

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
' B' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A. No. 622/Mds/2016
निर्धारण वर्ष /Assessment year : 2011-2012

M/s. EIH Associated Hotels Limited,
No.1/24, G.S.T. Road,
Meenambakkam,
Chennai 600 027. **Vs.** The Joint Commissioner of
Income Tax,
Corporate Circle 2(1)
Chennai.

आयकर अपील सं./I.T.A. No. 662/Mds/2016
निर्धारण वर्ष /Assessment year : 2011-12

The Assistant Commissioner of Income Tax,
Corporate Circle 2(1)
Chennai **Vs.** M/s. EIH Associated Hotels
Limited,
No.1/24, G.S.T. Road,
Meenambakkam,
Chennai 600 027.

[PAN AAACE 2125M]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Assessee by : Shri. N.V. Balaji, Advocate
Department by : Shri. Supriyo Pal, IRS, JCIT.

सुनवाई की तारीख/Date of Hearing : 13-10-2016

घोषणा की तारीख /Date of : 28-10-2016

Pronouncement

आदेश / ORDER**PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER**

These are cross appeals filed by the Revenue and assessee directed against an order dated 13.01.2016 of Commissioner of Income Tax (Appeals)-6, Chennai.

2. Facts apropos are that assessee company engaged in the business of hoteliering and hospitality had filed return of income for the impugned assessment year disclosing income of ₹70,39,620/-. During the course of assessment, it was noted by the Assessing Officer that assessee had disclosed dividend income of ₹72,403/- from investment in mutual funds and had claimed it exempt u/s.10(35) of the Act. Upon above income, assessee had calculated a sum of ₹10,101/- as expenditure incurred and made a suo-motu disallowance.

3. Ld. Assessing Officer, was of the opinion that assessee had not worked out disallowance in accordance with Rule 8D of the Income Tax Rules. Explanation of the assessee was that substantial part of investments were in subsidiaries which did not yield any dividend. However, as per Assessing Officer CBDT's Circular No.5/2004, dated 11.02.2014 did not make any differentiation between investments yielding dividend income and investments not yielding dividend

income. According to him all investments of the assessee had to be considered for working out the expenditure incurred for earning exempt income, as prescribed under Rule 8D. Disallowance was worked out by the Assessing Officer by applying Rule 8D(2)(ii) for interest and Rule 8D(2) (iii) for indirect expenditure. While applying these rules, he worked out the average investments including investments made in the subsidiaries. Disallowance under Rule 8D(2)(ii) came to ₹5,40,30,988/- and that Rule 8D(2)(iii) came to ₹42,80,300/- Average investments considered while calculating these disallowance came to ₹85,60,60,000/-.

4. Aggrieved, the assessee moved in appeal before Id. Commissioner of Income Tax (Appeals). Contention of the assessee before Id. Commissioner of Income Tax (Appeals) as under:-

'During the concerned assessment year the appellant invested Rs.8,39,90,000/- in loss making 100% subsidiary company namely Island Hotel Maharaj Ltd. (IHML)

The investments made by the assessee in the 100% subsidiary company were not on account of investment for earning capital gains/dividend income. Such investments were made by the assessee to promote subsidiary company into the hotel industry and were on account of Business expediency and the dividend therefrom is purely incidental.

IHML is a . loss making company and there can be no dividend from investments. The financial results of IHML show that the company has been making huge losses in. pas: at: well as subsequent years. Details of losses (Profit Before Tax) incurred by the company are as under: (page no.194-203 of Paper Book).

Assessment Year	Profit/(Loss) before Tax (Rs.)
2006-07	(Rs.4,02,86,623)
2007"08	(Rs.3,84,70,069)
2008-09	(Rs.2,32,55,177)
2009-10	(Rs.2,94,59,949)
2010-11	(Rs.32,645,134)
2011-12	(Rs.29,728,690)

From the perusal of the above table indicating the financial results IHML, it is clear that the company would not be delivering profits in the near future. Further, the Companies Act, 2013, clearly states that a company cannot declare dividend if it has carried forward losses during the relevant assessment years for which it wishes to declare any dividend. Hence, the investment was not made for earning any exempt dividend income. In subsequent year i.e: A. Y.2012-13 the said loss making subsidiary was merged with the appellant company. This indicates that the investment made in the above mentioned company was 110t for t-he purpose of earning dividend”.

5. Ld. Commissioner of Income Tax (Appeals) after considering the above contention noted that this Tribunal in assessee’s own case for assessment year 2008-09 in ITA Nos.1503 and 1624/Mds/2012 dated 17.07.2013 had directed exclusion of investments in subsidiaries while working out disallowance u/s.14A r.w.r. 8D. As per the Id. Commissioner of Income Tax (Appeals), for impugned assessment year also investments in subsidiaries had to be excluded from value of investments while applying Rule 8D of the Act. Ld. Commissioner of Income Tax (Appeals) also directed the Assessing Officer to consider

the reworked disallowance alone, while arriving at the Minimum Alternative Tax u/s.115JB of the Act.

6. Now before us, Revenue is in appeal against the direction of Id. Commissioner of Income Tax (Appeals) to exclude investments in subsidiaries while computing disallowance under Rule 8D. As against this, assessee in its appeal is aggrieved on part sustenance of disallowance under Rule 8D. Assessee has also raised a grievance that investment in one particular company called M/s. Mercury Travels Limited was not directed to be excluded. One other ground also appears in assessee's appeal which assails invocation of Rule 8D without expressing dissatisfaction over the suo-motu disallowance of ₹10,101/- made by the assessee.

7. Ld. Departmental Representative submitted that law did not allow exclusion of investments in subsidiary companies while applying Rule 8D. Reliance was placed once again on the CBDT Circular No.5/2004 (supra). Further, as per Id. Authorised Representative, Id.CIT(A) erred in directing such exclusion even while working out profits for levying MAT u/s.115JB of the Act. However, as per Id. Departmental Representative, Id. Commissioner of Income Tax (Appeals) was justified in holding that disallowance was required both under Rule 8D(2)(ii) and Rule 8D(2)(iii).

8. Per contra, and in support of its own appeal, Id. Authorised Representative submitted that issue whether investments in subsidiary companies were to be excluded or not, had come up before this Tribunal in assessee's own case for assessment year 2008-09. As per Id. Authorised Representative, the Tribunal had confirmed the order of the Id. Commissioner of Income Tax (Appeals) holding that investments in subsidiary companies were to be excluded while working out the disallowance under Rule 8D. As per Id. Authorised Representative dividend earned from investments in subsidiaries was purely incidental to such investments. However, as per Id. Authorised Representative, Id. Commissioner of Income Tax (Appeals) erred in not directing exclusion of investments in one particular subsidiary called M/s. Mercury Travels Limited. In any case as per the Id. Authorised Representative, without expressing dissatisfaction, over the suo motu disallowance made by the assessee, Id. Assessing Officer could not had invoked Section 14A. Reliance was placed on the judgment of Hon'ble Delhi High Court in the case of *M/s.Joint Investments Pvt. Ltd vs. CIT 372 ITR 694*. Further as per Id. Authorised Representative disallowance of any thing more than the exempt income was against law.

9. We have considered the rival contentions and perused the orders of the authorities below. Question whether investments in subsidiary company was to be excluded or not for the purpose of

working out disallowance under Rule 8D had come up before this Tribunal in assessee's own case for assessment year 2008-2009 wherein the Tribunal held as under:-

"We are of the considered opinion that the investments made by the assessee in the subsidiary company are not on account of investments for earning capital gains or dividend income. Such investments have been made by the assessee to promote subsidiary company into the hotel industry. A perusal of the order of the CIT(Appeals) shows that out of total investment of Rs.64,18,19,7751-, Rs.63,31,25,715/- is invested in wholly owned subsidiary. The fact supports the case of the assessee that the assessee it; not into the business of investment and the investments made by the assessee are on account of business expediency. Any dividend earned by the assessee from investment in subsidiary company is purely incidental. Therefore, the investment made by the assessee in its subsidiary an: 1"£01" to be reckoned for dis-allowance uls. 14. r.w.r 8D. The Assessing officer is directed to re-compute the average value of investment- under the provision of Rule BD after deleting investments made by the assessee in subsidiary company. Accordingly, this ground of appeal of the assessee is partly allowed and that of the Revenue is dismissed. The findings of the CIT(Appeals) on the issue are accordingly modified"

Now the question that remains is whether a disallowance under Rule 8D(2)(ii) could have been made. Rule 8D(2)(ii) is reproduced hereunder:-

(2) The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely :-

(i) ;

(ii) in a case where the assessee has incurred expenditure by way of interest during the previous year is not directly attributable to any particular income or receipt, an amount computed in accordance with the following formula,

namely :-

B

A X---

C

Where A =amount of expenditure by way of interest other than the amount of interest included in clause (i) incurred during the previous year ;

B =the average of value of investment, income from which does not or shall not form part of the total income, as appearing in the balance-sheet of the assessee, on the first day and the last day of the previous year ;

C =the average of total assets as appearing in the balance-sheet of the assessee, on the first day and the last day of the previous year ;

(iii).....

For applying rule 8D(2)(ii), it is necessary that assessee should have incurred expenditure by way of interest which is not directly attributable to any particular income or receipts. Ld. Assessing Officer had applied this rule mechanically without verifying whether any part of the total interest expenditure incurred by the assessee was directly attributable to any particular receipts or income. Only that expenditure which was not so attributable could be subject to disallowance under Rule 8D(2)(ii). No doubt Ld. Authorised Representative has made a submission that Ld. Assessing Officer had not expressed his dissatisfaction on the claim that expenditure earned for claiming exempt dividend of ₹72,403/- was ₹10,101/- only. However, this claim has to be considered after working out the actual investments made

by the assessee during the relevant assessment previous year, after excluding the investments made by it in its subsidiaries. This aspect was also not verified by the lower authorities.

10. Coming to the application of Sec. 8D(2)(iii) of the Act, there is no dispute about some indirect expenditure would have been incurred by the assessee for deciding on the investment made in mutual funds. Hence application of Rule 8D(2)(iii) by the lower authorities cannot be faulted. However, while applying this rule also, investments in subsidiaries have to be excluded.

11. Coming to the claim of the assessee that while excluding the investments in subsidiaries, Id. Commissioner of Income Tax (Appeals) had not given any specific direction for excluding investment in one M/s. Mercury Travels Limited, we find that Id. Commissioner of Income Tax (Appeals) had given clear direction to exclude investments in all subsidiaries. Hence, this ground of the assessee does not hold water. Nevertheless, it has to be mentioned that total disallowance u/s.14A of the Act cannot exceed the exempt income as held by Hon'ble Delhi High Court in the case of *Joint Investments Pvt. Ltd (supra)*. There are a host of decisions by various High Court where it has been held that disallowance u/s.14A of the Act cannot fully eat off the exempt income. Considering all these aspects, we are of the

opinion that the quantum of disallowance u/s.14A has to be re-worked by the Id. Assessing Officer. Needless to say, what can be considered for working out the profit on which Sec. 115JB of the Act is only the actual disallowance made under Rule 8D and nothing more. We therefore remit the matter back to the file of the Id. Assessing Officer for correct quantification of the disallowance under Rule 8D.

12. In the result, appeal of the Revenue is dismissed whereas that of the assessee is allowed for statistical purpose.

Order pronounced on Friday, the 28th day of October, 2016, at Chennai.

Sd/-

(एन.आर.एस. गणेशन))

(N.R.S. GANESAN)

न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated: 28th October, 2016

KV

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |