

**IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE**

PRESENT:

THE HON'BLE JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

**ITAT/43/2021
IA NO:GA/1/2021**

**KESORAM INDUSTRIES LIMITED
VS.
PRINCIPAL COMMISSIONER OF INCOME TAX 2
.....**

ITA/148/2018

**KESORAM INDUSTRIES LIMITED
VS.
PRINCIPAL COMMISSIONER OF INCOME TAX 2, KOLKATA**

For the appellant: Mr. Debasish Chowdhury, Adv.,
Mr. Madhu Jana, Adv.... for Appellant

For the respondent: Mr. J. P. Khaitan, Sr. Adv.,
Ms. Nilanjana Banerjee [Paul], Adv.

Heard on : January 19, 2022.

Judgement on : January 19, 2022.

T.S. SIVAGNANAM, J. : These appeals have been filed by the assessee under Section 260A of the Income Tax Act, 1961, (the Act, in brevity) challenging the orders passed by the Income Tax Appellate

Tribunal, Kolkata (Tribunal). There were four orders, which are subject matter of challenge before us in these two appeals. ITA/148/2018 is directed against the consolidated order dated 26.4.2018 passed by the Tribunal in ITA/1037/Kol/2012 and 773/KOL/2013 for the assessment years 2008-09 and 2009-10 respectively. The order impugned in ITAT/43/2021 is the order passed by the Tribunal in ITA/1195 and 1176/Kol/2019 for the assessment year 2011-12. The Tribunal in its order dated 21.10.2020, which is impugned in ITAT/43/2021 followed the order impugned in ITA/148/2018 and disposed of the appeal and, therefore, ITA/148/2018 is taken as the lead case which deals with the assessment years 2008-09 and 2009-10. ITA/148/2018 was admitted on 14.09.2018 on the following substantial questions of law.

- a. Whether rule 8D of the Income Tax Rules 1962 can be invoked without examining the correctness of the assessee's claim of expenditure incurred in relation to exempt income and without recording reasons as to why, having regard to the assessee's accounts, such claim was not correct or acceptable?
- b. Whether on the facts and in the circumstances of the instant case, the mechanical invocation and application of rule 8D of the Income Tax Rules, 1962 for computing the disallowance under Section 14A of the Income Tax Act, 1961 was justified?

In ITAT/43/2021 the appellant has also raised identical substantial questions of law for consideration. Thus, we proceed to hear out and decide the aforesaid appeals by passing a common judgment and order.

We have heard Mr. Khaitan, learned senior counsel assisted by Ms. Nilanjana Banerjee (Paul) counsel for the appellant and Mr. Debasish Chowdhury, learned senior standing counsel and Mr. Madhu Jana, learned junior standing counsel for the respondent/revenue.

The issue involved in the instant case is whether rule 8D of the Income Tax Rules, 1962 could have been invoked by the Assessing Officer without examining the correctness of the assessee's claim of expenditure in relation to exempt income and without recording reasons as to why such a claim was not correct or acceptable. The subsidiary question would be whether the Assessing Officer can mechanically invoke and apply rule 8D of the Rules for computing the disallowance under Section 14A of the Act. For the assessment years 2008-09 and 2009-10 the Assessing Officer in paragraph 11 of the assessment order dated 31.12.2010 the Assessing Officer has observed that the assessee has earned dividend income of Rs.3,58,81,107/-, which is exempt under Section 10(34) and they were called upon to explain why expenses related to dividend earned from shares held as investment be disallowed under Section 14A, as per formula provided in rule 8D of the Rules. The assessee had stated that they had voluntarily made a disallowance of Rs.10 lakhs. However, on going through the order of assessment dated 31.12.2010

we find that the Assessing Officer has not noticed this fact and noted only the argument of the assessee that no expenditure has been incurred by them for earning the exempt dividend and interest income. The Assessing Officer in a single line stated that the contention of the assessee is not acceptable and proceeded to apply rule 8D and disallowed the total amount of Rs.61,47,311/- for the assessment year 2008-09 and a sum of Rs.1,99,90,545/- for the assessment year 2009-10. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) (CIT(A)). It was contended before CIT(A) that the Assessing Officer erred in disallowing the amount mentioned above under Section 14A by automatically applying computation method prescribed in rule 8D without giving any reasons for non-acceptance of the claim of the appellant. Without prejudice to the said contention the assessee submitted even assuming but not admitting that the said amount could be disallowed under Section 14A, the Assessing Officer erred in adding the entire amount to the returned income which resulted in double disallowance as the assessee had voluntarily disallowed a sum of Rs.10 lakhs for the assessment year 2008-09. So far as the assessment year 2009-10, the Assessing Officer noted that the assessee has disallowed a sum of Rs.15 lakhs but has not recorded any finding as to why the said disallowance voluntarily made by the assessee was not acceptable. The assessee further contended that sub-section (2) of Section 14A does not enable the Assessing Officer to apply the method prescribed under rule 8D without determining in the first instance the correctness of the claim of the assessee, having

regard to the accounts of the assessee. The assessee placed reliance on the decision in the case of ***Godrej & Boyce Mfg. Co. Ltd. -Vs- DCIT reported in 328 ITR 081***. Further, the assessee contended that the disallowance has been computed by automatically applying the method prescribed in rule 8D of the Rules without recording any reasons on the non-satisfaction of the claim of the appellant.

We have perused the order passed by CIT(A) and we are surprised to note that no specific finding has been recorded by the CIT(A) on the ground canvassed by the assessee, the method of applying rule 8D and under what circumstances it could be done. The assessee filed appeal before the Tribunal as against the order of the CIT(A) for the assessment year 2008-09. Before the Tribunal the grounds which have been canvassed, before the CIT(A) were reiterated. However, we find that the Tribunal did not examine as to whether the Assessing Officer had mechanically followed the mechanism provided under rule 8D without recording any satisfaction. However, the Tribunal granted relief to the assessee with regard to the interest portion alone. As against the said portion of the order where relief was granted to the assessee, the Revenue is not on appeal before us. Since the order of the Tribunal was available when the appeal was taken up for hearing by the CIT(A) for the assessment year 2011-12, the CIT(A) granted relief to the assessee with regard to the interest portion alone. Thus, the assessee is before us once again canvassing the same grounds, which were canvassed before the CIT(A) as well as before the Tribunal. The law on the issue is no longer res integra and we are guided by the decision of the Hon'ble Supreme Court in the case of

Maxopp Investment Ltd.-Vs-Commissioner of Income Tax reported in [2018] 402 ITR 640 (SC). Paragraphs 34 and 41 would be of relevance to the case on hand, which is quoted hereinbelow for better appreciation:

“34 Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assesseees would apply while interpreting section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee-company. However, that does not appear to be a relevant factor in determining the issue at hand. The fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping the objective behind section 14A of the Act in mind, the said provision has to be interpreted, particularly, the words “in relation to the income” that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in section 14A of the Act. This is so held in Walfort Share and Stock Brokers P. Ltd., relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom:

“The next phrase is, ‘in relation to income which does not form part of total income under the Act’. It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A....The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14A”.

“41 Having regard to the language of section 14A(2) of the Act, read with rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the Assessing Officer needs to record satisfaction that having regard to the kind of the assessee, suo motu disallowance under section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the Assessing Officer was not accepting the said appointment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, the nature of the loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the Assessing Officer”.

Two important issues have been pointed out in the aforementioned decision. Firstly that the provisions of Section 14A has to be interpreted, particularly, the words that “in relation to the income” that does not form part of total income. Therefore, it was held that the principle of apportionment of expenses comes into play as that is the principle which is incorporated in Section 14A of the Act. With regard to as to how the power under Section 14A(2) read with rule 8D of the Rules could be invoked it was pointed out that the

assessing officer needs to record satisfaction that having regard to the kind of the assessee suo motu disallowance under Section 14A was not correct and it will be in those cases where the assessee in his return has himself apportioned but the assessing officer was not accepting the said apportionment. In any event, the assessing officer will have to record its satisfaction to the said effect. As pointed out earlier the assessing officer has not recorded satisfaction and when this was pointed out before CIT(A) the same was not decided by the CIT(A), the issue was also not decided by the Tribunal when the assessee raised the same, though the grounds have been noted. The Tribunal has not rendered any decision on the said point but granted partial relief to the assessee with regard to the interest alone. We also take note of the decision of this Court in the case of **Commissioner of Income Tax, Central I, Calcutta Versus Ashish Jhunjunwala** reported in 2015(12) TMI 905, Calcutta and the decision in **Principal Commissioner of Income Tax, Kolkata – 3, Kolkata Versus Britannia Industries Limited**, ITAT/45/2017 dated 19th July, 2018. It was pointed out that the assessee has to make a claim (including a claim that no expenditure was incurred) with regard to the expenditure incurred for earning income which is not chargeable to tax. Such a claim has to be examined by the assessing officer and only if on an objective satisfaction is arrived at by the assessing officer that the claim made by the assessee cannot be accepted, the assessing officer can then proceed to apply computation mode as provided in rule 8D (2) of the Rules. We also take into consideration the decision of the Hon'ble Supreme Court in **Godrej and Boyce**

Manufacturing Company Limited Vs. Deputy Commissioner of Income Tax, Mumbai; 2017(7) SCC 421, wherein it was held that the law postulates the recording of satisfaction as the requirement to be complied with by the assessing officer. The law on the subject as noted has been reiterated in several subsequent decisions as well, and, therefore, the issue has to be decided by the Tribunal, before the Tribunal can remand the matter to the assessing officer to do the computation as directed to be done in paragraphs 11 and 12 of the order passed by the Tribunal dated 26th April, 2018 in ITAT/373/Kol/2013 etc. However, we make it clear that so far as the relief which was granted to the assessee with regard to the interest portion shall remain intact for all the three assessment years and the matter is remanded to the Tribunal to consider as to whether assessing officer had followed the mandate in Section 14A(2) of the Act and while doing so, the Tribunal shall take note of the decisions which we have referred to above which has laid down the procedure to be adopted by the assessing officer.

For the above reasons, the appeals are allowed and substantial questions of law are answered in favour of the assessee, and the matter stands remanded to the Tribunal to decide the aforementioned issue namely with regard to whether the assessing officer has recorded his satisfaction as required to be done under Section 14A(2) before invoking the computation mode as specified in Rule 8D(2)(iii). As observed earlier, the relief granted to the assessee by the Tribunal for assessment years 2008-2009 and 2009-2010 by the CIT (A) for the

assessment years 2011-2012 with regard to the interest portion shall stand affirmed.

We also note that the Tribunal while remanding the matter to the assessing officer particularly directed consideration of the investment which yielded dividend income to the assessee for computing the disallowance under Section 14A read with R. 8D (2) of the Rules. Whatever relief has been granted to the assessee by the Tribunal under the said head shall remain intact. Nevertheless, the Tribunal will examine the larger issue with regard to the recording of satisfaction by the assessing officer as mandated under Section 14A and anything to be done later shall depend upon the conclusion that the Tribunal may arrive at.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)