

**IN THE INCOME TAX APPELLATE TRIBUNAL "F", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM**

**ITA No.1979/Mum/2015
(Assessment Year :2009-10)**

DCIT- 8(3)(1), Mumbai – 400 020	Vs.	Urban Infrastructure Holding Pvt. Ltd., 1 st Floor, Jai Centre, 34 PD Mello Road, Opp. RD Gate, Masjid – 400 009
PAN/GIR No.		AAJCS2680L
Appellant)	..	Respondent)

Revenue by	Ms. Pooja Swaroop
Assessee by	Mr. Madhur Agarwal
Date of Hearing	21/03/2017
Date of Pronouncement	31/03/2017

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the Revenue against the order of CIT(A)-14, Mumbai dated 24/12/2014 for the Assessment Year 2009-10 in the matter of order passed u/s.143(3) of the IT Act, wherein following grounds have been taken by the revenue.

(i) The Learned CIT(A) has erred on facts and in law, in deleting the disallowance of Rs.8,58,32,156/- under section 14A r.w.s. Rule 8D, without properly appreciating the factual and legal matrix as clearly brought out by the Assessing Officer.

(ii) The Learned CIT(A) has erred on facts and in law, in deleting the disallowance of Rs.8,58,32,156/ - under section 14A r.w. Rule 8D, by relying upon Hon'ble ITAT's decision in the case of Garware Wall Ropes Ltd, wherein department has not accepted the decision and filed an appeal before the Hon'ble Bombay High Court which is admitted.

(Hi) The Learned CIT(A) has erred on facts and in law in deleting the addition of Rs.1,32,77,073/- made u/s.36(I)(iii) of the I.T. Act, 1961 without properly appreciating the factual and legal matrix as clearly brought out by the Assessing Officer in his assessment order.

2. Rival contentions have been heard and record perused.
3. Facts in brief are that the assessee is a holding company mainly engaged in Investment activities and also promoting subsidiary company for carrying out business of promotion, development and operation of infrastructure facilities and services i.e. Special Economic Zones. During the year under consideration, the assessee had earned income from Profit on sale of current Investments, Consultancy, Contract Revenue and Interest Income. The Assessing Officer vide his order dated 28.12.2011 disallowed Rs.3,69,80,822 under section 36(1)(iii) of the Act being expenditure in respect of Investments. The learned Assessing Officer also disallowed the expenditure of Rs.8,58,32,156/- under section 14A of the Income Tax Act, 1961 read with Rule 8D.
4. By the impugned order, CIT(A) deleted the disallowance made by AO invoking Rule 8D after observing as under:-

3.3 I have gone through the facts and submission. First and foremost argument of appellant is that having not received arty dividend on the same for which they have relied upon the decision given by the Hon'ble Courts subsequent to CBDT's Circular No.5/2014 dated 11/02/2014, in the case of - CIT v. Lakhani Marketing, ITA No. 970/2008 (P&H) (Hq, CIT v. Shivam Motors (P) Ltd., ITA No. 88/2014 (All.)(HC), CIT v. Cortech Energy Pvt. Ltd., ITA No. 239 of 2014 (Guj.) (HC) and CIT v. Delite Enterprises, ITA No. 110/2009, as reproduced above in appellant's submission. The second argument, taken by the appellant is the investments were made in subsidiary company which is 100% subsidiary of the appellant and out of

total investment of 610.56 crores, investment to the tune of Rs.598 crores was made in these subsidiary company of the appellant named Dronagiri Infrastructure Pvt. Ltd. As per appellant, the investments being totally for the purpose of business, the ratio of decision in the case of Interglobe Enterprises Ltd. v. DCIT(Del.)(Trib.) has relied upon them is applicable. Along with the decision given by the Hon'ble Mumbai Tribunal in the case of Garware Wall Ropes Ltd. has been relied upon by the appellant.

3.4 I 'have gone through both of these cases and I am bound by the decisions given by the Hon'ble ITAT, Mumbai in the case of Garware Wall Ropes Ltd. wherein on identical facts of investments made with subsidiary company, it was held that the same being in the nature of business investment is not an investment and thus provisions of section 14A of the Act are not applicable. Along with this, the plea taken by the appellant that no dividend was earned on the same also go in favour of the appellant that same was not an investment but business transaction. For these reasons, I am of the considered view that provisions of section 14A cannot be attracted in the case and hence disallowance calculated u/s.14a r.w.s.8D for Rs.8,58,32,156/- being not sustainable are deleted herewith. The ground No.1 is allowed.

5. We have gone through the orders of the authorities below and found that disallowance made u/s.14A r.w.r. 8D was deleted by CIT(A) after relying on the decision of co-ordinate bench in case of Garware Wall Ropes Ltd., wherein it was held that investment made in subsidiary companies are required to be excluded while computing disallowance under Rule 8D. The CIT(A) also found that since no dividend income was received, no disallowance was warranted, the detailed finding so recorded by CIT(A) at para 3.3 are as per material on record, therefore, do not require any interference on our part.

6. Learned AR Shri Madhur Agarwal also placed on record the decision of the Hon'ble Delhi High Court in case of Cheminvest Ltd., 378 ITR 33 wherein it was held that no disallowance u/s.14A can be made where

there is no exempt income earned by the assessee in the relevant assessment year.

7. We had carefully gone through the decision of the Delhi High Court wherein the Hon'ble High Court held as under:-

The expression "does not form part of the total income" in Section 14A of the Income Tax Act, 1961 envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year. Held, that no exempted income was earned by the assessee in the relevant assessment year and since the genuineness of the expenditure incurred by the assessee was not in doubt, no disallowance could be made u/s.14A.

8. Furthermore, the proposition that no disallowance can be made u/s.14A in case there is no exempt income is also supported by the following judicial pronouncements.

1. *Joint Investments v. CIT (372 ITR 694 (Del)*
2. *Indus Valley Investments v DCIT being ITA No.3763/Del/2013 for A.Y.2009-10 dated 29/04/2015*
3. *M/s. Daga Global Chemicals vs. Asst. CIT being ITA No.5592/Mum/2012 dated 01/01/2015.*
4. *M/s. Slyvex Cable Co. Pvt. Ltd., v Dy. CIT being ITA No.8581/Mum/2011 for A.Y.2008-09 dated 24/02/2016.*

9. It is not in dispute that assessee was not in receipt of any exempt income during the year under consideration, accordingly on this proposition also, no disallowance is warranted u/s.14A r.w.r. 8D.

10. Disallowance made u/s.36(1)(iii) was deleted by CIT(A) after recording the following findings.

4.2 I have considered the facts in the case. The AO has clearly brought this fact on record that the assessee has

borrowed interest bearing funds for setting up a multi product Special Economic Zone (SEZ) at Sawantwadi, Dist. Sindhudurg in the state of Maharashtra for the identified certain villages and has engaged the services of Urban Transport Infrastructure Pvt. Ltd. to do the job of intermediary between assessee, land owners and relevant government bodies to negotiate the purchase price of land, make payments and complete the formalities. For the same, the assessee paid Rs.2.90 crores to M/s. Urban Transport Infrastructure Pvt. Ltd. also. However, due to certain unavoidable circumstances, the intermediary company UTIPL could not fulfill requirements and hence paid back compensation of Rs.8.70 crores to the appellant company against the deposit taken at Rs.2.90 crores. The assessee has credited the same as revenue in their books of accounts, and the same has been claimed against interest expenses of 12,39,80,822/-. The AO concluded that the difference between income generated and interest paid is not allowable and hence disallowed the difference between Rs.12,39,80,822 less Rs.8,70,00,000/- totaling to Rs.3,69,80,822/-. The appellant on the other hand have submitted that as per provisions of section 36(1)(iii) as well as 37(1) the entire interest expenses being for the purpose of business has to be allowed in toto, as same was undoubtedly and undisputedly taken for the purpose of business and amount kept with UTIPL was also a business transaction. It is for this reason that UTIPL paid them compensation having failed to fulfill the business obligation, and the AO has treated compensation as from business revenue, however have not allowed the expenses incurred for the purpose. For the same, the appellant have relied upon various decisions including that of Madhav Prasad Jatia vs. CIT 118, ITR 200 (SC) and Punjab Stainless Steel Industries vs, CIT, 324 396 by Hon'ble Delhi High Court.

4.3 On these given facts, where the amount was borrowed for the purpose of business and was transacted also for the purpose of business only, notwithstanding the fact that said business transaction could not be effected as the purpose was not served and that only has resulted into compensation from the party on the other hand, which has been duly reflected as revenue by the appellant company, I am of the considered view that stand taken by the AO to allow the interest expenses only up to the extent of compensation received is not supported by the accepted principle of accountancy. It is like saying that every expense incurred for the purpose must yield into profit. If that be the case there cannot be a loss in the business at all. Thus on these given facts where there is no

dispute that the interest were paid on the funds which were utilised for business purpose only, irrespective of the fact that the same could not reach to its desired and, thus resulting into compensation, the expenses have to be allowed u/s.36(1)(ii) of the Act and hence are allowed.

11. We have considered rival contentions and found that AO has disallowed part of the interest expenditure on the plea that compensation received from Urban Transport Infrastructure Pvt. Ltd., was less, accordingly, difference between the interest expenditure and compensation so received was disallowed. The CIT(A) has deleted the disallowance by recording a finding of fact that amount was borrowed for the purpose of business and utilized for the purpose of business only. The CIT(A) also observed that merely because the said business transaction with M/s. Urban Transport Infrastructure Pvt. Ltd., could not be materialized which resulted into compensation from the said party to the assessee which has been duly reflected as Revenue receipt by the assessee, disallowance of part of the interest expenses incurred wholly and exclusively for the purpose of business cannot be made. The CIT(A) also observed that any part of expense incurred for the purpose of business may not necessarily result into any profit. On these facts, the CIT(A) has deleted the disallowance of interest.

12. The expression "for the purpose of business" occurs in Section 36(l)(iii) and also in Section 37(1). A similar expression with different wording also occurs in Section 57(iii) which reads as "for the purpose of making or earning income." This issue came up for consideration before the Supreme Court and Hon'ble Supreme Court while giving judgment in

the case of Madhav Prasad Jatia v. CIT. (SC) 118LTR 200 has observed that the expression occurring in Section 36(l)(iii) is wider in scope than the expression occurring in Section 57(iii). Meaning thereby the scope for allowing a deduction under Section 36(1)(iii) would be much wider than one available under Section 57(iii). This phrase, as held by many legal pronouncement is the most important yardstick for the allowability of deduction under Section 36 (1) (iii) of Income Tax Act, 1961. While explaining the meaning of this phrase the Hon'ble Supreme Court in the case of S. A. Builders Ltd., vs. CIT(A), Chandigarh reported in 288 ITR 1 has used the word "commercial expediency". By using this phrase Hon'ble Supreme Court has given a new dimension and clarified the concept further. In the judgment, the Supreme Court has defined commercial expediency' as "an expression of wide import and' includes such expenditure 'as a prudent ' businessman incurs' for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure, if it was incurred on' grounds of commercial expediency". Further, following this judgment the High Court of Delhi, in the case of Punjab Stainless Steel Inds. Vs; OTT 324 ITR 396, has further elaborated "The commercial expediency would include such purpose as is expected by the assessee to advance its business interests, which has to be distinguished from the personal interest of its directors or partners as the case may be. In other words, there has to be a nexus between the advancing of funds and business interest of the, assessee-firm,.

13. On the facts of the case, we found that all the following three conditions for allowing deduction u/s.36 (1)(iii) was satisfied.

(i) The money, i.e., capital has been borrowed by the assessee

(ii) It must has been borrowed for the purpose of business.

(iii) The assessee has paid interest on the borrowed amount i.e., he has shown the same as an item of expenditure.

14. Further in the case of CIT v, Dalmia Cement (B) Ltd., 254 ITR 377 (Delhi) it has been held that, if all the requisite conditions for allowance of interest are fulfilled, it is not possible and open to the Revenue to make a part disallowance, unless there is a positive finding recorded that a part of the amount borrowed was not used for the purposes of the business. As was observed in Mahadev Prasad's case (1979) 118 ITR 200 (SC), the expression 'for the purpose of business' appearing in S. 36(I)(iii) and S. 37(I) is wider in scope than the expression 'for the purpose of making or earning income' used in S. 57(iii). Therefore, the scope for allowing a deduction u/s.36(I)(iii) is much wider than the one available u/s.57(iii)."

15. In view of the above discussion, we do not find any infirmity in the order of CIT(A) for deleting the disallowance of interest in respect of funds borrowed for the purpose of business.

16. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on this 31/03/2017

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 31/03/2017
Karuna Sr.PS

Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai