IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 266 OF 2018

Principal Commissioner Of Income Tax)
(Central)-4,Aaykar Bhavan, M. K. Road,)
Churchgate, Mumbai 400 020) ..Appellant

Versus

M/s JSW Energy Ltd.)
JSW Centre, Bandra Kurla Complex,)
Bandra (E), Mumbai 400 051) ..Respondent

Mr. Suresh Kumar for Appellant.
Mr. Priyanka Jain a/w Mr. Pankaj Soni & Mr. Devansh Jain i/b VaishAssociates for Respondent.

CORAM : K.R. SHRIRAM &
FIRDOSH P. POONIWALLA, JJ.
DATED : 21st JUNE 2023

(ORAL JUDGMENT PER K .R. SHRIRAM J.) :

1 The assessee filed the original return of income for A.Y.-2009-2010 on 30th September 2009 declaring income of Rs.317,47,69,697/- after claiming deduction under Section 80-IA of the Income Tax Act 1961 (the Act) of Rs.330,87,38,322/-. The taxable income under Section 115JB was calculated under Section 115JB at Rs.666,76,27,404/-. Subsequently, a search and seizure action under Section 132 of the act was carried out at JSW Group. In response to notice dated 24th October 2011 under section 153A of the Act, the assessee filed on 29th January 2011 its return of income for A.Y.-2009-2010 declaring total income of Rs.317,47,69,697/- and income under Section 115JB at Rs.666,76,27,404/-. The assessment under

Section 143(3) read with Section 153A was completed on 28th March 2013 by determining assessee's income at Rs.317,47,69,698/- and taxable income under Section 115JB of the Act was assessed at Rs.726,11,02,264/-. Additions were made on account of disallowance of claim of assessee on capitalization of expenses of Rs.68,15,702/- incurred during the year towards one M/s Gremach Infrastructure Equipments And Projects Ltd. Further disallowance of Rs.59,34,74,860/- under Section 14A of the Act read with Rule 8(d) of Income Tax Rules 1962 (the said Rules) was made as against a disallowance of Rs.13,59,67,318/- made by the assessee in the return of income under normal provisions of the Act and disallowance under Section 14A of the Act read with Rule 8(d) of the said Rules amounting to Rs.59,34,74,860/- was made while computing under Section 115JB of the Act.

2 Aggrieved by the order of the Assessing Officer, assessee filed an appeal before the Commissioner of Income Tax (Appeals) [CIT (A)]. By an order dated 24th December 2014 CIT(A) partly allowed assessee's appeal. Aggrieved by the order of CIT(A) revenue filed an appeal before the ITAT. The ITAT dismissed the appeal by an order dated 6th January 2017 which is impugned in this appeal.

3 The following substantial questions of law are proposed:

SUBSTANTIAL QUESTIONS OF LAW

"(a) Whether on the facts and circumstances of the case and in law

the ITAT is right in restricted the disallowance made u/s.14A of the I.T. Act from Rs. 59,34,74,860/- to Rs. 13,59,67,318/- by holding that no exempt income received or receivable by the assessee during the relevant previous year.?

(b) Whether on the facts and circumstances of the case and in law. the ITAT was justified in deleting the disallowance u/s.14A for AY 2009-10 without considering the circular No.5 of 2014 dated 11th February 2014, issued by the Central Board of Direct Taxes which clearly provides for disallowance of the expenditure even where taxpayer in a particular year has not earned any exempt income ?

c) Whether on the facts and circumstances of the case and in law. the ITAT was justified in directing the AO to delete the addition worked out u/s. 14A r.w. Rule 8D of the Act while computing the book profits under section 115JB of the Act relying on its own decision in the assessee's own case for A.Y. 2006-07 without considering that as per Explanation 1(f) to Section 115JB, the book profits have to be increased by the expenditure incurred for earning the exempt income?"

4 As regards question (b) proposed, Mr. Suresh Kumar in fairness stated that no submissions were made regarding Circular No.5 of 2014 before the Income Tax Appellate Tribunal (ITAT). Therefore, we will not go into that question, but deal only with the other two questions proposed.

5 Section 14A of the Act reads as under:

Expenditure incurred in relation to income not includible in total income.
14A. (1) Notwithstanding anything to the contrary contained in this Act, for the purposes of computing the total income under this Chapter no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.
(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.
(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act:

Provided that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001.

Rule 8D of the said Rules that was inserted w.e.f. 24th March 2008 by the Income Tax (5th Amendment Rules) 2008, reads as under:

"8D.-(1) Where the Assessing Officer, having regard to the accounts of the assesse of a previous year, is not satisfied with-
(a) the correctness of the claim of expenditure made by the assessee; or
(b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).

2) The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely:-
(i) the amount of expenditure directly relating to income which does not form part of total income; and
(ii) an amount equal to one per cent of the annual average of the monthly averages of the opening and closing balances of the value of investment, income from which does not or shall not form part of total income:

Provided that the amount referred to in clause (i) and clause (ii) shall not exceed the total expenditure claimed by the assessee.]

6 In sub-Section (2) of Section 14A and Rule 8D it is provided that if the Assessing Officer is not satisfied with the correctness of the claim in respect of expenditure made by assessee in relation to income which does not form part of the total income under this Act, he shall determine the amount of expenditure in relation to such income in accordance with the provisions prescribed.

7 Therefore, the most fundamental requirement is the Assessing Officer should record his dis-satisfaction with the correctness of the claim of the assessee in respect of the expenditure and to arrive at such dis-satisfaction he should give cogent reasons.

8 Ms Jain relied upon three judgments of this court, viz., ***Principal Commissioner of Income Tax Vs. Bajaj Finance Ltd.***[1], ***Principal Commissioner of Income Tax-2 Vs. Bombay Stock Exchange Ltd.***[2] and ***Principal Commissioner of Income Tax Vs. Godrej & Boyce Mfg. Co. Ltd.***[3] to submit that the Assessing Officer must first record a conclusion that having regard to the accounts of the assessee, he is not satisfied with the disallowance offered by the assessee in terms of Section 14A (2) of the Act and it is only on being dissatisfied with the disallowance offered by the assessee, can Rule 8D of the Rules be invoked to compute the disallowance.

9 Paragraph 9 of *Bajaj Fiance Ltd.* (Supra) reads as under:

> *"9. Question No. (ii) pertains to disallowance made by the Assessing Officer under Section 14A of the Act read With Rule SD. The Tribunal, however, deleted the disallowance on the ground that the Assessing Officer had not recorded the necessary satisfaction for not accepting the disallowance offered by the assessee. As is well the amount of expenditure incurred in relation to income which is examined for tax if he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. The satisfaction of the Assessing Officer about the correctness of the expenditure offered for disallowance by the assessee therefore is a pre-condition. In the present case, we have perused the order of assessment in which the Assessing Officer had called assessee to justify the limited disallowances voluntarily offered. The assessee made detailed representation upon the inter alia pointed out that the assessee had not made any expenditure in the nature of administrative expenses.*

1. (2019) 110 taxmann.com 303 (Bombay)
2. (2020) 113 taxmann.com 303 (Bombay)
3. (2023) 149 taxmann.com 222 (Bombay)

However, to avoid proceedings, a suo motu disallowance was made. The Assessing Officer did not in any manner reject this explanation of the assessee but merely proceeded to make disallowance by invoking Section 14A and applied Rule 8D which the Tribunal correctly reversed."

Paragraph 9 of *Bombay Stock Exchange* (Supra) reads as under:

"*9. We note that it is evident from the extracted part of the assessment order referred to hereinabove that the Assessing Officer has come to the conclusion that the disallowance claimed by the Respondent was not consistent with Rule 8D of the said Rules. It is only in view of the disallowances not being worked out as per Rule 8D of the Rules, that the Assessing Officer is not satisfied with the disallowance offered by the Respondent. This, to our mind, is putting the cart before the horse. The Assessing Officer must first record a conclusion that having regard to the accounts of the assessee, he is not satisfied with the disallowance offered by the Respondent in terms of section 14A(2) of the Act. It only on being dissatisfied with the above, does Rule 8D of the Rules can be invoked to compute the disallowance."*

Paragraph 11 of *Godrej & Boyce Mfg. Co. Ltd.* (Supra) reads as under:

"11. In the present case, the assessee had earned an exempt income of Rs. 84,30,37,423/- from shares and mutual funds and submitted a computation of inadmissible expenditure u/s 14A amounting to Rs. 13,66,635/- The assessee claimed that the disallowance made u/s14A was as per the books of account attributable to earning of exempt income. On a perusal of the assessment order we find that there is no discussion by the AO with regard income. Further, the AO has not recorded any satisfaction that the working of inadmissible expenditure u/s14A is incorrect with regard to the books of account of the assessee. The proviston u/s 14(2) does not empower the AO to apply Rule 8D straightaway without considering the correctness of the assessee's claim in respect of expenditure incurred in relation to the exempt income. We agree with the view of the ITAT that in the present case the AO has neither examined the claim in respect of expenditure incurred in relation to exempt income of the assessee nor has recorded any satisfaction with regard to the correctness of assessee's claim with reference to the books of account. Consequently, the disallowance made by applying the Rule 8D is not only against the statutory mandate but contrary to the legal principles laid down. In our view too, the CIT (A) has rightly deleted the addition made on account of interest expenditure as the assessee had sufficient interest free surplus fund to make the investment and the ITAT has rightly deleted the disallowance made by the AO u/s 14A r.w Rule 8D. Consequently we hold that, the interest expenditure cannot be disallowed u/s 14A r.w. Rule 8D(2)(ii) under any circumstances."

10 Now let us examine the assessment order to see whether this mandatory conclusion that the Assessing Officer is not satisfied with the disallowance made by the assessee, has been arrived at. The only place where the Assessing Officer has come to his findings is at paragraph 5.2 of the assessment order, which reads as under:

> *5.2. The said submission has been considered. In the assessment order passed u/s 143(3) dated 20.10.2010, the AO has worked out the disallowance u/s 14A as per Rule 8D at Rs.29,66,81,836/-. The assessee has also furnished working u/Rule 8D (though under protest) which amounts to Rs.44,03,33,135/-. Rule 8D is to be applied in the present case based on the various discussions and findings of the AO in the original assessment order passed. However, since the amount worked out by the assessee is higher, the same has been considered for disallowance.*

11 The Assessing Officer has not expressed his satisfaction in the way it should have been. The Assessing Officer does not say he is not satisfied and why he was not satisfied. There are no reasons given.

Moreover, Ms Jain submitted that the Assessing Officer, in paragraph 5.2 of the impugned order quoted above, has relied upon some discussions and findings of some original assessment order passed, but the first assessment order ever to have been passed is the impugned order dated 28th March 2013 where the Assessing Officer has reduced the disallowance. Therefore, it only indicates clear non application of mind by the Assessing Officer. This was not controverted. We would agree with the submissions of Ms Jain since CIT(A) in his order dated 9th December 2014 records *"Though not mentioned in assessment order, admittedly a notice u/s 143(2) was* *issued and assessment proceedings were pending on the date of search which came to be abated. In response to notice u/s 153A dated 24.10.2011 appellant filed return of income on 29.1.2011 declarting Total income of Rs.317,47,69,697/- and Book Profit u/s115JB Rs.666,76,27,404/- In the assessment order dated 28.3.2013 passed u/s 153A r.w.s. 143(3), the Assessing Officer has made certain additions / disallowance which are subject matter of this appeal".* The assessment order dated 28th March 2013 is the order that was impugned before the CIT(A). Therefore it clearly indicates that the Assessing Officer's finding in paragraph 5.2 of the assessment order is based relying upon a non existent assessment order and that indicates clear non application of mind.

12 As regards proposed question (c), we do not even find any discussion in the impugned order relating to Section 115JB of the Act. Mr. Suresh Kumar states that question was raised in the appeal filed by the revenue but it has not been discussed. Well, that cannot be still a ground for a substantial question of law and the revenue could have moved the ITAT by filing a Misc Application. It appears, that has not been done.

13 In the circumstances, we are satisfied that no substantial question of law arises. Appeal, therefore, dismissed.

(FIRDOSH P POONIWALLA, J.) **(K.R. SHRIRAM, J.)**