आयकर अपीलीय अधिकरण "डी" न्यायपीठ मुंबई में।

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

श्री डी. मन्नमोहन, उपाध्यक्ष **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।

BEFORE SHRI D. MANMOHAN, VP AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 374/Mum/2012

(**निर्धारण वर्ष /** Assessment Year: 2008-09)

HDFC Bank Limited (Successor to Business of Centurion Bank of Punjab Limited) Senapati Bapat Marg, Lower Parel, Mumbai – 400 013	बनाम/ Vs.	Dy. CIT 2(3), Aaykar Bhavan, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACC 2272 R		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Yogesh Thar
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri S. D. Srivastava

सुनवाई की तारीख / **Date of Hearing**	:	03.09.2015
घोषणा की तारीख / **Date of Pronouncement**	:	23.09.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-6, Mumbai ('CIT(A)' for short) dated 21.11.2011, dismissing 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.) 2008-09 vide order dated 22.12.2010.

2. The appeal raises three grounds, which we shall take up in seriatim. Vide its first ground, the assessee agitates the disallowance in the sum of Rs.366 lacs u/s.14A r/w rule 8D of the Income Tax Rules, 1962 ('the Rules' hereinafter). Section 14A of the Act being a *non obstante* provision, with rule 8D being mandatory, even as clarified by the Hon'ble jurisdictional High Court in *Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT* [2010] 328 ITR 81 (Bom), the reason for the controversy, as gathered from the reading of the assessment and the appellate order, is the assessee's contention of its tax-free investments, i.e., investments yielding tax-free income, being funded by the assessee's own capital, so that no disallowance of interest, i.e., on a proportionate basis, would arise in terms of r. 8D(2)(ii). The Revenue's contention, on the other hand, is that the capital raised by the assessee was specifically meant to meet the capital adequacy norms and, therefore, could not be presumed or inferred as having been invested in shares, including preference shares and PSU bonds, so as to be excluded while reckoning the disallowance under rule 8D.

3. Before us, the assessee's contention was that it had sufficient balance in the current deposit account/s, on which no interest is suffered, and which can or must therefore be considered as applied toward tax-free investments, i.e., yielding or liable to yield income which does not form part of the total income and, thus, not taxable. Further, the said investments include securities which are eligible for being considered as stock-in-trade of the assessee's business, acquired in the regular course of its business, so that it would not attract disallowance u/s.14A, as held in *CIT vs. India Advantage Securities Ltd.* (in IT Appeal No. 1131 of 2013 dated 13.04.2015/copy on record); *CCI Ltd. vs. Jt. CIT* [2012] 71 DTR 141(Kar) [206 Taxmann 563], which decision is in fact in line with that by the Apex Court in *CIT vs. Indian Bank Ltd.* [1965] 56 ITR 77 (SC). The Revenue would, on the other hand, rely on the decision in the case of *Godrej & Boyce* (supra), submitting that no infirmity in the impugned order has been pointed out. The argument as to the relevant securities representing the

stock-in-trade of its business, stands advanced by the assessee before the Tribunal for the first time. The decision in the case of *India Advantage Securities Ltd.* (supra) upholds, in effect, the disallowance u/s.14A by estimating the same at 10% of the dividend income, i.e., as confirmed by the tribunal and, further, clarifies the issue raised before it as not raising any substantial question of law. The ld. Authorized Representative (AR) would, in reply, submit that the decision by the tribunal approved by the Hon'ble Court in the said case, however, confirmed the deletion of the disallowance u/s.14A for the reason of the underlying shares forming part of the assessee-broker's stock-in-trade, placing a copy of the order by the tribunal on record. Further, even where so, it would be liable to disallowance u/s.14A r/w r. 8D at a fraction (1/5) of the proportionate interest cost, even as held by the Tribunal per its third member decision in the case of *D. H. Securities (P) Ltd. vs. DCIT* [2014] 146 ITD 1 (Mum) (TM).

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

Preliminary

4.1 At the outset, we may clarify that the assessee's contention of the relevant securities as representing it's stock-in-trade, stands raised for the first time, i.e., before the tribunal. As regards the availability of adequate interest-free funds in the form of current deposit monies, does it mean that the assessee thereby conveniently drop its earlier stand *qua* sufficiency of own capital, which the Department contends of having been raised to meet the capital adequacy norms? However, the said argument, toward which the assessee has furnished a statement reflecting the amount held in current deposit accounts (at Rs.215363 lacs), as against tax-free investments (Rs.5202 lacs), both, as on 31.3.2008, is to the same effect and purport, i.e., it has not incurred any expenditure on account of interest as it had sufficient interest free funds (capital) with it. As regards the second contention *qua* the securities representing trading assets, the same shall require being examined on merits only if the assessee had adduced any material to evidence its claim, accompanied by a petition for admission of additional evidence, which is absent. This is as the plea could be entertained only on the basis of a finding of the relevant investments as representing the assessee's stock-in-trade.

We may nevertheless discuss both the issues arising on merits, as under:

Financing Issue

4.2 The assessee has an income of Rs.581.23 lacs by way of interest on tax-free bonds and dividend on shares and units of mutual funds (PB pg. 211). To attribute a particular liability or a class of liabilities, viz. current deposits, against a particular segment of assets, both accumulated over the years in the course of its business, would be incorrect, both on facts and in law. Funds from various sources are tapped from time to time as well as get generated through and in the course of its business, and together go to form a common pool of funds, to be applied – on need basis, for the purpose of its business by the assessee-bank from time to time. To therefore appropriate a particular liability (or class of liabilities) toward a particular asset (or class of assets) would, therefore, be wholly incorrect, without factual basis and, rather, inconsistent with the manner in which the funds are normally accessed, generated and deployed in business. It would be a different matter altogether where the assessee is able to establish its case on facts, i.e., of the funds being sourced/contracted for a particular purpose, to which purpose they are subsequently applied, as for example, working capital advance for working capital purposes. We can understand if the funds, raised from a particular source or falling under a particular class, have to be necessarily deployed in the business in a particular manner, as (say) where the capital (as Tier I capital) is required to be invested, to a particular extent, in specified securities. However, where the legal requirement is only toward maintaining liquid assets (say) at a prescribed percentage of the capital or liabilities, it would only imply that the funds of the business are invested in a composite manner. The specification with reference to capital (and/or liabilities) is only to work out the quantum of such investment. In fact, even in the former case, i.e., where the legal requirement impinges directly on a source, i.e., is with regard to the application of a particular source of capital, as where capital representing shareholder funds (or demand liabilities) is to be invested in the specified securities up to a particular limit, it is only the application to that extent that could be said to be so specified, and would not extend to the entire such capital or liability. In fact, we find no legal or accounting basis for the contention as being raised before us, which, as it appears, is guided solely by the motive to avoid the incidence of section 14A.

Continuing further, the decision in the case of *Indian Bank Ltd.* (supra) is prior to co-option of s. 14A on the statute, and would thus not apply. The apex court in that case held that it was impermissible under the scheme of the Act for the assessing authority to look behind the expenditure and to determine as to whether it had the quality of producing taxable income. The said decision, among others, stands noted by the Hon'ble jurisdictional High Court in *Godrej & Boyce* (supra), on which it was otherwise binding (refer paras 17, 23, 41, 55 and 79 of the Reports), to hold that section 14A was enacted as it was impermissible to apportion expenditure between the taxable and non-taxable incomes, for which there is a clear mandate now (refer: *CIT vs. Walfort Share and Stock Brokers P. Ltd.* [2010] 326 ITR 1 (SC)). *In our opinion, rather, the decision in the case of Godrej & Boyce (supra) covers the case at hand on all fours*. Per the said decision, the Hon'ble jurisdictional High Court explains the genesis of section 14A, also expounding on its scope, clarifying that the basic principle of taxation is that it is only the net income, i.e., gross income less expenditure, which is taxable. The said principle, i.e., of only the net (and not gross) income (from any source or activity) as being liable to tax is axiomatic in tax jurisprudence and that, therefore, section 14A was curative and declaratory of the intent of the Parliament. That it represented the first serious attempt on its part to ensure that the tax incentive to certain incomes is not used to reduce the tax payable on the taxable income, i.e., by debiting the expenditure incurred to earn the non-taxable income against taxable income. Prior to insertion of section 14A, it was impermissible for the Assessing Officer (A.O.) to apportion the expenditure incurred in relation to such income as between the taxable and the tax-exempt income/s. Referring to *Walfort Share and Stock Brokers P. Ltd.* (supra), it was held that the theory of apportionment of expenditure between the taxable and non-taxable income has, in principle, been now widened under section 14A. Again, the apportionment of expenditure and, therefore, the expenditure that would be subject to disallowance, it stands explained, is not restricted to any particular expenditure, so that any expenditure falling u/ss.15 to 59, where incurred in relation to a tax-exempt income, would stand to be disallowed u/s.14A. There was, thus, no basis to restrict the disallowance u/s.14A to direct expenditure only.

The assessee has before us also relied on the decision in its own case reported at [2014] 366 ITR 505 (Bom). The said decision stands rendered following the decision by the hon'ble court in *CIT vs. Reliance Utilities and Power Ltd* [2009] 313 ITR 340 (Bom). The said (latter) decision stands in fact duly considered by the Hon'ble jurisdictional High Court in *Godrej & Boyce* (supra), and for which reference may be made to pgs. 135 to 136 (paras 84-86) of the Reports. It was clarified by it that the said decision was rendered on a finding of fact by the tribunal that there were sufficient interest-free funds available (<u>para 86</u>). The decision in *HDFC Bank Ltd.* (supra) is again rendered on the basis of the facts of the case as being covered by the judgment in *Reliance Utilities and Power Ltd.* (supra) (<u>refer pg. 522/para 5 of the Reports</u>). The question, with respect, as explained in *Godrej & Boyce* (supra), is not of the availability of the funds *per se*, but whether it could be said that it was only these funds that had gone to fund the relevant investments, i.e., in view of the statutory presumption cast by section 14A. The decision in the case of *Reliance Utilities and Power Ltd.* (supra), it must be appreciated and noted, is in context of section 36(1)(iii), the parameters of which are different. Further, in the facts of that case, even as explained by its counsel in *HDFC Bank Ltd.* (supra), the company was able to show that the investments with reference to which the disallowance u/s.36(1)(iii) was sought to be made by the Revenue were strategic investments in two companies of the same group, out of self generated funds. The utilization of borrowed capital of Rs.43.62 crores, raised by way of issue of debentures, was shown as utilized toward capital expenditure and inter-corporate deposits, *both yielding taxable income, so that no part of the interest bearing funds had gone in the investment of the said two companies* (refer pg. 521, para 4 of the Reports). In fact, the hon'ble court in *Godrej & Boyce* (supra) goes to the extent of stating that the fact that the assessee has utilized its own funds in making the investments would not be dispositive of the question of whether the assessee has incurred the expenditure in relation to earning such (tax-free) income. Even if, therefore, it had utilized its own funds for making investment which had resulted in income not forming part of the total income under the Act, the expenditure which is incurred in earning the income would have to be disallowed (refer pg. 135, para 85 of the Reports). The matter stands duly discussed, reproducing the relevant part of the said decision, i.e., in *Godrej & Boyce* (supra), both in *D. H. Securities (P) Ltd.* (supra) (at pg. 7 of the Reports) and *Damani Estates & Finance (P.) Ltd.* (infra) (at pg. 694 of the Reports). We have already noted the inability of the assessee to exhibit the exact funding of the tax-free investments under reference, acquired over the years in the course of its business, so that in the absence of leading evidence toward the same with reference to its accounts, as provided u/s.14A(2), the disallowance u/s. 14A(1) r/w rule 8D shall hold. It may be noted that this was precisely the fact situation in *Dhanuka & Sons* (supra), leading the Hon'ble Court to, following *Godrej & Boyce* (supra), uphold the invocation of rule 8D. We may clarify that we are conscious that the decision by the Hon'ble jurisdictional High Court is binding on us, so that the issue before us reduces to ascertaining as to which of the two decisions by the Hon'ble jurisdictional High Court, i.e., in the case of *Godrej & Boyce* (supra) or *HDFC Bank Ltd.* (supra), is to be followed. We have already clarified that the decision in the latter case was based on the finding of a parity of facts with the decision in the case of *Reliance Utilities and Power Ltd.* (supra). We are unable to issue any finding *qua* the facts of the present case, i.e., other than as to the securities under reference being acquired over a period of time and, further, from the common pool of funds, accessed and generated, as available with it at the relevant time (refer pg. 7 of the assessment order). No doubt, the bulk of investments are acquired by the assessee as a successor in business. The same, rather, further endorses the said finding; the assessee-bank acquiring these assets, along with other assets and a range of liabilities, as a successor-in-business. Again, the said decision, unlike in the case of *Godrej & Boyce* (supra), does not dilate on the scope and parameters of section 14A, but considers the ratio arising out of the decision in the case of *Reliance Utilities and Power Ltd.* (supra), which is in the context of section 36(1)(iii) and, even more importantly, considered in *Godrej & Boyce* (supra). In view of the foregoing, the same becomes distinguishable, so that we decide the issue following the binding decision in the case of *Godrej & Boyce* (supra), as found and explained by the tribunal in the case of *D. H. Securities (P.) Ltd.* (supra), a decision by its larger constitution.

In our view, it was incumbent on the parties to have brought its' decision in the case of *Godrej & Boyce* (supra) to the notice of the Hon'ble Court in *HDFC Bank Ltd.* (supra). We are conscious that we are deciding an appeal in the case of the same assessee. So, however, we are deciding a purely legal issue, i.e., whether, in view of the statutory presumption cast by section 14A, a *non obstante* provision, a presumption on facts could obtain, or that the assessee shall have to establish the same with reference to its accounts, in terms of section 14A(2) r/w s. 14A(3), leading to a satisfaction or otherwise of the assessing authority, arrived at objectively, only to find the earlier decision in *Godrej & Boyce* (supra) as having addressed the said issue. Further, that the facts in *Reliance Utilities and Power Ltd.* (supra), which was even otherwise in respect of allowance of expenditure u/s.36(1)(iii) – a provision which does not mandate any apportionment *per se*, stood established, *with in fact the said decision having been considered in Godrej & Boyce* (supra). As such, there being no estoppel against law, we consider ourselves as legally justified in following the said decision by the Hon'ble jurisdictional High Court, address as it does, in our opinion, the issue at hand, and is thus squarely applicable, even as found in *Dhanuka & Sons* (supra), *D. H. Securities (P) Ltd.* (supra); and *Damani Estates & Finance (P.) Ltd.* (supra). These also constitute the binding reasons for not following the decision by the tribunal in *Dy. CIT (OSD) vs. Shri Durga Capital Ltd.* (in ITA No. 7405/Mum/2011 dated 03.08.2015/copy on record), also relied upon before us, in-as-much as we find no statement of law ascribed to *India Advantage Securities Ltd.* (supra); the *Hon'ble Court therein holding the appeal before it to not raise any substantial question of law*. Further, there is, no reference to the binding decision by the Hon'ble jurisdictional High Court in *Godrej & Boyce* (supra), or by the tribunal in *D. H. Securities (P) Ltd.* (supra) as well as *Damani Estates & Finance (P.) Ltd.* (supra), explaining the said decision, as well as its bearing on the decision by the larger bench of the tribunal in *Daga Capital Management Pvt. Ltd.* (infra), in *Shri Dura Capital Ltd.* (supra).

Tax free investments held as stock-in-trade of the business

4.3 In-as-much as dividend is earned on shares or units held as stock-in-trade, i.e., where so, it is a direct fall out of such holding, an incidence of business, which thus yields both taxable and non-taxable incomes. Rather, as apparent, it is only to mitigate and transcend issues relating to attribution (of expenditure) that the provision of section 14A, followed by the mandatory rule 8D, has been brought in place, where one composite indivisible business gives rise to more than one stream of income, of which (at least) one does not form part of the total income, as clarified by the Hon'ble Court in *Godrej & Boyce* (supra). Dividend income arises from the same shares held as stock-in-trade which give rise to the share trading income in the case of a share trader, or the banking income of a bank, as the assessee, i.e., business income, generally speaking. Now, the shares and securities giving rise to dividend income, even assuming to be held as stock-in-trade of the business, form an integral part thereof, which represents a source giving rise to both types of income, the share trading or the regular banking income, which is taxable, and the dividend income, which is not. Share trading or the banking activity can thus be said to have an inherent quality of producing both these incomes, a qualifying condition for apportionment of expenses, contemplated u/s.14A. *How could, then, one may ask, interest expenditure in relation to such business, or in fact any expenditure of the said business, be said to be incurred either wholly and exclusively for either the regular share trading (banking) income or the dividend income*? Dividend income, being tax-exempt, would thus warrant an apportionment of expenses. In fact, but for the provision of section 56(2)(i), dividend or tax-free interest income in such a case would stand classified as business income, even as it could yet be tax-exempt. The taxability or otherwise of a particular income is independent of its classification, which, rather, is required to be only for the income forming part of the total income, for the purpose of its computation under the Act (section 14). As such, being tax-exempt, expenses would require being apportioned in respect of such tax-exempt income/s. This is precisely the purport of the decision in *Godrej & Boyce* (supra), even as explained by the tribunal in *D. H. Securities (P) Ltd.* (supra) as well as in *Dy. CIT vs. Damani Estates & Finance (P.) Ltd.* [2013] 25 ITR 683 (Mum) (Trib).

The tribunal, in these cases, was faced, in view of the conflicting decisions by the Hon'ble High Courts, as *CCI Ltd.* (supra) on one hand, and *Dhanuka & Sons vs. CIT* [2011] 339 ITR 319 (Cal) on the other, with the question as to whether section 14A shall apply in a case where the shares, or other assets for that matter, yielding or liable to yield tax-free income, form part of the assessee's stock-in-trade. After an exhaustive examination of the case law, it clarified that the decision by the *Godrej & Boyce* (supra) covers such a situation as well, so that the said decision in fact approves the decision by the Special Bench in *ITO vs. Daga Capital Management Pvt. Ltd.* [2009] 312 ITR (AT) 1 (Mum)(SB). Rather, as pointed out by the tribunal in *Damani Estates & Finance (P.) Ltd.* (supra), the decision by the Hon'ble Calcutta High Court in *Dhanuka & Sons* (supra), wherein again the question involved was of the application of section 14A where the relevant assets formed part of the assessee's stock-in-trade, stood rendered following the decision in *Godrej & Boyce* (supra). Reference in this context may be profitably made to the questions of law referred to, admitted and answered by the hon'ble court. Again, in fact, two of the questions referred to the third member u/s.255(4) in *D. H. Securities (P) Ltd.* (supra) (Q. Nos. 4, 5), all of which stand answered approving/confirming the order by the Accountant Member, are directly on the point, i.e., if the decision by the Hon'ble Court in *Godrej & Boyce* (supra) answers the situation where the tax-exempt income arises on an asset which represents the stock-in-trade of the business. Why, in-as-much as it forms part of the stock-in-trade of the business, it is clearly a case of a proximate cause, making for an impregnable case for apportionment of expenses. Continuing further, as explained in *Godrej & Boyce* (supra), rule 8D of the Rules was introduced only to deal with the challenge of apportionment by providing a uniform method for determining the amount of expenditure incurred in relation to income which did not form part of the total income in-as-much as all the assessees are not similarly placed, so that treating them equally poses a challenge. This is of-course under the mandate of law, i.e., section 14A(2) r/w s. 14(3) (refer para 70). It is only after an examination of the correctness of the assessee's claim, having regard to the accounts of the assessee, that a satisfaction (or otherwise), which is to be objectively arrived at on the basis of the accounts and after considering all the relevant facts and circumstances, is to be issued, and where not satisfied, rule 8D invoked. Reference for the same may be made to the discussion at paras 58 to 73 (pgs. 113-123) of the Reports – the constitutional validity of s. 14A as well as rule 8D being under challenge before the Hon'ble Court. Here it may be pertinent to state that prior to the enactment of rule 8D, the Hon'ble Courts had opined in favour of any reasonable method for allocation of expenditure attributable to tax exempt income/s. It is in this context, i.e., of a reasonable allocation, that the Hon'ble Court in *India Advantage Securities Ltd.* (supra) did not deem it appropriate to interfere with the disallowance u/s.14A worked at 10% of the dividend income earned, i.e., as confirmed by the tribunal. The Hon'ble Court did not answer any of the two questions referred to it, holding the same as not raising any substantial question of law.

We have already clarified that no case on facts has been made out by the assessee in the present case. In fact, there is even no claim, much less finding of the shares and securities under reference as representing stock-in-trade of the assessee's business. On the contrary, the assessment order states of the investment being in government securities, i.e., to meet the SLR requirements as stipulated by the RBI, so that the same would qualify as investments (refer pgs. 7-8 of the assessment order).

In summation

4.4 The sole premise of section 14A is to effectuate the basic postulate of taxation that it is only the net income, i.e., net of all expenditure incurred in relation thereto, that is to be subject to tax. It contemplates and seeks to put in place an effective mechanism for apportionment of expenditure where a composite business or activity yields (or is capable of yielding, in-as-much as the actual earning/receipt of income, including its extent, is not guaranteed by incurring the expenditure) both taxable and non taxable incomes, i.e., between the two, an exercise impermissible prior to the enactment of section 14A by Finance Act, 2001 with retrospective effect from 01.04.1962. This is made abundantly clear by the Hon'ble jurisdictional High Court in *Godrej & Boyce* (supra), for which reference may be made to the Segment C1 of the Judgment, titled '*Whether section 14A is attracted in case of dividend income received from shares and income from mutual funds*', where-under the Hon'ble Court has discussed this issue under various sub heads (at pgs.91-112 of the Reports), viz.-

- *Apportionment*
- *Enactment of section 14A*
- *Insertion of sub-sections (2) and (3) to section 14A*

- *Section 115-O*, besides others.

Dividend income, in the case of a dealer in shares, as afore-noted, is of the same species as the share trading income, arise as it does from the same principal activity of trading in shares, which yields two types of income, i.e., the profit on the purchase and sale of shares, and by way of dividend income on the shares held as stock-in-trade for the time being. Like-wise, for a bank (or any other assessee) who may deal in shares or other tax-free investments as a part of its regular business activity. The same composite business yielding two streams of income, taxable and tax-exempt, apportionment of the expenses of the business would be required to be made in terms of sec. 14A r/w r. 8D, which rule is mandatory from the current year. Not so doing would be to defeat and, rather, contrary to the clear mandate of section 14A. *On what basis, one may ask, could the expenses of the business be attributed only to one stream of income thereof*? The issue of apportionment gets settled per *Walfort Share and Stock Brokers P. Ltd.* (supra), even as noted in *Godrej & Boyce* (supra) (refer pgs. 97 to 99 of the Reports), *both binding precedents for us, and it is therefore immaterial whether the shares are held as investment or stock-in-trade, both being assets of a composite business giving rise to two sets of income*. This also represents the view of the tribunal per its larger bench decision in *Daga Capital Management Pvt. Ltd.* (supra), which stands impliedly approved by the Hon'ble Court in *Godrej & Boyce* (supra), as well as the reading of the said decision per other decisions noted here-in-before. *Unless, therefore, a decision by a larger Bench of the Hon'ble jurisdictional High Court, taking a different view, is brought to our notice, we are legally obliged to follow the same*. The decision in *India Advantage Securities Ltd.* (supra) clarifies, in sum and substance, *of no substantial question of law arising per the said appeal*. In fact, a statement of law, if any, that can be said to be issued by the Hon'ble Court, is when it states that one can at best disallow the expenses which are incurred for earning dividend income, at para 4 of its decision, *clearly an unqualified observation*. No doubt, it mentions of investments, but that by itself does not mean to the exclusion of others where the same also give rise to dividend income. In fact, the Hon'ble Court approves the disallowance u/s.14A at 10% of the dividend income, i.e., a measure independent and, in any case, different from 'investment'. It is even otherwise settled law that it is neither desirable nor permissible to pick out a word or sentence from the decision and read it to be the ratio of the decision, which alone, being the pronouncement of law, is binding, and is absent in-as-much as the Hon'ble Court unequivocally states of no question of law arising per the said appeal. The disallowance, thus confirmed, is without reference to rule 8D, which only bears the word 'investment' – in the context of valuation - and, accordingly, the tribunal's decision in *India Advantage Securities Ltd.* (supra) must also be considered as having been rendered in the facts of the case and not as not laying down any proposition of law. In fact, the same also does not consider the decision by the Hon'ble jurisdictional High Court in *Godrej & Boyce* (supra), followed by us, for the reasons afore-stated, also explained by the tribunal per its other decisions, including by its larger constitution.

The foregoing discussion is in fact preemptory in the absence of any claim, much less a finding, at any stage prior to the tribunal, of the relevant securities as forming a part of the assessee's stock-in-trade. There is also no material before us to hold so, nor in fact any plea for admission of any additional evidence, which would in fact require furnishing such evidence in the first place. The said discussion is thus without prejudice to our finding the assessee's argument, in the wake of this factual matrix, as not maintainable at the threshold.

As regards the claim of adequacy of capital or interest-free funds (held in current deposit accounts), we have already clarified of there being no finding of fact *qua* the specific source/s of financing, even as the Hon'ble Court has in *Godrej & Boyce* (supra) clarified that even 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 has incurred expenditure in relation to earning of such income. Even if, therefore, as explained by it, the assessee had 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, which is to be determined by the A.O. (para 85, pgs. 135-136 of the Reports). This is, it may be noted, in view of the rule of apportionment legislated by section 14A, enunciated by the Hon'ble Court, following the Apex Court in *Walfort Share and Stock Brokers P. Ltd.* (supra), also considered in *Dhanuka and Sons* (supra). In the facts of the present case, it is the admitted position that the investment in securities has been made out of common pool of funds (refer pgs. 7, 8 of the assessment order). Funds in the business, it may be appreciated, are always in a state of flux, so that the proximate or the immediate source of funds may not and, in any case, not generally, reflect the real or the effective source. The same can be assessed on the basis of a fund flow statement (for the period) coupled with the legal obligations incident, if any. As an example, where a business assumes working capital advance from bank, maintaining net current assets at the prescribed level, it could safely be assumed that the borrowed funds have financed its current assets to that extent, precluding an apportionment of the expenditure by way of bank interest - a direct expenditure, against any other income of the assessee. Similar would be a case of (say) a term loan for machinery, all of which fall in the category of dedicated funds. Can, excepting dedicated arrangements, a particular asset of the business be said to be financed in a particular manner? The assets being of the business, it is only the funds of the business as a whole, save dedicated funds, that can be said to finance its activities. This is precisely the import of what the Hon'ble Court explains and emphasizes in *Godrej & Boyce* (supra). In fact, the challenge in such a case would be to determine the source of the repayment of such (dedicated) loans, i.e., the cash profit generated or, again, the common pool of funds, including of course such profits. No case for financing by any dedicated source stands made out. The decision in *Reliance Utilities and Power Ltd.* (supra), being based on facts, as held in *Godrej & Boyce* (supra) (refer para 86, pg. 136), would, therefore, not apply. In our view, in fact, the Hon'ble High Court in *Godrej & Boyce* (supra), which also considers the decision in *East India Pharmaceutical Works Ltd. v. CIT* [1997] 224 ITR 627 (SC), has settled this aspect of the matter as well, even clarifying with regard to the play provided in the form of the satisfaction of the A.O., per sub sections (2) and (3) of sec. 14A. The decision in *Reliance Utilities and Power Ltd.* (supra), in any case, stands distinguished by the Hon'ble High Court in *Godrej & Boyce* (supra). The latter decision, clarifying the law in the matter, being not considered in *HDFC Bank Ltd.* (supra), rendered following *East India Pharmaceutical Works Ltd.* (supra) and *Reliance Utilities and Power Ltd.* (supra), both of which decisions stand considered [in *Godrej & Boyce* (supra)], shall, unless disapproved or over-ruled by the Apex Court or a larger bench decision of the Hon'ble jurisdictional High Court, continue to bind us. Further, the said decision stands, we may reiterate, discussed and explained at length by the tribunal in *D. H. Securities (P) Ltd.* (supra) – a larger bench decision, and *Damani Estates & Finance (P.) Ltd.* (supra), as well as by the hon'ble high court in *Dhanuka & Sons* (supra), all of which have precedent value, albeit varying, with our reading thereof being also in alignment therewith.

Accordingly, we uphold the application of section 14A r/w rule 8D in the facts and circumstances of the case, dismissing the assessee's Gd. # I.

5. The assessee's second Ground relates to the disallowance of the amortized Employee Stock Options Plan (ESOP) expenses in the sum of Rs.821.33 lacs. The same stands disallowed by the Revenue on the ground of it being a notional and, in any case, capital expenditure. The expenditure, as explained, represents the difference between the obtaining market price and the issue price of the shares offered as an option to the employees, to be acquired over the vesting period. For example, if 500 options, i.e., an option to acquire 500 shares at Rs.40 each (say) is given to an employee when the ruling market price thereof is at Rs.160/-, the loss suffered by the

company is Rs.120 per share, leading to a total loss of Rs.60,000/- (500 shares x Rs.120). If the shares are to be acquired, in terms of the option scheme, by the employees over a period of 2 ½ years, i.e., the vesting period, the amortized expense would be at Rs.24,000/- each for the first two years and at Rs.12,000/- for the third year. The expenditure stands provided in view and terms of the guidelines issued by the Securities and Exchange Board of India (SEBI). As per the Revenue, it is patently clear, firstly, that the same, even if realized, would go to form the issuer's capital. The same, therefore, represents a loss of capital. In fact, the loss is notional in-as-much as it only represents a loss with reference to a sum that could be realized by the assessee. No loss in actual terms has been suffered by the company by offering the shares at a discount, which is what an expenditure/loss essentially is, in-as-much as the shares are only rights therein issued by a company. The demand for shares would also depend on their issue price, while their market value itself represents the equilibrium of supply and demand forces there-for. The loss being reckoned with reference to the market price and not issue price, the loss to the extent of the difference between the two, is purely notional. Apart from thus representing a possible loss of capital, the expenditure is purely notional, having no basis on any actual or cognizable loss, not even stipulated or prescribed for being booked under an accounting theory or by any Accounting Standard, even as it is the provisions of the Act, i.e., the relevant law, that would prevail in the matter, as is the settled law. The expenditure could only be allowed if it is a revenue expenditure, incurred wholly and exclusively for the purpose of its business or otherwise fall u/ss.30 to 43D. Accordingly, applying the decision by the tribunal in *Ranbaxy Ltd. vs. Addl. CIT* [2010] 39 SOT 17 (URO), the ld. CIT(A) confirmed the impugned disallowance, distinguishing the decision by it in *SSI Ltd. vs. Dy. CIT* [2004] 85 TTJ 1049 (Chennai), in which, the issue, as explained by him, was different.

6. Before us, while the ld. DR would rely on the orders of the authorities below, the ld. AR would on the subsequent decision by the special bench of the Tribunal in the case of *Biocon Ltd vs. Dy. CIT* [2013] 25 ITR (Trib) 602 (Bang) (SB), warranted in view of the conflicting decisions in the matter by different benches of the Tribunal. Per the same, the tribunal, after considering the contrary decisions and examining the issues involved, held the discount on the issue of shares to employees under the ESOP as an expenditure deductible u/s.37(1) of the Act.

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

The decision by the Special Bench, rendered upon examining the issue in its various facets, is binding on us. No decision taking a contrary view by any higher appellate forum has been brought to our notice. The tribunal, per the same, explains that the discounted sum, i.e., which could be realized by the company on shares issued under ESOP, stands foregone by it only with a view to retain the employees, allowed by way of compensating them for their services. The extent of the amortized expense that could be allowed, i.e., with reference to time, stands also discussed by the tribunal per its said order, i.e., on a straight line basis over the vesting period, unless of course the vesting is not uniform (refer Part II/paras 10.1 to 10.8 of the order). In fact, it goes further to explain the subsequent adjustment to the discount deductible, i.e., in view of the exercise or the lapse of options, and again in terms of the scheme (refer part 3/para 11.1.1 to 11.3 of the order).

The decision by the tribunal in *Biocon Ltd.* (supra), being a larger bench, is binding on us. We are even otherwise in total agreement therewith. However, we observe that though thereby the tribunal approves of deduction of the discount (on ESOP shares) in principle, it does not mandate the discount to be worked out in a particular manner, which, i.e., the quantum of the discount, and as would be apparent, is even otherwise a purely factual matter. True, the tribunal in that case has confirmed the working of the discount with reference to the market value of the shares. This, as apparent from its reading, is for the reason that that was the only value against which the issue price of shares under ESOP was benchmarked, *representing the value which the shares would otherwise fetch for the company*. In the present case, however, the assessee-bank has issued shares to the public at large as well; the ESOP shares being in fact a mere fraction of the total shares issued during the year (refer para 8 of this order). Clearly, therefore, it is the difference between the issue price of the shares to the two segments, i.e., to the public and its' employees, which would mark or signify the extent of the value foregone or the discount allowed by the assessee on the latter issue. The ld. AR, on this being expressed by the Bench, would, while admitting that this aspect of the matter was not in controversy in *Biocon Ltd.* (supra), submit that the subscription price of the shares issued to the public is wholly irrelevant, for what has been foregone by the assessee-bank is the value it could have realized, i.e., the price at which the shares are traded on the bourses.

We are wholly in disagreement. We may, however, for the sake of clarity, exemplify the precise aspect of the matter being discussed. The company issues shares to the public at (say) Rs.55/- per share as against the market price (at the relevant time) of Rs.80/-, while issues shares to its employees under ESOP at Rs.20/-. The question is if the discount allowed on the shares issued to the employees, deductible in the computation of business income under the Act, should be taken at Rs.60/- (80-20), i.e., with reference to their market price, or at Rs.35/- (55-20), i.e., with reference to the issue price of the shares issued to and subscribed by the public. The excess of the market price over the issue price to the public (Rs.25/- in the example) is wholly notional. *On what basis, one wonders, could the same be claimed to be the value foregone, when the shares are issued to the public at large at Rs.55/-*? This issue price is fixed by the issuer-company with reference to a host of factors, including the likely impact on the market value of the shares subsequent to the public issue (of shares). In fact, it is quite unlikely that the market value of the shares shall subsist at the same value, i.e., post the said issue, in-as-much as the company's earnings have henceforth to support or service a much larger number (base) of shares. Further, these considerations are common and constant across the two categories of share issues, i.e., issued to the public and to the employees, which rank *pari passu*, except, perhaps, for a stipulation with regard to their holding period - a different matter altogether. There is, or can be, no question of any 'discount' or 'expenditure' incurred by the assessee, much less for the purpose of its business thus; it thereby only deciding on the value at which it is to raise capital from the market, which best suits its short term and long term interests, including the post issue earnings, also factoring into account the market position, i.e., in the share and the money market, at the relevant time, as also of allowing benefit to the family of existing shareholders, if any, and of making the share issue a success.

Put succinctly, a company does not incur any expenditure when it issues shares to the public at less than their going market price, an exercise aimed at raising capital from the market, at terms best suited to its interests and prospects, given the obtaining facts and circumstances. *The question of the expenditure being incurred for business purpose thus just does not arise*. The share issue to the employees under ESOP would therefore have to be considered as a segment of this issue, i.e., as a part/species of the public identified as its employees and, therefore, entitled to a discount on the regular price. *Would, one may ask, the company issue shares to its employees at a price in excess of that at which it issues them to the public*? And, even hypothetically assuming it to be so, *does it thereby intend to incentivize or penalize its employees*? It is this special, favourable treatment to its employees, i.e., vis-à-vis public at large, or the body of its 'other than employee' share applicants, which enables the value foregone to be considered as an 'expense', being only toward encouraging and retaining the employees – representing a talent or resource, in its service. That is, the reason for the difference or discount being considered as an expense *per se*, and of it being suffered for a business purpose, is one and the same, or in any case intrinsically linked, so that one would not survive without the other. *It is thus only the second difference, i.e., the excess of the public issue price over the price charged to the* *employees that would qualify as a discount in-as-much as that is the value foregone by it with reference to an arm's length transaction*. From the employee's stand-point as well, that is the benefit that gets extended to them, i.e., for being an employee, so as to elicit his loyalty, and for which discount stands, in effect, allowed in the first place.

It may be argued, as was indeed before us, *as to what if there is no public issue*? The question is misconceived. What, for instance, if the shares are not traded in the market, as where this is the first public offering by the company. The issue, it needs to be appreciated, is not whether the shares are or are not traded, but which 'difference' could be said to represent or be considered as a discount allowed by the company in the facts and circumstances of the case. We have in this regard clarified that it is the purpose for which the value, capital in nature, is foregone, which enables it to assume the character of a revenue expense, besides defining its business purpose, so as to be admissible u/s. 37(1) of the Act. In evidence of the value foregone, a public issue of shares at the relevant time, or even in proximity, provides an unimpeachable basis in the form of a comparable transaction, for determining the same, i.e., the value foregone or the discount allowed. Even accounting theory subscribes to booking only the discount *qua* the issue price. SEBI guidelines, prescribing a method in the matter, is largely irrelevant in-as-much as it is the provisions of law that would hold (refer: *Southern Technologies Ltd. vs. Jt. CIT* [2010] 320 ITR 577 (SC)) and, secondly, the matter as to the quantum of discount, is purely factual, to be decided on the basis of evidence/s and material on record. The SEBI guidelines – which are essentially disclosure norms, aimed at protection of investor interest, are with reference to the shares issued under ESOP. Besides not operating to detract from the provisions of law, which would prevail, what is relevant and material for our purpose is not the ESOP scheme *per se*, but the deductibility of the discount allowed on the shares issued to a segment of the public, i.e., employees, ostensibly for business purpose/s. The argument is without merit.

Coming to the decision in the case of *Biocon Ltd.* (supra), we may, at the cost of repetition, clarify that this aspect of the matter was not in controversy in the said case, so that the said decision is not an authority for the quantum of the discount. It is trite law that a precedent is an authority only for what it actually decides and not what may remotely or even logically follow from it (refer: *Goodyear India Ltd. vs. State of Haryana and Another* [1991] 188 ITR 402 (SC); *Blue Star Ltd. v. CIT* (1996) 217 ITR 514 (Bom.)). The quantum of discount is even otherwise, as afore-stated, a purely factual matter, to be decided in the conspectus of the case. *The assessee's argument alluding to the absence of a public issue in a particular case, in fact, endorses our view of the matter being a purely factual matter.* We are, in fact, fully supported by the decision in *Biocon Ltd.* (supra) in-as-much as in that case the market price of shares was taken as a surrogate measure of the value at which the shares could be issued to or made available to the public by the company. We may toward this reproduce a part of the said decision so as to exhibit the same:

> '**9.2.6** There is no doubt that the amount of share …………There is no difference in two situations viz., one, when the *company issues shares to public at market price* and a part of the premium is given to the employees in lieu of their services and two, when the shares are directly issued to employees at a reduced rate. In both the situations, the employees stand compensated for their effort. If under the first situation, the company, say, on receipt of premium amounting to Rs.100 from issue of shares to public, gives Rs.60 as incentive to its employees, such incentive of Rs.60 would be remuneration to employees and hence deductible. In the same way, if the company, instead, issues shares to its employees at a premium of Rs.40, the discounted premium of Rs.60, being the difference between Rs.100 and Rs.40, is again nothing but a different mode of awarding remuneration to employees for their continued services. *In both the cases, the object is to compensate employees to the tune of Rs.60.* It follows that the discount on premium under ESOP is simply one of the modes of compensating the employees for their services and is a part of their remuneration. Thus, the contention of the ld. DR that by issuing shares to employees at a discounted premium, the company got a lower capital receipt, is bereft of an force. The sole object of issuing shares to employees at a discounted premium is to compensate them for the

> continuity of their services to the company. By no stretch of imagination, we can describe such discount as either a short capital receipt or a capital expenditure. It is nothing but the employees cost incurred by the company. The substance of this transaction is disbursing compensation to the employees for their services, for which the form of issuing shares at a discounted premium is adopted.'
>
> [emphasis ours]

As apparent from a reading of the foregoing, the said decision, thus, rather being in support of the assessee's case, i.e., as to the quantum of discount, fully endorses the view point being canvassed by us.

In view of the foregoing, we direct the allowance of the discount on the shares issued to the employees, as held by the larger bench of the tribunal in *Biocon Ltd.* (supra), subject to the same being reckoned with reference to issue price of the shares issued to the public during the relevant year. All other parameters, including the adjustment to the discount, shall be in terms of the said order, having regard to the terms and conditions of the assessee's employee issue. We decide accordingly, partly allowing the assessee's Gd. # II.

8. The third and the final ground is an alternate to Ground No. II. Per the same, it is claimed that equity shares (3056.34 lac) other than ESOP shares (340.97 lac) have been issued during the year. As such, no disallowance of ESOP expenses, i.e., the expenditure under reference, is called for. We are unable to understand the purport of the argument in-as-much as the ESOP expenses are only in relation to ESOP shares, i.e., shares issued to the employees under an optional scheme designed to benefit them. It is a share issue nevertheless, and the expenses thereon, share issue expenses all the same. They thus bear the same character. In fact, we have already answered Gd. II by stating, as indeed informed the decision by the larger bench, that no doubt the 'expenditure' inures in the form of a shortfall in the capital raised, the purpose in foregoing the same is to allow an incentive to its employees, i.e., a business purpose, so that the capital to that extent stands deployed thus, and further clarified that it is

only the stated business purpose which qualifies the same to be considered as an expense and, in any case, as a revenue expenditure. The said Ground, which is in the nature of an alternate ground and/or argument, not pressed separately before us, stands, accordingly, dismissed as not pressed.

9. In the result, the assessee's appeal is partly allowed.
परिणामतः निर्धारिती की अपील आंशिक स्वीकृत की जाती है ।

Order pronounced in the open court on September 23, 2015

Sd/-	Sd/-
(D. Manmohan)	(Sanjay Arora)
उपाध्यक्ष / Vice President	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 23.09.2015

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

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उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**