आयकर अपीलीय अधिकरण "एच" न्यायपीठ मुंबई में।

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

श्री संजय अरोड़ा, लेखा सदस्य **एवं** श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।

BEFORE SHRI SANJAY ARORA, AM AND SHRI AMIT SHUKLA, JM

आयकर अपील सं./I.T.A. No. 3485/Mum/2012

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

HSBC Invest Direct (India) Ltd., HSBC Umang, 5th Floor, Mind Space, Link Road, Malad (W), Mumbai-400 064	**बनाम**/ Vs.	Dy. CIT, Range-8(2), Room No. 216-A, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACI 3364 A		
(निर्धारिती/**Assessee**)	:	(राजस्व/ **Revenue**)

&

आयकर अपील सं./I.T.A. No. 3944/Mum/2012

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

Dy. CIT, Range-8(2), Room No. 216-A, Aayakar Bhavan, M. K. Road, Mumbai-400 020	**बनाम**/ Vs.	HSBC Invest Direct (India) Ltd., HSBC Umang, 5th Floor, Mind Space, Link Road, Malad (W), Mumbai-400 064
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACI 3364 A		
(राजस्व/ **Revenue**)	:	(निर्धारिती/**Assessee**)

निर्धारिती की ओर से / **Assessee by**	:	Shri D. V. Lakhani
राजस्व की ओर से/**Revenue by**	:	Ms. Neeraja Pradhan

सुनवाई की तारीख / **Date of Hearing**	:	24.07.2014
घोषणा की तारीख / **Date of Pronouncement**	:	17.10.2014

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आदेश / O R D E R

Per Sanjay Arora, A. M.:

These are cross Appeals, i.e., by the Assessee and the Revenue, arising out of the Order by the Commissioner of Income Tax (Appeals)-17, Mumbai ('CIT(A)' for short) 02.03.2012, 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.) 2008-09 vide order dated 14.12.2010.

2. We shall take up the assessee's appeal, being senior, first. The principal issue agitated per the assessee's appeal (grounds 1-3) and ground no. 1 of the Revenue's appeal is in relation to the disallowance u/s.14A. The relevant facts are that the assessee was during the course of assessment proceedings observed to have earned dividend income at Rs.9.25 lacs, claimed exempt income u/ss. 10(34) & 10(35). The assessee, on being called upon to furnish the disallowance u/s.14A r/w rule 8D, worked the same at Rs.4,17,18,434/- (PB pg. 11), though maintained that the disallowance as effected by it *suo motu* (i.e., at Rs.92.44 lacs/PB pg.23) was the correct amount disallowable u/s.14A. The reasons cited were as under (refer PB pgs.18-19):

> a) it had made an investment of only Rs.15 crores in the shares of Investsmart Financial Services Ltd. (IFSL), a group company, during the relevant year, the balance investment of Rs.433.99 lacs being brought forward from the preceding year/s (PB pg. 21);
>
> b) that though the investment in shares during the current year also included another investment of Rs.125 crs. in shares in IFSL, the same is only by way of conversion of Optional Fully Convertible Debentures (OFCD) held in that company prior to the current year (PB pg. 21);
>
> c) the investment of Rs.15 crs. supra was financed to the extent of Rs.5 crs. by way of over draft account, on which interest suffered was at Rs.3,97,260/-, i.e., for the period 07.08.2008 to 05.09.2008, being discharged on the latter date (PB pgs. 20, 22, 23). This explains the inclusion of Rs.4 lacs on account of interest in the disallowance of Rs.92.44 lacs. The balance investment of Rs.10 crs. was by way of recall of loan to HSBC Investsmart Securities Ltd.;

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d) of the entire investment of Rs.448.99 lacs in equity shares (as on 31.03.2008), only that for Rs.1.02 crs. was in shares of other than subsidiary companies. The investment in subsidiary companies is strategic, i.e., for control purposes, rather than for earning income. Accordingly, it entails nil or little indirect expenditure (PB pg. 3);

e) the estimation of indirect cost (i.e., other than interest) is made at 10% of the total administrative cost (including the employee costs), incurred at a total of Rs.1556.31 lacs. However, certain costs, which have no bearing or relation whatsoever with the income, if any, on investments, i.e., provision for doubtful debts, loss on sale of fixed assets, etc., are excluded from the estimation process (PB pgs. 23-25).

The assessee, though unsuccessful at the assessment stage, was partly successfully before the first appellate authority, who accepted its exclusion of certain expenditure (aggregating to Rs.334.42 lacs) in estimating the administrative cost attributable to investments. Aggrieved, both the parties are in appeal. While the assessee appeals for sustaining of disallowance u/s. 14A at Rs. 92.44 lacs, the Revenue agitates the exclusion of certain expenses by the ld. CIT(A) while accepting in principle the Assessing Officer's (AO's) action in invoking and applying rule 8D as valid.

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

3.1 At the very outset, we find that the impugned order is unsustainable in law (on this ground, that is), with it in fact providing no relief to the assessee. This is as the acceptance of exclusion of certain expenditure (which is on the ground of it having no relation with the tax exempt income) assumes relevance only if the assessee's method of determining the expenditure in relation to income not forming part of the total income is accepted, which is the ld. CIT(A) does not. There is no scope for either inclusion or exclusion of any expenses – which method the assessee adopts, while applying rule 8D, estimation per which is based on the volume of investment yielding (or liable to yield) income not forming part of total income held during the year, i.e., is investment based (though of course would have to be capped at the total amount of expenditure incurred), rather than expense based. His order is therefore clearly self-contradictory and, thus, infirm.

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3.2 We next proceed to discuss the validity or otherwise of the assessee's method; the issue before us being the correct quantification of the disallowance u/s 14A in the facts and circumstances of the case, with both the opposing sides claiming their respective method to be legally firm. The first issue, therefore, is whether the law in the matter is ambivalent or provides for adoption of more than one method. In our clear view, the law does not circumscribe the estimation of the expenditure incurred by the assessee in relation to - implying a proximate nexus therewith, income not forming part of the total income, to any particular or one method or formulae. The Revenue wrongly presumes it as so. When it is said that rule 8D is mandatory (i.e., AY 2008-09 onwards), all that is meant is where the said expenditure cannot be reasonably ascertained with reference to the assessee's accounts, toward which the AO is to issue his satisfaction or, as the case may be, dissatisfaction, he has no discretion in case of the latter in formulating a method of his own, nor indeed has the assessee, and is bound to adopt the prescription of rule 8D. The sole premise of law, it needs to be appreciated, including that mandated per rule 8D, is to arrive at as fair and just an estimation of the sum expended by the assessee in relation to income that is not subject to tax, as the facts and circumstances admit, without at the same time allowing it to degenerate into an arbitrary or subjective exercise. That being so, i.e., the legal position, the matter, it would be discerned, is primarily factual.

3.3 We next subject the assessee's method to an examination on merits. Certain expenditure (Rs. 334.42 lakhs) is excluded on the ground of it being divorced from the activity of making or managing investment in shares. The same is valid in principle inasmuch as only the expenditure having a bearing or relation to the tax exempt income could be subject to disallowance - wholly or partly, u/s. 14A. The nomenclature of the account being representative of its' nature, which stands explained by the assessee (PB pgs. 24-25), it is clearly possible to determine, one way or the other, i.e., the validity or otherwise of each exclusion. The ld. CIT(A) has, however, summarily held the same as being outside the purview of section 14A. Inasmuch as his order is not supported by any finding or even reason as to why he considers it as so, his order cannot be said to be a

valid judicial order (also refer section 250(6)). We have in fact already noted his upholding of the said exclusion as inconsistent with his approving the application of rule 8D. We shall revisit this part of his order later.

3.4 Next, we shall consider the assessee's method, the basic facts which are as under:

(a) the assessee has estimated the indirect expenditure at 10% of the total administrative expenditure of Rs.1209.35 lacs (including employee cost), excluding there-from certain expenditure (Rs. 334.42 lacs);

(b) depreciation at 10% of the total depreciation debited to the operating statement (Rs. 9.21 lacs), or Rs. 92,078/-;

(c) restricting the disallowance *qua* financial cost, incurred at Rs. 337.75 lacs, to Rs. 4 lacs, which represents the interest cost on Rs. 5crs. at Rs. 3,97,260/- referred to supra.

We shall discuss them item-wise, as under:

(a) & (b): Administrative cost and depreciation:

The method is premised on 10% of the total administrative cost (other than excluded costs), including the employee cost and depreciation, as being toward investment activity, i.e., of the organizational resources being focussed or engaged in the said activity to the extent of 1/10 by volume/quantum. The same seems impressive, particularly considering that it generates a sum which is far in excess of the quantum of income arising for the year that is not subject to tax. The two, however, are not correlated, or at least linearly, i.e., the organizational input, which is being sought to be measured or assessed, and the organizational output. Reference in this context be made to the decisions, as in the case of *Cheminvest Ltd. vs. ITO* [2009] 121 ITD 318 (Del)(SB) (317 ITR (AT) 86); *D. H. Securities (P.) Ltd. vs. Dy. CIT* [2014] 146 ITD 1 (Mum) (TM); and *Dy. CIT vs. Damani Estates & Finance (P.) Ltd.* [2013] 25 ITR 683 (Mum)(Trib). This is more so where, as in the instant case, the income, which is by way of dividend and/or gain on sale of shares, is almost wholly outside the control of the investor company/entity. Why, in a particular case, the sale of shares may result in a loss, while the expenditure toward making the investment, as well as on holding it, i.e. the interest

cost, may yet be incurred and, thus, subject to disallowance. Income that does not form part of the total income, in the context of section 14A, could be both positive or negative, or even nil for that matter. Further, we would still have considered the assessee's case valid, were it able to demonstrate, through or with reference to its accounts, a basis in estimating the devotion of the organizational resources, i.e., to the investment activity, at 10%. The assessee's accounts are admittedly not maintained activity-wise. *On what basis then, one may ask, does it arrive at the said estimation of 10%*? Why not 20% (say), or even 5% for that matter. Rule 8D is statutorily prescribed (refer section 14A(2)) only to remove the estimation exercise from the realm of arbitrariness or any subjectivity. Arbitrariness at the end of the assessing authority cannot be substituted by that at the assessee's end, which is equally proscribed by law. The assessee speaks of the bulk, nay, almost the whole of its' investment being in shares in subsidiary companies, which it claims is for strategic reason/s and not for income generation. We have already noted that income on investment in shares is almost wholly extrinsic to the company's internal processes. An investee-company may do good, yet not declare dividend, or declare it at a rate which is nowhere compatible with the investment therein, finding it better to retain resources, being confident to being applied to propel future growth of the company. In fact, it's doing good is itself independent of the investment by the assessee therein, being dependent on a host of company-specific as well as external, i.e., industry or economy specific, factors. Similar is the case of gain (or loss) that may be realized on the sale of shares, its price being predominately market driven. A price, by definition, is the equilibrium of opposing factors of supply and demand. While one deems it fit to sell, the other, to the contrary, does to buy it at the same rate. That the investment is in shares of subsidiary companies, limits the management's options even further in-as-much as it is obliged to hold on to those shares, incurring costs, even if the same do not qualify on the investment criterion. It may even have access to information that may not be in the public domain and, besides, to a 'better' information, i.e., both quantitatively and qualitatively, enabling better decision making. *What value then its claim of the shares being in subsidiary companies*? True, there is merit in the contention that the investment being in

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(or primarily so) shares in subsidiary companies, the administrative cost may be lower, i.e., than that would normally obtain in case of investment in non-related companies. But then the question is not as to whether it is lower (or not so) in relation to another situation/scenario, but of what that expenditure is, and whether the claim as made is supported by its accounts, or even on any other objective basis. Incurring of expenditure is, after all, a matter of fact. *If it is not in the accounts, where the expenditure incurred is reflected, where it is*?

In fact, all these arguments/contentions are of little moment and get subsumed in the assessee's claim of 10% of its (relevant) organizational costs being dedicated to this activity. The claim, valid in principle, though would require being established as a fact before its acceptance, cannot be a matter of presumption. The presumption, if it all, that would hold, is in terms of rule 8D, which can thus be said to be a statutory presumption. Likewise, the assessee's argument of having made an investment of only Rs. 15 cr. during the year, that for another Rs. 125 cr. being only by way of conversion of debentures already held by it. When the statutory rule (of estimation) itself bases the expenditure on the investment held, on an average, during the year, what significance, one may ask, is the said fact/s. The arguments do nothing but to obfuscate the issue at hand, i.e., whether rule 8D is to be applied in the facts and circumstances of the case, the conditions for which are clearly spelled out in section 14A(2) r/w s. 14A(3).

Toward this, the assessee's argument is of the AO being precluded from proceeding to invoke rule 8D, otherwise mandatory for the current year, in view of his having not expressed his dissatisfaction with the assessee's *suo motu* disallowance. No specific format has been prescribed for communication of his dissatisfaction by the AO, which is immanent in the assessment order in the present case. The assessee's accounts are admittedly not maintained activity-wise, and its claim is *de hors* its accounts. We have already noted that the assessee's accounts do not in any manner support its claim of the organizational resources being dedicated to the extent of 10% toward the investment activity. Reference in this context may be made to the decision in the case of *AFL P. Ltd. vs. Asst. CIT* [2013] 28 ITR (Trib) 263 (Mum), rendered following the decision in *Godrej*

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& Boyce Mfg. Co. Ltd. v. Dy. CIT [2010] 328 ITR 81 (Bom), where the tribunal has discussed this aspect of the matter. In fact, we observe that the investments, being at 66% and 57% of the total assets as on 31.03.2008 and 31.03.2007 respectively, consume a significant proportion of the assessee's resources. This, when juxtaposed with its' claim of only 10% of the organizational resources being dedicated toward investment activity, which is though completely unevidenced, prompts us to put the said (latter) claim to scrutiny. We have already, and more than once, exclaimed the absence of any material or objective basis to the said claim. *What is assessee's revenue model*? The assessee nowhere specifies the same. It cannot presumably be divorced, or largely so, of the avenue consuming the bulk of its' resources. In fact, we find the assessee reporting dividend from, and profit on sale of, long term investments, both tax-exempt, as its' income from operations continuously from f.y. 2007-08 onwards (up to f.y. 2012-13, up to which year the material is on record), with the same constituting a significant proportion of the total operational income for some years, i.e., over 50% for A.Ys. 2012-13 & 2013-14, increasing to as high as ~70% for one year (A.Y. 2012-13) (refer PB page 1-5, PB-3/pages 4, 8, 12, 16, 20). *So much for the assessee's claim of the investments being not held for the purposes of income*! This would also meet the assessee's reliance on the decision in the case of *Garware Wall Ropes Limited vs. ACIT* (in ITA Nos. 4957 & 5408/Mum(G)/2012 dated 15.01.2014) and *J. M. Financial Ltd. vs. ACIT* (in ITA No. 4521/Mum(J)/2012 dated 26.03.2014).

The matter at hand is not without precedent. The proposition *qua* non-application of r. 8D(2)(iii) came up before, and stood discountenanced by the tribunal in *D. H. Securities (P.) Ltd.* (supra) and *Damani Estates & Finance (P.) Ltd.* (supra), with reference to the decisions in the case of *Godrej & Boyce Mfg. Co. Ltd.* (supra) and *ITO vs. Daga Capital Management Pvt. Ltd.* (supra). The tribunal in *D. H. Securities (P.) Ltd.* (supra) expressed the view that r. 8D(2)(iii), prescribing a ratio (of investment) in respect of indirect expenditure, could not be altered, as on account of hardship (see para 6.5, pgs. 9-10 of the reports). The same (ratio) was in fact nominal, recommending itself to easy acceptance, as also observed by it in *Damani Estates & Finance (P.) Ltd.* (supra).

Reference for the same may be made to the discussion at para 6.5 (pgs. 9-11) and para 20 (pgs. 698-700) of the said decision, which we reproduce as under for ready reference:

> 'Continuing further, the part of the rule prescribing the ratio in respect of indirect expenditure (r. 8D(2)(iii)) cannot be altered on account of hardship (reference is drawn to the section of the judgment in *Godrej & Boyce* (supra) on the constitutionality of sub-sections (2) & (3) of section 14A and rule 8D/pgs. 113 – 123). Even so, the rule prescribes the same as the ratio of indirect expenditure required to support an investment. We say so as the expenditure prescribed for disallowance is based only on one variable, i.e., the value of the investment (on an average). Investment activity, it may be appreciated, is much stabler in character in comparison to the trading activity, which involves continuous churning of funds and, thus, activity, requiring a much higher level of organizational support/expenditure. Investments, on the other hand, are long term and strategic, requiring only periodic review of performance with reference to the investment objective/s, besides on account of environmental changes, if any. Why, the prescribed allocation ratio of 0.5% of the investment value *qua* indirect expenditure is very nominal, recommending itself to easy acceptance, is itself based, even as observed by the hon'ble court (at 116 of the report), on the 2% to 2.5% (of the investment) usually charged by the Portfolio Management Service (PMS) providers, of which around 1% (of the portfolio value) would be their profit. The nominal rate of 0.5% also eschews the charge of it being harsh, while being at the same time clarificatory of its purpose; the investment activity being essentially sporadic and episodic. In fact, the assessee itself explains of no change in its investment portfolio during the year except for one switch from a company share to units of a Mutual Fund (HDFC Liquid Fund). Our discussion is, however, only toward the nominality and purport of the charge, and does not in any manner imply of it being confined only to shares held as investment. This is as even though purchased with a short term perspective, the shares are purchased only with profit objective, i.e., as representing a good investment opportunity, so that it is perceived as under-priced, and its market price would appreciate in time, yielding 'good' return and, rather, in a shorter period of time. That is, the investment component or element is inbuilt in any purchase and toward which the allocation of indirect expenditure is prescribed per r. 8D(2)(iii). The fact that trading shares also yield dividend income, which is not taxable, i.e., besides share trading income, is itself relevant and sufficient for attracting the provision of s.14A(1). In fact, an argument to this effect, i.e., r. 8D(2)(iii) as being not applicable to shares held as stock-in-trade, was specifically assumed in the case of *Daga Capital* (supra). The tribunal rejected the argument, made

with reference to the language of r.8D, clarifying that the words used are 'value of investment' and not 'held as investment'. We may reproduce the relevant part of the order for the sake of better clarity (page 55 of 312 ITR (AT)):

> "Learned Counsel for the assessee ……. We are not impressed with this submission raised on behalf of the assessee for the out-and-out reason that the reference in this rule is to the 'value of investment' and not the assets 'held as investment'. A person may make investment in shares and the shares so purchased may be held either as "Stock-in-trade' or 'Investment'. The word 'investment' in this rule refers to the making of purchase of shares and not holding it as investment."

We decide accordingly.'

There is, in the facts of the case, apart from dividend on investments, also from shares held as stock-in-trade, both for the current and the subsequent years. The Revenue however has not reckoned the same while computing the disallowance of either the administrative expenses or the interest component of the disallowance u/s 14A(1).

In view of the foregoing, we have accordingly no hesitation in upholding the disallowance of the indirect administrative expenditure, effected at Rs.220.74 lacs (PB page 11) at 0.5% of the average investment during the year, i.e., in terms of rule 8D(2)(iii), as in effect confirmed by the ld. CIT(A). Further, in this view of the matter, we also do not consider it necessary to dwell on his direction for exclusion of certain expenses, *qua* which we find his order as seriously wanting in the absence of definite findings, or even other deficiencies in the assessee's claim inasmuch as expenditure viz. depreciation, interest, provision for doubtful debts, etc., as actually claimed per the return of income could only be considered for the purpose of disallowance u/s. 14A (PB pgs. 6-10). We decide accordingly.

c) Interest:

The basis of the assessee's claim is that it has surplus funds, so that the entire investment be considered as out of its own funds. An exception is made for financing the investment of Rs.15 crs., i.e., to the extent of Rs.5 crs. by borrowed capital, so that the interest cost suffered thereon only be considered as liable for disallowance u/s.14A.

Reliance is placed on the decision in the case of *CIT vs. Reliance Utilities & Power Ltd.* [2009] 313 ITR 340 (Bom) as well as decisions by the tribunal following the same. The Revenue, on the other hand, contends that in the absence of any direct nexus between the funds and the investment, the proportionate formula of r. 8D(2) shall apply.

We find the claim of either party as partly correct. The assessee has in restricting the disallowance to Rs.4 lacs, i.e., the interest on borrowed capital availed to fund its investments made during the year, confused between the interest cost directly relatable to such investment, which is a subject matter of rule 8D(2)(i), and that indirectly relatable to such investment, estimation of which is governed by rule 8D(2)(ii). To the extent, however, the Revenue fails to make this distinction by not reducing the direct interest cost (Rs.3,97,260/-) as well as that not claimed by the assessee per its return of income (Rs.19,68,427/-/PB pgs.7-9), in working the interest cost indirectly attributable to the investments, it has also faltered.

We may, however, discuss the assessee's claim on surplus funds, made with reference to the decision in *Reliance Utilities & Power Ltd.* (supra), so that there was, in its view, no need to apply the proportionate method advocated by rule 8D. The investment, at Rs.448.99 crs. (as on 31.03.2008) is well within the own capital (including reserves), at Rs.682.43 crs as on that date, with no borrowed capital (PB pg.1). The argument misses the point completely. *If there is no borrowed capital, where, one may ask, is the question of the interest cost being incurred in the first place, which is in fact at Rs.337.75 lacs*? The borrowed capital, liquidated completely by 31.03.2008, outstands at Rs.73.71 crs. as on 31.03.2007. The interest cost suffered, as it appears, is on this line/s of credit, which has presumably fluctuated during the year, to be completely discharged by its end. Until and unless, therefore, there is material to show that no part of this capital finances the investment of Rs.433.99 crs. as on 31.03.2007, it is difficult to say that no part of the interest cost thereon is not indirectly attributable to the investment. The basis, again, has to be with reference to the assessee's accounts, in the absence of which, the rule of apportionment shall apply, which assumes all assets as being financed proportionately in-as-much as all the funds go to form or constitute a common pool of

funds, financing all the activities (and/or assets), i.e., both yielding income/s forming part, and not so, of total income, *pro rata*. The decision in the case of *Reliance Utilities & Power Ltd.* (supra), rendered in the context of section 36(1)(iii), would be of little relevance. The disallowance u/s.14A, it needs to be appreciated, 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.* (supra). The relevant discussion appears at paras 85 & 86 (pgs. 135-137) of the reports, and considers the decision by it in *Reliance Utilities & Power Ltd.* (supra). It stands explained that section 14A has widen 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, to tax, i.e., as the case may be. Where therefore the assessee is able to show, with reference to its accounts, of the borrowed capital having financed a particular asset, the interest cost relatable thereto would necessarily have to be consider as expended toward the same. None of the decisions by the tribunal cited before us consider the decision by the hon'ble jurisdictional high court in *Godrej & Boyce Mfg. Co. Ltd.* (supra), which is specific on this aspect, elucidating the law in the matter and, accordingly merits reading. Reference in this context be also made to the decision in the case of *Dhanuka & Sons vs. CIT* [2011] 339 ITR 319 (Cal), rendered following *Godrej & Boyce Mfg. Co. Ltd.* (supra). The tribunal has also explained and applied the principle in a number of cases, as for example in the case of *Hercules Hoists Ltd. vs. Asst. CIT* [2013] 22 ITR (Trib.) 527 (Mum); *AFL P. Ltd.* (supra); and *Kunal Corporation vs. Asst. CIT* [2013] 28 ITR (Trib) 277 (Mum). The decisions by the hon'ble jurisdictional high court in *DIT vs. BNP Paribas SA* [2013] 214 Taxmann 548 (Bom) and *CIT vs. K. Raheja Corporation P. Ltd.* (in ITA No. 1260 of 2009 dated 08.08.2011), as their reading would show, are distinguishable on facts. In *BNP Paribas SA* (supra), the tribunal recorded a finding of fact that the investment in shares was out of the assessee's own funds. The hon'ble high court, in view of this finding by the tribunal, which was in fact not challenged by the Revenue, declined to entertain the question of law posed by the Revenue before it. In *K. Raheja Corporation P. Ltd.* (supra), again, the

hon'ble court observed the finding of fact recorded by the tribunal that the investment in shares had been funded by the assessee's own funds in the earlier years, i.e., for the years relevant to A.Ys. 1994-95 to 1999-2000, over which the investments were in fact made. The said finding/s was in fact recorded by the tribunal for the said years. In view thereof, in its view, there was no basis to the Revenue's claim as made before it, so that the Revenue's appeal was dismissed. In the instant case, on the other hand, we have found ourselves unable to issue any finding of fact on the basis of the material on record, with the position of the law being amply clarified by the hon'ble high court in the case of *Godrej & Boyce Mfg. Co. Ltd.* (supra), after considering the decision in the case of *Reliance Utilities & Power Ltd.* (supra), as also in *Dhanuka & Sons vs. CIT* (supra), following it, that no presumption would obtain.

Continuing further, so however, it may well be, that the line/s of credit availed of by the assessee by way of secured loans may be toward financing its current assets or for any specific asset/activity. This is as it is not usual for the businesses to avail of dedicated financing, i.e., dedicated funds for specific activity/s, viz. term loan for fixed asset. If that be so, surely no part of the interest cost can be attributable to the investments in view of the assessee having adequate capital/self generated resources, on which no interest is incurred. This aspect stands again explained and discussed, in the context of different fact situations, in the decisions by the tribunal cited (supra), to which therefore reference may be made. The facts being not on record, we only consider it fit and proper to restore the matter *qua* the estimation of indirect interest attributable to its investments, back to the file of the A.O. to allow the assessee an opportunity to present its case with reference to the said loan/s being toward financing specific activity/s and/or assets, in which case; the terms and conditions of the finance being not violated, there would be no occasion to apply the proportionate method based on the funds in an entity being in a state of flux, so that it would be difficult to identify a particular activity/asset with a particular source of capital. The assessee may also prove its case in other manner it deems fit and proper – the matter being principally factual, the onus though being on it. The disallowance of Rs.3,97,260/-, as well as the exclusion of the interest cost not claimed (Rs.19.68 lacs) is

though confirmed, so that what is an issue is the balance interest cost. Further, though the assessee has tax free dividend income on shares held as stock-in-trade as well, 20% of the qualifying interest on which has been held by the tribunal in *D. H. Securities (P.) Ltd.* (supra) and *Damani Estates & Finance (P.) Ltd.* (supra) to be subject to disallowance u/s.14A(1), the Revenue having not made any disallowance *qua* the same, we do not consider it proper to issue any direction in its respect. We decide accordingly.

The assessee has also earned interest income at Rs.2962.63 lacs. The said income is on long term investments and on loans forming part of current assets. The entire interest income is offered as, and admittedly, business income. As such, the fact of earning of interest income would in our view be by itself of little consequence. There is no claim, which would, where so, though need to be established, of the interest being on borrowings which stood relent on interest. Rather, all business expenses have been claimed and allowed there-against, i.e., in computing the net assessable income. In fact, our restoration, seen in perspective, is only with the view and toward the assessee being able to establish its case on the lines of dedicated funding, so that the matter gets decided on the basis of the facts, on which it rests, rather than on presumptions. The decision by the tribunal in *Karnavati Petro Pvt. Ltd.* (in ITA No. 2228/Ahd.(D)/2012 dated 05.07.2013) (to which no specific reliance though was made before us) would have no bearing in the matter; our decision being guided by the decision by the hon'ble jurisdictional high court in *Godrej & Boyce Mfg. Co. Ltd.* (supra) and *Dhanuka & Sons* (supra), following it, besides applied by the tribunal in several cases cited supra. We may, if only to clarify matters further, reproduce from the said decision by hon'ble jurisdictional high court, as under (para 85, pgs. 135-136):

> '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.'

The foregoing decides grounds 1 to 3 of the assessee's appeal and ground no. 1 of the Revenue's appeal.

4. The second issue raised by the assessee is for the adjustment of the amount disallowed u/s.14A in computing the book profit u/s.115JB. While the assessee's stand is that the disallowance u/s.14A is toward computing the income under the regular provisions of the Act, no corresponding addition could be made while computing the book profit, the Revenue argues with reference to the specific provision of *Explanation* 1(f) to section 115JB(2).

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

5.1 *Explanation* 1(f) reads as under:

'**Special provision for payment of tax by certain companies.**

115JB. (1) …………
(2) ……………

Explanation 1- For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by-

(f) the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause (*38*) thereof) or section 11 or section 12 apply; or

(g) ………….

if any amount referred to in clauses (a) to (i) is debited to the profit and loss account, -'

5.2 Without doubt, only those adjustments as specified under *Explanation* 1 to section 115JB could be made in computing the book profit u/s.115JB. Clause (f) of *Explanation* 1 clearly provides for add back of the expenditure relatable to income exempt u/s.10 (or sections 11 & 12). The dividend income is exempt u/s.10(34). The amount disallowable u/s.14A is only in relation to such income. There is thus a clear legal basis to the A.O.'s action, since confirmed by the first appellate authority. No specific argument in fact stood raised before us. It is the fallacy to consider that the expenditure disallowed u/s.14A is not debited to the profit and loss account. The disallowance u/s.14A is not *qua* notional, but actual expenditure. *As explained, if not debited in accounts, where else would the same find reflection in*? There is no scope for the application of the decisions referred in respect of determination of income under the regular provisions of the Act. The only adjustment in our view that shall obtain is that the expenditure shall have to be valued at the amount as per the assessee's books, so that where there is a difference, for example, as in the case of depreciation, or the loss on the sale of assets, etc., it is the latter, i.e., the book value, which shall prevail. Subject to this caveat, we confirm the adjustment of the expenditure disallowed u/s.14A, being only in relation to income not forming part of the total income, under *Explanation* 1(f) in computing the book profit u/s.115JB, in-as-much as it is exempt u/s.10 and, further, only debited to the assessee's profit and loss account. This is in fact in line with the series of decisions by the tribunal, as in the case of *JSW Energy Limited vs. Asst. CIT* (in ITA No. 498/Bang/2010 dated 30.04.2013); *Esquire Private Limited vs. DCIT* (in ITA No.5688/Mum/2011 dated 29.08.2012); *ITO v. RBK Share Broking Pvt. Ltd.* (in ITA Nos.7546 & 6678/Mum/2011 dated 24.07.2013); and *ITO vs. Sea Wind Investment & Trdg. Co. Ltd.* (in ITA No.6320/Mum/2004 dated 17.10.2007). Toward this, we have also gone through the case law, being decisions by the tribunal relied upon by the assessee (pgs. 83-121 of the compilation of case law). The same is on the premise that the provision of section 14A cannot be imported into *Explanation* 1(f) to section 115JA or, as the case may be, section 115JB, so that there could be no adjustment in computing the book profit there-under for the disallowance made u/s.14A. Our decision, which is in line with the several by the tribunal, is however

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not on the incorporation of the provision of section 14A (or any other provision for that matter) in *Explanation* 1(f) to section 115JB, nor is the decision based on the principle of incorporation. The expenditure disallowed u/s.14A is only that incurred and claimed by the assessee in respect of dividend income, exempt u/s.10. It is only on this basis, and this basis alone, that we have found *Explanation* 1(f) to section 115JB (s.115JA) to be providing a clear legal basis to the adjustment *qua* expenditure relatable to dividend income. That the amount disallowed u/s.14A provides a ready basis for determining the amount of such expenditure is another matter. It would be a complete fallacy and a travesty of facts, being without basis and wholly presumptuous to state or consider that the disallowance (u/s.14A) is *qua* notional expenditure and not against that actually claimed by the assessee and, further, per its books of account. *Or does it mean to suggest that the expenditure claimed is outside the books of account*? We say so as without doubt the adjustment under *Explanation* 1 could only be *qua* sums debited or credited and thus reflected in the accounts. In fact, in this regard, we have also clarified that where and to the extent there is a difference between the expenditure, i.e., as per the assessee's books and that as claimed per its return of income, only the sum debited in books (to the profit and loss account) would hold. Further, the decision by the tribunal in *Goetze (India) Ltd. vs. CIT* [2009] 32 SOT 101 (Del), followed, *inter alia*, by the tribunal in *Ovira Logistics Ltd.* (in ITA Nos. 2439 & 3230/Mum(C)/2012 dated 30.08.2013), stands since reversed by the hon'ble high court in *CIT vs. Goetze India Ltd.* [2014] 361 ITR 505 (Del); the relevant findings by the hon'ble court appearing at pgs. 529-531 of its' judgment. We decide accordingly.

Revenue's Appeal (in ITA No.3944/Mum/2012)

6. Ground no. 1 stands already adjudicated per paras 2 & 3 of this order.

7. Ground no. 2 disputes the allowance of the assessee's claim of the loss of Rs.50 lacs on write off of a receivable, claiming it to be not allowable u/s. 36(1)(vii) or section 37(1) of the Act. The write off is in respect of service tax. The same, paid by the assessee

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on input services, is reflected in its accounts as receivable, debited to an asset account titled 'service tax asset account'. This is for the reason that the credit in its respect is available to the assessee against the service tax payable on the output service/s as per the Cenvat Credit Rules, 2004 (PB 2, pgs. 28-37). To illustrate by way of an example, say the service tax liability (i.e., gross) on services rendered by the assessee for any period is Rs.100/-, with the input credit of service tax (on the services availed of by it) outstanding in its books being at Rs.90/- at the relevant time, the assessee would pay only Rs.10/- to the exchequer, claiming the set off of Rs.90/-, which in fact stood paid by it to the service provider/s on availing the input services. No one-to-one correspondence, i.e., between the input and the output services, is required for claiming the set off. There is thus in effect a recovery by the assessee of Rs.90/-, which gets neutralized against liability, with only the balance Rs.10/- entering its profit and loss (operating statement) account, both by way of credit (receipt) and debit payment to the treasury. The same is again revenue neutral; the assessee paying the service tax realized (on output) to the Government. The asset or receivable account thus only represents the recovery anticipated by the assessee through the receipt of the service tax in future on services provided, and which explains its' accounting treatment. As the assessee-company discontinued its broking business, which was the principal source of recovery of service tax, it wrote off Rs.50 lacs of the total outstanding of the balance Rs.75.90 lacs outstanding in the receivable account as on 31.03.2008, claiming the same as an expense (or loss). Even the income from syndication, merchant banking and other services, the other major source of generation of service tax, also stood to decline.

The basis of the Revenue's non-acceptance is that though the assessee may have discontinued its broking services, it was continuing its other business segments yielding service tax. Credit would therefore be available to it on those services. Further, there is no time limit over which the input credit could be availed of, i.e., by way of set off. The same is also not a trade debt, satisfying the condition of section 36(1)(vii) r/w s. 36(2) of the Act (refer para 4.3 of the assessment order). The ld. CIT(A) allowed the assessee's claim, stating that the assessee, by so claiming, was not seeking a deduction which was

not otherwise available to it, being only service tax, since paid; his finding reading as under:

> '2.2 I have considered the submission of the ld. counsel and in view of the facts brought on record and the fact that by writing off the sum of Rs.50 lacs, the appellant has not claimed any deduction which is not otherwise allowable – the A.O. is directed to allow the same. Hence, this ground of appeal is allowed.'

8. We have heard the parties, and perused the material on record. AS-I issued by the CBDT u/s.145(2) of the Act advocates and emphasizes the fundamental accounting principles of 'prudence', 'substance over form' and 'materiality', as informing the accounting policies of an enterprise; the relevant part reading as under (also refer AS-1 issued by ICAI):

> **'A. Accounting Standard I relating to disclosure of accounting policies:**
> 1. ………………
> 2. ……………….
> 3. ……………….
> 4. Accounting policies adopted by an assessee should be such so as to represent a true and fair view of the state of affairs of the business, profession or vocation in the financial statements prepared and presented on the basis of such accounting policies. For this purpose, the major considerations governing the selection and application of accounting policies are following, namely:-
>
> (i) *Prudence* - Provisions should be made for all known liabilities and losses even though the amount cannot be determined in certainty and represents only a beset estimate in light of the available information;
>
> (ii) ……………….'

What the assessee in effect claims is the loss, on perceiving the amount as no longer receivable in view of the ceasure of some business/es, on reorganization, so that the same would henceforth be carried on by another group concern/s. The claim is u/s.28 and not either u/s. 36(1)(vii) or section 37(1). What all therefore the assessee has to demonstrate is an honesty of its intent in effecting the write off – nothing more and nothing less. The broking business continues to be nil in the subsequent years, while

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syndication, merchant banking and other services stand scaled down considerably in time (refer PB 3, pg. 1). There had been no adjustment of input tax during the months October, 2007 to March, 2008. No doubt, there is an input credit of Rs.130.77 lacs in October, 2008, but the same, as explained, is on account of an one off transaction of purchase of trade mark, which could not be anticipated at the time of finalizing the balance-sheet for the relevant year end in April, 2008. Also, the same stands capitalized in December, 2008 to the extent of Rs.75 lacs under the trade mark (TM) account (PB-2/pg. 51, PB-3/pg.22). In fact, inspite the TM transaction, there was still an unadjustment balance of Rs.4.03 lacs in the service tax receivable account as on 31.03.2009. Under the circumstances, we are unable to see as to how the same (write off) does not represent a honest assessment by the management of the amount being no longer receivable, so that the write off would qualify for deduction on the ground of prudence. It may well be that circumstances may arise in future making available the credit of input available to the assessee; there being no time bar for the claim of the same. If and when claimed, the same would stand to be brought to tax as income for the relevant year. We say so as the assessee is bound to maintain accounts so as to reflect the true and fair view of its affairs, and any future adjustment, if any, would therefore find due reflection therein. For the reasons stated, which though are different from that prevailed with the ld. CIT(A), we are in full agreement with the assessee's stand and, accordingly, confirm the deduction. We decide accordingly.

9. Vide its ground no. 3, the Revenue contests the deletion of the corresponding addition of Rs.50 lacs written off in computing the book profit u/s.115JB. We have already observed the write off to be in pursuance to an accounting policy which is in conformity with the fundamental accounting principles as advocated by the Accounting Standards issued by the ICAI (so that it is in accordance with the provisions of Part II of Schedule VI to the Companies Act, 1956) as well as by CBDT. Accordingly, we find no merit in not, likewise, confirming the adjustment in computing the book profit u/s.115JB. We decide accordingly.

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10. In the result, the assessee's appeal is partly allowed for statistical purposes and the Revenue's appeal is dismissed.

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

Order pronounced in the open court on October 17, 2014

Sd/-	Sd/-
(Amit Shukla)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 17.10.2014
व.नि.स./Roshani, Sr. PS, Shravan, 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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