

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

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

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.366/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2009-10)

K. Raheja Corp Private Limited, Raheja Tower, Plot No.C-30, G Block, Opp. SIDBI, Bandra Kurla Complex, Bandra East, Mumbai - 400 051.	बनाम/ v.	Asstt. Commissioner of Income Tax - Central Circle - 29, Mumbai.
स्थायी लेखा सं./PAN : AAACP0522B		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Ms. Aarti Sathe
Revenue by :	Shri A. Ramachandran

सुनवाई की तारीख / **Date of Hearing** : 14-6-2016

घोषणा की तारीख / **Date of Pronouncement** : 08-09-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee company, being ITA No. 366/Mum/2013, is directed against the appellate order dated 6th November, 2012 passed by learned Commissioner of Income Tax (Appeals)- 40, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2009-10, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 28th December, 2011 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income Tax Act,1961 Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee company in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") read as under:-

"1. The CIT(A) erred in upholding the disallowance of finance expenses and other expenses of Rs.11,91,18,562/- made by A.O. on investment in shares out of business income without appreciating the fact that the appellant had surplus interest free funds available for investment in shares and hence no finance expenses and other expenses is attributable towards investment in shares."

3. The brief facts of the case are that the assessee is engaged in the construction activity and is also running a hotel at Madh Marve Road, Malad in the name and style "The Resort". Besides this, the assessee has invested in shares and it is also a partner in various partnership firms. On perusal of the Balance Sheet of the assessee company, it was observed by the AO that the assessee has invested an amount of Rs. 1,49,42,31,141/- in the shares of various companies whereby the assessee has received dividend amounting to Rs. 8,47,63,456/- and the same was claimed as an exempt income u/s 10(34) of the Act. It was also observed by the AO that the assessee is paying interest on borrowed funds which is debited to the P&L account as an expenditure. The assessee was asked as to why interest relatable to borrowed funds used in making investment in shares should not be disallowed u/s.14A of the Act read with Rule 8D of the income Tax Rules, 1962. In reply, the assessee submitted that the assessee company has sufficient non-interest bearing funds available and hence no disallowance of interest is called for. The assessee also submitted that the additions made by the A.O. in earlier years were deleted by the Hon'ble High Court/ITAT/CIT(A) up to the assessment year 2007-08. The A.O. observed that assessee has made investment in shares of group companies with an purpose of earning dividend and to help the management in having controlling interest in the said companies. Thus,

the A.O. observed that the borrowed fund utilized in making investment in shares were not used for the purpose of business of the assessee and the interest paid on the same can be disallowed under the provisions of section 36(1)(iii) of the Act. The A.O. held that the onus is on the assessee to establish the nexus between funds utilized in investment in shares and source of such fund. The assessee submitted that it has sufficient funds for making investment in shares and on that basis the Hon'ble High Court and ITAT has allowed relief to the assessee for the earlier years whereby the ITAT has come to the conclusion that in view of availability of surplus funds with the assessee company for the investment made in shares, no disallowance was justified.

The A.O. rejected the contentions of the assessee as the assessee is not able to establish a direct link with the interest free funds or own funds available with the assessee with the investments made and therefore the usage of interest bearing borrowed fund in making investment in shares, income from which does not form part of the total income, cannot be ruled out. The A.O. accordingly applied Rule 8D of the Income Tax Rules, 1962 read with Section 14A of the Act for computing disallowance relying on the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Co. Limited v. DCIT in writ petition no. 758/2010 and judgment of Hon'ble Bombay High Court in appeal no ITA No. 626/2010 delivered on 12.08.2010 . The A.O. was not satisfied with the claim made by the assessee and accordingly determined the interest at Rs. 11,26,89,134/- under Rule 8D(2)(ii) of Income Tax Rules, 1962 and disallowed the same. Disallowance was also made of administrative expenses of Rs. 64,29,427/- being 0.5% of average investments as per rule 8D(2)(iii) of Income Tax Rules, 1962 vide assessment order dated 28-12-2011 passed u/s 143(3) of the Act.

4. Aggrieved by the assessment order dated 28-12-2011 passed by the A.O. u/s. 143(3) of the Act, the assessee company filed first appeal before the ld. CIT(A).

5. Before the ld. CIT(A) the assessee made elaborate submissions in support of its claim. The assessee submitted that the assessee has its own sufficient funds to make investments in shares and in the earlier years the appellate authorities have accepted the contentions of the assessee and deleted the addition w.r.t. interest expenditure disallowed by the Revenue. The ld. CIT(A) considered the submissions of the assessee and observed that the A.O. after verification of the facts submitted by the assessee has recorded his satisfaction and the A.O. has rightly made the disallowance u/s 14A of the Act read with Rule 8D of Income Tax Rules, 1962. The action of the A.O. was, therefore, confirmed by the ld. CIT(A) vide appellate orders dated 06-11-2012.

6. Aggrieved by the appellate orders dated 06-11-2012 of the ld. CIT(A), the assessee is in appeal before the Tribunal.

7. The ld. Counsel for the assessee at the outset submitted that the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for the assessment year 2008-09 in ITA No.6900/Mum/2011 vide orders dated 4th April, 2016 whereby the Tribunal has recorded a finding of fact that the assessee has its own share capital and reserves and surplus which is sufficient to cover investment made by the assessee in the shares, and there was no evidence to prove that borrowed funds were utilized for making investment in shares and hence it is to be presumed that the assessee has made investments in shares out of own funds. Keeping in view the availability of funds, the A.O. was not justified in disallowing interest expenditure and disallowance as per the provisions of

section 14A read with Rule 8D cannot be made in a mechanical manner was the observation of the Tribunal in afore-stated order dated 04-04-2016. The Tribunal also held that the disallowance cannot be made in a mechanical manner and also no disallowance can be made more than the expenditure claimed by the assessee. The said order of the Tribunal dated 04-04-2016 is placed in the file. The Id. Counsel submitted that the Tribunal and the Hon'ble High Court had decided identical issue in favour of the assessee while deciding the appeal filed by the assessee for the earlier years. The Id. Counsel submitted that the share capital of the assessee company is Rs.60.48 crores and reserves and surplus stood at Rs. 209.37 crores as at 31-03-2009 , while investments in shares stood at Rs.128.67 crores as at 31-03-2009. Similarly it was submitted that the investment as at 31-03-2008 was Rs. 141.80 crores and as against this the share capital was Rs. 60.48 crores and Reserves and surplus was Rs. 174.68 crores. It was submitted that no disallowance of interest expenditure of Rs. 11.26 crores on borrowings as were made by the Revenue is sustainable. The chart has been filed by the assessee to reflect the financial figures as at 31-03-2008 and 31-03-2009 to contend that owned funds of the assessee comprising of share capital and reserves and surplus are more than the investments in shares both as at 31-03-2008 and 31-03-2009. The said chart which is an unsigned chart is placed in paper book , while no audited financial statements are filed by the assessee to support the relevant financial figures .

8. The Id. D.R., on the other hand, relied on the orders of the authorities below.

9. We have considered the rival contentions and also perused the material available on record. We have observed that the assessee has made investment of Rs. 149,42,31,141/- in the shares of various companies as stated by the AO in the assessment order u/s 143(3) of the Act against which

an amount of Rs. 8,47,63,456/- has been received as dividend. The contention of the assessee company is that it has its own surplus funds available which is more than sufficient to make investment in shares. We have gone through the orders of authorities below. There is no finding of fact recorded in the orders of authorities below that assessee has its own surplus funds available in this year which are sufficient to make the investment. However, an unsigned chart has been submitted by the Id. Counsel for the assessee before the Tribunal whereby it is submitted that there is share capital of an amount of Rs. 60,48,00,000/- and reserves and surplus amounting to Rs. 2,09,36,78,634/- as at 31-03-2009 against which investments in shares stood at Rs.1,28,67,27,471/- as at 31-03-2009. In the same unsigned chart it is also reflected an amount of Rs. 34,92,98,780/- under the head profits earned during the year as per P&L A/c, while dividend received stood at Rs. 8,47,63,455/- . However, no audited financial statements are submitted by the assessee . We , however, agree with the proposition and contentions of the assessee that presumption will apply that the assessee has made investment in shares out of its own surplus funds unless contrary is brought on record keeping in view the decision of the Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities and Power Ltd., (2009)313 ITR 340(Bom. HC) and HDFC bank Limited v. DCIT (2016) 383 ITR 529(Bom. HC) . Hence keeping in view the factual matrix of the case as set out above, the disallowance of interest amounting to Rs. 11,26,89,134/- made by the A.O. under Section 14A of the Act read with Rule 8D(2)(ii) of Income Tax Rules, 1962 is not sustainable and ordered to be deleted subject to limited verification by the AO about the correctness of figures of net owned funds which includes share capital + reserves and surpluses- accumulated losses , as well as investments in shares etc made by the assessee which are capable of yielding exempt income as contended by the assessee before us through unsigned chart. However, with respect to disallowance made u/s 14A of the Act read with Rule 8D(2)(iii) of Income Tax

Rules, 1962, the disallowance of Rs. 64,29,427/- @ 0.5% of average value of investment, the A.O. was not satisfied with the claim of the assessee as the assessee had contended that no expenses were incurred by the assessee, while the AO made disallowance u/s 14A of the Act read with Rule 8D(2)(iii) of Income Tax Rules, 1962 without having regards to the accounts of the assessee which is contemplated u/s 14A(2) of the Act. In our considered view, this matter with respect to disallowance of administrative and indirect expenses u/s 14A of the Act read with Rule 8D(2)(iii) of Income Tax Rules, 1962 needed to be set aside and restored to the file of the A.O. for de-novo computation of the disallowance of administrative and indirect expenses having regard to the accounts of the assessee as contemplated u/s 14A(2) of Income Tax Rules, 1962. Needless to say proper and adequate opportunity of being heard shall be provided by the AO to the assessee in accordance with the principles of natural justice in accordance with law and the assessee shall be allowed to produce all necessary and relevant evidences and explanations in support of its contentions. We order accordingly.

10. In the result, appeal filed by the assessee in ITA No. 366/Mum/2013 for the assessment year 2009-10 is partly allowed for statistical purpose.

Order pronounced in the open court on 8th September, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 08-09-2016 को की गई ।

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 08-09-2016

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "A" Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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