आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'डी' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

श्री आर.एस. स्याल, लेखा सदस्य, एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI R.S. SYAL, ACCOUNTANT MEMBER AND

SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं. / ITA no. 5039/Mum./2011
(निर्धारण वर्ष / Assessment Year : 2008–09)

Reliance Infrastructure Ltd. Reliance Energy Centre Santa Cruz (East) Mumbai 400 055	………………… अपीलार्थी / Appellant

बनाम v/s

Dy. Commissioner of Income Tax Circle–10(1), Aayakar Bhavan 101, M.K. Road, Mumbai 400 020	……………… प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AACCR7446Q

आयकर अपील सं. / ITA no. 4419/Mum./2011
(निर्धारण वर्ष / Assessment Year : 2008–09)

Reliance Infrastructure Ltd. Reliance Energy Centre Santa Cruz (East) Mumbai 400 055	………………… अपीलार्थी / Appellant

बनाम v/s

Dy. Commissioner of Income Tax Circle–10(1), Aayakar Bhavan 101, M.K. Road, Mumbai 400 020	……………… प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AACCR7446Q

आयकर अपील सं. / ITA no. 5285/Mum./2011
(निर्धारण वर्ष / Assessment Year : 2008–09)

Asstt. Commissioner of Income Tax
Circle–10(1), Aayakar Bhavan
101, M.K. Road, Mumbai 400 020
……………….. अपीलार्थी / Appellant

बनाम v/s

Reliance Infrastructure Ltd.
Reliance Energy Centre
Santa Cruz (East)
Mumbai 400 055
……………….. प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AACCR7446Q

निर्धारिती की ओर से / Assessee by : Mr. Jitendra Sanghvi
राजस्व की ओर से / Revenue by : Mr. Rakesh Ranjan Prasad

सुनवाई की तारीख / Date of Hearing – 04.07.2013	आदेश घोषणा की तारीख / Date of Order – 19.07.2013

आदेश / ORDER

अमित शुक्ला, न्यायिक सदस्य के द्वारा /
PER AMIT SHUKLA, J.M.

These cross appeals have been preferred by the rival parties challenging the impugned order dated 21st April 2011, passed by the learned Commissioner (Appeals)–XXI, Mumbai, for the quantum of assessment passed under section 143(3) of the Income Tax Act, 1961, for the assessment year 2008–09.

2. At the outset, the learned authorized representative, on behalf of the assessee, submitted before us that the assessee has, by mistake, filed two appeals containing same grounds against the same impugned order, one being ITA no.5039/Mum./2011 and the other being ITA no.4419/Mum./2011

and, therefore, one appeal is required to be withdrawn and treated as infructuous.

3. After hearing the authorized representative and also it is an admitted fact, we find that the appeal in ITA no.5039/Mum./2011, which has been filed subsequently, is hereby treated as infructuous and the same is dismissed.

We now first proceed to dispose off the Revenue's appeal in ITA no.5285/Mum./ 2011, vide which, following grounds have been raised:–

> *"1. In the facts and in the circumstances of the case and in law , the learned CIT(A) has erred in allowing the assessee's claim of the environment monitoring and community development expenses of Rs.4,91,62,163/- treating it as expenditure incurred fir the purpose of business.*
>
> *2. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in directing the assessing officer to' allow the expenditure on replacement of meters amounting to Rs.19,99,36,872/- as revenue expenditure.*
>
> *3. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in directing the Assessing Officer not to allocate any head office expenses for the purpose of computing deduction u/s.80-IA in respect of Goa unit, Samalkot Unit and Windmill Unit.*
>
> *4. On the facts and in the circumstances of the case and in law , the learned CIT(A) has erred in directing the Assessing Officer to adopt the market price of power generated as provided under sub-section 8 of section 801A as the price of power purchased from Tata Power Company as against the reasonable rate of return of 16% as per the orders of Maharashtra State Electricity Regulatory Commission adopted by Assessing Officer for the purpose of computing the deduction u/s.801A in respect of Dahanu Unit.*
>
> *5. On the facts and in the circumstances of the case and in law , the learned CIT(A) has erred in directing the Assessing Officer to allow deduction u/s. 801A to the extent of gross total income and not to the extent of the net business income.*
>
> *6. In the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in holding that the provision of section 115JB are not applicable to the assessee, since the accounts prepared by the assessee in accordance with the provisions of Electricity Supply Act and not in accordance with the provisions of Part II & III of schedule VI of the Companies Act.*
>
> *7. The appellant prays that the order of the CIT (A) on the above grounds be set aside and that of the Assessing Officer be restored."*

4. Before us, both the parties have fairly admitted that all the grounds raised in this appeal are covered by the earlier decisions of the Tribunal in assessee's own case right from the assessment years 1999–2000 to 2007–08. The compilation of such case laws was filed before us in the form of paper book. The learned Departmental Representative, however, chose to rely upon the order passed by the Assessing Officer.

5. The Tribunal in ITA no.5692/Mum./2010 and ITA no.6760/Mum./ 2010, for the assessment year 2007–08, vide order dated 28th September 2011, has considered all the grounds which are identical to the grounds raised in the present appeals, therefore, a reference has been made of the earlier orders passed by the Tribunal and the same was relied upon. The learned Commissioner (Appeals) also in respect of all the grounds has decided the issues in favour of the assessee, following the earlier orders passed by the Tribunal.

6. Ground no.1, relates to the claim of environmental monitoring and community development expenses of ₹ 4,91,62,163, as expenditure incurred for the purpose of business.

7. We find that this issue has been dealt by the Tribunal in its order cited supra, vide Paras–2 to 6, wherein the Tribunal, while dismissing the ground raised by the Revenue, has followed the earlier years' order. Consequently, following the said order, ground no.1, raised by the Revenue is treated as dismissed.

8. In ground no.2, the Revenue has challenged the deletion of expenditure on replacement of meters amounting to ₹ 19,99,36,872, as revenue expenditure.

9. This issue has been discussed by the Tribunal in its order cited supra from Paras–8 to 12, wherein the Tribunal has decided the issue in favour of the assessee for the reasons stated therein. Since the issue before us is identical to the issue decided by the Tribunal in assessee's own case cited

supra, consequently, the ground raised by the Revenue is treated as dismissed.

10. Ground no.3, relates to allocation of headquarter expenses for the purpose of computing the deduction under section 80IA in respect of Goa Unit, Samalkot Unit and Wind Mill Unit.

11. This ground has been discussed by the Tribunal in its order cited supra in Paras–14 to 18, wherein the Tribunal has decided the issue in favour of the assessee for the reasons stated therein. Since the issue before us is identical to the issue decided by the Tribunal in assessee's own case cited supra, consequently, the ground raised by the Revenue is treated as dismissed.

12. In ground no.4, the Revenue has challenged that the direction of the learned Commissioner (Appeals) to the Assessing Officer to adopt a market price of power generated as provided under section 80IA(8) as the price of power purchased from Tata Power Company as against the reasonable rate of return of 16% as per the orders of MSERC adopted by the Assessing Officer for computing the deduction under section 80IA in respect of the Dahanu Unit.

13. This issue has been discussed by the Tribunal in its order cited supra from Paras–20 to 29, wherein the Tribunal, after detailed discussion, has followed the decision of the Tribunal in assessee's own case for the assessment year 2006–07. Since the issue before us is identical to the issue decided by the Tribunal in assessee's own case cited supra, consequently, the ground raised by the Revenue is treated as dismissed.

14. In ground no.5, the Revenue has challenged the allowance of deduction under section 80IA to the extent of gross total income and not to the extent of net business income.

15. This issue has been discussed by the Tribunal in its order cited supra from Paras–29 to 35, wherein the Tribunal, after detailed discussion, has followed the decision of the Tribunal in assessee's own case for the assessment years 2001–02 to 2005–06. Since the issue before us is identical to the issue decided by the Tribunal in assessee's own case cited supra, consequently, the ground raised by the Revenue is treated as dismissed.

16. In ground no.6, the Revenue has challenged non–applicability of the provisions o section 115JB.

17. We find that the Tribunal, in its order cited supra, in assessee's own, vide Paras–37 to 40, has decided the issue in favour of the assessee. Since the issue before us is identical to the issue decided by the Tribunal in assessee's own case cited supra, consequently, the ground raised by the Revenue is treated as dismissed.

18. Ground no.7 and 8 being general in nature, hence, no separate adjudication is required. Accordingly, these grounds are treated as dismissed.

19. परिणामतः राजस्व की अपील खारिज मानी जाती है ।

19. In the result, Revenue's appeal is treated as dismissed.

We now proceed to dispose off the assessee's appeal in ITA no.4419/ Mum./2011, vide which, the assessee has challenged the disallowance made under section 14A r/w rule 8D amounting to ₹ 65,58,58,204, on account of expenditure incurred for earning of exempt income.

20. The Assessing Officer noted that during the year under consideration, the assessee has claimed divided income of ₹ 23,80,81,398, which has been claimed as exempt under section 10. The assessee was required to furnish the details of disallowance as per section 14A and rule 8D. In response, the assessee submitted that it has offered disallowance under section 14A of ₹

5,46,16,385, as per the working under rule 8D and also made various other submissions which has been incorporated in Para–4.1 of the assessment order. The Assessing Officer held that the disallowance worked out by the assessee is not in accordance with the provisions of rule 8D and, therefore, he worked out the disallowance in Para–4.0 in the following manner:–

> *"4.10 Considering the above, the disallowance u/s 14A is computed as under:–*
>
> *i. Disallowance of directly related expenditure;*
> *ii. Disallowance of interest expenses;*
>
> *a. Amount of interest paid – ₹ 3,08,76,49,956*

b.	*<u>Average amount of Investments / Stock–in–trade</u>*	
	Opening balance of investments	*940.81 crores*
	Closing balance of investments	*5876.52 crores*
	Total	*6817.33 crores*
c.	*<u>Average amount of assets</u>*	
	Opening balance of Assets	*18584.15 crores*
	Closing Balance of assets	*<u>20393.54</u> crores*
	Total	*38977.69 crores*
	Average assets	*19488.85 crores*
iii.	*Disallowance of other expenses*	
	<u>0.5% of Average amount of Investments</u>	
	0.5% of ₹ 3408.67	*<u>Rs.17,04,33,500</u>*
	Total disallowance u/s 14A	*<u>Rs.71,04,74,589"</u>*

21. Thus, the disallowance was computed at ₹ 71,04,74,589, instead of disallowance of ₹ 5,46,16,385, offered by the assessee. The net addition of ₹ 65,58,58,204, was made in the in the assessment order.

22. The assessee, before the learned Commissioner (Appeals), submitted details of the borrowed funds as on 31st March 2008 and as on 31st March 2007, and also the details of financial expenditure and interest charges incurred by it and contended that the investment in the securities giving rise to exempt income was made out of surplus funds over the period of time and no expenditure in the nature of interest had been incurred in earning the aforesaid income. As regards other incidental expenditure, it was submitted that dividend warrants and interest warrant in respect of exempt income has been received either once or twice in the year which was received directly by

the party, hence, there was no actual expenditure incurred by way of collection charges or in any other form. Thus, in the absence of any specific expenditure having been incurred for the purpose of earning the exempt income, disallowance under section 14A could not have been made. It was further submitted that the assessee has paid–up capital in the reserves at the beginning of the year at ₹ 9339 crores. As against this, the total investments were at ₹ 2512 crores and at the beginning of the year it was ₹ 7947 crores at the end of the year. Thus, the additional investment of ₹ 5396 crores were made out of the profits of the year as increased by the depreciation. In this regard, reliance was placed on the decision of the Hon'ble Jurisdictional High Court in CIT v/s Reliance Utilities and Powers Ltd., [2009] 313 ITR 340 (Bom.). Lastly, it was submitted that the disallowance made by the Assessing Officer under rule 8D was incorrect because while considering the investment which included the tax free income, only those investment which has actually yielded tax free income during the year can only be considered. In other words, the expenditure on investment which had not yielded tax free income during the year should have not been taken into consideration in the formula of rule 8D, while working out the disallowance. It was also argued that rule 8D(2) can only be invoked when the Assessing Officer has not satisfied with the claim made by the assessee.

23. The learned Commissioner (Appeals), however, rejected the assessee’s entire contentions and held that, firstly, the provisions of section 14A will apply in this case and disallowance has to be worked out, as the assessee itself has admitted that the said provisions are applicable and has suo–motu made disallowance of ₹ 5,46,16,385. Further, he also held that the assessee has only offered the disallowance by considering only those investments on which income was received. In other words, the investment on which the income was not received was not considered for the purpose of disallowance. This is contrary to the provision of law and also clause (2) of rule 8D. The Assessing Officer has, accordingly, invoked the formula provided in rule 8D and there is no error in the working of disallowance. Insofar as satisfaction of

the A.O. on the correctness of assessee's disallowance is concerned, he held that the working itself given by the assessee was incorrect insomuch so it has not considered those investments on which the income was not received. He, thus, confirmed the disallowance made by the A.O.

24. Before us, the learned Counsel for the assessee reiterating the same contentions as were made before the authorities below, submitted that once the investment which had not yielded dividend income or exempt income, the same cannot be considered for the purpose of disallowance because no expenditure can be said to be attributable to such income. In any case, the disallowance sustained by the ld. CIT(A) is very high and excessive. He has not disputed before us that rule 8D will not apply on the facts of the case.

25. Learned Departmental Representative, on the other hand, relied upon the findings of the Assessing Officer as well as the learned CIT (Appeals).

26. We have carefully considered the rival contentions, perused the relevant findings of the Assessing Officer as well as that of the learned Commissioner (Appeals) and the material placed on record. It is not in dispute that the assessee has earned huge dividend income which has been claimed as exempt and for the purpose of disallowance under section 14A, it has disallowed a sum of ₹ 5,46,16,385. The assessee's working of disallowance was too based on rule 8D. However, in its working, the assessee has not considered those investments which have not yielded any income. In our opinion, such a working is not correct, as once the expenditure has been incurred in relation to an income which do not form part of the total income, then the provisions of section 14A, comes into play. Identical issue has come up for consideration before Mumbai Special Bench of the Tribunal in Cheminvest Ltd. v/s ITO, [2009] 121 ITD 318 (Mum.), wherein it has been held that disallowance under section 14A can also be made in the year in which no exempt income has been earned or received by the assessee. When the expenditure is incurred in relation to income which does not form part of the total income, it has to suffer the disallowance

under section 14A, irrespective of the fact that whether or not any income has been earned by the assessee. The section itself does not carve out any such exception. Thus, respectfully following the decision Special Bench decision of the Tribunal in Cheminvest Ltd. (supra), we do not find any merit in the contentions of the assessee that those investments which has not yielded any income in this year should be excluded for the purpose of disallowance in the formula given in rule 8D. Once it is not disputed that the provision of rule 8D are applicable on the conditions stated therein, then disallowance has to be made as per the formula given in rule 8D, except when the assessee brings out cogent material on record to show that a particular expenditure as provided in the formula was not attributable to earning of the exempt income. Consequently, we do not find any infirmity in the finding and conclusion drawn by the learned Commissioner (Appeals) and the same are hereby upheld.

27. परिणामतः राजस्व की अपील खारिज मानी जाती है ।

27. In the result, assessee's appeal is treated as dismissed.

28. निर्णयों के सारांशस्वरूप, राजस्व की अपील एवं निर्धारिती की अपीलें खारिज मानी जाती है ।

28. To sum up, Revenue's appeal and assessee's appeals are treated as dismissed.

आदेश की घोषणा खुले न्यायालय में दिनांकः 19th July 2013 को की गई ।
Order pronounced in the open Court on 19th July 2013

Sd/-	**Sd/-**
आर.एस. स्याल	अमित शुक्ला
लेखा सदस्य	न्यायिक सदस्य
R.S. SYAL	**AMIT SHUKLA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई MUMBAI, दिनांक DATED: 19th July 2013

<u>आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to</u>:

(1) निर्धारिती / The Assessee;

(2) राजस्व / The Revenue;

(3) आयकर आयुक्त(अपील)/ The CIT(A);

(4) आयकर आयुक्त / The CIT, Mumbai City concerned;

(5) विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR, ITAT, Mumbai;

(6) *गार्ड फाईल / Guard file.*

सत्यापित प्रति / True Copy

आदेशानुसार / By Order

प्रदीप जे. चौधरी / Pradeep J. Chowdhury

वरिष्ठ निजी सचिव / Sr. Private Secretary

उप / सहायक पंजीकार / (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

		Date	Initial	
DICTATION PAD ENCLOSED WITH THE FILE				
1.	Draft dictated on	8.7.2013		Sr.PS
2.	Draft placed before author	11.7.2013		Sr.PS
3.	Draft proposed & placed before the second member	15.7.2013		JM/AM
4.	Draft discussed/approved by Second Member	15.7.2013		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	16.7.2013		Sr.PS
6.	Date of pronouncement	19.7.2013		Sr.PS
7.	File sent to the Bench Clerk	22.7.2013		Sr.PS
8.	Date on which file goes to the Head Clerk			
9.	Date of dispatch of Order			