IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI'F' BENCH, MUMBAI

[Coram: Justice P P Bhatt (President) and
Pramod Kumar (Vice President)]

ITA No. 6264/Mum/18
Assessment year: 2013-14

Deputy Commissioner of Income Tax
Central Circle 3(2), Mumbai ……..……Appellant

Vs

JSW Limited ……Respondent
(successor company on amalgamation
Of JSW Ispat Limited) JSW Centre, BKC
Bandra East, Mumbai 400 051
[PAN: AAACI6293E]

ITA No. 6103/Mum/18
Assessment year: 2013-14

JSW Limited ……..……Appellant
(successor company on amalgamation
Of JSW Ispat Limited) JSW Centre, BKC
Bandra East, Mumbai 400 051
[PAN: AAACI6293E]

Vs

Deputy Commissioner of Income Tax
Central Circle 3(2), Mumbai ……Respondent

Appearances by
Jascinta Zimik Vashai *for the appellant*
Gaurav Kabra *for the respondent*

Date of concluding the hearing: : January 7, 2020
Date of pronouncement : May 14, 2020

O R D E R

Per Bench :

1. These cross appeals, filed by the assessee and the Assessing Officer, are directed against the order dated 1st August 2018 passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2013-14.

2. Grievances raised by the parties are as under:

Grievance of the assessee:

On the facts and circumstances of the case and in law, the learned Assessing Officer has erred in restricting the disallowance to Rs 80,51,200 under section 14A of the Income Tax Act, 1961, without appreciating the fact that the appellant company has not earned any tax-exempt income during the relevant assessment year.

Grievances of the Assessing Officer:

1. **On the facts and in the circumstances of the case, the learned CIT(A) erred in deleting the disallowance of Rs 3,35,40,340 under section 8D(2)(ii) without appreciating the fact that the assessee could not link its investments with its own funds.**

2. **On the facts and in the circumstances of the case, the learned CIT(A) erred in deleting the disallowance of part of interest under section 14A by not following the decision of Hon'ble Supreme Court in the case of Maxopp Investment Ltd Vs CIT (Civil Appeal No. 104-109 of 2015) wherein it is held that when funds utilized by the assessee are mixed funds, then principles of apportionment is applicable.**

3. **On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that the disallowance made under section 14A cannot be considered while computing the book profit under section 115JB, without appreciating the fact that this issue is squarely covered in favour of the revenue by decision of F bench of the ITAT in the case of Viraj Profiles Ltd [(2016) 156 ITD 72 (Mum)].**

3. To adjudicate on these appeals, it is sufficient to take note of the fact that admittedly the assessee did not have any exempt income in the relevant previous year, and yet the Assessing Officer proceeded to make the disallowance under section 14A of the Act, which pertains to disallowance "in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act". Learned Departmental Representative does not fairly dispute this factual position.

4. Learned representatives fairly agree that the question as to whether a disallowance under section 14A can be made even in a situation in which the assessee has not earned any tax-exempt income is no longer *res integra* inasmuch as Hon'ble jurisdictional High Court, in

the case of **PCIT Vs Ballarpur Industries Limited (ITA No 51 of 2016; judgment dated 13th October 2016)**, has confirmed the findings of the Tribunal and declined to admit the question of law, and observed, inter alia, as follows :

> **…….On hearing the learned Counsel for the Department and on a perusal of the impugned orders, it appears that both the Authorities have recorded a clear finding of fact that there was no exempt income earned by the assessee. While holding so, the Authorities relied on the judgment of the Delhi High Court in Income Tax Appeal No. 749/2014, which holds that the expression "does not form part of the total income" in Section 14A of the Income Tax Act, 1961 envisages that there should be an actual receipt of the income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. The Income Tax Appellate Tribunal held that the provisions of Section 14A of the Income Tax Act, 1961 would not apply to the facts of this case as no exempt income was received or receivable during the relevant previous year. It is not the case of the Assessing Officer that any actual income was received by the assessee and the same was includible in the total income. ……**
>
> **The findings of facts recorded by both the authorities below donot give rise to any substantial question of law.**
>
> **Since no substantial question of law arises in this income tax appeal, the income tax appeal is dismissed with no order as to costs.**

5. In the case of **Cheminvest Ltd Vs CIT [(2015) 378 ITR 33 (Del)],** Hon'ble Delhi High Court has, on this issue, observed as follows:

> **15. Turning to the central question that arises for consideration, the Court finds that the complete answer is provided by the decision of this Court in CIT v. Holcim India (P.) Ltd. [2015] 57 taxmann.com 28. In that case a similar question arose, viz., whether the ITAT was justified in deleting the disallowance under Section 14A of the Act when no dividend income had been earned by the Assessee in the relevant AY? The Court referred to the decision of this Court in Maxopp Investment Ltd's. case (supra) and to the decision of the Special Bench of the ITAT in this very case i.e. Cheminvest Ltd. v. ITO [2009] 121 ITD 318. The Court also referred to three decisions of different High Courts which have decided the issue against Revenue. The first was the decision in CIT v. Lakhani Marketing Inc . [2014] 226 Taxman 45/49 taxmann.com 257 of the High Court of Punjab and Haryana which in turn referred to two earlier decisions of the same Court in CIT v. Hero Cycles Ltd. [2010] 323 ITR 518/189 Taxman 50 and CIT v.**

Winsome Textile Industries Ltd . [2009] 319 ITR 204. The second was of the Gujarat High Court in CIT v. Corrtech Energy (P.) Ltd. [2014] 223 Taxman 130/45 taxmann.com 116 and the third of the Allahabad High Court in CIT v. Shivam Motors (P.) Ltd . [2015] 230 Taxman 63/55 taxmann.com 262. These three decisions reiterated the position that when an Assessee had not earned any taxable income in the relevant AY in question "corresponding expenditure could not be worked out for disallowance."

16. In Holcim India (P.) Ltd's. case (supra), the Court further explained as under:

"15. Income exempt under Section 10 in a particular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax. It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not an improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax."

17. On facts, it was noticed in Holcim India (P.) Ltd's. case (supra) that the Revenue had accepted the genuineness of the expenditure incurred by the Assessee in that case and that expenditure had been incurred to protect investment made.

18. In the present case, the factual position that has not been disputed is that the investment by the Assessee in the shares of Max India Ltd. is in the form of a strategic investment. Since the business of the Assessee is of holding investments, the interest expenditure must be held to have been incurred for holding and maintaining such investment. The interest expenditure incurred by the Assessee is in relation to such investments which gives rise to income which does not form part of total income.

19. In light of the clear exposition of the law in Holcim India (P.) Ltd's. case (supra) and in view of the admitted factual position in this case that the Assessee has made strategic investment in shares of Max India Ltd.; that no exempted

income was earned by the Assessee in the relevant AY and since the genuineness of the expenditure incurred by the Assessee is not in doubt, the question framed is required to be answered in favour of the Assessee and against the Revenue.

20. Since the Special Bench has relied upon the decision of the Supreme Court in Rajendra Prasad Moody's case (supra), it is considered necessary to discuss the true purport of the said decision. It is noticed to begin with that the issue before the Supreme Court in the said case was whether the expenditure under Section 57(iii) of the Act could be allowed as a deduction against dividend income assessable under the head "income from other sources". Under Section 57(iii) of the Act deduction is allowed in respect of any expenditure laid out or expended wholly or exclusively for the purpose of making or earning such income. The Supreme Court explained that the expression "incurred for making or earning such income', did not mean that any income should in fact have been earned as a condition precedent for claiming the expenditure. The Court explained:

"What s. 57(iii) requires is that the expenditure must be laid out or expended wholly and exclusively for the purpose of making or earning income. It is the purpose of the expenditure that is relevant in determining the applicability of s. 57(iii) and that purpose must be making or earning of income. s. 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of s. 57(iii) to suggest that the purpose for which the expenditure is made should fructify into any benefit by way of return in the shape of income. The plain natural construction of the language of s. 57(iii) irresistibly leads to the conclusion that to bring a case within the section, it is not necessary that any income should in fact have been earned as a result of the expenditure."

21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in Rajendra Prasad Moody's case (supra) was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is 'for the purpose of making or earning such income'. Section 14A of the Act on the other hand contains the expression 'in relation to income which does not form part of the total income.' The decision in Rajendra Prasad Moody's case (supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act.

22. In the impugned order, the ITAT has referred to the decision in Maxopp Investment Ltd's. case (supra) and remanded the matter to the AO for reconsideration of the issue afresh. The issue in Maxopp Investment Ltd's. case

(supra) was whether the expenditure (including interest on borrowed funds) in respect of investment in shares of operating companies for acquiring and retaining a controlling interest therein was disallowable under Section 14A of the Act. In the said case admittedly there was dividend earned on such investment. In other words, it was not a case, as the present, where no exempt income was earned in the year in question. Consequently, the said decision was not relevant and did not apply in the context of the issue projected in the present case.

23. In the context of the facts enumerated hereinbefore the Court answers the question framed by holding that the expression 'does not form part of the total income' in Section 14A of the envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year.

6. In view of the above discussions, and in the light of undisputed facts of this case that there was no tax exempt income in the relevant previous year, we hold that no disallowance under section 14A could have been made, on the facts of this case and in the year before us. We, therefore, uphold the plea of the assessee and delete the disallowance of Rs 80,51,200 sustained by the CIT(A). Once we uphold the plea of the assessee that no disallowance under section 14A could have been made on the facts of this case, grievances of the Assessing Officer, against learned CIT(A)'s partially deleting the disallowance under section 14A, become infructuous. Grievance of the assessee is thus upheld and grievances of the Assessing Officer are dismissed as infructuous.

7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

(5) The pronouncement may be in any of the following manners :—

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not **ordinarily** *(emphasis supplied by us now)* be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that "**We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (***emphasis, by underlining, supplied by us now***), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment**". In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.

9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "**In case the limitation has**

expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "**It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**", and also observed that "**arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020**". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC *(i.e.* ***force majeure*** *clause)* maybe invoked, wherever considered appropriate, following the due procedure…". The term '***force majeure'*** has been defined in Black's Law Dictionary, as '**an event or effect that can be neither anticipated nor controlled**' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "**while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**". The extraordinary steps taken *suo motu* by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which

lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

11. To sum up, the appeal of the assessee is allowed, and appeal of the Assessing Officer is dismissed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/xx
Justice P P Bhatt
(President)

Sd/xx
Pramod Kumar
(Vice President)

Mumbai, dated the 14th day of May 2020

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai