee's stock-in-trade as per CBDT Circular No.18, dated 2 November 2015. It was pointed out that the High Court observed that the 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. Further, if the object is to derive income by way of dividend, then the profit would be said to have accrued from the investment. The assessee may have two portfolios, namely, investment portfolio and a trading portfolio. In the case of the former, the securities are to be treated as capital assets and in the latter as trading assets. It was submitted that the Supreme Court in the case of Maxopp (supra) which also decided appeal against the decision of Hon'ble Punjab & Haryana High Court in the case of State Bank of Patiala (supra) has observed that Hon'ble Punjab & Harayana High Court was right in its judgment. In paras 18 and 40 of its ruling, the SC had referred to the facts in PCIT v. State Bank of Patiala (supra) while dealing with the issue relating to shares held as stock-in-trade. In that case, the assessee had earned exempt income of Rs. 12.20 crores. The AO restricted the disallowance under section 14A to the extent of exempt income i.e. Rs. 12.20 crores. The Commissioner of Income-tax (Appeals) [CIT(A)] disallowed the entire expenditure thus enhancing the disallowance made by the AO. The SC, in para 40 held that the view of the CIT(A) was untenable and rightly set aside by the Tribunal which was subsequently affirmed by the High Court and upheld the distinction between stock in trade and investment. On the theory of dominant intention, the SC did not agree to the test of dominant intention as applied by the Punjab and Haryana High Court. It held that the applicability of Section 14A is triggered in cases when shares are held as stock-in-trade and the main purpose is to trade in those shares and earn

profits. This so, as certain dividend income is incidentally earned. However, by the provisions of Section 10(34) of the Act, dividend income is not included in the total income and is exempt from tax. Hence, the expenditure incurred in acquiring those shares will have to be apportioned, based on the facts of each case, between taxable and non-taxable income as held in the case of Walfort Share and Stock Brokers P Ltd. 326 ITR 1 (SC). The ruling seems to suggest that expenditure needs to be apportioned between these two sources, though it is silent on the manner thereon. It was submitted that the Delhi Bench of the ITAT in the case of Punjab National Bank Ltd. Vs. DCIT ITA No. 1519/Del/2016 for AY: 2012-13 by order dated 28.11.2018 held that in the case of Banks investments were stock in trade and hence no disallowance can be made u/s.14A read with Rule 8D(2)(ii) of the Rules. The following were the observations of the Tribunal.

> *"6. Ground No. 2 relates to disallowance conformed by Ld. CIT (A) under rule 8D (iii) of Income Tax Rules, 1963.*
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> *6.1. At the outset, Ld.Counsel submitted that, this issue stands squarely covered by following observation by Hon'ble Supreme Court in case of Maxopp Investments vs CIT reported in (2018) 91 taxman.com 154, in favour of assessee:*
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> > *"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.*
> >
> > *37. 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 investment made by a banking concern are part of the business or banking. Therefore, the income arises from such investment 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 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.

40. We note from the facts in the State Bank of Patiala cases that the AO, while passing the assessment order, had already restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in Rule 8D of the Rules and holding that section 14A of the Act would be applicable. In spite of this exercise of apportionment of expenditure carried out by the AO, CIT A) disallowed the entire deduction of expenditure. That view of the CIT A) was clearly untenable and rightly set aside by the ITAT. Therefore, on facts, the Punjab and Haryana High Court has arrived at a correct conclusion by affirming the view of the ITAT, though we are not subscribing to the theory of dominant intention applied by the High Court. It is to be kept in mind that in those cases where shares are held as 'stock-in-trade', it becomes a business activity of the assessee to deal in those shares as a business proposition. Whether dividend is earned or not becomes immaterial. In fact, it would be a quirk of fate that when the investee company declared dividend, those shares are held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits. The situation here is, therefore, different from the case like Maxopp investment Ltd. where the assessee would continue to hold those shares as it wants to retain control over the investee company. In that case, whenever dividend is declared by the investee company that would necessarily be earned by the assessee and the assessee alone. Therefore, even at the time of investing into those shares, the assessee knows that it may generate dividend income as well and as and when such dividend income is generated that would be earned by the assessee. In contrast, where the shares are held as stock-in-trade, this may not be necessarily a situation. The main purpose is to liquidate those shares whenever the share price goes up in order to earn profits. In the result, the appeals filed by the Revenue challenging the judgment of the Punjab and Haryana High Court in State Bank of Patiala also fail, though law in this respect has been clarified hereinabove."

6.2. On the contrary Ld.Sr.DR placed reliance upon the orders passed by authorities below and following decisions: · Godrej and Boyce manufacturing Co Ltd vs. DCIT reported in (2017) 81 Taxmann.com 111 (SC); · India Bulls financial services Ltd vs. DCIT reported in (2016) 76 Taxmann.com 268 (Del); · Punjab tractors Ltd vs. CIT reported in (2017) 78 Taxmann.com 65 (P&H).

7. We have perused the submissions advanced by both sides in the light of records placed before us.

8. It is observed that decisions relied upon by Ld.Sr.DR has been passed prior to decision of Hon'ble Supreme Court in the case of Maxopp Investment vs CIT (supra). Further Hon'ble Supreme Court in the case of Maxopp Investment vs CIT (supra), has rendered a clear finding in respect of banking institutions which is peculiar. Present assessee before us is also a Bank, where shares were held as stock-in-trade and therefore it becomes business activity of assessee. In our opinion specific observation Hon'ble Supreme Court in the case of Maxopp Investment vs CIT (supra), reproduced hereinabove are squarely applicable to facts of present case. Respectfully following the view taken by Hon'ble Supreme Court in the case of Maxxop Investment vs CIT (supra), we allow this ground raised by assessee and hold that these were not investments made by assessee in order to fall within the ambit of Rule 8D (iii) of Income tax Rules 1963. ITA 1519/Del/16 and ITA 7106/Del/2017 A.Y.:2012-13 Punjab National Bank, New Del.

8 8.1. Accordingly the ground raised by assessee stands allowed."

Placing reliance on the above judgment, it was submitted that in the case of bank where shares are to be regarded as stock-in-trade no expenditure could be disallowed u/s.14A of the Act.

(iv) It was submitted that when sufficient surplus funds are available, investments made out of such funds and tax free dividend is earned on such investments no disallowance could be made and in this regard relied on decision of Hon'ble Gujarat High Court in the case of CIT Vs. Sitex Industries Ltd., (2017) 82 taxmann.com 171

(Guj.)

12. We have carefully considered the rival submissions and are of the view that before 01.06.2001, section 251(1)(a) provided that CIT(A) may set aside the assessment and refer the case back to the Assessing Officer for making a fresh assessment in accordance with the directions given by the Commissioner (Appeals) and after making such further inquiry as may be necessary, the Assessing Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment. However the power of remand was omitted by the Finance Act, 2001 w.e.f. 01.06.2001. Therefore the CIT(A) ought not to have remanded the issue to the AO for fresh consideration. Nevertheless, as per the order of Tribunal dated 5.9.2014 remanding the issue of disallowance to be made u/s.14A of the Act, the AO was directed to follow the decision of the Hon'ble Kerala High Court in the case of CIT Vs. Catholic Syrian Bank (2011) 9 taxmann.com 148(ker) and ITA No.1324 of 2009 being appeal in the case of Dhanalakshmi Bank. As per the spirit of the decision of Hon'ble Kerala High Court, the AO can resort to Rule 8D of the Rules, only, if he in terms of Sec.14A(2) of the Act, he arrives at a satisfaction that having regard to the accounts of the assessee, that the claim of the assessee in respect of expenditure in relation to income which does not form part of the total income under the Act is incorrect. Therefore the AO cannot blindly apply Rule 8D of the Rules without first complying with the requirements of Sec.14A(2) of the Act. This exercise has to be necessarily carried out by the AO and therefore we are of the view that the issue requires fresh examination by the AO as directed by the Tribunal in it's order dated 5.9.2014 after affording the Assessee opportunity of being heard and after considering the submissions made before us with regard to the amount to

be disallowed u/s.14A of the Act and in particular the mandate laid down in the provisions of Sec.14A(2) of the Act. The AO will also consider the specific submissions made by the Assessee before us as to why disallowance u/s.14A of the Act cannot be made in the case of the Assessee. We therefore allow both the appeals by the Revenue and the Assessee for statistical purpose.

13. ITA No. 272 to 274/Coch/2020 are appeals by the Assessee against the orders all of CIT(A), Kochi-1 dated 5.3.2020 relating to AY 2011-12, dated 6.3.2020 relating to AY 2012-13, dated 6.3.2020 relating to AY 2013-14, dated 5.3.2020 for AY 2014-15. ITA Nos. 309 and 311/Coch/2020 are cross appeals by the Revenue against the orders of CIT(A) for AY 2012-13 and 2014-15.

14. In so far as ground appeals of the Assessee for AY 2011-12 to 14-15 and Revenue for AY 2012-13 and 2014-15 are concerned, one of the common issues in these appeals is with regard to disallowance of expenditure u/s.14A of the Act. In AY 2011-12, while completing the Assessment u/s.143(3) of the Act, the AO added the entire exempt income as addition u/s.14A of the Act by observing that during discussion, the Assessee agreed to such addition. In respect of the other AY 2012-13 to 2014-15, the AO disallowed expenditure in accordance with Rule 8D of the Rules. On appeal by the Assessee, the CIT(A) for AY 2011-12, 2012-13 and 2014-15, sustained addition to the extent permitted and by following the formulae suggested by the Hon'ble Kerala High Court in the case of Catholic Syrian Bank (supra) without realizing that for those AYs, disallowance had to be made in accordance with Sec.14A(2) read with Rule 8D of the Rules. For AY 2013-14, the CIT(A) restricted the disallowance of expenditure to the extent of exempt income.

15. The contention of the learned DR was that in AY 2012-13 and 2014-15, the CIT(A) ought not to have allowed relief to the Assessee and ought to have sustained the disallowance made by the AO. The learned counsel for the Assessee's contention were almost identical to the contentions raised in AY 2008-09 to 2011-12 on identical issue, which we have set out in the earlier part of this order i.e., Rule 8D cannot be invoked mechanically without first following the mandate of Rule 14A(2) of the Act and that the Assessee had sufficient surplus funds and that the investments being stock in trade no disallowance can be made u/s.14-A of the Act.

16. After considering the rival contentions, we are of the view that the issue of disallowance u/s.14A of the Act has to be remanded to the AO for fresh consideration on terms set out in this order with regard to identical issue raised by the Revenue and Assessee in AY 2008-09 to 2010-11. We hold and direct accordingly.

17. The next common issue in Assessee's appeal 2011-12 to 2014-15 is with regard to disallowance of deduction on account of provision for leave encashment. The Hon'ble Supreme Court in the case of Exide Industries 116 Taxmann.com 378 (SC) on 24 April 2020, in Civil Appeal 3545/2009 overruled the decision of Calcutta High Court in the case of Exide Industries and upheld the constitutional validity for deduction of leave encashment on payment basis under section 43B(f) of the Act. In view of the Hon'ble Supreme Court decision, the deduction on account of provision for leave encashment cannot be allowed unless it is actually paid. in the light of the decision of the Hon'ble Supreme Court in the case of Exide Industries (supra), the Assessee will not be entitled to claim deduction on leave encashment on the basis of the provision. Accordingly, the relevant grounds of appeal raised by the Assessee are dismissed.

18. The next common issue that requires to be considered in Assessee's appeals for AY 2012-13 & 2014-15. As far as AY 2012-13 is concerned, the facts are that the Assessee offered to tax gain on sale of securities as per the books whereas the said book value was arrived at after adjustment of the amount amortized/depreciated in the books (as per RBI guidelines) in earlier years but not claimed or allowed and offered to tax in those years as the securities were then held as stock-in-trade. Some of the securities were sold during the previous year relevant to AY 2012-13 and the profit as per the books was duly offered to tax as above. The relatable amount amortized/depreciated as above also ought to have been allowed as per the consistent treatment adopted in assessment. Due to error in computation the Assessee had not claimed deduction of deduction of the said amount at Rs.51,360 instead of the correct amount of Rs.32,24,413.20/- on sale of such securities during the AYs and the same ought to have been allowed. The Assessee filed an application seeking to raise additional ground of appeal before CIT(A) explaining as to the circumstances under which the above amount was not claimed before the AO along with additional evidence to support the claim made in the additional ground. The CIT(A) omitted to consider the same and did not adjudicate on the said additional ground both on merits as well as its admissibility.

19. In so far as AY 2014-15 is concerned, the Assessee filed a revised the original claim and claimed enhanced deduction on account of amortization of premium on securities not claimed or allowed in earlier years now allowable on sale of securities. A claim was therefore made before the AO but without filing a revised return of income. The AO did not entertain the revised claim of the Assessee on the ground that such a claim was not made in the return filed u/s.139 of the Act by relying on the decision of the Hon'ble Supreme Court in case of Goetze

(India) Ltd. 284 ITR 323 (SC) wherein it was held that the AO cannot entertain any claim by an Assessee without such claim being made in the return of income or a revised return of income. On appeal by the Assessee CIT(A) upheld the action of the AO.

20. Aggrieved by the orders of the CIT(A), the Assessee has filed appeals before the Tribunal on the aforesaid issue for AY 2012-13 & 2014-15. We have considered the rival submissions. As far as AY 2012-13 is concerned, it was a case where the Assessee claimed deduction on account of amortization of premium on securities not claimed or allowed in earlier years now allowable on sale of securities of the Act in the computation of total income at Rs.51,360 instead of the correct amount of Rs.32,24,413.20. It was not a case where no claim was made in the return of income but a case where only the quantum of deduction claimed was sought to be enhanced. An additional ground was raised before CIT(A) to adjudicate the claim of the Assessee but the same was not adjudicated or considered by the CIT(A). We therefore restore the issue to CIT(A) to consider the additional claim made by the Assessee.

21. In so far as AY 2014-15 is concerned, the Assessee filed a revised the original claim and claimed enhanced deduction on account of amortization of premium on securities not claimed or allowed in earlier years now allowable on sale of securities. A claim was therefore made before the AO but without filing a revised return of income. The CIT(A) also held that the claim made without filing a revised return of income cannot be examined. The CIT(A) as a first appellate authority has the power to entertain a new claim even in the absence of a revised return of income. The Supreme Court in case of Goetze (India) Ltd. 284 ITR 323 (SC) has clarified that "the decision was restricted to the power of

the assessing authority to entertain a claim for deduction otherwise than by a revised return, and did not impinge on the power of the Appellate Tribunal under section 254 of the Income-tax Act, 1961". The law by now is well settled that the appellate authority under the Act can entertain a legal claim even though the said claim has not been made by way of a revised return of income. In Jute Corporation of India Ltd. Vs. CIT (1990) 53 taxman 85(SC) it was held that the first appellate authority has wide powers u/s.251(1)(a) of the Act and can entertain an additional claim. In National Thermal Power Co. Ltd. Vs. CIT 229 ITR 383 (SC) it was held that the purpose of proceedings under the Act is for correct determination of tax liability and examination of claim on the basis of facts already on record should be entertained. In CIT Vs. Pruithivi Brokers & Shareholders (2012) 23 Taxmann.com 23 (Bom) Ramco Cements Ltd. Vs. DCIT (2015) 55 taxmann.com 79 (Mad) Rakesh Singh Vs. ACIT (2012) 26 taxmann.com 240(Bang-ITAT) and Chicago Pneumatic India Ltd. Vs. DCIT (2007) 15 SOT 252 (Mum-ITAT) it was held that appellate authorities have power to entertain a new claim de hors filing revised return of income and that the prohibition laid down by the Hon'ble Supreme Court in the case of Goetz India Ltd. Vs CIT 284 ITR 323 (SC) is not applicable to the appellate authorities under the Act. In the case of **Chicago Pneumatic India Ltd. vs. DCIT 15 SOT 252 (2007) (ITAT) (Del),** the Delhi ITAT, in the context of allow ability of new claims during the assessment proceedings without having recourse to a revised return, has, placing reliance on principle embedded in Article 265 of Indian constitution (No tax can be collected except by the authority of law), CBDT Circular No. 14 dated 11 April 1955 and explaining the ratio of the Goetz (india) Ltd. (supra) ruling, categorically held that assessee has the right to make new claims during assessment proceedings without recourse to a revised return. The

CIT(A), in our view, therefore ought to have entertained the claim of the Assessee in this regard. Since the issue requires examination by the AO, we deem it fit and proper to remand this issue in AY 2014-15 to the AO for consideration on merits, in accordance with law after affording Assessee opportunity of being heard.

22. The only other issue that remains for consideration in the Assessee's appeal is the issue raised by the Assessee in Grd.No.3 in the appeal for AY 2014-15, with regard to claim for deduction on account of bad debts written off in accordance with the provisions of Sec.36(1)(vii) of the Act. The Assessee during the assessment proceedings claimed before the AO that a sum of Rs.12.5 Crores be allowed as deduction on account of bad debts written off. The same was not considered by the AO and no reasons were assigned why the claim was not being considered. Before CIT(A), the claim was made for deduction. The CIT(A) however held that the claim was not made in the original return filed and no revised return was filed and hence the claim cannot be entertained. We are of the view that in the light of the discussion on identical issue in the earlier paragraphs, the claim of the Assessee should be examined and rejecting the claim without even examining the same on merits was not proper and that the CIT(A) ought to have entertained the claim. Since the issue requires examination by the AO, we deem it fit and proper to remand this issue in AY 2014-15 to the AO for consideration on merits, in accordance with law after affording Assessee opportunity of being heard.

23. The only other issue that remains for consideration is the issue raised by the revenue in its appeal for AY 2012-13 & 2014-15 with regard to deduction

u/s.36(1)(viii) of the Act. The relevant extract of Section 36(1)(viii) of the Act, reads as under:-

> "(viii) in respect of any special reserve created and maintained by a financial corporation which is engaged in providing long-term finance for industrial or agricultural development or development of infrastructure facility in India or by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes, an amount not exceeding twenty per cent of the profits derived from such business of providing long-term finance (computed under the head "Profits and gains of business or profession" before making any deduction under this clause) carried to such reserve account:
>
> > Provided that where the aggregate of the amounts carried to such reserve account from time to time exceeds twice the amount of the paid-up share capital and of the general reserves of the corporation or, as the case may be, the company, no allowance under this clause shall be made in respect of such excess.
>
> Explanation,-In this clause,- (a) "financial corporation" shall include a public company and a Government company; (b) "public company" shall have the meaning assigned to it in section 3 of the Companies Act, 1956 (1 of 1956); (c) "Government company" shall have the meaning assigned to it in section 617 of the Companies Act, 1956 (1 of 1956);"

24. There is no dispute that the Assessee is eligible to claim deduction u/s.36(1)(vii) of the Act. The deduction is allowed at 40% of the profits derived from eligible business after reducing from such profits any deduction to be allowed u/s.36(1)(viii) of the Act. There is also no dispute with regard to the gross income from eligible business. The dispute is with regard to what is the sum to be reduced from the gross income as deduction under clause 36(1)(viii) of the Act. According to the revenue the expenditure of the bank as one whole unit is to be taken and not the expenditure relatable to the eligible unit that should be taken as deduction. According to the Assessee Banks have income both from eligible and non-eligible business and therefore only expenditure relating to eligible business is to be considered for computation of deduction u/s.36(1)(viii) of the Act. The dispute thus boiled down to what is the figure that should be reduced from the gross income from eligible business. In arriving at the net income from eligible business what is to be reduced from the gross income from eligible business, was the question before the AO.

25. In AY 2012-13, the gross income from eligible business was Rs.577 Crores and there is no dispute on this gross income. To arrive at the deduction u/s.36(1)(viii) of the Act, expenses relatable to the gross income have to be reduced. The Assessee reduced expenses related to eligible business which was arrived at Rs.434.28 crores by the Assessee and arrived at net income from eligible business for the purpose of Sec.36(1)(viii) of the Act of a sum of Rs.142,71,50,703 and 20% of this sum was Rs.28,54,30,141/- which was claimed by the Assessee only at Rs.28,50,00,000/-. The AO also computed gross income from eligible business of Rs.577 crores but net income from eligible business by taking percentage of eligible business profits to

the gross income under the head Business or Profession, which included also non-eligible business expenditure. By doing so, the AO disallowed deduction u/s.36(1)(viii) of the of a sum of Rs.10.72 Crores. The CIT(A) rightly upheld the computation of deduction u/s.36(1)(viii) of the Act as done by the Assessee. The CIT(A) rightly appreciated the position that while computing profits of eligible business only proportionate expenses relatable to the eligible business should be reduced from gross receipts from eligible business to arrive at the profits of the eligible business.

Expenses which are not pertaining to eligible business cannot enter into computation of net income from eligible business and this position has rightly been appreciated by the CIT(A) and hence his order on this issue is upheld and the ground of appeal of the revenue is dismissed.

26. In AY 2014-15, the deduction u/s.36(1)(viii) of the Act was computed by the Assessee in the same manner it was done in AY 2012-13 at Rs.33.70 crores which was revised to Rs.38.10 Crores (due to purely arithmetical error) as per the same manner of computation as was done in AY 2012-13. The AO adopted the total income for the purpose of book profits u/s.115JB of the Act and arrived at expenses to be deducted from gross income from eligible business for the purpose of Sec.36(1)(viii) of the Act and thereby added a sum of Rs.2.61 Crores to the total income of the Assessee. In our view the CIT(A) rightly computed the quantum of deduction u/s.36(1)(viii) of the Act and our finding for AY 2012-13 in this regard is applicable for AY 2014-15 also. Hence the relevant ground of appeal of the Revenue for AY 2014-15 is dismissed.

27. For the reasons given above, we find no merits in the grounds raised by the revenue in this regard for AY 2012-13 and 2014-15 and dismiss the same.

28. ITA No.310/Coch/2020 Appeal by the revenue for AY 2008-09. In AY 2008-09, the Assessee claimed deduction u/s.36(1)(viii) of the Act for a sum of Rs.18 Crores. In the order of assessment passed u/s.143(3) of the Act dated 9.12.2010, the AO disallowed the claim of the Assessee on the ground that the Assessee is not a financial corporation engaged in providing long term finance for industrial or agricultural development or development of infrastructure facility. The Assessee filed appeal before the CIT(A) against the order of the AO. By an order dated 23.1.2014, the CIT(A) held the words "banking company" has been added in clause (a)(iii) of Sec.36(1)(viii) of the Act w.e.f. 1.4.2008 and therefore banking company is also covered u/s.36(1)(viii) of the Act. The revenue did not prefer any appeal against the said order of the CIT(A) before the Tribunal and the issue attained finality. The AO also gave effect to the order of the CIT(A).

29. The AO passed an order u/s.154 of the Act dated 27.3.2019. In the said order the AO revised the deduction u/s.36(1)(viii) of the Act by observing that a sum of Rs.4,82,83,470/- was allowed as excess deduction u/s.36(1)(viii) of the Act. According to the AO due to the order of the CIT(A) dated 23.1.2014, the CIT(A) had cumulatively granted reliefs totaling to Rs.749.81 Crores and consequently income under the head "profits and gains of the business was reduced to that extent and therefore that will have bearing on the deduction u/s.36(1)(viii) of the Act.

30. The Assessee filed appeal before CIT(A) against the order dated 27.3.2019 passed u/s.154 of the Act. By order dated 5.3.2020, the CIT(A) held that the CIT(A) in his order dated 23.1.2014 has upheld the quantification of deduction u/s.36(1)(viii) of the Act. Therefore the AO cannot rectify the said quantum in an order u/s.154 of the Act and that in the event of dispute with regard to the quantum of amount that should have been allowed u/s.36(1)(viii) of the Act, the AO ought to have filed appeal against the order of CIT(A) dated 23.1.2014 and without doing so ought not to have resorted to proceedings u/s.154 of the Act. The disallowance made by the AO was accordingly deleted by the CIT(A). Aggrieved by the said order of CIT(A), the revenue has filed the present appeal before the Tribunal.

31. We have heard the rival submissions. We are of the view that the CIT(A) in his order dated 23.1.2014 has upheld the quantification of deduction u/s.36(1)(viii) of the Act at Rs.18 Crores as claimed by the Assessee. Therefore, the AO cannot rectify the said quantum in an order u/s.154 of the Act and that in the event of dispute with regard to the quantum of amount that should have been allowed u/s.36(1)(viii) of the Act, the AO ought to have filed appeal against the order of CIT(A) dated 23.1.2014 and without doing so ought not to have resorted to proceedings u/s.154 of the Act. Therefore, we find no merits in this appeal by the revenue and accordingly dismiss the same.

32. In the result, appeals of the Assessee and revenue for AY 2008-09 to 2010-11 are treated as allowed for statistical purpose. The appeals of the Assessee for AY 2011-12 to 2014-15 are treated as partly allowed for statistical purpose.

While the appeal of the Revenue for AY 2012-13 & 2014-15 are partly allowed for statistical purpose. Appeal for AY 2008-09 by the revenue is also dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(S. PADMAVATHY)	**(N.V. VASUDEVAN)**
Accountant Member	**Vice President**

Bangalore,
Dated: 12.12.2022.
/NS/*

Copy to:

1.	Appellants	2.	Respondent
3.	CIT	4.	CIT(A)
5.	DR	6.	Guard file

By order

Assistant Registrar,
ITAT, Cochin.