

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “F”, MUMBAI
BEFORE SHRI PAWAN SINGH (JM) &
SHRI S RIFAUR RAHMAN (AM)
ITA No. 270/Mum/2018(Assessment year: 2013-14)

Shri Jayant R Pardiwala 218, High Tech Industrial Centre, Caves Road, Jogeshwari (E), Mumbai-400 060 PAN : AAAPP4718N	Vs	ACIT-24(1), Pratyaksh Kar Bhavan, Bandra, Mumbai-400050
APPELLANT		RESPONDEDNT

Appellant by	Shri Ajay R Singh & Ravindra Poojary Advocates
Respondent by	Mrs Kavita Kaushal Sr DR
Date of hearing	05-12-2019
Date of pronouncement	11-12-2019

O R D E R

PER PAWAN SINGH, JM :

1. This is an appeal filed by the assessee which arises out of the order of learned Commissioner of Income tax (Appeals)-42, hereinafter referred as “Id CIT(A)” , Mumbai dated 18-08-2017, which in turn arises from assessment order dated 31-12-2015 passed under section (u/s) 143(3) of Income-tax Act (Act) for the assessment year 2013-14. The assessee has raised the following grounds of appeal:-

“I: DISALLOWANCE U/s. 14A

On the facts and in the circumstances of the case and in law the Learned CIT(A) has erred by confirming disallowance u/s 14A read with rule 8D of Rs. 9,05,5087- over above appellant's suo motto disallowances of Rs. 442,6147- in return of income

On the facts and in the circumstances of the case and in law the Learned CIT(A) has erred by considering interest received from PSU tax free bond, while determining disallowance u/s 14A read with rule 8D of Rs. 1,50,24,2897-; which actually should be outside the purview of section 14A. On the facts and in the circumstances of the case and in law the Learned CIT(A) has ignored the fact that Hon. ITAT in appellant case has restricted disallowance at 2% of tax free income for assessment year 2010-11.”

2. Facts in brief are that the assessee is an individual, engaged in the business of dealing in high-tech printing machinery, computer software and other annual maintenance contract. The assessee is partner in partnership firms M/s Graphic Firm. The assessee filed his return of income for AY 2013-14 declaring total income at Rs.2.48 crores. In the computation of income, the assessee has shown following exempt income;

Sr No.	Particulars	Exempt income (Rs.)
1	Dividends from companies	54,74,290/-
2	Interest from tax free PSU bonds	1,50,24,289/-
3	Share in profit from a partnership firm	1,32,123/-
	Total	2,60,30,702/-

3. During the assessment, the assessing officer (AO) noted that the assessee has made *suo moto* disallowance of Rs.4,12,614/-. The AO further recorded that basis of working of the disallowance is not furnished by assessee. Therefore, the AO issued show cause notice to explain and co-relate with the evidence of each of the investment. The assessee filed its reply dated 20-10-2015. In the reply, the assessee

stated that provisions of section 14A is not applicable to the assessee for the reason that assessee has made suo moto disallowance of 2% of tax free income as per CIT(A)'s order for AY 2009-10. The assessee also furnished the breakup of exempt income earned during the year. The assessee also stated that he has not borrowed any amount for making investment and no interest is paid. Disallowance as per Rule 8D was not made as the formula was giving absurd results. The assessee was availing services of Fund Manager and stock broker on free of cost basis for the purpose of investment of earning tax free income. The broker and agent get hefty commission from mutual funds because of huge investments made by assessee. The assessee stated that *suo moto* disallowance was quite enough. The contents of the reply furnished by the assessee is recorded at para 4.2 of the assessment order.

4. The submission of the assessee was not accepted by the AO. The AO invoked the provisions of Rule 8D and made disallowance under – (i) Rs.2,022 being demat charges; (ii) no disallowance u/r 8D(2)(ii) and (iii) Rs.13,16,100 being 0.5% of average value of investment.
5. On appeal before Id. CIT(A), the action of AO was confirmed. The Ld. CIT(A) while confirming the order of AO relied upon the order for

AY 2012-13 passed by CIT(A)-42 dated 30-03-2014. The Ld. CIT(A) further held that there is no change in the facts for the current year; accordingly, there was no reason to deviate from the finding of his predecessor's decision. Further aggrieved by the order of Ld. CIT(A), the assessee has filed present appeal before us.

6. We have heard the submissions of learned authorised representatives (Ld.AR) for the assessee and the learned departmental representative (Ld. DR) for the revenue and perused the material available on record. The Ld.AR for the assessee submits that the assessee is availing free services of the fund managers & stock broker for the purpose of investment & earning tax free income. The brokers, the agents get hefty commission from the mutual funds because of huge size of the investment made by the assessee. Therefore, the assessee is not required to make any expenditure by way of travelling or deploying staff etc. The assessee has not incurred any direct or indirect expenditure of any nature for the purpose of earning tax free income. Considering the status of the assessee, the assessee is getting free "Home Delivery" services from the mutual funds/ agents/ brokers and fund managers. . The assessee doesn't have any dedicated staff for handling portfolio. The portfolio analysis is made by the fund manager

in order to get more business from the assessee. Demat charges of Rs.2022/- are debited to capital account and not claimed as deductible expenses. The ld AR for the assessee submits that similar disallowance was restricted at 2% of tax free income by the Tribunal in appeal for assessment year 2010-11, vide ITA No. 3033/Mum/2016 dated 15.03.2017. The facts of the present year under consideration are similar and the order for AY 2010-11 may be followed.

7. The ld. AR for the assessee submits that the ld CIT(A) confirmed the order of AO by taking view that similar disallowance was made for assessment year 2012-13 wherein his predecessor dismissed the appeal of assessee vide order dated 30.03.2015. The ld AR for the assessee submits that against the order of ld CIT(A) for AY 2012-13 the assessee filed appeal before Tribunal, however, the said appeal was dismissed by Tribunal vide ITA No. 5231/Mum/2017 in order dated 30/01/2019. The ld. AR for the assessee further submits that the facts for the year under consideration are quite different with AY 2012-13. In AY 2012-13, the assessee has not offered suo moto disallowance; however, for the year under consideration, the assessee has offered suo moto disallowance @ 2% of exempt income, which is quite reasonable. The CIT(A) for AY 2009-10 restricted the disallowance @ 2% of the

exempt income, further the Tribunal also restricted similar disallowances for AY 2010-11 @2% of the exempt income and the revenue has not filed further appeal to higher forums/ courts.

8. Without prejudice to above, the Ld.AR submitted that in present case there is suo-moto disallowance of Rs. 4,12,614/-. Therefore, the AO was required to record his satisfaction before rejection of suo moto disallowance offered by the assessee under section 14A. The AO has not recorded his dissatisfaction before invoking the provisions of Rule8D, which is mandatory. In support of his submissions the Ld AR relied upon the decisions of Hon'ble Bombay High Court in case of CIT Vs M/s. Asian Paints Ltd, ITA No. 1564 of 2016, dated: 06/02/2019 wherein following the Apex Court in Godrej & Boyce Mfg. Co. Ltd. Vs. Dy. CIT, (394 ITR 449) held that in absence of recording the aforesaid fact of non-satisfaction in terms of section 14(2) of the Act, invocation of Rule8D is not permissible. Further reliance was placed on the following judgments:-

- PCIT v. Reliance Capital Asset Management Ltd 400 ITR 217 (Bom)(HC),
- Pr CIT v/s. Radha Madhav Invst Ltd ITA No. 934/2016 dt 21/1/19,
- Dy_CIT v/s. Anil Printers Ltd ITA no 645/M/2017 dt 30/11/2018

9. On the other hand, the Ld. DR for the revenue supported the orders of authorities below. The Ld. DR further submitted that the assessee has not made any suo moto disallowance. The disallowance was made when AO issued show cause notice. The Ld. DR further submitted that no format of rejection of suo moto disallowance is prescribed in the Act or under Rule 8D. The AO, after considering the submission of assessee was not agreeing with the suo moto disallowance. Accordingly, suo moto disallowance was not accepted. The AO at para 4.3 of the assessment order has recorded his dissatisfaction about the correctness of suo moto disallowance. The Ld. DR prayed for upholding the order of Ld. CIT(A). The Ld .DR further submits that the Ld.CIT(A) relied upon the order of his predecessor for AY 2012-13 which has been upheld by the Tribunal in ITA No.645/Mum/2017 dated 30-11-2018.
10. In the rejoinder submission, the Ld.AR for the assessee submits that for AY 2012-13, the assessee had not made any *suo moto* disallowance. Accordingly, the facts for the assessment year 2012-13 are different for the year under consideration. For the year under consideration, the assessee has made suo moto disallowance on the basis of decision of Ld. CIT (A) for AY 2009-10 which has not been challenged by

revenue. The Ld.AR further submits that in appeal for AY 2010-11 in ITA No.3033/Mum/2016, the Tribunal has accepted the 2% suo moto disallowance in order dated 15-03-2017. The ld AR for the assessee submits that suo moto disallowance under section 14A was debited by assessee in the computation of income. The Ld.AR placed on record the orders of CIT(A) for AY 2010-11 and order of Tribunal for AY 2010-11.

11. We have considered the submissions of both the parties and have gone through the orders of authorities below. We have noted that during the assessment, the assessing officer (AO) on verification of the return of assessee noted that the assessee has made *suo moto* disallowance of Rs.4,12,614/-. The AO recorded that basis of working suo moto disallowance under section 14A, is not furnished by assessee. On show the assessee explained that provisions of section 14A is not applicable to the assessee for the reason that assessee has made suo moto disallowance of 2% of tax free income as per CIT(A)'s order for AY 2009-10. The assessee also explained that he has not deployed any borrowed funds for earning tax free income and that disallowance as per Rule 8D was not made as the formula was giving absurd results. It was explained that the assessee was availing services of Fund

Manager, who are getting hefty commission from mutual funds because of huge investments made by assessee. As per assessee the suo *moto* disallowance was quite enough. The AO without expressly recording his dis-satisfaction about the correctness of the suo moto disallowance invoked the provisions of Rule 8D and in addition to direct expenses of Rs. 2022/- under Rule 8D(2)(i) also disallowed Rs. 13,16,100/- under Rule 8D(2)(iii) being average value of investment.

12. To support the disallowance made by AO and confirmed by Id CIT(A), the Id DR for the revenue strongly relied on the decision of Tribunal for AY 2012-13 dated 30.01.2019. On the contrary the Id AR for the assessee vehemently submitted that the facts for AY 2012-13 are at variance as no suo moto disallowance under section 14A was offered by the assessee in that year. We have carefully gone through the order of the Tribunal dated 30.01.2019 of AY 2012-13 and find that no suo moto disallowance under section 14A was offered by the assessee. The coordinate bench after considering the submissions of the parties have concluded that the question of recording of satisfaction would arise only when the assessee made suo moto disallowance, since no suo moto disallowance was made in relation to earning of exempt income, then question of recording satisfaction under section 14(2) does not

arise. Thus, in our considered view the facts for the year under consideration are at variance.

13. Now, turning the facts of the year under consideration, we have seen that the assessee has suo moto offered 2% of the exempt income as expenditure income for earning such income. Perusal of bifurcation of exempt income shows that the assessee earned dividend of Rs. 54,74,290/-, Rs. 1,50,24,289/- being interest on tax free Public Sector Units (PSU) bonds and Rs.1,32,123/- as a share of partnership firm. We have noted that in appeal for AY 2009-10, the Id CIT(A) restricted the disallowance of 14A @ 2% of the exempt income. Similar disallowance under section 14A was again made in AY 2010-11, and on appeal before Tribunal vide ITA No. 3033/Mum/2016, the disallowances was restricted at 2% of the exempt income.

14. The Hon'ble Bombay High Court in CIT Vs M/s. Asian Paints Ltd, (supra) by following the judgment of Hon'ble Apex Court in Godrej & Boyce Mfg. Co. Ltd. (supra) held that in absence of recording the aforesaid fact of non-satisfaction in terms of section 14(2) of the Act, invocation of Rule 8 D is not permissible. Therefore, considering the facts that in absence of recording non-satisfaction about the correctness of assessee's suo moto disallowances under section 14A, the further

disallowance calculated by invoking the provisions of Rule 8D is not justified. Hence, we direct the assessing officer to accept the disallowance offered by the assessee. In the result the grounds of appeal raised by the assessee are allowed.

15. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 11-12-2019.

Sd/-

Sd/-

(S Rifaur Rahman)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 11th December, 2019

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order
Asstt. Registrar, ITAT, Mumbai