IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 344 OF 2018

Pr. Commissioner of Income Tax, Central-1, Mumbai….. Appellant
Vs.
D.B. Realty Pvt. Ltd. ….. Respondent

Mr. Akhileshwar Sharma a/w Ms. Shilpa Goel, for Appellant.
None for the Respondent.

CORAM: K.R.SHRIRAM, J &
FIRDOSH P. POONIWALLA, J.

DATED : JUNE 28, 2023

P.C.

1. The Principal Commissioner of Income Tax, Central-1, Mumbai ('PCIT') has filed this appeal aggrieved by an order dated 20/02/2017 passed by the Income Tax Appellate Tribunal ('ITAT') dismissing the appeal of the Revenue. Respondent is the assessee and this relates to the Assessment Year 2010-11.

2. Respondent was engaged in the business of construction, development and real estate. Respondent filed its return of income on 30/09/2010 declaring loss of Rs. 86,50,349/-. Assessment order under Section 143(3) of the Income Tax Act, 1961 ('the Act') came to be passed on 28/03/2013 and the income came to be assessed at Rs.3,86,29,793/-

after making disallowances of Rs. 4,05,42,608/- under Section 14A of the Act and of Rs. 67,37,534/- under Section 36(i)(iii) of the Act. The assessed income thereafter was set off against carried forward business loss making the total income of respondent as nil.

3. Aggrieved by the said assessment order, respondent preferred an appeal to the Commissioner of Income Tax (Appeal)-36, Mumbai [CIT(A)]. CIT(A) partly allowed the appeal of respondent and relied upon a decision given by his predecessor in respondent's own case in Assessment Year 2009-10 and restricted disallowance at 5% of aggregate of expenditure, i.e., restricted to Rs.19,99,230/-. Aggrieved by this order, Revenue preferred an appeal to ITAT. ITAT dismissed the appeal filed by Revenue by observing that the Assessing Officer ('AO') had computed disallowance under Rule 8D(2)(iii) at 0.5% of average value of investment. ITAT also observed that CIT(A) noted that respondent had major portion of investments only in subsidiary companies, associates concerns and partnership firms in which respondent was a partner. The CIT(A) has taken a view that the investments made by company are in the form of strategic investments and directed the AO to compute the disallowance at 5% of the fixed/semi variable expenditure incurred by respondent and there was nothing wrong in the view expressed by CIT(A).

4. Respondent though served, as is evident from affidavit of service of

Mr. Vijay Kumbhar affirmed on 26/11/2021, has not entered appearance.

5. Following substantial questions of law are proposed:

> (a) Whether on the facts and in the circumstances of the case and in law the Hon'ble ITAT was justified in confirming the computation of disallowance of expenditure u/s. 14A adopted by the CIT(A) without appreciating that the disallowance u/s. 14A was required to be determined according to Rule 8D of Income Tax Rules 1962 as had been done by the Assessing Officer ?"
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> (b) Whether on the facts and in the circumstances of the case and in law disallowance of expenditure was required to be made u/s. 14A in relation to the share income from the firm received by the assessee as such share income is exempted under 10(2A) of the Act and whether such disallowance was required to be determined in accordance with Rule 8D of the Income Tax Rules 1962?"
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> (c) "Whether on the facts and in the circumstances of the case and in law the Hon'ble ITAT was justified in not upholding the computation of the disallowance u/s. 14A made by the assessing officer when the assessing officer has simply accepted the computation made by the assessee?"
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> (d) Without prejudice to the above, whether on the facts and in the circumstances of the case and in law the Hon'ble ITAT was justified in not itself correcting the computation of the disallowance u/s. 14A of the Act read with rule 8D made by the Assessing Officer or setting aside the assessment to the file of the Assessing Officer to rework the disallowance u/s. 14A read with Rule 8D if it had any reservation about the computation of disallowance u/s. 14A.
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> (e) Whether on the facts and in the circumstances of the case and in law, the order of the Hon'ble ITAT confirming the order of the CIT(A) is not perverse when it specifically disapproved the method of computation of disallowance u/s. 14A adopted by the CIT(A)?

6. The Apex Court in [1]***Maxopp Investment Ltd. Vs. Commissioner of Income Tax*** relied upon by Mr. Sharma has held that as per Section 14A inserted by Finance (Amendment) Act, 2001, 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. The Apex Court held that as per Section 14A(1) of the Act, deduction of that expenditure is not to be allowed which has been incurred by assessee "in relation to income which does not form part of the total income under this Act". Axiomatically, it is that expenditure alone which has been incurred in relation to the income which is includible in total income that has to be disallowed. If an expenditure incurred has no causal connection with the exempted income, then such an expenditure would obviously be treated as not related to the income that is exempted from tax, and such expenditure would be allowed as business expenditure. To put it differently, such expenditure would then be considered as incurred in respect of other income which is to be treated as part of the total income. Rule 8D provides for method for determining amount of expenditure in relation to income not includible in total income.

7. In view of the judgment of the Apex Court in *Maxopp Investment Ltd. (supra)*, we hereby quash and set aside the order impugned passed

1 (2018) 402 ITR 640 (SC)

by ITAT and direct the AO to give effect to this order passed by us. The AO shall strictly follow the law and formula laid down in *Maxopp Investment Ltd. (supra)*. Before passing any order, the AO shall give reasonable opportunity to assessee to show cause.

8. Appeal disposed.

9. We clarify that we have not made any observations on the computation part.

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