

आयकर अपीलीय अधिकरण  
मुंबई पीठ "ई", मुंबई

श्री विकास अवस्थी. न्यायिक सदस्य एवं  
श्री गगन गोयल, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH " E ", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

आअसं. 7060/मुं/ 2017 (नि.व. 2014-15)

ITA NO. 7060/MUM/2017(A.Y.2014-15)

आअसं. 1515/मुं/ 2019(नि.व. 2015-16)

ITA NO. 1515/MUM/2019(A.Y.2015-16)

Tata Capital Limited,  
11<sup>th</sup> Floor, Tower A, Peninsula Business Park,  
Ganpatrao Kadam Marg,  
Lower Parel, Mumbai – 400 013  
PAN:AADCP-9147-P

..... अपीलार्थी /Appellant

बनाम Vs.

The Assistant Commissioner of Income-tax,  
Circle – 2(3)(1), Room No.552, 5<sup>th</sup> Floor,  
Aaykar Bhavan, M.K.Road,  
Mumbai – 400 020

..... प्रतिवादी/Respondent

आअसं. 61/मुं/ 2018 (नि.व. 2014-15)

ITA NO. 61/MUM/2018(A.Y.2014-15)

आअसं. 2109/मुं/ 2019(नि.व. 2015-16)

ITA NO. 2109/MUM/2019(A.Y.2015-16)

The Assistant Commissioner of Income-tax,  
Circle – 2(3)(1),/JCIT (OSD) 2(3)(1)  
Room No.552, 5<sup>th</sup> Floor,  
Aaykar Bhavan, M.K.Road,  
Mumbai – 400 020

..... अपीलार्थी /Appellant

बनाम Vs.

Tata Capital Limited,  
11<sup>th</sup> Floor, Tower A, Peninsula Business Park,  
Ganpatrao Kadam Marg,  
Lower Parel, Mumbai – 400 013  
PAN:AADCP-9147-P

..... प्रतिवादी/Respondent

Assessee by : Shri J.D.Mistry,Sr.Advocate with  
 S/ Shri Niraj Sheth & Ninand Patade  
 Revenue by : Shri Prakash Mane  
 सुनवाई की तिथि/ Date of hearing : 07/09/2022  
 घोषणा की तिथि/ Date of pronouncement : 05/12/2022

**आदेश/ ORDER**

**PER VIKAS AWASTHY, JM:**

These two sets of cross appeals for the assessment years 2014-15- and 2015-16 are taken up together as the issues involved and the facts germane to the issue in both the impugned assessment years are similar. For the sake of convenience the appeals are taken up in seriatim of the Assessment Year.

**ITA NO.61/MUM/2018 –A.Y. 2014-15 – REVENUE’S APPEAL:**

**ITA NO.7060/MUM/2017 –A.Y. 2014-15- ASSESSEE’S APPEAL:**

2. The cross appeals by the Revenue and assessee are directed against the order of Commissioner of Income Tax(Appeals)-6, Mumbai [ in short ‘the CIT(A)’] dated 20/10/2017 for the assessment year 2014-15. The Revenue in its appeal has assailed the order of CIT(A) on the following grounds:-

*"On the circumstances and facts of the case and in law, the Ld. CIT(A) has erred in deleting the addition made by the AO on account of disallowance u/s 14A r.w.r. 8D(2)(ii), without considering the fact that Revenue has not accepted the decision of CIT(A) for A. Y. 2010-11 & 2011-12 and filed further appeal before ITAT on this issue."*

*"On the circumstances and facts of the case and in law, the Ld. CIT(A) has erred in directing the AO to exclude strategic investment from the total investment for computing disallowance u/s 14A r.w.r. 8D(2)(iii), without considering that the assessee has earned dividend income from its strategic investment which were claimed as exempt."*

*"On the circumstances and facts of the case and in law, the Ld. CIT(A) has erred in deleting deemed rent on the Thane property of the assessee, without considering the fact that once the assessee got the occupancy right of the property it is fit for letting*

*out and the assessee already received advance towards rent as per the rent agreement."*

3. The gist of grounds/additional grounds raised by the assessee in its appeal are as under:

- (i) Disallowance u/s. 14A of the Income Tax Act, 1961 [ in short 'the Act'].
- (ii) Addition u/s. 56(2)(vii) of the Act in respect of purchase of shares in Simtools Pvt. Ltd.

**Additional Grounds:**

- (i) Disallowance u/s. 14A of the Act.
- (ii) Deduction in respect of Education Cess and Secondary and Higher Education Cess on Income tax.
- (iii) Deduction in respect of expenditure incurred on Employee Stock Option Plan [ in short 'ESOP']

3. Shri Prakash Mane representing the Department submitted that during the period relevant to assessment year under appeal, the assessee has earned exempt income of Rs.76.82 crores. The assessee made suo-motu disallowance of expenditure Rs.8,09,25,922/- for earning of exempt income. The Assessing Officer rejected assessee's computation of suo-motu disallowance u/s. 14A of the Act and thereafter, made disallowance u/r. 8D(2). The Assessing Officer computed total disallowance u/s. 14A of the Act r.w.r 8D(2) of Rs.32.68 crores. After reducing suo-motu disallowance made by the assessee, the Assessing Officer made addition of Rs.24,58,74,078/-. In appeal by the assessee, the CIT(A) deleted the disallowance made u/r. 8D(2)(ii) of Rs.14.05 crores. The CIT(A) further restricted the disallowance u/r. 8D(2)(iii) after excluding strategic investments. The Id. Departmental Representative submits that from perusal of financials of assessee it is evident that own

interest free funds of the assessee are not sufficient to cover the investments. The Id. Departmental Representative referred to Balance Sheet as on 31/03/2014 at page 11 of the paper books and the schedule of investments at page 26 of the paper book. The Id. Departmental Representative pointed that as against assessee's share capital and reserves and surplus aggregating to Rs.397,113 lacs, the assessee has long term investments of Rs.403,126 lacs.

3.1 The Id. Departmental Representative further submits that the CIT(A) has erred in holding that strategic investment should be excluded. The Hon'ble Supreme Court of India in the case of Maxopp Investments Ltd. vs. CIT, 402 ITR 640(SC) has dislodged the distinction of strategic investments.

3.2 In respect of third ground raised in appeal by the Department, the Id. Departmental Representative submits that assessee had rented out office premises at Lodha i-think Tecno Campus, Off Pokhran Road No.2, Thane West to e-Nxt Financials Ltd. for a period of 60 months on a monthly rent of Rs.16,94,000/- w.e.f. 01/11/2013. However, in the return of income for the impugned assessment year no rent was offered to tax for the period 01/11/2013 to 31/03/2014. The Assessing Officer made addition of Rs.84,70,000/- of the rent for five months not offered to tax. The CIT(A) has deleted the addition. The Id. Departmental Representative submits that there was no documentary evidence to show that for the aforesaid five months the assessee had not charged any rent from the tenant. The Id. Departmental Representative prayed for upholding the findings of Assessing Officer on this issue.

4. Shri J.D.Mistry, Sr. Advocate appearing on behalf of the assessee submits that the assessee had filed an application dated 15/02/2021 seeking

permission to raise additional grounds of appeal. The Ld.Counsel for the assessee submits that additional grounds of appeal No.1 is in respect of disallowance u/s. 14A of the Act. The said additional ground is subsumed in ground No.1 of the appeal.

4.1 The additional ground No.2 of appeal is in respect of education cess and secondary and higher education cess on Income tax. On instructions from the assessee he is not pressing addition ground No.2 of the appeal.

4.2 The third additional ground is with respect to expenditure incurred on ESOP. The assessee is raising this additional ground pursuant to the decision of Hon'ble Karnataka High Court in the case of CIT vs. Biocon Ltd., 121 taxmann.com 351, wherein it has been held that expenditure incurred on ESOP is liable for deduction u/s. 37(1) of the Act. In assessee's own case for assessment year 2012-13 and 2013-14 in ITA NO.7058 & 7059/Mum/2017 the assessee had raised similar additional grounds of appeal. The Tribunal vide order dated 18/06/2021 following the decision of Hon'ble Karnataka High Court (supra) allowed the claim of assessee.

4.3 In respect of ground No.1, relating to disallowance u/s. 14A of the Act , the Ld.Counsel for the assessee submits at the outset that while making disallowance u/s.14A of the Act r.w.r.8D(2), the Assessing Officer has not recorded satisfaction as mandated under the Act. The Id.Counsel for the assessee pointed that in Assessment Year 2010-11 the Assessing Officer has recorded the satisfaction in similar manner. The Tribunal in ITA No.2223/Mum/2014 decided on 30/01/2020 held that no satisfaction has been recorded. The Id.Counsel for the assessee submits that a perusal of the

assessment order would show that in the name of satisfaction the Assessing Officer has merely made general discussions. There is no specific reference to the books of assessee. The Id.Counsel for the assessee contended that as per the provisions of sub-section (2) to section 14A of the Act the Assessing Officer has to record dissatisfaction on the correctness of the claim of the assessee having regard to the accounts of the assessee. In support of his submissions the Id.Counsel for the assessee placed reliance on the following decisions:

- (i) PCIT vs. Reliance Capital Asset Management Ltd., 86 taxmann.com 200 (Bom)
- (ii) H.T. Media Ltd. vs. PCIT, 85 taxmann.com 112 (Del).

However, the Id.Counsel for the assessee fairly conceded that the concept of strategic investments is no more relevant in light of decision rendered by the Hon'ble Supreme Court of India.

4.4 In respect of ground No.2 of appeal, the Id.Counsel for the assessee submits that the Assessing Officer and the CIT(A) have erred in misreading the terms and conditions of the agreement for sale. The assessee had entered into an agreement dated 21/08/2013 with M/s. Lodha Elevation Bilcon Pvt. Ltd. (copy of the registered agreement is at page -56 to 93 of the paper book). The agreement was with respect to purchase of office premises on the 4<sup>th</sup> Floor, B-Wing of the Building i-think Techno Campus, Thane along with shares (17,120 fully paid equity shares) held by the seller (M/s. Lodha Elevation Bilcon Pvt. Ltd. ) in Simtools Pvt. Ltd. for a lumpsum consideration of Rs.22,47,45,300/-. The said shares were purchased under the provisions of Maharashtra Ownership of Flats(Regulation of the Promotions of Construction, Sale, Management and Transfer) Act, 1962 (in short 'MOFA'). Under section 4 of

MOFA the purchaser and the seller are required to execute a written agreement for sale of premises along with proportionate number of shares. Thus, the shares acquired by the assessee in Simtools Pvt. Ltd. is as per the provisions of MOFA. The Assessing Officer and the CIT(A) has segregated the transaction of sale of immovable property and the shares. The Assessing Officer had attributed entire consideration paid by the assessee for acquisition of shares and thereafter wrongly invoked the provisions of section 56(2)(vii) of the Act to make the addition of Rs.10,13,74,200/-. The Id.Counsel for the assessee further pointed that assessee has not received the shares during the period relevant to the assessment year under appeal. This fact is further evident from the books of assessee as well.

5. Rebutting the arguments made on behalf of the assessee, the Id. Departmental Representative submits that the Assessing Officer has recorded his satisfaction in accordance with the provisions of section 14A(2) of the Act. In respect of ground No.2 in the appeal of assessee, the Id. Departmental Representative submits that there is no sale of immovable property. The consideration received is for the sale of shares. The Id. Departmental Representative prayed for upholding the findings of CIT(A) on the issue raised by the assessee in its appeal.

6. The Id.Counsel for the assessee controverting the submissions made by Id. Departmental Representative in respect of ground No.3 raised in the appeal by the Department submitted that as stated earlier the assessee had acquired office premises in Lodha i-think Techno Campus the assessee entered into Leave & Licence Agreement with e-Nxt Financials Ltd for a period of 60 months commencing from 01/11/2013 ending on 31/10/2018. In

Schedule-II of the said agreement, it is clearly mention that from 01/11/2013 to 31/03/2014, would be rent free period. The said period was allowed to the Licensee for fit outs. The Assessing Officer has erred in coming to the conclusion that the assessee has received rent during the said period without examining the documents on record. The Id.Counsel for the assessee thus, prayed for dismissing the appeal of Revenue.

7. We have heard the submissions made by rival sides and have examined the orders of authorities below. The ground No. 1 and 2 in the appeal by the Revenue and ground No.1 and additional ground No.1 of appeal by assessee are with respect to disallowance made u/s. 14A r.w.r. 8D, therefore, these grounds are taken up together for adjudication. In so far as quantum of exempt income earned and the suo-motu disallowance made by the assessee u/s. 14A of the Act, they are not in dispute. The contention of the assessee is that Assessing Officer has not recorded satisfaction u/s. 14A of the Act as envisaged under sub-section (2) to section 14A of the Act.

8. Sub-section (2) to section 14A of the Act mandates that if the Assessing Officer, **having regard to the accounts of assessee** is not satisfied with the correctness of the claim of assessee in respect of expenditure in relation to the income which does not form part of the total income under the Act, the Assessing Officer shall determine the amount of expenditure incurred in relation to such income in accordance with the provisions of Rule 8D.

From a bare perusal of section 14A, it is evident that application of Rule 8D is not automatic nor the assessee is under obligation to compute disallowance u/s. 14A of the Act in accordance with Rule 8D. The assessee can

suo-motu make disallowance and can justify the basis of same to the satisfaction of Assessing Officer. If the Assessing Officer is not satisfied with the correctness of claim of the assessee having regard to the accounts of the assessee, the Assessing Officer shall determine the expenditure incurred for earning exempt income in accordance with rule 8D.

9. In the instant case we find that the Assessing Officer in assessment order has recorded about the assessee's investment and the increase in investment during the relevant Financial Year and thereafter has made generic remarks about the requirements for making the investment viz. technicalities involved in study of market analysis and operations, etc. Thereafter, the Assessing Officer show caused the assessee to explain as to why disallowance u/s. 14A r.w.r. 8D should not be made. The assessee gave reply explains the basis for suo-motu disallowance. The Assessing Officer rejected the same and proceeded on to make disallowance u/r.8D(2)(ii) and 8D(2)(iii) without commenting on the total expenditure incurred by the assessee vis-à-vis exempt income earned by the assessee. The requirement of section 14A(2) of the Act is that the Assessing Officer has to record his (dis)satisfaction after having regard to the accounts of the assessee vis-à-vis correctness of the claim of assessee. The Assessing Officer has clearly missed the requirement of section 14A(2) of the Act. The Assessing Officer nowhere in recording his alleged dissatisfaction has made reference to the accounts of the assessee. In the case HT Media Ltd vs. PCIT (supra) the Hon'ble Court held that where the Assessing Officer failed to comply with mandatory requirement of section 14A(2) of the Act r.w.r. 8D(i)(a) of the rules in recording satisfaction as required there under, the question of applying Rule 8D(2)(iii) does not arise.

Thus, in view of above findings, ground No.1 and 2 raised in the appeal by Revenue are dismissed and ground No.1 and additional ground No.1 of appeal by the assessee are allowed.

10. The ground No.3 of appeal by the Revenue is against deleting the addition of deemed rent. The assessee had rented out office premises at Lodha i-think Techno Campus to e-Nxt Financial Ltd. The Leave and Licence Agreement was executed between the parties. The licence period was for 60 months commencing from 01/11/2013. The assessee specifically allowed rent free period to the Licensee from 01/11/2013 till 31/03/2014 for fit outs. The clause-5.1.3 of the Leave and Licence Agreement clearly mention about the rent free period. Schedule –II to the said agreement specifies the Rent Free Period- from 1<sup>st</sup> November, 2013 till 31<sup>st</sup> March, 2014. The CIT(A) after taking note of the above clause in the agreement has deleted the addition. We find no infirmity in the findings of CIT(A) on this issue, hence, the same is upheld and ground No.3 of Revenue's appeal is dismissed.

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

12. The assessee in ground No.2 of appeal has assailed addition u/s. 56(2)(viiia) of the Act in respect of shares in Simtools Pvt. Ltd. The assessee vide registered agreement dated 21/08/2013 purchased 4<sup>th</sup> Floor admeasuring 40399.04 sq.fts. in Wing -B of building situated at i-think Techno Campus, Simtools Pvt. Ltd, off Pokheran Road No.2, Behind TCS, Thane along with shares held by seller (M/s. Lodha Elevation Buildcon Pvt. Ltd.) i.e. 17,120 fully paid up equity shares in Simtools Pvt. Ltd. for a lumpsum consideration of Rs.22,47,45,300/-. The aforesaid consideration mentioned in the agreement is

a composite consideration for the building and the shares. The contention of the assessee is that proportionate shares have been purchased by the assessee to comply with the provisions of section 10 of MOFA.

Dehors, the requirement to purchase shares under MOFA, we find that the Authorities below have erred in coming to the conclusion that the consideration paid is for acquiring shares solely disregarding the fact that the assessee had purchased immovable property vide registered sale deed dated 21/08/2013. The market value of Rs.32,61,19,500/- as mentioned in the receipt attached to registered sale deed as against the consideration of Rs.22,47,45,300/- is not of the shares alone. The assessee has pointed the fact before the Authorities below that the entire consideration paid for acquiring the immovable property along with stamp duty, registration charges, professional fees, etc. aggregating to Rs.25,35,148/- has been capitalized in the books of assessee under the head building. This fact has not been controverted by the Revenue. From the bare reading of the findings of CIT(A) and the Assessing Officer it emanates that they have proceeded with the notion that the agreement is with respect to sale of shares and the consideration has been paid to acquire share turning a blind eye towards the immovable property which has been described in the agreement. The CIT(A) has presumed that the transfer of property is through the sale of shares. The basis of such presumption is superfluous. The assessee has paid consideration for purchase of immovable asset along with shares. There is a fallacy in the presumption of the CIT(A) that shares represent the asset i.e. building. The findings of the CIT(A) on this issue are based on wrong appreciation of facts, hence, unsustainable. Accordingly, the findings of

CIT(A) on this issue are set-aside and the assessee succeeds on ground No.2 of the appeal.

13. The Id.Counsel for the assessee has stated at Bar that he is not pressing additional ground No.2 of appeal, hence, additional ground No.2 of the appeal is dismissed as not pressed.

14. In additional ground No.3 of appeal the assessee has assailed disallowance of deduction in respect of expenditure incurred on ESOP. We find that in Assessment Year 2011-12 and 2013-14, the same very issue was agitated by the assessee as additional ground of appeal. The Tribunal allowed the additional ground with respect to expenditure incurred in ESOP in ITA No.7058 & 7059/Mum/2017(supra). The relevant extract of the findings of Co-ordinate Bench reads as under:-

*“23. Coming to additional ground No.3 of grounds of appeal i.e., in respect of expenditure incurred on Employee Stock Option Plan (ESOP) we observe that the issue is decided in favour of the assessee by the Special Bench of the Tribunal, Bangalore Bench in the case of Biocon Ltd., v. DCIT (supra) and this Special Bench decision has been affirmed by the Hon'ble Karnataka High Court in the case of CIT v. Biocon Limited (supra). Thus, respectfully following the said decision we direct the Assessing Officer to allow the expenditure on Employee Stock Option Plan. Additional ground No.3 of the assessee is allowed.”*

No contrary material has been placed on record by the Revenue on this issue. Respectfully following the decision of Co-ordinate Bench, additional ground No.3 of appeal is allowed in similar terms.

**15. In the result, appeal by the assessee is partly allowed.**

**16. To sum up, appeal by the Revenue is dismissed and appeal by the assessee is partly allowed.**

**ITA NO.1515/MUM/2019, A.Y. 2015-16- ASSESSEE'S APPEAL:****ITA NO.2019/MUM/2019 -A.Y. 2015-16 – REVENUE'S APPEAL:**

17. These cross appeals by the Revenue and assessee are directed against the order of Commissioner of Income Tax(Appeals)-6, Mumbai [ in short 'the CIT(A)'] dated 31/01/2019 ,for the assessment year 2015-16.

18. The assessee in appeal has raised solitary ground assailing disallowance u/s. 14A of the Act. The assessee has raised identical additional grounds of appeal as were raised in Assessment Year 2015-16.

19. The Revenue in its appeal has raised two grounds. Both the grounds in appeal are directed against the findings of CIT(A) in deleting disallowance u/r. 8D(2)(II) and u/r. 8D(2)(iii).

19. Both sides are unanimous in stating that the facts in Assessment Year 2015-16 are similar to the facts in Assessment Year 2014-15, therefore, the submissions made in appeal for Assessment Year 2014-15 would equally apply to Assessment Year 2015-16.

20. Both sides heard. The assessee in ground No.1 of appeal has assailed the disallowance made u/s. 14A of the Act on the ground that the satisfaction has not been recorded as envisaged u/s. 14A(2) of the Act. The Revenue has raised corresponding ground No.1 & 2 in its appeal for restoring the disallowance made by the Assessing Officer u/r. 8D(2)(ii) and 8D(2)(iii) of the Act. From perusal of the documents on record we find that during the period relevant to the assessment year under appeal the assessee has earned income exempt from tax amounting to Rs. 129,05,88,612/-. The assessee made suo – motu disallowance of Rs.12,72,53,642/-. The Assessing Officer thereafter

invoked the provisions of Rule 8D and made disallowance of Rs.17.48 crores. In first appeal, the CIT(A) deleted the disallowance made u/r. 8D(2)(ii) and gave partial relief in respect of disallowance u/r. 8D(2)(iii). The Revenue is in appeal against relief granted to the assessee by CIT(A). The assessee has primarily assailed the manner of recording satisfaction u/s. 14A of the Act by the Assessing Officer. We have examined the assessment order and find that the Assessing Officer has not recorded the satisfaction rejecting assessee's computation of suo-motu disallowance made u/s. 14A of the Act with regard to the accounts of the assessee. The observations made by Assessing Officer are generic and not specific to the assessee's accounts. In fact, the Assessing Officer has recorded that accounts prepared by the assessee do not give true picture about the correctness of the expenditure with regard to the earning of exempt income without pointing out the defects in the accounts. The Assessing Officer has primarily based his (dis)satisfaction over assessee's claim by placing reliance on the various decisions of the Tribunal without resorting to the examination of the accounts of the assessee. Thus, in our considered view, the (dis)satisfaction recorded by the Assessing Officer for invoking Rule 8D fall short of the requirement as mandated under sub-section (2) to section 14A of the Act. Therefore, we find merit in ground No.1 r.w. additional ground No.1 to the appeal of assessee. Hence, ground No.1 and additional ground No.1 of assessee's appeal are allowed. Consequently, ground No.1 and 2 raised in the appeal by Revenue are dismissed.

22. The additional ground No.2 in the appeal by assessee is with respect to education cess. The Id. Counsel for the assessee stated at Bar that he is not pressing additional ground No.2, hence, the same is dismissed as not pressed.

22. The additional ground No.3 of appeal is with respect to expenditure incurred on ESOP. While deciding the appeal of assessee for 2014-15, this issue has been decided. The said finding would *mutatis mutandis* apply to the assessment year 2015-16 as well. For parity of reasons additional ground No.3 of the appeal is allowed.

23. **In the result, appeal by Revenue is dismissed appeal by the assessee is partly allowed.**

Order pronounced in the open court on Monday the 05<sup>th</sup> day of December, 2022.

Sd/-

( GAGAN GOYAL )

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 05/12/2022

Vm, Sr. PS(O/S)

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

BY ORDER,

(Dy./Asstt. Registrar) /  
 Sr.Private Secretary  
 ITAT, Mumbai