

**आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।  
**BEFORE SHRI JOGINDER SINGH, JM AND SHRI SANJAY ARORA, AM**

आयकर अपील सं./I.T.A. No. 857/Mum/2013

(निर्धारण वर्ष / Assessment Year: 2009-10)

Ferani Hotels Pvt. Ltd. Construction House ‘B’, 2 <sup>nd</sup> Floor, 623, Linking Road, Khar (W), Mumbai-400 052	<b>बनाम/</b> Vs.	Asst. CIT, Central Circle 23, Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACF 0693 B		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri Sanjay B. Sawant
प्रत्यर्थी की ओर से/Respondent by	:	Shri Jitendra Kumar
सुनवाई की तारीख / Date of Hearing	:	17.09.2014
घोषणा की तारीख / Date of Pronouncement	:	17.11.2014

**आदेश / ORDER**

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-40, Mumbai (‘CIT(A)’ for short) dated 06.11.2012, partly allowing the assessee’s appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 (‘the Act’ hereinafter) for the assessment year (A.Y.) 2009-10 vide order dated 28.12.2011.

2. The assessee, in the business of real estate and hotels, was observed to have for the relevant year dividend income at Rs.25,80,944/- as well as profit from partnership firm (at Rs. 1,46,977/-), claimed exempt under difference clauses of section 10 of the Act. Section 14A of the Act would therefore apply, even as the assessee had made no

disallowance of any expenditure in relation to this income. The same was worked out under Rule 8D, at Rs.35,70,437/-, as under:

- |    |   |                |
|----|---|----------------|
| a) | <i>Qua</i> direct expenditure (r. 8D(2)(i))                           | Nil            |
| b) | <i>Qua</i> indirect expenditure (r. 8D(2)(ii))                        | Rs.25,60,423/- |
| c) | <i>Qua</i> indirect expenditure – other than interest (r. 8D(2)(iii)) | Rs.10,10,014/- |

The same being confirmed in first appeal, the assessee is in second appeal. Additional ground is also raised before us for the first time in respect of the corresponding adjustment in computing the book profit u/s.115JB; the relevant facts being on record. The issue being legal, we admit the said ground.

We shall proceed issue-wise. With regard to interest, the assessee contended to have sufficient capital of its' own, i.e., a capital base of Rs.160.98 crores, as against a total investment of Rs.85.32 crs. as on 31.03.2009, so that investment in shares (Rs.14.79 crs.) and in partnership firm (Rs.10.39 crs.), yielding tax exempt incomes, must be considered as out of own capital, entailing no interest expenditure and, thus, disallowance thereof. Toward this, reliance stands placed on the decision in the case of assessee's sister concern in *Palm Grove Beach Hotels Private Limited* (in ITA No. 5678/Mum/2011 dated 22.03.2013/copy on record) and *Shopper's Stop Limited vs. ACIT* (in ITA Nos. 1448 and 4475/Mum/2010 dated 30.08.2011), wherein this principle stands accepted following *CIT vs. Reliance Utilities & Power Ltd.* [2009] 313 ITR 340 (Bom).

With regard to the expenditure other than interest, the assessee's stand is of having incurred a lesser expenditure. Further, as regards the disallowance *qua* profit from partnership firm, the matter would need to be restored back to the file of the Assessing Officer (A.O.) to apply the ratio of the decision by the Special Bench of the tribunal in the case of *Vishnu Anand Mahajan v. CIT* [2012] 147 TTJ 142 (Ahd)(SB), as directed by the co-ordinate bench in the case of *Palm Grove Beach Hotels Pvt. Ltd.* (supra).

3. We have heard the parties, and perused the material on record.

3.1 As regards the claim *qua* disallowance of interest expenditure, the argument of sufficient capital, so that the same must be presumed as having been applied toward investments yielding tax exempt income, misses the point completely. The matter has to

be decided on the basis of facts and not presumptions. Until and unless therefore it is shown and, again, with reference to the assessee's accounts, that the investments have been financed from own capital, so that no part of the borrowed capital has been utilized for the purpose, no such presumption would hold, and the rule of apportionment, prescribed by r. 8D, mandatory w.e.f. A.Y. 2008-09, shall apply. The decision in the case of *Reliance Utilities & Power Ltd.* (supra) stands rendered in the context of section 36(1)(iii), and would thus be of little relevance. It needs to be appreciated that the disallowance u/s.14A is a statutory disallowance, constituting a complete code in itself. The said decision was cited before, and stands discussed by the hon'ble jurisdictional high court in *Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT* [2010] 328 ITR 81 (Bom). It stands explained that section 14A has widened the theory of apportionment, which only seeks to effectuate the principle of only the net (i.e., net of all expenses) income, whether positive or negative, being liable to, or not so, i.e., as the case may be, to tax. The relevant discussion appears at paras 85-86 (pgs. 135-137 of the reports), a part of which we consider it relevant to reproduce, as under:

‘In all these decisions, the Tribunal held that no nexus had been established between borrowed funds and investments by the assessee in dividend yielding shares/income yielding mutual funds. Now assuming that this is so, the only conclusion which emerges is that the assessee had utilized its own funds for the purpose of making the investments. The fact that the assessee has utilized its own funds in making the investments would not be dispositive of the question as to whether the assessee had incurred expenditure in relation to the earning of such income. Even if the assessee has utilized its own funds for making investments which have resulted in income which does not form part of the total income under the Act, the expenditure which is incurred in the earning of that income would have to be disallowed. That is exactly a matter which the Assessing Officer has to determine. Whether or not any expenditure was incurred by the assessee in relation to the earning of non-taxable income falls within the domain of the Assessing Officer. The basis on which the Tribunal had come to its decision for the assessment years 1998-99, 1999-2000 and 2001-02 would not conclude that question.’

Where therefore the assessee is able to show, with reference to its accounts, of the borrowed capital having financed a particular asset (or asset class), the interest cost

relatable thereto would necessarily have to be consider as expended toward the same. Upon this being conveyed by the Bench during hearing, the Id. Authorized Representative (AR), the assessee's counsel, would submit that the borrowed capital in the instant case is in fact wholly for business purposes, being toward the assessee's hotel project at Kodaikanal and the real estate business at Mumbai. We observe no findings in the matter on record. So, however, if, as claimed, the borrowed capital is in the form of dedicated funds, i.e., specified activities and/or assets, so that the same stands utilized for the same purpose/s, and which would be where the terms and conditions of the borrowing have been met, there could be no presumption with regard to the borrowed funds having been used for any purpose other than the same and, accordingly, no part of the interest could be considered as having not been utilized for business purposes and, hence, toward financing the investment/s. The presumption of proportionate funding, on which the formula prescribed u/r. 8D(2)(ii) is premised, would not obtain in that case. This represents the finding by the tribunal in several cases, applying *Godrej & Boyce Mfg. Co. Ltd.* (supra), as in the case of *Hercules Hoists Ltd. vs. Asst. CIT* [2013] 22 ITR (Trib.) 527 (Mum); *Kunal Corporation vs. Asst. CIT* [2013] 28 ITR (Trib) 277 (Mum); and *AFL P. Ltd. vs. Asst. CIT* [2013] 28 ITR (Trib) 263 (Mum). Under the circumstances, we only consider fit and proper that the matter is restored back to the file of the A.O. to allow the assessee an opportunity to present and exhibit its case as stated hereinabove, the onus for which would only be on it, and shall stand to be decided in terms of our foregoing observations, on the basis of definite findings of fact to be issued by the A.O.

The other aspect of the disallowance u/s. 14A is in respect of indirect administrative expenditure, covered under Rule 8D(2)(iii), at Rs. 10.10 lacs The same stands made applying the said rule. While the A.O. effected the disallowance invoking the said rule, mandatory for the current year, the Id. CIT(A), in appeal, rejected the assessee's contention of the rule being arbitrary. Further, the A.O. having rendered his satisfaction with reference to the facts of the case, rule 8D stood triggered and, accordingly, the disallowance was to be, in his view, confirmed. No specific contention in this regard stood made before us. The assessee failing to substantiate its claim of having not incurred any expenditure in relation to income not forming part of the total

income, we find no infirmity in the orders of the authorities below and, accordingly, confirm the disallowance of the indirect administrative expenditure, which is the subject matter of disallowance under r.8D(2)(iii), i.e., in principle.

We may though further clarify that the disallowance *qua* investment in partnership firm, i.e., to the extent it survives our directions afore-said, shall be computed in terms of the decision by the larger bench of the tribunal in *Vishnu Anand Mahajan* (supra).

We decide accordingly.

3.2 The only other issue arising in this appeal is with regard to the adjustment to the book profit *qua* the disallowance effected u/s. 14A of the Act, raised by the assessee per an additional ground. No specific arguments were raised by the assessee *qua* this ground, which was in fact also not a subject matter of appeal before the first appellate authority. The matter, however, being legal, we admit the same. The disallowance of expenditure, interest or administrative, is only of that incurred by the assessee. *If the same is not in the books of account, where we wonder it is?* Both the income and expenditure, determining the net profit, which forms the basis for computing income under the Act, are only as per the books of account. The provision of section 14A only codifies the law, which is otherwise inherent in tax jurisprudence, that only the net income (i.e., net of the expenditure), from whatever source, is to be brought to tax and, consequently, only the net income, where tax-exempt, is to be so. Further, rule 8D prescribes a method/s toward determining the said income, i.e., on net basis, providing a uniform basis for ascertaining the amount of expenditure liable to be excluded in computing the income chargeable to tax. The legal basis for the relevant adjustment, i.e., *qua* the expenditure relatable to the exempt income, in determining the book profit, which is an alternate method of taxation, i.e., where the income computed under the regular provisions of the Act falls below the prescribed percentage of book profit, is per clause (f) of *Explanation 1* below sub-section (2) of section 115JB.

We, therefore, find no reason or basis for not confirming the adjustment of the expenditure, as finally sustained for disallowance u/s. 14A(1), in computing the book

profit u/s.115JB. We decide accordingly; our decision being supported by a host of decisions by the tribunal, viz.

- *Catalyst Finance Ltd. v. ITO* (in ITA No. 1087/Mum/2013 dated 17/11/2014)
- *JSW Energy Limited v. ACIT* (in ITA No. 498/Bang/2010 dated 27/12/2013)
- *ITO v. RBK Share Broking Pvt. Ltd.* (in ITA Nos.7546 & 6678/Mum/2011 dated 24.07.2013);
- *Esquire Private Limited vs. DCIT* (in ITA No.5688/Mum/2011 dated 29.08.2012);
- *ITO vs. Sea Wind Investment & Trdg. Co. Ltd.* (in ITA No.6320/Mum/2004 dated 17.10.2007).

4. In the result, the assessee's partly allowed for statistical purposes.

परिणामतः निर्धारिती की अपील सांख्यकीय उद्देश्य के लिए आंशिक स्वीकृत की जाती है ।

*Order pronounced in the open court on November 17, 2014*

Sd/-  
(Joginder Singh)

न्यायिक सदस्य / Judicial Member

Sd/-  
(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 17.11.2014

व.नि.स./Roshani, Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/ BY ORDER,**

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

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**