आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'आई' मुंबई

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

श्री बी. रामकोटय्य, लेखा सदस्य, एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं. / ITA no. 7676/Mum./2011
(निर्धारण वर्ष / Assessment Year : 2008–09)

M/s. IL & FS Financial Services Ltd. Plot no.C–22, G–Block, BKC Bandra (E), Mumbai 400 051	……………….. अपीलार्थी / Appellant

बनाम v/s

Addl. Commissioner of Income Tax Circle–10(1), Mumbai	……………….. प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AAACI4805L

निर्धारिती की ओर से / Assessee by : Mr. Dilip . Lakhani
राजस्व की ओर से / Revenue by : Mr. P.K. Shukla

सुनवाई की तारीख / Date of Hearing – 12.08.2013	आदेश घोषणा की तारीख / Date of Order – 13.09.2013

आदेश / ORDER

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

The present appeal has been preferred by the assessee, challenging the impugned order dated 2nd August 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 short "the Act") for the assessment year 2008–09, vide which, following grounds have been raised:–

> *"1. On the facts & circumstances of the case the Learned Commr. of Income Tax (Appeals) has erred in confirming the additions made Under Section 14A read with Rule 8D. The appellant prays that the disallowances of Rs. 28,72,22,642/- is not justified as the networth of the company far exceeds its investments capable of yielding exempted income and be deleted.*
>
> *2. The appellant prays that the activity of purchase and sale of shares is treated as business activity and the result of the said activity is offered for tax under the head 'Business Income'. In view of this no disallowance should be made u/s 14A r.w.r 8D.*
>
> *3. On the facts & circumstances of the case the appellant prays that the addition made u/s l4A r.w.r 8D amounting to Rs. 28,72,22,642/- may be deleted."*

2. <u>Facts in brief</u>:– The assessee is mainly engaged in the business of lending, leasing and financial services. During the relevant previous year, the assessee had shown fund based income at ₹ 792,97,74,893, fee based income at ₹ 170,15,32,847 and miscellaneous income at ₹ 22,45,342 and the net profit was computed at ₹ 168,40,01,429. The Assessing Officer noted that the assessee has also earned dividend income of ₹ 16,35,85,508, which was claimed as exempt. In the computation of total income, the assessee has worked out the disallowance under section 14A at ₹ 55,21,289.

3. In response to the show cause notice as to why the disallowance should not be re–worked on the basis of rule 8D, the assessee submitted that the provisions of rule 8D will not be applicable as the investments were held as stock–in–trade. The Assessing Officer rejected the assessee's

contention and held that the disallowance has to be worked out as per rule 8D in the following manner:–

Particulars	*Mar–08 (₹)*	*Mar–07 (₹)*	*Average (₹)*
Balance of investment capable of yielding exempted income	*10,662,450,791*	*4,265,086,585*	*7,463,768,688*
Total asset	*83,442,663,532*	*51,717,152,332*	*67,579,90,07,932*
Unspecified interest cost for the year (excluding other finance charges)	*2,262,727,643*		

While calculating the disallowance the following have been considered.
i) Interest on bank loan is reduced as incurred towards lending portfolio of the company
ii) As per RBI regulations bank cannot lend for investment purpose to borrower, hence all the bank loan of IFIN are not used for investment purpose.
iii) 0.5% of average value of investment capable of yielding exempted income is disallowed.
Disallowance as per Sec. 14A of I.T. Act, 1961 as per Rule SD.

Sr. No.	*Particulars*	*Amount*
a)	*Expense directly related to Exempt Income*	*—, —*
b)	*Allocated Interest Cost*	*24,99,03,799*
c)	*0.5% of Average value of Investment*	*3,73,18,843*
	Total Disallowances	*28,72,22,642*

Accordingly, an amount of ₹ 28,72,22,642 is added to the total income of the assessee under section 14A r.w. rule 8D of the I.T. Act, 1961."

4. Before the learned Commissioner (Appeals), the assessee submitted that it was having total networth of ₹ 1261 crores and the total investment in shares which was capable of yielding exempt income was ₹ 1066 crores. Since the assessee's networth was far in excess of average investment,

therefore, there should not be attribution of interest while working the disallowance under section 14A. Further, it was also submitted that the assessee was holding shares partly as investment and partly as stock–in–trade and any disallowance under rule 8D cannot be made on stock–in–trade because the assessee is showing business income from such stock–in–trade. The learned Commissioner (Appeals) rejected the assessee’s contention and confirmed the action of the Assessing Officer and also the working of the disallowance under section 14A as per the formula provided in rule 8D.

5. Before us, the learned Counsel submitted that insofar as the investment in shares are concerned, the shares have been made in listed securities as well as unlisted securities. When unlisted shares are sold, the assessee had offered it as capital gain. Further, most of the shares were held as stock–in–trade and, therefore, to the extent of these shares, no disallowance should be made under section 14A. He further contended that the assessee’s total net worth is approximately ₹ 1260 crores whereas the investment in shares which was capable of earning exempt income were far less. Therefore, no interest cost should be disallowed while working out the disallowance under section under rule 8D. For all the above propositions, he relied upon various case laws including that of Bombay High Court in CIT v/s Reliance Utilities and Power Ltd., [2009] 313 ITR 340 (Bom.).

6. Before us, the learned Counsel for the assessee has submitted different working of disallowance based on his above proposition i.e., (i) working of disallowance, if networth is more than investment capable of yielding exempt income; (ii) disallowance, if investment in equity shares is excluded and (iii) disallowance, if only stock–in–trade is excluded.

7. On the other hand, the learned Departmental Representative relying upon the findings given by the Assessing Officer as well as the learned Commissioner (Appeals), submitted that once provisions of rule 8D are

applicable, then the disallowance has to be worked out as per formula given therein. Moreover, it is not a case that the assessee has not paid any interest and, therefore, interest element cannot be excluded in the working. For the other proposition also, he raised strong objection.

8. We have heard the rival contentions and have perused the relevant findings of the Assessing Officer and the learned Commissioner (Appeals) and the material available on record. The Assessing Officer has worked out the disallowance under section 14A as per rule 8D at ₹ 28,72,22,642, after taking interest cost of ₹ 24,99,03,799 and administrative cost of ₹ 3,73,18,843. The learned Counsel has given various working of disallowance under section 14A and had submitted that if any disallowance is called for, then same should be made on that basis only. His main contention has been that the assessee's networth and availability of funds is far more than investment which are capable of yielding exempt income and, therefore, no interest cost should be attributed for working out the disallowance. If the assessee has huge funds which also consist of interest free funds, then presumption would be that investments have been made out of interest free funds, available with the assessee and, therefore, interest cost cannot be made attributable. However, availability of interest free funds and investments which are capable of yielding exempt income, has not been examined properly either by the Assessing Officer or by the learned Commissioner (Appeals). Therefore, respectfully following the decision of the Hon'ble Jurisdictional High Court in Reliance Utilities and Power Ltd. (supra), we direct the Assessing Officer to re–examine the nexus of interest free funds and investment made. In case, the interest free funds are more than the investment, then interest should be cost excluded from the working of the disallowance and in that situation only administrative cost can only be disallowed. Other workings given by the assessee are not being considered in view of the aforesaid direction. We, thus, set aside the impugned order

passed by the learned Commissioner (Appeals) and restore the matter back to the file of the Assessing Officer with the above direction. Needless to say that the Assessing Officer shall give due and effective opportunity of being heard to the assessee and to explain its case.

9. परिणामतः निर्धारिती की अपील ख्यकीय उद्देश्य के लिए आंशिक स्वीकृत मानी जाती है।

9. In the result, assessee's appeal is partly allowed for statistical purposes.

आदेश की घोषणा खुले न्यायालय में दिनांकः 13th September 2013 को की गई
Order pronounced in the open Court on 13th September 2013

Sd/-	**Sd/-**
बी. रामकोटय्य	**अमित शुक्ला**
लेखा सदस्य	**न्यायिक सदस्य**
B. RAMAKOTAIAH	**AMIT SHUKLA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई MUMBAI, दिनांक DATED : 13th September 2013

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

(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