

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI**

**BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM**

आयकर अपील सं/ I.T.A. No.2683/Mum/2023

(निर्धारण वर्ष / Assessment Year: 2020-21)

ACIT(CC)-6(4) Room No. 1925, 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400021.	<b>बनाम /</b> Vs.	Indiabulls Housing Finance Ltd M-62 & 63 1 <sup>st</sup> Floor, Connaught Place, New Delhi-110001.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCI3612A</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri K. Gopal	
Revenue by:	Shri Hemankumar Chimanlal Leuva (CIT-DR)	

सुनवाई की तारीख / Date of Hearing: 13/11/2023

घोषणा की तारीख /Date of Pronouncement: 29/11/2023

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the revenue against the order of the Ld. CIT(A)/NFAC, Delhi dated 30.05.2023 for the AY. 2020-21.

2. Ground no. 1 of revenue reads as under: -

“1. “Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made u/s 14A by holding that the disallowance u/s 14A cannot exceed the exempt income by ignoring the CBDT circular no 5/2014 which is clarificatory in nature.

2. “Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the explanation to the section 14A introduced w.e.f 01.04.2022 which clearly states that the provisions of the section 14A shall apply and shall be deemed to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous



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year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income. ?

**3. Facts relevant to the aforesaid grounds as noted by Ld. CIT(A) is as under: -**

“6.1 During the course of assessment proceedings, the AO observed that the assessee company had claimed exempt income of Rs. 859,23,74,682/-. The assessee company had suo-moto disallowed a sum of Rs.22,55,27,357/- u/s 14A of the Act. The AO asked the assessee to furnish the computation of the disallowance made by it. It was noticed from the details furnished by the assessee that while computing the disallowance the assessee only considered the investment on which it had earned exempt income and excluded those investment which were capable of generating exempt income. The assessee was show-caused as to why the disallowance u/s.14A should not be in accordance with Rule 8D of the Income Tax Rules, 1962 as, according to the AO all investments were to be considered for working out such disallowance. The assessee submitted that it had already made disallowance u/s.14A amounting to Rs. 22,55,27,357/- being the expenses attributable to the exempt income on the basis of investments on which exempt income had been earned. The assessee further stated that no other disallowance u/s14A is warranted other than the disallowance suo-moto made by the assessee. However, the assessee’s explanation was not found acceptable to the AO who proceeded to compute the disallowance in accordance with Rule 8D and made a further disallowance of Rs.38,76,81,666/-



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(Rs.61,32,09,023 - Rs.22,55,27,357) and added the same to the total income of the assessee.”

4. Aggrieved by the aforesaid action of AO disallowing further amount of Rs.3,87,68,166/- in place of *suo-motto* disallowance made by assessee to the tune of Rs.22,55,27,357/-, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to allow the appeal of assessee *subject to verification* as under: -

“6.4 The appellant has firstly argued that the CBDT circular no. 5/2014, which has been relied upon by the AO, is not a conclusive evidence to trigger Rule 8D. In this regard, the appellant has relied upon decision in the case of Redington (India) Ltd. vs. Additional Commissioner of Income -Tax (2017) 392 ITR 063. The appellant has further submitted that Investments that did not earn any exempt income during the year cannot be included for computing average investment u/r 8D. In support of this submission the appellant has relied upon the decision in the case of the High Court in the case of ACB India Ltd vs ACIT [TS-176-HC-2015(DEL)]. All the arguments taken by the appellant have been considered.

6.5 In this regard, it is seen that in view of the decision of Special Bench, ITAT is Delhi in the case of ACIT v. Vireet Investment (P.) Ltd. [2017] 82 taxmann.com 415 (Delhi - Trib.) (SB) as also the decision of the jurisdictional Mumbai ITAT in the case Excel Industries Ltd. in ITA No. 5472/Mum/2017 (Order dated 09.01.2023), it is now a settled view that investments that yielded exempt income during the year only have to be considered for computing average investment for the



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purpose of the 8D. The appellant has, however, not given any bifurcation of investment that earned exempt income and that did not. Therefore, the quantification of average investment that yielded exempt income is not possible. Accordingly, the appellant is directed to give bifurcation of investment that earned exempt income and that did not result into exempt income to the AO and the AO is directed to compute disallowance u/s 14A taking average investment of those investments that have yielded the exempt income, My Ld. Predecessor, while deciding the appeal of the assessee for AY 2017-18 had also taken this view and I also see no reason to deviate from this view. Accordingly, this ground of appeal is partly allowed.”

**5.** Aggrieved by the aforesaid action of Ld. CIT(A), the revenue has preferred this appeal.

**6.** Assailing the action of Ld. CIT(A), the Ld. CIT-DR contended that Ld. CIT(A) erred in directing the AO to compute disallowance u/s 14A of the Act taking average investment of those investments that have yielded the exempt income. The Ld. DR referring to the amendment brought in by Finance Act, 2022 wherein Explanation was inserted under proviso to sub section (3) of section 14A of the Income Tax Act, 1961 (hereinafter “the Act”) submitted that the impugned action of Ld. CIT(A) is erroneous; and also submitted that impugned action is against the CBDT circular no. 05/2014. So, he contended that Ld. CIT(A) action is erroneous and pleaded that the impugned action of Ld. CIT(A) be reversed and action of AO be upheld.



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7. Per contra, the Ld. AR of the assessee, *inter-alia* supported the action of Ld. CIT(A) in principle. However, pointed out that assessee have not received copy of Form-36 along with grounds of appeal and conveyed his desire to file Cross Objection (CO) against the action of Ld. CIT(A) to the extent of the direction given by him regarding verification by AO about quantification of average investment which yielded exempt income. Further, according to Ld. AR, the amendment brought in by Finance Act, 2022 in section 14A of the Act is prospective in operation w.e.f. 01.04.2022 for AY. 2022-23 onwards and not applicable to the relevant year under consideration and for such proposition cited the Hon'ble Delhi High Court decision in the case of PCIT Vs. Era Infrastructure (India) Ltd. (2022) 448 ITR 674 (Delhi). Therefore, he submitted that amendment is not applicable for the present case. According to Ld. AR, the verification ordered by Ld. CIT(A) is not necessary because all relevant facts were submitted before AO which fact is discernable from AO's order and referred to assessment order para no. 3.1 and chart reproduced thereunder. Therefore, on principle he supported the action of Ld. CIT(A) and objected against the verification part of the order passed by Ld. CIT(A).

8. We have heard both the parties and perused the records. We note that assessee company has earned exempt income of Rs.859,23,74,682/- and *suo-motto* disallowed under Rule 8D of the Rules an amount of Rs.22,55,27,357/-. The AO asked the assessee during the assessment proceedings to furnish the details of *suo-motto*



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disallowance; and pursuant to such direction, the assessee filed the details of computation of disallowance of Rs.22,55,27,357/- as well as the breakup of exempt income i.e. dividend from Mutual Fund (MF) Rs.816,82,35,236/-, interest earned from Pass Through Certificate (PTC) of Rs.42,19,74,646/- and interest from bonds of Rs.21,64,800/-. The assessee also submitted the detailed working of the same in a chart format reproduced by the AO reproduced under para 3.1. of the assessment order. However, AO having acknowledged that assessee has filed the aforesaid details noted that assessee while computing disallowance under Rule 8D of the Rules, has only considered the investment on which it has earned exempt income and in that process has excluded those investments which were capable of generating exempt income. According to AO, there was no restriction placed by section 14A of the Act that would suggest that while making disallowance under Rule 8D of the Rules only investment need to be considered which yielded exempt income. And after referring to CBDT Circular No.05/2014 and amendment brought in by Finance Act, 2022, he re-computed the disallowance u/s 14A of the Act at Rs.61,32,09,023/- and thus disallowed further an amount of Rs.38,76,81,666/- (Rs.61,32,09,023 minus Rs.22,55,27,357/-). On appeal, the Ld. CIT(A) upheld the contention of assessee that disallowance under Rule 8D(2)(iii) of the Rules should be made only on investment which yielded exempt income by referring to Special Bench decision of this Tribunal in ACIT Vs. Vireet Investment (P) Ltd. (2017) 82 taxmann.com 415 (Delhi-Trib) (SB) and further directed the assessee to submit before AO, the bifurcation of



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investment that earned exempt income as well as investment which did not result in exempt income and directed AO to re-compute the disallowance u/s 14A of the Act by taking the average investment of those investment that have yielded the exempt income. We agree with the action of Ld. CIT(A), firstly because he has followed the ratio laid by Special Bench decision of this Tribunal in Vireet Investment (supra) wherein it was held that for computing the average investment for the purpose of Rule 8D(2)(iii) of the Rules, the investment that yielded exempt income during the year only have to be considered and not the investment which did not yield any exempt income. And for such a proposition, we also rely on the decisions of Hon'ble High Court of Delhi in the case of ACB India Ltd. Vs. ACIT (374 ITR 108) (Del); and we find nothing wrong in the direction given by the Ld. CIT(A) and therefore, reiterate the direction of Ld. CIT(A) to assessee to submit before AO the value of investment which yielded exempt income and then the AO to compute disallowance u/s 14A of the Act taking average investment of those investment that have yielded the exempt income. And if the assessee is able to demonstrate that suo-motto disallowance made by assessee to the tune of Rs.22,55,27,357/- is in consonance with the aforesaid discussion, then no more disallowance is warranted. With the aforesaid observation, AO is directed to re-compute disallowance in accordance to law. For completeness, we do not find any merit in the contention of Ld. DR that in the light of amendment/explanation inserted by Finance Act, 2022, the disallowance made by AO is justified. We find that this issue is also no longer res-integra. The explanation inserted by Finance Act,



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2022 w.e.f. 01.04.2022 is applicable from AY. 2022-23 onwards as held by Hon'ble Delhi High Court in Era Infra Structure (India) Ltd. (supra). Therefore, this contention of Ld. DR is also rejected.

**9.** Coming to ground no. 2 of revenue, which is against the action of Ld. CIT(A) deleting ESOP expenses of Rs.6,38,52,634/-.

**10.** Facts relevant to the aforesaid issue is that assessee company had claimed ESOP expenses of Rs.6,38,52,634/- and AO asked the assessee to justify the claim of expenses to which assessee cited the earlier year decision in its own case passed by Ld. CIT(A)/ITAT, wherein similar issue was decided in assessee's favour and held it to be revenue expense. But AO did not agree. According to him, any expenses/loss on account of ESOP is towards raising of share capital and thus capital in nature; and he disallowed the claim. On appeal, the Ld. CIT(A) deleted the addition by holding as under: -

“7.4 In the appellate order passed for AY 2013-14, my Ld Predecessor, while deciding the same issue, had observed that in the assessment order u/s 153A the AO had made the disallowance of ESOP expenses, which was made originally in the assessment order u/s 143(3) for A.Y. 2013-14. My Ld. Predecessor further observed that the CIT(A)-22, Delhi had deleted the disallowance of ESOP. expenses made in the order u/s 143(3) for the same assessment year, i.e. A.Y. 20 3-14. Further, the CIT(A)-XV, Delhi in the case of M/s Indiabulls Financial Services Limited (now merged with the assessee company) had also allowed ESOP expenses for AY 201112. Since, there was no change in the facts of the issue at hand,



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therefore, my Ld. Predecessor found no reason to deviate from the decision taken by the CIT(A)-22 and CIT(A)-IV, Delhi in respect of AY 2013-14 also. Thus, the disallowance of ESOP expenses made by the AO was deleted for AY 2013-14. The Hon'ble Mumbai ITAT in the assessee's own case for AY 2013-14 in ITA NO.1414/MUM/2022 (order dated 31.10.2022) has also upheld the decision of the Ld CIT(A) in deleting the addition on the issue of ESOPs and dismissed the departmental appeal. Relevant extract of the aforesaid decision is as under:

8. In ground No. 4 and 5 of appeal, the Department has assailed the order of CIT(A) in allowing the claim of ESOP expenses. The learned Authorized Representative (AR) submits that the issue of ESOP expenses was considered by the Tribunal in assessee's own case in ITA No. 4849/MUM/2019 for assessment year 2013-14 decided on 08/03/2021. We find that the Co-ordinate Bench dismissed this ground in an appeal by the Revenue following the decision in assessee's group company in ITA No. 6602/Del/2016 for assessment year 2012-13 decided on 11/03/2020.

The Delhi Bench placing reliance on the decision of Spl. Bench in the case of Biocon Ltd. 155TTJ649 (Bang-Trib) held that the discount under ESOP is allowable deduction u/s 37(1) of the Act. The CIT(A) in the impugned order deleted the addition following the order of CIT(A) in the case of M/s. Indiabulls Financial Services Ltd. (now merged with the assessee Co.) for the A.Y. 2011-12. The CIT(A) categorically observed that there is no change in the facts. The Revenue has not been able to rebut the above observations of the First Appellate Authority. We find no reason to interfere with the finding of the CIT(A)



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on this issue. Accordingly, ground No. 4 and 5 of the appeal are dismissed.

7.5 Same view was also taken by Ld. Predecessor for AY 2017-18 also. The appellant has also submitted that the facts this year are the same as the earlier years. Since there is no change in the facts of the issue at hand, therefore, I also see no reason to deviate from the decision taken by my Ld. Predecessor on this issue for AY 2017-18. Accordingly, the addition is deleted. This ground of the appeal is thus allowed.”

**11.** We note that Ld. CIT(A) has allowed the ESOP expenses by relying on the decision of his predecessor in assessee’s own case as well as the decision of Tribunal dated 31.10.2022 in assessee’s own case for AY. 2013-14 in ITA. No.1414/Mum/2022. In such a scenario, we will be able to interfere only if the revenue is able to show that there is change in facts or law which warrant interference. Since revenue could not point out any change in facts or law vis-à-vis the decision of ours in assessee’s own case for earlier years, we have no other alternative but to uphold the impugned action of Ld. CIT(A).

**12.** In the result, the appeal of the revenue stands dismissed.

Order pronounced in the open court on this 29/11/2023.

Sd/-  
(AMARJIT SINGH)  
ACCOUNTANT MEMBER

Sd/-  
(ABY T. VARKEY)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 29/11/2023.  
Vijay Pal Singh, (Sr. PS)



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**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

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