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

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER

ITA Nos.1349/M/2012 & 955/M/2014
Assessment Years: 2009-10 & 2010-11

| M/s. Fiduciary Euromax Global Markets Ltd.,<br>Unit No.T7B, 5th Floor,<br>Phoenix House, Block No.2,<br>Phoenix Mills Compound,<br>462, Senapati Bapat Marg,<br>Mumbai – 400 013<br>**PAN: AAACF 1326P** | Vs. | DCIT – 8(1),<br>Aayakar Bhavan,<br>Mumbai - 400020 |
|---|---|---|
| (Appellant) | | (Respondent) |

**Present for:**
Assessee by : Shri V.C. Shah, A.R.
Revenue by : Shri S. Senthil Kumaran, D.R.

Date of Hearing : 09.06.2016
Date of Pronouncement : 29.06.2016

**O R D E R**

**Per Sanjay Garg, Judicial Member:**

The above titled appeals by the assessee relevant to A.Y. 2009-10 and 2010-11 have been preferred against the orders of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] dated 19.12.2011 and 14.10.2013 respectively. Since both the appeals are relating to the same assessee, hence these were heard together and are being disposed of by this common order. First we take appeal of the assessee for A.Y. 2009-10.

**ITA No.1349/M/2012 for A.Y 2009-10**

2. The assessee in this appeal has taken the following grounds of appeal.

"1. On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming that disallowance u/s 14A read with rule 8D made by Assessing Officer amounting to Rs.43,39,842/- by ignoring the fact that there were no borrowings made for the purpose of investment as investments were made out of net worth of the company and there being no borrowings relating to or for the purpose of making investments and hence no

disallowance u/s 14A were attracted as no expenditure has been incurred by your appellant in relation to its activity of investment though he has issued directions to recompute the quantum of disallowance by applying rule 8D by ignoring the claim of your appellant.

2. The learned CIT(A) erred in not giving specific appropriate directions in report of disallowance u/s 14A which was done by adopting incorrect amount of quantum of interest to be considered for disallowance u/s 14A.

3. The learned CIT(A) erred in not deciding on the issue of treatment of loss of Rs.30,48,919/- as to whether it is speculation loss or business loss based on facts and decisions by considering it as afterthought.

4. Your appellant craves leave to add, to amend, alter or delete any of the above grounds.

5. Your appellant prays that justice he given."

**Grounds No. 1 & 2:**

3. The brief facts relating to above referred to grounds are that the assessee is a company carrying on business as trading in debt and government securities, commodities and shares at the recognized stock exchange. The assessee had filed its return of income for the year under consideration declaring total income of Rs.2,74, 67,743/-. The assessee during the year earned consultancy and advisory fees income in relation to its financial services activity of Rs.12,48,50,000. The assessee claimed loss on account of its share trading activity as deduction against the said income. The Assessing Officer (hereinafter referred to as the AO) however made the disallowance of Rs.1,16,65,581/- on account of loss in share trading activity by treating the same as speculation loss as per the explanation to section 73 of the Act and thereby rejected the set off of the said loss against business income of the assessee. The AO further disallowed the set off of expenditure of Rs. 2 lakhs holding the same as relating to the above stated share trading activity.

4. Being aggrieved by the order of assessment for A.Y. 2009-10 dated 30.06.2011, the assessee preferred an appeal before the CIT(A) Mumbai agitating the above disallowances. The learned CIT(A), however, dismissed

the appeal vide the impugned order dated 19.12.2011 upholding this disallowance made by the AO by invoking the provisions of Explanation to section 73 of the Act. The assessee has thus come in appeal before us.

5. The learned A.R. for the assessee, before us, has submitted that the AO invoked the provisions of Explanation to section 73 of the Act for disallowing the assessee's claim for setting off the loss on trading of shares against other business income. He, at the outset, while placing reliance on a recent decision of the co-ordinate bench of this tribunal in the case of its wholly owned subsidiary styled as "Fiduciary Shares & Stock P. Ltd. vs. ACIT" (ITA No.321/mum/2013 vide order dated 13.05.2016) has submitted that the Explanation to section 73 of the Act was inserted by the Taxation Laws (Amendment) Act, 1975 w.e.f. 01.04.1977 on the recommendations of Wanchoo Committee report of December, 1971. The relevant portion of which has been considered by the co- ordinate bench in the case of "Fiduciary Shares & Stock P. Ltd." (supra), which for the sake of convenience is reproduced as under:

> "A tax avoidance device often resorted to by business houses controlling groups of companies is manipulation of results from dealings in shares of the companies controlled by them. In our opinion, such manipulation in share dealings for the purpose of tax avoidance can be checked effectively if the results of dealings in shares by such companies are treated for tax purposes in a manner analogous to speculation. No doubt, companies whose main business activities centre around investment in shares will have to be left out. Accordingly, we recommend that the results of dealings in shares by companies, other than investment, banking and finance companies, should be treated in a manner analogous to speculation business."

6. The Ld. AR has further referred to the CBDT circular No. 204 dated 27.07.1976 contending that the object of the said provision was to curb the device sometimes resorted to by business houses controlling groups of companies to manipulate and reduce the taxable income of companies under their control. Thus the scope and effect of the Explanation to section 73 of the Act was to provide that the business of purchase and sale of shares by companies which were not investment or banking companies or companies

carrying on business of granting loans or advances would be treated on the same footing as a speculation business. Thus, in the case of aforesaid companies, the losses from share dealings would be set off only against profits or gains of a speculation business. Where any such loss for an assessment year is not wholly set off against profits from a speculation business, the excess would be carried forward to the following assessment year and set off against profits, if any, from any speculation business. He therefore has submitted that the Explanation to section 73 of the Act was inserted to curb the methods sometimes resorted to by business houses controlling a group of companies to manipulate and reduce the taxable income of companies under their control by showing losses incurred on purchase and sale of shares of group companies. However an exception was carved out of the Explanation by providing that the provisions of section 73 of the Act would be applicable to business of purchase and sale of shares by companies other than investment companies, banking companies or finance companies as speculation business. The learned A.R. for the assessee has further contended that Explanation to section 73 of the Act created a fiction to the effect that where any part of the business of a company consists of purchase and of share of other companies, such company shall be deemed to be carrying on speculation business to the extent to which business consists of purchase and sale of such shares. He has submitted that this fiction had overlooked the purpose for which it was inserted, namely to curb tax avoidance devices/methods resorted to by business houses controlling a group of companies manipulate the purchase and sale of shares of group companies and declare loss which was being adjusted against other income of the group companies. It has been further contended by the learned A.R. for the assessee that in order to achieve the real objective of curbing tax avoidance methods resorted to by business houses controlling their group companies, the Legislature by inserting an amendment to Explanation to section 73 of the Act by Finance (No. 2) Act, 2014, has extended the exception carved out in the Explanation by putting all the companies, the principal business of which is the

business of trading in shares into the exception. Thus, it is submitted by the learned A.R. for the assessee that the companies whose principal business is not the business of trading in shares and they have purchased and sold shares and incurred losses, only such companies fall in the ambit of the Explanation to section 73 of the Act so that their losses are treated as speculation loss, which was the object to be achieved by the insertion of the Explanation to section 73 of the Act. He has thus contended that insertion of amendment by Finance (No. 2) Act, 2014 in the Explanation to section 73 of the Act is clarificatory in nature and therefore such amendment will have to be given retrospective effect, i.e. from the year in which the Explanation was inserted. The learned A.R. thus, has stressed that in view of the amendment made to Explanation to section 73 of the Act, the loss incurred by the assessee on account of trading in shares is not a speculative loss and hence the same can be adjusted against other business income like brokerage and commission. He has strongly relied upon the observations made by the co-ordinate bench of this Tribunal in its order dated 13.05.2016 in the case of " Fiduciary Shares & Stock P. Ltd." (supra).

7. On the other hand, the learned D.R. for Revenue has strongly supported the decision of the learned CIT(A) on this issue and placed reliance on the decisions in the case of 'CIT vs. Intermetal Trade Ltd.' [2006] 285 ITR 536 (MP) and oin the case of R.P.G. Industries Ltd. vs CIT & another' [2011] 338 ITR 313 (Cal) to contend that the authorities below had correctly not allowed the assessee to claim adjustment of loss from share trading against other business income of the assessee-company.

8. We have considered the rival contentions. We find that the issue is now squarely covered in favour of the assessee by the decision of the co-ordinate bench of this Tribunal in the case of "Fiduciary Shares & Stock P. Ltd." (supra). The Co-ordinate bench after detailed discussion of the issue has finally concluded that that the amendment inserted in Explanation to section 73 of the

Act by Finance (No. 2) Act, 2014 w.e.f. 01.04.2015 is clarificatory in nature and would therefore operate retrospectively from 01.04.1977 from which date the Explanation to section 73 was placed on the statute. Accordingly, a company, the principal business of which is the business of trading in shares, would fall under the exception to the explanation to section 73 of the Act. Therefore, the loss incurred in share trading business by such companies, i.e. like the assessee, will not be treated as speculation business loss but normal business loss, and hence the same loss can be adjusted against other business income or income from any other sources of the year under consideration. The relevant part of the observation made by the co-ordinate bench of this Tribunal in its order dated 13.05.2016 in the case of "Fiduciary Shares & Stock P. Ltd." (supra) is reproduced as under:

> "5.6.1. We have heard the rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited. Section 73 of the Act stipulates that any loss computed in respect of speculation business shall not be set off except against profits and gains of speculation business. Section 43(5) of the Act clarifies 'speculative transaction' to mean a transaction in which a contract for purchase or sale of any commodity including stock and shares is periodically or ultimately settled otherwise than by actual delivery. Explanation 2 to section 28 of the Act stipulates that where speculative transactions carried on by an assessee are of such a nature so as to constitute a business, the speculation business shall be deemed to be distinct and separate from other business. The sections 73, 43(5) and Explanation 2 to section 28 of the Act are on the statute since 01.04.1962.
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> 5.6.2 Pursuant to the Wanchoo Committee Report of December, 1971, Explanation to section 73 of the Act was inserted by the Taxation Laws (Amendment) Act, 1975 w.e.f. 01.04.1977. Therefore, prior to 01.04.1977, if any assessee was carrying on any speculative transactions, i.e. a contract ultimately settled otherwise than by actual delivery; which are of such a nature to constitute a business, then such speculative transactions are considered as speculation business. If the assessee incurs a loss in such speculation business, then the loss from such speculation business can be adjusted only against profits of another speculation business as provided under section 73 of the Act. In other words, transactions prior to 01.04.1977, which were delivery based, were not treated as speculative transactions and hence the loss arising from such transactions was allowed to be adjusted against the income of the year under consideration. After the insertion of Explanation to section 73 of the Act, companies other than investment companies or finance companies carrying on business of purchase and sale of shares, then the loss from such business would be treated as speculation business loss. Therefore,

by virtue of the insertion of Explanation to section 73 of the Act, if companies whose principal business is of purchase and sale of shares suffer losses from share trading, then such loss from share trading is to be treated as speculative business loss. The intention behind the insertion of Explanation to section 73 of the Act has been explained by the CBDT, Circular No. 204 dated 24.07.1976 (extracted supra) was to curb the methods/devices sometimes resorted to by business house controlling groups of companies to manipulate and reduce the taxable income of companies under their control by showing loss on purchase and sale of shares of group companies. It appears that the intention of the Legislature, from a perusal of the Wanchoo Committee Report and CBDT Circular No. 204 dated
24.07.1976, was not to treat purchase and sale of shares by companies whose main business is trading in shares as speculative business and therefore the Explanation to section 73 of the Act should be read only to the extent of the purpose for which it was inserted. The subsequent amendment made by Finance (No.2) Act, 2014 in the Explanation to section 73 of the Act appears to be made in order to clarify the real intention behind the insertion thereof, by removing the obvious hardship caused to various assessees whose main business is trading in shares. The amendment has removed the anomaly and brought the ambit of the Explanation to section 73 of the Act in line with the intention of the Legislature by placing the companies whose principal business is trading in shares as part of the exception to Explanation to section 73 of the Act, because such companies were not the companies for whom the Explanation was inserted.

5.6.3 The insertion of the amendment in the Explanation to section 73 of the Act by the Finance (No. 2) Act, 2014, in our view, is curative and classificatory in nature. If the amendment is applied prospectively from A.Y. 2015-16, a piquant situation would arise that an assessee who has earned profit from purchase and sale of shares in A.Y. 2015-16 would be treated as normal business profit and not speculation business profit in view of the exception carried out by the amendment in Explanation to section 73 of the Act. In these circumstances, speculation business loss incurred by trading in shares in earlier years will not be allowed to be set off against such profit from purchase and sale of shares to such companies in A.Y. 2015-16. For this reason also, the amendment inserted to Explanation to section 73 of the Act by Finance (No. 2) Act, 2014 is to be applied retrospectively from the date of the insertion to Explanation to section 73 of the Act. In coming to this view, we draw support from the decision of the Hon'ble Apex Court in the case of CIT vs. Alom Extrusions Ltd. (319 ITR 306) wherein their Lordships were considering the amendment made by Finance Act, 2003 by omitting the second proviso to section 43B of the Act w.e.f. 01.04.2004 and bringing about uniformity in the first proviso by equating tax, duty, cess and fees with contribution to welfare funds (viz. Provident Fund, etc.). The Hon'ble Apex Court held that the aforesaid amendment in section 43B of the Act by Finance Act, 2003 is curative in nature and would therefore apply retrospectively w.e.f. 01.04.1988.

5.6.3 In the case of Allied Motors Pvt. Ltd. vs. CIT (224 ITR 677), the question before the Hon'ble Apex Court was whether Sales Tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant Sales Tax Law should be disallowed under section 43B of the Act. The Income Tax Officer disallowed the deduction of Sales Tax collected by the assessee

for the last quarter of the accounting year as the same was paid in the subsequent year. The aforesaid difficulty was cured by the insertion of the first proviso w.e.f. 01.04.1988. The Hon'ble Apex Court held that when a proviso is inserted to remedy unintended consequences and to make the provision workable, the proviso which supplies an obvious omission in the section and which is to be read into the section to give it a reasonable interpretation, it could be read as retrospective in operation to give effect to the section as a whole. The Hon'ble Apex Court held that the first proviso to section 43B of the Act was curative in nature and hence retrospective in operation, i.e. w.e.f. 01.04.1984 from when the section was brought on the statue.

5.6.4 The Hon'ble Apex Court in the case of CIT vs. J.H. Gotla (156 ITR 323) at page 339 and 340 thereof has observed as under: -

> "In the case of Varghese v. ITO [1981]131 ITR 597, this court emphasised that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. "Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by judge Learned Hand that one should not make a fortress out of the dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning.
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> "We have noted the object of s. 16(3) of the Act which has to be read in conjunction with s. 24(2) in this case for the present purpose. If the purpose of a particular provision is easily discernible from the whole scheme of the Act, which in this case is to counteract the effect of the transfer of assets so far as computation of income of the assessee is concerned, then bearing that purpose in mind, we should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be sub served by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. Furthermore, in the instant case, we are dealing with an artificial liability created for counteracting the effect only of attempts by the assessee to reduce tax liability by transfer. It has also been noted how for various purposes the business from which profit is included or loss is set off is treated in various situations as the assessee's income. The scheme of the Act as worked out has been noted before."

5.6.5 The Hon'ble Apex Court in the case of CIT vs. Gold Coin Health Foods Pvt. Ltd. (304 ITR 308) while reversing the decision of the Division Bench of the Apex Court in the case of Virtual Soft Ltd. vs. CIT (289 ITR 83) observed that "A combined reading of the recommendations of the Wanchoo Committee and Circular NO. 204 dated July 24, 1976, makes the position clear that Explanation 4(a) to section 271(1)(c)(iii) intended to levy penalty not only in the case where after addition of concealed income, a loss returned after assessment becomes positive income, but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. Therefore, even during the period between April 1, 1976 and April 1, 2003, the position was that penalty was leviable even in a case where addition of concealed income reduces the returned loss."

5.6.6 The Hon'ble Apex Court in the case of CIT vs. Podar Cement P. Ltd. (226 ITR 625) has held that the circumstances under which the amendment was brought in and the consequences of the amendment will have to be taken care of while deciding the issue as to whether the amendment was clarificatory or substantive in nature and whether it will have retrospective or prospective effect.

5.6.7 In the case of Daga Capital Management Pvt. Ltd. (117 ITD 169) the Tribunal by majority view held that the ultimate test for considering the retrospective or prospective operation of an amendment is to consider its nature rather than going by the date on which it is stated to be applicable from.

5.6.8 In the case of Rajeev Kumar Agarwal vs. Addl.CIT ([(2014) 45 taxmann.com 555 (Agra-Trib.)], the assessee had made interest payments without discharging his obligation to withhold tax under section 194A and the AO therefore disallowed the interest payments under section 40(a)(ia) of the Act. On appeal, the assessee contended that in view of the insertion of second proviso to section 40(a)(ia) by Finance Act, 2012 and in view of the fact that the recipients of the interest had included the income embedded in these payments in their tax returns filed under section 139 of the Act, the disallowance under section 40(a)(ia) of the Act could not be invoked. It was also contended that even though this second proviso is stated to be w.e.f. 01.04.2013, since the amendment is declaratory and curative in nature, it should be given retrospective effect from 01.04.2005, i.e. the date from which sub-clause (ia) of 40(a) was inserted in the statute by way of Finance (No.2) Act, 2004. At para 7 thereof the Tribunal held as under: -

> "7. When we look at the overall scheme of the section as it exists now and the bigger picture as it emerges after insertion of second proviso to section 40(a)(ia), it is beyond doubt that the underlying objective of section 40(a)(ia) was to disallow deduction in respect of expenditure in a situation in which the income embedded in related payments remains untaxed due to non deduction of tax at source by the assessee. In other words, deductibility of expenditure is made contingent upon the income, if any, embedded in such expenditure being brought to tax, if applicable. In effect, thus, a deduction for expenditure is not allowed to the assessees, in cases where assessees had tax withholding obligations from the related payments, without

> corresponding income inclusion by the recipient. That is the clearly discernable bigger picture, and, unmistakably, a very pragmatic and fair policy approach to the issue - howsoever belated the realization of unintended and undue hardships to the taxpayers may have been. It seems to proceed on the basis, and rightly so, that seeking tax deduction at source compliance is not an end in itself, so far as the scheme of this legal provision is concerned, but is only a mean of recovering due taxes on income embedded in the payments made by the assessee."

5.6.9 In the case of Subhalakshmi Vanijya Pvt. Ltd. vs. CIT [(2015) 60 taxmann.com 60 (Cal-Trib.)] an issue before the Bench was whether insertion of proviso to section 68 of the Act by Finance Act, 2012 w.e.f. 01.04.2013 empowering the AO to examine the genuineness of the share capital in the case of a company in which the public are not substantially interested is prospective OR is clarificatory and therefore applicable with retrospective effect. The Tribunal answered the question in para 13.aa thereof holding that the amendment to section 68 of the Act by insertion of proviso is clarificatory and hence retrospective.

5.6.10 We have carefully perused the decision of the Hon'ble Bombay High Court in the case of Prasad Agents (P) Ltd. in 333 ITR 275 (Bom) and are of the humble opinion that the decision/finding rendered therein would not apply to the issue in the case on hand since the issue raised before the Hon'ble High Court was whether the loss due to valuation of stock is covered by Explanation to section 73 of the Act as it stood in 2009 and not in respect to the effect of the amendment by way of the insertion of exception in Explanation to section 73 of the Act by Finance Act (No. 2) Act, 2014 which is before us. The Hon'ble High Court in the cited case (supra) held that there cannot be difference in the treatment between losses suffered in the course of trading in shares and losses in terms of book value of stock-in-trade, even if there was no trading in the course of financial year as the Explanation to section 73 of the Act would cover both shares which are stock-in-trade and shares which are traded for the purpose of considering the profit and loss for the year.

5.6.11 In our humble view, drawing support from the judicial pronouncements cited at paras 5.6.3 to 5.6.9 of this order (supra) we are of the considered opinion and hold that the amendment inserted in Explanation to section 73 of the Act by Finance (No. 2) Act, 2014 w.e.f. 01.04.2015 is clarificatory in nature and would therefore operate retrospectively from 01.04.1977 from which date the Explanation to section 73 was placed on the statute since this amendment to section 73 of the Act '.... or a company the principal business of which is the business of trading in shares .....' brings in the assessee whose principal business is trading of shares. Therefore, the loss incurred in share trading business by such companies, i.e. like the assessee will not be treated as speculation business loss but normal business loss, and hence the same loss can be adjusted against other business income or income from any other sources of the year under consideration. In this view of the matter, we direct the AO to allow the assessee's claim for setting off the loss from 'share trading business' against 'other business income' and income from any other sources during the year under consideration. Since we have

> allowed the assessee's primary contention/ground, we do not consider it necessary to adjudicate the alternative contention raised by the assessee."

9. In our view, the above decision of the Tribunal in the case of fully owned subsidiary of the assessee "Fiduciary Shares & Stock P. Ltd." (supra) on identical facts, is fully applicable to the case of the assessee.

10. So far as the reliance of the Ld. DR on the decision in the case of 'CIT vs. Intermetal Trade Ltd.' [2006] 285 ITR 536 (MP) and in the case of 'R.P.G. Industries Ltd. vs CIT & another' [2011] 338 ITR 313 (Cal) is concerned, we find that the said decisions have been rendered prior to the insertion of amendment to Explanation to section 73 of the Act by Finance (No. 2) Act, 2014, hence there was no question before the Hon'ble respective High Courts regarding the retrospective or prospective operation of the said amendment brought vide Act of 2014. Moreover the said decisions have been rendered in different context and it was not the case of any party that their principal business was of trading in shares. Hence, the said decisions relied upon by the ld. DR can not be applied to the facts of the case in hand.

Therefore, respectfully following the above decision of the Tribunal in the case of fully owned subsidiary of the assessee " Fiduciary Shares & Stock P. Ltd." (supra) on identical facts, this issue is accordingly decided in favour of the assessee. The AO, therefore, is directed to allow the assessee's claim for setting off the loss from 'share trading activity' and also the expenditure incurred relating to the said share trading activity against the income from 'business or profession' for the year under consideration.

**<u>Ground No.3:</u>**

11. In the year under consideration, the Assessing Officer (AO) noticed that the assessee had earned tax free dividend income of Rs.13288/- and that no expenses had been allocated as having been expended for earning such exempt income. On being queried in this regard, the assessee contended that it had not incurred any expenses for earning the exempt income. The AO rejected the

assessee's explanation and held that a certain percentage of the expenses claimed by the assessee company would definitely be attributable to the exempt income earned as the assessee- company had a common pool of human and financial resources which were being utilized to earn income in various forms. He, therefore, applying rule 8D of the Income Tax Rules, calculated the disallowance under section 14A of the Act at Rs.17,11,021/- and disallowed the same on account of expenditure incurred for earning of exempt income. The Ld. CIT(A) confirmed the said disallowance.

12. At the outset, the Ld. A.R. for the assessee, before us, has stated that the assessee has maintained two portfolios in relation to share transactions i.e. one relating to the investments made and the other being trading portfolio. He has further submitted the assessee had made investments only in the wholly owned subsidiaries and in associated companies aggregating to Rs.5,06,00,000/-. That the entire investments were made for business purposes for having control over subsidiary and associated companies. He, therefore, has submitted that the strategic investments made by the assessee were not for the purpose of earning of exempt income but the same were relating to the business strategy of the assessee. He, therefore, has contended that while making out the disallowance under section 14A read with rule 8D of the Income Tax Rules, the strategic investments made in the group concerns should not be considered and be excluded while calculating the disallowance under rule 8D.

He has further submitted that strategic investments were made out of own share capital and reserves of the assessee company. He in this respect has brought our attention to page 2 of the compilation to show that the assessee had own sufficient funds available to it for making such strategic investments in its subsidiaries. The learned AR has further submitted that the assessee had not earned any dividend income in relation to the investments made in subsidiary companies. The only dividend income of Rs. 13288/- earned during the year was in relation to shares held as stock in trade. The entire dividend

income earned from share trading activity was offered for taxation as business income of the assessee. Interest expenditure, if any, incurred by the assessee was relating to the loans used for the activity of trading in government securities and that no interest amount was paid in relation to the investments made in wholly owned subsidiaries as the assessee was possessed of own funds for making such investments. He has further submitted that since no dividend income has been earned out of the investment portfolio, hence, no disallowance was attracted in the light of the recent decision of the Honourable Delhi High Court in the case of M/s Cheminvest Ltd versus CIT (ITA No. 749/2014).

The learned AR on the other hand, has relied upon the observations of the lower authorities.

13. We have considered the rival contentions. So far as the contention of the Ld. AR that no disallowance is attracted in relation to strategic investments made in the sister concerns/group companies where the assessee holds substantial stake is concerned, we find that the identical issue has been raised and decided by the co-ordinate bench of the Tribunal in the case of "Kotak Mahindra Capital Co. Ltd. vs. DCIT" in ITA Nos.5748/M/2012 and 248/M/2013 for A.Ys. 2008-09 & 2009-10 respectively, decided on 21.01.2015 wherein the Tribunal has made the following observations:

> "3. Rival contentions have been heard and perused the records. The A.O. has made the disallowance u/s 14A r.w. Rule 8-D at 0.5% of administrative expenses. There was no disallowance on account of interest while working out the disallowance u/s 14A of the Income Tax Act, 1961. It was argued by the learned A.R. that the assessee has investments in companies which are its group companies where the assessee holds substantial stake. The Id. A.R. submits that strategic investments, per se do not require any day today monitoring as they are inherently long term in nature. No expenditure on day- to-day basis is incurred for managing those investments. Therefore, strategic investment should be excluded for attributing administrative expenses for making disallowance u/s 14A of the Act. The ld. A.R. has placed reliance on the following decisions:-
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> i) HSBC Securities and Capital Markets (I) P. Ltd. - ITA No. 3186/M/08
> ii) Zenstar Technologies Ltd. - ITA No. 4538/M/05
> iii) Shri Bhalchandra R. Sule - ITA No. 3684/M/05
> iv) EIH Associated Hotels vs. DCIT - ITA No. 1503/Mad/12

v) Interglobe Enterprises Ltd. vs. DCIT - ITA No. 1362 & 1032/De1/13
vi) JM Financial Limited vs. ACIT - ITA No. 4521/M/12
vii) CIT vs. Oriental Structural Engineers P. Ltd. - ITA 605 of 2012(HC)
viii) ACIT vs. Oriental Structural Engineers P. Ltd. ITA No. 4245/De1/2011
ix) Garware Wall Ropes Ltd. vs. ACIT - ITA No. 5408/M/2012

In view of the above judicial pronouncements, the ld. A.R. prayed that the A.O. be directed to exclude the investments made in foreign subsidiaries and investment made in companies which are strategic in nature while computing the disallowance u/s 14A of the Act in respect of administrative expenses.

4. On the other hand, the ld. D.R. relied on the orders of lower authorities.

5. We have considered the rival contentions, carefully gone through the orders of authorities below. We have also deliberated upon the judicial pronouncements cited with reference to the exclusion of investment made in the companies which are strategic in nature. As per the judicial pronouncements cited above, such investments should not be taken into account for working out the disallowance u/s 14A of the Act."

14. The Ld. A.R. of the assessee has further brought our attention to the decision of the Hon'ble Bombay High Court in the case of "CIT, Panaji, Goa vs. Phil Corpn. Ltd." (2011) 202 Taxman 368 wherein the Hon'ble Bombay High Court has held that where the investment in shares of sister/subsidiary company is made to have control over that company and further that such an investment was accordingly part of the business of the assessee, in that event the assessee is entitled to deduction of interest paid on the borrowed amount under section 36(1)(iii) of the Act. We, further find that recently the Hon'ble Delhi High Court in the case of "Eicher Goodearth Ltd. vs. CIT" (2015) 60 taxman.com 268 (Del.) has held that if the expenditure is incurred for the purpose of promotion of business-more specifically to retain control or as part of his strategic investment of the assessee company, such expenses by way of interest out go would have to be treated as allowable under section 36(1)(iii) of the Act.

In view of this, the strategic investment in group companies therefore cannot be held to be for investment purposes or with the object of earning of dividend/tax exempt income, but the same, in the light of above referred to Judicial decisions can safely be said to be related to the business activity of the

assessee and no disallowance, therefore, is attracted on such an income u/s 14A of the Act. In the light of the above referred to decisions and respectfully following the same, we direct the AO to exclude the strategic investments made by the assessee in group companies while calculating the disallowance under section 14A read with rule 8D of the Income Tax Act.

15. Further, we find that the Hon'ble Bombay High Court in the case of "CIT vs. Reliance Utilities and Power Ltd." (2009) 313 ITR 340 (Bom) has held has held that if there are funds available, both interest free and over draft and/or loans taken, then a presumption would arise that investments would be out of the interest free fund generated or available with the company, if the interest free funds were sufficient to meet the investment. Similar view has been taken in the case of "CIT vs. HDFC Bank Ltd." in ITA No.330 of 2012 decided on 23rd July 2014 by the Hon'ble Bombay High Court. In the light of the above cited decisions, even otherwise, no interest disallowance is attracted in relation to investments made by the assessee as the assessee had its own sufficient funds for the purpose of making investments.

16. Further, the Hon'ble Delhi High Court in the case of Joint Investment Private Limited (supra) has held that section 14 of the Act or rule 8D cannot be interpreted so as to mean that the entire tax exempt income of the assessee is to be disallowed. That the window for disallowance is indicated in Section 14A, and is only to the extent of disallowing expenditure incurred by the assessee in relation to the tax exempt income. This proportion or portion of the tax exempt income surely cannot swallow the entire amount of tax exempt income. The Hon'ble Delhi High Court in the case of "Chem Investments vs. CIT" (2015) 61 taxman.com 118 has held that section 14A will not apply if no exempt income is received or receivable during the relevant previous year and that the expression 'does not form part of the total income', in section 14A of the Act envisages that there should be an actual receipt of income which is not included in the total income during the relevant previous year for the purpose

of disallowing any expenditure incurred in relation to the said income. Almost identical issue has been taken by the Hon'ble Allahabad High Court in the case of "CIT Kanpur vs. M/s. Shivam Motors Pvt. Ltd." in ITA No.88 of 2014 vide order dated 05.05.2014; by the Hon'ble Gujarat High Court in the case of "CIT vs. Corrtecth Energy Pvt. Ltd." in ITA No.239 of 2014 vide order dated 24.03.2014 and by the Hon'ble Bombay High Court in the case of "CIT vs. M/s. Delite Enterprises" in ITA No.110 of 2009 vide order dated 26.02.09. Since the assessee, in the case in hand, has not earned any dividend income in respect of the investments made, hence in the light of the above case laws of the higher authorities, no disallowance of expenditure u/s 14 A is attracted in relation to the investment portfolio.

17. So far as the next contention that while calculating the disallowance under section 14A, the amount used for the purchase of the shares which are held as stock in trade is required to be excluded from the purview of disallowance u/s 14A of the Act is concerned, the Ld. A.R., in this respect, has relied upon the decision of the Hon'ble Bombay High Court in the case of "CIT vs. India Advantage Securities Ltd." in ITA No.1131 of 2013 vide order dated 17.03.2015 wherein the Hon'ble Bombay High Court has upheld the finding of the Tribunal holding that while making the disallowance under rule 8D, the shares held as stock in trade should not be considered; only the shares taken as investment in the account be considered for computation of disallowance of expenditure under rule 8D. The Ld. A.R. has submitted that the dividend earned in respect of shares held in stock in trade is incidental to the business of the assessee and the investment in the shares held as stock in trade was not made for earning of exempt income.

18. We have examined the above contentions of the Ld. AR. We find that the Tribunal in the case of "DCIT vs. India Advantage Securities Ltd." in ITA No.6711/M/2011 vide order dated 14.09.2012 while relying upon the decision of the Hon'ble Kerala High Court in the case of "CIT vs. Smt. Leena

Ramachandran (339 ITR 296) and further on the decision of the Hon'ble High Court of Karnataka in the case of "CCI Ltd. vs. JCIT" 250 CTR 291 has held that disallowance under section 14A in relation to dividend received from trading shares cannot be made. The said finding of the Tribunal has been upheld by the Hon'ble Jurisdictional Bombay High Court in the case of "CIT vs. India Advantage Securities Ltd." in ITA No.1131 of 2013 vide order dated 17.03.2015 (supra). The said decision holds binding precedent upon this Tribunal. Moreover the assessee has already offered the dividend income earned on the shares held as stock in trade as business income of the assessee.

19. Respectfully following the above referred to decisions of the higher courts, this issue is accordingly decided in favour of the assessee and the disallowance made by the AO in the case of the assessee under section 14A of the Act is hereby ordered to be deleted.

20. In the result, this appeal of the assessee is allowed.

21. Now coming to the assessee's appeal for A.Y. 2010-11 bearing ITA No.955/M/2014.

**ITA No.955/M/2014 for A.Y 2010-11**

22. The assessee, in this appeal, has taken three effective grounds of appeal. Ground Nos.1 & 2 are relating to the disallowance under section 14A of the Act. The facts for this year since are identical to that of A.Y. 2009-10 and in view of our discussions made above and in the light of the various judicial decisions of the High Courts as discussed supra, the ground Nos.1 & 2 are allowed.

23. So far as ground No.3 is concerned, the Ld. A.R. of the assessee has stated at bar that as per the instructions of his client he does not press ground No.3. Ground No.3 is therefore dismissed being not pressed.

24. Ground Nos.4 & 5 of the appeal are general in nature and do not require any adjudication.

25. In view of this, this appeal of the assessee is treated as partly allowed.

26. In the result, ITA No.1349/M/2012 for A.Y 2009-10 is allowed and ITA No.955/M/2014 for A.Y 2010-11 is partly allowed.

**Order pronounced in the open court on 29.06.2016.**

| **Sd/-**<br>**(G.S. Pannu)**<br>**ACCOUNTANT MEMBER** | **Sd/-**<br>**(Sanjay Garg)**<br>**JUDICIAL MEMBER** |
|---|---|

Mumbai, Dated: 29.06.2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.