IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

Before Shri R.S. Padvekar, Judicial Member
and Shri R.K. Panda, Accountant Member

ITA No.816/PN/2013
(Assessment Year 2008-09)

M/s. Messung Systems Pvt. Ltd.,
501, Lunkad Skymax,
Datta Mandir Square, Viman Nagar,
Pune – 411014 .. Appellant
PAN No. AABCM1832E

Vs.

DCIT, Circle-9, Pune .. Respondent

Assessee by	:	Shri P.D. Kudwa
Revenue by	:	Shri Mazhar Akram
Date of Hearing	:	31-10-2014
Date of Pronouncement	:	12-11-2014

ORDER

PER R.K. PANDA, AM :

This appeal filed by the assessee is directed against the order dated 26-03-2012 of the CIT(A)-V, Pune relating to Assessment Year 2008-09.

2. There is a delay of about 309 days in filing of this appeal by the assessee. The Ld. Counsel for the assessee referring to the condonation petition for delay in filing of the appeal explained the reasons for such delay. After hearing both the sides and after considering the contents of the condonation petition, the delay in filing of this appeal by the assessee is condoned.

3. Ground of appeal No.1 by the assessee reads as under :

> "On the facts and circumstances of the case and in law the Hon CIT(A) erred in confirming :-
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> 1. Disallowance of Rs. 3,23,660/- u/r 8D r.w.s. 14A of the IT Act as relatable to exempt dividend of Rs.7014015 on ground that w.e.f. A.Y. 2008-09 the AO had no option but to apply the rule."

3.1 Facts of the case, in brief, are that the assessee company is engaged in the business of trading of programmable logic controllers and parts thereof. During the course of assessment proceedings, the Assessing Officer noted that the assessee company has earned dividend income of Rs.70,41,015/- which it claimed as exempt u/s.10(34) of the Income Tax Act. In the return of income the assessee company has added back Rs.3,23,660/- as expenditure in relation to earning the above said income. The Assessing Officer therefore asked the assessee to explain the justification of such disallowance. Rejecting the various explanations given by the assessee and applying the provisions of Rule 8D the Assessing Officer determined such disallowance at Rs.3,23,660/-.

4. Before the CIT(A) it was submitted that in the year ending 31-03-2008 the assessee invested Rs.11,57,23,427 in mutual funds. The paid up share capital of the company as on 31-03-2007 was Rs.49 lakhs and reserves and surplus at Rs.56,39,78,345/-. It was argued that the assessee also earned net profit after tax of Rs.23 crores during the year. It was submitted that no borrowed funds were used for the purpose of these investments. The

assessee earned exempt dividend income of Rs.70,41,015/- and taxable short term capital gain of Rs.29,97,535/- on redemption of mutual funds units and PMS of HDFC during the year. There are only 4 transactions with regards to mutual funds redemption. It was submitted that the administrative expenses incurred by the assessee for investments and income there from during the year was negligible and considering the number of transactions mentioned therein it can hardly be expected to exceed Rs.1,000/- for the year. The assessee also submitted before the Assessing Officer that the disallowance u/s.14A should be limited to this amount which was the expenses reasonably attributable to the exempt income. Relying on various decisions it was submitted that no disallowance u/s.14A is called for.

5. However, the Ld.CIT(A) was also not convinced with the explanation given by the assessee and upheld the action of the Assessing Officer by observing as under :

> "11. After carefully considering the reply of the appellant as well as facts of the case, it is seen that the arguments of the appellant are bereft of merit. It is an undisputed fact that the appellant has shown tax free dividend. Income of ₹70,41,015/- against which no expenditure has been shown. For the present A.Y. Rule 8D is applicable. The claim of the assessee that no expenditure was incurred was not accepted by the Assessing Officer and the appellant came with the proposal that considering the number of dividend warrant (9 in total) and 4 transactions in respect of redemption of Mutual Fund units of HDFC, expenditure could hardly be expected to increase ₹1000/- for the year. Thus, in view of reply of the appellant itself the claim of no expenditure having been incurred for earning such income lost ground and therefore, the Assessing Officer was perfectly justified in applying Rule 8D which was applicable for the relevant A.Y. 2008-09. The appellant's plea that reasonable expenditure should be estimated even where Rule 8D is applicable cannot be accepted in view of

> the fact that appellant's working of disallowance (nil expenditure) was rejected by the Assessing Officer and once the working is rejected there is no other option available to the Assessing Officer but to follow rule 8D for this purpose. There is no via media available to the Assessing Officer. The appellant's reliance on Hon'ble Delhi High Court's decision in the case of Maxopp Investment Ltd. & others Vs. CIT is also misplaced as A.Yrs in question were 1998-99 to 2005-06 for which Rule 8D was not held to be applicable. Therefore, I do not find any merit in the arguments advanced by the applicant. Accordingly, the ground is dismissed.

5.1 Aggrieved with such order of the CIT(A) the assessee is in appeal before us.

6. The Ld. Counsel for the assessee referring to the decision of the Pune Bench of the Tribunal in the case of M/s. Ferrocare Machines Pvt. Ltd. Vs. JCIT vide ITA No. 2497/PN/2013 order dated 11-02-2014 submitted that the Tribunal, following the decision of the Mumbai Bench of the Tribunal in the case of Raj Shipping Agency Ltd. Vs. Addl.CIT reported in 38 Taxmann.com 315, has deleted the disallowance made u/s.14A on the ground that the AO can invoke Rule 8D only when he records satisfaction in regard to the correctness of the claim of the assessee, having regard to the accounts of the assessee. The AO must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. He submitted that when no expenditure was incurred and when no borrowed fund has been utilized towards investment in mutual funds, the income of which has been claimed as exempt, no disallowance u/s.14A can be made. He submitted that in the instant case also no borrowed fund

has been utilized for investment in mutual funds, the dividend income of which is exempt u/s.10(34) of the I.T. Act. He submitted that the entire investment in the mutual funds was out of own funds on which no interest liability was incurred by the assessee. Therefore, the facts of the case being identical to the case decided by the Tribunal in the case of M/s. Ferrocare Machines Pvt. Ltd. (Supra) no disallowance u/s.14A r.w. Rule 8D should be made.

7. The Ld. Departmental Representative on the other hand strongly relied on the order of the CIT(A).

8. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. There is no dispute to the fact that the assessee in the instant case has earned dividend income of Rs.70,14,015/- from mutual funds held by it and claimed the said income as exempt u/s.10(34) of the I.T. Act. We find the Assessing Officer applying the provisions u/s.14A r.w. Rule 8D disallowed an amount of Rs.3,23,660/- which has been upheld by the CIT(A). It is the case of the assessee that no borrowed fund has been utilised towards investment in mutual funds, the income of which has been claimed as exempt. Further, the Assessing Officer has also not recorded any satisfaction with reference to correctness of accounts of assessee nor rejected the claim that no expenditure was incurred. We find the facts of the

instant case are identical to the facts in the case of M/s. Ferrocare Machines Pvt. Ltd.(Supra) where the Tribunal has deleted the disallowance made u/s.14A r.w. Rule 8D by observing as under :

> "7. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the decision cited before us. in the case of Raj Shipping Agencies Ltd. (Supra). We find in the instant case the assessee had declared dividend income from mutual funds at Rs.21,90,651/- which it claimed as exempt. From the various details furnished by the assessee, we find no borrowed fund has been utilised towards investment in the mutual funds, the income of which has been claimed as exempt. We find the Assessing Officer disallowed an amount of Rs.3,03,823/- being expenditure incurred for earning the dividend income u/s.14A r.w. Rule 8D which has been upheld by the CIT(A). While doing so, we find the Assessing Officer has not recorded any satisfaction with reference to accounts of assessee nor rejected the claim that no expenditure was incurred. It is the case of the Ld. Counsel for the assessee that the Assessing Officer has not recorded any satisfaction with reference to accounts of the assessee nor rejected the claim that no expenditure was incurred and therefore in view of the Mumbai Bench of the Tribunal in the case of Raj Shipping Agencies Ltd. (Supra) no disallowance is called for. We find merit in the above argument of the Ld. Counsel for the assessee.
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> 7.1 We find the facts of the instant case are identical to the facts in the case of Raj Shipping Agencies Ltd. (Supra) where the assessee has declared dividend income from mutual funds amounting to Rs.1,12,84,713/- which was claimed as exempt. The entire investment in the mutual fund was out of own source on which no interest liability was incurred by the assessee. Since the assessee has not offered any disallowance u/s.14A the Assessing Officer disallowed an amount of Rs.4,40,138/- u/s.14A r.w. Rule 8D which was upheld by the CIT(A). On further appeal by the assessee the Tribunal deleted the addition by holding as under :
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> "6. The issue in this appeal is with reference to invoking of provisions of section 14A and Rule 8D. The Hon'ble Bombay High Court while upholding the constitutional validity of the section 14A and Rule 8D has this to observe with reference to sub section 2 & 3 of section 14A:
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> "Sub-sections (2) and (3) of section 14A were inserted by an amendment brought about by the Finance Act of 2006 with effect from April 1, 2007. Under sub-section (2), the Assessing Officer is required to determine the amount of expenditure incurred by an assessee in relation to such income which does not form part of the total income under the Act in accordance with such method as may be prescribed. Sub-section (2) was inserted so as to provide a uniform method applicable where the Assessing Officer is not satisfied with the correctness of the claim of the assessee.

Parliament has provided an adequate safeguard to the invocation of the power to determine the expenditure incurred in relation to the earning of non-taxable income by adoption of the prescribed method. The invocation of the power is made conditional on the objective satisfaction of the Assessing Officer in regard to the correctness of the claim of the assessee, having regard to the accounts of the assessee. These safeguards which are implicit in the requirements of fairness and fair procedure under article 14 must be observed by the Assessing Officer when he arrives at his satisfaction under sub-section (2) of section 14A. Sub-rule (1) of rule 8D of the Income-tax Rules, 1962, has also incorporated the essential requirements of sub-section (2) of section 14A before the Assessing Officer proceeds to apply the method prescribed under sub-rule (2)"

(emphasis supplied)

The same opinion was expressed by the Hon'ble Delhi High Court in the case of Maxopp Investment Ltd and Others v. CIT 247 CTR 162 wherein reliance was placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. Walfort Share & Stock Brokers Pvt. Ltd 326 ITR 1 (SC) and the decision of the Hon'ble Bombay High Court in the case of Godrej and Boyce Company Ltd vs. DCIT (328 ITR 81). The relevant portions of the judgment of Hon'ble Delhi High Court are as under:

29. Sub-section (2) of Section 14 A of the said Act provides the manner in which the Assessing Officer is to determine the amount of expenditure incurred in relation to income which does not form part of the total income. However, if we examine the provision carefully, we would find that the Assessing Officer is required to determine the amount of such expenditure only if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the said Act. In other words, the requirement of the Assessing Officer embarking upon a determination of the amount of expenditure incurred in relation to exempt income would be triggered only if the Assessing Officer returns a finding that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Therefore, the condition precedent for the Assessing Officer entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the Assessing Officer must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Sub-section (3) is nothing but an offshoot of sub-section (2) of Section 14A. Sub- section (3) applies to cases where the assessee claims that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act. In other words, sub-section (2) deals with cases where the assessee specifies a positive amount of expenditure in relation to income which does not form part of the total income under the said Act and sub-section (3) applies to cases where the assessee asserts that no expenditure had been incurred in relation to exempt income. In both cases, the Assessing Officer, if satisfied with the correctness of the claim of the assessee in respect of such expenditure or no expenditure, as the case may be, cannot embark

upon a determination of the amount of expenditure in accordance with any prescribed method, as mentioned in sub-section (2) of Section 14A of the said Act. It is only if the Assessing Officer is not satisfied with the correctness of the claim of the assessee, in both cases, that the Assessing Officer gets jurisdiction to determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the said Act in accordance with the prescribed method. The prescribed method being the method stipulated in Rule 8D of the said Rules. While rejecting the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the Assessing Officer would have to indicate cogent reasons for the same.

Rule 8D

30. As we have already noticed, sub-section (2) of Section 14A of the said Act refers to the method of determination of the amount of expenditure incurred in relation to exempt income. The expression used is - "such method as may be prescribed". We have already mentioned above that by virtue of Notification No.45/2008 dated 24/03/2008, the Central Board of Direct Taxes introduced Rule 8D in the said Rules. The said Rule 8D also makes it clear that where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with (a) the correctness of the claim of expenditure made by the assessee; or (b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act for such previous year, the Assessing Officer shall determine the amount of the expenditure in relation to such income in accordance with the provisions of sub-rule (2) of Rule 8D. We may observe that Rule 8D(1) places the provisions of Section 14A(2) and (3) in the correct perspective. As we have already seen, while discussing the provisions of Sub-sections (2) and (3) of Section 14A, the condition precedent for the Assessing Officer to himself determine the amount of expenditure is that he must record his dissatisfaction with the correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred. It is only when this condition precedent is satisfied that the Assessing Officer is required to determine the amount of expenditure in relation to income not includable in total income in the manner indicated in sub-rule (2) of Rule 8D of the said Rules.

31.It is, therefore, clear that determination of the amount of expenditure in relation to exempt income under Rule 8D would only come into play when the Assessing Officer rejects the claim of the assessee in this regard. If one examines sub-rule (2) of Rule 8D, we find that the method for determining the expenditure in relation to exempt income has three components. The first component being the amount of expenditure directly relating to income which does not form part of the total income. The second component being computed on the basis of the formula given therein in a case where the assessee incurs expenditure by way of interest which is not directly attributable to any particular income or receipt. The formula essentially apportions the amount of expenditure by way of interest [other than the amount of interest included in clause (i)] incurred during the previous year in the ratio of the average value of investment, income from which does not or shall not form part of the total income, to the average of the total assets of the assessee. The third component is an artificial figure - one half percent of the average value of the investment, income from which does not or shall not form part of the total income, as appearing in the balance sheets of assessee, on the first day and the last day of the previous year, It is the aggregate of these three components which would constitute the expenditure in relation to exempt income and it is this amount of expenditure which would be disallowed under section 14A of the said Act. It is, therefore, clear that in terms of the said Rule, the amount of expenditure in relation to exempt income has two aspects - (a) direct and (b) indirect. The direct expenditure is straightaway taken into account by virtue of clause (i) of sub-rule (2) of Rule 8D. The indirect expenditure, where it is by way of interest, is computed through the principle of apportionment, as indicated above, and, in cases where the indirect expenditure is not by way of interest, a rule of thumb figure of one half percent of the average value of the investment, income from which does not or shall not form part of the total income, is taken.

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41. Sub-section (2) of section 14A, as we have seen, stipulates that the Assessing Officer shall determine the amount of expenditure incurred in relation to income which does not form part of the total income "in accordance with such method as may be prescribed". of course, this determination can only be undertaken if the Assessing Officer is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. This part of section

14A(2) which explicitly requires the fulfillment of a condition precedent is also implicit in section 14A(1) [as it now stands] as also in its initial avatar as section 14A. It is only the prescription with regard to the method of determining such expenditure which is new and which will operate prospectively. In other words, section 14A, even prior to the introduction of sub-sections (2) and (3) would require the assessing officer to first reject the claim of the assessee with regard to the extent of such expenditure and such rejection must be for disclosed cogent reasons. It is then that the question of determination of such expenditure by the assessing officer would arise. The requirement of adopting a specific method of determining such expenditure has been introduced by virtue of sub-section (2) of section 14A. Prior to that, the assessing was free to adopt any reasonable and acceptable method.

7. The Hon'ble Punjab & Haryana High Court in the case of CIT vs. Hero Cycles Ltd 323 ITR 518 (P&H) has also held that disallowance under section 14A could not stand where it was found that for earning exempted income no expenditure has been incurred:

"Held - dismissing the appeal, that the expenditure on interest was set off against the income from interest and the investment in the shares and funds were out of the dividend proceeds. In view of this finding of fact, disallowance under section 14A was not sustainable. Whether, in a given situation, any expenditure was incurred which was to be disallowed, was a question of fact. The contention of the Revenue that directly or indirectly some expenditure was always incurred which must be disallowed under section 14A and the impact of expenditure so incurred could not be allowed to be set off against the business income which may nullify the mandate of section 14A, could not be accepted. Disallowance under section 14A required finding of incurring of expenditure and where it was found that for earning exempted income no expenditure had been incurred, disallowance under section 14A could not stand. Consequently, the disallowance was not permissible.

8. The Coordinate Bench in the case of Justice Sam P Bharucha vs. Addl. CIT in ITA No.3889/Mum/2011 dated 25.07.2012 has analyzed similar issue and came to the following conclusion:

"5 We have considered the rival submissions as well as relevant material on record. Section 14A has within it implicit notion of apportionment in the cases where the expenditure is incurred for the composite/indivisible activities in which taxable and non-taxable income is received. But when it is possible to determine the actual expenditure in relation to the exempt income or when no expenditure has been incurred in relation to the exempt income, then principle of apportionment embedded in section 14 A has no application. The objective of section 14 A is not allowing to reduce tax payable on the normal exempt income by debiting the expenditure incurred to earn the exempt income. Thus, the expenses incurred to earn exempt income cannot be allowed and the expenses shall be allowed only to the extent they are related to the earning of taxable income. If there is expenditure directly or indirectly incurred in relation to exempt income, the same cannot be claimed against the income, which is taxable as it is held by the Hon'ble Supreme Court in case of Commissioner of Income-tax v. Walfort Share and Stock Brokers P. Ltd. reported in 326 ITR 1 that for attracting the provisions of section 14 A, there should be proximate cause for disallowance which as relationship with the tax exempt income.

5.1 The expenditure incurred in relation to the income which does not form part of total income has to be disallowed. However, it should be proximate relationship between the expenditure and the income, which does not form part of total income. Once such proximity relationships exist, the disallowance is to be effected. In case the assessee had claimed that no expenditure has been incurred for earning the exempt income, it was for the assessing officer to determine as to whether the assessee had incurred any expenditure in relation to income which did not form part of total income and if so to quantify the extent of disallowance. Thus, in order to disallow the expenditure under section 14A, there must be a live nexus between the expenditure incurred and the income not forming part of total income. No notional expenditure can be apportioned for the purpose of earning exempt income unless there is an actual expenditure in relation to earning the income not forming part of total income. If the expenditure is incurred with a view to earn taxable income and there is apparent dominant and immediate connection between the expenditure incurred and taxable income, then no disallowance can be made under section 14A merely because some tax exempt income is received by the assessee.

5.2 Averting to the facts of the case in hand, the assessee had made a claim that no expenditure has been incurred or claimed for earning the exempt income. From the details of the expenditure, it is clear that the expenditure incurred and claimed by the assessee has direct nexus with the professional income of the assessee. It is not the case of the revenue that the assessee has used his official machinery and Establishment for earning the exempt income. The Assessing Officer has not given any finding that any of the expenditure incurred and claimed by the assessee is attributable for earning the exempt income. In other words when the assessing officer has not pointed out that certain expenditure is not incurred for earning the professional income; but are incurred in relation to dividend income or such expenditure is incurred for inseparable and indivisible activities comprising professional as well as the activities on which is exempt income has been earned by the assessee, then in the absence of any such instance of expenditure, finding of Assessing Officer or any material to show that the expenditure incurred and claimed by the assessee against the taxable income has any relation for earning the exempt income, the provisions of section 14A cannot be applied.

5.3 In the case of Shri Pawan Kumar Parameshwar Lal vs. ACIT (supra) this tribunal has considered and decided an identical issue in Para 4 as under:

"4. After hearing the assessee in person and arguments of the learned D.R. we are of the opinion that no disallowance is called for under section 14A. Obviously the assessee is maintaining separate books of account for purpose of business and these investments are in his personal capacity. The A.O. also has not disallowed any expenditure of personal nature out of the income from business or profession in the computation of income in the assessment order. In view of this we are of the opinion that the expenditure claimed in the business of share dealings cannot be correlated to the incomes earned in personal capacity that too on dividend, PPF interest and tax free interest on RBI bonds. In view of this, we are of the opinion that estimation of expenditure of Rs.20,000/- out of business expenditure claimed in business activity cannot be considered for being incurred for this earning of tax free income of above nature. In view of this disallowance so made under section 14A of Rs.20,000/- is deleted. Not only that the CIT(A) directed the A.O. to consider the allowance invoking Rule 8D. The Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. vs. DCIT 328 ITR 81 has considered Rule 8D to be applicable prospective and since the assessment year involved is before the introduction of sub- section (2) & (3) of section 14A, there is no question of disallowing the amounts invoking Rule8D. Therefore, the CIT(A)'s direction on this is set aside and the additions so made by the A.O. in the computation of business income is deleted. Ground is considered allowed."

5.4 Similarly in case of Auchtel Products Ltd (supra), it was held by this Tribunal in Para 15 has under:

"15. A bare perusal of the above provisions indicates that the AO shall determine the amount disallowable as per Rule 8D, if he, "is not satisfied with the correctness of the claim of the assessee" in respect of such expenditure in relation to exempt income. Even if the assessee claims that no expenditure was incurred in respect of exempt income, the AO is supposed to follow the mandate of Rule 8D if he is not satisfied with the correctness of the assessee's claim. To put it simply, the further disallowance u/s.14A is called for when the AO is not satisfied with the assessee's claim of having incurred no expenditure or some amount of expenditure in relation to exempt income. Satisfaction of the AO as to the incorrect claim made by the assessee in this regard is sine qua non for invoking the applicability of Rule 8D. Such satisfaction can be reached and recorded only when the claim of the assessee is verified. If the assessee proves before the AO that it incurred a particular expenditure in respect of earning the exempt income and the AO gets satisfied, then there is no requirement to still proceed with the computation of amount disallowable as per Rule 8D. From the assessment order, it is observed that the AO simply kept the assessee's submissions on record without appreciating as to whether these were correct or not. He proceeded on the premise as if the disallowance as per Rule 8D is automatic irrespective of the genuineness of the assessee's claim in respect of expenses incurred in relation to exempt income. It is an incorrect course adopted by the AO. The correct sequence, in our considered opinion, for making any disallowance u/s. 14A is to, firstly, examine the assessee's claim of having incurred some expenditure or no expenditure in relation to exempt income, If the AO gets satisfied with the same, then there is no need to compute disallowance as per Rule 8D. It is only when the AO is not satisfied with the correctness of the claim of assessee in respect of such expenditure or no expenditure having been incurred in relation to exempt income, that the mandate of Rule 8D will operate. In the instant case, the authorities below have directly gone to the second stage of computing disallowance u/s. 14A as per Rule 8D without rendering any opinion on the correctness or otherwise of the assessee's claim in this regard. We, therefore, set aside the impugned order on this issue and restore the matter to the file of AO to re-compute disallowance, if any, in accordance with our above observations after duly examining the assessee's claim in this regard."

6. In view of the above discussion and facts and circumstances of the case, we are of the considered opinion that no disallowance under section 14A is called for when the assessee has not incurred and claimed any expenditure for earning the exempt income.

9. Similar views were also expressed by the Coordinate Benches in the case of Relaxo Footwears Ltd, vs. Addl. CIT (2012) 50 SOT 102 and Priya Exhibitors (P) Ltd vs. ACIT (2012) 54 SOT 356. In the case of Relaxo Footwears Ltd, it was held as under:

" The Assessing Officer should have considered the claim of the assessee that no expenditure has been incurred in relation to earning the exempt income. If the claim was not found to be in consonance with the facts on record, it could have been rejected and disallowance could have been made as per rule 8D. However, it is found that the Assessing Officer has not considered the claim of the assessee at all and he has straightway embarked upon computing disallowance under rule 8D. The Commissioner (Appeals) made an assumption that whenever exempt income is earned there will be some expenditure incurred in relation thereto. Such presumption cannot form the basis for making disallowance under rule 8D."

10. In the case of Priya Exhibitors (P) Ltd vs. ACIT (2012) 54 SOT 356 it was held as under:

" From the careful study of the observations made by the Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. (supra), it is apparent that first the Assessing Officer has to determine the claim of the assessee regarding expenses which neither the Assessing Officer nor the Commissioner (Appeals) has done in the instant case. In fact, the said decision goes against the department itself in so far as their Lordships has held that the Assessing Officer must in the first instance determine whether the claim of the assessee is correct and determination must be made having regard to the accounts of the assessee. The Legislature directs him to follow rule 8D only where the Assessing Officer is not satisfied with the claim of assessee. "

11. After considering the principles laid down by various judgments, it is imperative that the Assessing Officer can invoke Rule 8D only when he records satisfaction in regard to the correctness of the claim of the assessee, having regard to the accounts of the assessee. The condition precedent for the Assessing Officer entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the Assessing Officer must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. While rejecting the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the Assessing Officer would have to indicate cogent reasons for the same. Therefore, it is all the more necessary that AO has to examine the accounts of assessee first and then if he is not satisfied with the correctness of the claim, only he can invoke Rule 8D. No such examination was made or satisfaction was recorded by AO in this case. It was noticed that the Assessing Officer has not considered the claim of the assessee at all and he has straightway embarked upon computing disallowance under Rule 8D. Disallowance under section 14A required finding of incurring of expenditure and where it was found that for earning exempted income no expenditure had been incurred, disallowance under section 14A could not stand. Consequently, the disallowance was not permissible.

12. Alternate contention was that the disallowance need not be made on entire expenditure made as assessee's income from shipping related activity was assessed u/s 115VA on presumptive basis. Since assessee has offered income under the Tonnage Tax Scheme, applicability of section 14A was also discussed by the Coordinate Bench in the case of Varun Shipping Company Ltd vs. Addl. CIT in ITA No.5576/Mum/2011 wherein the Coordinate Bench has held as under:

"7. We have considered the rival submissions and also perused the relevant material on record. It is observed that the assessee is mainly engaged in the business of operation of ships and its income from the said business was declared and assessed as per the special provisions contained in Chapter XIIG which lay down tonnage tax scheme. As per the provisions of section 115VA contained in Chapter XIIG, the income from the business of operating qualifying ships can be computed at the option of the assessee in accordance with the provisions of Chapter XIIG and once this option is exercised by the assessee, the income so computed shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and Gains of business or profession" notwithstanding any thing to the contrary contained in section 28 to 43C. It, therefore, follows that when the income of the assessee from the business of operating ships is computed as per the special provisions contained in Chapter XIIG, only the expenses incurred by the assessee for earning income of the said business are deemed to be allowed and nothing else. It, therefore, cannot be said that when the income of the assessee from the business of operating ships is computed as per the special provisions of Chapter XIIG, any expenditure other than the expenditure incurred for the purpose of the said business has been allowed and consequently no addition to income so computed can be made by way of disallowance u/s 14A on account of expenditure incurred by the assessee in relation to earning of exempt dividend income. We, therefore, find merit in the contention of the learned counsel for the assessee that the income of the assessee from the business of operating ships having been computed in accordance with the provisions of Chapter XIIG, only the expenses incurred for the said business are deemed to have been allowed and no addition to such income can be made by way of disallowance u/s 14A on account of any expenditure incurred in relation to earning of exempt dividend income. In our opinion, if at all the assessee has claimed any such expenditure in computation of profit of business of shipping, the same are to be taken as disallowed when the income of the said business is finally computed in accordance with the provisions of Chapter XIIG and no separate disallowance on account of such expenditure u/s 14A can be made. We, therefore, delete the disallowance made by the AO u/s 14A and confirmed by the learned CIT(Appeals) and allow ground No. 1 of the assessee's appeal".

13. In view of the above, since assessee has not directly spent any expenditure for earning the exempt income and also since AO has not recorded any satisfaction with reference to the accounts of assessee or claim that no expenditure was incurred and also keeping in mind the fact that assessee has offered most of the income under the Tonnage Tax Scheme and balance of the expenditure was for earning taxable non-tonnage tax income, we are of the opinion that invocation of Rule 8D for disallowing the expenditure under section 14A on estimation/ presumptive basis does not arise. Accordingly, the grounds raised by assessee are allowed."

> 7.2 Since the facts of the case decided by the Tribunal cited above are identical to the facts of the impugned appeal, therefore, respectfully following the decision of the Mumbai Bench of the Tribunal in the case of Raj Shipping Agencies Ltd. (Supra) and in absence of any contrary material brought to our notice by the Ld. Departmental Representative we set-aside the order of the CIT(A) and direct the Assessing Officer to delete the addition. The ground raised by the assessee is accordingly allowed."

8.1 Since facts of the instant case are identical to the case decided by the Tribunal cited (Supra), therefore, respectfully following the decision of the Coordinate Bench of the Tribunal and in absence of any contrary material brought to our notice by the Ld. Departmental Representative, we set-aside the order of the CIT(A) and direct the Assessing Officer to delete the disallowance. Ground of appeal No.1 by the assessee is accordingly allowed.

9. Ground of appeal No2 by the assessee reads as under :

> "2. Disallowance of Professional Fees of Rs. 2,65,270/- u/s 40(a)(ia) of the I.T. Act on grounds that TDS was not deposited within time in respect of bills approved and booked in March 2008 but bearing date prior to March 2008."

9.1 Facts of the case, in brief, are that the Assessing Officer during the course of assessment proceedings noted that the assessee has paid the tax deducted at source on 07-04-2008 on the following invoices in March 2008 but which are dated prior to 01-03-2008 and are recorded in the accounts in the ordinary course.

S.No.	Name of the deductee	Date	Amount (in Rs.)
1	M/s. Pasaydan Systems	31-10-2007	43,000
2	M/s. Pasayan Systems	12-12-2007	43,000
3	M/s. Pasayan Systems	03-01-2008	43,000
4	US Automation	29-01-2008	84,270
5	US Automation	29-02-2008	84,270

6	Interstat Consultants	29-02-2008	93,635
7	Interstat Consultants	29-02-2008	25,265
8	Makrand Deo	14-02-2008	27,000
9	AM Consultancy	17-12-2007	25,000
	TOTAL		**4,68,439**

9.2 On being questioned by the Assessing Officer it was explained that though the invoices were raised prior to March, 2008 but they were approved by the concerned department in March 2008 and were received by the Accounts department in the month of March 2008 or credited/paid to the parties in March, 2008. Tax has been correctly deducted and paid in April, 2008. However, the Assessing Officer was not satisfied with the explanation given by the assessee. He noted that invoices of M/s. US Automation and M/s. Interstat consultants which are dated 29-02-2008 were received and recorded in March, 2008 in ordinary course. The balance of the invoice of Rs.2,65,270/- should have been recorded in February, 2008 or earlier months and TDS thereof should have been deducted by 07-03-2008 or earlier due dates. Since the TDS in respect of such invoices is deposited on 07-04-2008, therefore, the Assessing Officer, invoking the provisions of section 40(a)(ia), disallowed the expenses amounting to Rs.2,65,270/-. In appeal the Ld.CIT(A) upheld the action of the Assessing Officer for which the assessee is in appeal before us.

10. The Ld. Counsel for the assessee referring to the decision of Hon'ble Delhi High Court in the case of CIT Vs. Rajinder Kumar reported in (2013) 39 Taxmann.com 126 (Delhi) submitted that the

Hon'ble High Court in the said decision has held that the expression "said due date" as occurring in item (A) of proviso to section 40(a)(ia) of the Act cannot mean date on which TDS as per Chapter XVIIB should have been paid. It refers to due date of filing of return of income u/s.139(1). Therefore, when assessee deducted TDS in March 2007, i.e. last month of the previous year and deposited the same in April 2007, i.e., before the said due date on which return of income u/s.139(1) is to be filed, therefore, provisions of section 40(a)(ia) could not have been invoked. He accordingly submitted that since the assessee in the instant case has deposited the TDS in the month of April, 2008,. i.e. before the due date of filing of the return, therefore, no disallowance u/s.40(a)(ia) is called for.

11. The Ld. Departmental Representative on the other hand heavily relied on the order of the Assessing Officer.

12. After hearing both the sides, we find the assessee undisputedly has paid the TDS on 07-04-2008, a fact brought on record by the Assessing Officer himself at page 7 of the assessment order. We find the Hon'ble Delhi High Court in the case of CIT Vs. Naresh Kumar reported in 263 ITR 56 while deleting disallowance u/s.40(a)(ia) has observed as under (Head Notes) :

> "Section 40(a)(ia), read with section 139, of the Income-tax Act, 1961 - Business disallowance - Interest, etc., paid to resident without deduction of tax at source [2010 amendment] - Assessment year 2008-09 - Whether section 40(a)(ia) to extent of 2010 amendment was procedural as same did not impose a new

tax but wanted to ensure collection of TDS and amendments made had streamlined and corrected anomalies noticed in said procedure by allowing deduction in year when expenditure was incurred provided TDS was paid before due date for filing of return - Held, yes - Whether section 40(a)(ia) should be interpreted liberally and equitable keeping in mind object and purpose behind same, so that assessee should not suffer unintended and deleterious consequences - Held, yes - Whether, therefore, amendment made in section 40(a)(ia) by Finance Act, 2010 giving relaxation applies retrospectively to earlier years - Held, yes [Paras 17, 26 & 29] [In favour of assessee]"

Therefore, respectfully following the decision of Hon'ble Delhi High Court in the case of Rajinder Kumar (Supra) we hold that the provisions of section 40(a)(ia) are not applicable to the facts of the present case. Accordingly, we set aside the order of the CIT(A) and direct the Assessing Officer to delete the disallowance. Ground of appeal No.2 by the assessee is accordingly allowed.

13. Ground of appeal No.3 by the assessee reads as under :

"3. Disallowance of contract payments of Rs. 15,71,667/- u/s 40(a)(ia) of the I.T. Act, on grounds that TDS was not deposited within time in respect of bills approved and booked in March 2008 but bearing dates prior to March 2008."

13.1 Facts of the case, in brief, are that the Assessing Officer during the course of assessment proceedings observed from the various details of expenses recorded in month of March 2008 that the invoices bear date 20-02-2008 and earlier, whereas the assessee has paid TDS only on 7th April 2008. The details are as under :

Expense	Gross amount (Rs.)	TDS (Rs.)
Agency Commission	3,80,987	8,649
Freight-Trading Goods	68,108	1,547

Carriage Outward	8,84,764	20,086
Cleaning & Forwarding Exp.	30,626	695
Labour-Manpower	1,00,109	2,273
Printing & Stationery	17,109	388
Software Development (oth)	90,000	2,043
Total	**15,71,667**	**35,681**

On being confronted, it was explained that though the invoices were raised prior to March, 2008 however they were approved by the concerned departments in March, 2008 and were received by the accounts department in March, 2008 or credited/paid to the parties in March 2008. Tax has been correctly deducted and paid in April, 2008. However, the Assessing Officer was not satisfied with the explanation given by the assessee and made addition of Rs.15,71,667/- u/s.40(a)(ia) of the I.T. Act. In appeal the Ld.CIT(A) upheld the addition for which the assessee is in appeal before us.

14. After hearing both the sides, we find the assessee in the instant case has undisputedly deposited the TDS on 07-04-2008, a fact brought on record by the Assessing Officer himself at page 7 of the assessment order. Since in the instant case the assessee had deposited the TDS in the month of April 2008, therefore, following the reasoning given in the preceding paragraphs while deciding ground of appeal No.2, we are of the considered opinion that no disallowance u/s.40(a)(ia) is called for. Accordingly, the order of the CIT(A) is set-aside and the ground raised by the assessee is allowed.

15. In the result, the appeal filed by the assessee is allowed.

Pronounced in the open court on 12-11-2014.

Sd/-	Sd/-
(R.S.PADVEKAR)	**(R.K. PANDA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Pune Dated: 12th November, 2014
Satish

Copy of the order forwarded to :

1. Assessee
2. Department
3. The CIT(A)-V, Pune
4. The CIT-V, Pune
5. The D.R, "B" Pune Bench
6. Guard File

By order

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Assistant Registrar
ITAT, Pune Benches, Pune