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

SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 502/MUM/2024	**ITA No. 302/MUM/2024**
(Assessment Year: 2017-18)	**(Assessment Year: 2018-19)**

Bennett Property Holdings Company Limited
5th Floor, Times Tower, Kamala Mills Compound
S.B. Marg, Lower Parel(W), Mumbai-400 013
Maharashtra.
[PAN: AAECB3780H] ..... **Appellant**

Deputy Commissioner of Income Tax
Circle 1(1)(1), Mumbai
Aayakar Bhavan, Mumbai-400 020 ..... **Respondent**

Vs

ITA No. 556/MUM/2024	**ITA No. 557/MUM/2024**
(Assessment Year: 2017-18)	**(Assessment Year: 2018-19)**

Assistant Commissioner of Income Tax
Circle 1(1)(1), Mumbai
579A,Aaykar Bhavan,
M.K. Road, Mumbai-400 020 ..... **Appellant**

Bennett Property Holdings Company Limited,
5th Floor, Times Tower, Kamala Mills Compound
S.B. Marg, Lower Parel(W), Mumbai-400 013
Maharashtra ..... **Respondent**
[PAN: AAECB3780H]

Vs

Appearance

For the Appellant/Assessee	**:**	Shri Madhur Agarwal & Shri Fenil Bhatt
For the Respondent/Department	**:**	Shri Kailash C. Kanojiya & Ms. Kaveeta Punit Kaushik

Date

Conclusion of hearing	**:**	25.09.2024
Pronouncement of order	**:**	12.12.2024

O R D E R

Per Bench:

1. This is a batch of four appeals consisting of a set of 2 cross-appeals

pertaining to Assessment Years 2017-18 and 2018-19. Since identical issues were raised in the appeals, the same were heard together and are, therefore, being disposed off by way of a common order.

Assessment Year 2017-2018

2. We would first take up cross-appeals pertaining to Assessment Year 2017-18 which arose from the order, dated 13/12/2023, passed by the National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as '**the CIT(A)**'], whereby the Ld. CIT(A) had partly allowed the appeal against the Assessment Order, dated 26/12/2019, passed under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'].

3. The Assessee has raised the following grounds of appeal in ITA No.502/Mum/2024:

> *"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the disallowance of Rs 6,38,05,671 made by the Ld. AO u/s 14A(2) of the Income Tax Act, 1961(the Act), by invoking Rule 8D.*
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> *2. On the facts and in the circumstances of the case and in law, since the Ld.AO erred in invoking Rule 8D to disallow Rs 6,38,05,671 under Section 14A(2) of the Act without coming to an objective satisfaction based on the accounts of the appellant that the disallowance made in the return of income was incorrect, the order of the Ld. CIT(A) confirming the said disallowance of Rs 6,38,05,671 was erroneous.*
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> *3. On the facts and circumstances of the case and in law. assuming without admitting that Rule 8D is applicable and can be invoked the appellant submits that: -*
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> *(a) Since no income was received by the appellant from its subsidiaries, the value of investments held by the appellant in its subsidiaries are not includible in arriving at the monthly averages of the opening and closing balances of investment under the said Rule.*

(b) Since the income earned by the appellant in mutual fund units held under growth schemes are taxable, the value of investments held by the appellant in mutual fund units under growth schemes are not includible in arriving at the monthly averages of the opening and closing balances of investment under the said Rule.

4. *On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in denying set off of the accumulated loss and unabsorbed depreciation of the demerged company, in so far as it pertained to the demerged undertaking, by erroneously relying upon the provisions of Section 72A(2) of the Act.*

5. *On the facts and in the circumstances of the case and in law appellant submits that the accumulated loss and unabsorbed depreciation of the demerged company, in so far as it pertains to the demerged undertaking, is allowable under Section 72A(4) of the Act and not under Section 72A(2) of the Act and the Ld. CIT(A) erred in not allowing the same.*

6. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erroneously relied on the sixth proviso to Section 32(1) of the Act to deny deduction of depreciation of Rs 4,38,18,551 in calculating book profits under Section 115JB of the Act.*

7. *On the facts and in the circumstances of the case and in law, the appellant having accounted for the fixed assets of its subsidiaries on amalgamation in accordance with Accounting Standard on Amalgamation (AS-14), depreciation of Rs 4,38,18,551 on the said amounts at which the fixed assets were recorded in the books of the appellant was deductible in computing book profits under Section 115JB of the Act and the Ld. CIT(A) erred in not allowing the same.*

8. *On the facts and in the circumstances of the case and in law, the appellant submits that the proviso to Section 10(38) being a charging provision is substantive in nature and consequently what is includible in arriving at book profits under Section 115JB of the Act is the long-term capital gain arrived at based on the indexed cost of acquisition of fixed assets and the Ld. CIT(A) erred in not accepting the same.*

9. *On the facts and in the circumstances of the case and in law, the appellant submits that the Ld. CIT(A) erred in not allowing credit of tax deducted allowing credit of tax deducted at source*

pertaining to 8 subsidiaries that had merged into the appellant and tax deducted at source pertaining to a division of an entity that was demerged and merged with the appellant. The Ld. CIT(A) ought to have directed the Ld. Assessing Officer to examine the claim of the appellant and allow the same.

10. On the facts and in the circumstances of the case and in law, the appellant submits that interest u/s 234B of the Act is chargeable only if there is a shortfall in the tax paid as compared to the assessed tax, after granting relief as above and after granting credit of tax deducted at source as above and the Ld. CIT(A) erred in not directing the Ld. Assessing Officer to do so accordingly."

4. The Revenue has raised the following grounds of appeal in ITA No.556/Mum/2024

"1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A)/NFAC has erred as deleting the addition made on account of deemed ALV for vacant flats, without appreciating the fact that the AO has rightly adopted calculated Fair Rent as ALV.

2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A)/NFAC has erred in deleting the addition made on account of deemed ALV for vacant flats, without appreciating the fact that the provisions of section 23(1)c of the Act is not applicable in the instant case.

3. On the facts and in circumstances of the case and in law, the Ld. CIT(A)/NFAC has erred in relying upon the decision of Hon'ble ITAT in the case of Sachin R. Tendulkar VS. DCIT, without appreciating the fact that the case law is not squarely applicable in the instant case."

4. On the facts and in circumstances of the case and in law, the Ld. CIT(A)/NFAC has erred in deleting the addition made on account of disallowance u/s. 14A amounting to Rs. 6,38,05,371/-while calculating income u/s 115JB, without appreciating the fact that the clause (1) in explanation 1 to section 115JB(2) of the Act mandates addition of such disallowance while working of book profit u/s. 115JB"

5. The relevant facts in brief that the Assessee is a company primarily

engaged in the business of earning rental income by letting out properties and running business centres. For the Assessment Year 2017–18, the Assessee filed original return of income on 06/11/2017 which was revised on 28/03/2019. The case of the Assessee was selected for scrutiny. The Assessing Officer completed the assessment under Section 143(3) of the act vide Assessment Order, dated 26/12/2019, assessing the total income of the Assessee under the normal provisions of the Act at INR.1,20,45,17,348/- and computing Book Profits of the Assessee under Section 115JB of the Act at INR.1,33,19,94,660/-. Since the tax payable on Book Profits was less than the tax payable on the income computed under normal provisions of the Act, the Assessee was assessed to tax under normal provisions of the Act.

6. Being aggrieved, the Assessee preferred appeal before the CIT(A) challenging:

(a) addition/disallowance made under normal provisions of the Act:

(i) Disallowance of INR.6,38,05,371/- made by the Assessing Officer under Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 [for short '**IT Rules**']

(ii) Addition taking deemed annual letting value of the immovable properties lying vacant during the relevant previous year at INR.23,28,000/-

(iii) Denial of claim of set off of accumulated loss of INR.12,86,53,730/- and unabsorbed depreciation of INR.15,65,15,799/- relatable to real estate service undertaking of Banhem Estates & IT Parks Ltd. that demerged into the Assessee pursuant to composite scheme of amalgamation and arrangement approved by the Hon'ble Bombay High Court vide order, dated 02/12/2016

(b) Increase/reduction made to the Book Profits computed under Section 115JB of the Act:

(i) Increase in Book Profits by Extra Depreciation of INR 4,38,18,551/-

(ii) Increase in Book Profits by INR 6,38,05,371/- disallowed under Section 14A of the Act by invoking provisions contained in Clause (f) of Explanation 1 to Section 115JB of the Act

(iii) Rejection of Assessee's claim of substitution of long term capital gain (computed by taking index cost of acquisition) in place of the profit on sale of capital asset appearing in the statement of Profit & Loss Account for the purpose of computing Book Profits

(c) The Assessee also raised additional grounds seeking credit of tax deducted at source in respect of companies/undertaking forming part of the composite scheme.

(d) The Assessee are also challenged the computation of interest under Section 234B of the Act.

6.1. The appeal preferred by the Assessee was dispose off by the CIT(A) as partly allowed vide order, dated 13/12/2023. The CIT(A) granted partial relief by (a) deleting the addition made under normal provisions of the act in respect in respect of deemed rental income estimated at INR.23,28,000/-, and (b) accepting Assessee's contention that no disallowance of expenses can be made in respect of any exempt income by invoking provisions contained in Section 14A read with Rule 8D of the IT Rules while computing Book Profits under Section 115JB of the Act by following the decision of Special Bench of the Tribunal in the case of Assistant Commissioner of Income Tax Vs. Vireet Investment Pvt. Ltd. [2017] 165 ITD 27 (Delhi–Trib) (SB).

7. Since, both, the Assessee as well as the Revenue were aggrieved by the order passed by the CIT(A), the present cross-appeals were preferred before the Tribunal. The grounds raised by the Assessee and Revenue are reproduced in paragraph 3 and 4 above, respectively.

ITA No. 556/Mum/2024

8. We would first take up appeal preferred by the Revenue. The Revenue has preferred appeal challenging the deletion of addition in respect of deemed annual letting income of INR.23,28,000/- under normal provisions of the Act. The Revenue has also challenged the relief granted by the CIT(A) by accepting of Assessee's claim that the 'Book Profits' could not be increased by INR 6,38,05,371/- *(being amount disallowed under Section 14A of the Act read with Rule 8D of the IT Rules)*, by invoking provisions contained in Clause (f) of Explanation 1 to Section 115JB of the Act. Thus, the Revenue has raised grounds having impact on the computation of income under normal provisions of the Act and the computation of 'Book Profits' under Section 115JB of the Act.

8.1. The Learned Authorised Representative for the Assessee appearing before us, at the outset, submitted that the Assessee has been assessed under normal provisions of the Act. Even if the grounds raised by the Revenue in relation to the computation of 'Book Profits' under Section 115JB of the Act are allowed in favour of the Revenue, the Assessee would be assessed to tax under the normal provisions of the Act. It was submitted that the grounds of appeal raised by the Revenue pertaining to the additions/disallowance made under the normal provisions of the Act carry tax effect below the specified monetary of INR.60 Lacs fixed by Central Board of Direct Taxes (CBDT) for filing Departmental Appeal before the Tribunal limit. A

Therefore, the appeal preferred by the Revenue should be dismissed as withdrawn in view of Circular No. 5 of 2024, dated 15/03/2024, read with Circular No. 9 of 2024, dated 17/09/2024, issued by CBDT.

8.2. Per Contra, the Learned Departmental Representative submitted that the tax effect as stated in the memorandum of appeal should be considered for the purpose of determining the applicability of Circular No. 5 & 9 of 2024 issued by the CBDT.

8.3. We have perused the Circular No. 5 & 9 of 2024 issued by the CBDT and have given thoughtful consideration to the rival submissions. Circular No.5 of 2024, dated 15/03/2024, when read with Circular No. 9 of 2024, dated 17/09/2024, issued by CBDT clarifies that the monetary limit of 'tax effect' for filing departmental appeals before Tribunal has been increased from INR.50 Lakhs to INR.60 Lakhs. It has also been clarified in Circular No. 9 of 2024 that the aforesaid monetary limit for filing the appeal before the Tribunal would also apply to the pending departmental appeals.

8.4. The contention advanced on behalf of the Assessee is that the Assessee has been assessed under the normal provisions of the Act and this would continue to be the case even if all the grounds raised by the Revenue *(whether related to computation of income under normal provisions of the Act or related to computation of Book Profits under 115JB of the Act)* are allowed. Therefore, for the purpose of computing the 'tax effect' involved in the present appeal preferred by the Revenue only the grounds raised by the Revenue having an impact of determination of total income under the normal provisions of the Act ought to be considered.

8.5. On examination the grounds raised by the Revenue having impact on computation of income under normal provisions of the Act, we find that tax effect involved in the present appeal is below the monetary

limit of INR.60 Lakhs fixed by the CBDT for the purpose of filing departmental appeal before the Tribunal. Paragraph 5.1 of the Circular No.5 of 2024 containing the definition of 'tax effect' reads as follows:

> *"5.1. For this purpose, 'tax effect' means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as '**dispute issues**'). Further, 'tax effect' shall be tax including applicable surcharge and cess. However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include national tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against." (Emphasis Supplied)*

8.6. On perusal of above, we find that 'tax effect' has been defined to mean the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed. When computed as aforesaid, the tax effect in the appeal preferred by the Revenue would fall below the specified monetary limit of INR.60 Lakhs for filing departmental appeals. On perusal of the computation submitted by the Assessee we find that the tax effect in the appeal preferred by the Revenue would only be INR.5,63,973/- for the reason that the Assessee would continue to be assessed under normal provisions of the Act even if all the grounds raised by the Revenue in departmental appeal are assumed to be allowed in favour of the Revenue. Thus, accepting the contention of the Assessee, we dismiss the appeal preferred by the Revenue as 'withdrawn' in terms of Circular No.5 & 9 of 2024 issued by CBDT.

ITA No. 502/Mum/2024

9. We would now adjudicate the grounds raised by the Assessee which are taken up hereinafter in seriatim.

Ground No.1 to Ground No.3

9.1. Ground No.1 to Ground No.3 raised by the Assessee pertain to disallowance of INR.6,38,05,371/- made by the Assessing Officer under Section 14A of the Act by invoking the provision contained in Rule 8D of the IT Rules.

9.2. The facts relevant for adjudication of the grounds under consideration are that in the return of income the Assessee had claimed that dividend income of INR.5,25,85,103/- earned from units of mutual fund during the relevant previous year was exempt from tax and that the Assessee had incurred expenses of INR.4,40,464/- for earning the aforesaid exempt income. Therefore, the Assessee had made suo moto disallowance of the said amount under Section 14A of the Act. While framing assessment under Section 143(3) of the Act the Assessing Officer made further disallowance of INR.6,38,05,371/- under Section 14A read with Rule 8D(2)(ii) of the IT Rules. The aforesaid action of the Assessing Officer was confirmed by the CIT(A) in appeal preferred by the Assessee. Being aggrieved, the Assessee has carried the issue in the present appeal before the Tribunal.

9.3. The Learned Authorised Representative for the Assessee appearing before us submitted that the disallowance made by the Assessing Officer under Section 14A of the act cannot be sustained for the reason that the Assessing Officer has failed to record proper dis-satisfaction regarding suo moto disallowance of INR.4,40,464/- made by the Assessee under Section 14A in the return of income. The Assessing Officer has failed to make reference to the specific cost/expenses debited to the Profit & Loss Account which, in the

opinion of the Assessing Officer, ought to have been allocated by the Assessee for earning exempt income. It was further pointed out that the Assessee was engaged in the business of earning income by way of letting out properties and from running business centres. Most of the expenses debited to the Profit & Loss Account were directly related to the aforesaid business the Assessee. The Assessee had clearly identified common expenses aggregating to INR.1,33,14,638/- which could have been considered to be common expenses incurred for the purpose of earning exempt income and the same consisted of (a) SLA Expenses (Service Agreement) of INR.26,29,500/-, (b) Salary to Accounts & Finance Team of INR.55,63,928/-, and (c) Office Rent & Maintenance Expenses of INR.55,21,210/-. The aforesaid expenses aggregating to INR.1,33,14,638/- were allocated in the ratio of Exempt Income to Total Income to arrive at the disallowance of INR.4,40,464/- under Section 14A of the Act. The Assessing Officer merely rejected the aforesaid computation on the ground that the computation was not in accordance with provisions contained in Rule 8D of the IT Rules. It was submitted that in the appeal preferred by the Assessee for the Assessment Year 2014-15 [ITA No.247/Mum/2024], the Tribunal had, vide order dated 30/05/2024, accepted the aforesaid submission of the Assessee and deleted the disallowance made by the Assessing Officer under Section 14A of the Act without recording proper dis-satisfaction. Without prejudice to the aforesaid, it was submitted on behalf of the Assessee that even the computation made by the Assessing Officer as per Rule 8D of the IT Rules was laden with infirmity. The Assessing Officer had included the growth funds which did not yield exempt income while computing the opening/closing value of investments for the purpose of computing disallowance in terms of Rule 8D of the IT Rules. Further, the inclusion of investments which did not yield the exempt income during the relevant previous year in the opening/closing value of the investments was also contrary to the decision of the Special Bench of

the Tribunal in the case of Vireet Investments Private Limited (supra).

9.4. Per contra the Learned Departmental Representative relied upon the paragraph 5.3 and 5.4 of the Assessment Order to contend that in the present case the provisions contained in Rule 8D of the IT Rules were invoked by the Assessing Officer after recording proper dis-satisfaction as the Assessing Officer had rejected the cost allocated by the Assessee for earning exempt income by making reference to the specific cost such as personnel cost, administration cost, interest cost etc, debited to the Profit & Loss Account. It was further submitted that reliance upon the decision of the Tribunal in the case of the Assessee for the Assessment Year 2014-15 was misplaced since in that case no such dis-satisfaction was recorded by the Assessing Officer. As regards the computation under Section 14A read with Rule 8D of the IT Rules was concerned, the Learned Departmental Representative relied upon the language of Section 14A of the Act to contend that all investments *(whether yielding exempt income during the relevant previous year or not)* were to be included into opening/closing value of the investment.

9.5. In rejoinder, the Learned Authorised Representative for the Assessee submitted that no interest cost was debited to the Profit & Loss Account for the relevant previous year. However, in paragraph 5.4 of the assessment order the Assessing Officer mentioned that *'interest cost on the funds invested'* had been debited to the Profit & Loss Account. Thus, the Assessing Officer had failed to apply his mind to record proper dis-satisfaction before invoking provisions contained in Rule 8D of the IT Rules. Therefore, the Assessing Officer had no jurisdiction to make disallowance under Section 14A of the Act read with Rule 8D of the IT Rules.

9.6. We have considered the rival submissions and perused the material

on record. We have also perused the orders passed by the authorities below. On perusal of paragraph 5.3 and 5.4 of the Assessment Order, we find that in the case before us the Assessing Officer has not invoked provisions contained in Rule 8D of the IT rules merely on the ground that the computation of disallowance under Section 14A made by the Assessee was not in accordance with the provisions contained in Rule 8D of the IT Rules. In paragraph 5.3 and 5.4 the Assessing Officer has recorded as under:

> *"5.3 The submission of the assessee has been perused and duly considered. However, the contention of the assessee is not acceptable. It is noted that assessee has itself accepted that expenses have been incurred for both exempt income as well as taxable income. If there are common expenses incurred for the both, then there is the formula given in Rule 8D for the allocation. But the assessee has not applied Rule 8D in this case.*
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> *5.4 Further, it is noted that assessee has made investments in shares and Mutual Investments. Making investments is an informed decision making process involving study and research. It requires manpower, man-hours and funds to make the investments at a time which the assessee considers it most prudent for making investments. Even after making the investments, the assessee would still have to take decision as to the time span for which it should continue to hold its investments and finally take decision as to the best time to exit from such investments. All this activities require manpower and funds and such man hours and funds will entail a cost to the assessee. This cost, is in the form of both direct costs and indirect costs and is debited in the P & L A/c under various heads such as personnel cost, administration cost, interest costs on the funds invested etc. Therefore, the all direct or indirect cost has been incurred in relation to the earning of tax free dividend income." (Emphasis Supplied)*

9.7. On perusal of above we find that the Assessing Officer has made reference to directs and indirect costs debited to the Profit & Loss Account including personnel and administration cost. Therefore, in our view it cannot be said that the Assessing Officer had proceeded to

invoke provisions contained in Rule 8D of the IT Rules without any application of mind or without recording any dis-satisfaction. During the course of hearing, reliance was placed by the Learned Authorised Representative for the Assessee on the decision of the Tribunal in the case of the Assessee for the Assessment Year 2014–15. On perusal of the above we find that the Tribunal had deleted the addition made under Section 14A of the Act for the Assessment Year 2004-15 by placing reliance upon the judgment of Hon'ble Bombay High Court in the case of Principal Commissioner of Income Tax Vs. Bombay Stock Exchange Ltd. [2020] 113 taxmann.com 303 (Bombay) on the ground that the dis-satisfaction regarding the correctness of claim of the suo moto disallowance of expenditure made by the Assessing Officer under Section 14A of the Act was absent. The Assessing Officer had neither recorded express dis-satisfaction nor put such dis-satisfaction being inferred from the assessment order in that case. The relevant extract of the aforesaid decision of the Tribunal read as under:

> *"4.4. On perusal of the above, we find that the Assessing Officer has only mentioned that the Assessee has not calculated disallowance in terms of Rule 8D(2)(iii) of the Rules towards administrative and other cost of making and maintaining investments. Thus, the Assessing Officer for invoking Rule 8D has taken the basis of Rule 8D only and not independently examined the correctness of claim of expenditure of the Assessee of Rs.1,20,835/- towards earning exempted income and not recorded any express or implied dissatisfaction to claim of Assessee keeping in view the accounts of the Assessee. In the case of* ***India Bulls Financial Services Ltd****. (supra), the Hon'ble Court held that implied dissatisfaction is suffice for invoking section 14A of the Act but in the case even there is no implied dissatisfaction by the Assessing Officer and he has only mentioned that disallowance was not computed by the as per Rule 8D of Rules. Similarly, in the case of Devarsons Industries (P.) Ltd. (supra), Hon'ble Court held that the Assessing Officer did not arrive at satisfaction in a particular manner while said disallowance, which would not per se destroy mandate of section 14A.* ***In the instant case, the***

Assessing Officer has not recorded any kind of dissatisfaction as to the correctness of claim of expenditure of the assessee. *Before us, the Ld. counsel for the assessee relied on the decision of the Hon'ble Bombay High Court in the case of* ***Pr. CIT v. Bombay Stock Exchange Ltd. [2020] 113 taxmann.com 303 (Bombay****), wherein in identically circumstances, the Hon'ble High Court observed that recording by the Assessing Officer that disallowance was not being worked out as per Rule 8D, is putting the cart before the horse. The relevant finding of the Hon'ble High Court is reproduced as under:*

> *"9. As We note that it is evident from the extracted part of the assessment order referred to hereinabove that the Assessing Officer has come to the conclusion that the disallowance claimed by the Respondent was not consistent with Rule 8D of the sand Rules. It is only in new of the disallowances not being worked out as per Rule SD of the Rules, that the Assessing Officer is not satisfied with the disallowance offered by the Respondent. This, to our mind, is putting the cart before the horse. The Assessing Officer must first record a conclusion that having regard to the accounts of the assessee, he is not satisfied with the disallowance offered by the Respondent in terms of section 144(2) of the Act. It only on being dissatisfied with the above, does Rule SD of the Rules can be invoked to compute the disallowance.*
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> *10. Mr. Vaidya, learned counsel appearing for the Respondent is correct in his submission that satisfaction which was to be recorded by the Assessing Officer has to be clear and on an objective basis without any reference to Rule 8D. In support of his contention, our attention is drawn to the judgment of this Court in the case of Godrej & Boyce Mfg. Co. Ltd. v Dy. CIT (2010) 194 Taxman 203/328 ITR 81 while dealing with constitutional validity of Rule 8D of the said Rules, negatived the challenge to its validity by, inter alia, recording as under:…….*
>
> > *"57. xx xx*
> >
> > *58. xx xx"*
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> *11. Non-satisfaction with the disallowance offered by the assessee has to be arrived at on the basis of the accounts submitted by the assessee. In this case, the Assessing Officer had not carried out the*

aforesaid exercise but rejected the disallowance claimed by the assessee only on the ground that it was not in accordance with Rule 8D of the Rules. The application of Rule BD of the Rules would only arise once the Assessing Officer is not satisfied on an objective criteria in the context of its accounts, that suo motu disallowance claimed by the assessee is not proper."

4.5. Therefore, respectfully following the finding of the Hon'ble Bombay High Court in the case of Bombay Stock Exchange Ltd.(supra), ***in absence of any dissatisfaction whether express or implied recorded by the Assessing Officer on the correctness of claim of the suo moto disallowance of expenditure by the for earning exempted income, the Assessing Officer is not justified in invoking Rule 8D of the Rules****. Accordingly, the disallowance made by the Assessing Officer invoking Rule 8D is hereby deleted. Since, we have already allowed the ground No. 2 of the appeal in favour of the assessee therefore, the other grounds are rendered merely academic." (Emphasis supplied)*

9.8. Therefore, given the facts of the present case, the aforesaid decision of the Tribunal would not apply to the facts of the present case. We have already reproduced paragraph 5.3 & 5.4 of the Assessment Order hereinabove which clearly shows application of mind by the Assessing Officer and recording of dissatisfaction.

9.9. However, we do find merit in the alternative submission advanced on behalf of the Assessee. As per the judgment of the decision of the Special Bench of the Tribunal in the case of Vireet Investments Private Limited (supra), only the investments that yielded exempt income during the relevant previous year could be taken into consideration for the purpose of calculating the opening/closing value of the investment. Therefore, we direct the Assessing Officer to exclude investments made in growth funds which do not yield exempt income and the investment in companies (including subsidiaries) which did not yield exempt income during the relevant previous year while computing opening/closing value of investment in terms of Rule

8D of the IT Rules. The Assessing Officer is directed to recompute the disallowance in terms of Rule 8D of IT Rules as per the aforesaid directions and restrict the amount of disallowance under Section 14A of the Act to the amount so computed or the amount of exempt income, whichever is lower. In terms of the aforesaid, Ground No. 1 raised by the Assessee is partly allowed, Ground No.2 raised by the Assessee dismissed and Ground No.3 raised by the Assessee is allowed.

Ground No.4 and Ground No.5

10. Ground No.4 and 5 raised by the Assessee are directed against the order of the CIT(A) denying set off of the accumulated loss (INR.12,86,53,730/-) and unabsorbed depreciation (INR.15,65,15,799/-) as claimed by the Assessee in respect of real estate services undertaking of Banhem Estates & IT Parks Ltd.

10.1. We have head both the sides and perused the material on record pertaining to this issue.

10.2. On perusal of record we find that under a Composite Scheme of Amalgamation and Arrangement (for short '**Composite Scheme'**) sanctioned by the Hon'ble Bombay High Court vide Order, dated 2/12/2016, 8 wholly owned subsidiaries of the Assessee were amalgamated with the Assessee and the real estate services undertaking of Banhem Estates & IT Parks Ltd (hereinafter referred to as '**Demerged Undertaking**') was demerged into the Assessee-Company. A copy of the Composite Scheme has been placed before us as part of the paper book *[at Page Nos. 125-154]*. Paragraph 1 and 20 of the Composite Scheme read as under:

> *"1. This Composite Scheme of Amalgamation and Arrangement ('the Scheme") is presented under the provisions of the Act, for amalgamation of Aadidev Properties Limited ('Aadidev'/'Transferor Company 1'), Anagha Estates Limited*

('Anagha'/'Transferor Company 2'), Aryabhata Properties Limited ('Aryabhata'/'Transferor Company 3'), Sushena Properties Limited ('Sushena'/'Transferor Company 4'), Shubhan Properties Limited ('Shubhan'/'Transferer Company 5'), Vaidehi Estates Limited ('Vaidehi'/'Transferor Company 6'), Nandeeshwar Properties Limited ('Nandeeshwar'/'Transferor Company 7'), Suryashankar Properties Limited ('Suryashankar'/'Transferor Company 8') herein after collectively referred to as (the 'Transferor Companies') with Bennett Property Holdings Company Limited ('BPHCL / 'Transferee Company') and demerger of Real Estate Services Undertaking of Banhem Estates & IT Parks Limited ('Banhem'/'Demerged Company') into BPHCL and their respective Shareholders and Creditors.

Aadidev, Anagha, Aryabhata, Sushena, Shubhan, Vaidehi, Nandeeshwar, Suryashankar and Banhem are part of the Transferee Company ('the Group') and are wholly owned subsidiaries of BPHCL. The Group proposes to consolidate Andidev, Anagha, Aryabhata, Sushena, Shubhan, Vaidehi, Nandeeshwar, Suryashankar with BFHCL and, segregate the Real Estate Services Undertaking of Banhem into BPHCL. As a result of the above restructuring the following benefits will accrue to the Group:

i. Consolidation of businesses of the Group,

ii. Reduction in number of companies and regulatory compliances thereof,

iii. Ease of management; and

iv. Reduction of operating and administrative costs.

The Scheme is divided into following parts:

PART A : Deals with definitions and share capital

PART B : xx xx

***PART C** : Deals with demerger of Real Estate Services Undertaking of Banhem into BPHCL*

PART D: xx xx

"20. CONDITIONALITY OF THE SCHEME

This Scheme is and shall be conditional upon and subject to:

20.1 This scheme comprises of amalgamation of Transferor Companies and demerger of Real Estate Services Undertaking of Banhem. Each part in the Scheme is separate and severable.

In case, one of the part of the scheme is not approved by the Competent Authority or Board of Directors of Transferor Companies, Demerged Company and Transferee Company decide not to implement one of the part of the Scheme any time upto the date of the order passed by Competent Authority or it is agreed upon by the Board of Directors of Transferor Companies, Demerged Company and Transferee Company to not give effect to any part of Scheme before the effective date of the Scheme, the other parts of the scheme shall be implemented." (Emphasis Supplied)

10.3. On perusal of above it is clear that the Composite Scheme deals with the amalgamation of the 8 companies and demerger of real estate services undertaking of Banhem Estates & IT Parks Ltd. Part C of the Composite Scheme specifically deals with the aforesaid demerger. We note that the Assessing Officer disallowed the business loss and unabsorbed depreciation attributable to the Demerged Undertaking while computing the assessed income. In appeal before the CIT(A), the ground raised by the Assessee in relation to set off of the said business loss and unabsorbed depreciation was dismissed by placing reliance on the provisions contained in Section 72A(2)(b) of the Act. We note that the provision contained in Section 72A(2)(b) of the Act deal with the claim of set off of business loss and unabsorbed depreciation in case of amalgamation and therefore, the same are not applicable in case of claim of set off of business loss and unabsorbed depreciation of the Demerged Undertaking. Thus, the order passed by the CIT(A) on this issue is set aside. The Assessee has claimed set off of the business loss and unabsorbed depreciation pursuant to the demerger of the Demerged Undertaking from the Banhem Estates & IT Parks Limited into the Assessee-Company. Therefore, the set off of the business loss and unabsorbed depreciation of the Demerged Undertaking would be required to examined in terms of Section 72A(4) of the Act. Accordingly, the Assessing Officer is directed to adjudicate Assessee's claim for the set off of the business loss and unabsorbed depreciation pertaining to the Demerged Undertaking afresh as per the provisions contained in Section 72A(4) of the Act.

All rights in contention of Assessee in relation to the aforesaid claim are left open. In terms of aforesaid, Ground No.4 and 5 raised by the Assessee are allowed for statistical purposes.

Ground No.6 to Ground No.8

11. Ground No.6 to 8 raised by the Assessee pertain to the computation of 'Book Profits' under Section 115JB of the Act. While advancing arguments in the appeal preferred by the Revenue it was contended by the Assessee that the assessment was framed on the Assessee under the normal provisions of the Act since the tax payable computed on income under normal provisions of the Act was more than tax payable on Book Profits. Even if the disputed issues relating to computation of Book Profit under Section 115JB of the Act are decided in favour of the Revenue, the Assessee would still be assessed to tax under the normal provisions of the Act. The aforesaid contention of the Assessee has been accepted while adjudicating the appeal preferred by the Revenue. Since the issues raised in Ground No.6 to 8 pertaining to the computation of 'Book Profits' under Section 115JB of the Act are academic in nature, Ground No.6 to 8 are dismissed as being academic while the issue raised therein are left open at the request of the Learned Authorised Representative for the Assessee.

Ground No.9

12. Ground No.9 raised by the Assessee pertains to disallowance of credit of tax deducted at source and advance tax pertaining to the amalgamated companies and the Demerged Undertaking for the relevant previous year. While computing the tax liability, the Assessing Officer did not grant credit of TDS and advance tax reflected in the name of the amalgamating companies and relating to the Demerged Undertaking. The Assessee raised additional ground

before CIT(A) for claiming credit of the aforesaid TDS and advance tax. The CIT(A) rejected the additional ground raised holding that (a) the Assessee has not submitted any supporting document evidence in the form of 26AS statement of the said companies to demonstrate its claim; and (b) there is a mismatch in the details submitted by the Appellant in its letters, dated 10/02/2023, and 21/02/2023, and therefore, the claim of the Assessee cannot be allowed. During the appellate proceedings before the Tribunal it was submitted on behalf of the Assessee that (a) the order of the Hon'ble High Court sanctioning the Composite Scheme was passed on 02/12/2016 fixing the appointed date as 01/04/2016. Therefore, all the transactions of the amalgamating companies and the Demerged Undertaking were considered in the books of the Assessee with effect from the appointed date. However, in the meantime, tax withholding compliances and advance tax payments were done in the name of the amalgamating companies and demerged company. Therefore, the advance tax and TDS were not reflected in the 26AS of the Assessee-Company. As the Assessee had included the income from the transaction carried on by the companies from 01/04/2016, in its books of account of the Assessee, the Assessee has also correspondingly claimed the said amount of advance tax and TDS in its revised return of income. Copy of Form 26AS of the 8 amalgamating companies and the demerged company were always available with the Revenue. The Assessee has also files copies of the same before the Tribunal which are placed at pages 161-231 of the paper book. It was also submitted that the there is no mismatch between the amounts mentioned in the said two letters as referred to by the CIT(A). The first letter, dated 10/02/2023, gave the bifurcation between the TDS amount and the advance tax amount, whereas in the second letter, dated 21/02/2023, gave the bifurcation with respect to the amalgamating companies and the amount relatable to the demerged undertaking. The total claim as per both

the letters, was INR.7,01,28,518/-. Therefore, it was contended that direction be granted to the Assessing Officer to allow the said claim of TDS and advance Tax.

12.1. Per contra the Learned Departmental Representative relied upon the order passed by the CIT(A).

12.2. Having considered the rival submissions and on perusal of record we find some merit in the contentions advanced on behalf of the Assessee. Accordingly, deemed it appropriate to direct the Assessing Officer to verify the factual averments made on behalf of the Assessee and to grant credit of TDS and advance tax pertaining to the amalgamated companies and the Demerged Undertaking for the relevant previous year to the Assessee after due verification as per law. In terms of the aforesaid Ground No.9 raised by the Assessee is allowed for statistical purposes.

Ground No.10

13. Ground No.10 raised by the Assessee pertains to levy/computation of interest under Section 234B of the Act. The aforesaid ground raised by the Assessee is consequential in nature. The Assessing Officer is directed to recomputed the interest under Section 234B of the Act as per law while giving effect to the present order passed by the Tribunal.

14. Now we will take appeal for the Assessment Years 2018-19, preferred by the which arose from the order, dated 11/12/2023, passed by the National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as '**the CIT(A)**'], whereby the Ld. CIT(A) had partly allowed the appeal against the Assessment Order, dated 17/09/2021, passed under Section 143(3) read with Section 144B of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'].

Assessment Year 2018-2019

15. We would now take up cross-appeals pertaining to Assessment Year 2018-19 which arose from the order, dated 11/12/2023, passed by the CIT(A) whereby the Ld CIT(A) had partly allowed the appeal against the Assessment Order, dated 17/09/2021, passed under Section 143(3) read with Section 144B of the Act.

16. The Assessee has raised the following grounds of appeal in ITA No.302/Mum/2024:

> *"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the disallowance of Rs 6,72,57,812 made by the Ld. AO u/s 14A(2) of the Income Tax Act, 1961(the Act), by invoking Rule 8D.*
>
> *2. On the facts and in the circumstances of the case and in law, since the Ld.AO erred in invoking Rule 8D to disallow Rs 6,72,57,812 under Section 14A(2) of the Act without coming to an objective satisfaction based on the accounts of the appellant that the disallowance made in the return of income was incorrect, the order of the Ld. CIT(A) confirming the said disallowance of Rs 6,72,57,812 was erroneous.*
>
> *3. On the facts and circumstances of the case and in law, assuming without admitting that Rule 8D is applicable and can be invoked the appellant submits that: -*
>
> *(a) Since no income was received by the appellant from its subsidiaries, the value of investments held by the appellant in its subsidiaries are not includible in arriving at the monthly averages of the opening and closing balances of investment under the said Rule.*
>
> *(b) Since the income earned by the appellant in mutual fund units held under growth schemes are taxable, the value of investments held by the appellant in mutual fund units under growth schemes are not includible in arriving at the monthly averages of the opening and closing balances of investment under the said Rule.*
>
> *4. On the facts and in the circumstances of the case and in law the appellant submits that the Ld. Assessing Officer erred in adding*

the sum of Rs.67,36,800 to book profits computed u/s 115JB of the Act, being the addition made by him to Income from House Property while computing the income of the appellant under normal provisions of the Act, when no provision exists under Section 115JB of the Act to make such an addition."

17. The Revenue has raised the following grounds of appeal in ITA No.557/Mum/2024

"1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A)/NFAC has erred as deleting the addition made on account of deemed ALV for vacant flats, without appreciating the fact that the AO has rightly adopted calculated Fair Rent as ALV.

2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A)/NFAC has erred in deleting the addition made on account of deemed ALV for vacant flats, without appreciating the fact that the provisions of section 23(1)c of the Act is not applicable in the instant case.

3. On the facts and in circumstances of the case and in law, the Ld. CIT(A)/NFAC has erred in relying upon the decision of Hon'ble ITAT in the case of Sachin R. Tendulkar VS. DCIT, without appreciating the fact that the case law is not squarely applicable in the instant case.

4. On the facts and in circumstances of the case and in law, the Ld. CIT(A)/NFAC has erred in deleting the addition made on account of disallowance u/s. 14A while calculating income u/s 115JB, without appreciating the fact that the clause (1) in explanation 1 to section 115JB(2) of the Act mandates addition of such disallowance while working of book profit u/s. 115JB"

18. The relevant facts in brief that for the Assessment Year 2018–19, the Assessee filed original return of income on 31/10/2018 which was revised on 28/03/2019. The case of the Assessee was selected for scrutiny. The Assessing Officer completed the assessment under Section 143(3) read with Section 144B of the act vide Assessment Order, dated 17/09/2021, assessing the total income of the Assessee under the normal provisions of the Act at INR.58,05,27,113/- and computing Book Profits of the Assessee under Section 115JB of the

Act at INR.62,46,98,115/-. Since the tax payable on Book Profits was less than the tax payable on the income computed under normal provisions of the Act, the Assessee was assessed to tax under normal provisions of the Act.

19. Being aggrieved, the Assessee preferred appeal before the CIT(A) challenging:

(a) addition/disallowance made under normal provisions of the Act:

(i) Disallowance of INR.6,72,57,812/- made by the Assessing Officer under Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 [for short '**IT Rules**']

(ii) Addition taking the deemed annual letting value of the immovable properties lying vacant during the relevant previous year at INR.96,24,000/-

(b) Increase/reduction made to the Book Profits computed under Section 115JB of the Act:

(i) Increase in Book Profits by INR.6,72,57,812/- disallowed under Section 14A of the Act by invoking provisions contained in Clause (f) of Explanation 1 to Section 115JB of the Act.

(c) The Assessee are also challenged the computation of interest under Section 234B of the Act

20. The appeal preferred by the Assessee was dispose off by the CIT(A) as partly allowed vide order, dated 11/12/2023. The CIT(A) granted partial relief by (a) deleting the addition made under normal provisions of the act in respect of deemed rental income, and (b) accepting Assessee's contention that no disallowance of expenses can be made in respect of any exempt income by invoking provisions contained in Section 14A read with Rule 8D of the IT Rules while

computing Book Profits under Section 115JB of the Act by following the decision of Special Bench of the Tribunal in the case of Assistant Commissioner of Income Tax Vs. Vireet Investment Pvt. Ltd. [2017] 165 ITD 27 (Delhi –Trib) (SB).

21. Since, both, the Assessee as well as the Revenue were aggrieved by the order passed by the CIT(A), the present cross-appeals were preferred before the Tribunal. The grounds raised by the Assessee and Revenue are reproduced in paragraph 12 and 13 above, respectively.

ITA No. 557/Mum/2024

22. We would first take up appeal preferred by the Revenue. Both the sides agreed that there is no change in the facts and circumstances of the case for the Assessment Year 2018-19. As was the case for Assessment Year 2017-18, on examination the grounds raised by the Revenue having impact on computation of income under normal provisions of the Act, we find that tax effect involved in the present appeal is below the monetary limit of INR.60 Lakhs fixed by the CBDT for the purpose of filing departmental appeal before the Tribunal. On perusal of the computation submitted by the Assessee we find that the tax effect in the appeal preferred by the Revenue would only be INR.23,31,472/- for the reason that the Assessee would continue to be assessed under normal provisions of the Act even if all the grounds raised by the Revenue in departmental appeal are assumed to be allowed in favour of the Revenue. Thus, accepting the contention of the Assessee, we dismiss the appeal preferred by the Revenue as 'withdrawn' in terms of Circular No.5 & 9 of 2024 issued by CBDT.

ITA No. 302/Mum/2024

23. We would now adjudicate the grounds raised by the Assessee which

are taken up hereinafter in seriatim.

Ground No.1 to Ground No.3

24. Ground No.1 to Ground No.3 raised by the Assessee pertain to disallowance of INR.6,72,57,812/- made by the Assessing Officer under Section 14A of the Act by invoking the provision contained in Rule 8D of the IT Rules.

24.1. We note that in facts and circumstances, identical to those prevailing in Assessment Year 2017-18, the Assessing Officer made disallowance of INR.6,72,57,812/- under Section 14A read with Rule 8D(2)(ii) of the IT Rules in addition to the suo moto disallowance of INR.3,84,617/- made by the Assessee. The aforesaid action of the Assessing Officer was confirmed by the CIT(A) in appeal preferred by the Assessee. Being aggrieved, the Assessee has carried the issue in the present appeal before the Tribunal.

24.2. Both the sides adopted the arguments made in relation to Ground No.1 to 3 raised by the Assessee in appeal for the Assessment Year 2017-18.

24.3. There being no change in the facts and circumstances of the case, adopting the reasoning given in paragraph 9.6 to 9.9 above, we hold that our findings/adjudication in relation to Ground No.1 to 3 raised by the Assessee in appeal for the Assessment Year 2017-2018 shall apply mutatis mutandis to the Ground No.1 to 3 raised in the present appeal. Accordingly, we hold that for the Assessment Year 2018-2019 also, the invocation of the provisions contained in Rule 8D of the IT Rules cannot be rejected. Perusal of Paragraph 5.3 of the Assessment Order, dated 17/09/2021, clearly shows application of mind by the Assessing Officer and recording of dissatisfaction. However, the alternative submission advanced on behalf of the Assessee merits

consideration. The Assessing Officer is directed to exclude investments made in growth funds which do not yield exempt income and the investment in companies (including subsidiaries) which did not yield exempt income during the relevant previous year while computing opening/closing value of investment in terms of Rule 8D of the IT Rules. The Assessing Officer is directed to recompute the disallowance in terms of Rule 8D of IT Rules as per the aforesaid directions and restrict the amount of disallowance under Section 14A of the Act to the amount so computed or the amount of exempt income, whichever is lower. In terms of the aforesaid, Ground No. 1 raised by the Assessee is partly allowed, Ground No.2 raised by the Assessee dismissed and Ground No.3 raised by the Assessee is allowed.

Ground No.4

25. Ground No.4 raised by the Assessee pertains to the computation of 'Book Profits' under Section 115JB of the Act. While advancing arguments in the appeal preferred by the Revenue it was contended by the Assessee that the assessment was framed on the Assessee under the normal provisions of the Act since the tax payable computed on income under normal provisions of the Act was more than tax payable on Book Profits. Even if the disputed issues relating to computation of Book Profit under Section 115JB of the Act is decided in favour of the Revenue, the Assessee would still be assessed to tax under the normal provisions of the Act. The aforesaid contention of the Assessee has been accepted while adjudicating the appeal preferred by the Revenue. Since the issues raised in Ground No.4 pertaining to the computation of 'Book Profits' under Section 115JB of the Act is academic in nature, Ground No.4 is dismissed as being academic while the issue raised therein are left open at the request of the Learned Authorised Representative for the Assessee.

Conclusion

26. In result, the appeals preferred by the Revenue [ITA No.556/Mum/2024 and ITA No.557/Mum/2024] are dismissed while the appeals preferred by the Assessee [ITA No.502/Mum/2024 and ITA No.302/Mum/2024] are partly allowed.

Order pronounced on 12.12.2024.

Sd/-	***Sd/-***
(Amarjit Singh)	***(Rahul Chaudhary)***
Accountant Member	***Judicial Member***

मुंबई Mumbai; दिनांक Dated : 12.12.2024
Milan, LDC

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai