

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)

ITA No. 483/MUM/2018
Assessment Year: 2012-13

M/s Satguru Corporate Services
Pvt. Ltd.,
5th floor, Sunteck Centre, 37-40
Subhash Road, Vile Parle (East),
Mumbai-400057.

PAN No. AAPCS 2160 R
Appellant

ITO, 11(1)(3),
Aayakar Bhavan, 4th
floor, Mumbai.

Vs.

Respondent

ITA No. 878/MUM/2018
Assessment Year: 2012-13

ITO, 11(1)(3),
Room No. 201, Aayakar
Bhavan, M.K. Marg,
Mumbai-400020.

Appellant

Vs.

M/s Satguru Corporate Services Pvt.
Ltd.,
5th floor, Sunteck Centre, 37-40
Subhash Road, Vile Parle (East),
Mumbai-400057.

PAN No. AAPCS 2160 R
Respondent

Assessee by
Revenue by

: Mr. Rakesh Joshi
: Mr. Dr. Kishor Dhule, CIT-DR

Date of Hearing
Date of pronouncement

: 07/09/2023
: 09/10/2023

ORDER

PER OM PRAKASH KANT, AM

These cross appeals by the Revenue and the assessee respectively are directed against order dated 29.09.2017 passed by



the Ld. Commissioner of Income-tax (Appeals)-18, Mumbai [in short 'the Ld. CIT(A)'] for assessment year 2012-13.

2. The grounds raised by the Revenue in form No. 36 have been revised vide letter dated 15/11/2022 of the Assessing Officer, which has been brought on record by the ld DR on 6/09/23. The revised grounds are reproduced as under:

1. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting addition of Rs.50,00,45,000/- u/s 69 B of the Income Tax Act 1961 even though the three shareholders namely Shri Vinay Somani, Smt. Shrilekha Somani and Balgopal Trust have admitted that they had received additional consideration in the form a residential flat to each of them with car parking space, (total value of the three flats being Rs.50,00, 45,000/ -) vide escrow agreement dated 06.06.2011 over and above the share purchase consideration received from the assessee company and have shown the said additional consideration as their income of the year under consideration in their return of income filed and have offered the tax thereon."*

2. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in rejecting the legal sanctity of escrow agreement and allotment letter issued therewith merely being incomplete and defective despite Hon'ble High Court of Bombay upheld the substance of the commercial arrangement reflected by escrow agreement and allotment letter, thereby restraining the assessee and its sister concerns from creating any third party rights in disputed flats."*

2.1 The grounds raised by the assessee are reproduced as under:

1. *On the facts and circumstances of the case as well as in law, the Learned CIT (A) has erred in confirming the action of Learned Assessing Officer in making a further disallowance of expenses of Rs.4,58,23, 162/ - u/s. 14A of the Income Tax Act, 1961, without considering the facts and circumstances of the*
2. *2) On the facts and circumstances of the case as well as in law, the Learned CIT (A) has erred in confirming the action of the Learned Assessing Officer in making a disallowance u/s.14A without appreciating the fact that Somani and Company Pvt. Ltd. had merged with the assessee company w.e.f. 01.01.2012 as held by Bombay High Court.*



3. 3) On the facts and circumstances of the case the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in not accepting the revised computation and the amalgamated accounts during the Assessment proceedings and acting on the same ignoring the fact that the said accounts could not be presented earlier as the date of Bombay High Court order was 12.12.2014 and the assessee was therefore prevented by sufficient cause in presenting the same earlier.
4. 4) On the facts and circumstances of the case as well as in law, the Learned CIT (A) has erred in confirming the action of the Learned Assessing Officer in making a disallowance u/s.14A without appreciating the fact that investment in shares was made in Somani and Company Pvt. Ltd., a wholly owned subsidiary and thus constituted strategic investment on which provisions of sec 14A do not apply.
5. On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in not appreciating the fact that the assessee could not file amalgamated accounts as per order of amalgamation dated 17.08.2012 in the absence of completion of certain statutory formalities.

3. Briefly stated facts of the case are that the assessee company filed its return of income on 29.09.2012 declaring total loss at Rs.34,094/-, which was further revised on 13.02.2012 for claiming carry forward loss of the earlier years which was omitted in the original return of income dated 29/09/2012. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the course of the scrutiny proceedings, the Assessing Officer observed that the assessee purchased 20,000 equity shares of 'M/s Somani and Company Pvt. Ltd'. from 20 shareholders for a consideration of Rs.182 crores. The Assessing Officer observed that as per the 'escrow agreement' dated 06.06.2011, the assessee paid additional consideration in the form of rights in three flats amounting to Rs.50,00,45,000/- , in



addition to sum of Rs.182 crores, but same was not reported for income-tax purpose as part of the sale consideration for acquiring the shares of the company and therefore, the Assessing Officer held the sum of Rs.50,00,45,000/- as unexplained investment in terms of section 69B of the Act. Further, the Assessing Officer noted that the assessee company received dividend of Rs.71,25,686/- on investment in shares and mutual funds. However no *suo-moto* disallowance was made by the assessee for earning the said exempted income in terms of section 14A of the Act. The Assessing Officer noted that dividend income was set off by the assessee against expenditure incurred on work in progress. The Assessing Officer invoked Rule 8D of the Income-tax Rules, 1962 (in short 'the Rules') and made disallowance for direct interest expenses amounting to Rs.185,78,555/- invoking Rule 8D(2)(i) and 0.5% of the average investment in shares/mutual funds etc amounting to Rs.45,70,475/- in terms of Rule 8D(2)(iii) of the Rules. In this manner total disallowance of Rs.5,29,49,030/- was made invoking section 14A r.w.r. 8D of the Rules and same was reduced out of the amount of work-in-progress carried forward by the assessee. In the assessment order passed u/s 143(3) of the Act dated 31.03.2015, the Assessing Officer assessed total income under the normal provisions at Rs.50,00,10,910/-.

4. On further appeal, the Ld. CIT(A) on the issue of the addition of unexplained investment amounting to Rs.50,00,45,000/- allowed



relied to the assessee but the sustained disallowance u/s 14A of the Act. Aggrieved, both the Revenue and the assessee are in the appeal before the Tribunal raising grounds as reproduced above.

5. Before us, the Ld. Counsel of the assessee has filed a Paper Book containing pages 1 to 168 and further filed additional Paper Book 169 to 201. On the other hand, the Revenue has also filed a Paper Book containing page 159.

6. The ground Nos. 1 and 2 raised by the Revenue pertain to the issue of deletion of unexplained investment amounting to Rs.50,00,45,000/-. The material facts qua the issue in dispute are that the assessee company purchased 20,000 equity share, which is 100% shareholding of M/s Somani and Company Pvt. Ltd., from 20 different shareholders through a “shareholder’s agreement” (i.e. share purchase agreement) dated 04.01.2012. After acquiring 100% shareholding M/s Somani and Company Pvt. Ltd. , it became subsidiary of the assessee and same was later amalgamated with the assessee company w.e.f. appointed date i.e. 01.01.2012, under the scheme approved by the Hon’ble Bombay High Court vide order dated 07.08.2012 and subsequent order dated 12.12.2014. In order to give effect of said order of the Hon’ble Bombay High Court, the assessee filed revised computation before the AO on 30.03.2015 along with consolidated accounts. It has been submitted by the assessee that those consolidated accounts had not been considered by the Assessing Officer in the order passed u/s 143(3) of the Act.



7. For verification of the acquisition of the shares by the assessee, the Assessing Officer issued notice u/s 133(6) of the Act to the shareholders from whom the assessee purchased shares of M/s Somani and Company p Ltd. In response to the notices issued u/s 133(6) of the Act, three shareholders namely Shri Vinay Somani, Mrs. Shrilekha Somani and M/s Balgopal Trust said that in addition of the consideration as mentioned in the share purchase agreement, they had also received additional consideration through an “Escrow agreement” dated 06.06.2011 amounting to Rs.50,00,45,000/- being the value of the flats in building named as Signature Island/Signia Isles. The Assessing Officer accordingly issued show-cause notice to the assessee as why the said additional consideration paid to three shareholders under the Escrow agreement should not be treated as undisclosed investment by the assessee u/s 69B of the Act. The assessee contested that said Escrow agreement was not acted upon and therefore no consideration was paid to the shareholders other than the consideration noted in the share purchase agreement dated 04.06.2012. The assessee submitted that as no such additional consideration was paid so the matter has been taken up by those three share holders before the Hon’ble Bombay High Court and litigation is still pending. The assessee submitted that no additional consideration has been paid by the assessee therefore no addition could have been made u/s 69B of the Act. The Ld. Assessing Officer however rejected the contention of the assessee and further



submitted that the Hon'ble Bombay High Court has restrained the assessee from creating any third party rights in aforesaid three flats. He further observed that those shareholders have also declared receipt of additional consideration in return of income filed and offered taxes thereon. Before the Ld. CIT(A), the assessee further contended that the said flats under the Escrow agreement are not owned by the assessee and owners of those flats have not confirmed the Escrow agreement. The Ld. Counsel of the assessee submitted that though Escrow agreement was agreed not to act upon, however without prejudice the same prescribe only further commitment and no present liability on the assessee. Further submitted that owners of the flat i.e. M/s Starlight Systems LLP, has declined to give any possession to the assessee. Accordingly, the Assessing Officer in the case of those shareholders has also denied claim of deduction u/s 54 of the Act. In detailed discussion, the Ld. CIT(A) has deleted the addition observing as under:

“10. Decision: I have carefully considered the contention of the Assessing Officer, the oral as well as the written submissions of the appellant. I have perused the materials on record to name a few, share purchase agreement, the escrow agreement, Interim order of the Hon'ble High Court of Bombay, etc. The single issue here is whether the appellant has expended any amount by way of transfer of the three flats to the three persons of M/s Somani group in connection with the purchase of shares of M/s Somani & Co. P. Ltd which is not accounted in its books which attracts invoking the provision of Section 69B of the Income tax Act, 1961. The shareholders agreement on the basis of which shares of M/s Somani & Co. P. Ltd have been transferred to the appellant company at an agreed consideration does not speak about any other consideration or remuneration. On the other hand, the Escrow Agreement entered between the appellant company and the three shareholders, Mr. Vinay Somani, Mrs. Shreelekha Somani. & Balgopal Trust dictates terms of agreement that each of the three



shareholders will be allotted a flat each in the building complexes named as Signature Island/Signia Isles. On the strength of the Escrow Agreement, and being asserted in the affirmative in the information provided in response to notice u/s 133(6) by the aforesaid three shareholders of Somani Group, the Assessing officer made the addition of Rs.50 crores under section 69B of the Act stating that the consideration paid in the form of flats against sale of shares are not accounted for in the books of the appellant.

10.1 On a careful study of the Escrow agreement, it is observed that the agreement executed on 06.06.2011 is between the appellant company on the One part and thrée others, Mr. Vinay Somani, Mrs. Shreelekha Somani & Balgopal Trust as the other patt and Shri Anil Harish, Senior Partner of M/s D.M.Harish & Company as the solicitor. The terms of agreement are that the Solicitor is to (a) Release the letter of allotment in respect of Flat No B-504 in Signature Island to Vinay on payment of 50% of the Purchase price of the land at Oshiwara by Satguru to Somanis under the Agreement. (b) Release the letter of allotment in respect of Flat No 702 in Signia Isles to Vinay on payment of further 25% (making a total of 75%) of the Purchase price of the land at Oshiwara by Satguruto Somanis under the Agreement and (c) Release the letter of allotment in respect of Flat No 301 in Signia Isles to Vinay on payment of the final balance amount) of the Purchase price of the land at Oshiwara by Satguru to Somanis under the Agreement. The release of the third flat shall be made on condition that Vinay pays to Satgurus Rs.7,46,59,302/-. All the above flats are stated to be under construction. On verification of the so called Allotment Letters, it is seen that these are (*) application forms making requisition for provisional registration/enrolment for a unit in the Signature Island and agree to sign and execute the alltoment as and when desired by the developer. (ii) the Developer is mentioned as M/s. Starlight Systems Pvt. Ltd. (iii) The application forms are blank and without signature. (iv) In each of the Personal Form attached to the application form only three items are filled, the name as the sole/first applicant without photo, the tentative unit No. and an amount under sale price of saleable area and the other portions in the two pages are blank, unsigned and undated. (v) The continuation of the Personal Form titled as Broad Terms and Conditions for Provisional Allotment of a unit in Signature Island is also unsigned and undated. In the Receipt portion which is signed by M/s Sarlight System Pvt. Ltd., the space for specifying the amount "received as booking amount" is not filled and left blank. The above findings reveal that the documents, which are the basis for the Escrow Agreement do not stand to be executable as they are ive and incomplete as pointed out above. On the face of it, these documents cannot be treated or termed as Allotment Letter. Such application forms, do not create any right over a property unless the transaction takes place through registration with the concerned authority. As all the concerned signatories have not signed them, the so called allotment letters/documents are not legally enforceable. Further this form was



signed by M/s Star Light Systems Pvt. Ltd., who is not a party to the so called Escrow Agreement.

10.2. Further in para 13 of the Interim Order dated 14.06.2014, the Hon' ble High Court of Bombay has given a finding as "The Defendants have referred to the supplementary share purchase agreement as also supplementary escrow agreement proposed to be entered between the parties, purportedly to give effect to the understanding between the parties concerning payment of the additional consideration of Rs.50 crores, to claim that the suit transaction was to be accomplished in the manner proposed therein. It is however, a matter of fact that these documents were not executed between the parties. These documents, at any rate, merely reflect on the particulars of the modalities and do not detract from the substance of the commercial agreement between the parties. The so called suppression of these documents, which at any rate, were admittedly not executed between the parties, is neither here nor there".

10.3 From the perusal of letter dated 07.11.2016 of Shri. Vinay Somani addressed to the ITO Ward-11(1)(3), Mumbai, under whose jurisdiction, the appellant is assessed to income tax, to the specific query raised whether the transaction with the appellant has been registered and whether the possession of the flats have been given to him and his wife and the trust, he replied that in October 2013, when communication was sent for registering the three sale deeds, the developer, M/s Starlight Systems (1) LLP to whom M/s Starlight salorer ou stems (I) Pvt. Ltd has handed over the building assets denied the transaction. Thereafter he was constrained to file a suit before the Hon'ble Bombay High Court, Mumbai. Further it is stated that the Occupation Certificate for the flats have been issued in November, 2015 and that they have filed an additional Notice of Motion applying for possession of the flats or sealing the same by a Court Receiver. In the assessment made u/s 143(3) in the case of each of the aforesaid three persons/ parties for A.Y. 2012-13, the claim for deduction u/s 54 on the plea that out of the proceeds received from sale of shares, investment has been made in the purchase of the said flats have been denied on the ground that the flats have not been purchased during the year relevant to A.Y. 2012-13. The appellant company has purchased shares of M/s Somani & Company from the shareholders vide agreement dated 04.01.2012 wherein it was agreed that the shares shall be transferred in favour of the appellant for a total consideration of Rs. 182 crores. The appellant has entered into a separate Escrow agreement with three share holders namely Mr. Vinay Somani, Smt. Shrilekha Somani & Balgopal Trust, as per which it was agreed between the three share holders on one side and the appellant on the other side that over and above the consideration mentioned in share transfer agreement, the appellant shall also give three flats worth Rs.50 crore to the three share holders. However the fact is that this escrow agreement was not honoured by the appellant and a dispute arose between the appellant and



the three parties which is pending for adjudication before Hon ble Bombay High Court. There is no evidence on record to prove that the flats were actually allotted to the aforesaid three shareholders.

10.4 Further on careful study of the share purchase agreement dated 04.01.2012, entered between Shri Vishal Somani and the other shareholders of M/s Somani & Company Pvt. Ltd. listed in the First schedule of the agreement collectively referred to as the 'Sellers' of the first part, and Shri. Maheshkumar Somani and four other persons enumerated therein referred to as the Directors' of the second part and Satguru Corporate Services Pvt Ltd., the appellant company referred to as the 'Purchasers' of the third part, it is stated that the Sellers are the only members and registered shareholders, holding the entire 100% paid-up 20,000 equity share capital of Rs. 100/- each of M/s Somani & Company Pvt. Ltd., referred to as the 'Company'. It is also declared that the five Directors are the only directors of the Company as on the date of execution of those present. The Company is ceased and possessed of pieces and parcel of land at village Goregaon, Taluka Borivali, which is referred to as the first property and of the land in village Majas, Taluka Andheri referred to as the second property. The first and second properties are collectively referred to as the said properties. The Sellers and Directors have represented to the purchaser the properties were divided into nine plots and six out of the nine plots have been conveyed and transferred to its group entities and two to co-operative housing societies and one plot is remaining with the company. The Sellers have agreed to sell to the Purchasers and the Purchasers have agreed to acquire from the Sellers 100% of the equity shares of the Company held by the Sellers free from all encumbrances and claims at or for the Lump-sum consideration of Rs.182,00,00,000/- and on the terms and conditions mutually agreed upon by and between them. Thereafter, it is declared, confirmed and recorded that the transaction of transfer of the shares and handing over of the management of the company was completed on the said day/date and in the manner set out. Further in Clause 6 (xv) of the agreement it is stated that "there are no agreements, contracts, arrangements with any individual, firm, body corporate or any service contracts with any directors or executives or executives of company which are valid or subsisting." The above cast a question on the survival of the Escrow Agreement in the wake of the above clause, the Share purchase agreement being a vital document on the basis of which the Hon'ble High Court of Bombay has accorded approval for the taking over of the aforesaid company from the Somanis by the appellant company.

10.5 Further on perusal of page 146-209 of the paper book, it is seen that the appellant has purchased land from six parties, who were also shareholders of M/s Somani & Co. Ltd. and has paid separate consideration for acquisition of the said land by entering into separate conveyance agreement, details of which are as under:



Agreement date	Owner details	Land Area	Consideration paid
04/01/2012	M/s Venkatesh Processors (Through its Partner Mahalaxmi Rope Works Ltd.)	1359.62 Sq. Metre	4,89,46,320/-
04/01/2012	M/s Vinay Enterprises (Through its partner Mr. Sharad Somani & others)	1609.50 Sq. Meter	5,79,42,000/-
04/01/2012	M/s Shree Gopal Corporation (Through its Proprietor Mr Vinay Somani)	1591 Sq. Metre	5,72,76,000/-
04/01/2012	M/s Shree Arvind Corporation (Through its Partner Mahesh Somani & Others)	1591 Sq. Metre	5,72,76,000/-
04/01/2012	M/s Maheshwari Trading Co. (Through its Partner Vinay Somani & Others)	2528.25 Sq. Metre	9,10,17,000/-
04/01/2012	M/s Laxminarain Bhagwan Bux (Through its Partner Vijaynarain Somani & Others)	1733 Sq. Metre	6,23,88,000/-

On perusal of these conveyance deeds it is noticed that the acquisition of land from the share holders is a separate transaction and not related to the acquisition of shares.

10.6 The Assessing officer made the addition under section 69B of the Act stating that the consideration paid in the form of flats against sale of shares are not accounted for in the books of the appellant. At this juncture, it will not be out of place to refer to the provisions of section 69B of the Act, which reads as under:

"Where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the 6 Assessing! Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the 1 Assessing] Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year." From a plain reading of the aforesaid section it can be noted that existence of three conditions is essential to invoke the provisions of section 69B of the Act:

- (i) The appellant should have made investment or be found to be owner of any bullion, jewellery or other valuable article;
- (ii) The amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income;
- (iii) The assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory.

In the appellant's case, the documents do not speak about the appellant acquiring or investing in the said properties ie. the flats. Hence, the first condition is not present as the appellant company has neither made investment in acquiring or purchasing the said flats nor is the owner of



the said three flats. Thus, it follows that the second and third limbs do not arise. Hence the appellant company has no legal right to transfer the said flats to the three shareholders. The flats belong to a separate entity viz. M/s. Starlight Systems Pvt Ltd/ M/s. Starlight Systems (1) LLP, who is neither a party/ signatory to the Escrow Agreement nor to the Shareholders Agreement. As the ownership is not there, the appellant is not in a position to exchange them for shares or include them in the purchase price of the shares of M/s Somani & Co. P. Ltd purchased by the appellant. Only when the appellant acquires them or makes advance payment for buying, the requirement for accounting them in its books of account arises and if the amounts recorded in the books is lesser than the actual price and the appellant offers no explanation about such excess, amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, Section 69B can be invoked. In the appellant's case I find such a situation of facts is not there. Hence to form an opinion that the amount expended on purchase of shares of M/s. Somani & Company by the appellant is higher by Rs. 50 Crore in the form of allotment of flats to the three shareholders is unfounded. Transfer of an immovable property such as a house or a flat can take place via registration of the sale deed as per the Registration Act 1908. From the perusal of the assessment order it is not clear as to whether the Ld. Assessing Officer wants to make addition u/s 69B of the Act on account of purchase of shares or purchase of flats which was to be given to the three shareholders as additional consideration. As far as purchase of flats is concerned, M/s Star Light Systems Pvt. Ltd. has duly informed the Assessing Officer vide letter dated 25.03.2015, copy of which is placed at page 137 of the paper book, that no flat as agreed upon has been allotted to these three shareholders. The application form addressed to M/s Star Light Systems Pvt Ltd to allot flats cannot be equated to be a legally valid document to evidence transfer of the flats or ownership of the flats in the absence of registration to that effect. Further the dispute between the parties before Hon'ble Bombay High Court is another proof that the flats were not allotted as per the Escrow Agreement. Since the flats were not allotted or parted with on behalf of the appellant during the year, to construe that additional consideration has been given by the appellant is a misplaced interpretation of facts. Mere commitment in an agreement between two private parties, which was not acted upon for the reasons best known to the parties where no transaction having financial value has taken place cannot be the basis for making addition u/s 69B of the Act. Since the appellant was not the owner of the flats, therefore the second option of giving these flats as additional consideration to the aforesaid parties of Somani Group for purchase of shares is neither conceivable nor feasible.

10.7 The suit pending before the Hon'ble High Court of Bombay shows that the appellant has not expended the said additional consideration during the year and so accounting for it in the books of the appellant will not arise. It is further important to note that addition u/s 69B can be made only in the year when such investment was made by expending the consideration. The appellant has not incurred expenditure on the said flats as they were not purchased by it during



the current assessment year in appeal. The appellant has expended Rs. 182.82 crores, which is duly accounted in the books of accounts. Therefore in my opinion, considering the above facts, no addition can be made u/s 69B in the current assessment year. In view of the above, the Assessing Officer is directed to delete the addition of Rs.50 crores made u/s 69B of the Act. Accordingly, the grounds of appeal at No.5.1 to 5. 3 are allowed.”

7.1 before us , the Ld. CIT-DR submitted that, **firstly**, the Ld. CIT(A) has read the “share purchase” agreement and “escrow agreement” separately and not in sink. According to him under the Escrow agreement the parties has duly agreed for additional consideration was to be paid in phased manner on completion of part share purchase agreement. He submitted that the said residential flats were kept in Escrow account with Shri Anil Harish , Senior partner of M/s DM Harish and Company on 6/06/2011 and escrow agreement was accordingly drawn. On completion of the share purchase agreement, the Escrow was released and thus considerations in money as well as three flats (in kind) were assigned to the ‘Somanis’ by the assessee. Therefore, the amount not shown by the assessee is liable for taxation u/s 69B of the Act. **Secondly**, the Ld. DR also relied on the order of the Hon’ble Bombay High Court dated 14.06.2014 under which the assessee has been restrained from creating third party rights in respect of those three flats. **Thirdly**, the Ld. DR submitted that rejection of deduction u/s 54 in the case of the shareholder(s) under reference cannot be a basis for allowing relief to the assessee.

7.2 On the other hand, the Ld. Counsel of the assessee relied on the order of the Ld. CIT(A) and submitted that when no



consideration has been paid in the form of the flats to those shareholders, the addition made by the Assessing Officer is not justified. Regarding the restrain order of the Hon'ble Bombay High Court, the Ld. Counsel submitted that the assessee is not the owner of the said flats and therefore, restrain does not apply and further submitted that in case the assessee losses then assessee will pay the additional consideration out of its own sources which would not warrant u/s 69B of the Act.

7.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the Ld. Assessing Officer has relied on **firstly**, the "Escrow agreement", **secondly**, declaration of additional consideration by the shareholders in their return of income filed for the relevant assessment year, **thirdly**, restrain order issued by the Hon'ble Bombay High Court, but we find that in the share purchase agreement there is no reference of "Escrow agreement" and assessee has not made any compliance of the said Escrow agreement, which is under litigation before the Hon'ble Bombay High Court. In such circumstances, it cannot be held that assessee has paid additional consideration for purchase of the shares. In absence of any proof of payment of additional sale consideration, particularly when owner(s) of the flat i.e M/s Starlight Systems LLP has declined request of the three shareholders for allotment of flats to them. Further documents relating to allotment of those flats to three



shareholders have been observed to be defective by the Ld. CIT(A) and this fact has not been controverted by the Ld. DR. Be that as it may be, it is evident that those three flats belonging to the M/s Starlight security LLP mentioned in the Escrow agreement has ultimately not been given to those three shareholders by the assessee on anyone on behalf of the assessee and matter being under litigation before the Hon'ble Bombay High Court, no addition for unexplained investment could survive in the hands of the assessee company. In our opinion order of the Ld. CIT(A) on the issue in dispute is well reasoned and accordingly, we uphold the same. In the result, the ground Nos. 1 and 2 of the appeal of the Revenue are dismissed. The ground Nos. 3 and 4 being general in nature, same are also dismissed as infructuous.

8. The ground Nos. 1 to 5 of the appeal of the assessee relate to the sole issue of disallowance of Rs.4,58,23,162/- u/s 14A of the Act. The fact in brief qua the issue in dispute are that the Assessing Officer observed the assessee issued non-convertible debenture (NCD)/optionally convertible debenture (OCD)(PB-169) worth Rs. 252, 59, 08,800/- for raising funds for acquisition of shares of 'Somani and company p ltd' and paid interest of Rs. 4,83,78,555/- (PB-169) on them up to 31.03.2012. The said funds were invested partly in shares (Rs. 182 crores) of 'Somani and Co. p ltd' and balance in mutual funds and received dividend of Rs.71,25,686/- from said investment in mutual funds, but no *suo-moto*



disallowance was made by the assessee for earning such exempted income. The Assessing Officer invoked Rule 8D of the Rules and made disallowance of Rs.5,29,49,030/- as per the computation below :

				Amount
1.	Amount of expenses directly related to such income			4,83,78,555/-
2.	Amount of the interest expenses indirectly attributable to such income, in accordance with the formula $A \times B / C$ where			
	A.	Total interest expenditure minus direct interest expenditure on such income		
			NIL	(A)
	B.	Average of such investment on the first and last day of previous year		
		$\frac{0+1,82,81,90,016}{2}$	91,40,95,008/-	(B)
	C.	Average of total assets on first and last day of previous year		
		$\frac{95,71,574+260,50,80,547}{2}$	130,73,26,060	(C)
		$A \times B / C =$		0
3.	0.5% of the 'B' above			45,70,475
	Total disallowance u/s 14A			5,29,49,030

8.1 Out of total disallowance of Rs. 5,29,49,030/- , the Assessing Officer reduced amount of dividend of Rs.71,25,686/- which was set off by the assessee against work in progress and the balance amount of Rs.4,58,23,162/- was reduced out of closing work in progress and allowed balance closing work in progress of Rs.48,85,376/- to be carry forward in subsequent years as against claim of Rs.46,59,08,538/- by the assessee. On further appeal, the Ld. CIT(A) rejected the claim of the assessee observing as under :

“12 Decisions: I have considered the submission of the appellant as well as the contention of the AO. The Assessing Officer has invoked the provisions of section 14A and disallowed a sum of Rs.5,29,19,030/-



applying the procedure laid down in Rule 8D of the I T Rules, 1962. The main grievance of the appellant is that the Assessing Officer should not have considered investment in Shares of M/s. Somani & Co. PvtLtd. while working out disallowance u/s 14A for the reasons that (1) there is no dividend received from these shares during the year under consideration, (ii) the company has already merged vide High Court order dated 17.8.2012 with the appellant company therefore Shares shown under investment got cancelled after giving effect to the High Court order and in the merged balance sheet the said investment is not reflected and (i) the AO has not taken cognizance of merged balance sheet filed during the course of assessment proceedings.

12.1 On careful perusal of the balance sheet, profit and loss account and material on record and considering the submissions of the appellant, I find that the appellant is in receipt of dividend of Rs.71,25,686/- from mutual funds during the year relevant to the assessment year in appeal as against loss of Rs.34,094/- declared in the Return filed for A. Y.2012-13. It is stated that the same was reduced from the interest and finance charges and the net interest and finance charges of Rs 4,12,52,869/- is shown under the head "Closing WIP". The appellant in doing so has not followed the procedure laid down by Rule 8D to work out the disallowance u/s 14A. It is a settled law that disallowance u/s 14A has to be computed as per Rule 8D from Assessment Year 2008-09 onwards. Therefore in my opinion the Assessing officer has rightly resorted to Rule 8D to compute the disallowance under Section 14A in accordance with the method specified in Rule 8D as the appellant has did not follow the norms laid down for this purpose. In fact the above receipt of dividend is not shown in the computation of total income. The merged financial statements have not been filed with the return of income for the current assessment year in appeal. Hence going by the financial statements filed with the Return, the share capital as per the balance sheet is Rs.1,00,000/- only and there is no positive amount under the head reserve and surplus. On the other hand the long term borrowings amounted to Rs.252.70 crores and short term borrowings is Rs.2.73 crores besides trade payables of Rs. 39.89 lacs and statutory dues of Rs.57.98 lacs. The appellant has made investment in equity shares of Rs.182.82 crores in M/s Somani & Company Pvt. Ltd. The financial cost debited and included in work in progress is Rs.4.83 crores. Thus the appellant has utilized, borrowed funds for investment in shares and mutual funds, which are exempt income yielding assets as seen from the above financial statements. The interest expenses are therefore direct cost for computation of disallowance under section 14A. In the wake of the above facts, computation of disallowance u/s 14A has to be worked out as per the formula prescribed in Rule 8D. The Assessing officer has rightly, invoked the provisions of Section 14A and applied Rule 8D to compute the disallowance. The disallowance made u/s.14A is herewith confirmed

12.2. With regard to the contention of the appellant that the appellant company and M/s. Somani & Company Pvt Ltd has amalgamated as per the order of the Hon'ble High court of Bombay dated 17.08.2012 and due to merger of accounts, the purchase of shares cannot be construed as



investment in exempt yielding assets, cannot be accepted. For the assessment year in appeal this issue has to be dealt with on the basis of the financial statements filed with the return of income under Section 139. The appellant has not filed the merged accounts with the return of income. Even otherwise also, it is not justiger of two companies. It is a situation where in the entire equity shares of M/s Somani & company Pvt Ltd has been acquired from its shareholders by the appellant for a payment of Rs.182.82 crores which is sourced from long term borrowings received in the form of Redeemable Non-convertible Debentures/ICD. Taking into account this factor, I am not inclined to agree with the submission of the appellant that it is a case of investments made by the assessee to promote a subsidiary company and investments were made on account of business expediency and that dividend therefrom is purely incidental. The crux of the matter here is that the appellant has received dividend receipts of Rs.71,25,686/- from mutual funds which is claimed as exempt from tax. The investment made out of borrowed funds is not to promote a subsidiary company. It is rather an outright purchase of the entire equity shares of the aforesaid company. In other words, equity shares of a company has been acquired out of borrowed funds for which expenses have been incurred in the form of interest/financial cost during the year relevant to the assessment year in appeal. Therefore the investment amount of Rs. 182.82 crores has to be taken into account in computing average investment and average total assets for the current assessment year. The appellant is also in receipt of dividend of Rs.71,25,868/- claimed as exempt from tax by the appellant. The Assessing officer has rightly computed as per Rule 8D the disallowance u/s 14A. Accordingly in the light of the above facts and circumstances, the stand taken by the Assessing Officer is confirmed and the ground of appeal at 5.5 is dismissed.”

8.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the Ld. Counsel of the assessee submitted that assessee has already adjusted the dividend income against the work in progress which means the expenses to the extent of Rs.71,25,868/- has already been disallowed by the assessee. The Ld. Counsel submitted that **firstly** in view of the decision of the Hon'ble Delhi High Court in the case of Joint Investment Private Limited Vs. CIT 372 ITR 694 held that the disallowance u/s 14A of the Act cannot exceed the exempted income and therefore, no further disallowance is warranted in the case of the assessee. **Secondly**, he submitted that



in view of the amalgamation shares of the Somani and Company Pvt. Ltd. has already extinguished and therefore while considering Rule 8D , the interest paid corresponding the same cannot be disallowed and also quantum of those shares cannot be taken into account for computation of disallowance. He referred to paper book page 153 to 167 and submitted that revised financial statements were already filed before the AO.

8.3 We have noted that Hon'ble Delhi High Court in the case of M/s Joint investment Company (supra) has already held that disallowance u/s 14A of the Act cannot exceed dividend income. In the case of PCIT vsc Era Infrastructure (India) Ltd., (2022)141taxmann.com 289(Delhi), the Hon'ble Delhi High Court considered the effect of amendment made by the Finance Act, 2022 to section 14A of the Act by insertion of a non obstante clause and explanation after the proviso, subsequent to the decision of the Hon'ble Delhi High Court in the case of PCIT vs. IL&FS Energy Development Co. Ltd., (2017) 84 com186. The Hon'ble High Court analysed the same in the light of the decision of the Hon'ble Supreme Court in the case of Sedco Forex International Drill. Inc. vs. CIT (2005) 149 Taxman 352 reiterated in M.M. Aqua Technologies Ltd. vs. CIT (2021) 129 taxmann.com 145 and held that the amendment to section 14A of the Act which is 'for removal of doubt' cannot be presumed to be retrospective even where such language is used, if it alters or changes law as it earlier stood.



Thereupon the Hon'ble High Court followed the decision of IL&FS Energy Development Co. Ltd., (supra) and concluded that no disallowance under section 14A of the Act can be made if the assessee had not earned any exempt income during the year under consideration. Hon'ble High Court, however, was pleased to clarify that the orders passed in the case of Era Infrastructure (India) Ltd., (supra) shall abide by the final decision of the Hon'ble Supreme Court in the SLP filed in the case of IL&FS Energy Development Co. Ltd., (supra). The decision in Era Infrastructure (India) Ltd., (supra) was followed by the Hon'ble Delhi High Court in the case of Delhi International Airport (P.) Ltd., (supra). Since in the case assessee has already made disallowance to the extent of exempted income, therefore, respectfully following the finding of the Hon'ble Delhi High Court, we set aside the finding of the Ld. CIT(A) on the issue in dispute and delete the addition made by the Assessing Officer. The arguments of the ld counsel for the assessee for restricting the disallowance under rule 8D to the extent of interest corresponding to the investment in mutual funds, are rendered academic only. The ground Nos. 1 to 4 of the appeal are accordingly allowed.

8.3 In ground No. 5, the assessee is aggrieved with the direction of the Ld. CIT(A) upholding the stand of the Assessing Officer of not considering the revised computation of the income filed in compliance to the amalgamation of the order of the Hon'ble High Court passed on 12.12.2012. The ld Counsel referred to PB 153 to



169 , which is a copy of revised computation of income and financial statement prepared in consequent to the order of Hon'ble Bombay high Court and relied on the order of Hon'ble supreme court in the case of **Dalmia Power Ltd vs ACIT in (2019) 112 taxmann.com 252 (SC)** , wherein it is held that at the time of passing order by the NCLT for approval and sanction of merger/amalgamation , the time for filing revised return already expired and therefore it was impossible for the assessee to file revised returns of income , thus department was directed to receive revised return and complete assessment after tasking into account scheme of arrangement and amalgamation as sanctioned by the NCLT. We find that that the Ld. CIT(A) upheld the decision of the Assessing Officer in view of the decision of the Hon'ble Supreme Court in the case of **Goetze (India) Ltd. [(2006, 284 ITR 323, (SC)]** but the Ld. CIT(A) however has mentioned that direction given and the date specified in the original order dated 17.08.2012 as well as revised order dated 10.12.2012 of Hon'ble High Court will have to be complied with by the AO. Accordingly, following the finding of the Hon'ble supreme court in the case of **Dalmiya Power Ltd (supra)**, we uphold the direction of ld CIT(A) to the Assessing Officer to take into consideration revised computation of the income of the assessee in compliance of the amalgamation order approved by the Hon'ble Bombay High Court vide order dated 12.12.2012. The ground No. 5 of the appeal of the assessee is accordingly allowed.



9. In the result, the appeal of the Revenue is dismissed whereas appeal of the assessee is allowed.

Order pronounced in the open Court on 09/10/2023.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 09/10/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai