

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI NARENDER KUMAR CHOUDHRY, JM

ITA No.1228/Mum/2023

(Assessment Year: 2011-12)

ACIT, Circle 2(1)(1)
Room No.575, 5th Floor,
Aaykar Bhavan,
M.K. Road,
Mumbai-400 020

(Appellant)

Vs.

M/s Bank of India
C5 Block Star House,
Bandra Kurla Complex,
Bandra East,
Mumbai-400 051

(Respondent)

PAN No. AAACB0472C

ITA No.1094/Mum/2023

(Assessment Year: 2011-12)

M/s Bank of India
C5 Block Star House,
Bandra Kurla Complex,
Bandra East,
Mumbai-400 051

(Appellant)

Vs.

ACIT, Circle 2(1)(1)
Room No.575, 5th Floor,
Aaykar Bhavan,
M.K. Road,
Mumbai-400 020

(Respondent)

Assessee by

: Mr . C Naresh CA

Revenue by

: Shri Sanjay Deshmukh CIT DR
and Shri P D Chougule, Addl.
CIT

Date of hearing:

3/7/2023 and
08.12.2023

Date of pronouncement :

21.12.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA No. 1228/Mum/2023, is preferred by the learned Assessing Officer being Asst. Commissioner of Income-tax, Circle 1(1), Mumbai [Id AO] and ITA no 1094/M/2023



is filed bank of India [Assessee] against the appellate order passed by the National Faceless Appeal Centre (NFAC), Delhi, for A.Y. 2011-12 on 15th February, 2023, wherein the appeal filed by the assessee against the order passed under Section 143(3) read with section 254 of the Income-tax Act, 1961 (the Act), passed by the learned Assessing Officer on 26th March, 2019, was partly allowed. Both the parties are aggrieved and are in appeal before us

02. The learned Assessing Officer is aggrieved with the appellate order and has preferred the appeal raising following grounds of appeal:-

"1. Whether on the fact and circumstances of the case and in law the learned CIT (A) was right in holding that if there are funds available both interest free and loans fund then presumption would arise that investment is made out of interest free fund for calculation of disallowance under Section 14A read with Rule 8D2(ii) when the issue of mixed fund as pending before larger Bench of Supreme Court. More so when no nexus is established by the assessee to prove that own i.e. interest free funds were initiated to make the investment?

2. Whether on the facts and in the circumstances of the case and in law, the learned CIT (A) was correct in holding that the interest portion of the refund issued earlier has to be ignored for the purpose of calculating interest under Section 244A of the Income-tax Act, 1961 (the Act), payable to the



assessee, on refund arising out of the order giving effect to order of appellate authority?

3. the learned CIT (A)'s order is contrary in law and on the facts and deserves to be set aside.

4. The appellant prays that the order of CIT (A) on the above grounds be set aside and that of the Assessing Officer restored. The appellant craves leave to amend or alter any ground or add a new ground that may be necessary at the time of hearing. "

03. Assessee has appealed against the disallowance confirmed u/s 14 A of the Act.
04. The brief facts of the case shows that assessee is a bank engaged in the banking business, filed its return of income on 29 November, 2011, at a total income of ₹1,683 crores. This return was revised on 18th March, at ₹1187 crores. Assessment under Section under Section 143(3) of the Act was made determining the total income at ₹4,165 crores. The assessment order was challenged before the learned CIT (A), as per appellate order dated 16th March, 2016, he partly allowed the appeal of the assessee. The assessee preferred the appeal before the co-ordinate Bench in ITA No.4357 to 4491/Mum/2016 dated 25th May, 2018, which restored the matter before the learned Assessing Officer for considering the arguments of the assessee against disallowance under Section 14A of the Act.



05. The learned Assessing Officer passed the consequent order on 26th March, 2019. He noted that the assessee has earned exempt income of ₹18,07,69,806/- and disallowed the equivalent amount under Section 14A read with Rule 8D of the Rules. The assessee argued before him that assessee is a bank and securities are held as stock-in-trade and therefore, disallowance under Section 14A of the Act is not warranted. Several other arguments were also raised. However, same were rejected. Ld AO made disallowance of Rs 597626012/- reduced therefrom disallowance restricted to exempt income of Rs 180769806/-.
06. The assessee also contended that assessee has not been granted interest under Section 244A of the Act on the refund remaining unpaid, which included the interest element but has not been paid. The learned Assessing Officer computed the refund and interest, however, while computing the refund has first adjusted the refunds already granted against the interest under Section 244A of the Act and thereafter interest under Section 244A of the Act was calculated on the balance sum. Thus, he did not calculate the interest under Section 244A of the Act already due up to the dates of the grant of the refund.
07. The assessee aggrieved that the same has preferred an appeal before the learned Commissioner of Income-tax (Appeals). The appellate order was passed wherein the learned CIT (A) held that he does not agree with the contentions of the assessee that if the bank is holding

shares as investment or stock-in-trade, the provisions of Section 14A of the Act would apply. He held so as per the decision of Hon'ble Supreme Court in case of Maxopp Investment Ltd. However, he found that the stand of the learned Assessing Officer in invoking the provisions of Section 14A of the Act is proper. However, with respect to the indirect expenses disallowance cannot be made as the assessee having huge interest free funds more than the investment yielding tax free income. Further, the disallowance made by the learned Assessing Officer under Rule 8D(2)(ii) of the Act was restricted up to ₹5,92,74,298/- over and above the suo moto disallowance of the assessee at ₹11,73,702/-. This is computed at the rate of 0.5% of average investment of ₹1,208.96 crores computed originally.

08. With respect to the granting of the interest he followed the decision of the co-ordinate Bench, wherein it has been held that amount of refund has to be adjusted towards interest payable to the assessee and then it shall be adjusted to tax. He directed the learned Assessing Officer to follow the decision of the co-ordinate Bench.
09. Against this appellate order, the learned Assessing Officer is aggrieved.
010. The learned Departmental Representative on disallowance under Section 14A of the Act submitted that the learned CIT (A) is incorrect in holding that if there are funds available with the assessee as a common pool of interest free and interest bearing funds, the assessee cannot be



granted the benefit of the presumption. Therefore, the disallowance under Rule 8D(2) of the Rules is required to be made. Therefore, he submits that when no nexus is established by the assessee to prove that interest free funds are used for making investment such presumption cannot be granted.

011. On the ground no.2, he submitted that the learned CIT (A) is not correct in holding that refund is required to be adjusted first against the interest payment and then on taxes.
012. The learned Authorized Representative submitted that identical issue arose in case of the assessee for A.Y. 2012-13 in assessee's own case which has been contested by the co-ordinate Bench on 28th June, 2013. He submits that provisions of Section 14A of the Act, the co-ordinate Bench has held that if the shares are held as stock-in-trade no disallowance can be made. He submits that the ground no.1 of the appeal is covered.
013. With respect to the ground no.2, he submits that the learned CIT (A) has relied upon the several decisions of the co-ordinate Bench which are not disputed.
014. The Id DR in rejoinder to disallowance u/s 14A of the Act submitted that if the view is taken that in case of a bank if investments are held to be stock in trade, then exempt income earned from that stock in trade does not invite disallowance u/s 14A of the Act is fallacious. He submits that law cannot be read in manner, which makes the

section unworkable. He further submits that in case of individual who is dealer in stocks and hold it as stock in trade then also the disallowance cannot be made u/s 14 A of the Act if the above proposition is accepted. He submits that it is neither the intention of the law and nor the purport of the decision of Honourable Supreme court in Maxopp's case. He referred to para no 30 onwards of that decision where it is held that :-

"33. *There is no quarrel in assigning this meaning to section 14A of the Act. In fact, all the High Courts, whether it is the Delhi High Court on the one hand or the Punjab and Haryana High Court on the other hand, have agreed in providing this interpretation to section 14A of the Act. The entire dispute is as to what interpretation is to be given to the words 'in relation to' in the given scenario, viz. where the dividend income on the shares is earned, though the dominant purpose for subscribing in those shares of the investee company was not to earn dividend. We have two scenarios in these sets of appeals. In one group of cases the main purpose for investing in shares was to gain control over the investee company. Other cases are those where the shares of investee company were held by the assesseees as stock-in-trade (i.e. as a business activity) and not as investment to earn dividends. In this context, it is to be examined as to whether the expenditure was incurred, in respective scenarios, in relation to the dividend income or not.*



34. *Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessee would apply while interpreting Section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind Section 14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act. This is so held in Walfort Share & Stock Brokers (P.) Ltd., relevant passage whereof is already reproduced above, for the sake*

of continuity of discussion, we would like to quote the following few lines therefrom."

015. We have carefully considered the rival contentions and perused the orders of the lower authorities. We find that on the issue of applicability of Section 14A of the Act, the co-ordinate Bench had decided the issue that when the assessee is holding investment as stock-in-trade, no disallowance under Section 14A of the Act can be made. The co-ordinate Bench decided the issue for A.Y. 2012-13, relying on the decision of PCIT Vs. Punjab National Bank reported in 140 taxmann.com 131, where in it has been held that where the assessee bank is holding investment as stock-in-trade no disallowance under Section 14A of the Act can be made. Honourabel high court held so as under :-

"15. The Appellant in the present appeal has also challenged the deletion of the disallowance under rule 8D(2)(ii) of Rs. 17,48,97,348/-. The said disallowance was deleted by the CIT (Appeals) vide order dated 28th June, 2017. The CIT (Appeals) noted that this issue was also covered by the order of the ITAT in the case of Respondent in Assessment Year 2009-10. It was noted that in the said Assessment Year the Tribunal had observed that no part of the borrowed funds were utilised by the Respondent for making investments yielding tax free income. It was also observed that the

Assessing Officer had not brought on record any nexus between the borrowed funds and amounts invested by the Respondent. The Tribunal, therefore, held that the disallowance made by the Assessing officer under rule 8D(2)(ii) of the Rules was not permissible. The learned Counsel for the Appellant has not disputed the aforesaid facts and on this ground additionally, no challenge can be maintained to the deletion of the disallowance made under this Rule.

16. *The learned counsel for the Appellant has contended that the decision of the Tribunal deleting the addition of Rs. 1,58,00,000/- made by the JAO under section 14A of the Act read with rule 8D(iii) is incorrect since the said amount was offered for disallowance suo moto by the Respondent.*

17. *In this regard, the Tribunal has observed that the facts of the Respondent in the present appeal are similar to the order passed by another Bench of the Tribunal in the case of Nice Bombay Transport (P.) Ltd. v. Asstt. CIT [2019] 103 taxmann.com 338/175 ITD 684 (Delhi - Trib.) wherein issue relating to Section 14A of the Act read with Rule 8D of the Rules in respect of shares held in stock has been discussed and adjudicated in favour of the Assessee therein.*

18. *Learned counsel for Appellant has submitted that the facts of the assessee in the case of Nice*



Bombay Transport (P.) Ltd. (supra) are distinct from the case at hand, however, no submissions have been made with respect to the said 'distinguishing facts'. On the contrary, it is noted that the Supreme Court has held in the case of Maxopp Investment Ltd. v. CIT [2018] 91 taxmann.com 154/254 Taxman 325/402 ITR 640 that in cases where the main purpose for investing in shares was to hold the same as stock-in-trade, the expenditure incurred by the Respondent shall be permissible to be deducted from its gross income. The relevant paragraph of the judgment of the Supreme Court reads as under :

"...40 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...."

19. *The Supreme Court in this judgment upheld the decision of the High Court of Punjab and Haryana arising under section 14A of the Act with respect to an assessee bank. It further held that when the shares were held as stock-in-trade and not as investment particularly by banks, the main purpose was to trade in those shares and earn profits there from and therefore section 14A of the Act was not attracted and the expenditure could not be disallowed. The judgment of Maxopp Investment Ltd. (supra) has been duly noted by the Tribunal in its impugned order and in our opinion the Tribunal*

has correctly disallowed the disallowance under rule 8D(2)(iii) of the Rules.

20. *In the present case as well, the Tribunal has considered that the Respondent was holding the shares as a stock-in-trade and has, therefore, disallowed the addition made by the JAO. Learned counsel for the Appellant has not disputed the fact that the shares are held as stock-in-trade by the Respondent.*

21. *In the aforesaid view of the matter, the questions of law proposed by the Appellant do not arise for consideration either in fact or in law in view of the judgments of the Supreme Court, which have conclusively decided the questions sought to be canvassed by the Appellant.”*

016. Thus in the above case Honourable High court referred to para no 40 of the order of the Honourable Supreme court where as the Id DR referred to before us Para no 33 onwards of that decision where honourable supreme court has discussed that dominant purpose theory is not important.

017. However, judicial precedents bind us. Therefore, respectfully following the decision of the co-ordinate Bench in assessee's own case ground no.1 of the appeal is dismissed and appeal of assessee is allowed.



018. With respect to the ground no.2 of the appeal, the short controversy is that when the refund is due to the assessee, the amount refunded has to be adjusted towards interest payment to assessee first and the balance any shall be adjusted towards tax. This issue has been decided by the learned CIT (A) in favour of the assessee by relying upon several judicial precedents of the co-ordinate Benches. No contrary decision was produced before us. Therefore, we uphold the order of the learned CIT (A).

019. Accordingly, the appeal of the learned Assessing Officer is dismissed and appeal of assessee is allowed.

Order pronounced in the open court on 21.12. 2023.

Sd/-
(NARENDER KUMAR CHOUDHRY)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 21.12. 2023

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai